

CROSS-BORDER LAW

Many Canadians hold misconceptions about crossing the American border

The climate for crossing the border has dramatically changed since the tragic events of September 11, 2001

By Rosanna Berardi

Each year, hundreds of thousands of Canadians travel to the United States for work, vacation and shopping. Some believe they are not subject to U.S. immigration law due to the friendly relationship between the two countries. However, Canadians, like other foreign nationals, are subject to U.S. immigration law and need work permits, waivers, and green cards to enter the U.S. While many Canadians cross the border with little difficulty, several misconceptions still exist:

1) "Why am I being refused admission at the border? My criminal record is over 20 years old."

The Immigration and Nationality Act ("INA") contains several criminal-related provisions related to admission to the U.S. Specifically, one provision of the INA renders foreign nationals inadmissible if they are convicted of a crime involving moral turpitude ("CIMT"), regardless of the date of conviction. A CIMT generally refers to conduct that is contrary to the accepted rules of society. In addition, a foreign national is inadmissible to the U.S. if he attempts, conspires or violates any con-

trolled-substance law of the U.S. or any foreign country. The most common CIMTs for Canadians are possession of marijuana, possession of stolen property, fraud and theft over \$1,000. If a Canadian has been convicted of a CIMT, he must obtain a nonimmigrant waiver from Customs & Border Protection ("CBP"). Such waivers must be applied for in advance of entry to the U.S. Unlike those from the Canadian immigration system, U.S. waivers generally take six to eight months to obtain. If your client possesses a criminal record or if you are contemplating a plea bargain, you should contact a U.S. immigration lawyer to determine how it will affect his ability to enter the U.S.

2) "I shouldn't be refused admission to the U.S., my criminal record has been sealed and pardoned by the Canadian government."

The U.S. government does not recognize foreign pardons. Even though a foreign national's criminal record is sealed and pardoned in Canada, it's accessible at any port of entry as the CBP database contains information regarding foreign criminal convictions. The

database is generally checked when a foreign national attempts admission. If a foreign national's conviction record is located by CBP, he will need to obtain a non-immigrant waiver to enter the U.S. Upon applying for a pardon on behalf of your client, you should inform him that the Canadian pardon will not eliminate the conviction for U.S. border-crossing purposes.

3) "I know I'm not supposed to enter the U.S., but I'll tell the agent I'm going on vacation and try anyway."

Committing fraud or misrepresentation at a U.S. port of entry is a bad idea. In 1997, Congress mandated a procedure for the expedited removal of persons deemed inadmissible at the border based on attempting to enter through material misrepresentation or fraud and/or with a lack of proper immigration documents. An Immigration Inspector can issue an expedited removal order which will ban the foreign national from entering the U.S. for five years. The result is the immediate exclusion or removal of the person from the United States. There is no appeal process or judicial review

of an expedited removal order.

4) "I was refused admission at Pearson International Airport. I will just drive to Buffalo and try my luck at the Peace Bridge."

This type of "port shopping" is very risky behavior. Whenever a foreign national is refused admission to the U.S. he is advised by the CBP agent to not seek admission through another port of entry. Many foreign nationals choose to ignore this advice. The agents will know of the prior refusal through their comprehensive computer databases, and can: a) refuse the foreign national again; and/or b) seize his vehicle; and/or c) charge him with material misrepresentation and issue an order of expedited removal. You should always discourage your clients from "port shopping," as the consequences are severe.

5) "Why would my Canadian attorney need to consult with a U.S. immigration lawyer?"

The climate for crossing the border has dramatically changed since the tragic events of September 11, 2001. In 2002, The Department of Homeland Security was created, in part, to increase the security at the U.S. border. As a result, various agencies including Customs and Border Protection, Citizenship and Immigration Services, and Immigration and Customs Enforcement, are charged with strictly enforcing the various regulations of the INA. The procedures for entering the U.S. are very complex and require an intimate knowledge of the laws and current policies. Foreign nationals cannot

afford to make a mistake at the U.S. border. A misunderstanding at a port of entry can result in a five-year ban from the United States. As such, it is critical for Canadian lawyers to form strategic partnerships with U.S. immigration lawyers to ensure their clients are in compliance with all immigration laws before they attempt to cross the border.

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operate "to the maximum extent possible" with foreign courts and foreign insolvency representatives. Courts may communicate directly with each other and may request information or assistance directly

from foreign courts or foreign insolvency representatives. Cooperation can, for example, consist of appointing someone to act on the direction of the court, communicating information by any appropriate means and coordinating the administration of the proceedings in both jurisdictions.

Over 70 countries and international organizations participated in UNCITRAL's development of the Model Law and, at each stage, there was a consensus on each of the provisions of the Model Law. Consequently, the Model Law is a broad expression of international co-operation in an important area of commercial law and practice.

The Model Law has been adopted and recommended for adoption in some 15 countries. Most recently, the Model Law was adopted virtually verbatim by the United States in a new Chapter 15 to the United States Bankruptcy Code which is scheduled to come into effect on Oct. 20. The Model Law has been also adopted by Canada's other NAFTA partner,

Mexico. The U.K. has passed enabling legislation to adopt the Model Law, and Australia and New Zealand have recommended its adoption. The Model Law has been adopted with variations in Japan and Spain and has been enacted in Poland and Romania and passed in South Africa. Several other countries are reviewing the possibility of enacting the Model Law as well.

In Canada, the Senate Banking, Trade and Commerce Committee in its 2003 report recommended that Canada adopt the Model Law. In the prospective amendments to the BIA and the CCAA that were recently introduced in Parliament, it was claimed that Canada has adopted the Model Law but, on closer examination, this proves to be not completely true.

Although Canada participated in every stage of the development of the Model Law's new international standard for cross-border co-operation and despite all 70 countries (including Canada) having reached a consensus on all aspects of the Model Law legislation, when it came time for Canada to put the Model Law legislation into its own legislation, it couldn't bring itself to do so. The version of

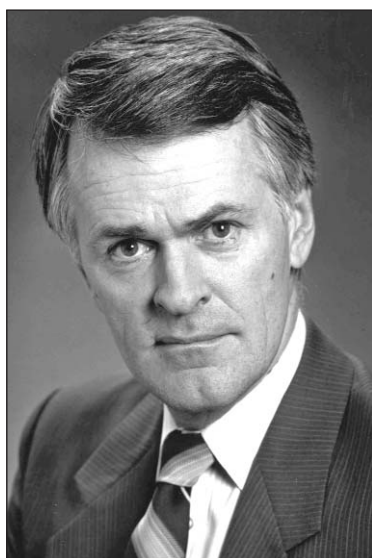
the Model Law that Canada has suggested for its own legislation doesn't resemble any other adaptation of the Model Law anywhere in the world.

Although the commitment that Canada and other countries made in the development of the Model Law was to adopt it in substantially the same form, when it came time to do so, the folks in Ottawa, for inexplicable reasons, took it upon themselves to devise their own form of Model Law which eliminates virtually half of the provisions of the Model Law that are being universally adopted elsewhere around the world. Such provisions as those mandating communications among courts and insolvency administrators to coordinate and harmonize administrations in different countries (which Canadian judges and practitioners actually pioneered) have been dropped from the proposed Canadian adaptation of the Model Law. It has not been made clear what particular Canadian insights led the government to adopt its own peculiar version of the Model Law. One can only hope that the unusual version of the Model Law proposed for Canada can be reversed out of the current Parlia-

mentary process so as to bring Canada back into step with the rest of the world.

Despite the curious Canadian position on the Model Law, the rest of the world seems inclined to adopt it in substantially the form it was prepared and this will, in effect, create a form of international bankruptcy treaty based on parallel legislation around the world (except, at the moment, for Canada). The widespread adoption of the Model Law will take international reorganizations and restructurings to an entirely new and constructive plane and will save, over time, billions of dollars, euros and yen for businesses, their employees, their stakeholders and their communities and countries around the world.

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