1 Introduction

I. Overview

This text is intended to provide, in plain language, a comprehensive yet practical overview for immigration practitioners that need to understand the consequences of inadmissibility provisions for their clients, as well as students and others seeking to better understand this complex area of law. Practitioners and stakeholders are confronted with constant change and shifting sands in the legislation, regulation, policy manuals, and jurisprudence in this realm. Perhaps no facet of immigration practice is more complex and consequential than the law surrounding prohibitions from entry, revocation or denial of status, and removal from Canada.

The goal of this text is to demystify the law, process, and procedures surrounding inadmissibility, and to do so in a way that makes even the most complicated concepts easy to understand. The aim is to distill theory and jurisprudence in order to provide a foundational and functional understanding of how best to serve clients faced with such allegations.

The COVID-19 pandemic and the issuance of stringent travel restrictions in response has reinforced the importance of international borders and underscored the ambit and flexibility of immigration laws, including enforcement powers. Simply put, borders matter.

Empowered by the *Immigration and Refugee Protection Act*,[1] officers are called upon to make hundreds of thousands of decisions every year—upon application, upon entry, and post-arrival. Decisions to refuse applications, or decisions made at entry or examination thereafter, have consequences. A mundane refusal or negative decision on eligibility grounds may have little impact; one based on an inadmissibility ground may have devastating and long-term consequences for the person concerned and their family.

While these decisions may have their basis in the IRPA or the *Immigration and Refugee Protection Regulations*[2] and be informed by the guidelines of Immigration, Refugees and Citizenship Canada (IRCC) and the Canada Border Services Agency (CBSA), there remains significant discretion within the system. It is essential for the practitioner to understand the extent of this discretion and when and where to seek to access it.

All foreign nationals (FN), and, to a lesser extent, permanent residents (PR), remain strangers in a strange land, as their status is conditional: "The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada. *Chiarelli v. Canada (Minister of Employment and Immigration)*, 1992 CanLII 87 (SCC), [1992] 1 S.C.R. 711, at p. 733."[3]

1 SC 2001, c 27 [IRPA].

2 SOR/2002-227 [IRPR].

3 *Medovarski v Canada (Minister of Citizenship and Immigration)*; *Esteban v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at para 46.

There are manifold consequences to a finding of inadmissibility. Beyond the law, regulations, and policy documents, removal and enforcement require the practitioner chart a course for their client across a sea of bureaucracy.

II. The IRPA

The IRPA—now the governing law for almost two decades—was a marked departure from its predecessor legislation. Enacted in the days and months following September 11, 2001, the Act prioritizes security over settlement and integration:

> The objectives as expressed in the IRPA indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada. This marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security: e.g., see s. 3(1)(i) of the IRPA versus s. 3(j) of the former Act; s. 3(1)(e) of the IRPA versus s. 3(d) of the former Act; s. 3(1)(h) of the IRPA versus s. 3(i) of the former Act. Viewed collectively, the objectives of the IRPA and its provisions concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act.[4]

These competing objectives are contained in section 3 of the IRPA. The objectives of the Act include, of course, the salutary benefits of enriching the social and cultural fabric of Canadian society; to see that families are reunited in Canada; and to facilitate the entry of visitors, students, and temporary workers. Balanced against these are the requirements to maintain the integrity of the Canadian immigration system, to protect public health and safety and to maintain the security of Canadian society, to promote international justice and security, and to deny access to Canadian territory to persons who are criminals or security risks. These latter objectives are driven by a distinct policy goal: that of maintaining public confidence in the immigration system. Erosion in public confidence would undermine the current broad support for sustained high levels of immigration and refugee settlement.[5]

The IRPA is framework legislation, setting out just the "bones" of the system—much of the "meat" is contained in the IRPR. All practitioners will need to understand the system as a whole; and the system is not just the IRPA and the IRPR, but also the operational manuals, guidelines, and other instruments of policy. A practitioner

4 *Ibid* at para 10.

5 Michelle Carbert, "Canadians Continue to Support Immigration, Despite Concerns It Would Be Election Issue, New Poll Says," *The Globe and Mail* (5 November 2019), online: <https://www.theglobeandmail.com/politics/article-canadians-continue-to-support-immigration-despite-concerns-it-would>; Lynn Desjardins, "Canadians' Support for Immigration, Refugees Increasing," *Radio Canada International* (8 October 2020), online: <https://www.rcinet.ca/en/2020/10/08/canadians-support-for-immigration-refugees-increasing>.

will also need to understand the roles and responsibilities of the stakeholders of this complex system: IRCC, the CBSA, the Immigration and Refugee Board (IRB), and the Federal Court of Canada.

There are four primary forms of immigration status in Canada:

1. temporary residents (e.g., FNs who are visitors, work permit holders, study permit holders, etc.);
2. PRs;
3. convention refugees/protected persons (who can hold this status on its own in addition other statuses); and
4. citizens.

There are four primary points of interdiction for a potential finding of inadmissibility:

1. Application: Before arrival, overseas, where an applicant seeks authorization to travel to Canada. An officer (IRCC) either issues or refuses a visa or electronic travel authorization.
2. Examination at the port of entry.
3. Post-arrival and initiated either by application or examination, triggered by allegations of inadmissibility.
4. Citizenship applications and associated examinations.

Inadmissibility laws and procedures vary based on the status of the individual and the type of application being made by the individual or by the minister. There are also distinctions based on whether the individual is inside or outside of Canada.

Foreign nationals that are outside Canada and confronted with an allegation of inadmissibility can have the opportunity to respond to a procedural fairness letter and can seek a review of a negative decision at the Federal Court of Canada. For individuals inside Canada, the document that initiates enforcement proceedings is the "section 44 report."[6] There are usually additional safeguards and layers of review for individuals that are already in Canada, including the right to a tribunal hearing in many cases. Permanent residents retain a right to travel back to Canada by commercial means (i.e., not in a private vehicle) while they hold a valid PR card and can, in some cases, return if issued a PR travel document.

III. Policy Documents: Operational Manuals, Guidelines, and More

Immigration, refugee, and citizenship policy documents are an important source of information and guidance for stakeholders as well as for IRCC and CBSA officials. Given the complexity of the immigration scheme and the broad administrative latitude it affords, such policy documents serve to provide clarification on the minister's

6 IRPA, s 44.

interpretation of the Act and the IRPR while providing for structure and consistency in the administration of the law.

These policy instruments take many forms, including but not limited to:

- operational manuals, which are comprehensive guidelines covering a range of categories including overseas process (OP manuals), inland processing (IP manuals), enforcement (ENF manuals), and others;
- program delivery instructions (PDIs), detailing how a certain program is to be administered;
- operational bulletins (OBs), issued regularly to deliver instructions and updates to officers and staff; and
- chairperson guidelines and jurisprudential guides, issued by the IRB as authorized by the IRPA, section 159(1)(h).

Most of these documents are published on the IRCC website, but some have been made available only through access to information requests. Even manuals that are not current and listed as "archived" may provide useful guidance as long as the law and policy with respect to the issue in question has not changed significantly.

It is trite law that while the immigration guidelines are not binding, they may be useful in gauging the reasonableness of the exercise of discretion by an officer. Officers generally do follow them. As the Supreme Court held in *Baker*:[7]

> The guidelines are a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section, and the fact that this decision was contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise of the H & C [humanitarian and compassionate] power.[8]

Jurisprudence has also held that guidelines may create the legitimate expectation that their procedures will be followed.[9]

At the same time, the information contained in such policy documents and directives should not be taken as gospel. Policy documents are not law and cannot supersede the IRPA and IRPR. In some instances, the preferred interpretation of the minister is at odds with other reasonable interpretations that may benefit individual applicants and clients, or the information may simply be incorrect. As the Federal Court explained in one example: "I am concerned that the [policy manuals] speak of 'compelling reasons,' while the Act itself does not. Not only are guidelines not law, but they cannot go beyond the boundaries of the statute itself."[10]

7 *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699.

8 *Ibid* at para 72.

9 *Brhane v Canada (Citizenship and Immigration)*, 2018 FC 220.

10 *Palmero v Canada (Citizenship and Immigration)*, 2016 FC 1128 at para 21.

For these reasons, policy documents and government websites should not be blindly relied upon or used as a crutch instead of developing a firm understanding of the primary sources of law and regulation.

Counsel should also be familiar with principles of natural justice and the duty of fairness as they inform both the discretion of an officer and the available defences/remedies. In determining the content of the duty of fairness, counsel should have regard to paragraphs 2-18 of the Supreme Court's decision in *Baker*[11] and subsequent jurisprudence.

IV. The Stakeholders

A. IRCC and CBSA Officers

Understanding both the role and responsibilities of officers and their respective organizations is essential to practice in this area of law. Officers at IRCC and the CBSA are essentially the gatekeepers to Canada's immigration system; not only do they determine who gets in, they are also responsible for initiating and enforcing who is removed from Canada. They are the front line and regulate admission and enforce removal. They seek to sift the desirable residents (temporary or permanent) from the undesirable. To do so, officers are informed by the legislation, regulations, and manuals and guidelines jurisprudence but also by their experience and judgment. Discretion continues to play a large role in both enforcement but also for redress and remedies.

B. Immigration, Refugees and Citizenship Canada

Previously known as Citizenship and Immigration Canada (CIC), IRCC deals with the *Citizenship Act* and shares responsibility with the minister of public safety for administering the IRPA. IRCC has also taken carriage of Passport Canada.[12]

C. The Canada Border Services Agency

With the enactment of the IRPA, important structural changes were implemented, including the creation of the CBSA, in essence by partitioning CIC. The mandate of the CBSA is

> providing integrated border services that support national security and public safety priorities and facilitate the free flow of persons and goods, including animals and plants, that meet all requirements under the program legislation.[13]

11 *Supra* note 7.

12 "Mandate—Immigration, Refugees and Citizenship Canada" (last modified 27 March 2018), online: *Government of Canada* <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate.html>.

13 "Who We Are" (last modified 3 March 2021), online: *Government of Canada* <https://www.cbsa-asfc.gc.ca/agency-agence/who-qui-eng.html>.

The CBSA communicates with IRCC and the relevant divisions of the IRB to carry out the enforcement of a removal order.

For our purposes, the CBSA is charged with investigation and enforcement under the IRPA. It is this agency that practitioners will deal with for most inadmissibility issues arising upon entry and within Canada. It is the CBSA that enforces the removal of individuals that have been found to be inadmissible and have exhausted their options to remain in Canada.

Thus, the CBSA is a law enforcement agency like the RCMP, but the agency and its officers enjoy far less independent oversight, and their acts are shielded, in many respects, from Charter[14] challenges.

D. The Immigration and Refugee Board

The four divisions of the IRB constitute the largest administrative tribunal in Canada, responsible for rendering thousands of decisions each year. The sheer volume of claimants and appellants requires the inherent efficiencies of administrative tribunals and specific policy directives that mandate institutional knowledge and expertise. This is simply not a task that any court would be well suited for.

Two divisions are of particular importance to practitioners in the area of inadmissibility: the Immigration Division (ID) and the Immigration Appeal Division (IAD). The ID presides over admissibility hearings and detention reviews. The IAD presides over immigration appeals—PRs and FNs that hold a PR visa[15] and protected persons have the right to appeal a removal order made against them or a finding of inadmissibility against a family member they are seeking to sponsor, in certain circumstances. A PR can also appeal against a negative residency determination. The minister also has access to the IAD and can appeal any decision by the ID *not* to issue a removal order.[16]

E. The Federal Court of Canada

The Federal Court is another part of the immigration system. The jurisprudence establishes significant deference and respect for the decisions of the various tribunals of the IRB and indeed for the decisions of officers both inside and outside Canada. You can seek judicial review for most of the decisions of the ID,[17] all of the decisions made by the IAD, and the decisions of officers made inside and outside Canada (other

14 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

15 Such appeals are rare and generally involve an inadmissibility finding or determination when the FN presents themself at a port of entry for landing. Note: a PR visa may be cancelled, thereby obviating a right of appeal (see *Zhang v Canada (Minister of Citizenship and Immigration)*, 2007 FC 593).

16 See s 63(5) of the IRPA.

17 The minister has a special appeal and can seek redress if the ID rules that a report was not well founded at the IAD.

than those that fall within the jurisdiction of the ID or IAD). Judicial review is not a substantive appeal on the merits. The Court cannot substitute a different decision than that of the original decision-maker except in very rare circumstances. The Court is primarily concerned with whether the decision is "reasonable" and whether there exists a reviewable error. The Court is confined to the record below and cannot usually consider new evidence—thus it is imperative that an immigration practitioner puts the absolute best foot forward.[18]

The Court may also be the last stop before the execution of a removal order; the Court can impose a stay of removal if an applicant establishes that they meet the tripartite test.[19]

V. Layout

There are myriad consequences of an allegation or finding of inadmissibility against an FN, a PR, and even a Canadian citizen. The text will start with the most common findings of inadmissibility: criminality and misrepresentation.

The vast majority of applicants and entrants to Canada are law abiding, have no improper associations with groups or organizations, are healthy, have provided accurate information about themselves and their past, and are going to achieve financial independence in this country. However, there are a few that embellish, obfuscate, omit, or outright lie in order to obtain status. Some may have committed offences before entering and obtaining status in Canada; some have committed offences after coming here. A few may have committed crimes against humanity or war crimes or are members of organizations that have committed terrorist acts. There may be allegations that others are members of organized crime. Others may be found inadmissible on health grounds or raise concerns that they may seek to avail themselves of Canada's social assistance regime.

The text is geared to practitioners, and therefore moral questions are outside the scope of this work. Indeed, the courts have found that the inadmissibility regime contained within the IRPA is neither criminal nor quasi-criminal in nature and does not engage an individual's section 7 Charter rights.

18 The Court's other roles, such as hearing an application for injunctive relief (or a "stay") and entertaining applications for an order of *mandamus* (to compel inaction on an immigration or citizenship application), are somewhat beyond the scope of this text.

19 That is, whether there is a serious issue, whether irreparable harm will occur, and which part the balance of convenience favours.

VI. Forms of Inadmissibility

Our text begins by detailing the grounds upon which a finding of inadmissibility may be made; this stretches from crimes against humanity to medical and financial concerns. The most commonly invoked of these inadmissibility provisions are criminality and misrepresentation.

Looking first to criminality: even a single pebble of criminality has far-reaching ripples. Some examples: Canadian criminality can result in lifetime inadmissibility to the United States even for a Canadian citizen. It can also delay the application by a PR for citizenship in this country. Time spent in jail, on probation, or out on parole does not count for the calculation of residency for an application for a grant of citizenship. A PR convicted of an offence involving violence against a family member could preclude a family class sponsorship for five years. A criminal conviction by a sponsored family member, or even a non-accompanying dependant, could waylay a years-old family class sponsorship. For PRs and FNs, criminality can also result in loss of status and removal from Canada. Criminality can waylay a refugee claim, and even those recognized as refugees in Canada can be removed and sent to a country where they fear persecution if there is sufficient concern regarding their (criminal) risk to Canadians.

There has always been interplay between the criminal law of Canada and Canada's immigration and enforcement regime. That intersection has become even more apparent with recent decisions of the Supreme Court of Canada. It is clear that criminal law practitioners will need more than a passing knowledge of the repercussions for a finding of guilt for clients that are either FNs or PRs. A separate, stand-alone chapter has been written to provide an overview of best practice from the first telephone call to criminal disposition.

Allegations of misrepresentation are pernicious and may arise with respect to any type of application, ranging from a temporary work permit to a spousal sponsorship. It is often easier dealing with allegations of criminality than the broadly defined ambit of misrepresentation under section 40 of the IRPA. Misrepresentation applies regardless of whether it was intentional or unintentional, direct or indirect, and is not contingent on whether it affected the final outcome of the officer's decision. If the spectre of misrepresentation arises, counsel must be aware of the limits of the broadly worded section. Thankfully, there is some allowance for the fragility of the human condition.[20]

In addition, the text will discuss how residency obligations are met, the exceptions that exist, and the specific inadmissibility process that unfolds in this context when a

20 A term borrowed from Justice Shore—see *Yu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 956 at para 31; *Sahar v Canada (Citizenship and Immigration)*, 2015 FC 1400; *Pfupa v Canada (Citizenship and Immigration)*, 2010 FC 590 at 20; *Narain v Canada (Citizenship and Immigration)*, 2017 FC 60 at 2, *inter alia*.

person fails to meet their residency obligations. This section also touches on the specific recourse available to PRs who are inadmissible for not meeting their residency obligations.

Finally, following the pandemic, issues surrounding admissibility on health grounds may become all the more acute. Individuals may be found medically inadmissible either because their medical condition is considered a risk to the public, or because it may cause an excessive demand on publicly funded health services. In each case, it is important to understand the contours of this ground of inadmissibility as well as the options available to clients, which are not always made clear or accessible by IRCC.

This section also covers less commonly invoked grounds of inadmissibility, including those with respect to national security and international war crimes, as well as financial inadmissibility and inadmissibility that stems from a dependent family member.

VII. Process and Procedure

Next, every practitioner needs to know process as much as law and policy. The second section of the text is thus devoted to covering each step of the inadmissibility procedure for inadmissibility concerns within Canada and allegations of inadmissibility that arise outside of Canada. Such allegations need oversight and a review mechanism, and so we will canvass the role and jurisdiction of the IRB and the Federal Court of Canada.

The discussion includes the process of how someone becomes inadmissible and loses status in Canada. The text examines how inadmissibility decisions are made and who makes these decisions: an officer, a delegate of the minister (a "minister's delegate" or "MD"), or a member of the ID of the IRB, depending on the circumstances. The text follows the linear progression of an admissibility decision, starting with how the process unfolds when the issue is first identified by a government official, including the initiating document (i.e., the section 44 report), followed by reviews and determinations by minister's delegates, as well as hearings before the ID and any appeals before the IAD.

An extensive chapter is provided with respect to practising before the ID, including conducting admissibility hearings and detention reviews, as well as a separate chapter with respect to representing clients on appeal to the IAD.

VIII. Remedies

Prevention is, of course, the best medicine. However, as practitioners, we are often called upon after most of the damage is done or after an inadmissibility finding has been made. As a result, we devote a separate section to the potential remedies available, as well as touching upon those remedies in each section dealing with the specific inadmissibility provision. These include administrative appeals, as well as applications for rehabilitation, temporary resident permits, and authorizations to return

to Canada. Access to these remedies has been constricted over the years, and it is imperative that practitioners understand what can and cannot be done once clients cross the Rubicon into the world of inadmissibility.

Remedies vary depending on the individual's immigration status: an FN generally has less recourse than a PR. Individuals within the family class may have appeal rights against a refusal to grant a PR visa. A protected person will have an additional layer of oversight prior to removal to a country that they have claimed protection against. Appeal rights have also been restricted over the years.

Each chapter is intended to be near stand-alone, allowing busy practitioners the ability to address the issue at hand without extensive cross-reference to other chapters or sections. This is also intended to facilitate learning, as the connections between sections are made clear for students.

IX. What Does the Future Hold?

Enforcement and removal will always remain a complex area of immigration law. It is difficult to predict the future, but we suspect the following developments:

- the CBSA may or may not become subject to greater oversight (although one suspects and hopes it to be the latter);
- there may well be an increase in the number of criminal prosecutions under the IRPA;
- it is unlikely that, no matter the government, restrictions to the right of appeal at the IAD will be rolled back;
- information sharing between governments, particularly with the Five Eyes, will increase and reveal far more hitherto hidden concerns of inadmissibility;
- the adoption of biometrics will reveal far more hitherto hidden concerns of inadmissibility;
- section 37 (organized criminality) will continue to gain in popularity as a ground of inadmissibility given the lowered thresholds (no conviction necessary) and the denial of equitable consideration on appeal;
- IRCC and the CBSA will be aided greatly by the implementation of exit controls (removing some of the guesswork involved in calculating whether the person concerned has met the residency obligation or meets the physical residency requirement for the grant of citizenship), and improved information sharing and cooperation between governments may well allow the CBSA to hit their removal targets;[21] and

21 Office of Auditor General of Canada, *Reports of the Auditor General of Canada to the Parliament of Canada—Spring 2020: Report 1—Immigration Removals* (Ottawa: Auditor General of Canada, 2020), online: <https://www.oag-bvg.gc.ca/internet/English/parl_oag_202007_01_e_43572.html>.

- the pandemic, while initially deleteriously affecting every business line at IRCC and the CBSA, will result in greater flexibility and efficiency and embrace of technology by both stakeholders in the future.

One prediction does not require any amount of scrying: inadmissibility and enforcement will continue to impact the lives of FNs, PRs, refugee claimants, protected persons, and even Canadian citizens. Enforcement entails emotion; each file represents an individual's past, present, and future. Counsel must do their best to avoid, address, mitigate, or overcome first-, second-, and even third-order effects of inadmissibility.

While it is challenging to practise in this area of law, it is also rewarding and necessary to achieving a holistic understanding of the ever-changing landscape of Canadian immigration law.