

Immigration Offences in Canada

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IMMIGRATION OFFENCES IN CANADA

There are several mechanisms to ensure compliance with Canada's immigration regime. Among those mechanisms are denial of entry, loss of status and removal, each of which can have devastating consequences for the individual affected and their loved ones. However, the offence provisions remain some of the most severe sanctions available in the enforcement of Canada's immigration laws.

A number of offences under various statutes that are relevant in the context of immigration prosecutions. The procedure under the *Criminal Code* applies to prosecutions under the *Immigration and Refugee Protection Act (IRPA)*. The application of the *Criminal Code* to offences under the *IRPA* is made pursuant to the section 34(2) of the *Interpretation Act*, which provides as follows:

(2) All the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of that *Code* relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.

R. v. Dudley 2009 SCC 58 also confirms that unless a statute explicitly states otherwise, criminal law defines criminal charges and sentences. Exploring all the implications of the application of the *Criminal Code* is beyond the scope of this paper, but it is important to underline that it means that offences can also be committed by being a party [s.21], an accessory after the fact [s.23] or attempting to commit the offence [s.24]. One of the areas that may be of particular concern to counsel given the very broad general offence provisions of *IRPA* is the counselling of offences. Pursuant to s.22 of the *Criminal Code*, a person counselling the commission of offences has broad liability for those offences:

22. (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

(2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

Section 464 of the *Criminal Code* establishes sanctions for counselling offences even if the offences in question are not committed. In relation to certain sections, *IRPA* itself explicitly sets out the breadth of criminal liability, for example in s.131. Perhaps the broadest section relates to misrepresentation:

126. Every person who knowingly counsels, induces, aids or abets or attempts to counsel, induce, aid or abet any person to directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of this Act is guilty of an offence.

Both *IRPA* [s.135] and the *Citizenship Act* [s.30] purport to grant extraterritorial jurisdiction, meaning that offences committed outside of Canada can be prosecuted in Canada.

TYPES OF IMMIGRATION OFFENCES

The majority of immigration offences can be divided into four broad categories, each of which will be explored in more detail below:

1. Unlawful entry
2. Document offences
3. Fraud related offences
4. General offences

UNLAWFUL ENTRY

Offences relating to unlawful entry into Canada can be broken down into three levels of increasing gravity. At the most basic level is the coming into Canada without the documentation required by the Act or without attending as required at a port of entry for examination. For the most part, these offences are covered by the general offence provision of *IRPA* [s.124]. One of the more common situations in which criminal charges are laid in cases of unlawful entry are in cases of individuals who return to Canada after being deported without obtaining authorization under *IRPA* s.52. Even the most serious cases of unlawful entry by an individual carry a maximum sentence of two years, meaning they do not qualify as “serious criminality” under s.36(1) of *IRPA* unless a sentence of more than 6 months is imposed.

The more serious offences relating to unlawful entry relate to organizing or assisting others to enter Canada unlawfully. These offences are divided into two broad categories of human smuggling and human trafficking.

Human Smuggling

It should be noted that the term human smuggling does not appear in the offence provision itself, but in the sub-heading under “Part 3 Enforcement” which refers to human smuggling and trafficking. The section itself is entitled “organizing entry” and reads as follows:

117. (1) No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.

The breadth of the section becomes evident upon even a cursory review. While including the more obvious acts of organized human smuggling operations, the section is broad enough to include anyone who assists someone to enter Canada when they are not in possession of the required documents. It was as a result of the concerns with respect to the breadth of the law that a requirement for the consent of the Attorney General of Canada to institute proceedings pursuant to s.117(4) was included in the legislation.

The section was interpreted by the Supreme Court in *R. v. Appulonappa*, 2015 SCC 59 and read down as it relates to the aiding and abetting entry of refugees:

[85] The appellants ask the Court to strike s. 117 down in its entirety. [...] In the particular circumstances of this case, I conclude that the preferable remedy is to read down s. 117 as not applicable to persons who give humanitarian, mutual or family assistance.

The offence of organizing entry under s.117 is a hybrid offence, meaning that it can be proceeded with either summarily or by indictment. The use of the term “knowingly” implies that, unlike certain other offences under *IRPA*, organizing entry is a full *mens rea* offence. The potential sentences on indictment range from a maximum penalty of 10 years imprisonment for a first offence [s.117(2)(a)(i)] to life imprisonment if the contravention is with respect to a group of 10 persons or more [s.117(3)].

The act of disembarking persons at sea “for the purpose of inducing, aiding or abetting them to come into Canada in contravention of this Act” is sanctioned under a separate section, which carries the same maximum penalty as human trafficking.

Human Trafficking

Human trafficking is an offence which has garnered a great deal of attention over the past few years, but for which we have not seen many prosecutions in Canada, and there is therefore a paucity of cases interpreting the relevant sections. The offence of trafficking in persons is set out in s.118 of *IRPA*:

118. (1) No person shall knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion.