Tougher Impaired Driving Penalties to Significantly Impact Permanent Residents and Foreign Nationals

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The enactment of Bill C-46 on December 18, 2018 has significantly changed Canada's impaired driving legislation and related offences under the *Criminal Code*. The immigration consequences of the new impaired driving regime will undoubtedly cause significant hardship to those impacted by the changes, including particularly harsh consequences for permanent residents who have committed or been convicted of an impaired driving offence. As a result of the amendments, impaired driving offences now constitute "serious criminality" under section 36(1) of the *Immigration and Refugee Protection Act*, which can render a permanent resident or foreign national inadmissible to Canada. Moreover, the reclassification of impaired driving offences is expected to cause an increased demand on already strained government resources because the delegated authority to oversee inadmissibility based on "serious criminality" is limited to officers at the superintendent level and above.

Serious Criminality under the *Immigration and Refugee Protection Act*

On December 18, 2018, Bill C-46 became law, amending the *Criminal Code* to impose significantly harsher sentences for impaired driving offences. As a result of the amendments, the maximum penalty for a conviction for a "simple" impaired driving offence has increased from five years to 10 years' imprisonment. This change is significant because a conviction for a "simple" impaired driving offence will now render both permanents resident and foreign nationals inadmissible to Canada on grounds of serious "serious criminality" pursuant to 36(1) of the *Immigration and Refugee Protection Act*. Previously, an impaired driving offence outside of Canada had no impact on permanent resident status; now, a conviction abroad for impaired driving could subject a permanent resident to permanent residency status proceedings and a deportation order, regardless of the sentence imposed by the foreign court. Similarly, a conviction for impaired driving in Canada, regardless of the sentence imposed, could cause a permanent resident to be issued a deportation order and lose his or her status as a permanent resident.

The amendments will also have a significant impact on foreign nationals who will no longer be eligible for a finding of deemed rehabilitation under section 36(3)(c) of the *Immigration and Refugee Protection Act.* Deemed rehabilitation is a curative

provision that allows certain foreign nationals convicted of an offence outside of Canada to be deemed no longer inadmissible once ten years from the date of completion of the sentence has passed and other conditions laid out in the Act are met. The only avenue available to a foreign national convicted of an impaired driving offence abroad is now a formal application for criminal rehabilitation, even if the offence was isolated and significant time has passed since the offence. As before, foreign nationals may seek temporary relief by making an application for a Temporary Resident Permit to overcome inadmissibility to Canada based on serious criminality, but the delegated authority is at a higher level of ministerial authority under the *Immigration and Refugee Protection Act.* Border Services officers now no longer have the authority to issue a Temporary Resident Permit to a foreign national for a conviction for an impaired driving offence; only superintendents and above have the delegated authority to make decisions to grant a Temporary Resident Permit where the offence is one of serious criminality.

Clarification by the Minister of Immigration

The Minister of Immigration, Refugees and Citizenship, the Honourable Ahmed Hussein, has stated that the Government of Canada's intention with Bill C-46 was to send a strong message that impaired driving is unacceptable. At the same time, he recognized there could be disproportionate immigration consequences for non-Canadian citizens.

He further confirmed that in assessing serious criminality, officers will take into consideration the Canadian law in place at the time of the commission of the offence consistent with the Supreme Court of Canada's decision in *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50. As a consequence, an offence of impaired driving that was considered "simple criminality" and occurred before the new penalties came into force will be treated as "simple criminality" rather than "serious criminality". Further, the Minister clarified an individual who was determined by an officer to be deemed rehabilitated for an impaired driving offence outside Canada before Bill C-46 came into force would not need to reapply for relief to overcome inadmissibility for that same offence.

Takeaways for Permanent Residents and Foreign Nationals

Impaired driving offences that occurred before December 18, 2018 will still fall into the category of "simple criminality" and permanent residents with such offences will not be affected by the new laws. Similarly, foreign nationals who were convicted of an impaired driving offence who were deemed rehabilitated by an officer before December 18, 2018 will also not be impacted by the amendments.

Non-Canadian citizens who commit impaired driving offences on or after December 18, 2018, however, will have to contend with the more severe penalties for impaired driving offences, subject to any future changes to Canada's immigration policies to mitigate the immigration consequences that resulted from the enactment of Bill C-46.

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