

FOREIGN STUDENTS AND THE LAW

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One purpose of this article is to forewarn this particular student group of the difficulties that they may run into, besides hiked tuition fees.

The contents of this article may not be unknown among foreign students, however, foreign students seem to have recurring problems with the Department of Immigration.

Foreign students are, in the eyes of Canadian Immigration law, visitors with a student authorization.

You recall when you applied for a visa to come to study in this country that you were required to arrange for admission by a university or a non-degree granting institution.

You also recall that you were required to show that you have sufficient financial resources for studying in Canada.

You also recall when you arrived in Canada, you were examined by an immigration officer. Under the authority of the Immigration Act he granted you entry.

He also imposed certain terms and conditions. Those terms and conditions included:

- 1) prohibition against engaging in employment in Canada.
- 2) attendance in a course of instruction and at an institution specified.
- 3) the duration of stay in Canada.

In other words, the legal status of a foreign student is a very narrowly defined one. You are a visitor who is permitted to study at a particular institution for a particular course of instruction, but who is normally not permitted to be engaged in employment.

Both the Federal Government and the Provincial Government have jurisdiction over the area of immigration. For the purpose of this article, I shall treat the matter of immigration as though it were solely a Federal Government jurisdiction.

In this regard, the Immigration Act, 1976 and the Immigration Regulations, 1978 are the primary references.

It should be said right at the beginning that violation of a provision in the Immigration Act would result in certain consequences, such as detention or deportation.

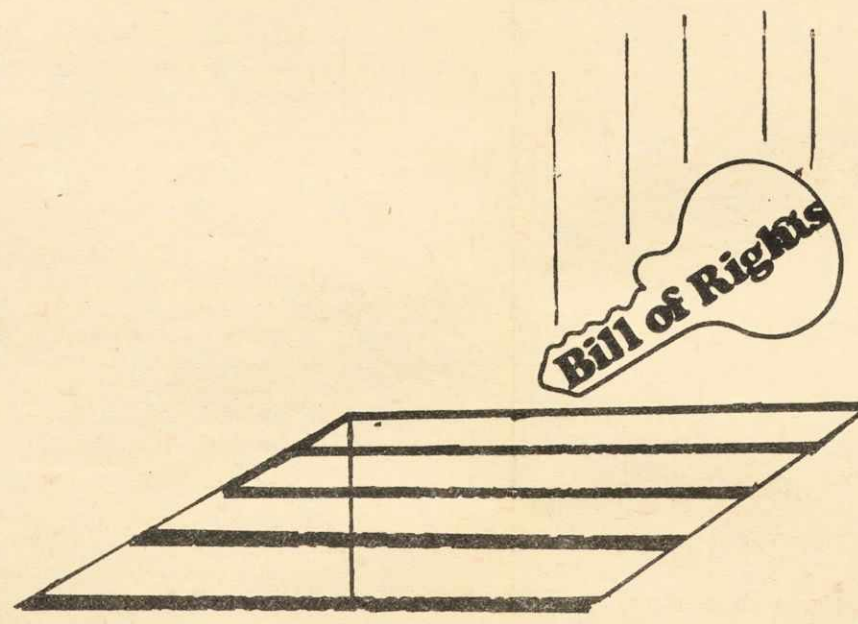
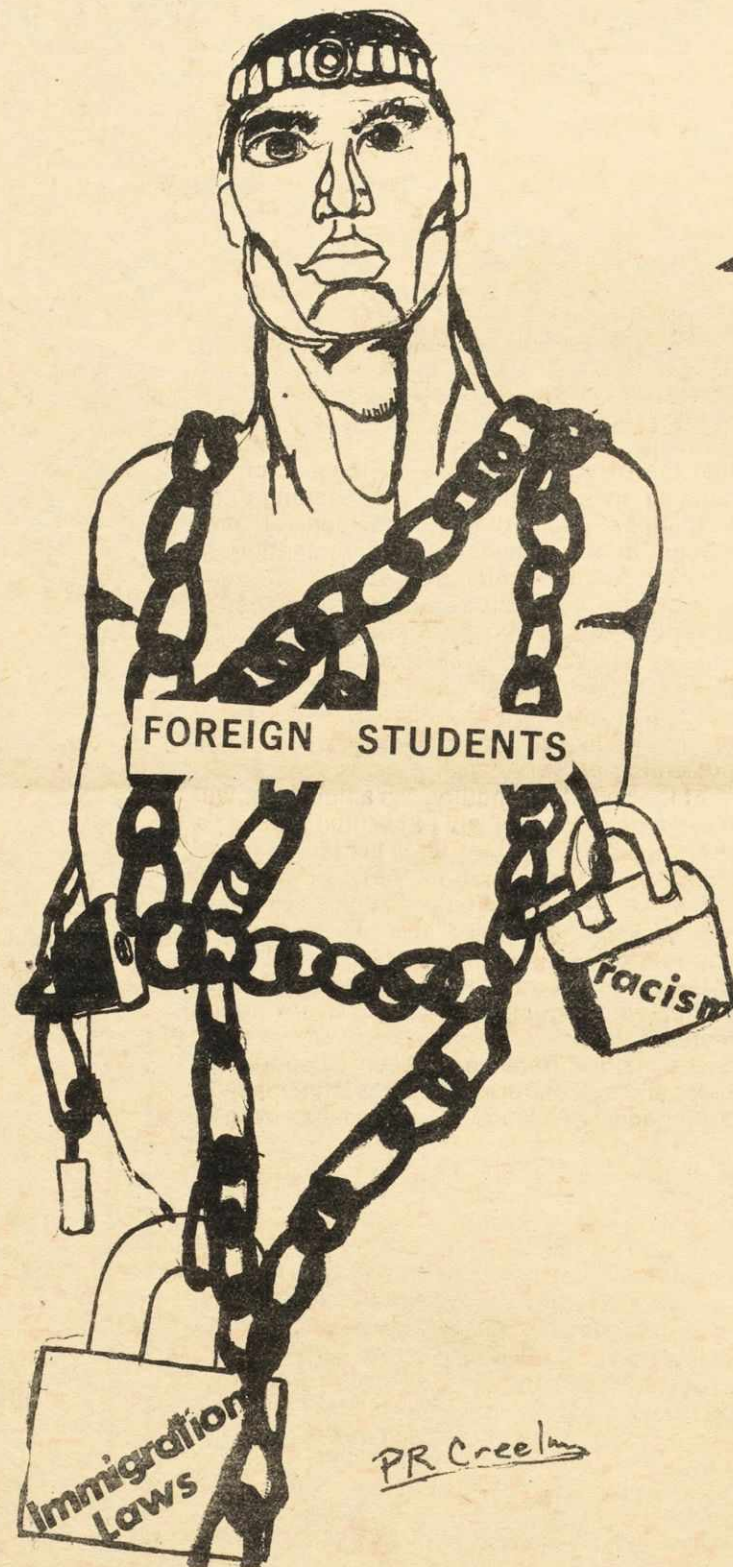
Also, an offence against the Immigration Act may also lead to prosecution in a court of law which may result in a conviction and a punishment imposed.

Some of the more frequently violated immigration provisions by foreign students are:

- 1) engaging in employment without authorization;
- 2) conviction of an offence;
- 3) overstaying as a visitor;
- 4) fraud or misrepresentation in obtaining a visa.

Most students who violate this prohibition appear to have deliberately chosen to take the risk, for one reason or another. Only in a few cases were there some doubts as to whether the activities could be regarded as employment.

The Act itself defines employment as "an activity for which a person receives or might reasonably be expected to receive valuable



LEGAL MAZE

of immigration 'inquiry'

consideration." Recent decisions by the Courts have not clarified this definition further.

The leading case is *Georgas v. Minister of Employment and Immigration*, a Federal Court of Appeal decision. It seems that the courts would, besides applying the facts to the definition, look at the nature of the work and the circumstances in which the work is performed.

It is fair to say that the term remains to be clarified further by subsequent courts.

As a visitor, it is a violation of the Immigration Act if you have been convicted of an offence under the Criminal Code. You should note that the seriousness of the offence is not a consideration at all.

It is sufficient that there is a conviction of an offence registered against you, no matter how trivial the nature of the offence, or how small the punishment was.

The following examples will illustrate this point.

Example 1—A is found guilty of an offence contravening s.294 (b) of the Criminal Code. Nature of the offence: A was caught shoplifting in a bookstore. He was pocketing a ball point pen valued at \$0.40. The judge sentenced A to a fine of \$50.00.

Example 2—B was charged and convicted of common assault. Nature of the offence: B became angry at X in a friendly football match. After the game, B approached X and pushed X to the ground. The judge fined B \$100.00.

Both the above examples of convictions would also be violations by a visitor against the Immigration Act.

When it is suspected that you have violated any of the immigration offences, you will likely be visited by an immigration officer investigating the offence. If it is alleged that you have indeed violated an immigration offence, you will be notified to attend an inquiry.

The purpose of that inquiry is to establish whether you indeed have violated an immigration offence. In certain circumstances, you may even be arrested and detained pending an inquiry.

The inquiry resembles a court, except an inquiry is conducted in a less formal manner. The inquiry is presided over by an adjudicator who is an immigration officer, playing a similar role to that of a judge. The Immigration Department is represented by another immigration officer, called the case presenting officer.

His role resembles that of a Crown Prosecutor. His primary task is to prove the case against you. You may represent yourself at the inquiry. Alternatively, you may have a friend to act as your "counsel". In most circumstances, your interests may be served best by obtaining the service of a lawyer.

At the inquiry, the case presenting officer carries the burden of proof. In other words, he has to establish every element of the allegations against you. However, you can be asked to be a witness against your own case. Ordinarily, a person in Canadian law is presumed innocent before proven guilty and he is not expected to incriminate himself.

In immigration law, however, it is presumed that the person himself is the best informed person in regards to any immigration allegations. Accordingly, the general protection in law against self-incrimination is removed by the Immigration Act.

In other words, you cannot refuse to answer questions put to you by the case presenting officer, even though the answers may help prove the case against you. However, you can, and you are strongly advised to, question every bit of evidence put forward by the case presenting officer.

At the end of the inquiry, the adjudicator will make a decision. He will either find you as "a person described", that is, a person who has violated the Immigration Act, or he will dismiss the case against you. If you are found "as a person described" he has to make a deportation order against you.

In certain circumstances, he may invite you to make an argument for a departure notice instead.

The major difference between a deportation order and a departure notice lies principally in the chance of returning to Canada. With a deportation order, you will be sent back to your country of origin at the Canadian government's expense.

However, if you wish to return to Canada in the future, you are required to obtain the consent of the Minister of Immigration. Such a consent may, at times, be difficult to obtain. A departure notice, however, is made only if the adjudicator is satisfied that in your circumstances a deportation order should not be made and that you are both willing and able to leave Canada at your own expense.

If you wish to return to Canada in the future, you may do so provided you can satisfy the normal requirements of the Immigration Act. The Minister's consent is not required.

Besides conviction of an offence under the Criminal Code, it is also a violation against the Immigration Act if a visitor is convicted of an offence which may be punishable by way of indictment under any other Acts of the Federal Parliament.

An example illustrating this point is conviction of possession of a narcotic or a controlled drug. One controlled drug is LSD and one narcotic is marijuana. Possession of LSD and possession of marijuana may be punishable by way of summary conviction or by way of indictment, pursuant to the Food and Drugs Act, s.41(2), or the Narcotic Control Act, s.3(2).

A first offender usually faces a summary conviction procedure. However, for the purpose of the Immigration Act, that person could have been punished by way of indictment. Accordingly, a visitor convicted of possession of a controlled drug or a narcotic is considered to have violated the Immigration Act.

As the term suggests, a person overstays when he remains in Canada for a period of time greater than the period for which he is authorized to remain. Usually the period of authorization for a student is one year. In other words, a student is advised to apply for a new authorization well in advance of the date of expiry of its present authorization.

Usually, the renewal is granted automatically provided that the student is able to show that he has complied with all the terms and conditions of the previous and existing authorization and that he is doing sufficiently well in school.

Overstaying can also come about in other forms, either involuntarily or inadvertently. If a student enrolls in another institution or changes his course of studies (in some cases even changes faculties or a major field of study) he is deemed to have failed to abide by the terms of the conditions of the student authorization. Accordingly, his authorization becomes void and he is deemed to have overstayed.

Another example is if a student is employed and he has therefore breached the terms of his student authorization. Likewise, that authorization ceases to have any effect, and therefore, the continuous presence of that student in Canada is considered as an overstayed visitor.

In short, any breach of any term and condition, either involuntary or deliberate, would render the authorization expired automatically, thereby rendering that student an overstaying visitor.

The entire Immigration Act operates on the assumption that the person himself has all the answers to the questions relating to immigration matters. Accordingly, this breach of the law abhors any fraud and misrepresentations.

It should be noted that there is no time limitation to allege such an offence against you. When it is alleged that you have misrepresented either fraudulently, or even innocently, the burden is on you to disprove such an allegation.

As far as students are concerned, the most common circumstances of misrepresentation arise in relation to proof of financial resources. It is not unknown that students, prior to renewing their student authorization, arrange to have money credited to their bank account for the purpose of showing that they have sufficient financial resources to continue their studies in Canada.

Under certain circumstances this arrangement may be regarded as misrepresentation or even fraud.

