

## Would Trump be inadmissible to Canada? | Sergio R. Karas

By **Sergio R. Karas**

Law360 Canada (June 21, 2024, 11:41 AM EDT) -- On May 30, 2024, former U.S. president Donald Trump was convicted of 34 counts of falsification of business records in the first degree, a felony under New York Penal Law s. 175.10. This conviction arose from a payment made to adult film star Stormy Daniels before the 2016 election, focusing on the paperwork generated when Trump reimbursed his attorney, Michael Cohen, for the payment. Even though this conviction is under appeal and may likely be reversed, it raises questions about his potential inadmissibility to Canada.



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Under subsection 36(2) of Canada's *Immigration and Refugee Protection Act*, a foreign national may be deemed inadmissible for committing an act or being convicted of a criminal offence abroad that, if committed in Canada, would constitute an indictable offence. Determining inadmissibility requires a criminal equivalency analysis, to compare the essential elements of the foreign conviction with those of a comparable Canadian offence. This analysis considers the wording of each statute and the surrounding circumstances of the offence.

In New York State, falsifying business records becomes a felony if the intent to defraud includes committing another crime or aiding in its concealment. According to a CBS News article from June 3, 2024, for Trump's charges to qualify as felonies, prosecutors had to prove that he intended to commit or conceal another crime when falsifying records. They argued that the other crime was a violation of New York election law, which prohibits conspiracies to influence elections by unlawful means. Prosecutors argued that the \$130,000 payment to Cohen was intended to keep voters in the dark about Daniels's allegation that she had an affair with Trump years earlier.

Prosecutors also claimed that the hush money payment violated campaign finance laws and that Trump's reimbursement to Cohen violated tax laws. This was because Cohen paid Daniels and was later reimbursed by Trump, with the Trump Organization falsely documenting these payments as legal services. Throughout 2017, Cohen received \$35,000 monthly payments directly from Trump's personal accounts, which were recorded as "legal expenses" filed under the company records. As a result, the 34 charges against Trump corresponded to cheques, invoices and vouchers created for Cohen's reimbursement, with prosecutors asserting Trump knew these payments were for Daniels and not legal expenses.

Under the New York *Penal Code*, an "intent to defraud" is broadly interpreted and not specifically defined by statute. Case law defines its parameters, indicating that a conviction does not require financial benefit or loss. Actions intended to hinder state functions can constitute fraud. This was determined in *People v. Kase*, 53 N.Y.2d 989, 441 N.Y.S.2d 671, 424 N.E.2d 558 (1981), where filing a false instrument was deemed fraudulent because it aimed to obstruct the state's ability to enforce its laws. Since New York law requires businesses to maintain accurate records for regulatory and tax purposes, falsified records are subject to a high degree of scrutiny. Therefore, falsifying business records to conceal hush money payments could be considered fraud under this broad interpretation as it obstructs government authorities from regulating elections.

The scope of fraud in New York State is broader than in Canada, where there must be an actual risk of harm to someone's economic interests to be considered fraud. Under the Canadian *Criminal Code*

ss. 397(1)(a) and (b), falsifying records with intent to defraud is an indictable offence, punishable by up to five years in prison. In addition, s. 380 of the *Code* defines fraud as deceit, falsehood or fraudulent means that defrauds the public or any person of property, money, valuable security or any service.

In *R. v. Theroux*, [1993] 2 SCR 5, the Supreme Court of Canada ruled that fraud requires proof of deceit, a causal connection to the victim's risk of deprivation, and awareness of the act's potential to deprive another. In *Li v. Canada (Minister of Citizenship and Immigration) (C.A.)*, [1997] 1 F.C. 235, it was established that if the Canadian statute is narrower than the foreign equivalent, additional evidence must be provided to demonstrate that the person would have been convicted if the offence were committed in Canada.

Since Trump's case involved internal company records and caused no financial loss to external parties, it likely does not meet the fraud criteria under Canadian law. Even if the falsified documents were intended to conceal personal payments, there was no risk of depriving another of money or property and no economic harm to others.

Therefore, falsifying business records in Trump's case is unlikely to be considered fraud under the Canadian *Criminal Code*. Further, the prosecutors' novel legal theory in elevating the misdemeanour fraud charges to a felony-level offence by linking them to election law violations does not have equivalence to Canadian law, making it unlikely that Trump would be considered criminally inadmissible to Canada.

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