

THE MEANING OF DISCHARGES

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This memo is the result of the review of an article by lawyer Joseph Di Luca, written in the Criminal Lawyer's Association Newsletter, November/December 2001.

There is some debate as to the meaning of a discharge.

A discharge comes by the application of section 730 of the Criminal Code which sets out the qualifying criteria. It describes there being 2 types of discharges, which are as follows:

1. Absolute discharges - which take effect immediately as soon as they are granted.
2. Conditional discharges - which take effect upon determination of a specified probation order (should an individual be convicted of failing to comply with the probation order that can be brought back before the court and can then be convicted and sentenced on the original charge).

It is suggested that the following is the appropriate answer when you ask if you will have a criminal record if you obtain a discharge:

1. A discharge does not involve the entry of a conviction on your criminal record.
2. A notation of the discharge will be kept on your criminal record for a period of time (three years for conditional discharges and one year for an absolute discharge).
3. After the expiry of the time period, all references to the discharge will be removed from the CPIC system and the existence of the discharge can no longer be disclosed, except with the prior approval of the Minister.
4. Nothing guarantees that the record of the discharge will be removed from all government and police computer systems.

The Short Answer

If you apply for a job and the question is have you ever been found guilty of a criminal offence for which you have not received a pardon you can answer "no".

A Criminal Record

It is somewhat questionable whether or not a discharge is some form of a "criminal record". The *Criminal Records Act* states that conditional discharges are kept for a period of 3 years (after the completion of the probationary period) and records of absolute discharges are kept for a period of

1 year. Although the Act speaks of these records being removed, and even if taken off the system an unretrievable, there is always the question as to whether the police has really destroyed all records of the events.

Discharge Inhibiting Travel to the United States

United States immigration may refuse admission to an "alien" (which includes Canadians) if he or she has:

1. a conviction for any violation relating to a controlled substance;
2. a conviction for a crime involving moral turpitude;
3. admitted (even without conviction) the essential elements of a crime of moral turpitude (This is an act done contrary to justice, honesty or good morals which includes murder, rape, kidnaping, incest, fraud, forgery, theft, arson, robbery, assault with a weapon. Crimes not in this category include fire arm violations, gambling offences, tax offences, common assault and mischief.), or a violation of a law relating to a controlled substance.

United States Immigration may conclude that conditional discharges are convictions if the probationary period has not been completed. Absolute discharges are not viewed as convictions as they bear no penalty. However an absolute discharge for an offence involving a controlled substance may act as a bar since it involves an admission of the essential elements of the offence.

In conclusion the impact of a discharge in terms of travel to the United States is complex. This memo is not a legal opinion and cannot be relied on as setting out what views will be taken of discharges when a person attempts to enter United States.