

Canadian immigration lawyers often receive calls from Americans asking if they will encounter any difficulties while traveling to Canada as a result of an old (and sometimes very old!) conviction for driving while impaired (DWI). Often, such calls are placed after someone has attempted to enter Canada and has encountered difficulties at the border. Sometimes, the callers have repeatedly crossed the border over many years and only recently have experienced difficulties in connection with an old record for what they perceive to be a "minor" offense. It is, therefore, important for travelers to understand Canada's complex rules relating to inadmissibility on grounds of criminality before they seek to enter the country.

### **CANADA'S CRIMINAL CODE**

It is important to understand the distinction between "indictable" and "summary conviction" offenses in Canada. Indictable offenses are the more serious offenses, while summary convictions are less serious. In many ways, these are analogous to felony and misdemeanor offenses in the United States. The major differences between summary conviction and indictable offenses relate to court procedures and sentencing. Indictable offenses generally carry longer maximum sentences. To further complicate matters, Canada also has "hybrid" or "dual procedure" offenses, for which the Crown prosecutor chooses to proceed either by summary conviction or by indictment. This decision is often based on the circumstances of the offense.

### **WHO IS INADMISSIBLE?**

Canada's Immigration and Refugee Protection Act (IRPA) provides that a person is inadmissible to Canada if he or she has been convicted in Canada or abroad of an offense that—if committed in Canada—would equate to an indictable offense; or has been convicted of two or more summary conviction offenses arising out of more than one incident. Unfortunately for those seeking to enter Canada, IRPA further specifies that for immigration law purposes, a "hybrid" or "dual procedure" offense is "deemed to be an indictable offense, even if it has been prosecuted summarily." (See IRPA §36(3)(a).) Thus, the following could render a person inadmissible on the basis of criminality pursuant to IRPA: (1) a conviction for one offense that would equate to an indictable offense in Canada; (2) convictions for two separate offenses that would equate to summary conviction offenses in Canada; or (3) a conviction for an offense that would equate to a "hybrid" offense in Canada. It is worth noting that unlike the United States, where consideration is given to whether a conviction is for a "crime involving moral turpitude," Canada has no such concept. Rather, inadmissibility

for reasons of criminality is based on equating a foreign conviction to its Canadian equivalent.

☛ **PRACTICE POINTER:** Under Canadian law, it is the Canadian equivalent of the offense that is relevant and not the foreign laws under which the person was convicted abroad.

There are two further possibilities: (1) one might be convicted in a foreign country for conduct that is not considered to be criminal under Canadian law; and (2) a person might participate in conduct that is legal in a foreign jurisdiction but that is considered to be criminal conduct within Canada. In the first scenario, for example, it is well known that homosexuality remains a crime in much of the Middle East and Africa, and in other parts of the world. If a person is “convicted” of the “crime” of homosexuality abroad, does that render the person inadmissible to Canada? In short, the answer is “no.” Since the conduct does not equate to any criminal offense under Canada’s laws, a “conviction” under another country’s laws would not render the individual inadmissible to Canada.

The second scenario may be more common. Some European countries are rather liberal in their treatment of the use of certain drugs. While it may be perfectly legal to use certain nonprescription drugs in some countries, the possession of and/or trafficking in these drugs remain offenses according to the Criminal Code of Canada. Thus, is someone inadmissible to Canada if he or she possesses or traffics marijuana or hashish in Europe but is neither charged nor convicted (since these are not offenses there)? Once again, the answer is “no.” Acts committed in other countries generally only render a person inadmissible to Canada if they equate to offenses in Canada; and if they were committed in Canada, they would constitute criminal offenses.

It is important, then, to discuss offenses that do render a person inadmissible to Canada. Very few people realize, for example, that even a conviction for DWI or driving under the influence (DUI) may render someone inadmissible to Canada on the basis of criminality. This confusion is due, in part, to the fact that in most American states, DWI (or DUI) is a misdemeanor offense, often under a state motor vehicle law or municipal law. In Canada, however, impaired driving is a criminal offense, listed as a “hybrid” offense in the Criminal Code. As such, a conviction under a municipal or state law for impaired driving will render someone inadmissible to Canada since

it equates to a hybrid (and by virtue of IRPA, deemed indictable) criminal offense in Canada.

### **BEING CHARGED WITH MULTIPLE OFFENSES**

From a Canadian immigration perspective, and for the purposes of this article, it is important to consider whether it is the original charge(s) or the ultimate outcome of the matter(s) that will affect one's admissibility to Canada. Similarly, in many jurisdictions, it is common practice—in the case of a person who is driving while under the influence of alcohol—for the police to charge the individual with multiple offenses. In Canada, for example, a person is often charged under Criminal Code §253(a) (operating a motor vehicle "while the person's ability to operate the vehicle ... is impaired by alcohol or a drug") and §253(b) (operating a motor vehicle while "having consumed alcohol in such a quantity that the concentration in the person's blood exceeds 80 milligrams of alcohol in 100 milliliters of blood"). The difference between these two offenses is perhaps a fine one, and is best illustrated by using the "slang" names of the offenses: "drunk driving" and "failing a Breathalyzer." The first is more subjective, and a conviction requires proof beyond a reasonable doubt that the accused was impaired, regardless of the actual amount of alcohol in his or her blood (if such was even measured). The second is more objective and is based strictly on the actual measurement of the blood-alcohol level of the accused.

☛ **PRACTICE POINTER:** It is common practice to charge an offender with both §§253(a) and (b) offenses, but because of the principle of "double jeopardy," an offender only will be convicted of one or the other since they arise from the same set of facts. (It is assumed, for the purposes of this discussion, that no accidents, injuries, or deaths resulted from the offense.) The second charge is, therefore subsequently withdrawn or stayed by the Crown prosecutor. Under IRPA, there is a positive duty imposed on anyone seeking entry to Canada to inform the inspecting immigration officer of any circumstances or facts that may affect the officer's decision. This "positive obligation" means that an applicant cannot hide behind the "don't ask, don't tell" (or, more specifically, the "wasn't asked, didn't tell") doctrine. Rather, one is compelled by law to raise any such issues even if an officer does not initiate the conversation. There have been several cases dealing with this issue, and, admittedly, there has been some degree of dissent as to the meaning of their outcomes. Nonetheless, the general rule is that this positive duty to disclose can be interpreted broadly and it is, therefore, prudent—when in doubt—to disclose.

A strict interpretation of this would suggest that one is obligated not only to disclose past convictions, but also past charges. This is supported by the fact that on several official forms used by Citizenship and Immigration Canada (CIC), applicants are specifically asked whether they have ever "committed, been arrested or charged with any criminal offense in any country." It is important to remember that while the "innocent until proven guilty" principle stands in the context of criminal law, such is not necessarily the case in the context of immigration law.

### **CRIMINAL REHABILITATION FOR DWI/DUI OFFENDERS**

Persons who are denied entry into Canada because of DWI/DUI offenses can apply for "criminal rehabilitation" by submitting the following:

- Form IMM 1444E, Application for Criminal Rehabilitation
- A passport-size photograph
- A copy of applicant's passport data pages
- An FBI certificate
- A state police certificate
- Copies of court documents indicating the charge, section of law violated, verdict, and sentencing
- Proof of completed sentences, paid fines, court costs, ordered treatments, etc.
- Copies of the text of the law describing the offense
- Detailed explanation of the circumstances surrounding the offense
- Three letters of reference from responsible citizens
- A nonrefundable processing fee of \$180 USD

Source:

[www.nvo.com/beaulier/minnesotadwianden-trancetocanada](http://www.nvo.com/beaulier/minnesotadwianden-trancetocanada)