

## Minor criminality can be major headache

*But an employee barred from entering Canada has several options*

Since the Immigration and Refugee Protection Act (IRPA) came into force in 2002, a foreign national applicant with a criminal record, even a minor one, can be denied entry to Canada.

For example, a business person who was convicted in the United States of driving under the influence of alcohol, pled guilty, paid a small fine and put the matter behind her could, until recently, easily obtain a permit at a Canadian port of entry, meet customers and drive back. Sometimes the minor offence was not even noticeable at the border. However, with the advent of the IRPA, it is no longer so easy for an applicant with a conviction to enter Canada.

Under the IRPA, a foreign national can be deemed "inadmissible" and refused entry into Canada if she has been:

- convicted of an offence punishable by way of indictment
- convicted of two summary offences not arising out of a single occurrence
- convicted of a "hybrid offence," which could be prosecuted either summarily or by indictment.

An indictable offence is generally more serious, carries a longer sentence and is more or less similar to felonies in the U.S. Summary offences are generally less serious, carry shorter sentences or smaller fines and are somewhat similar to misdemeanors in the U.S.

Hybrid offences in Canada are those that can be prosecuted either through indictments or through summary convictions, depending on the nature and circumstances of the offence. Driving under the influence of alcohol is an example of such an offence. However, under the IRPA, a hybrid offence is considered an indictable offence even if it has been prosecuted summarily.

### Canadian equivalency of offence

Immigration officers determine the inadmissibility of an applicant convicted of an offence in a foreign country by equating the offence with its Canadian equivalent. In *Wang v. Canada (Minister of Citizen-*



### GUEST COMMENTARY

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*ship and Immigration*), the Federal Court said a visa officer is obligated to conduct an equivalency analysis to show the act, "if committed in Canada, would constitute an indictable offence under an Act of Parliament," as set out in the IRPA, before deeming a person "criminally inadmissible."

For example, driving under the influence of alcohol is a criminal offence in most countries. In the U.S., the different offences that constitute driving under the influence are generally considered a misdemeanor and punishable by a range of sentences varying from small fines to significant jail terms. Such an offence may become a felony with a longer sentence only if it causes serious injury or other aggravating factors, and the punishment varies widely from state to state.

Under Canadian criminal law, however, a drinking and driving charge or conviction is considered a hybrid offence, potentially indictable, and is sufficient to render an applicant inadmissible by reason of criminality.

The governing principle is the status of the offence if committed in Canada — a lenient or harsh treatment of the offence in a foreign country is irrelevant for the purposes of equivalency.

### How to overcome 'inadmissibility'

An applicant barred from entering Canada for a past conviction has a number of options to overcome inadmissibility. She

can apply for a temporary resident permit at the border or at a Canadian consulate in her host country. Generally, the former is dependent on the border officer's discretion while the latter takes a considerable amount of time to process at a visa post abroad.

If more than five years have passed since the completion of an applicant's sentence, payment of fine or conclusion of probation, she can apply for "criminal rehabilitation," which removes the question of inadmissibility. But the decision to grant rehabilitation can depend on other factors, the documentation involved is extensive and processing can take time.

If more than 10 years have passed since the completion of an applicant's sentence for an indictable or hybrid offence, or five years for a summary conviction, rehabilitation does not happen automatically but the IRPA allows immigration officials leeway to deem applicants rehabilitated at a port of entry to Canada. It must be noted "deemed rehabilitation" does not apply to those who have been convicted of "serious criminality," which requires a formal rehabilitation application.

Thousands of U.S. citizens and other foreign nationals have been turned away from the border since the IRPA came into force. This has become a serious problem for individuals who have minor convictions dating back several years. Businesses with customers or operations in Canada that want employees to travel to Canada will find the practical effects of this provision frustrating if the employees have ever been convicted of an offence. It is advisable to obtain the necessary documentation to overcome inadmissibility before seeking to enter Canada.

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