Minor criminality can be a major headache

Immigration law makes it more difficult for business trips into Canada for employees with past convictions, even for small offences

By Sergio Karas

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, sometime in the past, of driving under the influence of alcohol and pled guilty, paid a small fine and put the matter behind her, could, until recently, easily obtain a permit at the Canadian Port of Entry, meet customers and drive back after her work was done. In fact, 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.

IMMIGRATION

Turned away at the border due to criminal conviction

Under section 36(2) of the IRPA, a foreign national can be deemed "inadmissible" and be 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," one 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 the 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 Citizenship & Immigration)*, the Federal Court found the visa officer is under an obligation to conduct an equivalency analysis to show that 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, the offence of driving under the influence of alcohol is a criminal offence in most countries. In the U.S., the different offences which constitute "driving under the influence" are generally considered a misdemeanor and are 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.

What must be considered as the governing principle is what would be 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, while the nature of the offence and penalty range under Canadian law dtermines its equivalence.

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 and 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 the applicant's sentence, payment of fine or conclusion of probation, the applicant can apply for "criminal rehabilitation," which removes the question of inadmissibility. The decision to grant rehabilitation can be dependent 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 that "deemed rehabilitation" does not apply to those who have been convicted of "serious criminality," which requires a formal rehabilitation application.

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ASK AN EXPERT

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determination.

It is important to note that an individual's intention is not a factor considered in the determination of the existence of harassment. In *Ontario (Human Rights Commission) v. Simpsons-Sears*, the Supreme Court of Canada concluded intention was not a necessary element of discrimination. It is not necessary that the individual intended to harass another individual in order to find harassment.

The duties of employers

Under the OHSA, employers have an obligation to ensure the workplace is free from harassment. The OHSA states "every employer shall ensure, insofar as is reasonably practicable, that the employer's workers are not exposed to harassment with respect to any matter or circumstance arising out of the workers' employment."

In order for an employer to fulfil its duty under the OHSA, it must implement a sound and effective workplace harassment policy. In developing and implementing policies to maintain a work environment free from harassment, the employer needs to take proactive steps to prevent harassment or mitigate its effects in the workplace. Three essential features of a workplace harassment policy include the following.

First, it should include a general statement from the employer with respect to a commitment to a harassment-free workplace.

Second, the policy should include a definition of harassment. Typically, any definition of harassment includes the definition contained in the OHSA as well as a list of specific actions which will be considered as harassment by the employer.

Lastly, the policy should include a discussion of how harassment will be dealt with by both employee and employer.

As mentioned above, in determining whether or not harassment has occurred, the law requires both a subjective and an objective assessment. It is certainly possible a false statement concerning an employee's behaviour could constitute prohibited workplace harassment. It is important to examine the impact of the false statement on the complainant and to determine what implications have arisen as a consequence. The complainant's subjective personal response to the false statement needs to be considered. If the false statement was scandalous or embarrassing in nature, it will be important to recognize that. Further, if any of it was communicated broadly throughout the organization, there is a greater impact upon the complainant.

In addition to the subjective analysis, one also needs to review on an objective level whether a reasonable person in the position of the complainant would feel the false statement was harassing in nature. In this way, one can review the false statement and its consequences without being overly influenced by possible heightened sensitivities on the part of the specific individual complainant.

In terms of the employer's responsibilities, it should be guided by the existing harassment policy, if there is one in place. The basic requirements should include conducting a fair and thorough investigation of the complaint. An employer might want to consider using an external investigator for this purpose. Even if the investigation is conducted internally, it should be fair, unbiased and detailed. If suitable arrangements can be made to remedy the consequences of the false statement, they should be undertaken.

In addition, if arrangements can be made to separate the complainant from the harasser, such steps may be a reasonable response. In some circumstances, however, a poisoned work environment can constitute constructive dismissal. Based on the limited information available here, it is difficult to assess whether such an approach would be reasonable in all of the circumstances. It is important to recognize employees have a duty to mitigate, even in circumstances of constructive dismissal and this may require remaining with the existing employer unless there are valid and sufficient grounds to warrant the employee leaving her job. CELT

For more information see:

- *Birch v. Union of Taxation Employees, Local 70030*, 2008 CarswellOnt 7219 (Ont. C.A.).
- *S.G.E.U. v. Saskatchewan*, 1990 CarswellSask 404 (Sask. C.A.).
- *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, 1985 CarswellOnt 887 (S.C.C.).

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Border trouble

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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 that have customers or operations in Canada who want their employees to travel to Canada will find the practical effects of this provision frustrating if their employees have ever been convicted of an offence. It is advisable to obtain the necessary documentation to overcome inadmissibility before seeking to enter Canada. See *Wang v. Canada (Minister of Citizenship & Immigration)*, 2007 CarswellNat 4536 (F.C.). CELT

ABOUT THE AUTHOR

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