

Criminal Barriers to Entry to Canada Including Intoxicated Driving Related Crimes



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When entering a foreign country such as Canada, legal interpretations of criminal convictions are based on the laws of the country to which the individual is seeking entry. When attempting to enter Canada, a conviction or multiple criminal convictions under U.S. law are converted to their closest Canadian Criminal Code equivalent. Thus, despite an offense being considered relatively minor or a misdemeanor in one's local jurisdiction, a conviction for alcohol-related driving offenses such as driving while intoxicated (DWI) or driving while ability impaired (DWAI) may be considered to be more serious under Canadian law and thus bar admission to Canada. Further, there remains a question as to whether a refusal itself would bar future entry to Canada.

The Canada Border Services Agency (CBSA) functions similarly to U.S. Customs and Border Protection (CBP); it monitors the Canadian border, investigates potential violations of Canadian law, and enforces the Immigration and Refugee Protection Act (IRPA). Because CBSA has access to the FBI's National Crime Information Center, they are able to obtain U.S. criminal histories. Although U.S. citizens do not need a visa to apply for admission to visit Canada, many are unaware that a criminal arrest or conviction, even if from years past, can bar entry to Canada.

There are a multitude of reasons an individual may be denied entry to Canada. One of the most commonly reported grounds is due to "criminal inadmissibility." IRPA's criminal inadmissibility provisions are codified in subsections 36(1) and 36(2) with the criminal provisions being bifurcated into 'Serious Criminality' and 'Criminality.' While both are grounds to deny admission to Canada, there are fundamental differences.

The provision for serious criminality applies to both permanent residents ('landed immigrants') of Canada and foreign nationals. These individuals will be

deemed inadmissible if they:

- Were convicted of an offense of an Act of Parliament (federal offense) in Canada that is punishable by a maximum prison sentence of ten years or more or conviction of an offense where a prison sentence of more than six months has been ordered;
- Were convicted of an offense outside of Canada that, if committed within the country, would be a federal offense punishable by a maximum prison term of ten years or more; or
- Committed an act outside of Canadian jurisdiction

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tion that is an offense in the local jurisdiction and, if committed within Canada, would be considered a federal offense under an Act of Parliament and carries a maximum sentence of ten years or more.

Likewise, a foreign national is deemed inadmissible for criminality if they:

- Were convicted in Canada of an indictable offense under an Act of Parliament or two summary offenses arising out of independent occurrences;
- Were convicted in a jurisdiction outside of Canada of an offense that would be indictable under an Act of Parliament in Canada or two non-indictable offenses arising out of independent occurrences;
- Committed an act outside of Canada that is an offense in the jurisdiction where it occurred and would be considered an indictable federal offense in Canada; or
- Committed an offense upon entering Canada.



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Most any violation of Canada's Controlled Drugs and Substances Act may make an individual inadmissible; however, perhaps the most common criminal bar to Canada relates to alcohol-related driving convictions. A single intoxicated driving related conviction may trigger inadmissibility.

While the U.S. allows each individual state to create and enforce the laws related to intoxicated-driving, in Canada it is considered as a federal hybrid offense. As per IRCA subsection 36(3)(a), because impaired driving can be charged as an indictable offense under Canadian federal law, an individual would be deemed inadmissible regardless of the severity in his or her home state. Canadian law also considers refusal to comply with lawfully made requests for a roadside sobriety test or chemical tests to be equivalent to an intoxicated driving conviction carrying an identical penalty and immigration consequences.

Temporary Resident Permit & Rehabilitation as Solutions to Potential Inadmissibility

Despite inadmissibility to Canada, one may apply for a waiver via a Temporary Resident Permit (TRP) or a finding of rehabilitation.

A TRP can allow an individual to overcome their criminal inadmissibility. Through the TRP application process, a person must show that the benefits of their presence in Canada outweigh the potential risks. A TRP may be appropriate when either: (1) less than five years have elapsed since the sentence was completed; or (2) at least five years have elapsed since the completion of the sentence and the individual has failed to apply for, or has not yet received, a decision on an application for criminal rehabilitation.

A finding of 'rehabilitation' can permanently remove the grounds for one's criminal inadmissibility to Canada. Only an applicant who has committed a Canadian federal offense may apply for criminal rehabilitation. Application for criminal rehabilitation may be submitted five years after the individual has completed all aspects of the sentence or penalty imposed. Depending on the sentence imposed, the method for calculating the waiting period varies. For instance, if a suspended sentence is imposed, then the waiting period is calculated from the date of sentencing. If a prison sentence is imposed, then the five-year waiting period does not begin until the full sentence has been served. In contrast, if a prison sentence with probation is imposed, then the waiting period does not begin until both aspects of the sentence are served in full.

Finally, if ten or more years have elapsed since completion of the sentence for the intoxicated driving related conviction and no other offenses or convictions are present, one may be deemed rehabilitated through the mere passage of time. However, the passage of ten years may not rehabilitate an individual convicted of multiple acts of criminality or a single act of serious criminality. What constitutes 'criminality' or 'serious criminality' is a highly complicated area of immigration law which must be analyzed on a case-by-case basis by expert legal counsel.

The likelihood of success for an application for a TRP or finding of rehabilitation depends on a variety of factors. For example, among other considerations, the amount of time that has elapsed since the conviction and whether there is a history of recidivism are critical questions in the eyes of the adjudicating officer. It is highly advisable to seek legal counsel to review the positives and negatives of a particular case and to help craft the application(s).

What is ineffective in avoiding or overturning a determination of inadmissibility? The criminal practitioner should take note of these collateral consequences. It is imperative for the criminal practitioner to advise his or her client of these consequences at the outset of the attorney-client relationship.

As a matter of course, a follow-up letter at the end of the case setting forth all the consequences of the conviction - including barriers to entering Canada - is recommended. [B]