

IN AND OUT OF CANADA

By Wayne R. Foote¹



A few years ago I received a frantic call from the father of a former client. "Michael is in jail in Calgary! They claim he is in Canada illegally! He didn't do anything wrong. What should I do?" After calming the father down I referred him to Canadian immigration counsel. It turned out that Michael met a Canadian girl at school, fell in love, and went to visit her in Calgary for a few weeks. While he was visiting she had a minor fender bender and Michael was a passenger. When the police arrived they obtained ID's and ran a check of the usual suspects. The record check showed that Michael was an inadmissible foreign national based on two prior OUI convictions in Maine. When asked about the convictions by the police, he lied and denied the convictions. He was arrested for illegal entry. Ultimately, Michael sat in jail for two weeks until his Canadian lawyer could negotiate deportation instead of criminal prosecutions for illegal entry and false statements.

After I reviewed the case file I handled for Michael I was relieved to see that I properly advised Michael that he was inadmissible and could not travel to Canada without prior approval from Immigration Canada.

Canada is not the only country that excludes non-citizens for DUI. Some countries specifically exclude visitors who committed DUI or other alcohol-related crimes. Other countries, such as New Zealand, have a catchall exclusion for lack of "good character" under which a DUI can result in exclusion. The difference between Canada and almost all other countries, however, is that the United States shares criminal and motor vehicle databases with Canadian authorities. A record check in Canada or at the border will likely disclose inadmissibility. Many of our clients travel to Canada for business or pleasure. Travel can be on short notice and visa applications that might disclose inadmissibility in advance are not required. Eventually every one of us will have a client who will be affected by Canada's DUI exclusion rules. Knowing the basic rules regarding inadmissibility will help properly advise that client.

IMMIGRATION AND REFUGEE PROTECTION ACT

Canadian admissibility is governed by the Immigration and Refugee Protection Act, Chap. 27 (2001) (IRPA). Section 36 of the IRPA deals with "Serious Criminality." It states that a "foreign national" is "inadmissible" if that person "committed" or was "convicted of" a single offense that would constitute an "indictable" offense under an Act of Parliament, or two "summary" offenses not occurring at the same time.² If the indictable offense is

also one that is punishable by a term of imprisonment of at least ten years, a foreign national is inadmissible and a permanent resident is excludable. § 36(1).³ Whether the conduct occurred inside or outside of Canada is irrelevant. What matters is that it occurred.

CONVICTIONS FOR INDICTABLE AND SUMMARY OFFENSES

The Criminal Code of Canada (CCC) contains at least three separate indictable offenses involving impaired driving. These offenses apply when a person operates or has care and control of any motor vehicle⁴, vessel, aircraft or railway equipment, or assists in the operation of any aircraft or railway equipment.⁵ CCC § 253. The first offense is impaired driving which occurs when the person is impaired to any degree, however slight, by alcohol or drugs. § 253(a). The second offense is excessive BAC which occurs when the person has a blood-alcohol concentration of .08% or more. § 253(b).⁶ The third offense is refusing a test which occurs when the person refuses or fails to submit to an alcohol PBT, a breath or blood test for alcohol, or a blood test for drugs. § 254. Any of these offenses is an indictable offense. § 255. A person who has been convicted of any of these offenses in any country is inadmissible under Canadian law. A conviction includes a verdict of guilty, a plea of guilty or no contest, and deferred disposition or deferred sentence where the court enters a finding of guilty. Other common driving offenses that make a person inadmissible are leaving the scene of an accident (CCC § 252) and operating with a license suspension or revocation (CCC § 259(4) - Drive Disqualified.)

In some cases a DUI prosecution is resolved by a plea to a lesser charge such as careless or reckless driving. Some states have offenses that combine both alcohol and improper driving elements.⁷ Whether such an offense will make the defendant inadmissible depends upon the elements of the offense compared to Canadian Law. Under CCC § 249, "Dangerous Driving" is an indictable offense that involves both the element of danger to others and a culpable mental state. A single Dangerous Driving conviction equivalent will make the person inadmissible. "Careless Driving," however, is a summary offense under the various Provinces' traffic codes. One Careless Driving conviction equivalent will not result in inadmissibility. Determining whether a plea-down offense results in inadmissibility requires a comparison of the elements of the offense to Canadian law as interpreted by decisions of the Canadian courts. These cases should be referred to a specialist in Canadian Immigration law.

NON-CONVICTION ACTIONS CAN CAUSE INADMISSIBILITY

The exclusionary sweep of the IRPA is broad. Convictions are not the only official actions that will result in inadmissibility. A person is also inadmissible if that person has "committed" an act outside of Canada that is an offense in the jurisdiction in which it occurred, and the act constitutes a single indictable offense,

¹ Wayne R. Foote is Board Certified as an OUI Defense Law Specialist by the National College for DUI Defense (NCDD). Contributors to this article are Stephen R. Biss, Bar-rister & Solicitor, Mississauga, ON; Matthew B. Nichols, Esq., Portland, ME; and Lucy Perillo, Canada Border Crossing Services, Winnipeg, MB.

² Although the IRPA uses the term "indictable" offense, a Canadian impaired driving offense may be charged by indictment or summary prosecution at the discretion of the Crown prosecutor. Canadian attorneys refer to these offenses as "hybrid" offenses. The term "indictable" is used in this article to refer to both indictable and hybrid offenses.

³ This article does not cover offenses punishable by a term of imprisonment of ten years or more. A permanent alien or a foreign national who has committed one of those offenses is excludable and inadmissible. § 35. A client with such a conviction seeking to enter Canada should be referred to Canadian Immigration counsel, as should a permanent resident facing such a charge.

⁴ A "motor vehicle" includes a snowmobile, ATV or any other vehicle. *R v Baggett*, 26 CCC 2 464.

⁵ Thus, boating under the influence can result in exclusion or inadmissibility, regardless of whether the vessel is motorized.

⁶ A .08% offense is known as an "80," referring to 80 milligrams of alcohol per 100 milliliters of blood.

⁷ California has a "reckless driving" offense without alcohol as an element, but applies a different sentencing statute if the conduct involved alcohol (referred to by California practitioners as a "wet reckless").



or two summary offenses occurring on separate occasions. The term "committed" can involve a lesser level of proof than proof beyond a reasonable doubt, and may be based on an administrative finding alone. For example, a person whose license is suspended administratively for DUI, excessive BAC or a refusal, has been found (or consented to a finding) by a tribunal that the person "committed" the act. Because driving with an excessive BAC is an offense in all states and federal territories, an administrative suspension for excessive BAC renders the person inadmissible. Similarly, a traffic adjudication for impaired driving, such as New York's Driving While Ability Impaired, makes a person inadmissible because it is a finding that the person operated a motor vehicle when that person's mental or physical faculties were impaired to any degree by an intoxicant. In some cases a standard of proof as low as probable cause is a sufficient level of proof to render the person inadmissible. A person facing charges for DUI, excessive BAC or refusing a test is generally inadmissible, at least so long as those charges remain pending. Offenses committed before age eighteen often are not counted.

The extent of admissibility for an administrative suspension based upon a test refusal, however, is not entirely clear. According to IRPA § 36(1)(c), an act committed outside of Canada must be an offense in the jurisdiction in which it was committed, as well as being an indictable offense under Act of Parliament, to trigger inadmissibility. In many jurisdictions a refusal of a test results in a suspension, but is not an "offense" for which "punishment" is imposed. Several courts in the United States have emphasized this distinction in cases where defendants argue double jeopardy as a bar to enhanced penalties or prosecution after imposition of an administrative refusal suspension. In some jurisdictions a refusal is an actual offense for which court-ordered penalties are imposed. Rhode Island and New Jersey are states that separately prosecute refusals. A third situation is those states in which a refusal itself results only in an administrative suspension, without a separate offense having occurred, but that refusal suspension then counts as a prior offense to enhance future DUI charges. Maine is an example of the latter situation. Immigration officers do not normally consider these subtle distinctions and count any adverse action based upon a refusal of any flavor as an act triggering inadmissibility. Canadian immigration counsel may be helpful in resolving refusal issues.

THE SCOPE OF INADMISSIBILITY

Inadmissibility extends beyond prohibiting driving to or in Canada. A person who is inadmissible is barred from entering Canada by any means: land, sea or air. If an inadmissible person is found in Canada that person is subject to deportation and possible prosecution. The process is not necessarily pleasant. Persons flying to Canada are checked for inadmissibility at the Canadian airport at which they arrive. Persons found to be inadmissible and who are not granted entry are required to leave the country. If that person is fortunate, the immigration agent may allow him to stay in a hotel until it is time for the next flight south. If less fortunate, the stay will be in a detention room or cell.⁸ In some circumstances criminal prosecution may result.

RELIEF FROM INADMISSIBLE STATUS

The timing and conditions of relief from inadmissible status will depend upon the nature, number and timing of the person's convictions. For a person who has a conviction for a single, indictable offense punishable by less than ten years (including DUI or test refusal), that person is "deemed" rehabilitated after ten years from the end of the last court-ordered sanction. That sanction may be a license suspension, probation, fine payment schedule or a jail sentence, depending upon timing. For a person who has a two or more convictions for summary offenses occurring on at least two different dates, two or more indictable offenses punishable by less than ten years (including DUI or test refusal) or one indictable offense and one or more summary offenses, that person cannot be "deemed" rehabilitated.

Persons who cannot be deemed rehabilitated by the passage of time may apply for rehabilitation status. This application may be made after five years has passed from the date of the last court-ordered sanction. People who can be rehabilitated by the passage of ten years may also apply for rehabilitation status after five years. Forms to apply for rehabilitation are available online at the Immigration Canada website. Applications require a non-refundable fee (currently \$200.00 CDN to \$1,000.00 CDN - the higher fee is for more serious offenses) and extensive documentation. Documentation must include references from three prominent community members or clergy attesting to the applicant's good character. Processing may take up to a year. There are companies that, for a fee, will handle the processing.⁹

If the person wants to travel to Canada before either of the deadlines above, application should be made for a Temporary Resident Permit¹⁰. While a Temporary Resident Permit *can* be issued at the border at major points of entry, leaving for Canada and hoping to be granted a permit is risky. In most cases they are not granted and deportation occurs, so a "let's hope" approach to entry is risky! A Temporary Resident Permit allows entry for up to six months. Application for a Temporary Resident permit should be made through a consulate. The application requires a non-refundable fee of \$200.00 to \$1,000.00 CDN. The processing time will vary by the application load at a particular consulate. A delay in processing of six or more months is not extraordinary. Again, Canada Border Crossing Services or Canadian Immigration counsel may be helpful in obtaining a permit.

Whether a permit will be granted depends to a large extent upon the purpose of the visit. Permits for pleasure visits such a hunting or tourist trips are the least likely to be approved. Trips that benefit Canada generally, such as business trips, stand a somewhat better chance of being approved. Trips that directly benefit Canadian interests (e.g., applicant studying Atlantic salmon spawning behavior in the Canadian rivers) or humanitarian purposes are the most likely to be approved. In some cases, extended permits are available for people who must travel across the border to reach homes or businesses in the United States or Canada. Places such as portions of Big Twenty Township in extreme northern Maine can only be accessed in the winter by traveling over Canadian roads. Permits are somewhat more available in those circumstances. The

⁸ One client traveling by bus on a college ski trip to Ontario was summarily booted from the bus with all of his gear at the Sandy Bay POE in northwestern Maine. The temperature was -20F. Sandy Bay is located in Township 5, Range 3 NBKP (North of Bingham's Kennebec Purchase of 1793.) It is miles to the nearest town and there are no taxi cabs.

⁹ One such company is Canada Border Crossing Services (<http://bordercrossing.ca/border/home.html>).

¹⁰ According to Canada Border Crossing Services, there were previously two types of permit - a Minister's Permit issued at the border, and a Temporary Resident Permit. The Minister's permit is no longer used. The TRP is now used in all cases.

decision to grant or deny these permits is at the discretion of the local Immigration Canada officer.

THE EFFECT OF A DISMISSAL, PLEA TO A LESSER CHARGE, ACQUITTAL, DEFERRAL OR PARDON

In some cases a dismissal or plea to a lesser charge will cure inadmissibility. The outright dismissal of the DUI charge will terminate inadmissibility based on the pending charge itself. A dismissal (as opposed to an outright acquittal) may not terminate inadmissibility based upon an administrative suspension for excessive blood alcohol levels or refusal. As noted above, a plea to a lesser charge will terminate inadmissibility based upon the DUI charge itself, so long as the lesser charge does not trigger inadmissibility as either an indictable offense or a second summary offense. The plea to a lesser charge, however, may not lift inadmissibility based upon an administrative suspension for excessive blood-alcohol levels or refusal. An acquittal or a pardon removes inadmissibility based on both the pending charge and any associated administrative suspension.

Best To Refer Clients To Canadian Immigration Counsel.

The intricacies of when an offense (conviction or not) is an offense rendering a person inadmissible are generally beyond the expertise of a United States DUI attorney. The risks associated with improperly advising a client regarding inadmissibility are significant. The financial costs of an abruptly interrupted Canadian vacation or business trip can be significant. Detention and possible criminal prosecution are obviously unpleasant. When in doubt, a client should be referred to competent Canadian immigration counsel for an evaluation of the situation and, if necessary, action to lift inadmissible status.

Sh. W.

©2009 by the National College for DUI Defense and/or individual contributors. All rights reserved, however, no right is claimed to governmental works. The Journal is a topic specific newsletter published bi-annually and distributed to members of the National College for DUI Defense, Inc., 445 S. Decatur Street, Montgomery, AL 36104 (334) 264-1950. It is not intended as a reporter, unofficial or otherwise. No part of this newsletter may be reproduced in any form or incorporated in any information retrieval system without permission of the copyright owner.