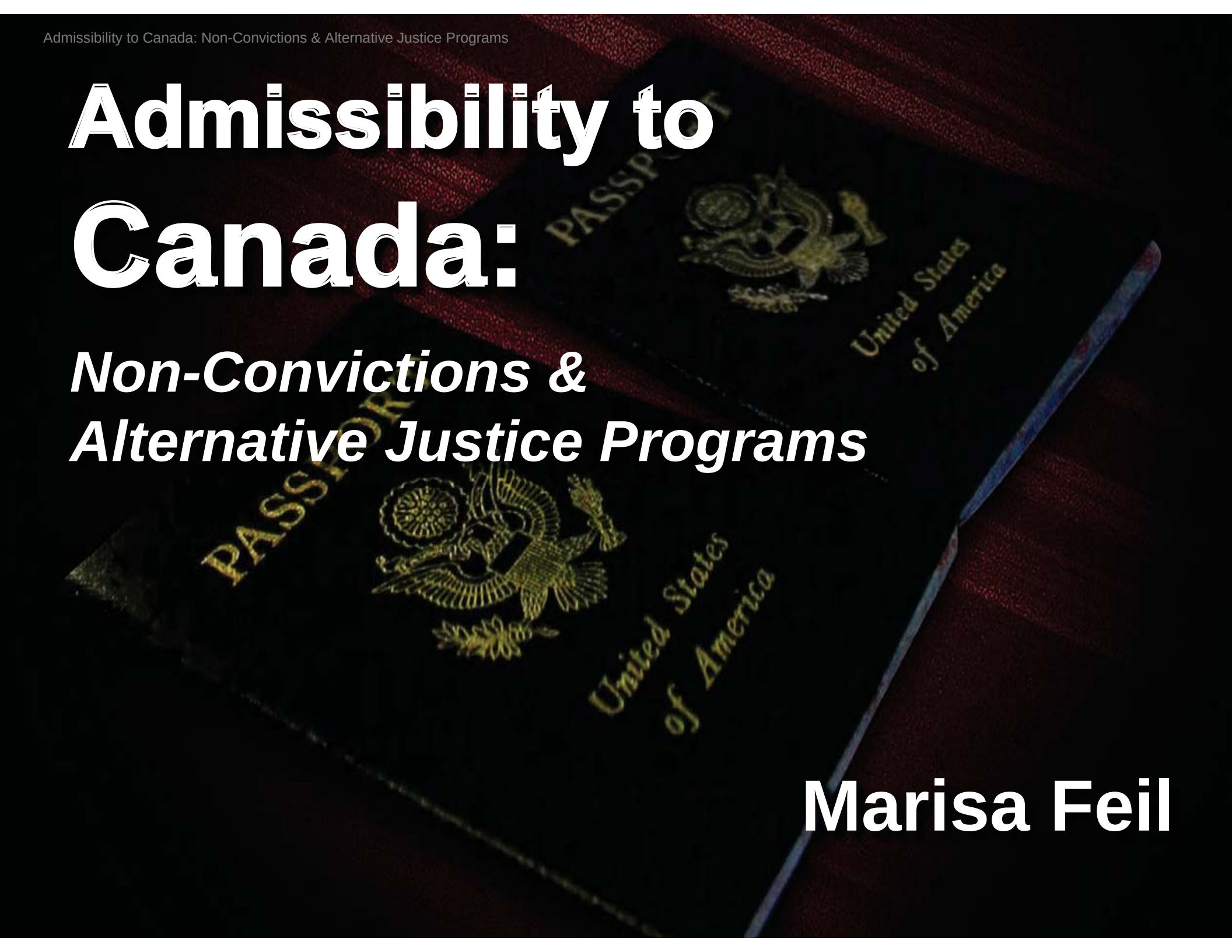
Admissibility to Canada:

Non-Convictions & Alternative Justice Programs



Marisa Feil

Most people are already aware that a conviction for a criminal offense in the United States will render a person inadmissible to Canada. Due to the volume of DUI offences in the US each year, the most common type of conviction that results in inadmissibility to Canada is DUI.

(See the sidebar article "Why is Everything a Felony in Canada?" following this article to explain more on Canadian procedures - Editor)

What is usually less clear to people is what happens to charges, non-convictions or other types of alternative justice programs.

In some states, DUI offenses can be conditionally discharged, which does not result in a conviction. While conditional discharge for DUI is not offered in Canada, what is relevant for Canadian immigration purposes is whether a conviction resulted in the state where the offence occurred. If the deferral program or conditional discharge program allows a person to complete conditions and then enter a finding of not guilty, these individuals will not be inadmissible to Canada. Conditional discharge may be known by different names, such as: continuance without a finding, accelerated rehabilitative disposition or stipulated order of continuance.

Any programs that require the individual to plead guilty and have the guilty plea entered onto the individuals record will be treated by Canadian immigration officials as a conviction.

When a particular offence is ineligible for a conditional discharge or deferral program, some states will allow plea bargains to reduce the offence to something that is eligible for a non-conviction program. There are also some judges/district attorneys that will allow a plea bargain to an offence that would not render a person inadmissible to Canada. The most common plea in the US from a DUI charge is to a "wet reckless" – reckless driving with some sort of alcohol-related classes or probation terms. The second most common is "dry reckless" which is simply reckless driving without any alcohol restrictions, classes or probation terms.

Unfortunately a wet reckless in most US states is equivalent to impaired driving in Canada and most Canadian immigration officers equate a dry reckless to a provision of the Canadian criminal code called "dangerous operation of a motor vehicle".

Therefore, someone who pleads guilty to either of these "lesser" offenses, in the state where they occurred are still likely to be inadmissible to Canada. In order to overcome inadmissibility on a DUI charge, the individual would usually have to plead guilty to a traffic offence that would not be covered by the Canadian Criminal Code. We have also seen plea bargains for disorderly conduct work successfully.

Once the conviction has been entered, having a record sealed or expunged is another method for overcoming inadmissibility, only if, the expungement allows the individual to state to anyone, including a government official that they have never been convicted of an offence. This standard is set by the Canadian equivalent of an expungement, the Canadian record suspension. Eligibility for conditional discharge programs and expungement policies differ state to state in the United States.

Convictions vs. Non-convictions

The *Immigration and Refugee Protection Act* (IRPA) of Canada distinguishes convictions and non-convictions when determining criminal inadmissibility. While criminal convictions result in criminal inadmissibility a charge without conviction is generally insufficient to render an applicant inadmissible to Canada. Stated below are the differences between convictions and non-convictions, types of sentences and the considerations for the purpose of Canadian immigration.

Convictions:

Usually, an offence committed outside of Canada equivalent to a single summary offence under Canadian law is not considered a criminal inadmissibility. However, two or more summary offences – arising from two or more unique sets of circumstances committed outside of Canada makes the applicant inadmissible.

If the applicant committed an offense within Canada, under the Canadian deferral act or regulation, this must be resolved prior to entering Canada.

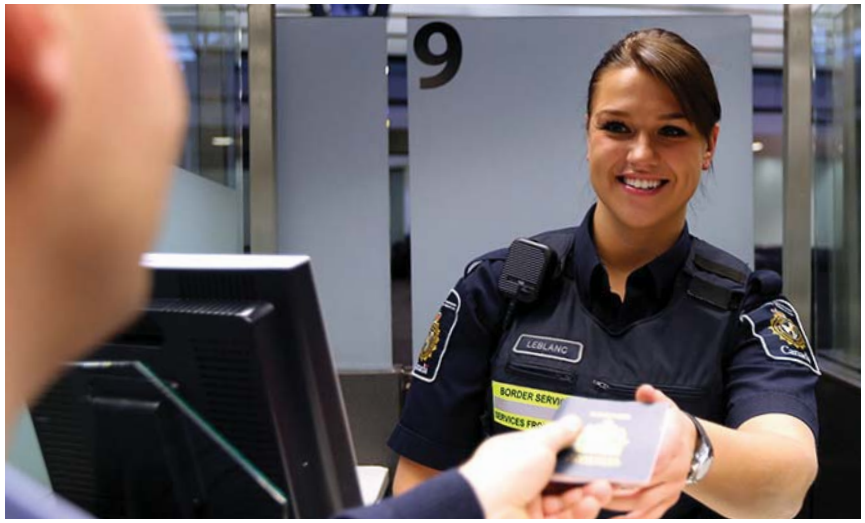
After a minimum of five years following the completion of the entire imposed criminal sentence, including completion of probation and/or full payment of fines, a criminal conviction in Canada and a foreign conviction requires rehabilitation. The offender must provide evidence of submitting the application for record suspension to the Parole Board of Canada for offences committed within Canada, as well as a legal opinion letter, which is not obligated, but advisable.

Acquittals and Non-convictions:

The following are considered non-convictions, allowing a person to travel to Canada:

- An arrest record for being charged, without a conviction
- Acquittals
- Participation in pre-trial intervention program
- Conditional discharge

The cases above should not cause problems for travel, and the individual is admissible for Canada. However, there may be other complications for entry to Canada if an individual's criminal record has not been updated to acquittal, if the individual has not paid the fine, or if a guilty disposition was on their record at any point. It is up to the application to demonstrate that there was no conviction, as the burden of proof lies in the applicant. *The decision for admissibility is at the discretion of the border agent.*



Adjudications, suspended imposition of a sentence, and deferred sentence

The **suspended imposition of a sentence** and a **deferred sentence** are considered convictions that lead to inadmissibility under Canadian immigration law. This is different from a suspended judgement or adjudication where there is no finding of guilt and the charges are dismissed after completion of probation without conviction. A suspended sentence just avoids having the defendant complete part of their sentence if certain conditions are met.

Conditional discharge may be known by different names, such as: continuance without a finding, accelerated rehabilitative disposition or stipulated order of continuance.

An explanation may be required at the border for any entry of a criminal record including charges or arrests that resulted in a non-conviction or acquittal. A Legal Opinion Letter from a Canadian lawyer may be helpful in such cases. A case where an individual with convictions not considered as federal offences in Canada, such as possession of less than 30 grams of marijuana, may benefit from the letter. This will ensure that there are no complications at the port of entry.

A Legal Opinion Letter serves to:

- Recognize the discrepancy on an individual's record;
- Explain why the event is not equivalent to a conviction in Canada;
- Explain why the individual should not be considered criminally inadmissible in Canada

The following are definitions of American terminology, as they are interpreted under Canadian immigration law:

Admissible

Acquittal contemplating dismissal
This is not a conviction, and would likely have the same effect as a conditional discharge.

Deferral of prosecution
This is not a conviction. A deferral indicates that a trial has not been held, similar to a stay.

Deferral of conviction
This is not a conviction, but a form of disposition equivalent to a conditional discharge in Canada.

Deferral of judgment
This is not a conviction. The final judgment rendered may be a finding of "not guilty" if the conditions imposed in the deferral are fulfilled.

Nolle prosequi
This is a Latin phrase meaning "I will no longer prosecute." In Canada, this is similar to a *stay of prosecution*. No conviction results.

Expungement
An expungement is not a conviction. Expunged means to strike out; obliterate; mark for deletion; to efface completely; deemed to have never occurred. Many U.S. states have an expungement process. After an expungement, the record of their conviction is sealed and the conviction is deemed not to exist.

Inadmissible

Deferral of sentence
This is a conviction similar to a suspended sentence in Canadian law, provided that the offence equates to Canadian law.

Nolo contendre
This is a Latin phrase meaning "I will not contest it." It is a plea used in court when the accused does not deny or admit to the charges, and is similar to pleading guilty. A conviction will result.

Convicted of several counts
This means to have multiple convictions. Counts in the U.S. are equivalent to charges in Canadian law.

Sealed record
A sealed record is considered a criminal record in the context of the *Immigration and Refugee Protection Act*. While the existence of a sealed record itself does not result in inadmissibility, an officer should question the concerned individual in order to determine the circumstances of the sealed record.

As a sealed record is used often for young offenders, an officer should question whether the record was from a conviction as a minor. In the case where the record was from a conviction as a minor, the sealed record would most likely equate to an offence under the *Youth Criminal Justice Act*, unless the case would have been eligible for transfer to an adult court.

A sealed record can also indicated that there was an agreement between the prosecutor and defendant, or indicate that the case was a security case. If an individual abides by the terms and conditions imposed by the court, their record may be sealed in Vermont. The record of the case is kept private, unless made public by court order, but will still appear on the individual's "rap sheet."

As an illustration, we have selected a handful of states and described their policies for non-convictions as they relate to offences that would render a person inadmissible to Canada:

New York

Currently, New York does not offer any conditional discharges or diversion programs for individuals charged with DUI. Instead, New York offers an education program called the Drinking Driver Program to help reinstate licenses for DUI offenders. Participation in the education program may help recover licenses but does not remove the conviction. Under New York policy, expungements are prohibited, and reducing an alcohol traffic sentence to a non-alcohol offence is also not an option. Therefore, an individual charged and convicted of a DUI is unlikely to overcome inadmissibility without applying to the Canadian government for rehabilitation.

Washington

Washington does not offer any conditional discharge programs, but the offender may plead for an alternative, lesser offense such as reckless driving, first degree negligent driving, and reckless endangerment. Deferred prosecution programs are available for DUI charged individuals diagnosed with alcohol dependency, given that the individual is sober, and must get sober. Most offenses in Washington are eligible for expungement after the sentence has been completed, and three years have passed without other convictions or charges. DUIs are ineligible for expungement. The offences that are available as a lesser offence are still offences that may render a person inadmissible to Canada – until such time as they are expunged.

California

California policy allows first time offenders with minor drug crimes a deferred entry of judgement statute after successful completion of probation resulting in a non-conviction. This does not apply for DUI charges. However, this does not mean that DUI convictions cannot be expunged; individuals become eligible for DUI expungement upon completion of their probation or sentence, without a waiting period, provided that there are no other charges against the individual. There are also other options such as a wet and reckless, a dry reckless and exhibition of speed plea. However, expungement does not remove inadmissibility to Canada, as the individual must still disclose expungement to the government. As a result, the Canadian government regularly takes the position that a California expungement is not a full expungement and is not equivalent to a Canadian record suspension.

Hawaii

The Hawaiian conditional discharge program is equivalent to Canada's conditional discharge program outlined in its statutes. However, the Hawaii program only applies to first time drug offenders, and do not allow expungement of criminal conviction. Plea bargain is prohibited in Hawaii. Individuals may apply for a pardon for their conviction but this does not erase the criminal record.

Texas

Texas offers a deferred adjudication program that places defendants on community supervision. Defendants, upon completion may have the chance to have their charges dismissed without entering an adjudication of guilt. Deferred adjudication, however, is not offered to charges related to alcohol, including driving, boating, or flying while under influence. Texas lawmakers considered reinstating deferred adjudication options for DUIs in recent years, but no legislation has been passed. In Texas, expungement is only available if a person was acquitted, the charges were dismissed, if the case is reduced to a Class C misdemeanour, or if the individual was granted a pardon for the offense. While DUI convictions are not eligible for expungement for any reason, there are possible alternatives to plea, including obstruction of highway and reckless driving.

Florida

Florida offers a Pre-Trial Intervention Program that offers first time offenders, or any offender with one non-violent misdemeanour on record charged with misdemeanour or third degree felony an opportunity to have charges dismissed. While in most cases, DUI charges are likely to be eligible for the program, expungements tend to be limited for those who were acquitted of their charges, had their charges dismissed, or entered a deferred adjudication program. Deferred adjudication tends not be available for DUI offenses in Florida, meaning generally, a DUI record cannot be expunged in this state.

Marisa Feil graduated from McGill University with a Bachelor's degree before pursuing her Master's in Common and Civil Law from Université de Montreal, one of the top law schools in Canada. She wrote her thesis on Medical Inadmissibility to Canada and shortly after began her career in Canadian immigration law. After graduation, she began work at one of the largest immigration firms in Canada where she noticed an absence of comprehensive representation for those trying to enter Canada with a criminal conviction.

Acting upon this she thus started her own firm, Foreign Worker Canada, to represent those who were criminally inadmissible as well as to aid with other immigration obstacles. Marisa now assists her clients with the assembly of their applications for entry into Canada, and guides them through the complicated Canadian immigration processes. From clients looking to live and work to those just looking to travel in Canada, Marisa works with a wide variety of temporary and permanent applications to help her clients achieve their Canadian dreams.

Marisa's ability to reach a wide range of clients has been a large part of why her practice has succeeded. Outreach and marketing efforts, as well as her transparent online presence have helped FWCanada grow into one of Canada's leading immigration law firms.

Through the success of her own firm, as well as strength of her legal counsel and expertise, Marisa has become a respected authority on matters of Canadian immigration. Besides being frequently contacted to offer her expertise in lectures, conferences, and webinars, she has also been asked to be a contributor in various publications.

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