

# The Two Way Trading Relationship: Doing Business in Canada and the United States



# Part I: The Three Keys to Cross-Border Success



# A. Management Buy-In: Understanding Your Market in Canada





# “The True North Strong and Free”

---

- Canada is the world’s second largest country / 10% of world’s land mass
- Canada is a federation of 10 provinces and 3 territories. Federal Parliament in Ottawa and 10 provincial parliaments + territorial governance
- First Nations – 700,000 pop. + Metis and Inuit
- 34.8 million residents; 80% live in urban centres – GTA/Toronto (6 million), Montreal (4 million), Vancouver (2.5 million), Ottawa (1.26 million), Calgary (1.27 million), Edmonton (1.2 million)
- 80% of population lives within 160 kilometers / 100 miles of the US border

# The World's Largest and Most Integrated Two-Way Trading Relationship

---

- Canada and the United States Enjoy the World's Largest Two-Way Trading Relationship at \$742.5 billion in goods and services in 2012
- The relationship is larger than the trading relationship between the US and the European Union; as well as the US and the BRIC countries (Brazil, Russia, India, China) combined
- Of greater significance, more than 1/3 of Canada-US trade occurs intra-firm, and an additional 1/3 of Canada-US trade occurs within integrated supply and value chains (e.g., automotive)
- Approximately two-thirds of first time US exporters enter the CDN market

**YOU ARE NOT ALONE IN DOING BUSINESS IN CANADA**

# . . . Integrated into North American markets



# Canada - Your Best Customer

---

- Canada bought \$233 Billion from USA in 2012 (up 3.9% from 2011, and up 81% from 2002)
- More than China, UK, and Japan, combined
- 38 US States count Canada as their largest trading partner (not just “border” states)
- More than 8 million U.S. jobs depend on trade and investment with Canada
- Canada’s dollar remains strong, and US goods and services remain the largest recipient of Canadian Direct Investment Abroad(CDIA)

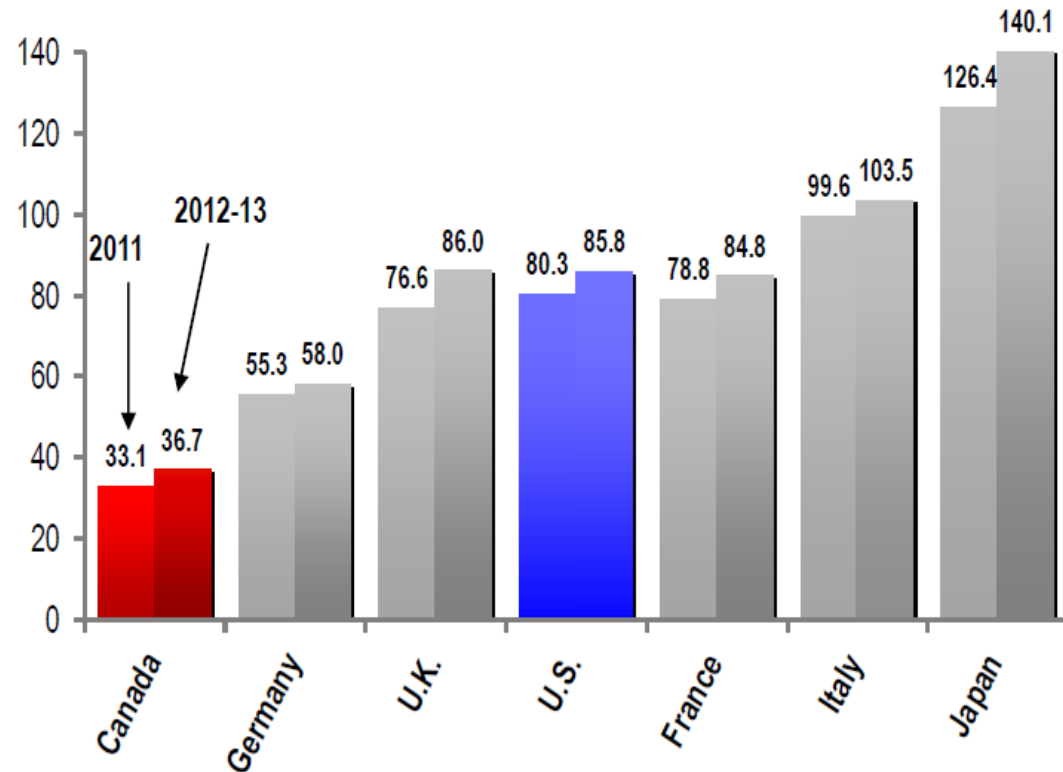
# Canada is the best place to do business in the G7

The EIU ranks **Canada #1 in the G7 and #4 in the world** as a country in which to conduct business over the next five years (2013 – 2017)<sup>1</sup>

Forbes Magazine, ranked **Canada #1 in G7** on its “**Best Countries for Business**” list<sup>2</sup>

According to the IMF, **Canada** has the **lowest net debt-to-GDP ratio in the G7**<sup>3</sup>

General Government Net Debt 2011-13  
(% of GDP)



<sup>1</sup> The Economist Intelligence Unit, October 2012 .

<sup>2</sup> Forbes Magazine's November, 2012

<sup>3</sup> IMF Fiscal monitor, October 2012



# Why is Canada a great place in the G7 to do business?

---

## Strong Economic Growth

Canada led all G-7 countries in economic growth, on average, over the past decade (2002 -2011).<sup>1</sup>

## The Soundest Banking System in the World

The World Economic Forum says that Canada has the soundest banking system in the world<sup>2</sup>

## Low Overall Business Costs

Canada offers one of the lowest overall business costs in the G7<sup>3</sup>

<sup>1</sup> World Bank 2012

<sup>2</sup> The World Economic Forum. *The Global Competitiveness Report 2012 - 2013*.

<sup>3</sup> KPMG. *Competitive Alternatives 2012*.

# ...Strong focus on innovation...



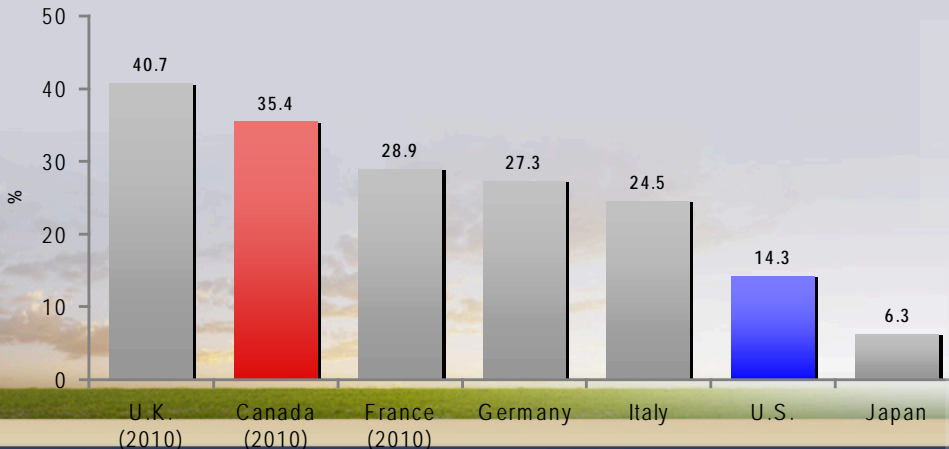
**Canada is #1 in G7** in R&D investment in post –secondary research<sup>1</sup>

**Canada is a world leader in post-secondary research**, outpacing other G-7 countries on higher education investment

**Canada ranks #1** in the G7 for the number of scientific articles published per capita<sup>3</sup>

**Canada ranks 2<sup>nd</sup> in the G-7** in terms of the proportion of Business R&D expenditure undertaken by foreign affiliates.

R&D Expenditure of Foreign Affiliates as a Percentage of Business R&D Performed \*\*



## ... Highly educated and multicultural workforce



**Canada ranks #1** in the OECD for its *college completion rates* (51% of working-age Canadians have graduated from college)<sup>1</sup>

**Canada ranks #1** in the G7 in terms of the *availability of qualified engineers* in its workforce <sup>2</sup>

**Canada ranks #1** in the G7 for *highest proportion of foreign-born workers* in the G-7 <sup>3</sup>

<sup>1</sup> OECD. *Education at a Glance 2012*

<sup>2</sup> International Institute of Management Development. *World Competitiveness Yearbook 2012*.

<sup>3</sup> OECD 2007

# Yet Canada is not the 51<sup>st</sup> US State

## WELCOME!

This play structure is designed for  
**2-5 Year olds - United States**  
**1.5 - 5 Year olds - Canada**

Although this equipment meets requirements of ASTM F1487 - 98 for ages 2 - 5 and CAN/CSA - Z814 for ages 1.5 - 5, some equipment may not be appropriate for all children in this age group.

- Adult supervision is strongly recommended for children using this equipment.
- Loose clothing, clothing with draw strings and items worn around the neck must be avoided to prevent string entanglement.
- Debris, especially sharp items, ropes and cords must be removed from play area immediately.
- Extra care must be taken when conditions are damp, snowy, icy or hot.
- Regular inspection of play equipment is vital to prevent crushing, worn or damaged parts to the user.
- Care must be taken near swings and other moving equipment to avoid impact.

**IMPORTANT:** The U.S. Consumer Product Safety Commission (CPSA) and Canadian Standards Association (CSA) state that the safety requirements for playground equipment are not the same for the U.S. and Canada.



# Know Thy Customer

---

While the similarities between Canada and the United States render Canada as the leading market for US business expansion via international trade, there are important differences that companies must take into account. Your basic understanding of issues must include:

- Federal / Provincial Relations
- Inter-provincial differences (Quebec, East / West divide)
- Intra-provincial differences
- Role of bureaucrats / regulatory officers
- Cultural elements (Francophonie, Labor and Employment issues, etc.)

# B. Management Buy-In: Adopt the “Crossing the Moat” Perspective



# Are You the Trojan Horse: Defense, Health & Safety Considerations

---

- The leading concern of the host country - here, Canada - is whether the goods and services that you will provide to CDN citizens /consumers are safe
- This gives rise to national security/defence concerns in Canada, as well as export controls from the US
- Also gives rise to immigration issues as you move people across the border (e.g., after sales service),
- Health and safety concerns exist between Canada and the US and there is a potential need to deal with separate licensing regimes between Canada and the US

## Example: National Security / Defense Regimes

---

- Do US export controls (EAR) apply? Commerce Controls? ITAR?
- US and Canada law also prohibits bribery abroad and support for the Arab boycott of Israel. Watch for Cuba issues arising from trade with Canada
- Can obtain advance opinions from Canadian Border Services Agency

The key is do not “wing it.” Dedicate time at the front end to properly classify your goods under the Harmonized Commodity Description and Coding System (HS)



## Example: Other National Defense / Security Issues

---

- *Corruption of Foreign Public Officials Act*
- *Proceeds of Crime (Money Laundering) and Terrorist Financing Act (financial institutions, life insurance companies, securities dealers, accountants, etc.)*
- *Personal Information Protection and Electronic Document Act (“PIPEDA”) / Anti-Spam Legislation*

## Example: Consumer Safety

---

- Canada has a complex legal framework at both the federal and provincial levels that impacts the sale of products in Canada. There are many regulations that govern the packaging, labelling, formulation, testing, safety, licensing, registration and promotion of products that are uniquely Canadian and that need be taken into consideration when doing business in Canada
- The federal *Competition Act* governs business conduct in Canada. Generally speaking, it contains both civil and criminal provisions targeted at preventing anticompetitive practices in the marketplace.
- On June 20, 2011, the Canadian Consumer Product Safety Act (CCPSA) came into force and introduced sweeping changes to Canada's approach to dealing with consumer product safety and recalls

# C. Management Buy-In: The Tax





## A Few Words About NAFTA

---

- The North American Free Trade Agreement is a regional trade agreement between Canada, the US, and Mexico.
- “Free Trade” in Goods and Services between the Member Countries through the reduction of tariffs and elimination of NTBs
- Facilitates Direct and Indirect Investment into the countries
- Protections for fair and non-discriminatory treatment
- Dispute resolution mechanism - private investor v. governments
- **THE NAFTA ESSENTIALLY GUARANTEES THAT YOU WILL BE TREATED JUST LIKE A DOMESTIC COMPANY - FREE TRADE DOES NOT MEAN “TAX FREE” TRADE**



# Taxation in Canada

---

- Canada bases its taxation system on the concept of residence. Individuals are considered to be residents if they “ordinarily reside” in Canada or are present in Canada for 183 days or more in a taxation year
- Under the ITA, Canadian federal income tax is levied on the worldwide income of individuals and corporations resident in Canada, but only on certain Canadian-source income of non-residents
- For tax purposes, a corporation is viewed as a “person” and is therefore a taxpayer. All corporations formed in Canada after April 26, 1965 are considered to be residents of Canada

# Taxation of Non-Residents

---

- A foreign incorporated entity will be considered to be a resident of Canada if the company exercises its central management and control in Canada
- Unlike Canadian residents who are taxed on their worldwide income, non-residents are subject to Canadian income tax on income that is derived from:
  - a. Employment in Canada;
  - b. Carrying on business in Canada; and
  - c. Dispositions of certain types of properties that are located in Canada
- Canadian-Derived interest, dividends, rents and royalties

# Canada-US Tax Treaty

---

- Canada has income tax treaties with other countries that alleviate double taxation of personal income. The taxation of non-residents in Canada is subject to the overriding provisions of any applicable Income Tax Treaty between Canada and the country of residence of the non-resident.
- Generally speaking, these income tax treaties reduce the statutory withholding tax rate of 25% and specify the circumstances under which Canada will retain the right to impose income tax on the non-resident on various categories of income.

# Canada-US Tax Treaty

---

- Canada's tax treaties typically exempt from domestic income taxation any profits from a business carried on in Canada, unless it is carried on through a "permanent establishment" located here. Each treaty defines this term for purposes of this exemption.
- The Canada-U.S. Tax Convention defines "permanent establishment" as a fixed place of business through which the business of a resident of a Contracting State (i.e. Canada or the U.S.) is wholly or partly carried on. "Permanent establishment" includes a place of management, a branch, an office, a factory, a workshop, a mine, an oil or gas well, a quarry or any other place of extraction of natural resources



# Corporate Taxes

---

- Federal and provincial tax rates for corporations vary.
- Manufacturing and small Canadian-controlled business corporations enjoy preferential tax rates on their profits.
- A corporation must file a corporate tax return with the CRA within 6 months of its fiscal year-end

# Transfer Pricing

---

The primary objective of the transfer pricing rules is to ensure that non-arm's length parties transact with each other as if they were dealing with each other at arm's length. Therefore, inter-company pricing and other charges for these transactions should be no higher or lower than those prices charged by parties that deal with each other at arm's length

# Transfer Pricing

---

- Inter-company transactions include charges for:
  - Purchase and sale of inventory and services;
  - Management fees;
  - Royalties on know-how (intellectual property) and technology;
  - Interest on inter-company loans; and
  - Inter-company administrative fees

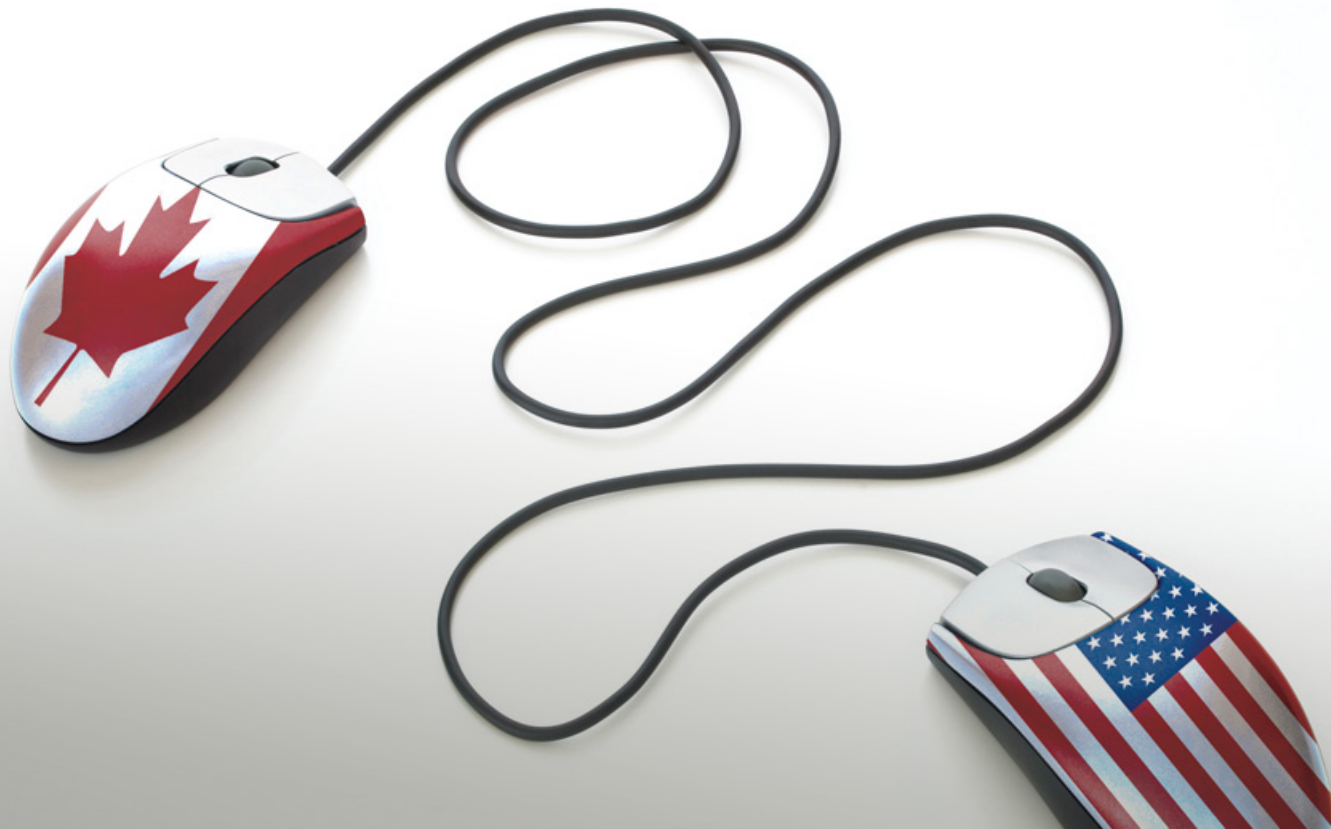
# HST

---

- On April 1, 1998, the provinces of Nova Scotia, New Brunswick, and Newfoundland introduced the Harmonized Sales Tax (HST) of 8%. The HST extended the GST to a provincial level at a combined tax rate of 13%. On July 1, 2010, the HST was also introduced in Ontario resulting in an HST rate of 13%. Also as of July 1, 2010, Nova Scotia increased its HST rate from 13% to 15%. The province of Quebec has a form of harmonized value-added tax called the Quebec Sales Tax at a rate of 7.5%
- Most other provinces impose retail sales taxes, which range from 5% to 10%. The only exception to this is the province of Alberta, which has no retail sales tax



# Part II. Starting Off: Exporting to Canada



# Checklist item #1

---

## Trademarks and Intellectual Property:

- Be aware of ‘trademark pirates’
- Outside the USA, most countries follow a “first to file” trademark rule.  
The USA does now too.
- Patents and copyrights need attention too

## Checklist item #1 IP

---

Canada has modern federal legislation protecting trade-marks, copyrights, patents, industrial designs, integrated circuit topographies, and plant breeders' rights. Registration in Canada extends intellectual property protection to all of Canada. Intellectual property is registered with the Canadian Intellectual Property Office (CIPO), which is a special operating agency associated with Industry Canada. CIPO is responsible for the administration and processing of the greater part of intellectual property.

# Checklist item #1 IP

---

## Patents

- Patents cover new inventions or any new and useful improvement to an existing invention. The process for obtaining a patent in Canada is detailed in the federal Patent Act. The basic principle of the Patent Act is that a patent is only granted to an original inventor or to his or her legal representatives.

## Trade-Marks

- The registration of a trademark is advisable because an applicant who registers a mark under the Trade-marks Act is granted the exclusive right to use the mark throughout Canada. Once a trade-mark application has been approved, the trade-mark is registered for a term of 15 years with the possibility for renewal.



# Checklist item #1 IP

---

## Copyright

- The federal Copyright Act gives exclusive right to the copyright holder of any original literary, dramatic, musical or artistic work, to control the copying and other commercial exploitation of that work. The copyright holder has the exclusive right to publish, produce, reproduce, translate, broadcast, adapt, perform or cause to be performed, or produce the copyrighted works. Registration is not necessary to create copyright in a particular work, but it does serve as evidence of ownership should copyright infringement arise. Anyone using, renting, selling, distributing or importing a work without the owner's consent infringes the copyright and may be subject to criminal penalties. Copyright can exist by virtue only of creation of the work, but can, for greater certainty, also be registered. To register a copyright, you must file an application with the Copyright Office of CIPO and pay a prescribed fee.

# Checklist item #1 IP

---

## Domain Names

- The Canadian Internet Registration Authority (CIRA) is responsible for the “.ca” system, which is governed by Canadian law. In order for a company to register a “.ca” name, certain requirements must be met in order to ensure that the “.ca” names remain a public resource for Canadian’s social and economic development. The person who wishes to register a “.ca” domain must firstly contact a certified registrar to submit a registration request to CIRA. Domain names are granted on a first-come first-served basis. The applicant must also conduct a WHOIS search in order to ensure that the desired domain name is available, and to ensure that they are not infringing on any third-party intellectual property or other rights.

## Checklist item #2

---

### Sales Representatives and Distributors:

- Sales representatives solicit orders for a commission; distributors buy and sell for their own account
  - This is different than passage of title / liability issues
    - “Golden handshakes” at termination
    - Territorial restrictions and “parallel imports”

# Legal Issues in Distributor / Sales Agreements

---

- These individuals are representing your company.
- Again, watch taxable presence.
- Employee under foreign law? Fact specific inquiry into control focussed on compensation, hours, place of employment, restrictions.
- Watch health and safety standards; termination provisions.
- “I have a friend” scenario. Watch for FCPA violations.



## Checklist item #3

---

### Export Contract:

- Custom agreement or standard forms?
- Domestic forms need review for international use (e.g., UN Convention on Contracts for the International Sale of Goods)
  - Terms requiring special attention

## Checklist item #4

---

### Taxes:

- Generally, independent sales representatives do not create a taxable “permanent establishment” abroad under US tax treaties
- If selling through affiliated foreign companies, pay attention to transfer pricing

## Checklist item #5

---

### Shipping and Customs:

- Delivery at your place or mine?
- Clearly define responsibility for arranging shipping, clearing customs, paying duties and so on
- ICC Incoterms are very useful in clearly allocating responsibility between buyer and seller

## Checklist item #6

---

### Government Regulations and Product Standards:

- Do US export controls apply?
- US law also prohibits bribery abroad and support for the Arab boycott of Israel
- Look into import restrictions and product standards in the destination country

## Checklist item #7

---

### Getting Paid:

- So how do I assure that I will get paid?
- There are various structures that will protect buyer and seller (e.g., letters of credit)



# Non-Resident Importer to Canada

---

- A Non-Resident Importer (NRI) is a company who, in most cases, does not have a physical presence in Canada, yet for purposes of customs and GST, acts as the importer of record for goods sold/consigned into Canada.
- As an NRI, you will relieve your Canadian customers of the responsibilities of importation, making it easier for them to buy from you.
- For example, a U.S. supplier may be required, by its Canadian customer, to ship its goods "delivery/duty paid" and therefore must become an NRI.

# Part III. Setting Up Shop in Canada



# Foreign Investment

---

## Triggering events:

- Establishment of a new Canadian business
- Acquisition of control of existing Canadian business

## Establishment of a new business

- File a notice in prescribed form (size of enterprise irrelevant)
- Notice for information purposes (any time up to 30 days after)
- Exceptions: cultural businesses (eg print, film, music, radio and television, cultural heritage) and national security threats

# Foreign Investment

---

- Fostering of foreign investment
- Review and approval by MOI generally limited
- *Investment Canada Act* – statutory framework
- Notification or Application for review
- Thresholds based on nationality, size and sector
- Test: “net benefit to Canada”
- Case by case basis

# Foreign Investment

---

## Direct acquisition of control of a Canadian business

- Assets of a business or voting interest in a corporation, joint venture, partnership, etc.
- Exceptions: less than one third interest, realisation on security for loan, reorganization without changing ultimate control
- Application for review (pre-closing) in prescribed form / Notice:
  - World Trade Organization (WTO) member - other than a cultural business - book value of assets of Canadian business exceed \$344m
  - Non-WTO member and cultural business - book value of assets of Canadian business exceed \$5m
  - Process may include meetings/undertakings and can extend up to 130 days



# Forms of business organization

---

- Incorporated subsidiary vs branch office
- Corporations
  - Federal vs provincial incorporation (Unlimited Liability Companies)
  - Private vs public
  - Residency requirements
  - Articles, bylaws, unanimous shareholders agreements
- Branch office
  - Registration
  - Name issues
  - Tax and liability

# Part IV. Your People



# Your People - Immigration

---

- Business persons who seek to enter Canada for an activity anywhere in the business cycle - from visiting a client for one day to establishing a brick-and-mortar subsidiary for their employer - may apply either for temporary admission or for status as a permanent resident
- Typically, individuals coming to Canada will initially make an application for temporary admission and may or may not follow this process with an application for permanent residence

# Temporary Admission

---

- The general rules for temporary admission are that, unless expressly exempted from any of the following requirements, foreign workers must:
  - Possess the academic and vocational experience required to perform the work they seek admission to do;
  - Be admissible to Canada on criminal and medical grounds; and
  - Be in possession of a valid work permit issued by Citizenship and Immigration Canada (CIC).
- Apply to Human Resources and Skills Development Canada (HRSDC) for a Labour Market Opinion confirmation letter (an “LMO”), confirming that issuing the work permit to the foreign national will have either a positive or a neutral effect on the Canadian labour market. Processing for an LMO can take anywhere from four to sixteen weeks, depending on circumstances

## “Work” vs. “Non Work”

---

- “Work” is very broadly defined as “any activity for which wages are paid or commission is earned or that competes directly with the activities of Canadian citizens or permanent residents in the Canadian labour market.”
- Therefore, while this definition of work includes manual labour such as laying telecommunications cable and hands-on work such as accounting, it also includes soft work activities such as “consulting, supervising and managing” in a non-industrial environment. Even unpaid employment undertaken for the purpose of obtaining work experience (such as an unpaid internship or practicum) is considered work.



## Not “Work”

---

- Volunteer work for which a person would not normally be remunerated. Normally this activity would be part-time and incidental to the main reason the person is in Canada;
- Self-employment, where the work to be done would have no real impact on the Canadian labour market. This would include, for example, farmers from the United States of America crossing the border to work on land that they own; and
- Long-distance work conducted over the Internet or telephone by a visitor whose employer is outside of Canada and who is remunerated from outside of Canada.

## “Work” with a Permit and No LMO

---

- Intra-company transfers of executives, managers or specialized knowledge employees who have worked for the foreign employer in qualified positions for at least one year immediately prior to the work permit application being made, and who wish to work in the Canadian subsidiary, affiliate or branch office (U.S. and Mexican nationals qualify if they worked in the qualified positions for at least one year in the three years immediately prior to the work permit application being made);
- Certain professionals under the North American Free Trade Agreement (NAFTA), the General Agreement on Trade in Services (GATS), the Canada-Chile Free Trade Agreement (CCFTA), the Canada-Peru Free Trade Agreement (CPFTA) or the Canada-Columbia Free Trade Agreement;
- “Traders” or “investors” under NAFTA, CCFTA, CPFTA or the Canada-Columbia Free Trade Agreement;

# “Work” with a Permit and No LMO

---

- Entrepreneurs / self-employed candidates;
- Emergency Repair Personnel;
- Employees whose admission to Canada will provide “significant benefit” to Canada;
- Charitable or religious work;
- Employees whose admission to Canada reflects a reciprocal benefit conferred on Canadian workers abroad;
- The spouses or partners of most work permit holders; and
- Participants in qualifying international agreements

# “Work” Without a Work Permit

---

- Business visitors whose primary source of remuneration for the business activity is outside of Canada and the principal place of accrual of profits remains predominantly outside of Canada;
- Foreign nationals purchasing Canadian goods or services for a foreign business or government, or receiving training or familiarization concerning these goods or services;
- Foreign nationals receiving or giving training within a Canadian parent or subsidiary of the corporation that employs them outside of Canada, so long as any production of goods or services that result from the training is incidental;
- Foreign nationals representing a foreign business or government for the purpose of selling goods for that business or government, if the foreign national is not engaged in making sales to the general public;

# “Work” Without a Work Permit

---

- Foreign nationals providing after-sales services, provided that the services are being provided as part of an original or extended sales agreement, lease agreement, warranty or service contract. Hands-on building and construction work are not covered by this provision;
- Certain foreign nationals who are engaged in the performing arts and/or their crew, film producers and guest speakers, including commercial speakers or seminar leaders seeking admission for less than five days; and
- Foreign nationals who are crew in the transportation industry in limited circumstances.



# Other Options

---

- Permanent Residents
- Investor / Entrepreneur Opportunities

# Employee Considerations

---

The Employment Standards Act (ESA) in Ontario prescribes minimum requirements in such areas as:

- Payment of Wages; Keeping and Providing of Records; Hours of Work and Eating Periods; Overtime Pay; Minimum Wage; Public Holidays; Vacation with Pay; Equal Pay for Equal Work; Benefit Plans; Leaves of Absence (pregnancy, parental, family, medical, personal emergency, etc.); Termination and Severance of Employment; Reprisal; Complaints and Enforcement
- Certain types of employees are exempt from all or part of the ESA. For example, certain salespeople or persons whose only work is supervisory or managerial in character are exempted from the hours of work and overtime pay provisions of the ESA

# Employee Considerations

---

In addition to employee standards and labour relations, an employer must also comply with other legislation and regulations relating to:

- Equity in the Workplace;
- Human Rights;
- Occupational Health and Safety;
- Workplace Safety and Insurance; and
- Hospital Insurance.

Some employee benefits, such as Canada Pension Plan and Employment Insurance, require the employer to withhold premiums from the employee's earnings and submit them, along with the employer's contribution, to the applicable government agency.

# Legal Disclaimer

---

The contents of this presentation outline a number of complex issues in a concise and general manner, we recommend that you first consult with a lawyer from Dickinson Wright LLP before acting upon, or refraining from acting upon, any of the information contained in this presentation.

***The information provided in this presentation is for information purposes only. It is not intended to be and shall not constitute legal advice. Although every reasonable effort has been made to ensure the accuracy of the information contained in this presentation at the time of its publication, no individual or organization involved in either the preparation or distribution of this presentation accepts any contractual, tortious, or other form of liability for its contents or for any consequences arising from its use.***

---

**Bon Voyage!**