

# For an entrepreneur used to conducting business in English or French, Canada is particularly appealing

Entrepreneurs often dream of breaking into the vast U.S. market to sell their goods and services. However, prior to tackling the large and hyper-competitive U.S. market, many entrepreneurs may choose to start their operations in Canada by taking advantage of a smaller and less intimidating business environment. Canada provides an ideal market in which to commence business operations in North America or, if you've already settled in in the United States, to conveniently expand your operations from the U.S.

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For an entrepreneur accustomed to conducting business in English or French, the Canadian market is particularly appealing given the ability to use existing technical, sales and marketing materials. The province of Quebec offers French speakers the ability to conduct business in French (although most businesses tend to be bilingual), while the majority of the rest of Canada is English

speaking.

To make matters more interesting (and challenging) from a legal perspective is the fact that, in general terms, the Province of Quebec is subject to Civil Law while the remainder of Canada is subject to Common Law, and each of the 10 Provinces has a set of Provincial laws with additional Federal legislation encompassing the whole country also applying at the provincial level.

Despite this cultural and linguistic accessibility, entrepreneurs should however understand that Canada is a unique market and preparation and awareness are therefore key to a successful entry into the Canadian market.

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The startup ecosystems also vary greatly region by region. If the main technology hubs are located in Vancouver, British Columbia (west coast), Toronto, Ontario, and Montreal and Quebec City, Quebec (central Canada), provincial tech sectors are emerging in a number of other Canadian regions.

To be successful, the entrepreneur must understand the specificities of the local market and adjust their marketing strategy accordingly.

Admitted to practice law in the United States, Canada, France and the UK, we focus our practice on assisting foreign entrepreneurs, startups and small to mid-size companies in their Canadian operations. We have created this mini-guide to provide some preliminary guidance in how to successfully establish your business in the Canadian market.

We are confident that our mini-guide will help you better understand some of the key aspects of doing business in Canada and will be the starting point to prepare you and your business for the next phase of your growth!

## **STRATEGY:**

There are several options for entry into the Canadian market, some of which require physical presence on Canadian soil and others which do not.

Understanding these options is key to making the right decisions and to adopting the most appropriate market entry strategy for your business.

### **Option 1: Entry without a local presence**

Many foreign entrepreneurs assume that succeeding in the Canadian market requires establishing a physical presence. They proceed by incorporating a local legal entity, usually in the Canadian Province where they intend to base their operations. These entrepreneurs also often assume that setting up a corporation in Canada is essential to a successful local sales strategy.

It is not always the case and, especially for early stage startups without significant business experience, setting up a corporation can create unnecessary financial setback and operational difficulties, particularly at the outset.

By contrast, foreign entrepreneurs can easily position themselves in the Canadian market from their country of origin by simply leveraging their English and French language websites. It is advisable, where practicable, to have the websites available in both official languages, French and English. By creating parallel websites for the Canadian market or appropriately localising an existing website for Canada, businesses can enter the Canadian market remotely. By making adjustments to comply with Canadian standards (including localising their website or mobile app Terms of Use, and drafting a Privacy Policy that complies with Canadian federal and provincial laws), entrepreneurs can begin to conduct business in Canada with a very modest up front expenditure.

Taking additional steps, such as creating Canadian templates; bringing their foreign business documents into compliance with Canadian law; and localising to local laws and standards their agreements, terms of use or service, and other key legal instruments allows foreign entrepreneurs to engage and build trust with Canadian prospects and clients not inclined to transact under foreign laws. These moves also signal that you are serious about doing business in Canada, even if you continue to use your foreign company structure until you are ready to formalise your Canadian operations through establishing a local business entity.

### **Option 2: Entry without a local presence through a local representative**

A second option for the foreign entrepreneur is to augment Option 1 with the appointment of a local representative with or without a local office. Such a representative, often an independent contractor, would be responsible for meeting potential clients and promoting the company's products or services within Canada. One method is to sign a contract with a commission-only

business referrer with experience in the local market and knowledge of your industry.

### **Option 3: Entry through a local presence**

This third option is best for entrepreneurs who have already had a chance to test the Canadian market for their products or services and who wish to further develop their local presence through a Canadian location, a Canadian workforce, and local financing from Canadian angel investors or VCs. This could also be an effective strategy for foreign entrepreneurs who are already well-established in their country of origin and intend to set up a wholly-owned subsidiary in the Canadian market.

## **Corporate law**

The most common form of commercial legal entity in Canada is that of a Corporation.

A business can be incorporated pursuant to Provincial legislation (in a specific Province) or under Federal Legislation – the Canada Business Corporations Act (national level). The formalities and requirements of incorporation under the two systems are to some extent similar.

Federal incorporations are mainly reserved for large scale businesses such as telecoms, transport companies etc. Although the costs of incorporation at the provincial or federal level are relatively similar, there are additional costs with Federal incorporations as the Federal company will have to be extra-provincially registered in each province it intends on conducting business with a corporate presence. Federal incorporation further allows for the corporate name to be registered at the Federal level, in Ottawa (the nation's capital) which may give the corporate entity some name protection on the national scale (although trademarking is by far the recommended route to take to ensure enforceable name protection).

Provincial incorporations are suited for companies that plan on having their offices primarily based in one province (which does not exclude the future potential of growth). The corporate name is registered at the Provincial level, with the limited name protection in that province. As mentioned earlier, obtaining a registered trademark is by far the superior method of achieving name protection.

Incorporations in the province of Quebec follow additional unique rules of that province including the obligation to ensure that the corporate name is conforms to the requirements of the Charter of the French Language.

The Directors of a Federal or a Provincial corporation are required to be natural persons. In addition, there are strict requirements as to the number of directors and shareholders that need to qualify as Canadian residents for Income Tax purposes (people that file Canadian income taxes) in order for the corporation to qualify for lower corporate taxes by being classified a Canadian corporation for Income Tax purposes. Currently, at least 25% of the Directors are required to be Canadian residents and the majority of the issued shares need to be controlled by Canadian shareholders. If those requirements are not met, the corporation will be taxed at a higher level as a foreign entity. For greater details and to take advantage of a favorable tax treatment, it is always recommended to seek professional advice prior to incorporation.

Once incorporated, either under the Provincial or Federal regime, there is an annual obligation to file a corporate Annual Report with the appropriate corporate registry, failing which the company may be struck and removed from the registry.

Corporations are distinct from their owners for both tax and liability purposes. A corporation's responsibility is distinct from that of its shareholders'. Whereas the shareholders' financial liability is limited to the value of their respective contribution to the share capital, only the corporation is responsible legally for its actions and debts (with some notable exceptions such as fraud, etc.). Shareholders who are also employed by the corporation pay taxes on their salaries. Corporate income can be taxed twice: the corporation pays taxes on any profits, while shareholders pay personal taxes on dividends they receive.

It is the preferred vehicle for businesses seeking venture capital or outside investment.

## **Work visas**

Once you have determined that you intend to be physically present in Canada, the first step is to apply for a work visa. Any person seeking to legally enter Canada must demonstrate evidence of his right to live and work in the country. Requirements vary based on status.

Federal legislation governs in the matters of immigration, with provinces offering certain incentives to attract specific categories of immigrants.

In general, entrepreneur immigration to Canada requires the candidate to open or purchase, and then actively manage, a qualifying small business in Canada. Upon satisfying pre-determined conditions, Entrepreneur Visa holders can then become Canadian permanent residents and eventually citizens of the country.

Founders and entrepreneurs are likely able to benefit from Start-up Visa Program (2017). Canada's Start-up Visa Program targets immigrant entrepreneurs with skills and potential to build businesses in Canada that (1) are innovative, (2) can create jobs for Canadians and (3) can compete on a global scale.

The requirements under this program, or the program itself can change from time to time, but the general requirements at the time of this article are as follows: (1) your business must be supported a designated organisation (there is a specific list of designated organisations found at [www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/start-visa.html](http://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/start-visa.html)), (2) show that your business meets the ownership requirements, (3) meet the language requirements (English or French) and (4) bring enough money to settle (currently for a single person the amount is set at \$12,475 CAD).

The British Columbia Entrepreneur Program is one of the top Canadian business immigration programs available today. Candidates that open a qualifying new business or significantly expand an existing one in the province of British Columbia, can qualify for expedited Canadian permanent residency through the British Columbia Provincial Nominee Program (BCPNP).

The current BC Entrepreneur Program Requirements are as follows: (1) a personal net worth of at least CAD \$600,000, (2) a minimum investment of CAD \$200,000 and (3) the creation of at least one new job.

Another excellent Canada business immigration program is the Quebec Entrepreneur Program. Experienced entrepreneurs who wish to create or acquire a business in Quebec can become permanent residents of Canada in through the program.

The current Quebec Entrepreneur Program Requirements are as follows: (1) a personal net worth of at least CAD \$300,000, (2) a minimum investment of CAD \$100,000 and (3) at least two years of experience operating a business.

As immigration requirements and visa types and opportunities change on regular basis, it is strongly recommended that the founder or entrepreneur wishing to immigrate to Canada contact a professional practicing in the area of immigration and business law to find out the current requirements and opportunities prior to arrival in the country.

## **Employment law**

Once you have established yourself in Canada, one of your first challenges in

operating in Canada will be to secure the talent and workforce to operationalise your business development strategy. While many foreign companies, and technology startups in particular, prefer to keep their R&D in their country of origin, business often requires local staff to sell to the Canadian clientele. A local salesforce understands Canadian sales and marketing expectations and is best able to execute a local sales strategy, even if the bulk of operations continue to be located in the company's country of origin.

In general terms, Canadian Employment law is regulated at the Provincial Level (the Canada Labour Code, being Federal legislation, governs employment relations between federal employers and federal employees and would not apply to startups and private businesses). In addition, Common Law of employment applies consistently throughout Canada, with the exception of Quebec where Civil Law applies. It is therefore important to work with an employment lawyer who practices in your target Province

*As soon as you hire your first employee in Canada, you'll be required to undergo extensive registration procedures at both the federal and provincial level.*

Like corporate law, employment law varies from Province to Province. Therefore, ensure that any counsel you retain is admitted to practice law in the Province in which you wish to conduct your business activities. Regarding employment law in particular, if you wish to include non-disclosure obligations, non-solicitation, or non-compete clauses in your letter of engagement with employees, make sure your legal advisor is able to advise you as to the validity of those clauses under local employment laws. As a general rule, Courts tend to adopt a rather narrow approach to restrictive covenants in employment contracts, the less restrictive a covenant is on the employee's post-employment activities, the more receptive the courts will be to its enforcement.

As mentioned earlier, in most cases employment relationships are governed by Province- specific legislation. For instance, in British Columbia (Vancouver) if your business hires workers (full-time, part-time, casual, or contract), you need to be registered under the Workers Compensation Act so workers are covered in the event of a workplace accident or illness. Secondly, you need to ensure that you comply with requirements under the Employment Standards Act. Other Provinces have similar legislations that require compliance.

Finally, it is essential for employers in Canada to implement a number of internal policies in the workplace in order to document their compliance with employment laws and regulations. Some policies that all employers can expect to enact include an Anti-Harassment Policy, Code of Conduct, etc. Additionally, policies related to the use of social media, the internet, and personal e-mail use at work and different policies related to conflicts of interest and company policies surrounding reimbursements of business expenses (“Business Expense and Reimbursement Policies”) are becoming standard across Canada

In short, employment law is a potential minefield for foreign businesses entering Canada, hence the importance of retaining the services of a lawyer able to assist you in complying with applicable laws.

## **Intellectual property**

Unlike corporate or employment law, intellectual property law is essentially a matter of Federal law in Canada.

Without going into too much detail regarding the various rights that are protected under Canadian laws (i.e., patents, trademarks, copyrights and trade secrets), it is vital to protect your intellectual property in Canada if you intend to sell products or services within Canadian territory.

Although Canada has yet to reach the level of litigation and awards of damages that are present in the U.S., damages awarded by Canadian courts in cases of infringement of third party intellectual property rights, may quickly reach millions of dollars. To manage that risk companies that are able to document their claim to ownership of IP associated with their technology have a definitive advantage in the event of litigation, both as a defence strategy or in support of a IP asset monetisation strategy through licensing. Courts often award higher damages to plaintiffs who can document their IP rights through registration – the potential and future benefits more than offset the initial costs of such registration. In addition, it is common in Canada for vendors of products and services to not only warrant ownership to the associated IP, but also indemnify and hold their clients harmless in case of a third-party claim that alleges a violation of that party’s intellectual property. These practices, standard in Canada., can be extremely dangerous for any businesses that have not secured registration of their IP with CIPO (Canadian Intellectual Property Office).

## **Contract law**



Canadian Contract Law is based on Civil Law (Quebec) and Common Law in the remainder of Canada. The contracts should always identify the Province that has jurisdiction of their enforcement.

The purpose of this guide is not to give an exhaustive presentation of the various contract forms that are commonly used in Canada, but to stress the importance of equipping yourself with Canadian-compliant agreements that provide you with appropriate contractual protections for your business.

This can be achieved either by localising your foreign contract templates to Canadian law, or simply by instructing a local lawyer to create Canadian templates, website terms of use, privacy policies, etc. for your business.

Contracts in Canada must comply with both Provincial and Federal law. Since Canadian contract law is distinctive from other countries', it is essential to ensure that your contracts are drafted and structured in accordance with Canadian requirements. The assistance of local legal counsel, preferably dually qualified in Canada and in your country of origin (and thus aware of key differences between the two), could ensure that contracts are fully binding as intended and also become a real asset for you during negotiations with local clients.

The same applies to your website or mobile app terms of use from the moment you intend to make those accessible to a Canadian-based clientele.

Beyond the protections that derive from localising your contracts and online terms and conditions, such an approach will allow you to position yourself as a local player and to increase the confidence your clients and local prospects have in your commitment to succeed in the Canadian market.