

# Doing Business In Canada:

A Legal Overview



Torkin|Manes  
Barristers & Solicitors



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# Introduction

Canada has always been a great place for non-Canadians to do business. Moreover, during the last twenty years, it has stood out among the world's nations as one of the most stable business environments, whether measured in terms of its currency, political climate, highly educated and trained workforce or ability to both develop and attract world-class talent.

At Torkin Manes LLP, we are proud of our involvement in working with our clients on developing new, and acquiring existing, Canadian businesses. We believe that foreign investment benefits both Canadians and the global economy. With this in mind, we have created *Doing Business in Canada: A Legal Overview* to highlight some of the fundamental issues that foreign businesses and decision-makers need to consider when evaluating Canada as a possible investment destination.

Our lawyers have assisted thousands of foreign clients with their business investments in Canada and we would be pleased to do the same for you. For more information, or should you require assistance with any legal issues relating to a prospective business investment in Canada, we invite you to visit our website at [www.torkinmanes.com](http://www.torkinmanes.com) for information about our services and a complete list of our lawyers and their areas of expertise. We hope you find this publication informative and useful. We look forward to working with you.

**Torkin Manes LLP**  
151 Yonge Street, Suite 1500  
Toronto, Ontario, Canada  
M5C 2W7

Telephone: 416 863 1188  
Toll-Free: 1 800 665 1555  
[www.torkinmanes.com](http://www.torkinmanes.com)

# A Snapshot of Canada

Canada is one of the most unique and enjoyable places in the world for a non-Canadian to explore. The same can be said of its business opportunities and economic landscape. Here we highlight certain elements that comprise the Canadian investment environment that may be relevant to any potential foreign investor's consideration of Canada as a place to do business.

## The Land

In size, Canada is the second largest country in the world. It has more coastline than any other country reaching north to the Arctic, west to the Pacific Ocean and east to the Atlantic Ocean. Of perhaps greater interest is that its southern border with the United States is the longest two-nation border in the world and stretches for almost 8,900 kilometres or just over 5,500 miles.

Canada is made up of ten provinces and three territories. The provinces are (from west to east): British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador. The territories are (from west to east): Yukon, Northwest Territories and Nunavut.

## The Population

The population of Canada (as of the 2016 census) is approximately 35,000,000. Over two-thirds of Canadians live within 200 miles (or 322 kilometres) of the United States border, including those that live in the three largest Canadian cities: Toronto, Montreal and Vancouver, which together represent about one-third of the entire Canadian population.

## The Economy

Canada has the tenth largest economy in the world with an affluent, high-tech industrial society, the overall output of which exceeds 1.5 trillion dollars. Canada is a party to various free-trade agreements, which includes the United States-Mexico-Canada Agreement (USMCA). It is one of the United States' largest trading partners and foreign supplier of energy, including oil, gas, uranium and electric power. Further, Canada's major banks are among the strongest in the world, owing to the Canadian financial sector's tradition of conservative lending practices and strong capitalization.

## The Political and Legal Structure

Canada operates as a western style democracy built upon the British parliamentary system of government. Each of the provinces and territories has its own legislature and Canada's constitution delineates responsibilities and rights between its national and provincial/territorial governments, with the bulk of such responsibilities and rights falling into one sphere or the other (although some areas of regulation are shared). The English Common Law underpins the federal law of Canada and the laws of all provinces and territories, save for the laws of Quebec which are based on the Napoleonic Civil Code.

## The Language

Canada has two official languages, English and French, with its residents largely being able to demand services from the federal government in either language. However, the vast majority of French speaking Canadians reside in the Province of Quebec.



# Business Structures

Canada, like most jurisdictions, provides for various vehicles through which a person can conduct business. Although it is possible to do business in Canada without establishing a formal presence here, there are often regulatory, tax and/or practical reasons why one should adopt a formal Canadian structure. The following is a brief summary of different types of business structures available in Canada.

## Sole Proprietorship

A sole proprietorship is a business method by which an individual conducts business on his/her own account. All benefits, including assets and income, as well as all obligations and liabilities, belong exclusively to the sole proprietor.

## Corporations

A foreign enterprise seeking to conduct business in Canada may wish to establish a subsidiary corporation in Canada that is owned, in whole or in part, by the foreign enterprise. Generally, a foreign enterprise can elect to incorporate its subsidiary either federally under the laws of Canada or provincially under the laws of any one of its provinces or territories, however, certain corporate statutes impose a minimum residency requirement for directors.

## Unlimited Liability Companies (ULC)

In contrast to the general form of corporations, where the shareholders do not incur liability for the debts and liabilities of the corporation, in a ULC, the shareholders will be liable for the debts and liabilities of the ULC if the assets of the ULC are insufficient to satisfy the debts and liabilities of the ULC upon liquidation, dissolution or bankruptcy. Generally speaking, ULCs are utilized by Americans to hold Canadian assets due to the more favourable tax treatment that results than if the assets were held by a corporation. Only the statutes of three Canadian provinces, Alberta, British Columbia and Nova Scotia, provide ULCs.

## Branch Operation

Operating a Canadian branch of a foreign business does not involve the creation of a separate entity, rather, it is the establishment of a Canadian-based office. For a foreign business to operate through a branch operation in Canada, the branch must be registered as an extra-provincial entity in each province and territory in which it carries on business. Branch operations are subject to many of the same federal and provincial or territorial disclosure and filing obligations which apply to Canadian corporations.

## Partnerships

A partnership is a contractual relationship between two or more persons carrying on business together with a view to earning a profit. There are three types of partnerships typically utilized to conduct business depending upon the degree and type of liability exposure of the partners, namely, general partnerships, limited partnerships and Limited Liability Partnerships.

### *General Partnerships*

In a general partnership each partner is an agent of, and can create legal obligations for, the other partner(s). Given that the partnership is not a separate legal entity, creditors of the partnership can look to the partners and their personal assets to satisfy the obligations owing to the creditor. Unless the partnership agreement provides otherwise, the law assumes that the partners will share equally in the profits and losses of the partnership.

### *Limited Partnerships*

The limited partnership and general partnership are similar and, generally speaking, the laws governing general partnerships also apply to limited partnerships. The key difference however is that a limited partnership requires a general partner and a limited partner(s). The general partner is responsible for the operation of the partnership business and is liable for all of the obligations and debts of the partnership. The limited partner(s) is essentially a "silent partner", that is, an investor who invests money into the business but does not participate in the active management of the business. The limited partner(s) liability is limited to its investment in the partnership but its personal assets will not be at risk.

### *Limited Liability Partnerships*

The limited liability partnership has similarities to both the general partnership and the limited partnership. All partners

may participate in the active management of the business but a partner will not be liable for the negligent acts or omissions of any other partner. This limitation does not extend to breach of contract or the debts or liabilities of the limited liability partnership generally. A limited liability partnership is used only in the context of professional partnerships such as those of accountants and lawyers.

# Securities

In broad terms, securities legislation in Canada regulates the sale of securities, the provision of advice in relation to securities and the managing of investment funds.

The Canadian securities regime is in many ways similar to that of the United States and other western jurisdictions. For example, as in the United States, issuers who wish to sell their securities to the public must provide a comprehensive disclosure document, called a prospectus, or must qualify for certain exemptions from this requirement. Those in the business of trading and advising in relation to the purchase and sale of securities or the management of investment funds must meet certain qualifications and be registered to do so. The resale of securities in Canada is also governed by securities legislation, the rules of self-regulatory organizations and the rules of the stock exchanges in Canada on which securities trade.

However, there are critical differences between Canadian securities legislation and those of other jurisdictions such as the United States. For example, unlike other jurisdictions where federal securities legislation is paramount, in Canada there is no national securities statute. Instead, each province and territory of Canada has the authority to enact its own securities legislation. Despite ongoing efforts to harmonize securities legislation across the Canadian provinces and territories, the laws and regulations differ and it is therefore critical that one be aware of the requirements of securities legislation in the particular provinces and territories of Canada in which one conducts securities activities.

There are several securities exchanges in Canada ranging from the traditional stock exchange, principal among which are the Toronto Stock Exchange and the TSX Venture Exchange, to those on which specialized securities such as derivatives and commodities may be traded.

**Tax**

## Carrying on Business Directly

A non-resident will be subject to Canadian income tax when the non-resident carries on business in Canada directly through a branch or through a Canadian subsidiary. Whether a business is carried on in Canada is generally determined by a factual test with reference to several factors such as whether the business has an office or employees in Canada, whether agents solicit orders in Canada, and whether the business is producing anything in Canada. If a non-resident is carrying on business in Canada and is resident in a country with which Canada has a tax treaty and entitled to the benefits of such treaty, such as the *Canada-United States Income Tax Convention* (the “US Convention”), the non-resident will only be subject to Canadian income tax if it carries on business through a “permanent establishment” in Canada. A non-resident will be held to have permanent establishment if it carries on business wholly or partly through a fixed place of business located in Canada. A non-resident will also be deemed to have a physical establishment where it uses agents or employees in Canada if certain tests are met.

Where a non-resident has a physical establishment, the non-resident will pay Canadian corporate tax on profits attributable to that physical establishment. Canadian branch profits tax will be levied on any after-tax income of a non-resident corporation that is not reinvested in Canada. The rate of branch profits tax is reduced under certain treaties.

Provincial taxes will also be payable by a non-resident on income earned in the province(s) where the physical establishment is located.

## Carrying on Business Through a Canadian Subsidiary

If the non-resident carries on business through a subsidiary, the subsidiary, and not the non-resident parent, will be subject to Canadian tax on income earned from a Canadian business. However, certain payments from the subsidiary to the non-resident such as dividends, rents and royalties may be subject to a 25% withholding tax. Where the parent entity is resident in a treaty country, this rate may be reduced or eliminated under the terms of the applicable treaty.



In addition, the US convention eliminates withholding tax on certain categories of interest payments paid by a Subsidiary to a non-arm's length US resident.

Canada has "thin-capitalization" rules to limit the deductibility of interest paid to certain non-arm's length non-residents to prevent the erosion of the tax base through interest payments. Where these rules apply, the subsidiary is denied an interest deduction and the interest is taxed as a dividend which is subject to withholding tax.

Transfer pricing rules are of increasing importance in Canada. Under these rules, transactions between a parent and subsidiary must conform to an "arm's length" standard. The subsidiary would be required to prepare documentation to support the prices used in its transactions with its parent.

Contributed capital can be returned to the non-resident without withholding tax. This is an important structuring consideration if a non-resident acquires a Canadian business by purchasing the shares of an existing Canadian corporation.

## Goods and Services Tax/Harmonized Sales Tax

The federal Goods and Services Tax, and in some cases the combined federal-provincial Harmonized Sales Tax, is imposed on goods and services whether supplied in Canada or imported into Canada. The threshold for carrying on business in Canada is lower for GST/HST purposes than for income tax purposes. A non-resident carrying on business in Canada is required to register under the GST/HST legislation. If the non-resident does not have a physical establishment, it will be required to post security with Canada Revenue Agency for the GST/HST it expects to collect.

If a subsidiary is carrying on business in Canada, the subsidiary, and not the parent, will have the obligation to collect and remit GST/HST.

# Real Estate

Investing in Canadian real estate is one of the many ways in which business can be conducted in Canada, whether it be a part, or the core, of a primary business. The Canadian real estate market is generally viewed as one of the most stable markets in the world and provides investors with a wide range of opportunities. A summary of some of the particular issues that affect real estate investment in Canada follows.

## Ownership

While a foreign investor can hold title to a Canadian property in its own name, subject to certain exceptions and potential tax implications, it is common for purchasers of Canadian real estate to hold title to real property through a corporation. Title to Canadian property can also be held by a nominee (or trustee) for the beneficial ownership of one or more investors. Though the nominee is shown in the public records as the owner of the property, the beneficial owner is considered the owner of the property for tax and accounting purposes.

## Land Transfer Tax

In most provinces and territories in Canada, some form of provincial and/or municipal land transfer tax is payable by the purchaser upon the purchase of real property. Tax rates vary by jurisdiction; however, they often increase in percentage as the value of the land increases.

## Sales and Other Taxes

The operation and sale of different types of real property (such as leases and sales of commercial properties and sales or rentals of new or substantially renovated residential properties) are subject to various federal, provincial and/or territorial sales taxes.

Those looking to invest in residential properties in the provinces of British Columbia and Ontario should be aware that each imposes a “foreign buyer’s tax” or “non-resident speculation tax”, subject to certain exemptions. This is a tax of fifteen percent (15%) of the purchase price for the purchase or acquisition of an interest in residential property in specified areas by individuals who are not citizens or permanent residents of Canada or by foreign corporations. This tax is in addition to the land transfer tax discussed above. Purchases of multi-residential apartment buildings with more than 6 units, agricultural land, commercial land and industrial land are not subject to this tax.

## Environmental Matters

In Canada, environmental matters are governed by a combination of federal and regional legislation. It is common for purchasers of Canadian real property and lenders to such purchasers to perform various types of environmental inspections when assessing potential investments in real property. As well, most lenders taking real property security will require a borrower to provide various representations, warranties and indemnities regarding environmental matters that could potentially affect a borrower's property.

## Land Development and Income Producing Properties

All provinces and territories have planning legislation in place governing the manner in which land may be used and developed. The use and development of land is also governed by official plans and zoning and other by-laws in effect in the municipality in which the land is located. As well, commercial and residential rental properties will often be governed by specific legislation that addresses the respective rights and obligations of landlords and tenants. Those looking to invest in Canadian residential rental properties should be aware that, generally speaking, the provincial and territorial legislation governing the relationship between residential landlords and tenants is quite onerous, especially with respect to matters relating to residential rents and repairs.

# Charities & Other Not-for-Profits

Charities and various other not-for-profits can be exempt from certain taxes in Canada. Canadian registered charities can also issue tax donation receipts which qualify for Canadian charitable tax credits. Charities and other not-for-profits carry on activities for specified purposes and do not generally carry on business. However, they are important to the economic landscape of Canada, representing \$135 billion or 8.1% of the country's gross domestic product and employing 2 million people.

As in many other jurisdictions, there are different vehicles through which charities and other not-for-profits can operate. The most common vehicle is through a Canadian corporation. A foreign entity seeking to conduct activities in Canada may wish to establish a subsidiary corporation in Canada that is controlled, in whole or in part, by the foreign entity. Generally, a foreign entity can choose to incorporate its subsidiary either federally under the laws of Canada or provincially/territorially under the laws of one of its provinces or territories, however, certain incorporation statutes impose a minimum residency requirement for directors.

It is also possible, like businesses, to carry on charitable or other not-for-profit activities in Canada without establishing a formal presence in the country. Operating a Canadian branch of a foreign charity or other not-for-profit does not involve the creation of a separate entity, rather, it is the establishment of a Canadian-based office. For a foreign organization to operate through a branch operation in Canada, the branch must be registered extra-provincially in each province and territory in which it intends to carry on certain business-like activities. (The same requirement may apply to federal corporations.) Branch operations are subject to many of the same federal and provincial or territorial disclosure and filing obligations which apply to Canadian corporations.

Depending upon the operations of an organization (be it a Canadian subsidiary corporation or a Canadian branch of a foreign organization), it may be subject to other registration requirements such as a business name registration if it carries on activities under a name other than its corporate name. The appropriate vehicle for the Canadian operations of a charity or other not-for-profit will be impacted by regulatory, tax and other practical implications resulting from the structure of the organization.

# Intellectual Property

It is vital in establishing a new business in Canada to protect any existing or future intellectual property rights. Intellectual property, such as patents, trademarks, copyright and industrial designs, is protected in Canada by a multitude of federal legislation.

## Patents

A Canadian patent provides an inventor with a monopoly to make, use or sell an invention (including business methods) for a period of 20 years from the date the patent is filed. Patents are not renewable. In order to be patentable, the patent invention must be novel, non-obvious and have utility. Patents are granted to the first to file an application and not the first to invent the invention. Foreign patents will not protect inventions in Canada.

## Trademarks

A Canadian trademark is a word, symbol and/or design used to distinguish the wares and/or services of one person or organization from those of others in the marketplace. Unlike a patent, it is not necessary to register a trademark in order to acquire rights to it, but unregistered marks do not enjoy the same level of national protection as registered marks. Registration of a trademark provides the exclusive right to use of the trademark for 15 years and can be renewed on an indefinite basis.

## Copyright

A copyright in Canada protects all original literary, dramatic, musical and artistic works upon creation of the work. Although not required, a copyright may be registered. The author of the work is automatically the first owner of the copyright and is generally afforded copyright protection, that is, the sole right to produce, reproduce, perform or publish the work or any substantial part of it, for the lifetime of the author, the remainder of the calendar year in which the author dies and a period of 50 years following the end of that calendar year. Copyright only protects the expression of an idea in some fixed form (including, text, drawing, sculpture) but, subject to some exceptions, does not protect the idea itself.



## Industrial Design

An industrial design is defined as “features of shape, configuration, pattern or ornament and any combination of those features that, in a finished article, appeal to and are judged solely by the eye”. It is only protected if it is registered and, upon registration, the proprietor of a design is afforded the exclusive right to the design for a period of ten years.

## Trade Secrets

A trade secret is any data or information (including recipes, formulas, customer lists, functionalities and specific know-how) that has economic or commercial value for a business that it treats as confidential. Careful protection of trade secrets through the use of protective contracts with third parties, employee training, monitoring and physical and organization methods, is essential in maintaining their confidential nature and value.

## Domain Names

Only certain persons or corporations who meet Canadian presence requirements can apply for and hold a “.ca” domain name, including for example, a corporation registered under the laws of Canada or any provincial/territorial laws or the owners of certain registered trade-marks.

# Technology, Privacy & Data Management

## Canada's Anti-Spam Legislation (CASL)

Canada has one of the world's most stringent anti-spam legislation. CASL prohibits the sending of commercial electronic messages ("CEMs"), including text, sounds, voice or image message, without the appropriate consent. Noncompliance with CASL can result in severe monetary penalties for corporations and individuals. The penalty for a violation can be up to \$1,000,000 for individuals and \$10,000,000 for corporations. There are also potential criminal sanctions since prohibited conduct under CASL is also reviewable under the *Competition Act* (Canada).

## Privacy

Canada has a wide range of private sector and public sector provincial and federal privacy laws. *The federal Personal Information Protection and Electronic Documents Act* (PIPEDA) regulates the collection, use and disclosure of personal information in much of the private sector. Companies have numerous obligations under PIPEDA, including the requirement that a company cannot collect, use or disclose an individual's personal information without the individual's knowledge and consent and must limit the collection of personal information to what is necessary for identified purposes. Canadians must also be told if their personal information will be transferred outside of Canada. The mandatory breach notification provisions of PIPEDA come into force, companies that violate the provisions regarding breaches of security safeguards under PIPEDA will face fines of up to \$100,000.

## E-Commerce/m-Commerce

Companies that sell goods and services over the Internet must be aware of Ontario's and other provincial e-commerce laws as well as technology and privacy implications. Companies involved in e-commerce/m-commerce must consider e-signatures and security features, such as storing financial information. Alternatively, companies that retain third parties to process payments must consider whether such third party providers have secure servers, appropriate safeguards and privacy policies that comply with

Canada's privacy laws. Websites and mobile sites should be reviewed by legal counsel to ensure that they comply with a host of other Canadian laws such as consumer protection and intellectual property laws. Well-written internet agreements and terms and conditions of use help minimize legal disputes, enforce legal agreements with consumers and protect a company's reputation.

## Consumer Protection

Companies that provide services and products to Canadian consumers must also be mindful of Ontario's *Consumer Protection Act* (the "CPA") and its detailed regulations, which apply when a Canadian consumer is located in Ontario when the transaction takes place. The CPA penalizes companies that engage in unfair practices such as false, misleading or deceptive representations. However, there are also obligations with respect to the different consumer agreements, such as particular information that must be disclosed to consumers entering into internet agreements. If an individual or corporation is convicted under the CPA, the individual can face a fine of up to \$50,000 or imprisonment for a term of not more than two years less a day or both, and a corporation can be liable to a fine up to \$250,000.

## Cloud Computing

Under Canada's private sector privacy legislation, an organization that collects personal information from an individual is accountable for the personal information even when it is outsourced for processing to third-party providers. What this means is that all businesses in Canada, regardless of their size, are: (i) Ultimately accountable for the personal information they collect, use and disclose even if they outsource personal information to a service provider that operates in the cloud; and (ii) Must use contractual or other means to ensure that personal information is appropriately handled and protected by the cloud provider. Additional laws will apply to holders of personal health information in various provinces, including Ontario's *Personal Health Information Protection Act*.

# Employment & Labour

Employment and labour in Canada is highly regulated and governed by various pieces of legislation and judicial/tribunal decisions.

Most businesses are generally subject to the provincial/territorial legislation in the jurisdiction in which the business is operating. Accordingly, statutory provisions applicable to employment and labour can vary from province to province.

The employment relationship in Canada is contractual. Employees are deemed by law to have an employment contract with the employer (whether or not the contract is in writing). In this regard, Canadian employment law differs from the United States (and is more similar to the laws of the United Kingdom) in that the employment relationship is not “at will”. Accordingly, it is common to have employment contracts in place that specify the terms of the relationship, and, in particular, terminating the relationship.

## Employment Standards

Federal and provincial/territorial employment standards legislation lay out certain minimum standards for all employment situations. These minimum standards are deemed to form part of an individual’s contract of employment with an employer. The specific standards differ depending upon the employment standards legislation in the particular province/territory but generally deal with such topics as payment of wages, record keeping, pay statements, hours of work, rest periods, overtime pay, minimum wage, notice of termination and severance pay upon dismissal, public holidays, vacation time and vacation pay, and leaves of absence (including maternity leave, parental leave, personal emergency leave and others). Various narrow exemptions apply to certain employment standards – most notably, hours of work and overtime - as set out in the legislation.

## Labour Relations

Many employees in both the private and public sectors are represented by collective bargaining agents or unions. Provincial and territorial labour relations legislation (and federal legislation for federally regulated employers) provides for both the establishment (and termination) of bargaining rights which permit the union to negotiate on behalf of a group of employees.

Generally speaking, while the rules differ across the country, unionizing a workplace requires that a union first establish a certain threshold level of support (e.g. 40%) within a proposed bargaining unit or group of employees and then be successful in a secret ballot vote of a simple majority of employees in the proposed bargaining unit. Unlike other jurisdictions, such as the United States, there are quick timelines for a vote with no prolonged campaign period. Such legislation creates various “unfair labour practices”, mandates procedures for negotiating collective agreements (including an obligation to bargain in good faith) and imposes mandatory provisions in all collective agreements (such as “just cause” for dismissal protection and a grievance procedure for disputes).

## Occupational Health and Safety

Occupational health and safety legislation is in place across Canada and imposes numerous obligations on employers to ensure safe and healthy working conditions. While such obligations can vary depending on the employer’s industry, they generally include obligations regarding reasonable precautions for worker safety, health and safety policies, posting of information, training, personal protective equipment, hazardous chemicals, machine guarding, reporting of certain workplace injuries, confined spaces, workplace violence and harassment, joint health and safety committees, workplace inspections, and employee work refusal rights in certain dangerous situations.

## Workers’ Compensation Insurance

Regulated at the provincial/territorial level, workers’ compensation insurance legislation establishes an insurance plan which provides benefits (e.g. loss of earnings) to an employee injured at work. Most workplaces are governed by such legislation or can voluntarily opt-in. Generally speaking, participation in the insurance plan excludes an employee from commencing a civil action against the employer based on a workplace injury.

## Equality and Human Rights

Provincial, territorial and federal human rights legislation prohibits discrimination and harassment with respect to employment on certain enumerated grounds such as race, colour, ethnic origin, sex, sexual orientation, age, marital status, family status and disability. Such legislation imposes on employers a duty to accommodate an employee based on such grounds up to the point of undue hardship. Human rights complaints proceed directly to a specialized Tribunal for adjudication or, alternatively, to a specialized commission for investigation and potential referral to adjudication.

Pay equity legislation is currently in effect federally and in certain of the provinces/territories. This legislation provides that men and women are to be paid equally for work of equal value and aims to eliminate systemic gender discrimination in compensation through the establishment of pay equity plans and the comparison of the value of female dominated job classes with male dominated job classes.

## Social Insurance Programs

Canada has various provincial and federal social insurance programs, including employment insurance, Canada Pension Plan and Government health insurance. Employers and employees have obligations to make contributions into these programs.



# Immigration

Individuals are generally not allowed to work in Canada unless they are Canadian citizens, permanent residents of Canada, or holders of work permits.

## Working in Canada

Individuals may obtain a work permit permitting them to perform work in Canada for a temporary period. Such skilled work may, in turn, open pathways to become a permanent resident of Canada.

Obtaining a Work Permit in Canada generally involves the Canadian employer obtaining permission to hire a foreign worker after demonstrating an inability to recruit domestic talent. This official permission to hire a foreign worker is called a “Labour Market Impact Analysis” or “LMIA”. There are also special LMIA’s for individuals who own and operate a business in Canada.

There are exceptions to the LMIA system, where individuals can apply for a work permit without first applying for an LMIA. Some of the more common exceptions involve applications made under Free Trade Agreements with Canada (e.g. USMCA or the Canada-European Union Comprehensive Economic and Trade Agreement). Multinational firms may also be able to transfer highly skilled workers or managerial staff to their Canadian office as intra-company transferees without obtaining an LMIA. There are many exemptions to the LMIA program, all with their own qualifying criteria and guidelines. We highly recommended that corporations consult with immigration counsel to determine if an exemption applies before embarking on an LMIA application.

## Staying in Canada Permanently

Obtaining permanent residence involves submitting an application under a specific category or “class” of permanent residence, after meeting all the qualifying criteria for that class. Some of the most frequently used permanent residence classes are the Family Class, the various Economic Classes, and the Provincial Nominee Class.

### *Start-Up Visas*

Business people with an economically viable business idea that is able to successfully solicit a qualifying investment from immigration-certified

venture capital funds, angel investor groups, or business incubators can then apply for a “start-up visa” that grants permanent residence.

## Immigration Obligations of Employers

Employers in Canada are obligated to exercise due diligence in ensuring the individuals who work for them are eligible to do so. This generally consists of examining documents that purport to permit an individual to work in Canada. Employers must ensure that the work assigned to foreign workers do not violate any conditions, such as the place of employment, or the type of work, listed on the foreign worker’s work permit. Failure to follow provincial, territorial or federal employment laws may also make an employer liable under immigration regulations as well.

## Inadmissibility

Some people cannot obtain temporary or permanent residence in Canada through a normal application because of “inadmissibility.” People may become inadmissible, for example, owing to a criminal record, chronic health conditions, lack of financial security, or by making misrepresentations to immigration authorities.

# Insolvency & Restructuring

In Canada, an individual or legal entity is said to be insolvent when he, she or it is unable to meet his, her or its financial obligations as they become due. Generally, insolvency proceedings may include a stay of other proceedings which immediately stops creditors from pursuing their individual claims and to cooperate with the insolvency proceedings undertaken by the debtor.

A summary of the three main types of insolvency proceedings in Canada follows.

## Bankruptcy

Bankruptcy proceedings may be voluntary when they are initiated by a debtor or involuntary when they are commenced by a creditor by application to a court. Upon bankruptcy, all other legal proceedings against the debtor for the collection of debts are suspended and the bankrupt's assets are put into the hands of a trustee in bankruptcy who will proceed to sell the assets and then distribute the net proceeds to those creditors with claims that have been submitted to, and accepted by, the trustee in bankruptcy. Upon discharge from bankruptcy of an individual, most pre-bankruptcy claims are released (although conditions may be imposed). Statute created entities such as corporations may only be discharged following full satisfaction of the claims of all creditors.

## Proposals or Restructuring

Restructuring proceedings recognize that a business may be more valuable if it continues and there may be a benefit to avoiding liquidation of all the assets. Restructuring proceedings, therefore, involve negotiations and compromises between the debtor and its creditors, which allow the debtor to maintain control of its assets and ultimately continue its business.

## Receiverships

In a receivership, a receiver or receiver-manager is appointed, either privately by a creditor in accordance with the terms of a security agreement, or by a court, to take possession and control of the debtor's business. Receivership provides an opportunity to remove poor management and substitute it with the receiver. Generally, a receiver will proceed to liquidate the assets of the business to satisfy the amount owing to the creditors. However, the receiver may continue to operate the business if it believes that it will enhance the recovery for creditors.

# Regulated Professions & Industries

In Canada, there are a large number of regulated professions and industries.

Regulated professions include health professionals, such as physicians, dentists, pharmacists, veterinarians, etc., as well as other professionals, such as lawyers, engineers, accountants, and the like. Members of regulated professions must abide by the standards and regulations set by the federal and provincial governments as well as by the particular regulator which governs that specific profession. Governments and regulators work together to establish the legal framework governing each profession. That framework includes standards by which members of the profession must abide as well as mechanisms by which a regulator investigates and, where appropriate, sanctions a member.

Regulated industries appear in almost every facet of life in Canada and include industries such as gaming, alcohol, cannabis, and the long-term care sector. Similar to the regulation of professionals, the regulatory landscape for industries is typically made up of a combination of federal and provincial legislation and, in some regulated industries, such as cannabis, municipalities can enact regulations. As a result, the regulatory framework governing these diverse industries can be quite different from one Canadian jurisdiction to the next.

Disputes concerning regulated professions and industries play out in a myriad of specialized tribunals across Canada and, on appeal, in provincial and federal Courts. Torkin Manes has, for many years, assisted clients before such tribunals in the context of discipline and other regulatory hearings and on appeal to Canada's highest Courts. Our lawyers have a wealth of experience in representing regulated professionals as well as clients in established regulated industries, such as the long-term care sector, and, more recently, cannabis.

# Cannabis Law

Although the use of medical cannabis has been legal in Canada for over 15 years, it was not until 2015 when Canada grabbed headlines around the world as Prime Minister Justin Trudeau was elected after running an election campaign that included, among other things, the legalization of recreational use of cannabis by adults in Canada. On October 17, 2018, the Prime Minister made good on his campaign promise and the Federal *Cannabis* Act came into force making Canada just the second country after Uruguay to legalize the recreational use of cannabis.



The legal framework in which the cannabis industry operates is complex and highly regulated. As a result of the division of powers set out in the Canadian Constitution among federal, provincial/territorial and municipal governments, every level of government in the country has a degree of influence on the overall legal system.

Cannabis is grown by companies that are licensed by the federal government to do so. These companies are frequently referred to domestically and internationally as licensed producers or “LPs”. The cannabis grown by LPs is used to supply both the medical and recreational markets. The application process to become LP is rigorous and requires, among other things, security approvals both with respect to personnel and the physical facility in question. The application process typically takes one to two years to complete.

While LPs are permitted to sell the cannabis they grow to medical patients directly, utilizing an on-line platform, as well as to other LPs, the rules surrounding the sale of recreational use cannabis are determined by the provinces and territories and are diverse. Some provinces and territories have elected to opt for a publically-owned retail model, whereby the retail distribution is controlled entirely by the provincial or territorial government, who may sell cannabis purchased by LPs to the public both on-line and through bricks and mortar store(s), while others, including the Province of Ontario, have turned to a private or quasi-private licensing regime for the sale of cannabis through bricks and mortar store(s) and in certain instances on-line. Like sales, consumption rules are also set by the provinces and territories and vary across the country.

Municipal governments are, for the most part, able to contribute to the legal framework by enacting location-based rules both with respect to the location, as well as, in certain instances, the prohibition of retail stores and areas in which the public is permitted to consume cannabis.

Given that it is only the second (and by far the largest) country to legalize the recreational use of cannabis, Canada has established itself as a global leader in this industry. Market participants are on the cutting edge of technology and new product development and are utilizing their expertise to actively expand into global markets

where medical, and perhaps in the future recreational, use of cannabis is permitted. These participants are also actively involved in the creation of joint venture agreements with foreign companies who wish to bring their own knowledge, skill and product into the Canadian market place.

Although currently LPs are only permitted to sell dried cannabis, fresh cannabis, plants, seeds and cannabis oil, the Canadian government has already committed to the legalization of edible and drinkable products, concentrates and cannabis based drugs. As such, the future is bright and the possibilities for cultivators, accessory and service-based companies are seemingly endless.

# Civil/ Commercial Litigation

In Canada, there are two different court systems: the provincial courts and the federal courts.

The majority of commercial litigation in Canada proceeds through the provincial courts and is typically commenced in the superior court of the applicable province. Indeed, the provincial superior courts have inherent jurisdiction over most civil, commercial and even criminal proceedings. Each province is also vested with its own appellate court.

In contrast, the Federal Court of Canada is a statutory court, which only has jurisdiction to hear cases involving a limited number of specified federal matters, including, but not limited to, national security, claims involving the federal Crown and certain intellectual property matters. Appeals from decisions of the Federal Court of Canada are heard by the Federal Court of Appeal.

The Supreme Court of Canada is the highest court of Canada and is the final appellate court for both the provincial and federal court systems. Its decisions are binding on all other courts in the country.

# Alternative Dispute Resolution

An emerging trend in Canada has been the increased use of voluntary alternative dispute resolution procedures (ADR) in place of litigation. Typical ADR methods include mediation and arbitration. Used properly, ADR can be highly effective from the perspectives of time, cost and privacy when compared with the usual form of court litigation. Mediations are typically utilized when parties are of the view that independent facilitators can assist them in reaching negotiated settlements. Arbitration is used in place of a court where the parties contractually agree to have an arbitrator hear their dispute and rule on it with binding authority. A third ADR process, known as “medi-arb”, is a combination of mediation and arbitration procedures.

Canada, along with 139 other countries from around the world, is a signatory to the New York Convention, which helps to provide certainty that agreements to arbitrate will be respected, so that one party cannot force the other party into court once the parties have agreed to arbitrate. The New York Convention also provides certainty in respect of the enforceability of an arbitral award. Parties who choose to arbitrate in Canada also benefit from the ability to choose procedures of major arbitral institutions from around the world for the purposes of carrying out the arbitration.

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**Torkin Manes LLP**

151 Yonge Street, Suite 1500  
Toronto, Ontario, Canada  
M5C 2W7

Telephone: 416 863 1188  
Toll-Free: 1 800 665 1555  
[www.torkinmanes.com](http://www.torkinmanes.com)

**Torkin | Manes**  
Barristers & Solicitors