

# Canada Business Immigration Manual

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BAKER & MCKENZIE

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## Introduction

Canada's immigration law is split between temporary (foreign worker, student, visitor) and permanent residence (immigrant) programs. Canada was built with the help of immigrants and to this day arguably remains the most immigrant-friendly nation in the world. It has consistently welcomed about 250,000 new immigrants yearly for the past 15 years and, in recent years, has opened its doors to over one million temporary residents annually. In 2010 Canada admitted nearly 200,000 foreign workers and 100,000 international students respectively. According to the 2011 annual Immigration Plan, Canada's federal government expects between 240,000 and 265,000 new permanent residents in 2011. Sixty percent of these immigrants will come through economic streams.

Canada's immigration system is generally administered pursuant to the *Immigration and Refugee Protection Act* (IRPA) and its associated Regulations, and the *Citizenship Act*. In addition, certain treaties such as the *North American Free Trade Agreement* (NAFTA), the *General Agreement on Trade in Services* (GATS), and the *Canada-Chile Free Trade Agreement* (CCFTA) facilitate the temporary entry of business visitors and foreign workers. The federal and provincial governments have concurrent powers to legislate matters that affect immigration. However, where there is conflict, federal legislation prevails.

## Federal Immigration

Historically, only the federal government delivered Canada's immigration program. Quebec entered the field in the 1980s, and other provinces followed suit over the next two decades. The majority of Canada's immigration system is still administered at the federal level, but provinces are becoming increasingly important, both in terms of immigrant selection and integration, such as through the delivery of settlement programs.

While immigration itself is an area of shared jurisdiction between the federal government and the provinces, national health and security lie exclusively within the federal domain. Therefore, federal visa offices around the world, through Citizenship and Immigration Canada (“CIC”) staff, are still responsible for security and medical screening of Canada’s immigrants and foreign workers. Applications are usually submitted to federal immigration officials at a visa office abroad, but for visa-exempt nationals entering Canada temporarily (for a visit or for work), applications can be submitted at a port of entry, or an inland Temporary Foreign Worker Unit (“TFWU”).

In addition, every foreign national, whether selected by a permanent, temporary, or provincial immigration program, must first obtain permission to enter the country through the Canada Border Services Agency (“CBSA”). This is because CIC shares some of the visa processing work with other federal departments, including security screening and border entry. In fact, the CBSA took over responsibility for entry into Canada and immigration enforcement, both inside Canada and at all ports of entry, after 9/11- similar to the changes division between Customs and Border Patrol and Citizenship & Immigration Service.

Recent developments in the federal domain include international treaties, such as the Canada-Peru Free Trade Agreement (FTA), and negotiation of the Canada – European Union Comprehensive Economic and Trade Agreement. The latter agreement will provide significant opportunities for worker mobility beyond existing treaties. However, for the first time in a major international treaty, the provinces have been involved throughout the negotiations. Provincial immigration authorities are also involved in permanent immigration to Canada, as described.

## Provincial Immigration

Many Canadians are not aware that their Constitution creates a shared federal/provincial jurisdiction over immigration, or that provinces and territories now have a significant stake in choosing Canada's future citizens. Provincial Nominee Programs ("PNPs") allow provinces to select and nominate immigrants based on regional priorities and policies geared to economic establishment. Provincial involvement in immigrant selection is a unique feature of Canadian law when compared to immigration in other countries. The regional immigration movement is expanding, with recent agreements authorizing provinces to select foreign workers destined to their jurisdictions.

How does provincial immigration work? Canadian immigration law enables the federal and provincial governments to enter into immigration agreements. Quebec was the first province to enter into a comprehensive agreement, the *Canada-Quebec Accord*, in 1982. This gave Quebec broad selection powers. To this day it remains the most comprehensive of the federal-provincial immigration agreements.

Other provinces began to follow Quebec's lead when Manitoba introduced its PNP in 1996. Since that time, all provinces and the Yukon and Northwest Territories have in turn followed Manitoba, entering into immigration agreements with the federal government. These agreements allow provinces to select "nominees" through the Provincial Nominee class. In its first year, Manitoba welcomed less than 100 nominees. In 2010 the provinces selected approximately 42,000 of Canada's 160,000 economic immigrants (skilled workers and business immigrants). That number will likely continue to grow over the next few years.

## Immigration Choices

Other immigrant categories, including the Refugee, Family, Humanitarian and Permit Holders classes, still fall entirely within Federal programs and account for the balance of Canada's

immigrants. For detailed information on Canada's immigration statistics, please see [www.cic.gc.ca/english/resources/statistics/index.asp](http://www.cic.gc.ca/english/resources/statistics/index.asp).

The net effect of the developments in Canadian immigration over the past quarter century is that instead of one selection system as offered by most other “immigration-friendly” countries such as the United States, Australia, New Zealand and the United Kingdom, Canadian immigrants can now choose between thirteen unique selection programs – the federal, Quebec and ten PNPs - each having their own subsets of categories and rules.

Moving to Canada is therefore both flexible and daunting, precisely because applicants must select the best strategy from so many choices. With long queues resulting from a seemingly infinite demand but finite supply of visas, choosing the wrong category can mean the difference between getting to Canada quickly with the immediate ability to work, or spending years waiting in line with thousands of others while the application sits on a visa office shelf. Some of the slowest visa offices, at the time of reforms made in 2008, had processing times of between five to ten years. These changes were designed to reduce the tremendous backlog, but we have seen little evidence of quicker times for the average immigrant. In fact, certain queues have lengthened. Thus, advance strategic planning is critical. Often, the key to a future in Canada, facilitated through reasonable time frames, depends on obtaining a job eligible for a work permit. In short, Canada's system has largely become a “temporary-to-permanent” one.

## Immigration Change

Provincial and federal governments have recognized, in their own ways, the need for immigration reform. Change does not happen quickly, but is definitely happening. Examples at the federal level over the last decade include entirely new legislation, the introduction of new employer categories, and occupational caps. On the temporary side, there has been an expansion of the international student program,

including the ability for foreign students to work more easily, and several reforms to facilitate the movement of both low and high skilled workers.

At the same time, countervailing measures have been imposed to keep employers and foreign workers in check, including new compliance and enforcement measures, the elimination of the IT Worker program, and general challenges in obtaining work permits due to a softer post-recession labour market.

In terms of immigration, new permanent residence priority streams recognize foreign workers and international students, given their head start towards integration into Canadian society, and their ability to become economically established. This head start helps in long term outcomes: studies have consistently shown that immigrants who can quickly find jobs fare far better in the long term than those who do not.

In terms of positive reform on the provincial side, PNPs expedite the conversion of work permit holders and international students to permanent residents. In addition, provinces have recently introduced a wide variety of new economic categories, from trucking and “lower-skilled” occupations that are in demand, to farming and family or connections-based economic categories. Many PNP categories also allow nominees to enter under work permits while awaiting permanent residency, avoiding the need to obtain labour market opinions.

## Basic Rules for Entry

An application for entry into Canada will vary depending on a number of factors including the nature and duration of the trip to Canada. Foreign nationals who intend to enter Canada on a temporary basis are admitted in various categories under the tourist, business visitor, student or temporary foreign worker programs and may apply at CIC visa offices or inland offices (located in four Canadian cities), or directly at a border if labour market opinion (“LMO”) or temporary resident visa (“TRV”) exempt.

Foreign nationals who intend to stay in Canada permanently must apply for permanent resident status, and this is normally done at the Canadian High Commission or Embassy in their home country (it can only be done inland for certain non-economic categories). Temporary foreign workers already in Canada often choose to apply through the Canadian Consulate in the Buffalo, New York. Buffalo has historically offered quicker processing times, and is far more convenient in the event that an interview is required, because Buffalo can refer out processing to any of four regional consulates across the U.S. However, since Canada's new immigration legislation was introduced in 2001 making major changes to the Federal Skilled Worker program, the need for interviews has been greatly reduced.

Finally, after meeting the specific requirements applicable to a particular visa category, certain temporary residents and all permanent residents must undergo medical and security checks.

## Temporary Resident Status

### Introduction

A temporary resident is a foreign national (i.e. a person other than a citizen or permanent resident of Canada) who is lawfully in Canada for a temporary purpose – namely to visit or tour, conduct business, work or study. A temporary resident is permitted to stay in Canada for a limited period of time. Unless visa exempt due to nationality, all foreign nationals must obtain a TRV, in addition to a study or work permit if coming to undertake such activities in Canada. If inadmissible to Canada due to criminality, non-compliance, health issues or other reasons, these entrants would also require a temporary resident permit (“TRP”).

Business or pleasure visitors are usually granted a maximum stay of six months, although they may apply to extend their stay from within Canada. Temporary residents with valid work or study permits are encouraged to submit an application to Case Processing Centre (“CPC”) Vegreville in Alberta to extend their status, although they may apply for new paperwork at a port of entry in certain situations. At the time of writing, paper-based extensions at CPC take on average 125 days to adjudicate. While this number fluctuates during the year, we have not seen it move much below 90 days in the recent past. Thus, one should be prepared well ahead of time. Online applications will become more widely available and utilized in the years to come.

### Temporary Resident Status

Temporary residents include business visitors, foreign workers, students, and tourists who are lawfully in Canada. Some foreign nationals must obtain visas abroad to gain entry to Canada, while others are visa exempt and can often avoid the need to apply at a Consulate abroad.

## Visa Exempt Nationals

A TRV will not be required if the foreign national is a citizen of one of the following countries:

Andorra	Antigua & Barbuda	Australia
Austria	Bahamas	Barbados
Belgium	Botswana	Brunei
Croatia	Cyprus	Denmark
Estonia	Finland	France
Germany	Greece	Hong Kong (S.A.R. passports)
Hungary	Iceland	Ireland
Israel (National Passport holders )	Italy	Japan
Korea (Republic of)	Latvia	Lithuania
Liechtenstein	Luxembourg	Malta
Monaco	Namibia	Netherlands
New Zealand	Norway	Papua New Guinea
Poland	Portugal	St. Kitts & Nevis
St. Lucia	St. Vincent	San Marino
Singapore	Slovakia	Solomon Islands
Spain	Swaziland	Sweden
Slovenia	Switzerland	United Kingdom and territories*
United States (including Green Card holders)	Western Samoa	Vatican/Holy See
Taiwan (ordinary passport with Personal Identification Number)	British Overseas Citizens who are re-admissible to the United Kingdom	

\* Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn, St. Helena, Turks and Caicos Islands and formerly Hong Kong.

Nationals of any country not listed above require a TRV, and will need to apply at a Canadian mission abroad where a visa officer will consider whether the foreign national:

- has properly applied for a visa and is a member of the student, worker, or visitor class;
- will leave Canada by the end of the authorized period;
- holds the proper documents to get back into his/her country of origin or another country;
- has sufficient funds to support himself/herself during the stay; and
- is not otherwise inadmissible (e.g. by reason of criminality, medical condition, etc.).

## Medical Requirements for a Temporary Resident Visa

Generally, if the foreign national intends to visit Canada for six months or less, no medical exam is required, although officers retain discretion to request them and indeed in countries with a high incidence of emigration or political instability, medicals are often required. Medical examinations are mandatory if applying to enter Canada for a period of over six months, and coming from a country not on the list of countries below. A medical examination is always required if the foreign national intends to work at a job where the protection of public health is essential. Those jobs include but are not limited to:

- workers in the health sciences field;
- clinical laboratory workers;
- patient attendants in nursing and geriatric homes;
- medical students admitted to Canada to attend university;
- medical electives and physicians on short-term locums;

- teachers of primary or secondary schools or other teachers of small children;
- domestics;
- workers who give in-home care to children, the elderly and the disabled;
- day nursery employees; and
- agricultural workers from designated countries or territories

In addition, if a foreign national has visited or resided in a “medically designated” country for at least six months within the 12 months immediately preceding entry into Canada, and is entering for more than six months, the applicant will be required to pass an immigration medical examination. This applies even where the foreign national is a citizen of a country that does not require a visa to enter Canada. Countries which do not require medical checks are:

## Medically Exempt Countries

Albania	American Samoa	Australia
Austria	Belgium	Bulgaria (Chile)
Costa Rica	Cuba	Cyprus
Czech Republic	Croatia	Denmark
Estonia	Egypt	Fiji
Finland	France	Germany
Greece	Guyana (French)	Hungary
Iceland	Iran	Ireland
Israel	Italy	Jamaica
Japan	Jordan	Kuwait
Lebanon	Liechtenstein	Luxembourg
Macedonia	Malta	Mexico
Monaco	Montenegro	Montserrat
Netherlands	New Zealand	Norway
Oman	Poland	Serbia
Singapore	St. Pierre et Miquelon	Slovakia
Slovenia	Spain	Sweden
Syria	Switzerland	Tonga
Tunisia	Turkey islands*	U.A.E.
United Kingdom	United States	Uruguay
Western Samoa	Vatican City State	Caribbean islands*

\*Anguilla, Antigua & Barbuda, Barbados, Bermuda, British Virgin, Cayman, Cocos, Cook, Dominica, Grenada, Guadeloupe, Martinique, Netherlands Antilles, Puerto Rico, St. Vincent and the Grenadines, St. Barthelemy, St. Kitts & Nevis, St. Lucia, St. Martin, St. Vincent and the Grenadines, Trinidad and Tobago, Turks and Caicos, U.S. Virgin.

## Documentary Requirements - Application for a Temporary Resident Visa

The following are typically required for a TRV application at an Embassy or Consulate abroad:

- CIC application forms;
- original passport;
- two passport-size photographs;
- evidence of purpose of trip, whether pleasure or business;
- supporting documents including bank information, ties to home country such as proof of ongoing employment, and close family members staying behind;
- return ticket; and
- fees (depend on single or multiple entry TRV, and number of accompanying family members).

Please note this is a general list and local visa offices may have different requirements.

### Length of visit

A temporary resident is permitted to stay in Canada for a limited period of time. Pleasure or business visitors are usually granted a maximum stay of six months and may apply to extend their stay from within Canada.

A temporary resident's authorized period of stay in Canada ends on the earliest of:

- the day on which the person leaves Canada without prior authorization to re-enter;
- the day on which a work permit or study permit expires;
- the day on which a temporary resident permit is no longer valid; or

- six months after the date of entry, if no other date has been specifically authorized.

Temporary residents with valid work permits or study permits may submit an application to CIC to change conditions or extend status in Canada. These extension requests are usually submitted through CPC Vegreville. Where individuals are visa-exempt, they may renew their status authorization by exiting Canada and reapplying at a border, even if only by “flagpoling” at a land Port of Entry (“POE”). “Flagpoling” is the term used when foreign nationals drive to a POE along the Canada-U.S. border, turn around (when technically having departed) and re-enter Canada. Counsel should always be consulted before this is attempted because it can pose risks. We recommend that foreign nationals have permission to enter the U.S. as if they were visiting the U.S. independent of their intention of merely facilitating Canadian entry.

The visa categories most commonly used for business travel are the business visitor and work permit categories. If a foreign worker qualifies as a business visitor, a work permit is not required. If work, rather than business, is being done, the foreign national must obtain a work permit. A foreign national’s ability to obtain a work permit will depend on a number of factors, including the foreign national’s work experience, educational background, and proposed job duties in Canada, and the state of the local labour market (if a labour market opinion is required).

## Business Visitors

A business visitor is a foreign national who enters Canada seeking to engage in international business activities in Canada without entering the Canadian labour market. To remain outside the Canadian labour market, the visitor’s primary source of remuneration for the business activity, the principal place of business, and the actual place of the accrual of profits, must all remain outside of Canada. This category is most commonly used by foreign nationals entering Canada for business meetings.

Typical examples of activities generally covered under the “Business Visitor” exemption include internal (e.g. intra-company) or client meetings, discussions and consultations, negotiations, limited research activities, participation in educational, professional or business conventions or meetings, and soliciting certain business. A foreign national permitted to enter Canada as a “Business Visitor” is generally allowed to visit customer sites in order to meet, consult, discuss, solicit business and negotiate sales.

The general “Business Visitor” category, however, does not allow a foreign national to engage in the production of goods, or to engage in hands-on work or to provide hands-on “services” that benefit the customer. These activities would be viewed as “work” or entry into the Canadian labour market. Accordingly, while a foreign national may be allowed entry into Canada without a work permit to consult with a customer about possible sales of a product or service, or to report on progress with respect to a project, a foreign national would not gain business entry to Canada to engage in hands-on services, such as consulting or installation/repair of a product (other than within the scope of the “after sales service” category - see below).

In short, there is a very gray line between “work” and “business” under Canadian immigration law. Although not an exhaustive list, the following activities are considered “business” (assuming all other requirements applicable to the business visitor category are satisfied):

- purchasing Canadian goods or services for a foreign business or government, or receiving training or familiarization in respect of such goods or services;
- receiving or providing training within a Canadian parent or subsidiary of the corporation that employs the individuals outside Canada; and
- 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 in Canada.

## After Sales Service Business Visitors

A foreign national may be eligible to enter Canada as a “Business Visitor” to provide “After-Sales Service” where warranted in the original sales contract or extensions thereto. In addition to the general criteria outlined above, to be eligible for entry into Canada under the “After-Sales Service” category the individual may be an installer, repair or maintenance worker (or supervisor) who possesses specialized knowledge that is essential to a vendor’s service obligations (including computer hardware and/or software). However, “hands-on” installation work generally performed by construction or building trades, such as electricians, is prohibited under this category.

## Direct After Sales Service

Individuals who seek entry into Canada under the “After-Sales Service” category must be able to satisfy the port of entry officer that they are required to perform installation, repair and/or maintenance services under a sales contract between their vendor employer and a Canadian customer. The commercial or industrial equipment must be purchased from the vendor located outside Canada under a warranty or other service contract that is incidental to the sale of the equipment. The warranty must oblige the vendor to install, maintain, repair and/or service the equipment for the Canadian customer. The services that the individual is to provide must require highly specialized knowledge of the product that is the subject of the “After-Sales Service” obligation and the individual involved must be highly trained.

## Third Party/Sub-Contracted After-Sales Service

Third party or sub-contracted service is also permitted provided that the necessary requirements under this category are met. Specifically, there must be clear language in the sales agreement between the vendor or manufacturer, and the Canadian customer, that provides for a third party or sub-contractor to perform the installation, maintenance, or repair service. This demonstrates that the third party

or sub-contracted service is incidental to the sale of the equipment. The third party need not be specifically identified in the sales agreement between the vendor and the Canadian customer. As with company employees, third parties or sub-contractors seeking entry under the “After Sales Service” category must possess specialized knowledge that is essential to the discharge of the vendor’s obligations to the Canadian customer.

Service personnel seeking entry into Canada to perform service work on equipment absent a service obligation being identified in the sales agreement, or where the equipment is out of warranty, or where no service contract exists, are not eligible to enter as business visitors and would instead require a work permit.

The “After-Sales Service” category also contemplates entry into Canada for the purpose of providing familiarization or training services to prospective users or to maintenance personnel of the Canadian customer after the installation of specialized equipment purchased outside Canada. It would be prudent to refer to such training in the sales agreement or warranty or service agreement. Intra-company trainers may also be eligible for entry into Canada as “Business Visitors”, as discussed next.

## Training

Training is also a tricky category within Canadian immigration law. There is a fine line between foreign nationals who are deemed as business visitors to provide training, and other foreign nationals who require work permits. When deciding whether to apply for business visitor status or a work permit, employers must carefully consider the consequences of a failed entry at the border, which could delay training plans.

Short-term trainees or trainers, particularly of a foreign affiliate, will be permitted to enter as business visitors as long as they continue to be paid abroad and do not cross the line into “working” at the Canadian entity. Third-party contractors providing training can enter as business

visitors, if this was contemplated in the after-sales service provisions of a contract. For instance, the foreign national coming to train Canadians on machinery or software does not require a work permit, as long as the contract clearly sets out the training requirement.

## Public Speakers

Public speakers for conferences, company meetings, or other short-term events (typically less than five days) may also qualify as business visitors, if they rent their own space and charge their own admission fees. However, work permits must be obtained for commercial trainers or speakers contracted from a third party to train Canadian employees. U.S. and Mexican nationals may benefit from the “NAFTA” provisions that allow professionals to obtain work permits for pre-arranged training sessions for subject matter within the trainer’s profession.

## Entertainers, Performers and Athletes

There are detailed rules concerning entertainers, performers, and athletes, including actors and technicians involved in concerts, films, and other productions. Advice should be sought before anyone wishing to work in these fields arrives at the Canadian border. Often, business visitor status can be obtained, but various items need to be considered first. If a work permit is required, a Labour Market Opinion (see below) should be sought well in advance. In addition, questions should always be asked regarding any previous criminality: Even if a work permit is not required, inadmissibility can prevent entry into Canada.

## Other Types of Work-Permit Exempt Activities

Aside from the five business visitor sub-categories discussed above, Federal immigration regulations provide various circumstances in which a foreign national may undertake work activities in Canada without a work permit. Examples include:

- diplomats and representatives of international organizations, and their accompanying dependents;

- visiting members of armed forces;
- on-campus work for full-time international students;
- certain athletes and referees;
- certain individuals on conference organizing committees;
- certain news reporters;
- certain religious workers and clergy;
- students with a practicum in the health field;
- emergency workers, including those rendering medical services; and
- certain transportation workers, including aviation inspectors and crew involved in international transportation.

## Temporary Foreign Workers (Work Permits)

An assessment of whether a foreign national requires and qualifies for a work permit must be conducted on a case-by-case basis. Factors considered by visa officers include the foreign national's educational background, work experience, citizenship, and the types of activities to be undertaken while in Canada.

There are two broad types of work permit classifications in Canada: (i) work permits requiring a Labour Market Opinion ("LMO"), which is the default category, and (ii) work permits exempt from the LMO requirement. LMOs are adjudicated by Service Canada, part of Human Resources and Social Development Canada ("HRSDC"), the federal government department responsible for overseeing Canada's labour market.

About half of the work permits provided to foreign nationals each year are LMO exempt. These exemptions are prescribed by the *Immigration and Refugee Protection Regulations* ("Regulations") and include special labour market validations agreed to by HRSDC. Companies should always first consider whether these validations are available before applying for LMOs, particularly in times of a weaker labour market and/or a poor economy.

## Work Permit with Labour Market Opinion

Applying for a work permit often involves a two-step process. As the first step, the proposed Canadian employer must submit a “Temporary Foreign Worker Application” to HRSDC’s local Service Canada Centre. Every province has a centralized Service Canada office. LMO applications are adjudicated regionally because, while the need for a particular type of labour may exist in some regions or provinces, others may have a surplus of Canadian workers who qualify for the position. An exception to local processing applies to academics and health care workers, whose processing is centralized in New Brunswick.

An LMO application can be made with respect to a single job offer or multiple job offers. The HRSDC officer assesses any LMO application with a number of considerations in mind. Most importantly, the offer must be genuine and it must have a neutral or positive effect on the Canadian labour market. The effect on the labour market is assessed through six factors contained in the Regulations, namely whether the employment of the foreign national is likely to result in:

1. direct job creation or job retention for Canadian citizens or permanent residents;
2. creation or transfer of skills and knowledge for the benefit of Canadians;
3. undercutting the prevailing wage rate and working conditions for the occupation;
4. undermining the settlement or employment of persons involved in a labour dispute;
5. filling a labour shortage; and
6. post-recruitment hiring and training of Canadians.

The second step of the LMO process, assuming receipt of a positive opinion, is applying for a physical work permit, and TRV (abroad) if required.

## Recruiting and Advertising

The sixth and arguably most important LMO factor, particularly in an economic downturn or its aftermath, is recruiting or, as the regulations put it, “whether the employer has made, or agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents.” In January 2009, HRSDC mandated national advertising as the primary mode of recruiting with few exceptions. National advertising standards replaced often confusing provincial lists of “high-demand” occupations for which no advertising was required. Even when occupations were not on these official lists, pre-2009 employers could often get away without recruiting for foreign workers for positions that were unofficially acknowledged to be “in demand”. That flexibility has, for the foreseeable future, all but disappeared at the federal level. At the provincial level, however, British Columbia and Quebec are expected to create their own LMO-exempt occupation lists which will most likely include health care and other “in demand” occupations.

Today, three broad skill level classifications carry different recruitment and advertising obligations:

- A. Management and professional level occupations, namely National Occupational Classification (“NOC”) O/A classifications, such as CFOs or computer accountants, require advertising on HRSDC’s web-based National Job Bank for a minimum of two weeks, or similar recruitment activities during the three months prior to the LMO application;
- B. High skilled trades and related fields (NOC B classifications, such as secretaries, bookkeepers, or machinists) require two weeks of National Job Bank advertising; and
- C. Low and semi-skilled occupations (such as truck drivers, general labourers, or retail clerks) require National Job Bank placement, in addition to two weeks of advertising on a secondary internet site, newspaper or prominent community

posting (the latter for three weeks), along with demonstrating ongoing efforts to recruit from disadvantaged groups such as aboriginals or older workers.

Wages must be disclosed in all advertisements, except for those relating to group A.

## Advertising Exemptions

The only officially endorsed exceptions to recruiting are where the position:

- entails installation, inspection or repair of equipment, and the warranty requires the work to be done by skilled workers designated by the manufacturer;
- requires a specialist familiar with the overall operation to do the work on a regular basis, with limited duration, with no opportunity for Canadians to be trained;
- is in the entertainment sector and involves a limited number of days in a specific location and on very short notice (e.g. boxers, bar bands and DJ's, musicians, singers, film directors, or first assistant directors);
- is with an international organization or the mission of a foreign government;
- is for a live-in-caregiver who is already in Canada, in emergency situations, or when the employer of a live-in-caregiver moves their household to a new province/territory and wishes to retain his/her current live-in caregiver;
- is for an owner or operator who is an integral to the day-to-day operation of the business and will be actively involved in business processes or service delivery in Canada;
- is for certain academic occupations, or
- supports an international student who has graduated from a recognized post-secondary Canadian institution and who holds an open "post-graduate" work permit.

## Sector Agreements

The LMO application process may be streamlined if the foreign national qualifies under any existing sector agreements. These special programs, each with different rules, ease one or more components of the LMO process. Special programs currently exist for the following areas:

- academics;
- seasonal agriculture workers ;
- film and entertainment workers;
- live-in-caregivers (with particular rules for the province of British Columbia);
- Pilot Project for occupations requiring at most a high-school diploma or job-specific training (often referred to as the “low skill” program); and
- employment of international students graduating from recognized post-secondary institutions (often work after a post-graduation work permit).

While the sector agreements differ in their rules, all of them offer a streamlined process compared to the standard LMO application. For instance, these relaxed rules include certain positions where LMOs are not needed in the film and television industry, and reduced recruiting for academics and certain university graduates. On the other hand, when it comes to lower skilled occupations (NOC C and D), there may be additional recruiting and contractual requirements.

### “Bulk” LMOs

Companies requiring many foreign workers may apply for bulk LMOs, which facilitate the issuance of individual-specific LMOs at a later date. Bulk approvals are useful where larger-scale labour market shortages can be demonstrated, and recruiting subsequently may occur unfettered by concerns of wasted time in the candidate search process.

## Documentary Requirements

The following documents are typically required for an LMO application:

- LMO application form (ensure it is a current form);
- cover letter from the employer (the most crucial part of the application);
- documents describing company (including passport data page, resume, degree/diploma);
- job description;
- copies of advertising efforts and description of recruitment;
- summary of the results of the recruitment;
- Certificate of Acceptance (“CAQ”) form and fees (if the job is in Quebec – applications in the rest of Canada only require fees at the work permit stage); and
- documents describing applicant (optional but may be useful).

## After Labour Market Opinion Approval

Once the LMO is approved, the local HRSDC office will issue the opinion to the employer. Where an LMO is required and the foreign national will be working in Quebec, a CAQ must also be obtained from the Quebec immigration authorities. The foreign national must then apply for a work permit, first at a Canadian visa office abroad if a TRV is required, or directly at a port of entry if visa exempt.

Generally, only foreign nationals who are visa-exempt and from a non-designated country (for medical purposes) may apply for a work permit at a port of entry. If applying abroad because a TRV is required, the applicant will receive a visa counterfoil, along with a work permit confirmation letter from the visa office which is then used to obtain a work permit at the port of entry.

## Work Permits Exempt from Labour Market Opinions

The general rule states that any foreign national engaging in “work” must obtain a work permit unless there is an available exemption (i.e. business visits and other activities in the bulleted list above). The Regulations provide for a number of “LMO-exempt” work permit categories. Each category has specific requirements that must be satisfied. As should now be clear, LMOs add complexity and time to the process, particularly during and in the aftermath of an economic downturn, when unemployment in Canada tends to be high. Therefore companies should always first consider whether LMO-exempt work permits are available. The most common of the LMO-exempt categories follow.

### Intra-company Transfers

Multinational companies seeking to assign foreign employees to Canadian positions often use the LMO-exempt intra-company transferee category. There are a number of affiliate relationships that qualify under this category, but all generally rely on common control (e.g., parent-subsidiary, sister corporations, branch or representative offices). These work permits are initially valid for assignments of up to three years, and extendable in two-year increments. Executive and managerial-level employees can obtain this status for a total of seven years, whereas specialized knowledge employees are limited to five years.

Executive and managerial-level staff must generally manage other employees, although management of crucial company functions or processes may qualify. The applicant must be coming from a similar position at an affiliate outside Canada, which he/she has occupied for at least one continuous year in the past three.

Advanced and unique experience in a specialized knowledge capacity requires proof that the employee holds knowledge of the organization’s products, services, research, equipment and techniques.

The knowledge must be so specialized that it is not ordinarily held by others within the sector or industry. In 2011, the Canadian government established six factors to guide officers in making a determination as to whether a particular individual has the specialized knowledge required for the position requested in Canada. These factors are:

- **Education:** is a diploma or degree required for the position sought?);
- **Knowledge:** is it relatively unique within the company and industry in that it is not commonly held?
- **Experience:** does the experience with the foreign company/respective industry support the claim of specialized knowledge?
- **Salary:** is the salary realistic in terms of Canadian wage levels for the occupation concerned?
- **Relevant Training:** Does any previous training support the claim to specialized knowledge? and
- **Supporting Documentation:** Do the resumé, reference letters, and other documentation support the claim?

Simply possessing proprietary knowledge of, or using proprietary tools developed by the company is not sufficient: in order to be considered a specialized knowledge worker, one must possess many, if not all, of the following characteristics:

- knowledge that is **uncommon** (i.e., beyond that generally found in a particular industry and within the company);
- knowledge that has been gained through **extensive experience** and is **difficult to acquire in a short period of time**; and
- **complex** knowledge that **cannot easily be transferred**.

The employer must show that it would be very difficult to train another worker to assume such duties and that the employee is going to be filling a position that is critical to the well-being or productivity of the Canadian employer

While salary is only one of the factors set out above, employers wishing to hire foreign specialized knowledge workers must offer salaries that are "realistic" in terms of Canadian wage-levels for the occupation concerned. Ultimately, if the proposed specialized knowledge worker's salary does not approximate the average salary for the position in the location of the occupation, the application may be rejected by CIC. With respect to per diems being added to a proposed salary, it is important for employers to note that only allowances in monetary form and paid directly to the employee will be included. Items such as paid accommodation or transportation while in Canada will not be considered as forming part of the salary.

## International Agreements

Under Canada's previous immigration law, the intra-company provisions were more generous to U.S. and Mexican nationals under both NAFTA and GATS. The current law creates parity between nationals qualifying under these international agreements and all other workers, such that it no longer makes a difference which intra-company transfer provisions are used.

Many international agreements other than the NAFTA and GATS allow international assignees, depending on their nationality, to obtain a work permit without an LMO, as long as they have employment opportunities in Canada. These agreements include:

- Artists Residencies Program (USA, Mexico);
- Professional Trainees (Bermuda);
- Canada-Chile Free Trade Agreement ("CCFTA");
- International Film Co-Production Agreements (not restricted);
- International Air Transport Association;
- Seasonal Agricultural Program (Certain Caribbean countries);
- Professional Accounting Trainees (Malaysia); and
- Scientific and Technical Cooperation Agreement (Germany).

The most commonly utilized international agreements for international employment transfers are still the NAFTA, CCFTA and GATS, which allow certain professionals and skilled workers to come to work in Canada for periods of up to three years, subject to extensions.

## North American Free Trade Agreement

NAFTA provides expanded mobility and foreign workers' rights for citizens of the United States and Mexico, although in the case of Mexico some of the benefits of expanded rules have been curtailed by the visa requirement imposed by Canada in July 2009.

The "NAFTA Professional" category contains a list of over 60 occupations, of which the most commonly used include:

- accountants;
- architects;
- economists;
- engineers;
- hotel managers;
- industrial/graphic/interior designers;
- lawyers;
- management consultants;
- research assistants (in post-secondary institutions);
- scientists (botanists, geologists, chemists, etc.);
- scientific technicians and technologists;
- teachers;
- technical publications writers;
- urban planners; and
- computer systems analysts.

Some of these require licenses and/or a post-secondary education. Health professions (which all require degrees) include:

- doctors;

- nurses;
- dentists;
- nutritionists;
- dieticians;
- medical laboratory technologists;
- occupational/physiotherapists;
- pharmacists;
- psychologists; and
- veterinarians.

These NAFTA Professional work permits are issued for up to three years, but may be extended multiple times in most occupations.

## General Agreement on Trade in Services

GATS' international mobility provisions are much narrower than NAFTA's, although the agreement is much broader, as GATS applies to over 150 signatory countries, including the U.S. and Mexico. GATS, a WTO agreement, only provides for one 90-day work permit in any 12-month period. Its list contains nine occupations:

- engineers;
- agrologists;
- architects;
- foresters;
- urban planners;
- foreign legal consultants;
- land surveyors;
- geomaticists; and
- senior computer specialists.

All but the last two occupations require licensing and degrees. Computer specialists are given the choice between post-secondary credentials, or equivalent work experience. The category is therefore very restrictive in terms of the length of time allowable in Canada, and access to professions.

## IT/Software Workers

A special program was created in 1996 to facilitate the processing of work permits for IT specialists in high-demand occupations. However, the federal government has eliminated this exemption category at the national level. A variation of the program can still be found in the provinces of British Columbia and Quebec.

## Reciprocal Employment

This category can be used for international exchanges, both in public and private sector contexts. The purpose of this LMO exemption is to provide complementary opportunities for international work experience and cultural interchange. It includes well-known student work-abroad programs (such as SWAP and AISEC), which are negotiated on a reciprocal basis by Canada's Department of Foreign Affairs and International Trade.

Companies can also use this exemption category if they create equivalent opportunities for Canadians abroad. For companies to benefit from this category, a formal exchange or employee transfer program, or a minimum number of positions for Canadians sent abroad, should be provided in the application package. Entry under this exemption category must result in a neutral labour market impact. Note that parity in reciprocity does not need to be demonstrated for academic exchanges.

## Provincial Nominee Programs (PNPs)

PNPs are run by each province and territory, and result in a nomination for permanent residence in Canada. Another benefit of receiving a nomination in most PNP employer-based categories is the ability to receive an LMO-exempt work permit based on that nomination. While specific rules cannot be neatly summarized here due to the ten PNPs each having distinct requirements, PNPs are another valuable tool in an HR manager's arsenal in avoiding the need for an LMO.

## International Student Work Permits

There are many opportunities for foreign students to work while studying, and to obtain LMO-exempt work permits after graduation.

During the academic year, these students are eligible for both on and off-campus work. For off-campus work, they must prove to have a strong academic standing.

CIC amendments of April 2008 allow students who have graduated from recognized post-secondary institutions in most full-time degree/diploma-granting programs to automatically qualify for an open work permit ranging from eight months to three years, depending on the length of their studies.

In addition, HRSDC also relaxes post-graduation work permit extensions requiring an LMO after completion of CIC's post graduate work permit program, by eliminating the need for both (i) recruiting, and (ii) the need to pay the prevailing wage.

## Spousal Work Permits

Spouses of foreign workers on NOC O, A, or B work permits valid for at least six months are eligible to work in Canada. These spouses, including common law and same-sex spouses, receive open work permits, meaning that they can work in any occupation, with any employer (including self-employment), subject to the medical examination rules discussed above.

## Other Types of Common LMO-Exempt Work Permits

Several other LMO-exempt categories are available, and include:

- “Significant Economic Benefit” work permits;
- entrepreneurs/self-employed work permits; and

- research, educational or training programs, including post-doctoral fellows and award recipients.

These categories are useful alternatives to consider for recruitment strategies when other LMO exemptions are not available.

## Work Permit Documentary Requirements

Work Permit applications should generally include the following documentation:

- government application forms;
- copy of passport data page;
- company support letter;
- documentary information describing the employer;
- copy of detailed résumé;
- copies of educational degrees/certificates;
- copy of LMO (if applicable);
- passport size photographs (visa office specific); and
- fees.

Note that documentary requirements change depending on the application venue and the type of work permit category. This list is intended to provide general guidance.

## Work Permit Extensions

All temporary foreign workers must ensure they remain in valid status while in Canada. As long as they continue to be employed, remaining in valid status means extending their work permits before expiry.

Generally, extension applications should be submitted at least 90 to 150 days before expiry, due to unpredictable processing times (which should be checked on the CIC website to be aware of current delays). Online applications may be quicker. However, as long as CIC receives the extension application before the work permit expires, and as long as the request is for a continuation of the previous position, the foreign worker may continue to work under “implied” status, as provided by

the Regulations. This is one of a few circumstances in which a foreign national can work without having a valid physical work permit in hand. Applicants should avoid leaving Canada while on implied status: while CBSA may permit them to re-enter, they lose their implied status upon re-entry to Canada.

## Work Permit Extension - Documentary Requirements

Work Permit extension applicants must generally provide the following documentation:

- CIC Application to Extend Form;
- copy of passport data page;
- copy of current work permit;
- copy of LMO (if applicable);
- any additional documents required by CPC Vegreville; and
- fees.

## Port of Entry Work Permit Applications

For visa-exempt individuals, work permit applications (and effective extension requests) may be made at a POE. The criteria are the same, but documentary requirements differ slightly. POE applicants should provide the following documentation:

- LMO from HRSDC (if applicable);
- Labour Market Exemption Opinion letter from the TFWU (if applicable);
- job offer;
- company support letter;
- fees; and
- any additional documents required by the port of entry officer.

## Dependent Children WP Program

Alberta and Ontario currently have a program whereby dependent children of foreign workers will be able to obtain open work permits for one year from the date of issue, or for the duration of the parent/guardian's work permit. Children are eligible as long as one parent has an employer-specific WP for at least six months in one of the two provinces, and works in a skilled, managerial or professional job (A, O or B on the National Occupation Classification).

Children must be of legal working age (at least 14 in Ontario, and between 18 and 22 in Alberta). This addition to Canada's TFWP builds on advantages relative to other jurisdictions including the United States, such as spousal work permits, the inclusion of same-sex spouses, and public health insurance, for most TFWs and their families. These advantages mean that Canada will continue to attract the foreign workers necessary to meet labour market needs, expected to grow significantly over the next decade.

## Major Changes Made to Canada's Temporary Foreign Worker Program: April 2011

The objectives of these changes, as expressed by the Government of Canada, are as follows:

1. to reduce the potential for the exploitation of TFWs by employers and third party agents, thereby better protecting TFWs who work in Canada,
2. to implement stricter employer accountability mechanisms, including a denial of service provision, to encourage greater adherence by employers to the terms and conditions of their job offers (e.g. wages, working conditions, and occupations); and
3. to underline that employment facilitated through the TFWP is meant to be temporary in nature.

## Genuineness of the Job Offer

At their core, additions to the Regulations offer three major changes to address the three objectives outlined above. First, all visa officers, before approving a work permit, must ensure that the job offer is genuine. An officer will evaluate the genuineness of an offer by various due diligence measures, including ensuring that the offer is made by an employer that is actively engaged in the business in respect to which the offer is made.

Another component of the genuineness assessment is that the offer must be consistent with the reasonable employment needs of the employer. Officers must be satisfied that the offer of employment is reasonable in relation to the type of business the employer is engaged in. Should the officer have doubts in this respect, more information will be requested from the employer to show that the role the foreign worker will be engaging in is reasonable both in terms of the occupation and from a business perspective. A refusal to submit further information, if requested, may result in a refusal to issue the work permit.

Until a database is created that will enable officers to view an employer's past history of genuineness, an officer may request documents such as a T4 Summary of Remuneration Paid, T2 schedule, T2125, Workers' Compensation clearance letter or business contracts.

The genuineness assessment also considers past compliance with the law. The employer must have been in compliance with the federal and/or provincial laws that regulate employment, or the recruiting of employees, in the province in which it is intended that the foreign national will work.

Federal and provincial laws are defined as laws related to the regulation of employers, employer consultants and/or recruiters, as well as the employment of foreign workers, Canadian citizens and permanent residents. Violations by employers and/or third parties such

as recruiters working on behalf of employers, reported by either the federal or provincial authorities, may be considered when an employer's previous compliance is being determined. It makes no difference whether those committing the violation(s) are Canadian citizens, permanent residents or foreign workers.

It is anticipated that further instructions on assessing compliance with federal, provincial and/or municipal legislation will be provided by Citizenship and Immigration Canada (CIC).

### The "Substantially the Same" (STS) Test

The new Regulations allow the government to examine the last two years of the employer's record with regard to its foreign workers. In doing so, the government will want to see that the employer provided each foreign worker with wages, working conditions and employment (i.e. occupation title) that was *substantially the same* as those set out in the employer's original offer of employment and/or work permit authorization. Deviations from this STS test can be excused if justified. Justifications include:

1. a change in federal or provincial law;
2. a change to the provisions of a collective agreement;
3. the implementation of measures by the employer in response to a dramatic change in economic conditions that directly affected the employer, provided that the measures were not directed disproportionately at foreign nationals employed by the employer;
4. an error in interpretation made in good faith by the employer with respect to its obligations to a foreign national, if the employer subsequently provided compensation or made sufficient attempts to do so to all foreign nationals who suffered a disadvantage as a result of the error;

5. an unintentional accounting or administrative error made by the employer, if the employer subsequently provided compensation or made sufficient attempts to do so to all foreign nationals who suffered a disadvantage as a result of the error; or
6. circumstances similar to (1) to (5) above.

A negative STS assessment will reflect situations in which the difference relating to the wage, working conditions or occupation that were provided to the foreign national vis-à-vis those in the original job offer are considered detrimental or disadvantageous to the foreign national. This would, in the view of the government, compromise the integrity of the TFWP.

On the other hand, should an employee be earning slightly more wages than the original job offer, that will not, in and of itself, be cause for a negative STS assessment. However, we recommend that any potential future increases in salary (via pay raises or bonuses) are addressed at the outset in the foreign national's contract of employment. It is also recommended as a best practice that all changes be brought to the attention of the government.

We expect that that CIC will be publishing further guidance with more detailed instructions on the subject.

## Penalties

The Regulations now provide for sanctions against employers that contravene the TFWP by providing job offers not deemed to be genuine in the previous two-year period. The main new penalties are an exclusion from using the TFWP for a two year period going forward and the publication of the name of the offending employer on a Canadian government website, available for the public to see. The website will state the names and addresses of each employer and the date that the determination was made. The government will not issue a work permit for any employer on the blacklist, nor will a current

employee be able to obtain a work permit extension if his/her employer is a new addition to the blacklist.

Of course, the increased scrutiny and enforcement resulting from the Regulations will also expose more employers and TFWs to findings of immigration law violations. All previously existing penalties will still be available to the government, including fines, jail terms and exclusion from the country for offending foreign nationals. In short, we expect to see an increase in immigration law enforcement as a result of these changes.

### The 4-year Cap

The third objective of the reforms is to underline the temporary nature of the TFWP. To achieve this end, the government is, starting from April 1, 2011, imposing a four year limit on the number of years that foreign workers can remain working in Canada in any eight year period. There are exceptions to this rule, namely for TFWs who are:

- in managerial (NOC 0) or professional (NOC A) occupations;
- employed in Canada under an international agreement, such as the NAFTA, CCFTA, GATS, or another agreement;
- exempt from LMOs, including entrepreneurs, intra-company transferees, post-graduate work permit holders, post doctoral fellows, “significant benefit” workers, provincial nominees and spouses of all of these workers.
- applying for Canadian Permanent Residence and have received a/an:
  - “Certificat de sélection do Québec” (CSQ) if applying as a Quebec Skilled Worker;
  - Provincial Nominee (PN) certificate if applying under a province’s Provincial Nominee Program;
  - approval in principle letter if applying as a Live-in Caregiver;
  - positive selection decision if applying as a Federal Skilled Worker; or

- positive selection decision if applying as a Canadian Experience Class applicant.

A CIC officer, when calculating the number of years a foreign national has already worked in Canada, will assume that the foreign national worked for the length of time indicated in the previous work permit(s). Put another way, if the foreign national had a work permit issued for three years, the officer will assume the foreign national worked for that entire three year period. However, legitimate breaks in employment which include extended sick-leave, maternity leave and extended absences from Canada, will not be counted against the 4-year cap, provided the foreign national can show, by way of documentary evidence, that s/he was in fact not working in Canada during that time. This includes time spent outside Canada by those who split their work or residence between Canada and another country, such as the United States. As such, employees are advised to keep records of all absences from work and the reason for those absences. Examples of such documentary evidence include letters from doctors, employers, schools, proof of maternal/parental benefits from government agencies, Record of Employment documentation, etc.

All work performed in Canada while on implied status will count towards the 4-year cap. In other words, work performed after the expiry of a work permit while the foreign national is waiting for a fresh work permit, which was applied for prior to the previous work permit's expiration, counts toward the 4-year cap. On the other hand, work performed in Canada by a foreign national who was/is a full-time student at the time the work was performed will not count towards the 4-year cap.

### Changes to the TFW forms

The application forms have been amended to reflect the Regulations. For instance, there is a new form that must be submitted with all new LMO-exempt work permits. This form makes certain representations

about genuineness to CIC and to CBSA. As for the other government departments involved, HRSDC, operating through Service Canada, the LMO poses additional questions that permit an officer to address the genuineness of the application. Specific certifications must also now be provided by the employer in the new LMO form. Employers will need to make the following four attestations:

1. I will provide any temporary foreign worker employed by me with wages, working conditions and employment in an occupation that are the same as those described in the Labour Market Opinion confirmation letter and annex.
2. I will immediately inform Service Canada/Temporary Foreign Worker Program officers of any subsequent changes related to the temporary foreign workers' terms and conditions of employment, as described in the Labour Market Opinion confirmation letter and annex.
3. I am compliant with, and agree to continue to abide by the relevant federal/provincial/territorial laws that regulate employment in the occupation specified and, if applicable, the terms and conditions of any collective agreement in place. I recognize that any terms and conditions of the attached offer of employment are considered null and void if they are less favourable to the temporary foreign worker than the standards stipulated in the relevant *Labour Standards Act*.
4. I am compliant with, and agree to continue to abide by federal/provincial/territorial legislation related to the temporary foreign worker's recruitment applicable in the jurisdiction where the job is located. I declare that all recruitment done or that will be done on my behalf by a third party, was or will be done in compliance with federal/provincial/territorial laws governing recruitment. I am aware that I will be held responsible for the actions of any person recruiting temporary foreign workers on my behalf.

## Recommendations

Strategies should be updated (or in some cases, implemented) to ensure the accuracy of the applications being filed, and ensure that those making the representations have the appropriate authority to make them to the government.

We encourage employers to implement an audit system which can address the genuineness of employment offers made to any and all foreign workers employed during for the past two years in order to take the appropriate corrective action necessary. We suggest the following 10-step process to ensure that you audit your foreign workers and have no surprises:

1. Adopt a formal HR compliance program for foreign workers; create a centralized database to track these workers; appoint a compliance officer;
2. Ensure all authorizations are current, including immigration and social insurance paperwork. Ensure all documentation is up-to-date and properly filed;
3. Ensure HR representatives are in a position to abide by all representations made to the government in TFW applications;
4. Audit all foreign workers regularly - preferably every six months, and at a minimum, annually - including verification of current position and salary, comparing these against immigration documentation;
5. Report all significant or material changes in employment or salary to government, and/or amend status documentation;
6. Apply for extensions early;

7. Provide immigration resources for foreign workers, including information about pathways to permanent residence, and rules about leaving the country during implied status or other delicate immigration times;
8. Provide a central HR contact for TFW questions;
9. Have your audit process set out in a cover letter from counsel, to be able to claim solicitor-client privilege in results of the audit; and
10. Should issues become apparent, work with counsel to address and resolve issues , and assist with the audit if necessary, or where issues arise during the due diligence process.

## Study Permits

To be eligible to study in Canada, students must (i) be accepted to an eligible institution, (ii) prove sufficient funds for tuition, living expenses and return transportation, and (iii) otherwise comply with the temporary entry requirements outlined above (such as admissibility, intention to return, etc.). Medical and police certificates may be required. Study permits are not required for courses of under six months and many international students enter Canada on this basis for English or French language studies.

Post-secondary international students may work on campus if they are a full time student at an eligible institution. No work permit is required for qualifying on campus work.

Students can work off campus if they (a) study at an institution that qualifies for the off campus program, (b) continue to study full-time, and (c) maintain satisfactory academic standing. The student may only work a maximum of 20 hours per week during school, while full-time hours are permissible during scheduled breaks (e.g. March Break,

summer holidays). Off campus work permits can only be applied for after six months of full-time studies. Certain students are not eligible to apply for these work permits (generally, those who are taking part in internationally funded scholarship or grant programs).

Under the post-graduation work permit category, international students may obtain an open (non employer-specific) work permit, up to the length of the study program in Canada. These work permits are valid for no less than eight months and no more than three years. The graduate must apply for the open work permit within 90 days of receiving written confirmation of program completion.

Note that spouses of study permit holders are eligible for open work permits. These are valid for the same period as the principle spouse's study permit.

## Documentary Requirements for Study Permits

The following documents are typically required for a Study Permit:

- CIC application forms;
- copy of passport data page;
- fees;
- passport size photographs;
- medical and police checks (depending on the country);
- proof of funds; and
- proof of acceptance:
  - for attendance at a university, college or technical institution, a letter from the educational institution, indicating the:
    - name of the institution;
    - confirmation of acceptance and/or registration as a student;
    - course of study;

- duration of the academic program; and
  - latest date for registration.
- for attendance at a primary or secondary school, a letter from the school board having jurisdiction for the school (or for private schools, a letter from the school itself), indicating the:
- name of the school;
  - level of study; and
  - duration of the course.

# Settlement Planning

## Customs

CBSA allows temporary residents to bring in “personal baggage” (defined as “clothing, camping and sports equipment, cameras and personal computers. It also includes vehicles, private boats and aircraft.”) on a duty free basis, if the goods:

- (a) are declared upon arrival;
- (b) will not be used by a resident of Canada, or a business based in Canada;
- (c) are not given as a gift; and
- (d) are removed from Canada, upon the departure of the temporary resident.

CBSA can request a security deposit for the goods upon arrival, which will be returned upon proof that the goods will be exported at the time of the foreign national’s departure. This used to occur more frequently in the past than it does today.

## Motor Vehicles

Every vehicle (the definition of which includes trailers, such as recreational, camping, boat, horse and stock trailers, wood chippers, generators or any other equipment mounted on rims and tires) that is imported into Canada must comply with the various Canadian import legislation. Not all motor vehicles are eligible to be imported into Canada, and the foreign national should confirm the eligibility of his/her vehicle with Transport Canada and the CBSA before purchasing a vehicle that will be imported into Canada.

## Money/Funds

Although there is no limit on the amount of money one can bring in or take out of Canada, the CBSA officer must be informed if currency or

monetary instruments that are equal to, or exceed CAD\$10,000.00, are being imported. If such importation does not get reported, CBSA has the authority to seize unreported amounts over the CAD\$10,000.00 threshold and/or pursue criminal prosecution. The seized amount may be returned upon payment of any penalty imposed.

## Restrictions

Canada has imposed restrictions on the importation of alcoholic beverages, firearms and certain foods, plants, and animals. Further information regarding the restriction of goods into Canada can be found at <http://www.cbsa-asfc.gc.ca/publications/pub/bsf5056-eng.html#s5>. Customs questions can be complicated and our customs specialists are able to assist with any issues in this area.

## Health Insurance

In most cases, foreign workers and their accompanying dependants are eligible for public health insurance, although provinces regulate this area and rules should be researched before arrival. Generally, there are 90-day waiting periods, during which time the provincial system does not cover a foreign national's health care costs.

As many insurance companies will not provide coverage for a foreign national unless the insurance is purchased within five days of arrival, foreign workers are advised to purchase private health insurance prior to their arrival in Canada to ensure they are covered during this period. However, they should apply for provincial health insurance immediately upon arrival in Canada.

### Ontario Health Insurance Plan (OHIP)

We will look at one province's health insurance rules as an example of how the system works for foreign nationals. For foreign nationals coming to Ontario, TFWs holding employer-specific work permits and their dependents are eligible for the Ontario Health Insurance Plan

("OHIP"). Open work permit holders are eligible for public health coverage via OHIP as long as they are employed for at least six months, including post-graduation work permit holders.

Upon applying for an OHIP card, documentation proving identity, employment status, residential address, and status in Canada (i.e. work permit and/or visa) is required. To prove employment status, a signed letter from the foreign national's employer stating his or her start date and that the foreign national 'physically works in Ontario' is required. In this letter, it is advisable to have a section including the foreign national's start date in case s/he does not have other documentation showing a residential address in Ontario. The OHIP card will be mailed to the foreign national once he or she has become eligible to be insured, and generally arrives within approximately three weeks after that point in time.

TFWs and permanent residents ("PRs") must be physically present in Ontario for 153 of the first 183 days immediately after establishing residency in the province, and must also be physically present in Ontario for at least 153 days in any 12-month period. Seasonal Agricultural Worker Program TFWs, tourists, and visitors remain ineligible for OHIP.

Whenever a foreign national goes to visit a doctor, hospital or walk-in clinic, the foreign national will be required provide his or her OHIP card. As such, it is advisable that the foreign national carry it at all times. Note, however, that OHIP does not pay for the cost of medication or dental services.

## Finding a doctor or a dentist

One way to find a doctor in a certain area is to search the database of the Royal College of Physicians and Surgeons Canada. The website locates doctors and displays their credentials. Additionally, there are other search engines on the internet and phone numbers that can be utilized in order to find the right doctor or dentist.

## Social Insurance

Foreign workers may be eligible for employment insurance if they meet the qualifying periods and rules. In order to do so, foreign workers require a Social Insurance Number (“SIN”). As with health insurance, all foreign workers should apply for a SIN card immediately after arriving in Canada.

All workers require a SIN to be remunerated by their employer, pay taxes and apply for other government services. Therefore, it is important that a SIN card is applied for as soon as possible after arrival in Canada so that they can begin legal employment immediately. Employers are legally obligated to request to see an employee's SIN Card within three days of the start of their employment, and employers are encouraged to have a verification process to ensure that the employee has the appropriate documents allowing them to work in Canada.

In order to apply for a SIN card the foreign national must attend in person at a Service Canada Center, which are located in towns and cities across the country. Upon attending at the Service Canada Center, documentation proving the (i) foreign national’s identity and (ii) permission to work in Canada, must be shown. The documents that Service Canada requires can be found at [www.servicecanada.gc.ca/eng/sc/sin](http://www.servicecanada.gc.ca/eng/sc/sin)

## Obtaining a driver's licence

In Canada, an individual must have his or her driver's licence at all times when driving, and if requested to do so, must present it to the authorities. The rules and regulations surrounding driving vary from province to province. Basic information for each province is listed below:

## Alberta

In Alberta, a valid United States licence may be exchanged for an equivalent Class 5, 6, or 7. Other countries that have a reciprocal agreement with Alberta include Austria, Belgium, France, Germany, Japan, South Korea, Switzerland and the United Kingdom of Great Britain (excluding Northern Ireland). A valid licence from any of these countries can be exchanged for a Class 5 when the applicant is presenting a valid licence of equivalent class. For more information please visit:

[www.transportation.alberta.ca/543.htm](http://www.transportation.alberta.ca/543.htm)

## British Columbia

British Columbia has a driver's licence exchange agreement with the United States, Austria, Germany, Switzerland, Japan and South Korea. However, the foreign national must have held his or her existing for at least two years to take advantage of the exchange agreement. A foreign national from a country not listed above will need to qualify for a British Columbia licence, which includes passing a road signs test, a knowledge test and a road test, along with passing the medical requirements and vision screening processes. For more information please visit:

[www.icbc.com/driver-licensing/getting-licensed](http://www.icbc.com/driver-licensing/getting-licensed)

## Manitoba

American drivers are able to surrender a valid U.S. driver's licence in exchange for a Manitoba licence. A foreign national from a country other than the United States who possesses a driver's licence from their home must pass Manitoba's knowledge, road, and vision tests. For more information please visit

[www.mpi.mb.ca/english/english.html](http://www.mpi.mb.ca/english/english.html).

## New Brunswick

Foreign nationals from Australia, Austria, Belgium, Denmark, France, Germany, Ireland, Italy, Netherlands (Holland), New Zealand, Norway, Portugal, Scotland, Spain, Sweden, Switzerland or United Kingdom (Except Northern Ireland), may exchange a valid driver's licence for a Class 5 New Brunswick licence. Nationals from any other country will have to take a full driver's licence examination, including written, vision and road tests. For more information please visit:

[www2.gnb.ca/content/gnb/en/services/services\\_renderer.200566.html](http://www2.gnb.ca/content/gnb/en/services/services_renderer.200566.html).

## Newfoundland & Labrador

Existing licence holders originating from the United States, Germany, Austria, Switzerland and the United Kingdom (excluding Northern Ireland) may exchange their licence for a Class 5 Newfoundland driver's licence without any tests having to be taken. Foreign nationals from all other countries are required to take and pass Newfoundland's knowledge, road, and vision tests. For more information please visit:

[www.gs.gov.nl.ca/drivers/index.html](http://www.gs.gov.nl.ca/drivers/index.html).

## Nova Scotia

Americans can exchange their existing driver's licence for a Class 5 licence. All other foreign nationals cannot exchange their licences, and they are required to take vision tests, written tests on safety rules, written road sign tests and road tests. For more information please visit:

[www.gov.ns.ca/snsmr/rmv/licence/default.asp](http://www.gov.ns.ca/snsmr/rmv/licence/default.asp).

## Ontario

Foreign national drivers from the Canadian Forces-Europe, United States, Japan, Korea, Switzerland, Germany, France, Great Britain, Austria and Belgium, Australia and the Isle of Man may exchange their licence for a full G licence. Foreign nationals from all other

countries must undergo complete testing for all classes of the licence requested, and must provide applicable medical and vision screening as required. All applicants from jurisdictions that do not have a reciprocal licence exchange agreement with Ontario may declare up to a maximum of 12 months of driving experience by presenting a valid out-of-country driver's licence (if it is not in English or French, it must be accompanied by a written translation from a qualified translator) and written authentication of their foreign driving experience from the originating licensing agency, or from the Embassy, Consulate or High Commissioner's office representing the jurisdiction. These applicants will not be required to serve all Graduated Licensing System mandatory wait periods. For more information please visit: [www.mto.gov.on.ca/english/dandv](http://www.mto.gov.on.ca/english/dandv).

#### Prince Edward Island

Americans can exchange their existing driver's licence for an equivalent Prince Edward Island driver's licence. All other foreign nationals that have never been licenced in the United States or Canada must complete a written, vision and driving test. For more information please visit: [www.gov.pe.ca/tir/index.php3?number=1003074&lang=E](http://www.gov.pe.ca/tir/index.php3?number=1003074&lang=E)

#### Quebec

It is possible to exchange a U.S. licence for a Québec licence without taking a test, but only for a passenger car or a moped. For vehicles other than passenger cars and mopeds, tests are required. Foreign nationals from Austria, Belgium, France, Germany, Japan, Netherlands, Republic of Korea (South Korea), Switzerland, Great Britain (excluding Northern Ireland), Taiwan or Turkey can exchange their licence for an equivalent Quebec licence. Foreign nationals from countries not listed above must undergo complete testing and conform to the applicable medical and vision screening procedures as required. For more information please visit: [www.saaq.gouv.qc.ca/en/driver\\_licence/index.php](http://www.saaq.gouv.qc.ca/en/driver_licence/index.php).

## Saskatchewan

Drivers from the United States, United Kingdom, Gibraltar, Northern Ireland, Switzerland, South Korea, Germany or Austria may exchange their licence for an equivalent Saskatchewan licence. Foreign nationals from all other countries must complete written, vision and road examinations prior to being issued a Saskatchewan driver's licence. For more information please visit:

[www.sgi.sk.ca/sgi\\_pub/drivers\\_licences/how\\_to\\_get\\_a\\_licence.htm](http://www.sgi.sk.ca/sgi_pub/drivers_licences/how_to_get_a_licence.htm).

# Permanent Resident Status

## Introduction

A permanent resident (PR) is a foreign national who has been granted PR status in Canada and has not lost such status. A person can lose permanent residence status by (i) not complying with the conditions attached to the status, (ii) becoming inadmissible (often due to committing crimes), or (iii) failing to meet the residency requirements. These are all “negative” ways to lose status.

The positive way to lose permanent residency status, and the far more common way for most immigrants, is through a grant of Canadian citizenship. After accumulating three years of residency, most PRs are eligible to become Canadian citizens and, in doing so, lose their PR status.

PRs generally have the right to enter or remain in Canada and may be employed in Canada without a work permit. To maintain their status, permanent residents must be physically present in Canada for at least 730 days out of any five year period. Exemptions to this rule include time spent outside Canada working for a Canadian company or government abroad and accompanying a Canadian spouse who has been transferred. These exemptions are discussed in more detail in “Departure Issues” below.

## Permanent Residence Categories

Economic immigrants can apply for permanent resident status pursuant to one of the following federal classes: (i) Federal Skilled Worker, (ii) Canadian Experience, or (iii) Business. However, there are additional economic immigration programs at the provincial level, whereby the provinces have created their own PNP selection criteria based on their needs. Foreign nationals destined for the province of Quebec may apply under Quebec’s Skilled Worker or Business class

categories, which have different selection criteria than the analogous federal class categories.

## Federal Skilled Worker Class

Federal Skilled Worker (“FSW”) category applicants are selected based on their ability to successfully establish themselves economically in Canada. FSWs are assessed under a point system which takes into consideration factors such as age, language skills, education, work experience, arranged employment, and adaptability. Applicants must achieve a minimum of 67 points, although immigration officers may exercise positive (or negative) discretion in granting (or refusing) permanent residence if an applicants’ points do not adequately reflect their ability to become economically established in Canada.

It is important to note that processing times for FSWs have been much longer than for provincially selected immigrants under a PNP. This trend is changing somewhat, given two new federal programs, Bill C-50 and the Canadian Experience Class (“CEC”), described below.

### Bill C-50: Ministerial Instructions

In late 2008, the federal government introduced changes to the processing and eligibility of applicants to the FSW class. Subsequently in June of 2010, CIC implemented further amendments which restricted the FSW category. For example, individuals outside Canada without Arranged Employment were limited in their ability to utilize this category. CIC has set an annual maximum of 20,000 FSW applications for those applying without Arranged Employment, with a maximum of 1,000 in any listed occupation. CIC argues that a cap is the only guaranteed way to limit the number of applications it receives, and that without the cap on applications, the backlog and processing times will only get longer.

FSW applications continue to be processed through the Centralized Intake Office (“CIO”) in Sydney, Nova Scotia. The submission must include all documents relating to the application. All principal applicants filing an application for permanent residence to the CIO must fit into one of the following two streams:

- have at least one year of full-time work experience in one of the “high demand” occupations, which cut across numerous industry sectors and skill levels, but all within NOC A, B, and O; and/or
- have Arranged Employment, which requires either an existing work permit and a full-time, permanent offer of employment with an established company or business, or an Arranged Employment Opinion (“AEO”).

Applicants fitting into one of the two streams will pass the first step, after which the CIO will forward the application to the appropriate visa office abroad for processing. During the second step at the visa office, the candidate will still be required to meet the 67-point threshold, along with all other regulatory requirements. Bill C-50, like the CEC, clearly shifts immigration priorities to the job market – whether through a permanent job offer or the occupation list (See Annex A).

The process is now based on a “first come, first serve” principle: as soon as the cap in that occupation has been reached, no further applications will be processed for the year, and all new application packages and processing fees will be returned. The number of applications received to date within each occupation can be found at: <http://www.cic.gc.ca/english/immigrate/skilled/complete-applications.asp>

## Documentary Requirements

The documentation typically required for a Federal Skilled Worker application includes:

- fees;
- CIC application forms;
- Police Clearance Certificates;
- copy of passport data page;
- copy of detailed résumé;
- copies of educational degrees/certificates;
- job references;
- company or school information, if currently working or studying;
- current work or study permit (if applicable);
- AEO (if applicable);
- English or French language test results\*\*;
- proof of funds;
- passport size photographs; and
- application and landing fees.

\*\*All principal applicants applying by way of the FSW and CEC streams are required to include the results of an English or French language test as part of their application. There are no exceptions to this rule, regardless of nationality, current residency or educational background. The test must have been written within the 2 years preceding the date of the application.

## The Canadian Experience Class

In September of 2008, the federal government introduced the Canadian Experience Class (“CEC”). Under this program, certain temporary foreign workers qualify to immigrate if they have 24 months of Canadian work experience within the previous 36-month period. Graduates from certain Canadian post-secondary programs are also eligible if they have obtained 12 months of full-time work experience within the 24 months preceding the date of filing the permanent residence application. All work experience must be in skilled occupations and trades under NOC codes O, A, and B.

CEC is a pass-fail rather than a point system: as long as the applicant has the requisite work and/or student experience, and meets benchmark language skills, that person will pass, and may obtain Canadian permanent residence shortly thereafter. The CEC category benefits companies employing foreign workers and international graduates by allowing those individuals to remain in Canada permanently, in the fastest priority queue. In the past, many workers and international students had to return home, potentially not being able to return to Canada.

While the CEC has slowed since initial projections of six month service standards, it still offers faster processing times than FSW applications: CEC applications can take ten to twenty months, whereas FSW applications generally have longer processing times.

## Federal Business Immigration Classes

Business immigrants are chosen for their prospective contribution to the Canadian economy and the likelihood that their presence will create job opportunities for Canadians. There are three basic classes of federal business immigrants: (i) Entrepreneurs, (ii) Investors, and (iii) Self-Employed Persons. In addition, many of the provinces have their own business programs based on unique selection criteria.

It should be noted that federal business immigrant candidates are still assessed on the point system. However, the pass mark for all three classes of business immigrants is 35 instead of 67 points, based on age, education, language skills, business experience, and adaptability. Applicants rarely have a problem reaching this lower point level. Rather, it is the program criteria under each of the three categories which can be challenging to attain, and that discussion follows.

## Entrepreneur Category

The Canadian Entrepreneur category is designed for the businessperson who wishes to be an active participant in a business enterprise, and who has the financial and managerial ability to start

that business, purchase an existing business or portion thereof, participate in a joint venture, or otherwise participate in a qualifying business venture. An applicant under the Entrepreneur category must meet the definition of an “entrepreneur” and the minimum points required. To qualify as an “entrepreneur”, the applicant must:

- have “Business Experience”;
- have legally obtained a “net worth” of at least CAD\$300,000; and,
- meet the following conditions within the three-year period immediately after becoming a permanent resident:
  - control a percentage of equity of a qualifying Canadian business equal to or greater than 33 1/3 per cent;
  - provide active and ongoing management of the “Qualifying Canadian Business”; and
  - create at least one full-time job equivalent in that business for Canadian citizens or permanent residents, other than the entrepreneur and his/her family members.

“Business Experience” for an entrepreneur is defined as: (i) the management of a “Qualifying Business” (defined below) and (ii) the control of a percentage of the equity of a qualifying business for at least two years in the period beginning five years before the date of application for a permanent resident visa, and ending on the day a determination is made regarding that application.

“Net worth” means the fair market value of the assets of the applicant and spouse or common-law partner, minus the fair market value of the liabilities of the applicant and spouse or common-law partner.

“Qualifying Canadian Business” means a business operated in Canada (other than a business operated primarily to derive investment income) for which there is, in any year within the three-year period after the

individual becomes a permanent resident, documentary evidence of any two of the following:

- the percentage of equity multiplied by the number of full-time job equivalents is equal to or greater than two full-time job equivalents per year;
- the percentage of equity multiplied by the total annual sales is equal to or greater than CAD\$250,000;
- the percentage of equity multiplied by the net income in the year is equal to or greater than CAD\$25,000; and,
- the percentage of equity multiplied by the net assets at the end of the year is equal to or greater than CAD\$125,000.

Entrepreneurs will also be assessed on a point system based on age, education, language skills, relevant work experience, and adaptability.

If the foreign national's application is approved, the entrepreneur and his/her accompanying dependants will be admitted to Canada on the condition that all the above conditions are met within three years. The applicant will be required to provide monitoring reports to CIC to evidence compliance with the conditions within the three years after s/he becomes a permanent resident. Otherwise, the entire family's permanent resident status can be revoked.

## Investor Category

An applicant under the federal Investor category must meet the definition of an "investor" and the minimum points required. An "investor" is a foreign national who:

- has business experience;
- has a legally obtained net worth of at least CAD\$1,600,000.00; and
- indicates in writing to an officer that s/he intends to make or has made an investment of at least CAD\$800,000 with an approved facilitator. The applicant's investment is returned

after a five-year period, without interest. There are alternatives to paying the entire CAD\$800,000, such as financing plans available from several Canadian financial institutions. Such plans cost approximately CAD\$175,000-\$220,000, where the amount is paid to the institution and not returned to the Investor at the end of 5 years.

“Business experience” for an Investor is the same as for an Entrepreneur, with the option of having been a manager, rather than an owner/operator of a business outside Canada. Specifically, the investor may qualify if s/he actively managed at least five full-time job equivalents in a business for at least two years in the period beginning five years before the date of the application and ending on the date a determination is made on the application. Note, however that the management experience considered is narrower than that of the Quebec program, in that managing in a public sector (government) context and/or professional services practice, will not be considered. There are other advantages of the Quebec program including processing speed, that should also always be considered when applying in this category.

“Qualifying Business” for an Investor is the same as for an Entrepreneur (see above). Investors are assessed on the same point system applicable to the Entrepreneur category.

## Self-Employed Persons

An applicant under the Self-Employed category must meet the definition of a “self-employed person” and the minimum 35 points required. A “self-employed person” is a foreign national who:

- has relevant experience;
- has the intention and ability to be self-employed in Canada; and
- makes a significant contribution to specified economic activities in Canada (cultural activities, athletics, or the purchase and management of a farm).

“Relevant experience” means at least two years, during the period beginning five years before the date of the application and ending on the date a determination is made on the application, of one of the following types of experience:

- self-employment in cultural activities or athletics;
- participation at a world-class level in cultural activities or athletics; or
- farm management experience.

With respect to the 35-point level required, self-employed persons are assessed on the same criteria as those in the Investor and Entrepreneur categories.

## Documentary Requirements

Paperwork for the three Business categories, aside from mandatory forms, is the most fact-dependant of all immigration categories. The package must be tailored according to the plans of the applicant (particularly for Self-Employed and Entrepreneur applicants) and the business background described in detail (in all three cases). Other special forms are required, such as Schedule 6 of the IMM0008 forms. All proof of assets (including bank accounts, investment portfolios, home ownership and other asset valuations) should be included in the application. Accumulation of wealth and source of funds is the largest documentary and evidentiary challenge for Investors. Management and/or business experience must be clearly proven with documentation. Please consult us if filing one of these applications.

## Family Class

To qualify under the Family Class, a “member of the family class” may be sponsored by an individual who is at least eighteen years old, resides in Canada, and is a citizen or a permanent resident of Canada. A “member of the family class” includes the sponsor’s:

- spouse or common law partner (including same-sex partner) or conjugal partner;
- dependent child(ren);
- father or mother;
- grandfather or grandmother;
- certain adopted children; and
- brothers or sisters, nephews or nieces, granddaughters or grandsons who are orphaned, under 18 years of age and not married or in a common-law relationship.

If the sponsor does not have a living spouse or common-law partner, conjugal partner, a son or daughter, parent, grandparent, sibling, uncle, aunt, nephew or niece who could be sponsored as a member of the family class, and does not have any relative who is a Canadian citizen or a permanent resident or registered as an Indian under the *Indian Act*, s/he may sponsor another relative regardless of age or relationship.

“Conjugal partner” is defined under the immigration legislation as a foreign national, residing outside Canada, who is in a conjugal relationship with the sponsor and has been in that relationship for at least one year, but does not cohabit with the person. CIC will generally only approve such applications in unique cases, such as where the couple cannot cohabit due to penal, discrimination or immigration hurdles. Couples should always apply under the common law or traditional (married) spousal definition where possible.

“Common-law partner” is defined under the immigration legislation as a person who is cohabiting with another in a conjugal relationship, and has cohabited with that person for at least one year. For both this category and the conjugal partnership, objective evidence must be provided to document the history of the union and the close ties between the two individuals. Documentary evidence should include copies of joint bank accounts, insurance policies, pension benefits, wills, and anything else that can show legitimate union. Evidence of common law cohabitation generally includes copies of joint tenancy

or lease agreements, if renting, and joint community participation (such as church membership, etc.). Where geographic separation exists, items such as proof of communication (phone bills, letters, emails) and travel receipts should be provided.

Detailed financial assessments of sponsors will also be conducted. A formula based on the Low Income Cut-Off (“LICO”) figures published by Statistics Canada is used to determine whether the sponsor has sufficient resources to meet the needs of the sponsored family member and dependants. This formula is not applied where a spouse, common-law partner, conjugal partner, or dependent children are sponsored.

It is possible to sponsor a spouse from within Canada under certain circumstances. However, a spousal sponsorship application filed at a visa office abroad is still quicker than the inland route, so it is important to consider the relative benefits of the location of filing.

On November 24, 2010, CIC introduced a pilot project in Ontario to assist foreign spouses and dependant children of Canadian citizens or permanent residents. If eligible, foreign spouses or dependant children can apply for open work permits for a maximum period of two years, to enable spouses and dependant children to work while they wait for their permanent residence application to be processed.

To be eligible, the returning Canadian citizen or permanent resident who is sponsoring the foreign national must:

- be returning to Ontario, Canada;
- be engaged as a healthcare professional or as an academic in a public post-secondary institution; and
- have submitted a Family Class application which has already been approved by CPC in Mississauga.

This pilot project runs until May 24, 2012.

## Customs for Permanent Residents

Prior to entering Canada as a Permanent Resident, the foreign national is customarily required to complete forms B4 and B4A which will need to be presented to the CBSA Officer upon arrival. This is a declaration listing all the household/non-commercial belongings that will be accompanying them.

Generally, a foreign national can bring these items into Canada on a tax/duty free basis. If applicable, the list of goods should be divided into two parts: one should list the items that are accompanying the foreign national (e.g. clothing/jewellery/bedding etc.) and the other should list which goods that are to follow later (e.g. larger furniture). In order to qualify for duty free entry (subject to limited exceptions) the goods must satisfy criteria. The goods must:

- (a) be imported by the settler for the settler's household or personal use; and
- (b) have been “owned, possessed and used abroad by the settler prior to the settler's arrival in Canada”.

In addition, any goods that are imported under this waiver cannot be sold or otherwise disposed of within 12 months after importation or the items will be subject to the duties that would have otherwise been payable.

In order to benefit from the duty free status, it is crucial that the goods that the foreign national transports to Canada arrive **after** the physical landing. Although there is no time limit for importing “goods to follow” listed in the B4 form, it is recommended that such goods are imported within a period of approximately six months.

## Maintaining Permanent Residence

A permanent resident of Canada who is planning to reside outside Canada should bear in mind the possibility that s/he may lose Canadian permanent residency status should s/he reside outside of Canada for too long a period. When an individual ceases to be a Canadian permanent resident, the individual is deemed to have disposed of all of her or his property for proceeds equal to the property's fair market value (see "Tax Effect of a Subsequent Departure from Canada" below).

Pursuant to IRPA, if a permanent resident of Canada wants to retain his or her permanent resident status, he or she is required to be physically present in Canada for at least 730 days of any five-year period. However, a permanent resident who is absent from Canada for more than 730 days of any five-year period may be able to retain his or her permanent resident status if the reason for the absence is because the permanent resident is:

- accompanying a spouse, common-law partner, or parent (if the permanent resident is a child who is under the age of 22), who is a Canadian citizen;
- transferred outside Canada on a full-time basis by a "Canadian business" or the public service of Canada or of a province; or
- accompanying a Canadian permanent resident spouse, common-law partner, or parent (for children under the age of 22), who is employed outside Canada on a full-time basis for a Canadian business or the public service of Canada or of a province.

In addition, if an immigration officer determines that humanitarian and compassionate grounds exist to justify the retention of permanent resident status, any breach of the residency requirement may be overcome.

## How is Employment on a Full-Time Basis Defined?

Pursuant to the regulations, an individual will be considered to be employed on a full-time basis by a Canadian business, or in the public service of Canada or of a province, if:

- the individual is an employee of, or under contract to, provide services to, a Canadian business or the public service of Canada or of a province; and
- the individual is assigned on a full-time basis as a term of the employment or contract to:
  - a position outside Canada;
  - an affiliated enterprise outside Canada; or
  - a client of the Canadian business or the public service outside Canada.

## How is a “Canadian Business” Defined?

The regulations define a “Canadian business” as:

- a corporation that has an ongoing operation in Canada;
- an enterprise that has an ongoing operation in Canada, is capable of generating revenue, is carried on in anticipation of profit, and the majority of voting or ownership interests is held by Canadian citizens, permanent residents, or Canadian businesses; or
- an organization or enterprise created by the Laws of Canada or a province.

## Permanent Resident Cards

Permanent residents who travel outside Canada for business or other purposes must also be aware of the Permanent Resident (“PR”) Card issued to permanent residents of Canada.

All permanent residents travelling outside Canada will be required to present a valid PR Card in order to board any commercial carrier (plane, train, boat, etc.) to re-enter Canada. PR Cards are valid up to a maximum of 5 years.

An application made by an existing permanent resident for a new PR Card is filed at the PR Card Centre in Sydney, Nova Scotia. Once approved, a letter is sent to the address listed on the application form, which must be a Canadian address. The letter advises the applicant when and where s/he can pick up the PR Card.

At the time of writing, the processing time for a PR Card application made by an existing permanent resident is 90 calendar days. For a new permanent resident, s/he can expect to receive the PR Card approximately 30 days after having activated his or her PR status.

For security purposes, PR Cards will not be mailed by the PR Card Centre or CIC to addresses outside Canada. For new permanent residents, the card is sent from the PR Card Centre to the Canadian address used by the applicant upon activating PR status. For existing permanent residents, the PR Card is sent to the CIC office closest to the Canadian address stated on the application form, which may be the applicant's Canadian address, or the Canadian address of his or her counsel. The applicant is required to pick up the new card in person at that CIC office.

If a permanent resident is outside Canada and does not have a PR Card, s/he will be required to obtain a "travel document" from a visa post outside Canada in order to re-enter Canada, if from a "visa required" country.

## Travel Documents

A Travel Document is issued to a permanent resident who is outside Canada and who does not have a PR Card, whether due to it being lost, stolen, or not yet issued. A travel document may be issued if an immigration officer determines that the permanent resident:

- has complied with the residency obligation;
- has not complied with the residency requirements, but the officer has determined that humanitarian and compassionate factors exist to overcome the breach of the permanent residency requirement;
- has not complied with the residency requirements, but was physically present in Canada at least once within the past 365 days before the examination and either an appeal to the Immigration Appeal Division has been made but not finally determined, or the period for making such an appeal has not yet expired; or
- has not complied with the residency requirements, but has filed an appeal with the Immigration Appeal Division within the prescribed period and the Division has ordered the presence of the permanent resident to attend the appeal hearing.

# Immigrant Tax and Trusts

## Tax Effect of a Subsequent Departure from Canada

When an individual ceases to be a Canadian resident for Canadian tax purposes, that individual is deemed to have disposed of all of his or her property for proceeds equal to the property's fair market value. The difference between the tax cost of the property and its then fair market value is subject to tax in Canada on departure. Property excluded from the deemed disposition rules include: (i) real property situated in Canada; (ii) property used in a Canadian business; and (iii) excluded rights and interests (including rights in Canadian-resident trusts and interests in non-resident testamentary trusts). In addition, when an individual has been resident in Canada for a total of no more than 60 months during the prior 120 months, property that was owned by the individual at the time when he or she last became resident in Canada or that was acquired by the individual by inheritance or bequest after he or she last became resident in Canada is also excluded from the deemed disposition on departure.

In lieu of paying the resulting departure tax upon emigration, the individual may elect, on giving security acceptable to Canada Revenue Agency ([www.cra-arc.gc.ca](http://www.cra-arc.gc.ca)), to defer payment of departure tax.

## Immigration Trusts

It is possible for an individual to avoid Canadian tax on the income or capital gains generated by his or her assets (with the exception of Canadian-*situs* assets) for the first 60 months of the individual's residence in Canada by establishing a non-resident trust and transferring all of his or her non-Canadian *situs* assets to the trust. Persons contemplating business immigration to Canada, whether through one of the federal or provincial programs, may wish to consider setting up an immigration trust to take advantage of this tax

holiday. What follows is a summary of considerations in the area of immigration trusts.

## How Immigration Trusts Work

When an individual becomes a resident of Canada, he or she becomes taxable on his or her worldwide income, regardless of where the income-generating assets (i.e. dividends, rent, interest, and business profits) are located. However, if properly structured, immigrants can avoid Canadian tax on the income or capital gains generated by their non-Canadian assets during the first 60 months that they are resident in Canada. In order to avoid paying Canadian tax on income or gains from such assets, an individual must establish a discretionary trust in any jurisdiction other than Canada, and then transfer such income-producing assets to a non-resident trust either prior to or after arrival in Canada. This structure is commonly referred to as a “five-year immigration trust” (an “Immigration Trust”).

There are no specific requirements, language, or structure required for a trust to qualify as an Immigration Trust, except that it cannot be resident in Canada. Generally speaking, provided that (i) the trustees of the trust are non-residents of Canada, (ii) the trustees do not meet in Canada, and (iii) the “central management and control” of the trust is not in Canada, the Immigration Trust should not be considered to be resident in Canada. After a contributor to the Immigration Trust has been resident in Canada for 60 months, the trust will be deemed to be resident in Canada.

The Immigration Trust can distribute capital to Canadian-resident beneficiaries on a tax-free basis.

Since the Immigration Trust is not resident in Canada, the income of the Immigration Trust is generally not taxable in Canada. However, income earned in a year by the Immigration Trust that is subsequently paid out of the trust to the Canadian-resident beneficiaries in the same year that it was earned is taxable in Canada as income in the hands of the Canadian resident-beneficiaries. Fortunately, it is acceptable for

income earned by the Immigration Trust in a year to be “capitalized” at the end of the year and then distributed to the Canadian-resident beneficiaries as capital in the following year. As a result, provided that the Immigration Trust gives the trustees the discretion to capitalize income and distribute capital, the Canadian-resident beneficiaries should not pay any Canadian income tax on any distributions out of the capital of the Immigration Trust during the five-year period.

Both Canadian-resident contributor(s) and Canadian-resident beneficiaries of the Immigration Trust must annually report their contributions and loans to, and distributions and loans from the Immigration Trust (except for the year in which they first become resident in Canada).

## The “Step-Up” to Fair Market Value

On becoming resident in Canada, an immigrant is generally deemed to have disposed of and immediately re-purchased all his or her assets for Canadian tax purposes at the fair market value of those assets on the day the immigrant becomes a resident of Canada (generally, the day of arrival). On any subsequent sale of those assets, the immigrant is taxable only on any increase in the fair market value of the assets since becoming resident in Canada.

In Canada, 50% of capital gains are included in ordinary income and taxed at the individual’s graduated marginal tax rates on income. However, assets that have been transferred to an Immigration Trust are not owned by the immigrant at that time and any gain on the sale of the assets by the Immigration Trust during the 60-month period should not be subject to tax in Canada.

## After the 60-Month Exemption from Income Tax

In the year in which the contributor to the Immigration Trust becomes resident in Canada for more than 60 months (five years), the Immigration Trust is deemed to be resident in Canada from the

beginning of that year (January 1<sup>st</sup>), and therefore taxable in Canada on its worldwide income. However, if the Immigration Trust is migrated to Canada before the end of the 60-month period (generally by making the trustees residents of Canada), the retroactive tax liability can be avoided.

There are a variety of options open to the immigrant at the end of the 60-month period depending on the specific facts of each case. If the contributor(s) of the Immigration Trust leaves Canada before the end of the 60-month period, the assets in the Immigration Trust should never be subject to tax in Canada. We suggest that the contributor(s) of an Immigration Trust obtain Canadian tax advice well before the end of the 60-month period.

In short, if immigrants have significant assets outside of Canada, and there are no non-Canadian adverse consequences to transferring assets to such a trust, an Immigration Trust is generally advisable. As a practical matter, if the immigrant owns assets that generate more than CAD\$20,000 in taxable income each year, the Immigration Trust would likely pay for itself during the five-year period, depending on the facts in each case.

## Citizenship

The Citizenship Act provides that the Minister shall grant Canadian citizenship to any person who:

- makes an application;
- is eighteen years of age or over;
- has been admitted to Canada as a permanent resident;
- has not ceased to be a permanent resident;
- has resided in Canada for at least three years out of the four years immediately preceding the date of application (time spent in Canada before the applicant became a permanent resident will be counted as half time up to a total of one year,

if it falls within the four years immediately preceding the date of application);

- has adequate knowledge of either French or English;
- has adequate knowledge of Canada and of the responsibilities and privileges of citizenship; and
- is not under a deportation order.

Unlike permanent residence, there is far less scope to obtain citizenship without being physically present in Canada for the required amount of time. Prior to 2000, applicants could often convince Citizenship Judges and/or the Federal Court that they should be granted citizenship despite long absences from Canada. However, the trend over the past decade has been towards enforcing physical residency in Canada without any justification for absences.

A minor child of a Canadian citizen is also entitled to citizenship provided that the application for citizenship is made on behalf of the child by his or her parent or any other authorized person. Canadian citizens can make a citizenship application for adopted children without sponsoring them as permanent residents first.

Changes to the *Citizenship Act* effective June of 2010 allow a person born outside of Canada to qualify for Canadian citizenship only if a parent is a Canadian citizen by virtue of:

1. being born in Canada themselves; or
2. having immigrated to Canada and subsequently been granted citizenship (i.e. naturalized).

Fundamentally, this means that the right to claim citizenship cannot pass beyond the first generation of children born abroad.

## Annex A: Occupation List

1. 0631 Restaurant and Food Service Managers
2. 0811 Primary Production Managers (Except Agriculture)
3. 1122 Professional Occupations in Business Services to Management
4. 1233 Insurance Adjusters and Claims Examiners
5. 2121 Biologists and Related Scientists
6. 2151 Architects
7. 3111 Specialist Physicians
8. 3112 General Practitioners and Family Physicians
9. 3113 Dentists
10. 3131 Pharmacists
11. 3142 Physiotherapists
12. 3152 Registered Nurses
13. 3215 Medical Radiation Technologists
14. 3222 Dental Hygienists & Dental Therapists
15. 3233 Licensed Practical Nurses
16. 4151 Psychologists
17. 4152 Social Workers
18. 6241 Chefs
19. 6242 Cooks
20. 7215 Contractors and Supervisors, Carpentry Trades
21. 7216 Contractors and Supervisors, Mechanic Trades
22. 7241 Electricians (Except Industrial & Power System)
23. 7242 Industrial Electricians
24. 7251 Plumbers
25. 7265 Welders & Related Machine Operators
26. 7312 Heavy-Duty Equipment Mechanics
27. 7371 Crane Operators
28. 7372 Drillers & Blasters - Surface Mining, Quarrying & Construction
29. 8222 Supervisors, Oil and Gas Drilling and Service

See <http://www5.hrsdc.gc.ca/NOC/English/NOC/2006/Welcome.aspx> for the NOC job descriptions and educational requirements applicable to these occupations.

## Helpful Websites

Citizenship & Immigration Canada: [cic.gc.ca](http://cic.gc.ca)

HRSDC/Service Canada: [servicecanada.gc.ca](http://servicecanada.gc.ca)

Foreign Worker Page: [hrsdc.gc.ca/eng/workplaceskills/noc/index.shtml](http://hrsdc.gc.ca/eng/workplaceskills/noc/index.shtml)

Processing times: [cic.gc.ca/english/information/times/index.asp](http://cic.gc.ca/english/information/times/index.asp)

Visa offices: [gc.ca/english/information/offices/missions.asp](http://gc.ca/english/information/offices/missions.asp)

Medically designated countries:

[cic.gc.ca/ENGLISH/information/medical/dcl.asp](http://cic.gc.ca/ENGLISH/information/medical/dcl.asp)

CIC Forms: [cic.gc.ca/english/information/applications/index.asp](http://cic.gc.ca/english/information/applications/index.asp)

CIC Fees: [cic.gc.ca/english/information/fees/fees.asp](http://cic.gc.ca/english/information/fees/fees.asp)

IRPA (Immigration Legislation): <http://laws.justice.gc.ca/en/I-2.5/>

IRPR (Immigration Regulations): <http://laws.justice.gc.ca/en/I-2.5/SOR-2002-227/index.html>

Citizenship Act: <http://laws.justice.gc.ca/en/ShowFullDoc/cs/C-29///en>

CIC Policy Manuals: [cic.gc.ca/english/resources/manuals/index.asp](http://cic.gc.ca/english/resources/manuals/index.asp)

Canadian Diplomats Abroad: <http://w01.international.gc.ca/cra-rcr/Index.aspx?lang=eng>

PNP Information (for all provinces):

[cic.gc.ca/english/immigrate/provincial/index.asp](http://cic.gc.ca/english/immigrate/provincial/index.asp)

HRSDC Foreign Worker Page: [rhdcc-](http://rhdcc-)

[rsdc.gc.ca/eng/workplaceskills/foreign\\_worker/index.shtml](http://rsdc.gc.ca/eng/workplaceskills/foreign_worker/index.shtml)

HRSDCForms: [hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/fwp\\_forms.shtml](http://hrsdc.gc.ca/eng/workplaceskills/foreign_workers/fwp_forms.shtml)

HRSDC contact numbers (for all provinces):

[servicecanada.gc.ca/eng/common/contactus/index.shtml](http://servicecanada.gc.ca/eng/common/contactus/index.shtml)

[hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/listhrcc.shtml](http://hrsdc.gc.ca/eng/workplaceskills/foreign_workers/listhrcc.shtml)

Federal Government Telephone Directory: <http://sage-geds.tpsgc-pwgsc.gc.ca/>

Prevailing wage information: [labourmarketinformation.ca](http://labourmarketinformation.ca)

SIN (Social Insurance Number): [servicecanada.gc.ca/eng/sc/sin/index.shtml](http://servicecanada.gc.ca/eng/sc/sin/index.shtml)

OHIP (Ontario Health Insurance Plan):

[health.gov.on.ca/en/public/programs/ohip/](http://health.gov.on.ca/en/public/programs/ohip/) (for other provincial health plans, go to provincial web site)

Customs Information: [cbsa-asfc.gc.ca/menu-eng.html](http://cbsa-asfc.gc.ca/menu-eng.html)

Pearson Airport: [gtaa.com/en/home/](http://gtaa.com/en/home/)

Settlement information: [settlement.org](http://settlement.org)

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- **Business migration** for extended work assignments or inward investment
- **Large-scale transfers**, including transfers relating to “major business change” transactions, including mergers and acquisitions, divestitures, reorganizations, and reductions in force
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- **Transfer-related permanent immigration matters**, including permanent residence, citizenship and relocation of spouses and other dependents

- **Establishment of new business operations abroad**, including the transfer of senior personnel to establish operations and related corporate and securities and taxation advice
- **Ancillary transfer issues**, working with a range of professionals in relation to shipping of personal belongings and customs and excise duties
- **Worksite compliance management**, including development of corporate immigration policies, compliance protocols, records retentions, voluntary internal audit support, and real-time government audit management
- **Government relations**, including regulatory and legislative solutions for systemic problems or intervention on individual case complexities
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- **Dedicated extranet**, for easy and rapid knowledge sharing, as well as training customized to your particular business strategies
- **Client care**, including electronic bulletins on major changes in local immigration law and practice, a quarterly newsletter outlining global developments, provision of our global and regional immigration and mobility handbooks, and regular seminars and workshops for clients on a broad range of issues

For more information visit: [www.bakermckenzie.com/globalmigration/](http://www.bakermckenzie.com/globalmigration/)

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Alan Diner is head of the Canadian Global Mobility and Executive Transfers (Immigration) Practice Group. He is based out of Baker & McKenzie's Toronto office.

Alan's practice involves advising clients on all aspects of Canadian immigration and citizenship law, with a particular emphasis on business immigration and the temporary transfer of executives and professionals to Canada. His practice also involves coordinating multinational moves of executives between other countries for Canadian clients. He represents a wide range of corporations across industries, as well as individual immigrants and their families.

Prior to joining Baker & McKenzie, Alan served in a variety of positions in both the public and private sectors. In his past role as the Manager of Ontario's Provincial Nominee Program, Alan helped to design and implement Ontario's first-ever immigrant selection program. Previous roles in government included coordinating the \$920M Canada-Ontario Immigration Agreement for the Ministry of Citizenship and Immigration. He also held a previous senior government position advising companies and individuals on business immigration with respect to foreign investment, with Ontario's Ministry of Economic Development and Trade.

Alan's private sector work has included practice at major Canadian law firms primarily in business immigration, as well as in international trade and competition law. He has also worked as in-house counsel for an Ontario-based business. This background in corporate and international law provides a deep understanding of business needs and issues in an immigration law context.

Alan understands the art of the deal from all sides, and how to produce effective outcomes in an efficient and business-sensitive manner.

In addition to his business immigration experience, Alan has represented clients at all levels of the Immigration and Refugee Board, as well as at the Federal Court and Federal Court of Appeal (F.C.A.). Alan clerked for Mr. Justice Hugessen at the F.C.A. He is a former member of the National Executive of the Canadian Bar Association's Citizenship and Immigration Section. He also worked in international relations at the Organization of American States in Washington, DC, and human rights in Jamaica and Puerto Rico.

- Alan is admitted to practice law in Ontario and New York LL.B. He received his B.A from the University of Western Ontario in 1990, his LL.B. from Osgoode Hall Law School in 1993 and his LL.M. (International Trade and Competition Law) from Osgoode Hall Law School in 1998. Alan speaks French and Spanish. Alan speaks and publishes regularly.

Alan serves as President of his community's Residents' Association. He volunteers in other capacities, including serving as a mentor with TRIEC's initiatives for New Canadians.

Alan continues to regularly publish legal updates and Alerts. If you would like to receive any, please contact him at 416.865.2338 or [alan.diner@bakermckenzie.com](mailto:alan.diner@bakermckenzie.com).

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Rick practices mainly in Canadian corporate immigration law, assisting clients in effectively transferring personnel to Canada. Rick is highly experienced in providing advice to corporate clients and helping to create short- and long-term immigration strategies for their foreign national labour force. He also represents individual clients with respect to their Canadian immigration needs.

Rick has advised a wide variety of large multinational clients — including those in the financial services, information technology, engineering, energy, pharmaceutical and retail industries — on corporate immigration, both on a temporary and permanent basis.

Prior to joining Baker & McKenzie, Rick practiced for close to five years at one of Canada's largest corporate immigration law boutiques, where he was the head of the firm's Canadian Permanent Residence department.

He has spoken on the topic of Canadian immigration law at conferences, assisted with publications, and lectured at the University of Ottawa's faculty of law for a number of years.

Rick was admitted to practice law in Ontario in 2006. Rick graduated with distinction from Bishops University in 2002, where he obtained his Bachelor of Arts degree. He earned his Bachelor of Laws from the University of Western Ontario in 2005.

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