Incorporating in Canada

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Introduction

Canada offers many benefits to organizations seeking to incorporate, including a stable government, strong infrastructure and a highly-educated workforce. While the advantages of doing business in Canada are widespread, organizations should be careful when choosing where to incorporate. Although legal systems are similar across the country, there are some variations between the 10 provinces.

Canada's Provinces

The largest provinces in Canada are Ontario, Quebec, British Columbia and Alberta. Most English-speaking international businesses select Ontario, British Columbia or Quebec to incorporate in. This guide will focus on Ontario and British Columbia's corporate systems.

Province	Population	GDP	Largest City	Key Industries
Ontario	14,745,040	$857.4 billion	Toronto	Finance, manufacturing, real estate, construction
Quebec (French-speaking)	8,552,362	$439.4 billion	Montreal	Aerospace, finance, electrical generation
British Columbia	5,120,184	$295.4 billion	Vancouver	Forestry and mining, film and television, technology
Alberta	4,428,247	$344.8 billion	Calgary	Oil and gas, real estate, finance

Legal System

The Constitution of Canada divides powers between the federal government and the 10 provincial governments. Some industries are regulated by the federal government, while others are regulated by the provincial governments. For organizations operating in provincially-regulated industries, it is important to choose the right province to incorporate in.

Most of Canada, including the federal level, uses a common law legal system similar to the United Kingdom or United States. Quebec is the only jurisdiction that uses a civil code, similar to those used in most of continental Europe.

Areas of Federal Jurisdiction	Areas of Provincial Jurisdiction	Areas of Overlapping Jurisdiction
Shipping and Aviation Banking Intellectual Property National Defence Fisheries	Property and Civil Rights Municipalities and Cities Healthcare Education Local Matters	Taxation Natural Resources and the Environment Labour and Employment Transportation

Canadian Corporate Requirements

The most important consideration for international organizations incorporating in Canada is the director residency requirement. The chart below outlines these requirements for some of the most common places of incorporation.

Jurisdiction	Director Residency Requirements
Federal	At least 25% of directors must be Canadian residents
Ontario	At least 25% of directors must be Canadian residents
Quebec	No residency requirement
British Columbia	No residency requirement
Alberta	At least 25% of directors must be Canadian residents (though legislation has been proposed to remove the residency requirement)
Nova Scotia	No residency requirement

For U.S.-based companies seeking to incorporate in Canada, another important issue to consider is whether to form a ULC (unlimited liability company) or a traditional Canadian corporation. There is no difference between these two types of entities from a Canadian tax perspective, though depending on the facts and circumstances of the company, there may be a U.S. tax benefit. Most provinces do not allow for the formation of ULCs. However, British Columbia and Nova Scotia (neither of which has a director residency requirement) allow for the formation of ULCs.

For these two reasons, most of our international clients form their Canadian company in British Columbia, despite the fact that they intend to carry on business in Ontario.

Business Organizations

There are three main types of business organizations in Canada: corporations, partnerships and sole proprietorships. The vast majority of international businesses choose to run their Canadian operations as corporations. Each is compared in the chart below.

Type	Description
Corporation	Has a separate legal personality from the shareholders – shareholders are generally not liable for the corporation's debts Subject to corporate taxes Most common type of organization, especially for larger businesses Two types of corporations: traditional Canadian corporations and ULCs (which are treated as flow-through entities from a U.S. tax perspective)
Partnership	No separate legal personality – partners are each liable for the debts of the partnership Partners pay income tax on the partnership's earnings Effective for smaller organizations with a few key members Not effective for maximizing Canadian tax benefits like SR&ED or for limiting liability
Sole Proprietorship	No separate legal personality – business is legally the same as the owner The owner pays income tax on the business's earnings Usually only used for small businesses Not effective for maximizing Canadian tax benefits like SR&ED or for limiting liability

Corporate Governance

Canadian corporations are primarily run through the board of directors. Under the *Ontario Business Corporations Act* ("**OBCA**") and the *British Columbia Business Corporations Act* ("**BCBCA**"), directors are elected by the shareholders of the corporation. The directors are responsible for the management of the corporation, though they can hire officers to handle most of the day-to-day operations. During the incorporation process, we draft articles of incorporation and by-laws to govern how the corporation operates.

In both Ontario and British Columbia, corporations have significant flexibility in establishing their structures. Corporations can have different classes of shares with different rights, including non-voting shares.

Directors' Liability

While directors are generally not liable for the debts of the corporation, they can face liability in certain situations. For example, if a corporation is unable to pay the wages it owes to its employees, the directors can be held personally liable for up to two months of wages per employee in British Columbia, and up to six months in Ontario. Directors can also be liable for owed taxes or certain violations of each jurisdiction's corporate or securities acts.

Directors owe a duty of care and a duty of loyalty to the corporation. This means that they must act prudently in making decisions, and that they must put the interests of the corporation ahead of their own personal interests when making business decisions. The OBCA and BCBCA provide remedies to shareholders, directors, officers and other stakeholders against directors who violate these duties.

The most common remedy is known as the oppression remedy, which allows a court to award damages against the director or make orders changing the decision of the corporation. However, Canadian courts are highly deferential to directors in making business decisions. Courts are generally hesitant to interfere in the decisions of corporate directors as long as they are somewhat reasonable. This is known as the business judgement rule, and it provides significant protection to corporate directors.

Taxes

There are three main categories of taxes that affect businesses operating in Canada: Goods and Services Tax ("**GST**")/Harmonized Sales Tax ("**HST**") (a VAT equivalent), corporate tax and income tax. The federal and provincial governments offer many tax credits and rebates that can significantly reduce an organization's tax burden. Additionally, some structures of businesses and transactions enjoy special tax rates. There is no franchise tax in Canada.

(I) GST/HST + Sales Tax

All provinces and territories are subject to the federal GST, which is 5% on the sale of most goods and services. In addition, most provinces have provincial sales taxes.

In Ontario, the combined tax rate (known as the HST) is 13%. In British Columbia, the combined GST and provincial sales taxes amount to 12%. Alberta is the only province with no provincial sales tax.

(II) Corporate Tax

Corporations are subject to both federal and provincial corporate taxes. Provincial taxes are charged for corporate income generated by a permanent establishment in that province. The federal corporate tax rate is 15%.

Ontario has a corporate tax rate of 11.5%, with reduced rates for the first $500,000 of revenue if the company is a Canadian-controlled private corporation (which will not be the case for international clients incorporating a subsidiary in Canada). British Columbia's rate is 12%.

The applicable provincial tax rate is based on where the business operates, and not the province in which a business is incorporated. As a result, if a company incorporates in British Columbia but operates only in Ontario, British Columbia income tax will not be relevant.

(III) Income Tax

Canada has progressive income tax rates, where higher income brackets are charged higher tax rates. All tax residents of Canada are subject to Canadian income tax on their worldwide income. There are federal income taxes as well as provincial income taxes, which have varying rates between jurisdictions.

Those rates are outlined in the following charts for Canada, Ontario and British Columbia.

Federal Income Tax Rates

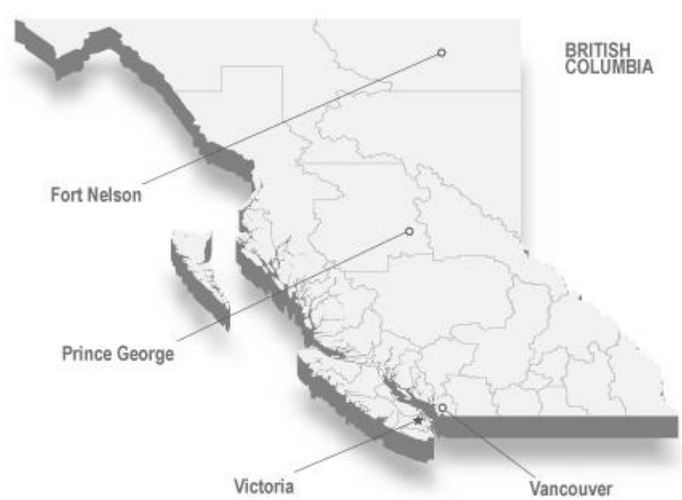
Income Bracket	Tax Rate
$0-$48,535	15%
$48,535-$97,069	20.5%
$97,069-$150,473	26%
$150,473-$214,368	29%
Over $214,368	33%

Ontario Income Tax Rates

Income Bracket	Tax Rate
$0-$43,906	5%
$43,907-$87,813	9.15%
$87,813-$150,000	11.16%
$150,000-$220,000	12.16%
Over $220,000	13.16%

British Columbia Income Tax Rates

Income Bracket	Tax Rate
$0-$40,707	5.06%
$40,707-$81,416	7.70%
$81,416-$93,476	10.50%
$93,476-113,506	12.29%
$113,506-$153,900	14.70%
Over $153,900	16.80%



Human Resources and Employment

Most Canadian provinces have labour and employment legislation, including employment standards, human rights codes, occupational health and safety and privacy laws. Usually unionized employees are subject to somewhat different rules than non-unionized employees. If a business is primarily involved in a federally regulated industry (such as interprovincial or international transportation or banking), then federal labour laws will apply. The rules are generally fairly similar across country, but with some key differences.

Hours of Work and Overtime

The standard work day in Ontario and British Columbia is eight hours, not including breaks. If employers wish for their employees to work more than this, it can be established in the employment agreement. Employees are entitled to a 30 minute unpaid break after every five hours of consecutive work. There are also requirements in both provinces for time off between shifts and days off in a week. In British Columbia, employers must provide 32 consecutive hours free from work each week. In Ontario, employers can choose to provide 24 consecutive hours free from work per week, or 48 consecutive hours bi-weekly.

In Ontario and British Columbia, most employees are eligible for overtime. Certain employees such as managers, regulated professionals and some high-skilled workers are not eligible for overtime. In Ontario, employees are entitled to overtime pay after 44 hours worked in a week. Overtime pay is 1.5 times the employee's normal hourly wage. In British Columbia, employees are entitled to overtime pay at a rate of 1.5 times the normal wage after eight hours worked in a day, or twice the normal rate after 12 hours worked in a day. Employees in British Columbia are also entitled to overtime pay if they work more than 40 hours in a week, not including any daily overtime hours.

Minimum Wage

In Ontario, the minimum wage is $14.00 per hour. In British Columbia, the minimum wage is currently $14.65 per hour.

Vacation Time and Statutory Holidays

Ontario and British Columbia each have 10 statutory holidays each year. Employees receive pay for a statutory holiday based on their average daily wage in the month prior. Most employees who are required to work on a statutory holiday must be paid at 1.5 times their normal hourly rate, as well as statutory holiday pay. In Ontario and British Columbia, employees are entitled to a minimum of two weeks of paid vacation annually. After three years' service with an employer, this increases to three weeks. In British Columbia, employers are required to ensure that employees take their vacation time each year.

Notice of Termination and Severance Pay

Upon termination without cause, employees are usually entitled to notice of termination or pay in lieu of notice, as well as severance pay in some jurisdictions. This is governed by both employment standards legislation and the common law. Under the British Columbia *Employment Standards Act*, employees are entitled to one to eight weeks of notice or pay in lieu of notice, depending on how long they have been with the employer. Ontario's *Employment Standards Act, 2000* also entitles employees to one to eight weeks of notice or pay in lieu of notice. Additionally, employees in Ontario with five or more years of service with a company with at least 50 employees or $2.5 million in payroll are entitled to severance pay of one week's pay per year of service, up to a maximum of 24 weeks' pay. Employers cannot contract out of these standards. Unlike in the United States, there is no "at will" employment in Canada.

Unless an employment contract explicitly states otherwise, employees are entitled to common law reasonable notice for termination without cause. This is usually significantly more than employees would be entitled to under the relevant employment standards legislation. Accordingly, it is important to have a strong and well-drafted termination provision in an employment contract.

Occupational Health and Safety

Each province in Canada has its own occupational health and safety legislation, but most have fairly similar requirements. There are requirements on both employers and employees, but broadly speaking, employers are responsible for maintaining a safe workplace. This can include providing safety equipment, having safety training and having protocols and practices in place to ensure employees perform their jobs safely. The provinces also have bodies that inspect workplaces and ensure compliance with the standards.

Each province has its own worker's compensation system. In Ontario, this is the Workplace Safety Insurance Board, which provides no-fault insurance for workplace injuries. British Columbia's Workers' Compensation Insurance fulfills a similar role. Employers remit fees that cover worker's medical expenses and lost wages in case of injury.

Contributions and Payroll Taxes

While employers in Ontario and British Columbia are not obligated to pay into private pension plans for their employees, they are required to make certain payroll deductions and payments. Employers must make deductions for the Canada Pension Plan ("**CPP**") and employment insurance. Employers in Ontario are also required to pay an additional 0.98% to 1.95% of total payroll in the provincial Employer Health Tax.

CPP contributions are paid by both the employer and the employee. All employees between the age of 18 and 69 must contribute to CPP for all annual income between $3,500 and $58,700. The employer is responsible for deducting 5.25% of each employee's eligible earnings every pay period. The employer then must contribute an additional 5.25% of each employee's eligible earnings every pay period.

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Fiona is known for her commitment to outstanding client service. Fiona's practice focuses on advising clients with respect to employment issues related to compliance with employment standards, human rights, pay equity and occupational health and safety requirements. She also coordinates a team of lawyers to assist her clients in corporate commercial matters, litigation, intellectual property, and other areas. Fiona's responsiveness, dedication to clear communication, and hands-on approach show that she is personally invested in the success of her clients.

Fiona frequently advises international clients expanding into Canada. She works closely with lawyers and patent agents in all major practice areas and many industries, including technology, cannabis, energy, retail, manufacturing, infrastructure, construction, and others to provide her clients with a full range of legal services to take their business to the next level.

Fiona is a practical lawyer who enjoys working with clients to develop workable business solutions.

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With a strong education and background in business, Aaron brings a sensibility for framing his legal advice from the perspective of a business professional. The underlying question that consistently guides his work is whether he is adding value to his clients and furthering their business objectives.

Aaron has helped dozens of companies from the U.S., Europe, and Central and South America establish Canadian subsidiaries. He works closely with Aird & Berlis tax experts to ensure subsidiaries are set-up in a tax efficient manner. As a member of the firm's Privacy & Data Security Group, Aaron regularly advises companies that are establishing Canadian operations about Canadian privacy matters.

Aaron has a keen interest in legal technology and has played a leading role in the firm's adoption of artificial intelligence, legal project management, and data analytics tools that are transforming the practice of law. In 2018, Aaron was seconded to Diligen, a leading AI contract review company based in Toronto. Aaron is an active member of the firm's Technology Advisory Committee and an advisor to a number of leading legal tech startups.

Summer student Matthew Patterson contributed to this article.