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Navigating Canada's COVID Border Restrictions: Facilitating Cross-Border Business as a U.S. Corporate Entity

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Unlike the increasingly relaxed border policies of the United States, Canada's borders remain relatively closed to all non-essential travel due to the COVID-19 pandemic. Canadian border policies also continue to be stringent. Except for those who benefit from certain exemptions, travellers who are permitted to come to Canada by airplane are currently subject to a 14-day quarantine period, with the first three days being in a government-authorized accommodation at their own cost. [1] The Federal Court decision of the Chief Justice on June 18, 2021, upheld the hotel quarantine provisions for those arriving by air. [2] Travellers are also required to undergo PCR testing before departure, upon arrival to Canada and during the quarantine period.

Today the Government of Canada announced that starting on July 5, 2021, fully vaccinated Canadian citizens and permanent residents will be able to enter Canada and not need to quarantine at all. [3] Yet for a U.S. citizen or other foreign national to enter Canada from the U.S., they must be travelling for a non-discretionary reason, they must be asymptomatic and must be able to comply with the quarantine requirements. [4] These restrictions have acted as a barrier to U.S. businesses seeking entry to Canada during the pandemic, as they now need to not only comply with existing work permit regulations but must also take on the costs of their employees' quarantine requirements. Consequently, whereas the U.S. is increasingly becoming 'open for business', the Canadian borders remain largely unreceptive to foreign business visitors.

Canada's mandatory quarantine measures have recently been critiqued by economists and health experts alike. In May of 2021 the Ministry of Health's COVID-19 Testing and Screening Expert Advisory Panel released a report

[1] Canada, Health Canada, Priority strategies to optimize testing and quarantine at Canada's borders (Report), (Ottawa: Government of Canada, May 2021) at 3, available online (pdf): <https://www.canada.ca/content/dam/hc-sc/documents/services/drugs-health-products/covid19-industry/medical-devices/testing-screening-advisory-panel/reports-summaries/priority-strategies/borders-frontieres-eng.pdf>.

[2] See *Spencer v Canada (Health)*, 2021 FC 621.

[3] "Some travel restrictions easing July 5 for fully vaccinated people with proof" (21 June 2021), online: CBC News <https://www.cbc.ca/news/politics/fully-vaccinated-canadians-travel-july-1.6073480>.

[4] Canada, Canadian Border Services Agency, Restricting entry of U.S citizens and other foreign nationals into Canada from the United States (all modes), (Shift Briefing Bulletin), (Novel Coronavirus Task Force) at 1, updated 21 April 2020.

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recommending that border measures be adapted with the changing nature of the pandemic to reflect current health data. One key recommendation in the report was for fully vaccinated travellers to be exempt from all quarantine requirements, and subject only to a PCR test on arrival. The Canadian Government's announcement today was a significant step towards meeting this recommendation. Yet, no decision has been made so far about relaxing restrictions for foreign travellers. Further, Canada has just decided that land border restrictions with the U.S. are extended to July 21, 2021. [5]

One critical barrier to the ability of American businesses to gain entry at the Canadian border has been the lack of transparency surrounding what qualifies as discretionary versus non-discretionary travel. A Canadian Border Services Agency (CBSA) directive and related Annexes dated March 26 – April 10, 2020, defined "discretionary" travel as being for the purpose of tourism, recreation, social visits to friends or family, religious functions, shopping for non-essential goods, and entertainment. [6] The directive further states that economic services and supply chains, critical infrastructure support, and cross-border employment are to be considered non-discretionary and therefore allowed. [7] According to the directive, the purpose of this distinction is to protect Canadian nationals from virus outbreak while allowing entry to foreign nationals whose travel is essential to Canadian commerce, trade, economic services, and supply chains. [8] However, many foreign business personnel are still being subject to Canada's strict border restriction regime, as they may not be exempt from the active travel restrictions.

Travellers coming to Canada have the responsibility of demonstrating their qualification for quarantine exemption. Even where a person may appear to qualify for entry to Canada based on the current exemption eligibility criteria, they may be denied at the port of entry. [9] Employers must ensure that their employees are equipped with appropriate documentation explaining the nature and necessity of their work to ensure they are permitted entry under the relevant exemptions. Further, there are limited circumstances in which persons coming to Canada from the U.S. for economic reasons can currently obtain exemption from the quarantine restrictions. Provincial and territorial announcements have highlighted that only organizations and personnel necessary to provide "essential services" are permitted to operate and seek entry to Canada. Certain American businesses may currently qualify under this exemption criteria, as critical infrastructure work is considered to be essential.

Canada's *National Strategy for Critical Infrastructure* defines critical infrastructure as the processes, systems, facilities, technologies, networks, assets, and services essential to the health, safety, security or economic well-being of Canadians and the effective functioning of government. The Strategy classifies critical infrastructure in Canada according to the following sectors: Energy and Utilities,

[5] Sarah Turnbull, "U.S. border restrictions extended to July 21, PM cites desire to stick to vaccine targets" (18 June 2021), online: CTV News <<https://www.ctvnews.ca/health/coronavirus/u-s-border-restrictions-extended-to-july-21-pm-cites-desire-to-stick-to-vaccine-targets-1.5476103>>.

[6] Canada, Canadian Border Services Agency, Entry Restrictions and Exemptions – Essential/Non-Discretionary Travel and Non-Essential/Discretionary Travel, (Annex A to 2020-HQ-03-26 and 2020-AC-03-26-B), 10 April 2020.

[7] *Ibid.*

[8] *Ibid.*

[9] Mandatory quarantine or isolation, 14 June 2021, "Who is exempt from quarantine", online: Government of Canada <<https://travel.gc.ca/travel-covid/travel-restrictions/isolation#exemptions>>.



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Information and Communication Technologies, Finance, Health, Food, Water, Transportation, Safety, Government, and Manufacturing. *Public Safety Canada* has compiled a non-exhaustive list of essential services and functions to assist in enabling the movement of critical infrastructure workers within and between jurisdictions, including from the United States to Canada. These services and functions are considered essential to preserving life, health, and basic societal functioning. These include, but are not limited to, workers who are essential to the supply of critical goods such as food and medicines.

There are few other active classes of exemptions available to U.S. businesses outside of critical infrastructure work. However, exemptions to travel and quarantine requirements may also be granted where the work being done is of national interest, or, where those coming to Canada are also doing so for the purpose of family reunification. [10] Persons from the U.S. who are travelling to reunite with their immediate or extended family – who are in Canada with legal status – and are staying for 15 days or more will be exempted from the travel restrictions. [11] A person may also be exempted from quarantine requirements if they are assisting with specific COVID-related provincial or territorial projects. However, economic pathways from the U.S. to Canada remain generally narrow, prompting ongoing concern from economists and stakeholders.

Unsurprisingly, pressure on the Canadian Government to open Canada’s borders is mounting on behalf of both Canadian and American businesses [12]. Confusion surrounding the plausibility of cross-border business endeavours from the U.S. to Canada remains high, and many economic sectors in Canada are struggling as a result. [13] With vaccination rates increasing the time has come for the Canadian Government to begin to employ border policies that not only protect the people within the nation, but Canada’s economy as well. In the meantime, American business owners need to stay informed as to what border restriction exemptions are available to them.

[10] Non-optional and non-discretionary travel: COVID-19 program delivery, 2 November 2020, online: Government of Canada <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/service-delivery/coronavirus/travel-restrictions/non-optional-non-discretionary.html>>.

[11] *Ibid.*

[12] Campbell Clark, “It’s time to wake up and reopen the Canada-U.S. border”, (4 June 2021), online: *The Globe and Mail* <<https://www.theglobeandmail.com/politics/article-its-time-to-wake-up-and-reopen-the-canada-us-border/>>; The Editorial Board, “Full vaccinated travellers? Welcome to Canada. Everyone else? Quarantine” (4 June 2021), online: *The Globe and Mail* <<https://www.theglobeandmail.com/opinion/editorials/article-fully-vaccinated-travellers-welcome-to-canada-everyone-else-quarantine/>>.

[13] Erin Rose & Thomas Clarke, “Counting on Immigration: Assessing COVID-19’s Impact and Planning for the Future” (2021), online (pdf): *The Conference Board of Canada* <<https://www.conferenceboard.ca/e-library/abstract.aspx?did=11163>>.

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