

Introduction: The Regulation of Business in Canada



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Learning Outcomes

Following your study of the materials in this chapter, you should be able to:

- outline the role of corporations in society;
- identify common tasks that corporate law clerks undertake;
- present an overview of the government regulation of businesses; and
- debate the value of corporate social responsibility (CSR) initiatives.

Introduction to Corporations

corporation

an entity, created under the authority of a statute, with many of the legal rights and responsibilities of a natural person

CEO

the chief executive officer of a corporation

conspiracy

an agreement between competitors to raise the price of a product or to otherwise limit competition in the sale of a product

What comes to mind when you hear the word “**corporation**”? If you follow the news in print or online, you may be thinking of the many evils that corporations are accused of on a regular basis: exorbitant markups by corporate businesses that prey on dependent customers; questionable marketing practices; exploitation of workers; environmental damage; excessive **CEO** remuneration; bribery of government officials; and the list goes on. So, is that the whole story? Are corporations evil entities that exploit and abuse those they encounter? Certainly there are grounds to criticize some corporate behaviour. Consider these two examples:

ASSESSING CORPORATE BEHAVIOUR

Paying Extra Bread for Bread

Between 2001 and 2017, you may have been paying more for your toast than you should have. According to documents filed in court by the Canadian Competition Bureau, bakery wholesalers Canada Bread Company Ltd and George Weston Ltd (“Weston”) and grocery retailers Loblaw Companies Limited (“Loblaw”), Walmart Canada Corp, Sobeys Inc, Metro Inc, and Giant Tiger Stores Ltd conspired to fix the price of baked goods, including bread, buns, bagels, naan, English muffins, and tortillas.¹ The Competition Bureau started its investigation after Weston and Loblaw came forward with evidence of the **conspiracy**. These two companies received immunity from prosecution in exchange for their assistance. For a period of time, Loblaw offered a \$25 gift card to eligible customers as a gesture of goodwill.

To date, charges have not been laid against the other companies. However, this does not protect them from civil actions. Class actions have been filed against all seven companies in both Ontario and Quebec seeking compensation for customers harmed by the high prices.²

Questions for Discussion

1. Conspiracy is a difficult crime to uncover because the participants are sworn to secrecy. In this case, Weston and Loblaw stepped forward and provided information on the conspiracy to authorities. Why do you think they did that?
2. Should Weston and Loblaw have been granted immunity from prosecution given that it is alleged they gouged customers for over 15 years?
3. Are class action lawsuits effective deterrents for corporate misbehaviour, or do the court awards simply amount to a “cost of doing business”? What type of responses might be more effective in shaping corporate behaviour?

1 The Canadian Press, “Grocery Stores, Bakers Reached Deals on Bread Price Increases: Competition Bureau,” *BNN Bloomberg* (31 January 2018), online: <<https://www.bnnbloomberg.ca/7-companies-committed-indictable-offences-in-bread-scandal-competition-bureau-1.984173>>.

2 “Class Action Over Bread Price Fixing Authorized by Quebec Judge,” *CBC* (20 December 2019), online: <<https://www.cbc.ca/news/canada/montreal/class-action-bread-pricing-approved-quebec-1.5404365>>.

Tragedy in Bangladesh

Corporations must search for the least expensive means of producing their products if they want to maximize their profits. This approach is what investors expect, isn't it? However, the April 2013 collapse of a garment factory building in Bangladesh caused many to question the extent to which a corporation should look for the lowest-cost supplier and the responsibilities that a corporation has to the broader community.

On April 23, 2013, in Savar, Bangladesh, an eight-storey building that housed a garment factory collapsed, killing 1,135 Bangladeshi workers and injuring another 2,500. Loblaw was again implicated. Its Joe Fresh brand of clothing was among the clothing brands produced at the factory. The day before the collapse, cracks had appeared in the walls of the building. Other businesses had evacuated the building, but the garment factories ignored police instructions and continued to work.³ In the aftermath of the collapse, Loblaw and other companies that sourced products from Bangladesh faced heavy criticism.⁴ A **class action lawsuit** filed against the Loblaw group of companies for \$2 billion in damages, claiming that the companies knew of the poor safety and building standards, was denied certification in Canada.⁵

Loblaw continues to purchase clothing produced in Bangladesh and defends its relationship with Bangladeshi manufacturers, arguing that its long-term commitment to the area benefits the economy and manufacturing communities.⁶ Since the collapse, Loblaw has signed the Accord on Fire and Building Safety in Bangladesh,⁷ a binding agreement that ensures that building structure and fire safety inspections are conducted on all factories that it uses. It has donated money to a trust fund to help injured workers and the families of deceased workers and also paid compensation of approximately \$150 per worker to survivors who were making Joe Fresh clothes. This amount is equal to approximately three months' wages in Bangladesh.⁸

Questions for Discussion

1. In the wake of this tragedy, has Loblaw done enough? What more should we expect corporations to do to ensure that products they purchase are produced in a safe and ethical manner?

class action lawsuit

a lawsuit that is filed by one or more persons (the "representative plaintiff(s)") on behalf of a group of people (the "class")

3 "Bangladesh Building Collapse Kills More than 230; Joe Fresh Clothing, Other Brands Made at Site," *Toronto Star* (25 April 2013), online: <https://www.thestar.com/news/world/2013/04/25/bangladesh_building_collapse_toll_nears_200_joe_fresh_clothing_other_brands_made_at_site.html>.

4 Lesley Ciarula Taylor, "Joe Fresh Customers Vow Boycott After Bangladesh Factory Collapse," *Toronto Star* (25 April 2013), online: <https://www.thestar.com/news/world/2013/04/25/joe_fresh_customers_vow_boycott_after_bangladesh_factory_collapse.html>.

5 Colin Perkel, "Supreme Court Refuses to Hear Lawsuit Against Loblaws over Bangladesh Factory Collapse," *Global News* (8 August 2019), online: <<https://globalnews.ca/news/5742110/loblaws-bangladesh-factory-lawsuit/>>.

6 Julia Sisler, "Joe Fresh Continuing Garment Business in Bangladesh in Year After Tragedy," *CBC News* (10 April 2014), online: <<https://www.cbc.ca/news/world/joe-fresh-continuing-garment-business-in-bangladesh-in-year-after-tragedy-1.2606120>>.

7 International Labor Rights Forum, "Accord on Fire and Building Safety in Bangladesh" (13 May 2012), online: <<http://www.laborrights.org/creating-a-sweatfree-world/resources/bangladesh-fire-and-building-safety-agreement>>. The Accord has now been replaced by the Transition Agreement, see Joint Statement Accord—BGMEA, "Accord on Fire and Building Safety in Bangladesh and BGMEA Sign Agreement on Transition to RMG Sustainability Council" (15 January 2020), online: <<https://bangladeshaccord.org/updates/2020/01/15/joint-statement-accord-bgmea>>.

8 *Supra* note 6.

2. Or, has Loblaw done too much? Is it not the role of a domestic government (in this case, the Bangladeshi government) to legislate to protect its workers and then to adequately enforce that legislation? Should a foreign corporation be meddling in the policy, legislative, and enforcement decisions of a foreign government?
3. What about you, the customer? How can you influence the choices that a corporation makes? Is there an onus on consumers to find out how a corporation operates and then make their personal purchasing decisions with that knowledge in mind?

Given these examples and the other stories you have heard, does it seem as though corporations have little that is positive to offer society? Maybe. But maybe there is a more positive side to this story. There should be. Why? Because we have created corporations. Corporations are not natural beings. They did not evolve from fish or dogs or apes. We (through our legislatures) created these artificial beings, and we created them because we thought they could make our lives better.

We created corporations because we believed they could do certain things better than we could as **individuals**. Our limitations as individuals relate to the fact that, individually, we have very limited resources, and we have a limited lifespan. The problems these limitations create when we talk about a **business** enterprise are interesting. First, let's look at our limited resources. Most start-up businesses require an amount of **capital** that exceeds what a single individual can afford. Furthermore, few of us are willing to contribute all of our capital to a business; we have other financial obligations that we must meet, such as paying for housing, food, clothing, and a good education. A corporate structure can make it easier to raise capital from a number of sources. This possibility has an added benefit. If you can obtain a small amount of capital from a large number of investors, the **risk** to each individual investor, should the business fail, is also small.

In addition, as individuals, we have limited intellectual and skills-based resources. I may be very good at marketing a product but not be able to come up with the product idea in the first place nor be good at the financial side of a business. A corporate structure can provide the institutional framework for the combination and coordination of many people with the varied knowledge and skills necessary for a successful business.

And once I have created a quality product and fostered strong brand loyalty, I want the benefits of that work to continue even after I die. If the product is associated with me, its reputation dies with me. If the product is associated with an entity that does not die—a corporation—the business can continue and grow despite the comings and goings of the human beings associated with the business. While most of us still know the name and reputation of Steve Jobs, in time it will be Apple's name that will be remembered as the entity that produces and sells Jobs's ingenious product designs.

individual

in the legal context, an individual is a natural person, a human being

business

the provision of goods or services in exchange for money, usually with the aim of making a profit

capital

money or assets (land, machinery, etc.) that can be used in a business

risk

the potential to lose something of value; in this case, the loss of the money invested in the business

So, these are the things that corporations can do better than you or I individually: raise capital; organize people (labour) and processes; and provide continuity through their perpetual existence. These benefits, in turn, allow us to have stronger, more successful businesses.

Corporations can be a powerful economic force that improves societal well-being through research and development, by producing goods and services that benefit society, by providing employment opportunities, and through ongoing financial and other contributions to the communities in which they are located. However, as we know, corporations can also have a negative societal impact. The goal of the **government regulation** of corporations is to establish a legal environment that encourages corporations to do the things that benefit us as a society and discourages them from doing things that harm society.

In this introductory chapter, we will look at the broad scope of government regulation of business in Canada in order to give you a foundational understanding of the environment in which businesses operate. The exposure to the overall regulatory environment will prepare you for a more detailed look at corporate law in subsequent chapters.

Corporate law is a subset of the broader regulatory framework for Canadian businesses. Its focus is on the creation of corporations, **corporate governance**, the maintenance and restructuring of corporations, and, if need be, their **dissolution**. In this text, we focus on the procedural components of corporate law and, more particularly, on the roles and functions that a corporate law clerk may perform. However, the issues and procedures covered in the text will also be of value to many who work for or within corporations, including corporate **officers** and directors, legal and financial advisers, and those considering incorporating their business.

The Role of the Corporate Law Clerk

Advising a client on the form of business organization best suited to their needs requires legal knowledge and should be undertaken only by lawyers. The issues involved can be complex and encompass such things as how long the business is expected to operate, the number of participants in the business, the extent to which different participants expect to be involved in the day-to-day running of the business, the financial risks that the participants are willing to take, profit expectations, and tax and accounting issues. Frequently, additional experts like accountants and insurance brokers are also called on to advise clients on the most appropriate business form and structure for their undertaking.

Despite the need for the advice of licensed professionals to guide a client's decision to incorporate, a corporate law clerk employed in a law firm or in the legal department of a corporation can have significant responsibility for initiating, organizing, and maintaining the records and other documentation required both to create a corporation and then to ensure its proper functioning once created. A law clerk must always work under a lawyer's supervision and control, but a corporate law clerk who is well versed in corporate procedure is able to complete many challenging corporate law tasks, subject to review by the supervising lawyer.

government regulation

defined by the OECD Glossary of Statistical Terms as the "imposition of rules by government, backed by the use of penalties that are intended specifically to modify the economic behaviour of individuals and firms in the private sector"

corporate governance

the rules and processes that govern how a corporation makes decisions

dissolution

the legal termination of a corporation; once a corporation is "dissolved," it ceases to exist

officers

individuals appointed by the board of directors of a corporation to run its day-to-day business and operations

Law Society of Ontario
the professional organization
that governs Ontario lawyers
and paralegals pursuant
to the *Law Society Act*

Ontario lawyers are governed by the **Law Society of Ontario** and must comply with the *Rules of Professional Conduct* and by-laws passed by the Law Society. By-Law 7.1⁹ deals with the operational obligations and responsibilities of lawyers and paralegals and, more specifically, with the type of work that may be delegated by lawyers to non-lawyers. Lawyers have the general authority to assign to a law clerk tasks and functions in connection with the lawyer's practice; however, before delegating a task to a law clerk, lawyers must ensure the law clerk has the knowledge, skills, and competency to correctly carry out that work. The by-law leaves no doubt that a lawyer retains the responsibility for supervising and ensuring the accuracy of the work performed by law clerks and is liable for any errors made by anyone under the lawyer's supervision, including law clerks.

The type of work that may be delegated to a competent corporate law clerk is set out in rule 6.1-1, commentary 5.5 of the *Rules of Professional Conduct*.¹⁰

A lawyer may permit a non-lawyer to attend to all matters of routine administration and to assist in more complex matters and to draft routine documents and correspondence relating to corporate, commercial, and securities matters such as drafting corporate minutes and documents pursuant to corporation statutes, security instruments, security registration documents and contracts of all kinds, closing documents and statements of account, and to attend on filings.

Corporate law clerks may be involved in:

- drafting articles of incorporation (for this purpose, they frequently accompany the lawyer to the meeting with the client);
- preparing registration documents to be filed with government authorities;
- drafting post-incorporation documents, like corporate by-laws, resolutions, and shareholder agreements;
- maintaining corporate records (referred to as the corporate "**minute book**");
- conducting business searches, such as name searches and bankruptcy searches;
- drafting corporate transaction agreements, such as share purchase or asset purchase agreements;
- processing corporate changes, such as name changes, **amalgamations**, and dissolutions;
- conducting **corporate due diligence**, including minute book reviews; and
- preparing financing documents and/or securities filings.

As you can see, the job of a corporate law clerk can be challenging and varied. To prepare for that job, you must develop a solid grounding in corporate procedure and a more general understanding of the regulatory environment in which businesses operate.

As mentioned above, corporate law is a subset of the broader regulatory framework for Canadian businesses. Corporate law governs the life of the corporation from its birth through to its maturity and possible death. While the focus of this text is corporate law, we would like to first introduce you to the broader scope of business

minute book

the book in which minutes of shareholders' and directors' meetings and other corporate documents are kept

amalgamation

when two or more corporations combine and continue as one corporation

corporate due diligence

a thorough investigation into a corporation that is undertaken prior to a significant business transaction; often involves a review of the corporation's minute book, debts, leases, customer agreements, employment contracts, and potential lawsuits

9 Law Society of Ontario, online: <<https://www.lso.ca/about-lso/legislation-rules/by-laws>>.

10 Law Society of Ontario, online: <<https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/chapter-6>>.

regulation in order to provide context for our discussion. While corporate law governs how a corporation is created and *how* it makes its decisions, broader business law regulation places limits on *what* those decisions may be.

The Regulation of Business in Canada

You will see as we work our way through this text that a business in Canada can take one of three primary forms. It can be a **sole proprietorship**, a **partnership**, or a corporation. The choice of form affects how business decisions are made and how liability is apportioned, as well as other issues relating to the creation, ownership, and management of the business. The focus of this text is on these details, particularly in the corporate context.

However, as we delve into the details, it is important to remember the broader regulatory context in which a business operates. Regardless of which form the business chooses, the business will have to comply with myriad laws and regulations that apply by virtue of the fact that it is a business. These laws and regulations will shape the content of the decisions that a business makes. A detailed discussion of these laws and regulations is beyond the scope of this text, but a brief overview is warranted to provide context for our future discussions.

Generally, businesses are subject to many of the same types of government regulation as you or I. Just as we register the names of our children, businesses must register their names with the province.¹¹ Businesses must pay taxes, including taxes on business income (like income tax for us), property taxes, and sales taxes. Businesses must obtain licences to carry on certain activities. Just as you must obtain a licence to drive a car, a business will be required to obtain a business licence from its local municipality before commencing business. Depending on the type of business, there may be additional provincial or municipal licences and permits that are required.¹² Businesses must also comply with municipal by-laws and zoning, just as you must when you decide to build an addition onto your house.

However, beyond this type of regulation, there are additional areas of regulation that are unique to the business context. These areas of regulation reflect our concern as a society that, left unregulated, businesses (whether they are sole proprietorships, partnerships, or corporations) may make decisions that harm vulnerable sectors of our society or the underpinnings of our economic structure. In particular, legislators have taken steps to protect (1) employees, (2) consumers, and (3) the environment. Further, competition laws constrain business action in order to protect the Canadian market economy. A brief review of the legal protections in these four areas will allow you to appreciate the degree to which government regulates business activity in Canada.

sole proprietorship

an unincorporated business operated by an individual known as the “sole proprietor”

partnership

a contractual relationship involving two or more persons carrying on business in common with a view to profit

¹¹ Subject to some exceptions that will be discussed in Chapter 6.

¹² The Canada Business Network, a group of federal departments and agencies, provincial and territorial governments, and not-for-profit entities, has created a useful resource that allows you to identify a variety of licences and permits that may be required depending on the province, municipality, and industry your business is in. The resource is found online at <<https://services.bizpal-perle.ca>>. Additional details relating to the licences and permits required for businesses are provided in Chapter 17. Chapter 17 can be accessed freely at the “Additional Content” tab on the text’s website, <<http://www.emond.ca/corplaw2>>.

Protecting Employees

independent contractor

a person who enters into a contract to provide a service and who maintains control over how he or she will provide that service

employee

a person who enters into a contract to provide a service to an employer who will have control over the person in the provision of the service

waive

voluntarily surrender a legal right

When a business needs something done—a part manufactured, computer code written, or even photocopies made—it has a choice. The business may enter into a contract with an **independent contractor** or it may hire an **employee** to do the task. Both arrangements will be governed by general legal principles relating to contract law;¹³ however, the employment relationship is subject to additional regulation that protects the employee because legislators are concerned that employees lack sufficient bargaining power in the face of their employers.

Employment standards legislation establishes minimum standards for employer–employee contracts that cannot be **waived** by the employee.¹⁴ Businesses may provide better benefits than the minimums set out in the legislation but are not permitted to enforce contractual terms set below the minimum standards. For example, businesses must pay a minimum wage to their employees and provide them with certain holidays or additional payment as compensation for having to work on a holiday, and they cannot force employees to work beyond a certain number of hours per week. Privacy legislation also establishes minimum standards for the protection of employees’ personal information that is held by a business and sets limits on how intrusive an employer/business may be—for example, when setting up surveillance cameras.¹⁵

Beyond these minimum standards, human rights legislation imposes additional obligations on businesses.¹⁶ Employers must take reasonable steps to ensure that they provide a workplace that is free from harassment, including sexual harassment. Discrimination based on a number of grounds including race, ethnic origin, sexual orientation, gender expression, age, marital status, or disability is prohibited in the employment context, including in the advertising, interview, and hiring stages. Employers also have a duty to accommodate an employee with a disability up to the point that accommodation would impose an undue hardship on the business. In Ontario, the *Accessibility for Ontarians with Disabilities Act, 2005*¹⁷ has set mandatory standards for customer service, employment, information and communications, transportation, and the design of public spaces. These minimum standards are established in order to permit full participation by those with disabilities in their communities, including in the workplace.

Finally, safety in the workplace is promoted through occupational health and safety legislation.¹⁸ The key element of this type of legislation is the protection of workers by

13 Note that common law principles of contract interpretation contain additional protections for employees compared with other types of contracting parties. For example, specific performance is less likely to be granted as a remedy for breach of contract where the contract is breached by an employee. See the discussion in SM Waddams, *The Law of Contracts*, 6th ed (Toronto: Carswell, 2010) at 512.

14 In Ontario, see the *Employment Standards Act, 2000*, SO 2000, c 41 and the related regulations.

15 For example, see the federal *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, which applies in Ontario until such time as equivalent legislation is passed by the Ontario Legislature. The Office of the Privacy Commissioner of Canada has published a number of helpful information sheets on privacy issues, including video surveillance. See e.g. the Office of the Privacy Commissioner of Canada, “Guidance on Covert Video Surveillance in the Private Sector” (May 2009), online: <https://www.priv.gc.ca/en/privacy-topics/surveillance/video-surveillance-by-businesses/gd_cvs_20090527>.

16 In Ontario, see the *Human Rights Code*, RSO 1990, c H.19.

17 SO 2005, c 11.

18 In Ontario, see the *Occupational Health and Safety Act*, RSO 1990, c O.1. Online training programs are available through the Ontario Ministry of Labour, Training and Skills Development, “Health and Safety Awareness Training for Workers and Supervisors” (June 2014), online: <<http://www.labour.gov.on.ca/english/hs/training>>.

recognizing and enforcing their right to know about workplace hazards, to participate in addressing workplace safety issues, and to refuse to work in unsafe conditions.¹⁹ Businesses must establish internal procedures to ensure that these rights are respected.

Protecting Consumers

Consumers are particularly vulnerable in business transactions. It is often difficult for consumers to obtain detailed information on the product or service being purchased. For the most part, consumers are unable to negotiate the terms of sale or service, being instead presented with pre-set terms and told to either take it or leave it. Furthermore, many consumers have difficulty understanding the complex contractual terms that they are presented with, particularly in credit transactions. For these reasons, both federal and provincial consumer protection legislation have developed.²⁰ Federal competition legislation also has a consumer protection element and will be addressed later in the chapter.

Federal legislation addresses issues like labelling requirements to ensure that consumers have a minimum amount of information about the products they purchase as well as production and processing standards to enhance the safety of certain products.²¹ The *Canada Consumer Product Safety Act*²² requires businesses to report consumer product safety incidents or product defects, maintain records that will facilitate product recalls, and undertake other protective actions. It also prohibits the sale of dangerous or recalled products and the use of deceptive packaging or labelling.

In addition, each province and territory has enacted consumer protection legislation²³ that addresses a range of issues, including:

- minimum quality standards for both goods and services (“reasonably acceptable quality”)²⁴ that cannot be waived by the consumer;
- prohibitions on certain unfair business practices, including:
 - making false, misleading, or deceptive representations;
 - placing undue pressure on a consumer to enter into a transaction; and
 - taking advantage of a consumer who is unable to protect their own interests because of disability, illiteracy, language barriers, etc.; and²⁵
- **cooling-off periods** for various consumer agreements, including Internet agreements, door-to-door sales agreements, and certain fitness services agreements.

consumer

a person who purchases goods or services for their own use

cooling-off period

a period of time during which a consumer who has entered into a contract may reconsider their decision and cancel the contract

19 In addition, most businesses must contribute to provincially run workers’ compensation funds, which provide compensation to those injured on the job. In Ontario, see the *Workplace Safety and Insurance Act, 1997*, SO 1997, c 16, Schedule A.

20 A valuable source of information on how consumers can protect themselves in the marketplace is found on the federal Office of Consumer Affairs website (<<http://www.ic.gc.ca/eic/site/oca-bc.nsf/eng/home>>). It includes helpful guides on everything from identity theft and fraud to becoming a green consumer. It also has links to related government departments, including its provincial counterparts.

21 See e.g. the *Consumer Packaging and Labelling Act*, RSC 1985, c C-38; the *Textile Labelling Act*, RSC 1985, c T-10; and the *Food and Drugs Act*, RSC 1985, c F-27.

22 SC 2010, c 21.

23 In the non-consumer context, see provincial sale of goods acts, such as the Ontario *Sale of Goods Act*, RSO 1990, c S.1.

24 For example, see the Ontario *Consumer Protection Act, 2002*, SO 2002, c 30, Schedule A, s 9.

25 For example, see the Ontario *Consumer Protection Act, 2002*, *ibid*, s 15.

Businesses must ensure that their consumer transactions comply with these requirements.

Protecting the Environment

The protection of the environment is becoming an increasingly urgent concern for both the public and government. Business activities can have significant negative effects on the environment, from the diversion of natural water flows to the destruction of natural habitats to the emission of pollutants into the air or water, or onto land. Federally, the *Canadian Environmental Protection Act, 1999*²⁶ requires businesses involved in environmentally sensitive activities to develop and implement a pollution prevention plan. Enforcement officers have the power to issue environmental protection compliance orders, and businesses (including corporate officers and **directors**) that contravene the Act can be subject to both civil and criminal penalties. Provincial environmental protection legislation overlaps significantly with the federal legislation while also providing additional detail relating to issues such as the transportation of hazardous materials, site cleanup, sewage treatment, and the disposal of manufacturing by-products.²⁷ Environmental protection legislation is rigorously enforced, and businesses that cause damage to the environment face public censure as well as potential fines and other sanctions.

directors
individuals elected by the shareholders of a corporation to manage or supervise the management of the business and affairs of the corporation

Most people would agree that employees, consumers, and the environment are vulnerable and in need of legislative protection, but some would be surprised to discover that the Canadian market system is also subject to abuse, and it too requires robust legislative protection.

Protecting the Market System

The Canadian economy is based on the free market system. The premise behind this system is that businesses will be most efficient and provide the greatest benefit to consumers and society at large if they are exposed to free and open competition in the marketplace. However, when businesses are able to manipulate the market and reduce competition, businesses benefit to the detriment of consumers and broader society.

The federal *Competition Act*²⁸ seeks to protect the operation of the free market by prohibiting anti-competitive business practices and supporting the flow of information in the market (a precondition of a properly functioning market). It focuses on three types of anti-competitive activities:

- activities that are presumed to always have an anti-competitive effect;
- activities that may have either a pro-competitive effect or an anti-competitive effect, depending on market conditions; and
- deceptive marketing practices.

There are certain activities that are presumed to always have an anti-competitive effect. When competitors band together and agree to set prices at a level that is higher

²⁶ SC 1999, c 33.

²⁷ For example, see the *Ontario Environmental Protection Act*, RSO 1990, c E.19.

²⁸ RSC 1985, c C-34.

than would exist if they were competing against each other for customers on the basis of price, this practice harms consumers because they must pay higher prices for the product, and it harms society because it leads to a misallocation of resources. For this reason, conspiracies among competitors that fix prices, allocate markets, or control the production or supply of a product are criminal offences under the Act, as is **bid-rigging**. The proper functioning of a competitive market also relies on the availability of accurate information. If consumers are misled into believing that one product is safer, stronger, or more effective than another when it is not, consumers will make the wrong purchasing decisions. There will be increased demand for the wrong products, and resources will be allocated away from the safer, stronger, and better-functioning products toward the more dangerous, more easily broken, or less effective products. For this reason, it is also an offence to knowingly or recklessly make false or misleading representations to the public about your products or services and to engage in deceptive telemarketing practices.

Other business practices may have anti-competitive effects but only in certain circumstances. For example, a **merger** between two businesses may result in improved efficiencies in the production processes used by the merged entity. If one business has developed a way of producing a component of a product using less material and the other has created a faster, more efficient way of assembling the product, a merger that combines these two businesses could result in a business that is more efficient and uses fewer resources in producing the final product. This could be a pro-competitive result. In contrast, a merger between two fierce competitors in a particular market may reduce the level of effective competition and have an anti-competitive result. If there are only two grocery stores in a small town and one grocery store merges with the other, the merged business now has no competitors in town. Depending on how far out of town the next grocery store is, this merger may have an anti-competitive effect. For this reason, mergers are “reviewable” under the Act. Should the Competition Tribunal determine that a merger substantially lessens competition, the merger can be prohibited or, if it has already taken place, “unwound.” Other business practices that are reviewable include **refusal to deal**, **price maintenance** arrangements, **exclusive dealing** arrangements, **tied selling**, customer–supplier **market restriction** agreements, and more generally, an **abuse of dominant position**.

The Act also protects consumers from certain deceptive marketing practices, including statements as to the performance capabilities of a product or its expected length of life that are not based on adequate testing; statements as to the “ordinary price” of a product where the product has not been offered at that price for a substantial period of time or a substantial volume of the product has not been sold at that price; false or misleading statements sent via electronic message; **bait-and-switch selling**; and sales above the advertised price. When a business engages in these practices, a court may order the business to cease the conduct, to publish a notice warning consumers that it engaged in deceptive conduct, and/or to pay an administrative monetary penalty.

Reducing “Red Tape”

Already you likely have a strong sense that the regulation of businesses in general, and corporations in particular, is a complex subject. The extent to which governments *should* interfere with business activities and decisions is a hotly debated topic as increased

bid-rigging

an agreement among competitors that attempts to control the outcome of a competitive bidding process by, for example, agreeing on the terms of the bids that each will submit

merger

when control over all or part of a business is acquired by another person

refusal to deal

when a business is harmed because it is unable to obtain adequate supplies of a product because there is inadequate competition in the supply of the product

price maintenance

when a person has influenced a seller to increase (or not reduce) the price at which a product is sold or has refused to supply a seller with the product because of the low price at which the seller is selling it

exclusive dealing

when a supplier requires their customer to only or primarily source a product from the supplier and not from competitors of the supplier

tied selling

when a supplier requires a customer to buy a certain product as a condition of being supplied with a different product

market restriction

when a supplier, as a condition of supplying a customer, requires the customer to sell the product only in a defined market

abuse of dominant position

when a person with an ability to control a market (a person with “market power”) engages in anti-competitive acts

bait-and-switch selling

when a person advertises a product at a bargain price but does not obtain adequate supplies of the product for sale to customers; the assumption is that the bargain price was advertised for the purpose of getting the customer into the store (the “bait”) so that the customer would then purchase other products (the “switch”) when the advertised product was not available

regulation results in increased costs of doing business. Reducing regulation (or “red tape”) is a focus of many current provincial governments.²⁹ Balancing the interests of businesses against the interests of employees, consumers, the environment, and the public and competitors in maintaining a competitive marketplace remains a challenge.

This overview of the government regulation of business in Canada has only touched the surface but should give you a general understanding of the type of legal constraints that are placed on business activity. Keep these broader constraints in mind as we explore how corporations are created and make their decisions.

Overview of the Scope of This Text

This text aims to answer three fundamental questions for businesses:

1. What legal forms can a business take?
2. How are each of those business forms created?
3. For corporations, which involve the creation of a new legal entity, how are they organized and maintained?

Chapter 2 of the text focuses on the legal structures we use to carry on business in Canada. It provides a general overview of the three main legal forms for carrying on business in Canada: sole proprietorships, partnerships, and corporations. The focus is on a comparative review of these business forms so that you are provided with a general understanding of the main characteristics of each and the differences among them. The chapter also introduces different types of contractual relationships, such as joint ventures, franchise agreements, and licensing agreements, which can be entered into between or among businesses to allow them to benefit from each other’s expertise. Finally, the chapter discusses co-operatives and not-for-profit organizations and how they are organized to achieve their goals, which may, or may not, have a business focus.

In the next three chapters (Chapters 3 to 5), we explore the three business forms in greater depth. For each of sole proprietorship, partnership, and corporation, we analyze its legal characteristics, the advantages and disadvantages of the business form, and how it is created. In the discussion of partnerships, we also explore variations on the general partnership structure, including limited partnerships and limited liability partnerships. Upon completion of this material, you should have a basic understanding of the three business forms and be able to discuss why business owners might choose one form over another.

In Chapter 6, before shifting our focus exclusively to corporations for the rest of the text, we explore the importance of choosing the right name for a business and how that name is legally protected. In addition, we review name registration requirements for each of the business forms.

At this point, we leave the discussion of sole proprietorships and partnerships behind and devote our full attention to corporations. As legal entities separate from those that create them, corporations are more complex to create and maintain than sole proprietorships or partnerships. The remainder of the text delves into these intricacies.

²⁹ For example, see the government sites devoted to cutting red tape in Ontario (<<https://www.ontario.ca/page/cutting-red-tape>>) and Alberta (<<https://www.alberta.ca/cut-red-tape.aspx>>).

Chapter 7 starts with an analysis of the decisions that must be made prior to incorporation, including the choice of incorporating jurisdiction, **share** structure, and how to deal with pre-incorporation contracts that **incorporators** will want the new corporation to adopt. We next work through the key steps and documents required to complete the incorporation of a business.

Once **articles of incorporation** are issued by the relevant government department, the corporation exists as a separate legal entity. Significant corporate decisions will now be made by its board of directors and, once shares are issued, its shareholders (depending on the matter being decided). Chapter 8 examines how directors' and shareholders' decisions are made either through formal meetings where resolutions are passed or by unanimous written resolution. With this background, we are then ready to examine how the corporation is "organized." Chapter 9 looks at the steps needed to organize a corporation so that it has the structures in place to take properly authorized action. These steps will include issuing the corporation's first shares, perhaps electing additional or new directors, appointing officers, and adopting corporate **by-laws**.

The next three chapters (Chapters 10 to 12) address how a corporation will undertake various activities that it is likely to encounter throughout its existence. Chapter 10 focuses on the annual proceedings that must occur to maintain the corporation in good standing. This chapter will examine what constitutes annual and special business at shareholders' meetings and the required sequencing of the directors' and shareholders' annual meetings. The chapter also provides an overview of the corporation's annual filing requirements and outlines broad issues related to the requirement to obtain a licence or register as an extra-provincial corporation should the corporation decide to carry on business outside of its jurisdiction of incorporation. Chapter 11 looks at the corporate processes required to authorize **debt financing** and **equity financing** as a corporation grows and requires additional capital to fund its operations or expansion. It then looks at two types of major transactions that a corporation may want to finance and enter into—an asset purchase or sale and a share purchase or sale. It discusses the corporate due diligence that must be completed prior to the transactions taking place and, once again, how to properly authorize and implement the transactions. Chapter 12 looks at changes that a corporation may want to make to its structure as it evolves, and at the processes that must be completed to properly authorize and implement those changes.

The material in Chapters 1 through 12 provides you with a comprehensive overview of corporate procedure. An introductory course in corporate law and procedure that stopped at that point would cover the necessary objectives. However, there are a number of corporate law issues that warrant additional attention if you want to further develop your expertise. Five of these issues are addressed in Part V: Topics for Further Study. Chapter 13 provides a more detailed review of the issues relating to director and officer liability that are briefly introduced in Chapter 5 and discusses when shareholders may be personally liable for corporate obligations. Chapter 14 looks at the regulation of **public corporations**. This issue is touched on briefly in Chapter 11 in our discussion of equity financing but is developed more fully here. In particular, securities regulation is examined, including the process for making an initial public offering, prospectus requirements, and continuous disclosure and other financial reporting requirements. Chapter 15 also expands on the issues first raised in Chapter 11 and

share

a unit of ownership interest in a corporation

incorporator(s)

the person(s) who signs and files the articles of incorporation

articles of incorporation

the government-issued document that is evidence of the creation of a corporation and contains key information about the corporation, including its name and share structure

by-laws

created by the directors and approved by the shareholders, the by-laws are the rules that govern the day-to-day functions of the corporation, including how shareholders' and directors' meetings are to be conducted and the duties and responsibilities of directors and officers

debt financing

when a business obtains cash to finance the business through a loan, which it must pay back

equity financing

when a corporation obtains cash to finance the business by selling shares of the corporation to investors

public corporations

corporations that offer their shares for sale to the public; also known as "offering corporations"

looks at debt financing options, including both unsecured and secured debt financing. Chapter 16 looks at a unique type of corporation—a not-for-profit corporation. Because many law firms act for both for-profit and not-for-profit corporations, an understanding of this area can be valuable. This chapter is supplemented by online material at <http://www.emond.ca/corplaw2> dealing with methods of incorporating a not-for-profit organization. The material has been placed online to provide the latest updates once expected changes to the Ontario not-for-profit incorporation legislation come into effect. Finally, Chapter 17, online at <http://www.emond.ca/corplaw2>, looks at common business licensing and registration requirements. This chapter addresses issues relevant to all businesses, whether they are sole proprietorships, partnerships, or corporations.

Corporate Social Responsibility

The focus of our discussion so far has been on the legal obligations of a corporation; however, legal obligations represent a minimum standard and, at times, fall short of the behaviour society expects. Many corporations have recognized the importance of establishing higher standards for their behaviour and have discovered that being good citizens is good for business, too. Socially responsible corporations attract and retain employees more easily, differentiate themselves in a positive way from competitors, build stronger customer relationships, and develop supportive relationships with the communities in which they operate. More and more often, potential investors are looking beyond a corporation's bottom line when making investments. They want to invest in a business that has a positive economic, social, and environmental impact. However, not all investors and corporate leaders share this view. Some criticize the expansion of corporate focus beyond the generation of profit and the maximization of shareholder value. They argue that corporations have a narrow economic purpose and should stay on task, leaving broader social policies to governments, community groups, and others.

corporate social responsibility (CSR)

a company's commitment to operate in an economically, socially, and environmentally sustainable way

The government of Canada defines **corporate social responsibility (CSR)** as “the voluntary activities undertaken by a company to operate in an economically, socially and environmentally sustainable manner.”³⁰ Actions or codes of conduct that go beyond what is required by law or regulation and reflect the broader interests of the corporation and its surrounding community form part of CSR initiatives.

Most larger corporations have CSR policies or initiatives that address one or more of the following issues:

- corporate governance, accountability, and transparency;
- corporate ethics, including anti-bribery and anti-corruption policies;
- corporate donations/employee volunteer initiatives;
- community involvement, development, and/or investment;
- environmental stewardship; and
- respect for human rights, including monitoring suppliers for their human rights practices.³¹

³⁰ Industry Canada, *Corporate Social Responsibility: An Implementation Guide for Canadian Business* (2014), online: <https://www.ic.gc.ca/eic/site/csr-rse.nsf/eng/h_rs00599.html>.

³¹ A selection of issues taken from Industry Canada, *ibid*.

While CSR policies and initiatives are not mandated by government, many view them as a valuable addition to good corporate governance practices. As you learn about corporate procedures throughout this text, continue to ask yourself whether the minimum procedures prescribed by law meet the standard necessary to ensure that the corporate actions taken reflect economically, socially, and environmentally sustainable behaviour. If they don't, consider what components should be added to a corporation's CSR policy in order to meet that standard.

intellectual property creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names, and images used in commerce

FACT SCENARIO

It is often difficult to understand procedures and the practical application of laws and regulations when they are discussed in the abstract. For this reason, we have developed a fact scenario that will run through the chapters of this text and allow us to apply the ideas, principles, and procedures that are discussed in a practical context. The following is the background information for that scenario. As you read through the text, additional facts will be added that allow us to explore varied aspects of corporate law and procedure.

Alice Kaltush is an inventor with a master's degree in applied physics from the University of Guelph. The focus of her research has been the conversion of radio frequencies to DC electrical power. She recently had a breakthrough in her research and has developed radio frequency sensors that collect radio frequencies emitted by a standard Wi-Fi router and convert them to DC electrical power.³² Effectively, this development means that a standard router is now able to provide both the data and the power necessary to run electronic devices. If she is able to produce and market this product, there will no longer be a need to plug in your devices. They will recharge automatically in any Wi-Fi environment.

Although others have developed sensors that can perform the same function, Alice's sensors are remarkable because of their inexpensive components, small size, and effective range of operation. The sensors are the size of a dime and can provide power up to 25 metres from the router. They can be easily retrofitted to any electronic device. Alice is very keen to get this product to market.

Devinder Chada is Alice's best friend from high school. Ever since Alice has known him, he has been involved in one business venture or another. Alice told Dev about her breakthrough, and he is eager to help her bring it to market. He has an MBA from Western University, and his expertise is in business planning and finance.

Dev worked with Gina Ito during his last business venture and mentioned to Alice that Gina has extensive experience in product marketing, particularly in this product area. Gina also has international connections in both South America and Asia. Dev thinks Gina would be a valuable addition to the business and that she may even want to invest as well as lend her expertise.

Alice does not have the means to finance the start-up of a new business. She has a \$25,000 student loan and rents a small apartment. She earns some money as a research assistant at the university but that only covers her expenses and debt repayment. She knows that she is going to need help to get this off the ground, but she is concerned about allowing too many people in on the idea. She wants to retain control of the business's development and of the **intellectual property** associated with it.

Alice has also discussed her invention with her aunt, Eva Deerfoot. Eva is a retired entrepreneur. She was very successful and is often sought after to speak at business conferences about how to nurture fledgling businesses. Eva is enjoying her retirement and has no desire to devote the time and energy necessary to start up a new business, but she is willing to loan Alice some money to help her get things going.

32 The idea for this product arose from a conversation between one of the authors and her son, followed by research that uncovered the following article: Brian Barrett, "Wi-Fi That Charges Your Gadgets Is Closer Than You Think," *Wired* (7 June 2015), online: <<https://www.wired.com/2015/06/power-over-wi-fi/>>.

CHAPTER SUMMARY

Corporations perform important functions in our society. They allow us to organize ourselves in a way that provides greater access to capital, an effective institutional framework for combining and coordinating people who possess the knowledge and skills necessary for a successful business, and a means of ensuring continuity for the business. The government regulation of corporations aims to establish a legal environment that encourages corporations to maximize these benefits while discouraging corporations from acting in a manner that harms society.

This text focuses on corporate law, which is a subset of the broader regulatory framework for Canadian businesses. Corporate law governs the creation of corporations, corporate governance, the maintenance and restructuring of corporations, and their dissolution. A corporate law clerk must possess a solid grounding in corporate law and procedure and a more general understanding of the regulatory environment in which businesses operate.

KEY TERMS

abuse of dominant position, **14**

amalgamation, **8**

articles of incorporation, **15**

bait-and-switch selling, **14**

bid-rigging, **13**

business, **6**

by-laws, **15**

capital, **6**

CEO, **4**

class action lawsuit, **5**

corporation, **4**

corporate governance, **7**

corporate due diligence, **8**

corporate social responsibility (CSR), **16**

conspiracy, **4**

consumer, **11**

cooling-off period, **11**

debt financing, **15**

directors, **12**

dissolution, **7**

employee, **10**

equity financing, **15**

exclusive dealing, **13**

government regulation, **7**

independent contractor, **10**

incorporator(s), **15**

individual, **6**

intellectual property, **17**

Law Society of Ontario, **8**

market restriction, **13**

merger, **13**

minute book, **8**

officers, **7**

partnership, **9**

price maintenance, **13**

public corporations, **15**

refusal to deal, **13**

risk, **6**

share, **15**

sole proprietorship, **9**

tied selling, **13**

waive, **10**

REVIEW QUESTIONS

1. Search online for instances of corporate wrongdoing. Once you find a case you are interested in, consider the following questions:
 - a. What happened in the case?
 - b. Who was involved within the corporation?
 - c. Who was harmed by the activities engaged in?
 - d. Were there any consequences for the corporation?
 - e. What could have been done at the government, corporate, or individual level to prevent this from happening?
2. Why is it important for a business to be able to continue to exist and operate even after its founder dies?
3. Review the Law Society of Ontario By-Law 7.1 (found at <https://www.lso.ca/about-lso/legislation-rules/by-laws>). Identify three tasks that a lawyer is *not* permitted to delegate to a law clerk.
4. Both consumer protection legislation and competition legislation prohibit the making of false or misleading representations. Why do both types of legislation address this conduct?
5. Search online for the CSR policies of two corporations. Compare the two policies. What differences did you discover?
6. The Canadian Federation of Independent Business (CFIB) produces a “Red Tape Report Card” each year that grades the federal and provincial governments on their efforts to tackle excessive regulation. Review

the most recent report card (<<https://www.cfib-fcei.ca/en/research-economic-analysis/red-tape-report-card>>). Debate the value of the standards used by the CFIB to rate each government.

7. Climate change presents a significant and growing threat to the world with environmental, political, social, and economic impacts. While many businesses are taking steps to reduce their environmental impact, some are balking at the high cost of regulations and other requirements

governments impose on them. Consider the view of the Canadian Chamber of Commerce in “The unsavory pancaking of Canada’s climate regulations: A high cost climate strategy Canadian businesses find hard to swallow” (<<https://chamber.ca/wp-content/uploads/publications/documents/Chamber%20Site/190314TheUnsavoryPancakingOfCanadasClimateRegulations.pdf>>) and discuss how to balance the need to support businesses while protecting the environment.

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