Government controls business activity through legislation and regulations; regulations are the detailed rules imposed under the general power of the authorizing legislation. Regulations are used to manage business relationships with key stakeholders such as customers, competitors, and the public. In this chapter, we examine the Canadian regulatory framework within which business must operate, concentrating on three general areas of regulation that apply to most businesses: competition, consumer protection, and the environment. Other areas of regulation will be dealt with in later chapters of this book.

We examine such questions as:

- Who has the power to regulate?
- How are specific business sectors regulated?
- How can business use the law to eliminate oppressive regulation?
- How does competition law affect business arrangements?
- What are the consequences of consumer protection law for the consumer and for business?
- What are the main elements of environmental protection law?
THE LEGAL FRAMEWORK FOR DOING BUSINESS IN CANADA

Regulation is another word for control. Governments control business behaviour through regulation. In the legal context, a regulation is a detailed rule adopted under the authority of an existing government statute; in Chapter 2, we referred to this as subordinate legislation. For business to operate fairly and efficiently, an adequate legal and regulatory framework must be in place. However, excessive regulation can impose heavy and unnecessary costs and inhibit business activity. The challenge is to strike an appropriate balance. Political parties are categorized as “left” or “right” based upon the level of government regulation that they support: Parties “on the left” favour lots of government regulation, and parties “on the right” support minimal regulation. Therefore, the emphasis on government regulation will vary depending upon which party forms the government of the day.

During the 1980s and early 1990s, “deregulation” was a popular notion—freeing business from existing (excessive) government control. In many instances, direct government interference was merely replaced by a different sort of regulation, social regulation. Direct regulation occurs when the government controls such matters as prices, rates of return, and production levels. Social regulation, on the other hand, lays down standards that businesses must observe while carrying on their activities, in such areas as health, safety, and the environment. Chapter 2 described how governments use their legislative powers to create legislation, subordinate legislation, and administrative tribunals.

In this chapter, we examine how regulatory schemes may be challenged and look at some direct and social regulatory regimes designed to protect three key stakeholders: consumers, competitors, and the public. Future chapters will examine other regulatory schemes protecting such stakeholders as employees and public investors.

CHALLENGING GOVERNMENT REGULATION OF BUSINESS

Business does not always agree with the regulatory scheme imposed upon it by government. We saw in Chapter 1 that there are three general strategies that businesses may use to try to avoid complying with government regulation: They may ask a court to find that

- the statute is invalid because the subject matter of the legislation is not within the jurisdiction of the relevant government,
- the statute is invalid because the legislation violates the Charter of Rights and Freedoms, and/or
- the interpretation of the legislation is wrong and the statute does not apply to the particular conduct.

Jurisdiction over “Business Activities” under the Constitution

The Canadian Constitution Act, 1867 divides the power to regulate business between the federal and provincial governments. The checklist below identifies some of the powers often used to regulate business. Under the provincial power to regulate municipalities, provinces have delegated local business regulation power to municipal councils. As a result, all three levels of government—federal, provincial, and municipal—regulate business activities.
Inevitably there is overlap between the categories, and sometimes there are even conflicting rules, making it difficult for businesses and their lawyers to determine which regulations apply in a particular situation, especially when business is carried on in more than one province.\(^2\)

When a business wishes to challenge a particular scheme, it begins by asking whether the legislature that passed the law had jurisdiction. This is not always an easy question for courts to answer, since some of the powers in section 91 overlap those listed in section 92. As we discussed in Chapter 1, questions about jurisdictional power are resolved by the courts using a two-step process that first identifies the primary subject matter of the law and then determines under which power that topic fits.\(^3\) Broad interpretations of any power will shelter many laws.

The courts have very broadly interpreted the provincial power over “property and civil rights” giving the provinces control over virtually all of private law, including contracts and most business transactions—matters that arguably could also fall in federal jurisdiction over “trade and commerce.” Alternatively, the federal power over “trade

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1 Eng v. Toronto 2012 ONSC 6818; on deference to be shown to municipal bylaws see Friends of Landsdowne Inc. Ottawa (City) 2012 ONCA 273.

2 For example, section 95 provides that both the federal and provincial governments have concurrent jurisdiction over agriculture and immigration, and section 92A gives the provinces to make laws regulating the export of natural resources. The Supreme Court of Canada recently held the provincial consumer protection legislation also applied to federally regulated banks: Bank of Montreal v. Marcotte 2014 SCC 55.

and commerce" has been interpreted very narrowly to mean trade and commerce across borders. Therefore, it applies to matters of interprovincial and international commerce and not to matters conducted wholly within a single province. For example, section 91 has been interpreted to give the federal government exclusive jurisdiction over banks and banking; deep sea, coastal, and Great Lakes shipping and navigation; air transportation; radio and television broadcasting; and atomic energy. The production, storage, sale, and delivery of oats, barley, and wheat is in federal hands on the basis that its major activity is international.

On the other hand, two sectors with a large interprovincial element remain almost exclusively within regulatory schemes of the provinces—road transportation, including trucking; and stock exchanges and securities transactions in general. In 2011, the Supreme Court of Canada rejected a proposed national Securities Act as overreaching the national concern. It held that regulating publicly traded companies was a provincial power and did not fit under the federal government’s trade and commerce power.

Still, business activities in many sectors fall within both federal and provincial jurisdiction.

**Government Regulation of Business and the Impact of the Charter**

Even if a law is within the jurisdictional power of the government passing it, that law may still be challenged. As we noted in Chapter 1, the rights entrenched in the Canadian Charter of Rights and Freedoms cannot be infringed by legislation, federal or provincial, unless it is justifiable in a free and democratic society. Although Charter rights are essentially personal in nature, they nevertheless do have an important application to some business situations. To the extent a law offends a right in the Charter, it will be declared invalid and this can have important business consequences. We saw in Chapter 1 that a provincial government law preventing businesses from operating on Sunday was declared invalid because it discriminated based on religion and therefore violated the charter. The result was that businesses were free to operate seven days a week.

The fundamental freedoms of expression and association may also be invoked to protect business activities. The Supreme Court of Canada has ruled on a number of occasions

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4 *Citizen’s Insurance Co. v. Parsons* (1881), 7 App. Cas. 96; the Privy Council ruled that a provincial statute regulating fire insurance was within the provincial power; it did not affect the federal trade and commerce power because the federal power did not extend to matters wholly within the boundaries of a single province. The Supreme Court of Canada has continued to question the federal power to legislate in general commercial matters where the application of a law falls within the boundaries of a province. See, for example, *MacDonald v. Vapour Canada*, [1977] 2 S.C.R. 134, and *Labatt Breweries v. Attorney General of Canada*, [1980] 1 S.C.R. 914.

5 It is interesting to note that the U.S. Constitution’s equivalent to our trade and commerce provision is “commerce among the several states.” The U.S. Supreme Court has given these words a much wider interpretation and has expanded the powers of Congress, despite the interstate requirement of the words themselves.


7 *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295. Subsequently, in *R. v. Edwards Books and Art*, [1986] 2 S.C.R. 713, the court held that an Ontario law prohibiting stores from opening on Sundays was a valid exercise of the province’s power over property and civil rights, since the purpose of the law was to ensure that workers had a uniform day off each week. Sunday opening has since been legalized in Ontario.

8 Charter of Rights and Freedoms, section 2(b) and (d). By contrast, in *Canadian Egg Marketing Agency v. Richardson*, supra, n. 8, the mobility rights (under section 6) were held to be essentially private in nature; they do not extend to the right to conduct one’s business anywhere in Canada without restriction. See also *Archibald v. Canada* (2000), 188 D.L.R. (4th) 538, concerning the legality of restrictions on grain farmers under the Canadian Wheat Board Act, R.S.C. 1985, c. C-24.
that “commercial speech” is protected under section 2(b). Restrictions on advertising of products or of professional services are at first glance contrary to the Charter, though such restrictions may be justified under section 1, provided they are reasonable and do not go beyond what is necessary to promote a legitimate objective. Arbitrary or unreasonable restrictions will be struck down.

**CASE 3.2**

In 1988, the federal government introduced legislation prohibiting all advertising and promotion of tobacco products. The prohibition was challenged by one of the leading cigarette manufacturers.

The Supreme Court of Canada held that the legislation violated section 2(b) of the Charter and was not justifiable under section 1. The objective of the legislation—to discourage the use of tobacco—was legitimate, but there was no direct scientific evidence showing a causal link between advertising bans and decreased tobacco consumption. The government had failed to show that a partial advertising ban would be less effective than a total ban. The impairment of the complainant’s rights was more than minimal, and the offending provisions of the legislation were declared to be of no force and effect.

As a result of the court’s ruling, the federal government adopted new legislation restricting tobacco advertising, but in a way that is intended to be consistent with the ruling. The new law has, in turn, been challenged by the manufacturers, but has so far been found not to infringe the Charter.

With respect to freedom of association, protected by section 2(d) of the Charter, Case 3.3 shows its business application.

**CASE 3.3**

Pursuant to the Optometrists Act, R.S.B.C. 1996, c. 342, the Board of Examiners in Optometry adopted rules prohibiting business associations between optometrists and non-optometrists. Two optometrists who had been cited by the board for violating the prohibition petitioned for judicial review of the validity of the board’s rules. They argued that the rules violated their freedom of association guaranteed by section 2(d) of the Charter.

The court held that the rules were of a public nature. Section 2(d) applies to a wide range of associations, including those of an economic nature, and a business relationship is an association protected under the section. The prohibition could not be justified under section 1 of the Charter. The board had failed to establish that the rules were proportional to the objective of maintaining high standards of professional conduct and independence free of any real or apparent conflicts of interest that would undermine the public’s confidence in the profession. The absolute prohibition against any business relationship between optometrists and non-optometrists was excessively broad.

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To convince a court to apply the Charter to a business situation, the business must show more than just an economic impact:

Because there is an economic aspect to a Charter claim does not, for that reason alone, disqualify it . . . there have been numerous Charter cases in which there was an economic component or implication to a claim. On the other hand, where a claim is based solely on economic grounds, it [is] unlikely that a Charter claim could succeed. 16

Corporations may invoke the Charter’s protection. In particular, a corporation should be allowed to rely on the Charter where it is charged with an offence or is the defendant in civil proceedings instigated by the government. Just as no one should be convicted of an offence under an unconstitutional law; no one should be subject to any proceedings or sanction authorized by an unconstitutional law. 17

**Administrative Law**

Finally, a business may oppose the application of regulation on the basis that the regulation does not apply to its circumstances. This involves attacking the decision of whichever decision maker applied the regulation to the business. The decision maker could be a court or an administrative government commission, tribunal, or other official.

In 2013, The Chief Justice of the Supreme Court observed that the modern trend is for regulatory schemes to shift work away from the courts toward administrative tribunals with specialized adjudicators, not judges, ruling on those matters that fall under the specific authorizing legislation. 18 The decisions of administrative adjudicators must be made fairly, reasonably, and in accordance with the power given to them by the initiating legislation. This means that not only should the decision be right based upon the facts, it must be one that the administrator is allowed to make and is arrived at after following fair procedures. The law about the actions and operation of administrative tribunals and decision makers is known as administrative law.

We saw in Chapter 2 that “active” legislative schemes are the foundation of administrative law and regulatory liability. The legislation outlines general principles and then delegates the power over the details to administrators named in the legislation itself. The administrators set specific standards, qualifying conditions, and procedures, and implement, enforce, and monitor compliance. As also noted in Chapter 2, the rules made by the administrators are called subordinate legislation.

Residential landlord and tenant law is regulated this way in most provinces. Disputes between landlords and tenants do not go to the courts, but to specialized adjudicators that only deal with residential tenancies. The Residential Tenancies Act of British Columbia creates a director who is then responsible for “the administration and management” of all matters under the Act including forms, fees, and dispute resolution. 19 Arbitrators appointed by the director decide landlord and tenant disputes according to the rules set by the director and the principles in the legislation. The Ontario Securities Commission is another example of an administrative agency which sets the rules for publicly trading stocks under

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16 Archibald v. Canada, supra, n. 9, at 545–6, per Rothstein, J.A. See also Longley v. Canada (2000), 184 D.L.R. (4th) 590.

17 Canadian Egg Marketing Agency v. Richardson, [1998] 3 S.C.R. 157. In that case, a national egg marketing scheme was held (by the Supreme Court of Canada) not to be contrary to the Charter.


19 S.B.C. 2002 c. 78, s. 9.
the authority of the Securities Act and then monitors compliance of traders, issuing companies, and licensees.

Businesses are frequently subject to regulatory schemes with administrative bodies supervising their compliance. The environmental and competition regulatory schemes are examples examined in this chapter. If a business disagrees with the decision of an administrator, it may appeal the decision’s correctness or it may attack the underlying authority or procedures followed to arrive at the decision through a process called judicial review. Both appeals and judicial review will take the business back to the courts.

**JUDICIAL REVIEW OF GOVERNMENT REGULATION**

It remains the court’s job to make sure that administrative decision makers exercise their power properly, even when the legislation that confers regulatory powers says the decisions are final. Federal and provincial legislation gives the courts a power of review. The Federal Court has a general jurisdiction to review actions of federal boards and commissions, and several of the provinces have enacted similar provisions with respect to provincial boards. Even without such legislation, the courts have a general right to review the legality of administrative acts and decisions.

As mentioned above, an administrative act or decision may be challenged on a number of grounds:

- **Lack of authority**—although the relevant legislation itself may be valid, the official or agency acted outside the scope of the authority conferred by the statute.
- **Procedural irregularity**—the official or agency proceeded in a manner inconsistent with the requirements of the statute; for example, public meetings required by the legislation were not held, or the prescribed notice was not given.
- **Procedural unfairness**—even when the legislation does not prescribe appropriate procedures, an official or agency is not entitled to act in a purely arbitrary manner.

Procedural fairness means that persons likely to be affected have a right to be heard and to have access to relevant documents, that adequate notice must be given of any public hearings, and that the decision maker must act impartially and not have a personal interest in the subject matter.

When courts review decisions, they are careful to show respect for the special area of expertise of the administrative tribunal. Therefore the standard of review applied to evaluate administrative decisions is usually reasonableness: As long as the decision is one of the possible acceptable outcomes based on the facts and law, it will be allowed to stand. It need not be the same decision the court would have made. Only rarely, in matters of general law (outside the tribunal’s area of expertise) will a standard of correctness be applied, meaning it must be the same decision the court would have made. See the Companion Website for more information on this topic.

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20 Federal Court Act, R.S.C. 1985, c. F-7, s. 18.
Next, we will look at three regulatory regimes that affect most businesses: competition, consumer protection, and environmental protection.

COMPETITION

The essential characteristic of an efficient market economy is competition. If consumers and customers have a choice between the goods or services of competing firms, prices will be lower or quality better, or both. But an entirely unregulated market does not ensure competition. The most efficient firms will ultimately drive the less efficient out of business—at least in certain sectors of the market. They will then enjoy a monopoly, there will be no competition, and the benefits of a free market will be lost. The same might occur where two or more firms coordinate their actions and strategies in such a way as to divide up the market rather than compete for it. Where such market imperfections exist or are likely to occur, governments must intervene in order to preserve competition.

The Competition Act

The federal Competition Act was enacted under the trade and commerce power to prevent unfair competition and abuse. It creates a regulatory regime that controls three main types of anti-competitive behaviour:

- conspiracies,
- monopolizing, and
- mergers.

Before examining these provisions, two aspects of the Act should be considered briefly: exemptions and administrative enforcement.

Exemptions The Act does not apply to certain classes of persons or to certain types of restrictive practice with their own regulatory oversight. In particular, the basic prohibition against conspiracies generally does not apply to the professions. Governing bodies of professions such as law, medicine, and public accountancy may establish agreements among their members dealing with such matters as qualifications, provided they are reasonably necessary for the protection of the public. Also exempt are agreements or arrangements among underwriters and others involved in the distribution of securities.

Enforcement The responsibility for administration of the Act is delegated to the Commissioner of Competition, as head of the Competition Bureau. Less serious regulatory offences known as civil matters or reviewable matters are managed by the Deputy

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**CHECKLIST**

Strategies to Prevent or Limit the Application of Government Regulation

1. Challenge the validity of the legislation on the basis of constitutional jurisdiction.
2. Challenge the validity of the legislation because it violates the Charter of Rights and Freedoms.
3. Appeal the decision of the administrative decision maker on one of the grounds set out in the legislation.
4. Seek judicial review of the administrative decision because it was outside the scope of the legislation or the process was flawed.

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23 R.S.C. 1985, c. C-34. References to section numbers in this part of the chapter are to this Act, as amended. It underwent significant revisions in 2010.
Commissioner–Civil Matters and are ultimately referred to the Competition Tribunal (see Figure 3.1). This specialized tribunal has the power to grant or impose a variety of civil remedies and penalties. More serious cases involving criminal offences are investigated by the Deputy Commissioner–Criminal Matters and prosecuted through the courts by the attorney general. The Act creates a number of criminal offences, punishable by heavy fines and by imprisonment for up to five years. In one criminal case, fines totalling almost $90 million were imposed on a number of producers of vitamins participating in an international price-fixing cartel (see the Companion Website for more information on this topic); a Swiss businessman was personally fined $250 000.  

Normally, a person who is adversely affected by conduct that is prohibited by the Act lodges a complaint, and then it is the commissioner’s responsibility to investigate and take the appropriate procedure. However, section 36 also provides that an individual may bring a civil action for damages resulting from prohibited conduct or from contravention of an order of the tribunal. This is rarely done because it is difficult and expensive to prove.

Conspiracies

The Competition Act prohibits competitors from entering into agreements that hurt competition in their industry, which are generally described as conspiracies. The Act divides these agreements into three categories. In the first group are agreements considered so harmful that they are subject to a blanket prohibition without requiring any proof that competition would actually be reduced. This type of conspiracy results in criminal liability through the courts. The second group is for less serious forms of conspiracies that are merely reviewable by the Competition Bureau. If the bureau determines that the agreement lessens competition, it will be subject to regulatory action by the tribunal. There is a third category of acceptable competitor agreements: the Competition Act has a registration process under which parties may seek regulatory approval of their proposed agreement and thereby avoid liability.

Figure 3.1 Competition Bureau Enforcement Process

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25 The constitutionality of this provision was upheld by the Supreme Court of Canada in City National Leasing Ltd. v. General Motors of Canada, [1989] 1 S.C.R. 641. For a recent example of such an action, see Calhan v. ATP Aero Training Products Inc. (2004), 238 D.L.R. (4th) 112, in which the plaintiff failed to substantiate a claim of predatory pricing.
Criminal Conspiracies: Section 45 of the Competition Act

Section 45 of the Act is an absolute prohibition of the most serious conspiracies. The negative impact on competition is assumed. It states that

1. Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges
   (a) to fix, maintain, increase or control the price for the supply of the product;
   (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
   (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

For these serious types of conspiracy (price fixing, market allocation, and output restrictions), the Act creates a criminal indictable offence that proceeds to court rather than the tribunal. Possible punishments include imprisonment for a term not exceeding 14 years or a fine not exceeding $25 million, or both.

“Conspires, Combines, Agrees or Arranges . . .” The essential requirement of section 45 is that two or more persons conspire together—that is, they enter into some sort of agreement. The great difficulty lies in proving the conspiracy. Restrictive agreements are rarely in writing. There would be little point in drawing up a formal written agreement since it would not be enforceable and would constitute damning evidence of a criminal conspiracy. In investigating suspected offences under the Competition Act, the Competition Bureau has wide powers to search premises and computer records, and to seize documents (sections 15 and 16), and authorizes the court to “infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it” (section 45(3)).

CASE 3.4

Members of the Canadian Steel Pipe Institute were concerned about the lack of price stability in their market, following a period during which there had been wide fluctuations and various attempts by some firms to undercut their competitors and fellow members. Public meetings were held and industry reports circulated, urging members to adopt an open pricing policy. The policy involved publication of price lists and notification of price changes.

The Institute emphasized that the policy was a voluntary one, and each member was free to adopt its own pricing policy. Nevertheless, the evidence was that after the open price policy was instituted, bids submitted by members of the Institute were frequently identical.

The evidence to support the existence of an actual agreement comprised the following:

1. the various public statements that had been made
2. the publication of price lists
3. the fact of identical pricing
4. a communication from one firm to another to the effect that a third firm, which had been awarded a contract at a substantially lower price, was “not playing ball”

On that evidence the court inferred that an agreement existed among the members of the Institute.26

The fact that prices among competitors in a particular industry tend to go up or down at the same time, and by approximately the same amount, does not necessarily mean that there is a conspiracy or agreement. Within the industry, prices of competitors will tend to be similar for similar products, a practice called parallel pricing; otherwise, those with higher prices would lose sales. One firm may tend to be the “price leader,” so that if it raised or reduced its prices, the others would quickly follow suit even though they had made no commitment to do so. Therefore, parallel pricing by itself is not evidence of conspiracy.

Other Criminal Conspiracies

Apart from the activities listed above, the Act names three other agreements that constitute criminal conspiracy offences. In particular, it is an offence

to agree to withdraw or not submit a bid or to agree in advance on the details of bids to be submitted in response to a call for bids or tenders (bid-rigging) (section 47);

■ to conspire to limit unreasonably the opportunities for any person to participate in professional sport or to play for the team of her or his choice in a professional league (s. 48); and

■ to implement in Canada a directive or instruction from a person outside Canada, giving effect to a conspiracy that, if it had been entered into in Canada, would constitute an offence under the Act (s. 46).

**Reviewable Conspiracies: Lessening of Competition**  For this second, less serious group of conspiracies, the Competition Act does not specify the types of agreements covered. Any agreement that lessens or has the potential to lessen competition may be reviewed by the Competition Bureau (section 90.1). Thereafter, the Commissioner of Competition may seek enforcement proceedings before the Competition Tribunal. The available remedies are a cease-and-desist order or an order requiring some other form of corrective or modifying action. There are no fines or imprisonment imposed on the parties unless they fail to comply with the tribunal’s order, and no private cause of action for damages is allowed. Factors relevant to the determination that an agreement lessens competition include the impact of foreign competitors and the availability of substitute products.

**Registered Agreements: Specialization Agreements**  Where competitors freely enter into an agreement under which each will discontinue producing a current product, the agreement is known as a specialization agreement. If the efficiencies created for the market by the agreement make up for any lessening of competition, the competitors may apply to the Competition Tribunal for approval of the agreement (sections 84–90). If the tribunal approves the agreement, it will direct that the agreement be registered with the bureau for a specific period of time. Registration exempts the agreement from both the criminal and regulatory conspiracy rules. This registry may be searched by any member of the public.

**Monopolizing**

The offence of conspiracy requires that two or more persons agree to restrict competition. However, a single person or firm that enjoys a monopoly or even a very powerful position in a particular sector of the market may also abuse its power in a manner that inhibits competition. The Act identifies and restricts some improper distribution practices and labels some anti-competitive behaviour as an **abuse of dominant position**, which, though not a criminal offence, may be reviewed and prohibited by order of the Tribunal.

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**ILLUSTRATION 3.1**

One of the most famous illustrations of improper distribution (tied selling) and abuse of market dominance is Microsoft’s bundling of its Windows operating software with its internet browser and media player. Windows consumers could not get one product without the other. This had a devastating effect on other software suppliers. Microsoft’s practice was challenged not only in the United States, but all around the world. In the European Union, Microsoft was ordered to separate the products, offer unbundled software, and share codes that would allow compatibility with other products. It was also fined $690 million plus costs. In February 2008, Microsoft was fined an additional $1.325 billion for failure to comply with the earlier rulings.  

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**Distribution Practices** Generally, a supplier is entitled to choose its customers and is free to decide whether to supply a particular person or not, except where that refusal is part of a conspiracy or is related to a pricing offence. However, in circumstances where a vendor refuses to deal with a customer even though there is plenty of product and the customer is willing to pay the usual price, the tribunal may order a supplier to supply that customer (section 75). This is done when the refusal is having a negative impact on the market.

Exclusive dealing, tied selling, and market restriction are also reviewable distribution practices. A supplier may make it a condition that the buyer deals only or primarily in the supplier’s products (exclusive dealing); it may be a condition for the supply of one type of product that the buyer also deals in other products of the supplier (tied selling); or it may be a condition of supplying a customer that the customer markets the product only within a prescribed area (market restriction). Such practices are not forbidden, but section 77 provides that the tribunal may, on application by the commissioner, make an order prohibiting the practices or requiring them to be modified when they are lessening competition.

**Abuse of Dominant Position** Also reviewable by the tribunal is conduct amounting to an abuse of a dominant position. Examples of suspect behaviour include predatory pricing, which involves selling products at unreasonably low prices to drive others out of the market, and discriminatory pricing, which involves differentiating pricing between purchasers to give one group an advantage. In one example of predatory pricing, a valium manufacturer supplied the drug free to Canadian hospitals for a period of one year; this was viewed as an attempt to prevent other manufacturers of tranquilizers from entering the market.28

To obtain an order remedying an abuse of dominant position, the commissioner must show that the firm against which the order is sought is in substantial control of a particular business sector and has engaged in an anti-competitive practice that has prevented, or is likely to prevent or substantially lessen, competition (section 79). Section 78 sets out a non-exhaustive list of practices that are regarded as anti-competitive, such as the buying up of products to prevent the erosion of existing price levels, the pre-emption of scarce facilities or resources, and the requirement that a supplier refrain from selling to a competitor or sell only to certain customers.

The applicability of section 79 depends largely upon the identification of the relevant product and market. The firm usually argues for a broad definition, while the commissioner proposes a narrower definition so that fewer products or a smaller geographic area will be taken into account.29

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**CASE 3.5**

NutraSweet accounted for more than 95 percent of all Canadian sales of the sweetener aspartame—a product used mainly in the soft-drink industry. One other firm, Tosoh, accounted for the rest of the market.

Tosoh complained to the Competition Bureau that NutraSweet had entered into exclusive purchasing contracts with its customers: If they wished to buy aspartame from NutraSweet, they had to agree to buy only from NutraSweet.

This raised the question of defining the relevant market: Was it the market for aspartame or for sweeteners generally, and was the market Canada or the world? The tribunal considered the evidence of cross-elasticity of demand between the various types of sweeteners and concluded that there was, at most, only weak evidence of competition between aspartame and other sweeteners. Customers were unlikely to switch to other sweeteners on account of the conditions imposed by NutraSweet. Similarly, although

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aspartame was available in other countries, transportation costs were low, and there were no tariff barriers, the tribunal concluded that the relevant market was Canada. Prices in Canada differed significantly from prices in other countries, suggesting that Canada was a distinct geographic market and that customers were unlikely to switch to imported aspartame.

Having defined the market, the tribunal found that NutraSweet had used its market power to keep other suppliers out of Canada, with the effect of lessening competition significantly.\(^{30}\)

See the Companion Website for more information on this topic.

### Checklist

**Restricting Competition**

Competition may be restricted by conspiracies between a number of producers, or by monopolizing on the part of a single producer.

Criminal conspiracies include
- price fixing,
- market allocation,
- restriction of supply,
- bid-rigging, and
- sports professional restraint of play.

Any agreement among competitors that lessens competition is subject to review by the commission and prohibition by the tribunal.

Reviewable monopolizing distribution practices include
- refusal to supply,
- exclusive dealing,
- tied selling,
- market restrictions.

Any anti-competitive behaviour by a firm in substantial control of a market that lessens competition is an abuse of power and is reviewable by the tribunal. Examples include
- discriminatory pricing,
- predatory pricing,
- exclusive dealerships,
- tied selling arrangements, and
- marketing restrictions.

### Mergers

One way to combat monopolizing is to try to prevent monopolies from coming into existence in the first place. To this end, section 92 of the Competition Act gives the tribunal power to prevent a merger from proceeding, in whole or in part, and to make various other orders, where it concludes that the merger is likely to prevent or significantly lessen competition in Canada. The tribunal may act only on a reference from the commissioner, after the commissioner has carried out a full investigation of a proposed merger or of one that has taken place. The initial review may be followed up with a second request for information in complex mergers.

**Merger** is broadly defined (by section 91) to include the acquisition, by the purchase of shares or assets, or by amalgamation, combination, or other means, of control over, or of a

\(^{30}\) *Director of Investigation and Research v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1.
significant interest in, the business of a competitor (horizontal merger), supplier, customer (vertical merger), or other person (conglomerate or diversification merger). “Control” apparently means legal control—that is, ownership of more than 50 percent of the shares or voting rights of another corporation, but a “significant interest” may be something less than legal control.\(^{31}\) Most likely to lessen competition are horizontal mergers between competing firms, since the number of competitors is effectively reduced when one such firm obtains control over another. But vertical mergers, where a firm takes control of its suppliers or its distributors, may also reduce competition by increasing the market control of large firms. Diversification will only rarely have an anti-competitive effect.

In determining whether a merger is likely to have a significant effect on competition, the tribunal is required (by section 93) to have regard to a variety of factors. In particular, it should consider whether

- the existence of foreign competition is likely to ensure that a reduction of competition within Canada will not have adverse consequences;
- the “target” firm is in poor economic health and would likely not have continued in business;
- acceptable substitutes exist for the products affected;
- there are barriers that might prevent new competitors from entering the market;
- effective competition will still exist after the merger; and
- the merger will eliminate a vigorous, effective, and innovative competitor.

Even where it is determined that a proposed merger will substantially and detrimentally lessen competition, it may still be justified on grounds of economic efficiency (section 96). The creation of a larger firm, pooling the assets and skills of the parties, may produce gains—such as improved products, increased exports, or reduced reliance on imports—that offset any detrimental effects resulting from a reduction in competition.\(^{32}\)

Although the tribunal has the power to “unscramble” a completed merger within one year after closing, such an event is unlikely for two reasons. First, there are pre-notification requirements for large mergers involving firms whose combined revenues exceed $400 million per year, or whose assets exceed $70 million (section 110). A party proposing a large acquisition must inform the bureau before proceeding with the transaction.\(^{33}\) Consequently, the mergers most likely to affect competition are reviewed before they take place. Second, where it is reasonably clear that a merger will not have anti-competitive consequences, the review process can be avoided by obtaining an advance ruling from the commissioner.

### CASE 3.6

Bell (BCE Inc.) proposed a takeover of Astral Media Inc. for $3.38 billion. The Competition Bureau reviewed the proposed merger. To preserve consumer choice in television programming, Bell was required to sell several specialty television channels including The Family Channel, Teletoon, The Cartoon Network, Disney XD and others, in order to obtain Competition Bureau approval. The broadcasting regulator (Canadian Radio-television and Telecommunications Commission) was also free to impose other conditions on the deal.\(^{34}\)

See the Companion Website for more information on this topic.

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31 The Act does not define significant interest—the Bureau considers the qualitative and quantitative impact of the acquisition. See Competition Bureau, Merger Enforcement Guidelines, October 6, 2011, available on the Competition Bureau website.


33 S. 110. Under the Investment Canada Act, additional conditions apply in the case of acquisition of a Canadian firm by a foreign firm.

34 The Commissioner of Competition v. BCE Inc. CT 2013-002 (Consent Agreement March 4, 2013).
CONSUMER PROTECTION

Consumers are broadly defined as individuals who purchase goods and services from a business for their personal use and enjoyment. The definition does not include organizations or individuals using goods or services for a business activity or resale. Consumer protection statutes apply to both the sale of goods and the supply of services such as home repairs, carpet cleaning, and the preparation of income tax returns. They regulate the behaviour of manufacturers, distributors, importers, advertisers, and retailers.

Why Is Consumer Protection Legislation Necessary?

Protective legislation is necessary because modern business methods have increased risks for consumers. Figure 3.2 shows some of the ways modern developments have affected consumers.

Consumer protection is one of those topics that falls under concurrent jurisdiction of both federal and provincial governments; every Canadian province, as well as the federal government, has legislation. The result is a collection of individual statutes that often overlap. The federal government is trying to organize its legislation under a comprehensive Consumer Protection Action Plan, beginning with the implementation of the Canada Consumer Product Safety Act (CCPSA) in 2011. As we will discuss below, the CCPSA applies many of the existing consumer protection strategies to a wider range of products and adds some new initiatives. The two most important new CCPSA initiatives are mandatory recall power for Health Canada and regulatory and criminal liability for corporate directors and officers.

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**Modern Business Development**

1. Large business enterprises
2. Only the manufacturer, not the retailer, can detect and remedy defects
3. Sealed packaging
4. High profile advertising
5. Expanded use of credit for larger items
6. Expanded use of Internet contracts with detailed terms and conditions

**Impact on Consumer**

- No equality of bargaining power: "take it or leave it"
- Consumers need rights against the manufacturer
- Consumers cannot examine quality until after purchase
- Advertising raises consumer expectations and may be more influential than information from the retailer
- Sophisticated terms of borrowing are difficult to comprehend
- Consumers are often unaware of terms and/or the terms may be one-sided

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*George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd., [1983] 1 All E.R. 108 at 113; in the words of Lord Denning: “The freedom was all on the side of the big concern... The big concern said ‘Take it or leave it.’ The little man had no option but to take it.”

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36 S.C. 2010, c. 21.

37 Ibid., ss. 42, 43.
Principal Types of Consumer Legislation

Some consumer risks are contractual—arising from the one-sided agreement made with the business. Onerous terms, high cost of credit, and low negotiating power are contractual risks. Therefore, one type of consumer protection legislation regulates consumer contracts including pressure sales tactics, onerous terms, disclosure and cancellation rights; this type of legislation falls primarily under provincial jurisdiction and it generally takes a “passive” form where it is up to the consumer to enforce their rights. We address this type of legislation in the chapters dealing with contracts, and specifically in Chapter 14, Sale of Goods and Consumer Contracts.

In this chapter, we focus on the second type of consumer protection legislation. It is broader in scope, is typically “active” with an administrative agency to enforce it, and addresses behaviour of business with the public. This legislation is primarily federal, dealing with national concerns such as health, safety, and mass communication in the form of advertising and labelling; many of the statutes address more than one risk.

In this section, we provide an overview of the non-contractual issues in consumer protection. They are

- regulation of misleading advertising;
- regulation of quality standards affecting labelling, safety, performance, and availability of servicing and repairs;
- regulation of high risk industries that deal with the public through licensing, bonding, and inspection.

Misleading Advertising  More and more legislation addresses misleading representations by sellers of goods and services. Statutes create both regulatory and criminal offences to punish non-compliance. One act that addresses advertising of food, cosmetics, and devices is the Food and Drugs Act. It is administered by Health Canada and enforced by the Canadian Food Inspection Agency. It is a regulatory or even criminal offence to:

- label, package, treat, process, sell or advertise any food or drug in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety (s. 5, 9)
- label, package, sell or advertise a product in a way that it is likely to be mistaken for a regulated cosmetic (s. 17)
- label, package, sell or advertise a device in a false, misleading or deceptive way (s. 19)

As already discussed, the federal Competition Act is the most comprehensive legislation regulating business conduct and so, not surprisingly, it also deals with advertising and false claims. It contains a general prohibition of misleading representations made for the purpose of promoting the supply or use of a product or of any business interest. Specifically, the Act makes it an offence to make false or misleading representations about

- Qualities of a product
- Length of life
- Warranties
- Guarantees

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38 R.S.C. 1985, c. F-27, s. 5(1). Other provisions regulating labels and advertising are found in the Weights and Measures Act, R.S.C. 1985, c. W-6. There are separate federal statutes regulating the sale of meat, livestock, fruit, vegetables, and honey.

39 Competition Act, R.S.C. 1985, c. C-34, s. 52.

40 Ibid., s. 74.01.
Chapter 3 Government Regulation of Business

■ Performance claims
■ Test results

CASE 3.7

The Competition Bureau imposed an administrative penalty of $10 000 000 on Rogers Communications Inc. because it made two performance claims not based on proper testing when it launched its new Chatr cell phone campaign in television, internet, and radio ads across the country. Both performance claims related to dropped call rates—Chatr’s dropped call rate was lower than other providers’ and customers would have no worries about dropped calls. Rogers appealed. The court held that the proper test of a false or misleading advertisement under the Competition Act was one where the average wireless consumer who is credulous, is technically inexperienced, and does not take more than ordinary care when observing the entire advertisement is likely to form a false general impression. In order for the ads to be neither false nor misleading, the fewer dropped calls claim needed to be true in all Chatr markets. On this point, the court’s findings were split: Some of the ads were held not to be misleading; other ads were misleading because Rogers failed to conduct adequate and proper tests in the Calgary and Edmonton zones, and in Toronto and Montreal (as against Public Mobile); the complaints were upheld for those advertisements.

The Act defines the word “product” as referring equally to goods and services. Liability extends to importers of goods from outside Canada, even though the misrepresentation may have been made outside Canada. This is clearly aimed at American manufacturers who target Canadian consumers. Misleading advertising during telemarketing is addressed separately.

Misleading advertising is a dual offence. Depending upon the seriousness of the non-compliance, it may constitute either a criminal or a regulatory offence. The criminal offence carries a maximum penalty of 14 years’ imprisonment, a substantial fine, or both. The regulatory penalty is a maximum fine of $200 000 and/or one year’s imprisonment (s. 52(5)).

Several other advertising-related offences under the Act are exclusively regulatory offences included in a category of reviewable “deceptive market practices.” These include bait-and-switch advertising, making performance claims that lack proper substantiation, and making misleading savings claims and misrepresenting the original price of a sale item. Such practices are subject to review by the Competition Tribunal, which may order the offender to refrain from such conduct for up to 10 years and may impose fines of up to $10 000 000 on corporations (s. 74.1).

CASE 3.8

In 2000, Alan Benlolo and his brothers Elliot and Simon were the principals in two internet directory scams known as yellowbusinesspages.com and yellowbusinessdirectory.com. Between May and August, they sent out four different bulk “advertising” mailings to over 600 000 prospects. The mailings looked remarkably like a Bell Canada invoice and some contained a version of the Yellow Pages “walking fingers” logo. Each “invoice” requested payment of $25.52 by a specific date. After several warnings from the Competition Bureau, the brothers were convicted of the criminal offence of making false and misleading representations contrary to s. 52(1) of the Competition Act. Alan and Elliot were sentenced to three years in federal jail and fined $400 000. The brothers appealed the sentences, claiming that the conduct should have been characterized as a deceptive market practice and dealt with as a regulatory offence, thereby eliminating any possible federal jail time. In 2006, the Court of Appeal upheld the sentences, saying that criminal charges and significant jail time were appropriate because these individuals opened bank accounts for their “business,” incorporated the operating corporations, designed the mailings, and arranged for their distribution. They were intentional architects of a fraud, not legitimate businesspeople who stepped over a line.

41 Ibid., s. 74.02.
42 Canada (Competition Bureau) v. Chatr Wireless Inc. 2013 ONSC 5315 (CanLII).
43 Ibid., ss. 74.01–74.07.
As noted above, the Canada Consumer Product Safety Act (CCPSA) focuses on harmful or dangerous products. It is an offence for a manufacturer or importer to advertise a product that is a danger to human health or safety or is the subject of a recall (s. 8). Retailers and advertisers may be convicted of an offence if they know the product is dangerous or recalled. Again, the CCPSA offences are dual offences that will be treated as criminal offences in the more serious circumstances.

The provinces also have legislation dealing with misleading advertising. In addition to prohibiting such advertising and imposing fines against sellers, consumers affected by misleading statements may start their own lawsuits. For instance, Ontario’s Consumer Protection Act declares it to be an “unfair practice” to make “a false, misleading or deceptive consumer representation,” which may include a wide variety of representations about the “sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or quantities” that the goods or services do not have.  

There is a long list of examples of deceptive representations. The Act also creates “an unconscionable consumer representation” as a type of unfair practice that includes such conduct as simply asking a price that “grossly exceeds the price at which similar goods or services are readily available to like consumers.” A consumer subjected to an unfair practice may terminate the contract and “where rescission is not possible . . . the consumer is entitled to recover any payment exceeding the fair value of the goods or services received under the agreement or damages, or both” (section 18(2)). In addition, the court may award exemplary or punitive damages against the business. Similar protection exists in other provinces.

The above provisions demonstrate the overlap of federal and provincial jurisdictions in the Constitution; both levels of government seem to have concurrent powers to regulate these selling practices, and this has led to some confusion.

It can be difficult to determine when an ad is misleading, and, therefore, only the most obvious abuses are acted upon by the government. In an effort to raise the level of professionalism in advertising and foster public confidence, Advertising Standards Canada (ASC), an industry body formed in the 1960s, developed the Canadian Code of Advertising Standards. The code goes far beyond inaccurate or misleading ads, and addresses advertisements that:

- target children,
- contain violence,
- play on fears, or
- offend public decency.

This voluntary code of conduct is widely adopted by advertisers, advertising agencies, and the media. A dispute resolution process is also available to resolve consumer and competitor complaints.

Questions to Consider
1. How does compliance with the Canadian Code of Advertising Standards promote corporate social responsibility?
2. What are the arguments in favour of and against endorsing the ASC code?
3. When is an ad too violent or offensive to public decency?


Regulation of Labelling, Product Safety, and Performance Standards
There is a lot of federal legislation establishing public health and safety standards for consumer products. Some standards focus on the quality of the product itself, while other standards ensure that the consumer is informed about the product. For example, the Consumer

46 Ibid., s. 15 (2)(b).
47 See, for example, Trade Practice Act, R.S.B.C. 1996, c. 457; Fair Trading Act, R.S.A. 2000, c. F-2.
Packaging and Labelling Act\(\textsuperscript{48}\) sets out comprehensive rules for packaging and labelling consumer products, including requirements for identifying products by their generic names and stating the quantity of the contents. The Act also provides for standardized package sizes to avoid confusion.

The Textile Labelling Act\(\textsuperscript{49}\) requires labels bearing the generic name of the fabric to be attached to all items of clothing. The federal care labelling program encourages manufacturers to include recommended procedures for cleaning and preserving the fabric. The Ministry of Labour administers this Act and offences are processed through the courts.\(\textsuperscript{50}\)

The Hazardous Products Act\(\textsuperscript{51}\) is one of many statutes that deal with harmful products. In 2010, control over products so dangerous that their manufacture is banned in Canada was transferred to the Canada Consumer Product Safety Act. This act deals with “controlled” products that must be manufactured and handled in conformity with regulations under the Act and includes such items as bleaches, hydrochloric acid, and various glues containing potent solvents. The Minister of Health\(\textsuperscript{52}\) has broad discretion to regulate products deemed to be a threat to public health or safety which includes warning symbols and container type, and to appoint investigators. In British Columbia, the Workers’ Compensation Board administers the requirements of this Act.

The Motor Vehicle Safety Act\(\textsuperscript{53}\) provides for the adoption of regulations setting national safety standards for motor vehicles (whether manufactured in Canada or imported) and accessories such as seat belts and booster seats. It also requires manufacturers to give notice of defects in vehicles to Transport Canada and to all purchasers of the defective vehicles. All of the above-described federal statutes create regulatory and/or criminal offences for non-compliance.

As we have already discussed, the Food and Drugs Act\(\textsuperscript{54}\) is a comprehensive statute regulating many aspects of foods and medical and cosmetic products, since virtually all of them, if improperly processed, manufactured, stored, or labelled, may adversely affect consumers’ health or safety. Provisions deal with such matters as sanitary production, contamination prevention, the listing of ingredients contained in products, and the dating of products having a shelf life of less than 90 days. The Act is administered jointly by the Canadian Food Inspection Agency and Health Canada. They have the power to search, seize, examine, and recall products, including imports.

**ILLUSTRATION 3.2**

The 2008 tainted meat outbreak involving Maple Leaf Foods illustrates the importance of effective inspection and recall procedures. More than 30 people died from eating various products containing tainted meat, and a $100 million class action lawsuit was commenced.

The Canadian Food Inspection Agency came under heavy criticism when the contents of a 2005 report were made public. The report identified problems in the system, including irregular inspections, delays in warning the public, unclear recall protocols, and limited resources.\(\textsuperscript{55}\)


\(\textsuperscript{50}\) Department of Industry Act S.C. 1995 C. 1, s. 9 establishes the framework for the many regulatory regimes assigned to this government agency.


\(\textsuperscript{52}\) Ibid., s. 2, 20, 21.

\(\textsuperscript{53}\) S.C. 1993, c. 16.

\(\textsuperscript{54}\) R.S.C. 1985, c. F-27.

The passage of the Canada Consumer Product Safety Act in 2010 addressed some of these issues. It applies to manufacturing, importing, selling, and distributing a broad range of products that could pose a danger to health or safety of Canadians. It bans some unsafe products such as baby walkers, and sets standards for quality for others such as hockey helmets. Packaging and labelling must not misrepresent the safety of the product. The Act empowers Health Canada to inspect premises, products, and records and expands and clarifies mandatory recall power beyond food products.

32. (1) If an inspector believes on reasonable grounds that a consumer product is a danger to human health or safety, they may order a person who manufactures, imports or sells the product for commercial purposes to recall it.

If the business does not comply, Health Canada may carry out the recall itself and bill the business for the cost. The CCPSA also requires mandatory disclosure of defect incidents, increases penalties for non-compliance, and expands criminal liability to include corporate directors and officers. The process is now much more transparent and you can view the latest recalls and safety alerts on the Health Canada website.

Regulation of Specific Businesses by Licensing, Bonding, Inspection, or Other Regulation Licensing of businesses is another common method of protecting consumers. We will discuss the licensing of professions in Chapter 5. Licensing is also used to regulate the providers of a variety of goods and services. A familiar example is the inspection and licensing of restaurants by municipal authorities to ensure sanitary conditions in the preparation of food.

Provincial consumer protection acts allow regulatory boards to suspend or revoke registration and to hear complaints. All provinces prohibit door-to-door traders from continuing to sell unless they are registered, so that sanctions, if actively pursued, can be effective. Collection agencies—often accused of using high-pressure tactics and harassment to collect outstanding debts—are also subject to similar registration requirements.

After some highly publicized failures of travel agencies in which consumers who had paid for holiday packages lost their money, some provinces passed legislation to license travel firms in much the same way as door-to-door sellers and collection agencies. In addition, travel agents must be bonded in order to guarantee consumers against loss of prepaid travel; industry-wide Travel Assurance Funds accomplish the same purpose.

ILLUSTRATION 3.3
The payday loan industry provides an interesting illustration of provincial and federal cooperation in consumer protection regulation. In 2004, the questionable lending practices of the payday loan industry caught the attention of the press. The Toronto Star reported that the combination of administrative charges, interest, and insurance fees typically collected on a two-week payday loan amounted to the equivalent of an annualized interest rate of 390–891 percent, even though it is a criminal offence to charge more than 60 percent per annum.

Since banking and interest are matters of federal jurisdiction, the federal government acted first by amending the Criminal Code to allow provinces to regulate this lending industry and set their own interest rate caps. Since then, British Columbia, Manitoba, Nova Scotia, Ontario, and Saskatchewan have passed legislation regulating the industry. Licensing, bonding, reporting, and disclosure requirements are common to most of the provincial schemes, but not all have capped the interest rates. Manitoba set an interest rate cap of 17 percent per annum. Ontario’s legislation sets an actual cost-of-borrowing cap of $21 per $100 borrowed for loans of 62 days or less. This results in a higher rate of interest for shorter loans. Ontario also mandates disclosure and preserves the right to bring a class action.

See the Companion Website for more information on this topic.

56 S.C.2010, c. 21.
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Federal Regulation of Consumer Protection

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ENVIRONMENTAL PROTECTION

The environment is another area managed by government regulation. Most businesses need professional advice to navigate the complicated environmental regulatory schemes applicable to their industry. Non-compliance will trigger costly clean-up costs as well as fines and penalties.

The Legislative Framework

Environmental law is another of the areas in which the federal parliament and provincial legislatures have concurrent jurisdiction. The protection of the environment is clearly within the competence of the provinces, but matters such as air and water pollution are national problems and require national solutions. Municipalities also pass bylaws to provide local environmental protection and to restrict activities deemed to be harmful. All three levels of government need to be involved because environmental damage is not contained by borders.

CASE 3.9

Corporations operating in Manitoba, Ontario, and Saskatchewan were found to have improperly discharged mercury into rivers that drained into Manitoba. The Manitoba government passed a regulatory scheme requiring the companies to compensate fishermen for loss suffered as a result of mercury contamination. The Supreme Court of Canada held that, although creating a civil cause of action for damages caused by pollution was within provincial jurisdiction, Manitoba did not have power to impose liability in respect of acts done outside the province.  

**Federal Legislation** The most important federal legislation is contained in the Canadian Environmental Protection Act (CEPA) administered by Environment Canada. It is augmented by a number of separate statutes relating to particular types of pollution or dangers to the environment.

The CEPA applies to all elements of the environment—air, land, and water, all layers of the atmosphere, all organic and inorganic matter and living organisms, and any interacting natural systems that include components of the foregoing. The Act contemplates a coordinated intergovernmental approach to environmental policy and requires the minister of the environment to create a national advisory committee with representatives from every province, territory, and Aboriginal government (section 6). The committee will advise on environmental quality objectives and recommend guidelines and codes of practice to the minister (section 54), taking a precautionary (preventive) strategy. To facilitate access to the many resulting policies, guidelines, and regulations, the minister must also create a public registry of all regulations, proposed regulations, and court proceedings (sections 12–14). Separate parts of the CEPA deal with subjects such as toxic substances, hazardous wastes, nutrients, international air pollution, and ocean dumping, as well as reactive measures for emergencies and clean-up. Any substance listed in Schedule 1 is considered toxic and subject to special controls. Substances not yet classified must be assessed by Health Canada and Environment Canada before they can be imported or manufactured.

In the case of an abnormal environmental event, the person who owns or controls the substance or activity has a duty to report and take remedial action. Environment Canada will investigate, issue emergency orders and clean-up orders, and may lay charges if it finds non-compliance with environmental standards.

Part 10 of the CEPA deals with enforcement and empowers enforcement officers to deal with polluters as peace officers with the power to search, seize, and arrest (sections 217–224). Any contravention of the CEPA or its regulation is a criminal offence with a minimum fine, as well as a maximum fine of $1,000,000 and three years of imprisonment, or both. Fines double for second offences. This is separate from the costs of the clean-up. The CEPA imposes a personal duty on officers and directors of corporations to comply with the Act, and they are subject to the same penalties (s. 280, 280.1). See the Companion Website for more information on this topic.

**CASE 3.10**

While blasting rock to widen a highway, rock debris escaped and flew 90 metres into the natural environment, damaging homes and cars in the area. This was a dangerous and abnormal result, so the contractor reported the incident to the Ministry of Labour and the Ministry of Transport, but failed to report the incident to the Ministry of Environment. The contractor was convicted of the offence of failing to report an incident. It appealed all the way to the Supreme Court of Canada and the Court held that the event was out of the ordinary and not trivial, as it produced adverse effects; therefore, reporting was necessary.

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59 S.C. 1999, c. 33. The Act consolidated a number of earlier statutes, among them the Clean Air Act, the Environmental Contaminants Act, the Ocean Dumping Control Act, and parts of the Canada Water Act.


61 *Castonguay Blasting Ltd. v. Ontario (Environment)* 2013 SCC 52.
Provincial Legislation  All the provinces have a “general” environment protection law, supplemented by various statutes referring to specific types of environmental protection. Examples are statutes relating to air pollution, water conservation and pollution, transportation of dangerous goods, and waste management.

Environmental Impact Assessment Review

It is much better to prevent injury to the environment than to try to remedy it after it has occurred and, as noted above, CEPA takes a precautionary approach. Environmental impact assessment review processes are required at the federal level by the Canadian Environmental Assessment Act (CEAA) and in all provinces. Regulations under the CEAA identify specific types of projects that may require an environmental assessment. For these projects, the developer must submit a summary of the project to the Canadian Environmental Assessment Agency and the Agency has 45 days to decide if an assessment is required. Selected projects will be reviewed by a panel of independent experts. Public hearings are held in the communities likely to be affected. The review board submits its findings to the minister responsible or to the whole cabinet, which makes the final decision about the future of the project based upon whether or not it will have significant adverse environmental effect. The federal process is concerned about environmental effects on matters within federal jurisdiction (such as fishing), on federal land or on environments outside the project’s host province or outside Canada, or on Aboriginal land, culture, health, or traditions. Conditions may be attached to any approval. The process must be completed within 365 days. See the Companion Website for more information on this topic.

The scope and the procedures of the review process vary from one jurisdiction to another. Where multiple jurisdictions are involved, the federal Minister of the Environment may substitute the provincial process for the federal one.

Enforcement and Liability

Although private enforcement of environmental standards is possible using the common law tort of nuisance or negligence, the enforcement of environmental laws is primarily a public matter. Legislation provides public authorities with a wide variety of enforcement tools. Polluters may be ordered to refrain from harmful activities, to remedy existing situations, and to pay for the costs of clean-up. Owners of contaminated property may be forbidden from dealing with that property, even where they were not responsible for causing the contamination. Most important, environmental legislation normally creates a number of offences, punishable by fines and, in serious cases, by imprisonment. Since most major polluters are corporations, which cannot be sent to prison, the statutes frequently provide for the punishment of corporate directors and officers who are personally responsible for pollution offences. See the Companion Website for more information on this topic.

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62 See, for example, Environmental Management Act, S.B.C. 2003, c. 53; Environment Act, S.N.S. 1994–95, c. 1; Environment Protection Act, R.S.O. 1990, c. E-19.
63 See, for example, Clean Air Act, S.S. 1986–87–88, c. 12.1; Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12.
64 See, for example, Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12; Environment Act, S.N.S. 1994–95, c. 1.
65 See, for example, Dangerous Goods Handling and Transportation Act, C.C.S.M., c. D-12; Dangerous Goods Transportation Act, R.S.O. 1990, c. D.1.
66 See, for example, Waste Management Act, R.S.B.C. 1996, c. 482.
68 Ibid., s. 5.
Bribery of Foreign Officials

This chapter has dealt with a number of regulations that require businesses to seek government approval. Would an ethical Canadian business ever consider bribing the Commissioner of Competition to obtain approval for a merger? Of course not; in Canada, bribery of Canadian public officials is unacceptable and government corruption is prohibited through a number of Criminal Code offences, including bribery, fraud, influence peddling, and money laundering.

Internationally, attitudes concerning the bribery of government officials vary widely. In some cultures, it is considered normal, if not acceptable, to bribe an official to get a favourable or at least more rapid response.

In 1997, the Organisation for Economic Co-operation and Development (OECD) adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. This treaty called for member nations to adopt domestic legislation that criminalized bribery of foreign officials. Canada ratified the treaty and passed the Corruption of Foreign Public Officials Act (CFPOA) in 1999. This Act makes it a crime to confer any benefit, directly or indirectly, to a public official "in order to obtain or retain an advantage in the course of business." It covers any global bribery where there is a real and substantial link between the offence and Canada. The maximum penalty under the Act is 14 years in prison. Progress on the fight against corruption must be reported to Parliament on an annual basis.

In recognition of the cultural variation in bribery standards, "facilitation payments" made to expedite or secure the performance of a "routine" act by a public official are exempt for the CFPOA. Amendments introduced in 2013 anticipate the removal of the exemption.

In 2002, Hector Ramirez Garcia, a U.S. immigration officer working at the Calgary airport, was sentenced to six months in jail and deported to the United States after accepting bribes from an Alberta company, Hydro Kleen Systems Inc., in violation of the CFPOA. The company was also convicted and received a $25 000 fine. In 2013, the director of a technology company was convicted of agreeing to offer a bribe to the Indian Minister of Civil Aviation in order to obtain an Air India contract.

The United States has similar legislation known as the Foreign Corrupt Practices Act. The OECD visits participating countries to evaluate anti-corruption progress and makes recommendations about further measures. Other Canadian steps taken to reduce bribery include inserting anti-money-laundering provisions in the Income Tax Act and amending the Criminal Code to expand its applications to organizations.

Questions to Consider
1. Should Canada attempt to regulate international business conduct by extending the reach of its criminal law beyond its borders?
2. Facilitation payments are not acceptable in Canada, so why should they be exempt from the Corruption of Foreign Public Officials Act?


Strategies to Manage the Legal Risks

This chapter provides only a general overview of the main categories of government regulation of business. Management personnel must familiarize themselves with the industry-specific rules affecting their business’s activity. There must be a system in place to routinely update the regulatory information as new guidelines are adopted on an ongoing basis. Some requirements are mandatory, in the form of regulations enforced through inspection and penalties. Naturally, these must be complied with, or even directors and officers will be punished. Other standards are recommendations only, such as guidelines, codes of practice, and policies. Although these recommendations may not be mandatory, non-compliance may give rise to civil liability for those harmed—therefore, the best strategy is to conform to all recommended best practices.

Product safety is one of the major objectives of several pieces of legislation discussed in this chapter, and it is no longer a concern for just the product manufacturer. Every business involved in the manufacture, import, distribution, advertisement, or sale of a product may be liable for defects or misrepresentations. Those involved in the supply chain must inform themselves about the compliance of their distribution partners. Naturally, indemnity clauses

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(under which the offending party agrees to cover all costs of the defect) play a key role in managing the risk, but they may be of little help if the other businesses are foreign or insolvent. Insurance should be obtained not only for the damage caused to outside parties but also for the losses to the business itself when expensive recalls must be undertaken and funded.

Businesses need not accept all regulations imposed on them by government; sometimes the rule is beyond the power of the government, violates the Charter, or does not cover the subject conduct. Rather than waiting to complain until after their implementation, management should participate in the development of regulations. Many regulators, such as the securities commissions and the environmental protection agencies, release discussion papers seeking comments on proposed regulation. Businesses have the opportunity to respond individually or through industry-wide associations. Shaping the regulation before it is adopted is much easier and cheaper than attempting to invalidate it after enactment. This is just one of the uses of industry-wide associations. They may also be useful to supply current information about required standards of behaviour and in the development of best practices. However, caution must be exercised when developing industry-wide solutions to common challenges through an association of competitors.

QUESTIONS FOR REVIEW

1. What strategies are available to business to avoid the application of government regulation?
2. How does the Constitution divide the power to regulate business among the various levels of government in Canada?
3. Which provisions of the Charter have particular application to business activity?
4. What changes to the business environment strengthened the need for consumer protection legislation?
5. What are the principal forms of misleading advertising that are prohibited by the Competition Act, and what are the consequences?
6. What is a conspiracy? How does the Competition Act categorize conspiracies?
7. How does a court determine if competition has been unduly lessened?
8. Give examples of the principal types of abuse of dominant position.
9. Why is it thought necessary for governments to control mergers?
10. Why are horizontal mergers more likely to affect competition than other types of mergers?
11. Why is the determination of the relevant market essential to the application of competition law?
12. What is the purpose of environmental impact assessment review?

CASES AND PROBLEMS

1. Continuing Scenario

Before opening her restaurant, Ashley contacted O’Brien’s Food Service Ltd. to be her frozen poultry supplier. Because she was new to the business and her volume would be low, O’Brien’s quoted her a price of $25.00 per case of frozen chicken breasts. Adam, O’Brien’s salesman, told her in an email that the price was only $20 per case for restaurants that ordered more than three cases a week. Ashley could not be sure she would need this much chicken, so she proceeded on the initial quote. The following day, Adam stopped by the restaurant with the customer application form describing the price as “as quoted” and told Ashley that with every order of chicken she must also take two cases of frozen meatballs at a cost of $15.00 a case. Meatballs are not on Ashley’s proposed menu—she does not want them. Adam tells her it is both or nothing. Ashley says she needs time to think about it. Is there anything wrong with this practice? What can Ashley do?
2. Dr. Carpenter relocated her dental practice to premises in a new shopping mall and placed an advertisement to that effect in the local newspapers. The notice conformed with the advertising standards of the dental profession in the province, but one of the newspapers decided to print a “human interest” story and did an interview with Dr. Carpenter. The story was printed without first having been shown to Dr. Carpenter, and a number of advertisements for dental supplies appeared on the same page. At the same time, Dr. Carpenter ordered a sign announcing the change of premises, which she intended to be displayed in the window of her old premises. Instead, by mistake, the sign was displayed in a public area of the shopping mall.

The professional association considered that the sign and the advertisements that accompanied the newspaper article constituted breaches of the professional advertising code, and gave notice to Dr. Carpenter of a disciplinary hearing, which could result in the cancellation or suspension of her licence to practise.

On what grounds, if any, can the validity of the disciplinary hearing and the professional regulations be challenged?

3. Red Square Records Inc. is a Canadian corporation holding the sole rights to import and distribute in Canada discs and tapes produced by a Russian company, Krasnayadisk. For some years, Red Square has been importing two labels that have proven very popular, partly because of their low price. It has been selling the discs to dealers at $4.99 each, and they are retailed at prices ranging from $6.99 to $8.99.

Recently, Krasnayadisk introduced a new label, on which it is releasing previously unavailable archival recordings that are of great interest to collectors. Red Square has started to import the discs and makes them available to retailers at $18.99 each.

Steve's Records Inc., a Canadian firm that owns a large chain of record stores across Ontario, had been selling large quantities of the cheaper Krasnayadisk recordings, and its customers had shown a lot of interest in the new label. However, many were deterred by the high price. Steve's found another source for the new label—a dealer in the United States, who was prepared to supply Steve's at a price of $11.99 per disc. This enabled Steve's to sell the new label at a much lower price than any of its competitors.

Some months ago, Steve's received a letter from Red Square to the effect that, if Steve's did not stop purchasing the new label from the United States, Red Square would no longer be willing to supply Steve's with the two cheaper labels. Steve's ignored the warning and continued to import the new label.

A few weeks ago, Steve's ordered some discs from Red Square and was informed that Red Square would no longer supply Steve's. The cheaper labels are also available in the United States, but at the same price of $4.99, and with higher shipping costs.

Is there any action that Steve's can take against Red Square's refusal to supply it?

4. Truenorth Press Inc. owned both of the daily newspapers in Bayville. The papers were relatively unsuccessful compared to Truenorth's other dailies throughout Canada, and faced stiff competition for advertising revenue from a large number of small community newspapers that circulated in the same distribution area. Those community newspapers contained local news stories and advertisements from mainly local firms, appeared once or twice a week, and were distributed free of charge.

Truenorth embarked on a campaign to acquire the community papers and, within one year, obtained control of 20 publications, including the two papers with the largest circulation.

A group of citizens—readers, who feared that there would be fewer local stories, and small firms, who feared that their advertising rates would be increased once Truenorth gained control of the remaining papers—held a number of public meetings to express their concern.

Is there any legal action that they could take?
In addition to pre- and post-tests, mini-cases, and application exercises, the Companion Website includes the following province specific resources for Chapter 3:

- **Alberta:** XXX
- **Atlantic Provinces:** Consumer Product and Liability Act; Public Utilities Board
- **British Columbia:** British Columbia Environments Legislation; Business Practices and Consumer Protection Act; Collection Agents; Consumer Protection Legislation; Consumer Taxes; Cooling-off Period; Cost of Borrowing; Credit Cards; Credit Reporting; Direct Sales Contracts; Dishonest Trade Practices; Distance Sales Contracts; Sale of Goods Act
- **Manitoba/Saskatchewan:** Consumer Protection Legislation; Environmental Legislation; False or Exaggerated Claims
- **Ontario:** Agreements to Share Power; Consumer Protection Act (2002); Environmental Protection Legislation; Payday Loans; Unfair Business Practices

(www.pearsoncanada.ca/smyth)