

# Types of Business Organization

Section C of Stikeman Elliott's *Doing Business in Canada*





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# Types of Business Organization

## CORPORATION

### **Business Corporations Acts**

Both the federal and provincial governments have enacted legislation providing for the incorporation and regulation of business corporations (known as “companies” under some statutes). A business corporation incorporated under provincial law may carry on business as of right in the province of its incorporation and also has the capacity to carry on business beyond the limits of that province. A federal business corporation is subject to provincial laws of general application, although it has the basic right to carry on business in any province. Most provinces require corporations incorporated in other jurisdictions to register or to be licensed before doing business in that jurisdiction and to file initial and annual returns and notices reporting certain basic corporate changes. Failure to comply with the rules governing extra-provincial corporations can prevent a corporation from holding land in the subject jurisdiction, from maintaining an action before the courts and, in certain cases, from enforcing an otherwise valid agreement.

### **Differences Among The Acts**

Although federal and provincial business corporation statutes are quite similar in most respects, there are some differences that can affect the decision whether to incorporate federally or provincially. Examples include ease and timeliness of incorporation, flexibility in carrying out corporate proceedings, licensing requirements, fees and taxes and the extent of continuous disclosure requirements. One consideration often relevant to non-resident investors is the requirement, found in many corporation statutes, of a minimum number or percentage of resident Canadian directors. It is usually easier for a non-resident to incorporate under a statute with a minimal Canadian residency requirement or no requirement at all. Otherwise, where all else is equal, non-residents are often advised to incorporate federally rather than provincially on the theory that a federal corporation will be more readily recognized and accepted – as a practical rather than a legal matter – outside Canada.

### **Sector Specific Legislation**

Certain types of business corporation (for example, banks, trust and loan companies, credit unions or associations, and insurance companies) are governed by sector-specific legislation rather than the general federal or provincial business corporations statutes.

## Unlimited Companies

An interesting hybrid of corporation and partnership is the “unlimited company” (ULC), unique to Nova Scotia, British Columbia and Alberta law in respect of which, among other things, the “members” or shareholders have unlimited liability in certain circumstances. ULCs gained popularity in the mid-1990s, as a ULC that is a subsidiary of a U.S. parent was able to produce certain tax advantages, as a tax flow-through vehicle, for its parent. Effective January 1, 2010, the Fifth Protocol to the US-Canada Income Tax Treaty limited many of the tax advantages enjoyed through ULCs.

## PARTNERSHIPS

Partnership law in Canada is a matter of provincial jurisdiction. While a partnership is generally formed under the laws of a particular province, partnerships carrying on business in more than one province will be required to comply with the law of, and may be required to register in, each such province. In the absence of an agreement to the contrary, the rights and obligations of partners are those found in the governing provincial legislation.

Canadian jurisdictions generally recognize two forms of partnership: *general* and *limited*. General partnerships have most of the characteristics of sole proprietorships, except that they include more than one person. Like sole proprietorships, general partnerships can be attractive in virtue of their simplicity and informality, but they also share the characteristic of unlimited liability, which in the case of a general partnership attaches jointly and severally to each partner. The only filing normally required with respect to a general partnership is a registration of the business name where the partners are not using their own names.

Limited partnerships are creatures of statute and are formed by the filing of a declaration of partnership under the relevant partnership statute. Limited partnerships alleviate liability concerns to some extent by allowing the creation, within a partnership arrangement, of limited partners whose liability is limited to their respective contributions to the partnership. The price of this, however, is a prohibition on participation by a limited partner in the “control” of the business of the partnership.

The limited partnership (LP) is distinct from the “limited liability partnership” (LLP), a special form of partnership recognized in a growing number of provinces. The LLP form is designed principally for law firms and other professional services firms.

## JOINT VENTURES

A joint venture may have tax advantages as an alternative to partnership. Because Canadian law does not recognize the joint venture as a distinct form of business association, joint ventures must take one of the forms that are recognized, for example, corporations, partnerships or contractual relationships. In particular, because there is no specific joint venture legislation, parties entering into a joint venture who do not wish to form a partnership must make it clear that they do not intend to be associated in partnership.

## SOLE PROPRIETORSHIPS

Although the sole proprietorship is free from most government regulations that apply to business corporations, certain registration requirements must be complied with in the jurisdiction in which the business is to be carried on. For example, a sole proprietor who uses as his or her business style a name or designation other than his or her own is required to register the name under applicable provincial legislation.

## FRANCHISES AND LICENSING ARRANGEMENTS

Franchising and licensing arrangements are generally governed by the applicable law of contracts, although Alberta, Ontario and Prince Edward Island have specific franchising statutes.

Federally, the *Competition Act* prohibits certain practices with particular relevance to franchises and licence arrangements. These practices relate to promotional allowances, resale price maintenance, pyramid selling, referral selling and advertising. In addition, the *Competition Act* subjects certain trade practices to review, including refusals to deal, consignment selling, exclusive dealing, tied selling and market restriction. Also relevant in some cases are the *Trade-marks Act* and the *Patent Act*.

Alberta, Ontario, and Prince Edward Island have enacted specific disclosure legislation with respect to franchising. These acts mandate fair dealing in the franchise relationship and provide special remedies to franchisees in the event of abusive conduct by a franchisor. Other provinces indirectly regulate certain aspects of franchising through their consumer protection and securities laws, as well as through laws relating to fair trade practices, pyramid selling, referral selling and advertising.

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[www.stikeman.com](http://www.stikeman.com)

This publication is intended to provide general information about developments in the law and does not constitute legal advice.

For further information please contact your Stikeman Elliott representative or any of the Managing Partners or Principals listed below:

#### **MONTRÉAL**

1155 René-Lévesque Blvd. West, 40th Floor, Montréal, QC, Canada H3B 3V2  
Tel: (514) 397-3000 Fax: (514) 397-3222  
Contact: André J. Roy aroy@stikeman.com

#### **TORONTO**

5300 Commerce Court West, 199 Bay Street, Toronto, ON, Canada M5L 1B9  
Tel: (416) 869-5500 Fax: (416) 947-0866  
Contact: Roderick F. Barrett rbarrett@stikeman.com

#### **OTTAWA**

Suite 1600, 50 O'Connor Street, Ottawa, ON, Canada K1P 6L2  
Tel: (613) 234-4555 Fax: (613) 230-8877  
Contact: Stuart McCormack smccormack@stikeman.com

#### **CALGARY**

4300 Bankers Hall West, 888 - 3rd Street S.W., Calgary, AB, Canada T2P 5C5  
Tel: (403) 266-9000 Fax: (403) 266-9034  
Contact: G. Frederick Erickson ferickson@stikeman.com

#### **VANCOUVER**

Suite 1700, Park Place, 666 Burrard Street, Vancouver, BC, Canada V6C 2X8  
Tel: (604) 631-1300 Fax: (604) 681-1825  
Contact: Ross A. MacDonald rmacdonald@stikeman.com

#### **NEW YORK**

445 Park Avenue, 7th Floor, New York, NY 10022  
Tel: (212) 371-8855 Fax: (212) 371-7087  
Contact: Kenneth G. Ottenbreit kottenbreit@stikeman.com

#### **LONDON**

Dauntsey House, 4B Frederick's Place, London EC2R 8AB England  
Tel: 44 20 7367 0150 Fax: 44 20 7367 0160  
Contact: Derek N. Linfield dlinfield@stikeman.com

#### **SYDNEY**

Level 12, The Chifley Tower, 2 Chifley Square, Sydney N.S.W. 2000 Australia  
Tel: (61-2) 9232 7199 Fax: (61-2) 9232 6908  
Contact: Brian G. Hansen bhansen@stikeman.com