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Fundamentals of Franchising - Canada

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I. INTRODUCTION

Over the last 50 years, American franchise systems have regularly chosen Canada as one of their international expansion targets. Geographic proximity and historical and cultural commonalities between the two countries have made Canada a premiere destination for U.S. franchisors. Canadian business practices and consumer tastes are very similar to the United States, giving American business the opportunity to succeed in the Canadian marketplace. Canada's form of federalism under the Constitution grants the federal government exclusive authority over such areas as trade and commerce, banking and bills of exchange, bankruptcy and insolvency, trademarks, patents and copyrights. The Constitution grants provincial governments exclusive jurisdiction over such areas as property and civil rights, as well as the administration of justice in the province. Therefore, franchisors should be aware that intellectual property law, as well as competition law, are within the powers of the federal government with statutes that apply across the entire country. In contrast, the law relating to private contractual matters fall within the powers of the provincial government. This means that any franchise legislation in Canada will only ever likely arise at the provincial level. To date six of ten provinces have chosen to pass a franchise law, namely Alberta, British Columbia, Manitoba, New Brunswick, Ontario and Prince Edward Island. So, as of this date, none of Newfoundland, Nova Scotia, Quebec or Saskatchewan has a franchise law.

This paper will highlight a variety of significant differences when comparing the business, law and practices of franchising in Canada and the United States. At the same time, it will explore the similarities that exist between the two countries. Recognizing the differences and exploiting the similarities should assist in building a successful franchise system in Canada. This paper and the Forum workshop at which it is being presented coincide with the publication of the 2nd Edition of Fundamentals of Franchising - Canada. This new edition explores many of these concepts in greater detail and this paper purposefully refers to the appropriate parts of the book, with the intention that it can be used as a practical guide for U.S. franchisors looking to expand their brand into Canada. None of this of course replaces specific local legal advice by lawyers licensed to practice law in Canada, and the reader is cautioned against providing advice to their clients on the laws of a foreign jurisdiction without obtaining such counsel.

II. STRUCTURING AN EXPANSION INTO CANADA

Once a business based outside the country makes the decision to expand to Canada through franchising (as opposed to opening corporate units), there are a number of key issues that need to be considered at the outset and decisions that need to be made in regard to structure. Generally, these issues relate to whether the franchisor believes it needs to have a

2 Id.
3 Id.
4 Id. at 5.
5 This summary is based on Chapter 1 in Fundamentals of Franchising - Canada, supra note 1. The intricate detail of the tax issues that need to be considered are beyond the scope of this paper, but are discussed in more detail in the book. However, this paper will make note when the tax issues arise, giving the reader an understanding that knowledgeable cross border tax advice needs to be sought.
physical presence in Canada, the identity of the franchisor, and the method of franchise expansion.

All of the issues are inter-related, and not one of them necessarily comes first in any decision making analysis. And much of this analysis is related to cross-border tax issues.

Of the issues noted, one to consider and that will guide other decisions is whether the business being franchised requires from the outset that the foreign franchisor have a physical presence or permanent establishment in Canada. The business issues that need to be addressed are whether the business being franchised will have a greater likelihood to succeed if the franchisor puts “boots on the ground” in Canada. Putting those “boots on the ground” will result literally in the franchisor becoming a resident of Canada for tax purposes.

Many franchisors looking to expand outside their home country go to great lengths to ensure they do not become residents for tax purposes in any foreign country they expand into through franchising. In fact many of them would view the avoidance of being a resident in those countries for tax purposes to be one of the advantages of franchising.

But the experience as between Canada and the U.S. has always been a little different. Canada is often chosen by U.S. based brands as the first market to expand into internationally because it is often seen as so similar to the U.S. that any such expansion will be simpler. But franchisors who fail to recognize that there are many differences between the two countries do so at their peril.

So putting “boots on the ground” will permit the foreign franchisor to learn from the on the ground team about what really is similar and different in their particular business as between the two countries. Suffice it to say the authors believe that any foreign franchisor should not use preconceived notions about the structure to choose. Instead they should engage in a thoughtful analysis on whether “boots on the ground” will give that business the greatest chance of success, the pros and cons of the tax issues, in order to decide whether or not having a permanent establishment is really something to be avoided above all else.

It is perhaps obvious that the use of a Canadian corporation will amount to becoming a resident of Canada for tax purposes. But more detailed advice is needed as even a U.S. corporation opening an office with employees in Canada will amount to a permanent establishment which can trigger tax consequences. So the franchisor should obtain tax advice to understand what will amount to a permanent establishment, as something even less than the establishment of a physical office can result in that. An entity with a permanent establishment makes itself a resident of Canada for tax purposes. That is not necessarily a good or bad thing. But it should not be a surprise, as it is something that should be planned for, with the most efficient tax structure sought.

A. No Permanent Establishment

A franchisor who decides that a physical presence in Canada is not required, will then not be able to use a Canadian corporation as franchisor. And to otherwise avoid being a resident of Canada for tax purposes it will need to avoid engaging in certain “on the ground” conduct in Canada, such as the entering into of contracts. It will need to carefully operate from the foreign country into the Canadian market. In regard to the identity of the franchisor, it will then need to decide whether the franchisor entity will be the same one it uses for its U.S. domestic franchising, or whether it is going to use a new U.S. corporation of some kind (such as
That is usually an issue involving both U.S. and Canadian tax issues, and of course, exposure to legal liability. But the authors can confirm that both appear to be equally common routes to take. In any of these scenarios, payments of initial franchise fees, royalties, and perhaps even advertising fund payments, will be subject to a Canadian non-resident withholding tax.

B. Permanent Establishment in Canada - Branch or Subsidiary

But where the franchisor decides that a physical presence is what it wishes to have, then it needs to decide whether to use a Canadian subsidiary or whether to have the U.S. franchisor operate directly in Canada by way of a “branch”.6 (It should also be noted here that a U.S. franchisor who does too much on the ground in Canada may inadvertently risk being found to be operating a branch in Canada.)

1. Branch

Rather than forming a separate corporate entity through which to operate, a U.S. franchisor may decide to develop its system in Canada by using its U.S. entity to operate from its home office or by establishing a branch office in Canada. Establishing a branch office in Canada provides a local base from which to administer the expansion. In either scenario, the franchisor remains in charge of the franchisees in Canada. There are many income tax considerations that must be carefully examined when choosing to operate from a home office outside of Canada as opposed to setting up a branch office in Canada.7

However, as discussed above, it is important to note the concept of “withholding tax.” If a new Canadian operation is to be run by an arm’s-length entity that is granted master franchise rights or area development rights, with the franchisor having little role in the day-to-day operations, then income earned by the franchisor through initial franchise fees and royalties would likely be treated as passive income under Canadian income tax law. In this scenario, payments made by Canadian resident franchisees to a non resident franchisor will only be subject to a withholding tax. On the other hand, if the U.S. franchisor chooses to actively engage in the Canadian franchise operation, its compensation would be treated as business income and therefore not result in a withholding tax. Here the franchisor would be taxable in Canada on a net income basis.8

There are both advantages and disadvantages associated with a U.S. franchisor operating through a branch in Canada. Some franchisors do not have a permanent establishment in Canada because they will typically qualify for a foreign tax credit. Furthermore, resulting losses from a Canadian branch operation will reduce taxable income in the franchisor’s home jurisdiction.9 But in other instances there is potential that tax authorities will assert that payments to the non-resident franchisor are passive income subject to a withholding tax on

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7. A detailed analysis can be found in Chapter 1 in Fundamentals of Franchising - Canada, supra note 1.
9. Id. at 7.
gross income paid. If the business’ expenses are large and the tax rate is not reduced, a flat withholding tax could eliminate all profit. ¹⁰

2. **Subsidiary**

A U.S. franchisor may choose to establish a wholly-owned Canadian subsidiary to operate its franchise system in Canada. Under this model, the franchisor will have full operating control of the subsidiary as a separate corporate entity through ownership of the subsidiary’s shares and appointment of its board of directors, officers, and managers. This structure well-suits franchisors looking to be risk-averse because forming a separate corporate entity can be a more efficient shield against creditors. This is especially beneficial to U.S. franchisors seeking to avoid liability for potential start-up losses and other liabilities that may arise in a new Canadian operation.¹¹

U.S. franchisors interested in creating a subsidiary structure should be aware that a subsidiary may be incorporated federally or in any province or territory of Canada.

A special type of corporation known as an “unlimited liability company” (ULC) is available in the provinces of Nova Scotia, Alberta, and British Columbia. ULCs are unique because they are treated in the same way as other corporate entities for Canadian tax purposes, but as flow-through entities for U.S. tax purposes. The liability of shareholders of ULCs is unlimited and thus a typical ULC structure consists of a liability blocker corporation, such as an intermediate subsidiary, who serves as the ULC’s sole shareholder. The current Canadian tax legislation requires a ULC to partake in a two-step distribution of the profits in order to avoid adverse tax consequences. The process involves a stated increase in the paid-up capital of the shares of the ULC, followed by a payment that reduces the paid up capital. Franchisors should still be aware of the potential disadvantages associated with a ULC structure. In some provinces, a ULC is more expensive to incorporate and maintain than a conventional limited liability business corporation.¹²

C. **Method of Franchise Expansion**

A U.S. franchisor can consider multiple methods of franchise expansion into Canada. The methods and their names are the same as those commonly known throughout the world and all are commonly used in Canada, whether a franchisor decides to use single unit franchising, or one or more of the multi-unit methods of expansion such as master franchising, an area development agreement, or area representatives.¹³

Interestingly, U.S. franchisors looking to expand their business through franchising into Canada have been just as likely to use single unit franchising as any other multi-unit method. That is usually not true for any other country in the world. Most U.S. franchisors looking to expand to any other country of the world will most usually look to a master franchise structure, and sometimes, but less often, an area development or area representative model. Single unit

¹⁰ [Fundamentals of Franchising - Canada, supra note 1.](#)

¹¹ *Id.* at 10.

¹² *Id.* at 12.

¹³ *Id.*
franchising is beyond the realm of contemplation in expansion to these counties because of the hands-on efforts in the foreign country that would be required by the franchisor.

But, expanding to Canada has always been different. A U.S. based franchisor has always been able to consider the use of any one of these established methods, with single unit franchising at one time being the most common way to expand from the U.S. to Canada. However, with the advent of franchise laws in Canada, the attendant cost of compliance, as well as the growth worldwide in multi-unit models, single unit franchising has become less common as the preferred means of expansion. However it is still used quite often.

1. **Master Franchising**

A basic master franchise agreement involves the granting of rights by the franchisor to one or more master franchisees (subfranchisors) to subfranchise units in particular geographic areas, usually on an exclusive basis. In a master franchise agreement, the master franchisee stands in the shoes of the franchisor. As such, the franchisor places a great deal of faith in the master franchisee to properly maintain and develop the franchise system. U.S. franchisors looking to rely on the experience, contacts, and human resources of the master franchisee should make every effort to ensure that the master franchisee is a party capable of acting in that capacity. There is often a substantial cost and time spent associated with concluding a Master Franchise Agreement. That is because the typical master franchisee is making a larger investment, and is by definition a more sophisticated party, as compared to a single unit franchise transaction. And those are exactly the qualities one wants in a master franchisee, and justifies the splitting of fees as between the U.S. franchisor and the local master franchisee. So, there is a strong argument for a franchisor to contract with a master franchisee in a foreign territory because large U.S. franchisors want a subfranchisor capable of the responsibility and potential liability attached to individual franchisees. While Master Franchise Agreements are indeed successful for many foreign franchisors, it is worth mentioning that choosing the wrong master franchisee can cause irreparable harm to the franchisor's business and cause reputational damage to the brand. Choosing the wrong master franchisee in any one place in the world can harm the brand in the long term, and perhaps that is even a more relevant concern just next door in Canada.

The master franchise agreement will typically require payment of an initial fee for the right to open (through subfranchising) a specified number of units, over a specific period of time. A critical component of these agreements is the negotiation and finalization of the development schedule relating to the number of units to be opened and over what period of time. Both parties are often very optimistic about the territory's prospects, and the development schedule gets finalized accordingly. A sophisticated master franchisee candidate should want to deal with any failure to meet that quota in a way that avoids a single remedy, namely termination.

2. **Area Development**

A U.S. franchisor may consider one or more area development agreements as another option for entry into Canada due to the large size of the country and prevalent regional differences. In this type of agreement, the franchisor will usually grant the area developer the right to establish a multiple number of individual units or franchises associated with the

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14 Fundamentals of Franchising - Canada, supra note 1, at 22.
15 Id. at 23.
franchise system, usually within an exclusive territory. But like a master franchise agreement, an international area developer typically needs to be a more sophisticated and capable party, as otherwise the franchisor is in effect simply ending up with a number of single unit franchises owned by a single franchisee (the developer).

Like the master franchise agreement, the area development agreement will typically have an initial fee for the right to open a specified number of units, over a specific period of time. Sometimes that upfront fee is credited to the initial franchise fees payable under the unit franchise agreements to be signed upon the opening of a unit. Again, a critical component of these agreements is the negotiation and finalization of the development schedule, and both parties are often very optimistic about the territory’s prospects, with the development schedule getting finalized accordingly. So a sophisticated area developer will want to deal carefully with the provisions that may be included in an area development agreement on exclusivity of territory, and if the developer fails to meet any quota.16

3. Alternative Arrangements

Many actual deals that get completed in Canada are in fact hybrid arrangements, containing characteristics of both master franchise agreements and area developer arrangements. Ultimately that is because a master franchisee may be required often to first open their own “corporate” units, while in many area development agreements the developer is at some point permitted to start subfranchising.

In an area representative arrangement the franchisor retains the “area rep” to be the agent of the franchisor in the market, in exchange for a portion of the royalties received by the franchisor from the unit franchisees. The area rep may end up doing some or all of the franchisor’s job in the market. This usually begins with the area rep acting on the recruitment and sales of franchises, but can extend to many if not most of the responsibilities of the franchisor in the market under the single unit franchise agreement it will sign with franchisees, including sourcing locations, negotiating leases, opening and ongoing support, locating suppliers, conducting audits and inspections, etc. The more responsibility the area rep takes on, the more it presumably will get paid. Several brands have launched their franchise programs in the U.S. using this model, and have similarly expanded into Canada using the same method.

Historically joint ventures were not that common when a U.S. franchisor sought to expand to Canada. However, in the last few years, it would appear that the number of potential franchise joint ventures has expanded. This is perhaps explained by any one U.S. franchisor’s growing desire to “partner” with more sophisticated multi-unit operators, as noted above. And so a joint venture has now become another realistic and possible option. In any event, they often involve the creation of a joint venture entity to act as franchisor in the market, with ownership split between the U.S. franchisor and a Canadian operator. The joint venture entity will then become a master franchisee, area developer or area representative. But layered on top of that complicated arrangement is more complication, by way of the shareholders agreement they need to conclude, and the ongoing need to collaborate and work very closely together.17

16 Fundamentals of Franchising - Canada, supra note 1 at 24.

17 Id. at 25.
III. TRADEMARK AND OTHER INTELLECTUAL PROPERTY ISSUES

Expansion into Canada, regardless of the type of business structure involved, requires an appreciation of the mechanisms behind enforcing and protecting intellectual property rights which are critical to franchising.

There are two primary vehicles for protecting the intellectual property rights in the context of Canadian franchise law: trademarks and copyrights. While there is some overlap between the two, they are sufficiently distinguished to warrant a separate discussion of each.

A. Trademarks

In Canada, rights in a trademark arise either statutorily, from registration under the Trade-marks Act, R.S.C. 1985, c. T-13 (TMA), or as a result of the use of the trademark in the marketplace, otherwise known as common law rights. Although there are significant advantages to registration, the owner of an unregistered trademark (or in certain cases, trade-name or other signs) may not only assert its rights over others based on the use of its trademark; but it may also rely on these rights to prevent the registration by third parties of confusingly similar trademarks.

1. Common Law Protections

The common law tort of “passing-off” provides protection to producers (and consumers) in Canada by prohibiting the use of a trademark or trade-name that would wrongly lead consumers to believe that the unauthorized user’s products or services were those of the trademark or trade-name owner. Over time, the concept of passing-off was extended not only to trademarks or trade-names, but also to trade dress copying, unfair advertising or misappropriation of rights in names and personality.

For a passing-off action to be successful, three requirements must be established by the plaintiff, as stated by the Supreme Court of Canada in Ciba-Geigy Canada Ltd. v. Apotex, Inc. at 301:

- The existence of goodwill or reputation in the plaintiff’s trademark;
- A misrepresentation, whether intentional or not, that leads or is likely to lead the public to believe that the defendant’s products, services or business are associated with, or authorised by the plaintiff; and
- Actual or potential damages to the plaintiff.

2. Trade-Marks Act

In Canada, the registration of trademarks is governed by the TMA. As mentioned above, trademark owners have common law rights which may be exercised in the form of an action for passing-off. Thus, registering a trademark under the TMA is not a condition precedent to gaining legal protection; rather, registration is a powerful evidentiary tool that helps to not only prove

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18 This summary is based on Chapter 4 in Fundamentals of Franchising - Canada, supra note 1.

19 (1992), 44 C.P.R. (3d) 289 at 301.
prior ownership, but also helps bolster protection across all of Canada as opposed to being limited to specific geographic areas.

Under the TMA, there are four categories of trademarks: trademarks, certification marks, a distinguishing guise, or a proposed trademark. The TMA has defined a trademark to mean:

(a) a mark that is used by a person for the purpose of distinguishing or so as to distinguish goods or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others;

(b) a certification mark;

(c) a distinguishing guise; or

(d) a proposed trade-mark; (marque de commerce)\(^{20}\)

Generally, trademarks can include "any mark, sign, logo, symbol, design, acronym, single word or sentence or any combination of these elements that is used or proposed to be used in Canada for the purposes of distinguishing the wares, services or business of a person or entity from those of others."\(^{21}\) Sounds have also been recognized as valid trademarks by the Federal Court of Canada in *Metro-Goldwyn-Mayer Lion Corp. v. Canada (A-G)* rendered on March 3, 2012, T-1650-10.\(^{22}\) Interestingly, the Trade-marks Office still requires a visual representation of the sound note to be presented with the application.

Of noteworthy consideration, especially in contrast to the American context, are "official marks." These are a unique type of trademark for which no American equivalent exists. These types of marks may be granted to "royalty, governments, universities or other public authorities in Canada." Furthermore, there are certain privileges enjoyed by the owners of official marks that are not enjoyed by ordinary trademark holders.\(^{23}\)

As previously discussed, trademarks are defined as marks that are used for the purpose of distinguishing goods and services. Thus, in order to register a trademark, these specific grounds must be met. What qualifies as "use" and "distinguishing" has been explored at great lengths in Canadian jurisprudence.

In addition, there are further requirements as to the content of the trademark. Section 12(1) of the TMA defines a set of grounds that disqualify an individual from registering a trademark. Section 30 of the TMA further outlines the process for filing registration on a trademark.


\(^{21}\) Fundamentals of Franchising - Canada, supra note 1, at 120.

\(^{22}\) Id.

\(^{23}\) Id. at 121.
Under the TMA, subsections 7(b) and (d) create the statutory offence of passing off. Further, it has been held in subsequent jurisprudence that the common-law tort of passing off and the statutory offence created under the TMA do not contain any "significant differences."

In addition to passing off, the sections 19 and 20 of the TMA also create infringement offences. Together, these sections prohibit the use of identical trademarks and those that are "confusingly similar."

In addition to these remedies, section 22 of the TMA also prohibits the depreciation of goodwill. While similar protections are common elsewhere, of particular importance is the fact that the TMA does not require the trademark to be famous. This is in contrast to both European and American legislation. If the claimant can demonstrate that the trademark is sufficiently well known to have goodwill attached to it, this is sufficient to trigger protection under section 22 of the TMA.

The licensing of trademarks is exceedingly important in the context of franchises. Most franchisors will readily admit that one of the most important and valuable assets of the franchise system is the name or other marks used to distinguish their business from others. Part of the value attributable to these trademarks is, of course, the ability to trade under these words and symbols without fear that others can use the same or a similar name or design, the effect of which would tend to confuse the public and diminish goodwill.

Under Canadian law, the validity of a trademark is partially based on distinctiveness, and thus a given trademark should direct the consumers to a single source. However, it is common for a trademark owner to capitalize on the goodwill attached to its mark by licensing its use to third parties.

When a franchisor licenses its trademarks to a franchisee, important factors must be taken into consideration when drafting the agreement. For example, section 50 of the TMA requires that in order for the use of a licensee to have the same effect as that of the licensor, the owner of the trademark must maintain "direct or indirect control of the character or quality of the wares or services associated with the trademark." As in the United States and elsewhere, this can be difficult because too much control can result in joint employer, agency or vicarious liability issues. Furthermore, subsection 50(3) claims that "in the absence of an agreement to the contrary between the owner and the licensee, the licensee may force the owner to take proceedings for infringement of the licensed trademarks."

Absent a written agreement, providing satisfactory evidence of the existence of a license may be extremely difficult. For example, the mere fact that the licensee is a wholly-owned subsidiary of the owner was determined in *MCI Communications Corp. v. MCI Multinet Communications Inc.* to be insufficient to establish the existence of a valid license and of control over the use of the mark.

When drafting a franchise agreement, especially in the context of entering the Canadian market from abroad, careful attention must be paid to the rules regarding franchises and trademarks.

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24 *Pharma Communications Holdings Inc. v. Avencia International Inc.*, 2009 FCA 144 at para 8.
25 *Trade-marks Act*, supra note 20, section 50(3).
3. **Pending Statutory Changes**

On June 19, 2014, Bill C-31 received royal assent to become law. However, full implementation of the Bill is subject to the adoption of accompanying Regulations, which is expected to occur by the end of the 2017 or early in 2018. Until then, the current TMA and current Canadian practice will remain in effect.

Bill C-31 contains many substantial changes to the TMA. One of the most important requirements is that a trademark must be used or proposed to be used to be registered. No declarations of use will be required prior to registration.

**B. Copyright**

Copyright law is a statutory creation within the exclusive jurisdiction of the federal government of Canada, and is governed by the *Copyright Act*, R.S.C., 1985, c. C-42 (Copyright Act). The purpose of copyright law is to protect authors, in the broad sense, who create original works, whether they be literary, artistic, dramatic or musical.

In the franchising context, operations manuals, standard plans and specifications, menus, advertising materials, catalogues, proprietary software and websites would in most cases qualify as a "work" and benefit from copyright protection under the Copyright Act.

Just like trademarks, copyrights do not have to be registered to receive protection under the Act in Canada. Furthermore, copyrights exist for 50 years after the death of the holder.

Generally, the owner of the copyrighted work is the one who enjoys enforceable rights. There are, however, exceptions to this rule, such as where the author makes a work in the course of employment.

In the franchisor/franchisee context, an important point to be aware of is when a work is translated. In the absence of an agreement to the contrary, a translator of a copyrighted work will retain copyright rights over the work, irrespective of the fact that the original work was not their own.

The Copyright Act creates the concept of "moral rights" (Section 14.1(1)). In essence, "moral rights" are the right of an author to the integrity of its work, as well as the right to be associated with the work as its author by name or under a pseudonym, as well as the right to remain anonymous. Moral rights may not be assigned to anyone other than the holder, although they may be waived in part or in whole. The mere assignment of copyright does not imply a waiver - waivers must be explicit and in writing in Canada.

A person cannot produce or reproduce a copyrighted work without the owner's permission, unless a specific statutory exception applies. It does not matter if the person is unaware of the copyright in the work and innocently copies it. In this situation, the act is still an infringement.

In contrast to the United States, the list of exceptions to infringement is statutorily codified rather than being in the discretion of the courts.
C. **Other Intellectual Property Rights**

While trademarks and copyrights are the most common forms of protection in the franchisor/franchisee context, there are other forms of intellectual property that may arise less frequently. Industrial designs, patents, and confidential information may be extremely important to some franchise systems.

In Canada, there are no specific statutes governing confidential information. The protection of confidential information, including trade secrets, is governed by provincial common law (or civil law, in the case of the province of Québec). All types of business information, if confidential, can be protected from unauthorized use and disclosure in Canada under the common law. The common law is available to protect information such as customer lists, data, business, financial or marketing plans, formulas, recipes, processes, plans and drawings. The proper remedy is to claim a “breach of confidence.” There are three requirements that must be met in order to establish such a breach:

- the information conveyed was confidential;
- it was communicated in confidence; and
- it was misused by the party to whom it was communicated. 27

The courts will consider whether reasonable measures were taken to maintain the confidentiality (which may include, for example, an obligation by the recipient party to cause its employees to execute a confidentiality undertaking). An action for breach of confidence will not succeed if the information has been shared outside of the organization. In order to better bolster such protection through contract, various clauses can be inserted. A typical franchise agreement should contain a confidentiality undertaking, as well as an obligation of the corporate franchisee to cause its directors, officers and key employees to execute and deliver the franchisor’s standard form of confidentiality undertaking.

Business method patents were, for many years, not accepted in Canada. However, in a 2010 matter involving the well-known Amazon ‘one-click’ method to purchase goods online, the Federal Court of Canada, (see Amazon.com, Inc. v. Canada (Attorney General),28 ordered the patent commissioner to reconsider her rejection of the patent application and indicated that methods of doing business, if they met the test for a patent, could be accepted The decision was affirmed on appeal to the Federal Court of Appeal (FCA) [see Canada (Attorney General) v. Amazon.com, Inc.]29

IV. **THE CANADIAN FRANCHISE AGREEMENT**30

As mentioned above, the United States and Canada’s similar cultures and business practices make Canada an extremely attractive location for U.S. franchise expansion. As any franchisor knows, the franchise agreement is the backbone of any franchise relationship. Thus,

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28 2010 FC 1011.  
29 2011 FCA 328.  
30 This summary is based on Chapter 5 in Fundamentals of Franchising - Canada, supra note 1.
if U.S. franchisors are looking to expand their business properly, they need to understand the particulars of a Canadian franchise agreement. While the franchise agreements of Canada and the U.S. are mostly interchangeable, this paper aims to draw on some of the unique issues relating to the laws and practices of franchising in Canada. At a basic level, any U.S. franchisor must first consider what unique Canadian aspects of a franchise agreement need to be introduced into any U.S. agreement to be used in Canada.  

It is not sufficient to focus on the franchise agreement alone. Franchisors need to be aware of a series of other documents that may be incorporated by reference and are integral parts of the arrangements between the franchisor and franchisee. For example, Canadian franchisors have often sought to control the franchised business premises by leasing the premises directly from the landlord and then subleasing to the franchisee. So the relevant portions of the franchise agreement have often dealt with this reality, and lease and sublease documents are often key parts of the document package.

In addition, Canadian franchisors have often been intimately involved in the development and construction of the franchised unit, and so Canadian franchisors often act like (if not exactly like) the general contractor and deliver “turnkey” units once completed, and at a profit. Thus, portions of the franchise agreement need to address that, often in great detail.

These elements that are often unique to Canadian franchising will be further explored below.

A. Term and Renewal

The grant of franchise rights is normally for a specific term and, like in the U.S., in Canada that is often for a period of five or ten years. But while some U.S. franchise agreements will provide for an even longer 20-year term this very unusual in Canadian franchise systems. As mentioned above, the franchisor in Canada has often been the franchisee’s sub-landlord. Thus, the length of the term is often tied to the term of the lease for the premises from which the franchise will be operated, and lease terms almost never exceed 10 years. So an initial term of 20 years rarely be appropriate.

One unique advantage to the franchisor leasing the premises directly is the ability to control the premises and take over the location (in the event of a default) through self-help remedies.

Renewal provisions are generally pretty similar in both U.S. and Canadian franchise agreements. For instance, like in the U.S., requiring the then current form of franchise agreement be signed on renewal, can often provide an opportunity to increase royalties and/or advertising funds to then current rates. Similarly, renewal provides a chance to require franchisees to update or renovate the franchise location with the franchisor’s latest system modifications.

31 Fundamentals of Franchising - Canada, supra note 1, at 153.
32 Id.
33 Id. at 155.
34 Id.
But there are important differences that need to be taken into account. For instance, unlike the attention that has been paid in state legislation in the United States to renewal provisions, and the obligations of franchisors who choose not to renew a franchise agreement, Canada has no statutory obligations. The legislated good faith standard in Canada has been considered by the courts in this context, and it does not impose an obligation to renew where there is no contractual right (See TDL Group Ltd. v. 1060284 Ontario Ltd). As well, the typical release that a franchisor wants to have signed on renewal cannot be asked for in Canada, and any such blanket provision requiring a general release is almost certainly unenforceable. Instead they need to be carefully redrafted to require all, but no more than, is permitted by the case law interpreting the provincial franchise law statutes.

B. Non-competition Covenants

Most if not all franchise agreements will include covenants that restrict competition both during the term of the franchise agreement and following its expiration, termination or transfer. Canadian courts evaluate the enforceability of non-competition clauses in a similar way as in most common law countries, namely as a restraint on trade that must be reasonable in order to be enforceable, from a public policy perspective. But this evaluation in Canada is not then exactly the same as in the U.S. So therefore it is important for U.S. franchisors to be aware of the fact that a Canadian court may refuse to enforce a far-reaching covenant if it is seen as unreasonable in terms of the activity covered, the time period covered, and/or the geographic area covered. The Court will not reduce the scope of the covenant to render it enforceable. It either must stand or fall on its own. So a U.S. prepared covenant needs to be carefully considered in Canada.

On occasion a U.S. non-compete covenant will even name competitors who are to be avoided. Too often the U.S. franchisor expects to use that same provision in Canada not even realizing that most of the brands names do not exist in Canada, and ignoring any truly local competition.

Canadian courts are more likely to enforce a non-competition provision if the covenant was negotiated as part of a sale of a business, instead of as a term of a person’s employment. And from the case law we have learned that those involving franchise agreements seem to fall somewhere in the middle.

C. Initial Fees and Royalty Payments

U.S. franchisors are of course aware that one of the main provisions that a franchisee will focus on in a franchise agreement is the initial fee and the amount of ongoing royalty obligations. It perhaps appears to be an easy decision to provide in the agreement whether the initial franchise fee is in Canadian or U.S. dollars, and/or whether other amounts like royalties are to be converted and paid in U.S. or Canadian dollars. But with a fluctuating exchange rate, those seemingly simple decisions can have far reaching impact on the business and its potential for success. A fee stated in U.S. dollars can be problematic for Canadian franchisees whose sales will be made in Canadian dollars. Similarly, any obligation to purchase equipment or even inventory from U.S. sources can end up being extremely problematic when the cost is

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35 Fundamentals of Franchising - Canada, supra note 1, at 159.
37 Fundamentals of Franchising - Canada, supra note 1, at 165.
prohibitive once it goes over the border. So U.S. franchisors need to consider the impact of all of these decisions, and whether alternatives are available for their new and future franchisees.

Sales taxes in Canada are usually new to an American, as in most cases the Canadian sales and use taxes apply to initial fees and royalty payments. While a U.S. based franchisor may be relieved from having to collect Canadian sales taxes if they do not have a physical presence in Canada, the unit franchisees will need to charge them to their customers, and any payments within Canada will attract these taxes. Appropriate provisions need to be added to the franchise documents for use in Canada that deal with sales taxes,\(^{38}\) in addition to the non-resident withholding taxes discussed earlier in this paper.

D. Interest Rates

S.347 of the Federal Criminal Code, makes usury an offence by providing that anyone who enters into an agreement that extracts an effective annual interest rate exceeding 60% on the credit advanced is committing an offence. In accordance with section 347(1)(a) and (b) of the Criminal Code, depending on how the offence is prosecuted, the punishment for violation can be up to five years' imprisonment or can involve a fine up to $25,000 and/or imprisonment of up to six months. As interest rates charged by franchisors on overdue amounts tend to be high, franchisors entering Canada need to be aware of any potential sanctions or violations of Canadian law.\(^{39}\)

E. Location, Design, Construction

As mentioned above, it has always been common in Canada for the franchisor to lease the premises directly and sublease them to a franchisee. While that was at one time the predominant structure for a franchise system operating in Canada, it is now also common for franchises systems in Canada to be structured such that franchisees enter into leases directly. Most U.S. brands will adopt this latter approach, which is consistent with their U.S. practices. But understanding the very different Canadian real estate and leasing market is as important for business success as choice of structure.

The practices relating to the securing of premises are also different. It is common in Canada for tenants to enter into binding offers to lease with an obligation to further negotiate and execute a landlord's form of lease. The key is that the offer to lease is a binding document. So legal review becomes advisable at an earlier stage.

Many may wonder why a franchisor would think that being the tenant on the lease ever provides an advantage. But it certainly does at least in one way, namely enforcement. It is well established under Canadian commercial tenancy law that a landlord may use self help remedies and not need court approval to “lock out” a tenant if a default is not cured, especially for such objective criteria as the non-payment of rent. A properly drafted franchise agreement package (with sublease) can provide a franchisor with the ability to more easily obtain control of the premises as a tenant in the event of default and termination of the franchise relationship.\(^{40}\)

\(^{38}\) Fundamentals of Franchising - Canada, supra note 1.

\(^{39}\) Id. at 168.

\(^{40}\) Id.
F. Advertising Fund

A successful advertising program can promote a franchise system's brand awareness, increase traffic, and improve the overall profitability of the organization. Franchisees are usually asked to spend locally, contribute to a national or international advertising fund, or in a geographic region, a franchisor may ask franchisees to pool their resources in the form of local advertising cooperatives so that they can collectively buy advertising time and space more efficiently. While regional cooperatives are growing trend they can be difficult to use successfully in Canada due to its relatively small population being spread out across a large geographic area.  

U.S. franchisors need to consider whether they will operate a separate advertising fund for Canadian franchisees and whether advertising fund revenues are to stay in Canada. Removing these fund revenues from Canada can arguably subject the U.S. franchisor's local franchisees to a withholding tax obligation on these amounts, as was discussed above.

Canadian franchisees will often resent an unequal distribution in advertising campaigns instituted by the franchisor. This can happen when funds from Canadian franchisees become co-mingled with an advertising fund maintained in the U.S. But it can also happen in franchise systems where there are a greater number of units in one part of Canada and the franchisees in other areas of the country do not agree with a franchisor's decision to invest most of its advertising dollars in the areas where there are more franchisees. Alternatively, franchisees in an area whether there are large numbers of franchises may be upset that precious advertising dollars are being spent on areas with a smaller number of franchisees. These issues frequently arise in Canada due to the geographic spread of, and distances between pockets of franchised outlets.  

G. Termination

Just like any common law contract, a franchise agreement must be clear and specific when and how a franchisor may terminate the franchise rights granted and must make reference to any specific restrictions that survive termination. Unlike some jurisdictions in the United States, there is no statutory definition in Canada of "good cause" to mandate what constitutes a default, or what are acceptable grounds for denying a renewal or transfer. In Canada, absent specific provisions in the franchise agreement, this would be mainly guided by the duty of good faith and fair dealing under the provincial franchise laws and under the common law in Canada.  

There are no provisions in federal law nor provincial legislation in Canada imposing any additional obligations upon a franchisor upon termination of the franchise agreement.  

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41 Fundamentals of Franchising - Canada, supra note 1, at 174.

42 Id.

43 Id. at 189.

44 Id.
H. Security to Franchisor

Historically it was very common for Canadian-based franchisors to require that franchisees grant to them a security interest in the franchised business assets in order to secure payment and performance under the franchise agreement. This was and is particularly common if the franchisor is the primary supplier of goods and services to the franchisee. Security is usually taken by way of a general security agreement (GSA). Registration and perfection of a security interest is a provincial matter. Any security interest taken against person personal property is filed and perfected under each provincial property registry system (called a “PPSA”, and similar to the Uniform Commercial Code). In those rare instances where the franchisor is taking a security interest against real property (land), this can be registered as a mortgage in the applicable provincial land title office.

I. Governing Law and Jurisdiction

It is not uncommon for U.S. franchise agreements to provide that the U.S. franchisor’s home jurisdiction’s laws govern and that all matters be tried in that jurisdiction. This can become quite complicated in Canada, as each of the provincial franchise laws require that the law of the province where the franchise operates be the governing law, and that any proceedings be heard in the province, in respect of any claim under the franchise law. But the four Canadian provinces with no franchise laws have no such a requirement. While it is common to recommend that the laws of the Canadian province or territory in which the franchisee is located should govern the franchise agreement, there is not necessarily a one size fits all solution. Each agreement and the nature of the business need to be considered in order to come up with a best approach.

In regard to foreign judgments, while Canadian courts in the common-law jurisdictions will generally recognize and enforce a foreign judgment, this judgment must be final and conclusive on the merits and for a definite sum of money.

Since injunctive relief is an important tool to the franchisor for enforcement of a franchisee’s obligations under the franchise agreement and related documents (i.e.: a non-compete clause), a foreign choice of laws and jurisdiction provision may cause complications. It is highly unlikely that a Canadian court would recognize and enforce any injunctive relief granted by a foreign jurisdiction. Thus, if a franchise agreement names a foreign jurisdiction as having exclusive jurisdiction and the franchisor attempts to ignore this provision and applies to a Canadian court for relief, the court may stay the action.

As mentioned above, Canadian and American franchise agreements, in many ways, are very similar. However, there are important and notable differences in the Canadian laws and practices, and as such, a U.S. franchisor looking to expand into Canada needs to be careful and have their agreement “Canadianized” for best use in this country. The few but important differences can have a significant effect down the road if there is a dispute, or worse, litigation.

45 Fundamentals of Franchising - Canada, supra note 1, at 194.

46 Id. at 201.
V. FRANCHISE DISCLOSURE ISSUES IN CANADA

Under Canada’s constitution, franchise legislation is a matter delegated to the Canadian provinces rather than the federal government. Accordingly, apart from federal legislation that has a direct impact on franchising like intellectual property and competition legislation, franchise registration, disclosure and relationship legislation is within the exclusive mandate of the provinces of Canada.

Six provinces – Alberta, Ontario, Prince Edward Island, New Brunswick, Manitoba and British Columbia – have enacted stand-alone franchise legislation. Alberta was the first province to do so in 1971 followed by replacement franchise legislation in 1995. Ontario followed with franchise legislation in 2000. In 2005 the Uniform Law Conference of Canada ("ULCC") developed a Franchises Act and regulations based on the Ontario legislation as a starting reference. The ULCC Franchises Act and regulations were developed for use by provinces as a model toward harmonizing provincial franchise legislation.

Between 2006 and 2017, Prince Edward Island, New Brunswick, Manitoba and British Columbia enacted legislation that follow the ULCC model Franchises Act and regulations with some variations. The remaining provinces and territories in Canada have no legislation which specifically governs franchises.

The six Provincial Acts share many of the same features. All of them have similar but not identical franchise legislation that requires disclosure. None require registration with any government agency or commission.

A. Overview of the Requirements under Canadian Provincial Laws

Unless an exemption is available, all six statutes require the preparation and delivery of a disclosure document with prescribed content requirements to prospective franchisees. All of the statutes also regulate the franchise relationship to a certain degree through provisions dealing with the rights of franchisees to associate, a statutory duty of fair dealing and applicable law, venue and jurisdiction. The Regulations contain prescribed material facts which must be included in the disclosure document and there is a general requirement to include "all other material facts”. Furthermore, there are prescribed standards for financial statement inclusion in and as part of the disclosure document and franchisor certification with varying degrees of personal liability for directors and officers.

The relevant legislation is complex but there are some highlights that provide helpful context for the discussion that follows. Franchisees are given several rights in the statutes, including the right to associate with one another and form an organization of franchisees. They are also given the right to have a disclosure document provided to them not less than 14 days before the execution of an agreement, and to rescind an agreement within two years if one is not provided, or 60 days if it is deficient.

47 This summary is based on Chapter 6 in Fundamentals of Franchising - Canada, supra note 1.


49 Fundamentals of Franchising - Canada, supra note 1, at 207.
Notwithstanding the similarities of the legislation, there are noticeable differences in the statutes including the contents of disclosure documents, mandatory statements and risk warnings, financial statement reporting, exemptions from financial statement inclusion in a disclosure document and forms of franchisor certificates. Additionally, the legislation in Alberta, PEI, New Brunswick, Manitoba and British Columbia give a franchisor the ability to utilize a form of disclosure document prepared in accordance with the laws of another jurisdiction, as long as supplementary information is provided.

1. **Important Definitions under the Provincial Acts**

The following terms appear throughout the Provincial Acts but the precise wording varies from province to province.

   a. **Franchise**

   The definition of “franchise” is substantially the same in the Ontario, Prince Edward Island, New Brunswick, Manitoba and British Columbia. It means a right to engage in a business for which the franchisee is required by contract or otherwise to make a payment or continuing payments, whether direct or indirect, or a commitment to make such payment or payments to the franchisor, or the franchisor’s associate, in the course of operating the business or as a condition of acquiring the franchise or commencing operations and, (a) in which, (i) the franchisor grants the franchisee the right to sell goods or services substantially associated with the franchisor’s trademark, service mark, trade name, logo or advertising or other commercial symbol and (ii) the franchisor exercises significant control over or offers significant assistance in the franchisee’s method of operation, or (b) in which, (i) the franchisor grants the franchisee the representational or distribution rights, whether or not a trademark, service mark, trade name, logo or advertising or other commercial symbol is involved, to sell or distribute goods or services supplied by the franchisor or a supplier designated by the franchisor, and (ii) the franchisor or a third person designated by the franchisor provides location assistance, including securing retail outlets or accounts or securing locations or sites for vending machines, display racks or other product sales displays. The extended definition of the term “franchise” means that many distribution-type relationships may fall within the definition, though the latter five provinces include some relief through their statutory wholesale arrangement exclusions. Regardless, each relationship should be examined on its own facts in the context of the definition.

   This differs from Alberta’s definition, which is less detailed. Additionally, the term “franchise fee” is defined as a direct or indirect payment to purchase a franchise or to operate a franchise business. It is worth noting that certain payments are excluded from this definition under the Alberta Act, such as a purchase of or an agreement to purchase a reasonable amount of goods at a reasonable *bona fide* wholesale price.

   b. **Franchise Agreement**

   The definition of a “franchise agreement” in each of the Provincial Acts includes any agreement (not just the franchise agreement) that relates to the franchise between a franchisor

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50 Supra note 48, section 1(1).

51 Supra note 48, section 1(1) (Alberta).

52 Fundamentals of Franchising - Canada, supra note 1, at 218.
(or the franchisor's associate) and a franchisee. Therefore, typical ancillary documents like applications or deposit agreements, subleases, trademark licenses, software licenses, internet or intranet access agreements, equipment or sign leases, reservation systems agreements, security documents, guarantees and assignments may all be subject to the provisions of the Provincial Acts dealing with a franchise agreement. For more details on case law, please refer to Chapter VI of this paper.

c. **Franchisor's Associate**

Each of the Provincial Acts contains an expansive definition of a “franchisor's associate” which is substantially the same under each act except Alberta’s. This definition can include principal owners and controlling shareholders. A franchisor's associate means a person: (a) who, directly or indirectly, (i) controls or is controlled by the franchisor, or (ii) is controlled by another person who also controls the franchisor, and (b) who, (i) is directly involved in the grant of the franchise, (A) by being involved in reviewing or approving the grant of the franchise, or (B) by making representations to the prospective franchisee on behalf of the franchisor for the purpose of granting the franchise, marketing the franchise or otherwise offering to grant the franchise, or (ii) exercises significant operational control of the franchisee and to whom the franchisee has a continuing financial obligation in respect of the franchise.

There is no specific definition of a “franchisor's associate” in the Alberta Act. However, the Alberta Act defines an “associate of a franchisor” as a person who is directly involved in the granting of the franchise; or, if there are continuing financial obligations by the franchisee to that person, significant operational controls by that person on the franchisee, and the person controls the franchisor, the person is controlled by the franchisor or the person and the franchisor are under the common control of another person.

**B. Application of the Provincial Acts**

Each of the Provincial Acts applies to a franchise agreement if it is to be operated partly or wholly in any of those Provinces. The Alberta Act only applies to purchasers who are residents of Alberta, or have permanent establishments already in Alberta. Other than that, there is no residency requirement for the franchisee. This means that, if a U.S.-based franchisor sells a franchise to a franchisee located in the U.S. and the business is to be operated in Ontario, Prince Edward Island, New Brunswick, Manitoba, British Columbia or Alberta, it will be required to comply with each act other than the Alberta Act.

Exemptions from the application of the entirety of each of the Provincial Acts other than the Alberta Act are available for certain continuing commercial relationships, such as employer-employee relationships and partnerships. For example, the Ontario Act and the Prince Edward Island Act do not apply a service contract or franchise-like agreement with the Crown (the government of the province). The Alberta Act does not provide for exemptions from the application of the entire Alberta Act other than in the transitional provisions.53

1. **Obligation to Disclose**

A franchisor is required to provide a prospective franchisee with a disclosure document not less than 14 days before the earlier of: (a) the signing by the franchisee of the franchise agreement or any other agreement relating to the franchise; or (b) the payment of any

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53 Fundamentals of Franchising - Canada, supra note 1, at 223.
consideration relating to the franchise. In each of the Alberta, Manitoba, Prince Edward Island, New Brunswick and British Columbia Acts, one or more of the following is not a franchise agreement, thereby not requiring the delivery of a disclosure document:

(i) the keeping confidential or prohibiting the use of any information or material that may be provided to the prospective franchisee; and

(ii) the designation of a location or territory of the prospective franchised business.

The content requirements of a disclosure document varies between provinces. Under each of the Provincial Acts, a disclosure document must contain any and all material facts including, without limitation, financial statements as prescribed by the respective regulations, copies of all agreements relating to the franchise, certification by the Franchisor, other information as prescribed under each of the Provincial Regulations and all other material facts. In each case, franchisors will have to consider carefully what constitutes a material fact (a defined term) at the time of disclosure apart from and in addition to the specific material fact items outlined in the Provincial Regulations.

Each of the Provincial Acts contains similar definitions of "material fact" with some minor variation. Under the Provincial Acts, a "material fact" is defined to mean (in Ontario, it is defined more broadly to "include") any information about the business, operations, capital or control of the franchisor, the franchisor’s associate, or the franchise system that would reasonably be expected to have a significant effect on the value or price of the franchise to be granted or the decision to acquire the franchise.

Case law has demonstrated that courts are expecting that disclosure documents will be customized to include specific material facts about the actual franchise being granted. Accordingly, the disclosure document must include that particular prospective franchisee’s territorial rights, initial fee, performance standards and other information about his or her franchise, not just general descriptions of these disclosure items or formulas for their calculation. If such information specific to a particular site or candidate is known at the time of disclosure, it must be included in the disclosure document. If it is not known at the time of disclosure, the franchisor should provide the information to the franchisee by way of a statement of material change (discussed below) once it becomes known. Note that there are some franchise practitioners who take the position that a statement of material change cannot be used to provide such information, and re-disclosing with a customized disclosure document (and re-starting the 14-day disclosure period) is the only option to proceed. Accordingly, while the statement of material change has become a tool used to provide candidate- and site- specific information, this approach to disclosure is not expressly contemplated under the franchise legislation.

Each Act requires a list of all costs associated with the establishment of the franchise, with an estimate of operating costs and an earnings projection being optional. If they are provided, additional information including the basis for these numbers is mandatory.

If the disclosure document is to be used in connection with a resale or renewal of a franchise location, certain information contained in the standard disclosure document will require revision. For example, the sections in the disclosure document regarding the statement of costs associated with establishing the franchise are probably averages used to reflect the costs for a generic franchise. As a resale is for a specific franchise, this section of the disclosure document should be modified to reflect the actual historical costs of the franchise location in
question. Similarly, a renewing franchisee will not bear the same start-up costs as part of continuing the operation of the franchised business as will a new franchisee. In addition, although not specifically required by the Acts, there is a good argument that, in the context of a resale, historical financial information of the existing franchise constitutes a "material fact" and therefore, should be disclosed to the prospective franchisee.

Though the obligation to disclose exists in each province, the Provincial Acts each consider possible exemptions from this requirement. For a summary of available disclosure exemptions, please refer to Appendix A. However, given the potentially significant adverse consequences if a franchisor relies on a disclosure exemption and a court later determines that the exemption was not available, there is inherent risk in relying on an exemption.

2. Material Change

Under all of the Provincial Acts, a franchisor is required to provide a prospective franchisee with a written statement of any material change as soon as practicable after the change has occurred and before the earlier of: (a) the signing of the agreement; and (b) the payment of any consideration relating to the franchise.

In determining whether delivery of a statement of a material change is required, it is necessary to consider the definition of "material change". In each of the Provincial Acts, "material change" is defined to mean a change in the business, operations, capital or control of the franchisor or the franchisor's associate, a change in the franchise system or, under the Ontario Act, a change prescribed by regulation, which would reasonably be expected to have a significant adverse effect on the value or price of the franchise to be granted or on the decision to acquire the franchise. If the decision to implement the change has been made by senior management of the franchisor, disclosure may also be required if senior management believes that confirmation of the decision by the board of directors is probable even though the board has not yet considered the change. 54

3. Delivery Mechanics

The manner by which the disclosure document is delivered is outlined in the Provincial Acts in great detail. Other than Alberta and British Columbia, a disclosure document may be delivered personally, by registered mail or by any other prescribed method. Regulations under the Prince Edward Island, New Brunswick, Manitoba and Ontario Acts state that delivery is also permitted by courier and electronically. The Alberta Act does not specify any method of delivery. The Act only requires that a franchisor must give every prospective franchisee a disclosure document and provide a prospective franchisee with a description of the material change. 55

4. Rescission

Franchisees are given a right of rescission under each of the Provincial Acts if the franchisor has not provided a disclosure document as required by the Provincial Legislation. In each of the Provincial Acts other than the Alberta Act, a franchisee may rescind the franchise agreement no later than 60 days after receiving the disclosure document if the franchisor fails to provide the disclosure document or statement of material change within the time requirements.

54 Fundamentals of Franchising - Canada, supra note 1, at 226.

55 Id. at 227.
of the applicable Provincial Act or if the contents do not meet the requirements of the applicable Provincial Act. The franchisee may also rescind the franchise agreement without penalty or obligation within two years of entering into the agreement if the franchisor never provided a disclosure document.

Under the Alberta Act, if a franchisor fails to give a franchisee the prescribed disclosure document in accordance with the time requirements of the Act, the prospective franchisee may rescind the franchise agreement by giving notice of cancellation no later than 60 days after receiving the disclosure document or no later than two years after the granting of the franchise, whichever occurs first. Under each of the Provincial Acts, other than Alberta, a franchisor, within sixty days of the effective date of rescission, must refund to the franchisee any money received from or on behalf of the franchisee, with some exceptions. The financial exposure to a franchisor on rescission can be substantial as it must reimburse all the franchisee’s direct and indirect losses. Under the same Act, a franchisor, within 30 days of receiving a notice of cancellation, must compensate the franchisee for any net losses the franchisee has occurred in acquiring, setting up and operating the franchised business.

There are many court cases in which the rescission rights under the Alberta Act and the Ontario Act have been considered. It is settled that, where no disclosure document has been given, the two year right to rescind and be compensated for losses will apply. However, in addition to that right of rescission, the Alberta Act, the Ontario Act and the other Provincial Acts include a right to rescind within a 60 day period if the disclosure is merely defective. For defective disclosure, the court will consider whether a deficient disclosure document is so deficient that it is as if no disclosure document had been given at all and courts have been increasingly finding that certain deficiencies in a disclosure document are so material that the disclosure document is considered to not be a disclosure document at all. The advantage to a franchisee in making such a claim is the ability to increase the time to rescind from 60 days to two years.\textsuperscript{56}

5. Damages for Misrepresentation

A “misrepresentation” is defined to include an untrue statement of a material fact, or an omission to state a material fact necessary to make a statement not misleading. It included in all of the Provincial Acts, with the result that other forms of misrepresentation may be applicable as well. If a disclosure document contains a misrepresentation, each of the Provincial Acts provides that the franchisee is deemed to have relied on the misrepresentation. In the BC Act only, the legislation states that the franchisee is “conclusively” deemed to have relied on the misrepresentation.

Under the Provincial Acts, other than the Alberta Act, if a franchisee suffers a loss because of a misrepresentation contained in the disclosure document, a statement of material change, or as a result of the franchisor’s failure to comply with the disclosure document requirements of the applicable act, the franchisee has a right of action for damages against the franchisor, the franchisor’s broker, the franchisor’s associate, and every person who signed the disclosure document or statement of material change. Under the Ontario Act, there is also a right of action against the franchisor’s agent, defined as “a sales agent of the franchisor who is engaged by the franchisor’s broker and who is directly involved in granting the franchise”. This greatly expands the classes of persons who are subject to liability beyond those that would otherwise be liable under common law.

\textsuperscript{56} Fundamentals of Franchising - Canada, supra note 1, at 230.
Under the Alberta Act, if a franchisee suffers a loss because of a misrepresentation contained in a disclosure document, the franchisee has a right of action for damages against the franchisor and every person who signed the disclosure document.  

6. Liability

Each of the Provincial Acts impose joint and several liability on all persons found liable for breaching the duty of fair dealing, and for interfering with the freedom of the franchisees to associate. Directors and officers who sign a disclosure document or statement of material change are also subject to personal liability for misrepresentations in the disclosure document or statement of material change and in each of the Provincial Acts other than Alberta, for failure to comply with the disclosure obligations. All the statutes contain a number of exemptions from liability for misrepresentations, including exemptions for experts whose opinions are made part of the disclosure document.

7. Waivers, Jurisdiction, Venue and Forum

The rights conferred by the statutes are in addition to and do not derogate from any other right or remedy a franchisee may have at law. Any provision in the franchise agreement attempting to restrict the application of the particular provincial franchise law or to restrict jurisdiction or venue to a forum outside of the particular province is void with respect to a claim otherwise enforceable under the relevant Act. Proceedings should be conducted in the province in which the franchise is located in accordance with local law; as such, foreign franchisors should ensure that all relevant documents are reviewed and amended for compliance with the applicable provincial law.

8. Financial Information

Unless the franchisor meets the exemption criteria set out in the Regulations for each of the Provincial Acts, the disclosure document must include financial statements for the most recently completed fiscal year of the franchisor’s operations. The expectations set out for these statements vary by province with Ontario’s being the most strict.

A franchisor may be exempt from having to include its financial statements in a disclosure document if it is in compliance with the regulations of the province in which the franchise is located. The exemption, however, is not indefinite and the franchisor should revisit the criteria annually. If relying on an exemption, the disclosure document must include a statement to the effect that financial statements are not being provided because the franchisor qualifies for the exemption. Please note that the exemption is only from disclosing the franchisor’s financial statements – it must still prepare those statements as they are used to assess a franchisor’s net worth per the purposes of the exemption.

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57 Fundamentals of Franchising - Canada, supra note 1, at 231.
58 Id. at 232.
59 Id. at 233.
9. **Certificate of Disclosure**

In each of the Provincial Acts, every disclosure document delivered in the particular province must contain a certificate in the prescribed form certifying that the document contains no untrue information, representations or statements, and includes every material fact, financial statement and other information required by the Acts and Regulations. This certificate must be signed and dated by the franchisor, and if the franchisor is incorporated it must also be signed by one or more directors or officers, depending on how many there are. It should be noted that the Ontario, Prince Edward Island and New Brunswick Acts do not define director or officer. Therefore, it is possible that individuals other than those formally appointed may be found to be directors or officers in those provinces.\(^{60}\)

10. **Risk Statements**

Aside from Alberta, each of the Provincial Regulations mandates that specific risk warnings are included in every disclosure document. Though Alberta’s do not, they require that certain sections of the Alberta Act be quoted.

11. **Alternative Dispute Resolution**

The Ontario, Manitoba, Prince Edward Island and British Columbia Regulations require a description of mediation or other alternative dispute resolution and the circumstances under which the process may be initiated, if an internal or external mediation or other alternative dispute resolution process is used. Regardless of whether an alternative dispute resolution process is used, an Ontario and Manitoba disclosure document must contain a statement in prescribed language with respect to the possibility of utilizing mediation as a voluntary dispute resolution process. The New Brunswick Act and Mediation Regulation provide a detailed statutory scheme that governs dispute resolution between parties to a franchise agreement under which the process, timelines, and formalities required when engaging in dispute resolution are described.\(^{61}\)

C. **Matters of Special Interest to Foreign Franchisors**

1. **Can a Foreign Franchisor use its Domestic Disclosure Document in Canada?**

   a. **Ontario**

   It is the widely accepted view of Canadian franchise lawyers, that franchise disclosure documents prepared for compliance with domestic U.S. law cannot be used in Canada without significant risk. Further, without obtaining an unqualified opinion from a reputable and experienced Canadian franchise lawyer, lawyers from other jurisdictions might also be taking a significant (and perhaps unnecessary) risk in guiding or advising their clients otherwise.

   The Ontario Regulations require in section 6 that every disclosure document must include specified disclosure items together in one part of the document. If the ordering of these items is not followed consecutively, or if the items are not grouped together, it is possible that

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\(^{60}\) Fundamentals of Franchising - Canada, supra note 1.

\(^{61}\) Id. at 236.
the requirements of the Regulation will not have been satisfied. Since a U.S. Franchise Disclosure Document (FDD) requires disclosure of prescribed items in a different order, and must be responsive to differently worded questions, it is likely not possible to comply with this requirement by using a U.S. FDD with a wrap-around or addendum. By using a U.S. FDD which contains disclosure items extraneous to or in addition to those required to be disclosed pursuant to the Ontario Regulations, (unless they constitute “material facts”) it is possible that a franchisor may not have complied with the requirement to disclose accurately, clearly and concisely when the disclosure language of corresponding items under a U.S. FDD is used.

Because use of a wrap-around document is not expressly permitted by all of the Provincial Acts, the difficulty in preparing a compliant wrap-around, and given the similarities of each of the Provincial Acts, most franchisors choose to prepare a single national disclosure document which can easily be used in and complies with each of the Provincial Acts.

b. Alberta, Prince Edward Island, New Brunswick, Manitoba and British Columbia

Regulations in these provinces also contemplate the situation where a franchisor, required to provide a disclosure document to a prospective franchisee in the particular province where the franchise is located, has an approved disclosure document authorized under the laws of another jurisdiction. In such a case, the franchisor may use a disclosure document authorized under the law of another jurisdiction provided that the franchisor also provides to the prospective franchisee a supplementary addendum or wrap-around document setting out any material changes to the document necessary for it to comply with the disclosure document requirements of the particular province where the franchise is located. Such a wrap-around document would include any additions or amendments to the foreign disclosure document necessary to make it compliant.

In practice, it may require more time and cost to prepare a wrap-around document than an appropriate disclosure document in the first place for a given province.

2. Can a Foreign Franchisor Use Its Domestic Law to Govern Its Canadian Franchise Documents?

It is not uncommon for foreign franchisors and their professional advisors to insist upon the law of their domestic jurisdiction in governing a Canadian franchise agreement. While the Acts do not specifically require that franchise agreements and related documents be expressly governed by the laws of the province in which the franchisee’s particular franchise is located, they do state that any provision in a franchise agreement (which, by definition, includes any agreement relating to the franchise) purporting to restrict the application of such provincial law or to restrict jurisdiction or venue to a forum outside the particular province is void with respect to a claim otherwise enforceable under the applicable franchise statute. If, despite this provision in the Acts, a foreign franchisor attempts to have its domestic laws apply to its franchise agreements, apart from the difficulty of introducing expert evidence in a Canadian court to establish the principles of the domestic governing law, there is also the difficulty of enforcing a foreign judgment in Canada if a foreign forum is mandated for determination of disputes and remedies.

While the courts of most common law jurisdictions in Canada may recognize a foreign governing law clause, such a provision will often result in difficulties that will outweigh perceived
advantages. For example, United States franchise laws, anti-trust laws, common law principles and other applicable statutes are generally more onerous to a franchisor than those in Canada.

Further, franchisors frequently need to seek injunctive relief against franchisees, particularly following termination of the relationship, in order to restrain a franchisee from breaching restrictive covenants. Although a foreign court may grant an injunction against a Canadian franchisee it is unlikely that a Canadian court would recognize and enforce injunctive or other non-monetary relief imposed by a foreign court. It is much easier and less time-consuming for a franchisor to obtain an injunction from the court in the Canadian province in which the franchisee is resident.

Additional problems arise in the Province of Quebec, which is a civil law jurisdiction. There, before a court will enforce a foreign judgment, the defendant will be afforded an opportunity to raise any defence available in the initial action. In other words, if the franchisor had brought and won an action in its home jurisdiction, it could be faced with the expense and uncertainty of litigating the same issue twice.

It is generally suggested that foreign franchisors ensure their franchise agreements and related documents are governed by the laws of the province in which the franchised business is located and the laws of Canada applicable therein, and that no choice of venue provision be included or that the choice of venue be the province in which the franchised business is located. 62

VI. DISPUTE RESOLUTION AND FRANCHISE LITIGATION IN CANADA 63

When Fundamentals of Franchising - Canada was first published in 2004, there were only two provinces in Canada with franchise disclosure and relationship legislation, Alberta and Ontario. Franchise proceedings tended to be based on a blend of statutory and common law causes of action.

Over the past twelve years, jurisprudence in the area of franchise law has developed. The focus of claims has shifted from common law claims and statutory rescission claims to claims based on the quality of the disclosure provided, and on breaches of the mutual statutory duty of fair dealing, though common law claims and statutory rescission claims continue to be made. It is not surprising that courts often see these disputes being advanced as class proceedings as well.

A. Litigation Differences between Canada and the U.S.

Franchisors dealing with disputes in Canada need to pay particular attention to the laws of the province which governs. Matters of contract, including franchise agreements, are considered to be matters of “property and civil rights” and within exclusive provincial jurisdiction. Not all provinces have enacted legislation dealing with franchises. Today, franchise disclosure and relationship statutes exist in 6 of the 10 provinces of Canada.

In the common law provinces, decisions made by courts outside of a province are considered to be of “persuasive” as opposed to “binding” authority. Of particular note in the

62 Fundamentals of Franchising - Canada, supra note 1, at 201.

63 This summary is based on Chapter 7 in Fundamentals of Franchising - Canada, supra note 1.
American context is that, generally, Australian and UK case law tends to be seen as more persuasive than American case law.

Each province determines its own rules of civil procedure. Three of the biggest differences among the rules of civil procedure are: 1) prevalence of contingency fee litigation; 2) general procedures regarding discovery of witnesses; and 3) differences in the use of jury trials.

1. Damage Awards

Canada is generally thought to be a less litigious jurisdiction than the U.S. A general reluctance on behalf of Canadian courts to award harsh punitive damages coupled with the rarity of civil jury trials in Canada are meaningful contributors to this distinction.

At common law, damages in Canada fall into four broad categories: 1) general damages; 2) special damages; 3) aggravated damages; and 4) punitive damages. However, statutory damage awards in the context of Canadian franchising warrant special discussion.

Each of the six provincial franchise statutes provide for statutory damages in varying circumstances. For example, in Ontario, the right of action for damages for breach of the duty of fair dealing is contained in s. 3(2) of the AWA. Section 4(5) of the Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3 provides a right of action for damages against the franchisor if the franchisor contravenes the right to associate. 64

Damage awards in the franchising context continue to unfold rapidly. In particular, franchisors doing business in the Province of Quebec must take special note of the recent affirmation by that province’s Court of Appeal of the trial decision in Dunkin’ Brands Canada Ltd. v. Bertico Inc. et al; appeal dismissed65 leave to appeal dismissed by the Supreme Court of Canada; 66 which found that the franchisor owed a duty to its franchisees to protect the franchise’s brand in the wake of increasing competition.

2. Costs and Legal Fees

Canadian courts generally award a successful party a portion of its legal costs, with such costs to be paid by the losing party, absent special circumstances. Generally, costs are fixed by the judge hearing a motion or trial, after a review of each party’s costs outline or bill of costs. In awarding costs, the Court considers a range of different factors in order to make a reasonable determination.

A costs clause in an agreement automatically awarding costs to one party, usually the franchisor may be pleaded, but the court has the inherent jurisdiction to award costs, and so at best such a clause will only be one of the factors which the judge will look at when considering the award of costs. 67

64 Fundamentals of Franchising - Canada, supra note 1, at 266.
65 [2012], O.J. No. 4996 (S.C.); 2015 QCCA 624.
66 2016 CanLII 13728 (SCC).
67 See, for example, R. v. Innocente (2003), 214 N.S.R. (2d) 263.
Cost awards will normally not be sufficient to fully compensate or reimburse the winning party for all of its legal fees and disbursements expended in the litigation, except in special circumstances.

3. **Class Actions in Canada**

Franchise class action litigation is an area that has experienced significant development in recent years. The procedural process for class actions is governed by provincial legislation, thus varying between the provinces. While no cases have yet gone to a full trial, a growing number of franchise class actions have been certified, and the body of law on the topic continues to grow, especially in the last 10-15 years.

*Trillium Motor World Ltd. v General Motors of Canada Ltd.*,68 involved a class action brought by franchisee auto dealerships against GMC Ltd. The case was in the context of the global financial crisis and saw GMC Ltd. devise a plan to reduce its dealership network in an attempt to avoid creditor protection under Canada’s insolvency legislation. Although GMC Ltd. was determined to be a franchisor within the meaning of the legislation and therefore owed a duty of fair dealing to the class members, the court did not find that there was a breach of such duty. The duty of good faith and fair dealing (which is discussed in more detail below), required GMC Ltd. to treat affected dealers with honesty and fairness and give due regard to their interests, among other things.69

Overall, the relatively low threshold for certification has made Canada a fertile ground for franchisee class actions in recent years.

**B. Right of Association**

Franchisees have rights under the common law and by statute, to associate together, free from a franchisor’s direct or indirect interference or threats of retribution or penalty for doing so.70

The right to associate is codified in the *Canadian Charter of Rights and Freedoms*.71 The Ontario, P.E.I., New Brunswick, Manitoba and BC statutes establish and protect the right to associate each with virtually identical wording.

The right of franchisees to associate was first considered by the court in *405341 Ontario Inc. v. Midas Canada Inc.*; affirmed72 In this class proceeding, the plaintiff made a post-certification motion to the court for a declaration that the requirement in the franchise agreement to sign a general release in favour of the franchisor, as a condition of the renewal or assignment of a franchise agreement, was void on the grounds that (a) it offended the non-waiver provision

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68 2015 ONSC 3824.
69 2015 ONSC 3824.
70 *Supra* note 48. See section 4 of each of the Ontario, Prince Edward Island, New Brunswick, Manitoba and British Columbia statutes and section 8 of the Alberta statute.
of the Ontario statute; and (b) it violated the right of franchisees to associate. The court agreed with the franchisees and the motion was granted.

Franchisors should take caution not to negatively affect a franchisee's right to associate, as this could be a statutory violation.

C. Enforcement of Foreign Judgements in Canada

Canadian courts will enforce a foreign judgment where a "real and substantial connection" is shown between the cause of action and the foreign jurisdiction. The exceptions are when: (a) the judgment was obtained by fraud; (b) the judgment did not afford to the judgment debtor the opportunity to respond to the proceeding that gave rise to the judgment in accordance with the principles of fairness and natural justice; or (c) enforcement would be contrary to public policy.

The leading case in Ontario on the meaning of "public policy" in this context is the decision of the Court of Appeal in Boardwalk Regency v Maalouf. In that case, the defendant had gambled on credit at the plaintiff's casino in New Jersey and had written and dishonoured a cheque for $43,000 in payment of the debt.

The majority of the Court of Appeal concluded that gambling under license was not the type of morally repugnant activity which was tainted by immorality in such a way as to refuse enforcement of the judgment. Similarly, because gambling was legal and regulated in New Jersey, it would not offend the Canadian general public to enforce a debt legally incurred in such a jurisdiction.

In the context of international franchises, franchisors should be aware of the rules of not only judgement enforcement, but also final money orders and other final court orders.

D. Choice of Law and Forum, and Waivers

Generally speaking, Canadian courts will uphold the agreements made by the parties, and this includes choice of law and choice of forum clauses. Where parties have agreed to a particular forum to resolve their disputes, the onus will be on the party seeking to displace the forum chosen by the parties. However, there are many differences between the laws of Canada and the laws of the U.S., and these differences need to be considered carefully when considering choice of law and choice of forum clauses. In Di Stefano v Energy Automated Systems Inc., Mr. Justice Code stayed an action commenced in Ontario in favour of Tennessee because the contract between the parties provided that Tennessee was the forum in which any disputes regarding the agreement were to be determined.

Of particular importance are the non-waiver provisions found in Canadian franchise legislation. While there are differences between the wording and legal effects, generally franchisees cannot waive any right provided to them under statute, with the exception being (in certain jurisdictions) when the waiver is part of a settlement.

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74 2010 ONSC 493.
For example, in 2176693 Ontario Ltd. v Cora Franchise Group Inc., Madam Justice Matheson declared void and unenforceable a provision of Cora's franchise agreement that required a franchisee and its directors, officers and shareholders to sign and deliver a general release of any claims against Cora and its officers, directors, shareholders and employees as a condition precedent to the franchisor consenting to an assignment of the franchise agreement.

Careful attention should be paid to the prevailing statute depending on the jurisdiction the contract is to have effect.

E. Duty of Good Faith and Fair Dealing in Canada

The duty of good faith and fair dealing arises between contracting parties. Canadian courts have not recognized a stand-alone duty of good faith that is independent from the terms expressed in a contract or from the objectives that emerge from those provisions. The implication of a duty of good faith has not gone so far as to create new, unbargained-for rights and obligations. Rather, courts have implied a duty of good faith with a view to securing the performance and enforcement of the contract made by the parties.

In the recent decision of Bhasin v Hrynew, the Supreme Court of Canada made it clear that a breach of an alleged duty of good faith at common law is not a cause of action in and of itself. Good faith is only recognized through already existing legal concepts: honest, candid, forthright or reasonable contractual performance. Outside of these doctrines, claims of good faith at common law will likely fail.

The various provincial franchise statutes that have been enacted in some Canadian provinces impose on each party to a franchise agreement a statutory duty of fair dealing in the performance and enforcement of the franchise agreement.

The statutes in Ontario, Manitoba, PEI, New Brunswick and BC provide that the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards. In Manitoba, PEI, New Brunswick and BC this duty is expressly extended to include "the exercise of a right under the agreement." 78

Good faith and fair dealing in Canada have lengthy judicial histories of interpretation, and careful regard should be had in both drafting and carrying out franchise agreements.

F. Injunctive Relief

In Canada, various types of injunctive relief are available. A permanent injunction may be sought and granted as a part of the relief at trial. A temporary or interlocutory injunction is invariably sought, on an urgent basis, in order to provide temporary and immediate relief, pending and up to the time of trial. In rare circumstances, a party may apply for an "interim" injunction, on an ex parte basis, meaning that the application can be made to the court even without first serving notice of the application on the other party.

75 2014 ONSC 600.

76 2176693 Ontario Ltd. v. Cora Franchise Group Inc., 2014 ONSC 600 at para 41.

77 2014 SCC 73.

78 Fundamentals of Franchising - Canada, supra note 1, at 220.
The Supreme Court of Canada decision in *RJR-MacDonald Inc. v. Canada (A.G.)*\(^{79}\) is often cited as setting forth the standard test that the moving party must meet before the court will grant an interlocutory injunction. The three factors are:

1. That there is a serious issue to be tried (or a strong prima facie case);
2. That the party moving for the injunction will suffer irreparable harm if the injunction is not granted; and
3. That the balance of convenience favours the granting of the injunction; in other words, the inconvenience to the moving party if the injunction is not granted is greater than the inconvenience to the responding party if it is granted.

Injunctive relief may be sought in the franchising context in a number of different ways. In *Paul Sadlon Motors Inc.*, \(^{80}\) a Chevrolet dealership franchisee brought a motion to enjoin General Motors, the franchisor, from allowing a rival Pontiac Buick GMC dealership to also sell Chevrolet vehicles. In declining to award an injunction, Perell J. found that despite a loss of competitive advantage, the plaintiff franchisee would not suffer irreparable harm pending trial given that the plaintiff's actual market area remained unchanged and could thus continue to sell a competing product in the marketplace.

Whether or not to grant an injunction, whether temporary or permanent, is within the overall discretion of the court. Indeed, some provinces may adopt their own particularity in respect of the degree of certainty required in order to grant an injunction. However, the natural tendency of the court is to maintain the status quo pending trial, as illustrated by the three tests a court will consider before an injunction will be granted.

In Canada, injunctions are known as an equitable remedy. That means that the party seeking the injunction must come to court with "clean hands." Franchisees who withhold their payments of royalties and advertising fund contributions or payments for products or supplies purchased, or who otherwise breach or repudiate their franchise agreements, are thus not helping themselves in the eyes of the court when they seek equitable relief, such as relief against their own termination.

G. Non-Competition Covenants

Non-competition covenants are difficult to enforce in Canada, unless they have been properly drafted so as to be interpreted as reasonable in all respects. Generally speaking, the test of an enforceable non-competition covenant is that it is interpreted as being reasonable as between the parties, in reference to the public interest, and with respect to the circumstances in effect at the time the covenant is given and to those which are reasonably foreseeable as between the parties at that time. Reasonableness (and thus enforceability) is measured in respect of three elements: 1) the geographical area; 2) the time period; and 3) the scope of the activities covered by the restriction.


\(^{80}\) 2011 ONSC 4432.
The scope of the activities covered by the restriction must also be interpreted as having been drafted to be no broader, i.e. no more restrictive, than is necessary for the protection sought. For example, the Court of Appeal in MEDichair LP v DME Medequip Inc.\(^8\) discussed reasonableness of a restrictive covenant contained in a franchise agreement when deciding to allow an appeal of a trial judge’s finding that the restrictive covenant should be enforced. This case considered the issue of whether a franchisor was entitled to enforce the restrictive covenant when its evidence was that it had no intention of opening another franchise location within the protected area. Though the court agreed with the Franchisor that the standard applied when addressing restrictive covenants is a “similar” business standard, the restrictive covenant in this case was ultimately not found to be reasonable in scope.

**H. Alternative Dispute Resolution, Mediation, and Arbitration**

Mediation and arbitration are well developed and well recognized as alternative dispute resolution mechanisms throughout Canada. In general, alternative dispute resolution ("ADR") is designed to encourage parties to resolve disputes based on compromise and allows for greater control over the process. The growing prevalence of ADR is a direct response to the inefficiencies, uncertainties and expense of going to trial. The term encompasses processes such as negotiation, mediation, arbitration, mediation-arbitration, neutrals-party evaluation, and more.

Response to ADR in the context of franchise litigation, however, has remained somewhat tepid. It is still relatively rare to find a franchisor in Canada that obligates itself in the franchise agreement to resolve its disputes with its single-unit franchisees through some form of mandatory mediation or arbitration. That being said, these provisions are appearing in more and more franchise agreements.

Provinces like British Columbia, Saskatchewan and Ontario, have introduced some form of mandatory pre-trial mediation into the civil court process, meaning that mediation is or can be required after an action has been commenced, but before it reaches trial.

Most provinces have enacted arbitration legislation, and several provinces, including British Columbia and Ontario, have enacted two separate statutes, to apply to each of domestic and international arbitrations, respectively. The statutes contain a set of rules for the conduct of arbitration. They also provide for arbitral awards recognized by the court to be enforceable in the same manner as a judgment or order of the court.

With ADR provisions becoming a requirement in certain jurisdictions, as described above with New Brunswick, parties are being forced to take notice. Gradually, the inclusion and utilization of ADR provisions has increased in Canada.

**I. Recent Developments in the Case Law**

Two recent cases are important when franchising in Canada. *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*,\(^9\), involved a class action brought by franchisee dealerships against GMC Ltd. The case was in the context of the global financial crisis. At the time, GMC

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\(^8\) 2016 ONCA 168.

\(^9\) 2015 ONSC 3824.
Ltd. devised a plan to reduce its dealership network in an attempt to avoid creditor protection under Canada’s insolvency legislation. After it delivered Notices of Non-Renewal and Wind-Down Agreements to 240 dealers, a class action was formed to bring a claim against GMC Ltd. The Dealers alleged a breach of both common-law and statutory obligations under the provincial franchise legislation. The court held that there was no breach of any common-law or statutory obligation toward the class members in this case.

GMC Ltd. was found to be a franchisor within the meaning of the legislation and therefore owed a duty of fair dealing to the class members. However, the court did not find that GMC Ltd. breached its duty. The duty of good faith and fair dealing required GMC Ltd. to treat affected dealers with honesty and fairness and give due regard to their interests, among other things. Although the dealers were given only six days to consider the proposed agreements, based on the circumstances there was no dishonesty or unreasonableness found to justify a breach of good faith and fair dealing. This decision also determined that GMC Ltd. did not interfere with class members’ right to association. This portion of the judgement was affirmed on appeal to the Ontario Court of Appeal.

The second case, Raibex Canada Ltd. v. ASWR Franchising Corp., involved a franchise agreement that was entered into prior to deciding on the franchised restaurant location. After a few months of operating the franchise, an action was filed by the franchisee against the franchisor for failing to meet its disclosure obligations by entering into the franchise agreement before securing a location and lease agreements. The Court held that the franchisee was entitled to rescission and damages due to the fact that the lease to be disclosed was comprised of two components: the head lease and the sublease, and in the absence of both documents, proper disclosure was impossible.

Raibex is a precedent-setting case in regards to the requirements for disclosure under Ontario’s Arthur Wishart Act. This case stands as a clear signal to franchisors that when a franchise agreement is entered into, and material facts about the agreement remain unknown, the franchisee will be entitled to rescission of the contract for a period of two years post-signing. The court considered the location of a franchise to be a material fact for the purposes of s. 6(2) of the Arthur Wishart Act.

This case has sweeping implications for Canadian franchise law. Specifically, the common practice of signing franchise agreements when the exact location of the franchise has yet to be determined is no longer acceptable at least in Ontario. It remains to be seen whether provinces in other jurisdictions follow suit.

VII. FRANCHISING IN THE PROVINCE OF QUÉBEC

With a population of 8 million, the province of Québec is Canada’s largest after Ontario. Québec is somewhat unique in that it is the only Canadian province where the official language is French and the legal system is based on a Civil Code similar to the ones found in many Western European countries. Québec is also governed by Federal laws and regulations but has no specific laws or regulations governing franchising.

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83 2016 ONSC 5575.

84 This summary is based on Chapter 2 in Fundamentals of Franchising - Canada, supra note 1.
In spite of the absence of disclosure legislation franchisors are nevertheless required to disclose information that could have an effect on a franchisee’s decision to enter or not into a franchise agreement. Conversely, a prospective franchisee also has a corollary obligation to ask for any information he/she might consider relevant to his/her decision to enter into a franchise agreement. In many instances, Québec courts have considered the exchange of financial information and financial projections as relevant information.

A. The Franchise Agreement

The franchisor-franchisee relationship and franchise agreement is commercial in nature, bi-lateral and sets out the respective obligations of each of the parties. The franchise agreement is considered to be an un-named contract governed by the provisions of the Québec Civil Code. It is also often considered to be an adhesion contract if the franchisee does not have the opportunity to negotiate the essential terms of the franchise agreement. In addition, abusive provisions of a franchise agreement can be reduced or annulled. Furthermore, external provisions (such as those contained in an operations or other manuals) can also be reduced or annulled if they have not been disclosed to the franchisee prior to or upon execution of the franchise agreement.

Good faith and equity are cornerstones of Québec civil law and govern all contractual relations including franchising. In short, every person is bound to exercise his civil rights in good faith\(^{85}\) and no right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith.\(^{86}\)

Much has been written on the concept of good faith in Québec. It is not defined per se in the Québec Civil Code but it could be characterized as a form of contractual morality. The concept of good faith applies before a contract is concluded, during its execution and at the time it is terminated.

B. French Language

For many non-French speaking business persons the mandatory use of the French language can seem challenging. The Charter of the French language\(^{87}\) (the “Charter”) was enacted in order to protect the French language in Québec. The Charter has accomplished this objective to a large extent but still poses certain inconveniences for those unfamiliar with the obligations set out in the Charter. In short, French is required to be used as the language of work, instruction, communications, commerce and business and applies in large part to consumers and workers.

Franchise practitioners should bear in mind the following general guidelines:

- The name of a company should be in French, or in another language provided that a French version exists, but a registered trademark in Canada can be in English only.\(^{88}\)


\(^{88}\) Charter of the French Language, C.Q.L.R. c. C-11, Articles 64, 65 and 68.
• Public signs, posters and commercial advertising must be in French or in another language provided that French is markedly predominant (twice as visible is the general rule). In addition, recent amendments to the Regulations concerning the language of commerce and business of the Charter provide for basic requirements when trademarks are displayed outside an immovable property in a language other than French such as the requirement of “sufficient presence of French” which must accompany the trademark. Places of business in Québec have a 3-year grace period from November 16, 2016, to comply with this requirement.

• Commercial contracts between private parties (that do not include an individual consumer) can be drafted in a language other than French provided the parties specifically agree to do so in the contract.

• Products and labels must be in French or in another language provided that the French portion is predominantly visible. This rule applies to containers, wrappings, menus, wine lists, directions for use and warranty certificates.

C. Recent Developments

Security instruments in the Province of Québec are similar to those in the other Canadian provinces save for their designations. Specifically, Hypothecs on moveable property are the equivalent of a general security interest under the PPSAs in the common-law provinces. They are created by way of written contract and must be registered to be enforceable against third parties. The rules for enforcement are set out in the Civil Code and predominantly involve the use of the courts. Immovable Hypothecs securing real estate generally follow the same rules as movable Hypothecs.

In Québec, the Consumer Protection Act (the “CPA”) applies to every contract for goods or services entered into between a consumer and a merchant in the course of business. Franchisors should be aware of the basic obligations of merchants under the CPA as their franchisees are merchants and are likely selling their goods or services directly to consumers. Franchisors operating corporate stores may also be subject to the CPA. In addition, franchisors that are manufacturing or distributing goods may be liable for latent defects and sued directly by consumers. Franchisors may also be liable for false publicity or misleading advertising.

Franchising in the Province of Québec is not so different than anywhere else in Canada save for the language and legal regime. However, the challenges created by these differences are largely outweighed by the potential business development opportunities in the second most important market in Canada.

89 Charter of the French Language, C.Q.L.R. c. C-11, Articles 58.
90 Charter of the French Language, R.S.Q., chapter C-11 (a. 54.1, 58 and 67), Article 15 et seq.
91 Id.
VIII. OTHER LAWS AFFECTING FRANCHISING IN CANADA (INCLUDING PRIVACY)\(^{95}\)

This part of the paper will review some of the federal, provincial, territorial and municipal laws that are most commonly encountered by franchisors expanding their systems into Canada. Some Canadian legislation applies primarily to particular categories of goods and services and are considered in depth in the book. This paper will focus almost exclusively on general commentary that is applicable to the majority of franchises.

A. Laws Affecting the Movement of People and Goods Across the Border

In Canada, immigration is the responsibility of several federal government agencies, including Citizenship and Immigration Canada, Canada Border Services Agency at ports of entry and the Department of Foreign Affairs and International Trade at visa offices located outside Canada. Immigration laws and policies are contained in the Immigration and Refugee Protection Regulations Act. People who are neither Canadian citizens nor permanent residents are referred to as “foreign nationals” and do not have the right to work in Canada. Described below are the requirements most applicable to foreign franchisors establishing Canadian operations.

1. Bringing Your Executive and Employees into Canada

Employees who are foreign nationals must, unless exempted, obtain permits to work in Canada. Duration is not a factor, and if a person is found to have worked illegally in Canada without a permit, he or she may be held inadmissible to Canada for a period of two years. Employees of franchisors who are carrying out pre-operational activities may be allowed to enter Canada as temporary business visitors.

a. Temporary Work Permits

Before determining whether a work permit is required, it must be determined whether a foreign national employee needs to obtain an underlying visa, called a “temporary resident visa”, before travelling to Canada. If an employee attempts to enter Canada at a port of entry without the requisite visa, the immigration officer will not permit entry. A visa must be applied for at a visa office outside Canada so that an immigration officer can adjudicate whether the person involved is admissible to Canada (health, non-criminality, security and other requirements are examined) and has the ability to leave the other country (normally as evidenced by a valid passport or other travel document) prior to entering Canada.

If it is determined that a work permit and a temporary resident visa are needed, the employee must apply for a work permit at a visa office. The processing time can take up to several weeks depending on the circumstances, and will be issued for a fixed period of time, allowing for a single or multiple entries to Canada. A work permit is issued for up to three years but generally may be extended. It is both employer and occupation specific, so if an employee will be spending significant time working in more than one location, a separate permit may be required.

Generally, a foreign national employer must obtain a positive Labour Market Impact Assessment ("LMIA") from Human Resources Skills and Development Canada ("HRSDC") before a work permit application is submitted. A positive LMIA will provide that the employment

\(^{95}\) This summary is based on Chapter 3 in Fundamentals of Franchising - Canada, supra note 1.
of a foreign national is likely to have a neutral or positive economic effect on the labour market in Canada. Normally, a foreign franchisor can maintain successfully that expanding its franchise system to Canada will result in new jobs being created in Canada.

There exist exemptions from this requirement. Certain nationalities do not need to obtain a temporary resident visa to travel to Canada. For example, persons who are citizens or permanent residents of the U.S. are exempted.

b. Permanent Residency Requirements

A permanent resident is someone who has been given permanent resident status by immigrating to Canada, but is not a Canadian citizen. If an employee is anticipated to work in Canada for several years, obtaining permanent resident status may be beneficial. A permanent resident is not constrained by the same conditions regarding employment as a foreign worker holding a work permit. To maintain permanent resident status, a person must normally be residing in Canada for at least two of the last five years. To apply for citizenship, a person must normally have permanent resident status and have been residing in Canada for at least three of the four years prior to the date of the application.

2. Bringing Your Existing Supply Chain into Canada

Franchises entering Canada must be aware of regulatory barriers on goods at the Canadian border, in particular import restrictions, import duties and technical barriers.

One major factor that U.S. and overseas franchisors need to be aware of is that there are specific Canadian packaging and labeling issues that must be complied with in relation to consumer products. Specifically, consumer products for sale in Canada must abide by the federal Consumer Packaging and Labelling Act. This prohibits labels from containing any false or misleading information, and ensures that certain features are included on labels.

Franchise systems operating in the food industry must be aware of the Food and Drugs Act which regulates the advertising, sale and importation of foods, drugs, cosmetics and medical devices. The law on labelling food is extensive and includes lengthy legislation and regulations. Although the format for nutrition labelling appears to be similar to U.S. requirements, companies should not use a U.S. label. Great care should go into the labels and advertising of all food products to ensure compliance with Canadian standards.

In addition to the aforementioned differences, the importation of goods into Canada may be subject to customs duties and various taxes. Canada uses the same tariff schedule as most other countries, including the U.S. If the goods purchased from a supplier in a North American Free Trade Agreement ("NAFTA") country originated in that country, they qualify as duty free. Canada also has other bilateral treatises which may counteract the customs duties.

In addition to any duties, goods imported into Canada are subject to Federal goods and service tax ("GST"), or the federal part of the harmonized sales tax ("HST"), unless items are specified as non-taxable importations. Both are value added taxes. The GST/HST is calculated on the Canadian dollar value of the goods, including duty and excise tax, and is collected at the

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border at the same time as these duties and taxes. The owner or importer of record is responsible for paying the GST/HST on imported goods. If a party is registered for the GST/HST and is the importer, they may claim an input tax credit ("ITC") for the tax paid on the imported goods as long as the party meets the requirement for claiming ITCs. On its website, the Canada Revenue Agency lists examples of non-taxable importations.

a. **Mandatory GST/HST Registration**

A non-resident franchisor which sells franchise rights for a particular geographic area but does not actively participate in soliciting franchisees or assisting in franchise operations in Canada will not be considered to be carrying on business in Canada. Accordingly, the franchisor could avoid becoming a registrant and avoid reporting to Canada Revenue Agency on GST/HST collection. However, a high level of business activity in Canada including actively soliciting franchisees would often indicate that the foreign franchisor is carrying on business in the province(s) involved.

b. **Voluntary GST/HST Registration**

A foreign franchisor may want to voluntarily become a registrant even if it is not considered to be carrying on business in Canada. Registration would require it to collect GST/HST from its franchisees, except to the extent the franchisor is an exempt supplier. The Canadian franchisee will necessarily be a GST registrant and will get a full refund of the GST/HST it pays in the course of operating its business. Registration would also mean that the non-resident franchisor would get a full refund of the GST/HST that it incurs in purchasing goods and services in Canada. Management of the GST/HST system by a registrant is much less complex and less costly than income tax compliance.

B. **Laws Affecting How Products and Services are Advertised**

Upon entering the Canadian market, one of the first things a foreign franchisor should do is apply for registration of its trademarks under the federal Trade-marks Act. Although registration provides a superior form of protection, unregistered rights may be protected under the common law action of passing off.  

1. **Pricing and Advertising in Canada**

a. **Pricing**

The federal *Competition Act* applies to individuals carrying on business in Canada, including franchisors, franchisees and suppliers. The Act sets out substantive competition rules, including a framework for administration and enforcement. Franchisors with systems in Canada should review their franchise agreements and operating policies for compliance with the most recent amendments to the Act, as amendments introducing new provisions were made that fundamentally changed the way franchisors can do business in Canada.

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98 See Chapter III of this paper, and Canadian Intellectual Property Office, http://www.cipo.ic.gc.ca, for further discussion on Canada's trademark regime.

b. Canadian Advertising Standards

The Canadian Code of Advertising Standards establishes the standards of acceptable advertising in Canada. It has 14 provisions which must be complied with in both letter and spirit. Its provisions address many topics, including accuracy, price claims, safety, and advertising to children. Additionally, the Broadcast Code for Advertising to Children regulate advertisements targeting children under the age of 12.

It is also worth noting that the Charter of the French Language requires that franchisors conducting business in the province of Québec ensure that all corporate entities conduct business in French. More information on the laws of Québec can be found in Chapter VII of this paper.

2. Canada's Anti-Spam Law

Canada has enacted what may be the strictest spam law in the world. Canada's Anti-Spam Law (“CASL”)\(^{100}\) came into force on July 1, 2014 with certain provisions to be phased-in over a three-year transition period. The reach of the CASL extends to organizations located outside of Canada that send commercial electronic messages (“CEMs”) to or install computer programs on computers located in Canada.

The legislation does more than just simply regulate unsolicited emails. Subject to limited exceptions, the CASL prohibits businesses from sending CEMs for a business purpose unless it complies with following three rules: (a) the business must have expressed or implied consent to send the message; (b) the business must clearly identify themselves including prescribed contact information; and (c) every message must have an unsubscribe mechanism. Given the wide reaching nature of the CASL along with its significant enforcement provisions, franchisors must be careful to ensure compliance with the law. Canadian practitioners are expecting class actions to follow the private right of action coming into force on a date yet to be announced.\(^ {101}\)

The Competition Act imposes disclosure and other requirements on promotional contests undertaken for the purposes of promoting a product or business interest. Since the requirements apply to a contest, lottery, game of chance or skill, or mixed chance and skill, many franchise systems are affected. Administrators must provide adequate and fair disclosure in compliance with the provisions of the federal Competition Act and the Criminal Code. Before launching a contest in Québec, franchisors must be willing to comply with additional regulatory requirements

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\(^{100}\) An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act, S.C. 2010, c. 23 (“CASL”).

\(^{101}\) On June 7, 2017, the Canadian federal government announced that it has suspended the coming into force of the private right of action under CASL, originally scheduled to come into force on July 1, 2017.
C. Privacy Law

In a franchise system, it is the franchisees that have the day-to-day customer contact and thus accumulate knowledge about customer preferences and habits. Franchisors have traditionally dealt with this problem by, among other things, inserting provisions in franchise agreements outlining that it is the franchisor who owns the customer list, or at least requiring transfer of the list or other customer information to the franchisor. After the introduction of the Personal Information Protection and Electronic Documents Act (PIPEDA) in Canada, notwithstanding such contractual provisions, such information cannot be transferred without customer consent.

In Canada, there are two significant federal privacy laws: Canada's federal public sector privacy law — the Privacy Act\textsuperscript{102} — and Canada's federal private sector privacy law — PIPEDA\textsuperscript{103}. Because of the latter's unusual structure, it is best to read Schedule 1 of the Canadian Standards Association's Model Code, which considered principles central to privacy law, first. A full discussion of these principles can be found in the book.

D. Securing Payment

In order to secure performance of a franchisee's obligations, a franchisor may want to obtain a security interest over the franchisee's assets. In Canada, most provinces have a Personal Property Security Act\textsuperscript{104} ("PPSA") which deals with taking, registering and enforcing security on personal property. Québec is the one exception. Within Canada, there are differences in the PPSA of each province, but the legislation is similar in basic principles.

1. Taking Security in a Franchisee's Assets

Franchisors will often supply franchisees with products and equipment in order to run their business in a manner that is consistent with the brand. As suppliers of equipment and inventory, franchisors should consider taking a security interest under the PPSA to secure payment of monies owing to the franchisor.

The PPSA applies to most security interests in personal property, and in particular applies to any agreement that in substance creates a security interest. In a franchise situation, a franchisor may take a security interest in personal property from a franchisee to secure the franchisee's obligations in or pursuant to the franchise agreement. The actual grant of the security interest may be contained within the franchise agreement or in a separate document.

There are certain interests a franchisor may take which are not security interests, and therefore are not governed by the PPSA. These include a promissory note, which is only evidence of indebtedness, and personal guarantees, which are merely a secondary covenant to pay.

\textsuperscript{102} R.S.C. 1985, c. P-21.
\textsuperscript{103} R.S.C. 2000, c. 5.
a. **Provincial PPSA Legislation**

Each PPSA deals with the concept of “attachment” in the taking of a security interest. In simple terms, attachment means the creation of the security interest between the secured party (franchisor) and the debtor (franchisee). In addition to “attachment”, a security interest must be “perfected” to be enforceable against third parties. Perfection is achieved either by the secured party taking possession of the collateral or, more usually, by registering a financing statement. All of the PPSA jurisdictions in Canada have an online Personal Property Registry (“PPR”) for searches of debtors’ names to identify existing security interests registered against them and for registration of financing statements.

A financing statement perfecting the security interest must be registered in the province where the collateral is located or where the franchisee carries on business (both registrations are advisable from the purpose of giving broader notice).

Additionally, under the PPSA, the residual priority rule provides in general that the first secured party to register a financing statement (or to take possession of collateral if perfection is by way of possession) has priority over later secured parties or other third parties. However, there are many exceptions to this residual priority rule, which may apply to franchisors or their designated suppliers, all of which are listed in the book.

In the province of Québec security interests are governed by the Civil Code which creates one type of security: the hypothec. The hypothec can be taken as a charge against all of the personal property of the debtor, but must be registered in Québec in order to be enforceable against third parties.

2. **Guarantees**

Although franchisors and franchisees enter into a business relationship together with the expectations of mutual success, in some situations the business fails. Where the franchisee is a corporation, it is common practice for a franchisor to require the shareholders, officers and directors of the franchisee to personally guarantee the obligations of the franchisee to the franchisor. Guarantees act as a source of comfort for the franchisor, allowing them to look to the guarantor upon default.

Personal guarantees in a franchise agreement need to comply with Canadian practice and common law. Alberta is the only province in Canada to legislate a requirement that a guarantor resident in that province obtain independent legal advice in advance of executing the guarantee. So franchisors should make special note of the *Alberta Guarantees Acknowledgement Act*. Failure to comply with the AGAA will likely render a guarantee unenforceable.

In Québec, personal guarantees are subject to certain rules not applicable to the rest of Canada. Accordingly, if a guarantee is to be taken from a resident of Québec, both the franchise agreement and normal form of guarantee may need to be revised.

IX. **CONCLUSION**

This paper has provided a useful overview of the important issues a U.S. franchisor will typically need to address to successfully expand their system to Canada. While Canada is often looked upon as an easy international target where to expand, simplicity is a relative concept.
While certainly easier than perhaps any other new country into which a franchisor may wish to franchise, the franchisor must still realize that there are a host of legal, business, cultural and practical issues that will need to be addressed. And addressing them early, with competent advice from local legal counsel, and other local advisors, in addition to the franchisor's U.S. advisors, can make all the difference between success or failure in this or any other international market.
Exemptions from Requirement to Provide a Disclosure Document

The following are summaries of the exemptions in the Acts from the requirement to provide a disclosure document:

<table>
<thead>
<tr>
<th>Exemption</th>
<th>Ontario</th>
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<td>Grant for the franchisee's own account.</td>
<td>(a) The grant of a franchise by a franchisee if, among other things, the grant is for the franchisee's own account and the grant is not effected by or through the franchisor. A grant is not affected by or through the franchisor merely because the franchisor has a right, exercisable on reasonable grounds, to approve or disapprove the grant or a transfer fee must be paid in an amount set out in the franchise agreement or in an amount that does not exceed the reasonable actual costs incurred by the franchisor to process the grant.</td>
<td>(a) The sale of a franchise by a franchisee if (i) the franchisee is not the franchisor or an associate of the franchisor or a director, officer or employee of the franchisor or its associate, (ii) the sale is for the franchisee's own account, (iii) in the case of a master franchise, the entire franchise is sold, and (iv) the sale is not effected by or through the franchisor.</td>
<td>(a) The grant of a franchise by a franchisee if (i) the franchisee is not the franchisor, the franchisor's associate or a director, officer or employee of the franchisor or of the franchisor's associate, (ii) the grant of the franchise is for the franchisee's own account, (iii) in the case of a master franchise, the entire franchise is granted, and (iv) the grant of the franchise is not effected by or through the franchisor.</td>
<td>(a) The grant of a franchise by a franchisee if (i) the franchisee is not the franchisor, the franchisor's associate or a director, officer or employee of the franchisor or of the franchisor's associate, (ii) the grant of the franchise is for the franchisee's own account, (iii) in the case of a master franchise, the entire franchise is granted, and (iv) the grant of the franchise is not effected by or through the franchisor.</td>
<td>(a) The grant of a franchise by a franchisee, (i) if the franchisee is not the franchisor, the franchisor's associate or a director, officer or employee of the franchisor or of the franchisor's associate, (ii) the grant of the franchise is for the franchisee's own account, (iii) in the case of a master franchise, the entire franchise is granted, and (iv) the grant of the franchise is not effected by or through the franchisor.</td>
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<td>Sale of franchise to officer or director.</td>
<td>(b) The grant of a franchise to a person who has been an officer or director of the franchisor or the franchisor’s associate for at least six months for that person’s own account.</td>
<td>(b) The sale of a franchise to a person who has been an officer or director of the franchisor or its associate for at least 6 months for that person’s own account.</td>
<td>(b) The grant of a franchise to a person who has been an officer or director of the franchisor or of the franchisor’s associate for at least six months immediately before the grant of the franchise, for that person’s own account.</td>
<td>(b) The grant of a franchise to a person who has been an officer or director of the franchisor or of the franchisor’s associate for at least six months immediately before the grant of the franchise, for that person’s own account.</td>
<td>(b) The grant of a franchise to a person who has been an officer or director of the franchisor or of the franchisor’s associate for at least six months immediately before the grant of the franchise, for that person’s own account.</td>
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<td>Grant of additional franchisee to existing franchisee.</td>
<td>(c) The grant of an additional franchise to an existing franchisee if that additional franchise is substantially the same as the existing franchise that the franchisee is operating and if there has been no &quot;material change&quot; since the existing franchise agreement or latest renewal of extension of the existing franchise agreement was entered into.</td>
<td>(c) The sale of an additional franchise to an existing franchisee if that additional franchise is substantially the same as the existing franchise that the franchisee is operating and if there has been no material change since the existing franchise agreement or latest renewal or extension of the existing franchise agreement was entered into.</td>
<td>(c) The grant of an additional franchise to an existing franchisee if that additional franchise is substantially the same as the existing franchise that the franchisee is operating and if there has been no material change since the existing franchise agreement or most recent renewal or extension of the existing franchise agreement was entered into.</td>
<td>(c) The grant of an additional franchise to an existing franchisee if (i) that additional franchise is substantially the same as the existing franchise that the franchisee is operating, and (ii) there has been no material change since the existing franchise agreement or its latest renewal or extension was entered into.</td>
<td>(c) The grant of an additional franchise to an existing franchisee, if (i) the additional franchise is substantially the same as the existing franchise that the franchisee is operating, and (ii) there has been no material change since the existing franchise agreement, or latest renewal or extension of the existing franchise agreement, was entered into.</td>
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<td>Grant of franchise by an executor, receiver, trustee.</td>
<td>(d) The grant of a franchise by an executor, receiver, trustee or guardian on behalf of a person other than the franchisor or the estate of the franchisor.</td>
<td>(f) The sale of a franchise by an executor, administrator, sheriff, receiver, trustee, trustee in bankruptcy or guardian on behalf of a person other than the franchisor or the estate of the franchisor.</td>
<td>(d) The grant of a franchise by an executor, administrator, sheriff, receiver, trustee, trustee in bankruptcy or guardian on behalf of a person other than the franchisor or the estate of the franchisor.</td>
<td>(d) The grant of a franchise by an executor, administrator, sheriff, receiver, trustee, trustee in bankruptcy or guardian on behalf of a person other than the franchisor or the estate of the franchisor.</td>
<td>(d) The grant of a franchise by an executor, administrator, sheriff, receiver, trustee, trustee in bankruptcy, liquidator or guardian on behalf of a person other than the franchisor or the estate of the franchisor.</td>
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<td>Fractional franchise.</td>
<td>(e) The grant of a franchise to a person to sell goods or services within a business in which that person has an interest if the sales arising from those goods or services as anticipated by the parties at the time the agreement was entered into, do not exceed, in relation to the total sales of the business, a percentage (20%) prescribed in the Regulation (generally known as a &quot;fractional franchise&quot;).</td>
<td>(e) The sale of a fractional franchise, meaning maximum (20%).</td>
<td>(e) The grant of a franchise to a person to sell goods or services within a business in which that person has an interest, if the sales arising from those goods or services, as anticipated by the parties or that should be anticipated by the parties at the time the franchise agreement is entered into, will not exceed 20 per cent of the total sales of the business during the first year of operation of the franchise.</td>
<td>(e) The grant of a franchise to a person to sell goods or services within a business in which that person has an interest, if the sales arising from those goods or services, as anticipated by the parties or that should be anticipated by the parties at the time the franchise agreement is entered into, will not exceed 20% of the total sales of the business during the first year of operation of the franchise.</td>
<td>(e) The grant of a franchise to a person to sell goods or services within a business in which that person has an interest, if the sales arising from those goods or services, as anticipated by the parties or that should be anticipated by the parties at the time the franchise agreement is entered into, will not exceed 20% of the total sales of the business during the first year of operation of the franchise.</td>
<td>(e) The grant of a franchise to a person to sell goods or services within a business in which that person has an interest, if the sales arising from those goods or services, as anticipated by the parties or that should be anticipated by the parties at the time the franchise agreement is entered into, will not exceed 20% of the total sales of the business during the first year of operation of the franchise.</td>
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<td>Renewal or extension.</td>
<td>(f) The renewal or extension of a franchise agreement where there has been no interruption in the operation of the business and there has been no &quot;material change&quot; since the franchise agreement or latest renewal or extension of the agreement was entered into.</td>
<td>(d) A renewal or extension of an existing franchise agreement.</td>
<td>(f) The renewal or extension of a franchise agreement where there has been no interruption in the operation of the business operated by the franchisee under the franchise agreement and there has been no material change since the franchise agreement or latest renewal or extension of the franchise agreement was entered into.</td>
<td>(f) The renewal or extension of a franchise agreement if there has been no interruption in the operation of the business operated by the franchisee under the franchise agreement and there has been no material change since the franchise agreement or its most recent renewal or extension of the franchise agreement was entered into.</td>
<td>(f) The renewal or extension of a franchise agreement if there has been (i) no interruption in the operation of the franchised business, and (ii) no material change since the franchise agreement or its latest renewal or extension was entered into.</td>
<td>(f) The renewal or extension of a franchise agreement, if there has been (i) no interruption in the operation of the franchise operated by the franchisee under the franchise agreement, and (ii) no material change since the franchise agreement, or the latest renewal or extension of the franchise agreement, was entered into.</td>
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<td>Minimal total investment.</td>
<td>(g) The grant of a franchise if the prospective franchisee is required to make a total annual investment to acquire and operate the franchise in an amount that does not exceed an amount ($5,000) prescribed in the</td>
<td>(e) The sale of a franchise if the franchisee is required to make a total annual investment to acquire and operate the franchise in an amount that does not exceed the prescribed amount</td>
<td>(g) The grant of a franchise if the prospective franchisee is required to make a total annual investment to acquire and operate the franchise in an amount that does not exceed the prescribed amount</td>
<td>(g) The grant of a franchise if the prospective franchisee is required to make a total annual investment to acquire and operate the franchise in an amount that does not exceed the prescribed amount</td>
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<td>($5,000).</td>
<td>prescribed amount ($5,000).</td>
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<td>Sophisticated franchisee exemption.</td>
<td>(h) The grant of a franchise where the prospective franchisee is investing in the acquisition and operation of the franchise over a period (1 year) prescribed in the Regulation, in an amount greater than an amount ($5,000,000) prescribed in the Regulation (the &quot;sophisticated franchisee&quot; exemption).</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
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<td>(i) The grant of a franchise, if the prospective franchisee is investing an amount greater than a prescribed amount ($5,000,000) in the acquisition of the franchise.</td>
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<td>-- or --</td>
<td>1-year franchise agreement.</td>
<td>The grant of a franchise if the franchise agreement is not valid for longer than 1 year and does not involve the payment of a non-refundable franchise fee.</td>
<td>N/A</td>
<td>(i) The grant of a franchise if the franchise agreement is not valid for longer than one year and does not involve the payment of a non-refundable fee and if the franchisor or franchisor's associate provides location assistance to the franchisee, including securing</td>
<td>(h) The grant of a franchise if the franchise agreement is not valid for longer than one year and does not involve the payment of a non-refundable fee and if the franchisor or franchisor's associate provides location assistance to the franchisee.</td>
<td>(h) The grant of a franchise if (i) the franchise agreement is not valid for longer than one year and does not involve the payment of a non-refundable fee, and (ii) the franchisor or franchisor's associate provides location assistance.</td>
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<td>Competition Act, Section 55.</td>
<td>The grant of a franchise if the franchisor is governed by Section 55 of the <em>Competition Act</em> (Canada).</td>
<td>N/A</td>
<td>(j) The grant of a franchise if the franchisor is governed by Section 55 of the <em>Competition Act</em> (Canada).</td>
<td>(i) The grant of a franchise if the franchisor is governed by section 55 of the <em>Competition Act</em> (Canada).</td>
<td>(i) The grant of a franchise if the franchisor is governed by section 55 of the <em>Competition Act</em> (Canada).</td>
<td>non-refundable initial franchise fee, renewal fee or extension fee.</td>
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