

Franchising in Canada

Franchising is not as heavily regulated in Canada as it is in a number of other jurisdictions, including the United States. In Canada, franchising is a purely provincial matter and, currently, only five provinces have franchise legislation in place: Alberta, Manitoba (effective as of October 1, 2012), Ontario, Prince Edward Island and New Brunswick. While there are slight differences in the legislation and regulatory requirements of each province, they are all derived ultimately from the U.S. model of mandated disclosure by a franchisor to prospective franchisees, coupled with a duty of good faith and fair dealing owed by each party to the other, and a right of franchisees to associate freely amongst themselves.

Unlike the U.S., no Canadian province requires either the registration of franchisors or the public filing of their disclosure documents. There is no government agency in Canada which is charged with the task of regulating or overseeing compliance with franchise legislation, with the result that there is no body (save the court) from whom any permission must be sought or any comfort may be obtained (regarding compliance with or the non-application of franchise legislation, the availability of a disclosure exemption or otherwise). Put simply, a franchise relationship is an ongoing relationship that is found to exist under provincial franchise legislation where the franchisor grants the franchisee the right to use the franchisor's trade-marks and other intellectual property and business methodology (often within a specific territory only) in exchange for a fee. In a franchise relationship, the parties are independent contractors and neither party is an agent for the other party but the franchisor generally retains a certain degree of control over the franchisee's manner of carrying on its business. This designation as a "franchise" is fact-based and occurs whether a company intends to operate as a "franchise" or not. As such, when utilizing distributorships or granting licences in Canada, it is important to consider the implications of franchise legislation and the extent of a company's involvement in and/or control over the operation of the new distributor or retailer.

Among the most significant features of franchise legislation is the disclosure obligation which requires that franchisors deliver detailed pre-sale disclosure documents to prospective franchisees at least 14 days before an agreement is signed or any fees are paid. The disclosure document must contain all of the information prescribed by provincial regulations (substantially similar but different in each province with franchise legislation) and any additional material facts about the franchise that could reasonably be expected to influence the prospective franchisee's assessment of the value of the franchise or decision to enter into a franchise arrangement. If the disclosure document does not comply with the requirements of the legislation, is delivered late, or is not delivered at all, then the franchisee has the right for a specific period of time to rescind the franchise agreement and the franchisor is required to compensate the franchisee for all losses incurred to establish and operate the franchised business (in addition, in certain provinces, to repurchase obligations). Franchisees can also bring a claim for damages for misrepresentation if the franchisor does not meet the applicable disclosure requirements.

Generally speaking, franchise legislation is remedial legislation enacted to protect franchisees and accordingly, it is not possible to contract out of its provisions. This means that properly identifying one's business as a franchise system that is subject to franchise legislation is of critical importance.