COUNTRY COMPARATIVE GUIDES 2021

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Canada

FRANCHISE & LICENSING

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This country-specific Q&A provides an overview of franchise & licensing laws and regulations applicable in Canada.

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CANADA
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1. Is there a legal definition of a franchise and, if so, what is it?

The franchise legislation in each of the six Canadian provinces that have enacted such legislation contains its own specific definition of "franchise", but each such definition includes two separate formulations. The first formulation (dealing with "business format" franchises) entails:

- a right to engage in a business in which the franchisee makes a payment or series of payments to the franchisor;
- the franchisee having the right to sell (or offer for sale) goods or services that are substantially associated with the franchisor's trademark, trade name or other commercial symbol; and
- the franchisor exerting significant control over, or offering significant assistance in, the franchisee's method of operation.

This definition is quite broad and covers many relationships beyond what may generally be understood as a classic franchise.

The second formulation (dealing with "business opportunities" franchises) expands the net even further to capture arrangements where the franchisor grants the franchisee representational or distribution rights, no matter whether a trademark, trade name or other commercial symbol is involved, to sell (or offer for sale) goods or services supplied by the franchisor or by a supplier that it designates, and where the franchisor or a designated third person provides location assistance to the franchisee, whether by securing retail outlets or accounts or by securing locations for vending machines, display racks or other product sales displays.

2. Are there any requirements that must be met prior to the offer and/or sale of a franchise? If so, please describe and include any potential consequences for failing to comply.

There are no requirements that must be met by a franchisor prior to the offer and/or sale of a franchise other than the disclosure requirements specified in each provincial franchise disclosure law. Please refer to Question "4", below, for further information regarding these disclosure requirements.

3. Are there any registration requirements for franchisors and/or franchisees? If so, please describe them and include any potential consequences for failing to comply. Is there an obligation to update existing registrations? If so, please describe.

Canadian provincial franchise legislation is enforced only by private rights of action. Currently no province has appointed a regulatory authority to monitor and enforce compliance. Accordingly, no registration of franchisors or franchisees, and no filing of disclosure documents, is required.

4. Are there any disclosure requirements (franchise specific or in general)? If so, please describe them (i.e. when and how must disclosure be made, is there a prescribed format, must it be in the local language, do they apply to sales to sub-franchisees) and include any potential consequences for failing to comply. Is there an obligation to update and/or repeat disclosure (for example in the event that the parties enter into an amendment to the franchise agreement or on renewal)?

Each disclosure province's franchise legislation requires that a franchisor (or sub-franchisor) deliver a franchise

disclosure document (FDD) to each prospective franchisee no later than 14 calendar days before the prospective franchisee signs a "franchise agreement" or pays any consideration in respect of the franchise, whichever is earlier. A "franchise agreement" includes any agreement between a franchisor or a franchisor's associate and a franchisee.

The FDD must contain all "material facts", including, but not limited to, those prescribed by regulation (ie,, the prescribed list is not exhaustive). "Material facts" include any information about the business, operations, capital or control of the franchisor, or about 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 on the prospective franchisee's decision to acquire it.

In addition, between the time that the FDD is delivered and the time when the franchisee signs a franchise agreement or pays any money, "material changes" may occur and the franchisor will be required to notify the franchisee of such material changes in accordance with the specifications of the provincial franchise legislation and give the franchisee an opportunity to consider their significance. "Material change" is defined to mean a change in the business, operations, capital or control of the franchisor, or a change in the franchise system, that would reasonably be expected to have a significant adverse effect on either the value or price of the franchise or on the decision to acquire it.

Various exemptions are available in each disclosure province, the most common being exemptions for:

- renewals or extensions, where there has been no material change since the current agreement was entered into;
- additional franchises of the same type, where there has been no material change since the existing franchise agreement was entered into;
- fractional franchises (ie, where the revenues of the franchised business are not expected to exceed 20% of the revenues of the overall business);
- transfers by the franchisee, where the transfer is not effected by or through the franchisor;
- grants to directors or officers of the franchisor;
- grants where the franchisee is not expected to make a total initial investment of more than the prescribed amount (typically C$5,000); and
- grants where the franchisee is expected to make a total initial investment in excess of the prescribed amount (between C$3,000,000 and C$5,000,000).

Canadian courts construe these exemptions strictly against the franchisor, and so they are used sparingly and with caution. Absent one of these exemptions applying, a FDD must be provided to a prospective franchisee, regardless of whether it's the grant of a new franchise or the transfer or renewal of an existing franchise. Failure by a franchisor to abide by these requirements can provide a franchisee with a claim for damages, or possibly a right to rescind the franchise altogether. For further information on remedies available to franchisees, see Question "6" below.

5. If the franchisee intends to use a special purpose vehicle (SPV) to operate each franchised outlet, is it sufficient to make disclosure to the SPVs' parent company or must disclosure be made to each individual SPV franchisee?

Disclosure must be delivered to each separate entity to which a franchise is granted.

6. What actions can a franchisee take in the event of mis-selling by the franchisor? Would these still be available if there was a disclaimer in the franchise agreement, disclosure document or sales material?

There are two types of remedies available for franchisees who were enticed to purchase a franchise as a result of a franchisor's mis-selling or misrepresentation: the right to sue for damages and the right to rescind the franchise agreement.

If the franchisee suffers a loss because of a misrepresentation contained in the disclosure document, the franchisee will have a right of action for damages against the franchisor and against every person who signed the document – in other words, those who sign the disclosure document have personal liability with respect to such misrepresentations.

More significantly, in provinces which have enacted franchise disclosure legislation, if the franchisor delivers the disclosure document late, the franchisee has the right to rescind the franchise agreement, without penalty or obligation, within 60 days after its receipt of the disclosure document. If the document is never delivered, or its contents are deemed so deficient that a court decides it is akin to the franchisee having not received a

disclosure document at all, that rescission right is extended to two years after the date that the franchisee signs the franchise agreement.

In the event of rescission, the franchisor and everyone who personally signed the disclosure document must compensate the franchisee for any losses it incurred in acquiring, setting up, and operating the franchise. In other words, by not disclosing (or not disclosing properly), the franchisor is effectively insuring the franchisee's investment and potential business losses for the first two years of its operation. This liability also extends to persons identified as 'franchisor's associates' (ie, persons who control, are controlled by, or are under common control with the franchisor and who either are involved in the approval of the grant or exercise significant operational control over the franchisee, and to whom the franchisee owes a continuing financial obligation in respect of the franchise).

A franchisor may not contract out of these remedies, or otherwise shield itself from liability through specific disclaimers or disclosure statements to that effect.

7. Would it be legal to issue a franchise agreement on a non-negotiable, "take it or leave it" basis?

Yes. Franchisors are free to negotiate, or refuse to negotiate, amendments to their franchise agreements as desired.

8. How are trademarks, know-how, trade secrets and copyright protected in your country?

Franchisors can register their trademarks pursuant to Canada's *Trade-marks Act* and can register copyright pursuant to Canada's *Copyright Act*. Use of a trademark in Canada without registration provides some trademark protection rights, but those rights are limited to the trading area in which the business is known. Trademark registration entitles a trademark owner to protection across Canada (even if the owner is not doing business using the trademark across Canada). Copyright also exists automatically when a work is created but it is much easier to protect against unauthorised users when it is registered.

9. Are there any franchise specific laws governing the ongoing relationship between franchisor and franchisee? If so, please describe them, including any terms that are required to be included within the franchise agreement.

The franchise-specific legislation in each of the six disclosure provinces imposes a duty of fair dealing (which includes a duty to act in good faith and in a commercially reasonable manner) on all parties to a franchise agreement. This duty applies in respect of both the performance and enforcement of the franchise agreement and applies throughout the term of the franchise agreement. In addition, each provincial franchise statute contains a right of franchisees to associate with one another and a corresponding prohibition on franchisors interfering with such right.

10. Are there any aspects of competition law that apply to the franchise transaction (i.e. is it permissible to prohibit online sales, insist on exclusive supply or fix retail prices)? If applicable, provide an overview of the relevant competition laws.

Canada's Competition Bureau is responsible for administering and enforcing the *Competition Act*. Those found to be in contravention of the act may be subject to significant monetary fines, imprisonment and court orders to cease the offending conduct and compensate consumers, where appropriate.

The *Competition Act* regulates certain trade practices that may be of relevance to franchisors:

- For example, 'market restriction' (ie, the practice of a supplier requiring that its customer sell specified products within a defined market area as a condition of supplying those products to the customer) is a 'reviewable trade practice' under the act. If the Canadian Competition Tribunal were to find that a franchisor's practice of mandating exclusive geographical areas is likely to lessen competition substantially in relation to a product, either because the franchisor is a major supplier of the product or because the practice is widespread with respect to the product, then the tribunal could order the franchisor to halt its practice. However, exceptions exist, and most franchisors do not wield sufficient market power to make this a concern.
- Similarly, 'price maintenance' (ie, the practice of a supplier influencing the price at which its products are to be resold by its customer) and

'tied selling' (ie, the practice of a supplier, as a condition of supplying a particular product, either requiring or inducing a customer to acquire a second product or preventing the customer from using or distributing another product (e.g., a competitor's product) with the supplied product) are also 'reviewable trade practices' which the tribunal can enjoin if they threaten to lessen competition substantially in a given market. 'Exclusive dealing' (ie, where a supplier requires or induces a customer to deal only, or mostly, in products supplied by the supplier or someone designated by the supplier) is a practice that is often engaged in by franchisors and which may similarly be enjoined if it threatens anti-competitive effects. Franchisors in Canada should be aware of each of these practices and should discuss them with their legal advisers, but again, most franchisors do not wield sufficient market power to make them a practical concern.

Moreover, the federal *Competition Act* applies to contests held in Canada, as well as marketing and advertising practices. For contests, there are minimum disclosure requirements set out in the Competition Act, such as the number and value of prizes, the odds of winning, regional allocation of prizes and any fact within the knowledge of the advertiser which materially affects the chances of winning. The C*ompetition Act* also prohibits false or misleading representations and deceptive marketing practices (e.g. performance claims not based on adequate or proper tests, misleading testimonials, sale of products above an advertised price).

11. Are in-term and post-term non-compete and non-solicitation clauses enforceable?

Franchise agreements may include in-term and post-term confidentiality provisions prohibiting disclosure of know-how and trade secrets. Such provisions, however, must be reasonable in terms of geographic scope, duration and prohibited activities, as well as not vague, in order to be enforceable.

Non-competition and non-solicitation clauses are enforceable in Canada, provided, however, that such clauses will be closely scrutinized by the courts. Issues with the enforceability of non-competition and other restrictive covenants have historically arisen as a result of the view, under Canadian common law, that such provisions are inherently offensive to public policy as restraints on trade. Enforceability is generally restricted to covenants that protect the actual, legitimate interests of franchisors; as such, post-term covenants must not over-reach in terms of their geographic or temporal scope, or otherwise unduly restrict the ability of the covenanting franchisee to earn a living after the franchise agreement has ended. Non-solicitation clauses are generally more easily enforced than non-competition covenants, since the scope of the restricted activity is more narrowly targeted to conduct that would directly and clearly harm the franchisor (and which is thus more readily avoidable and unnecessary by the franchisee).

Canadian courts are generally reluctant to amend unenforceable covenants to render them enforceable – they typically will not 'blue pencil' a provision to excise the most offensive portions, but rather will strike the entire clause, leaving the overly aggressive franchisor with no protection whatsoever. Accordingly, great care must be taken in drafting these provisions and ensuring they are prohibiting the minimum conduct necessary to protect the franchisor's legitimate interests.

12. Are there any consumer protection laws that are relevant to franchising? Are there any circumstances in which franchisees would be treated as consumers?

Although no consumer protection laws specific to franchising and franchise sales exist in Canada, Franchisors (and each individual franchisee) are still required to abide by all such laws in the day-to-day operations of their businesses. This includes the relevant consumer protection law in each province and territory (such as the *Consumer Protection Act* in Ontario), that regulates topics like the delivery of goods, remedies available to a party harmed by a seller's misrepresentation, consumer cooling-off periods, etc.

13. Is there an obligation (express or implied) to deal in good faith in franchise relationships?

The franchise-specific legislation in each of the six disclosure provinces imposes a duty of fair dealing (which includes a duty to act in good faith and in a commercially reasonable manner) on all parties to a franchise agreement. This duty applies in respect of both the performance and enforcement of the franchise agreement.

Beyond the six disclosure provinces, parties to a contract are also more generally subject to the common law duty of fair dealing imposed upon them by several substantial

court decisions in the previous decade. This common law duty of fair dealing is applicable to franchisors and franchisees alike, much like the statutory duty of fair dealing in the six disclosure provinces, it creates a requirements on those parties to act in good faith and carry out the honest performance of each party's contractual obligations with a consideration of the interests of the other party.

14. Are there any employment or labour law considerations that are relevant to the franchise relationship? Is there a risk that the staff of the franchisee could be deemed to be the employees of the franchisor? What steps can be taken to mitigate this risk?

Similar to the United States, one of the most serious considerations to Canadian franchisors is the risk of being deemed the employer of its franchisee and/or a "joint employer" of its franchisee's employees.

Canadian franchisors can avoid liability as employers of their franchisees, and as joint employers (with their franchisees) of their franchisees' employees, by limiting the level of control and direction they exercise over such persons. Maintaining a hands-off posture opposite the franchisees' employees, both contractually and in practice, is a must. Canadian federal and provincial governments have not, to date, expressly assigned joint employment liability to franchisors; although the Ontario provincial government did previously consider amending its employment standards legislation to make franchisors jointly liable for their franchisees' breaches of such standards, and amending its labour relations statute to make it easier for franchisees' employees to unionise. However, neither such initiative has been implemented and each appears to have been abandoned, at least for the foreseeable future. Provincial human rights codes may, however, pose risks to franchisors in respect of the control they may assert over the employment practices of their franchisees, given the broad definitions of who may be held liable for breaches of the codes.

15. Is there a risk that a franchisee could be deemed to be the commercial agent of the franchisor? What steps can be taken to mitigate this risk?

Franchisees may be deemed to be commercial agents of the franchisor in instances where the franchisor exercises significant control over the franchisee's conduct of its franchised business, or where the franchisee fails to properly identify itself to a counterparty as an entity distinct from the franchisor, resulting in the counterparty assuming the franchisee and the franchisor are not distinct entities. Although there is no complete list as to what behaviour on the part of a franchisor would constitute "significant control", actions such as the franchisor hiring or directing the franchisee's employees, managing the franchisee's finances, maintaining the franchisee's corporate and financial records, and exercising its own day-to-day business judgement in place of the franchisee's judgement, are likely examples.

To avoid such situations, franchisors are advised to state unequivocally in their franchise agreement that the franchisees are independent contractors and not agents of the franchisor, and therefore cannot bind the franchisor to any obligation or otherwise create liability on the part of the franchisor. They should also ensure that this is true in practice by exercising no more control over a franchisee than is absolutely necessary to allow the franchised business to operate properly; although tempting, such overreach may create more problems than it solves.

Moreover, through the terms of the franchise agreements, franchisors should require each franchisee to conspicuously identify itself as a distinct entity carrying on business as an independent franchisee of the franchisor, both in the franchise's storefront (if applicable), as well as on invoices, business cards, and other stationery.

16. Are there any laws and regulations that affect the nature and payment of royalties to a foreign franchisor and/or how much interest can be charged?

Foreign franchisors seeking to expand into Canada should consult with Canadian tax experts, including with respect to Canadian income tax that may be exigible if the franchisor is found to be carrying on business in Canada. Apart from income tax, fee and royalty payments made by franchisees are generally regarded as being made in respect of services provided by the franchisor in Canada, and so are generally subject to Canadian federal and provincial sales, goods and services, or "harmonized sales" taxes. Where such payments are made to an offshore franchisor, the franchisee is required to withhold and remit to the Canadian federal government withholding tax (ie, as a proxy for the income tax that the franchisor would be required to pay on such amounts if it were resident in Canada). The amount of such withholding tax is

generally 25%, subject to reduction by any tax treaty in place between Canada and the franchisor's home country.

The Criminal Code of Canada prohibits any interest rate exceeding 60% per annum.

17. Is it possible to impose contractual penalties on franchisees for breaches of restrictive covenants etc.? If so, what requirements must be met in order for such penalties to be enforceable?

Canadian courts outside of Quebec have ruled that penalty provisions in franchise agreements are not enforceable. That being said, in some situations, liquidated damages clauses (in which the quantum of potential future damages is reasonably determined and specified during the formation of the contract) are permissible. In Quebec, Canada's lone civil law jurisdiction, penalty clauses are permissible in some circumstances, assuming that they are not excessively unreasonable or oppressive.

The general practice in Canada is to avoid the use of such penalty or liquidated damages clauses. Practically speaking, their inclusion in the franchise agreement makes selling franchises to interested parties significantly more difficult. Many franchisors do, however, charge administrative "fees" on franchisees in instances where the franchisees have failed to meet certain obligations under their franchise agreement, and the franchisor is required to remedy these deficiencies, with such fees generally being in such amounts as to compensate the franchisor for its time and expense of enforcement and/or remedy.

18. What tax considerations are relevant to franchisors and franchisees? Are franchise royalties subject to withholding tax?

Franchisees are subject to the *Income Tax Act* of Canada. In addition to the considerations specific to non-resident franchisors (as discussed in Question "16", above) franchisors are subject to a general corporate tax rate which ranges from 26% to 31%, depending on the province. Franchisors and franchisees are also required to pay value-added taxes on the sale of most supplies of property and services in Canada. In some provinces, distinct taxes are collected for remittance to both the federal and provincial governments (in the form of a Good and Sales Tax and a Provincial Sales Tax, respectively), while in others, a sole Harmonized Sales Tax is collected on each sale.

19. Does a franchisee have a right to request a renewal on expiration of the initial term? In what circumstances can a franchisor refuse to renew a franchise agreement? If the franchise agreement is not renewed or it if it terminates or expires, is the franchisee entitled to compensation? If so, under what circumstances and how is the compensation payment calculated?

Generally speaking, a franchisee does not have an automatic right of renewal unless otherwise provided for in their franchise agreement. There are no statutory rights of renewal available for franchisees in Canada. If the franchise agreement does not provide for renewal of the agreement, then on expiry, the franchisor is not required to renew or extend the agreement. If the franchise agreement provides the franchisee with a right to renew the agreement, then such provisions will apply to the franchisor's right to renew or not renew the agreement. The franchisee's failure to comply strictly with all of the renewal requirements under the franchise agreement will entitle the franchisor to refuse to renew the agreement. However, if the franchisor has previously granted renewals to the franchisee, Canadian common law (and any applicable statutory duty of fair dealing) may require the franchisor to give the franchisee reasonable notice of its intention not to grant a further renewal.

In instances where the franchisee is not granted a renewal, there is no statutorily-mandated compensation due to the franchisee from the franchisor.

20. Are there any mandatory termination rights which may override any contractual termination rights? Is there a minimum notice period that the parties must adhere to?

There are no mandatory termination rights other than franchisees' ability to rescind the franchise agreement as a result of materially deficient disclosure. In all other cases, the circumstances in which either party may terminate the franchise agreement will be governed by the provisions of such franchise agreement. See Question "6", above, for further information on the rescission remedy.

21. Are there any intangible assets in the

franchisee's business which the franchisee can claim ownership of on expiry or termination, e.g. customer data, local goodwill, etc.

Typically, Canadian franchise agreements stipulate that all customer data is owned by, and that all goodwill accrues to, the franchisor. There are no statutory restrictions against franchisors claiming ownership of their franchisees' intangible assets at the expiration or termination of the franchise agreement. However, practically speaking, any provisions that are excessively oppressive or not tailored for the specifics of the franchise being granted will hinder the franchisor's ability to recruit franchisees.

22. Is there a national franchising association? Is membership required? If not, is membership commercially advisable? What are the additional obligations of the national franchising association?

The primary franchising association in Canada is the Canadian Franchise Association (CFA). Membership in the CFA is voluntary and is open to both franchisors and franchisees. Membership carries with it an obligation to follow the CFA's code of ethics, which, among other things, places an obligation on franchisors to provide prospective franchisees with full and accurate written disclosure of all material facts about the franchise system prior to executing a binding agreement relating to the award of the franchise. This obligation applies to all franchisor members of the CFA, including those operating in provinces that do not have franchise-specific legislation in place.

23. Are foreign franchisors treated differently to domestic franchisors?

Foreign franchisors are required to comply with applicable Canadian provincial franchise legislation to the same degree as domestic franchisors. Different tax rules may apply to foreign franchisors, however, as might import or export regulations. Additional considerations, including under corporate law, foreign investment review legislation (ie, the *Investment Canada Act*) and employment law, may arise depending on the structure employed by the franchisor in its expansion (e.g. if the franchisor is franchising directly into Canada as opposed to establishing a Canadian-domiciled corporation to act as master franchisee or distributor).

24. Are there any requirements for payments in connection with the franchise agreement to be made in the local currency?

No, the franchisor may require their franchisee to make all payments in a currency other than the Canadian dollar. Franchisors should consider, however, if this will prove to be a serious burden on a franchisee's ability to conduct business, or otherwise dissuade potential franchisees from joining the system. The franchise agreement must specify the currency in which payments are to be made.

25. Must the franchise agreement be governed by local law?

Generally speaking, no. However, each existing provincial franchise statute contains a provision stating that any provision in a franchise agreement that purports to restrict the application of that province's law to any claim that arises under the statute is void. As a result, many franchisors specify that the franchise agreement will be governed by the laws of the province in which the franchised business is located.

26. What dispute resolution procedures are available to franchisors and franchisees? Are there any advantages to out of court procedures such as arbitration, in particular if the franchise agreement is subject to a foreign governing law?

Franchisors and franchisees are able to resolve their disputes through formal court proceedings, or through the use of alternative dispute resolution methods and techniques.

Each province and territory has its own courts, as well as courts that have national jurisdiction. Canada has four levels of court:

- provincial and territorial (lower) courts;
- provincial and territorial superior courts;
- provincial and territorial courts of appeal and the Federal Court of Appeal (which hear appeals from the superior and lower courts); and
- the Supreme Court of Canada (which hears appeals from each appellate level court).

In addition to the court system, the following alternative dispute resolution processes are available in Canada:

- negotiation – the parties attempt to resolve the dispute without the intervention of an independent third party;
- mediation – an independent third party assists the parties with arriving at a mutually-agreeable resolution; and
- arbitration – an independent arbitrator makes a final (and potentially binding) decision based on evidence and arguments submitted by the parties.

The main advantages of arbitration can include the more timely resolution of disputes, more flexible procedure, and confidentiality (including the avoidance of publicity). Inclusion of a mandatory arbitration provision in a franchise agreement might also be effective for those franchisors wishing to avoid class action proceedings since class-wide arbitration is not available in Canada. The main disadvantage of arbitration is that the costs of the arbitrator must be paid for by the parties to the dispute.

Franchise agreements may be governed by foreign law. As stated above, however, each provincial franchise statute contains a provision stipulating that any provision in a franchise agreement that purports to restrict the application of that province's law to any claim that arises under the statute is void. In addition, such legislation similarly restricts any choice of dispute resolution venue to the respective province, again, in so far as it relates to claims arising under the franchise legislation, meaning that most out-of-court proceedings are limited to the province in question as well.

27. Does local law allow class actions by multiple franchisees?

Franchisees are permitted to bring class actions against their franchisors in Canada. Such class actions are generally brought on behalf of franchisees when the franchisor breaches provincial franchise legislation, including when the franchisor's conduct breaches the statutory duty of good faith and fair dealing owed to its franchisees, or the terms of the franchisees' franchise agreements.

28. Must the franchise agreement and disclosure documents be in the local language?

Section 55 of the Quebec Charter of the French Language requires that contracts of adhesion (e.g. a franchise agreement) be written in French unless the express wish of the parties indicates otherwise (e.g. the franchise agreement may be written in English if it includes a statement that the parties wish for the agreement to be drawn up in English only).

There are no other laws in Canada that require disclosure documents or franchise agreements to be in either French or English. Practically speaking, the disclosure document and franchise agreement will need to be in a language that all of the relevant parties understand. For example, if a party is unable to understand the contents of the franchise agreement, then the agreement may not be enforceable against them, as there may not have been a mutual agreement on the terms of the contract.

29. Is it possible to sign the franchise agreement using an electronic signature (rather than a wet ink signature)?

Yes. Pursuant to each province's and territory's e-commerce laws, electronic signatures on franchise disclosure documents, franchise agreements, and ancillary agreements, are just as valid as ink signatures.

30. Can franchise agreements be stored electronically and the paper version be destroyed?

Yes. Franchise agreements (and other ancillary documents, as well as franchise disclosure documents) can be stored and transmitted in electronic format.

31. Please provide a brief overview of current legal developments in your country that are likely to have an impact on franchising in your country.

Cannabis Legalization: In October 2018, Canada legalized recreational cannabis sales and usage. In the wake of legalization, multiple new cannabis brands emerged to begin establishing retail cannabis stores and concepts, including franchised cannabis outlets. The rise of cannabis franchising in Canada has not been without its complications, however, as various provincial governments have closely regulate the number of cannabis stores permitted to open following legalization. Moreover, a stringent application process has been established in many jurisdictions to regulate and limit the establishment of retail cannabis outlets, whether or not franchised. Nonetheless, the rapid establishment of cannabis retail outlets nationwide has led to substantial competition in many urban markets, and has led to numerous 'accidental franchise' occurrences where

brands unknowingly entered into franchise relationships with counterparties, rendering such brands a franchisor under the various provincial disclosure acts and beholden to the stringent requirements thereunder.

Amendments to the *Arthur Wishart Act*: Long-awaited (but unproclaimed) amendments to the *Arthur Wishart Act* (the Province of Ontario's disclosure act) and its associated regulations came into force on September 1, 2020. The amendments include permitting a franchisor to collect an initial deposit from a franchisee prior to the expiry of the 14-day statutory disclosure period (see question "4", above) under certain circumstances, provide further clarity on the permissibility of including non-Canadian financial statements in a franchise disclosure document, and expand the circumstances in which a franchisor may be exempt from providing a franchise prospect a franchise disclosure document. A complete description of the amendments can be found here: https://sotosllp.com/pending-amendments-to-arthur-wishart-act-to-take-effect-september-1-2020/.

Data Privacy: Following the lead of several other jurisdictions, including the European Union's *General Data Protection Regulation*, the Government of Canada is proposing to radically rework the nation's privacy law framework. In November 2020, the government tabled *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act*, proposing to replace and amend substantial elements of the existing privacy law regime. This new act will provide regulators with increased enforcement powers and significantly more stringent penalties to punish contraventions of Canada's privacy law regime. It would also establish a new tribunal to hear appeals of the Privacy Commissioner's decisions under the new regime. While the new act has not yet been enacted, and remains subject to comment, franchisors and franchisees alike should begin to consider the increased obligations to be placed upon them by the new act, and ensure that existing policies, processes, and systems are current and conform to the act prior to its enactment.

32. In your opinion, what are the key lessons to be learned by franchisors as a consequence of the COVID-19 crisis?

Flexibility, communication, support and empathy are critical, particularly during a time of crisis, but also during less turbulent times. During a crisis, the franchisor must be flexible (some would say "nimble") in the way it conducts its business and adapts to changes, including operational changes. The franchisors whose systems have survived (or even thrived during) the pandemic are invariably those that have been able to modify their customer offerings (ie, "pivot") to respond to the changing regulatory landscape, while staying true to their fundamental brand promise. During calmer times, franchisors should still be looking for alternative products and services, and methods of delivering them, to diversify (and thereby "crisis-proof") their systems.

Successful franchisors have also been able to maintain and strengthen their relationships with their franchisees through more frequent and more detailed communications and support initiatives. Town halls, Zoom calls and regular site visits all provide greater opportunities for collaboration and sharing of best practices, and assure greater "buy-in" by franchisees regarding (and thus smoother implementation of) necessary system changes. All of these efforts should continue (albeit, with somewhat reduced intensity) once the crisis passes, in order to maintain those relationships and the goodwill they generate.

Although franchise agreements clearly stipulate the obligations and responsibilities placed on each party at any given time, a rewriting of the 'rules of the game' virtually overnight has required franchisors to critically assess weaknesses and vulnerabilities in their systems in real time and consider whether a strict adherence to all of the terms of a franchise agreement best serves the needs of franchisees and the system generally. Many franchise systems have grappled with the unenviable task of deciding which obligations and requirements under the franchise agreement could not or should not be enforced in light of the crisis to ensure the continued survival and operation of the brand and its franchisees, while still needing to ensure the delivery of safe and consistently high-quality products and services and remaining viable as a system. Although strict adherence to a franchise agreement's terms and obligations is a key element of any franchise relationship, many franchisors have had to apply such obligations in conjunction with, and in a manner responsive to, the on-the-ground reality.

Equally importantly, the emergence of the COVID-19 pandemic caught many franchisors and franchisees alike flat-footed. Many franchisors had not established a crisis management plan, whether related to global health emergencies or brand-defining crises, generally. Although COVID-19 continues to recede in Canada, it seems unlikely it will be fully beaten any time soon. A sudden and drastic increase in case numbers, or the emergence and spread of further variants of the virus, has the potential to undo much of the progress that Canada has made in combatting the virus thus far. Moreover, while COVID-19 was unexpected, no franchisor should assume that it will be the last

pandemic or other global health emergency their brands will face. Franchisors should critically assess their experiences throughout the pandemic, and build on those experiences in developing a crisis response and continuity of operations plan to deal with future crises and disturbances. Franchisors should ensure they have incorporated lessons learned during 2020 and 2021 to better prepare, manage, and overcome the inevitable next challenge to come.

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