

## Franchising - Canada

### Franchise-Specific Legislation in the Provinces

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**Manitoba**  
**New Brunswick**

Thus far, four of the 10 Canadian provinces (Alberta, Ontario, Prince Edward Island and New Brunswick) have adopted franchise-specific legislation and other Canadian provinces are now considering following suit and enacting similar legislation. This update focuses on the status of franchise-specific legislation and proposed regulations pending in two Canadian provinces: Manitoba and New Brunswick.

#### Manitoba

Manitoba is the fifth Canadian province that is in the process of considering the enactment of legislation to regulate franchise relationships. While the Manitoba government has not yet formally decided whether to enact franchise legislation, in May 2008 the Manitoba Law Reform Commission published a detailed report, which was subsequently submitted to the minister of justice (Manitoba), recommending the enactment of franchise legislation within the province. As well as recommending that the Uniform Franchises Act (created by the Uniform Law Conference of Canada with a view to adopting uniform franchise legislation across the country) serve as a viable model for Manitoba's franchise legislation, the commission also makes additional recommendations that are not contained in either the Uniform Franchises Act or any other existing provincial franchise legislation. This has caused concern among those supporting the harmonization of provincial franchise legislation across Canada.

Most of the additional recommendations are made with a view to heightening disclosure requirements. Some of these recommendations raise confidentiality concerns - for example, requiring the disclosure of:

- the number of lawsuits initiated by the franchisor against its franchisees in the 10-year period immediately preceding the date of disclosure and the number of disputes that were resolved through mediation or arbitration;
- the number of confidentiality agreements between the franchisor and its existing and former franchisees; and
- leasing arrangements where an individual or corporation related to the franchisor acts as head tenant of the premises.

On a more positive note, the commission also supports the use of a 'wrap-around' disclosure document and its electronic delivery, as well as ensuring relief for franchisors in circumstances where the disclosure document contains only minor errors or irregularities. In particular, the commission recommends that if the disclosure document substantially complies with franchising legislation, it should be deemed valid. Furthermore, the commission supports a franchisor's ability to enter into a site selection or confidentiality agreement with prospective franchisees and to require a fully refundable deposit from franchisees, without triggering the application of disclosure requirements.

With respect to franchisees' remedies for a franchisor's failure to comply with disclosure requirements, the commission recommends that Manitoba remain consistent with the Uniform Franchises Act as regards statutory disclosure remedies and the preservation of common law rights and remedies (ie, the right to rescind within 60 days for incomplete disclosure, the right to rescind within two years for non-disclosure and full reimbursement in either case). However, the commission also recommends that the statutory remedy of damages for misrepresentation apply to future projections and forecasts.

Finally (and perhaps more ominously), despite the general absence of interference with contractual provisions by franchise legislation in Canada, the commission is

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concerned with the power imbalance in the context of a franchise relationship and makes additional recommendations with a view to offsetting the power imbalance, including:

- a prohibition against the termination of, or failure to renew, a franchise agreement without just cause and, if the terms of the franchise agreement upon renewal materially differ from the initial agreement, the imposition of an obligation upon the franchisor either to repurchase the franchise at the original purchase price or to release the franchisee from the franchise agreement;
- the ability of franchisees to purchase goods and services from suppliers other than those designated by the franchisor, except goods and services that are central to the business and incorporate the franchisor's trade secrets or are manufactured by the franchisor; and
- restrictions on franchisors' encroachment upon franchisees' exclusive territory through direct sales, internet sales or corporate-owned units.

The draft report is in the consultation period and the commission is accepting comments on the report until October 31 2009.

## **New Brunswick**

On April 16 2009 the Department of Justice and Consumer Affairs (New Brunswick) released a consultation paper proposing regulations and transition provisions in connection with its Franchises Act. The regulations will establish the details of a disclosure document that franchisors must provide to prospective franchisees prior to executing a franchise agreement. The regulations will also introduce and establish a framework for a mediation process between franchisors and franchisees. The consultation period held by the Department of Justice and Consumer Affairs on the consultation paper and proposed legislation recently ended on June 12 2009. No further legislative updates on the proposed regulations have been announced as yet.

Unlike other provinces that have enacted franchise legislation, only New Brunswick has incorporated mediation as a mandatory element if requested by either party to the franchise agreement.

Given the continuing developments regarding franchise-specific legislation in Canada, it is important for a franchisor to monitor continuously franchise-specific legislative updates and, in particular, the possible differences in the franchisor's statutory obligations in each province in which it engages in franchising activities.

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