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International Franchising in a Changing World

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RECENT DEVELOPMENTS IN CANADIAN FRANCHISE LAW

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1. Introduction

Canada has a mature and well-developed franchise industry, with an estimated 1,300 franchise brands generating approximately $68 billion per year in revenue.[1] A significant percentage of this industry is, perhaps unsurprisingly, comprised of franchises that have expanded from the United States, such as Subway, McDonald's and RE/MAX. Another significant percentage of this industry is made up of home-grown franchises such as Tim Hortons, Second Cup, and Canadian Tire.

Due to the franchise industry's significance to the Canadian economy, lawmakers have become increasingly attuned to the business and legal developments in this industry. Although the first piece of franchise-specific legislation in the country was passed in the 1970s in the Province of Alberta (unlike in the United States, the franchise industry in Canada is not federally regulated), the real explosion in legislative activity started in the mid-1990s with Alberta's passage of its current *Franchises Act*. Five other provinces followed suit in the two decades that followed, with the most recent being British Columbia, whose *Franchises Act* came into effect on February 1, 2017 (the "**B.C. Act**").[2] As of the date of writing, six out of the ten provinces in Canada, being British Columbia, Ontario, Alberta, New Brunswick, Prince Edward Island and Manitoba (the "**Regulated Provinces**"), have adopted franchise legislation.[3] American observers will find that these franchise statutes share many aspects in common with the *Federal Trade Commission Franchise Rule*,[4] with the notable exception that disclosure documents do not need to be filed and reviewed by a government regulator.

This paper summarizes the major legal developments in Canadian franchise law over the last 12 months. As mentioned above, perhaps the most significant development is the coming into force of the B.C. Act. Other major developments include the Ontario Ministry of Labour's Changing Workplaces Review, which may have significant implications for franchisors' labour and employment practices and responsibilities going forward; the decision of the Ontario Superior Court of Justice in *Raibex Canada Ltd. v ASWR Franchising Corp.*[5] ("***Allstar***") which may have raised the standard of franchise disclosure; and new regulations passed in the Province of Québec in 2016 which introduced new French language requirements applicable to franchisors/franchisees.

2. New British Columbia Franchise Legislation

On February 1, 2017, B.C. Act and the British Columbia *Franchises Regulation* (the "**B.C. Regulation**") came into force, making it the sixth of ten Canadian provinces to enact franchise-specific legislation along with Ontario, Alberta, New Brunswick, Prince Edward Island and Manitoba.[6] The act and regulations were passed after the British Columbia Law Institute, a law reform research organization, recommended in 2014 the adoption of franchise-specific legislation in British Columbia, to be modeled on

[1] Canadian Franchise Association, "CFA Accomplishments Report 2017" (January 2017), online: CFA <https://www.cfa.ca/available-now-cfa-accomplishments-report-2017/>.

[2] Dominic Mochrie & Paul Kotschorek, "B.C.'s Franchises Act now in force" (March 3, 2017), online: Osler <https://www.osler.com/en/resources/regulations/2017/franchise-review-march-2017/b-c-s-franchises-act-now-in-force> [Dominic Mochrie & Paul Kotschorek (March 3, 2017)].

[3] *Franchises Act*, RSA 2000, c F-23. *Franchises Act*, SBC 2015, c 35. *The Franchises Act*, CCSM c F156. *Arthur Wishart Act (Franchise Disclosure), 2000*, SO 2000, c 3. *Franchises Act*, SNB 2014, c 111. *Franchises Act*, RSPEI 1988, c F-14.1.

[4] 16 C.F.R. § 436.1, et seq.

[5] 2016 ONSC 5575 [*Allstar*]. Note that this case is under appeal as of the date of this paper.

[6] Dominic Mochrie & Paul Kotschorek (March 3, 2017), *supra* note 2.

the *Uniform Franchises Act* template and the associated template regulations.[7] The *Uniform Franchises Act* and the associated regulations were themselves developed by the Uniform Law Conference of Canada in 2005 based on the two provincial franchise legislative regimes in force in Canada at the time – the Alberta regime and the Ontario regime.[8] The respective franchise acts and regulations of Prince Edward Island, Manitoba, and New Brunswick were all based upon, and substantially follow the drafting of the *Uniform Franchises Act* and the associated regulations.[9] The franchise legislative regimes in Canada are therefore relatively harmonized, even taking into consideration the passage of the B.C. Act and B.C. Regulation.

Although most of the differences between the British Columbia regime and that of the other Regulated Provinces are minor, there exist several key differences that may impact the internal processes of an international franchisor, subject the international franchisor to additional obligations, or both:[10]

(a) Disclosure documents are considered valid if they are in substantial compliance with legislation and regulations, thereby ensuring that a minor defect in the documents (one that does not influence the prospective franchisee's investment decision) does not lead to non-compliance consequences such as rescission of the franchise agreement. Alberta, Manitoba and Prince Edward Island currently follow this approach.[11]

(b) Some forms of confidentiality agreements and site selection agreements will not be considered "franchise agreements" and may be signed in advance of disclosure.[12]

(c) The payment by a prospective franchisee of a fully refundable deposit prior to the disclosure period elapsing does not breach the B.C. Act. Like Alberta and Manitoba, the B.C. Act and the B.C. Regulation provide that a fully refundable deposit is a deposit that does not exceed 20% of the initial franchise fee (in Manitoba the maximum deposit is capped at $100,000), is refundable without deduction and is given pursuant to an agreement that does not oblige the prospect to enter into a franchise agreement. The B.C. Act also contains a provision requiring that the deposit be refundable without any deductions, if the prospect does not enter into a franchise agreement.[13]

(d) A franchisee need not elect between a rescission remedy and a statutory right of action for damages but that franchisee may not receive double recovery if successful in both instances. This concept provides marginal additional flexibility to the franchisee, as these remedies are often pleaded in the alternative in any event.[14]

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[7] Dominic Mochrie, "New Developments in British Columbia's Consideration of Franchise Law" (May 2014), online: Osler <https://www.osler.com/en/resources/regulations/2014/franchise-review-may-2014/new-developments-in-british-columbia-s-considerati> [*Dominic Mochrie*].

[8] *Ibid.*

[9] *Ibid.*

[10] The introduction of the British Columbia regime will require certain drafting changes to the international franchisor's standard Canadian franchise disclosure document that are not discussed in the body of this paper. Appendix A includes a non-exhaustive comparison of certain requirements of the British Columbia regime against that of the other Regulated Provinces.

[11] Dominic Mochrie, *supra* note 7.

[12] Dominic Mochrie & Paul Kotschorek, "Proposed Franchise Bill Introduced in B.C." (October 9, 2015), online: Osler <https://www.osler.com/en/resources/regulations/2015/proposed-franchise-bill-introduced-in-b-c> [Dominic Mochrie & Paul Kotschorek (October 9, 2015)].

[13] Andraya Frith, Dominic Mochrie & Paul Kotschorek, "British Columbia's new franchise regulation: How do B.C.'s requirements stack up?" (November 3, 2016), online: Osler <https://www.osler.com/en/resources/regulations/2016/franchise-review-october-2016/british-columbia-s-new-franchise-regulation-how-d> [Andraya Frith, Dominic Mochrie & Paul Kotschorek].

[14] Dominic Mochrie & Paul Kotschorek (October 9, 2015), *supra* note 12.

(e) Like other Regulated Provinces (except Ontario), the B.C. Regulation allows franchisors to use a disclosure document that is prepared to comply with the disclosure requirements of another jurisdiction. Also like the other Regulated Provinces, franchisors that choose to use a "wrap-around" disclosure document must include any additional information that is necessary for the disclosure document to comply with the B.C. Act and the B.C. Regulation.[15]

(f) Although all of the other Regulated Provinces (except Alberta, which does not deal with methods of delivery at all) explicitly allow for electronic delivery of disclosure documents, the B.C. Regulation is the only one that (subject to certain conditions) specifically addresses delivery by "electronic means, including email." It is important to remember that a written acknowledgement of receipt must be received by the franchisor from the franchisee for this delivery method to be effective.[16]

(g) The B.C. Regulation also allows for prepaid courier delivery, but the courier service must allow for tracking and confirmation of receipt of the delivery. This is unique among the Regulated Provinces and will likely limit courier choices to major courier service providers. The P.E.I. and B.C. regulations require written acknowledgement of receipt from the prospective franchisee for courier delivery to be effective; the other Regulated Provinces do not impose conditions on the use of prepaid courier delivery.[17]

(h) The financial statement requirements are similar to those of other Regulated Provinces. However, the B.C. Regulation (like Alberta's) recognizes the accounting standards of the Chartered Professional Accountants of Canada and of the International Auditing and Assurance Standards Board. The B.C. Regulation differs in the situation where a franchisor has operated for less than one fiscal year or if 180 days have not yet passed since the end of the first fiscal year of operation and financial statements for that year have not been prepared. In that case, in all Regulated Provinces, a franchisor may disclose only an opening balance sheet. None of the other Regulated Provinces imposes a standard for such opening balance sheets. The B.C. Regulation, however, requires that the opening balance sheet be prepared and reported on in the same manner as required of financial statements.[18]

(i) Like other Regulated Provinces (except Alberta whose legislation is silent on the issue), the B.C. Regulation requires disclosure of the franchisor's restrictions or requirements with respect to alternative dispute resolution processes including requirements related to the location or venues. However, unlike any of the other Regulated Provinces, the B.C. Act contains a provision that makes it clear that the governing law and venue provision in the legislation applies to any arbitration proceeding. This means that arbitration must be conducted in B.C. and pursuant to B.C. law. [19]

(j) The net worth requirement of the large franchisor exemption to financial statement disclosure is $5 million. This aligns with the Alberta, Ontario and Manitoba exemptions. P.E.I. and New Brunswick have a $2 million net worth requirement.[20]

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[15] Andraya Frith, Dominic Mochrie & Paul Kotschorek, *supra* note 13.
[16] *Ibid.*
[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.*

3. The "Joint Employer" Concern: Ontario's Changing Workplaces Review

In July 2016, the Ontario Changing Workplaces Review: Special Advisors' Interim Report (the "**Interim Report**") was released to the public (as of the date of writing of this paper, the final report has not been released but it is expected to be released in late May or June 2017). The Interim Report was issued in connection with an independent review commissioned by the Government of Ontario related to the province's key statutes regulating the employment relationship: the *Employment Standards Act, 2000* ("**ESA**") and the *Labour Relations Act, 1995* ("**LRA**"), and canvassed 50 separate issues and included over 225 proposals for change on which the special advisors invited comment.[21] One of the groups of proposals included in this report, if adopted, would complete overhaul the relationship between franchisors, franchisees and the employees of the franchisees. These proposed changes include:

- The introduction of a new joint employer provision in the LRA whereby franchisors and franchisees could be declared joint employers for all of the franchisee's workers. This could force franchisors into collective bargaining negotiations in respect of workers over whom they have no day-to-day oversight, and could impose on them the obligations contained in a collective agreement, including potentially joint liability for a franchisee's failure to pay its workers.[22]

- Adopting a new model for unionizing franchises that would allow employees at one franchise site to unionize, negotiate an initial collective agreement, and then allow other franchise sites of the same franchisor to be brought under the terms of that initial agreement.[23]

- Amending the ESA to make franchisors liable for employment standards violations of their franchisees. This amendment could incline franchisors to exercise additional control over the operations of their franchisees, which would in turn enhance the risk that franchisors are found to be the true employers of the franchisees' workers.[24]

Understandably, employer and franchisor interest groups have made submissions opposing these changes, as the proposed changes under consideration have the potential to disrupt existing business structures and to threaten the franchise model as it exists. If adopted, these proposed changes could (a) increase a franchisor's liability to its franchisees' commitments to their employees, including liability for wages, salaries, overtime, vacation pay, benefits, termination notice and pay in lieu of notice, severance pay and employment-related premiums, and payroll taxes; (b) increase a franchisor's compliance costs; (c) change the economics and incentives of a franchisor's business model as the franchisor attempts to flow these costs and liabilities down to its franchisees; and (d) increase the risk of franchisee workers becoming unionized.[25]

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[21] Jason Hanson, Sven Poysa, Allison Di Cesare & Josh Fineblit, "Government report indicates potential overhaul of Ontario labour and employment landscape" (September 13, 2016), online: Osler <https://www.osler.com/en/blogs/risk/september-2016/government-report-indicates-potential-overhaul-of>.

[22] *Ibid.*

[23] *Ibid.*

[24] *Ibid.*

[25] Andraya Frith, Christine Jackson, Gillian S.G. Scott & Daniel Wong, "Franchisors – Are you at risk of joint employer status in Canada?" (May 12, 2016), online: Osler<https://www.osler.com/en/resources/regulations/2016/franchisors-are-you-at-risk-of-joint-employer-st>.

4. *AllStar* – Enhanced Standard for Franchise Disclosure

The 2016 decision of the Ontario Superior Court of Justice in *AllStar* may have significantly raised the standard of franchise disclosure in Ontario, particularly with respect to leasing arrangements, and potentially impacts the timing of when the franchise agreement can be entered into between the parties. We also discuss the subsequent decision of this same court in *2212886 Ontario Inc. v Obsidian Group Inc.*[26] ("***Crabby Joe's***") where the court came to a different conclusion regarding the materiality of disclosing the head lease and held that it was sufficient to disclose the offer to lease and the draft form of sublease.

4.1 *Raibex Canada Ltd. v ASWR Franchising Corp. (AllStar) – Facts and Holding*

In this September 7, 2016 case, the plaintiffs were the franchisee and the principals and shareholders of the franchisee of an AllStar Wings restaurant. They sought summary judgment against the franchisor and were successful in obtaining the two-year rescission remedy available under the *Arthur Wishart Act (Franchise Disclosure), 2000*.

The franchise disclosure document that was delivered to the plaintiffs included an estimate for the cost to build a franchise restaurant from a shell building. There was no estimate for conversion from an existing building, despite all of the franchisor's existing locations being conversions. Instead, the franchise disclosure document contained a statement to the effect that the franchisor could not estimate such cost with any certainty.

After the franchise disclosure document was delivered and the franchise agreement was signed, an existing restaurant was identified for conversion into an AllStar Wings restaurant. The plaintiffs signed the sublease before the plaintiffs saw a copy of the executed head lease. The franchisor subsequently invoiced the franchisee for the security deposits and prepaid rent, including $120,000 in security deposit and prepaid rent required under the head lease, which the franchisee refused to pay. The plaintiff franchisee and plaintiff owners brought a summary judgment motion for rescission.

The court granted the two-year rescission remedy sought by the plaintiffs primarily because the franchise disclosure document did not contain a copy of the head lease (and the associated $120,000 in security deposit and prepaid rent), despite the fact that no site had been identified, and therefore no head lease existed, at the time of disclosure or when the franchise agreement was executed. The court held that the terms of the head lease were material facts that ought to have been disclosed, and was not persuaded by the argument that, in the franchise industry, franchise agreements are often signed prior to a site being identified, and stated that the only remedy for this was to delay disclosure until all material facts are known.

With respect to the disclosure of the costs of establishing the franchise, the court found the disclosure provided to be deficient, as the plaintiffs' franchise location was a conversion and not built from a shell building. An estimate of the costs for conversion was not provided. A disclaimer that a required disclosure item could not be provided due to uncertainty could not stand in the place of the required disclosure.

4.2 *Raibex Canada Ltd. v ASWR Franchising Corp. (AllStar) – Implications*

The broader implications of this case flowing from the holding that disclosure must be delayed until *all* material facts are known is that franchisors must necessarily push back the point in time in their franchisee intake processes at which they sign franchise agreements. This pronouncement may lead to significant uncertainty for franchisors in determining when they are ready to disclose and when they can

[26] 2017 ONSC 1643 [*Crabby Joe's*].

enter into the franchise agreement, and also means that franchisors must necessarily take on more risk. For example, in the present case, had the franchisor fully complied with the disclosure standard under *AllStar*, there would have been a period of time where the franchisor would be searching for a franchise location and entering into negotiations with landlords without the certainty of a franchisee who has signed a franchise agreement, and who would be ready to take over the location upon its readiness.[27]

The most significant immediate implication of this case, however, is that the common practice of the franchisor and franchisee jointly selecting a franchise location after the execution of the franchise agreement may no longer be possible. Franchisors that continue to do so may be opening themselves up to liability for claims for rescission and/or misrepresentation damages.[28]

By holding that the disclosure documents must be specific to the franchisee receiving them, existing jurisprudence in Ontario has effectively expanded the scope of disclosure beyond the prescribed disclosure items in the disclosure regulation. The more troubling aspect of this decision is that material facts can be entirely unknown to the franchisor at the time of disclosure, and still form the basis of liability when discovered after the franchise agreement has been signed.[29]

The court also leaves the door open for the "possibility that proper disclosure could be made [where the site is not known at the time of disclosure]." Accordingly, it may be possible for a franchisor to meet its disclosure burden without waiting for the head lease to be signed, provided that the head lease does not ultimately impose any new substantial costs and that the disclosed form of sublease accurately predicts the material terms of the head lease. A franchisor who chooses to accept this risk, however, should carefully consider an alternative plan in the event that the terms of the head lease do not reflect what was disclosed.[30]

With respect to the franchisor's use of a disclaimer, the court's holding that a disclaimer cannot substitute for a required disclosure item is perhaps unsurprising - franchisors cannot evade their disclosure obligations simply by stating that they don't know the answer, that it is burdensome to prepare the information, or because the information provided would be uncertain.[31]

4.3 *2212886 Ontario Inc. v Obsidian Group Inc. (Crabby Joe's) – Facts and Holding*

In this March 21, 2017 case, the plaintiffs were the franchisee and the franchisee's principals of a Crabby Joe's restaurant. They successfully sought the two-year rescission remedy against the franchisor, alleging several disclosure failures including: (a) failure to provide the head lease when they signed the franchise agreement (only a draft sublease and offer to lease was provided); (b) failure to accurately disclose the costs of establishing the franchise; (c) failure to disclose the fact that financing was available from the franchisor (franchisor provided the franchisee with financing after the franchisee became unable to pay the costs of establishing the franchise, which turned out to be higher than anticipated); and (d) disclosing inflated financial projections that were never achieved.

The allegation that failure to disclose the head lease was a material deficiency giving rise to the full two-year rescission remedy was rejected on the facts: there was no head lease in place; there was only an offer to lease, which was properly disclosed. This aspect of the *Crabby Joe's* decision is at odds with the findings in the *AllStar* decision discussed above. Interestingly, although the *Crabby Joe's* decision was

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[27] Andraya Frith, Paul Kotschorek & Dominic Mochrie, "Is there a new "AllStar" standard for franchise disclosure?" (September 28, 2016), online: Osler <https://www.osler.com/en/resources/regulations/2016/is-there-a-new-allstar-standard-for-franchise-di>.

[28] *Ibid.*

[29] *Ibid.*

[30] *Ibid.*

[31] *Ibid.*

rendered after the *AllStar* decision, it makes no attempt to distinguish the facts before the court in Crabby Joe's; indeed it does not even mention the AllStar decision.

The allegations that disclosure relating to the franchisor financing was not given in the franchise disclosure document, and that this disclosure was given in piecemeal fashion and not all in one document as prescribed, were rejected because neither party could have reasonably contemplated this disclosure when the disclosure document was given (the franchisor financing was considered and given after the disclosure obligation expired).

The allegation that the franchisor did not disclose the actual development costs was determined to be unfounded in the evidence, as the disclosure document gave an estimated range of costs of which the actual cost turned out to be within the bounds. The disclosure document also indicated that actual costs may vary. Another agreement between the parties also gave the franchisor the right to authorize variations within 10% of the estimated cost.

With respect to the financial projections, the court found that the franchisor showed the principals of the franchisee the financial projections before the signing of the franchise agreement, but that the financial projections did not form part of the franchise disclosure document. These projections also did not include the underlying basis for such projections. The court agreed that it is not mandatory for a franchisor to disclose earning projections, but held that once these projections are provided, they must be disclosed as part of the franchise disclosure document or through a Statement of Material Change. The court then found the failure to include the projections in the franchise disclosure document to be an omission so material that it amounted to no disclosure, entitling the franchisee to the full two-year rescission remedy.

4.4 *2212886 Ontario Inc. v Obsidian Group Inc. (Crabby Joe's) – Implications*

While the court confirmed that it is optional whether or not a franchisor provides an earnings claim (some franchise lawyers have taken the position that earnings information necessarily constitutes a "material fact" and on this basis must always be disclosed), not surprisingly the court held that where a franchisor chooses to provide an earnings claim they must then form part of the formal franchise disclosure process. Failure to do so was held to be a material deficiency akin to no disclosure at all, thereby entitling the franchisee to the full two-year rescission remedy (as opposed to the more limited 60 day rescission remedy).

It is more difficult to reconcile the *Crabby Joe's* case with the earlier *AllStar* case. While *AllStar* held that the franchise disclosure document must contain *all* material facts, the discussion in *Crabby Joe's* surrounding the franchisor financing suggests to the contrary. For example, the court stated that the fact that franchisor financing was required to complete the establishing of the franchise location was "reasonably unforeseeable", and that "[t]he disclosure obligation ended before the loan and none of the financing documents were contemplated at the time of the disclosure requirements nor required in connection with the terms of the franchise agreement." In the *AllStar* case, the $120,000 payable was also not known at the time that the franchise disclosure document was given, and was also arguably "reasonably unforeseeable" and yet the *AllStar* court concluded that this resulted in a material deficiency giving rise to the full two-year rescission remedy.

This begs the question of whether the accuracy of the franchise disclosure document must be judged according to the facts available to the parties at the time of disclosure, or according to the facts as they eventually come to light. *Crabby Joe's*, being the more recent decision, seems to be the law in Ontario (although *Crabby Joe's* does not reference *AllStar*). It also seems to be the more commercially reasonable approach, given that the approach taken in *AllStar* would open up the franchisor to indeterminate liability with respect to alleged failures to disclose information that was not known or reasonably foreseeable at the

time the franchise agreement was entered into. It remains to be seen how courts in Ontario will reconcile these two cases, but it is anticipated that the Ontario Court of Appeal hearing the appeal of the AllStar decision will clarify what is now an unsettled area of law in the province on critical issues affecting the timing of entering into franchise agreements and leasing arrangements and how franchisors can meet their disclosure obligations under the Ontario franchise legislation.

5. Québec French Language Requirements For Public Signage

On November 24, 2016, new regulations amending the rules under the *Charter of the French Language* ("***Charter***") and requiring public signage that displays English trademarks to also include a French-language description of the business or other "sufficient presence of French" came into force in Québec.[32]

The legislative solution was adopted after the Office québécois de la langue française sought to impose an interpretation of the *Charter* requiring that a generic term in French accompany English trademarks on public signs, posters and commercial advertising in 2011, resulting in retailers instituting a court challenge that ultimately ended in the Court of Appeal of Québec siding with the retailers in April 2015.[33]

The new basic requirement is that where a trademark is displayed "outside an immovable" in a language other than French, a "sufficient presence of French" must accompany the trademark. The new regulations give some guidance as to the interpretation of this basic requirement:[34]

(a) The "sufficient presence of French" can be satisfied in one of three ways: (1) a generic term or a description of the products or services concerned; (2) a corporate slogan or (3) any other term or indication deemed sufficient.

(b) The "outside an immovable" requirement refers to: (1) signs or posters outside premises situated in an immovable or a larger property complex, including those situated in a mall or a shopping centre, underground or not; and (2) signs or posters inside an immovable, if they are intended to be seen from the outside.

(c) The "presence of French" must have permanent visibility, similar to that of the principal signs displaying the trademark, and must also have legibility in the same visual field (i.e. night illumination) as the principal signs displaying the trademark.

(d) The "sufficient presence" will be adjudged from the position from which the signage will be viewed. For example, for a location which is located on a street with a sidewalk, the assessment will be made from the perspective of an individual standing on the sidewalk. In the case of a sign or poster visible from the highway, the French content must be sufficiently legible from the highway.

Businesses and franchises are provided with a three-year grace period to bring themselves into compliance with the new amendments, commencing on November 24, 2016. This grace period applies to a trademark that is already used on signs or posters, as well as if the installation or replacement of the sign or

[32] Kelly Moffatt, Nicolas Nadeau Ouellet, Alexandre Fallon, François Laurin-Pratte & Juliette Cong Liu, "French language requirements for public signage in Québec" (March 30, 2017), online: Osler <https://www.osler.com/en/resources/regulations/2017/franchise-review-march-2017/french-language-requirements-for-public-signage-in>.

[33] *Ibid.*

[34] *Ibid.*

poster has been the subject of the issue of, or an application for, a municipal permit or a similar government authorization in the six months preceding November 9, 2016.[35]

6. Conclusion

Franchise law is in a state of flux in Canada, as lawmakers become increasingly attuned to the business and legal developments in this industry. British Columbia's passing of its own franchise legislation, an expanding body of case law, and other provincial legal developments that have a distinct impact on the franchise industry made 2016 a very eventful year in the Canadian franchise industry, and serve to demonstrate the growing maturity of this market.

7. Author's Biography

Andraya is Chair of Osler's National Franchise and Distribution Practice Group, one of the most frequently recommended law firms for franchise law in Canada. She is also Co-Lead of Osler's Retail Practice Group. She practises business law with an emphasis on franchising, distribution, privacy, and e-commerce law. Andraya has extensive experience advising Canadian and International franchisors of all sizes operating in a broad range of industries, including quick service restaurants, retail, pharmacy, automotive, real estate and hospitality. She counsels franchisors on structuring international and domestic franchise transactions and preparing "best in class" franchise agreements and franchise disclosure documents for use in Canada's increasingly complex franchise regulatory environment. Andraya has developed particular expertise on advising foreign franchisors and retailers expanding their operations to Canada. She helps them manoeuvre through significant judicial, statutory and cultural differences between their home states and Canada to help ensure a smooth and successful entry into the Canadian market. She also regularly advises franchisors, retailers and on-line businesses on Canadian distribution and trade practice law, including privacy, anti-spam, consumer protection, Internet sales, advertising, and telemarketing. Andraya is one of only two Canadian lawyers recognized in *Chambers Global: The World's Leading Lawyers for Business* in the area of Franchising (Global-Wide) and was named 2017 "Lawyer of the Year" in the area of Franchise Law by *Best Lawyers Canada*.

[35] *Ibid.*

Appendix A

Major Differences and Similarities Between the British Columbia *Franchises Act* and *Franchises Regulation* and that of other Regulated Provinces

(a) Risk warnings

Like other Regulated Provinces (except Alberta, which does not include prescribed risk warning statements, and except New Brunswick, which does not require the risk warning statements to be included at the beginning of the disclosure document), risk warning statements are prescribed and are required to be included together at the beginning of the disclosure document. The B.C. Regulation adopts the same risk warning statements as P.E.I., New Brunswick and Manitoba.

(b) Advertising funds

The B.C. advertising fund disclosure requirements are less onerous. Ontario, Manitoba and New Brunswick, for example, require disclosure of the percentage of funds used in national and local advertising during the prior two fiscal years, the percentage retained by the franchisor during the prior two fiscal years and similar projections for the current fiscal year. The B.C. Regulation only requires a description of the advertising fund including (a) the amount or basis for determining the amount of funds, (b) the frequency of the franchisee's required contribution to the fund, (c) the administration of the fund including what portion of the fund may be used for the administration of the fund and the persons who administer the fund and (d) whether reports on advertising activities financed by the fund will be made available to the franchisee (this last requirement exists in all the Regulated Provinces).

(c) Training and manuals

Like other Regulated Provinces (except Alberta), disclosure of any training offered must be included. B.C. is unique among the Regulated Provinces in stipulating that a statement specifying who bears the training costs must be included, regardless of whether the training is mandatory or optional. Other Regulated Provinces require this statement only in the event that the training is mandatory.

Similar to New Brunswick and Manitoba, if the franchisee will be required to operate in accordance with manuals provided by the franchisor, then the disclosure document must either include the table of contents of each manual required or include a statement specifying where the manuals are available for inspection. In New Brunswick, the manual must be available at a location in New Brunswick.

(d) Territory and proximity

If territorial rights are granted, franchisors must include a description of "the franchisee's rights to the territory, including the manner in which and the person by whom" the rights will be determined. In New Brunswick and Manitoba, if an exclusive territory is granted under the franchise agreement the franchisor must describe the exclusive territory or the manner in which and the person by whom the territory will be determined. Ontario and Alberta simply require a description of any exclusive territory granted to the franchisee. It should be noted that the B.C. Regulation uses the term "territory" not "exclusive territory" as is the case in all of the other Regulated Provinces.

Unique among the six Regulated Provinces, the B.C. Regulation does not require a description of the franchisor's policy on proximity between existing franchises. In B.C., franchisors will not have to disclose their practices and policies concerning how they decide where to place franchisees in relation to one another, unless this information is required to be disclosed as a "material fact."

Under the B.C. Regulation, franchisors are required to describe any reservation of rights to (i) market goods or services that are the same as those sold or distributed by the franchisee (under the same or different marks or advertising) or (ii) to distribute those goods or services via internet, telephone, catalogue sales or by other means. Manitoba is the only other Regulated Province to address reserved rights in its franchise legislation, but it only requires franchisors to describe rights reserved under (ii) above.

(e) Certificates

The B.C. Regulation requires that franchisors attach a franchisor's certificate to a statement of material change (SMC). The certificate must state that the SMC contains no untrue information and includes every material change that is required to be disclosed. Each of the other Regulated provinces (except Ontario) has a similar, explicit requirement for the use of franchisor's certificates in respect of SMCs.

(f) Current and former franchisees

There are several similarities and a key difference between the B.C. Regulation and the other provincial disclosure requirements with respect to the lists of current and past franchisees that must be included.

- A list of current franchisees in Canada must be included. B.C. has a significantly broader geographic scope than the other Regulated Provinces, which generally require a list of the locations within the applicable province (with the exception of P.E.I., which calls for franchisees in P.E.I., New Brunswick and Nova Scotia to be included).

- A list of current businesses of the same type as the franchise being offered that are operated by the franchisor in Canada. This mirrors a similar requirement in the Alberta, Manitoba and New Brunswick regulations, in contrast to the Ontario and P.E.I. regulations.

- A list of former franchisees that were terminated, cancelled, reacquired, not renewed or that otherwise left the system in Canada within the immediately preceding fiscal year. This requirement is uniform throughout Canada.

- A total number of franchises in Canada within the last three fiscal years that have been terminated, not renewed or reacquired. This is similar to the requirement in Alberta. P.E.I., Manitoba and New Brunswick do not have similar requirements.

(g) Negative statements

The B.C. Regulation also requires franchisors to make negative statements with respect to certain prescribed matters. Where the franchisor does not provide an earnings projection, an estimate of operating costs, training, manuals or a territory, the franchisor must include a statement or statements to that effect. Only New Brunswick and Manitoba have similar requirements for negative statements.

(h) Guarantees and security interests

Unlike in Ontario and Alberta, guarantees and security interests required of the franchisee must be disclosed.

(i) Trademarks

Like other Regulated Provinces (except Alberta), disclosure of trademarks and proprietary rights afforded to the franchisee must be included.

(j) Licenses, registrations and authorizations

Like Ontario, New Brunswick and Manitoba, disclosure of any licences, registrations, authorizations and other permissions (approvals) required of the franchisee must be included. The B.C. Regulation, however, does not place an obligation upon the franchisor to determine every approval required under any applicable federal or provincial law or municipal by-law for the franchisee to operate the franchise, but merely requires the disclosure of the approvals that the franchisor requires the franchisee to acquire, as well as a statement declaring that other approvals may be required and inquiries must be made. This approach is in line with those used in Manitoba and New Brunswick, and differs from the Ontario approach (where there is an obligation upon the franchisor to disclose all approvals required under applicable federal or provincial law or municipal by-laws).

(k) Unilateral amendments

New Brunswick remains the only jurisdiction in Canada that requires the franchisor to disclose in the disclosure document the fact that it has the unilateral right to amend terms of the franchise agreements.