

PUBLICATION

Oh Canada! Developing Patchwork of Canadian Franchise Regulations Not Uniform

September 20, 2010

On July 10, 2010, New Brunswick became the fourth Canadian province to enact franchising regulations, following Alberta, Ontario and Prince Edward Island (PEI). The New Brunswick regulations provide franchise dispute resolution procedures, and set forth specific franchise disclosure requirements. While there is some apparent consistency among the provinces, significant variations do exist. These variations may create a trap for unwary foreign franchise concepts. As more provinces enact franchise legislation, the differences in disclosure requirements argue for careful study by franchisors before market entry.

For instance, for all regulated provinces but Ontario, a confidentiality agreement between a franchisor and franchisee does not constitute a "franchise agreement" and will not violate the 14-day waiting period after delivery of disclosure documents. Also, unlike all other regulated provinces, the Ontario model does not apply the duty of good faith and fair dealing specifically to the exercise of a right under the franchise agreement, but instead requires parties to act in good faith in accordance with commercially reasonable standards. Furthermore, New Brunswick is the only province that expressly allows for delivery of disclosure documents by electronic means.

Perhaps the most significant variation among the provinces is the Ontario model's silence on whether a "wrap-around" franchise disclosure document is legally permissible. Alberta, PEI and New Brunswick allow foreign franchisors to use their own disclosure documents, provided the document is supplemented with additional disclosures required by the particular province. Ontario's regulations do not address the use of any foreign disclosure documents, but require that disclosures be "clear and concise." These inconsistent, and sometimes amorphous, disclosure requirements cause franchisors to create an Ontario disclosure document that is wrapped by disclosures for the other provinces. Foreign franchisors are discouraged from the use of existing home country disclosure documents out of fear of running afoul of the specific requirements of each province. The body of experience incorporated into the home country disclosure document is then unavailable to prospective Canadian franchisees.

While U.S. franchisors accustomed to U.S. franchise disclosure regulation may find Canadian franchise legislation to be a curious patchwork of modest regulatory hurdles, the small populations and markets in some provinces with regulations may prove to be insufficient incentive for costly compliance efforts. The compliance cost per potential unit may become so costprohibitive for smaller unit concepts attempting to enter Canadian markets, they are less likely to enter new, smaller markets in regulated provinces. Some enhanced uniformity might go a long way to opening these markets.