

Franchise Law In British Columbia: The New Franchises Regulation

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On October 3, 2016, the British Columbia legislature released the long-awaited Franchises Regulation,¹ which, along with the *Franchises Act*,² came into force on February 1, 2017. British Columbia is the sixth province in Canada to introduce franchise legislation, following Alberta, Manitoba, Ontario, New Brunswick and Prince Edward Island. Franchisors carrying on business in British Columbia are now required to provide a disclosure document to a prospective franchisee prior to entering into a franchise agreement.

The BC Regulation sets out the detailed requirements of the mandatory franchise disclosure scheme established by the BC Act. The BC Regulation is similar to the franchise regulations in place in Manitoba, Ontario, New Brunswick and Prince Edward Island. Like the regulations in Manitoba, Ontario, New Brunswick and Prince Edward Island, the BC Regulation requires that a disclosure document contain certain mandatory risk warning statements, information regarding the franchisor and its directors, officers and general partners, financial statements for the franchisor (of at least review engagement level), unless the franchisor is exempted from this requirement,³ and certain prescribed information about the franchise system and the franchise being offered. Among other things, a disclosure document must provide:

1. a list of all costs associated with establishing the franchise;
2. the nature and amount of any recurring or isolated fees or payments payable to the franchisor;
3. a description of any training offered to franchisees by the franchisor;
4. a description of any restrictions or requirements imposed by the franchise agreement with respect to: (i) any obligations to purchase or lease from the franchisor, its affiliates or approved suppliers; (ii) the goods and services the franchisee may sell; and (iii) the customers to whom the franchisee may sell goods and services, or the means by which the franchisee may sell them;
5. descriptions of the franchisor's policies with respect to rebates, commissions, payments or other benefits, guarantees and security interests required of franchisees, and how proximate to an existing franchisee the franchisor may establish other businesses or methods of distribution;
6. if territorial rights are granted, a description of the franchisee's rights to the territory and any reservation of rights by the franchisor;

7. a description of the franchisor's rights with respect to the trademark or trade name associated with the franchise;
8. a list of every license, registration, authorization or other permission the franchisee will need to obtain under federal or provincial laws in order to operate the franchise;
9. a description of the extent to which the franchisee will be required to participate personally and directly in the operation of the franchise;
10. a list of all provisions in the franchise agreement that deal with the termination and renewal of the franchise agreement and the transfer of the franchise;
11. lists of current and former franchisees, and franchisor outlets; and
12. information regarding franchise closures in the previous three fiscal years.

Franchisors carrying on business in any of the other five provinces with disclosure regulations will already be well acquainted with many of these requirements (or requirements similar to them).

However, there are certain differences in the requirements under the BC Regulation, which franchisors carrying on business in British Columbia need to be aware of. Franchisors in British Columbia will need to review the BC Regulation carefully and make sure they understand the nature and scope of the information they must provide in order to comply with the BC Regulation. With respect to the contents of the disclosure document, the BC Regulation requires franchisors to provide additional information about certain matters that is not required under the disclosure regulations in some of the other disclosure provinces. This information includes the following:

1. with respect to any dispute resolution provisions contained in the franchise agreement, the BC Regulation requires that the disclosure document provide a description of any requirements relating to the location or venue of any dispute resolution process (which franchisors are also required to disclose in New Brunswick and Prince Edward Island, but not in Alberta, Manitoba or Ontario);⁴
2. a description of the frequency of a franchisee's required contribution to any advertising, marketing, promotion or similar fund;⁵ and
3. a list of all franchisees *in Canada*, which is broader than the corresponding requirement in the other provinces.⁶

The BC Regulation also requires that franchisors include a specific British Columbia form of certificate in their disclosure documents and statements of material change.

The BC Regulation provides that a franchisor may use a document that complies with the disclosure requirements of another Canadian disclosure jurisdiction for the purposes of providing franchise disclosure in British Columbia.⁷ However, if a franchisor wishes to use a disclosure document that complies with the laws of another jurisdiction, it must ensure that the disclosure document includes all of the information that is necessary to comply with the BC Regulation, including the additional information discussed above. The most common ways of dealing with this are to produce a national form of disclosure document, which meets the requirements of all disclosure provinces, or to use a wraparound to a disclosure document prepared for use in another jurisdiction, which sets out the additional information required to comply with the BC Regulation.

The BC Regulation provides for delivery of a disclosure document by prepaid courier or an equivalent prepaid method, and by electronic means, including email, so long as

certain conditions are met, namely: (i) the disclosure document is delivered in a form that allows the prospective franchisee to view and print it; (ii) all the information that must be contained in the disclosure document is available without accessing external documents or content; and (iii) the franchisor receives a written acknowledgement of receipt of the disclosure document from the prospective franchisee. With respect to delivery of a disclosure document by prepaid courier, the BC Regulation requires that the method of delivery allow for tracking and confirmation of receipt of the delivery by the prospective franchisee, which is not a requirement in the other provinces that provide for delivery by prepaid courier.

Like the *Arthur Wishart Act*⁸ in Ontario and its regulation,⁹ the BC Act and the BC Regulation provide a disclosure exemption for "large franchisees" where the prospective franchisee's investment exceeds \$5 million.¹⁰ However, unlike the AWA and the Ontario Regulation, the BC Act and the BC Regulation do not provide a disclosure exemption for "small franchisees" where the prospective franchisee's investment is less than a prescribed amount (in Ontario, the prescribed amount is \$5,000).¹¹

The *Franchises Act* and Franchises Regulation significantly change the law regarding franchising in British Columbia. As noted above, franchisors in British Columbia now have mandatory disclosure obligations and failure to comply with them can give franchisees a number of potent rights and remedies. Franchisors who are doing business in British Columbia or who are considering expanding into British Columbia should consult with experienced franchise counsel to ensure that they are up to speed with the requirements of the *Franchises Act* and the Franchises Regulation.

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¹ B.C. Reg. 238/2016 [the "BC Regulation"].

² Bill 38 - 2015 [the "BC Act"].

³ Pursuant to Section 6 of the BC Regulation, a franchisor is not required to provide financial statements in a disclosure document if certain conditions are met with respect to, among other things, the franchisor's net worth, the size of its franchise network, the length of time the franchisor has been engaged in the line of business associated with the franchise, and whether the franchisor, its associates or any of its directors, officers and general partners have had a conviction, judgment, order or award relating to fraud or unfair or deceptive business practices made against them.

⁴ BC Regulation, Section 4.

⁵ BC Regulation, Schedule, Part 2, Section 15.

⁶ BC Regulation, Schedule, Part 3, Section 23(1).

⁷ BC Regulation, Section 2(3).

⁸ *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3 [the "AWA"].

⁹ Ontario Regulation 581/00 [the "Ontario Regulation"].

¹⁰ AWA, Section 5(7)(h), Ontario Regulation, Part III, Section 10; BC Act, Section 5(8)(i), BC Regulation, Section 10.

¹¹ AWA, Section 5(7)(g)(i), Ontario Regulation, Part III, Section 9.

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