

Frequently asked questions – Franchising

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These are questions that come up repeatedly in our practice and we thought it would be useful to offer some general guidance:

1) Will my U.S.-style non-compete clause be enforceable in Canada?

Non-compete covenants must be reasonable — both between the franchisor and the franchisee and for public interest — to be valid and enforceable in Canada. When assessing the reasonableness of a non-compete clause, Canadian courts will consider the scope of the geographical area, the time period and the activities covered. Canadian courts have held that restricted or prohibited activities that have been defined using such terms as “any competing activity” or “similar to the business conducted by the franchisor” are uncertain, and therefore not enforceable. Canadian courts generally will not rewrite or write down a non-compete clause to make it reasonable and enforceable.

2) Do I have to disclose to renewing franchisees?

In the Canadian provinces that have franchise legislation, franchisors may choose to rely on an exemption from disclosure in the case of renewing franchisees. In all regulated provinces except Alberta the exemption may be available if, since the current agreement was entered into, there has been (i) no interruption in the operation of the franchisee's business, and (ii) no material change. There is no definition in the *Arthur Wishart Act (Franchise Disclosure), 2000* (the Act) of (i), so a plain language reading would apply. However, a “material change” is broadly defined in the Act, and includes any change to the “franchise system,” which is also broadly defined. Accordingly, the franchisor must consider all changes to itself and the franchise system within the term of the expiring franchise agreement to determine if there has been a material change. If both (i) and (ii) are satisfied, no disclosure is required. If disclosure is required, the franchisor will have to prepare a form of disclosure document for renewals, as the disclosure document for new franchisees will contain information inapplicable to renewing franchisees. Alberta's exemption from disclosure on renewals is less complicated, and simply provides that a disclosure document is not required in connection with “a renewal or extension of an existing franchise agreement.” Generally speaking, exemptions have been narrowed by case law, so it is risky for franchisors to rely upon disclosure exemptions and they are well-advised to seek the advice of franchise counsel before doing so.