

## Leveling the playing field: the benefits of voluntary franchise disclosure

MARCH 9, 2022 4 MIN READ

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Did you know that six Canadian provinces have legislation that regulate franchising? In those provinces it is mandatory for a franchise disclosure document (FDD) to be provided before entering into any agreements related to the franchise or paying any consideration related to the franchise, with some exceptions.

In this article we will look at where an FDD is required and the benefits of providing one even in jurisdictions where they are not legally required.

Franchising is regulated at the provincial level in Canada. To date, only six provinces have enacted franchise legislation: Alberta, British Columbia, Manitoba, New Brunswick, Ontario, and Prince Edward Island.

Although it is not a legislative requirement in the unregulated jurisdictions, it is still a recommended best practice to provide franchise disclosure in all 13 provinces and territories in Canada.

### The benefits of a franchise disclosure document

Providing disclosure promotes consistency in the sales process and can level the playing field in terms of information provided to franchisee candidates and can help avoid common law misrepresentation claims.

An FDD can serve as a guide for your franchise sales teams by setting out the information that can and should be highlighted to prospective franchisees during the sales process. This can help alleviate potential problems and confusion later in your franchise relationship that may otherwise be caused by conversations that take place during the sales process.

By having material information set out in writing in an FDD that has been vetted by senior management and legal counsel, you reduce the risk of sales representatives “going off script” with a potential franchisee. The FDD also provides a written medium for setting out the underlying assumptions and bases for the information that is being provided to the franchisee candidate, which serves the dual purpose of ensuring the franchisee candidate is making an “informed investment decision” and of protecting the franchisor from common law misrepresentation claims.

## Quebec: Franchise agreements as contracts of adhesion

The *Civil Code of Quebec*, which has been in force since January 1994, contains a number of provisions aimed at protecting parties to consumer contracts or contracts of adhesion (a contract where essential stipulations were imposed by one of the parties and not negotiable).

In Quebec, the courts consistently consider franchise agreements to be contracts of adhesion and the *Civil Code of Quebec* will affect franchises located in the province and those whose franchise agreements are governed by the laws in Quebec.

Unlike the common law provinces, the general obligation under the *Civil Code of Quebec* to act in good faith also applies at the pre-contractual phase, which has been interpreted to include a positive obligation to inform (which is effectively the equivalent to a duty to disclose). Although there is no franchise legislation specifying what must be disclosed, franchisors are required to disclose material facts about the franchise. This obligation can be met by providing Quebec candidates with a slightly modified version of the FDD that is provided in the regulated provinces.

## Exceptions in unregulated provinces

Certain customizations should be made to an FDD before it is used in the unregulated provinces, including:

- removing the franchisor's certificates to avoid any unnecessary personal liability for the officers/directors that would otherwise be signing the certificates in the event of a misrepresentation claim
- removing individual franchisee information due to potential privacy law concerns and
- removing financial statements to avoid disclosing confidential financial information (particularly where the franchisor is a privately held company)

## Canadian Franchise Association membership

If you're a current or prospective member of the Canadian Franchise Association, it is a condition of membership that you provide franchisees with a disclosure document.

Whether you're in the process of updating your disclosure practices or looking for ways to streamline and standardize processes and information sharing within your organization, it is important that your FDDs are complete, accurate and delivered efficiently. If you need help with improving your current disclosure practices, our franchise disclosure and contracting solution might be right for you.

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