



**Canadian  
Franchise  
Association®**

**Growing Together**

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Legislative Services  
Ministry of Justice and Attorney General  
Government of Saskatchewan

Attention: Maria Markato, Senior Crown Counsel  
VIA EMAIL: [lsjui@gov.sk.ca](mailto:lsjui@gov.sk.ca)

## **RE: PROPOSED SASKATCHEWAN FRANCHISE LEGISLATION**

Dear Sir/Madam:

The Canadian Franchise Association welcomes this opportunity to respond to the request for comments with respect to the implementation of franchise legislation in Saskatchewan based on the ULCC *Uniform Franchise Act*, and to express other concerns and offer suggestions respecting the regulation of franchising and franchise disclosure legislation.

### **What is Franchising?**

Franchising is a business relationship in which an owner (the franchisor) grants a license (through a franchise agreement) to a third party (the franchisee), allowing them the right to use the franchisor's operating system, proprietary methods and know-how, brand name(s) and trademark(s), copyrighted materials, products, and marketing techniques. Under this model, the franchisee owns and operates their own business while capitalizing on and using a proven business concept, with the support and assistance of the franchisor.

Many businesses (and small ones in particular) that wish to expand often do not have access to adequate sources of capital, and so expansion through franchising is very often their only way to develop a chain. The business/brand owner will recruit the franchisee who will be investing (often some combination of cash savings and borrowed funds) their own capital to develop, open and operate the business. In addition, this model provides the franchisor the benefit of ensuring that an owner/operator is running the business on a day-to-day basis.

The franchisor will need to invest relatively significant amounts in launching a franchise expansion program, which usually includes obtaining specialized legal, accounting and consulting advice to ensure that the franchise agreement is appropriate for the circumstances and to comply with Canadian franchise laws (see below).

In exchange for the license granted to the franchisee, the franchisor typically collects an initial upfront fee from the franchisee and ongoing fees, usually based on a percentage of the franchisee's revenues for the continuing use of the franchisor's trademarks, processes and knowledge. As a result, the franchisee's success, which is often a by-product of being heavily involved and invested in the business, leads to the success of the franchisor.

While many people first think of 'fast food' when they think of franchising, the reality is any business can be franchised if it has a history of success and a tried-and-true formula that can be standardized and replicated in new locations. The franchise business model can be found in more than 60 different sectors in Canada, including automotive, travel and hotel, real estate, retail, grocery, pharmacy, senior care, education, health and fitness, a whole host of services, and more.

Although many franchised brands are recognized across the country and around the world, their local stores are owned by franchisees who live and work in their communities. As such, the franchise business model has provided many entrepreneurs with the opportunity to start and operate successful small businesses. These entrepreneurs invest in franchises to be in business for themselves, but not by themselves. But for the ability to license the use of a business system through franchising, most franchisees would never be in a position to start a successful business.

In summary, the economic opportunity franchising has provided franchisors, franchisees, their respective employees, and local communities cannot be underestimated. Growth through franchising has been and remains a powerful tool to expand economic opportunity and prosperity here at home and around the world.

### **Why is Franchising Important to the Canadian Economy?**

Franchising is a strong and important contributor to the Canadian economy. Recent statistics show:

- The Canadian franchise industry businesses generate approximately \$120 billion every year<sup>1</sup>;
- Nearly 2 million Canadians (approximately 1 out of every 10 working Canadians) are directly or indirectly employed by the franchise industry<sup>2</sup>;
- Over \$60 billion in wages are dependent on franchising<sup>3</sup>;
- The Canadian franchise industry contributes \$15.55 billion in federal taxation and \$13.21 billion in overall provincial taxation each year<sup>4</sup>;
- Canada has over 65,000 franchised establishments<sup>5</sup>;
- Approximately 1,300 franchise brands operate in Canada<sup>6</sup>;
- Franchising is more than food and accommodations – 60% of all franchises can be found in non-food and accommodation sectors<sup>7</sup>;
- Individual investments in franchises can range from under \$10,000 to over \$1,000,000<sup>8</sup>;
- Initial franchise fees can range from under \$5,000 to over \$75,000<sup>9</sup>;
- Every time a new franchise opens, it creates new jobs;
- The franchise business model is valuable to new Canadians as it creates new career opportunities;

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<sup>1</sup> Canadian Centre for Economic Analysis, *Canadian Franchise Industry Economic Outlook 2023* (Canadian Franchise Association, 2023), Table 2 [[report](#)].

<sup>2</sup> *Ibid*, Table 1.

<sup>3</sup> *Ibid*, Table 10.

<sup>4</sup> *Ibid*, Table 13.

<sup>5</sup> *Ibid*, Figure 2.

<sup>6</sup> Canadian Franchise Association, *2023 Franchise Canada Directory* (Canadian Franchise Association) [[report](#)].

<sup>7</sup> *Supra* note 1, Figure 5.

<sup>8</sup> *Supra* note 6.

<sup>9</sup> *Ibid*.

- Franchising offers direct and indirect economic benefits to all communities across Canada; and
- A franchised business is a small business.

### **Why is Franchising Important to the Saskatchewan Economy?**

- The Saskatchewan franchise industry businesses generate almost \$2.4 billion every year<sup>10</sup>;
- In Saskatchewan, 36,900 jobs (approximately 1 in 16 working Saskatchewanians) are directly or indirectly employed by the franchise industry<sup>11</sup>;
- \$1.08 billion in wages are dependent on franchising<sup>12</sup>;
- The Saskatchewan franchise industry contributes \$230 million in provincial taxation each year<sup>13</sup>;
- Saskatchewan has over 1,500 franchised establishments<sup>14</sup>.

### **How is Franchising Regulated?**

In Canada, there is no federal legislation that governs franchising across the country. Rather, the regulation of franchising is considered a matter of provincial jurisdiction. To date, 6 of the 10 Canadian provinces have enacted provincial franchise legislation to regulate the offer and sale of franchises, and the franchise relationship. These provinces are Alberta, British Columbia, Manitoba, New Brunswick, Ontario, and Prince Edward Island. While Alberta has had a franchise law since 1971 (and in its current form since 1995), the 5 other provinces with a franchise law today enacted their laws in the 2000s, beginning with Ontario in 2001. And while the laws are substantially similar in their purpose and approach, there are some differences.

Broadly speaking, the provincial franchise laws are intended to address the perceived imbalance of information and bargaining power in the franchisor-franchisee relationship by adopting the following key features:

#### *(a) The Franchisor's Obligation to Provide Disclosure*

- Franchisors are required to provide prospective franchisees with a “franchise disclosure document” (also known as an “FDD”) before the signing of a franchise agreement or the payment by the franchisee of any money to the franchisor. The FDD is a written resource designed to provide franchisees with all the information they need to make an informed decision about investing in a franchise.
- While there is an overriding obligation to include all “material facts” in the FDD that could impact the franchisee’s decision to invest, the statutes also prescribe a minimum set of mandatory items that must be addressed. These items include, for example, information on the franchisor’s business background, litigation history, trademarks and other intellectual property, and financial statements. The mandatory items also include information on the franchise offer itself, such as a description of the costs required to open and run the business, a summary of training and other assistance programs, whether an exclusive territory will be granted to the franchisee, a list of current and former franchisees and their contact details, and more.

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<sup>10</sup> *Supra* note 1, Table 7

<sup>11</sup> *Ibid*, Table 8.

<sup>12</sup> *Ibid*, Table 10.

<sup>13</sup> *Ibid*, Table 13.

<sup>14</sup> *Ibid*, Table 5.

- Prospective franchisees must be given at least a 14-day cooling-off period to review the FDD before signing a franchise agreement or making any payments to the franchisor.
- If the FDD fails to meet the legal requirements, the consequences for the franchisor can be drastic. In certain situations, where a franchisor wholly fails to meet their disclosure obligations, a franchisee may be entitled to cancel the franchise agreement and receive back from the franchisor all of the money they paid for the franchise, reimbursement for their investment in fixtures and equipment, and any losses they incurred while owning and operating the franchise for up to two years.

*(b) The Franchisor's and Franchisee's Duty of "Good Faith"*

- All parties to a franchise agreement are required to act in "good faith" (i.e., they must act honestly in the performance and enforcement of their contractual obligations).

*(c) The Franchisee's Right to Associate*

- Franchisees have a right to associate with other franchisees, and to form or join an organization of franchisees without penalty or interference from the franchisor.

## **Franchise Legislation in Saskatchewan**

Although the government of Saskatchewan has indicated an intention to rely on the ULCC's *Uniform Franchise Act* as a starting point for its legislation, we recommend that it not do so. The *Uniform Franchise Act* was issued in 2004. Since then, New Brunswick, Prince Edward Island, Manitoba, and British Columbia have introduced franchise legislation, and Ontario has substantially amended its *Arthur Wishart Act*. A significant body of case law has developed since 2004. We believe the Uniform Franchise Act is out of date and should not be relied upon until the ULCC reviews and updates it. The most recent franchise legislation passed in Canada was enacted in 2017 by the province of British Columbia, and we believe that it should be used as the starting point for new legislation. However, certain areas of the British Columbia law should be improved. We propose below, at a high level, elements of the British Columbia *Franchises Act* that should be reconsidered and improved upon in drafting franchise legislation for Saskatchewan.

### *1. Content of a Disclosure Document.*

Canada is the only North American jurisdiction that has an open-ended "catch-all" approach to the requirement to disclose all other "material facts." Experience now shows that well-meaning franchisors can be faulted in hindsight for failing to meet this disclosure standard, as the expansive definition of "material fact" has become very easy to challenge. As a consequence of the open-ended definition of "material fact," franchisors who meet the prescribed disclosure requirements but fail to disclose what, in hindsight, a court considers to be a "material fact" give rise to the full 2-year rescission remedy. Further, disclosure documents have become longer and longer, and are failing to achieve their original purpose of providing a prospective franchisee with a "clear and concise" statement of what they need to know before buying the franchise. In the US, they employ a finite, list-based approach which increases certainty and clarifies the expectations and requirements for full and proper disclosure. We recommend that Saskatchewan adopt such an approach. We realize that this is a departure from the existing Canadian franchise laws, and it is an instance where we are recommending best practice over uniformity in Canada, in the expectation that uniformity across Canada will follow. We would be happy to work with the Government of Saskatchewan in that regard.

### *2. Financial Statements.*

There is considerable needless uncertainty and variation in the handling of financial statements issued by US and other international franchisor companies. Ontario has addressed this in its most recent amendments to the *Arthur Wishart Act*. The CFA recommends that financial statements prepared on an

audited or review engagement basis in accordance with IFRS or US GAAP be explicitly permitted (in addition to statements prepared in accordance with the audit or review engagement standards of the CPA Canada Handbooks) and regardless of the franchisor's jurisdiction. We believe that British Columbia erred in Section 5(3) of its Franchise Regulation by referring to the "jurisdiction in which the franchisor is based", in that if a franchisor prepares statements that are prepared to an acceptable standard (such as in accordance with IFRS, US GAAP or the CPA Canada Handbooks), it should not matter where the franchisor is based.

British Columbia is the only province in Canada that has imposed a requirement that an opening balance (when permitted) be audited or prepared on a review engagement basis. We recommend that Saskatchewan not adopt this additional requirement.

### *3. Definition of a Franchise and the Payment Obligation.*

Four provinces, including British Columbia, provide that their franchise statutes do not apply to an arrangement arising out of an agreement for: (i) the purchase and sale of a reasonable amount of goods at a reasonable wholesale price, or (ii) the purchase of a reasonable amount of services at a reasonable price. This is generally interpreted by the franchise bar as meaning that the payment element of the definition of a franchise is not satisfied only by payment for a reasonable amount of goods (i.e. inventory) at a reasonable wholesale price or by the purchase of a reasonable amount of services at a reasonable price. We suggest that this be made explicit in the definition of a franchise rather than being contained in exemptions from the application of the Act.

For clarity, Ontario has no corresponding exemption, and we believe that it should adopt one.

Alberta has taken a different approach that is consistent with its differing definition of a franchise.

### *4. Franchisor's Associate.*

The definition of a 'franchisor's associate' should be amended to provide that a person "controlled by" the franchisor cannot be an individual (i.e. an employee). Claims have emerged alleging that even junior employees of a franchisor who are involved in the franchise sales process may be considered a franchisor's associate, in that such individuals are "controlled by" the franchisor, resulting in potentially significant personal financial liability to those employees. We do not believe this was the intent of the definition, nor is it a fair allocation of liability or risk.

### *5. Extraterritoriality*

The decision of the Ontario Court of Appeal in *405341 Ontario Limited v. Midas Canada Inc.*, (2009), 64 B.L.R. (4th) 251, affirmed 2010 ONCA 478, has left uncertainty and a lack of clarity in the extra-provincial application of franchise statutes. A Saskatchewan franchise law should only apply to locations actually operating wholly or partly in that province, regardless of the governing law of the contract.

### *6. Damages on Rescission*

Damages payable to a franchisee on rescission should be based on net losses, in addition to any amounts to be refunded. A profitable franchisee claiming rescission should not benefit from a windfall. This is consistent with the approach taken in Alberta. Further, amounts to be refunded should not include 'flow through payments' (such as sublease rent that is not retained by the franchisor but is flowed through to the head landlord).

## 7. Exemptions from Disclosure

### Short Term

We believe that British Columbia erred in drafting Section 5(8)(g) 'short-term exemption' from disclosure by including reference to 'renewal or extension' of the franchise agreement. Under the British Columbia Franchises Act, the exemption is available if the term of the franchise agreement, including any renewal or extension of that franchise agreement, is valid for one year or less (and does not involve the payment of a non-refundable initial franchise fee, renewal fee or extension fee). The corresponding exemption under Ontario's *Arthur Wishart Act*<sup>15</sup> does not include reference to renewals or extensions. The courts in Ontario have said that the underpinning legislative purpose is to protect franchisees by ensuring they receive a disclosure document before committing to a franchise agreement, unless the period during which they will be shouldering rights and obligations is of short enough duration that they are at minimal risk<sup>16</sup>. The fact that a franchisee has an option to extend or renew the franchise agreement does not increase the franchisee's risk. Therefore, the one-year duration should not include any renewal or extension of the franchise agreement.

### Low Investment

British Columbia is the only province with franchise legislation that does not include a low investment exemption from disclosure. We believe that the reason for this may have been the historic difficulty in interpreting the meaning of the words "total annual investment to acquire and operate the franchise" and how to calculate that figure. However, the 2017 amendments to the *Arthur Wishart Act* (which came into effect September 1, 2020) have set out the parameters for the practical use of the exemption. We recommend that Saskatchewan follow Ontario's path in the drafting and adoption of this exemption.

### Next Steps

The CFA would welcome any opportunity for further involvement in the development of franchise legislation in Saskatchewan. Within the ranks of the CFA's volunteers, including its General Counsel, its Chair of the Legal and Legislative Affairs Committee and the members of its committees, are some of Canada's most experienced franchise lawyers, including those that represent mostly franchisors, those that represent mostly franchisees, and those that represent both.

Thank you for your consideration.

Sincerely,



Sherry McNeil  
President and CEO

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<sup>15</sup> *Arthur Wishart Act (Franchise Disclosure) 2000*, S.O. 2000, Section 5(7)(g)(ii).

<sup>16</sup> *TA & K Enterprises Inc. v. Suncor Energy Products Inc.*, 2011 ONCA 613 at para 18.

### **About the Canadian Franchise Association**

The Canadian Franchise Association (CFA) is the national, not-for-profit association of more than 600 corporate members representing over 40,000 franchise small business owners of more than 65,000 franchise establishments.

The CFA is the voice of the franchise community and the recognized authority on franchising in Canada. The CFA speaks for an industry that touches the lives of every Canadian, in every community across the country.

Canadian franchises contribute over \$117 Billion per year to the Canadian economy and create jobs for more than 1.9 million Canadians. They enable 78,000 Canadians to be their own boss as the owner of their own small business franchise location, serving their neighbours in communities from coast to coast. These enterprises contribute over \$15.5 Billion in federal taxation revenue and pay over \$60 Billion in wages each year.

CFA members represent a diverse cross-section of businesses and over 60 sectors in Canada. Our members range from very large, established franchise systems, to smaller or emerging franchise brands. Members share the conviction that their commitment to excellence improves franchising for everyone involved, including franchisors, franchisees, suppliers, and customers.