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ASK A LEGAL EXPERT

Q What are electronic disclosure documents and why and how may they be used?

A: Franchise laws currently in force in Alberta, Ontario, and Prince Edward Island and one expected to come into force within the next year in New Brunswick all require franchisors to deliver written disclosure documents to prospective franchisees at least 14 days before the prospective franchisee signs an agreement or pays any money in connection with the franchise. This pre-sale disclosure is very beneficial for franchisees, but the time and cost involved in printing and delivering paper disclosure documents, which can run to hundreds of pages, is substantial. As a result, franchisors in Canada, and elsewhere, are increasingly looking to electronic disclosure documents as a means of streamlining the disclosure process.

The law regarding electronic disclosure in Canada is not as clear as it could be. At the time of writing, only Prince Edward Island has expressly allowed for electronic disclosure in its Franchises Act Regulations (the "PEI Regulations"). However, both New Brunswick and Manitoba, which is developing franchise legislation, have indicated that they will also expressly allow electronic disclosure. As more provinces allow for electronic disclosure, the rules found in the PEI Regulations are likely to become familiar in other parts of the country.¹

The electronic disclosure requirements in the PEI Regulations state that a disclosure document may be delivered "by electronic means" (i.e., by e-mail or download) or "in machine readable media" (i.e., by physical delivery of a CD or other storage device), if the electronic disclosure document meets the following requirements: (i) it is delivered as a single, integrated, document or file; (ii) it has no extra content beyond what is required or permitted by law²; (iii) it has no links to or from external documents or content, (iv) it is delivered in a form that enables the recipient to store, retrieve, and print the disclosure document, and (iv) its content and format meets the requirements of law. In addition, the franchisor

must keep a record of electronic delivery of the disclosure document and obtain a written receipt.

The requirement for delivery as a single, integrated document, reinforces the more general rule found in Ontario and PEI franchise legislation that disclosure documents must be delivered as one document at one time. The purpose of this rule is to ensure that franchisees are able to find all relevant information in one place and are not required to piece together shreds of information delivered at different times, in which case the information would be harder to absorb.

The requirement against extra content is intended to prevent franchisors from attempting to de-emphasize or distract prospective franchisees from unfavourable information in the disclosure document by including extra marketing or promotional information. This rule would probably also cover the use of distracting multi-media features such as pop-up screens, animation, video and audio. This means that an electronic disclosure document should simply be the electronic embodiment of the franchisor's paper disclosure document, with very little in the way of electronic add-ons. However, software devices and tools, such as scroll bars and search functions, are both permissible under the PEI Regulations and desirable for prospective franchisees.

The requirement against links to external content ensures that the franchisee is not required to take any additional steps, other than opening the electronic file, to access all information in the disclosure document. It also ensures that when a prospective franchisee prints the disclosure document, no information will be omitted from the resulting hard copy. While external links are prohibited, internal links, such as between a table of contents and individual sections of a disclosure document, are permitted and may assist franchisees.

The requirement that the disclosure document be delivered in a format that intrinsically allows the franchisee to store,

retrieve and print the document requires little explanation. However, the requirement takes on new significance in the context of franchise disclosure documents which, with attachments, may run to hundreds of pages and which prospective franchisees may find difficult to read entirely on a computer screen.

Finally, the requirement that the electronic disclosure document conform to the requirements of law, ensures that all the protections available to recipients of paper disclosure documents are also available to recipients of electronic disclosure.

For example, the disclosure certificate, which must be signed by officer(s) and/or director(s) of the franchisor, certifying that the information contained in the document is accurate and complete, must be signed whether the disclosure is given in paper or electronic format.

Franchisees receiving disclosure in any form must remain critical in assessing the information provided. However, rules such as those found in the PEI Regulations should mean that franchisees will be able to enjoy the benefits of electronic disclosure, such as electronic word searching, without being unduly concerned that the electronic medium is being used to distort or obscure information.



Michael Melvin
Associate Lawyer
McInnes Cooper

Tel: 506-458-1666
michael.melvin@mcinnescooper.com
www.mcinnescooper.com

¹The PEI electronic disclosure requirements are modeled on the 2003 NASAA Statement of Policy Regarding Electronic Delivery of Franchise Disclosure Documents issued by the U. S.-based North American Securities Administrators Association ("NASAA"). Several years ago, electronic disclosure rules based on this same policy were recommended by a joint subcommittee of the Ontario Bar Association for adoption in Ontario. The Manitoba Law Reform Commission has also recommended that, subject to some modification, any Manitoba franchise law should allow electronic disclosure along the lines set out in the PEI Regulations.

²As noted below, and as set out in the full text of the PEI Regulations, standard software devices and tools, such as scroll bars and search functions, are permissible.

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