

## Operating a Franchise Through COVID-19: Considerations for Franchisees

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At the beginning of 2020, you were operating a successful franchise – you had a steady stream of customers, happy employees, and royalty and ad fund payments were regularly submitted on time. It was smooth sailing until around March 2020, when the COVID-19 pandemic resulted in forced closures, business losses, and general uncertainty about the future. In the face of such uncertainty, you, as a franchisee, may be asking: where do I go from here? Hopefully your franchisor has provided support and guidance on ways to mitigate losses and eventually turn your business around. If not, below are some considerations for franchisees operating in Ontario during this global pandemic.

As we are all aware by now, when the pandemic hit, the Ontario government placed restrictions on which businesses could open to the public and the method of operation. Those businesses, including franchises, that were not considered an "essential business" were forced to close their doors to the public but could in some circumstances offer curbside pick-up or alternative delivery options. While restrictions are now starting to be relaxed, some businesses, in a desperate attempt to avoid further losses, are considering opening their doors to the public in violation of the restrictions. Not only would this be a violation of law, it would likely be a violation of the specific terms of the franchise agreement, which often contains a covenant to comply with applicable laws or risk immediate termination by the franchisor.

Instead of using such extreme (and illegal) measures, a good first step is to reach out to the franchisor in an attempt to negotiate a deferral or reduction of franchise royalty fees and/or ad fund payments. Keep in mind that the franchisor has no obligation to agree to any such concessions – they are facing the same financial uncertainty as their franchisees, so they may not be in a financial position to agree to any new terms. If the franchisor is unable or unwilling to agree to revised payment terms, the franchisee should look to some of the government programs established to assist businesses in Canada, including, but not limited to, the Canada Emergency Wage Subsidy and the Canada Emergency Business Account, to determine eligibility for assistance.

An alternative or supplementary step would be to look at the specific language of the franchise agreement with respect to a *force majeure* clause. This is a clause that contemplates an event beyond the control of a party (labour strike, natural disaster, etc.) that prevents the party from performing its obligations under the agreement and essentially absolves that party of liability for failure to comply with the terms of the agreement. The applicability of the *force majeure* clause relies heavily on the wording used, so it is important to review carefully to ensure the clause applies in the context of a pandemic and does not specifically exclude the obligation to make royalty payments.

If all else fails, and depending on when the franchise agreement was entered into, a franchisee may have the option of franchise rescission at its disposal. Pursuant to Ontario's franchise legislation, the *Arthur Wishart Act (Franchise Disclosure), 2000*, and as further developed through case law, there are two scenarios in which a franchisee may rescind the franchise agreement:

(1) a franchisee may rescind within 60 days of receiving the franchise disclosure document ("**FDD**") if the franchisor failed to deliver an FDD or statement of material change (if applicable) at least 14 days before the signing of the franchise agreement and/or the payment to the franchisor of any consideration relating to the franchise (franchise fee, initial deposit, etc.); and

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(2) a franchisee may rescind within two years of entering into the franchise agreement if the franchisor never delivered an FDD or if the FDD was so deficient that it amounted to no disclosure at all.

An experienced franchise lawyer should review and assess the situation and the FDD (if one was delivered) to determine whether rescission is an available option. While Ontario, through an Order in Council, has temporarily suspended limitation periods and other periods of time within which a step must be taken in a proceeding, the common view in the franchising world is that such suspension would not apply to delivery of a notice of rescission, as notice of rescission is not a "step taken in a proceeding" but is instead a step taken prior to a proceeding. A proceeding will only be commenced when the franchisor does not fulfill its obligations or denies the rescission claim upon receipt of a notice of rescission. Therefore, if a franchisee delivers a notice of rescission outside of the 60-day or two-year period, as the case may be, it cannot rely on COVID-19 as an excuse for failure to deliver the notice on time.

While business may be difficult right now for franchisees, as outlined above, there are options available. We recommend seeking legal advice to assess your specific situation. If you need legal advice regarding the contents of this article or any other franchise-related matter, please contact the author.