La Belle Province: A Practical Business Guide to Key Legal Issues When Franchising in Québec

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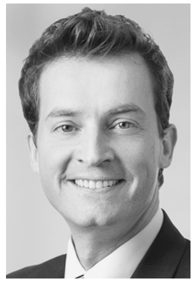

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Expanding business operations into the province of Québec is often overlooked, delayed, or avoided by international franchisors coming to Canada. Although its marked differences from the other Canadian provinces warrant adapting a franchisor's approach to expansion, with sound legal and business advice and the appropriate upfront investment, Québec can be a very lucrative and rewarding market. This article is designed to introduce international franchisors to some of the unique aspects of franchising in Québec to allow them to assess the investment required to unlock the veritable opportunity the Québec market affords.

I. Business Profile of Québec

A. *Population and Geography*

Located in the northeastern part of North America, Québec is Canada's largest province by area and second largest by population.[1] The vast majority of Québec's 8.3 million inhabitants

1. Government of Québec, *Québec Portal–Québec: Geography*, http://www.gouv.qc.ca/EN/LeQuebec/Pages/Géographie.aspx (2016).

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reside in cities, the most populous being Montréal, Québec City (the province's capital), Gatineau, and Sherbrooke.[2]

Although Québec's official language is French (the only province in Canada to hold French as its sole official language), approximately eighty other languages are commonly spoken. Additionally, almost half of Québeckers speak both French and English, thus contributing to the province's unique linguistic diversity.[3]

Québec benefits from a diversified economic landscape, in part because of its unique geographical location. The forestry sector, for instance, is a key economic driver in many of the province's regions. In particular, pulp and paper production, softwood and hardwood timber products, and forestry management serve as important sources of economic growth and job creation.[4] Similarly, Québec's mining industry occupies an important position in the province's economy. Québec is a worldwide leader in its production of iron, zinc, nickel, silver, and gold in addition to non-metallic minerals.[5] The economy is dominated by the services sector, which produces about 70 percent of all goods and services.[6] Other key industries in the province include manufacturing; transportation; and technology, which includes the aerospace, life sciences industry, and renewable energy sectors.[7] The province's gross domestic product (GDP) is CAD $363 billion, representing approximately 19 percent of the total GDP of Canada,[8] and the per capita GDP stands at CAD $44,499.[9]

B. *U.S. Business Presence in Québec Generally*

The United States is Québec's largest trading partner for both imports and exports; the province benefits from a considerable American commercial presence.[10] The value of Québec's total annual exports has grown consis-

2. Statistics Canada, *Population and Dwelling Count Highlight Tables, 2011 Census*, http://www12.statcan.gc.ca/census-recensement/2011/dp-pd/hlt-fst/pd-pl/Table-Tableau.cfm?LANG=Eng&TABID=1&T=802&SR=1&RPP=999&S=51&O=A&CMA=0&PR=24#C2 (last updated Aug. 9, 2016).

3. Statistics Canada, *Population by knowledge of official language, by province and territory (2011 Census)*, http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo15-eng.htm (last updated Feb. 13, 2013).

4. Government of Québec, *Québec Portal–Québec: Economy*, *Natural Resource Development*, http://www.gouv.qc.ca/EN/LeQuébec/Pages/%C3%89conomie.aspx (2016) [hereinafter Government of Québec, *Economy*].

5. *Id.*

6. *Id.*

7. *Id.*

8. Statistics Canada, *Gross domestic product, expenditure-based, by province and territory*, http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/econ15-eng.htm (last updated Nov. 10, 2015).

9. Government of Québec, *Economy*, *supra* note 4.

10. Ministère des Relations internationales et de la Francophonie, *Québec and the United States: Open and Integrated Partners*, https://www.mrif.gouv.qc.ca/content/documents/en/BR_General_ANG.pdf (Feb. 2010); Institut de la Statistique Québec, *Québec Handy Numbers* 42 (2016 ed.) http://www.stat.gouv.qc.ca/quebec-chiffre-main/pdf/qcm2016_an.pdf [hereinafter Institut de la Statistique Québec].

tently and now stands at roughly $82 billion.[11] Nearly 70 percent of those exports go to the United States.[12] The United States is also Québec's most significant source of imports, which were valued at $34 billion in 2015, accounting for 38 percent of Québec's imports for that year.[13]

Influenced by both the North American and European cultures, Québec attracts American investment in a variety of industries, and American companies, including a number of established franchisors,[14] enjoy considerable success within the Québec market. However, linguistic requirements do pose certain challenges to English-speaking companies. As addressed in further detail in Part IV, the Québec *Charter* of the French Language regulates the language of commerce and business in Québec.[15] Section 2 of the *Charter* sets forth the right of every person to have all firms doing business in Québec communicate with him or her in French.[16] Despite these requirements, major U.S. companies and franchise systems continue to have an ongoing presence in the province, as exemplified by the over 100 American companies with offices in Québec.

C. *Overview of the Consumer Market and Consumer Tastes*

Québec's blend of North American and European business and commercial culture uniquely positions the consumers in this market. A 2016 study by Nielsen examining the demographics and shopping habits of French Canadians found some unique differences between Québec consumers and the rest of Canada.[17] In particular, Québec has a high number of single-member households, 26 percent more than the rest of Canada. The number of single-member households in Québec is increasing and currently represents 34 percent of the province's population. This is in contrast to the rest of Canada, where single-member households have held steady since 2011 at 26.5 percent.[18] According to Nielsen, a greater proportion of single-member households is correlated with income spikes in lower brackets in Québec as compared to the rest of Canada.[19]

In the last year, Québec experienced an increase of 1.9 percent in consumer packaged goods (CPG), lagging behind the rest of Canada. Despite

11. Institut de la Statistique Québec, *supra* note 10 at 42.
12. Investissement Québec, *Why Québec? Business Environment*, http://www.investQuébec.com/international/en/industries/agri-food/industry-leading-companies.html (2016).
13. Institut de la Statistique Québec, *supra* note 10, at 42.
14. *See*, *e.g.*, App. C for international franchises with a presence in Québec.
15. *Charter of the French Language*, CQLR c C-11, s. 2.
16. *Id.* at s. 2.
17. Nielsen, *Québec Qualities: The Unique Demographics and Shopping Habits of French Canadians*, http://www.nielsen.com/ca/en/insights/news/2016/Québec-qualities-the-unique-demographics-and-shopping-habits-of-french-canadians.html (last updated June 24, 2016) [hereinafter Nielsen, *Québec Qualities*].
18. *Id.*
19. Québec has 21% more households with incomes under $20,000 than the rest of Canada, 30% more with incomes ranging from $30,000–$39,000, and 29% more with income ranging from $40,000–$49,000. *Id.*

this, the Nielsen research found that Québec households tend to spend considerably more on household products than the rest of the country. On average, Québeckers spent $8,759 per household on CPG products—second to Alberta, where the household spending average was $9,490. Average spending on household products in Ontario was approximately $6,917 per household in 2015.[20]

In a series of research studies by Headspace Marketing Inc. in 2013, 3,000 respondents were surveyed to identify various consumer sentiments in Québec compared to the rest of Canada. The study found that brand loyalty (defined as a strong resistance to switching a brand) is far more pronounced in Québec than anywhere else.[21] Québeckers were also found to be more supportive of locally grown brands, making Québec potentially a more difficult market to penetrate.

With Québec displaying such different demographics than the rest of Canada, largely the result of its unique linguistic identity and traditions, many consumer researchers caution retailers and manufacturers to pay particular attention to French consumers' habits and preferences when entering the Québec market.

Québec Practice Point*—A franchisor entering Québec must do its own specific market research with respect to consumer preferences and should not rely solely on general research on North Americans or on English-speaking Canadians.*

D. *Key Franchises Operating in Québec*

The *Conseil Québecois de la Franchise* (CQF) brings together franchisors and franchisees as well as suppliers of the franchise industry in Québec. According to the CQF, Québec houses over 8,000 franchisees and more than 300 franchisors.[22] Québec has several Québec-established franchisors, some unique to its market and others that it has exported to the rest of Canada and beyond. These franchises cross a broad range of sectors from homegrown automotive franchises to those in the telecommunications sector, and most predominantly, those in the food services industry. A number of Québec-based franchises in the food industry, such as Cora, Bâton Rouge, Cacao 70, Eggspectation, Presse Café, Première Moisson, and Rôtisserie St-Hubert, to name a few, have extended their reach beyond the province

20. Statistics Canada, *Average Household Expenditure, by Province (Ontario)*, http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/famil130a-eng.htm (2014).

21. What Québec Wants, *Brand loyalty is the absence of something better. Really?*, http://www.nielsen.com/ca/en/insights/news/2016/Québec-qualities-the-unique-demographics-and-shopping-habits-of-french-canadians.html (last updated Oct. 20, 2013); Susan Krashinsky, *Target take note: Québec market tricky for outsiders*, Globe & Mail, Mar. 4, 2013, http://www.theglobeandmail.com/report-on-business/industry-news/marketing/target-take-note-Québec-market-tricky-for-outsiders/article9259193/ ("When asked if they agreed with the statement 'I consider myself to be very brand loyal,' 47.6% of Canadians agreed. In Québec, among French-speaking Québeckers, 60% agreed.").

22. Conseil Québecois de la Franchise, *À propos*, http://cqf.ca/a-propos/.

and into other parts of Canada.[23] See Appendix A for a list of examples of Québec-established franchisors.

The following Canadian national brands from diverse sectors also operate in Québec: Beaver Tails, Tim Hortons (food–quick service), M&M Food Market (food–grocery/retail), Mr. Lube (automotive services), and Trade Secrets (retail–cosmetics/beauty), to name a few. See Appendix B for a list of examples of Canadian franchisors with operations in Québec.

Of course, a number of international franchisors of various sectors and origin also operate in Québec, including Midas (automotive services), Kumon Math and Reading Centres (education), Planet Fitness (fitness), McDonald's (food–quick service), and the UPS Store (printing/copying/shipping). See Appendix C for a list of examples of non-Canadian franchisors operating in the province.

II. Key Business Considerations When Planning Entry to the Québec Market

As with any business expansion, franchisors must devote significant economic and human resources to help ensure the successful launch of their brands in Québec. In addition to doing the homework necessary to understand the unique competition, customs, and consumer tastes found within the province, franchisors are often well-advised to engage a local business consultant or partner who is familiar with the market, has existing relationships with local landlords, and experience operating a business within the French language and civil law environment of Québec.

Even where the franchisor has established franchised operations in other parts of Canada, it is often a good idea to assess whether the same business model and organizational structure is appropriate for expanding into Québec. For example, as part of its initial launch into Canada, a franchisor may have successfully expanded using the direct-unit franchising model and franchise sales and training representatives from its home jurisdiction. However, given the relatively unique aspects of operating a business in Québec, a franchisor may decide that having a local presence, such as an area developer, multi-unit, or master franchisee with existing relationships and business experience in Québec, warrants a different approach.

Regardless of what business model is selected for their Québec expansion, many franchisors see the value in having "boots on the ground" and decide to partner with an area representative or hire an experienced locally based employee to assist with franchise sales and recruitment, site selection and devel-

23. On September 2, 2016, Cara Operations Ltd., a Canadian corporation headquartered in Ontario, completed its acquisition of St-Hubert. *See* Press Release, Cara, Cara completes acquisition of St-Hubert (Sept. 2, 2016), http://cara.investorroom.com/2016-09-02-Cara-completes-acquisition-of-St-Hubert.

opment, and initial and ongoing training as well as day-to-day operational support and compliance.

Québec Practice Point—*Franchisors should assess whether a different franchise model (such as an area developer or master franchisee) is warranted for its Québec expansion. They may also decide to partner with a local area representative to assist with franchise sales and ongoing operational support.*

III. How Québec Law Views the Franchise Relationship

A. *Adapting the Franchise Agreement for Québec*

A franchisor that seeks to establish its business in Québec may be tempted to use its existing Canadian, or even North American, standard form franchise agreement with its Québec franchisees. Although this solution may initially appear more efficient, there is a significant risk that it will, in fact, bring adverse consequences in the long run if the agreement is not adapted for key differences in the Québec legal landscape.

The most significant and overarching factor that differentiates Québec's legal system from that of the rest of North America (with the partial exception of the State of Louisiana)[24] is that it is governed by a single and comprehensive piece of legislation and not by precedential decision making as in a common law system. The law in Québec stems from the *Civil Code of Québec* (CCQ).[25]

Although the CCQ provides specific rules with respect to private law contracts, it does not deal specifically with franchise agreements. Franchise agreements in Québec are therefore interpreted in accordance with the general law of contract of the CCQ. This has several immediate and significant practical consequences for franchisors operating in Québec.[26] First, the lack of specific rules (such as the *Arthur Wishart Act (Franchise Disclosure), 2000* in Ontario) and the limited case law on franchising may lead in some circumstances to increased legal uncertainty.[27] Franchisors should note that this uncertainty is

24. Louisiana has a civil code based on French and Spanish codes with some common law influences. *See* E. Fabre-Surveyer, 1:4 *The Civil Law in Québec and Louisiana* 1:4 LA. L. REV. 649 (1939), http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1082&context=lalrev.

25. *Civil Code of Québec*, CQLR c CCQ-1991; DANIEL F. SO, CANADIAN FRANCHISE LAW 88–89 (2d ed. 2010).

26. *See* Bruno Floriani & Nadia Perri, *A Comparative Analysis of Key Legal Issues Relevant to Adapting Common Law Franchise Agreements to the Civil Law of Québec*, *in* DÉVELOPPEMENTS RÉCENTS EN DROIT DE LA FRANCHISE vol. 368 (2013) [hereinafter Floriani, *A Comparative Analysis*].

27. Consider the *Dunkin' Brands Canada Ltd.* case, *infra* note 105, where the first instance judge found an implied duty from the franchisor to act in good faith to support and enhance the brand. The Court of Appeal refused the argument that this added unforeseen elements to the franchise contract:

> In other words, in characterizing the essential obligation of the Franchisor as a duty to protect and enhance the brand, the judge did not assign a new and unintended obligation on the Franchisor, but he drew on the explicit terms, *supplemented by implicit obligations flowing from the nature of the agreement* that, in both cases, reflected the intention of the parties.

Id. (emphasis added).

not always resolved in favor of franchisees but, in some cases, makes the outcome difficult to predict. Second, the language of the franchise agreement itself becomes even more important because it is the main source from which courts can draw when defining the parties' rights and obligations.[28]

This section of the article reviews certain general provisions of the CCQ relating to commercial contracts, including franchise agreements. As discussed in more detail later, a single-unit franchise agreement will typically be considered a contract of adhesion under the CCQ, thereby triggering a number of other provisions of the CCQ concerning (1) external clauses, (2) illegible or incomprehensible clauses, (3) the interpretation of the agreement, and (4) abusive clauses.[29] We provide a brief review of these provisions as well as tips on how to minimize their impact on the franchisor-franchisee relationship.

1. Contracts of Adhesion

Contracts of adhesion are characterized by an inequality of bargaining power, where a stronger party may take advantage of a weaker party.[30] The CCQ defines a contract of adhesion as one where "the essential stipulations were imposed or drawn up by one of the parties, on his behalf or upon his instructions, and were not negotiable."[31] The term "essential stipulations" refers to the material terms of a particular contract.[32] Importantly, in determining whether a contract is one of adhesion, the weaker contracting party must not have had the opportunity to negotiate certain material terms and cannot simply rely on a failure to attempt to negotiate.[33]

In Québec, as in some other jurisdictions, franchise agreements are generally found to be contracts of adhesion, with the franchisee as the adhering party.[34] The CCQ treats adhering franchisees the same way it treats consumers: both are seen by the legislature as vulnerable parties who require protection from the imbalanced effects of freedom of contract.[35]

28. Consider the *Uniprix* case [paras 66 to 69], *infra* note 107. Justice Lévesque based his decision on the affiliation contract and wrote that courts must be particularly sensitive to contractual freedom in cases of contracts, such as franchise agreements, that were not addressed by the legislature (such as franchise agreements).

29. Jean-Louis Baudouin & Pierre-Gabriel Jobin, Les obligations, at para. 65 (7th ed. 2013) [hereinafter Baudouin, Les obligations].

30. *Id.* at para. 63.

31. Article 1379 CCQ.

32. Baudouin, Les obligations, *supra* note 29, at para. 63.

33. *Id.*; Distribution Stéréo Plus inc. v 140 Gréber Holding Inc., 2012 QCCS 33, at paras. 39–48; Entreprises MTY Tiki Ming inc. v McDuff, 2008 QCCS 4898, at para. 208; 9069-7384 Québec inc. v Superclub Vidéotron Ltée, 2004 CanLII 32216, at paras. 104–05 (Que. S.C.).

34. 9102-5486 Québec inc. v Café suprême Canada inc., 2008 QCCS 4016, at paras. 90–106; Provigo Distribution inc. v Supermarché A.R.G. inc., 1997 CanLII 10209 (Que. C.A.), at para. 23; Sachian inc. v Treats inc., 1997 CanLII 8474 (Que. S.C.), at para. 40; Frédéric P. Gilbert, *Le droit de la franchise au Québec* 43–44 (2014), at 43-44 [hereinafter Gilbert, Le Droit de la Franchise]; Jean H. Gagnon, La franchise au Québec 228.38 (1986) (loose-leaf consulted July 22, 2016) [hereinafter Gagnon, La franchise au Québec].

35. *See* Articles 1432, 1435, 1436, and 1437 CCQ.

Whether a particular franchise agreement is a contract of adhesion will depend on the circumstances in which it is entered into by the parties. A franchisor is usually in a position of strength vis-à-vis the prospective franchisee and generally sets the material terms of the agreement (e.g., obligations of the franchisor, obligations of the franchisee, duration of the agreement, grounds for termination, etc.), if only to ensure uniformity among its franchised network.[36] There are cases, such as master franchise, area developer, or multi-unit agreements, where a franchisee has the ability to negotiate and may have more leverage than a single-unit franchisee candidate. In these cases, the franchisor will have stronger arguments that the agreement is *not* a contract of adhesion.[37] Franchisors may be able to avoid a finding that the franchise agreement is a contract of adhesion by including an express acknowledgment from the franchisee that it had the "ability to negotiate" and the benefit of "independent legal advice," but the inclusion of such clauses alone will not be determinative of the issue.

2. External Clauses

In the franchise context, an external clause is a contractual stipulation that is separate from the franchise agreement itself (e.g., a reference to compliance with the operating manual or to website terms and conditions), but is deemed to be a material term through an integrating clause (e.g., incorporation by reference clause) in the franchise agreement.[38] Clauses found at the back of the agreement or in a schedule attached to the contract are not considered to be external clauses since they are not separate from the agreement.[39] Common examples of an external clause in franchise matters are the operations manual, a separate document, or set of documents, regularly updated by the franchisor.

Although external clauses are valid in principle, in the case of a contract of adhesion, their validity is conditional upon proof that (1) the clause was expressly brought to the attention of the franchisee, or (2) the franchisee otherwise knew of it.[40] As the Supreme Court of Canada stated in *Dell Computer Corp v Union des consommateurs*, "[a] contracting party cannot argue that a contract clause is binding unless the other party had a reasonable opportunity to read it. For this, the other party must have had access to it. [A]ccessibility is an implied precondition for setting up the [external] clause against the other party."[41]

In light of this rule, the franchisor should either give the franchisee a copy of all the documents incorporated by reference in the franchise agreement or

36. Gagnon, La franchise au Québec, *supra* note 34, at 228.37–228.38.
37. *See* Voncorp, inc. v 147013 Canada inc., 1997 CanLII 9196 (Que. C.S.), at para. 62.
38. Baudouin, Les obligations, *supra* note 29, at para. 196.
39. *Id.*
40. Article 1435 CCQ; Dell Computer Corp. v Union des consommateurs, [2007] 2 SCR 801, at para. 92.
41. *Id.* at para 98.

reasonable access to such documents prior to entering into the agreement. A franchisor may also want to include in the terms of its franchise agreement a clause containing an acknowledgment by the franchisee that it has received and reviewed the referenced documents.[42] Such a clause would assist a franchisor in establishing that it had met the requirements of the CCQ on external documents. Otherwise, the franchisor assumes the risk that a Québec court may declare the external clauses null.[43] In other words, the franchise agreement itself would survive, but the referenced materials, such as the operations manual, would not bind the franchisee.[44]

Québec Practice Point*—Prior to entering into the franchise agreement, franchisors must provide the prospective franchisee with copies of or access to all documents referenced in the franchise agreement. The franchise agreement should also include an express acknowledgment from the franchisee that it received and reviewed these external documents.*

3. Illegible and Incomprehensible Clauses

A clause is found to be illegible when it can be said that a reasonable person would have a hard time deciphering it. Illegibility depends on the quality of presentation, such as the font, the size, and the color of the text.[45] By contrast, incomprehensibility refers to the substance or content of the clause, which must be understandable to a reasonable franchisee.[46] Incomprehensibility depends on factors such as style, vocabulary, and length of the clause.[47] The use of obscure technical terms or ambiguous language risks making a clause incomprehensible.[48]

Pursuant to the CCQ,[49] where a clause in a franchise agreement is either illegible or incomprehensible and a franchisee has relied on that clause to its detriment and suffered harm, courts will annul that clause at the franchisee's request. To avoid this outcome, the franchisor must show that the franchisee was given an adequate explanation of the nature and scope of the clause.[50] Otherwise, the annulment of one or more clauses of the franchise agreement may have significant and costly consequences for the franchisor.

As discussed in further detail later, a franchisor may be obliged to draft a French version of its franchise agreement for its Québec franchisees. Incomprehensibility is one of the risks of not engaging a legal translation team to assist with translating an existing franchise agreement into French. A literal or otherwise poor translation may lead to ambiguities and lack of clarity,

42. Floriani, *A Comparative Analysis*, *supra* note 26, at 133–34.
43. Baudouin, Les obligations, *supra* note 29, at para. 196.
44. Article 1438 CCQ.
45. Didier Lluelles & Benoît Moore, Droit des Obligations at paras. 1690–92 [hereinafter Lluelles, Droit des Obligations).
46. *Id.* at para. 1696.
47. *Id.* at paras. 1694–99.
48. *Id.* at paras. 1700–07.
49. Article 1436 CCQ.
50. *Id.*

rendering certain clauses of the agreement incomprehensible.[51] For instance, certain stock or boilerplate legal terms often found in franchise agreements have no equivalent in the civil law system, and their direct translations have little to no meaning in Québec or to a francophone. The terms "security interest," "personal property," and "real property," to name a few, should be replaced by the civil law terms "hypothec," "movable property," and "immovable property," respectively, while being mindful that these terms are not always perfect equivalents.

Québec Practice Point*—Translation of stock phrases into French can lead to issues of incomprehensibility and put the franchisor at risk of having the clauses containing such phrases annulled. A franchisor is well advised to engage the services of a legal translation team and Québec trained-attorneys to oversee the French translation of the franchise agreement and insert the appropriate legal language.*

4. *Contra Preferentem*

Pursuant to the CCQ,[52] where there is any ambiguity in a contract, that ambiguity will be interpreted in favor of the party who did not draft the contract. This is analogous to the common law doctrine of *contra preferentem* in the instance of contracts of adhesion. Ambiguous terms in franchise agreements will therefore be interpreted in the manner most favorable to the franchisee.[53]

5. Abusive Clauses

Finally, the CCQ empowers the court to annul any abusive clause[54] found in a contract of adhesion. Alternatively, the court may choose, at its discretion, to reduce the obligations that result from the abusive clause.[55]

An abusive clause is defined as "a clause which is excessively and unreasonably detrimental to the . . . adhering party and is therefore contrary to the requirements of good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract."[56]

A clause will not be found to be abusive merely because it is disadvantageous to one party. The disadvantage must be both so excessive and unreasonable[57] that it fundamentally departs from socially acceptable contractual practices.[58] Exactly what is abusive is hard to predict, considering the courts'

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51. Lluelles, Droit des Obligations, *supra* note 45, at para. 1705.
52. Article 1432 CCQ.
53. 9102-5486 Québec inc. v Café suprême Canada inc., 2008 QCCS 4016, at paras. 106, 127; Gilbert, Le Droit de la Franchise, *supra* note 34, at 44–46; Vincent Karim, I Les obligations vol. I at paras. 1812–13 (4th ed. 2015) [hereinafter Karim, Les obligations].
54. Article 1437 CCQ.
55. *Id.*
56. *Id.*
57. Québec (Procureur général) v Kabakian-Kechichian, 2000 CanLII 7772 (QC CA), at para. 49.
58. Baudouin, Les obligations, *supra* note 29, at para. 144.

wide discretion.[59] The case law contains some examples of abusive clauses. For instance, the Québec Superior Court considered that a collateral assignment of lease was abusive because such lease provided it would be assigned to the franchisor upon breach by the franchisee of any of its obligations under the lease, the franchise agreement, or any other agreement securing the franchise agreement.[60] In other cases, the courts found that a penal clause was abusive because the amount of the penalty was excessive when considered with the royalties payable under the agreement[61] or because the same penalty applied regardless of the nature of the breach.[62]

Whether a clause is excessive can be determined based on either an objective or a subjective test. A clause is *objectively excessive* when the resulting obligations are virtually impossible to meet, such as an overly aggressive development schedule for a multi-unit or master franchisee, or completely disproportionate in light of the other party's corresponding obligations.[63] It is *subjectively excessive* when the difficulties that result from the particular circumstances of the adhering party are taken into account.[64] For instance, a franchisee's obligation to pay high royalties may not be objectively excessive in light of the franchisor's corresponding obligations. However, a franchisee who has very little business experience may have opened a franchised store in a particularly difficult and unprofitable market. In this situation, the obligation to pay high royalties, even when the franchisee operates at a loss, may be considered subjectively excessive, and the clause at issue potentially abusive.

Québec Practice Point*—Franchisors in Québec are well advised to review certain standard clauses and obligations in its franchise agreement with Québec trained-attorneys to assess whether they are excessive or unreasonable and, where necessary, customize them to specific franchisee situations.*

6. Conclusion

Given the high likelihood that their franchise agreements will be held to be contracts of adhesion, franchisors who operate in Québec will need to review and tailor their agreements to manage the risks of having the contract interpreted against them. This means clear, unambiguous, Québec-specific legal terms, and customized terms for unique franchisee situations.

Québec Practice Point*—Although the contractual changes required to address the CCQ are important, typically it is possible to make relatively few changes to the*

59. *Id.* at para 147.

60. Sachian inc. v Treats inc., 1997 CanLII 8474 (Que. S.C.), affirmed by Treats inc. v Sachian inc., 1998 CanLII 12848 (Que. C.A.).

61. Groupe Sinisco inc. v Groupe Ventco inc., 1998 CanLII 11791 (Que. S.C.).

62. 3743781 Canada inc. v Multi-marques inc., 2009 QCCS 3663.

63. Québec (Procureur général) v Kabakian-Kechichian, 2000 CanLII 7772 (QC CA), at para 55.

64. *Id.*

Canadian form of franchise agreement so that the franchisor can use one form of agreement throughout Canada, including in Québec.

B. *Franchise Disclosure Requirements in Québec*

Unlike in the United States and certain other Canadian provinces,[65] there is no franchise-specific disclosure legislation in Québec. Nonetheless, the general duty of good faith enshrined under the CCQ gives rise to a duty of disclosure in Québec, and the information provided to prospective franchisees prior to their entering into a franchise agreement is the subject of some litigation in Québec.[66] As a result, at least some level of franchise disclosure is required in Québec, but franchisors do not have the benefit of direction from franchise-specific legislation on what must be disclosed. In this section of the article we review the legal considerations that inform franchise disclosure practices in Québec.

Under the Québec civil law, there is a general obligation to act in good faith.[67] Absent a definition in the CCQ, the notion of good faith has been defined in the case law as an objective standard of conduct,[68] corresponding to the behavior that a reasonable person would adopt in similar circumstances.[69] This obligation is a fundamental principle of the civil law of obligations, including the law of contract. Good faith must at all times, that is, during the pre-contractual negotiations, the performance of the contract, and its termination,[70] govern the relations between parties to a commercial contract.[71] This distinguishes the good faith regime in Québec from that in the common law provinces where at common law the duty is owed only by parties to a contract, and there is no definitive duty to negotiate an agreement in good faith.

At the pre-contractual phase, the obligation to act in good faith under Québec civil law translates into a positive obligation to inform (akin to a duty of disclosure). The Supreme Court of Canada has set out three criteria to define the scope of this obligation in practice: "(a) whether the party owing the obligation has actual or presumed knowledge of the information; (b) whether the information is of decisive importance; and (c) whether the party to whom the obligation is owed cannot inform itself, or legitimately relies on the debtor of the obligation."[72]

65. British Columbia (not yet in force), Alberta, Ontario, Manitoba, New Brunswick, and Prince Edward Island.

66. *See*, *e.g.*, 9150-0595 Québec inc. v Franchises Cora inc., 2013 QCCA 531; 9103-9149 Québec inc. v 2907763 Canada inc., 2007 QCCS 724; Sachian inc. v Treats inc., 1997 CanLII 8474 (Que. S.C.), affirmed by Treats inc. v Sachian inc., 1998 CanLII 12848 (Que. C.A.); Cadieux v St A. Photo Corporation, 1997 CanLII 8417 (Que. S.C.).

67. Articles 6, 7 & 1375 CCQ.

68. Baudouin, Les obligations, *supra* note 29, at para. 132.

69. Gilbert, Le Droit de la Franchise, *supra* note 53, at paras. 188–97.

70. *Id.* at para. 170.

71. *Id.* at para. 169.

72. Bank of Montréal v Bail Ltée, [1992] 2 SCR 554, at 586–87.

In the franchise context, the franchisee is generally understood to be a vulnerable party who depends on the franchisor as its primary source of information about the franchise opportunity (e.g., profitability of existing franchised stores, resources of the franchisor, nature and strength of the competition, etc.).[73] As such, the franchisee is entitled to the disclosure of key or material facts about the franchise. This means, in essence, that the duty of good faith in Québec gives rise to a duty of disclosure, which remains an open issue in the common law provinces that has not yet been finally decided by the courts.

Québec Practice Point*—Although there is no specific franchise disclosure legislation in Québec, the duty of good faith under the CCQ gives rise to a pre-contractual duty to inform, akin to a duty of disclosure. As a practical matter, many franchisors elect to provide prospective franchisees in Québec with a slightly modified version of their Canadian franchise disclosure document in order to satisfy their civil law duty to inform.*

The consequences for failing to disclose key or material facts about the franchise can be as extreme as the annulment of the franchise agreement.[74] Under the CCQ, a franchisee's pre-contractual erroneous belief about a franchise can arise in two ways: (1) mere errors, and (2) fraud, each of which gives rise to the possible annulment of the franchise agreement.

C. *Mere Errors*

A franchise agreement may be annulled if the franchisee gave its consent to the franchise agreement in reliance on an error.[75] The reason for the error is immaterial; that is, whether or not it results from the franchisor's failure to give the relevant information to the franchisee, and may relate to:

1) the nature of the contract (e.g., a franchisee signing a franchise agreement thinking it is a lease agreement);
2) the object of the contract (e.g., franchisees signing a franchise agreement thinking they may operate a restaurant with their own menus, whereas the franchise serves only burgers); or
3) any other material term of the contract on which the franchisee's consent turned, provided that the franchisee must have voiced the importance of the element in question.[76,77]

73. Pascale Cloutier & Marie Hélène Guay, *La responsabilité contractuelle et extracontractuelle du franchiseur*, *in* Développements récents en droit de la franchise et des groupements 127 (2008) [hereinafter Cloutier, *La responsabilité contractuelle*]; Gagnon, La franchise au Québec, *supra* note 34, at 228.4.

74. CCQ, article 1399; Baudouin, Les obligations, *supra* note 29, at para. 170.

75. Articles 1400 and 1407 CCQ.

76. Lluelles, Droit des Obligations, *supra* note 45, at paras. 529 & ff.

77. Gilbert, Le Droit de la Franchise, *supra* note 34, at 122–23; Lluelles, Droit des Obligations, *supra* note 45, at para, 585; *see* 9150-0595 Québec inc. v Franchises Cora inc., 2013 QCCA 531, affirming 9150-0595 Québec inc. v Franchises Cora inc., 2011 QCCS 1034.

The court will not, however, annul a franchise agreement if the error is "inexcusable." Together with the franchisor's obligation to inform, the franchisee is bound by a corresponding obligation to inquire.[78] Therefore, a franchisee must take into account the information made available to it; ask relevant questions; and take other reasonable steps, e.g., ask for professional advice; and conduct its own due diligence in order to make an informed decision.[79] For example, franchisees who do not read the franchise agreement and ask no questions should not be able to rely on their mistaken belief to obtain the annulment of the franchise agreement. Such a failure to inquire would amount to an inexcusable error.[80]

What constitutes an inexcusable error is based on a comparison between the conduct of the franchisee and that of a reasonable franchisee in similar circumstances.[81] A franchisee that is grossly negligent, reckless, or careless cannot invoke an error in order to annul the contract.[82] This comparison must take into account the personal characteristics of the franchisee.[83] Therefore, a sophisticated franchisee with significant business experience will be held to a higher standard of conduct, and the converse is true for a small, unsophisticated franchisee.[84]

D. *Errors Due to Fraud*

Errors due to fraud are those caused by the deceitful conduct of the franchisor. They occur[85] when the franchisor willfully misleads the franchisee into signing a franchise agreement, using fraudulent tactics, misrepresentations, or omissions of essential information.[86] The CCQ[87] requires proof that the franchisee's decision to enter into the agreement flowed from the error caused by the franchisor's fraudulent conduct.[88] Franchisors should note that good faith is always presumed in Québec.[89]

There are important distinctions between the two types of errors. First, unlike mere errors, errors by fraud are not limited to certain categories.[90] Second, errors due to fraud may not only lead to the annulment of the contract, but also to damages or the reduction of the victim's obligations.[91]

78. Karim, Les obligations, *supra* note 53, at para. 962.
79. *Id.* at para. 965.
80. Gilbert, Le Droit de la Franchise, *supra* note 34, at 123–24.
81. Karim, Les obligations, *supra* note 53, at paras. 1022, 1024; Lluelles, Droit des Obligations, *supra* note 45, at para. 546.
82. Article 1474 CCQ; Lluelles, Droit des Obligations, *supra* note 45, at para. 544; Baudouin, Les obligations, *supra* note 29, at 329.
83. Lluelles, Droit des Obligations, *supra* note 45, at paras. 546–47.
84. Gilbert, Le Droit de la Franchise, *supra* note 34, at 121–22.
85. Karim, Les obligations, *supra* note 53, at para. 1032.
86. Lluelles, Droit des Obligations, *supra* note 45, at paras. 613 & ff.
87. Article 1401 CCQ.
88. Lluelles, Droit des Obligations, *supra* note 45, at para. 647 & ff.
89. Article 2805 CCQ.
90. Lluelles, Droit des Obligations, *supra* note 45, at para. 608.
91. Article 1407 CCQ; Lluelles, Droit des Obligations, *supra* note 45, at paras. 674 & ff.

Third, there is no such thing as an inexcusable error by fraud.[92] A franchisor who willfully misled the franchisee cannot invoke the franchisee's obligation to inquire.[93] The franchisee's duty to inquire remains relevant, however, in determining whether the franchisor has fulfilled its duty to inform, and whether there has been a misrepresentation in the first place.[94]

When considering the franchisor's duty to inform, courts have often found a franchisor's *omission* of material facts from its pre-contractual disclosure to prospective franchisees to constitute fraudulent misrepresentation.[95]

Franchisors in Québec (as in many other jurisdictions) often give prospective franchisees financial projections in a pro forma document. The pro forma generally contains information about a franchisee's expected costs and revenues.[96] Pro formas are undeniably responsible for most of the litigation between franchisors and franchisees in Québec.[97] A franchisor's willful omission to disclose unfavorable financial information and the presentation of overly optimistic projections have both been found to constitute fraudulent misrepresentations leading to the annulment of the franchise agreement as well as damages.[98] That said, the fact that a franchised store performs less profitably than expected does not necessarily mean that a franchisor made any misrepresentation to the franchisee. By definition, projections may involve a great degree of uncertainty, particularly in situations where there is little or no prior data on franchisees in the same location. In such cases, even where projections diverge significantly from the actual experience, the franchisee will have no recourse, provided that the franchisor acted reasonably in preparing the projections.[99]

In their efforts to determine whether pro forma financial information provided to a franchisee complied with the franchisor's obligation to inform, Québec courts have made eight basic inquiries:

1) Did the franchisor know that the projections were false or incorrect?
2) Did the franchisor otherwise know that it would be impossible for the franchisee to meet the expectations detailed in the projections?
3) Did the franchisor act prudently and reasonably in preparing the projections?

92. Article 1407 CCQ; Lluelles, Droit des Obligations, *supra* note 45, at paras. 674 & ff.
93. Gilbert, Le Droit de la Franchise, *supra* note 34, at 140.
94. Martineau v Société Canadian Tire ltée, 2011 QCCA 2198, at para 60.
95. Gilbert, Le Droit de la Franchise, *supra* note 34, at 136–44.
96. Gagnon, La franchise au Québec, *supra* note 34, at 144.34.1,144.34.2.
97. Cloutier, *La responsabilité contractuelle*, *supra* note 73, at 129.
98. Gilbert, Le Droit de la Franchise, *supra* note 34, at 144; 9192-6287 Québec inc. v Café Vienne Canada inc., 2013 QCCS 4063, reversed on other grounds by Presse Café Franchise Restaurants inc. v 9192-6287 Québec inc., 2016 QCCA 151; Sachian inc. v Treats inc., 1997 CanLII 8474 (Que. S.C.), affirmed by Treats inc. v Sachian inc., 1998 CanLII 12848 (Que. C.A.); Cadieux v St-A. Photo Corporation, 1997 CanLII 8417 (Que. S.C.).
99. 9069-7384 Québec inc v Superclub Vidéotron Ltée, 2004 CanLII 32216 (Que. S.C.).

4) Did the franchisor make other representations to the franchisee so as to enhance the franchisee's level of confidence in the projections (e.g., representations with respect to the experience and qualities of the franchisor, the support, and services offered by the franchisor, etc.)?
5) Did the franchisee know that the pro forma contained projections only and did not constitute a guarantee or representations as to the profitability of the enterprise? Does the franchise agreement specifically address the hypothetical nature of the projections?
6) Did the franchisee act prudently in reviewing the projections and did the franchisee take into account other available information that was easily accessible? Did he or she consult with professionals?
7) Did the differences between the projections and the actual results relate to the expected costs or the expected revenues? Expected costs, as opposed to expected revenues, are less unpredictable; courts tend to be less tolerant of inaccurate cost projections.
8) Did the franchisee have business experience or experience relevant to the area of activities of the franchise? Franchisors should be especially careful when dealing with inexperienced and unsophisticated prospective franchisees.[100]

As such, in preparing and providing pro forma statements to prospective franchisees in Québec, franchisors should:

1) act reasonably in making projections;
2) disclose all relevant data regarding the past performance of any franchised store (assuming that such data is available);
3) include an entire agreement clause in the franchise agreement, making it more difficult for a franchisee to claim that the franchisor made misrepresentations based on statements that are not reflected in the agreement;[101] and
4) expressly underline the risks of operating a franchised store and include terms to the effect that the financial projections do not constitute a guarantee or a representation as to the profitability of the store—both in the pro forma and any description of the pro forma in the franchise agreement.[102]

It is worth noting that although the franchisee is often the vulnerable party in terms of information disclosed, a franchisor may also be the victim of misrepresentations made by a franchisee. For instance, prospective franchisees may mislead a franchisor with respect to their experience or financial

100. Gagnon, La franchise au Québec, *supra* note 34, at 144.34.2–144.34.12.
101. 9103-9149 Québec Inc. v 2907763 Canada Inc., 2007 QCCS 724, at paras. 105–10.
102. *Id.*

situation. In such cases, the same recourses under the CCQ would be available to the franchisor.

Finally, there may be cases where the franchisor does not comply with its obligation to inform in a way that is harmful to the franchisee, but without meeting the requirements for either types of errors.[103] For the purpose of this article, one should note that there may be a separate recourse in damages available, based on a breach of a party's general obligation to act in good faith during the pre-contractual negotiations.[104]

Québec Practice Point— *To the extent possible, the majority of the information provided to the franchisee should be in a written format, and franchisors should bring to the attention of the franchisee the correlative exclusions and waivers so as to avoid any unforeseen litigation based on alleged errors, promises, or omissions.*

E. *Key Franchise Related Judicial Trends in Québec*

In addition to the above discussion of the courts' review of cases on pro formas, two key cases provide particular and practical insight into the Québec court's recent approach to franchising. Both decisions were unfavorable to franchisors.

The first, the *Dunkin' Donuts* case, reaffirmed the implied duty of good faith in the franchise agreement as reviewed above. The franchisor's application for leave to appeal to the Supreme Court of Canada was denied.

The second, the *Uniprix* case, acknowledged the existence and validity of a perpetual franchise agreement. The Supreme Court of Canada recently granted Uniprix's application for leave to appeal this decision—and as of the time of writing this article, the appeal had yet to be heard.[105]

1. *Dunkin' Donuts* and the Implied Duty of Good Faith

This case[106] was a group action brought against Dunkin' Brands Canada Ltd. by twenty-one plaintiff Dunkin' Donuts franchisees that collectively operated thirty-two Dunkin' Donuts franchises in Québec. Dunkin' Donuts was historically a strong brand in Québec with 210 stores in its heyday in 1998. However, its market share had been slipping as the result of a wave of Tim Hortons franchises flooding the province through the late 1990s and early 2000s.

The plaintiffs claimed that, although they had voiced concerns to Dunkin' Donuts about rejuvenating the Dunkin' Donuts brand and business strategy

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103. For instance, the error as defined by article 1400 CCQ would usually exclude the error of a franchisee as to the profitability (i.e., the economic value) of the franchise, provided the franchisee has not voiced the determinative character of this element during the course of the negotiations with the franchisor. In a case where the error results from the negligence of the franchisor and not by fraud, the franchisee would be left without recourse. *See* Lluelles, Droit des Obligations, *supra* note 45, at paras. 568–70.

104. Article 1375 CCQ; *see* Karim, Les obligations, *supra* note 53, at paras. 1001–03; Lluelles, Droit des Obligations, *supra* note 45, at paras. 928 & ff.; Baudouin, Les obligations, *supra* note 29, at paras 304–05.

105. The appeal hearing date in this matter is tentatively set for January 12, 2017.

106. Dunkin' Brands Canada Ltd. v Bertico inc., 2015 QCCA 624.

in Québec as early as 1996, they found Dunkin' Donuts to be unsupportive and unresponsive to their concerns.

The plaintiffs brought an action against Dunkin' Donuts for the formal termination of their leases and franchise agreements together with damages totalling \$16.4 million. The claim alleged a repeated and continuous failure by Dunkin' Donuts between 1995 and 2005 to fulfill its explicit contractual obligations to "protect and enhance" the Dunkin' Donuts brand in Québec. The plaintiffs' action was based on breach of contract, namely the franchise agreements between each plaintiff and Dunkin' Donuts.

The plaintiffs' claim succeeded in full in first instance and the franchisor appealed the decision on several grounds.

The main thrust of the Court of Appeal's findings related to the implied terms of the franchise agreements.[107] In this case, the court found that these implied terms included the obligation to undertake reasonable measures to help the franchisees support the brand of the franchise.

Franchisees may take a broader interpretation of certain points made by the court as grounds for expanding the scope of a franchisor's implicit obligations to a franchisee, especially given that the Supreme Court of Canada, with the dissent of Justice Côté, dismissed the application for leave to appeal. It is important to keep in mind, however, that the implied obligations found by the Court of Appeal, which were central to its decision, arise out of the express language of the Dunkin' Donuts franchise agreements and the intent of the parties. Notably, the express language in this case was relatively unique in that it referred specifically to protection and enhancement of the brand.

If nothing else, this case reinforces that franchisors, and those who act for them, should be diligent in enforcing the standards contained in their franchise agreements when faced with uncooperative, under-performing, and/or potentially rogue franchisees because the risk of not doing so on the overall franchise system could create a situation like the one in this case and potentially attract the franchisor's liability.

2. *Uniprix Inc.* and Perpetuity

The dispute[108] involved the franchisor-appellant, Uniprix Inc., and the franchisee-respondents, which operated a pharmacy under the Uniprix banner (Gosselin Group).

In 1998, Uniprix and the Gosselin Group entered into a contract of affiliation with a five-year term. The contract contained a renewal provision according to which the agreement was to be renewed automatically for an ad-

107. Importantly, the court made clear that the implied obligation of good faith that results in heightened obligations incumbent on the franchisor was based on article 1434 CCQ (implied terms of the contract) and not the obligation to conduct oneself in good faith pursuant to article 1375 CCQ. *See* Jennifer Dolman & Alexandre Fallon, *Dunkin' Donuts decision has limited application outside Quebec*, CANADIAN LAWYER, May 4, 2015, http://www.canadianlawyermag.com/5580/Dunkin-Donuts-decision-has-limited-application-outside-Quebec.html.

108. Uniprix inc. v Gestion Gosselin et Bérubé inc., 2015 QCCA 1427.

ditional five years unless the Gosselin Group provided six months' notice of its intention to leave the banner.

Unlike the Gosselin Group, Uniprix had no ability to end the renewal cycle; it could only terminate the relationship with cause in accordance with specific terms set out in the agreement. Therefore, unless the Gosselin Group decided not to renew the agreement, Uniprix was perpetually bound.

After two automatic renewals, Uniprix notified the Gosselin Group of its intention not to renew the agreement a third time, Gosselin Group contested the notice in court, and succeeded in the first instance.

The majority of the Court of Appeal upheld the judgment of the Superior Court, with Chief Justice Nicole Duval Hesler dissenting. At the core of the dissent was whether the agreement was for a fixed or indeterminate duration. According to Chief Justice Duval Hesler, in spite of the five-year term, the renewal provision rendered the duration of the agreement indeterminate. According to the majority, however, the contract of affiliation had a fixed term of five years. It acknowledged that this interpretation created perpetual obligations for Uniprix, but stated that perpetual obligations are enforceable in Québec civil law.

The Supreme Court of Canada recently granted Uniprix's application for leave to appeal this decision. Whether or not Canada's highest appellate court upholds the ruling of the Court of Appeal, the scope of automatic renewal provisions should be expressly limited when drafting a contract so as to avoid being inadvertently bound by perpetual obligations.

Indeed, although enduring commercial relationships are often desirable, perpetual contracts seldom are. An agreement that is mutually profitable for many years may become unprofitable. Long-term contracts, such as franchise or affiliation agreements, should expressly allow the parties to end their relationship in a commercially reasonable manner, for instance, by limiting the number of automatic renewals or by giving both parties the ability to end the renewal cycle subject to a reasonable notice period.

F. *Other Key Legal Considerations for Franchisors in Québec*

This section provides a high level review of certain other legal considerations for those franchising in Québec.

1. Employment

Québec-specific employment issues will be relevant to those franchisors establishing head offices, subsidiaries, or corporate-owned stores in Québec. Both the CCQ and specialized laws, primarily the *Act Respecting Labour Standards* (LSA) in a non-unionized context, govern employment.[109] The LSA contains close to 200 provisions and establishes the general rules and

109. Although rare, in some instances hourly workers of franchise networks were able to unionize, particularly given the union friendly laws of Québec. In such a case, the work relations would be governed by the *Labour Code*, CQLR c C-27.

legal environment in which employees perform their work. The *Commission des normes du travail* supervises the implementation and application of the LSA. Certain specific language law issues also apply to employers. Although the specifics of employer issues are beyond the scope of this article, it is advisable for those companies doing business in Québec to seek out legal counsel who deal specifically with employment.

2. Tax Issues

Québec-specific tax issues will also be relevant to those franchisors establishing head offices, subsidiaries, or corporate-owned stores in Québec. Although these issues fall outside the scope of this article, franchisors should note that several specific tax considerations must be made in the context of carrying on a business in Québec. Business in Québec is governed by the *Québec Taxation Act* and its corresponding regulations. Companies doing business and employing individuals in Québec must register with the Minister of Revenue of Québec under the *Legal Publicity Act*. If a nonresident individual or corporation receives fees for Québec services, the payments are subject to a specific withholding tax. Additionally, certain corresponding forms must be filed with the Minister of Revenue. As a Québec business, a company must make source deductions from employee remuneration and transmit these funds to the Minister of Revenue. Numerous contributions, including to the *Commission des normes du travail* and the *Commission des normes, de l'équité, de la santé et de la sécurité du travail*, among others, must be made.

There have been no concrete developments regarding tax initiatives in the context of franchise law in Québec. In recent years, medical specialists and politicians alike at both the federal and provincial levels have proposed taxing high-fat and sugar foods and beverages at higher rates compared to other healthier foods or lowering the tax rates on nutritious foods. However, these initiatives and proposals remain at the early stages of development.

3. Security (Hypothec)

It is beyond of the scope of this article to address in detail the specificities of Québec rules regarding security interests. However, this section provides a very brief overview of some of the differences between the common law and civil law legal systems in Canada with respect to the grant of a security interest over the personal property of the franchisee, often found in franchise agreements.[110]

Each province and territory in Canada, with the exception of Québec, has enacted a *Personal Property Security Act* (PPSA), which was largely inspired by Article 9 of the U.S. Uniform Commercial Code.[111] PPSAs govern the grant

110. Gagnon, La franchise au Québec, *supra* note 34, at 301.

111. Floriani, *A Comparative Analysis*, *supra* note 26, at 139 & ff.; Ronald C.C. Cuming, Catherine Walsh & Roderick J. Wood, Personal Property Security Law 18–19 (2d ed. 2012) [hereinafter Cuming, Personal Property Security Law].

of security interests over personal property. They distinguish between entering into a security agreement, the attachment of the security, and its perfection. Although a written security agreement is used in most cases to create a security interest, the creation of the security and its enforceability between the parties depends on the attachment of the security. Its effectiveness against third parties, as well as its priority, depends on its perfection.[112]

The creation of a security interest is subject to three conditions: (1) the creditor has possession of the collateral or there is an oral or written security agreement; (2) the creditor has given value, that is, sufficient consideration; and (3) the debtor has rights in the collateral.[113] A security interest is perfected when it has attached—in addition to meeting one of the following conditions: (1) the creditor has possession of the collateral or (2) registered a financing statement in the Personal Property Registry.[114] Perfection determines priorities between secured creditors. Importantly, an unperfected security interest continues to be enforceable against certain third parties.[115]

By contrast, there is no PPSA in Québec. The relevant rules are found in the CCQ, which allows a debtor to grant a conventional hypothec (i.e., a security interest) over movable property (i.e., personal property). In civil law, a hypothec is created either by written agreement (i.e., movable hypothec without delivery)[116] or by the creditor taking possession of the property or the title with the consent of the grantor (i.e., movable hypothec with delivery).[117] Although oral security agreements are valid under PPSA legislation, in the case of a hypothec without delivery, the writing is a substantive precondition to the creation of the security.[118]

For a hypothec to be set up against third parties, it must be published in the Register of Personal and Movable Real Rights (RPMRR).[119] Hypothecs rank according to the date and time of their publication.[120] Unlike the failure to perfect a security under PPSA legislation, the failure to publish a hypothec makes it impossible to realize the security,[121] and the creditor will rank as an unsecured creditor. The consequences of this failure may even go beyond the

112. *Id.* at 18–19, 240 & ff, 296 & ff.

113. Frank Bennett, Bennett on the PPSA (Ontario) 35 & ff. (3d ed. 2006).

114. *Id.* at 49 & ff.

115. Cuming, Personal Property Security Law, *supra* note 111, at 96.

116. This is called a "movable hypothec without delivery," and according to Article 2696 CCQ, such a hypothec must be granted in writing. Unlike under PPSA legislation, an oral hypothec is null.

117. This is called a "movable hypothec with delivery," governed by articles 2702 and ff. CCQ.

118. Cuming, Personal Property Security Law, *supra* note 111, at 91.

119. In the case of a movable hypothec with delivery, the hypothec is published by the creditor taking possession and remaining in possession of the property or title (article 2703 CCQ). This is similar to PPSA legislation, allowing the perfecting of a security by the creditor taking possession of the collateral.

120. Articles 2941 & 2945 CCQ.

121. The hypothec is nonetheless valid as between the parties. But in practice, the creditor will not be entitled to exercise its hypothecary rights (i.e., realize its security), such as the taking in payment (i.e., foreclosure) and the sale of the property by the creditor or by judicial authority.

creditor's ability to realize its security. In the event that the franchisor also obtained a third party guarantee, the failure to publish the hypothec could be used by the guarantor to escape liability.[122]

To enforce a movable hypothec in Québec, the creditor has four options, that is, hypothecary rights: (1) the taking possession for purposes of administration (i.e., receivership); (2) the taking in payment (i.e., foreclosure); (3) sale by the creditor; and (4) sale by judicial authority. Each remedy has its own set of rules, which should be carefully considered, since these rules may be more or less advantageous to the franchisor depending on the circumstances. Importantly, like PPSA legislation, the exercise of a hypothecary right requires giving prior notice to the debtor. However, the CCQ requires, in addition, the publication of the notice,[123] giving the debtor, as well as any other interested party (e.g., another secured creditor), an opportunity to prevent the first creditor from exercising its right.[124]

4. Third Party Guarantees

Franchisors often require guarantees from the franchisees' directors, officers or shareholders, or from other third parties.[125] Like hypothecs, third party guarantees, known as suretyships, are governed by the CCQ, which contains provisions that may affect the franchisor's situation.[126]

Notably, the surety (i.e., guarantor) may terminate the suretyship unilaterally when the suretyship was contracted for a future or indeterminate debt or for an indeterminate period of time.[127] Typically, a franchisor obtains a suretyship for all present and future debts of the franchisee for the duration of the franchise relationship. In such a case, the surety is entitled to terminate the suretyship after three years by giving prior notice to the franchisor. Although the surety remains liable for the debt existing at the time of termination,[128] this unilateral right of the suretyship may affect the security of the

See Louise Payette, Les sûretés réelles dans le Code civil du Québec at paras. 358 & ff. (5th ed. 2015).

122. Article 2365 CCQ. The guarantor who indemnified the creditor would normally be subrogated in the hypothecary rights of the creditor (Article 1656 (3) CCQ), allowing the guarantor to realize the security. If the creditor failed to publish the hypothec, the guarantor could argue that, because of the creditor, the guarantor was now precluded from realizing the security, thereby discharging it to the extent of the resulting prejudice. Third party guarantees, or surety in civil law, are discussed in the next section.

123. Cuming, Personal Property Security Law, *supra* note 111, at 100; Articles 2757 & ff. CCQ. The notice period varies, but is usually from ten to twenty days in the case of a franchisor exercising a hypothecary right against a franchisee, depending on the right that is being exercised.

124. For instance, Article 2761 CCQ allows the debtor or any interested party to defeat the exercise of a hypothecary right by paying the creditor all that is owed in addition to the costs incurred by the creditor.

125. Gagnon, La franchise au Québec, *supra* note 34, at 299.

126. Floriani, *A Comparative Analysis*, *supra* note 26, at 157–58.

127. Article 2362 CCQ.

128. Article 2364 CCQ.

payments due to the franchisor, since franchise agreements usually last more than three years.

Furthermore, when the suretyship is attached to certain duties,[129] the suretyship will end upon cessation of said duties.[130] When the surety is attached to the duties of a director or an officer, for instance, the suretyship will be terminated when the director or officer steps down, subject to the debts existing at the time of termination.[131]

Considering these rules, a franchisor should require that the surety expressly waives its termination rights in the suretyship agreement. Although such waiver would clearly be effective to prevent a termination upon cessation of the surety's duties,[132] it remains unclear whether a similar waiver would be effective in the case of the surety's unilateral right of termination with respect to future or indeterminate debts.[133] It may be wise for a franchisor to include in the franchise agreement a stipulation to the effect that the termination of a surety constitutes an event of default, allowing the franchisor to terminate the agreement unless a new surety is found.[134]

5. Leases

In many cases, the franchisor will lease a commercial space in a building owned by a third party (the principal lease) and sublease this space to the franchisee.[135] This allows the continued operation of the franchise in the same location, despite the termination of the franchise agreement with a particular franchisee. This also puts the franchisor in a dual position—as a tenant in relation to the owner of the premises and a landlord in relation to the franchisee. It is therefore important to consider the regime applicable to leases under the CCQ.

In common law jurisdictions, a lease is considered a property right.[136] Absent a stipulation in the lease, the tenant has discretion to sublease or assign the lease. By contrast, article 1870 CCQ requires the tenant in Québec (1) to give prior notice to its landlord of its intention to assign or sublease and (2) to obtain the landlord's consent before either subleasing or assigning the lease. Accordingly, a franchisor must first obtain consent of its landlord before subleasing to a franchisee or assigning the lease. The landlord may only refuse for serious reasons within fifteen days of the notification.[137]

129. The burden falls on the surety to prove that "that the duties he or she performed constituted one of the reasons why the creditor requested the suretyship." Épiciers Unis Métro-Richelieu Inc., division "Éconogros" v Collin, 2004 CSC 59, at para. 41.

130. Article 2363 CCQ.

131. Article 2364 CCQ.

132. Crédit Ford du Canada ltée v Carrefour Ford inc., 2009 QCCS 6767, at para. 13; Épiciers Unis Métro-Richelieu Inc., division "Éconogros" v Collin, 2004 CSC 59, at paras. 42–43.

133. Floriani, *A Comparative Analysis*, *supra* note 26, at 158.

134. *Id.*

135. Gagnon, La franchise au Québec, *supra* note 34, at 305.

136. Floriani, *A Comparative Analysis*, *supra* note 26, at 160.

137. Article 1871 CCQ.

It is also worth considering the consequences of a sale of the leased property. Under the CCQ, the new owner may terminate the principal lease, thereby also terminating the sublease.[138] Provided that the lease has a fixed duration, the franchisor may be able to prevent the early termination by publishing the lease in the RPMRR before the sale.[139] The publication of the lease is optional, but a franchisor may be liable for damages if its failure to publish the lease causes harm to the franchisee, e.g., if the new owner terminates the principal lease (and the sublease) and thereby prevents the franchisee from operating the franchise in accordance with the franchise agreement.[140]

The rules of the CCQ also affect the franchisor as landlord of the franchisee. It is important to note that the subleasing franchisor remains liable under the principal lease.[141] Meanwhile, an assignment of the sublease by the franchisee to a third party effectively terminates the leasing relationship between the franchisor and the franchisee, thereby discharging the franchisee under the sublease. A franchisor may therefore wish to take advantage of article 1873 CCQ by stipulating in the sublease that the franchisee will remain jointly liable with the assignee.[142]

IV. French Language Laws—En Français S'il Vous Plaît!

As reviewed above, although a significant portion of Québec's population understands and speaks English, the official and predominant language of the province is French. A franchisor's first and perhaps most obvious challenge in doing in business in Québec will be navigating through the province's unique language rules to determine its obligations.

A. *Charter of the French Language and Act Respecting the Legal Publicity of Enterprises*

In 1977, the National Assembly of Québec adopted the *Charter of the French Language*[143] in order to protect the French language.[144] The *Charter* affirms the status of French as the official language of the province and establishes French as the everyday language of work, business, and commerce.[145] It gives every person the right to have all enterprises doing business in Québec communicate with him or her in French, every worker in Québec the right to carry on his or her activities in French, and every con-

138. Article 1887 CCQ; Floriani, *A Comparative Analysis*, *supra* note 26, at 161–62.
139. *Id.*
140. *Id.*; 9102-5486 Québec inc. v Café suprême Canada inc., 2008 QCCS 4016, at paras. 130–48.
141. The franchisor acting as landlord for all its franchisees may incur significant liability, which may reflected in the franchisor's financial statements. GAGNON, LA FRANCHISE AU QUÉBEC, *supra* note 34, at 305.
142. Floriani, *supra* note 26, at 161.
143. CQLR c C-11.
144. Ford v Québec (Attorney General), [1988] 2 RCS 712, at 777–79.
145. *Charter of the French Language*, CQLR c C-11, preamble and section 1.

sumer in Québec the right to be informed and served in French.[146] Any business operating in Québec risks being subject to the *Charter*, which will affect its operations in various ways.

The first step is to determine whether the *Charter* is applicable to the franchisor's business as an "enterprise doing business in Québec." In conducting this analysis, it is helpful to break this question into its two components: (1) an enterprise and (2) the act of doing business in Québec.

The CCQ broadly defines the notion of an "enterprise" as "[t]he carrying on by one or more persons of an organized economic activity, whether or not it is commercial in nature, consisting of producing, administering or alienating property, or providing a service."[147] This definition includes any sort of organized economic activity, such as not only those conducted by merchants of goods or services and professionals, but also not-for-profit organizations.[148] Considering the broad scope of the definition, we can safely assume that franchisors and franchisees are both enterprises for the sake of the application of the *Charter*.

The act of "doing business in Québec" is less easily assessed. An enterprise having its head office, a place of business, or an address in Québec risks being considered to be doing business in Québec. It follows then that the *Charter* would clearly apply to a Québec franchisee. In the case of the franchisor, however, unless that franchisor establishes its own offices, retail or corporate stores in Québec, or employs people in Québec, the *Charter* will not necessarily apply. That said, even in those circumstances a franchisor may be deemed to be doing business in Québec if it runs Québec-targeted advertising. This would include having billboards in Québec, advertising in Québec newspapers or on Québec television channels, distributing catalogues in Québec, or having a website targeted at Québec consumers.

In addition, a franchisor may be considered to be doing business in Québec if it is required to register under the *Legal Publicity Act* (LPA). The goal of the LPA is to protect the public by ensuring it has access through the "enterprise register" to reliable information about the identity of enterprises conducting business in Québec.[149] Thus, it requires any person, including a corporation, such as a franchisor, constituted under the laws of another jurisdiction to register if carrying on activities in Québec.[150] The LPA creates a presumption that a person, such as a corporation, is carrying on activities in Québec if: (1) it has an address, an establishment, a post office box, or the use of a telephone line in Québec; or (2) it performs any activity for profit in Québec.[151]

146. Sections 2, 4 & 5.
147. CCQ, article 1525, al. 3.
148. Nicole Lacasse, Droit de l'entreprise 45–49 (9th ed. 2015) [hereinafter Lacasse, Droit de l'entreprise].
149. *Id.* at 227; Nabil N. Antaki & Charlaine Bouchard, I Droit et pratique de l'entreprise 316 (3d ed. 2014) [hereinafter Antaki, Droit et pratique de l'entreprise].
150. Section 21(5) LPA.
151. Section 25 LPA

The Québec Court of Appeal dealt with the meaning of "carrying on an activity or operating an enterprise in Québec" in *White International Management Inc. c. 9041-8351 Québec Inc.*[152] White International Management Inc., a company based in the Bahamas, had given Gestion Finance Tamalia, based in Québec, the exclusive commercial and distribution rights for Canada to one of its trademarks. Tamalia made use of this trademark by setting up a franchise system with Tamalia acting as franchisor. 9041-8351 Québec Inc., a former franchisee of Tamalia, had continued to use the trademark after the termination of its franchise. White took action against the former franchisee for illegal use of its trademark. The former franchisee alleged that White needed to be registered in Québec in order to file suit and maintain its action.

The Court of Appeal ruled against the former franchisee. There was no evidence of profit. In addition, the court noted that White did not control the services and sale of products commercialized under its trademark. From the facts at hand, it was deemed that only Tamalia exploited the trademark and that White's action against the former franchisee was only a method of protecting its legal rights to the trademark.

This decision raises concerns regarding the requirements for foreign businesses to register in Québec under the LPA. It is possible, for example, that the outcome would have been different had evidence been provided that the licensing arrangement provided for royalties or fees to be paid to White or that White was doing more than protecting its trademark, such as controlling the sale of merchandise or services rendered in Québec.

Given the fact that firms carrying on "an activity in Québec" (and therefore subject to registration under the LPA) are also considered to be "doing business in Québec" for the purposes of section 2 of the *Charter*, there is a risk that a foreign franchisor, which has no physical presence itself in Québec but merely collects fees from Québec franchisees or exerts control over the merchandise sold in Québec, may be subject to the *Charter*.

Where a franchisor has determined that the *Charter* is applicable (or does not wish to take the risk that it is), it must comply with several obligations regarding the language used in the course of their activities. The sections that follow provide an overview of the main obligations arising from the *Charter*.

B. *Registering a Franchise*

As reviewed earlier, a franchisor or franchisee operating an enterprise in Québec must register under the LPA.[153] The key elements of registering an enterprise are detailed below on Chart 1. With regard to the name of

152. [2002] R.J.Q. 89 (Que. C.A.).

153. LPA, sections 21 and 25; *see also* Articles 305 & 306 CCQ. Although corporations have to register, it is not the case of all juridical forms. For instance, an unincorporated person conducting business under his or her real name is not required to register. Similarly, joints ventures do not have to register. ANTAKI, DROIT ET PRATIQUE DE L'ENTREPRISE, *supra* note 149, at 326.

Chart 1: Registering a Franchise

Item	**Requirement**	**Statutory Provision**
Register declaration with the registrar	Must be filed within sixty days after the enterprise begins conducting its activities in Québec	LPA, ss. 32
	Must contain: —Enterprise name (i.e. corporate name) —Any other names it uses in the course of carrying on its activities (i.e., trade names) —Additional information may also be required depending on the juridical form of the enterprise	LPA, s. 33 CCQ, Arts. 305 and 306
Name of enterprise	The name of the enterprise must be in French or have a declared French version of its name. The latter may be a non-French word as long as it is paired with a generic term in French.	LPA, s. 17(1)*
Updating declaration	The enterprise (once properly registered) must ensure that the information contained in the register is up-to-date by filing updating declarations whenever a change occurs as well as annual declarations.	LPA, ss. 41, 45

*See also section 27 of the *Regulation respecting the application of the Act respecting the legal publicity of sole proprietorships, partnerships and legal persons* CQLR c P-45, r 1.

the enterprise, a franchisor may register its original English name as the French version of its name, provided the registrant adds a French generic element. For instance, a fictitious franchisor with the name “Shop Better Inc.” could register as “Les Magasins Shop Better Inc.” (which translates as “Shop Better Inc. stores”).

C. *Franchise Agreements*

Contracts of adhesion, and hence most franchise agreements, are subject to the French language requirements under the *Charter* in the manner in Chart 2.

Québec Practice Point*—Franchisors may contract with their franchisees in English and do not need to create French forms of agreement where both franchisor and franchisee agree to contract in English. In such an instance, franchisors will therefore want to include a clause in any non-French language agreement with a franchisee, in both French and the language of the agreement, clearly stating that both parties agree to the contract being in English.*

Chart 2: Your Franchise Agreement

Document	Requirement	Statutory Provision
Franchise agreement and all related documents	***General Rule:*** Must be drawn up in French "Related documents" include schedules, leases, subleases, guarantees, notes, licenses, security agreements, and notices. Operation manuals and other support materials also risk being labelled as related document.	*Charter*, s. 55
	Exception: Parties may —draft a bilingual contract, or —contract out of the French language requirement where they both expressly agree that their agreements will be in another language. This is normally achieved by including a bilingual language consent clause as a term of agreement.	*Charter*, ss. 55, 89, 91

D. *Labeling, Advertisements, and Signs*

In addition to the name registration requirement and the manner in which the franchise agreement is drafted, another major consequence of the *Charter* on franchisors wishing to do business in Québec relates to the language used on their products, transactional documents, and advertisement materials.

Chart 3: Labeling, Advertisements, and Signs

Item	Applies To	Requirement	Statutory Provision
Packaging and labels	—Writing on a product, on its container, or on its wrapping —Any documents or objects supplied with the product (such as directions for use, instruction manuals, and warranty certificates) —Restaurant menus and wine lists	Inscription must be in French	*Charter*, s. 51
		Although any French inscription may be accompanied by a translation in one or many other languages, the French inscriptions must be at least as prominent as the other languages.	*Charter*, s. 51
		Exception: Registered trademark for which there is no registered French equivalent or the name of a firm established exclusively outside Québec.	*RRLC*, s. 7

Chart 3: (*Continued*)

Item	**Applies To**	**Requirement**	**Statutory Provision**
Promotional and advertising material	All printed material, such as: catalogues, brochures, folders, commercial directories, and any similar publications	Must be available in French or in a bilingual format	*Charter*, s. 52
		The French version must be at least as easily accessible as the English version (i.e., for no extra cost) and must be of at least equal quality.	*RRLC*, s. 10
		Exception: Registered trademark for which there is no registered French equivalent	*RRLC*, s. 25(4)
Public signs, posters, and commercial advertising	All publicly displayed signs and posters, such as billboards, in-store ads, aisle signs, promotional pens, shopping bags, calendars etc.	Must be in French.	*Charter*, s. 58
		If other languages are used on these signs, the French must be "markedly predominant."	*Charter*, s. 58
		Exceptions to "markedly predominant" rule: large billboards designed to be seen from a public highway or those displayed on or in a public transportation vehicle, registered trademark (without a French version)	*RRLC*, s. 15 (Billboards), 16, 17 (Public transportation vehicle), s. 25 (4) (Trademarks)
Transactional Documents	All transactional documents, such as contracts, order forms, invoices, and receipts.	Must be in French or at least bilingual unless the parties expressly agree otherwise	*Charter*, ss. 55, 57, 89, 91
Websites	Websites or online ads intended to be used or seen by Québec customers	Must be in French or at least bilingual.	Not mentioned in the *Charter* but requirements apply

A franchisor wishing to distribute its products in Québec must therefore translate, often at significant cost, its packaging and labels. The exception to the packaging rule, i.e., a registered trademark without a French equivalent, explains why products with bilingual packages and labels in French and English are often found in Québec with English-only trademarks.[154]

Similarly, for printed promotional and advertising material, a foreign franchisor distributing the English version of its materials has two options: make a bilingual version of its material for distribution in Québec or translate its material to distribute both a French and an English version.

Québec Practice Point*—Considering that a franchisor is required to translate its standard promotional material into French, it may be less costly to make bilingual versions of any and all material for distribution across Canada.*[155]

With regard to public signs, the idea behind the "markedly predominant" requirement is to give the French text "a much greater visual impact than the text in the other language."[156] The legislation contains a significant amount of detail as to how such "marked predominance" may be achieved.[157]

E. *Pending Amendments to Québec Signage Requirements*

An important topic for any foreign franchisor wishing to do business in Québec concerns public signage. Franchisors often use a recognized trademark as their name, e.g., Best Buy, Costco, Gap, etc. These trademarks are usually displayed prominently on the front of their stores because stores are mostly recognizable by their trademark. More often than not, these trademarks are in English and they constitute the only inscriptions visible from the outside of the stores.

In Québec, this commercial reality presents a particular challenge. Indeed, section 58 of the *Charter*, by requiring that all public signs and posters be in French,[158] seeks to preserve the "*visage linguistique*" of the province, that is, quite literally the linguistic face of the landscape. Making sure that the linguistic landscape communicates the reality of Québec society, a French-speaking society, is one important way of protecting French language,[159] but results in a tension between the objective of the *Charter* and the legitimate protection of trademarks. Recently, this tension has led to a struggle between a group of retailors/franchisors and the *Office de la langue française* (OLF), the public body tasked with ensuring compliance with the *Charter*. This struggle culminated in a legal dispute, and ultimately, resulted

154. Section 51 also refers specifically to restaurant menus and wine lists, which must be in French or bilingual.

155. The *RRLC* contains several exceptions to section 52, allowing publications exclusively in another language, for instance, where the publications are included in news publications in that language (section 10), or where they are used for a convention, a conference, or similar gatherings intended for a specialized or limited public (section 12).

156. RMP, section 1.

157. See RMP, sections 2, 3 & 4.

158. Subject to the markedly predominant rule, discussed earlier.

159. Ford v Québec (Attorney General), [1988] 2 SCR 712, at p 778–79.

in a proposed amendment to the existing signage requirements, as described in more detail later.

For years, the exception to the marked predominance rule for English registered trademarks where there is no registered French equivalent (section 25(4) *RRLC*) enabled the common practice of franchisors and franchisees identifying their stores by hanging signs with only their English trademarks. In 2011, dissatisfied with this state of affairs, the OLF took the position that trademarks in a foreign language used as business names on signs and posters required the addition of a French generic term or slogan.

The OLF adopted the view that section 27 *RRLC*, which applies notably to the registration of business and corporate names, also applied to trademarks used as business names on public signage. In 2014, several retailers and franchisors, including Best Buy, Costco, Gap, Old Navy, Walmart, Toys 'R' Us, Curves, and Guess, successfully challenged the OLF's interpretation before the courts.[160] In *Magasins Best Buy ltée c. Québec (Procureur général)*,[161] the Québec Court of Appeal held that section 25(4) *RRLC* allows trademarks to appear exclusively in another language on public signs and posters without any French generic terms. This is also true, the court concluded, when an English trademark is used as a business name and displayed on a storefront.

Given this outcome, the Québec government undertook to amend the *RRLC* to require a "sufficient presence of French" on exterior public signage. On May 4, 2016, it introduced draft regulations and requested feedback from stakeholders.[162] The feedback period has now expired, and Québec is awaiting the final version of the new regulations.

Based on the current draft regulations, the new rules, when they come into force, will require that a trademark in a foreign language displayed on a sign or a poster located "*outside an immovable*" (i.e., outside a building as further defined in the chart below) be accompanied by a "*sufficient presence of French*." Of course, this type of phrase is heavily subject to interpretation.

The key elements of this rule as it stands in the current draft regulation are detailed in Chart 4.

The "sufficient presence of French" requirement is indeed premised upon a very broad definition. It reflects the intended flexibility of the new rules, allowing businesses to choose how they wish to ensure the presence of French in a way that fits their circumstances and preserves the integrity of registered trademarks.

According to the draft regulations, virtually any French inscriptions will do. Their sufficiency will depend on the circumstances. Evidently, the "Shop Better" trademark, for instance, may be displayed on the storefront if the same

160. Magasins Best Buy ltée v Québec (Procureur général), 2014 QCCS 1427.

161. Québec (Procureure générale) v Magasins Best Buy ltée, 2015 QCCA 747.

162. *Draft Regulation to amend the Regulation respecting the language of commerce and business*, (2016) GOQ II, 2477 & ff [hereinafter *DR*].

Chart 4: Pending Amendments to Québec Signage Requirements

Element of Draft Regulation Trademark Rule	**Key Points**
Located outside an immovable (or building) *DR*, s. 1(25.2)	—A sign or poster is located "outside an immovable" when it is somehow attached to the outer walls or the roof a building. —The following are examples of what would be deemed to be outside an immovable: any sign or poster intended to be seen from the outside of a building; a sign or poster located outside a commercial space, which is itself located inside a mall or a shopping center; and certain signs or posters found on an independent structure near a building. (*DR*, s. 1(25.2))
Sufficient presence of French *DR*, s. 1(25.1)	—A sufficient presence of French is defined in the draft regulations either as a generic term or description of the products or services offered, a slogan, or any other terms or indications deemed sufficient. (*DR*, s. 1(25.1) —The French elements must have the same permanence or durability and the same visibility as the trademark so that both can be easily read simultaneously. (*DR*, s. 1(25.3)) —The ability to read both the trademark and the French elements at the same time implies that they are legible in the "same visual field."
Permanence or Durability *DR*, s. 1(25.3)	The material or manner in which the sign or poster is attached cannot be easily removed.
Visibility *DR*, s. 1(25.3)	The French elements are lighted in a similar way.
Same visual field *DR*, s. 1(25.4)	The draft regulations explain how to assess the "same visual field." Typically, when a trademark is displayed on a sign attached to a storefront bordered by a sidewalk, the assessment is made from the perspective of someone standing on the sidewalk.

sign also contains the generic French terms "Les magasins." However, it would also be sufficient to display a separate poster, in the front window, describing in French weekly rebates or the services offered, provided that the poster meets the "permanence," "visibility," and "same visual field" requirements. The only limitations are listed in the draft regulations, which provide that French indications such as business hours, telephone numbers, addresses, percentages and numbers are *not* taken into account.[163]

163. *DR*, section 1, subsection 25.5.

Despite its obvious advantages for franchisors, this flexibility creates uncertainty for businesses as well as enforcement challenges for the OLF. It remains to be seen what the final amendments will look like, and how the OLF will apply them in the future. Franchisors and franchisees which are part of franchise system already present in Québec will have three years from the date of the amendments to comply with the new rules,[164] but all new franchises will have to comply with the new rules immediately.

V. Key Resources For Franchisors in Québec

The following organizations and government offices offer a number of excellent resources to help prospective franchisors have a successful entry into the Québec market.

A. *Canadian Franchise Association*

Founded in 1967, the Canadian Franchise Association (CFA) is a nationwide Canadian organization promoting the interests of its members from the franchise industry, including franchisors, franchisees, service providers, and suppliers.[165] The CFA is the Canadian equivalent of the International Franchise Association. Members of the CFA agree to abide by a code of ethics,[166] which focuses on the relationship between franchisors and franchisees. The CFA offers support and services to its members and constitutes a good source of information on franchising in Canada.

B. *Conseil Québecois de la Franchise*

Established in 1984, the *Conseil national sur le franchisage et le partenariat* was replaced in 2004 by the *Conseil québécois de la franchise* (CQF).[167] The CQF is an industry organization for franchisors, franchisees, service providers, and suppliers in the province. In this way, it is similar to the CFA. It promotes the interests of its members from the franchise sector and offers information and support on franchising in Québec.

C. *Office Québecois de la langue française*

The OLF, as reviewed above, was established by the *Charter*.[168] It is tasked with the elaboration and implementation of language policies. It monitors the linguistic situation in the province and promotes the use of French as the language of work, communication, commerce, and business in the civil administration and in enterprises. The OLF is the public body

164. *DR*, section 2.

165. Canadian Franchise Ass'n, *CFA Mandate*, http://www.cfa.ca/about-cfa/mandate/.

166. Canadian Franchise Ass'n, *Code of Ethics*, http://www.cfa.ca/about-our-members/cfa-code-of-ethics/ (last revised Mar. 19, 2007).

167. *Conseil Québécois de la franchise*, *À propos*, http://cqf.ca/a-propos/.

168. Sections 157 & ff. *Office Québecois de la langue française* (http://www.oqlf.gouv.qc.ca/accueil.aspx).

in charge of ensuring that businesses conducting activities in Québec comply with their obligations under the *Charter* regarding the use of French.[169]

D. *Consumer Protection*

Like every province and territory, Québec has its own consumer protection legislation. The *Consumer Protection Act*[170] (CPA) is aimed at protecting consumers in their dealings with merchants of goods and services. The *Office de la protection du consommateur* (OPC) is the government agency monitoring compliance with the CPA, advocating in favor of consumers, informing and educating consumers, receiving and processing consumer complaints, conducting investigations, and representing consumers in lawsuits against delinquent merchants. The OPC is a good resource for merchants seeking to know more about their obligations under the CPA.[171]

E. *Quick Service Restaurants*

Restaurants Canada (RC) is a national organization promoting the interests of its members from the restaurant and foodservice industry in Canada, including restaurants, bars, caterers, institutions, and suppliers.[172] Active since 1944, first known as the Canadian Restaurant Association and later the Canadian Restaurant and Foodservices Association, RC provides helpful information and resources.

F. *Retail*

The Retail Council of Canada (RCC) advocates for the benefit of its members from the Canadian retail industry. It provides services and information specific to the retail sector.[173]

G. *Health, Medical, and Fitness*

The Recreation and Sports division of the *Ministère de l'Éducation et Enseignement supérieur*[174] offers several guides and policies to help health and fitness centers adopt best practices.

H. *Real Estate*

The *Organisme d'autoréglementation du courtage immobilier du Québec* (OACIQ) is an organization whose main goal is to ensure the protection of the public by overseeing the practice of real estate brokerage in Québec.[175]

169. Section 159.
170. CQLR c P-40.1.
171. *Office de la protection du consommateur, gouvernement du Québec, Mission and Mandate of the Office*, http://www.opc.gouv.qc.ca/en/opc/office/mission-mandates/.
172. Restaurants Canada, *About Us*, https://www.restaurantscanada.org/en/About-Us.
173. Retail Council of Canada, http://www.retailcouncil.org/.
174. *Ministère de l'Éducation et Enseignement supérieur*, http://www.education.gouv.qc.ca/organismes-de-loisir-et-de-sport/.
175. *Organisme d'autoréglementation du courtage immobilier du Québec* (OACIQ), http://www.oaciq.com/en/pages/about-oaciq.

I. *Hospitality*

The *Association Hôtellerie Québec* (AHQ) defends the interests of its members from the hospitality industry in Québec, and offers them useful information and resources.[176]

VI. Conclusion

As with any international expansion, a franchisor's successful launch into Québec requires an upfront investment of financial and human resources to help assess the local market and consumer tastes. It also entails engaging local business and legal experts to help manoeuvre through the unique statutory and cultural differences between Québec and the franchisor's home jurisdiction.

As part of its initial planning stage, a franchisor is well-advised to conduct specific market-research on Québec consumer preferences and local brands, and to assess whether a different franchise business model may be warranted for Québec, such as a local master franchisee or area developer for the province. Engaging the services of a French-speaking local area representative or hiring a local employee to assist with franchise sales and ongoing operational support is often recommended.

A franchisor may be tempted to use its existing domestic or even Canadian standard form franchise agreement with its Québec franchisees, but it is important to revise the agreement to address key differences under the Québec civil law regime, including provisions governing contracts of adhesion, as well as other legal considerations unique to Québec, such as French language, taxes, security interests, guarantees, and leases. Although Québec does not have franchise-specific legislation, it is also imperative that the franchisor understand its civil law duties more generally, including its obligation to act in good faith which creates a positive duty to inform that is similar to the statutory duty of disclosure that exists in certain other Canadian provinces.

176. *Association Hôtellerie Québec*, *Mission*, http://www.hotellerieQuebec.com/en/about-us/mission/.

APPENDIX A

EXAMPLES OF HOME GROWN QUÉBEC–ESTABLISHED FRANCHISORS[1]

Automotives
Docteur du Pare-Brise
Location Pelletier
Lebeau Vitres d'Autos
DURO Vitres d'autos

Cleaning Services
Adèle
Carrébleu entretien ménager
Ménage-Aide
Parfait Ménage
Qualinet
UrbaiNET Inc.

Construction
Les Scellants Élastek
Pieux Xtrème Inc

Fitness Centres
Cardio Plein Air
Énergie Cardio
Nautilus Plus

Food–Full Service Restaurants
Bar à pâtes Mia Pasta
Bâton Rouge*
Cacao 70*
Chez Cora*
Dagwoods*
Eggspectation*
FF Pizza
Fromagerie Victoria
Giorgio Ristorante
La Cage aux Sports
La Piazzetta
Pacini
Trattoria Di Mikes
Rôtisserie St-Hubert*

Food–Quick Service Restaurants
Café Vienne
Franx Supreme
Habaneros Grill Mexicain
La Crémière
M4 Burritos
Maître Glacier
Première Moisson*
Presse Café*
Sésame
Sushi Taxi
Sushi Shop*
Thaï Express*
Thaï Zone
Tiki-Ming*
Vie & Nam

Furniture and Appliances
Corbeil Électroménager

Pet Shops
Animo Etc.

Retail–Cosmetics/Beauty
Uniprix
Jean Coutu
Proxim
Brunet
Familiprix

Telecommunications
Le Superclub Vidéotron /
Microplay

1. Conseil québécois de la franchise, *Répertoire des franchiseurs*, http://cqf.ca/membres-franchiseurs/; Canadian Franchise Ass'n, *The Official Online Franchise Directory of the Canadian Franchise Association*, http://lookforafranchise.ca/browse-franchises/?do-browse-franchises=1.
* Indicates franchises that have expanded operations outside of Québec.

APPENDIX B

EXAMPLES OF CANADIAN FRANCHISORS ESTABLISHED IN QUÉBEC[1]

Automotive Services
Canadian Tire
Mr. Lube

Commercial/Residential Services
Fire-Alert Mobile Extinguishers

Food–Full Service Restaurants
Boston Pizza

Food–Grocery/Retail
M&M Food Market

Food–Quick Service Restaurants
A&W Food Services of Canada
BeaverTails (Queues de Castor)
Bento Sushi
Booster Juice
Cultures
Coffee Culture
Harvey's
Jugo Juice
Mucho Burrito
Pizza
Second Cup
Tandori
Tim Horton's
Vanellis
Villa Madina
Yogen Früz

Retail–Cosmetics/Beauty
Trade Secrets
Shoppers Drug Mart (Pharmaprix)

1. Conseil québécois de la franchise, *Répertoire des franchiseurs*, http://cqf.ca/membres-franchiseurs/; Canadian Franchise Ass'n, *The Official Online Franchise Directory of the Canadian Franchise Association*, http://lookforafranchise.ca/browse-franchises/?do-browse-franchises=1.

APPENDIX C

EXAMPLES OF INTERNATIONAL FRANCHISORS ESTABLISHED IN QUÉBEC[1]

Automotive Services
Midas

Cleaning Services
Jan-Pro

Education
Kumon Math & Reading Centres

Financial Services
H&R Block[2]

Fitness
Anytime Fitness
Planet Fitness

Furniture & Appliances
California Closet Company

Food–Quick Service
Burger King
Dairy Queen
KFC
Little Caesars
McDonald's
Pizza Hut
Quizno's
Subway

Printing/Copying/Shipping
The UPS Store

Real Estate
Re/max[3]

Seniors Services–Home Care
Home Instead

1. Conseil québécois de la franchise, *Répertoire des franchiseurs*, http://cqf.ca/membres-franchiseurs/; Canadian Franchise Ass'n, *The Official Online Franchise Directory of the Canadian Franchise Association*, http://lookforafranchise.ca/browse-franchises/?do-browse-franchises=1.
2. H&R Block, *Franchise Opportunities*, https://www.hrblock.ca/our-company/franchise-opportunities/.
3. Re/Max, *Re/Max History*, http://www.remax-Québec.com/en/infos/histoire.rmx.