

A Wishart Come True? Amendments to the Wishart Act and Regulations Come into Effect on September 1, 2020

Larry M. Weinberg

August 24, 2020

On September 1, 2020, several long-promised and potentially important changes to the *Arthur Wishart Act (Franchise Disclosure), 2000* (the Wishart Act) and the accompanying *General Regulation (O. Reg. 581/00)* will come into effect. These amendments are intended to reduce the burden on the franchise sector brought on by franchise disclosure obligations, and harmonize Ontario's disclosure regime to some degree with those of the other provinces with a franchise law.

Confidentiality Agreements and Deposits

Each of the other regulated provinces already permits a franchisor to ask prospective franchisees to sign an agreement relating to confidentiality before providing a franchise disclosure document (FDD). The franchise laws in the provinces of Alberta, British Columbia, and Manitoba also permit franchisors to take a fully refundable deposit. These steps were never permitted in Ontario. The changes to the Wishart Act will clarify when certain preliminary agreements are exempt from triggering the obligation to deliver an FDD, and permit a limited refundable deposit.

Under the new Section 5 (1.1), the disclosure requirement is not triggered by a preliminary agreement if it only contains terms that: (i) require confidentiality; (ii) prohibit the use of information provided to a prospective franchisee, or; (iii) designate a location site or territory for a prospective franchisee. In this way, Ontario will come into line with the other provinces that already permit such preliminary agreements.

However, the disclosure obligation is still triggered by confidentiality agreements with terms that require confidentiality even when the information: (i) comes into the public domain; (ii) is disclosed to anyone other than by a contravention to the agreement, or; (iii) is disclosed with consent of all parties. This exemption will also not apply if the preliminary agreement contains terms that prohibit the disclosure of information to an organization of franchisees, other franchisees in the same system or their professional advisors.

Regarding a deposit, the Wishart Act will now permit the payment of a deposit by the prospective franchisee if it: (i) does not exceed the prescribed amount of 20 per cent of the franchise fee, to a maximum of C\$100,000; (ii) is refundable without any deductions, and; (iii) is given under an agreement that in no way binds the prospective franchisee to enter into a franchise agreement.

Cassels

Exemptions from Disclosure

In addition, the existing language of several of the long-standing exemptions from the provision of an FDD to a prospective franchisee will be amended to add some clarity to when they apply and can be relied upon by a franchisor. These amendments apply to the following exemptions:

- **Director and Officer Exemption:** The Wishart Act always provided that if a franchisor's director or officer was being granted a franchise, then the transaction was to be exempt. But it did not exempt the transaction if the person had recently ceased to be a director or officer, nor was it clear if it applied to a corporation owned by the director or officer. The amendments will clarify that the franchisor will be exempt from having to deliver an FDD if the grant is to a person or a corporation that person controls if the person is and has been an officer or director of the franchisor or an associate for at least six months, or was an officer or director for at least six months and not more than four months have passed since they held that position.
- **Fractional Franchise Exemption:** The Wishart Act always provided for the so called "fractional franchise exemption" which applies when there is the grant of a franchise to a person to sell goods or services within a business in which that person has an interest if the sales arising from those goods or services, as anticipated by the parties or that should be anticipated by the parties at the time the franchise agreement is entered into, do not exceed 20% of the total combined sales of the business. Whether that percentage had to apply over the entire life of the franchise was previously unclear. The amendment will clarify that the applicable period is now one year, so that if the new franchise's sales during the first year are not anticipated to exceed 20% of the total of the sales of the business that year then the exemption will apply.
- **Small Franchise Exemption:** The Wishart Act always provided that the offer of a franchise was exempt from the disclosure obligation if the prospective franchisee was required to make a total annual investment that did not exceed C\$5,000. Unfortunately, this was of limited application and it was unclear what expenses would fall into the calculation. The Wishart Act will now be amended to apply to the franchisee's "total initial investment," and not "annual investment," and the amount has been increased to C\$15,000.00. As well, the Regulations stipulate that this amount is determined by all the franchisee's costs associated with the establishment of the franchise, including deposits and fees, inventory and property costs, and any other costs.
- **Sophisticated Purchaser Exemption:** The Wishart Act always provided that the offer of a franchise was exempt from the disclosure obligation where the prospective franchisee was investing in the acquisition and operation of the franchise, over a one-year period, an amount greater than C\$5,000,000. This exemption was of limited application because of the high threshold amount, and the difficulty in prospectively calculating what would be spent over a one-year period. Accordingly,

Cassels

the Wishart Act has been revised so that the exemption will be available where the prospective franchisee is required to make a “total initial investment” that is greater than a new lower prescribed amount, namely C\$3,000,000.

Statements of Material Change

The AWA amendments will also affect the use of Statements of Material Change, as their contents will now be prescribed by the accompanying Regulation to the Wishart Act. As of September 1, 2020, Statements of Material Change must include a certificate certifying that it contains no untrue information, representations or statements, whether of a material change or otherwise, and that it includes every material change. This certificate must be signed and dated in the same way as the certificates attached to an FDD.

Financial Statements

One key goal of the revisions to the AWA Regulations is to provide clarity regarding the financial statements that may be included in an FDD, by specifying that franchisors will be permitted to include financial statements of the franchisor if they meet Canadian, American or acceptable international standards. Prior to these amendments, the Regulations required that the financial statements meet Canadian standards or standards of a foreign jurisdiction that were equivalent. However, there was no consensus on whether financial statements prepared in accordance with US or other international standards were sufficiently equivalent. So the Wishart Act Regulations will be amended with the intention of permitting franchisors to include franchisor financial statements that meet Canadian, US or acceptable international accounting standards in their FDD.

These changes may affect your franchise’s disclosure requirements under the Wishart Act. It should, however, be remembered that changes to the Wishart Act are only effective in Ontario, so any franchisor still needs to consider their legal obligations in the other five regulated provinces. And although they are designed to ease some of the burden on franchisors in Ontario, you should familiarize yourself with the updates to avoid any non-compliance issues, and direct any questions to any member of our firm’s Franchise Law Group.

The author of this article gratefully acknowledges the contributions of summer student Sarah Kemp.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.