

Ontario Government Makes Changes to Ontario's Franchise Legislation

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In November 2017, the Ontario Legislature passed *The Cutting Unnecessary Red Tape Act, 2017* (the *CURT Act*), an omnibus piece of legislation designed to address issues in a number of provincial statutes. The *CURT Act* is relevant to Ontario's franchise industry stakeholders because it contains various amendments to Ontario's franchise legislation, the *Arthur Wishart Act (Franchise Disclosure), 2000* (the Wishart Act). Cassels Brock discussed these proposed amendments in a previous newsletter.

As described below, some of the changes to the Wishart Act via the *CURT Act* are not in force yet, as the changes rely on regulations that have not yet been enacted by the Ontario Government.

The following changes to the Wishart Act have been made as part of the *CURT Act*:

Service Marks

The *CURT Act* removes the use of the term "service mark" from the Wishart Act because the term does not have legal significance in Canada. This amendment is a helpful housekeeping exercise. These changes are now in force.

The Definition of "Franchise"

In respect of the definition of "franchise," the *CURT Act* provide recognition that the franchisor themselves may be a licensee, rather than an owner, of the intellectual property for the franchise. The amendment also provides that the right to exercise control, rather than the actual exercise of that control, may be sufficient for the purposes of characterizing a business as a franchise. The former change is a helpful housekeeping exercise, but the latter change in respect of the exercise of control will potentially increase the number of business arrangements that will fall under the ambit of this legislation. The *CURT Act* also provides a helpful clarification to the single license exemption from franchise disclosure, clarifying that the relevant single licence must be granted for Canada in order to trigger the exemption. These changes are now in force.

The Circumstances Under Which A Disclosure Document Is Not Required (Non-Disclosure Agreements)

Cassels

The *CURT Act* introduces changes to the circumstances under which a franchisor is required to deliver a disclosure document to a franchisee (as set out in paragraph 5 of the *Wishart Act*).

Specifically, a disclosure document does not have to be provided prior to the signing of a franchise agreement or any other agreement relating to the franchise if the agreement only contains terms that (a) require any information or material that may be provided to a prospective franchisee be kept confidential, (b) prohibit the use of any information or material that may be provided to a prospective franchisee, or (c) designate a location, site or territory for a prospective franchisee. This addresses industry concerns regarding whether compelling a franchisee to sign a non-disclosure agreement prior to providing an FDD ran afoul of the *Wishart Act*'s statutory disclosure obligations.

However, there are qualifications to this exemption, namely that it does not apply to an agreement if the agreement contains terms that: (a) require the information to be kept confidential or prohibit the use of that information if the information (i) comes into the public domain other than as a result of a contravention of the agreement, (ii) is disclosed to any person other than as a result of a contravention of the agreement, or (iii) is disclosed with the consent of all parties to the agreement; or (b) prohibit the disclosure of information to an organization of franchisees, other franchisees of the same franchise system, or a franchisee's professional advisors. As such, for the non-disclosure agreement to qualify for the disclosure exemption, it will have to be limited in scope.

Additionally, a disclosure document does not have to be provided upon the payment of a fully refundable deposit if the deposit (a) does not exceed a yet-to-be prescribed amount, (b) is refundable without any deductions, and (c) is given under an agreement that in no way binds the prospective franchisee to enter into a franchise agreement.

Similar changes apply to the requirements for delivering a statement of material change under section 5(5) of the *Wishart Act*.

These changes are not yet in force.

Statements of Material Change

The *CURT Act* provides that the contents of statements of material change will "contain the information that is prescribed." No such prescription has yet been proposed by regulation, and the changes are not yet in force.

Disclosure Exemptions For Officers and Directors

The availability of the disclosure exemption under section 5(7)(b) of the *Wishart Act* has been expanded to include the grant of a franchise to a corporation that the former director or officer controls. However, the

availability is limited to circumstances where (a) the franchisee has been an officer or director of the franchisor or franchisor's associate for at least six months and is currently an officer or director, or (b) was an officer or director of the franchisor or franchisor's associate for at least six months and not more than four months have passed since the franchisee was an officer or director. Although this is arguably a limitation of the exemption, it does provide a helpful bright-line test for franchisors to use in determining whether or not to disclose.

These changes are not in force yet.

Disclosure Exemptions for Fractional Franchise

The availability of the disclosure exemption under section 5(7)(e) in respect of fractional franchises has been clarified such that the calculation of anticipated sales has to be made in respect of the first year of operation. This amendment removes unnecessary ambiguity from the Wishart Act and brings it in line with the similar exemption in the other regulated provinces.

Disclosure Exemptions For De Minimis Investments and Large Investments

The CURT Act clarifies that the amount spent by the franchisee that is required to qualify for the de minimis investment exemption under section 5(7)(g)(i) of the Wishart Act is to be based on the "total initial investment, as described in the disclosure document." The former language of the Wishart Act refers to a "total annual investment to acquire and operate the franchise." Similar language has also been added for the large investment exemption under section 5(7)(h). These changes are not yet in force.

If you have any questions about these changes to the Wishart Act and their impact on your franchise system, please contact our Franchise Law Group.

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