

Ontario Government Introduces Proposed Amendments to its Franchise Legislation

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On September 14, 2017, the Ontario Government introduced Bill 154, “*An Act to cut unnecessary red tape by enacting one new Act and making various amendments and repeals*,” an omnibus bill that proposes to amend a number of Ontario statutes with the purported goal of “reduc[ing] regulatory burdens and practices that cost businesses time and money, while protecting environmental, health, and worker safety standards.”

Bill 154 is important to Ontario’s franchise industry stakeholders as it proposes to make various amendments to Ontario’s franchise legislation, the *Arthur Wishart Act (Franchise Disclosure)*, 2000. Many of these proposed amendments were raised earlier in 2016 and 2017 by the Ontario Government’s Business Law Advisory Council. However, while the proposed amendments to the Act provide some necessary clarification and correction of longstanding issues, the proposed changes do not address some of the major remaining problems with the Act. In fact, some amendments may potentially expand the burden of the *Wishart Act* on Ontario franchisors. The proposed changes include the following:

A. Service Marks

Bill 154 proposes the removal of the use of the term “service mark” from the *Wishart Act* because the term does not have legal significance in Canada. This proposed amendment is a helpful housekeeping exercise.

B. The Definition of “Franchise”

In respect of the definition of “franchise”, the proposed changes provide recognition that the franchisor themselves may be a licensee, rather than an owner, of the intellectual property for the franchise. The proposed 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 legislation.

C. The Circumstances Under Which A Disclosure Document Is Required

Bill 154 proposes changes to the circumstances under which a franchisor is required to deliver a disclosure document to a franchisee (as currently set out in paragraph 5 of the Act).

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Specifically, under Bill 154, 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 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 Act.

D. Statements of Material Change

The Bill proposes that the contents of statements of material change will "contain the information that is prescribed." No such prescription has yet been proposed by regulation.

E. Disclosure Exemptions For Officers and Directors

The availability of the disclosure exemption under section 5(7)(b) of the Act is 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.

F. Disclosure Exemptions for Fractional Franchise

The availability of the disclosure exemption under section 5(7)(e) in respect of fractional franchises clarifies 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 Act and brings it in line with the similar exemption in the other regulated provinces.

G. Disclosure Exemptions For De Minimis Investments and Large Investments

The Bill 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) is to be based on the “total initial investment, as described in the disclosure document.” The current language of the Act refers to a “total annual investment to acquire and operate the franchise.”

The same language is also proposed for the large investment exemption under section 5(7)(h).

Cassels will provide updates on the status of this legislation as it moves its way through the Ontario Legislature, and will advise of any further proposed statutory changes arising out of the Ontario Business Law Advisory Council’s consultative process. If you have any questions or concerns, please contact Derek Ronde, Larry Weinberg, Frank Robinson, Stéphane Teasdale and Noah Leszcz.

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