

# Cutting the red tape: recent amendments to Ontario's franchise disclosure act

24 November 2020 | Contributed by [Lapointe Rosenstein Marchand Melançon LLP](#)

## Introduction

### Key changes to act and regulation

### Comment

## Introduction

In 2017 the Ontario government enacted the Cutting Unnecessary Red Tape Act<sup>(1)</sup> with the objective of alleviating unnecessary regulatory burdens for businesses. The act provided for a series of proposed amendments to Ontario's franchise disclosure legislation, the Arthur Wishart Act 2000<sup>(2)</sup> and its General Regulation,<sup>(3)</sup> and ultimately came into force on 1 September 2020. The amendments include measures to clarify the province's franchise laws and temper or delay franchisors' disclosure obligations towards prospective franchisees in certain circumstances.

## Key changes to act and regulation

### **Confidentiality agreements**

Previously, the Arthur Wishart Act required a franchisor to provide a franchisee with a disclosure document at least 14 days before the earlier of:

- the prospective franchisee signing the franchise agreement or any other agreement relating to the franchise; or
- the payment of any consideration.

The amendment now clarifies that a franchisor can require a prospective franchisee to enter into a confidentiality agreement, without providing a disclosure document in advance, provided that the agreement in question contains only terms that:

- require any information or material that may be provided to a prospective franchisee to be kept confidential;
- prohibit the use of any information or material that may be provided to a prospective franchisee; or
- designate a location, site or territory for a prospective franchisee.

### **Deposit payments**

Further, with regard to the payment of consideration by or on behalf of a prospective franchisee, the amended Arthur Wishart Act now allows a franchisor to receive a deposit payment prior to or within the 14-day disclosure period if certain conditions are met – namely, the deposit payment must:

- not exceed 20% of the franchise fee, up to a maximum of C\$100,000;
- be refundable without any deductions; and
- be given under an agreement that in no way binds the prospective franchisee to enter into a franchise agreement.

### **Exemptions to franchisors' disclosure obligation**

Previously, the Arthur Wishart Act provided that a franchisor's disclosure obligation did not apply to the grant of a franchise to a person who has been an officer or director of the franchisor for at least six months. The amendment clarifies that the exemption to the disclosure obligation applies to the grant of a franchise to a person for the person's own account or to a corporation that the person controls if the person:

- has been an officer or director of the franchisor or of the franchisor's associate for at least six months and is currently such an officer or director; or
- was an officer or director of the franchisor or of the franchisor's associate for at least six months and no

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more than four months have passed since the person was such an officer or director.

Whereas the Arthur Wishart Act also previously exempted franchisors from providing a disclosure document to a prospective franchisee whose total annual investment to acquire and operate the franchise did not exceed C\$5,000, the amended act now provides that the disclosure obligation does not apply where the prospective franchisee is required to make a total initial investment of an amount that does not exceed C\$15,000. The General Regulation sets out specific guidelines for the determination of the total initial investment.

In addition, the disclosure exemption in respect of sophisticated franchisees, which previously applied where a franchisee invested more than \$5 million over a one-year period for the acquisition and operation of the franchise, now applies where the franchisee is required to make a total initial investment greater than \$3 million.

### **Statements of material change**

Under the Arthur Wishart Act, franchisors must provide prospective franchisees with a written statement of any "material change" as soon as practicable after the change occurs and before the earlier of:

- the signing of the franchise agreement or any other agreement relating to the franchise; and
- the payment of any consideration by the prospective franchisee to the franchisor or the franchisor's associate relating to the franchise.

The amended General Regulation also now requires a statement of material change to include a certificate, signed by the same signatories as that of the certificate included in the disclosure document, certifying that it:

- contains no untrue information, representations or statements, whether of a material change or otherwise; and
- includes every material change.

### **Financial statements**

Previously, the General Regulation required disclosure documents to include financial statements for the franchisor's most recently completed fiscal year, prepared in accordance with generally accepted auditing, reporting and review standards at least equivalent to those standards set out in the Canadian Institute of Chartered Accountants Handbook. The amended General Regulation now extends greater flexibility to franchisors, allowing for the preparation of financial statements in accordance with generally accepted auditing, reporting and review standards as prescribed in the Chartered Professional Accountants Canada Handbook or by US or international standards boards.

### **Comment**

Generally, the amendments to the Arthur Wishart Act and the General Regulation provide much-needed clarity and create more attractive business conditions for franchisors in Ontario. Franchisors in particular will presumably embrace the relaxation of 'red tape' requirements, such as the previous rules concerning the preparation of financial statements only in accordance with Canadian auditing, reporting and review standards. With these recent amendments, the Ontario legislature has arguably managed to strike a fair balance between reducing franchisors' regulatory burdens without adversely affecting the rights of franchisees to disclosure documents.

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### **Endnotes**

(1) 2017, SO 2017, c 20 - Bill 154.

(2) 2000, SO 2000, c 3.

(3) O Reg 581/00.

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