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Newsletter

Franchising

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Legal Update

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Franchise laws and other legislation affecting operations in various franchised fields in Canada saw significant changes over the past year. More specifically, in Quebec, Ontario and British Columbia, new legislation came into force which could have a significant impact on the operations of franchisors and franchisees alike.

New Disclosure Rules for British Columbia

British Columbia's long awaited *Franchises Act*[1] and its disclosure regulation came into force on February 1, 2017. Any franchise agreement, renewal or extension entered into on or as of that date will be subject to the new legislation. Certain elements of franchise agreements entered into before the coming into force of the new rules will also be subject to the *Franchises Act*, such as the right for franchisees to associate, and the duty of good faith and fair dealing of each party in the performance and enforcement of the franchise agreement.

Although the new British Colombia franchise disclosure rules are very similar to those in the other regulated provinces (namely Prince Edward Island, New Brunswick, Ontario, Manitoba, and Alberta), there are some key differences as compared to the other provinces' disclosure requirements.

For one, the British Colombia regulation requires that risk warning statements be included in the disclosure document, which is not required under the laws of Alberta or New Brunswick. Similar to New Brunswick and Manitoba, however, franchisors operating in British Columbia must include statements in the disclosure document regarding earnings projection, estimates of operating costs, and training expenses. Should any of this information not be provided by the franchisor, a statement to that effect would be required in the disclosure document.

British Columbia differs in its regulation of financial disclosure, insofar as franchisors having operated for less than one fiscal year are required to disclose an opening balance sheet, which must be prepared in the same manner as financial statements.

The British Colombia franchises regulation is less demanding than the other regulated provinces with respect to disclosures relating to central advertising funds. In fact, British Colombia's new rules simply require a description of any such fund, including information such as the amount of funds held, the frequency of a franchisee's contributions, the particulars of the administration of the funds, and the availability of reports on financed advertising activities.

Unlike any of the other regulated provinces, British Columbia's new franchise disclosure rules do not require franchisors to disclose how they select the locations of their franchisees in relation to one another, unless this information is considered a "material fact" that would otherwise be subject to disclosure. Franchisors must, however, provide potential franchisees with a list of all current franchises in Canada, unlike other disclosure laws

which generally require such disclosures only in respect of the applicable province.

British Columbia's *Franchises Act* also specifically allows the disclosure documents to be delivered by electronic means, including email.

While British Colombia's franchise disclosure rules do not constitute ground breaking developments in the highly regulated field of franchising, they do require franchisors to take adequate measures to timely comply with these new requirements that are not identical to those of other regulated provinces.

Ontario's Changing Workplace Review

The Changing Workplace Review is Ontario's independent review of the changing nature of the workplace. The Ontario government is aiming to significantly modernize labour laws in the province, thus potentially resulting in significant amendments to the *Employment Standards Act, 2000*[2] and the *Labour Relations Act, 1995*.[3] The Special Advisors leading the review were scheduled to release a final report on the matter in February 2017; however, the report is still pending.

The review mainly aims to ensure that vulnerable workers are afforded adequate protection by the potential amendments. As part of the review process, several different options are being considered to update the relevant legislation. For example, among the topics being discussed is the potential creation of a certification model whereby franchisors and franchisees would become joint employers in industries where workers are more vulnerable. Another option being considered is whether to hold employers or franchisors responsible for violations of the *Employment Standards Act, 2000* by their subcontractors or franchisees. These would constitute unprecedented statutory extensions of franchisors' obligations with respect to their franchisees' employees in the standard franchise business model. An additional option that could significantly impact franchising in Ontario is the idea to potentially allow employees at one franchise to unionize and then to extend any collective agreement to employees of other franchisees and outlets in the franchised network, thereby deepening the strength of collective bargaining units formed through this process.

While the conclusions of the Changing Workplace Review and any resulting legislative amendments have yet to be determined, franchisors and franchisees alike should closely monitor developments in this area and seek guidance in connection with their practices which may be impacted by the ongoing review.

Ontario Menu Labelling Laws

Ontario has decided to encourage healthier nutritional choices by introducing the *Healthy Menu Choices Act*,[4] which came into force January 1, 2017. This new legislation requires restaurants having 20 or more locations in Ontario to display on all menus the calorie content and other nutritional information of their standard foods and beverages.

The *Healthy Menu Choices Act* is the first of its kind in Canada, the only similar initiative being the Informed Dining Program in British Columbia, under which nutritional information is voluntarily provided by participating restaurants. The *Healthy Menu Choices Act* resembles federal legislation in the United States which imposes similar labelling requirements on chain restaurants.

This labelling obligation applies, *inter alia*, to any "person who has responsibility for and control over the activities carried on at a regulated food service premise, and **may include a franchisor, a licensor,** a person who owns or operates a regulated food service premise through a subsidiary."[5] In other words, many chains will be affected, including fast food restaurants, coffee shops, and convenience and grocery stores, many of which are part of franchised networks.

Any person in breach of the *Healthy Menu Choices Act* risks a fine. However, the legislation does not directly address the issue of franchisor liability in the case of non-compliance by a franchisee. Similar to other instances of franchisors being held liable for actions by their franchisees, the applicability and extent of franchisor liability will likely vary according to the level of control reserved or exercised over a franchisee's activities. However, requirements of uniformity of menus and supply chain logistics may create greater risks for franchised businesses as compared to other business model in this regard. As with many legislative amendments, further guidance on the application of the *Healthy Menu Choices Act* to franchised businesses is likely to be developed over time.

Electronic Disclosure in Ontario

The increased use of technology has become common in countless fields, and the franchise industry is no exception. The Province of Ontario recently began allowing franchisors to deliver disclosure documents electronically to potential franchisees. These amendments to the *Arthur Wishart Act (Franchise Disclosure), 2000*[6] came into force July 1, 2016.

The amendments provide certain requirements for valid electronic disclosure. For one, the disclosure document package must be delivered in a form that enables the recipient to view, store, retrieve and print them. The disclosure cannot contain links to external texts, and must contain an index for each separate electronic file. Lastly, the franchisee is required to send the franchisor written acknowledgment of receipt of the disclosure documents.

While many franchisors are keen to engage in electronic disclosure, a certain level of uncertainty remains as to whether any shortcomings in electronic delivery may even-

tually be cited by franchisees as the basis for rescission claims or other statutory rights. Given that these amendments are in their initial stages of application, there is also uncertainty as to the types of situations that may be found to legitimately cause concerns with respect to adequate electronic disclosure. As a result, franchisors should be mindful of emerging developments in this regard.

Quebec's New French Language Requirements for Signage

Amendments to the regulations under Quebec's *Charter of the French Language*[7] came into force November 24, 2016, affecting businesses in Quebec that display trademarks in a language other than French to identify their businesses on signage visible from outside.

Businesses will now have to ensure that a "sufficient presence of French" accompanies their trademark when used to identify the business on exterior signage or internal signage meant to be seen from outside. Businesses will have to add one of the following to their signage in French in order to satisfy the new requirements:

- a generic term or a description of their products or services;
- a slogan; or
- any other term or indication providing information on products or services that may be of interest to consumers or persons frequenting the site.[8]

Pursuant to the regulations, a "sufficient presence of French" requires that the additional French text be given permanent visibility, similar to that of the trademark displayed, and in the same visual field. In other words, the trademark and the accompanying French text must be designed, lighted and situated so as to be permanently visible and legible together at all times.

Certain limited exceptions apply: for example, trademarks that are composed of artificial expressions or alphanumeric combinations, names of places or people, and trademarks that appear on temporary or seasonal stands or on certain totem-type structures.

Unlike new signage installed as of November 24, 2016, which will be required to immediately comply with these requirements, the government provided a grace period until November 23, 2019 for businesses to make appropriate adjustments to existing signage.

Franchisors and franchisees must implement measures to ensure compliance with these rules, as it is anticipated that they will be strictly enforced by the relevant authorities.

Conclusion

The legislative developments discussed above are expected to have a significant impact on franchisors and franchisees operating in the relevant jurisdictions. As such, it is very important for businesses to seek guidance in order to assess the legal risks to which they may be exposed as a result of the shifting legislative framework.

1. *Franchises Act*, SBC 2015, c. 35.
2. *Employment Standards Act*, 2000, SO 2000, c 41.
3. *Labour Relations Act*, 1995, SO 1995, c 1, Sch A.
4. *Healthy Menu Choices Act*, 2015, SO 2015, c 7, Sch 1.
5. *Ibid.*, Subsection 1(2).
6. *Arthur Wishart Act (Franchise Disclosure),* 2000, SO 2000, c 3.
7. *Charter of the French Language*, CQLR c C-11.
8. *Regulation respecting the language of commerce and business*, c. C-11, ss. 54.1, 58 and 67, Section 25.1.

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