

Manitoba Proposes New Franchise Legislation

In a bold and somewhat surprising move, the Government of Manitoba introduced Bill 15 last week to enact franchise legislation in that province. If successfully passed, Manitoba would join Alberta, Ontario Prince Edward Island, and New Brunswick as the only jurisdictions in Canada with franchise legislation.

The proposed legislation follows the extensive report of the Manitoba Law Reform Commission in May 2008 which recommended the enactment of such legislation. Also as recommended by the report, the Bill is modelled on the Uniform Franchises Act that was prepared by the Uniform Law Conference of Canada, and proposes a “disclosure-type” regime as in the other provinces with franchise legislation.

Based on our preliminary review of the Bill, and to assist our clients that either currently franchise in Manitoba or are considering doing so, we have summarized highlights of the proposed Act, its differences with the current Ontario legislation, and, where applicable, its similarities or differences to franchise legislation in the other provinces.

As with the other franchise-legislated provinces and in addition to the provisions referred to in the table below, the Bill proposes to grant rights to franchisees and impose the duties and obligations on franchisors as follows:

- the duty of fair dealing is imposed on both parties;
- a franchisee has the right to associate with other franchisees, which a franchisor cannot interfere with;
- a franchisee may sue the franchisor for damages due to misrepresentations, which the franchisee is deemed to have relied upon; and
- a franchisee’s rights under the proposed Act cannot be waived.

Bill 15 – The Franchises Act (Manitoba)	Arthur Wishart Act (Franchise Disclosure), 2000 (Ontario)	Additional Comments
<p>Definitions – “officer” – An “officer” is defined as:</p> <ul style="list-style-type: none"> • For a corporation, a chief executive officer, president, vice-president, secretary, controller, treasurer or any other individual designated as an officer by by-law or resolution; • An individual who performs functions or acts in a similar capacity; or • In relation to any other entity, any individual designated as an officer by by-law or resolution of the members: section 1(1) 	<p><i>No definition of “officer”.</i></p>	<p><i>Broader disclosure of the business background of individuals who “act” as officers – although not formally appointed as such by the directors of a franchisor.</i></p>

Bill 15 – The Franchises Act (Manitoba)	Arthur Wishart Act (Franchise Disclosure), 2000 (Ontario)	Additional Comments
<p>Non-Application – The Act does not apply to an arrangement arising out of an agreement for (i) the purchase and sale of a reasonable amount of goods at a reasonable wholesale price; or (ii) the purchase of a reasonable amount of services at a reasonable price – section 2(3)(j)</p>	<p>The Ontario legislation does <i>not</i> contain this exemption. However, it contains the following exemption not in the Manitoba Act, namely an arrangement arising out of a lease or similar agreement whereby the franchisee leases space in the premises of another retailer and is not required or advised to buy the goods and services it sells from the retailer or its affiliate: section 2(3)6.</p>	<p>Similar provision in subsection 2(3)(g) of the <i>Franchises Act</i> (PEI), and section 2(4)(g) of the <i>Franchises Act</i> (New Brunswick)</p>
<p><i>No exemption for a service contract or franchise-like arrangement with the Crown or a Crown agency. By implication, Act applies to the Crown.</i></p>	<p>The Ontario Act does not apply to a service contract or franchise-like arrangement with the Crown or a Crown agency: section 2(3)8.</p>	<p>Crown exempt from being bound by the <i>Franchises Act</i> (PEI)</p>
<p>Fair Dealing – The performance and enforcement of a franchise agreement includes the exercise of a right under the agreement – subsection 3(3)</p>	<p><i>Not specifically defined as such in Ontario, but assumed to have same or similar meaning.</i></p>	<p>Similar provision in subsection 3(3)(b) of the <i>Franchises Act</i> (New Brunswick)</p>
<p>Timing of Delivery – If a disclosure document is not delivered as one document, the disclosure requirement is not met until the date of the delivery of the last document – section 5(3)</p>	<p>Disclosure document must be one document delivered at one time – subsection 5(3)</p>	<p><i>The proposed Manitoba Act contemplates that a disclosure document may be delivered either in one document or in a series of deliveries. In contrast, disclosure must be in one document delivered at one time in Ontario, PEI (section 5(3)), and New Brunswick (section 5(3)).</i></p>
<p>Delivery Methods – Disclosure document is to be delivered personally or by registered mail, <i>fax</i> or any other prescribed method – subsection 5(4)</p>	<p>Disclosure document is to be delivered personally, by registered mail or by any other prescribed method – section 5(2)</p> <p>To date, no other forms of delivery prescribed in the regulations.</p>	<p>Section 2 of the Regulations to the <i>Franchises Act</i> (PEI) also permits delivery by courier, electronic means or in machine-readable form provided certain conditions are met.</p>
<p>Dispute Resolution – If the franchise agreement provides that disputes may be mediated or arbitrated, the disclosure document must include information about the procedure including:</p> <ul style="list-style-type: none"> • Criteria and method for selecting a mediator or arbitrator • Governing rules and procedures • Confidentiality obligations • Costs and methods of calculations • Other prescribed information and statements: subsection 5(6) 	<p>The Ontario regulations are more open-ended requiring a statement of voluntary mediation and if an alternative dispute mechanism is used by the franchisor, a description of the process and the circumstances when it may be invoked: section 5 of the Regulations to the <i>Arthur Wishart Act (Franchise Disclosure), 2000</i>.</p>	<p>More onerous and extensive dispute resolution mechanism and procedures in <i>Franchises Act</i> (New Brunswick).</p>

Bill 15 – The Franchises Act (Manitoba)	Arthur Wishart Act (Franchise Disclosure), 2000 (Ontario)	Additional Comments
<p>Substantial Compliance – A franchise complies with the disclosure requirements if the document “substantially complies” with the Act and even if the document contains a technical irregularity or mistake not affecting the substance of the document: section 5(10)</p>	<p><i>Strict compliance required in Ontario.</i></p>	<p>Similar provision in subsection 2(4) of the <i>Franchises Regulation</i> (Alberta) and section 3(3) of the Regulations to the <i>Franchises Act</i> (PEI)</p>
<p>Non-Application – Disclosure not required for the grant of a franchise if the franchise agreement is not valid for more than one year and does not involve payment of a non-refundable fee, <i>and</i> the franchisor or its associate provides location assistance including securing retail outlets or customer accounts: section 5(11)(h)</p>	<p>Additional condition of site assistance <i>not</i> included in similar Ontario exemption.</p>	
<p><i>No large franchisor exemption from disclosure.</i></p>	<p>Disclosure exemption for large franchisors investing over a certain amount: subsection 5(7)(h).</p>	
<p>Rescission – A franchisee may rescind a franchise agreement within 60 days after receiving untimely or incomplete disclosure or within 2 years of signing the franchise agreement if disclosure was never provided: sections 6(1) and (2)</p>	<p>The time periods for rescission in Ontario are similar.</p>	<p><i>Manitoba’s proposed substantial compliance provision and the ability to deliver disclosure in multiple documents at different times may change the interpretation of the rescission provision. Determining the rescission period may turn on whether the disclosure document was substantially compliant at the time that the last document was delivered. If so, the 60-day period from that time will apply. If not, the franchisee will have a 2-year period from signing the agreement.</i></p>

Bill 15 – The Franchises Act (Manitoba)	Arthur Wishart Act (Franchise Disclosure), 2000 (Ontario)	Additional Comments
<p>Confidentiality and Location Agreements – An agreement is <i>not</i> a franchise agreement if it only contains terms about keeping confidential any information (that excludes: the use of information that is in the public domain, or that is disclosed without breaching the agreement or with consent of the parties; the disclosure of information to an organization of franchisees, other franchisees, or to a franchisee’s professional advisors) or designating a location, site or territory for a prospective franchisee: sections 5(12) and 5(13)</p>	<p><i>Not permitted in Ontario</i></p>	<p>Similar provisions in subsection 4(7) of the <i>Franchises Act</i> (Alberta); section 5(9)-(10) of the <i>Franchises Act</i> (PEI); and section 5(11)-(12) of the <i>Franchises Act</i> (New Brunswick)</p> <p><i>Coupled with section 5(14), the proposed Manitoba Act permits the use of confidentiality and deposit agreements before disclosure, provided that the provisions do not violate section 5(13).</i></p>
<p>Payment of Deposit – A fully refundable deposit is not payment of “consideration” under the Act: section 5(14)</p>	<p><i>Not permitted in Ontario</i></p>	<p>Similar provision in section 4(6) of the <i>Franchises Act</i> (Alberta), except limited to 20% of initial fee – <i>no limit in proposed Manitoba Act</i></p>
<p>Exception – Crown not required to include financial statements in disclosure document: section 5(15)</p>	<p><i>Crown related franchise or license agreements exempt from disclosure.</i></p>	<p>Similar provision in section 5(9) of the <i>Franchises Act</i> (New Brunswick)</p>
<p><i>No exemption from requirement to include specified financial information in a disclosure document for large or mature franchisors.</i></p>	<p>Large or mature franchisors meeting certain criteria exempt from financial disclosure: section 13(2)</p>	<p>Similar exemption for large or mature franchisors in section 8 of the <i>Franchises Act</i> (PEI)</p>

It is expected that a public consultation will follow regarding the draft Bill and its provisions. As such, it remains to be seen whether the proposed Act will proceed in its current form or have any further amendments.

It is also important to note that some of the mechanics and information required to comply with disclosure requirements will not be determined until regulations are prepared in association with the Act if passed. In this regard, the enactment of the regulations to the New Brunswick Franchises Act – being the latest regulations of franchise legislation in Canada and expected this spring – may have an influence over the direction to be taken by Manitoba.

For more information on franchising, please contact Derwin Wong or Dixie Ho at (416) 368-0600 or by email at dwong@businesslawyers.com or dho@businesslawyers.com.