AMENDMENT TO ONTARIO FRANCHISING LEGISLATION

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On July 16, 2020, the Government of Ontario confirmed that the amendment (the "**Amendment**") to both the franchise legislation, the *Arthur Wishart Act (Franchise Disclosure), 2000* (the "**Act**"), and its General Regulation (O. Reg. 581/00) (the "**Regulation**") (collectively, the "**Legislation**") will come into force on September 1, 2020.

The Amendment, which is intended to bring both clarity and flexibility to parts of the Act and Regulation, has been eagerly awaited by many franchisors.

Deposits

Unlike in British Columbia, Manitoba, and Alberta, the current Legislation in Ontario does not permit franchisors to collect deposits from franchisees prior to the expiry of the 14-day cooling-off period following delivery of the franchise disclosure document.

Pursuant to the Amendment, franchisors will now be permitted to take deposits from the prospective franchisee prior to the expiry of the 14 day cool-down period provided that such deposits: (i) do not exceed 20% of the initial franchise fee (up to a maximum deposit of $100,000), (ii) are fully refundable, and (iii) do not bind a prospective franchisee to sign a franchise agreement.

Confidentiality and Location Designation Agreements

Under the current Legislation, Ontario franchisors are unable to have prospective franchisees sign any agreement relating to the franchise, including confidentiality or location reservation agreements, prior to the expiration of the 14-day cooling off period following delivery of a franchise disclosure document.

The Amendment specifies certain circumstances where these general rules will not apply, thereby allowing prospective franchisees to sign confidentiality or location designation agreements prior to the expiry of the 14-day cool-off period. Franchisors can avail themselves of the exception as long as the terms of the agreement only require franchisees to keep any provided information confidential, prohibit them from using any provided material, or designate a location, site or territory for their prospective franchise. There are exceptions to the above, namely, where the information is already in public domain and where such agreement prevents communication between franchisees or a prospective franchisee's professional advisors.

Statements of Material Change

The current Legislation does not provide much guidance with respect to statements of material change (including with respect to the format or required information). While many franchisors have already been including a certificate with their statements of material change, the Amendment expressly prescribes the format of the certificate (which is similar to the certificate required for the franchise disclosure document). Specifically, each statement of material change must include a certificate certifying that it contains no untrue statements, whether of a material change or otherwise, and that it includes every material change. This certificate must be signed and dated by a sole director or officer of the franchisor, or, if the franchisor has more than one officer or director, by at least two directors or officers.

Disclosure Exemptions

The Amendment addresses some of the existing ambiguity and lack of detail around certain disclosure exemptions and broadens the application of others.

Insider Exemption

The Amendment provides clarity for the franchisor officer/director disclosure exemption and its application by specifying that the exemption will apply if a franchise is granted to the officer/director personally as well as a corporation controlled by that director/officer. In each case, the officer/director must have been an officer or director of the franchisor or of the franchisor's associate for at least six months and: (i) currently is an officer or director, or (ii) not more than four months have passed since the individual ceased being an officer or director.

Fractional Franchise Exemption

Ambiguity around the assessment of fractional franchises has been rectified by the Amendment. Specifically, the Amendment now specifies that this exemption applies if the franchise's sales, as anticipated, do not exceed 20% of the total business sales in the first year of operation. Previously not having this clarification made it difficult to determine whether the exemption applied.

Small and Large Investment Exemptions

Under the current Act, a franchisor is exempt from their disclosure obligations if the prospective franchisee is making a "small" total annual investment (under $5,000) or if the prospective franchisee is making a "large" annual investment (over $5,000,000).

The Amendment modifies the method for calculating these investment amount, as well as the thresholds for both "small" and "large" investments. The Amendment increases the "small" investment threshold to a *total initial investment* of not more than $15,000. The Amendment reduces the "large" investment threshold to a

total *initial investment* in excess of $3,000,000.

The total initial investment amounts are to be calculated prior to a grant of a franchise to prospective franchisees and must include any and all deposits, fees, and estimated costs associated with the franchise.

Financial Statements in Disclosure Documents

The Amendment expands the applicable accounting standards for preparing financial statements to be included in franchise disclosure document.

Pursuant to the current Regulation, franchisors are required to prepare financial statements on an audit or review engagement basis in accordance with generally accepted auditing standards (or review engagement standards that are "at least equivalent to those set out in the Canadian Institute of Chartered Accountants Handbook"). Accordingly, financial statements prepared outside of Canada (and therefore non-compliant with the requirements) had to be accompanied by a report from a licenced Canadian accounting firm reconciling them with the applicable Canadian accounting standards.

The Amendment now permits a franchisor to prepare financial statements (either audit or review engagement) in accordance with generally accepted auditing/review and reporting standards as set out: (i) in the CPA Canada Handbook – Assurance/Accounting, (ii) by the Auditing Standards Board of the American Institute of Certified Public Accountants, the Public Company Accounting Oversight Board of the United States, or the Financial Accounting Standards Board of the United States (as applicable), or (iii) by the International Auditing and Assurance Standards Board/International Accounting Standards Board.

In light of this change, US and other international franchisors expanding to Ontario may be permitted to include their home jurisdiction financial statements in their disclosure document (without the requirement to provide a reconciliation report) provided that the financial statements meet the new requirements.

Service Marks

Lastly, the Amendment removes the regulatory requirement for franchisors to describe the use of "service marks" within their franchise operations to reflect current custom and practice.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.


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