

Amendments to the *Arthur Wishart Act (Franchise Disclosure) 2000* (the “*Wishart Act*”)

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Ontario’s Bill 154, the *Cutting Unnecessary Red Tape Act, 2017* (the “*Amending Act*”) came into force on November 14, 2017. The *Amending Act* repeals various acts, enacts various other acts, and amends various acts including the *Wishart Act*.

The *Amending Act* provides for the following changes to the *Wishart Act*:

- 1) Subsection 5(1.1) provides that confidentiality agreements and location/territory reservation agreements are excluded from the *Wishart Act*’s definition of “franchise agreement”. The effect is that franchisors are now allowed to enter into confidentiality agreements and location/territory reservation agreements without triggering their section 5 disclosure obligation. This change is consistent with franchise legislation in other provincial jurisdictions, such as British Columbia.
- 2) Subsection 1(1)(a)(ii) amends the definition of “franchise” by only requiring that a franchisor or a franchisor’s associate has a “right” to exercise control over, or offer significant assistance in, the franchisee’s method of operation. The previous definition required that the franchisor exercise that right.
- 3) Subsection 2(3)5 of the *Wishart Act* contains an exemption from the application of the *Wishart Act* where the licensor grants a license to a single licensee. The *Amending Act* clarifies that the subsection 2(3)5 exemption must involve the grant of a nation-wide license in order for the licensor to rely upon the exemption.
- 4) Subsection 5(7)(b) contains an exemption to a franchisor’s disclosure obligation where the franchise has been granted to a director or officer of the franchisor or of the franchisor’s associate. The exemption now applies to the grant of a franchise to a person (being the director or officer) for the person’s own account or to a corporation that the person controls if the person: (i) is a director or officer of the franchisor or of the franchisor’s associate for at least six months, and still holds that title; or (ii) was once a director or officer as described in (i), and not more than four months have passed since they stopped acting in that capacity.
- 5) Subsection 5(7)(e) of the *Wishart Act* and the *General, O Regulation 581/00* (the “*Regulation*”) at *Part III* section 8 contains an exemption to a franchisor’s disclosure obligation where the sales of the franchised business do not exceed 20% of the business’ total sales. The *Amending Act* makes it clear that the sales for the first year of the

franchised business that were anticipated or that should have been anticipated, at the time the franchise agreement was signed, is the amount which will be compared against the business' total sales for that year for the purposes of qualifying for the exemption.

- 6) Subsection 5(7)(g)(i) of the *Wishart Act* and *Part III* section 9 of the *Regulations*, and 5(7)(h) of the *Wishart Act* and *Part III* section 10 of the *Regulations* contain exemptions to a franchisor's disclosure obligation where the franchisee spends less than \$5,000.00, or more than \$5,000,000.00, respectively, to acquire and operate the franchise. The *Amending Act* adds that each of these amounts are referred to as the "total initial investment" which is to be determined as prescribed under the *Regulation*. Although the basis for calculating the total initial investment is not prescribed by the *Regulation* at this time, it is anticipated that the *Regulation* will be amended to require that the total initial investment be calculated in the same way as the "franchisee's costs associated with establishing the franchise" pursuant to subsection 6(1)(i) of the *Regulations*.
- 7) Subsection 5(5) of the *Wishart Act* describes a franchisor's obligation to provide a written statement of material change. The contents of a statement of material change were undefined. The *Amending Act* requires that the contents of a statement of material change are to be prescribed by the *Regulation*. Although the *Regulation* does not currently prescribe the content of a statement of material change, we anticipate changes to the *Regulation* will be made to address this in the future.
- 8) Subsection 1(1) of the *Wishart Act* contained the term "service mark" in the definitions of "franchise" and "franchise agreement" as well, the term was used in subsections 2(3)4 and 2(3)5. The term "service mark" has been removed from the *Wishart Act* because it is an American trademark concept that is not used in Canada.

Although the import of these amendments do not significantly alter a franchisor's disclosure obligations in any meaningful way, they do bring some clarity to the items enumerated above.