



Bill 45, *Making Healthier Choices Act*, 2014

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Submitted to: Ministry of the Health and
Long-Term Care

Submitted by: The Ontario Bar Association,
Franchise Law Section



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Introduction

The Ontario Bar Association (the “**OBA**”) appreciates the opportunity to provide comments to the Ontario Ministry of Health and Long-Term Care (the “**Ministry**”) on Bill 45, *Making Healthier Choices Act*, 2014, and in particular, Schedule 1 – *Healthy Menu Choices Act*, 2014 (the “**HMCA**”).

The OBA believes the proposed amendments would allow the legislation to better achieve its objective while avoiding unintended consequences on the legal and commercial relationships between the various stakeholders operating in the franchise industry.

The OBA

Established in 1907, the OBA is the largest voluntary legal association in Ontario and represents approximately 16,000 lawyers, judges, law professors and law students. The OBA is pleased to analyze and assist government with dozens of legislative and policy initiatives each year - both in the interest of the profession and in the interest of the public.

This submission was prepared by the OBA Franchise Law Section. The section has over 150 members, and includes the leading experts on franchise law issues. Members of the section include lawyers who represent franchisors and franchisees, advise boards, management and industry groups on franchise and other related regulatory issues, and who regularly speak at industry group and legal conferences around the world.

Comments

The OBA supports the government’s overall objective of helping Ontarians make informed and healthier food choices. However, we have concerns that as drafted, the *HMCA* is overly broad in defining the class of persons required to comply with the proposed menu and signage requirements.

Section 2. (1) of the *HMCA* reads:

Every person who owns or operates a regulated food service premise shall ensure that there is displayed, in accordance with the requirements of this section, the following information... [emphasis added]



Section 1. (2) of the *HMCA* reads:

Section 1(2) For the purposes of this Act, and without in any way restricting the ordinary meaning of “owns or operates”, a person who owns or operates a regulated food service premise includes a franchisor, a licensor, a person who owns or operates a regulated food service premise through a subsidiary, and a manager of a regulated food service premise, but does not include an employee who works at a regulated food service premise but is not a manager.

The OBA recognizes that there are many different forms of ownership and organizational structure that may be applicable to food premises that the *HMCA* intends to cover. These include food service premises that are operated by a sole proprietor, a partnership or a corporation or, as is sometimes the case, a licensor or franchisor operating the establishment for its own account.

It is important to note that for different food service operations, there will be different persons having the ability to ensure that the menu and signage requirements are met.

The application of the *HMCA* to licensors is problematic as licensors do not exert control over the method of operation of their licensees beyond controls aimed at protecting the licensed trademark or other commercial symbols. Licensors merely grant to the licensee a right to use a trademark or other commercial symbols in exchange for a licensing fee. In context of the *HMCA*, a licensor would not have the necessary control over the operation of the business to require its licensee to comply with the requirements nor would it have the legal authority to enter onto the licensee’s premises to comply with the requirements itself.

The application of the *HMCA* to franchisors is also problematic as the relationship between a franchisor and a franchisee is an independent contractual relationship. A hallmark of the franchisor-franchisee relationship is the independent operation of the underlying business by a franchisee for its own account. Franchise agreements typically require the franchisee to comply with federal and provincial laws in the day-to-day operation of the franchised business.

Lastly, the *HMCA* applies to managers of regulated food service premises, many of whom would not have any responsibility or control over complying with menu and signage requirements.

The OBA submits that the legislative objectives are best achieved by remaining neutral as to ownership and organizational structure, and instead making it clear which persons have responsibility for complying with the legislation.

The OBA’s view is that the obligation to comply with the menu and signage requirements ought to rest with the operator of the regulated food service premise, and not with individuals who may have no organizational decision-making authority.



The OBA recommends that the *HMCA* be amended to adopt the purposive approach taken in the *Health Protection and Promotion Act* (the “**Health Promotion Act**”), which imposes liability on those who have responsibility for and control over activities carried on at the regulated food premise.

Section 1(1) of the *HMCA* already defines “food service premise” as any food premise as defined in the *Health Promotion Act*, where meals or meal portions prepared for immediate consumption or sold or served in a form that will permit immediate consumption on the premises or elsewhere.

We note that Section 16.1 of the *Health Promotion Act* requires that “every person who operates a food premise shall maintain and operate the food premise in accordance with the regulations.” [emphasis added]

For present purposes, Section 1(1), the *Health Promotion Act* defines an “operator” in relation to a food premise as “a person who has responsibility for and control over an activity carried on at the food premise...”

Amending the *HMCA* to adopt the same approach as the *Health Promotion Act* fosters a purposive approach to achieving the objectives of the proposed legislation and avoids making legislative assumptions that do not reflect the realities of the ownership and organizational structure.

We would add that the same kind of scrutiny that should be exercised in terms of who has control for complying with the requirements should be exercised in determining who would be subject to the extreme powers of a warrantless search, as set out in Section 3(2) of the *HMCA*. We submit that this section should also be amended to focus on operators of food service premises, who exercise responsibility for and control over activities carried on at the premise.

In the alternative, if the Ministry declines to amend the *HMCA* as described above in order to place obligations on persons who have responsibility for and control over activities at the food premise, the OBA recommends that the *HMCA* be amended to accurately reflect the division of control between franchisees and franchisors. In this alternative, the OBA recommends that the *HMCA* be amended to indicate that franchisors are responsible for providing franchisees with the required information on standard food items, and that franchisees are responsible for displaying the required information at regulated food premises.

Conclusion

The OBA appreciates the opportunity to make this submission in respect of Bill 45, and would be pleased to provide further assistance to the Ministry in addressing the proposed legislation.



Appendix 1 - Proposed Amendments

Amend Sections 2(1) and 2(6) of the *HMCA*, by deleting the words “owns or” as follows:

Information to be displayed

2. (1) Every person who ~~owns or~~ operates a regulated food service premise shall ensure that there is displayed, in accordance with the requirements of this section, the following information...

Signs

2. (6) Every person who ~~owns or~~ operates a regulated food service premise shall ensure that there are publicly posted at the regulated food service premise, in a manner that is in accordance with the regulations, one or more signs that contain any caloric or nutritional information that may be required by the regulations.

Amend Section 1(1) of the *HMCA*, by adding a definition of “operates” as follows:

Interpretation

“operates” in relation to a regulated food premise means a person who has responsibility for and control over activities carried on at the food premise.

Delete Section 1(2) of the *HMCA* in its entirety, as follows:

~~Franchisors, etc.~~

~~(2) For the purposes of this Act, and without in any way restricting the ordinary meaning of “owns or operates”, a person who owns or operates a regulated food service premise includes a franchisor, a licensor, a person who owns or operates a regulated food service premise through a subsidiary, and a manager of a regulated food service premise, but does not include an employee who works at a regulated food service premise but is not a manager.~~



Amend Section 3 of the *HMCA*, as follows:

Inspection

(2) For the purpose of determining whether this Act is being complied with, an inspector may, without a warrant, enter and inspect,

(a) a regulated food service premise; or

(b) any business premises of a company that ~~owns or operates, franchises or licenses~~ one or more regulated food service premises.