



May 4, 2016

Via email: businesslawpolicy@ontario.ca

**Ministry of Government and Consumer Services
Policy Branch
777 Bay Street, 5th Floor
Toronto, ON M7A 2J3**

Re: Enabling Delivery of Disclosure Documents under the *Arthur Wishart Act (Franchise Disclosure, 2000)* (the “Act”)

Attention: Business Law Review

The Ontario Bar Association (“OBA”) is pleased to submit the following comments to the Ministry of Government and Consumer Services (“the Ministry”) regarding the proposed amendments to Regulation 581/00 that would provide rules for the delivery of a disclosure document by courier or electronically.

The OBA’s prior submission to the Ministry on improving the Act included a recommendation to prescribe courier and electronic delivery as permissible methods of delivering disclosure, and we commend the Ministry for moving forward with that recommendation.¹

The OBA

Established in 1907, the OBA is the largest voluntary legal association in Ontario and represents some 16,000 lawyers, judges, law professors and law students. The OBA is pleased to analyze and assist the provincial government in Ontario 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”), which has over 240 members who are leading experts in franchise law issues, including those whose legal practices are devoted to representing franchisors, franchisees, or both.

Comments

The draft regulation includes the following provision:

12(2) A disclosure document delivered in accordance with subsection (1) is not effective until the franchisor receives an electronic acknowledgment of receipt from the prospective franchisee.

The Section has two concerns with this provision as drafted.

First, this provision should not make non-compliance with a specific and technical requirement result in a disclosure document that is “not effective”. The term “not effective” suggests that there will be “no disclosure document at all”, meaning the 2-year rescission period under section 6(2) of the Act might

¹ <https://www.oba.org/submissions>



apply. This would be a departure from a decision² that held that the 2-year rescission period did not apply to an otherwise compliant disclosure document merely because it was improperly delivered (e.g. delivered by email). It would also lead to unintended and disproportionate consequences between the parties, in that it would give the prospective franchisee control over whether the franchisor has complied with the regulation – i.e. with the result that the franchisee could ensure the availability to it of a 2-year rescission right simply by withholding its acknowledgment of receipt of the disclosure document.

Second, it is not clear why the acknowledgement of receipt needs to be only in an electronic format. This seems unnecessarily restrictive. The Section's view is that there is no reason why a printed and signed hardcopy should not suffice, one that is sent electronically or by another method of delivery. The regulation, as proposed, could lead to an absurd result if a franchisor that delivers a perfectly compliant disclosure document electronically and gets a paper receipt would nevertheless face a 2-year rescission remedy merely because of the form of the receipt of the prospective franchisee.

The Section's view is that both of the concerns outlined above should be addressed and that the delivery requirements in the regulation be harmonized with the requirements already in force in PEI, New Brunswick and Manitoba.³ The Section recommends that draft section 12(2) be deleted and replaced with a corresponding provision that avoids these two issues, such as found in the regulations in New Brunswick and Manitoba.

Proposed Changes

The Section proposes the following changes:

12. (1) ~~Subject to subsection (2), for~~ **For** the purposes of subsection 5(2) of the Act, a franchisor may deliver a disclosure document to a prospective franchisee by electronic transmission if the document,

- (a) is delivered in a form that enables the recipient to view, store, retrieve and print it;
- (b) contains no links to external documents or content; and
- (c) contains an index for each separate electronic file, if any, of which the document consists, where each index sets out,

² See, for example, *Vijh v. Mediterranean Franchise Inc. et al.* [2012] ONSC 3845, where Belobaba J., wrote: "...the two-year right of rescission is not available where a complete disclosure document was provided, as here, but it was provided by email rather than registered mail. If a breach of the timing or content requirements under ss. 5(1) and 5(4) allows only a 60-day right of rescission under s. 6(1), then a breach of the method of delivery requirement under s. 5(2), which by any measure is much less significant, cannot sensibly justify a two-year right of rescission under s. 6(2)."

³ Section 5(4) of the Manitoba *Franchises Act* permits delivery of a disclosure document by personal delivery, registered mail, by "fax" (not practical, in our view, given the length of a typical disclosure document) or by any other prescribed method. Section 5(1) of Man. Reg. 29/2012 also permits delivery by prepaid courier and electronic means. Section 5(2) of the New Brunswick *Franchises Act* permits delivery of a disclosure document by personal delivery, by registered mail or by any other prescribed method. Section 3(1) of NB Reg. 2010-92 also permits delivery by prepaid courier and electronic means. Like Manitoba and New Brunswick, Section 2 of PEI Reg. EC232/06 under the PEI *Franchises Act*, permits delivery by prepaid courier and electronic means.



- (i) *the file name, and*
- (ii) *if the file name is not sufficiently descriptive of the subject matter dealt with in the file, a statement of that subject matter,*

and if a written acknowledgment of receipt is received from the prospective franchisee.

~~———— (2) A disclosure document delivered in accordance with subsection (1) is not effective until the franchisor receives an electronic acknowledgment of receipt from the prospective franchisee.~~

~~(3) (2) A franchisor may deliver a disclosure document to a prospective franchisee by courier if the franchisor pays the costs of the delivery.~~

Conclusion

Once again, the OBA appreciates the opportunity to comment on this proposal and hopes that its submissions will assist you in this matter.

Yours truly,

Jeffrey Hoffman
Chair, Franchise Law Section, Ontario Bar Association