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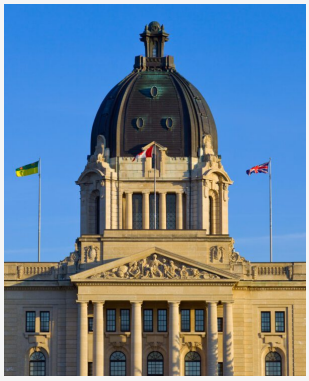
Saskatchewan's Franchise Disclosure Act receives royal assent

MAY 10, 2024 6 MIN READ



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Saskatchewan recently become the seventh Canadian province to enact franchise legislation, joining Alberta, Ontario, Prince Edward Island, New Brunswick, Manitoba and British Columbia. Last fall, the Legislative Assembly of Saskatchewan introduced Bill 149, *The Franchise Disclosure Act* (the Saskatchewan Act), which is the province's first and only comprehensive franchise statute. The Saskatchewan Act received royal assent on May 8, 2024, and will come into force on a currently unknown date to be set by the Lieutenant Governor in Council.

Legislative history

The Government of Saskatchewan had a brief call for public input about the need for franchise legislation and the use of the *Uniform Franchises Act* adopted by the Uniform Law Conference of Canada as a starting point. In response, the Canadian Franchise Association submitted a number of recommendations, including urging the province to follow the most recently enacted provincial franchise legislation, British Columbia's *Franchises Act* (the B.C. Act), which was enacted in 2016 and came into force in 2017. The Saskatchewan Act is substantially similar to legislation already in place in the other regulated provinces and follows the B.C. Act particularly closely.

As with the legislation in the other provinces, when in force, the Saskatchewan Act will primarily

1. impose a duty of fair dealing among the parties to a franchise agreement and remedies for a breach of that duty
2. confirm franchisees' right of association and provide remedies for infringement
3. require franchisors to provide a disclosure document, including prescribed information, to a franchisee prior to the franchisee entering into a franchise agreement
4. provide for a rescission remedy and a right of action for misrepresentation or damages for a franchisor's failure to comply with the disclosure obligation
5. create other rights of action for damages
6. prevent the waiver of application of the Saskatchewan Act, other than in the course of the

resolution of a claim or dispute that is subject to the legislation

Bill 149 passed first reading on November 9, 2023, and second reading on March 4, 2024, at which point it was referred to the Standing Committee on Intergovernmental Affairs and Justice (the IAJ Committee). The IAJ Committee made an amendment (described below) to the bill on April 15, 2024, following which Bill 149, as amended, passed third reading on April 16, 2024, and received royal assent on May 8, 2024.

Comparison to other provincial franchise legislation

The Saskatchewan Act narrows the definition of "franchise" to circumstances where the franchisor (or franchisor's associate) *exercises* significant control over, or *provides* significant assistance in, the franchisee's method of operation. By contrast, the equivalent provision in Ontario's *Arthur Wishart Act (Franchise Disclosure)*, *2000* (the Ontario Act) has a lower threshold, where the franchisor (or franchisor's associate) has *a right to exercise* significant control or *has a right to* provide significant assistance. Whether an arrangement meets the definition of a franchise in Saskatchewan centres on whether the franchisor actually exercises significant control or provides significant assistance, not simply if they have a right to do so or offer to do so.

Accordingly, the Saskatchewan Act implies that there will need to be evidence of a franchisor's actions, and not just evidence of contractual rights, to show that a given franchise arrangement meets the definition of a franchise. This potentially presents a higher evidentiary burden for plaintiffs claiming rights pursuant to the legislation where it is not conceded that the business arrangement gives rise to a "franchise."

The first- and second-reading versions of Bill 149 provided that a franchisee may rescind the franchise agreement within two years after entering into the franchise agreement if the franchisor "fails to provide the disclosure document within those two years". The reference to providing a disclosure document "within two years" was a notable divergence from any existing franchise legislation in Canada. A plain reading suggested that if a disclosure document is not received by a franchisee prior to the execution of a franchise agreement, the franchisor can remedy this by delivering a disclosure document within two years after the franchisee enters into the franchise agreement — long after the franchisee has made its investment decision — and end the two-year rescission period early. However, in its review, the IAJ Committee struck out "fails to provide the disclosure document within those two years" and replaced it with "never provided a disclosure document", thereby aligning the rescission remedy in the Saskatchewan Act with the rescission remedy in the franchise legislation in the other six provinces.

The Saskatchewan Act contains some notable differences compared to the B.C. Act and the Ontario Act with respect to the application of certain requirements to government entities, as there are no exemptions for franchise-like contracts with the Crown. For example, it does not relieve the government of Saskatchewan from the requirement to provide financial statements in a disclosure document (unlike the B.C. Act, where the B.C. government is exempt from this requirement). The Saskatchewan Act also does not expressly exclude application to a service contract or franchise-like arrangement with the provincial Crown (unlike in the Ontario Act, which makes explicit exclusions for these arrangements with the Crown).

Mirroring the B.C. Act, the Saskatchewan Act includes a substantial compliance provision in respect of disclosure documents and statements of material change. The provision includes a limited safe-harbour provision for certain defects, irregularities or errors that would not void a disclosure document or statement of material change.

Finally, the Saskatchewan Act provides the Lieutenant Governor in Council a broad range of powers and discretion in respect of the categories of information to be prescribed in future regulations, including a broad right to make regulations respecting any matter or thing that the Lieutenant Governor in Council considers necessary to carry out the intent of the Act. This is in contrast to the B.C. Act, which restricts the Lieutenant Governor in Council to making regulations in respect of a finite list of issues.

Included in the topics that the Lieutenant Governor in Council can address are details on the types of cooperative organizations that may be exempt from application of the Saskatchewan Act, acceptable methods for delivering the disclosure document and exempting specific classes of persons, organizations, relationships or arrangements from the Saskatchewan Act. The Saskatchewan Act's deference to regulation suggests that the legislature likely intended to impart the Saskatchewan Act with greater flexibility to contemplate ongoing legislative updates as franchising in the province (and the rest of the country) evolves.

Next steps

The Saskatchewan Act does not yet have a coming-into-force date, and draft regulations to the Saskatchewan Act have not yet been published. However, if Saskatchewan follows the pattern of other provinces with franchise legislation, it is most likely that there will be a delay between the regulations being finalized and coming into force to allow franchisors to prepare. Osler will continue to monitor the progress of the Saskatchewan Act and its associated regulations.

If you have any questions on how the new Saskatchewan Act may impact your franchise system, please contact a member of the Osler Franchise Group.