

December 2016

Business Law Advisory Council Releases Fall 2016 Report

In March 2016, Ontario's Ministry of Government and Consumer Services ("MGCS") established a new Business Law Advisory Council (the "**Council**"), which was tasked with putting forward recommendations for modernizing Ontario's corporate and commercial statutes. The Council was established following recommendations made to MGCS by the Business Law Agenda Stakeholder Panel, a volunteer panel of expert corporate and commercial lawyers and legal academics, in its June 2015 report. Among other things, the panel recommended that a regular formal process be put in place to continuously review and update Ontario's corporate and commercial statutes so as to ensure a competitive and efficient business law framework. For a review of the other recommendations made by the panel, please consult our bulletin on the formation of the Council [here](#).

MGCS recently posted the Council's Fall 2016 Report (the "**Report**") to solicit input and feedback from business and legal stakeholders as well as the general public. Please click [here](#) for a copy of the Report. Comments are due by December 12, 2016 and can be made by submitting comments through email or mail at the addresses found [here](#).

The Report recommends amendments to the following Ontario legislation:

- *Arthur Wishart Act (Franchise Disclosure), 2000* (the "**AWA**") and the general regulation made under the AWA (the "**AWA Regulation**")

- *Business Corporations Act* (the “**OBCA**”)
- *Personal Property Security Act* (the “**PPSA**”) and *Repair and Storage Liens Act* (the “**RSLA**”)

This bulletin will focus on the proposed reforms to the OBCA and the AWA. An analysis of the proposed PPSA and RSLA reforms can be found [here](#).

OBCA Reform Proposals

Director Residency Requirements. The first such reform involves eliminating the current requirement under the OBCA that 25% of directors of Ontario corporations be resident Canadians. According to the Council, this residency requirement imposes an undue burden on foreign businesses that might otherwise have considered incorporating in Ontario. It also leads to businesses deciding to incorporate in other Canadian jurisdictions without similar requirements. In order to maintain the efficacy of investigations and prosecutions, the Council also suggests introducing a requirement whereby non-resident directors will provide an agreement to attorn to the laws of Ontario with respect to the corporation either in advance or within 10 days of their first election.

Shareholder Proposals. The second such reform involves amending the provisions of the OBCA that prohibit shareholders from putting a proposal forward if the same proposal was made and defeated in the previous year. In particular, the Council is advocating for a proposal regime mirroring that of the *Canada Business Corporations Act*, whereby shareholders are entitled to put forward the same proposal if it received a prescribed level of support in the first year or received a prescribed increased level of support in subsequent years.

Process for Submitting Proposals. The final such reform would enable non-offering corporations to specify in their by-laws the time period within which shareholders must submit proposals, subject to certain constraints. More specifically, shareholders would be prohibited from submitting proposals more than 60 days prior to the

anniversary of the last annual meeting or within fewer than 10 days prior to the shareholder meeting. According to the Council, this would enhance shareholder democracy while also ensuring that management is able to adequately respond to any proposal submitted.

Additional Reforms. The Council also reviewed and commented on certain reform proposals to the OBCA and other relevant laws that were already being considered by MGCS at the time the Council was formed. The measures that the Council agreed should move forward included repealing the *Bulk Sales Act* (the “**BSA**”), reforming the requirements relating to quorum at shareholder meetings so as to prevent abuse by minority shareholders and broadening the flexibility of directors to meet outside of the location of their registered corporate office. These proposed amendments were included in Bill 27, the *Burden Reduction Act, 2016*. At the time of this report, Bill 27 was in second reading debate.

AWA Reform Proposals

Definitions. The Council recommends amending the definition of “franchise” to: (i) clarify the types of intellectual property that may form the basis of a franchise and that such intellectual property may be licensed to or owned by the franchisor; and (ii) ensure that franchisors that have the right to exert significant control over, or to provide significant assistance in, the franchisee’s method of operation are not exempted from the AWA simply because the franchisor fails to exercise that right. The Council also recommends narrowing the definition of “franchise agreement” to clarify that only the agreement by which the franchise is actually granted to the franchisee triggers the franchisor’s disclosure obligations (and potential rescission claims by the franchisee) and not for example, a deposit, confidentiality agreement or other ancillary agreements that tend to be entered into with a prospective franchisee before signing the actual franchise granting agreement.

Non-application of the AWA. Agreements between a licensor and a single licensee for use of a specific trade mark, trade name, or other commercial symbol where such license is the only one of its

general nature or type to be granted by the licensor are exempt from the AWA pursuant to s. 2(3)(5) of the AWA. The Council recommends amending the subsection to specify that the relevant geographic scope of such a license grant is all of Canada.

Financial Information. As it relates to franchisor disclosure obligations under s. 5 of the AWA, the Council recommends that U.S. GAAP and GAAS, as well as IFRS and IAASB auditing and review engagement standards as adopted by other countries, be deemed to be acceptable bases for the preparation and auditing or review of franchisor financial statements required to be attached to the disclosure document. This amendment is intended to lessen the burden on foreign franchisors considering entry into Ontario, who currently must determine whether their financials are prepared using GAAP "at least equivalent to" Canadian GAAP as per the AWA Regulation.

Material Change Statement. To ensure consistency in information provided in a material change statement and certainty of compliance with s. 5.(5) of the AWA, the Council recommends that either the content of the statement of material change or the form itself be prescribed to correspond to the prescribed content in the disclosure document certificate.

Exemptions from Franchise Disclosure Requirements

Officer or Director Exemption (s. 5(7)(b) of the AWA). This exemption applies when a franchise is granted to a former officer or director of the franchisor for that person's own account. The Council supports the recommendations of the Ontario Bar Association that the subsection be amended to: (i) clarify that the exemption ceases to be available on the expiry of a 120 day period after the prospective franchisee ceases to hold such director or officer position; and (ii) confirm that the exemption also applies when the prospective franchisee is a corporation owned by such former director or officer.

Fractional Franchise Exemption (s. 5(7)(e) of the AWA). This exemption applies in the case of a "business within a business",

where the franchise composes a relatively small part of the overall enterprise (anticipated at less than 20% of total sales of the business). The time period over which to calculate such anticipated percentage of sales is not specified. To ensure consistency in approach and certainty of compliance, the Council recommends that the subsection be amended to explicitly state the time period for calculating anticipated percentage of sales is the first year of operation of the franchise.

Small Investment Exemption (s. 5(7)(g)(i) of the AWA). This exemption applies when the total annual investment a franchisee has to make to acquire and operate the franchise is less than \$5000. To add certainty to the calculation, the Council recommends replacing the concept of "total annual investment" with the "initial investment to acquire and set up the franchise" that is anticipated by the parties at the time of signing the franchise agreement.

Large Investment Exemption (s. 5(7) (h) of the AWA). This exemption applies when the prospective franchisee is investing \$5,000,000 in the acquisition and operation of the franchise over a one year period. Similar to the proposed amendments to add certainty to the Small Investment Exemption calculation, the Council recommends that the calculation be of the up-front investment amount, calculated at the outset of the franchise relationship. Since the amendment would limit the prescribed amount to acquisition and set-up costs (as opposed to operational costs), the Council further recommends reducing the threshold amount from \$5,000,000 to \$3,000,000.

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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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