

FRANCHISE LAW PRACTICE GROUP

FRANCHISE ARTICLE SERIES: WHAT IS A FRANCHISE?

As of February 1, 2019, two years will have passed since the B.C. *Franchises Act* came into force (the "**Act**"). Since the enactment of this legislation, the Franchise Law Practice Group at Pushor Mitchell LLP has helped franchisors and franchisees navigate the Act, ensuring that those interested in operating a franchise business are compliant with the legislation's many requirements so that they can focus on what is most important: running a successful business!

This article is part of a series of articles that document some key considerations about franchising including some of the pitfalls and the opportunities which our firm has seen and advised upon over the past two years.



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WHAT IS A FRANCHISE?

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In a previous article, we discussed the importance of franchisors providing **Franchise Disclosure Documents** to franchisees. Since the Franchises Act (the "**Act**") was implemented in 2017, our Franchise Law Practice Group has encountered many examples of franchisors who have not complied with the requirement to provide such a Franchise Disclosure Document. The reality is that some franchisors simply did not know about the existence of the Act and its regulation while others were aware of the legislation but thought that it did not apply to their business.

Does the *Franchises Act* apply to my business?

In order to determine whether the *Act* applies to a particular business model, one must first review the definition of a "franchise" in the Act as well as in relevant court decisions.

The definition of "franchise" is broader than most people expect and may capture certain licensing, distribution, or other arrangements. Importantly, the courts look at the substance of the arrangement, not the title given to the arrangement by the parties.

For the entire definition, please see subsection 1(1) of the Act, however the following excerpt provides a good starting point (note: the emphasis in the following text is our own):

"Franchise" means a right to engage in a business in which a franchisee is required to ... make a payment or continuing payments, to a franchisor ..., and in which

(i) the franchisor grants the franchisee the right to sell, offer for sale or distribute goods or services that are substantially associated with the franchisor's or the franchisor's associate's trademark, trade name, logo or advertising or other commercial symbol, and

(ii) the franchisor or the franchisor's associate **exercises significant control over, or offers significant assistance for, the franchisee's method of operation**, including building design and furnishings, locations, business organization, marketing techniques, or training...

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The portion of the definition that is often in question is the requirement that the franchisor **exercises significant control over**, or offers significant assistance for, the franchisee's method of operation.

We are not aware of any court decisions based on the Act with respect to this issue; however, the courts in other provinces with similar legislation have considered the question and have engaged in a **contextual analysis** to determine whether one company has sufficient control over another company to be considered a franchisor.

What are the Courts saying?

Two examples of situations where courts found a franchise relationship even though the "franchisor" did not believe a franchise existed are:

1. A defendant entered into brokerage licensing agreements with various parties including the plaintiff. Licensees were provided with manuals, guidelines and resource kits containing the concepts and methodology integral to conducting the business. The plaintiff argued that the agreements did in fact meet the definition of a franchise. The court found that the defendant exercised significant control over the plaintiff's method of operation. The licensing agreement itself noted "**the necessity of operating the licensed business in strict conformity with the company's standards and specifications.**" The defendant also provided the plaintiff with billing and invoicing services, collection services, office support, accounting support, and other services.

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2. In another case, the defendants argued that they never entered into a franchise agreement despite their initial intention to do so. They argued that they entered into an asset purchase agreement for a restaurant, a sublease, and a license agreement. Initially a draft franchise agreement was prepared by the defendants but rejected by the plaintiffs. No further franchise agreement was prepared. The court found that although the plaintiffs had refused to sign the draft franchise agreement presented to them by the defendants, the **relationship between them was nevertheless a franchise**. Factors taken into consideration included the fact that the defendant designed and supervised construction of the store and ordered and paid for the equipment for the store. The defendant also provided the menu for the store and the plaintiff was obliged to serve the food described in the menu. The plaintiff was similarly required to use special trademark sauces of the restaurant. The transaction was structured in a manner typical of franchise transactions.

At Pushor Mitchell LLP, our Franchise Law Practice Group is happy to assist business owners and potential franchisors determine whether their business model or proposed business relationships will be governed by the Act. We are able to advise on alternative structures and our firm can further assist across a wide-range of business and personal needs. Should you require assistance, please contact any of the members of our Franchise Law Practice Group using the information provided on the front page of this article.

This article is provided as information only and should not be construed as legal advice. Always consult with a lawyer to provide you with advice specific to your own situation. For more information, please contact any member of the Franchise Law Practice Group at Pushor Mitchell LLP by calling (250) 762 – 2108 or visiting our website at www.pushormitchell.com.