

Generally speaking, there are two distinct commercial aspects to the purchase of any franchise:

- (a) entering into a Franchise Agreement and related documents in which Franchisor grants Franchisee the right to operate the Franchised Business; and
- (b) the purchase and sale of the assets to be used in the operation of the Franchised Business.

For the purchase of a new Franchise, both commercial aspects are almost always carried out by or through Franchisor, the assets being purchased from Franchisor, entities affiliated or associated with Franchisor, or through suppliers designated by Franchisor.

For the purchase of an existing Franchise, the commercial aspects are carried out separately. The new (purchaser) Franchisee acquires the assets used in the operation of the Franchised Business directly from the existing (vendor) Franchisee. Additionally, the existing (vendor) Franchisee either “assigns” the existing Franchise Agreement to the new (purchaser) Franchisee or the new (purchaser) Franchisee enters into a new Franchise Agreement with Franchisor, the existing Franchise Agreement with the existing (vendor) Franchisee being terminated by mutual agreement.

There are a number of other significant differences between purchasing a new as opposed to an existing Franchise. When purchasing a new Franchise:

- (a) Franchisor must provide a Disclosure Document to the prospective Franchisee in accordance with the Arthur Wishart Act (Franchise Disclosure) 2000 (the “Act”);
- (b) Franchisee must usually pay an initial franchise fee to Franchisor;
- (c) Franchisee receives from Franchisor the right to operate the Franchised Business for the standard term then being offered by Franchisor (usually limited by the length of the term available under any lease) as set out in the Franchise Agreement. Generally, terms range between five (5) to ten (10) years and often contain one or more rights of renewal for a term(s) equal to the original term granted; and
- (d) Generally speaking there is no payment for “goodwill”.

When purchasing an existing Franchise:

- (a) Franchisor is not obligated to provide a Disclosure Document to the new (purchaser) Franchisee in accordance with the Act since the Act provides an exemption to Franchisor from the obligation to deliver a Disclosure Document when the sale of a Franchise is for Franchisee's own account and the grant is not effected by or through Franchisor. However, in most circumstances the exemption is not practically available since most Franchisors will require that the new (purchaser) Franchisee execute Franchisor's current form of Franchise Agreement and/or require the principal(s) of the new (purchaser) Franchisee to execute a personal guarantee(s). These circumstances would require the delivery of a Disclosure Document to the new (purchaser) Franchisee;

- (b) Franchisee is not required to pay an initial franchise fee to Franchisor;
- (c) Franchisee will only have the right to operate the Franchised Business for the balance of the original, and any renewal terms, left in the existing Franchise Agreement.
- (d) The new (purchaser) Franchisee will have the opportunity to review the financial performance of the Franchised Business before making his/her decision. The purchase price is thus likely to be calculated based on the cash flow generated. As such, if the Franchised Business is profitable, the new (purchaser) Franchisee will pay to the existing (vendor) Franchisee as part of the purchase price an amount in excess of the actual 'cost' of the assets usually attributed to "goodwill".