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THE LAW FOUNDATION OF BRITISH COLUMBIA

Consultation Paper on a Franchise Act for British Columbia

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The British Columbia Law Institute was created in 1997 by incorporation under the provincial *Society Act*. Its strategic mission is to be a leader in law reform by carrying out:

- the best in scholarly law reform research and writing; and
- the best in outreach relating to law reform.

This project was made possible with the sustaining financial support of the Law Foundation of British Columbia and the Ministry of Justice for British Columbia. The Institute gratefully acknowledges the support of the Law Foundation and the Ministry for its work.

Call for Responses

We are interested in your response to this consultation paper.

Responses may be sent to us in one of three ways—

by mail: British Columbia Law Institute
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Attention: Greg Blue

by fax: (604) 822-0144

by email: gblue@bcli.org

If you wish your response to be considered by us as we prepare a final report on franchise legislation for British Columbia, we must receive it by **September 30, 2013**.

Your response will be used in connection with the B.C. Franchise Legislation Project. It may also be used as part of future law-reform work by the British Columbia Law Institute or its internal divisions. All responses will be treated as public documents, unless you expressly state in the body of your response that it is confidential. Respondents may be identified by name in the final report for the project, unless they expressly advise us to keep their name confidential. Any personal information that you send to us as part of your response will be dealt with in accordance with our privacy policy. Copies of our privacy policy may be downloaded from our website at: <http://www.bcli.org/privacy>.

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EXECUTIVE SUMMARY

Background

Franchises are very prevalent in Canadian business. They are estimated to account for 40 per cent of Canadian retail sales and to employ one in every 22 inhabitants of Canada. Franchises are especially common in the sectors that deal directly with the average consumer, including food and beverage outlets, the hospitality industry, car dealerships, and other retailers of goods and services.

Franchises are business arrangements in which the franchisor grants the franchisee the right to market goods or services under the franchisor's trademark or trade name, usually for a limited period of time, in return for payment of fees and royalties from the sale revenues. The franchisee is usually obligated to purchase inventory or supplies from the franchisor or suppliers approved by the franchisor, and may be required to contribute to an advertising fund controlled by the franchisor. The franchisor may commit to provide training and various forms of operational support to the franchisee.

A characteristic of most franchises is that the franchisor is entitled to exercise significant control over the operation of the franchisee's business. This allows the franchisor to implement a consistent business strategy and common policies aimed at building and retaining customer loyalty and goodwill for its product line or service. When functioning well, the franchisor-franchisee relationship is mutually profitable. The level of control a franchisor typically has over the franchisee's business and the superior economic and bargaining power usually resting with the franchisor are nevertheless capable of being exerted oppressively, without regard for the franchisee's economic interests.

Prospective franchisees are highly dependent on the franchisor for crucial information prior to making a decision to acquire a franchise at a particular location. If vital information is withheld or if they are misled, they stand to lose greatly. The franchisor, on the other hand, will profit from an initial franchise fee and royalties on gross sale proceeds even if a franchise fails quickly or is unprofitable. In addition, franchise agreements are seldom fully negotiated. In most cases, franchisees must accept the franchisor's standard terms.

These realities have caused many jurisdictions in Canada, the U.S. and elsewhere to regulate the sale of franchises and post-sale aspects of the franchisor-franchisee relationship.

Canadian Franchise Legislation

Five Canadian provinces have franchise legislation: Alberta, Ontario, New Brunswick, P.E.I. and Manitoba. The legislation is very similar, and the *Uniform Franchises Act* developed by the Uniform Law Conference of Canada is representative of the general scheme of these provincial enactments. The legislation of Alberta and Ontario provided the foundation for the the *Uniform Franchises Act*, which in turn influenced the legislation of the other three provinces. Manitoba has the most recent statute.

The chief features of the *Uniform Franchises Act* and existing Canadian franchise legislation are:

- franchisors must disclose financial statements and specific information about the franchise system, the business record of the franchisor, and the franchise being offered, to prospective franchisees at least 14 days before a franchise agreement is signed or any payment is made to the franchisor;

- if disclosure is deficient, or if there is no disclosure, the franchise agreement may be rescinded at the option of the franchisee within a specified period;

- a duty of fair dealing is expressly imposed on the franchisor and franchisee in the performance and enforcement of the franchise agreement;

- a franchisee may sue the franchisor to recover losses arising from a misrepresentation in a disclosure document, whether or not the misrepresentation becomes a term of the franchise agreement, unless the franchisee entered into the franchise agreement with knowledge that the misrepresentation was incorrect;

- franchisors are prohibited from preventing or interfering with the freedom of franchisees to associate and form associations;

- terms in a franchise agreement purporting to prevent application of the legislation (such as a choice of law clause providing that the law of another jurisdiction governs the contract), or that would require disputes involving a locally based franchise to be decided by courts outside the enacting jurisdiction, are void;

- rights under the legislation cannot be waived or released;

- rights conferred by the franchise legislation are in addition to any other rights the respective parties have in law.

The *Uniform Franchises Act* also requires mandatory mediation of disputes arising from a franchising agreement if a party to the franchising agreement chooses to initiate the procedure. Only New Brunswick has adopted this particular feature.

The Consultation Paper

This consultation paper examines whether British Columbia should follow the example of the five other provinces and enact legislation to regulate franchising. It begins by describing the legal nature of a franchise and the different categories of franchising arrangements in use. It explores the dynamics and legal aspects of the franchisor-franchisee relationship, and reviews the franchise legislation in force in Canada as well as the *Uniform Franchises Act*. American, Australian and and UNIDROIT models for franchise regulation are briefly reviewed as well.

The final chapter contains tentative recommendations on which readers are invited to comment. The recommendations are described as "tentative" because they are subject to reconsideration and revision following the consultation period. Following consideration of the responses to the consultation paper, BCLI will finalize and publish its recommendations in a report.

Franchise Legislation for British Columbia

The principal tentative recommendation of the consultation paper is that British Columbia should enact franchise legislation based generally on the *Uniform Franchises Act*, apart from its dispute resolution provisions calling for mandatory mediation. This would provide important protections for franchisees based in British Columbia, equivalent to ones enjoyed by their counterparts in neighbouring Alberta and four other provinces.

Enacting the *Uniform Franchises Act* would contribute to the already high degree of harmonization of franchise laws within Canada, and further the objectives of the federal-provincial *Agreement on Internal Trade*. As much franchising activity takes place on a national scale, legislative harmonization minimizes the regulatory burden for franchisors. In any case, the pre-contractual disclosure practices called for by the uniform Act are already followed by many reputable franchisors active in British Columbia, in part because they are mandatory in some other provinces.

The mandatory mediation provisions of the *Uniform Franchises Act* are not recommended for enactment in British Columbia because they are seen as being open to misuse for the purposes of delay and obstructionism by a party in breach of its obligations. They are not required to equalize the power imbalance that usually favours

the franchisor, because franchisees are given strong remedies in the rest of the Act. In fact, mandatory mediation may reinforce the power imbalance, because it could be initiated simply to delay the resolution of a dispute and exert economic pressure on the less well-positioned party. As the mandatory mediation provisions have only been adopted (with modifications) in one of the three provinces that have implemented the uniform Act, their adoption here would not contribute to legislative harmony in the area of franchising.

A further reason for not imposing a mandatory mediation procedure is that mediation is most likely to be successful when both parties want their commercial relationship to continue. If continuation of the franchisor-franchisee relationship is a mutual concern, the parties will be motivated in any event to resort to voluntary mediation, for which there are well-developed resources in British Columbia. If continuity of the franchise is not mutually desired, mediation is unlikely to be fruitful. Instead, it is more likely to add further expense and become merely an extra step on the way to court.

Additional Tentative Recommendations

Standard of compliance with disclosure requirements

The consultation paper tentatively recommends that British Columbia franchise legislation should provide, as does that of Alberta, Manitoba, and P.E.I., that disclosure documents should be valid if they are in substantial compliance with the legislation and regulations. Minor defects that do not influence the prospective franchisee's investment decision should not lead to the drastic consequences of non-compliance, namely possible rescission of the franchise agreement triggering repurchase and compensation obligations.

Fully refundable deposit

The *Uniform Franchises Act* requires that a prospective franchisee must receive complete disclosure before the franchisor receives any payment or other consideration on account of the franchise, but some provinces allow the franchisor to obtain a fully refundable deposit up to a ceiling amount before disclosure is made. The deposit must be refunded if the franchisee does not complete a franchise agreement.

Fully refundable deposits prior to disclosure should be permissible under British Columbia franchise legislation as well, because the franchisor must disclose much commercially sensitive information that may affect its competitive position, and may be holding territory open for the prospective franchisee while negotiations are con-

tinuing. The franchisor should be able to obtain an indication of the prospective franchisee's good faith before providing disclosure. The ceiling amount of a refundable deposit should be prescribed by regulation.

Disclosure regarding territorial rights

Prospective franchisees often mistakenly assume that an exclusive territory comes with a franchise. This is not the case unless exclusive territorial rights are granted by the franchise agreement. If territorial rights are not granted, the franchisor is free to grant any number of similar franchises in a given area. As in Manitoba, a franchisor should be required to state in the disclosure document whether or not exclusive territory will be granted under the franchise being offered.

Disclosure of franchisor's reservation of direct distribution rights

If the franchisor intends to reserve the right to sell goods and services directly and in competition with its franchisees, fairness requires that this reservation and the distribution channels the franchisor intends to use should be declared in the disclosure document.

Electronic delivery and electronic disclosure documents

Delivery of a disclosure document by electronic means such as e-mail, or delivery of a disclosure document in machine-readable form (such as a DVD disk), should be expressly permissible. British Columbia's *Electronic Transactions Act* likely allows electronic delivery in any event, but there are reasons why the authority to employ electronic means to effect disclosure should be obvious on the face of the franchise legislation or regulations.

Uniformity with the franchise legislation and regulations of the other provinces that also allow electronic delivery is one of the reasons for including an express enabling provision. Another is that the *Electronic Transactions Act* does not impose two requirements for valid electronic disclosure that are appropriate in the context of franchising: the disclosure document should be self-contained and not include hyperlinks to extrinsic content on a website, and receipt of the disclosure document should be acknowledged in writing by the franchisee. (By the terms of the *Electronic Transactions Act*, the written acknowledgment could also be in electronic form.)

A third reason is that employees of the franchisor will not seek legal advice on each occasion when providing disclosure to a prospective franchisee, and will need to determine readily how to comply with provincial requirements.

Statutory right of action for misrepresentation and financial projections

Pro forma revenue and operating costs projections or forecasts are sometimes used to entice prospective franchisees and may be seriously misleading. The franchisee's statutory right to sue for misrepresentation should extend to misleading statements made in a financial projection supplied by the franchisor before a franchise agreement is signed, unless the projection contains cautionary language similar to that required by securities legislation in forward-looking statements.

The cautionary language should state that the projection is made with respect to the future, that it is based on assumptions about future economic, fiscal, and other conditions, and that actual results may vary from those shown in the projection.

Wrap-around disclosure documents

In order to avoid the need to re-format disclosure documents for use in different jurisdictions, Alberta, P.E.I, and Manitoba allow the use of disclosure documents prepared to comply with the laws of another jurisdiction if they are supplemented by additional information needed to comply with their own legislation and regulations. These are referred to as "wrap-around" documents. The consultation paper tentatively recommends that wrap-around disclosure documents should also be permissible in British Columbia.

Section 11 of the Uniform Franchises Act and non-statutory claims

In a franchise dispute, claims and counterclaims based on statutory rights under the franchise legislation are often asserted together with non-statutory ones based on the common law of contract or tort.

Under section 11 of the *Uniform Franchises Act*, it is not possible for the terms of a franchise agreement to make the Act inapplicable to a claim "enforceable under the Act" by specifying that extraprovincial or foreign law applies to the claim, by requiring that a claim be decided in a place outside the implementing province or territory, or by declaring that the courts of that place will have exclusive jurisdiction to decide it. The words "enforceable under the Act" may be interpreted as referring only to claims based on provisions of the Act and not claims based on common law. As a consequence, terms in a franchise agreement specifying the applicable law, or that restrict court jurisdiction or venue, may apply with full effect to non-statutory claims. The result could be to require a party to a franchise agreement to litigate different aspects of the same dispute in two places.

Forcing a party to split its case and pursue or defend claims in an extraprovincial or foreign forum as well as a domestic one could very well operate oppressively. It could lead to injustice because of the increased expense, which might force a party to abandon a just claim. It would also allow for inconsistent results. In order to avoid case-splitting in franchise disputes, a provision in British Columbia legislation corresponding to section 11 of the *Uniform Franchises Act* should be worded so as to apply not only to claims "enforceable under the Act," but also to "claims arising from a franchise agreement."

Section 11 of the Uniform Franchises Act and arbitration clauses

Arbitration clauses in standard form agreements commonly require arbitration to take place in the home jurisdiction of the party whose standard terms are being used. Typically, that party will be the franchisor. If an arbitration clause in a franchise agreement requires a dispute to be arbitrated at a venue outside the province or country where the franchise unit is situated, it may operate as oppressively from the standpoint of the locally based party as an exclusive venue or jurisdiction clause relating to court proceedings.

It is not entirely clear that section 11 of the *Uniform Franchises Act* applies to arbitrations as well as to proceedings before courts. The provision in the British Columbia version of the *Uniform Franchises Act* corresponding to section 11 should therefore extend to an arbitration clause in a franchise agreement as well as to clauses concerning court litigation.

Concurrent exercise of statutory rescission and assertion of claims for damages

British Columbia franchise legislation should clearly provide that unlike the equitable remedy of rescission, exercise of the statutory right of rescission does not bar the franchisee from also pursuing a statutory right to damages, provided that double recovery does not occur. This point has had to be settled through judicial interpretation elsewhere under provincial franchise legislation with wording similar to the relevant provisions of the uniform Act.

Effect of the presumption of reliance on misrepresentation in a disclosure document

The *Uniform Franchises Act* deems a franchisee to have relied on a misrepresentation in a disclosure document unless the franchisee was aware before entering into a franchise agreement that the misrepresentation was inaccurate. This is a remedial provision, designed to encourage compliance with disclosure requirements as well as overcoming evidentiary difficulties a plaintiff faces in proving that a particular

misleading statement was in fact relied upon to the plaintiff's detriment in entering into a transaction.

In order to give effect to the purpose of the statutory presumption deeming reliance, British Columbia franchise legislation should clarify that it is not open to a franchisor to assert that the franchisee would have entered into the franchise agreement even if the franchisee had been aware of the true facts. In other words, the statutory presumption should operate conclusively, except where the franchisee had actual knowledge of the falsity of the misrepresentation prior to entering into the franchise agreement.

Release of statutory claim under settlement agreement

British Columbia franchise legislation should expressly state that the statutory bar to waiving or releasing a right under the legislation does not prevent a waiver or release that is part of a post-dispute settlement. This again is a point that has required judicial interpretation under franchise legislation in force elsewhere in Canada, but need not be re-litigated here if clear wording is employed.

Conclusion

British Columbia should join with other provinces in enacting franchise legislation broadly conforming to the *Uniform Franchises Act*. Comment is invited from all interested sectors on the tentative recommendations in the consultation paper.

CHAPTER I INTRODUCTION

A. General

Franchising is a very pervasive form of business arrangement in Canada. It is extremely common in the sectors that deal directly with the average consumer, including food and beverage outlets, the hospitality industry, car dealerships and other retailers of goods and services. Franchises exist across the spectrum of business sectors, however.

Franchising undoubtedly plays a very significant role in the Canadian economy. There are reportedly 78,000 franchised outlets ("units") in Canada with $100 billion in annual sales.[1] This amounts to slightly less than six per cent of Canada's gross domestic product in 2011.[2] Franchising is estimated to account for 40 per cent of Canadian retail sales.[3] Canadian franchises employ approximately 1,500,000 persons, or one in every 22 inhabitants of Canada.[4]

Given the prevalence and economic significance of franchising, it is not surprising that five provinces have enacted legislation regulating the sale of franchises and various aspects of the franchisor-franchisee relationship. These are Alberta,[5] Ontario,[6] New Brunswick,[7] Prince Edward Island,[8] and most recently Manitoba.[9] To date, British Columbia has not followed suit.

1. Canadian Franchise Association: "Franchise Fast Facts," online: http://www.cfa.ca/Publications_Research/FastFacts.aspx.
2. Calculated using the value of total annual sales in the amount of $100 billion asserted by the Canadian Franchise Association, *ibid.*, the value of Canada's GDP in 2011 as determined by the World Bank Group (USD $1.736 trillion), online at http://www.worldbank.org/country/Canada, and the the Bank of Canada average 2011 U.S.–Canada exchange rate, online at http://www.bankofcanada.ca/rates/exchange/exchange-rates-in-pdf/.
3. *Supra*, note 1.
4. *Supra*, note 1.
5. *Franchises Act*, R.S.A. 2000, c. F-23.
6. *Arthur Wishart Act (Franchise Disclosure), 2000,* S.O. 2000, c. 3.
7. *Franchises Act*, S.N.B. 2007, c. F-23.5.
8. *Franchises Act*, R.S.P.E.I. 1988, c. F-14.1.
9. *The Franchises Act*, S.M. 2010, c. 13; CCSM c. F156.

At the invitation of the Ministry of Justice and Attorney General, the British Columbia Law Institute (BCLI) has undertaken a project to examine the desirability of introducing legislation on franchising in B.C.

This consultation paper has been issued in connection with the project to elicit opinion from stakeholders and the general public on whether franchising in British Columbia should be the subject of special legislation and if so, what features the legislation should have.

B. Contents of this Consultation Paper

The consultation paper begins by describing the legal nature of a franchise and the several distinct kinds of franchising arrangements that have evolved. It explores the dynamics in a typical franchise relationship and discusses the legal issues that can arise between franchisor and franchisee.

The consultation paper then provides an overview of the legislation regulating franchising in Canada. Case law on the application of the Canadian legislation is reviewed. The *Uniform Franchises Act*,[10] which was developed by the Uniform Law Conference of Canada after the enactment of franchise legislation in Alberta and Ontario, is examined closely. The *Uniform Franchises Act* was intended as a means of harmonizing the legal framework for franchising between Canadian jurisdictions, and influenced the New Brunswick, Prince Edward Island, and Manitoba statutes. We examine its merits as a possible legislative model for this province to follow.

The consultation paper presents tentative recommendations on the regulation of franchising in British Columbia for comment by readers. They are "tentative" in the sense that they have not been formally adopted by the Board of Directors of BCLI and may be modified in light of the responses to this consultation paper.

After reviewing readers' responses to this document, BCLI will prepare and issue a report in late 2013 containing final recommendations that will be provided to the Minister of Justice and Attorney General.

10. Uniform Law Conference of Canada, *Proceedings of the Eighty-seventh Annual Meeting* (2005) at 196. Online at: http://www.ulcc.ca/en/2005-st-johns-nf/254-civil-section-documents/1044-uniform-franchises-act . See also Appendix B to the consultation paper.

CHAPTER II NATURE OF A FRANCHISE

A. General

In its contemporary commercial sense, the term "franchise" refers to a business arrangement in which one party (franchisor) grants to another (franchisee) the right to market goods or services under the franchisor's business system or trade name, usually for a limited period of time, in return for payment of fees and royalties from the sale revenues.[11]

The grant of a franchise typically includes the right to use the franchisor's trademarks, trade names, logos, and promotional materials.[12] It may also involve commitments regarding the supply by the franchisor and the purchase by the franchisee on a forward or continuing basis of various goods associated with the franchisor's trademark or trade name for use in the franchisee's business. The franchisor may commit to providing employee training, management and marketing advice, and other forms of operational support to the franchisee.[13] The franchisor may operate an advertising fund, to which franchisees are required to contribute from their sale revenues.

A characteristic feature of a franchise is a relationship of a continuing nature between the franchisor and franchisee in which the franchisor typically has the right to exercise a significant level of control over the operation of the franchisee's business. This degree of control allows the franchisor to implement common policies and business strategies throughout its franchise network that are intended to preserve market share and to build and retain customer loyalty and goodwill for its product line or service. The continuing nature of the franchise relationship, the identification with the franchisor's tradename and trademark, and the degree of control the franchisor often has over the way in which the franchisee's conducts business distinguish the franchise from other kinds of commercial arrangements for marketing a product line, such as distributorship agreements.

11. Frank Zaid, *Franchise Law* (Toronto: Irwin, 2005) at 5. See also Manitoba Law Reform Commission, *Franchise Law*, Report 116 (Winnipeg: The Commission, 2008) at 3. A franchise was originally a privilege specially granted by the Crown: *Black's Law Dictionary*, 6th ed., "franchise."

12. *Ibid.*

13. Daniel So, *Canadian Franchise Law Handbook* (Markham, Ont.: Lexis Nexis Butterworths, 2005) at 6.

B. Types of Franchises

1. Basic Forms

(a) General

Writers do not agree on how many distinct forms of franchising exist or how to categorize them. Three basic forms of franchises identified in the literature are: the business format franchise, the product distribution franchise, and the business opportunity franchise.[14] There are numerous variants of these basic forms.

(b) Business format franchise

Under a *business format franchise*, the franchisor grants a franchisee the right to use a business system owned by the franchisor.[15] This almost always includes a licence to use a trademark, trade name, or advertising logos, and may include marketing strategies, promotional materials, and reporting systems.[16] The franchisee's business is completely identified with the franchisor's trade name or trademark, so that customers would not readily distinguish between the franchisor and franchisee.[17] The franchisor may provide support to the franchisee with regard to finding a location for the business, leasing, staffing, training and other start-up matters, and will usually maintain a significant level of control over the franchisee's business on a continuing basis.[18]

Fast food outlets, so-called "chain stores" and hotels built and operated under the name of well-known "hotel chains" are examples of this familiar species of franchise.

(c) Product distribution franchise

A *product distribution franchise* consists of a right granted by the franchisor, usually a manufacturer, to sell the franchisor's products within a specific area.[19] Product distribution franchises typically operate much more like independent businesses than franchise units formed under the business format model. The franchisor exercises somewhat less control over the franchisee's operation than in a business format

14. Zaid, *supra*, note 11 at 5.

15. *Ibid.*

16. *Ibid.*

17. Arthur J. Trebilcock, "Franchising 101," online at: http://www.oba.org/EN/pdf/Chapter1_IntrotoFranchising.pdf at 2.

18. *Ibid.*

19. Zaid, *supra*, note 11 at 5.

franchise. Customers would tend to see the franchisee as an independent business owner.[20] The only overt connection with the franchisor is the brand name under which the products are sold.[21] Automobile dealerships are often operated under this kind of franchise.

(d) Business opportunity franchise

Under a *business opportunity franchise*, the franchisee obtains the right to sell products or services supplied by the franchisor and may receive assistance from the franchisor in locating outlets for doing so.[22] Vending machines, coin-operated game machines, and display racks in rented space within retail stores may be operated under this kind of franchise.[23]

2. Master Franchises

A *master franchise* is an agreement in which the franchisor authorizes the franchisee to grant subfranchises within a specified territory.[24] Franchisors typically use master franchises to expand their franchising networks into different countries or territorial subdivisions of countries.[25]

The master franchisee usually must create a minimum number of subfranchises within a specified period of time in order to continue to hold rights with respect to the territory under the master franchise.[26] Master franchisees tend to have substantial business experience and capital.[27]

Under the true master franchise, there is no agreement in place between the master franchisor and subfranchisees.[28] The subfranchisees enter into agreements with the master franchisee, who is the franchisor for their purposes. A form of franchising exists, however, in which the franchisor acts through an agent who is given authority

20. *Ibid.* See also *supra*, note 17 at 2.

21. *Supra,* note 17 at 2.

22. Zaid, *supra*, note 11 at 6.

23. *Ibid.*

24. *Ibid.*, at 22.

25. *Ibid.*

26. *Ibid.* See also Leonard V. Polsky, "Search continues for multiple unit franchisees" (2004) 24:21 *Lawyers Weekly* 16.

27. Zaid, *supra*, note 11 at 22.

28. *Ibid.*

by the franchisor to grant unit franchises and deal directly with the franchisees in a specified territority. In that case the franchise agreements concluded through the agent acting on behalf of the franchisor are between the individual franchisees and the franchisor.[29] This is sometimes referred to as an "area developer agreement,"[30] "area representative agreement,"[31] or "area representation franchising."[32] It is not to be confused with an *area development agreement*, which is a different business arrangement explained below.

3. Area Development Agreements (Multiple-Unit Franchises)

An *area development agreement* is a type of franchise in which the franchisee obtains the exclusive right to open a number of individual unit franchises within a specified territory.[33] Usually the franchisee is obliged to meet a schedule for opening the franchise units or open a minimum number within a set time period.[34] An area development agreement does not involve subfranchising.[35] Area development agreements are also referred to as *multiple-unit franchises*, *area franchises*, or *development franchises*.[36]

C. Franchising As a Business Strategy

1. The Upside: Reduction of Financial Risk and Capital Outlay

Franchising as a business strategy can be very advantageous for both franchisors and franchisees. Acquiring a franchise gives the franchisee access to the goodwill associated with franchisor's business name and trademark, plus the use of promotional channels and materials developed by the franchisor.[37] Use of an established business system under which a market for a product or service has already been established reduces the start-up cost and risk for a localized small business considera-

29. *Ibid.*, at 23.

30. *Ibid.*

31. Polsky, *supra*, note 26 at 17.

32. *Supra*, note 17 at 3.

33. *Supra*, note 11 at 22.

34. *Ibid.* See also Polsky, *supra*, note 26 at 17.

35. Zaid, *supra*, note 11 at 22.

36. *Ibid.*

37. Warren S. Grimes, "Perspectives on Franchising: When Do Franchisors Have Market Power? Anti-Trust Remedies for Franchisor Opportunism" (1996) 65 Antitrust L.J. 105 at 107.

bly.[38] Due to the reduction in risk, finding lenders to finance the purchase of a franchise is usually easier than financing the start-up of an entirely independent business.[39] If franchisors assume responsibility for staff training, especially in the start-up phase, this frees franchisees from a time-consuming task and allows them to focus on other aspects of management.

Ideally, the franchisee stands to benefit from continuing support from the franchisor in different aspects of the business throughout the term of the franchise.[40] For example, in a business format franchise the franchisee's chief or only sources of supply will generally be the franchisor itself or third party suppliers identified by the franchisor. Purchasing inventory and supplies can often be done more cheaply within a franchise system because of common suppliers and volume discounts. As franchisors obtain their income from revenues generated by individual franchise units, it is in their financial interest to assist their franchisees to operate the units successfully.[41]

The franchisor also benefits from significant cost reduction in conducting its business. A franchised structure allows the franchisor to expand its business into new territories and markets with less capital investment than would be needed to establish new units owned and operated by the franchisor directly, because some of the start-up cost is borne by the franchisee.[42] Royalty revenue from existing franchise units reduces the need for the franchisor to raise its own capital for the purpose of further expansion.[43] The greater the number of locally owned franchise units, the greater the amount of revenue for the franchisor that can be dedicated to this purpose, continuing the cycle.

2. The Downside: Intrinsic Risks and Potential for Abuses

Franchising also brings some disadvantages to both sides of the franchisor-franchisee relationship. As one text writer has put it: "Both the franchisee and the franchisor are capable of doing significant harm to the other. There is a degree of symbiosis in the relationship."[44]

38. So, *supra*, note 13 at 6.

39. *Ibid.*, at 7.

40. *Ibid.*, at 6.

41. *Ibid.*

42. *Ibid.*, at 5. See also Zaid, *supra*, note 11, at 9.

43. So, *supra*, note 13 at 5.

44. *Ibid.*, at 239.

The franchisor's business reputation and market share can be damaged by a few incompetent or rogue franchisees, because consumers generally do not distinguish between an independently owned franchise unit and the franchisor itself.[45] The franchisor must continually monitor its network of units for quality control, profitability, and adherence to operating procedures and standards in order to avoid this, and must absorb the costs associated with this level of oversight. Investment in training for franchisees and their employees is an associated cost for the franchisor, though one that will probably pay dividends in the long term.

The franchisee remains dependent on the franchisor throughout the duration of the franchise relationship. The significant level of control a franchisor has over operation of the franchisee's business and the superior economic and bargaining power that usually rests with the franchisor are susceptible to abuse.

In the process of acquiring a franchise, for example, prospective franchisees are highly dependent on the franchisor for crucial information about the franchise system, how it operates, its overall degree of success, and the prospects for operating an individual franchise in a given area or location.[46] If they are misled about any of these in entering into a franchise agreement, they stand to lose greatly. The franchisor, on the other hand, will receive an initial franchise fee even if the franchise unit generates little revenue or fails soon after opening.[47] Franchisees may have considerably less business experience than the franchisor or its representatives, and may easily fall prey to exaggerated claims of profitability. Unless the franchisee is a well-established, well-financed business operator who is being courted by the franchisor, the franchisee is not usually in a position to negotiate terms in a franchise agreement. Generally, franchisees must accept the franchisor's standard terms.

Franchisees do not have the same freedom of action in operating their businesses as a fully independent operator would. They seldom have the ability to turn to alternative suppliers for inventory. They are usually restricted from advertising outside of the franchisor's guidelines, which may be unsuited to their local market, and yet be required to pay for the advertising through contributions to the franchisor's advertising fund. Franchisors may or may not pass on the benefits of volume purchasing discounts they receive from suppliers to their individual franchisees. They may grant franchises with disregard for the size of the local market and without sufficient geographical separation, so that the individual units are locked in destructive com-

45. Manitoba Law Reform Commission, *supra*, note 11 at 9.

46. Grimes, *supra*, note 37 at 133.

47. *Ibid.*, at 124-125.

petition with one another. If a franchisor imposes onerous requirements that are unsuited to the local operation of a franchise unit, that unit may perform poorly or fail, with consequences that are likely to be much more severe for the franchisee than for the franchisor.

D. Legal Framework of the Franchise Relationship

1. General

As British Columbia has no special franchise legislation, the franchise relationship is governed by the terms of the franchise agreement and the common law of contracts.

2. The Franchise Agreement

(a) General

A typical franchise agreement of the business format type will contain terms covering at least these elements:

- a licence to the franchisee to use the franchisor's business system, business name and trademarks;[48]
- the location of the franchise unit and development of the site;[49]
- which products and services the franchisee is authorized to provide at the location of the franchise unit;[50]
- the sources from which the franchisee is authorized to obtain products for sale or display, and other supplies and services;[51]
- an obligation to operate the franchise unit in accordance with the standards, rules and procedures established by the franchisor;[52]

48. Zaid, s*upra*, note 11 at 13.

49. *Ibid.*, at 14.

50. *Ibid.*, at 15.

51. *Ibid.*

52. *Ibid.*, at 21. The standard operating manual for the franchisor's business system may be incorporated by reference into the franchise agreement, making adherence to its contents an obligation of the franchisee.

- fees and royalties the franchisee must pay to the franchisor for the right to continue to operate the franchise unit;[53]

- regular or continuous reporting to the franchisor about sales and the operation of the franchise unit, and access by the franchisor to the franchisee's records;[54]

- authorized methods of advertising, the obligation to participate in the franchisor's advertising programs, and to contribute (usually as a percentage of gross sales) to a pooled advertising fund, if the franchisor maintains one;[55]

- training and other operational assistance;[56]

- insurance;[57]

- the term of the franchise, or in other words the length of time that the franchisee is allowed to operate the franchise unit;[58]

- a restrictive covenant on the part of the franchisee not to own or operate a business competing with the franchisor during the term of the franchise agreement, and for a specified time within a certain geographic area after the franchise ends;[59]

- various other standard obligations of the franchisee, e.g. to operate the franchise unit in accordance with all applicable laws, bylaws, and regulations, to

53. *Ibid.*, at 16-17. The franchisee usually has to pay an initial fee to obtain the franchise. Thereafter, the franchisee normally pays the franchisor a periodic weekly or monthly royalty that is a percentage of gross sales: *ibid.*

54. *Ibid.*, at 17.

55. *Ibid.*, at 15, 17-18.

56. *Ibid.*, at 15.

57. *Ibid.*, at 16.

58. *Ibid.*, at 14. In *Peters Auto Sales Ltd. v. Chrysler Canada Ltd.* (1990), 63 Man. R. (2d) 295 (Q.B.) the court refused to imply a term into a franchise agreement that the franchise would continue indefinitely after expiration of the initial term, unless terminated for proper cause or upon reasonable notice.

59. *Ibid.*, at 18-19. Franchise agreements may also contain an additional restrictive covenant whereby the franchisee agrees not to employ or solicit employees of the franchisor or its franchisees for a specified time after the termination of the franchise.

maintain all required licences, permits, etc. in good standing, and to dedicate full time and attention to the franchised business;[60]

- default by the franchisee and the franchisor's right to terminate the franchise;[61]
- renewal of the franchise term, and the terms on which renewal may be granted;[62]
- transfer and assignment of the franchise;[63]
- an obligation on the part of the franchisee to indemnify the franchisor against any liability to a third party arising from an act or omission of the franchisee;[64]
- an obligation to keep certain categories of information about the franchise system confidential while the franchise is operating and after it ends, without limitation in time.[65]

The franchise agreement will usually contain an "entire agreement" clause stating that the franchise agreement and any documents incorporated into it by reference constitute the entire agreement between the parties. This is intended to make unenforceable any statements and representations that were made before the franchise agreement was signed.[66]

60. *Ibid.*, at 15.

61. *Ibid.*, at 19-20.

62. *Ibid.* In order for renewal of the franchise to be granted, the franchise agreement will typically require that the franchisee (a) not be in default of any obligation under the franchise agreement; (b) give written notice of intention to renew; (c) agree to accept the franchisor's standard agreement in use at the time of renewal; (d) pay a renewal fee.

63. *Ibid.* Usually the franchise agreement will prohibit the franchisee from selling the franchise and assigning its rights under the agreement without the franchisor having approved the proposed purchaser and given express consent to the transfer. Additional conditions for approving the transfer of a franchise may include payment of a transfer fee. The franchise agreement may also prohibit the franchisee from mortgaging or otherwise encumbering any of the assets involved in the franchised business without the franchisor's approval.

64. *Ibid.*, at 20.

65. *Ibid.*, at 20.

66. *Ibid.*, at 21-22.

There will be a "governing law" clause in the franchise agreement providing the agreement is to be interpreted and applied according to the laws of a particular jurisdiction.[67] This will be a system of law with which the franchisor is comfortable, very likely that of the province or state in which the franchisor's head office is situated. For example, the agreement may provide that is governed by the law of Ontario, although though the franchise unit to which it relates is to be situated in British Columbia and the agreement is actually signed here.

A franchise agreement may also contain clauses dealing with mediation or arbitration of disputes.

(b) Territorial Rights

The licence given to a franchisee to market the products or services of the franchise system is usually restricted by the franchise agreement to a particular geographical territory.[68] The licence may or may not be exclusive within the territory specified.[69] Exclusive rights over a given territory are more common in product distribution franchises. They are less common in ordinary business format franchises. If the franchise agreement does not give exclusive rights to market the franchisor's products and services in a particular territory, the franchisor is free to grant other franchises within the territory that will compete with the franchisee's business.[70]

3. Interpretation of Franchise Agreements

(a) General

Franchise agreements are interpreted according to normal principles. The wording of the agreement is given its ordinary meaning. The so-called "parol evidence rule" is applied, under which a written agreement is presumed to supersede alleged oral agreements that are inconsistent with it.

Another principle that is applied in interpreting franchise agreements as well as other contracts is known as c*ontra proferentem*. This principle comes into play if a term in an agreement is ambiguous. If one possible meaning favours the party who prepared the agreement or inserted the term and the other favours the party who did not, the agreement will be held to have the meaning that is less favourable to the party who prepared the agreement. In most cases a franchise agreement will be in

67. *Ibid.*, at 21-22.

68. *Ibid.*, at 13.

69. *Ibid.*

70. *Ibid.*

the franchisor's standard form, and therefore ambiguities in its terms will usually be resolved in favour of the franchisee.

(b) Duty of good faith

Despite the fact that franchisees are dependent to varying degrees on franchisors for many reasons, it is well-established that the franchisor-franchisee relationship is not intrinsically fiduciary in nature.[71] The degree of dependence and trust in the franchise relationship normally is not such as to impose a fiduciary duty on franchisors. In other words, franchisors do not owe their franchisees undivided loyalty. They are not required to place franchisees' interests before their own at all times and avoid conflicts of interest in any dealings with their franchisees and in any matters that may affect them, as are fiduciaries.[72]

Prior to the introduction of franchise legislation in Manitoba and Ontario, courts in those provinces nevertheless concluded that a franchise agreement is a unique kind of commercial contract that imposes a duty of good faith on both parties to have regard for one another's legitimate interests.[73] This duty requires them to deal "promptly, honestly, fairly and reasonably" with one another in the contractual relationship.[74] Apart from this, they may act in their own interest.

The Ontario Court of Appeal based its conclusion on the observation that a franchise agreement has some of the same features that give rise to an obligation of good faith under employment contracts, namely unequal bargaining power, the reality that the franchisee must usually accept the franchisor's terms and cannot negotiate terms in its own interest, and a power imbalance that persists throughout the entire duration of the relationship.[75]

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71. *Jirna v. Mister Donut*, [1975] 1 S.C.R. 2. See also *Beaucage v. Grand & toy Ltd.* (2001), 19 B.L.R. (3d 196, at para. 27 (Ont. S.C.J.). In *Jirna*, however, the parties were relatively equal in terms of their business sophistication. It has been suggested that in different circumstances, a fiduciary relationship could arise between a franchisor and franchisee: see Manitoba Law Reform Commission, *supra*, note 11 at 15.

72. The essential feature of a fiduciary relationship is "[a] mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party:" *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 409-410.

73. *Imasco Retail Interests (c.o.b. Shoppers Drug Mart) v. Blanaru*, [1995] 9 W.W.R. 44 (Man. Q.B.); *Shelanu Inc. v. Print Three Franchising Corporation* (2003), 64 O.R. (3d) 533 (C.A.).

74. *Shelanu*, *ibid.*

75. *Ibid.* The Supreme Court of Canada held in *Wallace v. United Grain Growers*, [1997] 7 S.C.R. 701 that these features of an employment relationship give rise to a duty of good faith on the part of an employer when dismissing an employee.

It is unclear whether the existence of a common law duty of good faith under a franchise agreement is recognized in British Columbia. The Ontario decisions recognizing such a duty were followed in at least one British Columbia case.[76] In a later British Columbia case involving a franchise dispute, however, the court was reluctant to accept the proposition that an implied duty of good faith existed, describing good faith in the context of a commercial contract as being "an issue of some complexity."[77] It cited with evident approval portions of an Ontario Court of Appeal decision in which that court had stated that Canadian courts do not recognize a common law "stand-alone" duty of good faith independent of the terms of the contract.[78]

If the true position under British Columbia law at the present time is that the parties to a franchise agreement are not under an implied duty of good faith that is independent of the terms of the agreement, then they have the same freedom to act as the parties to an ordinary commercial contract. In other words, they are free to act in their own interests without regard to those of the opposite party, as long as they do not breach the terms of the agreement.

For example, if a franchisor granted a franchise for a particular location under an agreement that was silent with respect to territorial rights, and then opened an outlet across the street that operates directly in competition with the franchisee at that location, the franchisee would have no basis for complaint. In the provinces where a statutory or common law duty of good faith under a franchise agreement applies, the

76. *Joo v. Shin*, 2005 BCSC 902, 6 B.L.R. (4th) 52, at paras. 27-28. In *Sultani v. Blenz Coffee Co.* (2005), 3 B.L.R. (4th) 93 (B.C.S.C.), aff'd [2005] B.C.J. No. 2560 (QL) (C.A.), a misrepresentation action, the trial judge accepted that a duty of good faith subsisted under a franchise agreement on the basis of *Shelanu*, *supra*, note 73, but dismissed the action. The Court of Appeal affirmed the trial decision on other grounds without reference to the existence or non-existence of an implied duty of good faith. Based on *Shelanu, supra*, note 73, pleadings alleging the breach of a duty of good faith by a party to a franchise agreement have been held in British Columbia to raise a triable issue: see *362041 B.C. Ltd. v. Domino's Pizza*, 2006 BCSC 792 at para. 18.

77. *Allegra of North America Inc. v. Stevens*, 2008 BCSC 1220, at para. 41. The defendant franchisor conceded that it owed a duty of good faith toward the franchisee, but contended that it had not breached the duty. The court held that, whether or not a duty of good faith arises under a franchise contract, the franchisor's conduct did not amount to a breach of good faith.

78. *Ibid.* The Ontario decision cited was *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 234 D.L.R. (4th) 367, at paras. 51-53 (Ont. C.A.). The British Columbia Court of Appeal has also stated (without reference to the context of franchising) that a stand-alone obligation of good faith that is independent of the terms of a contract is not recognized in Canada, despite movement towards the recognition of such an obligation in other parts of the common law world: *Princeton Light & Power Co. Ltd. v. MacDonald* (2005), 41 B.C.L.R. (4th) 271 (C.A.), per Huddart, J.A. at 284.

franchisor could conceivably be found to have acted in bad faith and be required to compensate the franchisee for resulting losses.[79]

4. Remedies of Franchisors and Franchisees

(a) General

The usual rights and remedies under the general law of contract and tort apply to the enforcement of franchise agreements in British Columbia as they do to other contracts. These rights and remedies arise from common law and equity rather than from legislation.

The principal remedy under the common law of contract is damages. If one party breaches a franchise agreement, the other may sue for damages.

In cases of misrepresentation, fraud, or mistake, an innocent party may alternatively seek the equitable remedy of rescission. A court will rescind an agreement only if it possible to restore the parties to their original positions before entering into the agreement.[80]

As equitable rescission (as opposed to statutory rescission under the franchise legislation discussed later) is a discretionary remedy, the conduct of the party seeking rescission is also relevant. Rescission may be refused, for example, on the ground that the party seeking it is also in breach of the agreement,[81] has delayed unduly in seeking relief,[82] or has continued in the contractual relationship in a manner that

79. See, for example, *Katotikidis v. Mr. Submarine Ltd.* (2002), 26 B.L.R. (3d) 140 (Ont. S.C.J.), where the franchisor opened another unit less than 1500 feet from the plaintiff's unit during the term of the plaintiff's franchise. The plaintiff had offered to purchase the franchise for the new location, but it was awarded to another franchisee in a departure from the franchisor's policy of giving a right of first refusal to an existing franchisee in the same area. The opening of the new unit in proximity to the plaintiff's caused the plaintiff's unit to fail. The franchisor nevertheless demanded that the plaintiff observe the restrictive covenant that kept the plaintiff from operating a similar business within two miles of her previous location. The Ontario franchise legislation did not apply as the relevant facts occurred prior to its effective date, but the franchisor was found to be in breach of a common law duty of good faith and fair dealing, resulting in liability for the plaintiff's assessed losses and also punitive damages.

80. *Zippy Print Enterprises Ltd. v. Pawliuk* (1994), 100 B.C.L.R. (2d) 55 at 74 (C.A.).

81. *Leader Windows Fashions Ltd. v. Home Products Inc.*, [1993] B.C.J. No. 1182 (QL) (C.A.). This equitable principle is often referred to as the "clean hands rule."

82. *Forbes v. Wellsley Investments Inc.*, 1997 CanLII 4219 (B.C.S.C.). Undue delay disentitling a plaintiff to an equitable remedy is known as *laches*.

unequivocally gives rise to an inference that a claim for relief in respect of the other party's breach will not be pursued.[83]

(b) Misrepresentation and franchise disputes

(i) General

Claims based on misrepresentation are very common in litigation between franchisors and franchisees, which frequently turns on the nature and extent of the information the franchisee was given about the proposed franchise before entering into the franchise agreement. A franchisee may sue for rescission of the franchise agreement as a plaintiff on the basis of alleged misrepresentation,[84] or raise misrepresentation as a counterclaim if the franchisor sues the franchisee for breach of the franchise agreement.[85]

A representation is a statement of fact. A misrepresentation is a representation that is false. Misrepresentations may be made innocently, negligently, or fraudulently.

In the law of contract, a pre-contractual misrepresentation does not result in any right to relief unless the untrue statement either became a term of the contract, or induced the complaining party to enter into the contract. If the misrepresentation was incorporated as a term of the contract, the party to whom it was made can sue

83. *Zippy Print Enterprises Ltd. v. Pawliuk*, *supra*, note 80 at 73. The British Columbia Court of Appeal held in *Zippy Print* that continuing to operate a struggling franchise for several years in an effort to make it a success will not automatically preclude a franchisee from claiming damages for negligent misrepresentation: *ibid.* at 74. Whether a franchisee has simply struggled to keep the franchise in operation without abandoning any claim for relief or has affirmed the contract and implicitly waived a right to claim relief for breach of warranty or misrepresentation is a question highly dependent on the facts of the individual case, however. Compare *Latella v. J.R.K. Car Wash Ltd* , [1988] O.J. No. 152 (H.C.), where the plaintiffs were found to have affirmed the contract by operating an unprofitable franchise for 18 months, although they had known after three months that the sales projections on which they had evidently relied were unrealistic. In *Latella* the sales projections were held not to have induced the plaintiffs to acquire the franchise because questions about their accuracy had been raised before the franchise agreement was signed.

84. Examples of misrepresentation actions brought by franchisees seeking rescission or damages in the alternative are *Sultani v. Blenz The Canadian Coffee Co., supra*, note 76, and *M. Reid Enterprises Ltd. v. Buffer King Inc.*, [1983] B.C.J. No. 55 1696 (QL) (S.C.).

85. Counterclaims by franchisees based on misrepresentation were made in the following cases: *Candy Express Franchising Inc. v. John Candy Co.* (1992), 42 C.P.R. (3d) 496 (B.C.S.C.); *Zippy Print Enterprises Ltd. v. Pawliuk*, *supra*, note 80; *Boston Pizza International Inc. v. Filcan Ventures*, 2011 BCSC 1907.

for damages in order to recover resulting loss.[86] If the misrepresentation induced the contract, a party who was induced by it to enter the contract can seek rescission.

Tort law allows relief for negligent or fraudulent misrepresentation in the form of damages or rescission, regardless of whether the misrepresentation became a term of the contract. The difference between a negligent and a fraudulent misrepresentation is that the maker of a fraudulent misrepresentation knows it is untrue or does not care whether it is true or not. The maker of a negligent misrepresentation may believe the statement to be true, but has failed to perform a duty of care owed to the hearer of the statement to determine that is is accurate.

(ii) Negligent misrepresentation

Claims for negligent misrepresentation have been made frequently by franchisees in British Columbia as elsewhere.

To succeed in a claim for negligent misrepresentation, a franchisee must prove: (1) a duty of care rested on the franchisor by virtue of a "special relationship" between the franchisor and franchisee arising in the circumstances of the pre-contractual dealings; (2) the representation in question was untrue or misleading; (3) the franchisor acted negligently in making the misrepresentation; (4) the franchisee relied reasonably on the misrepresentation; (5) the franchisee's reliance on the misrepresentation was detrimental in the sense that loss resulted.[87]

It does not appear to have been seriously questioned that pre-contractual negotiations bring the franchisor and prospective franchisee into a special relationship sufficient to give rise to a duty of care to ensure that information provided to a franchisee is not misleading. There is no obligation resting on the franchisor at common law to disclose material facts within the franchisor's knowledge that are unknown to the prospective franchisee, however. This is true even if the prospective franchisee

86. In *Kim v. Sheffield & Sons-Tobacconists Inc.*, [1989] B.C.J. No. 1175(S.C.); aff'd [1990] B.C.J. No. 738 (C.A.), pre-contractual statements by the franchisor concerning the financial soundness of the proposed franchise and an earnings projection were held to constitute warranties under the franchise agreement. The plaintiff franchisee recovered on this basis. Similarly, in *Avos Holdings Ltd. v. American Motors (Canada) Inc.*, [1986] B.C.J. No. 1891 (S.C.) a pre-contractual assurance that an existing dealership in the area would be terminated was found to be a warranty under the franchise agreement. The franchisor was found to be in breach of the warranty when the existing dealership was not terminated. See also *J.R.K. Car Wash Ltd. v. Gulf Canada Ltd.* (1992), 46 C.P.R. (3d) 525 (Ont. Gen. Div.).

87. *The Queen v. Cognos*, [1993] 1 S.C.R. 87.

has formed a false impression that disclosure would correct.[88] Silence does not amount to misrepresentation, but misrepresentation can consist of partial disclosure that is misleading.[89]

In a few instances, franchisees have succeeded against franchisors on the basis of negligent misrepresentation.[90] The franchisee's claim will fail if the franchisee's reliance on statements made is considered to have been unreasonable under the circumstances.[91]

A greater obstacle to relief for franchisees who believe they were misled by pre-contractual statements of franchisors, however, is the rule that a representation must be a statement of existing fact in order to be actionable (i.e., capable of serving as the basis for a lawsuit). Misrepresentation claims by franchisees are typically based on are pre-contractual statements concerning anticipated levels of gross sales, operating costs and earnings. Misrepresentation claims by franchisees in British Columbia based on statements of this kind have failed on the ground that projections of future costs and revenues are merely predictions or statements about future intention rather than statements about existing facts.[92]

The "entire agreement" clause usually found in franchise agreements is a further obstacle for franchisees who believe they are entitled to redress because they were misled by pre-contractual representations of the franchisor or the franchisor's agent. Some cases in the 1980's and 1990's indicated a reluctance on the part of British Columbia courts to enforce an "entire agreement" clause in a franchise agreement, or clauses excluding liability of the franchisor, in the face of a "substantial misrepresentation." In one decision of the Court of Appeal from that period, the reason for this reluctance was explained as being that a franchise agreement is a "standard form contract of adhesion." In other words, it is a contract in a form prepared by one party which the other party must either accept in total or reject outright, rather than one containing freely negotiated terms. The Court of Appeal reasoned that if a commercial enterprise makes an intentional representation intended to induce another party to enter into a standard form adhesion contract, it should

88. *1518628 Ontario Inc. v. Tutor Time Learning Centres, LLC*, [2006] O.J. No. 3011 at para. 55 (QL) (S.C.J.).

89. *Miller v. Edelweiss International Corporation*, 1996 CanLII 1766 (B.C.S.C.).

90. *Zippy Print*, *supra*, note 80; *M. Reid Enterprises Ltd. v. Buffer King, Inc.*, *supra*, note 84.

91. *Sultani*, *supra*, note 76.

92. *Salem v. Priority Building Services Ltd.*, [2004] B.C.J. No. 2110 (QL) (S.C.); *A-Wear Clothing Inc. v. Axiom Fashions Ltd.*, 2002 BCSC 316.

not be in a position to escape liability for misrepresentation on the basis of the parol evidence rule if the representation is false.[93]

Later cases, however, indicate a greater willingness on the part of British Columbia courts to give effect to language in franchise agreements that has the effect of precluding franchisor liability for negligent misrepresentations occurring in the pre-contractual stage if it is unambiguous and covers the circumstances of the case.[94] This is consistent with the approach to exclusionary terms recently endorsed by the Supreme Court of Canada in *Tercon Contractors Ltd. v. British Columbia (Tpt. and Highways)*.[95]

In *Tercon Contractors*, the Supreme Court of Canada held that a court cannot decline to enforce a clear and unambiguous exclusion clause applicable to the circumstances, unless the clause was unconscionable at the time of the contract or there is an applicable overriding public policy that outweighs the public interest in the enforceability of contracts.[96]

(iii) Fraudulent misrepresentation

Sometimes allegations of fraudulent misrepresentation are made in franchise disputes. For a misrepresentation to be fraudulent, it must have been made deliberately with the intention to deceive. Franchisors and their agents have been held liable for fraudulent misrepresentation in British Columbia for making intentionally false statements about the profitability of the franchise in question and the business of the franchisor for the purpose of inducing a proposed franchisee to enter into a franchise agreement.[97]

93. *Zippy Print*, supra, note 80 at 70-71.

94. See, for example, *No. 2002 Taurus Ventures Ltd. v. Intrawest Corp*, 2007 BCCA 228 (exclusionary clause in franchise agreement held to exclude liability of franchisor for negligent misrepresentation although not specifically mentioning negligence).

95. [2010] 1 S.C.R. 69.

96. *Ibid.*, at para. 122-123 per Binnie, J. (dissenting in the result but speaking for a unanimous court on the correct analytical approach to exclusionary terms in contracts).

97. *M. Reid Ent. Ltd. v. Buffer King Inc.*, *supra*, note 84. In that case the pro forma balance sheets the defendant franchisor's representatives showed to the plaintiff franchisee to induce him to purchase a worthless franchise were inaccurate by as much as 1000%. See also *Bell v. Consumers' Food Wholesale of Canada Ltd.*, [1987] B.C.J. No. 2387 (QL) (S.C.), where the franchisor characterized itself as a "major North American food company" and one of the largest in the country when in fact it had been newly incorporated and had no track record in business. The court characterized the statements made to the plaintiff franchisee about projected earnings as "simply outlandish" with no foundation in fact.

E. Summary

The above description of the essential characteristics of a franchise and the rights, obligations and liabilities surrounding it reflects a legal context in which, as is the case in British Columbia, there is no special legislation governing franchising. The following chapter examines statutory regulation of franchising as it has evolved in other parts of Canada.

CHAPTER III CANADIAN FRANCHISE LEGISLATION

A. General

This chapter provides an overview of the franchising legislation in force in Canada at the present time and briefly explains how it developed. Particular attention is given to the *Uniform Franchises Act* as it can be seen as a homogenized version of the franchise legislation now in effect in various provinces, and thus a convenient standard for comparison and analysis.

B. Characteristics of Current Canadian Franchise Legislation

While there are a few differences between the enactments of the provinces that have franchise legislation, a consistent pattern is readily apparent. All the Canadian franchise statutes now in force provide that:

- disclosure to prospective franchisees of specific information is required a minimum of 14 days before a franchise agreement is entered into, or before the prospective franchisee makes makes any payment or transfers other consideration to the franchisor on account of the proposed franchise;

- the information that franchisors are required to disclose to prospective franchisees is extensive and detailed, but can be summarized as:

    - financial statements of the franchisor;

    - other information about the franchisor;

    - information about the franchise itself;

    - lists of present and former franchisees in the jurisdiction and contact information for them;

    - any material facts that would reasonably be expected to have a significant effect on the value or price of the franchise or the decision to acquire it;

- if a material change occurs in the franchisor's business or the franchise system after the delivery of a disclosure document, the franchisor must provide the franchisee with a written "statement of material change" before a franchise

agreement is signed or any payment is made or other consideration given to the franchisor relating to the franchise;

- a franchisee may rescind a franchise agreement without penalty or obligation within 60 days after it is signed if the franchisor does not deliver a disclosure document within the time required or if the disclosure document does not comply with the Act;

- if the franchisor never delivers a disclosure document at all, the franchisee may rescind the franchise agreement without penalty or obligation within two years after entering into it;

- if the franchise agreement is rescinded, the franchisor must repay any money received from or on behalf of the franchisee, repurchase any inventory, supplies, or equipment purchased by the franchisee and also compensate the franchisee for losses incurred in acquiring, establishing, and operating the franchise that are not recovered through the repayments and repurchases the franchisor is obliged to make;

- a franchisee who incurs a loss due to misrepresentation in a disclosure document or statement of material change, or as a result of the franchisor's non-compliance with the disclosure requirements, can sue the franchisor for damages;

- the parties to a franchise agreement are under a duty of fair dealing in the performance and enforcement of the agreement, and are liable in damages for breach of this statutory duty. The statutory duty of fair dealing obliges the parties to act in good faith and in accordance with reasonable commercial standards;[98]

- a franchisor must not interfere with the right of franchisees to associate, and to form and join an organization of franchisees. If the franchisor does so, the franchisees may sue the franchisor for damages;

- franchisees or prospective franchisees cannot waive or release rights given by the Act or the obligations it imposes on the franchisor or franchisor's associate. A waiver or release that purports to do this is void;

98. The Alberta provision only mentions the duty of fair dealing and does not have the additional language stating that the duty obliges parties to a franchising agreement to act in good faith and in accordance with reasonable commercial standards: *Franchises Act* (Alta.) *supra*, note 5, s. 7.

- terms in a franchise agreement that attempt to prevent application of the law of the enacting province, or to restrict the jurisdiction or venue for the resolution of any dispute to a place outside the enacting province, are void;

- joint and several liability where more than one party is liable for a breach of the statutory duty of good faith, misrepresentation in a disclosure document or statement of material change, or interference with franchisees' right to associate;

- the rights given by the Act do not derogate from other rights or remedies that a party to a franchise agreement may have in law, but instead are in addition to them.

The reasons why Canadian franchise legislation has developed along consistent lines are explained in the next section.

C. Historical Overview of Development of Canadian Franchise Legislation

1. Alberta Prototypes

The first Canadian franchise legislation was enacted in Alberta in 1971.[99] This was modelled on California's franchise legislation, which was also the first statute of its kind in the U.S.[100] The model that was followed initially in Alberta imposed a regulatory scheme for franchising similar to that found in securities legislation. It required franchisors and their employees involved in selling franchises to register with the Alberta Securities Commission. Franchisors were required to file a prospectus before they could market franchises in the province.

The Alberta Securities Commission was mandated by the Act to carry out regulatory functions beyond vetting prospectuses for compliance with the statutory requirements. This it did by setting policies and standards like the ones securities issuers are required to follow. These extended to regulation of the post-contractual franchisor-franchisee relationship, covering matters such as when a franchisor could validly terminate a franchise.

Dissatisfaction with the cost and regulatory burden under this system was evident in the 1980's. A concern also arose that it created a barrier to business expansion and

99. *Franchises Act*, S.A. 1971, c. 38 (repealed).

100. *California Franchise Investment Law*, Cal. Corporations Code, Div. 5, Pts. 1-6, §§31000-31516.

investment in Alberta. These led to the repeal of the first Alberta *Franchises Act* in the mid-1990's and its replacement by a different legislative scheme.

Following public consultation, Alberta enacted a second *Franchises Act* in 1995.[101] This statute abandoned the securities regulation model. In place of registration with the Alberta Securities Commission and prospectus filing, this new statute substituted mandatory pre-contractual disclosure by franchisors of specified information as the chief protection for prospective franchisees, with rescission of the franchise agreement as a remedy for non-compliance by the franchisor.[102] The 1995 Alberta statute also imposed a duty of fair dealing on the parties to a franchise agreement with the right to sue for for its breach.[103] It gave a right to franchisees to sue to recover losses due to misrepresentation in the information that franchisors were required to disclose,[104] and prohibited interference by franchisors with the right of franchisees to form associations.[105]

The Alberta *Franchises Act* also includes a provision for franchising industry self-government. It authorizes the Lieutenant Governor in Council to designate a body to "govern franchising and promote fair dealing among franchisors and franchisees."[106] It allows regulations to be made for the purpose of setting out the powers of the designated body, requiring franchisors and franchisees to be members, authorizing the designated body to collect fees, and other purposes necessary or advisable to implement the provision.[107] To date no designation or regulation has been made under this provision.

2. Ontario Follows Alberta's Lead

Ontario's *Arthur Wishart Act (Franchise Disclosure) 2000*[108] was enacted in 2000 following the issuance of a consultation paper in 1998.[109] The Act was named after the

101. S.A. 1995, c. F-17, now R.S.A. 2000, c. F-23.

102. *Ibid.* s. 4.

103. *Ibid.*, s. 7.

104. *Ibid.*, s. 9.

105. *Ibid.*, ss. 8, 11.

106. *Ibid.*, s. 21(1).

107. *Ibid.*, s. 21(2).

108. *Supra*, note 6.

109. Ontario Ministry of Consumer and Commercial Relations, *Ontario Franchise Disclosure Legislation: A Consultation Paper* (June, 1998).

former Minister of Financial and Commercial Affairs of that province, Arthur Wishart, who had commissioned an inquiry into franchising in 1971.[110]

The *Arthur Wishart Act* resembles the 1995 Alberta *Franchises Act* in requiring disclosure by franchisors of specific categories of information to prospective franchisees before entering into a franchise agreement,[111] failing which the franchisee may seek to have the franchise agreement rescinded.[112] It also protects the right of franchisees to form associations.[113] It does not have provisions containing a framework for industry self-government like the Alberta statute.

3. The Uniform Law Conference of Canada *Uniform Franchises Act*

The Uniform Law Conference of Canada (ULCC) formed a working group in 2002 consisting of experts in franchise law, industry representatives and government officials for the purpose of developing uniform Canadian franchise legislation.[114] The working group presented a draft uniform statute and two associated regulations to the ULCC in 2005 following extensive consultations and examination of franchise regulation in the U.S. and elsewhere. The ULCC approved the *Uniform Franchises Act* and its accompanying regulations in that year, recommending them for enactment in each province and territory.[115]

The *Uniform Franchises Act* resembles the Ontario and current Alberta franchise legislation in requiring pre-contractual disclosure of specified information to a prospective franchisee,[116] imposing a duty of fair dealing on each party to a franchise agreement,[117] and protecting the right of franchisees to associate.[118] The remedies

110. See S.G.M. Grange, *Report of the Minister's Committee on Referral Sales, Multi-Level Sales and Franchises* (Toronto: Ontario Ministry of Financial and Commercial Affairs, 1971). The Grange report recommended legislation to regulate franchising in Ontario.

111. *Supra*, note 6, s. 5.

112. *Ibid.*, ss. 6(1), (2).

113. *Ibid.*, s. 4.

114. The Uniform Law Conference of Canada (ULCC) is a national body concerned with harmonization of legislation within Canada. It consists of delegates appointed by the government of Canada and each province who meet annually to examine and approve proposed uniform enactments. The *Uniform Franchises Act* was developed as part of the ULCC's Commercial Law Strategy, a comprehensive project to modernize and harmonize Canadian commercial legislation.

115. *Supra*, note 10 at 68.

116. *Ibid.*, s. 5.

117. *Ibid.*, s. 3.

118. *Ibid.*, s. 4.

granted to franchisees under the *Uniform Franchises Act* are also like those under the Alberta and Ontario legislation. Franchisees have the right to rescind the franchise agreement within 60 days after receiving disclosure if the disclosure document did not meet the requirements of the Act, or within two years if the franchisor never provided a disclosure document at all.[119] Franchisees also have a right under the Act to claim damages for misrepresentation contained in the disclosure document.[120] Either party to the franchise agreement may claim damages or for breach of the statutory duty of fair dealing.[121]

The *Uniform Franchises Act* has additional provisions dealing with dispute resolution that are intended to avert litigation between franchisor and franchisee.[122] The dispute resolution procedure contemplated by the uniform Act has two stages: informal resolution initiated by delivery of a notice of dispute to the opposite party, followed by mediation if the attempt at informal resolution fails.[123] The mediation procedure is initiated by delivery of a notice of mediation by either party. One of the two uniform regulations that accompany the uniform Act provides procedural details of the mediation procedure.[124] Participation in either stage is mandatory if one party to the franchise agreement invokes the procedure by giving the appropriate notice to the other.

4. Prince Edward Island's Slightly Modified Version of the ULCC Model

Prince Edward Island enacted a *Franchises Act* franchising statute in 2005.[125] Portions of the P.E.I. *Franchises Act* came into force in 2006 and the rest in 2007.[126] The P.E.I. statute is modelled on the *Uniform Franchises Act*, but differs from it in some respects. Unlike the *Uniform Franchises Act*, the P.E.I. statute provides expressly that it does not bind the Crown.[127] Another difference is that the P.E.I. statute does not

119. *Ibid.*, ss. 6(1), (2).

120. *Ibid.*, s. 7(1).

121. *Ibid.*, s. 3(2).

122. *Ibid.*, s. 8.

123. *Ibid.*, ss. 8(2), (3), (4).

124. Uniform Law Conference of Canada, *Mediation Regulation*, supra, note 10 at 236. See online: http://www.ulcc.ca/en/2005-st-johns-nf/254-civil-section-documents/1046-uniform-franchises-act-mediation-regulation.

125. *Supra*, note 8.

126. See *Prince Edward Island Royal Gazette*, Vol. CXXXII, No. 18 (6 May 2006), Part I at 409 , online at http://www.gov.pe.ca/royalgazette/pdf/20060506.pdf.

127. *Ibid.*, s. 2(4).

incorporate the dispute resolution provisions of the *Uniform Franchises Act* that contemplate a mediation procedure.

The regulation under the P.E.I. statute dealing with disclosure differs from the uniform disclosure regulation developed by the ULCC. The P.E.I. regulation states that a disclosure document is "properly given" if it is substantially complete.[128] It allows for electronic delivery of a disclosure document or delivery in a machine-readable medium (such as a compact disk), subject to certain requirements.[129] It permits the use in P.E.I. of the so-called "wrap-around," i.e. a form of disclosure document meeting the requirements of another jurisdiction with additional information required by P.E.I. attached.[130] As in Ontario and Alberta, certain franchisors are exempt from disclosing financial statements if they meet minimum size requirements based on net worth or the number of their actively operating franchisees.[131]

5. New Brunswick Follows the ULCC

New Brunswick passed its *Franchises Act* in 2007.[132] The *Act* came into force in early 2011.[133] The delay in implementation was to accommodate the preparation of regulations following consultation with industry and the public.[134]

The New Brunswick legislation and regulations follow the *Uniform Franchises Act* model fairly closely. They include provisions on dispute resolution that resemble those in the uniform Act, with some variations.[135] New Brunswick is the only prov-

128. *Franchises Act Regulations* (P.E.I.), Royal Gazette, vol. CXXXII, no. 18 (6 May 2006), Part II, s. 3(3).

129. *Ibid.*, s. 2(b). The requirements for valid electronic delivery are that the document must be a single, integrated document or file, have no extraneous content beyond what is required or permitted by law except for customary tools to enable the recipient to receive and view the material, have no links to or from external content, and be in a format that allows the recipient to store, retrieve, and print the contents. The franchisor must keep records of the electronic disclosure, and receive a written acknowledgment of receipt from the prospective franchisee.

130. *Ibid.*, s. 3(2).

131. *Ibid.*, s. 6.

132. *Supra*, note 7.

133. *The Royal Gazette* (N.B.), vol. 168 (14 July 2010) at 1358, online at: http://www.gnb.ca/0062/gazette/RG20100714.pdf.

134. See N.B. Ministry of Justice and Consumer Affairs, *Consultation Paper on Regulations Under the Franchises Act* (2009), online at http://www.gnb.ca/0062/promos/FranchisesAct-e.pdf.

135. The New Brunswick *Mediation Regulation – Franchises Act*. N.B. Reg. 2010-93 does not incorporate the feature of s. 3 of the ULCC uniform mediation regulation calling for appointment of a

ince that has enacted a mediation procedure specifically for the resolution of franchise disputes.

6. Manitoba Modifies the ULCC Model

Manitoba's has the newest franchise statute in Canada. *The Franchises Act* was passed in 2010.[136] It came into force in October 2012.[137]

The enactment of *The Franchises Act* was preceded by a report by the Manitoba Law Reform Commission that recommended legislation along the lines of the *Uniform Franchises Act* with a number of modifications.[138] Some, but not all, of the recommendations of the Manitoba Law Reform Commission for modifications of the ULCC are reflected in *The Franchises Act* and the regulations under it.

Manitoba legislation provides that a disclosure document is sufficient if it "substantially complies" with the Act.[139] A disclosure document may be in substantial compliance with the Act even though it contains a technical irregularity or mistake "not affecting the substance of the document."[140] The legislation expressly permits a disclosure document to be provided to a prospective franchisee in several parts on separate occasions, rather than as a single document on a single occasion, as long as the prospective franchisee receives all the required disclosures at least 14 days before a franchise agreement is signed or a payment relating to the franchise is paid to

mediator by a roster organization or the court if the parties do not agree on a mediator. Instead, s. 5(2) of the N.B. regulation allows for a mediator to be chosen by representatives appointed by each party. Section 12 of the N.B. regulation dispenses with the provision of the uniform regulation requiring a pre-mediation declaration by the parties on how costs of the mediation will be borne. It requires instead that the costs of mediation be shared equally unless the parties otherwise agree.

136. *Supra*, note 9.

137. *Manitoba Gazette*, 7 April 2012, Part I, at 141.

138. *Supra*, note 11.

139. *Supra*, note 9, s. 5(10)(a).

140. *Ibid.*, s. 5(10)(b).

the franchisor.[141] Electronic delivery of a disclosure document is permitted, provided it meets requirements similar to those imposed by the P.E.I. regulations.[142]

D. Analysis of the Uniform Franchises Act

1. Key Definitions

(a) Definition of "franchise"

The definition of "franchise" in section 1(1) of the *Uniform Franchises Act* is key to understanding the scope of the Act:

> "franchise" means a right to engage in a business where the franchisee is required by contract or otherwise to make a payment or continuing payments, whether direct or indirect, or a commitment to make such payment or payments, to the franchisor or the franchisor's associate in the course of operating the business or as a condition of acquiring the franchise or commencing operations and,
>
> (a) 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, trade-mark, 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 in, the franchisee's method of operation, including building design and furnishings, locations, business organization, marketing techniques or training, or
>
> (b) in which,

141. *Ibid.*, s. 5(3). Like the *Uniform Franchises Act* and the franchise legislation of other provinces, *The Franchises Act* of Manitoba requires that a prospective franchisee receive the entire disclosure document at least 14 days before a franchise agreement or other agreement relating to the franchise is signed, or any consideration relating to the franchise is paid by or on behalf of the prospective franchisee to the franchisor or franchisor's associate (other than the refundable deposit permitted by Manitoba and some other provinces): *ibid.*, ss. 5(2), (14).

142. *Franchises Regulation*, Man. Reg. 29/2012, s. 5(1). The Manitoba regulation requires a disclosure document delivered by electronic means to be in a form that enables the recipient to "retrieve and process" the document, and have no links to or from external documents or content. Written acknowledgment of receipt by the prospective franchisee is required: *ibid.* If the disclosure document consists of separate electronic files, there must be an index for each file setting out the filename and, a statement of the subject-matter if the filename is not sufficiently descriptive: *ibid.*, s. 5(2).

(i) the franchisor or the franchisor's associate grants the franchisee the representational or distribution rights, whether or not a trade-mark, trade name, logo or advertising or other commercial symbol is involved, to sell, offer for sale or distribute goods or services supplied by the franchisor or a supplier designated by the franchisor, and

(ii) the franchisor or the franchisor's associate or a third person designated by the franchisor, provides location assistance, including securing retail outlets or accounts for the goods or services to be sold, offered for sale or distributed or securing locations or sites for vending machines, display racks or other product sales displays used by the franchisee;

The definition corresponds closely to that in the Ontario legislation.[143] It also resembles the definition that appears in the Federal Trade Commission Franchise Disclosure Rule ("FTC Franchise Rule"), the principal enactment regulating franchising activity in the U.S.[144]

Paragraph (a) of the definition extends to business arrangements having these elements:

- a right to operate a business associated with the franchisor's trademark, trade name, or other symbol of commercial identity;
- the franchisor exerts significant control over, or provides significant assistance in, the operation of the business; and
- an obligation to make payments to the franchisor or franchisor's associate in the course of operating the business or to acquire the right to operate it.

This describes the classic business format franchise common in the food, retail, and service industries.

143. The definition in Alberta's *Franchises Act* is narrower and might not cover as many sales representation and distribution contracts as would the Ontario and uniform definitions of "franchise." The definition of "franchise" in the *Uniform Franchise Act* omits references to "service marks" that appear in the Ontario and Alberta statutes, because "service mark" is not a term used in Canadian trademark law: Uniform Franchise Act Working Group, "Uniform Franchises Act with Commentary," *Proceedings of the Eighty-sixth Annual Meeting* (Appendix D) (ULCC, 2004) 176 (text online at http://www.ulcc.ca/en/2004-regina-sk/272-civil-section-documents/954-franchise-law-draft-uniform-act.)

144 16 C.F.R. § 436.

Paragraph (b) of the definition extends to sales representation and distribution arrangements in which the right to sell or distribute products or services designated by the franchisor is granted in return for payments by the franchisee, and in which the franchisor provides location assistance. Paragraph (b) extends the scope of the Act to dealerships and distributorships that might not typically be considered franchises.[145] The definition is deliberately broad in order to extend the provisions of the Act, such as the obligation of fair dealing, to a wide range of marketing arrangements characterized by control exerted by one party over the business operations of the other.[146]

The term "franchise" under the uniform Act includes master franchises and subfranchises.[147] "Franchisor" is defined to include a subfranchisor, and "franchisee" to include a subfranchisee.[148] Thus, a subfranchisor is a franchisee for the purpose of the master franchise, and a franchisor vis-à-vis the subfranchisee.

(b) Definition of "franchisor's associate"

A "franchisor's associate" is defined as a person who directly or indirectly controls or is controlled by the franchisor, and who is directly involved in granting the franchise by way of reviewing or approving the grant, making representations on behalf of the franchisor, or who exercises significant operational control over the franchisee and to whom the franchisee has a continuing financial obligation in respect of the franchise.[149] The Act imposes the obligations and liabilities of the franchisor on a franchisor's associate, preventing the dilution or avoidance of those obligations by means of corporate structures.

145. A leading text writer commented on paragraph (b) of the uniform definition of "franchise" as follows: "Soft drink manufacturers, warehouse jobbers, cosmetic manufacturers, and video tape suppliers may find that their arrangements inadvertently fall within this branch of the definition of a 'franchise'": Zaid, *supra*, note 11 at 41.

146. Uniform Franchise Act Working Group, "Uniform Franchises Act with Commentary," *supra*, note 143, commentary to definition of "franchise".

147. *Ibid.*, s. 1(2).

148. *Supra*, note 10, s. 1(1).

149. A franchisor or franchisor's associate , or a franchisee, that is a corporation is deemed to be controlled by another person if the other person beneficially holds more than 50% of the voting securities of the franchisor or franchisor's associate, otherwise than by way of security, and the votes the securities carry are entitled to elect a majority of its directors: *Uniform Franchises Act*, *supra*, note 10, s. 1(3).

(c) Definition of "franchise agreement"

A franchise agreement is defined in the uniform Act simply as any agreement between a franchisor or franchisor's associate and a franchisee that relates to a franchise.[150]

2. Application of the Uniform Franchises Act

Section 2(1) of the uniform Act states the general rule that the Act applies to a franchise agreement that is entered into after the section comes into force. It extends also to renewals and extensions of franchise agreements that take place after the section comes into force, regardless of when the original franchise agreement was made.

Some provisions of the uniform Act are expressed to apply to franchise agreements that are in existence when the Act becomes effective in a particular jurisdiction. These are the provisions on fair dealing, the right of franchisees to associate, dispute resolution, preservation of rights other other than those conferred by the Act, nullification of terms that purport to exclude the application of the laws of the enacting jurisdiction to claims enforceable under the Act or that restrict the choice of forum or venue, inability to waive rights under the Act, and the burden of proof of entitlement to an exemption.[151]

In addition, the business to be operated under the franchise agreement must be wholly or partly located in the enacting jurisdiction in order for the Act to apply.[152]

3. Non-Application of the Uniform Franchises Act

Section 2(3) of the *Uniform Franchises Act* identifies a number of commercial arrangements or relationships to which the Act does not apply. Notable among these are employment relationships, partnerships, various types of co-operative organizations, and the arrangements described below:

- an arrangement arising from an agreement between a licensor and a single licensee regarding a specific trademark, trade name, logo or advertising or other commercial symbol if the licence is the only one of its kind in Canada;

150. *Ibid.*, s. 1(1). While the definition does not expressly require a franchise agreement to be in writing, s. 2(3) declares that the uniform Act does not apply to arrangements arising from oral agreements. See below under the heading "Non-Application of the Uniform Franchises Act."

151. *Ibid.*, s. 2(2).

152. *Ibid.*, s. 2(1).

- a relationship or arrangement arising out of an oral agreement where no writing evidences any material term or aspect of the relationship or arrangement.

4. The Duty of Fair Dealing

Section 3 of the *Uniform Franchises Act* is a very important provision. It imposes a duty of fair dealing on the parties to a franchise agreement and gives a right to sue for damages for its breach:

> Fair dealing
>
> 3. (1) Every franchise agreement imposes on each party a duty of fair dealing in the performance and enforcement of the agreement, including in the exercise of a right under the agreement.
>
> Right of action
>
> (2) A party to a franchise agreement has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing.
>
> Interpretation
>
> (3) For the purpose of this section, the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards.

The statutory duty of fair dealing applies to the performance and also to the enforcement of a franchise agreement. The words "including in the exercise of a right under the agreement," which do not appear in the Alberta or Ontario Acts, were added in the uniform Act in order to ensure that the duty of fair dealing would attach not only to the performance of obligations under a franchise agreement or steps taken to enforce it, but also to the exercise of discretionary rights and powers under it.[153] Examples of discretionary rights would be the franchisor's power to approve or withhold approval of a proposed sale or assignment of the franchise, or to renew or refuse renewal of the agreement on the expiration of a franchise term.

As noted in Chapter II, a duty of fair dealing and good faith requires parties to deal "promptly, honestly, fairly and reasonably" with one another.[154] It requires each party to take the other party's interests into account in the dealings that flow from the agreement, though not to the extent of subordinating one's own interests to

153. Uniform Franchise Act Working Group, *supra*, note 143.

154. *Shelanu Inc. v. Print Three Franchising Corporation, supra*, note 73.

those of the other party.[155] While much of the case law on good faith and fair dealing in franchising concerns arises from claims made against franchisors, the duty applies with equal force to franchisees.[156]

As the statutory duty of fair dealing applies "in the performance and enforcement…of the agreement," it arises once a franchise agreement is in existence. It does not apply to pre-contractual negotiations between a franchisor and a prospective franchisee. The uniform Act and the provincial franchise statutes in force provide mechanisms other than the duty of fair dealing to protect the interests of franchisees in the pre-contractual stage, namely disclosure and statutory causes of action for misrepresentation and rescission. These are discussed later in this chapter.

5. The Franchisee's Right to Associate

Section 4(1) of the uniform Act declares that a franchisee may associate with other franchisees and may form or join an organization of franchisees. Other provisions in section 4 reinforce this declaration. Franchisors and franchisor's associates are prohibited from interfering, prohibiting, or restricting the exercise of this right by franchisees.[157] They are also prohibited from directly or indirectly penalizing franchisees from exercising their freedom of association, or threatening to do so.[158] Terms in a franchise agreement or other contract that would have the effect of doing so are void.[159] The Act allows a franchisee to sue a franchisor or franchisor's associate for damages for a contravention of section 4.[160]

Protecting the ability of franchisees to form an association is a means of reducing the power imbalance inherent in the franchisor-franchisee relationship. It allows franchisees to deal collectively with the franchisor on issues that affect them within the franchise system, much like the right to collective bargaining in labour law.

155. *Ibid.* See also *Gerami v. Double Double Pizza Chicken Ltd.*, 2005 CanLII 45742 at para. 51 (Ont. S.C.J.)

156. *Gerami*, *ibid.* at paras. 51-52 (Ont. S.C.J.) (misrepresentations by franchisee concerning business experience and exaggeration of net worth constituting bad faith). See also *1017933 Ontario Ltd. v. Robin's Foods Inc.*, [1998] O.J. No. 1110 (Gen. Div.) (franchisee breaching franchise agreement as well as acting in bad faith by conducting sideline wholesale business selling products prepared at the franchise location to competing retailers).

157. *Supra*, note 10, s. 4(2).

158. *Ibid.*, s. 4(3).

159. *Ibid.*, s. 4(4).

160. *Ibid.*, s. 4(5).

6. Disclosure

(a) General

The requirements for pre-contractual disclosure by the franchisor or franchisor's associate are the core of the *Uniform Franchises Act*. While extensive and complex, they address the reality that a prospective franchisee is at an extreme disadvantage in dealing with a franchisor in terms of access to business information about the franchise, and must rely on what the franchisor discloses in making a decision on whether to invest. For the most part, the information the prospective franchisee requires to make a prudent decision is peculiarly within the knowledge of the franchisor. Inadequate or misleading disclosure can lead to unfortunate, even disastrous, consequences for the franchisee.

(b) The requirement to deliver a disclosure document

Section 5(1) of the uniform Act requires the franchisor to deliver a disclosure document to a prospective franchisee not less than 14 days before the prospective franchisee signs a franchise agreement or any other agreement relating to the franchise or before any consideration (money or money's worth) is paid to the franchisor or franchisor's associate relating to the franchise, whichever is earlier.

The disclosure document must be a single document delivered on a single occasion.[161] It may be delivered either personally, by registered mail, or by any other method prescribed by regulation.[162]

Disclosure is not required before the franchisee signs an agreement that only requires confidentiality regarding information or material that may be provided, or that simply designates a location, site or territory for the prospective franchisee. The uniform Act deems these agreements not to be "agreements relating to the franchise."[163]

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161. *Ibid.*, s. 5(3). In contrast, *The Franchises Act* of Manitoba allows expressly for delivery of a disclosure document in parts, but the prospective franchisee must have received all parts at least 14 days before signing an agreement or paying any consideration relating to the franchise.

162. *Ibid.*, s. 5(2).

163. *Ibid.*, s. 5(11). This is not the case if an agreement contains terms that require the franchisee to keep confidential or prohibits the use of information that is or comes into the public domain or is disclosed without a breach of the agreement, or disclosed by consent of the parties. In addition, the exemption does not apply to an agreement that prohibits disclosure of information to a franchisees' organization, other franchisees of the same franchise system, or to a franchisee's professional advisers. Such an agreement is a "franchise agreement or any other agreement relating to the franchise": s. 5(12).

(c) Contents of the disclosure document

The *Uniform Franchises Act* requires a disclosure document to contain:

- financial statements, as prescribed by regulation;
- copies of all proposed franchise agreements and other agreements to be signed by the prospective franchisee;
- statements and information prescribed by regulation for the purpose of assisting the prospective franchisee in making informed investment decisions;
- other information and copies of documents as prescribed by regulation.[164]

In addition to the above material, the disclosure document must contain all "material facts."[165] The uniform Act defines "material fact" as follows:

> "material fact" means any information, about the business, operations, capital or control of the franchisor or franchisor's associate or about the franchise or the franchise system, that would reasonably be expected to have a significant effect on the value or price of the franchise to be granted or the decision to acquire the franchise;[166]

The prescribed information that the franchisor must include in the disclosure document is set out in ULCC *Regulation made under the Uniform Franchises Act: Disclosure Documents* ("uniform *Disclosure Documents Regulation*").[167]

The requirements of the uniform *Disclosure Documents Regulation* reflect the high degree of standardization that exists among the disclosure requirements of the several provinces that possess franchise legislation. There are a few differences between the uniform *Disclosure Documents Regulation* and the regulations of individual provinces, but the differences are only ones of detail and are relatively minor.

164. *Ibid.*, s. 5(4).

165. *Ibid.*, s. 5(5).

166. *Ibid.*, s. 1(1).

167. Uniform Law Conference of Canada, *Proceedings of the Eighty-seventh Annual Meeting* (2005), *supra*, note 10 at 216. See also online at: http://www.ulcc.ca/en/2005-st-johns-nf/254-civil-section-documents/1048-uniform-franchises-act-disclosure-regulation.

The uniform *Disclosure Documents Regulation* requires a disclosure document to contain all of the following:

Risk warnings

At the beginning of the disclosure document, the following risk warnings must appear together:

- a prospective franchisee should seek information on the franchisor and on the franchisor's business background, banking affairs, credit history and trade references;
- a prospective franchisee should seek expert independent legal and financial advice in relation to franchising and the franchise agreement prior to entering into the franchise agreement;
- a prospective franchisee should contact current and previous franchisees prior to entering into the franchise agreement; and
- lists of current and previous franchisees and their contact information can be found in this disclosure document.[168]

Information about the franchisor

- the business background of the franchisor, including:
  - the name of the franchisor;
  - the name under which the franchisor is doing or intends to do business;
  - the name of any associate of the franchisor who will engage in business transactions with the franchisee;
  - the franchisor's principal business address or if outside the enacting jurisdiction, the name and address of a person authorized to accept service on the franchisor's behalf;
  - the franchisor's business form: corporate, partnership, or otherwise;
  - if the franchisor is a subsidiary, the name and principal business address of the parent corporation;
  - the business experience of the franchisor, including the length of time the franchisor has: operated a business of the same type as the franchise being granted, granted franchises of that type, or granted any other type of franchise;
  - if the franchisor has offered a different type of franchise, a description of every such type, including the length of time the franchisor offered it and

168. *Ibid.*, s. 2.

the number of franchises of that type granted in the five years immediately before the date of the disclosure document;[169]

- the business background of the directors, general partners, and officers of the franchisor, including
  - their names and current positions;
  - a brief description of the prior relevant business experience of each individual;
  - the length of time each individual has been engaged in a business of the same type as the franchise offered;
  - the principal occupation and employers of each individual during the five years immediately before the date of the disclosure document;[170]

- a statement whether the franchisor, franchisor's associate, a director, general partner, or officer of the franchisor has been convicted of fraud, unfair or deceptive business practices or a violation of a law regulating franchises or business within the 10 years immediately preceding the date of the disclosure document, or if a charge is pending involving such a matter, and the details of the conviction or charge;[171]

- a statement indicating whether the franchisor, franchisor's associate, a director, general partner, or officer of the franchisor has been subject to an administrative order or penalty under a law regulating franchises or business, or if any of them are the subject of any pending administrative actions to be heard under such a law, and the details of the order, penalty or pending action;[172]

- a statement indicating whether the franchisor, franchisor's associate, a director, general partner, or officer of the franchisor has been found liable in a civil action for misrepresentation, unfair or deceptive business practices or violating a law regulating franchises or business, inducing a failure to provide proper disclosure to a franchisee, or if such a civil action is pending, and the details of the action or pending action;[173]

169. *Ibid.*, s. 3(a).

170. *Ibid.*, s. 3(b).

171. *Ibid.*, s. 3(c).

172. *Ibid.*, s. 3(d).

173. *Ibid.*, s. 3(e).

- details of any bankruptcy or involvency proceedings taking place within six years immediately preceding the date of the disclosure document, if the debtor is the franchisor, the franchisor's associate, a corporation or partnership whose directors, officers, or general partners include a current director, officer or general partner of the franchisor, or included such a person when the proceeding took place, or a director, officer or general partner of the franchisor in a personal capacity.[174]

Information about the franchise

The following information about the franchise must be presented together in one part of the disclosure document:

- a list of all costs the franchisee must incur in establishing the franchise (described in further detail in s. 4(1)(a) of the uniform regulation);[175]

- the nature and amount of recurring or isolated fees or payments to the franchisor or franchisor's associate whether directly or indirectly, or that the franchisor or franchisor's associate directly or indirectly imposes or collects in whole or in part on behalf of a third party;[176]

- a description of the franchisor's policies and practices regarding guarantees and security interests that are required from franchisees;[177]

- if an annual operating cost estimate for the franchise is provided directly or indirectly, or an operating cost estimate for another regular period, a statement specifying the assumptions and bases underlying the estimate, that the same are reasonable, and where information substantiating the estimate is available for inspection;[178]

- a statement that no annual operating cost estimate is provided, if that is the case;[179]

174. *Ibid.*, s. 3(f).

175. *Ibid.*, s. 4(1)(a).

176. *Ibid.*, s. 4(1)(b).

177. *Ibid.*, s. 4(1)(c).

178. *Ibid.*, s. 4(1)(d).

179. *Ibid.*, s. 4(1)(e).

- if an earnings projection is supplied directly or indirectly, statements specifying:
  - the assumptions and bases underlying the projection;
  - that the same are reasonable;
  - the period covered by the projection;
  - whether the projection is based on actual results of franchises or business operated by the franchisor of the same type as the franchise being offered, and if so, the locations, areas, territories or markets of those franchises or other businesses;
  - if the projection is based on a business operated by the franchisor, franchisor's associate or affiliate, that the information may differ in respect of a franchise operated by a franchisee;
  - where information substantiating the projection is available for inspection;[180]

Financing

- terms and conditions of any financing that the franchisor or franchisor's associate offers or assists anyone to offer to the franchisee directly or indirectly;[181]

Training

- a description of any training or other assistance provided by the franchisor or franchisor's associate, where it is available, whether it is mandatory or optional, and if mandatory, an indication of who bears the cost; or

- a statement that no training is offered, if that is the case;[182]

Manuals

- a summary of the material topics covered in manuals provided by the franchisor or franchisor's associate, or an indication of where manuals may be inspected; or

- a statement that no manuals are provided, if that is the case;[183]

180. *Ibid.*, s. 4(1)(f).

181. *Ibid.*, s. 4(1)(g).

182. *Ibid.*, s. 4(1)(h),(i).

183. *Ibid.*, s. 4(1)(j), (k).

Advertising

- a description of any advertising, marketing, promotion or similar fund to which the franchisee is required to contribute, including the franchisor's policies and practices in respect of:
    - the franchisor's obligation to conduct advertising, marketing, promotion or similar activity;
    - the franchisor's expenditure of money from the fund on those activities in franchisees' locations, areas, territories or markets;
    - participation by franchisees in a local or regional co-operative for advertising, marketing, promotion or similar activity;
    - the amount and frequency of franchisee's contributions to the fund,
    - contributions by the franchisor, franchisor's associate or affiliate to the fund, if any, including their amount and frequency;
    - the portion of the fund that is or may be expended primarily for recruiting prospective franchisees;
    - the administration of the fund, including the portion that is or may be spent on administration and on personnel who administer it;
    - the availability to franchisees of financial statements or reports of contributions to or expenditures from the fund, the basis on which the statements or reports are prepared and how the cost of preparing the statements or reports is accounted for;
    - the availability to franchisees of other reports of activities financed by the fund and how the cost of preparing the same is accounted for;[184]

- if the franchisee is required to contribute to an advertising, marketing, promotion or similar fund, the disclosure document must also describe:
    - the amount or percentage of the fund spent on advertising, marketing, promotion or similar activity in each of the two completed fiscal years immediately preceding the date of the disclosure document;
    - the amount or percentage of the fund (exclusive of the amount or percentage mentioned immediately above that was spent on advertising, etc.) retained or charged by the franchisor, franchisor's parent or franchisor's associate in each of those two competed fiscal years;
    - the amount or percentage of any surplus or deficit in the fund in each of those two completed fiscal years;
    - the projected amount or the basis of the franchisee's contribution for the current fiscal year;

184. *Ibid.*, s. 4(1)(l).

- the projected amount of the contributions by all franchisees for the current fiscal year;
- a projection of the amount or percentage of the fund to be spent on advertising, marketing, promotion or similar activity for the current fiscal year;
- a projection of the amount or percentage of the fund to be retained or charged by the franchisor, franchisor's parent or franchisor's associate in the current fiscal year;[185]

- whether the franchisee is required to expend money on the franchisee's own local advertising, marketing, promotion or similar activity;[186]

Purchase and sale restrictions

- a description of any restrictions or requirements imposed by the franchise agreement regarding obligations to purchase or lease from the franchisor or franchisor's associate or from suppliers approved by them, the goods and services that the franchisor may sell, and to whom they may be sold;[187]

- a description of the franchisor's right to change any such requirement or restriction;[188]

Rebates

- a description of the franchisor's policies and practices, if any, regarding rebates, commissions, payments or other benefits, including the receipt of ones by the franchisor or franchisor's associate as a result of the purchase of goods and services by franchisees;[189]

- a description of the direct or indirect sharing of rebates, commissions, payments or other benefits with franchisees;[190]

Territory

- a description of the franchisor's policies and practices, if any, regarding:

185. *Ibid.*, s. 4(1)(m).

186. *Ibid.*, s. 4(1)(n).

187. *Ibid.*, s. 4(1)(o).

188. *Ibid.*, s. 4(1)(p).

189. *Ibid.*, s. 4(1)(q).

190. *Ibid.*, s. 4(1)(r).

- the granting of specific locations, areas, territories, or markets;
- approval of locations, areas, territories, or markets by the franchisor or franchisor's associate, including material factors considered;
- changes in franchise locations, areas, territories or markets required or approved by the franchisor or franchisor's associate, including material factors considered in the changes and conditions that may be imposed on approval of a change;
- modifications to franchisees' locations, areas, territories or markets that may be made by the franchisor or franchisor's associate;
- terms and conditions of an option, right of first refusal or other right of franchisees to acquire an additional franchise within their location, area, territory or market;
- granting of exclusive locations, areas, territories or markets to franchisees, including:
  - limitations on franchisees' exclusivity;
  - who determines the locations, territories, areas or markets;
  - the factors considered in making the determination and how the locations, etc. are described;
  - whether the continuation of exclusivity depends on franchisees' achievement of a certain sales volume, market penetration or other condition and, if so, the franchisor's rights and remedies in the event of failure to meet the condition;[191]

Proximity

- a description of the franchisor's policies and practices, if any, on the proximity between an existing franchise and:
  - another of its franchises of the same type;
  - any distributor or licensee using the franchisor's trademark, trade name, etc.
  - a business operated by the franchisor, franchisor's associate or an affiliate of the franchisor that distributes similar goods or services under a different trademark, trade name, etc.
  - a franchise of the franchisor, franchisor's associate or an affiliate of the franchisor that distributes similar goods or services under a different trademark, trade name, etc.[192]

- a description of the franchisor's policies and practices, if any, regarding

191. *Ibid.*, s. 4(1)(s).

192. *Ibid.*, s. 4(1)(t).

- compensation to franchisees or any distributor or licensee for any right they may have to operate a business of the same type as the franchise being offered or to distribute similar goods or services as the franchise in franchisees' locations, areas, territories or markets; and
- the resolution by the franchisor of conflicts between the franchisor, franchisor's associate, an affiliate of the franchisor or any distributor or licensee and franchisees respecting locations, areas, territories, markets, customers and franchisor support;[193]

Trademarks and other proprietary rights

- a description of:
  - the rights held by the franchisor or franchisor's associate to trademarks, trade names, logos or advertising or other symbols;
  - patents, copyrights, proprietary information or other proprietary rights associated with the franchise;
  - the status of the the same, any known or potential material impediments to their use, and any known or alleged material infringements of them;
  - the franchisor's or the franchisor's associate's right to modify or discontinue the use of the same;[194]

Licences

- a description of every licence, registration, authorization or other permission the franchisee must obtain under applicable federal, provincial or territorial law, or municipal bylaw in order to operate the franchise;[195]

Personal participation of franchisee

- a description of the extent to which the franchisee or the principals of the franchisee is or are required to participate personally and directly in the operation of the franchise;[196]

193. *Ibid.*, s. 4(1)(u).

194. *Ibid.*, s. 4(1)(v).

195. *Ibid.*, s. 4(1)(w).

196. *Ibid.*, s. 4(1)(x).

Termination, renewal and transfer of the franchise

- a description of all the provisions in the franchise agreement relating to its termination, renewal, and transfer of the franchise, and a list of where these provisions are found in the agreement;[197]

Schedules of franchisees, former franchisees, etc.

- a statement that attached to the disclosure document are:
  - a schedule of franchisees of the franchisor, franchisor's associates or affiliates of the franchisor currently operating franchises of the same type as the one being offered;
  - a schedule of businesses of the same type as the franchise being offered that are currently operated by the franchisor, franchisor's associates or affiliates of the franchisor;
  - a schedule of former such franchises and businesses;
  - a schedule of franchise and business closure information;[198]

(d) Financial statements

The financial statements required to form part of a disclosure document must be

- an audited financial statement for the most recently completed fiscal year of the franchisor's operations, prepared in acordance with the generally accepted auditing standards in the CICA Handbook; or

- a financial statement for the most recently completed fiscal year of the franchisor's operations, prepared in accordance with generally accepted accounting principles and in compliance with the review and reporting standards applicable to review engagements set out in the CICA Handbook.[199]

197. *Ibid.*, s. 4(1)(y).

198. *Ibid.*, s. 4(1)(z). Sections 5-8 of the uniform *Disclosure Documents Regulation* specify the numerical, temporal and geographical parameters of the information required in the schedules.

199. *Ibid.*, s. 9(1). If less than 180 days have passed since the end of the most recent fiscal year and a financial statement is not yet prepared for that year, the disclosure document must contain a financial statement for the last completed fiscal year that is compliant with one or the other of the above requirements for financial statements.: *ibid.*, s. 9(2). If the franchisor has been in operation for less than a year or if 180 days have not passed since the end of the first fiscal year of operation and no financial statement has yet been prepared for the first fiscal year meeting the CICA Handbook standards, the disclosure document must include the franchisor's opening balance sheet: *ibid.*, s. 9(3). If the franchisor is based outside the enacting jurisdiction, the financial statements in the disclosure document can be prepared in accordance with generally accepted

The Crown is not required to include financial statements in its disclosure document when acting as a franchisor.[200]

(e) Certificate of franchisor

The uniform Disclosure Document Regulation requires a signed and dated Certificate of Franchisor in a form set out in the regulation to be completed and attached to the disclosure document.[201] The Certificate of Franchisor declares that the disclosure document contains no untrue information, representation or statement, that it contains every material fact, financial statement, and other statement or information required by the Act and regulations to be in it, and does not omit a material fact that it must contain in order for it not to be misleading.

The franchisor's certification of the correctness and completeness of the disclosure is treated as a crucial aspect of compliance with the pre-contractual disclosure requirements under both the Alberta and Ontario legislation. The courts of each of those provinces have held that the absence of an authorized signature on behalf of the franchisor on a certificate in the statutory form is not merely deficient compliance, but non-compliance entitling the franchise to rescission of the franchise agreement.[202]

accounting principles for the franchisor's home jurisdiction, provided that the disclosure document contains a statement to that effect and the auditing standards or review and reporting standards of that jurisdiction are equivalent to those in the CICA Handbook, or if not, supplementary information is provided setting out the changes necessary to make the presentation and content of the financial statements equivalent to the CICA Handbook standards referenced in s. 9(1) of the regulation: *ibid.*, ss. 9(4),(5).

200. *Uniform Franchises Act*, *supra*, note 10, s. 5(9). Alberta, Ontario, and P.E.I. also exempt franchisors from the requirement to include financial statements in the disclosure if they meet certain criteria based on capitalization, number of active franchisees, and length of time in business: see Alta. Reg. 312/2000, s. 1; Ont. Reg. 581/00, s. 11, and PEI Reg. EC232/06, s.6. Section 8 of the PEI *Franchises Act*, *supra*, note 8, also provides for discretionary exemptions by ministerial order from the requirement to disclose financial statements.

201. *Disclosure Documents Regulation*, *supra*, note 167, s. 10(2). If the franchisor has more than two directors or officers, the certificate must be signed by two persons who are directors or officers.

202. *Hi Hotel Limited Partnership v. Holiday Hospitality Franchising Inc.* (2008), 296 DLR (4th) 335 at 351-352 (Alta. C.A.); *67922341 Canada Inc. v. Dollar it Ltd.*, 2009 ONCA 385, at para. 32. The Alberta Court of Appeal affirmed the decision at trial in *Hi Hotel* to this effect, even though s. 2(4) of the *Franchises Regulation*, Alta. Reg. 240/95 allows a disclosure document to stand if it is "substantially complete."

(f) Exemptions from disclosure requirement

The disclosure requirement does not apply to certain franchise transactions. The exempt group under the *Uniform Franchises Act* consists of grants of a franchise:

- by a franchisee for the franchisee's own account where the grant is not made by or through the franchisor (or in other words, a sale or transfer of a franchise by a franchisee to a purchaser or other transferee of the franchise);[203]

- to someone who has been an officer or director of the franchisor or the franchisor's associate for at least six months, for that person's own account;[204]

- of an additional franchise to an existing franchisee if the additional franchise is substantially the same as the existing one and there has been no material change since the existing franchise agreement or its latest renewal or extension was entered into;[205]

- by an executor, administrator, sheriff, receiver, trustee, trustee in bankruptcy or guardian on behalf of someone other than the franchisor or the franchisor's estate;[206]

- to sell goods or services within a business in which the grantee has an interest, if the sales are not anticipated to exceed 20 per cent of the total sales of the business during the first year of operation of the franchise (the so-called "fractional franchise" exception);[207]

- in which the total annual investment that the prospective franchisee is required to make to acquire and operate the franchise does not exceed an amount prescribed by regulation;[208]

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203. *Uniform Franchises Act*, *supra*, note 10, s. 5(8)(a). The fact that the franchisor has a right under the franchise agreement to approve or disapprove a sale or transfer of the franchise, or is entitled to receive a fee in connection with the sale or assignment that does not exceed the reasonable costs incurred by the franchisor to process the transaction does not make the sale or transfer one that is "effected by or through a franchisor": *ibid.*, s. 5(11).

204. *Ibid.*, s. 5(8)(b).

205. *Ibid.*, s. 5(8)(c). For an explanation of what "material change" means in this context, see under the heading "Statements of Material Change" later in this chapter.

206. *Ibid.*, s. 5(8)(d).

207. *Ibid.*, s. 5(8)(e).

208. *Ibid.*, s. 5(8)(g). For the purposes of the corresponding exemption in the *Arthur Wishart (Fran-*

- that has a term not longer than one year and does not involve payment of a non-refundable fee, and in which the franchisor or franchisor's associate provides location assistance to the franchisee, including securing retail outlets or accounts for the goods or services to be sold, offered for sale or distributed, or securing locations for vending machines, display racks or other product sales displays used by the franchisee; [209] or

- if the franchisor is governed by section 55 of the *Competition Act* (Canada), which regulates multi-level marketing arrangements.[210]

Renewals or extensions of a franchise agreement are also exempt from disclosure requirements if there has been no interruption in the operation of the business operated by the franchisee and no material change since the date of the franchise agreement or its latest renewal or extension.[211]

These exempt transactions fall into several classes. Each class is exempt from the pre-contractual disclosure requirement for a different reason.

One class comprises grants of franchises by a party other than the franchisor or a franchisor's associate, e.g. a franchisee selling the franchise to a purchaser, a receiver or trustee in bankruptcy liquidating assets of a debtor, or a sheriff conducting an execution sale. In these cases the seller of the franchise cannot be expected to have all the information needed to provide disclosure in compliance with the requirements of the Act and it would be unreasonable to require the seller of the franchise to provide it.

In a grant of a franchise to an officer or director of the franchisor organization who has been in that role for a substantial length of time, it is reasonably safe to assume

chise Disclosure) Act, 2000, *supra*, note 6, Ontario sets the ceiling on the annual investment at $5,000: Ont. Reg. 581/00, s. 9. Alberta sets it at $5,000 as well, exclusive of the cost of pre-sold inventory or a reasonable amount of inventory if a reasonable buy-back policy for unsold inventory is applicable: *Franchises Regulation*, Alta. Reg. 240/95, ss. 6(1), (2).

209. *Ibid.*, s. 5(8)(h).

210. *Ibid.*, s. 5(8)(i). Section 55(1) of the federal *Competition Act*, R.S.C. 1985, c. C-34 defines "multi-level marketing plans" as plans for the supply of a product in which a participant receives compensation for selling a product to another participant, who in turn receives compensation for the supply of the same or another product to other participants in the plan. Section 55(2) imposes disclosure requirements on those operating or participating in a multi-level marketing plan.

211. *Supra*, note 10, s. 5(8)(f). See the heading "Statements of material change" later in this chapter regarding the definition of "material change,"

that the information in a disclosure document would already be known or be accessible to that individual and formal pre-contractual disclosure would be superfluous.

In renewals or extensions of an existing franchise, or the acquisition of an additional franchise identical to an existing one where no material change has occurred since the existing franchise was granted, a repetition of disclosure would likewise provide no incremental protection for the franchisee because the information required to be disclosed has already been provided.

If the franchise involves only a portion of the franchisee's sales in a larger business operation ("fractional franchise") or requires only a very small investment, the regulatory burden of extensive and detailed disclosure probably outweighs the practical benefit in terms of protection of the franchisee. The same rationale applies to the exemption of short-term business opportunities franchises that can be acquired without an initial non-refundable fee.

The exclusion of multi-level marketing plans from the scope of the *Uniform Franchises Act* and provincial franchise legislation is to avoid duplication or conflict with the disclosure requirements that the federal *Competition Act* imposes on these arrangements.

In Ontario, a franchisor does not have to provide a disclosure document to a franchisee who is investing more than $5,000,000 in the franchise over a one-year period. The rationale for this exemption evidently is that a franchisee with the means to invest on this scale will be commercially sophisticated and does not require the protection of statutory disclosure.[212] Other existing provincial franchise legislation and the *Uniform Franchises Act* do not contain a "sophisticated franchisee" exemption of this kind.

7. Statements of Material Change

In addition to the requirement for delivery of a pre-contractual disclosure document before any franchise agreement is executed, the *Uniform Franchises Act* and the provincial franchise statutes currently in force require franchisors to provide prospective franchisees with a written statement of any material change as soon as practicable after the change occurs, and before a franchise agreement is signed or any consideration relating to the franchise is paid by or on behalf of the prospective franchisee.[213]

212. So, *supra,* note 13 at 111-112.

213. *Ibid.*, s. 5(6).

Statements of material change serve to prevent a disclosure document from becoming misleading in the interval between delivery and the signing of a franchise agreement due to altered circumstances that could reasonably be expected to affect the value of the proposed franchise or a decision to acquire it.

A "material change" is defined in the uniform Act:

> "material change" means a change, in the business, operations, capital or control of the franchisor or franchisor's associate or in the franchise or the franchise system, that would reasonably be expected to have a significant adverse effect on the value or price of the franchise to be granted or on the decision to acquire the franchise and includes a decision to implement such a change made by the board of directors of the franchisor or franchisor's associate or by senior management of the franchisor or franchisor's associate who believe that confirmation of the decision by the board of directors is probable.[214]

Under the definition of "material change," the altered circumstances may be in relation to the franchisor's business organization, the franchise system the franchisor operates, or the specific franchise being offered. They also include decisions taken within the franchisor's organization, whether or not they have been implemented, if they are expected to be confirmed by the franchisor's directors.

8. Statutory Remedies Under the *Uniform Franchises Act*

(a) General

The *Uniform Franchises Act* confers four statutory remedies on the franchisee. These are (1) a right to rescind the franchise agreement; (2) a right to sue for damages for misrepresentation and/or non-compliant disclosure; (3) a right to sue for damages for breach of the duty of fair dealing;[215] and (4) a right to sue the franchisor or the franchisor's associate for interference with the franchisee's right to associate.[216] These rights are in addition to any other right or remedy the franchisee may have in law.[217] The statutory remedies, like the franchisor's statutory obligations, cannot be waived and any purported attempt to do so is void.[218]

214. *Ibid.*, s. 1(1).

215. This right is available to any party to a franchise agreement, including the franchisor: *Shelanu Inc. v. Print Three Franchising corporation*, *supra,* note 73; *Gerami v. Double Double Pizza Chicken Ltd.*, *supra*, note 155.

216. *Supra*, note 10, s. 4(5).

217. *Supra*, note 10, s. 10.

218. *Ibid.*, s. 12.

(b) The statutory rescission remedy

(i) When it is available

The *Uniform Franchises Act* allows a franchisee to rescind the franchise agreement by delivering a written notice of rescission to the franchisor in two instances. The first is where the franchisor fails to provide a disclosure document or statement of material change within the prescribed time period (14 days before the earlier of the signing of the franchise agreement and the payment of any consideration), or the disclosure document does not comply with the disclosure provisions under the Act and regulation.[219] In this situation, the franchisee has 60 days from the date of receiving the disclosure document to rescind.[220]

The second situation is one in which the franchisor never provides a disclosure document at all.[221] In that case, the franchisee has two years from the date of entering into the franchise agreement to give notice of rescission.[222]

(ii) Effect of statutory rescission

The uniform Act provides that the right of rescission is exerciseable by the franchisee "without penalty or obligation."[223] The franchisor has substantial obligations in the event of rescission, however. Once the franchisee has given a valid notice of rescission, the franchisor has 60 days from the date of rescission to effectively restore the situation to what it was before the franchise agreement was signed. The franchisor is required to do all of the following:

- refund any money received from the franchisee;
- repurchase any inventory franchisee purchased under the agreement at a price equal to the original purchase price paid;
- repurchase any supplies and equipment at a price equal to the original purchase price; and
- compensate the franchisee for any losses incurred in acquiring, setting up and operating the franchise. [224]

219. *Ibid.*, s. 6(1), (3).

220. *Ibid.*

221. *Ibid.*, s. 6(2).

222. *Ibid.*

223. A civil action or bad faith claim brought by the franchisor after rescission has been held not to be a "penalty" under the Ontario legislation: *Personal Service Coffee Corp. v. Beer (c.o.b. Elite Coffee Newcastle),* [2005] O.J. No. 3043 (C.A.).

224. *Supra,* note 10, s. 6(6).

The rescission provisions in the Ontario, Manitoba, New Brunswick and PEI legislation are identical to the one in the uniform Act.[225] The Alberta provision is worded differently, in such a way as to suggest that rescission is available only in the event of untimely disclosure.[226] The Alberta courts have held, however, that delivery of a disclosure document that is deficient in a material respect triggers the statutory right to rescind.[227] In a similar vein, the Ontario courts have held that "a document does not become a disclosure document just because it is called one"[228] and that delivery of a substantially deficient disclosure document amounts to a situation of "no disclosure," making the two year limitation period applicable.[229]

(iii) Differences between statutory and non-statutory rescission

There are significant differences between rescission under franchise legislation (statutory rescission) and the non-statutory (equitable) remedy of rescission. The right to obtain non-statutory rescission of a contract for misrepresentation may be lost in certain circumstances.[230] A plaintiff who delays after learning of the misrepresentation may be taken to have affirmed the contract, and this will bar the remedy. Consider the example of a franchisee in a common law province without franchise legislation, like British Columbia. If the franchisee attempts unsuccessfully to continue operations after discovering the misrepresentation, at common law the fran-

225. *Arthur Wishart Act (Franchise Disclosure),* S.O. 2000, ch. 3, ss. 6(1), (2); *The Franchises Act*, C.C.S.M, c. F156, ss. 6(1), (2); *Franchises Act*, S.N.B. 2007, c. F-23.5, ss. 6(1), (2); *Franchises Act*, S.P.E.I., c. F-14.1, ss. 6(1), (2).

226. The *Franchises Act,* R.S.A. 2000, c. F-23, s. 13 stipulates that if the franchisor fails to give the disclosure document to a prospective franchisee within the requisite time period (at least 14 days before the signing of any agreement relating to the franchise or the payment of any consideration by the franchisee, whichever occurs first), the franchisee may rescind no later than 60 days after receiving the disclosure document or no later than two years after the franchise is granted, whichever occurs first.

227. See e.g. *Hi Hotel Limited Partnership v. Holiday Hospitality Franchising Inc.,* 2008 ABCA 276, aff'g 2007 ABQB 686. In this case, disclosure documents were delivered to the franchisee within the requisite 14 days. The document, however, did not contain a signed and dated certificate of correctness, information the court considered vital. The court held that given the materiality of the omission, the situation was one of no delivery and no disclosure and therefore, the franchisee had two years from the date of entering the franchise agreement to seek rescission.

228. *67922341 Canada Inc. v. Dollar It Ltd*., 2009 ONCA 385, at para. 74

229. See e.g. 6792341 *Canada Inc. v. Dollar It Ltd.,* 2009 ONCA 385; *Melnychuk v. Blitz Ltd.,* 2010 ONSC 566; *Burnett Management Inc. v. Cuts Fitness for Men*, 2012 ONSC 3358; *1159607 Ontario Inc. v. Country Style Food Services Inc*., 2012 ONSC 881; *1518628 Ontario Inc. v. Tutor Time Learning Centres, LLC,* [2006] O.J. No. 3011 (S.C.J.).

230. This extends to a claim based on actionable non-disclosure, i.e. misrepresentation by omission in circumstances where a duty to provide information is present.

chisee would be taken to have to have affirmed the contract, thereby foreclosing rescission as a remedy.[231]

In addition, non-statutory rescission is an equitable remedy and subject to the equitable maxim: "Those who seek equity must come with clean hands." In other words, a plaintiff seeking equitable relief must show that his or her past record in the transaction is clean.[232] A franchisee who is induced by a material misrepresentation to enter into a franchise agreement could lose the right to rescind if the franchisee's conduct vis-à-vis the franchisor was not entirely above board.

The statutory right of rescission under franchising legislation, however, stands on a different footing. In Ontario, the courts have held that the right, and entitlement to full restitution, are absolute and not conditional on prompt action or good conduct:

> There is nothing in the language of s. 6(2) suggesting that a franchisee's right to rescind is in any way conditional. Where there is non-disclosure, the statutory right to rescind appears to be absolute. Equally, the payments detailed in s. 6(6) are required to be made by the franchisor within sixty days of the date of rescission. Again, there is nothing in the language of the section that suggests such payments are conditional in any way on the conduct of the franchisee and, therefore, the right to payment also appears to be absolute….
>
> [A] franchisor cannot avoid the remedy [rescission] available to a franchisee…or its obligations in relation thereto by raising issues about the conduct of the franchisee. Were it permissible to do so, it would in my view emasculate the stringent disclosure provisions of the Act and the consequences that follow from the failure to meet those obligations. It would run counter to the intention of the legislature and the express language of the Act to diminish the rights of a franchisee where there has been non-disclosure.[233]

231. See e.g. *Lee v. Japan Centre 1 Hour Photo Ltd.,* [1991] O.J. No. 192 (Gen. Div.); *Capital Placement of Canada (CPC) Ltd. v. Wilson*, [1988] N.S.J. No. 116 (C.A.).

232. *Toronto (City) v. Polai (*1969), 8 D.L.R. (3d) 689 (Ont. C.A.), aff'd (1972), 28 D.L.R. (3d) 638 (SCC).

233. *Personal Service Coffee Corp. v. Beer (c.o.b. Elite coffee Newcastle), supra*, note 223 at paras. 32-35 (C.A.). See also *Payne Environmental Inc., v. Lord and Partners Ltd.,* [2006] O.J. No 273 (SCJ)(franchisee's failure to apprise franchisor of existence of Act apparently knowing about franchisor's ignorance not vitiating right to rescission and not constituting breach of fair dealing.) The B.C. courts have adopted a similar approach with respect to the statutory right of rescission under the *Real Estate Development Marketing Act*, SBC 2004, c.41: see *Pinto v. Revelstoke Mountain Resort Limited Partnership,* 2010 BCSC 422.

Similarly, it has been held that the motive of a franchisee in seeking rescission is irrelevant. In one Alberta case, the franchisee readily conceded that what was missing from the disclosure, namely a signed and dated certificate of correctness, would not have been important in its decision to acquire the franchise.[234] The franchisor alleged that the franchisee was a sophisticated investor who simply repented of the deal and was invoking a "technical defect" as an excuse to rescind the agreement eleven months later; in these circumstances, so the franchisor argued, the franchisee should not be entitled to the protection of the Act. The Alberta Court of Appeal disagreed:

> The appellant franchisor also suggests that the respondent franchisee simply rescinded because it was financially advantageous to do so. With respect, that is no answer. That is the inevitable result of any legislation to protect consumers or investors. Rarely does such legislation automatically nullify a sale or investment, and so it gives the consumer or investor an election whether to get out of the transaction. Only a malcontent or crank would do so if the transaction was profitable for him or her. The person whose shares go up will not complain that he or she did not get a prospectus.

234. *Hi Hotel Limited Partnership v. Holiday Hospitality Franchising Inc*, supra, note 202. The court considered the signature and date on the certificate vital:

> [The statutory cause of action] lies not only against the franchisor, but also against "every person who signed the disclosure document". The only signature required by the Act or the Regulation is the signature on the certificate… Furthermore, s. 10 of the Act gives several defences to such an action. Some are limited to persons other than the franchisor, so they help only people who signed the certificate. One of those defences excludes liability unless that person did not conduct a certain investigation (s. 10(3)(a)).
>
> [When one strips out the double negatives], one is left with this. A person who signs the certificate has a personal duty to "conduct an investigation sufficient to provide reasonable grounds for believing" that the facts stated are accurate, and that all facts to be disclosed were disclosed. Personal liability enforces that.
>
> If no one signs, no one has that duty. No individual need investigate, nor believe.
>
> So a signed certificate is not a question of form. It governs who has huge monetary liability, and who has the duty of investigation and disclosure.
>
> If the respondent franchisee here sued the two persons whose typed names were given, claiming a million dollars for non-disclosure, what would their statement of defence say? "We did not sign anything."

> That cannot be a reason to refuse to enforce the legislation. To give protective legislation effect only where the transaction made a profit, would virtually repeal the legislation and make it useless.
>
> It is especially inconsistent to couple such an interpretation with reliance upon a contract. Generally speaking, contracts law and common law let people make a profit, and do not look at motive. If one is bound by a valid enforceable contract, one must obey it, however noble one's motives. If one is not bound by a valid enforceable contract, one need not obey it, and is free to sell higher or buy lower elsewhere. So a profit motive here is nothing new or exceptional.[235]

It has also been held that notions of reliance and causation are irrelevant and that even if it can be shown that the franchisee would have proceeded in any event, this does not bar the right to statutory rescission.[236] By contrast, in this situation a non-statutory claim for rescission based on misrepresentation would fail on the basis of causation.

(iv) Policy and purpose of the statutory rescission remedy

While rescission might be seen as a drastic remedy, its imposition provides strong incentive for a franchisor to comply with the disclosure requirements and thereby promotes the purpose of the legislation.[237] In this regard, the Alberta Court of Appeal drew an analogy in a leading case between investor protection legislation and

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235. Paras. 108 to 110.

236. *Melnychuk v. Blitz Ltd.,* supra, note 229.

237. The Ontario Court of Appeal expressed this view in *MDG Kingston Inc. v. MDG Computers Canada Inc.* (2008), 92 O.R. (3d) 4 at paras. 1 and 2, leave to appeal refused, [2010] SCCA No. 94 :

> The [Act] was passed …to level the legal playing field between franchisees and franchisors by protecting franchisees when they enter into franchise agreements. *The Act provides a drastic remedy against franchisors who do not provide prior disclosure, in the required disclosure document, of all the relevant information that franchisees may need before deciding whether to enter into a franchise arrangement and to sign the franchise agreement…The remedy is that the franchisee may rescind the franchise agreement and obtain the return of all monies paid, equipment purchased etc., as well as damages.*
>
> (Italics added)

See also *6792341 Canada Inc. v. Dollar It Ltd.,* [2009] O.J. No. 1881 at para. 72 (C.A.):

> The purpose of the legislation is to protect franchisees and the mechanism for so doing is the imposition of rigorous disclosure requirements and strict penalties for non-compliance. The legislation must be considered and interpreted in light of this purpose.

consumer protection legislation, considering that it should be interpreted and applied accordingly, in light of its context, scheme and the mischief at which it is aimed, rather than "through the lens of freedom of contract and competition." [238] The court stated that in the context of franchising, those principles should generally yield to that of consumer protection, the principal concern being the "frequently total disparity of knowledge about the characteristics and technical components of the…services."[239] The Alberta Court of Appeal considered the knowledge disparity particularly relevant in the franchise context. Whatever the bargaining power of a prospective franchisee, large or small, in the absence of full disclosure the franchisee will rarely know much about the franchisor, its officers, and its actual practices.

It must be remembered that even though the remedy of statutory rescission is only available to the franchisee and not the franchisor, franchisors are not without any legal recourse against franchisees. Breaches of the franchise agreement or other misconduct by a franchisee within the franchise relationship may allow the franchisor to sue at common law or under the duty of good faith and fair dealing provisions of the legislation. [240]

238. *Hi Hotel Limited Partnership v. Holiday Hospitality Franchising Inc*, 2008 ABCA 276, at para. 19, quoting from *Assoc. des courtiers et agents immobiliers du Québec v. Proprio Direct,* [2008] SCJ No. 32, para. 34.

239. *Ibid.*, the Alberta Court of Appeal again quoting from *Proprio Direct*, paras. 35-36.

240. In *Personal Service Coffee Corp. v. Beer (c.o.b. Elite coffee Newcastle),* [2005] O.J. No. 3043 at paras. 32-35 (C.A.). the Ontario Court of Appeal stated:

> [s. 6] [of the *Arthur Wishart Act*] deals only with the statutory right of rescission remedy available to a franchisee where a franchisor has failed to comply with the mandatory disclosure required by s. 5. If the franchisor has a complaint about the conduct of the franchisee, it must look beyond s. 6 to assert any such claim.
>
> Put another way, a franchisor cannot avoid the remedy available to a franchisee under s. 6(2) or its obligations in relation thereto by raising issues about the conduct of the franchisee. Were it permissible to do so, it would in my view emasculate the stringent disclosure provisions of the Act and the consequences that follow from the failure to meet those obligations*. It would run counter to the intention of the legislature and the express language of the Act to diminish the rights of a franchisee where there has been non-disclosure.*
>
> In my view, where a franchisor has a complaint about the conduct of a franchisee, it is obliged to assert such a claim under ss. 3 [fair dealing] or 9 [non-derogation from other rights of franchisees and franchisors at law] of the Act.
>
> (Italics added)

(c) Damages for misrepresentation or non-compliant disclosure

(i) General

The *Uniform Franchises Act* provides that if a franchisee suffers a loss because of a misrepresentation in the disclosure document or statement of material change, or as a result of franchisor's failure to comply in any way with the disclosure provision, the franchisee has a right of action for damages against the franchisor, the franchisor's broker, the franchisee's associate and every person who signed the disclosure document or statement of material change.[241] The liability of these persons is joint and several.[242] In other words, the franchisee can recover damages in the total amount of the loss from any of the persons liable, and the persons liable who actually indemnify the franchisee may claim contribution from one another in proportion to their degree of fault. Certain defences are available to persons other than the franchisor.[243]

The franchising legislation of Ontario, Alberta, Manitoba, New Brunswick, and PEI contain similar provisions. There are some variations. For example, the Ontario provision also applies to the franchisor's "agent" in addition to the franchisor's associate, broker or other signatory to the franchise agreement.[244] The Alberta Act refers only to the disclosure document, not to a statement of material change, and the

241. *Supra*, note 10, s. 7(1). Again, "misrepresentation" is defined in the UFA as including an untrue statement of a material fact or an omission to state a material fact that is required to be stated or is necessary to make a statement not misleading in light of the circumstance in which it was made. "Material fact" is defined as any information about the business, operations, capital or control of the franchisor or franchisor's associate or the franchise or the franchise system that would "reasonably be expected to have a significant effect on the value or the price of the franchise to be granted or the decision to acquire the franchise."

242. *Ibid.*, s. 9(3).

243. Under s. 7(5) of the uniform Act, a person other than a franchisor can avoid liability in the following circumstances: (1) where the disclosure document is given without the other person's knowledge or consent and the person promptly gives written notice to the franchisee of that fact upon becoming aware of the disclosure document or statement of material change having been given; (2) where the person acquires knowledge of the misrepresentation, withdraws consent to it and notifies the franchisee in writing of the withdrawal before the franchisee acquires the franchise; (3) if part of the disclosure document purports to be made on the authority of an expert or public official, the person had no reasonable grounds to believe that there had been a misrepresentation or that the impugned part of the report did not fairly represent the opinion of the expert or public official; or (4) with respect to any part of the disclosure document or statement of material change, the person conducted an investigation sufficient to provide reasonable grounds for believing there was no misrepresentation and the person believed there was no misrepresentation (the "due diligence" defence.)

244. *Supra*, note 6, s. 7(1)(b).

only parties liable to suit are the franchisor and the signatories to the franchise agreement.[245]

(ii) Deemed reliance on misrepresentation in disclosure document

Under the uniform Act, a franchisee is deemed to have relied on a misrepresentation in a disclosure document or statement of material change.[246] It is therefore unnecessary to prove reliance as part of the franchisee's case in a claim based on misrepresentation in the disclosure document.

If the franchisor or other party can establish that the franchisee entered into the agreement with knowledge of the misrepresentation, however, the deemed reliance provision does not apply.[247] Only in that circumstance is the presumption of reliance expressed to be rebuttable. An issue that has arisen in connection with Ontario's identically worded provision is whether the presumption of reliance may be rebutted in situations other than one in which the franchisee had actual knowledge of the misrepresentation. An Ontario court has held that it is not open to the franchisor to argue that the franchisee would have entered into the franchise agreement even if the disclosure document had not been deficient, and therefore the non-compliant disclosure did not cause any loss to the franchisee.[248] This decision suggests that the statutory presumption of reliance operates conclusively unless the franchisee had actual knowledge of the true facts before entering into the franchise agreement, but the Ontario decision is not binding in other jurisdictions and clarification of the point would be desirable in provincial and territorial legislation following the uniform Act.

(d) Damages for Breach of the Duty of Fair Dealing

Breach of the duty of fair dealing under the uniform Act and the franchising legislation of the provinces results in a right to sue for damages.[249]

245. *Supra*, note 5, s. 9(1).

246. *Supra*, note 10, s. 7(2). Note that "misrepresentation" is defined in s. 1(1) of the uniform Act to include both an untrue statement and an omission of a material fact required to be stated or that it is necessary to state in order to avoid making a statement that is misleading in light of the circumstances in which the statement is made. If the franchisor omits to deliver a statement of material change, the franchisee is deemed to have relied on the information in the disclosure document: *ibid.*, s. 7(3).

247. *Supra*, note 10, s. 7(4).

248. *Melnychuk v. Blitz Ltd.*, *supra*, note 229 at para. 13.

249. *Supra*, note 10, s. 3(2).

As mentioned above, the uniform Act imposes a duty of fair dealing not only in the performance and enforcement of the franchise agreement but also in "the exercise of a right" under the agreement. The Manitoba, New Brunswick and PEI legislation also extend the duty to the "exercise of a right," but the Ontario and Alberta legislation that preceded the other provinces' enactments and the uniform Act do not.

(e) Damages for interference with franchisee's right to associate

As indicated earlier, the uniform Act prohibits a franchisor or franchisor's associate from interfering or restricting the right of franchisees to associate, whether by contract or otherwise, or penalizing a franchisee for the exercise of this right. Contravention of this prohibition allows the franchisee to sue the franchisor or franchisor's associate for damages. The provinces possessing franchising legislation have similar provisions in their enactments.[250]

There is a possible gap in the protection given by this provision in relation to the provision of information by existing franchisees to prospective franchisees.[251] As the uniform Act and the similar legislation now in force in several provinces only prohibits interference with the ability of franchisees to associate with franchisees and not with persons who are not yet franchisees, it is arguable that a franchisor could permissibly interfere with communications between franchisees and a prospective franchisee. This would undermine the purpose and effectiveness of the franchisor's obligation to disclose the names and contact information of existing franchisees in pre-contractual negotiations. Information that existing franchisees can provide about their experience with the franchisor and the franchise system in which they operate is important to a franchisee's investment decision.

(f) Election of remedies

Someone in a position to sue for non-statutory (equitable) rescission of a contract and damages for its breach must elect which remedy to pursue. The reason for the elec-

250. Alberta's provisions regarding the right of franchisees to associate are slightly divergent from those of the other provinces possessing franchising legislation. The Alberta *Franchises Act* legislation does not refer to franchisees' right to associate; it simply states the negative, namely that a franchisor must not prohibit a franchisee from associating with other franchisees and cannot penalize them for so doing. The Alberta Act does not contain a provision invalidating clauses in the franchise agreement that interfere with franchisees' right to associate, although the prohibition against interference with association by franchisees arguably leads to the same result as the avoidance of terms that restrict association.

251. See Austl., Commonwealth, Franchising Code Review Committee, *Review of the Disclosure Provisions of the Franchising Code of Conduct: Report to the Hon Fran Bailey, Minister for Small Business and Tourism* (Canberra: Secretariat, Office of Small Business, October 2006) at 42.

tion is to avoid over-compensation. Rescission is a restitutionary remedy; its aim is to restore claimants to the position they would be in if the contract had never come into being. The purpose of damages is to place plaintiffs in the position they would be in if the contract had been properly performed. To allow a tandem claim for damages where full restitution has been made raises the spectre of double recovery for the same losses.

Different considerations apply under franchising legislation as it has evolved. The Ontario Court of Appeal has held that a franchisee may pursue statutory rescission and damages at the same time:

> [T]he principles of equitable rescission do not apply in a case of statutory rescission. Further, the Act specifically provides for certain payments to be made to the franchisee within sixty days of the effective date of rescission as set out in s. 6(6). In addition, s. 7 clearly provides that if a franchisee suffers a loss as a result of a franchisor's failure to comply in any way with s. 5, the franchisee has a right of action for damages. Failure to comply in any way with s. 5 includes a failure to provide the disclosure document that the section requires. In circumstances where a franchisor fails to make the payments required of it under s. 6(6), those damages could include such amounts. As well, if a franchisee suffered any other loss as a result of the franchisor's failure to comply with s. 5, the franchisee may sue for such damages under s. 7.
>
> It is clear from the language of the Act that the legislature intended that in cases of non-disclosure the franchisee would no longer be bound by the agreement; would be entitled to the return of any money paid to the franchisor; would be entitled to have the franchisor purchase any inventory, equipment, and supplies that the franchisee purchased pursuant to the franchise agreement at the price it had paid for such inventory, equipment, and supplies; and would be entitled to compensation for losses incurred in acquiring, setting up, and operating the franchise. [252]

This decision has been the subject of some criticism on the basis that it leaves the door open to double recovery.[253] A close reading of the decision does not support this view, however. The decision suggests that sections 6 (rescission) and section 7 (damages for misrepresentation in a disclosure document or statement of material change) should operate complementarily. For example, if the franchisor does not make some or all of the payments required after being served with notice of rescis-

252. *1490664 Ontario Ltd. v. Dig This Garden Retailers Ltd.,* [2005] O.J. No. 3040, at paras. 38-39(C.A.); *Burnett Management Inc. v. Cuts Fitness for Men*, 2012 ONSC 3358 at paras. 48-50.

253. See S. Graham, "Statutory Rescission: Where's the Equity?" (2006) *Siskinds Collection of Franchise Law Articles* 22.

sion, then those payments would be recoverable in an action for damages under s. 7. There is nothing in the judgment or the franchising legislation that would allow for inconsistent remedies or over-compensation, for example rescission (including recovery for consequential loss) coupled with an award for prospective losses, such as loss of profits.

In any case, even non-statutory rescission does not bar a claim for damages for incidental or consequential loss that has been incurred as a result of entering into the contract that is rescinded.[254]

Nevertheless, the uniform Act does not expressly dispense with election of remedies, and a franchisee who pursues both statutory remedies in another province that has enacted the uniform Act could be met with the objection that there must be an election between them. For this reason, it would be desirable for provincial legislation based on the uniform Act to address the matter of election of remedies expressly.

9. Dispute Resolution

The *Uniform Franchises Act* provides for mandatory mediation in the event there is a dispute between the parties to the franchise agreement. The process contemplates (1) delivery of a notice setting out the nature of the dispute and the desired outcome;[255] and (2) attempted resolution of the dispute within the next 15 days.[256] If there is no resolution, either party may deliver a notice to mediate not more than 30 days after delivery of the notice of dispute and before 15 days have elapsed since the parties began to attempt to resolve it following the notice of dispute.[257] Once notice is given, mediation is mandatory.[258] The process for mediation is prescribed in the uniform *Mediation Regulation*.[259]

254. Rescission does not bar a claim for damages for incidental or consequential loss: *Sedgemore v. Block Bros. Realty Ltd.* (1985), 39 R.P.R. 38 (B.C.S.C.).

255. *Supra*, note 10, s. 8(1).

256. *Ibid.*, s. 8(2),

257. *Ibid.*, s. 8(3).

258. *Ibid.*, s. 8(4).

259. *Regulation made under the Uniform Franchises Act: Mediation* in Uniform Law Conference of Canada, *Proceedings of the Eighty-seventh Annual Meeting* (2005) at 236. See also online at: http://www.ulcc.ca/en/2005-st-johns-nf/254-civil-section-documents/1046-uniform-franchises-act-mediation-regulation

Only New Brunswick has a similar mandatory mediation procedure in its franchise legislation.[260] No other province provides for a mandatory form of dispute resolution for franchise-related disputes. Under the Ontario, Manitoba and PEI regulations, however, the franchisor is required to describe in the disclosure document any alternative dispute resolution procedure it intends to use or that is imposed by the franchise agreement.[261] The Ontario and Manitoba regulations also require that the franchisor include in the disclosure document the following statement:

> Mediation is a voluntary process to resolve disputes with the assistance of an independent third party. Any party may propose mediation or other dispute resolution process in regard to a dispute under the franchise agreement, and the process may be used to resolve the dispute if agreed to by all parties.[262]

10. Provisions on Jurisdiction and Venue

(a) General

Section 11 of the uniform Act provides that a provision in a franchise agreement purporting to restrict the application of the law of the enacting province or territory or to restrict jurisdiction or venue to a forum outside that province or territory is void with respect to a claim enforceable under the Act. This provision is intended to prevent circumvention of the Act by the use of choice of law, exclusive jurisdiction, or exclusive forum clauses in a franchise agreement. These types of clauses are common in standard form contracts, although they also appear in fully negotiated ones.

A choice of law clause states that the contract or the legal relations between the parties are to be governed by a law of a specified country or a territorial unit of a country. Often the legal system specified will be that of the economically stronger party's place of incorporation, or where the economically stronger party's head office or main place of business is located.

An exclusive jurisdiction clause declares that only the courts of a certain country or territorial unit of a country will have jurisdiction to hear and decide legal disputes between the parties to the contract, and that any claims between the parties must be made in those courts. An exclusive forum clause is similar, providing that any claim

260. *Supra*, note 7, s. 8. And see *Mediation Regulation – Franchises Act*, N.B. Reg 2010-93.

261. Ont. Reg. 581/00, s. 5(1); Man. Reg. 29/2012, s. 24(1); PEI Reg. EC232/06, s. 16. The PEI regulation stipulates that the description of the dispute resolution procedure must include reference to the location or venue.

262. Ont. Reg. 581/00, s. 5(2); Man. Reg. 29/2012, Sch. A, s. 24(2).

arising under the contract must be asserted in a particular place. The exclusive forum is usually one that is convenient for the party who prepares the standard contract terms and inconvenient for the other party, in order to discourage the other party from pursuing claims against the party whose standard contract terms are being used. Exclusive jurisdiction and venue clauses can be very oppressive in their effect, effectively insulating the stronger party from litigation and nullifying the ability of the weaker party to pursue valid claims.

Section 11 of the uniform Act overrides clauses of this kind that could otherwise allow franchisors to do indirectly what they cannot do directly: compel franchisees to waive their rights under the Act by providing that another system of law governs the franchise agreement or requiring franchisees to assert a claim against the franchisor in an extraprovincial forum.

(b) Arbitration clauses in a franchise agreement

There is some question as to whether section 11 of the uniform Act is worded broadly enough to apply to exclusive venue clauses for arbitrations, if the franchise agreement contains a clause requiring disputes between the parties to be referred to arbitration in a place outside the enacting jurisdiction.

(c) Non-statutory claims

As section 11 refers only to claims "enforceable under this Act," it is potentially arguable that the section does not prevent the operation of clauses in a franchise agreement providing for the application of foreign law or for exclusive jurisdiction of foreign courts with respect to non-statutory claims as opposed to ones based on a breach of a statutory duty under the Act. Litigation between franchisees and franchisors that arises in a province or territory having franchise legislation will often involve non-statutory and statutory claims being asserted in the same action. For example, a non-statutory claim for breach of contract for failing to provide promised training or failure to supply trademark goods on schedule might be raised together with statutory claims alleging a breach of the duty of fair dealing and misrepresentation in pre-contractual disclosure.

If section 11 applies only to claims based on a breach of statutory duty under the Act, an exclusive jurisdiction or forum clause in a franchise agreement could still operate with respect to non-statutory claims. As a result, a plaintiff might be faced with having to split a case and and litigate in two places with all the expense and uncertainty that situation inevitably brings, or else abandon a significant part of the case. This is an undesirable result. It undermines the policy behind section 11,

which is to ensure that the Act is applied to franchisor-franchisee disputes arising under franchises based in the province or territory that enacts it.

It would be preferable if section 11 were expressed to extend to claims arising from the franchise agreement, rather than only to those enforceable under the Act.

11. Inability of Franchisee to Waive or Release Rights Under the Act

Any purported waiver or release by a franchisee of rights given by the Act or of an obligation or requirement imposed by the uniform Act on a franchisor or franchisor's associated is, by virtue of section 12, legally ineffective. It is immaterial for the purpose of section 12 whether the franchisee is an individual or a corporation.

A provision preventing waiver or release of the benefits of the Act is found in all existing Canadian franchise legislation. It is a key element needed to fulfil the policy behind this legislation, which calls for statutory protections to be in place for the purpose of preventing or curbing the one-sidedness typical of standard form adhesion contracts and alleviating the imbalance of bargaining power usual in the franchisor-franchisee relationship. The purpose of the legislation would be defeated entirely if a waiver or release by the franchisee could be incorporated in a franchise agreement to displace those protections.

The issue of whether a release of a statutory claim under a settlement agreement is valid has been decided in Ontario. The conclusion reached by the Ontario Superior Court of Justice was that a statutory claim for rescission could be released under a settlement agreement.[263]

263. *1518628 Ontario Inc. v. Tutor Time Learning Centres*, [2006] O.J. No. 3011 (S.C.J.). The Manitoba Law Reform Commission recommended that Manitoba franchise legislation should provide expressly that the bar to waiver or release of a right under the legislation would not prevent a plaintiff from giving a valid release as part of a post-dispute settlement: *supra*, note 11 at 116-117.

CHAPTER IV INTERNATIONAL MODELS FOR REGULATION OF FRANCHISING

A. General

This chapter briefly reviews and compares several highly evolved models for franchise regulation that may be found outside Canada. The systems examined are those of the United States, Australia, and selected European countries. The chapter also examines the *Model Franchise Disclosure Law* developed by the Rome-based International Institute for the Unification of Private Law (UNIDROIT).[264]

B. United States

The sale of franchises in the U.S. is regulated by both federal and state laws. At the federal level, the Federal Trade Commission Rule (FTC Rule) requires franchisors to provide a disclosure document to prospective franchisees prior to any offer or sale.[265] The form of disclosure document typically used in the U.S. to comply with the FTC Rule and state legislation was formerly known the Uniform Franchise Offering Circular (UFOC) and is now referred to as the Franchise Disclosure Document (FDD).[266]

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264. UNIDROIT, *Model Franchise Disclosure Law* (Rome: Unidroit, 2002), online at: http://www.unidroit.org/english/modellaws/2002franchise/2002modellaw-e.pdf. The development of the Model Franchise Disclosure Law originated with a recommendation made by a Canadian member of the Governing Council of Unidroit in 1985 because of what were described as "sharp practices" in Canada: *ibid.*, *Explanatory Report* at p. 11.

265. 16 C.F.R. § 436. First promulgated in 1979 and substantially revised in 2007.

266. The requirements for the contents of a disclosure document under the revised FTC Rule include: information about the franchisor, its corporate predecessors, direct and indirect parent companies and affiliates; the business experience of the franchisor and a description of the franchised business; information about the relevant market and competition and regulation within that market; the identities and last five years' business experience of the franchisors' directors and senior management; pending and concluded litigation against the franchisor, its directors and officers, predecessors and affiliates; information regarding bankruptcy proceedings involving the franchisor, its directors, officers, or its affiliates in the last ten years; information regarding initial and recurring franchise fees; information regarding franchisee's initial investment; restrictions on the sources of products and services and whether any officer of the franchisor has an interest in an approved supplier; information as to the specific obligations of the franchisee and franchisor; rights and restrictions relating to territory and competition; whether any other distribution channels are used by the franchisor or its affiliates; description of trademarks licensed to franchisee; information relating to patents, copyrights and other

Fifteen states have their own franchise legislation governing pre-sale disclosure by the franchisor.[267] Thirteen of these states prohibit the offer or sale of a franchise until an offering circular has been filed on public record and registered by a designated state agency.[268] State laws usually apply only if (1) the offer or sale of a franchise is made in the state; (2) the franchise business will be located in the state; or (3) the franchisee is a resident of the state.[269]

Some but not all states that have legislation on franchising provide for a mutual obligation of good faith and fair dealing, and protect a franchisee's freedom of association.[270]

Some states have legislation regulating certain aspects of the post-contractual franchise relationship, such as rights regarding termination and renewal of the franchise agreement, and sale or transfer of the franchise business.[271] For example, in a number of these states, it is illegal for a franchisor to terminate a franchise agreement without good cause. Generally, "good cause" exists where the franchisee has become insolvent, has abandoned its operations, is convicted of a criminal offence in relation

proprietary matters; a description of training provided by the franchisor, if any; summaries of contractual provisions relating to renewal, termination, transfer and dispute resolution; financial information (franchisor must either provide information on financial performance with substantial supporting data or give no such information at all and indicate this in the disclosure statement); most recent three years' statistics on number of franchise units, businesses terminated and projected opening of units for next fiscal year; audited financial statements for the last two fiscal years; copies of all agreements to be offered, including the franchise agreement, leases, subleases and financing agreements; and a detachable document acknowledging receipt of the FDD by the prospective franchisee. If the franchisor is selling a previously granted franchise, it must provide supplemental disclosure of the names and contact information of any previous owners during the past five years and reasons for the change(s) in ownership.

267. Federal Trade Commission, "State Offices Administering Franchise Disclosure Laws," online at http://www.ftc.gov/bcp/franchise/netdiscl.shtm. The states are: California, Hawaii, Illinois, Indiana, Maryland, Michigan, Minnesota, New York, North Dakota, Oregon, Rhode Island, South Dakota, Virginia, Washington and Wisconsin.

268. *Ibid.* Michigan requires only a notice filing.

269. Vinson Franchise Law Firm, *U.S. Franchise Law Basics*, online at: http://franchiselaw.net/startups/usfranchiselawbasics.html.

270. *Ibid.* A duty to deal in good faith and/or to act in a commercially reasonable manner is included in the legislation of Arkansas, Hawaii, Iowa, Minnesota, Nebraska, New Jersey and Washington. In Arkansas, California, Hawaii, Illinois, Iowa Michigan, Minnesota, Nebraska, New Jersey, Rhode Island and Washington, it is illegal for a franchisor to interfere with a franchisee's freedom of association or to prevent franchisees from participating in a trade association.

271. *Ibid.*

to the franchise operations, or fails to comply with material provisions of the franchise agreement. Written notice of termination is required; the notice period varies from state to state, ranging from one to four months. In most states, the franchisee has the right during the notice period to "cure" the default and thereby avoid termination.[272]

State laws do not require franchise agreements to provide for a right of renewal. If an agreement does so provide, however, most states that have legislated on the subject treat non-renewal in the same way as termination: the franchisor must renew unless there is good cause not to do so.[273]

In the other states with legislation respecting franchise renewal, the franchisor is entitled not to renew if written notice of non-renewal is given to the franchisee in advance, typically at least six months before expiration of the franchise agreement.[274] In a few states, the franchisor may be subject to additional requirements, such as an undertaking not to enforce any non-competition clause in the agreement.[275] Other states impose an obligation to repurchase some or all of the assets and inventory of the franchise.[276]

Other aspects of the franchise relationship regulated by laws of some states include the franchisee's right to transfer or sell the franchise;[277] the franchisor's ability to

272. *Ibid.* There are, however, defaults incapable of being cured such as bankruptcy, criminal conviction or abandonment.

273. These states include Arkansas, Connecticut, Delaware, Hawaii, Iowa, Indiana, Minnesota, Mississippi, Missouri, Nebraska, New Jersey and Wisconsin: *ibid.*

274. *Ibid.* Some states have additional conditions. In California, for example, during the notice period, the franchisor must allow the franchisee the opportunity to sell the business to a person meeting the franchisor's current requirement; and the refusal to renew must not be for the purpose of converting the business to the franchisor's own account.

275. *Ibid.*: California, Illinois, Michigan and Washington.

276. *Ibid.*: Arkansas, California, Connecticut, Hawaii, Illinois, Iowa, Michigan, North Dakota, Washington and Wisconsin. The repurchase obligation varies from state to state. For example, in Arkansas and California, the obligation is triggered only where the non-renewal or termination violates state law; by contrast, in Connecticut, the obligation arises on any termination of a franchise agreement. In Hawaii and Washington, the repurchase obligation applies to both terminations and non-renewals.

277. *Ibid.:* In Arkansas, California, Hawaii, Indiana, Iowa, Michigan, Minnesota, Nebraska, New Jersey and Washington, a franchisor cannot refuse its consent to a sale or transfer except for "good cause", although in many states, the franchisor has a right of first refusal.

open a similar franchise in proximity to the franchisee's existing operation,[278] change of management,[279] the use of marketing fees,[280] and the purchase of supplies, goods or services.[281]

C. Australia

In Australia, franchising is governed by the *Franchising Code of Conduct*.[282] The code has the force of law.[283]

Under the Code, a franchisor is obliged to prepare and deliver a disclosure document to a prospective franchisee or existing franchisee before entering a franchise agreement and within four months after the end of each fiscal year.[284] The information required to be disclosed is similar, but not identical to, the kind of information contemplated by the Canadian legislation.[285]

278. *Ibid.*: Hawaii, Iowa, Minnesota and Washington.

279. For example, in Arkansas, a franchisor cannot prohibit a change in management of the franchisee's business except for good cause: *ibid.*

280. In Arkansas, marketing fees collected from franchisees must be spent on marketing within Arkansas: *ibid.*

281. In Hawaii, Indiana, Iowa and Washington, there are restrictions on how far a franchisor may go in requiring the franchisee to purchase goods, supplies or services from stipulated sources: *ibid.*

282. *Trade Practices (Industry Codes – Franchising) Regulations 1998* (Sch.), online at http://www.comlaw.gov.au/Details/F2010C00457.

283. The *Franchising Code of Conduct* was originally voluntary, but is now a mandatory industry code under s. 51AE of the *Competition and Consumer Act 2010* (Cth.).

284. *Supra*, note 282, s. 6(1).

285. Under Annexure 1 of the Code, the franchisor must disclose details about the franchisor, such as its name and those of its associates, its business address and details about its officers; a summary of the franchisor's relevant business experience in the last ten years; details of current proceedings by a public agency, criminal or civil proceedings or arbitration relevant to the franchise or against the franchisor or its officers; information regarding past civil, criminal, regulatory or insolvency proceedings against franchisors and details of those proceedings; information as to the number, identity and location of existing franchises; description of any patent, copyright or design relevant to the franchise and details relating to such intellectual property, such as whether it has been registered in Australia or any judgment or pending action that could significantly affect use of the IP; information regarding location of the franchise and whether the franchise is for an exclusive or non-exclusive territory or limited to a particular site; with respect to the supply of goods or services, details of any restrictions such as requirements for the franchisee to maintain a certain level of inventory or restrictions on the franchisee's ability to purchase from another source; details about any restrictions on goods and services to be supplied by the franchisee; information about marketing and other co-

The disclosure document must be provided to a prospective franchise at least 14 days before the franchise agreement is entered into or a non-refundable payment is made. In the case of the renewal or extension of an existing franchise, the document must be delivered at least 14 days before the renewal.[286] The document may be delivered electronically, provided the franchisee consents.[287] The Code prohibits franchisors from entering into or renewing franchise agreements unless they have received written statements from their franchisee or prospective franchisee confirming that the latter received, read and had a reasonable opportunity to understand the disclosure document and the Code.[288]

A franchisee also has the right to request a current disclosure document. If a written request is made, the franchisor must provide the document within fourteen days. However, a request for a current document can be made only once in twelve months.[289]

The Code provides for a "cooling-off" period. The franchisee has an apparently absolute right to terminate the agreement, even in the face of fully compliant disclosure, but the time frame for doing so is exceedingly short: termination must be made within seven days of the earlier of entry into the agreement or the payment of any consideration to the franchisor.[290] The franchisor then has fourteen days to return

operative funds; if the franchisor requires a prepayment prior to entering the franchise agreement, why the money is required, how it is to be applied and the conditions under which it will be refunded; details on the range of costs to start operating the franchise; whether the franchisee is to bear the costs of unforeseen capital expenditures; allocation of any costs, including legal costs, incurred in dispute resolution; details of any financing arrangements between franchisee and franchisor; description of the franchisor's obligations in the agreement, including any obligation in respect of training; summary of the franchisee's obligations; description of any provisions in the agreement relating to the term of the agreement, variation, renewal or extension, termination and the franchisee's obligations on termination; description of any confidentiality obligations of franchisee; earnings information and financial statements; and description of any arrangements to apply at the end of the franchise relationship.

286. *Supra*, note 282, s. 10.

287. The *Electronic Transactions Act 1999* (Cth) provides that a requirement under a law of the Commonwealth to give information in writing is satisfied by electronic delivery if it is reasonable to expect that the information will be readily accessible so as to be useable for subsequent reference and the person to whom the information is given consents to electronic delivery.

288. *Supra*, note 282, s. 11.

289. *Ibid.*, s. 19.

290. *Ibid.*, s. 13.

all payments, whether of money or other valuable consideration, made under the agreement.[291]

With respect to the right to associate, the Code stipulates that a franchisor "must not induce" a franchisee or prospective franchisee "not to form an association" or "not to associate with other franchisees…for a lawful purpose."[292]

With respect to the transfer or novation (re-granting) of a franchise, the Code provides that the franchisor must not "unreasonably" withhold its consent.[293] The franchisor is deemed to have consented if it does not give written notice that consent is withheld and the reasons for the decision within 42 days after the request for consent is made.

The Code does not restrict a franchisor's right to terminate or not renew the franchise other than to impose various notice requirements. For example, if the franchisor decides not to renew, it must give notice to this effect at least six months before expiration of the agreement.[294] Where the franchisor proposes to terminate because of a breach by the franchisee, it must give "reasonable" notice and allow the franchisee a "reasonable" time to remedy the breach.[295] In cases where termination is sought in accordance with the agreement before it expires, and where the franchisee is not in breach and does not consent to the termination,[296] the franchisor must give reasonable notice of the termination and the reasons for it.[297]

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291. The cooling-off provision does not apply to the renewal, extension or transfer of the franchise.

292. *Supra*, note 282, s. 15.

293. *Ibid.*, note 282, s. 20. Section 20(3) stipulates that the circumstances in which it would be reasonable to withhold consent include ones in which: the proposed transferee is unlikely to meet the financial obligations under the agreement or does not satisfy the franchisor's selection criteria; the transfer will have a significantly adverse effect on the franchise system; the proposed transferee does not agree in writing to comply with obligations imposed by the franchise agreement; the franchisee has not paid or made reasonable provision to pay amounts owing to the franchisor or has otherwise breached the franchise agreement and has not remedied the breach.

294. *Ibid.*, s. 20A. The notice period is one month if the franchise agreement is for a term of less than six months.

295. *Ibid.*, s. 21.

296. Section 22(2) of the Code stipulates that a term in the franchise agreement stating that the franchisor can terminate without the consent of the franchisee does not amount to consent (to early termination).

297. The franchisor is not obliged to give notice of termination in cases where the franchisee no longer holds a licence necessary to carry on the franchised business, becomes insolvent, volun-

The Code does not impose a positive obligation of good faith. It merely stipulates that nothing in the Code shall limit any obligation at common law on the parties to a franchise agreement to act in good faith.[298]

Disputes relating to termination as well as other disputes are subject to mandatory mediation according to the procedure set out in the Code, although this does not affect the right of a party to a franchise agreement to take legal proceedings under the agreement.[299]

Various remedies for contravention of the Code may be sought under the *Competition and Consumer Act 2010*.[300] Damages for misrepresentation in disclosure can be sought in a regular civil action.

In January 2013, the Australian government published a discussion paper reviewing the *Franchising Code of Conduct* and inviting comment from stakeholders with a view to recommending legislative amendments to the Australian government.[301] The principal issues on which comment was sought were the questions of: whether there should be a statutory duty of good faith; the rights of franchisees at the end of the franchise term; whether franchisors should have the right to terminate or not renew a franchise when they do not have good cause for doing so; whether a franchisee should be recognized for any contribution to building the franchise; whether manda-

tarily abandons the premises, is convicted of a serious offence, operates the franchise in a way that endangers public health or safety, is fraudulent with respect to business operations, or consents to the termination.

298. *Supra*, note 282, s. 23A.

299. *Ibid.*, Part 4, ss. 25-31.

300. As noted earlier, the *Franchising Code of Conduct* is a mandatory industry code prescribed under the Act. Breach of the Code constitutes a breach of s. 51AD of the Act which states: "A corporation must not, in trade or commerce contravene an applicable industry code." A person who suffers loss or damage as a consequence of breach of s. 51AD may seek an injunction (s. 80), a remedial/compensatory order under s. 87, or damages under s. 82. The Australian Competition and Consumer Commission is also authorized under ss. 80(1) and 87(1)(A)(b) and (1B) of the *Competition and Consumer Act 2010* to seek an injunction or remedial order (but not damages) on behalf of an aggrieved person. See also Franchising Code Review Committee (Australia), *Review of the Disclosure Provisions of the Franchising Code of Conduct* (October 2006), pp.26-27.

301. Department of Industry, Innovation, Science, Research and Tertiary Education, *Discussion Paper: Review of the Franchising Code of Conduct*, online at: http://www.innovation.gov.au/SmallBusiness/CodesOfConduct/Documents/2013ReviewDiscussionPaper.pdf.

tory mediation was being misused to stall negotiations or to deplete the resources of the other party in order to frustrate the dispute resolution process; and the adequacy of the current enforcement apparatus.

D. UNIDROIT

In 2002, the International Institute for the Unification of Private Law (UNIDROIT) produced its Model Franchise Disclosure Law.[302] The Model Law deals only with the obligation of disclosure. It does not purport to regulate the franchise relationship.

Under the Model Law, the franchisor must deliver a disclosure document to a proposed franchisee at least 14 days before the earlier of the signing of any agreement relating to the franchise or the payment of non-refundable moneys.[303] The information required to be disclosed is similar to the information that must be disclosed under Canadian franchising legislation.[304]

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302. Online at http://www.unidroit.org/english/modellaws/2002franchise/2002modellaw-e.pdf. UNIDROIT is an intergovernmental organization dedicated to the harmonization of international private law. Its projects include the drafting of international conventions and the production of model laws. As of 2012, UNIDROIT had 63 member countries, including Canada.

303. Confidentiality agreements made in respect of the information provided by the franchisor are an exception.

304. For example, the legal name, form and address of the franchisor; the franchisor's trademark, trade name, or business name; a description of the franchise; a description of the business experience of the franchisor and its affiliates including the length of time during which each has run a business of the type to be operated; the names, business addresses, positions held, and business experience of any person who has senior management responsibilities for the franchisor's business; any criminal convictions or any finding of liability in a civil action or arbitration involving franchises or other businesses relating to fraud, misrepresentation, or similar acts or practices of the franchisor and any affiliate, and whether any such action is pending; any bankruptcy, insolvency or comparable proceeding involving the franchisor and its affiliate(s) for the previous five years; the total number of franchisees and company-owned outlets of the franchisor and of affiliates of the franchisor granting franchises under substantially the same trade name; the names, business addresses and business phone numbers of the franchisees, and of the franchisees of any affiliates, operating under substantially the same trade name whose outlets are in close proximity; information about franchisees that have ceased to be franchisees during the three past fiscal years; information relating to intellectual property to be licensed; information on the categories of goods and/or services that the franchisee is required to purchase or lease and from whom; information regarding rebates, bonuses and incentives; financial matters, including an estimate of the prospective franchisee's initial investment, financing offered by the franchisor, if any, and financial statements of the franchisor; information about the state of the general market relevant to the franchise; territorial limitations, in-term and post-term non-compete conditions under which franchise might be terminated and the effects of such termination; restrictions or conditions imposed on the franchisee in relation to the goods and/or serv-

The Model Act provides for a right to terminate the franchise agreement and to claim damages in the case of untimely delivery, where the disclosure document contains a misrepresentation of material fact, or omits a material fact.[305] These remedies are not available if the franchisee had the information required to be disclosed through other means, did not rely on the misrepresentation, or termination of the franchise agreement would be a disproportionate remedy in the circumstances.[306]

The franchisee must give the franchisor 30 days prior written notice of the intention to resort to one or both of these remedies.[307] The exercise of the remedies is also subject to limitation periods.[308]

The final article of the Model Law provides that any waiver by a franchisee of its rights under the Model Law is void.[309]

ices that the franchisee may sell; conditions for the assignment or other transfer of the franchise; and any forum selection or choice of law provisions and any selected dispute resolution processes; information and information regarding the terms and conditions of renewal, if any; any other information necessary to prevent any statement from being misleading. If information is provided to the prospective franchisee by or on behalf of the franchisor concerning the historical or projected financial performance of outlets owned by the franchisor, its affiliates or franchisees, the information must have a reasonable basis at the time it is made and include the underlying material assumptions: *supra*, note 302, art. 6.

305. *Supra*, note 302, art. 8(1).

306. *Ibid.*

307. *Ibid.*

308. *Ibid.*, art. 8(2).

309. *Ibid.*, art. 9.

CHAPTER V FRANCHISE LEGISLATION FOR BRITISH COLUMBIA?

A. Should British Columbia Enact Franchise Legislation?

There is definitely a trend in Canada toward legislative regulation of franchising. Five of the ten provinces have enacted franchise legislation having a high degree of consistency in all essential features. The *Uniform Franchises Act* may be considered representative of this common model. The three most recently enacted franchise statutes in Canada, namely those of New Brunswick, PEI and Manitoba, follow the model of the uniform Act closely.

With this degree of legislative harmony, it is no longer possible to argue credibly that it would be tantamount to erecting a new barrier to trade or investment for British Columbia to enact franchise legislation. On the contrary, if British Columbia became the sixth province to do so, it would be fully in keeping with one of the guiding principles of the 1995 *Agreement on Internal Trade* to which British Columbia is a party, namely the reconciliation of regulatory standards and standards-related measures within Canada.[310]

Our information is that reputable franchisors already follow the same practices in marketing franchises here as they do in the provinces that have franchise legislation, using disclosure documents prepared to comply with that legislation. While this might be said to raise a question about the need for legislative intervention, it can be argued with equal cogency that enacting legislation along the same lines in British Columbia would only regularize the practices already followed by the better franchisors, and contribute to establishing a nearly uniform regulatory standard across the country.

In any case, franchising legislation as it has evolved in Canada concerns more than pre-contractual disclosure requirements. The statutory remedies overcome many of the obstacles that a wronged party faces in asserting claims based on misrepresentation and deceit at common law. They are important protections for franchisees, who

310. Article 405, para. 1, as amended by the Seventh Protocol of Amendment (2007), online at http://www.ait-aci.ca/index_en/ait.htm. This point was made by the Manitoba Law Reform Commission in reference to the enactment of Manitoba's franchise legislation on the model of the *Uniform Franchises Act*: *supra*, note 11 at 44.

are seldom on an even playing field with their franchisors in terms of business sophistication, wealth, access to expert advice, and other resources. They are typically, though not invariably, small business operators who have invested their personal savings or borrowed funds in the franchise.

Franchise legislation may be viewed as fulfilling public policy in support of small business and entrepreneurial enterprise. Reliable information on total sales volumes and total numbers of franchise units are not apparently available on a province-by-province basis, but it is obvious from their prevalence that franchised businesses represent a significant part of the British Columbia economy. They represent a sizeable portion of the small business sector, which in 2011 employed 45 per cent of the workforce in this province and generated 29 per cent of the provincial gross domestic product.[311] Franchisees in British Columbia undoubtedly deserve no less protection than their counterparts in other provinces.

The Institute tentatively recommends:

1. *British Columbia should enact franchise legislation.*

B. The *Uniform Franchises Act* as a General Model

1. General

As mentioned above, Canadian franchise legislation follows a general model, of which the *Uniform Franchises Act* is representative. The uniform Act arose from a national consultative process and has been enacted in three provinces in more or less intact form except for the feature of mandatory mediation. The earlier Alberta and Ontario statutes are very similar to the uniform Act.

As many franchise systems are national or international in size rather than provincially based, inconsistencies in legislation between the jurisdictions increase the regulatory burden on franchisors. Franchisors may avoid jurisdictions that have more onerous or intrusive requirements. Conversely, consistency between the regulatory requirements for marketing franchises in the various jurisdictions is conducive to expansion.

311. Ministry of Jobs, Tourism and Skills Training, *BC Small Business Profile 2012*, online at: http://www.resourcecentre.gov.bc.ca/pdf/SmallBusEngWeb.pdf, pp 3 and 10. A "small business" in this context refers to a business with fewer than 50 employees or one operated by a self-employed individual with no paid help: *ibid.* at p. 4.

It would make little sense for British Columbia to enact franchise legislation that was markedly different from the Canadian norm that other provinces currently consider adequate to protect the interests of franchisees. In our view, there is no demonstrable reason at the present time for enacting legislation that is significantly more intrusive or onerous than that norm.

While all the franchise legislation now in force in Canada is relatively new, some of it has been in force long enough for a body of case law to develop under it that points to a few areas of ambiguity and in which language could be modified to better express the underlying policy of the legislation. The relatively few modifications to the language of the *Uniform Franchises Act* and the uniform *Disclosure Documents Regulation* tentatively recommended later in this chapter are mostly of this kind.

The Institute tentatively recommends:

2. Subject to Tentative Recommendation 3, franchise legislation in British Columbia should be modelled generally on the Uniform Franchises Act.

2. Dispute Resolution

(a) Mandatory mediation

As noted in Chapter III, PEI and Manitoba rejected the mandatory mediation feature of the uniform Act. Only New Brunswick has incorporated mandatory mediation provisions into its franchise legislation.

Regarding the desirability of mandatory mediation, the ULCC Working Group stated:

> The Committee considered at great length whether franchise disputes would be resolved more advantageously through a form of alternate dispute resolution. Recognizing that in certain provinces, the rules of practice mandate a form of pre-trial mediation, and recognizing that the Ontario Act contains a mandatory disclosure statement that mediation is a form of dispute resolution, the Committee determined that it would be beneficial to provide for mediation to be invoked by any party to a franchise agreement.
>
> The committee believes based on its own experiences and those brought to the attention of the Committee that party initiated mediation will be of significant benefit to resolve franchise disputes prior to the commencement of, as well after the commencement of, litigation proceedings.[312]

312. ULCC, *Uniform Franchises Act with Commentary,* s. 8. Note that in British Columbia, pre-trial mediation is mandated only in motor vehicle actions; see *Notice to Mediate Regulation*, B.C. Reg. 127/98 under the *Insurance (Motor Vehicle) Act.*

An advantage commonly cited with respect to mediation is that it is less costly and less incendiary than litigation. But that is not always the case, particularly if one party is obstructionist or is drawn into the process involuntarily, and the mediation then becomes only an extra step on the way to court.

Furthermore, mandatory mediation can exacerbate the power imbalance already inherent in the franchise relationship. An intransigent franchisor might insist on mediation as a stratagem to drag things out, drive up costs and eventually to wear down the franchisee, whose toleration for legal cost will usually be considerably less than that of the franchisor.

Conversely, mandatory mediation can prevent rightful access to an appropriate remedy. If a franchisee is misusing the franchisor's trademark and logo by selling unapproved goods in flagrant breach of the franchise agreement, mandatory mediation could allow the franchisee to play for time while preventing the franchisor from properly exercising its termination rights and taking control of the franchise operation to protect its reputation and intellectual property.[313]

New Brunswick's Act addresses possible abuses of this kind by stipulating that the mandatory mediation process does not prevent a party from taking "any other measure" in relation to the dispute.[314] This raises a question, however, as to why the process should be mandatory in any case.

We do not see mandatory mediation as an equalizing mechanism. A power imbalance is equally if not more likely to manifest itself in mediation as in litigation, and there is considerable potential for the economically stronger party to exploit the weaker party's lower tolerance for cost. The strong statutory remedies under the franchise legislation are the equalizing mechanism.

An additional reason for rejecting mandatory mediation is that if the parties are concerned about preserving the franchise relationship and avoiding the cost of litigation, they are likely to resort to voluntary mediation in any event. British Columbia has adequate infrastructure for voluntary commercial mediation inside and outside of litigation, and an experienced cadre of mediators. It is unnecessary, in our view, to provide for a special statutory mediation procedure for franchise disputes.

313. In coming to the conclusion that mandatory mediation should not be a feature of Manitoba franchise legislation, the Manitoba Law Reform Commission mentioned the abandonment of a Tim Horton's franchise by a franchisee as an example of a situation in which mandatory mediation would impede the franchisor TDL Group from taking quick action to terminate the franchise and take possession of the premises: *supra*, note 11 at 130.

314. *Supra*, note 7, s. 8(10).

The Institute tentatively recommends:

3. British Columbia franchise legislation should not provide for mandatory mediation on the demand of one party to a franchise agreement.

(b) Voluntary mediation

Voluntary mediation is often appropriate where the parties to a commercial dispute have a mutual interest in preserving a working relationship over a period of time. This is the case under a franchise when there is a realistic prospect of the franchise being able to continue in operation. The Ontario and Manitoba requirement to include a statement in the disclosure document to the effect that the franchisor and franchisee can resort to mediation by mutual agreement in attempting to resolve a dispute is one that commends itself for this reason.

The Institute tentatively recommends:

4. A disclosure document provided to a prospective franchisee in British Columbia should contain the following statement:

> Mediation is a voluntary process to resolve disputes with the assistance of an independent third party. Any party may propose mediation or other dispute resolution process in regard to a dispute under the franchise agreement, and the process may be used to resolve the dispute if agreed to by all parties.

3. Regulation of the Franchisor-Franchisee Relationship

In Chapter IV it was noted that numerous U.S. states as well as Australia have laws that govern aspects of the relationship between franchisor and franchisee following the formation of a franchise agreement, such as renewal and termination of franchises, provision of training, restrictions on a franchisee's sources of supply, encroachment by the grant of franchises in nearby locations, and the transfer of a franchise. A number of other countries also have franchise laws of this kind.[315]

Apart from the express prohibition on interference with franchisees' right of association, the approach of existing Canadian franchise legislation has been to leave these matters primarily to be governed by the general statutory duty of fair dealing. Some franchisees' groups have advocated for more extensive regulation of the post-contractual relationship. Having received submissions on both sides of the issue, the Manitoba Law Reform Commission recommended that franchise legislation in that

315. John Sotos, "Recent Trends in Franchise Relationship Laws," paper presented at International Bar Association conference, Dubai, 2011, online at: http://www.sotosllp.com/wp-content/uploads/2012/John-Sotos-Recent-Trends-in-Relationship-Laws-IBA-Dubai-2011.pdf.

province should incorporate some features of U.S.-style relationship laws that are aimed at curbing arbitrary and oppressive unilateral conduct by franchisors.[316] These recommendations were not, however, among those implemented by the Manitoba legislature in passing the most recent franchising statute in Canada.

It may not be unreasonable to assume that the reason the Commission's recommendations calling for more extensive regulation of the franchise relationship were not carried forward into the Manitoba statute were threefold. First, the extent of regulation they called for would have rendered the Manitoba legislation out of step, and significantly so, with the franchising legislation of other provinces. Second, many of the relationship problems identified in case law and literature, e.g. capricious termination or non-renewal of the franchise agreement, are amenable to resolution under the statutory duty of fair dealing, good faith and commercial reasonableness. Finally, there is always the concern that legislative "micromanagement" will discourage investment and business activity.[317]

These are rational policy considerations. There is a legitimate concern for legislative harmony within Canada, particularly in light of the fact that successful franchise systems typically cross jurisdictional boundaries. The duty of good faith and fair dealing is a flexible instrument, and Canadian courts have not hesitated to invoke it when a party to a franchise relationship has acted in a manner that deprives the other party of the intended benefit and purpose of the franchise agreement.[318] The effect of perceived over-regulation on the investment climate is always speculative, but it is not irrational to take it into account.

The existing pattern of Canadian legislation on franchising, of which the *Uniform Franchises Act* may be seen as representative, is still relatively new in terms of normal timescales for the evolution of regulatory policy. Before more intrusive laws are introduced, the *Uniform Franchises Act* model should be allowed to operate for a time and a greater body of interpretive jurisprudence allowed to build up before a determination is made about its effectiveness. More extensive regulation of the franchise relationship than that contained in the *Uniform Franchises Act* is not recommended at this time.

316. *Supra*, note 11 at 119-126.

317. See Peter Dillon, "Will Franchising Survive as a Business Model Under Canadian Laws?" (2006-2007) 26 Franchise L.J. 32.

318. See, for example, *Katotikidis v. Mr. Submarine Ltd.*, *supra*, note 79; *Machias v. Mr. Submarine Ltd.* (2002), 24 B.L.R. (3d) 228 (Ont. S.C.J.); and the cases cited in note 156, *supra*.

C. Adjusting the Model to Fit

1. Disclosure Requirements: Substantial vs. Strict Compliance

The *Uniform Franchises Act* contains no provision dealing with the standard of compliance required of the franchisor with respect to disclosure requirements. This is also the case under the Ontario and New Brunswick legislation. In Alberta[319] and PEI,[320] a disclosure document is properly given if the document is "substantially complete," and in Manitoba, if it "substantially complies."[321] Manitoba also provides expressly that a technical irregularity or defect not affecting the substance of the disclosure document does not affect its validity.[322]

Clearly, technical defects and matters of form alone should not trigger the right to rescind. The matter of whether the standard of compliance should be substantial or strict compliance is much more difficult. On one hand, the legislative scheme of Canadian franchising legislation is one in which the legislatures have designated certain kinds of information as being essential to an informed investment decision on the part of a franchisee. How is it then possible to say that a disclosure document can be upheld if any of that information is missing or inaccurate? If the disclosure document omits one item that is required to be disclosed, is the document nonetheless substantially compliant? If not, how many omissions must occur before the line is crossed?

On the other hand, the remedy given by the legislation for non-compliance with disclosure requirements, namely rescission of the franchise agreement, is a drastic one. The omission to list in a disclosure document existing franchises located within a radius of one kilometre of the location of the proposed franchise could be misleading in a given case, but can the legislatures have intended that rescission should inevitably flow from the fact that the name and address of one franchisee in another province is missing from a list of 200 current franchisees across the country? A standard of strict compliance so rigid as to permit such a result when the omission has no practical bearing on an investment decision would create considerable room for opportunistic withdrawal by a franchisee, who thereupon becomes entitled to full recovery of the initial investment and other expenses incurred to set up the franchise unit. By contrast, the franchisor faced with statutory rescission may incur unrecov-

319. *Franchises Regulation*, Alta. Reg. 240/95, s. 2(4);

320. *Supra*, note 128.

321. *Supra*, note 9, s. 5(10)(a).

322. *Ibid.*, s. 5(10)(b).

erable losses in connection with acquiring the location, providing initial training, supply of equipment, etc.

In the practical application of the statutory remedies, the materiality of a defect in terms of its effect on the franchisee's investment decision must be taken into account. In Ontario, where the Act's silence on the issue of the compliance standard points to one of strict compliance, some of the decided cases indicate that defects lacking materiality in this sense should not result in a finding of non-disclosure and attract the drastic remedy of rescission.[323] This is a de facto "substantial compliance" standard.

Three of five provinces have opted for a standard of substantial compliance, and case law in another where a strict compliance standard nominally is in place appears to recognize the necessity of weighing the materiality of defects. This leads us to favour Manitoba's approach of declaring that a disclosure document or statement of material change is valid if it substantially complies with the Act and technical and formal defects will not impair its validity.

The Institute tentatively recommends:

5. British Columbia franchise legislation should provide that a disclosure document or statement of material change

(a) is valid if the disclosure document or statement of material change substantially complies with the Act and regulations; and

(b) is valid despite the presence of a technical irregularity, error, or defect in form that does not affect the substance of the document.

2. Refundable Deposits

As explained in Chapter III, the uniform Act requires that a disclosure document be provided to a prospective franchisee before any payment or other consideration is made to the franchisor on account of the franchise. In Alberta and Manitoba, a franchisor may obtain a fully refundable deposit up to a prescribed maximum amount from a prospective franchisee before providing a disclosure document.[324] The Al-

323. See *4287975 Canada Inc. v. Imvescor Restaurants Inc*., 2009 ONCA 308, at para. 43; *Vijh v. Mediterranean Franchise Inc.,* 2012 ONSC 3846 (delivery statement in improper form but disclosure document allowed to stand as substantially complying with Act).

324. *Franchises Act*, R.S.A. 2000, c. F-23, ss. 4(7), (8); *The Franchises Act*, S.M. 2010, c. 13, s. 5(14). The maximum refundable deposit that a franchisor may require in Alberta is 20 per cent of the initial

berta and Manitoba statutes declare that a fully refundable deposit is not "consideration" for the purpose of the provisions stating when a disclosure document must be delivered.[325] The Alberta statute also provides that an agreement containing only terms relating to a refundable deposit is not a "franchise agreement."[326] If the prospective franchisee proceeds to purchase the franchise, the deposit is applied towards the initial franchise fee. If not, the deposit is refundable without deductions.

In fairness to the franchisor, it should be noted that the legislation requires the franchisor to disclose much information about its own business organization, about individuals connected with it, and about the franchise system that may be competitively sensitive, regardless of whether the prospective franchisee obtains the franchise being offered.[327] The franchisor may be holding exclusive territory open for the proposed unit while negotiating with the prospective franchisee, and if the negotiations prove abortive, the franchisor may have lost opportunities in the meantime to sell the franchise to other buyers. These are good reasons to permit the franchisor to require a fully refundable deposit as a sign of the prospective franchisee's good faith.

The Manitoba Law Reform Commission proposed that in order to provide the prospective franchisee with the assurance the deposit will be refunded if the acquisition of the franchise does not proceed, the deposit should be held by the prospective franchisee's legal counsel or other independent adviser selected by mutual agreement pending either the signing of a franchise agreement or the expiration of one year from the time the deposit was made.[328] This recommendation is not reflected in Manitoba's legislation.[329] While having the deposit held in escrow in this manner would protect prospective franchisees, we do not believe it is essential.

The Institute tentatively recommends:

franchise fee: Alta. Reg. 240/95, s. 5. In Manitoba it is 20 per cent of the initial fee up to a maximum of $100,000: *supra,* note 142, s. 11.

325. *Franchises Act* (Alta.), s. 4(6); *The Franchises Act* (Man.), s. 5(14).

326. *Franchises Act* (Alta.), s. 4(7)(a).

327. The Manitoba Law Reform Commission saw this as a valid reason for requiring a refundable deposit as a sign that the prospective franchisee is pursuing negotiations in earnest: *supra*, note 11 at 97.

328. *Supra*, note 11 at 97.

329. *Supra*, note 9, s. 5(14).

6. It should be permissible for a franchisor to request and receive a fully refundable deposit from a prospective franchisee before delivering a disclosure document if the deposit

(a) does not exceed an amount prescribed by regulation;

(b) is refundable without any deductions if the prospective franchisee does not enter into a franchise agreement; and

(c) is given under an agreement with the franchisor concerning the deposit that does not obligate the prospective franchisee to enter into any franchise agreement.

3. Disclosure Regarding Exclusive Territorial Rights

The disclosure regulation accompanying the *Uniform Franchises Act* requires franchisors to describe their policies and practices concerning proximity between franchise units, but it is not completely clear that the disclosure document must state expressly that there are no exclusivity rights if that is the case.

Manitoba requires that the disclosure document clearly indicate whether the franchisee will have an exclusive territory or not.[330] This is a reasonable requirement, because a franchise is associated in popular conception with territorial representation of the franchisor's trademark and trade name. There are, however, no exclusive territorial rights under a franchise unless they are conferred by the terms of the franchise agreement. Without a clear statement in the disclosure document regarding the presence or absence of exclusive territorial rights, prospective franchisees might wrongly assume they are acquiring exclusive territory.

The Institute tentatively recommends:

7. A franchisor should be required to state in the disclosure document whether or not exclusive territory is granted under the franchise being offered.

330. *Supra*, note 142, Sch. A, s. 18(2). The UNIDROIT Model Franchise Disclosure Law, *supra*, note 302, contains a similar requirement.

4. Disclosure of Direct Distribution Rights Reserved by Franchisor

Manitoba requires that the franchisor disclose whether it reserves the right to market its goods or services directly by telephone, catalogue or internet sales, or other means.[331]

It is only fair that the franchisor should disclose whether it reserves the right to compete with the franchisee and the distribution channels that it may use for direct sales, e.g. internet, telemarketing, or retail outlets that it operates directly. British Columbia should incorporate this Manitoba requirement into its disclosure regulations.

The Institute tentatively recommends:

8. A franchisor should be required to disclose whether it reserves the right to market directly goods or services of the same kind as are to be sold or distributed under the franchise being offered, and the channels of distribution that the franchisor uses or may use, including but not limited to telephone, catalogue, and internet sales, and outlets that the franchisor operates or intends to operate directly.

5. Electronic Delivery of Disclosure Documents

Section 5(2) of the *Uniform Franchises Act* allows for methods of delivery to be prescribed by the enacting jurisdiction. The regulations under the PEI and Manitoba franchise statutes allow for electronic delivery of a disclosure document. PEI also permits delivery "in machine-readable media."

The PEI regulation requires the disclosure document to be delivered in a form enabling the recipient to store, retrieve, read and print it. The Manitoba regulation is similar. Manitoba and PEI also require that an electronic or machine-readable disclosure document must have no links to or from external documents or external content. This is to ensure that the electronic disclosure document is self-contained and that the entire body of required information is provided by one means, rather than being comprised in part of content stored on a remote website. The regulations of the two provinces also require that for an electronic delivery to be valid, the recipient must acknowledge receipt of the disclosure document in writing. An e-mailed acknowledgment would presumably satisfy the requirement for writing.

In British Columbia, the *Electronic Transactions Act* would likely allow for delivery of a disclosure document in digital form or by electronic means, even if the franchise

331. *Supra*, note 142, Sch. A, s. 18(1)(d).

legislation were to be silent on the subject.[332] It would also allow the requirement for a written acknowledgment of its receipt to be satisfied by an electronic record, such as a return e-mail message.[333]

There are nevertheless reasons why the authority to employ electronic means to effect disclosure should be obvious on the face of the franchise legislation or regulations. One reason is the desirability of uniformity with the legislation and regulations of the other provinces. Another is that the *Electronic Transactions Act* does not impose the requirement that the disclosure document contain all the information required by law without the need to resort to a link to an extrinsic source. This additional requirement is appropriate in the context of disclosure for franchising purposes and would not conflict with the *Electronic Transactions Act*, which does not limit the operation of other laws concerning the use and transmission of information in electronic form.[334]

Yet another reason for including express authority for electronic disclosure in the franchise legislation itself is that, as a practical matter, franchisors cannot be expected to obtain legal advice on every occasion when they send a disclosure document to a prospective franchisee. They will naturally look to the provincial franchise legislation and regulations to determine the required content and process for valid disclosure, and should be able to make that determination readily.

We propose that British Columbia franchise legislation should contain provisions expressly authorizing electronic delivery of disclosure documents, or delivery in a machine-readable form. In order to complete a valid electronic delivery, there should be proof that the prospective franchisee has acknowledged receipt of the disclosure document in writing. By the terms of the *Electronic Transactions Act*, such a requirement could be satisfied by an e-mailed acknowledgement or other electronic transmission.[335]

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332. Section 6 of the *Electronic Transactions Act*, S.B.C. 2001, c. 10 provides that a legal requirement to provide information or a record is satisfied if it is provided electronically and it is (a) accessible by the recipient in a manner usable for subsequent reference, and (b) capable of retention by the recipient in a manner usable for subsequent reference. Section 7 provides that a legal requirement to provide information or a record in a specified non-electronic form (such as the franchisor's certificate of verification attached to the disclosure document) is satisfied if the information or record meets the same requirements as in ss. 6(b) and (c) and also is organized in the same or substantially the same manner as the specified non-electronic form.

333. *Ibid.*, s. 5.

334. *Ibid.*, s. 2(1).

335. *Ibid.*

The Institute tentatively recommends:

9. Delivery of a disclosure document or statement of material change to a prospective franchisee by electronic means, or in a machine-readable form, should be permissible provided that:

(a) the disclosure document or statement of material change meets the requirements of sections 6 and 7 of the Electronic Transactions Act;

(b) the disclosure document or statement of material change contains no links to or from external documents or content; and

(c) the recipient acknowledges in writing the receipt of the disclosure document or statement of material change, which acknowledgement may be in the form of an e-mail message or other electronic transmission to the franchisor.

6. Financial Projections and the Statutory Misrepresentation Action

A franchisee is not likely able to obtain relief for misrepresentation under the *Uniform Franchises Act* if the misleading information consisted of a revenue or operating costs projection or forecast provided by the franchisor. This is because financial projections and forecasts are predictions rather than statements of existing *fact*. Yet inflated or over-optimistic financial projections may be the principal inducements used to entice prospective franchisees. Examples of franchisors selling new franchises using financial projections that have no reasonable basis in reality can be readily found in case law.[336]

The Manitoba Law Reform Commission recommended that the statutory remedy for misrepresentation in the disclosure document be expressly extended to financial projections and forecasts provided to the franchisee by the franchisor unless they are accompanied by cautionary language of the kind that must accompany forward-looking statements under securities legislation, and the maker of the projection or forecast had a reasonable basis for making it.[337] While this recommendation was

336. See, for example, *Kim v. Shefield & Sons – Tobacconists Inc.,* [1989] B.C.J. No. 1175 (S.C.); aff'd [1990] B.C.J. No. 738 (C.A.); *Perfect Portions Holding Co. v. New Futures Ltd.,* [1995] O.J. No. 2113 (Gen. Div.) and cases cited, *supra*, in note 97.

337. *Supra.*, note 11 at 111. The cautionary language used to comply with securities legislation when providing forward-looking statements typically consists of a declaration that a particular estimate or forecast is a forward-looking statement, that it is based on assumptions about future economic or other specified conditions, and that actual results may vary significantly from what the estimate or forecast predicts.

not carried forward into the Manitoba statute, the extension of the misrepresentation remedy that it calls for is reasonable in order to discourage deceptive earnings and costs projections. The franchisor can easily afford itself of a defence by employing cautionary language and by not presenting earnings and costs projections to prospective franchisees that are unrealistic and unsupportable.

The Institute tentatively recommends:

10. A franchisee's statutory right of action for misrepresentation under British Columbia franchise legislation should extend to misleading or inaccurate information in a financial or earnings projection provided by the franchisor or franchisor's associate to the franchisee before the franchisee entered into a franchising agreement, unless the projection has a reasonable basis and is accompanied by cautionary language stating that:

(a) the projection is made with respect to the future;

(b) the projection is based on assumptions about future economic, fiscal, and other conditions; and

(c) actual financial results may vary significantly from those predicted in the projection.

7. "Wrap-Around" Disclosure Documents

Alberta, PEI and Manitoba allow franchisors to use a disclosure document that is prepared to comply with the laws of another jurisdiction if it is supplemented by any additional information required to comply with the provincial franchise legislation and regulations. Disclosure documents in this format are sometimes referred to as "wrap-arounds."

The ULCC Working Group decided against allowing wrap-arounds on the ground that they would detract from the clarity of disclosure and would be unnecessary in a harmonized system such as would be created under the uniform Act.[338] Permitting wrap-arounds appears nevertheless to be a practical approach, given that franchising is done on a national or international scale, and having to modify the format for much of the same information for use in each jurisdiction where the franchisor is ac-

338. Uniform Franchises Act Working Group Report, online at http://www.ulcc.ca/en/2005-st-johns-nf/254-civil-section-documents/1042-uniform-franchises-act-report, p. 4.

tive seems to be an unnecessary regulatory burden. Wrap-arounds would remain subject to the requirements of section 5(7) of the uniform Act, namely that all information in a disclosure document or statement of material change be "accurately, clearly and concisely set out."

The Institute recommends that:

11. A franchisor should be able to use as its disclosure document under British Columbia franchise legislation a document that is prepared in compliance with the franchise disclosure requirements under the laws of another jurisdiction, if the franchisor includes additional information with that document as is necessary to comply with the franchise disclosure requirements of British Columbia.

8. Exclusive Jurisdiction and Venue Clauses And Non-Statutory Claims

As mentioned in Chapter III, section 11 of the *Uniform Franchises Act* overrides clauses in a franchise agreement that would require a claim that is "enforceable under the Act" to be decided in a place outside the enacting jurisdiction and makes the restriction on the venue ineffective. It is noted in that chapter that the wording "enforceable under the Act" could be interpreted to restrict the scope of section 11 to statutory claims, but in a franchise-related dispute both statutory and non-statutory claims are frequently raised. Chapter III contains examples of claims based on common law arising from the same facts as claims based on franchise legislation.[339]

If section 11 is interpreted to apply only to statutory claims, the effect could be to split cases when the franchise agreement stipulates that disputes between the parties are to be decided in a place outside the province, or that the courts or tribunals of another province, state, or country will have exclusive jurisdiction over disputes. Claims and counterclaims based on common law would then have to be asserted in the place stipulated in the franchise agreement.

Case-splitting of this kind would give rise to procedural jousting over the multiplicity of proceedings and greatly increase the overall expense of litigation or arbitration, as well as allowing for the possibility of inconsistent results. The increased expense and inconvenience of having to sue or go to arbitration in more than one forum would operate oppressively, creating pressure on the economically weaker

339. For example, see *1518628 Ontario Inc. v. Tutor Time Learning Centres LLC*, *supra*, note 88 (franchisee claiming statutory rescission; franchisor counterclaiming for liquidated damages for breach of contract); *Personal Service Coffee Corp. v. Beer*, *supra*, note 223 (franchisee claiming statutory rescission; franchisor counterclaiming for misappropriation of proprietary information and use of franchisor-supplied equipment in a competing business).

party to abandon part of a valid case or discouraging the party from proceeding altogether.

Cases should not have to be split or remedies abandoned because of uneven application of section 11. In British Columbia's version of the uniform Act, the counterpart provision to section 11 should apply to non-statutory as well as statutory claims made by a party to a franchising agreement against the other party. This could be accomplished by re-wording it to apply to "claims arising from a franchise agreement" instead of claims "enforceable under this Act."[340]

The Institute tentatively recommends:

12. Section 11 of the Uniform Franchises Act should be amended in a version of the Act enacted in British Columbia so as to apply with respect to "claims arising under a franchising agreement," rather than only to claims enforceable under the Act.

9. Arbitration Clauses Specifying an Extraprovincial Venue

Some franchise agreements have clauses that would require all disputes between the parties to be referred to arbitration rather than be decided by a court, and also specify that the arbitration is to occur at a place outside the province where the franchise unit is located. It is not entirely clear that section 11 applies to restrictions on the venue of an arbitration.

Section 11 is in the uniform Act to serve a policy of the Act of protecting access to justice in the province or territory where the Act has been implemented. It does so by rendering exclusive venue clauses void if they stipulate an extraprovincial venue. This policy would be seriously undermined if section 11 could be circumvented merely by inserting an arbitration clause. In a version of the uniform Act made in British Columbia, the language of section 11 should be modified to clearly apply to arbitration clauses as well as to terms restricting jurisdiction and venue in court proceedings.

The Institute tentatively recommends:

340. Similar wording is found in § 20040.5 of the *California Business and Professions Code*, which reads:

> 20040.5. A provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state.

13. Section 11 of the Uniform Franchises Act should be amended in a version of the Act enacted in British Columbia so as to extend to terms mandating an extra-provincial venue for arbitration of a claim arising from a franchise agreement.

10. Asserting Statutory Rescission and Damages Claims Concurrently

The issue of whether statutory rescission and statutory damages claims can be asserted concurrently without election between the remedies has been decided in Ontario, but could still be raised again in British Columbia if the same or similar language were to be enacted here. In order to avoid the need to re-litigate the matter here, franchise legislation enacted in British Columbia should clarify that a franchisee is not precluded from obtaining damages in addition to statutory rescission unless it would result in double recovery. In other words, an award of damages would not be made in respect of losses recovered through the rescission remedy.

The Institute tentatively recommends:

14. A version of the Uniform Franchises Act enacted in British Columbia should specify that a franchisee is not required to elect between statutory rescission under the Act and the statutory rights of action for damages, but is not entitled to be indemnified by way of damages in respect of a loss recovered through rescission.

11. Presumption of Reliance on Misrepresentation in Disclosure Document

In a misrepresentation action at common law, if a defendant can establish on a balance of probabilities that the plaintiff would have entered into a contract in any event, regardless of the misrepresentation, the plaintiff's claim will fail on the basis of lack of causation.[341] As was explained in Chapter III, the uniform Act deems a franchisee to have relied on a misrepresentation unless the franchisee was actually aware of the true facts.

In *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*[342] the Supreme Court of Canada had occasion to address the nature of a similar deeming provision in the B.C. *Real Estate Act*.[343] Section 75(2)(a) of that Act stipulated that purchasers of certain property interests were deemed to have relied on the representations in a prospectus filed by a developer, regardless of whether the purchaser had received the pro-

341. *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.,* [1991] 3 S.C.R. 3 at pp.14-17; *Canada Trustco Mortgage Co. v. Barlet & Richardes* (1996), 91 O.A.C. 33 at para. 26.

342. 2011 SCC 23, aff'g 2009 BCCA 224.

343. RSBC 1996, c. 397.

spectus or not. Unlike the *Uniform Franchises Act* provision, however, the *Real Estate Act* did not provide for a defence based on the purchaser's knowledge of the misrepresentation, as did the legislation which later replaced it.[344] The trial judge held that the presumption was conclusive. She concluded that the purpose of the *Real Estate Act* was to protect the investing public and that it would undercut the purpose of the legislation to allow a developer to attempt to rebut the presumption and "direct the focus of the inquiry to what the investor knew rather than what the developer failed to disclose." The Supreme Court of Canada disagreed. After noting that it is the purpose of the statute that determines whether a deeming provision creates a conclusive or rebuttable presumption, the court stated:

> As I have discussed above, disclosure is a matter of legislative policy that involves "balancing the needs of the investor community against the burden imposed on issuers" ...A non-rebuttable presumption could interfere with this balancing and would not serve the statutory purpose behind legislated disclosure obligations. For example, a non-rebuttable presumption would allow an investor to claim reliance on a misrepresentation, even if the investor was fully informed and had complete knowledge of all the facts. In doing so, the issuer would be held liable for a misrepresentation of which the investor was fully aware. This would be an absurd and unjust result, which would place issuers into the position of having to guarantee the losses of fully informed investors. The purpose of the disclosure obligation is to balance the amount of disclosure made, not to place [the developer] into the role of insurer for [investors].[345]

This approach is logically defensible and eminently fair in cases where a party enters into a transaction fully aware of a misrepresentation by the other contracting party.

To allow the statutory presumption of reliance to be rebutted in cases apart from actual knowledge, however, would require the court to embark on an exercise in speculation on what the franchisee might have done if no misrepresentation had been made, or in other words to assume a hypothetical set of facts rather than what actually took place between the contracting parties.[346] To disallow a defence based on this kind of speculative exercise is not the same as treating the franchisor as an insurer of the franchisee's losses, because the franchisor can still attempt to prove the

344. *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41, s. 22(5).

345. *Supra,* note 342 at para. 118.

346. This was the reason given by the Ontario court in *Melnychuk v. Blitz Ltd., supra*, note 229 at para. 13 for refusing to entertain the franchisor's argument on lack of a causal link between a misrepresentation through omission in a disclosure document and the franchisee's entry into a franchising agreement.

franchisee was fully aware of the inaccuracy in, or omission from, the disclosure document and nevertheless entered into the franchise agreement. To allow it would definitely detract from the purpose of the disclosure provisions, namely to ensure that prospective franchisees receive all the information the legislature considers is necessary to allow them to make a properly informed decision. Some of that information, particularly that relating to the franchise system, may be peculiarly within the franchisor's knowledge.

British Columbia franchise legislation should make it clear that the statutory presumption of deemed reliance on the disclosure document and a statement of material change is rebuttable only if the franchisor, franchisor's associate, or other party liable for the misrepresentation proves the franchisee had actual knowledge of the true facts before entering into a franchise agreement.

The Institute tentatively recommends:

15. British Columbia franchise legislation should state that the presumption of deemed reliance by a franchisee on a disclosure document or statement of material change operates conclusively, except where it is proved that the franchisee acquired the franchise with actual knowledge of a misrepresentation, or of a material change occurring between the delivery of a disclosure document and the execution of a franchise agreement that was not described in a statement of material change given to the franchisee within the time required by the legislation, as the case may be.

12. Release of Statutory Right or Claim Under a Settlement Agreement

In Chapter III it is noted that Ontario courts have held that the statutory prohibition on waivers and releases of statutory rights given by franchise legislation does not prevent a release of a statutory claim under a settlement agreement. The state of Washington provides this expressly in its franchise legislation.[347] It would be worthwhile to follow the example of Washington and provide for this practical exception in the legislation itself.

The Institute tentatively recommends:

16. British Columbia franchise legislation should indicate clearly that the prohibition on waivers and releases of statutory rights (in the provision corresponding to section 12 of the Uniform Franchises Act) does not apply to a post-dispute settlement agreement.

347. RCW 19.100.220(2).

D. Conclusion

The Institute believes that franchising legislation in British Columbia is overdue and these tentative recommendations provide the basis for the needed regulatory framework. Comment is invited from all interested sectors.

APPENDIX A

LIST OF TENTATIVE RECOMMENDATIONS

1. British Columbia should enact franchise legislation.

(p. 76)

2. Subject to Tentative Recommendation 3, franchise legislation in British Columbia should be modelled generally on the Uniform Franchises Act.

(p. 77)

3. British Columbia franchise legislation should not provide for mandatory mediation on the demand of one party to a franchise agreement.

(p. 79)

4. A disclosure document provided to a prospective franchisee in British Columbia should contain the following statement:

> Mediation is a voluntary process to resolve disputes with the assistance of an independent third party. Any party may propose mediation or other dispute resolution process in regard to a dispute under the franchise agreement, and the process may be used to resolve the dispute if agreed to by all parties.

(p. 79)

5. British Columbia franchise legislation should provide that a disclosure document or statement of material change

(a) is valid if the disclosure document or statement of material change substantially complies with the Act and regulations; and

(b) is valid despite the presence of a technical irregularity, error, or defect in form that does not affect the substance of the document.

(p. 82)

6. It should be permissible for a franchisor to request and receive a fully refundable deposit from a prospective franchisee before delivering a disclosure document if the deposit

(a) does not exceed an amount prescribed by regulation;

(b) is refundable without any deductions if the prospective franchisee does not enter into a franchise agreement; and

(c) is given under an agreement with the franchisor concerning the deposit that does not obligate the prospective franchisee to enter into any franchise agreement.

(p. 84)

7. A franchisor should be required to state in the disclosure document whether or not exclusive territory is granted under the franchise being offered.

(p. 84)

8. A franchisor should be required to disclose whether it reserves the right to market directly goods or services of the same kind as are to be sold or distributed under the franchise being offered, and the channels of distribution that the franchisor uses or may use, including but not limited to telephone, catalogue, and internet sales, and outlets that the franchisor operates or intends to operate directly.

(p. 85)

9. Delivery of a disclosure document or statement of material change to a prospective franchisee by electronic means, or in a machine-readable form, should be permissible provided that:

(a) the disclosure document or statement of material change meets the requirements of sections 6 and 7 of the Electronic Transactions Act;

(b) the disclosure document or statement of material change contains no links to or from external documents or content; and

(c) the recipient acknowledges in writing the receipt of the disclosure document or statement of material change, which acknowledgement may be in the form of an e-mail message or other electronic transmission to the franchisor.

(p. 87)

10. A franchisee's statutory right of action for misrepresentation under British Columbia franchise legislation should extend to misleading or inaccurate information in a financial or earnings projection provided by the franchisor or franchisor's associate to the franchisee before the franchisee entered into a franchising agreement, unless

the projection has a reasonable basis and is accompanied by cautionary language stating that:

(a) the projection is made with respect to the future;

(b) the projection is based on assumptions about future economic, fiscal, and other conditions; and

(c) actual financial results may vary significantly from those predicted in the projection.

(p. 88)

11. A franchisor should be able to use as its disclosure document under British Columbia franchise legislation a document that is prepared in compliance with the franchise disclosure requirements under the laws of another jurisdiction, if the franchisor includes additional information with that document as is necessary to comply with the franchise disclosure requirements of British Columbia.

(p. 89)

12. Section 11 of the Uniform Franchises Act should be amended in a version of the Act enacted in British Columbia so as to apply with respect to "claims arising under a franchising agreement," rather than only to claims enforceable under the Act.

(p. 90)

13. Section 11 of the Uniform Franchises Act should be amended in a version of the Act enacted in British Columbia so as to extend to terms mandating an extra-provincial venue for arbitration of a claim arising from a franchise agreement.

(p.91)

14. A version of the Uniform Franchises Act enacted in British Columbia should specify that a franchisee is not required to elect between statutory rescission under the Act and the statutory rights of action for damages, but is not entitled to be indemnified by way of damages in respect of a loss recovered through rescission.

(p. 91)

15. British Columbia franchise legislation should state that the presumption of deemed reliance by a franchisee on a disclosure document or statement of material change operates conclusively, except where it is proved that the franchisee acquired the franchise with actual knowledge of a misrepresentation, or of a material change occurring between the delivery of a disclosure document and the execution of a franchise agreement that was not described in a statement of material change given to the franchisee within the time required by the legislation, as the case may be.

(p. 93)

16. British Columbia franchise legislation should indicate clearly that the prohibition on waivers and releases of statutory rights (in the provision corresponding to section 12 of the Uniform Franchises Act) does not apply to a post-dispute settlement agreement.

(p. 93)

APPENDIX B

UNIFORM FRANCHISES ACT AND REGULATIONS

Uniform Franchises Act[348]

CONTENTS

Definitions
1.(1) In this Act,

"disclosure document" means the disclosure document required by section 5;

"franchise" means a right to engage in a business where the franchisee is required by contract or otherwise to make a payment or continuing payments, whether direct or indirect, or a commitment to make such payment or payments, to the franchisor or the franchisor's associate in the course of operating the business or as a condition of acquiring the franchise or commencing operations and,

(a) in which,

The *Uniform Franchises Act* and the two regulations made under the Act (*Disclosure Documents* and *Mediation*) were created under the auspices of the Uniform Law Conference of Canada and are found at: http://www.ulcc.ca/en/uniform-acts-en-gb-1/403-franchises-act/1126-franchises-act-and-regulations. Commentaries contained in the text of the *Uniform Franchises Act* and the regulations made under the Act are also those of the Uniform Law Conference of Canada.

(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, trade-mark, 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 in, the franchisee's method of operation, including building design and furnishings, locations, business organization, marketing techniques or training, or

(b) in which,

(i) the franchisor or the franchisor's associate grants the franchisee the representational or distribution rights, whether or not a trade-mark, trade name, logo or advertising or other commercial symbol is involved, to sell, offer for sale or distribute goods or services supplied by the franchisor or a supplier designated by the franchisor, and

(ii) the franchisor or the franchisor's associate or a third person designated by the franchisor, provides location assistance, including securing retail outlets or accounts for the goods or services to be sold, offered for sale or distributed or securing locations or sites for vending machines, display racks or other product sales displays used by the franchisee;

Comment: "franchise". This definition tracks the Ontario Act but deletes all references to a "service mark" since that term does not accord with Canadian trade-mark legislation terminology.

An inclusive definition of franchise was chosen in order to capture a wide range of relationships subject to requirements such as fair dealing but also to exempt certain others (i.e. business opportunities or multilevel marketing) from the disclosure requirements. The Act uses a functional test based on the level of control in the definition rather than relying on what the parties choose to call the relationship. The definition also extends to a "franchisor's associate".

"franchise agreement" means any agreement that relates to a franchise between,

(a) a franchisor or franchisor's associate, and

(b) a franchisee;

"franchisee" means a person to whom a franchise is granted and includes,

(a) a subfranchisor with regard to that subfranchisor's relationship with a franchisor, and

(b) a subfranchisee with regard to that subfranchisee's relationship with a subfranchisor;

"franchise system" includes,

(a) the marketing, marketing plan or business plan of the franchise,

(b) the use of or association with a trade-mark, trade name, logo or advertising or other commercial symbol,

(c) the obligations of the franchisor and franchisee with regard to the operation of the business operated by the franchisee under the franchise agreement, and

(d) the goodwill associated with the franchise;

Comment: "franchise system". This definition tracks the Ontario Act but deletes all references to a "service mark" since that term does not accord with Canadian trade-mark legislation terminology.

"franchisor" means one or more persons who grant or offer to grant a franchise and includes a subfranchisor with regard to that subfranchisor's relationship with a subfranchisee;

"franchisor's associate" means a person,

(a) who, directly or indirectly,

(i) controls or is controlled by the franchisor, or
(ii) is controlled by another person who also controls, directly or indirectly, the franchisor, and

(b) who,

(i) is directly involved in the grant of the franchise,
(A) by being involved in reviewing or approving the grant of the franchise, or
(B) by making representations to the prospective franchisee on behalf of the franchisor for the purpose of granting the franchise, marketing the franchise or otherwise offering to grant the franchise, or
(ii) exercises significant operational control over the franchisee and to whom the franchisee has a continuing financial obligation in respect of the franchise;

"franchisor's broker" means a person, other than the franchisor, franchisor's associate or franchisee, who grants, markets or otherwise offers to grant a franchise, or who arranges for the grant of a franchise;

Comment: "franchisor's broker". This definition has been moved from section 7(1)(c) of the Ontario Act to the Definitions section in this Act.

"grant", in respect of a franchise, includes the sale or disposition of the franchise or of an interest in the franchise and, for such purposes, an interest in the franchise includes the ownership of shares in the corporation that owns the franchise;

"master franchise" means a franchise that is a right granted by a franchisor to a subfranchisor to grant or offer to grant franchises for the subfranchisor's own account;

"material change" means a change, in the business, operations, capital or control of the franchisor or franchisor's associate or in the franchise or the franchise system, that would reasonably be expected to have a significant adverse effect on the value or price of the franchise to be granted or on the decision to acquire the franchise and includes a decision to implement such a change made by the board of directors of the franchisor or franchisor's associate or by senior management of the franchisor or franchisor's associate who believe that confirmation of the decision by the board of directors is probable;

Comment: "material change". The following amendments were made scaling back the scope of the Ontario Act definition: (i) the substitution of the word "means" for "including" in order to provide more certainty to franchisors preparing disclosure documents; and (ii) the reference to "prescribed change" was deleted in the interest of uniformity in all jurisdictions.

"material fact" means any information, about the business, operations, capital or control of the franchisor or franchisor's associate or about the franchise or the franchise system, that would reasonably be expected to have a significant effect on the value or price of the franchise to be granted or the decision to acquire the franchise;

Comment: "material fact". The Act recognizes the need to balance the goal of making available all relevant information to the franchisee while making the requirements sufficiently clear and finite so that a franchisor can determine its obligations with certainty. The concern exists that too broad a definition is inappropriate since a franchisor will be in an advantageous position only with regard to information about itself and not the world in general. On the other hand, the Act should recognize that information that may not be strictly about the franchisor but that would still be relevant to the franchisee (e.g., if the franchisor knew that a competitor was planning to set up an outlet in close proximity to the proposed franchise) is crucial. The words "franchise or" were added before the words "franchise system" in the definition adopted from the Ontario Act in order to cover this type of scenario. Furthermore, the terms "grant and acquire" are used generally throughout the Act rather than the terms "purchase and sale". Finally, the definition is drafted to be exclusive by using the word "means" as opposed to inclusive by using the word "includes".

"misrepresentation" includes,

(a) an untrue statement of a material fact, or

(b) an omission to state a material fact that is required to be stated or that is necessary to

make a statement not misleading in light of the circumstances in which it was made;

"prescribed" means prescribed by regulations made under this Act;

"prospective franchisee" means a person who has indicated, directly or indirectly, to a franchisor or a franchisor's associate or broker an interest in entering into a franchise agreement, and a person whom a franchisor or a franchisor's associate or broker, directly or indirectly, invites to enter into a franchise agreement;

"subfranchise" means a franchise granted by a subfranchisor to a subfranchisee.

Master franchise, subfranchise
(2) A franchise includes a master franchise and a subfranchise.

Deemed control
(3) A franchisee, franchisor or franchisor's associate that is a corporation shall be deemed to be controlled by another person or persons if,

(a) voting securities of the franchisee or franchisor or franchisor's associate carrying more than 50 per cent of the votes for the election of directors are held, otherwise than by way of security only, by or for the benefit of the other person or persons; and

(b) the votes carried by such securities are entitled, if exercised, to elect a majority of the board of directors of the franchisee or franchisor or franchisor's associate.

Application
2.(1) This Act applies with respect to,

(a) a franchise agreement entered into on or after the coming into force of this section, if the business operated or to be operated by the franchisee under the agreement is partly or wholly in [insert jurisdiction]; and

(b) a renewal or extension entered into on or after the coming into force of this section of a franchise agreement that was entered into before or after the coming into force of this section, if the business operated or to be operated by the franchisee under the agreement is partly or wholly in *[insert jurisdiction]*.

Comment: s. 2(1). This subsection tracks the Ontario Act but has been amended so as to permit the insertion of the applicable province or territory.

Same
(2) Sections 3 and 4, clause 5(8)(d) and sections 8 to 12 apply with respect to a franchise agreement entered into before the coming into force of this section, if the business operated or to be operated by the franchisee under the franchise agreement is partly or wholly in *[insert jurisdiction].*

Comment: s. 2(2). This subsection tracks the Ontario Act but has been amended by:
(i) expanding the scope of its applicability to include section 8 (Dispute Resolution), section 9 (Joint and Several Liability), and section 11 (Attempt to Affect Jurisdiction Void); and
(ii) permitting the insertion of the applicable province or territory.

Non-application
(3) This Act does not apply to,

(a) an employer-employee relationship;

(b) a partnership;

(c) membership in,

(i) an organization operated on a co-operative basis by and for independent retailers that,
(A) purchases or arranges the purchase of, on a non-exclusive basis, wholesale goods or services primarily for resale by its member retailers, and
(B) does not grant representational rights to or exercise significant operational control over its member retailers,
(ii) a "cooperative corporation" as defined under subsection 136(2) of the *Income Tax Act* (Canada) or as would be defined under that subsection, but for paragraph 136(2)(c),
(iii) an organization incorporated under the *Canada Cooperatives Act*, or
(iv) an organization incorporated under the *Co-operative Corporations Act;*

(d) an arrangement arising from an agreement to use a trade-mark, trade name, logo or advertising or other commercial symbol designating a person who offers on a general basis, for consideration, a service for the evaluation, testing or certification of goods, commodities or services;

(e) an arrangement arising from an agreement between a licensor and a single licensee to license a specific trade-mark, trade name, logo or advertising or other commercial symbol where such licence is the only one of its general nature and type to be granted in Canada by the licensor with respect to that trade-mark, trade name, logo or advertising or other commercial symbol;

(f) a relationship or arrangement arising out of an oral agreement where there is no writing that evidences any material term or aspect of the relationship or arrangement; or

(g) an arrangement arising out of an agreement,

(i) for the purchase and sale of a reasonable amount of goods at a reasonable

wholesale price, or
(ii) for the purchase of a reasonable amount of services at a reasonable price.

Comment: s. 2(3). This subsection substantially tracks the Ontario Act with some modification. The following amendments were made to the Ontario Act:

(i) "co-operative association" is defined within numbered subparagraph 3 of the Uniform Act rather than being defined in a regulation;
(ii) all references to "service mark" have been deleted since that term does not accord with Canadian trade-mark legislation terminology;
(iii) numbered subparagraph 7 of the Ontario Act has been clarified in section 2(3)(e) to confirm that the single trade-mark licence is the only type of its kind in Canada as the Ontario Act confirms no territorial qualification;
(iv) numbered subparagraph 6 of the Ontario Act relating to lease arrangements whereby the franchisee leases space in a retailer's premises but is not required or advised to buy the goods or services it sells from the retailer or an affiliate of the retailer has been deleted;
(v) numbered subparagraph 8 of the Ontario Act relating to business arrangements with the Crown was not included as there was no reasonable basis on which to exempt the Crown if it is in a business franchise relationship acting like a private sector entity; and
(vi) Section 2(3)(g) was added to exempt wholesale arrangements as in the Alberta Act.

Fair dealing
3.(1) Every franchise agreement imposes on each party a duty of fair dealing in the performance and enforcement of the agreement, including in the exercise of a right under the agreement.

Comment: s. 3(1). This subsection has been expanded by adding the words "including in the exercise of a right" to the application of the duty of fair dealing definition. As a result, the duty of fair dealing will apply not only during the performance and enforcement of the agreement but also in the exercise of a right under it. The addition of the words "in the exercise of a right" is necessary because the duty of fair dealing incorporating the duty of good faith and commercial reasonable standards in the Ontario Act does not extend to express contractual provisions granting the franchisor discretionary authority over rights to be exercised during the term of the contract that may be carried out without regard to fair dealing.

Right of action
(2) A party to a franchise agreement has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing.

Interpretation
(3) For the purpose of this section, the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards.

Right to associate
4.(1) A franchisee may associate with other franchisees and may form or join an organization of franchisees.

Franchisor may not prohibit association
(2) A franchisor and a franchisor's associate shall not interfere with, prohibit or restrict, by contract or otherwise, a franchisee from forming or joining an organization of franchisees or from associating with other franchisees.

Same
(3) A franchisor and a franchisor's associate shall not, directly or indirectly, penalize, attempt to penalize or threaten to penalize a franchisee for exercising any right under this section.

Provisions void
(4) Any provision in a franchise agreement or other agreement relating to a franchise which purports to interfere with, prohibit or restrict a franchisee from exercising any right under this section is void.

Right of action
(5) If a franchisor or a franchisor's associate contravenes this section, the franchisee has a right of action for damages against the franchisor or franchisor's associate, as the case may be.

Comment: s. 4. Section 4 of the Ontario Act was adopted instead of the corresponding section of the Alberta Act. The Alberta Act has been drafted in the negative, that is, that a franchisor or its associate may not prohibit or restrict a franchisee from forming an organization while the Ontario Act has been drafted in the affirmative, a "franchisee may associate with other franchisees . . .".

Franchisor's obligation to disclose
5.(1) A franchisor shall provide a prospective franchisee with a disclosure document and the prospective franchisee shall receive the disclosure document not less than 14 days before the earlier of,

(a) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise; and

(b) the payment of any consideration by or on behalf of the prospective franchisee to the franchisor or franchisor's associate relating to the franchise.

Comment: s.5(1). This subsection tracks the Ontario Act which is more comprehensive than the Alberta Act.

Methods of delivery
(2) A disclosure document may be delivered personally, by registered mail or by any other prescribed method.

Comment: s.5(2). This subsection allows a province to prescribe other methods of delivery of a disclosure document (e.g. electronic mail – currently being considered by the Federal Trade Commission in respect of uniform franchise offering circulars in the United States).

Same
(3) A disclosure document must be one document delivered as required under subsections (1) and (2) as one document at one time.

Contents of disclosure document
(4) The disclosure document shall contain,

(a) financial statements as prescribed;

(b) copies of all proposed franchise agreements and other agreements relating to the franchise to be signed by the prospective franchisee;

(c) statements as prescribed for the purpose of assisting the prospective franchisee in making informed investment decisions;

(d) other information as prescribed; and

(e) copies of other documents as prescribed.

Comment: s.5(4). This subsection tracks the Ontario Act which is more comprehensive than the Alberta Act.

Same – all material facts
(5) In addition to the statements, documents and information required by subsection (4), the disclosure document shall contain all material facts.

Material change
(6) The franchisor shall provide the prospective franchisee with a written statement of any material change, and the prospective franchisee shall receive such statement, as soon as practicable after the change has occurred and before the earlier of,

(a) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise; and

(b) the payment of any consideration by or on behalf of the prospective franchisee to the franchisor or franchisor's associate relating to the franchise.

Information to be accurate, clear, concise
(7) All information in a disclosure document and a statement of material change shall be accurately, clearly and concisely set out.

Comment: s.5(7). This subsection is contained in the Ontario Act, but not the Alberta Act. It follows current trends in securities laws to require clear and concise disclosure.

Exemptions
(8) This section does not apply to,

(a) the grant of a franchise by a franchisee if,

(i) the franchisee is not the franchisor, the franchisor's associate or a director, officer or employee of the franchisor or of the franchisor's associate,
(ii) the grant of the franchise is for the franchisee's own account,
(iii) in the case of a master franchise, the entire franchise is granted, and
(iv) the grant of the franchise is not effected by or through the franchisor;

(b) the grant of a franchise to a person who has been an officer or director of the franchisor or of the franchisor's associate for at least six months immediately before the grant of the franchise, for that person's own account;

(c) the grant of an additional franchise to an existing franchisee if that additional franchise is substantially the same as the existing franchise that the franchisee is operating and if there has been no material change since the existing franchise agreement or latest renewal or extension of the existing franchise agreement was entered into;

(d) the grant of a franchise by an executor, administrator, sheriff, receiver, trustee, trustee in bankruptcy or guardian on behalf of a person other than the franchisor or the estate of the franchisor;

(e) the grant of a franchise to a person to sell goods or services within a business in which that person has an interest, if the sales arising from those goods or services, as anticipated by the parties or that should be anticipated by the parties at the time the franchise agreement is entered into, will not exceed 20 per cent of the total sales of the business during the first year of operation of the franchise;

(f) the renewal or extension of a franchise agreement where there has been no interruption in the operation of the business operated by the franchisee under the franchise agreement and there has been no material change since the franchise agreement or latest renewal or extension of the franchise agreement was entered into;

(g) the grant of a franchise if the prospective franchisee is required to make a total annual investment to acquire and operate the franchise in an amount that does not exceed the prescribed amount;

(h) the grant of a franchise if the franchise agreement is not valid for longer than one year and does not involve the payment of a non-refundable fee and if the franchisor or franchisor's associate provides location assistance to the franchisee, including securing retail outlets or accounts for the goods or services to be sold, offered for sale or distributed or securing locations or sites for vending machines, display racks or other product sales displays used by the franchisee; or

(i) the grant of a franchise if the franchisor is governed by section 55 of the *Competition Act* (Canada).

Comment: s.5(8). S. 5(8) has been drafted to include the specified percentage of sales and the period of time for calculating the applicable percentage rather than allowing such items to be prescribed by regulation in order to achieve uniformity. The Alberta Act and the Ontario Act allow the items to be prescribed by regulation.

The exemption in s.5(8)(h) has been specifically limited to business opportunity franchises rather than business format franchises as generally defined. It was felt that there might be abuse of the one-year franchise exemption by franchisors who constantly renew or extend one-year terms, and that there was no business justification for denying a business format franchise disclosure simply because the term is limited to one year.

Crown exempt from financial statement requirement
(9) The Crown is not required to include the financial statements otherwise required by clause (4)(a) in its disclosure document.

Comment: s.5(9). There is no valid policy reason to have an overall exemption in the Act for agreements with the Crown as currently exist in the Ontario Act (but not in the Alberta Act). The Crown is exempted from financial disclosure.

Interpretation - grant effected by or through franchisor
(10) For the purpose of subclause (8)(a)(iv), a grant is not effected by or through a franchisor merely because,

(a) the franchisor has a right, exercisable on reasonable grounds, to approve or disapprove the grant; or

(b) a fee must be paid to the franchisor in an amount set out in the franchise agreement or in an amount that does not exceed the reasonable actual costs incurred by the franchisor to process the grant.

Interpretation - franchise agreement
(11) For the purposes of subsections (1) and (6), an agreement is not a franchise agreement or any other agreement relating to the franchise if the agreement only contains terms in respect of,

(a) keeping confidential or prohibiting the use of any information or material that may be provided to the prospective franchisee; or

(b) designating a location, site or territory for a prospective franchisee.

Comment: s.5(11). The Alberta Act exempts from disclosure certain deposit agreements and confidentiality agreements. The Ontario Act has no similar exemption. An agreement which is restricted to confidentiality or designation of a location should be able to be entered into prior to disclosure and should therefore be exempt from disclosure. A prospective franchisee would not be prejudiced in this regard.

Exception re interpretation of franchise agreement
(12) Despite subsection (11), an agreement that only contains terms described in clause (11)(a) or (b) is a franchise agreement or any other agreement relating to the franchise for the purposes of subsections (1) and (6) if the agreement,

(a) requires keeping confidential or prohibits the use of information,

(i) that is or comes into the public domain without breaching the agreement,
(ii) that is disclosed to any person without breaching the agreement, or
(iii) that is disclosed with the consent of all the parties to the agreement; or

(b) prohibits the disclosure of information to an organization of franchisees, to other franchisees of the same franchise system or to a franchisee's professional advisors.

Right of rescission
6.(1) A franchisee may rescind the franchise agreement, without penalty or obligation, no later than 60 days after receiving the disclosure document, if the franchisor failed to provide the disclosure document or a statement of material change within the time required by section 5 or if the contents of the disclosure document did not meet the requirements of section 5.

Same
(2) A franchisee may rescind the franchise agreement, without penalty or obligation, no later than two years after entering into the franchise agreement if the franchisor never provided the disclosure document.

Notice of rescission
(3) Notice of rescission shall be in writing and shall be delivered to the franchisor, personally, by registered mail, by fax or by any other prescribed method, at the franchisor's address for service or to any other person designated for that purpose in the franchise agreement.

Effective date of rescission
(4) The notice of rescission is effective,

(a) on the day it is delivered personally;
(b) on the fifth day after it was mailed;
(c) on the day it is sent by fax, if sent before 5 p.m.;
(d) on the day after it was sent by fax, if sent at or after 5 p.m.;
(e) on the day determined in accordance with the regulations, if sent by a prescribed method of delivery.

Same
(5) If the day described in clause (4)(b), (c) or (d) is a holiday, the notice of rescission is effective on the next day that is not a holiday.

Franchisor's obligations on rescission
(6) The franchisor or franchisor's associate, as the case may be, shall, within 60 days of the effective date of the rescission,

(a) refund to the franchisee any money received from or on behalf of the franchisee, other than money for inventory, supplies or equipment;

(b) purchase from the franchisee any inventory that the franchisee had purchased pursuant to the franchise agreement and remaining at the effective date of rescission, at a price equal to the purchase price paid by the franchisee;

(c) purchase from the franchisee any supplies and equipment that the franchisee had purchased pursuant to the franchise agreement, at a price equal to the purchase price paid by the franchisee; and

(d) compensate the franchisee for any losses that the franchisee incurred in acquiring, setting up and operating the franchise, less the amounts set out in clauses (a) to (c).

Comment: s.6. The rescission right contained in the Ontario Act, which is far more favourable to a franchisee, has been retained.

Damages for misrepresentation, failure to disclose
7.(1) If a franchisee suffers a loss because of a misrepresentation contained in the disclosure document or in a statement of material change or as a result of the franchisor's failure to comply in any way with section 5, the franchisee has a right of action for damages against,

(a) the franchisor;

(b) the franchisor's broker;

(c) the franchisor's associate; and

(d) every person who signed the disclosure document or statement of material change.

Comment: s.7(1). Liability on the part of a franchisor's agent, as contained in the Ontario Act, has been eliminated with deletion of the concept of a franchisor's agent which created significant interpretation problems in the Ontario Act.

Deemed reliance on misrepresentation
(2) If a disclosure document or statement of material change contains a misrepresentation, a franchisee who acquired a franchise to which the disclosure document or statement of material change relates shall be deemed to have relied on the misrepresentation.

Deemed reliance on disclosure document
(3) If a franchisor failed to comply with section 5 with respect to a statement of material change, a franchisee who acquired a franchise to which the material change relates shall be deemed to have relied on the information set out in the disclosure document.

Defence
(4) A person is not liable in an action under this section for misrepresentation if the person proves that the franchisee acquired the franchise with knowledge of the misrepresentation or of the material change, as the case may be.

Same
(5) A person, other than a franchisor, is not liable in an action under this section for misrepresentation if the person proves,

(a) that the disclosure document or statement of material change was given to the franchisee without the person's knowledge or consent and that, on becoming aware of its having been given, the person promptly gave written notice to the franchisee and the franchisor that it was given without that person's knowledge or consent;

(b) that, after the disclosure document or statement of material change was given to the franchisee and before the franchise was acquired by the franchisee, on becoming aware of any misrepresentation in the disclosure document or statement of material change, the person withdrew consent to it and gave written notice to the franchisee and the franchisor of the withdrawal and the reasons for it;

(c) that, with respect to any part of the disclosure document or statement of material change purporting to be made on the authority of an expert or purporting to be a copy of or an extract from a report, opinion or statement of an expert, the person had no reasonable grounds to believe and did not believe that,

> (i) there had been a misrepresentation,
> (ii) the part of the disclosure document or statement of material change did not fairly represent the report, opinion or statement of the expert, or
> (iii) the part of the disclosure document or statement of material change was not a fair copy of or extract from the report, opinion or statement of the expert;

(d) that, with respect to any part of the disclosure document or statement of material change purporting to be made on the authority of a statement in writing by a public official or purporting to be a copy of or an extract from a report, opinion or statement of a public official, the person had no reasonable grounds to believe and did not believe that,

(i) there had been a misrepresentation,
(ii) the part of the disclosure document or statement of material change did not fairly represent the report, opinion or statement of the public official, or
(iii) the part of the disclosure document or statement of material change was not a fair copy of or extract from the report, opinion or statement of the public official; or

(e) that, with respect to any part of the disclosure document or statement of material change not purporting to be made on the authority of an expert or of a statement in writing by a public official and not purporting to be a copy of or an extract from a report, opinion or statement of an expert or public official, the person,

(i) conducted an investigation sufficient to provide reasonable grounds for believing that there was no misrepresentation, and
(ii) believed there was no misrepresentation.

Comment: s.7(5). S.7(5) incorporates components of the Ontario Act and the Alberta Act, with necessary clarifications. S.7(d), taken from the Alberta Act, clarifies that statements of public officials must be in writing and that a "public official document" as used in the Alberta Act means a report, opinion or statement of a public official. S.7(5)(e) allows a defence to a liability claim where a person has conducted due diligence in arriving at the decision that there was no misrepresentation and in fact believed that there was no misrepresentation.

Dispute resolution
8.(1) Any party to a franchise agreement who has a dispute with one or more other parties to the agreement may deliver to the party or parties with whom the party has a dispute a notice of dispute setting out,

(a) the nature of the dispute; and

(b) the desired outcome of the dispute.

Attempt at informal resolution
(2) Within 15 days after delivery of the notice of dispute, the parties to the dispute shall attempt to resolve the dispute.

Mediation
(3) If the parties to the dispute fail to resolve the dispute under subsection (2), any party to the dispute may, within 30 days after delivery of the notice of dispute but not before the expiry of the 15 days for resolving the dispute under subsection (2), deliver a notice to mediate to all the parties to the franchise agreement.

Same
(4) Upon delivery of a notice to mediate, the parties to the dispute shall follow the rules set out in the regulations respecting mediation.

Confidentiality of mediation
(5) No person shall disclose or be compelled to disclose in any proceeding before a court, tribunal or arbitrator any information acquired, any opinion disclosed or any document, offer or admission made in anticipation of, during or in connection with the mediation of a dispute under this section.

Exceptions
(6) Subsection (5) does not apply to,

(a) anything that the parties agree in writing may be disclosed;

(b) an agreement to mediate;

(c) a document respecting the costs of the mediation;

(d) a settlement agreement made in resolution of all or some of the issues in dispute; or

(e) any information that does not directly or indirectly identify the parties or the dispute and that is disclosed for research or statistical purposes only.

Same
(7) Subsection (5) does not apply to information disclosed to court as permitted or required under a regulation made under clause 14(1)(f).

Same
(8) Nothing in subsection (5) precludes a party from introducing into evidence in any proceeding before a court, tribunal or arbitrator any information acquired, any opinion disclosed or any document, offer or admission made in anticipation of, during or in connection with the mediation that is otherwise producible or compellable in the proceeding.

Comment: S.8. S.8 of the Uniform Act recognizes that franchise disputes would be resolved more advantageously through a form of alternate dispute resolution. S.8 was developed recognizing that in certain provinces the rules of practice in civil proceedings mandate a form of pre-trial mediation, and recognizing that the Ontario Act contains a mandatory disclosure statement that mediation is a form of dispute resolution. It was determined that it would be beneficial to provide for mediation to be invoked by any party to a franchise agreement. S.8 also takes the policy position that party initiated mediation will be of significant benefit to resolve franchise disputes prior to the commencement of, as well as after the commencement of, litigation proceedings.

Joint and several liability
9.(1) All or any one or more of the parties to a franchise agreement who are found to be liable in an action under subsection 3(2) or who accept liability with respect to an action brought under that subsection are jointly and severally liable.

Same
(2) All or any one or more of a franchisor or franchisor's associates who are found to be liable in an action under subsection 4(5) or who accept liability with respect to an action brought under that subsection are jointly and severally liable.

Same
(3) All or any one or more of the persons specified in subsection 7(1) who are found to be liable in an action under that subsection or who accept liability with respect to an action brought under that subsection are jointly and severally liable.

Comment: S.9. S.9 reflects the wording of the joint and several liability provisions of the Ontario Act. The Alberta Act provisions are more general but essentially the same.

No derogation of other rights
10. The rights conferred by or under this Act are in addition to and do not derogate from any other right or remedy any party to a franchise agreement may have at law.

Comment: S.10. The "derogation of other rights" provisions in the Ontario Act and the Alberta Act are limited to a franchisee and a franchisor. Since other persons may be party to a franchise agreement (given the definition of that term), it was considered appropriate to extend this right to any party to a franchise agreement.

Attempt to affect jurisdiction void
11.(1) Any provision in a franchise agreement purporting to restrict the application of the law of [insert jurisdiction] or to restrict jurisdiction or venue to a forum outside [insert jurisdiction] is void with respect to a claim otherwise enforceable under this Act in [insert jurisdiction].

Exception
(2) Subsection (1) does not apply to a claim if an action based on the claim was commenced before the coming into force of this section.

Comment: S. 11. This section tracks the Ontario Act but has been amended so as to permit the insertion of the applicable province or territory.

Rights cannot be waived
12. Any purported waiver or release by a franchisee or a prospective franchisee of a right conferred by or under this Act or of an obligation or requirement imposed on a franchisor or franchisor's associate by or under this Act is void.

Comment: S.12. Any allowance for waivers or releases of legislated rights would defeat the purpose of the legislation, which is to protect franchisees and prospective franchisees. This section has been expanded from the Ontario Act by adding the words "or a prospective franchisee" thereby expanding the list of parties to whom this section applies. As a result, a franchisee or a prospective franchisee cannot waive or release any of their rights conferred under the Act or of an obligation or requirement imposed on a franchisor or franchisor's associate by or under the Act.

The reason for the addition of a prospective franchisee is that it is necessary in order to prohibit the franchisor or its associate from taking away any rights that the prospective franchisee may have. The protection of the prospective franchisee is necessary since the duty of fair dealing incorporating the duty of good faith and commercial reasonableness in the Ontario Act does not extend to the prospective franchisee.

Burden of proof

13. In any proceeding under this Act, the burden of proving an exemption or an exclusion from a requirement or provision is on the person claiming it.

Regulations

14.(1) The Lieutenant Governor in Council may make regulations,

(a) prescribing and governing the financial statements to be contained in the disclosure document;

(b) prescribing statements for the purpose of clause 5(4)(c);

(c) prescribing other information and documents for the purposes of clauses 5(4)(d) and (e);

(d) prescribing an amount for the purpose of clause 5(8)(g);

(e) prescribing methods of delivery for the purposes of subsections 5(2), 6(3) and 8(1) and (3), and prescribing rules surrounding the use of such methods, including the day on which a notice of rescission delivered by such methods is effective for the purpose of clause 6(4)(e);

(f) prescribing rules governing the informal resolution and mediation of a dispute for the purpose of section 8 and prescribing forms to be used in the mediation process;

(g) prescribing forms and providing for their use;

(h) respecting any matter that the Lieutenant Governor in Council considers necessary or advisable to carry out effectively the intent and purpose of this Act.

General or specific

(2) A regulation made under subsection (1) may be general or specific in its application.

Regulation Made Under the Uniform Franchises Act

Disclosure Documents

CONTENTS

General Comments

The Regulation on Disclosure Documents deals with information that is required in a disclosure document such as costs of establishing a franchise, earnings projection, financing, training, manuals and purchase and sale restrictions. It prescribes schedules that are required including those of current franchisees, businesses and franchise and business closure information. The Regulation also prescribes financial statements to include in a disclosure document and provides for certificates to be issued by a franchisor.

The Regulations follow, in some respects, the ordering and format of the Ontario regulations. However many items currently contained in the Alberta or Ontario regulations have been substantially enhanced with additional disclosure requirements, definitions and more clarity in wording. In addition, new disclosure items have been included in the Regulations.

The use of wrap-around documents with disclosure documents or offering circulars used by a franchisor in another jurisdiction in compliance with the laws of such other jurisdiction was considered. It was noted that the Alberta legislation currently permits the use of wrap-around statements, whereas the Ontario legislation does not explicitly provide for such right. Following extensive consideration of the subject, it was concluded that there was no need to permit the use of wrap-around documents in a Canadian harmonized system, and that the use of such statements would negatively affect the clarity of disclosure documents as a whole.

Interpretation

1.(1) In this Regulation,

"affiliate" has the same meaning as in the Canada Business Corporations Act.

(2) In this Regulation, a franchise or business is the same type as an existing franchise or as the franchise being offered if it is operated or to be operated under the same trade-mark, trade name, logo or advertising or other commercial symbol as that franchise.

Risk warnings
2. Every disclosure document shall contain, presented together at the beginning of the document, the statements that,

(a) a prospective franchisee should seek information on the franchisor and on the franchisor's business background, banking affairs, credit history and trade references;

(b) a prospective franchisee should seek expert independent legal and financial advice in relation to franchising and the franchise agreement prior to entering into the franchise agreement;

(c) a prospective franchisee should contact current and previous franchisees prior to entering into the fran¬chise agreement; and

(d) lists of current and previous franchisees and their contact information can be found in this disclosure document.

Comment: With respect to the issue of risk warnings or mandatory statements the regulations cover matters not otherwise dealt with in a disclosure document. Mandatory statements serve as an early warning system for a prospective franchisee that does not have significant expertise in the area of franchising. Every disclosure document must therefore include the risk warning or mandatory statements with respect to a franchisee seeking information on the franchisor, seeking expert independent legal and financial advice, and contacting current and former franchisees.

Required information about the franchisor
3. Every disclosure document shall contain,

(a) the business background of the franchisor, including,

(i) the name of the franchisor,
(ii) the name under which the franchisor is doing or intends to do business,
(iii) the name of any associate of the franchisor that will engage in business transactions with the franchisee,
(iv) the franchisor's principal business address and, if the franchisor's principal business address is outside [insert jurisdiction], the name and address of a person authorized to accept service in [insert jurisdiction] on the franchisor's behalf,
(v) the business form of the franchisor, whether corporate, partnership or otherwise,

(vi) if the franchisor is a subsidiary, the name and principal business address of the parent,
(vii) the business experience of the franchisor, including the length of time the franchisor has operated a business of the same type as the franchise being offered, has granted franchises of that type or has granted any other type of franchise,
(viii) if the franchisor has offered a different type of franchise from that being offered, a description of every such type of franchise, including, for each type of franchise,
(A) the length of time the franchisor has offered the franchise to prospective franchisees, and
(B) the number of franchises granted in the five years immediately before the date of the disclosure document;

(b) the business background of the directors, the general partners and the officers of the franchisor, including,

(i) the name and current position of each person,
(ii) a brief description of the prior relevant business experience of each person,
(iii) the length of time each person has been engaged in business of the same type as the business of the franchise being offered, and
(iv) the principal occupation and the employers of each person during the five years immediately before the date of the disclosure document;

(c) a statement indicating whether, during the 10 years immediately before the date of the disclosure document, the franchisor, the franchisor's associate or a director, general partner or officer of the franchisor has been convicted of fraud, unfair or deceptive business practices or a violation of a law that regulates franchises or business, or if there is a charge pending against the person involving such a matter, and the details of any such conviction or charge;

(d) a statement indicating whether the franchisor, the franchisor's associate or a director, general partner or officer of the franchisor has been subject to an administrative order or penalty under a law that regulates franchises or business or if the person is the subject of any pending administrative actions to be heard under such a law, and the details of any such order, penalty or pending action;

(e) a statement indicating whether the franchisor, the franchisor's associate or a director, general partner or officer of the franchisor has been found liable in a civil action of misrepresentation, unfair or deceptive business practices or violating a law that regulates franchises or business, including a failure to provide proper disclosure to a franchisee, or if a civil action involving such allegations is pending against the person, and the details of any such action or pending action; and

(f) details of any bankruptcy or insolvency proceedings, voluntary or otherwise, any part of which took place during the six years immediately before the date of the disclosure docu-

ment, in which the debtor is,

(i) the franchisor or the franchisor's associate,
(ii) a corporation whose directors or officers include a current director, officer or general partner of the franchisor, or included such a person at a time when the bankruptcy or insolvency proceeding was taking place,
(iii) a partnership whose general partners include a current director, officer or general partner of the franchisor, or included such a person at a time when the bankruptcy or insolvency proceeding was taking place, or
(iv) a director, officer or general partner of the franchisor in his or her personal capacity.

Required information about the franchise
4.(1) Every disclosure document shall contain, presented together in one part of the document,

Costs of establishing the franchise
(a) a list of all of the franchisee's costs associated with the establishment of the franchise, including,

(i) the amount of any deposits or initial franchise fees, or the formula for determining the amount, whether the deposits or fees are refundable and, if so, under what conditions,
(ii) an estimate of the costs for inventory, supplies, leasehold improvements, fixtures, furnishings, equipment, signs, vehicles, leases, rentals, prepaid expenses and all other tangible or intangible property and an explanation of any assumptions underlying the estimate, and
(iii) any other costs associated with the establishment of the franchise not listed in subclause (i) or (ii), including any payment to the franchisor or franchisor's associate, whether direct or indirect, required by the franchise agreement, the nature and amount of the payment and when the payment is due;

Comment: The principles guiding this disclosure item were that categories of start-up fees should be kept distinct, and that the disclosure item should distinguish between initial capital investment and on-going expenses paid to the franchisor. The Regulation also requires that a disclosure document include specifically described costs associated with the establishment of the franchise, as well as other recurring or isolated fees or payments made to the franchisor, whether direct or indirect.

Other fees
(b) the nature and amount of any recurring or isolated fees or payments, other than those listed in clause (a), that the franchisee must pay to the franchisor or franchisor's associate, whether directly or indirectly, or that the franchisor or franchisor's associate imposes or collects in whole or in part on behalf of a third party, whether directly or indirectly;

Guarantees, security interests
(c) a description of the franchisor's policies and practices, if any, regarding guarantees and security interests required of franchisees;

Comment: The Regulation requires a description of the franchisor's policies and practices regarding the requirements for guarantees or security interests from franchisees.

Estimate of operating costs
(d) if an estimate of annual operating costs for the franchise, or of operating costs for the franchise for another regular period, is provided directly or indirectly, a statement specifying,

(i) the assumptions and bases underlying the estimate,
(ii) that the assumptions and bases underlying the estimate are reasonable, and
(iii) where information that substantiates the estimate is available for inspection;

(e) if an estimate of annual operating costs for the franchise, or of operating costs for the franchise for another regular period, is not provided, a statement to that effect;

Comment: As a matter of policy, the Regulations require disclosure with respect to any estimates of annual or other periodic operating costs, if such are provided, directly or indirectly, together with a statement specifying the basis for the estimate, the assumptions underlying the estimate and a location where information is available for inspection that substantiates the estimate. Further, if an estimate of annual or other periodic operating costs is not provided, a mandatory statement to that effect should be included in the disclosure item.

Earnings projection
(f) if an earnings projection for the franchise is provided directly or indirectly, a statement specifying,

(i) the assumptions and bases underlying the projection, its preparation and presentation,
(ii) that the assumptions and bases underlying the projection, its preparation and presentation are reasonable,
(iii) the period covered by the projection,
(iv) whether the projection is based on actual results of existing franchises or of existing businesses of the franchisor, franchisor's associates or affiliates of the franchisor of the same type as the franchise being offered and, if so, the locations, areas, territories or markets of such franchises and businesses,
(v) if the projection is based on a business operated by the franchisor, franchisor's associate or affiliate of the franchisor, that the information may differ in respect of a franchise operated by a franchisee, and
(vi) where information that substantiates the projection is available for inspection;

Comment: Current Ontario and Alberta Legislation deal with the subject of earnings claims dif-

ferently, but neither contains a precise definition of what is meant by the term "earnings claims" or "earnings projection". In United States disclosure legislation on the issue of earnings projections such projections are not currently mandatory but, if they are included, they must be extremely detailed. The regulatory language, with respect to earnings projections, includes an inclusive definition of the term "earnings projection" to mean any information given or to be given by or on behalf of the franchisor or the franchisor's associate, directly or indirectly, from which a specific level or range of actual or potential sales, costs, income, revenue or profits from franchisee business, or franchisor or franchisor affiliate businesses can easily be ascertained. See sub.(2), below.

Financing

(g) the terms and conditions of any financing arrangements that the franchisor or franchisor's associate offers or assists any person to offer, directly or indirectly, to the franchisee;

Comment: The Regulations extend current disclosure requirements to include financing arrangements where the franchisor assists third parties to offer goods and services to franchisees.

Training

(h) a description of any training or other assistance offered to the franchisee by the franchisor or franchisor's associate, including where the training or other assistance will take place, whether the training or other assistance is mandatory or optional and, if it is mandatory, a statement specifying who bears the costs of the training or other assistance;

(i) if no training or other assistance is offered to the franchisee by the franchisor or franchisor's associate, a statement to that effect;

Comment: The Regulation expands the current disclosure requirements of the Ontario legislation to deal with payment for training and, if no training or other assistance is provided, a statement to that effect.

Manuals

(j) if any manuals are provided to the franchisee by the franchisor or franchisor's associate, a summary of the material topics covered in the manuals or a statement specifying where in [insert jurisdiction] the manuals are available for inspection;

(k) if no manuals are provided to the franchisee, a statement to that effect;

Comment: The regulation expands upon Ontario and Alberta legislation which do not require the disclosure of contents of operating manuals. This disclosure item in the Regulations requires that if manuals are provided to the franchisee, there should be disclosure of a summary of the material topics covered in the manuals or a statement specifying where in the particular jurisdiction the manuals are available for inspection. If no manuals are provided to the franchisee, a statement to that effect should be included.

Advertising

(l) if the franchisee is required to contribute to an advertising, marketing, promotion or similar fund, a description of the fund, including the franchisor's policies and practices in respect of,

(i) the franchisor's obligation to conduct advertising, marketing, promotion or similar activity,
(ii) the franchisor's expenditure of money from the fund on advertising, marketing, promotion or similar activity in franchisees' locations, areas, territories or markets,
(iii) participation by franchisees in a local or regional co-operative for advertising, marketing, promotion or similar activity,
(iv) the amount and frequency of franchisees' contributions to the fund,
(v) contributions by the franchisor, franchisor's associate or affiliate of the franchisor to the fund, including the amount and frequency of their contributions, if any,
(vi) the portion of the fund, if any, that is or may be spent primarily for the recruitment of prospective franchisees,
(vii) the administration of the fund, including the portion of the fund, if any, that is or may be spent for its administration and the persons who administer the fund,
(viii) the availability to franchisees of financial statements or reports of contributions to or expenditures from the fund, the basis upon which such statements or reports are prepared and how the costs of the preparation of such statements or reports are accounted for, and
(ix) the availability to franchisees of other reports of the activities financed by the fund and how the costs of the preparation of such reports are accounted for;

(m) if the franchisee is required to contribute to an advertising, marketing, promotion or similar fund,

(i) a statement describing,
  (A) the amount or percentage of the fund that has been spent on advertising, marketing, promotion or similar activity in each of the two completed fiscal years immediately before the date of the disclosure document,
  (B) the amount or percentage of the fund, other than the amount or percentage described in sub-subclause (A), that has been retained or charged by the franchisor, franchisor's parent or franchisor's associate in each of the two completed fiscal years immediately before the date of the disclosure document, and
  (C) the amount or percentage of any surplus or deficit of the fund in each of the two completed fiscal years immediately before the date of the disclosure document, and
(ii) another statement describing,
  (A) the projected amount or basis of the contribution of the franchisee for the current fiscal year,
  (B) the projected amount of the contributions of all franchisees for the current

fiscal year,

(C) a projection of the amount or percentage of the fund to be spent on advertising, marketing, promotion or similar activity for the current fiscal year, and

(D) a projection of the amount or percentage of the fund to be retained or charged by the franchisor, franchisor's parent or franchisor's associate in the current fiscal year;

(n) a statement as to whether the franchisee must expend money on the franchisee's own local advertising, marketing, promotion or similar activity;

Comment: The Regulations expand on current Ontario legislation and recognize that one of the most important issues concerning advertising disclosure was whether franchisees were required to contribute to an advertising, marketing, promotion or similar fund. If so, the disclosure document must describe the fund, including the franchisor's policy and practice in respect of a number of specific items concerning the fund. Further, the disclosure document should contain a statement outlining expenditures from the fund, amounts retained or charged by the franchisor, the amount or percentage of any surplus or deficit of the fund, all for the past two fiscal years, together with another statement describing such items on the basis of projections for the current fiscal year.

Purchase and sale restrictions

(o) a description of any restrictions or requirements imposed by the franchise agreement with respect to,

(i) obligations to purchase or lease from the franchisor or franchisor's associate or from suppliers approved by the franchisor or franchisor's associate,
(ii) the goods and services the franchisee may sell, and
(iii) to whom the franchisee may sell goods or services;

(p) a description of the franchisor's right to change a restriction or requirement described in subclause (o) (i), (ii) or (iii);

Comment: The Regulations require a description of any restrictions or requirements imposed by the franchise agreement with respect to obligations to purchase or lease from franchisor, and other parties, the goods and services the franchisee may sell, and to whom the franchisee may sell goods or services. Further, there should be a statement as to whether by the terms of the franchise agreement, or otherwise, the franchisor has the right to change a restriction or requirement with respect to purchase and sale of goods or services.

Rebates, etc.

(q) a description of the franchisor's policies and practices, if any, regarding rebates, commissions, payments or other benefits, including the receipt, if any, by the franchisor or fran-

chisor's associate of a rebate, commission, payment or other benefit as a result of purchases of goods and services by franchisees;

(r) a description of the sharing of the rebates, commissions, payments or other benefits described in clause (q) with franchisees, either directly or indirectly;

Comment: The Regulation attempts to protect franchisees without requiring such extensive disclosure that might prejudice the competitive and business strategies of the franchisor. The regulatory language requires a franchisor to describe its policy or practice regarding rebates, commissions, payments or other benefits, whether or not the franchisor or the franchisor's associate may receive or receives any such benefits as a result of the purchase of goods and services by a franchisee and, if so, whether such benefits are or may be shared with franchisees, either directly or indirectly.

Territory

(s) a description of the franchisor's policies and practices, if any, regarding,

(i) the granting of specific locations, areas, territories or markets by the franchisor or franchisor's associate,
(ii) the approving of locations, areas, territories or markets by the franchisor or franchisor's associate, including the material factors considered in such approvals,
(iii) changes in franchise locations, areas, territories or markets required or approved by the franchisor or franchisor's associate, including the material factors considered in such changes and conditions that may be imposed on an approval of a change,
(iv) modifications to franchisees' locations, areas, territories or markets that may be made by the franchisor or franchisor's associate,
(v) the terms and conditions of any option, right of first refusal or other right of franchisees to acquire an additional franchise within their location, area, territory or market, and
(vi) the granting of exclusive locations, areas, territories or markets to franchisees including,
  (A) any limitations on franchisees' exclusivity,
  (B) who determines the locations, areas, territories or markets, the factors that are considered in making the determination and how the locations, areas, territories or markets are described, and
  (C) whether continuation of location, area, territory or market exclusivity depends on franchisees achieving a certain sales volume, market penetration or other condition and, if so, the franchisor's rights and remedies if franchisees fail to meet the condition;

Comment: The Regulations require the disclosure of the franchisor's policy or practice, if any, as to whether the continuation of a franchisee's rights to exclusive territory depends upon the franchisee achieving a specific level of sales, market penetration, or other condition, and under what circumstances these rights might be altered if the franchise agreement grants the franchi-

see rights to exclusive territory.

With respect to exclusive territory, the disclosure document must contain a description of the franchisor's policies and practices regarding the granting of specific locations, areas, territories or markets, the approval of same, changes in same, modifications to same, terms and conditions of any options, rights, or similar rights, and the granting of exclusive locations, areas, territories or markets.

Proximity

(t) a description of the franchisor's policies and practices, if any, on the proximity between an existing franchise and,

> (i) another franchise of the franchisor or franchisor's associate of the same type as the existing franchise,
> (ii) any distributor or licensee using the franchisor's trade-mark, trade name, logo or advertising or other commercial symbol,
> (iii) a business operated by the franchisor, franchisor's associate or affiliate of the franchisor that distributes similar goods or services to those distributed by the existing franchise under a different trade mark, trade name, logo or advertising or other commercial symbol, or
> (iv) a franchise of the franchisor, franchisor's associate or affiliate of the franchisor that distributes similar goods or services to those distributed by the existing franchise under a different trade-mark, trade name, logo or advertising or other commercial symbol;

(u) a description of the franchisor's policies and practices, if any, regarding,

> (i) compensation to franchisees by the franchisor, franchisor's associate, affiliate of the franchisor or any distributor or licensee for any right they may have to operate a business of the same type as the franchise being offered or to distribute goods or services similar to those distributed by the franchise being offered in franchisees' locations, areas, territories or markets, and
> (ii) the resolution by the franchisor of conflicts between the franchisor, franchisor's associate, affiliate of the franchisor or any distributor or licensee and franchisees respecting locations, areas, territories, markets, customers and franchisor support;

Comment: The Regulations contain a substantially revamped provision dealing with proximity or encroachment. In particular, franchisors must disclose their policies and practices regarding compensating franchisees for encroachment as well in respect of the resolution by the franchisor of conflict between the franchisor and its affiliates and franchisees respecting not only locations but also markets, customers and franchisor support.

Trade-marks and other proprietary rights

(v) a description of,

(i) the rights that the franchisor or franchisor's associate has to trade-marks, trade names, logos or advertising or other commercial symbols,
(ii) any patents, copyrights, proprietary information or other proprietary rights associated with the franchise,
(iii) the status of the trade-marks, trade names, logos, advertising or other commercial symbols, patents, copyrights, proprietary information and other proprietary rights, any known or potential material impediments to their use and any known or alleged material infringements of them, and
(iv) the franchisor's or franchisor's associate's right to modify or discontinue the use of any trade-mark, trade name, logo, advertising or other commercial symbol, patent, copyright, proprietary information or other proprietary right;

Comment: This disclosure item is a considerable extension of the current Ontario and Alberta disclosure items on the subject of intellectual property. The regulatory language requires the franchisor to describe rights to trade-marks, trade names, logos or advertising or other commercial symbols, and other forms of intellectual property associated with the franchise, the status and known impediments to the use of same, and a description of the franchisor's right to modify or discontinue the use of any of the same.

Licences
(w) a description of every licence, registration, authorization or other permission the franchisee is required to obtain under any applicable federal, provincial or territorial law or municipal by-law to operate the franchise;

Comment: As a matter of policy, the Regulation requires that the franchisor should assume the responsibility for determining required licences and permits, and that there be a description of every licence, registration, authorization or other permission the franchisee is required to obtain in order to operate the franchise.

Personal participation
(x) a description of the extent to which the franchisee is required to participate personally and directly in the operation of the franchise or, if the franchisee is a corporation, partnership or other entity, the extent to which the principals of the corporation, partnership or other entity are so required;

Comment: The Regulation requires disclosure as to the extent to which the franchisee is required to participate personally and directly in the operation of the franchise or, if the franchisee is a non-individual entity, as to the extent to which the principals would be so required.

Termination, renewal and transfer of the franchise
(y) a description of all the provisions in the franchise agreement that deal with the termination of the agreement, the renewal of the agreement and the transfer of the franchise and a list of where these provisions are found in the agreement; and

Comment: With respect to terminations, transfers and reacquired franchises the current language contained in the Ontario legislation is adopted with some minor clarification changes. The regulatory language requires a description of all restrictions on, or conditions to, termination and transfer of a franchise.

Schedules of franchisees, former franchisees, etc.
(z) a statement that there are attached to the document,

(i) a schedule of franchisees of the franchisor, franchisor's associates or affiliates of the franchisor that currently operate franchises of the same type as the franchise being offered,
(ii) a schedule of businesses of the same type as the franchise being offered that are currently being operated by the franchisor, franchisor's associates or affiliates of the franchisor,
(iii) a schedule of former such franchisees and businesses, and
(iv) a schedule of franchise and business closure information.

(2) For the purpose of clause (1)(f), an earnings projection includes any information given by or on behalf of the franchisor or franchisor's associate, directly or indirectly, from which a specific level or range of actual or potential sales, costs, income, revenue or profits from franchises or businesses of the franchisor, franchisor's associates or affiliates of the franchisor of the same type as the franchise being offered can easily be ascertained.

Schedule of current franchisees
5.(1) The schedule of current franchisees referred to in subclause 4(1)(z)(i) shall contain franchisee contact information for every franchise of the franchisor, franchisor's associate or affiliate of the franchisor of the same type as the franchise being offered, in Canada.

(2) If there are fewer than 20 franchises in Canada as described in subsection (1), the schedule shall also contain franchisee contact information for every franchise of the franchisor, franchisor's associate or affiliate of the franchisor of the same type as the franchise being offered, in the country geographically closest to Canada.

(3) If there are fewer than 20 franchises in total in Canada and in the country geographically closest to Canada as described in subsections (1) and (2), the schedule shall also contain franchisee contact information for every franchise of the franchisor, franchisor's associate or affiliate of the franchisor of the same type as the franchise being offered, in the country where the largest or next-largest number of such franchises have been granted, and so on, until the schedule contains franchisee contact information for 20 or more franchises.

(4) For greater certainty, if the schedule is required to include franchisee contact information for one or more franchises in a country other than Canada or the country geographically closest to Canada in order to contain franchisee contact information for 20 or more franchises, the schedule shall contain franchisee contact information for every franchise of the franchisor, franchisor's associate or affiliate of the franchisor of the same type as the

franchise being offered, in that country.

(5) If the total number of franchises of the franchisor, franchisor's associates or affiliates of the franchisor of the same type as the franchise being offered in the world is less than 20, the schedule shall contain franchisee contact information for all such franchises.

(6) In this section,

"franchisee contact information" means the name, address and telephone number of the franchisee and the business address and telephone number of the franchise.

Comment: As to the schedule of current franchisees, in keeping with the policy objective of full and fair disclosure, the franchisor's associates and affiliates are to be included in the disclosure document. Similarly, express disclosure of corporate or affiliate operated businesses also must be disclosed. Where the franchisor has fewer than twenty (20) franchises in Canada, disclosure must be made country by country, until contact information for twenty or more franchisees has been provided. Finally, the content of disclosure with respect to former franchisees has been substantially expanded both for the purpose of clarity as well as to assist those preparing disclosure documents.

Schedule of current businesses

6.(1) The schedule of current businesses referred to in subclause 4(1)(z)(ii) shall contain business contact information for every business of the franchisor, franchisor's associate or affiliate of the franchisor of the same type as the franchise being offered, in Canada.

(2) In this section,

"business contact information" means the business address and telephone number of the business and, if applicable, the name of the franchisor's associate or affiliate of the franchisor that operates the business.

Schedule of former franchisees and businesses

7.(1) The schedule of former franchisees and businesses referred to in subclause 4 (1) (z) (iii) shall contain,

(a) the name and last known address and telephone number of every person who operated, in Canada and in any other country where a franchise included in the schedule of current franchisees required by section 5 is located, a franchise of the franchisor, franchisor's associate or affiliate of the franchisor of the same type as the franchise being offered in respect of which the franchise agreement was terminated or cancelled by the franchisor, franchisor's associate, affiliate of the franchisor or franchisee during the reporting period;

(b) the name and last known address and telephone number of every person who operated, in Canada and in any other country where a franchise included in the schedule of current franchisees required by section 5 is located, a franchise of the franchisor, franchisor's asso-

ciate or affiliate of the franchisor of the same type as the franchise being offered in respect of which the franchise agreement was not renewed by the franchisor, franchisor's associate, affiliate of the franchisor or franchisee during the reporting period;

(c) the name and last known address and telephone number of every person who operated, in Canada and in any other country where a franchise included in the schedule of current franchisees required by section 5 is located, a franchise of the franchisor, franchisor's associate or affiliate of the franchisor of the same type as the franchise being offered that was reacquired by the franchisor, franchisor's associate or affiliate of the franchisor during the reporting period;

(d) the name and last known address and telephone number of every person who operated, in Canada and in any other country where a franchise included in the schedule of current franchisees required by section 5 is located, a franchise of the franchisor, franchisor's associate or affiliate of the franchisor of the same type as the franchise being offered and who otherwise ceased to operate the franchise during the reporting period; and

(e) the former business address and telephone number of every business, in Canada, of the franchisor, franchisor's associate or affiliate of the franchisor of the same type as the franchise being offered that ceased to operate as such a business during the reporting period and, if applicable, the name of the franchisor's associate or affiliate of the franchisor that operated the business.

(2) In subsection (1),

"reporting period" means the period beginning with the start of the most recently completed fiscal year before the date of the disclosure document and ending with the date of the disclosure document.

Schedule of franchise and business closure information

8. The schedule of franchise and business closure information referred to in subclause 4(1)(z) (iv) shall contain,

(a) for all franchises, in Canada and in any other country where a franchise included in the schedule of current franchisees required by section 5 is located, of the franchisor, franchisor's associates or affiliates of the franchisor of the same type as the franchise being offered, and for the period beginning with the start of the third-last completed fiscal year before the date of the disclosure document and ending with the date of the disclosure document,

(i) the number of franchises in respect of which the franchisor, franchisor's associate or affiliate of the franchisor terminated or cancelled the franchise agreement,
(ii) the number of franchises in respect of which the franchisor, franchisor's associate or affiliate of the franchisor refused to renew the franchise agreement,
(iii) the number of franchises in respect of which the franchisee terminated or cancelled the franchise agreement,

(iv) the number of franchises in respect of which the franchisee refused to renew the franchise agreement,
(v) the number of franchises that were transferred by the franchisee,
(vi) the number of franchisees in which a controlling interest was transferred,
(vii) the number of franchises that were re-acquired by the franchisor, franchisor's associate or affiliate of the franchisor, and
(viii) the number of franchises that otherwise ceased to operate as a franchise of the franchisor, franchisor's associate or affiliate of the franchisor; and

(b) the number of businesses, in Canada, of the franchisor, franchisor's associates or affiliates of the franchisor of the same type as the franchise being offered that ceased to operate as such a business in the period beginning with the start of the third-last completed fiscal year before the date of the disclosure document and ending with the date of the disclosure document.

Financial statements
9.(1) Every disclosure document shall contain,

(a) an audited financial statement for the most recently completed fiscal year of the franchisor's operations, prepared in accordance with the generally accepted auditing standards set out in the *Canadian Institute of Chartered Accountants Handbook*; or

(b) a financial statement for the most recently completed fiscal year of the franchisor's operations, prepared in accordance with generally accepted accounting principles and which complies with the review and reporting standards applicable to review engagements set out in the *Canadian Institute of Chartered Accountants Handbook.*

(2) Despite subsection (1), if 180 days have not yet passed since the end of the most recently completed fiscal year and a financial statement has not been prepared for that year, the disclosure document shall contain a financial statement for the last completed fiscal year that is prepared in accordance with the requirements of clause (1)(a) or (b).

(3) Despite subsection (1), if a franchisor has operated for less than one fiscal year or if 180 days have not yet passed since the end of the first fiscal year of operations and a financial statement for that year has not been prepared in accordance with the requirements of clause (1)(a) or (b), the disclosure document shall contain the opening balance sheet for the franchisor.

(4) Despite subsection (1), if the franchisor is based in a jurisdiction other than *[insert jurisdiction]*, the disclosure document shall contain financial statements prepared in accordance with generally accepted accounting principles for the jurisdiction in which the franchisor is based if,

(a) the auditing standards or the review and reporting standards of that jurisdiction are at least equivalent to those standards described in clause (1)(a) or (b); or

(b) the auditing standards or the review and reporting standards of that jurisdiction are not at least equivalent to those standards described in clause (1)(a) or (b), but the disclosure document contains supplementary information that sets out any changes necessary to make the presentation and content of such financial statements equivalent to those of clause (1)(a) or (b).

(5) In a circumstance described in clause (4)(a) or (b), the disclosure document shall contain a statement that the financial statements contained in the disclosure document are prepared in accordance with generally accepted accounting principles for the jurisdiction in which the franchisor is based and that the requirements of clause (4)(a) or (b), as the case may be, are satisfied.

Comment: As to the nature and quality of financial statements to be included in a disclosure document there are no exemptions from financial statement disclosure other than for the Crown. Financial statements to be included in a disclosure document must take the form of either an audited financial statement for the most recent fiscal year, or a review engagement report prepared according to Canadian Generally Accepted Accounting Principles. Both of these requirements currently apply in Alberta and Ontario. With respect to financial statements prepared in a foreign jurisdiction the use of financial statements prepared in accordance with generally accepted accounting principles of another jurisdiction in which the franchisor is based will be acceptable if the auditing standards or the review and reporting standards of that jurisdiction are at least equivalent to the Canadian standards or, if such standards are not equivalent, the disclosure document must contain supplementary information that sets out any changes necessary to make the presentation and content of such financial statements equivalent. In addition, the disclosure document must contain a statement that the financial statements contained in the disclosure document are prepared in accordance with generally accepted accounting principles for the jurisdiction in which the franchisor is based and that the equivalency requirements are satisfied.

A procedure is permitted under the FTC Rule in the United States for the use of consolidated statements of a parent company of the franchisor with an appropriate guarantee from the parent company respecting the obligations of the franchisor. The Regulations do not adopt this approach for, as a matter of policy, it would be inappropriate for Canadian franchisees to be deprived of the opportunity to review financial statements of the actual entity with which they are dealing as the franchisor since, in many cases, the parent company would not be located in Canada and the financial statements would most likely not be prepared in accordance with Canadian standards.

Certificate of Franchisor

10.(1) A Certificate of Franchisor in Form 1 shall be completed and attached to every disclosure document provided by a franchisor to a prospective franchisee.

(2) A Certificate of Franchisor in Form 2 shall be completed and attached to every statement of material change provided by a franchisor to a prospective franchisee.

(3) A Certificate of Franchisor shall be signed and dated,
(a) in the case of a franchisor that is not incorporated, by the franchisor;
(b) in the case of a franchisor that is incorporated and has only one director or officer, by that person;
(c) in the case of a franchisor that is incorporated and has more than one officer or director, by at least two persons who are officers or directors.

Comment: The Regulations mandate specific disclosure certificate forms in the Regulations, one for the disclosure document and one for a statement of material change. These are included in the Regulations to ensure consistency and certainty with respect to the content and form of such disclosure certificates.

FORM 1 - CERTIFICATE OF FRANCHISOR UNIFORM FRANCHISES ACT

This Disclosure Document,
(a) contains no untrue information, representation or statement, whether of a material fact or otherwise;
(b) contains every material fact, financial statement, statement and other information that is required to be contained by the Act and the regulations made under it;
(c) does not omit a material fact that is required to be contained by the Act and the regulations made under it; and
(d) does not omit a material fact that needs to be contained in order for this Disclosure Document not to be misleading.

A Certificate of Franchisor shall be signed and dated as required by subsection 10(3) of the Disclosure Documents regulation.

FORM 2 - CERTIFICATE OF FRANCHISOR UNIFORM FRANCHISES ACT

This Statement of Material Change,
(a) contains no untrue information, representation or statement, whether of a material change or otherwise;
(b) contains every material change that is required to be contained by the Act and the regulations made under it;
(c) does not omit a material change that is required to be contained by the Act and the regulations made under it; and
(d) does not omit a material change that needs to be contained in order for this Statement of Material Change not to be misleading.

A Certificate of Franchisor shall be signed and dated as required by subsection 10(3) of the Disclosure Documents regulation.

Regulation Made Under the Uniform Franchises Act - Mediation[349]

GENERAL COMMENTS:

As most provinces do not provide for rules for mediation in their respective Rules of Civil Procedure, a comprehensive mediation code for use in such jurisdictions is provided. The mediation process is a party initiated pre- and post-litigation/arbitration form of mediation. For jurisdictions that currently have mediation régimes in their Rules of Practice, post litigation mediation is to be governed by the Rules rather than by the Regulations.

The Regulation on Mediation provides for the appointment of a mediator and the conduct of mediation to resolve a dispute between parties to a franchise agreement. There are rules for two types of mediation: pre-litigation and post-litigation. The Regulation also prescribes forms to be used in mediation. The Regulation represents a significant and positive development in connection with the resolution of franchise disputes in the interest of all stakeholders.

Mediation is to occur within 45 days of the appointment of the mediator and mediation is to be concluded after 10 hours. There is nothing in the Regulations, however, preventing parties from extending mediation beyond the 10 hours. Failure of any of the parties to comply with the requirement to mediate can be subject to an adverse costs award. Unless a court orders otherwise, no more than one mediation may be initiated in respect of the same dispute. A court or an arbitrator may consider an allegation of a default under the mediation provisions by a party in respect of costs in the proceeding or arbitration. A complete set of prescribed forms has been included in the mediation Regulation.

PART I - INTERPRETATION

Definitions

1. In this Regulation,

"court" means *[insert the superior court of record in the jurisdiction]*;

"mediation" means a process in which two or more parties meet and attempt to resolve issues in dispute between them with the assistance of a mediator;

"mediator" means a person who assists parties in resolving issues in dispute between them,

349. As a consequence of Tentative Recommendation 3, a version of the *Uniform Franchises Act* (reproduced in Appendix B) enacted in British Columbia would not contain a provision corresponding to s. 8 of the uniform Act dealing with dispute resolution, nor would British Columbia have a counterpart to the uniform *Mediation Regulation*. The ULCC *Mediation Regulation* under the *Uniform Franchises Act* is therefore reproduced in Appendix B only for the reader's information.

but has no power to unilaterally resolve the dispute;

"party" means a party to a franchise agreement who has a dispute with one or more other parties to the franchise agreement;

"roster organization" means a body authorized by the Attorney General to select mediators for the purposes of this Regulation.

PART II - GENERAL RULES RE APPOINTMENT OF MEDIATOR AND MEDIATION

Application of Part
2. This Part applies to mediation of a dispute that is initiated by a notice to mediate delivered before or after a legal proceeding or arbitration in respect of the dispute has been commenced.

Appointment of mediator
3.(1) Upon a notice to mediate being delivered under subsection 8 (3) of the Act, the parties shall jointly appoint a mediator,

(a) if there are four or fewer parties to the dispute, within 14 days after the notice to mediate was delivered to all the parties to the franchise agreement under subsection 8 (3) of the Act;

(b) if there are five or more parties to the dispute, within 21 days after the notice to mediate was delivered to all the parties to the franchise agreement under subsection 8 (3) of the Act.

(2) If the parties fail to jointly appoint a mediator within the time required by subsection (1), any party may apply to a roster organization for the appointment of a mediator, or if there is no roster organization, any party may apply to court for the appointment of a mediator.

(3) The roster organization or court shall, within seven days after receiving an application by a party under subsection (2), provide each of the parties with the same list of at least six proposed mediators.

(4) Within seven days after receiving the list from the roster organization or court, each party shall return the list to the organization or court with the mediators numbered in the order of the party's preference, with one being the number given to the most preferred mediator.

(5) A party may also delete a maximum of two names from the list before returning it to the roster organization or court.

(6) A party that does not return the list as required by subsection (4) shall be deemed to

have accepted all the names on the list.

(7) Within 14 days after receiving an application by a party under subsection (2), the roster organization or court shall appoint a mediator from the names remaining on the list or, if no names remain on the list, shall appoint any person as the mediator, and shall notify each of the parties in writing of the name of the appointed mediator.

(8) If the mediator appointed by the roster organization or court is unable or unwilling to act as mediator in the dispute, the mediator or any party may notify the organization or court of the fact.

(9) Within seven days after being notified under subsection (8), the organization or court shall appoint another person as mediator from the names remaining on the list or, if no names remain on the list, shall appoint any person as the mediator, and shall notify each of the parties in writing of the name of the appointed mediator.

(10) In appointing a mediator under subsection (7) or (9), the roster organization or court shall take into account,

(a) the order of preference indicated by the parties on the returned lists;

(b) the requirement that a mediator be neutral, independent and impartial vis à vis the parties and the dispute;

(c) the qualifications of the persons who may be appointed;

(d) the fees charged by the persons who may be appointed;

(e) the availability of the persons who may be appointed;

(f) the nature of the dispute; and

(g) any other consideration that the organization or court considers relevant to the selection of an impartial, competent and effective mediator.

(11) A mediator appointed by the roster organization or court shall be deemed to be appointed on the date on which the parties are notified under subsection (7) or (9).

Pre-mediation conference
4. If the mediator is of the opinion that the dispute is complex, he or she may hold a pre-mediation conference with the parties in order to consider organizational matters, including,

(a) identification of the issues that are to be addressed by the mediation;

(b) the exchange of information and documents before mediation; and

(c) scheduling and timing matters.

Exchange of information
5.(1) Each party shall deliver to the mediator a statement of facts and issues setting out the factual and legal basis for the party's claim or defence to relief sought in the dispute.
(2) The statement of facts and issues shall be delivered to the mediator and the other parties not less than 14 days before the first mediation session is scheduled to be held.

Costs of mediation
6.(1) The parties shall jointly complete and sign a mediation fee declaration setting out,

(a) the costs of the mediation; and

(b) the allocation of the costs of the mediation between or among the parties.

(2) The parties shall share the costs of the mediation equally or as otherwise provided in the mediation fee declaration.

(3) The mediation fee declaration shall be completed before or at the pre-mediation conference, if there is one, and if there is not a pre-mediation conference, before or at the first mediation session.

(4) The mediation fee declaration is binding on all the parties.

(5) Despite subsection (4), a court may include in an award of costs to a party to a proceeding in respect of the same dispute that the mediation addressed any amount in compensation of the party's costs of the mediation as set out in the mediation fee declaration.

Parties' attendance
7.(1) Each party is required to attend a pre-mediation conference or mediation session scheduled by the mediator.

(2) A party is in compliance with subsection (1) if the party is represented at a pre-mediation conference or mediation session,

(a) by counsel; or

(b) by another person if,

(i) the party is not an individual,
(ii) the party is under a legal disability and the other person is the party's legal guardian,
(iii) the party is suffering from a mental or physical injury or impairment such that

he or she cannot effectively participate, or
(iv) the party is not a resident of [insert jurisdiction] and is not in [insert jurisdiction] at the scheduled time.

(3) A person who represents a party at a pre-mediation conference or mediation session under clause (2)(b) must,

(a) be familiar with all the relevant facts on which the party he or she represents intends to rely; and

(b) either,
(i) have full authority to settle the dispute on the party's behalf, or
(ii) be able to communicate promptly with the party or with another person who has full authority to settle the dispute on the party's behalf.

(4) A party or a party's representative may be accompanied by counsel at a pre-mediation conference or mediation session.

(5) Any other person may attend a pre-mediation conference or mediation session with the consent of all the parties.

(6) For the purposes of this section, a person may attend a pre-mediation conference or mediation session by telephone or other electronic means if,

(a) the person is not a resident of [insert jurisdiction]; and

(b) the person is not in [insert jurisdiction] at the time of the conference or session.

Conduct of mediation
8.(1) The mediator shall schedule the dates, times and locations of the pre mediation conference, if any, and the mediation sessions.

(2) The mediator shall conduct the pre-mediation conference, if any, and the mediation sessions in the manner he or she considers appropriate to assist the parties to reach a resolution of the dispute that is fair, timely and cost-effective.

Conclusion of mediation
9.(1) A mediation is concluded when,

(a) all the issues are resolved; or

(b) the mediator terminates the mediation prior to the issues being resolved.

(2) When a mediation is concluded, the mediator shall complete a certificate of completed mediation and deliver a copy of it to each of the parties. *[If the jurisdiction's Ministry of the*

Attorney General has a dispute resolution office, insert "and to the dispute resolution office in the Ministry of the Attorney General".]

PART III - PRE-LITIGATION MEDIATION — SPECIFIC RULES

Application of Part
10. This Part applies to mediation of a dispute that is initiated by a notice to mediate delivered before any legal proceeding or arbitration in respect of the dispute has been commenced.

Notice to mediate
11. A notice to mediate may be delivered under subsection 8(3) of the Act no earlier than 16 days after a notice of dispute was delivered under subsection 8(1) of the Act.

Timing of mediation
12.(1) Mediation of the dispute must begin within 45 days after a mediator is appointed under section 3, unless another date,

(a) is specified by the mediator in writing with the agreement of all the parties; or

(b) is ordered by the court under subsection (2).

(2) Upon an application by any party to court, the court may, on the terms and conditions that the court considers appropriate,

(a) extend the time in which the mediation must begin;

(b) whether or not the court extends the time under clause (a), fix a date on which the mediation must begin.

(3) Upon an application under subsection (2), the court shall take into account all of the circumstances, including,

(a) whether a party intends to bring a motion for summary judgment, summary trial or for a special case; and

(b) whether the mediation will be more likely to succeed if it is postponed to allow the parties to acquire more information.

Time limits on mediation
13.(1) The mediator shall terminate the mediation, whether or not the issues are resolved, after 10 hours of mediation.

(2) The mediator may terminate the mediation earlier if he or she is of the opinion that the

mediation is not likely to be successful.

(3) Despite subsection (1), the mediator may extend the mediation, with the agreement of all the parties, if the mediator is of the opinion that the mediation is likely to be successful with the additional time.

Defaults

14.(1) Any party who is of the opinion that another party has failed to comply with a provision of this Regulation may apply to the court for an order under subsection (3) by filing with the court,

(a) an allegation of default; and

(b) any affidavits in support of the application.

(2) Before making an application under subsection (1), the party shall deliver to each of the other parties the documents described in that subsection.

(3) Upon an application made under subsection (1), the court may make any one or more of the following orders:

1. Directing, on the terms and conditions that the court considers appropriate, that a pre-mediation conference or mediation session be held.

2. Directing that the party who is the subject of the allegation of default attend a pre-mediation conference or mediation session.

3. Directing that the party who is the subject of the allegation of default deliver a statement of facts and issues to the mediator and the other parties.

4. Directing the party who is the subject of the allegation of default to comply with any other requirement of this Regulation.

5. Adjourning the application.

6. Dismissing the application if the court is of the opinion that the party who is the subject of the allegation of default did not commit the alleged default or has a reasonable excuse for the default.

7. Making any order it considers appropriate with respect to costs of the application.

8. Making any other order it considers appropriate.

(4) If the court is of the opinion that public disclosure of the allegation of default and the supporting affidavits would cause hardship to any party, the court may,

(a) order that all or any part of the allegation of default and supporting affidavits be treated as confidential, sealed and not form part of the public record; or

(b) make any other order respecting the confidentiality of the documents that the court considers appropriate.

(5) In a legal proceeding or arbitration in respect of the same dispute that is the subject of the mediation, the court or arbitrator may consider an allegation of default in making any order respecting costs in the proceeding or arbitration.

PART IV - POST-LITIGATION MEDIATION - SPECIFIC RULES
[This Part to be excluded in jurisdictions with general rules of court for post-litigation mediation applicable to franchise disputes]

Application of Part
15. This Part applies to mediation of a dispute that is initiated by a notice to mediate delivered after a legal proceeding or arbitration in respect of the dispute has been commenced.

Notice to mediate
16. Unless otherwise ordered by the court, a notice to mediate may be delivered under subsection 8 (3) of the Act no earlier than 16 days after a notice of dispute was delivered under subsection 8 (1) of the Act and no later than 45 days after the first defence has been filed in the legal proceeding or arbitration.

Timing of mediation
17.(1) Mediation of the dispute must begin within 45 days after a mediator is appointed under section 3 and not later than seven days before the date of the trial of the same dispute, unless another date,

(a) is agreed to by all the parties and confirmed by the mediator in writing; or

(b) is ordered by the court under subsection (2).

(2) Upon an application by any party to court, the court may, on the terms and conditions that the court considers appropriate,

(a) extend the time in which the mediation must begin;

(b) whether or not the court extends the time under clause (a), fix a date on which the mediation must begin.

(3) Upon an application under subsection (2), the court shall take into account all of the circumstances, including,

(a) whether a party intends to bring a motion for summary judgment, summary trial or for a special case; and

(b) whether the mediation will be more likely to succeed if it is postponed to all the parties to acquire more information.

Limitation on mediation
18. Unless the court orders otherwise, no more than one mediation under this Part may be initiated in respect of the same dispute.

Defaults
19.(1) Any party who is of the opinion that another party has failed to comply with a provision of this Regulation may apply to the court for an order under subsection (3) by filing with the court,

(a) an allegation of default; and

(b) any affidavits in support of the application.

(2) Before making an application under subsection (1), the party shall deliver to each of the other parties the documents described in that subsection.

(3) Upon an application made under subsection (1), the court may make any one or more of the following orders:

1. Directing, on the terms and conditions that the court considers appropriate, that a pre-mediation conference or mediation session be held.

2. Directing that the party who is the subject of the allegation of default attend a pre-mediation conference or mediation session.

3. Directing that the party who is the subject of the allegation of default deliver a statement of facts and issues to the mediator and the other parties.

4. Directing the party who is the subject of the allegation of default to comply with any other requirement of this Regulation.

5. Adjourning the application.

6. Staying the legal proceeding or arbitration commenced in respect of the same dispute that is the subject of the mediation until the party who is the subject of the allegation of default attends a pre-mediation conference or mediation session.

7. Dismissing the legal proceeding or arbitration commenced in respect of the same dispute that is the subject of the mediation or striking out the statement of defence in the legal

proceeding or arbitration and granting judgment in the legal proceeding or granting an award or making a determination in the arbitration.

8. Dismissing the application if the court is of the opinion that the party who is the subject of the allegation of default did not commit the alleged default or has a reasonable excuse for the default.

9. Making any order it considers appropriate with respect to costs of the application.

10. Making any other order it considers appropriate.

(4) If the court is of the opinion that public disclosure of the allegation of default and the supporting affidavits would cause hardship to any party, the court may,

(a) order that all or any part of the allegation of default and supporting affidavits be treated as confidential, sealed and not form part of the public record; or

(b) make any other order respecting the confidentiality of the documents that the court considers appropriate.

(5) In a legal proceeding or arbitration in respect of the same dispute that is the subject of the mediation, the court or arbitrator may consider an allegation of default in making any order respecting costs in the proceeding or arbitration.

PART V - FORMS

Forms

20.(1) The notice of dispute to be delivered under subsection 8 (1) of the Act shall be in Form 1.
(2) The notice to mediate to be delivered under subsection 8 (3) of the Act shall be in Form 2.
(3) The statement of facts and issues to be delivered under subsection 5 (1) or which may be ordered by a court under section 14 or 19 to be delivered to the parties shall be in Form 3.
(4) The mediation fee declaration to be completed under section 6 shall be in Form 4.
(5) The allegation of default that may be filed under section 14 or 19 shall be in Form 5.
(6) The certificate of completed mediation to be completed under section 9 shall be in Form 6.

FORM 1 - NOTICE OF DISPUTE UNIFORM FRANCHISES ACT

TO: _____

AND TO: _____

[insert other party or parties to the dispute]

_____
[insert name of party]

asserts that,

1. The following is the nature of the dispute:

_____

_____

_____

_____

_____

2. The following is the desired outcome of the dispute:

_____

_____

_____

_____

_____

_____
Date

_____
Signature of party issuing notice of dispute

_____
Name, address, telephone number and fax number of lawyer of party issuing notice of dispute, or of party

FORM 2 - NOTICE TO MEDIATE UNIFORM FRANCHISES ACT

In the dispute between/among

_____
[insert parties to the dispute]

TO: _____

AND TO: _____
[insert other party or parties to the franchise agreement]

TAKE NOTICE that the dispute between/among _____ will be mediated in accordance with the Mediation regulation under the *Uniform Franchises Act.*

The parties to the dispute must jointly appoint a mediator,
(a) if there are four or fewer parties to the dispute, within 14 days after delivery of this notice; or
(b) if there are five or more parties to the dispute, within 21 days after delivery of this notice.

Otherwise, any of the parties to the dispute may apply to a roster organization, or if there is no roster organization, to the court, for the appointment of a mediator.

_____
Date

_____
Signature of party issuing notice to mediate

_____
Name, address, telephone number and fax number of lawyer of party issuing notice to mediate, or of party

FORM 3 - STATEMENT OF FACTS AND ISSUES UNIFORM FRANCHISES ACT

In the dispute between/among
_____
[insert parties to the dispute]

(To be provided to the mediator and parties not less than 14 days before the first mediation session)

1.Factual and legal issues in dispute

_____
[Insert name of party]

states that the following factual and legal issues are in dispute and remain to be resolved.
(Issues should be stated briefly and numbered consecutively.)

_____

_____

_____

2. Party's position and interests (what the party hopes to achieve)
(Brief summary)

_____

_____

_____

3.Attached documents
Attached to this form are the following documents that the above-named party considers of central importance in the action: ***(list)***

_____

_____

_____
Date

_____
Signature of party filing statement of facts and issues

_____
Name, address, telephone number and fax number of lawyer of party filing statement of facts and issues, or of party

FORM 4 - MEDIATION FEE DECLARATION UNIFORM FRANCHISES ACT

In the dispute between/among

_____
[insert parties to the dispute]

We are participating in a mediation under the Mediation regulation under the *Uniform Franchises Act.*

The costs of the mediation will be $ _____ for a completed mediation session or will be calculated at $ _____ per hour, plus necessary disbursements, or will be calculated as follows:

We will pay the cost of the mediation in equal shares or as follows:

_____

_____

_____

We make this declaration under the Mediation regulation under the *Uniform Franchises Act.*

_____
Date

_____
Party's Signature

_____
Name of party

_____
Party's signature

_____
Name of party

_____
Party's signature

_____

Name of party

FORM 5 - ALLEGATION OF DEFAULT IN THE *[INSERT SUPERIOR COURT OF RECORD IN THE JURISDICTION]*
UNIFORM FRANCHISES ACT

_____
[insert name of party]

states that _____
[insert name of party alleged in default]
has failed to comply with the following provisions of the Mediation regulation under the Uniform Franchises Act:

(List provisions and briefly describe the nature of the alleged default.)

_____

_____

_____

Attach any affidavits in support.

_____
Date

_____
Signature of party filing allegation of default

_____
Name, address, telephone number and fax number of lawyer of party filing allegation of default, or of party

FORM 6 - CERTIFICATE OF COMPLETED MEDIATION UNIFORM FRANCHISES ACT

_____
In the mediation between/among *[insert parties to the dispute]*

TO: _____

AND TO: _____
[insert parties to the dispute]

I certify that the mediation between/among *[insert parties to the dispute]* is concluded.

The following issues are resolved as follows:

_____

_____

_____

The following issues remain unresolved:

_____

_____

_____
Date

_____
Mediator's signature

_____
Name, address, telephone number and fax number of mediator

PRINCIPAL FUNDERS IN 2012

The British Columbia Law Institute expresses its thanks to its principal funders in the past year:

- The Law Foundation of British Columbia;
- The Notary Foundation of British Columbia;
- The Real Estate Foundation of British Columbia;
- Ministry of Justice for British Columbia;
- Department of Justice Canada;
- Continuing Legal Education Society of British Columbia;
- Lawyers Insurance Fund; and
- Boughton Law Corporation.

The BCLI also reiterates its thanks to all those individuals and organizations who have provided financial support for its present and past activities.