Uniform Franchise Act Report – August 2004

1. **Overview of Activities**

[1] The Committee has proceeded following the ULCC August 2003 meeting to consider and prepare a draft Uniform Franchises Act (the "Act") based on the recommendations made to the ULCC by the Committee, and the resolution of the ULCC in that regard.

[2] As previously reported to the ULCC the Committee has reviewed franchise legislation currently in force in the provinces of Alberta and Ontario, the draft model franchise disclosure law adopted by UNIDROIT, and the Federal Trade Commission franchise disclosure rule in the United States. The basic approach of the Committee has been to consider the Ontario legislation as a working model, inserting changes and modifications considered appropriate for both clarity, inclusionary and consistency purposes.

[3] The Committee composition consisted of co-chairs John Sotos and Frank Zaid, ULCC National Co-ordinator Tony Hoffmann, Francois Alepin, Richard Cunningham, James Lockyer, Len Polsky, Bruce Macallum, Tim Rattenbury and Dan Zalmanowitz.

[4] With the generous support of the Ontario Ministry of the Attorney General, legislative drafters were assigned to assist the Committee in preparing the Act. Susan Klein, Legislative Counsel and Abi Lewis, Counsel, Policy Branch, were assigned as drafters to the project and were of invaluable assistance. The Committee sincerely acknowledges their contribution.

2. **Activities During the 2003-2004 Year**

[5] The Committee held a series of meetings by conference telephone and one in-person meeting during the 2003-2004 year. Conference telephone meetings were held on October 30, 2003, November 25, 2003, January 14, 2004, March 31, 2004, May 10, 2004 and June 10, 2004. An in-person meeting was held in Toronto, Ontario on February 18, 2004. Also, a meeting was held on October 14, 2003 with the legislative draft-persons to discuss an appropriate approach for proceeding with the preparation of the Act.

[6] Discussion with respect to the duty of good faith and fair dealing began at the October 30th, 2003 meeting and occupied the better part of the three subsequent meetings as well. The subject of statutory good faith obligations with respect to the performance of a franchise agreement generally has been viewed as highly objectionable by many in the franchisor community. The Committee considered replacing the good faith standard with a standard of unconscionability instead. It was noted that in the approximately three (3) years that the expanded Ontario good faith and fair dealing standard has been in existence, it has not led to the predicted proliferation of litigation or to unpredictable results. In fact, early court decisions have held that the statutory of good faith merely codifies the common law. The Committee noted that the duty of good faith and fair dealing may not extend to cases of unreasonable or arbitrary exercise of discretion that is expressly provided for or allowed by contract. The Committee has debated extensively the desirability of statutorily-imposed normative standards in franchise agreements with strongly held views on both sides of the issue.

[7] The discussion concerning fair dealing continued at the November 25, 2003 meeting. The Committee stressed that it had considered the interests of all parties to franchise agreements in coming to the conclusion that a reasonable commercial standards test was sufficient with respect to the balance between the interests of the parties to a franchise agreement.

[8] At the January 14, 2004 meeting, consideration of fair dealing continued. One particular issue raised for consideration by the ULCC was, whether in respect of section 3(3) of the Act, it would be necessary to include the words "in addition to other remedies" at the beginning of this provision. The Committee was in agreement that the right of action for damages should be in addition to other remedies but was simply not certain that there was a need to expressly state so in the subsection. Discussion also ensued with respect to a possible requirement that earnings claims be provided as a matter of law rather than being optional. It was generally agreed that because of sizeable franchisor opposition it would not be politic to change the status quo and that earnings claims should be left as voluntary and should be included in the regulations to the Act. The Committee began consideration of possible mandatory dispute resolution provisions in the Act.

[9] At the February 18, 2004 meeting, the Committee concluded its discussions of good faith and fair dealing. The Committee considered that an expansion of the duty would be intended to capture gaps in the current duty of good faith and fair dealing in the Ontario and Alberta franchise legislation. The Committee discussed various options, but agreed that the preferred legislative language to section 3 would be as follows:

> **Fair Dealing**
> **3.** 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.

[10] At the February 18, 2004 meeting, the Committee addressed issues of exclusions from the requirement for financial disclosure. The Committee was of the view that there should be an exemption granted to the Crown but that a sound policy reason was needed to justify creating an exemption for large corporations as has been done in the Ontario legislation. The majority of the Committee was of the view that there should not be an exemption for large corporate franchisors from financial disclosure. The minority of the Committee felt that there should be a large corporation exemption.

[11] At the February 18, 2004 meeting, the Committee also commenced its consideration of dispute resolution. Invaluable input was given by Ron Tucker (Legal Counsel to the Dispute Resolution Office of the Ministry of Attorney General and Ministry Responsible for Treaty Negotiations in British Columbia). Items considered extended to the possible inclusion of enabling authority to make regulations, a private mediation roster, means of initiating mediation, and procedures for mediation.

[12] At its meeting of March 31, 2004, the Committee continued with its discussion regarding dispute resolution and mediation and came to the initial conclusion that mediation was a

desirable component of the draft Act. The Committee felt that there would be too much resistance from the business community and from legislators to make the ability to litigate contingent on having completed a mediation process. It was considered that the draft Act could not reasonably compel the creation of a national mediation roster organization, and that the regulation should allow a party to apply to the court to appoint a mediator. With respect to harmonizing the Act with existing civil procedures in certain jurisdictions, it was agreed that existing procedures triggering mediation after the commencement of litigation would trump the mediation provisions of the Act. It was also agreed that, with respect to timing and time limits, the mediation process should occur in the shortest possible time.

[13] At its May 10, 2004 meeting, the mediation proposal was considered in detail and the Committee agreed that there was a definite need for detailed rules regarding mediation, rather than providing for a basic statutory obligation to mediate to be included in the Act. It was also noted that if the issue was a choice between one of party-initiated mediation anda mandatory system, then the issue of what rules are required for such a process to operate would possibly constitute a hindrance to an effective facilitation of dispute resolution.

[14] It was generally agreed by the Committee that a mandatory model of mediation would override the provisions in the Act, and accordingly the Committee favoured a partyinitiated (by notice) procedure for jurisdictions which do not already have mandatory mediation.

[15] The Committee agreed that the best course of action would be for the development of a party-initiated model for franchise disputes which would apply both prior to and after the commencement of litigation. The model would be subject to the discretion of the provinces to apply their own mediation rules.

[16] At its June 10, 2004 meeting, the Committee commenced consideration of the draft regulation to the Act and a proposed timetable for considering the contents of the regulation.

[17] Also at its meeting of June 10, 2004 the co-chairs reported that a subcommittee of the Ontario Bar Association Franchise Law Committee had been formed to recommend changes to the Ontario Government in respect of the Arthur Wishart Act, and that the Chair of that group had invited the co-chairs of this Committee to attend as observers. The co-chairs reported that the methodology of the Ontario Bar Association Group was to go into extensive redrafting with respect to proposed regulations and changes to regulations and it did not appear to be of significant benefit for the co-chairs of the Committee to work with the OBA group other than as observers.

3. **Overview of the Draft Act**

[18] The draft Act follows in its ordering and format the Ontario Act. It incorporates in certain respects provisions contained in the Alberta Act which are absent in the Ontario Act and which are considered of importance for inclusion in the draft Act.

[19] Many of the operative provisions of the draft Act will refer to the regulations for detail content and procedure. These provisions include the content of franchise disclosure documents, the form of financial statements required to be disclosed, procedures for the party-initiated mediation and other matters.

[20] The final report of the Committee to the ULCC at the summer meeting in 2005 will include proposed regulations to the Act.

Recommendation

[21] It is recommended that the ULCC approve and adopt the model Act attached to thisreport.