ULCC | CHLC

UNIFORM LAW CONFERENCE OF CANADA

UNIFORM FRANCHISES ACT AND *REGULATIONS* -

RECOMMENDATIONS FROM THE CANADIAN FRANCHISE ASSOCIATION (2017)

Presented by the Canadian Franchise Association

Regina
Saskatchewan
August, 2017

Presented to the Civil Section

Introduction

1.1 Background

[1] The Canadian Franchise Association (CFA) has requested the Uniform Law Conference of Canada (ULCC) consider amendments to its *Uniform Franchises Act and Regulations* (UFA).

[2] Many jurisdictions use the UFA as a guide to create franchise disclosure legislation and the UFA working group seeks to achieve consistency when franchise legislation is introduced across Canada.

[3] Over the years there has been development in the case law related to franchising and an evolution of franchising. As a result, this working group believes the UFA is now, in a number of ways, not reflective of best practices and the practical reality of franchising as it exists today.

[4] In working with various governments in the development of franchise legislation, inconsistency between recommendations under consideration and the UFA, along with other existing franchise disclosure legislation, has resulted in hesitancy for jurisdictions to adopt some of the more evolutionary recommendations.

1.2 Project Status

[5] This report sets out the UFA Central Working Group's draft policy recommendations for amendments to modernize the *Uniform Franchises Act and Regulations.*

1. Project organization

[6] The Working Group Report is guided by two committees, a Central Working Group, and a broader Consultative Working Group.

2.1 UFA Central Working Group

[7] The UFA Central Working Group ('Working Group') is a collection of some of Canada's foremost franchise lawyers, including representation from the British Columbia Ministry of Justice and Attorney General, and a ULCC representative.

[8] The Working Group members provide expert experience and knowledge, highlighting and discussing problematic areas where current franchise legislation is (or will soon be) inadequate. Members are involved with ongoing policy developments in their jurisdictions, as well as relevant franchise disclosure related issues under discussion. A list of members can be found below.

[9] The Working Group will hold regular meetings to create a final draft of recommended amendments for the ULCC.

Central Working Group

Name	Firm	Home Province
Peter Snell (Chair)	Gowlings WLG	British Columbia
Clark Dalton	ULCC	
Clark Harrop	McDonalds Restaurants of Canada Ltd.	Ontario
Darrell Jarvis	Fasken Martineau DuMoulin LLP	Ontario
David Kornhauser	MacDonald Sager Manis LLP	Ontario
Michael Melvin	McInnes Cooper	New Brunswick
Renee Mulligan	Ministry of Justice and Attorney General	British Columbia
David Shaw	Blake, Cassels & Graydon LLP	Ontario
Daniel So	McKenzie Lake Lawyers LLP	Ontario

2.2 ULCC Consultative Working Group

[10] The ULCC Consultative Working Group ('Consultative Group') is a collection of approximately 20-30 members. Members include franchisors, franchisees, lawyers, and franchise consultants from across Canada.

[11] The Consultative Group will be leveraged to review draft recommendations and provide feedback to the Working Group at designated times. Those who have been invited to participate in this group are as follows:

Consultative Working Group (Invited)

Lawyers

Name	Firm	Home Province
Larry Weinberg (Chair)	Cassels Brock	Ontario
Blair Rebane	BLG	British Columbia
Tony Wilson	Boughton Law	British Columbia
Stephane Teasdale	Cassels Brock	Ontario
Ned Levitt*	Dickinson Wright LLP	Ontario
Frank Zaid*	FRANlegal Support Services	Ontario
Bruno Florinani	Lapointe Rosenstein Marchand Melancon LLP	Quebec
Jean-Philippe Turgeon	Lavery	Quebec
Jennifer Dolman	Osler, Hoskin & Harcourt LLP Chair, OBA Franchise Law Section	Ontario
Andraya Frith	Osler, Hoskin & Harcourt LLP	Ontario
John Sotos*	Sotos LLP	Ontario
Peter Viitre	Sotos LLP Vice Chair, OBA Franchise Law Section	Ontario
Nicole Merrick	Taylor McCaffrey	Manitoba
Ellery Lew	Witten LLP	Alberta
Susan Clapp	Witten LLP	Alberta

*Participated in original ULCC UFA consultations

Franchisors

Name	Company	Home Province
Dawn Mucci	Lice Squad	Ontario
Randy Moore	Mr. Transmission	Ontario
Mike Graham	Smokes Poutinerie	Ontario
Steve Mooreman	The UPS Store	Ontario
John Prittie	2 Men & a Truck	Ontario
Sebastian Fuschini	Pizza Pizza	Ontario
Brian Leon	Choice Hotels	Ontario
Dan Stewart	Pillar 2 Post Home Inspections	Ontario
Don Koenig	Humptys Restaurant	Alberta
Bill Haman	MTY Group	Ontario

Franchisees

Name	Company	Home Province
Jon-Anthony Lui	Tutor Doctor	Ontario
	3 More Multi-Unit Franchisees TBD	

Consultants

Name	Company	Home Province
Gary Prenevost	FRANNET	Ontario

2. Key issues and subjects of research

3.1 Priority Issues

[13] The following are a brief summary of the collection of work developed by the Canadian Franchise Association's Legislation and Regulations Review Subcommittee, which analyzed the ULCC's *Uniform Franchises Act and Regulations* in comparison to other jurisdiction's Franchise Legislation to determine best practices, balanced with a uniform approach to franchise legislation across the country. Please note that during the process of consultation with the Working Group and Consultative Group, we expect debate on the following issues and therefore additional issues may be added or removed as deemed appropriate. The Working Group's general recommendations include, but are not limited to, the following:

Uniform Franchises Act

- Amendments to various definitions within the UFA;
- Limiting the scope of "material fact" disclosure to material facts that relate directly to the finite list of required disclosure items in the Regulations;
- Expanding the amount of auditing and review standards that are acceptable with regards to financial statements;

- Implementing 'Substantial Compliance' as has been adopted in Manitoba, and most recently, British Columbia;
- Revising language used in various exemptions to eliminate the uncertainty which currently makes the majority of exemptions unusable;
- Implementing a mature franchisor exemption; and
- Adding a section to the Act to address obligations of prospective franchisees in the event they rescind the franchise agreement.

Uniform Franchises Act Regulations

- Revisions to risk warnings;
- Amendments to various definitions;
- Implementing an option for alternative methods of delivery;
- Adopting language used in various other provincial legislation, especially with respect to require disclosure regarding advertising, territory, licences and permits and lists of current and former franchisees and franchisor businesses; and
- Removing mandatory mediation.

3. Recommendations

[15] The ULCC Working Group's recommendations are set out below in detail.

Disclaimer: The information provided herein is intended only as general information that may or may not reflect the most current developments in franchise disclosure legislation best practices. Changes may be made as new developments occur and/or at the discretion of the ULCC Working and Consultative Groups between June 30, 2017 and the final submission of this report.

Uniform Franchises Act and Regulations

(with original ULCC Commentary, and CFA Suggestions)

UNIFORM FRANCHISES ACT

CONTENTS

Definitions

1.(1) In this Act,

"disclosure document" means the disclosure document required by section 5 («document d'information»);

"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,

- (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 («franchise»);

Payment

- Payment for the purchase and sale of a reasonable amount of goods at a reasonable bona fide wholesale price, or for the purchase of a reasonable amount of services at a reasonable bona fide price, does not constitute a payment or continuing payment in the course of operating the business or as a condition of acquiring the franchise or commencing operations.

ULCC 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".

CFA Suggestion: CFA advocates for a revision to the definition of a franchise to make clear that the mere purchase of a reasonable amount of inventory or services at bona fide wholesale prices does not itself constitute a payment so as to invoke the applicability of franchise legislation, absent other payments. This is similar to the approach taken in the Alberta statute. Accordingly, the new underlined paragraph above has been added.

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

(a) a franchisor or franchisor's associate, and
(b) a franchisee «contrat de franchisage»;

CFA Suggestion: UFA problematic in defining a franchise agreement as "any agreement". In practice, there is the agreement that in fact grants the franchise, and then ancillary agreements such as software licenses, subleases, supply agreements, etc. These should be distinguished, so CFA recommends defining "franchise agreement" as the franchise granting agreement, and "other agreement" or "related agreement" as the other agreements that relate to the franchise. (Note: OBA Franchise Law section report makes same recommendation to revise Ontario's Wishart Act.)

"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 («franchisé»);

"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 («système de franchise»);

ULCC 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 («franchiseur»);

"franchisor's associate" means

(a) (i) a person who, directly or indirectly, controls the franchisor,

(ii) a person other than an individual which is, directly or indirectly controlled by the franchisor or 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 («personne qui a un lien»);

CFA Suggestion: This provision was not intended to capture as franchisor's associates, and hence impose personal liability on, employees of the franchisor, as persons "controlled by the franchisor". These claims are now being made in the courts. The revisions recommended above in the underlined portion of the definition are intended to make that clear.

"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 («courtier du franchiseur»);

ULCC 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 («concession»);

"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 («franchise maîtresse»)

"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 («changement important»);

ULCC 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.

CFA Suggestion: If the proposed legislation does limit the meaning of "material fact", then the definition of "material change" should be similarly amended to relate to a change in the material facts that are enumerated. See below for discussion of definition of "material fact".

"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 («fait important»);

ULCC 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".

CFA Suggestion: Canada is one of the only jurisdictions in the world that has an open ended "catch all" approach to material fact. In the US they employ a finite, list-based approach which increases certainty and clarifies the expectations and requirements for full and proper disclosure. CFA realizes this is a departure from the existing Canadian franchise laws, and it is an instance where we are recommending best practice over uniformity in Canada, in the expectation that uniformity across Canada will follow. Experience now shows that well-meaning franchisors can be faulted in hindsight for failing to meet this disclosure standard, as the expansive definition of "material fact" is too easy to challenge.

"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 («présentation inexacte des faits»);

"prescribed" means prescribed by regulations made under this Act («prescrit»);

"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 («franchisé éventuel»);

"subfranchise" means a franchise granted by a subfranchisor to a subfranchisee («sous-franchise»).

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]*.

ULCC 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.

CFA Suggestion: The decision of the Ontario Court of Appeal in 405341 Ontario Limited v. Midas Canada Inc., (2009), 64 B.L.R. (4th) 251, affirmed 2010 ONCA 478 has left uncertainty and a lack of clarity in the extra provincial application of franchise statutes. Unlike UFA we recommend not expanding scope of provinces and not having retroactive application. Legislation should only apply to locations actually operating in that province.

Since we are not certain how this issue may ultimately be resolved by the courts, we recommend using the language created by the OBA to read as follows (the added language being underlined):

S.2(1)(a) This Act applies with respect to a franchise agreement entered into on or after the coming into force of this section, with respect to a renewal or extension of a franchise agreement entered into before or after the coming into force of this section and with respect to a business operated under such an agreement, renewal or extension if the business operated by the franchisee under the franchise agreement or its renewal or extension is to be operated partly or wholly in [province]. A franchise agreement governed by the laws of the Province of [insert jurisdiction] shall not be governed by this Act unless the business operated by the franchisee under the franchise agreement or its renewal or extension is to be operated partly or wholly in [province].

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]*.

ULCC 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.

ULCC 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.

CFA Suggestion: The provision for non-application of the Act in Section 2.3(g) does not work in practical application. The Act of course applies to arrangements that include the purchase of a reasonable amount of goods or services at reasonable prices, if all of the elements of the franchise definition are present. What must be intended by this provision is that the purchase of goods or services at reasonable prices is not sufficient to constitute a payment or continuing payment as required at the beginning of the "franchise" definition. Hence, the suggested amendment above to the definition of a franchise.

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.

ULCC 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.

ULCC 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.

ULCC 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.

ULCC 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).

CFA Suggestion: To modernize the legislation we suggest adding allowance for courier and electronic delivery of the franchise disclosure document, and notices to be delivered under the statute, as well as a time reference for when such methods would be considered received. While Alberta is silent on it, most provinces allow for it, most recently being amended in Ontario's franchise legislation to include the provision as well as being implemented during BC's creation of provincial franchise legislation.

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.

ULCC 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.

CFA Suggestion: As previously noted, the CFA advocates for a disclosure regime requiring disclosure of a finite list of items.

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.

ULCC 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.

CFA Suggestion: This can be a challenging definition. The challenges are trying to balance being concise while disclosing all material facts. As a result of the open ended definition of "material fact", and unforgiving attitude towards franchisors who fail to disclose what in hindsight is considered all material facts, disclosure documents have become longer and longer, and are failing to achieve their original purpose of providing a prospective franchisee with a concise statement of what they need to know before buying.

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).

ULCC Comment: s.5(8). S. 5(8)(e) 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.

CFA Suggestion: 5(8)(b) CFA recommends this be revised to say that franchisor can take the benefit of this exemption if the director and officer uses a corporation to be the franchisee (that is unclear right now), and that the 6 month time period not have to be immediately preceding the purchase of the franchise.

CFA Suggestion: 5(8)(c) The CFA recommends adding clarity to this exemption, by making it clear it applies to the same brand and substantially the same form of agreement.

.

CFA Suggestion: 5(8)(g) BCLI recommended this be deleted because of difficulty to utilize. CFA believes it should be retained, and that small businesses would appreciate having the option. But it should be revised to delete "and operate".

CFA Suggestion: 5(8)(h) CFA made the following recommendation to BCLI and it was accepted in their final report. Refinement is also needed to exemption (h). It is important to clarify that this refers specifically to there being no initial franchise fee and that the intention is related to short-term (for example seasonal) agreements for not longer than one year. In Ontario the legislation makes it clearer that this section deals with an initial fee and not ongoing fees and we agree that it should be changed to read:

(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 initial franchise fee.

CFA Suggestion: Ontario's franchise law now provides for an additional exemption, the so called large franchise exemption, which applies if the franchisee will be spending in the acquisition and operation of the franchise in the first year more than Can $5,000,000. CFA advocates for such an exemption. Like the OBA report, the CFA advocates for adding clarity to when the exemption is available, by specifying that it applies to acquisition and set up as opposed to having to estimate far into the future regarding operational costs. A corresponding decrease in the monetary threshold is also recommended, so that the exemption will apply if the amount exceeds Can $3,000,000. So, like OBA, CFA suggests it read as follows:

(h) the grant of a franchise where the prospective franchisee is required, by contract or otherwise, to initially invest, in the acquisition and set up of the franchise, an amount, as anticipated by the parties or that should be anticipated by the parties at the time the franchise agreement is entered into, greater than a prescribed amount.

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.

ULCC 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.

ULCC 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.

CFA Suggestion: CFA advocates for adding a new Section 6.7 to address obligations on franchisee even if they rescind the agreement, such as the obligation to maintain confidentiality, return franchisor's proprietary materials, and take reasonable steps to preserve assets that franchisor is required to buy back.

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).

ULCC Comment: s.6. The rescission right contained in the Ontario Act, which is far more favourable to a franchisee, has been retained.

CFA Suggestion: 6.6 The intention of this section is to ensure that a franchisee is made 'whole' again after rescission occurs. The language as it exists has proven to be punitive to the franchisor in certain instances and has resulted in a windfall profit by the franchisee, which is neither just nor the intention of the law. It also does not take into account any profit made by the franchisee during the period of operation.

In Alberta the approach is, to compensate for a franchisee's net losses. BCLI rejected this recommendation in part because it doesn't happen often. However, we do not feel this reasoning is enough to justify. CFA advocates to adopt Alberta's approach, by requiring compensation for net losses as calculated in accordance with Canadian GAAP, and making clear there is to be no collection of flow through payments (i.e.: rent under a lease and sublease) that find their way to a third party (and are not retained by the franchisor).

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.

ULCC 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.

ULCC 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.

ULCC 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.

CFA Suggestion: CFA believes the UFA should be amended to remove the requirement of provinces to adopt any provisions requiring mandatory mediation for franchise disputes.

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.

ULCC 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.

ULCC 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.

ULCC 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.

ULCC 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 franchisors 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.

CFA Suggestion: The courts have recognized that parties need to be able to enter into bona fide settlements of their disputes, and in settling, provide a release of all claims, notwithstanding the non- waiver provisions of the franchise laws. Accordingly, CFA advocates for codification of this common law exception to the non-waiver provision, and that section 12 be amended to read as follows (the additional suggested language being underlined):

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, <u>except when made in writing as part of the settlement of a bona fide dispute, and signed by the franchisee or prospective franchisee with the benefit of independent legal advice.</u>

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.

Uniform Franchises Act and Regulations

(with original ULCC Commentary, and CFA Recommendations)

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.

CFA Recommendation: CFA advocates for adding a definition for "Officer". We recommend a definition similar to the definition adopted in the Manitoba Franchises Act. The proposed language is as follows:
1.(1)
"(a) in relation to a corporation, a chief executive officer, president, vice-president, secretary, controller, treasurer or other individual designated or acting in the capacity as an officer of the corporation by by-law or by resolution of the directors of the corporation;" or
"(b) in relation to any other entity, any individual designated as an officer of the entity by by-law, resolution of the members of the entity or otherwise."

CFA Recommendation: The decision of the Ontario Court of Appeal in *Midas* has left uncertainty and a lack of clarity in the extra provincial application of franchise statutes. Since we are not certain how this issue may ultimately be resolved by the courts, we recommend using the following language, similar to the Ontario Bar Association's (OBA) recommendation:
s.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 is operating or to be operated by the franchisee under the agreement is partly or wholly in [province]; 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 is operating or to be operated by the franchisee under the agreement is partly or wholly in [province]. A franchise agreement governed by the laws of the Province of [province] shall not be governed by this Act unless the business operated by the franchisee under the franchise agreement or its renewal or extension is to be operated partly or wholly in [province].

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 franchise agreement; and
(d) lists of current and previous franchisees and their contact information can be found in this disclosure document.

ULCC 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.

CFA Recommendation: 2.(b) & 2.(c)

We recommend the UFA be amended to adopt language that is currently used in New Brunswick and Manitoba to encourage uniformity by substituting "prior to" with "before" in the above subsections.

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 document, 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.

CFA Recommendation: 3.(iii)
The CFA recommends adding a definition for "Franchisor's Affiliate", which we understand the OBA also supports. The addition of the definition of franchisor's affiliate should limit the liability the Act otherwise would impose on franchisor's associates. The term franchisor's affiliate would replace "franchisor's associate" in numerous places in the Regulations. We have identified each place where this change is recommended. The definition should read:

"franchisor's affiliate" means a person, 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.

CFA Recommendation: 3.(iv)
We recommend adopting the language used in Prince Edward Island and New Brunswick to encourage uniformity in this subsection where a franchisor must disclose "…the name and address of a person authorized to accept service in [insert jurisdiction] on the franchisor's behalf," if the franchisor's principal business address is outside [insert jurisdiction]. The language used in the majority of provinces only requires the franchisor to disclose the information of an attorney of service if the franchisor has one, rather than requiring a franchisor to have an attorney for service.
The recommended wording for this subsection is below:

Sch. A Part 2.1(c) "the franchisor's principal business address and, if the franchisor has an attorney for service in [insert province], the name and address of that person;"

CFA Recommendation: 3. Required information about the franchisor
The CFA recommends replacing "franchisor's associate" with "franchisor's affiliate" in subsections. 3.(c), 3.(d), 3.(e) and 3.(f)(i).

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 sub clause (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;

ULCC 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;

ULCC 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;

ULCC 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.

CFA Recommendation: 4.(d)(ii)
We recommend deleting this subsection entirely, as there is an express statement that costs be reasonable. We agree that franchisors have to provide reasonable estimates, however, we do not agree that an express statement that they are reasonable assists, or is required. Deleting this subsection will encourage uniformity with other provinces such as Ontario and Manitoba.

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;

ULCC Comment: Current Ontario and Alberta Legislation deal with the subject of earnings claims differently, 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.

CFA Recommendation: 4.(f)(ii)
CFA recommends deleting this subsection entirely, as there is an express statement that the preparation and presentation of the projection be reasonable. We agree that franchisors have to provide reasonable estimates, however, we do not agree that an express statement that they are reasonable assists, or is required. Deleting this subsection will encourage uniformity with Ontario and Manitoba.

CFA Recommendation: 4. Earnings Projection
CFA recommends adding a subsection under 'Earnings projection' by adopting language currently used in New Brunswick and Manitoba's franchise legislation. The subsection wording is as follows:

> Sch. A Part 3.5(2) "If an earnings projection for the franchise is not provided, a statement to that effect."

The CFA also recommends removing the words "associate or" from section 4.(f)(iv) and 4.(f)(v).

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;

ULCC Comment: The Regulations extend current disclosure requirements to include financing arrangements where the franchisor assists third parties to offer goods and services to franchisees.

CFA Recommendation: 4.(g)
UFA is unique in requiring franchisors to include financing arrangements where the franchisor assists third parties to offer goods and services. However, no other province has implemented this requirement. We recommend amending the UFA to include the following language:

> Sch. A Part 3.6 "The terms and conditions of any financing arrangements that the franchisor or franchisor's associate offers, directly or indirectly, to the franchisee."

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;

ULCC 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.

CFA Recommendation: 4.(h)
CFA recommends dropping the language "and, if it is mandatory". We believe this language should be removed as it implies that the franchisor does not have to specify who bears the cost of training, if the training is optional. Removing the language implies, in either case, the franchisor will provide information on who bears the cost of training.

The CFA also recommends replacing "franchisor's associate" with "franchisor's affiliate" in section 4.(h) and subsection 4.(h)(i).

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;

ULCC 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.

CFA Recommendation: 4.(j)
We recommend amending the UFA to adopt the language used in New Brunswick and Manitoba for this section. Rather than a franchisor being required to list a "summary of the material topics covered in the manual" we suggest requiring franchisors to provide a "table of contents of each manual" as we believe a summary of material topics is too broad. The suggested language is below:

> Sch. A Part 2 14(1) "If the franchisee will be required to operate in accordance with manuals provided by the franchisor, the table of contents of each manual or a statement specifying where the manuals are available for inspection.
>
> Sch. A Part 2 14(2) "If no manuals are provided to the franchisee, a statement to that effect."

The CFA also recommends replacing "franchisor's associate" with "franchisor's affiliate" in section 4.(j).

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-sub clause (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;

ULCC 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.

CFA Recommendation: 4.(l)
The CFA recommends deleting all subsections except for 4.(l)(iv), 4.(l)(vii) and 4.(l)(viii).

CFA Recommendation: 4.(m)
The CFA recommends amending the UFA to adopt language similar to that used in New Brunswick as it is preferred over the UFA. The distinction between "local" and "national" is problematic and the more important information relates to the percentage spent on advertising and branding campaigns. The recommended language is as follows:

Sch. A Part 3.9 "If the franchisee will be required to contribute to an advertising, marketing, promotion or similar fund, a statement describing the fund and specifying"
Sch. A Part 3.9(a)"the amount or the basis of calculating the amount of the franchisee's required contribution,"
Sch. A Part 3.9(b)"the percentage of the fund that has been spent on advertising and branding campaigns in the 2 fiscal years immediately preceding the date of the disclosure document,"
Sch. A Part 3.9(c)"the percentage of the fund, other than the percentage referred to in paragraph (b), that has been retained by the franchisor, the franchisor's parent or the franchisor's associates in the 2 fiscal years immediately preceding the date of the disclosure document,"
Sch. A Part 3.9 (d)"a projection of the percentage of the fund to be spent on national or local advertising and branding campaigns for the current fiscal year,"
Sch. A Part 3.9(e)"a projection of the percentage of the fund to be retained by the franchisor, the franchisor's parent or the franchisor's associates in the current fiscal year, and"
Sch. A Part 3.9(f)"whether reports on advertising activities financed by the fund will be made available to the franchisee."

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);

ULCC 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.

CFA Recommendation: 4.(o)(i)
We recommend replacing "franchisor's associate" with "franchisor's affiliate" in subsection 4.(o)(i)

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 franchisor'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;

ULCC 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.

CFA Recommendation: 4.(q)
The CFA recommends replacing "franchisor's associate" with "franchisor's affiliate" in section 4.(q).

CFA Recommendation: 4.(r)
We suggest uniformity by adopting the language used by Ontario, Prince Edward Island, New Brunswick and Manitoba for this section. In these provinces, the franchisor is only required to disclose whether rebates are taken and whether they are shared. The suggested language is below:

> Sch. A Part 3.11(b) "whether rebates, commissions, payments or other benefits are 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;

ULCC 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 franchisee 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.

CFA Recommendation: 4.(s)
CFA recommends amending the UFA to adopt the language used in New Brunswick and Manitoba for this section. None of the provinces have followed the UFA's suggested language. It is our view that two of the most recent provinces with franchise legislation, New Brunswick and Manitoba, represent best practices.
The language for these provinces is as follows:
Sch. A Part 3.12(1)"A description of the franchisor's policies and practices regarding the granting of exclusive territory and, if the franchise agreement grants the franchisee rights to exclusive territory, "
Sch. A Part 3.12(1)(a) "a description of the exclusive territory granted or of the manner in which and the person by whom the exclusive territory will be determined,"
Sch. A Part 3.12(1)(b)"a description of the franchisor's policy, if any, as to whether the continuation of the franchisee's rights to the exclusive territory depends on the franchisee achieving a specific level of sales, market penetration, or other condition, and"
Sch. A Part 3.12(1)(c)"a description of the circumstances under which the franchisee's rights to the exclusive territory may be altered."
Sch. A Part 3.12(2)"If no exclusive territory is granted to the franchisee, a statement to that effect."

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;

ULCC 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.

CFA Recommendation: 4.(t)
We recommend replacing "franchisor's associate" with "franchisor's affiliate" in subsection 4.(t)(i), 4.(t)(iii) and 4.(t)(iv).

CFA Recommendation: 4.(u)
The CFA recommends deleting 4.(u) entirely as no other province has adopted it.

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;

ULCC 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.

CFA Recommendation: 4.(v)
This section is a considerable extension of the current Ontario and Alberta disclosure items, and far more than the other provinces have adopted. As a best practice approach, the CFA recommends adopting the language from New Brunswick's legislation as follows:

> Sch. A Part 3.15 "A description of the rights the franchisor or the franchisor's associate has to the trade-mark, trade name, logo or advertising or other commercial symbol associated with the franchise and of any known or alleged material impediments to its use."

We also recommend replacing "franchisor's associate" with "franchisor's affiliate" in subsection 4.(v)(i) and 4.(v)(iv).

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;

ULCC 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.

CFA Recommendation: 4.(w)
The CFA suggests using the phrase “a list” to replace “a description”. As well, the CFA recommends adopting similar language to New Brunswick and Manitoba. These provinces only require the franchisor to list any applicable federal and provincial laws. The recommended language is as follows:

> Sch. A Part 3.16(1) “A description of every licence, registration, authorization or other permission that the franchisee will be required to obtain under federal or provincial laws in order to sell or distribute the particular goods or services sold or distributed by the franchise.”
>
> Sch. A Part 3.16(2) "A statement that, in addition to those identified in subsection (1), the franchisee may be required under other federal or provincial laws or under the by-laws of a municipal or other local authority to obtain licences, registrations, authorizations or other permissions to operate the franchise and that the franchisee should make inquiries to determine whether such licences, registrations, authorizations or other permissions are required."

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;

ULCC 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

ULCC 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.

CFA Recommendation: 4.(y)
The majority of provinces use the wording “a concise summary” in substitute of “a description”. The CFA suggests partially adopting the wording of these provinces by replacing “a description” with “a summary” as it may not be beneficial to the franchisor or franchisee to be concise.

The broad definition of “franchise agreement” is a problem in this section as well. CFA recommends a definition of “ancillary agreement” (see previous comments provided on the draft Act.)

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.

CFA Recommendation: 4.(z)
The CFA recommends using language similar to the language found in Prince Edward Island, where the franchisor is required to provide a list of franchisees of the franchisor including those, "that has been terminated, cancelled, not renewed or reacquired". However, unlike PEI's legislation, the CFA recommends that the list is of all locations in Canada (and not limited provincially). The CFA's recommended language is as follows:

Sch. 1 Part 4.2 "A list of all franchisees of the franchisor, franchisor's affiliates of the franchisor that operated a franchise in Canada of the same type as the franchise being offered that has been terminated, cancelled, not renewed or reacquired by the franchisor or otherwise left the system within the least fiscal year immediately preceding the date of the disclosure document, including the name, last known address and telephone number of each franchisee."

We also recommend removing the words "associates or" in subsection 4.(z)(i) and 4.(z)(ii).

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.

ULCC 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.

CFA Recommendation:

We recommend removing the words "franchisor's associate or affiliate of the franchisor" in subsection 5.(1), 5.(2), 5.(3), 5.(4), 5.(5) and replacing them with the words "or franchisor's affiliate".

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.

CFA Recommendation: 6.1
The CFA recommends removing the words ", franchisor's associate or affiliate of the franchisor" from the section and replacing them with the words "or franchisor's affiliate".

6.2
We also recommend adding an option to provide the business email.

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 associate 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 re- acquired 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.

CFA Recommendation: 7. Schedule of former franchisees and businesses
The CFA recommends deleting the words "franchisor's associate or affiliate of the franchisor" in subsection 7.(1)(a), 7.(1)(b), 7.(1)(c), 7.(1)(d), and 7.(1)(e) and replacing them with "or franchisor's affiliate".

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.

CFA Recommendation: 8. Schedule of franchise and business closure information
The CFA recommends deleting section 8, '*Schedule of franchise and business closure information*' entirely. Only Ontario and Alberta have included a requirement for a three-year list of closures in their Regulations and only with a fraction of the detail required by the UFA. Prince Edward Island, New Brunswick and Manitoba have chosen not to adopt this section. To encourage uniformity and best practices, we recommend deleting this section.

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.

ULCC 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.

CFA Recommendation: 9.(1)(a)&(b)
The CFA recognizes that this approach is intended to allow foreign based franchisors more flexibility as it contemplates permitting use of the franchisor's home jurisdictional financial statements. The CFA suggests that if not in accordance with the generally accepted auditing standards set out in the *Canadian Institute of Chartered Accountants Handbook,* then financial statements on an audit or review engagement basis in accordance with IFRS or US GAAP be accepted.

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.

ULCC 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.

CFA Recommendation: 10. Certificate of franchisor
The form of the certificate is unimportant if the certificate complies in substance. The statements in this section are acceptable, however, we recommend wording that puts more emphasis on the importance of the substance of the certificates rather than the specific forms of the certificates. We recommend wording similar to the approach taken in Ontario. Specific language is below:

> 7.(1) "Every disclosure document shall include a certificate certifying that the document," 7.(1)(a) "contains no untrue information, representations or statements; and"
> 7.(1)(b) "includes every material fact, financial statement, statement and other information required by the Act and this Regulation. O. Reg. 581/00, s. 7 (1)."
> 7.(2) "A certificate referred to in subsection (1) shall be signed and dated by," 7.(2)(a) "in the case of a franchisor that is not incorporated, the franchisor;"
> 7.(2)(b) "in the case of a franchisor that is incorporated and has only one director or officer, by that person;"
> 7.(2)(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. O. Reg. 581/00, s. 7 (2)."

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

CFA Recommendation: Mediation
The CFA recommends deleting all of the following under mediation. There is a danger of including too much detail in the proposed legislation regarding the mediation process which not only is counter to the intention of uniformity, but also adds burden through an abundance of detail.

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 regimes 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, 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.