UNIFORM LAW CONFERENCE OF CANADA

COMMERCIAL LAW STRATEGY

UNIFORM FRANCHISES ACT

REPORT OF THE WORKING COMMITTEE

Fredericton, New Brunswick
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UNIFORM FRANCHISES ACT – REPORT OF THE WORKING COMMITTEE

Background

[1] The Uniform Law Conference of Canada ("ULCC") announced the establishment of a new project to consider and make recommendations for the adoption of uniform franchise legislation (the "Model Act") throughout Canada on June 19, 2002. The project is being directed by a working committee (the "Committee") established by the ULCC as part of its Commercial Law Strategy.

[2] The Committee is being co-chaired by two leading Canadian franchise lawyers, both based in Toronto. John Sotos, a founding partner of Sotos Associates, specializes in franchising, licensing and distribution law, served on the Ontario Government's Working Sector Team considering franchise legislation for that province and is a major proponent of balanced franchising throughout the country. Frank Zaid, a senior partner in the Toronto office of Osler, Hoskin & Harcourt LLP, has served as counsel to many of Canada's and the world's leading franchisors, and is Past General Counsel to the Canadian Franchise Association and Past Chair of the Council of Franchise Suppliers of the International Franchise Association.

Franchise Law Working Committee

[3] The Committee was established on a national basis to draw upon the resources of other experienced franchise lawyers and interested industry and government representatives, and currently includes the following additional individuals to the two Co-chairs: Richard Cunningham, President, Canadian Franchise Association, Mississauga, Ontario; Jean Gagnon, an accredited expert in franchising/mediator/chartered administrator/lawyer, Longueuil, Quebec; James E. Lockyer, Professor, University of Moncton, Moncton, New Brunswick; Bruce Macallum, British Columbia Ministry of Attorney General, Victoria, British Columbia; Leonard Polsky, Gowling Lafleur Henderson LLP, Vancouver, British Columbia; Daniel Zalmanowitz, Witten LLP, Edmonton, Alberta; François Alepin, Alepin Gauthier, Laval, Quebec; Tim Rattenbury, Legal Research Coordinator, Office of the Attorney General, Fredericton, New Brunswick; Ned Levitt (invited guest), General Counsel, Canadian Franchise Association, Levitt Hoffman, Toronto, Ontario. Hélène Yaremko-Jarvis, National Co-ordinator of the Commercial Law Strategy was an *ex officio* member of the Committee and served as its secretary.

Legislative and Business Background

[4] Franchising has experienced phenomenal growth throughout the world and in Canada in recent years, and is of substantial significance to the Canadian economy. It is estimated that franchised businesses account for close to $100 billion dollars in sales across Canada, representing forty cents out of every retail dollar spent. There are estimated to be over one thousand (1,000) franchised systems in Canada, with investments for franchisees ranging from several thousand dollars for simple home service franchises to millions of dollars for full service franchises like five-star hotels.

[5] At the present time, Alberta and Ontario are the only provinces in Canada which have legislation directly regulating franchising. The Province of Alberta originally enacted its legislation in 1972, following a California model. The Alberta *Franchises Act*, as originally enacted, required all franchisors operating in the Province of Alberta to prepare a form of prospectus which was required to be submitted to and approved by the Alberta Securities Commission before a franchisor was entitled to offer franchises in that province. The prospectus required annual renewals. As well, any person engaged in the sale of a franchise was required to be registered.

[6] Following approval by the Alberta Securities Commission of the prospectus, a certificate of registration was issued. Thereafter, the franchisor was entitled to offer franchises provided that it delivered to each prospective franchisee the form of prospectus as approved by the Alberta Securities Commission. Certain types of franchisors were exempted from the registration process and were allowed to file a modified form of prospectus known as a statement of material fact. Certain types of transactions were fully exempted from the registration process altogether.

[7] Over a period of time the Alberta Securities Commission developed a number of policies, most of which were not published, which were applied to determine whether a particular franchise would be allowed to be registered. In many cases, the Alberta Securities Commission insisted upon certain provisions being contained in a franchisor's standard form of franchise agreement dealing with default, termination, renewal and other matters, thereby in effect regulating the relationship between the parties although the legislation did not specifically authorize or endorse this form of regulation.

[8] After many years of complaints from the franchisor community regarding the cost, bureaucratic approach and the uncertainty of the registration process, and coincident with a provincial policy initiative to deregulate, the Alberta Government decided in 1995 to repeal its *Franchises Act* and enacted a new piece of legislation under the same name.

[9] The new *Alberta Franchises Act*, R.S.A. 2000, Chap. F-23, completely did away with the registration and governmental review process. It provided for a standard form of disclosure document to be prepared by a franchisor, responding to certain specific items contained in the regulation to the legislation. The content of the disclosure document and the degree of disclosure do not involve any government filing, review or approval. It is simply left to the parties to determine that there has been compliance with the legislation.

[10] All franchisors are required to deliver their disclosure documents to prospective franchisees at least fourteen (14) days prior to the execution of any agreement relating to the franchise, or the taking of any financial consideration. Again, as in the case of the previous legislation, certain exemptions from the legislation and certain exemptions from disclosure are also provided for.

[11] The Alberta legislation also contains a statutory duty of fair dealing in respect of the performance and enforcement of a franchise agreement by both parties. For the first time in Canadian law, the Alberta *Franchises Act* codifies a standard of dealing between franchisors and franchisees. The legislation also allows for the freedom of franchisees to associate, and contains a provision allowing the Alberta Government to delegate to an industry body certain functions under the legislation, although to date no such delegation has taken place.

[12] The second province in Canada which enacted franchise legislation is the Province of Ontario. After nearly thirty (30) years of prior policy pronouncements, commitments by Ministers of the Ontario Government, introduction of draft bills, and the like, franchise law in the Province of Ontario became a reality in June 2000. On July 1, 2000, the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, Chap. 3 was proclaimed in force except for those provisions dealing with disclosure which were proclaimed into force effective January 31, 2001. In many ways, the Ontario legislation parallels the Alberta *Franchises Act*.

[13] The legislation provides for the requirement of a franchisor to deliver a disclosure document responding to specific items contained in a regulation to the Act, as well as any other material facts, to a prospective franchisee at least fourteen (14) days prior to the taking of any financial consideration or the execution of any agreement. Again, as in the case of Alberta, there is no governmental review, approval or registration of the disclosure document.

[14] The Act provides for harsh civil consequences for failure to disclose, including the right of a franchisee to whom a disclosure document has not been delivered to rescind the agreement and to recover all costs incurred in connection with the establishment and operation of the franchise including mandatory repurchase of equipment, inventory and leaseholds used in connection with the franchise system.

[15] The Ontario legislation also contains a provision codifying the standard of fair dealing, similar to that in Alberta. However, the Ontario standard of fair dealing goes further than Alberta's by stating that the duty of fair dealing includes, without limitation, the duty to act in good faith and in accordance with reasonable commercial standards. The duty to act in accordance with reasonable commercial standards is a unique concept in commercial law and is not contained in franchise legislation anywhere else in the world. Also, as in the case of Alberta, the right of a franchisee to associate is preserved in the Ontario legislation.

[16] The Ontario legislation does not contain the right of the Minister to delegate responsibility for any part of the legislation to a self-governing body as in Alberta. The regulation to the Ontario Act, which contains the disclosure document requirements, was drafted with some haste and without industry consultation in late 2000, and became effective on January 31, 2001. There are many ambiguities and uncertainties contained in the disclosure document requirements for the most part as a result of insufficient certainty in language and the lack of guidelines.

[17] In both Alberta and Ontario, subject to some exceptions for large franchisors in Ontario, franchisors must provide to franchisees, as part of their disclosure document, financial statements for the most recent fiscal year of the franchisor. Many franchisors, particularly those which are privately held, do not wish to have financial statements disclosed in this manner, for both personal and competitive reasons. However, there are no means provided for in either legislation

for financial statements to be maintained in privacy or pursuant to an obligation of confidentiality.

[18] The Alberta legislation specifically allows for disclosure documents prepared in accordance with the laws of another jurisdiction having franchise legislation to be used in Alberta provided that an addendum is attached containing the specific changes from the disclosure document used in the other jurisdiction for modification and use in Alberta. The Ontario legislation does not contain a similar provision. Therefore, at the present time a franchisor selling or offering to sell franchises in the Province of Ontario cannot use an Alberta form of disclosure document, but must have an Ontario form separately prepared for this purpose. It is also the generally accepted view that a franchisor wishing to franchise in both Alberta and Ontario can only use a standard form of franchise disclosure document if it is prepared in accordance with Ontario law and an addendum is subsequently attached outlining the changes for compliance with Alberta disclosure requirements. The reverse process is not acceptable for the Province of Ontario. Similarly, it is not possible in the Province of Ontario for a franchisor to use the form of a disclosure document which complies with franchise legislation in any foreign jurisdiction, including a uniform franchise offering circular ("UFOC") prepared in accordance with the Federal Trade Commission's Trade Regulation Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures" (the "FTC Rule") which became effective on October 21, 1979. Alberta legislation would permit the use of a UFOC with an Alberta addendum.

[19] Given the fact that two major commercial provinces in Canada have established franchise legislation, the Committee has carefully considered the evolution and the specific wording of each piece of legislation when developing its recommendations for a Model Law for all of Canada.

Listserve

[20] The Committee has followed a process of information gathering and consultation with the legal community, the public sector and the private sector. A dedicated listserve has been established for the dissemination of information by the Committee, and for the solicitation of comments and input from interested parties. To participate in the listserve an interested party

must send an email message to maiser@www.bcli.org and in the body of the message must type: "subscribe cls-franchise".

To start sending messages to members of the group, an email must be sent to cls-franchise@www.bcli.org and everyone on the listserve will receive a copy.

[21] The Committee has used its dedicated listserve as a means of submitting proposals to and asking questions of the subscribers on various issues throughout its deliberations. Input has been sought from subscribers to the listserve on the following topics:

(a) any issues relevant to the franchise relationship and proposed legislation;

(b) the definition of "franchise", including possible exemptions from the application of the Act and possible exemptions from the disclosure requirements;

(c) regulation and self-regulation;

(d) the treatment to be given to wholesale supply relationships; and

(e) dispute resolution.

[22] A number of private law practitioners having experience in franchising have responded, and several industry associations have made suggestions to the Committee on an on-going basis. In addition, several independent franchise companies have made submissions with respect to issues specifically affecting their business operations.

Meetings

[23] The Committee has engaged in regular meetings, usually held on a monthly basis, by both conference telephone and personal attendance. Except as otherwise noted, the following meetings have been held by conference telephone call: May 22, 2002, June 19, 2002, September 23, 2002 (in person, Toronto), November 7, 2002, January 28, 2003, February 28, 2003 (in person, Vancouver), March 31, 2003, April 23, 2003 (in person, Toronto), May 8, 2003 and June 18, 2003 (in person, Montreal).

ULCC 2002 Report

[24] The Committee prepared its first report to the ULCC on July 26, 2002 and the Co-Chairs made a presentation to the ULCC Annual Meeting in Yellowknife, NWT on August 21, 2002. The ULCC passed a resolution endorsing the work of the Committee and directing it to continue the project.

Research Projects

[25] In order to provide a proper framework for several issues of importance to the Committee, and to understand both the national and international landscape of franchise legislation, several research projects have been undertaken by the Committee. The papers published for the Committee in connection with these projects are available to the ULCC on request, but have not been included in this report due to their length.

[26] The first research project undertaken by the Committee was the preparation of a summary of international franchise laws, prepared by a summer student at Osler, Hoskin & Harcourt LLP in the summer of 2002.

[27] The second research project undertaken by the Committee was the compilation of comparative legislation including side-by-side analyses of the Ontario *Arthur Wishart Act*, the Alberta *Franchises Act*, the *1985 Uniform Franchises Act* proposed by the ULCC, the Unidroit Draft Model Franchise Disclosure Law proclaimed in 2002 ("Unidroit") and the FTC Rule. This research project was undertaken by two articling students at Osler, Hoskin & Harcourt LLP. The comparison chart also included a comparison of disclosure regulations.

Subsequently, a sixth column dealing with the Civil Code of Quebec was prepared and added to the compilation by one of the Committee members, François Alepin.

The comparative legislation chart was amended to extract the Ontario franchise legislation in to a running draft from which a working Model Act could be prepared for the Committee's project work. This running draft consists of four columns, namely the current *Arthur Wishart Act*, amendments proposed to the *Arthur Wishart Act*, a working Model Act and comments. The

running draft will eventually be transformed into the proposed Model Act of the Committee. The working draft is being maintained by one of the Committee's Co-Chairs, John Sotos.

[28] Another research project undertaken by the Committee, largely at the instance of the Canadian Franchise Association, was a project to review franchise law decisions in Canadian courts during the years 2001 through 2003, based on a survey of decisions reported in on-line data bases. These decisions were categorized under some 40 headings. The research also categorized the same decisions by jurisdiction and year, and by Alberta and Ontario franchise legislation. Summaries of the case reviews were prepared by issue, by parties, by date and by jurisdiction. This work was undertaken by Committee member Leonard Polsky of Gowling Lafleur Henderson LLP in Vancouver, British Columbia.

[29] The final research project of the Committee to date involved the preparation of a paper with respect to the framework for the creation of a dispute resolution mechanism in a Uniform Franchises Act. This paper was prepared by Committee member Bruce Macallum, with the assistance of Avneet Sidhu, an articling student with the Ministry of the Attorney General for the Province of British Columbia.

[30] In addition to these research projects, Committee members prepared background papers on various topics under discussion. These papers included:

(a) "Some Considerations Regarding the Judicial and Non-Judicial Resolution of Franchisor/Franchisee Disputes" prepared by Jean Gagnon;

(b) "Some Particular Considerations Concerning the Province of Quebec" prepared by Jean Gagnon;

(c) "Summary of Discussion of Directors and Officers Liability under the Uniform Franchise Act" prepared by Bruce Macallum; and

(d) "Towards a Framework for the Creation of a Dispute Resolution Mechanism in the Uniform Franchise Act" prepared by Bruce Macallum and Avneet Sidhu (articling student with the British Columbia Ministry of the Attorney General).

Policy Discussions

[31] In order to establish of a proper framework for recommended legislation, it was necessary for the Committee to engage in a number of initial policy discussions. One of the initial discussion papers considered by the Committee was a paper on why there is a need to regulate franchising in Canada. This discussion paper considered the policy reasons why the current legislation in Alberta and Ontario does not provide for a direct government oversight as a method of regulation.

[32] A second policy discussion involved input from Quebec Government representatives of the ULCC with respect to the position of the Province of Quebec in connection with possible uniform Canadian franchise legislation. By letter dated November 6, 2002, Jean-Pierre Bergeron of the Quebec Government officially indicated to the Committee that Quebec would not actively participate in the project. The issue of franchise legislation had been discussed prior to the introduction of the new Civil Code adopted in 1994 and, as a matter of policy, it was determined not to pursue franchise legislation as the new Code would deal adequately, under new substantive law, with most of the issues arising in the course of a franchisor-franchisee relationship.

[33] A Policy Paper considered at the September 23, 2002 meeting outlined the theory and practice of regulation. It was noted that the political trend throughout Canada was for less active government involvement in regulation. It was suggested that the self-regulation mechanism might be appropriate when dealing with relationship laws and good faith requirements. The concept of "responsive regulation" was discussed and it was noted that such an approach could involve the development of laws with the input of the franchisors and franchisees, and possibly the representatives of public interest groups. It was suggested that while the Committee should seek to achieve its goals without invoking government apparatus, the importance of identifying public interest elements in franchise legislation must be considered.

The merits of self regulation were also discussed by the Committee at the meeting held on September 23, 2002. The Committee determined that there was no body capable of performing the role of an ombudsman in franchise disputes, and no body should be referred to in the

legislation itself. It was pointed out, however, that there was no reason to completely close the door to industry self-regulation involving the Canadian Franchise Association in some form.

[34] Discussion was entertained on whether there should be a private central depository to receive disclosure documents, and if so whether records would be available to the public. Such a depository, it was submitted, could provide useful statistics on the industry. It was decided to defer this issue and to deal with it in a future submission, although it could be raised on the listserve for discussion.

[35] Statistics Canada materials on retail (including franchise) operations in Canada were ordered and tabled by the National Coordinator of the ULCC. However, since these statistics lumped retail with franchise operations in Canada, they were not considered helpful to the Committee's deliberations.

Consultations and Submissions

[36] Consultation meetings, presentations, discussions and exchange of correspondence occurred between the National Coordinator of the Commercial Law Strategy of the ULCC and representatives of various industry and trade associations. These include the Canadian Franchise Association, Canadian Federation of Independent Grocers, the Canadian Vehicle Manufacturers Association, the Committee for Fair Franchise Dealing for the Province of Prince Edward Island, Association of International Automobile Manufacturers of Canada, Canadian Automobile Dealers Association, Retail Council of Canada, Conseil québecois du commerce de détail, American Franchisee Association, International Automobile Dealers Association, Toronto Automobile Dealers Association, Canadian Association of Franchise Operators and the Used Car Dealers Association.

[37] Written submissions have been received by a number of industry and trade associations with respect to both the policy framework for the proposed legislation, as well as specific issues involving financial disclosure and the application of franchise legislation to industry sectors in general. A submission was received from the International Franchise Association urging that the proposed legislation follow the format of the disclosure legislation currently in force in the Provinces of Alberta and Ontario, and that accommodations be included in the legislation for the

use of a UFOC prepared by United States based franchisors in accordance with U.S. franchise laws (see paragraph [18] above).

Directors and Officers Liability

[38] The discussion with respect to franchisor liability under the proposed legislation involved an overall consideration of the possibility of introducing directors and/or officers liability. Committee member Bruce Macallum arranged for a presentation to be made by Professor Janis Sarra of the University of British Columbia Law School on this subject. A summary of Professor Sarra's comments and the group discussion has been prepared and is attached to the minutes of the May 28, 2003 Committee meeting and is available to the ULCC on request.

[39] As noted above, the general format of policy discussions involves consideration of issues requiring departure from the current Ontario and Alberta statutes, and consideration of issues not included in the Alberta and Ontario Acts. For example, consideration of relationship issues including renewals, terminations, transfers, advertising funds and rebate disclosure will be undertaken by the Committee in the near future, although none of these particular items is separately dealt with in the legislation currently in force in the provinces of Ontario or Alberta. While the Committee does not feel that it must accept as a model statute the framework established by the Alberta and the Ontario statutes, there is a clear understanding, however, that acceptability of the Model Act will require a close analysis of these two pieces of legislation with departures and additions only being proposed when there appears to be necessary reason on either a policy or drafting basis. Further, the Committee will be able to take into account several years of practical experience gained in dealing with these two statutes in order to avoid or modify those provisions which have proven to be impractical or difficult to interpret.

Format of Proposed Legislation

[40] As noted above (see paragraph [27]), a running draft of proposed legislation is being maintained by the Committee. Draft notes and comments are being maintained opposite different provisions of the legislation for back tracking and future review, and ultimately for preparation of textual explanation as to the reasons for recommendations in various areas of the proposed legislation.

[41] The running draft adopts as its model current Ontario legislation with changes, additions, modifications and deletions as considered necessary or appropriate by the Committee. This procedure allows the Committee to take into consideration the fact that there is existing franchise legislation currently in force in Ontario and Alberta, while at the same time allows the Committee to draft a Model Act which improves upon the existing legislation.

[42] No work has yet been undertaken except by way of anecdotal reference with respect to the contents of a disclosure document which is generally dealt with in Alberta and Ontario by way of regulation. As noted, issues are generally being considered by way of discussion involving the inclusion of specific statutory provisions. For example, policy issues with respect to the inclusion of a duty of fair dealing and the right of franchisees to associate were considered during the discussions concerning these matters in the context of the existing legislation and legislative drafting recommendations.

Quebec

[43] As noted above (see paragraph [32]), the Province of Quebec, through Jean-Pierre Bergeron, has notified the Committee that it will not be participating in the Committee as it believes that the issues concerning franchise law are addressed in the 1994 Civil Code and specific legislation is not necessary. However, Quebec does have a particular interest in ideas for dispute resolution in view of the upcoming reform of civil procedure in the province. The ULCC government representatives will monitor the Committee's work and will co-ordinate Quebec's comments via Committee members Jean Gagnon and François Alepin.

Industry Groups

[44] As noted above, industry groups have provided specific input on various issues affecting the Committee's deliberations. Such input has been made by way of written representation by the International Franchise Association, the Canadian Vehicle Manufacturers Association, the Canadian Automobile Dealers Association, the Association of International Automobile Manufacturers of Canada, representatives of specific franchise systems and a number of lawyers practicing in the franchise area. Representations have also been made through formal meetings and discussions with the National Coordinator of the Commercial Law Strategy of the ULCC Hélène Yaremko-Jarvis. (See paragraph [36] above).

Dispute Resolution and Alternate Methods of Dispute Resolution

[45] As a result of submissions made early in the policy discussions of the Committee, and research results obtained through the research undertaken by the Committee with respect to an analysis of franchise case law decisions in the years 2001-2003, it has been determined that the Committee should consider the possibility of including in the proposed legislation a dispute resolution mechanism or framework. The initial policy paper and discussion concerning this topic was addressed at the June 18, 2003 meeting of the Committee held in person in Montreal, Quebec. The Committee reached a preliminary consensus that the Act should address the question of alternate dispute resolution in some manner, and that further consideration should be given to the possible inclusion of a party-initiated mandatory mediation process.

Further Work of the Committee

[46] The Committee has prepared a proposed timetable and agenda for future discussion of various topics under consideration. The Committee will recess for the summer months of July and August, and will reconvene in September, 2003 to continue on its proposed timetable to consider and discuss various topics. While the Committee would like to have its final report prepared for consideration by the ULCC at its summer 2004 meeting, the Committee members recognize that such a timetable is ambitious given the extensive drafting which will be necessary for finalization of the proposed legislation and, in particular, the regulation dealing with disclosure.

Current Status Report

[47] A status report summarizing the Committee's current recommendations, outstanding issues and background deliberations on the Model Act is attached as Schedule A.

Next Steps

[48] The Committee will continue to seek input from all stakeholders on a going forward basis. The Committee will continue to meet regularly in order to proceed with this project.

SCHEDULE A

CURRENT MODEL ACT STATUS REPORT

Franchise

[1] There was a general philosophical discussion of whether to take an inclusive or exclusive approach to formulating the definition of a "franchise". It was pointed out that because the statute deals not only with disclosure but also conduct during the life of the contract, the Model Act should contain an inclusive definition so as to make a wide range of relationships subject to requirements such as fair dealing but then also exempt some kinds (e.g., business opportunities or multi-level marketing) from the disclosure requirements. The exemptions could be based on the value of the opportunity or franchise, although it was pointed out that the smallest deals might be the ones involving people most in need of protection. One concern with the inclusive approach was that the public might be confused as to what a franchise is if too many other relationships are covered. It was suggested that a list could be made of all the possible relationships that could be covered but it was decided that a functional test based on the level of control was preferable as a definition rather than relying on what the parties chose to call the relationship or themselves. The element of control was seen as common to all of the definitions, but some add references to trade-marks, and Ontario includes the "franchisor's associate". It was generally agreed an inclusive general definition (including business opportunities and the like) with precisely worded exemptions from the disclosure requirements was the preferred approach. The traditional core of "significant and continuing operational control" should be the basis of the definition in order to minimize confusion in the business community. Also, as an anti-avoidance measure the definition should cover the concept of a franchisor's associate. As a result, the Ontario definition was adopted.

Franchise System

[2] The existing Ontario wording was adopted without change because it is comprehensive.

Franchisor's Associate

[3] It was suggested that the CBCA or ITA could provide a definition of "associate", and it was pointed out that the 1985 ULCC Act contains a detailed definition. Ultimately, the Ontario definition was adopted as being consistent with the purposes of the Model Act.

Material Fact

[4] Members discussed the need to balance the goal of making available all relevant information to the franchisee while making the requirement sufficiently clear and finite so that a franchisor can determine its obligations with certainty. This arose in debating the use of "means" versus "includes" as the first verb in the definition. "Means" was preferred since the definition includes "any other material fact" and therefore is already very expansive. There was concern that too broad a definition was inappropriate since the franchisor will be in an advantageous position only with regard to information about itself and not the world in general. On the other hand, Committee members wanted to be sure that the definition includes information that may not be strictly about the franchisor but that would still be very 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). It was decided that the words "franchise or" should be added before the words "franchise system" in the definition to cover this type of scenario. It was also decided that the terms "grant and acquire" should generally be used throughout the model act rather than "purchase and sale".

Material change

[5] It was agreed that the definition of "material change" should be amended reflect the change made to the definition of "material fact" by the substitution of the word "means" for "including" and the addition of the words "in the franchise or". Also, the reference to "prescribed change" was deleted in the interests of uniformity in all jurisdictions. Except for the changes to the Ontario definitions referred to above, the balance of the definitions in the Ontario statute were adopted without change.

Application of Legislation and Exemptions

[6] The Committee considered the various wordings relating to "application" contained in Ontario section 2, Alberta section 3, 1985 ULCC draft section 10 and Unidroit article 1(1) and article 9. The consensus was that the Ontario section 2 language is more expansive and inclusive and that it is preferable to the other language. There were two specific differences discussed in the comparison of the Alberta and Ontario provisions, namely:

- the Alberta Act refers to application to the "sale of a franchise" while the Ontario language refers generally to a "franchise agreement"; and

- the Alberta section contains a requirement that the franchisee be an Alberta resident or permanent establishment in Alberta in addition to the franchise business being operated partly or wholly in Alberta while the Ontario definition does not have the residency requirement.

[7] The consensus of the Committee was that the application of the Model Act should be broader and that there not be a residency requirement. There was a suggestion that the Ontario language should be changed so that it applies with respect to a "franchise" entered into rather than a "franchise agreement" entered into. After looking at the definition of franchise, the consensus was that the wording should not be changed.

[8] There was also some discussion as to whether the exemption contained in section 2(3)(7) of the Ontario Act, which exempts relationships or arrangements arising out of an oral agreement from the application of the Act left a gap whereby if a potential purchaser paid a deposit without receiving any disclosure, the Act might not apply so as to give its remedies to that purchaser. It was felt that the exemption in section 2(3)(7) was restrictive enough in that it went on to further say that it must be an "oral agreement where there is no writing which evidences any material term or aspect of a relationship or arrangement". There was discussion as to whether or not business terms written on a napkin or a cheque, by way of example, which said "deposit for franchise" would be sufficient to negate the availability of the exemption. The consensus was that they would.

[9] The Committee also considered the issue of retroactive application of certain provisions of the Model Act. The consensus was that the following provisions should be retroactively applicable to franchise agreements which were entered into before the coming into force of the legislation:

(a) fair dealing;

(b) provisions giving franchisees the right to associate;

(c) the provision indicating that the statutory rights are in addition to and not in substitution for other existing rights and remedies;

(d) the provision that any waiver or attempted waiver of the provisions of the legislation is unenforceable;

(e) the burden of proof resting upon the party asserting an exemption;

(f) forum and choice of law. There was considerable discussion as to whether the statutory interference with contractual provisions relating to forum and choice of law should apply retroactively. The Committee appreciated that there would be some conflict of law issues but those would arise whether or not the legislation was retroactive or only prospective. There was some discussion as to whether or not the limiting of choice of law and forum would impact international treaties relating to reciprocal enforcement of judgments. It was decided that those items would be left for discussion when specific provisions relating to choice of law and forum were addressed by the Committee. It was also mentioned that if a foreign jurisdiction choice of law were to override the application of the domestic statute then the application of the other protective clauses in the Act such as fair dealing might also be excluded. It was also felt that there should be transitional provisions relating to proceedings which were commenced before the legislation comes into force;

(g) arbitration and mediation provisions (if the Committee decides to recommend that these be included then they ought also to apply retroactively);

(h) industry self government (if the Committee determines in the future to recommend self government, then such provisions should also apply retroactively);

(i) the Committee also considered whether or not the provision which allows for the promulgation of ministerial regulations should be included as a section which applies retroactively. The consensus was that it should not. Part of the objective of this project is to have the Model Act whose uniformity cannot be undermined by the proliferation of regulations.

[10] The Committee next considered the issue of exclusions of certain types of relationships from the application of the legislation. It was noted that Alberta has no such section. The provisions of section 2(3) of the Ontario Act were acceptable to the Committee with the following discussion:

(a) General Language - the question was raised as to whether the relationships that are excluded could be used to circumvent the application of the Act such as an employer/employee relationship that is used to mask what is in substance a franchise agreement. There was some discussion as to whether or not the opening language of section 2(3) of the Ontario Act should be changed to read as follows:

> "2(3) This Act does not apply to the following continuing commercial relationships or arrangements *that are not otherwise a franchise agreement*" (additional language is in italics).

It was felt that that might create more problems than it would solve and that if a relationship was in fact and in substance a franchise relationship the courts would sort that out. It was also pointed out that the burden of proof language that is contained in the Ontario Act would also place the burden on the person asserting that the relationship is exempt.

(b) Service Marks. There was also a consensus that references to service marks in the legislation should be deleted as the term is not applicable Canadian terminology.

(c) Membership in a co-operative association. Membership in a co-operative association was agreed to be an exempted relationship. Next, relating to the same section, the Committee considered how a "co-operative association" would be defined rather than "as prescribed" so that it works in all provincial and territorial jurisdictions without reference to regulations to promote uniformity. It was decided that this would be an issue to be dealt with by the legislative draftspersons who could consider the various statutory definitions across Canada and perhaps look at the definition of what qualifies as a co-operative association in Canadian federal legislation or in any national association of co-operative associations. The legislative drafter should provide appropriate and specific language but not allow for "as prescribed" generic language.

(d) The single license of a specific trade-mark. The exemption relating to a single license of a specific trade-mark, which is the only one of its general nature and type, generated a lot of discussion. The consensus was that this exclusion, if it was to remain, would need to be clarified as to what it intends to capture so that it is meaningful in the context of the Model Act that is to be enacted in multiple jurisdictions. It was thought by some that the section intended to cover a relationship where an owner of a trade-mark granted one license in a jurisdiction to manufacture items using that trade-mark. It was generally thought that this was not to be an exemption of franchisors who only have one franchisee in a jurisdiction. Even if it were, however, there would still be the confusion as to whether this would be one franchise per province or jurisdiction or one national. Examples were pointed out such as where a designer licenses the use of its trade-mark to a manufacturer in Canada (e.g., Ralph Lauren licensing a manufacturer of blue jeans in Canada). The Committee has not reached a decision on this issue.

(e) Oral agreements. The consensus was that this definition was narrow enough with the qualifying language "where there is no writing which evidences any material term or aspect of the relationship or arrangement" to suffice.

(f) Crown or an agent of the Crown Exclusion. Re exclusion #8 – if the Crown is in a business relationship acting like a private sector franchisor why shouldn't it be subject to the legislation? We deliberately did not include item #8 (i.e., the Crown exemption) but the Committee will consider an exemption, in whole or in part, from disclosure requirements including financial disclosure when looking at the regulations. Except for the provinces of British Columbia and Prince Edward Island which are the only provinces that have legislation reversing the rule that provincial statutes do not bind the Crown so in all other jurisdictions, the general rule that provincial statutes do not bind the Crown continues to apply.

(g) Further Exclusions. The Committee then went on to consider further potential exclusions and started with the exclusion of the pure wholesale arrangement that was contemplated in the exclusion from the definition of "franchise fee" in the Alberta legislation. The exclusions were the agreement to buy a reasonable amount at a bona fide wholesale cost with similar provision with respect to an agreement to buy services in a reasonable amount at a reasonable cost. It was pointed out that this does not have application in the Ontario legislation because there is no definition of franchise fee or a specific requirement of a franchise fee in the definition of a "franchise" in the Ontario Act. There was no objection in principle to pure wholesale relationships being excluded but it was to be noted that this issue has to be addressed in the context of the overall definition of a franchise and a franchise agreement. It was pointed out that a wholesale arrangement without the continuing significant operating controls would not fall within the definition of a "franchise" as contemplated above.

(h) Specific Relationships. There was concern expressed about the opening language of section 2(3) of the Ontario Act which lists certain continuing commercial relationships or arrangements as being exempt from the Ontario Act such as employer/employee relationships, partnerships, etc. The concern which had been raised at the prior meeting was that the list could be abused by people structuring relationships so that they are characterized and have elements of the excluded relationships but still are in their essence franchises. Some members thought that

there should not be any qualifying language so that there would be commercial certainty and that the courts could exercise judgment as to whether the relationships were, in essence, franchises. It was pointed out that a relationship could have both the elements of an employee/employer relationship while still being a franchise. The Committee discussed whether or not to use the words "that are not otherwise a franchise agreement" versus the words "created solely" and the consensus was if qualifying language is to be included the words "created solely" were preferable as used in the FTC Rule because it then requires more of a purpose test.

Exemption from Franchisor's Obligation to Disclose

[11] The Committee examined the opening language of section 5(7) of Ontario, section 5(1) of Alberta, article 5 of Unidroit and section 436.2(a) of the FTC Rule and decided that, as there was no substantive difference, the Ontario version could be adopted. There was a discussion as to whether to use the word "grant" as is used in the Ontario legislation or the word "sale" as was used in the Alberta legislation. It was concluded that in some cases it should be "grant or sale", the connotation being that the word "grant" could include a grant or sale by a franchisor to a franchisee but would not include a resale by a franchisee to a third party and that typically master franchises are granted rather than sold.

[12] The Committee then considered whether or not the exemption from disclosure should apply to a grant or sale to a person who has been an officer or a director for at least six months. The discussion centered on 3 areas:

(a) Firstly, does an officer or director have the information necessary to make an informed decision? The conclusion was that if somebody was going to be put into the position of director or officer in most cases they would have the appropriate "inside" information. Also, it was noted that this is not an exemption from the entire Act but just from the disclosure requirement.

(b) Secondly, there was some concern that the question as to who is an "officer". It was noted that the Alberta Act had a definition of "officer" but in the Ontario Act

there was no definition. In the absence of a definition in the Ontario Act people are referring to the definition contained in the *Business Corporations Act* of Ontario.

(c) Thirdly, it was felt that there should be a clarification that the 6 month period should have some proximity to the time at which the franchise is granted so that there should be words of clarification inserted. The Committee adopted the Ontario wording but changed it so that the six month period is "immediately before the grant of the franchise."

Additional Franchise

[13] The Committee then considered the exclusion of the grant of an additional franchise to an existing franchisee. The consensus was that the Ontario wording, which included a reference not only to the franchise being substantially the same as the existing franchise but also having a test as to whether or not there has been a material change since the existing franchise agreement or latest renewal. The consensus was that the Ontario wording was more appropriate given the purpose of the legislation so as to enable people to make informed decisions. It was also agreed that there is no need to include the words "or sale" as this applies to a grant by a franchisor to a franchisee and not a resale."

Executors, etc.

[14] The Committee then considered whether or not the exclusion of executors, administrators, sheriffs, receivers, trustees in bankruptcy or guardians from the obligation to disclose. The consensus was that there was a good reason with the addition of the words "grant" or "sale" that these persons are not in a position to provide disclosure even though they have to dispose of the franchise as an asset.

Fractional Franchise

[15] The Committee then considered the fractional franchise exemption that is contained in the various Acts. It was decided that rather than having a prescribed percentage to include the

20% in the section to promote uniformity. That is the same amount that is prescribed for in each of Alberta, Ontario and Unidroit.

[16] The Committee also specifically discussed whether or not to include the words "as anticipated by the parties" or "that should be anticipated by the parties". It was considered whether or not there should be a requirement of the parties "acting reasonably". The consensus was that this would make the test more subjective and the way that the wording reads allows for participation of the franchisee in the determination and that this subject could be dealt with by representations and warranties in the agreement or a certificate signed by the parties. The wording "that should be anticipated by the parties" is sufficient to prevent abuses. There was also a grammatical change proposed to use the word "will" rather than "do" in the phrase "is entered into do not exceed in relation to a total sales of the business . . . ". It was also pointed out that the percentage could actually fluctuate and that it is only appropriate to have the anticipation relate to a specified period of time. The consensus was that the section should have added to the end of it the words "during the first year of the operation of the franchise within the business".

Renewal or Extension

[17] The Committee then considered the exemption of a renewal or extension of a franchise and compared the wording of the relevant sections in Ontario, Alberta and Unidroit. The consensus was that given the purpose of the legislation that the Ontario wording should be included. It was noted that in practical terms, most franchise agreements are not exactly the same on renewal and that if there has been a material change, a franchisee ought to know about it prior to committing for a further period of time.

Minimum Investment

[18] The Committee next considered the exemption of a grant of a franchise if the franchisee required to make a total investment of less than a prescribed amount. The Committee felt that it would be very difficult for anyone to fit into the category of requiring to make a total annual investment to acquire and operate of less than a $1000. The Committee considered what type of franchise this would apply to if any employees were involved or if there needed to be any purchase or contribution of a vehicle or any of such other matters. The Committee felt that there

could be a place for such a small investment exemption and that it should be left as a "prescribed amount" to account for inflation and economic differences in different jurisdictions across Canada even though it may lead to inconsistencies between provincial legislation.

[19] There was some discussion as to whether or not this exemption was conjunctive with the requirement that the franchise not be valid for longer than one year which is contained in (ii) of the Ontario section. It was pointed out that the use of the term "or" after (ii) made it clear that these were separate exemptions.

[20] The Committee considered the "less than one year term" exemption from disclosure and felt that coupled with the requirement that there not be payment of a non refundable franchise fee it was appropriate. There was discussion as to whether a one year agreement with renewals or extensions could be used to circumvent disclosure and there was some concern that even without a non refundable franchise fee, a franchisee could be investing lots of money and then get cut off after a year. It was pointed out that the example of the type of arrangement to which this exemption would apply was the vending machine/business opportunity type of arrangement so that the qualifying wording could be added to this less than one year exemption so that it is limited to those types of situations. The consensus was that this exemption was to handle the vending machine business opportunity and that it should be left in but that it should be further qualified with wording similar to that used in 1(1)(b)(ii) of the Ontario Act. At the end the following words are to be added:

> " . . .and 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."

Multi-level Marketing

[21] The Committee then considered whether or not the exemption relating to multi-level marketing should be contained in the proposed uniform law. This is the exemption that deals

with situations covered by section 55 of the ***Competition Act***. The consensus was that it should remain in.

Large Dollar Franchise Exemption

[22] The Committee then considered the exemption from disclosure of franchises where the investment required over a prescribed period of time is greater than a prescribed amount. This is what the Committee referred to as the "large dollar franchise exemption". There was extensive discussion but the Committee could not come up with a good policy reason to include it. The theory behind that kind of an exclusion from disclosure is a presumption that somebody investing large dollar amounts would be sophisticated and would have access to appropriate professional and business advice. It was pointed out that there are often investors in franchises such as hotels or car dealerships or car rental agencies who, although they may have the capital, do not have the sophistication. The Committee also looked at the Unidroit legislation which used the words "commits to a total financial requirement under the franchise agreement" as opposed to "the franchisee is investing in the acquisition and operation of the franchise over a prescribed period". The consensus of the Committee was that this exemption should not be included in the Model Act but that there was to be a note that if it were retained, instead of the use of the word "investing" to use the words "commits to a total financial requirement in the acquisition and operation of the franchise over a prescribed period an amount greater than a prescribed amount". The Committee felt that if it were to be left in, it should also leave in the reference to prescribed amounts to account for inflation as well as provincial and territorial differences in costs for set up.

Retail Establishment Exemption

[23] The Committee then considered the exemption contained in section 5(1)(g) of the Alberta Act. There was considerable discussion as to why this exemption was included in Alberta. The Committee was aware that it was intended to cover situations such as department store lease/license arrangements. The Committee discussed how these arrangements could vary from being simple leases of space to being items such as a coffee franchise occupying part of another establishment. It was recognized simple lease arrangements should not be included but that those would not necessarily fall within the definition of a franchise as the legislation was going

to contemplate. In the examples of a jewelry repair shop or shoe repair shop, there may be requirements that would bring it within the definition of a franchise. These included a requirement to pay a percentage of sales, a requirement to acquire supplies such as bags and stationery and a requirement to use the name of the department store and comply with its hours of operations and the types of display. It was felt that where there were significant operating controls, the disclosure requirement should apply. It was also pointed out that the way this section is worded it might operate so as to exclude a franchisor (such as a coffee shop franchisor) from complying with the franchise disclosure requirements even thought the intent of the exemption was to exempt the department store operator which is hosting the franchise rather than the franchisor. There was also reference made to the case of 3664902 Canada Inc. v. Hudson's Bay, [2002] C.C.S. 3122, [2002] O.J. 7 (Ontario Superior Court of Justice) regarding a furrier arrangement. It was decided that it should not be included, but that if it were to be included, it should be reworded to read as follows:

> "(g) The grant or sale by the operator of a retail establishment of a right to a person to sell goods or services within or adjacent to the retail establishment as a department or division of the establishment, if the person is not required to purchase goods or services from the operator of the retail establishment;"

[24] There was still some dissatisfaction with the wording but it was felt that this slight rewording would eliminate the potential exemption of a true franchise by a franchisor who has space in a department store to a franchisee (such as the coffee franchise example mentioned above). It was noted that the exemption referred to in Alberta section 5(1)(h) is the fractional franchise exemption which is dealt with above using the equivalent section 5(7)(e).

Resale Exemption Clarification

[25] The Committee then considered section 5(8) of the Ontario Act and section 5(2) of the Alberta Act which define some circumstances in which a grant is not "effected by or through a franchisor". For consistency and because a sale is usually a resale by an existing franchisee, the words "grant or sale" should be used instead of just the words "grant" as in the Ontario Act or just the word "sale" in the Alberta Act.

[26] It was the consensus of the Committee that the wording of section 5(8)(a) of the Ontario Act was preferable in the way that it used the words "exercisable on reasonable grounds" as opposed to a "reasonable right".

[27] The wording of section 5(8)(b) of Ontario was preferred over section 5(2)(b) because Alberta uses the words "specific amount of which is established in the franchise agreement" while Ontario uses the words "an amount set out in the franchise agreement". It was noted that many franchise agreements use a provision where the amount of the transfer fee is part of a formula such as "the greater of $_____ or fifty percent (50%) of the then current franchise fee" so that the amount is ascertainable even though it is not specified.

Non-delivery of a Disclosure Document

[28] The Committee compared sections 6(1) of the Ontario Act to section 13 of the Alberta Act and section 9(1)(a) of Unidroit – there was considerable discussion about the difference between Ontario and Alberta. It was noted that the Ontario section allows for rescission where no disclosure document is given or if the contents of the disclosure document did not meet the requirements of section 5 while the Alberta section only applies where no disclosure document is given. One concern that was raised was that the 60 days from receiving a non-conforming disclosure document in Ontario is not of much use because the franchisee would in many cases not discover the problems with the disclosure document (i.e. any misrepresentation) until well after the 60 days had gone by. The franchisee's remedy after that would be to take action for misrepresentations. It was suggested that maybe the 60 day period ought to be longer. The consensus was that the purpose of this section was to provide a summary remedy and that there was still the summary remedy available in Ontario if the problem with the disclosure document (i.e. the non-compliance with section 5) were discovered within the 60 days and that that was still broader than the Alberta section. And accordingly, section 6(1) was preferred over section 13 of the Alberta Act.

[29] There was discussion as to whether the absolute compliance required by the Ontario legislation without a saving provision like Alberta's provision which states that where a disclosure document is substantially complete, is preferable. The consensus was that the "substantially complete" saving provision in the Alberta legislation muddies the clarity of the

self-policing nature of the legislation – i.e., that it is up to the franchisor to do it right (that is, disclose properly). In some circumstances, a document could be substantially complete but would not comply with the Ontario requirement that the document be clear and concise

[30] The Committee then considered section 6(2) of the Ontario Act as compared to section 13(b) of the Alberta Act and section 9(2) of the ULCC – all of the jurisdictions provided for a rescission remedy for 2 years if no disclosure document was provided. There was discussion about the inconsistency between 6(2) of the Ontario Act which uses the words "if the franchisor never provided the disclosure document" (which seems to preclude the situation where a disclosure document was provided although it did not meet the requirements of section 5). There was concern as to at what point does a non-complying disclosure document amount to no disclosure document at all. As an example, would the writing of some disclosure items onto a napkin constitute a disclosure document that did not meet the requirements of section 5? It was suggested that the wording could be improved by changing the word "the" to the word "a" so that the last 3 lines would read as follows:

> " . . . entering into the franchise agreement if the franchisor never provided a disclosure document."

Limitation Period

[31] This also is more consistent with distinguishing section 6(1) from section 6(2). The result would be to make it clearer that improper or partial disclosure does not necessarily give rise to a 2 year time period and it would be left to the courts to determine where a disclosure document is so flawed that it is no disclosure document at all. The Committee also considered whether to use the words "2 years after the franchise is granted" as is used in Alberta versus the words "no later than 2 years after entering into the franchise agreement". The consensus was that the Ontario wording was more certain except for changing "the disclosure document" to "a disclosure document". Finally, the Committee will consider the adoption of a "uniform franchise disclosure document."

Notice of Rescission

[32] The Committee then considered sections 6(3) and 6(4) and 6(5) of the Ontario Act which include specific ways of giving a notice of rescission and deemed times of receipt as preferable for certainty and that e-mail could be included at some point in the future because of the use of the words "by any other prescribed method". The Committee did discuss section 6(5) which referred to a "holiday" and it was pointed out that it could be a holiday in one jurisdiction but not in another jurisdiction. The Committee decided to leave the section as is.

[33] The Committee then considered section 6(6) of the Ontario Act and section 14(2) of the Alberta Act and firstly considered whether or not it was preferable to have the time for compensating a franchisee who had rescinded at 60 days as in the Ontario legislation or 30 days as in the Alberta legislation. The Committee discussed the potential rationale for the longer time period as being an opportunity to allow for proper calculation of quantum of losses. One suggestion was that there should be one time limit for compensating the franchisee with respect to easily ascertainable items such as a refund of monies received, refund of purchase price of equipment and inventory and a separate time limit for compensation for other damages. The consensus was that that would be inappropriate as in practice quantum was almost always going to be an issue and that extending the number of days to 60 days for a franchisor to respond was just going to create a greater time limit on what is supposed to be a summary remedy.

Amounts to be Refunded

[34] The Committee agreed that the wording of the Ontario Act which was more specific than the Alberta Act was preferable in terms of defining the amounts to be refunded and then having a separate section for other losses versus the Alberta Act would just provide for compensation for "net losses".

Remedies for Failure to Disclose

[35] The Committee reviewed section 7(1) of the Ontario Act in comparison to section 9(1) of the Alberta Act and also noted the comparable FTC Rule and Unidroit provisions. The conclusion was that the opening language of the Ontario Act was more comprehensive and also

closes a loophole of avoidance of liability by not providing a disclosure document or no one signing the disclosure document. It also includes reference to the statements of material change.

Liability

[36] The Committee then considered who should be personally liable for losses suffered because of a misrepresentation in the disclosure document. There was a consensus that the franchisor and every person who signs the disclosure document or statement of material change should be liable.

Broker

[37] The Committee then considered whether a franchisor's broker should be liable. The consensus was that the term "broker" as defined in section 7(1) made it clear that the broker was somebody who was independent of the franchisor. The Committee considered the question as to whether a broker should be liable for misrepresentations contained in the disclosure document or statement of material change or only for misrepresentations of the broker. It was noted that this section only refers to liability for losses because of misrepresentations contained in the disclosure document or in the statement of material change. Therefore, since the franchisor is the one that prepares the disclosure document, why should the broker be liable for anything contained in the disclosure document? It was pointed out that sometimes a broker prepares or assists in the preparation of the disclosure document. It was decided that brokers ought to be left in as being liable but that there should be defences to liability in a later section where the broker has exercised due diligence.

[38] As a side issue, the questions were raised as to: whether or not the fact that a broker is involved is a material fact which should be disclosed in the disclosure document? And, if so, should there be disclosure required about a broker in the disclosure document? The Committee decided that there should be consideration in the regulations as to whether those items should be included as mandatory disclosure items.

[39] The Committee then considered the definition of "broker" which is contained in 7(1)(c) of the Ontario Act. The consensus was that this definition should be moved to the definition

section of the Model Act and that it should be modified slightly so that mere advertisers or hosts of websites would not be considered to be the franchisor's broker.

Franchisor's Agent

[40] The Committee then considered whether 7(1)(b) of the Ontario section which made the "franchisor's agent" liable for a misrepresentation should be included. The Committee considered the question as to why it was included in the Ontario Act and who it was intended to catch. The Committee considered who, other than a broker, would be an agent and felt that the term "agent" captures too many people. The Committee considered if the "franchisor's agent" was deleted from the section, would that exclude agents who are brokers – e.g., an agent who is acting as a broker? It was the consensus that the definition of a broker would catch that situation and the consensus was that use of the term "franchisor's agent" was too broad and could result in parties such as leasing agents, professional advisors, landlords, etc. being caught in situations over which they have no control (e.g., misrepresentations contained in the disclosure document or statement of material change). It was felt that the term "franchisor's broker" as defined and modified was sufficient.

Franchisor's Associate

[41] The Committee considered whether the franchisor's associate should also be liable. Given the definition of the "franchisor's associate" contained in the Model Act, it was felt that it was appropriate to retain that liability.

Directors and Officers

[42] The Committee considered whether or not to extend liability to directors or officers who are not signatories to the disclosure document. It was noted that the previous ULCC Act did make them liable but Alberta and Ontario didn't. The Committee was aware of the usual reasons for not extending personal liability to directors and officers (i.e., making it difficult to attract competent directors and officers) but was also cognizant of the trend in Canada in statutes towards making directors and officers more accountable, particularly in light of the high profile bankruptcies have which occurred in public companies in the United States in the recent past.

There was considerable discussion as to whether or not it was reasonable, in a large organization, to make an officer such as a vice president for information technology liable for a misrepresentation in a situation where he or she has no knowledge or control in another area.

[43] The Committee considered that it may be possible to reduce that unfairness by either:

(a) limiting the liability to those directors or officers who have day to day management responsibilities relating to the franchise; or

(b) including a defence for directors and officers who were not responsible for the area or did not participate in making the disclosure relating to the misrepresentation.

[44] The consensus was that directors and officers should not be included in the Model Act but that there should be a note to draft about the alternative of leaving it in with a restriction to those with day to day management responsibilities and/or a defence based on due diligence or not having responsibility for the area in respect of which the misrepresentation was made.

Statement of Material Fact

[45] The Committee then considered section 7(2) of the Ontario Act and section 9(2) of the Alberta Act. There were no comparable provisions in the ULCC or Unidroit drafts. It was decided that the Ontario section 7(2) was preferable in that it included statements of material change.

[46] The Committee then considered section 7(3) of the Ontario Act. There was no equivalent provision in the Alberta Act or Unidroit or ULCC. The consensus was that this section was appropriate in that it covered the situation where a statement of material change was not provided when it should have been provided and makes it clear that there is a deemed reliance by the franchisee on the information set out in the disclosure document.

Defences

[47] The Committee considered section 7(4) of the Ontario Act in comparison to section 10(1) of the Alberta Act and section 9(3) of ULCC. These sections give a person a defence against a claim for misrepresentation if the defendant proves that the franchisee acquired the franchise with knowledge of the misrepresentation or material claim. All are in substance the same and it was determined that the Ontario language was preferable and that it also referred to a material change. It was pointed out that this would not necessarily preclude a franchisee from exercising a right of rescission if there was a misrepresentation. It was decided to leave the defence in the Model Act.

[48] The Committee then considered section 7(5) of the Ontario Act in comparison with section 10(2) of the Alberta Act. It was pointed out in the opening language there was a minor difference in the reference to "a franchisor" in Ontario compared to the reference "the franchisor" in Alberta. It was decided that the Ontario opening language was appropriate.

[49] The Committee then considered the various defences listed in each of the Ontario, Alberta and ULCC drafts.

[50] With respect to item (a) of Ontario compared to item (a) of Alberta, the Ontario language was preferable because it specifies that both the franchisee and the franchisor must be given written notice where a person is "blowing the whistle" so that franchisor could also react.

[51] With respect to item (b) of Ontario and Alberta, both sections were the same in substance except that the Ontario language should be amended to provide for written notice to not only the franchisee but also the franchisor.

[52] With respect to item (c) of Alberta and Ontario, which relate to reliance on an expert's report, it was felt that this was a reasonable defence.

[53] The Committee then considered paragraph 10(2)(d) of the Alberta Act, for which there was no equivalent in the Ontario Act or Unidroit or ULCC. This is a defence where the person had relied on a statement made by a public official (e.g., a search at a municipality or a certificate of status from a registrar). The Committee considered whether or not the language

was sufficient to cover officials of bodies which were created by statute but were not necessarily public officials. The consensus was that the Model Act should include this provision with some changes to insure that the statement has to be in writing and that it is a public official which the Committee felt was clearer than use of the term "official person".

[54] The Committee then considered section 10(3) of the Alberta Act, for which there was no equivalent in Ontario, ULCC or Unidroit. This section covers a situation where a person who exercised due diligence and did not believe that there was a misrepresentation would have a defence. The consensus was that it should be included as is but there should be a note to draft so that if directors and officers who did not sign the disclosure document were to be found liable for misrepresentation, it should be redrafted to included the defence of "not my area of responsibility".

Non-Derogation of Other Rights

[55] The Committee considered section 9 of the Ontario Act, section 15 of the Alberta Act, section 9(4) of ULCC and article 8(3) of Unidroit. The consensus was that the Ontario section was preferable over the Alberta section because it used the words "and do not derogate from any other right or remedy" rather than just any other right.

Jurisdiction, Venue and Applicable Law

[56] The Committee had a lengthy discussion over the jurisdiction sections of the Ontario and Alberta Acts. The consensus was that Ontario section 10 was preferable over that of Alberta because it used the words "purporting to restrict the application of the law" rather than just "restricting the application of the law".

[57] It was noted that Alberta section 16 specifically states that the law of Alberta applies to franchise agreements. The Committee noted that the policy behind the section is to not require a franchisee to have to travel a long distance and sue or defend away from the franchisee's home jurisdiction.

[58] The Committee discussed the meaning of "a claim otherwise enforceable under this Act". The Committee also considered whether or not there should be a provision in both Alberta and

Ontario which specifically states that parties to a franchise agreement are required to attorn to the jurisdiction of the courts of the province.

Waiver of rights

[59] Section 11 of the Ontario legislation renders void any purported waiver or release by a franchisee of a right given under the legislation or of an obligation imposed on a franchisor or a franchisor's associate by the legislation. Consideration was given to permitting releases and waivers of rights or obligations following independent legal advice. In the end, the Committee concluded that permitting for waivers or releases of legislated rights would defeat the purpose of the legislation which is to protect franchisees.