

Uniform Franchises Act with Commentary

Definitions

1. In this Act,

“disclosure document” means the disclosure document required by section 5;

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

(a) in which,

- (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;

Commentary - "franchise"

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

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

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

- (a) franchisor or franchisor's associate, and
- (b) a franchisee;

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

- (a) a subfranchisor with regard to that subfranchisor's relationship with a franchisor, and
- (b) a subfranchisee with regard to that subfranchisee's relationship with a subfranchisor;

"franchise system" includes,

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

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

Commentary - "franchise system"

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

"franchisor" means one or more persons who grant or offer to grant a franchise and includes a subfranchisor with regard to that subfranchisor's relationship with a subfranchisee;

"franchisor's associate" means a person,

- (a) who, directly or indirectly,
 - (i) controls or is controlled by the franchisor, or
 - (ii) is controlled by another person who also controls, directly or
 - (iii) indirectly, the franchisor, and
- (b) who,
 - (i) is directly involved in the grant of the franchise,
 - (A) by being involved in reviewing or approving the grant of the franchise, or
 - (B) by making representations to the prospective franchisee on behalf of the franchisor for the purpose of granting the franchise, marketing the franchise or otherwise offering to grant the franchise, or
 - (ii) exercises significant operational control over the franchisee and to whom the franchisee has a continuing financial obligation in respect of the franchise;

"franchisor's broker" means a person, other than the franchisor, franchisor's associate or franchisee, who grants, markets or otherwise offers to grant a franchise, or who arranges for the grant of a franchise;

Commentary - "franchisor's broker"

This definition has been moved from section 7(1)(c) of the Ontario Act to the Definitions section in this Act.

"grant", in respect of a franchise, includes the sale or disposition of the franchise or of an interest in the franchise and, for such purposes, an interest in the franchise includes the ownership of shares in the corporation that owns the franchise;

"master franchise" means a franchise that is a right granted by a franchisor to a subfranchisor to grant or offer to grant franchises for the subfranchisor's own account;

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

Commentary - "material change"

The following amendments were made scaling back the scope of the Ontario Act definition: (i) the substitution of the word "means" for "including" in order to provide more certainty to franchisors preparing disclosure documents; and (ii) the reference to "prescribed change" was deleted in the interest of uniformity in all jurisdictions.

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

Commentary - "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 (eg. if the franchisor knew that a competitor was planning to set up an outlet in close proximity to the proposed franchise) is crucial. The words "franchise or" were added before the words "franchise system" in the definition adopted from the Ontario Act in order to cover this type of scenario. Furthermore, the terms "grant and acquire" are used generally throughout the Act rather than the terms "purchase and sale". Finally, the definition is drafted to be exclusive by using the word "means" as opposed to inclusive by using the word "includes".

"misrepresentation" includes,

- (a) an untrue statement of a material fact, or
- (b) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in light of the circumstances in which it was made;

"prescribed" means prescribed by regulations made under this Act;

"prospective franchisee" means a person who has indicated, directly or indirectly, to a franchisor or a franchisor's associate or broker an interest in entering into a franchise agreement, and a person whom a franchisor or a franchisor's associate or broker, directly or indirectly, invites to enter into a franchise agreement;

"subfranchise" means a franchise granted by a subfranchisor to a subfranchisee;

Master franchise, subfranchise

- (2) A franchise includes a master franchise and a subfranchise.

Deemed control

- (3) A franchisee, franchisor or franchisor's associate that is a corporation shall be deemed to be controlled by another person or persons if,
- (a) voting securities of the franchisee or franchisor or franchisor's associate carrying more than 50 per cent of the votes for the election of directors are held, otherwise than by way of security only, by or for the benefit of the other person or persons; and
 - (b) the votes carried by such securities are entitled, if exercised, to elect a majority of the board of directors of the franchisee or franchisor or franchisor's associate.

Application

2.1 This Act applies with respect to,

- (a) a franchise agreement entered into on or after the coming into force of this section;
- (b) a renewal or extension of a franchise agreement described in clause (a) entered into on or after the coming into force of this section; and
- (c) a business operated under an agreement, renewal or extension described in clause (a) or (b), if the business operated by the franchisee under the franchise agreement or its renewal or extension is to be operated partly or wholly in *[insert jurisdiction]*.

Commentary - s. 2(1)

This subsection tracks the Ontario Act but has been amended so as to permit the insertion of the applicable province or territory.

Same

(2) Sections 3 and 4, clause 5 (7) (d) and sections 8, 9, 10, 11, 12 and 13 apply with respect to a franchise agreement entered into before the coming into force of this section and with respect to a business operated under such agreement, if the business operated by the franchisee under the franchise agreement is operated or is to be operated partly or wholly in *[insert jurisdiction]*.

Commentary - 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 Joint and Several Liability, section 10 (Attempt to Restrict Local Law Void), section 11 (Attempt to Affect Jurisdiction Void) and section 13 (Dispute Resolution); and (ii) permitting the insertion of the applicable province or territory.

Non-application

2(3) This Act does not apply to the following continuing commercial relationships or arrangements:

1. Employer-employee relationship.
2. Partnership.
3. 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 nonexclusive 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) 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) iii. an organization incorporated under the *Canada Cooperatives Act*, or
 - (iv) iv. an organization incorporated under the *Co-operative Corporations Act*.

4. 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.
5. 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.
6. 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.
7. 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.

Commentary - 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 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 5 has been clarified 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) numbered subparagraph 7 was added to exempt wholesale arrangements as in the Alberta Act.

Fair dealing

3.(1) Every franchise agreement imposes on each party a duty of fair dealing in the performance and enforcement of the agreement, including in the exercise of a right under the agreement.

Commentary - 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 (2) 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.

Commentary - 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.

Commentary - 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.

Commentary - s.5(2)

This subsection allows a province to prescribe other methods of delivery of a disclosure document (e.g. electronic mail - currently being considered by the Federal Trade Commission in respect of uniform franchise offering circulars in the United States).

Same

(3) A disclosure document must be one document delivered as required under subsections (1) and (2) as one document at one time.

Contents of disclosure document

- (4) The disclosure document shall contain,
- (a) all material facts, including material facts as prescribed;
 - (b) financial statements as prescribed;
 - (c) copies of all proposed franchise agreements and other agreements relating to the franchise to be signed by the prospective franchisee;
 - (d) statements as prescribed for the purposes of assisting the prospective franchisee in making informed investment decisions; and
 - (e) other information and copies of documents as prescribed.

Commentary - s.5(4)

This subsection tracks the Ontario Act which is more comprehensive than the Alberta Act.

Material change

- (5) The franchisor shall provide the prospective franchisee with a written statement of any material change, and the 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

- (6) All information in a disclosure document and a statement of material change shall be accurately, clearly and concisely set out.

Commentary - s.5(6)

This subsection is contained in the Ontario Act, but not the Alberta Act. It follows current trends in securities laws to require clear and concise disclosure.

Exemptions

- (7) 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).

Commentary - s.5(7)

S.5(7) 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(7)(h) has been specifically limited to business opportunity franchises rather than business format franchises as generally defined. It was felt that there might be abuse of the one-year franchise exemption by franchisors who constantly renew or extend one-year terms, and that there was no business justification for denying a business format franchise disclosure simply because the term is limited to one year.

Crown exempt from financial statement requirement

- (8) The Crown is not required to include the financial statements otherwise required by clause (4) (b) in its disclosure document.

Commentary - s.5(8)

There is no valid policy reason to have an overall exemption in the Act for agreements with the Crown as currently exists in the Ontario Act (but not in the Alberta Act). The Crown is exempted for financial disclosure.

Interpretation - grant effected by or through franchisor

- (9) For the purpose of subclause (7) (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

(10) For the purposes of subsections (1) and (5), 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.

Commentary - s.5(10)

The Alberta Act exempts from disclosure certain deposit agreements and confidentiality agreements. The Ontario Act has no similar exemption despite significant lobbying by the industry. The Committee has recommended that 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

(11) Despite subsection (10), an agreement that only contains terms described in clause (10) (a) or (b) is a franchise agreement or any other agreement relating to the franchise for the purposes of subsections (1) and (5) if the agreement,

- (a) requires keeping confidential or prohibits the use of information,
 - (i) that is or comes into the public domain without breaching the agreement,
 - (ii) that is disclosed to any person without breaching the agreement, or

- (iii) that is disclosed with the consent of all the parties to the agreement; or
- (b) prohibits the disclosure of information to an organization of franchisees, to other franchisees of the same franchise system or to a franchisee's professional advisors.

Right of rescission

6(1) A franchisee may rescind the franchise agreement, without penalty or obligation, no later than 60 days after receiving the disclosure document, if the franchisor failed to provide the disclosure document or a statement of material change within the time required by section 5 or if the contents of the disclosure document did not meet the requirements of section 5.

Same

(2) A franchisee may rescind the franchise agreement, without penalty or obligation, no later than two years after entering into the franchise agreement if the franchisor never provided the disclosure document.

Notice of rescission

(3) Notice of rescission shall be in writing and shall be delivered to the franchisor, personally, by registered mail, by fax or by any other prescribed method, at the franchisor's address for service or to any other person designated for that purpose in the franchise agreement.

Effective date of rescission

- (4) The notice of rescission is effective,
- (a) on the day it is delivered personally;
 - (b) on the fifth day after it was mailed;
 - (c) on the day it is sent by fax, if sent before 5 p.m.;
 - (d) on the day after it was sent by fax, if sent at or after 5 p.m.;
 - (e) On the day determined in accordance with the regulations, if sent by a prescribed method of delivery.

Same

(5) If the day described in clause (4) (b), (c) or (d) is a holiday, the notice of rescission is effective on the next day that is not a holiday.

Franchisor's obligations on rescission

(6) The franchisor or franchisor's associate, as the case may be, shall, within 60 days of the effective date of the rescission,

- (a) refund to the franchisee any money received from or on behalf of the franchisee, other than money for inventory, supplies or equipment;
- (b) purchase from the franchisee any inventory that the franchisee had purchased pursuant to the franchise agreement and remaining at the effective date of rescission, at a price equal to the purchase price paid by the franchisee;
- (c) purchase from the franchisee any supplies and equipment that the franchisee had purchased pursuant to the franchise agreement, at a price equal to the purchase price paid by the franchisee; and
- (d) compensate the franchisee for any losses that the franchisee incurred in acquiring, setting up and operating the franchise, less the amounts set out in clauses (a) to (c).

Commentary - s.6

The rescission right contained in the Ontario Act, which is far more favourable to a franchisee than the right contained in the Ontario Act, has been retained.

Damages for misrepresentation, failure to disclose

7(1) If a franchisee suffers a loss because of a misrepresentation contained in the disclosure document or in a statement of material change or as a result of the franchisor's failure to comply in any way with section 5, the franchisee has a right of action for damages against,

- (a) the franchisor;
- (b) the franchisor's broker;
- (c) the franchisor's associate; and

- (d) every person who signed the disclosure document or statement of material change.

Commentary - 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.

Commentary - s.7(5)

S.7(5) incorporates components of the Ontario Act and the Alberta Act, with necessary classifications. 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. The Committee spent considerable time in considering the issue of strict liability for misrepresentation in a disclosure document and ultimately was of the view that this limited defence should be allowed.

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 other party or parties 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), either 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 franchise agreement 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) (g).

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.

Commentary - s.8

The Committee considered at great length whether franchise disputes would be resolved more advantageously through a form of alternate dispute resolution. Recognizing that in certain provinces the rules of practice 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, the Committee determined that it would be beneficial to provide for mediation to be invoked by any party to a franchise agreement.

The Committee believes based on its own experiences and those brought to the attention of the Committee that party initiated mediation will be of significant benefit to resolve franchise disputes prior to the commencement of, as well as after the commencement of, litigation proceedings.

Joint and several liability

9(1) All or any one or more of the parties to a franchise agreement who are found to be liable in an action under subsection 3 (2) or who accept liability with respect to an action brought under that subsection are jointly and severally liable.

Same

(2) All or any one or more of a franchisor or franchisor's associates who are found to be liable in an action under subsection 4 (5) or who accept liability with respect to an action brought under that subsection are jointly and severally liable.

Same

(3) All or any one or more of the persons specified in subsection 7 (1) who are found to be liable in an action under that subsection or who accept liability with respect to an action brought under that subsection are jointly and severally liable.

Commentary - 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.

Commentary - 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. 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]*.

Commentary - 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.

Commentary - s.12

Any allowance for waivers or releases of legislated rights would defeat the purpose of the legislation which is to protect franchisees and prospective franchisees. This section has been expanded from the Ontario Act by adding the words "or a prospective franchisee" thereby expanding the list of parties to whom this section applies. As a result, a franchisee or a prospective franchisee cannot waive or release any of their rights conferred under the Act or of an obligation or requirement imposed on a franchisor or franchisor's associate by or under the Act.

The reason for the addition of a prospective franchisee is necessary in order to prohibit the franchisor or its associate from taking away any rights that the prospective franchisee may have. The protection of the prospective franchisee is necessary since the duty of fair dealing incorporating the duty of good faith and commercial reasonableness in the Ontario Act does not extend to the prospective franchisee.

Burden of proof

13. In any proceeding under this Act, the burden of proving an exemption or an exclusion from a requirement or provision is on the person claiming it.

Regulations

14(1) The Lieutenant Governor in Council may make regulations,

- (a) prescribing material facts for the purpose of clause 5 (4) (a);
- (b) prescribing the financial statements to be included in the disclosure document;

- (c) prescribing statements for the purpose of clause 5 (4) (d);
- (d) prescribing other information and copies of documents to be included in the disclosure document;
- (e) prescribing an amount for the purpose of clause 5 (7) (g);
- (f) 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);
- (g) 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;
- (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.