

December 12, 2016

Business Law Policy
Consumer and Business Policy Unit
Ministry of Government and Consumer Services
6th Floor, 56 Wellesley Street West
Toronto, ON M7A 1C1

VIA EMAIL: businesslawpolicy@ontario.ca

Dear Sir/Madam:

The Canadian Franchise Association (CFA) welcomes this opportunity to provide this letter in response to the November 2016 report and recommendations of the Business Law Advisory Council to the Minister of Government and Consumer Services, Ontario.

The CFA works with all levels of government to promote the value of franchising in Ontario, and throughout Canada, and the development of industry-made solutions to challenges affecting the franchise industry. For 50 years, the CFA has acted as the authoritative voice for franchising in Canada, and is the only national trade association dedicated to accelerating the success of franchised small businesses in Canada while protecting the franchise business model. With over 600 corporate members nationwide, the CFA represents approximately 40,000 small business owners, with 88% of our members operating in Ontario.

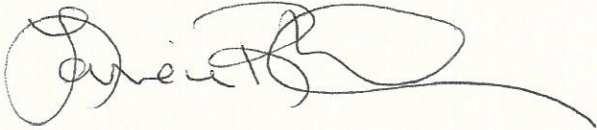
We commend this initiative to update the Arthur Wishart Act (AWA) and broadly agree with the recommendations of the Committee. Additionally, CFA is taking this opportunity to make a number of further recommendations which we ask the Committee to consider. In the attached document, for ease of reference, CFA's comments on the Committee's recommendations are provided in blue and CFA's additional recommendations are provided in red.

While CFA seeks to achieve, as much as possible, consistency in franchise disclosure legislation across Canada, there has been development in the case law related to franchising and an evolution of franchising. As a result, the Uniform Franchises Act (UFA) is now, in a number of ways, not reflective of best practices and the practical reality of franchising as it exists today. In working with various governments in the development of franchise legislation, inconsistency between recommendations under consideration and the UFA, along with other existing franchise disclosure legislation, has resulted in hesitancy to adopt some of the more evolutionary recommendations.

It is CFA's intention to ask that the Uniform Law Conference of Canada (ULCC) consider the case law and developments in franchising since the writing of the UFA and to work with the ULCC to produce an updated UFA. This is noted in several of CFA's recommendations in the attached document and we encourage Ontario to take a leadership position and consider implementation of these progressive recommendations.

CFA appreciates this opportunity to provide feedback and recommendations on the development of the Arthur Wishart Act. We anticipate that as this review process continues it will also include consideration of the Regulations. As the national association representing franchising in Canada, CFA looks forward to continuing consultation on the review and further development of the Arthur Wishart Act and Regulations.

Sincerely,

A handwritten signature in black ink, appearing to read "Lorraine R. McLachlan", with a long horizontal flourish extending to the right.

Lorraine R. McLachlan
President and Chief Executive Officer



Canadian Franchise
Association™

**Business Law Report:
CFA
Recommendations to
Ministry of
Government and
Consumer Services**

Submitted by:
Canadian Franchise Association

Date:
December 12, 2016

Arthur Wishart Act (Franchise Disclosure), 2000

(With Business Law Advisory Council comments and CFA recommendations inserted)

Definitions

1. (1) In this Act,

“disclosure document” means the disclosure document required by section 5;
 (“document d’information”)

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

CFA Recommendation:

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

(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, service mark, trade name, logo or advertising or other commercial symbol, and

BLAC Recommendation: 1. (1)(a)(i) Definition of “franchise”

Remove the term “service mark”. In Canada, we do not have service marks, and this portion of the definition was based largely on the U.S. Federal Trade Commission Franchise Rule. Other Canadian provinces, with the exception of Alberta, do not refer to service marks.

CFA Recommendation:

CFA agrees with BLAC’s recommendation to remove the term “service mark” from the definition of “franchise.”

- (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

BLAC Recommendation: 1. (1)(a)(ii) Definition of "franchise"

This portion of the definition implies that the trademark or other intellectual property in question is owned by either the franchisor or its associate. This may not always be true, such as in the case of a master franchisee who sublicenses the IP to unit (sub-) franchisees. The OBA has recommended that subparagraph (i) be further amended to provide that the intellectual property may be owned by or licensed to the franchisor. The amendment might be effected as follows:

"the franchisor grants the franchisee the right to sell, offer for sale or distribute goods or services that are substantially associated with a trademark, trade name, logo or advertising or other commercial symbol, that is owned by or licensed to the franchisor or the franchisor's associate."

BLAC Recommendation: 1. (1)(a)(ii) Definition of "franchise"

Amend the paragraph to clarify that actual control or assistance by the franchisor with respect to the franchisee's method of operation should not be required to bring a given relationship within the ambit of the AWA, as long as the franchisor has the right to exert such control or provide such assistance. This amendment might be effected as follows:

"the franchisor or the franchisor's associate has the right to exercise or exercises significant control over, or has the right to provide or provides significant assistance in, the franchisee's method of operation, including building design and furnishings, locations, business organization, marketing techniques or training."

(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, service mark, trade name, logo or advertising or other commercial symbol is involved, to sell, offer for sale or distribute goods or services supplied by the franchisor or a supplier designated by the franchisor, and
- (ii) the franchisor, or the franchisor's associate, or a third person designated by the franchisor, provides location assistance, including securing retail outlets or accounts for the goods or services to be sold, offered for sale or distributed or securing locations or sites for vending machines, display racks or other product sales displays used by the franchisee; ("franchise")

“franchise agreement” means any agreement that relates to a franchise between,

- (a) a franchisor or franchisor’s associate, and
- (b) a franchisee; (“contrat de franchisage”)

BLAC Recommendation: 1. (1)(a) Definition of “franchise agreement”

Clarify that only the agreement by which the franchise is actually granted triggers disclosure obligation on the part of the franchisor. In addition to express exclusion, the OBA has recommended that the AWA be further clarified to recognize the term “franchise agreement” should only cover the agreement pursuant to which the franchise is actually granted, and that a separate definition of “related agreements” be introduced to deal with ancillary agreements, particularly where they are entered into before the actual “franchise agreement” is signed.

CFA Recommendation: 1. (1)(a) Definition of “franchise agreement”

CFA agrees with this recommendation and suggests amending the AWA to define “franchise agreement” as the franchise granting agreement, and provide a definition for “other agreement” or “related agreement” as agreements that relate to the franchise.

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

- (a) a subfranchisor with regard to that subfranchisor’s relationship with a franchisor, and
- (b) a subfranchisee with regard to that subfranchisee’s relationship with a subfranchisor; (“franchisé”)

“franchise system” includes,

- (a) the marketing, marketing plan or business plan of the franchise,
- (b) the use of or association with a trade-mark, service mark, trade name, logo or advertising or other commercial symbol,
- (c) the obligations of the franchisor and franchisee with regard to the operation of the business operated by the franchisee under the franchise agreement, and
- (d) the goodwill associated with the franchise; (“système de franchise”)

“franchisor” means one or more persons who grant or offer to grant a franchise and includes a subfranchisor with regard to that subfranchisor’s relationship with a subfranchisee; (“franchiseur”)

“franchisor’s associate” means a person,

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

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

“master franchise” means a franchise which is a right granted by a franchisor to a subfranchisor to grant or offer to grant franchises for the subfranchisor’s own account; (“franchise maîtresse”)

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

CFA Recommendation:

The definition of “material change” should be similarly amended to relate to a change in the material facts that are enumerated.

“material fact” includes any information about the business, operations, capital or control of the franchisor or franchisor’s associate, or about the franchise system, that would reasonably be expected to have a significant effect on the value or price of the franchise to be granted or the decision to acquire the franchise; (“fait important”)

CFA Recommendation:

In the US and other international jurisdictions, they employ a finite, list-based approach which increases certainty and clarifies the expectations and requirements for full and proper disclosure. Experience shows that well-meaning franchisors can be faulted in hindsight for failing to meet this disclosure standard, as the expansive definition of “material fact” is too easy to challenge. Therefore we recommend employing a finite, list-based approach when it comes to disclosing material fact.

“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 the light of the circumstances in which it was made; (“présentation inexacte des faits”)

“prescribed” means prescribed by regulations made under this Act; (“prescrit”)

“prospective franchisee” means a person who has indicated, directly or indirectly, to a franchisor or a franchisor’s associate, agent or broker an interest in entering into a franchise agreement, and a person whom a franchisor or a franchisor’s associate, agent or broker, directly or indirectly, invites to enter into a franchise agreement; (“franchisé éventuel”)

“subfranchise” means a franchise granted by a subfranchisor to a subfranchisee. (“sous-franchise”) 2000, c. 3, s. 1 (1); 2009, c. 33, Sched. 10, s. 1 (1).

Master franchise, subfranchise

(2) A franchise includes a master franchise and a subfranchise. 2000, c. 3, s. 1 (2).

Deemed control

(3) A franchisee, franchisor or franchisor’s associate which 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. 2000, c. 3, s. 1 (3).

Application

2. (1) This Act applies with respect to a franchise agreement entered into on or after the coming into force of this section, with respect to a renewal or extension of a franchise agreement entered into before or after the coming into force of this section and with respect to a business operated under such an agreement, renewal or extension if the business operated by the franchisee under the franchise agreement or its renewal or extension is to be operated partly or wholly in Ontario. 2000, c. 3, s. 2 (1).

CFA Recommendation:

The decision of the Ontario Court of Appeal in *45341 Ontario Limited v. Midas Canada Inc.*, (2009), 64 B.L.R. (4th) 251, affirmed 2010 ONCA 478 has left uncertainty and a lack of clarity in the extra provincial application of franchise statutes. CFA recommends not expanding scope of provinces and not having retroactive application. Legislation should only apply to locations actually operating in that province. Litigation and arbitration between the same parties about the same issues, in multiple jurisdictions, is challenging for both parties and we hope this amendment will be adopted and will become a best practice model for the rest of Canada.

Same

(2) Sections 3 and 4, clause 5 (7) (d) and sections 9, 11 and 12 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 Ontario. 2000, c. 3, s. 2 (2).

Non-application

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

1. Employer-employee relationship.
2. Partnership.
3. Membership in a co-operative association, as prescribed.
4. An arrangement arising from an agreement to use a trade-mark, service 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, service 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 by the licensor with respect to that trade-mark, service mark, trade name, logo or advertising or other commercial symbol.

BLAC Recommendation: 2. (3)(5)

The exemption from the AWA in the case of license granted by a licensor to a single licensee be clarified to state that the relevant geographic scope of the license be Canada. Council recommends inserting the words “in Canada” after the word “licensor” in the second-last line of the paragraph.

CFA Recommendation:

The CFA supports the BLAC’s recommendation for subsection 2. (3)(5).

6. An arrangement arising out of a lease, licence or similar agreement whereby the franchisee leases space in the premises of another retailer and is not required or advised to buy the goods or services it sells from the retailer or an affiliate of the retailer.
7. A relationship or arrangement arising out of an oral agreement where there is no writing which evidences any material term or aspect of the relationship or arrangement.
8. A service contract or franchise-like arrangement with the Crown or an agent of the Crown. 2000, c. 3, s. 2 (3).

Fair dealing

3. (1) Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement. 2000, c. 3, s. 3 (1).

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 in the performance or enforcement of the franchise agreement. 2000, c. 3, s. 3 (2).

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. 2000, c. 3, s. 3 (3).

Right to associate

4. (1) A franchisee may associate with other franchisees and may form or join an organization of franchisees. 2000, c. 3, s. 4 (1).

Franchisor may not prohibit association

(2) A franchisor and a franchisor's associate shall not interfere with, prohibit or restrict, by contract or otherwise, a franchisee from forming or joining an organization of franchisees or from associating with other franchisees. 2000, c. 3, s. 4 (2).

Same

(3) A franchisor and 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. 2000, c. 3, s. 4 (3).

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. 2000, c. 3, s. 4 (4).

Right of action

(5) If a franchisor or 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. 2000, c. 3, s. 4 (5).

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. 2000, c. 3, s. 5 (1).

Methods of delivery

(2) A disclosure document may be delivered personally, by registered mail or by any other prescribed method. 2000, c. 3, s. 5 (2).

Same

(3) A disclosure document must be one document, delivered as required under subsections (1) and (2) as one document at one time. 2000, c. 3, s. 5 (3).

Contents of disclosure document

(4) The disclosure document shall contain,

(a) all material facts, including material facts as prescribed;

CFA Recommendation:

CFA advocates for a disclosure regime requiring disclosure of a finite list of items.

(b) financial statements as prescribed;

BLAC Recommendation: 5. (4)(b)

U.S GAAP, GAAS as well as IFRS and IAASB auditing and review standards be deemed to be acceptable bases for the preparation and auditing or review of financial statements required to be attached to a disclosure document delivered under section 5(4) of the AWA.

CFA Recommendation: 5. (4)(b)

CFA supports the BLAC's recommendation with regards to financial statements in subsection 5. (4)(b).

- (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. 2000, c. 3, s. 5 (4).

Material change

(5) The franchisor shall provide the prospective franchisee with a written statement of any material change, and the franchisee must 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. 2000, c. 3, s. 5 (5).

BLAC Recommendation: 5. (5)

Recommends that either the content of the statement of material change, or that a Form-Certificate of Franchisor be prescribed to correspond to the prescribed content in the disclosure document.

CFA Recommendation:

CFA recommends adopting the language used in British Columbia's franchise legislation.

A franchisor must provide a prospective franchisee with a written statement of any material change, and the prospective franchisee must receive the statement of material change as soon as practicable after the change has occurred and before the earlier of the following:

- (a) the signing, by the prospective franchisee, of a franchise agreement or any other agreement relating to a franchise;*
- (b) the payment, by or on behalf of the prospective franchisee to the franchisor or franchisor's associate, of any consideration relating to the franchise.*

Information to be accurate, clear, concise

(6) All information in a disclosure document and a statement of a material change shall be accurately, clearly and concisely set out. 2000, c. 3, s. 5 (6).

CFA Recommendation:

CFA recommends implementing 'substantial compliance', which would deem a franchisor to comply with disclosure if the franchisor's disclosure document substantially complies with the Act, and even if the disclosure document contains a technical irregularity or mistake not affecting the substance of the document. The two most recent provinces to adopt franchise legislation have introduced a section for substantial compliance. Substantial compliance is utilized in Manitoba's franchise legislation, and most recently in British Columbia's franchise legislation.

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, an associate of the franchisor 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;
- (c) 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, for that person's own account;

BLAC Recommendation: 5. (7)(b)

Recommend the adoption of OBA to;

a) clarify that the exemption ceases to be available on the expiry of a fixed period after prospective franchisee has ceased to be an officer or director of the franchisor;

b) confirm that the exemption should also apply where the prospective franchisee is a corporation owned by such an individual; and

c) the fixed period be 120 days.

CFA Recommendation: 5. (7)(b)

CFA recommends this be revised to say the franchisor can take the benefit of this exemption if the director and officer uses a corporation to be the franchisee, and that the 6 month time period not have to be immediately preceding the purchase of the franchise.

- (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 do not exceed, in relation to the total sales of the business, a prescribed percentage;

BLAC Recommendation: 5. (7)(e)

Subsection be amended to clarify that the time period for measuring anticipated percentage of sales for the purposes of the exemption is during the first year of operation of the franchise.

CFA Recommendation:

CFA agrees with BLAC's recommendation for subsection 5. (7)(e), and recommends adopting similar language used in British Columbia legislation:

(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 do not exceed, in relation to the total sales of the business, a prescribed percentage, 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,

(i) the prospective franchisee is required to make a total annual investment to acquire and operate the franchise in an amount that does not exceed a prescribed amount,

BLAC Recommendation: 5. (7)(g)(i)

Recommend replacing the concept of "total annual investment" with the concept of "initial investment" anticipated by the parties at the time of entry into the franchise agreement, to clarify the timing and method of calculating the relevant investment amount for the purposes of the exemption. Amendments could be achieved as follows:

"the prospective franchisee is required, by contract or otherwise, to make an initial investment to acquire and set up the franchise in an amount, as anticipated by the parties or that should be anticipated by the parties at the time the franchise agreement is entered into, that does not exceed a prescribed amount."

CFA Recommendation: 5. (7)(g)(i)

CFA recommends adopting the language used in British Columbia's legislation.

(g) the grant of a franchise, if the prospective franchisee is investing an amount greater than a prescribed amount in the acquisition of the franchise.

- (ii) the franchise agreement is not valid for longer than one year and does not involve the payment of a non-refundable franchise fee, or
- (iii) the franchisor is governed by section 55 of the *Competition Act* (Canada);
- (h) the grant of a franchise where the prospective franchisee is investing in the acquisition and operation of the franchise, over a prescribed period, an amount greater than a prescribed amount. 2000, c. 3, s. 5 (7)

BLAC Recommendation: 5. (7)(h)

Amend the subsection to improve consistency between this exemption and the De Minimis exemption. The OBA further recommends that the threshold be lowered to \$3,000,000.

CFA Recommendation: 5. (7)(h)

CFA agrees with the BLAC's recommendation for subsection 5. (7)(h), as well as the OBA's recommendation to lower the threshold to \$3,000,000.

Same

(8) 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 transfer 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. 2000, c. 3, s. 5 (8).

Rescission for late disclosure

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. 2000, c. 3, s. 6 (1).

Rescission for no disclosure

(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. 2000, c. 3, s. 6 (2).

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. 2000, c. 3, s. 6 (3).

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. 2000, c. 3, s. 6 (4).

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. 2000, c. 3, s. 6 (5).

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). 2000, c. 3, s. 6 (6).

CFA Recommendation:

CFA advocates for adding a new Section – 6. (7) – to address obligations on prospective franchisees even if they rescind the agreement, such as the obligation to maintain confidentiality, return franchisor's proprietary materials, and take reasonable steps to preserve assets that the franchisor is required to buy back.

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 a 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 agent;
- (c) the franchisor's broker, being a person other than the franchisor, franchisor's associate, franchisor's agent or franchisee, who grants, markets or otherwise offers to grant a franchise, or who arranges for the grant of a franchise;
- (d) the franchisor's associate; and
- (e) every person who signed the disclosure document or statement of material change. 2000, c. 3, s. 7 (1).

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. 2000, c. 3, s. 7 (2).

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. 2000, c. 3, s. 7 (3).

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. 2000, c. 3, s. 7 (4).

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 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 of the withdrawal and the reasons for it; or

- (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. 2000, c. 3, s. 7 (5).

Joint and several liability

8. (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. 2000, c. 3, s. 8 (1).

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. 2000, c. 3, s. 8 (2).

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. 2000, c. 3, s. 8 (3).

No derogation of other rights

9. The rights conferred by this Act are in addition to and do not derogate from any other right or remedy a franchisee or franchisor may have at law. 2000, c. 3, s. 9.

Attempt to affect jurisdiction void

10. Any provision in a franchise agreement purporting to restrict the application of the law of Ontario or to restrict jurisdiction or venue to a forum outside Ontario is void with respect to a claim otherwise enforceable under this Act in Ontario. 2000, c. 3, s. 10.

Rights cannot be waived

11. Any purported waiver or release by a franchisee of a right given under this Act or of an obligation or requirement imposed on a franchisor or franchisor's associate by or under this Act is void. 2000, c. 3, s. 11.

CFA Recommendation:

CFA recommends adopting the language used in British Columbia's legislation:

11. (1) Any purported waiver or release by a franchisee, or by a prospective franchisee, of a right conferred under this Act or of an obligation or requirement imposed on a franchisor or franchisor's associate under this Act is void.

(2) Subsection (1) does not apply to a waiver or release by a franchisee, or by a prospective franchisee, made in accordance with a settlement of an action, claim or dispute.

Burden of proof

12. 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. 2000, c. 3, s. 12.

Exemption

13. (1) REPEALED: 2000, c. 3, s. 13 (7).

Same

(2) If a franchisor meets the criteria prescribed for the purpose of this subsection, the Lieutenant Governor in Council may, by regulation, exempt the franchisor from the requirement to include specified financial information in a disclosure document, subject to the terms and conditions set out in the exempting regulation. 2000, c. 3, s. 13 (2).

General or specific

(3) A regulation made under this section may be general or specific in its application. 2000, c. 3, s. 13 (3).

Revocation of exemption

(4) A regulation made under this section may be revoked if the franchisor no longer meets the prescribed criteria or if the franchisor asks that the exemption be revoked. 2000, c. 3, s. 13 (4).

Statutory Powers Procedure Act does not apply

(5) The *Statutory Powers Procedure Act* does not apply to a decision under this section to grant or to refuse to grant an exemption, to impose terms and conditions on an exemption or to revoke an exemption. 2000, c. 3, s. 13 (5).

(6), (7) REPEALED: 2009, c. 33, Sched. 10, s. 1 (2).

Regulations

14. (1) The Lieutenant Governor in Council may make regulations,
- (a) defining co-operative association for the purpose of paragraph 3 of subsection 2 (3);
 - (b) prescribing types of changes that constitute a material change;
 - (c) prescribing material facts for the purpose of clause 5 (4) (a);
 - (d) prescribing the financial statements to be included in the disclosure document;
 - (e) prescribing statements for the purpose of clause 5 (4) (d);
 - (f) prescribing other information and copies of documents to be included in the disclosure document;
 - (g) prescribing a percentage of sales for the purpose of clause 5 (7) (e);
 - (h) prescribing an amount for the purpose of subclause 5 (7) (g) (i);
 - (i) prescribing an amount and period of time for the purpose of clause 5 (7) (h);
 - (j) prescribing methods of delivery for the purposes of subsections 5 (2) and 6 (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);
 - (k) prescribing criteria for the purposes of subsections 13 (1) and (2);
 - (k.1) defining, for the purposes of this Act, any word or expression used in this Act that has not already been expressly defined in this Act;
 - (l) respecting any matter that the Lieutenant Governor in Council considers necessary or advisable to carry out effectively the intent and purpose of this Act. 2000, c. 3, s. 14 (1); 2001, c. 9, Sched. D, s. 1.

General or specific

(2) A regulation made under subsection (1) may be general or specific in its application. 2000, c. 3, s. 14 (2).

15. Omitted (provides for coming into force of provisions of this Act). 2000, c. 3, s. 15.

16. Omitted (enacts short title of this Act). 2000, c. 3, s. 16.