CFA Report on Recommended Changes to the ULCC Model Franchises Act

Submitted by:
Canadian Franchise Association

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Uniform Franchises Act and Regulations

(with original ULCC Commentary, and CFA Suggestions)

UNIFORM FRANCHISES ACT

CONTENTS

Definitions

1.(1) In this Act,

"disclosure document" means the disclosure document required by section 5;

"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;

Payment

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

> **ULCC Comment:** "franchise". This definition tracks the Ontario Act but deletes all references to a "service mark" since that term does not accord with Canadian trade-mark legislation terminology.
>
> An inclusive definition of franchise was chosen in order to capture a wide range of relationships subject to requirements such as fair dealing but also to exempt certain others (i.e. business opportunities or multilevel marketing) from the disclosure requirements. The Act uses a functional test based on the level of control in the definition rather than relying on what the parties choose to call the relationship. The definition also extends to a "franchisor's associate".

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

"franchise agreement" means any agreement that relates to a franchise between,
(a) a franchisor or franchisor's associate, and
(b) a franchisee;

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

"franchisee" means a person to whom a franchise is granted and includes,
(a) a subfranchisor with regard to that subfranchisor's relationship with a franchisor, and
(b) a subfranchisee with regard to that subfranchisee's relationship with a subfranchisor;

"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;

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

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

"franchisor's associate" means
(a) (i) a person who, directly or indirectly, controls the franchisor,

(ii) a person other than an individual which is, directly or indirectly controlled by the franchisor or controlled by another person who also controls, directly or indirectly, the franchisor, and

(b) who,

- (i) is directly involved in the grant of the franchise,

(A) by being involved in reviewing or approving the grant of the franchise, or
(B) by making representations to the prospective franchisee on behalf of the franchisor for the purpose of granting the franchise, marketing the franchise or otherwise offering to grant the franchise, or

- (ii) exercises significant operational control over the franchisee and to whom the franchisee has a continuing financial obligation in respect of the franchise;

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

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

> **ULCC Comment:** "franchisor's broker". This definition has been moved from section 7(1)(c) of the Ontario Act to the Definitions section in this Act.

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

"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;

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

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

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

> **ULCC Comment:** "material fact". The Act recognizes the need to balance the goal of making available all relevant information to the franchisee while making the requirements sufficiently clear and finite so that a franchisor can determine its obligations with certainty. The concern exists that too broad a definition is inappropriate since a franchisor will be in an advantageous position only with regard to information about itself and not the world in general. On the other hand, the Act should recognize that information that may not be strictly about the franchisor but that would still be relevant to the franchisee (e.g., if the franchisor knew that a competitor was planning to set up an outlet in close proximity to the proposed franchise) is crucial. The words "franchise or" were added before the words "franchise system" in the definition adopted from the Ontario Act in order to cover this type of scenario. Furthermore, the terms "grant and acquire" are used generally throughout the Act rather than the terms "purchase and sale". Finally, the definition is drafted to be exclusive by using the word "means" as opposed to inclusive by using the word "includes".

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

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

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

ULCC Comment: s. 2(1). This subsection tracks the Ontario Act but has been amended so as to permit the insertion of the applicable province or territory.

Same

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

Litigation and arbitration between the same parties about the same issues, in multiple jurisdictions, is challenging for both parties and we hope that if BC pursues franchise legislation then it will be a best practice model for the rest of Canada.

Since we are not certain how this issue may ultimately be resolved by the courts, we recommend using the language submitted by the OBA but in this case replacing “Ontario” with “British Columbia " to read as follows (the added language being underlined):

S.2(1)(a) This Act applies with respect to a franchise agreement entered into on or after the coming into force of this section, with respect to a renewal or extension of a franchise agreement entered into before or after the coming into force of this section and with respect to a business operated under such an agreement, renewal or extension if the business operated by the franchisee under the

franchise agreement or its renewal or extension is to be operated partly or wholly in Ontario [British Columbia]. A franchise agreement governed by the laws of the Province of British Columbia shall not be governed by this Act unless the business operated by the franchisee under the franchise agreement or its renewal or extension is to be operated partly or wholly in British Columbia.

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

ULCC Comment: s. 2(2). This subsection tracks the Ontario Act but has been amended by:

- (i) expanding the scope of its applicability to include section 8 (Dispute Resolution), section 9 (Joint and Several Liability), and section 11 (Attempt to Affect Jurisdiction Void); and
- (ii) permitting the insertion of the applicable province or territory.

Non-application

(3) This Act does not apply to,
(a) an employer-employee relationship;
(b) a partnership;
(c) membership in,

- (i) an organization operated on a co-operative basis by and for independent retailers that,

(A) purchases or arranges the purchase of, on a non-exclusive basis, wholesale goods or services primarily for resale by its member retailers, and
(B) does not grant representational rights to or exercise significant operational control over its member retailers,

- (ii) a "cooperative corporation" as defined under subsection 136(2) of the *Income Tax Act* (Canada) or as would be defined under that subsection, but for paragraph 136(2)(c),
- (iii) an organization incorporated under the *Canada Cooperatives Act*, or
- (iv) an organization incorporated under the *Co-operative Corporations Act;*

(d) an arrangement arising from an agreement to use a trade-mark, trade name, logo or advertising or other commercial symbol designating a person who offers on a general basis, for

consideration, a service for the evaluation, testing or certification of goods, commodities or services;
(e) an arrangement arising from an agreement between a licensor and a single licensee to license a specific trade-mark, trade name, logo or advertising or other commercial symbol where such licence is the only one of its general nature and type to be granted in Canada by the licensor with respect to that trade-mark, trade name, logo or advertising or other commercial symbol;
(f) a relationship or arrangement arising out of an oral agreement where there is no writing that evidences any material term or aspect of the relationship or arrangement; or
(g) an arrangement arising out of an agreement,

- (i) for the purchase and sale of a reasonable amount of goods at a reasonable wholesale price, or
- (ii) for the purchase of a reasonable amount of services at a reasonable price.

ULCC Comment: s. 2(3). This subsection substantially tracks the Ontario Act with some modification. The following amendments were made to the Ontario Act:

- (i) "co-operative association" is defined within numbered subparagraph 3 of the Uniform Act rather than being defined in a regulation;
- (ii) all references to "service mark" have been deleted since that term does not accord with Canadian trade-mark legislation terminology;
- (iii) numbered subparagraph 7 of the Ontario Act has been clarified in section 2(3)(e) to confirm that the single trade-mark licence is the only type of its kind in Canada as the Ontario Act confirms no territorial qualification;
- (iv) numbered subparagraph 6 of the Ontario Act relating to lease arrangements whereby the franchisee leases space in a retailer's premises but is not required or advised to buy the goods or services it sells from the retailer or an affiliate of the retailer has been deleted;
- (v) numbered subparagraph 8 of the Ontario Act relating to business arrangements with the Crown was not included as there was no reasonable basis on which to exempt the Crown if it is in a business franchise relationship acting like a private sector entity; and
- (vi) Section 2(3)(g) was added to exempt wholesale arrangements as in the Alberta Act.

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

continuing payment as required at the beginning of the "franchise" definition. Hence, the suggested amendment above to the definition of a franchise.

Fair dealing

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

> **ULCC Comment:** s. 3(1). This subsection has been expanded by adding the words "including in the exercise of a right" to the application of the duty of fair dealing definition. As a result, the duty of fair dealing will apply not only during the performance and enforcement of the agreement but also in the exercise of a right under it. The addition of the words "in the exercise of a right" is necessary because the duty of fair dealing incorporating the duty of good faith and commercial reasonable standards in the Ontario Act does not extend to express contractual provisions granting the franchisor discretionary authority over rights to be exercised during the term of the contract that may be carried out without regard to fair dealing.

Right of action

(2) A party to a franchise agreement has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing.

Interpretation

(3) For the purpose of this section, the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards.

Right to associate

4.(1) A franchisee may associate with other franchisees and may form or join an organization of franchisees.
Franchisor may not prohibit association
(2) A franchisor and a franchisor's associate shall not interfere with, prohibit or restrict, by contract or otherwise, a franchisee from forming or joining an organization of franchisees or from associating with other franchisees.
Same

(3) A franchisor and a franchisor's associate shall not, directly or indirectly, penalize, attempt to penalize or threaten to penalize a franchisee for exercising any right under this section.

Provisions void

(4) Any provision in a franchise agreement or other agreement relating to a franchise which purports to interfere with, prohibit or restrict a franchisee from exercising any right under this section is void.

Right of action

(5) If a franchisor or a franchisor's associate contravenes this section, the franchisee has a right of action for damages against the franchisor or franchisor's associate, as the case may be.

> **ULCC Comment:** s. 4. Section 4 of the Ontario Act was adopted instead of the corresponding section of the Alberta Act. The Alberta Act has been drafted in the negative, that is, that a franchisor or its associate may not prohibit or restrict a franchisee from forming an organization while the Ontario Act has been drafted in the affirmative, a "franchisee may associate with other franchisees . . .".

Franchisor's obligation to disclose

5.(1) A franchisor shall provide a prospective franchisee with a disclosure document and the prospective franchisee shall receive the disclosure document not less than 14 days before the earlier of,

(a) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise; and

(b) the payment of any consideration by or on behalf of the prospective franchisee to the franchisor or franchisor's associate relating to the franchise.

> **ULCC Comment:** s.5(1). This subsection tracks the Ontario Act which is more comprehensive than the Alberta Act.

Methods of delivery

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

> **ULCC Comment:** s.5(2). This subsection allows a province to prescribe other methods of delivery of a disclosure document (e.g. electronic mail – currently being considered by the Federal Trade Commission in respect of uniform franchise offering circulars in the United States).

CFA Suggestion: To modernize the legislation we suggest adding allowance for courier and electronic delivery of the franchise disclosure document, and notices to be delivered under the statute, as well as a time reference for when such methods would be considered received. Since above ULCC comment was made, electronic delivery has been permitted in the United States. While some provinces permit it, Ontario does not, and Alberta is silent. BC can take leadership on this issue by permitting electronic and courier delivery.

Same

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

Contents of disclosure document

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

ULCC Comment: s.5(4). This subsection tracks the Ontario Act which is more comprehensive than the Alberta Act.

Same – all material facts

(5) In addition to the statements, documents and information required by subsection (4), the disclosure document shall contain all material facts.

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

Material change

(6) The franchisor shall provide the prospective franchisee with a written statement of any material change, and the prospective franchisee shall receive such statement, as soon as practicable after the change has occurred and before the earlier of,
(a) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise; and
(b) the payment of any consideration by or on behalf of the prospective franchisee to the franchisor or franchisor's associate relating to the franchise.

Information to be accurate, clear, concise

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

> **ULCC Comment:** s.5(7). This subsection is contained in the Ontario Act, but not the Alberta Act. It follows current trends in securities laws to require clear and concise disclosure.

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

Exemptions

(8) This section does not apply to,
(a) the grant of a franchise by a franchisee if,

- (i) the franchisee is not the franchisor, the franchisor's associate or a director, officer or employee of the franchisor or of the franchisor's associate,
- (ii) the grant of the franchise is for the franchisee's own account,
- (iii) in the case of a master franchise, the entire franchise is granted, and
- (iv) the grant of the franchise is not effected by or through the franchisor;

(b) the grant of a franchise to a person who has been an officer or director of the franchisor or of the franchisor's associate for at least six months immediately before the grant of the franchise, for that person's own account;

(c) the grant of an additional franchise to an existing franchisee if that additional franchise is substantially the same as the existing franchise that the franchisee is operating and if there has been no material change since the existing franchise agreement or latest renewal or extension of the existing franchise agreement was entered into;
(d) the grant of a franchise by an executor, administrator, sheriff, receiver, trustee, trustee in bankruptcy or guardian on behalf of a person other than the franchisor or the estate of the franchisor;
(e) the grant of a franchise to a person to sell goods or services within a business in which that person has an interest, if the sales arising from those goods or services, as anticipated by the parties or that should be anticipated by the parties at the time the franchise agreement is entered into, will not exceed 20 per cent of the total sales of the business during the first year of operation of the franchise;
(f) the renewal or extension of a franchise agreement where there has been no interruption in the operation of the business operated by the franchisee under the franchise agreement and there has been no material change since the franchise agreement or latest renewal or extension of the franchise agreement was entered into;
(g) the grant of a franchise if the prospective franchisee is required to make a total annual investment to acquire and operate the franchise in an amount that does not exceed the prescribed amount;
(h) the grant of a franchise if the franchise agreement is not valid for longer than one year and does not involve the payment of a non-refundable fee and if the franchisor or franchisor's associate provides location assistance to the franchisee, including securing retail outlets or accounts for the goods or services to be sold, offered for sale or distributed or securing locations or sites for vending machines, display racks or other product sales displays used by the franchisee; or
(i) the grant of a franchise if the franchisor is governed by section 55 of the *Competition Act* (Canada).

> **ULCC Comment:** s.5(8). S. 5(8)(e) has been drafted to include the specified percentage of sales and the period of time for calculating the applicable percentage rather than allowing such items to be prescribed by regulation in order to achieve uniformity. The Alberta Act and the Ontario Act allow the items to be prescribed by regulation.
>
> The exemption in s.5(8)(h) has been specifically limited to business opportunity franchises rather than business format franchises as generally defined. It was felt that there might be abuse of the one-year franchise exemption by franchisors who constantly renew or extend one-year terms, and that there was no business justification for denying a business format franchise disclosure simply because the term is limited to one year.

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

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

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

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

(h) the grant of a franchise if the franchise agreement is not valid for longer than one year and does not involve the payment of a non-refundable initial franchise fee.

CFA Suggestion: Ontario's franchise law now provides for an additional exemption, the so called large franchise exemption, which applies if the franchisee will be spending in the acquisition and operation of the franchise in the first year more than Can$5,000,000. CFA advocates for such an exemption in BC as well. Like the OBA report, the CFA advocates for adding clarity to when the exemption is available, by specifying that it applies to acquisition and set up as

opposed to having to estimate far into the future regarding operational costs. A corresponding decrease in the monetary threshold is also recommended, so that the exemption will apply if the amount exceeds Can$3,000,000. So, like OBA, CFA suggests it read as follows:

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

Crown exempt from financial statement requirement

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

ULCC Comment: s.5(9). There is no valid policy reason to have an overall exemption in the Act for agreements with the Crown as currently exist in the Ontario Act (but not in the Alberta Act). The Crown is exempted from financial disclosure.

Interpretation - grant effected by or through franchisor

(10) For the purpose of subclause (8)(a)(iv), a grant is not effected by or through a franchisor merely because,
(a) the franchisor has a right, exercisable on reasonable grounds, to approve or disapprove the grant; or
(b) a fee must be paid to the franchisor in an amount set out in the franchise agreement or in an amount that does not exceed the reasonable actual costs incurred by the franchisor to process the grant.

Interpretation - franchise agreement

(11) For the purposes of subsections (1) and (6), an agreement is not a franchise agreement or any other agreement relating to the franchise if the agreement only contains terms in respect of,
(a) keeping confidential or prohibiting the use of any information or material that may be provided to the prospective franchisee; or
(b) designating a location, site or territory for a prospective franchisee.

ULCC Comment: s.5(11). The Alberta Act exempts from disclosure certain deposit agreements and confidentiality agreements. The Ontario Act has no similar exemption. An agreement which is restricted to confidentiality or designation of a location should be able to be entered into prior to disclosure and should therefore be exempt from disclosure. A prospective franchisee would not be prejudiced in this regard.

Exception re interpretation of franchise agreement

(12) Despite subsection (11), an agreement that only contains terms described in clause (11)(a) or (b) is a franchise agreement or any other agreement relating to the franchise for the purposes of subsections (1) and (6) if the agreement,
(a) requires keeping confidential or prohibits the use of information,

- (i) that is or comes into the public domain without breaching the agreement,
- (ii) that is disclosed to any person without breaching the agreement, or
- (iii) that is disclosed with the consent of all the parties to the agreement; or

(b) prohibits the disclosure of information to an organization of franchisees, to other franchisees of the same franchise system or to a franchisee's professional advisors.

CFA Suggestion: The CFA advocates for keeping the exception as stated in the ULCC. Any attempt to require that a third party, such as a lawyer, become involved, will render useless the exception as it will cease to be practical.

Right of rescission

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

Same

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

Notice of rescission

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

Effective date of rescission

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

Same

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

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

Franchisor's obligations on rescission

(6) The franchisor or franchisor's associate, as the case may be, shall, within 60 days of the effective date of the rescission,
(a) refund to the franchisee any money received from or on behalf of the franchisee, other than money for inventory, supplies or equipment;
(b) purchase from the franchisee any inventory that the franchisee had purchased pursuant to the franchise agreement and remaining at the effective date of rescission, at a price equal to the purchase price paid by the franchisee;
(c) purchase from the franchisee any supplies and equipment that the franchisee had purchased pursuant to the franchise agreement, at a price equal to the purchase price paid by the franchisee; and
(d) compensate the franchisee for any losses that the franchisee incurred in acquiring, setting up and operating the franchise, less the amounts set out in clauses (a) to (c).

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

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

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

Damages for misrepresentation, failure to disclose

7.(1) If a franchisee suffers a loss because of a misrepresentation contained in the disclosure document or in a statement of material change or as a result of the franchisor's failure to comply in any way with section 5, the franchisee has a right of action for damages against,
(a) the franchisor;
(b) the franchisor's broker;
(c) the franchisor's associate; and
(d) every person who signed the disclosure document or statement of material change.

ULCC Comment: s.7(1). Liability on the part of a franchisor's agent, as contained in the Ontario Act, has been eliminated with deletion of the concept of a franchisor's agent which created significant interpretation problems in the Ontario Act.

Deemed reliance on misrepresentation

(2) If a disclosure document or statement of material change contains a misrepresentation, a franchisee who acquired a franchise to which the disclosure document or statement of material change relates shall be deemed to have relied on the misrepresentation.

Deemed reliance on disclosure document

(3) If a franchisor failed to comply with section 5 with respect to a statement of material change, a franchisee who acquired a franchise to which the material change relates shall be deemed to have relied on the information set out in the disclosure document.

Defence

(4) A person is not liable in an action under this section for misrepresentation if the person proves that the franchisee acquired the franchise with knowledge of the misrepresentation or of the material change, as the case may be.

Same

(5) A person, other than a franchisor, is not liable in an action under this section for misrepresentation if the person proves,
(a) that the disclosure document or statement of material change was given to the franchisee without the person's knowledge or consent and that, on becoming aware of its having been given, the person promptly gave written notice to the franchisee and the franchisor that it was given without that person's knowledge or consent;
(b) that, after the disclosure document or statement of material change was given to the franchisee and before the franchise was acquired by the franchisee, on becoming aware of any misrepresentation in the disclosure document or statement of material change, the person withdrew consent to it and gave written notice to the franchisee and the franchisor of the withdrawal and the reasons for it;
(c) that, with respect to any part of the disclosure document or statement of material change purporting to be made on the authority of an expert or purporting to be a copy of or an extract from a report, opinion or statement of an expert, the person had no reasonable grounds to believe and did not believe that,

- (i) there had been a misrepresentation,
- (ii) the part of the disclosure document or statement of material change did not fairly represent the report, opinion or statement of the expert, or
- (iii) the part of the disclosure document or statement of material change was not a fair copy of or extract from the report, opinion or statement of the expert;

(d) that, with respect to any part of the disclosure document or statement of material change purporting to be made on the authority of a statement in writing by a public official or purporting to be a copy of or an extract from a report, opinion or statement of a public official, the person had no reasonable grounds to believe and did not believe that,

- (i) there had been a misrepresentation,

- (ii) the part of the disclosure document or statement of material change did not fairly represent the report, opinion or statement of the public official, or
- (iii) the part of the disclosure document or statement of material change was not a fair copy of or extract from the report, opinion or statement of the public official; or

(e) that, with respect to any part of the disclosure document or statement of material change not purporting to be made on the authority of an expert or of a statement in writing by a public official and not purporting to be a copy of or an extract from a report, opinion or statement of an expert or public official, the person,

- (i) conducted an investigation sufficient to provide reasonable grounds for believing that there was no misrepresentation, and
- (ii) believed there was no misrepresentation.

> **ULCC Comment:** s.7(5). S.7(5) incorporates components of the Ontario Act and the Alberta Act, with necessary clarifications. S.7(d), taken from the Alberta Act, clarifies that statements of public officials must be in writing and that a "public official document" as used in the Alberta Act means a report, opinion or statement of a public official. S.7(5)(e) allows a defence to a liability claim where a person has conducted due diligence in arriving at the decision that there was no misrepresentation and in fact believed that there was no misrepresentation.

Dispute resolution

8.(1) Any party to a franchise agreement who has a dispute with one or more other parties to the agreement may deliver to the party or parties with whom the party has a dispute a notice of dispute setting out,
(a) the nature of the dispute; and
(b) the desired outcome of the dispute.

Attempt at informal resolution

(2) Within 15 days after delivery of the notice of dispute, the parties to the dispute shall attempt to resolve the dispute.

Mediation

(3) If the parties to the dispute fail to resolve the dispute under subsection (2), any party to the dispute may, within 30 days after delivery of the notice of dispute but not before the expiry of the 15 days for resolving the dispute under subsection (2), deliver a notice to mediate to all the parties to the franchise agreement.

Same

(4) Upon delivery of a notice to mediate, the parties to the dispute shall follow the rules set out in the regulations respecting mediation.

Confidentiality of mediation

(5) No person shall disclose or be compelled to disclose in any proceeding before a court, tribunal or arbitrator any information acquired, any opinion disclosed or any document, offer or admission made in anticipation of, during or in connection with the mediation of a dispute under this section.

Exceptions

(6) Subsection (5) does not apply to,
(a) anything that the parties agree in writing may be disclosed;
(b) an agreement to mediate;
(c) a document respecting the costs of the mediation;
(d) a settlement agreement made in resolution of all or some of the issues in dispute; or
(e) any information that does not directly or indirectly identify the parties or the dispute and that is disclosed for research or statistical purposes only.

Same

(7) Subsection (5) does not apply to information disclosed to court as permitted or required under a regulation made under clause 14(1)(f).

Same

(8) Nothing in subsection (5) precludes a party from introducing into evidence in any proceeding before a court, tribunal or arbitrator any information acquired, any opinion disclosed or any document, offer or admission made in anticipation of, during or in connection with the mediation that is otherwise producible or compellable in the proceeding.

> **ULCC Comment:** S.8. S.8 of the Uniform Act recognizes that franchise disputes would be resolved more advantageously through a form of alternate dispute resolution. S.8 was developed recognizing that in certain provinces the rules of practice in civil proceedings mandate a form of pre-trial mediation, and recognizing that the Ontario Act contains a mandatory disclosure statement that mediation is a form of dispute resolution. It was determined that it would be beneficial to provide for mediation to be invoked by any party to a franchise agreement. S.8 also takes the policy position that party initiated mediation will be of significant benefit to resolve franchise disputes prior to the commencement of, as well as after the commencement of, litigation proceedings.

CFA Suggestion: We agree with BCLI's recommendation that BC not adopt any provisions requiring mandatory mediation of franchise disputes.

Joint and several liability

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

Same

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

Same

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

ULCC Comment: S.9. S.9 reflects the wording of the joint and several liability provisions of the Ontario Act. The Alberta Act provisions are more general but essentially the same.

No derogation of other rights

10. The rights conferred by or under this Act are in addition to and do not derogate from any other right or remedy any party to a franchise agreement may have at law.

ULCC Comment: S.10. The "derogation of other rights" provisions in the Ontario Act and the Alberta Act are limited to a franchisee and a franchisor. Since other persons may be party to a franchise agreement (given the definition of that term), it was considered appropriate to extend this right to any party to a franchise agreement.

Attempt to affect jurisdiction void

11.(1) Any provision in a franchise agreement purporting to restrict the application of the law of [insert jurisdiction] or to restrict jurisdiction or venue to a forum outside [insert jurisdiction] is void with respect to a claim otherwise enforceable under this Act in [insert jurisdiction].

Exception

(2) Subsection (1) does not apply to a claim if an action based on the claim was commenced before the coming into force of this section.

> **ULCC Comment:** S. 11. This section tracks the Ontario Act but has been amended so as to permit the insertion of the applicable province or territory.

Rights cannot be waived

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

> **ULCC Comment:** S.12. Any allowance for waivers or releases of legislated rights would defeat the purpose of the legislation, which is to protect franchisees and prospective franchisees. This section has been expanded from the Ontario Act by adding the words "or a prospective franchisee" thereby expanding the list of parties to whom this section applies. As a result, a franchisee or a prospective franchisee cannot waive or release any of their rights conferred under the Act or of an obligation or requirement imposed on a franchisor or franchisors associate by or under the Act.
>
> The reason for the addition of a prospective franchisee is that it is necessary in order to prohibit the franchisor or its associate from taking away any rights that the prospective franchisee may have. The protection of the prospective franchisee is necessary since the duty of fair dealing incorporating the duty of good faith and commercial reasonableness in the Ontario Act does not extend to the prospective franchisee.

> **CFA Suggestion:** The courts have recognized that parties need to be able to enter into bona fide settlements of their disputes, and in settling, provide a release of all claims, notwithstanding the non-waiver provisions of the franchise laws. Accordingly, CFA advocates for codification of this common law exception to the non-waiver provision, and that section 12 be amended to read as follows (the additional suggested language being underlined):
>
> 12. Any purported waiver or release by a franchisee or a prospective franchisee of a right conferred by or under this Act or of an obligation or requirement imposed on a franchisor or franchisor's

associate by or under this Act is void, except when made in writing as part of the settlement of a bona fide dispute, and signed by the franchisee or prospective franchisee with the benefit of independent legal advice.

Burden of proof

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

Regulations

14.(1) The Lieutenant Governor in Council may make regulations,
(a) prescribing and governing the financial statements to be contained in the disclosure document;
(b) prescribing statements for the purpose of clause 5(4)(c);
(c) prescribing other information and documents for the purposes of clauses 5(4)(d) and (e);
(d) prescribing an amount for the purpose of clause 5(8)(g);
(e) prescribing methods of delivery for the purposes of subsections 5(2), 6(3) and 8(1) and (3), and prescribing rules surrounding the use of such methods, including the day on which a notice of rescission delivered by such methods is effective for the purpose of clause 6(4)(e);
(f) prescribing rules governing the informal resolution and mediation of a dispute for the purpose of section 8 and prescribing forms to be used in the mediation process;
(g) prescribing forms and providing for their use;
(h) respecting any matter that the Lieutenant Governor in Council considers necessary or advisable to carry out effectively the intent and purpose of this Act.

General or specific

(2) A regulation made under subsection (1) may be general or specific in its application.