RECOMMENDATIONS TO AMEND THE *ARTHUR WISHART ACT (FRANCHISE DISCLOSURE)*, *2000*

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Submitted to: Ministry of Government and Consumer Services

Submitted by: The Ontario Bar Association, Franchise Law Section

Contents

Introduction

The Ontario Bar Association ("OBA") is pleased to provide this submission regarding its review and proposed amendments for improving Ontario's *Arthur Wishart Act (Franchise Disclosure), 2000* (the "proposed amendments").

The OBA

Established in 1907, the OBA is the largest voluntary legal association in Ontario and represents some 16,000 lawyers, judges, law professors and law students. The OBA is pleased to analyze and assist government with dozens of legislative and policy initiatives each year - both in the interest of the profession and in the interest of the public.

The OBA Franchise Law Section has over 240 members, and includes the leading experts in franchise law issues, including many whose legal practices are devoted to representing franchisors, franchisees, or both. Members of the Franchise Law Section include both solicitors – who advise franchise companies on starting or expanding franchise systems, deal with the franchise contracts and compliance with the Act, and barristers – who deal with disputes that arise under the Act, including litigation. The Franchise Law Section also has a number of lawyers who practise in-house with franchisor companies.

Overview

The *Arthur Wishart Act (Franchise Disclosure), 2000* (the "Act") has now been in force since 2001. Many judicial decisions have been rendered; many franchise law conferences have been held; and many legal papers on franchising have been written.

The Franchise Law Section formed a Working Group to consider changes that should be made to improve the Act based on the practical experiences of our members since the Act came into force. This submission is the product of a consensus that the Act is in need of revision. The proposed revisions are intended to deal with issues arising from the practical application of the Act, without fundamentally altering the regime created by the Act. These submissions do not reflect the OBA's view of how any of the provisions discussed below ought to be interpreted in any case currently pending before the courts.

The submission is comprised of two parts. Part A identifies sections of the Act for which the OBA has proposed amendments, along with a notation of the corresponding page where the proposed amendments are discussed. Part B sets out the proposed revisions to the Act, along with a discussion as to why those changes are seen as wise or necessary.

PART A – Current Act and Sections Noted for Amendment

Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, chapter 3
Amended by: 2001, c. 9, Sched. D, s. 1.

Definitions

1. (1) In this Act,

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

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

(a) in which,

(i) the franchisor grants the franchisee the right to sell, offer for sale or distribute goods or services that are substantially associated with the franchisor's, or the franchisor's associate's, trade-mark, service mark, trade name, logo or advertising or other commercial symbol, and **NOTE (1), see page 11**

(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 **NOTE (2) , see page 13**

(b) in which, **NOTE (3), see page 14**

(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, **NOTE (4) see page 16**

(a) a franchisor or franchisor's associate, and

(b) a franchisee; ("contrat de franchisage")

"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, **NOTE (5), see page 18**

(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")

Insert new definition: "franchisor's affiliate" NOTE (6), see page 19

"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")

"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") **NOTE (7), see page 19**

"minister" means the minister responsible for the administration of this Act; ("ministre")

"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") **NOTE (8), see page 20**

"subfranchise" means a franchise granted by a subfranchisor to a subfranchisee. ("sous-franchise") 2000, c. 3, 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). **NOTE (9), see page 21**

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). **NOTE (9), see page 21**

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.
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). **NOTE (10), see page 22**

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, **NOTE (11), see page 24**

(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). **NOTE (12), see page 27**

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; **NOTE (13), see page 28**

(b) financial statements as prescribed; **NOTE (14), see page 29**

(c) copies of all proposed franchise agreements and other agreements relating to the franchise to be signed by the prospective franchisee; **NOTE (15), see page 30**

(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, **NOTE (16), see page 30**

(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).

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).

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;

(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, for that person's own account; **NOTE (17), see page 32**

(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; **NOTE (17), see page 32**

(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, **NOTE (17), see page 32**

(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,

(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). **NOTE (17), see page 32**

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). **NOTE (18), see page 35**

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). **NOTE (18), see page 35**

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, **NOTE (19), see page 36**

(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).

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, **NOTE (20), see page 39**

(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. **NOTE (21), see page 39**

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.

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).

Ministerial regulations revoked in five years

(6) Any regulation made under subsection (1) is revoked on the fifth anniversary of the day this section comes into force, if not expressly revoked earlier. 2000, c. 3, s. 13 (6).

(7) SPENT: 2000, c. 3, s. 13 (7).

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.

PART B – Proposed Amendments to the Act

Note (1): Subparagraph 1(1)(a)(i) - Definition of "franchise"

The current subparagraph states:

(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

The recommended changes shown in black-line are the following[1]:

(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,~~ a trade-mark, ~~service mark~~(1), trade name, logo ~~or advertising~~(2)or other commercial symbol, that is owned by or licensed to the franchisor or the franchisor's associate,(3) and

The reasons for this recommendation are as follows:

1. Deletion of "service mark":
   - The words "service mark" do not have legal significance in Canada; it is recommended these words be deleted throughout the Act.

2. Deletion of "or advertising":
   - The words "or advertising" do not fit into the context of the words, "trade-mark, trade name, logo or other commercial symbol."
     - "Trade-mark" usually means a mark that is used by a person to distinguish his wares or services from those of others;
     - "Trade name" means a name or style under which a person does business;
     - "Logo" means a graphic representation or abbreviation of a trade-mark or trade name; and
     - "Commercial symbol" has a meaning similar to "logo".
   - In contrast, "advertising" means commercial information presented while offering goods or services through announcements in the media, and is therefore too broad. For example, negative advertising is usually substantially associated with the trade-mark, trade name, logo, etc. not just of the advertiser, but also the competitor.

3. Addition of "owned by or licensed":
   - Currently, the subparagraph implies ownership of the trademark by the franchisor or an associate; however, this may not be the case. For example,

[1] Text that is struck out indicates it has been removed in the recommendation. Text that is underlined indicates it has been added in the recommendation. The numbers in brackets beside the additions and deletions correspond to the reasons for the recommendations set out below the black-line.

where the franchisor is a subfranchisor the trademark may merely be licensed. The addition of "owned by or licensed" allows the subsection to cover not only owned trademarks, but also licensed trademarks.

The OBA recommends that the first part of the definition of "franchise" state:

> (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 a trade-mark, trade name, logo or other commercial symbol, that is owned by or licensed to the franchisor or the franchisor's associate, and

Note (2): Subparagraph 1(1)(a)(i) - Definition of "franchise"

The current subparagraph on the second part of the definition of "franchise" states:

> (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

The recommended changes shown in black-line are the following:

> (ii) the franchisor or the franchisor's associate has the right to exercise or exercises significant control over, or ~~offers~~ 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, or

The subparagraph should be amended to provide consistency with respect to the actual exercise of significant control as compared with an offer of significant assistance. The OBA recommends the Act contemplate the right to exercise control in addition to actual control.

It follows that this subparagraph should be changed to read:

> (ii) 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, or

Note (3): Subparagraph 1(1)(b)(i) and (ii) - Definition of "franchise"

The current subparagraph states:

> (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")

The recommended changes shown in black-line are the following:

(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~~ meaning 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")

As stated in note 1 above, the OBA recommends the words "service mark" and "or advertising" be deleted.

Subparagraph 1(1)(b)(ii) uses the term "location assistance" as part of the test to determine whether a relationship can be defined as a franchise. This term is not defined in the statute nor is it an ordinary commercial law term. The OBA, therefore, recommends the word "including" be changed to "meaning". This change clarifies both the meaning of the term "location assistance" and the definition of "franchise".

It follows that this subparagraph should be changed to read:

(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 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, meaning 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")

Note (4): Subsection 1(1) - Definition of "franchise agreement"

The current definition of "franchise agreement" states:

"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")

The recommended changes shown in black-line are the following:

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

(a) a franchisor ~~or franchisor's associate,~~ and

(b) a franchisee;

by which the franchisor grants the franchisee the right to sell, offer for sale or distribute goods or services through the franchise;

"related agreement" means any agreement between,

(a) a franchisor or franchisor's affiliate, and

(b) a franchisee,

that relates to the franchise that is granted by the franchise agreement;

As a practical reality most franchisors use a number of ancillary agreements in addition to

the agreement that actually grants the franchisee distributional rights for the goods or services associated with the trade-mark, etc. (i.e., the "franchise-granting agreement"). Some of these ancillary agreements are entered into before the parties enter into the franchise-granting agreement. Examples of these agreements include deposit agreements, territory reservation agreements, and confidentiality agreements. Other ancillary agreements may be entered into after the parties have entered into the franchise-granting agreement; for example, a sublease. All of these agreements relate to the franchise, and as a result, under the current definition, would require disclosure.

The OBA recommends the definition of "franchise agreement" be amended to deal with (1) the franchise agreement as the document which grants the franchise and (2) the other ancillary documents as "related agreements". The amendment therefore also contemplates a separate definition for "related agreements". The question of whether an agreement "grants" a franchise may still turn on the facts in particular instances, such as with respect to an agreement that constitutes a fundamental change to the franchise arrangement.

Further, since the new definition of franchise agreement means it is only the agreement that grants the franchise, a franchise agreement can only be between the franchisor and the franchisee, and not between the franchisor's affiliate or associate and the franchisee. As a result, the recommendation is as follows:

> "franchise agreement" means the agreement between,
>
> (a) a franchisor, and
>
> (b) a franchisee,
>
> by which the franchisor grants the franchisee the right to sell, offer for sale or distribute goods or services through the franchise;
>
> "related agreement" means any agreement between,
>
> (a) a franchisor or franchisor's affiliate[2], and
>
> (b) a franchisee,
>
> that relates to the franchise that is granted by the franchise agreement;

[2] The recommendation refers to a "franchisor's affiliate", not a "franchisor's associate". Note (6) deals with OBA's recommendation to amend the Act to include a definition of "franchisor's affiliate".

Note (5): Paragraphs 1(1)(b) and (c) - Definition of "franchise system"

The current definition of "franchise system" states:

> "franchise system" includes,
>
> (a) the marketing, marketing plan or business plan of the franchise,
>
> (b) the use of or association with a trademark, 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; ("systeme de franchise")

The OBA's recommendations deal with paragraphs 1(1)(b) and (c). The recommended changes shown in black-line are the following:

> (b) the use of or association with a trademark, ~~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 related agreements, and

With respect to paragraph (b), as stated in notes (1) and (3), the words "service mark" and "or advertising" should be deleted.

The OBA recommends that paragraph (c) deal with the obligations of the franchisor and franchisee as they relate to the whole business, not simply the "operation of the business". The OBA also advises the introduction of "related agreements" into the definition as discussed in note (4) above.

It follows that the paragraphs should be amended to read:

> (b) the use of or association with a trade-

mark, trade name, logo or other commercial symbol,

(c) the obligations of the franchisor and franchisee with regard to the business operated by the franchisee under the franchise agreement and related agreements, and

Note (6): Subsection 1(1) - Definition of "franchisor's affiliate"

The OBA recommends that a definition of "franchisor's affiliate" be added to the Act for the purposes of disclosure as set out in sections 2 – 6 of the Regulations; however, it is not the OBA's intention that the addition of the definition of franchisor's affiliate should be used to expand the liability the Act imposes on franchisor's associates. The term franchisor's affiliate should also be provided for in the Regulations where required. The definition should read:

"franchisor's affiliate" means a person, who directly or indirectly

(i) controls or is controlled by the franchisor, or

(ii) is controlled by another person who also controls, directly or indirectly, the franchisor.

Note (7): Subsection 1(1) - Definition of "material fact"

The current definition of "material fact" states:

"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 fran--chise; ("fait important")

The recommended changes shown in black-line are the following:

"material fact" ~~includes~~ means any information about the business, operations, capital or control

> of the franchisor or franchisor's associate,
> or about the franchise system <u>or the franchise</u>,
> 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")

The OBA recommends the word "includes" be changed to "means" to provide clarity. Ontario is the only province in Canada with franchise legislation that uses "includes" instead of "means". The recommendation provides the definition should read:

> "material fact" means any information about
> the business, operations, capital or control
> of the franchisor or franchisor's associate,
> or about the franchise system or the franchise,
> 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")

Note (8): Subsection 1(1) - Definition of "prospective franchisee"

The current subsection states:

> "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 fran-
> chise agreement, and a person whom a fran-
> chisor or a franchisor's associate, agent or
> broker, directly or indirectly, invites to enter
> into a franchise agreement; ("franchise
> eventual")

The recommended changes shown in black-line are the following:

> "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 fran-
> chise agreement, and a person whom a fran-
> chisor or a franchisor's associate, agent or
> broker~~, directly or indirectly,~~ invites to enter
> into a franchise agreement; ("franchise
> eventual")

The OBA recommends that the words "directly or indirectly" are unnecessary and should be deleted from the definition because they create uncertainty. Based on this recommendation, the subsection should state:

> "prospective franchisee" means a person who has indicated 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 invites to enter into a franchise agreement; ("franchise eventual")

Note (9): Subsection 2(1) and (2) – Application of the Act

Subsection 2(1) currently states:

> 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.

The recommended changes shown in black-line are the following:

> 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. <u>A franchise agreement governed by the laws of the Province of Ontario 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 Ontario.</u>

The OBA recommends the phrase added above be added to both subsections 2(1) and (2). The decision in 405341 Ontario Ltd. v. Midas Canada Inc., 2010 ONCA 478 suggests that if

parties to a contract deem Ontario law to govern the contract, then the Act applies to their relationship even if the franchise is not to be operated partly or wholly in Ontario. This may lead to situations where the Act applies in other provinces which already have an applicable franchise law, or to franchises operated outside of Canada. The uncertainty surrounding the extra-territorial application of the Act, has given rise to claims against franchisors and their advisors.

The OBA, therefore, recommends the subsections read:

> (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. A franchise agreement governed by the laws of the Province of Ontario 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 Ontario.
>
> (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. A franchise agreement governed by the laws of the Province of Ontario 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 Ontario.

Note (10): Subsection 2(3)) – Non-application of the Act

Subsection 2(3) currently states:

> 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.

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.

The OBA recommends changes be made to paragraphs 4 and 5. The recommended changes shown in black-line are the following:

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 <u>in Canada</u> 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 <u>in Canada</u> by the licensor with respect to that trade-mark, ~~service mark~~, trade name, logo ~~or advertising~~ or other commercial symbol.

The recommendations regarding the deletions of "service mark" and "or advertising" in paragraphs 4 and 5 have been dealt with above in note 1.

The OBA's recommendation to add the words "in Canada" in paragraph 5 is made to clarify that the "single license" exemption is limited to Canada as it is now unclear whether it means Ontario, Canada or the entire world.

The amended paragraphs would state:

> 4. An arrangement arising from an agreement to use a trade-mark, trade name, logo 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 in Canada to license a specific trade-mark, trade name, logo 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 other commercial symbol.

Note (11): Paragraphs 5(1)(a) and (b) – Distribution of Disclosure Documents, Signing Franchise and Related Agreements and Payment of Consideration

The current paragraphs 5(1)(a) and (b) state:

> 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.

The recommended changes shown in black-line are the following:

A franchisor shall provide ~~a~~ each 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~~ related agreement that is signed before or contemporaneously with the franchise agreement; 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.

The first words of subsection 5(1), "shall provide a prospective franchisee with the disclosure document and the prospective franchisee shall…" are unclear on whether each individual franchisee must receive a disclosure document where there is more than one prospective franchisee: where the prospective franchisees are a husband and wife living in the same household, for example, would delivery of one disclosure document be sufficient? To add clarity, the OBA recommends the words, "each prospective franchisee" be added.

On paragraphs 5(1)(a) the phrase "relating to the franchise" is too broad and seems to cover any agreement relating to a franchise, whether such agreement is entered into by the franchisee with the franchisor or a third party. As a result, the phrase "related agreements" should be adopted instead as recommended in notes 4 and 5 above.

In relation to subsection 5(1), the OBA recommends the addition of language that permits limited deposits and the signing of confidentiality agreements in advance of disclosure being provided. This is permitted in the other provinces in Canada that have a franchise law. Using Alberta ((*Franchise Regulation*, Alta Reg 240/1995 [Alberta Regulations]) as an example, the OBA recommends that franchisors in Ontario be permitted to take a deposit so long as the deposits taken by a franchisor are fully refundable, the deposit does not exceed the prescribed amount (i.e. 15% of the initial franchise fee), and the deposit is given under an agreement that does not bind the prospective franchisee to enter into a franchise agreement. The agreement contemplated may be a confidentiality agreement; however, for the purposes of a deposit, a confidentiality agreement should not fall under the concept of related agreements, notwithstanding any other definitions.

The OBA also recommends that there be a timing of signature component to deal with the practical reality that over the course of the term of a franchise agreement that may last many years, many agreements may be entered into by the franchisor and the franchisee

(i.e., purchase orders for inventory). As a result, the OBA recommends the addition of the language "that is signed before or contemporaneously with the franchise agreement."

It is recommended paragraphs 5(1)(a) and (b) state:

> A franchisor shall provide each 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 related agreement that is signed before or contemporaneously with the franchise agreement; 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.

The OBA recommends using the wording in Alberta's Regulations under section 4 to more fully address the rules on deposits:

> (6) For the purposes of subsections (2)(b) and (5)(b), the payment of any consideration relating to a franchise does not include the payment of a fully refundable deposit.
>
> (7) For the purposes of subsections (2)(a) and (5)(a), an agreement that contains only terms and conditions relating to any one or more of the following is not a franchise agreement:
>
> (a) a fully refundable deposit;
>
> (b) the keeping confidential or prohibiting the use of any information or material that may be provided to the prospective franchisee;
>
> (c) the designation of a location or territory of the prospective franchised business.
>
> (8) For the purposes of this section, a fully refundable deposit is a deposit that does not exceed the amount prescribed by the regulations, that is refundable without any deductions and that is given under an agreement that in no way binds the prospective franchisee to enter into any franchise agreement.

Note (12): Subsection 5(2) – Delivery of the Disclosure Document

The current subsection 5(2) states:

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

The recommended changes shown in black-line are the following:

> A disclosure document may be delivered personally~~,~~ or by registered mail or ~~by~~ any other prescribed method.

Currently there is no other prescribed method of delivery. The OBA recommends adopting the language in the Manitoba Act (Bill 15, *The Franchises Act*, 4th Sess, 39th Leg, Man, 2010 "Manitoba Act") and adding to the Regulations the language in the Manitoba Regulations (*Franchise Regulation*, MR 29/2012, the "Manitoba Regulations"), which provide for both couriers and electronic delivery. The Manitoba Act uses the word "or" instead of a comma to make it clear that registered mail or any other prescribed method are not forms of personal delivery, but rather that each are unique methods of delivery. With respect to methods of delivery and electronic delivery, the Manitoba Regulations state:

> **Methods of delivery of disclosure documents**
> 5(1) For the purposes of subsection 5(4) of the Act, a disclosure document may be delivered
> (a) by prepaid courier; or
> (b) by electronic means, if
> (i) the disclosure document
> (A) is delivered in a form that enables the recipient to retrieve and process the disclosure document, and
> (B) contains no links to or from external documents or content, and
> (ii) a written acknowledgment of receipt is received from the prospective franchisee.
>
> **Requirements when delivery by electronic means**
> 5(2) If a disclosure document is delivered by electronic means and consists of separate electronic files, the disclosure document must contain an index for each file that sets out
> (a) the file name; and
> (b) if the file name is not sufficiently descriptive of the subject matter dealt with in the file, a statement of that subject matter.

In addition to amending the Regulations to include the above language, the OBA recommends the Act be amended to read:

> A disclosure document may be delivered personally or by registered mail or any other prescribed method.

Note (13): Paragraph 5(4)(a) - Disclosure of all Material Facts

The current paragraph 5(4)(a) states:

> The disclosure document shall contain,
>
> (a) all material facts, including material facts as prescribed;

The OBA recommends the Act be amended to deal with disclosure documents that substantially comply with the Act, which may not be caught under the current language. This amendment would allow a disclosure document to satisfy the requirements of the Act notwithstanding the fact that it contains a technical irregularity or mistake which does not affect its substance. Such provisions appear in other provincial franchise laws in Canada. The Alberta Franchises Regulation provides that "A disclosure document is properly given for the purposes of section 13 of the Act if the document is substantially complete". The term "substantially complete" was discussed at para. 138 of the trial decision in *Hi Hotel Limited Partnership v Holiday Hospitality Franchising Inc.* ([2007] AJ No 1465 (QB); affirmed [2008] AJ No 892 (CA)) and interpreted to mean that "each one of the requirements for the disclosure document must be met, however technical defects in any of the required elements will not invalidate the disclosure so long as each required element is substantially complied with". The language of the PEI Regulation is very similar to Alberta's. The Manitoba Franchises Act provides in Section 5(10) that "A franchisor complies with this section (a) if the franchisor's disclosure document substantially complies with this Act; and (b) even if the disclosure document contains a technical irregularity or mistake not affecting the substance of the document". Further, in its "Consultation Paper on a Franchise Act for British Columbia", the British Columbia Law Institute is recommending that franchise legislation in British Columbia contain a similar provision. The lack of a substantial compliance provision in Ontario leads to a situation where the disclosure obligations are almost certainly to a standard in Ontario that is impossible to meet, and will always provide a franchisee with a right of rescission, no matter how trivial the error or omission. With the revision proposed, in the overall scheme of the Act, the prospective franchisee is still going to receive meaningful pre-grant disclosure, while balancing a workable business environment for franchisors.

The OBA recommends adopting subsection 5(10) of the Manitoba Act, which states:

Substantial compliance
5(10) A franchisor complies with this section

(a) if the franchisor's disclosure document substantially complies with this Act; and

(b) even if the disclosure document contains a technical irregularity or mistake not affecting the substance of the document.

Note (14): Paragraph 5(4)(b) and Paragraphs 3(1)(a) and (b) of the Regulations – Contents of the Disclosure Document

Paragraph 5(4)(b) of the Act states:

> The disclosure document shall contain,
> (b) financial statements as prescribed;

The Regulations set out the requirements for financial statements; however, the current language simply requires financial statements be "at least equivalent to those set out in the *Canadian Institute of Chartered Accountants Handbook.*" This requirement is ambiguous as to whether financial standards in the United States meet the requirement. The OBA recommends that financial statements that meet the American standard would be appropriate, as the financial information to be provided will be sufficient for the stated purposes of the Act, namely to protect prospective franchisees. Part 2, paragraphs 3(1)(a) and (b) should be amended to identify which sets of financial statements are allowed for disclosure purposes, for example US GAAP, Canadian GAAP and IFRS.

Note (15): Paragraph 5(4)(c) – Signing of Disclosure Document Containing Copies of All Proposed Franchise and Related Agreements

The current paragraph 5(4)(c) now states:

> The disclosure document shall contain,
>
> (c) copies of all proposed franchise agreements and other agreements relating to the franchise to be signed by the prospective franchisee;

The recommended changes shown in black-line are the following:

> The disclosure document shall contain,
>
> (c) copies of all proposed franchise agreements and ~~other agreements relating to the franchise~~ related agreements to be signed by the prospective franchisee before or contemporaneously with the franchise agreement;

The OBA recommends the phrase "other agreements relating to the franchise" be replaced with "related agreements" as dealt with in note 4 above. The OBA also recommends the addition of a timing component as dealt with in note 12 above.

If the amendments are made as recommended the paragraph will state:

> The disclosure document shall contain,
>
> (c) copies of all proposed franchise agreements and related agreements to be signed by the prospective franchisee before or contemporaneously with the franchise agreement;

Note (16): Subsection 5(5) – Statement of Material Change

Neither the Act nor the Regulations require a certificate of material change where a material change has occurred with respect to a disclosure document. The OBA recommends that such a certificate should be required, as is the case in Manitoba. The OBA also recommends that the specific requirements of this certificate can be dealt with in the regulations, also using Manitoba as an example.

MANITOBA ACT

> **Statement of material change**
> 5(7) The franchisor must give the prospective franchisee a written statement describing any material change.

REGULATIONS

> **Methods of delivery of statement of material change**
> 6(1) A statement of material change may be delivered by any method set out in subsection 5(4) of the Act or in subsection 5(1) of this regulation.

Certificate of franchisor
6(2) A certificate of franchisor in Form 2 of Schedule B must be attached to a statement of material change.

Completing certificate of franchisor
6(3) Subsection 2(4) applies to a certificate of franchisor for a statement of material change.

See below for a sample of the form prescribed in the Manitoba Regulations.

FORM 2

CERTIFICATE OF FRANCHISOR
THE FRANCHISES ACT

This statement of material change,

(a) contains no untrue information, representation or statement, whether of a material change or otherwise; and

(b) contains every material change that is required under *The Franchises Act* and the *Franchises Regulation*.

Date of Certificate

FORMULE 2

CERTIFICAT DU FRANCHISEUR —
LOI SUR LES FRANCHISES

La présente déclaration au sujet des changements importants :

a) ne contient aucun renseignement, aucune assertion ni aucune déclaration, concernant ou non un changement important, qui soit erroné;

b) mentionne tous les changements importants qui doivent y être mentionnés conformément à la *Loi sur les franchises* et au *Règlement sur les franchises*.

Date du certificat

Note (17): Subsection 5(7) – Exemptions from Providing Disclosure Under Section 5

The OBA's recommendations below deal with certain paragraphs of the subsection in turn.

(a) Paragraph 5(7)(b) deals with the exemption where the grant is to an officer or director of the franchisor or of the franchisor's associate. It currently states:

> (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, for that person's own account;

The recommended changes shown in black-line are the following:

> (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, or a corporation owned by such officers or directors, for at least six months ending no more than 120 days before the franchise agreement is entered into, for that person's own account;

This exemption is currently available to any individual who has been an officer or director of the franchisor or of a franchisor's associate for at least a six month period; however, there is no reference to the period of time prior to the grant when the six month period may have occurred. The OBA recommends the exemption be amended to apply to officers and directors for at least six months ending no more than 120 days before the franchise agreement is entered into. The exemption should also apply where the grant of the franchise is to a corporation wholly owned by an officer or director of the franchisor or the franchisor's associate. A clean version of the OBA's recommendation states:

> (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, or a corporation owned by such officers or directors, for at least six months ending no more than 120 days before the franchise agreement is entered into, for that person's own account;

(b) Paragraph 5(7)(e) states the exemption dealing with cases where the grant relates to anticipated sales of a franchise not exceeding a percentage of total sales of the combined business (the franchisee's pre-existing business and the franchised business). This is the

so-called "fractional franchise" exemption. The current paragraph 5(7)(e) states:

> (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;

The recommended changes shown in black-line are the following:

> (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 <u>during the first year of operation of the franchise</u>, in relation to the total sales of the business, a prescribed percentage;

The exemption currently creates uncertainty because it does not set the time parameters required to meet the threshold for the exemption. The OBA recommends an estimate period of one year to remove uncertainty as to how to apply the exemption; this same period is used in the Manitoba Act. A clean version of the OBA's recommendations states:

> (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 during the first year of operation of the franchise, in relation to the total sales of the business, a prescribed percentage;

(c) Subparagraph 5(7)(g)(i), (ii) and (iii) deal with the exemptions of (i) the prospective franchisee acquiring a franchise of an amount not exceeding a prescribed amount; (ii) the franchise agreement not being valid longer than one year without a non-refundable franchise fee required; and (iii) the franchisor governed by the Competition Act. The

current paragraph 5(7)(g) states:

> (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,
>
> (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);

These are three separate exemptions and as a result the OBA recommends creating three separate paragraphs in the Act: (g), (h) and (i), respectively.

Subparagraph 5(7)(g)(i) contemplates situations where the cost to establish the franchise is so low that it outweighs the expense for the franchisor. The OBA recommends amending the language in the subparagraph to help clarify when the exemption applies and remove uncertainty associated with estimating "annual costs" at start-up. The recommended changes shown in black-line are the following:

> (i) the prospective franchisee is required, by contract or otherwise, to initially invest ~~make a total annual investment~~ to acquire and set up ~~operate~~ 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,

A clean version of the OBA's recommendation for the wording of the subparagraph states:

> (i) the prospective franchisee is required, by contract or otherwise, to initially invest to acquire and set up 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, that does not exceed a prescribed amount,

(d) The current paragraph 5(7)(h) of the Act respecting the exemption of a substantial investment states:

> (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.

The recommended changes shown in black-line are the following:

> (h) the grant of a franchise where the prospective franchisee is required, by contract or otherwise, to ~~is~~ initially invest~~ing~~, in the acquisition and set up ~~operation~~ of the franchise, ~~over a prescribed period,~~ 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.

The policy underlying this exemption is that franchisors may forego disclosure where the franchisee invests significant capital in the franchise. The idea is that if a franchisee can meet the investment threshold the franchisee must be a sophisticated party capable of evaluating the investment despite absence of a disclosure document meeting the Act's requirements. The purpose of the OBA's recommendation is to help clarify the application of the exemption: i) that it only applies where the investment is required to acquire and establish the franchise, and ii) that the investment can be quantified with certainty regarding "acquisition and set up", rather than estimating with reference to the uncertainty of "operation" costs. As a corollary, the OBA also advises that the $5 million threshold required to fall within the exemption stated in the Regulations be lowered to $3 million since the recommendation for the paragraph only deals with acquisition and set up costs, and not ongoing operational costs.

The OBA recommends the paragraph read:

> (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.

Note (18): Subsections 6(1) and (2) – Rescission for Both Late and No Disclosure

The current subsections state:

> (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.
>
> (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.

The OBA recommends the addition of the phrase "and related agreements" to both subsections. This results in the provisions stating:

> (1) A franchisee may rescind the franchise agreement <u>and related agreements</u>, 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.
>
> (2) A franchisee may rescind the franchise agreement <u>and related agreements</u>, without

> penalty or obligation, no later than two years after entering into the franchise agreement if the franchisor never provided the disclosure document.

The addition of this phrase is to help clarify ambiguity on whether the subsection refers merely to the agreement granting the franchise rights or instead to all agreements related to the franchise.

Note (19): Subsection 6(6) – The Franchisor and Rescission

The current subsection states:

> 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).

There are many actions decided and pending involving the interpretation of section 6(6). The courts have done their best to clarify, but it is evident that this section can be subject to abuse. By way of an example, a franchisee which is perfectly aware that it received bad disclosure can wait two years less a day, be profitable, and trigger rescission and recover substantial funds and retain its profits. Further, payments which, in practical terms, have only flowed through the franchisor, such as rent to a head landlord, are subject to being

required to be returned as a payment to the franchisor. Under this interpretation, amounts payable under Section 6(6) could be far in excess of losses actually experienced by the franchisee. The proposed change seeks to create certainty as to the entitlement to franchisees and the exposure of franchisors. The OBA recommends amending this subsection to take into account that in some instances the franchisee could otherwise be put in a better position after rescission as compared with the franchisee's position had the franchisee never entered into the franchise agreement. The revisions are intended to clarify that monies paid to the franchisor for its benefit ought to be returned and, to the extent the franchisee suffered a loss in in acquiring, setting up and operating the franchise it is compensated.

The recommended changes shown in black-line are the following:

> 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~~a) purchase from the franchisee free and clear of any liens and encumbrances 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~~b) purchase from the franchisee free and clear of any liens and encumbrances 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~~c) 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~~ and (~~c~~b) and refund to the franchisee any initial franchise fee paid~~.~~; and
>
> (d) in calculating the amount to be paid to the franchisee pursuant to subsection 6(6), the amount payable shall be reduced by the amount of any profit realized by the

> franchisee in the operation of the franchise up to the effective date of rescission.

A clean version of subsection 6(6) with the recommendations would state:

> The franchisor, or franchisor's associate, as the case may be, shall, within 60 days of the effective date of the rescission,
>
> (a) purchase from the franchisee free and clear of any liens and encumbrances 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;
>
> (b) purchase from the franchisee free and clear of any liens and encumbrances 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;
>
> (c) 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) and (b) and refund to the franchisee any initial franchise fee paid; and
>
> (d) in calculating the amount to be paid to the franchisee pursuant to subsection 6(6), the amount payable shall be reduced by the amount of any profit realized by the franchisee in the operation of the franchise up to the effective date of rescission.

Note (20): Paragraph 7(5) – Defences Against an Action for Misrepresentation where Damages Sought (Other than Against Franchisor)

The OBA recommends an additional statutory defence be added to those already set out in subsection 7(5). This new defence contemplates the protection of a defendant who could not have known of the misrepresentation despite making reasonable inquiries. The OBA recommends adopting the language in Prince Edward Island's Act (*Franchises Act*, RSPEI, c F-14.1):

> (d) 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.

Note (21): Section 10 – Restriction of the Application of the Laws of Ontario or Restriction of the Jurisdiction or Venue to a Forum Outside Ontario

The current section 10 states:

> 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.

The recommended changes shown in black-line are the following:

> 10. Any provision in a franchise agreement or any related agreements 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 enforce--able under this Act in Ontario~~ under the franch--ise agreement, any related agreements, or a claim otherwise enforceable under this Act in Ontario.

Under the newly worded section it is clear that a franchise agreement cannot contract out of Ontario law or scrutiny by proceedings in Ontario (i.e., court or arbitration). The current language gives rise to the possibility that a proceeding under the Act may be started in Ontario, while a separate one under the contract is commenced in a different jurisdiction. As a result, the OBA recommends the following wording:

> 10. Any provision in a franchise agreement or any related agreements purporting to restrict the appli--cation of the law of Ontario or to restrict jurisdic--tion or venue to a forum outside Ontario is void

with respect to a claim under the franchise agree-
-ment, any related agreements, or a claim other-
-wise enforceable under this Act in Ontario.