



April 29, 2016

Via email: [Rence.Mulligan@gov.bc.ca](mailto:Rence.Mulligan@gov.bc.ca)

**Civil Policy and Legislation Office  
Justice Services Branch  
Ministry of Justice and Attorney General  
PO Box 9222, Stn Prov Govt  
Victoria, BC V8W 9J1**

**Re: British Columbia Franchise Act (Disclosure) Regulation Consultation**

**Attn: Renée Mulligan, Legal Counsel**

Dear Ms. Mulligan:

The Ontario Bar Association (“OBA”) is pleased to submit comments to the Ministry of Justice and the Attorney General (“the Ministry”) regarding the proposed Franchises Act (Disclosure) Regulation.

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 the provincial government in Ontario 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 (“the Section”) has over 240 members who are leading experts in franchise law issues, including those whose legal practices are devoted to representing franchisors, franchisees, or both. Our members include both solicitors – who advise franchise companies on starting or expanding franchise systems, deal with the franchise contracts and compliance with statutory requirements, and barristers – who deal with disputes arising under the legislation, including litigation. The Section also has a number of lawyers who practise in-house with franchisor companies.

Based on the Ministry’s indication that the Franchise Act (Disclosure) Regulation will be based on the Uniform Law Conference of Canada’s Disclosure Documents Regulation, we have formatted the attached document to reproduce the ULCC regulation, with recommendations from the OBA noted separately under each section.

Again, the OBA appreciates the opportunity to comment on this proposal and hopes that its submissions will assist you in this matter.

Kind regards,

Jeffrey Hoffman  
Chair, Franchise Law Section, Ontario Bar Association



# Uniform Franchises Act and Regulations

## 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.

## REGULATION MADE UNDER THE UNIFORM FRANCHISES ACT DISCLOSURE DOCUMENTS

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## General Comments

The Regulation on Disclosure Documents deals with information that is required in a disclosure document such as costs of establishing a franchise, earnings projection, financing, training, manuals and purchase and sale restrictions. It prescribes schedules that are required including those of current franchisees, businesses and franchise and business closure information. The Regulation also prescribes financial statements to include in a disclosure document and provides for certificates to be issued by a franchisor.

The Regulations follow, in some respects, the ordering and format of the Ontario regulations. However many items currently contained in the Alberta or Ontario regulations have been substantially enhanced with additional disclosure requirements, definitions and more clarity in wording. In addition, new disclosure items have been included in the Regulations.

The use of wrap-around documents with disclosure documents or offering circulars used by a franchisor in another jurisdiction in compliance with the laws of such other jurisdiction was considered. It was noted that the Alberta legislation currently permits the use of wrap-around statements, whereas the Ontario legislation does not explicitly provide for such right. Following extensive consideration of the subject, it was concluded that there was no need to permit the use of wrap-around documents in a Canadian harmonized system, and that the use of such statements would negatively affect the clarity of disclosure documents as a whole.

## Interpretation

- 1.(1) In this Regulation,  
“affiliate” has the same meaning as in the Canada Business Corporations Act.
- (2) In this Regulation, a franchise or business is the same type as an existing franchise or as the franchise being offered if it is operated or to be operated under the same trade-mark, trade name, logo or advertising or other commercial symbol as that franchise.

## Risk warnings

2. Every disclosure document shall contain, presented together at the beginning of the document, the statements that,
  - (a) a prospective franchisee should seek information on the franchisor and on the franchisor’s business background, banking affairs, credit history and trade references;
  - (b) a prospective franchisee should seek expert independent legal and financial advice in relation to franchising and the franchise agreement prior to entering into the franchise agreement;
  - (c) a prospective franchisee should contact current and previous franchisees prior to entering into the franchise agreement; and



(d) lists of current and previous franchisees and their contact information can be found in this disclosure document.

**Comment:** With respect to the issue of risk warnings or mandatory statements the regulations cover matters not otherwise dealt with in a disclosure document. Mandatory statements serve as an early warning system for a prospective franchisee that does not have significant expertise in the area of franchising. Every disclosure document must therefore include the risk warning or mandatory statements with respect to a franchisee seeking information on the franchisor, seeking expert independent legal and financial advice, and contacting current and former franchisees.

**OBA Recommendation:** 2.(b) & 2.(c) Risk Warnings

We recommend British Columbia adopt language that is currently used in New Brunswick and Manitoba to encourage uniformity by substituting “prior to” with “before” in the above subsections.

### Required information about the franchisor

3. Every disclosure document shall contain,

(a) the business background of the franchisor, including,

- (i) the name of the franchisor,
- (ii) the name under which the franchisor is doing or intends to do business,
- (iii) the name of any associate of the franchisor that will engage in business transactions with the franchisee,
- (iv) the franchisor’s principal business address and, if the franchisor’s principal business address is outside [insert jurisdiction], the name and address of a person authorized to accept service in [insert jurisdiction] on the franchisor’s behalf,
- (v) the business form of the franchisor, whether corporate, partnership or otherwise,
- (vi) if the franchisor is a subsidiary, the name and principal business address of the parent,
- (vii) the business experience of the franchisor, including the length of time the franchisor has operated a business of the same type as the franchise being offered, has granted franchises of that type or has granted any other type of franchise,
- (viii) if the franchisor has offered a different type of franchise from that being offered, a description of every such type of franchise, including, for each type of franchise,

(A) the length of time the franchisor has offered the franchise to prospective franchisees, and  
(B) the number of franchises granted in the five years immediately before the date of the disclosure document;

(b) the business background of the directors, the general partners and the officers of the franchisor, including,



- (i) the name and current position of each person,
- (ii) a brief description of the prior relevant business experience of each person,
- (iii) the length of time each person has been engaged in business of the same type as the business of the franchise being offered, and
- (iv) the principal occupation and the employers of each person during the five years immediately before the date of the disclosure document;

(c) a statement indicating whether, during the 10 years immediately before the date of the disclosure document, the franchisor, the franchisor's associate or a director, general partner or officer of the franchisor has been convicted of fraud, unfair or deceptive business practices or a violation of a law that regulates franchises or business, or if there is a charge pending against the person involving such a matter, and the details of any such conviction or charge;

(d) a statement indicating whether the franchisor, the franchisor's associate or a director, general partner or officer of the franchisor has been subject to an administrative order or penalty under a law that regulates franchises or business or if the person is the subject of any pending administrative actions to be heard under such a law, and the details of any such order, penalty or pending action;

(e) a statement indicating whether the franchisor, the franchisor's associate or a director, general partner or officer of the franchisor has been found liable in a civil action of misrepresentation, unfair or deceptive business practices or violating a law that regulates franchises or business, including a failure to provide proper disclosure to a franchisee, or if a civil action involving such allegations is pending against the person, and the details of any such action or pending action; and

(f) details of any bankruptcy or insolvency proceedings, voluntary or otherwise, any part of which took place during the six years immediately before the date of the disclosure document, in which the debtor is,

- (i) the franchisor or the franchisor's associate,
- (ii) a corporation whose directors or officers include a current director, officer or general partner of the franchisor, or included such a person at a time when the bankruptcy or insolvency proceeding was taking place,
- (iii) a partnership whose general partners include a current director, officer or general partner of the franchisor, or included such a person at a time when the bankruptcy or insolvency proceeding was taking place, or



- (iv) a director, officer or general partner of the franchisor in his or her personal capacity.

**OBA Recommendation:** 3.(a)(iv) Attorney for Service

The language used in the majority of provinces only requires the franchisor to disclose information concerning an attorney of service if the franchisor has one, rather than requiring a franchisor to obtain an attorney for service. The recommended wording for this subsection is below:

“the franchisor's principal business address and, if the franchisor has an attorney for service in British Columbia, the name and address of that person;”

**OBA Recommendation:** Required information about the franchisor

Consistent with the OBA recommendation with respect to the BC Franchises Act, the OBA recommends replacing “franchisor’s associate” with “franchisor’s affiliate” in subsections. 3.(c), 3.(d), 3.(e) and 3.(f)(i).

### Required information about the franchise

4.(1) Every disclosure document shall contain, presented together in one part of the document, Costs of establishing the franchise

(a) a list of all of the franchisee’s costs associated with the establishment of the franchise, including,

- (i) the amount of any deposits or initial franchise fees, or the formula for determining the amount, whether the deposits or fees are refundable and, if so, under what conditions,
- (ii) an estimate of the costs for inventory, supplies, leasehold improvements, fixtures, furnishings, equipment, signs, vehicles, leases, rentals, prepaid expenses and all other tangible or intangible property and an explanation of any assumptions underlying the estimate, and
- (iii) any other costs associated with the establishment of the franchise not listed in subclause (i) or (ii), including any payment to the franchisor or franchisor’s associate, whether direct or indirect, required by the franchise agreement, the nature and amount of the payment and when the payment is due;

**Comment:** The principles guiding this disclosure item were that categories of start-up fees should be kept distinct, and that the disclosure item should distinguish between initial capital investment and on-going expenses paid to the franchisor. The Regulation also requires that a

disclosure document include specifically described costs associated with the establishment of the franchise, as well as other recurring or isolated fees or payments made to the franchisor, whether direct or indirect.

### **Other fees**

(b) the nature and amount of any recurring or isolated fees or payments, other than those listed in clause (a), that the franchisee must pay to the franchisor or franchisor's associate, whether directly or indirectly, or that the franchisor or franchisor's associate imposes or collects in whole or in part on behalf of a third party, whether directly or indirectly;

### **Guarantees, security interests**

(c) a description of the franchisor's policies and practices, if any, regarding guarantees and security interests required of franchisees;

**Comment:** The Regulation requires a description of the franchisor's policies and practices regarding the requirements for guarantees or security interests from franchisees.

### **Estimate of operating costs**

(d) if an estimate of annual operating costs for the franchise, or of operating costs for the franchise for another regular period, is provided directly or indirectly, a statement specifying,

- (i) the assumptions and bases underlying the estimate,
- (ii) that the assumptions and bases underlying the estimate are reasonable, and
- (iii) where information that substantiates the estimate is available for inspection;

(e) if an estimate of annual operating costs for the franchise, or of operating costs for the franchise for another regular period, is not provided, a statement to that effect;

**Comment:** As a matter of policy, the Regulations require disclosure with respect to any estimates of annual or other periodic operating costs, if such are provided, directly or indirectly, together with a statement specifying the basis for the estimate, the assumptions underlying the estimate and a location where information is available for inspection that substantiates the estimate. Further, if an estimate of annual or other periodic operating costs is not provided, a mandatory statement to that effect should be included in the disclosure item.

**OBA Recommendation:** 4.(d)(ii) Estimate of Operating Costs

The OBA recommends deleting this subsection 4(d)(ii) (an express statement that costs be reasonable) as there is a requirement that estimates be reasonable. Deleting this subsection will result in uniformity with Ontario and Manitoba.

### Earnings projection

(f) if an earnings projection for the franchise is provided directly or indirectly, a statement specifying,

- (i) the assumptions and bases underlying the projection, its preparation and presentation,
- (ii) that the assumptions and bases underlying the projection, its preparation and presentation are reasonable,
- (iii) the period covered by the projection,
- (iv) whether the projection is based on actual results of existing franchises or of existing businesses of the franchisor, franchisor's associates or affiliates of the franchisor of the same type as the franchise being offered and, if so, the locations, areas, territories or markets of such franchises and businesses,
- (v) if the projection is based on a business operated by the franchisor, franchisor's associate or affiliate of the franchisor, that the information may differ in respect of a franchise operated by a franchisee, and
- (vi) where information that substantiates the projection is available for inspection;

**Comment:** Current Ontario and Alberta Legislation deal with the subject of earnings claims differently, but neither contains a precise definition of what is meant by the term "earnings claims" or "earnings projection". In United States disclosure legislation on the issue of earnings projections such projections are not currently mandatory but, if they are included, they must be extremely detailed. The regulatory language, with respect to earnings projections, includes an inclusive definition of the term "earnings projection" to mean any information given or to be given by or on behalf of the franchisor or the franchisor's associate, directly or indirectly, from which a specific level or range of actual or potential sales, costs, income, revenue or profits from franchisee business, or franchisor or franchisor affiliate businesses can easily be ascertained. See sub.(2), below.



**OBA Recommendation: 4(f). Earnings Projection**

OBA recommends adding a subsection to subsection 4(f) requiring a statement, as contained in New Brunswick's and Manitoba's franchise legislation, as follows:

"If an earnings projection for the franchise is not provided, a statement to that effect."

The OBA also recommends removing the words "associate or" from subsections 4.(f)(iv) and 4.(f)(v).

**OBA Recommendation: 4.(f)(ii)**

The OBA recommends deleting subsection 4(f)(ii) (the express statement that the preparation and presentation of the projection be reasonable). Franchisors are required to prepare and present only reasonable projections. Deleting this subsection will result in uniformity with Ontario and Manitoba.

## Financing

(g) the terms and conditions of any financing arrangements that the franchisor or franchisor's associate offers or assists any person to offer, directly or indirectly, to the franchisee;

**Comment:** The Regulations extend current disclosure requirements to include financing arrangements where the franchisor assists third parties to offer goods and services to franchisees.

**OBA Recommendation: 4.(g) Financing**

The UFA is unique from the legislation of other provinces in the requirement to describe financing arrangements that the franchisor or franchisor's associate assists a third party to provide. We recommend British Columbia not adopt this language in order to maintain uniformity with other provinces. The language we recommend be adopted is as follows:

"The terms and conditions of any financing arrangements that the franchisor or franchisor's affiliate offers, directly or indirectly, to the franchisee."

## Training

(h) a description of any training or other assistance offered to the franchisee by the franchisor or franchisor's associate, including where the training or other assistance will take place, whether the training or other assistance is mandatory or optional and, if it is mandatory, a statement specifying who bears the costs of the training or other assistance;

(i) if no training or other assistance is offered to the franchisee by the franchisor or franchisor's associate, a statement to that effect;



Comment: The Regulation expands the current disclosure requirements of the Ontario legislation to deal with payment for training and, if no training or other assistance is provided, a statement to that effect.

**OBA Recommendation: 4.(h) Training**

The OBA recommends deleting the words “and, if it is mandatory” as the franchisor should disclose who bears the cost of training, even if the training is optional.

The OBA also recommends replacing “franchisor’s associate” with “franchisor’s affiliate” in subsections 4.(h) and subsection 4.(h)(i).

## Manuals

- (j) if any manuals are provided to the franchisee by the franchisor or franchisor’s associate, a summary of the material topics covered in the manuals or a statement specifying where in [insert jurisdiction] the manuals are available for inspection;
- (k) if no manuals are provided to the franchisee, a statement to that effect;

Comment: The regulation is wider than Ontario and Alberta legislation, which do not require the disclosure of contents of operating manuals. This disclosure item in the Regulations requires that if manuals are provided to the franchisee, there should be disclosure of a summary of the material topics covered in the manuals or a statement specifying where in the particular jurisdiction the manuals are available for inspection. If no manuals are provided to the franchisee, a statement to that effect should be included.

**OBA Recommendation: 4.(j) Manuals**

The OBA recommends that British Columbia adopt the language used in New Brunswick and Manitoba such that the franchisor would be required to provide the “table of contents of each manual” rather than a “summary of the material topics covered in the manual”. British Columbia would be unique in this requirement and to comply would create an unduly onerous obligation for franchisors. The recommended language is the following:

“If the franchisee will be required to operate in accordance with manuals provided by the franchisor, the table of contents of each manual or a statement specifying where the manuals are available for inspection.

“If no manuals are provided to the franchisee, a statement to that effect.”

The OBA also recommends replacing “franchisor’s associate” with “franchisor’s affiliate” in subsection 4.(j).



## Advertising

(l) if the franchisee is required to contribute to an advertising, marketing, promotion or similar fund, a description of the fund, including the franchisor's policies and practices in respect of,

- (i) the franchisor's obligation to conduct advertising, marketing, promotion or similar activity,
- (ii) the franchisor's expenditure of money from the fund on advertising, marketing, promotion or similar activity in franchisees' locations, areas, territories or markets,
- (iii) participation by franchisees in a local or regional co-operative for advertising, marketing, promotion or similar activity,
- (iv) the amount and frequency of franchisees' contributions to the fund,
- (v) contributions by the franchisor, franchisor's associate or affiliate of the franchisor to the fund, including the amount and frequency of their contributions, if any,
- (vi) the portion of the fund, if any, that is or may be spent primarily for the recruitment of prospective franchisees,
- (vii) the administration of the fund, including the portion of the fund, if any, that is or may be spent for its administration and the persons who administer the fund,
- (viii) the availability to franchisees of financial statements or reports of contributions to or expenditures from the fund, the basis upon which such statements or reports are prepared and how the costs of the preparation of such statements or reports are accounted for, and
- (ix) the availability to franchisees of other reports of the activities financed by the fund and how the costs of the preparation of such reports are accounted for;

(m) if the franchisee is required to contribute to an advertising, marketing, promotion or similar fund,

- (i) a statement describing,

(A) the amount or percentage of the fund that has been spent on advertising, marketing, promotion or similar activity in each of the two completed fiscal years immediately before the date of the disclosure document,

(B) the amount or percentage of the fund, other than the amount or percentage described in sub-subclause (A), that has been retained or charged by the franchisor, franchisor's parent or franchisor's associate in each of the two completed fiscal years immediately before the date of the disclosure document, and

(C) the amount or percentage of any surplus or deficit of the fund in each of the two completed fiscal years immediately before the date of the disclosure document, and

- (ii) another statement describing,



- (A) the projected amount or basis of the contribution of the franchisee for the current fiscal year,
- (B) the projected amount of the contributions of all franchisees for the current fiscal year,
- (C) a projection of the amount or percentage of the fund to be spent on advertising, marketing, promotion or similar activity for the current fiscal year, and
- (D) a projection of the amount or percentage of the fund to be retained or charged by the franchisor, franchisor's parent or franchisor's associate in the current fiscal year;
- (n) a statement as to whether the franchisee must expend money on the franchisee's own local advertising, marketing, promotion or similar activity;

**Comment:** The Regulations expand on current Ontario legislation and recognize that one of the most important issues concerning advertising disclosure was whether franchisees were required to contribute to an advertising, marketing, promotion or similar fund. If so, the disclosure document must describe the fund, including the franchisor's policy and practice in respect of a number of specific items concerning the fund. Further, the disclosure document should contain a statement outlining expenditures from the fund, amounts retained or charged by the franchisor, the amount or percentage of any surplus or deficit of the fund, all for the past two fiscal years, together with another statement describing such items on the basis of projections for the current fiscal year.



**OBA Recommendation: 4.(l) Advertising**

The OBA recommends deleting all subsections of 4(l) except for 4.(l)(iv), 4.(l)(vii) and 4.(l)(viii). In subsection 4(l)(viii), the OBA recommends deleting the words, “and how the costs of the preparation of such statements or reports are accounted for” No province has adopted the portions of the section that the OBA is recommending be deleted.

**OBA Recommendation: 4.(m) Advertising**

The OBA recommends that British Columbia adopt the language used in New Brunswick in place of the language of the UFA. The recommended language is as follows:

"If the franchisee will be required to contribute to an advertising, marketing, promotion or similar fund, a statement describing the fund and specifying

the amount or the basis of calculating the amount of the franchisee's required contribution,

the percentage of the fund that has been spent on national campaigns and local advertising in the 2 fiscal years immediately preceding the date of the disclosure document,

the percentage of the fund, other than the percentage referred to in paragraph (b), that has been retained by the franchisor, the franchisor's parent or the franchisor's associates in the 2 fiscal years immediately preceding the date of the disclosure document

a projection of the percentage of the fund to be spent on national or local advertising campaigns for the current fiscal year,

a projection of the percentage of the fund to be retained by the franchisor, the franchisor's parent or the franchisor's associates in the current fiscal year, and

whether reports on advertising activities financed by the fund will be made available to the franchisee."

## Purchase and sale restrictions

(o) a description of any restrictions or requirements imposed by the franchise agreement with respect to,

- (i) obligations to purchase or lease from the franchisor or franchisor's associate or from suppliers approved by the franchisor or franchisor's associate,
- (ii) the goods and services the franchisee may sell, and
- (iii) to whom the franchisee may sell goods or services;

(p) a description of the franchisor's right to change a restriction or requirement described in subclause (o) (i), (ii) or (iii);



**Comment:** The Regulations require a description of any restrictions or requirements imposed by the franchise agreement with respect to obligations to purchase or lease from franchisor, and other parties, the goods and services the franchisee may sell, and to whom the franchisee may sell goods or services. Further, there should be a statement as to whether by the terms of the franchise agreement, or otherwise, the franchisor has the right to change a restriction or requirement with respect to purchase and sale of goods or services.

**OBA Recommendation:** 4.(o) and 4(p) Purchasing

The OBA recommends replacing “franchisor’s associate” with “franchisor’s affiliate” in subsection 4.(o)(i).

The OBA recommends deleting subsection 4(p) in the interest of uniformity with the other provinces. No province requires the disclosure set out in subsection 4(p).

**Rebates, etc.**

(q) a description of the franchisor’s policies and practices, if any, regarding rebates, commissions, payments or other benefits, including the receipt, if any, by the franchisor or franchisor’s associate of a rebate, commission, payment or other benefit as a result of purchases of goods and services by franchisees;

(r) a description of the sharing of the rebates, commissions, payments or other benefits described in clause (q) with franchisees, either directly or indirectly;

**Comment:** The Regulation attempts to protect franchisees without requiring such extensive disclosure that might prejudice the competitive and business strategies of the franchisor. The regulatory language requires a franchisor to describe its policy or practice regarding rebates, commissions, payments or other benefits, whether or not the franchisor or the franchisor’s associate may receive or receives any such benefits as a result of the purchase of goods and services by a franchisee and, if so, whether such benefits are or may be shared with franchisees, either directly or indirectly.



**OBA Recommendation: 4.(q) Rebates**

The OBA recommends replacing the language contained in subsection 4(q) with the provision contained in the Ontario regulations, which is clearer. The UFA language implies that the franchisor is required to describe its policies and practices with respect to benefits beyond those relating to purchases by franchisees. The language of the Ontario regulations is as follows:

“A description of the franchisor’s policy, if any, regarding volume rebates, and whether or not the franchisor or the franchisor’s associate receives a rebate, commission, payment or other benefit as a result of purchases of goods and services by a franchisee and, if so, whether rebates, commissions, payments or other benefits are shared with franchisees, either directly or indirectly”

**OBA Recommendation: 4.(r) Rebates**

The OBA was unable to reach consensus as to whether the regulation should require “a description of the sharing of the rebates, commissions, payments or other benefits described in clause (q) with franchisees, either directly or indirectly.”

## Territory

(s) a description of the franchisor’s policies and practices, if any, regarding,

- (i) the granting of specific locations, areas, territories or markets by the franchisor or franchisor’s associate,
- (ii) the approving of locations, areas, territories or markets by the franchisor or franchisor’s associate, including the material factors considered in such approvals,
- (iii) changes in franchise locations, areas, territories or markets required or approved by the franchisor or franchisor’s associate, including the material factors considered in such changes and conditions that may be imposed on an approval of a change,
- (iv) modifications to franchisees’ locations, areas, territories or markets that may be made by the franchisor or franchisor’s associate,
- (v) the terms and conditions of any option, right of first refusal or other right of franchisees to acquire an additional franchise within their location, area, territory or market, and
- (vi) the granting of exclusive locations, areas, territories or markets to franchisees including,



- (A) any limitations on franchisees' exclusivity,
- (B) who determines the locations, areas, territories or markets, the factors that are considered in making the determination and how the locations, areas, territories or markets are described, and
- (C) whether continuation of location, area, territory or market exclusivity depends on franchisees achieving a certain sales volume, market penetration or other condition and, if so, the franchisor's rights and remedies if franchisees fail to meet the condition;

**Comment:** The Regulations require the disclosure of the franchisor's policy or practice, if any, as to whether the continuation of a franchisee's rights to exclusive territory depends upon the franchisee achieving a specific level of sales, market penetration, or other condition, and under what circumstances these rights might be altered if the franchise agreement grants the franchisee rights to exclusive territory.

With respect to exclusive territory, the disclosure document must contain a description of the franchisor's policies and practices regarding the granting of specific locations, areas, territories or markets, the approval of same, changes in same, modifications to same, terms and conditions of any options, rights, or similar rights, and the granting of exclusive locations, areas, territories or markets.

**OBA Recommendation: 4.(s) Territory**

None of the provinces have followed the UFA's language for this provision. The OBA recommends adopting the New Brunswick and Manitoba approach as follows:

"A description of the franchisor's policies and practices regarding the granting of exclusive territory and, if the franchise agreement grants the franchisee rights to exclusive territory,

a description of the exclusive territory granted or of the manner in which and the person by whom the exclusive territory will be determined,

a description of the franchisor's policy, if any, as to whether the continuation of the franchisee's rights to the exclusive territory depends on the franchisee achieving a specific level of sales, market penetration, or other condition, and

a description of the circumstances under which the franchisee's rights to the exclusive territory may be altered.

If no exclusive territory is granted to the franchisee, a statement to that effect."



## Proximity

(t) a description of the franchisor's policies and practices, if any, on the proximity between an existing franchise and,

- (i) another franchise of the franchisor or franchisor's associate of the same type as the existing franchise,
- (ii) any distributor or licensee using the franchisor's trade-mark, trade name, logo or advertising or other commercial symbol,
- (iii) a business operated by the franchisor, franchisor's associate or affiliate of the franchisor that distributes similar goods or services to those distributed by the existing franchise under a different trade mark, trade name, logo or advertising or other commercial symbol, or
- (iv) a franchise of the franchisor, franchisor's associate or affiliate of the franchisor that distributes similar goods or services to those distributed by the existing franchise under a different trade-mark, trade name, logo or advertising or other commercial symbol;

(u) a description of the franchisor's policies and practices, if any, regarding,

- (i) compensation to franchisees by the franchisor, franchisor's associate, affiliate of the franchisor or any distributor or licensee for any right they may have to operate a business of the same type as the franchise being offered or to distribute goods or services similar to those distributed by the franchise being offered in franchisees' locations, areas, territories or markets, and
- (ii) the resolution by the franchisor of conflicts between the franchisor, franchisor's associate, affiliate of the franchisor or any distributor or licensee and franchisees respecting locations, areas, territories, markets, customers and franchisor support;

**Comment:** The Regulations contain a substantially revamped provision dealing with proximity or encroachment. In particular, franchisors must disclose their policies and practices regarding compensating franchisees for encroachment as well in respect of the resolution by the franchisor of conflict between the franchisor and its affiliates and franchisees respecting not only locations but also markets, customers and franchisor support.

**OBA Recommendation:** 4.(t) Proximity

The OBA recommends replacing "franchisor's associate" with "franchisor's affiliate" in subsections 4.(t)(i), 4.(t)(iii) and 4.(t)(iv).

**OBA Recommendation:** 4.(u) Proximity

The OBA recommends deleting 4.(u). No province has adopted this provision.



## Trade-marks and other proprietary rights

(v) a description of,

- (i) the rights that the franchisor or franchisor's associate has to trade-marks, trade names, logos or advertising or other commercial symbols,
- (ii) any patents, copyrights, proprietary information or other proprietary rights associated with the franchise,
- (iii) the status of the trade-marks, trade names, logos, advertising or other commercial symbols, patents, copyrights, proprietary information and other proprietary rights, any known or potential material impediments to their use and any known or alleged material infringements of them, and
- (iv) the franchisor's or franchisor's associate's right to modify or discontinue the use of any trade-mark, trade name, logo, advertising or other commercial symbol, patent, copyright, proprietary information or other proprietary right;

**Comment:** This disclosure item is a considerable extension of the current Ontario and Alberta disclosure items on the subject of intellectual property. The regulatory language requires the franchisor to describe rights to trade-marks, trade names, logos or advertising or other commercial symbols, and other forms of intellectual property associated with the franchise, the status and known impediments to the use of same, and a description of the franchisor's right to modify or discontinue the use of any of the same.

### **OBA Recommendation:** 4.(v) Trademarks

This subsection constitutes a significant increase in disclosure beyond any province's requirements. The OBA recommends adopting the New Brunswick provision, but replacing "franchisor's associate" with "franchisor's affiliate", as follows:

"A description of the rights the franchisor or the franchisor's associate has to the trade-mark, trade name, logo or advertising or other commercial symbol associated with the franchise and of any known or alleged material impediments to its use."

## Licences

(w) a description of every licence, registration, authorization or other permission the franchisee is required to obtain under any applicable federal, provincial or territorial law or municipal by-law to operate the franchise;



**Comment:** As a matter of policy, the Regulation requires that the franchisor should assume the responsibility for determining required licences and permits, and that there be a description of every licence, registration, authorization or other permission the franchisee is required to obtain in order to operate the franchise.

**OBA Recommendation: 4.(w) Licenses**

The OBA recommends limiting the description to federal and provincial laws, as in New Brunswick's and Manitoba's regulations. The suggested language is as follows:

"A description of every licence, registration, authorization or other permission that the franchisee will be required to obtain under federal or provincial laws in order to sell or distribute the particular goods or services sold or distributed by the franchisee."

A statement that, in addition to those identified in subsection (1), the franchisee may be required under other federal or provincial laws or under the by-laws of a municipal or other local authority to obtain licences, registrations, authorizations or other permissions to operate the franchise and that the franchisee should make inquiries to determine whether such licences, registrations, authorizations or other permissions are required."

### Personal participation

(x) a description of the extent to which the franchisee is required to participate personally and directly in the operation of the franchise or, if the franchisee is a corporation, partnership or other entity, the extent to which the principals of the corporation, partnership or other entity are so required;

**Comment:** The Regulation requires disclosure as to the extent to which the franchisee is required to participate personally and directly in the operation of the franchise or, if the franchisee is a non-individual entity, as to the extent to which the principals would be so required.

### Termination, renewal and transfer of the franchise

(y) a description of all the provisions in the franchise agreement that deal with the termination of the agreement, the renewal of the agreement and the transfer of the franchise and a list of where these provisions are found in the agreement; and

**Comment:** With respect to terminations, transfers and reacquired franchises the current language contained in the Ontario legislation is adopted with some minor clarification changes. The regulatory language requires a description of all restrictions on, or conditions to, termination and transfer of a franchise.



**OBA Recommendation:** 4.(y) Termination, Renewal and Transfer Provisions

Currently, provinces use the words “a concise summary” or a “a description”. The OBA recommends simply adopting the words, “a summary” as the obligation to be concise may not be beneficial to the franchisor or franchisee in this instance.

**Schedules of franchisees, former franchisees, etc.**

(z) a statement that there are attached to the document,

- (i) a schedule of franchisees of the franchisor, franchisor’s associates or affiliates of the franchisor that currently operate franchises of the same type as the franchise being offered,
- (ii) a schedule of businesses of the same type as the franchise being offered that are currently being operated by the franchisor, franchisor’s associates or affiliates of the franchisor,
- (iii) a schedule of former such franchisees and businesses, and
- (iv) a schedule of franchise and business closure information.

**OBA Recommendation:** 4.(z) Required Statement

The OBA recommends deleting this subsection as the information contained in the required statement is adequately covered in the statements contained in the Risk Warning above.

**Schedule of current franchisees**

5.(1) The schedule of current franchisees referred to in subclause 4(1)(z)(i) shall contain franchisee contact information for every franchise of the franchisor, franchisor’s associate or affiliate of the franchisor of the same type as the franchise being offered, in Canada.

(2) If there are fewer than 20 franchises in Canada as described in subsection (1), the schedule shall also contain franchisee contact information for every franchise of the franchisor, franchisor’s associate or affiliate of the franchisor of the same type as the franchise being offered, in the country geographically closest to Canada.

(3) If there are fewer than 20 franchises in total in Canada and in the country geographically closest to Canada as described in subsections (1) and (2), the schedule shall also contain franchisee contact information for every franchise of the franchisor, franchisor’s associate or affiliate of the franchisor of the same type as the franchise being offered, in the country where



the largest or next-largest number of such franchises have been granted, and so on, until the schedule contains franchisee contact information for 20 or more franchises.

(4) For greater certainty, if the schedule is required to include franchisee contact information for one or more franchises in a country other than Canada or the country geographically closest to Canada in order to contain franchisee contact information for 20 or more franchises, the schedule shall contain franchisee contact information for every franchise of the franchisor, franchisor's associate or affiliate of the franchisor of the same type as the franchise being offered, in that country.

(5) If the total number of franchises of the franchisor, franchisor's associates or affiliates of the franchisor of the same type as the franchise being offered in the world is less than 20, the schedule shall contain franchisee contact information for all such franchises.

(6) In this section,  
"franchisee contact information" means the name, address and telephone number of the franchisee and the business address and telephone number of the franchise.

**Comment:** As to the schedule of current franchisees, in keeping with the policy objective of full and fair disclosure, the franchisor's associates and affiliates are to be included in the disclosure document. Similarly, express disclosure of corporate or affiliate operated businesses also must be disclosed. Where the franchisor has fewer than twenty (20) franchises in Canada, disclosure must be made country by country, until contact information for twenty or more franchisees has been provided. Finally, the content of disclosure with respect to former franchisees has been substantially expanded both for the purpose of clarity as well as to assist those preparing disclosure documents.

**OBA Recommendation:** 5. Schedule of the current franchisees

The OBA recommends the approach taken in Ontario, as follows:

A list of the locations of all franchises in British Columbia of the type being offered, including the business address, telephone number and name of the franchisee who operates the franchise and, if there are less than 20 franchises in British Columbia, the list shall include those franchises which are geographically closest to British Columbia , until information on 20 franchises is provided.

6.(1) The schedule of current businesses referred to in subclause 4(1)(z)(ii) shall contain business contact information for every business of the franchisor, franchisor's associate or affiliate of the franchisor of the same type as the franchise being offered, in Canada.

(2) In this section,  
"business contact information" means the business address and telephone number of the business and, if applicable, the name of the franchisor's associate or affiliate of the franchisor that operates the business.

**OBA Recommendation: 6.1**

The OBA recommends replacing “Canada” with “British Columbia” and removing the words “associate or”.

### Schedule of former franchisees and businesses

7.(1) The schedule of former franchisees and businesses referred to in subclause 4 (1) (z) (iii) shall contain,

- (a) the name and last known address and telephone number of every person who operated, in Canada and in any other country where a franchise included in the schedule of current franchisees required by section 5 is located, a franchise of the franchisor, franchisor’s associate or affiliate of the franchisor of the same type as the franchise being offered in respect of which the franchise agreement was terminated or cancelled by the franchisor, franchisor’s associate, affiliate of the franchisor or franchisee during the reporting period;
- (b) the name and last known address and telephone number of every person who operated, in Canada and in any other country where a franchise included in the schedule of current franchisees required by section 5 is located, a franchise of the franchisor, franchisor’s associate or affiliate of the franchisor of the same type as the franchise being offered in respect of which the franchise agreement was not renewed by the franchisor, franchisor’s associate, affiliate of the franchisor or franchisee during the reporting period;
- (c) the name and last known address and telephone number of every person who operated, in Canada and in any other country where a franchise included in the schedule of current franchisees required by section 5 is located, a franchise of the franchisor, franchisor’s associate or affiliate of the franchisor of the same type as the franchise being offered that was re-acquired by the franchisor, franchisor’s associate or affiliate of the franchisor during the reporting period;
- (d) the name and last known address and telephone number of every person who operated, in Canada and in any other country where a franchise included in the schedule of current franchisees required by section 5 is located, a franchise of the franchisor, franchisor’s associate or affiliate of the franchisor of the same type as the franchise being offered and who otherwise ceased to operate the franchise during the reporting period; and
- (e) the former business address and telephone number of every business, in Canada, of the franchisor, franchisor’s associate or affiliate of the franchisor of the same type as the franchise being offered that ceased to operate as such a business during the reporting period and, if applicable, the name of the franchisor’s associate or affiliate of the franchisor that operated the business.

(2) In subsection (1),  
“reporting period” means the period beginning with the start of the most recently completed



fiscal year before the date of the disclosure document and ending with the date of the disclosure document.

**OBA Recommendation:** 7 Schedule of former franchisees and businesses

The OBA recommends that the “reporting period” be the preceding fiscal year of the franchisor. The OBA recommends that the geographic area from which the information in section 7 be derived should be the same geographic area from which the list of current franchises is created. The OBA recommends deleting the words “associate or ” in subsections 7.(1)(a), 7.(1)(b), 7.(1)(c), 7.(1)(d), and 7.(1)(e).

**Schedule of franchise and business closure information**

8. The schedule of franchise and business closure information referred to in subclause 4(1)(z) (iv) shall contain,

(a) for all franchises, in Canada and in any other country where a franchise included in the schedule of current franchisees required by section 5 is located, of the franchisor, franchisor’s associates or affiliates of the franchisor of the same type as the franchise being offered, and for the period beginning with the start of the third-last completed fiscal year before the date of the disclosure document and ending with the date of the disclosure document,

- (i) the number of franchises in respect of which the franchisor, franchisor’s associate or affiliate of the franchisor terminated or cancelled the franchise agreement,
- (ii) the number of franchises in respect of which the franchisor, franchisor’s associate or affiliate of the franchisor refused to renew the franchise agreement,
- (iii) the number of franchises in respect of which the franchisee terminated or cancelled the franchise agreement,
- (iv) the number of franchises in respect of which the franchisee refused to renew the franchise agreement,
- (v) the number of franchises that were transferred by the franchisee,
- (vi) the number of franchisees in which a controlling interest was transferred,
- (vii) the number of franchises that were re-acquired by the franchisor, franchisor’s associate or affiliate of the franchisor, and
- (viii) the number of franchises that otherwise ceased to operate as a franchise of the franchisor, franchisor’s associate or affiliate of the franchisor; and

(b) the number of businesses, in Canada, of the franchisor, franchisor’s associates or affiliates of the franchisor of the same type as the franchise being offered that ceased to operate as such a business in the period beginning with the start of the third-last completed fiscal year before the date of the disclosure document and ending with the date of the disclosure document.



**OBA Recommendation:** 8. Schedule of franchise and business closure information

The OBA recommends deleting section 8, '*Schedule of franchise and business closure information*' entirely. Only Ontario and Alberta have included a limited approach to this section in their Regulations. Prince Edward Island, New Brunswick and Manitoba have chosen not to adopt this section. To encourage uniformity and best practices, we recommend British Columbia not adopt this provision.

## Financial statements

9.(1) Every disclosure document shall contain,

(a) an audited financial statement for the most recently completed fiscal year of the franchisor's operations, prepared in accordance with the generally accepted auditing standards set out in the *Canadian Institute of Chartered Accountants Handbook*; or

(b) a financial statement for the most recently completed fiscal year of the franchisor's operations, prepared in accordance with generally accepted accounting principles and which complies with the review and reporting standards applicable to review engagements set out in the *Canadian Institute of Chartered Accountants Handbook*.

(2) Despite subsection (1), if 180 days have not yet passed since the end of the most recently completed fiscal year and a financial statement has not been prepared for that year, the disclosure document shall contain a financial statement for the last completed fiscal year that is prepared in accordance with the requirements of clause (1)(a) or (b).

(3) Despite subsection (1), if a franchisor has operated for less than one fiscal year or if 180 days have not yet passed since the end of the first fiscal year of operations and a financial statement for that year has not been prepared in accordance with the requirements of clause (1)(a) or (b), the disclosure document shall contain the opening balance sheet for the franchisor.

(4) Despite subsection (1), if the franchisor is based in a jurisdiction other than *[insert jurisdiction]*, the disclosure document shall contain financial statements prepared in accordance with generally accepted accounting principles for the jurisdiction in which the franchisor is based if,

(a) the auditing standards or the review and reporting standards of that jurisdiction are at least equivalent to those standards described in clause (1)(a) or (b); or

(b) the auditing standards or the review and reporting standards of that jurisdiction are not at least equivalent to those standards described in clause (1)(a) or (b), but the disclosure document contains supplementary information that sets out any changes necessary to make the presentation and content of such financial statements equivalent to those of clause (1)(a) or (b).

(5) In a circumstance described in clause (4)(a) or (b), the disclosure document shall contain a statement that the financial statements contained in the disclosure document are prepared in accordance with generally accepted accounting principles for the jurisdiction in which the



franchisor is based and that the requirements of clause (4)(a) or (b), as the case may be, are satisfied.

**Comment:** As to the nature and quality of financial statements to be included in a disclosure document there are no exemptions from financial statement disclosure other than for the Crown. Financial statements to be included in a disclosure document must take the form of either an audited financial statement for the most recent fiscal year, or a review engagement report prepared according to Canadian Generally Accepted Accounting Principles. Both of these requirements currently apply in Alberta and Ontario. With respect to financial statements prepared in a foreign jurisdiction the use of financial statements prepared in accordance with generally accepted accounting principles of another jurisdiction in which the franchisor is based will be acceptable if the auditing standards or the review and reporting standards of that jurisdiction are at least equivalent to the Canadian standards or, if such standards are not equivalent, the disclosure document must contain supplementary information that sets out any changes necessary to make the presentation and content of such financial statements equivalent. In addition, the disclosure document must contain a statement that the financial statements contained in the disclosure document are prepared in accordance with generally accepted accounting principles for the jurisdiction in which the franchisor is based and that the equivalency requirements are satisfied.

A procedure is permitted under the FTC Rule in the United States for the use of consolidated statements of a parent company of the franchisor with an appropriate guarantee from the parent company respecting the obligations of the franchisor. The Regulations do not adopt this approach for, as a matter of policy, it would be inappropriate for Canadian franchisees to be deprived of the opportunity to review financial statements of the actual entity with which they are dealing as the franchisor since, in many cases, the parent company would not be located in Canada and the financial statements would most likely not be prepared in accordance with Canadian standards.

**OBA Recommendation:** 9.(1)(a)&(b) Financial Statements

The OBA recommends that the regulation contain an exemption from the requirement to disclose financial statements, as found in the Ontario regulation.

The OBA recommends that the regulation also simply recognize the sufficiency of statements prepared in accordance with IFRS or U.S. GAAP (and without requirement for the supplementary information referred to in subsection (4))



## Certificate of Franchisor

- 10.(1) A Certificate of Franchisor in Form 1 shall be completed and attached to every disclosure document provided by a franchisor to a prospective franchisee.
- (2) A Certificate of Franchisor in Form 2 shall be completed and attached to every statement of material change provided by a franchisor to a prospective franchisee.
- (3) A Certificate of Franchisor shall be signed and dated,
- (a) in the case of a franchisor that is not incorporated, by the franchisor;
  - (b) in the case of a franchisor that is incorporated and has only one director or officer, by that person;
  - (c) in the case of a franchisor that is incorporated and has more than one officer or director, by at least two persons who are officers or directors.

**Comment:** The Regulations mandate specific disclosure certificate forms in the Regulations, one for the disclosure document and one for a statement of material change. These are included in the Regulations to ensure consistency and certainty with respect to the content and form of such disclosure certificates.

**OBA Recommendation:** 10. Certificate of franchisor

The form of the certificate is unimportant given that the certificate complies in substance. The statements in this section are acceptable, however, we recommend wording that puts more emphasis on the importance of the substance of the certificates rather than the specific forms of the certificates. We recommend wording similar to the approach taken in Ontario. Specific language is below:

“Every disclosure document shall include a certificate certifying that the document,  
contains no untrue information, representations or statements; and

includes every material fact, financial statement, statement and other information required by the  
Act and this Regulation.”

“A certificate referred to in subsection (1) shall be signed and dated by,

in the case of a franchisor that is not incorporated, the franchisor;

in the case of a franchisor that is incorporated and has only one director or officer, by that person;

in the case of a franchisor that is incorporated and has more than one officer or director, by at least  
two persons who are officers or directors.”



## FORM 1 - CERTIFICATE OF FRANCHISOR UNIFORM FRANCHISES ACT

### **This Disclosure Document,**

- (a) contains no untrue information, representation or statement, whether of a material fact or otherwise;
- (b) contains every material fact, financial statement, statement and other information that is required to be contained by the Act and the regulations made under it;
- (c) does not omit a material fact that is required to be contained by the Act and the regulations made under it; and
- (d) does not omit a material fact that needs to be contained in order for this Disclosure Document not to be misleading.

*A Certificate of Franchisor shall be signed and dated as required by subsection 10(3) of the Disclosure Documents regulation.*

## FORM 2 - CERTIFICATE OF FRANCHISOR UNIFORM FRANCHISES ACT

### **This Statement of Material Change,**

- (a) contains no untrue information, representation or statement, whether of a material change or otherwise;
- (b) contains every material change that is required to be contained by the Act and the regulations made under it;
- (c) does not omit a material change that is required to be contained by the Act and the regulations made under it; and
- (d) does not omit a material change that needs to be contained in order for this Statement of Material Change not to be misleading.

A Certificate of Franchisor shall be signed and dated as required by subsection 10(3) of the Disclosure Documents regulation.

## REGULATION MADE UNDER THE UNIFORM FRANCHISES ACT – MEDIATION

### **OBA Recommendation:** Mediation

We note that the Act does not appear to contemplate mediation. Further British Columbia has adopted a Notice to Mediate process, whereby a party can compel the other to mediate a dispute by serving a Notice to Mediate at least 60 days following the delivery of a defence (response to civil claim) and no later than 120 days before trial. The OBA presumes that this provision will not be included in the British Columbia regulations



As most provinces do not provide for rules for mediation in their respective Rules of Civil Procedure, a comprehensive mediation code for use in such jurisdictions is provided. The mediation process is a party initiated pre- and post-litigation/arbitration form of mediation. For jurisdictions that currently have mediation regimes in their Rules of Practice, post litigation mediation is to be governed by the Rules rather than by the Regulations.

The Regulation on Mediation provides for the appointment of a mediator and the conduct of mediation to resolve a dispute between parties to a franchise agreement. There are rules for two types of mediation: pre-litigation and post-litigation. The Regulation also prescribes forms to be used in mediation. The Regulation represents a significant and positive development in connection with the resolution of franchise disputes in the interest of all stakeholders.

Mediation is to occur within 45 days of the appointment of the mediator and mediation is to be concluded after 10 hours. There is nothing in the Regulations, however, preventing parties from extending mediation beyond the 10 hours. Failure of any of the parties to comply with the requirement to mediate can be subject to an adverse costs award. Unless a court orders otherwise, no more than one mediation may be initiated in respect of the same dispute. A court or an arbitrator may consider an allegation of a default under the mediation provisions by a party in respect of costs in the proceeding or arbitration. A complete set of prescribed forms has been included in the mediation Regulation.

## **PART I - INTERPRETATION**

### **Definitions**

1. In this Regulation,

“court” means *[insert the superior court of record in the jurisdiction]*;

“mediation” means a process in which two or more parties meet and attempt to resolve issues in dispute between them with the assistance of a mediator;

“mediator” means a person who assists parties in resolving issues in dispute between them, but has no power to unilaterally resolve the dispute;

“party” means a party to a franchise agreement who has a dispute with one or more other parties to the franchise agreement;

“roster organization” means a body authorized by the Attorney General to select mediators for



the purposes of this Regulation.

## **PART II - GENERAL RULES RE APPOINTMENT OF MEDIATOR AND MEDIATION**

### **Application of Part**

2. This Part applies to mediation of a dispute that is initiated by a notice to mediate delivered before or after a legal proceeding or arbitration in respect of the dispute has been commenced.

### **Appointment of mediator**

- 3.(1) Upon a notice to mediate being delivered under subsection 8 (3) of the Act, the parties shall jointly appoint a mediator,
- (a) if there are four or fewer parties to the dispute, within 14 days after the notice to mediate was delivered to all the parties to the franchise agreement under subsection 8 (3) of the Act;
  - (b) if there are five or more parties to the dispute, within 21 days after the notice to mediate was delivered to all the parties to the franchise agreement under subsection 8 (3) of the Act.
- (2) If the parties fail to jointly appoint a mediator within the time required by subsection (1), any party may apply to a roster organization for the appointment of a mediator, or if there is no roster organization, any party may apply to court for the appointment of a mediator.
- (3) The roster organization or court shall, within seven days after receiving an application by a party under subsection (2), provide each of the parties with the same list of at least six proposed mediators.
- (4) Within seven days after receiving the list from the roster organization or court, each party shall return the list to the organization or court with the mediators numbered in the order of the party's preference, with one being the number given to the most preferred mediator.
- (5) A party may also delete a maximum of two names from the list before returning it to the roster organization or court.
- (6) A party that does not return the list as required by subsection (4) shall be deemed to have accepted all the names on the list.
- (7) Within 14 days after receiving an application by a party under subsection (2), the roster organization or court shall appoint a mediator from the names remaining on the list or, if no names remain on the list, shall appoint any person as the mediator, and shall notify each of the parties in writing of the name of the appointed mediator.
- (8) If the mediator appointed by the roster organization or court is unable or unwilling to act as mediator in the dispute, the mediator or any party may notify the organization or court of the fact.
- (9) Within seven days after being notified under subsection (8), the organization or court shall



appoint another person as mediator from the names remaining on the list or, if no names remain on the list, shall appoint any person as the mediator, and shall notify each of the parties in writing of the name of the appointed mediator.

(10) In appointing a mediator under subsection (7) or (9), the roster organization or court shall take into account,

- (a) the order of preference indicated by the parties on the returned lists;
- (b) the requirement that a mediator be neutral, independent and impartial vis à vis the parties and the dispute;
- (c) the qualifications of the persons who may be appointed;
- (d) the fees charged by the persons who may be appointed;
- (e) the availability of the persons who may be appointed;
- (f) the nature of the dispute; and
- (g) any other consideration that the organization or court considers relevant to the selection of an impartial, competent and effective mediator.

(11) A mediator appointed by the roster organization or court shall be deemed to be appointed on the date on which the parties are notified under subsection (7) or (9).

#### **Pre-mediation conference**

4. If the mediator is of the opinion that the dispute is complex, he or she may hold a pre-mediation conference with the parties in order to consider organizational matters, including,

- (a) identification of the issues that are to be addressed by the mediation;
- (b) the exchange of information and documents before mediation; and
- (c) scheduling and timing matters.

#### **Exchange of information**

5.(1) Each party shall deliver to the mediator a statement of facts and issues setting out the factual and legal basis for the party's claim or defence to relief sought in the dispute.

(2) The statement of facts and issues shall be delivered to the mediator and the other parties not less than 14 days before the first mediation session is scheduled to be held.

#### **Costs of mediation**

6.(1) The parties shall jointly complete and sign a mediation fee declaration setting out,

- (a) the costs of the mediation; and
- (b) the allocation of the costs of the mediation between or among the parties.

(2) The parties shall share the costs of the mediation equally or as otherwise provided in the mediation fee declaration.



(3) The mediation fee declaration shall be completed before or at the pre-mediation conference, if there is one, and if there is not a pre-mediation conference, before or at the first mediation session.

(4) The mediation fee declaration is binding on all the parties.

(5) Despite subsection (4), a court may include in an award of costs to a party to a proceeding in respect of the same dispute that the mediation addressed any amount in compensation of the party's costs of the mediation as set out in the mediation fee declaration.

### **Parties' attendance**

7.(1) Each party is required to attend a pre-mediation conference or mediation session scheduled by the mediator.

(2) A party is in compliance with subsection (1) if the party is represented at a pre-mediation conference or mediation session,

(a) by counsel; or

(b) by another person if,

- (i) the party is not an individual,
- (ii) the party is under a legal disability and the other person is the party's legal guardian,
- (iii) the party is suffering from a mental or physical injury or impairment such that he or she cannot effectively participate, or
- (iv) the party is not a resident of [insert jurisdiction] and is not in [insert jurisdiction] at the scheduled time.

(3) A person who represents a party at a pre-mediation conference or mediation session under clause (2)(b) must,

(a) be familiar with all the relevant facts on which the party he or she represents intends to rely; and

(b) either,

- (i) have full authority to settle the dispute on the party's behalf, or
- (ii) be able to communicate promptly with the party or with another person who has full authority to settle the dispute on the party's behalf.

(4) A party or a party's representative may be accompanied by counsel at a pre-mediation conference or mediation session.

(5) Any other person may attend a pre-mediation conference or mediation session with the consent of all the parties.

(6) For the purposes of this section, a person may attend a pre-mediation conference or mediation session by telephone or other electronic means if,

(a) the person is not a resident of [insert jurisdiction]; and



(b) the person is not in [insert jurisdiction] at the time of the conference or session.

### **Conduct of mediation**

8.(1) The mediator shall schedule the dates, times and locations of the pre mediation conference, if any, and the mediation sessions.

(2) The mediator shall conduct the pre-mediation conference, if any, and the mediation sessions in the manner he or she considers appropriate to assist the parties to reach a resolution of the dispute that is fair, timely and cost-effective.

### **Conclusion of mediation**

9.(1) A mediation is concluded when,

(a) all the issues are resolved; or

(b) the mediator terminates the mediation prior to the issues being resolved.

(2) When a mediation is concluded, the mediator shall complete a certificate of completed mediation and deliver a copy of it to each of the parties. *[If the jurisdiction's Ministry of the Attorney General has a dispute resolution office, insert "and to the dispute resolution office in the Ministry of the Attorney General".]*

<hrdata-mce-alt="Part 3 - Pre-litigation Mediation - Specific Rules" class="system-pagebreak" title="Part 3 - Pre-litigation Mediation - Specific Rules" />

## **PART III - PRE-LITIGATION MEDIATION — SPECIFIC RULES**

### **Application of Part**

10. This Part applies to mediation of a dispute that is initiated by a notice to mediate delivered before any legal proceeding or arbitration in respect of the dispute has been commenced.

### **Notice to mediate**

11. A notice to mediate may be delivered under subsection 8(3) of the Act no earlier than 16 days after a notice of dispute was delivered under subsection 8(1) of the Act.

### **Timing of mediation**

12.(1) Mediation of the dispute must begin within 45 days after a mediator is appointed under section 3, unless another date,

(a) is specified by the mediator in writing with the agreement of all the parties; or



- (b) is ordered by the court under subsection (2).
- (2) Upon an application by any party to court, the court may, on the terms and conditions that the court considers appropriate,
  - (a) extend the time in which the mediation must begin;
  - (b) whether or not the court extends the time under clause (a), fix a date on which the mediation must begin.
- (3) Upon an application under subsection (2), the court shall take into account all of the circumstances, including,
  - (a) whether a party intends to bring a motion for summary judgment, summary trial or for a special case; and
  - (b) whether the mediation will be more likely to succeed if it is postponed to allow the parties to acquire more information.

### **Time limits on mediation**

- 13.(1) The mediator shall terminate the mediation, whether or not the issues are resolved, after 10 hours of mediation.
- (2) The mediator may terminate the mediation earlier if he or she is of the opinion that the mediation is not likely to be successful.
- (3) Despite subsection (1), the mediator may extend the mediation, with the agreement of all the parties, if the mediator is of the opinion that the mediation is likely to be successful with the additional time.

### **Defaults**

- 14.(1) Any party who is of the opinion that another party has failed to comply with a provision of this Regulation may apply to the court for an order under subsection (3) by filing with the court,
  - (a) an allegation of default; and
  - (b) any affidavits in support of the application.
- (2) Before making an application under subsection (1), the party shall deliver to each of the other parties the documents described in that subsection.
- (3) Upon an application made under subsection (1), the court may make any one or more of the following orders:
  - 1. Directing, on the terms and conditions that the court considers appropriate, that a pre-mediation conference or mediation session be held.
  - 2. Directing that the party who is the subject of the allegation of default attend a pre-mediation conference or mediation session.
  - 3. Directing that the party who is the subject of the allegation of default deliver a statement



of facts and issues to the mediator and the other parties.

4. Directing the party who is the subject of the allegation of default to comply with any other requirement of this Regulation.

5. Adjourning the application.

6. Dismissing the application if the court is of the opinion that the party who is the subject of the allegation of default did not commit the alleged default or has a reasonable excuse for the default.

7. Making any order it considers appropriate with respect to costs of the application.

8. Making any other order it considers appropriate.

(4) If the court is of the opinion that public disclosure of the allegation of default and the supporting affidavits would cause hardship to any party, the court may,

(a) order that all or any part of the allegation of default and supporting affidavits be treated as confidential, sealed and not form part of the public record; or

(b) make any other order respecting the confidentiality of the documents that the court considers appropriate.

(5) In a legal proceeding or arbitration in respect of the same dispute that is the subject of the mediation, the court or arbitrator may consider an allegation of default in making any order respecting costs in the proceeding or arbitration.

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## **PART IV - POST-LITIGATION MEDIATION - SPECIFIC RULES**

*[This Part to be excluded in jurisdictions with general rules of court for post-litigation mediation applicable to franchise disputes]*

### **Application of Part**

15. This Part applies to mediation of a dispute that is initiated by a notice to mediate delivered after a legal proceeding or arbitration in respect of the dispute has been commenced.

### **Notice to mediate**

16. Unless otherwise ordered by the court, a notice to mediate may be delivered under subsection 8 (3) of the Act no earlier than 16 days after a notice of dispute was delivered under subsection 8 (1) of the Act and no later than 45 days after the first defence has been filed in the legal proceeding or arbitration.

### **Timing of mediation**



17. (1) Mediation of the dispute must begin within 45 days after a mediator is appointed under section 3 and not later than seven days before the date of the trial of the same dispute, unless another date,

- (a) is agreed to by all the parties and confirmed by the mediator in writing; or
- (b) is ordered by the court under subsection (2).

(2) Upon an application by any party to court, the court may, on the terms and conditions that the court considers appropriate,

- (a) extend the time in which the mediation must begin;
- (b) whether or not the court extends the time under clause (a), fix a date on which the mediation must begin.

(3) Upon an application under subsection (2), the court shall take into account all of the circumstances, including,

- (a) whether a party intends to bring a motion for summary judgment, summary trial or for a special case; and
- (b) whether the mediation will be more likely to succeed if it is postponed to all the parties to acquire more information.

Limitation on mediation

18. Unless the court orders otherwise, no more than one mediation under this Part may be initiated in respect of the same dispute.

## Defaults

19.(1) Any party who is of the opinion that another party has failed to comply with a provision of this Regulation may apply to the court for an order under subsection (3) by filing with the court,

- (a) an allegation of default; and
- (b) any affidavits in support of the application.

(2) Before making an application under subsection (1), the party shall deliver to each of the other parties the documents described in that subsection.

(3) Upon an application made under subsection (1), the court may make any one or more of the following orders:

1. Directing, on the terms and conditions that the court considers appropriate, that a pre-mediation conference or mediation session be held.
2. Directing that the party who is the subject of the allegation of default attend a pre-mediation conference or mediation session.
3. Directing that the party who is the subject of the allegation of default deliver a statement of facts and issues to the mediator and the other parties.
4. Directing the party who is the subject of the allegation of default to comply with any other requirement of this Regulation.



5. Adjourning the application.
  6. Staying the legal proceeding or arbitration commenced in respect of the same dispute that is the subject of the mediation until the party who is the subject of the allegation of default attends a pre-mediation conference or mediation session.
  7. Dismissing the legal proceeding or arbitration commenced in respect of the same dispute that is the subject of the mediation or striking out the statement of defence in the legal proceeding or arbitration and granting judgment in the legal proceeding or granting an award or making a determination in the arbitration.
  8. Dismissing the application if the court is of the opinion that the party who is the subject of the allegation of default did not commit the alleged default or has a reasonable excuse for the default.
  9. Making any order it considers appropriate with respect to costs of the application.
  10. Making any other order it considers appropriate.
- (4) If the court is of the opinion that public disclosure of the allegation of default and the supporting affidavits would cause hardship to any party, the court may,
- (a) order that all or any part of the allegation of default and supporting affidavits be treated as confidential, sealed and not form part of the public record; or
  - (b) make any other order respecting the confidentiality of the documents that the court considers appropriate.
- (5) In a legal proceeding or arbitration in respect of the same dispute that is the subject of the mediation, the court or arbitrator may consider an allegation of default in making any order respecting costs in the proceeding or arbitration.

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## **PART V - FORMS**

### **Forms**

- 20.(1) The notice of dispute to be delivered under subsection 8 (1) of the Act shall be in Form 1.
- (2) The notice to mediate to be delivered under subsection 8 (3) of the Act shall be in Form 2.
- (3) The statement of facts and issues to be delivered under subsection 5 (1) or which may be ordered by a court under section 14 or 19 to be delivered to the parties shall be in Form 3.
- (4) The mediation fee declaration to be completed under section 6 shall be in Form 4.
- (5) The allegation of default that may be filed under section 14 or 19 shall be in Form 5.
- (6) The certificate of completed mediation to be completed under section 9 shall be in Form 6.

### **FORM 1 - NOTICE OF DISPUTE UNIFORM FRANCHISES ACT**