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Consultation Paper on

Regulations under the *Franchises Act*

Justice and Consumer Affairs
April 2009

Contents

A. Introduction and Request for Comments

This consultation paper sets out the Department of Justice and Consumer Affairs's proposals for regulations under the *Franchises Act.* The Act was passed in 2007, and injects five new elements into the franchisor/franchisee relationship: the duty of fair dealing (s.3), the franchisees' right to form an association (s.4), the franchisors' duty of precontractual disclosure and the related remedies (ss.5, 6 and 7)), the mediation procedure (s.8), and the overriding of provisions requiring litigation to be conducted outside New Brunswick (s.11).

Before the Act is brought into force, two regulations are needed. The first will establish the details of the disclosure document that franchisors must provide to franchisees before a franchise agreement is signed. The second will create the framework for the mediation process. This paper discusses both, and adds some notes about transitional issues that will arise when the Act comes into force.

Comments on the proposals in this paper are welcome, and should be received no later than June 12, 2009. They should be sent to:

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The final regulations will be prepared once the comments received have been considered.

B. General Approach and Highlights

New Brunswick's *Franchises Act*, like Prince Edward Island's, is based on the *Uniform Franchises Act* (the *Uniform Act*) adopted by the Uniform Law Conference of Canada (ULCC) in 2005. The *Uniform Act* was designed as the basis for harmonized legislation throughout Canada. It was primarily modelled on Ontario's *Arthur Wishart Act (Franchise Disclosure) 2000*, but included several adjustments derived from Alberta's *Franchises Act*, as well as other changes that the ULCC developed to address problems or inadequacies that experience under the Ontario and Alberta Acts had identified.

The ULCC also developed uniform regulations to accompany its Act. Its disclosure regulation (http://www.ulcc.ca/en/us/UFA_Disclosure_Documents_Reg_En.pdf) was largely based on the Ontario regulations and was designed to improve upon them, while its mediation regulation (http://www.ulcc.ca/en/us/UFA_Mediation_Reg_En.pdf) was not based on an existing specific model in the franchising field, since the mediation provision in the *Uniform Act* was an innovation.

Prince Edward Island, when it developed its regulation on disclosure (http://www.canlii.com/pe/laws/regu/2006r.232/20080715/whole.html), attempted to remain close to the Ontario regulations, so that franchisors could easily comply using familiar documents, but also to take advantage of the ULCC's work in various places. Other substantial reviews have been released since then, notably the report of the Ontario Bar Association's Joint Sub-Committee on Franchising (2006) and the Manitoba Law Reform Commission's Report on *Franchise Law* (2008), but for practical reasons the proposals in this paper have taken the Prince Edward Island regulations and the ULCC recommendations as their principal points of reference. This produces a disclosure regulation which is similar to Ontario's and very similar to Prince Edward Island's, but does include some variations, mostly derived from the ULCC. These variations, however, should be easy to incorporate into existing documents and practices.

The fact that the proposed New Brunswick disclosure regulation fits within a well-established pattern of well-identified issues makes it possible to summarize immediately the highlights of these proposals and the positions they take on some familiar subjects:

- ‘Wraparound’ documents should be permitted (p.5).
- Electronic documents should be permitted (p.6).
- There should be no provision for ‘substantial completeness’ (p.6).
- There should be a modified ‘mature franchisor’ exception under which mature franchisors would have the option of disclosing either financial statements or an auditor’s certificate, but would not be exempt from financial disclosure (p.9).
- Most existing Prince Edward Island disclosure items will be enacted in New Brunswick with minimal changes (p.11).
- New disclosure requirements will relate to manuals, some kinds of competition by franchisors, ‘negative disclosures’ on specified key issues, unilateral changes, and trademark infringements (p.14).

Page 16 of this paper presents a summary of what a franchisor currently operating in Prince Edward Island would need to do in a ‘wraparound’ document in order for its Prince Edward Island disclosure document to comply with the New Brunswick regulations.

In relation to mediation, by contrast, comparison cannot be made to regulations that are already in force elsewhere, since the Alberta, Ontario and Prince Edward Island Acts do not have a mediation provision comparable to section 8 of the New Brunswick and ULCC Acts. The current proposals have therefore been based on the ULCC’s mediation regulation, though with some modifications.

C. The Disclosure Regulation

C.1. The legislative context

Section 5 of the Act requires a franchisor to provide a prospective franchisee with a disclosure document before the franchise agreement is signed. The disclosure document must be one document delivered at one time. It consists of the agreements the franchisee is to sign, as well as the financial statements and other statements, documents and information prescribed by the disclosure regulation discussed below. It must also contain all “material facts”. Section 1 of the Act defines these as follows:

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

Under section 5 of the Act, any “material change” must also be disclosed before the franchise agreement is signed or the prospective franchisee makes a payment to the franchisor. “Material change”, like “material fact”, is defined in section 1 of the Act but not by regulation. It is an actual or impending change in the business, operations, capital or control of the franchisor, etc., that would be expected to have a significant adverse effect on the value or price of the franchise or the decision to acquire it.

Other issues that the regulations can address include forms, methods of delivery and anything else that is necessary or advisable to carry out the intent and purpose of the Act. This paper will group its proposals relating to the disclosure document under the two headings “Formalities of the disclosure document” and “Content of the disclosure document”.

C.2. Formalities of the disclosure document.

a. Structure

The Ontario, Prince Edward Island and ULCC regulations contain very few requirements about the structure of the disclosure document. It must simply contain the necessary information, which section 5(7) of the Act requires to be “accurately, clearly and concisely set out”. The same approach is proposed for New Brunswick.

One small exception in those three regulations is the requirement that risk warnings advising the franchisee to seek information about the franchisor, and to obtain legal and financial advice, must be placed at the beginning of the disclosure document. Ontario (s.6) and ULCC (s.4(1)) also require an important grouping of information about the franchise to be “presented together in one part of the document”. Although it is proposed that franchisors in New Brunswick should give risk warnings, and that these should follow the Prince Edward Island wordings, it is not proposed that any requirement should be enacted specifying where the risk warnings or any other particular information should be placed.

b. ‘Wraparound’ documents

Prince Edward Island has also adopted a ‘wraparound’ provision saying that a document prepared for use in another jurisdiction can be used in Prince Edward Island as long as it is supplemented by a statement that provides any information that Prince Edward Island requires but the other jurisdiction does not. This is based on a provision from Alberta. Strictly speaking, this provision seems unnecessary, since nothing in the Act or regulations prevents material from another jurisdiction being used as long as the disclosure document as a whole contains all the required information. Nonetheless, to avoid uncertainty, the New Brunswick regulation should spell out that ‘wraparound’ documents are permitted. Their use is simplified if, as suggested above, the New Brunswick disclosure document does not require any particular information to be located in any particular place.

c. Electronic and courier delivery

Prince Edward Island has expressly authorized electronic disclosure documents and courier delivery of disclosure documents (PEI reg., s.2). In New Brunswick, both would be permitted without express mention in the regulations, since section 5(2) of the *Franchises Act* permits delivery by registered mail, and this connects with section 14 of the *Electronic Transactions Act*, which permits the consensual use of electronic documents in place of registered mail, and with section 22(e.1) of the *Interpretation Act*, which permits the use of courier or certified mail in place of registered mail. Nonetheless, in the interests of clarity, it is proposed that both courier and electronic delivery of a disclosure document should be expressly authorized in the regulations.

In relation to electronic delivery, Prince Edward Island adds several requirements as to the characteristics of electronic disclosure documents (PEI reg., s.2(b)). Some of these are desirable, but others seem excessive. It is proposed that the requirements in New Brunswick should be limited to the essential elements of an electronic disclosure document, namely: (a) it must meet the requirements of section 12 of the *Electronic Transactions Act* (which means that the franchisee must be able to read, store and print the material provided); (b) it must be self-contained (which means that the electronic information provided to the franchisee must itself fully comply with the Act, and must not depend on links to other sites in order to do so); and (c) it may consist of one or more files, as long as these are all delivered together.

d. Substantial completeness

Prince Edward Island, like Alberta but unlike Ontario or ULCC, has a provision saying that a disclosure document is “properly given for the purposes of section 6” of the PEI Act if it is “substantially complete” (PEI reg., s.3(3)). Section 6 of the Act, in both New Brunswick and Prince Edward Island, deals with the franchisee’s remedy of rescission, and provides two alternatives: rescission within 60 days if a disclosure document is provided late or its contents do not meet the requirements of section 5, or rescission within two years if no disclosure document is provided.

Here the Ontario and ULCC approach is preferred to Prince Edward Island's, since a 'substantial completeness' provision does not fit well with section 6 and seems likely to cause undesirable confusion. Read literally, the statement that a disclosure document is "properly given for the purposes of section 6" if it is substantially complete bears no obvious relationship to the wording of section 6, which is not concerned with how a disclosure document is supposed to be given. Read more loosely, as an attempt to express the general idea that all that a franchisor is required to deliver is a 'substantially complete' disclosure document, it will lead to debate about what kinds of 'incompleteness' are or are not 'substantial', and it will undermine the distinction that section 6 draws between disclosure documents that do or do not meet the requirements of section 5.

Making a disclosure document 'complete' should be straightforward; all the franchisor has to do is make sure it includes the material that the Act and regulation list. If it is incomplete, which presumably means that something that the Act or regulation requires is missing, it does not meet the requirements of section 5, and the 60 day rescission period under section 6(1) applies. Admittedly, it may sometimes be frustrating to franchisors that the possibility of rescission is briefly left open because of an insubstantial omission in their disclosure document. Overall, though, this seems preferable to opening up the considerable uncertainties that a 'substantial completeness' provision would present.

e. Franchisor's certificates

Ontario, Prince Edward Island and ULCC require a franchisor to sign a certificate confirming that the disclosure document complies with the Act. New Brunswick should do the same, and should use similar wording to Prince Edward Island. The franchisor would thereby confirm that the disclosure document is accurate and includes all required information and material facts.

In addition, however, the prescribed certificate should state what the Act means by "material facts". As mentioned above, "material fact" is defined in section 1 of the Act as "any information, about the business, operations, capital or control of the franchisor, franchisor's associate or about the franchise or the franchise system, that would reasonably be expected to have a significant effect on the value or price of the franchise to be granted or the decision to acquire the franchise." If this is not explained in the franchisor's certificate, franchisees might easily misunderstand the franchisor's statement that it had disclosed the prescribed information and all "material facts".

Prince Edward Island, like ULCC (but not Ontario), has a similar prescribed form certificate for a "statement of material change" that occurs after the disclosure document is given but before the franchise agreement is signed. The statement says what the "material change" is and that there are no others. It is proposed that New Brunswick, too, should create a prescribed form, and that this form should explain what the Act means by a "material change". Otherwise the franchisor's statement that there had been no material changes except the ones stated in the certificate could be misunderstood.

As for the signing and dating of the franchisor's certificate, the Ontario, Prince Edward Island and ULCC regulations all impose the same requirement: the franchisor signs if it is not incorporated; one officer signs if the franchisor is a corporation with only one officer; and two officers or directors sign if the franchisor is a corporation with more than one officer or director (PEI reg., s.4). The same approach is proposed for New Brunswick, for both the franchisor's initial certificate and any statement of material change.

C.3. Content of the disclosure document

The information that Ontario, Prince Edward Island and ULCC require franchisors to disclose to their prospective franchisees can be grouped under four headings: financial statements, information about the franchisor, information about the franchise, and lists of current and former franchisees. The same order will be followed here, with discussion of the 'mature franchisor' exception and the small investment exception also being added.

a. Financial statements

The general requirement under other Canadian franchise regulations is that franchisors must provide financial statements for their most recent operating year, or for the previous one if statements for the most recent year have not yet been completed, or an opening balance if they have not been operating long enough to have a financial statement yet. The statements must be either audited or reviewed in accordance with the *Canadian Institute of Chartered Accountants Handbook* or with generally accepted auditing standards that are “at least equivalent”. It is proposed that New Brunswick follow the same approach, and use the Prince Edward Island wording that indicates that these statements can be prepared in accordance with the generally accepted accounting principles of the franchisor’s home jurisdiction as long as the audit or review meets Canadian standards.

b. ‘Mature franchisor’ exception

Prince Edward Island (s.6) and Ontario (s.11) both exempt large, well-established franchisors with a good record of legal compliance (often referred to as ‘mature franchisors’) from the requirement to provide financial statements. To qualify for this exemption:

(a) the franchisor must have a net worth of more than $5 million (Ontario) or $2 million (PEI), or of $1 million if it is controlled by a corporation which meets the $5 million or $2 million threshold;

(b) the franchisor or its controlling corporation must have had more than 25 franchisees operating in Canada or another single jurisdiction for more than five years;

(c) the franchisor or its controlling corporation must have engaged in the same line of business as the franchise being granted for more than five years; and

(d) neither the franchisor nor its associates, directors, general partners or officers must have had a judgment, order or award made against them in the past five years relating to fraud, unfair or deceptive practices or a law regulating franchises, including the *Franchises Act*.

ULCC thought this exception was undesirable, and did not provide for it in either its Act or its regulations.

It is proposed that New Brunswick should create a mature franchisor exception, but with some adjustments from existing models:

- The financial threshold should be $2 million, as in Prince Edward Island (for regional consistency).
- The reference to judgments or awards “under a law regulating franchises” should be removed (since the most honourable of franchisors can easily have a civil judgment made against it under franchise legislation from time to time).
- However, the provision should not completely exempt mature franchisors from providing financial information. Instead they should have the option of providing either (a) the same financial statements as other franchisors, or (b) a declaration and an audit certificate verifying that they meet the criteria in the regulation. In Ontario (but not Prince Edward Island) a franchisor who claims the ‘mature franchisor’ exemption must already provide a declaration stating that it qualifies (Ontario reg., s.3(1)(c)). The slight adjustment proposed for New Brunswick is that, in relation to the net worth requirement, this declaration should be supported by a certificate from an independent auditor. Since the ‘mature franchisor’s’ financial statements already have to be audited in order for the exemption to apply, an audit certificate should not be hard to obtain.

c. Information about the franchisor

Ontario, Prince Edward Island and ULCC contain very similar requirements for the information that the franchisor must provide about itself. It is proposed that New Brunswick follow the Prince Edward Island model (PEI reg., Part 2). In summary, the franchisor will have to state:

(i) its name, business name, business address and business form (e.g., corporation or sole proprietorship),

(ii) its experience operating franchises of the kind being offered and of other kinds, as well as other businesses of the same kind as the franchise,

(iii) the name, relevant business experience and past 5 years' occupation of the directors, general partners and officers of the franchisor,

(iv) whether the franchisor or its associate or any of the individuals listed under (iii) above, have had criminal, civil or administrative judgments or orders against them in the past, or whether proceedings are pending, in relation to fraud, unfair or deceptive practices or breaches of franchise laws, and

(v) recent bankruptcy or insolvency proceedings in which the insolvent is the franchisor or franchisor's associate, or one of the individuals listed in (iii) above, or a corporation or partnership in which one of those individuals was a director, officer or partner.

Ontario, Prince Edward Island and ULCC all use 10 years as the reporting period for past criminal proceedings, and 6 years for bankruptcies, and Prince Edward Island also applies a 10 year period to civil or administrative proceedings. For simplicity, however, it is proposed that 5 years, which is also the period under item (iii) above and in the 'mature franchisor' exception, should apply in all cases. Prince Edward Island adds, in relation to item (iii) above, that the "officers" whose business background must be disclosed are those with "day to day management responsibilities relating to the franchise". This adjustment is not proposed for New Brunswick, since "officer" is a word used in various places in the regulation, and it will cause confusion if it has one meaning under item (iii) but a potentially different meaning everywhere else in the Act and the regulation.

d. Information about the franchise

Ontario, Prince Edward Island and ULCC contain several provisions that are identical and many that are very similar. Where they are similar, ULCC made recommendations to address practical problems that had emerged under the Ontario regulations, and Prince Edward Island adopted the ULCC recommendations in many cases, but sometimes kept the Ontario text or even reduced the requirement it imposed. In most cases it is proposed that New Brunswick follow Prince Edward Island's lead. These items are listed below without explanation. In some cases, however, it is felt that additional disclosure would be beneficial to both franchisors and franchisees by eliminating some important sources of misunderstanding before the contract is entered into. These items will be explained in more detail.

The following is the list of proposed disclosure items that will be substantially the same in New Brunswick as in Prince Edward Island. They are dealt with in individually numbered clauses of Schedule II, Part 3, of the Prince Edward Island regulation. The franchisor will therefore have to disclose:

- the franchisee's costs associated with establishing the franchise (cl.1);
- other recurring or isolated payments that the franchisee must make to the franchisor (cl.2);
- the franchisor's policies and practices regarding guarantees or security interests that the franchisee must provide (cl.3);
- if an estimate of operating costs is provided, an explanation of it (cl.4);
- if an earnings projection is provided, an explanation of it (cl.5);
- the terms and conditions of financing arrangements that are offered to the franchisee (cl.6);
- a description of training or similar assistance offered (cl.7);
- a description of any restrictions on from whom, or to whom, the franchisee must or may buy or sell goods, supplies or services (cl.9);
- a description of the franchisor's policies and practices regarding any rebates and commissions it receives when purchases are made by franchisees, and whether these are shared with franchisees (cl.10);
- a description of the franchisor's policies and practices regarding exclusive territory (cl.11, which should be revised to ensure that the document describes the territory);
- a description of the franchisor's policies and practices regarding proximity between franchisees (cl.12);
- a description of the extent to which the franchisee's personal participation in the operation of the franchise is required (cl.14);

- a summary of the provisions relating to termination, renewal and transfer, and a statement of where they are found in the agreement (cl.15);
- a description of any dispute resolution provisions (cl.16).

In two areas Prince Edward Island reduced or removed Ontario and ULCC disclosure requirements that are proposed to be retained in New Brunswick's regulation, though in a modified form:

- Prince Edward Island (cl.8) requires franchisors to provide a description of any advertising or promotional fund that franchisees must pay into, as well as of the franchisee's contributions. Ontario (s.6(6)) requires additional information about the use of the fund, and ULCC (s.4(1)(l)) expands this considerably. It is proposed that information on the use of the fund should be provided, so that the franchisee knows what benefit he or she can expect to obtain from the fund in return for the contributions made. ULCC section 4(1)(l)(ii) captures the idea of benefit to the franchisees by referring to "the franchisor's expenditure of money from the fund on advertising, marketing, promotion or similar activity in franchisees' locations, areas, territories or markets". The franchisor should be required to provide two years' past experience of this and a one year forward projection (compare Ontario section 6(6)(1)(i) and (ii)), as well as a statement of what happens to the rest of the money in the fund if it is not entirely used for that purpose.
- Prince Edward Island deletes the Ontario (s.6(10)) and ULCC (s.4(1)(w)) requirement for franchisors to describe the federal, provincial and municipal licences and registrations that the franchisee will need to operate the business. The municipal element of this has been criticized as demanding too much of franchisors, and should not be included. But the federal and provincial elements should be included, though they should be restricted to the licences that are specific to the particular business that the franchisor is offering.

It is also proposed that several new items be added to the disclosure statement, though they are not yet required by Prince Edward Island or Ontario. Most of them are based on ULCC recommendations, and are designed to address particular situations where, even though franchisors had disclosed everything the legislation required, serious misunderstandings could still remain.

- Following the ULCC's section 4(1)(j) and (k), it is proposed that if the franchisee will be required to operate in accordance with a franchisor's manual, the franchisor should provide a summary of the material topics covered by the manual and say where it is available for inspection.
- ULCC recommends that if a franchisor does not provide an estimate of operating costs (s.4(1)(e)), training (s.4(1)(i)) or manuals (s.4(1)(k)), the disclosure document should expressly say so. These kinds of 'negative disclosures' seem desirable in cases where mere silence would produce false expectations. It is proposed that this requirement be put in place for operating costs and for training (though not for manuals), and also extended to the disclosure items on earnings projections, rebates and territory/proximity.
- ULCC also recommends that if the franchisor has the right to change unilaterally the purchase or sale restrictions it imposes on franchisees, the disclosure document should say so (s.4(1)(p)). This seems desirable, and it is proposed that the same approach be adopted for any other provisions that the franchisor can change unilaterally.
- ULCC recommends an expanded provision on trademarks, etc., under which franchisors should also disclose other proprietary rights associated with the franchise (e.g., patents) and any material impediments to their use or infringements of them (s.4(1)(v)). An extension of this to other proprietary rights is not proposed, but given that trademarks, etc., must be disclosed, it does seem appropriate that the franchisee should also be informed of any known material impediments or infringements.
- It is also proposed that the franchisor's right (if any) to offer the same goods or services as the franchisee through distance sales such as internet or telephone sales should be disclosed. Without a disclosure of this sort, the franchisee might get a very misleading understanding of the protections offered by promises such as an exclusive territory or a restriction on the proximity of other franchises.
- Finally, and generally based on the ULCC's section 4(1)(u), franchisors should be required to disclose other businesses that they operate if these are of the same type as the franchise or if they distribute goods or services similar to the

franchise. Without this, franchisees may be surprised to find that they are, in fact, competing with, rather than purely cooperating with, the franchisor in the intended market.

e. Lists of franchisees

Prince Edward Island, Ontario and ULCC all require the franchisor's disclosure document to contain a list of both current and former franchisees. The lists vary in their details, but contain contact information that is designed to enable the prospective franchisee to enquire about other franchisees' experiences before signing the franchise agreement. It is proposed that New Brunswick do the same.

As for the content of the lists, it is proposed to stay closer to the Ontario and Prince Edward Island models, with appropriate local adjustments, than to the much expanded version in the ULCC's sections 4(10)(z), 5, 6, 7 and 8.

(i) Current franchisees. The franchisor should list all franchisees in New Brunswick, but if there are less than 20 of these, the franchisor should bring the total up to 20 by adding franchisees from other jurisdictions, drawing first from Ontario, Quebec, Prince Edward Island, Nova Scotia and the State of Maine, then from the rest of Canada, then from anywhere else. If the franchisee operates less than 20 franchises in total, it should list them all.

(ii) Former franchisees. The franchisor should list the contact information for all recent franchise closures in New Brunswick and in any other jurisdiction from which its list of 20 current franchisees is drawn. The reporting period would begin at the beginning of the franchisor's last fiscal year, and end at the date of the disclosure document. Unlike Ontario, but like Prince Edward Island, the franchisor would not have to provide the reasons for the closure. The franchisor's version of the reasons, after all, may be very different from the former franchisee's, and the prospective franchisee will be able to make appropriate enquiries from former franchisees as long as he or she has the contact information from the list.

One additional requirement that it is proposed to adopt from the ULCC is that the franchisor should also list the businesses that it or its affiliates or associates operate themselves in the franchisee's area under the same trademark as the franchise, not just their franchised operations.

f. Small investment exception

Section 5(8) of the *Franchises Act* establishes several exceptions to the franchisor's duty of precontractual disclosure, and one of these requires a regulation. Under section 5(8)(g), a disclosure document need not be given if the total annual investment that the prospective franchisee is required to make to acquire and operate the franchise does not exceed the amount prescribed by regulation. It is proposed that the prescribed amount should be $5,000, as it is in Ontario and Prince Edward Island.

C.4. The 'wraparound' document

If New Brunswick follows the proposals above, the differences in disclosure requirements between New Brunswick and Prince Edward Island could be readily addressed by the 'wraparound' provisions discussed above. Starting with a Prince Edward Island disclosure package, the New Brunswick 'wraparound' document would consist of a revised franchisor's certificate and a supplement covering the added disclosure requirements on the following issues: advertising, licences and permits, manuals (if any), 'negative disclosures', unilateral changes, trademarks, distance sales, and other businesses operated. It would probably also require a revised list of current and former franchisees, but if franchisors that operate in various jurisdictions maintain a separate list for each, it should not be hard to make the appropriate substitutions. In addition, mature franchisors who chose not to provide financial statements would need to declare that they qualified for this exemption and provide an audit certificate, and some franchisors, when providing information about their officers' business backgrounds, might have to take care to refer to the right officers. The proposal to require only 5 years' past history of bankruptcies or legal proceedings, rather than 6 or 10 respectively, would not require an adjustment (though the franchisor might choose to make one), since a franchisor who disclosed 6 or 10 years would automatically satisfy a requirement to disclose 5.

D. The Mediation Regulation

D.1. The legislative context

Section 8 of the New Brunswick Act creates a dispute resolution procedure under which any party to a franchise agreement can seek mediation of a dispute. This procedure is optional, in the sense that nobody is obliged to invoke the section and mediation is not a precondition to the exercise of other legal rights and remedies under the franchise agreement. But it does involve a mandatory element, in that if one party to the agreement serves a “notice of dispute” on another, the parties must attempt to resolve the dispute, and if they are unsuccessful, any of them can trigger the operation of the mediation regulation by serving a “notice to mediate”. Underlying the exercise of all of these interconnecting rights and remedies is the parties’ duty of “fair dealing” under section 3 of the Act, which requires the parties to act in good faith and in accordance with reasonable commercial standards in the performance and enforcement of the franchise agreement

The Act provides some of the basic elements of the mediation procedure, and leaves the rest to the regulations. The Act says that the parties must attempt to resolve their dispute within 15 days after the notice of dispute is served, and permits a notice to mediate to be served within the next 15 days after that. The Act also protects the confidentiality of the mediation process. But most issues relating to procedure and forms are dealt with by the regulations.

The ULCC, as the body that recommended this party-initiated mediation process, has developed proposed uniform procedural rules to accompany it. They come in four main parts, dealing respectively with general rules, pre-litigation mediation, post-litigation mediation and forms. The proposals in this paper follow most of the ULCC’s purely procedural recommendations, but do not adopt the provisions relating to third party, especially court, involvement in the process. This is because mediation is supposed to assist the parties in resolving a substantive dispute, but not to become an additional source of litigation in itself. If non-compliance with the mediation procedure is to become an issue in court proceedings at all, the appropriate context is when the underlying substantive dispute is litigated, if this eventually occurs. At that point, the parties may allege that failure to mediate was either a substantive breach of obligation in itself or was at least a factor to be considered in an award of costs.

D.2. General rules

The ULCC's "General Rules re Appointment of Mediator and Mediation", Part II of its regulation, apply to all mediations under the Act. They are activated when a "notice to mediate" is served, which means that a "notice of dispute" must also have been served beforehand, but the parties were not then able to resolve the dispute by themselves in the time the Act allows.

The ULCC's general provisions are these.

- The parties must jointly appoint a mediator within 14 days if there are 2 to 4 parties, or 21 days if there are 5 or more parties. (s.3(1))
- If they fail to agree, any party may apply to a "roster organization" approved by the Attorney General, or to a court if there is no roster organization, to appoint a mediator. The organization or court provides a list from which the parties express preferences, and the organization or court then makes the appointment. (s.3(2) to (11))
- The mediator can hold a pre-mediation conference with the parties to consider organizational matters if he or she thinks the dispute is complex. (s.4)
- Each party must deliver a "statement of facts and issues" at least 14 days before the first mediation session. (s.5)
- The parties must also jointly complete and sign a "mediation costs declaration" setting out the costs of the mediation and their allocation. Costs are shared equally unless the declaration provides otherwise. (s.6)
- Attendance at the mediation (and at the pre-mediation conference if there is one) is mandatory. Attendance can be by counsel or (in specified situations) by another person who knows the facts and has, or can easily obtain, authority to settle the dispute. (s.7)

- The mediator schedules any pre-mediation conference and all mediation sessions, and is to conduct them in the manner he or she considers appropriate to assist the parties to reach a resolution that is fair, timely and cost-effective. (s.8)
- The mediation concludes when the issues are resolved or when the mediator terminates them without a resolution. (s.9)

Much of this seems satisfactory, though two alterations are proposed.

The first of them is to the ULCC's proposals to give a "roster organization" or a court a role in the appointment of mediators, which seem over-elaborate in this particular statutory context. If the parties need this much third party involvement in order to accomplish even the preliminary step of selecting a mediator, the mediation seems doomed from the outset. A less formal means for breaking a deadlock would be to say that if the parties do not agree on a mediator, they can nominate representatives to agree on one. However, if deadlock remains even after that, or if the mediator the representatives agree on is unacceptable to one of the parties, there would seem to be little point in forcing the issue further.

The second alteration is that requiring the parties to sign an agreed "mediation costs declaration" appears to add an unnecessary step that may simply give the parties one more thing to disagree about before the substantive mediation even begins. A simple statement that the costs of the mediator are shared equally unless the parties agree otherwise is proposed instead.

D.3. Pre-litigation mediation

Part III of the ULCC regulation is headed "Pre-Litigation Mediation – Specific Rules", but the scenario contemplated is free-standing mediation in the absence of litigation. Major provisions in Part III include the parts of section 12(1) which say that the mediation must begin within 45 days after the mediator's appointment, unless the parties and the mediator agree otherwise, and section 13, which sets a general rule that mediation will not last longer than 10 hours unless the parties agree to extend it, but that the mediator can terminate it earlier if he or she considers it is unlikely to be successful. It is proposed that both of these be adopted.

The remainder of the ULCC's Part III, however is not proposed for adoption. This includes section 12(2) and (3), which permits the parties to ask the court to override the 45 day limit for mediation to begin, and section 14, which permits a party who considers that another party has not complied with the regulation to make an "allegation of default" to the court and seek an order appropriate to the default. As mentioned, previously, a mediation in which a party needs to obtain court orders about how the process will operate seems most unlikely to achieve its objective of producing an agreed solution to a substantive dispute, and court orders seem out of place anyway in a mediation that can be terminated at any time if the mediator decides it will not be successful.

<u>D.4. Post-litigation mediation</u>

Part IV of the ULCC regulation is headed "Post-Litigation Mediation – Specific Rules". The scenario it envisages is that mediation under the *Franchises Act* is initiated while litigation is already proceeding over the same subject-matter (and perhaps over other subject-matter as well). Much of Part IV restates Part III, but with adjustments of timing or substance that reflect the fact that a court is already involved and that the litigation also has various timelines and fixed points. Thus section 16 says that, unless the court orders otherwise, a notice to mediate must be delivered no more than 45 days after the first defence is filed, and section 17 says that mediation must begin at least 7 days before the intended date of the trial, unless the parties agree, or the court orders, otherwise. Section 18 says that there can only be one mediation in relation to the same dispute, and the wording of the provision on "allegations of default", section 19, is revised to reflect the fact that there is already a court involved.

It seems just as practical, though, to leave these things to the good sense of the parties and the court, rather than to formalize them through explicit rules and overrides. If an attempt at post-litigation mediation looks promising, it should not be difficult to persuade the court to adjust the normal timelines of the litigation, if necessary, to give it a chance to work. If, on the other hand, the mediation process is misused as a tactical manoeuvre by the party initiating it, or if a *bona fide* attempt at mediation is ignored by the other party, the most likely avenue of recourse would be through awards of costs in the litigation.

D.5. Forms

The ULCC regulation provides six forms. Two of them (Forms 4 and 5) relate to processes that are not proposed for inclusion in the regulations: the “mediation costs declaration” and the “allegation of default”. The ULCC versions provide a good foundation for the remaining four items.

- Form 1 is the “notice of dispute”. This simply requires the party using it to describe the nature of the dispute and the desired outcome. This appears satisfactory.
- Form 2 is the “notice to mediate”. This states that the dispute will be mediated, identifies the time limit for appointment of the mediator, and mentions the default mechanism, through a “roster organization” or the court, by which a mediator will be appointed if the parties do not agree. If, as suggested above, a different means for breaking a deadlock between the parties is established, the description of this mechanism would be changed. Apart from that, the only change proposed is that the notice to mediate should also indicate the nature of the dispute and the applicant’s desired outcome. These may have changed since the notice of dispute was served, and even if they have not, there is no harm in repeating them.
- Form 3 is the “statement of facts and issues” that the parties are to provide to each other and to the mediator before the mediation begins. The ULCC subdivides this under three headings which each party must complete: “Factual and legal issues in dispute”, “Party’s position and interests (what the party hopes to achieve)” and “Attached documents.” This seems satisfactory.
- Form 6 is the “certificate of completed mediation” that the mediator will sign. It, too, seems straightforward and satisfactory. First the mediator certifies that the mediation is concluded. Then he or she fills out the results of the mediation by completing the following two statements: “The following issues are resolved as follows: . . . “ “The following issues remain unresolved: . . .”.

D.6. Summary

If the procedural provisions of the Act are combined with the discussion in this consultation paper, the following emerges as the proposed mediation procedure under the *Franchises Act*.

- The initiator serves a notice of dispute on the other parties. The notice describes the nature of the dispute and the initiator's preferred outcome.
- The parties have 15 days to attempt to resolve the dispute.
- If they are unsuccessful, any of them can serve a notice to mediate on the others within the following 15 days. This notice will state the current nature of the dispute and this party's preferred outcome.
- Within 14 days (up to 4 parties) or 21 days (5 or more parties) the parties must jointly appoint a mediator.
- If they are unable to do so, each party may name a representative to agree on a mediator. However, there will be no guarantee that the representatives will reach agreement, and no means to compel any party to cooperate with the appointed mediator if they do. If that happens, the mediator will simply have to report that the mediation has been unsuccessful.
- Once the mediator is appointed, mediation must begin within 45 days. The mediator can give organizational directions, and can conduct the mediation as he/she considers best.
- The parties must provide "statements of facts and issues" to each other and to the mediator at least 10 days before the mediation.
- Mediation will not run for more than 10 hours unless the parties agree. The mediator can terminate the mediation earlier if convinced that it will not be successful.
- When the mediation terminates, the mediator issues a certificate stating what has been resolved and what has not.
- There will be no provision for applications to the court to compel compliance with the procedure.
- The regulation will not differentiate pre-litigation from post-litigation mediation. In practice, in the post-litigation scenario, it will be up to the court to determine whether the litigation timetable should be adjusted in any way to accommodate

an attempt at mediation. It will also be up to the court, if one party attempts mediation and another demurs, to decide whether the conduct of either one may attract sanctions in costs or otherwise in the substantive litigation. A specious attempt at mediation might just as easily be a breach of “fair dealing” as an unreasonable refusal to mediate would be.

E. Transition

When the *Franchises Act* is proclaimed, changes will occur to the legal rights and obligations of both franchisors and franchisees. In most cases the changes can be readily absorbed. Of the five new elements that the Act injects into the franchisor/franchisee relationship, four require little advance preparation. These are the duty of fair dealing, the franchisees' right to form an association, the mediation procedure, and the provisions governing the venue of litigation. This leaves the duty of precontractual disclosure as the one element which will require some lead time, and where franchisors, in particular, will need to make careful preparations for the coming into force of the Act.

Prince Edward Island, when it proclaimed its *Franchises Act*, did so in two stages, with the precontractual disclosure provisions only coming into force several months after the rest of the Act. That approach would also be possible in New Brunswick if there were a particular reason to bring provisions such as the duty of fair dealing into force quickly. However, it appears simpler to bring the complete package of Act and regulations into force together at a single time. Reasonable advance notice must be given, of course, and it is therefore proposed that, when the final regulations are published, a period in the three to six month range should be allowed before the Act and regulations come into force.

The transition from the existing law to the full operation of the *Franchises Act* is governed by section 2(2) and (3). Of the five new elements mentioned above, all except precontractual disclosure apply immediately to existing franchise agreements as well as to new ones. Precontractual disclosure, by contrast, only applies to new franchise agreements and to renewals or extensions of existing franchise agreements that take place after the Act comes into force. This, though, is itself subject to several exceptions, since even when the Act is fully in force, section 5(8) lists several situations where the duty of precontractual disclosure does not apply. They include: some transfers of franchises by franchisees or their personal representatives; some grants of franchises to officers or directors of the franchisor; some grants, renewals and extensions provided to existing franchisees if there has been no "material change" since their current franchise was granted or last renewed; and some franchises where the franchisee's investment is small or the franchise is less than 20% of the franchisee's business. The item of greatest practical interest here will probably be the provision relating to renewals and extensions of existing franchises (s.5(8)(f)). Unless there has been no "material change", a full disclosure document must be provided when an existing franchise is first renewed or extended after the Act comes into force.

These transitional arrangements are set by the Act and cannot be altered by the regulation. If, though, there are any particular practical concerns that people wish to bring to the Department's attention, these will be considered while the details of the regulations and of the process for bringing the Act and regulations into force are finalized.