



A Closer Look at the Regulations Under the New Brunswick Franchises Act

By Michael Melvin

On June 23, 2010, New Brunswick published two regulations under its Franchises Act (the “NB Act”). The Disclosure Document Regulation – Franchises Act (the “Disclosure Regulation”) and Mediation Regulation – Franchises Act (the “Mediation Regulation”) are modelled on disclosure and mediation regulations proposed by the Uniform Law Conference of Canada (“ULCC”) but differ from ULCC models, and from other provincial regulations, in some significant ways. In anticipation of the coming into force of the NB Act and regulations on February 1, 2011, this article highlights some of the significant features of these new regulations.

THE DISCLOSURE REGULATION

Electronic Disclosure Allowed

The Disclosure Regulation allows delivery of disclosure documents by “electronic means” as long as the electronic disclosure: (a) is delivered in a form that enables the recipient to view, store, retrieve and print the disclosure document; and (b) contains no links to or from external documents or content. These are less detailed requirements than those found in the PEI Franchises Act Regulations (“PEI Regulations”). In addition, section 3 of the Disclosure Regulation relaxes the rule from section 5(3) of the NB Act, that a disclosure document must be “one document delivered...at one time”. An electronic disclosure document may be delivered in New Brunswick in two or more separate elec-

tronic files as long as it contains an index listing a name and, if necessary, a description for each electronic file.

Wrap-Around Disclosure Documents Allowed

Like the PEI Regulations, section 4 of the Disclosure Regulation allows franchisors to use a disclosure document from another jurisdiction in New Brunswick, as long as the franchisor attaches a New Brunswick supplement. The Disclosure Regulation deliberately excludes requirements as to the grouping or placement of information in the disclosure document in order to facilitate the use of such “wrap-around” disclosure documents.

“Mature Franchisor” Exemption Modified

Like franchise regulations in Ontario and PEI, the Disclosure Regulation exempts “mature franchisors”, who meet certain criteria relating to net worth, system size, length of experience in the business and history of legal compliance, from the requirement to disclose financial statements. As in other provinces, two of the qualifications require that the franchisor have five years of experience, immediately preceding the date of the disclosure document, operating a large franchise system and operating in the line of business associated with the franchise. If the franchisor does not meet these qualifications but its parent corporation does, the franchisor will still qualify. New Brunswick

enhances this flexibility, clarifying that even if neither the franchisor nor its parent corporation can individually satisfy these qualifications, the franchisor can rely on its own experience for part of the five year qualifying period and on its parent’s experience for the remainder. The Disclosure Regulation also eliminates the requirement, found in other provinces, that “mature franchisors” must not have had a judgment against them under a law regulating franchises. A franchisor claiming the “mature franchisor” exemption in New Brunswick must include a declaration to this effect on the prescribed form of franchisor’s certificate.

Prescribed Form for Statement of Material Change

Another form prescribed in the Disclosure Regulation is the Statement of Material Change. The form is uncomplicated, but the requirement to use a prescribed form for material changes presents a potential pitfall for franchisors who are not attentive to local requirements.

Convictions, Administrative Orders, Civil Proceedings and Bankruptcies

Like franchise regulations in Alberta, Ontario and PEI, the Disclosure Regulation requires the franchisor to disclose detailed information about convictions, administrative orders or civil judgements or any bankruptcy proceedings involving the franchisor or its directors, general partners or officers within a prescribed period of years before

the date of the disclosure document, or any pending proceedings. The reporting periods in other regulating provinces are 10 years for convictions, six years for bankruptcies and 10 years (PEI) or unlimited (ON and AB) for administrative and civil proceedings. The Disclosure Regulation simplifies these requirements by imposing a uniform five year reporting period for all of the above-noted disclosures. For franchisors that are willing to tailor their disclosure document for use in New Brunswick, this may afford the opportunity to avoid disclosing certain unfavourable information, which would tend to deter prospective franchisees.

Procedure under the Mediation Regulation is simple and affords the mediator a high degree of discretion

Information about the Franchise

Most of the new or modified requirements in the Disclosure Regulation relate to information about the franchise itself. The Disclosure Regulation combines Ontario and PEI requirements regarding advertising fund disclosure but adds no new requirements. As in Ontario, a description of any exclusive territory is required, but franchisors making disclosure early in the process may provide, in lieu of a description of the territory, a description of the manner in which and the person by whom the exclusive territory will be determined. An exhaustive list of all federal and provincial permits and licenses required to carry on the franchised business is required, but municipal permits and licenses need not be listed. The franchisor need only advise the franchisee that it should make its own inquiries at the municipal level. The required lists of current and former franchisees are similar to those required in other provinces; however, if there are less than 20 current franchisees in New Brunswick, the Disclosure Regulation specifies the other jurisdictions to which the franchisor must look to fill out the list, i.e., first to Ontario, Quebec, Prince Edward Island, Nova Scotia, and the State of Maine, then the rest of Canada and then “elsewhere”. The franchisee is also required to list all corporate stores currently operating in New Brunswick.

The Disclosure Regulation also contains a number of new disclosure items. The fran-

chisor must disclose the table of contents of its operations manual or provide a location where the manual may be reviewed by prospective franchisees. Many franchisors will likely opt to disclose the table of contents rather than allow prospective franchisees to access proprietary information. The franchisor must also disclose “internet sales or other distance sales” permitted to be made by a franchise, distributor, licensee or other business of the franchisor. Known impediments to the use of the franchisor’s trade-mark must be disclosed, as must any power the franchisor has to unilaterally amend any terms or conditions of the fran-

chise agreement. The particular provisions susceptible to unilateral change need not be listed; however, franchisors may wish to disclose this level of detail so as to make clear the limits of their unilateral discretion. Finally, if the franchisor does not provide (i) estimates of operating costs, (ii) earnings projections, (iii) training or (iv) an exclusive territory, the disclosure document must include express “negative disclosure” statements to that effect.

THE MEDIATION REGULATION

While the Disclosure Regulation presents franchisors with a number of new and modified disclosure items to address, the Mediation Regulation creates an entirely new dispute resolution process with no equivalent in any other province. The mediation process is mandatory in that, under the NB Act, once a “notice to mediate” is delivered, the parties are compelled to proceed in accordance with the Mediation Regulation. However, unlike the ULCC model on which it is based, the Mediation Regulation allows parties to issue a written “notice declining mediation” in which the declining party must state the reasons it feels the dispute is not suitable for mediation. While the ability to decline mediation will undoubtedly help to curb abuses of the mediation process, the requirement to provide written reasons means that franchisors and other parties can be held accountable in fair dealing actions if their reasons for

declining mediation are found to be dubious.

Procedure under the Mediation Regulation is simple and affords the mediator a high degree of discretion. Mediation must begin within 45 days of the appointment of the mediator, unless the mediator specifies another date with the parties’ agreement. The mediator schedules the dates, times and locations of the mediation sessions and any pre-mediation conference and conducts the sessions in “the manner he or she considers appropriate”. The parties must deliver a “statement of facts and issues” not less than 10 days before the first scheduled mediation session. Unless the parties agree to extend the mediation, the mediator is required to terminate the mediation after 10 hours. Extension of the mediation is allowable on consent where the mediator believes the mediation is likely to be successful with the additional time. The parties share the costs of mediation equally unless they otherwise agree in writing.

CONCLUSION

While it is not possible to treat both the Disclosure Regulation and Mediation Regulation comprehensively in an article of this length, the discussion above should provide a basic orientation with respect to the content of these regulations. For franchisors accustomed to operating in other regulated provinces, the regulations should not pose any major problems. However, as always, franchisors will need to be attentive to local requirements. 🌸

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