

ONTARIO'S FRANCHISE REGULATORY REGIME: WHY ONTARIO SHOULD GET ACTIVE IN NASAA

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Executive Summary

In 2000, Ontario introduced legislation to regulate a segment of the economy commonly thought to account for 40 percent of all retail sales. With very little formal study, Ontario introduced flawed legislation into a marketplace that was ill prepared. Ontario now has the highest disclosure requirements of any jurisdiction in the world. We stand on the brink of a painful period of learning in the school of hard knocks. There is an easier, softer way.

Early Franchise Regulation In The U.S.

Franchising -- at least as we currently conceive of it -- is generally considered to have evolved from the early 20th-century American economy, as a means of rapidly expanding soft drink bottling and gasoline distribution. "Business format" franchising, its most visible current guise, took off in the 1960s. While some of these brands prospered, many did not. Even brand-name franchise systems utilized questionable earnings information and other sales practices; the so-called "fly by night" franchise systems were simply a method to fleece helpless would-be investors.

In situations where a defendant could be identified, aggrieved parties turned to the courts for redress using laws of general application (contracts, fraud, misrepresentation, etc.). Usually, there was none.

Early efforts to apply securities law to franchising proved unsuccessful. The active involvement of the franchisee/investor in the management of the franchised business took a typical franchise out of the category of investment security that the state Blue Skies laws were meant to regulate.

In 1971, California adopted franchise-specific legislation, closely modeled on its securities statute that required comprehensive presale disclosure to prospective investors. Fifteen other states quickly followed California, representing about 50 percent of the U.S. population at the time.

In the U.S., jurisdiction over franchising is shared between state and federal government. The unsavoury practices that were complained of in the franchise industry had also drawn the attention of the United States Federal Trade Commission. The FTC investigation into franchising practices reported as follows:

The franchise industry...has been plagued by numerous cases of abuses and misrepresentations aimed at unsophisticated prospective franchisees. Widespread instances have been documented involving such malpractices as high pressure franchise sales tactics, unscrupulous and inexperienced franchisors, financially unstable franchisors, hidden fee requirements and kick-backs, failure to provide

information on services and training to be furnished to the franchisee, and use of coercive methods to get quick large deposits. ... franchisees' complaints frequently involve both material misrepresentations and nondisclosure of material facts on the part of franchisors. In addition, a large number of comments on the record describe franchisor conduct wherein the franchise offering itself was fraudulent, resulting in serious economic harm to franchisees. [see CCH BFG ¶ 6304]

In 1979, the FTC responded with its Franchise Rule, applicable in all 50 states (and superseding any existing state law that provided a lower standard in any respect). The FTC Rule requires mandatory presale disclosure. The FTC Rule does not provide any private right of action, does not provide for any regulatory review or registration of the disclosure document, and is manifestly of a "consumer protection" nature.

Almost without exception, state laws have continued to be administered by securities regulators who have vigorously enforced their provisions -- including penalties. The review process leading up to the registration of a disclosure document with a state regulator can be an arduous affair.

NASAA

Franchising, by its nature, is multijurisdictional. It is the means *par excellence* of expanding product and service distribution nationally and internationally.

It is trite to say that the regulation of anything presents a hindrance to that activity (although an argument can be made that, on a macroeconomic scale, the regulation of franchising is good for the industry as a whole). While the cost of compliance with the laws of the single jurisdiction might be supportable, the exponential increase in cost--coupled with the almost insurmountable task of administrative compliance--brought on by the requirement to comply with a hodgepodge of state franchise legislation was not supportable.

It's worth mentioning at this point that the direct regulation of franchising occurs in one of three different ways. The first is to mandate and stipulate the format for presale disclosure to prospective franchisees. The second is to require and maintain a system for the vetting and registration of the disclosure document with a regulatory body. The third is to regulate the ongoing relationship between franchisor and franchisee, in such areas as fair dealing, the right to associate, good cause for termination, post-term restrictive covenants, etc.

In 1975, the Midwestern Securities Commissioners Association, an organization of state securities regulators, attempted to harmonize their disclosure requirements to enable franchisors to produce a single disclosure documents for use in each of their states. The one format which they agreed upon as embodying the minimum disclosure requirement of each of their respective state statutes was dubbed the "uniform franchise offering circular" or UFOC -- a moniker that stuck. The MSCA's Model Franchise Legislation met with little acceptance.

The UFOC format was quickly adopted by all of the U.S. registration states. With the promulgation of the FTC Rule 1979, even the FTC accepted the UFOC format as an alternative acceptable form of disclosure to the FTC's own idiosyncratic format. Practically speaking, the UFOC format is almost universally employed in the U.S., and the FTC is poised to discard its own franchise disclosure rules in favour of the UFOC format.

In 1981, the North American Securities Administrators Association assumed the mantle of franchise regulator to the regulators. NASAA, which traces its origins back to 1919, is concerned primarily with the harmonization of securities laws in North America. Its members include all 50 states, all 10 Canadian provinces and Mexico. NASAA's involvement in franchising is overseen by its Franchise and Business Opportunities Committee, currently chaired by Dale Cantone, Deputy Attorney General of Maryland, and consisting of regulatory



members from five other states. In 1993, NASAA updated the form of UFOC originally developed by the MSCA (originally dubbed the "NUFOC" but since happily re-baptised as simply UFOC).

NASAA also prepared its own Model Franchise Investment Act. The original draft contained extensive franchise relationship content, including obligations of good faith, nondiscrimination, good cause termination requirements, etc. Like its MSCA predecessor, NASAA members were unable to reconcile the disclosure and registration provisions of their draft with its more contentious relationship provisions. Although NASAA did adopt a Model Franchise Investment Act containing only disclosure and registration provisions at its August 30, 1990 Annual Meeting, it has never pursued its proposal to develop a Model Franchise Relationship Act.

Two factors have combined to radically curtail the regulation of franchising since the heyday of this activity in the early seventies. First, the initial array of presale disclosure legislation appears to have had the desired salutary effect on the "wild west" of franchising—the aspect of this type of business that permitted or encouraged unscrupulous or unethical sales practices. By creating a barrier to entry to those fly-by-night operators, the legislation had the secondary effect of reducing unfair franchise operators from ever getting established. Second, budget-conscious governments have eschewed forms of regulation that actually require the involvement of regulators, in favour of legislation that promotes marketplace regulation. The second trend is probably responsible for two states – Indiana (effective July 1, 2001) and Michigan (effective June 20, 1984), who were originally full-blown registration states, becoming notice filing states only.

Franchise Regulation in Canada

Canada is, statistically, the first choice of venue for international expansion when U.S. franchise systems consider international expansion. Its relative proximity and its linguistic, political, cultural and legal similarities make it a logical first step. There are many franchise systems of American origin operating in Canada. Not surprisingly, these systems are amongst the larger systems operating in Canada in terms of units and sales.

Relative to Americans, Canadians are slow to legislate. With about one-half of the number of lawyers per capita, perhaps the reason is that there are fewer lawyers to be fed. There tends to be more reliance on the gradual evolution of judge-made Common Law, especially in matters of commercial regulation. The regulation of franchising, and other distribution-specific industries, is no exception. You will not find franchise relationship legislation, motor vehicle, motor vehicle fuel, or "your day in court" laws in Canada (some provinces have farm dealer legislation that imposes certain obligations upon manufacturers following termination of a dealership -- although the statutes certainly do not impose "good cause" guidelines or restrictions). Nor will you find any business opportunity laws.

In accordance with the British North American Act, 1867, franchising has been allocated to exclusive provincial jurisdiction, as a matter relating to commerce. This is unfortunate, given the borderless nature of franchising (Canadian lawyers can be proud of the example they have provided to other industries as a result of the recent liberalization of laws and regulations permitting qualifying for lawyers to carry on the practice of law in any reciprocating jurisdiction (which excludes Québec)). There are other laws in Canada that relate to franchising, such as competition and multilevel sales legislation, that have been regulated at the federal level. Nevertheless, the federal government has never attempted to legislate in this area and, in the current political climate, it is most unlikely that they will seek to do so.

It also needs to be borne in mind is that, while Canada is geographically large, its population of 30 million is, by global terms, quite small. Moreover, fully one-third of the population is located in the province of Ontario (and, like people huddled around the fire -- most Ontarians are located within 100 kilometres of the U.S. border.

One-fifth of the Canadian population is located in the province of Quebec. Not only is Quebec's Civil Code an entirely different legal system (based on the Justinian/Napoleonic codification) but, in recent years, the linguistic unfriendliness of Quebec (whose license plates used to say "the beautiful province", but now taunt ominously "I remember") keeps many franchise systems away.

Alberta's Experience

In this context, it still defies reason that Albertans, not known for eating sushi, promulgated franchise legislation in 1971. The Alberta Act was based closely on its Californian predecessor: it contained prospectus-like disclosure, and was administered by steely-eyed securities regulators. Although it may be trendy to be in the avant-garde, we all know that the avant-garde is the first to get shot. Many franchise systems, mindful of the puny and geographically dispersed population of Alberta, chose to do business -- entirely free of regulation -- elsewhere in Canada.

For several years, Jim Turner of the Alberta Securities Commission sat as a member of NASAA's Franchise and Business Opportunities Committee. Mr. Turner was involved in the development of NASAA's Model Franchise Investment Act, and so it is not surprising that Alberta's second attempt at franchise legislation, introduced in 1995, should closely resemble NASAA's Model Act (the predecessor to the 1995 Act, Bill 45, contained a full-blown registration regime; successful lobbying substantially muted its content). In keeping with the times (and the downsizing typified by the Klein government), Alberta's legislation removed responsibility for administering the legislation from the Securities Commission to the Ministry of Municipal Affairs (since transferred to the Department of Government Services, Consumer Services Division). It also removed any requirement for registration or review of the disclosure document, and did not require any mandatory filing of the disclosure document or public archive of such material. The current Act does contain a somewhat enigmatic "fair dealing" requirement (enigmatic only because neither courts nor practitioners have addressed the decision by the legislators not to include a "good faith" obligation), but no other significant relationship-type governance.

Ontario the Good

Conversely, it is surprising that Ontario was able to resist for so long the temptation to legislate in this area. In 1970, the government of Conservative Premier John Robarts convened a Commission (a typically Canadian solution to most pressing issues of the day). The Minister's Committee on Referral Sales, Multi-level Sales and Franchises (commonly referred to as the Grange Report, for its Chairman) recommended introduction of legislation along the California/Alberta model; ie. prospectus-like disclosure with full registration and review.

Ontario might still be without franchise-specific legislation were it not for the notorious Pizza Pizza litigation of the early 1990s. The allegations of the franchisees in that litigation were consistent front-page stories in the Toronto Star, featuring such revelations as a prior fraud conviction of the President of the franchisor. The media, in their blood lust, set out on a crusade to find any other tale of woe relating to franchising (the franchisee's role in any business demise was usually conveniently overlooked). The government of the day was itself looking for some means by which to portray itself as the "friend of the little guy" and decided that introduction of consumer protection legislation in the area of franchising was one such means.

However, times had changed: this was a government dedicated to deficit and red tape reduction. Accordingly, as we know, Ontario's franchise law closely resembles the re-vamped Alberta Franchises Act of 1995.

The problems with Ontario's franchise legislation are only slowly becoming apparent. At the risk of being labelled a Chicken Little, I predict that the area of franchise litigation will be a fast-growing practice area in the

province over the next two decades. The Ontario Bar Association has struck a special subcommittee to examine and make recommendations for revisions to the Arthur Wishart Act (Franchise Disclosure), 2000 (which, for the sake of clarity, I refer to as the “Franchise Disclosure Act” or simply the “Act”). While I expect the recommended changes to be many, I will, in the following two sections, highlight briefly two acute problematic areas.

The Morass: Ontario’s Disclosure Regime

For purposes of this section of the article, I highlight three possible alternative ways to provide disclosure in accordance with the Act and Regulations. First, one can work through the Regulation (bearing in mind section 5 of the Act). For American franchisors and their counsel coming to Canada who would dissect the information contained in their UFOC and reorder it in the manner specified by the Regulations, this would be a laborious process indeed. For Canadian franchisors hoping to expand into the U.S., the process is just as laborious (and expensive) in reverse. Second, the U.S. franchisor can take its UFOC and “Canadianize” its content -- while maintaining its form. Third, the U.S. franchisor can keep the form and content of its UFOC, and add (“wrap”) an addendum setting out all information relative to the proposed franchise as it relates to Canada.

There was no public consultation or review of the General Regulation to the Act prior to its enactment. Its form and content appears as though it were compiled in a hurry, and with little concern for harmonization with other jurisdictions.

The numbering system used in General Regulation 581/00 should be a tip off to the substance of the Regulation: some subsections are bracketed, others are not; section 6 of the Regulation itself contains 18 subsections; the number styles used are not consistent with the Act, nor are they internally consistent for the Regulation.

How many items of disclosure are required? The UFOC fairly clearly divides disclosure into 23 categories. Its consistency of form permits users (both prospective franchisees and practitioners) to compare one disclosure document against another. None of the disclosure documents I have seen so far produced for Ontario have anything approaching a consistency of form (let alone content) -- because the Regulation does not require nor encourage it.

Substantive provisions of the Regulation are interspersed with the mandated disclosure format.

Terminology within the Regulation is inconsistent and ambiguous. For instance, in s.2, the word “address” is used in 3 different ways, presumably to mean the same thing: “address”, “principal business address” and “principal address”. The Item 1C Instruction in the UFOC clarifies the issue:

“Principal business address means “home office” in the United States, not in the state for which the offering circular was prepared. If appropriate, also disclose the location of an international “home office.” The business address can not be a post office box.

In the face of this sort of ambiguity, and without the aid of similar (or any) Guidelines, Instructions or the ability to seek an Interpretive Opinion from an administrator, what’s an Ontario practitioner to do?

Certain parts of the Act and Regulation lack the necessary statutory underpinning or basis in reality. For example, the Act requires delivery of disclosure documents personally, by registered mail, or by any other prescribed method (Act s. 5(2)). No other means of delivery have been prescribed in the Regulations. However, Canada Posts weight restrictions for Registered Mail do not permit delivery of any substantial

disclosure document. Reg. S.2 contains another example: it requests the name and address of an agent for service if the franchisor's "principal address" is outside of Ontario, however there is no statutory requirement that a franchisor appoint or maintain such an agent for service (this is likely an example of simply copying the wording from Item 1C of the UFOC, whereas an Application for registration under the UFOC format contains a mandatory consent for the relevant State's Attorney General to accept service on behalf of any franchisor registered in that state).

Certain portions of the mandated disclosure (those enumerated under section 6) are required to be "presented together in one part of the document". This requirement presents a material, yet absurd, potential barrier to use of a UFOC-formatted offering circular in Ontario. The items of disclosure itemized in Reg. s.6 are no more important than, say, the material required by Reg. s.2. But what is "together"? What is "in one part"? Reg. s. 6 includes all or part of the disclosure required by the following Items of the UFOC, in this order: Item 5, 7, 6, 19, 10, 11, 8, 16, 13, 9, 15, 12, 20 and 17; ie. every Item from 5 to 20 both inclusive except Items 19 (Public Figures) and 14 (Patents). So in order to satisfy this formatting requirement, a US franchisor need only delete its Items 14 and 19 disclosure, or cut and paste them to appear after Item 20 (there is no requirement that the order of information be maintained). But query whether having additional information included in the s.6 disclosure offends the "togetherness" requirement in the first place? The Act itself requires inclusion of any additional material facts; does the formatting requirement of s.6 require that this information appear "elsewhere" in the document? That would be silly, hence I conclude that the risk of using a UFOC-formatted offering circular, with its content modified appropriately to reflect the Ontario facts and circumstances, and subject to the additional requirements in s. 5(4)(a) of the Act that it contain all material facts (ie. open-ended disclosure) and s. 5(6) of the Act that the information be accurate, clear and concise, may be one that US and foreign franchisors are willing to assume.

There are at least three factors that result in offering circulars used in the U.S. being substantially wordier than their current Canadian counterparts. First, the UFOC format is published with Guidelines that enumerate a number of issues to be addressed as part of the discussion of each enumerated Item. Second, a UFOC will typically be reviewed and commented upon by numerous state examiners. These comments typically lead to additional disclosure being made. Third, Canadian lawyers simply haven't yet developed the standard lexicon and phraseology with which to "flesh out" a disclosure document. As a result, a typical UFOC contains considerably more substantive information than its Canadian counterpart. My own view is that this additional disclosure is good from the perspective of a prospect considering the purchase of a franchise. Conversely, I would not want to have to explain in the context of a solicitor's negligence claim why I deleted certain material from my client's U.S.-based UFOC. In Ontario's current open-ended disclosure (ie. "all material facts") regime, I think a strong argument could be made that any information set out in a U.S.-based UFOC would be "material" for Ontario disclosure purposes.

The Federal Trade Commission, whose Franchise Rule applies in all 50 states, has for more than 20 years permitted use of the UFOC format for disclosure in lieu of its own. In a recent Notice of Proposed Rulemaking, the FTC appears ready to throw in the towel altogether and abandon its format for disclosure in favour of the UFOC format. If the FTC -- with its considerable franchise expertise and resources -- can concede the superiority of the UFOC format and, by extension, to the efficacy of NASAA, then surely Ontario can also. But franchising doesn't come close to showing up on any radar screen at the Ministry of Consumer Business Affairs¹. This does not bode well for ensuring that Ontario's laws relating to franchising remain current. NASAA,

¹ This is by no means a criticism of the highly competent and industrious staff of the Ministry. This is more a reflection of the larger market and considerably greater maturity of the U.S. franchise sector.

by contrast, is constantly wrestling with the development of policy in this area, with concomitant modifications to the UFOC format and its companion Guidelines. Two current examples include electronic disclosure and mandatory disclosure of earnings information.

We are also moving toward a North American standard with respect to the timeframe in which disclosure is to be made. Ontario and Alberta are already consistent in terms of the requirement that the disclosure document be provided 14 days prior to receipt by the franchisor of monies or signature of agreements. In the U.S., the Federal Trade Commission Franchise Rule has two ambiguous timing requirements, including the requirement that disclosure be made at the earlier of the "first personal meeting" or 10 *business* days prior to receipt of monies or signature of a binding agreement (making it necessary to mark Washington's Birthday on your calendar each year). The FTC has issued a Notice of Proposed Rulemaking in which it proposes to replace these two time frames with a 14 day rule (note, however, that the FTC will retain the requirement that execution copies of all documentation to be signed be provided to prospective franchisees five days prior to signature of the agreements -- a requirement that will not likely make its way north of the border).

Certain important items of UFOC (and FTC) disclosure are not contained in the Regulation. For example, there is no equivalent to Item 1E, the description of the franchisor's business. This Item includes such basics as a description of what the franchisor sells, whether the franchisor operates businesses of the type being franchised, the franchisor's other business activities, a description of the business to be conducted by the franchisee(!), the general market for the product or service to be offered by the franchisee and a general description of the competition. Similarly Item 13 disclosure regarding trademarks is considerably more extensive than what is required under Regulation s.6.9. There really is no equivalent in the Ontario Regulation to Item 14 disclosure on the subject of patents, copyrights and proprietary information. There is no equivalent to Item 19 disclosure requiring discussion of public figure endorsement. After comparing, line by line, the disclosure required under the Ontario Regulation with the UFOC-formatted disclosure, I suggest that no fair-minded commentator could argue that the UFOC disclosure is not more meaningful and more extensive.

What then of the ability of a US or foreign franchisor to "wrap" an Ontario addendum to its UFOC for use in Ontario? Administrative Policy 3.1 to the *former* Alberta Act expressly permitted use of a wraparound document, and specified the contents of the wraparound as follows: a face page; Alberta statutory rights of withdrawal and rescission; currency and exchange information; financial statement disclosure; name and address of an agent for service in Alberta; a statement that the franchise agreement would be construed in accordance with Alberta law and the agreement by the franchisor to attorn to the jurisdiction of Alberta courts; a requirement that the wraparound be bound to the UFOC; and a manually signed certificate of full, plain and true disclosure as required by section 9 of the former Alberta Act.

Alberta's current Act continues its express recognition of the ability to utilize a wraparound form of disclosure in Alberta. Section 2(2) of Alberta's General Regulation provides as follows:

a franchisor may use a document authorized under the franchise law of a jurisdiction outside Alberta as its disclosure document to be given to a franchisee, if supplementary information is included that sets out any material changes to the document from that jurisdiction so that it complies with the requirements of this Regulation.

Simple, effective, and highly recommended for implementation in Ontario. At least one staffer at the Ministry responsible for preparation of the Act was surprised by my suggestion that the Act and Regulation presented an impediment to use of a wraparound in Ontario. That is the case and prompt action needs to be taken by the Ministry to remedy this oversight.



The Abyss: Open vs. Closed Disclosure

No other jurisdiction in the world has as high a standard of disclosure as does Ontario. I don't think many people in practice, in the franchise community or in government recognize that. To understand how this happened, one needs to go back to the former Alberta Act.

Section 8 of the former Alberta Act required a franchise prospectus to provide "full, plain and true disclosure of all material facts relating to the franchise proposed to be offered." Anyone with a securities law background will recognize the wording. However, disclosure to prospective franchisees is significantly different from disclosure by publicly traded companies to individual investors. Franchise disclosure is a business to business issue between parties that are entering into an ongoing business relationship, will usually have met personally and had an opportunity to assess various aspects of the franchisor's business and the proposed investment, often with legal representation, and frequently involving amounts of money that would ordinarily exempt them as sophisticated investors from the requirement for disclosure under securities laws. Perhaps more importantly, franchise disclosure does not take place in a vacuum: regulators have already listed the nature and scope of the information that a prospect should be provided with.

Alberta Bill 45 (June 26, 1992), which was proposed to replace the former Alberta Act, would have continued the requirement for full, plain and true disclosure of all material facts. However, the responsible Alberta Ministry eventually recognized (in the face of some stiff lobbying) that the Bill did not go far enough to bring Alberta into sync with the times. As a result, the full, plain and true provision was deleted: Alberta's new Act required simply disclosure of the information stipulated by the regulations.

Unfortunately, s.2(1) of the new Alberta *regulations* included the requirement that a disclosure document "must contain all material facts including material facts relating to the matters set out in Schedule 1." Zap! The drafters had done by the back door what they had apparently agreed not to do by the front door.

Remember, no other jurisdiction in the world requires disclosure of all material facts in connection with franchise disclosure. The general theory is that the prescribed list is adequate to achieve the goals of disclosure legislation, and to go further is to introduce an element of uncertainty and risk that is both unfair to franchisors and harmful to franchising generally.

At least Alberta attempted to introduce an element of balance into its regulations: s. 2(4) provides that "A disclosure document is properly given...if the document is substantially complete".

Ontario, on the other hand, gave it to the franchise industry with both barrels: the requirement to provide disclosure of all material facts was imbedded into the Act itself (s. 5(4)(a)) and no saving provision à la s 2(4) of the Alberta Regulations was included.

The typical approach with respect to omissions and misstatements is to include an anti-fraud provision in the legislation. Section 6 of the Illinois Franchise Investment Act is typical of such a provision. It reads as follows:

Section 705/6. Fraudulent Practices

Section 6. In connection with the offer or sale of any franchise made in this State, it is unlawful for any person, directly or indirectly, to:

- (a) employ any device, scheme or artifice to defraud;

(b) make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

(c) engage in any act, practice, or course of conduct which operates or would operate as a fraud or deceit upon any person.

Why, in 1971, Alberta opted for "full, plain and true" disclosure, when no US jurisdiction was adopting this standard is anyone's guess. However, the inconsistency from a legislative harmony perspective and the element of unfairness that it introduces -- relative to any benefit obtained -- is disproportionate. Ontario should move swiftly to delete section 5(4)(a) of the Act and to amend section 7(1)(b) of the General Regulation to delete reference to "material facts". Introduction of an antifraud provision would more than compensate for this "loss".

The Solution: To Boldly Go Where Everyone Else Has Gone Before

It makes no economic sense for Ontario not to permit use of disclosure documents prepared in accordance with the UFOC format.

It makes no economic sense for Ontario not to permit use of disclosure documents consisting of a UFOC with an Ontario wraparound.

There is absolutely no benefit to would-be purchasers of franchises of the current Ontario format over disclosure documents prepared in accordance with the UFOC format or consisting of a UFOC with an Ontario wraparound. Conversely, there is a cost to U.S. and foreign franchise systems considering entry into the Ontario market of having to totally reformat their document, add or delete information to comply with the different substantive requirements, and assume a considerable risk that, operating in unfamiliar territory, they might get some minor detail wrong.

It merits a separate paragraph to add that the compliance cost and risk of maintaining two separate disclosure documents (one for the U.S./Alberta and one for Ontario) is considerably greater than someone who hasn't done it before would ever suspect.

Permitting the preparation of disclosure documents for use in Ontario in accordance with the UFOC format would likely result in a considerable standardization of the formatting of disclosure documents, which would improve readability and heighten consumer confidence. It would also have the salutary effect of facilitating entry of Ontario-based franchise systems into the U.S. market.

This is not to suggest that U.S. franchisors be permitted to sell franchises in Canada by merely photocopying their U.S. offering circular. All the information contained in a Canadian disclosure document must be relevant to the Canadian marketplace. Any franchisor who neglects or refuses to modify their disclosure to reflect differences in climate, currency, geography, demographics, suppliers and costs will at best encounter difficulty, and at worst expose themselves to claims of misrepresentation. There is also a variety of other likely modifications, such as the identity of the corporate entity used to franchise in Canada and its officers and directors, the cost of establishing an outlet, the currency in which payments are to be made, provisions relating to the Income Tax Act, the Goods And Services Tax, interest rate re-statements in order to comply with the Interest Act, withholding tax considerations, choice of law and forum provisions and changes in terminology to reflect the Canadian legal landscape. But for the reasons set above, I think this can best be done by use of either an "Ontario-ized" UFOC or an Ontario wraparound.

Similarly, I suggest that both Ontario and Alberta missed the boat in requiring that the disclosure document contain "all material facts". This wart-like anachronism from the era when the Alberta Act was administered by securities regulators was mindlessly copied into Ontario. It's simply out of place in legislation characterized by the Ontario Ministry as intended to regulate "business to business" affairs. The unpredictability of this requirement is both unfair to franchisors and destabilizing to the franchise marketplace as a whole, which must endure the coming years of litigation in which franchisees will attempt to argue that the failure to include this or that fact amounted to noncompliance with the Act. For the sake of legislative harmony (in North America and globally) the requirement that a disclosure document contain all material facts should be deleted from the Act, and an antifraud provision included. Given the fact that the introduction of an amendment to the Act would entail considerable parliamentary wrangling, the best practical solution would be the inclusion in the Regulation of a "substantially complete" saving provision as found in Alberta.

The Ministry (under a new government and a new Minister) is currently considering some minor amendments requested by the Canadian Franchise Association. Given the ease with which these changes could be made, and the substantial benefit to franchisors and franchisees alike -- not to mention franchising and the economy as a whole -- the time for Ontario to take a role at NASAA and to provide franchising with the type of regulatory support (via NASAA) that it needs and deserves -- is now.

