

October 14, 2016

Changing Workplaces Review  
ELCPB 400 University Ave., 12<sup>th</sup> Floor  
Toronto, ON M7A 1T7

**RE: Final Submission in Response to the Changing Workplaces Review Interim Report**

The Canadian Franchise Association (CFA) submits this letter in response to the July 2016 Interim Report on the Changing Workplaces Review.

The CFA welcomes this opportunity to make its submission to the Special Advisors and Ontario Government. This submission will focus on CFA's recommendations that government must focus on education, raising awareness, accreditation and enforcement of current and future labour and employment legislation as they are better paths to ensuring fairness for workers while maintaining franchising as a proven business model.

We encourage the Special Advisors of the Changing Workplaces Review to contact us with any questions and ask that, as the national association representing franchising in Canada, the CFA be provided with an opportunity to meet with the Special Advisors. We look forward to continuing to consultations.

Respectfully yours,



Lorraine R. McLachlan  
President and Chief Executive Officer  
Canadian Franchise Association



**The Modern Workforce:**  
The Contribution & Future  
Opportunity of Franchising  
in Ontario

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**Submission to:**  
Changing Workplaces Review  
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The Canadian Franchise Association (CFA) appreciates the opportunity to respond to the issues and options outlined in your Interim Report.

## About the CFA

The Canadian Franchise Association is the recognized authority on franchising in Canada. With over 600 members, including their 40,000 franchisees, CFA represents a diverse cross section of franchise systems (i.e. the franchisor and their franchisees together comprise the franchise system) as well as companies that provide services to the franchise sector. All CFA members are required to abide by CFA's Code of Ethics, disclosure policies, and the highest industry standards.

There are more than 1 million workers directly and indirectly employed by the franchising industry. CFA members, 88% of whom have locations in Ontario, share the societal concerns about work that is truly precarious, a changing economy, globalization, the contraction of our manufacturing sector, and negative changes in the workplace.

## Franchising in Ontario

Franchising is a strong and important contributor to the economy in Ontario. Franchisees are typically independent small business owners and their franchise locations are independently owned. The franchise business structure has provided many entrepreneurs the opportunity to start and operate a successful small business.

Franchise businesses employ hundreds of thousands of people across the province – in communities of all sizes and in all locations. Furthermore, franchises provide secure work. The most precarious work and the greatest threat to employees of not being paid or receiving their full benefits occurs when a business fails and goes bankrupt. In the previous five years, 97% of franchises opened in Canada are still operating today compared to 51% of independent businesses opened over the same time period.<sup>1</sup>

The relationship between franchisor and franchisee is carefully outlined in a contractual agreement. The franchisor provides an established brand, recognized products and services, and the structure and assistance so that a franchisee can attempt success for themselves. The entrepreneur (franchisee), meanwhile, invests money and time to work within that structure to operate and grow a business. Like any business investment, success for the franchisee is never guaranteed. But as mentioned, franchises have a much higher success rate than independent business.

The balance between franchisor and franchisee is critical to the model's success and we are concerned that the direction of the Interim Report may upset that balance and do significant and irreparable harm to a proven business model which has become vital to the Ontario economy.

We intend to address five key points arising from the Interim Report:

- 1) The diversity of industries using the franchise business model as well as the wide range of sizes of companies and franchised brands;

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<sup>1</sup> FranchiseLink, "Canadian Franchise Statistics & Info", online: <<http://www.franchiselink.ca/canadian-franchise-faqs/canadian-franchise-statistics-info/>>; and FranNet, "Understanding Success Rates for Franchisees in NJ", online: <<http://franchisenjnyc.com/2015/07/understanding-success-rates-for-franchisees-in-nj/>>.

- 2) The harmful effect on the franchising industry caused by eliminating “common control and direction” as a prerequisite to declaring one or more employers (e.g. a franchisor and franchisee) to be joint or common employers under the *Employment Standards Act* (“ESA”) and/or the *Labour Relations Act* (“LRA”);
- 3) Questioning the appropriateness of simply adopting U.S. employment policy in a uniquely Canadian and largely different employment context; and
- 4) Alternatives to legislative amendments that would afford the government better opportunity to protect employees while still supporting business and job creation.
- 5) The necessity and value of changing the definition of “employee” in the *ESA* to reflect the true nature of franchised businesses

## 1) Diversity of Franchised Businesses

The franchise sector is inaccurately regarded as being comprised mainly of quick service restaurants. Franchising covers a wide range of diverse sectors in the Ontario economy. Within the CFA, quick service restaurants account for only a quarter of total membership.

You were previously provided with a copy of the *FranchiseCanada* Directory, which lists the majority of franchised brands in Canada covering more than 50 industry/sector categories. We have condensed and classified these sectors into eight categories which represent the CFA membership:

- 1) Consumer Products & Services (34%)
- 2) Quick Service Restaurants (25%)
- 3) Full Service Restaurants (13%)
- 4) Business to Business (8%)
- 5) Retail (8%)
- 6) Automotive Services & Products (5%)
- 7) Children’s Products & Services (6%)
- 8) Home based (1%)

This demonstrates that more than 60% of franchised brands are in sectors other than food services. Franchise companies vary greatly in size from small local start-ups to mature, well-known national brands. One-third of CFA members are franchise brands with fewer than 15 franchisees each, while less than 20% of CFA members have grown to more than 100 franchisees or outlets. So most franchisors are themselves small businesses.

Franchising is small business. Any actions that might place additional burdens disadvantaging these businesses compared to their non-franchised competitors will be detrimental to the Ontario economy and job opportunities for Ontarians.

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**Additional burdens that disadvantage these small businesses compared to their non-franchised competitors will be detrimental to the Ontario economy and job opportunities for Ontarians.**

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Franchisees are small business owners who have invested in themselves to run their own business. There are 78,000 such small businesses that operate across Canada, and franchising has provided them a relatively secure and established entrepreneurial opportunity that may otherwise not have been available. In addition to creating independent entrepreneurs these small businesses provide for more than 1 million direct and indirect jobs.

A change to the joint/common employer test in either the *LRA* or *ESA* will seriously harm these business owners, their employees, and the province of Ontario. Franchisors would be required to assume intrusive control of a franchisee's business to protect against employment-related liabilities. A business model that has appealed to tens of thousands of entrepreneurs would become very unattractive to people who want the independence of running their own business. Anecdotally, CFA is aware of two possible franchisors who were considering expansion to Ontario but the suggestion of common and joint employer has caused them to put their plans on hold.

## **2) The Franchisor/Franchisee Contractual Relationship & the Negative Impact of Eliminating the “Common Control & Direction” Prerequisite**

The franchisor is not intimately involved in the day-to-day operation of a franchisee's business. The franchisor's role is to provide a structure, services, a brand, and a proven-business format and reach a contractual agreement with a franchisee to operate within that structure and brand.

The franchise business model is mutually beneficial to both parties. The entrepreneur acquires use of a brand, a well-known product, and a “system” for operating for which they pay the franchisor. In most agreements, the franchisor usually sets standards such as product or service offerings and the look or style of a location, while the franchisee retains ownership of their business and the responsibility for day to day control of the operations, including:

- Staffing;
- Training;
- Adherence to applicable laws or regulations;
- Local store marketing;
- Accounting, community involvement, etc.

In our view, the perception that the franchisor is intimately involved in the day-to-day operation of a franchisee's business is mistaken. Further, the suggestion that the franchise business model was established for the express purpose of insulating the franchisor from compliance with laws such as the *ESA* and *LRA* is completely without foundation.

## ■ The Franchise Agreement

The relationship between the franchisor and the franchisee is a contractual business relationship, which is clearly distinct and different than an employer/employee relationship. The accompanying sample franchise agreement requires a franchisee to follow prescribed operating standards and follow all laws, regulations and ordinances governing the operation of a business.

However, the franchise agreement will not typically require a franchisee to:

- Hire a specific number of employees;
- Hire a specific number of Full-Time or Part-Time employees;
- Maintain specific staffing levels;
- Offer a certain level of compensation;
- Set shift times; or
- Discipline or terminate employees.

These are all examples of matters that are the responsibility of the franchisee, no different than any other independent business operator.

The financial component of the franchise agreement is not an indication of control. Most often the return to the franchisor is based on a percentage of sales. A financial obligation based on sales is not unique to the franchisor/franchisee agreement and is also often found in retail lease agreements. A landlord may have an agreement where payment terms are based on revenues, and the landlord has control over operating hours and the outlet's appearance, but no one is suggesting that the landlord has control over the business or is the employer of the people who work there. Clearly, the financial relationship does not equate to control whether it be by the landlord or the franchisor.

**The financial relationship does not equate to control  
whether it be by the landlord or the franchisor.**

## ■ No Evidence of Non-Compliance

The CFA is committed to ensuring the success of the franchising business model in Canada and categorically rejects any suggestion that franchised business employees are disadvantaged or worse off than employees of comparable non-franchised businesses. Despite several direct requests, the Ministry of Labour has provided no evidence that franchisees violate employment legislation at a higher frequency than other small business owners.

The CFA believes the opposite is likely true because franchisees are screened for suitability before being awarded a franchise, benefit from support and tools provided by franchisors, and must sign a contract agreeing to follow the applicable laws or risk losing their business. Such action by a franchisor is not an indication of control, it is a matter of brand protection for the benefit of all franchisees in that system. Without day-to-day operating control, the recourse a franchisor has against a franchisee significantly violating laws or regulations – be they municipal bylaws, food safety regulations, employment standards, and so on – is to remove the franchisee.



Most stakeholders recognize that the evidence of non-compliance with respect to employment-related laws in Ontario does not point to the franchising industry as demonstrably any less compliant than other sectors of the economy. In fact, many would suggest that franchisees are better equipped to comply with employment-related laws, and in fact do comply, because of the resources made available to them by franchisors and others.

### ■ **Common Employer Creates an Uneven Business Environment**

The Interim Report appears to lump franchising with other commercial arrangements such as sub-contracting, outsourcing and the use of temporary help agencies (“temp agencies”). However, there are considerable differences in, rationales for and results from franchising when compared to these other commercial arrangements. Therefore, franchising warrants separate analysis and consideration. A one-size-fits-all response will have negative effects that will far outweigh any intended goals.

**Many would suggest that franchisees are better equipped to comply with employment-related laws, and in fact do comply, because of the resources made available to them by franchisors.**

Any recommendations should first weigh the evidence of all possible effects on business costs and competitiveness, particularly given the increased competitive pressures, north-south re-orientation, and increased capital mobility being experienced in Ontario.<sup>2</sup> Ontario does not need regulation, it needs smart regulation that can ensure fairness for workers that has minimal interference with efficiency and does not make the province an outlier when compared to other jurisdictions.

The risks involved in options 2, 3 and 4 in section 4.2.2. – changing the current legal standard for a determination of joint or common employers – namely, “common direction and control” by the franchisor over the essential terms and conditions of employment of the franchisee’s employees – are significant and must not be underestimated:

- **Franchisors will be faced with a punitive choice – either to provide less support and accept less consistency across a franchised system, or to impose significant new requirements in the employment relationship between franchisees and their employees.** The first option risks doing harm to the franchise business model while the latter takes away the independence of the franchisee to act like any other small business owner to develop a workforce that is reflective of the community in which they are located.
- **Increased franchisor involvement in the employment relationship will increase operating costs for both franchisors and franchisees.** This will lead to decreased growth and business activity, higher prices and lower overall employment. Fewer entrepreneurs will be willing to invest in franchises as they will have more risk, less control over their own business operations, and the possibility of higher fees payable to the franchisor as a result of responsibility imposed on them.

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<sup>2</sup> Morley Gunderson, “Changing Pressures Affecting the Workplace and Implications For Employment Standards and Labour Relations Legislation” (Prepared for the Ontario Ministry of Labour, 30 September 2015) at 4 [Gunderson].



It will put franchisees at a clear disadvantage over their non-franchised competitors. Existing franchise agreements will cease to make economic sense as, while the fees payable from franchisee to franchisor are fixed for years, the costs to the parties will be radically changed, and many existing businesses will simply fail.

- **Franchisees will be treated differently than other small business owners.** They will no longer be able to respond to the needs of their workforce by establishing employment and workplace conditions that reflect their community.
- **Adding franchisors as common employers in all matters under the *ESA* and *LRA* will have unintended consequences.** Workplace disputes and litigation will become more complicated leading to slower resolutions. Franchisors will automatically become parties to all issues even though they will have no actual knowledge or involvement in the workplace issue. This will result in delays and increased investigative and litigation costs particularly in cases where the franchisor is in another province or country. This delays resolution for the employee.
- **Removing “common direction and control” contradicts national regulatory harmonization and will be a disincentive for foreign expansion and/or investment in Ontario.** Franchising systems will not enter a jurisdiction that is considering an intrusion into their standard franchise agreement. It introduces uncertainty and inequality of treatment that will be evidence that Ontario is not a place to invest.
- **Foreign franchisors will face the prospect of having their tax status in Canada changed unilaterally and without their consent.** Foreign franchisors, most of whom are American, have structured their existing arrangements in accordance with the existing definition of being an employer and domestic and Canadian tax laws and treaties. Arbitrarily declaring these franchisors as employers may result in them being deemed to have a permanent establishment in Canada, which will represent a significant change in their tax status. Current businesses may be sold or disbanded and as a result additional unemployment will be created.
- **The relationship between franchisees and their employees will be compromised.** Forcing liability on franchisors does nothing to improve employee relations, but removes the autonomy of franchisees to respond to the needs of their employees or their responsibility to address problems at the community level.
- **Options 2, 3 and 4 in section 4.2.2 will damage labour relations and result in increased frequency of strikes and lockouts** because negotiations could involve multiple independent franchisees with different wage rates, policies, benefits and economic strengths.

**For the franchise industry, the current “common control and direction” standard appropriately protects employees while still supporting business.**

### 3) Question the appropriateness of simply adopting U.S. employment policy in a uniquely Canadian employment context

Jurisprudence interpreting both the *LRA* and *ESA* already provides clear guidance on how to determine who is the true employer of an employee. More specifically, subsection 1(4) of the *LRA* states:

*Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.*

Likewise, subsection 4(1) of the *ESA* states:

#### **Separate persons treated as one employer**

*(1) Subsection (2) applies if,*

*(a) associated or related activities or businesses are or were carried on by or through an employer and one or more other persons; and*

*(b) the intent or effect of their doing so is or has been to directly or indirectly defeat the intent and purpose of this Act.*

For decades in Ontario, under both the *LRA* and *ESA*, the corporate entity that exercises fundamental direction and control over an employee has consistently been found to be the true employer of that employee.<sup>3</sup> Similarly, when two or more corporate entities have shared direction and control over an employee, they have consistently been found to be common or joint employers of the employee.<sup>4</sup> Conversely, in the United States, the National Labor Relations Board (“NLRB”)<sup>5</sup> has historically provided much less certainty when determining who is the true employer.

In 2015, the NLRB found that Browning Ferris Industries (“BFI”) was a joint employer with Leadpoint, a staffing services company that supplied BFI with employees to perform various tasks. In finding that BFI and Leadpoint were joint employers, the NLRB changed the joint employer test by relying on both the direct and indirect control that BFI possessed over the essential terms and conditions of employment of the employees supplied by Leadpoint. The NLRB also relied on BFI’s reserved authority to control such terms and conditions of employment.

Although ground breaking in the United States, a closer review of the NLRB’s decision reveals it would be anything but in Canada. In fact, given BFI’s actual control over workplace wages, discipline, scheduling, and work productivity, as well as the interaction between BFI leaders and Leadpoint

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<sup>3</sup> See e.g. *Pointe-Claire (City) v Quebec (Labour Court)*, [1997] 1 SCR 1015; *LIUNA, Local 183 v York Condominium Corp. No 46*, [1977] OLRB Rep 645; and *Sysco Fine Meats of Toronto v UFCW, Local 1000A*, [2013] OLRB Rep 160.

<sup>4</sup> See e.g. *Teamsters Local Union No 419 v Metro Waste Paper Recovery Inc. and The K.A.S. Group of Companies Inc.*, [2009] OLRB Rep 911 [Metro Waste].

<sup>5</sup> *TLI, Inc.* (1984), 271 NLRB 798; *Laerco Transportation* (1984), 269 NLRB 324; *Airborne Express* (2002), 338 NLRB 597; *AM Property Holding Corp.* (2007), 350 NLRB 998; and *Browning-Ferris Industries of California, Inc.* (2015), 362 NLRB No 186.

employees in the workplace, the Ontario Labour Relations Board (“OLRB”) would have come to the same conclusion using its existing case law (see *Metro Waste Paper Recovery*)<sup>6</sup>.

It is important to note a number of the Options in Sections 4.2.2. and 5.2.2 of the Interim Report appear to be influenced by both the NLRB’s new joint-employer test and/or David Weil’s book, *“The Fissured Workplace”*. However, adopting a U.S.-centric approach here in Ontario is unnecessary and unsupported by any form of evidence. We respectfully submit that the current *LRA* and *ESA* joint-employer provisions provide an appropriate framework that apportions employment related liabilities both fairly and, just as important, clearly for the franchising industry.

Just as clear, concise, and understandable laws are fundamental to good governance,<sup>7</sup> a franchise agreement<sup>8</sup>, a generic sample of which is attached (see Appendix A), is also intended to be clear, concise and understandable with respect to the rights and responsibilities of the franchisor and franchisee. In the majority of franchise agreements, the franchisee has the right to direct and control its employees in accordance with applicable workplace legislation and therefore the franchisee should appropriately be found to be the true employer.

**In the majority of franchise agreements,  
the franchisee has the right to direct  
and control its employees.**

However, where a franchisor does not heed this separation, and instead exercises direction and control over the franchisee’s employees, it is typically found to be the true employer, or, at a minimum, a common or joint employer along with the franchisee.<sup>9</sup>

The claim that any beneficiary of labour, particularly in the case of a franchisor receiving royalties, should in exchange bear responsibility for employment and labour related liabilities usurps the franchise agreement. Further, the suggestion that the franchise model was established by business (e.g. franchisors) to avoid employment liabilities is an unsupportable conclusion. The purpose of the franchise agreement is to provide employers/entrepreneurs with limited capital, in exchange for royalties, access to the resources, know-how, systems, products and brand recognition that is often needed to be successful — even more so in today’s globalized economy.

### ■ Impact on Collective Bargaining

The claim that collective bargaining cannot occur with only a franchisee (i.e. it must occur with the franchisor), once again ignores the reality of the *LRA* that governs collective agreement negotiations. For example, the *LRA* requires an employer to bargain in good faith and make reasonable efforts to conclude a collective agreement. It also contains statutory freeze provisions, unfair labour practice

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<sup>6</sup> *Metro Waste*, *supra* note 4.

<sup>7</sup> Human Resources Professional Association, “A New Deal for Ontario’s Changing Workplaces: A Review and Recommendations by the HRP on the Employment Standards Act and Labour Relations Act” at 7.

<sup>8</sup> See Appendix “A” for sample franchise agreement.

<sup>9</sup> See e.g. *Penmarkay Foods Ltd. v RWDSU, Local 414*, [1984] OLRB Rep 1214; *RPKC Holding Corp. v RWDSU, Local 414*, [1986] OLRB Rep 828; *Sobeys Capital Inc.*, [2001] OLRB Rep. September/October 1250; and *Service Employees International Union (Brewery, General & Professional Workers’ Union, Local 2) v Capital Franchising Limited*, 2014 CanLII 19408 (OLRB).

provisions and provisions that dictate the processes required prior to a lawful strike or lockout. These provisions apply to the true employer of a group of employees, irrespective of whether that employer is a franchisor or franchisee.

Importantly, in Ontario, the majority of union certifications result in the establishment of a collective agreement. Conversely, in the United States, a union is far less likely to ever achieve a first collective agreement with an employer who has been certified. This is the result of legislative protections surrounding the negotiation process in Ontario that simply do not exist in the United States. These protections do not support the argument for an expanded joint-employer test that includes “indirect control” and “reserved control.” Nor do these protections support the argument for automatically deeming franchisors and franchisees as “joint employers”.

#### ■ **Impact on Franchising and the Ontario Economy**

Deeming franchisors and franchisees as “joint employers” will stifle the growth and prosperity of independent and small businesses in Ontario — the critical part in Ontario’s economic engine which is driving growth in a new globalized world where an economy’s aging manufacturing base has been eroded largely through lack of competitiveness.<sup>10</sup> Today, employers need to be able to react swiftly to changing labour markets in order to win the escalating war for talented employees and to have the flexibility to develop a workforce that is appropriate for their community.

In today’s competitive global economy, the franchise agreement establishes a balance, which motivates both the franchisor and franchisee to invest money and resources. The current *LRA* and *ESA* also strikes an appropriate balance among true employers, employees, and trade unions. We ask you recommend the status quo be maintained to ensure the delicate balance is not needlessly upset. Doing so would alter investment interest in a franchise and disrupt the maintenance of a healthy, but fragile, successful job creating sector of the Ontario economy.

**In today’s competitive global economy, the franchise agreement establishes a balance which motivates both the franchisor and franchisee to invest money and resources.**

## **4) Alternatives to Legislative Amendments – Education v. Heightened Enforcement**

#### ■ **Education**

The research commissioned by the Special Advisors suggests that small business and franchising create regulatory challenges for a variety of reasons.<sup>11</sup> The CFA believes it is well placed to assist in the development and delivery of materials aimed at increasing awareness, education, and compliance with

<sup>10</sup> *Gunderson, supra* note 2 at 9.

<sup>11</sup> *Ibid* at 5.

the *ESA* in the franchising industry. According to the Ministry of Labour's most recent stakeholder consultations both employer and employee stakeholders desire such initiatives, including:

- increased education in regards to public holidays, hours of work and overtime provisions;
- increased educational resources to assist employees and employers in understanding their rights and obligations (e.g. educational videos);
- self-audit tools such as "compliance checklists";
- on-line self-help tools; and
- increased consultation with business associations.<sup>12</sup>

We suggest that there would be significantly greater benefit in enshrining in the relevant parts of the *ESA* and the *LRA* the contractual nature of the franchisor/franchisee relationship and create an environment where a franchisor is encouraged rather than penalized for using their resources to help educate franchisees, many of whom are immigrants new to Canada, about their many obligations as an employer and to inform themselves on workplace legislation.

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**Create an environment where a franchisor is encouraged rather than penalized for using their resources to help educate franchisees, many of whom are immigrants new to Canada.**

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Franchisors should be encouraged to provide more support and systems to assist franchisees in an effort to develop a culture of compliance rather than limit their involvement due to a fear of being deemed a joint employer. Ironically, this risk is an impediment to franchisors who want to provide detailed guidance to franchisees due to fear of being found a joint or common employer.

#### ■ Legislative Protection for Franchises

In response to the NLRB's pronouncement of joint employer status between two distinct business entities in *Browning-Ferris Industries*, a number of state legislatures, including Texas, have passed legislation to protect the franchise industry from exposure to lawsuits for franchisees' labor and employment law violations. Other states that have passed similar legislation include Louisiana, Tennessee, Wisconsin, Michigan and Utah.

In Texas, the new legislation reads, in part,

For purposes of this chapter, a franchisor is not considered to be an employer of:

(1) a franchisee; or

(2) a franchisee's employees.

(c) With respect to a specific claim for relief under this chapter made by a franchisee or a franchisee's employee, this section does not apply to a franchisor who has been found by a court of competent jurisdiction in this state to have exercised a type or degree of control over the franchisee or the franchisee's employees not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks and brand.

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<sup>12</sup> Peter Augurso, Ministry of Labour, "Overview of Ministry of Labour Enforcement Activities" (Address delivered to Canadian Manufacturers & Exporters OHS Committee, 8 September 2016) [unpublished].

Including language that enshrines in the *ESA* and *LRA* the understanding of the independent nature of the franchisor/franchisee relationship will allow Ontario to benefit from accessing and utilizing the built-in education process inherent in franchising, all at no additional cost to the Ontario government or tax payer, and for the betterment of the work culture for everyone.

**Enshrining in the *ESA* and *LRA* the independent nature of the franchisor/franchisee relationship will benefit Ontario at no additional cost and for the betterment of the work culture for everyone.**

■ **Awareness and accreditation leading to increased compliance**

The CFA is committed to assisting the government with not only compliance with workplace-related laws but to strive for a sustained culture of proactive compliance in the franchising industry similar to what has been achieved in other sectors.

Under both the *Occupational Health and Safety Act, 1990* (“*OHSA*”) and the *Workplace Safety and Insurance Act, 1997* (“*WSIA*”), successful awareness and accreditation initiatives have contributed to significant improvements in overall compliance rates. For example, lost injury statistics demonstrate that Ontario leads the country with respect to the least amount of “allowed lost time injuries”.

Ontario has also shown improvement in workplace injury reduction in each of the last five years<sup>13</sup> largely attributed to increased education. The replication of processes through *ESA* driven initiatives, such as an employer accreditation process, could result in a similar decrease in the estimated 16,000 to 17,000 annual *ESA* complaints received by the Ministry of Labour (MOL), as well as parallel improvement in compliance rates. The CFA would support the establishment of a process designed to enable employers to seek accreditation compliance (similar to the Safety Groups established under other workplace-related legislation) in exchange for incentives and/or relief from proactive MOL audits.

Moreover, if provisions are added to the *LRA* and *ESA* to increase the likelihood a franchisor will be considered a joint employer with its franchisee, it is likely that franchisors will cease from providing franchisees with any guidance in regards to remaining and/or becoming complaint.

In recognition of the value of potential franchisor initiatives aimed at increasing compliance, we submit that additional language should be added to both the *LRA* and *ESA* similar to s.126 of the *LRA*. This section provides that in a related employer application, the OLRB shall not consider, “...any relationship by way of blood, marriage or adoption ...”<sup>14</sup>. This is philosophically in line with the proposed language noted above.

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<sup>13</sup> *Ibid.*

<sup>14</sup> *Labour Relations Act, 1995*, RSO 1995, c 1, Sched A, s 126(3)(1).

Similarly, a franchisor's provision of education, training, and other compliance initiatives to a franchisee should be commended, not used against the franchisor in a related employer application and/or any other process attempting to have the franchisor and franchisee jointly liable for the franchisees' employees.

### **A franchisor's provision of education, training, and other compliance initiatives to a franchisee should be commended.**

Ultimately, the MOL, in conjunction with stakeholders such as the CFA, could develop an accreditation program that recognizes employers who successfully implement employment standards management systems. Such a program would leave the MOL with a better sense of continuing compliance and allow the assignment of scarce Ministry resources elsewhere in the Ontario economy.

## **5) Definition of an Employee**

As has been demonstrated above, the independent nature of the franchisor/franchisee relationship is central to the franchise business model. Clarification of this would be achieved through changing the definition of "employee" in the ESA to reflect the true nature of the franchise business model by specifically excluding franchisees from the definition to recognize that franchisees are not employees of their franchisor and that the relationship between franchisor and franchisee is based in contract and is not an employment relationship. A number of jurisdictions have made this clarification in their laws governing employment and labour relations, and we strongly urge Ontario to include similar language in our labour laws.

### **Change the definition of "employee" in the ESA to reflect the true independent nature of the franchisor/franchisee relationship.**

## **6) Other Matters**

In addition to the matters raised in this submission, CFA and its members have significant concerns about a number of proposals and issues considered in the Interim Report. Of particular concern are sectoral bargaining and card-based certification of unions. These issues are well covered in the submissions from the Keep Ontario Working Coalition and Restaurants Canada. CFA supports the positions and recommendations put forward in those submissions.

### **■ Sectoral Bargaining**

The Interim Report includes options that would enable Sectoral Standards Agreements, which extend standards and contractual provisions throughout identified regional/occupational/industrial labour markets. These Agreements would expand collective bargaining among disjointed groups of employers



and employees. This could create a scenario where thousands of small employers are effectively subject to the demands of a single bargaining council.

With the wide range of issues in the workplace, it is doubtful that workers in one region have the same goals as those in another region. Even within the same franchise system, the issues will vary by each franchisor, franchisee, and their management teams.

### ■ Certification

We believe the removal of a secret ballot vote diminishes employees' rights and would prevent workers from having a real say about whether or not they wish to be part of a union. Secret ballot voting safeguards employees from external pressures and helps ensure their true opinion is represented.

## Conclusion and Summary

Summary of Key Recommendations:

1. Provide support to employers and employer associations to work with employers, particularly small businesses, on an ongoing basis to increase awareness of and compliance with the *ESA* and *LRA*.
2. Include language that enshrines in the *ESA* and *LRA* the understanding of the independent nature of the franchisor/franchisee relationship to allow Ontario to benefit from accessing and utilizing the built-in education process inherent in franchising, which comes at no additional cost to the Ontario government or tax payers.
3. Develop an accreditation program that recognizes employers who successfully implement employment standards management systems.
4. Change the definition of "employee" in the *ESA* to reflect the true independent nature of the franchisor/franchisee relationship.

The current law in Ontario already establishes a clear, well-understood, and longstanding test for determining whether two or more parties should be found to be joint or common employers. This test operates effectively and should remain in place.

Changing the test for common-employer status would be a fundamental and far reaching disruption to the current relationship between employees and employers and would create enormous uncertainty in an area of law which is currently clear. For business owners, there is legitimate concern that these unilateral changes may result in disruptions to longstanding contractual agreements.

Franchisors and franchisees are particularly vulnerable to this risk.

This relationship between franchisor and franchisee is governed by a contract, the franchise agreement, which is a licence of a brand and "system" (the body of knowledge needed to operate the business). But the franchisee is still an independent business person. So while they receive the benefits that a franchisor has to offer, such as manuals and training, the franchisee's investment is at risk like any other business.

It is inaccurate to argue that because franchisors maintain consistent brand standards that they also exert any level of day-to-day operational control that should automatically make them a joint or common employer. Should franchisors be deemed joint or common employers in Ontario it would set this province apart from the rest of Canada and reduce the number of new franchised businesses expanding into this province.

This is not a hypothetical concern. The release of the Interim Report has already had a chilling effect as even the mere suggestion of such a common-employer characterization has caused franchise companies from outside the province to reconsider their expansion into Ontario.

- A US-based franchisor with more than 2,000 outlets, has recently opened a corporate location in Alberta but decided to focus franchise efforts outside of Ontario based upon the Interim Report.
- In a second case, a Michigan-based franchisor has decided not to expand to any part of Canada so long as there is a risk of common employment in Ontario.

In both situations, and these are simply two that have come to our attention, new investments by Ontario franchisees will not be made, new outlets using Ontario-based contractors and labour will not be built, consultants of various sorts in Ontario (i.e. architects, engineers, advertising agencies, accountants and lawyers, etc.) will not get retained, and there will be no jobs created for Ontario residents as employees of the franchisees.

Ontario is a relatively small jurisdiction in the world for foreign brands to look to for growth. If Ontario becomes an outlier they will simply look elsewhere. If the foreign franchisor is not willing to assume liability that they do not face elsewhere, or undergo an unwelcome change in taxation status, they will avoid Ontario. If they are here already, they can seek to reduce their risk by not growing further in this province or even selling their assets outright.

The CFA shares the government's view that more can and should be done to better protect workers in the province but the recommendations in the Interim Report forcing a change to the relationship between franchisor and franchisee will not achieve the objective and may, in fact, take the province backwards.

Our members believe education, raising awareness, accreditation, and enforcement are better paths to ensuring fairness for workers while maintaining a proven business model that creates successful small businesses and employs hundreds of thousands of Ontarians.

We look forward to further consultation with the Special Advisors on these issues central to the ongoing success of franchised small businesses in Ontario.

## **APPENDIX “A”: SAMPLE FRANCHISE AGREEMENT**

• XYZ INC.

*[ L O G O ]*

## FRANCHISE AGREEMENT

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**THIS AGREEMENT** made this \_\_\_\_\_ day of \_\_\_\_\_, 201\_\_\_\_.

**A M O N G:**

●, a corporation incorporated under the laws of Ontario;

(the "**Franchisor**")

OF THE FIRST PART;

- and -

●, a corporation incorporated under the laws of ●;

(the "**Franchisee**")

OF THE SECOND PART;

- and -

● of the City of ●,  
in the Province of ●;

(the "**Guarantor**")

OF THE THIRD PART.

**WHEREAS** the Franchisor owns a unique system for the development, opening and operation of distinctive quick service outlets featuring, primarily, the products listed on Schedule "A" hereto, as well as beverages and other food and related products;

**AND WHEREAS** the Franchisor owns certain registered and unregistered trade names, trademarks, logos, emblems and indicia of origin which are used in association with the system, including the Proprietary Marks (as more particularly defined in Section 1.20 of this agreement);

**AND WHEREAS** the distinguishing features of the System include, but are not limited to, food selection and presentation, unique recipes, unique methods and procedures, specially designed premises with distinctive decor, equipment, equipment layouts, interior and exterior accessories, colour schemes, products, including the Products, services, methods of operation, management programs, standards, specifications, proprietary marks and information;

**AND WHEREAS** by reason of the System and uniform business format and high standards of quality and service associated therewith, the Franchisor is intending to establish an excellent business reputation, to create substantial demand for the products and services, and to develop valuable goodwill therein;

**AND WHEREAS** the Franchisee wishes to acquire from the Franchisor the right and licence to operate a quick service outlet utilizing the System, and the Proprietary Marks, upon the terms and conditions hereinafter set forth.

**NOW THEREFORE** this agreement witnesseth that in consideration of the mutual covenants and agreements herein contained the parties hereto do hereby covenant and agree with each other as follows:

## 1. DEFINITIONS

Where used herein or in any schedules or amendments hereto, the following terms shall have the following meanings:

- 1.1 **"Accounting Period"** means such weekly, monthly or other period designated from time to time by the Franchisor, and to be used for accounting or other purposes;
- 1.2 **"Address"** has the meaning provided in subarticle 8.6 below;
- 1.3 **"Commencement Date"** means the date which is first written above, being the date upon which this agreement takes effect;
- 1.4 **"Competing Business"** has the meaning provided in subarticle 14.1 below;
- 1.5 **"Development Cost"** has the meaning provided in subarticle 7.2 below;
- 1.6 **"Discounts"** has the meaning provided in subarticle 8.3 below;
- 1.7 **"Franchised Business"** means the business to be operated by the Franchisee under the System and Proprietary Marks and at the Premises, as licensed by and pursuant to the provisions of this agreement;
- 1.8 **"Fund"** has the meaning provided in subarticle 10.2 below;
- 1.9 **"Gross Sales"** means the entire amount of the actual sales price of all sales of Products, however allocated amongst such Products, and all other receipts or receivables whatsoever from any and all business conducted upon or originating from the Premises, including, if permitted by the Franchisor, through delivery or catering services, telephone order, internet and other electronic based sales, whether such sales or other receipts be by cheque, for cash, credit, charge accounts, exchange or otherwise and whether such sales be made by means of mechanical or other vending devices in the Premises. There shall be no deductions allowed for uncollected or uncollectible credit accounts and no allowances shall be made for bad debts. Gross Sales shall not include the amount of any tax imposed by any federal, provincial, municipal or governmental authority directly on sales and collected from customers if such tax is added to the selling price and actually paid by the Franchisee to such governmental authority. Each charge or sale upon installment or credit shall be treated as a sale for the full price in the week during which such charge or sale shall be made, irrespective of the time when the Franchisee shall receive payment (whether full or partial) therefor;
- 1.10 **"Initial Fee"** has the meaning provided in subarticle 3.1 below;
- 1.11 **"Initial Term"** has the meaning provided in subarticle 4.1 below;
- 1.12 **"Interest Rate"** means the lesser of: two (2%) percent per month (twenty-four (24%) percent per annum), or the maximum rate of interest that may be legally charged;
- 1.13 **"Lease"** means any lease, sublease, guarantee, or other instrument under which the right to occupy the Premises has been obtained;
- 1.14 **"Manual"** means, collectively, all books, pamphlets, bulletins, memoranda, letters, notices, video or audio tapes, computer media (i.e. computer software, CD-Rom) or other publications, documents or electronic communications (i.e. internet, website, intranet, extranet), prepared by or on behalf of the Franchisor for use by franchisees generally or for the Franchisee in particular, setting forth information, advice, standards, requirements,

operating procedures, instructions or policies relating to the System and the operation of the Franchised Business, as same may be amended from time to time;

- 1.15 **"Notices"** has the meaning provided in subarticle 21.9 below;
- 1.16 **"Offer"** has the meaning provided in subarticle 15.3 below;
- 1.17 **"Other Brands"** has the meaning provided in subarticle 2.2 below;
- 1.18 **"Premises"** means the Premises at which the Franchised Business is to be located, as described in Schedule "A" hereto;
- 1.19 **"Products"** means all foods, beverages, wares, merchandise, supplies, accessories and items sold, dispensed, handled, used or otherwise dealt in, and all services performed at or from the Premises or in connection with the Franchised Business, as may be amended or specified by the Franchisor from time to time for association with one or more System licensed by this agreement;
- 1.20 **"Proprietary Marks"** means the trademarks, trade names, certification marks and other commercial symbols and related logos as listed in Schedule "A" hereto, together with such other trade names, trademarks, symbols, logos, distinctive names, service marks, certification marks, logo designs, insignia or otherwise which may be designated by the Franchisor for use in the System from time to time, and not thereafter withdrawn;
- 1.21 **"System"** means, as applicable, the quick service system or, collectively, systems licensed by this agreement, as defined in the recitals to this agreement, and as identified in Schedule "A" hereto;
- 1.22 **"Territory"** means the territory described in Schedule "A" hereto; and
- 1.23 **"Transfer"** has the meaning provided in subarticle 15.1 below.

## 2. GRANT

### 2.1 Grant

Subject to the provisions of this agreement and for the term hereinafter specified, the Franchisor hereby grants to the Franchisee a non-exclusive right to operate a Franchised Business at and only at the Premises and a non-exclusive licence to use the System and Proprietary Marks identified in Schedule "A" hereto solely and exclusively in the operation thereof. Termination, expiration or non-renewal of this agreement shall constitute a termination or expiration of the rights and licence granted herein to the Franchisee.

### 2.2 Restricted Territory

So long as the Franchisee is in full compliance with the terms and conditions of this agreement, the Franchisor shall refrain from operating or granting to anyone else a franchise to operate a restaurant business using the Proprietary Marks and System licensed by this agreement from premises permanently located within the Territory. The Franchisor expressly reserves all rights not granted to the Franchisee by this agreement. Accordingly, and notwithstanding the foregoing, nothing in this agreement or at law shall prevent the Franchisor, their respective licensees or others, from:

- (a) operating, or granting to someone else a franchise or license to operate anywhere outside the Territory (whether immediately adjacent, or otherwise) a business using the System and Proprietary Marks; and

- (b) operating or granting to someone else a franchise or license to operate, in or outside the Territory, a business using one or more of the other brands and franchise systems or trademarks now or hereafter, owned or licensed by the Franchisor, or whose owners or licensors own the Franchisor, the Proprietary Marks and the System, regardless of whether they are competitive with the System or its Products and located in close proximity to the Franchised Business (the “**Other Brands**”); and
- (c) distributing, selling, offering, or granting to someone else the right to distribute, sell or offer, the Products or similar or different products, using the System and Proprietary Marks (including the Other Brands) or similar or different business systems or trademarks, inside or outside of the Territory, of a temporary or permanent nature, by means of other or alternate channels of distribution, such as without limitation, by or through; (i) telephone orders, mail order, television, vending machines, electronic media (i.e. including the internet) or catalogue sales; (ii) through catering, catering trucks, carts, mobile vehicles of any kind, and/or delivery services of any kind, including the Delivery System; (iii) supermarkets, grocery, retail, convenience, or similar stores, or as a concession, kiosk, department or as part of or in combination with any restaurant, supermarket, grocery, retail or similar establishments; or (iv) through outlets of any kind located at public or quasi-public institutions, such as without limitation, hospitals, schools, universities, colleges, correctional facilities, airports, train and/or bus stations, gas and/or service stations, highway rest stops and plazas, sports facilities, arenas, stadiums, concert halls, theatres, fairs and/or exhibitions, food court locations, office complexes and enclosed shopping malls; and,
- (a) advertising, sponsoring, endorsing, or otherwise promoting or advancing the System, the Proprietary Marks or Other Brands inside or outside of the Territory, in any manner whatsoever.

### **3. INITIAL FEE & ROYALTY**

#### **3.1 Initial Fees**

In consideration of the Franchisee receiving the opportunity to establish the Franchised Business, and conduct it at the Premises, the Franchisee shall pay to the Franchisor upon execution of this agreement an initial, non-recurring, non-refundable franchise fee in the amount specified in Schedule “A” to this agreement (the “**Initial Fee**”). The Initial Fee shall be deemed to be fully earned by the Franchisor upon the execution of this agreement and in consideration of the grant by it to the Franchisee of the opportunity to establish the Franchised Business as herein provided, and the Franchisee shall not be entitled to a refund of any part thereof, regardless of the date of expiration, termination or non-renewal of this agreement, except as specifically provided herein.

#### **3.2 Continuing Royalty**

In return for the on-going rights and privileges granted to the Franchisee hereunder, the Franchisee shall pay to the Franchisor, throughout the term of this agreement, a royalty based on the percentage amount of Gross Sales specified in Schedule “A” to this agreement, calculated for such Accounting Period as is prescribed from time to time by the Franchisor. The royalties are allocable in respect of the Products as may be specified by the Franchisor from time to time, and shall be payable in arrears on the day specified from time to time by the Franchisor, for the Gross Sales generated by the Franchisee during the immediately preceding designated Accounting Period. In the case of any interruption of business, Gross Sales shall include the amount of all sales assumed to have been lost by the interruption of business at the Premises, to be determined on the basis upon which proceeds of any business interruption insurance are paid or are payable to the Franchisee or other occupiers of the

Premises, or which proceeds would have been payable to the Franchisee or other occupiers of the Premises in the case where the Franchisee did not have in full force and effect any insurance required by this agreement.

### **3.3 Sales Taxes**

Any and all amounts expressed as being payable pursuant to this agreement are exclusive of any applicable taxes. Accordingly, if applicable, all payments by the Franchisee shall, in addition, include an amount equal to any and all goods and services taxes, harmonized taxes, sales taxes, value added taxes, or other taxes, assessments or amounts of a like nature imposed on any payments to be made pursuant to this agreement.

## **4. TERM**

### **4.1 Initial Term**

The term of this agreement (the "**Initial Term**") shall commence on the Commencement Date, and shall expire either at 11:59 p.m. on the day preceding the end of the period of time specified in Schedule "A" to this agreement, or on the expiration, termination or non-renewal of the Franchisee's right to occupy Premises pursuant to the Lease, whichever date shall be the earlier, unless terminated sooner in accordance with the provisions of this agreement. Notwithstanding the foregoing, the Franchisor may, in its sole discretion, on notice to the Franchisee, extend the Initial Term beyond the length of time hereinbefore specified for the purposes of having the Initial Term coincide with the then remaining term, or part thereof, of the Lease, less one day. Any such extension shall be considered part of the Initial Term.

### **4.2 Renewal**

If throughout the Initial Term, and as described herein, the Franchisee shall have fully complied with all of the terms and conditions of this agreement and any other agreement entered into between the Franchisor and the Franchisee and shall have complied with the operating standards and criteria established for the Franchised Business, including, without limitation, the System, the Franchisee shall have the option to renew this agreement for two (2) renewal terms. Each renewal term shall commence on the expiry of the Initial Term, or then current renewal term (as applicable), and unless terminated sooner in accordance with the terms and conditions of this agreement, or the then effective franchise agreement (as applicable), shall expire on (a) the fifth (5th) anniversary thereof; or, (b) in the case where the Franchisee's right to occupy the Premises under the Lease shall expire or be terminated before the fifth (5th) anniversary thereof, at the same time as such expiration, termination or non-renewal of the Franchisee's right to occupy the Premises. Notwithstanding the foregoing, the Franchisor, may, in its sole discretion, on notice to the Franchisee, extend the term of such renewal beyond the length of time hereinbefore specified for the purposes of having the renewal term coincide with the then remaining term, or part thereof, of the Lease, less one day. Each such renewal shall require payment by the Franchisee of the Franchisor's then current renewal fee, which renewal fee shall be no greater than fifty (50%) percent of the Franchisor's then existing Initial Fee charged to new franchisees. Each such renewal shall be subject to the following terms and conditions being complied with in full prior to the expiration of the Initial Term, or then current renewal term (as applicable):

- (a) The Franchisee shall give the Franchisor written notice of its desire to exercise the renewal option herein provided for not less than six (6) months prior to the expiration of the Initial Term, or then current renewal term (as applicable);
- (b) The Franchisee shall do or cause to be done all such things as the Franchisor may require to ensure that the Franchised Business satisfies the then current image, standards and specifications established by the Franchisor for new franchises in the System whether or not such image, standards or specifications reflect a material change

in the System in effect during the Initial Term, or then current renewal term (as applicable), or require a significant investment or expenditure of funds the Franchisee. Without limiting the generality of the foregoing, the Franchisee shall complete such renovations and make such capital expenditures as the Franchisor shall determine as being required in connection with the foregoing for the renovation, modernization and refurbishing of the Premises and all fixtures, furnishings, equipment and signs therein or thereon;

- (c) The Franchisee is not in default of any provision of the Lease and shall provide evidence satisfactory to the Franchisor of the Franchisee's right to remain in possession of the Premises, for the applicable renewal term on terms satisfactory to the Franchisor;
- (d) The Franchisee shall reimburse the Franchisor for all reasonable legal fees and other costs and expenses incurred by it incident to the exercise of the renewal option herein provided for and with respect to the renewal of the Lease, and the Franchisee shall have paid all amounts owing by it to the Franchisor;
- (e) The Franchisee is not in default of any provision of any licences for the Franchised Business carried on at the Premises and is able to renew such licences as necessary, and is up to date in all of its tax filings and remittances;
- (f) At the Franchisor's request, the Franchisee and Guarantor shall have executed a release, to the extent permitted by applicable law, in the Franchisor's prescribed form, of any and all claims against the Franchisor and its officers, directors, agents and employees, excepting any claims under an applicable franchise law statute (if any) that are not permitted to be waived or released; and
- (g) At the commencement of each renewal term, the Franchisee and Guarantor shall, at the option of the Franchisor, execute a new franchise agreement in the form then being used by the Franchisor, which may contain the then current Proprietary Marks, System royalty rates and advertising contributions (which may be different than those contained in this agreement), and an altered, geographically reduced or eliminated Territory. The Franchisee and the Guarantor shall execute such other documents and agreements as are then customarily used by the Franchisor in the granting of franchises and licences. If the Franchisor shall elect not to execute such a new franchise agreement, all of the provisions contained in the franchise agreement in effect immediately prior to the commencement of such renewal term shall remain in force during the next succeeding renewal term (except for any further right of renewal after the second (2<sup>nd</sup>) renewal term).

## **5. TRAINING AND OPERATING ASSISTANCE**

### **5.1 Training and Start Up Assistance by the Franchisor**

**Prior to the opening of the Franchised Business, the Franchisor shall provide to a maximum of three (3) of the Franchisee's employees (at least one of whom shall be the Guarantor), an initial training course of such duration and at such location as the Franchisor may deem necessary, covering all necessary aspects of the System (including kitchen and "front of the house" training"). The Franchisee shall ensure that its designated employees attend, and successfully complete the Franchisor's training course. In the event that the Franchisee wishes to have additional employees attend the initial training course provided by the Franchisor, the Franchisee will be responsible for all additional costs, including without limitation, the then current daily or weekly rate per trainee established by the Franchisor. The Franchisee shall be responsible for all travel and living expenses and all wages or other amounts payable to any**

**trainees and no wages or other amounts shall be payable by the Franchisor to any such trainee for any service rendered at any location during the course of such training.**

The Franchisor further agrees to furnish at least one (1) person, experienced in the System, to provide start-up training to the Franchisee's employees at the Premises and to assist the Franchisee at the Premises for such period immediately preceding or following the opening of the Franchised Business, as the Franchisor in its sole discretion deems reasonable. The Franchisee shall be responsible at such time as the Franchisor may specify for all reasonable travel, food and lodging costs incurred by the Franchisor or its designee in connection with the provision of the initial training course.

Additional training, start-up training and assistance, retraining, refresher courses, seminars or management/franchisee meetings may be provided by the Franchisor, at its discretion, and at a cost to the Franchisee based on the Franchisor's then current fee (if any) for the Franchisor's personnel performing such training or assistance, plus other reasonable expenses, including registration fees and all travel, meal and accommodation expenses.

## **5.2 Operating Assistance**

**During the term of this agreement, the Franchisor shall furnish to the Franchisee a reasonable amount of continuing advice and guidance as is from time to time required by the Franchisee, in the judgment of the Franchisor, with respect to the planning, opening and operation of the Franchised Business, including consultation and advice regarding:**

- (a) selection, purchasing, stocking, preparation and recipes relating to Products;
- (b) **hiring and training of employees;**
- (c) formulation and implementation of advertising and promotional programs;
- (d) establishment and maintenance of administrative, inventory control and general operating procedures; and
- (e) improvements to the System, including new product and service development.

In addition, upon reasonable written request of the Franchisee, the Franchisor will use its best efforts to furnish assistance to the Franchisee to aid in devising solutions to special problems encountered by the Franchisee in the operation of the Franchised Business. The Franchisee shall reimburse the Franchisor for its employees' time and its actual expenses incurred in aiding the Franchisee with such problems.

## **6. PREMISES**

### **6.1 Use of Premises**

The right and license granted to the Franchisee pursuant to article 2 hereof, has been granted to the Franchisee solely for use by him at the Premises. The Franchisee shall use the Premises for the operation of the Franchised Business only and for no other purpose.

### **6.2 Sublease By Franchisee**

Subject to the provisions of subarticle 6.3 below, the Franchisee will simultaneously with or immediately following the execution of this agreement, enter into a sublease (or other form of Lease required by the Franchisor) for the Premises substantially in the form attached hereto as Schedule "B" or in such other form as may otherwise be required by the Franchisor or any lessor of the Premises (which



may include a nominee of the Franchisor). The Franchisee further agrees that, if requested to do so either by the Franchisor or any lessor of the Premises, the Franchisee and/or the Guarantor shall execute a covenant and/or agreement directly in favour of such lessor, covenanting and agreeing to be bound by, and to perform and observe all of the terms and conditions of the sublease (or other form of Lease required by the Franchisor). If the Franchisor is, for any reason whatsoever, unable to obtain the written consent of any lessor of the Premises whose consent may be required to the subletting of the Premises to the Franchisee, then this agreement shall be terminated and of no further force or effect and the Franchisor shall not be responsible for any losses, costs or expenses whatsoever incurred by the Franchisee as a result of such inability to obtain the consent.

### **6.3 Lease By Franchisee**

If the Franchisor elects not to enter into the Lease then the Franchisee shall enter into the Lease, which Lease shall be in form and upon terms acceptable to the Franchisor. Without limitation, the Lease entered into by the Franchisee shall provide that such Lease be subject to the requirements of the three party agreement that the Franchisor or its nominee shall be entitled to insist upon as a condition of approving the Lease which shall be substantially in the form of agreement attached as Schedule "C" hereto. Without limitation the Franchisor may insist that the Lease be assigned to the Franchisor, or its nominee, at the Franchisor's option, upon a Transfer, or the termination or expiry of this agreement or the Lease for whatever reason. The Franchisee agrees not to terminate or in any way alter or amend such Lease during the Term, including any renewal thereof, without the Franchisor's prior written approval. Any attempt to terminate, alter or amend such Lease shall be null and void and have no affect as to the Franchisor's, or its nominee's, interests thereunder, and the clause to such effect shall be included in such Lease.

The Franchisee agrees to pay any applicable fees, costs or charges payable in respect of brokering or legal services engaged for the purposes of locating premises or entering into a lease or sublease for any such premises.

### **6.4 Search for Premises and Option to Terminate**

If at the Commencement Date, a location for the Premises has not been obtained, the Franchisee will use its reasonable best efforts to find a suitable location for the Premises acceptable to the Franchisor, within the Territory or such other area designated by the Franchisor. Once determined, the Franchisor shall be permitted to complete the address of the Premises in Schedule "A" hereto. If at the Commencement Date, a Territory has not been assigned to the Franchisee by the Franchisor, then Franchisor shall be permitted to assign the Territory, either prior or subsequent to the determination of the location of the Franchised Business, in accordance with the terms of this agreement, and shall be permitted to complete the designation of the Territory in Schedule "A" hereto.

In the event the Franchisor locates a suitable location and a Lease for the Premises within the Territory that it believes the Franchisee should accept, and the Franchisee does not enter into a Lease for the Premises within fourteen (14) days of written notice from the Franchisor, then the Franchisor shall have the continuing option to terminate this agreement by giving seven (7) days written notice of termination to the Franchisee. If such notice of termination is given in accordance with this paragraph, then unless the Franchisee agrees to or enters into the Lease proposed by the Franchisor before the expiry of the notice period, this agreement shall terminate in accordance with its terms. Upon such termination of this agreement, the Franchisee shall deliver to the Franchisor, its directors, officers and shareholders, such full and final releases (excluding any claims under an applicable franchise law statute (if any) that are not permitted to be waived or released under that statute), and other documents as may be required by Franchisor. Upon compliance with the foregoing, the Franchisor agrees to refund to the Franchisee three-quarters (3/4) of the Initial Fee, which shall be the only amount(s) to be refunded or paid by the Franchisor to the Franchisee.

If within a period of one (1) year following the execution of this agreement, a suitable location has not been found and a Lease for the Premises has not been signed by the Franchisee or the Franchisor in accordance with this article 6 then, until such time as the Franchisee or the Franchisor has entered into the Lease in accordance with this article 6, either party shall have the continuing option to terminate this agreement by giving twenty one (21) days notice of termination to the other party. If such notice of termination is given in accordance with this paragraph, then unless a suitable location has been found and the Franchisee or the Franchisor has entered into the Lease before the expiry of the notice period, this agreement shall terminate in accordance with its terms. Upon such termination of this agreement, the Franchisee shall deliver to the Franchisor, its directors, officers and shareholders, such full and final releases (excluding any claims under an applicable franchise law statute (if any) that are not permitted to be waived or released under that statute), and other documents as may be required by Franchisor. Upon compliance with the foregoing, the Franchisor agrees to refund to the Franchisee one-half (1/2) of the Initial Fee, which shall be the only amount(s) to be refunded or paid by the Franchisor to the Franchisee.

#### **6.5 No Warranty**

The Franchisee acknowledges that any assistance (including site selection, lease negotiation and project oversight) provided or required by the Franchisor or its nominee in relation to the selection or development of the Premises is only for the purpose of determining compliance with System standards and does not constitute a representation, warranty, or guarantee, express, implied or collateral, regarding the choice and location of the Premises, that the development of the Premises is free of error, nor that the Franchised Business is likely to achieve any level of volume, profit or success. The Franchisor does not represent that it has any special expertise in selecting sites or negotiating lease arrangements. The Franchisee hereby agrees that the Franchisor's assistance in regard to selection, negotiation or approval or disapproval of a proposed site or lease arrangement does not impose any liability on the Franchisor.

### **7. DESIGN AND CONSTRUCTION**

#### **7.1 Development of Premises by The Franchisee**

The Franchisee shall construct and equip the Premises in accordance with the time table or schedule specified by, and in conformity with the System standard layout plans, specifications and drawings provided by, the Franchisor. Following receipt of the System standard plans, specification and drawings from the Franchisor, the responsibility and cost of customizing specific plans, specifications and drawings to the Premises (upon the prior approval of the Franchisor) and all costs and expenses pertaining to the construction and equipping of the Premises shall be borne exclusively by the Franchisee. The Franchisor shall have the right to inspect the construction and development of the Premises at all reasonable times. The Franchisee agrees to do or cause to be done the following at its sole cost and expense:

- (a) present a chosen architect, designer, contractor and contractor's tender for approval by the Franchisor, retain and compensate all contractors, subcontractors or other professionals required, and ensure that the Franchisor's requirements regarding insurance coverage are complied with (or insurance requirements under the Lease, whichever provide for greater coverage), in connection with the construction and development of the Premises. In respect of any architect's and designer's drawings, the Franchisor shall be permitted to require that the Franchisee pay a deposit amount to be retained by the Franchisor for payment of such architect and designer;
- (b) ensure that all applicable by-laws, building codes, permit requirements and lease requirements and restrictions are complied with in connection with such construction;

- (c) obtain all required building, utility, sign, sanitation, and business permits and licenses and any other required permits and licenses;
- (d) construct all required improvements to the Premises and decorate the Premises in compliance with plans and specifications approved by the Franchisor; and
- (e) subject to the provisions hereof, purchase or lease and install all fixtures, equipment and signs required for the Premises by the Franchisor.

Upon request, the Franchisee shall pay the Franchisor or its nominee an administrative or management fee in respect of the time and expenses incurred by the Franchisor or its nominee relating to the administration, participation or involvement with respect to the development of the Premises by the Franchisee, including reimbursement for reasonable travel and lodging costs incurred by any representatives of the Franchisor or its nominee in connection with the foregoing.

## **7.2 No Liability For Franchisor**

The Franchisor is not responsible for architecture or engineering, or for code, zoning use or other requirements of the laws, ordinances, regulations or bylaws of any federal, provincial, local, or municipal governmental body, including, without limitation, any requirement relating to accessibility by disabled persons or others, nor is the Franchisor responsible for any errors, omissions, or discrepancies of any nature in the development of the Premises. The Franchisor will have no liability to the Franchisee or any other party with respect to the plans, specifications and development of the Premises.

## **7.3 Development of Premises By the Franchisor**

Notwithstanding the provisions of subarticle 7.1, and (to the extent provided for herein) in lieu thereof, the Franchisor may, at its option, undertake, on an independent consultant basis, the partial or full development, including all or any part of the construction, fixturing and equipping of the Premises and the establishment of the Franchised Business in conformity with the System standard layout plans, specifications and drawings on behalf of the Franchisee, in which case:

- (a) The Franchisee hereby authorizes and directs the Franchisor to undertake the development of all or any part of the Premises as aforesaid and to do or cause to be done all or any part of such things as may be necessary to complete the Premises and establish the Franchised Business for use by the Franchisee, including appointing architects, designers and contractors and purchasing or otherwise acquiring supplies, materials and other items. The Franchisee acknowledges that all or any part of such work may be performed by such person or persons as the Franchisor will nominate including persons affiliated with the Franchisor. Said work shall be performed on a basis deemed commercially reasonable by the Franchisor having regard to the estimate previously furnished to the Franchisee provided, however, the Franchisor shall not be obligated to solicit competitive bids for any work performed or merchandise supplied in connection with such development
- (b) The Franchisee shall be required to deposit with the Franchisor a portion of the estimated costs for the partial or full development of the Premises (the "**Development Cost**"), as determined by the Franchisor, upon the execution of this agreement. Further payments toward the Development Cost shall be deposited with the Franchisor at such times as are specified by the Franchisor, with any balance of the Development Cost to be deposited with the Franchisor one (1) month prior to the turnover of the Premises to the Franchisee. In arriving at the said Development Cost, the Franchisor will have regard to its general experience and prices generally charged by suppliers and trades people in developing similar premises in the area where the Premises are situated provided that this estimated Development Cost shall in no way be construed as a guarantee of the costs of the actual Development Cost. To the extent that the actual Development Cost incurred by the Franchisor in respect of such development exceeds the estimated Development Cost or the amount or amounts previously paid by the Franchisee to the Franchisor under this

article, the Franchisee shall pay to the Franchisor an amount equal to such excess forthwith upon receipt from the Franchisor of a statement setting forth in reasonable detail the costs and expenses for which such additional funds are required. If such a statement indicates that the actual Development Cost was less than the estimated Development Cost, then the difference shall be credited by the Franchisor against any amounts due and owing by the Franchisee to the Franchisor until such time as it is fully credited to the Franchisee.

- (c) The Development Cost, without limiting the generality of the foregoing, may include, but not be limited to, all or any part of the costs of the Franchisee's leasehold improvements, whether performed by the Landlord, the Franchisor or by the chosen contractor, on behalf of the Franchisee, of equipment and machinery, of signs and logos, of permits and fees, of marketing materials, including clothing, business forms, menus, promotional materials and whatever else the Franchisor encounters in the way of out-of-pocket or other costs in bringing about the completion of the work undertaken by the Franchisor pursuant to this subarticle 7.3, plus an administration fee payable to the Franchisor in the then current amount specified by the Franchisor. The Franchisee acknowledges that any guarantees or warranties with respect to the performance and function of any of the equipment selected for use in the Franchised Business will be limited to those provided by the manufacturer or supplier of such equipment.
- (d) Regardless of who undertakes development of the Premises, the Franchisor shall have the right to notify the Franchisee of the completion of the development of the Premises. Upon receiving such notification, the Franchisee shall have thirty (30) days within which to commence operation of the Franchised Business on the Premises, provided that the Franchisor shall not turn over the Premises, nor shall the Franchisee be permitted to open for business, until the full remaining amount owing, subject to reconciliation contemplated in section 7.3(a) above, if any, is paid by the Franchisee to the Franchisor for the costs and expenses incurred in respect of the development of the Premises. If the Franchisee fails to pay and commence operation of the Franchised Business within thirty (30) days of receiving such notification from the Franchisor, it shall be a default under this agreement. Without limiting the Franchisor's other rights in the event of such default, the Franchisor may, at its sole option, commence operation of the Franchised Business at the Franchisee's sole cost and expense, for the account of the Franchisee.

#### **7.4 Service Providers, Fixtures, Equipment and Signs**

The Franchisee agrees to use in the operation of the Franchised Business only those service providers, manufacturers, brands or types of fixtures, equipment (including without limitation, computer, cash register, surveillance or security, and point of sale systems), and signs that the Franchisor has approved, in its sole discretion, as meeting its specifications and standards for design, appearance, function, performance and serviceability. The Franchisee may purchase approved brands or types of fixtures, equipment and signs only from suppliers approved by the Franchisor, in its sole discretion, which may include the Franchisor or its affiliates. The Franchisee further agrees to place or display at the Premises (interior and exterior) only such signs, emblems, lettering, logos and display materials that are from time to time approved in writing by the Franchisor, which approval may be given or withheld in the sole discretion of the Franchisor.

### **8. OPERATION OF FRANCHISED BUSINESS**

#### **8.1 Duties and Obligations**

The Franchisee acknowledges that the Franchisor has invested and is investing time and capital in the advertising and promotion of System franchises and other outlets as a chain of quick service restaurant outlets conducting business in a uniform and high quality manner. The Franchisee

understands and acknowledges that such advertising and promotion by the Franchisor has created and is creating goodwill and customer association in the Proprietary Marks, which benefit the Franchisor, the Franchisee and all other franchisees in the System. The Franchisee acknowledges that, to foster and preserve such goodwill, it is necessary for the Franchisee to operate the Franchised Business in a manner and to a quality consistent with the System and the restaurant businesses heretofore operated by the Franchisor, their affiliates, and/or franchisees. The Franchisee acknowledges that, in order to maintain such uniformity and quality consistency, it is necessary for the Franchisor to exercise a degree of control over the operation of each and every business using the System and Proprietary Marks. Therefore, the Franchisee agrees to operate the Franchised Business strictly in accordance with the System, whether contained in the Manual, or otherwise. Without limiting the generality of the foregoing, the Franchisee agrees to:

- (a) operate the Franchised Business with due diligence and efficiency in an up-to-date, quality and reputable manner during such days, nights and hours as may be designated by the landlord for the Premises and/or the Franchisor;
- (b) **ensure that the number of staff working at any given time in the Franchised Business, and their respective duties, is as specified by the Franchisor in the Manual from time to time, and that at all times prompt, courteous and efficient service is accorded to its customers. All employees shall not in any way be deemed employees of the Franchisor and all shall be under the exclusive order, direction, care and control of the Franchisee. The Franchisee be solely responsible for hiring and discharging employees of the Franchised Business, and setting their wages and terms of employment. All employment related documents, including, without limitation, employment applications, schedules, job descriptions, and pay cheques, must clearly identify the Franchisee, and not the Franchisor, as the employer;**
- (c) in all dealings with its customers, suppliers and the public adhere to the highest standards of honesty, integrity, fair dealings and ethical conduct;
- (d) sell such Products, including menu items, and only such Products as meet the Franchisor's uniform standards of quality and quantity, as have been expressly approved for sale in writing by the Franchisor and as have been prepared in accordance with the Franchisor's recipes, methods and techniques for Product preparation. The Franchisee shall sell all approved items pursuant to a menu approved by the Franchisor and the Franchisee shall not offer for sale any other products from the Premises. The Franchisee shall discontinue the sale of any food or drink items or any other merchandise of any kind whatsoever as the Franchisor, in its sole discretion, prohibits in writing;
- (e) use in connection with the Franchised Business all plates, food containers, napkins, straws, bags, cups, matches, menus and other paper goods, promotional, packaging and point of sale materials, and like articles, of a brand, size, shape, quality and style approved by the Franchisor, which shall bear such reproductions of the Proprietary Marks as the Franchisor shall specify and all art work and reproductions used in connection therewith shall conform to specifications established by the Franchisor. Some or all of such items shall be purchased by the Franchisee only from the Franchisor or from suppliers or manufacturers approved in writing by the Franchisor. Such items shall be purchased by the Franchisee only from suppliers, sources, or manufacturers designed or approved in writing by the Franchisor, which may include the Franchisor or its affiliates;
- (f) maintain the condition and appearance of the Franchised Business, the leasehold improvements, furniture, fixtures and the equipment used therein consistent with the then image, as it may be from time to time, of the Franchisor's franchised restaurant businesses as an attractive, modern, clean, convenient and efficiently operated restaurant

business offering high quality products and service, meeting or exceeding all applicable standards for health, safety and hygiene. The Franchisee agrees to effect such maintenance of, and repairs to the Premises and the equipment installed therein as is reasonably required on a regular and frequent basis and maintain such condition and appearance. Provided that the Franchisor shall be permitted, once every five (5) years, to require that the Franchisee spend on a significant renovation or refurbishment of the Premises, at one time, an amount that is up to fifty (50%) percent of the amount spent by the Franchisee in the original purchase or development of the Franchised Business. The scope of such work shall be determined by the Franchisor;

- (g) not make or cause to be made any alterations to the interior or exterior of the Premises so as to modify the appearance thereof or any alterations or replacements of any of the leasehold improvements, furniture, fixtures or equipment at the Premises without first having obtained the written approval of the Franchisor, which approval may be given or withheld in the sole discretion of the Franchisor;
- (h) participate fully in accordance with then applicable terms and conditions, at its own expense (if required by Franchisor), in all national, regional and local gift certificate, gift card, coupon and other promotional programs initiated by the Franchisor, the cost for which shall be borne by the Franchisee and determined by the Franchisor from time to time. For further clarity, the Franchisee acknowledges and agrees that only the Franchisor may produce gift certificates and coupons, which the Franchisee is obligated to redeem;
- (i) comply with all municipal, provincial and federal laws and regulations, and without limitation, those relating to privacy, health, sanitation, the service of food and beverages and music licensing and obtain and at all times maintain and keep in good standing, any and all permits, certificates and licenses necessary for the proper conduct of the Franchised Business pursuant to the terms of this agreement, and promptly notify the Franchisor following inspection of any regulatory authority and provide details of the report or inspection;
- (j) devote, together with the Guarantor, full time and attention to the establishment, development and operation of the Franchised Business;
- (k) pay all sums due to the Franchisor, its affiliates, suppliers, the lessor of the Premises, or any other party to which payment is due in respect of the operation of the Franchised Business in a timely and complete manner, provided that if the Franchisee fails to make payment in this regard to any of its affiliates, suppliers, the lessor of the Premises, or any other party, the Franchisor may, in its sole discretion, make such payment on behalf of the Franchisee, and the amount of any such payment by the Franchisor shall become immediately payable by the Franchisee to the Franchisor and subject to interest accrued at the Interest Rate; and
- (l) promptly advise the Franchisor with regard to any suggestions for operational developments or improvements to the System, including without limitation, new recipes and promotional ideas. In order that such developments or improvements shall be made available to the Franchisor and other franchisees for the benefit of the System, the Franchisee agrees that it hereby assigns and transfers all copyrights, trade marks or other rights in connection therewith to the Franchisor without any compensation, and waives all moral rights thereto.

## **8.2 Products**

- (a) The Franchisee acknowledges that the reputation and goodwill of the System is based upon, and can be maintained and enhanced only by, the sale of high quality products and services and the satisfaction of customers who rely upon the uniformly high quality of products and services that are sold under the System and such continued uniformity is essential to the goodwill, success and continued public acceptance of the System. Accordingly, the Franchisee agrees to sell, offer or otherwise deal in only the Products and services as the Franchisor shall from time to time specify in writing;
- (b) Recognizing that the Products must conform to the Franchisor's standards and specifications, the Franchisee hereby agrees to purchase all Products, and any other goods or services used in the Franchised Business, including without limitation, all raw or prepared or proprietary food or beverage products, ingredients, inventory, restaurant accessories, supplies, promotional materials, clothing, hats and kitchen equipment (including, without limitation, containers, dishes, glassware, take-out materials, cutlery, furniture, napkins, placemats and uniforms) only from the Franchisor or from sources, manufacturers or suppliers approved or designated in writing by the Franchisor (which sources or suppliers may include or be limited to the Franchisor or affiliates of the Franchisor).
- (c) To the extent permitted by applicable law, the Franchisor reserves the right to specify in writing a retail price and/or to establish in writing minimum and/or maximum prices for the Products the Franchisee sells. The Franchisee shall sell any Products and services at the specified retail price or, if applicable, in accordance with the minimum and/or maximum retail prices established by the Franchisor from time to time. Where no retail price or maximum or minimum prices has been specified or established by the Franchisor with respect to a particular Product, the Franchisee may sell such applicable Product at any reasonable price it chooses. The Franchisee acknowledges and agrees that the specified retail price and maximum and minimum prices for Products the Franchisee and other franchisees sell may vary from region to region to the extent necessary in order to reflect differences in costs and other factors applicable to such regions.
- (d) So long as the Franchisee is not in default hereunder, the Franchisor will endeavour to use its reasonable best efforts to fill all orders placed by the Franchisee as promptly as possible. However, the Franchisor will not be liable for loss or damage due to delay in delivery resulting from any cause beyond its reasonable control, including, but not limited to, compliance with any regulations, orders or instructions of any federal, provincial or municipal government or any department or agency thereof, acts or omissions of the Franchisee, acts of civil or military authority, fires, strikes, lockouts, embargoes, delays in transportation, and inability due to causes beyond the Franchisor's control to obtain the necessary products or ingredients. In no event shall the Franchisor be liable for financial loss, including consequential or special damages on account of delay due to any cause.
- (e) The Franchisee acknowledges that certain Products designated from time to time by the Franchisor are critical to the operation of the Franchised Business. Consequently, the Franchisee agrees to maintain a minimum inventory of certain designated Products, as specified by the Franchisor from time to time.
- (f) The Franchisee acknowledges that the Franchisor shall have the right, at any time, and without prior notice, to discontinue or limit the supply of, to make changes or alterations to, or to add new or additional types of items to the list of Products, without incurring any liability to the Franchisee. The Franchisee further acknowledges and agrees that the Franchisor shall not be required to maintain a minimum inventory of the Products and that



the Franchisor does not represent or warrant that any of the Products shall be available for sale on a continual basis. The Franchisor agrees to use reasonable efforts to allocate Products fairly amongst franchised outlets within the System, however, the Franchisor does not warrant or guarantee that any Products shall be equally allocated, sold or distributed within the System.

- (g) So long as the Franchisee is not in default hereunder, if and when the Franchisor or its affiliates is the supplier of the Products or other products or goods, the following shall apply:
- (i) The Franchisor or its affiliates, as the case may be, will endeavour to use reasonable best efforts to fill all orders placed by the Franchisee as promptly as possible. However, the Franchisor or its affiliates will not be liable for loss or damage due to delay in delivery resulting from any cause beyond its reasonable control, including but not limited to, compliance with any regulations, orders or instructions of any federal, provincial or municipal government or any department or agency thereof, acts or omissions of the Franchisee, acts of civil or military authority, fires, strikes, lockouts, embargoes, delays in transportation, and inability due to causes beyond the Franchisor's or its affiliates' control to obtain the necessary products or ingredients. In no event shall the Franchisor or its affiliates, as the case may be, be liable for financial loss, including consequential or special damages on account of delay due to any cause;
  - (ii) The Franchisee acknowledges that the Franchisor or its affiliates, as the case may be, shall have the right, at any time, and without prior notice, to discontinue or limit the supply of, to make changes or alterations to, or to add new or additional types of items to the list of Products, without incurring any liability to the Franchisee. The Franchisee further acknowledges and agrees that the Franchisor or its affiliates shall not be required to maintain a minimum inventory of the Products and that the Franchisor or its affiliates do not represent or warrant that any of the Products shall be available for sale on a continual basis. The Franchisor and its affiliates agree to use reasonable efforts to allocate Products fairly amongst franchised outlets within the System, however, the Franchisor and its affiliates do not warrant or guarantee that any Products shall be equally allocated, sold or distributed within the System.
  - (iii) the Franchisor or its affiliates, as the case may be, shall have the right to cancel, refuse or delay any shipment of the Products without any liability to the Franchisee or any other party for losses or damages of any kind, if the Franchisee fails to pay any invoice in accordance with its terms, the Franchisee is in breach of any of the terms of this agreement, or the Franchisor determines, in its sole discretion, that the financial position of the Franchisee is unsatisfactory;
  - (iv) the Franchisee shall pay the Franchisor or its affiliates, as the case may be, for the Products in accordance with the terms of the purchase order procedures, or by any other method approved by the Franchisor or its affiliates in writing. The prices paid by the Franchisee shall be the prices in effect at the time of shipment as provided on the price list published by the Franchisor or its affiliates from time to time. All prices and discounts may be changed by the Franchisor or its affiliates at any time without notice. The Franchisee agrees not to deduct or set-off any amount from any payments due to the Franchisor or its affiliates unless authorized to do so by the Franchisor or its affiliates in writing;
  - (v) all purchase orders received by the Franchisor or its affiliates, as the case may be, are subject to approval by the Franchisor or its affiliates which may be withheld if the Franchisee has any unpaid or overdue accounts, or if applicable,

the Franchisee's credit limit is exceeded, as determined exclusively by the Franchisor;

- (vi) the Products may be shipped to the Franchisee by the Franchisor or its affiliates, as the case may be, from any location, by any means of transportation and at such date and time as the Franchisor or its affiliates may determine, acting reasonably. Unless otherwise stated, all Products shipped by the Franchisor or its affiliates are F.O.B. the designated warehouse of the Franchisor or its affiliates. The Franchisee agrees to pay all freight, costs and insurance from that location in accordance with the standard freight terms established by the Franchisor or its affiliates from time to time. All risk of loss or damage to the Products shall be borne by the Franchisee when the Products leave the warehouse of the Franchisor or its affiliates, or their respective suppliers;
- (vii) within forty-eight (48) hours following the receipt by the Franchisee, the Franchisee shall inspect the Products received. The Franchisor or its affiliates, as the case may be, shall in no event have any responsibility for any damage caused to the Products during shipment, unless shipped by the Franchisor or its affiliates. It shall be the sole responsibility of the Franchisee to file any appropriate claims for reimbursement with the carrier; and
- (viii) title to the Products shall not pass to the Franchisee until the Franchisor or its affiliates, as the case may be, has received payment in full of the purchase price of the Products. Upon delivery of the Products, the Franchisor or its affiliates shall thereby acquire a purchase money security interest in the Products.

### **8.3 Discounts, Rebates, Bonuses**

In the event that any cash rebates, mark ups, volume discounts, concessions, advertising allowances, or discount bonuses (collectively "**Discounts**"), whether by way of cash, kind or credit, are available to or received by the Franchisor or its affiliates from any manufacturer or supplier designated by the Franchisor, whether or not on account of purchases made (i) by the Franchisor for its own account or for the account of the Franchisee, franchisees generally or the Other Brands, or (ii) by the Franchisee directly for its own account, the Franchisor and/or its affiliates shall be entitled to retain the whole of the amount or any part of such Discounts. The Franchisee acknowledges and agrees that the Franchisor and/or its affiliates have the right to realize a profit on any goods or services that the Franchisor or its affiliates supply to the Franchisee.

### **8.4 System Modifications**

The Franchisee acknowledges and agrees that the Franchisor may from time to time hereafter add to, subtract from, modify, combined, separate or otherwise change the System or elements thereof, including, without limitation, additions, subtractions or modifications to: any of the Proprietary Marks or other certification marks, trademarks or trade names; fixtures, equipment and signs; products and services; techniques and processes, and the Franchisee agrees, at its own cost, to promptly accept, implement, use and display all such alterations, modifications and changes.

### **8.5 Transfer of Funds**

The Franchisee covenants and agrees to cooperate fully and comply with any system implemented by the Franchisor for the electronic or other transfer of funds (including without limitation, royalties and advertising contributions) directly from the bank account of the Franchisee to the bank account of the Franchisor, including the execution of any pre-authorized payment forms required by the Franchisee's bankers.

## **8.6 Delivery System**

Pursuant to Section 2.2 of this agreement, the Franchisor shall be at liberty to institute a non-exclusive delivery system, including without limitation, a call-ahead, internet-order, or other similar program (the **"Delivery System"**) through, without limitation, a third party service provider, the Franchisor, an affiliate of the Franchisor, one telephone number and/or through the internet, for use by some or all businesses using the System, the Other Brands, or in conjunction with third parties in areas determined by the Franchisor from time to time. In the event that the Franchisor establishes a non-exclusive Delivery System within an area determined by the Franchisor which encompasses the Franchised Business (the **"Delivery Area"**), and qualifies the Franchisee as able to participate, the Franchisee shall thereafter not conduct any type of delivery system or similar service of any kind of its own, nor publish any other phone number, domain name or e-mail address (each of the foregoing, an **"Address"**) for any type of delivery or similar service of any kind offered by the Franchisee, except the Address designated by the Franchisor for the Delivery System. The Franchisee acknowledges that any Address shall be the sole property of the Franchisor, its affiliates, or its designated supplier.

The Franchisee shall execute all documents required by the Franchisor relating to the Franchisee's participation in the Delivery System and shall be responsible for all fees and charges levied by the Franchisor, its affiliate or its designated supplier for the Franchisee's participation in the Delivery System, including, without limitation, per order or transaction fees, charges for all capital costs, operating costs and overhead incurred in the establishment and operation of the Delivery System. If and when operated by the Franchisor, in levying such charges in respect of costs, the Franchisor shall use its best efforts to allocate all such costs and expenses among the various franchisees participating in the Delivery System on a fair and equitable basis. The Franchisee shall be obligated to follow all rules and procedures established from time to time by the Franchisor in regard to the Delivery System. Subject to the Franchisee from time to time being qualified by the Franchisor to participate, and to the Franchisee being in compliance with such rules and regulations, all orders for System specific products received through such the Delivery System from customers in the Delivery Area, shall be directed to the Franchisee, who shall promptly fill such orders. The Franchisee acknowledges that, for the purposes of the better operation of the Delivery System, the Delivery Area shall be non-exclusive and may not be consistent in any way with the geographic limits of the Territory, and the Delivery Area is subject to change by the Franchisor from time to time. Without limiting the generality of the foregoing, the Franchisee's failure to abide by the rules and procedures established from time to time by the Franchisor in regard to the Delivery System shall be a default under this agreement. Without limiting the Franchisor's rights in the event of such a default, the Franchisor shall be permitted to temporarily or permanently suspend the Franchisee from participation in the Delivery System.

## **9. OPERATING MANUAL AND CONFIDENTIALITY**

### **9.1 Compliance With Manual**

The Franchisee shall conduct the Franchised Business strictly in accordance with all of the provisions set out in the Manual (if any) or as otherwise specified in writing by the Franchisor, as amended from time to time. The Franchisor reserves the right to add to, revise or rescind various portions of the Manual periodically, and the Franchisee shall implement such changes when made, at the Franchisee's cost, even if additional investment or expenditures are required. The Franchisee shall keep the Franchisee's copy of the Manual current, and shall destroy superseded provisions of the Manual. If there is a conflict between the Franchisee's copy of the Manual and the master copy of the Manual maintained by the Franchisor, then the master copy maintained by the Franchisor shall control.

### **9.2 Non-Disclosure**

The Franchisee and Guarantor acknowledge that they have had no part in the creation or development of nor do they have any property or other rights or claims of any kind in or to any element of the System, the Proprietary Marks or any matters dealt with in the Manual and that all disclosures made to

the Franchisee and the Guarantor relating to the System, including, without limitation, the specifications, standards, procedures, sales information relating to other locations within the System, and the entire contents of the Manual and the Franchisor's franchise disclosure document, are communicated to the Franchisee and the Guarantor solely on a confidential basis and as trade secrets, in which the Franchisor has a substantial investment and a legitimate right to protect against unlawful disclosure. Accordingly, the Franchisee and the Guarantor agree to maintain the confidentiality of all such information beginning on the Commencement Date and at any time thereafter and shall not disclose any of the contents of the Manual or any information whatsoever with respect to the Franchisee's or the Franchisor's business affairs or the System other than as may be required to enable the Franchisee to conduct its business from the Premises, and the Franchisee and Guarantor further agree not to use any such information in any other business or in any manner not specifically approved in writing by the Franchisor.

The Franchisee shall have its shareholders, directors, officers, partners, **employees** and agents execute such agreements as to ensure that such persons are under similar duties as the Franchisee and the Guarantor under this agreement with respect to confidentiality and competition. It is expressly acknowledged by the parties thereto that this subarticle 9.2 shall survive a Transfer, the expiration, termination or non-renewal of this agreement for any reason whatsoever.

### **9.3 Manual is Property of the Franchisor**

The Franchisee hereby acknowledges that the Manual is loaned to the Franchisee and shall at all times remain the sole and exclusive property of the Franchisor, and upon a Transfer, or the expiration, termination or non-renewal of this agreement for any reason whatsoever, the Franchisee shall forthwith return to the Franchisor any documents or materials containing or referring in any way to the Manual, together with all copies of any portion of the Manual which the Franchisee may have made, and destroy or permanently delete all electronic copies of the Manual, or any electronic portion or related material thereof.

## **10. ADVERTISING**

### **10.1 Local Advertising**

The Franchisee agrees that during the Initial Term or any renewal thereof, it shall expend annually on local advertising and promotions within the Territory not less than an amount equal the percentage of Gross Sales set out in Schedule "A" each year, allocated amongst the System as specified by the Franchisor from time to time, and such amount as may be required to be expended for such purposes by the Lease.

Subject to abiding by any promotional programs instituted by the Franchisor, the Franchisee shall have the right to conduct such advertising and promotions in respect of the Franchised Business as the Franchisee shall, in its reasonable discretion desire, provided that:

- (a) the Franchisee shall advertise and promote only in a manner that will reflect favourably on the Franchisor, the Franchisee, the Products, the Proprietary Marks and the good name, goodwill and reputation thereof;
- (b) the Franchisee shall submit to the Franchisor for its approval, which approval shall not be unreasonably withheld or unduly delayed, all advertising and promotions to be utilized by the Franchisee and until such time as the Franchisor shall give its prior written approval to the use of such advertising and promotions, the Franchisee shall not utilize same in any advertising or promotion;
- (c) the Franchisee shall pay for any and all advertising and promotions approved by the Franchisor directly to the suppliers of such advertising and promotions;

- (d) the Franchisee shall prominently display, at its expense, in and upon the Premises signs of such nature, form, colour, number, location and size and containing such information as the Franchisor may direct or approve in writing from time to time and such signs shall be purchased from the Franchisor or, at its option, from suppliers approved by it; and
- (e) the Franchisee hereby acknowledges that the Franchisor is the sole and exclusive owner of all copyrights and any and all advertising and promotional material prepared by or on behalf of the Franchisor and shall at all times remain the property of the Franchisor;
- (f) the Franchisee agrees to advertise the Franchised Business (at the Franchisee's expense) in the white pages and classified section (yellow pages) of all local telephone directories, and on any internet advertising or listing, using only such materials as may be approved by the Franchisor. If other System businesses are served by the same white pages or classified section, the Franchisor shall have the right to require group listings therein, to make direct arrangements with the telephone company and to allocate the cost thereof among the applicable System businesses.

## **10.2 Advertising Funds**

Recognizing the value of uniform advertising and promotion to the goodwill and public image of the System, the Franchisee agrees that the Franchisor shall have the right to create, maintain, administer and discontinue a general advertising fund or multiple funds for such national, regional, local and other advertising and promotional programs in respect of one or more System licensed by this agreement (including gift certificates, gift cards, and coupons) as the Franchisor may deem necessary or appropriate (each a "**Fund**"). The Franchisor shall have the right to direct all such advertising programs with respect to the creative concepts, materials, endorsements and media used therein, and the placement and allocation thereof.

The Franchisee shall contribute to each Fund in each year an amount equal to the percentage of Gross Sales set out in Schedule "A" for such year, the specific amount to be determined by the Franchisor in its sole discretion from time to time. Any amounts payable hereunder to the Fund, shall be paid together with the royalty fees hereunder and shall be based upon Gross Sales for the preceding Accounting Period.

The Fund shall be used and expended for brand awareness programs, brand management costs, marketing department fees, media costs, commissions, market research costs, creative and production costs, including, without limitation, the costs of creating promotions and artwork, printing and electronic media costs, and other costs relating to advertising and promotional programs undertaken by the Franchisor. The Franchisor reserves the right to place and develop such advertisements and promotions and to market same as agent for and on behalf of the Franchisee, either directly or through an advertising agency retained or formed for such purpose or through co-operative advertising groups composed of System franchisees designated by the Franchisor. The Fund shall be accounted for separately from the other funds of the Franchisor and shall not be used to defray any of the Franchisor's general operating expenses, except for such reasonable salaries, administrative costs and overhead (calculated on a fully allocated basis), if any, as the Franchisor may incur in activities reasonably related to the administration or direction of the Fund and its advertising programs (including, without limitation, conducting market research). A statement of the operations of the Fund shall be prepared annually and shall be made available to the Franchisee upon request, the cost of such statement to be paid by the Fund.

The Franchisee acknowledges and agrees that the Fund is intended to maximize general public recognition and patronage of the restaurant businesses using the System, or any other system operated or franchised by the Franchisor for the benefit of all restaurants and franchisees, and that the Franchisor undertakes no obligation in administering the Fund to ensure that any particular franchisee, including the Franchisee, benefits directly or pro-rata from the placement or conduct of such advertising

and promotion. Without limiting the generality of the foregoing, the Franchisor is under no obligation to administer or distribute the Fund according to any particular geographic area or territory, including the Territory or exclusively within Canada. The Franchisee further acknowledges and agrees that, if the Franchisor deems appropriate, the Franchisor shall have the right to co-mingle, merge and/or separate funds to create one or more Funds for one or any further systems including Other Brands, and/or to allocate a portion of the Fund to regional advertising co-operatives administered by one or more groups of franchisees, without prior notice to the Franchisee. The Franchisee acknowledges and agrees that the Franchisor may spend in any fiscal year an amount greater or less than the aggregate contributions to the Fund in that year and that the Franchisor may make loans to the Fund bearing reasonable interest to cover any deficits of the Fund and cause the Fund to invest any surplus for future use by the Fund.

### **10.3 Internet Website and Electronic Commerce**

The Franchisee acknowledges and agrees that any internet website, email addresses, or other means of electronic advertising (including all forms of internet-based social media) or commerce created and/or operated by or on behalf of the Franchisor shall be deemed "advertising" under this agreement and, without limitation to any other terms and conditions herein imposed on such forms of advertising, such may be paid for by the Fund. The Franchisee further acknowledges and agrees that it shall not create and/or operate its own website, internet domain name, or participate in internet-based social media, which contains any reference to the System, the Proprietary Marks or the Franchised Business. Notwithstanding the foregoing, in the event that the Franchisor permits the Franchisee to create and operate its own website or internet domain name or participate in internet-based social media which contains references to the System, the Proprietary Marks or the Franchised Business, such things shall comply with the Franchisor's standards and specifications and then-current policies for electronic advertising and commerce, including without limitation, those in relation to use and display of Proprietary Marks and copyrighted materials, as prescribed by the Franchisor from time to time. If required by the Franchisor, the Franchisee shall establish its website as part of any other website which the Franchisor may prescribe, and/or shall establish electronic links to such websites as the Franchisor may prescribe.

## **11. PROPRIETARY MARKS**

### **11.1 No Permanent Interest**

Neither this agreement nor the operation of the Franchised Business shall in any way give or be deemed to give to the Franchisee any interest in the Proprietary Marks except for the right to use the Proprietary Marks solely at and on the Premises and in accordance with the terms and conditions of this agreement. The Franchisee shall not use the Proprietary Marks in any manner calculated to represent that it is the owner of the Proprietary Marks. Neither during the Initial Term, nor any renewal term thereof, nor at any time after a Transfer, or the expiration, termination or non-renewal hereof, shall the Franchisee, either directly or indirectly, dispute or contest the validity or enforceability of the Proprietary Marks, attempt any registration thereof, or attempt to dilute the value of any goodwill attaching to the Proprietary Marks. Any goodwill associated with the Proprietary Marks shall enure exclusively to the benefit of the Franchisor.

### **11.2 Franchisee's Obligations With Respect to Proprietary Marks**

Without in any way restricting or limiting subarticle 11.1 hereof, the Franchisee covenants and agrees as follows:

- (a) that forthwith upon any request by the Franchisor, the Franchisee will execute such applications or agreements or such other instruments in such form and with such parties, as the Franchisor in its sole discretion shall specify, protecting the interests and rights of the Franchisor in such Proprietary Marks, or complying with any applicable trade name, trade-mark or other similar legislation;

- (b) that the Franchisee will not use either the Proprietary Marks or any variations thereof as any part of its corporate, firm or business name or for any other purposes, save and except in accordance with the terms and conditions of this agreement or as may otherwise be specifically authorized by the Franchisor in writing;
- (c) that if the business, partnership or corporate statutes of any jurisdiction require that the Franchisee make application to use the Proprietary Marks within such jurisdiction, such application of the Franchisee shall specify that the Franchisee's use of such Proprietary Marks is subject to and limited by the terms and conditions of this agreement; and
- (d) forthwith upon a Transfer, or the expiration, termination or non-renewal for any reason whatsoever of this agreement, the Franchisee shall cease all use of the Proprietary Marks (including any colourable imitations thereof) for any purposes whatsoever and the Franchisee shall not make known, either directly or indirectly, following such Transfer, expiration, termination or non-renewal, that the Franchisee previously conducted business under the Proprietary Marks.

### **11.3 Affixing of Notice**

The Franchisee hereby covenants and agrees that it will affix in a conspicuous location in or upon the Premises, a sign containing the following notice:

"This business is owned and operated independently by *(name of franchisee)* who is an authorized licensed user of the trademark "*(applicable Proprietary Marks as listed on Schedule "A" hereto)*", which trademark is owned by ●"

In all written materials, including without limitation, on advertising, promotional materials, invoices, order forms, receipts, letterhead, contracts, and business cards, the Franchisee shall include the information as is specified in the above referenced notice at the Premises.

### **11.4 Infringement or Change of Proprietary Marks**

The Franchisee shall immediately notify the Franchisor of any infringement of, or challenge to, the Franchisee's use of any of the Proprietary Marks and the Franchisor shall have the sole discretion to take such action as it deems appropriate in response thereto. In the prosecution or defense of any such proceeding the Franchisee shall cooperate fully with the Franchisor, and execute any documents deemed necessary in the opinion of counsel to the Franchisor. The Franchisor agrees to indemnify the Franchisee against, and to reimburse the Franchisee for, all damages for which it is held liable in any proceeding arising out of the use of any of the Proprietary Marks in compliance with this agreement, and for all costs reasonably incurred by the Franchisee in the defence of any such claim brought against it or in any such proceeding in which it is named as a party, to a maximum aggregate amount equal to the Initial Fee paid hereunder. If it becomes advisable at any time in the sole discretion of the Franchisor for the Franchisee to modify or discontinue the use of any of the Proprietary Marks or use one or more additional or substitute certification marks, trade names or trade-marks, the Franchisee agrees to do so at its sole cost and expense.

### **11.5 Registration of Proprietary Marks**

The Franchisee recognizes that the Franchisor makes no representations or warranty to the Franchisee that any of the Proprietary Marks, that the Franchisor has the right or exclusive right to use any of the Proprietary Marks, or that the Proprietary Marks do not infringe any intellectual property, proprietary or other right of any person.

## **12. ACCOUNTING, RECORDS, REPORTS, AUDITS AND INSPECTIONS**

### **12.1 Bookkeeping, Accounting and Records**

The Franchisee shall establish and continuously use such computerized inventory, ordering, bookkeeping, accounting and record-keeping systems and cost control procedures mandated by and conforming to the requirements prescribed from time to time by the Franchisor, including, without limitation, individual systems in respect of those Products and elements of the System as specified by the Franchisor from time to time. This shall include, without limitation, the use and retention of cash register, tapes, invoices, cash receipts, inventory records, purchase orders, payroll records, cheque stubs, bank deposit receipts, sales tax records and returns, cash disbursement journals and general ledgers together with such further and other equipment, records and documents as may from time to time be required by the Franchisor, and including computerized point-of-sale, inventory, ordering, bookkeeping and accounting systems established from time to time. In the event that the Franchisor requires the establishment of, or specifies changes to, the computerized point-of-sale, inventory, ordering, bookkeeping, accounting or record keeping systems for its Franchisees, the Franchisee agrees to utilize such systems and pay all fees charged by the Franchisor or others for the use of such systems and to purchase or lease all necessary computer hardware and software. The Franchisee and all personnel employed by the Franchisee shall record, at the time of sale, in the presence of customers, all receipts from sales or other transactions, whether for cash or credit, on point-of-sale systems, cash registers or other equipment approved by the Franchisor. If deemed necessary by the Franchisor, the Franchisee agrees to use, at the Franchisee's own expense, the bookkeeper or accountant specified by the Franchisor for the purposes of maintaining the financial records of the Franchised Business.

### **12.2 Reports and Financial Information**

The Franchisee shall furnish to the Franchisor such reports as the Franchisor may require from time to time. Without limiting the generality of the foregoing, the Franchisee shall furnish to the Franchisor in the form from time to time prescribed by the Franchisor and together with such detail and breakdown and copies of supporting records as the Franchisor may from time to time require:

- (a) by the Monday following each week period specified by subarticle 3.2, a report of the Gross Sales for the preceding week period, signed and verified by the Franchisee;
- (b) within ten (10) days after the end of each Accounting Period, a profit and loss statement for the Franchised Business for such Accounting Period;
- (c) within sixty (60) days after the end of each fiscal year of the Franchised Business, financial statements for the Franchised Business, including a balance sheet, profit and loss statement and a statement of retained earnings for such period, which statements shall be signed and verified by the Franchisee; and
- (d) within thirty (30) days of filing, a true copy of all returns, schedules and reports filed by the Franchisee for income, corporate or sales tax purposes.

The Franchisee shall have a fiscal year end on a date designated by the Franchisor. The Franchisee hereby authorizes the Franchisor to make inquiry of the Franchisee's bankers, suppliers and other trade creditors as to their dealings with the Franchisee in relation to the Franchised Business, to discuss the affairs, finances and accounts of the Franchised Business (and by its execution hereof the Franchisee authorizes and directs such bankers, suppliers and other trade creditors to discuss with the Franchisor the affairs, finances and accounts of the Franchised Business) and to obtain information and copies of invoices relating to sales or other dealings with all such persons and the Franchisee in any way relating to the Franchised Business. If requested, the Franchisee agrees to execute and deliver such directions and other documents as the Franchisor may require in order to permit such bankers, suppliers or other trade creditors to release or disclose any such information and documents to the Franchisor.



### **12.3 Inspection and Audit of Books and Records**

The Franchisor shall have the right, during normal business hours and without prior notice to the Franchisee, to inspect or audit, or cause to be inspected or audited the financial books, records, bookkeeping and accounting records, documents or other materials in respect of the Franchised Business, including the right, without limitation, to have a person on the Premises to check, verify and tabulate Gross Sales, and/or to examine and make copies of all accounting and business records and procedures.

In the event that any such audit or inspection shall disclose an understatement of Gross Sales, the Franchisee shall pay to the Franchisor, within two (2) days after receipt by the Franchisee of the inspection or audit report, the royalty and other sums due on account of such understatement. Further, if such audit or inspection is made necessary by the failure of the Franchisee to furnish reports, financial statements or any other documentation as herein required, or if it is determined by any such audit or inspection that the Franchisee's records and procedures were insufficient to permit a proper determination of Gross Sales for any year or part thereof to be made, or that Gross Sales for the period in question were understated by three percent (3%) or more of the Gross Sales actually received, or that the Franchisee was not complying with each of the provisions of article 12 hereof, the Franchisee shall immediately take such steps as may be necessary to remedy such default in accordance with the recommendations of such auditor and the Franchisee shall promptly pay to the Franchisor the royalty and other sums due on account of such understatement, plus fifty percent (50%) of such sums, which amount shall bear interest at the Interest Rate, calculated and payable weekly, not in advance, as well as all costs incurred in connection with such audit or inspection, including, without limitation, charges of an accountant and the travel expenses, room, board and compensation of employees and agents of the Franchisor.

If the Franchisee's records and procedures were insufficient to permit a proper determination of Gross Sales, the Franchisor shall have the right to deliver to the Franchisee an estimate, made by the Franchisor, of Gross Sales for the period under consideration and the Franchisee shall immediately pay to the Franchisor any amount shown thereby to be owing on account of the royalty fees and other sums due on account of any understatement. Any such estimate shall be final and binding upon the Franchisee.

### **12.4 Auditors Report to be Final**

Any report of the Franchisor's auditor rendered from time to time pursuant to this article 12 shall be final and binding upon all of the parties hereto; provided that, in making any such report, the Franchisor's auditor shall make such report pursuant to generally accepted accounting principles.

### **12.5 Right to Inspect Franchised Business and Premises**

The Franchisor and/or its representatives shall have the right at all times to inspect the Premises and the furnishings, equipment and fixtures thereon, the Products, to take inventory of such Products, and otherwise to examine the manner in which the Franchisee is conducting the Franchised Business; in the event of any such inspection, the Franchisee and its staff shall co-operate fully. The Franchisor shall have the right to require that the Franchisee cease to use and immediately remove from the Premises any product, or other item, which the Franchisor determines is not in strict accordance with the applicable standards and specifications, or which has not been duly authorized for use or sale by the Franchisor. In the event the Franchisee fails or refuses to remove such product or other item, then the Franchisor shall be permitted to do so, at the Franchisee's cost.

### **12.6 Right to Information**

The Franchisee and the Guarantor consent to the Franchisor obtaining, using and disclosing to third parties (including, without limitation, prospective franchisees, financial institutions, legal and financial advisors), for any purpose or as may be required by law, any financial or other information

contained in or resulting from information, data, materials, statements and reports received by the Franchisor or disclosed to the Franchisor in accordance with this agreement.

### **12.7 Financing by the Franchisee**

The Franchisee and Guarantor further covenant to produce to the Franchisor, for its prior written approval, any document intended to be issued by or used by the Franchisee for purposes of raising or attracting funds for the Franchisee, whether by way of debt, share issuance or issuance of new partnership interests or other securities or interests of any nature whatsoever (or the transfer of existing shares or partnership interests or other securities or interests) and whether such document be in the form of a security agreement, prospectus, offering memorandum or circular, or any other form of document, and the Franchisee and Guarantor shall not issue such document, nor take any steps to raise such additional funds, until such time as the Franchisor's prior written approval has been obtained. It is understood and agreed that the provisions of this subarticle 12.7 shall apply whether or not the effect of such financing is to change the effective voting or other control of the Franchisee.

## **13. INSURANCE**

### **13.1 Types of Insurance**

The Franchisee shall, at its sole cost and expense, take out and keep in full force and effect throughout the term of this agreement and any renewal thereof, such insurance coverage as may be required, pursuant to the Lease and as the Franchisor may from time to time require (including, without limitation, product liability insurance, fire and extended coverage insurance on the equipment, leasehold improvements and stock of the Franchised Business, business interruption insurance, rental insurance, workmen's compensation insurance and public liability and indemnity insurance), and/or in such amounts as the Franchisor may from time to time require, fully protecting as named insureds the Franchisor and the Franchisee against loss or damage occurring in connection with the operation of the Franchised Business. All costs in connection with the placing and maintaining of such insurance shall be borne solely by the Franchisee.

### **13.2 Policies of Insurance**

All policies of insurance obtained pursuant to this article 13 shall:

- (a) be placed only with insurers designated or reasonably acceptable to the Franchisor;
- (b) be in such form and amounts as is acceptable to the Franchisor;
- (c) contain a clause that the insurer will not cancel or change or refuse to renew the insurance without first giving to the Franchisor thirty (30) days prior written notice; and
- (d) name the Franchisor as an additional named insured.

### **13.3 Copies**

Copies of all policies or certificates of insurance and any renewals thereof, shall be delivered promptly to the Franchisor by the Franchisee from time to time.

### **13.4 Placement of Insurance by the Franchisor**

If the Franchisee fails to take out or keep in force any insurance referred to in subarticle 13.1 above, or should any such insurance not be as provided in subarticle 13.2 above, and should the Franchisee not rectify such failure within forty-eight (48) hours after written notice is given to the Franchisee by the Franchisor, the Franchisor has the right, without assuming any obligation in connection

therewith, to effect such insurance at the sole cost of the Franchisee and all outlays by the Franchisor shall be immediately paid by the Franchisee to the Franchisor on the first day of the next month following such payment by the Franchisor without prejudice to any other rights and remedies of the Franchisor under this agreement.

## **14. RESTRICTIVE COVENANTS AND TRADE SECRETS**

### **14.1 Competition During Term of Agreement**

The Franchisee and the Guarantor (in consideration of the Franchisor entering into this agreement), jointly and severally, covenant and agree that, beginning on the Commencement Date, and during the Initial Term and any renewal period thereof, each of the Franchisee, any shareholder of the Franchisee if the Franchisee is a corporation, any partner of the Franchisee if the Franchisee is a partnership, the Guarantor, and any of their respective spouses and children, shall not either individually or in partnership or jointly or in conjunction with any person, firm, association, syndicate or corporation, as principal, agent, shareholder or in any manner whatsoever, carry on or be engaged in or be concerned with or interested in or advise, lend money to, guarantee the debts or obligations of or permit their names or any part thereof to be used or employed in any business operating or franchising a restaurant business of any kind, regardless of whether it is quick service (fast food), sit down, full service, take out, home delivery or some combination thereof (a "**Competing Business**").

### **14.2 Competition After Transfer, Expiration or Termination**

In the event of a Transfer, or the expiration, termination or non-renewal of this agreement for any reason whatsoever, the Franchisee and the Guarantor (in consideration of the Franchisor entering into this agreement) jointly and severally covenant and agree that each of the Franchisee, any shareholder of the Franchisee if the Franchisee is a corporation, any partner of the Franchisee if the Franchisee is a partnership, the Guarantor, and any of their respective spouses and children, shall not, at any time during the period of two (2) years from the date of such Transfer, expiration, termination or non-renewal, either individually or in partnership or jointly or in conjunction with any person or persons, firm, association, syndicate, company or syndication as principal, agent, shareholder or in any other manner whatsoever carry on, be engaged in or be concerned with or interested in or advise, lend money to, guarantee the debts or obligations of or permit its name or any part thereof to be used or employed in any Competing Business that offers the products listed in Schedule "A" hereto, or franchising Competing Businesses that offer the products listed in Schedule "A" hereto, at the Premises, within the Territory or, within ten (10) miles of the perimeter of the Territory, or within five (5) miles of any other restaurant business using the System and Proprietary Marks in existence as of the date of the expiration, termination, non-renewal or Transfer of this agreement.

### **14.3 Solicitation of Employees**

The Franchisee and the Guarantor (in consideration of the Franchisor entering into this agreement), jointly and severally, covenant and agree that, during the term of Initial Term, any renewal period thereof, and at any time during the period of two (2) years from the date of the Transfer, expiration, termination or non-renewal of this agreement for any reason whatsoever, each of the Franchisee, any shareholder of the Franchisee if the Franchisee is a corporation, any partner of the Franchisee if the Franchisee is a partnership, or any person associated with the Franchisee, and the Guarantor, and any of their respective spouses and children, shall not, directly or indirectly, without the prior written consent of the Franchisor, hire, solicit, interfere with or entice away, from the Franchisor, or any other franchisee of the Franchisor, any employee of the Franchisor or any employee of another franchisee of the Franchisor.

#### **14.4 Acknowledgement of Corporate Franchisee**

In the event the Franchisee is a corporation, it shall have no other active or passive business interests, other than the Franchised Business, and the Franchisee covenants and agrees to deliver to the Franchisor at any time the Franchisor may request, the written acknowledgement of such directors, officers, shareholders or employees of the Franchisee, as the Franchisor shall in its discretion determine, acknowledging that they have reviewed the provisions of this article 14 and that they agree to abide by and be bound by all such provisions.

### **15. TRANSFER**

#### **15.1 Transfer by the Franchisee**

The Franchisee acknowledges that the Franchisor, in granting this franchise and the rights and interests under this agreement, has relied upon, among other things, the character, background, qualifications and financial ability of the Franchisee and, where applicable, its partners, officers, directors, shareholders, managers and the Guarantor. Accordingly, this agreement, the Franchisee's rights and interests hereunder, the Lease and the property and assets owned and used by the Franchisee in connection with the Franchised Business shall not be sold, assigned, transferred, shared or encumbered in whole or in part in any manner whatsoever including pursuant to an order of a Court under applicable family law legislation (any or all of which are defined in this agreement as a "**Transfer**"), without the prior written consent of the Franchisor, which shall not be unreasonably withheld. Prior to seeking such consent, the Franchisee shall provide the Franchisor with a right of first refusal as set forth in subarticle 15.3 below. Any actual or purported Transfer occurring by operation of law or otherwise without the Franchisor's prior written consent shall be a material default of this agreement and shall be null and void.

#### **15.2 Conditions of Transfer**

In considering the request for a Transfer pursuant to subarticle 15.1 above, the Franchisor may consider, among other things, the information set out in the Franchisee's application, the qualifications, good character, requisite general business experience, apparent ability to operate the Franchised Business and credit standing of the proposed transferee, and its partners, managers, principal shareholders, directors and officers, as appropriate. In addition, the Franchisor shall be entitled to require as a condition precedent to the granting of its consent that:

- (a) the proposed transferee or an affiliate of the proposed transferee is not, in the discretion of the Franchisor, a competitor of the Franchisor, the System or the Other Brands, nor involved in any way in a Competing Business;
- (b) the Franchisee shall furnish to the proposed transferee and the Franchisor an accurate, clear and concise report enclosing all material facts related to the Franchised Business;
- (c) the Franchisor is provided with a copy of the agreement of purchase and sale between the Franchisee and the proposed transferee and all documents referred to therein as relied upon by the parties. If any financial statements are included, the Franchisor shall be entitled but not obligated to question any figures relating to matters in respect of which the Franchisee is required to report to the Franchisor under this agreement;
- (d) as of the date of the Franchisee's request for consent and as of the effective date of Transfer there shall be no default in the performance or observance of any of the Franchisee's obligations under this agreement or any other agreement between the Franchisee and the Franchisor or any affiliate or supplier thereof, and if the Franchisee intends to transfer its rights of possession of the Premises, that the Franchisee have

obtained the consent of all necessary parties to the assignment of the Lease to the proposed transferee;

- (e) the Franchisee shall have settled all outstanding accounts with the Franchisor, its affiliates and all other trade creditors of the Franchised Business up to the date of closing of the proposed Transfer;
- (f) if requested to do so by the Franchisor, the Franchisee and the Guarantor shall have delivered to the Franchisor a release, to the extent permitted by applicable law, of the Franchisor, its directors and officers, their affiliates and the directors and officers thereof from all obligations under this agreement of any such persons, in a form satisfactory to the Franchisor, excepting any claims under an applicable franchise law statute (if any) that are not permitted to be waived or released;
- (g) the proposed transferee shall have entered into a new franchise agreement in the form then being used by the Franchisor, which may provide for the then current Proprietary Marks, System royalty and advertising and promotion rates (which may differ from those in this agreement) or an altered, geographically reduced or eliminated Territory. The Franchisee and Guarantor shall have executed such other documents and agreements as are then customarily used by the Franchisor in the granting of franchises and licences;
- (h) At the commencement of the renewal term, the Franchisee and the Guarantor shall, at the option of the Franchisor, execute a new franchise agreement in the form then being used by the Franchisor for the purposes of renewal;
- (i) the proposed transferee providing guarantees from anyone whom the Franchisor may request, guaranteeing the proposed transferee's performance of its obligations under the agreements to be entered into;
- (j) the proposed transferee completing, to the satisfaction of the Franchisor, such training in the operations of the Franchised Business, at the proposed transferee's or the Franchisee's sole expense, as the Franchisor may require;
- (k) the proposed transferee providing, to the satisfaction of the Franchisor, a business plan indicating that the proposed transferee possesses the required level of business experience and acumen necessary in the operation of a restaurant business using the System;
- (l) the purchase price to be paid to the Franchisee by the proposed transferee, or if applicable, the proposed encumbrance and debt associated therewith is reasonable in the circumstances having regard to the debt and interest charges being acquired or already in existence;
- (m) the proposed transferee agreeing to cause or be done all such things as the Franchisor may require to ensure that the Franchised Business satisfies the then current image, standards and specifications established by the Franchisor for new franchises in the System whether or not such image, standards or specifications reflect a material change in the System in effect during the Initial Term or any renewal thereof. Without limiting the generality of the foregoing, the proposed transferee shall agree to make such capital expenditures as the Franchisor shall determine as being required in connection with the foregoing for the modernization and refurbishing of the Premises and all fixtures, furnishings, equipment and signs therein or thereon; and

- (n) the Franchisee or transferee paying the Franchisor's out of pocket expenses and paying to the Franchisor a transfer fee equal to seventy-five (75%) percent of the Franchisor's then existing Initial Fee charged to new franchisees.

The refusal of the Franchisor to consent to the proposed Transfer based upon the non-compliance with any of the foregoing conditions shall not be deemed to be an unreasonable withholding of such consent. The Franchisor's consent to a Transfer shall not operate to release the Franchisee from any liability under this agreement.

### **15.3 Right of First Refusal**

Without in any way derogating from the Franchisor's right to reject a proposed Transfer pursuant to subarticle 15.1 above, if at any time or times during the term of this agreement, including any renewal thereof, the Franchisee obtains a bona fide offer (the "**Offer**") to acquire the whole or any part of his interest in the Franchised Business, which the Franchisee wishes to accept, the Franchisee shall promptly give written notice thereof to the Franchisor together with a true copy of the Offer. Upon receipt of such notice and Offer, the Franchisor shall have the option of purchasing the property forming the subject matter thereof upon the same terms and conditions as those set out in the Offer except that:

- (a) there shall be deducted from the purchase price the amount of any commissions, fee or transfer fee that would otherwise have been payable to the Franchisor, any broker, agent or other intermediary in connection with the Transfer;
- (b) the Franchisor shall have the right to substitute cash for any other form of consideration specified in the Offer and to pay in full the entire purchase price at the time of closing.

The Franchisor may exercise its option at any time within thirty (30) days after receipt of the said notice by giving written notice to the Franchisee. If the Franchisor declines to exercise such option and if such Transfer is approved by the Franchisor, the Franchisee shall be at liberty to complete the Transfer to such third party transferee in accordance with the Offer, provided that, notwithstanding the terms of the Offer, such transaction must be completed within thirty (30) days of the date on which the Franchisor notifies the Franchisee of its approval of such transaction. If the transaction is not completed within thirty (30) days, the foregoing provisions of this subarticle 15.3 shall apply again in respect of the proposed Transfer and so on from time to time;

In addition to the Offer to be given by the Franchisee to the Franchisor together with the notice described in subarticle 15.3 above, the Franchisee shall provide the Franchisor with:

- (a) Information relating to the business reputation and qualifications to carry on the Franchised Business of the proposed transferee;
- (b) any credit information the Franchisee may have as to the financial ability and stability of the proposed transferee, including, if the proposed transferee is an individual, his personal net worth statement and if the proposed transferee is a corporation, partnership, or other entity, its latest financial statements.

### **15.4 Sale of Shares or Other Interest in the Franchisee**

In the event the Franchisee is a corporation or partnership:

- (a) then the respective transfer, sale, assignment, pledge, mortgage or hypothecation of any shares or interest, or any change in the composition of partners, whether by operation of law, pursuant to an order of a Court under applicable family law legislation, or otherwise, or any amalgamation which results or could result in the change of control, within the meaning of the *Income Tax Act (Canada)*, of the Franchisee, as applicable, shall be

deemed to be a Transfer of this Agreement and shall be subject to all of the provisions, terms and conditions precedent specified in this article 15, which shall apply mutatis mutandis;

- (b) the Franchisee will, upon the Franchisor's request from time to time, deliver to the Franchisor a certificate certifying as to the then current shareholders, directors, officers, members, or partners, as the case may be of the Franchisee;
- (c) the Franchisee will cause the share certificates representing share ownership in the case of a corporation or the documents of title representing an ownership interest in the case of a partnership or other entity, to have typed or written thereon a legend stating that such shares or documents of title are subject to this franchise agreement among the Franchisor, the Franchisee and the Guarantor, that the said franchise agreement contains restrictions on the sale, assignment, transfer, mortgage, pledge, hypothecation, donation, encumbrancing or other dealings with the said shares or documents of title, and that notice of the said agreement is thereby given.

#### **15.5 Assignment By the Franchisor**

A sale, transfer or assignment by the Franchisor of its interest in the System or the Proprietary Marks or any parts thereof, and/or in the sale, transfer or assignment by the Franchisor of this agreement or any interest therein, may be completed without the consent of the Franchisee. To the extent that the purchaser or assignee shall assume the covenants and obligations of the Franchisor under this agreement, the Franchisor shall thereupon and without further agreement, be freed and relieved of all liability with respect to such covenants and obligations. The Franchisee acknowledges that nothing in this Agreement shall prevent the Franchisor from granting security over any of its assets, including the Marks and any other intellectual property, on terms required by any secured party from time to time, and the Franchisee further acknowledges that such any such secured party or any agents acting on behalf of such secured party shall not have any obligations to the Franchisee by reasons only of such security interest.

### **16. DEATH OR INCAPACITATION**

#### **16.1 Death or Incapacitation**

Upon the death or permanent disability of the Franchisee or the controlling shareholder or partner or partners of the Franchisee as the case may be, if such person has at the date of such death or permanent disability a spouse or any adult children surviving, the following shall apply:

- (a) if the surviving spouse and/or adult child desire and are, in the reasonable opinion of the Franchisor, capable of carrying on the Franchised Business, the said spouse and/or adult child shall have the right to continue, to operate the Franchised Business provided that they shall directly covenant and agree with the Franchisor to be bound by the terms and conditions of this agreement and any other agreements made between the Franchisor and the Franchisee;
- (b) if the surviving spouse and/or an adult child do not desire or are not, in the reasonable opinion of the Franchisor, capable of carrying on the Franchised Business, or cannot devote their full time and attention to the Franchised Business or if the Franchisee does not have a spouse or adult child surviving, the Franchisor shall have the right, such right to be exercised by the Franchisor giving written notice to the Franchisee or to the Franchisee's estate within ninety (90) days of the date of the Franchisee's death or death of the controlling shareholder(s) or partner(s) of the Franchisee or the date upon which the Franchisee's permanent disability arises or the permanent disability of the controlling shareholder(s) or partner(s) of the Franchisee arises, to purchase all or any part of the

assets of the Franchisee used in the operation of the Franchised Business for a purchase price equal to the "asset value" of the Franchisee's assets calculated in accordance with the provisions of subarticle 16.2 below, less all proper business liabilities assumed by the Franchisor as at the date the said purchase is completed. To satisfy the aforesaid purchase price, the Franchisor shall pay the difference between the said "asset value" and the amount of the liabilities assumed by it, on the date of the completion of the purchase by way of cash or certified cheque.

## **16.2 Valuation**

For the purposes of this article 16, "asset value" shall be determined as follows:

- (a) "inventory" shall be valued at the Franchisee's actual cost; provided that, if in its sole opinion, the Franchisor believes any portion of the inventory is stale-dated, damaged or not saleable, the Franchisor shall not be required to purchase such portion;
- (b) "fixtures, equipment and furniture" shall be valued at an amount equal to the "net depreciated book value" of each such item as such term is defined in subarticle 17.4(b) below;
- (c) "goodwill" shall be valued at an amount equal to the average of the Franchisee's annual after-tax earnings for the three (3) fully completed fiscal years immediately preceding the date of death or permanent disability of the Franchisee or the controlling shareholder(s) or partner(s) of the Franchisee; provided that, if the Franchisee shall have conducted business for less than the said three (3) year period but for at least one (1) fully completed fiscal period, goodwill shall be valued at an amount equal to the Franchisee's average annual after-tax earnings for such lesser period. If the Franchisee has conducted business for less than one (1) fully completed fiscal period, no value shall be attributed to goodwill. In calculating such after-tax earnings, appropriate adjustments shall be made for reasonable management salaries.

Any other assets (except for any leasehold interest) purchased by the Franchisor hereunder shall be valued at the lesser of their depreciated value as shown in the financial records of the Franchisee, or the actual cost to the Franchisee. No value shall be attributed to any interest in the lease or other instruments pursuant to which the Franchisee occupied the Premises. Any purchase pursuant to the provisions of this article 16 shall be completed within one hundred and twenty (120) days of the date of death or permanent disability of the Franchisee or its controlling shareholder(s) or partner(s), or at such other time as may be mutually agreed upon by the Franchisor and the Franchisee or the appropriate estate personal representatives.

## **16.3 Deemed Permanently Disabled**

For the purposes of this article 16, the Franchisee or any controlling shareholder(s) or partner(s) as the case may be shall be deemed to have a "permanent disability" if the usual participation of the Franchisee or any controlling shareholder(s) or partner(s), as the case may be, in the Franchised Business is for any reason curtailed for a cumulative period of one hundred and eighty (180) days during the term of this agreement, including renewals.

## **17. TERMINATION**

### **17.1 Events of Termination**

The Franchisor shall have the right to terminate this agreement and the rights granted hereunder (provided however that articles 9 and 14, shall continue in full force and effect for the periods



therein specified), without prejudice to the enforcement of any other legal right or remedy, immediately upon giving written notice of such termination upon the happening of any of the following events:

- (a) if in the Franchisor's opinion, acting reasonably, the Franchisee's participation in the Franchisor's initial training program pursuant to subarticle 5.1 hereof discloses the Franchisee's designated trainees inability to adequately manage and operate the Franchised Business. In the event of such termination, the Franchisor shall refund to the Franchisee, one-half (1/2) of the Initial Fee which shall be the only amount(s) to be refunded or paid by the Franchisor to the Franchisee. Provided that as a condition of any such refund the Franchisee shall have first delivered to the Franchisor a full and final release of the Franchisor, its directors and officers, their affiliates and the directors and officers thereof from all obligations under this agreement of any such persons, in a form satisfactory to the Franchisor, and to the extent permitted by applicable law, excepting any claims under an applicable franchise law statute (if any) that are not permitted to be waived or released under that statute;
- (b) if default shall be made in the due and punctual payment of any amount payable under this agreement, or to any affiliate of the Franchisor, or any of the Franchisee's suppliers or creditors, when and as same shall become due and payable, and such default shall continue for a period of seven (7) days after written notice thereof has been given to the Franchisee;
- (c) if the Franchisee or the Franchised Business is in default of any governmental laws or regulations or any directives or guidelines from the Franchisor pertaining to health and safety standards in the operation of the Franchised Business and the Franchisee fails to remedy such default within twenty-four (24) hours after written notice thereof has been given to the Franchisee;
- (d) if the Franchisee shall breach any other of the terms or conditions of this agreement or any other agreement or undertaking entered into between the Franchisor and the Franchisee and such breach shall continue for a period of ten (10) days after written notice thereof has been given to the Franchisee;
- (e) if default shall be made in the due and punctual payment of any amount payable under this agreement, or the Franchisee shall breach any of the other terms or conditions of this agreement, four (4) times in any twenty-four (24) consecutive month period, even if such defaults shall have been cured;
- (f) if the Franchisee shall fail to observe or perform any of the rules, bulletins, directives or other notices set forth in the Manual and any such failure to observe or perform same shall continue for a period of ten (10) days after written notice thereof has been given to the Franchisee;
- (g) if the Franchisee shall fail to observe or perform any of the terms and conditions of the Lease other instruments under which the Franchisee has acquired the right to occupy the Premises, or if the Lease expires or is terminated for any reason whatsoever;
- (h) if the Franchisee fails to develop the Premises in accordance with the terms and conditions hereof, including without limitation, if the Franchisee fails to use approved architects, contractors, subcontractors or other professionals in the development of the Premises;

- (i) if the Franchisee fails to conduct business in, at or from the Premises for a period of five (5) consecutive days without the prior written consent of the Franchisor or if the Premises are used by any party other than such as are properly entitled to use same;
- (j) if the Franchisee ceases or threatens to cease to carry on business, or takes or threatens to take any action to liquidate its assets, or stops making payments in the usual course of business;
- (k) if either the Franchisee or the Guarantor makes or purports to make a general assignment for the benefit of creditors;
- (l) if either the Franchisee or the Guarantor makes or purports to make a bulk sale of their assets;
- (m) if either the Franchisee or the Guarantor shall institute any proceeding under any statute or otherwise relating to insolvency or bankruptcy, or should any proceeding under any such statute or otherwise be instituted against the Franchisee or the Guarantor;
- (n) if a custodian, receiver, manager or any other person with like powers shall be appointed to take charge of all or any part of the Franchisee's or Guarantor's undertaking, business, property or assets;
- (o) if any lessor or encumbrancer or any other person, corporation or entity lawfully entitled, shall take possession of any of the undertaking, business, property or assets of either the Franchisee or the Guarantor;
- (p) if either the Franchisee or the Guarantor shall commit or suffer any default under any contract of conditional sale, mortgage or other security instrument;
- (q) if an order shall be made or a resolution passed for the winding up or liquidation of either the Franchisee or the Guarantor;
- (r) if either the Franchisee or the Guarantor passes or purports to pass, or takes or purports to take any corporate proceedings to enable it to take proceedings for its dissolution, liquidation or amalgamation;
- (s) if either the Franchisee or the Guarantor shall lose its charter by expiration, forfeiture or otherwise;
- (t) if any proceedings with respect to either the Franchisee or the Guarantor are commenced under the *Companies Creditors Arrangement Act (Canada)*.
- (u) if a distress or execution against any of the undertaking, business, property or assets of either the Franchisee or the Guarantor shall not be discharged, varied or stayed within twenty (20) days after the entry thereof or within such time period as action must be taken in order to discharge, vary or stay the distress or execution, whichever shall be the earlier;
- (v) if final judgment for the payment of money in any amount in excess of \$2,500 shall be rendered by any court of competent jurisdiction against either the Franchisee or the Guarantor and such judgment shall not be discharged, varied or execution thereof stayed within twenty (20) days after entry thereof or within such time period as action must be taken in order to discharge, vary or stay execution of the judgment, whichever shall be the earlier;

- (w) if the Franchisee or any agent or representative of the Franchisee:
  - (i) fails to submit any report required to be furnished to the Franchisor pursuant hereto within three (3) days of the date such report is due;
  - (ii) understates Gross Sales by more than three (3%) percent on such report;
- (x) if the Franchisee distorts any material information pertaining to the Franchised Business, or fails to maintain its records in a manner which permits a determination of Gross Sales, unless the Franchisee proves to the satisfaction of the Franchisor that it had no knowledge of such distortion;
- (y) subject to the provisions of article 16 hereof, if the Franchisee shall die or otherwise become permanently disabled and the Franchisee's or the Guarantor's spouse or an adult child does not desire or is not capable to continue to operate the Franchised Business as provided in accordance with the provisions of the said article 16 or if the Franchisee shall not have a spouse or adult child; or
- (z) if the Franchisee shall fail to observe or perform any of the terms and conditions of any license or other permit under which the Franchisee has acquired the right to operate the Franchised Business at the Premises.

The Franchisee shall permit the Franchisor, its affiliates, and their respective agents to enter upon the Premises without liability for trespass or other tort, for the purpose of ascertaining whether or not a default by the Franchisee exists under this agreement. If an inspection reveals any subsisting default of this agreement, the Franchisee shall remedy such default according to the terms of this agreement, or as otherwise communicated to the Franchisee by written notice from the Franchisor. If the Franchisee fails to remedy any such default, the Franchisor may, without prejudice to its other rights or remedies under this agreement, at its option, but without obligation to do so, enter the Premises, and itself remedy such default, and bill the Franchisee for all costs and expenses reasonably incurred in doing so. In the exercise of its rights under this section the Franchisor agrees that it shall act reasonably and the Franchisee agrees that it shall co-operate with the Franchisor in every respect.

## **17.2 Effect of Termination**

Upon the expiration, termination or non-renewal of this agreement for any reason whatsoever, the following shall apply:

- (a) The Franchisee shall, immediately upon the Franchisor's request (in order that the Franchisor may protect the Proprietary Marks and the Franchisor's other franchisees), permit the Franchisor or its representatives to enter the Premises and, at the Franchisor's option, and at the Franchisee's cost, to cure any default by the Franchisee, to operate the Franchised Business for the Franchisee's or the Franchisor's account or to secure the Franchisee's complete and timely compliance with the other obligations set forth in this agreement. Provided that the foregoing provisions of this subarticle 17.2(a) shall also apply upon the happening of any of the events listed in subarticle 17.1, and prior to and regardless of any actual or purported termination of this agreement, or delivery of a notice pursuant to subarticle 17.1, by the Franchisor.
- (b) The Franchisee shall pay to the Franchisor, within seven (7) days after the effective date of termination, expiration or non-renewal, all royalties, advertising fees and other charges then due and unpaid by the Franchisee including, but not limited to the Franchisor's costs and expenses in re-entering the Premises and in completing the acts specified in this subarticle 17.2;

- (c) The Franchisee shall immediately discontinue the operation of the Franchised Business, use of the System and the use of the Proprietary Marks and other proprietary rights licensed under this agreement, and similar names and marks, or any other designations or marks associating the Franchisee with the Franchisor or the System. The Franchisee shall cease displaying and using all signs, stationery, letterheads, packaging, forms, containers, manuals, bulletins, instruction sheets, printed matter, advertising and other physical objects used from time to time in connection with the System or containing or bearing any of the Proprietary Marks or other names, marks or designations, and shall not thereafter operate or do business under any name or in any manner in violation of subarticle 11.2 above or that might tend to give the general public the impression that it is associated with the Franchisor or the System or that it is operating a business similar to a restaurant business using the System, or that it previously conducted its business under the Proprietary Marks;
- (d) The Franchisee shall, at the Franchisor's election, vacate the Premises. Whether or not the Franchisee retains possession of the Premises, the Franchisee shall promptly and, at its expense, make such modifications to the interior and/or exterior decor of the Premises as the Franchisor shall require to remove all identification as a restaurant using the System and/or Proprietary Marks;
- (e) The Franchisee shall promptly execute such documents or take such actions as may be necessary to abandon the Franchisee's use of any fictitious business name containing any of the Proprietary Marks adopted by the Franchisee and to remove (in respect of the next publication), at the Franchisor's request, the Franchisee's listing from the yellow pages, all other telephone directories and all other trade or business directories, and to assign to the Franchisor or any other party designated by the Franchisor all of the Franchisee's telephone numbers, domain names, email addresses, and listings in connection with the Franchised Business;
- (f) Within three (3) days after the effective date of expiration, termination or non-renewal, the Franchisee shall return to the Franchisor all copies of the Manual, all other confidential material provided to the Franchisee by the Franchisor and all other materials required to be returned in accordance with this agreement or the Manual; and
- (g) Notwithstanding the expiration, termination or non-renewal of this agreement, the Franchisee and the Guarantor shall not be released from any of their continuing obligations hereunder, nor any obligations under any Lease, including without any limitation, any amounts due and payable to the Franchisor, its affiliates, or any suppliers, nor any confidentiality and non-competition covenants, or any other obligations or covenants in any of the foregoing, which by their nature, continue to apply after expiration, termination or non-renewal.

### **17.3 Rights of the Franchisor**

Upon the expiration, termination or non-renewal of this agreement for any reason whatsoever, save and except in the event of a purchase pursuant to the provisions of article 16 of this agreement, the Franchisor shall have the right, but not the obligation, such right to be exercised by notice in writing delivered to the Franchisee within thirty (30) days of the date of expiration, termination or non-renewal of this agreement for any reason whatsoever, to purchase from the Franchisee all or any portion of the Products located on the Premises or otherwise held by the Franchisee for the purposes of sale or distribution at the Premises, and/or all or any part of the fixtures, equipment, furniture or other assets located on, in or at the Premises or otherwise used in connection with the Franchised Business.

#### **17.4 Purchase of Assets**

The purchase price payable by the Franchisor to the Franchisee for any assets purchased by the Franchisor under subarticle 17.3 shall be determined as follows:

- (a) for each of the Products so purchased, the Franchisor shall pay an amount equal to the cost (less freight or other shipping charges) thereof to the Franchisee;
- (b) for each fixture, or item of equipment or furniture or other asset so purchased, the Franchisor shall pay an amount equal to the net depreciated book value of each such fixture, item of equipment or furniture or other asset. In calculating "net depreciated book value", all fixtures, equipment, furniture or other assets shall be deemed to have been depreciated at the maximum amount of depreciation allowed in accordance with the provisions of the *Income Tax Act (Canada)*. In no event, shall any amount be payable under this subarticle 17.3 for "goodwill" or "going concern value"; and
- (c) the Franchisor shall deliver to the Franchisee a statement prepared by the Franchisor's accountants setting forth the basis upon which the purchase price has been calculated. Such statement shall be conclusive and binding upon all parties. The purchase price shall be paid in cash at the closing of the purchase transaction, which shall take place no later than thirty (30) days after receipt by the Franchisee of the Franchisor's notice pursuant to subarticle 17.3 above, at which time the Franchisee shall: (1) deliver all documents and instruments necessary to transfer good and merchantable title to the assets purchased, to the Franchisor or its nominee, free and clear of all liens and encumbrances; and (2) transfer or assign to the Franchisor, or its nominee, all licenses or permits, utilized by the Franchisee in the conduct of the Franchised Business which may be assigned or transferred. The Franchisee shall, prior to closing, comply with any applicable bulk sales legislation or other rules or legislation governing the sale of an enterprise. The Franchisor shall have the right to set off against and reduce the purchase price by any and all amounts owed by the Franchisee to the Franchisor or any of its affiliates or for encumbrances not discharged.

#### **17.5 Additional Remedies**

The Franchisee expressly consents and agrees that, in addition to any other remedies the Franchisor may have, at law or under this agreement, including the right to sue for damages, the Franchisor may obtain an injunction and/or appointment of a receiver which term includes a receiver and manager of the Franchised Business to terminate or prevent the continuation of any existing default, or to prevent the occurrence of any threatened default by the Franchisee of this agreement. Further, upon the happening of any of the events listed in section 17.1, and prior to and regardless of any actual or purported termination of this agreement, or delivery of a notice by the Franchisor pursuant to section 17.1, the Franchisor, or its representatives may enter the Premises and, at the Franchisor's option and the Franchisee's cost, cure any default by the Franchisee, operate the Franchised Business for the Franchisee's account or secure the Franchisee's complete and timely compliance with the other obligations set forth in this agreement.

#### **17.6 Survival of Covenants**

Notwithstanding the expiration, termination or non-renewal of this agreement for any reason whatsoever, all covenants and agreements to be performed and/or observed by the Franchisee and/or the Guarantor under this agreement or which by their nature survive the expiration, termination or non-renewal of this agreement, including without limitation, those set out in articles 9, 14.2, 0, 16, 17.2, 17.3, 17.4, 17.5 and 18 hereof shall survive any such expiration, termination or non-renewal

### **17.7 Failure to Act Not to Affect Rights**

The failure of the Franchisor to exercise any rights or remedies to which it is entitled upon the happening of any of the events referred to in subarticle 17.1 hereof, shall not be deemed to be a waiver of or otherwise affect, impair or prevent the Franchisor from exercising any rights or remedies to which it may be entitled, arising either from the happening of any such event, or as a result of the subsequent happening of the same or any other event or events provided for in subarticle 17.1 above. The acceptance by the Franchisor of any amount payable by or for the account of the Franchisee under this agreement after the happening of any event provided for in subarticle 17.1 above, shall not be deemed to be a waiver by the Franchisor of any rights and remedies to which it may be entitled, regardless of the Franchisor's knowledge of the happening of such preceding event at the time of acceptance of such payment. No waiver of the happening of any event under subarticle 17.1 above, shall be deemed to be waived by the Franchisor unless such waiver shall be in writing.

## **18. GUARANTOR'S COVENANTS**

### **18.1 Guarantee and Indemnity**

In consideration of the Franchisor entering into this agreement with the Franchisee and in consideration of the sum of two dollars (\$2.00) and other good and valuable consideration, (the receipt and sufficiency whereof is hereby acknowledged by the Guarantor) the Guarantor hereby unconditionally guarantees to the Franchisor that the Franchisee will pay all amounts to be paid to the Franchisor and any affiliate of the Franchisor, and otherwise observe and perform all terms and conditions to be so observed and performed, either in this agreement and/or in any agreement, and/or any Lease. If the Franchisee shall default in making any such payments or in the observance or performance of any such obligations, the Guarantor hereby covenants and agrees to pay to the Franchisor forthwith upon demand all amounts not so paid by the Franchisee and all damages that may arise in consequence of any such non-observance or non-performance.

Without in any way restricting or limiting the guarantee given by the Guarantor as set out above or any other rights and remedies to which the Franchisor may be entitled, the Guarantor hereby covenants and agrees to indemnify and save the Franchisor harmless against any and all liabilities, losses, suits, claims, demands, costs, fines and actions of any kind or nature whatsoever to which the Franchisor shall or may become liable for, or suffer, by reason of any breach, violation or non-performance by the Franchisee of any term or condition of this agreement, the Lease or any other agreement made between the Franchisee and the Franchisor.

With respect to the guarantee and indemnification provided for herein by the Guarantor, the Guarantor covenants and agrees to execute and deliver under separate instrument, at such time or times as the Franchisor may request, such form of guarantee and/or indemnity evidencing its obligations under the provisions of this article 18 as the Franchisor shall in its discretion determine.

### **18.2 Waiver of Right to Proceed**

In the enforcement of any of its rights against the Guarantor, the Franchisor may in its discretion proceed as if the Guarantor was the primary obligor under this agreement, the Lease, or any other agreement made between the Franchisee and the Franchisor. The Guarantor hereby waives any right to require the Franchisor to proceed against the Franchisee or to proceed against or to exhaust any security (if any) held from the Franchisee, or to pursue any other remedy whatsoever which may be available to the Franchisor before proceeding against the Guarantor.

### **18.3 Any Dealings Binding on Guarantor**

No dealings of whatsoever kind between the Franchisor and the Franchisee and/or any party from whom the right to occupy the Premises has been obtained and/or any other persons as the

Franchisor may see fit, whether with or without notice to the Guarantor, shall exonerate, release, discharge or in any way reduce the obligations of the Guarantor in whole or in part, and in particular, and without limiting the generality of the foregoing, the Franchisor may modify or amend this agreement or the Lease, grant any indulgence, release, postponement or extension of time, waive any term or condition of this agreement or the Lease or any obligation of the Franchisee, take or release any securities or other guarantees for the performance by the Franchisee of its obligations and otherwise deal with the Franchisee and/or any party from whom the right to occupy the Premises has been obtained and/or any other persons as the Franchisor may see fit without affecting, lessening or limiting in any way the liability of the Guarantor. The Guarantor hereby expressly waives notice of all or any default of the Franchisee.

#### **18.4 Settlement Binding on Guarantor**

Any settlement made between the Franchisor and/or the Franchisee and/or any party from whom the right to occupy the Premises has been obtained and/or any other persons as the Franchisor may see fit to deal with, or any determination made pursuant to this agreement or the Lease which is expressed to be binding upon the Franchisee, shall be binding upon the Guarantor.

#### **18.5 Bankruptcy of the Franchisee**

Notwithstanding any assignment for the general benefit of creditors or any bankruptcy or any other act of insolvency by the Franchisee and notwithstanding any rejection, disaffirmation or disclaimer of this agreement (including its agreement and covenant under this article 18 and/or the Lease), the Guarantor shall continue to be fully liable hereunder.

#### **18.6 Guarantor's Covenants Binding**

Without in any way limiting the generality of any other article of this agreement, the covenants and agreement of the Guarantor contained in this article 18 shall enure to the benefit of and be binding upon the Guarantor and the heirs, executors, administrators, successors and assigns of the Guarantor.

#### **18.7 Guarantor to be Bound**

The Guarantor acknowledges reviewing all of the provisions of this agreement and agrees to be bound by all of the provisions hereof insofar as applicable to him, including without limitation, the provisions of articles 9 and 14 which, by his execution of this agreement, he covenants and agrees to abide by and be bound by.

### **19. SECURITY TO THE FRANCHISOR**

To secure payment and performance of any and all obligations from time to time owing by the Franchisee to the Franchisor, including payment of any amount owing by the Franchisee to the Franchisor in respect of goods and services from time to time purchased by the Franchisee, the Franchisee and the Guarantor covenant and agree to provide from time to time, on request by the Franchisor, a security interest or interests by a security agreement, substantially in the form attached hereto as Schedule "D" in such of the inventory, equipment, leasehold improvements and other assets of the Franchised Business and in such amount or amounts and upon such terms as the Franchisor, in its absolute discretion, determines advisable. Failure to provide such security within ten (10) days following the receipt by the Franchisee or Guarantor of a written request therefor, specifying the nature and extent of the security required, shall be deemed to be a default under this agreement.

### **20. ACKNOWLEDGEMENTS**

#### **20.1 Independent Investigation**

The Franchisee and the Guarantor acknowledge that they have conducted an independent investigation of the Franchised Business and recognize that the business venture contemplated by this agreement involves business risks and that its success will be largely dependent upon the ability of the Franchisee and the Guarantor as independent businessmen. The Franchisor expressly disclaims the making of and the Franchisee and the Guarantor acknowledge that they have not received any warranty or guarantee, expressed or implied, as to the potential volume, profits or success of the Franchised Business.

The Franchisee and the Guarantor acknowledge that they have received, have had ample time to read and have read this agreement and fully understand its provisions. The Franchisee and the Guarantor further acknowledge that they have had an adequate opportunity to be advised by legal counsel and accounting professionals of their own choosing regarding all pertinent aspects of this franchise, the purchase of the Franchised Business and the franchise relationship.

The Franchisor hereby expressly disclaims the making of, and the Franchisee and the Guarantor acknowledge that they have not received nor relied upon, any warranty or guarantee, express or implied, as to the revenues, profits or success of the business venture contemplated by this agreement or of the suitability of the proposed location for the Premises. The Franchisee and the Guarantor acknowledge that they have not received or relied on any representations about the Franchised Business by the Franchisor, its affiliates, or their officers, directors, employees or agents, that are contrary to the terms herein, and further represents and warrants to the Franchisor that they have made no misrepresentations in obtaining the license herein granted, including with respect to the information contained in its franchise application, if furnished to the Franchisor.

## **20.2 Entire Agreement**

This agreement and the documents incorporated by reference constitute the entire agreement between the parties and supersedes all previous agreements and understandings between the parties in any way relating to the subject matter hereof.

## **21. GENERAL PROVISIONS**

### **21.1 Overdue Amounts**

All royalty and advertising contributions, all amounts due for products and services purchased by the Franchisee from time to time from the Franchisor or its affiliates and any other amounts owed to the Franchisor or its affiliates by the Franchisee pursuant to this agreement or otherwise shall bear interest after the due date at the Interest Rate, calculated and payable weekly, not in advance, both before and after default, expiration, termination or non-renewal of this agreement for any reason whatsoever, with interest on overdue interest at the aforesaid rate. The acceptance of any interest payment shall not be construed as a waiver by the Franchisor of its rights in respect of the default giving rise to such payment and shall be without prejudice to the Franchisor's right to terminate this agreement in respect of such default.

### **21.2 Indemnification of the Franchisor**

The Franchisee and the Guarantee hereby agree, during and after the Initial Term, including during any renewal term thereof, to indemnify and save the Franchisor and its affiliates and their directors, shareholders, officers, employees and agents harmless from any and all liabilities, losses, suits, claims, demands, costs, fines and actions of any kind or nature whatsoever to which they shall or may become liable for, or suffer by reason of any breach, violation or non-performance on the part of the Franchisee or any of its agents, servants or employees of any term or condition of this agreement and from all claims, damages, suits, costs or rights of any persons, firms or corporations arising from the operation of the Franchised Business.



### **21.3 Legal Fees**

In the event the Franchisor or the Guarantor shall be made a party to any litigation commenced by or against the Franchisee, then the Franchisee and the Guarantor shall indemnify and save the Franchisor harmless against any losses, damages or claims whatsoever arising therefrom and shall pay all costs and expenses including reasonable legal fees, accountants and expert witness fees, costs of investigation and travel and living expenses incurred or paid by the Franchisor in connection with such litigation. Further, if it is established that the Franchisee has breached any of the terms and conditions of this agreement, the Franchisee hereby agrees to pay all costs and expenses including legal fees that may be incurred or paid by the Franchisor in enforcing the Franchisor's rights and remedies under this agreement.

### **21.4 No Liability**

The Franchisor shall not be responsible or otherwise liable for any injury, loss, or damage resulting from, occasioned to or suffered by any person or persons or to any property because of any products sold or services provided by it to the Franchisee.

### **21.5 Legal Relationship**

The parties hereto hereby acknowledge and agree, that, except as expressly provided in this agreement, each is an independent contractor, that no party shall be considered to be the agent, representative, master or servant of any other party hereto for any purpose whatsoever, and that no party has any authority to enter into any contract, assume any obligations or to give any warranties or representations on behalf of any other party hereto. **Furthermore, and without limitation to the foregoing, the Franchisor is not (and shall have no responsibility or liability as) an employer, co-employer or otherwise of or to any of the Franchisee's employees, contractors or others who may work for or at the Franchised Business.** Nothing in this agreement shall be construed to create a relationship of partners, joint venturers, fiduciaries, or any other similar relationship among the parties.

### **21.6 Joint and Severable**

If two or more individuals, corporations, partnerships or other entities (or any combination of two or more thereof) shall sign or be subject to the terms and conditions of this agreement as the Franchisee or as a Guarantor, the liability of each of them under this agreement shall be deemed to be joint and several.

### **21.7 Severability**

If for any reason whatsoever, any term or condition of this agreement or the application thereof to any party or circumstance shall, to any extent be invalid or unenforceable, all other terms and conditions of this agreement and/or the application of such terms and conditions to parties or circumstances, other than those as to which it is held invalid or unenforceable, shall not be affected thereby and each term and condition of this agreement shall be separately valid and enforceable to the fullest extent permitted by law.

### **21.8 Franchisee May Not Withhold Payments Due the Franchisor**

The Franchisee agrees that he will not, on grounds of the alleged non-performance by the Franchisor of its obligations hereunder, withhold payment of any royalty or other amounts due to the Franchisor or its affiliates, whether on account of goods purchased by the Franchisee or otherwise.

### **21.9 Notice**

All notices, consents, approvals, statements, authorizations, documents, or other communications (collectively "**Notices**") required or permitted to be given hereunder shall be in writing, and shall be delivered personally or mailed by registered mail, postage prepaid, to the said parties at their respective addresses set forth hereunder, namely:

To the Franchisor at:                   XYZ Inc.  
  [Address]

Attention: President

To the Franchisee at:                   the Premises

To the Guarantor at:                   the Premises

or at any such other address or addresses as may be given by any of them to the other in writing from time to time. Such notices, if mailed, shall be deemed to have been given on the second business day (except Saturdays and Sundays) following such mailing, or, if delivered personally, shall be deemed to have been given on the day of delivery, if a business day, or if not a business day, on the business day next following the day of delivery; provided that if such notice shall have been mailed and if regular mail service shall be interrupted by strike or other irregularity before the deemed receipt of such Notice as aforesaid, then such Notice shall not be effective unless delivered.

#### **21.10 Headings, Article Numbers**

The headings, article numbers and table of contents appearing in this agreement or any schedule hereto are inserted for convenience of reference only and shall not in any way affect the construction or interpretation of this agreement.

#### **21.11 Applicable Laws**

This agreement shall be construed in accordance with and governed by the laws of the Province where the Franchised Business is located. To the extent permitted by applicable law, the parties agree that any action or other proceeding brought by Franchisee, the Guarantor or Franchisor, in any court, shall be brought in the City of Toronto, Ontario, or if required by applicable law, in such other city in the province in which the Franchised Business is located as the Franchisor shall designate. The Franchisee and the Guarantor hereby waive all questions of personal jurisdiction or venue for the purpose of carrying out this provision.

#### **21.12 Time of the Essence**

Time shall be of the essence of this agreement and of each and every part hereof.

#### **21.13 Waiver of Obligations**

The Franchisor may by written instrument unilaterally waive any obligation of or restriction upon the Franchisee under this agreement. No acceptance by the Franchisor of any payment by the Franchisee and no failure, refusal or neglect of the Franchisor to exercise any right under this agreement or to insist upon full compliance by the Franchisee with his obligations hereunder, including without limitation, any mandatory specification, standard or operating procedure, shall constitute a waiver of any provision of this agreement.

#### **21.14 Franchisee and Guarantor Defined, Use of Pronoun**

The words "Franchisee" and "Guarantor" whenever used in this agreement shall be deemed and taken to mean each and every person or party mentioned as a Franchisee or Guarantor herein, be the same one or more; and if there shall be more than one Franchisee or Guarantor, any notice, consent, approval, statement, authorization, document or other communication required or permitted to be given by the terms or conditions of this agreement may be given by or to any one thereof, and shall have the same force and effect as if given by or to all thereof. The use of the neuter or male or female pronoun to refer to the Franchisee and/or the Guarantor may be an individual (male or female), a

partnership, a corporation or another entity or a group of two or more individuals, partnerships, corporations or other entities. The necessary grammatical changes required to make the provisions of this agreement apply in the plural sense, where there is more than one Franchisee or Guarantor and to either individuals (male or female) partnerships, corporations or other entities, shall in all instances be assumed in each case. The words "hereof", "herein", "hereunder" and similar expressions used in any article or subarticle of this agreement relate to the whole of this agreement (including any Schedules attached hereto) and not to that article or subarticle only, unless otherwise expressly provided for or the context clearly indicates to the contrary.

#### **21.15 Lawful Attorney**

Notwithstanding anything herein contained, if the Franchisee or any Guarantor does not execute and deliver to the Franchisor any documents or other instruments which it is so required to execute and deliver pursuant to this agreement within the time period or periods so specified herein, the Franchisee and the Guarantor does hereby irrevocably appoint the Franchisor as the Franchisee's lawful attorney with full power and authority to execute and deliver in the name of the Franchisee and the Guarantor any such document or instruments and to do all things as may be required from time to time to comply with the provisions pursuant to which the power of attorney is being utilized, and the Franchisee and the Guarantor hereby agrees to ratify and confirm all such acts of the Franchisor as its lawful attorney and to indemnify and save the Franchisor harmless from all claims, losses, or damages in so doing. The Franchisee and the Guarantor hereby declares that the powers of attorney hereby granted may be exercised during any subsequent legal incapacity on his part.

#### **21.16 Default Cumulative**

In the event that the Franchisee or the Guarantor, either directly or through another franchisee owned in whole or in part, directly or indirectly, by the Franchisee or the Guarantor, acquires the right and franchise to operate another or other businesses using the System or any of the Other Brands, any default by the Franchisee, the Guarantor, or other franchisee owned in whole or in part, directly or indirectly, by the Franchisee or the Guarantor, in the performance or observance of any of the terms and conditions under any one agreement governing the aforesaid right and franchise shall be deemed to be an event of default under all other agreements pursuant to which the Franchisee, the Guarantor, or other aforesaid franchisee, operates such a business or businesses using the System or any of the Other Brands.

#### **21.17 Set-Off by the Franchisor**

Notwithstanding anything contained in this agreement, upon the failure of the Franchisee to pay to the Franchisor as and when due, any amounts of money provided for herein, the Franchisor shall have the right at its election, to deduct any and all such amounts remaining unpaid from any monies or credits held by the Franchisor for the account of the Franchisee.

#### **21.18 Further Assurances**

Each of the parties hereto hereby covenants and agrees to execute and deliver such further and other agreements, assurances, undertakings, acknowledgements or documents, cause such meetings to be held, resolutions passed and by-laws enacted, exercise their vote and influence and do and perform and cause to be done and performed any further and other acts and things as may be necessary or desirable in order to give full effect to this agreement and every part hereof.

#### **21.19 Binding Agreement**

Subject to the restrictions on assignment herein contained, this agreement shall enure to the benefit of and be binding upon the parties hereto and their respective heirs, executors, administrators, successors and assigns.

#### **21.20 When Agreement Binding on the Franchisor**

This agreement is not effective until signed by a corporate officer of the Franchisor. No field representative or salesman is authorized to execute this agreement on behalf of the Franchisor. The Franchisee is advised not to incur any expense or obligation with respect to the proposed Franchised Business until the Franchisee has received a fully executed copy of this agreement from the Franchisor.

#### **21.21 Rights of the Franchisor are Cumulative**

The rights of the Franchisor hereunder are cumulative and no exercise or enforcement by the Franchisor of any right or remedy hereunder shall preclude the exercise or enforcement by the Franchisor of any other right or remedy hereunder or which the Franchisor is otherwise entitled by law to enforce.

#### **21.22 Force Majeure**

In the event that any party hereto is delayed or hindered in the performance of any act required herein by reason of strike, lock-outs, labour troubles, inability to procure materials, failure of power, restrictive governmental laws or regulations, riots, insurrection, war or other reasons of a like nature not the fault of such party, then performance of such act shall be excused for the period of the delay and the period for performance of any such act shall be extended for a period equivalent to the period of such delay, up to a maximum of three (3) months. The provisions of this subarticle 21.22 shall not operate to excuse the Franchisee from the prompt payment of any fee or other payment due the Franchisor pursuant to the provisions of this agreement.

#### **21.23 Receipt of Disclosure**

The following section applies only in the event this agreement shall have effect within a province or territory requiring compliance with pre-sale franchise disclosure law:

The Franchisee and the Guarantor acknowledge that each has received as one document at one time, either personally or by registered mail, a copy of the form of this agreement, the schedules hereto, and the applicable complete franchise disclosure document, not less than fourteen (14) days prior to the earlier of: (i) the date on which this agreement or any other agreement relating thereto was executed, and (ii) the payment of any consideration by or on behalf of the Franchisee relating to this agreement, and the franchise associated therewith (except, where applicable, any deposit permitted under applicable law).

#### **21.24 Language**

Both parties have requested that the present agreement and all documents relating thereto be drafted in the English language. Les parties aux présentes ont exigé que la présente convention et tout document afférent soient rédigés en langue anglaise.

IN WITNESS WHEREOF the parties hereto have executed this agreement as of the day and year first above written.

**[Signature Page to Follow]**

SIGNED, SEALED AND DELIVERED  
in the presence of

**XYZ INC.**

Per: \_\_\_\_\_ c/s

A.S.O.

●[NAME OF FRANCHISEE]

Per: \_\_\_\_\_ c/s

A.S.O.

Witness

\_\_\_\_\_l/s

Guarantor

Witness

\_\_\_\_\_l/s

Guarantor

SCHEDULE "A"

PRODUCTS (Recitals):

**[CHECK ONE, TWO OR THREE]**


Franchisee's Initial:

--

Franchisor's Initial:

--

PREMISES (Subarticle 1.18):

**MUNICIPAL OR STREET  
ADDRESS**

**CITY, PROVINCE**

**UNIT OR LOT NUMBER, IF  
APPLICABLE**

PROPRIETARY MARKS (Subarticle 1.20):

**[CHECK ONE, TWO OR ALL]**

**MARK**

**APPLICATION  
NUMBER**

**REGISTRATION  
NUMBER**

**MARKS**

--

--

--

Franchisee's Initial:

--

Franchisor's Initial:

--

SYSTEM (Subarticle 1.21):

**[CHECK ONE, TWO OR ALL]**


Franchisee's Initial:

--

Franchisor's Initial:

--

TERRITORY (Subarticle 1.22):

As outlined in red on the map attached to and forming part of this Schedule "A".

INITIAL FEE (Subarticle 3.1): [CHOOSE 30K FOR ONE, 50K FOR TWO, AND 60K FOR ALL]

- |                          |                                     |
|--------------------------|-------------------------------------|
| <input type="checkbox"/> | THIRTY THOUSAND DOLLARS (\$30,000). |
| <input type="checkbox"/> | FIFTY THOUSAND DOLLARS (\$50,000).  |
| <input type="checkbox"/> | SIXTY THOUSAND DOLLARS (\$60,000).  |

Franchisee's Initial:

--

Franchisor's Initial:

--

ROYALTY (Subarticle 3.2):

Six percent (6%) of Gross Sales.

INITIAL TERM (Subarticle 4.1):

The tenth (10th) anniversary of the commencement of the Lease.

LOCAL ADVERTISING (Subarticle 10.1)

One percent (1%) of Gross Sales.

ADVERTISING FUND (Subarticle 10.2)

Two percent (2%) of Gross Sales.

RESTRICTED PRODUCTS (Subarticle 14.2)

[CHECK ONE, TWO OR ALL]


Franchisee's Initial:

--

Franchisor's Initial:

--

**SCHEDULE "A" – CONTINUED (MAP PAGE)**



- |                    |   |
|--------------------|---|
| Northern Boundary: | the south side of the northern boundary (ie: street(s)) outlined in red on the map below. |
| Southern Boundary: | the north side of the southern boundary (ie: street(s)) outlined in red on the map below. |
| Western Boundary:  | the east side of the western boundary (ie: street(s)) outlined in red on the map below.   |
| Eastern Boundary:  | the west side of the eastern boundary (ie: street(s)) outlined in red on the map below.   |



## **SCHEDULE “B”**

### **SUBLEASE**

**SCHEDULE "C"**  
**THREE PARTY AGREEMENT**

**SCHEDULE "D"**  
**GENERAL SECURITY AGREEMENT**