

September 18, 2015

Changing Workplaces Review
Employment Labour and Corporate Policy Branch
Ministry of Labour
400 University Ave., 12th Floor
Toronto, Ontario M7A 1T7

Via Email: CWR.SpecialAdvisors@ontario.ca


Re: Consultation Paper: The Changing Workplaces Review

Dear Sirs:

The Canadian Franchise Association (CFA) submits this letter in response to the May 2015 consultation paper on the Changing Workplaces Review.

The CFA welcomes this opportunity to make its submission to the Ontario Government. 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 continues to be invited to participate in this review.

Respectfully yours,



Lorraine R. McLachlan
President and Chief Executive Officer

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

Submission to: Changing Workplaces Review

September 18, 2015



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Introduction

The Canadian Franchise Association (CFA) makes this submission for consideration and review by the Changing Workplaces Review. The process and outcome of this review is considered to be a matter of utmost importance to the CFA and its franchise system members, and we ask that we be invited to participate in this consultation at all stages. If the Special Advisors have any questions or require clarification on any of the contents of this document, please contact our office.

The CFA would also like to take this opportunity to request a meeting to discuss a number of issues of priority to the CFA and its membership, which are mostly, but not entirely, outlined in this document. We would appreciate an opportunity to meet in the near future to discuss key policy issues that affect the franchising industry and consequential employment of Ontarians.

About the Canadian Franchise Association (CFA)

The Canadian Franchise Association was founded in 1967 and, for almost 50 years, has acted as the authoritative voice for franchising in Canada. We work with all levels of government to promote the value of franchising and development of industry made solutions to problems affecting the franchise industry. With over 600 corporate members nation-wide, the CFA represents many of Canada's best and lesser known franchise brands and over 40,000 franchisees. The CFA promotes excellence in franchising and educates Canadians about franchising, specific franchise opportunities and proper due diligence, through its websites, events, programs and publications.

The importance of franchising and contribution to the Ontario and Canadian economies

Franchising is a great growth engine for the Canadian economy, creating new jobs every time a new franchise business opens as well as providing direct and indirect economic benefits to the community in which it operates. Successful franchisees tend to reinvest in opening multiple units, which generate more jobs and career opportunities for employees.

There are approximately 78,000 franchised businesses across Canada. The geographic scope and prevalence of franchising in Canada is one that is impressive – members are represented in nearly every community and province in Canada. Fully 88% of our members operate in Ontario.

Every time a franchise opens, it is a new business that creates new jobs. Close to 700,000 people are directly employed by the franchising industry in Canada, and when indirect employment is included, well over 1 million jobs are supported. Franchising contributes approximately \$68 billion¹ to the Canadian economy annually, with community-level direct and indirect impact every time a franchise opens in a neighbourhood.

¹ CFA's "Franchising in Canada: A Primer", 2015

Franchise opportunities can be found in a wide range of industries – there are nearly 50 categories of franchise brands in the CFA membership, including: automotive repair, education, healthcare, cleaning services, movers, fitness, clothing, home painting and repair, and many more. Although the common association may be with restaurants – over 60% of franchise brands can be found in non-restaurant sectors and industries.

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- 78,000 franchised businesses in Canada
 - \$68 billion annual contribution to the Canadian economy
 - Over 1 million direct and indirect jobs supported
 - 88% of CFA Members operate in Ontario

Source: CFA's "Franchising in Canada: A Primer", 2015

The nature and importance of the franchisor/franchisee relationship

Franchising provides an opportunity for those who want to invest their money and time to develop an independent business operating within an existing brand and business system, where the franchisee has the support and knowledge of a franchisor who has developed a product or service and a system of marketing that product or service. The relationship is governed by a franchise agreement, which is a sophisticated license that permits use of the franchisor's trademarks and business systems, in exchange for payment by the franchisee for the right to use these items. In other words, franchising provides an opportunity for entrepreneurs to be in business for themselves, but not by themselves.

As was articulated by Strathy J (as he then was) in the case of *Fairview Donuts v Tim Hortons*: (Fairview Donut Inc. v. The TDL Group Corp. (Tim Hortons), 2012 ONSC 1252, affirmed 2012 ONCA 867, leave to appeal to the SCC dismissed 2013 CanLII 26760 (SCC)

The acquisition of a franchise can provide an independent business person with a number of benefits. These include:

- a) access to a well-recognized brand that immediately brings customers into the store due to goodwill association with the brand;
- b) a comprehensive business system with a proven track record;
- c) sophisticated and extensive business controls and accounting systems;
- d) a high quality, consistent and dependable product;
- e) the ability to provide customers with affordable prices in a highly competitive industry;
- f) extensive market research, which enables franchisees to remain competitive in a constantly changing market;

- g) national marketing, which promotes new products; and
- h) access to ongoing support and assistance from the franchisor.

By becoming a franchisee, an entrepreneur gains access to a successful and well-known brand, as well as a scalable and repeatable system for delivering consistent products or services that have already found favour with customers. The advantages to a franchisee of joining a franchised system are clear, but that does not take away from the fact that franchisees are small business owners.

Franchisors frequently provide training, tools (including, sometimes, software programs) and ongoing support to their franchisees. Compliance with the franchisor's brand standards and requirements are required in franchised systems to make sure that franchisees deliver products or services that consistently meet the established standards for quality and customer experience that the franchisor has established. It remains, however, that franchisees are independent business owners and their franchise locations are independently owned small businesses. Franchisees are solely responsible for the activities of their business and execute the day-to-day operations of the business. Even where, for instance, a franchisor might establish a minimum staffing requirement to provide a consistent customer experience, this doesn't change the fact that franchisees have responsibility for the essential terms and conditions of employment relationships, including employee hiring, training, promotions, discipline, terminations, benefits, health and safety, scheduling and payroll, payroll deductions and remittances, T4s and maintenance of employment records. Franchisors typically have no visibility into these issues.

Notwithstanding the support that franchisors provide, franchisees are risk-taking business people. In many cases they are not only managing their business and their employees and trying to grow their sales, they are also the book keeper and CFO, the head of marketing, the social media manager, the HR person and the compliance officer for all government regulations and paperwork. Just like any small business owner they wear many hats – this means long hours and incredible dedication to make their business grow.

Franchisees are independent business owners and their franchise locations are independently owned small businesses.

How franchising supports the Ontario government priorities

The mandate letter for the Minister of Labour includes this over-arching critical priority: “growing the economy and helping to create good jobs are fundamental to building more opportunity and security, now and in the future”. A specific goal outlined is that the Minister “protect workers while supporting business in today’s evolving economy” as well as “continue to strengthen protection for the most vulnerable workers in our province, while creating a level playing field for companies that follow the rules”. The mandate letter for the Minister of Economic Development, Employment and Infrastructure directs the Minister to: “build a strong, diversified and globally competitive economy that will provide

jobs, increase productivity and result in prosperity for all Ontarians. You will ensure our economic recovery is being felt in all areas of the province, and by all our people – including our youth”.

Aside from the opportunity to be a franchisee, the franchise business model is responsible for creating both low-skill and high-skill positions. Not all jobs in franchised units are entry-level and minimum wage – and for those offered that are, this is still a contribution for the prospective employee who is looking to build their work experience, such as students or New Canadians seeking experience and language skills. For many young Ontarians, their first job is at a franchised business, providing money for their education, professional socialization and workplace skills. Employment in a franchised business is a critical rung on the career ladder for many Ontarians. The CFA believes that all jobs are important to the Ontario economy.

Franchise employment opportunities can enable employees to build bridges to future life-long careers – for some it is their first job experience, and others grow into management careers in the same sector. There are examples of front-line franchise employees who have gone on to become franchise business owners themselves or even the CEO of the franchisor company. Everyone starts somewhere.

Franchisees are good employers, providing opportunity and high quality employment for Ontarians. There is no contrary evidence of which CFA is aware; and to suggest that employment in a franchised business is substandard demeans both franchisees and their employees. Franchisees, like all small business people, are job creators and are deserving of recognition and support. At the CFA, we are proud of our membership of both franchisors and franchisees. More importantly, we are proud of all the employment opportunities – both full time and part time – that have been created through the success of the franchise business model.

Franchisees are good employers, providing opportunity and high quality employment for Ontarians.

Our members are committed to bringing accessible opportunity into the communities in which they operate. In a climate where finding a good way to make a living may not be easily found on job search websites or other “traditional” methods – whether that be for youth, someone looking for a second career (by choice or not), or a more established, mature citizen who is ready to invest in themselves, employing themselves and others while they keep working to retirement or post-retirement age, or a New Canadian – franchising offers opportunities to Ontarians with a depth and breadth that is remarkable. Importantly, to suggest that employees of franchised business are somehow disadvantaged when compared to employees of non-franchised competitors is simply wrong and places an unfair burden on franchisees.

Function and importance of the entrepreneur – we all benefit

Entrepreneurs, whether that be the business owner who begins to develop their business into the franchise or the franchisee who decides to go into business for themselves with the support of the franchisor's brand, are people who create opportunity/jobs for themselves and others and stimulate activity in the economy because they are willing to take risks and put themselves and their investment on the line.

The franchisor developed a business model, brand and system from the ground up. They decided to expand their business via the franchising model because it offered improved growth opportunities and the rewards outweighed the risks. Many franchisors are themselves still small business, especially as they are first expanding, as not all are yet or may ever be large chains.

The franchisee also has an entrepreneurial spirit but not necessarily the idea or skill set to build a business from the ground up and make it successful. However, wanting to be their own boss and operate their own business by investing in themselves and others, they are motivated to take the risk of investment.

Franchising is less risky than opening another small business because the model, as it exists, has been proven and it works. This is because the franchisor's brand and system offer support and brand recognition, which is combined with the franchisee's capital, and willingness to follow the system. Franchisees typically have an easier time accessing financing because franchising is seen as a less-risky investment by the banks, and franchised businesses have a proven track record for performing better than other new small non-franchised businesses. This is the case because franchising is a consistent, trusted and effective way to do business. The model, as it is, works – and we all benefit.

Myth busting: franchising is small business, not big business

One of the most pervasive myths about franchising is that all franchisors are "Big Business" – faceless corporations with "deep pockets" who essentially run their franchises like satellite entities.

More accurately, franchisees are small business owners who have invested in local communities and support their local economies. Though a franchise system may be regional, national, or international in scope, the success and growth of a system is driven by its network of small businesses operated by a local franchisee in each market.

Franchising has allowed thousands of Ontarians to become investors and business owners. These are people who are passionate about building a business within their local communities. Franchising works because of their entrepreneurial spirit, willingness to risk their capital, their ability to understand the needs of customers in their communities and their ability to find and recruit the talented employees that make it all possible. With the backing of an established business system and marketing strategy, franchisees can compete with larger corporations by accessing sophisticated marketing and volume buying power for raw materials, equipment, advertising space and other business inputs.

Franchising has also allowed for the development of business ownership of a more diverse class of independent business people, allowing for higher percentage of women, visible minorities and new Canadian business owners. This diversity enriches Ontario. Franchisees provide evidence that anyone –

through hard work and the assumption of some financial risk – can own and operate their own business and prosper. This opportunity for diversity could not exist without a franchise structure. Franchising is not comprised of faceless managers hired by big business entities. Franchising is full of passionate, dynamic, caring, driven entrepreneurs running their small businesses and trying to make a living to support themselves and their family. They have chosen franchising as an avenue because it's a business model that provides them with this opportunity, and one that is not otherwise available in the marketplace.

The franchise model has been proven, it works – and we all benefit.

Threats to franchising and potential impact

There have been instances where recent provincial legislation has not recognized the fundamental and independent nature of the franchisor/franchisee relationship. Some of these legislative initiatives have sought to impose liability on franchisors for the actions of their independent franchisees. This concerns the CFA deeply, as it is a direct challenge to the nature of the franchisor/franchisee relationship being that of two independent parties coming together in a relationship governed by a license/contract negotiated by the parties, containing terms which are clear and certain, and creating a mutually agreeable allocation of risks and responsibilities.

The Changing Workplaces Review is charged with looking at proposed revisions to the Employment Standards Act, 2000 (“ESA”) and Labour Relations Act, 1995 (“LRA”). One such proposed revision that is of grave concern to the CFA would be to deem franchisors to be “joint” or “common” employers with their franchisees, by virtue of system standards that franchisors require to maintain consistency in trademark use, products, services and customer experience across a franchised system. Proponents of this reform claim that by establishing standards for the method of production, method of service, customer pricing or quality for products or services, that a franchisor is effectively capable of determining the essential terms and conditions of the employment relationship between a franchisee and its employees. The CFA disagrees completely with this assertion.

The fact of the matter is that the law as it exists today establishes a fair, long standing and relatively clear standard for a court or administrative tribunal to determine whether it is in the interest of the purpose of the legislation to declare common employment. While courts and administrative tribunals have, from time to time, determined that a franchisor and franchisee were common employers, these determinations were made on clear evidence that the franchisor had, in those circumstances, engaged in a significant measure of control over, or direct involvement in, important employment decisions concerning a franchisee’s employees. This is not typical of franchise relationships generally – but is evidence that the current standard already provides appropriate recourse where a franchisor behaves in a manner that is atypical of franchising generally, and is directly involved in setting the terms and conditions of employment between a franchisee and its employees. There is no evidence of any kind

advanced to indicate that the current standard is resulting in legal issues or is impairing the legislative intent of employment or labour law initiatives.

Adoption of a new standard – especially one that has the potential to automatically deem franchisors and franchisees to be common employers by virtue of the system standards and support that franchisors provide – would be dangerous and detrimental to franchising as a business model. It would create a great deal of uncertainty in an area of law which is currently certain and clear. It exposes both franchisors and franchisees to the risk that the obligations and responsibilities that they have mutually agreed to as independent contracting parties will be varied without their consent.

The proponents of this change might claim that a determination that all franchisors are common employers with their franchisees will assist in the enforcement of employment standards, occupational health and safety and human rights legislation. They may claim that franchisees are not able to satisfy judgements or penalties imposed as a result of statutory or employment law violations. These claims are based on false factual assertions and incorrect assumptions. To be clear, there is no evidence whatsoever that the employees of franchised businesses are somehow worse off or disadvantaged when compared to the employees of non-franchised businesses.

There is no evidence that franchisees violate employment legislation in a higher frequency than other small business owners. In fact, the CFA believes that the opposite is likely true – franchisees benefit from support and tools provided by franchisors, even while they remain exclusively responsible for complying with their legal obligations to their employees. Further, it is the franchisee and not the franchisor who is best positioned to ensure legal compliance with those obligations. Practically speaking, the franchisee is ‘on the ground’ and is in the best position to ensure that employment standards, labour laws, human rights, etc. are being complied with. If there was a workplace dispute or issue, the franchisee is the appropriate party to investigate and to resolve the issue.

There is absolutely no evidence that franchisees have failed to satisfy judgements or pay fines imposed due to violations of employment statutes or common law. The CFA is not aware of a single case in Ontario where the franchisee could not satisfy a judgement or fine.

The risks involved in any weakening of the current legal standard for a determination of joint or common employers – namely, direct involvement and/or control by the franchisor over the essential terms and conditions of employment – are significant and must not be underestimated:

- Franchisors will be faced with an impossible choice – either to provide less support and accept less consistency across a franchised system, or to start imposing significant new requirements in the employment relationship between franchisees and their employees. The first option risks losing the very essence of the franchise business model that has been so successful to date, while the latter takes away the independence of the franchisee to act like any other small business owner to recruit and retain a talented workforce.
- Increased oversight and franchisor involvement in the employment relationship between franchisees and their employees will increase operating costs for both franchisors and franchisees. This will impact franchisee profitability and could lead to decreased growth and business activity, higher prices and lower overall employment levels. Simply put, fewer entrepreneurs will be willing to invest in franchises as they will have more risk, and less

possibility of reward. This in turn will result in fewer not greater employment opportunities in the province.

- Franchisees will be treated differently than other small business owners. It is punitive and unfair to remove the discretion that franchisees currently enjoy to respond to the needs of their communities in establishing their employment practices and workplace conditions. Franchisees deserve to have their autonomy preserved without encroachment from the franchisor that would be inevitably necessitated were franchisors to be deemed to be common employers in all cases.
- Adding franchisors as common employers in all matters under the ESA and LRA is likely to complicate workplace disputes and litigation and lead to slower resolutions. Franchisors will become parties to all issues – in spite of the fact that in most cases franchisors will have no actual knowledge of, or involvement in, the workplace issue – and this will result in delays and increased investigative and litigation costs.
- This proposal is a disincentive for foreign investment in Ontario. It increases complexity, administrative costs and compliance requirements, while at the same time removing the clarity of the current legal standard. It introduces uncertainty in treatment and will be evidence to all investors that Ontario is not a place to invest capital. There is no jurisdiction that we are aware of that has adopted a presumption of joint employment currently being proposed by some in Ontario.
- The relationship between franchisees and their employees will be compromised. Forcing liability on franchisors does nothing to improve employment standards and labour relations, but removes the autonomy of franchisees to respond to the needs of their employees.
- If the franchisor and all franchisees are one employer, then all franchised units in one region could be considered a single employer for labour law purposes. This will result in labour law issues under current labour relations legislation. For example, all franchise employees in one region could be included in a single bargaining unit. This usurps the ability and responsibility of each business owner/franchisee to appropriately manage and treat their employees. It presumes incorrectly that all employees from many varied and different locations and employers will always prefer collective representation. The current legislation allows for individual choice of the employees of franchisees.
- The individuality of each location is demonstrated by the fact that individual franchisees have different wage rates, policies, benefits and economic strengths.

Recently in Ontario Bill 45, Making Healthier Choices Act, specifically singled out franchising in its proposed menu labelling law. The original form of the Bill defined franchisor as “owner and operator” of the restaurant, which is factually incorrect. The Canadian Franchise Association made a written submission and in-person presentation to the Standing Committee on General Government and succeeded in demonstrating to the committee that the wording in the Bill was incorrect. The

government put forth an amendment to the Bill and, when the legislation was passed, included language changes much more reflective of the true independent nature of the relationship between franchisor and franchisee.

Weakening the current legal standard for determination of joint or common employers will undermine, and has the potential to cut to the core of the very essence and nature of franchising. In this respect, it could fundamentally affect the decision to franchise, and to acquire a franchise. Imposing liability on franchisors for their franchisees' employment relationships will inevitably lead to a loss of franchisee autonomy. The system standards that franchisees must follow to ensure that their franchised business is operated in a manner consistent with the brand, trademarks and reputation of a particular franchise system must not be confused with the concept of "control" applied in employment and labour law. The imposition of system standards by a franchisor is: "... a necessary aspect of a franchised operation...to create the uniformity that is so vital to the success of the franchise as a whole" (*Fairview Donut v Tim Hortons*).

The franchisor should not be liable for the independent actions of the franchisees, when they do not have complete control over the operations of the franchised unit. The potential for risk and cost of liability of making them responsible fundamentally changes the balance in relationship within the franchise model and could result in its abandonment. Conversely, the franchisee should not be subject to interference from the franchisor or have their autonomy curtailed, which is likely to happen if the common employer standard is weakened and franchisors are compelled to minimize their risk exposure by involving themselves in their franchisees' employee relationships – something franchisors do not typically do today.

Franchising is a foundational aspect of the economy and, as we said, provides opportunity for the future. We ask that the reviewers recognize this as they are weighing the voices and input of other groups and trying to find the appropriate balance of protection and opportunity for Ontarians. Franchising has been resilient during economic turbulence but the integrity of the franchise system requires unique consideration.

Our purpose is to outline contributions, threats and the uniqueness of franchising for the purpose of recognizing and that it be noted and preserved so as to ensure its positive contribution in the future.

Any control exercised by the franchisor is: "a necessary aspect of a franchised operation...to create the uniformity that is so vital to the success of the franchise as a whole" (Fairview Donut v Tim Hortons)

Changes to the Employment Standards Act and Labour Relations Act

The CFA recognizes the importance of balancing protection for workers and support for businesses. Our members are good corporate citizens that want the best for their employees. Government regulation of businesses is necessary and important, even though there may be challenges from the stand point of the business owner, in terms of cost, clarity, purpose and sometimes even awareness. The Ontario government has made it a priority to look at “burden reduction” and CFA supports its work towards a regulatory environment that is reasonable and not needlessly detrimental to business prosperity.

The CFA advocates that changes to the ESA and LRA:

- Are clear, consistent, easy to follow and cause minimal administrative burden for employers.
- Provide protection for employees while ensuring flexibility to employers.
- Incentivize the creation of new full time and part time employment positions.

More specifically, the CFA recommends the following changes to the ESA and LRA:

- Change the definition of “employee” in the ESA to reflect the nature of the franchise business model and specifically exclude 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 not an employment relationship. A number of jurisdictions have made this clarification in their laws governing employment and labour relations – the CFA would be happy to provide examples and proposed wording.
- Maintain the sectoral exemptions in the ESA.
- Maintain the provisions in the LRA as they relate to how employees choose union representation, bargaining structure and bargaining rights.
- Maintain the current common law test for distinguishing between employer and independent contractors.

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.

Conclusion

The CFA appreciates the opportunity to share views and positions relative to the Changing Workplaces Review. We look forward to meeting with the Special Advisors to discuss these more fully as the important work under the Review continues.

Franchising and the franchise business model is an important part of the Ontario economy, providing current and future economic opportunities. We ask that the Special Advisors recognize this as they consider the input of other stakeholders and strive to strike the appropriate balance of protection and opportunity for employees and businesses. Franchising has been resilient during economic turbulence but the integrity of the franchise business model requires unique consideration. Our purpose in outlining the contributions, threats and uniqueness of franchising is to ensure that its significant role in employment and economic activity continues to grow.

Summary of key messages and recommendations

- Franchising contributes significantly to the economy of Ontario, forming an exceptional foundational aspect of the existing economy.
- Franchising is a business model that is by design, focused on growth – providing the opportunity for new investment by entrepreneurs, new jobs and new economic contributions to local economies.
- Franchising offers opportunities for employment for all Ontarians; youth as first employment, post-secondary graduate young adults, new Canadians, adults looking for second careers. Opportunities are available at different investment levels to enter the market as a franchisee, or to work within an existing franchise. These opportunities have no regional boundaries in Ontario, and employment opportunities exist in southern, western, eastern and central Ontario – urban or rural Ontario.
- Franchisees are independent small business owners. They are entrepreneurs who have gone into business for themselves, but not by themselves. They are good employers and should be recognized and supported.
- There should be no change to the current legal standard for determination of common employers. The current standard for determining when someone is an employee or independent contractor has proven itself to be fair and effective, while the proposed weakening of this standard is unlikely to bring any real benefits to workers, is costly and burdensome to business, and is highly detrimental to the entire franchise business model.
- The definition of employer should be modified and updated to reflect the prevalence of franchising in Ontario and to recognize that a franchise relationship is not an employment relationship.