



Michael H. Seid
Managing Director

94 Mohegan Drive
West Hartford, CT 06117-1403

860-523-4257

mseid@msaworldwide.com
www.msaworldwide.com

2 October 2016

Michael Mitchell, Special Advisor
John Murray, Special Advisor
Changing Workplaces Review
ELCPB 400 University Avenue
12th Floor
Toronto, Ontario M7A 1T7

Re: Proposed Amendment to:
Ontario's Labour Relations Act, 1995 and
Employment Standards Act, 2000

Dear Messrs. Mitchell and Murray:

I am the founder and Managing Director of MSA Worldwide. MSA is considered the leading advisory firm in franchising and include many clients with operations in Canada. Our primary clients range from small to mid-sized emerging companies that are either considering franchising for the first time to some of the world's largest franchised and non-franchised brands.

In 2011 I testified as an expert for Canada Post before the Canada Industrial Relations Board ("CIRB") on a claim by the Canadian Union of Postal Workers that Canada Post, as a franchisor, was a common employer of its franchisee's employees. After extensive discovery and testimony the CIRB found for Canada Post and upheld the legal fact and long recognized standard in Canada that franchisors and franchisees are separate and independent businesses that have distinct and meaningful operations. Because of the requirements under Canadian law and the necessities of a national postal system, it is interesting to note that even though the standards and controls included in the Canada Post franchise system exceed those generally found in many franchise systems, the CIRB rejected the notion of a common employer in the Canada Post franchise system. Canada Post and its franchisees were not found to be joint employers.

The definition of a franchise in Canada is materially consistent among the Provinces and generally defines franchising as a contractual relationship where in exchange for a payment the franchisor grants to the franchisee the right offer branded products and services under a system substantially associated with the franchisor's marks. The franchisor is required to exercise significant control or offer significant assistance to the franchisee in how the franchisee executes the licensed system in their independently owned and managed business in order to be considered a franchisor in Canada.

The business of a franchisor is to develop, license, support and expand an indirect system of distribution of its branded products and services. As required under Canadian law, it is the franchisor's responsibility to establish brand standards and enforce how the franchisee meets those brand standards sufficient to protect consumers. In contrast the business of a

franchisee is the independent management and operation of their business to the brand standards established by the franchisor in delivering those products and services to the public. The franchisor and franchisee are in distinctly different businesses and the franchisor in general has no contractual right to manage or supervise the day-to-day business affairs of its franchisees in meeting those standards. The franchisor and franchisee merely share a common brand. The enforcement rights of the franchisor under the relationship are limited to those agreed to in the agreement between the parties under Canadian law. Ultimately the franchisor's effective ability to control how the franchisee operates its business is to terminate non-compliant franchisees, a relatively high challenge to enforce under Canadian law.

Canada has a long-standing legal test to determine whether or not parties to an agreement are independent contractors. Under Canadian law the four-part test examines:

1. "Control" - The extent to which the organization retains control over the work performed by the service provider;
2. "Investment" - Whether the service provider owns the tools used by the provider in the performance of the work;
3. "Profit" - Whether the service provider has a chance of profit as a result of the performance of his or her work; and
4. "Loss" - Whether the service provider has a risk of loss as a result of the performance of his or her work.

Control: While having a contractual obligation to meet standards of brand promise established by the franchisor, the franchisee can adapt their own techniques in meeting those standards. The franchisee may elect to hire employees and other independent contractors to meet its contractual obligations regarding the operation and the day-to-day management of the business. The franchisee is wholly and solely responsible for the selection of its employees; the salary it pays; its bonus schemes; employee benefits; and, only the franchisee may discipline or terminate its employees.

The franchisor generally does not choose the franchisee's location but instead merely sets standards and reviews whether the site selected by the franchisee meet those brand standards, nor does the franchisor build or fit the location the franchisee has chosen.

The franchisor does not dictate the essential areas of business responsibility for the franchisee including but not limited to: corporate formation; debt or capital formation; banking relationships; engagement of professional advisors; selection of maintenance personnel or other independent contractors; hours of operation; obtaining local business licenses; payment of payroll and other taxes, the local advertising (other than approval for logo use), etc. The franchisor generally does not have the right or the authority under the agreement to manage or control the day-to-day business affairs of the franchisee's business and merely establishes brand standards for the franchisee to meet, based on the franchisee's own internal strategy and policies.

The terms of the relationship are defined and typically provided for in a written franchise agreement. Employees can generally be terminated at will, based on the unilateral determination of its employer (subject to timing, termination pay and other limitation or requirements that may be specified under the law). As governed by the franchise agreement,

the franchisor has no role in establishing or enforcing any of the independently selected human resource policies of the franchisee or in the management of its business under Canadian law.

The terms of the franchise and the rights and obligations of the franchisor and franchisee, both in-term and post term is specified in the written franchise agreement. The franchise agreement specifies the duration of the initial term and any successor or renewal terms provided; the fees paid by the franchisee to the franchisor; the rights of each party to terminate the relationship, either with or without cause; the rights to cure specified defaults; the right to use the franchisor's marks and system; and, other rights and obligations for both the franchisor and franchisee.

Investment: The franchisee has an equity stake in their business, which he/she obtains through the payment of fees to the franchisor and the execution of a contract so that they can obtain use of the franchisor's brand and business model; the development and construction of its location to brand standards; the purchase of furniture, fixtures and equipment; the purchase of inventory and supplies; the signage for the business; travel and living expenses during training; salaries for management and staff during the pre-opening period; payment of professional fees; payment of business licenses; other miscellaneous opening expenses; and, working capital required to fund the business until it is self sustaining. The franchisee is solely responsible for the necessary investment to open and begin the operation of their business.

Profit and Loss: The franchisee can earn income or suffer a loss based on his or her own performance. The franchisee is free to establish its payroll scheme including salary, benefits, bonus, vacation policy, termination pay, etc.; determine its level of marketing above any minimum contractual requirements including publication/type of vehicle used, frequency, etc.; and, all other costs in running the day-to-day operation of the business. While the franchisee is obligated to offer the products and services mandated by the franchisor to meet its brand standards, the franchisee is solely responsible for its own staff's performance in quality customer service; upselling by its staff; which products or services it markets; and, whether or not it includes additional ancillary services allowed by the franchisor. The franchisee is not paid a salary or guaranteed a minimum level of earnings and is free to increase its earnings or sustain a loss based upon his or her management of the business to brand standards.

I understand that a proposed change in the well-established independent business relationship between a franchisor and franchisee in Ontario to that of a joint-employer or common employer is currently under consideration. I am also aware that this change is based on concepts advanced by David Weil in his book *The Fissured Workplace*. Outside of labor unions and with limited support in academia and government, Dr. Weil's philosophical approach to how business should be conducted in the 21st Century has found relatively modest support. I know of no commercial enterprise in Canada or the United States that supports Dr. Weil's illogical approach to business in the 21st Century.

Dr. Weil's lament over the use of independent contractors and the emergence of the "gig" economy is similar to many theoretical writings by academics without any significant business experience. It ignores our global transition to a technological based economy that creates and distributes products and services differently than we did in the past. Its sole potential beneficiary are labor unions whose membership decline has been accelerating over the past several decades. Besides having a negative impact on businesses and the overall

economy, if adopted, Dr. Weil's views will cause significant damage to workers, consumers, capital formation, and the Provincial budget in Ontario, including increasing the cost of delivered social services.

As found, as we transitioned from an agrarian economy to a manufacturing economy at the turn of the 19th Century through the third quarter of the 20th Century, how business and individual worker met the reality of the new marketplace by necessity changed. We are now nearly 40 years into our latest transition into a service based and technological economy and business and labor are adapting to this latest reality.

It was never the intent in Canada for a licensor meeting legally mandated requirements of being a franchisor under Canadian law to be a common employer with its franchisees. Franchisors and franchisees would lose the upside benefits of the relationship and franchising in Ontario would become an unworkable business model. For franchisees, it would damage the investment they have made in their businesses and in order to maintain a reasonable return on their investment, there will be significant acceleration in the adoption of technological changes that will effectively reduce the need for labor to lower business risk. This change will be contrary to the rightful expectations of franchisees and their workers under the existing laws in Canada.

Dr. Weil is merely attempting to turn the clock back to a labor model that no longer matches the new economy in an attempt to salvage labor union's declining membership base. However, forcing an outdated mid 20th Century employee labor concept into a 21st Century technological and service based economy will serve to retard Canada's economic growth. Rather than increase opportunities for workers to advance into the new careers that will become available in the future, Dr. Weil's approach will limit worker's opportunity, retard business growth and depress the creation of first ladder positions potentially resulting in generational poverty that will mainly impact the young and disproportionately impact minority workers. If there is any beneficiary, for a time, it will be the labor unions. However, because of disruptive innovation and changing business practices even those benefits will be short lived and consumers, workers, business enterprises, capital creation and the overall economy of Canada will be left to pay the long term cost.

Dr. Weil's theory of indirect control and impact is illogical even when examined in the context of current well-established business practices. Under his approach, all manufactures, distributors and retailers will potentially be classified as joint employers. Consider that companies regularly set and enforce a host of socially beneficial standards on their suppliers including safety, security, confidentiality, child labor and other human resource practices advanced by the Canadian government. Under Dr. Weil's approach to labor, the mere retention of rights to cancel supply agreements for the violation of express standards the Canadian government supports and advances would potentially create a joint-employment relationship between manufacturers, distributors, and retailers. Under Dr. Weil's theory the retention of such potential controls would be sufficient to trigger a joint employment relationship because argumentatively retaining the right to cancel any supply agreement could potentially impact the job security and wages for the employees of the other downstream and upstream participants. This is dramatically different than the independent contractor standard historically used in Canada and would effectively eliminate the concept of independent contracting in Canada.

Michael Mitchell
John Murray
2 October 2016
Page 5 of 5

For these and other reasons, I am opposed to the redefinition of the independent contractor relationship as being considered in Ontario. In addition to distorting the historic and beneficial relationship between independent parties, it is an unworkable approach that will cause significant economic disruption and damage at many levels in the current service and technological economy.

Respectfully I request that you not adopt Dr. Weil's model of joint-employment and retain the historic standard that has worked well in Canada. If I can provide you with additional information, I am available should you wish to further discuss my views.

Respectfully,

A handwritten signature in black ink, appearing to be 'J. Murray'.