Changing Workplace Review Consultation

Special Advisors' Interim Report

Submitted to: Changing Workplaces Review: Special Advisors

Submitted by: Ontario Bar Association

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

Introduction

The Ontario Bar Association (the "OBA") appreciates the opportunity to comment on the Changing Workplaces Review Special Advisors' Interim Report (the "Interim Report"), which is seeking input on a range of issues and the options for change that are under consideration in light of the changing nature and trends of the modern workplace in today's economy.

The OBA

Established in 1907, the OBA is the largest legal advocacy organization in the province, representing more than 16,000 lawyers, judges, law professors and law students in Ontario. OBA members are on the frontlines of our justice system in every area of law and in every type of practice, and provide legal services to a broad range of clients in every region of the province. In addition to providing legal education for its members, the OBA is pleased to assist government with dozens of policy initiatives each year – in the interests of the public, the profession, and the administration of justice.

This submission was prepared by members of the OBA Franchise Law Section, which is comprised of approximately 130 lawyers who serve as legal counsel to franchisors and franchisees across the province, and have experience in a wide range of legal issues arising in the area of franchise law.

Comments

In line with the Special Advisors' mandate, the OBA Franchise Law Section's submission reflects our members' concern about the impact that potential changes to Ontario's labour relations and employment standards legislation may have on various aspects of franchise law, and on the delineation between franchisors and franchisees in other areas of law in this province. The OBA Franchise Law Section wants to ensure that the full legal consequences of removing the distinction between franchisors and franchisees for the purposes of employment standards enforcement and broader collective bargaining are being taken into account in the Changing Workplace Review process.

Under Canadian law, the relationship between franchisors and franchisees involves varying degrees of control by the franchisor over the franchisee's method of operation. This is essential for the purposes of the franchise model (i.e. maintaining uniformity throughout the chain) and for protecting the validity and integrity of the franchisor's trade-marks[1]. Under the *Trade-marks Act*, a franchisor must be able to demonstrate that it has direct or indirect control over the character or quality of the wares and services sold by a franchisee, as the failure to exercise control may lead

[1] *Trade-marks Act*, RSC 1985, c T-13, s.50.

to the trade-mark being expunged for non-distinctiveness.[2] Franchising involves finding a balance of control between the franchisor and the franchisee, who is generally an independent business person operating the franchise. Canadian courts and tribunals have routinely applied existing control-based tests to determine the circumstances in which the ostensible separation between franchisors and franchisees should be crossed for the purposes of determining contractual, statutory, and common law rights and obligations.

The OBA Franchise Law Section's comments are limited to an expression of caution regarding legislative efforts to treat franchisors and franchisees as related parties, or a single party, for the purposes of amending Ontario's legislation. There may be significant statutory and common law consequences to removing the distinction between franchisor and franchisee, and treating these franchise parties as joint employers of the franchisee's employees. For example:

- In an employment law context, the treatment of franchisors as joint employers could mean potential liability for franchisors under other legislation such as *Ontario's Workplace Safety Insurance Act, 1997* and the *Occupational Health and Safety Act*. Furthermore, this could potentially extend to liability under the province's human rights legislation.

- In the tax context, the treatment of franchisors as joint employers could mean potential liability under the federal *Income Tax Act* for employee taxes not withheld at source, as well as liability under other federal legislation for source deductions such as Employment Insurance and Canada Pension Plan premiums and contributions.

- Out-of-jurisdiction franchisors may end up subject to Ontario and Canadian tax liability as a result of ostensibly doing business in Ontario as a result of a finding of being a joint employer.

- The extension of liability for franchisee conduct to franchisors could also have an impact on the common law, including potential franchisor liability for tortious acts committed by franchisees. This could encompass areas such as personal injury, product liability, and other claims. This would, in turn, also potentially impact, in a negative way, franchisors' insurance coverage. Further, the extension of liability in the employment context could also lead to franchisor liability for breaches of contract committed by franchisees, including breaches of employment contracts between franchisees and their employees.

To the extent that the independent nature of franchisees is put into question via changes to Ontario's employment legislation, precautions must be taken to ensure that franchisees are not considered to be employees of franchisors. Such a classification would have a serious impact on franchise law in Ontario. The most prominent impact would be on the applicability of the *Arthur*

[2] Kelly Gill, Fox on Canadian Law of Trade-marks and Unfair Competition 4th Ed., loose-leaf (Toronto: Carswell: 2002), 15-26.

Wishart Act (Franchise Disclosure), 2000 (the "*Wishart Act*"). The *Wishart Act* specifically states that, "This Act does not apply to the following continuing commercial relationships or arrangements: 1. Employer-employee relationship." If franchisees are found to be employees of franchisors, they may lose the right to receive franchise disclosure under the *Wishart Act* or avail themselves of the various remedies under the legislation, including the ability to sue for inadequate disclosure and statutory misrepresentations.

If proposed changes are suggested to the *Employment Standards Act* or the *Labour Relations Act* resulting from the Changing Workplace Review process that alter or amend the existing obligations of franchisors and franchisees under these two statutes, the OBA Franchise Law Section strongly recommends consulting with stakeholders beyond the labour & employment fields, particularly other legal stakeholders, to ensure that there are no unintended consequences to such changes and that safeguards can be put into place to ensure that the changes are confined to the particular statutes in question. Legislative changes may be required to ensure that the amendments proposed in the Changing Workplaces Review process are properly confined and limited to the employment standards and labour relations contexts.

From their experiences, the members of the OBA Franchise Law Section are well aware of the problems franchisees and franchisors face whenever there is uncertainty regarding legal obligations imposed by statute. Those practicing in the franchise law area have spent the last decade and a half interpreting the *Wishart Act* and examining its impact on its stakeholders and clients. The importation of statutory joint employer obligations may have far-reaching consequences for the franchise sector in Ontario, and, as such, the OBA Franchise Law Section suggests proceeding with caution, including detailed consideration of these consequences, well before any legislative amendments are enacted.

Conclusion

The OBA appreciates the opportunity to provide its input to the Special Advisors' Interim Report, and hopes that these general concerns will assist the Special Advisors in this broad review of the significant changes in Ontario workplaces.