CHANGING WORKPLACES REVIEW FINAL REPORT – WHO MUST BARGAIN WITH FRANCHISE EMPLOYEES?

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Some potentially significant changes lie ahead for franchising in Ontario. On May 23, 2017, the Ontario Ministry of Labour's special advisors released their much-anticipated (and 419 page long) Final Report on their review of Ontario's labour and employment legislation. The purpose of the project, called "The Changing Workplaces Review", is to identify possible amendments to Ontario's laws to better protect workers while supporting business in today's changing economy.[1] This bulletin highlights the changes to franchising in Ontario that may result from the Final Report.

No Immediate Change to the "Related Employer" Definition

One of the issues the special advisors considered was whether to modify existing labour and employment legislation so that franchisors are more likely to be regarded as "joint" or "related" employers of their franchisees' employees. In their Interim Report released in July, 2016, the special advisors identified several options for revising both the *Employment Standards Act* (the "ESA") and the *Labour Relations Act* (the "LRA") in this regard. Those options included, among others, changing the definition of "related employers" in the ESA to make franchisors liable for the employment standards violations of their franchisees and creating a model for certification under the LRA that applies specifically to the franchise industry.

Those in favour of an expanded "related employer" concept submitted to the special advisors that, because franchisors have overall control of important items such as the brand, business model and many key aspects of how the business operates, it is appropriate to make franchisors responsible for complying with employment legislation jointly with their franchisees. Those stakeholders also advocated for expanded franchisor liability with respect to labour laws on the basis that, regardless of the level of control exercised by franchisors over their franchisees' operations, collective bargaining cannot be effective unless the real economic players in the enterprise are required to bargain together.

With respect to the related employer provision of the ESA, section 4 currently provides that companies may be treated as one employer if associated or related businesses are carried on by an employer and one or more others where the "intent or effect" of their doing so is to "defeat the intent or purpose" of the legislation. The

special advisors rejected calls for a wholesale revision to this provision to make franchisors responsible for the employment standards violations of their franchisees in all cases. Rather, the special advisors recommend amending section 4 of the ESA simply to remove the requirement for finding that the intent or effect of an arrangement be to "defeat the intent and purpose" of the ESA. In their view, the ESA should enable a related employer finding to be made once it is established that the activities or businesses are associated or related. This proposed change is not specific to the franchise industry.

Similarly, with respect to the related employer test in section 1(4) of the LRA, the special advisors have decided not to recommend any substantive changes. Whether a franchisor should be considered a related employer of its franchisee's employees under the LRA will continue to be determined on a case-by-case basis. Notably, the special advisors did not close the door on possible future amendments to the related employer test under the LRA, and suggested that it may be helpful to revisit the topic if related employer issues arise with greater frequency and a gap in case law and legislation emerges.

The fact that the special advisors do not recommend sweeping changes to the related employer definitions under the ESA and LRA is good news for franchisors. However, their Final Report does recommend dramatic changes to how employees of franchisees will collectively bargain if unionized. These changes, discussed below, could have significant implications for franchisors if ultimately implemented.

Changes to Franchise-Related Bargaining Model

Currently, the Ontario Labour Relations Board (the "Board") generally treats franchisees as independent employers – so, every franchise must be separately organized by unions and each location will have a collective agreement with the employees of that franchise. The Final Report notes that this is a "structural weakness" in the current legislation that effectively denies employees of franchisees the opportunity to bargain collectively in a meaningful fashion.

The key change recommended by the special advisors is that the Board be empowered to require bargaining units of different franchisees of the same franchisor to bargain together centrally with representatives of the franchisee employers in that area. In connection with this recommendation, the special advisors have also recommended the following:

- The Board may direct the terms of a collective agreement between a franchisee and a union to apply to a newly certified bargaining unit involving the same union and a different franchisee.
- In exercising its authority, the Board should consider whether proposed terms and bargaining structure contribute to the development of an effective collective bargaining relationship and serve the development of collective bargaining in the industry.
- The Board may consolidate locations owned by the same franchisee as a single bargaining unit. That

employer would also participate in central bargaining as a franchisee of the same franchisor.
- The Board may consolidate corporate stores owned by the franchisor as a single bargaining unit. If the same union centrally bargaining with the franchisees certified the franchisor, the bargaining with the franchisor would be part of the same central bargaining process.
- Any strike or ratification vote would involve the entire constituency of bargaining units and not the individual bargaining units.

If implemented, these recommendations would permit the Board to require certified or voluntarily recognized bargaining units of different franchisees of the same franchisor, and who are represented by the same union in the same geographic area, to bargain together centrally. Any such bargaining would be conducted with representatives of the franchisee employers in that area. Each franchisee would be bound by the resulting collective agreement and any strike or ratification vote would involve the entire constituency of bargaining units and not the individual bargaining units.

While individual franchisees of the same franchisor are separate businesses owned and operated by different people, the special advisors nonetheless found that it is good labour relations policy to treat franchisees of the same franchisor as a single employer for bargaining purposes. In reaching this conclusion, the Final Report noted that franchisees of the same franchisor market the same brand, sell the same products and operate in the same market, and under the same contracts and policy manuals of the same franchisor.

Takeaways for Franchise Businesses

The proposed new approach to bargaining gives support to the contentious notion that the franchisor is the "true" or "actual" employer of franchisee employees. This is despite the fact that franchisee business are in business for their own pursuit of success and profit, and exercise varying degrees of control and direction over employees and operations. It would therefore not be surprising if franchise businesses consider various approaches to minimize the impact of this change (and the Canadian Franchise Association has already taken the position that the Final Report unfairly singles out, negatively characterizes and targets franchising).

If implemented, the new bargaining model will likely be used as a recruiting tool for some unions. Even if union representation rights in franchise businesses are not expanded, there is certainly a risk that terms of employment will be ratcheted up to the best in market. Should these possible outcomes prove to be off the mark, the uncertainty which this creates for some businesses may raise concerns.

The Ontario government is expected to publicly comment soon on the 173 recommendations proposed in the Final Report. Whether the current government will implement some or all of the recommendations remain to be seen. We plan to provide ongoing updates on various topics, including potential implications for franchise business. This includes the bargaining change described above, as well as a host of other proposed

amendments to workplace law. At this stage, one point is abundantly clear: businesses will need to closely review their commercial and workplace relationships, and assess how best to operate and comply in the face of changing legislation and enforcement.

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[1] See our August, 2016, Bulletin entitled "From Franchisors to Joint Employer – Update on Potentially Increasing Liabilities of Franchisors for the Employees of their Franchisees" for more background on this issue.[ps2id id='1' target=''/]

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.