

# Primer: Common/Joint-Employer and the Changing Workplaces Review

## What is the Changing Workplaces Review?

Ontario is conducting a review of the changing nature of the workplace. Two Special Advisors have been appointed to conduct public consultations and to provide the Ontario Minister of Labour with a final written report of their recommendations.

The Changing Workplaces Review will consider the broader issues affecting the workplace and assess the adequacy of current workplace legislation: *Employment Standards Act, 2000*, (ESA) and the *Labour Relations Act, 1995* (LRA). The Special Advisors have been tasked to determine what changes, if any, should be made to the legislation in light of the changing nature of the workforce, the workplace, and the economy itself.

The Changing Workplaces Review is important to franchisors and franchisees because potential changes to the ESA and LRA may include changes which fundamentally alter the landscape for franchising in Ontario:

- Expanding the definition of “employer” to deem franchisors employers of their franchisee’s employees;
- Expanding the definition of “employee” to deem independent contractors as employees;
- Requiring benefits to be extended to part-time employees;
- Restricting flexibility in employee scheduling; and
- Changing how labour organizing and collective bargaining is done in Ontario.

Throughout this review, the Canadian Franchise Association (CFA) has been working with a Task Force composed of member volunteers to ensure that the franchising voice is effectively represented and that the Ontario government clearly understands your concerns with respect to the changes being considered. CFA provided a submission to the Special Advisors of the Changing Workplaces Review in September 2015 to highlight the important contribution franchising makes to Ontario’s economy and the employment of Ontarians. We stressed the importance of maintaining the franchisor-franchisee commercial business arrangement. We explained the importance of franchisees being free to employ Ontarians without being deemed to be a joint employer with their franchisor.

Our work continues and we will need your support as the review process continues this summer. The CFA will have an opportunity to make additional submissions to the Special Advisors prior to the final recommendations being made in the Fall of 2016. We welcome your input and would appreciate hearing your reactions to the interim report of the Special Advisors that we expect later this month.

## What is Franchising?

Franchising is small business, not big business.

Franchisees are small business owners who have invested in local communities and support their local economies. They are the owners and operators of their franchised business and operate in a competitive market with their independent and franchised peers.

The relationship they have to the franchisor (the brand) is governed by a franchise agreement, which is a sophisticated licence that provides the rights to use of the franchisor’s trademarks and business systems, in exchange for payment by the franchisee. By investing in a franchised business, they are choosing to go into business for themselves – but not “by themselves.”

This relationship can be simplified as a contractual relationship. The franchisee is the independently operated business. The franchisor is in the business of franchising.

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 invest their capital, their ability to understand and meet the needs of customers in their communities, and their ability to find and recruit the talented employees that make it all possible.

The support and systems provided by the franchisor empower Canadians to become independent business people. Thanks to franchising, many women, visible minorities and new Canadians have become business owners.

All franchisees have chosen franchising as an avenue because it’s a business model that provides them with this opportunity, which isn’t otherwise available in the marketplace.

## What are CFA’s concerns?

One of the revisions proposed by the Special Advisors that is of grave concern to the CFA is the deeming of franchisors to be “joint” or “common” employers with their franchisees. There is a misperception that because franchisors maintain consistent brand standards and may, in some instances, specify minimum staffing levels, employee uniforms and other standards that relate to how a franchisee staffs and operates the franchise, that franchisors exert a level of control that should automatically make them a “co-employer” of the franchisee’s employees. This concerns CFA deeply because it is a direct challenge to the nature of the franchisor/franchisee relationship – two independent parties coming together in a relationship governed by a contract, containing terms which are clearly defined.

The current law in Ontario already establishes a clear and effective test for determining whether two or more parties should be found to be joint or common employers. This test was not created with franchising specifically in mind, but it has operated effectively. In a few rare instances, a franchisor in Ontario has been found to be a joint or common employer as a result of the franchisor exerting a level of direct control over the acts of its franchisee. The CFA supports the existing standard, but the Special Advisors are receiving submissions from some who feel that the law should be changed to make all franchisors liable for their franchisees’ employees.

Adoption of a new standard would be dangerous and detrimental to franchising as a business model. It would create uncertainty in an area of law which is currently certain and clear. It exposes

both the franchisors and franchisees to the risk that the responsibilities to which they have contractually agreed will be changed without their consent.

One of the fundamental benefits of being a franchisee is receiving support and tools provided by the franchisor, while remaining exclusively responsible for the day-to-day operations of their own business. If the standard for joint or common employer is changed, franchisors will be forced to provide less support to their franchisees to avoid the risk of being deemed common employers. Diminished support to franchisees means losing the supportive nature of the franchise business model, which is a core benefit of franchising. Fewer entrepreneurs will be willing to invest in franchises, as they will encounter more risk and less reward.

On the other hand, increased oversight and involvement of the franchisor will increase operating costs for both the franchisor and franchisee. This could impact franchisee profitability. More importantly, it risks losing the independent nature of the franchise business model and takes away the independence of the franchisee to act like any other small business owner.

### Why is this a concern?

Franchisees will be treated differently than any other small business owner. It is punitive and unfair to remove the discretion that franchisees currently enjoy to operate their businesses. The franchise business model will be irreparably harmed, as it will not be attractive to invest in a business where the franchisee is effectively a middle manager with no autonomy and much less reward. Changing the legislation to target franchising will mean that franchised businesses are not competing on a level playing field with their independent peers.

The common employer change would also cause increased oversight and costs for both franchisors and franchisees. There would be significant tax increases, removing small business rates and exemptions, which would be a disincentive for both parties.

The proposal is a disincentive for foreign investment in Ontario, and Ontario would be the only province in Canada with this standard in law. Investors from other parts of Canada and the U.S. will be very cautious about investment and expansion in Ontario. There is no jurisdiction that we are aware of that has adopted a presumption of joint employment as is being considered in Ontario.

### The Solution

Instead of focusing on a lose-lose solution, the CFA suggests a win-win solution.

If the true nature of the relationship between the franchisor and franchisee is enshrined in legislation, then the franchisor can take a more active role in helping to educate and train the franchisee on how to comply with government regulation, including employment standards, without risk that they will be seen as exercising too much “control.”

There are examples of U.S. amendments to legislation that specifically protect franchising and the contractual relationship of franchisor and franchisee as two independent businesses that is so critical to franchising.

This way, the franchisor can provide education and support within reasonable boundaries, but also allow the franchisee (the employer and owner of the business) to continue to be responsible

for the legal and regulatory responsibilities of their business, just like any other small business owner.

### Importance of Franchising

The franchise business model started in the 1950s and 1960s. It is a young business model and current Ontario employment and labour legislation does not specifically address franchise relationships, despite the significant positive impact franchising has on employment in Ontario.

Franchising accounts for 78,000 franchised small business owners. 88% of CFA members have locations in Ontario, and create jobs. These jobs are in a wide variety of industries and include diverse roles for individuals at varying stages in their careers.

Every time a franchise opens, it 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 one million jobs are supported. Franchising contributes approximately \$68 billion to the Canadian economy annually.

Franchise opportunities can be found in a wide range of industries – there are nearly 50 categories of franchise brands in CFA membership, including: automotive repair, education, health care, cleaning services, fitness, and many more.

### Advantages of the Franchise Business Model

#### For franchisees:

- Operating a business that already has in place a proven concept, successful track record, and a recognized brand
- Autonomy over the operations of their business, including hiring decisions and other day-to-day processes
- Increased familiarity with franchised brands at financial institutions and other lenders who can assist when franchisees approach them about financing
- Initial and ongoing training and support from the franchisor
- Learning from the experience of the franchisor and other franchisees who have operated the same exact business

#### For franchisors:

- Benefit from partnering with independent business people in local markets who have invested in the system and have strong motivation to make their franchise location successful
- Achieve accelerated growth by expanding through franchisee investment
- Attain further market share by expanding points of sale
- Share in the revenue generated by the system through royalties collected from franchisees

### What solution does CFA propose?

The win-win solution we have suggested to the Advisors and the government is to distinguish in the *Employment Standards Act* the true relationship of the franchisor and franchisee in order to preserve the model of the franchised businesses. This enshrinement would help franchisors provide assistance and education to their franchisees to assist them in understanding their responsibilities under the *Employment Standards Act*. 🍁

For more information, contact **Samantha Sheppard**, Government Relations Specialist, at [ssheppard@cfa.ca](mailto:ssheppard@cfa.ca) or call 416-695-2896 ext. 230.