

Too Fully Baked: The Ontario Labour Relations Board Approves Application for Unionization of Canada Bread “Franchisees”

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A. INTRODUCTION

The hallmark of every franchise agreement, and indeed every franchisor/franchisee relationship, is that although the franchisee is required to follow the franchisor’s system of operating its business so that the product and the brand are the same, the franchisee acknowledges and agrees that it is not an agent or employee of the franchisor but is an independent contractor completely separate from the franchisor; most franchise agreements go on to state that the agreement shall not be construed so as to constitute the franchisee as a partner, joint venturer, agent, employee or representative of the franchisor for any purpose whatsoever (the foregoing is hereinafter generally referred to as the “**Independent Contractor Language**”).

The foregoing hallmark principle of franchise law, and the franchisor/franchisee relationship, was recently turned on its head as a result of five (5) applications for union certification under the *Labour Relations Act*, 1995, SO 1995, c1, as amended (the “**Labour Act**”) brought before the Ontario Labour Relations Board (the “**Board**”) by five units of delivery drivers (the “**Drivers**”) who delivered Canada Bread Company Limited (“**Canada Bread**”) products from Canada Bread depots. Each of the Drivers, as franchisee principals, had entered into a franchise agreement (collectively the “**Franchise Agreements**”) with Canada Bread, as franchisor.

The issue before the Board was whether the Drivers were “dependent contractors” as that term is defined under the *Labour Act* and therefore employees capable of unionization, notwithstanding the fact that they had signed Franchise Agreements which contained the Independent Contractor Language.

B. BACKGROUND AND FACTS

Canada Bread is a large manufacturer of packaged bread/bread products (the “**Products**”). The products are made at various bakeries and then shipped to distribution depots. At the depots each Driver accepts Products to be delivered, loads it into his or her delivery truck (or trucks), which trucks are owned and operated by the Drivers, and then delivers the Products to various retail customers (the “**Customers**”) along a route. As set forth above, Canada Bread utilizes a franchise system to engage its Drivers, each of whom is party to a Franchise Agreement (there were actually two different forms of franchise agreement but the differences are not relevant to the import of this decision).

In executing a Franchise Agreement, Canada Bread required that each Driver incorporate a company to act as “franchisee” (the “**Franchisee**”). The Franchise Agreement:

- a) detailed the Franchisee's Customers and the depot out of which those Customers will be serviced;
- b) required that the Driver, as "Principal", personally guarantee the corporate Franchisee's obligations to Canada Bread;
- c) contained language granting the Franchisee the right to sell the Products to the Customers;
- d) required the payment of an initial fee and continuing royalty fees to Canada Bread;
- e) required compliance with all of Canada Bread's rules and standards relating to how Drivers are to meet their service requirements to Customers, including those set forth in the Standards of Operations Manual;
- f) required the Driver to attend, and pay for, training; and
- g) the Customers serviced by the Drivers and the "Customer List" that is appended to the Franchise Agreement is confidential and proprietary to Canada Bread. In addition, the Franchise Agreements include extensive and comprehensive restrictive covenants on competition, both during the term of the franchise agreement and for a one year period thereafter.

The Driver is responsible for filling the Customer's shelves; in the case of large volume Customers this is done in accordance with the merchandising requirements, and at dates/times, established by the Customer and Canada Bread. Drivers order the Products they will need for subsequent deliveries through a hand-held computer, which is a device owned by Canada Bread.

Drivers purchase Products from Canada Bread at a wholesale price and then sell those same Products to Customers at a higher wholesale price, which higher wholesale price is fixed by Canada Bread for each Customer, and which depends on each Customer's negotiating power. A Driver's gross income is derived by the price differential. Except for the smallest Customers, payment for Products is made by the Customer directly to Canada Bread. In fact, Drivers were unable to attract new non-chain or small volume Customers because the lowest price the Driver could charge was higher than the retail price charged by larger chain store Customers (meaning it is always cheaper for the small volume Customer to buy Products from the large volume Customer rather than from the Driver).

Drivers decide how much of each Product to order for each Customer for each delivery day. However, Customers are allowed to return unsold Products for a full refund. If a Driver's returns exceed the overall allowance established by Canada Bread, the Driver is charged 50% of the price Canada Bread charges the Driver for each returned item.

Drivers are responsible for the payment of all income taxes and other levies that accrue to them as a result of their work. Canada Bread makes no withholdings or remittances. All Drivers

take advantage of at least some of the advantageous tax arrangements that follow from this relationship (such as taking certain permissible deductions from business income). Each Driver must as a condition of the franchise agreement maintain general liability insurance and provide for *Workplace Safety and Insurance Act* coverage. There were a number of other aspects of the relationship that were considered by the Board including a Driver's right to buy or sell Customers, the formation of an Advisory Council, the ability of a Driver to take time off, etc.

C. CONSIDERATIONS BY THE BOARD

In ascertaining whether the Drivers were employees capable of unionization, on the basis that they were "dependent contractors" or were independent contractors on the basis that they signed Franchise Agreements, the Board assessed the following factors.

1. *Economic Dependence & Control*

While acknowledging that the relationship between a franchisor and franchisee is typically asymmetrically tilted in the franchisor's favour because the franchisor has to ensure standardization across the franchise system in order to preserve the goodwill of the business, the Board found that the business arrangement between Canada Bread and the Drivers far exceeded the norms found in most franchise agreements in respect of the grant of territorial exclusivity, and proximity between franchisees. The Drivers were:

- a) not permitted to sell their services or Products freely to the market and in fact are precluded from selling Products on any meaningful scale to other potential customers; and
- b) are required to sell products to specified Customers at prices determined by Canada Bread and in fact are prohibited from rejecting Customers—at least those that Canada Bread identifies as national accounts.

2. *Faux Business Divide*

The Board then analyzed whether the franchised aspect of the business was sufficiently distinct from the franchisor's operation. In this regard, the Board could not make the distinction. The Board found that the Drivers were totally integrated into Canada Bread's business, and in fact the Drivers were the only method Canada Bread uses to deliver its Products to its retail Customers from its distribution depots. As such, the Board held that trying to define Canada Bread's operations as two discrete businesses is illusory.

3. *Absence of Work Specialization*

High work specialization militates against dependence. The Board conceded that the work performed by the Drivers was sophisticated; however, it concluded that there was an absence of specialization or esoteric skill which would mark the Drivers off as independent contractors. The short training period and evidence submitted by the Drivers assisted the Board in making this conclusion.

4. *Value in Territorial Routes*

One of the hallmarks of being an independent contractor is that, generally speaking, franchisees have the uninterrupted freedom to buy and sell facets of their franchised business to other franchisees. Drivers were in fact allowed to buy and sell their routes amongst one another without Canada Bread's involvement in the process. The Board found that this factor contradicted a finding that the Drivers were "dependent contractors".

D. DECISION

Under the *Labour Act* a "dependent contractor" is defined as follows:

"dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

Based on the criteria set forth above, the Board held that the Drivers were "dependent contractors" and could therefore vote in the certification applications. The Board did however exclude those Drivers who employed one or more full-time workers as helpers because those Drivers had assumed a managerial/employer role, and employers are expressly precluded from union certification under the *Labour Act*.

In its final analysis the Board stated that those with a vested interest in determining whether franchisees are in fact employees should consider the following hypothetical: if tomorrow the relationship changed such that formal employment contracts are executed, between franchisor and franchisee, how would the franchisee's work change? If the answer is that very little would change as a result of the employment contracts, then it may be the case that an employment relationship exists. That is the conclusion the Board reached when it held that, "the essential conditions of the [D]rivers' work is [sic] indistinguishable in any material sense from how directly employed persons would fulfill the same role."

E. LAST THOUGHTS

There has been much discussion, and concern within the franchise industry, over the last number of years about the independent nature of the relationship between franchisors and franchisees. Some of this concern was the result of legislation being proposed in Ontario which: a) deemed franchisors to be "joint employers" with their franchisees; and b) would have permitted unions to apply for certification of employees employed by different franchisee employers.

Although the import of this decision (which we understand is under appeal) might further the cause for concern within the franchise industry, the authors believe that this decision is based on its own unique set of facts. It is a rare franchise agreement which imposes such strict

conditions and limitations on its franchisees as in the present case. If there is a lesson to be learned, it is that control is a double edged sword. It may be beneficial from being able to exert control over the franchise system, but it might lead to third parties redefining the intended relationship.