

The Ontario Labour Relations Board Opens the Door to Franchisee Unionization in the *Canada Bread* Certification Case

Kate Byers, Frank Robinson, Derek Ronde, Kristin Taylor

October 13, 2017

The Ontario Labour Board has found that Canada Bread's drivers, who were principals of franchisee corporations that contracted with Canada Bread for the right to deliver products along designated routes, are dependent contractors and capable of being certified into bargaining units.

In *Canada Bread Company Limited*¹, the Ontario Labour Relations Board (OLRB) heard five applications for certification filed by locals of the International Brotherhood of Teamsters (the Union) for delivery drivers (Drivers) of Canada Bread Company Limited's (Canada Bread) products to retail resellers out of specific depots operated by Canada Bread. The OLRB had previously ordered certification votes, which were sealed pending the disposition of a dispute over the status of the Drivers.

The issue before the OLRB was whether the Drivers were dependant contractors, and therefore employees of Canada Bread under the *Labour Relations Act* and thus capable of being unionized, or whether they were principals of franchises that operated small businesses and thus incapable of being unionized. The decision will have ramifications for the franchise industry in Ontario.

The OLRB determined that the Drivers were dependent contractors, and therefore were Canada Bread employees. This finding was based on the application of a number of criteria, including the significant control exerted by Canada Bread over the Drivers, particularly with respect to pricing, access to customers, and integration into Canada Bread's business, which led to the conclusion that the work performed by the Drivers more closely resembled an employment arrangement than an independent contractor arrangement. The OLRB, however, did carve out an exception for Drivers who employed 'helpers' who allowed them to meaningfully expand the scope of their business, rather than just to allow the Driver to fulfil their baseline obligations to Canada Bread.

The decision can be found [here](#).

Takeaways For Franchisors

The impact of the *Canada Bread* decision is significant for franchisors who operate systems in Ontario that involve a distribution model with tight operational controls. Despite the existence of a contractual franchise

relationship, the OLRB may find that the ostensible franchisees are dependent contractors for the purposes of union certification, which could theoretically lead to increased willingness for courts to find liability in other legal contexts. This would be a dramatic change for the franchise industry in Ontario. At this juncture, it is entirely unclear how the province's labour relations regime would interact with the parties' statutory obligations under the Ontario's franchise disclosure regime and franchise law in general. Franchisors that believe they may be facing unionization issues should seek advice from their legal counsel.

There are a couple of key general takeaways for franchisors operating similar franchise systems to Canada Bread in Ontario that may wish to protect themselves from a similar OLRB application.

- The primary consideration in avoiding a finding that a franchisee is a dependent contractor is the degree of control exerted by the franchisor over the franchisee's business. In particular, franchisors should be concerned with their control over important aspects of the relationship such as pricing, the assignment of customers for servicing, the franchisee's meaningful ability to sell the products or services to an open market (versus being able to solicit new customers or reject existing ones assigned by the franchisor), and the franchisee's ultimate dependence on the franchisor to make its living. The latter consideration was particularly important in this case, given Drivers' reliance on routes and customer lists provided by Canada Bread. In order to avoid a similar finding, franchisors should ensure that they can demonstrate that their franchisees have the flexibility to exert control over their own businesses, particularly with respect to these considerations.
- Given the OLRB's finding on "helpers," franchisors may, where possible, want to ensure that their franchise systems allow and encourage franchisees to hire people to help expand their businesses – and not merely to make ends meet in the existing business. While the OLRB only exempted those Drivers who hired such employees, the rule it applied in doing so could plausibly be read to capture any franchisees who are permitted to hire such employees.

The Background: Characteristics of the Canada Bread Franchise System

Canada Bread is a large-scale manufacturer of baked goods. The goods are prepared at various bakeries and shipped to distribution depots where they are picked up by Drivers who deliver the products to retail customers, many of whom are predetermined by Canada Bread. Canada Bread's franchise system required Drivers to incorporate franchise corporations that are party to franchise agreements with Canada Bread. Individual Drivers are characterized as principals to the franchisee.

The OLRB undertook a detailed review of Canada Bread's franchise system and made the following observations and conclusions:

- Participating franchisees must (a) obtain approval from Canada Bread to either apply for or purchase a franchise, (b) pay initial and royalty fees, and (c) comply with rules and standards set out in various operations manuals. In return, they are permitted to distribute Canada Bread products to customers

Cassels

set out on a customer list attached to their franchise agreements. The customers and the customer lists are confidential and proprietary to Canada Bread.

- Canada Bread testified it adhered to the *Arthur Wishart Act (Franchise Disclosure)*, 2000, SO 2000, c. 3 (the AWA) in its dealings with its Drivers.
- New Drivers had to undertake a formal training program, paid for by a training fee. Once operational, Drivers relied on computers owned by Canada Bread to order their volumes.
- Drivers purchase products from Canada Bread at wholesale prices and resell them to retailers at a higher price. Drivers' income derives from the price differential between these amounts. Exchange of payment occurs directly between retailers and Canada Bread: Canada Bread bills the retailer, and then pays the Drivers the differential.
- Prices are fixed by Canada Bread, and cannot be varied by the Drivers. Canada Bread testified that it was open to having Drivers contact it to negotiate a price for specific customers, but offered no examples where that occurred. Drivers testified that the price control imposed by Canada Bread hampered its ability to attract new customers.
- While Drivers decide how much product to order for each customer for each delivery day, they are liable for unsold ordered product. Canada Bread provides Drivers with "suggested orders."² In some cases, customers made delivery arrangements directly with Drivers, but in other cases, they made them directly with Canada Bread.
- Drivers receive no vacation time, nor do they accumulate sick days. While they may set their own hours, their flexibility in doing so is constrained by the customers on their routes, and their delivery and merchandizing service requirements.
- Drivers and their helpers are expected to wear Canada Bread uniforms, purchased at their own expense.
- Drivers who acquire new, small retail customers must pay acquisition fees to Canada Bread, and when Canada Bread removes a customer from a Driver's route, it compensates them via a similarly calculated rate.
- Drivers cannot unilaterally add large volume grocery chain stores: such changes are the sole province of Canada Bread.
- Transfers among Drivers are private matters, but Canada Bread may unilaterally change routes by removing existing retailers and placing them on new routes, known as "alternative distribution methods" (ADMs). These changes could have significant effects on Drivers, which their testimony indicated would be negative.
- Drivers may engage 'helpers' as employees, either with fixed salaries with usual payroll deductions, or via contracts with corporations owned by the helper. Canada Bread has no involvement in these arrangements.
- Drivers are required to participate in biweekly performance reviews with territory managers, and in other, annual evaluations. Drivers regularly meet at depots with Canada Bread personnel to hear about developments in the franchise system.
- An Advisory Council of franchisees meets and provides advice which is non-binding, except with respect to notice being required for certain pricing changes.

- The Advisory Council is permitted due to the requirements of the AWA.

The Parties' Legal Arguments

The central focus of the parties' legal arguments was whether Drivers were independent businesses, or almost entirely dependent on Canada Bread for maintaining their business on an ongoing basis. Significant evidence dealt with the importance of entrepreneurship and business ownership to the Canada Bread franchise system.

The Drivers agreed that they could seek to increase sales by way of building new, or strengthening existing, customer relationships, but also indicated that their capacity to do so was limited due to strict price product controls. The Drivers agreed that they had an interest in other Drivers competently performing their obligations in order to retain reputation and the market value of their routes.

The Drivers submitted that Canada Bread had "significant and pervasive control" over them, as demonstrated by the exclusive supply arrangement, control over volume of products to be delivered and methods of servicing clients, control over access to customers and to delegation of customers, and regular monitoring of performance. They also pointed to the impact of Canada Bread's unilateral decisions to change routes on the market value of a franchise. They argued that it was clear that Drivers generally only work for, and are entirely dependent on, Canada Bread. They argued that the possibility for private sales of routes existed in a small and essentially "closed" market of a fixed number of existing Drivers, given that there were a fixed number of routes and route operators at any given time.

Canada Bread argued that the Drivers made substantial investments in their businesses and assumed significant risks of loss, and generally hired their own employees. It argued that the Drivers fully understood themselves to be the principals of franchise corporations bound to franchise agreements, which outline a business – not an employment – relationship. Drivers confirmed that they "owned" their own, separate businesses, but the OLRB placed little importance on that distinction.

Canada Bread particularly relied on Drivers' hiring of helpers and consequent status as employers. They conceded that the Drivers were somewhat dependent on Canada Bread, but argued that it was a business, and not an employment, dependency, typical of any arrangement where a licensee is permitted to sell and distribute the products of another party. Alternatively, they argued all franchise relationships involve a degree of dependency, and since the AWA applied to the parties, they could not be employees. Finally, they argued that there was a relatively open market for the Drivers' routes, and marketability was driven by Drivers' own efforts.

The OLRB's Decision

The OLRB surveyed existing decisions dealing with similar legal questions and in considering the continuum

from an employee to an independent contractor, determined that the Drivers were dependant contractors. However, it carved out Drivers who employ full time helpers.

The OLRB indicated that the line between an entrepreneur and a dependant contractor may be a thin one. In such cases, in concluding someone is a dependent contractor, relevant considerations are their economic dependence and an obligation to perform duties for another person. The 11 criteria set out in *Algonquin Tavern*³ should be considered, but are not a mechanical checklist.

The criteria are:

- (i) the use of or right to use substitutes;
- (ii) ownership of tools and equipment;
- (iii) evidence of entrepreneurial activity;
- (iv) selling services to the market generally;
- (v) economic freedom (i.e., the right to reject work);
- (vi) freedom to set prices for the services rendered;
- (vii) whether the person is separate from or integrated into the business to whom he or she supplies services;
- (viii) the degree of specialization, skill or expertise involved in the work;
- (ix) control of the manner in which goods/services are delivered;
- (x) magnitude of the contract amount, its terms and the manner of payment; and
- (xi) does the person render services or goods or both in a manner similar to how employees do so.

Here, factors (iv), (v), (vi), (viii), and (xi) most favoured the conclusion the Drivers were dependent contractors. Factors (i), (ii), and (ix) favoured the finding of an independent contractor relationship. The other factors were neutral.

Most significantly, the OLRB found that Drivers were not able to meaningfully sell their services, or Canada Bread products, to the market. They had no control over pricing or over their customer lists, nor could they reject certain national, chain accounts. Drivers' work was not sufficiently specialized to mark them off as independent contractors; rather, their work resembled that of employees *subject to a contract*.

Of significance, Canada Bread reserved its right to strip out certain grocery accounts considered prized customers, from the Drivers' routes at its sole discretion under the ADM model, which could materially affect the Drivers' business.

While the OLRB was given pause by criterion (xi), given that the Drivers could obtain additional market value and engage in private transfers of their routes, it referred to case law where similar arrangements did not preclude a finding of a dependent contractor relationship. For example, drivers in other industries had been found to be dependent contractors, and the OLRB likened this ability to that of a financial services

Cassels

worker who built a book of business that created a fungible value in their employment, convertible to personal value. This criterion was not enough to outweigh the numerous criteria weighing in favour of the Drivers' status as dependent contractors. The OLRB found that the Drivers "can exercise some entrepreneurial initiative but there are material constraints on their doing so ... similar to that of commission-earning sales persons..."

Ultimately, the OLRB held that only criterion (i) would outweigh the finding of a dependant contractor relationship. The OLRB hewed to distinctions made out in previous cases and found that where a helper merely permitted the individual to make ends meet, the individual was still a dependent contractor. However, where the individual had a full time helper who essentially performed the same route requirements, and functioned to increase the scale and scope of business, the individual was *not* an dependent contractor and could not be unionized. This distinction was categorized as a helpful "bright line" test. However, the OLRB did not meaningfully address the fact that Canada Bread clearly conferred the *right* to use substitutes, and exempted only those franchisees that actually did use them. Presumably, this issue will be raised in any appeal.

The OLRB specifically noted that the mere fact that a company professes to follow the AWA, or even that the AWA does in fact apply, does not mean franchisees cannot be dependent contractors.

In the result, the ballots cast in the applications for certification were ordered to be opened and counted once the Drivers who employed one or more full time helpers were excluded.

Conclusion

Canada Bread is a reminder that even where a business has long considered itself to be operating a franchise system, and has been contracting with franchisees by way of franchise agreements and governing itself in strict accordance with applicable franchise legislation, it may still be vulnerable to its franchisees being considered to be dependent contractors. With that finding comes potential liability and vulnerability to unionization.

According to the OLRB, whether or not a franchisee is considered to actually be a dependant contractor will depend on the application of the *Algonquin Tavern* criteria. A franchisor must keep in mind that, even where some factors favour an independent contractor relationship, a dependent contractor relationship, with the attendant employment-related responsibilities, may still be found.

Ultimately, the question boils down to whether it can be said that the franchisees exert control over their work, which includes factors such as customer lists, access to customers, routes, pricing, and general ability to market their own business to increase its value. Even where a franchisee can set its own hours, or attract new customers, where that ability is hamstrung by requirements of the franchise system, it may not be sufficient to avoid characterization as a dependant employee. Where they can hire their own employees,

this may only classify them as independent contractors where those employees essentially performed similar roles to their own, in order to expand their business rather than simply to manage it.

In order for franchisors to ensure that their franchisees will not be characterized as dependent contractors in a similar situation, they should be prepared to demonstrate that their franchisees have the flexibility to exert control over their own businesses, particularly with respect to pricing and access to the market for new customers, and that the franchisees render specialized services and have the right to hire or use substitutes in the operation of their business. As *Canada Bread* demonstrates, the latter criterion creates a “bright line” test that may crucially act as a silver bullet, at least in respect of some franchisees, even where the other criteria favour an employment relationship. Accordingly, concerned franchisors should consider ensuring that franchisees at the very least have the right to employ substitutes, even though they may not have control over whether franchisees do in fact cross this bright line.

¹ 2017 Canlii 62172 (OLRB) (“*Canada Bread*”).

² Drivers testified that in practice, Canada Bread would punish them both for deviating from these orders or from adhering to them too closely, depending on whether they produced an under-supply or excess in the circumstances.

³ [1981] OLRD Rep. August 1057 (“*Algonquin Tavern*”).