

Canadian Franchise Association - Submission to the Competition Bureau

Re: Draft Enforcement Guidance on Wage-Fixing and No-Poaching Agreements (the “Draft Guidance”)

Introduction

I write to you on behalf of the Canadian Franchise Association (“**CFA**”) and its more than 600 corporate members and the over 40,000 franchisees in Canada they represent. We appreciate the opportunity to comment on the Draft Guidance.

While the CFA is generally supportive of the policy goals which underpin the new wage-fixing and no-poaching prohibitions, for the reasons set out below, we believe that the Bureau’s proposed enforcement approach to those provisions, as reflected in the Draft Guidance, threatens to harm Canadian franchises and the franchise business model itself.

Let us provide some context for this concern to help inform your consideration of this submission.

Canadian Franchising Snapshot

The CFA represents the franchise industry in Canada which includes small, medium and large franchisors and all of their franchisees across the country from many of Canada’s best-known and emerging franchise brands.

Canada’s franchise sector is a vibrant, diverse, economic and social contributor from coast to coast to coast. It is the nation’s 12th largest industry and franchised businesses contribute \$120 billion per year to the Canadian economy.

The Franchise Business Model

The franchise business model offers everyday Canadians the opportunity to realize the dream of owning and operating their own businesses through the mechanism of franchising, while creating jobs in the communities within which they operate.

Canadian consumers depend on franchised businesses to provide their many daily goods and services. From food and beverages, to home, personal and family care, hotels and auto dealers, franchising has proven to be a model that delivers trustworthy, reliable and consistent products and services to consumers under recognized brand names.

Simply stated, franchising is an independent contractor relationship between a franchisor and a franchisee based on a franchise agreement, the licensing agreement between the parties. The franchisor is the owner or itself has rights to the use of a brand/trademark, and the know

how needed to open and operate the business (often referred to as the “system”). The franchisor licenses use of the system and brand/trademark to the franchisee, who operates for themselves, and under the guidance of the franchisor.

The franchisor owns or has rights to the systems, thereby ensuring standards are maintained at the franchisee level, and is responsible for the stewardship of the brand. The franchisee is the small business owner who very often lives in the community they serve, operating their business according to the franchise agreement terms, and system and brand standards set by the franchisor in an operations manual.

Franchisors and franchisees are separate legal entities, independent contractors, and not affiliates in law. Franchisees hire, remunerate, and are entirely responsible for the terms and conditions of employment of their own employees.

In return for the rights granted, the franchisee pays the franchisor upfront and ongoing fees for use of the system and brand/trademark, and makes contractual commitments designed to protect the integrity of the system and brand. It is this bargain that underlies the trustworthiness, reliability and consistency of the products and services delivered to consumers and the franchise business model’s value proposition. Franchisors have codified their system, such as successful recipes, goods and business practices, creating respected brands and standards that other entrepreneurs choose to replicate by opening these same businesses in their communities. Franchisors impose these standards on franchisees, who in turn have to impose or enforce observance of these standards by the franchisee’s employees.

It is therefore one of the longstanding features of the relationship that franchisees, and sometimes even those working for franchisees, would be subject to covenants designed to protect the confidentiality of certain trade secrets and system features.

Franchisees invest significant time and resources in their employees, in order to meet the obligations in their franchise agreements and deliver high-quality products and services to consumers. In a franchise business, the franchisor trains the franchisee on the system, and in turn, the franchisee trains their employees. Training on how to make products, deliver services to customers, and uniforms that franchisee’s employees are required to wear on the job, are a few examples of “terms and conditions of employment” that exist within many, if not most, franchise agreements.

If a typical franchise agreement is now viewed as a contract with illegal terms, whereby a franchisor is agreeing with and imposing on a franchisee any number of terms and conditions of employment that a franchisee will in turn impose on its employees, then the entire franchise business model, and the success it has brought to the Canadian economy and many thousands of Canadians, could be at risk.

Similarly, franchise agreement non-solicitation clauses guard against these investments walking out the door to the business down the road, or taking this valuable information to establish similar, competing businesses outside the franchise agreement.

Without those assurances in place, the key features of the franchisor’s system could be misused or copied, to the detriment of the franchisor and all of the franchisees of that brand who have paid something valuable for the use of that system and brand/trademark.

CFA Input

In view of the foregoing, the Draft Guidance does not reflect a proper appreciation of the franchise model or the role of franchisors in managing franchise systems, including, in some cases, interactions between franchisees.

The CFA urges the Bureau to revise its guidance to expressly confirm that non-solicitation and no-hire clauses as well as other terms and conditions of employment agreed to between a franchisor and a franchisee, including in circumstances where those clauses or terms and conditions may affect the interactions between franchisees, will benefit from the ancillary restraints defence, except where the franchise agreement in which they appear or to which they relate is a sham.

The CFA would be pleased to schedule a meeting with you early next month to discuss this issue more fully.

Thank you for considering this submission. We look forward to working together to ensure Canada's franchise businesses continue to thrive and contribute to their communities' economic and social well-being.

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