

A. INTRODUCTION

Certain provinces have firmly entrenched the right of Franchisees to associate and have provided a measure of protection by giving Franchisees a right to sue Franchisors who attempt to interfere with the exercise of that right. Having secured that right, the question becomes, what are the advantages of forming or joining a Franchisee Association?

This article will touch upon some of the more important functions of Franchisee Associations and the role they play in serving their members' interests. The effectiveness of an Association is proportional to membership. In circumstances where the Association can be said to represent the interests of a large majority of Franchisees, the leverage that the Franchisee Association enjoys enhances its ability to affect Franchisee-Franchisor relations and effect changes to the system. Thus, a central goal of any Franchisee Association will be to ensure that as many existing Franchisees as possible are brought into the fold and that prospective or new Franchisees are made aware of the existence of the Association and the benefits of membership in it.

Regardless of the nature and function of any particular Franchisee Association, it must be careful not to infringe upon the proprietary rights of the Franchisor. In all but the most exceptional of cases, the Franchisor owns the "company" trademark and has the exclusive right to authorize the use of the trade name as it sees fit. Franchise agreements normally contain broad language to protect the Franchisor's interest in the trademark or trade name. While it may seem natural to have the brand name in the name of the Franchisee Association, any unauthorized use of the trademark or trade name could expose the Association and its members to legal action at the suit of the Franchisor. The more forward thinking Franchisors will provide their consent if their legitimate interests can be protected. These issues involve significant legal considerations. It is therefore essential that Franchisees who intend to form or join an Association seek out and obtain legal advice on the Association's name and the authorized and unauthorized uses of the Franchisor's proprietary information, including trade names and marks.

B. COMMUNICATION

Perhaps the most important function of the Franchisee Association is communication. It is in fact, the Association's primary function. Without an effective means of communication with other Franchisees, a single unit operator must rely on the Franchisor for information regarding the myriad issues that affect its day to day operations and its economic wellbeing. This can be a precarious position. The cases are replete with examples of Franchisors providing incomplete or

inaccurate information regarding the financial health of the system and the true cost of doing business. Franchisees isolated from one another have no way to “compare notes” and make educated decisions about their businesses, financial and otherwise. An Association can act as a clearing house for the exchange of information regarding shared interests and concerns. Individual Franchisees can share their experiences in their dealings with the Franchisor in relation to specific issues and devise strategies to meet them. Franchisees usually feel more comfortable expressing their opinions and concerns amongst their own group. An Association thus encourages a more open and frank exchange among members who might not air their grievances in the presence of the Franchisor.

Inter-Franchisee communication can be accomplished in several ways. A regular newsletter or a “members only” Internet website can be highly effective. Care should be taken with respect to the information published in a newsletter or posted on a website to ensure that the Franchisor’s proprietary rights are not infringed. Furthermore, information disseminated by either means must be taken to be in the public domain. Franchisees should assume that what is published will come to the attention of the Franchisor. Accordingly, all communications should be vetted by counsel to ensure that no rights are violated and that the interests of the Franchisees, the Franchisor and the system as a whole are not compromised.

An Association can also serve as a useful source of information for prospective Franchisees. Franchisors have been known in the past to paint an overly rosy picture about the economic potential of a franchise, and sometimes to a scandalous degree. An Association can provide a Franchisee oriented view of the financial and operational realities of the particular system. Once again, this benefits both Franchisee and Franchisor. The health of the system is more likely to be enhanced when new members are successful. They are more likely to succeed if they have made a realistic decision based on solid information.

An Association can also be a channel for getting information out to the public. While Franchisees must be careful not to undermine the brand or the public confidence in it and are often constrained by the terms of their franchise agreements, an Association can act as a counterbalance to perhaps one-sided public statements made by Franchisors.

Franchisee Associations can also be a means of communication with the Franchisor, particularly with respect to the shared interests and concerns of the members. The inequality of bargaining power between individual Franchisees and a Franchisor is alleviated to a large extent in circumstances in which the Association is articulating a position on behalf of its members. It must be noted in this regard that a Franchisor has no legal obligation to deal with the Association. However, Associations usually improve communications between the Franchisees and the Franchisor. More forward thinking Franchisors will see the benefits of recognizing an Association and interacting with it in a positive atmosphere. Franchisors who value the health of the system over their sense of control will not stand in the way of an Association but will actively participate with it in making decisions and developing policy that affects their mutual and dependent interests. It does not bode well for a business if its constituent elements find themselves in a constant state of battle with “head office”.

C. EDUCATION

Franchisee Associations serve a significant education function. Associations enhance the ability of Franchisees to keep abreast of developments in the system, such as the addition of new Franchisees, the granting of new territories or changes to the franchise agreement. An Association can educate its members about the most current and best business practices in the industry. It can also provide information to its members regarding the effect that changes to the system imposed by the Franchisor might have on operations and to assist in the transition to new business realities.

Associations can also be a vital source of information regarding changes in the marketplace, such as the emergence of new competitors or advances that competitors have made in their operations. It is equally important to keep up with market changes affecting Franchisees' suppliers and the impact those changes could have on business. Market analyses regarding customer preferences and spending habits will also assist Franchisees retain or increase market share. Again, an Association can ensure that information is presented to its members from a Franchisee-oriented perspective. Franchisors who undertake this function often interpret market developments in a manner intended to promote their particular interests. While there may be nothing nefarious in this, Franchisees are well served to remember that their interests are not necessarily the same as those of the Franchisor. An Association can ensure that its members get a more balanced view of things and one that promotes their economic health and well-being.

Franchisee Associations can also help their members stay current with changes in the legal framework within which they operate. They can monitor proposed legislative and regulatory developments on everything from health and safety issues to employment standards. Such information will help Franchisees stay ahead of the game and minimize disruptions if and when changes to the law are implemented.

The degree to which this is possible will, of course, depend on the size of the franchise system and the resources of the Association. Larger, national franchises will have a large pool of Franchisees from which an Association can draw its membership. These Associations will have greater resources generated through the payment of members' dues and will thus be better able to dedicate the time and money necessary to achieve their goals. However, knowledge is power at any level. An Association that recognizes the importance of Franchisee education and undertakes to fulfil that function even to the extent that limited resources might dictate will nonetheless provide a valuable service to its members.

D. LOBBYING AND PUBLIC RELATIONS

Franchisee Association can serve as a vehicle for lobbying at a political level with respect to matters that affect the industry in general or those related to the specific market niche in which an Association's members operate. This can include efforts to enact or revise legislation regulating franchising to provide greater protection to Franchisees. The overwhelmingly one-sided nature of franchise agreements resulting from the inherent inequality of bargaining power between Franchisee and Franchisor has too often tied the hands of the courts when disputes arise. Given the adversarial nature of the court process, where competing interests tend to be decided

on a winner-take-all basis, political action might hold out greater hope as a means of leveling the playing field.

Lobbying political representatives in the public forum serves not only to educate law makers about the inequalities that exist in Franchisee-Franchisor relationship but can help sway public opinion about the need to address those inequalities in a meaningful way. As we have seen, this type of activity can lead to very positive results. Submissions made by Franchisees to law makers in Ontario regarding the steps that some Franchisors took to prevent Franchisees from associating were instrumental in enshrining the right of Association in the Arthur Wishart Act (Franchise Disclosure) 2000.

Franchisee Associations might also consider developing good relationships with those in the media who report on franchising in general or on the industry in question. Positive reporting that respects the legitimate concerns of Franchisees can go a long way to ensure that the message gets out in a manner that promotes the interests of Franchisees.

Lobbying can have another important effect. Franchisors are more likely to take seriously the complaints of Franchisees when those complaints are aired in public. The success of a franchise is dependent on the public perception of the brand. Franchisors have a vested interest in protecting the brand's image in the eyes of consumers. Franchisors might therefore be more willing to sit at the negotiation table to keep conflicts "in house" rather than risk the threat of legislative action or bad public press. Developing good contacts with those in the media that cover franchising in general or a particular type of business increases the odds that the Franchisees' point of view gets equal coverage if and when conflicts spill out into the public forum.

Again, the degree to which these activities are feasible will depend on the resources of the Association. Thus, the importance of increasing membership cannot be overstated.

E. NEGOTIATION

One of the primary goals of a Franchisee Association is to articulate to the Franchisor the concerns of the Franchisees. Due to the fact that the Franchisee Association represents a number, if not most of the Franchisees, there is greater likelihood that the Franchisor will respond positively to the concerns raised by the Association. While there may be limited room for an individual Franchisee to negotiate the terms of a franchise agreement before signing on, a Franchisee Association can use the power it has to negotiate concessions from, and resolve disputes with, the Franchisor. For example, Franchisors commonly designate suppliers from whom the Franchisees are required to purchase product. Negotiations between an Association and the Franchisor could lead to the utilization of alternate suppliers at a lower cost to the Franchisees without any impairment to the quality of the goods or services they offer.

Similarly, Franchisee Associations can negotiate the manner in which the franchises are renewed. Franchise agreements often provide for a lengthy initial term. The question of renewal might not be given the attention that it deserves at the time agreement is signed. The economic conditions at the time for renewal could be significantly different from those that existed when

the contract was entered into. An Association can negotiate the particular aspects of renewal in a manner that recognizes current market realities while at the same time protecting the interests of its members going forward.

The areas of a Franchisee-Franchisor relationship that could be open for negotiation will vary from system to system. Much will depend on the openness and creativity of both the Franchisor and the Association. However, it is far more likely that positive change will be achieved when Franchisees speak with a united voice.

G. COST SHARING AND PURCHASING POWER

Pooling the resources of Franchisees through an Association can benefit the individual Association members in many ways. The cost to individual Franchisees of negotiating with or initiating a legal challenge to its Franchisor can be prohibitive. An Association can use its combined resources to support individual Franchisees who are encountering such difficulties. The dues paid by members can be used to retain counsel to negotiate or litigate with a Franchisor. This is particularly useful where the conflict involves issues that are common to all of the Franchisees in a system. In one case, the resources of an Association were marshalled behind an individual Franchisee that successfully resisted the efforts of the Franchisor to terminate the relationship over a dispute regarding the renewal provisions in the Franchise agreement . A successful resolution to such a conflict can act as a precedent to be applied system wide, resulting in a substantial saving of the time and money that would otherwise be spent if each Franchisee took on the challenge individually.

In addition, Franchisee Associations can be used to pool local marketing and advertising funds to purchase larger, more effective blocks of advertising. In this manner, individual Franchisees who could not otherwise afford various types of marketing campaigns can receive the benefit of larger, more effective initiatives at a fraction of the cost than they would otherwise incur. Such campaigns would of course, have to dovetail with the advertising and marketing requirements of the Franchisor.

Franchisee Associations can also act as purchasing co-operatives for the purchase of supplies and equipment. The purchasing power of an Association representing a large number of Franchisees can substantially lower overhead. Vendors tend to be willing to reduce unit costs when goods are purchased in large quantity. Associations can use their bargaining power to exact further concessions from manufacturers and distributors. In some cases, the concept of Franchisee cooperation has been pushed to its limit where an Association has entered negotiations for or explored the possibility of purchasing the franchise outright.

Franchises, like most things, are not static. Business realities change with time. Old issues are put to bed and new challenges arise. Franchisee Associations, supported by the resources and industry of their members, can be highly effective in protecting and advancing the interests of individual Franchisees in today's dynamic business environment. Franchisors with an eye to the future will see the benefits of cooperation and will work in concert with Franchisee Associations to improve the economic outlook of the system as a whole.

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