

THE SUPREME COURT OF CANADA RULES ON THE DISTINCTION BETWEEN AN EMPLOYEE AND AN INDEPENDENT CONTRACTOR/FRANCHISEE IN QUÉBEC PURSUANT TO A FRANCHISE AGREEMENT

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In recent years, many authors have analyzed the law of franchise in Québec. Being one of the few provinces in which no specific laws have been enacted until today, the Québec is nonetheless a province where the development of the franchise field is flourishing, but whose legal framework is governed by the case law and the doctrine. The law of franchise is important to analyze not only because of its development, but also because it raises the difficulty for litigants and courts to juggle the very particular characteristics of the franchise relationship which, although based on a contract concluded individually with each franchisee, concerns above all a network as a whole.

In a decision rendered on May 3, 2019,^[1] the highest court of the country, the Supreme Court, offered a detailed factual and legal analysis of a franchise agreement (the “**Agreement**”) entered into between Modern Cleaning Concept Inc. (the “**Franchisor**” or “**Modern**”) and Francis Bourque (the “**Franchisee**” or “**Bourque**”) in order to determine if Bourque was in fact a franchisee, i.e. an independent contractor, or an employee under the Act respecting collective agreement decrees (the “**Act**”) and that, notwithstanding the terms of the Agreement.

Facts

The parties

Modern – is an entity that provides cleaning and maintenance services in the Québec region through a network of approximately 450 franchises. Modern’s business model is to negotiate a master cleaning contract with its clients and then assigns such contracts for specific locations to its franchisees, who perform the cleaning and maintenance work.

Bourque – is an individual who owned and operated his own part-time cleaning business called Nettoyage Francis Bourque with his spouse, Jocelyne Fortin (“**Fortin**”).

Applicable legislation

The provision of cleaning services in public buildings located in the Québec region is covered by a collective agreement, the *Decree respecting building service employees in the Québec region* (the "**Decree**"). The Decree sets out minimum standards in the workplace and is governed by the Act. The Act makes the *Comité paritaire de l'entretien d'édifices publics de la région de Québec* (the "**Comité**"), responsible for overseeing compliance with the Decree and can take action on behalf of employees.^[2] Pursuant to the Act, employers cannot pay their employees less than the minimum set out in a decree.^[3]

Events

In 2013, Bourque contacted Modern when he learned that Modern was looking for a replacement cleaner at a SAQ branch. At first, he worked as a subcontractor, but after several months, he took the decision to become a franchisee.

On January 1, 2014, the Agreement was signed between the parties. At first, Bourque was assigned the cleaning contracts for one National Bank location and one branch of the SAQ. Within the next months, Bourque was assigned cleaning contracts for three (3) additional National Bank locations.

On May 31, 2014, approximately five (5) months after working with Modern, Bourque decided to terminate the Agreement and commenced the operation of his own cleaning business. The decision to terminate was based on his frustration caused by his lack of profits and inability to develop his business as he wished.^[4]

On November 12, 2014, the Comité commenced proceedings against Modern on behalf of Bourque before the Court of Québec with respect to unpaid wages and other benefits (for an aggregate amount of \$9,219.32). These proceedings followed an investigation previously made by the Comité with respect to the relationship between Bourque and Modern. The Comité concluded that despite the language of the Agreement, Bourque was determined to be an "employee" within the meaning of the Act and not an independent contractor. Therefore, he was entitled to the mandatory wages and benefits set out in the Decree.

Previous judgments

Court of Québec: Bourque was an independent contractor and therefore not entitled to the unpaid wages and benefits

The trial Judge analyzed the relationship between Modern and Bourque in order to determine whether Bourque was an employee or an independent contractor/franchisee. He found that some factors indicated that Bourque was an independent contractor while other indicated he was an employee.

Factors – Independent contractor/franchisee:^[5]

- He owned his own cleaning business;
- He acted as a subcontractor for Modern prior to becoming a franchisee;
- He hoped to enlarge his business.

Factors – Employee:[\[6\]](#)

- His inability to negotiate the terms of the Agreement;
- Modern's ongoing supervision of his work;
- Payments from his clients made to Modern that then paid him.

In light of the above and because of the fact that, pursuant to the trial Judge, Bourque's actual purpose was to expand his own business and that the common intention of the parties to the Agreement was for Bourque to be an independent contractor and not an employee, Bourque was an independent contractor. He was therefore not entitled to the amount claimed by the Comité on his behalf, but to \$2,877.28 that Modern admitted owing to him pursuant to the Agreement.

Court of Appeal: Bourque was not an independent contractor, but rather an employee, notwithstanding the Agreement, and was therefore entitled to unpaid wages and benefits

The Court of Appeal, by a majority, allowed the appeal and held that the trial Judge had misapprehended the nature of the tripartite contractual relationship between Modern, its clients and its franchisee, Bourque. The trial Judge had then made a palpable and overriding error in failing to consider the nature of the assignments of the cleaning contracts from Modern to Bourque. The Court of Appeal, after analyzing the tripartite model at the heart of Modern's business model, concluded that Bourque was an employee and not an independent contractor. Therefore, the Court of Appeal ordered Modern to pay the Comité \$9,219.32 claimed for Bourque and Fortin.

The Appeal

Fundamental issue at bar – “employee” or “independent contractor”

The dispute of the appeal is whether the *Decree* applies to the relationship between Modern and Bourque. More specifically, is Bourque an “employee”,[\[7\]](#) an “artisan”[\[8\]](#) or an “independent contractor” and Modern a “professional employer”[\[9\]](#) pursuant to the *Act* and is therefore entitled to the mandatory wages and benefits set out in the *Decree*. Secondly, the Court had to determine if the trial Judge made a palpable and overriding error subject to the intervention of the Court of Appeal by concluding that the *Decree* did not apply.[\[10\]](#)

The Supreme Court held, in accordance with the Court of Appeal, that the failure of the trial Judge to consider

the tripartite nature of Modern's business model was a palpable and overriding error warranting appellate intervention. This error caused the trial Judge to err in his assessment of whether Bourque was an employee or an independent contractor.

The concepts of “employee” “artisan” and “professional employer”

The first thing that the Supreme Court analyzed in order to answer the issue at bar was the definitions of “employee”, “artisan” and “professional employer”.

- Employee – Agreeing with the Court of Appeal, the Supreme Court held that under the *Act* and the *Decree* the definition of employee was given a large and liberal interpretation, even broader than the one of the *Civil Code of Québec* (“**CCQ**”). Therefore, the *Decree* could apply to “any contract in which one can conclude that an individual is in a relationship determined to be that of “employee” within the meaning of the *Act*”,^[11] and not only employment contracts.
- Artisan – Artisan is listed in the definition of “employee” in the *Act*. This category of worker is not generally seen as an employee under Québec labour legislation, because of their degree of autonomy. In the context of the *Act* and the *Decree*, two main decisions have been rendered by the Court of Appeal to determine whether an employee is an artisan or an independent contractor.

In the first decision, rendered in 1985,^[12] the Court emphasized that artisans are those performing mechanical or manual trades or arts and usually work alone or within a small enterprise. However, the main factor distinguishing artisans from independent contractors was the degree of risk and the ability to make a profit – the independent contractor accepts the business risk in trying to make profits while the artisans, do not.^[13] The second main factor distinguishing the two was the ability to set working hours and determine methods and manner of payment.^[14]

In the other decision, rendered in 1986,^[15] the Court used the same test with respect to “risk and profit”.^[16] In that decision, the Court added that the relevant risk was the business risk^[17] and not any risk. The independent contractor is the one bearing the *business risk*. Therefore, a fact-specific inquiry into the nature of the relationship is necessary to assess which party bears the business risk in order to determine who is an artisan and who is an independent contractor.^[18]

Even if in the case at bar there was the presence of a franchise relationship contrary to the two decisions of the Court of Appeal cited, the Supreme Court considered that Bourque's status of franchisee was not determinative. The Court had to assess if Bourque was an employee or an independent contractor (i.e. and therefore a franchisee) based on Modern's business structure and the “risk and profit” test developed by the case law.

Analysis of the agreements – the franchise agreement and the cleaning service agreement

The tripartite nature of the business model

Modern's business model was analyzed thoroughly by the Court. Both the cleaning services agreement between Modern and its clients (i.e. the Bank) and the franchise agreements between Modern and its franchisees (i.e. Bourque) were taken into account.

The Supreme Court agreed with the Court of Appeal that the business relationship was tripartite in nature, since it involved three parties, namely the client requesting the cleaning services, Modern that guaranteed the quality and the provisions of the services and the franchisee, i.e. Bourque, who actually performed the services.

In fact, in this case, there was an imperfect assignment of the cleaning services agreement, because Modern was not released from all of its obligations under the contract toward its clients, even by assigning the cleaning service agreement to its franchisees. Therefore, a contractual link subsisted between Modern and its client, thus creating "an ongoing tripartite relationship"^[19] between Modern, Bourque and the client, i.e. the Bank. For the Bank, Modern and Bourque were obligated to execute the contract. The Court found that this was a distinct business model from the usual franchise models. Generally, in franchise business models, the franchisee has a "direct, autonomous relationship with its clients independent of the franchisor",^[20] contrary to the case at bar.

The business risk and the opportunity to make a profit

Modern, by its ongoing liability to the client, assumed the business risk, even if it was written in the Agreement that Bourque was an independent contractor. Typically, in franchise models, the franchisee is the one bearing the business risk, more specifically the risk of contractual non-performance.^[21] In the present instance, however, Bourque only assumed certain risks that did not constitute, for the Court, the business risk, but rather risks usually assumed by workers with respect to their working conditions. He assumed the risks associated to a failure to comply with the terms of the cleaning contracts, through an indemnification clause in which Modern could recover against him, and also assumed risks with respect to improper use of time, equipment and product.^[22] From the client's perspective, it was Modern, not Bourque, that bore the risk of contractual non-performance, even if Bourque could owe 43% of his revenue to Modern in case of non-compliance.^[23]

Pursuant to the fact that Modern maintained a liability to its clients, the Court determined that the Agreement imposed extensive controls on Bourque in order to detect any non-performance and limit Modern's liability. The restrictions imposed on Bourque limited his ability to organize his own business and therefore limited his ability to make profit.

The extensive control exercised on the franchisee

There were various restrictions and limitations imposed on Bourque.

First, even if Bourque had to pay to obtain the cleaning contracts from Modern, the terms of the Agreement limited Bourque's ability to transfer the cleaning contracts obtained to third parties either by sale or assignment. When the relationship with Modern was terminated, it was Modern who reassigned the contracts.^[24]

Secondly, Bourque was bound by a non-competition clause. Therefore, any new cleaning contracts presented to Bourque or that Bourque wished to obtain had to be submitted to Modern before. Modern was the one negotiating the master service contract with the new client. Then, Bourque could purchase the rights to the new client.^[25]

Thirdly, Modern had an ongoing supervision over Bourque's work. Modern had access to the locations serviced by Bourque and dealt with the clients with respect to any complaint relating to the work done. If a complaint was made, Modern had the ability to deduct from Bourque's pay without any discussion.^[26]

Finally, the payments made to Bourque were comparable to salary rather than business revenue. The clients paid Modern directly who then paid Bourque by direct deposit after having deducted the amounts for franchising fees, the loans and the products sold by Modern to Bourque.^[27]

The Supreme Court also noted that the extensive control put in place by Modern, even if it could somehow be linked with some of the supervisory authority of a franchisor mentioned in the case law,^[28] namely the duty to protect and enhance Modern brand, it could not in itself suffice to indicate that the relationship between Modern and Bourque was one of franchisor-franchisee. The main issue remained "who assumed the acceptance of and remuneration for business risk".^[29]

Conclusion

Therefore, the Supreme Court ruled, as the Court of Appeal did, that Modern was the one assuming the business risk and the ability to make a profit. Bourque was then an artisan, included in the definition of employee under the *Act*, and Modern was his professional employer. As a result, it was determined that the *Act* and the *Decree* applied to the relationship between them, and Bourque and Fortin were entitled to wages and benefits claimed on their behalf by the Comité.

Dissent

The Judgment was however rendered at five judges against three, with Judges Côté, Brown and Rowe dissenting. For the dissenting judges, the trial Judge did not made an overriding and palpable error susceptible of appeal. Moreover, they were of the opinion that the trial Judge made a thorough analysis of the relationship

between Modern and Bourque pursuant to their Agreement with respect to the evidence presented and did not rely only on the terms of the Agreement to render his decision.

According to them, there is not *one* business risk. Therefore, it is possible that two parties to a contract both assume the business risk. For them, it is the level of risk assumed by the party performing the work that determines whether that party can be characterized as an artisan within the meaning of the Act, “regardless of the fact that another party also incurs a business risk”^[30]. For them, a franchisee will be considered as an employee under the Act if he performs work, to which a decree applies, without assuming *any* business risk.^[31]

Secondly, the dissenting judges did not agree with the Court of Appeal that the fact that the assignments of the contract were imperfect affected the analysis of the business risk. For them, the fact that Modern remained liable, did not eliminate or limit Bourque’s liability – it only added a debtor for the client. Modern and Bourque were liable *in solidum* and therefore, the client had the choice of suing both of the debtors or one of them in case of non-performance of the contract.^[32] Consequently, the imperfect assignments of contracts did not limit the franchisee’s liability and business risk.

Moreover, the dissenting judges indicated that “ it cannot be presumed – absent any evidence in this regard – that the degree of supervision exercised by a franchisor is inversely proportional to the risk assumed by a franchisee”.^[33] In their opinion, the supervision exercised by Modern was comparable to what is usual in franchise agreements, as all franchisors have an obligation and an interest in supervising their franchisees to protect the network of franchises.^[34]

Key Takeaways

The Judgment is interesting because it reaffirms and reiterates the test to apply in order to distinguish an employee from an independent contractor, but in the context of a franchise agreement. The Judgment can therefore be used to analyze the factual status of a franchisee.

The two main takeaways of the Judgment are:

1. The terms of an agreement does not define the real nature of it; a thorough analysis of the agreement and the relationship between the parties based on facts is necessary. In other word, “it is substance, not form, that is determinative”;^[35]
2. The two main elements to analyze in order to distinguish an independent contractor (and a franchisee) from an employee are (i) who bears the business risk and not any risk and; (ii) is there an ability to make profits.

In light of the above, any company wishing to establish a network of franchises in Québec should be careful about the development of its business model and ensure that it respects the main elements developed by the

Court of Appeal and reiterated by the Supreme Court in the Judgment.

by Yassin Gagnon-Djalo

[1] *Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2019 SCC 28 (the "**Judgment**")[\[ps2id id='1' target="'\]](#)

[2] Judgment, paras. 1-3[\[ps2id id='2' target="'\]](#)

[3] s. 12 of the Act[\[ps2id id='3' target="'\]](#)

[4] Judgment, para. 15[\[ps2id id='4' target="'\]](#)

[5] Judgment, para 18[\[ps2id id='5' target="'\]](#)

[6] Judgment, para. 18[\[ps2id id='6' target="'\]](#)

[7] s. 1.(j) of the Act[\[ps2id id='7' target="'\]](#)

[8] s. 1(j) of the Act[\[ps2id id='8' target="'\]](#)

[9] s. 1(g) of the Act[\[ps2id id='9' target="'\]](#)

[10] Judgment, para. 5[\[ps2id id='10' target="'\]](#)

[11] Judgment, para. 25[\[ps2id id='11' target="'\]](#)

[12] *Comité paritaire de l'entretien d'édifices publics v. Confédération des caisses populaires et d'économie Desjardins du Québec*, [1985] C.A. 17[\[ps2id id='12' target="'\]](#)

[13] Judgment, para. 30[\[ps2id id='13' target="'\]](#)

[14] Judgment, para. 31[\[ps2id id='14' target="'\]](#)

[15] *Confection Coger Inc. v. Comité paritaire du vêtement pour dames*, [1986] R.J.Q. 153 (C.A.)[\[ps2id id='15' target="'\]](#)

[16] Judgment, para. 34[\[ps2id id='16' target="'\]](#)

[17] *Ibid.*[\[ps2id id='17' target="'\]](#)

[18] Judgment, para. 36[\[ps2id id='18' target="'\]](#)

[19] Judgment, para. 42[\[ps2id id='19' target="'\]](#)

[20] Judgment, para. 45[\[ps2id id='20' target="'\]](#)

[21] Judgment, para. 48[\[ps2id id='21' target="'\]](#)

[22] Judgment, para. 46[\[ps2id id='22' target="'\]](#)

[23] Judgment, para. 49[\[ps2id id='23' target="'\]](#)

[24] Judgment, para. 50[\[ps2id id='24' target="'\]](#)

[25] Judgment, para. 51[\[ps2id id='25' target="'\]](#)

[26] Judgment, para. 52[\[ps2id id='26' target="'\]](#)

[27] Judgment, para. 53[\[ps2id id='27' target="'\]](#)

[28] *Dunkin Brands Canada Ltd. v. Vertico Inc.*, 41 B.L.R. (5th) 1; Judgment, para. 55[\[ps2id id='28' target="'\]](#)

[29] Judgment, para. 56[ps2id id='29' target='']

[30] Judgment, para. 95[ps2id id='30' target='']

[31] Judgment, para. 115[ps2id id='31' target='']

[32] Judgment, paras. 108-111[ps2id id='32' target='']

[33] Judgment, para. 113[ps2id id='33' target='']

[34] Judgment, para. 131[ps2id id='34' target='']

[35] Judgment, para. 56[ps2id id='35' target='']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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