

Employee or Franchisee (Independent Contractor)? Definitive Guidance from the Supreme Court of Canada

David N. Kornhauser (Corporate Counsel) and Izak C. Rosenfeld (Articling Student),
Macdonald Sager Manis LLP¹

A. Introduction

In a recent decision of the Supreme Court of Canada, the analysis of whether an individual is considered an employee or independent contractor is given a thorough review, bringing into question the interplay of previous cases that have considered the nature of this relationship in a franchise context.

B. *Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec*

The *Modern Cleaning*² case relates to a claim for unpaid wages and benefits arising out of cleaning services provided via a franchise, brought by the statutory committee (the “Committee”) responsible for overseeing compliance with the collective agreement (the “Decree”) that governs cleaning services in public buildings in the Québec region.

Modern Cleaning Concept Inc. (“Modern”) is a franchisor that provides cleaning and maintenance services via a network of franchisees, including Mr. Francis Bourque (“Mr. Bourque”). Modern negotiates the cleaning contracts and assigns contracts specific to a particular location to a franchisee, who then performs the actual cleaning work. In each instance, Modern remained on the contract and was responsible to the client for the performance of the services.

In 2013, Mr. Bourque engaged in cleaning work as a subcontractor for Modern, until, in January 2014, Mr. Bourque became a franchisee, and was termed an ‘independent contractor’ pursuant to the terms of the franchise agreement. Only five (5) months later, Mr. Bourque terminated his franchise agreement due to his frustration with the lack of profits and inability to develop his business.

Among other things, the franchise agreement stipulated that Mr. Bourque agreed to perform cleaning services exclusively through the franchise relationship, not to compete with Modern, and to use his own tools and equipment. Clients were billed directly by Modern, but in Mr. Bourque’s name. Mr. Bourque was then paid by direct deposit, after Modern had deducted its

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² *Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2019 SCC 28 (“*Modern Cleaning*”).

fees, royalties, etc. (which could amount to up to 43% of Mr. Bourque's revenue). Mr. Bourque had limited interaction with the clients.

After termination of the franchise agreement, Mr. Bourque returned to his own independent cleaning business and the Committee began investigating the relationship between Modern and Mr. Bourque. Concluding that Mr. Bourque was in fact an "employee", despite the language of the franchise agreement, the Committee determined that Mr. Bourque was entitled to the mandatory wages and benefits set out in the *Decree*.

As a result of this determination, the Committee commenced proceedings against Modern for \$9,219.32 in unpaid wages and other benefits in relation to the cleaning services provided by Mr. Bourque and his wife, who had assisted him in providing such cleaning services.

The trial judge found that the following factors were determinative of the relationship between Mr. Bourque and Modern, such that Mr. Bourque could be found an independent contractor:

1. he owned his own cleaning business;
2. he acted as a subcontractor for Modern prior to becoming a franchisee; and
3. he was attempting to grow his business.

However, the trial judge also considered the following factors as supporting a finding that Mr. Bourque was an employee:

1. he was unable to negotiate the terms of the franchise agreement;
2. Modern supervised his work; and
3. Modern collected money from the clients before passing it on to Mr. Bourque.

The trial judge also emphasized Mr. Bourque's intention – that Mr. Bourque entered into the franchise relationship with the aim of expanding his own cleaning business. This intent, coupled with the language of the franchise agreement, led the trial judge to conclude that there was a common intention that Mr. Bourque would be an independent contractor (and therefore would not be entitled to the benefits claimed by the Committee on his behalf).

On appeal, the Quebec Court of Appeal reached a different conclusion, finding that the trial judge had misunderstood the nature of the relationship between Modern, its clients and Mr. Bourque. In particular, the Court was swayed by the nature of the assignments of the cleaning contracts from Modern to Mr. Bourque, noting the fact that Modern remained contractually liable to its clients as a strong indicator of an employment relationship, rather than that of an independent contractor. Ultimately, the control and involvement exhibited by Modern in the cleaning contracts was sufficient for the Court of Appeal to find that Mr. Bourque was in fact an employee and therefore was entitled to the benefits claimed.

On further appeal to the Supreme Court of Canada, the issue of employee vs. independent contractor was placed under strict scrutiny. Reviewing the development of case law on this topic, the Supreme Court established that the analysis “demands a highly contextual and fact-specific inquiry into the nature of the relationship in order to determine which party bears the business risk”,³ and that the terms or labels used in the relevant agreement are themselves superfluous to the analysis. The Court highlighted that “the question is not one of comparative risk; rather, it is which party actually assumes the risk of the business.”⁴

The Court reiterated the importance of looking behind contracts to uncover the true nature of the relationship between parties, stating that:⁵

The presence of a franchise agreement cannot function to disguise the presence of a relationship between an ‘employee’ and ‘professional employer’ [...] This is consistent with the general principle that the desire to evade the application of a decree cannot overcome the reality of the contractual relationship.

In assessing the controls that Modern exercised over Mr. Bourque arising from the franchise agreement, the Court viewed a number of factors as indicative of the level of control an employer would exercise over its employees, including the following:

1. the terms of the franchise agreement limited Mr. Bourque’s ability to transfer his cleaning contracts to third parties, despite the fact that he had paid to obtain them;
2. upon termination, Modern re-assigned the contracts that Mr. Bourque had paid to obtain;
3. Modern had the option of repurchasing the cleaning contract if a franchisee decided that he/she wanted to cease operating a particular franchise or leave the Modern network altogether;
4. Modern retained the right to oppose the transfer or sale of a cleaning contract to a third party;
5. any new cleaning contracts Mr. Bourque sought to obtain had to be submitted to Modern, and Modern would then negotiate the contract with the new client before offering the contract for sale to the franchisees;
6. at any time, Modern could access the locations serviced by Mr. Bourque;
7. Mr. Bourque was required to document the work he completed;

³ *Modern Cleaning*, at para 36.

⁴ *Ibid.*

⁵ *Ibid.*, at para 38.

8. if a client complained to Modern about Mr. Bourque's services, it was Modern which had the ability to deduct Mr. Bourque's pay without discussing the complaint with Mr. Bourque; and
9. Despite the invoice being issued in Mr. Bourque's name, Mr. Bourque received no direct payment from the clients, who instead paid Modern. Modern paid Mr. Bourque through direct deposit, after deducting amounts for franchising fees, the loans and the products sold by Modern to Mr. Bourque.

All of the above factors, according to the majority of the Supreme Court, were "extensive supervision and limits imposed on Mr. Bourque through the franchise agreement, restricting his ability to control, organize and expand his own business" that were essentially "designed to protect Modern from the possibility of liability generated by Mr. Bourque's conduct".⁶

Clearly, certain of these controls appear to align with that of a typical franchise agreement. This issue was addressed by the Court, where they admit that although these factors seem standard to the franchise relationship, "the fact that the relationship between Modern and Mr. Bourque was one of franchisor-franchisee does not answer the question of who assumed the acceptance of and remuneration for business risk".⁷

The Court then canvassed the differences between perfect and imperfect assignments, finding that the tripartite agreements into which Modern would enter with its clients and Mr. Bourque constituted imperfect assignments, since Modern would remain contractually bound after adding Mr. Bourque to the agreements. In this regard, the Court highlighted that:⁸

The provisions of the service contract indicated that despite any subcontracting, assignment or franchising, Modern remained responsible for ensuring that the services were performed and for the quality of the cleaning services. The inclusion of an indemnity clause in the franchise agreement between Modern and Mr. Bourque does not change the fact that Modern remained liable to its clients if the cleaning services were not delivered in accordance with the contract between Modern and its client.

The Court framed the issue of whether it was Modern or Mr. Bourque who assumed the acceptance of, and remuneration for, the business risk of the cleaning contracts, as Modern's attempts to balance liability and control, stating as follows:⁹

Modern's ongoing liability to its clients by virtue of the imperfect assignments is inexorably linked to the controls it placed on Mr. Bourque through the franchise agreements. Modern, at all times, remained liable to its clients. The controls it

⁶ *Modern Cleaning*, at para 54.

⁷ *Ibid.*, at para 56.

⁸ *Ibid.*, at para 42.

⁹ *Ibid.*, at para 49.

placed on Mr. Bourque aimed to limit this liability. Modern's strategy to strictly control its franchisees, like Mr. Bourque, is the context for examining Modern's assumption of risk.

The Court concluded that Modern's business model was governed by both the cleaning contracts and the franchise agreement. As a result of the tripartite agreement, Mr. Bourque really did not assume any of the business risk which would result in him being an independent contractor. The majority thus reached the conclusion that it was Modern that continued to bear the business risk:¹⁰

the effect of Modern's business model was that it, not Mr. Bourque, assumed the "risk and profit" of the business. Because of its tripartite business model and ongoing liability to its clients, Modern placed extensive controls on Mr. Bourque to limit its own business risk. Mr. Bourque did not assume the business risk and therefore it cannot be said that he was an independent contractor.

Ultimately, the majority of the Supreme Court found that Mr. Bourque was entitled to wages and other benefits owed to employees when he terminated his franchise agreement with Modern Cleaning Concept Inc., as he was an employee and not an independent contractor.

In dissenting reasons, Justice Suzanne Côté, writing for justices Russell Brown and Malcolm Rowe, found that the proper analysis is whether the subject in question assumed a *real* business risk, whether they intended to assume the risk and the extent to which other secondary factors, including the ownership of the work tools, the method of compensation and the degree of freedom in performing the work, reflect the risk assumed by the subject.

Though agreeing with the majority that a franchise agreement cannot disguise the reality of an employment relationship, the minority of the Supreme Court reasoned that the imperfect assignment of the cleaning contracts did not diminish the risk and liability attributable to the franchisee. The minority stated:¹¹

The fact that the assignment was imperfect simply meant that the assigned party, Mr. Bourque's client, obtained a second debtor that was also liable to it for everything under the contract. If the contractual obligations were breached, the client had the choice of suing both debtors, or just one of them, as it wished.

Concluding their analysis, the minority of the Supreme Court reasoned that the very same factors raised by the majority were indicators that Mr. Bourque was not an employee but instead an independent contractor:¹²

¹⁰ *Modern Cleaning*, at para 58.

¹¹ *Ibid.*, at para 108.

¹² *Modern Cleaning*, at para 114.

In the case at bar, despite the tripartite relationship among Modern, the franchisees and their clients, it was open to the trial judge to find that Mr. Bourque had assumed a business risk in order to make a profit. He remained liable to his clients under the cleaning contracts, he sought out potential clients [...], he could, in principle, sell his franchise or his contracts and hope to make a profit [...], he acquired the necessary tools and products himself [...], he subcontracted certain tasks [...], and he planned to hire staff [...]. It is true that Mr. Bourque paid a substantial share of his income to Modern, but contrary to what our colleague suggests [...], it cannot be inferred from this that Modern alone assumed the business risk.

Ultimately, the minority concluded that Mr. Bourque was an independent contractor, citing the business risk that he retained pursuant to the imperfect assignment, coupled with the fact that the supervision exercised by Modern was typical of that of a franchisor:¹³

In sum, it would be an error to confuse Modern's powers as a franchisor, with the relationship of subordination that characterizes a contract of employment.

C. Prior Decision on the Employee vs. Franchisee Analysis

The Ontario Labour Relations Board came to a similar conclusion in respect of the issue of whether certain individuals were considered employees (or dependent contractors) or franchisees (independent contractors) in the *Canada Bread* decision.¹⁴ Both the *Modern Cleaning* and the *Canada Bread* decisions are fact-based treatises on the hallmarks of the employee (or dependent contractor) vs. franchisee (independent contractor) analysis – in these cases, the respective courts highlighted indicia that swayed the scales one way or the other, despite the language of the relevant franchise agreements.

In *Modern Cleaning*, the analysis of whether the franchisee assumed sufficient business risk to be considered an independent contractor fell short because of the tripartite agreement, where the franchisor maintained liability, and in light of the controls exhibited by the franchisor over the franchisee's business.

In *Canada Bread*, the analysis was similar, as the franchisor owned and controlled access to the customers, while manifesting a level of control over the franchisees' work such that their work was indistinguishable from how an employee would fulfill the same role.

One of the more significant factors in the control analysis – that of the control of the flow of funds and collection of payments – was present in both *Canada Bread* and *Modern Cleaning*, demonstrating that the emphasis on certain aspects of the relationship in *Canada Bread* has now been validated by the Supreme Court of Canada.

¹³ *Ibid.*, at para 135.

¹⁴ *Canada Bread Company Limited*, 2017 Canlii 62172 (OLRB).

One key difference between the two cases is that, in *Canada Bread*, the franchise agreements did allow for the purchase and sale of territorial rights amongst the franchisees (drivers), whereas in *Modern Cleaning*, such transfers were strictly monitored by the franchisor. However, this difference pales in comparison to the array of similarities that appear in two cases decided by different judicial institutions – one decided by the Ontario Labour Relations Board and the other decided by the Supreme Court of Canada.

In the authors' view, the import of the *Modern Cleaning* decision, at least for the purported employer in *Canada Bread*, is that the chance of success on appeal has been considerably diminished. Given the similarities in the analysis conducted by the Ontario Labour Relations Board and the Supreme Court, it will be a significant challenge for any appellate court to overturn the decision in *Canada Bread*.

D. Conclusion

The *Modern Cleaning* case is a flagstone in the employee vs. franchisee (independent contractor) analysis, with a definitive confirmation of the appropriate test for such analysis – whether the subject party assumed business risk in the relationship – and the relevant factors of control and liability that will dictate whether a relationship fits the mold of that of an employer-employee.

Furthermore, the overlap of the 'control' analysis with the consideration of the degree of controls exercised by a franchisor pursuant to the franchise agreement is a warning to all franchisors that too much control over a franchisee may have wider-reaching consequences than just a franchise-law claim.

Indeed, this case highlights that a franchise relationship is not mutually exclusive from that of an employment relationship, and that a court may view the status of a franchise in such a way that it falls within the scope of non-franchise legislation. As is typical in the franchise-law analysis, the terms of the agreement, and the related conduct of the parties, are far more determinative than how the parties describe, or the name that they give to, their relationship.