

## Clean Break - Supreme Court of Canada Finds a Quebec Janitorial Services Franchisee is Actually an Employee

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In the recent Quebec decision of *Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec*<sup>1</sup>, the Supreme Court of Canada considered whether an independent contractor relationship created by a franchise agreement was truly an employment relationship.

### Background

The franchisor, Modern Cleaning Concept Inc. (Modern Cleaning), operated a franchise system that provided cleaning services in public buildings in the Province of Québec. The system had a somewhat unusual “tripartite” business model, whereby the client would request the cleaning services, Modern Cleaning would guarantee the performance of the services, while the franchisees would perform the services.

Modern Cleaning entered into a franchise agreement with an individual franchisee which required the franchisee to exclusively perform cleaning services for Modern Cleaning. The agreement provided that the franchisee was an independent contractor, rather than an employee. Approximately five months into the franchise relationship, the franchisee terminated the agreement.

### Legal Background and Committee Investigation

In the Province of Québec, a collective agreement, entitled the *Decree respecting building service employees in the Québec region*<sup>2</sup> (the Decree) governs employers and employees engaged in various activities, including cleaning public buildings.<sup>3</sup> The Decree sets out various minimum standards, including in relation to hours and wages.

The *Act respecting collective agreement decrees*<sup>4</sup> (the Act), provides that the Comité paritaire de l'entretien d'édifices publics de la région de Québec (the Committee) is responsible for ensuring compliance with the Decree.

Following the termination, the Committee commenced a proceeding on behalf of the franchisee, claiming unpaid wages and other benefits, on the basis that the franchisee was an employee, rather than an independent contractor, and therefore entitled to the minimum standards prescribed by the Decree.

## The Courts' Decisions

At trial, the Court found that the franchisee was an independent contractor, largely because he owned his business, had acted as a subcontractor prior to becoming a franchisee and had hoped to grow his business. Emphasis was placed on the franchisee's intention to make a profit. The trial judge found that the franchisee was not an employee and not entitled to compensation pursuant to the Decree.

On appeal to the Court of Appeal for Québec, the majority held that the trial judge erred by failing to consider the tripartite contractual relationship between Modern Cleaning, the franchisee and the clients. In particular, the majority focused on the trial judge's failure to recognize that Modern Cleaning remained contractually liable to the clients (and therefore bore the business risk). This factor was, in the Appellate Court's view, indicative of an employment relationship. The Court of Appeal reversed the trial judge's decision and ordered Modern Cleaning to compensate the franchisee under the Decree.

The Supreme Court of Canada upheld the Court of Appeal's decision.

Abella J., writing for the majority of the Supreme Court, held that the relevant question is whether the franchisee assumed the "business risk and corresponding ability to make a profit that would qualify him as an independent contractor." The Appellate Court was of the view that by "imperfectly assigning" cleaning contracts to franchisees, Modern Concept maintained a direct relationship with its clients that placed the business risk squarely on its shoulders.

The majority reiterated that a franchise agreement cannot be used to disguise the presence of a relationship between an "employee" and "professional employer," as those terms are defined in the Act. It is the true nature of the relationship, rather than the words in the agreement, that determine whether an employment relationship exists.

## Key Takeaway

Franchisors should be aware that the exercise of greater control over franchisees, and in particular, a franchisor's assumption of the business risk and ability to make a profit, may lead to a finding that the franchisee is actually an employee. Because such a finding is likely to have system-wide implications, franchisors should consider their own business model before an issue arises.

A franchise lawyer with knowledge of employment principles can assist in navigating these issues and mitigating the risk that an employment relationship will be found.

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<sup>1</sup> 2019 SCC 28.

<sup>2</sup> CQLR c D-2, r 16.

# Cassels

<sup>3</sup> It is important to note that the definition of employee in the Act is somewhat broader than under the *Civil Code* of Québec.

<sup>4</sup> CQLR c D-2.

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