

Goodmans^{LLP} Update

It's About the Parties' Entire Relationship – SCC Clarifies Independent Contractor vs. Employee Classification

In its recent decision *Modern Cleaning Concept Inc. v Comité paritaire de l'entretien d'édifices publics de la région de Québec*, the Supreme Court of Canada (SCC) considered the distinction between independent contractors and employees in a franchisor-franchisee relationship. The majority of the SCC upheld the decision of the Québec Court of Appeal (the “**Court of Appeal**”) and determined that, based on a consideration of the entire relationship between the parties, the franchisee in question was an employee. The SCC reiterated that the words of the agreement alone are not determinative of the relationship between the parties, and that the totality of the relationship between the parties, as demonstrated by factors including degree of control, ownership of tools, chance of profit and risk of loss, must be considered.

Background

At issue in *Modern Cleaning Concept Inc. v Comité paritaire de l'entretien d'édifices publics de la région de Québec* was the proper characterization of the relationship between Modern Cleaning Concept Inc. (“**Modern**”), and Francis Bourque, a franchisee of Modern's whose interests were represented by Comité paritaire de l'entretien d'édifices publics de la région de Québec (the “**Comité**”). Modern's position was that Mr. Bourque was an independent contractor, while the Comité maintained that he was properly an employee. This distinction in characterization affected the applicability of the *Decree respecting building service employees in the Québec region* (the “**Decree**”) as well as, by extension, the *Act respecting collective agreement decrees* (the “**Act**”). Were Mr. Bourque held to be an employee, he would have been entitled to protections under the Act and the Decree, including, for example, payment of minimum wage.¹

Operating in Quebec, Modern provides cleaning services to its clients through its franchise network. Modern is responsible for negotiating master contracts with clients which it later assigns to its specific franchisees responsible for actually providing the services in question. Franchisees do not participate in the negotiation of the master contracts.

Mr. Bourque joined Modern in 2013 as a subcontractor and became a franchisee in 2014. The franchise agreement signed by Mr. Bourque expressly provided that Mr. Bourque was an independent contractor and that he would be entitled to “complete control over the management of his operations which involves a business risk as in any other business, for which the franchisor is in no way a guarantor.” Mr. Bourque was also contractually required not to compete with Modern, to report any new cleaning opportunities to Modern (to allow Modern to negotiate additional master contracts), to report any complaints he received from clients to Modern, and to be responsible for hiring and firing employees.

Mr. Bourque's clients remitted payment for Mr. Bourque's services to Modern and, in turn, Mr. Bourque was paid by Modern, but only after Modern had deducted various (and, at times, substantial) amounts owing to Modern. A few months after he entered into a relationship with Modern, Mr. Bourque terminated the franchise agreement.

The Comité, an organization whose mandate is to oversee compliance and enforcement of the Decree, investigated Modern and, in 2014, the Comité concluded that Mr. Bourque was a Modern employee. As a result, it commenced proceedings in Québec for Mr. Bourque's unpaid wages.

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The Trial Decision

At trial, the judge determined that Mr. Bourque was an independent contractor. The trial judge found Mr. Bourque had owned his own cleaning business and acted as a subcontractor for Modern before becoming a franchisee, which suggested an independent contractor relationship. Though the trial judge commented on certain facts of the parties' relationship which suggested an employer-employee relationship (including, for example, the fixed terms of the franchise agreement, Modern's supervision of Mr. Bourque's work, and the terms stipulated by Modern for payment of services), the deciding factor in the trial judge's analysis came down to the parties' intention – the trial judge found that Mr. Bourque's intention was to expand his own business.

The Court of Appeal Decision

The Court of Appeal reversed the trial judge's decision, holding that the failure to properly consider the specific and tripartite nature of the contractual relationship between the parties, which provided that Modern ultimately remained liable to its clients even after assigning the contracts to its franchisees, was an error. The Court of Appeal held the tripartite nature of the contractual relationship between Modern, its clients, and its franchisees meant that Mr. Bourque was properly characterized an employee.

The SCC's Decision

The majority of the SCC upheld the Court of Appeal's decision, reasoning that Mr. Bourque's status as a franchisee was not a determinative factor in the analysis of the employment relationship between the parties.² Instead, the Supreme Court underscored that the focus in any analysis of an alleged employment relationship must be on the "actual nature of the relationship between the parties, regardless of the terms and labels used in an agreement" (in this case, the franchise agreement). Abella J., writing for the majority, affirmed the Court of Appeal's reasoning that Modern's "business structure must be examined as a whole to determine who assumed the business risk and attendant prospect of making a profit."

The majority focused on the tripartite nature of the contractual relationship and reasoned that Modern's cleaning service agreements with its clients provided the clients' consent to the assignment of the cleaning contract to franchisees, but did not release Modern from the original service contract. Accordingly, it was Modern (and not Mr. Bourque) that retained the responsibility for ensuring the services were provided.

This, as the Court reasoned, meant that Mr. Bourque never assumed the "business risk" in the relationship. Though he assumed certain risks, including those related to improper use of time, equipment, and product, these were risks related to working conditions and were not "business risks." This was manifest in the degree of control maintained by Modern, including the extensive and ongoing supervisory powers Modern retained over Mr. Bourque's work and the manner of Mr. Bourque's reimbursement, which more closely resembled salary than business revenue. These factors also influenced the majority's holding. The nature of the relationship between Modern and Mr. Bourque further limited Mr. Bourque's ability to organize his business as he saw fit and, thus ultimately, limited his ability to generate profit.

Implications

The SCC's decision serves as an important reminder that when determining whether a working relationship is one of an independent contractor, or more properly characterized as an employee/employer relationship, it is always necessary to consider the totality of the relationship between the parties; the words of a contract will not be determinative of the relationship. Employers, owners, and/or franchisors should be mindful of the specific circumstances and unique realities of their particular relationships with their workers to ensure these relationships are properly characterized.

For further information about this decision, please contact any member of our [Employment Group](#).

¹ Though both the majority and the dissent analyzed the specific statutory regime in question, the provisions of the Québec legislation at issue are not discussed in detail in this update.

² Three of the nine SCC justices dissented and would have held that Mr. Bourque was not an employee. The dissenting justices reasoned that the tripartite nature of the contractual relationship, including in the specific context of a franchisor-franchisee relationship, should not affect the “business risk” test. Further, the imperfect assignment of the contracts had no bearing of the ultimate retention of business risk since, according to the dissenting justices, it did not limit the liability of the franchisee, even though it might have slightly diminished the overall business risk carried by Modern. The dissenting justices reasoned that the trial judge had properly assessed all of the relevant evidence in question, had not relied solely on the terms of the agreement, and had not made a reviewable error.