

# BRIEFING NOTE

## “AN EMPLOYEE BY ANY OTHER NAME, IS STILL AN EMPLOYEE”

### SCC AFFIRMS THE LANGUAGE OF A CONTRACT CANNOT FUNCTION TO DISGUISE THE TRUE NATURE OF THE RELATIONSHIP BETWEEN AN EMPLOYEE AND EMPLOYER

Recently, in *Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2019 SCC 28 (“*Modern*”), the Supreme Court of Canada (9 judge panel; 3 judges dissenting) confirmed that the business risk test was still the appropriate test to distinguish between an employee and an independent contractor. According to this test, an independent contractor, in attempting to generate profit, assumes the risk of the business while an employee does not. The decision emphasized that a proper application of the business risk test involves looking at the structure of a business in its entirety to determine the reality of the contractual relationship.

As background, in Quebec, the provision of cleaning services in public buildings located in the Québec region are covered by a collective agreement, the *Decree respecting building service employees in the Québec region* (“*Decree*”). The Decree sets out minimum standards in the workplace, including wages, hours of work, holidays and overtime. The Comité, by statute, is responsible for overseeing compliance with the Decree and can take actions on behalf of employees who have not commenced a legal action.

In *Modern*, the Appellant was a cleaning and maintenance service provider whose structure involved entering into master cleaning contracts with its clients and then assigning cleaning contracts for specific locations to its various franchisees. Francis Bourque ran a cleaning business and entered into a franchise agreement with Modern. After 5 months, he terminated his agreement because of the lack of profits and controls over his business. The Comité commenced proceedings on behalf of Mr. Bourque against Modern, claiming that mandatory unpaid wages and other benefits were owed to the franchisee as an “employee”.

At the trial level, the trial judge relied on the language of the franchise agreement and the intention of the parties and found that the franchisee was an independent contractor.

The Quebec Court of Appeal overturned this decision, holding that the trial judge failed to consider the tripartite nature of Modern's business model. This tripartite relationship meant that, at all times, Modern was directly involved in the

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contractual relationship between the franchisee and the client. Specifically, the appellate court found that despite assigning the contracts to its franchisees, Modern remained liable to the clients and therefore assumed the business risk.

The decision was appealed to the Supreme Court of Canada. The SCC (majority) agreed with the Court of Appeal and concluded that the trial judge erred in applying the business risk test only in light of the franchise agreement. Rather, the SCC held that determining who truly bore the business risk required examining the business as a whole, including the tripartite contractual relationship between Modern, the franchisee, and the client.

The SCC found that:

- Status as a franchisee and the language of a franchise agreement are not determinative of the reality of a business relationship.
- A business structure must be examined as a whole to determine who assumed the business risk and the accompanying possibility of making a profit.
- The definition of "employee" must be given a large and liberal interpretation in light of the remedial purposes of the *Act* and the *Decree*.
- An employee having some degree of autonomy or assuming a degree of risk does not mean that he or she assumes the business risk. In this case, the franchise agreement limited Mr. Bourque's ability to organize his business and correspondingly, his ability to make a profit.
- The question is whether the worker assumes a business risk. The relevant secondary factors include ownership of the work tools, the method of remuneration and the degree of freedom in the performance of the work, to the extent that these factors reflect the risk assumed.

Accordingly, the SCC concluded that the trial judge had improperly applied the business risk test and that the franchisee was an "employee" under the *Act*. As such, the Comité was entitled to collect the wages and benefits claimed on behalf of the franchisee.

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## WHAT DOES THIS MEAN FOR EMPLOYERS?

While this case is specific to statutes and labour relations in Quebec, the SCC's conclusions are relevant across the country, particularly as the labour market is modernizing/evolving and we are seeing an increase in freelance, independent contract and consulting work.

The SCC reiterated that the business risk test is still an important factor in determining whether an individual is an employee or an independent contractor; namely in order to qualify as an independent contractor, a person has to bear the business risk, in the sense of being able to organize his or her business venture in order to make a profit.

The decision reveals the importance of considering the entirety of the business structure and not relying on categories or labels, such as a franchisee/franchisor relationship, because the language used by the parties to describe the business relationship may not reflect the reality of the situation, revealing the risk of relying on too narrow of an analysis.

This decision will encourage businesses and employers to properly assess whether a worker is an employee or an independent contractor and not rely on assigned labels without further analysis. It is critical to seek the necessary legal advice about your business relationships to help navigate what consequences it may have.



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