

# Franchisee or employee? The Supreme Court renders a decision

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## Context

On May 3, 2019, the justices of the Supreme Court of Canada dismissed in majority the appeal filed by Modern Concept d'entretien inc. (Modern) against the Québec Court of Appeal's decision. Accordingly, the Supreme Court confirmed that the franchisee in this case was qualified as an "employee" within the meaning of the *Act respecting collective agreement decrees*, CQLR c D-2 (the Act), with the result that he enjoys the minimum conditions of work decreed under this Act.

For more detailed context of this case, [read our analysis](#) of the Court of Appeal's decision. Let us remind that Modern operates a network of franchises in the field of office maintenance. The franchisor's business model operates according to a so-called tripartite model. First, Modern signs a maintenance agreement with a client. Then, with the client's consent, Modern assigns the agreement to one of its franchisees so that the franchisee may provide the services required in the maintenance agreement. However, the assignment of the agreement is imperfect given that Modern is still liable for the performance of the obligations stipulated in the maintenance agreement.

Through his own company, Mr. Bourque, assisted by his spouse, operates a franchise offered by Modern. The franchise agreement expressly stipulates in its preamble that the franchisee retains "[translation] complete control over the management of his operation," and that said management "[translation] involves a business risk just as any other business for which THE FRANCHISOR does not guarantee in any way."

## Reasons and conclusions

Within the meaning of the Act, is the franchisee an "employee" who benefits from conditions of employment set by decree, or is he rather an independent contractor who does not benefit from said conditions of employment? As with the Court of Appeal, the Supreme Court explained that in order to answer this question, we must identify the party who really takes the business risk in the hope of making a profit in return.

Justice Abella, speaking for the majority, reminded that the business risk criteria required a contextual analysis in order to determine the true capacity of the franchisee to organize his company in order to make a profit. The fact that the franchisee enjoys a certain level of autonomy does not mean that he assumes the business risk, no more in fact than his quality of franchisee or the labels used in the franchise agreement. Beyond the parties' declared intention with regard to the franchisee's will to assume a business risk, we must rather evaluate the true nature of the relationship between the parties.

In applying this analysis, the majority essentially reproduced the reasons of the Court of Appeal regarding the tripartite relationship between Modern, the franchisee and the client. According to the majority justices, this relationship reveals an important clue as to the identity of the party who truly assumes the business risk, namely the particularly high level of control that Modern exercises over its franchisee. Following the mechanism used to assign maintenance agreements discussed earlier, Modern remains liable towards the client for the execution of maintenance agreements and in the franchise agreement, Modern reserves for itself important oversight and control over the franchisee. Although every franchisor exercises some control over its franchisees, as noted by the majority, we note that the level of control is higher than what usually characterizes the relationship between a franchisor and its franchisee (e.g., the franchisee was paid by direct deposit by Modern, rather than directly by the client; the maintenance contract was negotiated between the respondent-franchisor and the client without franchisee involvement; etc.).

According to the majority, such a level of control has the goal of reducing the risk arising from the franchisor's continuous liability towards the client. Accordingly, it generates an equally important decrease in the franchisee's autonomy and limits the latter's capacity to control, organize and expand his own business. These elements lead the majority to the conclusion that Modern truly assumed the business risk. The Court therefore confirmed the Court of Appeal's decision to that effect and dismissed the application. As an employee within the meaning of the Act, Mr. Bourque therefore had the right to the working conditions decreed pursuant to the Act.

Dissenting Justices Côté, Brown and Rowe would have granted the appeal and restored the trial judge's decision. In their opinion, the mechanism of "imperfectly assigning" maintenance agreements would not have any significant impact on the business risk assumed by Mr. Bourque. For the dissenting justices, it should rather be determined whether the employee had the intention to accept an actual business risk. The trial judge would therefore have been correct in concluding that Mr. Bourque was not an employee within the meaning of the Act given that, according to the evidence, he had the intention of assuming an actual business risk with the goal of making a profit.

## Comments

On the one hand, it is important to define the scope of this decision. The Court's reasoning applies to a particular situation in which working conditions are decreed according to an Act which adopts a very wide definition of the notion of "employee." The Court explicitly acknowledged that the definition in the Act surpasses the one in general civil law. On the other hand, the Court also emphasized the highly significant level of control exercised by the franchisor, which level, as noted, exceeds that which normally characterizes the relationship between a franchisor and its franchisee.

Nevertheless, what we can remember from this decision is the importance for the franchisor to be aware of labour laws that apply to its area of operations. This case reminds us that occasionally, some statutes contain atypical definitions of "employee" and "employer" and that these definitions may unexpectedly impact the franchisor's obligations towards its franchisee.