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## PURPORTED FRANCHISOR GETS TAKEN TO THE CLEANERS: SUPREME COURT OF CANADA RULES THAT INDEPENDENT CONTRACTOR WAS IN FACT AN EMPLOYEE

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Once in a while I speak with a new client about their employment law obligations, and they inform me that they don't have any employees. They tell me that they only use independent contractors. My response is often along the lines of "Wanna bet?"

I am not saying that a company can never have independent contractors providing services to them instead of employees, but I will say to you dear readers the same thing that the Supreme Court of Canada said in a May 3, 2019 judgment: it is the actual relationship that will carry the day, not just the words in a contract.

In *Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2019 SCC 28, Francis Bourque operated a part-time cleaning business in the Quebec City area with his wife. He decided to enter into a franchise agreement to clean commercial, institutional, and industrial buildings with Modern Cleaning Concept Inc. Modern would sign contracts for cleaning services with its customers and manage the overall business, and then hire cleaners presumed and intended to be franchisees, to perform the actual cleaning work.

Bourque was contracted to act as an independent contractor, with control over his own business. However, the facts of the case did not reflect that intention. Modern collected payments from the customers, and funneled the proceeds to its franchisees after taking its share under the franchise agreement, up to 43% of the income. Modern also exercised considerable control over Bourque's business, such that he had to report any complaints to Modern immediately, terminate any employee that Modern or a customer wanted fired, and report any new potential customers to Modern so that Modern could try to sign them up.

After working under this arrangement for five months, Bourque realized that he could not build his business or make profits the way he wanted, and terminated the contract.

In Quebec City, employees cleaning public buildings are covered by a collective agreement called the *Decree Respecting Building Service Employees in the Quebec Region*. That agreement sets out minimum standards in the workplace, governed by a corresponding provincial statute, which does not include independent contractors. The Comité governs the statute, and in this case, took the position that notwithstanding the contract entered into between Bourque and Modern, Bourque operated as an employee to Modern, rather than a franchisee.

The Supreme Court of Canada agreed with the Quebec Court of Appeal that in order to determine whether a party is truly an independent contractor, one must look at the specific facts of the relationship. Independent contractors look more like they are operating their

own autonomous business. They take business risks in the pursuit of profits. Employees do not. In the relationship between Modern and Bourque, the Supreme Court held that Modern was the party who was assuming the risks. The reward for taking the business risk was receipt of up to 43% of Bourque's earnings. Further, Modern controlled Bourque's "business" in a manner far more restrictive than a substantive independent contract arrangement, the result of which was that Bourque ultimately determined that he could not build his business or make sufficient profit under the control of Modern.

Having determined that Bourque was an employee and not an independent contractor, the Supreme Court of Canada ruled that Modern was in breach of the Decree, and ordered it to pay Bourque \$9,213.91 in wages.

Of course this case is specific to the statutes and labour relations regime from the province of Quebec. However, similar cases have been litigated in the common law provinces, including Ontario. Employees have protections and entitlements at law that independent contractors relinquish when they take the risk to pursue their own profits. So when a supposed independent contractor turns around and claims to have been an employee, the deemed employer is on the hook for things like: EI and CPP premiums, unpaid wages, vacation pay, and especially common law damages for wrongful dismissal of employment without notice.

It is always important that you seek proper advice regarding whether your business relationship is more likely to resemble an independent contract, or employment, preferably before executing any such agreement.

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