



SUPREME COURT OF CANADA

CITATION: Modern Cleaning Concept Inc. v. Comité
paritaire de l'entretien d'édifices publics de la région de
Québec, 2019 SCC 28

APPEAL HEARD: November 13, 2018
JUDGMENT RENDERED: May 3, 2019
DOCKET: 37813

BETWEEN:

Modern Cleaning Concept Inc.
Appellant

and

Comité paritaire de l'entretien d'édifices publics de la région de Québec
Respondent

- and -

Conseil québécois de la franchise
Intervener

OFFICIAL ENGLISH TRANSLATION: Reasons of Côté, Brown and Rowe JJ.

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown,
Rowe and Martin JJ.

REASONS FOR JUDGMENT: Abella J. (Wagner C.J. and Moldaver, Karakatsanis, Gascon
(paras. 1 to 61) and Martin JJ. concurring)

JOINT DISSENTING REASONS: Côté, Brown and Rowe JJ.
(paras. 62 to 138)

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MODERN CLEANING CONCEPT v. COMITÉ PARITAIRE

Modern Cleaning Concept Inc.

Appellant

v.

**Comité paritaire de l'entretien d'édifices
publics de la région de Québec**

Respondent

and

Conseil québécois de la franchise

Intervener

**Indexed as: Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien
d'édifices publics de la région de Québec**

2019 SCC 28

File No.: 37813.

2018: November 13; 2019: May 3.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown,
Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Labour relations — Collective agreements — Juridical extension by government decree — Franchises — Provincial legislation guaranteeing minimum conditions of employment by extending collective agreement to all employees and professional employers within scope determined by means of government decree — Parity committee responsible for administering and overseeing scheme created by decree — Franchisee entering into agreement with franchisor to perform cleaning services — Parity committee seeking unpaid wages and other benefits on behalf of franchisee pursuant to applicable decree — Whether decree applies to relationship between franchisor and franchisee — Whether franchisee was employee of franchisor — Act respecting collective agreement decrees, CQLR, c. D-2, ss. 1(g) “professional employer”, 1(j) “employee” — Decree respecting building service employees in the Québec region, CQLR, c. D-2, r. 16.

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*. The Decree sets out minimum standards in the workplace, including wages, hours of work, holidays and overtime, and is governed by the *Act respecting collective agreement decrees*. The Act makes the Comité paritaire de l’entretien d’édifices publics de la région de Québec (“Committee”) responsible for overseeing compliance with the Decree, and it can therefore take any necessary action arising from the Decree on behalf of employees.

In 2014, the Committee commenced proceedings against Modern Cleaning Concept Inc., claiming \$9,219.32 in unpaid wages and other benefits in relation to cleaning services performed by B. Modern provides cleaning and maintenance services in the Québec region through a network of franchises. It negotiates master cleaning contracts with clients, and assigns them for specific locations to its franchisees, who perform the cleaning and maintenance work. B became a franchisee in January 2014, agreeing to perform cleaning services exclusively through the franchise relationship. After five months of working within the Modern network, B terminated his franchise agreement. The Committee investigated the relationship between B and Modern. It was of the view that the language of the franchise agreement was not determinative of the reality of the relationship between B and Modern, and that B was in fact an “employee” as defined by the Act, not an independent contractor. He was therefore entitled to be paid the mandatory wages and benefits set out in the Decree.

The trial judge concluded that there was a common intention that B would be an independent contractor, not an employee. Accordingly, B was not entitled to the amount claimed by the Committee on his behalf. Allowing the appeal, a majority in the Court of Appeal was of the view that the trial judge made a palpable and overriding error in failing to consider the nature of the assignments of the cleaning contracts from Modern to B, and that by failing to recognize that Modern remained contractually liable to its clients, the trial judge erred in his analysis of

whether B was an employee or an independent contractor. The majority concluded that B was an employee and ordered Modern to pay the \$9,219.32 claimed by the Committee on behalf of B.

Held (Côté, Brown and Rowe JJ. dissenting): The appeal should be dismissed.

Per Wagner C.J. and **Abella**, Moldaver, Karakatsanis, Gascon and Martin JJ.: The trial judge's failure to consider the tripartite nature of Modern's business model was a palpable and overriding error warranting appellate intervention. This error caused the trial judge to err in his assessment of whether B was an employee or an independent contractor. B is an "employee" within the meaning of the Act and Modern is correspondingly a "professional employer". The mandatory provisions of the Act and Decree therefore govern the relationship between Modern and B, and B is entitled to the wages and benefits claimed on his behalf by the Committee.

The Decree can apply to any contract in which one can conclude that an individual is in a relationship determined to be that of "employee" within the meaning of the Act. Workers may be considered employees for the purposes of the Act and Decree even if they would not be considered employees pursuant to other laws of Quebec. The fact that the franchise agreement identifies B as a franchisee is not determinative. Nor is the fact that he is identified as an independent contractor with Modern. The Decree can apply to relationships other than those governed by employment contracts. The presence of a franchise agreement cannot function to

disguise the true nature of the relationship between an employee and professional employer as those terms are defined in the Act. To the extent that the reality of the relationship between the parties reveals that a franchisee did not in fact assume the business risk and had no meaningful opportunity to make a profit, he or she is an employee and that relationship is subject to the Decree.

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 business relationship in this case was tripartite: the client requesting cleaning services, the franchisor Modern who guarantees the quality and provision of services, and the franchisee who actually performs them. In the cleaning service agreements between Modern and its clients, the clients consented in advance to the assignment of the cleaning contracts to franchisees, but Modern remained liable to its clients if the cleaning services were not delivered in accordance with the contract between Modern and its client. By failing to consider the tripartite relationship, the trial judge did not consider the business as a whole, and, as a result, improperly concluded that B bore the business risk and was therefore not an employee. Because of its tripartite business model and ongoing liability to its clients, Modern placed extensive controls on B. B did not assume the business risk and therefore it cannot be said that he was an independent contractor, making him an employee under the Act.

Per Côté, Brown and Rowe JJ. (dissenting): The appeal should be allowed and the trial judge's decision restored. The trial judge made no reviewable

error in concluding that B was not an employee within the meaning of the Act, because the fact that the assignments of contracts between Modern and B were imperfect did not significantly affect the business risk assumed by B. Furthermore, even if it were assumed that B was an employee, Modern could not have been considered to be his professional employer.

The determination of B's status under the Act raises a question of mixed fact and law, since it involves applying a legal test — specifically the business risk test — to the facts of the case. Unless an exception applies, the standard for intervention in respect of questions of mixed fact and law is that of palpable and overriding error, which is a highly deferential standard. If no palpable and overriding error is properly established, this Court must restore the trial judge's decision.

The Act provides for the juridical extension of a collective agreement, by means of a government decree, so that it binds all employees and employers working in a specific field of activity. The Act's purpose is to guarantee minimum conditions of employment and to prevent abuses in the industries concerned. Whether the conditions provided for in a decree apply to a worker must be determined by first considering (1) whether the worker is an employee within the meaning of the Act and, if so, (2) whether he or she is within the scope determined in the decree. It is then necessary to identify a debtor bound by the decree, that is, a professional employer that employs the employee covered by the scope of application of the decree.

The concept of employee in the Act is broader than it is under the *Civil Code* because of the inclusion of the term “artisan” in the definition of “employee” in the Act. Unlike an employee within the meaning of the *Civil Code*, an artisan is not, in any true sense, subordinate to an employer in the performance of his or her work. Generally speaking, an artisan is a natural person who does manual work on his or her own account, alone or with the help of family members, journeypersons, workers or apprentices. An artisan will generally be a contractor in the civil law. The legal subordination that distinguishes a contract of employment and a contract of enterprise within the meaning of the *Civil Code* is not essential to the status of employee under the Act. An artisan who is a contractor — and not an employee — within the meaning of the *Civil Code* may therefore be considered to be an employee to whom the Act applies.

However, not every contractor who personally, on his or her own account, performs manual work to which a decree applies is necessarily an artisan within the meaning of the Act. There are some contractors who *prima facie* fit the definition of an artisan but to whom the Act does not apply because their activities are organized with a view to making a profit and, as a corollary, involve a business risk. This business risk must go beyond the risk that any artisan assumes, such as the risk of defective work tools or inefficient work methods. Further, the court must ask whether the worker intended — in fact and in light of the evidence — to accept a real business risk in order to make a profit.

In assessing the business risk test, the court must consider a series of factors. 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. The terms of the contracts entered into by the worker and his or her clients or business partners are relevant but not in themselves determinative. The business risk test remains the same regardless of whether the contractual relationship in issue is bipartite or tripartite in nature, including in the context of a franchise agreement. In each case, the purpose of the analysis is simply to determine whether the worker assumes a business risk. It is not a matter of establishing which party to a contract assumes the business risk, as if there could be only one risk. The parties each incur such risks at the same time. Fundamentally, the level of risk assumed by the party performing the work is what determines whether that party can be characterized as an artisan within the meaning of the Act, regardless of the fact that another party also incurs a business risk, for example by assuming liability for the same contractual obligations.

The fact that the assignments of contracts were imperfect affected B's business risk only to a limited extent, if at all. In the instant case, failure to deal with this aspect was not a palpable and overriding error. In the absence of such an error, the conclusions reached by the trial judge cannot be called into question. Despite the tripartite relationship among Modern, B and their clients, it was open to the trial judge to find that B had assumed a business risk in order to make a profit and that he was

not an “employee” for the purposes of the Act. That conclusion is entitled to deference.

A franchise agreement cannot function to disguise the reality of a relationship between an employee and an employer, as those terms are defined in the Act. The trial judge shared this concern in the instant case. Far from relying blindly on the terms of the agreement, he rendered his decision on the basis of extensive evidence concerning the reality of the relationship between B and Modern.

Furthermore, not every person who has work to which a decree applies done by an “employee” can, on that basis alone, be treated as a professional employer and be required to assume the obligations that flow from that status. There are “employees” within the meaning of the Act who quite simply do not have a professional employer. For a “professional employer” to be required to meet the obligations provided for in a decree, the work must be done in the context of a relationship that is sufficiently similar to an employment relationship within the meaning of the *Civil Code*, which is to say that a certain degree of control or economic dependence is required. Here, even if it is assumed that the concept of “professional employer” has a meaning broader than that of an employer under the *Civil Code*, the franchise agreement does not readily support a conclusion that Modern was subject to the Decree, since the supervision it exercised did not suffice to characterize it as a professional employer. Modern’s powers as a franchisor cannot be confused with the relationship of subordination that characterizes a contract of

employment. As well, B was not in a position of economic dependence toward Modern.

Cases Cited

By Abella J.

Applied: *Comité paritaire de l'entretien d'édifices publics v. Confédération des caisses populaires et d'économie Desjardins du Québec*, [1985] C.A. 17; *Confection Coger Inc. v. Comité paritaire du vêtement pour dames*, [1986] R.J.Q. 153; **referred to:** *Comité paritaire de l'entretien d'édifices publics de la région de Québec v. Station de ski le Valinouët inc.*, 63 Q.A.C. 143; *Québec (Office municipal d'habitation) v. Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2009 QCCA 2428; *Comité paritaire de l'entretien d'édifices publics v. Caisse populaire Immaculée-Conception de Sherbrooke*, 43 Q.A.C. 1; *Groupe d'entretien Salibec inc. v. Québec (Procureur général)*, 1993 CanLII 4298; *Parity Committee for the Building Services (Montreal Region) v. 4523423 Canada Inc. (Sani-Vie-Tech)*, 2011 QCCQ 12209; *Dunkin' Brands Canada Ltd. v. Bertico Inc.*, 2015 QCCA 624, 41 B.L.R. (5th) 1.

By Côté, Brown and Rowe JJ. (dissenting)

Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235; *Prud'homme v. Prud'homme*, 2002 SCC 85, [2002] 4 S.C.R. 663; *Churchill Falls (Labrador)*

Corp. v. Hydro-Québec, 2018 SCC 46; 3091-5177 *Québec inc. (Éconolodge Aéroport) v. Lombard General Insurance Co. of Canada*, 2018 SCC 43; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352; *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *J.G. v. Nadeau*, 2016 QCCA 167; *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014; *Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138; *H.L. v. Canada (Attorney general)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Salomon v. Matte-Thomson*, 2019 SCC 14; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Comité paritaire de l'industrie de la chemise v. Potash*, [1994] 2 S.C.R. 406; *Comité paritaire d'installation d'équipement pétrolier du Québec v. Entreprises Nipo Inc.*, 65 Q.A.C. 29; *Comité paritaire des agents de sécurité v. Société de services en signalisation SSS inc.*, 2008 QCCS 335, aff'd 2009 QCCA 1787; *Comité paritaire de l'entretien d'édifices publics de la région de Québec v. Station de ski Le Valinouët Inc.*, 63 Q.A.C. 143; *Comité paritaire de l'industrie de l'automobile des régions Saguenay-Lac St-Jean v. Soucy*, 60 Q.A.C. 76; *Cabiakman v. Industrial Alliance Life Insurance Co.*, 2004 SCC 55, [2004] 3 S.C.R. 195; *Dicom Express inc. v. Paiement*, 2009 QCCA 611, [2009] R.J.Q. 924; *Comité paritaire de l'entretien d'édifices publics v. Confédération des caisses populaires et d'économie Desjardins du Québec*, [1985] C.A. 17; *Confection Coger Inc. v. Comité paritaire du vêtement pour dames*, [1986] R.J.Q. 153; *Comité paritaire de l'entretien d'édifices publics v. Caisse populaire Immaculée Conception de Sherbrooke*, 43 Q.A.C. 1; *Québec (Procureur général) v. Groupe d'entretien Salibec Inc.*, 1993 CanLII 4298; *Bérubé v. Tracto inc.*, [1998] R.J.Q. 93; *Provigo Distribution Inc. v. Supermarché A.R.G. Inc.*,

[1998] R.J.Q. 47; *Dunkin' Brands Canada Ltd. v. Bertico Inc.*, 2015 QCCA 624, 41 B.L.R. (5th) 1; *Québec (Procureur général) v. Lazarovitch* (1940), 69 B.R. 214; *Comité paritaire de l'industrie de l'automobile de Montréal et du district v. Giguère*, [1987] R.J.Q. 1176; *Quebec (Construction Industry Commission) v. M.U.C.T.C.*, [1986] 2 S.C.R. 327; *Comité Paritaire de l'Industrie de l'Imprimerie de Montréal et du District v. Dominion Blank Book Co.*, [1944] S.C.R. 213; *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916, 315 D.L.R. (4th) 129.

Statutes and Regulations Cited

Act respecting collective agreement decrees, CQLR, c. D-2, ss. 1(f), (g), (j), 2, 3, 5, 6, 11, 12, 13, 16, 22 para. 2(a), (e), (i), 24, 52.

Act respecting labour standards, CQLR, c. N-1.1, s. 1(10).

Canada Labour Code, R.S.C. 1985, c. L-2, s. 3(1).

Civil Code of Québec, arts. 9, 2085, 2098, 2098 et seq., 2099.

Consumer Protection Act, CQLR, c. P-40.1.

Decree respecting building service employees in the Québec region, CQLR, c. D-2, r. 16.

Decree respecting hairdressers in the Outaouais region, CQLR, c. D-2, r. 4.

Decree respecting the cartage industry in the Québec region, CQLR, c. D-2, r. 3.

Labour Code, CQLR, c. C-27.

Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A, s. 1(1).

Loi relative à l'extension des conventions collectives de travail, S.Q. 1934, c. 56.

Authors Cited

- Baudouin, Jean-Louis, et Pierre-Gabriel Jobin. *Les obligations*, 7^e éd. par Pierre-Gabriel Jobin et Nathalie Vézina. Cowansville, Que: Yvon Blais, 2013.
- Beaulieu, Marie-Louis. *Les Conflits de Droit dans les Rapports Collectifs du Travail*. Québec: Presses universitaires Laval, 1955.
- Bich, Marie-France. “Le contrat de travail — Code civil du Québec, Livre cinquième, titre deuxième, chapitre septième (Articles 2085-2087 C.c.Q.)”, dans *La réforme du Code civil*, t. 2, *Obligations, contrats nommés*. Sainte-Foy, Que.: Presses de l’Université Laval, 1993.
- Boubli, Bernard. “Contrat d’entreprise”, dans Éric Savaux, dir., *Encyclopédie juridique Dalloz: Répertoire de droit civil*, t. IV, 2^e éd. Paris: Dalloz, 1979 (mise à jour juin 2018).
- Carbonnier, Jean. *Droit civil*, vol. II, *Les biens. Les obligations*. Paris: Quadrige/PUF, 2004.
- De Niverville, Patrick, et Hélène Ouimet, *Loi annotée sur les décrets de convention collective*, par Patrick de Niverville, Claude Carignan et Hélène Ouimet. Montréal: Wilson & Lafleur, 1996 (feuilles mobiles mises à jour septembre 2001, envoi n^o 3).
- Dubé, Jean-Louis. *Décrets et comités paritaires: l’extension juridique des conventions collectives*. Sherbrooke: Éditions Revue de droit Université de Sherbrooke, 1990.
- Gagnon, Jean H. *La franchise du Québec*. Montréal: Wilson & Lafleur, 2003 (feuilles mobiles mises à jour septembre 2007, envoi n^o 32).
- Gagnon, Robert P. *Le droit du travail du Québec*, 7^e éd., mise à jour par Langlois Kronström Desjardins, sous la direction de Yan Bernard et autres. Cowansville, Que.: Yvon Blais, 2013.
- Gagnon, Robert P., Louis LeBel et Pierre Verge. *Droit du travail*. Québec: Presses de l’Université Laval, 1987.
- Gagnon, Robert P., Louis LeBel et Pierre Verge. *Droit du travail*, 2^e éd. Sainte-Foy, Que.: Presses de l’Université Laval, 1991.
- Jobin, Carol. “Statuts de salarié et d’employeur dans les lois du travail” dans *JurisClasseur Québec — Rapports individuels et collectifs du travail*, vol. 1, par Guylaine Vallée et Katherine Lippel, dir. Montréal: LexisNexis, 2009, fascicule 8 (feuilles mobiles mises à jour mars 2018, envoi n^o 17).
- Lluelles Didier, et Benoît Moore, *Droit des obligations*, 3^e éd. Montréal: Thémis, 2018.

- Mathieu, Paul-André. *La nature juridique du contrat de franchise*. Cowansville, Que.: Yvon Blais, 1989.
- Morin, Fernand, et autres. *Le droit de l'emploi au Québec*, 4^e éd. Montréal: Wilson & Lafleur, 2010.
- Perrault, Antonio. *Traité de droit commercial*, t. I. Montréal: Albert Lévesque, 1936.
- Pineau, Jean, Danielle Burman et Serge Gaudet. *Théorie des obligations*, 4^e éd., par Jean Pineau et Serge Gaudet. Montréal: Thémis, 2001.
- Quebec. Assemblée nationale. Commission permanente de l'économie et du travail. "Étude détaillée du projet de loi n^o 75 — Loi modifiant la Loi sur les décrets de convention collective", *Journal des débats*, vol. 35, n^o 30, 2^e sess., 35^e lég., 6 décembre 1996.
- Quebec. Ministère du Travail. *Rapport sur l'application de la Loi modifiant la Loi sur les décrets de convention collective*. Québec: Bibliothèque nationale du Québec, 2000.
- Reid, Hubert. *Dictionnaire de droit québécois et canadien*, avec la collaboration de Simon Reid, Montréal: Wilson & Lafleur, 2016.
- Sylvestre, Chantal. "Le contrat de franchise" dans *Droit spécialisé des contrats*, vol. 2, *Les contrats relatifs à l'entreprise*, par Denys-Claude Lamontage, dir. Cowansville: Yvon Blais, 1999.

APPEAL from a judgment of the Quebec Court of Appeal (Kasirer, Morin and Bélanger JJ.A.), 2017 QCCA 1237, [2017] AZ-51418252, [2017] J.Q. No. 10958 (QL), 2017 CarswellQue 7138 (WL Can.), setting aside a decision of Lavoie J., 2016 QCCQ 1789, [2016] AZ-51267820, [2016] J.Q. No. 2589 (QL), 2016 CarswellQue 2561 (WL Can.). Appeal dismissed, Côté, Brown and Rowe JJ. dissenting.

Marc-André Fabien, Frédéric Gilbert, Alain Gutkin and Christine Provencher, for the appellant.

Jacques Cantin, for the respondent.

Paul-André Mathieu, for the intervener.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon and Martin JJ. was delivered by

ABELLA J. —

[1] 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*, CQLR, c. D-2, r. 16. The *Decree*, or collective agreement, sets out minimum standards in the workplace, including wages, hours of work, holidays and overtime.

[2] The *Decree* in turn is governed by the *Act respecting collective agreement decrees*, CQLR, c. D-2. The purpose of the *Act* was to encourage the negotiation of collective agreements which would lead to improved working conditions for a greater number of workers. The *Act* also sought to achieve uniformity of working conditions within workplaces in the same industry and region. Section 22 para. 2(a) of the *Act* makes the Comité paritaire de l'entretien d'édifices publics de la région de Québec responsible for overseeing compliance with the *Decree*, which may exercise all recourses arising from the *Decree* “in favour of employees who have not

caused a suit to be served”. Pursuant to s. 12 of the *Act*, employers cannot pay their employees less than the minimum set out in a decree.

[3] In light of the *Act*’s remedial, benefit-conferring objectives, the Quebec Court of Appeal has held that the *Act* and the *Decrees* governed by it must be given a large and liberal interpretation (*Comité paritaire de l’entretien d’édifices publics de la région de Québec v. Station de ski le Valinouët Inc.*, 63 Q.A.C. 143; *Québec (Office municipal d’habitation de) v. Comité paritaire de l’entretien d’édifices publics de la région de Québec*, 2009 QCCA 2428). At its peak, the *Act* governed approximately 100 collective agreements. It now applies to 15, including the one at issue in this appeal.

[4] Related to its aims of protecting and promoting collective agreements in order to improve workplace conditions, s. 11 of the *Act* states that the provisions of a decree are of “public order”. Article 9 of the *Civil Code of Québec (C.C.Q.)* states that provisions of public order cannot be varied. That means that, if applicable, the provisions of the *Decree* are mandatory and cannot be changed.

[5] The dispute underlying this appeal is whether the *Decree* applies to the relationship between Modern Cleaning Concept Inc. and Francis Bourque because Mr. Bourque is an “employee” within the meaning of the *Act*. In resolving this dispute, this Court must determine whether the majority in the Court of Appeal (2017 QCCA 1237) was justified in intervening because the trial judge (2016 QCCQ 1789)

committed a palpable and overriding error in concluding that the *Decree* did not apply.

[6] Modern provides cleaning and maintenance services in the Québec region through a network of approximately 450 franchises. Its clients are typically small and medium sized businesses requiring cleaning services in multiple locations.

[7] Modern's business model is to negotiate a master cleaning contract with its clients. It then assigns cleaning contracts for specific locations to its various franchisees, who perform the actual cleaning and maintenance work. The franchisees are not involved in negotiating the contracts with Modern's clients.

[8] Modern negotiated a cleaning services contract with the National Bank of Canada in 2012 for approximately 400 of the Bank's locations. The agreement between Modern and the Bank stated that the contract would be assigned by Modern to franchisees who would perform the actual cleaning. Modern would, however, remain responsible to the Bank for the implementation of the contracts at each location. The contract also stated that the price of Modern's cleaning services would increase if the wages required under the *Decree* increased. Modern had a similar contractual relationship with the Société des alcools du Québec (SAQ).

[9] Francis Bourque owned and operated his own part-time cleaning business, Nettoyage Francis Bourque. His spouse, Jocelyne Fortin, helped him operate the business. Mr. Bourque first contacted Modern in 2013, when he learned

that it was looking for a replacement cleaner at a SAQ branch. He initially took on this work as a subcontractor. Several months later, Mr. Bourque decided to become a franchisee. He signed the franchise agreement with Modern on January 1, 2014.

[10] The franchise agreement between Modern and Mr. Bourque is a lengthy document with multiple appendices. The preamble states that the franchisee, Mr. Bourque, would have [TRANSLATION] “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”.

[11] The agreement stipulated that Mr. Bourque agreed to be assigned cleaning contracts and stated that he was an [TRANSLATION] “independent contractor”. Modern was to be indemnified for any and all suits, claims or other demands related to a failure to comply with any obligation in the agreement. Modern was also entitled to cancel Mr. Bourque’s cleaning contracts on [TRANSLATION] “mere notice”.

[12] Mr. Bourque agreed to perform cleaning services exclusively through the franchise relationship, not to compete with Modern’s network, and to use his own tools and equipment. He was required to identify himself as a member of the Modern network in relation to any business activity and was to immediately report any complaints he received from clients to Modern. Any of Mr. Bourque’s employees deemed to be unacceptable to either Modern or one of its clients were to be let go. Modern’s representatives were entitled to perform quality control checks at any time

without prior notice. Any new cleaning opportunities had to be reported to Modern so that Modern could negotiate the contracts.

[13] In accordance with the franchise agreement, Modern billed the clients in Mr. Bourque's name. It paid Mr. Bourque by direct deposit after deducting the various amounts Mr. Bourque owed it. At any given time, Mr. Bourque could owe up to 43% of his revenue to Modern, including 25% paid in advance for the rights to the franchise and the acquisition of the first contract, plus 7% of gross revenue, 10% for administrative fees and up to 1% of annual gross revenue for publicity fees. Additionally, Mr. Bourque made loan arrangements with Modern to help him acquire the cleaning contracts and assist with the franchising costs. These arrangements were appended to the franchising agreement.

[14] Mr. Bourque was initially assigned cleaning contracts for one National Bank location and one branch of the SAQ. Over the next few months, Mr. Bourque was assigned cleaning contracts for three additional National Bank locations. He had limited interaction with the clients whose premises he cleaned. His spouse, Ms. Fortin, helped him perform the cleaning services.

[15] On May 31, 2014, after approximately five months of working within the Modern network, Mr. Bourque, increasingly frustrated by his lack of profits and inability to develop his business as he wished, terminated his franchise agreement and recommenced the operation of his own cleaning business.

[16] After the termination of the franchise agreement, the Comité investigated the relationship between Mr. Bourque and Modern. It concluded that the language of the franchise agreement was not determinative of the reality of the relationship between Mr. Bourque and Modern, and that despite the language in the franchise agreement, Mr. Bourque was in fact an “employee” as defined by the *Act*, not an independent contractor. He was therefore entitled to be paid the mandatory wages and benefits set out in the *Decree*.

[17] On November 12, 2014, the Comité commenced proceedings against Modern in the Court of Québec, claiming \$9,219.32 in unpaid wages and other benefits in relation to the cleaning services performed by Mr. Bourque and Ms. Fortin.

[18] The trial judge considered the relationship between Modern and Mr. Bourque to determine whether Mr. Bourque was an employee or independent contractor. He found that the following factors suggested Mr. Bourque was an independent contractor: he owned his own cleaning business; he acted as a subcontractor for Modern prior to becoming a franchisee; and Mr. Bourque hoped to enlarge his business. The factors the trial judge said supported Mr. Bourque being an employee included his inability to negotiate the terms of the franchise agreement; Modern’s ongoing supervision of his work; and the fact that Mr. Bourque’s clients paid Modern who then paid Mr. Bourque.

[19] In order to determine whether Mr. Bourque was actually an employee or an independent contractor, however, the trial judge emphasized Mr. Bourque's intention. He concluded that Mr. Bourque clearly entered into the franchise relationship with the aim of expanding his own cleaning business. That the venture did not go as planned — due to Mr. Bourque's dissatisfaction with Modern's role as franchisor — did not, in the trial judge's view, detract from Mr. Bourque's actual purpose: to expand his own business.

[20] Relying on the language of the franchise agreement, the trial judge concluded that there was a common intention that Mr. Bourque would be an independent contractor, not an employee. Accordingly, as an independent contractor, he was not entitled to the full amount claimed by the Comité on his behalf. He was, however, entitled to \$2,877.28, an amount Modern conceded it still owed him pursuant to the franchise agreement.

[21] Kasirer J.A., writing for a majority in the Court of Appeal, allowed the appeal. He held that the trial judge had misapprehended the nature of the tripartite contractual relationship between Modern, its clients and its franchisee, Mr. Bourque. Specifically, Kasirer J.A. was of the view that the trial judge had made a palpable and overriding error in failing to consider the nature of the assignments of the cleaning contracts from Modern to Mr. Bourque. By failing to recognize that Modern remained contractually liable to its clients, the trial judge erred in his analysis of whether Mr. Bourque was an employee or an independent contractor. Various elements of this

tripartite model led the Court of Appeal to conclude that Mr. Bourque was an employee not an independent contractor and ordered Modern to pay the Comité the \$9,219.32 it claimed on behalf of Mr. Bourque and Ms. Fortin.

[22] For the following reasons, I agree with Kasirer J.A that the trial judge's failure to consider the tripartite nature of Modern's business model was a palpable and overriding error warranting appellate intervention. This error caused the trial judge to err in his assessment of whether Mr. Bourque was an employee or an independent contractor.

Analysis

[23] Two provisions of the *Act* are primarily engaged by this appeal, s. 1(g) which defines "professional employer", and s. 1(j) which defines "employee". The provisions state:

1.(g) «employeur professionnel» désigne: un employeur qui a à son emploi un ou des salariés visés par le champ d'application d'un décret;

1.(g) "professional employer" means an employer who has in his employ one or more employees covered by the scope of application of a decree;

1. (j) «salarié» signifie: tout apprenti, manoeuvre ou ouvrier non spécialisé, ouvrier qualifié ou compagnon, artisan,

1. (j) "employee" means any apprentice, unskilled labourer or workman, skilled workman, journeyman, artisan, clerk

commis ou employé qui
travaille individuellement,
en équipe ou en société;

or employee, working
individually or in a crew or
in partnership;

[24] The definitions of “employee” and “professional employer” are related: a professional employer is one who employs one or more employees covered by a *Decree* (see F. Morin et al., *Le droit de l’emploi au Québec* (4th ed. 2010), at para. III-508; *Comité paritaire de l’entretien d’édifices publics v. Caisse populaire Immaculée Conception de Sherbrooke*, 43 Q.A.C. 1, at paras. 13-15, per Proulx J.A.). I agree with Kasirer J.A. that the definition of “professional employer” must, like the definition of “employee”, be given a large and liberal interpretation in light of the remedial purposes of the *Act* and *Decree*.

[25] Consistent with those objectives, the definition of “employee” in the *Act* is broader than set out in the *C.C.Q.* Workers may therefore be considered “employees” for the purposes of the *Act* and *Decree* even if they would not be considered employees pursuant to other laws of Quebec. The fact that the franchise agreement identifies Mr. Bourque as a franchisee is not determinative. It also means that, contrary to the views of the dissenting judge in the Court of Appeal, the *Decree* can apply to relationships other than those governed by employment contracts. It can, in fact, apply to *any* contract in which one can conclude that an individual is in a relationship determined to be that of “employee” within the meaning of the *Act*.

[26] Part of that task, therefore, is interpreting “artisan”, listed in the definition of “employee” in the *Act*. Artisans are one such category of worker not generally seen to be an employee under Quebec labour legislation because artisans, like independent contractors, often exercise a great deal of autonomy (A. Perrault, *Traité de droit commercial* (1936), vol. II, at p. 225). As Professor Carol Jobin noted, the inclusion of artisan in the definition of “employee” indicates that the notion of employee in the *Act* has a greater reach than just what comes from an employment contract (“Statuts de salarié et d’employeur dans les lois du travail” in *JurisClasseur Québec — Rapports individuels et collectif du travail* (loose-leaf), by G. Vallée and K. Lippel, eds., fasc. 8, at para. 145). The language of the French version of the *Act* clarifies further the wider breadth of the category of “employee”, defining a “*salarié*” as including an “*employé*”, not merely, as in the English, the use of the tautological “employee”. The inclusion of “artisan” in the *Act*’s definition of “employee” clearly demonstrate that the *Act* and the *Decree* apply to relationships other than those governed by employment contracts.

[27] The seemingly anomalous inclusion of “artisan” in the definition of “employee” in the *Act* has resulted in a body of jurisprudence to determine whether a worker is an artisan who is therefore covered by the *Act*, or an independent contractor. Two decisions of the Quebec Court of Appeal have grappled with this distinction. In *Comité paritaire de l’entretien d’édifices publics v. Confédération des caisses populaires et d’économie Desjardins du Québec*, [1985] C.A. 17, the Court of

Appeal established the test for distinguishing between an artisan and an independent contractor under s. 1(j) of the *Act*.

[28] In *Desjardins*, the Caisse populaire of St-Pascal-de-Maizerets had entered into an agreement with a worker to clean its premises. The worker owned his own cleaning business and used his own equipment. He was also responsible for ensuring that he had adequate staffing to complete the work. Some years later, he sold his cleaning business and the contracts he had with the Caisse populaire to Louis-Émile Girard, who carried on business under the name “Service d’Entretien Ménager Louis-Émile Girard Enr.”. The dispute in *Desjardins* centred upon whether the Caisse populaire was an employer within the meaning of the *Act*. In order to answer that question, it was necessary to determine whether the workers were “employees” as defined by the *Act*.

[29] After considering dictionary definitions of “artisan”, the Court of Appeal emphasized that artisans are those who perform mechanical or manual trades or arts and that, generally, an artisan works alone or with a small enterprise. Jacques J.A. noted that despite the similarities between artisans and independent contractors, the legislation included artisans within the definition of “employee” in the *Act* in order to provide them with greater benefits and improved working conditions. The independence usually relied on to distinguish independent contractors from employees could not, therefore, be determinative in deciding who was entitled to legislated employment standards.

[30] The critical factor distinguishing artisans from independent contractors was held to be the respective degree of risk and the attendant ability to make a profit. The independent contractor, in attempting to generate profit, accepts the business risk. Artisans, on the other hand, do not. Jacques J.A. noted that this distinction was also reflected in French law where it is used to differentiate business contracts from employment contracts (see B. Boubli, “Contrat d’entreprise”, in É. Savaux, eds., *Encyclopédie juridique Dalloz: Répertoire du droit civil* (2nd ed., 1979), vol. 4, updated June 2018, at para. 11 et seq.).

[31] The acceptance of risk and attendant ability to make a profit were therefore found to be the primary indicia distinguishing artisans from independent contractors — independent contractors assume the risk of the business while artisans do not. Secondary indicia are also relevant in distinguishing artisans from independent contractors, including the ability to set working hours, and determine methods and manner of payment.

[32] Applied to the facts of the case, the Court of Appeal concluded that the risk of the enterprise, or business risk, was with the worker. He was free to create his own schedule and to use his own methods to complete the necessary work. He received remuneration in the form of a lump sum. The business risk — including having more or less work and the ability to control the pace of work — was the worker’s. He was, as a result, an independent contractor, not an artisan. As such, he

was not an employee, the Caisse populaire was not a professional employer, and neither the *Act* nor *Decree* applied.

[33] The Court of Appeal returned to the issue in *Confection Cogér Inc. v. Comité paritaire du vêtement pour dames*, [1986] R.J.Q. 153 (C.A.). The court was asked to determine whether the relationship between Cogér and a group of female workers in the garment industry was an employment relationship, or whether the workers were independent contractors. The workers sometimes solicited work themselves and at other times received work from Cogér. They were unable to set the price for their work. They were free, however, to set their own hours and do their work either in Cogér's workshop or in their own homes. They owned their own equipment.

[34] To determine whether these workers were artisans and therefore employees in accordance with the *Act*, the Court of Appeal returned to the *Desjardins* "risk and profit" test. Once again, Jacques J.A. wrote for the court. He emphasized that the relevant risk is *business* risk, not simply any risk accepted by the worker in relation to his or her working conditions. Artisans, by virtue of their independence, will always have a degree of autonomy and will likely accept some risk in structuring their work. Even in circumstances where the worker owns his or her own equipment and is characterized as an independent contractor by tax law, as these women were, a worker may, for the purposes of s. 1(j) of the *Act*, nonetheless be characterized as an artisan and thus an "employee". The working relationship has to be examined in its

entirety to determine who bears the business risk. If it is the worker, then he or she is properly characterized as an independent contractor. If not, the worker is an artisan, and, as a result, an employee for the purposes of the *Act*.

[35] Applying the law to the facts before it, the Court of Appeal concluded that the workers did not assume the business risk and were therefore employees of Coger. Coger dictated the work to be done and the prices. While Coger did not control the minutiae of the worker's daily activities, it set delivery times which effectively created deadlines for the work's completion. The *Decree*, as a result, applied to the relationship.

[36] The case law distinguishing independent contractors from artisans thus demands a highly contextual and fact-specific inquiry into the nature of the relationship in order to determine which party bears the business risk. The question is not one of comparative risk; rather, it is which party actually assumes the risk of the business.

[37] While, on the surface, the presence of a franchise relationship in this appeal distinguishes it from both *Desjardins* and *Coger*, for the purposes of the *Act*, Mr. Bourque's status as a franchisee is not determinative. Instead, in accordance with *Desjardins* and *Coger*, the inquiry must assess the actual nature of the relationship between the parties, regardless of the terms of and labels used in the franchise agreement. I agree with Kasirer J.A.: Modern's business structure must be examined as a whole to determine who assumed the business risk and attendant prospect of

making a profit. This inquiry is consistent with the longer judicial tradition in Quebec of looking behind contracts to ascertain the true nature of the relationship of the parties (P. de Niverville et H. Ouimet, *Loi annotée sur les décrets de convention collective* (loose-leaf), at p. 27).

[38] The relevant question in this appeal is whether Mr. Bourque assumed the business risk and corresponding ability to make a profit that would qualify him as an independent contractor. The presence of a franchise agreement cannot function to disguise the presence of a relationship between an “employee” and “professional employer” as those terms are defined in the *Act*. This is consistent with the general principle that the desire to evade the application of a decree cannot overcome the reality of the contractual relationship (*Groupe d’entretien Salibec inc. v. Québec (Procureur général)*, 1993 CanLII 4298 (Que. C.A.)). This principle does not change in the case of franchise agreements (see *Parity Committee for the Building Services (Montreal Region) v. 4523423 Canada Inc. (Sani-Vie-Tech)*, 2011 QCCQ 12209, at para. 38 (CanLII)). To the extent that the reality of the relationship between the parties reveals that Mr. Bourque did not in fact assume the business risk and had no meaningful opportunity to make a profit, that relationship is subject to the *Decree*.

[39] Modern’s business model requires it to enter into two types of contracts — cleaning service agreements with its clients like the Bank, and franchise agreements with individual cleaners, like Mr. Bourque. The terms of the contract between Modern and the Bank stipulated that the service contract would be assigned

to a franchisee. After “purchasing” the cleaning contract from Modern, Mr. Bourque, as franchisee, agreed to perform the work in accordance with terms agreed to by Modern and the Bank as client. Kasirer J.A. properly characterized this business relationship as being tripartite in nature, since it involves three parties: the client requesting cleaning services, Modern which guarantees the quality and provision of services, and the franchisee who actually performs them.

[40] To fully understand this relationship, it is necessary to examine the nature of the assignments made by Modern. Quebec law, as Kasirer J.A. noted, draws a distinction between perfect and imperfect assignments. In a perfect — or true — assignment, the assignor transfers the rights and obligations it has under the contract to an assignee. The assignor is released from the assigned contract, and the assignee becomes bound as if it was the original party to the contract (see J. Pineau, D. Burman and S. Gaudet, *Théorie des obligations* (4th ed. 2001), by J. Pineau and S. Gaudet, at No. 505.1).

[41] In an imperfect assignment, however, the assignor is not released from its obligations under the contract: [TRANSLATION] “There is no *substitution* of a contracting party, [but] rather, a new contracting party is *added*” (D. Lluelles and B. Moore, *Droit des obligations* (3rd ed. 2018), at para. 3217 (emphasis added)). The assignor therefore remains contractually bound by the contract and the other party to the assigned contract will then have *two* parties it can pursue for the performance of the contract’s obligations: the assignor and the assignee (see J. Carbonnier, *Droit*

civil, vol. 2, *Les biens. Les obligations* (2004), at No. 1240; J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at Nos. 1028 and 1047-48).

[42] In the cleaning service agreements between Modern and its clients, the clients consented in advance to the assignment of the cleaning contracts to franchisees, but they did *not* consent to releasing Modern from the original service contract. The provisions of the service contract indicated that despite any subcontracting, assignment or franchising, Modern remained responsible for ensuring that the services were performed and for the quality of the cleaning services. The inclusion of an indemnity clause in the franchise agreement between Modern and Mr. Bourque does not change the fact that Modern remained liable to its clients if the cleaning services were not delivered in accordance with the contract between Modern and its client. The assignment of cleaning contracts by Modern are therefore “imperfect assignments” because a direct contractual link subsists between Modern and its client. The effect of this “imperfect” assignment was to create an ongoing tripartite relationship between Modern as franchisor, Mr. Bourque as franchisee, and the Bank as client. From the perspective of the Bank, both Modern *and* Mr. Bourque were obliged to perform the contract.

[43] Both the cleaning services contract and the franchise agreement must be considered to understand Modern’s business model. By virtue of the imperfect assignment, Modern’s cleaning services contract with the Bank and its franchise

agreement with Mr. Bourque are inextricable. Mr. Bourque's non-performance of the cleaning contract would permit Modern to terminate the franchise agreement. Similarly, the renewal of the franchise agreement between Mr. Bourque and Modern was contingent on Mr. Bourque's compliance with the obligations to the Bank as set out in the cleaning services contract.

[44] This, however, was overlooked by the trial judge. Instead, he only examined whether Mr. Bourque assumed some risks, not whether he assumed the business risk. In *Desjardins*, Jacques J.A. emphasized that artisans will always have a degree of autonomy. But the fact that an employee has a degree of autonomy and assumes some degree of risk does not mean that he or she bears the business risk, in the sense of being able to organize his or her business venture in order to make a profit. By failing to consider the tripartite relationship, the trial judge did not consider the business as a whole, and, as a result, improperly concluded that Mr. Bourque bore the business risk.

[45] As Kasirer J.A. noted, by virtue of its imperfect assignments, Modern's tripartite business model is distinct from most franchise models in which the franchisee has a direct, autonomous relationship with its clients independent of the franchisor. In those franchise models, it is only the franchisee who is contractually liable to the clients, and it is therefore the franchisee who will generally bear the risk of the business. By "imperfectly assigning" cleaning contracts to franchisees like Mr. Bourque, however, Modern maintained a direct relationship with its clients. I agree

with the majority at the Court of Appeal that characterizing Mr. Bourque's business risk in light *only* of the franchise agreement, as the trial judge did, constituted a palpable and overriding error because it was an unduly narrow and restrictive one which obfuscated Modern's continuous contractual relationship with its client, a contractual relationship that placed the business risk squarely on Modern's shoulders. An understanding of this *tripartite* relationship is the indispensable context for applying the *Desjardins/Coger* test. The question asked by this test remains the same of whether or not the relationship is bipartite or tripartite in nature.

[46] In light of Modern's ongoing liability to the Bank, the fact that Mr. Bourque and Modern agreed to a term stating that Mr. Bourque would be an independent contractor does not materially affect the analysis, as the trial judge concluded it did.

[47] Through the operation of the franchise agreement, Mr. Bourque accepted certain risks, including an indemnification clause to the effect that Modern could recover against him for any failure to comply with the terms of the cleaning contracts. Mr. Bourque also assumed some risks relating to any improper use of time, equipment and product. But as the Quebec Court of Appeal noted in *Coger*, artisans, by virtue of their independence, will typically accept some risk in connection with their workplace conditions. There is, however, a fundamental distinction between the risks assumed by workers relating to working conditions, and the *business risk*.

[48] By virtue of its imperfect assignment to Mr. Bourque and the terms of its cleaning service contract with the Bank, Modern retained the risk of contractual non-performance. From the Bank's perspective, as Modern's client, Modern's continued involvement was critical. As a stranger to the franchise agreement with Mr. Bourque, Modern's ability to demand that Mr. Bourque indemnify it was of no relevance to the Bank. Modern's preferred strategy in circumstances where a franchisee failed to perform the cleaning contract was, indeed, to pre-emptively take back the cleaning contract and assign it to another franchisee. This strategy allowed Modern to maintain good relations with its clients while avoiding potentially costly indemnification proceedings against the non-performing franchisee. This preventative strategy and desire to maintain a positive relationship with its clients resulted in the franchise agreement imposing extensive controls on Mr. Bourque so as to detect any non-performance as early as possible.

[49] Modern's ongoing liability to its clients by virtue of the imperfect assignments is inexorably linked to the controls it placed on Mr. Bourque through the franchise agreements. Modern, at all times, remained liable to its clients. The controls it placed on Mr. Bourque aimed to limit this liability. Modern's strategy to strictly control its franchisees, like Mr. Bourque, is the context for examining Modern's assumption of risk. These controls were critical because from the Bank's perspective it was Modern, not Mr. Bourque, who bore the risk of contractual non-performance. As Kasirer J.A. noted, Modern was well-rewarded for assuming this risk: Mr. Bourque could owe Modern up to 43% of his revenue.

[50] As part of its scheme, Modern limited Mr. Bourque's ability to organize his own business, and therefore also limited Mr. Bourque's prospect of making a profit. The terms of the agreement limited Mr. Bourque's ability to transfer his cleaning contracts to third parties. Despite the fact that Mr. Bourque had paid for obtaining the cleaning contracts, he was not free to transfer them — either by sale or assignment. Once Mr. Bourque terminated his relationship with Modern, it was Modern, *not* Mr. Bourque, who reassigned the contracts which Mr. Bourque had paid to obtain. Modern had the option of repurchasing the cleaning contract if a franchisee decided either that he or she wanted to cease operating a particular franchise or leave the Modern network altogether, and Modern retained the right to oppose the transfer or sale of a cleaning contract to a third party. These measures permitted Modern to retain control over its network of franchises, critical for Modern's ongoing contractual relationship with — and liability to — its business clients.

[51] Further, the franchise agreement tightly controlled how franchisees could get new business. Mr. Bourque was bound by a non-competition clause. Any new cleaning contracts Mr. Bourque sought to obtain had to be submitted to Modern. Modern would then negotiate the master service contract with the new client. A franchisee would then be able to purchase the rights to the new client, despite having brought the client to Modern's attention to begin with.

[52] Beyond these constraints on Mr. Bourque's ability to organize his own business, Modern exercised ongoing supervision over Mr. Bourque's work. At any

time, Modern could access the locations serviced by Mr. Bourque. He was also required to document the work he completed. Ongoing supervision allowed Modern to minimize its business risk vis-à-vis its clients, which was critical to the success of Modern's business model given that it remained directly liable to its clients for non-performance. In contrast, Mr. Bourque had limited dealings with the employees of the Bank, which reported any complaints to Modern, not Mr. Bourque. When a Bank branch complained to Modern about Mr. Bourque's services, it was Modern which had the ability to — and did in fact — deduct Mr. Bourque's pay without discussing the complaint with Mr. Bourque.

[53] Moreover, Mr. Bourque's receipt of payment from Modern more closely resembled a salary than business revenue. Mr. Bourque received no direct payment from the clients, who paid Modern. Modern paid Mr. Bourque through direct deposit, *after* deducting amounts for franchising fees, the loans and the products sold by Modern to Mr. Bourque.

[54] Because of the imperfect assignments, Modern remained responsible to its clients. The extensive supervision and limits imposed on Mr. Bourque through the franchise agreement, restricting his ability to control, organize and expand his own business, were designed to protect Modern from the possibility of liability generated by Mr. Bourque's conduct. Modern, however, argues, unpersuasively, that the terms of its franchise agreement with Mr. Bourque merely complied with its obligations as a

franchisor, that is, it controlled Mr. Bourque, a franchisee, in a manner that discharged its duties to support and enhance its brand.

[55] There is no provision of the *C.C.Q.* or any other Québec legislation dealing specifically with franchise agreements. In *Dunkin' Brands Canada Ltd. v. Bertico Inc.*, 41 B.L.R. (5th) 1, the Quebec Court of Appeal set out the obligations owed by a franchisor to its franchisees in a franchise relationship. Writing for the court, Kasirer J.A. emphasized that franchisors have an implied obligation to take reasonable measures to support their franchisees and maintain the strength and relevance of the brand, including measures to preserve the brand's goodwill in the marketplace. The franchisor owes this duty to each individual franchisee *and* to its entire network of franchisees in order to preserve the integrity of the franchise. To enhance the brand, the franchisor has a duty to assist the franchisees in adapting to a changing marketplace, in implementing reasonable measures to remain competitive, and in promoting ongoing innovation.

[56] The controls put in place by Modern undoubtedly align with some of the supervisory authority contemplated by *Dunkin' Brands*, since Modern, as franchisor, owed all of its franchisees a duty to protect and enhance the Modern brand. But, as previously noted, the fact that the relationship between Modern and Mr. Bourque was one of franchisor-franchisee does not answer the question of who assumed the acceptance of and remuneration for business risk. As *Desjardins* and *Coger* delineate, it is substance, not form, that is determinative. In the case before us, the extent of the

controls placed on Mr. Bourque by Modern were necessary for Modern to organize and supervise the business risk since it remained in a direct contractual relationship with its clients. Modern limited Mr. Bourque's ability to organize his own business so that it could limit its own risk in its ongoing relationship with its clients, a risk it retained because of its imperfect assignment of cleaning contracts. Whether the arrangement is also consistent with the franchisor's obligations as set out in *Dunkin' Brands* is immaterial.

[57] Determining who bears the business risk is, of course, a fact-specific, contextual inquiry. There may be other circumstances in which a franchisee could be said to bear sufficient risks so as to assume the business risk of his or her enterprise and thus be considered an independent contractor.

[58] In this case, the trial judge's failure to consider the effect of the imperfect assignment of the cleaning contracts from Modern to Mr. Bourque, caused him to err in his application of the *Desjardins/Coger* test. At all times, both the cleaning services contract *and* franchise agreement governed Modern's business model. The effect of Modern's business model was that it, not Mr. Bourque, assumed the "risk and profit" of the business. Because of its tripartite business model and ongoing liability to its clients, Modern placed extensive controls on Mr. Bourque to limit its own business risk. Mr. Bourque did not assume the business risk and therefore it cannot be said that he was an independent contractor. I agree with the majority of the Court of Appeal that the trial judge's failure to consider the nature of the imperfect

assignments at the heart of Modern's business model, and the resulting tripartite nature of the relationship between Modern, its clients and Mr. Bourque, was a palpable and overriding error which led to the improper application of the *Desjardins* and *Coger* tests.

[59] When Modern's tripartite business model is properly brought into the analysis, it becomes clear, as the Court of Appeal held, that it was Modern who assumed the business risk and ability to make a profit. Mr. Bourque therefore was an artisan, making him an employee under the *Act*. Given that Mr. Bourque and Ms. Fortin are employees within the meaning in the *Act*, Modern is correspondingly a "professional employer".

[60] The mandatory provisions of the *Act* and *Decree* therefore govern the relationship between Modern and Mr. Bourque. As a result, both Mr. Bourque and Ms. Fortin are entitled to the wages and benefits claimed on their behalf by the Comité.

[61] Accordingly, the Court of Appeal properly intervened. I would dismiss the appeal with costs.

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[62] We have carefully read our colleague’s reasons, which essentially reiterate the position stated by the majority of the Quebec Court of Appeal with regard to the effect of imperfect assignments of contracts. With respect, we believe that the reasoning underlying that position is flawed. The fact that the assignments of contracts between Modern Cleaning Concept Inc. (“Modern”) and Mr. Bourque were

imperfect did not significantly affect the business risk assumed by Mr. Bourque, and therefore the trial judge's failure to deal with this aspect of the contractual relationship between Modern and Mr. Bourque is not a reviewable error. The appeal should be allowed and the trial judge's decision restored.

I. Background and Judicial History

[63] The appellant, Modern, operates a large network of cleaning and maintenance franchises. Francis Bourque, a contractor in the same field of activity, decided to join the network as a franchisee in the hope of enlarging his client base and expanding his own business. Modern therefore assigned him cleaning contracts with commercial clients, including branches of the National Bank ("Bank"). After just a few months, Mr. Bourque, who was not satisfied with the results, gave up his franchise and continued carrying on business under his own name.

[64] The respondent, the Comité paritaire de l'entretien d'édifices publics de la région de Québec ("Parity Committee"), argued that Mr. Bourque and his spouse, Jocelyne Fortin, who worked with him, were in fact "employees" of Modern for the purposes of a specific statute, the *Act respecting collective agreement decrees*, CQLR, c. D-2 ("ACAD"). On this basis, the Parity Committee claimed \$9,219.32 on their behalf for wages that had allegedly not been paid.

[65] The Court of Québec dismissed the action, finding that Mr. Bourque had been engaged in a business venture involving a business risk that was incompatible

with the status of “employee” under the *ACAD* (2016 QCCQ 1789). The Court of Appeal reversed that decision after concluding that the trial judge had erred in assessing that risk by failing to consider the imperfect nature of the assignments of contracts between Modern and its franchisees (2017 QCCA 1237). Morin J.A, dissenting, was of the view that Mr. Bourque could not be characterized as an employee for the purposes of the *ACAD* in the absence of a contract of employment within the meaning of the *Civil Code* (“*C.C.Q.*”).

II. Issues and Standards for Intervention

[66] The appeal to this Court essentially raises two issues: was Mr. Bourque an employee within the meaning of the *ACAD* and, if so, was Modern his “professional employer” for the purposes of that statute?

[67] We begin by noting, with regard to Modern’s status under the *ACAD*, that the judge did not analyze this second issue directly. There is therefore no need to discuss the applicable standard for intervention in this regard, other than to note that the Court must defer to the relevant findings of fact made by the trial judge.

[68] The determination of Mr. Bourque’s status under the *ACAD* raises a question of mixed fact and law, since it involves applying a legal test — specifically the business risk test — to the facts of the case (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 26-37; *Prud’homme v. Prud’homme*, 2002 SCC 85, [2002] 4 S.C.R. 663, at para. 66). One of the main points to consider is what the

parties to the franchise agreement intended, including what risk Mr. Bourque intended to assume. In this regard, this Court recently noted in *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46, at paras. 49 and 147, that the interpretation of a contract is generally a question of mixed fact and law. The same is true with the characterization of a contract where it rests on the determination of the parties' common intention, at least when regard must be had to extrinsic evidence, as is the case here (*3091-5177 Québec inc. (Éconolodge Aéroport) v. Lombard General Insurance Co. of Canada*, 2018 SCC 43, at paras. 18 and 59).

[69] Unless an exception applies, the standard for intervention in respect of questions of mixed fact and law is that of palpable and overriding error, which is a “highly deferential” standard (*Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at para. 38, citing *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46). Under this standard, an appellate court’s role is not to reconsider the evidence globally and reach its own conclusions, but simply to ensure that the trial judge’s conclusions — including the trial judge’s legal inferences — are supported by the evidence (*Housen*, at paras. 1, 4, 22-23 and 26; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 55; *J.G. v. Nadeau*, 2016 QCCA 167, at para. 79 (CanLII)).

[70] It is important to remember that “failure to discuss a relevant factor in depth, or even at all, is not in itself a sufficient basis for an appellate court to reconsider the evidence” (*Housen*, at para. 39). The trial judge is presumed to have

considered the evidence in its entirety (*Housen*, at para. 72). As the Court noted in *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, at para. 15, “an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion”.

[71] Appellate intervention is warranted only where it is shown that a palpable error, that is, an error that is “plainly seen”, has affected the result (*Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138, at para. 38). If no palpable and overriding error is properly established, this Court must restore the trial judge’s decision, even if it considers the appellate court’s conclusions to be more persuasive in some respects (*H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at para. 74; see also *Nelson (City)*, at para. 38; *Salomon v. Matte-Thomson*, 2019 SCC 14, at paras. 33 and 110; *Schwartz v. Canada*, [1996] 1 S.C.R. 254, at para. 36).

III. Statutory Framework of the ACAD

A. *History and Scheme of the ACAD*

[72] The purpose of the *ACAD* is to provide for the juridical extension of a collective agreement, by means of a government decree, so that it binds all employees and employers working in a specific field of activity. The initial version of the statute,

which was inspired by European legislation, was enacted in Quebec in 1934,¹ at a time when the labour movement was still relatively weak and legislated minimum labour standards were not stringent. The statute's original purpose was to promote the establishment of decent conditions of employment while ensuring that employers that granted concessions to their employees would remain competitive. In authorizing the government to issue a decree imposing conditions of employment negotiated by an association of employees and an employer on an entire field of activity, the statute reflected a compromise between state intervention, on the one hand, and negotiation on a voluntary basis by workers and employers, on the other (see J.-L. Dubé, *Décrets et comités paritaires: l'extension juridique des conventions collectives* (1990), at pp. 5-22).

[73] Over time, the mechanism of juridical extension of collective agreements has declined in importance. Whereas in 1948 there were nearly 100 decrees in Quebec governing labour relations between approximately 18,000 employers and 200,000 employees (Dubé, at p. 21), today there are only 15 decrees in force under the *ACAD*. In fields of activity like hairdressing, automotive services, cartage and cleaning and maintenance, to name just a few, juridical extension is still aimed at maintaining decent conditions of employment for certain classes of employees while preserving healthy competition among employers.

¹ *Collective Labour Agreements Extension Act*, S.Q. 1934, c. 56.

[74] The juridical extension mechanism works as follows. When a collective agreement is entered into by an association of employees and an employer, any party to the agreement may apply to the government to have its content imposed on others in the industry in a particular region (*ACAD*, s. 3). If, upon inspection, the application is considered admissible, the Minister must publish a notice specifying that any objection to the draft collective agreement extension must be filed within 45 days (or a shorter time in certain cases) (*ACAD*, s. 5). At the expiry of that time, the Minister may recommend that the government issue a decree ordering the extension of the collective agreement, with or without changes, if the Minister considers that the application meets the conditions set out in s. 6 *ACAD*, which concern matters such as the scope of the decree, the preponderant importance of the proposed conditions of employment and the absence of serious inconvenience for the enterprises concerned. Where appropriate, the government may then order that the collective agreement will, by juridical extension, bind all employees and employers within the geographical and sectoral limits provided for in the decree (*ACAD*, s. 2).

[75] Once in effect, the conditions of employment imposed by decree become minimum standards of public order from which the employers and employees concerned may not derogate (*ACAD*, ss. 11 and 12). However, as under the *Act respecting labour standards*, CQLR, c. N-1.1, the parties may, through a contract of employment, provide for conditions that are more advantageous for employees (*ACAD*, s. 13). A parity committee made up of employer and employee representatives is responsible for overseeing and ascertaining compliance with the

decree (*ACAD*, s. 16). The parity committee may, among other things, receive the complaints filed by employers and employees (*ACAD*, s. 24), collect levies (*ACAD*, s. 22 para. 2(i)), inspect worksites (*ACAD*, s. 22 para. 2(e)), make claims on behalf of employees (*ACAD*, s. 22 para. 2(a)) and institute penal proceedings (*ACAD*, s. 52).

[76] The *ACAD* is considered remedial legislation because its purpose is to guarantee minimum conditions of employment and to prevent abuses in the industries concerned (see *Comité paritaire de l'industrie de la chemise v. Potash*, [1994] 2 S.C.R. 406, at p. 419; *Comité paritaire d'installation d'équipement pétrolier du Québec v. Entreprises Nipo Inc.*, 65 Q.A.C. 29; *Comité paritaire des agents de sécurité v. Société de services en signalisation SSS inc.*, 2008 QCCS 335, at para. 31 (CanLII), aff'd 2009 QCCA 1787). The *ACAD* must therefore be given a large and liberal interpretation (*Société de services en signalisation SSS inc.* (Que. Sup. Ct.), at para. 38, citing *Comité paritaire de l'entretien d'édifices publics de la région de Québec v. Station de ski Le Valinouët Inc.*, 63 Q.A.C. 143).

B. *Scope of a Decree*

[77] In 1996, the government undertook a major reform of the *ACAD* in order to modernize it and harmonize it with the *Labour Code*, CQLR, c. C-27, and the *Act respecting labour standards (An Act to amend the Act respecting collective agreement decrees*, S.Q. 1996, c. 71). At the time of the reform, one of the legislature's concerns was with countering the practice of [TRANSLATION] "horizontal extension", whereby a decree was extended outside the fields contemplated when it

was passed (Commission permanente de l'économie et du travail, "Étude détaillée du projet de loi n° 75 — Loi modifiant la Loi sur les décrets de convention collective", *Journal des débats*, vol. 35, No. 30, 2nd Sess., 35th Leg., December 6, 1996, at pp. 1-2; Ministère du Travail, *Rapport sur l'application de la Loi modifiant la Loi sur les décrets de convention collective* (2000), at pp. 28-29). To address that problem, the legislature amended the *ACAD* to ensure that the juridical extension mechanism could be used only in relation to employees and employers falling within the scope of a decree.

[78] Since that reform, the scope of a collective agreement decree has been defined by the interplay of ss. 1(g), 1(j) and 2 *ACAD* and by the sectoral and geographical parameters specified in the decree. Section 2 provides that the juridical extension of a collective agreement binds all *employees* and *professional employers* within the scope determined in the decree. Section 1(j) defines an *employee* as "any apprentice, unskilled labourer or workman, skilled workman, journeyman, artisan, clerk or employee, working individually or in a crew or in partnership". Section 1(g) defines a *professional employer* as an employer that has in its employ one or more employees covered by the scope of application of a decree.

[79] Whether the conditions provided for in a decree apply to a worker must therefore be determined by first considering (1) whether the worker is an employee within the meaning of the *ACAD* and, if so, (2) whether he or she is within the scope determined in the decree. It is then necessary to identify a debtor bound by the decree,

that is, a professional employer that employs the employee covered by the scope of application of the decree.

[80] In the instant case, it is not in dispute that the activities of Modern and its franchisees are within the parameters specified in the *Decree respecting building service employees in the Québec region*, CQLR, c. D-2, r. 16 (“*Decree*”), which applies to maintenance work performed for others in the Québec region. The only issues before the trial judge were therefore whether Mr. Bourque was an employee within the meaning of the *ACAD* and, if so, whether Modern was his “professional employer”. The judge concluded that Mr. Bourque could not be characterized as an “employee”.

IV. Status of Mr. Bourque Under the ACAD

A. *Concept of Employee in the ACAD*

[81] The *ACAD* defines the term “employee” as follows:

In this Act and in its application, unless the context requires otherwise, the following words and expressions have the meaning hereinafter given to them:

...

“employee” means any apprentice, unskilled labourer or workman, skilled workman, journeyman, artisan, clerk or employee, working individually or in a crew or in partnership; [Emphasis added.]

(s. 1(j))

[82] The concept of employee in the *ACAD* has been the subject of much discussion in light of the broad and, to say the least, vague definition in s. 1(j). That being said, both the authors and the courts are of the view that the concept is broader in the *ACAD* than it is under the *Civil Code* because of the inclusion of the term “artisan” in the definition in the *ACAD* (*Comité paritaire de l’industrie de l’automobile des régions Saguenay Lac St-Jean v. Soucy*, 60 Q.A.C. 76, at pp. 77-79; Dubé, at p. 54; R. P. Gagnon, L. LeBel and P. Verge, *Droit du travail* (2nd ed. 1991), at p. 556).

[83] Under the *Civil Code*, the concept of employee refers to a person who undertakes, for remuneration, to do work under the direction or control of an employer under a contract of employment (art. 2085 *C.C.Q.*). An agreement may be characterized as a contract of employment when the following three elements exist: performance of work by the employee, payment of wages by the employer and a relationship of subordination between the parties (*Cabiakman v. Industrial Alliance Life Insurance Co.*, 2004 SCC 55, [2004] 3 S.C.R. 195, at para. 27; R. P. Gagnon, *Le droit du travail du Québec* (7th ed. 2013), at p. 88; F. Morin et al., *Le droit de l’emploi au Québec* (4th ed. 2010), at para. II-52). The most important characteristic of a contract of employment is the legal subordination of the employee to the employer. This is what distinguishes a contract of employment from a contract of enterprise or for services governed by arts. 2098 et seq. of the *C.C.Q.* (see *Cabiakman*, at para. 28; *Dicom Express inc. v. Paiement*, 2009 QCCA 611, [2009]

R.J.Q. 924, at para. 15; R. P. Gagnon (2013), at p. 90; M.-F. Bich, “Contracts of Employment”, in *Reform of the Civil Code*, vol. 2-B, *Obligations* (1993), 1, at p. 6).

[84] Unlike an employee within the meaning of the *Civil Code*, an artisan is not, in any true sense, subordinate to an employer in the performance of his or her work. Generally speaking, an artisan is a natural person who does manual work *on his or her own account*, alone or with the help of family members, journeypersons, workers or apprentices (C. Jobin, “Statuts de salarié et d’employeur dans les lois du travail”, in *JurisClasseur Québec — Collection droit du travail — Rapports individuels et collectifs du travail* (loose-leaf), vol. 1, by G. Vallée and K. Lippel, eds., fasc. 8, at para. 146; Dubé, at pp. 40-43; M.-L. Beaulieu, *Les Conflits de Droit dans les Rapports Collectifs du Travail* (1955), at pp. 143-44).

[85] In fact, an “artisan” will generally be a “contractor” in the civil law (A. Perrault, *Traité de droit commercial* (1936), vol. II, at pp. 225-26). The *Civil Code* defines a contract of enterprise (or for services) as “a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to another person, the client, to carry out physical or intellectual work or to supply a service, for a price which the client binds himself to pay to him” (art. 2098 *C.C.Q.*). Because the artisan works on his or her own account, he or she generally enters into a contract of enterprise (or for services) with the client. As a contractor, the artisan is free to choose the means of performing the contract, and no relationship of

subordination exists between him or her and the client (art. 2099 *C.C.Q.*). In other words, the artisan is legally independent of the client.

[86] Nevertheless, once an artisan performs work to which a decree applies, he or she becomes an “employee” within the meaning of the *ACAD* despite having a certain level of independence. The inclusion of the term “artisan” in s. 1(j) therefore means that the concept of “employee” in the *ACAD* has a broader scope than that which results solely from a contract of employment under the *Civil Code* (Jobin, at para. 145). In particular, the “legal subordination” that distinguishes a contract of employment and a contract of enterprise within the meaning of the *Civil Code* is not essential to the status of “employee” under the *ACAD* (Dubé, at pp. 43-44). In short, an artisan who is a contractor — and not an employee — within the meaning of the *Civil Code* may be considered to be an employee to whom the *ACAD* applies.

B. *Business Risk Test*

[87] However, not every contractor who personally, on his or her own account, performs manual work to which a decree applies is necessarily an “artisan” within the meaning of the *ACAD*. The prevailing view of the Quebec Court of Appeal is that there are some contractors who *prima facie* fit the definition of an artisan but to whom the *ACAD* does not apply because their activities are organized with a view to making a profit and, as a corollary, involve a [TRANSLATION] “business risk” (*Comité paritaire de l’entretien d’édifices publics v. Confédération des caisses populaires et d’économie Desjardins du Québec*, [1985] C.A. 17 (Que.); *Confection Coger Inc. v.*

Comité paritaire du vêtement pour dames, [1986] R.J.Q. 153; *Comité paritaire de l'entretien d'édifices publics v. Caisse populaire Immaculée Conception de Sherbrooke*, 43 Q.A.C. 1; *Québec (Procureur général) v. Groupe d'entretien Salibec inc.*, 1993 CanLII 4298 (Que. C.A.).

[88] Indeed, some definitions of “artisan” reflect the limited risk incurred by such a person. For example, the *Dictionnaire de droit québécois et canadien* (2016) defines “artisan” as a person [TRANSLATION] “who works on his or her own account, lives off the profits from his or her manual work and, unlike a merchant, does not speculate on the labour he or she employs or the materials he or she uses” (p. 34; see also *Bérubé v. Tracto Inc.*, [1998] R.J.Q. 93 (C.A.), at pp. 99-100, as regards the distinction between an artisan and a merchant within the meaning of the *Consumer Protection Act*, CQLR, c. P-40.1). For the purposes of the *ACAD*, there is thus a distinction between an artisan, who is a contractor within the meaning of the *Civil Code* but nonetheless an employee subject to the *ACAD*, and other contractors who are not considered to be artisans because of the degree to which their activities are organized and the business risk they assume.

[89] In *Desjardins*, the Court of Appeal found that the primary test for differentiating a contractor from an artisan is [TRANSLATION] “organization for the purpose of profit, that is, acceptance of and remuneration for risk”, which is incompatible with the concept of artisan in the *ACAD*:

[TRANSLATION] However, a contract of enterprise is very similar to the contract entered into by an artisan, given that artisans and contractors are legally independent of their clients (Antonio Perrault. *Traité de droit commercial*. Volume II. Montréal: Albert Lévesque, 1936, at p. 225). This is a shared characteristic.

Notwithstanding this shared characteristic, the legislature has included artisans in its definition of “employee” in order to provide them with conditions of employment that are not “unjust” (see the preamble to the original statute, the *Minimum Wage Act*, S.Q. 1940, c. 39).

This characteristic is therefore not what distinguishes the case of an artisan who is subject to the decree from that of a contractor who is not.

The most important factor that differentiates a contractor’s contract from an artisan’s is that an enterprise involves organization for the purpose of profit, that is, acceptance of and remuneration for risk, whereas this aspect is missing from the contract entered into by an artisan. This is one of the distinctions identified by the French courts for differentiating a contract of enterprise from a contract of employment (Daloz. *Répertoire de droit civil*. Volume III. Edited by Pierre Raynaud. Paris: Jurisprudence générale Daloz. See “contrat d’entreprise”, section 2, paragraph II):

Nonetheless, *remuneration* based on the work performed is often indicative of a contract of enterprise (Soc., Dec. 2, 1970, *Bull. civ. V*, No. 683), whereas “the absence of an additional amount” as consideration for liability or risk is “likely to preclude the existence of such a contract” (Soc., July 19, 1968, *Bull. civ. V*, No. 400).

In my opinion, acceptance of and remuneration for risk are what differentiate an artisan from a contractor in the strict sense where the statute treats artisans, but not contractors, as employees.

Other secondary factors are freedom to determine work methods and schedules as well as aggregate, lump-sum payment. They may make it possible to characterize the contract where they coexist with business risk. [Emphasis added; p. 20.]

[90] In *Coger*, the Court of Appeal noted that a worker who assumes a [TRANSLATION] “business risk” cannot be characterized as an artisan within the meaning of the *ACAD*. Though not explicitly stated in the relevant case law, it stands

to reason that this business risk must go beyond the risk that any artisan assumes, such as the risk of defective work tools or inefficient work methods.

[91] Further, we are of the view that the business risk must be a real one and that the worker must intend to assume it. In other words, the court must ask whether the worker intended — in fact and in light of the evidence — to *accept* a real business risk in order to make a profit.

[92] In assessing the business risk test, the court must consider a series of factors. 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 (see *Desjardins* and *Coger*).

[93] In this regard, the terms of the contracts entered into by the worker and his or her clients or business partners are relevant but not in themselves determinative: [TRANSLATION] “[T]he appellants’ desire to avoid the application of the decree cannot obstruct the reality that penetrates the shield of the contract” (*Salibec*, at p. 3). As summed up by the trial judge in the instant case, [TRANSLATION] “beyond the legal organization of the work activity performed, there is a clear preponderance of facts, **concrete** reality, revealing . . . how the work is actually organized” (para. 123 (emphasis in original)).

[94] The business risk test remains the same regardless of whether the contractual relationship in issue is bipartite or tripartite in nature, including in the

context of a franchise agreement. In each case, the purpose of the analysis is simply to determine whether the worker assumes a business risk. Contrary to what our colleague suggests (paras. 37-38), it is not a matter of establishing which party to a contract assumes *the* business risk, as if there could be only one risk. The parties each incur such risks at the same time. With respect, it is completely artificial to say that a business risk always rests with *just one* of the parties to a contract, whatever the nature of the business relationship.

[95] *Desjardins* and *Coger* do not support our colleague's approach. The former case dealt with the relationship between a contractor and his client, while the latter dealt with the relationship between an employer and its employees within the meaning of the *Civil Code*. In both cases, only one of the two parties actually assumed a business risk. But it cannot be inferred that this will always be the case, particularly in a tripartite relationship. Fundamentally, the level of risk assumed by the party performing the work is what determines whether that party can be characterized as an artisan within the meaning of the *ACAD*, regardless of the fact that another party also incurs a business risk, for example by assuming liability for the same contractual obligations.

C. *Application to the Facts*

[96] The trial judge concluded that Mr. Bourque and his spouse, Ms. Fortin, were not employees within the meaning of the *ACAD* and denied the claim made by

the Parity Committee on their behalf.² His analysis of the evidence shows that Mr. Bourque entered into an agreement with Modern under which he assumed a business risk in order to make a profit. This meant that he could not be characterized as an artisan or, consequently, as an employee. The same is true of Ms. Fortin, who assisted her spouse with his work on an as-needed basis.

[97] The majority of the Court of Appeal found that the trial judge had made a palpable and overriding error by failing to note the imperfect nature of the assignment of cleaning contracts between Mr. Bourque and Modern, which remained fully liable to clients for the performance of the contracts (Que. C.A. reasons, at paras. 147 and 173-76 (CanLII)). Even assuming that this was a palpable error, we are of the view that it did not justify the Court of Appeal's intervention given that it could not affect the trial judge's analysis. He would have reached the same result if he had dealt with the imperfect assignment of the cleaning contracts.

(1) Trial Judge's Analysis of the Evidence

[98] It is clear from the trial judge's reasons that Mr. Bourque genuinely intended to [TRANSLATION] "pursue [a] cleaning services business venture" and to "do business" with Modern, and that as a result he could not be characterized as an employee within the meaning of the *ACAD* (C.Q. reasons, at paras. 176-80 (CanLII));

² In fact, the trial judge allowed the claim in part for the sole purpose of recognizing Modern's admission that it owed Mr. Bourque \$2,877.22 (paras. 181-82). That amount was not in issue before the Quebec Court of Appeal (paras. 125-26), nor is it in issue in this Court.

see also the reasons of Morin J.A., dissenting in the Court of Appeal, at paras. 42 and 63).

[99] In arriving at his conclusions, the trial judge considered a series of factors and analyzed the evidence carefully (see, for example, paras. 169-80). As aptly stated by Morin J.A., dissenting in the Court of Appeal, at para. 70, [TRANSLATION] “the trial judge did not merely interpret the franchise agreement based on its terms, but considered all the evidence, including the testimony of Mr. Bourque and his spouse, in reaching his conclusions”.

[100] Specifically, to determine whether Mr. Bourque was an employee within the meaning of the *ACAD*, the trial judge analyzed the evidence at three stages: before, during and after the conclusion of the franchise agreement. From that perspective, he stated that, in his view, the following conduct indicated that Mr. Bourque was not an employee to whom the *Decree* applied:

- a) before the agreement, Mr. Bourque had his own business registered in his name and even performed a contract for Modern as a subcontractor (para. 171);
- b) at the time the agreement was signed, Mr. Bourque intended to expand his business, hire employees and make the business his main source of income (para. 172);

- c) during the performance of the agreement, Mr. Bourque tried to obtain new clients and wanted to add lettering to his vehicle showing the name of his franchise; he even subcontracted part of the work to a third party (para. 173).

[101] On the other hand, the trial judge stated that the following conduct was more similar to that of an employee (para. 174):

- a) he accepted the franchise agreement without negotiating its terms;
- b) his work was supervised by the franchisor's coordinator;
- c) he obtained supplies from the supplier of the franchisor, which received the invoices directly;
- d) he did not negotiate directly with clients;
- e) he had to adhere to a work schedule set out in specifications that he had not negotiated;
- f) he had to pay up to 43% of his income to the franchisor.

[102] According to the trial judge, this evidence had to be weighed to determine Mr. Bourque's true intention. On the basis of the evidence as a whole, the trial judge found that Mr. Bourque and his spouse had been engaged in a business venture that

had unfortunately not turned out as expected. In the trial judge's view, the failure of that business venture did not suffice to characterize Mr. Bourque as an employee within the meaning of the *ACAD*:

[TRANSLATION] The premature termination of Francis Bourque's business venture, which was tied to his dissatisfaction with the defendant's support services and a certain impatience for his business to grow, must not be used to misrepresent the business objective he had at the time he entered into the agreement with the defendant. Indeed, the evidence shows that, after he severed ties with the defendant, he carried on with his cleaning activities in the same form as he had previously, using his name as a registered firm name.

(para. 177)

[103] Moreover, according to the uncontradicted testimony of Louis Clavet, Modern's vice-president and general manager at the time, Mr. Bourque obtained a poor return on his investment because he took twice the time that was needed, compared to industry standards, to perform his work (C.Q. reasons, at para. 76; C.A. reasons, at para. 78).

[104] Finally, the trial judge was well aware of the fact that certain contractual arrangements could be used to conceal a worker's status as an employee in order to circumvent the *ACAD*'s public order provisions. He considered this possibility and expressly rejected it:

[TRANSLATION] . . . [T]he factual framework establishing the relationship between the defendant and Francis Bourque indicates that there was a real contract, which was a contract of adhesion, of course, but which resulted from the clear desire of two parties to do business with

each other for their mutual benefit. Just as good faith is presumed, the evidence does not justify disregarding the contractual basis for the agreement between the defendant and Francis Bourque as if it were merely a scheme to get around the requirements of a statute of public order. [Emphasis added; para. 180.]

[105] We agree completely with our colleague that a franchise agreement cannot function to disguise the reality of a relationship between an employee and an employer, as those terms are defined in the *ACAD* (para. 38). As the passages quoted above show, the trial judge also shared this concern. Far from relying blindly on the terms of the agreement, he rendered his decision on the basis of extensive evidence concerning the reality of the relationship between Mr. Bourque and Modern. In the absence of a palpable and overriding error in his assessment of the evidence, the conclusions he reached cannot be called into question.

(2) Effect of the Imperfect Assignment of Cleaning Contracts on Business Risk

[106] Kasirer J.A., writing for the majority of the Court of Appeal, found that the trial judge’s analysis was based on an [TRANSLATION] “incorrect understanding of the tripartite contractual relationship among clients, the franchisor and franchisees” (para. 94). Specifically, in Kasirer J.A.’s opinion, the trial judge had failed “to note that the assignments of cleaning contracts by the franchisor to the franchisee are what are characterized in the civil law as ‘imperfect assignments’: despite the assignments, the respondent-franchisor (the assignor) remains bound by the cleaning contracts it originally negotiated and is still liable to the client (the assigned party) for the

provision of cleaning services by the franchisee (the assignee)” (para. 95; see also paras. 147, 154, 156-57, 159, 163 and 173). In Kasirer J.A.’s view, “even though the franchisee was legally independent of the franchisor, the franchisor still assumed the business risk in relation to the client” (para. 96).

[107] In our opinion, the fact that the assignments of contracts were imperfect does not affect the analysis of business risk in the manner suggested by Kasirer J.A. Failure to deal with this aspect is therefore not a palpable and overriding error.

[108] It is true that clause 11 of the cleaning contract with the Bank did not release Modern from its obligations in the event that the contract was assigned to a franchisee. In this sense, the juridical operation by which Modern’s franchisees obtained their cleaning contracts did indeed involve an imperfect assignment. That being said, the fact that the assignment was imperfect did not diminish the liability of the franchisee, in this case Mr. Bourque. Modern certainly remained liable *in solidum* for the performance of the contracts, but this did not eliminate or limit Mr. Bourque’s liability. The assignment of contracts made him a debtor in respect of all the cleaning services to be provided (C.A. reasons, at paras. 158 and 171). The fact that the assignment was imperfect simply meant that the assigned party, Mr. Bourque’s client, obtained a second debtor that was also liable to it for everything under the contract. If the contractual obligations were breached, the client had the choice of suing both debtors or just one of them, as it wished. D. Lluelles and B. Moore explain this as follows:

[TRANSLATION] *Imperfect assignment of a contract*. We use this term by analogy with both delegation and the assignment of a debt. Some authors instead use the expressions “non-releasing assignment” or “cumulative assignment”. In such a case, C becomes, by contract with A, party to a contract with B; C may therefore require B to perform the prestations owed under the contract, and B may require the same of C. The assignment is imperfect because A is not released from its obligations; B therefore has two debtors. There is no substitution of a contracting party, nor is the contract transferred; rather, a new contracting party is *added*. [Emphasis added; footnotes omitted.]

(*Droit des obligations* (2nd ed. 2012), at No. 3217)

[109] The comments of Jobin and Vézina are to the same effect:

[TRANSLATION] **Imperfect assignment that does not release the assignor from the obligations resulting from the assigned contract** — Where the assigned party expressly refuses to release the assignor or where there is no tacit intention that is sufficiently clear to find a perfect delegation of payment, there is said to be an imperfect assignment of a contract. The assignor will not be released from its obligations to the assigned party, and that party can require the assignor to perform them. If called upon to do so, the assignor can bring a recursory action against the assignee, in keeping with the relationship that exists between a delegator and a delegate in the context of an imperfect delegation of payment.

...

Assignee’s obligation to assume the debts resulting from the assigned contract — By definition, there must be a personal undertaking by the assignee to pay the assignor’s debts under the contract that is the subject of the assignment in order to find that the contract has actually been assigned. If there is no such undertaking, the situation does not involve a delegation of payment but at most merely an indication of payment that does not bind the assignee’s patrimony (art. 1667 C.C.Q.). In the absence of a delegation of payment that can transfer the assignor’s debt, the transfer between the assignor and the assignee will be limited to an assignment of claims.

The assignee is subject to the same obligations and restrictions initially imposed on the assignor. The assignee must therefore perform the obligations, monetary or otherwise, resulting from the contract. [Emphasis added; citations omitted.]

(J. L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at Nos. 1048 and 1051)

[110] In the instant case, the clients, including the Bank, could therefore sue Modern *and* Mr. Bourque directly if the obligations provided for in the cleaning contracts were breached. In this sense, the fact that the assignments were imperfect benefited the clients without limiting the franchisees' liability. In addition, Modern could bring a recursory action against Mr. Bourque if it were required to perform obligations. Although Modern's practice was generally to avoid suing its franchisees for breach of contract (C.Q. reasons, at para. 80), such an action remained a possibility and therefore a risk for Mr. Bourque. In fact, the franchise agreement expressly provided that, if Modern was sued, Mr. Bourque undertook to indemnify it and even to pay its lawyers' fees (clause 8.19.1; see Que. C.A. reasons, at para. 184). Plainly, Mr. Bourque's ultimate liability was in no way reduced.

[111] In short, the fact that the assignments were imperfect affected Mr. Bourque's business risk only to a limited extent, if at all. Indeed, Kasirer J.A. recognized that Mr. Bourque accepted certain risks, including because he assumed liability for non-performance of the cleaning contracts and was also subject to a risk of bad debts (paras. 182-86 and 211). In this context, it is indisputable that the trial judge's conclusions were supported by the evidence and that no palpable and overriding error was established. In reality, the majority of the Court of Appeal based its intervention on a simple difference of opinion concerning the assessment of business risk (*Housen*, at para. 56; *Nadeau*, at para. 79). In our view, this is sufficient

to dispose of this appeal. In the absence of an actual reviewable error, the majority could not reassess the entire record and substitute its own conclusions for those of the trial judge.

[112] At the same time, we acknowledge that the very existence of a franchise agreement may lessen the business risk, since a franchisee can generally count on a proven business model, a recognized trademark and the franchisor's support with management and marketing. These are precisely the advantages of a franchise when compared with other forms of enterprise. In this regard, the following definition by J. H. Gagnon was referred to by Morin J.A. of the Court of Appeal in his dissenting reasons (para. 48):

[TRANSLATION] A long-term commercial and contractual relationship between two enterprises that are legally independent of each other, in which one of them (called the "franchisor") grants the other (called the "franchisee") the right to carry on business in a particular manner, which has been developed and already tested out successfully by the franchisor, within a specified territory, in accordance with uniform, defined standards, using one or more specific trademarks or signs, for a limited time, for remuneration. Under the agreement, the franchisor also provides the franchisee with certain additional services, including support services for the management of the franchisee's business and marketing services for the products or services offered by the network, and the franchisor undertakes to monitor the uniformity of the defined methods and to improve them continuously based on the needs of the marketplace.

(La franchise au Québec (loose-leaf), at p. 21)

[113] As a general rule, however, the mere existence of a franchise agreement does not eliminate a franchisee's business risk (*Provigo Distribution Inc. v. Supermarché A.R.G. Inc.*, [1998] R.J.Q. 47, at p. 57). A franchisor must, of course,

exercise some supervision with respect to the services provided by franchisees in order to ensure the quality of those services and thereby limit its own business risk, but this does not mean that a franchisee does not also incur such a risk. In other words, it cannot be presumed — absent any evidence in this regard — that the degree of supervision exercised by a franchisor is inversely proportional to the risk assumed by a franchisee. If this reasoning were accepted, any franchisee could be considered to be an employee within the meaning of the *ACAD*, since significant supervisory powers are an inherent part of a franchise agreement (see, for example, *Dunkin' Brands Canada Ltd. v. Bertico Inc.*, 2015 QCCA 624, 41 B.L.R. (5th) 1, at paras. 59-65 and 77-87). We will come back to this point when discussing Modern's status under the *ACAD*.

[114] In the case at bar, despite the tripartite relationship among Modern, the franchisees and their clients, it was open to the trial judge to find that Mr. Bourque had assumed a business risk in order to make a profit. He remained liable to his clients under the cleaning contracts, he sought out potential clients (C.Q. reasons, at para. 173), he could, in principle, sell his franchise or his contracts and hope to make a profit (paras. 72 and 85), he acquired the necessary tools and products himself (para. 20), he subcontracted certain tasks (paras. 50 and 173), and he planned to hire staff (para. 172). It is true that Mr. Bourque paid a substantial share of his income to Modern, but contrary to what our colleague suggests (para. 50), it cannot be inferred from this that Modern alone assumed the business risk. In fact, the payments were made partly in exchange for management and advertising services (C.Q. reasons, at

para. 18). As well, the lump sum paid to Mr. Bourque by clients cannot be considered wages simply because the payments went through Modern at the clients' request and as a matter of administrative convenience (see our colleague's reasons, at para. 56; C.Q. reasons, at paras. 60 and 82-83; Que. C.A. reasons, at para. 32, reasons of Morin J.A.). The profits generated by Mr. Bourque's business remained contingent on his ability to organize his activities efficiently. All things considered, the trial judge could certainly conclude that, based on the evidence in the record, Mr. Bourque was not an "employee" for the purposes of the *ACAD*.

[115] To be clear, there is nothing in our reasons that precludes a franchisee from being characterized as an artisan, and therefore as an employee within the meaning of the *ACAD*, in certain circumstances. This will be the case where a franchisee personally performs work to which a decree applies but does not assume any business risk. In the instant case, however, the trial judge found that Mr. Bourque was engaged in a business venture that was incompatible with the status of artisan. In our view, that conclusion is entitled to deference.

V. Status of Modern Under the *ACAD*

[116] In light of the foregoing, it is not necessary to rule on Modern's status under the *ACAD* in order to decide this appeal. However, because this question was raised, albeit briefly, in this Court and was discussed by the majority and the dissent in the Court of Appeal, certain comments are in order. In our view, even if Mr. Bourque could be considered to be an employee for the purposes of the *ACAD*,

Modern could not be characterized as a “professional employer” and thus be bound by the conditions provided for in the *Decree*.

A. *Concept of Professional Employer in the ACAD*

[117] Our colleague is of the opinion that it suffices to find that Mr. Bourque is an employee within the meaning of the *ACAD* in order to conclude that Modern is a “professional employer” within the meaning of s. 1(g) (para. 59). This corresponds to Kasirer J.A.’s position (paras. 233 et seq.) that status as a professional employer is contingent on status as an employee. According to this reasoning, once a person has work to which a decree applies done by an “employee”, that person is necessarily, through the interplay of ss. 1(f), 1(g) and 1(j), a “professional employer”. The relevant definitions are as follows:

1. In this Act and in its application, unless the context requires otherwise, the following words and expressions have the meaning hereinafter given to them:

...

(f) “employer” includes any person, partnership or association who or which has work done by an employee;

(g) “professional employer” means an employer who has in his employ one or more employees covered by the scope of application of a decree;

...

(j) “employee” means any apprentice, unskilled labourer or workman, skilled workman, journeyman, artisan, clerk or employee, working individually or in a crew or in partnership;

[118] In Kasirer J.A.'s view, a corollary of the expansiveness of the concept of employee in the *ACAD* is that the concept of professional employer is equally broad and depends not on the existence of a contract of employment within the meaning of the *Civil Code*, but simply on having work to which a decree applies done by an "employee". This reasoning led Kasirer J.A. to assert, citing *Desjardins* and *Coger*, that [TRANSLATION] "it may well be that an employee within the meaning of the *Act* is 'legally independent' of the person that is said to be his or her professional employer" (para. 240).

[119] That conclusion needs to be qualified. Not every person who has work to which a decree applies done by an "employee" can, on that basis alone, be treated as a professional employer and be required to assume the obligations that flow from that status, such as those relating to overtime, annual vacation, sick leave, maternity leave or notices of termination of employment. This is so because of the nature of certain activities covered by the decrees passed under the *ACAD*, in respect of which a member of the public may sometimes enter into a contract directly with the person doing the work as an "artisan". An example would be the case of a hairdresser who provides customers with one of the services listed in the *Decree respecting hairdressers in the Outaouais region*, CQLR, c. D-2, r. 4, in his or her home. Does such a customer become a "professional employer" solely by having work done by a person who is an employee for the purposes of the decree? Of course not. Although an artisan hairdresser is an "employee" for the purposes of the *ACAD*, he or she is not in the employ of a "professional employer" that the hairdresser could require to

comply with the minimum conditions provided for in the decree. I would add that this is what R. P. Gagnon, L. LeBel and P. Verge state in *Droit du travail* (1987), at p. 484:

[TRANSLATION] The persons whom the statute deems to be employees include artisans, even though in common parlance artisans are self-employed persons who work alone, without the help of employees. Do the provisions of a decree nevertheless apply to them? That seems doubtful for the most part. Insofar as they remain artisans, that is, self-employed, no employer is responsible for paying them benefits under a decree, although there has been a temptation to argue that they receive wages from their clients. On the other hand, artisans will have administrative obligations to the committee responsible for administering a decree, such as paying levies and providing certain reports or information. [Emphasis added; footnotes omitted.]

[120] In fact, the Court of King's Bench firmly rejected the idea that an artisan's client could be an "employer" within the meaning of the *ACAD* in 1940:

SIR MATHIAS TELLIER. [TRANSLATION] . . . A customer who takes or sends shoes to a cobbler's workshop or establishment to have them restored or simply to have the soles, the heels, an upper, or everything at once, repaired does not thereby become the cobbler's master or employer, nor does the cobbler become the customer's employee or workman. The relationship established between them is quite different from that of a master and servant or of an employer and workman or employee. As a result, it cannot be governed either directly or indirectly by the decree or order-in-council authorized by the above-mentioned statute.

. . .

MR. JUSTICE BARCLAY. . . . Upon a true construction of the Act itself, it is clear that the object and purport of the Act is to regulate the relationship between employers and employees *inter se*, and when recognized bodies make what appears to be a reasonable agreement considering local conditions, their agreement may be extended to and enforced against all other in the same industry, even though not parties to the agreement, and the Act is careful to set forth what kind of

arrangements can be made obligatory under such circumstances. But the class of persons thus affected must be employers and employees only. Other individuals and the public at large are not concerned and are not contemplated. [Emphasis added.]

(Québec (Procureur général) v. Lazarovitch (1940), 69 B.R. 214, at pp. 222-23 and 228.)

[121] In short, there are “employees” within the meaning of the *ACAD* who quite simply do not have a professional employer. Indeed, the *ACAD* provides expressly for the case of an employee who is required to pay levies despite not serving a professional employer. Section 22 para. 2(i) provides that a parity committee may, by regulation, “levy upon the professional employer alone or upon both the professional employer and the employee, or upon the employee alone, the sums required for the carrying out of the decree”. In s. 22 para. 2(i)(3), this power is expressly extended to include artisans who are covered by a decree but who are not serving a professional employer:

the regulation may determine the basis for the calculation of the levy in the case of a workman or artisan who is not serving a professional employer, and determine that the levy shall be collectable from such workman or artisan although demandable only from the professional employer;

[122] In *Soucy*, the Court of Appeal considered the case of an artisan who had failed to pay the levies authorized by s. 22 para. 2(i)(3). Mr. Soucy worked alone as a painter and body repairer of motor vehicles, an activity covered at the time by the *Decree respecting garage employees in the Saguenay — Lac-Saint-Jean region*, R.R.Q. 1981, c. D-2, r. 50. The Court of Appeal held that he was an employee to

whom the *ACAD* applied even though he was not serving a professional employer. He was accordingly ordered to pay a fine.

[123] Thus, while it is correct to say that the *ACAD* imposes certain obligations on “employees” regardless of whether there is a contract of employment within the meaning of the *Civil Code*, it does not follow that every person who has work done by someone who is an employee for the purposes of a decree is, on that basis, a “professional employer” for the purposes of the statute. For a “professional employer” to be required to meet the obligations provided for in a decree, it is also necessary that the work be done in the context of a relationship that is sufficiently similar to an employment relationship within the meaning of the *Civil Code*.

[124] In fact, Morin J.A., dissenting in the Court of Appeal, was of the opinion that there could not be a professional employer within the meaning of the *ACAD* in the absence of a true contract of employment (paras. 58-62 and 85-88; see also *Comité paritaire de l'industrie de l'automobile de Montréal et du district v. Giguère*, [1987] R.J.Q. 1176 (Prov. Ct.), at p. 1181). He relied in particular on s. 13 *ACAD* and on the term “employment contract” used in it, as well as on s. 2 *ACAD*, which, in his view, suggests that the relationship between an “employee” and a “professional employer” must be in the nature of a “collective agreement”, that is, a contract of employment.

[125] It should be made clear in this regard that, contrary to what Kasirer J.A. suggested at para. 233, note 76, this Court’s case law does *not* support the proposition

that *any* contractual relationship *whatsoever* suffices to make one of the contracting parties an “employer” or a “professional employer” within the meaning of the *ACAD* as long as the object of the obligation assumed by the other party is the performance of work to which a decree applies. Thus, in *Quebec (Construction Industry Commission) v. M.U.C.T.C.*, [1986] 2 S.C.R. 327, there was no doubt that the “employers” concerned were employers for the purposes of the *Civil Code* and the *Labour Code* (see also *Comité Paritaire de l’Industrie de l’Imprimerie de Montréal et du District v. Dominion Blank Book Co.*, [1944] S.C.R. 213).

[126] It is not necessary in this appeal to specify the exact nature of the minimum relationship that will be needed for a person who has work done by an employee to qualify as a professional employer and for an employee to be able to claim the benefits provided for in a decree from that professional employer. That being said, even if it were agreed that a person can be characterized as a “professional employer” in the absence of a contract of employment within the meaning of the *Civil Code*, it would at the very least be necessary to establish that there is a relationship that resembles one of subordination, either because of the degree of control exercised by the client or because of the worker’s position of economic dependence (to the same effect, see, for example, Gagnon, LeBel and Verge (1987), at pp. 485-86). Therefore, a simple contract of enterprise or for services could not generally serve as a basis for the application of a decree.

[127] By analogy, it is helpful to note that there are employment and labour statutes under which the conditions of employment of persons who are employees within the meaning of the *Civil Code* can apply to “dependent” contractors in certain circumstances (*Act respecting labour standards*, s. 1(10); *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 3(1); *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, s. 1(1); see, for example, *Dicom*, at paras. 14-16; *McKee v. Reid’s Heritage Homes Ltd.*, 2009 ONCA 916, 315 D.L.R. (4th) 129, at paras. 31-36). Under such statutes, a person who has work done by another person can be treated as an employer even in the absence of a contract of employment under the *Civil Code*, but a certain degree of control or economic dependence is nonetheless required. In our view, this is also the minimum relationship required under the *ACAD* for a “professional employer” to exist. However, it is not essential to decide here whether a contract of employment within the meaning of the *Civil Code* is necessary for this purpose.

B. *Application to the Facts*

[128] Even if it is assumed that the concept of “professional employer” has a meaning broader than that of an employer under the *Civil Code*, the franchise agreement at issue in this case does not readily support a conclusion that Modern was subject to the *Decree*. This is confirmed by a brief review of the business relationship between Modern and Mr. Bourque, specifically as regards (a) the supervision exercised by the franchisor and (b) the economic independence of the franchisee.

(1) Supervision Exercised by the Franchisor

[129] As a general rule, simply acting as a franchisor is not sufficient to qualify as a professional employer for the purposes of the *ACAD*. In *Dunkin' Brands*, at para. 59, Kasirer J.A., writing for the court, stated that a franchise agreement is characterized by long-term collaboration between two *independent businesses*. In this sense, it is fundamentally different from a contract of employment (Gagnon, at p. 213). Although the franchisee is obligated to comply with the standards defined in the franchise agreement and the franchisor exercises some supervision in this regard, the franchisor does not, in principle, *control* the franchisee (Gagnon, at p. 206). This is in fact what is said by M. Coutu et al.:

[TRANSLATION] [I]n *Jan-Pro Canada inc.*, the Court of Québec [*Comité paritaire de l'entretien d'édifices publics de la région de Québec v. Jan-Pro Canada Inc.*, D.T.E. 97T-869 (C.Q.), aff'd D.T.E. 98T-79 (Sup. Ct.) and AZ-50074347 (C.A., 1998-11-09)] found that the principal franchisor was not a professional employer within the meaning of the Act. The *Act respecting collective agreement decrees* applies only to contracts of employment and not to contracts of enterprise [See *Comité paritaire de l'industrie de l'automobile de Montréal et du district v. Giguère*, [1987] R.J.Q. 1176, at p. 1181 (Prov. Ct.)]. Because the relationship between the franchisor and the franchisees involves a contract of enterprise and not a contract of employment, and given the acceptance of risk by the franchisees and the absence of a relationship of subordination, the Act does not apply to the contractual relationship between the franchisor and the franchisees. [Emphasis added.]

(*Le droit des rapports collectifs du travail au Québec* (2nd ed. 2013), vol. 2, *Les régimes particuliers*, at No. 704)

[130] The case at bar is no exception. It is true that Modern retained significant powers over the franchisees' performance of cleaning contracts, over the payment of their income and over their right to assign cleaning contracts or to assign them back (Que. C.A. reasons, at paras. 96, 164-67, 174 and 187-220). But that is not

uncommon. It is inherent in a franchise agreement that the franchisor exercises a power of supervision over its franchisees:

[TRANSLATION] In practice, the franchisor will use a variety of inspection and verification mechanisms to ensure that the franchise is administered properly. For example, the franchisor will require the franchisee to accept that it can enter the establishment at any reasonable time in order to, first, conduct an inspection and, where appropriate, take samples of products or accessories for analysis and, second, ensure that the operation is in compliance with established standards.

(P.-A. Mathieu, *La nature juridique du contrat de franchise* (1989), at p. 22)

[TRANSLATION] In granting a franchise, the franchisor is not merely allowing a name to be used, but is requiring the franchisee to follow to the letter a set of instructions that it has devised, formulated, developed and tested and that have already made it a success. Most of them will in fact be part of the “operations manual”, the central element of the franchise. [Footnote omitted.]

(C. Sylvestre, “Le contrat de franchise”, in *Droit spécialisé des contrats*, vol. 2, *Les contrats relatifs à l’entreprise* (1999), by D.-C. Lamontagne, ed., at para. 13)

[131] In our opinion, the supervision exercised by Modern did not differ significantly from [TRANSLATION] “what is ordinarily seen in a franchise agreement” (Que. C.A. reasons, at para. 202). In reality, every franchisor has an interest in supervising its franchisees and even, to some degree, an obligation to do so in order to protect the network of franchisees (*Dunkin’ Brands*, at paras. 59-65 and 77-87). We therefore cannot agree with Kasirer J.A.’s conclusion that Modern’s powers were much broader than those of the franchisor in *Dunkin’ Brands* (Que. C.A. reasons, at para. 209). In that case, the franchisor’s powers were, as Kasirer J.A. himself put it, “especially wide-ranging” and included control over the materials and ingredients

used, a power to inspect premises, a power to examine the books of the business and the franchisee's income tax returns, and even some control if the franchisee were to sell or to transfer his or her rights to a third party (*Dunkin' Brands*, at para. 85; see also paras. 61-67 and 78). Those powers are quite comparable to the ones exercised by Modern in the instant case.

[132] Modern certainly may have had a greater interest in supervising its franchisees because of the imperfect assignment of the cleaning contracts, given that it was still exposed to liability. But as can be seen from the evidence in the record, Mr. Bourque retained considerable independence from Modern. Thus, on the condition that he satisfied his clients' requirements, Mr. Bourque was [TRANSLATION] "free to do his work at the times and using the methods that suited him" as well as to "choose the equipment and products that he liked" (Que. C.A. reasons, at para. 44, dissenting reasons of Morin J.A.). Although Modern reserved the right to visit work sites without notice in order to verify the quality of the services (franchise agreement, clause 8.6.4), such visits occurred at most on a monthly basis (C.Q. reasons, at paras. 78 and 94). It cannot be argued that Modern controlled Mr. Bourque's cleaning work.

[133] It should also be mentioned that Mr. Bourque was not required to do the work provided for in the cleaning contracts personally. He could therefore subcontract part of his work, which he in fact did for the washing of windows (paras. 50 and 173). The franchise agreement also authorized him to hire his own

employees. Thus, Mr. Bourque could if he wished have had employees whom he could ask to do all the work (franchise agreement, clauses 8.8.1 and 8.8.2; see Que. C.A. reasons, at para. 44, dissenting reasons of Morin J.A.). According to clause 16.1 of the agreement, such employees would not have been subject to Modern's control. It should also be noted that the *Decree* would in all likelihood have applied to them, which means that Mr. Bourque would, with respect to them, have been characterized as a "professional employer" within the meaning of the *ACAD*.

[134] In this regard, the Court of Appeal held in *Dicom* that there was, at least under the *Civil Code*, [TRANSLATION] "incompatibility between the status of employee and that of employer" (para. 29):

[TRANSLATION] It is not possible to be both one person's employee and another person's employer in respect of the performance of the same task, as the type of control that legal subordination of an employee to an employer entails cannot support such a division. A person to whom the performance of a task is entrusted and who can for that purpose call on his or her own employees cannot claim to have a contract of employment with the client. Such a person has necessarily entered into a contract for services that, although it may be demanding and may leave little room for autonomy, is nonetheless a contract for services. [Emphasis added.]

[135] In the context of the *ACAD*, the fact that the franchise agreement expressly granted Mr. Bourque the right to hire employees to do the work seems to indicate that Modern could exercise only limited control over his activities. This is one more factor that tends to confirm that the supervision exercised by Modern did not suffice to characterize it as a professional employer. In sum, it would be an error

to confuse Modern's powers as a franchisor, with the relationship of subordination that characterizes a contract of employment.

(2) Economic Dependence

[136] It is true that Mr. Bourque undertook, as a franchisee, to perform his cleaning contracts only within the framework of his franchise and not to enter into competition with the franchisor (franchise agreement, clauses 8.2.1 and 8.3). Be that as it may, Mr. Bourque did not "depend" economically on any particular client. Thus, between January and March 2014, he was assigned five cleaning contracts for an outlet of the Société des alcools du Québec and for branches of the Bank (C.Q. reasons, at para. 27; Que. C.A. reasons, at para. 111). As we mentioned above, Mr. Bourque also tried to obtain new clients during the short time he was associated with Modern (C.Q. reasons, at para. 173). In addition, the franchise agreement authorized Mr. Bourque, under certain conditions, to sell his franchise or a particular cleaning contract (franchise agreement, clause 25). Nothing in the evidence indicates that Modern prevented its franchisees from exercising their rights in this regard. Finally, it was in fact possible for Mr. Bourque to terminate his business relationship with Modern and to continue operating his business outside the franchise agreement. It is thus difficult to argue that he was in a position of economic dependence.

[137] In summary, even on the basis of an expansive definition of the concept of "professional employer", it is our view that Modern did not, as a franchisor, exercise sufficient control over Mr. Bourque's activities for the *Decree* to apply to it.

As well, Mr. Bourque was not in a position of economic dependence toward Modern. In this context, the parties' business relationship was not such as to make the conditions provided for in the *Decree* applicable to Mr. Bourque as a franchisee. We do not, however, rule out the possibility that in different circumstances a franchisor might, on an exceptional basis, be considered to be a professional employer within the meaning of the *ACAD*.

VI. Conclusion

[138] For these reasons, we are of the view that the trial judge made no reviewable error in concluding that Mr. Bourque was not an employee within the meaning of the *ACAD* and that the Parity Committee's claim on his behalf and on behalf of Ms. Fortin therefore had to be dismissed. Furthermore, even if it were assumed that Mr. Bourque was an employee, Modern could not have been considered to be his professional employer. We would accordingly allow the appeal, with costs.

Appeal dismissed with costs, CÔTÉ, BROWN and ROWE JJ. dissenting.

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