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Supreme Court of Canada May Finally Clear up Issue of "Employment" in Human Rights Cases

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Case commented on: *Fasken Martineau DuMoulin LLP v British Columbia (Human Rights Tribunal)* 2012 BCCA 313; leave to appeal granted, *Michael McCormick v Fasken Martineau Dumoulin LLP*, 2013 CanLII 11313 (SCC).

I have written a number of posts (see for example here and here) about the narrowing interpretation given to "employment" in discrimination cases under the *Alberta Human Rights Act*, RSA 2000 c A-25.5. Since the *Act* protects individuals from discrimination in five areas (employment, notices, tenancy, services and accommodation, and trade unions), on several grounds (e.g., age, gender, race, colour, place of origin, ancestry, source of income, religious beliefs, family status, marital status, physical disability, mental disability, or sexual orientation), if the discrimination does not occur in an area defined as "employment" (or any of the other four areas) then the complainant cannot obtain a remedy under the *Act*. Consequently, one way that respondents seek to counter human rights complaints is by establishing that they do not fit within the current definition of "employment", and hence the Commission does not have jurisdiction to deal with the complaint. As noted previously, the narrowing interpretation of "employment" seems to counter the overarching educational and remedial purpose of human rights law, and the "large and liberal interpretation" that is supposed to be given to provisions in the *Act*.

A human rights case out of British Columbia, which will be argued before the Supreme Court of Canada in December, may assist in limiting this narrowing trend.

Michael McCormick, a partner in the limited liability partnership of Fasken Martineau Dumoulin in Vancouver, complained to the British Columbia Human Rights Tribunal about his mandatory retirement at age 65. He was successful at the Tribunal and at the British Columbia Supreme Court, but the British Columbia Court of Appeal (BCCA) ruled in favour of the firm.

The BCCA held that although the British Columbia *Human Rights Code*, RSBC 1996, c 210 contained principles that mandated a "broad, liberal approach consistent with its legal purposes", this did not change the underlying legal relationship between the parties. In particular, it not override the well-established principle of law that a partnership is not a separate entity from its partners, and thus cannot be an employer of a partner (BCCA at para 3). Thus, the Tribunal did not have jurisdiction to hear the complaint (BCCA at para 4).

McCormick was an equity partner in Fasken and had been working there since May 1970. He was a party to the partnership agreement that provided that absent an individual arrangement to the contrary, he was required to retire at the financial year-end of the year in which he turned 65 (BCCA at paras 6-9).

Both the Tribunal and the British Columbia Supreme Court applied indicia of an employment relationship as set out in the case of *Crane v British Columbia (Ministry of Health Services)*, 2005 BCHRT 361, which was reversed on other grounds (2007 BCSC 460). These indicators include: utilization, control, financial burden and remedial purpose (e.g., is it for a remedial purpose that the Human Rights Tribunal would consider it an employment relationship) (BCCA at para 20).

The BCCA noted that there had been broad, liberal and purposive interpretations of human rights legislation that were extended to the determination of whether an employment relationship existed. In previous cases, the term "employ" and "employment" had been given a broad meaning to apply to contractors for service and independent contractors (See *Canadian Pacific Ltd. v Canada (Human Rights Commission)*, [1991] 1 FC 571 (CA), and *Pannu, Kang and Gill v Prestige Cab Ltd.* (1986), 73 AR 166 (CA)) (BCCA at para 27). The BCCA noted that in the cases where the Tribunal or Court found that there was an employment relationship, the decision-maker had applied the broad, liberal and purposive approach to interpreting the applicable human rights legislation, looking to the nature of the relationship between the parties rather than the traditional legal concepts of employment law or common law (BCCA at para 29).

The BCCA focused on the fact that, from a strictly legal perspective, a partnership is not a separate legal entity from its partners. Thus, a partner cannot be an employee of the partnership of which he or she is a member, because he or she cannot employ him or herself (BCCA at para 37). Based on the legal nature of a partnership, the BCCA concluded that the trial judge's rationale for treating the firm as a separate legal entity from its partners was unsupportable (BCCA at para 45). Regarding the question of whether this well-established legal principle could be over-ridden by a broad, liberal and purposive interpretation of the *Human Rights Code* (BCCA at para 46), the BCCA held that the inevitable conclusion of its analysis is that there was no employment relationship between McCormick and the firm. Therefore, the Tribunal did not have jurisdiction to hear the complaint (BCCA at para 60).

Thus, it is now up to the SCC to determine whether remedial human rights legislation can apply to non-traditional employment relationships. This is significant because so many people are in these types of independent working relationships. If human rights law does not apply, then there is little protection from discrimination in these quasi-employment relationships. Perhaps this is why several human rights commissions sought to intervene in the appeal (including those from Alberta, BC, Ontario, and Canada, all of which were granted intervener status in September). A number of limited liability partnerships were also granted intervener status.