

May 2014

Who is an “employee” under the British Columbia Human Rights Code?

By [Rob Sider](#)

The Supreme Court of Canada has provided some important guidance regarding who qualifies as an “employee” under the British Columbia *Human Rights Code* in the case of [McCormick v. Fasken Martineau DuMoulin LLP](#) (2014 SCC 39).

Mr. McCormick was an equity partner at Fasken. The Fasken Partnership Agreement required Mr. McCormick to divest his ownership in the partnership and retire at the end of the year in which he turned 65. Mr. McCormick filed a complaint with the British Columbia Human Rights Tribunal alleging that the requirement to divest and retire discriminated against him as an “employee” on the basis of his age. While the Tribunal found that Mr. McCormick was an “employee” for the purposes of human rights legislation, its decision was eventually overturned by the British Columbia Court of Appeal. In upholding the Court of Appeal’s decision, the Supreme Court of Canada found that the factors determinative of an employment relationship are the extent to which an individual is controlled by, and dependent on, the alleged employer. The Supreme Court stated:

Control and dependency, in other words, are a function not only of whether the worker receives immediate direction from, or is affected by the decisions of others, but also whether he or she has the ability to influence decisions that critically affect his or her working life. The answers to these questions represent the compass for determining the true nature of the relationship...

...What is more defining than any particular facts or factors is the extent to which they illuminate the essential character of the relationship and the underlining control and dependency. Ultimately, the key is the degree of control, that is, the extent to which the worker is subject and subordinate to someone else’s decision-making over working conditions and remuneration...

Applying this test to partnerships generally, and to Mr. McCormick’s partnership in particular, the Court found that based on partners’ ownership, sharing of profits and losses, and the right to participate in management, partners were individuals who were in control of, rather than subject to, decisions about workplace conditions. The Court found that Mr. McCormick, as an equity partner, was part of “the group that controlled the partnership, not a person vulnerable to its control.” While the Court recognized that Mr. McCormick had been subject to certain administrative rules about how he performed his work for the partnership, those administrative rules did not transform the relationship into one of dependency. Indeed, those administrative rules were ultimately subject to and controlled by the partnership of which Mr. McCormick was a full and equal member. Further, as an equity partner when the policy of retirement was adopted, Mr. McCormick was entitled to vote on the policy that he eventually challenged. The Court found that he was working not for the benefit of someone else, which might suggest a dependency relationship, but rather working as an individual in a common enterprise with his other partners for profit and consequently for his own benefit.

While this case will not impact the majority of businesses in respect of their relationships with their employees, it does assist by clarifying that the primary factors to be reviewed in determining whether an individual is an employee are those of control and dependency and that no particular list of activities or formula should be applied to determine that relationship. Accordingly, it is possible that this decision will not only impact the view of whether a partner can be deemed to be an “employee” in certain circumstances but also the extent to which independent contractors, shareholders, agents, or others that work for or with others but are not called “employees” may be determined to be “employees” for some purposes.

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