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Can a Partnership be an Employer of a Partner?

**By Devin Lucas and Shafik Bhalloo*

In *Fasken Martineau DuMoulin LLP v. British Columbia (Human Rights Tribunal)[1],* the equity partner, John Michael McCormick, entered into a partnership agreement with Fasken Martineau DuMoulin LLP, an international law firm operating as an extra-provincial limited liability partnership registered pursuant to the *Partnership Act* of British Columbia. Under this agreement, which governs the relationship of all of Fasken's partners, McCormick was required to retire as an equity partner on January 31, 2011, the financial year end of the firm in which he turned 65.

The partnership agreement provided at section 9.2:

> (a) Each Equity Partner shall retire as an Equity Partner at the end of the Year in which the Partner reaches the age of 65, but as provided in paragraphs (d) and (e) of this Section 9.2 may be permitted to continue working with the Firm.
>
> (b) A Partner who retires from the Firm shall be deemed to have withdrawn from the Firm as at the date of his or her retirement, which date shall be his or her date of withdrawal.
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> (c) Upon reaching the age of 62, each Partner shall prepare and deliver to the Firm Managing Partner a practice transition plan.
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> (d) Agreements for working past age 65 are at the discretion of the firm Managing Partner and will be the exception rather than the rule. The criteria for approval shall include the value of the individual in coaching, business development, client relations, mentoring and community profile. Such agreements shall either be approved by the Board or be within any written policy established by the Board for this purpose.
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> (e) Partners who wish to continue in the practice of law with the Firm after age 65 may enter into an individual arrangement with the Firm as an employee or a Regular Partner as determined by the Firm Managing Partner and, if the Firm Managing Partner so decides, such individual may have the title of "Counsel" to the Firm. The Firm Managing Partner may at any time on three months' prior written notice revoke, in his or her discretion, the right of such individual to continue in the practice of law with the Firm, whether as employee or Regular Partner, or to be Counsel to the Firm.

In December 2009, McCormick filed a complaint with the Human Rights Tribunal alleging that Fasken discriminated against him by forcing his retirement as an equity partner in 2011, contrary to s. 13 of the *Human Rights Code* of British Columbia.

In response, Fasken brought an application to dismiss the complaint pursuant to ss. 27(1)(a) and (c) of the *Code*, on the basis that that the Tribunal did not have jurisdiction to hear the complaint and there was no reasonable prospect that it would succeed. The root of Fasken's argument was

that McCormick was not an employee of the firm and there was no employment relationship that could be the subject of a complaint under s. 13.

The Tribunal ruled against Fasken stating that it had jurisdiction over the complaint on the ground that the firm, for the purpose of the *Code*, employed McCormick. According to the Tribunal, in the context of human rights legislation, a partnership may be considered as a separate legal entity from its partners and as the employer of a partner.

Fasken appealed the decision to the British Columbia Supreme Court claiming that the Tribunal did not have jurisdiction to hear the complaint, since in law a partnership is not a separate entity from its partners, and cannot in law employ a partner. The chambers judge upheld the Tribunal's ruling. The chambers judge held that that the governance and management system of the firm met the criteria of an employment relationship for purposes of the *Code,* applying factors of "utilization", "control", "financial burden" and "remedial purpose" as held in *Crane v. British Columbia (Ministry of Health Services).*[2]

Once again, Fasken appealed the decision to the British Columbia Court of Appeal. The Court of Appeal in reversing the Tribunal and chamber's judge decisions stated:

> …the principles of interpretation of the *Human Rights Code,* R.S.B.C. 1996, c. 210, which mandate a broad, liberal approach consistent with its remedial purposes, do not change underlying legal relationships to the extent found by the Tribunal and the chambers judge. In particular, they do not extend to overriding the fundamental and well-established principle of law that a partnership is not, in law, a separate entity from, but is a collective of, its partners, and as such, cannot, in law, be an employer of a partner.

The Court of Appeal also observed that a partnership may employ other persons and, in those employment relationships, it normally makes no legal or commercial difference whether the partnership is seen as a separate body or a collective of the partners. According to the Court of Appeal, third parties, including employees of the partnership, are generally entitled to the same rights and obligations as against a partnership as they are against a corporation or a proprietorship, including protection from discriminatory employment practices. The court then drew the distinction between that of an employer-employee relationship and the relationship among all of the partners. The Court said:

> In this case, one of the supposed parties to the relationship, the firm, while a "person" for the purpose of the *Code,* is not separate from any individual equity partner such as Mr. McCormick. The only relationship that exists, in law and in fact, is among Mr. McCormick and all of the other partners of the firm. And the relationship among them cannot be one of employer and employee, as they are all equal in their rights and obligations with respect to the business of the firm.

It is important to note that McCormick was one of approximately 60 full-equity partners at Fasken. McCormick has an ownership interest in the firm; therefore, he is entitled to a share of the profits of the firm and is personally liable for its debts. Further, he is permitted to participate in the meetings of the partners and to vote on various issues affecting the firm's management. Conversely, employees do not enjoy any of these rights or obligations.

It remains to be seen, however, whether or not a partnership would be considered as a legal entity distinct from its non-equity partners for the purposes of human rights legislation? If a partnership may be treated as a separate legal entity from its non-equity partners, does it then follow that a non-equity partner is an employee of a partnership, which purportedly, he or she is a member? Applying the factual criteria of "utilization", "control", "financial burden", or "remedial purpose" from *Crane* would appear to affect equity partners differently than non-equity partners. The crux of this distinction is whether the controls exercised by the firm's management apply equally to all of the partners. If the controls are applied differently based on whether a partner is an equity or non-equity partner, it stands to reason that this would vary the relationship from one of partners collectively running a business to one of employment by equity partners over non-equity partners. This is still an open question at this point; however, it is an interesting issue that could have wide-ranging implications for partnerships and non-equity partners reaching the age of mandatory retirement.

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[1] 2012 BCCA 313

[2] 2005 BCHRT 361, rev'd on other grounds, 2007 BCSC 460.

Shafik Bhalloo has been a partner of Kornfeld LLP since 2000. His practice is focused on labour and employment law, and on commercial and civil litigation. He is also an Adjudicator on the Employment Standards Tribunal and an Adjunct Professor in the Faculty of Business Administration at Simon Fraser University.

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