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by Peter C. Straszynski

Can Partners Ever Be Employees? The McCormick Decision

IN ITS UNANIMOUS DECISION IN *MCKORMICK V. FASKEN MARTINEAU DUMOULIN LLP*[1], RELEASED IN MAY 2014, THE SUPREME COURT OF CANADA DECIDED THAT AN EQUITY PARTNER IN A B.C. LAW FIRM WAS NOT AN "EMPLOYEE" WITHIN THE MEANING OF THE BRITISH COLUMBIA *HUMAN RIGHTS CODE*. THE CASE IS SIGNIFICANT TO PROFESSIONALS OPERATING IN "PARTNERSHIP" ACROSS THE COUNTRY.

McCormick had filed a complaint alleging that his firm's mandatory retirement policy contravened Human Rights legislation. Similar to the legislation in other provinces, the B.C. Code prohibits discrimination in "employment" on a number of prohibited grounds, including "age". The issue was whether McCormick was an "employee" and therefore afforded the protections of the *Code*.

The British Columbia Court of Appeal had found that McCormick's "status" as a "partner" of his firm, alone, was enough to substantiate a finding that he was not an "employee". The Supreme Court did not agree, finding that the legal form of the parties' relationship is not determinative, and preferring to apply a "control" and "dependency" test. According to the Court, the applicable question is *"who is responsible for determining working conditions and financial benefits and to what extent does the worker have an influential say in those determinations?"* The degree of control and resulting dependency will determine whether the individual is an employee or not.

The Court found that McCormick was operating in a common enterprise with his partners and that *"far from being subject to the control of Fasken, McCormick was among the partners who controlled it"*. In support of this finding, the Court emphasized:

- McCormick's "equity" partnership and related voting rights
- McCormick's compensation from the firm's profits
- The setting of McCormick's compensation by a committee of his partners
- McCormick's capital investment in the firm; and
- The fact that expulsion form the partnership required extraordinary resolution

1 McKormick v. Fasken Martineau DuMoulin LLP, 2014 SCC 39

Peter Straszynski is a partner in Torkin Manes' Employment & Labour Group. He assists employers with all of their labour and employment issues, from the hiring to the post-termination stages of employment, in both the union and non-union settings.

FOR MORE INFORMATION, CONTACT:

Peter C. Straszynski

PHONE
416 777 5447

EMAIL
pstraszynski@torkinmanes.com

The Court was deliberate in pointing out that partners subject to a more diminished set of rights could very well be found to be employees under this test. This is particularly significant to law firms with "tiers" of partnership, typically identified by equity and non-equity (or "income") partners, where it is quite possible that the latter could be found to be employees for the purpose of applicable provincial Human Rights legislation.

The future application of the McCormick case may also affect much more than simply lawyers' inclusion or exclusion under applicable Human Rights legislation. The decision and its future application will be important to professionals other than lawyers (accountants, architects, etc…) for the same reasons that it is relevant to lawyers and their firms. It will also be interesting to watch and see whether (and how) the McCormick decision may affect the future determination of employment status in contexts other than Human Rights legislation.