COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Fasken Martineau DuMoulin LLP v. British Columbia (Human Rights Tribunal),* 2012 BCCA 313

Date: 20120719
Docket: CA039128

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241
And in the Matter of the *Human Rights Code*, R.S.B.C. 1996, c. 210

Between:

Fasken Martineau DuMoulin LLP

Appellant
(Petitioner)

And

British Columbia Human Rights Tribunal and John Michael McCormick

Respondents
(Respondents)

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Newbury
The Honourable Madam Justice Levine

On appeal from the Supreme Court of British Columbia, June 2, 2011
(*Fasken Martineau DuMoulin LLP v. British Columbia (Human Rights Tribunal*), 2011 BCSC 713, Vancouver Registry, Docket Number S110591

Counsel for the Appellant:	I.G. Nathanson, Q.C. P.R. Senkpiel
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No-one Appearing on Behalf of the British Columbia Human Rights Tribunal	
Place and Date of Hearing:	Vancouver, British Columbia April 3, 2012
Place and Date of Judgment:	Vancouver, British Columbia July 19, 2012

Written Reasons by:
The Honourable Madam Justice Levine

Concurred in by:
The Honourable Chief Justice Finch
The Honourable Madam Justice Newbury

Reasons for Judgment of the Honourable Madam Justice Levine:

[1] The issue on this appeal is whether a partner in a limited liability partnership is an employee of the partnership for the purpose of claiming the protection of human rights legislation from age discrimination.

[2] The British Columbia Human Rights Tribunal and a Supreme Court chambers judge on judicial review decided that for the purposes of human rights legislation, a partnership may be treated as a separate legal entity from its partners and as the employer of a partner, with the result that the Tribunal has jurisdiction to hear a complaint by a partner of discrimination in his employment. The partnership appealed, claiming the Tribunal does not have jurisdiction to hear the complaint, because in law a partnership is not a separate entity from its partners, and cannot in law employ a partner.

[3] In my opinion, 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.

[4] In my opinion, the Tribunal does not have jurisdiction to hear the complaint. It follows that I would allow the appeal.

Background

Mr. McCormick

[5] John Michael McCormick is a lawyer and one of approximately 60 “equity partners” in the Vancouver office of the appellant, Fasken Martineau DuMoulin LLP, an international law firm operating as an extra-provincial limited liability partnership

registered under the *Partnership Act*, R.S.B.C. 1996, c. 348. Fasken globally provides the services of approximately 650 lawyers, 260 of whom are equity partners.

[6] Mr. McCormick has worked at Fasken for all of his legal career since May 1970. He became an equity partner in approximately 1979. He turned 65 years old in March 2010.

[7] Mr. McCormick is a party to the partnership agreement that governs the relationship of all of Fasken's partners.

Retirement

[8] Section 9.2 of the partnership agreement addresses retirement of partners. Absent an individual arrangement to the contrary, this provision required Mr. McCormick to retire on January 31, 2011, the financial year end of the firm in which he turned 65.

[9] Section 9.2 of the partnership agreement provides:

> (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.
>
> (c) Upon reaching the age of 62, each Partner shall prepare and deliver to the Firm Managing Partner a practice transition plan.
>
> (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.
>
> (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.

[10] Starting in 2006, Mr. McCormick and the managing partner of the firm had discussions concerning Mr. McCormick's retirement from the firm. No agreement was reached concerning any continuing role for Mr. McCormick within the firm.

Complaint to Human Rights Tribunal

[11] In December 2009, Mr. McCormick filed a complaint with the Tribunal alleging that Fasken discriminated against him by requiring that he retire as an equity partner at the end of the year in which he turned 65, contrary to s. 13 of the *Code* which prohibits discrimination in employment on the ground of age.

[12] Fasken responded with an application to dismiss the complaint under ss. 27(1)(a) and (c) of the *Code*, on the grounds that the Tribunal did not have jurisdiction over the complaint and there was no reasonable prospect that it would succeed. The crux of Fasken's argument was that Mr. 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.

[13] The Tribunal dismissed Fasken's application, finding that it had jurisdiction over the complaint on the basis that Mr. McCormick was, for the purpose of the *Code,* employed by the firm.

[14] Fasken applied for judicial review. The chambers judge agreed with the decision of the Tribunal that Mr. McCormick was, for the purposes of the *Code*, employed by the firm, and dismissed the application.

Equity Partners of the Firm

[15] As an equity partner, Mr. McCormick has an ownership interest in the firm. His income is a share of the profits of the firm and he is entitled to a distributive

share of the assets of the firm on its dissolution. He has a capital account that is to be paid out to him upon retirement. He is personally liable, with other equity partners, for the debts of the firm to the extent they are not covered by insurance or treated as an expense, within the limits established by the partnership agreement and the *Partnership Act*. He is entitled to participate in meetings of the partners and to vote on various matters concerning the firm's operations. He is eligible for election to and to vote in elections for management positions and committees within the firm. None of these benefits is available to employees of the firm.

Management of the Firm

[16] The partnership agreement sets out in detail the manner in which the firm is governed (Article 4) and managed (Article 5).

[17] Under the partnership agreement, the firm is governed by a board composed of 13 equity partners, including 3 from the British Columbia region, the firm managing partner, and regional managing partners, all of whom are elected by the equity partners. The main functions of the board, "as the elected representatives of the Partners" are "setting strategic direction for the Firm, determination of Firm policies, and planning for the Firm". The firm managing partner and regional managing partners are responsible for overseeing and implementing the firm's strategies, policies and directives. The regional managing partners provide leadership by promoting individual practices of professionals and practice groups, including ensuring an appropriate level of consultation with partners, and developing client relationships.

[18] The chambers judge summarized some of the aspects of the management and operation of the firm (at paras. 10-13):

> [10] Fasken's managing partner and the regional managing partners exert control over individual equity partners through the enforcement of firm policies, strategies and directions. They may assign to equity partners specific functions and tasks and supervise the performance of these responsibilities. Practice groups appointed by the managing partners set standards for all work product, including legal opinions authored by equity

> partners, which must be reviewed by another partner before being released to a client. Every form of work product produced by an equity partner is owned by Fasken and any fee or payment received by an equity partner that relates to the practice of law is deemed to be the property of the firm. To avoid conflicts of interest the firm prohibits equity partners from acting for certain clients such as trade unions.
>
> [11] Fasken's financial management policy also includes detailed requirements governing client and file acceptance, billing procedures, retainers, time recording, collections and write-offs. Fasken appoints a client manager for each client who may not be the lawyer who secured the client for the firm. Even equity partners must take direction from a client manager with regard to matters assigned to them for performance as file manager and they must accept supervision by the client manager or a client service team, if one is appointed. Management and staff report to the managing partners and not to individual equity partners.
>
> [12] The partnership agreement requires every equity partner to devote the whole of their working time and attention to Fasken unless the managing partner consents to another arrangement, which may be revoked at any time. Partners are prohibited from entering into financial arrangements or contracts in the name of the firm without authorization of the managing partner, a board chair, a regional managing partner, or two members of the board.
>
> [13] The board establishes compensation criteria for equity partners and may change these criteria at any time. The current criteria include: quality legal work, teamwork, generation of profitable business from new and existing clients, profitable maintenance of existing clients, contribution to the firm's image, reputation and seniority, profitable personal production, businesslike personal practice management, contribution to firm activities, ancillary income generated for the firm, and peer review. Regional compensation committees, made up of equity partners, make annual allocations to equity partners from the net income of the firm, with a limited right of appeal back to the committee. These committees may also determine extraordinary bonuses for partners for exceptional performance in a year.

[19] On several occasions, Mr. McCormick ran for election to firm committees, and in 1998 was elected to a one-year term on the Executive Committee (similar in function to the present Board).

[20] The Tribunal and the chambers judge both found that the governance and management structure of the firm satisfied the indicia of an employment relationship for purposes of the *Code*, applying factors of "utilization", "control", "financial burden" and "remedial purpose" as set out in *Crane v. British Columbia (Ministry of Health Services)*, 2005 BCHRT 361, rev'd on other grounds, 2007 BCSC 460.

[21] Fasken says that the governance and management structure and the policies of the firm developed by the board and managing partners are the delegated organizational structure through which the partners exercise their roles as owners of the firm. They deny that the management structure amounts to "control" of the equity partners as that term is used in *Crane* and other employment law cases.

Issue on Appeal

[22] The issue is encapsulated in the chambers judge's conclusion (at para. 62):

> ... it is not an immutable principle of law that a partnership is merely the sum of its partners. As a consequence, there should be no legal impediment to according a partner and the firm separate legal status for the purpose of a complaint under the *Code*. In my view, this conclusion is consistent with a broad, liberal and purposive interpretation of ss. 1 and 13 of the *Code*.

[23] Fasken maintains that the legal principle that a partnership is not a separate entity but the sum of its partners is not displaced by a broad, liberal and purposive interpretation of the *Code*, but is determinative of the jurisdiction of the Tribunal. The firm says that in law, there can be no employment relationship between a partner and the firm of which he is a member, and that legal conclusion precludes an analysis of any factual details that determine whether an employment relationship exists for the purposes of the *Code*.

[24] Mr. McCormick maintains that the common law characterization of a legal relationship does not apply for human rights purposes, and does not restrict the analysis of the relationship in accordance with the factors that have been found to bring a relationship not customarily considered that of employment within the jurisdiction of the *Code*.

Statutory Interpretation

[25] Whether the Tribunal has jurisdiction over a complaint of discrimination is determined by the provisions of the *Code*, which are given a broad, liberal and purposive interpretation consistent with the characterization of human rights

legislation as "quasi-constitutional": see *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at 547; *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 at 1136; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353 at 370. Any exemptions from the provisions of the *Code* must be clearly stated: *Canada House of Commons v. Vaid*, [2005] 1 S.C.R. 667 at para. 81.

[26] That is not to say that the *Code* extends to every relationship and circumstance: see *Berg* at para. 27, where the Supreme Court of Canada said: "This interpretative approach does not give a board or court a license to ignore the words of the Act in order to prevent discrimination wherever it is found". See also: *Gould v. Yukon Society of Pioneers*, [1996] 1 S.C.R. 571 at para. 5, 12, 90; *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601 at para. 24; *Roth v. Beaver Creek Improvement District and Sopow*, 2008 BCHRT 133 at para. 53.

[27] The broad, liberal and purposive interpretation of the *Code* extends to the determination of whether an employment relationship exists. In *Vancouver Rape Relief*, this Court said (at para. 18):

> It is clear that the term "employment" in s. 13 of the *Code* has a broader meaning than is ascribed to it in employment law. For example, in *Reid v. Vancouver Police Board* (2005), 44 B.C.L.R. (4th) 49, 2005 BCCA 418, Lowry J.A. for the majority, referring to *Barrie (City) v. Canadian Union of Public Employees, Local 2380* (CUPE), [1991] O.P.E.D. No. 41 (Ont. P.E. Trib.) (Q.L.), said at para. 41 that the proper approach required "consideration of factors that are well beyond what traditional common law perceptions of the employer-employee relationship might dictate". In the same spirit, the Federal Court of Appeal has applied a broad meaning to the term "employ" and in *Canadian Pacific Ltd. v. Canada (Human Rights Commission)*, [1991] 1 F.C. 571 (C.A.), 120 N.R. 152, found it to encompass the relationship between Canadian Pacific Ltd. and an employee of a firm with whom Canada Pacific Ltd. contracted for services. As well, in *Pannu, Kang and Gill v. Prestige Cab Ltd.* (1986), 73 A.R. 166 (C.A.), 31 D.L.R. (4th) 338, the Alberta Court of Appeal interpreted the words "employer", "employee" and "employment" to encompass a relationship between a taxi company and taxi drivers in a fact situation in which the taxi drivers were more in the nature of independent contractors.

[28] The provisions of the *Code* have been extended to many relationships which are not considered to be employee-employer relationships at common law. Only

one case considered the relationship between a partnership and one of the partners: *Lower St. Lawrence Pilots v. Bouchard*, 2004 FC 1776 (T.D.), in which the Court dismissed an application for judicial review of a decision of the Canadian Human Rights Commission. The Commission had held it had jurisdiction to hear the partner's complaint. There was no analysis in this decision of the legal nature of a partnership or the employment relationship, and the decision is neither binding nor persuasive on this appeal.

[29] Other cases have determined that an employee of an independent contractor providing services was an employee of the company to which the services were provided (*Canadian Pacific Ltd. v. Canada (Human Rights Commission*, [1991] 1 F.C. 571 (C.A.)); an applicant for a licence to carry on her employment was in an employment relationship with the licensing body (*Mans v. British Columbia Council of Licensed Practical Nurses*, [1990] BCCHRD No. 38; aff'd, [1991] B.C.J. No. 2666 (S.C.); aff'd (1993), 77 B.C.L.R. (2d) 47 (C.A.); the relationship between an owner/driver of a taxicab, who would be characterized as an independent contractor at common law, with the company providing dispatch services, was one of employment (*Sharma v. Yellow Cab Company* (1983), 4 CHRR D/1432). In all of these cases, the decision-maker applied the broad, liberal and purposive approach to interpreting the applicable human rights legislation, looking to the nature of the relationship between the parties to the complaint rather than the characterization of the relationship at common law or the traditional legal concepts of employment law.

[30] Fasken points out that in all of the cases referred to in this context (other than *Lower St. Lawrence Pilots*, with which I have already dealt), there were two identifiable parties to the dispute, and the question was the proper characterization of their relationship for the purpose of the human rights legislation. In this case, the firm says that there are not two parties to the dispute. Mr. McCormick is a member of the collective body against whom he complains. The members of the partnership do not employ each other; they work together in a business in which they jointly determine their working conditions, remuneration, and all other aspects of the

operation of the business. The fact that the management of the operation of the business is delegated to some of the partners, whose identity changes from time to time, does not change the fundamental fact that none of the partners is an employee of any or all of the others.

Relevant Statutory Provisions

[31] The relevant provisions of the *Code* are ss. 1, 3 13 and 27(1)(a) and (c):

> **Definitions**
>
> 1. In this *Code*:
>
> "employment" includes the relationship of master and servant, master and apprentice and principal and agent, if a substantial part of the agent's services relate to the affairs of one principal, and "employ" has a corresponding meaning;
>
> "person" includes an employer, an employment agency, an employers' organization, an occupational association and a trade union;
>
> **Purposes**
>
> 3. The purposes of this Code are as follows:
>
> (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
>
> (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
>
> (c) to prevent discrimination prohibited by this Code;
>
> (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;
>
> e) to provide a means of redress for those persons who are discriminated against contrary to this Code;
>
> **Discrimination in employment**
>
> 13(1) A person must not
>
> (a) refuse to employ or refuse to continue to employ a person, or
>
> (b) discriminate against a person regarding employment or any term or condition of employment
>
> because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person ...

Dismissal of a complaint

27(1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:

(a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;

...

(c) there is no reasonable prospect that the complaint will succeed;

[32] Also of relevance is the definition of "person" in s. 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238:

29. In an enactment:

...

"person" includes a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law.

[33] The following provisions of the *Partnership Act* are also relevant:

Definitions

1. In this Act:

...

"firm" is the collective term for persons who have entered into partnership with one another;

Partnership defined

2. Partnership is the relation which subsists between persons carrying on business in common with a view of profit.

Fairness and good faith

22(1) A partner must act with the utmost fairness and good faith towards the other members of the firm in the business of the firm.

(2) The duties imposed by this section are in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties and liabilities of partners.

Rules for determining rights and duties of partners in relation to partnership

27 Subject to any agreement express or implied between the partners, the interests of partners in the partnership property and their rights and duties in relation to the partnership must be determined by the following rules:

...

(j) a partner may refer a difference concerning the interpretation or application of the partnership agreement to arbitration for a final and binding decision under the *Commercial Arbitration Act*.

The Legal Nature of a Partnership

[34] The legal nature of a partnership as a separate entity or a collective of its members was the subject of much discussion in the decisions of both the Tribunal and the chambers judge. I would say that it is not seriously disputed on appeal that a partnership is not, in law, a separate legal entity as is, for example, a corporation. Nor can it be: under Canadian law, a partnership is not a legal entity separate from the partners who are its members.

[35] Authorities supporting this principle are numerous. This Court has said this in recent cases: see for example, *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at paras. 15-18 and *Coal Harbour Properties Partnership v. Liu*, 2004 BCCA 283 at para. 10, and the principles were discussed in *Blue Line Hockey Acquisition Co. Inc. v. Orca Bay Hockey Limited Partnership*, 2008 BCSC 27 at paras. 79-89. These recent authorities reflect a long-standing principle of Canadian and English common law. The classic English text on partnerships, R. C. Banks, ed, *Lindley & Banks on Partnership,* 18th ed (London, U.K., Sweet & Maxwell, 2002), is often cited as an authority on the common law of partnerships in Canada.

[36] The consequences of the nature of the legal relationship of partnership extend to every aspect of commercial relationships. For a discussion of the implications for debtor-creditor relationships, see *Asset Engineering*; *Meyer and Company v. Faber (No. 2)*, [1923] 2 Ch. 421 at 439. A firm cannot sue a partner for indebtedness relating to the business of the firm. The indebtedness of a firm is the indebtedness of the partners, and a person cannot owe a debt to himself.

[37] Of more direct relevance, arising from the same principle, 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: see *Ellis v. Joseph Ellis & Co.*, [1905] 1 K.B. 324 (C.A.); *Re Thorne and New Brunswick Workmen's Compensation Board* (1962), 33 D.L.R. (2d) 167 (N.B.S.C., App. Div.).

[38] The chambers judge was somewhat equivocal about this well-established principle. She commented (at para. 56) "it is apparent that the common law and the *Partnership Act*, to a large extent, do not recognize a partnership as a legal entity distinct from its partners" (emphasis added). She found that certain provisions of the *Partnership Act* and the partnership agreement "recognize a distinction between individual partners and the firm for specific purposes" (at para. 56).

[39] In particular, the chambers judge found (at para. 57) that s. 22 of the *Partnership Act* creates enforceable rights between a partner and "the collective of the partnership in respect of acts constituting a violation of their fiduciary duties toward each other". Citing two cases in which s. 22 was referred to (*McKnight v. Hutchison*, 2002 BCSC 1373 and *Davis v. Ouellette* (1981), 27 B.C.L.R. 162 (S.C.)), she concluded that a "partner may sue the partnership and a partnership may sue a partner pursuant to s. 22 of the Act and the court may grant remedies in favour of the partnership or an individual partner".

[40] This is a considerable over-reading of both s. 22 and the cases cited. Section 22 confirms that partners owe each other fiduciary duties. Procedurally, partners may sue each other to enforce these duties. Also procedurally, a firm may be named as a defendant in lieu of naming all of the partners: see Supreme Court Civil Rule 20-1. If a partner sues the firm, he or she in effect is suing all of the partners, including himself. As explained in Seckel & MacInnis, eds, *B.C. Supreme Court Rules Annotated 2011* (Toronto: Thomson Reuters, 2010) at 638-639:

> Rule 20-1 streamlines the process that otherwise the common law would suggest should apply to an action against a partnership by permitting a firm to be sued in its firm name rather than by suing the individual partners.
>
> . . .

> As the Rule is procedural, allowing the style of cause to contain only the firm name, it does not change the substance of a claim against a firm being a claim against each of the partners of the firm.

[41] The chambers judge next considered section 27(j) of the *Partnership Act* and Article 12 of the partnership agreement, which provide for arbitration of disputes concerning the interpretation of the agreement. She concluded that these provisions acknowledged that for the purpose of resolving disputes, individual equity partners are distinct from the partnership (at para. 59).

[42] Once again, the chambers judge's conclusion is an over-reading of the provisions in question. A dispute between a partner and the partnership is a dispute among partners. These provisions provide procedural mechanisms for resolving disputes among the partners. They do not create a separate legal entity.

[43] Finally, the chambers judge considered the status of the firm as a limited liability partnership. She found that the provisions of the *Partnership Act* that limited the liability of limited partners, ss. 104 and 105, "significantly erode the common law concept of partnership as merely a collective of partners without a separate identity" (at para. 60), despite the fact that in B.C., unlike in the U.K., a limited liability partnership has not been legislatively given separate entity status (at para. 61). She misinterpreted para. 15 of *Asset Engineering* as supporting her conclusion.

[44] Her analysis of these provisions of the *Partnership Act* and partnership agreement led her to conclude that "there should be no legal impediment to according a partner and the firm separate legal status for the purpose of a complaint under the *Code*" (at para. 62). In light of the purpose of the *Code*, to extend basic human rights to a broad spectrum of persons, she found (at para. 63):

> ... It is inconsistent with this objective to exclude a category of persons from the protection of the *Code* based on a strict, legalistic categorization of their status at common law. The commercial reality of the Fasken partnership is that there is a distinction between the firm and individual partners.

[45] In my opinion, the chambers judge's rationale for treating the firm as an entity separate from Mr. McCormick is legally unsupportable. There can be no doubt that

in Canadian law, a partnership is not a separate entity from its partners, and a partner cannot be an employee of, or employed by, a partnership of which he is a member.

[46] The question is whether this well-established principle of law is over-ridden by a broad, liberal and purposive interpretation of the *Code*.

Application of the Code to Partnerships

[47] Mr. McCormick says that any exemption from the application of the *Code* must be expressly stated, and there is nothing in the *Code* that expressly exempts partnerships from its application.

[48] That is clearly so. Section 29 of the *Interpretation Act* defines "person" as including a partnership. Applying that definition to the *Code*, as it must be, a partnership is a "person" for the purpose of the definition of "person" in s. 1 of the *Code*. Section 13 provides that "a person must not refuse to employ or refuse to continue to employ a person". As a partnership is a "person" under the *Code*, s. 13 must be read as: "A partnership, including an employer, must not refuse to employ or continue to employ a person". Thus, a partnership is expressly included in the provision prohibiting discrimination in employment.

[49] But that is not the end of the interpretative exercise, as the extensive reasons of both the Tribunal and the chambers judge, and the submissions of the parties throughout these proceedings, aptly demonstrate. The question is whether for the purpose of the *Code*, the firm "employs" Mr. McCormick. Once again, there is no express exclusion in the *Code*.

[50] There is no doubt that a partnership may employ other persons – Fasken concedes it employs associate lawyers and staff. In those employment relationships, it normally makes no legal or commercial difference whether the partnership is viewed as a separate entity or a collective of the partners. Third parties, including employees of the partnership, are generally entitled to the same

rights and obligations as against a partnership as they are as against a corporation or a proprietorship, including protection from discriminatory employment practices. This result flows from the somewhat complex body of law governing the relationship of partnership as among the partners, and between partners and third parties.

[51] That same body of law makes it a legal impossibility for a partner to be "employed" by the partnership of which he is a member. In my opinion, neither a broad, liberal and purposive interpretation of the *Code* nor the analysis of the factual criteria of "utilization", "control", "financial burden", or "remedial purpose" can change that legal conclusion. No express exemption is required to exclude from the jurisdiction of the Tribunal under the *Code* a relationship to which, by law, the *Code* does not extend.

[52] The management of the firm, as it is constituted by election of the partners from time to time, may exercise aspects of control over the partners in accordance with the partnership agreement that are in virtually all ways similar to the control that may be exercised by the executive and management of a corporation over its employees. That does not change the relationship from one of partners running a business to one of employment by one group of partners over an individual partner. The Supreme Court of Canada made this clear in *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298 at para. 34 (*per* Justice Bastarache (in dissent, however, Chief Justice McLachlin, for the majority concurred on this point: see para. 103):

> The fact that the management of the Partnership was given to the Managing Partner does not mandate a conclusion that the business was not carried on in common. ... As *Lindley & Banks on Partnership*, supra, point out, at p. 9, one or more parties may in fact run the business on behalf of themselves and the others without jeopardizing the legal status of the arrangement.

[53] In a partnership, whatever controls are exercised by those elected to manage the firm are applied equally to all of the partners, including those in management. The additional factors of "utilization" and "financial burden", derived from *Crane*, similarly apply equally to all partners. All of the features of the management and operation of the firm that the Tribunal and the chambers judge found to be indicative

of an employment relationship between the firm and Mr. McCormick simply cannot create an employment relationship. Such a relationship must consist of two separate "persons" who are an employer and an employee. 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.

[54] The fourth *Crane* criterion, "remedial purpose", creates a sort of legal tautology, which the chambers judge acknowledged (at para. 77):

> ... circular reasoning should not be used in respect of this factor; that is, the purpose of the *Code* is to prevent discrimination, there is evidence of discrimination in this case, and therefore the *Code* must apply to the relationship. The *Code* was not intended to apply to every relationship or every form of discrimination. The application of the *Code* in each case must be based on a conclusion that the complainant and the alleged offender are in an employment relationship in fact and in substance, regardless of the label that describes their relationship.

[55] The chambers judge concluded that the firm is in the best position to remedy the adverse effects of any discrimination that might be proven. She said (at para. 79):

> ... In the case at bar, it seems unlikely that the party who creates, controls and maintains certain working conditions or circumstances is not the party in the best position to remedy any undesirable effects attributable to such conditions or circumstances.

[56] It is clear, however, that the firm could not, except in accordance with the partnership agreement, remedy any discrimination. Only the equity partners could amend the partnership agreement to change the retirement provisions. That change would require at least a majority, and perhaps a two-thirds majority for a special resolution. The remedy could result from compliance with an order of the Tribunal or a court, which would require the equity partners to vote for the change. Without a

vote of the requisite majority of equity partners, however, whether exercised freely or in compliance with legal direction, the firm could not carry out the remedial purpose.

[57] The legal consequences of the relationship of partnership are not a "label" that is different from the fact and substance of the relationship. They reflect the true nature of the relationship – that among persons carrying on business, operating under an agreement by which certain responsibilities have been delegated to some of the partners, elected by other partners for periods of time. The elected group of partners which exercises management responsibilities from time to time does not employ the other partners during that time.

[58] In his factum, Mr. McCormick refers to the firm's position on this appeal as "legalistic and technical", and argues that the "theoretical history of partnership law" is inconsistent with "commercial reality". As the oft-cited *Lindley & Banks on Partnership* explains (at 36):

> It is important to identify the precise significance of a firm name since, as previously noted, it represents an attribute which tends to encourage the commercial rather than the legal view of a firm. Lord Lindley put it in this way:
>
> "... the name under which a firm carries on business is in point of law a conventional name applicable only to the persons who on each particular occasion when the name is used are members of the firm."
>
> Once this point is understood, the fallacy of the commercial view becomes apparent. The firm name is a convenient method of describing a group of persons associated together in business at a certain point in time: no more and no less.
>
> [Footnotes omitted.]

[59] There is no distinction between "commercial reality" and the legal nature of a partnership. The interpretation of the *Code*, like all statutes, is a legal exercise, where well-established fundamental principles of law apply. If the result of that exercise is that there are gaps in the legislation, it is the task of the legislature to remedy them.

[60] The inevitable conclusion of this analysis is that there is no employment relationship between the firm and Mr. McCormick, and his complaint is not within the jurisdiction of the Tribunal.

Conclusion

[61] I would allow the appeal, set aside the order appealed from, set aside the decision of the Tribunal dated December 16, 2010, and dismiss Mr. McCormick's complaint on the ground that it is not within the jurisdiction of the Tribunal, with costs payable by Mr. McCormick to the Appellant.

"The Honourable Madam Justice Levine"

I Agree:

"The Honourable Chief Justice Finch"

I Agree:

"The Honourable Madam Justice Newbury"