

EMPLOYMENT LAW CONFERENCE—2008

PAPER 1.1

The Common Employer

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THE COMMON EMPLOYER

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I. Introduction

The common employer doctrine allows the court to treat different legal entities as one employer for the purpose of attributing liability for damages flowing from such actions as a wrongful dismissal.

The Nelligan O'Brien Payne Newsletter – Employment Law Vol. 12, No. 1 Spring 2003, at 41-2 states that:

The common employer rule usually applies to ensure that employees who sign contracts with one particular corporation but work for a collection of related corporations will not be left without a remedy if the corporation that signed the contract has no assets when the employees are dismissed.

Stacey Ball, in his text *Canadian Employment Law* (Aurora: Canada Law Book, 1999) states at 4-1:

The courts now recognize that, for purposes of determining the contractual and fiduciary obligations which are owed by employers and employees, an individual can have more than one employer. The courts now regard the employment relationship as more than a matter of form and technical corporate structure. Consequently, the present law states that an individual may be employed by a number of different companies at the same time.

II. The Case Law

The justification for the common employer doctrine was addressed in the BC Supreme Court case of *Sinclair v. Dover Engineering Services Ltd.*, [1987] B.C.J. No. 60. In *Sinclair*, the plaintiff was hired by Dover and held out to be its employee, but was paid by a holding company. Because Dover had no funds to satisfy the plaintiff's claim, the plaintiff sought recovery against the holding company. The fact that one person was the "driving force" behind both companies was held to be sufficient to establish both as common employers and to establish joint and several liability. The Court stated:

As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law

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or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees who, in effect, have served all without regard for any precise notion of to whom they were bound in contract. What will constitute a sufficient degree of relationship will depend, in each case, on the details of such relationships, including such factors as individual shareholdings, corporate shareholdings and interlocking directorships. The essence of that relationship will be the element of common control.

Sinclair was upheld on appeal.

In 2001, *Sinclair* was cited with approval by the Ontario Court of Appeal in *Downtown Eatery (1993) Ltd. v. Ontario*, [2001] O.J. No. 1879. At trial the plaintiff succeeded in establishing a wrongful dismissal but was unable to collect on the award as the employer had transferred assets to related corporations. The Court allowed a subsequent claim against these companies stating at para. 36:

... although an employer is entitled to establish complex corporate structures and relationships, the law should be vigilant to ensure that permissible complexity in corporate arrangements does not work an injustice in the realm of employment law. At the end of the day, Alouche's [the plaintiff's] situation is a simple, common and important one—he is a man who had a job, with a salary, benefits and duties. He was fired—wrongfully. His employer must meet its legal responsibility to compensate him for its unlawful conduct. The definition of 'employer' in this simple and common scenario should be the one that recognizes the complexity of modern corporate structures, but does not permit that complexity to defeat the legitimate entitlements of wrongfully dismissed employees.

Instrumental to the Court's ruling was that the multi-corporate structure constituted "a highly integrated or seamless group of companies which together operated all aspects of [the business]." This notion of 'integration' was referenced from the 1991 case of *Jones v. CAE Industries Ltd.* (1991), 40 C.C.E.L. 236 (Ont. Gen. Div.) where it was determined that "[t]he true employer must be ascertained on the basis of where effective control over the employee resides ... an employment relationship is not simply a matter of form and technical corporate structure."

The BC Supreme Court cited both *Sinclair* and *Downtown Eatery* with approval in *Bartholomay v. Sportica Internet Technologies Inc. et al.*, [2004] B.C.J. No. 750 (S.C.). The following factors persuaded the Court to conclude that the plaintiff's employer, Sportica, and two other related or associated companies were common employers:

- One of the related companies was tied in to certain of the plaintiff's obligations under his written employment contract with Sportica (i.e., there were confidentiality, non-competition and other provisions relating to the related company as well as to Sportica);
- The companies carried on one enterprise: the business or activities of the companies were closely and inextricably interrelated. One company developed certain technology, another housed and maintained it, and a third licensed and used it as its product;
- The three companies had common shareholders and directors;
- The three companies were located in the same premises, although they may have had their own separate areas therein;
- One of the three companies could not exist without the other two; and
- When the plaintiff made presentations on behalf of Sportica, the other two companies featured prominently in his presentations.

III. Written Employment Contracts

What about written employment contracts? Do the courts refuse to make common employer findings in circumstances where the employee has signed a contract naming only one employer?

In *Bagby v. Gustavson International Drilling Co.* (1980), 24 A.R. 181, the Alberta Court of Appeal found the defendant parent company liable for damages as a common employer *even though it was not a party to the employee's written employment agreement*. The Court was satisfied that the parent was a "controlling company" and, therefore, within the purview of liability. The Court wrote at para. 44 of the judgment:

There can be no doubt that the cause of action in wrongful dismissal is based solely on the employment contract. Only the contracting parties are liable under it. Nevertheless the realities of modern business life, in my opinion, require us to recognize the existence of the modern corporate conglomerate and its business practises. It is common place for an employee to spend a lifetime with essentially one employer. Yet from time to time he is transferred to the employ of one associated company after another as the interests of the group as a whole may require. If at some point in his career, the employee finds that the particular corporate entity which is at the moment his nominal employer is bankrupt, it would be unrealistic as well as unjust to ignore his past service with other entities of the conglomerate. The law must, in my opinion, recognize the reality that though he may have worked only a few months for the bankrupt subsidiary, he has served the group as a whole for a lifetime. We are entitled to ask: In substance who is his employer? Liability for contractual obligation should flow from that answer.

At para. 46, the Court wrote:

A most helpful analysis of this problem is contained in Harris, Wrongful Dismissal, commencing at page 105. The learned author states: [*page200]

No authority, however, has yet held or denied that the entire employment record would be the relevant factor in the situation where the servant has been successively transferred from one related corporation to another, all within the same corporate structure. Upon grounds of equity, it would appear that a proper consideration would conclude that the real employer is the parent corporate company, at whose ultimate direction the employee has been transferred. The conclusion would, of course, be particularly significant when the dismissal is caused by the liquidation or bankruptcy of the subsidiary corporation, a cause of action thus only leading to the plaintiff's position as yet another unsecured creditor, should the parent company not be established as the real employer.

In the Ontario Court of Appeal decision in *Downtown Eatery*, it was held that the fact that the employee had a written employment contract with only one employer did not limit the court's ability to attach liability to related companies through the common employer doctrine. The Court states at para. 37 of its judgment:

The trial judge focused on the absence of a contract between Alouche [the plaintiff] and any of the potential common employers. With respect, we think this focus is too narrow. *A contract is one factor to consider in the employer-employee relationship. However, it cannot be determinative; if it were, it would be too easy for employers to evade their obligations to dismissed employees by imposing employment contracts with shell companies with no assets.* (emphasis added)

Lower courts have also found that a written employment contract is not determinative of the common employer issue. For example, in BC:

- In *Bartholomay*, Hood J. found that the related defendant companies (three in number) were carrying on a single enterprise, such that "the fact that the employee has a written contract with one of the companies [was] not determinative" (para. 10).

- In *Vanderpol v. Aspen Trailer Co.*, [2002] B.C.J. No. 709 (S.C.), it appears (see paras. 18 and 19 of the judgment) that the employee had a written employment contract with only one defendant company but the court found that two related defendant companies were his common employers.
- In *Jacobs v. Harbour Canoe Club Inc.*, [1999] B.C.J. No. 2188, the plaintiff employee had a written employment agreement with only one corporate defendant but Ralph J. held that the second defendant was jointly and severally liable under the common employer doctrine for damages awarded to the plaintiff.
- In *Carmanah Pacific International Industries Corp. v. Westex Timber Mills Ltd.*, 2005 BCSC 1136 (CanLII), Madam Justice Dillon ordered a company added as a defendant to an action stating “the fact that the original contract was between the plaintiff and the defendant should not deter the plaintiff from adding Kitwanga as a party when the companies appeared to operate as a common enterprise ...”

IV. The Employment Standards Act

Section 95 of the *ESA* sets out the statutory version of a “common employer.”

Associated employers

95. If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,

- (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one employer for the purposes of this Act, and
- (b) if so, they are jointly and separately liable for payment of the amount stated in a determination, a settlement agreement or an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

V. Colak: A Case Study

In September 1997, Mr. Colak was hired as the Vice President of Sales and Marketing for UV Systems Technology Inc. (“UVST”). On February 28, 2000, Mr. Colak signed a written employment contract with UVST (the “Contract”). At the time he entered into the Contract, the parent company of UVST was Service Systems International, Ltd. (“SSI”).

Beginning in mid-2001 and continuing until April of 2002, UVST failed to pay Mr. Colak certain of the expenses, wages and commissions he was entitled to under the Contract. Colak brought claims under the *Employment Standards Act* (for unpaid salary, unpaid commission, unpaid annual vacation pay, and unpaid compensation for length of service pay wages) and in Supreme Court (business expenses and severance due under the Contract).

Colak was successful at the Employment Standards Branch (including receiving a positive s. 95 finding) however, at trial, the judge dismissed Mr. Colak’s claim on technical grounds and did not undertake a common employer analysis.

On appeal, the Court of Appeal reversed the lower Court’s ruling and awarded Colak over \$180,000 in contractually mandated severance. However, the Court found that because Mr. Colak had entered into a written agreement with UVST three years after the start of his employment, he should have known that UVST and SSI were “common employers” and therefore he should have contracted with both (i.e., parent and subsidiary). Under those circumstances the Court was not willing to hold the parent liable for the damages owed to Mr. Colak by the subsidiary.

On the common employer issue, the BC Court of Appeal in *Colak* wrote:

[21] The third question is whether UVST and its parent are ‘common employers’ so that they are jointly and severally liable for the awards made to Mr. Colak. This is not the same question as that determined by the Employment Standards Branch under s. 95 of the Act. Under that provision, the only issue is whether the business of UVST was ‘carried on by or through more than one corporation ... under common control or direction.’ Common control is one of the indicia of an employment relationship set down in *Waddell v. Cintas Corp.* (2001), 96 B.C.L.R. (3d) 366, 2001 BCCA 717, as necessary to establish the dual employment that gives rise to joint and several liability as common employers. Here, the directors and officers of UVST and its parent were common, as were their premises. Because UVST was its parent’s only operating business, they constituted effectively one enterprise. All these factors favour a ‘common employer’ finding.

[22] However, this was not a situation where a shell company was established to enter contracts that effectively protect the parent from suit by an employee, nor one where the complexity of the corporate arrangements works an injustice on employees. The written employment contract was based on a draft Mr. Colak had prepared. Mr. Colak signed the agreement three years after the commencement of his employment as a senior employee with full knowledge that the parent was the source of all funds for UVST’s activities. Mr. Colak was *capable of appreciating* why he might (or might not) want a contract with both his employer and its parent. His contract included incentive benefits from the parent company by way of shares in the parent. As I have found, the termination provision was onerous and tied to a non-competition clause. (emphasis added)

[23] In these circumstances I am not persuaded Creative Eateries Corporation should be visited with joint and several liability for the damages I would award for UVST’s breach of Mr. Colak’s employment contract.¹

VI. SCC: Leave to Appeal

Colak sought leave to the Supreme Court of Canada on this question: “Is an employee precluded from relying on the common employer doctrine because he/she signed a contract naming only one employer?”

On the leave application, Colak argued that the BC Court of Appeal decision in his case conflicts with the Alberta Court of Appeal decision in *Bagby* and the Ontario Court of Appeal decision in *Downtown Eatery*. It was said that this conflict created unsettled law in Canada on the common employer issue. Leave was denied.

VII. A Post-Colak World

It appears that the Court of Appeal in *Colak* has created a new “capable of appreciating” test to be used in the common employer analysis. The Court states that employees like Mr. Colak, who observe themselves working for two related employers, should be “capable of appreciating” that their second employer should be added as a party to their oral or written employment contract.

¹ The Court of Appeal had before it evidence of 17 “connections” between the parent company and the subsidiary including that both companies worked out of the same premises; that they had the same directors; that the parent’s only assets were those of the subsidiary; that Colak did work for the parent; and that Colak was paid partially in shares of the parent.

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The effect of this new “capable of appreciating” test is to negate the very reason the common employer doctrine was developed by the courts in the first place (i.e., to ensure that privity of contract does not leave an employee without a remedy when he or she signs a contract with one employer but works for several related employers).

Here is how the *Colak* case will play out in employment law cases throughout Canada if left unaltered:

Employee Sally has worked for Employer A for five years under the terms of an oral employment contract. During year six Sally is asked to also do some work for Employer B. Sally continues to work for both employers until she is dismissed in year seven. Unfortunately, Employer A is insolvent and when Sally turns to the courts for relief under the common employer doctrine to attach a wrongful dismissal judgment to Employer B, the Court holds that as per *Colak* Sally was “capable of appreciating” that Employer B was also her employer and because she did not amend her employment contract to include Employer B as a party, she is prevented from a common employer remedy.

While there are only a few cases that refer to written employment contracts in a common employer analysis, it is of note that none of those cases denied an employee relief under the common employer doctrine because the employee had signed a contract with only one employer. *Colak* takes the common employer doctrine in the opposite direction.

VIII. Conclusion

For plaintiff employees, a successful common employer argument may be the difference between a hollow judgment and getting paid. In building your client’s case it is important to explore if he or she has done work for more than one employer during their employment and to determine the “connections” between those employers.

The *Colak* decision complicates matters when a written employment agreement is in place (only naming one employer). It is argued that *Colak* opens the door for employers to exploit their workers on this issue. *Colak* tells employers that in order to protect themselves from the joint liability of a common employer finding, they should move their existing employees to written contracts that name just one employer. It is submitted that employees will have no idea of the rights they are surrendering by signing such a contract.

The majority of Canadian non-union employees work for their employers under the terms of an oral employment contract. When a court makes a common employer finding, the court is essentially adding a party to that employee’s oral contract.

What is the difference between a written and oral contract as it relates to a court’s analysis of the common employer doctrine? The Courts of Appeal in Alberta and Ontario hold that there is no difference while the Court of Appeal in BC has gone in a different direction.