

Wrongfully dismissed employees get paid by invoking doctrine of common employer

By Simon Kent and Jason Ellis

Canadian courts appear increasingly willing to protect the wrongfully dismissed employee from getting lost in the complexity of today's sophisticated and often convoluted corporate arrangements. The "common employer" doctrine is an example of such protection. It allows the court to treat different legal entities as one employer for the purpose of attributing liability for damages flowing from a wrongful dismissal.

The justification for the common employer doctrine was addressed in the B.C. Supreme Court case of *Sinclair v. Dover Engineering Services Ltd.* [1987] B.C.J. No. 60. The plaintiff was employed by Dover but paid by an affiliated management company. Since it was doubtful that damages

would be recoverable from Dover alone, both companies were named in the wrongful dismissal suit. The trial judge rejected the defendant's claim that an employee may only contract with one employer, emphasizing that "[t]he old fashioned notion that no man can serve two masters fails to recognize the realities of modern-day business..."

This rationale reflected the reality that both businesses

benefiting from an employee's services should share responsibility for providing reasonable notice. The trial judge justified this imposition by recognizing a "sufficient degree of relationship between the different legal entities" with sufficiency being defined by the elements of common control: indi-

vidual and corporate shareholders, interlocking directorships, etc. The decision in *Sinclair* was affirmed on appeal.

In 2001, *Sinclair* was cited with approval by the Ontario Court of Appeal in *Downtown Eatery*

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"... 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." 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]."

But what about written employment contracts? When conducting a common employer analysis, should a court consider whether the employee has signed a contract naming only one employer?

In *Bagby v. Gustavson International Drilling Co.* [1980] A.J. No. 743, 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 plaintiff in *Downtown Eatery* also had a written contract with a single employer. However, this did not stop the court from attaching liability to the others. The appellate court affirmed that "[a] contract is one factor to consider in the employer-employee relationship." To allow strict adherence to privity would effectively empower employers "to evade their obligations to dismissed employees by imposing employment contracts with shell companies with no assets."

Contrasting the liberal application of the common employer doctrine in these two cases is the B.C. Court of Appeal case of *Colak v. UV Systems Technology and Creative Eateries* [2007] B.C.J. No. 769. The appellate court found evidence that the defendants (the parent and subsidiary company)

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Court adds party to oral contract

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were common employers. However, because the plaintiff had entered into an agreement with his employer (the subsidiary) three years after the start of his employ-

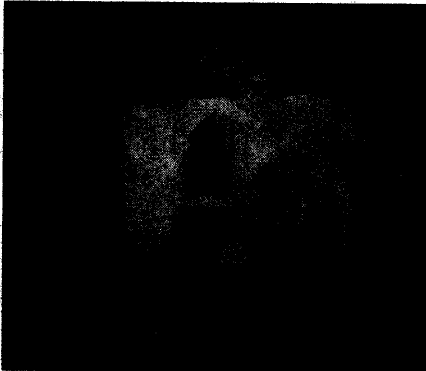
ment, the court held that he should have known that his employers were potentially "common employers" and should have contracted with both parent and subsidiary. Under these circumstances the court was unwilling to hold the parent liable for the damages owed to Colak by the subsidiary.

Most employees have an oral employment contract with one employer. When a court makes a common employer finding, the court is essentially adding a party to that original oral contract. Colak was looking for the same relief. However, the court appears to be punishing him for converting his oral contract into a written one. The decision to adhere strictly to privity of contract in *Colak* is in direct conflict with the reason the common employer doctrine was

developed in the first place: to provide a remedy for employees who have worked for several related employers but who only have a contract (oral or written) with one of those employers, and that employer has no assets.

Despite the *Colak* case, the common employer doctrine continues to be an important weapon in the arsenal of an employee's lawyer. A successful common employer argument may very well be your client's best hope for getting paid.

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