

**SUPREME COURT OF CANADA**

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| **Citation:** McCormick *v.* Fasken Martineau DuMoulin LLP, 2014 SCC 39, [2014] 2 S.C.R. 108 | **Date:** 20140522  **Docket:** 34997 |

Between:

John Michael McCormick

Appellant

and

Fasken Martineau DuMoulin LLP

Respondent

- and -

Alberta Human Rights Commission, British Columbia Human Rights Tribunal,

Ernst & Young LLP, KPMG LLP, Deloitte LLP, PricewaterhouseCoopers LLP,

BDO Canada LLP, Grant Thornton LLP, Young Bar Association of Montreal,

Ontario Human Rights Commission and Canadian Human Rights Commission

Interveners

**Coram:** McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

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| **Reasons for Judgment:**  (paras. 1 to 49) | Abella J. (McLachlin C.J. and LeBel, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. concurring) |

mccormick *v.* fasken martineau dumoulin, 2014 SCC 39, [2014] 2 S.C.R. 108

John Michael McCormick Appellant

v.

Fasken Martineau DuMoulin LLP Respondent

and

Alberta Human Rights Commission,

British Columbia Human Rights Tribunal,

Ernst & Young LLP, KPMG LLP, Deloitte LLP,

PricewaterhouseCoopers LLP,

BDO Canada LLP, Grant Thornton LLP,

Young Bar Association of Montreal,

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**Indexed as: McCormick *v.* Fasken Martineau DuMoulin LLP**

2014 SCC 39

File No.: 34997.

2013: December 13; 2014: May 22.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

on appeal from the court of appeal for british columbia

*Human rights — Discrimination — Employment — Age — Law firm partnership agreement containing provision relating to retirement at age 65 — Equity partner filing complaint with Human Rights Tribunal arguing provision constituting age discrimination in employment — Whether equity partner engaged in “employment relationship” for purposes of Human Rights Code — Whether complaint comes within jurisdiction of Human Rights Tribunal — Human Rights Code, R.S.B.C. 1996, c. 210, ss. 1, 13, 27.*

M became an equity partner at his law firm in 1979. An equity partner has an ownership interest in the firm. In the 1980s, the equity partners voted to adopt a provision in their Partnership Agreement that required equity partners to retire as equity partners and divest their ownership shares at the end of the year in which they turned 65. A partner could make individual arrangements to continue working as an employee or as a “regular” partner without an equity stake, but such arrangements are stated in the Agreement to be the exception rather than the rule. In 2009, when he was 64, M brought a complaint to the Human Rights Tribunal arguing that this provision constituted age discrimination in employment, contrary to s. 13(1) of the *Human Rights Code*, R.S.B.C. 1996, c. 210 (“*Code*”).

The law firm applied to have the complaint dismissed on the grounds that M, as an equity partner, was not in the type of workplace relationship covered by the *Code*. The Tribunal concluded that there was an employment relationship. The law firm’s application for judicial review was dismissed by the B.C. Supreme Court. The Court of Appeal allowed the appeal, concluding that M, as a partner, was not in an employment relationship pursuant to the *Code*.

*Held*: The appeal should be dismissed.

The *Code* is quasi-constitutional legislation that attracts a generous interpretation to permit the achievement of its broad public purposes. Those purposes include the prevention of arbitrary disadvantage or exclusion based on enumerated grounds, so that individuals deemed to be vulnerable by virtue of a group characteristic can be protected from discrimination. The *Code* achieves those purposes by prohibiting discrimination in specific contexts. One of these contexts is employment.

Deciding who is in an “employment relationship” for purposes of the *Code* means examining how two synergetic aspects function in an employment relationship: control exercised by an employer over working conditions and remuneration, and corresponding dependency on the part of a worker. The test is who is responsible for determining working conditions and financial benefits and to what extent does a worker have an influential say in those determinations? The more the work life of individuals is controlled, the greater their dependency and, consequently, their economic, social and psychological vulnerability in the workplace.

Control and dependency are a function not only of whether the worker receives immediate direction from, or is affected by the decisions of others, but also whether he or she has the ability to influence decisions that critically affect his or her working life. The answers to these questions represent the compass for determining the true nature of the relationship. Ultimately, the key is the degree of control and the extent to which the worker is subject and subordinate to someone else’s decision-making over working conditions and remuneration.

Applying the control/dependency test to this case, in addition to the right to participate in the management of the partnership, as an equity partner M benefited from other control mechanisms, including the right to vote for ― and stand for election to ― the firm’s Board; the duty that the other partners owed to him to render accounts; the right not to be subject to discipline or dismissal; the right, on leaving the firm, to his share of the firm’s capital account; and the protection that he could only be expelled from the partnership by a special resolution passed by a meeting of all equity partners and a regional resolution in his region.

As an equity partner, and based on his ownership, sharing of profits and losses, and the right to participate in management, M was part of the group that controlled the partnership, not a person vulnerable to its control, and, for over 30 years, benefited financially from the retirement of other partners. In no material way was M structurally or substantively ever in a subordinate relationship with the other equity partners. It is true that the law firm had certain administrative rules to which M was subject, but they did not transform the substance of the relationship into one of subordination or dependency. This is not to say that a partner in a firm can never be an employee under the *Code*, but in the absence of any genuine control of M in the significant decisions affecting the workplace, there was no employment relationship between him and the partnership under the provisions of the *Code*.

The Tribunal therefore had no jurisdiction over M’s relationship with the partnership.

**Cases Cited**

**Referred to:** *Crane v. British Columbia (Ministry of Health Services) (No. 1)*, 2005 BCHRT 361, 53 C.H.R.R. D/156, rev’d 2007 BCSC 460, 60 C.H.R.R. D/381; *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360; *British Columbia (Workers’ Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422; *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321; *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Canadian Pacific Ltd. v. Canada (Human Rights Commission)*, [1991] 1 F.C. 571; *Pannu v. Prestige Cab Ltd.* (1986), 73 A.R. 166; *Yu v. Shell Canada Ltd.*, 2004 BCHRT 28, 49 C.H.R.R. D/56; *Canada (Attorney General) v. Rosin*, [1991] 1 F.C. 391; *Mans v. British Columbia Council of Licensed Practical Nurses* (1990), 14 C.H.R.R. D/221; *International Woodworkers of America v. Atway Transport Inc.*, [1989] OLRB Rep. 540; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015; *York Condominium Corp.*, [1977] OLRB Rep. 645; *Clackamas Gastroenterology Associates, P. C. v. Wells*, 538 U.S. 440 (2003); *Backman v. Canada*, 2001 SCC 10, [2001] 1 S.C.R. 367; *Boyd v. Attorney-General for British Columbia* (1917), 54 S.C.R. 532; *Green v. Harnum*, 2007 NLCA 57, 269 Nfld. & P.E.I.R. 97; *Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Ltd. Partnership*, 2008 BCSC 27, 40 B.L.R. (4th) 83, aff’d 2009 BCCA 34, 52 B.L.R. (4th) 108; *Re Davies and Council of the Institute of Chartered Accountants of Saskatchewan* (1985), 19 D.L.R. (4th) 447; *Coal Harbour Properties Partnership v. Liu*, 2004 BCCA 283, 48 B.L.R. (3d) 237; *Largie v. TCBA Watson Rice, LLP*, 2013 U.S. Dist. LEXIS 117688; *Bowers v. Ophthalmology Group, LLP*, 2012 U.S. Dist. LEXIS 118761, rev’d 733 F.3d 647 (2013); *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 2009 U.S. Dist. LEXIS 100326; *Equal Employment Opportunity Commission v. Sidley Austin Brown & Wood*, 315 F.3d 696 (2002); *Ellis v. Joseph Ellis & Co.*, [1905] 1 K.B. 324; *Re Thorne and New Brunswick Workmen’s Compensation Board* (1962), 33 D.L.R. (2d) 167, aff’d [1962] S.C.R. viii; *Hitchcock v. Sykes* (1914), 49 S.C.R. 403; *Cameron v. Julien* (1957), 9 D.L.R. (2d) 460; *Rochwerg v. Truster* (2002), 58 O.R. (3d) 687.

**Statutes and Regulations Cited**

*Administrative Tribunals Act*, S.B.C. 2004, c. 45, s. 59.

*Age Discrimination Act 2004* (Cth.), No. 68, s. 21.

*Anti-Discrimination Act 1977* (N.S.W.), No. 48, ss. 10A, 27A, 49G.

*Anti-Discrimination Act 1991* (Qld.), No. 85, ss. 16 to 18.

*Disability Discrimination Act 1992* (Cth.), No. 135, s. 18.

*Equal Opportunity Act 1984* (S.A.), ss. 33, 55, 70.

*Equal Opportunity Act 1984* (W.A.), ss. 14, 40, 66E.

*Equal Opportunity Act 2010* (Vic.), No. 16, ss. 30, 31.

*Equality Act 2010* (U.K.), 2010, c. 15, s. 44.

*Human Rights Act 1993* (N.Z.), 1993, No. 82, s. 36.

*Human Rights Code*, R.S.B.C. 1996, c. 210, ss. 1 “employment”, “person”, 3, 13, 27(1)(a), (c).

*Partnership Act*, R.S.B.C. 1996, c. 348, ss. 1 “firm”, 2 “partnership”, 22, 27(e), 28, 31, 104.

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*Sex Discrimination Act 1984* (Cth.), No. 4, s. 17.

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APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J. and Newbury and Levine JJ.A.), 2012 BCCA 313, 352 D.L.R. (4th) 294, [2012] 9 W.W.R. 633, 325 B.C.A.C. 216, 34 B.C.L.R. (5th) 160, 100 C.C.E.L. (3d) 196, [2012] B.C.J. No. 1508 (QL), 2012 CarswellBC 2180, setting aside a decision of Bruce J., 2011 BCSC 713, 335 D.L.R. (4th) 450, 93 C.C.E.L. (3d) 314, 71 C.H.R.R. D/280, [2011] B.C.J. No. 999 (QL), 2011 CarswellBC 1340. Appeal dismissed.

*Murray Tevlin* and *John Chesko*, for the appellant.

*Irwin G. Nathanson*, *Q.C.*, and *Peter Senkpiel*, for the respondent.

*Arman Mujahid Chak* and *Audrey Dean*, for the intervener the Alberta Human Rights Commission.

*Katherine Hardie*, for the intervener the British Columbia Human Rights Tribunal.

*Peter H. Griffin* and *Rory Gillis*, for the interveners Ernst & Young LLP, KPMG LLP, Deloitte LLP, PricewaterhouseCoopers LLP, BDO Canada LLP and Grant Thornton LLP.

Written submissions only by *Vincent de l’Étoile* and *Catherine Galardo*, for the intervener the Young Bar Association of Montreal.

*Reema Khawja* and *Anthony D. Griffin*, for the intervener the Ontario Human Rights Commission.

*Philippe Dufresne* and *Valerie Phillips*, for the intervener the Canadian Human Rights Commission.

The judgment of the Court was delivered by

1. Abella J. — John Michael McCormick became an equity partner at Fasken Martineau DuMoulin LLP in 1979. In the 1980s, the equity partners — those partners with an ownership interest in the firm — voted to adopt a provision in their Partnership Agreement whereby equity partners were to retire as equity partners and divest their ownership shares in the partnership at the end of the year in which they turned 65. A partner could make individual arrangements to continue working as an employee or as a “regular” partner without an equity stake, but such arrangements were stated in the Agreement to be “the exception”.
2. In 2009, when he was 64, Mr. McCormick brought a claim alleging that this provision in the Partnership Agreement constituted age discrimination contrary to s. 13(1) of the British Columbia *Human Rights Code*.[[1]](#footnote-1)
3. Fasken applied to have the claim dismissed on the grounds that the complaint was not within the jurisdiction of the tribunal and that there was no reasonable prospect that the complaint would succeed.[[2]](#footnote-2) In its view, Mr. McCormick, as an equity partner, was not in the type of workplace relationship covered by the *Code*.
4. The issue before this Court, therefore, is how to characterize Mr. McCormick’s relationship with his firm in order to determine if it comes within the jurisdiction of the *Code* over employment. That requires us to examine the essential character of the relationship and the extent to which it is a dependent one.
5. At the time this complaint was brought, Fasken had 650 lawyers worldwide, of whom 260 were equity partners. There were about 60 equity partners in Fasken’s Vancouver office. Responsibility for the day-to-day running of the partnership is delegated through the Partnership Agreement to the Partnership Board, consisting of 13 equity partners, including three from the British Columbia region, elected to three-year terms by the equity partners. Before the creation of the Board, this responsibility had been given to the “Executive Committee”. In 1998-1999, Mr. McCormick served for a year on that committee.
6. The Board determines the compensation criteria for equity partners.[[3]](#footnote-3) The compensation criteria in place at the relevant time included the quality of the 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. A regional compensation committee, comprised of equity partners, allocates the firm’s profits to the equity partners in the region based on these criteria. There is a limited right of appeal back to the committee based on information not available at the time the initial allocation was made.
7. The Board appoints and gives direction to the firm’s managing partner, who is responsible for the overall management of the firm and who is accountable to the Board. The duties of the managing partner include “managing and structuring the human resources of the Firm, including Partners, associates and staff” and “delegat[ing] specific functions, responsibilities, authorities and accountabilities to Regional Managing Partners, committees, task forces, individual Partners or associates, as appropriate, and supervis[ing] the execution of those tasks”.[[4]](#footnote-4) Within the firm, all management and support staff report directly or indirectly to a chief operating officer.[[5]](#footnote-5) The chief operating officer reports through the firm’s managing partner to the Board.[[6]](#footnote-6)
8. All written opinions given to a client are the opinion of the firm, and must be reviewed and approved by a partner other than the partner who prepared it. The firm appoints a “client manager” for each client, who may not be the lawyer who brought the client to the firm. Each matter the firm handles for a client is overseen by a “file manager”, who is responsible for ensuring that the matter is efficiently and properly dealt with. The client manager monitors the performance of the file manager for each matter. All content produced by lawyers, including equity partners, becomes the property of the firm. Any income earned by a partner that relates in any manner to the practice of law is deemed to be property of the firm.[[7]](#footnote-7) Partners are prohibited from entering into financial arrangements or contracts in the name of the firm without the authorization of the firm’s managing partner, Board Chair, regional managing partner or two members of the Board.[[8]](#footnote-8)
9. A vote of the equity partnership as a whole is required for such matters as an amendment to the Partnership Agreement, the admission of a new equity partner, the expulsion of an equity partner, the dissolution of the firm, the removal of the managing partner, the opening of a new office, as well as the approval of certain significant expenses or debts.[[9]](#footnote-9)
10. An equity partner also has a capital account with the firm, which is paid out when he or she leaves the firm.[[10]](#footnote-10) The aggregate of the partners’ capital accounts represents the funding of the partnership. Partners are liable for the debts of the partnership to the extent that they are not covered by insurance or which the Board elects to treat as an expense, and as limited by s. 104 of the *Partnership Act*.[[11]](#footnote-11) If the partnership is dissolved, partners are entitled to receive a share of the assets remaining after all of the partnership’s debts and obligations are satisfied.
11. An equity partner like Mr. McCormick has an ownership interest in the firm. The terms of the Partnership Agreement require that equity partners divest their ownership shares in the partnership at the end of the year in which they turn 65. All equity partners are subject to this time limit on their ownership interests in the firm. A partner may make individual arrangements to continue working as an employee or as a “regular” partner without an equity stake, but such arrangements are stated in the Agreement to be “the exception rather than the rule”.[[12]](#footnote-12)
12. Mr. McCormick brought a complaint to the British Columbia Human Rights Tribunal, arguing that this provision of the Partnership Agreement constituted age discrimination in employment, contrary to s. 13(1) of the *Code*. Fasken brought an application to dismiss Mr. McCormick’s claim on the grounds that the Tribunal did not have jurisdiction over the claim because Fasken was not in an employment relationship with Mr. McCormick.
13. In assessing whether Mr. McCormick was in an employment relationship with the firm, the Tribunal relied on the factors it had developed in *Crane v. British Columbia (Ministry of Health Services)(No. 1)* (2005), 53 C.H.R.R. D/156, rev’d on other grounds (2007), 60 C.H.R.R. D/381 (B.C.S.C.): utilization, control, financial burden, and remedial purpose. Under the first factor, the Tribunal found that Fasken “utilized” Mr. McCormick to provide legal services to the firm’s clients and to generate intellectual property. Under the second, the Tribunal found that Fasken exercised control over Mr. McCormick through the direction given by managing partners and client and file managers. With respect to remuneration, the Tribunal found that despite the fact that the partnership involves sharing profits rather than paying fixed wages, the firm nevertheless had the burden of determining and paying Mr. McCormick’s compensation. Finally, the Tribunal concluded that allegations that Fasken treated Mr. McCormick differently because of his age engaged the broad remedial purposes of the *Code*. It concluded that there was therefore an employment relationship and dismissed Fasken’s application. Fasken’s application for judicial review was dismissed by the B.C. Supreme Court.
14. The B.C. Court of Appeal allowed Fasken’s appeal, concluding that Mr. McCormick, as a partner, was not in an employment relationship pursuant to the *Code*. It held that because a partnership is not, in law, a separate legal entity from its partners, it is a legal impossibility for a partner ever to be “employed” by a partnership of which he or she is a member.
15. For the reasons that follow, I agree with the Court of Appeal that the Tribunal’s decision was incorrect and that the Tribunal had no jurisdiction over Mr. McCormick’s relationship with the firm, but do not accept that a partner can never be an employee for purposes of the *Code*. The key is the degree of control and dependency.

Analysis

1. In the prior proceedings, the parties did not dispute that the standard of review was correctness. Since the issue does not deal with a finding of fact or the exercise of the Tribunal’s discretion, under s. 59 of the B.C. *Administrative Tribunals Act*[[13]](#footnote-13) a correctness standard is mandated: *Moore v. British Columbia (Education)*, [2012] 3 S.C.R. 360, at paras. 55-57; *British Columbia (Workers’ Compensation Board) v. Figliola*, [2011] 3 S.C.R. 422, at paras. 18-20.
2. The *Code* is quasi-constitutional legislation that attracts a generous interpretation to permit the achievement of its broad public purposes: *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 547, *per* McIntyre J.; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, at pp. 1133-36; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650.
3. Those purposes include the prevention of arbitrary disadvantage or exclusion based on enumerated grounds, so that individuals deemed to be vulnerable by virtue of a group characteristic can be protected from discrimination.
4. The *Code* achieves those purposes by prohibiting discrimination in specific contexts. One of those contexts is “employment”. The definition of employment must be approached consistently with the generous, aspirational purposes set out in s. 3 of the *Code* and understood in light of the protective nature of human rights legislation, which is “often the final refuge of the disadvantaged and the disenfranchised” and of “the most vulnerable members of society”: *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, at p. 339. This is the philosophical framework for ascertaining whether a particular workplace relationship represents the kind of vulnerability the *Code* intended to bring under its protective scope.
5. Mr. McCormick’s claim was based on age, an enumerated ground, and was brought under s. 13 of the *Code*, which states:

**13** [Discrimination in employment] (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 or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

. . .

(3) Subsection (1) does not apply

(a) as it relates to age, to a bona fide scheme based on seniority, or

(b) as it relates to marital status, physical or mental disability, sex or age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan, whether or not the plan is the subject of a contract of insurance between an insurer and an employer.

(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

“[E]mployment” and “person” are defined in s. 1 as follows:

“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;

1. While the starting point of the analysis is found in the legislative language of “master and servant”, “master and apprentice”, and “principal and agent”, it is important to note that the definition of employment “includes” these relationships, but is not restricted to them (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 239; *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029, at p. 1041). Moreover, relying on a formalistic approach to a “master and servant” relationship, resurrects an unduly restrictive traditional test for employment (H. W. Arthurs, “The Dependent Contractor: A Study of the Legal Problems of Countervailing Power” (1965), 16 *U.T.L.J.* 89; George W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), at p. 6-35). At the same time, the relationships which are deemed to be included should be analogous to those set out in the definition. As this Court said in *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353: “It is the duty of boards and courts to give [provisions] a liberal and purposive construction, without reading the limiting words out of the Act or otherwise circumventing the intention of the legislature” (p. 371).
2. The jurisprudence confirms that there should be an expansive approach to the definition of “employment” under the *Code*. Independent contractors, for example, have been found to be employees for purposes of human rights legislation, even though they would not be considered employees in other legal contexts: *Canadian Pacific Ltd. v. Canada (Human Rights Commission)*, [1991] 1 F.C. 571 (C.A.); *Pannu v. Prestige Cab Ltd.* (1986), 73 A.R. 166 (C.A.); *Yu v. Shell Canada Ltd.* (2004), 49 C.H.R.R. D/56 (B.C.H.R.T.). See also *Canada (Attorney General) v. Rosin*, [1991] 1 F.C. 391 (C.A.); *Mans v. British Columbia Council of Licensed Practical Nurses* (1990), 14 C.H.R.R. D/221 (B.C.C.H.R.).
3. Deciding who is in an employment relationship for purposes of the *Code* means, in essence, examining how two synergetic aspects function in an employment relationship: control exercised by an employer over working conditions and remuneration, and corresponding dependency on the part of a worker. In other words, the test is who is responsible for determining working conditions and financial benefits and to what extent does a worker have an influential say in those determinations? The more the work life of individuals is controlled, the greater their dependency and, consequently, their economic, social and psychological vulnerability in the workplace: Guy Davidov, “The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection” (2002), 52 *U.T.L.J.* 357, at pp. 377-94; Arthurs, at pp. 89-90; *International Woodworkers of America v. Atway Transport Inc.*, [1989] OLRB Rep. 540; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015.
4. The test applied by the Human Rights Tribunal in British Columbia for determining whether someone is in an employment relationship under the *Code* was developed in *Crane*,where it identified the following indicia:

a. “Utilization” — this . . . looks to the question of whether the alleged employer “utilized” or gained some benefit from the employee in question;

b. Control — did the alleged employer exercise control over the employee, whether in relation to the determination of his or her wages or other terms and conditions of employment, or in relation to their work more generally, such as the nature of the work to be performed or questions of discipline and discharge?

c. Financial burden — did the alleged employer bear the burden of remuneration of the employee? and

d. Remedial purpose — does the ability to remedy any discrimination lie with the alleged employer? [para. 79]

This test too is, in essence, a control/dependency test. The concepts of utilization, control, financial burden, as well as the ability of the employer to remedy any discrimination, all ultimately relate to whether the employer controls working conditions and remuneration, resulting in dependency on the part of the employee.

1. Placing the emphasis on control and dependency in determining whether there is an employment relationship is consistent with approaches taken to the definition of employment in the context of protective legislation both in Canada and internationally: Davidov, at pp. 365-71. The Ontario Labour Relations Board, for example, uses a seven-factor test for determining if an employment relationship exists, based on indicia that relate mainly to control and economic dependency. Among other criteria, the Board asks whether the alleged employer exercises direction and control over the performance of work; imposes discipline; has the authority to dismiss employees; bears the burden of remuneration; and is perceived to be the employer (*York Condominium Corp.*, [1977] OLRB Rep. 645; Adams, at p. 6-36). That said, while significant underlying similarities may exist across different statutory schemes dealing with employment, it must always be assessed in the context of the particular scheme being scrutinized.
2. While the specific indicia used in other jurisdictions may vary from those adopted by Canadian authorities, the consistent animating themes are control and dependency. For example, in *Clackamas Gastroenterology Associates, P. C. v. Wells*, 538 U.S. 440 (2003), a case that required the U.S. Supreme Court to define who is an employee under the *Americans with Disabilities Act of 1990* (104 Stat. 327, as amended, 42 U.S.C. § 12101 *et* *seq.*), the court relied on the following control/dependency factors:

“Whether the organization can hire or fire the individual or set the rules and regulations of the individual’s work

“Whether and, if so, to what extent the organization supervises the individual’s work

“Whether the individual reports to someone higher in the organization

“Whether and, if so, to what extent the individual is able to influence the organization

“Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts

“Whether the individual shares in the profits, losses, and liabilities of the organization.” EEOC Compliance Manual § 605:0009. [pp. 449-50]

1. Control and dependency, in other words, are a function not only of whether the worker receives immediate direction from, or is affected by the decisions of others, but also whether he or she has the ability to influence decisions that critically affect his or her working life. The answers to these questions represent the compass for determining the true nature of the relationship.
2. While control and dependency define the essence of an employment relationship for purposes of human rights legislation, this does not mean that other indicia that courts and tribunals have developed, such as the *Crane* factors, are unhelpful in assessing the extent to which control and dependency are present. But such factors are unweighted taxonomies, a checklist that helps explore different aspects of the relationship. While helpful in framing the inquiry, they should not be applied formulaically. What is more defining than any particular facts or factors is the extent to which they illuminate the essential character of the relationship and the underlying control and dependency. Ultimately, the key is the degree of control, that is, the extent to which the worker is subject and subordinate to someone else’s decision-making over working conditions and remuneration: Geoffrey England, *Individual Employment Law* (2nd ed. 2008), at p. 19.
3. This brings us to partnerships generally. British Columbia’s *Partnership Act* is modeled on the U.K. *Partnership Act 1890*[[14]](#footnote-14) (Alison R. Manzer, *A Practical Guide to Canadian Partnership Law* (loose-leaf), at p. 1-2). Section 1 states that “‘firm’ is the collective term for persons who have entered into partnership with one another”. Section 2 defines a partnership as “the relation which subsists between persons carrying on business in common with a view of profit”. Accordingly, a partnership is by its nature an entrepreneurial relationship among individuals agreeing to do business together.
4. The conventional view of a partnership was famously described in *Lindley & Banks on Partnership* (19th ed. 2010) as a collection of partners, rather than a distinct legal entity separate from the parties who are its members:

The law, ignoring the firm, looks to the partners composing it; any change amongst them destroys the identity of the firm; what is called the property of the firm is their property, and what are called the debts and liabilities of the firm are their debts and their liabilities. [para. 3-04]

(Cited with approval in *Backman v. Canada*, [2001] 1 S.C.R. 367, at para. 41. See also *Boyd v. Attorney-General for British Columbia* (1917), 54 S.C.R. 532; *Green v. Harnum* (2007), 269 Nfld. & P.E.I.R. 97 (N.L.C.A.); *Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Ltd. Partnership* (2008), 40 B.L.R. (4th) 83 (B.C.S.C.), at paras. 79-89, aff’d (2009), 52 B.L.R. (4th) 108 (B.C.C.A.); *Re Davies and Council of the Institute of Chartered Accountants of Saskatchewan* (1985), 19 D.L.R. (4th) 447 (Sask. Q.B.), at pp. 451-53; *Coal Harbour Properties Partnership v. Liu* (2004), 48 B.L.R. (3d) 237 (B.C.C.A.), at para. 10.)

1. Among the distinctive features of a partnership is that partners generally have a right to participate meaningfully in the decision-making process that determines their workplace conditions and remuneration (J. Anthony VanDuzer, *The Law of Partnerships and Corporations* (3rd ed. 2009), at p. 75; *Partnership Act*, s. 27(e)). This is reflected in, for example, the duty to render accounts to other partners in order to permit them to have the information they need to participate in workplace decisions and ensure that their interests are adequately considered. This duty is set out in s. 31 of the *Partnership Act*:

**31** Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his or her legal representatives.

1. Partnership agreements also typically create a high threshold for expulsion and, unless the agreement explicitly provides otherwise, a partner cannot be expelled by a simple majority of partners (*Partnership Act*, s. 28). The Fasken Partnership Agreement, for example, requires a special resolution passed by a meeting of all equity partners, as well as a regional resolution in the partner’s region.[[15]](#footnote-15) When partners do leave a partnership, they are entitled to be paid their share of the partnership’s capital account: VanDuzer, at p. 73; Partnership Agreement, s. 9.5.
2. In other words, the control over workplace conditions and remuneration is with the partners who form the partnership. In most cases, therefore, partners are not employees of the partnership, they are, collectively, the employer.
3. American courts have generally found that partnerships are not employment relationships under anti-discrimination legislation since even in a large partnership, partners are typically able to influence the running of the partnership to a significant extent: *Largie v. TCBA Watson Rice, LLP*, 2013 U.S. Dist. LEXIS 117688 (D.N.J.); *Bowers v. Ophthalmology Group, LLP*, 2012 U.S. Dist. LEXIS 118761 (W.D. Ky.), rev’d on other grounds 733 F.3d 647 (6th Cir. 2013); *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 2009 U.S. Dist. LEXIS 100326 (W.D. Pa.), at [\*82]. In *Clackamas*, however, the U.S. Supreme Courtspecifically left open the possibility that nominal “partners” could still be considered employees in exceptional circumstances based on an assessment of the substance of the relationship (p. 446; see also *Equal Employment Opportunity Commission v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002), at pp. 702-7).
4. Canadian and British courts have similarly held that partnerships are not relationships of employment for purposes of other forms of protective legislation, such as in the realm of workers’ compensation: *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.)), aff’d [1962] S.C.R. viii.
5. This does not mean human rights legislation cannot apply to partnerships, it means that an express statutory provision is usually required, as is found in s. 44 of the U.K. *Equality Act 2010*, 2010, c. 15. The Explanatory Note to that provision states that a separate provision protecting partners from discrimination was necessary because their relationship with their partnership is not one of employment:

Because partners are mainly governed by their partnership agreements, rather than by employment contracts, separate provisions are needed to provide protection from discrimination, harassment and victimisation for partners in ordinary and limited partnerships. [para. 158]

1. Partnership is also designated as a separate category from employer/employee relationships in anti-discrimination legislation in Australia and New Zealand: *Sex Discrimination Act 1984* (Cth.), No. 4, s. 17; *Disability Discrimination Act 1992* (Cth.), No. 135, s. 18; *Age Discrimination Act 2004* (Cth.), No. 68, s. 21; *Anti-Discrimination Act 1977* (N.S.W.), No. 48, ss. 10A, 27A and 49G; *Anti-Discrimination Act 1991* (Qld.), No. 85, ss. 16 to 18; *Equal Opportunity Act 1984* (S.A.), ss. 33, 55 and 70; *Equal Opportunity Act 2010* (Vic.), No.16, ss. 30 and 31; *Equal Opportunity Act 1984* (W.A.), ss. 14, 40 and 66E; *Human Rights Act 1993* (N.Z.), 1993, No. 82, s. 36.
2. While the structure and protections normally associated with equity partnerships mean they will rarely be employment relationships for purposes of human rights legislation, this does not mean that form should trump substance. In this case, for example, the Court of Appeal appeared to focus exclusively on partnership as a legal concept, rather than examining the substance of the actual relationship and the extent to which control and dependency played a role.
3. Turning to Mr. McCormick’s relationship with his partnership and applying the control/dependency test, based on his ownership, sharing of profits and losses, and the right to participate in management, I see him more as someone in control of, rather than subject to, decisions about workplace conditions. As an equity partner, he was part of the group that controlled the partnership, not a person vulnerable to its control.
4. It is true that Fasken had certain administrative rules to which Mr. McCormick was subject, but they did not transform the substance of the relationship into one of subordination or dependency. Management and compensation committees are necessary mechanisms to implement and coordinate the firm’s policies, not limitations on a partner’s autonomy. Fasken’s Board, regional managing partners, and compensation committees were all directly or indirectly accountable to, and controlled by, the partnership as a whole, of which Mr. McCormick was a full and equal member. Under the Partnership Agreement, most major decisions, *including those relating to the firm’s mandatory retirement policy*, were subject to a vote of the partnership, in which all partners, including Mr. McCormick, had an equal say.[[16]](#footnote-16) Mr. McCormick was an equity partner when the current retirement policy was adopted, and was entitled to vote on the very policy that he is now challenging.
5. In addition to the right to participate in the management of the partnership, as an equity partner Mr. McCormick benefited from other control mechanisms, including the right to vote for — and stand for election to — the firm’s Board; the duty that the other partners owed to him to render accounts; the right not to be subject to discipline or dismissal; the right, on leaving the firm, to his share of the firm’s capital account; and the protection that he could only be expelled from the partnership by a special resolution passed by a meeting of all equity partners and a regional resolution in his region, arguably giving him tenure since there is no evidence of any equity partners being expelled from this partnership.
6. Nor was Mr. McCormick dependent on Fasken in a meaningful sense. It is true that his remuneration came exclusively from the partnership, but this remuneration represented his share of the profits of the partnership in accordance with his ownership interest. The partnership was run for the economic benefit of the partners, *including* Mr. McCormick. While the financial proceeds of Mr. McCormick’s work were pooled with those of other lawyers in the firm, and the distribution of profits was ultimately determined by internal committees, these committees applied criteria that were designed to measure the partner’s contribution to the firm. Mr. McCormick drew his income from the profits of the partnership and was liable for its debts and losses. In addition, he had a capital account and was entitled to share in the partnership’s assets if it dissolved. In effect, Mr. McCormick was not working for the benefit of someone else, as the Tribunal’s reasons suggest, he was, as an equity partner, in a common enterprise with his partners for profit, and was therefore working for his own benefit.
7. Finally, it must be observed that in order to change the firm’s mandatory retirement policy, all of Fasken’s equity partners would have been entitled to vote. Responsibility for remedying any alleged inequity thus lay in the hands of Mr. McCormick as much as any other equity partner. Instead, he financially benefited for over 30 years from the retirement of the other partners. In fact, in no material way was Mr. McCormick structurally or substantively ever in a subordinate relationship with the other equity partners.
8. I appreciate that the Tribunal sought, through the application of the *Crane* factors, to assess Mr. McCormick’s relationship with his firm, but in so doing, it paid insufficient attention to whether he was actually subject to the control of others and dependent on them. It assessed “control”, for example, in terms of some administrative restrictions on partners rather than examining the underlying power dynamics of the relationship. And it found that Mr. McCormick was “utilized” and “remunerated” by Fasken, while disregarding the fact that the firm was run for the benefit of, and by, its equity partners, including Mr. McCormick.
9. In the absence of any genuine control over Mr. McCormick in the significant decisions affecting the workplace, there cannot, under the *Code*, be said to be an employment relationship with the partnership. Far from being subject to the control of Fasken, Mr. McCormick was among the partners who controlled it from 1979, when he became an equity partner, until he left in 2012. The Tribunal therefore erred in concluding that it had jurisdiction over his relationship with the partnership.
10. This is not to say that a partner in a firm can never be an employee under the *Code*, but such a finding would only be justified in a situation quite different from this case, one where the powers, rights and protections normally associated with a partnership were greatly diminished.
11. But the fact that a partner like Mr. McCormick has no remedy under the *Code* does not necessarily mean that partners have no recourse for claims of discrimination. One of the duties partners owe each other is the duty of utmost fairness and good faith, set out in s. 22 of the *Partnership* *Act*:

**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 or liabilities of partners.

1. This duty is an important source of protection for partners: *Hitchcock v. Sykes* (1914), 49 S.C.R. 403, at p. 407; *Cameron v. Julien* (1957), 9 D.L.R. (2d) 460 (Ont. C.A.); *Rochwerg v. Truster* (2002), 58 O.R. (3d) 687 (C.A.). While this case does not require us to decide the point, the duty of utmost good faith in a partnership may well capture some forms of discrimination among partners that represent arbitrary disadvantage: see Manitoba Law Reform Commission, *Good Faith and the Individual Contract of Employment*, Report #107 (2001), at pp. 22 and 32-33; Emily M. S. Houh, “Critical Race Realism: Re-Claiming the Antidiscrimination Principle through the Doctrine of Good Faith in Contract Law” (2005), 66 *U. Pitt. L. Rev.* 455. That said, absent special circumstances, it is difficult to see how the duty of good faith would preclude a partnership from instituting an equity divestment policy designed to benefit all partners by ensuring the regenerative turnover of partnership shares.
2. The appeal is dismissed with costs.

*Appeal dismissed with costs.*

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1. R.S.B.C. 1996, c. 210. [↑](#footnote-ref-1)
2. *Human Rights Code*, s. 27(1)(a) and (c). [↑](#footnote-ref-2)
3. Partnership Agreement, ss. 7.1(b) and 7.4(a). [↑](#footnote-ref-3)
4. Partnership Agreement, s. 5.3(b) and (g). [↑](#footnote-ref-4)
5. Partnership Agreement, s. 5.6. [↑](#footnote-ref-5)
6. Partnership Agreement, s. 5.6. [↑](#footnote-ref-6)
7. Partnership Agreement, s. 8.4. [↑](#footnote-ref-7)
8. Partnership Agreement, s. 3.7. [↑](#footnote-ref-8)
9. Partnership Agreement, ss. 3.3 and 3.4. [↑](#footnote-ref-9)
10. Partnership Agreement, s. 9.5. [↑](#footnote-ref-10)
11. R.S.B.C. 1996, c. 348. [↑](#footnote-ref-11)
12. Partnership Agreement, s. 9.2. [↑](#footnote-ref-12)
13. S.B.C. 2004, c. 45. [↑](#footnote-ref-13)
14. 1890, c. 39. [↑](#footnote-ref-14)
15. Partnership Agreement, s. 3.3. [↑](#footnote-ref-15)
16. Partnership Agreement, s. 3.2. [↑](#footnote-ref-16)