

# **Common Employer – An Update on the Common Law Doctrine**

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## **INTRODUCTION**

The organization of businesses has grown in complexity in recent years. Webs of companies are often utilized for a single undertaking. Shell companies are used by even the most reputable business people. Large corporations utilize smaller ones, for each of their different endeavours. The ultimate goal: to minimize legal exposure. It is within this environment that the most vulnerable group in the corporate world finds itself engaged – the employee. The employee has no say in who writes their ultimate pay cheque. The employee has no decision-making power in how its employer organizes its business affairs. And the employee has no control as to what entity holds the actual assets of the organization. The common law has offered up a solution; the common employer doctrine.

## **THE EVOLUTION OF THE COMMON EMPLOYER DOCTRINE**

The common employer doctrine arises in 3 contexts: 1) common law contracts of employment; 2) employment standards legislation; and, 3) collective bargaining legislation. The first context shall be the focus of this paper; however, in order to provide a fulsome review for employment counsel, the application of this doctrine to the *Employment Standards Act, 2000*<sup>2</sup> will also be briefly discussed.

The common employer doctrine has been explained as:

“The concept of associated or related employers extends liability for employment-related obligations among a group of related entities in ways that ignore the corporate legal form and do not require that a legal entity have a direct contractual relationship with an

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<sup>1</sup> I would like to thank our articling student Jeff VanBakel for his invaluable assistance in gathering together the research upon which this paper is based.

<sup>2</sup> S.O. 2000, s.41 as amended.

employee. It modifies the traditional binary contractual model by trumping privity when it comes to the employment contract or the collective agreement and by lifting corporate veils.”<sup>3</sup>

First it should be noted that the terminology of related employer, common employer and associated employer are all used interchangeably.

The doctrine can be summarized as not permitting form to govern over substance to determine the question of who is the employer. Different from director liability cases, the common employer doctrine is applied in order to find liability of one corporation for the employment obligations of another.

It can be useful to litigants where the contractual employer has ceased operation or is a shell corporation, creating entitlements to severance pay under employment standards legislation, and expanding the reach of liability for any damages for which an employer is otherwise liable.

### **THE DEVELOPMENT OF THE DOCTRINE LEADING UP TO *DOWNTOWN EATERY***

The first seeds of the doctrine were sown by the Ontario Court of Appeal decision of *Manley Inc. v. Fallis*.<sup>4</sup> *Manley* was a breach of fiduciary duty case. The Defendant was terminated when it was discovered that he had set up a company which competed directly with the parent company of his direct employer, whose business was intertwined with it. The issue was whether he was liable for any breach of fiduciary duty.

Lacourciere J.A. writing for the Court stated:

“This is a case where the Court is not precluded from lifting the corporate veil and, in effect, regarding the closely related companies as essentially one trading enterprise, in the

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<sup>3</sup> Judy Fudge & Kate Zavitz, *Vertical Disintegration and Related Employers: Attributing Employment-Related Obligations in Ontario*, (2007) 13 C.LE.L.J 107.

<sup>4</sup> (1977), 38 C.P.R. (2d) 74 (Ont.C.A.).

interests of the affiliated companies, in a circumstance where the refusal to do so would allow the appellant to escape the consequences of his breach of fiduciary trust.”<sup>5</sup>

Liability was found to follow.

The doctrine grew roots and sprouted in the Alberta Court of Appeal decision of *Bagby v. Gustavson International Drilling Co.*<sup>6</sup> The issue was which of a number of corporate entities, joined together in a modern corporate conglomerate, were liable for wrongful dismissal. The Court made the following pronouncement and went on to conclude that there was liability under the unnamed “common employer” doctrine resulting from the control exercised by the other company:

“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 practices. It is commonplace 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 the employer? Liability for contractual obligations should flow from that answer.”<sup>7</sup> [emphasis added]

Eight years later, the common employer doctrine went into full bloom in *Sinclair v. Dover Engineering Services Ltd.* a decision by the British Columbia Court of Appeal.<sup>8</sup> In this case we

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<sup>5</sup> *Ibid* (QL) at p. 4.

<sup>6</sup> [1980] A.J. 743 (Alta.C.A.).

<sup>7</sup> *Ibid* at para 44.

<sup>8</sup> (1988) 49 D.L.R. (4<sup>th</sup>) 297 (B.C.C.A.) affirming (1987), 11 B.C.L.R. (2d) 176 (B.C.S.C.).

first see the Court conclude that an individual can be employed by more than one entity at a single point in time – the essence of the common employer doctrine.

The Court of Appeal upheld the finding by the trial judge but did not agree with the path to get there. At trial the Court found that the degree of common control of the companies gave rise to liability and that the corporate veil could be lifted in order to find that liability. The Court of Appeal on the other hand held that neither a finding of vicarious liability nor the lifting of the corporate veil was necessary. It concluded that the Plaintiff employee was employed by two entities concurrently, both of which were responsible for the damage award for his wrongful dismissal. This was the first recognition that there may concurrently be multiple employers of the same employee.

In the *Sinclair* case, the Plaintiff employee was paid by a shell company while performing all his services for the benefit of another. The finding of this joint employment was premised upon the employer being aware of the employee's activities, and there being an element of common control over the employee. The Court recognized the latitude of organizations to do what they consider to be commercially convenient; however, finding that the arrangement was devised because of various beneficial aspects to the corporations and that both companies exercised control over the Plaintiff employee and his affairs, he was under contract for services with both entities.

*Sinclair* made the emphasis one of “common control”. However, it indicated the determination was based upon the relationship of the entities to the employee. This gradually began to change with some trial decisions emphasising the aspect of the relationship between the entities themselves rather than their relationship with the employee. *Sinclair* remained the leading case in the area until the 2001 decision of the Ontario Court of Appeal; it is still often quoted.

## **THE DOWNTOWN EATERY CASE**

The 2001 decision of the Ontario Court of Appeal in *Downtown Eatery (1993) Ltd. v. Ontario*<sup>9</sup> was important in two respects. First, it resulted in a finding of liability by a corporation to an employee under the oppression remedy provisions of the *Ontario Business Corporations Act*.<sup>10</sup> Second, it provided guidance as to the application of the common employer doctrine and placed the focus of the common control analysis on the relationship between the parties.

The case involved an employee who had been employed within the “For Your Eyes Only” enterprise as manager of one of the clubs. The enterprise divided its operation between a series of four separate companies, each with a colourful name. One paid the Plaintiff and the others the **wages**. Another was the owner and lessor of the two nightclub premises. A third was the leasee of the premises who held the liquor licenses and adult entertainment licenses as well as the trademark for “For Your Eyes Only”. The fourth owned the chattels and equipment and operated the clubs under a license from the third. All companies were owned and controlled by two individuals and their respective holding companies.

At first instance, the employee sued only the first entity and obtained judgment. Some money was seized by the sheriff from its on-going nightclub operations, and the operating company (the fourth company) sued the employee claiming ownership in the money. The employee counterclaimed against all four companies for the unsatisfied judgment against the first on the basis of the common employer doctrine, oppression relief and a tracing remedy associated with a fraudulent conveyance. The employee appealed after he was entirely unsuccessful at trial.

The Court of Appeal considered the common employer doctrine set out in *Sinclair v. Dover* and referred to several cases in support of the proposition of the doctrine where there was a “paymaster” closely connected to other corporations.<sup>11</sup> It was concluded that the group of companies “functioned as a single, integrated unit” and as such were all employers and all liable.

Borins and MacPherson JJ.A. in delivering the judgment of the Court very eloquently said:

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<sup>9</sup> [2001] O.J. No. 1879 (Ont.C.A.).

<sup>10</sup> *Business Corporations Act, R.S.O. 1990, c. B.16.*

<sup>11</sup> *Ibid* at par33.

“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. ....[t]he definition of ‘employer’ is this simple and common scenario should be one that recognizes the complexity of modern corporate structures, but does not permit that complexity to defeat the legitimate entitlements of wrongfully dismissed employees.”<sup>12</sup>

That “policy” statement is effectively how common employer cases are determined. It reflects the rationale of the Court in all the cases which follow and can be used to predict the anticipated outcome.

The focus of the analysis was not on the role each of the four corporations played in relation to the employment of the Plaintiff, but rather, the integration of the companies themselves and their common control.

The Court held the written contract to be but one consideration. The actual determination will depend upon the individual facts of the case, with the essence of the relationship being the element of common control. Not control over the employee but rather control over the corporations themselves.

### ***DOWNTOWN EATERY – EIGHT CASES IN THE PAST FIVE YEARS***

Since the release of the Court of Appeal decision in August of 2001, the *Downtown Eatery* case has been judicially considered in 37 cases across Canada 28 of those in the past 5 years. However most of the cases consider *Downtown Eatery* for its development of the use of the oppression remedy provisions of the *Business Corporations Act* and not for the common employer doctrine. In the past five years fewer than ten cases have been located that considered the decision in that context. The following is a review of the judicial application of the common employer doctrine over the past five years.

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<sup>12</sup> Ibid at par 36.

**1. *Bartholomay v. Sportica Internet Technologies Inc.*<sup>13</sup>**

The Plaintiff employee had a written contract with one employer Defendant. It sought to have liability attached to another entity on the basis of the common employer doctrine. The written contract also mentioned the second company and attached the confidentiality, non-competition, non-solicitation and non-disparagement provisions to both entities.

The trial judge found there to be strong evidence pertaining to the close relationship between the Defendant companies, the nature of their enterprise and their common control. Reviewing the case law, the law was summarized as follows:

“While each case depends on its own facts, and the cases may be factually distinguishable to some degree, they demonstrate the importance of the degree of the relationship between the Defendant companies and the commonality of their purpose and control and, although perhaps to a lesser extent, the Plaintiff’s relationship and conduct in relation to them. It is a matter of substance rather than form and the fact that the employee has a written contract with one of the companies is not determinative.”<sup>14</sup>

The Court was satisfied that the doctrine was applicable to the second corporation and concluded both Defendants were liable on the following facts:

- a. they were described as “related” or “associated” companies;
- b. they carried on one enterprise;
- c. business operations were closely and inextricably interrelated;
- d. the companies had common shareholders as well as common directors;
- e. they operated from the same premises; and,
- f. the companies were held out as being part of the same entity at business presentations.

Result: common employer

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<sup>13</sup> (2004), 32 C.C.E.L. (3d) 229 (B.C.S.C.), per Hood J.

<sup>14</sup> *ibid* at par. 10.

**2. *McCulloch v. IPlatform Inc.*<sup>15</sup>**

The Court was satisfied that the doctrine was applicable and concluded all Defendants were liable on the following facts:

- a. company 1 had signed the employment contract;
- b. salary was provided by company 2 as was the associated T4;
- c. company 2 provided the benefits;
- d. company 2 was often referred to as a division of company 3;
- e. company 1 purported to effect the termination of his employment;
- f. the termination documents thanked him for service to company 3, and asked for a release of company 3 while the Record of Employment was issued by company 2;
- g. the Plaintiff employee performed services primarily at the place of business of company 2 but occasionally also at the place of business of company 3; and,
- f. the companies shared a common bookkeeper who testified that they were “run together”.

Result: common employer

**3. *Jakl v. Russell Tire & Automotive Centre (1990) Inc.*<sup>16</sup>**

The Court concluded that Goodyear was the “co-employer” of the employees of Russell Tire as a result of the fact that Goodyear had effective control of Russell Tire’s business and employees. By virtue of an option agreement between the companies the Goodyear management team was inserted into Russell Tire. As co-employer, Goodyear was responsible for providing reasonable notice of termination of the employee from the time period of its time as co-employer until the time of termination only.

Result: common employer (Note: unique fact situation)

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<sup>15</sup> (2004), 46 C.C.E.L. (3d) 257 (Ont.S.C.J.) per Echlin J.

<sup>16</sup> [2005] O.J. No. 88 (Ont.C.A.) per K.M. Weiler, M.J. Moldaver and J.M. Simmons JJ.A.



**4. *Kent v. Stop N' Cash 1000 Inc.*<sup>17</sup>**

The Court was satisfied that the doctrine was applicable and concluded both Defendants were liable on the following facts:

- a. the Defendants were related companies;
- b. the employment contract was with the franchisor, the other Defendants were franchisees (2 of the franchises from 26 which existed at the time of trial across Canada);
- c. notwithstanding the franchise relationship, the Defendant companies had common ownership and principals;
- d. all Defendants were under common control;
- e. the Plaintiff began providing services solely for the franchisor. She was appointed later as loans manager for one of the two franchisees (she did not seek to attach liability to this entity), and still later manager of the other franchisee but continued to provide service to the franchisor throughout;
- f. the Plaintiff's T4 slips were in one year divided between the 3 companies; however the final year of her employment was provided solely from one franchisee, although she was paid a bonus that year by the franchisor; and,
- g. there was significant evidence that the corporations were treated as part of one organization and that the two "franchisees" were flagship stores used to sell more franchises.

The Court concluded:

"At the time of her termination of employment on October 31, 2004, I find that the parties knew and understood she was an employee of both corporations, as they were part of the Stop N' Cash organization. She was performing services on behalf of both those corporations and receiving payment of her salary and earned bonus from both of these named Defendants. She was at all times under the supervision, control and direction of the corporate officer and directors of [the franchisor]"<sup>18</sup>.

Result: common employer

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<sup>17</sup> [2006] O.J. 2699 (Ont.S.C.J.) per J.R.H. Turnbull J.

<sup>18</sup> *Ibid* at para 37.

**5. *Bitterman v. Knoll Inc.*<sup>19</sup>**

This case marked an important development in the common employer doctrine.

It involved a motion under Rule 21 to dismiss the Plaintiff's action against one of the Defendants on the ground that it was not her employer. The moving party Defendant argued, *inter alia*, that the action against it should be struck because it was unnecessary as the other Defendant and rightful employer was not insolvent and all claims for relief could be brought against it.

As this was a Rule 21 motion, the facts as plead were all that was before the Court. They were as follows:

- a. the employee received her salary and benefits from company 1;
- b. the employee was supervised by and took instructions from company 2;
- c. the companies acted under common direction and control.

Perell J. concluded the lack of an insolvent entity did not operate to bar a claim founded on the common employer doctrine. There was no ground upon which to strike the claim as "frivolous and vexatious" as being brought purely for tactical reasons. The fact that recovery was available was not a bar to the claim itself. Hence, any view that this doctrine could be asserted in limited circumstances has been expressly addressed.

Result: common employer doctrine may be pursued (decision was motion level)

**6. *Colak v. UV Systems Technology Inc.*<sup>20</sup>**

The Court was not satisfied that the doctrine was applicable and concluded no liability flowed to any entity other than the contractual employer on the following facts:

- a. during the course of the Plaintiff's employment by company 1, company 1 became a subsidiary of company 2 with company 1 as essentially the operating company of company 2;
- b. he had a written contract of employment with company 1;

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<sup>19</sup> [2005] O.J. no. 3791 (Ont.S.C.J.) per Perell J.

<sup>20</sup> [2007] B.C.J. No. 769 (B.C.C.A.) per Huddart, Hall and Smith J.J.A. Leave to appeal to the Supreme Court refused at [\[2007\] S.C.C.A. No. 306](#).

- c. the companies had common directors and officers;
- d. the companies operated from the same premises; and,
- e. company 1 by the time of trial had no assets remaining having transferred operations to another entity under a joint venture agreement, leaving company 1 as a shell corporation.

The Court concluded that:

“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.”<sup>21</sup>

Result: common employer not found.<sup>22</sup>

#### **7. *Coupe v. Malone’s Restaurant Ltd.***<sup>23</sup>

The Plaintiff had worked at several locations of “Malone’s Restaurant”, each of which was owned by a separate corporate entity. Prior to his termination, the location at which the Plaintiff was employed had changed ownership when the landlord distrained and took over operations. It was argued that the new owner was responsible for all prior years of service by the Plaintiff to the other companies, as it was a successor employer and was therefore bound by the prior years of service of the Plaintiff with the former common employers.

The Court was satisfied that the doctrine was applicable and concluded all corporate Defendants were liable on the following facts:

- a. until the distraint, all locations, though owned by separate corporations, each was owned and controlled by the same individual;
- b. the locations were operated in much the same fashion: same t-shirts were worn by staff at all locations, the menu was the same, the logo was the same, and the staff referred to the same employment manual;
- c. T4 slips were issued by the various locations, as were the payroll deposits; and,

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<sup>21</sup> *Ibid* at para 22.

<sup>22</sup> It is difficult to reconcile this decision with the balance of the case law.

<sup>23</sup> [2006] B.C.J. No. 2045 (B.C.S.C.) per. Myers J.

- d. Employees worked at other locations from time to time and were sometimes “transferred” between locations.

Result: common employer

**8. *Group Medical Services v. Saskatchewan (Labour Standards Branch)*<sup>24</sup>**

The Court in this case upheld the decision of a labour arbitrator concluding two corporations were common employers on the following facts:

- a. The employee was hired to work for company 1 and entered into an employment contract with company 1;
- b. company 1, which operated only in Saskatchewan, later incorporated company 2 to operate extra-provincially;
- c. the employee supervised business development companies of both company 1 and company 2;
- d. the employees bonus structure took into account sales for both company 1 and company 2; and,
- e. when he was later told that to be paid on company 2 sales he would need to become an employee of company 2 and sign a written contract, he refused.

Result: common employer.

**Limitation Concerns**

Plaintiff’s counsel need to carefully consider the possible entities to be named as Defendants. That is even more so in view of the fact that the limitation legislation which came into force in 2004 gives little room for error in this regard. On December 9, 2002, Bill 213, which contained “Schedule B — *Limitations Act, 2002*” received Royal Assent. It came into force January 1, 2004.<sup>25</sup> The most significant impact of the *Limitations Act, 2002* was to implement a general limitation period effective two years from the date of discovery of a claim, replacing the former six year limitation period.<sup>26</sup>

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<sup>24</sup> [2007] S.J. No. 525 (Sask.Q.B.) per J.E. McMurtry J.

<sup>25</sup> *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B [*Limitations Act*].

Claims discovered after January 1, 2004 are subject to the general two-year limitation period<sup>27</sup> which runs from the date of discoverability of the claim. Absent evidence to the contrary, discoverability is presumed to take place on the day of the act or omission which forms the basis of the claim.<sup>28</sup> The *Employment Standards Act, 2000*<sup>29</sup> contains a two-year limitation period respecting complaints thereunder.<sup>30</sup>

In employment situations discoverability is rarely a factor. It will, however, play a role in circumstances such as discovery of breaches of restrictive covenants and other breaches of contracts, or settlement agreements such as the obligation to report that alternate employment has been secured. It will also play a role when selecting entities to name as Defendants. No longer will there likely be any cushion that if only one Defendant is named and then one proceeds to trial, obtains judgment, and they cannot collect as the Defendant was a shell, that a second proceeding can be launched. Arguably, the fact of the entities being common employers will be statute barred. Consequently, we can expect that the number of instances in which the doctrine is asserted will increase as counsel become more attune to this potential problem.

When retained to act for an employee, it is advisable when assessing the claim to discuss with the client any and all other companies which are potentially liable for his or her claims.

The issue arose in the case of *George v. Epstein*<sup>31</sup>, a 2005 decision of the Honourable Madam Justice Swinton. The Plaintiff in the proceedings sought to enforce a judgment obtained against company 1 against two new companies on the basis that they were common employers on the basis of common control. The Defendants brought a summary judgment motion on the basis of

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<sup>26</sup> *Ibid.*, s. 4.

<sup>27</sup> *Ibid.*, s. 24.

<sup>28</sup> *Ibid.*, s. 5(2).

<sup>29</sup> S.O. 2000, c. 41, as amended [*ESA 2000*].

<sup>30</sup> *Ibid.*, s. 96(3) provides:

**96.** (3) A complaint regarding a contravention that occurred more than two years before the day on which the complaint was filed shall be deemed not to have been filed.

<sup>31</sup> [2005] O.J. No. 560 (Ont.S.C.J.) per Swinton J.

the limitation period. While on this appeal, Swinton J. agreed with the motion judge that a triable issue existed and denied leave to appeal as sought by the Defendants. In so concluding she wrote:

“Whether a limitation period has commenced turns on a conclusion about when the Plaintiff knew or, with reasonable diligence, ought to have known that he or she had a cause of action against the Defendant (*Aguonie v. Galion Solid Waste Management Inc.* (1998) 38 O.R. (3d) 161 (C.A.) at p.9 Quicklaw). The Defendants characterize this common employer claims as a wrongful dismissal action, arising from Mr. George’s dismissal in 1995. The Plaintiff characterizes this as an enforcement action, arising when Mr. George had knowledge that his judgment was not collectable.

“In my view, the motions judge correctly concluded that there were material facts in dispute with respect to the issue of when the limitation period began to run, and most particularly when Mr. George had the knowledge or, with reasonable diligence, would have had the knowledge necessary to pursue a common employer claim. A determination of this issue will require consideration of disputed facts, findings of credibility and a weighing of the evidence. These are functions of the trial judge.”<sup>32</sup> [emphasis added]

Accordingly, Swinton J. did not adopt the approach of either party but properly focused on the nature of the claim which was being asserted. The common employer claim is not one for “collection” but it is not necessarily simply one of “wrongful dismissal” if the intricacies of the corporate organization are not known to the employee. Discoverability will be a consideration; it is important that simple due diligence at the time the action is commenced is undertaken in order not to miss the limitation period. Simple corporate searches would, in the writers view, certainly fall into this category and would commence the limitation period.

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<sup>32</sup> *ibid* at par. 9 & 10.

## UNCONVENTIONAL APPLICATIONS OF THE DOCTRINE

It is also useful to consider how counsel have “thought outside the box” and used the application to achieve more than findings of joint liability for their clients.

In one case, there was a “reverse” application of the common employer doctrine. In *Pattillo v. Murphy Canada Exploration Ltd* an employer successfully used the doctrine to avoid a finding that a transfer of an employee to a subsidiary amounted to a constructive dismissal.<sup>33</sup> The Court concluded that:

“The transfer of an employee from a subsidiary corporation to its parent, in this case, does not automatically constitute constructive dismissal. Under the doctrine of “common employer”, two or more separate corporate entities may, but not always, be considered a single employer in relation to one employee. Therefore, the mere transfer of that employee from a subsidiary to its parent does not necessarily constitute a change in the identity of that employee’s employer, which would terminate the existing employment relationship.”<sup>34</sup>

In another case a Plaintiff was able to establish a “real and substantial connection” to British Columbia in which the action was commenced notwithstanding that the Plaintiff had been employed in the United States by a company incorporated there.<sup>35</sup> However, the U.S. entity had closed its operations and the Plaintiff named two Canadian companies (one incorporated in Alberta and another incorporated in British Columbia) which were allegedly controlled by the same individuals as his U.S. employer. The Court found that as a result of the Plaintiff establishing that the Defendants carried on a common enterprise and were a common employer,

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<sup>33</sup> *Pattillo v. Murphy Canada Exploration Ltd.* (2002) 16 C.C.E.L. (3d) 24 (Alta.Q.B.), per Rawlins J.

<sup>34</sup> *Ibid* at para 9.

<sup>35</sup> *Vanderpol v. Aspen Trailer Co.* [2002] B.C.J. No. 709 (B.C.S.C.) per Allan J.

he had also established a real and substantial connection to the jurisdiction. The Court determined the “common employer” at the outset of the case as opposed to at trial in order to make a preliminary determination of the appropriate forum.<sup>36</sup> The Defendant’s application that the Court decline jurisdiction was dismissed.

A similar conclusion was upheld by the Ontario Court of Appeal in which the existence of a “common employer” finding was a factor which was given some consideration in concluding that Ontario was the *forum conveniens* for the proceeding.<sup>37</sup>

### **The ESA**

An examination of the common employer doctrine as it applies to the *Employment Standards Act, 2000* is an interesting one. While it has been said that the common law doctrine arose from Provincial employment standards legislation, the considerations under the legislation are very different than at common law. Accordingly, the case law will not necessarily be transferable between the two contexts.

Section 4 of the *Employment Standards Act, 2000* provides as follows:

“Separate persons treated as one employer

4. (1) Subsection (2) applies if:

(a) associated or related activities or businesses are or were carried on by or through an employer and one or more other persons; and,

(b) the intent or effect of their doing so is or has been to directly or indirectly defeat the intent and purpose of this Act.

(2) The employer and the other person or persons described in subsection (1) shall all be treated as one employer for the purposes of this Act.

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<sup>36</sup> In another Alberta action, the decision of the forum was made without making any conclusion concerning whether or not the Defendants were common employers (see: *Lozeron v. Phasecom Systems Inc. (c.o.b. Mastec Canada)*, [2005] A.J. No. 510 (Alta.Q.B.) per Lee J.).

<sup>37</sup> *Newton v. Larco Hospitality Management Inc.* [2005] O.J. No. 479 (Ont.C.A.) upholding, [2004] O.J. No. 1408 (Ont.S.C.J.) per Brennan J.



(3) Subsection (2) applies even if the activities or businesses are not carried on at the same time.

...

(5) Persons who are treated as one employer under this section are jointly and severally liable for any contravention of this Act and the regulations under it and for any wages owing to an employee or any of them.”

The leading case which has interpreted this provision is that of *Platespin Canada Inc.*<sup>38</sup> In that case, it was concluded that the decision turns on whether the intent or effect of the arrangement was to defeat the true intent and purpose of the Act.<sup>39</sup> The “test” was articulated in the following manner:

1. Are or where associated or related activities, businesses, works, trades, occupations, professions, projects or undertakings carried on by more than one corporation, individual, firm, syndicate, or association or any combination thereof?
2. Did any corporation, individual, firm, syndicate, or association found to be associated or related employ the claimant during the period of time for which benefits are claimed or the violation of the Act or regulations took place?
3. Was the intent or effect of carrying on associated or related activities to directly or indirectly defeat the true intent and purpose of the Act?<sup>40</sup>

In other words, the requirements go beyond control. There needs to be some effect on the employee entitlements under the Act in order for the finding of joint liability based upon the common employer section 4(5) to be found. The most common example of such a structure will clearly be where multiple corporations are utilized such that no one company meets the payroll threshold to trigger a payment of severance pay under the Act.

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<sup>38</sup> [2005] O.E.S.A.D. No. 33 (Ont.Lab.Brd.) per Wacyk, Vice-Chair

<sup>39</sup> *ibid* at par 75.

<sup>40</sup> *Ibid* at para 76.

Further clarification of the requirement of a “casual connection” between the corporate structure and the defeat of the purpose and intent of the Act was espoused by the Court in the judicial review application of *Abdoulrab v. Ontario (Labour Relations Board)*.<sup>41</sup> The Court held that while the application of section 4 is not discretionary in nature, it is a fact-driven conclusion.<sup>42</sup>

Swinton J. wrote:

“It is apparent from cases such as *Bilt-Rite*<sup>43</sup> and the case before this Court that the decision whether corporations are to be treated as a single employer under s. 4 is fact-driven, with the Board seeking to determine whether a business has been artificially severed into pieces to defeat the statutory obligations to employees, or the business has been carried on in such a way as to preserve the assets of a failing corporation in a new corporation where they are shielded from employee claim.”<sup>44</sup>

Some consideration is still given to the voluntariness of the relationship between the entities sought to be fixed with the common employer finding; however, the case law does not give that consideration the same weight it did under the wording of the prior Act. An exception is made in cases where there has been an insolvency of one party in which case the circumstances are considered.<sup>45</sup> In cases where liability is sought to be attached to “the Phoenix”, the consideration becomes whether “the principals of the financially troubled company had made reasonable efforts to save that company from bankruptcy.”<sup>46</sup>

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<sup>41</sup> [2007] O.J. No. 3155 (Ont.Div.Crt.) per G.D. Lane, K.E. Swinton and A.W. Bryant JJ. at par. 30[ *Abdoulrab*].

<sup>42</sup> *Ibid* at par 35. This latter scenario is referred to in the case law as “the phoenix scenario”.

<sup>43</sup> *550551 Ontario Ltd. v. Framingham*, [1991] O.J. No. 1035 (Ont.Div.Crt.).

<sup>44</sup> *Abdoulrab*, *supra* at par. 29.

<sup>45</sup> A full discussion of this issue can be found in Judy Fudge & Kate Zavitz, *Vertical Disintegration and Related Employers: Attributing Employment-Related Obligations in Ontario*, (2007) 13 C.LE.L.J 107.

<sup>46</sup> *Abdoulrab*, *supra* at par. 39.

## **CONCLUSION**

In view of the fact that: 1) limitation periods may bar claims rooted in the common employer doctrine which could have been advanced together with the main claim of the employer; and, 2) there is no requirement of impecuniosity or non-recoverability of a judgment or potential judgment in order to successfully attach liability to multiple corporations under application of the doctrine, we are likely to see an increasing number of such claims being advanced. The impact of this will likely be increased costs to litigants on both sides. Outside counsel may need to be consulted for independent legal advice for the employers/potential employers and the scope of production and discovery will also increase. This all arises from lawyer's concerns for potential liability should a sole Defendant employer not be around long enough to pay a trial judgment. With limitation periods of two years, it is better to be safe than sorry.