# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *James McCallum & Associates Ltd. v. Courchene,* 2025 BCCA 82

Date: 20250313
Docket: CA50050

Between:

**James McCallum & Associates Ltd.**

Appellant
(Defendant)

And

**Gisela Courchene**

Respondent
(Plaintiff)

Before: The Honourable Justice Griffin
The Honourable Madam Justice Horsman
The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated July 26, 2024 (*Courchene v. Dr. Paul Lee Inc.*, Abbotsford Docket S04722).

## Oral Reasons for Judgment

| | |
|---|---|
| Counsel for the Appellant: | D.D. McWhinnie<br>R. Sissons, Articled Student |
| Counsel for the Respondent: | C.D. Drinovz |
| Place and Date of Hearing: | Vancouver, British Columbia<br>March 13, 2025 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>March 13, 2025 |

***Summary:***

*The appellant, an accounting firm, appeals from the dismissal of its application to strike the respondent's claim against it. The respondent claims the appellant was a "common employer" with its known employer, a dentistry practice. Held: Appeal allowed, the claim against the appellant is struck. The respondent did not plead sufficient facts to support a claim that the appellant was a common employer. At most the respondent pleaded that in the last months of her lengthy employment, the appellant exercised some direction and control over the appellant's duties, but the same could be said of an agent of the employer, a professional advisor, or another employee in a supervisory position. There was no pleading that the appellant had an interest in the business or was related to the known employer, or of any other alleged material fact to support an arguable claim that there was an objective intention to create a contractual employer/employee relationship.*



**GRIFFIN J.A.**:

## Introduction

[1] The appellant James McCallum & Associates Ltd. ("JMA") is an accounting firm named as a defendant in a wrongful dismissal claim advanced by the respondent Ms. Courchene.

[2] Ms. Courchene sued her former employer for wrongful dismissal, and named JMA alleging it was a common employer. JMA applied to strike the claim against it on the basis that no material facts were pleaded to support the allegation it was a common employer and so it was bound to fail. JMA relied on Rule 9-5(1)(a) of the *Supreme Court Civil Rules* where a claim may be struck if it discloses no reasonable claim.

[3] The chambers judge dismissed the application with oral reasons on July 26, 2024. JMA appeals from that decision.

[4] In summary, the judge recognized that there is a doctrine of common employer whereby two entities can owe contractual obligations jointly, as employer, to an employee notwithstanding the fact that formally the employment relationship began with one entity only.

[5] The judge reviewed authorities that establish that where two corporations have a "sufficient degree of relationship" and common control over an employee, and where the employee has a reasonable expectation that the other corporation was a party to the contract, they may both be found to be common employers.

[6] The single issue on appeal is whether the judge was correct in finding that sufficient material facts have been pleaded to support the claim that JMA was a common employer with Ms. Courchene's longstanding employer Dr. Paul Lee Inc. ("Dr. Lee Inc.").

[7] For the reasons that follow, I agree with JMA that Ms. Courchene's claim does not plead material facts to support a claim that JMA was her common employer.

**Proper Approach to An Application to Strike**

[8] The law is well established on the proper approach to an application to strike a pleading pursuant to R. 9-5(1)(a).

[9] The question is whether it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action or, putting the test another way, that the claim has no reasonable prospect of success. Where it is a novel claim that has not yet been determined, the courts must read the claim generously and, so long as it is arguable, allow it to proceed to trial. However, the facts must be pleaded that allow the case to be evaluated, and a plaintiff cannot simply rely on the possibility that facts may "turn up as the case progresses". Mere conclusions of law must be supported by a foundation of pleaded material facts: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 paras. 17–22; *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465 at paras. 20–22, leave to appeal to SCC ref'd 40051 (30 June 2022); *Arbutus Bay Estates Ltd. v. Canada (Attorney General)*, 2023 BCSC 1726 at para. 20, aff'd 2025 BCCA 10.

[10] The parties agree the standard of review is correctness: *Canada (Attorney General) v. Frazier*, 2022 BCCA 379 at para. 21.

**Authorities on Claims Against Common Employers**

[11] A claim for damages for wrongful dismissal is based on an allegation of breach of the employee's employment contract. The claim can therefore only be brought by the employee against the party who contracted with them for their employment services.

[12] However, circumstances can arise, particularly in the case of related companies, where there is a dispute over whether one entity or more than one is the employer. In some circumstances, courts have held related companies to be a common employer of an employee. The common employer doctrine appears to have parallels in employment standards statutes which deem associated or related businesses to be "one employer" for purposes of protecting employee benefits: see *Downtown Eatery (1993) Ltd. v. Ontario*, 54 O.R. (3d) 161 at para. 2, 2001 CanLII 8538 (Ont. C.A.).

[13] The Ontario Court of Appeal in *O'Reilly v. ClearMRI Solutions Ltd.*, 2021 ONCA 385, leave to appeal to SCC ref'd, 39834 (10 March 2022), summarized the approach in considering whether two related companies in a corporate group, both exercising an active role in the business operations, are a common employer. In summary:

a) There must be an objective intention to create a contractual employer/employee relationship between the employee and the alleged employer. The parties' subjective thoughts are irrelevant.

b) The objective intention may be reflected in a written agreement, but also may be derived from conduct.

c) Conduct that may reflect this objective intention can include conduct that reveals the alleged employer has effective control over the employee. This can include showing that the alleged employer has effective control over such matters as the selection of the employee, payment of wages, methods of work, and the ability to dismiss.

[14] Where there is clear evidence that one party is an employer, and the question is whether a second party is a common employer with the known employer, the authorities first ask whether the two entities have a sufficient interrelationship to give rise to the potential inference that they are common employers. This can involve consideration of whether the parties have common control or are members of a related corporate group with common directors, owners or management. The question of who is truly the employer is a matter of substance and not mere form: see *Linza v. Metric Modular*, 2023 BCSC 1196 at paras. 61–73; *Scamurra v. Scamurra Contracting*, 2022 ONSC 4222 at paras 63–65; *Sinclair v. Dover Engineering Services Ltd.*, 1987 CanLII 2692 at paras. 18–21, 11 B.C.L.R. (2d) 176 (B.C.S.C.), aff'd [1988] B.C.J. No. 265, 1988 CanLII 3358 (C.A.); *Cicalese v. Siapem Canada Inc.*, 2018 ABQB 835 at paras. 141–150.

[15] Even where two related entities have a sufficient relationship, the question remains: did the employee have a reasonable expectation that the other entity was a party to the employment contract: see *Linza* at para. 65, citing *Scamurra*.

**Pleaded Claim**

[16] Ms. Courchene pleads in Part 1 Material Facts of her Notice of Civil Claim, that:

a) She was first employed by the named defendant, Dr. Paul Lee, a dentist, and his former dentistry partner, in the 1980s before that partnership dissolved (para. 10);

b) She entered into an oral employment contract with Dr. Lee in 1985, where she was employed to support his periodontal dentistry practice (the "Contract");

c) In 1997, Dr. Lee Inc. was incorporated, and "at all times thereafter, Dr. Lee Inc. was [her] employer, and Dr. Lee Inc. assumed the terms and conditions of the Contract" (para. 14);

d) She served as the administrative and management arm of the dentistry practice responsible for all office functions (para. 15);

e) Dr. Lee's spouse, Ms. Lee, became involved in the practice in December 2022 (paras. 35–36);

f) On January 10, 2023 she received an email from JMA, an accounting firm, stating that JMA "would be assuming the payroll duties for Dr. Lee Inc.", which were previously Ms. Courchene's duties (para. 44);

g) JMA would be reviewing employee compensation for compliance with Dr. Lee Inc.'s legal and tax obligations (para. 45);

h) JMA announced a new payroll system (para. 46);

i) Thereafter JMA and Ms. Lee gave many orders and directions to Ms. Courchene "in concert with the Lee Defendants" (para. 48). These are detailed and have to do with reducing or changing her compensation and duties;

j) Ms. Lee gave Ms. Courchene a letter in July 2023 telling her she was terminated (para. 70); and

k) Following the termination, Dr. Lee Inc. did not pay her what she was entitled to.

[17] Under Part 3, Legal Basis of the Notice of Civil Claim, Ms. Courchene pleads:

> 5. By exerting substantial control and direction over the Plaintiff and her employment, JMA became a common employer with Dr. Lee Inc. and assumed joint and several liability for the legal responsibilities of Dr. Lee Inc. in relation to the Plaintiff's employment, including for wrongful dismissal and other breaches of the Contract.

[18] The pleading of "common employer" above is conclusory. In my view there is a central problem with Ms. Courchene's claim: she has not pleaded sufficient facts

that would support her having an objectively reasonable expectation that JMA became her common employer with Dr. Lee Inc.

[19] With one exception, all of the cases relied upon by Ms. Courchene where a finding is made that two entities may be joint employers have to do with related companies or entities where the two companies' affairs are connected and intertwined. In such a case it can be inferred that the employee is providing services to both related companies, and the employee had an objective expectation that both were the employer. This is not such a case. Ms. Courchene does not plead that JMA and Dr. Lee Inc. are related.

[20] I mentioned that one of the cases relied upon by Ms. Courchene is not a case involving related companies. That is the case of *Dhillon v. Coape and Hockaday*, 2004 BCSC 1208, in which a chambers judge refused to strike a claim pleading that an individual was an employer. That defendant denied she was an employer but instead said she was simply another employee of the company which employed them both. However, she was a director of that company. There is not a detailed analysis of the pleading in that case. I find it does not support Ms. Courchene's argument here.

[21] Ms. Courchene also refers to the case of *Uppal v. Parkland Fuel Corporation*, 2023 BCSC 1132. That case involved an appeal from a decision made during a small claims court settlement conference, dismissing a claim alleging Parkland Fuel Corporation was the plaintiff's common employer together with a numbered company. There is not enough known about the facts or pleading or reasons of the small claims judge for that case to form a useful precedent for Ms. Courchene's arguments here.

[22] I accept that there may be room in the law for a novel claim that unrelated companies or entities became a common employer. For example, I can imagine there might be a situation where one distinct entity ended up investing in the other entity, taking over some of the operations and directing employees and benefiting from the profits of the business, to the point where what was previously one

employer became two. But there must be some facts pleaded to support such a conclusion. In my view, there are insufficient facts pleaded here.

[23] In my view, it is not enough for Ms. Courchene to allege that JMA, an accounting firm, has exerted some control and direction over her in the last few months of her employment. Some degree of direction and control may be one element of being a joint employer, but in the context of her pleading it is not enough because it could also apply to an agent of the employer, a professional advisor, or another employee who is in a supervisory position.

[24] Ms. Courchene pleads that she was employed for almost 40 years in Dr. Lee's dentistry practice. She pleads that only in the last six months of her employment prior to her termination, her duties changed and she received directions from Dr. Lee's wife and from JMA.

[25] Ms. Courchene has pleaded no facts to suggest JMA's role went beyond some supervision or direction of her to involve some employer-like attributes, such as by issuing a paycheque on its own account to her or giving her notice of her dismissal or directly benefiting from her services perhaps as an investor or co-owner of the business. She pleads that Dr. Lee Inc. failed to pay her following the termination, not that it was JMA's responsibility to do so.

[26] In summary, there are insufficient facts pleaded that, even if accepted, would support a conclusion that JMA became a common employer with Dr. Lee Inc. The claim as pleaded is not arguable.

**Disposition**

[27] For these reasons, I would allow the appeal and strike the claim against JMA.

[28] **HORSMAN J.A.**: I agree.

[29] **WINTERINGHAM J.A.**: I agree.

[30] **GRIFFIN J.A.**: The appeal is allowed, and the claim against JMA is struck.

"The Honourable Justice Griffin"