

**ARE DEPARTING EMPLOYEES PERMITTED TO COMPETE WITH THEIR FORMER
EMPLOYER DURING THE REASONABLE NOTICE PERIOD?**

ACCORDING TO THE SUPREME COURT OF CANADA: "YES"

RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc., 2008 SCC 54 (CanLII)

by R. Lance Ceaser

Introduction

As a matter of fairness, most employers might believe that an employee who leaves their organization should be forbidden from directly competing with the former employer, at least during the period of reasonable notice required by law. However, a recent decision of the Supreme Court of Canada clearly indicates that this is not the case. In *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2008 SCC 54 (CanLII), the Supreme Court overturned a damages award against a group of investment advisors who left RBC *en masse* in 2000, and immediately started working for Merrill Lynch, in direct competition with their former employer. In doing so, the Court made some interesting observations regarding the obligations of departing employees.

Background to the Action

In November 2000, virtually all of the investment advisors employed by RBC Dominion Securities Inc. at its offices in Cranbrook, British Columbia, left their employment with RBC, and immediately started working for Merrill Lynch Canada Inc. The move had been coordinated by the RBC branch manager, who also left to take up employment with Merrill Lynch. The evidence at trial indicated that Merrill Lynch had been involved in planning the move, and had actively recruited all of the employees, with the exception of two junior investment advisors and two administrative staff members, who remained with RBC. The evidence also disclosed that prior to the move to Merrill Lynch, RBC's confidential client records had been surreptitiously copied and transferred to Merrill Lynch. RBC's Cranbrook office all but collapsed as a result of the defections, and RBC sued Merrill Lynch and the former employees, claiming damages for breach of fiduciary duty, breach of an implied duty to not compete unfairly upon leaving RBC, failure to provide reasonable notice, misuse of confidential information (against the former employees), inducing breach of contract (against Merrill Lynch and the departing branch manager), and conspiracy and conversion (against all of the defendants).

The Trial Decision

At trial, Holmes J. of the British Columbia Supreme Court allowed the action, but dismissed the claims for conspiracy and breach of fiduciary duty against the employees, holding that no such duties were owed to RBC. With respect to the investment advisors, the Court held that the employees had failed to provide reasonable notice of termination and had competed unfairly with RBC, by engaging in concerted efforts to transfer clients and by removing confidential client

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information before RBC could protect its business relationships. All of the remaining claims against Merrill Lynch and the former branch manager were allowed.

At a second stage of the trial, Holmes J. assessed damages for the wrongs committed by the various defendants. The largest part of the damages award (almost \$1.5 million) was against the former manager, for the loss of profits associated with the breach of his duty of good faith. However, the investment advisors were also found liable, in the amount of \$40,000 each for failure to give reasonable notice of resignation, and for a total of \$225,000, for RBC's loss of profits due to their unfair competition. Merrill Lynch and its manager were also held jointly and severally liable for those damages (and an additional \$250,000 in punitive damages).

At the Court of Appeal

The B.C. Court of Appeal was divided on the assessment of damages. The majority of the Court overturned the substantial damages award against the former RBC branch manager, as well as the damages against the former employees for profits lost due to the unfair competition, but upheld the other damages awarded. Rowles J.A., in a partial dissent, would have upheld the damages against the manager for breach of the duty of good faith.

The Supreme Court of Canada

RBC appealed the B.C. Court of Appeal's decision regarding the damages assessed against the former branch manager and the departing investment advisors. With respect to the claim against the branch manager, the Supreme Court of Canada agreed with the reasons of the trial judge and Rowles J.A. of the Court of Appeal. The Supreme Court found that the damages awarded were consistent with the claims pled against the manager, and that the majority of the Court of Appeal applied the test for "proximity" of damages incorrectly. The Supreme Court held that it would have been in the contemplation of RBC and the manager, at the time of entering into the employment contract, that the manager would be liable for the loss of profits if he were to orchestrate the departure of almost all of the branch's investment advisors. Moreover, the use of a 5-year window for calculating the lost profits was found to be reasonable and supported by the evidence at trial.

However, with respect to the investment advisors' liability for "unfair competition", the Supreme Court of Canada concluded that these damages could not stand. At trial, the Court had found that during the reasonable notice period, implied by law, employees continue to be under a general duty not to compete with their former employer. Since the investment advisors had violated this duty, they were liable for a percentage of the branch's lost profits. The Court of Appeal had unanimously rejected this approach, instead finding that once the employees left their employment with RBC, they no longer owed the employer any obligations (with the possible exception of not misusing confidential information acquired during the employment). At paragraphs 18 through 20, the Court stated:

The majority of the Court of Appeal ... held that once the investment advisors left RBC, they were no longer under a duty not to compete with it. The view of the Court of Appeal on the law for the purposes of this issue may be summed up as follows. Generally, an employee who has terminated employment is not

prevented from competing with his or her employer during the notice period, and the employer is confined to damages for failure to give reasonable notice (Southin J.A. for the majority). To this general proposition Rowles J.A. may be read as adding the qualification that a departing employee might be liable for specific wrongs such as improper use of confidential information during the notice period. This appears to be consistent with the current law, which restricts post-employment duties to the duty not to misuse confidential information, as well as duties arising out of a fiduciary duty or restrictive covenant: [citations omitted]. Neither of the latter duties are at issue here.

For the purposes of this case, the law may be accepted as summarized by the preceding paragraph. The contract of employment ends when either the employer or the employee terminates the employment relationship, although residual duties may remain. An employee terminating his or her employment may be liable for failure to give reasonable notice and for breach of specific residual duties. Subject to these duties, the employee is free to compete against the former employer.

To the extent the trial judge awarded damages on the basis that the employees continued to be under a general duty not to compete, this award of damages was wrong in law.

Conclusion

While it may seem inherently improper for employees, departing one employer, to immediately commence work with a direct competitor, the decision of the Supreme Court of Canada is clear that former employees are not prohibited from doing so, even where they have not provided reasonable notice of resignation. Employers who may be vulnerable to mass defections will want to ensure that they include post-termination obligations in the employment contracts of those employees whose departures could harm the bottom line, as well as provisions dealing with the enforcement of such duties. In the absence of provisions that survive the end of the employment relationship, employers may be left with little if any resort when departing employees take the business with them.

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