Fiduciary Duties: Obligations of Departing Employees

Prepared for: Legal Education Society of Alberta

For Presentation In: Edmonton, Alberta
March 9, 2009

Calgary, Alberta
March 17, 2009

For Presentation by: Tina Giesbrecht
McCarthy Tetrault LLP
Calgary, Alberta

FIDUCIARY DUTIES: OBLIGATIONS OF DEPARTING EMPLOYEES

By: Tina Giesbrecht and Lana Jackson

INTRODUCTION

Why should employers care about whether or not an employee owes them a fiduciary duty? Recent case law from the Supreme Court of Canada reminds employers of the importance of identifying fiduciaries in their organizations and clarifying what duties the fiduciaries owe to them. Following a review of the recent *RBC Dominion Securities v. Merrill Lynch*, 2008 SCC 54, this paper will provide a general overview of fiduciary duties and examine various issues that can arise with duties owed by fiduciaries and how employers can establish greater certainty in the relationship.

During employment, the duties owed by fiduciaries are similar to those owed to employers by all employees; they must not misuse confidential information and must be loyal in the exercise of their employment duties. When the employment relationship is terminated, employers may have concerns regarding the obligations of the departing employee. These concerns are even greater when the employee is a key member of the business and is a fiduciary. Can the employee compete against the employer for the business of former clients? Is the employee required to maintain confidentiality in regards to trade secrets or other sensitive company information? Can the employee recruit fellow employees to join them? A recent decision of the Supreme Court of Canada provides some guidance in establishing duties of departing employees.

RBC DOMINION SECURITIES INC. V. MERRILL LYNCH CANADA INC., 2008 SCC 54

On October 9, 2008, the Supreme Court of Canada ruled that there is no general duty for employees who are not fiduciaries and who are not bound by restrictive covenants not to compete post-employment. However, employees have a duty to give reasonable notice prior to resigning from their employment and they are bound by the duties of confidentiality and good faith. Damages will flow from high-handed resignations including, as evidenced in this case, a mass departure organized by a manager.

FACTS

A manager from RBC and the majority of investment advisors and support staff of RBC's branches in Cranbrook and Nelson, B.C. were approached by a direct competitor, Merrill Lynch Canada Inc. ("Merrill Lynch"). The RBC manager "brazenly" organized a group departure such that all of the RBC employees left en masse without giving any notice. Further, at Merrill Lynch's direction, prior to resigning, the RBC

employees copied confidential client records for use with their new employer. RBC's operations in Cranbrook and Nelson were crippled.

None of the departing employees were fiduciaries. They did not occupy senior positions at RBC so were not obliged to act in the best interests of RBC and had not signed any non-competition or non-solicitation agreements.

LOWER COURT DECISIONS

The trial judge found that the employees had breached their obligation to give reasonable notice, had competed unfairly and were liable for damages. Merrill Lynch was also liable for these damages in addition to punitive damages due to the wrongful copying of confidential records. In determining notice, the trial judge was presented with evidence that the industry standard was such that investment advisors give little, if any notice. The trial judge stated that industry norms do not necessarily establish a reasonable notice period, especially considering the devastating effect of the mass departure. The trial judge determined that the appropriate notice period that the employees should have given RBC was 2.5 weeks.

Although the manager was responsible for the day-to-day operations of the branch, hiring, supervising and disciplining employees, ensuring compliance with regulatory requirements and representing the branch in the local community, the trial judge determined that he was not in a fiduciary relationship with RBC. Essentially, the manager was not in a position to affect the economic interests of RBC at either the national or local level. Factors that contributed to this determination were that the manager had no responsibility for the office premises, required approval for expenditures over $500, had little if any direct involvement in policy formulation, had little authority in formulation of the branch budget and did not set salary or commission structures. Based on the large size of RBC and its tight institutional structure the Court concluded that the manager was not a fiduciary. It is interesting to note that in a smaller scale operation, the duties of the manager may have provided sufficient grounds to establish that he was a fiduciary.[1]

The Court of Appeal, however, noted that brokerage houses may not put their interests ahead of the client's interests. As RBC did not have a property right in any client, the employees could prepare their own client contact lists and remove these lists from the office. Thus, although the Court of Appeal agreed that a breach of confidence had occurred, the breach was limited to the taking of inappropriate papers belonging to RBC. The investment advisors' communications with the former clients did not breach their duty to RBC. The

[1] In *Adler Firestopping Ltd. v. Rea*, [2008] A.W.L.D. 1436, 41 B.L.R. (4th) 87 (ABQB), the Alberta Court of Appeal found that a senior employee who acted as general manager, even though the title had not been officially given to him, and who was involved in discussions regarding business operations was a fiduciary.

Court of Appeal also noted that there is no obligation to compete fairly in the absence of express restrictions in written employment contracts.

The Court of Appeal agreed with the trial Court, however, that the employees had breached their duty to give reasonable notice prior to resigning from their employment. The Court of Appeal held that RBC was entitled to the amounts earned by its former employees during the 2.5 weeks' notice that the employees should have given to RBC, but not entitled to compensation for loss of profits due to unfair competition. In the end result, the Court of Appeal upheld the punitive damages awarded against Merrill Lynch but greatly reduced the compensatory damages levied against Merrill Lynch and the individual former employees.

As an aside, the appropriate notice to be given by employees to employers can vary. While some provinces have statutory minimum notice requirements, courts can imply longer notice periods depending on the circumstances. In *Clayburn Industries Ltd. v. Piper*, (1998), 62 B.C.L.R. (3d) 24, at paragraphs 18-20, Burnyeat J. found that a 15 year employee should have provided 6 months notice to his employer. In *RBC v. Merrill Lynch*, the court considered the industry standard of relatively no notice provided by departing employees, but found that where "the departure of numerous employees is coordinated and destined, though not deliberately designed, to lead to the collapse of the office they leave, the length of time will further increase, to allow time for replacement employees to move in to cover the immediate crisis."[2]

SUPREME COURT OF CANADA DECISION

RBC appealed the BC Court of Appeal's decision on two grounds: (1) that the Court of Appeal had improperly overturned the award of damages against the former RBC manager and employees and Merrill Lynch for losses caused over a five-year period; and (2) the Court of Appeal had improperly set aside the award against the former manager on the finding of breach of a contractual duty of good faith.

The Supreme Court stated that for the purposes of this case:

> 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.[3]

---

[2] *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2003 BCSC 1773, at para. 117. (BCSC)

[3] *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2008 SCC 54, at para. 19. (SCC)