

Wrongful Dismissal Update –
2008 Decisions of the Supreme Court of Canada

Part II – Employee Personally Liable for Leaving with Other Employees
RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.

In Part I of this series, reviewing key 2008 employment law decisions, we looked at *Evans v. Teamsters Local Union No. 31*, a harshly decided wrongful dismissal case from the Supreme Court of Canada released in May 2008. In October 2008, the Supreme Court released another decision which could have dangerous and far reaching implications for employees looking to move to competitors.

RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.

In November 2000, a Branch Manager at RBC in Cranbrook, B.C. coordinated a group move where virtually all of the RBC employees went to work for Merrill Lynch in the same town, without giving any notice. Before leaving, they copied RBC records and provided the information to Merrill Lynch. RBC sued.

The B.C. Trial Court held that the employees had breached implied terms of their agreements by failing to give notice of resignation, by breaching duties of confidentiality and by breaching duties of good faith owed to their employer. Significant damages were awarded. Damages for improperly copying information and providing it to Merrill Lynch were awarded by the Trial Court and were not appealed. There is no real legal issue or difficulty with these types of damages. Similarly, damages for failure to give proper notice of resignation were also relatively reasonable and legally supportable. The major issue to be determined by the appellate courts in this case was whether the RBC Branch Manager owed a duty of good faith to RBC and whether the Branch Manager breached that duty by leaving with a number of other employees to go work for Merrill Lynch.

The case was appealed to the Supreme Court of Canada after the B.C. Court of Appeal had lowered or reduced some of the damages that had been awarded at trial.

The majority of the Supreme Court sided with RBC and ordered the defendants liable for five years' profits. The Supreme Court noted that part of the Branch Manager's job was to recruit and train staff. By recruiting staff for a competitor, while still working for RBC, he effectively breached the duties of good faith that he owed to RBC. He had coordinated a mass exodus of employees and this was a breach of the obligations that he had to work in the best interests of RBC. The Branch Manager and Merrill Lynch were liable for five years' worth of damages.

Once again, as with *Evans v. Teamsters*, Justice Abella was the lone dissenting judge from this harsh majority decision. In an angry but carefully argued and

legally logical dissent, Justice Abella focused the discussion on whether or not the Branch Manager had breached any legally recognized duty of good faith owed to his employer and if so how the damages should be calculated.

Justice Abella noted that historically, employees have generally only been found liable if they have competed with their employer while working or if they have improperly used confidential information. In this case, there was an award for the improper use of confidential information – including a punitive damages award. This award was not contested and should have resolved one of the issues.

Factually, there was no finding that the Branch Manager had competed unfairly while still working with RBC so there was no basis for an award on this issue.

The major dispute was over the issue of an implied duty of good faith owed by the Branch Manager to RBC. As Justice Abella pointed out, the Branch Manager and the other employees had not signed any restrictive covenants. In fact, during the trial, RBC representatives had expressly stated that they had not asked the employees to sign restrictive covenants when they were hired because it would make recruiting difficult. Under Canadian law, the Branch Manager and the other employees therefore should have been free to leave and work elsewhere unless they breached a duty of confidentiality or some other duty when leaving.

According to Justice Abella, RBC was asking the Supreme Court to provide it with greater protection than it had tried to obtain from its employees when they were first hired. All Court levels had agreed that these were not “fiduciary employees” and would not be subjected, under Canadian law, to heightened duties of fiduciary employees. As a result, in normal circumstances, any one of the employees could have left to go and work for a competitor with little concern. But here the Supreme Court of Canada still imposed a duty of “good faith” on the Branch Manager – even though he was not a fiduciary and had not signed a restrictive covenant.

In responding to the majority decision, Justice Abella angrily points out that employees in Canada are not “indentured servants.” They should be free to move freely from one workplace to another unless they signed a reasonable, legally enforceable restrictive covenant when they first started working for the employer.

The trend for a number of years from appellate court decisions across Canada has been to make it increasingly difficult for employers to restrict the movement of employees from one workplace to another. While courts have been willing to go to extraordinary lengths to protect confidential information, they have generally been unwilling to sustain unnecessary restrictions on employees that prevent them from moving around.

This majority decision opens up a range of claims for employers. Even without signed non-solicitation or signed non-competition agreements, employers may now sue departing employees and argue that they have breached duties of good faith – simply by going to work for competitors. The decision is potentially far reaching and is likely to lead to significant litigation brought by employers against former employees.

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