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## Supreme Court of Canada Places New Obligations on Departing Non-Fiduciary Employees: *RBC Dominion Securities Inc. v. Merrill Lynch et al.*

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*In a recent decision, the Supreme Court of Canada has ruled that departing “non-fiduciary” employees owe their employer an implied contractual duty of good faith (and loyalty) while they remain employed. According to the Supreme Court, departing non-fiduciary employees can only compete with their former employer after terminating the employment agreement, although they must provide reasonable notice and protect confidential information during the notice period. Departing non-fiduciary employees who do not provide reasonable notice cannot compete with their former employer during what would have otherwise been the appropriate notice period.*

### **Facts**

The manager of an RBC Dominion Securities Inc. (“RBC”) branch in Cranbrook, British Columbia, was approached by its cross-town competitor, Merrill Lynch, to facilitate the recruitment of investment advisors from the RBC branch to Merrill Lynch. Ultimately, the RBC branch manager, Don Delamont, organized a mass departure of RBC employees, most of whom were investment advisors, to Merrill Lynch.

All of the employees left RBC without giving notice and copied confidential client information that was to be used at Merrill Lynch. As a result of the departure, operations at the RBC branch in Cranbrook effectively collapsed.

It is also important to note that none of the RBC employees, including Delamont, had non-competition or non-solicitation clauses in their employment contracts with RBC.

### **Trial Decision**

Although the trial judge held that the RBC employees, including Delamont, were not fiduciaries, she nonetheless ruled that they all breached the implied terms of their employment contracts by failing to



provide reasonable notice and by unfairly competing with RBC during what would have otherwise been the appropriate notice period. Merrill Lynch was found liable for inducing the RBC employees to breach their duty not to compete unfairly.

In addition, the trial judge held that Delamont also breached an implied duty of good faith toward RBC. Specifically, the trial judge felt that Delamont did not faithfully perform his duties as manager by organizing the mass exodus of employees and by not informing RBC of same.

Regarding damages, the trial judge awarded over \$1.4 million against Delamont, based on RBC's loss of profits over 5 years.

Damages were also awarded against all of the RBC employees, including Delamont, for (a) loss of profits during what would have been the appropriate notice period (2.5 weeks); and (b) loss of profits for a period of 5 years as a result of unfair competition during the notice period. Merrill Lynch was found jointly and severally liable for the latter category of damages. Punitive damages were also awarded against all defendants.

### **B.C. Court of Appeal Decision**

The majority of the Court of Appeal held that there was no implied duty on an employee to refrain from competing with an employer after the contract of employment has been terminated.

The majority of the Court of Appeal expanded by holding that although a departing employee may not take confidential information or trade secrets, it was permissible to take client contact lists and subsequently communicate with such clients. Although it was held that the departing employees did in fact take confidential information, no damages were awarded because RBC could not prove a link between the breach and the loss of clients.

Ultimately, the majority of the Court of Appeal held that damages against the employees, including Delamont, were limited to the profits that RBC lost during the 2.5 week notice period. No damages were awarded for loss of future profits.



The majority of the Court of Appeal also held that Delamont should be treated in the same manner as the other employees and did not owe any additional duties to RBC.

### **SCC Decision**

The Supreme Court overruled the Court of Appeal decision, in part. Specifically, the Supreme Court held that (a) Delamont did in fact owe an implied duty of good faith towards RBC and (b) he breached that duty by organizing the mass departure of employees and failing to advise RBC of the departure. As a result, the Supreme Court reinstated the damages award of the trial judge (i.e. 5 years loss of future profits).

In justifying the damages award against Delamont, the Supreme Court held that a “loss of future profits” was a loss that would have been contemplated by Delamont and RBC (at the time they entered into their employment contract) had they turned their minds to the possibility of Delamont orchestrating a mass departure of employees.

Regarding the other employees, the Supreme Court agreed with the Court of Appeal in holding that an employee who has terminated his contract of employment is free to compete with his now former employer. As such, the Supreme Court ruled that trial judge should not have awarded additional damages for loss of “future” profits. As a result, the damages against the other employees were limited to profits lost by RBC for failing to obtain proper notice.

In a strongly worded dissent, Madam Justice Abella criticized the decision of the majority with respect to the findings against Delamont. She argued that it was incorrect for the Supreme Court to place restrictions on post-employment competition, especially since Delamont was not a fiduciary nor did he have a non-competition clause in his contract. By placing such restrictions, Madam Justice Abella felt that the Supreme Court created a new class of “quasi-fiduciary” employee, which she felt will create significant uncertainty for employees and will affect their mobility.

### **Conclusion**

The decision of the Supreme Court is particularly relevant for employers and employees in competitive industries, as it has clearly created new obligations for non-fiduciary employees. Employees must



ensure that they do not breach an implied duty of good faith to their employer (which appears to include a duty of loyalty) as long as they remain employed. This duty may be particularly applicable to key employees such as supervisors and managers and those employees considering a change in employers.

In addition, the Supreme Court decision confirmed that employees must provide notice prior to resigning and failing to do so may give rise to damages for loss of profit during such notice period. Finally, the Supreme Court re-confirmed that employees have a right to compete with their former employer as soon as they provide notice, provided that they protect confidential information.