

Cautionary tale for bank-owned dealers

B.C. ruling allows departing advisors to contact clients

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The British Columbia Court of Appeal overturned an important lower court decision on Friday, Jan. 12, 2006, which has a significant impact on employment relationships in the financial industry.

In RBC Dominion Securities Inc. v. Merrill Lynch et al, the Court of Appeal found that advisors at the Royal Bank Dominion Securities were permitted to remove client lists and contact information, but no other documentation, when leaving the employment of Dominion Securities to join Merrill Lynch. While the employees were required to pay punitive damages for removing client documents and breaching confidentiality, they were found to be permitted to contact clients to advise them of their whereabouts at Merrill Lynch.

This, the majority of the Court reasoned, was to ensure clients had the continuity of service by their advisors.

I do not believe that Madam Justice Mary Southin, speaking for the majority, appreciated this industry sufficiently well to determine the impact departing advisors may have on clients. Furthermore, how could the foundation of this decision be based upon concern for clients when dealers contact all clients within a day or two after an advisor departs to provide a new contact person at the dealer?

The underlying question that needs to be answered in each case where advisors leave any dealer, bank owned or not, is: Who owns the book of business? The Court of Appeal did not comment on this point. Without a full analysis of whether an advisor or dealer owns the book of business, how can a court rule on the right to remove the client list and contact information?

A further inconsistency relates to the requirement that advisors and branch managers provide the dealer with reasonable notice of termination. The Court of Appeal upheld the lower court decision on this point, compelling them to give the dealer reasonable notice of just a couple of weeks.

I suggest, however, that allowing the advisors to contact clients to advise of their move defeats the main purpose for providing an employer with notice. The requirement to give notice is specifically to allow an employer to replace the employee or otherwise adjust to the loss (Sure-Grip Fasteners Ltd. v. Allgrade Bolt & Chain, 1993 Ontario General Division).

During the notice period, the employees' duty of fidelity to the employer continue, thereby preventing them from competing with the employer. As a result, how can employees/advisors be permitted to remove client contact lists and contact clients immediately upon departure?

I am hopeful that leave will be granted to appeal to the Supreme Court of Canada, thereby creating the opportunity to bring some clarity to this relationship and focus on the following:

1. Are advisors required to give their bank-owned dealers notice of termination?

2. What is the purpose of the notice if the advisors are permitted to contact their clients within the notice period?

3. Does the bank-owned dealer own the book of business or do the advisors?

Until the law is settled, to protect bank-owned dealers, I would suggest that the banks insist advisors sign an employment agreement that clarifies these three issues. The contract should set out who owns the book, what notice is required and whether the advisors are permitted to remove client lists and contact clients during the notice period.

For advisors, I would not assume that this decision will withstand the scrutiny of the Supreme Court of Canada. I would not take comfort from this decision and remove client lists and I would wait until after the notice period to contact clients.

You will notice that I refer to "bank-owned dealers" as opposed to the independent dealer network, which I suggest is an issue for another day.

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