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RBC Dominion Securities v. Merrill Lynch: Placing an Additional Burdon on Managerial Employees

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On October 9, 2008 the Supreme Court of Canada issued its judgement on an important for the financial and securities industry. In *RBC Dominion Securities Inc. V. Merrill Lynch, et al*[1]. the court was forced to answer difficult questions about the nature of the employee-employer relationship. In particular the court reviewed the duties that a non-fiduciary employee in a management role owes to its current, and previous, employer. A near unanimous court, in a judgement written by Chief Justice McLaughlin, ruled that even non-fiduciary employees owe certain implied duties to their employers and should these duties not be met they can be liable for a substantial amount of damages. These duties include the duty to retain employees in good faith. Justice Abella issued a partially dissenting judgement in which she rejected the reasoning of the majority on the issue of the duties that exist for a non-fiduciary employee, particular the duties imposed on a manager in a non-fiduciary role with the company. She further argued that the majorities measure of damages is unjustified by the principles of damages for breach of contract and how they should apply to the case at bar.

With great respect to the majority of the court, this paper argues that the judgement given by Justice Abella is more logical in light of the competitive nature of the financial and securities industry, the historical treatment of good faith in employment contracts and the Canadian legal precedent regarding the absence of restrictive covenants. The majority judgement in this case, by ignoring the important policy considerations addressed by justice Abella, has the capacity to substantially alter the freedom of employees within this industry and shifts the balance of power in this relationship even more into the hands of the employer.

THE FACTS

[1] 2008 SCC 54, [2008] 3 S.C.R. 79 [*RBC Supreme Court Judgement].*

The appellant RBC Dominion Securities Inc. (RBC) and the respondent Merrill Lynch Canada Inc. (Merrill Lynch) owned competing offices in British Columbia. In November of 2000 all except two investment advisors (IAs) left the RBC branch without notice to join Merrill Lynch. Prior to the departure, many of the IAs had expressed discontent with RBC, and were particularly concerned about a possible change in the way their salaries would be calculated. The manager at Merrill Lynch, James Michaud, recruited these advisors and worked with Don Delamont, the bank manager at RBC, in order to facilitate the departure. Prior to the departure, RBC's client records had been copied and transferred to Merrill Lynch.[2] The trial judge held that securities firms regularly engage in a practice of "competitive hiring" as a method for growing the firm. These "competitive hires" are seen as valuable partly because of their experience but mostly because of the book of business that they bring with them from their prior firm. The average competitive recruit brings 50-75% of their client book with them to the new firm, and senior brokers can bring as much as 90% of the book of business.[3] RBC heard from an outside source that the employees had planned on leaving on November 16 and efforts to retain the IAs were unsuccessful. The employees left the firm on November 20.[4]

THE LOWER COURT DECISIONS

The trial judge was forced to look at several significant legal issues including; whether the IA's or Delamont, or both, qualified as fiduciary employees, whether the departing employees gave reasonable notice of their departure, and whether the employees competed unfairly with RBC. The trial judge sided with RBC on these issues. Although the trial judge found

[2] *Ibid.* at 1.
[3] *RBC Dominion Securities v. Merrill Lynch* [2003] B.C.J. 44 B.L.R. (3d) 72 at 10 [*RBC* Trial Judgement].
[4] *Ibid.* at 13-22.

that neither Delamont nor the other IAs qualified as fiduciary employees, they nonetheless breached duties to RBC including "the duty to provide reasonable notice of termination which in turn contributed to their larger breach of the duty not to compete unfairly with DS [RBC] after their departure."[5] Furthermore, they found that Delamont "breached his duty to faithfully perform the functions of his role as branch manager, in the months before the departures."[6] The court further held that both Michaud and Merrill Lynch were directly liable for the conversion of RBC's records and for inducing the IAs breaches of the duty not to compete unfairly.[7]

In a separate on damages there was some debate as to whether the actions taken by Merrill Lynch, Delamont and Michaud caused the collapse of the RBC branch. RBC argued that "the virtual collapse of the branch was a direct and almost inevitable consequence of Mr. Delamont's breach of his duty of fidelity as branch manager."[8] The respondents alternatively argued that the IAs were discontented with RBC and would have left regardless of the actions involved in this case and therefore this would not meet the level of causation required by law.[9] The judge sided with the appellant and stated that

> "It is true that each IA made an autonomous decision to leave... However, the state of affairs at the time was a large part a function of Mr. Delamont's breach....This is not to say that in no circumstances other than those that arose would one or more of the IAs have left DS [RBC] for Merrill Lynch....A certain turnover in the branch's sales staff, and consequent rises and falls in the branch's profits, could be expected as normal

[5] *Ibid*. at 144.
[6] *Ibid*.
[7] *Ibid.* at 145.
[8] *RBC Dominion Securities Inc. V. Merrill Lynch Canada Inc.* et al. [2004] B.C.J. 36 B.C.L.R. (4th) 138 At 15 [*RBC* Damages Judgement].
[9] *Ibid*. at 16.

> contingencies of operation. This coordinated mass departure, however, was of an entirely different nature and scale."[10]

Therefore, Delamont, Michaud and Merrill Lynch were all held liable for damages based on RBC's future lost profits.

As a result of the trial judge's findings the IAs, Delamont, Merrill Lynch and Michaud were all held liable for a substantial amount of damages. The Supreme Court outlined these damages (and the reasons for them) and the subsequent changes to the damages by the Court of Appeal in table format, which has been reproduced below (see table A).

Table A: Damage Awards of the Trial Judge and Court of Appeal[11]

Level of Court	All RBC IAs (Including Delamont)	Delamont (Additional Damages)	Merrill Lynch	Michaud
Trial Judge	$40,000 Total for failure to give reasonable notice (2.5 weeks lost profits) $225,000 for loss of profits due to unfair competition $5,000 each in punitive damages for taking confidential records	$1,483,239 for loss profits due to breach of duty of good faith $5,000 additional punitive damages for taking confidential records	$225,000 joint and severable liability for unfair competition $250,000 Punitive Damages for taking confidential records.	$225,000 joint and severable liability for unfair competition
Court of Appeal Majority	Overturned the $225,000 for loss of profits due to unfair competition	Overturned the $1,483,239 for loss profits due to breach of duty of good faith	Overturned the $225,000 joint and severable liability for unfair competition	Overturned the $225,000 joint and severable liability for unfair competition

[10] *Ibid*. at 22-24.
[11] *RBC* Supreme Court Judgement*, supra* note 1 at 6.

The majority of the Court of Appeal reversed the most substantial damage awards, including; the nearly 1.5 million dollars in lost profits against Delamont for breaching his duty of good faith, the $225 000 against all of the RBC IAs for loss of profits due to unfair competition and the $225,000 joint and severable damages against Michaud and Merrill Lynch for unfair competition. The Court of Appeal noted several aspects about the securities industry business that distinguish it from many other businesses that are important to consider when calculating damages. The most important characteristic noted by the court was that it is "of grave importance to a client that there should be no break in the service available to the client from his or her advisor. The client may well require immediately—the market crash of 1987 comes to mind—advice from the person with whom he or she has a relationship of confidence as to what to do about his or her investments."[12] As such, the court felt that the IAs should not be responsible for the loss of profits due to unfair competition as the customers had every right to leave the business of RBC along with their IAs. Therefore the IAs should be able to contact their clients upon deciding to leave the firm and give them the option to leave with them.

The court also found that "there is no such thing on the part of a servant, upon leaving his master's employ, as an obligation not to compete "unfairly." Such a broad open-ended legal duty, whether treated as an implied term of a contract of service [as the trial judge did here] or as some obligation outside the contract but imposed by law, would be dependent for its scope *on the length of any particular judge's foot*" (emphasis added).[13] For these reasons the damage award of $225 000 against the IAs was overturned as this figure was calculated based on future

[12] *RBC Dominion Securities v. Merrill Lynch et al.* (2007), 25 B.L. R. (4th) 211, 2007 BCCA 22 at 3 [*RBC* Appeal Court Judgement].
[13] *Ibid*. at 65.

loss profits that they would have brought in had they stayed at RBC. The award of $40,000 for lost profits during the notice period was allowed to stand, as were the punitive damages for copying confidential client information.[14]

THE SUPREME COURT OF CANADA: ABELLA V. THE COURT

The majority of the Supreme Court of Canada largely restored the judgement of the trial judge in a short judgement citing only the old common law case on damages, *Hadley v. Baxendale.*[15] The majority reinstated the 1.5 million in damages against Delamont for breaching the implied duty of good faith that the trial judge had found existed in his employment contract. The Court of appeal had overturned this award as it was not properly pleaded by the plaintiff and because the damages claimed were not "proximate" as required by *Hadley v. Baxendale.*[16] The Supreme Court dismissed the pleadings issue quickly[17] and went on to address the respondent's argument that the breach in question "was not within the contemplation of the parties" at the time the contract was made.[18] The majority found that the Court of Appeal asked the wrong "proximity" question and that the correct question is "had the parties at the time of entering into the contract of employment directed their minds to the possibility that Delamont might orchestrate the departure... would they have contemplated a loss of profits given rise to damages."[19] The majority found that the trial judge had asked this question and thus reinstated the large damage award against Delamont. The Supreme Court

[14] *Ibid*. at 107.
[15] (1854), 9Ex. 341, 156 E.R. 145.
[16] *RBC* Supreme Court Judgement, *supra* note 1 at 8.
[17] *Ibid*. at 9.
[18] *Ibid.* at 10.
[19] *Ibid*. at 12.

Majority agreed with the Court of Appeal that the $225000 award against the IAs should be overturned, as it is not an implied term of an employment contract not to compete with your former employer after terminating the employment contract. Furthermore, it would be unjust to grant further damages based on lost profits as Delamont is already paying a global loss of profits award.[20]

Justice Abella in a spirited, lengthy, and thoroughly researched dissent took a very different view of the case then the majority judgement. She did not limit her analysis of this case to the issue of damages but opened up discussion about how the duties found by the trial judge, and the majority judgement, would impact the employee-employer relationship. She agreed with the majority's decision to overturn the unfair competition award against the IAs but she "respectively disagree[d] with the conclusion that Delamont breached an implied contractual duty of good faith in the manner of his departure."[21] Justice Abella recognized that the only legal issue before her is "whether Delamont breached an implied duty of good faith to his employer and, if he did, the extent of the damages. *These are narrow issues with wide implications.*[emphasis added]."[22] She disagreed with the majority on these issues for four main reasons.

Firstly, she argued that the implied term of good faith in an employment has only been used historically against employees to impose damages on them if he or she competed against their employed during the course of the employment contract or by improper use of confidential information. She found no reason to extend this duty to cover the facts of this

[20] *Ibid*. at 17-21.
[21] *Ibid*. at 34.
[22] *Ibid*. at 35.

case.[23] Secondly, Abella argued that the employment contract is one of personal service and that subject to a finding of fiduciary duties or a non-competition clause, employees are free to leave their employment and compete against their former employees.[24] Delamont's employment contract did not have a non-competition clause and RBC, being a "titan" in the securities industry, had the capability to ask its employees to sign this type of clause when they were hired. Abella found that there is "no reason for courts to impose, retroactively, restrictions on post-employment completion."[25] It was also a finding of fact that Delamont did not qualify as a fiduciary employee as his primary function was an IA, and not a manager and that expanding the scope of the duty of good faith to non-fiduciary employees represents a "potentially enormous liability on employees."[26] Justice Abella also disagreed with the majority of the court in regards to Delamont's blameworthiness in orchestrating the mass departure of the IAs. She finds that it would set a dangerous precedent to hold a non-fiduciary employment liable for discussing with co-workers about alternative job opportunities and that making this part of the implied duty of good faith in an employment contract would be unrealistic and unfair.[27] The cultural reality in the industry in question further dictates that there should be no breach of the implied duty of good faith in this case. Post-employment competition is the norm and would be within the contemplation of the parties involved.[28]

Based on these three points, Abella would have found that Delamont did not breach an implied term of his contract. Her fourth point, assuming that the majority was correct and there

[23] *Ibid.* at 37.
[24] *Ibid*. at 39.
[25] *Ibid.* at 44.
[26] *Ibid*. at 52
[27] *Ibid.* at 56-58.
[28] *Ibid*. at 59.

was a breach, was that the damages awarded against Delamont were grossly disproportionate and exaggerated. She referred to *Fidler v. Sun Life Assurance Co. Of Canada*, which outlined the test for remoteness of damages as being "what was in the reasonable contemplation of the parties at the time of contract formation."[29]Abella found that finding Delamont liable for five years of presumptive losses, in the absence of a non-competition clause or a fiduciary relationship, would not have been in the reasonable expectation of the parties nor with anyone else in the investment industry.[30]

WHY ABELLA GOT IT RIGHT

Justice Abella in her dissent offered a much more thorough and impressive summary of the law in Canada regarding the duty of good faith that exists in employment contracts between employers and non-fiduciary employees. The majority largely sidestepped these issues and operated on the assumption that there was a breach, and thus merely focused on deciding the case based on the law of damages. Justice Abella got this case right in light of a) the commercial reality of the financial and securities industry, b) the prior case law on the duty of good faith and employment contracts and c) the absence of restrictive covenants.

a) The commercial reality of the financial and securities industry

Throughout justice Abella's dissenting judgement she referred regularly to the commercial reality of the financial and securities industry. She states that "Those expectations [the reasonable expectations of the parties] must necessarily take into account the understanding in

[29] *Fidler v. Sun Life Assurance Co. Of Canada,* [2006] 2 S.C.R. 3, 2006 SCC 30 at 54.
[30] *RBC* Supreme Court Judgement, *supra* note 1 at 66.

this industry that relationships between employees and employers are often short-lived and subject to abrupt change. Firms engage in aggressively competitive recruitment practices and investment advisors are expected to do everything they can to take clients with them when they leave their employer."[31] The trial judge heard evidence that in the securities industry, reasonable notice is often considered to be in the terms of hours or minutes and IAs often take their clients with them during a move.[32] Although this may be viewed by many as an unfair practice, it is very much the nature of the securities industry.

Several other industries have similar practices and customs and employers have been traditionally vulnerable in suffering similar losses due to employees switching firms. Perhaps the larger problem that the court is attempting to deal with in this case is the debate over who owns the book of business. The securities industry, along with lawyers, accountants and real estate agents, often switch firms throughout their career and take clients with them. The courts, up until this case, have largely been indecisive as to who owns the book of business. IAs accumulate their book of business over many years, and it is an accepted industry practice to sell their book to junior colleagues upon retirement.[33] This practice seems to indicate that the book of business is owned by the IA, and not the investment firm. Despite this industry practice, the courts seem divided on the issue. In a 2005 Ontario decision Superior Court Justice R. J. Smith ruled that the wrongfully dismissed IA failed to award the IA damages based on the defendant's retention of his clients after the dismissal. The court held that the book of business

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[31] *Ibid*. at 66.
[32] *RBC* Trial Judgement, *supra* note 5 at 4.
[33] Antonio Di Domenico, "RBC Dominion Securities v. Merrill Lynch Canada Inc.: The Supreme Court of Canada Provides Some Clarity in the War Over Books of Business," Case Comment, *Ontario Bar Association Civil Litigation Newsletter* (December 2008), online: Fasken Martineau < http://www.fasken.com/dec2008_oba/> [Di Domenico, "War over the book of business"]

had always been owned by the firm as the clients had opened accounts with the firm, signed firm account agreements and received statements from the firm, not from the individual IA.[34] The opposite conclusion was reached in *Clark v. BMO Nesbitt Burns* where a dismissed IA was awarded damages for both wrongful dismissal as well as for the loss of his book of business and the ability to sell his book of business to another advisor before leaving the firm.

Although the Supreme Court seems to suggest in *RBC v. Merrill Lynch* that the book of business is in fact property of the firm, there is still significant confusion as to what this means and its implications. Antonio Di Domenico of Fasken Martineau DuMoulin has commented that this case seems to suggest that the book of business belongs to the firm, based on the substantial award of damages awarded against Delmont. It remains unclear, however, whether similar damages would be awarded had the IAs taken with them simply their clients contact information, outlook express contact lists or a Rolodex.[35]

The analysis undertaken by the majority focused on the losses suffered by *RBC* while Justice Abella takes a more practical view of the problem based on the commercial realities of the industry. The majority, as previously discussed, held Delamont responsible for a blanket amount of damages for lost profits caused by the mass departure of the firms IAs and the subsequent departure of their clients. This seems to suggest that the Supreme Court views the clients as property of RBC and that future IAs may also be found liable for departing a firm along with the book of business. As it has been common practice for IAs to take their book of business with them, this decision could result in substantial amounts of litigation against IAs

[34] King v. Merrill Lynch, [2005] O.J. No. 5028, [2005] O.T.C. 994 at 181.
[35] Di Domenico, "War over the book of business", *supra* note 34.

that thought that they were participating in a legal, and common, practice. After the trial judge's ruling in favour of RBC there was marked increase in litigation in the area and the effects have been felt in the financial advisory business as both CIBC and BMO Nesbitt Burns have initiated similar claims against former IAs.[36] This trend may increase in further litigation, particularly against senior IAs that also have management roles within the firm.

b) Prior Case law on the duty of good faith in employment contracts

As mentioned by Abella in her judgement, the implied duty of good faith that exists in all employment contracts had never been used, up until this case, to hold a non-fiduciary employee liable for damages unless he of she competed with the employee during the course of the employment by utilizing confidential information. Fiduciary employees have been subject to a more rigorous duty of loyalty than those imposed on the average employee. Although there is a fairly flexible test that the courts use to determine when an employee qualifies as a fiduciary, the courts have consistently found that fiduciary relationships are restricted to executives at the top levels of the organizational hierarchy who have the ability to make decisions that are fundamental to the firm.[37] By holding Delamont liable for damages resulting from his decision to leave the firm, and his decision to discuss this option with the other IAs, Abella argues that the duty of good faith has been expanded in the case to punish an employee

[36] Gary Fraser, "In the Aftermath of Coordinated Departures," *Employment and Labour Brief* [Spring 2007], Online: Lang Michener LLP < http://www.langmichener.ca/index.cfm?fuseaction=content.contentDetail&ID=9457&tID=244>

[37] Geoffrey England, *Individual Employment Law,* 2nd ed., (Toronto: Irwin Law, 2008), at 80-81. [England, *Employment Law*].

that is not a fiduciary from deciding to leave the firm, sharing the prospects of alternative employment with others and subsequently competing with the firm.[38]

For the most part, courts in Canada have been reluctant to qualify to what extent a duty of good faith exists within contract law. The Supreme Court has developed the doctrine of good faith through a case-by-case basis, and has recognized that one exists in certain situations. However, the court has been reluctant to stat that there is a general duty of good faith that encompasses all contracts.[39] In the context of employment contracts there appears to be a general duty of good faith both that both the employer and the employee must honour. In *Wallace v. United Grain Growers Ltd.* the Supreme Court held that an employment contract gives rise to an obligation on the employer to treat the employee in good faith at the time of termination of the employment contract.[40] It is also commonplace for the courts to imply duties into a contract that the employees must follow. Employment contracts have traditionally been very brief, generally just outlining the role of the employee and the amount of remuneration. As such the courts have developed a practice of implying terms into contracts of employment that the employee must follow.[41]

The courts have generally implied more stringent terms into the contract of a fiduciary employee then a non-fiduciary. Some of these implied terms include; a fiduciary cannot quit his or her employment to exploit a business opportunity it discovered due to his or her course of employment, a fiduciary must disclose any information that he or she would reasonably believe

[38] *RBC* Supreme Court Judgement, *supra* note 1 at 37 and 51.
[39] Geoff R. Hall, *Canadian Contractual Interpretation Law,* 1st ed., (Markham: LexusNexus, 2007) At 9.1., [Hall, *Contractual Interpretation*].
[40] *Ibid*, at 9.2.6.
[41] England, *Employment Law, supra* note 38 at. 49.

would be important to the employer's business interests and a fiduciary cannot compete with a former employee for a reasonable time following the term of employment.[42] Non-fiduciary employees, on the other hand have none of the above-mentioned duties. Although all employees have a general duty of fidelity to their employer, it has been consistently held that going for a job interview, preparing for future employment, and even persuading other employees to consider new employment options does not breach this duty.[43] Justice Abella sees no reason to modify this law.

Abella argues that while declaring that Delamont is a non-fiduciary employee and at the same time holding that, due to his position as manager, he has some implied contractual duties that included to maintain subordinate employees in good faith, the court is effectively creating a new category of "quasi-fiduciary" employee. This would be a new subset of the law that is not defined and would leave a potentially enormous liability of employees. She states specifically that "it[creating the category of quasi-fiduciary' employee] risks widening what this Court has long recognized to be the imbalance of power in employment relationships, by further entrenching the inherent vulnerability of employees."[44] Even more troublesome is the fact that the majority, while effectively detouring from the common law precedents, decided not to comment or define the duties of managerial employees. This may lead to more litigation against former managers in hopes that duties beyond maintaining employees in good faith also exist.

[42] *Ibid,* at 82.
[43] *Ibid*. at 73.
[44] *RBC* Supreme Court Judgement, *supra* note 1 at 51-52.

Stacey Ball, an employment law practitioner and author of a text cited by Abella in the judgement, reiterated Abella's concerns in an interview for a case commentary published following the case. She stated that, "I think Justice Abella's concerns are very real and very valid. If the majority has, as Justice Abella stated, created a brand new quasi-fiduciary status this is extremely troublesome. It may put some handcuffs on managerial employees."[45] She also stated that the majority of the court's focus on correcting a possible error regarding the calculation of damages got in the way of them formulating important legal policy. The "court's relatively terse and factually-oriented employment law opinions these days contract with the policy-oriented scholarly judgements in rendered during the 1990s…. It appears to me that Justice Abella seems to be carrying the flame from that time frame."[46] Ball's statements are highly accurate in light of the level of scholarship and analysis that went into the majority of the courts analysis. The majority cited only one case and failed to address most of the concerns raised by Justice Abella, dismissing with her concerns in one unsatisfactory paragraph under the title "miscellaneous matters". [47] It seems apparent that a decision that seems to set a precedent of restricting the liberties of management employees through implied employment terms should warrant more discussion on the policy impacts of their decision, as advocated by Justice Abella and Stacey Ball.

c) **The Absence of Restrictive Covenants**

The contract of employment between Delamont and RBC did not contain any restrictive covenants that would have prevented him from competing against the firm upon termination

[45] Cristin Schmitz, "Departing Manager Hit with 1.5m in Damages" *The Lawyers Weekly,* Vol. 28, No. 24 (October 24, 2008).
[46] *Ibid.*
[47] *RBC* Supreme Court Judgement, *supra* note 1 at 22.

of his employment. Due to this lack of clause in the contract Justice Abella believes that it is wrong to hold him liable for five years of estimated lost profits, which stems after the termination of his employment contract. RBC stated that it purposely chose not to include these terms into its employment contracts with IAs in fears that it may hurt their recruiting potential. [48] Restrictive covenants in an employment context occur when an employee gives up their rights to undertake in a particular line of business, in a specific area, for a specific period of time following the end of their employment.[49]

Following the judgement by the British Columbia Court of Appeal, law firms began issuing newsletters that commented on the importance of having restrictive covenants within the contracts of managerial employees.[50] These newsletters indicate that had the Supreme Court decided not to hold managers responsible for additional implied employment duties, there were clearly recognized legal tools available that businesses could have utilized to protect their interests. A publication by McCarthy Tetrault highlighted the importance for companies involved in highly competitive industries, where competitive hires are the norm, to include restrictive covenants such as non-competition and non-solicitation clauses in their contracts with employees.[51] A similar warning was also issued in a publication published by Fraser Milner Casgrain. The importance of these law firm publications is to recognize that businesses do have options to include restrictions within their employment contracts that would limit the freedoms on managerial employees. Therefore, it seems unjust for the Supreme Court of Canada to imply

[48] *Ibid,* at 42-44.
[49] Hall, *Contractual Interpretation*, *supra* note 40 at 276.
[50] See generally Gary Clarke, "Case Comment: RBC Dominion Securities v. Merrill Lynch Canada Inc. et al., (2007) BCCA 22" *Focus* [May 2007] (Vancouver: Fraser Milner Casgrain], online: www.fmc-law.com/upload/en/publications/2007/GTC%20Case%20Comment.pdf.
[51] Tina Giesbrecht and Erika Ringseis, "To Compete Fairly or Not to Compete Fairly… That is NOT the Question," *McCarthy Tetrault*(July 16, 2007), online: www.mccarthy.ca/article_deatil.aspx?id=3619.

these restrictions into contracts of non-fiduciary managers, especially given the fact that the corporation in question specifically decided not to include them in their contracts of employment for other reasons. It is obvious that this policy limits the liberties of employees in managerial roles.

CONCLUSIONS

It is clear that the majority of the Supreme Court set out to correct a perceived error in the way in the rule for remoteness of damages weirs applied, without taking an opportunity to address the larger issues at play in this case. Both the majority of the Court of Appeal and Justice Abella recognized that it was important to discuss what holding Delamont liable for a substantial sum of damages, calculated based on lost profits that occurred solely after the employment contract, and notice period, had ended and extending for a period of five years would mean for other employees in his position. Delamont was held by the trial judge not to have qualified as a fiduciary employee and yet the Supreme Court held him to a higher standard based on an implied term of his contract to retain employees under his supervision. Justice Abella has correctly noted that this has, in effect, created a new type of employee that has quasi-fiduciary obligations to the company.

The majority judgement failed to further qualify the duties that a quasi-fiduciary employee would have as an implied term of their contract, and ignored the fact that they were creating such a category. The majority's decision is problematic in light of the commercial realities of the securities industries. Competing firms often recruit senior IAs from their competition and it is common place for their books of business, and even other employees, to move with them.

Furthermore, the majority is expanding on the employees duty of good faith by implying terms into a contract and utilizing these terms to justify a substantial damage award. Prior to this case a non-fiduciary employee was only held liable for damages due to the breach of a duty of good faith to their employer by competing with their employer during the course of their employment using confidential records. Finally, RBC is being rewarded in this case despite the fact that they intentionally decided not to include restrictive covenants into their employment contracts with IAs. The presence of these covenants may have convinced the IAs not to leave RBC and thus would have avoided this whole costly litigation. Instead of putting the burden into the hands of the employers to compose such covenants, the Supreme Court has decided that the burden should be placed on the IAs liberty. The judgement of Justice Abella is more likely to protect employees and place the burden on the employers, which is more in line with the commercial, and legal, realities in Canada today.

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