



## DAMAGES FOR EMPLOYEE'S LACK OF GOOD FAITH

by Tara R. Britnell and Karol K. Wince

Employees have an implied duty to discharge their employment contracts in good faith (referred to as the "good faith duty"). On October 9, 2008, the Supreme Court of Canada released its decision in the case of *RBC Dominion Securities v. Merrill Lynch Canada*. Until then, an employer had only collected damages from an employee's breach of the good faith duty for 'competing during employment' or 'improperly using confidential information'. The majority decision in this case expands an employee's good faith duty beyond these two conditions, although how far remains unclear.

Implied conditions of a contract are based on what is reasonably expected of the parties to a contract. What is reasonable may vary with the type of business or industry. Therefore, determining whether an implied condition exists depends on the context of the particular business. If an employee breaches one of these implied conditions, he or she has breached the good faith duty.

In this case, one of the Defendants was a Branch Manager of RBC. His job description contained the clause 'to attempt to retain the Investment Advisors within Dominion Securities'. The Defendant's role as Branch Manager only occupied 20% - 25% of his time at work. The rest of his time was spent as an Investment Advisor. In the investment industry, competitive recruiting and sudden changes of employee allegiance are commonplace. An Investment Advisor's loyalty is to their client, not the investment house that employs them. Therefore, the Defendant's role as Branch Manager was minor, and loyalty to one's employer was not typical of the industry. However, the court found that reasonable attempts to retain Investment Advisors within Dominion Securities was an implied condition of the Branch Manager's employment contract.

The Branch Manager coordinated an exodus of RBC Investment Advisors, including himself, to join competitor Merrill Lynch, and in effect shut down the RBC Dominion Securities branch. The court held that this breached an implied condition of the Branch Manager's employment contract. This meant he breached his good faith duty, so the court held the Branch Manager liable for the damages arising from the breach. In this case damages of almost 1.5 million dollars were awarded; the equivalent of 5 years of the RBC branch's profits.

The question now is how far is an employee's duty of good faith been expanded by this decision? What is known is that 'not competing during employment' and 'not improperly using confidential information', are no longer the only conditions that when breached expose an employee to liability for damages. Employees must be more aware of possible implied conditions in their employment contracts, because this decision increases their exposure to liability for damages for breaching these conditions. It will take further decisions to determine whether this precedent will be the beginning of a pro-employer trend in employment law, or merely an aberration based on the unique facts of the case.