

# THE LITIGATOR

FEBRUARY, 2008



## Whose book of business is it, anyway?

### *Confusion reigns on "ownership" of investment firm clients*

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There are few, if any, legal issues affecting the investment industry that are more cloudy and less certain than whether investment firm clients belong to the investment advisor or to the investment firm. And there are arguably few issues more important. An investment firm's financial bottom line is tied to the number of clients and the total value of their accounts. Investment firms typically view those clients as clients of the firm. For an investment advisor, his or her client base - or book of business - is a valuable asset that is personally cultivated over the advisor's career, follows the advisor from one firm to another, and is often "sold" to a colleague (usually subject to the firm's approval) when the advisor retires. Throw into the mix the fact that it is really up to each client to decide whether to follow an investment advisor from one firm to another and you get a difficult mix of competing rights and responsibilities that are often at odds with each other. This mix has been a recipe for litigation that has led to several widely divergent - and even confusing - recent court decisions on the issue.

Probably the most notorious recent battle over departing investment advisors and the clients that followed them is the ongoing litigation relating to the departure of most of the employees from RBC Dominion Securities' Cranbrook, B.C. branch to join Merrill Lynch: *RBC Dominion Securities Inc. v. Merrill Lynch*, [2007] B.C.J. No. 48. The solicitation of clients to move from RBC to Merrill Lynch led to a multi-million dollar trial judgment against both Merrill Lynch and the former RBC employees. The B.C. Court of Appeal largely set aside that damages award in a January 2007 decision in which it found, among other things, that the clients had never "belonged" to RBC and thus no damages flowed to RBC when they left. The Court of Appeal further

found that it is in the interest of the clients, and the public at large, for an investment advisor to be permitted to use his/her clients' contact information when moving to a new firm. The Supreme Court of Canada is scheduled to hear the appeal in this case on April 25, 2008.

Ontario courts have come down on both sides of the question of who owns an advisor's book of business. In his 2005 decision in *King v. Merrill Lynch*, [2005] O.J. No. 5028, Superior Court Justice R. J. Smith dismissed a claim by a former Merrill Lynch investment advisor seeking damages for wrongful dismissal and damages for Merrill Lynch's retention of the advisor's clients after his departure. In doing so, Justice Smith found that Mr. King's book of business had always belonged to Merrill Lynch because, among other things, the clients had all opened their accounts, signed account agreements and received statements from Merrill Lynch, not Mr. King. As a result of this finding, and his dismissal for cause, Mr. King was denied any compensation for the loss of his book of business.

A very different conclusion was reached this past October in *Clark v. BMO Nesbitt Burns*, [2007] O.J. No. 4021. In that case, Ontario Superior Court Justice Peter Jarvis granted judgment in favour of a dismissed investment advisor. Mr. Clark was awarded damages not only for wrongful dismissal, but also for the loss of his book of business or, more accurately, his ability to sell his book of business to another advisor before leaving the firm. In reaching his conclusion, Justice Jarvis cited the common practice in which retiring advisors sell their book of business to a colleague, subject to the firm's approval. Here, Mr. Clark had already discussed selling his book for as much as \$175,000 to another

Nesbitt advisor and it was found that Mr. Clark's sudden dismissal kept him from finalizing such a sale. Justice Jarvis further found that BMO Nesbitt Burns had an implied obligation not unreasonably to refuse to consent to the sale of Mr. Clark's book of business. In the result, Mr. Clark was awarded \$90,000 for the loss of an asset that, in *King v. Merrill Lynch*, had been found to belong to the investment firm and not the advisor. An appeal from this decision is pending.

The courts' past treatment of investment advisors' books of business leaves the question of who owns such valuable assets very much up in the air. It is by no means certain that the pending appeals in *RBC Dominion Securities Inc. v. Merrill Lynch* and *Clark v. BMO Nesbitt Burns* will clarify the issue. It may be that the question *cannot* be conclusively answered given the diversity of arrangements that exist among investment advisors, the firms they work for and the clients they serve.

The solution? Probably the best way for investment advisors and firms to ensure certainty and protect themselves is by entering into clear, detailed and enforceable contractual terms dealing with ownership of books of business and the right of departing advisors to solicit their existing clients or their obligation to refrain from doing so. Courts have recently shown a willingness to respect and enforce contractual terms that govern investment advisors' books of business and departing advisors' dealings with clients, although they remain hostile to broader non-competition clauses.

**This article was originally published in the January 25, 2008 issue of *Lawyers Weekly*.**



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