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The result of this case was equitable as far as GMAC was concerned since GMAC was put in no worse position than it would have been without the CIBC Subordination being in place. However, the result may seem harsh for a secured party in CIBC's position. In effect, CIBC as first place security holder was pushed to the bottom of the list by virtue of subordinating its interest to one of the two subordinate creditors. CIBC had no subordination agreement with GMAC and may have assumed (erroneously, though perhaps logically) that granting the CIBC Subordination would have no effect on its statutory priority over GMAC.

To avoid this problem, CIBC could have sought a subordination agreement from GMAC, in which case the priorities would have been altered as shown in the right-hand column below:

Realization	Initial priorities	With CIBC Subordination in favour of RBC	With CIBC and GMAC Subordinations in favour of RBC	With CIBC Subordination in favour of RBC and GMAC Subordination in favour of CIBC
1. CIBC share	CIBC	RBC (balance, if any, to CIBC)	RBC (balance, if any, to CIBC)	RBC (balance, if any, to CIBC)
2. GMAC share	GMAC	GMAC	RBC (balance, if any, to GMAC)	CIBC (balance, if any, to GMAC)
3. RBC share	RBC	RBC (balance, if any, to CIBC)	RBC (balance, if any, to CIBC and then GMAC)	RBC (balance, if any, to CIBC and then GMAC)

PROTECT YOUR PRIORITY

It is important for senior secured parties to recognize that granting subordination agreements could affect their priorities as against any intervening subordinate secured parties. Similarly, subordinate secured parties such as GMAC, if asked to grant priority agreements in favour of senior secured parties, should consider the possibility that their position could be further eroded by any present or subsequent subordination agreements entered into by the senior secured party. Had GMAC subordinated its interest to CIBC, it may have opened itself to the risk of being pushed into third place by virtue of CIBC granting the CIBC Subordination. In those circumstances, it would have been prudent for GMAC to obtain, as a condition of granting any subordination, CIBC's agreement not to subordinate its interest to any creditors subordinate to GMAC.

Security interests are only as valuable as the priority they enjoy. Secured parties and their legal counsel must be alive to any issues, including circular priorities, which may erode the secured party's

priority and ensure that all possible measures have been taken to adequately protect that priority.

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ELECTRONIC DISCOVERY

By Ben Ingram, FMC Vancouver



DISCOVERY OF ELECTRONIC DOCUMENTS

In our adversarial legal system, parties must make full disclosure of all documents relating to matters in dispute. In the past, document discovery has focused on disclosure of paper documents. However the current trend is for greater emphasis on disclosure of electronic communications, including emails and other forms of electronic data.

WHAT ARE ELECTRONIC DOCUMENTS?

What exactly is meant by the terms "electronic documents" and "electronic discovery"? These terms refer to the preservation, retrieval, and production of documents from electronic sources in electronic form. Examples of electronic documents include photos, emails, Word, Excel and Powerpoint files, voice messages, Blackberry and text messages, accounting systems, and information contained on removable memory cards and camera phones.

The characteristics of electronic documents are very different than paper documents. For instance:

- A paper document can be simply and permanently destroyed, but electronic documents may continue to be retrievable despite efforts to delete them.
- Electronic documents can be programmed to change automatically over time. For example, certain documents when opened will automatically insert the current date, overwriting the previous date.
- Additional background information called "meta data" is stored behind the viewable contents of an electronic document. This information normally includes the date the document was created, as well as revision details, printout times, and operator identification.

RECENT DEVELOPMENTS

Electronic discovery rules in the United States have led major corporations to appoint electronic discovery managers. While it is not expected that similar steps will be necessary in B.C. in the

short term, local corporations should be broadening the number of personnel who are familiar with details of internal information technology systems.

The Supreme Court of B.C. has seized upon initiatives in other jurisdictions and introduced a new *Electronic Evidence Practice Direction*, which became effective on July 1, 2006. Taking a measured approach, the *Practice Direction* encourages counsel and litigants to use technology to conduct civil litigation more efficiently. It is expected that the Practice Direction Guidelines will evolve into mandatory procedures.

The Practice Direction places the primary responsibility upon counsel to effectively use technology. For example, counsel can agree how they will communicate with each other during the course of a lawsuit (e.g., when a formal written letter must be delivered as opposed to communication by email). Counsel can agree that court documents such as pleadings, motion materials, and discovery appointments can be exchanged by email, in PDF format. With respect to document discovery, counsel are encouraged to provide lists of documents as well as requested documents in electronic format. The court has designated an “eCourt Coordinator” who can provide information and assistance to litigants and their counsel.

GOOD BUSINESS STRATEGIES

To address the increasing focus on electronic discovery, businesses should review their current document retention and document management systems and policies.

EMAIL POLICY

A policy on internal email use should caution staff that all email communications should be prepared with the same care and consideration as a formal letter. Casual comments regarding a potentially litigious matter should obviously be discouraged.

DOCUMENT DESTRUCTION

Document destruction is a sensitive area requiring input from counsel. However, if there is already an established policy on document destruction, it is reasonable to continue with that program, provided certain types of documents are destroyed on a regularly scheduled basis.

FILING SYSTEMS

If litigation is commenced, counsel will need to know details of the corporation’s internal electronic filing systems (including archival backup systems for accounting, word processing, and email documents and files). For this reason, it may be time to review internal measures or hire a consultant to review current document management systems.

ACHIEVING BUSINESS EFFICIENCIES

Electronic discovery is becoming common in civil litigation. Many view this development as an opportunity to use technology to streamline the litigation process. Businesses can take this opportunity to review their own systems and implement new policies for document retention, management and retrieval.

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CASE COMMENT: RBC DOMINION SECURITIES INC. V. MERRILL LYNCH CANADA INC. ET AL., (2007) BCCA 22

By Gary Clarke, FMC Vancouver



Recently, the B.C. Court of Appeal released its decision in *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc. et al* (“RBC”). This decision, if not successfully appealed to the Supreme Court of Canada, will have a significant impact on the duties and obligations (or the lack thereof) that departing employees owe to their employers, particularly in the financial services sector.

WHAT HAPPENED IN THIS CASE?

The case arose after a group of employees (the branch manager, investment advisors, and assistants) in two towns in B.C., left their employment with RBC financial services to join Merrill Lynch. As a group, they constituted almost the entire branch. In advance of their departure, they took confidential client information to their future employer, Merrill Lynch, to have it copied. Once at Merrill Lynch they resumed their business and continued to service most of their old clients. RBC’s business in the two towns was significantly damaged as a result of their departure.

RBC sued the departed employees, Merrill Lynch, and its regional manager who had been actively involved in recruiting the staff and copying client records. RBC claimed damages for breach of fiduciary and other duties. The issues of liability and damages were heard separately.

WHAT DID THE TRIAL COURT DECIDE?

The trial court found there was no fiduciary relationship between the employer and its employees, but found that the employees breached their duty of good faith not to compete unfairly with their employer and to provide reasonable notice of termination. Merrill Lynch was also found liable for inducing the staff to not compete unfairly.

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