

## HOW TO COVER YOUR ASSETS

Human ones, that is, in these days of poaching, espionage and not-so-secret messages

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Published in *The Bay Street Bull*, August 2005

**AFTER THE CANADIAN IMPERIAL BANK OF COMMERCE** slapped its former employees at Genuity Capital Markets Inc. with a lawsuit in January, BlackBerry users began eyeing the e-mail device with a degree of suspicion and companies looked at ways to monitor the BlackBerry's confidential PIN-to-PIN messaging function.

These were reflex actions to CIBC's lawsuit against Genuity, which names 10 former CIBC employees—including Genuity co-founder David Kassie—and alleges a variety of transgressions against the bank, including stealing client information and poaching employees from the bank's brokerage arm, CIBC World Markets Inc. The legal fight, which is being slugged out through filing after filing with the Ontario Superior Court of Justice, is supported by copies of numerous BlackBerry messages exchanged by the defendants in the summer of 2004.

As sensational as the technological twist may be, the potential impact of the \$10-million-plus lawsuit should be viewed beyond how it has changed the way some individuals and organizations use their mobile devices. This is, after all, a case that revolves around human assets. Regardless of its outcome, it is logical to assume that CIBC World Markets Inc., et al vs. Genuity Capital Markets, et al, would in some way, affect companies' recruiting and hiring practices. While the lawsuit is unlikely to stop employees from leaving their employer's house to build their own, it could make enterprising types proceed with a lot more caution than they might have in the past.

"I don't think this lawsuit will change anything as far as people starting their own firms or getting hit on by other firms—that's an ongoing thing and that's not going to change," says Derek Nelson, director and chairman at MGI Securities Inc., a boutique investment firm with headquarters in Toronto. "But people will be more cautious and circumspect and they'll take care to cross their t's and dot their i's."

Nelson says the CIBC suit could also cause companies to clamp down on senior executives and other "poachable" talent. "I can see certain firms holding up this case as an example to their employees and saying, 'Look guys, you see what CIBC is doing? We can do it too,'" he says.

So what, exactly, can companies do to avoid a similar situation? For starters, they can make sure their employees are fully aware of their obligations to the company, says Krista Hiddema, a human resources specialist with e2r Solutions, an HR consulting practice within the Toronto law firm Woolgar VanWiechen Ketcheson Ducoffe LLP.

Hiddema says most companies take the time to explain to new employees the scope of their job, the details of their compensation package and, in short, just what a great organization they're about to start working with. But few discuss the employee's fundamental obligations, such as confidentiality and loyalty.

"Companies especially fail to do this for lower-level employees," says Hiddema, "and a lot of junior people have access to confidential information." Those companies that do explain employees' obligations when they hire new people should also remember to repeat the exercise when they're promoting employees; as positions get higher, the set of obligations attached to them grows larger.

Ted Rechtshaffen, who left RBC Dominion Securities Inc. last year to start TriDelta Financial Partners, says the CIBC suit should serve as a reminder about the importance of ethics during the recruitment process. In an industry that has always competed fiercely for top talent, it's not unusual for companies to court each other's employees and, for that matter, for employees to set up shops that compete directly with the very companies that once deposited large performance bonuses into their bank accounts.

Nothing wrong with that, says Rechtshaffen, as long as competing employers play by the rules: keep your hands off a previous employer's confidential information, and don't set out to raid en masse one particular company's workforce.

And, if you're an employee looking to go head-to-head against your former boss, wait until you've left the job before you start building your empire. "Continue to focus on your current job even if you know that, down the road, you're going somewhere else," says Rechtshaffen. "It's just basic ethics."

In fact, basic ethics is what the CIBC-versus-Genuity saga is all about. At first glance, the case appears to be a debate about employees' rights to earn a living—even when that means competing against their former employers—and to work wherever and for whomever they wish.

But a closer look reveals that this fight is really about employees' obligation to act ethically and in their employers' best interests. Such an obligation is inherent in any employment relationship, but when the employee in question is in a senior position, the expectation that this obligation will be met becomes even greater and can extend well after the employee has left the company.

In CIBC versus Genuity, several of the defendants were senior executives at the bank: Kassie was chief executive officer of CIBC World Markets; Daniel Daviau and Phil Evershed were managing directors and co-heads of the brokerage arm's investment banking division; and Earl Rotman was a managing director and vice-chairman. "As far as the bank was concerned, as senior people, these men had obligations of loyalty," says Irvin Schein, a partner and commercial litigation expert at the Toronto-based law firm Minden Gross Grafstein & Greenstein LLP. "Some may also have had specific contractual obligations."

Kassie has stated in an affidavit that he "was not restricted by any agreement from competing with CIBC" when he left the bank last February. Daviau and Evershed, on the other hand, had agreed as part of their severance agreement not to directly or indirectly solicit their former colleagues for 21 months and remained on the bank's payroll months after their employment with CIBC ended.

Whether or not the senior-level defendants in the suit had signed restrictive covenants, the court has to deal with the fundamental issue that they—or at least Kassie—have the duties of a corporate fiduciary or trustee. And with that, says Stuart Ducoffe, an employment lawyer with Woolgar VanWiechen Ketcheson Ducoffe, comes a legally implicit understanding that the fiduciary will not solicit a former employer's clients or employees for a certain period after leaving the company.

"What's a reasonable period of time?" asks Ducoffe. "More often than not, you'll see (court) decisions that reflect a non-solicitation period of about a year." Of course, CIBC still has to prove that Kassie and gang did in fact orchestrate a scheme to recruit colleagues at the bank. That's where all those BlackBerry messages will come in to play. Ducoffe says, however, that the bank's case may hinge more on its allegations that two of the defendants had taken confidential information over to Genuity. "If the courts find that they took confidential information, then it will bend over backwards to also make them accountable for any breaches of non-compete or non-solicitation contracts," says Ducoffe.

So what is the likely dénouement to this drama? Some observers predict that the case will never go to trial and that the parties will end up settling out of court. But so far, both sides are persevering in their efforts at battle. Since CIBC first filed suit in early January, Genuity struck back with a \$14-million countersuit, in which it accuses the bank of breaching its executives' privacy by going through their e-mail.

The counterclaim also rejects the notion of a conspiracy and argues that many employees left CIBC World Markets because of "fundamental issues" at the brokerage. None of the allegations in the CIBC and Genuity lawsuits have been proven in court, and it could take years before the cases are decided or settled. In the meantime, employers and employees, startups and longstanding establishments, may want to make a mental note to cross their t's and dot their i's the next time they're eyeing a potential recruit. And if they're going to be using their BlackBerries, well, they should know what they ought to know by now. ■

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