IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Blackman v. Merrill Lynch Canada Inc. , 2013 NSSC 87

Date: 20130308
Docket: Hfx. No. 266089
Registry: Halifax

Between:

Richard George Blackman

Plaintiff

v.

Merrill Lynch Canada Inc.

Defendant

Revised Decision:	The text of the original decision has been corrected according to the erratum dated March 20, 2013. The text of the erratum is appended to this decision. This decision replaces the previously released decision
Judge:	The Honourable Justice Allan P. Boudreau
Heard:	January 7, 8, 9 and 10, 2013 in Halifax, Nova Scotia
Counsel:	Eric K. Slone, for the plaintiff Dennis James and Melissa MacAdam, for the defendant

INTRODUCTION:

[1] Richard Blackman ("Mr. Blackman") is an Investment Adviser/Broker, having been in the business since 1984. In 1996, Mr. Blackman was working for Richardson Greenshields when that business was acquired by RBC-Dominion Securities ("RBC"). Shortly thereafter, Mr. Blackman was approached on a regular basis by Hugh Wilson ("Mr. Wilson"), a regional manager with another investment firm, Midland Walwyn ("Midland"), with the prospect of Mr. Blackman becoming employed with Midland. For reasons which will be discussed more fully later, Mr. Blackman eventually decided to move himself, and as much of his investment business as would follow him, to Midland.

[2] A detailed contract of employment was eventually signed between Mr. Blackman and Midland. Mr. Blackman has contended that he was very concerned about having to rebuild his investment "book of business" once he moved from RBC to Midland because he could not be certain how many of his clients would follow him to Midland. He said that, for that reason, Mr. Wilson agreed that Mr. Blackman would commence at Midland with a "Length of Service" ("LOS") designation of zero (0). This alleged agreement or term was not mentioned in the

eventual contract of employment. Mr. Blackman contends that this was an important condition for him and that, notwithstanding that it is not in any written document, it was a legally binding collateral agreement.

[3] After three years of employment with Midland, which had by then been purchased by the defendant, Merrill Lynch, Mr. Blackman's LOS designation was indicated as LOS (10). Mr. Blackman protested this change in his LOS designation, but without resolution. Merrill Lynch's Canadian retail operations were subsequently purchased by CIBC-Wood Gundy ("CIBC"), effective early 2002.

[4] Mr. Blackman's employment was transferable to CIBC and he did so by entering into a new contract of employment with CIBC. He subsequently resigned his employment with CIBC in 2004.

[5] Mr. Blackman contends that the change of his LOS designation by Merrill Lynch to (10) after only three years with that firm was a breach of his "collateral" contract or agreement with Merrill Lynch; and alternatively, that the manner of his

transfer of employment from Merrill Lynch to CIBC in 2001-2002 constituted a constructive dismissal.

[6] Mr. Blackman claims that he had no choice but to resign from CIBC in 2004 primarily because of his LOS designation, and he claims damages ranging from 1.3 million dollars to 3 million dollars.

[7] Merrill Lynch denies any collateral employment agreement or any breach of such alleged agreement or wrongful dismissal of any kind.

ISSUES:

1. **Has Mr. Blackman proven that his employment contract with Midland was subject to a collateral agreement regarding his LOS designation?**

2. **If the answer to issue No. 1 is "yes", then has Mr. Blackman proven that an implied term of that collateral agreement was that his LOS designation would remain unchanged as it progressed annually from LOS (0) to LOS (10+)?**

3. **If the answer to issue No. 2 was also "yes", then has Mr. Blackman proven any damages caused by his designation change from LOS (2) in 2000, to LOS (10) in 2001?**

4. **If the answer to any of issues No. 1, No. 2 or No. 3 is "no", then has Mr. Blackman proven a constructive dismissal when his employment was transferred from Merrill Lynch to CIBC in 2001-2002?**

5. If the answer to issue No. 4 was "yes", then has Mr. Blackman proven any damages?

BACKGROUND

[8] Mr. Blackman graduated from a "Securities Course" in 1979; however, he did not go in the "Investment Business" until 1984. Mr. Blackman worked for various firms in Halifax at the beginning of his investment career, building his assets under management which is commonly referred to as an investment adviser's "book of business." In 1991, the firm with which Mr. Blackman was employed left the Canadian market and he was then hired by the large national investment firm, Richardson Greenshields ("Richardson").

[9] Mr. Blackman enjoyed considerable success while at Richardson and he earned a number of prestigious awards. His income ranged from approximately $150,000 to approximately $200,000 per year for the time he was at Richardson.

[10] In 1996, Richardson's investment business was acquired by RBC and Mr. Blackman continued his employment with RBC. He had been recommended for a

vice president position while at Richardson and he became a vice-president at RBC.

[11] Shortly after going with RBC, he was approached by Mr. Wilson, a local manager with another investment firm, Midland, with a view to Mr. Blackman moving over to Midland. Mr. Blackman testified that this occurred approximately monthly and that he was cool to the idea at first.

[12] Mr. Blackman testified that, by 1997, he was starting to warm up to the idea of moving to Midland. He stated that the reason for his "change of heart" was because some of the brokers which had come over from RBC into the merged Richardson/RBC business had larger portfolios than Mr. Blackman. He said this was because they were getting referrals from RBC branches. He said he was finding it harder to compete with the RBC brokers and he began thinking that his job with RBC may not be secure; although there was no evidence that RBC had indicated that Mr. Blackman's job was in jeopardy in any way.

[13] Mr. Blackman testified that one reason he was "warming up" to the idea of moving to Midland was because that firm was not associated with any "Banks" so

that investment advisers had to build their own book of business as opposed to getting referrals from bank branches, as was the case at RBC. He stated that security at his firm of employment was important to him, as was "name recognition" of the firm for which he worked. He said he felt that moving to Midland would only be a minor step back because, at that firm, he would have "name recognition" and an ability to build his book of business. The result was that Mr. Blackman signed a fairly detailed contract of employment with Midland in December of 1997 and moved to that firm in April of 1998.

THE CONTRACT OF EMPLOYMENT

[14] The final signed Employment Agreement between the parties and dated December 9, 1997 is found beginning at page 14 of Tab 2 of Exhibit 1.

[15] There was at least one previous draft of this agreement presented to Mr. Blackman, dated November 17, 1997, on which he made certain proposed changes which were eventually incorporated in the December 9th document.

[16] The final employment contract documents were the result of various discussions between Mr. Blackman and Mr. Wilson; however, Mr. Wilson testified that, once Mr. Blackman had agreed to go with Midland, the details of finalizing the agreements and documentation were left to Scott Fowler, the branch manager of the local office from which Mr. Blackman was to perform his duties.

[17] Mr. Blackman has testified that his ability to compete in his new position at Midland was very important to him. He said he was concerned that a significant portion of his book of business under management at RBC may not follow him to Midland. He said Mr. Wilson proposed that he could start at Midland as a designated LOS (0), thereby being compared, at least initially, with peers in that group. Mr. Blackman said this was very important to him; however, there is no mention of this in the draft or final Employment Agreements. Nevertheless, he did in fact commence his employment at Midland with an LOS designation of (0).

[18] Mr. Blackman testified that he wanted the LOS designation of (0) included in the Contract of Employment; but that he was told by Mr. Wilson the "standard contract" could not be altered by adding clauses. This is contradicted by the testimony of Mr. Wilson and by the fact that changes to the Employment

Agreements as proposed by Mr. Blackman in November 1997 were made to the documents.

[19] Neither Mr. Blackman nor Mr. Wilson could recall that there had been any discussion about the progression or the duration of the LOS designation at any time prior to entering into the Employment Agreement. In fact Mr. Wilson did not recall that the LOS designation had been an integral part of the employment discussions at all, let alone its duration.

[20] As it turned out, Mr. Blackman's concerns as to how many of his clients at RBC would follow him to Midland turned out to be warranted. A little more than one half of his clients followed him to Midland, approximately 9 million dollars worth out of a book of business of approximately 17 million dollars. Nevertheless, Mr. Blackman compared favourably in his LOS peer group in his first few years at Midland. After all, he had by then been in the business some 14 to 15 years and had come over to Midland with a 9 million dollar book of business. Needless to say, he won several awards and ranked well locally and nationally during those first years.

[21] It is worth nothing that by 2000/2001, Mr. Blackman's book of business had not increased significantly and was hovering around 13 million dollars. Around March of 2000, Mr. Blackman had been offered help by a Merrill Lynch supervisor to assist him with asset gathering, although he still compared well in his by then LOS (1) peer group. It should also be noted that during this time period (2000/2001) Midland's business had been acquired by Merrill Lynch, but the transfer of business and employees to the latter had been seamless. In other words, very little had changed operationally for Mr. Blackman.

[22] Mr. Blackman's LOS designation had progressed as follows:

April 1998-1999 = LOS (0)

April 1999-2000 = LOS (1)

April 2000-2001 = LOS (2)

During that time, Mr. Blackman had ranked favourably locally and nationally with other investment advisers in the same LOS category. By that time he had been in the investment advisor business for some 17 years. In June of 2001, Mr. Blackman noticed that he was designated as an LOS (10) years on Merrill Lynch progress reports (see page 16 of Tab 4 of Exhibit - 1). There is no evidence as to how or by whom this change was made, just that it appeared on the Merrill Lynch

June 2001 production report for Mr. Blackman. There is no LOS group higher than (10+), that's as high as it goes. Needless to say, Mr. Blackman compared less favourably with other investment advisers in the LOS (10+) group. Mr. Blackman testified that he fully expected his LOS designation to go to (3) in 2001, that is progress by increments of (1) each year, as it had for the first 3 years with Midland/Merrill Lynch. He protested this change to his superiors at Merrill Lynch; and thus began his periodic crusade to have his LOS designation reduced, although, as stated previously, he had by then been in the business 17 years. Mr. Wilson testified that Length of Service (LOS) designation simply means length of time in the investment adviser business and that it is not a factor in assessing compensation. He stated that size of book of business and gross commissions generated were the only factors affecting the compensation of individual investment advisers at Merrill Lynch.

[23] Mr. Blackman was not successful in getting his LOS designation reduced by Merrill Lynch. It appears that no one shared his concerns about this issue. Two things happened around this time.

[24] One, the September 11, 2001 terrorist attacks on the U.S.A., adding to the upheaval in the markets; and the other, rumours which were circulating that CIBC was in the process of acquiring the Canadian retail business of Merrill Lynch. Mr. Blackman testified that these events, especially the former, caused him to be very occupied with trying to deal with his clientele and he relented on his attempts to get his LOS designation reduced. He testified several times that he had always assumed that LOS ranking may be connected to compensation.

[25] The purchase of Merrill Lynch's Canadian business by CIBC went ahead. Mr. Blackman stated he understood that all Merrill Lynch investment advisers who so wished could transfer and sign new employment contracts with CIBC. He also stated he believed that everything about his contract with Merrill Lynch was being transferred to CIBC.

The Conditions of Transfer to CIBC:

[26] A brief history of the terms of Mr. Blackman's employment with Midland when he moved there from RBC is warranted at this point. Mr. Blackman was granted a $300,000 forgivable loan when he moved from RBC to Midland (see

Page 14 of Tab 2 of Exhibit 1). This was to provide him with some income replacement due to the anticipated fact that not all of his RBC clients would move to Midland. Although the loan was payable to Mr. Blackman in $75,000 instalments over his first four months of employment with Midland, it was forgivable over 5 years such that only $60,000 per year would have to be accounted for as taxable income during that period. When Merrill Lynch sold its Canadian retail investment brokerage business to CIBC at the end of 2001, Mr. Blackman still had almost one year (or $60,000) left on his $300,000 forgivable loan with Merrill Lynch.

[27] It appears that all Merrill Lynch investment consultants were being offered employment with CIBC, provided they agreed to the latter's employment terms. However, it appears many of the Merrill Lynch investment consultants had unfinished business with that firm. There were the matters of any balances owing on forgivable loans as well as bonuses and stock based awards or options. Merrill Lynch advised the investment consultants, by letter dated December 3, 2001, that they would retain these benefits if they accepted employment with CIBC. Merrill Lynch also required transferring investment consultants to resign their

employment with that firm and that they would then be considered as having "retired" (see page 5 of Tab 7 of Exhibit 1).

[28] The above referenced letter of December 3, 2001, also advised the investment consultants, including Mr. Blackman, that if they did not transfer and accept employment with CIBC, then the balance owing on any forgivable loan would immediately become due and payable. Investment consultants who did not transfer to CIBC would also forfeit any nonvested stock awards. Mr. Blackman has testified that he felt he had no reasonable alternative but to accept employment with CIBC, which he did.

[29] The CIBC offer of employment also provided for an interest free loan to former Merrill Lynch employees to be advanced in four monthly installments commencing at the end of the first month of employment and continuing at the end of the next three months. The loan was to be repaid in 60 equal monthly payments, which would be offset by proposed monthly bonuses. The only income which would accrue to the investment consultant for income tax purposes would be the interest imputed on the loan by Canada Revenue Agency regulations. Except for that, the loan was essentially a "signing bonus". Mr. Blackman

received an interest free loan of $49,350. He accepted all these conditions and signed on with CIBC and commenced his employment there in early 2002.

[30] Mr. Blackman testified that, had he been transferred to CIBC as an LOS (3), he believes he would have received an interest free loan of 90% rather than 50% of his previous year's commissions; however that is not clear from page 17 of Tab 7 of Exhibit 1 and there is no confirming evidence on this matter.

Mr. Blackman's Employment at CIBC:

[31] Mr. Blackman testified that, in mid 2002, CIBC announced that it was introducing a revised compensation scheme. An investment consultant's percentage of commissions paid as compensation would include the LOS designation as a factor in the calculations. He said his compensation went from 40% to 12% of commissions as a result of this change. Mr. Blackman stated that he then resumed his "struggle" to have his LOS designation, now with CIBC, reduced. He contended strongly that his initial LOS designation of (0) had been critical to his agreeing to become employed with Merrill Lynch and he wanted CIBC to honour that and continue on an annual progression from there.

[32] Mr. Blackman continued his "struggle" with various persons in CIBC's administration, including regional and national managers or vice-presidents to have his LOS designation adjusted, but without success. In one of his emails, Mr. Blackman threatened legal action if the matter was not resolved. The numerous letters and emails sent by Mr. Blackman and the replies can be found at Tab 6 of Exhibit 1. Mr. Blackman also testified that when Paul Scott ("Mr. Scott") first came on the scene as the CIBC manager in Halifax, he told Mr. Blackman that if he did not drop this LOS issue, he had better find himself another place to work. It is apparent that Mr. Scott was of the view that Mr. Blackman was unjustifiably "flogging" this issue. Mr. Scott has testified that he and others at CIBC and in the business generally were well aware that Mr. Blackman had been in the business for 18 plus years by then.

[33] In 2002, Mr. Scott, on behalf of CIBC, offered Mr. Blackman an improved compensation package which he accepted. This was in order to compensate for his low LOS ranking. However, Mr. Blackman would not accept it as a settlement of his LOS issue. Around this time Mr. Blackman's book of business had more or less stagnated and was not growing. Mr. Scott offered to assist Mr. Blackman

with a Production Improvement Plan ("PIP") in order to help him increase his book of business. Mr. Blackman said he felt that his position at CIBC may not be secure and that he was "being squeezed out the door". There is absolutely no evidence that Mr. Blackman was being "squeezed out", as he put it. On the contrary, Mr. Scott has testified that employees of CIBC have benefited from participation in a PIP and have continued and gone on to successful careers with CIBC.

[34] Mr. Blackman has testified that the important factors which led him to leave CIBC were; firstly, his income was declining and; secondly, that his LOS of (10+) meant he did not measure up favourably against other investment consultants in that category. He said he "felt" he had no choice but to go somewhere else. He said he started to look for alternate employment in April or May of 2003. He said he had hoped to go with a large firm, but that he soon learned the large firms were not interested in him. He decided to go with a smaller firm, Acadian Securities ("Acadian").

[35] Mr. Blackman commenced legal proceedings against CIBC in June of 2004 because he was of the view that CIBC had inherited responsibility for him from

Merrill Lynch and that CIBC were in breach of his Merrill Lynch employment contract and agreement. In the law suit, he also alleged harassment and unfair scrutiny by CIBC. In effect he alleged constructive dismissal. Mr. Blackman had not by then resigned from CIBC nor advised them of the law suit and, when Mr. Scott found out from a media release or inquiry he asked Mr. Blackman to come to his office. Mr. Blackman then tendered his letter of resignation (Exhibit 8) to Mr. Scott. Mr. Blackman's law suit against CIBC has been discontinued.

Mr. Blackman's Production and Income History:

[36] It is useful at this time to outline Mr. Blackman's production history and his income as indicated in the various records found in Exhibit 1, at Tab 4 and Tab 1, respectively. I will outline in the Table 1 below the year in question, the firm for which Mr. Blackman was working, his total assets under management and his commission income for the same taxation year, as reported on Tax Returns, Notices of Assessment and/or T-4 slips.

TABLE 1

Year	Firm	Total Assets under Management (in 000's of $	Commission Income
1992	Richardson Greenshields	$5,762	$163,879
1993	Richardson Greenshields	$10,027	$128,227
1994	Richardson Greenshields	$9,374	$151,898
1995	Richardson Greenshields	$11,008	$169,958
1996	RBC Dominion Securities	$16,386	$323,503
1997	RBC Dominion Securities	(Approx.) $17,000	$255,904
1998	Midland Walwyn	$9,768	$128,280
1999	Midland Walwyn	$11,183	$123,571
2000	Merrill Lynch	$13,673	$126,521
2001	Merrill Lynch	$13,051	$90,522
2002	CIBC-Wood Gundy	(Approx.) $17,000	** $102,790
2003	CIBC-Wood Gundy	$16,315	** $105,541
2004	CIBC-Wood Gundy & Acadian	$15,436/$7,000	$61,810
2005	Acadian	$7,000	$83,972
2006	Acadian	$7,000	$76,399
2007	Acadian	$7,000	$79,969
2008	Acadian	$7,000	$42,895
2009	Jennings Capital	$7,000	$52,562
2010	Jennings Capital	$7,000	$51,359
2011	Jennings Capital	$7,000	$35,049
2012	Altus Securities	$2,000	(Estimate) $15,000

**It should be noted that, for the years 2002 and 2003, the information was taken from T-4 slips only and appears to include other income, such as forgivable loans.

[37] Mr. Blackman, at date of trial, was still with Altus Securities Inc. ("Altus"), a small firm without even a web site. He feels that he has now hit the end of the road in the investment business. At age 60, he does not believe staying with Altus is an option.

Further Testimony - Mr. Blackman:

[38] Mr. Blackman, on cross-examination, testified that Merrill Lynch or other investment firms that he had been with had not considered LOS designations as a measure to calculate compensation. He stated that LOS designations had first become an issue which may affect compensation when CIBC made a change to its method of calculation in mid-2002. Mr. Blackman agreed that production, in terms of total assets under management, which in turn reflects on gross commissions produced, are the two factors which affect compensation. However, the compensation formula introduced by CIBC in mid-2002 had LOS designations as a factor which may affect compensation.

[39] Mr. Blackman testified that Midland/Merrill Lynch fulfilled all the terms of his employment agreement with that firm as far as any compensation commitments

were concerned. Mr. Blackman agreed that he could not recall any discussion with Mr. Wilson or any one else at Merrill Lynch as to how long his reduced LOS designation would last. He said he assumed that it would start at (0) and progress annually from there.

[40] Mr. Blackman testified that he understood, in December of 2001, that he was resigning from Merrill Lynch and accepting "new" employment with CIBC. In his law suit commenced against CIBC in June of 2004, Mr. Blackman alleged that, basically, he had been forced out of CIBC, in effect, constructively dismissed; however, he admitted in cross examination that CIBC had not undertaken any disciplinary action of any kind against him. The compensation plan which CIBC had put in place in mid 2002 applied to all of its investment consultants. Production was still the main factor determining compensation and not LOS designation.

[41] In November of 2002, CIBC exempted Mr. Blackman from production requirements for the next year. This placed him at a "grid" compensation level 6 instead of level 2, the latter being the level at which his production would have warranted. Mr. Blackman accepted this accommodation by CIBC, but he would

still not relinquish on his pursuit to have his LOS designation reduced (see page 36, Tab 6, Exhibit 1). He still "felt" that he was being unfairly compared to other investment advisers in the LOS (10+) group; however, there is no evidence that he was being "targeted" because of his performance in this group.

[42] By 2002 Mr. Blackman had assets of some 17 million dollars under management. He had therefore rebuilt his asset base from approximately 9 million dollars when he had left RBC to join Midland. He agreed that he had not initially lost anything because of his transfer from Merrill Lynch to CIBC. Nevertheless, Mr. Blackman started looking for alternate employment in 2003. It appears that he did not want to stay with CIBC at an LOS designation of (10+), although he had been in the investment consultant business for some 20 years by then.

[43] By May of 2004, shortly before he commenced a lawsuit against CIBC and subsequently resigned, he would have been an LOS (6) even if his progression had been one level per year after commencing work with Midland. Mr. Blackman agreed that consultants at LOS (6) were treated virtually identically to those in LOS (10+) as far as "grid" compensation was concerned. However, he stated in cross-examination that "it mattered very much to him who he was compared with."

He said he was concerned that it may affect job security if there were any layoffs or downsizing; however, there were none during his tenure at CIBC.

[44] In the final analysis, I find that there is no cogent evidence that Mr. Blackman was, as he said, "being forced out of CIBC."

Testimony of Hugh Wilson:

[45] Mr. Wilson has been an investment adviser since 1980. He was with Midland when he first approached Mr. Blackman to join that firm. He had been a regional or branch manager since 1992 and he had continued to be so with Midland/Merrill Lynch and CIBC until October of 2012. He was also a regional representative heavily involved in recruiting. He continues as an investment consultant with CIBC. Although he continues with CIBC to this day, this law suit does not involve CIBC directly and it is not a party. I found Mr. Wilson's testimony to be frank, impartial and unbiased toward any party.

[46] Mr. Wilson testified that recruiting was a large part of his job when he was at Midland and Merrill Lynch. He said that the legal department provided

standard contracts of employment, but that in the end few were identical and they were customized to fit the circumstances. He said he and a supervisor would normally put a package/offer together and present it to the potential recruit.

[47] He said the manager of the local branch at which the recruit was to work would sit in on the later interviews with the recruit. Once the recruit "agreed to come on board", Mr. Wilson passed the contract finalization on to the local branch manager; however, it was Mr. Wilson who decided which potential recruits would be presented with offers of employment. Mr. Wilson testified that the recruits had to be comfortable with all the terms of the offer and that the contract had to incorporate all that was agreed upon.

[48] Mr. Wilson testified that he and Mr. Blackman conversed regularly during the year before an offer of employment was made. He said this occurred some 16 years ago, that there were several meetings, but that he could not recall all the details of those meetings. He said he recalls that Mr. Blackman was concerned about how many of his RBC clients would move with him to Midland.

[49] Mr. Wilson testified that the LOS designation means Length of Service "in the investment adviser business", regardless of which or for how many firms an individual has worked. He did say that LOS could be adjusted at Midland for a 3-year period. This was regarded as a 3-year training program for new recruits. He said there was also a minimum rate of compensation for new recruits which would be 30% of the gross commissions generated. He also said there was an "absolute minimum" compensation rate of 20% of production at Midland, production being the total gross commissions generated.

[50] Mr. Wilson testified that, from discussions he had with Mr. Blackman in 1996 and 1997, he believed Mr. Blackman's business was suffering and the latter thought it may be difficult for his clients to follow him to Midland. Mr. Wilson did not recall any discussions with Mr. Blackman regarding adjusting his LOS designation initially or for what period of time. He confirmed that Mr. Blackman commenced at Midland with an LOS (0) designation but he said he did not recall where it came from, but he believed that would come from management. He said LOS designation is an internal number only, which can be used to accomplish a desired end, depending on what the desired end may be. He said different firms

use it differently. He said grid compensation levels are not consistent with LOS levels, they are consistent with production levels.

[51] Mr. Wilson testified in cross-examination that LOS designation is just a measure of time it takes for an investment adviser to build a business and it provides a basis to compare one investment adviser to another. He did agree that investment advisers who don't compare well in the same LOS category may be more vulnerable in times of staff adjustment or downsizing.

Testimony of Paul Scott:

[52] Paul Scott ("Mr. Scott") commenced his career in 1977, right after graduating from university. He started with Merrill Lynch and now continues with CIBC. He was a branch manager from 1990 to 2007 and he would have been the Halifax branch manager of CIBC from 2002 to 2007. He came on the scene in Halifax in 2002 and he would have been Mr. Blackman's branch manager from then until Mr. Blackman resigned in June of 2004.

[53] Mr. Scott testified that a branch manager's job is to manage all staff, ensure compliance with securities regulations and company policies, sales motivation, plus performance assessment and performance assistance. He said his job was to monitor all correspondence in and out of the office, plus the trading activity of all investment consultants. He said discussions with all investment consultants was an everyday occurrence.

[54] Mr. Scott was asked what he meant by his comment, "I noticed that you seem to keep odd hours" in the email he sent to Mr. Blackman on August 2, 2002 (see page 30, Tab 6, Exhibit 1). Mr. Scott replied he had frequently noticed that Mr. Blackman would come into the office around noon and leave around 3 p.m. He said Mr. Blackman was never formally reprimanded or disciplined because of that.

[55] Mr. Scott testified that it was the firm's (CIBC's) position that Mr. Blackman was indeed an LOS (10+). He said he had known Mr. Blackman for a long time and he knew that he had been in the industry for a long time. Mr. Scott stated emphatically that he had never had any discussion with anyone at Merrill Lynch about Mr. Blackman's LOS designation. He said he had a discussion with

Mr. Janson, vice-president at CIBC regarding this topic and the result was that they felt Mr. Blackman was indeed at LOS (10+). Nevertheless, in order to resolve the matter, Mr. Blackman was raised two or three grid compensation levels higher for a period of one year, being November 1, 2002 to October 31, 2003. Mr. Scott said he believed the LOS issue had been put behind them and that he did not recall any further discussions on the matter.

[56] Mr. Scott testified that if brokers are not reaching their potential or they appear to have stagnated, CIBC will develop a Performance Improvement Program ("PIP") for that individual. He said such a program is focussed on asset base development and not commission production. The focus is on increasing the individual's total assets under management, rather than production, because the latter could encourage a high turn over rate to generate commissions, a process which is known in the trade as "churning" and which is seriously discouraged.

[57] Mr. Scott testified that a PIP program was discussed with Mr. Blackman. He said LOS designation has no bearing whatsoever on a PIP program. He said Mr. Blackman did not pursue the PIP program and that he subsequently resigned. Mr. Scott emphasized that the PIP program is not a disciplinary measure, but it is

meant to help investment consultants who want to increase their business and who appear to need assistance.

[58] Mr. Scott testified that he learned on the "Internet" that Mr. Blackman had commenced litigation against CIBC for what he perceived to be "constructive dismissal". Mr. Scott asked Mr. Blackman to come to his office, where upon Mr. Blackman submitted his resignation. Mr. Scott said he understood that Mr. Blackman had taken a position at another firm. Mr. Scott emphasized that he had never told Mr. Blackman that his employment with CIBC was in any way in jeopardy or under review. He testified that there were two other PIPs in progress around the time one was intended for Mr. Blackman and that the other two individuals are still with CIBC and have continued with successful careers.

[59] Mr. Scott testified that the grid compensation levels at CIBC (see page 49, Tab 7, Exhibit 1) are totally tied to gross production. He said LOS may be an issue for newer investment consultants, but that they are locked in at grid level 6, no lower, but that there is no cap on improving one's compensation grid level through production. The level of production is calculated yearly and adjusted retroactively. Investment consultants start each new year at one compensation

grid level lower than that achieved the previous year. This is done in order to protect individual advisers from owing money to the firm, but if they achieve a higher level of production, their compensation is adjusted retroactively.

[60] Mr. Scott agreed that a consistently low LOS ranking for an investment consultant may attract a PIP program for that individual. Mr. Scott said that was the case for Mr. Blackman. This was the only consequence for Mr. Blackman having an LOS designation of (10+) while at CIBC and not ranking favourably in that peer group.

The Claim:

[61] Mr. Blackman alleges that the fact Merrill Lynch unilaterally noted his designation on his progress reports, commencing mid 2001, as a category LOS (10) rather than LOS (3) was a breach of his employment agreements with that firm. He claims that this breach caused him to lose anywhere between $100,000 and $200,000 each year after his transfer to CIBC and particularly after he resigned from CIBC in 2004. He projects those alleged losses to age 65, a total of approximately 15 years.

[62] Mr. Blackman claims losses under three alternate types of damages. These are; firstly, “expectation damages”; secondly, “reliance damages”; and thirdly, value of “assets left behind” at CIBC. These alternate damages are approximately 3 million dollars, 2.9 million dollars and 1.3 million dollars respectively.

[63] Mr. Blackman indicated in his pre-trial brief that he would not be filing any actuarial evidence in support of his claim, and he did not. His calculations are purely linear and they are based primarily on his past income as an investment consultant with Richardson, RBC and Merrill Lynch. Alternatively, he claims income on the value of a “book of business” of approximately 9 million dollars which did not follow him to Acadian but stayed with CIBC when he resigned from the latter in 2004. However, all of these various types of damages have a common thread, that is that it was Merrill Lynch changing Mr. Blackman’s LOS designation to (10) in 2001 which caused him to suffer all these alleged losses.

Expectation Damages:

[64] Mr. Blackman submits that he had a reasonable expectation that he could prosper at Merrill Lynch and later CIBC, had his contract regarding his LOS designation and its alleged implied progression been honoured by Merrill Lynch. Since Mr. Blackman did not prosper as he had hoped, he cites the cause of this as being his LOS (10) designation in 2001. He therefore simply takes his net average income for the 1995, 1996 and 1997 taxation years, which were among his best, averaging approximately $250,000, and he multiplies that amount by 15 years. Thus the net loss claimed of 3 million dollars under that head of damages.

[65] Mr. Blackman also characterizes these damages as "loss of chance". He concedes that it is not possible to prove all his damages, in the conventional sense, on a balance of probabilities. He says he is not asking the Court to determine "what happened?", but rather to determine "what might have happened?" if Merrill Lynch's alleged breach of contract had not occurred. Here he quotes from several cases which I shall refer to later in this decision.

Reliance Damages:

[66] Reliance damages are advanced as an alternate remedy in the event that expectation damages are found to be too speculative in the circumstances of this case. This head of damages is advanced on the theory that Mr. Blackman made the move from RBC to Midland/Merrill Lynch primarily because he was offered to commence with the latter firm as an LOS (0). His average annual income for the taxation years 1991 to 1997 was $209,097. Again this average annual income is multiplied by 20 years, less income actually earned or projected to be earned to age 65, for a net claim of 2.9 million dollars. Again, it is argued that it is Mr. Blackman's LOS designation by Merrill Lynch, and then, continued at CIBC, which caused him to suffer those losses.

Value of "assets left behind" at CIBC:

[67] This alternate head of damages is based on the allegation that, because of Mr. Blackman's transfer from Merrill Lynch to CIBC as an LOS (10+) and continued as such at CIBC, he eventually had to resign from CIBC. He alleges that his LOS designation of (10+) significantly hampered his ability to succeed at CIBC and he concluded he had no future as an investment consultant with that employer. When Mr. Blackman resigned from CIBC in 2004, he had not

succeeded in making any significant progress in growing his "book of business" during the time he had been at CIBC. He claims that his earnings dropped significantly and he contends that was because CIBC continued to refuse to "roll back" his LOS designation.

[68] When Mr. Blackman resigned from CIBC in 2004, approximately 9 million dollars of his "book of business" did not follow him to Acadian, and he claims this was the direct result of his LOS (10+) designation and the refusal to roll it back. It should be noted that, by mid 2004, Mr. Blackman would have been an LOS (6) even if he had progressed annually from Merrill Lynch as he claims should have been the case.

[69] An LOS (6) designation would not have significantly affected his compensation levels at CIBC because there is no significant difference in treatment between an LOS (6) and an LOS (10). It should also be remembered that, by 2004, Mr. Blackman would have been an investment consultant for some 20 years.

[70] Under this alternate head of damages, he claims that this 9 million dollars "book of business" which stayed at CIBC when he resigned would have earned him between 1.3 and 1.6 million dollars over the next 13.5 years. It should also be noted that Mr. Blackman's employment was not terminated in any way by CIBC, but that he chose to resign because he had concluded that he had no future with that firm.

Wrongful Dismissal:

[71] Mr. Blackman has contended that his claim is not one of wrongful dismissal by Merrill Lynch, constructive or otherwise, even though he alleges that he had no choice but to resign from that firm and transfer to CIBC. He has testified that the conditions placed upon him by Merrill Lynch if he did not accept employment with CIBC left him with very little choice. Mr. Blackman refutes any attempt by Merrill Lynch to categorize his termination of employment from that firm upon the sale of its Canadian business to CIBC as a constructive dismissal. He claims this would just be an attempt to "cap" its liability by way of a reasonable notice period analysis.

Merrill Lynch's Position:

[72] Merrill Lynch does not admit to any type of wrongful dismissal and contends that any such claim would have been vitiated by Mr. Blackman accepting employment with CIBC and continuing as an investment consultant with that firm for more than two years, with his "book of business" and opportunities all in tact. Merrill Lynch denies any liability for Mr. Blackman's income situation while at its firm or at CIBC. It denies any breach of contract and it denies any agreement to simply progress Mr. Blackman's LOS designation by increments of (1) indefinitely. Moreover, Merrill Lynch contends that Mr. Blackman has not proven that any down turn in his career or income was caused by his LOS designation.

The Law:

[73] It is trite law to say that what one alleges, one must prove. The first issue in this case is whether there was an oral agreement between the parties collateral to the final written and executed employment contract regarding LOS designation for Mr. Blackman. The defendant quotes Black's Law Dictionary for a definition of a collateral contract:

> **collateral contract**. A side agreement that relates to a contract, which, if unintegrated, can be supple-mented by evidence of the side agreement; an agreement made before or at the same time as, but separately from, another contract. See COLLATERAL - CONTRACT DOCTRINE.[2]
> . . .
> **collateral-contract doctrine**. The principle that in a dispute concerning a written contract, proof of a second (usu. oral) agreement will not be excluded under the parol-evidence rule if the oral agreement is independent of and not inconsistent with the written contract, and if the information in the oral agreement would not ordinarily be expected to be included in the written contract.[3]

[74] The Defendant also cites the case of Ahone v. Holloway, [1998] 30 BC LR (2d) 368, where McLachlin J.A., (as she then was) commented on collateral contracts as follows:

> [17] ...[E]vidence of an oral agreement or representation may be admissible notwithstanding the existence of a written document to establish a collateral agreement which, although oral, is enforceable.
>
> [18] A collateral contract is an oral agreement ancillary to a written agreement. As with any contract, the party alleging it must establish the agreement of all parties to its terms. He must also establish consideration, which in the case of a collateral contract consists in entering into or promising to enter into the principal contract.
>
> [19] The Supreme Court of Canada has repeatedly held that a collateral contract – which is one way of characterizing the agreements as to interest and accommodation in this case – cannot contradict the main written contract....
>
> [emphasis added]

[75] The plaintiff cites the case of Total Petroleum (North America) Ltd. v. AMF Tuboscope Inc. (1987) 54 Alta. L.R. (2d) 13 (Q.B.), for the following definition and requirements to prove a collateral contract:

> 40 A party seeking to establish a collateral contract must prove strictly the essential elements of an agreement separate and distinct from the main contract. The terms of the separate contract must be certain and clear in the minds of both parties. Consideration for the seller's promise will usually be found in the buyer's agreement to enter into the main contract on the strength of that promise. Most important, the totality of the evidence surrounding the transaction must clearly show an intention by both parties to create a contractual relationship. That intention is to be determined objectively from the words used and the conduct of the parties.
>
> [emphasis added]

[76] With regard to the issue of causation, Mr. Blackman agrees the onus is on him to prove that any alleged breach of contract caused his alleged losses, or as he put it, "was the effective or dominant" cause of his loss. He cites the case of Hi-Alta Capital Inc. v. Montreal Co. of Canada, 2004 A.B.Q.B. 687 (affirmed 2007 Carswell Alta 1018 (C.A.)) on the issue of causation:

> 41 As to Causation, the main issue in this law suit, Chitty on Contracts, (London: Sweet & Maxwell, 1999) sets out the classic test in contracts at para. 27-024:
>
> [T]here must be a causal connection between the defendant's breach of contract and the claimant's loss. The claimant may recover damages for a loss only where the breach of contract was the "effective" or "dominant" cause of that loss. The courts have avoided laying down any formal tests for causation: they have relied on common sense to guide decisions as to whether a breach of contract is a sufficiently substantial cause of the claimant's loss. The answer to whether the brach was the cause of the loss or merely the occasion for the loss must "in the end" depend on "the court's common sense" in interpreting the facts.
>
> 42 The Supreme Court in *Martel Building Ltd.* v. *R.*, [2000] 2 S.C.R. 860, 2000 SCC 60 (S.C.C.), put it even more succinctly at paragraph 102: "to be recoverable, a loss must be caused by the contractual breach in question."
>
> [emphasis added]

[77] The claims of Mr. Blackman involve several alternate heads of damages, although all are based on the same alleged breach of the collateral agreement regarding LOS designation. The defendant contends that, regardless of liability, which it denies, the damages claimed by Mr. Blackman, especially "expectation damages" are too remote to even consider. However, the issue of remoteness only arises, according to the following paragraphs of the Hi-Alta case quoted by Mr. Blackman, if "the causation question has been settled in his favour":

> 46 These principles are not without limits, however, as Asquith L.J. observed in *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*, [1949] 2 K.B. 528 (Eng. C.A.) at 539:
>
> This purpose, if relentlessly pursued, would provide [the plaintiff] with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognized as too harsh a rule.
>
> • • •
>
> 48 As to limits on recovery and remoteness in the context of breach of contract, McGregor on Damages at paragraph 4-022 sets out the general principle:
>
> It is not always realised that there are two aspects of remoteness. The first aspect of remoteness concerns causation: the question to be answered is whether the defendant caused the particular damage to the claimant. The second aspect of remoteness, which on a strict analysis arises only after the issue of causation has been settled and settled in the claimant's favour, concerns the extent of the protection which is afforded to the claimant: the question to be answered is whether the law protects the claimant from the particular damage he has suffered.
>
> 49 So, before there is any analysis on the scope of damages, it must first be settled whether the defendant's breach was the cause of the damages claimed. The question whether Hi-Alta is entitled to the damages it suffered if proved arises only if the causation question has been settled in its favour.
>
> [emphasis added]

[78] With respect to "expectation damages", the defendant cites the following paragraphs from a decision of this Court by Justice Murphy (Carrigan v. Berkshire Securities Inc., 2012 NSSC 373) in support of its argument that such damages would not be an appropriate consideration in the circumstances of the present case:

> [57] I agree with the plaintiff's submission that, as an alternative to awarding compensation in the traditional manner based on expectation, damages for breach of contract may in appropriate cases be assessed as the amount required to put the plaintiff in the position occupied before the contract was made, rather than in the situation the plaintiff would have been if the contract had been performed (Ramey v. Wilder Mobility Liability, [2004] O.J. number 2674 (SCJ); S.M. Waddams, The Law of Contract (4th edition) p. 515). I have concluded, however, that this is not a case where damages should be awarded on a "reliance" basis.
>
> [58] In my view, the authorities upon which the plaintiff relies to support the basis upon which he seeks a damage award are distinguishable. Those decisions did not award reliance damages for breach of a contractual employment arrangement to which the parties had adhered for more than three years, as in this instance. Rather, a plaintiff's claim for loss of capital in the context of a unilateral contract was dismissed in *Hubrisca Enterprises Ltd. and Shotco Ammunitions Corporation v. the Atty. Gen. of Canada* [1998] O.J. No. 5028 (O.C.J.) reliance damages were awarded where the breach occurred prematurely before the project reached production; in *Ramey v. Wilder Mobility Ltd*., supra the court determined that it would be very difficult, if not impossible, to assess damages for breach of contract in the traditional manner as there was no evidence with respect to the cost of putting the plaintiffs in the position they would have been had the contract been performed as agreed.
>
> [emphasis added]

[79] The third alternate basis for Mr. Blackman's damages claim, "assets left behind", raises the spectre of proprietary rights to his "book of business" at RBC,

Merrill Lynch or CIBC when he left any of those firms. This issue was addressed by Justice Smith in the case of King v. Merrill Lynch Canada Inc., [2005] O.T.C. 994, 2005 C 43679 (ONSC) at paragraph 18, as follows:

> [181] I have previously found that the plaintiffs were employees of Merrill Lynch and I found that Merrill Lynch, as the broker and employer, did retain a proprietary interest in the client list and client information, charts and files. As a result, I find no damages would be awarded for loss of economic opportunity, interference with economic relations, for unjust enrichment, or for breach of fiduciary duty, or breach of confidence, as Merrill Lynch was entitled to solicit the business of their clients and to attempt to retain all of their clients and to transfer them to other financial consultants employed by Merrill Lynch.

Analysis:

[80] Although there is considerable law which applies to some of the issues raised in these proceedings, the answers to the questions posed essentially turn on findings of fact.

Issue No. 1 - Has Mr. Blackman proven that his employment contract with Midland was subject to a collateral agreement regarding his LOS designation?

[81] When one considers the testimony of Mr. Blackman and the subsequent events after his leaving RBC to go with Midland, then objecting strenuously and continuously when his LOS went from (2) to (10), it is apparent that LOS designation was important to him. He has testified that it was Mr. Wilson's offer

to commence him at Midland with an LOS (0) that "tipped the scales" into accepting Mr. Wilson's offer of employment. I am fully cognisant that the recruiting discussions spanned a significant period to time, with proposals and changes requested and obtained by Mr. Blackman, before a final agreement was signed. Although the final employment agreement is silent on the LOS issue, it is fact that Mr. Blackman commenced at the LOS (0) designation. Mr. Wilson testified that he could not recall any LOS discussions with Mr. Blackman and that he delegated the final documentation to the local branch manager. Therefore, Mr. Blackman's testimony and his commencing employment at Midland as an LOS (0) are uncontradicted and it clearly does not contradict the written agreements.

[82] I am satisfied, on a balance of probabilities, that starting Mr. Blackman at an LOS (0) at Midland was a valid collateral agreement to Mr. Blackman's employment with that firm.

Issue No. 2 - If the answer to issue No. 1 is "yes", then has Mr. Blackman proven that an implied term of that collateral agreement was that his LOS designation would remain unchanged as it progressed annually from LOS (0) to LOS (10+)?

[83] Mr. Blackman testified that he had no recollection of discussing the issue of his LOS progression with Mr. Wilson or any one else at Midland. This question apparently did not cross his mind until mid 2001, when it reverted to his actual Length of Service in the investment counselling business, which all knew was (10+). Mr. Wilson testified that there was an employment plan for new recruits whereby they were given special consideration for the first three years of employment while they built up their "book of business". There is no evidence that this time frame was discussed with Mr. Blackman, but it appears to have been the standard practice for all new recruits at Midland.

[84] Mr. Blackman testified that it was important to have a reasonable period of time to rebuild his "book of business" after leaving RBC and having to accept that a good portion of his clients would stay behind with RBC. He said he was concerned about comparing well in his LOS peer group. I agree that he could expect a reasonable period of time to rebuild his business at Midland before his comparative group would be peers with the same number of years in the investment business. I would therefore be left to decide, what, if any, would be a reasonable implied term to consider as part of the collateral agreement to commence Mr. Blackman at LOS (0). There is a dearth of evidence on the point.

The only evidence which provides any guidance in this regard is Mr. Wilson's testimony regarding a 3-year business building accommodation and compensation plan for new recruits.

[85] Although this term was not discussed by anyone, I find that "in all probability" a three year period during which to allow Mr. Blackman, as a new recruit, to develop his business before he was compared to others in the business with similar years of experience would be the three years testified to by Mr. Wilson. That is the most probable explanation as to the reason for Mr. Blackman's LOS designation being changed to (10+) in 2001, three years after his recruitment and his actual length of time in the business being some 17 years by that time.

[86] I find that Mr. Blackman has failed to prove, on a balance of probabilities, that a collateral term of his employment with Midland was that his LOS designation would progress from LOS (0) to LOS (10) by only one category annually during his period of employment with that firm. To do so would be reading a term in the employment agreements which was not discussed by any of the parties, let alone agreed upon.

Issue No. 3 - If the answer to issue No. 2 was also "yes", then has Mr. Blackman proven any damages caused by his designation change from LOS (2) in 2000, to LOS (10) in 2001?

[87] Although I have answered "No" to Issue No. 2, I will deal provisionally with Issue No. 3. Mr. Blackman contends that a breach of the alleged implied term in Issue No. 2 caused him hundreds of thousands of dollars in losses. He claims his LOS (10+) designation in 2001 caused almost all of the reductions in his income from that time forward to age 65, some 15 years. Mr. Wilson testified that LOS designation was not in any way tied to compensation for investment advisers. He said that production; that is size of "book of business" which in turn results in gross commissions are the only factors impacting on an individual investment adviser's compensation. He said that LOS ranking can be used to measure an individual's success in the business, but it still does not affect compensation. This was the case the entire time that Mr. Blackman was at Midland/Merrill Lynch.

[88] Mr. Blackman testified that he was not aware that LOS designation did affect compensation until CIBC instituted a new compensation formula in June 2002. If Mr. Blackman's compensation was adversely affected when CIBC made

this change in its program in 2002, it was remedied for him by elevating his compensation level for one year. If one looks at Table 1, it is apparent that Mr. Blackman's commission income and his total income did not change significantly from 2001 to 2003. Mr. Blackman's income took a significant drop when he voluntarily resigned from CIBC in 2004 and joined Acadian. Merrill Lynch is clearly not responsible for Mr. Blackman leaving CIBC in 2004.

[89] I find that Mr. Blackman has failed to prove, on a balance of probabilities, that his change in LOS designation at Merrill Lynch in mid 2001 is the proximate cause of any decrease in his income since that time. Mr. Blackman has acknowledged that there were other factors making it difficult to succeed in the investment counselling business, such as the terrorist attacks on the U.S.A. in 2001, the technology bubble burst, the subsequent recessions, including the financial crises of 2008.

[90] In the final analysis, I am not satisfied that Mr. Blackman's 2001 change from LOS(2) to LOS(10) by Merrill Lynch caused any of the alleged losses.

[91] I will deal with issues No. 4 and No. 5 together.

Issue No. 4 - If the answer to any of issues No. 1, No. 2 or Nov. 3 is "no", then has Mr. Blackman proven a constructive dismissal when his employment was transferred from Merrill Lynch to CIBC in 2001-2002?

Issue No. 5 - If the answer to issue No. 4 was "yes", then has Mr. Blackman proven any damages?

[92] Mr. Blackman has shied away from saying he was constructively dismissed from Merrill Lynch in 2001 when that business was sold to CIBC. He has taken this position for strategic considerations in order to avoid any "notice cap" associated with such an action. Mr. Blackman had two options in November of 2001. He could refuse to transfer to CIBC and pursue Merrill Lynch for constructive dismissal, or he could transfer to CIBC to mitigate his damages, and later pursue Merrill Lynch for constructive dismissal. He chose neither, instead he opted to accept employment with CIBC and he resigned from Merrill Lynch. There were some immediate benefits to the latter course of action in that Mr. Blackman did not have to repay a balance left on his forgivable loan with Merrill Lynch and he would retain any vested stocks or stock options. He also received a forgivable loan from CIBC. Mr. Blackman was treated like all the other investment advisers at Merrill Lynch. Also Mr. Blackman retained his "book of business" when he moved to CIBC. It appears that some of the investment

advisers at one of the Merrill Lynch offices in Cape Breton did not transfer to CIBC, for reasons which were not in evidence at this trial. Nevertheless, it appears that there were options.

[93] Mr. Blackman accepted employment with CIBC and he resigned at Merrill Lynch. He continued with CIBC for some two years until he resigned, of his own accord, in June of 2004. Therefore, he was with CIBC for more than 24 months. During that time he earned total annual employment income of $102,790 and $105,541. In the circumstances, any allegation of constructive dismissal is without factual foundation.

[94] Even if one had found constructive dismissal, any reasonable period of notice required of Merrill Lynch would have been substantially less than 24 months, especially considering that Mr. Blackman's entire employment period with Midland/Merrill Lynch was approximately 48 months. Moreover, Mr. Blackman was employed at CIBC for more than 24 months after, transferring from Merrill Lynch. Considering the latter, and Mr. Blackman' employment over his 24 plus months at CIBC, Mr. Blackman could not prove any additional damages.

Assets left behind claim:

[95] Mr. Blackman has claimed damages for the "book of business" which he left behind when he voluntarily resigned from CIBC in 2004. As noted from the *King case*, supra, Mr. Blackman had no proprietary interest in the "book of business" at CIBC. He also knew that leaving CIBC for a much smaller firm such as Acadian, without the name recognition of CIBC-Wood Gundy, would result in a significant portion of his "book of business" staying with CIBC.

[96] I find that this head of damages claim advanced against Merrill Lynch has no merit in law or in fact and I would have dismissed this aspect of the claim as well.

Conclusion:

[97] Career choices are in effect personal decisions to invest time and effort in a particular endeavour in order to pursue a particular goal. Career decisions which do not work out as planned or anticipated are no more actionable than investment decisions which do not work out. There has to be an actionable wrong on the part of some person or entity.

[98] I have found that there was no actionable wrong on the part of Merrill Lynch toward Mr. Blackman. I can understand that Mr. Blackman's LOS ranking *via à vis* his peers was important to him personally, but in this case it took on "a life of its own." It appears to have significantly distracted him from pursuing his primary goal, which was to build his production, i.e., his "book of business" after leaving RBC and the increased commissions which would result from such a course of action. For personal reasons which are not entirely clear, coupled with difficult market economic factors, Mr. Blackman's production did not increase as he and others had hoped.

[99] I have found that the above-noted result was not "caused", in the legal sense, by Mr. Blackman's LOS designation either at Merrill Lynch or at CIBC. Therefore, the change in Mr. Blackman's LOS designation from LOS(2) to LOS(10) while at Merrill Lynch is not actionable in law. Mr. Blackman decided to not pursue a Production Improvement Plan as offered by CIBC, but he decided to resign instead and pursue other career opportunities. While one can sympathize with Mr. Blackman's situation, it is primarily the result of employment decisions which he made along the way.

[100] In the final analysis, I have no choice but to dismiss Mr. Blackman's claims against Merrill Lynch.

Costs:

[101] In the circumstances, I would award costs to the defendant on a party and party basis. If the parties cannot agree on this question, I will hear them in chambers at a mutually-convenient time.

Order:

[102] I will grant an Order accordingly, prepared by counsel for the defendant and consented by both parties as to form.

Boudreau, J.

SUPREME COURT OF NOVA SCOTIA
Citation: Blackman v. Merrill Lynch Canada Inc. , 2013 NSSC 87

Date: 20130308
Docket: Hfx. No. 266089
Registry: Halifax

Between:

Richard George Blackman

Plaintiff

v.

Merrill Lynch Canada Inc.

Defendant

Revised Decision:	The text of the original decision has been corrected according to the erratum below, dated March 20, 2013.
Judge:	The Honourable Justice Allan P. Boudreau
Heard:	January 7, 8, 9 and 10, 2013 in Halifax, Nova Scotia
Counsel:	Eric K. Slone, for the plaintiff Dennis James and Melissa MacAdam, for the defendant

Erratum:

Heading reads: **Counsel:** Eric K. Slone, for the plaintiff
Dennis James and Melissa Adams, for the defendant

Heading should read: **Counsel:** Eric K. Slone, for the plaintiff
Dennis James and Melissa MacAdam, for the defendant