CITATION: Ratz-Cheung v. BMO Nesbitt Burns Inc., 2024 ONSC 161
COURT FILE NO.: CV-18-00606586-0000
DATE: 20240108

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
BIRGIT RATZ-CHEUNG	)	*Mick Hassell and Daniel Hassell*, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
BMO NESBITT BURNS INC.	)	*Matthew P. Sammon, Aoife Quinn and Sam Hargreaves*, for the Defendant
	)	
Defendant	)	
	)	
	)	
	)	
	)	**HEARD:** May 15-18, 23-24 and June 19, 2023

REASONS FOR JUDGMENT

VERMETTE J.

[1] This is a wrongful dismissal action. The Plaintiff, an investment advisor, was dismissed without cause at 54 years old, after working approximately 24 years for the Defendant.

[2] The Plaintiff asks for: (a) damages for lost commissions in the amount of $374,393; (b) damages for the lost opportunity to sell her book of business in the amount of $1,118,800; and (c) bad faith conduct damages in the amount of $100,000.

[3] During the examination for discovery of the Plaintiff, the Defendant learned for the first time that she had copied thousands of e-mails onto a USB key a few months prior to her termination. The e-mails contained confidential client information. The Defendant subsequently amended its Statement of Defence to allege after-acquired cause.

[4] I find that the Plaintiff was dismissed without just cause and that she is entitled to a 24-month notice period and damages for lost commission in the amount of $240,091. While I am of the view that damages for the lost of opportunity to sell a book of business can be available in a wrongful dismissal action, I conclude that the Plaintiff has failed to prove her entitlement to such

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damages in the particular circumstances of this case. The Plaintiff has also failed to demonstrate a basis for bad faith damages.

A. FACTUAL BACKGROUND

1. The parties and witnesses

[5] The Plaintiff, Birgit Ratz-Cheung, was an investment advisor ("**IA**") at the Defendant, BMO Nesbitt Burns Inc. ("**NB**").

[6] NB is an investment firm providing wealth management services.

[7] Ms. Ratz-Cheung worked at NB from May 30, 1994 to February 20, 2018, for a total of approximately 24 years. She had no written employment contract with NB. As an IA, Ms. Ratz-Cheung did not receive any salary but was paid commissions calculated as a percentage of the gross commissions earned on assets under management of clients she serviced. Each fiscal year, NB established a compensation grid that set out the applicable percentages. An IA's percentage of gross revenue and "grid level" increased with their production.

[8] While Ms. Ratz-Cheung was working at NB, the IA industry was a male-dominated industry, with few women.

[9] At the time of her dismissal on February 20, 2018, Ms. Ratz-Cheung was 54 years old. She was 59 years old at the time of the trial.

[10] Ms. Ratz-Cheung testified at trial. In addition, she called an expert witness, Brandon Lewis, who was qualified as an expert in business valuation and damages quantification.

[11] NB called the following witnesses at trial:

a. Bruce Ferman, Chief Operating Officer of BMO Private Wealth Canada. From April 2012 to September 2017, Mr. Ferman was Vice-President of Products and Services of NB. He was actively involved in a group that designed and implemented compensation programs for IAs. He was promoted as Head of Private Client Division in September 2017. In this position, he continued to have the same responsibilities as in his prior position, but he also became accountable for additional services. He remained in that position until February 2019.

b. Faisal Hassan, IA at NB. Mr. Hassan was branch manager at Ms. Ratz-Cheung's branch at the relevant time.

c. Larry Andrade, an expert witness who was qualified as an expert in economic loss and business valuation.

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2. Pre-2015 period

[12] As an IA, Ms. Ratz-Cheung had to build her own wealth advisory business. When she started, she did cold calling, among other things. In 1998, she bought[1] the book of business of another female IA. Ms. Ratz-Cheung paid her with a personal cheque. In 2003, she bought a second book of business from another female IA.

[13] In 2012, Ms. Ratz-Cheung had performance issues because her annual revenue was insufficiently high. She also had performance issues in 2014 because she was not meeting her "grid level". NB sought to assist Ms. Ratz-Cheung through coaching by a branch manager.

3. Business Succession Agreement Program

[14] In late 2013 or early 2014, NB adopted a policy entitled "Investment Advisors Retirement Agreements" ("**BSA Program**").

[15] Mr. Ferman was involved in the creation and implementation of the BSA Program. His understanding was that before the BSA Program was formalized in 2013 or 2014, IAs would enter into arrangements with each other to sell and buy books of business, without the involvement of NB. These arrangements were never formally permitted by NB. I note that this evidence is contradicted by findings made in *Clark v. BMO Nesbitt Burns Inc.*, 2008 ONCA 663 ("***Clark***"), which is discussed in detail below. Mr. Ferman said that it was important for NB to formalize the BSA Program in order to ensure the orderly transition of clients and give more certainty to retirees.

[16] The BSA Program provides that the following two eligibility requirements must be met before an IA can enter into a retirement agreement:

a. The number of years that the retiring IA has been employed with NB added to the assets under their management must total a minimum number of 30. For example, a 15-year employee having $15 million of assets under management would be eligible.

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[1] While the expressions "buying a book of business" and "selling a book of business" were used in this case, what was being "sold" or "purchased" was the ability to service the clients who were serviced by the original owner of the "book of business".

b. The retiring IA must be in good standing with NB, i.e., NB "will determine in its sole discretion that there are no outstanding performance, compliance or regulatory issues." This eligibility criterion also states the following:

> Any IA who has been terminated, with or without cause, whether or not working notice or payment in lieu of notice termination and/or severance pay has been offered to the IA by the firm, is not eligible to enter into a retirement agreement. All agreements must be approved by BMO Nesbitt Burns, even if the eligibility criteria appear to be satisfied. BMO Nesbitt Burns has the right to determine, in its sole discretion that an Investment Advisor is not eligible to participate in a retiring agreement.

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[17] Mr. Ferman testified at trial that the purpose of the "good standing" requirement was to ensure that clients would be successfully transitioned to a new IA. According to Mr. Ferman, having well-served clients would facilitate a successful transition and avoid complaints and financial problems "down the road". Mr. Ferman also stated that, based on his experience, terminated employees were entitled to severance, but they were not entitled to both severance and a retirement agreement. He said that he was not aware of any exceptions to this "rule". Again, the evidence that employees could not receive both severance and a retirement agreement is contradicted by findings made in *Clark*.

[18] The BSA Program identifies two types of retirement agreements. The only one that is relevant for the purpose of this case is the Business Succession Agreement ("**BSA**"). A BSA is made up of two different agreements: (1) an agreement between the retiring IA and NB; and (2) an agreement between the acquiring IA and NB. The agreement between the retiring IA and NB is described as follows in the BSA Program:

> This agreement requires John [the retiring IA] to assist with and to provide support in the transfer of the responsibility for client accounts to Jane [the acquiring IA]. This deal works for John because, under this agreement, the retiree is not involved in the business following the date of retirement. Under this option, if John chooses to he may also seek employment outside of the industry after his resignation from BMO Nesbitt Burns. The payments made to John consist of two portions: the first is a Loyalty Bonus paid as a lump sum at the end of the first month of retirement; this bonus is considered a retirement allowance. The second is an ongoing stream of revenue paid monthly for a period of 36 months, the payment of which is conditional upon John's ongoing compliance with the terms of his agreement with the firm. This revenue stream is taxed as employment income. John will be required to comply with all of the firm's Pro Account Policies until the date of his retirement.

[19] The agreement between the acquiring IA and NB is described as follows:

> This agreement recognizes that Jane [the acquiring IA] has been selected by the firm as the Investment Advisor who will provide services to and be responsible for the client accounts previously serviced by John [the retiring IA]. Jane agrees to enter into a 6 year revenue sharing agreement between herself and the firm. In doing so, Jane will be given the benefit of being assigned the responsibility for these client accounts at BMO Nesbitt Burns.

[20] The BSA Program brochure ends with a section entitled "Approval Process". This section provides, in part:

> Once the Investment Advisors have met with their Branch Manager(s) and have agreed on which Agreement is appropriate for their situation, they will need to follow the process below to have their agreement approved:
>
> 1. Investment Advisors must complete one of the Forms (for Business Succession Agreement or Retiring IA Pooling Agreement) outlining the option they would like to enter into. […]
>
> 2. PCD Management must review and approve the Form on the basis that the Agreement is reasonable in the circumstances, that the sharing of responsibilities and the commission split are commercially reasonable and that the commission split reflects the relative contribution of each IA to the generation of the total pooling commissions.
>
> 3. Once approved, PCD Management will forward the Form to Dentons Canada LLP […] who will complete the Agreement.
>
> […]

4. 2015 BSA

[21] In 2015, Ms. Ratz-Cheung bought the book of business of Judith Sheldon, another IA at NB. Ms. Sheldon had more than $118 million in assets under management. Ms. Sheldon's commissions were mostly transaction-based. Ms. Ratz-Cheung saw the purchase of Ms. Sheldon's book of business as an opportunity to convert it to fee-based commissions, which could be significantly higher than transaction-based commissions.

[22] The purchase of Ms. Sheldon's book of business was made pursuant to the BSA Program. Ms. Ratz-Cheung's evidence is that she reviewed the BSA Program many times before she entered into a BSA with NB regarding Ms. Sheldon's book of business.

[23] On August 21, 2015, Ms. Sheldon and Ms. Ratz-Cheung completed and signed a one-page form entitled "Business Succession Agreement (BSA)". The form was also signed by Ms. Ratz-Cheung's branch manager, Faisal Hassan, on August 25, 2015 and by the regional manager on

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August 31, 2015. The form indicated that the book of business was valued at $401,513.44 and that Ms. Sheldon would receive monthly payments of $9,000.33 over a 36-month period.

[24] On October 5, 2015, Ms. Ratz-Cheung and NB entered into a BSA in relation to Ms. Sheldon's book of business ("**2015 BSA**"). The 2015 BSA reads, in part:

> RECITALS
>
> A. The Company [i.e., NB] wishes to ensure the proper management of, and service to, the client accounts of the Company set out in Schedule "A" attached hereto;
>
> B. The Assuming Investment Advisor [i.e., Ms. Ratz-Cheung], as defined below (the "**Assuming IA**"), wishes to acknowledge the benefit of being assigned the responsibility for certain client accounts of the Company that were previously assigned by the Company to another investment advisor, and has agreed to the commission structure on the Client Accounts (as defined below) as set out in Schedule "B" attached hereto in consideration therefor;
>
> C. The Assuming IA wishes to acknowledge that the Company may, as provided herein, reassign the responsibility for some or all of the client accounts of the Company that were previously serviced by another investment advisor to one or more investment advisors employed by the Company; and
>
> D. The Assuming IA also wishes to acknowledge that at all times, whether prior to entering into, during or following the termination of, this Agreement, all client accounts, including, without limitation, the Client Accounts, and records and information with respect to clients serviced by the Assuming IA are and shall remain the exclusive property of the Company;
>
> THEREFORE the Assuming IA and the Company have agreed to the following:
>
> […]
>
> **2. Term and Termination of Agreement**
>
> 2.1 This Agreement and the arrangement contemplated herein shall be effective as of its date of execution and will expire once the Commissions set out in Schedule "B" attached hereto have been paid (the "**Term**"), subject to its early termination pursuant to section 2.2 or 2.3 and to the survival of certain terms and conditions pursuant to section 7.6.

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2.2 This Agreement and the arrangement contemplated herein shall be immediately terminated upon the mutual agreement of the Parties.

2.3 This Agreement and the arrangement contemplated herein shall be immediately terminated, and the Company has the right to reassign all of the Client Accounts to one or more investment advisors employed by the Company, in any of the following circumstances:

(a) if the Assuming IA fails to satisfy her obligations under this Agreement;

(b) upon the Assuming IA commencing a leave of absence for any reason in excess of sixty (60) days;

(c) upon the Assuming IA ceasing to be an employee of the Company for any reason, including death;

[…]

(f) upon the provision of written notice to the Assuming IA where, in the opinion of the Company, the Assuming IA has failed to satisfy asset or Commission targets, client service and/or other performance measures required by the Company with respect to one or more Client Accounts and the Assuming IA has failed to cure such performance deficiency after being provided with a reasonable opportunity to do so, where at the sole discretion of the Company the performance deficiency is deemed curable; or

(g) upon the provision of written notice to the Assuming IA by the Company, if the last Client Account is reassigned by the Company to another investment advisor of the Company pursuant to section 2.4.

2.4 The Company may, upon the provision of written notice to the Assuming IA, reassign the Assuming IA's responsibility for one or more of the Client Accounts to one or more investment advisors employed by the Company at the request of a client, with respect to such client's Client Account and upon reassignment, such account shall cease to be a Client Account and will be deemed to have been removed from Schedule "A".

3. Consequences of Termination and Reassignment

3.1 Upon the expiration of this Agreement, or early termination pursuant to section 2.2, the Assuming IA will continue to be responsible for the Client Accounts, unless otherwise agreed by the Parties to this Agreement. The

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Assuming IA will be entitled to the Gross Payout in respect of such Client Accounts in accordance with the Company's practice in force at that time, or in accordance with an employment agreement as may be applicable.

3.2 Upon the termination of this Agreement pursuant to section 2.3, the Company, in its sole discretion, may reassign the Client Accounts. For greater certainty, if this Agreement is terminated pursuant to section 2.3. the Assuming IA shall be discharged of all of her obligations hereunder, subject to the survival of certain terms and conditions set out in section 7.6. and shall not be entitled to any rights hereunder, including to any payments pursuant to this Agreement, except for any monies due and owing to the Assuming IA as of the date of the termination, and the Company is relieved of any further obligations to the Assuming IA under this Agreement.

[…]

4. Payment Terms

4.1 The Company agrees to assign to the Assuming IA, subject to sections 2.3 and 2.4, the Client Accounts and in consideration therefore the Assuming IA agrees to accept the commission payments as set out in Schedule "B" attached hereto.

[…]

5. Representations, Warranties and Covenants of the Assuming IA

5.1 The Assuming IA represents, warrants and agrees that:

(a) the Assuming IA's decision to enter into this Agreement is voluntary having been offered the opportunity to seek independent legal advice and any other advice and having done so or declined to do so of the Assuming IA's own volition;

[…]

(c) while the Assuming IA remains an employee of the Company, all of the employment terms and obligations applicable to the Assuming IA remain in full force and effect, except as expressly modified by this Agreement;

(d) the Company may, at any time, reassign the responsibility for some or all of the Client Accounts to one or more investment advisors pursuant to section 2.3 or 2.4 during the Term of this Agreement, or at any time thereafter in accordance with the Company's practice in

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force at that time or in accordance with an employment. agreement as may be applicable;

(e) throughout the Term of this Agreement, the Assuming IA shall not seek, obtain or commence employment with any other person, company or entity to provide or offer investment services (which includes, without limitation, providing investment or financial advice regarding any investment product or security or the selling. trading or otherwise dealing in any investment product or security);

(f) at all times, whether prior to entering into, during or following the termination of, this Agreement, all client accounts, including, without limitation, the Client Accounts, and records and information with respect to clients serviced by the Assuming IA are and shall remain the exclusive property of the Company;

(g) upon the request of the Company, the Assuming IA shall return all of the Company's property to the Company including, but not limited to, all records, account statements, account documentation and other information relating to the client accounts that have been or are presently serviced by the Assuming IA, including, without limitation, the Client Accounts, whether recorded on paper, electronically or otherwise, and shall not retain copies of same in any format whatsoever;

[…]

(k) the Assuming IA shall disclose to the clients of the Company the accounts of whom are included in the Client Accounts, in the form and manner directed by the Branch Manager, that the responsibility for such Client Accounts has been transferred to the Assuming IA.

6. Protection of Client Interests and Privacy

6.1 In consideration for the payments described in this Agreement, and other good and valuable consideration, the sufficiency of which is acknowledged, the Assuming IA agrees as follows:

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(a) the Assuming IA expressly agrees that she will not, at any time during the Restricted Period,[2] directly or indirectly, by any means, in any capacity or in any manner, approach, solicit, contact, attempt to direct away from the Company, any clients of the Client Accounts, or any other clients or prospective clients of the Company for which the Assuming IA was responsible or that the Assuming IA approached, solicited or contacted on behalf of the Company in the twelve (12) months prior to the date that her employment with the Company terminates for any reason, located anywhere in the Province of Ontario, in order to provide or offer investment services (which includes, without limitation, providing investment or financial advice regarding any investment product or security or the selling, trading or otherwise dealing in any investment product or security) on behalf of any person or entity other than the Company:

[…]

6.3 For greater certainty, the Assuming IA acknowledges that her obligations contained in this section 6 will survive the termination of this Agreement and will continue in full force and effect without limitation of time, other than as provided herein.

[…]

7.6 Survival of Certain Terms and Conditions

The terms of the Agreement set out in sections 3, 4.2, 5.1, 6 and 7.1 shall survive and extend beyond the termination of this Agreement.

[…]

[25] Schedule "B" to the 2015 BSA, entitled "Commission Structure", reads, in part:

Each of the Company and Assuming IA agrees that as of the date that this Agreement is entered into, the value of the assets in the Client Accounts is equal to approximately $120,000,000.00 and the average gross annual production generated

[2] "Restricted Period" means "at any time during the Assuming IA's employment with the Company and for the period of twelve (12) months following the resignation or termination of the Assuming IA's employment from the Company, irrespective of how such resignation or termination is caused."

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by the Client Accounts over the past three years is equal to approximately $493,020.00.

The Assuming IA acknowledges that the Client Accounts are existing clients of the Company and that the Assuming IA had no involvement in the development or building of the Client Accounts. In consideration of being assigned the responsibility to service the Client Accounts, the Assuming IA agrees that commencing on November 1, 2015 and ending on October 31, 2021, the Company shall compute and pay gross commission with respect to the Client Accounts, on a monthly basis according to Schedule 1 below (the "**Commission Split**").

Schedule 1

Period	Percentage of Gross Payout Payable to Company	Percentage of Gross Payout Payable to Assuming IA
Months 1-12 (Year 1)	**75%**	**25%**
Months 13-24 (Year 2)	**75%**	**25%**
Months 25-36 (Year 3)	**65%**	**35%**
Months 37-48 (Year 4)	**65%**	**35%**
Months 49-60 (Year 5)	**55%**	**45%**
Months 61-72 (Year 6)	**40%**	**60%**

The Company agrees that all of the gross commissions in respect of the Client Accounts will be allocated to the Assuming IA prior to determining her grid level placement.

The above payments will be made to the Assuming IA net of any deductions required by law or pursuant to any agreement between the Assuming IA and the Company (*e.g.*, marketing costs, sales assistant and marketing assistant costs, etc.), including pursuant to section 4.2 of this Agreement.

[…]

The Assuming IA specifically acknowledges and agrees that the Commission Split detailed above continue notwithstanding the fact that some or all of the Client

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Accounts may choose not to remain with the Assuming IA or may be reassigned by the Company pursuant to section 2.4.

[26] Ms. Sheldon also entered into a BSA with NB on October 14, 2015 ("**Sheldon BSA**"). The Sheldon BSA provides, in part:

> A. The Retiring Investment Advisor [i.e., Ms. Sheldon], as defined below (the "**RIA**"), will retire from her employment with the Company [i.e., NB] and from the investment industry, effective on November 2. 2015;
>
> B. The Company wishes to ensure the proper management of, and service to, the client accounts of the Company that are presently serviced by the RIA, and wishes to provide a high level of service without interruption to such clients after the Retirement of the RIA;
>
> C. The RIA also wishes to acknowledge that at all times, whether prior to entering into, during or following the termination of, this Agreement, all client accounts, including, without limitation, the Client Accounts (as defined below) and records and information with respect to clients serviced by the RIA are and shall remain the exclusive property of the Company; and
>
> D. The RIA agrees to provide support to the Company by transferring the responsibility for such client accounts to one or more investment advisors employed by the Company and by assisting with the retention of such client accounts by the Company for a period of thirty-six (36) months following her Retirement;
>
> THEREFORE the RIA and the Company have agreed to the following:
>
> […]
>
> 2.1 This Agreement and the arrangement contemplated herein shall be effective as of its date of execution and will expire once the payments set out in Schedule "B" hereto have been paid (the "**Term**"), subject to its early termination pursuant to section 2.3 and to the survival of certain terms and conditions pursuant to section 7.6.
>
> 2.2 The RIA hereby irrevocably resigns from employment with the Company, the Company hereby irrevocably accepts such resignation, and such resignation is effective on the earlier of: […].
>
> […]
>
> 3.4 Upon the expiration or early termination of this Agreement, for greater certainty, the RIA agrees that she is not entitled to any termination or

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severance payments pursuant to this Agreement or at common law. To the extent that the RIA has any entitlements under applicable provincial employment standards legislation, the Company agrees that it shall comply with only those obligations, and the RIA agrees to accept such amounts in full and final satisfaction of any termination or severance obligations owing to her by the Company.

4. Payment Terms

4.1 Subject to section 4.2 of this Agreement, Schedule "B" attached hereto sets out the only payments to be made by the Company to the RIA following the Retirement of the RIA. No other salary, Commission, bonus or other payments will be made by the Company to the RIA following the Retirement of the RIA. For greater certainty, this Agreement shall not affect any right, obligation or entitlement that the RIA has under the terms of any existing agreement between the RIA and the Company with respect to the Deferred Stock Unit Plan, the Restricted Share Unit Plan or the Employee Share Ownership Plan.

[…]

5. Representations, Warranties and Covenants of the Retiring Investment Advisor

5.1 The RIA represents, warrants and agrees that:

[…]

(d) throughout the Term of this Agreement, the RIA shall not seek, obtain or commence employment with any other person, company or entity to provide or offer investment services (which includes, without limitation, providing investment or financial advice regarding any investment product or security or the selling, trading or otherwise dealing in any investment product or security);

[…]

(g) the RIA has not and shall not take any action detrimental to the Company or the client accounts of the Company, including, without limitation, the Client Accounts;

(h) the RIA shall assist with and provide support in the transfer of the responsibility of the Client Accounts to one or more investment

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advisors employed by the Company and continue to use her best efforts to preserve the Company's relationship with its clients, and to promote to such clients the investment advisor(s) who will have the exclusive responsibility for handling the Client Accounts following the RIA's Retirement;

[…]

(k) the RIA shall disclose to the clients of the Company the accounts of whom are included in the Client Accounts, in the form and manner directed by the Branch Manager, that the responsibility for such Client Accounts has been transferred to one or more investment advisor(s) employed by the Company;

(l) the RIA's decision to retire from the Company and the investment industry is voluntary; and

(m) if the RIA has not turned 55 years of age either on or before her Retirement Date under this Agreement, the RIA shall not be eligible for any retirement benefits in accordance with the Company's policies and she hereby waives any and all claims that she has, or may have, with respect to such retirement benefits.

6. Protection of Client Interests and Privacy

6.1 In consideration for the payments described in Schedule "B" to this Agreement, and other good and valuable consideration, the sufficiency of which is acknowledged, the RIA agrees as follows:

(a) the RIA expressly agrees that she will not, at any time during the RIA's employment with the Company or during the Restricted Period,[3] directly or indirectly, by any means, in any capacity or in any manner, approach, solicit, contact, attempt to direct away from the Company, any clients of the Client Accounts, or any other clients of the Company that the RIA serviced in the twelve (12) months prior to the RIA's Retirement Date or the date that her employment

[3] "Restricted Period" means "the date commencing on the date that this Agreement is executed, and ending on the later of: (i) twelve (12) months after the resignation or termination of the RIA's employment, irrespective of how such resignation or termination is caused, (ii) six (6) months after the date that this Agreement is otherwise terminated pursuant to section 2.3, and (iii) the expiry of the Term of this Agreement."

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with the Company otherwise terminates for any reason, or any prospective clients that the RIA approached, solicited or contacted in the twelve (12) months prior to the RIA's Retirement Date or the date that her employment with the Company otherwise terminates for any reason, located anywhere in the Province of Ontario, in order to provide or offer investment services (which includes, without limitation, providing investment or financial advice regarding any investment product or security or the selling, trading or otherwise dealing in any investment product or security) on behalf of any person or entity other than the Company;

[…]

6.3 The RIA acknowledges that the Company has a legitimate business interest in protecting its client relationships, and that the ongoing obligations contained in this section 6 are reasonable and necessary to protect that interest, because the RIA has close relationships with the clients of the Company and, in particular, with the Client Accounts. The RIA further acknowledges that the obligations contained in this section 6 are significant and fundamental terms of this Agreement, and that the Company would not have agreed to enter into this Agreement, or to provide the RIA with the continued payments outlined in Schedule "B" to this Agreement in the absence of the RIA's agreement to abide by, and strictly comply with, each of these obligations during the Restricted Period. The RIA agrees that he/she is receiving significant consideration under this Agreement in exchange for his/her continued compliance with these obligations over the entire Term and that, in the event of any actual or threatened breach of these obligations by the RIA. the payments outlined in Schedule "B" to this Agreement shall immediately cease.

[…]

7.6 Survival of Certain Terms and Conditions

The terms of the Agreement set out in sections 3, 4, 5.1, 6 and 7.1 shall survive the expiry or termination of this Agreement, irrespective of how such termination is caused.

[27] Schedule "B" to the Sheldon BSA sets out payment terms. It provides that NB shall pay Ms. Sheldon the total sum of $401,513.44, to be paid as follows:

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a. a one-time lump sum payment of $77,501.72 as a Loyalty Retirement Allowance, which payment was to be made by NB to Ms. Sheldon by no later than thirty (30) calendar days following Ms. Sheldon's retirement date; and

b. NB was also to pay Ms. Sheldon the total additional sum of $324,011.72 as consideration for her "continued and ongoing compliance with the restrictive covenants contained in Section 6" of the Sheldon BSA during the 36-month period immediately following November 2, 2015, payable in thirty-six (36) monthly instalments in the amount of $9,000.33 (except for the last payment which was in the amount of $9,000.17).

5. BSA early termination policy

[28] At the end of July 2017, NB introduced a BSA early termination opportunity for IAs who acquire, or had acquired, a book of business. Mr. Ferman was involved in this initiative. A document entitled "Business Succession Agreements (BSAs) – Early Termination Q&A" was circulated to branch managers and assistant branch managers at that time ("**BSA Early Termination Policy**").

[29] The BSA Early Termination Policy stated that there were two hurdles for a BSA to qualify for early termination:

a. The BSA must be outstanding for at least 36 months (due to tax considerations on asset write-downs under 36 months); and

b. NB must recover the greater of 1.25x the Retiring IA's book valuation (cash flows are discounted at BMO's weighted average cost of capital – currently 9.29%) or there must be a valuation floor of at least 1x the Retiring IA's production (average of the last 3 years).

[30] The BSA Early Termination Policy also included the following information:

6. How does the Acquiring IA know when they become eligible for early forgiveness?

Individual BSA reports will be produced on a quarterly basis and will reflect the Acquiring IA's progress against the eligibility requirements. These reports will be available to Branch Managers to share with the advisors. If/when the Acquiring IA meets the eligibility requirements the firm will – at management's approval –

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provide a termination letter to the Acquiring IA where both the firm and the acquiring IA would mutually agree to terminate the agreement.

7. What happens to the revenue split?

Once terminated, there will no longer be a revenue split between the firm and acquiring IA. The Acquiring IA's share would then be 100%. If, at the time of termination, the acquiring IA had exceeded the higher hurdle by $X amount, the firm will repay the $X amount to the Acquiring IA.

[31] Even though the BSA Early Termination Policy was adopted and sent to branch managers prior to Ms. Ratz-Cheung's termination, Ms. Ratz-Cheung was never shown the BSA Early Termination Policy or any of the quarterly individual BSA reports that the branch managers were supposed to share with acquiring IAs. However, she was generally aware that a BSA early termination opportunity was being discussed and contemplated.

6. 2017 issues

[32] 2017 was a difficult year for Ms. Ratz-Cheung. During that year, her father got sick and passed away; her husband's father had cancer and also passed away; and her husband had cancer. In addition, she had issues with her assistant at work, and she had to spend a lot of time and efforts on her new book of business.

[33] A report for the month of February 2017 shows that Ms. Ratz-Cheung lost $4.8 million in assets during that month. Her explanation was that she was still in the process of "cleaning out" Ms. Sheldon's book of business. At trial, NB asked Ms. Ratz-Cheung a number of questions about issues that she had with some clients in 2017 and clients who transferred their assets to another IA. However, no witness with direct knowledge of the events was called by NB. The only person who had direct knowledge was Ms. Ratz-Cheung.

[34] As of December 2017, Ms. Ratz-Cheung had approximately $150 million in assets under management.

[35] Starting in May 2017, Ms. Ratz-Cheung started having issues with her assistant at the time, Salome Jeraj. Ms. Ratz-Cheung was not satisfied with Ms. Jeraj's performance. In turn, Ms. Jeraj raised a number of issues with respect to the manner in which Ms. Ratz-Cheung was interacting with her. Ms. Ratz-Cheung had a meeting with her two branch managers, Brad Fox and Mr. Hassan, in May 2017 regarding the issues raised by Ms. Jeraj. However, Messrs. Fox and Hassan told Ms. Ratz-Cheung that they "refuse[d] to spend time dealing with HR issues".

[36] In October 2017, Ms. Ratz-Cheung had conversations with Shirley Tiong, the Branch Operations Manager, and another employee during which she complained about Ms. Jeraj's performance and mistakes she had made. During these conversations, Ms. Ratz-Cheung was very upset and frustrated with her situation. She swore (but not at the persons she was speaking to) and used negative language regarding her assistant. Shortly after this, Mr. Fox instructed Ms. Ratz-

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Cheung to communicate with Ms. Jeraj by e-mail only and to copy him on all e-mails to Ms. Jeraj with respect to client issues.

[37] The record before me contains e-mails that Ms. Ratz-Cheung sent to Ms. Jeraj later in the fall of 2007 that were copied to Mr. Fox. There is no evidence before me that Mr. Fox ever replied to Ms. Ratz-Cheung regarding these e-mails to tell her that any specific e-mail was inappropriate.

[38] At around the same time, i.e., in October 2017, NB also raised with Ms. Ratz-Cheung issues that NB said there were in 2016 between Ms. Ratz-Cheung and her prior assistant, Noah Marks. However, these issues were raised long after Mr. Marks left NB. There is no evidence before me that anyone at NB raised concerns with Ms. Ratz-Cheung with respect to her interactions with Mr. Marks at the relevant time, i.e., when he was working at NB or even shortly after his departure. It appears that there were real performance issues with Mr. Marks and that the IAs who were working with him were asked to send e-mails to Ms. Tiong with details when they were experiencing issues with him.

[39] Mr. Hassan gave evidence at trial that he had limited involvement with Noah Marks and he did not recall the management issues related to him. While Mr. Hassan was involved in dealing with the issues between Ms. Jeraj and Ms. Ratz-Cheung, he admitted that he was not aware of any issues with respect to Ms. Ratz-Cheung's work relationship with the assistant who was assigned to her after Ms. Jeraj.

7. Copying of e-mails by Ms. Ratz-Cheung

[40] In the fall of 2017, Ms. Ratz-Cheung accessed her NB Outlook e-mail account from home and asked her husband to copy the e-mails contained in three folders on a USB key. One folder contained e-mails between Ms. Ratz-Cheung and Mr. Marks regarding tasks that were assigned, one folder contained e-mails between Ms. Ratz-Cheung and Ms. Jeraj regarding tasks that were assigned, and the third folder contained e-mails between Ms. Ratz-Cheung and Ms. Tiong regarding assistant issues. Ms. Ratz-Cheung had created these folders in Outlook at work and was filing e-mails in these folders as they were sent and received. After the e-mails were copied, she kept the USB key in her home office. She did this as she felt that NB, and Mr. Fox in particular, were not treating her fairly with respect to the issues that she was having with her assistants, and she wanted to protect herself.

[41] More than 4,000 e-mails and documents attached to e-mails were copied. The e-mails included e-mails from clients that Ms. Ratz-Cheung had forwarded to her assistants. Some of the e-mails and their attachments contained personal information of clients such as social insurance number, date of birth, description of assets, investment objectives, driver's licence, etc. Some e-mails included communications with clients about particular trades.

[42] Until her examination for discovery in this action, Ms. Ratz-Cheung had never told anyone at NB that she had copied these e-mails. During her examination for discovery held on November 26, 20219, NB became aware that Ms. Ratz-Cheung had the USB key at home. Ms. Ratz-Cheung

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returned the USB key to NB in January 2020. NB amended its Statement of Defence on June 16, 2022 to allege after-acquired cause.

8. Code of Conduct

[43] BMO Financial Group has a Code of Conduct ("**Code of Conduct**") which applies to all BMO employees worldwide, including NB employees. Employees have to review the Code of Conduct every year and sign an acknowledgement.

[44] The Code of Conduct sets out five principles:

a. Be honest and respectful.

b. Be alert to behaviour contrary to the Code.

c. Be true to the letter and spirit of the law.

d. Be conscientious about security.

e. Manage conflicts of interest.

[45] The section of the Code of Conduct on Principle 4 ("Be conscientious about security") states, in part:

> Keep non-public information confidential – including non-public information about BMO's customers, suppliers and employees. Protect BMO's systems and other assets from improper use.
>
> **Protect confidential information**
>
> Protect the confidential information of BMO's customers, suppliers and fellow employees (past, present and prospective). Confidential information means all information that isn't public. Comply with all laws and regulations that restrict using, disclosing, keeping, and allowing access to confidential information.
>
> […]
>
> **Using and disclosing customer and employee information**
>
> Use and disclose this information only for the specific purpose for which it was given or collected. Unless BMO already has an individual's consent or the law requires disclosure, always get consent before disclosing an individual's information. Always follow BMO policy on using or disclosing customer or employee personal information.
>
> **Accessing customer and employee information**

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> Access customer and employee information in BMO systems or other media only for legitimate business purposes. Keep customer and employee information strictly confidential and use or disclose it only under the terms of BMO's policies and procedures.
>
> […]
>
> **Ensuring information security**
>
> Be alert to external security threats to BMO information and information entrusted to us. Don't put this information at risk. Maintain information security in our workplace and when working off-site. When using the web, browse safely to protect yourself and BMO against criminals seeking to breach our security. Use email encryption to keep confidential and highly sensitive information secure (i.e., add [PROTECT] to the subject line) and retain and dispose of information in the correct manner. Follow BMO policy on safeguarding information.

[46] The Code of Conduct states the following with respect to consequences for breaching the Code:

> **Not following the Code has serious consequences**
>
> Violating the Code damages our reputation, exposes business to serious risks, and can lead to legal action. Each one of us will be held accountable if we participate in any violation of the Code. Anyone who violates the Code will face corrective measures, ranging from counselling to termination of employment and legal action. These consequences also apply to anyone who:
>
> - retaliates against someone who reports a concern under the Code.
>
> - fails to cooperate with an investigation under the Code.
>
> **All of us must report actual and suspected breaches of the Code**
>
> We must speak up about actual and suspected breaches of the Code by reporting them to management or the department responsible for the matter. Principle 2 in this document or the Code of Conduct website explains how to report such concerns.

9. December 2017 letters between Mr. Fox and Ms. Ratz-Cheung

[47] On December 1, 2017, Mr. Fox sent the following letter to Ms. Ratz-Cheung ("**December 1, 2017 Letter**"):

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Further to our conversation(s) on November 22 2017, the purpose of this letter is to reiterate my concern regarding your ongoing performance within our team.

Please note the following is intended to provide you with relevant information to assist you in addressing the performance concerns and to support you in this process as much as possible. If there are issues which I am not aware of which may be impacting your performance I would ask you to make me aware of these at your earliest convenience in order that I may be able to provide or direct you to the appropriate assistance you may require.

Documented below are the continuing concerns that I have with your work effort.

Unprofessional behaviour

We have observed the following unprofessional and inappropriate behaviours:

- Yelling and swearing in the branch
- Rude tone when speaking to your support staff
- Rude and inappropriate emails
- Inappropriate conduct such as throwing papers at colleagues
- Entering a colleague's desk without their permission

Corrective action required

Birgit, you are responsible for exhibiting the professionalism that our clients and colleagues expect of the Uptown branch and of BMO Nesbitt Bums Inc. Your emails should be courteous, respectful and productive. I suggest that you consider the impact of your tone and language on others. You are required to use appropriate language and exercise "email etiquette". Avoid the expression of extreme emotion or opinion in an email message. If a message generates strong emotion, read it again and reassess the message. If you have concerns with a colleague's conduct or performance, you need to address those matters by going through the appropriate channels.

Inappropriate use of sales assistants

Birgit, we have observed that the volume of work you give to your shared sales assistant is inappropriate. The amount of work you assigned to Salome would be equivalent to the work level of two full time Sales Assistants. This is not fair to the Sales Assistant or the Investment Advisor you share her with.

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Corrective Action Required

We discussed that your Sales Assistant will no longer complete Globe Investor reports and that should you continue to leverage this application, you will complete these reports yourself. You should also be mindful of the volume and type of work you assign to your support.

Unprofessional and inappropriate use of office space

On more than one occasion we have expressed concern with the general untidiness of your office. There is a risk to the branch present when hardcopy information is stored in piles, as it becomes very difficult to determine if any information has gone missing.

Corrective Action Required

All paper files should be locked away or disposed of in secure shredding bins. You are required to review BMO's Code of Conduct and confirm your acknowledgement by December 5 2017. Specifically, please review Principle 4: Be conscientious about Security. This principle outlines your responsibility to keep company and client information safe at all times.

Your performance will continue to be monitored and I expect a significant improvement in respect of the corrective action discussed above. I must advise you that any further problems related to unprofessional behaviour will result in appropriate measures, up to and including termination, depending on the severity of the incident. To this end, if you have any questions, concerns or are not in complete understanding of the contents of this letter, please raise these immediately in order that we can move forward in a positive manner.

[48] Ms. Ratz-Cheung sent a response on December 14, 2017 ("**December 14, 2017 Letter**"):

I have had an opportunity to consider your letter of Friday, December 1, 2017. As this is the first time I have received a "corrective action" letter like this, I wish to respond in follow up to the issues raised in the letter in order that we can move forward in a positive manner. My concern with the Letter is that the allegations make me out to be someone I am not. I am always a person who will take direction and am willing to own up if I do something wrong.

At the outset, although I have experienced difficult family circumstances recently, with various family illnesses, the death of my father, my father in law and husband's cancer, my busy practice (having acquired a book of business) and

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performance issues with Salome, have caused me great deal of stress over the past year.

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Unprofessional behaviour

There is only one instance where I lost my composure in a private, closed door, meeting with Shirley on Wed Oct 11/17. I raised my voice, swore and cried since I was worried about my liability and frustrated with Salome's performance, in particular about mistakes made with one client, whose 500k remained uninvested after 3 months, as the market was going up, because of incorrect forms, despite my repeated efforts to work with Salome to ensure proper completion of the paperwork. I am sorry about my blow up and will make sure this never happens again.

I assume the behaviour complaints concerning my interaction with colleagues referenced in the Letter refer to Salome. With all due respect I believe that I have been professional, courteous, patient, and respectful in my interactions with her. However, I will continue to be more aware of my tone when speaking with my assistant. I believe my emails are respectful and courteous. I have asked for examples of rude comments but have not been provided with same. I will use the suggestions you make in the letter. I have never thrown papers at anyone. This Letter is the first time that I have heard about this. On entering a colleague's desk, as with all of my other assistants, I may occasionally need to access a client file from their desk if they are not there. I tried to let Salome know right away so she wouldn't be looking for it.

Corrective action

On email exchange, in which it is, at the best of times often difficult to ascertain tone, I will pay greater attention to the format of my emails to assistants. I have received conflicting advice from you on salutations but moving forward I will include same.

The letter says that if I have concerns about a colleagues conduct or performance, that I should use the appropriate channels to address performance matters. As you recall at our November 22nd meeting, I brought some of Salome's paperwork to the meeting to provide examples of problems I was experiencing with her work. I was hoping we could discuss a strategy whereby Salome could be coached in a manner that was helpful however I was not given the opportunity to present them. When I have approached you and Shirley with performance management suggestions or proposed we meet together with the assistant, I was told that no other brokers have an issue, although I heard they were experiencing the same problems. This left me feeling like I have nowhere to turn. In any event, moving forward I

don’t expect there to be any further difficulties as you have assigned me a new assistant, for which I am thankful.

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Inappropriate use of sales assistants

I, along with the other brokers, have very busy practices. I have heard no complaints from John on sharing Salome. You had previously told me that Salome had not complained about too much work, so I was surprised to see that in the Letter. I would suggest that when an assistant is learning it will take them longer to do tasks and when many mistakes are made it would double the amount of time they are working. I am assigning the same type of work that any broker with a $150 million book would assign to maintain good client service.

With regard to Globe Advisor reports, several brokers use the format as it is more client friendly. Globe Advisor is an easy way to show a client the portfolio performance of their individual positions which they really appreciate. The Globe Advisor report is easy to create and not time consuming to do for anyone who is reasonably computer literate.

Corrective action

I’d like to continue using the Globe Advisor report and I am hoping my new assistant Shakira will eventually be able to complete these reports, as previous assistants did with no problems. In the meantime, I will prepare the Globe Advisor.

Unprofessional and inappropriate use of office space

Having worked in this business for over 24 years, I am aware of the privacy and security concerns outlined in BMO Nesbitt Burn’s code of conduct regarding BMO Nesbitt Burn’s clients, which I have reviewed again.

Corrective action

My office is orderly but I will put away my files at the end of the day.

Moving forward, I think it would be helpful to discuss a mechanism whereby performance issues regarding assistants can be resolved. I have looked at the videos in the sales assistant manual and will follow those guidelines on how to have difficult conversations. I am hoping that my work, with Shakira, as with most of my previous assistants, will be good.

10. Termination on February 20, 2018

[49] On February 20, 2018, Ms. Ratz-Cheung was asked to meet with Mr. Fox prior to a client meeting that she had scheduled. When she arrived at the meeting, a human resources representative was also there. Mr. Fox gave Ms. Ratz-Cheung a termination letter which read as follows:

> This letter will confirm our discussion of today when you were advised that your position of Investment Advisor has been eliminated effective today as a result of restructuring. BMO NBI will provide you with a severance package to assist you in your career transition. Details of your severance package are outlined in the attached documents.
>
> Please indicate your acceptance of these terms by signing the Minutes of Agreement and Release on the enclosed copy of this letter and return it to me no later than ten business days from receipt of this letter.
>
> You may contact […] in Employee Relations at […] with any questions regarding your severance package.
>
> I would like to remind you that our Employee Assistance Program (EAP) is available for your use 24/7 for counseling and support. It is confidential, and at no cost to you. […]

[50] Later that day, an e-mail was sent to all the employees in Ms. Ratz-Cheung's branch informing them that "[e]ffective immediately, Birgit Ratz Cheung is no longer with BMO Nesbitt Burns."

[51] Letters dated February 20, 2018 were sent to Ms. Ratz-Cheung's clients. The letters informed the clients that Ms. Ratz-Cheung was no longer with NB and that Lianne Di Rocco had been selected as their new IA. Ms. Di Rocco joined the branch where Ms. Ratz-Cheung used to work after Ms. Ratz-Cheung's departure, and she took over Ms. Ratz-Cheung's clients. During its examination for discovery, NB refused to answer questions regarding Ms. Di Rocco, including whether NB entered into an agreement with Ms. Di Rocco with respect to taking over service of Ms. Ratz-Cheung's clients and whether Ms. Di Rocco paid anything for assuming Ms. Ratz-Cheung's client relationships.

[52] Ms. Ratz-Cheung was understandably upset as a result of being terminated. She was devastated that her client relationships were gone overnight and she was concerned about looking "guilty" in front of clients for no reason.

[53] On February 28, 2018, as required by the Investment Industry Regulatory Organization of Canada, NB submitted a form entitled "Notice of Termination Information for an Individual" in relation to Ms. Ratz-Cheung's termination. The form states the following as the reason for

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termination: “Dismissed in good standing”. The form also provides the following reason: “Job Elimination”.

[54] NB paid Ms. Ratz-Cheung $204,395 as pay in lieu of notice and severance pay. The parties agree that the termination and severance period under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (“***ESA***”) ended on September 30, 2018, approximately thirty-two (32) weeks following the termination of Ms. Ratz-Cheung’s employment.

[55] Ms. Ratz-Cheung did not receive any payment in relation to her book of business and was not reimbursed for the funds that she paid out of her commissions to purchase Ms. Sheldon’s book, which was approximately $333,000 as of the time of her termination.

[56] Ms. Ratz-Cheung’s T4 slips show the following income for the years 2014-2017:

a. 2014: $149,272.68

b. 2015: $157,702.79

c. 2016: $204,829.28

d. 2017: $250,720.48

[57] These amounts are net of: (a) amounts paid to NB for the use of an assistant and other expenses; and (b) amounts paid under the 2015 BSA pursuant to the commission split set out in Schedule “B” to the 2015 BSA.

[58] This action was commenced on October 9, 2018.

11. Employment at RBC Dominion Securities Inc.

[59] It took Ms. Ratz-Cheung approximately three weeks to find a new job. She ultimately obtained a position at RBC Dominion Securities Inc. (“**RBC**”) and started working there on March 15, 2018. However, she testified that she had to “start all over” and that it was often difficult for her to “make her grid”.

[60] Over approximately one year and a half following Ms. Ratz-Cheung’s termination, clients who had been serviced by Ms. Ratz-Cheung at NB with assets totaling $39,222,262.19 moved to RBC.

[61] Between October 1, 2018 (i.e., after the end of the severance period under the *ESA*) and February 20, 2020, Ms. Ratz-Cheung received $205,397 in commissions from RBC.

[62] As of November 2019, Ms. Ratz-Cheung’s two children were 22 and 18 years old. They were university students and she was supporting them financially. Ms. Ratz-Cheung has been the

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sole breadwinner in her family for most of her life. Her husband works on a contract basis once in a while. He did not bring in significant income in 2017 or 2018.

12. Evidence of Ms. Ratz-Cheung regarding her retirement plans

[63] During her examination for discovery (excerpts of which were read in at trial), Ms. Ratz-Cheung stated that in 2017, she did an analysis as to whether she could retire. The result of her analysis was that if she were to retire, she would have to sell her house and live on roughly $40,000/year. She concluded that to stop working was untenable given, among other things, that she was supporting her two children who were in university. At trial, Ms. Ratz-Cheung said that this analysis had been done after her termination and that she thought that her discovery evidence had been corrected, but I have no evidence that such a correction was made. Ms. Ratz-Cheung said at trial that she knew that she could retire if she could sell her book as she would make $40,000 per month for three years and she would be able to save money. However, I have no evidence that Ms. Ratz-Cheung came to the conclusion in 2017 that she would receive $40,000 per month should she sell her book of business. This amount comes from Mr. Lewis' expert evidence, which is based on an extrapolation of the commissions that Ms. Ratz-Cheung would likely have earned in 2018-2020. I have no evidence that Ms. Ratz-Cheung made such calculations by herself or with anyone's help in 2017 or at any other time.

[64] Ms. Ratz-Cheung gave evidence that she had had an informal discussion with another female IA about that IA buying her book of business, and that she thought that another female IA, who was younger, could also be a good candidate to purchase her book of business. However, Ms. Ratz-Cheung admitted that she never discussed entering into a BSA with these IAs or anyone else in management at NB. Her evidence was that she was waiting to have 25 years at NB before selling her book in order to get a higher loyalty bonus in the calculation of the value of her book of business.

13. BSA Valuation Tool

[65] The parties agree that NB's Valuation Tool is a valuation methodology for a BSA. The BSA Valuation Tool was used by both experts in this case (Mr. Lewis and Mr. Andrade).

[66] Pursuant to NB's BSA Valuation Tool, the valuation includes three components:

a. **Production Credit**: Calculated based on the average gross commission production for the three years prior to the date of the BSA, multiplied by a percentage factor as described by the following table:

Production	Bonus (% of Production)
–	50%
$ 600,000	75%

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$1,000,000	90%
$2,500,000	100%

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b. **Recurring Revenue Credit**: Calculated based on the portion of gross commission revenue that is recurring. A percentage factor, set out in the table below, is multiplied by the three-year average gross commissions prior to the date of the BSA:

Fee Revenue	**Bonus (% of Production)**
30%	5%
40%	20%
50%	30%

c. **Loyalty Bonus**: Calculated based on the number of years the IA has been with BMO. The bonus is calculated by multiplying a percentage factor, which is set out in the table below, by the three-year average gross commission prior to the date of the BSA:

Years	**Bonus (%)**
0	0%
10	5%
15	10%
20	15%
25	20%

14. Expert evidence

[67] As stated above, Ms. Ratz-Cheung retained an expert, Brandon Lewis, who was qualified as an expert in business valuation and damages quantification. Mr. Lewis was given four mandates:

a. Quantification of the value of Ms. Ratz-Cheung's book of business as of February 20, 2020 (i.e., 24 months after her termination).

b. Quantification of the debt owed to NB under the 2015 BSA and the time that it would have taken for Ms. Ratz-Cheung to pay it.

c. Determination of whether Ms. Ratz-Cheung would have satisfied the eligibility requirements for early repayment of the purchase price paid for Ms. Sheldon's book of business at some point during the notice period.

d. Preliminary calculation of mitigation based on the assets under management that moved with Ms. Ratz-Cheung to RBC.

[68] Mr. Lewis calculated that the total estimated value of Ms. Ratz-Cheung's book of business pursuant to the BSA Valuation Tool was $1,514,800.

[69] He calculated that the amount owing to NB pursuant to the 2015 BSA was approximately $68,000 at the time of Ms. Ratz-Cheung's termination, and that this amount would have been paid by August 10, 2018.

[70] Mr. Lewis determined that Ms. Ratz-Cheung would have satisfied the eligibility requirements under the BSA Early Termination Policy for early repayment of the purchase price paid for Ms. Sheldon's book of business by September 30, 2019.

[71] Mr. Lewis' preliminary calculation of mitigation based on the assets under management that moved with Ms. Ratz-Cheung to RBC was approximately $396,000.

[72] NB also retained an expert, Larry Andrade, who was qualified as an expert in economic loss and business valuation.

[73] Mr. Andrade was given three mandates:

a. To provide his comments on the mandates performed by Mr. Lewis.

b. To quantify the economic loss allegedly suffered by Ms. Ratz-Cheung before mitigation.

c. To quantify the economic loss allegedly suffered by Ms. Ratz-Cheung after mitigation.

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[74] Mr. Andrade's view was that, before adjustment, the value of Ms. Ratz-Cheung's book of business as of her termination date (February 20, 2018) was $985,000. Mr. Andrade deducted from this amount the amount still owed to NB under the 2015 BSA at the time of termination – $68,000 – and the severance payment received by Ms. Ratz-Cheung because he assumed that Ms. Ratz-Cheung could not have received both a BSA and a severance payment. Thus, he concluded that the value of Ms. Ratz-Cheung's economic loss before mitigation as at the date of her termination was approximately $713,000.

[75] After considering the mitigation amounts that he was able to quantify, including Ms. Ratz-Cheung's compensation at RBC and the value of her book of business at RBC, Mr. Andrade concluded that Ms. Ratz-Cheung's economic loss after mitigation was approximately $89,000.

B. DISCUSSION

[76] I first discuss the issue of after-acquired cause raised by NB. Given that I conclude that NB has not established just cause for Ms. Ratz-Cheung's dismissal, I then discuss the following issues: (a) notice period and amount of lost commissions; (b) lost opportunity to sell book of business; and (c) bad faith damages.

1. After-acquired cause

a. Applicable legal principles

[77] An employer is entitled to rely on wrongdoing discovered after the dismissal as just cause for the dismissal, so long as the wrongdoing occurred before the termination. See *Dowling v. Ontario (Workplace Safety and Insurance Board)*, 2004 CanLII 43692 at para. 51 (Ont. C.A.) ("***Dowling***") and *Lake Ontario Portland Cement Co. Ltd. v. Groner*, [1961] S.C.R. 553 at 563-564 ("***Groner***").

[78] Whether an employer is justified in dismissing an employee on the ground of dishonesty is a question that requires an assessment of the context of the alleged misconduct. The test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. In other words, just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to their employer. See *McKinley v. BC Tel*, 2001 SC 38 at para. 48 ("***McKinley***").

[79] In accordance with this test, a judge must determine: (1) whether the evidence established the employee's deceitful conduct on a balance of probabilities; and (2) if so, whether the nature and degree of the dishonesty warranted dismissal. See *McKinley* at para. 49.

[80] An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense

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of identity and self-worth individuals frequently derive from their employment. See *McKinley* at para. 53.

[81] In applying the test set out in *McKinley*, the court must: (1) determine the nature and extent of the misconduct; (2) consider the surrounding circumstances; and (3) decide whether dismissal is warranted, i.e., whether dismissal is a proportional response. See *Dowling* at para. 50.

[82] When considering the surrounding circumstances, the particular circumstances of both the employee and the employer must be considered. In relation to the employee, the court should consider factors such as age, employment history, seniority, role and responsibilities. In relation to the employer, factors such as the type of business or activity in which the employer is engaged, any relevant employer policies or practices, the employee's position within the organization, and the degree of trust reposed in the employee should be considered. See *Dowling* at para. 52.

[83] When deciding whether dismissal is a proportional response, the court must assess whether the misconduct is reconcilable with sustaining the employment relationship. This requires a consideration of the proved dishonest acts within the employment context to determine whether the misconduct is sufficiently serious that it would give rise to a breakdown in the employment relationship. See *Dowling* at para. 53.

b. Submissions of the parties

i. Submissions of the Plaintiff

[84] Ms. Ratz-Cheung submits that NB has not met its onus to prove after-acquired just cause for her dismissal. She states as follows in her written closing submissions:

> In the context of the 24-year employment relationship, the Plaintiff, a professional with significant autonomy asked her husband, also a professional, to assist her with an administrative technical function of copying group of emails that she felt were important to defend herself against allegations by her manger [sic].
>
> Termination of employment for after-acquired just cause would be entirely disproportionate to the allegations levelled against Ms. Ratz-Cheung.

[85] According to Ms. Ratz-Cheung, NB's allegation of after-acquired just cause was a disproportionate response to the conduct in question and an excuse to escape contractual obligations to her. She argues that a far lesser sanction, if any, would have sufficed. She states that NB is precluded from relying on anything that it was aware of prior to the dismissal, any post-dismissal conduct, or anything not pleaded.

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ii. Submissions of the Defendant

[86] NB argues that by giving access to her husband to effect mass copying of confidential information for her own personal use against NB, Ms. Ratz-Cheung violated her obligations and breached trust. According to NB, the employment relationship would have become untenable if the breach had been discovered during Ms. Ratz-Cheung's employment.

[87] NB also relies on alleged dishonesty, or "revelation of character", that emerged during the action. See *Groner* at 564. NB submits that the December 14, 2017 Letter was deliberately dishonest and that Ms. Ratz-Cheung's statements in her letter regarding her review and understanding of the Code of Conduct were untrue and misleading.

[88] NB states that essential conditions of employment were defined in the Code of Conduct, which is a foundational document directing behaviour. While there may have been implied consent to use the e-mails within the confines of BMO to deal with staffing issues, NB argues that there was no implied consent to mass copy confidential information to keep at an employee's house.

[89] NB submits that the nature and extent of the misconduct, the surrounding circumstances, and proportionality weigh in favour of a finding of after-acquired cause.

[90] NB argues that Ms. Ratz-Cheung's misconduct was severe in two respects: (a) the extent of her misappropriation of client information; and (b) the misrepresentations made by Ms. Ratz-Cheung to NB. With respect to the second point, as stated above, NB's position is that Ms. Ratz-Cheung explicitly misrepresented to NB her compliance with the Code of Conduct in the December 14, 2017 Letter, despite knowing that she had already directed her husband to copy confidential client information onto a USB key. According to NB, Ms. Ratz-Cheung did not have a legitimate business purpose for accessing this client information.

[91] With respect to surrounding circumstances, NB points out that Ms. Ratz-Cheung had worked in the investment industry for over two decades at the time of her termination, and that she was entrusted with dealing directly with highly confidential client information. NB also points out that she was a registered professional, with duties of confidentiality flowing from her regulated status. NB submits that it operates within a highly regulated industry and states that bank employees have been held to a particularly high standard of trustworthiness, honesty and integrity.

[92] NB argues that Ms. Ratz-Cheung's reckless disregard for NB's policies and her subsequently-discovered dishonesty were fundamentally incompatible with the employment relationship. It submits that just cause has been found in similar circumstances in other cases.

c. Discussion

[93] In my view, NB has not established that it had just cause to dismiss Ms. Ratz-Cheung.

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[94] I reject NB's submission that Ms. Ratz-Cheung intended to deceive NB or was deliberately dishonest in the December 14, 2017 Letter. The December 14, 2017 Letter was sent in response to the December 1, 2017 Letter which raised Principle 4 of the Code of Conduct in the context of Ms. Ratz-Cheung's physical office at the branch and the fact that "hardcopy information [was] stored in piles". I do not accept that: (a) Ms. Ratz-Cheung thought about the USB key when she reviewed the Code of Conduct in December 2017 after receiving the December 1, 2017 Letter; (b) she realized that she had breached the Code of Conduct in copying the e-mails onto the USB key; and (c) she then intentionally sought to mislead NB regarding her compliance with the Code of Conduct in the December 14, 2017 Letter. Thus, I find that no dishonesty or deceitful conduct has been established with respect to the December 14, 2017 Letter.

[95] However, I find that the copying of the e-mails onto the USB key constituted a breach of the Code of Conduct. Among other things, the copying of confidential information onto the USB key, which was then kept in Ms. Ratz-Cheung's home office, did not protect the security of the information and put the information at risk, even if it was a limited one. It is admitted that the e-mails contained confidential client information, and the total number of e-mails that were copied was very significant. In my view, there was nothing wrong with Ms. Ratz-Cheung accessing e-mails that she sent to her assistants or Ms. Tiong to deal with human resources issues or performance issues by assistants. NB itself accessed and used e-mails for similar purposes. What was problematic was the copying of the information and the storing of the information outside of NB, in Ms. Ratz-Cheung's home.

[96] The nature and extent of the breach must be considered. In addition to the observations in the prior paragraph, I note that Ms. Ratz-Cheung did not copy documents that she was not entitled to access. The e-mails that were copied were her own e-mails, which contained information that she was entitled to access and use while working at NB. Further, Ms. Ratz-Cheung did not disclose the documents or the information they contained to anyone, except for NB in the context of this litigation. There is no evidence that Ms. Ratz-Cheung's husband opened the e-mails or looked at their contents when he copied the three Outlook folders on the USB key in the fall of 2017 at Ms. Ratz-Cheung's request. Ms. Ratz-Cheung did not use the e-mails prior to this litigation, and it is noteworthy that e-mails between Ms. Ratz-Cheung and her assistants were used by NB in the litigation as well. It is also worthy of mention that Ms. Ratz-Cheung's focus in relation to the e-mails that were copied was not confidential client information, but her exchanges with her assistants (or Ms. Tiong) with respect to tasks that had been assigned. There was only one instance of copying and the USB key subsequently remained stored in Ms. Ratz-Cheung's home office, unused and unaccessed, until this litigation.

[97] The surrounding circumstances must also be considered. At the time the e-mails were copied onto the USB key, Ms. Ratz-Cheung was 54 years old, and she had been an employee of NB for more than 23 years. As an IA, she was entrusted with dealing with highly confidential client information. NB and IAs operate in a highly regulated industry and it is important that NB's employees comply with high standards of trustworthiness, honesty and integrity. NB had a Code of Conduct dealing with the protection of confidential information, which Ms. Ratz-Cheung had

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to review every year. I note that there is no evidence of any prior breach of the Code of Conduct on the part of Ms. Ratz-Cheung.

[98] In my view, consideration of the surrounding circumstances in this case must include some consideration of the issues that prompted the copying of the e-mails, i.e., the issues raised by NB regarding Ms. Ratz-Cheung's relationship with her assistants, more particularly Mr. Marks and Ms. Jeraj. The evidence before me does not allow me to make determinative findings on the issues raised regarding Ms. Ratz-Cheung's relationship with Mr. Marks and Ms. Jeraj. However, while there may have been some issues in the manner in which Ms. Ratz-Cheung was communicating at times with her assistants, there is at least an air of reality to Ms. Ratz-Cheung's view that she may not have been treated fairly by NB in relation to the criticisms raised regarding the manner in which she was communicating with her assistants, and that such criticisms were potentially sexist (e.g., an assertive woman being perceived and treated differently than an assertive man). Among other things:

a. Ms. Ratz-Cheung's evidence, which is uncontradicted on this point, does suggest significant performance issues on the part of Mr. Marks and Ms. Jeraj.

b. In a meeting with Ms. Ratz-Cheung in late October 2017, Mr. Fox and Mr. Hassan apparently stated that they had never been made aware of performance issues with respect to Ms. Jeraj, which is contradicted by the record before me because Ms. Ratz-Cheung had previously raised performance issues.

c. Mr. Fox and Mr. Hassan refused more than once to have conversations with Ms. Ratz-Cheung about Ms. Jeraj's performance issues, even when she came to meetings with documentary evidence. They told her to deal with Ms. Tiong with respect to these issues. In contrast, Ms. Jeraj was allowed to communicate directly with Mr. Hassan, a branch manager, to complain about Ms. Ratz-Cheung. I note that Ms. Jeraj's tone in her e-mails with Mr. Hassan was somewhat familiar.

d. As pointed out above, Ms. Ratz-Cheung was asked to copy Mr. Fox on all of her e-mails to Ms. Jeraj, but there is no evidence that Mr. Fox ever replied to Ms. Ratz-Cheung to let her know that a particular e-mail was inappropriate.

e. The alleged issues with Mr. Marks were raised numerous months after his departure from NB.

f. Mr. Fox did not address the concern raised by Ms. Ratz-Cheung that Ms. Jeraj was reacting differently to her because she was a woman.

g. Mr. Fox told Ms. Ratz-Cheung to "[b]e gentle on her approach".

[99] After considering the nature and extent of the misconduct and the surrounding circumstances, the last step in the analysis is to decide whether dismissal is an appropriate response: see *Dowling* at para. 40. Although Ms. Ratz-Cheung did not comply with the Code of

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Conduct, I ultimately conclude that dismissal is not a proportional response to this breach in the circumstances of this case. In my view, the breach was not sufficiently serious to give rise to a breakdown in the employment relationship. A lesser sanction could have been effectively imposed on Ms. Ratz-Cheung in relation to this breach. In assessing whether the misconduct is reconcilable with sustaining the employment relationship, I am only considering the misconduct at issue, i.e., the copying of e-mails onto the USB key, and not the other issues raised by NB (e.g., the assistant issues) which have not been established as misconduct and which were known at the time of Ms. Ratz-Cheung's termination.

[100] I find that the misconduct was a lapse in judgment on the part of Ms. Ratz-Cheung, in the context of a difficult year for her personally and in a situation where she thought that she was not being treated fairly. This lapse in judgment was not of a nature and degree to warrant dismissal without notice, especially since Ms. Ratz-Cheung did not disclose or use the information before this litigation, and the information in question was information to which she had legitimately access. This is in contrast with a situation where there are intentional and numerous dishonest acts on the part of an employee that occurred over a period of time: see, e.g., *Dowling* at para. 72.

[101] NB relies on a number of cases in support of its position on after-acquired cause, but all of the cases can be distinguished. I discuss the main cases below.

[102] In *Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127, a helpdesk employee improperly and intentionally accessed the personal file of a manager for her own purpose and in breach of a protocol regarding access to personal folders by helpdesk employees. This was found to constitute just cause for dismissal. In the present case, Ms. Ratz-Cheung did not access documents or e-mails that she was not entitled to access. The e-mails that were copied were her own e-mails.

[103] In *Sonnilal v. Slimband*, 2016 CarswellOnt 17102 (Small Claims Court), the employer, a medical clinic, discovered after the dismissal of a nurse that the nurse had forwarded approximately 120 e-mails from the company laptop to her personal e-mail account, many of which contained confidential corporate information or personal and confidential information of patients of the clinic. The nurse's evidence was that she had forwarded the e-mails once she thought that she might be dismissed because she needed the documents to protect herself if litigation arose. The deputy judge found that this conduct constituted just cause for dismissal. However, other serious misconduct was found on the part of the nurse which also established just cause. The deputy judge also found that the nurse's testimony regarding the e-mails that she sent to her personal e-mail account was inconsistent and unreliable. In the present case, no other serious misconduct that could establish just cause is present, and I have commented above on the assistant issues raised by NB and the circumstances in which the e-mails were copied. I also note that the deputy judge did not refer to the most recent case law on just cause in their reasons.

[104] In *Death v. Canadian Imperial Bank of Commerce*, [2006] CLAD No. 342, it was found that an employee's "excessive and ongoing misuse" of the employer bank's computer systems to look up financial information about family and friends amounted to a serious breach of the

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bank's policies that justified the employee's summary dismissal. A printout of the employee's inquiries on the system showed that this was not an occasional occurrence but an ongoing activity on the employee's part, involving a dozen of individuals. Again, in this case, Ms. Ratz-Cheung did not access documents or e-mails that she was not entitled to access. The e-mails that were copied were her own e-mails, and there was only one instance of copying.

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[105] In *Manak v. Workers' Compensation Board of British Columbia*, 2018 BCSC 182, the plaintiff, a manager, was dismissed for cause for sharing confidential human resources information about employees with other employees. Branch J. found as follows:

> I find that the defendant has met its burden of showing just cause in this case, applying the contextual approach required by *McKinley* at para. 5. No individual incident may have been sufficient to justify dismissal. But the cumulative effect of all of the incidents found to have occurred suggests a manager out of her depth, reacting to her stress by making an array of improper disclosures, in a misguided effort to obtain support from, or simply to be liked by, her subordinates.

[106] In the present case, there is only one incident. Further, Ms. Ratz-Cheung did not share the confidential information in the e-mails with anyone.

[107] Accordingly, I find that after-acquired cause was not established and that Ms. Ratz-Cheung was dismissed without cause.

2. Notice period and amount of lost commissions

a. Applicable legal principles

[108] Given my finding that Ms. Ratz-Cheung was dismissed by NB without cause, she was entitled to reasonable notice of her termination or, in the absence of reasonable notice, pay in lieu thereof.

[109] At common law, an employer has the right to terminate the employment contract without cause subject to the duty to provide reasonable notice. The failure to provide reasonable notice is a contractual breach that leads to an award of damages in lieu thereof. This breach does not turn on whether or not the employer acted honestly or in good faith. The remedy for a breach of the implied term to provide reasonable notice is an award of damages based on the period of notice which should have been given, with the damages representing what the employee would have earned in this period. The damages are compensation for the income, benefits and bonuses that the employee would have received had the employer not breached the implied term to provide reasonable notice. The employment contract effectively "remains alive" for the purposes of assessing the employee's damages, in order to determine what compensation the employee would have been entitled to but for the dismissal. See *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26 at paras. 43, 49, 53, 54 ("***Matthews***").

[110] In wrongful dismissal actions, the following factors are to be considered when determining the reasonable notice period: (a) the character of the employment; (b) the length of service of the employee; (c) the age of the employee; and (d) the availability of similar employment, having regard to the experience, training and qualifications of the employee. See *Bardal v. Globe & Mail Ltd.*, 1960 CanLII 294, 24 D.L.R. (2d) 140 at 145 (Ont. H.C.). Determining the period of reasonable notice is an art, not a science, and there is no one "right" figure for reasonable notice: *Lowndes v. Summit Ford Sales Ltd.*, 2006 CanLII 14 at para. 9 (Ont. C.A.) ("***Lowndes***"). Judges must weigh and balance all relevant factors and no one factor should be given disproportionate weight. I note, however, that the factor of the character of the employment has been found to be a factor of declining relative importance: see *Lowndes* at para. 9, *Arnone v. Best Theratronics Ltd.*, 2015 ONCA 63 at para. 11 and *Di Tomaso v. Crown Metal Packaging Canada LP*, 2011 ONCA 469 at para. 27.

[111] Although there is no absolute upper limit or cap on what constitutes reasonable notice, generally only exceptional circumstances will support a notice period in excess of 24 months: see *Lowndes* at para. 11 and *Dawe v. The Equitable Life Insurance Company of Canada*, 2019 ONCA 512 at paras. 31-33.

[112] Notice is to be determined by the circumstances existing at the time of termination and not by the amount of time that it takes the employee to find employment. The time it takes to find a new job goes to mitigation of damages, not to the length of notice. See *Holland v. Hostopia Inc.*, 2015 ONCA 762 at para. 61.

b. Submissions of the parties

i. Submissions of the Plaintiff

[113] Ms. Ratz-Cheung submits that she was entitled to a reasonable notice period of 24 months. She points out that she provided long service of approximately 24 years to NB in a professional role, she was 54 years old at the time of her dismissal, and she spent the bulk of her working life and her entire career as an IA working with NB. She also argues that the unique character of employment as an IA supports a lengthier notice period because it takes a long time to build up a book of business.

[114] Ms. Ratz-Cheung states that she was compelled to accept lesser employment at RBC which was not comparable to her employment at NB in terms of her level of income, size of her book of business and other factors.

[115] Ms. Ratz-Cheung's position is that she is entitled to $774,302 for lost commissions over a 24-month period. After accounting for amounts paid by NB and mitigation at RBC, she states that she is entitled to judgment in the amount of $374,393.

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[116] Ms. Ratz-Cheung submits that it would be inappropriate to use an average of her T4 statements over the past three years to calculate her damages for lost commissions. She points out that such an approach was rejected in *Clark* (at paras. 35-37) because Mr. Clark's commissions were rising, which was also her situation. Ms. Ratz-Cheung also submits that her T4 statements are understated because there were deductions for the commission split in relation to her purchase of Ms. Sheldon's book of business. She relies on the growth rate of 9.3% calculated by Mr. Lewis. Further, Ms. Ratz-Cheung states that the 2015 BSA would have terminated by mutual agreement prior to the end of the reasonable notice period pursuant to the BSA Early Termination Policy. She argues that she would have met the "hurdles" in the early termination program by September 30, 2019.

ii. Submissions of the Defendant

[117] If after-acquired cause is not established, NB does not dispute that Ms. Ratz-Cheung is entitled to compensation for lost commissions over a reasonable notice period, subject to mitigation. NB submits that an 18-month notice period is reasonable in this case, particularly given Ms. Ratz-Cheung's prompt re-employment at RBC following her termination.

[118] NB argues that Ms. Ratz-Cheung's position at RBC is comparable to her position at NB. NB states that, as was the case at NB, Ms. Ratz-Cheung is compensated at RBC based on a grid and there is no evidence that the grid at RBC is different from the grid at NB. According to NB, the difference in compensation experienced by Ms. Ratz-Cheung depends on the size of her book of business, not on the compensation structure, and this difference does not mean that her position at RBC is not comparable to her position at NB. NB points out that Ms. Ratz-Cheung was hoping that her clients would follow her to RBC, and it could not be known at the time of her departure how many clients would not follow her.

[119] NB submits that this Court should not rely on Mr. Lewis' evidence regarding Ms. Ratz-Cheung's claim for lost commissions because his mandate did not include quantification of damages over a reasonable notice period. NB argues that even if Ms. Ratz-Cheung could use Mr. Lewis' calculations for this purpose, Ms. Ratz-Cheung has not met her burden of proving on a balance of probabilities that the 9.3% growth rate used by Mr. Lewis would apply to the assets under management that she serviced during the reasonable notice period. According to NB, Ms. Ratz-Cheung's loss of assets under management and client complaints in the period leading to her departure would suggest otherwise. NB also submits that the growth of Ms. Ratz-Cheung's commissions had plateaued around the time of her termination.

[120] NB points out that the calculations provided by Ms. Ratz-Cheung are based on commissions payable from which there are normally deductions relating to expenses, such as her assistant, before payment of her income. NB submits that the use of Ms. Ratz-Cheung's T4 income is therefore more appropriate. NB states that the use of Ms. Ratz-Cheung's 2017 T4 income to calculate commissions over the reasonable notice period fairly recognizes the growth in the portfolio that Ms. Ratz-Cheung serviced, while not overcompensating Ms. Ratz-Cheung.

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[121] NB's position is that Ms. Ratz-Cheung's lost commissions over an 18-month period are in the amount of $376,080.72, and that the following amounts must be deducted as mitigation:

a. $204,395 in lieu of notice and severance pay paid by NB; and

b. $141,352.89 earned from RBC over the 18-month notice period, outside amounts earned during the statutory notice period.

[122] Accordingly, NB submits that Ms. Ratz-Cheung's claim of damages for loss of commissions is in the amount of $30,332.83. It further submits that Ms. Ratz-Cheung was not entitled to early termination of the 2015 BSA during the 18-month notice period.

c. Discussion

[123] Looking at the relevant factors in the context of this case, at the time of her termination Ms. Ratz-Cheung: (a) worked as a professional as an IA; (b) had been employed by NB for approximately 24 years; (c) was 54 years old; and (d) had obtained a bachelor's degree in sociology in 1985 but, in the previous 24 years, had only worked for one employer, NB, as an IA.

[124] While IA positions were available at the time of Ms. Ratz-Cheung's termination, including at RBC, this does not fully answer the question of whether "similar employment" was available. Similar or comparable employment does not mean any employment; rather, it is usually interpreted as employment comparable to the dismissed employee's employment with their former employer in status, hours and remuneration. See *Dussault v. Imperial Oil Limited*, 2019 ONCA 448 at para. 5 and *Carter v. 1657593 Ontario Inc.*, 2015 ONCA 823 at para. 6.

[125] While the compensation structure for IAs may be similar at RBC and NB, i.e., based on a percentage of commissions, Ms. Ratz-Cheung's remuneration was not similar at RBC and would not have been similar had she joined a different employer as an IA. This is because, as submitted by Ms. Ratz-Cheung, it takes a long time to build up a book of business. Further, there is uncertainty at the time of termination as to whether clients will follow an IA when an IA changes employers. At a minimum, there is a significant risk that, through sheer inertia, some clients will not move their assets to a different firm, thereby impacting the moving IA's compensation. From a remuneration perspective, the availability of similar/comparable employment at the time of termination was uncertain and probably unlikely.

[126] I have considered all of the cases referred to by the parties in support of their respective positions with respect to the length of the notice period. Ultimately, each case is fact-specific. In my view, Ms. Ratz-Cheung's age and length of service warrant significant consideration, as well as the difficulty in finding employment that is comparable to her employment at NB in terms of remuneration. In light of the foregoing, after reviewing the relevant case law and considering the relevant factors, I find the appropriate notice period to be 24 months.

[127] I agree with Ms. Ratz-Cheung's submission that it would be inappropriate to use an average of her T4 statements over the past three years, or even her last T4 statement to calculate her

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damages for lost commissions. 2017 was a difficult year for Ms. Ratz-Cheung on a personal level (illness and death in her family), and she was still in the process of "cleaning out" Ms. Sheldon's book of business. Despite this, and while she may have had some issues with some clients in 2017, her commissions increased, even if one only considers her original book of business (i.e., excluding Ms. Sheldon's book of business). As set out in Mr. Lewis' report, the growth in Ms. Ratz-Cheung's original book of business between February 2017 and February 2018 was 9.3%, and the growth in Ms. Sheldon's book of business during the same period was 45.3%, with a blended total growth of 26.2%. I find that it is likely that Ms. Ratz-Cheung's commissions would have continued to increase during the notice period. See *Clark* at paras. 35-37.

[128] In his report, and for the purpose of calculating Ms. Ratz-Cheung's estimated projected commissions for the periods ended February 28, 2019 and February 28, 2020, Mr. Lewis selected the growth rate equal to the rate of growth realized on Ms. Ratz-Cheung's original book of business, i.e., 9.3%. He did not consider the significant growth in Ms. Sheldon's book of business because such growth was likely not indicative of potential future growth in Ms. Ratz-Cheung's overall book of business. The choice of a 9.3% growth rate is a logical, conservative and fair one in the circumstances. I see no reason not to accept Mr. Lewis' opinion on the appropriate growth rate for the 24-month period following Ms. Ratz-Cheung's termination.[4]

[129] I also accept the calculations set out in Schedule "A" to Ms. Ratz-Cheung's written closing submissions, which apply the 9.3% growth rate, the BSA commission split percentage on Ms. Sheldon's book of business, and the grid percentage. Ms. Ratz-Cheung's calculations assume that she would have been able to take advantage of the BSA Early Termination Policy at the end of September 2019, based on Mr. Lewis' calculation that she would have met at that time the two hurdles to qualify for early termination set out in the BSA Early Termination Policy. I accept Mr. Lewis' opinion and calculations on this point. I also find that there were no proper grounds on which NB's approval could have been withheld under the BSA Early Termination Policy: see *Clark* at para. 60.

[130] Ms. Ratz-Cheung's calculations with respect to her net commissions during the notice period total $774,302. I find that this amount must be reduced for two reasons: (1) to take into account expenses that Ms. Ratz-Cheung would have had to pay (and had paid in the normal course) to NB before payment of her income (e.g., assistant expenses); and (2) to take into account negative contingencies. With respect to the last point, while it is possible that Ms. Ratz-Cheung could have earned more commissions than expected by Mr. Lewis, it is also possible, for many different

[4] I disagree with NB's argument that the calculation of the commissions that Ms. Ratz-Cheung would have earned until February 20, 2020 was not part of his mandate. Calculation of the gross commission production for the three years prior to the date of the BSA is an essential component under the BSA Valuation Tool. Given that Mr. Lewis' mandate was to quantify the value of Ms. Ratz-Cheung's book of business as of February 20, 2020, he had to calculate her gross commission production from February 20, 2017 to February 20, 2020.

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reasons, that she could have earned less. In my view, it is appropriate to reduce the amount of net commissions by approximately 17.5%, which I round up to $640,000.

[131] The amounts paid by NB as pay in lieu of notice and severance pay ($204,395) and the income that Ms. Ratz-Cheung received at RBC between October 1, 2018 (i.e., after the end of the severance period under the *ESA*) and February 20, 2020 ($205,397) must be deducted from this amount. In addition, the amount of $9,883 must be added as repayment under the BSA Early Termination Policy for the extra amount that Ms. Ratz-Cheung would have paid by the end of September 2019, as calculated by Mr. Lewis. As a result, the amount owing by NB for lost commissions during the notice period is $240,091.

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3. Lost opportunity to sell book of business

a. Applicable legal principles

[132] The basic principle in awarding damages for wrongful dismissal is that the terminated employee is entitled to compensation for all losses arising from the employer's breach of contract in failing to give proper notice. The damages award should place the employee in the same financial position the employee would have been in had such notice been given and the employee had worked to the end of the period of reasonable notice. In other words, in determining damages for wrongful dismissal, the court will typically include all of the compensation and benefits that the employee would have earned during the notice period. The employment contract effectively "remains alive" for the purposes of assessing the employee's damages, in order to determine what compensation the employee would have been entitled to but for the dismissal. See *Matthews* at paras. 49, 53, 54, *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618 at para. 16 ("***Paquette***") and *Lin v. Ontario Teachers' Pension Plan*, 2016 ONCA 619 at para. 84 ("***Lin***").

[133] Damages for wrongful dismissal may include an amount for a bonus or other benefit that the employee would have received had they continued in their employment during the notice period, or damages for the lost opportunity to earn a bonus or benefit. This is generally the case where the bonus or benefit is an integral part of the employee's compensation package. This can be the case even where a bonus or benefit is described as "discretionary". It is important to remember that the employee's claim is not for the bonus or benefit itself, but for common law contract damages as compensation for the income (including bonus and benefit payments) that the employee would have received had the employer not breached the employment contract by failing to give reasonable notice of termination. See *Paquette* at paras. 17, 23.

[134] A two-step approach applies to determine whether the appropriate quantum of damages for breach of the implied term to provide reasonable notice includes bonus payments and certain other benefits:

a. Would the employee have been entitled to the bonus or benefit as part of their compensation during the reasonable notice period?

b. If so, do the terms of the employment contract or bonus plan unambiguously take away or limit that common law right?

See *Matthews* at para. 55 and *Paquette* at paras. 30-31.

[135] The Supreme Canada stated the following with respect to the second step:

> [65] To this end, the provisions of the agreement must be absolutely clear and unambiguous. So, language requiring an employee to be "full-time" or "active", such as clause 2.03, will not suffice to remove an employee's common law right to damages. After all, had Mr. Matthews been given proper notice, he would have been "full-time" or "actively employed" throughout the reasonable notice period […]. Indeed, the trial judge and the majority of the Court of Appeal agreed that an "active employment" requirement is not sufficient to limit an employee's damages […].
>
> [66] Similarly, where a clause purports to remove an employee's common law right to damages upon termination "with or without cause", such as clause 2.03, this language will not suffice. Here, Mr. Matthews suffered an *unlawful* termination since he was constructively dismissed without notice. As this Court held in *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102, at p. 108, exclusion clauses "must clearly cover the exact circumstances which have arisen". So, in Mr. Matthews' case, the trial judge properly recognized that "[t]ermination without cause does not imply termination without notice" (para. 399; see also *Veer v. Dover Corp. (Canada) Ltd.* (1999), 120 O.A.C. 394, at para. 14; *Lin*, at para. 91). Yet, it bears repeating that, for the purpose of calculating wrongful dismissal damages, the employment contract is not treated as "terminated" until after the reasonable notice period expires. So, even if the clause had expressly referred to an unlawful termination, in my view, this too would not unambiguously alter the employee's common law entitlement. [Emphasis in the original.]

[136] Thus, a term that requires active employment when the bonus or benefit is paid, without more, is not sufficient to deprive an employee terminated without reasonable notice of a claim for compensation for the benefit they would have received during the notice period, as part of their wrongful dismissal damages. See *Paquette* at para. 47.

[137] A provision that no bonus or benefit is payable where employment is terminated by the employer prior to the payout of the bonus or benefit is, in effect, the same as a requirement of "active employment" at the date of payout. Without more, such wording is insufficient to deprive a terminated employee of the bonus or benefit they would have earned during the period of reasonable notice, as a component of damages for wrongful dismissal. A reference to the termination of employment must be taken to refer to an employee's lawful termination absent clear language to the contrary. See *Lin* at paras. 89, 91.

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b. Decision of the Ontario Court of Appeal in Clark

[138] Given its relevance and the numerous references made to this case in the parties' submissions, it is appropriate to discuss the *Clark* case in some detail.

[139] Mr. Clark worked as an investment advisor at NB. By the time of his dismissal in April 2004, he had worked for NB for seventeen years.

[140] The Court of Appeal's reasons note that Mr. Clark had bought the book of business of another investment advisor, James Davis, who was dismissed in September 2001. Mr. Davis was given pay in lieu of notice and allowed to sell his book of business. Mr. Clark's purchase of Mr. Davis' book of business was approved and facilitated by NB. Mr. Clark paid Mr. Davis for the purchase of his book over time. He was still making payments when his employment with NB was terminated. See *Clark* at paras. 8-9.

[141] Prior to his termination, Mr. Clark had had discussions with two investment advisors, Mr. Leith and Mr. Bontempo, about selling his book of business as he was considering leaving the brokerage business. The month before his termination, Mr. Clark agreed with one of the investment advisors, Mr. Leith, that at some point in the future, they would enter into an agreement to have Mr. Clark's book of business transferred to Mr. Leith. See *Clark* at paras. 10-11.

[142] At the time of his dismissal, Mr. Clark asked if he could stay on for some time so that he could arrange to sell his book of business. NB refused. After Mr. Clark's dismissal, Mr. Bontempo paid NB $50,000 for the right to serve the clients previously managed by Mr. Clark. See *Clark* at paras. 14, 17.

[143] The trial judge awarded the following to Mr. Clark: (a) damages of 18 months' pay in lieu of reasonable notice; (b) damages for the lost opportunity to sell his book of business; and (c) a three-month extension of the notice period on account of *Wallace* damages.

[144] The Court of Appeal found that the award of *Wallace* damages had to be set aside because, in the circumstances of the case, it amounted to double recovery for Mr. Clark in light of the damages awarded for the lost opportunity to sell his book of business. The Court of Appeal otherwise affirmed the trial judge's decision.

[145] The Court of Appeal specifically upheld the trial judge's decision to award compensation to Mr. Clark for his book of business. The Court of Appeal stated the following at paras. 56-62:

> [56] At the time of Mr. Clark's dismissal, the Bank had a policy that set out when and how an investment advisor who was leaving the brokerage business might "transition" management of his or her Bank client assets to another investment advisor. The transition policy stipulated that the departing investment advisor had to have an agreement to transition the client assets to a successor investment advisor

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and that the agreement had to have Bank approval. The policy set out minimum eligibility criteria and stated that the Bank had the discretion to determine that an investment advisor was not eligible to participate in a transition agreement, even in circumstances where the eligibility criteria appeared to be met. If Bank approval was obtained, the policy required that the Bank be made a party to the agreement and that all payments under the agreement were to be through the Bank's payroll system.

[57] The Bank submits that, in light of the policy, Mr. Clark had no contractual right to enter into an agreement to sell his book of business. Accordingly, it argues, the proceeds of such an agreement are not a benefit provided by Mr. Clark's employment contract that was lost by reason of the Bank's failure to provide Mr. Clark with reasonable notice of termination and he cannot recover damages for them.

[58] I do not accept this submission. The fact that Mr. Clark did not have a contractual right to sell his book of business at the time his employment was terminated is not determinative of the matter, in my view.

[59] Once the trial judge found that Mr. Clark had been wrongfully dismissed, his task was to determine what damage award would put Mr. Clark in the same position he would have been in had he received reasonable notice of termination.

[60] The trial judge considered the evidence and concluded it was reasonably probable that Mr. Clark would have sold his book to Mr. Leith or Mr. Bontempo had he been given the time in which to do so. He was also satisfied that there were no proper grounds on which Bank approval could have been withheld. Finally, he was satisfied that a reasonable price for the sale of the book would have been reached. Consequently, it was open to the trial judge to find, as he did, that the Bank's failure to provide Mr. Clark with reasonable notice of termination caused him to lose the opportunity to sell his book of business, a benefit that he would have had during the notice period.

[61] This principle underpins the award of damages for losses in addition to lost income in other instances. So, for example, in *Veer v. Dover* (1999), 1999 CanLII 3008 (ON CA), 120 O.A.C. 394, this court ratified the award of damages for unexercised options under a stock option agreement which were found to be available during the notice period, despite a clause in the agreement which provided that the option would be cancelled on termination of employment. Similarly, in *Taggart v. Canada Life* (2005), 2005 CanLII 3220 (ON SC), 39 C.C.E.L. (3d) 48 (S.C.), aff'd (2006), 50 C.C.P.B. 163 (C.A.), damages were awarded for the loss of value that would have been added to the employee's pension had he worked through the notice period.

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[62] Accordingly, I see no error in the award of damages for lost opportunity.

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c. Submissions of the parties

i. Submissions of the Plaintiff

[146] Ms. Ratz-Cheung submits that, as in *Clark*, she is entitled to receive damages for both her lost commissions and her loss of opportunity to sell her book of business. She states that her damages for loss of opportunity to sell her book of business are in the amount of $1,514,800. Her position is that after accounting for mitigation, she is entitled to judgment in the amount of $1,118,800.

[147] Ms. Ratz-Cheung argues that the correct valuation date is February 20, 2020 (i.e., at the end of a 24-month notice period), not February 20, 2018 (i.e., the date of termination). She states that using the termination date as the valuation date is not consistent with the object of determining what damage award would put her in the same position in which she would have been had she received reasonable notice of her termination. According to Ms. Ratz-Cheung, had she been given reasonable notice of her dismissal, she would have taken the opportunity to sell her book of business at the end of the notice period and retired.

[148] Relying on *Clark* (at para. 58), Ms. Ratz-Cheung submits that the absence of a contractual right to sell her book of business at the time of her termination is not determinative of the matter. She states that she was in good standing at all material times and that she would have continued to be in good standing. She argues that NB was obliged to fairly, honestly and in good faith permit her the opportunity to sell her book during the reasonable notice period. Her position is that the language in the BSA Program is not absolutely clear, as required by *Matthews*, to prevent her from taking advantage of the BSA Program.

[149] Ms. Ratz-Cheung acknowledges mitigation of $396,000 with respect to the approximate $40 million of her $150 million of assets under management that followed her from NB to RBC.

[150] Ms. Ratz-Cheung argues that it is unfair for NB to take the position that she had to retire from the industry based on a BSA for retiring IAs, such as the Sheldon BSA. She submits that this is a damages assessment and that NB cannot impose hypothetical contractual obligations to constrain her in circumstances where no such contract exists. In the alternative, she states that the BSA terms for retiring IAs purportedly requiring them to retire from the industry amount to an unfair restraint of trade and are unenforceable.

ii. Submissions of the Defendant

[151] NB's position is that: (a) Ms. Ratz-Cheung's alleged lost opportunity is not compensable at law; (b) Ms. Ratz-Cheung does not have an entitlement to enter a BSA during or following a period of working notice of termination; (c) in the alternative, if Ms. Ratz-Cheung did have an entitlement to enter into a BSA, the evidence of NB's expert should be preferred and Ms. Ratz-Cheung's opportunity should be valued at $89,000.

[152] NB submits that the relevant legal question in this case is what loss Ms. Ratz-Cheung suffered due to the failure to pay reasonable notice, not what economic loss she alleges to have suffered generally. NB states that an employee has no right to economic loss resulting from the fact of dismissal, and that damages awarded for dismissal with a lack of reasonable notice cannot exceed what pay in lieu of notice would have been. NB argues that awarding both pay in lieu of reasonable notice and a value of a book of business is double recovery.

[153] NB states that Ms. Ratz-Cheung was never at liberty to sell her book of business, that she was governed by the terms of the BSA Program, and that she did not meet the eligibility requirements. NB relies on the statement in the BSA Program that "any IA who has been terminated, with or without cause, whether or not working notice or payment in lieu of notice termination and/or severance pay has been offered to the IA by the firm, is not eligible to enter into a retirement agreement." NB also relies on the good standing requirement in the BSA Program. It argues that in light of "the myriad of issues raised with respect to client concerns and behavioural issues, [NB] had no obligation, contractual or otherwise, to consider Ms. Ratz-Cheung as being in 'good standing' within the meaning of the BSA Policies at the time of the termination."

[154] NB submits that the situation in *Clark* can be distinguished from the circumstances of this case. Among other things, NB notes that the BSA Program had not been established at the time of Mr. Clark's dismissal. It also points out that there is no credible evidence that Ms. Ratz-Cheung was planning to retire during the reasonable notice period, or that she would or could have entered into a BSA if she had been given working notice.

[155] In the alternative, should this Court award damages for lost opportunity to enter into a BSA, NB submits that this Court should adopt the calculation of Mr. Andrade, NB's expert. NB argues that the BSA should be valued as at the date of termination because the presumptive appropriate date for the assessment of damages for loss of opportunity is the date of breach. NB states that the later valuation date adopted by Ms. Ratz-Cheung is an unsupported attempt to increase her damages artificially.

[156] NB's position is that had Ms. Ratz-Cheung entered into a BSA, she would have had to agree to retire from NB and the industry. Accordingly, Ms. Ratz-Cheung would not have received income from RBC as an IA or gained the opportunity to enter into a BSA-like arrangement with RBC with respect to the clients that she serviced at RBC. NB submits that these amounts must be deducted. It further submits that Ms. Ratz-Cheung should not receive damages for lost commissions and that severance amounts already received should be deducted from any damages for lost opportunity to sell the book of business since, effectively, Ms. Ratz-Cheung would have

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agreed to voluntarily retire rather than be terminated. NB states that it would not have given Ms. Ratz-Cheung both severance and the opportunity to enter into a BSA.

[157] NB points out that Ms. Ratz-Cheung has acknowledged that RBC has a program for its IAs to "sell their book", but she failed to provide information about the assets under management that she services at RBC, despite requests from NB's counsel. NB argues that an adverse inference should be drawn that Ms. Ratz-Cheung's assets under management at RBC are significant enough that her compensation under RBC's BSA-like program will entirely mitigate the value of her alleged lost opportunity.

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d. Discussion

[158] I now turn to the two-step approach set out in *Paquette* and *Matthews*. I find that Ms. Ratz-Cheung would have been entitled to take advantage of the BSA Program during the reasonable notice period. She met the first eligibility requirement, i.e., the number of years that she had been employed with NB added to her assets under management (in millions of dollars) exceeded 30.

[159] In my view, Ms. Ratz-Cheung would also have met the "good standing" requirement. While the BSA Program states that NB "will determine in its sole discretion that there are no outstanding performance, compliance or regulatory issues", such discretion would have to be exercised in good faith. Further, the meaning of "good standing" has to be interpreted in light of the language used in the BSA Program which refers to: (a) "outstanding performance, compliance or regulatory issues" [emphasis added]; and (b) management approving a BSA on the basis that the BSA is reasonable in the circumstances, and that the sharing of responsibilities and the commission split are commercially reasonable (in the "Approval Process" section). Thus, based on the language in the BSA Program itself, the factors that would be considered during the approval process are relatively narrow.

[160] I note that despite some past performance issues, Ms. Ratz-Cheung was considered to be in good standing in 2015 when she entered into the 2015 BSA. In addition, at the time of her termination in February 2018, NB certified to the regulator that Ms. Ratz-Cheung was in good standing. At that time, Ms. Ratz-Cheung had a new assistant with whom she was working well. Thus, there were no outstanding assistant issues. Further, it has not been established that Ms. Ratz-Cheung was experiencing any meaningful performance issues at the time of her termination. In any event, I am satisfied that any issues (including any performance or compliance issues) would have been resolved and would no longer be "outstanding" by the end of the notice period. Moreover, there is no indication that a BSA with respect to Ms. Ratz-Cheung's book of business would not have been commercially reasonable. Finally, I note that a BSA would have ensured an orderly and successful transition of Ms. Ratz-Cheung's clients, which would have been beneficial for NB.

[161] In light of the foregoing, I conclude that had Ms. Ratz-Cheung been working during the notice period, she would have been eligible to enter into a BSA. As was the situation in *Clark*, I am satisfied that there were no proper grounds on which NB's approval could have been withheld: see *Clark* at para. 60.

[162] Under the second step in the analysis, I have to determine whether the terms of the BSA Program unambiguously take away or limit Ms. Ratz-Cheung's right to enter into a BSA. This brings me to the language in the BSA Program that states that an "IA who has been terminated, with or without cause, whether or not working notice or payment in lieu of notice termination and/or severance has been offered to the IA" by NB is not eligible to enter into a BSA.

[163] In my view, the BSA Program does not unambiguously take away or limit Ms. Ratz-Cheung's ability to enter into a BSA during the notice period. As pointed out by the Supreme Court of Canada in *Matthews* at para. 66, the employment contract is not treated as "terminated" until after the reasonable notice period expires. Thus, Ms. Ratz-Cheung was not "terminated" until the end of the notice period and, as a result, the language quoted in the previous paragraph does not prevent her from obtaining the benefit of the BSA Program during the notice period.

[164] I disagree with NB's argument that awarding both pay in lieu of reasonable notice and the value of a book of business constitutes double recovery. It is no more double recovery than it is for a regular employee who receives regular remuneration and decides at some point to enter into a BSA. As stated in *Clark* and numerous other cases, an employee who has been wrongfully dismissed is entitled to receive a damage award that places the employee in the same financial position the employee would have been in had reasonable notice been given and the employee had worked to the end of the period of reasonable notice. This includes all of the compensation and benefits that the employee would have earned during the notice period. As found in *Clark*, the opportunity to sell a book of business is an opportunity that would have been available to an employee during the notice period: see *Clark* at para. 60.

[165] In support of its position, NB relies on Master Abrams's (as her title then was) decision in *Seitz v. BMO Nesbitt Burns*, 2012 ONSC 1825, which in turn relies on a 2010 decision of the Alberta Court of Appeal in *Merrill Lynch Canada Inc. v. Soost*, 2010 ABCA 251 ("***Soost***"). In *Soost*, the Alberta Court of Appeal stated that there was double counting in the trial judge's decision to award: (1) lost future income, and (2) the present capital value of future income, i.e., the value of the employee's book of business. See *Soost* at paras. 35, 63. The Ontario Court of Appeal's decision in *Clark* is not referred to by the Alberta Court of Appeal. *Soost* can be distinguished from *Clark* and the present case because, contrary to the situation in *Clark* and in this case, there was no formal program by the employer in *Soost* which gave investment advisors the opportunity to sell their book of business under certain terms. Thus, the sale of the book of business was not in the nature of a benefit that was available pursuant to a policy or program of

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the employer during the notice period. In this case, Ms. Ratz-Cheung could have taken advantage of the BSA Program during the notice period.[5]

[166] In any event, I am bound by the decision of the Court of Appeal for Ontario in *Clark*.

[167] While I find that the BSA Program was a benefit that was available to Ms. Ratz-Cheung during the notice period, I am of the view that Ms. Ratz-Cheung has failed to establish on a balance of probabilities that she would have taken the opportunity to retire, enter into a BSA and sell her book of business during the notice period.

[168] Ms. Ratz-Cheung's evidence about her retirement plans was very limited, vague, general, self-serving, inconsistent and largely unsubstantiated. I do not accept the correction that she tried to make at trial regarding the timing of her retirement analysis. As set out above, her attempted correction is based on information that she did not have at the relevant time, i.e., calculations made by her expert in this litigation.

[169] Ms. Ratz-Cheung did not explain how the payments that she was expecting to receive under a BSA for three years would have been sufficient to cover all of her family's expenses and needs over an extended period of time. She also did not give evidence as to whether she was planning to work outside of the industry after entering into the BSA, what kind of jobs she would have considered, and how she thought that she could obtain such a job given her training and experience. Ms. Ratz-Cheung's evidence suggested that her plan was to stop working completely. However, she gave little or no evidence that substantiated such an intention and/or that showed that such a decision would have made sense for her, financially and otherwise, at the relevant time (i.e., in February 2020).

[170] This lack of evidence is in stark contrast with the situation in *Clark* where there was evidence that, prior to his termination: (a) Mr. Clark wished to retire from the IA business; and (b) he had reached an agreement to agree with another IA about selling his book of business after having discussions with two IAs regarding a possible sale.

[171] The submission of counsel for the Plaintiff that Ms. Ratz-Cheung would have acted in a way to avoid losing the value of her book of business if given reasonable notice of dismissal is argument that is not supported by evidence of Ms. Ratz-Cheung. It is also based on an unproven assumption, i.e., that selling her book of business would necessarily lead to the best financial

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[5] The case *Chrabalowski v. BMO Nesbitt Burns Inc.*, 2011 ONSC 3392 can be distinguished on the same basis. At para. 12, the Court stated that "there can be no claim for damages based on a loss of clientele where the claim is founded on a failure to allow the plaintiff to continue to work." The claim was not characterized as the loss of a benefit during the notice period. Here, there can be a claim for the loss of the opportunity to take advantage of NB's BSA Program during the notice period as a result of NB's failure to allow Ms. Ratz-Cheung to continue to work during the notice period.

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outcome for Ms. Ratz-Cheung. If Ms. Ratz-Cheung had analyzed her financial needs, the potential financial benefits and the risks, I cannot exclude the possibility that she could have decided that it was more financially beneficial for her to continue working in the industry, to move to another firm and to work hard to try to bring as many clients as possible with her. Again, I have no evidence one way or the other to support the bald statement that Ms. Ratz-Cheung would have decided to enter into a BSA during the notice period.

[172] A related issue is that Ms. Ratz-Cheung refused to provide information in the litigation about the assets under management that she services at RBC, despite requests from NB's counsel. Such evidence could have been relevant to the Plaintiff's unproven assumption regarding the financial benefits of a BSA. Further, in the absence of this evidence, it is not possible to determine whether Ms. Ratz-Cheung is worse off now than she would have been had she entered into a BSA – for instance, it is possible that Ms. Ratz-Cheung's assets under management at RBC are significant enough that Ms. Ratz-Cheung's sale of her book of business at RBC could entirely mitigate the value of her lost opportunity under the BSA Program.

[173] At trial, counsel for the Plaintiff argued that the clauses in the BSA that require a retiring IA not to commence employment with any other entity to provide or offer investment services for three years are unreasonable restrictive covenants that are unenforceable. As a result, he submitted that it was not clear that Ms. Ratz-Cheung would have had to retire or stop working as an IA. Counsel for the Plaintiff also suggested that Ms. Ratz-Cheung could have sold her book of business to another IA outside of the BSA Program and without the associated restrictions.[6] There are a number of problems with these submissions:

a. The Statement of Claim states that "but for the termination of her employment, [Ms. Ratz-Cheung] would have sold her books of business and retired during the reasonable notice period." There is no suggestion that Ms. Ratz-Cheung would have continued working, especially as an IA.

b. There is no evidence whatsoever that any IA would or could have been interested in "buying" Ms. Ratz-Cheung's book of business outside of the BSA Program. While such transactions appear to have taken place before the BSA Program was implemented, there is no evidence before me that they continued after the BSA Program was put in place. *Clark* does not assist Ms. Ratz-Cheung in this regard as the relevant events took place almost ten years before the BSA Program was implemented and the Court found that NB would have approved the proposed sale.

[6] I also note that without developing the argument in any way, Ms. Ratz-Cheung states in her closing submissions that NB "has not demonstrated that the [BSA Program] was incorporated in the notional employment contract between the parties". This argument is inconsistent with Ms. Ratz-Cheung's own position which is entirely reliant on the BSA Program. Among other things, Ms. Ratz-Cheung's expert, Mr. Lewis, relied on the BSA Valuation Tool to calculate the value of Ms. Ratz-Cheung's book of business.

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In my view, it would be unduly risky for an IA to pay anything for a book of business without the approval of NB in circumstances where NB could decide to reassign the responsibility for client accounts to a different IA. Further, and in any event, there is no evidence before me as to how much an IA would have been prepared to pay for Ms. Ratz-Cheung's book of business outside of the BSA Program. The only evidence before me regarding the value of Ms. Ratz-Cheung's book of business is based on the BSA Valuation Tool and, therefore, is premised on a BSA being entered into. Thus, if Ms. Ratz-Cheung is to establish the loss of an opportunity to sell her book of business, that lost opportunity would have had to occur under the BSA Program.

c. The restrictive covenant argument was raised late in the trial by counsel for the Plaintiff, in a very brief fashion. This Court does not have the required evidence and legal submissions to determine this issue. Given that the Plaintiff's entire damages claim in relation to her book of business is premised on the BSA Valuation Tool and, therefore, on a BSA being entered into, it is not appropriate for the Plaintiff to attack the validity of the BSA in passing in her closing submissions, without ensuring that NB and the Court were aware that this was an issue in the case, and without substantiating her position with evidence and properly developed legal arguments. Again, there is no evidence before me that, contrary to the allegations in the Statement of Claim, Ms. Ratz-Cheung intended to continue working after retiring from NB.

[174] In light of the foregoing, I conclude that Ms. Ratz-Cheung has failed to establish that she would have taken the opportunity to enter into a BSA during the notice period. As a result, she has failed to establish that she is entitled to damages in relation to the value of her book of business in order to place her in the same financial position she would have been in had reasonable notice been given.

[175] Had I concluded that Ms. Ratz-Cheung was entitled to receive damages with respect to her book of business pursuant to the BSA Valuation Tool, I would have used the valuation date used by Mr. Lewis (i.e., February 20, 2020), and not the valuation date used by Mr. Andrade (i.e., February 20, 2018). As stated above, the BSA opportunity under the BSA Program was available to Ms. Ratz-Cheung during the notice period and, consequently, she did not have to take this opportunity at the date of her termination and/or to elect between a BSA and pay during the notice period.

[176] NB's reliance on what it calls the "general presumption" that damages should generally be assessed as of the date of breach is misplaced. The law is clear that damages for wrongful dismissal should place the employee in the same financial position the employee would have been in had proper notice been given and the employee had worked to the end of the period of reasonable notice. It is not possible to calculate such damages by reference to the termination date only.

4. <u>Bad faith damages</u>

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a. Applicable legal principles

[177] The contract of employment is, by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision. At the time the contract was formed, there would not ordinarily be contemplation of psychological damage resulting from the dismissal since the dismissal is a clear legal possibility. Thus, the normal distress and hurt feelings resulting from dismissal are not compensable. See *Honda Canada Inc. v. Keays*, 2008 SCC 39 at para. 56 ("***Honda***").

[178] However, an employee can allege mistreatment in the manner of dismissal by the employer. A breach of the duty to exercise good faith in the manner of dismissal is independent of any failure to provide reasonable notice. It can serve as a basis to answer for foreseeable injury that results from callous or insensitive conduct in the manner of dismissal. See *Matthews* at para. 44.

[179] Damages resulting from the manner of dismissal are available only where the employer engages in conduct during the course of dismissal that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive. See *Honda* at para. 57. Examples of conduct in dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance. See *Honda* at para. 59.

[180] Awards for damages for psychological injury resulting from conduct in the manner of termination are intended to be compensatory. See *Honda* at para. 60.

b. Submissions of the parties

i. Submissions of the Plaintiff

[181] Ms. Ratz-Cheung seeks damages in the amount of $100,000 for bad faith in depriving her of her book of business, the misleading characterization of her wrongful dismissal and the unfounded allegation of after-acquired cause.

[182] Ms. Ratz-Cheung argues that NB misled her when it dismissed her because the reasons for termination (job elimination and restructuring) were false. She states that NB breached its duty of honesty and good faith. She also argues that NB's allegations of after-acquired just cause prolonged and complicated the action, and that NB apparently approached trial with the intention of dragging her through the mud in a disproportionate fashion, without regard to her contributions to NB. Ms. Ratz-Cheung points out that in addition to being wrongfully dismissed and having her livelihood removed, she was deprived of her book of business. She submits that NB egregiously took the book of business for itself, and sold it to Ms. Di Rocco.

ii. Submissions of the Defendant

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[183] NB submits that Ms. Ratz-Cheung has not demonstrated a basis for bad faith damages. It states that Ms. Ratz-Cheung has not established behaviour on the part of NB that was untruthful, misleading or unduly insensitive, and that there was no conduct in this case during the course of dismissal that was unfair or in bad faith. According to NB, it terminated Ms. Ratz-Cheung in a manner that supported her prompt re-employment at RBC, and it did not publicly emphasize Ms. Ratz-Cheung's behavioural issues.

[184] NB states that Ms. Ratz-Cheung cannot recover bad faith damages for NB's allegation of after-acquired cause. It relies on *Sankreacha v. Cameron J. and Beach Sales Ltd.*, 2018 ONSC 7216 at para. 182 ("***Sankreacha***").

[185] NB points out that bad faith damages are compensatory in nature and must reflect actual damage. It submits that Ms. Ratz-Cheung has not led any evidence that she has experienced loss directly related to any conduct by NB during the dismissal, and that her claim for bad faith damages falls squarely within the category of normal distress and hurt feelings flowing from dismissal.

c. Discussion

[186] I generally agree with NB's submissions on this issue. Aside from the normal distress and hurt feelings resulting from dismissal, which are not compensable, Ms. Ratz-Cheung has not established any damages flowing from the manner in which she was dismissed. She also has not established mistreatment in the manner of dismissal or conduct of NB in the course of the dismissal that was unfair or in bad faith. The fact that the reasons given for her termination – job elimination and restructuring – were not accurate does not establish mistreatment or bad faith. I accept NB's explanation that this was done in good faith and to facilitate Ms. Ratz-Cheung's re-employment. Further, there is no evidence that Ms. Ratz-Cheung was dismissed to deprive her of her book of business. Finally, a pleading of after-acquired cause cannot give rise to bad faith damages: see *Sankreacha* at para. 182.

[187] Consequently, I decline to order bad faith damages. There is also no basis in this case for an award of punitive damages: see *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419 at paras. 79-80.

C. CONCLUSION

[188] The Plaintiff's action is granted, in part. NB is ordered to pay to Ms. Ratz-Cheung damages in the amount of $240,091, with prejudgment interest from February 20, 2020 to the date of this judgment, and post judgment interest from the date of this judgment.

[189] If costs cannot be agreed upon, Ms. Ratz-Cheung shall deliver submissions of not more than five pages (double-spaced), excluding the bill of costs, by January 22, 2024. NB shall deliver its responding submissions (with the same page limit) by February 5, 2024. Ms. Ratz-Cheung may deliver reply submissions of not more than two pages (double-spaced) by February 12, 2024. The submissions of all parties shall also be sent to my assistant by e-mail and uploaded onto CaseLines.

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Vermette J.

Released: January 8, 2024

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