**CITATION:** Arora v. ICICI Bank of Canada, 2024 ONSC 4115
**COURT FILE NO.:** CV-21-00664265-0000
**DATE:** 20240723

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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| **BETWEEN:** | ) | |
| | ) | |
| AMIT ARORA | ) | |
| | ) | *Jason J. Jagpal*, for the Plaintiff |
| Plaintiff | ) | |
| **– and –** | ) | |
| | ) | |
| ICICI BANK OF CANADA | ) | *P.A. Neena Gupta*, for the Defendant |
| Defendant | ) | |
| | ) | |
| | ) | **HEARD:** February 5-9, 12 and 13, 2024 |
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| | ) | |

**L. BROWNSTONE J.**

## Introduction

[1] The plaintiff Amit Arora was employed by the defendant ICICI Bank of Canada (the "Bank") or its parent company ICIC Bank Limited for 15 years.

[2] At the time the Bank terminated Mr. Arora's employment, he held the position of Assistant Vice-President ("AVP"). He played a valuable role in two of the Bank's products connected to foreign students. The products were within an area of Bank's business called the "student direct stream". The first was a GIC product. Foreign students who wished to obtain a visa to study in Canada were required to demonstrate that they had sufficient funds to support themselves for a period of time. The Bank would assist students from India in transferring funds to Canada and securing a GIC to satisfy this visa requirement. In about 2019, ICIC wished to develop a second product, Unifee, which other banks had already developed. This product involved arrangements between the Bank and community colleges for the Bank to process the payment of students' tuition fees.

[3] In October 2020, the Bank's data leakage prevention program flagged that a large number of emails were sent from Mr. Arora's Bank email address to his home email address. The system also flagged that some of those emails, or their attachments, contained private information such as social insurance numbers. Upon review of those emails, the Bank developed concerns that Mr. Arora had engaged in activities that were contrary to various Bank policies and to the duties he owed to the Bank. A formal investigation committee was struck.

[4] After the investigation committee interviewed Mr. Arora and completed its report, the Bank terminated Mr. Arora's employment, taking the position that it had just cause to do so.

[5] To determine whether Mr. Arora was wrongfully dismissed, the court must determine whether the Bank has proven it had cause to terminate his employment. The Bank claims Mr. Arora stood in a fiduciary relationship to the Bank and breached those duties. In the alternative, even if he was not in a fiduciary position, he breached his duties of good faith and loyalty to the Bank, resulting in his dismissal for cause. Mr. Arora denies he was a fiduciary and claims any wrongdoings were minor and did not warrant dismissal for cause. He claims he was wrongfully dismissed and is entitled to pay and benefits in lieu of notice. Mr. Arora also claims he is entitled to moral damages for the Bank's investigation and post-termination conduct. He claims he is entitled to a pro-rated share of his bonus and to certain pension benefits even if the Bank had cause to dismiss him.



**Issue One: Did Mr. Arora breach his duties to the Bank?**

**a) Did Mr. Arora owe fiduciary duties to the Bank?**

[6] The markers of a fiduciary relationship are that the fiduciary has scope for the exercise of some discretion or power, the fiduciary can exercise that power or discretion to affect the beneficiary's legal or practical interests, and the beneficiary is vulnerable to the fiduciary holding the discretion or power. A fiduciary has a high degree of autonomy to exercise his power, discretion, or control to affect the beneficiary's legal or substantial practical interest: *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261, at paras. 27-36.

[7] In determining whether an individual is a fiduciary in the employment context, the court looks to the nature of the relationship between the parties, the job function and responsibilities, the degree of trust, confidence, and reliance given to the employee, and the corresponding vulnerability or dependency of the employer: *Ford v. Keegan*, 2014 ONSC 4989, 13 C.C.L.T. (4th) 188, at paras. 168-170.

[8] To understand Mr. Arora's position with the Bank at the time his employment was terminated, it is helpful to review his employment history. Mr. Arora had first worked for the Bank at its Indian parent company, ICIC Bank Limited, in international private banking. In 2006, he was asked to move to Canada to take on the role of senior relationship manager at ICIC Wealth Management. In 2009, the Bank moved him to Calgary, where he took over management of a branch. He moved back to Toronto in December 2010, where he had responsibility for customer service, product management, and a "tie-up" with a third party in respect of RESPs.

[9] In about 2016, he was promoted to Assistant General Manager, a position that is roughly equivalent to that of AVP. After a period of time, he accepted a lateral move to an AVP position. In that position, he reported to Ravi Balchandani, a Vice President who reported to Sandeep Goel, the Bank's CEO. Mr. Arora reported to Mr. Balchandani until 2019. They met frequently, sometimes as often as daily. There were some changes to Mr. Arora's direct supervisor after Mr.

Balchandani left Canada, but he continued to have reporting discussions and obligations at the same level.

[10] The Bank's six employment levels are described in brief in the Bank's 2020 employee handbook as follows: first, president and CEO, strategic senior management position; second, leadership team, described as "quasi-strategic" general management; third, operational, defined as line of business/ functional leaders; fourth, task planning, implementation and review; fifth, first level supervisors; and sixth, rule-based defined tasks. Mr. Arora's position at the time of termination was in the third category. The descriptions make it clear that those in Mr. Arora's job level were responsible for executing plans and budgets set by those in the level above them. Mr. Arora was not a member of the management committee and was only advised of its decisions if his superior advised him of decisions that were relevant to him and his work.

[11] In 2014 or 2015, Mr. Arora and his then-superior had created a student GIC product for foreign students, primarily students from India. In 2017, Mr. Arora became responsible for sales of student GICs for international students. The student GIC program was related to a federal government program permitting international students who were studying in community colleges in Canada. As a term of their visa, the students were required to provide proof that they had sufficient funds to support themselves in Canda for a year. The Bank provided student GICs for this purpose, initially to students coming from India.

[12] In 2019, Mr. Arora sought and received approval to start looking at Vietnam and the Philippines as potential markets for this product. Approval was granted through the management committee, a committee of which Mr. Arora's superior was a member. Mr. Arora did not appear before the management committee to pitch the idea or answer questions about it. Similarly, Mr. Arora determined that at some point the Bank should pay consultants in India who recruited students, as the competition was doing so. Ultimately, the more senior people at the Bank gave their approval for this to occur.

[13] In about 2019, Mr. Arora was given responsibility for a second product in the student direct stream, Unifee. This was a "tie-up" with colleges, where students' college tuition fees would be processed through the Bank. The Unifee program was less developed and less profitable for the Bank than was the GIC program at the time Mr. Arora's employment was terminated.

[14] At the time his employment was terminated in 2020, Mr. Arora had several direct reports. Anirudh Prabhakar in Canada and six people in India reported to him in respect of the GICs, and two people, including Bhavna Kumar, reported to him on the Unifee side.

[15] Mr. Arora acknowledged he was the most senior, knowledgeable Bank employee in Canada in respect of the student GICs, at least after 2019 when Mr. Balchandani moved to India. There was conflicting evidence on the two products' significance to the Bank. I accept Mr. Balchandani's evidence on this issue. He was a straightforward, direct witness. Although called by Mr. Arora, he remains an employee of the Bank and was clearly not an advocate for either party. I found him to be a credible witness, and I accept his evidence in this regard. He testified

that Mr. Arora was involved in about 25 percent of the smallest line of the Bank's business. While Anthony Coulthard, the Bank's Head Legal and Chief Compliance Officer, described the area as a key business for the Bank at the time, I accept Mr. Balchandani's evidence, supported by Mr. Arora's evidence, that the area represented a relatively small portion of the Bank's business.

[16] I find that although Mr. Arora was responsible for a portion of the Bank's business, he had limited authority or discretion to affect the Bank's interests. He was free to make suggestions, and sometimes those suggestions were accepted by the Bank, such as the two examples outlined in paragraph 12 above. He was not free to make decisions or exercise his discretion in many areas, including the ratings to be given to the employees who reported to him, or who would be hired onto his team. He had limited autonomy even in the circumscribed sphere in which he worked for the Bank.

[17] It may be that such limits on decision-making were usual for the Bank; that, however, does not alter or enhance the limited scope of Mr. Arora's ability to act on his own accord to make decisions affecting the Bank. Mr. Arora did have regular contact with the Bank's suppliers and had significant responsibility for a portion of the Bank's revenues, those that derived from student GICs and Unifee. The Bank claimed it was vulnerable to Mr. Arora's departure and to competition from him on his departure. I find this was not so and the Bank was able to recover relatively quickly once it decided to terminate Mr. Arora's employment.

[18] Mr. Arora had some, but limited, access to confidential Bank documents. For example, some information produced in this litigation was heavily redacted, as it was only available to a certain level of Bank employee, more senior than Mr. Arora. These included a performance review presentation to the board dated April 28, 2020 that was almost entirely redacted, and a strategy update from November 2020 that was significantly redacted.

[19] Mr. Arora had knowledge of the Bank's business and marketing opportunities. However, his role in strategic market development was carefully overseen and managed by his superiors at the Bank. Mr. Arora had knowledge of which other banks the Bank was competing with in relevant geographical areas, but much of this information was publicly available on websites. He denied having access to information about the Bank's future plans in the foreign student market.

[20] Given all of these facts, I find that Mr. Arora did not have a high degree of autonomy to exercise his power, discretion, or control to affect the Bank's legal or substantial practical interests, and that the Bank was not vulnerable to the exercise of any discretion that Mr. Arora did have: *Elder Advocates of Alberta Society*, at paras. 27-36. I find that Mr. Arora was not a fiduciary of the Bank.

**b) Did Mr. Arora breach other duties he owed to the Bank?**

***i) The nature of the duties owed***

[21] A finding that Mr. Arora did not owe the Bank fiduciary obligations does not mean he did not owe the Bank other duties. Quite the contrary. All employees owe their employers a duty of

good faith and fidelity. Indeed, Mr. Arora relies on *McMahon v. TCG International Inc.*, 2007 BCSC 1003, 59 C.C.E.L. (3d) 131, which holds that employees are required to faithfully serve the employer, not compete with the employer, not disclose the employer's confidential information, and provide full-time service to the employer. Employees are required to protect their employer's interests: see also *GasTOPS Ltd. v. Forsyth et al.*, 2009 CanLII 66153 (Ont. S.C.); *John A. Ford & Associates Inc. v. Keegan*, 2014 ONSC 4989, 13 C.C.L.T. (4th) 188, at para. 169.

[22] In addition to these general common law duties, the Bank relies on the 2007 terms and conditions of service the Bank provided to Mr. Arora when he moved to Canada as a senior relationship manager. Specifically, the Bank relies on the following term from that document:

> 7. Professional Ethics and Confidentiality
>
> While you are in the services of the Bank, you are not permitted to carry on any business or profession or enter, for any part of your time, in any capacity, the services of, or be employed by or engaged with any other firm, company or person. You will devote your whole time and attention to your office work to promote the interest of the Company and will not divulge to any person or utilise any of the Bank's secrets or other related information (which you may possess by reason of your association with the Bank) outside the Bank.

[23] Mr. Arora argues that this term is irrelevant because he no longer held the position of senior relationship manager at the time he was dismissed. He has had several promotions since that time. He argues that he was no longer bound by basic terms from the 2007 terms and conditions of his employment due to the changed substratum doctrine: *Celestini v. Shoplogix*, 2023 ONCA 131, 166 O.R. (3d) 368, at para. 35.

[24] I do not agree for the following reasons.

[25] First, the changed substratum doctrine is generally relied upon in the context of contractual notice provisions that cease to be fair after an employee is promoted and has a new set of responsibilities: *Celestini*, at para. 34. Second, even if I assume the doctrine can be applied beyond notice periods, there is no plausible scenario in which Mr. Arora's promotions released him from the requirement that he devote his full time and attention to his job or that he respect the Bank's secrets.

[26] I say this for four reasons.

[27] First, common sense dictates that with increased responsibilities comes a requirement to spend more, not less, time on one's work and to pay more, not less, attention to issues of confidentiality. If Mr. Arora was required to devote his whole time and attention to his work as a senior relationship manager, and later was promoted to the position of AVP, he could not have expected that this requirement no longer applied to him. Nor could he have expected that he was freer to share the Bank's confidential materials externally after his promotions.

[28] Second, Mr. Arora acknowledged that he understood he was governed by the Bank's Code of Conduct. Although Mr. Arora testified that no one from the Bank went through and explained the documents to him, he did agree he was bound by them. That Code required him to keep confidential the Bank's proprietary and confidential information, as defined. The Code specifies that:

> 'proprietary and confidential information' includes any system, information or process that gives the Bank an opportunity to obtain an advantage over competitors. This term also includes non-public information about the Bank's businesses, its customers and about its Representatives, as well as any other non-public information that may be in [the employee's] possession or control." Mr. Arora also acknowledged reading and knowing he was governed by the Bank's conflict of interest policy, which defined a conflict of interest as "any situation that could reasonably be expected to impair the ability of a director, officer or employee of the Bank to render unbiased and objective advice or that could reasonably be expected to adversely affect that person's duty to the Bank.

[29] Third, the terms and conditions the Bank relied on codify basic employment duties that are subsumed within every employee's general duty of good faith and fidelity owed to its employer.

[30] Fourth, Mr. Arora acknowledged in cross-examination that he knew he was required to devote his full time and attention to the Bank.

[31] In sum, although not a fiduciary of the Bank, Mr. Arora owed the Bank duties of good faith and loyalty. He was required to provide full-time service to the Bank, to refrain from competing with the Bank, and to refrain from disclosing the Bank's confidential information. These duties are based both in common law and in the contractual terms of Mr. Arora's employment with the Bank as referred to above.

### *ii) Did Mr. Arora breach the duties he owed to the Bank?*

[32] The Bank alleges Mr. Arora breached these duties in a number of ways. It argues that some of the breaches were severe enough to warrant summary dismissal on their own, and, taken cumulatively, no doubt justify dismissal for cause.

[33] A summary of the Bank's reasons for terminating Mr. Arora's employment is found in the investigative committee report provided to the CEO, Mr. Goel. Its conclusions with respect to Mr. Arora are summarized as follows:

> The Investigation Committee found that [Mr. Arora], while employed at the Bank, intended to and took positive steps to enter into a business in competition with the Bank's Student Direct Program between November 2019 and October 2020 in contravention of the Bank's Code of Conduct and in contravention of his employment agreement. It was also determined that it is likely that [Mr. Arora] took proprietary information and work product of the Bank in furtherance of this

> endeavor. The Investigation Committee found that Mr. Arora shared confidential information of the Bank with a competitor of the Bank on at least one occasion. It was also determined that [Mr. Arora] used Bank systems, time and resources in furtherance of at least two other businesses that were not in competition with the Bank since at least 2018 in violation of his employment agreement, and stored information that could be used to identify individuals on the Bank's systems in a manner that was in contravention of the Bank's Privacy Policy. It was also determined that Mr. Arora should have reported all of the activities addressed in this memo as a potential conflict of interest and taken formal advice from a member of senior management on whether those activities were permissible before commencement.

[34] The investigation committee also determined that Mr. Arora and his two subordinates took steps to establish a competitive business, using Bank resources and information to do so.

[35] The committee concluded that there had been a lack of transparency, inability to follow basic corporate policies, and a lack of integrity, transparency, and trustworthiness, such that the Bank could not continue its employment relationship with Mr. Arora. It recommended that the Bank terminate Mr. Arora's employment for cause, and require him to sign an agreement not to compete with the Bank and not to solicit its employees.

[36] The Bank was concerned that Mr. Arora, perhaps along with his subordinates Mr. Prabhakar and Ms. Kumar, and its competitor Mr. Gupta, were marketing themselves to other institutions to offer services they were supposed to be providing to the Bank and sharing confidential information or using it for their personal benefit along the way. Broadly speaking, the Bank alleges Mr. Arora breached his obligations to it in the following contexts: a) meeting with Mr. Kanishk Gupta, an employee of CIBC, a competitor; b) incorporating a company called BrainTree with his two subordinates and sharing confidential information with the Bank of Montreal ("BMO"); c) sharing information with the Royal Bank of Canada ("RBC"); d) preparing various proposals involving colleges; e) owning stakes in a Kumon franchise and a convenience store; and f) being untruthful and incomplete in his answers to the investigation committee.

[37] I will review each of the alleged breaches in turn.

*a) Interactions with Mr. Gupta*

[38] The Bank alleges that Mr. Arora improperly shared Bank information with Mr. Gupta and improperly planned with Mr. Gupta to compete with the Bank. Mr. Gupta was a former Bank employee who had moved to CIBC. Mr. Arora and Mr. Gupta had various contacts over the years. Mr. Arora stated that Mr. Gupta shared general CIBC information with him, including information about CIBC's market share of the student direct stream products, that Mr. Arora passed on to his superior. Mr. Balchandani and Mr. Gupta both denied this. They each claimed that market share was determined with reference to publicly available information on Immigration Refugee Citizenship Canada's (the "IRCC") website about the number of student visas issued. Mr.

Balchandani's evidence was that Mr. Arora was required to monitor trends, as set out in his job description, by speaking to customers, looking at IRCC information, and watching how the Bank's numbers compared to last month's and last year's numbers. Mr. Balchandani stated he had no knowledge of Mr. Arora speaking to people at other banks.

[39] Mr. Gupta described his work at CIBC as being somewhat different from that of Mr. Arora's work for the Bank. Mr. Gupta worked with educational institutions, while Mr. Arora worked with students. The Unifee product the Bank introduced did compete with Mr. Gupta's work at CIBC, while the GIC product did not.

[40] Mr. Gupta testified that he and Mr. Arora spoke with each other often regarding publicly available general industry trends and opportunities. He denied having discussed market share with Mr. Arora. He agreed they had a number of casual conversations about working with another financial institution in student services but described them as general discussions.

[41] Mr. Arora testified that he disclosed the Bank's activities in the Unifee space in a general way in discussions with Mr. Gupta, including challenges the Bank faced. Mr. Arora acknowledged that this information was not public and that he did not have permission to share that information. However, because he had seen his superiors doing similar things, he did not think it was wrong.

[42] I do not accept Mr. Arora's evidence about the contents of the meetings with Mr. Gupta. Although I have reservations about Mr. Gupta's evidence in general, as will be explained more fully below, I accept it on this point. This is because I accept Mr. Balchandani's evidence that Mr. Arora never discussed with him information he supposedly received from Mr. Gupta about CIBC, contrary to Mr. Arora's evidence. I therefore find Mr. Arora was not meeting with Mr. Gupta for the benefit of the Bank, or to obtain information from Mr. Gupta that would be helpful to the Bank. I find their meetings were for the purposes of advancing their own plans, particularly the BMO and RBC plans, which I discuss below. I do not accept Mr. Arora's evidence or submission that these meetings were to fulfill his job requirement of monitoring market trends. However, I do not find that Mr. Arora disclosed confidential Bank information to Mr. Gupta in their meetings.

*b) The incorporation of BrainTree and the sharing of the sourcing document*

[43] The Bank alleges that Mr. Arora breached his obligations to the Bank in the manner in which he pursued an opportunity with BMO. First, the Bank alleges he breached his obligations of confidentiality by sharing a proprietary Bank document with BMO. Second, the Bank alleges Mr. Arora breached his duties by incorporating a company to compete with the Bank and involving his two subordinates in that corporation.

[44] The BMO opportunity arose in June 2019 when Mr. Arora was approached on LinkedIn by Gurpreet Singh, a BMO employee. BMO was interested in starting a GIC business in India. Mr. Arora was interested in the opportunity to work for a top-five bank. He met with Mr. Singh and Mr. Singh's superior for an initial lunchtime meeting, and then on one or two further occasions, which he described as short coffee meetings. Mr. Arora testified that the BMO employees

suggested that Mr. Arora work not as an employee but as a contractor. They were to send him a non-disclosure agreement and draft sourcing agreement, which was an agreement to be used with educational consultants abroad. However, before receiving any documents from BMO, in early November 2019 Mr. Arora sent BMO a slightly modified version of the Bank's sourcing agreement. He sent it from his Bank email towards the end of a workday. Mr. Arora acknowledged in his evidence this was an error. He said he was excited by the opportunity to work with BMO and "jumped the gun" in not waiting for BMO to send him its draft documents.

[45] The parties differ on the seriousness of this breach. Their difference relates in large part to their different characterizations of the document sent.

[46] The sourcing agreement Mr. Arora sent to BMO was 18 pages long, including schedules. It was a template agreement with consultants abroad, who would refer the Bank customers who planned to immigrate to Canada, so that the Bank could provide newcomer accounts, including GIC accounts. The document included compensation numbers, although the Bank acknowledged that the compensation figures in the agreement were different than the Bank's compensation numbers. Mr. Arora forgot to change some of the identifiers in the documents, so that a specific educational consultant in India with whom the Bank worked, or intended to work, was identified.

[47] Mr. Coulthard testified that this was a proprietary document that the Bank did not wish to have shared with competitors. that it included the name of one counterparty, some key strategic information, and some financial information. The Bank's decision to pay consultants was recent, and the fee arrangements should not be shared with competitors. Mr. Arora needed to use the document to perform his duties for the Bank, as he was to engage student consultants in India on behalf of the Bank. Mr. Coulthard and Mr. Mohanty, then the Bank's Head of Human Resources, referred in a general sense to the cost the Bank had incurred in creating the agreement, which would have included Mr. Arora's time, HR's time, and legal review, among other things.

[48] Mr. Arora acknowledged that it was wrong to send the sourcing agreement to BMO. He testified that was the only Bank document he sent externally. He stated that he considered it to be a template without anything very proprietary in it. He understood proprietary to mean not freely available anywhere, but available only to the Bank. Consultants' identities are easily available from a simple internet search.

[49] Mr. Arora relies on *Partridge v. Botany Dental Corporation*, 2015 ONSC 343, 2015 C.L.L.C. 210-022, at para. 29, aff'd 2015 ONCA 836, 2016 C.L.L.C. 210-020. He argues that the document was not proprietary because the information contained in the document was generally known outside of the Bank, the document was readily available to employees at the Bank and had no special protection, there was no evidence of the amount of time or money expended by the Bank in developing the document, and the only sensitive information, being the pricing, was not included.

[50] I disagree. The document was a lengthy and detailed document intended to establish and define legal obligations between the Bank and its consultants. There was evidence that there had

been legal and employee resources expended on it. While other banks have sourcing documents, there was no evidence that the contents of those agreements are shared between banks. Indeed, had it been valueless, presumably Mr. Arora would not have shared it with BMO. Mr. Arora himself agreed that it was wrong of him to send it to BMO, that he was excited about the opportunity, and "jumped the gun" when he should not have. He did not seek the Bank's permission to share the document.

[51] While I agree with Mr. Arora that general knowledge, skills, and training he acquired at the Bank were not proprietary to the Bank (*Corporate Classic Caterers v. Dynapro Systems Inc.* (1997), 33 CCEL (2d) 58 (B.C.S.C.), at para. 29), I find that this document was proprietary, and that Mr. Arora knew it to be so.

[52] I find that Mr. Arora wrongly shared a confidential proprietary Bank document with a competitor, for his own benefit and to the detriment of the Bank, in breach of the Code of Conduct and in breach of his duties of loyalty to the Bank.

[53] The Bank's second concern with respect to BMO (although the Bank did not, at the time, know the document was related to the BMO opportunity) concerned a company that Mr. Arora incorporated in the middle of November 2019.

[54] The evidence is clear that Mr. Arora prepared incorporation documents for a corporation that would be the contracting party for the BMO opportunity. He asked Ms. Kumar and Mr. Prabhakar to review the articles of incorporation. The three suggested names for the corporation and ultimately chose one of Ms. Kumar's ideas, BrainTree. Both Mr. Prabhakar and Ms. Kumar are named as directors of the corporation, and the ownership of the corporation was to be roughly equal among the three of them. The restrictions on the business of the corporation were described as follows:

> 1) The directors are personally responsible for the operation of the business/corporation
>
> 2) The corporation activities are limited to providing consultancy to financial institutions /banks for sourcing students , work permit holders and immigrants from across different geographies;
>
> a) Student GIC known as SDS program
>
> b) Immigrants having work permits
>
> c) Immigrants intending to immigrate to Canada
>
> d) Products sold / consultancy provided will to be above segment intending to open accounts with the financial institution / bank. Also related products cross sold will be part of the above.

[55] In addition, the articles specified that each of the three directors has "the fiduciary responsibility to act honestly, in good faith, and with a view to the best interest of the corporation."

[56] The Bank notes that four of the five stated objects of BrainTree mirror the job duties that Mr. Arora, Mr. Prabhakar, and Ms. Kumar had at the Bank. Mr. Arora testified that these restrictions were intended to limit the scope of the corporation to be clear that it related only to the BMO opportunity. The restrictions also made clear that the plan had nothing to do with the Unifee program, just the student GICs. Mr. Arora testified that he specifically included language about fiduciary obligations to make it clear that the three of them were partners, owing duties to each other, in contrast to how he viewed his current position at the Bank.

[57] The evidence differed slightly as to how Mr. Prabhakar and Ms. Kumar became involved with the BMO opportunity. Mr. Arora testified that while he was in discussions with BMO, he put pressure on Mr. Prabhakar to start taking more responsibilities at the Bank. According to Mr. Arora, Mr. Prabhakar became concerned that Mr. Arora was leaving and started asking questions. When Mr. Arora told him about his possible plan, Mr. Prabhakar said he wanted to join. He described a similar discussion with Ms. Kumar.

[58] Mr. Prabhakar, on the other hand, testified that Mr. Arora initially told him there was a job opportunity for Mr. Prabhakar at BMO and that Mr. Arora could refer Mr. Prabhakar to BMO. Mr. Prabhakar was not interested, as things were going well for him at the Bank, but after some time had passed, Mr. Arora said there was also an opportunity for contract work for BMO. Mr. Prabhakar said he was interested in this work because it was an opportunity to create their own business. Mr. Arora told him they needed to incorporate, and then some months later Mr. Arora told him that BMO management had changed and the opportunity no longer existed.

[59] Ms. Kumar testified that Mr. Prabhakar advised her that Mr. Arora was going to contact her about an opportunity, which Mr. Arora did shortly thereafter. She testified there was a staggered resignation plan – she would resign first, followed by Mr. Prabhakar, and finally Mr. Arora.

[60] I accept Mr. Prabhakar and Ms. Kumar's evidence on how they learned of the BMO opportunity. Both witnesses readily acknowledged their role in BrainTree. They were clear and consistent in their evidence, and did not waver or hesitate in their answers. Mr. Prabhakar's evidence accords with the evidence of several other witnesses that he was doing very well at the Bank. Therefore I accept his evidence that when first presented with a potential employment opportunity at a competitor, he had no reason to want to move there. His evidence accords with common sense.

[61] In addition to the articles of incorporation, Mr. Arora shared with Mr. Prabhakar and Ms. Kumar some forecasting calculations he had done. He described working on the calculations at night and noted that he would not earn as much money as he earned with the Bank until year three or four of the BMO opportunity, according to his forecasts.

[62] The opportunity with BMO did not materialize. BrainTree remained in existence until 2021, but served no active purpose and was never utilized.

[63] The Bank argues that Mr. Arora was obliged, as a manager, to retain Mr. Prabhakar and Ms. Kumar as employees of the Bank: *RBC Dominion Securities v. Merrill Lynch Canada Inc*. 2008 SCC 54, [2008] 3 S.C.R. 79, at para. 13. Further, he should not have spent time they were all required to devote to the Bank discussing or pursuing other opportunities. He certainly should not have been planning with them to divert business from and compete with the Bank, whether on their own or for a competitor.

[64] Mr. Arora maintains that discussions between him, Mr. Prabhakar, and Ms. Kumar happened largely during lunch hours and personal time. He also thought that because senior people had departed the Bank and taken employees with them, there was nothing prohibiting him from doing so. Mr. Arora further testified that he had no ability to retain Mr. Prabhakar and Ms. Kumar – he was unable to offer them a pay hike or a promotion because it was beyond his purview. The description of the position Mr. Arora held at the time of termination did not include any responsibility for employee retention.

[65] Like in *Merrill Lynch*, Mr. Arora had managerial responsibilities for Ms. Kumar and Mr. Prabhakar. The context of the offending behaviour in *Merrill Lynch* made it more serious – a mass exodus to a competitor without notice to the employer and the removal of confidential client records. Nonetheless, I find that involving his two direct reports in his plans, which in the case of BrainTree would have been in competition with the Bank, breached his duty of good faith to the Bank.

[66] I find that Mr. Arora wrongly shared a proprietary document belonging to the Bank with BMO in breach of his obligations. I find that he brought the BMO opportunity to Mr. Prabhakar and Ms. Kumar and encouraged them to join him in the opportunity. Mr. Arora controlled that opportunity and decided to involve both Mr. Prabhakar and Ms. Kumar. I find his activities crossed the line from planning to leave his employment to breaching his duties to the Bank by disclosing the document in question to BMO and by involving his subordinates in his plan to compete with the Bank. I agree with the Bank's submission that it is not necessary for these plans to have come to fruition for the Bank to be entitled to act upon them. This is not an action in damages against Mr. Arora. Planning to compete and potential harm is sufficient to break the bonds of trust between employee and employer: *Empey v. Coastal Towing Co*. (1976), 31 C.P.R. (2d) 157 (B.C.S.C.); *Canadian Imperial Bank of Commerce v. Boisvert*, [1986] 2 F.C. 431, at pp. 456-57.

*c) The RBC opportunity*

[67] The Bank alleges that Mr. Arora breached its duties to the Bank by the manner in which he pursued an opportunity with RBC. The Bank alleges that Mr. Arora shared confidential information with RBC, and while he was working for the Bank, he pitched a directly competitive business whereby he would steer students not to the Bank, but to its competitor.

[68] Mr. Arora testified that RBC wished to enter the international student market, and that Mr. Gupta asked if Mr. Arora was interested in pursuing this opportunity. According to Mr. Arora, Mr. Gupta arranged a meeting with Mr. Amit Brahme at RBC. Mr. Gupta testified that Mr. Arora initiated this conversation.

[69] In October 2020, Mr. Arora and Mr. Gupta met with Mr. Brahme at RBC. Mr. Arora signed a non-disclosure agreement (an "NDA"). Mr. Arora created a proposal, which he shared with Mr. Gupta. In cross-examination, Mr. Arora acknowledged having prepared and sent to RBC a PowerPoint presentation that he created, with some input from Mr. Gupta. Mr. Gupta acknowledged having read it and ultimately agreed that he had added a slide to it. Mr. Arora testified that he got the information to populate the presentation from his experience and the IRCC website data. Mr. Arora worked on the process flow documents for RBC on his Bank laptop in the evenings and on weekends.

[70] I find that Mr. Gupta downplayed his involvement with this and other initiatives. For example, when asked why he suggested to Mr. Arora that they not use their work emails for correspondence between them, he answered that it was a proposal for RBC at the ideation stage, so why use a work email? When pressed as to whether he had a concern with using a work email he said, "it was the right thing to do since it was a personal initiative." He first denied having input into the RBC proposal documents, but ultimately conceded he had input and added information. He had very poor memory of events and documents. When it was suggested that he, not Mr. Arora, had set up the meeting at RBC, he said he did not remember. Mr. Gupta has reason to downplay his involvement in looking for other opportunities given his employment, then and now, at CIBC. I find his evidence regarding the RBC opportunity not credible.

[71] I accept the evidence of Mr. Brahme, the person at RBC with whom Mr. Arora and Mr. Gupta met. I find that he was straightforward and clear in his evidence. He is not tied to either party in the litigation and has no interest in its outcome. Where the evidence of Mr. Brahme differs from that of either Mr. Arora or Mr. Gupta, I have accepted Mr. Brahme's evidence. Mr. Brahme confirmed Mr. Gupta introduced Mr. Arora to Mr. Brahme, and I so find. When they met, Mr. Arora explained that Mr. Gupta and Mr. Arora were forming a business. There was some evidence that it was Mr. Gupta's wife who was Mr. Arora's intended partner, not Mr. Gupta.

[72] Mr. Arora argues that the evidence about whether there was a presentation to RBC was conflicting. Mr. Arora also argued that the information provided to RBC was not confidential. He stated that consultants' names are publicly available on websites, and the programs with which he was involved were known to other banks.

[73] However, Mr. Brahme testified that Mr. Arora advised RBC that the top 20 agents are responsible for 50 percent of the business. He testified that although some of the information was generic information, some was not and was "good intel" for RBC.

[74] I do not accept Mr. Arora's submission that it is immaterial whether there was a presentation. I accept Mr. Brahme's evidence and find that the presentation occurred, and that at

that meeting, Mr. Arora shared important information with RBC that assisted RBC in understanding the market in which it wished to compete with the Bank. I find that Mr. Arora gave information about how the Bank operated to Mr. Brahme and RBC, that Mr. Brahme and RBC did not previously know this information, and that Mr. Arora shared this information with Mr. Brahme and RBC for his personal benefit and to the Bank's detriment.

[75] Shortly after meeting with RBC, Mr. Arora was suspended from the Bank, and the RBC discussions came to an end.

[76] The Bank viewed the RBC opportunity as direct competition to it. Mr. Coulthard testified that it was clear to the Bank that the communications with RBC breached its conflict-of-interest policy and its Code of Conduct, and that Mr. Arora was planning to redirect to a competitor business opportunities properly belonging to the Bank, which the Bank was paying him to generate.

[77] I agree. I find that Mr. Arora breached his duties to the Bank by sharing confidential Bank information with RBC. He did so for his own gain – to secure a position with RBC and make his services appealing to RBC. He intended to compete with the Bank in the services he provided to RBC, and he provided confidential information to RBC while still employed by the Bank in an effort to secure a position, either employment- or consultant-based, for himself.

*d) The College marketing and purchasing proposals*

[78] In the summer of 2020, Mr. Arora was involved in discussions about several ideas regarding colleges, including recruitment, marketing, and purchasing a college. Various combinations of Mr. Arora, Mr. Prabhakar, Ms. Kumar, Mr. Gupta, and a representative of Sheridan College discussed possibly opening or purchasing a college, a college marketing plan, or college recruitment.

[79] Ms. Kumar testified that all the proposals were mere ideas, no serious steps were taken, and none of the discussions happened on Bank time. She did not view the actions as any different than going for interviews at different institutions while employed at the Bank, which many Bank employees did.

[80] The evidence of all witnesses was that all of these ideas were discarded quite quickly. They were found not to be feasible and not pursued. There was no sharing of confidential information with any third party, and Mr. Arora did not attempt to lure his subordinates from the Bank. These ideas had the flavour of brainstorming. They were not all generated by Mr. Arora.

[81] I find that the Bank has not proven on a balance of probabilities that Mr. Arora breached his duties to the Bank in respect of these college-related ideas.

*e) The Kumon and Convenience store issues*

[82] The Bank alleges that Mr. Arora's ownership interests in a Kumon franchise and a convenience store, as well as his activities in support of the Kumon business, breached his obligations to the Bank.

[83] Mr. Arora's wife is the majority owner of a Kumon franchise, of which Mr. Arora owns 25 percent. Many of the documents for Kumon, containing customers' personal information including social insurance numbers, were stored on Mr. Arora's work computer. The Bank has strict rules about how it must manage the privacy of information such as social insurance numbers. When the Bank discovered this information was being stored on its computer, it was concerned about the way in which the information was stored, as well as about having the Bank's resources used for a separate business.

[84] Mr. Arora was also a part owner of a convenience store.

[85] The Bank states it was unaware of either of these business interests. Mr. Arora argues he did not need to disclose either business as there was no conflict between those businesses and the Bank. The code of conduct states that "I will have no business interest outside the Bank which in any way conflicts with my duties to the customers or to the Bank. Any material business interest outside the Bank must be reported to the Conduct Review Committee of the Bank". Mr. Coulthard acknowledged that the document defines neither business interest nor material business interest.

[86] Although the 2007 terms and conditions of employment the Bank provided to Mr. Arora stipulated that he was not permitted to carry on another business or profession, the Bank concedes that the Kumon and convenience store issues on their own would warrant only a warning. However, the Bank states that viewed in conjunction with the other issues, these activities support its conclusion that the relationship of trust and honesty between employer and employee was broken and beyond repair.

[87] I do not find that Mr. Arora's interests in the two businesses were significant breaches of his duties to the Bank. There is no evidence of any issue with the convenience store ownership. There was some evidence that he spent some of the Bank's time and resources (printing and scanning, for example) on the Kumon business. There was no evidence that this interfered with his duties to the Bank. The storage of the private information of customers on the Bank's computers jeopardized both the customers and the Bank. I agree with Mr. Arora that this is a mistake that could have been easily managed, as the Bank conceded. It would not lead to an erosion of trust between the Bank and Mr. Arora.

*f) The interview and follow-up letter*

[88] After the Bank's data leakage prevention program flagged Mr. Arora's emails, the Bank started an investigation of Mr. Arora. On November 12, 2020, it told Mr. Arora it wished to meet with him about future plans for India. Instead, Mr. Arora was met by Mr. Coulthard, Mr. Mohanty, and Tova Blum, who worked in human resources. The Bank argues that the interview provides

clear evidence that Mr. Arora had irretrievably damaged the employment relationship such that it could not be repaired.

[89] The interview was obviously a stressful and difficult event for Mr. Arora, who became emotional when recounting it. He advised that after about 45 minutes into the approximately 90-minute interview, he gave up because he was being told he was a liar and the Bank had lost trust in him. He acknowledged they did not use the word "liar" or "lying" at the interview. He described feeling ambushed and humiliated. He testified that he panicked and thought he should just say yes and tell them what they wanted to hear. He acknowledged not telling the Bank about the BMO opportunity. He related that he misunderstood their questions at times. For example, they asked about the college marketing plan and then asked, "did you plan anything else?" He understood the question to be limited to the college marketing plan and said no.

[90] In cross-examination, he acknowledged that at the interview he gave an anodyne, false explanation for having sent the sourcing agreement to BMO (that it was to help a colleague).

[91] Mr. Coulthard testified that if Mr. Arora had been entirely honest in the interview, he would have felt that a suspension would have been an appropriate sanction. He acknowledged that Mr. Arora had no warning that the meeting would be taking place and so could not prepare for it any way. Mr. Coulthard acknowledged that Mr. Mohanty was more agitated and aggressive than he would have liked, that Mr. Mohanty raised his voice and that Mr Mohanty told Mr. Arora there was information, such as about the plan to purchase a college, that they did not want Mr. Arora to tell them about. Mr. Mohanty also told Mr. Arora that he had completely lost faith in Mr. Arora's answers and made unsustained accusations, such as that Mr. Arora sent more emails about Kumon than Bank business on some days.

[92] Mr. Arora provided his cell phone and computer to the Bank at the end of the interview, and was suspended with pay.

[93] Based on the documents it retrieved during its investigation, the Bank concluded Mr. Arora was not fully truthful in the interview. The Bank invited Mr. Arora to provide any further information that he wished to in order to assist in the investigation. It advised him that further information about BrainTree would be helpful. About 12 days later, Mr. Arora sent a letter to the Bank in follow-up to the interview, and on December 22 he was told his employment was terminated for cause.

[94] I find that Mr. Arora was untruthful in the interview and did not provide necessary corrections in his follow-up letter.

[95] Mr. Arora relied on specific portions of the interview transcript in argument but urged the court to review the entire interview. The Bank was of the view that only the portions referred to in evidence should be reviewed. I have listened to the entire interview in order to understand the snippets referred to in their entire context.

[96] Having reviewed the interview, I reject Mr. Arora's submission that he started off being truthful until he saw that honesty was getting him nowhere. The interview began with a discussion of the meeting with Mr. Gupta, Mr. Arora, and Mr. Arora's two subordinates, Mr. Prabhakar and Ms. Kumar, on a Saturday. Mr. Arora was not truthful with the Bank about the purpose and contents of the meeting. Mr. Arora advised the Bank that the weekend meeting with Mr. Gupta and his team was about Bank business. It was not. It was about other possible opportunities. This was the consistent evidence of Mr. Gupta, Mr. Prabhakar, and Ms. Kumar, and I accept it.

[97] When confronted with the BrainTree documents in the interview, Mr. Arora first said that BrainTree was incorporated on behalf of the Bank, and eventually said it was a contingency plan in case he had to leave the Bank. Mr. Arora testified that in 2020 there were rumours of people having their employment terminated or being sent back to India. The Bank first learned he was in discussions with BMO, and that this was the purpose for which BrainTree was incorporated, when it received Mr. Arora's statement of claim in this action. Mr. Arora did not voluntarily disclose information about the RBC meetings to the Bank during or after the interview.

[98] Mr. Arora did not provide the Bank with any information about BrainTree until confronted with it. In fact, when asked twice, Mr. Arora specifically denied that the sourcing document and the contact with Mr. Singh had anything to do with BrainTree. Mr. Arora advised the Bank that the only discussions between him and his team occurred in the spring and summer of 2020 and had not developed into anything.

[99] While Mr. Arora stated that this was because he thought the question was limited to the college initiative, that justification does not explain why he did not clarify the matter in his follow-up letter to Mr. Mohanty 12 days later. At the end of the interview, when discussing other information the Bank might find helpful, Mr. Coulthard indicated the Bank would like to understand the history of BrainTree. In his follow-up letter, Mr. Arora stated that BrainTree was "incorporated with no set goals, objectives or plan and was incorporated for future aspirations with a desire that at some point of time we would do some business of our own." He did not make any connection to BMO and Mr. Singh. He reiterated that "any discussions with this individual was for and on behalf of collecting market information and no other purpose."

[100] Mr. Arora complains that as part of its investigation, the Bank should have interviewed Mr. Gupta. This, he says, would have enabled the Bank to correct its misunderstanding that Mr. Gupta was involved in the same line of business as that which Mr. Arora carried out on behalf of the Bank. The Bank did not wish to disrupt its relationship with CIBC and concluded that was more important than getting Mr. Gupta's information. Mr. Arora also complains that the Bank did not try to speak to Mr. Singh from BMO or Mr. Brahme from RBC. The Bank points out that Mr. Arora disclosed no information about Mr. Brahme, and told them Mr. Gupta was just a friend with whom he discussed trends and numbers. It therefore had no reason to interview either person. Further, it is not required to conduct a forensic investigation.

[101] Mr. Arora argues that where the investigation is insufficiently broad to establish the full nature and extent of the misconduct, the court is impaired in conducting its just cause analysis and

the employer is impeded in discharging its onus of proof in connection with its claim for cause: *Porta v. Weyerhauser Canada Ltd*., 2001 BCSC 1480, [2001] B.C.T.C. 1480, at para. 14.

[102] This means that if the investigation was inadequate, the Bank may not be able to prove just cause. It does not mean that Mr. Arora has a free-standing right to a certain kind of investigation, or that a flawed investigation is relevant to the issue of whether just cause exists: *Render v. ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 310, 2022 C.L.L.C. 210-041, at para. 65; *Golob v. Fort St. John (City)*, 2021 BCSC 2192, 26 M.P.L.R. (6th) 334, at para. 45.

[103] In this case, I do not find that the investigation was particularly flawed. I find it was adequate. The Bank had no reason, based on the information Mr. Arora provided it, to seek information from Mr. Singh, Mr. Gupta, or Mr. Brahme. Further, having heard Mr. Gupta and Mr. Brahme testify, I conclude that the information provided by them would have hurt, not helped, Mr. Arora's position in the investigation.

[104] The investigation uncovered as much of the misconduct as it was able to do, given Mr. Arora's lack of full transparency. I find that Mr. Arora's dishonesty in and after the interview was a reasonable and appropriate consideration in the Bank's analysis of whether Mr. Arora should be dismissed with cause. Neither the court nor the Bank was impeded from gaining a complete enough picture of Mr. Arora's actions to analyse whether just cause existed.

**Issue Two: Do the proven breaches amount to just cause for termination?**

[105] In order to determine if an employer has just cause to terminate an employee, the court must take a contextual approach, looking at the nature and extent of the misconduct and the surrounding circumstances and determining if the employment relationship is undermined and dismissal is proportional. Misconduct, including dishonesty, does not automatically lead to summary dismissal. Rather, the question is whether the employee's misconduct gave rise to a breakdown in the employment relationship: *McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 S.C.R. 161, at paras. 48, 51.; *Dowling v. Ontario (Workplace Safety and Insurance Board)* (2004), 246 D.L.R. (4th) 65, (Ont. C.A.), at paras. 49-50.

**a) The nature and extent of the misconduct**

[106] As I have detailed above, Mr. Arora breached a number of his obligations to the Bank. The breaches are serious. Mr. Arora acknowledges that the Bank is entitled to rely on the cumulative effect of the conduct in assessing its position. He argues that even the cumulative effect, appropriately considered, does not amount to cause.

[107] Mr. Arora shared confidential information with two competitors – BMO and RBC – for his own potential gain. He involved two of his subordinates in a number of his plans, which would have resulted in key members of his team leaving the Bank to compete with it. He was engaged in activities at various times during the last 15 months of his employment that were designed to have him leave the Bank to compete with it, directly or indirectly. He was untruthful to the Bank about his activities, even after being confronted.

[108] Employees may look for other jobs. They may hatch future plans before they leave their current employment. I agree that Mr. Arora would have been free to work for another Bank and compete with the Bank upon resignation, and that he is permitted to take some steps in advance of departure to plan his future. I agree that Mr. Arora was free to seek new employment and was not required to tell the Bank if he was entertaining offers of employment: *McMahon*. However, he was not free, while employed, to use his employer's resources to his advantage and the potential detriment of the employer. He was not free to involve his subordinates in his plans. He was not free to be dishonest to his employer about these activities when confronted with them.

**b) The surrounding circumstances**

[109] This part of the analysis focuses on the employee's position in the employment relationship and considers the particular circumstances of both the employee and the employer: *Dowling*, at para. 52.

[110] Mr. Arora had no disciplinary history with the Bank. He was a very good performer and had received several promotions, ultimately to the level of AVP. He had management responsibilities in this position. The Bank acknowledged that one of the reasons it was concerned about him competing with it was because he was a capable performer.

[111] Mr. Arora relies on other contextual factors. He argues that the Bank terminated him and refused to pay him severance it knew was due and owing because of a desire to save money, given the decline in student revenue. I reject this suggestion. There is no doubt the Bank's student business was adversely impacted by COVID-19. However, Mr. Coulthard testified that to the degree there were layoffs due to COVID-19, the Bank paid the employees as required. It did not pay Mr. Arora because it believed it had cause to terminate his employment based on the results of its investigation. The Bank was concerned about Mr. Arora's lack of transparency, truthfulness, dedication to the Bank, and integrity. I accept the Bank's explanation. I find there is no evidence to support Mr. Arora's theory in this regard – it is mere conjecture.

[112] Mr. Arora points out that after reviewing his texts and WhatsApp messages that covered a period of over two years, the Bank only found two concerning WhatsApp messages, the two with Mr. Gupta in respect of the RBC opportunity. There were no messages about any of the college opportunities, the BMO opportunity, or BrainTree. It did not find any messages about Kumon or the convenience store. His misconduct should be seen as limited. I view this as a neutral factor. It simply indicates that Mr. Arora did not facilitate any other conduct unknown to the Bank by WhatsApp or text that remained accessible on his phone at the time of the investigation.

[113] Mr. Arora urges me to consider the context of the interview. I agree that the failure to be honest in the interview and in his subsequent communications to the Bank formed part of the basis of the Bank's decision and are important contextual factors for me to consider: *van Woerkens v. Marriott Hotels of Canada Ltd*., 2009 BCSC 73, 71 C.C.E.L. (3d) 87, at paras. 192-94.

[114] In that respect, I have found that Mr. Arora was dishonest in the interview. He was dishonest about his meetings with Mr. Gupta, insisting they were only for the purpose of sharing market information for the benefit of the Bank. I have rejected this assertion and have found that he met with Mr. Gupta to explore pursuing other opportunities. In the interview, he specifically denied that BrainTree was related to the BMO opportunity. It clearly was. He told the Bank nothing about the RBC opportunity despite being asked on several occasions whether he was involved in the pursuit of any other opportunities that would compete with the Bank or use Bank resources.

[115] I agree that the context of the interview is important. It is fair to say Mr. Arora was blindsided by the interview. He was told there was a meeting about something else entirely. He entered the room and was greeted there by, among others, the Bank's head legal and compliance officer. He was questioned for 90 minutes. Parts of the interview were heated. He was taken by surprise. He was interrupted on several occasions, and Mr. Mohanty told him the Bank was concerned that he was being untruthful. I give Mr. Arora some leeway for the clearly difficult circumstance posed by such an interview. If his answers were merely incomplete, or the questions were confusing, it may be understandable. However, he was asked point blank, more than once and after the surprise of the purpose of the interview had worn off, whether there was a connection between BrainTree and BMO. He denied it. He was clearly being asked to come clean. He chose not to.

[116] Further, any doubt about whether his failure to be honest was due to the stress of the interview is removed when reviewing the letter he sent shortly after the interview. The Bank had told him orally and in writing that a full explanation, especially in respect of BrainTree, would be useful. Yet in his letter sent with the benefit of time to reflect, 12 days after the interview, he advised that BrainTree was "incorporated with no set goals, objectives or plan and was incorporated for future aspirations with a desire that at some point of time we would do some business of our own." He never made the connection to BMO and Mr. Singh. He reiterated in his letter that he met Mr. Gupta only to obtain information in respect of what was happening in the market.

[117] Mr. Arora asks the court to find that the Bank had determined the outcome of his future employment with the Bank prior to the interview. I do not accept that because the Bank had a letter ready to give him the end of the interview suspending him and telling him it was considering terminating him for cause, there was a predetermined outcome. The Bank was prepared to exercise this option if the interview did not assuage its concerns. The interview did not. Given Mr. Arora's lack of candor in the interview, that was a reasonable conclusion for the Bank to reach.

[118] Mr. Arora also argued that Mr. Mohanty was in a conflict of interest because three months after the termination of Mr. Arora's employment, he took over responsibility for Mr. Arora's role. Ms. Blum, Mr. Mohanty's direct report, took over Ms. Kumar's role. Therefore, the argument goes, Mr. Mohanty had a vested interest in Mr. Arora's termination, and his conduct violates the Bank's conflict-of-interest policy. I do not accept this argument. Mr. Mohanty explained that, immediately after Mr. Arora's employment was terminated, a different employee took over Mr. Arora's job responsibilities. When Mr. DeVries, who had most recently been Mr. Arora's direct

superior, resigned, that employee took Mr. DeVries's job. Mr. Mohanty took the newly vacated position, which included Mr. Arora's portfolio. At the time of Mr. Arora's dismissal, there was no thought of Mr. Mohanty taking over Mr. Arora's former responsibilities. I accept this evidence. I reject the suggestion that the termination of Mr. Arora's employment was motivated by Mr. Mohanty seeking to take over Mr. Arora's responsibilities. I reject any suggestion that Mr. Mohanty was in a position of conflict in his role in Mr. Arora's termination, including his role with the investigative committee. As the HR Director, Mr. Mohanty would be expected to be involved in these issues.

[119] Mr. Arora asked that I draw an adverse inference against the Bank for not calling Mr. Goel, its CEO, who ultimately made the decision to terminate Mr. Arora's employment after receiving the investigation committee's report. Mr. Arora asks the court to infer that Mr. Goel did not consider Mr. Arora's employment history. I reject this submission. There is no adverse inference to be drawn. The Bank produced evidence of why it believed it had just cause to terminate Mr. Arora's employment. The question for the court is whether on the basis of the evidence, which includes Mr. Arora's employment history, the Bank had just cause for the dismissal.

[120] Mr. Arora also argued that the Bank's policies were ambiguous and that the ambiguities should be interpreted against the Bank as the author of the documents. I do not find the policies ambiguous on the relevant issues. I find that they generally codify the common law employment expectations on which my findings are based.

[121] The Bank asks the court to consider as a contextual factor the increased expectations of employees in the banking sector. The Bank relies upon *Steel v. Coast Capital Savings Credit Union*, 2013 BCSC 527, 2013 C.L.L.C. 210-025, at paras. 24-25, aff'd 2015 BCCA 127, 383 D.L.R. (4th) 481, leave to appeal refused, [2015] S.C.C.A. No. 217. It argues that employees in the banking industry are to be held to a higher level of trust than are employees in other sectors.

[122] Mr. Arora disputes this assertion and argues that the court should adopt Donald J.A.'s dissenting analysis at the British Columbia Court of Appeal that unless the misconduct involves money or the affairs of a client, this presumption should not apply. Mr. Arora also argues that because banks are not held to a higher level of scrutiny than the average litigant in a commercial context following *Royal Bank of Canada v. W. Got & Associates Electric Ltd.*, [1999] 3 S.C.R. 408, it would be unfair to hold a bank employees to a higher level of scrutiny in the employment context. However, Mr. Arora does not deny that he owed duties of honesty and fidelity to the Bank. I do not need to apply an elevated standard to find that he breached those duties. That is, even if I were to accede to his argument that an elevated standard does not apply in these circumstances, I find he breached his duties to the Bank in a repeated and serious way.

### c) Proportionality

[123] The third part of the analysis requires that there be proportionality between the severity of the misconduct and the sanction imposed: *McKinley*, at para. 53. The employee's conduct must be such that the employment contract is effectively repudiated. The impugned behaviour has to be sufficiently egregious to violate or undermine the duty of good faith in the employment relationship. Dismissal for cause is a serious outcome and is only warranted in serious cases.

[124] Parenthetically, I make a note about terminology in the context of the proportionality discussion. I do not minimize the importance or significance of termination of one's employment, particularly after 15 years of strong performance. One's work is often fundamental to one's identity and sense of self-worth. However, I do not find it helpful to equate this loss with "capital punishment". Termination for cause is a significant step, available to an employer in certain circumstances. In no way is it comparable to capital punishment, which is considered in Canada to "engage the underlying values of the prohibition against cruel and unusual punishment." Capital punishment is final and irreversible, and its imposition has been described as arbitrary: *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, at para. 78. Using the analogy in the employment context sheds more heat than light on the analysis required to determine if summary dismissal is appropriate in any given case.

[125] The Bank must show that a lesser form of discipline could not resolve its concerns and that Mr. Arora's conduct was incompatible with an ongoing employment relationship in the context of the case. The Bank's position is that the underlying misconduct is severe enough to warrant summary dismissal but that if any doubt remains, when one adds the interview dishonesty to the misconduct, summary dismissal is clearly justified.

[126] I find that the Bank has proven on the balance of probabilities that the nature and extent of Mr. Arora's misconduct warrants summary dismissal. The breaches I have found above are serious. They go to the heart of the employment relationship, engaging basic duties of loyalty and honesty. Mr. Arora and the Bank had a long, positive, and productive relationship. He was a valued employee for many years. Indeed, Mr. Coulthard referred to him as a fantastic salesman who is very good with people. Unfortunately, Mr. Arora's conduct rendered the employment relationship unsustainable. I find that Mr. Arora effectively repudiated the employment contract by sharing confidential documents and information with competitors, planning with his subordinates to defect and compete with the Bank and taking steps toward doing so while still employed with the Bank, and failing to be honest with the Bank, even when confronted with its concerns.

## Issue Three: Is Mr. Arora entitled to moral damages?

[127] Mr. Arora claims he is entitled to moral damages for the manner in which he was terminated, and that this claim is valid even absent any independent actionable wrong: *Pohl v. Hudson's Bay*, 2022 ONSC 5230, 2023 C.L.L.C. 210-016, at paras. 96-97.

[128] The Bank states there is no factual or legal basis to award standalone damages for the manner of termination or post-termination conduct. Factually, the Bank was protecting its interests against an employee who planned to compete against it. Engaging in tough litigation tactics does not render conduct actionable. Legally, there is no authority for the claim, and there is no indication in Mr. Arora's statement of claim that he sought damages for a breach of a standalone duty.

[129] Moral damages are meant to compensate an employee for injury or harm suffered by an employer's conduct. Even if I assume that moral damages could be awarded in a case where just cause is found to exist, I do not find the Bank's conduct in respect of the termination here to give rise to such damages. I do not find the Bank breached its duty of good faith and fair dealing in the manner in which Mr. Arora was dismissed. I do not find that, by the manner in which they carried out the interview and termination, the Bank caused him mental distress beyond that which normally accompanies a dismissal. The Bank had valid concerns, which it put squarely to Mr. Arora. The interview was not easy, but it was not carried out unfairly or in bad faith.

[130] Mr. Arora also relies on post-termination events in support of his claim for moral damages.

[131] I find that the Bank was harsh in its treatment of Mr. Arora post-termination. Mr. Coulthard conceded that the Bank attempted to pressure Mr. Arora into signing minutes of settlement and a release that included a non-compete clause that was extremely broad in both scope and time. It threatened to claim its costs of its investigation from him if he did not sign the minutes of settlement and release, and it started a counterclaim against him, which it only dropped just prior to or at the outset of trial.

[132] Mr. Arora interpreted these acts of the Bank as punishing and threatening. The Bank initially sought to stop him from competing in banking, the only industry in which he had ever worked. It exerted significant pressure him to get what it wanted.

[133] The Bank claims these are just litigation tactics, and parties are entitled to take strong positions in litigation. I have concerns that the Bank's post-termination tactics in respect of the pursuit of the minutes of settlement, the release, and the counterclaim went beyond litigation tactics. However, these are more properly considered in the context of costs: *Galea v. Wal-Mart Canada Corp*., 2017 ONSC 245, 2018 C.L.L.C. 210-017, at para. 234.

**Issue Four: Is Mr. Arora entitled to a proportionate share of his bonus and the value of his vested and unvested shares as at the date of termination?**

[134] Mr. Arora argues that even if he was terminated for cause, he should receive his prorated bonus until his suspension date and the vested unexercised portion of his employee stock option plan ("ESOP").

[135] The Bank argues that an employee who is terminated for cause is not entitled to ESOP benefits. Further, only employees who are active at the date of bonus disbursement are eligible for a bonus. There are no prorated bonus entitlements for employees who depart partway through a year. The Bank's year end is March 31, 2024, so bonuses are generally paid in late April or mid-May.

[136] The governing documents of the Bank's ESOP specifically state that no option or any part thereof shall vest if the participants employment is terminated by the Bank for cause. Cause is defined to include any act detrimental to the interest of the Bank. Further, the document provides that "If the Participant's employment is terminated by the Bank for the [*sic*] Cause the Participant's vested Options, to the extent then unexercised, shall thereupon cease to be exercisable and shall lapse and stand terminated and expired forthwith."

[137] In August 2020, Mr. Arora was provided a document that specified that the Bank could apply clawback and/or malus to variable pay and deferred variable pay, allowing it to recover or withhold certain pay in some circumstances. In relation to ESOPs, clawback and malus applied to grants made from April 1, 2020 onwards. These terms were in addition to existing terms specifying lapsing of grants. Mr. Arora confirmed in cross-examination that he reviewed and signed that document, and that he understood that if he was terminated for cause, the Bank could claw back his vested and unvested shares.

[138] With respect to the bonus, the employee handbook clearly states that "[e]mployees who are active on the date of the disbursement of the performance bonus are eligible for the performance bonus."

[139] I find the documents clearly state that in the event of dismissal for cause, Mr. Arora is not entitled to any portion of his performance bonus, or to the value of the vested unexercised portion of his ESOP.

[140] His claim for these benefits is dismissed.

**Issue Five: What would the appropriate notice period be if Mr. Arora were wrongfully dismissed?**

[141] I will consider the appropriate amount owing to Mr. Arora in lieu of notice, in the event I am incorrect in my conclusion that his employment was terminated for cause.

[142] Mr. Arora's position is that the appropriate notice period is 18 months; the Bank says it is 12-15 months. The Bank argues that the notice should move to the lower end of that range due to what it says is Mr. Arora's failure to mitigate.

[143] In order to prove that an employee has failed to mitigate, an employer must demonstrate that 1) the employee failed to take reasonable steps to mitigate damages, and 2) if reasonable steps had been taken, the employee would have been expected to secure a comparable position

reasonably adapted to their abilities: *Lake v. La Presse*, 2022 ONCA 742, 2023 C.L.L.C. 210-022, at paras. 7, 12.

[144] When Mr. Arora's employment was terminated, he was 50 years old and had worked for the Bank for the majority of his career. Once terminated, he made some efforts to find other employment. However, these efforts were hampered, and he did not find other work until 2022. First, the student direct stream in which he had expertise suffered a significant disruption due to COVID-19 and fewer international students being able to come to Canada. Second, the Bank was insistently advising Mr. Arora that if he competed in any way with the Bank, it would sue him. While Mr. Arora did not sign the minutes of settlement to this effect, he understandably took the Bank's words seriously and was concerned about being seen to compete with the Bank in any way.

[145] I therefore cannot accept the Bank's position that Mr. Arora's mitigation efforts were inadequate.

[146] Having regard to his age and experience, the relative size of the student banking stream in which he worked and had expertise, the level at which he was employed, and the difficulty in his industry due to the COVID-19 pandemic at and following his dismissal, I find that 18 months' notice would be the appropriate amount.

[147] Mr. Arora's base annual salary was $120,000. He would therefore be entitled to $180,000 in salary during the notice period.

[148] The Bank agrees that Mr. Arora would be entitled to his benefits during this period. Mr. Arora suggests those benefits be assessed at 10 percent of his base salary, and I agree that is a reasonable amount: *Ruston v. Keddco Mfg. (2011) Ltd*., 2018 ONSC 2919, 2018 C.L.L.C. 210-051, at para. 117. Those benefits would therefore be valued at $18,000.

[149] I find Mr. Arora would also be entitled to his ESOP benefits of shares that would have vested during the notice period. These calculations are to be made in Indian rupees, and the parties have helpfully agreed that as of May 9, 2022:

a. 2019 grant - all unvested would vest - 4,550 options at INR 401.80 exercise

b. 2020 grant – 60 percent would vest - 3,300 options at INR 337.70 exercise

[150] I find Mr. Arora would also be entitled to bonuses that would have been paid out in April/ May 2021 and April/ May 2022. These bonuses have been in the amount of $35,000. He would therefore be owed $70,000 for the two bonuses.

**Disposition**

[151] The plaintiff's claims are dismissed.

[152] The parties are encouraged to agree on costs of the trial. Should they be unable to do so, the defendant may provide costs submissions of no more than five pages double spaced, along with a bill of costs and any offers to settle, within ten days. The plaintiff shall have ten days to respond, with the same page limits. There shall be no reply submissions without leave. These submissions may be sent to my judicial assistant at linda.bunoza@ontario.ca.

L. Brownstone J.

**Released:** July 23, 2024

**CITATION:** Arora v. ICICI Bank of Canada, 2024 ONSC 4115
**COURT FILE NO.:** CV-21-00664265-0000
**DATE:** 20240723



**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

AMIT ARORA

Plaintiff

**– and –**

ICICI BANK OF CANADA

Defendant

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**REASONS FOR JUDGMENT**

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L. Brownstone J.

**Released:** July 23, 2024