

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Salina v. Investors Group Financial
Services Inc.*,
2026 BCSC 1168

Date: 20260623
Docket: S252897
Registry: New Westminster

Between:

Sergio Salina

Plaintiff

And

Investors Group Financial Services Inc.

Defendant

Before: The Honourable Justice Morishita

Reasons for Judgment

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Place and Dates of Trial:

New Westminster, B.C.
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Introduction

[1] On the morning of May 23, 2018, Sergio Salina entered the lobby of the Fairmont Empress Hotel in Victoria. He was at the hotel for a breakfast meeting with Darryl Gossen, the vice president of Western Canada for Investors Group Financial Services Inc. ("Investors Group"), the company with which Mr. Salina had worked as an investment consultant since 1991. Mr. Salina expected the meeting to bring good news, specifically accolades for his work. Instead, he received a termination letter, ending his 27-year career with Investors Group.

[2] Mr. Salina has brought a wrongful dismissal claim, and Investors Group has brought a counterclaim.

Summary of Background Facts

[3] Given the volume of evidence and the number of issues, I will first summarize the background facts.

[4] Mr. Salina was 66 years old at the time of trial. He was raised in Powell River, B.C., and earned an undergraduate degree in economics from the University of Victoria. In 1990, he earned a master's degree in business administration from McGill University.

[5] In 1991, Mr. Salina began working for Investors Syndicate Limited, a predecessor to Investors Group. His working relationship with Investors Syndicate began on February 11, 1991, under a Sales Representative Agreement dated February 8, 1991, between the parties.

[6] Mr. Salina did not receive any training specific to the financial services industry before joining Investors Syndicate. Nevertheless, he completed a company training program, after which he began his career as an investment advisor/investment consultant based in the Victoria area.

[7] Since then, Mr. Salina has received two designations: Registered Financial Planner and Certified Financial Planner. To obtain these designations, he completed

the required courses and met the work experience requirements. As a mutual fund dealer and salesperson, Mr. Salina was regulated by the Mutual Fund Dealers Association of Canada (the "Mutual Fund Dealers Association") and the British Columbia Securities Commission (the "Securities Commission"). In addition, as a Certified Financial Planner, he was required to adhere to that organization's code of conduct.

[8] On August 6, 2002, Mr. Salina and Investors Group entered into a Consultant's Agreement (the "Consultant's Agreement"). The Consultant's Agreement was in effect at the time of Mr. Salina's termination.

[9] As a consultant with Investors Group, Mr. Salina primarily sold mutual funds; however, he also sold other investment or financial products, such as Guaranteed Investment Certificates and insurance. All the investment products he sold were managed and owned by Investors Group. Investors Group consultants are not permitted to sell non-Investors Group investment products.

[10] Mr. Salina grew his clientele by initially focusing on family and friends in Powell River. In the early days, he would travel to Powell River for one week each month. Because he had a large network there, he was able to grow his clientele more quickly than most.

[11] By the time he was terminated, Mr. Salina had built a thriving book of business and had become one of the top investment consultants in the Victoria office. He had approximately 500 clients across about 290 households and managed approximately \$92.5 million in client assets. Most of his clients were elderly and long-term, and his average client relationship was 22 years.

[12] The events that ultimately led to Mr. Salina's termination began on January 25, 2016 with the death of Ms. Florence Day, a long-time client of Mr. Salina's. Mr. Salina was named a beneficiary in Ms. Day's will but failed to promptly disclose this to Investors Group, in contravention of company policy. When Investors Group learned of the bequest, its compliance department ("Compliance") opened an

investigation and reported it to the Mutual Fund Dealers Association, which also opened its own investigation. Mr. Salina wished to accept the bequest but was ultimately directed on April 25, 2017 to decline it by May 3, 2017, or he would be terminated with cause. Mr. Salina formally declined the bequest on May 1, 2017.

[13] During its investigation, Investors Group flagged a July 14, 2014 trade in Ms. Day's account. Specifically, Mr. Salina – with Ms. Day's consent – moved \$498,511.57 from a no-load series of a mutual fund to a deferred sales charge ("DSC") series of the same fund. The fund itself (i.e., the portfolio of assets comprising the mutual fund) was the same; however, the fees and commissions associated with the two series differed. Investors Group was of the view that the switch was a commission-generating trade – i.e., a trade that had no purpose other than to provide Mr. Salina with a commission.

[14] Investors Group then examined whether Mr. Salina had made any other no-load to DSC trades for other senior clients. The investigation found that from January 2, 2014 to February 1, 2017, Mr. Salina completed 53 no-load to DSC trades for 16 clients aged mid-to-late 50s or older.

[15] On April 5, 2017, the Securities Commission imposed terms and conditions requiring that Investors Group place Mr. Salina under close supervision.

[16] As part of the close supervision, Investors Group completed a review of Mr. Salina's book. The review showed that most of Mr. Salina's clients who were at or near retirement age had high-risk, aggressive portfolios, which concerned Investors Group. To address this concern, Investors Group implemented a series of three action plans, which required Mr. Salina to meet with the identified clients and repeat the "Know Your Client" ("KYC") process to ensure their investments were suitable. As will be set out in greater detail in these reasons, Investors Group and Mr. Salina were not on the same page regarding what was required of him under the action plans.

[17] Investors Group was dissatisfied with Mr. Salina's approach to the second and third action plans. Combined with concerns about the Ms. Day bequest and the commission-generating trades, this led Investors Group to conclude that Mr. Salina was "unsupervisable". As noted, on May 23, 2018, Mr. Salina was terminated with cause.

[18] Ms. Lindsay Edgren, who was Mr. Salina's associate at Investors Group, was also terminated on May 23, 2018. Mr. Salina and Ms. Edgren continued to work together. At some point after their termination, they became romantic partners in addition to being business partners.

[19] After Mr. Salina was terminated, Investors Group discovered that he had obtained and possessed 24 pre-signed forms from 13 clients. The acquisition and retention of pre-signed forms from clients is prohibited under Investors Group policy and the guidelines of the Mutual Fund Dealers Association.

[20] Mr. Salina's registration with the Mutual Fund Dealers Association was tied to his association with Investors Group. When he was terminated, his registration with the Mutual Fund Dealers Association was also terminated. At that point, Mr. Salina was effectively unlicensed and could sell mutual funds only if he joined a firm that was a member of the Mutual Fund Dealers Association. Ultimately, Mr. Salina decided to obtain a licence with a different platform – the Investment Industry Regulatory Organization of Canada ("IIROC"). To obtain IIROC licensing, Mr. Salina was required to complete a course and pass an exam. His disciplinary issues with the Mutual Fund Dealers Association also delayed the licensing process. Further, Mr. Salina encountered difficulties finding a new firm to work with. Ultimately, on October 17, 2018, he accepted an employment offer with Echelon Wealth. On January 2, 2019, he became licensed with IIROC. Mr. Salina subsequently moved to a company called Ventum, where he was working at the time of trial.

[21] Following his termination, Mr. Salina maintained contact with several of his former Investors Group clients. In the fall of 2018, as he neared re-licensure, he

began meeting with many of them. Ultimately, many of these clients moved their portfolios from Investors Group to Echelon.

[22] In addition to communicating and meeting with former Investors Group clients, Mr. Salina retained a number of documents from his time at Investors Group and did not return them despite Investors Group's demand.

[23] As a result of the events leading up to his termination, Mr. Salina faced disciplinary proceedings before the Mutual Fund Dealers Association. On July 12, 2022, he entered into a settlement agreement with the Association, admitting to a number of violations of its by-laws, rules, or policies, including the following:

- (a) That switching Ms. Day from a no-load to a DSC fund gave rise to a conflict or potential conflict of interest that he did not address by exercising responsible business judgment, influenced only by the best interests of the client;
- (b) That he failed to disclose to Investors Group that he had been named a beneficiary in Ms. Day's will, thereby failing to disclose a conflict or potential conflict of interest, contrary to Investors Group's policies and the Mutual Fund Dealers Association rules; and
- (c) That he obtained and possessed 24 pre-signed forms for 13 clients, in violation of Investors Group's policies and the Mutual Fund Dealers Association's rules.

[24] As part of the settlement agreement, Mr. Salina agreed to pay a \$30,000.00 fine and \$5,000.00 in costs.

The Trial

[25] There was considerable evidence led at trial and numerous issues to address. The trial lasted over three weeks. More than 40 binders were entered as exhibits. Most of the binders were three-inch binders. The parties provided about 250 pages of written submissions, including over 150 authorities.

[26] The plaintiff called the following witnesses at trial:

Name	Position
Mr. Sergio Salina	Plaintiff
Ms. Lindsay Edgren	Plaintiff's former business associate/current business partner and romantic partner
Mr. Michael Sileika	Expert witness/Chartered Public Accountant/Chartered Business Evaluator

[27] The defendant called the following witnesses:

Name	Position
Ms. Kate Schroeder	Investors Group Assistant Vice President, Compliance/formerly Senior Manager, Compliance
Mr. Mark Kinzel	Investors Group Vice Chair/formerly Executive Vice President
Mr. Darryl Gossen	Investors Group Wealth Management, Vice President Corporate Channel/formerly Investors Group Vice President, Western Canada
Mr. Jeff Zarn	Investors Group Vice President Planning and Analysis/formerly Assistant Vice President
Mr. Spencer Cotton	Expert witness/Chartered Public Accountant/Chartered Business Evaluator

Issues to be Decided

[28] The questions to be decided in this trial are as follows:

- (a) Was Mr. Salina in an employment-like relationship with Investors Group?
- (b) Is the termination clause in Mr. Salina's contract with Investors Group enforceable?

- (c) If not, did Investors Group have grounds to terminate Mr. Salina for cause?
 - (d) If not, is Mr. Salina entitled to reasonable notice of termination or to compensation in lieu? If so:
 - i. What is the length of the reasonable notice period, and
 - ii. What amounts would Mr. Salina have earned from his employment with Investors Group during the reasonable notice period, including bonuses, retirement benefits, and other compensation?
 - (e) Has Mr. Salina mitigated his losses resulting from the termination?
 - (f) Did Investors Group breach its duty of honest contractual performance and/or act in bad faith in terminating its relationship with Mr. Salina?
 - (g) Is Mr. Salina entitled to aggravated and/or punitive damages?
 - (h) Is Mr. Salina entitled to special costs?
- [29] Investors Group has brought a counterclaim for breach of contract. The questions to be decided on the counterclaim are as follows:
- (a) Is the non-solicitation clause in Mr. Salina's contract with Investors Group enforceable?
 - (b) Did Mr. Salina breach the contract's non-solicitation clause?
 - (c) Did Mr. Salina breach the confidentiality clause in the contract with Investors Group?
 - (d) If Mr. Salina breached the contract's non-solicitation and/or confidentiality clauses, is Investors Group entitled to damages, and if so, in what amount?

Preliminary Issues

[30] Before addressing the issues, I will first address two preliminary matters: the credibility and reliability of the witnesses, and the use of business records.

Credibility and Reliability

[31] Credibility and reliability are not the same thing. Credibility concerns whether a witness is truthful. Reliability, by contrast, concerns the accuracy of a witness's testimony; it involves assessing a witness's ability to observe, recall, and recount the events in issue: *Ford v. Lin*, 2022 BCCA 179, at para. 104

[32] The typical starting point in a credibility assessment in a civil matter is to presume truthfulness: *Hardychuk v. Johnstone*, 2012 BCSC 1359, at para. 10.

[33] Factors the court may consider in assessing credibility include: the ability and opportunity to observe events; the firmness of memory; the ability to resist the influence of interest in modifying recollection; whether the witness's evidence harmonizes with accepted independent evidence; whether the witness changes their testimony during direct and cross-examination; whether the witness's testimony seems unreasonable, impossible, or unlikely; whether a witness has a motive to lie; and the demeanour of a witness generally: *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, at para. 186.

[34] Additional factors include whether a witness's explanation defies logic or common sense, or whether a witness is evasive, long-winded, or argumentative in their responses: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2019 BCSC 739, at para. 92.

[35] A court may accept all, some, or none of a witness's evidence: *R. v. R.E.M.*, 2008 SCC 51, at para. 65.

[36] I have significant concerns about Mr. Salina's credibility. Much of my concern about Mr. Salina's credibility stems from his conduct post-termination and the attestations he made regarding pre-signed forms.

[37] As will be set out in greater detail later, Mr. Salina's contract with Investors Group included a non-solicitation clause. Immediately after his termination, he contacted some of his former clients. After he was hired by Echelon, he began meeting with former clients. These two actions are not necessarily a breach of the non-solicitation clause; however, some of his evidence regarding these actions raises credibility issues.

[38] At trial, Mr. Salina agreed that he held extensive meetings with former clients in the fall of 2018 to early 2019; however, at his examination for discovery he denied that he began attending meetings with clients "for business purposes" between October 2018 and January 2019. When confronted with this inconsistency at trial, Mr. Salina said his discovery answer was truthful because he was not licensed until January 2019 and they were operating under Ms. Edgren's licence. That answer was unresponsive and difficult to comprehend. It is possible that the two answers could be reconciled based on what Mr. Salina meant by "business purposes," i.e., that he was meeting with former clients for social purposes. Alternatively, Mr. Salina might be saying he could not have been meeting clients for business purposes because he was not yet licensed. Nevertheless, the evidence clearly shows that Mr. Salina was meeting clients in that time frame for business purposes. Mr. Salina filed memos of all his meetings with clients during this period, documenting detailed discussions on topics such as the differences between the firms and regulatory platforms; changes in clients' personal circumstances, including jobs, income, and assets; investment options and pricing; and the implications of transferring their accounts. Mr. Salina was untruthful at discovery on this point and, when given the opportunity at trial to explain the significant inconsistency between his sworn testimony, was non-responsive and incomprehensible.

[39] In many of the memos from these client meetings, Mr. Salina noted that he was meeting with former clients "at their request." However, on one occasion, there was evidence that this statement was false. On February 17, 2019, Mr. Salina emailed his former clients, JF and DF. In the email, he wrote that he wanted to let them know that he and Ms. Edgren were now fully licensed at Echelon and were "up

and running and back in the saddle." He then wrote that he would "love the opportunity to introduce you to our new world. Maybe a lunch at your favourite restaurant." JF and DF replied that it would be nice to catch up with him, but asked: "...rather than lunch, would you mind if we meet for coffee to begin with."

[40] Mr. Salina met with JF and DF and wrote a memo documenting the meeting. In the memo, he wrote: "Meeting with [JF and DF] at 1:30pm to have a coffee and a visit at their request." During cross-examination, the accuracy of the memo was challenged. Mr. Salina maintained that the memo was accurate and that JF and DF had asked him for coffee. He was partially correct. JF and DF did request a coffee meeting, but in the context of the overall email conversation, it was offered as an alternative to the lunch meeting Mr. Salina had first suggested. At best, Mr. Salina lacked candour in writing that the coffee meeting was at the request of JF and DF. At worst, it was deceitful. Regardless, Mr. Salina's failure at trial to acknowledge that the memo was inaccurate undermines his credibility. It also calls into question the accuracy of all the memos of the post-termination client meetings.

[41] With respect to pre-signed forms, Mr. Salina has admitted to obtaining and possessing them. He has also admitted that, during his working relationship with Investors Group, he annually certified to Investors Group that he had no pre-signed forms. As will be set out in greater detail later in these reasons, the evidence establishes that, while under close supervision, Mr. Salina obtained pre-signed forms and made monthly attestations that he had neither accepted nor maintained them. These actions negatively affect his credibility assessment.

[42] Lastly, during his testimony, Mr. Salina never disclosed that he and Ms. Edgren had become romantic partners shortly after their termination and were living together at the time of trial. As noted, Ms. Edgren was a witness at trial and testified after Mr. Salina. She was in a position to provide important evidence regarding when Mr. Salina might have discovered that he was a beneficiary under Ms. Day's will, as well as his efforts related to the action plans. The fact that he and

Ms. Edgren were romantic partners is relevant information the court would need to consider in assessing Ms. Edgren's credibility.

[43] There were many opportunities for Mr. Salina to disclose that he and Ms. Edgren were in a romantic relationship. At one point during his direct examination, Mr. Salina was asked whether he was still associated with Ms. Edgren. He answered that Ms. Edgren was his "partner in business". While this answer was correct and, on its face, not a lie, Mr. Salina was not candid by omitting the important and relevant fact that Ms. Edgren was also his romantic partner.

[44] Mr. Salina did not demonstrate the candour and forthrightness associated with credible witnesses. I have significant concerns with his credibility. As such, I approach his evidence with caution, particularly when it is not corroborated by other credible evidence.

[45] I have no concerns about the credibility or reliability of any of the other witnesses. I do, however, note that Ms. Edgren was also less than candid in disclosing her relationship with Mr. Salina. Specifically, she did not disclose during direct examination that she and Mr. Salina were romantically involved. That said, she was not asked any direct questions about her non-business relationship with Mr. Salina. It was only when asked a direct question on cross-examination that Ms. Edgren gave evidence that she and Mr. Salina were a couple. Nevertheless, overall, I found Ms. Edgren to be a credible witness. She was a careful witness, and while there were a few inconsistencies in her evidence, they were not significant.

[46] Kate Schroeder and Mark Kinzel were the primary fact witnesses for Investors Group. Overall, I found Ms. Schroeder to be a credible witness. That said, there were times when she appeared to advocate for herself and Investors Group, which modestly affected the weight I gave to some of her evidence. Mr. Kinzel was an excellent witness. He was fair and insightful and did not come across as an advocate.

Business Records

[47] An evidentiary issue arose mid-trial regarding emails and documents that Investors Group sought to admit into evidence. The parties agreed that, rather than ruling during the trial, the Court could address the issue in its reasons for judgment.

[48] Investors Group called three witnesses who were involved to varying degrees in Mr. Salina's close supervision and ultimate termination: Ms. Schroeder, Mr. Kinzel, and Mr. Gossen. Of these three, Ms. Schroeder had the most involvement in the close supervision. Mr. Kinzel was involved at a much higher level and ultimately had responsibility for the decision to terminate Mr. Salina. Mr. Gossen was on the periphery of the close supervision; however, he was involved in setting up and attending the meeting at which Mr. Salina was terminated. Two Investors Group employees who played a key role in the close supervision were not called as witnesses: Jeff Smith, the branch manager and regional director, and Tom Vowell, a vice president in the private wealth management division.

[49] During her direct examination, Ms. Schroeder was taken to various Investors Group emails and documents that she did not create, although she was included in some of the email correspondence. The documents at issue are as follows:

- (a) Close supervision reports drafted by Mr. Smith;
- (b) A March 2, 2018 email drafted by Mr. Vowell;
- (c) A May 3, 2018 email from Danielle Tetrault, Investors Group's Chief Compliance Officer, recommending Mr. Salina's termination; and
- (d) A May 15, 2017 Complaint Investigation Summary, drafted by Sharon Delise, Investors Group's Associate Manager, Compliance Investigations.

[50] All these documents were in the joint book and were subject to the parties' document agreement, which provided as follows:

- (a) Joint book documents are authentic and are written by the person whose name appears as the author of the document;
- (b) Where, on a *prima facie* basis, a document appears to be a business record, it is a business record within the meaning of s. 42 of the BC *Evidence Act*, and statements in these documents are admissible to prove the fact the statement was made.

[51] In their written submissions, Investors Group indicates that it is not seeking to admit any of the statements of fact contained in the close supervision reports and the March 2, 2018 email from Mr. Vowell for the truth of their contents, but rather for the non-hearsay purpose of showing that Mr. Smith and Mr. Vowell documented general concerns about Mr. Salina's conduct. I find those records admissible for that limited purpose.

[52] Investors Group seeks to have Ms. Tetrault's May 3, 2018 email and Ms. Delise's May 15, 2017 Complaint Investigation Summary admitted for the truth of their contents under the business records hearsay exception. This requires a finding that the documents were made or kept in the usual and ordinary course of business, and that it was in the usual and ordinary course of business to record the fact in question in the document at the time it occurred, or within a reasonable time thereafter.

[53] In my view, Ms. Tetrault's May 3, 2018 email is not a business record. In reaching this conclusion, I am mindful of Madam Justice Young's comments in *Cowichan Tribes v. Canada (Attorney General)*, 2021 BCSC 2528, as follows:

[99] Not all documents created by a business are business records. As the Ontario Division Court found in *EllisDon Corp. v. Ontario Sheet Metal Workers' and Roofers' Conference*, 2013 ONSC 5808 at para. 35, not every document authored by an entity is a business record. "Such a result completely undermines the purpose of the provision and makes all hearsay records admissible provided they are the documents of a business as opposed to an individual" (Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 5th ed., (Toronto: LexisNexis, 2018) at 318).

[54] Investors Group submits that Ms. Tetrault made her statements in the ordinary course of performing her employment and statutory duties as Investors Group's Chief Compliance Officer. Moreover, Investors Group says that Ms. Tetrault was required to report to the designated person at the firm as soon as possible upon becoming aware of any circumstances indicating that any individual acting on the company's behalf may not be in compliance with securities legislation, and that such non-compliance is part of a pattern of non-compliance.

[55] In my view, Ms. Tetrault's email does not engage the business records exception. She lacks personal knowledge of the information contained in the email, and the source of that information is not identified. Moreover, a significant portion of the email consists of opinion and conclusions rather than statements of fact. As such, it is not admissible for the truth of its contents and is admissible only for the limited purpose of establishing that she recommended to Mr. Kinzel that Mr. Salina be terminated and that she provided a basis for that recommendation. However, to be clear, the email is not admissible for establishing the truth of her recommendation or the truth of her basis.

[56] Similarly, Ms. Delise's May 15, 2017 Complaint Investigation Summary is not admissible as a business record. I accept that it was in the usual and ordinary course of business for the summary to be prepared and kept. But I am not satisfied that the second part of the test has been established. The document is essentially a comprehensive summary of past events. Thus, the statements of fact in the document were not recorded at the time those facts occurred or shortly thereafter.

Was Mr. Salina in an employment relationship with Investors Group?

[57] The first question for me to determine is the nature of the relationship between Mr. Salina and Investors Group. More specifically, was Mr. Salina an employee, an independent contractor, or a dependent contractor of Investors Group?

Law

[58] In *Pasche v. MDE Enterprises Ltd.*, 2018 BCSC 701, Justice D. MacDonald summarized the applicable legal principles as follows:

[65] There is no universal test to determine whether a worker is an employee. The actual existence, or lack thereof, of a common law employment relationship must be made out on the evidence adduced. Various tests have been employed to make this determination.

[66] Historically, a worker's status was determined by the degree of control that the employer had over the worker. This test is no longer considered adequate, especially in relation to professional workers and those with specialized skills, since their work-related knowledge in their area may well exceed that of their superiors. In *Montréal (City) v. Montréal Locomotive Works Ltd.*, 1946 CanLII 353 (UK JCPC), [1946] 3 W.W.R. 748 (S.C.C.), the degree of control test was expanded into a fourfold test, under which the court should examine the issues of: (1) control; (2) ownership of tools; (3) chance of profit; and (4) risk of loss.

[67] Another test that has been utilized is the "business integration" test, sometimes referred to as the "organization" test. This test focuses on the amount of integration between the employer and the worker. The Supreme Court of Canada has noted that this test is difficult to apply: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 [*Sagaz*] at para. 42.

[68] While control is no longer necessarily conclusive, it remains an important factor to be considered: *Truong v. British Columbia*, 1999 BCCA 513 at para. 28; *Sagaz* at para. 47. The intention of the parties is also a factor to be considered. What the parties understood their relationship to be should be examined and given weight: *Royal Winnipeg Ballet v. Canada (Minister of National Revenue)*, 2006 FCA 87 at para. 60; *Straume v. Point Grey Holdings Ltd.*, [1990] B.C.J. No. 365 (S.C.).

[69] Other factors that a court should consider are:

- i) whether the worker provides their own equipment;
- ii) whether the worker hires their own helpers;
- iii) the degree of financial risk taken by the worker;
- iv) the degree of responsibility for investment and management held by the worker; and the worker's opportunity for profit in the performance of their tasks.

Sagaz at para. 47.

[70] The relative weight of each factor will depend on the particular facts and circumstances of the case: *Sagaz* at para. 48. What is clear is that there

is no universal test. One must consider the total relationship between the parties: *Sagaz* at paras. 46-47. Emphasis should be on the substance of the relationship rather than its form: *Goldberg v. Western Approaches Ltd.*, 1985 CanLII 674 (BC SC), [1985] B.C.J. No. 937 (B.C.S.C.).

[71] There have been recent cases where an individual is determined not to be an employee but is still entitled to reasonable notice because the worker falls somewhere on the continuum between an employee and an independent contractor. These are referred to as "intermediate" cases: *Marbry Distributors Ltd. v. Avreca International Inc.*, 1999 BCCA 172 [Marbry]. The factors particular to the analysis are: (1) the duration/permanency of the relationship; (2) the degree of reliance/closeness of the relationship; and (3) the degree of exclusivity: *Marbry* at para. 38. No single factor is conclusive and "not every factor need be present in order to classify a relationship as one requiring notice to terminate": *Marbry* at para. 38.

[72] *Marbry* was recently reaffirmed by the BC Court of Appeal in *TCF Ventures Corp. v. The Cambie Malone's Corporation*, 2017 BCCA 129 [TCF Ventures]. In the trial decision, indexed as 2016 BCSC 1521, Justice Williams summarized the recent law at paras. 48-49:

The jurisprudence of employment law has, in relatively recent times, evolved to recognize the realities of the modern workplace and the fact that the relationship between workers and those to whom they provide their services are not simply binary -- either employee-employer or independent contractor. In a number of decisions, the courts have come to acknowledge that there are a variety of different arrangements that the parties may have. The approach to be taken is to examine the situation from a functional perspective.

The result has been the recognition of relationships that fall within an area between the two traditional models. ...

[Upheld on this issue by the BCCA].

[73] The Court of Appeal specifically upheld the finding that "intermediate" cases attract "the obligation to provide reasonable notice" (para. 20). The court noted that this principle has been endorsed by the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986 [Machtinger].

[74] The Ontario Court of Appeal has taken a similar approach, referring to these hybrid relationships as "dependent contractor" relationships. The concept of the dependent contractor arose out of a desire to provide protection to economically dependent workers: *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916 at para. 25.

[75] Justice Rogers recently summarized the law on dependent contractor relationships in *Glimhagen v. GWR Resources Inc.*, 2017 BCSC 761 [Glimhagen] at para. 44:

As a general proposition, a person on an employer's payroll and for whom the employer makes conventional statutory deductions from his pay will be considered to be an employee. If his contract does not provide otherwise, that person is entitled to reasonable notice of termination of his employment. An independent contractor, on the other hand, is not an employee. Between those two states lies a construct of the common law: the dependent contractor. The dependent contractor is not on payroll, but in most other ways operates and is treated as an employee. A dependent contractor is entitled to reasonable notice of termination of his contract.

[59] In *Lightstream Telecommunications Inc. v. Telecon Inc.*, 2018 BCSC 1940, Madam Justice Russell canvassed the case law and identified the following factors that have been considered in determining whether a worker is a dependant contractor (or, with even stronger reason, an employee) or an independent contractor.

1. The defendant's level of control over the worker's activities, including:
 - a) the defendant's power to select or not select the worker;
 - b) the payment of wages;
 - c) control over the method of work; and
 - d) the defendant's right of suspension or dismissal.
2. The exclusive nature of the relationship;
3. The worker's economic dependence on the defendant;
4. Whether the worker could hire their own helpers;
5. Whether the worker provides his or her own tools and equipment;
6. The worker's opportunity for profit in the performance of their tasks;
7. The degree of financial risk taken by the worker;
8. The worker's responsibility for investment and management;

9. Whether the worker is a crucial element of the defendant's business;
 10. Whether the activity of the worker represents the defendant's business;
 11. The permanency and length of the relationship; and
 12. Whether the parties rely on each other or closely co-ordinate conduct.
- [60] These factors can be grouped into four main or overarching general tests:
1. Level of Worker Control;
 2. Ownership of Equipment and Tools;
 3. Profit/Loss Opportunity; and
 4. Business Integration.

Lightstream, at para. 125.

[61] In applying these factors, if the relationship "bears more resemblance to, or is akin to, an employer/employee relationship, the relationship will be treated as an employer/employee relationship for the purpose of implying an obligation to provide reasonable notice": *TCF Ventures* at para. 24; *Pasche* at para. 77.

Analysis

Level of Worker Control

[62] Mr. Salina submits that, during the relevant period while he was with Investors Group, Investors Group maintained a high level of control over all aspects of his day-to-day practice, his client interactions, and the products and services he could offer clients. According to Mr. Salina, examples of this level of control include the following, which I accept as facts:

- (a) When he started with Investors Group, he completed a two-year in-house training program under the supervision of a sales leader;

- (b) Under the Sales Representative Agreement and the Consultant's Agreement, he was permitted only to sell to clients products issued or distributed by Investors Group;
- (c) He had to comply with Investors Group's internal policies, as amended, including the Consultant Compliance Manual;
- (d) Sales made by Mr. Salina were reviewed by Investors Group at multiple levels. More specifically, all trades were reviewed by the branch manager (tier one level), and certain trades were further reviewed at the head office (tier two level);
- (e) Any of Mr. Salina's advertising and promotional activities and materials, including marketing letters to clients, required approval from Investors Group;
- (f) Although Mr. Salina could hire staff and associates and set their compensation, hours of work, and scope of work, contracts with associate consultants required approval from Investors Group;
- (g) If Mr. Salina wished to engage in any business or volunteer activities outside his role with Investors Group, he required Investors Group's approval. For example, he was required to disclose to Investors Group the rental of a condominium he owned; and
- (h) Investors Group controlled how consultants were paid. For example, under the Consultant's Agreement, Mr. Salina was to "arrange for the distribution of the financial products and services offered or sponsored by" Investors Group and to "collect and pay over to [Investors Group] all payments [he] received in connection with such activity." Further, under the agreement, Investors Group could, at its sole discretion, vary the compensation paid to consultants such as Mr. Salina. Mr. Salina was eligible to receive certain bonus payments based on sales or performance;

however, these bonuses were paid in accordance with Investors Group policies.

[63] Investors Group submits that at all times, Mr. Salina was permitted a wide latitude in structuring his financial advisor practice, subject to Investors Group's oversight to ensure regulatory compliance and protect its reputation. They note that Mr. Salina had discretion to decide whom he met with and how to meet their financial needs. Further, Mr. Salina was able to set his own hours, hire and terminate his assistants and associates at his own expense, and incur business expenses at his discretion. Lastly, Investors Group says that Mr. Salina had authority over how to pursue business development.

[64] In my view, the evidence establishes that Investors Group exercised considerable control over Mr. Salina and his business activities. Although Mr. Salina controlled business expenses and the hiring and firing of assistants and associate consultants, that control was not complete. Associate consultants signed contracts naming both Mr. Salina and Investors Group as parties. Further, while Mr. Salina had discretion to pursue business development and manage client relationships, as set out above, all marketing required Investors Group's approval. Moreover, clients were clients of Investors Group, not Mr. Salina. Most significantly, Investors Group controlled which products Mr. Salina could offer, set the compensation structure, and reviewed all trades he made (and had the power to reverse them).

[65] This factor weighs heavily against a finding that Mr. Salina was an independent contractor.

Ownership of Equipment and Tools

[66] Mr. Salina submits that this factor also weighs in favour of a finding that he was an employee or a dependent contractor. He submits that at all material times he was required to use tools issued by Investors Group to conduct business. For example, he was required to lease or purchase an Investors Group-specific computer, pay for and install the company intranet to access resources, and use

Investors Group software, such as the program "Pathway," to document interactions and manage client correspondence.

[67] Investors Group argues that it did not materially provide Mr. Salina with the equipment or tools he used to carry out his engagement. They further note that Mr. Salina was responsible for paying all of his professional and licensing fees. In contrast to the plaintiff's argument, Investors Group submits that Mr. Salina's payment to access the Investors Group intranet indicates he was an independent contractor.

[68] In my view, this factor weighs modestly in favour of the relationship being that of an independent contractor. On the one hand, Mr. Salina leased or owned the equipment and tools necessary for the business. Nevertheless, he was required to lease equipment such as computers from Investors Group and to use Investors Group's proprietary programs. I further note that Mr. Salina was responsible for paying rent – although if he met certain business targets, he would be allocated certain amounts of space without having to pay rent.

Profit/Loss Opportunity

[69] To assess this factor, the court considers indicia such as the person's opportunity for profit in performing their tasks, the degree of financial risk the person assumes, and the person's responsibility for investment and management.

[70] In his work with Investors Group, Mr. Salina had considerable opportunity for profit and a modest risk of loss. Mr. Salina's compensation structure at Investors Group was multifaceted and varied by the type of investment involved. In general, Mr. Salina's compensation was commission-based – he earned no fixed salary, but instead received amounts tied directly to client investments. As such, if he built a strong book of business, he would earn greater compensation, with no upper limit. Moreover, because some aspects of his compensation were tied to the value of the assets under his management, if the value of the investments went up, he would earn higher trailing fees. Conversely, if he could not build a strong book of business,

if he lost clients, or if the market declined and the value of his clients' investments fell, Mr. Salina would earn less compensation.

[71] With respect to risk of loss, Mr. Salina was responsible for most of his operating expenses, including licensing and regulatory fees, rent, marketing, computer equipment, and employee wages. That said, he operated out of Investors Group's offices, and significant portions of his rent were covered by Investors Group as business sales credits, which consultants earn when they reach sales targets. Further, Mr. Salina's associates were not salaried but earned compensation through commissions and/or a percentage of Mr. Salina's earnings. Lastly, in general, a consultant's risk of loss is mitigated to some degree because, if they are unable to build a sufficient book of business, they may be assigned as associate consultants to well-performing consultants.

[72] Overall, this factor weighs in favour of finding that Mr. Salina was an independent contractor.

Business Integration

[73] The plaintiff's position is that every aspect of his practice was tied to Investors Group. The defendant's position is that the integration between Mr. Salina's business and Investors Group was minimal, and limited to what was necessary to protect Investors Group's goodwill and ensure Mr. Salina's regulatory compliance.

[74] In my view, Mr. Salina's activities were deeply integrated into Investors Group. Many of the facts regarding the level of control are relevant to this factor. In particular, I reiterate that Mr. Salina was permitted to sell only Investors Group products. Moreover, all trades he made were reviewed by Investors Group, and all advertising and marketing required Investors Group's approval. Mr. Salina was a crucial element of Investors Group's business. Clients could go to an Investors Group office, meet with a consultant, and any mutual fund they purchased was issued by Investors Group or its subsidiaries. As such, Investors Group would earn income from virtually every aspect of the mutual fund, including the fund's ongoing management fee and any fees, charges, or commissions related to the sale of the

mutual fund. Consultants like Mr. Salina were the endpoint of Investors Group's supply chain.

[75] Further, under the 2002 Consultant's Agreement, the clients were considered clients of Investors Group, not of Mr. Salina or his company. As a result, Mr. Salina was deeply embedded in Investors Group's business. Client files technically belonged to Investors Group, and Mr. Salina had no independent client base he could easily take with him if he left. Lastly, Mr. Salina worked out of the Investors Group office in Victoria. Although Mr. Salina was responsible for paying rent (which was reduced or eliminated if he earned business sales credits), his office was located on premises controlled by Investors Group – as shown by the fact that when he was terminated, he was not initially permitted to return to his office.

[76] Overall, these facts show that Mr. Salina's business was highly integrated with Investors Group, which strongly weighs against finding that Mr. Salina was an independent contractor.

Other Considerations

[77] In addition to the four *Lightstream* factors, I must also consider objective evidence of the parties' mutual intention: *Pasche*, at paras. 53 and 89-94; *Cvjetkovich v. Breezemax Web (Ca) Ltd.*, 2024 BCSC 808, at paras. 37-40.

[78] The objective evidence of mutual intention strongly favours finding that Mr. Salina was an independent contractor. When he began with an Investors Group precursor, Mr. Salina signed a "Sales Representative's Agreement" on February 8, 1991. The first paragraph of that agreement states that Mr. Salina was appointed as an independent contractor. On August 6, 2002, that agreement was replaced by a Consultant's Agreement, which, as noted, was the contract between the parties at the time of termination. Section 1 of that agreement states: "[f]or greater certainty, [Mr. Salina] and [Investors Group] agree that [Mr. Salina] is not an employee of [Investors Group] and the relationship is one of principal and agent." The agreement further provides that, at all times, Mr. Salina was "free to exercise [his] own judgment

as to the conduct of [his] business and ... free to carry out [his] responsibilities at such times and at such places and in such manner as [he saw] fit."

[79] In assessing the parties' mutual intentions, the court can also consider how the relationship is characterized for tax purposes: *Cvjetkovich*, at paras. 38-39.

[80] How a relationship is characterized for tax purposes is a key factor to consider, but it is not necessarily determinative: *Cvjetkovich*, at para. 38, citing *Jacks v. Victoria Amateur Swimming Club et al.*, 2005 BCSC 778, at paras. 14-16, and *King v. Merrill Lynch Canada Inc.*, [2005] O.J. No. 5028 (Crt. J.), 2005 CanLII 43679, at para. 38.

[81] In his tax returns, Mr. Salina claimed business expense deductions as a self-employed contractor rather than as an employee. He also remitted both the employer and employee portions of the required Canada Pension Plan contributions for himself, as required of self-employed contractors. Thus, Mr. Salina represented himself to the Canada Revenue Agency as a self-employed contractor and received the associated expense deductions. Investors Group did not issue Mr. Salina a T4 and did not remit the employer portion of CPP. Accordingly, Investors Group did not consider Mr. Salina an employee for tax and CPP purposes.

[82] The objective evidence of the parties' mutual intention strongly supports the conclusion that Mr. Salina was an independent contractor.

Conclusion

[83] In the end, as Justice D. MacDonald noted in *Pasche* at paras. 65 and 70, there is no universal test to determine whether someone is an employee, an independent contractor, or a dependant contractor. Instead, the Court must weigh a number of factors, with the relative weight of those factors depending on the facts and circumstances of the case. The focus is on the total relationship between the parties and on examining the situation from a functional perspective. In other words, I am to look at how the relationship between the parties operated in practice, rather than at the label.

[84] Some considerations weigh in favour of finding that Mr. Salina was an employee (i.e., the level of control and degree of business integration), while others weigh in favour of finding that he was an independent contractor (i.e., ownership of equipment/tools, profit/loss, and especially the parties' mutual intention and how the relationship was characterized for tax purposes). Nevertheless, in my view, the issue turns on the substantial degree of control Investors Group exercised over Mr. Salina's activities and the significant integration of those activities into Investors Group's business. As such, when considered as a whole and examined from a functional perspective, the relationship falls between that of an employee and an independent contractor, and thus Mr. Salina's role at Investors Group is best characterized as a dependent contractor.

[85] As a dependent contractor, in the absence of just cause, Mr. Salina is entitled to compensation for a reasonable period of notice: *Ursic v. Country Lumber Ltd.*, 2025 BCSC 970; *Dibble v. Creative Music Therapy Solutions Inc.*, 2024 BCSC 1066, at para. 36.

Enforceability of the Termination Provision

[86] The August 6, 2002 consultant's agreement between Mr. Salina and Investors Group includes a provision allowing either party to terminate the contract with or without cause and with or without notice (the "Termination Provision"). If this provision is enforceable, the Court need not address whether Mr. Salina was terminated for cause.

[87] The Termination Provision states:

10. TERMINATION

This Agreement may be terminated at any time by either party, with or without cause and with or without notice or any compensation in lieu of notice and, without limitation, may be terminated by [Investors Group] upon the breach by the Consultant of any of the terms, conditions or provision of this Agreement. On any termination or pending termination of a Consultant, [Investors Group] shall provide its clients with the appropriate notice.

[88] Investors Group submits that if Mr. Salina is found to be a dependent contractor or employee and to have been terminated without cause, the Termination Provision is enforceable and Investors Group had no obligation to provide Mr. Salina with notice of termination.

[89] As the Court of Appeal recently stated in *Egan v. Harbour Air Seaplanes LLP*, 2024 BCCA 222, at para. 24:

There is a presumption at common law that an employer cannot terminate an employee without providing "reasonable notice". That presumption is rebuttable "if the contract of employment clearly specifies some other period of notice, whether expressly or impliedly": *Machtinger* at 998. Any such agreement must comply with the minimum notice periods in applicable employment standards legislation, otherwise the termination clause will be null and void and the presumption of reasonable notice will not be rebutted: *Machtinger* at 1001, 1004.

[90] Mr. Salina's position is that the Termination Provision is not sufficiently clear and unambiguous to rebut the common-law presumption of entitlement to reasonable notice. He submits that the presumption may be rebutted if the employment contract specifies "some other period of notice." He further argues that "some period of notice" cannot include "no period of notice." In support of this argument, he submits that no case authority was provided that supports treating a contractual term of no notice as equivalent to some other defined notice period. He states that in all the cited cases, the presumption of reasonable notice had been rebutted in favour of a specific period of notice, and never zero notice.

[91] Investors Group says that no notice was required, and cites as support a New Brunswick case: *Johnson v. Investors Group Financial Services Inc.* (1999), 217 N.B.R. (2d) 317 (QB), add'l reasons at (1999), 220 N.B.R. (2d) 13 (QB), aff'd in (2000), 227 N.B.R. (2d) 49 (CA).

[92] Further, Investors Group submits that because the *Employment Standards Act*, R.S.B.C. 1996, c. 113 does not apply to Mr. Salina, there is no statutory minimum notice requirement. Accordingly, they say there is no rule prohibiting the parties from entering into a contractual termination clause that would allow Investors

Group to terminate Mr. Salina without cause and without notice, because the contractual notice would be zero notice.

[93] *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, is the leading case on the enforceability of employment contract provisions limiting reasonable notice. In *Machtinger*, the plaintiffs were managers at the same car dealership. Both were terminated without cause. Each had an indefinite-term employment contract that allowed the employer to terminate the employees without notice (in one employee's case) and on two weeks' notice (in the other's case). Under the provincial employment standards act, the employees were entitled to a minimum notice of four weeks, so each contract specified notice periods shorter than the statutory minimum.

[94] In his reasons, Justice LaForest (for the majority) divided his analysis into three parts. In the first, he discussed the common-law presumption that reasonable notice is required to terminate indefinite-term employment contracts. In the second, he reviewed the impact of Ontario's employment standards legislation on the two contracts at issue. In the third, he considered the policy dimensions of the issue before the court.

[95] In the first part, LaForest J. briefly canvasses the history of the common-law principle and concludes:

The presumption at common law that a contract of employment for an indefinite term is terminable only on reasonable notice would have been rebutted by the clear language of the contract specifying shorter notice periods.

[96] After stating that principle, LaForest J. then assesses the impact of minimum notice periods mandated by the employment standards act. Because the contracts at issue on appeal attempted to contract out of the minimum notice period set out in the act, the Court found that the portions of the contracts specifying the notice periods were "null and void."

[97] As noted, the *Employment Standards Act* does not apply to Mr. Salina. Accordingly, the second part of LaForest J.'s analysis is not relevant. However, the

first part is highly relevant. In other words, the common law presumption applies. Thus, if Mr. Salina was terminated without cause, he is entitled to notice unless it is established that the Consultant's Agreement clearly specifies some other period.

[98] Investors Group submits that the Termination Provision clearly specifies some other period of notice – namely, zero notice.

[99] As noted, Mr. Salina says that there is no case authority supporting this interpretation of the common law. Indeed, Investors Group was unable to provide any authority in which *Machtinger* has been interpreted in this way.

[100] In my view, "no notice" or "zero notice" is incompatible with "some other period of notice" or a "shorter period of notice." "Some other period of notice" or a "shorter period of notice" implies some other amount, but not nothing. Because the *Employment Standards Act* does not apply to Mr. Salina, the shorter notice period could have been any amount of time, even one day.

[101] Because the Termination Provision does not clearly specify any other period of notice, it does not rebut the common-law presumption of entitlement to notice and is therefore unenforceable.

[102] If I am wrong, and "some other notice period" could mean no notice, the Termination Provision does not clearly and unambiguously indicate that Mr. Salina is entitled to no notice. The Termination Provision states that either party may terminate the agreement with or without cause and *with or without notice or compensation in lieu of notice*. In other words, under the provision, Mr. Salina could receive notice or he could not. In my view, for the provision to be sufficiently clear and unambiguous, it should state that Mr. Salina is not entitled to any notice on termination.

[103] As I have found the Termination Provision unenforceable on the basis of the common law presumption, it is unnecessary for me to address whether it should not be enforced on unconscionability grounds.

Was there Just Cause?

Legal Framework

[104] As noted, the law of just cause applies to dependent contractors: *Liebreich v. Farmers of North America*, 2019 BCSC 1074, at paras. 75-76; *Dibble* at para. 36.

[105] In *Eisler Estate v. GWR Resources Inc.*, 2019 BCSC 1990, aff'd 2021 BCCA 113, Justice Donegan (then of this court), sets out the applicable law as follows:

[198] GWR bears the onus of establishing cause exists for Mr. Eisler's discharge and that onus is a heavy one: *Staley v. Squirrel Systems of Canada, Ltd.*, 2013 BCCA 201 at para. 19.

[199] Just cause is conduct on the part of the employee "that, viewed in all the circumstances, is seriously incompatible with the employee's duties, conduct which goes to the root of the contract and fundamentally strikes at the employment relationship": *Panton v. Everywoman's Health Centre Society* (1988), 2000 BCCA 621 at para. 28 as cited in *Van den Boogaard v. Vancouver Pile Driving Ltd.*, 2014 BCCA 168 at para. 17. Put another way, it is "conduct that is fundamentally antithetical to the continuation of the employment relationship": *Smith v. Pacific Coast Terminals Co. Ltd.*, 2017 BCCA 197 at para. 27.

[200] In *McKinley*, the Supreme Court of Canada explained that the court must undertake a contextual approach in determining the existence of cause, including an examination of the category of misconduct and its possible consequences, the circumstances surrounding the alleged misconduct, the nature of the employment contract and the status of the employee: paras. 33, 34, 48, 51. Although the misconduct in *McKinley* concerned the employee's dishonesty, the Court's analysis applies more generally to cases where termination for cause is at issue. In addition to outlining the requirement for a contextual approach, the Court in *McKinley* underscored the need for consideration of proportionality as well. A balance must be struck between the severity of an employee's misconduct and the sanction imposed. The Court held:

[51] This being the case, I conclude that a contextual approach to assessing whether an employee's dishonesty provides just cause for dismissal emerges from the case law on point. In certain contexts, applying this approach might lead to a strict outcome. Where theft, misappropriation or serious fraud is found, the decisions considered here establish that cause for termination exists. This is consistent with this Court's reasoning in *Lake Ontario Portland Cement Co. v. Groner*, [1961] S.C.R. 553, where this Court found that cause for dismissal on the basis of dishonesty exists where an employee acts fraudulently with respect to his employer. This principle necessarily rests on an examination of the nature and circumstances of the misconduct. Absent such an analysis, it would be impossible for

a court to conclude that the dishonesty was severely fraudulent in nature and thus, that it sufficed to justify dismissal without notice.

...

[53] Underlying the approach I propose is the principle of proportionality. 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 of identity and self-worth individuals frequently derive from their employment, a concept that was explored in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, where Dickson C.J. (writing in dissent) stated at p. 368:

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

This passage was subsequently cited with approval by this Court in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, and in *Wallace, supra*, at para. 95. In *Wallace*, the majority added to this notion by stating that not only is work itself fundamental to an individual's identity, but "the manner in which employment can be terminated is equally important".

...

[56] Such an approach could foster results that are both unreasonable and unjust. Absent an analysis of the surrounding circumstances of the alleged misconduct, its level of seriousness, and the extent to which it impacted upon the employment relationship, dismissal on a ground as morally disreputable as "dishonesty" might well have an overly harsh and far-reaching impact for employees. In addition, allowing termination for cause wherever an employee's conduct can be labelled "dishonest" would further unjustly augment the power employers wield within the employment relationship.

[57] Based on the foregoing considerations, I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. At the same time, it would properly emphasize that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause.

[201] In *George v. Cowichan Tribes*, 2015 BCSC 513, Justice Skolrood summarized the two key principles that emerge from *McKinley* at para. 112 as follows:

[112] Two key principles emerge from *McKinley*:

- a) in considering whether cause has been established, the court must engage in a contextual analysis of all of the relevant facts and circumstances; and
- b) the objective of the contextual analysis is to determine whether the misconduct is such that it has led to a breakdown of the employment relationship or is otherwise irreconcilable with the continuation of that relationship.

[202] The test is an objective one, viewed through the lens of a reasonable employer and taking into account all of the relevant circumstances: *Roe v. British Columbia Ferry Services Ltd.*, 2015 BCCA 1 at para. 35.

[203] Not every act of misconduct or dishonesty amounts to cause for termination. A finding of misconduct does not, by itself, give rise to just cause. Rather, the question to be addressed is whether, in the circumstances, the behaviour was such that the employment relationship could no longer viably subsist: *Smith v. Pacific Coast Terminals Co. Ltd.*, 2016 BCSC 1876 at para. 55; aff'd 2017 BCCA 197.

[204] Since dismissal without notice is such a severe punishment, it can be justified only by misconduct of the most serious kind: *Sheehan v. British Columbia Hydro & Power Authority*, [1999] B.C.J. No. 1415 (S.C.) at para. 113. Misconduct alleged against a more senior, longer service employee who has made contributions to the company must be more serious in order to justify his or her termination. Generally speaking, the misconduct of such an employee must be of "such magnitude as to overshadow the years, loyalty and efforts devoted by the employee to the employer. However, years of service cannot excuse lapses that occur towards the end": *Sheehan* at para. 114.

[205] It is incumbent upon the employer, as part of the contextual analysis, to consider the suitability of alternative disciplinary measures to dismissal: *George* at para. 115.

[106] In addition to these general principles, in employment relationships where the employee holds a position of substantial trust, the continued existence of that trust is fundamental to the viability of the employment relationship: *Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127, at para. 34.

[107] A relationship of trust is considered especially critical in the banking sector, where employees are held to a higher standard of conduct than their counterparts in other commercial or industrial enterprises: *Steel*, at para. 24.

[108] As noted by Justice Norell in *Movassaghi v. Harbourfront Wealth Management Inc.*, 2020 BCSC 579:

[87] [...] Cornerstones of [the financial services] industry are trust and acting with a client's consent. [...] In an industry where clients put their trust in financial services firms, Harbourfront must be able to put trust in its employees. Harbourfront employees are given autonomy on the "front end" to run their practices. Autonomy requires trust. [...]

Facts

[109] As noted, Investors Group bears the onus of establishing just cause. Investors Group submits that it terminated Mr. Salina due to a fundamental breakdown in the relationship between the parties, which led to Mr. Salina being deemed "unsupervisable". More specifically, Investors Group argues that Mr. Salina engaged in serious professional misconduct, including acting in a conflict of interest, engaging in deceitful, dishonest, and reckless behaviour, and demonstrating a pattern of ethical breaches and poor judgment incompatible with continued engagement with Investors Group as an investment consultant.

[110] There was considerable evidence adduced at trial regarding Mr. Salina's alleged misconduct. Fortunately, most of the relevant facts are not in dispute, as reflected in the agreed statement of facts. The Court is grateful to counsel for the comprehensive agreed statement of facts and for their thorough submissions, which accurately summarize much of the relevant evidence.

[111] There are four events/issues that form the basis of Investors Group's argument that it had just cause to terminate Mr. Salina:

- (a) Bequest of client Florence Day;
- (b) Commission Generating Trades;
- (c) Investors Group's Compliance Book Review and action plans; and
- (d) Pre-signed forms.

Bequest of Client Florence Day

[112] Ms. Florence Day was a former client of Investors Group. Mr. Salina served as the servicing consultant for Ms. Day's account with Investors Group from 1994 until her death on January 25, 2016. He continued as the servicing consultant for the account after it passed to Ms. Day's estate, until the estate's liquidation on April 6, 2017.

[113] Mr. Salina's relationship with Ms. Day began as entirely professional but later developed into a friendship. Specifically, he provided Ms. Day with a variety of assistance and services that went beyond the typical relationship between a consultant and an Investors Group client. This included taking her to pick up groceries and run errands, such as going to the bank. Mr. Salina testified, and I accept, that he never entered a bank with Ms. Day, but rather waited in his car.

[114] Ms. Day's husband died on April 27, 1991, before Mr. Salina became her consultant. By the time she met Mr. Salina, Ms. Day had no children and no living siblings.

[115] As noted, Ms. Day died on January 25, 2016. In a letter dated February 9, 2016, from the executrix of the estate, Deborah A. Todd, addressed to Mr. Salina, Ms. Todd enclosed certified copies of Ms. Day's death certificate and a copy of Ms. Day's will (the "Will"), as well as the invoice for the service. In her letter, Ms. Todd also requested information about Ms. Day's holdings with Investors Group.

[116] In the Will, Mr. Salina was named a beneficiary of one-quarter of Ms. Day's estate, with his share valued at approximately \$180,000.00. This was problematic for Mr. Salina because it may have contravened Investors Group policy. Specifically, the Investors Group Consultant Compliance Manual in effect at the time provided:

You must not permit a client to name you as a beneficiary of his or her estate, name you in the will, or name you as a beneficiary of a particular Investors Group account, plan, policy, or any form of trust, unless that client is an immediate family member.

[117] I pause to note that pursuant to the Consultant's Agreement, Mr. Salina was required to comply with all rules, regulations and policies that Investors Group may prescribe regarding the consultant's conduct, and to further comply with any applicable rule or policy of the Mutual Fund Dealers Association, the Investment Funds Institute of Canada, and any other self-regulatory authority and securities commission.

[118] Under both the Investors Group policy and the Mutual Fund Dealers Association's rules, Mr. Salina was required to immediately disclose to Investors Group any conflict of interest – or potential conflict – arising from being named in his client's will.

[119] The date on which Mr. Salina learned he was named a beneficiary in the Will is disputed. Investors Group submits that Mr. Salina learned he was a beneficiary by mid-February 2016. Mr. Salina says the date is March 9, 2016.

[120] The following facts are not disputed and are borne out by the evidence:

- (a) By February 3, 2016, Mr. Salina had learned of Ms. Day's passing, as evidenced by his email that day to Ms. Day's lawyer/executrix, Ms. Todd, requesting a copy of Ms. Day's death certificate.
- (b) As noted in the cover letter dated February 9, 2016, Ms. Todd mailed a notarized copy of the Will and the death certificate to Mr. Salina's office.
- (c) On February 12, 2016, Ms. Todd's assistant sent an email to Mr. Salina, attaching a copy of a letter signed by Ms. Day on September 2, 2014. The assistant's email states that the attached letter was signed by Ms. Day and is "in regard to the bequest in her Will." In that letter, Ms. Day explains why she left a bequest for Mr. Salina.
- (d) Mr. Salina left on vacation on February 15, 2016. He admits he received the envelope containing Ms. Todd's letter before leaving for vacation.

- (e) Mr. Salina returned from his vacation sometime between March 1 and 2, 2016.
- (f) On March 7, 2016, Mr. Salina certified in his Annual Consultant's Certification that he was unaware of being named a beneficiary in a client's will.
- (g) On March 10, 2016, Ms. Edgren sent copies of the notarized Will and the death certificate to Investors Group's Estates Department.

[121] In a December 12, 2016 email to Investors Group's compliance department, Mr. Salina stated that he believed he became aware of being a named beneficiary in the Will around February 15-16, 2016. He made this statement despite his March 7, 2016 attestation that he was unaware of being named a beneficiary in a client's will.

[122] As noted, the Mutual Fund Dealers Association opened an investigation. In February 2017, it asked Mr. Salina to respond to a number of questions, including one asking him to explain why he made the March 7, 2016 attestation that he had not been named as a beneficiary in the client's will, even though he had indicated to Investors Group that he became aware of being named a beneficiary on February 15-16, 2016. Mr. Salina's response was essentially that he was mistaken. More specifically, he told the Association that he initially believed the formal notification was around February 15-16, 2016, but could now confirm that he received official notification on March 9, 2016. He told the Association that he received that notification via email, along with an attached letter from the executor, on that date. Mr. Salina told the Association that the February 15-16, 2016 date he provided earlier was not when he learned he was a beneficiary, but rather the date he notified Investors Group's head office of Ms. Day's passing. That notification occurred on February 15, 2016.

[123] At trial, Mr. Salina explained what he did with the package Ms. Todd's office sent him around February 9, 2016, which contained a cover letter dated that day, the Will, and the death certificate. Specifically, Mr. Salina testified that he received the

envelope from Ms. Todd's office before he left for vacation, but he was not in the "head space to open it." He said he did not open it and went on vacation. On cross-examination, it was pointed out to Mr. Salina that his discovery evidence was that he had never seen the envelope before leaving on vacation. When pressed on this apparent inconsistency, Mr. Salina said the point was that he had not seen the letter before going on vacation, but that he now believes he may have seen the envelope before his vacation. In other words, he says he received the package but did not open it.

[124] Further, when asked about the February 12, 2016 email from Ms. Todd's assistant that referenced a bequest and attached Ms. Day's September 2, 2014 letter, Mr. Salina said he did not read the attached letter. When asked for an explanation, he said he deliberately did not open the attachment because he was going away.

[125] Mr. Salina's evidence was that Ms. Day had, on two occasions, indicated she wished to leave him a bequest. To his credit, he instructed her not to on both occasions. Nevertheless, Mr. Salina candidly stated at trial that when he received the envelope from Ms. Todd's office, he suspected that Ms. Day had left him a bequest, contrary to his wishes. Given that suspicion, it is difficult to accept that Mr. Salina waited until March 9, 2016 – nearly a month – to open the envelope from Ms. Todd's office. It is equally difficult to accept that, upon receiving the February 12, 2016 email from Ms. Todd's assistant – which referenced a bequest and a letter drafted by Ms. Day (attached to the email) – Mr. Salina neither opened the attachment nor recognized from the email's text that he had been left a bequest. Mr. Salina was a high-performing consultant, organized, detail-oriented, and committed to providing his clients with excellent service. In my view, it would be very out of character for him not to open mail or review emails and attachments.

[126] Moreover, given Mr. Salina's suspicion that Ms. Day had left him a bequest, it is difficult to understand why he would have attested on March 7, 2016, that he was unaware of being named as a beneficiary in any client's will. If Mr. Salina had not

opened the envelope from Ms. Todd before going on vacation, I would have expected that, given his suspicions, he would have opened it to confirm whether he was a beneficiary before making the March 7, 2016 attestation. Even if one gives Mr. Salina the benefit of the doubt and assumes he did not open the envelope beforehand, was careless in filling out the attestation such that he was not prompted to open it at that time, and then opened the envelope on March 9, 2016, one would have expected him to take steps to amend or correct the attestation. He did not.

[127] The more plausible explanation is that Mr. Salina was aware he was a beneficiary but did not wish to disclose this to Investors Group. This finding is supported by his conduct in the months that followed. As noted, Investors Group's policy and the Mutual Fund Dealers Association's rules required him to immediately disclose that he had been named a beneficiary in Ms. Day's Will. He failed to do so. Mr. Salina's evidence is that sending the notarized Will to the Investors Group estates department constituted disclosure. I disagree. Ms. Schroeder testified that the estates department's sole responsibility is to facilitate the settlement and disbursement of a deceased client's assets in accordance with the client's wishes. Further, Ms. Schroeder indicated that it is not the estates department's function to review wills in depth or to determine whether a consultant is named as a beneficiary in a will. I accept Ms. Schroeder's evidence on these points. In addition, I note that the Investors Group Consultant Compliance Manual states that whenever a consultant feels they may be facing a potential conflict, they should immediately disclose the situation to their branch manager, who will consult with Investors Group's compliance department. Mr. Salina did not do this.

[128] On October 12, 2016, a branch examination was conducted at the Investors Group branch where Mr. Salina was based. Branch examinations are routine audits. During the branch examination interview, Mr. Salina was asked whether he had ever been named as a beneficiary in a non-family client's will. He answered yes and then provided the auditor with the client's information. On October 18, 2016, Mr. Salina verbally advised Jeff Smith, the regional director and Investors Group branch manager, of the beneficiary designation.

[129] Following Mr. Salina's disclosure during the branch examination, Investors Group's Compliance Investigations Department launched an investigation into the matter.

[130] On November 21, 2016, Sharon Delise of the Compliance Investigations Department sent Mr. Salina an email to:

- (a) request that Mr. Salina decline the bequest;
- (b) provide Mr. Salina an opportunity to provide information; and
- (c) ask that Mr. Salina forward a copy of Ms. Day's file for review.

[131] On December 5, 2016, Mr. Salina provided a written response to the Compliance Investigations Department. In his response, Mr. Salina requested that compliance reconsider its direction for him to decline the bequest. He wrote that the basis for his reconsideration request was his view that the initial direction was based on incomplete knowledge of the professional and personal relationship that had developed between him and Ms. Day, and of the steps he had taken to prevent Ms. Day from conferring any benefit on him. He further indicated that the initial decision was based on an unreasonable interpretation of the Mutual Fund Dealers Association's conflict guidelines and of Investors Group's own conflict policy. In this regard, he stated that he in no way permitted Ms. Day to make the bequest and, in fact, had actively discouraged it. Lastly, he submitted that Ms. Day's testamentary wish ought to be followed.

[132] The matter ultimately went to Investors Group's Financial Services Compliance Committee ("FSCC"), which comprises of senior Investors Group leadership, including the chief compliance officer and the Ultimate Designated Person, who is responsible for regulatory compliance. At the time, that person was Mark Kinzel, executive vice president of sales distribution. At its April 24, 2017 meeting, the FSCC unanimously agreed that Mr. Salina was in a clear conflict of interest and must renounce the beneficiary designation within one week or face termination.

[133] On April 25, 2017, Investors Group directed Mr. Salina to decline Ms. Day's bequest by May 3, 2017, or face termination of his engagement with Investors Group for cause.

[134] On May 1, 2017, Mr. Salina emailed the executrix of Ms. Day's estate, stating that he must decline the bequest and that Investors Group prohibited him from accepting the gift.

[135] Given the inconsistencies in his evidence, my overall concerns about Mr. Salina's credibility and demonstrated lack of candour, his delay in disclosing the bequest, and his strong desire to keep it, I find, on a balance of probabilities, that Mr. Salina was aware that he was named a beneficiary in the Will prior to making the March 7, 2016 attestation, and that he was untruthful when he attested that he was unaware of being named a beneficiary in a client's will.

Commission Generating Trades

[136] As noted, the disclosure of the bequest prompted Investors Group's compliance department to investigate.

[137] On December 5, 2016, the Mutual Fund Dealers Association opened a file to review the beneficiary designation matter. By letter dated March 28, 2017, the Association advised Investors Group that, after its initial review, it had escalated Mr. Salina's file to investigations status.

[138] On April 4, 2017, the Securities Commission sent a letter to Mr. Salina proposing to impose terms and conditions on his registration under the *Securities Act*. The letter set out terms and conditions requiring Investors Group to place Mr. Salina under close supervision (the "Close Supervision Program").

[139] On April 7, 2017, Investors Group sent Mr. Salina a letter dated that day informing him that he had been placed on Close Supervision, as required by the Securities Commission.

[140] On April 10, 2017, Mr. Salina and Mr. Smith agreed to the Securities Commission's recommended conditions of registration.

[141] On April 13, 2017, the Securities Commission formally imposed terms and conditions on Mr. Salina's registration.

[142] The investigation revealed a trade Mr. Salina made on July 14, 2014 on behalf of Ms. Day. Specifically, Mr. Salina switched \$498,511.57 held in the Investors Dividend Fund B mutual fund to the Investors Dividend Fund A mutual fund. The funds were identical but had different fee structures. Fund B had a no-load fee structure, whereas Fund A had a DSC fee structure. For no-load mutual funds, the consultant receives a trailing commission, which is an ongoing payment made while the client has money invested in the funds. A client can redeem or withdraw their money from a no-load fund at any time without penalty. For DSC mutual funds, the consultant receives a larger upfront commission instead of a trailing commission. If a client redeems or moves money out of a DSC fund within seven years, they are subject to a declining penalty schedule – starting at 5.5% in the first year and decreasing to 1.5% in the seventh year, after which no penalty applies.

[143] Both no-load and DSC funds carry a management fee – an ongoing percentage-based fee deducted from the fund's assets and paid to the fund manager. No-load funds have a higher management fee than DSC funds. The difference in the fee (also referred to as the Management Expense Ratio or "MER") between the no-load Fund B and DSC Fund A was 0.10%, or 10 basis points. Investors Group witnesses described the MER savings of a DSC fund versus a no-load fund as marginal.

[144] Generally speaking, a DSC fund may be suitable for a client who plans to keep their money invested in the fund for the long term – i.e., seven years or more – and who does not need access to those funds in the meantime. In contrast, a no-load fund is more suitable for anyone investing with a short time horizon who needs access to those funds.

[145] From the consultant's perspective, the primary benefit of a client investing in a DSC fund is the significant upfront commission it generates. However, if the client remains invested over the long term, the consultant's total compensation from a DSC fund is ultimately comparable to what would have been earned from a no-load fund. The key difference is that DSC front-loads that compensation, while no-load pays it out gradually through trailing commissions.

[146] On May 20, 2014, after the sale of her home was completed, Ms. Day deposited \$483,866.27 into her non-registered Investors Group investment account. Prior to the deposit, the account's value was \$251,939.41. The \$483,866.27 was immediately invested in the no-load Fund B. On July 14, 2014, the funds in the no-load Fund B, which had since grown to \$498,511.57, were switched to the DSC Fund A. Ms. Day was 95 years old at the time of the switch. On July 15, 2014, as part of the usual compliance process, Jeff Smith queried the trade and asked Mr. Salina why the funds were moved into a DSC mutual fund. On July 17, 2014, Mr. Salina responded that the funds were initially invested in the no-load and, after many meetings with Ms. Day to review her estate plans, they decided to switch the funds to the DSC Fund A to provide an incentive for her heirs to remain clients of Investors Group and to acknowledge remuneration for himself and his staff. On July 23, 2014, Mr. Smith approved the trade.

[147] Ms. Day's Investors Group file included a July 9, 2014 letter signed by her, in which she indicated that she approved the DSC Fund A investment. The letter indicates that she recognized the estate may be liable for fees in the near future should she pass away, but she believed it was an appropriate investment, as she wished to encourage and motivate her heirs to keep their inheritances with Investors Group and remain clients of Mr. Salina. The letter further indicates that she specifically instructed Mr. Salina to make the investment, as she wished him to be compensated for his work. Mr. Salina testified that Ms. Day was particularly concerned about the controlling behaviour of the spouse of one of her heirs and the risk that that spouse would control the bequest. He also testified that Ms. Day felt

that having that heir's bequest in a long-term investment would address some of these concerns.

[148] Mr. Salina earned \$18,043.44 in up-front commissions from the sale of the DSC Fund A to Ms. Day.

[149] On April 16, 2017, Ms. Day's estate redeemed the investments held at Investors Group, including the DSC Fund B, incurring penalty fees of \$24,380.39. In April 2018, the FSCC reversed the transaction and refunded the penalty fees to the estate.

[150] During its investigation, Investors Group's compliance department found that from January 2, 2014 to February 1, 2017, Mr. Salina facilitated 53 trades from no-load funds to DSC funds, affecting 16 clients at or near retirement age. Investors Group's view was that the affected clients obtained no material benefit from these switches and that the trades were unsuitable.

Investors Group's Compliance Book Review and Action Plan

[151] As part of the Close Supervision Program, Investors Group conducted a book review of Mr. Salina's trades for the preceding two years to determine whether he had any other compliance issues.

[152] The review concluded that there were no completed KYC forms on file for four client accounts and that 21 client account plans appeared to be invested more aggressively than stated in the KYC.

[153] The KYC process and form are vital to the relationship among Investors Group, the consultant, and the client. Consultants go through the KYC process and complete the form with the client, obtaining information on the following: net worth, annual income, investment knowledge, investments held, investment objectives, investment time horizon, risk tolerance, and desired portfolio profile (e.g., conservative, moderate, or aggressive). Ms. Schroeder testified that the KYC process is the most fundamental part of a consultant's job. It sets the groundwork for

everything that follows – how the consultant makes recommendations, develops plans, and serves the client effectively. Ms. Schroeder said that without a thorough understanding of the client's essential facts, the consultant cannot do their job properly. Moreover, from a compliance perspective, the KYC process is the foundation upon which a consultant can successfully do their job.

[154] Ms. Schroeder's evidence was that they would not expect the KYC information to change frequently – typically only a handful of times over the life of each account. Nevertheless, consultants are required to speak with the client at least annually to confirm that the information on file remains accurate.

Ms. Schroeder said that the conversation and its record inform all downstream decisions and actions, and, in particular, help the consultant determine product suitability by comparing the client's risk tolerance, desired investment profile, and time horizon with a particular fund's risk ranking. From a compliance perspective, each trade and the client's portfolio as a whole should be consistent with the client's KYC.

First Action Plan

[155] On August 25, 2017, Mr. Salina was placed on the first of three action plans. As part of its investigation, Investors Group identified four clients whose accounts lacked KYC documentation and a further 21 accounts whose portfolio composition was inconsistent with the clients' KYC (referred to as "out of scope"). It is unclear precisely what the first action plan required. Investors Group submits that it simply required Mr. Salina to provide the client files of the 21 clients whose portfolios were out of scope to the Branch Manager. Investors Group required Mr. Salina to complete the first action plan by September 10, 2017.

[156] Mr. Salina completed these tasks and reviewed the 21 client accounts identified in the first action plan. Between August 25, 2017 and September 13, 2017, Mr. Salina met with each identified client to address compliance concerns, i.e., to bring their investment portfolios into alignment with the KYC risk profiles. Mr. Salina

and Ms. Edgren maintained an internal spreadsheet to track their progress and provided weekly progress updates to Mr. Smith.

[157] I accept Mr. Salina and Ms. Edgren's evidence that they approached this task diligently. They met with each of the 21 clients, advised them that their portfolios were not aligned with their risk profiles, and either adjusted the portfolios or the KYC to ensure alignment and client satisfaction.

[158] The evidence establishes that Mr. Salina received no feedback from either Mr. Smith or Compliance.

Second Action Plan

[159] On October 30, 2017, Investors Group provided Mr. Salina with a revised action plan, which the parties have referred to as the second action plan.

[160] As their review continued, Investors Group became aware of a trend in the plaintiff's book: nearly 90% of the clients the plaintiff served were reported to have a high or very high risk tolerance and an aggressive desired investment profile. According to Mr. Kinzel, Mr. Salina's book was "skewed." Investors Group believed that this concentration of clients with high-risk tolerances and aggressive investment profiles was a red flag indicating that Mr. Salina was not properly assessing clients' KYC. Further, Investors Group was concerned that Mr. Salina was expediting the KYC process rather than conducting a highly individualized assessment of each client's personal circumstances. Investors Group's concerns were amplified by the fact that most of Mr. Salina's clients were over 60 years of age – i.e., people who could reasonably be expected to be at or nearing retirement age. The concern is that clients at or near retirement age are more likely to require access to their funds within a shorter time horizon and are therefore less able to absorb the volatility associated with high-risk, aggressive investments. As a result of these concerns, Investors Group mandated the second action plan.

[161] On October 30, 2017, Mr. Smith and Mr. Salina discussed the second action plan. The same day, an email followed up on the conversation and attached the

action plan, a spreadsheet listing clients. The top of the spreadsheet outlined the purpose and rationale for the second action plan. Under "PURPOSE", the action plan stated:

This action plan was created from the Consultant to review the client account risk tolerance and to take corrective action as required – refer to tabs age 60 to age 90 plus in this workbook.

[162] Under "REASON", the action plan stated:

The client accounts reflect a risk tolerance of "high" or "very high." This represents 80%+ of client accounts in these age groups. The client account risk tolerance is summarized in the following chart:

[163] The chart that followed contained columns for clients aged 60-70, 71-80, 81-90, and 90+. In each category, the chart showed how many accounts in each age group fell into each risk tolerance category (i.e., very high, high, medium, low, very low, and not on file). The chart confirms that for clients aged 60-90, the overwhelming majority of accounts had a high or very high risk tolerance. The second action plan also included another spreadsheet identifying 147 accounts (from 92 clients) that Investors Group had determined required review.

[164] In the October 30, 2017 email to Mr. Salina, Mr. Smith wrote:

As a refresher, the attached action plan is broken down into client account risk tolerance, relating to age. The suggestion going forward is starting with the 90+ tab and working back to the age 60 to 70 tab. I'll circle back to you later this week to discuss what you feel are realistic timelines to work through [sic] request.

[165] On November 6, 2017, Mr. Salina had a conference call with Ms. Schroeder and others to discuss the second action plan. The parties differ somewhat on what occurred during the call. Mr. Salina believes the call was intended to address his concerns about actions taken by Investors Group for which he had received no feedback – for example, regarding the first action plan. Nevertheless, he confirmed that during the call he was told that, as part of the second action plan, he needed to review KYCs for the listed clients due to their age, and, more specifically, that he needed to review and consider the clients' circumstances and determine whether

high-risk tolerances were still appropriate. In her testimony, Ms. Schroeder said she gave Mr. Salina more detailed instructions during the call. Specifically, she said she advised that he was required to:

- Have meaningful conversations with clients;
- Ensure that KYCs on file were accurate;
- Use an Investment Profile Questionnaire where necessary and appropriate to recommend that clients take less risk;
- Properly document the content of client conversations regarding KYC; and
- Update KYCs where appropriate.

[166] Ms. Schroeder further testified that she explained to Mr. Salina that the second action plan was intended to address the concentration of risk among his older clients, who are part of a demographic in which Investors Group typically observes a decrease in risk. Her evidence was that she told Mr. Salina that Investors Group expected him to advise at least some of his clients that, in most cases, they should have less risky profiles, and that, as a result of the action plan, there would be some decrease in risk for these clients.

[167] Mr. Salina's evidence was that he was never expressly told to reduce risk. Ms. Schroeder confirmed during cross-examination that it was never expressly communicated to Mr. Salina that he was expected to reduce the risk profiles of the identified clients.

[168] The November 6, 2017 phone call occurred almost eight years before trial. Neither Ms. Schroeder nor Mr. Salina took notes of the conference call. As indicated, I have concerns about Mr. Salina's credibility and reliability. Moreover, while I found Ms. Schroeder generally credible and reliable, she often came across as advocating for Investors Group, and I have concerns about her objectivity. That said, she struck me as a detailed and thorough person, and I would have expected her to provide

background and guidance to Mr. Salina on the second action plan. Nevertheless, given that she was in Compliance and struck me as detail-oriented, it is somewhat surprising that she did not take notes on the conversation. Given the passage of time, I do not accept that Ms. Schroeder would have such a detailed memory of what she said in the conference call. Nevertheless, I accept that she advised Mr. Salina to have conversations with clients about their risk and investment profiles, update their KYC as appropriate, and recommend that clients take less risk in their portfolios. Further, I accept that she told Mr. Salina that the second action plan was intended to address the concentration of risk for his older clients. I also accept that she told Mr. Salina that he should advise some of his clients to have less risky profiles and that, for those clients, there would be some decrease in risk. Nevertheless, I find as a fact that Ms. Schroeder and Investors Group did not give Mr. Salina any further or more specific guidance on reducing risk. Moreover, at no time during the second action plan did Investors Group instruct him on how many clients/accounts they expected the risk to be reduced for, or by how much. Nor did they give clear or explicit instructions on how much they would expect overall risk to be reduced at the aggregate level.

[169] Mr. Salina was not given a specific deadline to complete the second action plan, but January 2018 was the target date.

[170] There was considerable evidence at trial about the steps Mr. Salina and Ms. Edgren took to complete the second action plan. In my view, the evidence establishes that they diligently and in good faith undertook the second action plan. I reach this conclusion based on the following factual findings:

- (a) Mr. Salina began working on the second action plan immediately;
- (b) For each meeting, Mr. Salina's team prepared a comprehensive meeting package to help him prepare for the meetings. The package included an agenda, the client's current KYC, the client's investment portfolio, risk profile, market trends, and historical data on the client's investment performance.

(c) Mr. Salina entered the client meeting notes into the Investors Group software; and

(d) Mr. Salina provided Mr. Smith with regular updates.

[171] Implementing the second action plan was not easy for Mr. Salina. He testified that several clients were frustrated by being told to reduce their risk profile due to their age. This is understandable, particularly for clients who were independent, financially secure, and experienced investors.

[172] Mr. Salina completed the second action plan and submitted it to Mr. Smith on February 5, 2018. In total, after consulting with his clients, Mr. Salina determined that nine accounts required revised KYC profiles. For the remaining accounts, he indicated that no changes were necessary.

[173] Mr. Salina did not receive any specific feedback from Investors Group on the results of action plan two.

Third Action Plan

[174] Investors Group was dissatisfied with the results of the second action plan. It did not accept that no change was necessary for the vast majority of accounts that had not changed. It instructed Mr. Salina to reassess KYC for nearly all of the same accounts, as well as for additional accounts for clients aged 60+ with high or very high risk tolerance. In total, 338 accounts comprising 150 clients were identified for review. This was the third action plan.

[175] The third action plan was presented to Mr. Salina on March 2, 2018, by Mr. Tom Vowell, the Vice President of Private Wealth Management. Mr. Salina spoke with Mr. Vowell by phone early that morning, and Mr. Vowell followed up with an email later that day. The email was just over a page long and provided more specific instructions than those in the second action plan. In particular, Mr. Vowell

suggested steps to consider to reduce risk to the clients and his practice. In the email, he wrote:

Here is what I would be doing to try and mange [sic] this with some efficiency:

1. I would sort these clients by risk-client who are older and in show a high risk profile with a moderate/moderate aggressive portfolio would be my first focus.
2. Then methodically work through the list and set up meeting with the clients. The meetings need not last no more than 30 min. The purpose of the meeting is to update our paperwork.
3. In the meeting I would position the discussion about needing to take some risk out of the portfolio-markets have been strong for a number of years, a correction is inevitable, the ability to recover is always limited by our age, pulling back some of the risk will better protect the value of their holdings and those funds which will form part of the estate to be passed on to beneficiaries.
4. I would then review the risk profile option on the KYC form, possibly suggesting they take a more 'moderate' approach. If they agree, then I would have a KYC update form ready, and recommended changes which will have little downstream impact. I would not do an IPQ for these clients, all that is needed is a discussion where you can point out to them the risk and how we can help them manage this risk.
5. At the same time I would have ready the paperwork for moving the clients to Series U, and if needed a copy of the CFP Letter of Engagement. This way, all the paperwork is updated and complete.

[176] In the email, Mr. Vowell also noted that adopting his suggested approach might help mitigate any scrutiny by the Mutual Fund Dealers Association arising from its investigation. He closed by saying that he hoped his suggestions were helpful and that he was prepared to assist in whatever way necessary to move the plan forward, if required.

[177] Mr. Salina and Ms. Edgren immediately began implementing the third action plan by meeting with clients. Mr. Salina testified that he was clear that, for the third action plan, he needed to reduce the risk for the identified clients. He listed the clients on a spreadsheet and, starting with the 90+ age group, began meeting with clients in person to update their profiles and obtain instructions to adjust the clients' portfolios to reflect the new profiles.

[178] Mr. Salina testified that he met with about one-third of the identified clients before his termination. He said that in every meeting he followed Investors Group's direction to reduce risk. He said that unless a client absolutely refused to make changes, he was able to lower the client's risk. Mr. Salina testified that he encountered resistance from some of the clients he had previously met during the second action plan. Specifically, these clients asked why they were being asked to review their risk profiles again. Mr. Salina testified that when clients asked these questions, he conveyed the message that Mr. Vowell had recommended.

[179] Investors Group was monitoring Mr. Salina's progress in completing the third action plan much more closely than during the second action plan. Ms. Schroeder had concerns about Mr. Salina's approach. While she acknowledged that Mr. Salina had reduced risk, she was of the view that the reduction was marginal, or that it was being reduced in some cases but not in many. On cross-examination, she did not agree that Mr. Salina was directed to reduce risk. Rather, she said the focus of Investors Group's direction was for Mr. Salina to meet with clients, have fulsome conversations with them, and ensure that one of the files was accurate. Nevertheless, she also said on cross-examination that there was an expectation that there would be a reduction in risk, but that he was not specifically told to go and decrease risk.

[180] Ms. Schroeder testified that during the third action plan, Mr. Vowell and Mr. Smith both expressed concerns about how seriously Mr. Salina was taking the plan and the likelihood of its success. As indicated, neither Mr. Vowell nor Mr. Smith testified at trial. The evidence of what Mr. Vowell and Mr. Smith told Ms. Schroeder about the progress of the third action plan, or their views on its progress, is hearsay and not admissible for the truth of its contents unless an exception applies. I reiterate my comments about business records set out earlier in these reasons. Regardless, my understanding is that Investors Group is not relying on the out-of-court statements of Mr. Vowell and Mr. Smith for the truth of their contents, but rather for the fact that Mr. Vowell and Mr. Smith expressed concern. Whether those concerns were valid or true is not admissible evidence.

[181] I pause to note again that Mr. Vowell and Mr. Smith were significantly involved in the key events leading up to Mr. Salina's dismissal. In my view, they should have been called as witnesses by Investors Group. If they had been called, they would have given sworn oral evidence as to their recollection of the events. They could have been permitted to refresh their present memory, if needed, by referring to the emails. If they had no present memory, the emails could have been admitted into evidence as past recollection recorded. Regardless, their evidence would have been tested in cross-examination, and the court would have had the opportunity to assess their reliability and credibility. The court did not have this opportunity. Investors Group initially sought to have many of their emails admitted into evidence as business records for the truth of their contents, but later withdrew that request. In my view, most or all of the emails could not be considered business records under the *Evidence Act* because they contained a significant amount of opinion rather than statements of fact. And what statements of fact were left were not established to have been recorded at the time those facts occurred or shortly thereafter.

[182] In any event, Ms. Schroeder had independent concerns. She reviewed KYC changes and the notes Mr. Salina was recording in the Pathways system. Ms. Schroeder was particularly troubled by notes indicating that Mr. Salina had told clients he was meeting with them only at the "urging of head office" or that "head office" was requiring him to reduce their risk. Mr. Salina confirmed in his testimony that he had told some clients that the meetings were not his idea or that head office was asking him to arrange them.

[183] Mr. Salina received feedback from Mr. Vowell while working on the third action plan. Mr. Salina offered potentially hearsay evidence that Mr. Vowell provided positive feedback, including via email. As noted, Mr. Vowell did not testify; thus, unless a hearsay exception applies, the evidence is admissible only as to the fact that Mr. Salina received positive feedback from Mr. Vowell, not as to its truth. Counsel for Mr. Salina did not attempt to have Mr. Vowell's emails admitted as business records; nevertheless, given Mr. Vowell's senior position at Investors

Group, these statements could constitute admissions. Without Mr. Vowell testifying, it is difficult to reconcile how he could have expressed concerns to Ms. Schroeder about Mr. Salina's efforts while also providing him with positive feedback. It is possible that Mr. Vowell had concerns but believed that providing positive feedback to Mr. Salina would be the best way to achieve a positive result. In the end, nothing turns on this. I have found that Mr. Vowell's out-of-court statements to Ms. Schroeder are not admissible for the truth of their contents. Further, while Mr. Vowell's statements to Mr. Salina could constitute admissions, I do not attach any weight to them because I am not satisfied they were true. If the parties wished the Court to rely on the truth of Mr. Vowell's statements, they should have subpoenaed him to testify. Nevertheless, I accept that it was reasonable for Mr. Salina to believe that Mr. Vowell had no concerns about the third action plan's progress.

[184] Despite Investors Group's concerns, no one from Investors Group provided negative feedback to Mr. Salina during the implementation of the third action plan.

[185] By mid-April 2017, about six weeks into the third action plan, Investors Group began considering whether to terminate Mr. Salina, unbeknownst to him. Ultimately, the decision to terminate Mr. Salina was Mr. Kinzel's. He said he made his decision after consulting with the FSCC and the Chief Compliance Officer, Ms. Danielle Tetrault. Based on his engagement and feedback from others, he felt it was clear that Investors Group had no choice. In this regard, he noted the concerns expressed by Ms. Tetrault, who was of the view that Mr. Salina had an ongoing lack of cooperation with Compliance (both at the head office and branch level), which was a continuation of the issues from 2016 (i.e., the lack of disclosure of being named a beneficiary and the no-load to DSC switches). In addition, Ms. Tetrault noted that the branch manager (i.e., Mr. Smith) indicated he did not feel Mr. Salina could be supervised and refused to sign off on his close supervision. Lastly, Ms. Tetrault believed that Mr. Salina would not cooperate with Compliance without intervention from the private wealth management team, which she felt put Investors Group at risk from a regulatory perspective.

[186] I pause to again note that Ms. Tetrault did not testify. As set out above, Investors Group unsuccessfully sought to have Ms. Tetrault's email, which set out these concerns, admitted as business records for the truth of its contents. Given the nature and significance of her evidence, Investors Group should have called Ms. Tetrault as a witness at trial. Nevertheless, the email's contents are admissible for the limited purpose of establishing what Mr. Kinzel considered in deciding to terminate Mr. Salina.

[187] On a related issue, Mr. Kinzel said he also considered the concerns of Mr. Smith, the branch manager. Mr. Smith did not testify; therefore, his statements that he did not feel Mr. Salina was superviseable and that he would not sign off on his close supervision are not admissible for the truth of their contents. They are admissible only for the limited purpose of establishing what Mr. Kinzel considered in deciding to terminate Mr. Salina.

[188] Overall, Mr. Kinzel said there was not just one issue that informed his decision to terminate Mr. Salina. He said there were a multitude of issues, including being named as a beneficiary without disclosing it, switching funds from no-load to DSC, and their view that Mr. Salina was "not engaged" during the action plan process, which challenged their ability to supervise him. Mr. Kinzel said that as a dealer, Investors Group must be in a position to supervise the advisors who work for the organization. They deemed Mr. Salina "unsupervisable", which he defined as an individual who does not want to work with you, does not seem to understand the rules, and does not meaningfully work on assigned tasks.

[189] As noted, in May 2018 Darryl Gossen was Vice President, Western Canada, for Investors Group's Private Wealth Management division. He was based in Victoria. Mr. Gossen was not involved in the Close Supervision Program or any of the action plans. However, Ms. Schroeder asked him to call Mr. Salina during the third action plan to check in on him, which he did. Mr. Gossen was not involved in the decision to terminate Mr. Salina, but he was tasked with arranging the termination meeting.

[190] Mr. Gossen arranged for the meeting to be held off-site and for a change to the office's lock. He contacted Mr. Salina and asked him to meet at the Empress Hotel on the morning of May 23, 2018. The meeting took place at 8:30 a.m. in the upper-level seating area of the hotel's foyer. Unbeknownst to Mr. Salina, Mr. Vowell was also invited to the meeting. Mr. Vowell informed Mr. Salina that his consultant agreement was being terminated. At the meeting, Mr. Salina was also handed a letter dated May 23, 2018, which stated the reason for termination in one sentence: "The basis for this termination is our assessment that you are unsuperviseable."

[191] According to Mr. Salina, he met Mr. Gossen at the Empress. After they shook hands, Mr. Gossen suggested they go upstairs and then invited him to sit in a couple of chairs. Shortly thereafter, Mr. Vowell came around the corner, approached them, took out an envelope, which turned out to contain the May 23, 2018 letter, handed it to him, and said, "As of this moment, your contract with [Investors Group] has been terminated."

[192] Mr. Salina was surprised and asked Mr. Vowell whether they had the right person. Mr. Vowell apologized and said the decision had been made. Mr. Salina asked on what basis. Mr. Vowell said something along the lines of the trading trend that had been observed. Mr. Salina was then escorted by Mr. Gossen back to the building housing the Investors Group office – he was ultimately escorted up to his office to retrieve his keys and possibly some other personal items, and then received a call from Ms. Edgren, who had also been terminated, and waited for her in the lobby.

Pre-signed forms

[193] After Mr. Salina's termination, Investors Group discovered that he had obtained and possessed 24 pre-signed forms for 13 clients. The pre-signed forms consisted of the following:

- (a) Investor profile questionnaires;
- (b) Tax Free Saving Account client application forms;

- (c) Non-registered client application forms;
- (d) Transfer authorizations;
- (e) Pre-authorized contribution agreements; and
- (f) RSP client application forms.

[194] While Mr. Salina was working at Investors Group, he had to certify annually that he did not have pre-signed forms with any clients.

[195] Under the Mutual Fund Dealers Association's guidelines, pre-signed forms are considered a form of signature falsification and constitute serious misconduct.

[196] Mr. Salina certified to Investors Group annually that he was in compliance with the rules regarding pre-signed forms.

[197] Mr. Salina was aware that pre-signed forms were prohibited at the times he obtained them. On December 15, 2014, Mr. Salina signed a "pre-signed forms attestation" acknowledging the rules regarding pre-signed forms and that violations could result in discipline, including termination.

[198] During the Close Supervision Program, Mr. Salina was required to complete monthly attestations that included confirming compliance with the rules regarding pre-signed forms. This section of the monthly attestation form was worded as follows:

I am aware that the use of pre-signed forms or partially completed forms is a prohibited activity. I have not accepted nor do I maintain any pre-signed or partially completed form(s) in any client files.

[199] Although a completed monthly attestation form was not in evidence for every month from the start of the Close Supervision Program to the termination date, I am satisfied that Mr. Salina completed the attestation for most months during his close supervision, including on April 2, 2018, about seven weeks before he was terminated.

[200] Examples of pre-signed forms that were located in Mr. Salina's files post-termination include the following:

- (a) Client Information Form (Form CL2052). The footer on the template form indicates that this form was created in 06/2007, and thus any forms signed were signed while Mr. Salina was under close supervision.
- (b) Pre-Authorised Contribution (PAC) Agreement form (Form C3643). The footer on the template form indicates this form was created in 01/2018, and thus any forms signed were signed while Mr. Salina was under close supervision.
- (c) Transfer Authorization Form (Form CI2794). The footer on the template form indicates this form was created in 12/2016.
- (d) Investment Profile Questionnaire Form (Form C4161). The footer on the template form indicates this form was created in 05/2017, and thus any forms signed were signed while Mr. Salina was under close supervision.
- (e) General Authorization Letters.

[201] Based on the creation dates of the forms, I find that at least four of the pre-signed forms were created while Mr. Salina was under close supervision (i.e., from April 7, 2017 to the termination date). Thus, Mr. Salina was not in compliance with Investors Group policy and the Mutual Fund Dealers Association rules regarding pre-signed forms during that period.

[202] In cross-examination, Mr. Salina acknowledged that his client files contained pre-signed forms, but he maintained that they were obtained in the past and that he was unaware of them when he signed his monthly attestations. When asked about pre-signed forms where the form itself was created while he was under close supervision (and thus could not have been pre-signed at any time other than while he was under close supervision), Mr. Salina suggested the forms were signed in May 2018, after he signed the last monthly attestation.

[203] I do not accept Mr. Salina's suggestion. In total, Mr. Salina was under close supervision for more than 13 months before he was terminated. He suggests that he obtained pre-signed forms (for forms created while he was under close supervision) in the 13th month, a month in which he did not sign an attestation. As noted, I have concerns about Mr. Salina's credibility and approach his evidence with caution. If he had clients sign pre-signed forms in May 2018 – i.e., after he signed his April 2, 2018 attestation but before he was terminated – he could have called those clients to testify to corroborate his evidence, or he could have provided evidence of the dates on which he met these clients. He did neither. I find it much more likely that at least one of the forms was pre-signed before April 2, 2018.

[204] In sum, I find that Mr. Salina collected and maintained pre-signed forms while under close supervision, and made at least one false monthly attestation regarding those forms during that period.

Discussion

[205] Because I have found that Mr. Salina was a dependent contractor, Investors Group must establish that it had just cause to terminate him.

[206] Investors Group says it terminated Mr. Salina on May 23, 2018, because he was unsupervisable. More specifically, it had concerns about his honesty, judgment, and ethics, as well as his ability to follow instructions and guidance. I will address each event that informed Investors Group's decision, both individually and cumulatively.

Bequest of Client Florence Day

[207] I find that the issues concerning Ms. Day's bequest, on their own, do not constitute just cause.

[208] Investors Group was critical of Mr. Salina's relationship with Ms. Day. They felt he had grown too close to Ms. Day and, in any event, should have handed her file to another consultant once their relationship took on personal aspects. I note that Investors Group did not suggest any nefarious motives on Mr. Salina's part, nor was

there any evidence of that. The evidence established that Mr. Salina was very committed to providing exceptional client service. He struck me as someone committed to forming deep, long-standing relationships with his clients. Ms. Day was elderly, widowed, and had no family living in the Victoria area. Mr. Salina checked in on her by phone and assisted her with errands. Ms. Day was vulnerable by virtue of her age and personal circumstances, but there was no evidence that Mr. Salina was motivated by ill intentions. Rather, the evidence established that he cared for her. In addition, there was no evidence that Mr. Salina ever suggested to Ms. Day that she leave him a bequest. In fact, when she suggested it, he actively told her not to leave anything to him.

[209] Mr. Salina could be criticized for wishing to accept the bequest, but not to the extent that Investors Group suggests. Investors Group's policies did not prohibit consultants from accepting a bequest from a non-family member. Rather, the policy states that consultants must not permit such a client to name them as a beneficiary in their estate. Nevertheless, having consultants accept bequests from such clients – even if they did not permit it – creates poor optics and certainly raises conflict-of-interest concerns for financial consultants servicing elderly clients. Mr. Salina should have appreciated the conflict-of-interest concerns more fully. Nevertheless, I do not share Investors Group's level of criticism regarding his wish to keep the bequest and his participation in the internal review process.

[210] Ultimately, Investors Group's internal review process determined that accepting the bequest would not be consistent with its conflict-of-interest guidelines and advised Mr. Salina that doing so would result in termination. Mr. Salina accepted Investors Group's decision and declined the bequest.

[211] In addition to taking issue with Mr. Salina's desire to accept the bequest, Investors Group also took issue with his failure to disclose it to Investors Group in a timely manner. Mr. Salina's failure to disclose the bequest was problematic because, as indicated, he was required under Investors Group policy (and thus under the Consultant's Agreement) and under Mutual Fund Dealers Association guidelines to

disclose any conflict of interest or potential conflict of interest. As noted, I do not accept Mr. Salina's explanation for the delay and have found that he was aware he had been named a beneficiary by the time he made his March 7, 2016 attestation that he was not aware of being named a beneficiary in a client's will. Further, Mr. Salina kept this information from Investors Group until he was asked during a routine audit whether he had been named a beneficiary in a client's will.

[212] Mr. Salina's conduct in breaching company policy and the Mutual Fund Dealers Association guidelines, and in making a false attestation, was problematic and, in my view, constituted misconduct of moderate severity. Nevertheless, in applying a contextual approach, I find that Mr. Salina's failure to disclose and his false attestation did not provide just cause for termination. His conduct did not involve theft, misappropriation, or serious fraud. As the case law indicates, dismissal without notice is such a severe punishment that it can be justified only by misconduct of the most serious kind: *Sheehan v. British Columbia (Hydro & Power Authority)*, [1999] B.C.J. No. 1415 (S.C.) at para. 113. Mr. Salina had many years of loyal service with Investors Group. He was among their top performers. In the circumstances, his misconduct was not severe enough to justify dismissal without notice. Moreover, while trust is especially critical in the financial services industry, I find that Mr. Salina's actions did not create a breakdown in the employment relationship, nor were they otherwise incompatible with the continuation of that relationship.

Commission Generating Trades

[213] I find that the issues relating to the commission-generating trades do not, on their own, constitute just cause. That is not to say that Mr. Salina's actions in switching funds from no-load to DSC were not problematic.

[214] I find that it was improper for Mr. Salina to advise Ms. Day to switch the \$498,511.57 held in the no-load fund to the DSC fund. As noted, holders of a DSC fund incur penalties if the funds are redeemed within seven years. Ms. Day was 95 years old when the switch was made. While it was possible she could have lived for

another seven years (and thus avoided any early redemption penalties), it was unlikely. Mr. Salina's evidence is that Ms. Day opted for the DSC fund because she wanted her heirs to keep their inheritances at Investors Group and because she wanted him to be compensated for his work. Ms. Day signed a letter outlining these reasons and stating that she had specifically instructed Mr. Salina to make the switch.

[215] In my view, these explanations for the switch were unreasonable. First, there was no evidence that, if Ms. Day passed away within seven years, her estate and heirs could avoid the early redemption penalty even if they kept their portions of the bequest with Investors Group. The estate would ultimately need to redeem the fund to distribute the bequest, incurring a penalty. I suppose it is possible that, in that situation, Investors Group would refund or reverse the penalty if the beneficiaries reinvested their bequests with Investors Group in their own names; however, there was no guarantee of that. Second, regardless of whether the money was in a no-load or DSC fund, Mr. Salina would be compensated for his work. However, if the fund was redeemed within seven years, he would receive greater compensation from a DSC fund than from a no-load fund. Mr. Salina should not have permitted Ms. Day to make this trade. I am mindful of Mr. Salina's evidence that Ms. Day was strong-willed. Nevertheless, he had a very close, long-term, and trusting relationship with her. He should have insisted that she keep the funds in the no-load fund. If Ms. Day refused, he should have had her sign a letter stating that he strongly advised her against making the switch and that, despite that advice, she insisted on making it. Instead, Mr. Salina drafted a waiver-type letter that Ms. Day signed.

[216] In sum, these trades were commission-generating and raised conflict-of-interest concerns regarding Mr. Salina.

[217] Collectively, Mr. Salina's actions regarding the Ms. Day bequest letter, the failure to disclose the bequest, the false attestation, and the July 2014 switch were highly problematic and constituted misconduct of moderate severity. They demonstrated a lack of appreciation for conflict-of-interest guidelines, Investors

Group policies, and regulatory guidelines, as well as a lack of candour and, possibly, trustworthiness. Nevertheless, I find that Investors Group did not have just cause to terminate Mr. Salina at this stage. Although Mr. Salina's actions were problematic and raised concerns about his ethics, his misconduct to that point had not led to a breakdown of the relationship, nor was it otherwise irreconcilable with its continuation. Investors Group appeared to share the same view. They did not terminate Mr. Salina at that point; however, he received a warning letter, faced regulatory investigations, and was placed under close supervision.

[218] As noted, Investors Group subsequently learned that from January 2, 2014 to February 1, 2017, Mr. Salina facilitated 53 trades from no-load funds to DSC funds, affecting 16 clients at or near retirement age.

[219] Investors Group policy prohibits commission-generating activities, including trades that generate commissions for consultants but provide little or no economic benefit to the client. Investors Group submits that all of these trades were commission-generating. In support of this argument, Investors Group notes the following:

- (a) Ms. Schroeder's evidence that while no-load to DSC trades may be acceptable in some cases, a significant change in the client's circumstances would be necessary to warrant the switch, given that the consultant had determined that a no-load fund was acceptable at the time of the initial investment;
- (b) No-load to DSC trades were permissible when appropriate; and
- (c) The Mutual Fund Dealers Association and IIROC have found that similar switches were improper, commission-generating activity.

[220] Investors Group submits that Mr. Salina's pattern of no-load to DSC trades was indicative of a broad pattern of misconduct and was completed for the purpose of earning large amounts of upfront commission. They further note that the review of the internal Investors Group notes shows very little explanation for why the trades

were suitable, and some indicate that the reason for the trades included Mr. Salina obtaining commissions.

[221] Mr. Salina submits that the evidence does not establish that these 53 trades were unsuitable or that Mr. Salina engaged in misconduct in recommending them. I agree with Mr. Salina's position for the following reasons:

- (a) Investors Group reached its conclusion about the propriety of these trades primarily on the age of the clients in question, not on the specific circumstances of each client.
- (b) The trades involved clients who were in their late 50s or older. Investors Group compiled the data based on people who were 60 or older at the time of compilation, not at the time of the trade – thus, the data included some people in their late 50s. The suitability considerations for a switch for someone in their late 50s versus someone in their 80s are very different.
- (c) Mr. Salina's evidence, which I accept, is that when clients deposited funds, he often invested them in a no-load fund until he could meet with the client for a more detailed discussion, at which point a switch to a DSC fund could occur. In other words, the situation that Ms. Schroeder described, where a significant change in the client's circumstances would be necessary to warrant the switch, would not apply – as the funds were invested in a no-load fund (where there is no penalty to redeem) pending Mr. Salina's ability to have a more detailed discussion with the client to determine which fund would ultimately be suitable.
- (d) The ongoing management fees for DSC funds were lower than those for no-load funds. Although the percentage difference was small – generally 0.10% – there could be meaningful long-term fee savings for a large investment.
- (e) Some clients are fee-sensitive or may wish to put funds in a DSC to support long-term investment strategies.

- (f) Investors Group also benefited from clients keeping their money in funds over the long term and rewarded consultants with business credits when funds were deposited into DSC funds.
- (g) Mr. Salina gave evidence regarding the basis for the switches for some of the 53 clients. I accept his evidence for those clients (i.e., Mr. Chew, Mr. Duckett, Mr. McFarlin, and Ms. Slovik) that there was a basis for the switches and that the switches were not commission-generating activity.
- (h) All the switches would be reviewed by the branch manager at the tier one level. Some may have been reviewed by the compliance department at the tier two level. Other than the Ms. Day trade, there was no evidence that any of these trades were flagged at either level. As noted, the Ms. Day trade was flagged at the branch manager level and ultimately approved.

[222] Overall, the evidence does not establish that any of the 53 switches – other than the Ms. Day switch – were unsuitable, or that Mr. Salina engaged in misconduct in recommending and executing the trades. While it is understandable that the number of these trades raised concerns with Investors Group in the aggregate, and in the context of the other related events, these trades alone (and cumulatively with the issues related to Ms. Day) did not provide just cause for termination.

Compliance Book Review and Action Plan

[223] Investors Group submits that, during the book review, it identified systemic deficiencies in Mr. Salina's KYC practices and implemented action plans to address them as part of the close supervision program. It further states that, as the book review continued, it became aware of an "alarming trend" in Mr. Salina's book – that nearly 90% of the clients he serviced were rated as having a high or very high risk tolerance and had very aggressive Investor Profile and Preferences. In its view, Mr. Salina's book was "skewed", and it was concerned that he was not engaging in an adequate and appropriate KYC process with his clients. Investors Group submits

that, upon becoming aware of the skewed nature of Mr. Salina's book, it was obligated to act to ensure that clients' KYCs were properly assessed.

[224] Investors Group says that Mr. Salina's approach to the second action plan amounted to an "abdication of responsibilities." They say that Investors Group brought to his attention "an alarming problem with this book that he should have taken seriously." Overall, Investors Group felt that Mr. Salina was not taking the process seriously, as he was not sufficiently reducing overall risk levels.

[225] Investors Group submits that the plaintiff's systemic KYC failures, his refusal to remediate, and his dismissive attitude towards compliance contributed to the overall assessment that the plaintiff could not be trusted to observe fundamental professional obligations, to the breakdown of the relationship, and to Investors Group's decision to terminate Mr. Salina.

[226] I accept the evidence of Ms. Schroeder and Mr. Kinzel that, overall, Mr. Salina's book was unbalanced or skewed, with the vast majority of clients having high or very high risk tolerances and aggressive profiles. Further, I accept that it was appropriate for Investors Group to implement all three action plans.

[227] Nevertheless, I do not agree with Investors Group's characterization of Mr. Salina's approach to the three action plans.

[228] As noted, I found it unclear what the first action plan required. Investors Group said it required only that Mr. Salina provide the branch manager with 21 client files that were "out of scope." Mr. Salina went beyond this. He reviewed each of the 21 client files and met with each client to align their investment profiles with the KYC risk profiles. Investors Group raised no concerns with Mr. Salina about the first action plan and appeared to take no issue with his approach to it.

[229] The parties hold very different views on the second action plan. More specifically, each party has a different perspective on what was required of Mr. Salina and how he was to carry it out. Mr. Salina's understanding was that he was to review KYCs for the listed clients, review and consider their circumstances,

and determine whether the high-risk tolerances were appropriate. Ms. Schroeder testified that she gave Mr. Salina much more detailed instructions, including telling him he needed to have meaningful conversations with clients, ensure the KYCs on file were accurate, use the investment profile questionnaire where necessary to recommend that clients take less risk, document the conversations with clients, and update the KYCs as appropriate. Moreover, she testified that she told Mr. Salina he needed to address risk and that they expected, overall, there would be some decrease in risk for some of the clients. Mr. Salina disputes that he was told he was expected to reduce the risk profiles of identified clients. As noted, neither Mr. Salina nor Ms. Schroeder made notes of this conversation.

[230] Despite the lack of clarity about what was expected of Mr. Salina, the action plan worksheet itself, which was an Excel spreadsheet, set out some instructions. As noted, under "Purpose," the action plan worksheet stated that Mr. Salina was to review the client account risk tolerance for the listed clients and "take corrective action as required." Under "Reason," the action plan worksheet notes that the listed client accounts "reflect a risk tolerance of 'high' or 'very high.' This represents 80%+ of your client accounts in these age groups."

[231] I have set out the steps Mr. Salina took to implement the second action plan above. Those steps were comprehensive, and it cannot be said that he did not take the process seriously. In fact, the opposite was true. That said, I agree with Investors Group that the second action plan did not result in any reduction in risk. As indicated, KYCs were updated for nine accounts. For the remaining accounts, Mr. Salina stated that no changes were necessary.

[232] It is understandable that Investors Group was dissatisfied with the results of the second action plan. They wanted to see a significant overall reduction in risk across the identified clients' portfolios. However, as noted, I find that this goal was never clearly articulated to Mr. Salina. From a process perspective, I find that Mr. Salina took the matter seriously and acted diligently.

[233] Investors Group was dissatisfied with the results and implemented the third action plan. However, it is significant that Investors Group provided Mr. Salina with no specific feedback on action plan two.

[234] In addition, they brought Mr. Vowell in, hoping he could assist with the process. Mr. Vowell provided Mr. Salina with very clear instructions on how to reduce risk in individual client portfolios. As noted, Mr. Salina and Ms. Edgren quickly went to work to meet with clients, in many cases for a second time in recent months.

[235] Investors Group was somewhat clearer that it wished to reduce risk in the third action plan, but again, Ms. Schroeder's evidence regarding Investors Group's expectations was not entirely clear to me. For example, as indicated in her testimony, Ms. Schroeder did not agree that Mr. Salina was directed to reduce risk; rather, the focus was on the process and ensuring that the KYC on file was accurate. Nevertheless, Ms. Schroeder also testified, as did Mr. Kinzel, that they expected some reduction in risk.

[236] The overall thrust of Investors Group's argument is that Mr. Salina, as a professional investment advisor, should know these things without them having to spell them out, and that not knowing calls into serious question Mr. Salina's professionalism and their ability to supervise him. The challenge with that argument is that if one is going to be terminated for not following instructions or for failing to meet certain objectives or expectations, those instructions, objectives, and expectations should be clear. That was not the case in the second or third action plans.

[237] Internal correspondence made it clear that Investors Group had concerns about Mr. Salina's approach to the action plans and, more generally, about its ability to supervise them. Nevertheless, none of these concerns were relayed to Mr. Salina during any of the action plans.

[238] Mr. Salina was fired before he could complete the third action plan.

[239] I find that Mr. Salina was cooperating with Investors Group in completing the action plans. Certainly, Mr. Salina is not immune to criticism for the way he completed them. It was not appropriate for him to tell clients that he was being asked to meet with them again due to head office. That said, I am also mindful that it was a difficult situation for Mr. Salina. He testified, and I accept, that many of his clients were long-time clients with some sophistication when it came to financial matters. It would be uncomfortable and somewhat awkward for him to meet clients for a second time to go over their KYC and portfolio. He had to navigate the situation fairly delicately from a client management point of view. Overall, it was in both his and Investors Group's interests for the clients to have continued confidence in Mr. Salina.

[240] Overall, I find that Mr. Salina's actions in completing the three action plans could not reasonably form the basis for concluding that he could not be trusted to observe professional obligations. Moreover, his actions in this regard could not reasonably have led to the conclusion that Mr. Salina was unsupervisable, leading to the breakdown of the dependent contractor relationship.

Did Investors Group Have Cause as of May 23, 2018?

[241] As set out above, Mr. Salina's failure to advise Investors Group that he was a beneficiary in Ms. Day's will and his false attestation constituted misconduct of moderate severity. Nevertheless, that misconduct alone would not justify termination without notice, especially given Mr. Salina's many years of loyal service. Moreover, while I have found that the Ms. Day commission-generating trade was problematic and raised ethical concerns, that issue, together with the other Ms. Day issues, did not constitute just cause to terminate without notice. I have further found that the other no-load to DSC trades were not shown to be unsuitable, nor was any misconduct on Mr. Salina's part in relation to those trades proven. Finally, I have found that Mr. Salina's approach to the three action plans cannot reasonably form the basis for a conclusion that he could not be trusted to observe professional obligations, nor can it reasonably lead to the conclusion that he was unsuitable for the role or unsupervisable.

[242] Overall, I find that Investors Group has not established that Mr. Salina's conduct up to that point was fundamentally antithetical to the continuation of the dependent contractor relationship, nor was it irreconcilable with sustaining the employment relationship. In other words, as of May 23, 2018, they did not have just cause to terminate him.

[243] Nevertheless, the analysis does not end here.

After Acquired Cause: Pre-Signed Forms

[244] Investors Group submits that it can establish just cause as of the date of Mr. Salina's termination, based on misconduct that Investors Group learned of after termination. This is known as after-acquired cause. Justice Tammen recently summarized the legal basis for after-acquired cause in *Golob v. Fort St. John (City)*, 2021 BCSC 2192. He writes:

[47] The Court of Appeal in *Carr v. Fama Holdings Ltd.*, [1990] 1 W.W.R. 264 (B.C.C.A.) held at p. 271 that, "an employer may dismiss an employee, giving the wrong reasons, *provided that causes which would justify dismissal did in fact exist at the time*" [emphasis in original.]

[48] More recently, in *Van den Boogaard v. Vancouver Pile Driving Ltd.*, 2014 BCCA 168, the court stated:

[33] The Supreme Court of Canada set out the principle behind after-acquired cause in *Lake Ontario Portland Cement Co. v. Groner*, [1961] S.C.R. 553 at 563-564, as follows:

The fact that the appellant did not know of the respondent's dishonest conduct at the time when he was dismissed, and that it was first pleaded by way of an amendment to its defence at the trial does not, in my opinion, detract from its validity as a ground for dispensing with his services. The law in this regard is accurately summarized in Halsbury's Laws of England, 2nd ed., vol. 22, p. 155, where it is said:

It is not necessary that the master, dismissing a servant for good cause, should state the ground for such dismissal; and, provided good ground existed in fact, it is immaterial whether or not it was known to the employer at the time of the dismissal. Justification of dismissal can accordingly be shown by proof of facts ascertained subsequently to the dismissal, or on grounds differing from those alleged at the time.

[34] Regardless of whether dismissal for after-acquired cause or for cause is being argued, the issue is whether the employer can establish that, at the time of dismissal, there were facts sufficient in

law to warrant a dismissal. If an employer knew of the misconduct and had expressly or implicitly condoned it, then claims of after-acquired cause will be defeated.

[245] Simply put, after-acquired cause may be invoked where, after the employee's dismissal, the employer discovers misconduct that occurred before the dismissal and would have justified summary dismissal had the employer known of it earlier: *Doucet and Dauphinee v. Spielo Manufacturing Incorporated and Manship*, 2011 NBCA 44, at para. 74.

[246] As noted, after Mr. Salina was terminated, Investors Group discovered 24 pre-signed forms in his files involving 13 clients. Investors Group policy and Mutual Fund Dealers Association guidelines prohibited him from collecting and keeping pre-signed forms. Further, as indicated, Mr. Salina was aware that pre-signed forms were prohibited at the times he obtained them. He had to certify, in an annual declaration (which included other certifications), that he understood the rules regarding pre-signed forms and that violations could result in disciplinary action, including termination. Further, after he was placed on close supervision on April 7, 2017, he had to sign monthly attestations confirming compliance with the rules regarding pre-signed forms. Nevertheless, I have found that he had pre-signed forms in his possession when he made these monthly attestations and, in fact, had some signed while he was in close supervision. I have also found that Mr. Salina made a false certification on at least one of the monthly close supervision attestations.

[247] Investors Group says his actions in collecting pre-signed forms while under close supervision and certifying that he was complying with the rules were dishonest, deceitful, and a fundamental breach of his obligations to Investors Group, the regulators, and his clients. In their submissions, Investors Group asks: "if [Investors Group] could not even rely on Mr. Salina to comply with critical rules governing the industry, at a time when he was under close supervision and regulatory scrutiny, when could they possibly rely on him?" Investors Group submits that after discovering the pre-signed forms – which they could not have discovered

until after termination – no further reliance or trust could be placed in Mr. Salina to perform his duties in an industry requiring the utmost standards of honesty, integrity, and trust.

[248] Mr. Salina argues that the presence of pre-signed forms in his files, whether alone or in conjunction with other alleged misconduct, does not give rise to cause warranting summary dismissal. In support of this position, they rely on several Mutual Fund Dealers Association decisions and settlements involving Investors Group consultants who had pre-signed forms. In these decisions and settlements, the consultants were not terminated, except for one who was terminated after the third offence. The rest received lesser discipline, such as verbal warnings or warning letters.

[249] In addition, Mr. Salina submits that Investors Group has not established a key element of after-acquired cause, namely that Investors Group did not know of the alleged misconduct until after termination. Mr. Salina argues that Investors Group should have been aware of all the contents of his files during the period of close supervision, including the presence of pre-signed forms.

[250] I am unable to accept Mr. Salina's position. The only way Investors Group could have known about the pre-signed forms before termination was if Mr. Salina disclosed their existence or if they had searched his office. None of these occurred. As such, the only way for them to discover the forms was after termination, when they presumably went through the files left in the office.

[251] In addition, I give limited weight to the Mutual Fund Dealers Association settlements and decisions that Mr. Salina relies on in support of his position. These are not court decisions, nor do they involve a determination of just cause. They are regulatory decisions. Moreover, even if they were persuasive, none of them involved consultants who had collected pre-signed forms while under close supervision.

[252] In collecting pre-signed forms while under close supervision and falsely indicating in at least one monthly close supervision attestation that he complied with

the rules on pre-signed forms, Mr. Salina engaged in severe misconduct. In my view, it demonstrated a level of deceit and dishonesty incompatible with the trust and integrity required of an investment advisor. At that point, it would be reasonable for Investors Group not to trust anything that Mr. Salina said. Mr. Salina's severe misconduct in collecting and possessing these forms while under close supervision and in making a false attestation was irreconcilable with the continuation of the dependent contractor relationship with Investors Group and establishes just cause for his termination.

[253] If I am wrong, specifically that collecting and maintaining pre-signed forms while under close supervision and making a false attestation during that period are insufficient to establish just cause, I find that these actions, together with his failure to disclose the bequest and the false attestation he made in that regard, cumulatively establish just cause.

Counterclaim

[254] Investors Group has brought a counterclaim against Mr. Salina. Specifically, Investors Group alleges that Mr. Salina breached two clauses of the Consultant's Agreement: the non-solicitation and confidentiality clauses. I will address each alleged breach separately.

Breach of the Non-Solicitation Clause

[255] The non-solicitation clause (the "Non-Solicitation Clause") is as follows:

9. NON-SOLICITATION

(i) For a period of one (1) year after termination of this Agreement, the Consultant shall not, directly or indirectly, solicit any investment business from any client of IGFS in the territory served by the Region Office or Offices with which the Consultant was associated during the year prior to such termination.

(ii) Notwithstanding the provisions of paragraph (i) above, for a period of two (2) years after termination of this Agreement, the Consultant shall not directly or indirectly solicit any investment business from any client of IGFS with whom the Consultant has dealt during the term of this Agreement

For the purpose of this Agreement, clients of IGFS are holders of mutual fund shares or units, investment contracts and other financial products and

services offered or sponsored by IGFS and/or its affiliated corporations from time to time.

[256] Investors Group submits that Mr. Salina breached the Non-Solicitation Clause by soliciting Investors Group clients' business. These efforts, Investors Group says, caused a number of clients to leave Investors Group and sign up with Mr. Salina at his new employer, resulting in loss. Mr. Salina disputes that he breached the Non-Solicitation Clause and further argues that even if he did, Investors Group has not proven that the breach caused any damage or loss.

[257] Both parties agree that a threshold issue is whether the Non-Solicitation Clause is valid and enforceable.

[258] The Non-Solicitation Clause is a restrictive covenant, which is a restraint of trade. At common law, restraints of trade are contrary to public policy and are *prima facie* unenforceable: *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6 at para. 16. Nevertheless, the common law also recognizes the freedom of parties to contract. Thus, an exception exists if the restriction is reasonable in light of the parties' and the public's interests: *Shafron*, at para. 17.

[259] As Justice Donegan, then of this court, writes in *853947 B.C. Ltd. v. Source Office Furniture & Systems Ltd.*, 2016 BCSC 2233:

[31] The reasonableness of a restrictive covenant has three dimensions: (1) the nature of the activity the covenant seeks to prohibit; (2) the duration of the prohibition; and (3) the geographic scope of the prohibition: *Shafron* at para. 43.

[32] The degree of scrutiny into the reasonableness of a restrictive covenant depends on the nature of the relationship between the parties. Courts have long recognized the distinction between a contract for the sale of a business and an employment contract. As Hall J.A. observed, "As a general principle, the courts will look with more particular scrutiny at a covenant designed to protect pure employment relationship as opposed to a covenant associated with the sale of a business": *Anderson v. Berry-Heldt*, 2007 BCCA 100 at para. 12.

[260] Justice Donegan notes that, as a starting point, for a restrictive covenant to be reasonable, it must be unambiguous: *853947 B.C. Ltd.*, at para. 39, citing *Shafron* at para. 27. If any potential ambiguity can be resolved, the analysis

proceeds to a consideration of reasonableness: *Shafron* at para. 43. A restrictive covenant is ambiguous if it is “not clear as to activity, time, or geography”: *Shafron*, at para. 43.

[261] Investors Group submits that the Non-Solicitation Clause is enforceable. It argues that Investors Group and Mr. Salina were parties of equal bargaining power, and thus the degree of scrutiny to be applied is on the lower end of the spectrum. It states that the clause protects Investors Group's legitimate proprietary interest in its clients and their information, which have been recognized as worthy of protection. Moreover, it argues that firms such as Investors Group have an interest in ensuring that their platforms are not exploited by investment advisors, who may seek to establish client relationships within the firm and then use those connections to divert clients away from the firm. It further argues that the terms of the clause are not ambiguous, that the clause does not restrain competition generally, and that it does not impose unreasonable or impractical restraints, as Mr. Salina was free to provide investment advising services to any expansive market.

[262] Mr. Salina submits that although the clause is labelled a non-solicitation clause, it is actually both a non-competition and a non-solicitation clause. He argues that it is a non-competition clause because it restrains him from conducting business with former clients and customers, even if those individuals were not clients of Mr. Salina's during the time he was with Investors Group. Mr. Salina further argues that the clause is not enforceable, given the ambiguity as to geographic location.

[263] I will start with whether the clause is ambiguous.

[264] In my view, the first paragraph of the Non-Solicitation Clause (i.e., paragraph 9(i)) is ambiguous and therefore not enforceable. That subclause prohibits Mr. Salina from directly or indirectly soliciting any investment business from any Investors Group client in “the territory served by the Region Office or Offices” with which Mr. Salina was associated during the year prior to the termination of the Consultant's Agreement. The Consultant's Agreement does not define “Region Office” or “Offices”. Investors Group argues that the clause limits the non-solicitation

obligation to members of two groups: (1) clients of the Downtown Victoria Branch office with whom the plaintiff dealt in the year prior to his termination; and (2) clients of Investors Group with whom the plaintiff dealt during the term of the Consultant's Agreement. In my view, the clause is not that clear. The clause references the "Region Office" or "Offices" with which the consultant is associated. The evidence did not make clear what the "Region Office" was, nor did the contract or the evidence indicate which territory the "Region Office" served or the offices in which Mr. Salina was associated.

[265] However, the second clause of the Non-Solicitation Clause (i.e., paragraph 9(ii)) is not ambiguous. That clause states that, notwithstanding clause (i), for two years after the termination of the agreement, the consultant shall not directly or indirectly solicit any investment advice from any Investors Group client with whom the consultant had dealt during the term of the consultant's agreement. In my view, the terms of this subclause are crystal clear: for two years after termination, Mr. Salina could not solicit business from any Investors Group client he had served from the start of the agreement in 2002 until his termination in May 2018.

[266] Before moving to the analysis of whether the second part of the Non-Solicitation Clause is reasonable, I must look at the context of the clause to assess the degree of scrutiny to be applied: *IRIS The Visual Group Western Canada Inc. v. Park*, 2017 BCCA 301, at para. 19.

[267] As Justice Hunter, for the Court, notes in *IRIS The Visual Group Western Canada*, there is a distinction between restrictive covenants in the context of a sale of a business and those in an employment agreement. He writes:

[21] The distinction between these two categories reflects common sense principles. In the case of the sale of a business, the seller is normally being paid for the assets of the business including its goodwill. It is not only reasonable that the seller be held to a bargain not to compete with the purchaser in the same business, it is in the best interests of the seller to be able to provide a reliable assurance to the purchaser that the promise not to compete in the same business can be enforced.

[22] By contrast, it has long been recognized that there is an imbalance of power between an employer and employee in negotiating employment

agreements. It is that imbalance that provides the underlying rationale for the "more rigorous scrutiny" applied by the courts to restrictive covenants contained in employment agreements.

[268] Investors Group submits that the degree of scrutiny to be applied to the reasonableness of the Non-Solicitation Clause should fall on the lower end of the continuum. In support of this, they note that Mr. Salina was an independent contractor with Investors Group for 11 years before entering into the Consultant's Agreement. They state that, due to his tenure and the demand for his services, Mr. Salina had gained status within Investors Group. Moreover, he was better positioned to build relationships of trust and loyalty with the clients he serviced. These factors, they submit, suggest there was no imbalance of power.

[269] Mr. Salina submits that the heightened scrutiny test applies because he had an employee relationship with Investors Group and there was no consideration for the provision (i.e., no payment for goodwill upon the employee's departure).

[270] I find that the heightened scrutiny test applies. Mr. Salina was a dependent contractor, not an independent contractor. This is not a case of a sale of a business. As an investment advisor, Mr. Salina built relationships with Investors Group's clients, but there was no provision in the Consultant's Agreement for the payment of goodwill upon termination. In addition, I find that there was a power imbalance between Mr. Salina and Investors Group at the time the Consultant's Agreement was executed. At the time, the contract governing the parties' relationship was the 1992 agreement. That agreement also contained a non-solicitation clause with no provision for the payment of goodwill. That agreement was signed when Mr. Salina first started with Investors Group – where there was an even greater power imbalance, because at the time Mr. Salina was just starting out and had no clients, no training, and no experience in the investment advising industry. By the time the Consultant's Agreement was signed in 2002, Mr. Salina had grown the book of business for the benefit of both himself and Investors Group. Nevertheless, if he refused to sign the Consultant's Agreement and chose to leave Investors Group, he would be bound by the non-solicitation clause in the 1992 agreement and would

have to start over. This, in my view, created a considerable power imbalance between the parties.

[271] Once the degree of scrutiny to be applied is determined, three questions must be addressed:

- (a) Does the claimant have a proprietary interest worthy of protection?
- (b) If so, can that interest be adequately protected by other less restrictive measures?
- (c) If not, is the non-competition clause in the agreement reasonable by reference to the activity prohibited, the geographical area of the prohibition and the duration of the prohibition?

IRIS The Visual Group Western Canada, at para. 25.

Interest to be Protected

[272] The courts have recognized and afforded reasonable protection to trade secrets, confidential information, and the employer's trade connections: *Elsley v. J. G. Collins Insurance Agencies Ltd.*, [1978] 2 S.C.R. 916, at p. 924.

[273] Investors Group argues that it seeks to protect the trade connections – more specifically, the interest in preserving the goodwill attached to customer relationships. I was provided with a number of cases in which courts have found that preserving client relationships is a legitimate proprietary interest that an employer is entitled to protect: *IRIS The Visual Group Western Canada*, at para. 28; *MD Management Limited v. Dhut*, 2004 BCSC 513, at paras. 25-26; *Jardine Lloyd Thompson v. Fogal et al.*, 2007 BCSC 271, at para. 28; and *Friesen v. McKague* (1992), 96 DLR (4th) 341 at 346 (MBCA).

[274] Accordingly, I find that the Investors Group has a proprietary interest, namely preserving their relationships with their clients, which is worthy of protection.

Less Restrictive Mode of Protection

[275] As noted, Mr. Salina submits that the Non-Solicitation Clause is both a non-competition clause and a non-solicitation clause. I disagree with this characterization. As the Court of Appeal states in *Valley First Financial Services Ltd. v. Trach*, 2004 BCCA 312, at para. 49:

A non-solicitation covenant aims to prevent a departing employee from soliciting the customers of the former employer. It does not otherwise prevent the departing employee from competing. A non-competition covenant, on the other hand, seeks to keep the former employee out of the business completely.

[276] The Non-Solicitation Clause subclause does not restrain competition generally. Rather, it restrains the plaintiff from soliciting investment business from Investors Group clients with whom he dealt during the term of the agreement. It does not prohibit Mr. Salina from doing business with former clients; it only prohibits him from soliciting (or approaching) them. In my view, it is the least restrictive mode of adequately protecting Investors Group's proprietary interest in preserving its clientele.

Scope of Non-Solicitation Clause

[277] I find that even when analysed under the higher scrutiny lens, the sub-clause is reasonable.

[278] The nature of the prohibited activity is not overly broad. There are no general limits on the consultant's ability to work as an investment advisor. The consultant is prohibited from directly or indirectly soliciting any investment business from any Investors Group client with whom the consultant dealt during the term of the Consultant Agreement. As noted, the agreement does not prohibit the consultant from doing business with a former client, provided the consultant did not solicit the business. Thus, under the terms of the Consultant Agreement, if a former client searched for the consultant online, found the consultant's new contact information, initiated contact, and transferred their portfolio, the consultant would not be in breach of the clause. Moreover, under the subclause, the consultant is not prohibited from

soliciting business from Investors Group clients the consultant did not service. In my view, the prohibited activity is not overly broad and provides the consultant with clear, practical restraints while permitting the consultant to build a new book of business.

[279] Unlike the first sub-clause (which I have found unenforceable), the second sub-clause does not specify a geographic location and, on its face, is broad in scope. Nevertheless, I am mindful of the Supreme Court of Canada's comment that, in the context of the modern economy and, in particular, new technologies, customers are no longer limited geographically, which means that territorial limitations in non-solicitation clauses have generally become obsolete: *Guay inc. v. Payette*, 2013 SCC 45 at para. 73. I also agree with Justice R.W. Armstrong's reasoning in *Catch Engineering Partnership v. Mai*, 2023 ABKB 279, at para. 34, that where a non-solicitation clause is restricted in its application to an identified client, it may be reasonable notwithstanding the absence of a geographical restriction. I note that in *Catch Engineering Partnership*, the employee serviced only one client on behalf of the employer, whereas in this case Mr. Salina serviced approximately 500 clients in about 290 households. Nevertheless, these clients are all easily identified by both parties. This contrasts with sub-clause one, which applies to all Investors Group clients (including those that Mr. Salina never dealt with) served by an undefined "Region Office" or "Offices" with which Mr. Salina was "associated." Accordingly, when read in the context of the agreement as a whole and the surrounding circumstances, the absence of a geographic location does not render the sub-clause unreasonable.

[280] The sub-clause prohibits solicitation for two years. I agree with Investors Group that it is reasonable for the non-solicitation clause to provide sufficient time for Investors Group to assign a new consultant and for that consultant to establish a relationship with the clients the former consultant serviced. Many clients may have long-term relationships with the former consultant, which could require Investors Group to give the new consultant a longer runway to build those relationships. I note that the first sub-clause, which applies to Investors Group clients the former

consultant did not service, had a duration of one year. The shorter duration likely reflects that the clients captured by that sub-clause had no prior relationship with the former consultant – and thus Investors Group would not need as much time to build new relationships with those clients.

[281] Moreover, this aspect of the sub-clause must be read in the context of the agreement as a whole and the surrounding circumstances. Thus, it must be considered together with the fact that the clause does not prohibit the former consultant from doing business with former clients. It is limited to solicitation.

[282] Lastly, I note that in *AllWest Insurance Services Ltd. v. Meredith Phendler*, 2009 BCSC 2, Mr. Justice Pearlman found that a non-solicitation clause with the same duration and similar terms was reasonable. I note that the matter before Pearlman J. was an application by the employer for an interlocutory injunction restraining the ex-employee from soliciting the employer's clients. Thus, Pearlman J. was assessing the reasonableness of the clause not in the context of a trial, but rather in the context of whether there was a serious issue to be tried as to whether the restrictive covenants contained in the employment agreement are reasonable. At para. 31 of the decision, Pearlman J. referenced an unreported decision in *AllWest Insurance Services Ltd. v. Mark et al* (29 July 2004), Vancouver S040334 (BCSC), where Mr. Justice Masuhara found that a similarly worded non-solicitation clause with a two-year duration was reasonable. It is not clear whether the matter before Masuhara J. was a trial or an application seeking an interlocutory injunction. Nevertheless, I find Pearlman J.'s reasoning at paras. 34-46 persuasive.

[283] In sum, I find the second sub-clause of the Non-Solicitation Clause reasonable and therefore enforceable.

Did Mr. Salina Breach the Non-Solicitation Clause?

[284] Following his termination, Mr. Salina continued communicating with a number of his clients to advise them of his status. One challenge Mr. Salina faced was that his licence was tied to association with a firm that was a member of the Mutual Fund Dealers Association, and he had difficulty finding a new position due to his close

supervision status. As noted, he ultimately decided to obtain licensing through the IIROC platform, which required him to take a course and pass an exam. This delay left Mr. Salina in a state of limbo for about five months, until he secured a position with Echelon in October 2018. However, as indicated, he did not obtain his IIROC licence until January 2019. During this period, Mr. Salina kept in contact with clients and provided some of them with tax preparation assistance. Starting in October 2018, Mr. Salina began meeting with several of his former Investors Group clients. Investors Group submits that Mr. Salina's efforts in relation to these meetings were a breach of the Non-Solicitation Clause.

[285] In *Dr. P. Andreou Inc. v. McCaig*, 2007 BCCA 159, the Court surveyed a number of earlier decisions addressing whether particular conduct amounts to solicitation, drawing from them the following principles:

- (a) There is no useful distinction between a covenant not to solicit and a covenant not to communicate for the purpose of soliciting. The purpose of the action of communicating for the purpose of soliciting or the action of soliciting is the same: to seek business: para. 26.
- (b) General advertisements do not constitute solicitation. Solicitation connotes a private communication directed at a person or category of persons known to have an immediate need for the services being offered: para. 27.
- (c) "Something more" than a general advertisement is required to constitute a breach of a non-solicitation agreement. Solicitation implies an "ask," "invitation," or "request": paras. 34-35.

[286] In *MD Physician Services Inc. v. Wisniewski*, 2018 ONCA 440, leave to appeal ref'd, 2019 CanLII 6004 (SCC), a financial services company brought a claim for breach of a non-solicitation agreement against two former employees who had joined a competitor. On their first day of work with the competitor, the former employees wrote out from memory a list of their former clients and began phoning

them. The trial judge concluded that the employees had breached their non-solicitation agreement with their former employer.

[287] On appeal, the former employees argued that the terms of the non-solicitation agreement were so ambiguous, particularly regarding the meaning of “solicit”, that it must be unenforceable. The Ontario Court of Appeal disagreed and clarified the meaning of the word “solicit”. The Court writes:

[8] The meaning of the word “solicit” is obvious. The calls made by the appellants to former clients were not – as the appellants suggest – courtesy calls. They were clearly made with a view to bringing the clients to RBC. The calls were made immediately after being hired by RBC, they were made personally, by telephone and followed a predetermined structure. The evidence supports the trial judge’s conclusion that the calls were to solicit business.

[288] Although not binding on me, I find the Ontario Court of Appeal’s reasoning persuasive. Personal telephone calls to former clients that follow a predetermined structure and are clearly intended to bring those clients to a new employer constitute solicitation. By extension, similar communications made in person or in writing would also constitute solicitation.

[289] I find that Investors Group has not established that the phone calls Mr. Salina made to clients in the period shortly after his termination constituted solicitation. It is understandable that Mr. Salina may have wished to advise clients generally of his status and the status of their files, or that clients would have phoned him to discuss these matters. There was no evidence before the Court that Mr. Salina engaged in solicitation during these phone conversations.

[290] Although close to the line, I find that Mr. Salina’s offer to provide tax return services to some of his former clients did not constitute a breach of the non-solicitation clause. While I accept that his purpose in making these offers was, at least in part, to keep himself on his former clients’ radar and to maintain a line of communication, there was no evidence before me that he used these interactions to solicit investment advising business. I note, however, that this absence of evidence

is likely explained by the fact that Mr. Salina was still in the process of obtaining his IIROC licence at the time.

[291] However, I find that the client meetings Mr. Salina engaged in from October 2018 onward did constitute a breach of the sub-clause.

[292] Mr. Salina met with dozens of former Investors Group clients in the two years after his termination. After each meeting, he typed and filed memoranda summarizing the discussion. Many of these memoranda indicate that Mr. Salina met with the former client at the client's request. As noted, I have significant concerns about Mr. Salina's credibility, particularly regarding the accuracy of his statements in these memos that the meetings were initiated at the client's request. Nevertheless, in many of these memos, Mr. Salina documents discussions on some or all of the following topics:

- The client's work situation;
- Future work and personal plans;
- Assets;
- Income;
- RRSP, RESP, or TFSA contributions;
- Financial planning;
- Portfolio holdings;
- The state of the stock market;
- Insurance;
- Differences between Investors Group and Echelon;

- Differences between the Mutual Fund Dealers Association and IIROC platforms;
- Fee structure, including offers of discount pricing; and
- Redeeming or transferring Investors Group funds.

[293] In many cases, Mr. Salina had clients who moved their funds from Investors Group to Echelon sign a form letter stating that, upon learning that he had moved to Echelon, they had communicated with Mr. Salina, and that, at his request, they were providing the letter to confirm that they had made the decision independently and had not been approached or enticed by Mr. Salina in any way. These letters are hearsay, as none of the clients who signed them testified. As such, they are not admissible for the truth of their contents.

[294] Mr. Salina denied that he approached or enticed any of the many clients who left Investors Group to join Echelon. I do not believe Mr. Salina's evidence in this regard. Again, as set out above, I find that he initiated contact with JF and DF. The purpose was to meet with them to discuss what Echelon could offer. As indicated, the notes from that meeting show he discussed the differences between the firms and platforms, product options, and pricing. While the notes do not indicate that Mr. Salina specifically asked JF and DF to move from Investors Group to Echelon, when considered on the whole and in context, the meeting's purpose and Mr. Salina's intention were precisely that. The email correspondence and the meeting were private communications directed at former Investors Group clients whom Mr. Salina knew had an immediate need for financial services. The ask or request can be inferred from the evidence – he was asking them to move to Echelon or to consider moving to Echelon. There was no other plausible purpose or intention.

[295] As indicated, the records show that meetings with former Investors Group clients mostly began in October 2018, after Mr. Salina accepted a job with Echelon. I find it implausible that all those clients would have coincidentally started contacting Mr. Salina out of the blue at that time – five months after his termination. There was

no evidence that Mr. Salina began advertising around that time or engaged in any other activity that could have triggered the influx. While I accept that some of his former clients may have reached out to him on their own initiative around that time, in my view, the most likely explanation for the sudden influx of client contact and meetings in the fall of 2018 is that Mr. Salina had landed at a new firm, was close to getting relicensed, and initiated communication with former clients to convince them to switch firms.

[296] I find that Mr. Salina breached the Non-Solicitation Clause by soliciting business from Investors Group clients he previously serviced within two years of his termination.

Did Mr. Salina Breach the Confidentiality Clause

[297] The confidentiality clause provisions are as follows (the "Confidentiality Clause"):

7. CONFIDENTIAL INFORMATION

The Consultant acknowledges that during the term of this Agreement the Consultant will have access to certain confidential information relating to the business of IGFS and the business of IGFS' clients. The Consultant further acknowledges that such information is proprietary to and a trade secret of IGFS and its clients.

Except as required in order for the Consultant to perform his/her obligations hereunder, the Consultant shall not, directly or indirectly, use, disseminate, disclose, communicate, divulge, reveal, publish, use for the Consultant's own benefit, copy, make notes, input into a computer database, or preserve in any way any confidential information, unless the Consultant first receives written permission from his/her RD.

Intellectual property shall be used by the Consultant for the sole purpose of performance of his/her obligations hereunder. The Consultant shall at all times treat IGFS as owner of the intellectual property, and shall not do any act which may be inconsistent with, or challenge, such ownership. All unauthorized use of intellectual property which may come to the Consultant's attention shall be immediately reported to IGFS.

"Confidential Information" is information disclosed to or acquired by the Consultant relating to the business of IGFS or its clients as a consequence of the Consultant performing his/her obligations under this Agreement, including information developed or gathered by the Consultant. Such confidential information includes, but is not limited to, information regarding investments, client lists, personal financial reviews, portfolios, receipts, data files, financial information and summaries of client transactions, and intellectual property.

Confidential information shall not include information in the public domain, information released from the provisions of this Agreement by the written authorization of IGFS or information Which is part of the general skill and knowledge acquired by the Consultant

"Intellectual property" is all patents, trade marks, trade names and copyrights of which IGFS or any of its affiliated corporations is the owner or a licensee, or to which it may be entitled. Intellectual property shall include, without limitation, all computer software and programs and all related operational, service and training information and materials supplied by IGFS to the Consultant, whether in printed or machine-readable format or otherwise, and whether owned by or licensed to IGFS.

8. RETURN OF IGFS' PROPERTY AND CONFIDENTIAL DATA

Upon termination of this Agreement, the Consultant shall return to IGFS all confidential information, intellectual property and other property of IGFS and shall erase all excerpts from and copies of confidential information stored in electronic or machine readable format on the Consultant's personal computer system. The Consultant shall provide IGFS with a certificate that he/she has complied with this provision within three (3) days following the termination of this Agreement.

[298] There was no challenge to the enforceability of the Confidentiality Clause.

[299] The evidence made it clear that Mr. Salina breached the Confidentiality Clause. I note that Mr. Salina did not seriously contest this allegation. The Confidentiality Clause prohibited Mr. Salina, among other things, from using or preserving any confidential information of Investors Group without written permission. Confidential information is defined in the Consultant's Agreement to include, among other things, information regarding investments, client lists, personal financial reviews, and financial information and summaries of client transactions. Under the Consultant's Agreement, Mr. Salina was required to return all confidential information and release all copies he had stored. The Consultant's Agreement also required Mr. Salina to provide Investors Group with a certificate confirming compliance with the Confidentiality Clause within three days of termination. In the termination letter, Investors Group demanded the return of all confidential information.

[300] I need not go through the evidence in detail, as it is largely unchallenged. Mr. Salina admitted during his testimony that he retained client files, including 840 documents comprising databases of client information, portfolio return summaries,

family trees, and detailed account statements. Mr. Salina did not return the confidential information to Investors Group, despite his contractual obligation to do so. Mr. Salina testified that he did not use any of the confidential information during his meetings with clients. He also testified that the information was in his head. I do not find Mr. Salina's evidence in this regard credible. Mr. Salina had over 500 clients from about 290 households. While I accept that he would remember some general details about clients and their portfolios, given Mr. Salina's demonstrated efforts to prepare for client meetings, I do not accept that he would have prepared for his meetings with clients relying solely on his memory and without accessing the confidential information.

[301] In sum, I find that Mr. Salina breached the Confidentiality Clause of the Consultant's Agreement.

Causation

[302] Investors Group seeks compensatory damages for Mr. Salina's breaches of the Non-Solicitation Clause and the Confidentiality Clause. As the Court of Appeal notes in *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307, at para. 124:

[...] First proof of causation is an essential requirement in a claim for compensatory damages for breach of contract. Second, the issue of causation is distinct from the issue of the quantification of loss. Third, causation is a question of fact that must be addressed before turning to the issue of quantifying any loss.

[303] There must be a causal connection between the defendant's breach of contract and the claimant's loss; the claimant may recover damages for a loss only where the breach was the "effective" or "dominant" cause of that loss: *Sharp* at para. 115, citing *Chitty on Contracts*, 33rd ed., vol. 1 (London: Thomson Reuters, 2018) at 1841.

[304] The plaintiff must prove, on a balance of probabilities, that the breach, and not some intervening factor or factors, has caused loss to the plaintiff: *Sharp* at para. 122, citing *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.* (1993),

100 D.L.R. (4th) 469 (Ont. C.A.), leave to appeal ref'd [1993] S.C.C.A. No. 225, at 483-84.

[305] The evidence led by Investors Group, and its submissions, focused on Mr. Salina's breach of the non-solicitation and confidentiality clauses and the quantification of the loss. Investors Group adduced evidence showing that a number of Mr. Salina's former Investors Group clients left Investors Group and moved to Echelon. Further, Investors Group adduced evidence that it incurred losses due to clients leaving. Investors Group submits that from June 2018 to April 2025, it suffered a loss of about \$35,000,000 in assets under management, corresponding to a loss of \$1,332,779 in revenue from clients that Mr. Salina serviced while at Investors Group who subsequently left and joined Mr. Salina at his new company. Investors Group acknowledges that it generally experiences a 7% attrition rate. In other words, on average, it will lose clients or clients will redeem investments, resulting in an average loss of 7% in revenue per year. Of course, Investors Group is likely adding clients every year. Investors Group's claim for damages is adjusted to account for this typical average attrition rate.

[306] In determining causation in breach of contract cases, the test is not necessarily the question of "but for," but rather, "even if": *Water's Edge Resort Ltd. v. Canada (Attorney General)*, 2015 BCCA 319, at para. 40. As the Court of Appeal notes in *Water's Edge Resort*, at para. 40, the task of resolving this type of question is inherently more uncertain than the task before the court in most tort cases.

[307] Thus, the causation question for this Court can be articulated as follows: even if Mr. Salina complied with the Non-Solicitation and Confidentiality Clauses, would the clients in question have stayed with Investors Group?

[308] In my view, Investors Group has not established, on a balance of probabilities, that the answer to this question is yes. There was considerable evidence about the clients Mr. Salina met with. In addition, there was considerable evidence that he initiated contact with most of the clients. There was also evidence about what he discussed with these clients. However, there was no admissible

evidence from those clients about why they moved their portfolios from Investors Group to Mr. Salina. It could be that they were convinced to move their portfolios to Mr. Salina as a result of the solicitation. But it could also be that they were not happy with being moved to a new consultant at Investors Group, or with the specific new consultant they were assigned to. In other words, regardless of Mr. Salina's actions, the clients may have intended to move their files to him as soon as they learned he had been reestablished.

[309] In reaching this conclusion, I am mindful of the Court of Appeal's finding in *Water's Edge Resort* that resolving causation in breach of contract cases involves uncertainties. More specifically, I would not expect Investors Group to have called every single client who left Investors Group and joined Mr. Salina's new firm. The Court can draw some inferences to establish causation. Nevertheless, those inferences must be grounded in the evidence before it. In this case, there was no admissible evidence from any former clients who left Investors Group.

[310] Investors Group has not established causation for its losses arising from Mr. Salina's breaches of the Non-Solicitation Clause and the Confidentiality Clause. Accordingly, the Counterclaim is dismissed.

Conclusion

[311] The plaintiff's claim is dismissed.

[312] The defendant's counterclaim is dismissed.

[313] If the parties cannot agree on costs, they may schedule a one-hour hearing at 9:00 am. If a hearing is scheduled, the parties must file written submissions and a brief of authorities no later than seven days before the hearing. Written submissions must not exceed 3,000 words, and the brief of authorities must cite no more than five authorities. The parties may file up to two affidavits each. Each affidavit must not exceed 20 pages, including exhibits. If the parties wish to exceed any of these limits, they may seek written directions from the Court.

[314] Finally, I extend my sincere thanks to counsel for their exemplary advocacy and outstanding written submissions. I also offer my sincere apologies for the delay in delivering these reasons.

"Morishita J."