# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *TCF Ventures Corp. v. The Cambie Malone's Corporation*,
2017 BCCA 129

Date: 20170323
Docket: CA43913

Between:

**TCF Ventures Corp.**

Respondent
(Plaintiff)

And

**The Cambie Malone's Corporation**

Appellant
(Defendant)

Before: The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia, dated August 18, 2016 (*TCF Ventures Corp. v. The Cambie Malone's Corporation*, 2016 BCSC 1521, Vancouver Registry S128964).

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| Counsel for the Appellant: | T.D. Goepel |
| Counsel for the Respondent: | P.A. Kressock |
| Place and Date of Hearing: | Vancouver, British Columbia<br>February 17, 2017 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>March 23, 2017 |

**Written Reasons by:**
The Honourable Mr. Justice Harris

**Concurred in by:**
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Frankel

***Summary:***

*The respondent TCF, directed by Mr. Fernback, entered a contract with the appellant CMC for Mr. Fernback to serve as a CMC executive. Mr. Fernback was later dismissed and sued CMC for wrongful dismissal. The trial judge found he was akin to an employee (not an independent contractor), and was entitled to nine months' notice. The judge awarded damages for the notice period, including an estimate of lost potential commissions under a finder's fee contract and a partial reduction for mitigation. The appellant challenges the judge's findings on the required notice and damages. HELD: appeal allowed, only to the extent of setting aside the $75,000 award for lost opportunity to earn commissions and replacing it with an award for $15,000. The judge did not err in characterizing the relationship as employer/employee and awarding damages in lieu of notice for nine months. However, the award for lost opportunity to earn commissions was a projection that does not find support in the evidentiary record and a lower award is substituted.*



**Reasons for Judgment of the Honourable Mr. Justice Harris:**

## Introduction

[1] This is an appeal of an order based on finding that the plaintiff was entitled to reasonable notice arising on the termination of a relationship that was found to be akin to an employment relationship, setting the notice period at nine months and awarding damages, including on foregone commissions, subject to an offset for income earned in mitigation.

[2] The appellant accepts the judge's finding that the substance of the employment relationship placed it on a continuum closer to the employee than the pure independent contractor end of the spectrum. The appellant argues, however, that the judge erred in implying an entitlement to reasonable notice by operation of law. Such an entitlement arises, it contends, only in respect of classic employment relationships. Here, the judge did not examine the facts to decide whether a term should be implied at all, as a matter of the intention of the parties and, if so, to determine what notice period should be implied. Further, it contends, the judge erred in the test he applied to determine damages for foregone commission income during the notice period, erred in assessing the quantum of mitigation, erred in selecting the date the notice period began to run, and erred by quantifying damages on the basis

of lost revenue rather than lost income as revealed in TCF's and Mr. Fernback's tax returns.

**Background**

[3] Mr. Fernback provides business consulting and financial management services through his corporation, TCF Ventures Corp. ("TCF"). The Cambie Malone's Corporation ("CMC") is owned and operated by Mr. Yehia. CMC operates mainly in the hospitality industry. In this judgment I will refer to Mr. Fernback rather than his company except where the distinction is material.

[4] In early 2009, Mr. Fernback responded to CMC's advertisement seeking a Chief Financial Officer ("CFO"). Discussions took place between the parties that culminated in Mr. Fernback taking the position. The parties did not enter into a written agreement. There is no issue that the parties understood that Mr. Fernback would provide his services through TCF and would invoice CMC.

[5] The parties each refers to certain correspondence they consider material. In an email of March 11, 2009 to Mr. Yehia containing his proposal, Mr. Fernback said, "I will make this contract very flexible and will include a 30 day termination clause if in the event things do not work out." In a letter dated March 31, 2009, addressed to Mr. Fernback (not TCF) Mr. Smith, CMC's in-house counsel, offered Mr. Fernback "employment" as CMC's Chief Financial Officer. The letter did not address termination. The parties understood that Mr. Fernback could provide "outside" consulting services to others through TCF while working for CMC.

[6] On April 1, 2009, Mr. Fernback began work in his position. Remuneration was agreed at $75,000 per year. In November 2009, Mr. Fernback took on the additional role of Chief Operating Officer ("COO"). Remuneration increased to $100,000 per year. In March 2012, his COO duties and role were dropped, and remuneration returned to $75,000. When his duties were reduced, the parties discussed appropriate notice of the change in function. CMC contends these discussions are relevant to the proper notice period on termination.

[7] In addition to his CFO duties, TCF entered a Finder's Fee Contract with CMC on June 1, 2012 with respect to fundraising capital for CMC's subsidiaries. According to this contract, TCF received 4% commission on funds raised. In late 2012, TCF, using leads from Mr. Yehia, raised $1.2 million and earned $50,000 in commissions.

[8] The parties' relationship deteriorated. In September 2012, Mr. Yehia informed Mr. Fernback that he would be taken off CMC's payroll on November 1, 2012. Mr. Fernback's last day of work in the office was November 15, 2012. TCF then brought an action against CMC for damages for wrongful termination. There is considerable confusion in the evidence about the effective date of termination.

[9] In September 2012, TCF contracted to provide services for UTM Exploration Services Ltd. ("UTM") for a fee of $7,000 plus taxes per month. TCF charged UTM a total of $57,222.87 (including taxes) between September 1, 2012 and March 11, 2013. How much of this income earned by TCF/Mr. Fernback should be taken into account in mitigation is an issue on appeal.

## Trial Judgment

[10] The judge first analyzed whether there was an employer/employee relationship. Adopting a substance-over-form approach, the judge found the essential nature of the relationship was akin to an employer/employee situation, as opposed to a pure independent contractor. Since that conclusion is not contested on appeal it is not necessary to set out the judge's reasoning, although it is helpful to set out his conclusion:

> [48] 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.
>
> [49] The result has been the recognition of relationships that fall within an area between the two traditional models. ...

> ...
>
> [51] Notwithstanding the formal structure (that is, the provision of services through a corporation) and the lack of complete exclusivity, it is my conclusion based on all of the above that the arrangement the parties agreed upon in this case entailed a significant element of personal service. CMC set out to hire a CFO; it wanted a professional person to provide certain services to the corporation. That entailed having a specific, identified, and qualified person to perform those functions. The person CMC selected was Mr. Fernback. It was his package of attributes that CMC wanted to have working for it, and that is what occurred.
>
> [52] By way of analogy, this was not a situation where CMC entered into a contract with a third-party corporate entity—say, for example, one of the major accounting firms—to have that firm assign a properly qualified worker to provide the services required. CMC bargained to have Mr. Fernback join its workforce, and that is what happened. There was a permanency to that relationship that persisted for a significant time—some three and a half years.
>
> [53] Accordingly, I am satisfied that the essential nature of the relationship was akin to an employer-employee situation, as opposed to a pure independent contractor.

[11] The judge stated that the plaintiff was entitled to notice at common law because of the nature of the employment relationship. He considered the cases he was given and taking into account the particulars of the relationship, concluded that nine months' notice was reasonable. He considered and rejected CMC's argument that discussions between the parties about notice at various times should inform or override the reasonable notice period required at common law. Based on $75,000 a year, the judge awarded $56,250 in damages.

[12] The judge considered whether TCF was entitled to damages for termination of the Finder's Fee Contract. The judge treated this contract as an aspect of the overall employment relationship and awarded damages based on the nine-month notice period. The judge considered practical limitations of fundraising and how successes in initial fundraising were substantially due to Mr. Yehia's list of contacts. In the circumstances, the judge found a reasonable projection for what would have been raised in nine months to be $1.875 million (i.e., $75,000 in commissions). He also considered an argument that any damages arising from commission income had been settled as evidenced by a consent order dealing with the payment of earned but unpaid commissions. In his view, the consent order only addressed the

debt owing for commissions already earned. It did not address entitlement to commission on funds that would have been raised during the future notice period but for termination.

[13] Turning to mitigation, the judge found Mr. Fernback mitigated his damages by working for UTM after he left CMC. Based on TCF's invoices to UTM, TCF earned a total of $33,366.67 during the relevant period. However, the judge applied only 70% of that amount ($23,356.67) as mitigation, because TCF could have done some "outside" work while working with CMC in any event.

[14] The judge also found as a fact that Mr. Fernback was effectively terminated on November 15, 2012. He acknowledged that this date was somewhat arbitrary because the end of the relationship was shrouded in confusion and there were discussions over a period of time.

[15] In total, he awarded TCF damages of $107,893.33, being $56,250 for damages in lieu of notice and $75,000 for damages from termination of the Finder's Fee Contract, less $23,356.67 earned in mitigation.

**On Appeal**

[16] The first issue on appeal was whether the judge erred in finding that the plaintiff was entitled to reasonable notice at common law because the relationship was on a continuum between pure employee and pure independent contractor and was more akin to an employer/employee situation than a pure independent contractor. The appellant argues that reasonable notice at common law is implied as a matter of law only if the relationship is that of an employer/employee. It says that a finding that a relationship is akin to an employer/employee relationship does not displace the requirement to establish on the facts that an entitlement to notice is to be implied and then to analyze the facts to determine what that notice period should be. The test to be applied is the traditional test for implying a term into a contract, that is, that the parties must have intended the term (both the entitlement to and length of notice) to form part of the contract on the basis that it "went without saying"

that it formed part of the contract as a term necessary to give business efficacy to the contract.

[17] In this case, CMC points to the judge's finding that agreement was reached on employment in general accordance with the discussion reflected in Mr. Fernback's March email and Mr. Smith's letter, referred to earlier. The email is important to CMC's argument on appeal because in it Mr. Fernback proposes a flexible termination arrangement with 30 days' notice. Moreover, when Mr. Fernback's duties were altered in March 2012, the parties discussed a suitable notice period for the change. The judge should, CMC says, have engaged in a more fact-specific analysis of the relationship, including how TCF arranged its tax affairs and pursued other business opportunities in settling on both whether notice was required (a result not seriously in issue) and what notice should have been. It was a legal error simply to apply the factors used to determine reasonable notice at common law to determine the notice period here. CMC says that it gave adequate notice.

[18] At the outset, it is useful to observe that although the judge found that the agreement was formed in general accordance with the March email, he clearly did not find that the parties agreed to a 30-day notice period. To the contrary, the effective finding is that there was no agreement to a specific notice period on termination.

[19] Mr. Fernback responds that whether reasonable notice is to be implied as a matter of law is a consequence of the classification of the employment relationship. If the relationship falls within a certain class of relationships the obligation to provide reasonable notice, absent agreement to the contrary, is implied as a matter of law and does not need to be established as a matter of intention: see *Machtinger v. HOJ Industries Ltd*., [1992] 1 S.C.R. 986, and in particular, the concurring reasons of Justice McLachlin (as she then was) at para. 48. He goes on to say that the law recognizes that employment relationships may exist on a continuum, but where a relationship is found to be more akin to employee/employer than independent

contractor or strict agency, it will be treated as an employer/employee relationship and the obligation to provide reasonable notice will be implied as a matter of law. He contends that, in substance, this has been the law in the common law provinces in Canada since *Carter v. Bell & Sons (Canada) Ltd.*, [1936] O.R. 290 (C.A.), even if the principle may be articulated in somewhat varying terms in different provinces. For example, Ontario uses categories of employee and dependent contractor both of which attract reasonable notice and independent contractor which does not. So far as BC is concerned, Mr. Fernback argues that the principle for which he contends is endorsed by *Marbry Distributors Ltd. v. Avrecan Int. Inc.*, 1999 BCCA 172. He says it is but one example of many cases in which an intermediate status attracts reasonable notice.



[20] I agree with Mr. Fernback's argument. *Carter* was a case involving intermediate status. The employment relationship there attracted the obligation to provide reasonable notice. *Carter* has been approved by the Supreme Court of Canada, for example in *Machtinger*. It has also been endorsed by this Court in *Marbry*.

[21] *Marbry* involved a distribution agreement and one issue involved the application of employment law principles to a distribution agreement, but the Court also had to grapple explicitly with the question whether the obligation to provide reasonable notice should be implied into "employment" contracts that could not be unequivocally classified as master/servant or independent contractor, but rather fell into an intermediate category. In short, the Court answered that question in the affirmative.

[22] Where a relationship falls in the intermediate category on the employment continuum depends on a non-exhaustive list of factors. In *Marbry*, they were described as follows:

> [38] In every case where a determination is necessary of whether a working relationship is one of employee/employer or independent contractor/strict agency, one should bear in mind the four-fold test as enunciated by Lord Wright in *Montreal*, *supra,* and Lord Denning's "business integration" test in *Stevenson*, *supra*. However, as the Privy Council

> recognized in *Montreal, supra,* as society, and as a corollary employment and business relationships, become increasingly complex the courts must adapt. The so called "intermediate category" involves different aspects and therefore additional considerations come into play. After reviewing the case law I suggest that the following factors be considered. While I do not suggest that this list is exhaustive I find it helpful in determining where on the continuum a relationship of this nature resides. These factors are:
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> [1] Duration/Permanency of the Relationship. The longer the duration of the relationship or the more permanent it is militates in favour of a reasonable notice requirement. Amongst other evidence, the purchase and maintenance of inventory, which contains a permanency aspect, should be considered;
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> [2] Degree of Reliance/Closeness of the Relationship. As these two interrelated sub-factors are increased the more likely it is that the relationship falls on the employer/employee side of the continuum. Included in this factor is whether the sale of the defendant's products amounted to a significant percentage of the plaintiff's revenues; and
>
> [3] Degree of Exclusivity. An exclusive relationship favours the master/servant classification.
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> None of these factors are by themselves conclusive and not every factor need be present in order to classify a relationship as one requiring notice to terminate.

[23] The majority noted that, in answering the question whether a relationship was one requiring notice to terminate, the heart of the inquiry is the true nature of the relationship:

> [9] At the heart of the court's inquiry is the true nature of the relationship between the parties. All relationships in the workplace setting can perhaps be thought of as existing on a continuum. At one end of the continuum lies the employer/employee relationship where reasonable notice is required to terminate. At the other extremity are independent contracting or strict agency relationships where notice is not required. The difficulty obviously lies in determining where upon that continuum one is located. Does the relationship bear more resemblance to the employer/employee or the independent contractor status?

[24] As I read the judgment, the Court is clear that where the relationship bears more resemblance to, or is akin to, an employer/employee status the relationship will be treated as an employee/employer relationship for the purpose of implying an obligation to provide reasonable notice. After examining the case law in detail, the majority concluded:

> [46] For all of the reasons expressed above I would classify the relationship between *Marbry* and *Avrecan* as more akin to

> employee/employer than that of independent contractor or strict agency. As such, this relationship falls in that intermediate category as identified in *Carter v. Bell, supra*, where the agreement may only be terminated with reasonable notice.

[25] Chief Justice McEachern authored a powerful dissent, the point of which was implying a term as a matter of law in relationships that were close to near-employment created rights not bargained for and imposed obligations not freely undertaken. The dissent clarifies the ratio of the case: namely, a relationship akin to employment may only be terminated with reasonable notice. *Marbry* is binding on us. Accordingly, it is a complete answer to this ground of appeal.

[26] Before turning to other issues, I note again that the appellant did not take issue with the judge's findings about the nature of the relationship. Further, the judge considered whether any of the dealings between the parties would displace the obligation to provide reasonable notice. He concluded that they did not. Finally, I do not think there is any reasonable basis on which to challenge the judge's finding that reasonable notice was nine months. The real challenge was to the judge assessing the required notice by applying a reasonable notice analysis in the first place.

[27] I turn now to the issue of the effective date of termination. Here the judge faced, as he said, a confusing and highly equivocal record. The judge did the best he could in the face of the back-and-forth discussions between the parties. Ultimately, the effective date of termination is a finding of fact. The judge noted the degree of arbitrariness in the date he chose, but I cannot find that in choosing that date he committed a palpable and overriding error. I would not accede to this ground of appeal.

[28] CMC says next that the judge erred in awarding the plaintiff, TCF, damages on the basis of gross revenues instead of net earnings. Its point is that TCF's tax returns show that a surprisingly high proportion of money received was treated as expenses incurred by TCF to earn the revenue and therefore, its net earnings and Mr. Fernback's income from his company were low. It says damages ought to have

been calculated on net earnings of TCF or income declared by Mr. Fernback, not gross revenue, since only net earnings or income reflect a loss.

[29] While there is a seductive logic to this argument, I am unable to give effect to it. The judge found that the substance of the relationship was akin to an employment relationship. As I understand it, it is not unusual for individuals to provide employment services (in substance as employees) through corporations classified for tax purposes as personal services businesses in circumstances where, but for the interposition of a corporation, an individual would reasonably be regarded to be an employee. Specific rules relate to the nature and type of expenses that may properly be claimed in such a situation. Whether Mr. Fernback has complied with those rules to the extent they may apply to him is a matter between him and TCF and the revenue authorities. Whether all that Mr. Fernback claimed as expenses for tax purposes were properly claimed could only be determined by a tax audit, but that is a different issue from the measure of damages payable in these circumstances.

[30] The loss suffered by TCF in what in substance is akin to an employment relationship is the revenue it lost. Whether some of that revenue could be claimed as an expense for tax purposes is not the issue. If, for example, the Canada Revenue Agency were to disallow TCF's claim for car expenses, it would then be in the same position as a true employee who could not claim the cost of using a car to get to work. Had, by contrast, the relationship been found in substance to be akin to an independent contractor, the net income or lost profit analysis may well be the correct approach to damage calculation. I would not accede to this ground of appeal.

[31] The judge treated 70% of the revenue received by TCF from UTM as money earned in mitigation of damages. The judge's reasoning depended on two considerations. First, the existing arrangement permitted Mr. Fernback to do other work; the relationship was not exclusive. The deduction reflected the judge's awareness that TCF could have earned some other income while discharging its responsibilities to CMC. Second, given his continuing responsibilities to CMC he could not have earned everything he earned on this outside contract while still

fulfilling his responsibilities to CMC. The judge concluded as a result that not all of what he earned should be treated as mitigation.

[32] Given that the judge's conclusion rests on factual determinations about what was earned as mitigation and what could have been earned in any event, I cannot conclude that the judge fell into demonstrable error in adjusting the award the way he did.

[33] I now turn to the final issues on appeal. These have to do with compensation for foregone commission earnings during the notice period on the Finder's Fee contract. Here, as I understand it, several points are argued. CMC contends that the plaintiff pleaded the Finder's Fee Contract as a separate contract, sought damages in lieu of notice only in respect of what was called the Final contract (the $75,000 contract), settled the claim in respect of the Finder's Fee Contract, and provided no evidence that TCF would have earned any commission income subsequent to November 2012 after the termination of Mr. Fernback's employment. The judge erred by failing properly to appreciate this concatenation of circumstances, but in any event applied the wrong legal test to the assessment of a claim for lost commission income.

[34] There is force to CMC's argument that the Finder's Fee Contract was pleaded as a separate contract. Indeed, the contract is written and identifies TCF as CMC's agent in the fund raising effort. The judge, however, treated the contract as a part of the overall employment relationship and the potential compensation to be earned as a component of Mr. Fernback's remuneration. While the pleadings are at least equivocal, it appears that the trial proceeded on the basis that Mr. Fernback was seeking damages generally arising from the termination of his relationship with CMC. I am not persuaded that even if the issues at trial were somewhat broader than those strictly pleaded, any unfairness or prejudice arose. CMC defended the claim fully, including against any entitlement to foregone commissions on whatever basis they could be claimed.

[35] Moreover, the judge expressly considered whether the consent order granting judgment for unpaid commissions barred any further recovery of damages for lost commissions. He concluded that only a debt claim for past commissions earned was settled and it did not bar further claims for damages. In reaching this conclusion, the judge must be taken to have a settled view of what issues were properly before him, including what had been pleaded. I do not think that any reversible error has been demonstrated in the judge's conclusions that entitlement to damages for lost future commissions was properly before him.

[36] The more difficult question, in my view, lies in the assessment of damages. CMC contends that the judge simply engaged in a "reasonable projection" without an evidentiary basis. It says that the correct test is whether the plaintiff had proven on a balance of probabilities that the commissions would have been earned.
Mr. Fernback counters that the correct test is proof of some reasonable probability of earning commissions during the notice period. Here the judge made a "reasonable projection" based on evidence of a reasonable probability that commissions would be earned. He says the judge correctly applied the test set out in *Stuart v. Navigata Communications Ltd.*, 2007 BCSC 463.

[37] Neither party cited binding authority on the correct test to be met in a case such as this. Since this is a loss of opportunity claim, I do not think the test is the one proposed by CMC; namely, proof on a balance of probability that the commission amount would have been earned. What is being valued here is loss of opportunity to earn commissions that resulted from a wrongful termination. The elements of the cause of action, being the wrongful termination, must be proven on a balance of probabilities to give rise to a remedy. But once *entitlement* to a remedy is established, the proper *quantum* of the remedy rests upon a holistic assessment of the totality of the relevant evidence, including the contingencies that bear upon such an estimation. In this regard, estimations are inherently necessary where damages are based in part on future events. Such estimations are proper if they find a reasonable basis supportable in the factual evidence. Having said that, it is not, in

my view, necessary in this case to lay down a definitive test, if there be uncertainty about its content.

[38] An award of damages is an assessment of fact and this Court should interfere with an award only if the trial judge proceeded upon a wrong principle of law or the amount awarded is either so inordinately low or high that it must be a wholly erroneous estimate of the damage: *Lines v. W & D Logging Co. Ltd.,* 2009 BCCA 106 at para. 6, citing *Nance v. British Columbia Electric Railway Company,* [1951] 3 D.L.R. 705 (P.C.). An appeal court is "obliged to interfere" if it could be shown, *inter alia*, there was no evidence on which the trial judge could have reached his or her conclusion, or the trial judge failed to consider relevant factors in the assessment of damages: *Naylor Group Inc. v. Ellis-Don Construction Ltd.,* 2001 SCC 58 at para. 80.

[39] Here, the judge recognized that Mr. Fernback had raised about $1.2 million in the first six weeks of fund raising, but had done so by using the list of contacts provided by Mr. Yehia and "his initial work had been to some extent at least, something of a matter of 'picking the low hanging fruit'". The judge relied on the experience of the first six weeks of fund raising, noting its peculiar characteristics, as a basis for projecting that Mr. Fernback would likely have raised a further $1.875 million over the nine-month notice period.

[40] It is of course appropriate to use the evidence of the past as a guide to the future, particularly where it is reasonable to project that relevant circumstances in the past will continue into the future, making due allowances for contingencies. Moreover, implicit in the analysis is a finding that Mr. Fernback would, to a reasonable level of probability, have earned some commission income had he not been terminated.

[41] The difficulty with the analysis is that I do not think there was any evidentiary basis to conclude that Mr. Fernback could have raised an amount remotely close to $1.875 million. The judge seems to have lost sight of the fact that the final offering amount that CMC sought to raise was $2.5 million. Although the Finder's Fee

Contract referred to raising $5 million, the Offering Memorandum for what was called the "Gee-Strings" offering sought to raise $2.5 million. All of the money raised by Mr. Fernback was in relation to that offering and no other offerings were launched. The judge's analysis assumes that the total amount that would have been raised by Mr. Fernback was over $3 million, some $500,000 more than the target, even allowing for the contingencies the judge took into account. The judge did not place any weight on the fact that after Mr. Fernback ceased his efforts to raise money, no further money was raised at all and the financing was abandoned. Furthermore, there was no evidence of any further potential investors or other sources of financing. Taken together with the conclusion that the low hanging fruit had already been picked, I do not think there was any evidence capable of supporting the reasonableness of the projection the judge made.



[42] I do not think that the judge's assumption that Mr. Fernback would have earned some commission in the notice period rests on a reversible error. Even though no further money was raised after Mr. Fernback departed the scene, it is not unreasonable to assume that had he stayed some further money would have been raised. But the fact that the financing was abandoned does demonstrate that basing a damage award on the assumption that more money than was sought would have been raised renders the assessment vulnerable to review. The difficulty, in my view, rests on the absence of evidence capable of informing an analysis of the true contingencies affecting the likelihood of Mr. Fernback raising the moneys on which the award is based. While the judge discounted the projections significantly from what had been raised in the first six weeks, there was not an evidentiary basis capable of supporting as a reasonable projection the conclusion that the damage award should be based on raising a further $1.875 million.

[43] A party claiming a loss bears the onus of proving that a loss has occurred and the value of that loss. This Court reviewed the relevant principles in *Vancouver Canucks Limited Partnership v. Canon Canada Inc.,* 2015 BCCA 144:

> [145] The principle that, no matter how difficult the exercise, a judge is obliged to assess damages applies to situations in which it is impossible to lead evidence that assists in quantifying the loss. Cases dealing with loss of a

> speculative opportunity provide a good example of this principle: *Chaplin v. Hicks*, [1911] 2 K.B. 786 (C.A.).
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> [146] … A party claiming a loss bears the onus of proving that a loss has occurred and the value of that loss. Where there is evidence available to prove its loss, it is incumbent on the plaintiff to lead it. If it fails to do so, leaving no basis for assessment, the court may, as in *Williams v. Stephenson* (1903), 33 S.C.R. 323 and *Cotter v. General Petroleum Ltd.*, 1950 CanLII 50 (SCC), [1951] S.C.R. 154, decline to make an award of damages. In *Wood v. Grand Valley Rwy. Co.*, 1915 CanLII 574 (SCC), [1915] 51 S.C.R. 283 at 303, Anglin J. cited with approval the words of Lord Justice Bowen in *Ratcliffe v. Evans*, [1892] 2 Q.B. 424 (C.A.):
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> > As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles.
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> [147] The following passage from *McGregor on Damages*, 18th ed. (London, U.K: Sweet & Maxwell, 2009) at ¶08-001 is also apt:
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> > A claimant claiming damages must prove his case. To justify an award of substantial damages he must satisfy the court both as to the fact of damage and as to its amount. … If the fact of damage is shown but no evidence is given as to its amount so that it is virtually impossible to assess damages, this will generally permit only an award of nominal damages[.]

[44] I am satisfied that Mr. Fernback did lose an opportunity to earn commission income for the notice period and that there is some value to that opportunity. There is, however, insufficient evidence to ground a reasonable assessment of the value of that opportunity at $75,000. The $75,000 award cannot be sustained as it supposes TCF would have raised more than the total offering amount and does not reflect the true contingencies that bear upon that quantum. In sum, the award does not find support in the evidence.

[45] In the circumstances, it is not in the interests of the parties to return the issue of assessing the damages in respect of lost commissions to the trial court. The evidence is as complete as it is likely to be. Mr. Fernback lost an opportunity of value and it is likely that he would have raised some more money had he not been terminated. Doing the best that can be done on the record and in the face of the inevitable difficulties in leading evidence of events that did not occur as a result of

termination, I would substitute an award of $15,000 in respect of this head of damages, reflecting the raising of an additional $375,000.

## Conclusion

[46] I would allow the appeal only to the extent of setting aside the award of damages of $75,000 for lost opportunity to earn commission income and substitute an award of $15,000.

"The Honourable Mr. Justice Harris"

**I agree:**

"The Honourable Madam Justice Kirkpatrick"

**I agree:**

"The Honourable Mr. Justice Frankel"