SUPREME COURT OF NOVA SCOTIA

Citation: *Gold Recruitment Services Incorporated v. QDS Holdings Incorporated*, 2024 NSSC 354

Date: 20241122
Docket: Hfx No. 523539
Registry: Halifax

Between:

Gold Recruitment Services Inc.

Plaintiff

v.

QDS Holdings Inc.

Defendant

DECISION

Judge: The Honourable Justice Peter P. Rosinski

Heard: November 4, 2024, in Halifax, Nova Scotia

Counsel: Laura Neilan for the Plaintiff
Serge Racine as agent for the self represented Defendant

By the Court:

Introduction

[1] Gold Recruitment Services Inc. ("Gold") is a Nova Scotian registered personnel recruitment company, owned exclusively by Fraser Muir.

[2] Mr. Muir specializes in recruiting exceptional and hard to find technical human resources; namely, highly skilled candidates that are rarely unemployed and rarely available.

[3] In 2022, he was introduced to QDS Holding Inc. ("Q"), a federally incorporated, developmental stage cybersecurity company based in Québec.

[4] Gold and Q entered into a written contract ("the Agreement") on November 16, 2022, to have Gold recruit highly skilled cybersecurity personnel for presentation to Q.

[5] I find that the Agreement was drafted for Gold's regular use in Mr. Muir's work on behalf of Gold, and he used it repeatedly in the past.

[6] No modifications to its core terms were requested by Q, and none made for present circumstances.

[7] Mr. Muir located two such persons: CM and MI. Both were acceptable to Q, and they were hired by Q in early 2023.

[8] Gold sent timely invoices to Q for payment of its recruitment services rendered.[1]

[9] To date, Q has not made any payment to Gold.

[10] I accept Mr. Muir's testimony that he "never really got a reason for the non-payment".

[11] Gold has sued Q:

1. based on Justice Cromwell's reasons in *Bhasin v. Hrynew*, 2014 SCC 71 (and later reasons in *CM Callow Inc. v. Zollinger*, 2020 SCC 45)

[1] I find they did so on or about the date printed on the invoices.

for dishonesty/bad faith in contractual dealings, i.e. alleging that Q hired Gold with the intention of benefiting from its expertise, experience, and labour, but it did not intend to pay for that work as required by the Agreement;

2. alternatively, Gold argues that Q has been unjustly enriched by the work done by Gold and Q should make payment on a *quantum meruit* basis; and be ordered:

3. to pay punitive damages for its bad faith conduct; plus

4. prejudgment interest, costs and disbursements.

[12] Q responds that the terms of the Agreement do not require it to make the payments because the individuals presented, and who consequently worked for Q, were independent contractors, rather than employees to whom the Agreement would be applicable. Q further states that:

> because Gold had rendered services to Q, which benefit Q, equitable compensation for such services should be considered with necessary adjustments related to the application of a *quantum meruit* doctrine, including adjustments related to employment deductions.

[13] Q's Statement of Defence include headings that summarize its basic legal position:

1. "No violation of the Agreement";
2. "[CM and MI] are independent contractors and not employees".

[14] I am satisfied that Gold has established more likely than not its *Bhasin* claim against Q for bad faith in contractual dealings, and alternatively, pursuant to the *quantum meruit* doctrine.

[15] The amount owing under the *Bhasin* claim is CDN $89,700 ($51,750 + $37,950) plus prejudgment interest of 5% per annum, costs and disbursements.[2]

[2] Even if I were to assess the claim under the *quantum meruit* equitable doctrine, I find it inappropriate to deduct any amounts for tax consequences as argued by Q because they are not established in the evidence, and in any event, doing so would not consistent with equitable considerations underlying the claim in the present circumstances.

[16] From my understanding of the positions taken by Gold, it relies upon Q's conduct from the inception of the contractual relationship through to the end of the trial for its claim of punitive damages.

[17] Based on the foundational principles in *Hill v. Church of Scientology*, [1995] 2 SCR 1130 and *Whiten v. Pilot Insurance Co.*, [2002] 1 SCR 595, I find punitive damages are appropriate.

[18] I am satisfied that the present circumstances are such a "rare and exceptional" case that Q's conduct also justifies an award of punitive damages.

[19] Q acted in a high-handed, dismissive and dishonest manner in relation to Gold/Mr. Muir, who as a single individual, sole proprietor and recruiter for Gold, was in a position of disadvantage as compared to what I find was a sophisticated corporation such as Q, which benefited from his work yet refused to make payment, which Q itself recognized is legally required (although it may disagree about the timing and/or precise amount).

[20] I am satisfied more likely than not that Q at no time intended to honour the Agreement.

[21] There is evidence that Q actively and intentionally misled Gold when its representatives were purporting in good faith to enter into and be bound by the Agreement, yet once the two recruits were retained for them, Q refused to pay Gold.

[22] Even after Q's initial refusal to pay any monies at all to Gold, it continued to purport that it was not legally bound to pay Gold.

[23] I award $30,000 punitive damages.[3]

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[3] This is a highly discretionary calculation, which is based on the particular circumstances of the given case. While "no two cases are exactly alike" I find the following cases provide reasonable benchmarks for my award of punitive damages: *Gill v. 1176520 Alberta Ltd.*, 2020 ABQB 274 at paras. 223 - 224 ($45,000 then, $53,000 adjusted for inflation); *Counterforce Corp. v. Volpe*, 2015 ONSC 4555, at paras. 25 - 27 ($25,000 - $31,600 adjusted for inflation) wherein Justice E.M. Morgan stated: "Counsel for the Plaintiff requests $50,000 in punitive damages for this flagrant breach of contract. While I agree that the Defendant's violation of the Plaintiff's rights under the Agreement was 'high handed and calculated to injure the plaintiff and make a profit for the defendant', *AR Thomson Ltd v. Stock*, [1994] BCJ No. 1566, at para. 26, the amount sought by the Plaintiff here would be at the very top end of the awards one finds in the Canadian case law."; *Proulx v. Canadian Cove Inc.*, 2014 ONSC 3493 at 103, wherein Justice Carole J. Brown stated: "I am of the view that the defendants' actions in reselling the SSP to a third party, prior to advising the plaintiff that the contract had, in the vendor's mind been terminated, was a high-handed act which offends the sense of decency of this Court. Accordingly, I award the plaintiff punitive damages in the amount of $25,000 - $32,000 adjusted for inflation". - see also 2015 ONCA 509.

The denial of the adjournment requested by Q

[24] Gold filed its initial Notice of Action on May 8, 2023. A Notice of Defence was filed on June 29, 2023, by Q, which was then represented by Mallory Adams of McInnes Cooper in Halifax.

[25] A Consent Amended Notice of Action was filed on May 23, 2024, and co-signed by Jennifer Singh of McInnes Cooper in Halifax. An Amended Notice of Defence was filed June 14, 2024, also signed by Jennifer Singh of McInnes Cooper in Halifax.

[26] On September 12, 2024, Jennifer Singh signed a Notice of Motion on behalf of McInnes Cooper seeking an Order pursuant to *Civil Procedure Rule* 33.11 removing it as Counsel of Record for the Defendant. She also filed a sworn affidavit, which included the following evidence:

> i - Before I assumed carriage of this file November 6, 2023, Mallory Adams, a lawyer who is associated with McInnes Cooper… had full carriage of this file.… On November 24, 2023, I attended a Date Assignment Conference before the Hon. Justice Boudreau. Since November 24, 2023, the Plaintiff and Defendant have produced disclosure and have discovered witnesses. Discoveries were completed on June 19, 2024. A Trial Readiness Conference is scheduled for September 13, 2024. The trial of this matter is scheduled to take place on November 4 and 5, 2024.
>
> ii - Nonpayment of Legal Fees-since March 2024 McInnes Cooper has sent invoices to [QDS] in respect of legal fees incurred by McInnes Cooper while working on this matter…Total $17,131.71. As of September 10, 2020, the full amount of $17,131.71 was owing to McInnes Cooper…On September 12, 2024, QDS provided McInnes Cooper a payment of $7,000…As of the date of this affidavit, this account receivable remains unpaid by QDS.
>
> iii - … Problems have arisen within the solicitor-client relationship with QDS due to non-payment of legal fees. The solicitor-client relationship and communication with QDS have been strained on account of this and ultimately that relationship has broken down. In addition to non-payment of legal fees, there has been a serious loss of confidence in the solicitor-client relationship with QDS, due to failure to accept and act upon legal advice. This has further contributed to the breakdown of the solicitor-client relationship. I am not willing to continue to act for QDS further in this proceeding. On September 10, 2024, I advised QDS of my intent to bring a motion to withdraw.
>
> iv - On September 13, 2024, a Trial Readiness Conference was held by Justice John Keith. His written summary includes: 'Have the parties exchanged lists of witnesses? Yes, however this is an action under Rule 57. The Defendants did not file a will say statement for certain witnesses who were on their witness list but

> were not discovered as required under Rule 57.13. Counsel for the Defendants indicated that she has instructions to remove these witnesses from their witness list and will file an amended witness list today… Counsel for the Plaintiff has no issue with that amended witness list' [the original witness list for the Defendants filed on November 28, 2023 included: Tilo Kunz; Serge Racine; CM and MI (the two individuals Mr. Muir recruited); a further witness list for the Defendants filed August 15, 2024 confirmed these four names. An amended witness list filed September 13, 2024, struck all those names except that of Mr. Racine].
>
> v - On September 17, 2024, Ms. Singh sent a letter to the Court advising: 'Please find enclosed four copies of a Notice of Intention to act on one's own, signed by Serge Racine of QDS Holdings Inc.… The Motion to Withdraw as Counsel of Record scheduled in General Chambers for September 23, 2024, is no longer necessary and can be released.'
>
> vi - On October 23, 2024, Q filed a letter entitled 'Request for a management conference' signed by Mr. Racine. It read in part:
>
> > …left only with the trial prospect, on October 16, 2024, QDS's management instructed the undersigned to propose a list of new counsels to represent QDS at trial. So, in parallel to this request I am busy finding a new counsel for QDS.
> >
> > QDS humbly requests a management conference to set the parameters so that:
> >
> > 1 - the Court confirms that QDS may find a new counsel.
> >
> > 2 - with the help of the new counsel, QDS will be able to adequately file its trial brief and book of authorities within the timeline set by the Court.
> >
> > 3 - and with the further help of new counsel, to be ready for trial. Therefore, because new counsel will have to take adequate time to prepare himself, the November 4 and 5 trial should be postponed for the time and the conditions the Court will see fit.
> >
> > In my perception, the requested management conference should be a time matter for a maximum of 35 - 45 minutes.
> >
> > In that regard, my time availabilities are all day, this Thursday, October 24 and any days next week, the week of October 28, 2024.

[27] On October 29, 2024, I held such a conference with the parties.

[28] Q requested an adjournment of the trial dates to allow them to find counsel.

[29] It has been unsuccessful in retaining anyone to represent it for the November 4 and 5, 2024 trial. No details of what efforts were made and when were put into evidence.

[30] I concluded that Q was not reasonably diligent in foreseeing by July 2024, the inevitability of having to retain alternative counsel, and in expeditiously taking steps to do so.

[31] I note that the breakdown of the solicitor-client relationship was attributed by its counsel to Q: "a serious loss of confidence in the solicitor client relationship with QDS, due to failure to accept and act upon legal advice."

[32] McInnes Cooper had been Q's counsel since at least the date of filing its Notice of Defence on June 29, 2023. Jennifer Singh was the Counsel of Record as of November 6, 2023.

[33] The Finish Date was August 15, 2024.

[34] However, Q had paid nothing toward the $17,131.71 legal fees which had been accumulated for the period before March 2024, long before the Finish Date.

[35] At the last moment, $7,000 thereof was paid on September 12, 2024, being the same date its counsel had filed its Motion to Withdraw as counsel.

[36] McInnes Cooper's intention to withdraw as Q's counsel so close to the impending trial dates would have been considered as a last resort by counsel.

[37] I infer that counsel, well aware of the impending trial dates, communicated to Q in a timely manner that counsel would be forced to withdraw in the months before September 12, 2024, if its fees were not paid.

[38] It is unclear precisely when Q's conduct occurred that gave rise to the concern and later conclusion of its counsel that the solicitor-client relationship had broken down "due to failure to accept and act upon legal advice."

[39] Q's counsel did not advise the Court or, it appears, opposing counsel that there was any problem with the trial proceeding as scheduled until on or about September 13, 2024, at the Trial Readiness Conference.

[40] McInnes Cooper had sent Q their invoices in March 2024 for the $17,131.71 for work done to that point. Q did not pay any of that amount until September 12, 2024, when it only paid $7,000 of that amount.

[41] I accept Ms. Singh's affidavit evidence which explains McInnes Cooper's motion to withdraw as counsel at a late hour preceding the trial dates herein:

> Problems have arisen within the solicitor-client relationship with QDS due to non-payment of legal fees. …. In addition to non-payment of legal fees, there has been a serious loss of confidence in the solicitor client relationship with QDS, due to failure to accept and act upon legal advice. This has further contributed to the breakdown of the solicitor-client relationship. I am not willing to continue to act for QDS further in this proceeding.

[42] Thus, Q's counsel, properly in my view, was required to make the motion to withdraw as counsel.

[43] Given all the circumstances present before me, I infer more likely than not, that Q was, at best indifferent toward, or at worst did not seriously intend, that the trial proceed in November 2024.

[44] The Plaintiff opposed this request.

[45] His counsel represented to the Court, and I accept, that the litigation/non-payment by Q has taken a significant toll on Mr. Muir financially, and from a mental health perspective, such that he discontinued working.

[46] I declined to grant the adjournment.

[47] At the time I was thinking of the well-worn applicable law regarding adjournments of trials, which includes our jurisprudence (e.g. Justice Keith's decision in *Glasgow v. Canada*, 2024 NSSC 185 paras.19-27, which admittedly does involve distinguishable facts; and the reasons in *Secunda Marine Services Ltd. v. Caterpillar Inc.*, 2010 NSCA 105, per Fichaud JA.) and our *Civil Procedure Rules*, particularly 4.20.

[48] At the time, I considered, *inter alia*, that:

- the Notice of Action filed May 8, 2023, and a Date Assignment Conference ("DAC") had been held on November 24, 2023. The parties and the presiding Justice collectively turned their attention to the mechanics of ensuring a smooth unfolding of the litigation so that the trial may be completed as scheduled. The trial was scheduled at that time for November 4 and 5, 2024;

- I am satisfied more likely than not, that it would be a lengthy delay before a new date certain could be found to which this trial could be rescheduled to start, bearing in mind that Q must find alternate

counsel, and that counsel has to find time in their schedule to prepare for and attend at, the trial, which dates must also accommodate the witnesses' schedules;

- Q had the benefit of the legal advice of McInnes Cooper since at least at the filing of its Defence in 2023, (amended June 14, 2024) and that the reason for their ceasing in that role was based upon Q's failure to pay outstanding invoices in the amount of $17,131.71 (less $7,000 paid September 12, 2024), and there had "been a serious loss of confidence in the solicitor client relationship with QDS, due to failure to accept and act upon legal advice".;

- Q had taken, at best, an indifferent attitude about the trial proceeding as scheduled on November 4 and 5, 2024;

- a Joint Exhibit Book ("JEB") was ready to be presented to the Court at trial;

- Mr. Racine is not only completely knowledgeable about the circumstances of the case as a result of his direct involvement, but he is also a lawyer of long-standing in Québec, specializing in business law, albeit not appearing as Counsel for the Defendant;

- this trial is within Rule 57 (albeit in proper cases exceptions may be made per subsection 5), which "provides for the economical conduct of certain defended actions by limiting pretrial and trial procedures".

Background

[49] Although I accept Mr. Tilo Kunz's June 19, 2024, discovery evidence that Q was and remains in the developmental stage and is "pre-revenue" ("there is no revenue") at all relevant times hereto, he also did testify that the company was "solvent" and agreed "there is profit being made by [Q]".

[50] The latter statement is difficult to accept, since profit is generally understood to be the difference between revenues and expenses.

[51] Based on all the circumstances here, I do have some concerns about Q's willingness and readiness to pay any judgment rendered against it by this Court.

[52] Nevertheless, I do accept his testimony that when Mr. Muir presented his Contingency Recruitment Service and Fee Agreement to Q, it was signed by Serge Racine - who was a member of the Board of Directors and a lawyer of long-standing in Québec who also "acted as in-house counsel".

[53] Later at page 17 of the transcript Mr. Kunz refers to Mr. Racine as, having been at that time, the "Chief Legal Officer and Chief Compliance Officer".

[54] At pages 20-21 Mr. Kunz confirmed that he had received the Agreement from his subordinate, Bill Yakamovich ("Bill"), Chief Security Officer, and Mr. Kunz then "sent it to Serge [Racine]".

[55] Mr. Kunz agreed that "[Serge] provides legal advice sometimes to QDS".[4]

[56] I find that representatives of Q, including Mr. Racine, examined the Agreement, had an opportunity to request changes, but they were satisfied with the terms thereof as drafted by Mr. Muir on behalf of Gold.

[57] Mr. Racine consequently signed it on or about November 16, 2022, on behalf of Q.

[58] I am satisfied that the parties reached a *consensus ad idem* regarding the intention and wording of the Agreement.

[59] The Agreement in its essence is simple - Gold recruits personnel qualified as requested by QDS, and if acceptable and hired by it, QDS is required to pay Gold as per the Agreement.

[60] The two successfully recruited candidates, CM and MI, each executed a "Consulting Agreement" with Q on February 21 and March 1, 2023, respectively.

[61] Gold presented its invoices in relation to recruitment of CM on February 23, 2023, in the amount of $51,750 and in relation to MI on March 31, 2023 in the amount of $37,950.

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[4] This is consistent with Bill's November 14, 2022, 9:24 AM email to Mr. Muir: "Hi Fraser, looks like we are finally going to proceed. I am having legal look over the draft agreement." Bill went on to add in an email at 9:34 AM: "re-Agreement - one other item… Can you include an outline of the recruitment process as part of the agreement and any specifics about conducting background checks?"

[62] CM and Q agreed on February 21, 2023, that she would commence working for Q on February 21, 2023, and its term would conclude on February 29, 2024.

[63] MI and Q agreed on March 1, 2023, that he would commence working for Q on March 13, 2023, and its term would end on March 31, 2024.

[64] The Agreement stated:

> Client agrees to notify Recruiter as promptly as practicable when it issues an employment offer letter to an applicant and again when the applicant accepts an offer. Client will provide Recruiter by email copies of the offer letter and written acceptance. Recruiter understands and acknowledges that a job offer by Client is contingent upon a number of additional steps in the employment process including, but not limited to, background and reference checking. The Fee will be considered fully earned when an offer has been extended and accepted, and Recruiter will issue an invoice at that time. The Fee is payable in full by Client within 30 days of candidate signed acceptance of Client offer.

[65] Gold continuously pursued Q to pay the two invoices, but reasonably concluded Q had no foreseeable intention of paying any amount of the invoices presented by Gold.

[66] Gold filed its Notice of Action on May 8, 2023.

[67] Bearing in mind that the quantum of punitive damage awards must be rationally proportionate to the ends sought to be achieved (to act as a deterrent to the defendant and to others from acting in a similar manner, retribution, and to demonstrate that the court's sense of decency must be respected), I find an appropriate amount in the present circumstances is $30,000.[5]

The evidence at trial[6]

[68] Mr. Muir testified for the Plaintiff, Gold.

[69] The Plaintiff also introduced into evidence the discovery evidence of Tilo Alexander Kunz who, when he testified on June 19, 2024, was Executive Vice

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[5] I also have generally considered the Court's reasons in *Industrial Alliance Insurance and Financial Services Inc. v. Brine*, 2015 NSCA 104, and specifically at paras. 217 - 224; application for leave to appeal dismissed - May 12, 2016, SCC file number 36809.

[6] Although at trial or in my decision, I may not have expressly referenced each of the specific arguments made by the parties, I have given close attention to the legal arguments presented in the Plaintiff's brief and by oral submissions, as well as the briefs presented to the court on October 30 and November 4 by the Defendant, and the oral submissions made by its representative.

President of Q. He had assumed that role in July 2023, when he ended his role as President and Chief Operating Officer of Q.

[70] Mr. Racine testified for the Defendant, Q.

1 - Credibility findings

[71] When I speak of "credibility", I am referring to honesty/veracity as well as the reliability of the witnesses' testimony.

Mr. Muir

[72] I found Mr. Muir testified credibly. I accept his evidence unless otherwise so stated.

[73] He testified that early on, he met by video, the management team of Q, including Bill, Tilo Kunz, and others.

[74] He was told that Q was growing rapidly and that was why they needed a recruiter for what they expected would be 50-100 further personnel over an 18-month period.

[75] This is generally consistent with Mr. Racine's testimony that Q viewed its growth in three stages: a Research and Development stage when only independent contractors are hired, which is the stage at which the Agreement was signed; a Pilot Projects stage which involves the testing of software; and a Commercialization stage, at which time only then would the hiring of "employees" be considered. This last stage was anticipated to be reached within 18 months of the start of the Research and Development stage.

[76] Mr. Muir's main contact at Q was Bill Yakamovich.

[77] Bill told Mr. Muir that, as a start up, Q was going to start off with "contractors and later full time" (which I construe as being in the nature of employees) staff.

[78] Mr. Muir told CM and MI this.

[79] Mr. Muir testified that neither did he have any input into, nor was he shown before litigation commenced, the Consulting Agreements (e.g. at Tab 9 for CM) signed by the recruits he sent to Q.

[80] The choice of wording in those Agreements is irrelevant to the proper interpretation of the Agreement between Gold and Q, although the wording of the Consulting Agreements does contextualize Mr. Racine's testimony, and Mr. Kunz's discovery evidence.

[81] Mr. Muir testified that his thinking at the time of the execution of the Agreement, was it did not matter to him whether he was recruiting people as potential employees or contractors, because it was the identical amount of work for him to do, so the fee should be identical as well, regardless of the status given by Q to their new personnel recruited by him.

[82] He understood that, "I am not paid until a person is hired - [when there is] an offer to, and acceptance by, the candidate."

[83] He testified that between the time of signing of the Agreement and the retention of CM and MI in February and March 2023, he spent approximately 200+ hours of his time and incurred expenses.

[84] To facilitate Mr. Muir's work, Q gave him job descriptions for which he was to recruit persons to work with Q.

[85] Mr. Muir testified that his goal, as he saw it, was to find as many people as possible for the job description he was presented by Q, and then narrow down the list to a select group.

[86] He vetted thousands of people across Canada in pursuit of those especial recruits that Q sought.

[87] Then he had first to compile from that large group, a smaller group, from which he would then contact those remaining persons, to see if they have any interest in working with Q.

[88] If so, then he interviewed them winnowing the list down in this case to approximately 50+ people.

[89] Mr. Muir presented CM and MI specifically to Bill, who himself went over their technical backgrounds and interviewed them.

[90] Bill found them both to be suitable, and informed Mr. Muir that he had made offers to both which had been accepted- Tabs 8, 9 and 10 JEB.

[91] According to the "Contingency Recruitment" provision in the Agreement, "the fee for our services is earned if an applicant is hired by Client or any of its affiliates on a permanent, contract or consulting basis at any time within one year of the date the applicant is submitted to Client."

[92] According to the "Fee" provision in the Agreement:

> Client agrees to pay Recruiter a fee equal to 20% of the first-year Compensation ("the Fee") for each applicant hired by Client. For this purpose, the Compensation shall be defined as the base salary or the sum of base salary plus target commissions (also commonly referred to as OTE or on target earnings) as appropriate. The Recruiter agrees that it shall be entitled to the Fee, subject to the terms and conditions of this Agreement, only if Recruiter is the procuring cause or screening agent for Client to hire an applicant.

[93] In relation to all successful recruits, the Agreement required Q to pay to Gold 20% of their "base salary"/remuneration.

[94] In relation to CM, the yearly "base salary" was $13,900 US per month (annually US $166,800) commencing February 21, 2023, which 20% Fee is shown in Invoice February 23, 2023 at Tab 8 (parties agreed HST is also payable by Q).

[95] In relation to MI, the yearly "base salary" was $10,250 US per month (annually US $123,000) commencing March 13, 2023, which 20% Fee is shown in Invoice March 31, 2023, at Tab12 JEB.

[96] The parties agree that if the contractual formula is followed, a total amount owing Gold in Canadian dollars is $89,700 ($51,750 for CM and $37,950 for MI).

[97] Mr. Muir testified regarding his long experience in the industry, and I accept he was thereby highly attuned to the recruitment practices in relation to personnel such as the ones sought by Q in this case.

[98] I accept his evidence that he was completely surprised to discover, after litigation had been commenced, Q's position was that no amount was then payable to him under the Agreement, and particularly so, that Q claimed such on its interpretation, because only the recruitment of "employees" would lead to payment of his recruitment fee.

Mr. Racine

[99] He confirmed Q had only been founded in 2021, and it was intended to develop specific software tools for use by the Quantum Internet industry.

[100] I am satisfied that Mr. Racine was very much involved in the business and legal matters of Q since 2021. No other person is identified as having legal expertise.

[101] To understand the background, it is helpful to revisit the discovery of Tilo Kunz.

[102] George Cohen, Chief Executive Officer of Q, was referenced as having the final say on monetary expenditures (including Mr. Muir's invoices) according to Mr. Kunz's testimony.[7]

[103] Mr. Kunz stated "I never discussed invoices with George. That's it. Period."[8] and he confirmed that although Mr. Muir had repeatedly corresponded by email with Mr. Kunz, urging him to have the invoices paid as he was in a dire financial situation, Mr. Kunz did nothing to see that they were paid or seriously considered for payment.

[104] Mr. Kunz testified in discovery:

Question:	Whose decision would it have been to pay the invoice? Would it have been the CEO's decision?
Answer:	Correct.
Question:	But he was never asked to pay it?
Answer:	That's right.
Question:	So, whose decision was it to not pay [Mr. Muir's] invoice?
Answer:	There was no decision.
…	
Question:	So, George would have decided, but you're just saying you never specifically discussed it with him, I see. (see also p. 59(9))
Answer:	That's correct. (p. 58)
…	
Question:	So considering that, Mr. Kunz, … Fraser was asked to find the security focused people, did he do that, yes or no?
Answer:	Yes. (p. 63(24))

[105] or completeness, I will add here the following from Mr. Kunz's discovery evidence: (p. 28(25))

[7] See p. 56 line 8, p. 59 line 9 discovery transcript.
[8] See p. 57 line 3 discovery transcript.

Question: So, it says: "the fee for our services is earned if an applicant is hired by Client or any of its affiliates on a permanent contract or consulting basis at any time within one year of the date the applicant is submitted to the Client."

So, my question is, do you agree that CM was hired on a contract or consulting basis within one year of the date she was submitted as a candidate by [Gold]?

…

Answer: **She wasn't hired. We don't have employees. She was a contractor.** There is no dispute about that.

…

Question: … Did you enter into a consulting or contract with CM within one year of the date she was submitted as a candidate by [Mr. Muir]?

Answer: Yes.

… (p. 31)

Question: … **What was the reason for QDS's hiring a consultant rather than an employee when it came to [CM]?**

Answer: Well,… **it wasn't specific for her. It was everybody**… What we were… the plan, **the plan was, as a startup bring on consultants so specifically as contractors. And if they work out, present them with an employment package, which would include options, like equity and bonuses,… and things like this and… We never ended up doing that, but that was… That was the goal**, is we would bring on a contractor, if they worked out, great, offer them a package, if they don't keep them on is a contractor or, you know terminate the contract.

Question: And was that… **was that always the plan**?

Answer: **Yeah**.

[106] Mr. Racine agreed that the total amount of invoices in US dollars for CM should be based on US $166,800. He did not dispute the Plaintiff's figures in relation to MI – US $123,000.

[107] He acknowledged he had signed the Agreement on behalf of Q.

[108] However, by way of argument during his testimony, he insisted that the Agreement should be interpreted as excluding CM and MI because they were hired as "independent contractors", and if the Court agrees, this is the defensible reason why payment has not been made to Gold.

[109] Mr. Racine says I should interpret the Agreement so that any Fee payable thereunder is not due to be paid to either CM or MI, unless and until they achieve and maintain the status of "employees" with a "permanent contract" with Q.[9]

[110] I note here that the Agreement uses the following language:

> The fee for our services is earned if an applicant is hired by Client or any of its affiliates on a permanent contract or consulting basis at any time within one year of the date the applicant is submitted to Client.

[111] Q's argument to that effect is contained in its October 30, 2024, brief on page 2:[10]

> On November 16, 2022, QDS CLO [Chief Legal Officer - Mr. Racine] signed the contingency agreement… provided by GoldR to QDS. **GoldR agreement is a generic agreement to provide referral services for new employees**. QDS's intent to agree to GoldR agreement was to **foresee the referral of employees at the time of stage 3 commercialization (12 to 18 months)**.[11]
>
> [My bolding added]

[112] Mr. Muir testified that, before the Agreement was signed, when he discussed Q's plans with Bill, Bill told him that they intended to use "contractors" at first, and later they would use "full-time" staff.

[113] I conclude that Mr. Muir was satisfied, based on his communications with Q's representatives, that Q wanted him to recruit persons who were "contractors" - not employees.

[114] Mr. Muir testified that, as late as the determination of the amount to be invoiced to Q, being a precise calculation of his Fee owing, he and Bill did an agreed-to calculation online, regarding the proper US dollar to Canadian dollar exchange rate to apply for CM's successful hire by Q.

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[9] As I understood his argument, Mr. Racine put forward Q's position as follows: the recruitment fee is payable only if CM/MI stayed on with Q until stage 3 and became employees. Mr. Racine was also suggesting there could perhaps be situations where persons would be in an analogous situation to an employee - but perhaps without benefits - for example hired under a separate (permanent) contract with Q on a consulting basis. For those persons, under the Agreement, they could be of a category that could also justify payment to Gold.

[10] Q submitted a further slightly revised brief on November 4, 2024.

[11] This is somewhat contextually consistent with Mr. Kunz's June 19, 2024, evidence in discovery at: pages 24 line 25; page 29 lines 15 - 18; and page 31 lines 4 - 25.

[115] Mr. Muir makes an argument that I should draw adverse inferences against Q, regarding Q not presenting as witnesses Tilo Kunz and Bill Yakamovich, who had decision-making authority at Q, whereas Mr. Racine did not.

[116] Although the discovery evidence of Mr. Kunz is before me, I am inclined nevertheless to conclude that Q not presenting Messrs. Kunz and Yakamovich in person as witnesses, permits me to, and I do in the circumstances, draw an adverse inference as against Q - that had they been presented as witnesses, the evidence of those persons on material matters would have been adverse to the interests of Q.

[117] I wish to emphasize that even without the benefit of such adverse inference, I was very satisfied that the evidence rises to the level required to support the *Bhasin* claim and punitive damages here.

The application of the relevant legal principles to the facts

Interpretation of contracts

[118] Regarding the proper interpretation of contracts, the Court succinctly stated a summary of the principles of contractual interpretation at paras. 73 - 80 in *Resolute FP Canada v. Ontario (Atty. Gen.)*, [2019] 4 SCR 394. They bear repeating:

> A. *Principles of Contractual Interpretation*
>
> [73] The Ontario Indemnity is a contract. Today's lawyers are fortunate to live in "an age when there is a galaxy of high appellate guidance on how to interpret contracts" (*Royal Devon and Exeter NHS Foundation Trust v. ATOS IT Services UK Ltd.*, [2017] EWCA Civ 2196, [2018] 2 All E.R. (Comm.) 535, at para. 45). While not wishing to add more gas and dark matter to the "galaxy", we do find it helpful here to stress certain first principles which we see as important in interpreting this particular contract.
>
> [74] **This Court has described the object of contractual interpretation as being to ascertain the objective intentions of the parties (*Sattva*, at para. 55). It has also described the object of contractual interpretation as discerning the parties' "reasonable expectations with respect to the meaning of a contractual provision**" (*Ledcor*, at para. 65). In meeting these objects, the Court has signalled a shift away from **an approach to contractual interpretation that is** "dominated by technical rules of construction" to one that is instead **rooted in "practical [ities and] common-sense" (*Sattva*, at para. 47)**. This requires courts to read a contract "as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract" (*ibid.*).

[75] **We recognize that this Court's references to the objective intentions of the parties at the time they entered into the contract, and to parties' reasonable expectations, may leave a degree of uncertainty respecting the objects of contractual interpretation (see A. Swan, J. Adamski and A. Y. Na, Canadian Contract Law (4th ed. 2018), at pp. 673-916). Since there is no suggestion here of a divergence between the parties' intentions and their expectations, we do not find it necessary to resolve this here, but we simply note the inconsistency.**

[76] Contractual interpretation begins with reading the words of the contract. **A legitimate interpretation will be consistent with the language that the parties employed to express their agreement** (G. R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at p. 11). As this Court stated in Sattva, the meaning of a contract is rooted in the actual language used by the parties (para. 57). A meaning that strays too far from the actual words fails to give effect to the way in which the parties chose to define their obligations (*Canadian Contractual Interpretation Law*, at p. 9).

[77] **This is not to say that the words of the contract are to be read in isolation**. This Court's direction in Sattva was that **the words of the contract are to be read in light of the surrounding circumstances - sometimes referred to as the "factual matrix" - which consist of "objective evidence of the background facts at the time of the execution of the contract, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting**" (para. 58 (citation omitted)). An interpretation that ignores the context in which the contract was formed will not accurately discern what the parties intended to achieve, even if the interpretation is "literally correct" (*Canadian Contractual Interpretation Law*, at p. 9; see also *Sattva*, at para. 57). Put simply, contractual text derives its meaning, in part, from the context.

[78] **We stress that text derives its meaning from context in part. This leads to an important caveat: the context - that is, the factual matrix - cannot "overwhelm the words" of the contract or support an interpretation that "deviate[s] from the text such that the court effectively creates a new agreement**" (*Sattva*, at para. 57). The factual matrix assists in discerning the meaning of the words that the parties chose to express their agreement; it is not a means by which to change the words of the contract in a manner that would modify the rights and obligations that the parties assumed thereunder (*Canadian Contractual Interpretation Law*, at pp. 33-34).

[79] As we will explain below, **contractual interpretation also requires courts to consider the principle of commercial reasonableness and efficacy. Contracts ought therefore to be interpreted "in accordance with sound commercial principles and good business sense**" (*Scanlon v. Castlepoint Development Corp.* (1992), 1992 CanLII 7745 (ON CA), 11 O.R. (3d) 744, at p. 770). As Lord Diplock explained in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.*, [1985] 1 A.C. 191 (H.L.), at p. 201, "if detailed semantic and syntactical analysis of words

> in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense". **The principle that requires contracts to be read in a commercially reasonable and efficient manner is therefore an important interpretive aid in construing contractual terms**.
>
> [80] **Ultimately, contractual interpretation involves the application of various tools - including consideration of the factual matrix and the principle of commercial reasonableness - in order to properly understand the meaning of the words used by the parties to express their agreement**.
>
> [My bolding added]

[119] Q is arguing that the use of the words, "hire"; "on a permanent contract or consulting basis"; "when it issues an employment offer … to an applicant"; "… the entire agreement of the parties with respect to the placement of applicants for employment at Client"; "applicants whom [Q] agrees to consider for employment" can mean only that the Agreement is intended to recruit "employees"; and that neither CM nor MI were hired as "employees".

[120] This is also reflected in its pleadings at paras. 7 , 9, 11 - 17, and 23 - 25.

[121] I have great difficulty accepting Q's suggested interpretation of the Agreement.

[122] It is difficult to reconcile Q's proposed interpretation of the Agreement with the application of the above-noted principles including, interpreting it "in accordance with sound commercial principles and good business sense", and the evidence that I accept.

[123] Broadly stated, I am troubled by the suggestion that, with the benefit of legal advice, Q entered into the Agreement, seeking to have Gold recruit "applicants whom [Q] agrees to consider for employment", yet Q's purported belief then, which still remains - is that the Agreement only obligates it to pay the recruitment fee for any persons hired as "employees".

[124] Q simultaneously had an ongoing intention to <u>not hire any employees</u>, or a similar category of persons suited to the relevant job descriptions, for at least 18 months.

[125] The Agreement, under "Contingency Recruitment" uses the language: "the fee… is earned if an applicant is hired… <u>on a permanent contract or consulting basis</u>…".

[126] Notably, Q's own "Consulting Agreement" under "Remuneration" considers CM/MI are to be paid "a fee… upon commencement of full-time engagement", not employment.

[127] Q must have considered CM/MI as having been hired on a "full-time" basis.

[128] Q's own choice of those words in its "Consulting Agreement" could fairly be characterized as equivalent to "on a permanent… basis".

[129] Mr. Racine alternatively suggested that, to avoid the uncertainty surrounding a proper interpretation of the Agreement, the Court could consider the *quantum meruit* argument.

[130] Q's pleadings, at paras. 29 - 30 deny such a basis is available to the Court: "[Q] specifically denies that [it] was unjustly enriched and denies that there is any basis for a claim in equity…".

[131] Nevertheless, Q argues that Mr. Muir/Gold could still be compensated based on the monies earned by CM/MI, however, this approach would effect a lower Fee payment to Gold, due to the application of Quebec taxation law to them as "employees" (according to Mr. Racine's evidence - not qualified as an "expert" but testifying as a fact witness - see Exhibit 3 entered by Q at trial).

[132] To re-iterate, this argument by Q is inconsistent with what I find to be the parties' objective intentions and collective reasonable expectations of their rights and obligations at the time the Agreement was signed.

[133] Moreover, that the recruitment fee payable to Gold should be reduced by the application of Québec tax law under the guise of the equitable construct of *quantum meruit* is frankly at odds with the principles of equity, including my finding of fact that Q does not come to the Court "with clean hands".

[134] I am satisfied that in relation to the Agreement, at no time before Mr. Racine signed the Agreement, did representatives of Q make any mention to Mr. Muir that he would only be paid if Q hired the persons he recruited as "employees", and that such positions would at the earliest only exist 18 months into the future, or they might never exist.

[135] Even Q's own argument, that Gold would be paid if CM/MI were hired by Q in the future as "employees", will only be so if - as the Agreement obligates under "Contingency Recruitment"- "the fee for our services is earned if an applicant is

hired by the client… at any time within one year of the date the applicant is submitted to Client."

[136] Mr. Racine was at all relevant times the Chief Legal Officer at Q.

[137] He reviewed and signed the Agreement.

[138] He did not request any amendments to the wording.

[139] The term "employee(s)" does not appear anywhere in the standard Agreement put forward by Gold.

[140] He did not expressly testify that when he signed it, he interpreted the Agreement to mean that Q would only be responsible for recruitment fees for "employees".

[141] After all, he testified that he knew Q was not looking for "employees" at that time.

[142] In the ensuing months when Mr. Muir sought to be paid and communicated with representatives of Q, not one of them responded to Mr. Muir that his fee was not payable because CM/MI had not been hired as "employees".

[143] Yet, after the litigation was commenced, that has become Q's position.

[144] I conclude that the specific wording of the Agreement is not problematic in these circumstances.

[145] Mr. Muir, whose chosen wording is reflected in Gold's Agreement, was clear that his fee was not intended to be dependent on whether the persons he recruited became "employees" or not of the Client.

[146] I am able to discern the objective intentions of the parties including their reasonable expectations with respect to the meaning of the contractual provisions.

[147] Q suggests the use of the word "hire" in the Agreement suggests it is for "employment" only, and therefore "employees" are those persons that the Agreement is intended to cover; especially in light of the other wording therein, that "applicants whom Client agrees to consider for employment".

[148] The use of the word "hire" can have more than one meaning, depending on the context.

[149] In the Agreement we see: "The fee for our services is earned if an applicant is hired by Client… on a permanent, contract or consulting basis at any time within one year…"

[150] Mr. Kunz agreed at p. 63(24) discovery transcript that both CM and MI were the kind of applicants that Q was seeking (the job description can be found at JEB Tab 6 pgs. 2- 5). The evidence herein clearly suggests they were not hired as employees. They were hired "on a permanent, contract or consulting basis".

[151] My analysis of the objective intentions of the parties to the Agreement suggests that the use of the word "hire" therein does not restrict the Agreement's application to the recruiting by Gold of only persons who would be hired as an "employee".

[152] The word "employee" does not appear in the Agreement.

[153] The use of the word "employment" does not restrict the Agreement's application to the recruiting of only "employees".

[154] Otherwise, Q could not have, in good faith have entered into this Agreement, since it was not intending to hire "employees" for at least another 18 months.

[155] Moreover, Q's own Consulting Agreement for CM and MI refers to each of them as "the Consultant"; and provides that:

> Corporation's **engagement** of Consultant to perform the Services shall not be exclusive and that the Corporation may engage another individual or entity to provide the same or similar Services and the Consultant shall be free to provide the same or similar Services to another individual or entity…

[156] The Consulting Agreement also reads at "7.9 Independent Consultant: "Nothing contained herein shall be deemed or construed to create between the parties hereto a partnership, employment relationship…".

[157] The Agreement presented by Gold to Q, under "Contingency Recruitment", states: "The fee for our service is earned if an applicant is hired by Client or any of its affiliates on a permanent, contract or consulting basis at any time within one year of the date the applicant is submitted to Client."

[158] Use of the word "permanent" followed by a comma, suggests that it was intended to modify both "contract or consulting basis".

[159] Whether searching the CanLII or Advanced LEXIS-NEXIS database, the reference to "permanent contract" in Nova Scotia is restricted to cases of employees of School Boards.

[160] Incidentally, "permanent contract" is defined in s. 3 of the *Education Act*, SNS 2018, c.1 Schedule A, under subheading "Interpretation":

> (r) "permanent contract" means a written contract between an education entity and a teacher in a form approved by the Minister that has been entered into after the teacher has (i) served under a probationary contract, or (ii) been employed by the education entity for two or more years immediately preceding the year in which the education entity entered into probationary and permanent contracts with the teacher for the first time;

[161] Since this reference arises in the context of a statutory scheme, those cases are of no assistance here.

[162] I conclude a reasonable interpretation of "permanent" in the Agreement is that it stands in contrast to a "temporary" contract or consulting basis.[12]

[163] The Agreement contemplates that the applicants hired will remain so for at least "the first year Compensation". The evidence of the terms of Q's own "Consulting Agreement" for both CM and MI are for a one-year term.

[164] It makes commercial sense that the Client would not want to hire someone who does not legally commit to working for the Client for a period of time of a reasonable length that would justify the significant recruitment fee.

[165] Article 4.1 of Q's own "Consulting Agreement" with CM and MI states:

> The Agreement is for a fixed term and will automatically terminate on the Initial Term End Date as set out in Appendix "A" (the 'Term') unless earlier terminated or renewed in accordance with the terms of this Agreement.

[166] Moreover, CM and MI also have, what would be included within the term a "base salary", as used in the "Fee" subheading of the Contingency Recruitment Service and Fee Agreement:

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[12] Defined in the *Encyclopedic Dictionary of Canadian Law*, Volume 3, at page T - 40 as: "lasting for only a limited period of time; not permanent.… In relation to an appointment to a position, equivalent to 'acting' or 'interim'."

> Client agrees to pay Recruiter a **Fee equal to 20% of the first year Compensation** for each applicant hired by Client. **For this purpose, the Compensation shall be defined as the base salary or the sum of base salary plus target commissions**…

[167] I note that even Mr. Kunz does not distinguish between what he calls "contractors" and "consultants". At page 31of his discovery evidence he stated:

> Question: … **What was the reason for QDS hiring a consultant rather than an employee when it came to [CM]**?
>
> Answer: It wasn't specific for her. It was for everybody. I mean we were… What we were… The plan… **The plan was as a start up, bring on consultants, so specifically as contractors. And if they work out present them with an employment package** which would include options, like, equity and bonuses… **We never ended up doing that**, but that was… That was the goal, is we would bring on a contractor, if they worked out, great, offer them a package, **if they don't keep them on as a contractor or you know, terminate the contract**.
>
> [My bolding added]

[168] I am satisfied more likely than not that both Q and Gold's objective intentions and reasonable expectations were that CM and MI were hired by Q on a "permanent contract or consulting basis".

[169] This is also consistent with the jurisprudence regarding the distinction between employees and independent contractors.

[170] Whether someone is hired as an employee or an independent contractor was considered, albeit in distinguishable circumstances, in *1392644 Ontario Inc. (Connor Homes) v. Canada (National Revenue)*, 2013 FCA 85 where the Court stated[13]:

> [37] Because the employee-employer relationship has important and far reaching legal and practical ramifications extending to tort law (vicarious liability), to social programs (eligibility and financial contributions thereto), to labour relations (union status) and to taxation (GST registration and status under the *Income Tax Act*), etc., **the determination of whether a particular relationship is one of employee or of independent contractor cannot simply be left to be decided at the sole subjective discretion of the parties. Consequently, the legal status of independent contractor or of employee is not determined solely on the basis of**

[13] I bear in mind that, in such cases involving taxation issues, the circumstances are distinguishable in part as a result of their being a governmental body involved and a statutory regime.

the parties declaration as to their intent. That determination must also be grounded in a verifiable objective reality.

[38] Consequently, *Wolf* and Royal Winnipeg Ballet set out **a two step process of inquiry that is used to assist in addressing the central question, as established in Sagaz and Wiebe Door, which is to determine whether the individual is performing or not the services as his own business on his own account**.

[39] **Under the first step, the subjective intent of each party to the relationship must be ascertained**. This can be determined either by the written contractual relationship the parties have entered into or by the actual behaviour of each party, such as invoices for services rendered, registration for GST purposes and income tax filings as an independent contractor.

[40] **The second step is to ascertain whether an objective reality sustains the subjective intent of the parties**. As noted by Sharlow J.A. in *TBT Personnel Services Inc. v. Canada*, 2011 FCA 256, 422 N.R. 366 at para. 9, "it is also necessary to consider the *Wiebe Door* factors to determine whether the facts are consistent with the parties' expressed intention." In other words, the subjective intent of the parties cannot trump the reality of the relationship as ascertained through objective facts. In this second step, the parties intent as well as the terms of the contract may also be taken into account since they colors the relationship. As noted in *Royal Winnipeg Ballet* at para. 64, the relevant factors must be considered "in the light of" the parties' intent. However, that being stated, the second step is an analysis of the pertinent facts for the purpose of determining whether the test set out in *Wiebe Door* and *Sagaz* has been in fact met, i.e whether the legal effect of the relationship the parties have established is one of independent contractor or of employer-employee.

[41] **The central question at issue remains whether the person who has been engaged to perform the services is, in actual fact, performing them as a person in business on his own account**. As stated in both *Wiebe Door* and *Sagaz*, in making this determination no particular factor is dominant and there is no set formula. **The factors to consider will thus vary with the circumstances**. **Nevertheless, the specific factors discussed in *Wiebe Door* and *Sagaz* will usually be relevant, such as the level of control over the worker's activities, whether the worker provides his own equipment, hires his helpers, manages and assumes financial risks, and has an opportunity of profit in the performance of his tasks**.

[My bolding added]

[171] More recently this was cited with approval in *MacDonald v. Saskatoon Minor Basketball Association*, 2024 SKKB 85:

[36] Mr. Seiferling also notes respecting this issue, commencing at paragraph 22 of his brief:

> 22. The court in *McKee* [2009 ONCA 916, 315 DLR (4th) 129] also quoted the Supreme Court of Canada in Sagaz on the broad discretion of the trier of fact when characterizing a work relationship: "there is no one conclusive test which can be universally applied", and "what must always occur is a search for the total relationship of the parties." Pursuant to this search for the relationship, the Ontario Court of Appeal noted:
>
> > [39] In Belton [(2004), 2004 CanLII 6668 (ON CA), 72 OR (3d) 81], Juriansz J.A., writing on behalf of the court, upheld the use of the following five principles, modelled on the Sagaz factors, at paras. 11, 15:
> >
> > 1. Whether or not the agent was limited exclusively to the service of the principal;
> >
> > 2. Whether or not the agent is subject to the control of the principal, not only as to the product sold, but also as to when, where and how it is sold;
> >
> > 3. Whether or not the agent has an investment or interest in what are characterized as the "tools" relating to his service;
> >
> > 4. Whether or not the agent has undertaken any risk in the business sense or, alternatively, has any expectation of profit associated with the delivery of his service as distinct from a fixed commission;
> >
> > 5. Whether or not the activity of the agent is part of the business organization of the principal for which he works. In other words, whose business is it?
>
> 23. **In *1392644 Ontario Inc. (Connor Homes) v. Canada (National Revenue),* the Federal Court of Appeal adopted the elaboration on the *Sagaz* test as raised in *Royal Winnipeg Ballet v. Minister of National Revenue* [2006 FCA 87, [2007] 1 FCR 35].** The Court declared a two-step process: first seek the subjective intent of the parties to the relationship by determining if there was a mutual understanding about its legal nature. In looking for possible mutual understanding, courts should look at either the written contract or the actual behaviour of each party. Second, the courts must determine whether an objective reality supports the subjective intent of the parties.
>
> 24. **Despite the elaboration of the Federal Court of Appeal, the guidance of the Supreme Court of Canada in *Sagaz* remains the ultimate question**:
>
> > **The central question is whether the person who has been engaged to perform the services is performing them as a person in business on [their] own account**.

…

[38] I endorse and adopt the analysis of Randi's counsel as detailed above. I determine there is no reasonable conclusion other than for the entirety of the 16 or 17-year relationship, Randi was an employee of the SMBA. Moreover, **even if I am incorrect in concluding that Randi is an employee, then I would posit that if she is not an employee she is a dependent contractor and thus entitled to reasonable notice for termination. This status was reviewed in *McKee v. Reid's Heritage Homes Ltd*., 2009 ONCA 916, 315 DLR (4th) 129**.

[39] In that case, the Ontario Court of Appeal noted, commencing at para. 24:

> [24] **In 1936, this court recognized the existence of an "intermediate" position "where the relationship of master and servant does not exist but where an agreement to terminate the arrangement upon reasonable notice may be implied": *Carter v. Bell & Sons (Canada) Ltd.*, 1936 CanLII 75 (ON CA), [1936] O.R. 290, at p. 297. Carter emphasized the permanency of the working relationship between the parties as a determinant in delineating this intermediate category**: see *Carter* at pp. 297-98.
>
> [25] A number of courts in several Canadian jurisdictions have since found such intermediate workers in a number of reasonable notice cases, particularly where the worker is economically dependent on the defendant, generally due to complete exclusivity or a high-level of exclusivity in their work: see, e.g., *Marbry Distributors Ltd. v. Avrecan International Inc*. (1999), 1999 BCCA 172 (CanLII), 171 D.L.R. (4th) 436 (B.C.C.A.), at paras. 35-38, 46; *JKC Enterprises Ltd. v. Woolworth Canada Inc.* (1986), 2001 ABQB 791), 300 A.R. 1 (Q.B.); *Erb v. Expert Delivery Ltd.* (1995), 1995 CanLII 8874 (NB KB), 167 N.B.R. (2d) 113 (Q.B.), at paras. 6-14.
>
> [26] **This court impliedly recognized the existence of an intermediate category for work relationships involving a distributorship agreement in *Paper Sales Corporation Ltd. v. Miller Bros. Co.*** (1962) Ltd. (1975), 1975 CanLII 555 (ON CA), 7 O.R. (2d) 460. There, the court upheld, orally, Stark J.'s decision below, which held that a non-employment relationship whereby the plaintiff was "the exclusive distributor of the defendant's products in [two provinces]" was "closer to a contract of employment than to a commission agency" and thereby required reasonable notice for termination: *Paper Sales* at pp. 463-64.
>
> [27] ***Mancino v. Nelson Aggregate Co.***, [1994] O.J. No. 1559 (C.J. (Gen. Div.)), at paras. 9-13, **applied the reasoning in Paper Sales to self-employed truckers, requiring reasonable notice where the work relationship was permanent and exclusive in nature, such that the plaintiff was in a "position of economic dependence**". *Mancino* thereby exemplifies the applicability, in Ontario, of the intermediate category analysis beyond merely sales or distributorship relationships.

> [28] **Recently, this court again impliedly recognized the intermediate category** where the case required the court **to determine the status of a commissioned salesperson.** In *Braiden v. La-Z-Boy Canada Ltd.* (2008), 2008 ONCA 464, 294 D.L.R. (4th) 172, at para. 24, **Gillese J.A. noted** the trial judge's suggestion that **a "third category of relationship has emerged, between [the employer-employee and independent contractor relationship categories]**, in which reasonable notice of termination must also be given", while upholding his conclusion that the plaintiff, Braiden, was nevertheless an employee.
>
> [29] Finally, recognizing an intermediate category based on economic dependency accords with the statutorily provided category of "dependent contractor" in Ontario, which the *Labour Relations Act*, S.O. 1995, c. 1, Sch. A, s. 1(1), defines as:
>
> > [A] person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.
>
> [30] **I conclude that an intermediate category exists, which consists, at least**, of those non-employment work relationships that exhibit a certain minimum economic dependency, which may be demonstrated by complete or near-complete exclusivity. **Workers in this category are known as "dependent contractors"** and they are owed reasonable notice upon termination.

Summary of my assessment of the Agreement

[172] Neither CM nor MI intended to be hired as employees of Q.

[173] Q did not intend them to provide their services as employees.[14]

[174] I am satisfied that the Agreement reflected the true intentions and reasonable expectations of the parties; and that it was not intended to only be applicable to the hiring of "employees" is confirmed by the objective reality of the circumstances.

---

[14] This is particularly true of MI who engaged his services with Q through Growing Networks Consultant Inc.- a corporate body.

[175] The Agreement was intended to, and does, apply to CM/MI's hiring by Q as non-exclusive contractors/consultants on a 12-month fixed-term contract.

[176] Relying on the above-noted two-step analysis, I conclude that the objective reality of the circumstances supports my conclusion that the party's objective intentions were to hire contractors, not employees.

[177] Both CM and MI were hired "on a permanent, contract or consulting basis".

[178] This means that Gold has satisfied its obligations under the Agreement and was in accordance therewith entitled to be paid "in full by [Q] within 30 days of candidate signed acceptance of Client offer."

The Punitive Damages

[179] Furthermore, in all the circumstances, I conclude that Q's ongoing stated legal position since early November 2022, that a proper interpretation of the Agreement generally, and specifically the Fee under the Agreement, as being only payable in respect of CM and MI had they become employees of Q, is at best disingenuous.

[180] I find it is difficult to conceive how Q in good faith could have taken this legal position.

[181] I find its actions in relation to the non-payment of Gold's invoices are tainted.

[182] Q suggests that its personnel made reasonable efforts to address Mr. Muir's persistent requests for payment of the Fee. They surely did not.

[183] The evidence satisfies me that Q, both by inaction and action, wilfully interfered with the prompt payment of the Fee owing to Gold within a reasonable period of time.

[184] Not only was the payment of the Fee delayed - it has not been paid to date.

[185] On each and every occasion after the Agreement was signed, when Mr. Muir diligently repeatedly communicated with representatives of Q regarding payment of his invoice, they responded in a manner that inferred full payment would be forthcoming in the near future.

[186] At no time before the Agreement was signed, or even before the litigation started, did anyone from Q tell Mr. Muir that payment would not be forthcoming because neither CM or MI were hired as "employees".

[187] The conduct by persons acting on behalf of Q, and the legal positions it has taken herein, brings me to the conclusion that more likely than not Q has been dishonest in its contractual dealings with Gold from very early on in the circumstances and continuing to the present.

Conclusion

[188] I find for the Plaintiff and order Q to pay: within 60 calendar days of the date of the release of this decision, the amounts of $89,750 and $30,000; and prejudgment interest, costs and disbursements within a further 30 calendar days. I direct the Plaintiff's counsel to prepare a Preliminary Order to reflect my decision after which I will sign a Final Order, once the prejudgment interest, costs and disbursements have been approved by the Court.

[189] I will receive costs submissions (briefs no greater than 10 pages) from the Plaintiff within 10 calendar days of the release of this decision; from the Defendant within 10 calendar days after receipt of the Plaintiff's submissions; and with a further 5 calendar days permitted for the Plaintiff to answer the Defendant's submission. Any affidavits the parties may wish to file shall accompany the briefs. Cross-examination thereon is only by leave of the Court.

Postscript

[190] During the evidence and hearing of this matter, I became concerned about indicia that could bring into question Q's willingness, and possibly its ability, to pay the amounts in the anticipated Order for Judgement.

[191] Consequently, I also specifically bring to the attention of those responsible for the management of Q, the special responsibility that Q has as a debtor subject to an anticipated Order of the Nova Scotia Supreme Court, which requires preliminary payment within 60 days of the issuance of the Order, and final payment within a further 30 days.[15]

[15] The Agreement required the "fully earned" fee to be "payable in full by Client within 30 days of candidate signed acceptance of client offer" – here the payable dates were 30 days after February 21, and March 1, 2023 for CM and MI's recruitment.