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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	**APPEARANCES:**
R.S. DISTRIBUTION SERVICES LTD., plaintiff,	Gavin M. Wood for the Plaintiff
- and -	
MTS INC., BELL MTS INC. AND BELL CANADA, defendants.	Thor Hansell and Adam Meyers for the Defendants
	Judgment delivered: January 17, 2022

TOEWS J.

INTRODUCTION

[1] The plaintiff, R.S. Distribution Services Ltd. ("RS Distribution"), has commenced an action against the defendants alleging they fundamentally breached a contract with RS Distribution dated December 1, 2014 (the "Production Fulfillment Services Agreement" or the "PFSA") and in doing so they acted in bad faith. As a result, the plaintiff is claiming

damages, interest and costs. The plaintiff raises various other causes of action in the alternative. The defendants state that they acted in accordance with the terms of the PFSA in ending the relationship with the plaintiff and ask that the action be dismissed with costs.

[2] The relationship between the parties leading up to the PFSA is not disputed. Since the 1990's the principal of RS Distribution, Rene Saurette ("Saurette") entered into various contractual agreements with the defendant MTS Inc. ("MTS") either in a personal capacity and as the business evolved, through the corporate plaintiff, RS Distribution.

[3] For the purposes of these reasons there is no distinction to be made between the named defendants in terms of any potential liability to the plaintiff. There is no dispute that while it was the corporate defendant MTS that first entered into contractual relationships with Saurette and subsequently RS Distribution, as of April 1, 2017, MTS was amalgamated with the defendant Bell Canada. As of that date MTS ceased to exist and Bell Canada assumed all obligations of MTS under the PFSA. Accordingly, any liability of MTS under the PFSA has been assumed by Bell Canada. Bell MTS is a brand name used by Bell Canada and is not a party to the agreement. While I may refer to MTS and Bell Canada at different times in the course of these reasons, that distinction is made for the purposes of narrative and does not affect any potential liability of Bell Canada under the PFSA.

[4] The liability of Bell Canada hinges primarily upon the question of whether a memo (the "November 24 memo", at Tab 20 of Vol. 1 of the Book of Agreed Documents), signed by in-house legal counsel for MTS and addressed to Nadine Shah ("Shah"), forms a part

of the PFSA or constitutes evidence of a collateral contract between the parties. Shah, along with Christine Jonsson ("Jonsson"), was one of the MTS in-house negotiators who negotiated the PFSA with Saurette and Ben Chen ("Chen") of RS Distribution. RS Distribution states that the November 24 memo forms part of the PFSA, or in the alternative, a collateral agreement with the defendants. It argues that the November 24 memo establishes a financial obligation on the part of the defendants to pay the plaintiff for services provided by the plaintiff in a minimum amount of $3,778,486 over the term of three years.

THE FACTS

[5] While the background negotiations in respect of the PFSA are to be approached with caution in determining the terms and conditions of any agreement between the parties, all parties have led extensive evidence over the course of the trial in respect of those negotiations. Accordingly, without determining the legal significance, if any, of those negotiations at this point, it is instructive to review those negotiations for the purposes of narrative if not for legal significance per se. In this context I am mindful of the recent comments of Mainella J.A. in ***Rosenberg v. Securtek Monitoring Solutions Inc***., 2021 MBCA 100, [2021] M.J. No. 349 (QL), at para. 7, where in his reasons on behalf of the court, he cautions against "… placing excessive weight on the surrounding circumstances such as to overwhelm the words used in the purchase agreements."

[6] The evidence establishes that the three-year PFSA was preceded by a five-year contract (the "2009 contract"). The 2009 contract included minimum annual volume

commitments that MTS was required to meet for certain specified products which RS Distribution handled pursuant to the 2009 contract. MTS paid over $270,000 to the plaintiff for services that were not required as a result of the minimum volume commitments established under the 2009 contract not being met.

[7] The evidence led on behalf of the defendants was that minimum volume or financial commitments as well as the contractual exclusivity of the relationship between RS Distribution and MTS were discussed during the negotiations leading up to the PFSA. After a number of monthly extensions of the 2009 contract were agreed to by the parties, the parties entered into the PFSA for a term of three years, commencing December 1, 2014 and expiring on November 30, 2017.

[8] On April 1, 2017, approximately two and a half years into the term of the PFSA, MTS was amalgamated with Bell Canada. On May 9, 2017, Paul Norris ("Norris"), Vice-President of Bell Canada provided notice to RS Distribution that the PFSA would not be renewed after November 30, 2017. It is Bell Canada's position that while it expected RS Distribution to continue carrying out certain contractual obligations pursuant to the PFSA until the expiration of the contract, the notice was also intended to allow RS Distribution time to prepare and plan for the transition.

[9] It was after receiving the May 9, 2017 letter that Saurette raised his position that the PFSA contained a minimum financial obligation in the amount of $3,778,486 on the basis of the figure set out in the November 24 memo. It appears that RS Distribution received a copy of the November 24 memo when MTS couriered a hard copy of the PFSA to RS Distribution on or about December 1, 2014.

[10] A review of the negotiation process between the two parties to the PFSA shows that minimum volume or financial guarantees, along with exclusivity were matters that concerned both parties during the course of the negotiations. The evidence of Norris, who testified at trial, and the documentation produced by Bell Canada is clear that the defendants opposed minimum financial or volume guarantees as they did not wish a repeat of the experience of paying for services not rendered as occurred when MTS failed to meet the minimum volume commitments established under the 2009 contract. For its part, the evidence of RS Distribution was that the minimum volume or financial guarantees were important considerations given the insistence by Bell Canada on maintaining the price per unit of products handled by RS Distribution pursuant to the 2009 contract.

[11] The evidence further demonstrates that following further negotiations, the PFSA provided for an increase in the price per unit handling of products by RS Distribution over the prices set out in the 2009 contract. The PFSA also includes certain additional hourly fees payable by MTS to RS Distribution for specific services provided under the PFSA. In addition, the position on exclusivity first advanced by MTS found its way into the PFSA with certain modifications, presumably in order to address the concerns about the lack of reciprocity raised by RS Distribution in response to the exclusivity initially demanded by MTS. It is the position of Bell Canada that the creation of a service level agreement with stipulated penalties as a provision of the PFSA if those levels were not met by RS Distribution allowed it to be more flexible in respect of the position on exclusivity it had originally advanced.

[12] It is the position of RS Distribution, and specifically as found in the evidence of Chen who was the lead RS Distribution employee in charge of the duties related to the day-to-day handling of the PFSA, that Shah, one of the MTS negotiators, provided representations that there would be a separate document which would set out a minimum financial guarantee by MTS in respect of the PFSA. It is in this context that RS Distribution contends that the November 24 memo is an integral part of the PFSA or in the alternative, a collateral agreement binding the two parties and consistent with the representations it said it had received from Shah.

[13] Norris testified that he was the MTS lead on primarily a supervisory basis in the negotiations of the PFSA. He advised that neither Shah nor Jonsson are still employed by the defendants. Norris was unable to explain how the November 24 memo came to be attached to the hard copy of the PFSA sent to RS Distribution for signature, and testified that it was an internal document which sets out the legal review of the PFSA by MTS in-house legal counsel. This review is required by internal corporate procedures before a contract of this nature could be executed by the appropriate signing officer of the corporation.

[14] Norris testified that in-house legal counsel did not have the level of authority to bind MTS in the case of this contract. The internal authority required Kelvin Shepherd ("Shepherd"), then the president of MTS, to execute the document. It is noted that at page 10 of the 2014 contract, under the signature of Shepherd, appear the initials of Norris as "Product Manager" and Stefan Bounket ("Bounket"), the legal counsel from the

MTS "Law Dept" who drafted the November 24 memo. These initials are contained within a small box headed by the phrase "MTS APPROVED."

[15] It is also clear from the evidence that the electronic correspondence initially sending RS Distribution a copy of the PFSA for review did not include a copy of the November 24 memo. It was the hard copy subsequently couriered to RS Distribution for signature on or about December 1, 2014 that apparently included a copy of that memo. It is the evidence of the defendants that Saurette had already advised the defendants that he would sign the PFSA before he ever saw the November 24 memo.

[16] Saurette was produced as the representative of RS Distribution at the examination for discovery and at trial was cross-examined on some of his answers given on behalf of RS Distribution at the examination for discovery. At the examination it was his evidence that the only time a commitment by MTS on a minimum volume or global financial commitment in respect of the PFSA was at a negotiating meeting on October 22, 2014 with Shah and another negotiator for MTS, Guido Caputi ("Caputi"). Saurette states in the examination for discovery that although there were earlier discussions about that issue, the only time a commitment to that effect was made was at the one meeting on October 22, 2014. He stated in his evidence at trial that Chen was given that assurance and that he learned of that assurance from Chen.

[17] Chen had no notes of the October 22, 2014 meeting nor is there any internal RS Distribution documents as to any "numbers" in respect of that assurance. It is noted that Saurette was examined for discovery on January 24, 2019, and at that time stated that

no other assurances in respect of minimum volume or global financial commitments were made by the MTS negotiators after the meeting of October 22, 2014.

[18] However, Saurette and Chen testified at trial that there were two further telephone conversations between Chen and Shah after the October 22, 2014 meeting. Tabs 46, 47 and 48 found in the Agreed Book of Documents Vol. 1 provide evidence that certain telephone conversations did take place between the parties but those documents contain no record of or reference to the discussion of any minimum volume or minimum dollar commitments.

[19] Chen testified it was during those telephone conversations that Shah told him that a "minimum commitment" would be coming. Chen testified that Shah told him during the October 27, 2014 telephone meeting that there would be a separate document setting out a total dollar value and that he advised Saurette of that after the telephone meeting. Chen testified that in respect of the telephone conversation with Shah and Saurette on October 28, 2014, that Shah advised the total dollar guarantee by MTS would come on a separate document (Tab 47 Agreed Book of Documents Vol. 2).

[20] Furthermore, Chen testified that in a telephone conversation between Shah and himself on October 29, 2014, there was an "understanding" that the total dollar guarantee would come in a separate document. However, neither party produced any notes made in the course of the 2014 contract negotiations indicating anything about a minimum commitment being made by Shah or any of the other negotiators at that time or at any other time in the course of those negotiations.

[21] It should be noted Chen also testified that Shah told him early in the PFSA negotiations, the PFSA was to be a new agreement and not a renewal of the previous contract between the parties. He stated she wanted everything included in one agreement in order to "clean up" the contractual relationship.

[22] This is in fact consistent with Shah's e-mail to Chen dated July 22, 2014 at 11:15 a.m. where she attached a "clean version of the RS Distribution Agreement and Schedules A, B, C and D." (Tab 59 Book of Agreed Documents Vol. 2). Shah goes on to explain to Chen in the same e-mail that:

> As a bit of background, we have consolidated the original agreement and all the amendments and then made our changes to the attached agreement. I would also like you to be aware that I have not received comments from all of our internal groups as it relates to the agreement and the associated schedules. Lastly, the agreement and schedules are subject to final legal review and approval.

[23] Chen's explanation for Shah's change from wanting everything in one document to her stating in October that she wanted to have the minimum dollar commitment in a separate document, was that Shah did not want to change the wording of the draft contract agreed to given the progress that had been made to date. Therefore, the minimum dollar guarantee would come in a separate document.

[24] It should be noted however that the evidence establishes that other substantive clauses were subsequently included in the new draft agreement after the October 22, 2014 date with the inclusion of the service level agreement provisions which would provide for penalties in the event of a failure by RS Distribution to maintain certain levels of service in the performance of the contract.

[25] The last reference to "minimum volumes" appears to have been removed from an updated draft version of the PFSA at paragraph 10.1. That draft was sent by e-mail to the various participants involved in the negotiations, including Chen and Saurette, on September 23, 2014. A subsequent draft set out at Tab 49A of the Agreed Book of Documents Vol. 1 and sent to Saurette and Chen by e-mail on November 3, 2014, did not mention any minimum guarantee. These changes apparently elicited no specific written response by those acting on behalf of RS Distribution in the days following September 23, 2014, when the draft with the "crossed out" deletion was sent to RS Distribution or upon receipt of the November 3, 2014 draft by those acting on behalf of RS Distribution.

[26] In e-mails from counsel for the plaintiff to counsel for the defendants, dated December 6 and December 7, 2021, a few days before this trial, the defendants were advised that contrary to earlier answers to questions made on behalf of RS Distribution at the examination of Saurette in January 2019, Chen had a telephone conversation with Shah on November 17, 2014, in which she told him that a minimum financial commitment from MTS would be coming. These e-mails between counsel were produced by counsel for the defendants as Exhibit A.

[27] As set out in Exhibit A, filed at the trial of this matter, in response to questions set out in an e-mail dated December 6, 2021 and addressed to plaintiff's counsel, counsel for the defendants asked that Chen provide answers to a number of questions in respect of a further telephone conversation Chen had about a "minimum commitment", including a "dollar amount". In a response dated December 7, 2021, counsel for the plaintiff

advised that the telephone call took place on November 17, 2014 between Chen and Shah. In the course of that telephone conversation, Chen wanted to know if MTS was prepared to make a "minimum financial commitment". Chen advised through plaintiff's counsel that the "amount of the minimum commitment was not stated" but that "Ms. Shah indicated this minimum commitment would be in a separate document". The December 7, 2021 e-mail from plaintiff's counsel also advises that "Mr. Chen has no notes of this call."

[28] The defendants state that the plaintiff did not correct the answers given at the examination for discovery until the defendants' counsel received the December 7, 2021 e-mail from the plaintiff's counsel. These corrected answers are at odds with Saurette's answers at his examination for discovery that there were no further statements after October 22, 2014 made by anyone on behalf of the defendants about any minimum volume or dollar commitments. The evidence is that Saurette and Chen state they were aware of not only the October 22, 2014 statements about minimum volume or dollar guarantees on or about October 22, 2014, but that Saurette knew before the end of 2014 about other calls and various minimum dollar commitments allegedly made by Shah after October 22, 2014.

[29] It should be noted that Shah was not called by either party to testify. As stated earlier, Shah is no longer in the employ of the defendants. According to Norris, after learning of these allegations shortly before the trial commenced from counsel for the plaintiff, he was able to contact her by phone at a location out of province. However, she left Norris with the clear impression that she was not willing to cooperate with legal

counsel in the defence of this action. The reason for her unwillingness to do so was not provided in evidence. Counsel for the plaintiff objected to the admissibility of that evidence on the basis that its admission would violate the rule against the admissibility of hearsay evidence. The court did not make any ruling on that issue once counsel for the plaintiff raised that objection, however as I will discuss later, it appears to me that those comments may well have been admissible for certain limited purposes even if not for the truth of what was apparently said to Norris by Shah about her unwillingness to cooperate with the defendants' legal counsel.

[30] The PFSA provides a number of terms and provisions which Bell Canada states defines the entire written agreement and excludes the November 24 memo as a part of the contract. It is instructive to set out some of the provisions of the PFSA for the purposes of these reasons.

[31] The PFSA along with the November 24 memo is found at Tab 20 of the Agreed Book of Documents Vol. 1. Leaving aside an analysis of the November 24 memo for the moment, the PFSA includes inter alia the following provisions:

a) Article 1 - **DEFINITIONS AND INTERPRETATION** - 1.1:

> 1.1 **Definitions** In this Agreement, unless the context requires otherwise, the following terms shall have the following meanings:
>
> ***"Agreement"*** means this agreement and the attached Schedules A, B, C and D as amended from time to time.

b) Article 1 - 1.3:

1.3 **Schedules** The following are the schedules attached to and forming part of this Agreement:

Schedule A – Prepaid Card Fees, Fulfillment Services and Procedures
Schedule B – Wireless Product Fees, Fulfillment Services and Procedures
Schedule C – Reverse Logistics Fee, Fulfillment Services and Procedures
Schedule D – Collateral Fees, Fulfillment Services and Procedures

c) Article 2 - **TERM** - 2.2:

2.2 **Option to Renew** Provided that RS Distribution is not in default of any term or condition of this Agreement, and provided that this Agreement shall not have been terminated, this Agreement shall continue for successive one-year Renewal Terms on the same terms and conditions, unless either party indicates, by at least ninety (90) days' written notie prior to the expiry of the Term or Renewal Term, as applicable, that it does not wish to renew or that certain terms need to be negotiated.

d) Article 5 - **COMPENSATION** - 5.1 – 5.5:

5.1 **Fees** In consideration of RS Distribution's performance of the Fulfillment Services on the terms and conditions set out in this Agreement, MTS shall pay the Fees specified in the attached Schedules to RS Distribution.

5.2 **Inclusive Fees** The Fees shall include and cover all costs incurred by RS Distribution in the provision of the Fulfillment Services, save and except for those costs for which MTS is responsible as provided in sections 4.1 and 4.2 of this Agreement, as well as hourly rates for labor that may be requested from time to time and not otherwise covered in this agreement, as follows:

Rate	Amount	Description
Hourly labour rate	$35/hour	For jobs such as flashing device, tasks listed in 3.7, breaking collateral pads/bundles for pushes, or other general jobs not described in this agreement
Hourly IT rate	$120/hour	For major IT works/changes, this fee shall exclude any hardware or software purchases

5.3 **Taxes** All Fees are exclusive of applicable sales, commodity and value-added taxes.

5.4 **Invoices** MTS shall not be obliged to pay any Fees to RS Distribution until RS Distribution has submitted a monthly invoice to MTS relating to the Fees payable by MTS in respect of the Fulfillment Services. RS Distribution's invoices shall itemize the applicable Fees before taxes, the amount of taxes, RS Distribution's Goods and Services Tax registration number, and such other information as reasonably may be requested by MTS. Provided that an invoice is satisfactory in both form and content to MTS, MTS shall pay the undisputed invoice within fifty (50) days from the receipt of the invoice from RS Distribution.

5.5 **Disputed Invoices** MTS shall not be obligated to pay an invoice for which MTS disputes the accuracy, provided MTS gives notice of the disputed invoice to RS Distribution within thirty (30) days of the receipt of such invoice. The parties shall use their best efforts to resolve any such dispute in a timely and commercially reasonable manner. Notwithstanding that an invoice may be in dispute, RS Distribution shall be obligated to continue to provide the Fulfillment Services in accordance with the provisions of this Agreement.

e) Article 10 – **TERMINATION** – 10.1 and 10.4:

10.1 **Termination without Cause** Notwithstanding any provision of his Agreement, either Party shall have the right to terminate this Agreement at any time without penalty on twelve (12) months written notice to the other Party.

10.4 **Transition** Upon the expiration or termination of this Agreement, RS Distribution shall, at the request of MTS, cooperate in good faith and assist MTS in ensuring MTS, or a third party designated by MTS, shall have the ability to manage and distribute the Products including but not limited to storing, processing of orders for the Products, inventory management, tracking and reporting, activation of the Products where applicable, Kitting and Assembly, and any other activities relating to the management and distribution of the Products. Both parties agree to utilize reasonable efforts to minimize the costs associated with the transition plan and ensure a smooth and orderly transition with minimal impact to MTS's customers, Distributors and business operations.

f) Article 13 – **GENERAL PROVISIONS** - 13.1 and 13.2:

13.1 **Waiver** No term or condition of this Agreement may be waived by either party without the express written consent of the other, and forbearance or indulgence by a party in any regard whatsoever shall

> not constitute that party's waiver. No consent or waiver shall be effective unless made in writing by an authorized officer of the party.
>
> 13.2 **Entire Agreement** This Agreement cancels, replaces and supersedes as of its effective date all existing agreements and understandings, written or oral, between the parties relating to the subject matter of this Agreement. The whole contract between the parties is contained in this Agreement and no preliminary proposals, written or oral, form any part of this Agreement. This Agreement may not be amended or modified except by mutual agreement of the parties in writing.

[32] RS Distribution states at paragraph 7 of its Updated Statement of Claim that the November 24 memo is an "integral part of the Agreement" but in the alternative states at paragraph 7A of its Updated Statement of Claim that the November 24 memo constitutes "a collateral agreement" between the plaintiff and the defendants, "pursuant to the representations of MTS, containing the minimum financial obligation set forth in the Memo".

[33] The following observations about the November 24 memo can be noted:

a) The memo is from Bounket, MTS in-house legal counsel, addressed to Shah with the subject matter of the memo stated as "Product Fulfillment Services Agreement between R.S. Distribution Services Ltd. and MTS Inc." In the memo legal counsel advises Shah in the first and second paragraphs of the memo:

> Please find attached the above-noted Product Fulfillment Services Agreement. The signing page has my initials to indicate legal review of the Agreement has occurred. Please initial the approval box and then make the necessary arrangements for the appropriate person within MTS to sign on behalf of MTS Inc., being mindful of the authority level requirements for internal signing as set out in the MTS Financial Authorization Policy.
>
> Once the Agreement has been signed by both parties, please forward MTS's copy of the signed Agreement to my attention.

b) Following the opening two paragraphs of the memo, Bounket summarizes the "attached" agreement by setting out the parties, the term of the agreement, the subject matter of the agreement and the financial obligations imposed by the agreement. In respect of the financial obligations Bounket states:

> Article 5 (Compensation) specifically sets out the payment terms of the Agreement as referred to in the attached Schedules. The approximate value of the Agreement for the 3 year term is $3,778,486.00 for the 3 year term.

c) The memo concludes with the following two paragraphs which in turn are followed by Bounket's signature and designation as legal counsel:

> The Agreement and Schedules contain business terms which the business prime has advised are acceptable. I have only reviewed those business terms which the business prime has requested input on.
>
> Nadine Shah, Strategic Sourcing Marketing is responsible for the administration of the Agreement which responsibility includes ensuring that the obligations of each part under the Agreement are being met on an on-going basis. As a matter of course, the legal group will not follow up further on these administrative matter. If you have any, please call me at your convenience.

THE POSITION OF THE PLAINTIFF

[34] It is the plaintiff's position that although the PFSA was set to run until November 30, 2017, the defendants breached the PFSA by terminating the contract prematurely in or about June 2017.

[35] According to the plaintiff the main issues that the court needs to determine in this matter can be summarized as follows:

a) What constitutes the entire agreement between the parties in this dispute? Is it limited to the Production Fulfillment Services Agreement included at Tab 20 of the Agreed Book of Documents Vol. 1, or is the November 24, 2014 memorandum, which is also found at Tab 20 of the Agreed Book of Documents Vol. 1, also a part of the PFSA the parties executed on December 1, 2014?

   It is the plaintiff's position that the November 24 memo constitutes an integral part of the entire agreement between the parties. In the alternative, the plaintiff argues that the November 24 memo is a collateral agreement between the parties. The plaintiff states that this collateral agreement arose as a result of the representations made by one or more of the MTS negotiators during the negotiations between the parties. In this respect the plaintiff relies chiefly on comments allegedly made by Shah whom the plaintiff alleges assured the plaintiff's representatives that although no minimum volume or dollar guarantees were to be included in the PFSA, a minimum dollar guarantee would be provided to the plaintiff on a separate document.

b) Were misrepresentations made to RS Distribution by the defendants regarding minimum volume or dollar guarantees which induced it to sign the agreement between the parties? The plaintiff maintains that it was induced to enter into the PFSA with the defendants on the basis of misrepresentations made to its representatives by the defendants' negotiators regarding a minimum volume or dollar guarantee during the course of the negotiations.

c) Did the defendants breach the PFSA between the parties by purporting to terminate the PFSA in an unauthorized manner? It is the plaintiff's position that the defendants improperly terminated the PFSA by proceeding as they did. In particular, the plaintiff takes issue with the notification and process set out in the letter May 9, 2017 (Tab 105 of the Agreed Book of Documents Vol. 2) sent by Norris on behalf of Bell Canada to RS Distribution.

d) Did the defendants' course of conduct in refusing to honour minimum financial guarantees established by the PFSA or the collateral agreement constitute a breach of the defendants' duty of good faith in carrying out its obligations under the agreement which the parties reached. It is the plaintiff's position that the defendants breached that duty and accordingly are liable to the plaintiff for damages.

THE POSITION OF THE DEFENDANTS

[36] The defendants take the position that the agreement between the parties consists of the PFSA and does not include the November 24 memo. The defendants similarly deny that the November 24 memo constitutes a collateral contract between the parties.

[37] The defendants state that the plaintiff's claim, as evidenced by the pleadings in this matter, has evolved from the initial position that the November 24 memo is an integral part of the agreement between the parties to include an additional alternative position that the November 24 memo constitutes a collateral agreement between the parties.

[38] The defendants argue that initially there was no mention in the pleadings of a collateral contract or any claim for misrepresentation arising out of the meetings held between representatives of the parties on various dates, including October 22, 2014, October 27, 2014 or November 17, 2014. It was only when the pleadings were amended and filed on December 7, 2021 by the plaintiff, that the issue of a collateral contract was pleaded.

[39] The defendants point out that until December 6, 2021, a week before trial, the only claim advanced by the plaintiff in respect of representations made by the defendants' negotiators was made by Saurette on behalf of the plaintiff at the examinations for discovery that took place on January 24, 2019. At that time, he stated that a verbal commitment was made by Shah and Caputi on October 22, 2014, that they would come back to the plaintiff with some sort of minimum commitment. At that time there was no allegation of any other time when the defendants stated that they would come back with any minimum commitment. In fact, the answer of Saurette at the 2019 discovery was that October 22, 2014 "was the only time" that this type of reference to coming back with a minimum commitment was made.

[40] The defendants state that even though Saurette states he knew of the additional calls when or shortly after when these commitments were allegedly made in 2014, it was not until the week before the commencement of this trial that the defendants were alerted to these other allegations relating to minimum guarantees.

[41] Similarly, although neither Saurette or Chen had any notes concerning these commitments and the dates on which they were made, Chen testified as having a clear

recollection of these commitments being made during the telephone calls in the month or so subsequent to October 22, 2014. It is the position of the defendants that while Shah and Caputi may have made general comments in respect of the concept of "minimums", there was never any number raised and no promise made. The defendants take the position that the testimony regarding this recollection of commitments relating to guarantees is a fabrication.

[42] The defendants point out that it is on or about November 3, 2014, subsequent to the October 22, 2014 meeting, that the last reference to any "minimums" was removed from the PFSA.

[43] The defendants point out that Chen testified that Shah told him MTS wanted the PFSA to consolidate the prior agreements and amendments and yet states that shortly afterwards Shah stated that MTS would provide the plaintiff with minimum guarantees in a separate document. The defendants state that the explanation by the plaintiff that the defendants did not wish to include the minimum guarantees in the new draft contract because of the progress made in the negotiations does not make sense in light of the fact that substantial amendments to the new draft in the form of the service level agreement as well as additional amendments were still being made at the time.

[44] The defendants point out that there is no reference anywhere in the documentation during that time to any minimum financial or volume guarantees. The defendants state that the specific wording of the PFSA precludes the incorporation of any other oral or written communications such as those being advanced by the plaintiff into the agreement between the parties.

[45] As to whether the November 24 memo specifically is a collateral contract, the defendants state that the memo contains none of the essential provisions necessary to establish a contractual relationship. In respect of misrepresentation, the defendants take the position that the essential requirements to ground liability on the part of the defendants have not been established by the plaintiff. Finally, the defendants take the position that there has been no breach of the PFSA by the defendants nor has there been any bad faith giving rise to liability established by the plaintiff in respect of the manner in which the defendants carried out their obligations under the PFSA. The defendants state that no issue of bad faith arises where they are simply carrying out their obligations and advancing their rights under the PFSA.

ANALYSIS AND DECISION

I. The Failure to call Shah as a Witness

[46] Before I address the more general issues raised by the parties in this action and summarized in the context of identifying their positions, I wish to deal with the request by the plaintiff that the court draw an adverse inference against the defendants arising from the failure of the defendants to call a former employee, Shah, to testify.

[47] I must state that I find it passing strange that the plaintiff makes this request given that according to the evidence of Saurette, its main witness and the principal officer of RS Distribution, he was aware of various significant and seemingly favourable representations made by Shah to the plaintiff's representatives since 2014. After failing to disclose these allegations over the course of seven years, even when RS Distribution had a specific opportunity to do so at the examinations for discovery, the court is now

asked to make an adverse inference against the defendants for failing to call this former employee.

[48] In his testimony, Norris recounted his efforts to locate Shah on the eve of the trial after having been notified about statements apparently made by Shah favourable to the position of the plaintiff which the plaintiff had not disclosed until then. Norris stated in his testimony that it was clear from his telephone conversation with Shah that she was unwilling to cooperate with the defendants' legal counsel, and when Norris asked counsel for the plaintiff whether he wanted to know what Shah told him, plaintiff's counsel stated that he did not.

[49] It is my opinion that this evidence would have been relevant and admissible for a limited purpose in the course of this trial. In law, an adverse inference may be drawn where a party litigant or a key witness fails to testify "without explanation". An adverse inference is a presumption that the reason a litigant did not testify or call a key witness is because the resulting evidence would adversely affect the litigant's case.

[50] The testimony of Norris in respect of what Shah told him about her unwillingness to cooperate with the defendants' legal counsel in this matter appears to me to be relevant and admissible in providing an explanation as to why she was not called. The admission into evidence of this testimony for the limited purpose of assisting the court in determining whether an adverse inference should be drawn against a party does not, in my opinion offend the rule against the admission of hearsay evidence when provided for the purpose of offering an explanation as to why the witness was not called. In any

event, when counsel for the plaintiff objected to Norris repeating Shah's comments in court, the statements made by Shah were not provided.

[51] However, even if I am wrong concerning the admissibility of the particulars of the testimony of Norris relating to the reason for Shah's unwillingness to cooperate with legal counsel, I am prepared to deal with this matter on the very prudent and practical basis articulated by DeGraves J. in ***Vita Credit Union Ltd. v. South East Livestock Ltd***., 2000 MBQB 49, 146 Man.R. (2d) 40 (QL). In that case DeGraves J. dealt with the situation where a key witness who had knowledge relating to the transactions being scrutinized by the court was not called by either party even though he was a competent and compellable witness. DeGraves J. held as follows when asked to make an adverse finding against one of the parties for its failure to call the witness:

> **34** No doubt, experienced and competent counsel (and the Court certainly has had the benefit of such counsel in this case) having a hard choice to make considered the strategy of their case and decided against calling Reimer. The Court should be loath to interfere with or to make any adverse inferences arising from that decision. [Sopinka, Lederman, Bryant, The Law of Evidence in Canada, 2nd ed. (Toronto: Butterworths, 1999) s. 6.321 (p. 297), Lambert v. Guinn (1994), 1994, 110 D.L.R. (4th) 284 (Ont. C.A.) at 287 and 288 and Ritchie v. Thompson (1995), 35 C.P.C. (3d) 333 (N.B.C.A., Ryan J.A. for the Court)]
>
> **35** Accordingly in this case it would not be appropriate to impose any presumptions. The Court must make the necessary findings on the evidence as presented and the reasonable inferences to be derived from that evidence.

[52] Similarly, I have the benefit of very able counsel in this case, and had the plaintiff made the disclosures concerning statements allegedly made by Shah in a much timelier fashion, the failure to call her might have resulted in a different ruling. However, in the case at bar, and based on the known circumstances here, it would not be appropriate to rely on this presumption. As in the case of ***Vita Credit Union Ltd.***, the court will make

the necessary findings on the evidence as presented and the reasonable inferences to be derived from that evidence.

Does the November 24 memo form an integral part of the 2014 contract?

[53] It is clear from a consideration of the November 24 memo that it is a document that stands separate and apart from the PFSA to which the parties agreed. Furthermore, an examination of the November 24 memo as a whole leads to the unavoidable conclusion that it was not created for a purpose intended to establish or govern a binding legal economic relationship between the parties. The intent of the document is clear: it is to provide a legal review of the provisions of the PFSA in order to satisfy the internal administrative obligations established within MTS before a contract could be approved and executed by the appropriate officers or employees of MTS. However, it is not itself a part of the legal agreement.

[54] I draw this conclusion on the basis of a number of observations.

[55] The memo is from Bounket, MTS in-house legal counsel and addressed to Shah, one of the main MTS negotiators, with the subject of the memo identified quite specifically as the PFSA or Production Fulfillment Services Agreement, the project on which Shah had been working. The Production Fulfillment Services Agreement is identified as being attached to the November 24 memo and does not suggest in any way that the November 24 memo is a part of the Production Fulfillment Services Agreement. Indeed, it clearly provides direction to Shah as to what steps need to be taken in order to ensure that the "attached" document, the Production Fulfillment Services Agreement is signed by the appropriate internal officer or employee as established by the MTS

Financial Authorization Policy. Furthermore, Bounket directs Shah to send him a copy of the Agreement once both parties have signed it.

[56] Once those administrative directions have been provided to Shah by Bounket, under the heading "Agreement Summary" Bounket goes on to summarize the PFSA in the November 24 memo by setting out the parties to the Agreement, the term or length of the Agreement, the subject matter of the Agreement and finally the Financial Obligations that the Agreement establishes. In that summary Bounket points out that it is Article 5 of the Agreement that "**specifically** sets out the payment terms of the Agreement as referred to in the attached Schedules." (***emphasis added***) In the next sentence Bounket then states that the "***approximate*** value of the Agreement for the 3 year term is $3,778,486.00 for the 3 year term." (***emphasis added***)

[57] It is clear from a consideration of the November 24 memo as a whole that it does not constitute an integral or any part of the PFSA. Similarly, it is clear that the summary of the PFSA made by Bounket in respect of the financial obligations that arise under the "Agreement" is a specific reference to the obligations created by the PFSA and that the determination of the "approximate" value of the PFSA is calculated on the basis of the "specific" financial commitments made in the PFSA and the Schedules attached thereto.

[58] Ultimately the specific value of the PFSA in terms of the dollar amount received by RS Distribution from MTS is dependent upon the services provided by RS Distribution in accordance with the PFSA, which services are not a fixed or guaranteed amount under the provisions of the PFSA. The position by Saurette in his testimony that despite the use of the word "approximate" the minimum dollar value of the PFSA for the 3 year term

is $3,778,486 is simply not sound when considered in the context of the November 24 memo itself or in relation to the specific provisions of the PFSA.

[59] While not necessary for the purposes of these reasons, I would also point out that under Article 13.2 of the PFSA the parties agreed:

> 13.2 **Entire Agreement** This Agreement cancels, replaces and supersedes as of its effective date all existing agreements and understandings, written or oral, between the parties relating to the subject matter of this Agreement. The whole contract between the parties is contained in this Agreement and no preliminary proposals, written or oral, form any part of this Agreement. This Agreement may not be amended or modified except by mutual agreement of the parties in writing.

[60] I find that the whole contract between the parties is set out in the definition of Agreement found at Article 1.1 of the Agreement. This includes the document described as the Product Fulfillment Services Agreement and the attached Schedules A, B, C and D as amended from time to time but does not include the November 24 memo. However, if it is necessary to do so, I hold that the November 24 memo falls outside of the scope of the "Entire Agreement" as set out at Article 13.2 of the PFSA and therefore not a part of the contract between the parties formally executed on or about December 1, 2014.

II. Is the November 24 memo a collateral contract binding on the parties?

[61] It is my opinion that the November 24 memo does not form a collateral contract binding on the parties. As stated earlier, the November 24 memo is an internal MTS legal review of the PFSA which was conducted by in-house MTS legal counsel to ensure that various internal policies, including the MTS Financial Authorization Policy, are complied with. It is clear from a reading of that document that it is a legal review of a contractual document, and not a part of the contractual document itself.

[62] It is also noted that RS Distribution per Chen knew a legal review was a necessary step in the internal MTS approval process before a contract of this nature could be approved by MTS. (See e-mail to Chen dated July 22, 2014 found at Tab 59 of the Agreed Book of Documents Vol. 2) It is not a separate contractual obligation that bound MTS to a minimum dollar guarantee in respect of the services to be provided pursuant to the PFSA.

[63] As I stated under the previous heading, an examination of the November 24 memo as a whole lead to the unavoidable conclusion that it was not created for a purpose intended to establish or govern a binding legal economic relationship between the parties. The intent of the document is clear: it is to provide a legal review of the provisions of the PFSA in order to satisfy the internal administrative obligations established within MTS before a contract could be approved and executed by the appropriate officers or employees of MTS. It is not a part of the legal agreement nor is it a separate document evidencing a collateral agreement between the parties.

[64] I find there is no evidence of a collateral agreement between the parties as alleged by the plaintiff in its pleadings or otherwise.

III. Misrepresentations made to the Plaintiff

[65] The plaintiff argues that misrepresentations were made to RS Distribution by the representatives of MTS regarding minimum volume or dollar guarantees which induced it to sign the agreement between the parties.

[66] In order to be successful on a claim for damages for misrepresentation, the Supreme Court of Canada held in ***Queen v. Cognos Inc.***, [1993] 1 S.C.R. 87 (S.C.C.) (QL) at para. 33, that:

> … The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted. …

[67] While I have no doubt that there was some general discussion about minimum volume or financial guarantees at some point between the parties during the course of the negotiations leading up to the finalization of the PFSA, I am satisfied that these discussions did not involve any specific representations to RS Distribution by the MTS negotiators that there would be any minimum volume or minimum dollar guarantees.

[68] In this respect I would specifically note that it was only on the eve of trial that the plaintiff disclosed that there were allegedly specific guarantees of this nature made, highly favourable to its position, even though one or both of the witnesses called on behalf of the plaintiff claimed to be aware of these commitments being made by MTS representatives as early as 2014. One would have thought that commitments of the type alleged to have been made by the defendants' representatives on a number of occasions would have been disclosed as soon as possible by the plaintiff in an attempt to bring this legal dispute to a speedy conclusion. Yet, even when questioned about commitments of this nature at the examination of discovery in 2019, Saurette was only able to recall one time in October 2014 when he stated a verbal commitment had been made by the MTS

negotiators to come back with "some sort of minimum commitment". Even at that meeting, which Saurette stated occurred on October 22, 2014, no actual number was discussed and that the commitment made by Shah and Caputi, according to Saurette's testimony at trial, was to take the concept of an "overall number" back to MTS.

[69] Examining the course of the negotiations in their totality, both through the testimony of the witnesses and the examination of the documents included in the Agreed Book of Documents, I am satisfied that these recollections of commitments of this nature by the witnesses produced by the plaintiff are fanciful reconstructions and not what actually happened in the course of the negotiations. I find that no representations as to minimum volume or financial guarantees were made by MTS representatives during the course of the negotiations which induced the plaintiff to enter into the PFSA or in the creation of a collateral contract between the parties.

[70] I find that the negotiators acting on behalf of MTS did not make any untrue, inaccurate, or misleading representations that induced the plaintiff to sign the PFSA. Nor can it be said that the plaintiff relied, in a reasonable manner, on any misrepresentation made by the defendants. As Saurette stated in his e-mail to representatives of MTS on December 1, 2014 (See Tab 57 Agreed Book of Documents Vol. 2) he was prepared to sign the PFSA before he even knew about the existence of the November 24 memo. He was not dissuaded about the lack of any minimum volume or financial guarantees in the PFSA nor was he induced to sign the PFSA on the basis of his reliance upon the November 24 memo. I find that the plaintiff did not rely, in a reasonable manner or any manner for that matter, on any misrepresentation by MTS or on the statements contained in the

November 24 memo that somehow found its way to Saurette's office with the hardcopy, but not the earlier electronic copy, of the PFSA when the hardcopy of the PFSA was sent to Saurette for signature.

IV. Did the defendants breach the PFSA between the parties by purporting to terminate the PFSA in an unauthorized manner?

[71] Under the terms of the PFSA, and in particular Article 2.2 thereof, either party may indicate "by at least ninety (90) days' written notice prior to the expiry of the Term or Renewal Term, as applicable, that it does not wish to renew …"

[72] By letter dated May 9, 2017, Norris, on behalf of Bell Canada gave formal notice to RS Distribution under Article 2.2 of the PFSA that Bell MTS "… does not wish to renew the Term of the Agreement (as defined in the Agreement) and that the Agreement will terminate effective November 30, 2017." (See Tab 105 of the Agreed Book of Documents Vol. 2). Furthermore, in the same letter Norris advised that "We will be in touch shortly to set up a face to face meeting for May 15, 2016 [sic] where we plan to discuss transition …".

[73] That letter was followed by a further letter from Norris dated June 14, 2017, in which he outlined the expectations of Bell Canada in respect of RS Distribution and its role in the winding up of the contract responsibilities over the remaining months of the PFSA until it ended on November 30, 2017.

[74] In my opinion Bell Canada properly exercised its right not to renew the PFSA in accordance with Article 2.2 of the PFSA. In accordance with Article 2.1 of the PFSA, the term of the PFSA expired on November 30, 2017. By providing notice in its letter of

May 9, 2017, more than 90 days prior to the expiration of the contract, that it did not wish to renew the term of the PFSA, there was no further obligation on the part of the defendants to continue that contractual relationship after November 30, 2017.

V. Has there been any bad faith giving rise to liability in respect of the manner in which the defendants carried out their obligations?

[75] The plaintiff takes the position that the court should require the defendants to carry out its contractual obligations under the PFSA in good faith. They argue that a minimal level of good faith obliged the defendants to let the remainder of the contract proceed by maintaining the volume of service in place prior to May 9, 2017. The defendants' failure to do so, the plaintiff argues, is bad faith and compensable by the payment of damages.

[76] It is apparent from an examination of the volume of service and the payment for those services under the PFSA prior to May 9, 2017, if the defendants were required to maintain that volume of service under the PFSA for the remaining months of the PFSA after May 9, 2017, the payments by the defendants for the volume of services to be provided by the plaintiff would approximate or perhaps even exceed the dollar amount set out in the November 24 memo, that is approximately $3,778,486.

[77] The defendants take the position that they carried out their obligations in accordance with the provisions of the PFSA and that the obligations placed upon the plaintiff during the months from May 9, 2017 to the end of the term of the PFSA, were also in accordance with the PFSA.

[78] Without determining what level of good faith is required by the parties in carrying out the provisions of a commercial contract of this nature, I find that there was no evidence of bad faith here. It appears to me that this argument by the plaintiff is simply another way of stating that a minimum volume or minimum dollar guarantee should be implied by the court after finding that there was no minimal volume or minimum dollar guarantee specifically included in the contractual relationship between the parties. Whether the defendants should have been more accommodating or flexible in winding up its contractual relationship with the plaintiff and, if so, the extent that they should have done so, is not, in my opinion, a matter that the court should be called upon to imply and fashion in this case. My review of the material and the conduct of the defendants leads me to the conclusion that they carried out their obligations in accordance with the requirements of the PFSA. There is no basis to conclude in this case that there was an additional obligation to carry out their contractual responsibilities in a manner which would in effect require them to adopt implied provisions in the PFSA that they specifically chose not to include.

CONCLUSION

[79] In conclusion, on the basis of the reasons provided herein, the action of the plaintiff is dismissed with costs in favour of the defendant Bell Canada. If the parties are unable to agree upon costs, they may be spoken to.

_____ J.