

CITATION: Faragher v. ProRich Seeds (2016) Inc., 2026 ONSC 4161
COURT FILE NO.: CV-22-00000077-0000
DATE: 20260716

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: David Faragher, Plaintiff

-and-

ProRich Seeds (2016) Inc., Defendant

BEFORE: Justice Spencer Nicholson

COUNSEL: Chris Justice for the Plaintiff

Alan Cofman for the Defendant

HEARD: October 28, 29, 30, 31 and November 3, 2025

REASONS FOR JUDGMENT

NICHOLSON J.:

[1] ProRich produces and distributes alfalfa, grass and other seed products.

[2] David Faragher worked for ProRich Seeds from 2002 until September 2021. The issues are whether he did so as an employee or an independent contractor, and what the consequences are, if any, arising from the termination of his relationship with ProRich. ProRich has asserted a counterclaim that Mr. Faragher owes it approximately \$168,000 based on an agreement it alleges was entered into between the parties in 2007 (“the October 2007 Agreement” or “Agreement” in these Reasons).

[3] This matter was tried before me as a Rule 76 simplified trial. Affidavits were filed and cross-examination ensued. There were a total of six witnesses, including the Plaintiff and five witnesses on behalf of the Defendant. Each party read-in evidence from examinations for discovery. I note that when evidence is read-in from examinations for discovery, it is admissible for the truth of its contents, as opposed to when such evidence is used to impeach a witness. Thus, if a party reads-in evidence that may be unfavourable to its case, it may be detrimental to the party reading in the evidence.

[4] On consent of the Defendant, the Plaintiff was granted leave to adduce his income tax returns despite not producing them until shortly before trial. The Defendant consented to the Plaintiff being granted leave to re-open his case under rule 52.10 for the limited purpose of

identifying his tax returns. The Defendant then cross-examined the Plaintiff with respect to those documents.

[5] I should also note that the Plaintiff attempted to adduce evidence from a doctor, Dr. D’Urzo, and his accountant, Mr. Lokhurst, by filing short letters authored by each of them. This was objected to by the Defendant, as inadmissible hearsay opinion evidence. I agree that those individuals should have been called as witnesses to put this evidence before the court and I have not considered it.

Evidence/Findings of Fact:

The Parties:

[6] ProRich Seeds (2016) Inc., is a successor company to ProRich Seeds. Mr. Faragher did work for both. ProRich’s principal is Tommy Faulkner (“Tommy”). There are also affiliated companies, including Mt. Elgin Dairy Farms Ltd., London Dairy Farms Ltd. and Sequin Farms Ltd.. Mt. Elgin was the original farm from which Mr. Faulkner and his family bought, raised and sold cattle. In 2006, this business was substantially transferred to London Dairy. They also bought and sold cattle through Sequin Farms. ProRich Seeds was a complimentary business created solely for the purpose of selling seeds.

[7] Benji Faulkner (“Benji”) is Tommy Faulkner’s son. Debra Pettman has been the bookkeeper for ProRich and its predecessors for approximately 40 years. Tommy, Benji and Ms. Pettman provided affidavit evidence and were cross-examined at trial.

[8] David Faragher was born on December 27, 1959. He was 61 years of age when his relationship with ProRich ended.

[9] Mr. Faragher is a cattleman. He has been involved with cattle his entire life, beginning in England. He came to Canada in the 1990s and his first job was milking dairy cows. He then returned to England and was managing a cattle farm for four or five years. He returned to Canada in the mid to late 1990s, working for a different cattle operation, preparing dairy cattle for sales. He then did hoof trimming on a full-time basis.

[10] In his trial evidence, Mr. Faragher attempted to describe his cattle as a “hobby”. However, Benji testified that he and Mr. Faragher sold cattle together for many years. Benji testified that he and Mr. Faragher bought and sold between 500 to 800 cattle over the years, including during the period of time when Mr. Faragher was selling seeds on behalf of ProRich. Mr. Faragher confirmed on his examination for discovery that he bought and sold cattle with Benji. Benji testified that this continued until 2016. Mr. Faragher also sold bull semen, according to Benji, from 2008 onwards. Benji testified that he witnessed Mr. Faragher sell thousands of doses of bull semen.

[11] In his tax returns, Mr. Faragher has declared thousands of dollars in expenses relating to livestock, including livestock purchases, feed, veterinary expenses and barn rent. I agree with the

Defendant that these expenses are disproportionate to a “hobby” and would not be deductible unless it was a “business”.

[12] Additionally, John Martin testified at trial that he had also been a co-owner of cattle with Mr. Faragher.

[13] I find, on the balance of the evidence, that Mr. Faragher was active in the business of buying and selling cattle during much of the time when he also sold ProRich seeds and that cattle were not simply a hobby. This is corroborated by the social media evidence adduced at trial showing many photographs of cattle affiliated with Mr. Faragher, even allowing for the fact that many of the photographs are duplicates, or show the same cows more than once. For example, Mr. Faragher is shown as a “Sale Contact” for a cattle sale occurring in February of 2011. He is also noted to be self-employed with “Far-away Holsteins”/“Faraway Holsteins”.

[14] Mr. Martin also testified to selling minerals to dairy farmers to be used in their animal feed. Mr. Martin was both a mineral salesman and distributor for a company called MaxActive. He was the area manager for Ontario. Mr. Martin testified that as of October 2020, Mr. Faragher was also a commissioned salesman for MaxActive, through to the fall of 2021. At trial, Mr. Faragher testified that he had not sold very much of these minerals, and it was “just on the side”.

[15] Accordingly, I find that Mr. Faragher was not exclusively devoting his time to ProRich from 2002 to September 2021. He was also involved in buying and selling cattle. He was, at least after October of 2020 until the fall of 2021, also selling minerals for MaxActive.

Mr. Faragher’s Duties With ProRich:

[16] The uncontroverted evidence is that Mr. Faragher was buying and selling cattle with Benji when it was suggested to him that he could also sell ProRich seeds. Accordingly, in approximately 2002, Mr. Faragher began to sell ProRich seeds on behalf of ProRich.

[17] Mr. Faragher would travel to various farms across Canada, mainly in Alberta, Manitoba and Ontario, selling seeds to farmers. According to Mr. Faragher, he was working exclusively for ProRich during this time, working 40-50 hours on average. His duties included driving around and selling seeds. He would also make and take phone calls to and from customers. He denied combining trips for selling seeds with his cattle business.

[18] The customers would order their seeds in the fall, for the following season. In the spring, the seeds would be delivered. Tommy and Ms. Pettman testified that Mr. Faragher would accompany the delivery drivers to the customers’ farms when the seeds were delivered.

The Financial Picture:

[19] In his trial evidence, Mr. Faragher denied that he was receiving only a commission from the start of the relationship, although he was unable to provide any particulars of what his income was at the beginning. Ms. Pettman, however, testified that Mr. Faragher’s seed commissions were

initially very low. She produced a handwritten Commission chart (Ex. LL to her Affidavit), for 2002 to 2003 showing total commissions of approximately \$450.00. In 2003-2004, the commissions were approximately \$10,500. Ms. Pettman has adduced, and I accept, notes that she wrote when she provided Mr. Faragher with some of his commissions for 2002 to 2004.

[20] In his affidavit, Mr. Faragher states that when he started working for ProRich in 2002, he was offered wages and access to a company car. In his Reply Affidavit, Mr. Faragher repeats that he was promised a steady wage by Tommy in exchange for giving up his roof (*sic—should be hoof*) trimming business. However, Ms. Pettman deposes that Mr. Faragher was not given a vehicle until after the October 2007 Agreement. I prefer Ms. Pettman's evidence. I find that Mr. Faragher was paid via commission up until the October 2007 Agreement, as demonstrated by the Commission summaries for 2002 to 2003 and 2003-2004, as well as the supporting notes.

[21] I find that on the evidence, Mr. Faragher was initially simply paid his commissions, 50% when he turned in the order form, and 50% when the customer paid, as deposed by Ms. Pettman. This continued until October of 2007.

[22] Both Tommy and Ms. Pettman testified that in October of 2007, there were minor disputes occurring with Mr. Faragher in respect of his commissions. Ms. Pettman testified that it was Mr. Faragher that wanted a firm arrangement in place with respect to "perks" like use of a car, a phone and travel expenses. Accordingly, she testified that the parties agreed to memorialize their understanding in a written document. Ms. Pettman testified that she was present and witnessed Mr. Faragher and Tommy "negotiate" their agreement. She took notes of their understanding, which she produced at trial. She then typed up those notes into an agreement that both men signed. She observed both men sign the October 2007 Agreement.

[23] Tommy could not recall negotiating this Agreement and deferred to Ms. Pettman's evidence concerning how the Agreement was reached.

[24] Mr. Faragher testified that he could not remember signing the Agreement, although he acknowledged that it did look like his signature. At trial, his evidence changed significantly from not remembering whether he signed the document to *denying* that he signed the document.

[25] It is acknowledged that neither party sought any legal advice about this Agreement.

[26] In its entirety, the October 2007 Agreement reads as follows:

"23-Oct-07

Original Deal with David Faragher-

As at October 23, 2007—we owe David to end of December 2006	\$8,500.00
plus- (est) expenses towards 2007—Dick to provide to end of Sep-07	\$15,000.00
Plus-5% commission on Scott Brethet and Keejse Poldvervart's orders	\$5,182.64

to end of May 2007	<u>\$6,000.00</u>
plus-Grey Area	
TOTAL CHEQUE	\$34,682.64

Moving Forward:

David Faragher gets 15-18% commission on his orders
5% towards people he starts and people who sell to his customers (Anton Heinzie, Dale Blenert, Keesje Polderverart and Scott Brethet)

This commission is collected as \$4,000 a month advance and balanced at ProRich Seeds's year-end—May 2008 and forward. He owes us or we owe him based on the actual commission amount.

We pay David Faragher's travel expenses—He had received \$15,000.00 to the end of September 2007 (estimated and to be balanced with Dick). In the future each month receipts are handed in and David Faragher is paid the following month.

Expenses Are—Telephone, Travel (Hotel, Rental Cars, Gas, Airfare) not Meals

David Faragher is provided a car to use and his insurance is paid by ProRich Seeds."

There are handwritten notations on this document, including at the bottom where it states

"As long as Dave works for ProRich." "Grey Area is a one time payment."

[27] I accept the evidence of Ms. Pettman with respect to this Agreement. I find as a fact that Mr. Faragher and Tommy discussed these terms and set them to writing before signing them. I find as a fact that Mr. Faragher signed this document, as evidenced by what he acknowledges appears to be his signature and the direct evidence of Ms. Pettman that she observed him sign the document.

[28] Furthermore, I find that the terms of this Agreement are sufficiently unambiguous.

[29] Although none of the witnesses could provide a precise date, I find that at some point between October 2007 and September of 2021, the parties agreed to increase the amount of the monthly advance to \$5,000 per month. Ms. Pettman believed that this was about three or four years after the Agreement was signed.

[30] In his affidavit, Mr. Faragher denies that there was any written agreement that stated that he would receive a commission. Mr. Faragher testified at trial that his understanding is that he would receive a \$60,000 annual salary, plus commission. I reject that evidence entirely. First of all, the plain intent of the Agreement was that Mr. Faragher was to receive \$4,000 per month in commission, as an advance, reconciled at year end. It was possible that his commission would

exceed the annualized amount and that he would receive a top up. However, the Agreement clearly does not state that he is to receive a monthly salary plus commission.

[31] Secondly, I heard no evidence that, in fact, Mr. Faragher was ever paid in such a fashion. Rather, he appears to have simply always received his monthly advance. There is also no evidence that any money changed hands at year end at any time as a result of either a deficit or surplus between what Mr. Faragher was entitled to in commissions pursuant to the Agreement and the amount he was advanced.

[32] Ms. Pittman testified that she did complete annual reconciliations. She produced into evidence annual statements for 2016-2017, 2017-2018, 2018-2019, 2019-2020, 2020-2021 and June 2021 to September 3, 2021. She testified that she would place the statement in envelopes with Mr. Faragher's monthly draw at the end of each year. These showed the "Commission Advanced" (\$60,000), and the "Commission Earned" during the same period, plus the "Deficit".

[33] Mr. Faragher denied ever seeing such statements. I reject his evidence in that regard in favour of Ms. Pettman's evidence.

[34] Ms. Pettman testified that for the most part, Mr. Faragher's sales generated close to the amount required to justify the advances that were being made to him in the years 2007 to 2016. She and Tommy testified that they were not concerned with any minor discrepancies between what he actually generated and what he earned pursuant to the 2007 Agreement. Ms. Pettman stated in her affidavit that "we would simply roll the balance forward, one way or the other".

[35] There were, however, annual deficits starting in 2016 between the amount Mr. Faragher was advanced and what he was entitled to as commissions, as follows:

2016-2017	\$36,132.20 deficit
2017-2018	\$27,979.52 deficit
2018-2019	\$12,561.11 deficit (including an unrelated \$4,500 advanced)
2019-2020	\$32,062.71 deficit
2020-2021	\$45,362.10 deficit
June 2021-Sept. 2021	\$13,972.09 deficit

[36] Ms. Pettman has adduced commission summaries for those years, except one, showing the commissions that Mr. Faragher was entitled to. I accept those documents as authentic, and the numbers as set out therein as accurate. They were not contested by Mr. Faragher. Ms. Pettman testified that each year she would provide a copy of the commission summaries to Mr. Faragher. I accept her evidence.

[37] Ms. Pettman testified that pursuant to the 2007 Agreement, ProRich could have demanded payment from Mr. Faragher given he had been overpaid. She testified that "probably she decided not to pursue it and Tommy authorized her to not try to collect it". However, she "did not forget about these numbers". She agreed that ProRich did not strictly enforce the Agreement. She believed that Mr. Faragher's sales would improve and that he would be able to make up the

difference. She deposed that by the end of 2020, she was very concerned about Mr. Faragher's sales, but nonetheless continued to have confidence that he would continue to sell and improve the balance owing.

[38] Tommy testified that he agreed with Ms. Pettman's evidence on this issue. He agreed that ProRich did not demand repayment of the advances from Mr. Faragher until August of 2021 when things came to a head. Tommy did agree in cross-examination, that the 2007 Agreement does not specifically state that any deficit or surplus would be rolled into future years.

[39] The Defendant relies on the T4As that ProRich issued which show the money paid to Mr. Faragher as self-employed commission. One of the interesting flaws in the Defendant's case is that ProRich did issue these T4As for the full amount of \$60,000 even after it was aware that Mr. Faragher was running a deficit. If Mr. Faragher's actual earnings were limited to what he generated in commissions, rather than this salary, the T4As should have reflected that income, not the amount of the advances.

The Termination of the Relationship:

[40] Ms. Pettman describes in her affidavit that throughout 2021 she had conversations with Mr. Faragher about how his sales were going. According to her, Mr. Faragher would placate her by saying that he was having a "banner year".

[41] However, by August of 2021, Ms. Pettman deposed that she and Tommy spoke to Mr. Faragher that ProRich would not continue to pay him monthly draws if his sales did not justify those advances. Ms. Pettman testified that they asked Mr. Faragher to meet with them at ProRich's office. They had already given him his advance for August 1, 2021. Mr. Faragher was demanding his September 1, 2021 cheque.

[42] A series of text messages followed between Mr. Faragher and Ms. Pettman, as well as between Mr. Faragher and Tommy. Mr. Faragher testified that he was typing his texts, although his wife, Angela, was with him and involved in crafting the communications.

[43] Mr. Faragher indicated in his texts that he needed his cheque as he has bills to pay. He wrote "Now you are causing upset to me and my wife who is not well" and "So are you constructively dismissing me". Later, he texted, "I not going through this every month I do not deserve this treatment I hard worker (sic)".

[44] Mr. Faragher did not include a lengthier text that he sent in his affidavit, which was provided by the Defendant. It indicates that he had customers that should go into collection. He intended to do a booth for ProRich and had some orders that he would get into them by October. He claimed to have new customers so ProRich "does not need to hold a gun to my head".

[45] Ms. Pettman texted to Mr. Faragher "I am not playing games (in response to Mr. Faragher asking her to quit playing games) you aren't an employee and your sales have been not good. I want to work something out with you or I will have to talk to Tommy and that isn't going to be

good". It was suggested to Ms. Pettman that this was a threat. I agree with her response that this does not constitute a threat of any consequence.

[46] There is a text from Tommy that stated "I own the company any am asking you to call and talk to me. Deb is not the boss. You need to and it will be very helpful to do so before you see Deb". Tommy also texted "Check out your paystubs. They are T4A's. That is how a commission salesman is paid. Look how you file your taxes. That is commission. It's not wages. We sell seed all summer. Take your orders to Deb."

[47] Tommy further texted "Look at your T4's. Commission income. Not wages. If you were working for wages we would tell you what to do every day. We do not. We don't control you. You buy cattle, show cattle and trim feet and do lots of other things than just work for us. I think you have money troubles and Angela is telling you that you work for wages which is untrue. I don't want you to quit. You need to work it out with us. If you want to quit just return our \$50,000." Mr. Faragher responded, "Stop this horseshit".

[48] Mr. Faragher deposes in his affidavit that Tommy was "disrespectful, aggressive, and made threats of violence" during verbal conversations that occurred at this time. He states that Tommy said that if he did not repay \$50,000, he would break Mr. Faragher's legs. Mr. Faragher sent a text to Tommy in which Mr. Faragher stated, "Tom this morning you did you were gonna sue me and break my legs that is a threat". Tommy responded, "you heard wrong. No threats. On the contrary explain to you there are no threats".

[49] In his testimony, Tommy denied making any threats. He explained that he said, "it is not like I am going to break your legs or anything". He explained that Angela was with Mr. Faragher when the call happened and she went "ballistic" when he made that comment. In hindsight, Tommy testified that he should have used a different expression but he wanted to make it clear that it was simply a business issue.

[50] Remarkably, during the breaks in the trial, I understand that the police located in the courthouse had to become involved in a verbal altercation between Angela and Tommy. Tommy was cross-examined on this issue.

[51] I heard no evidence at trial from Angela, who was in position to corroborate Mr. Faragher's evidence but notably did not.

[52] I will discuss credibility at length below. Given how I found Tommy to be as a witness, combined by my concerns with Mr. Faragher's credibility, and the lack of any evidence from Angela, it is difficult to assess the alleged threats by Tommy to break Mr. Faragher's legs. It is entirely possible that Tommy stated that "it is not like I am going to break your legs" and that Mr. Faragher and Angela interpreted that as a threat and it was not intended as such. I also cannot rule out that he made a more specific comment about breaking legs. However, on balance, I am not satisfied with the Plaintiff's evidence on a balance of probability that Tommy in fact threatened to break Mr. Faragher's legs.

[53] Tommy testified that when he said “\$50,000” in his texts, it was his belief that this was the amount outstanding. Ms. Pettman testified that she provided this number to Tommy but she did not have the numbers in front of her. She plucked that number out of her head.

[54] Mr. Faragher testified that Tommy told him he was “constructively dismissed”. Tommy denied ever saying to Mr. Faragher that he had been constructively dismissed. I note that Tommy has a law degree. It would make no sense for an employer to ever tell an employee that they were constructively dismissed, which only benefits the employee. I do not find that Tommy told Mr. Faragher he was constructively dismissed. Rather, I find that this expression emanated from Mr. Faragher or Angela.

[55] On September 17, 2021, Tommy wrote a letter to Mr. Faragher as follows:

“In response to your text on Friday, September 10, 2021, you are not entitled to a termination letter as you are not an employee of ProRich Seeds. You are self-employed seed salesman.

We expected you to come to the office on Friday, September 3, 2021 at 9 am to bring your order books and to hand in the orders you had confirmed for the approaching Spring 2022 seed season. You did not come and therefore we accepted this as your resignation as a self-employed seed salesman.

We request that you at this time—

- hand in your confirmed orders for the approaching Spring 2022 season season (sic)
- return your vehicle and telephone
- return your advanced drawings that you were not entitled to, which total \$145,909.93.”

[56] At trial, it was ProRich’s position that the amount owing by Mr. Faragher was, in fact, \$168,069.73.

[57] Mr. Faragher testified, very poorly in this regard, that he was not given an opportunity to submit the order forms for 2021-2022 because of his constructive dismissal but that he had a lot of orders pending. He testified that he did not turn the order forms in because he did not like the way he was treated. I found his evidence on this to be entirely unbelievable and reject it. Facing the termination of his position, I find that if he had order forms ready to be submitted he would have done so in order to save his “job”. I also would have expected him to produce these order forms at trial and he did not do so. Rather, I suspect that Mr. Faragher had few order forms to submit.

Miscellaneous Evidence Regarding Employee vs Independent Contractor:

[58] The parties referred to several pieces of evidence to establish whether Mr. Faragher was an employee of ProRich’s, or an independent contractor. I consider that evidence.

[59] There are two letters written to Mr. Faragher's accountant by Ms. Pettman. Mr. Faragher relies on the letter dated October 3, 2016, which reads as follows:

"TO WHOM IT MAY CONCERN,

David Faragher has been selling seed for ProRich Seeds Inc. since approximately 2002. He is commissioned salesperson, so his commission is based upon his sales. He at this time does receive from ProRich Seeds Inc. \$5,000 a month totalling \$60,000.00 a year."

[60] The Defendant has produced an earlier letter dated August 16, 2005, also to the accountant, which reads as follows:

"RE: DAVID FARAGHER

David is self-employed. He sells grass seed for us and his commission is approximately \$45,000.00 a year. In addition, he buys and sells cows for another one of our companies, Mt. Elgin Dairy Ltd. He makes additional commission from these sales also. This amount is an additional \$2,000.00 a month (minimum)."

[61] Frankly, very little, in my view, turns on either letter. As I will discuss, it is not determinative whether or not Mr. Faragher was paid solely in commissions. Contrary to Mr. Faragher's position, the October 2016 letter does not support the proposition that Mr. Faragher was an employee. It simply sets out his pay structure, although notably does not specifically refer to any reconciliation, which does appear implied. The August 2005 letter is more supportive of ProRich's position, given that Mr. Faragher is described as "self-employed". However, as the law makes clear, the label provided by the parties is also not determinative of their legal relationship.

[62] In Mr. Faragher's income tax returns, there is no employment income declared. Rather, in each of those years, Mr. Faragher has reported gross farming income, which consists of the \$60,000 from ProRich, plus various amounts received from the sale of cattle. He specifically describes "Other Income" as including "T4A Box 020, Self-employed commissions—ProRich Seeds \$60,000". He deducts various farming expenses, some of which I have previously described, and declares net farming income.

[63] The Defendant relies on the fact that it issued T4As showing self-employed commissions. Again, as I will discuss, it is not determinative to the question of whether a person is an employee or an independent contractor how a person treats income for income tax purposes.

[64] Tommy and Samuel Noach, who became manager of the salespersons for ProRich, prepared annual letters to their salespeople. Tommy testified that these were essentially cut and paste year to year. This is self-evident from reviewing the letters. There was an amendment to add information pertaining to COVID-19. Otherwise, the letters remained essentially unchanged. The Plaintiff argues that these letters constitute written policies and directions to ProRich's salespersons and are therefore evidence of an employer-employee relationship.

[65] Letters to the salespeople from the 2015-2016 season onward have been introduced into evidence. The letters invariably discuss the prices for the upcoming season and offer an explanation for any change in pricing. They describe new products that ProRich is offering for the upcoming season. The letters describe that the salespersons need to “follow the book prices”, and that “[c]hanges of any prices must be cleared with Deb at the ProRich office”. The letters advise which products will be eligible for bonus commissions and how discounts may be offered to customers. The letters instruct that if the salesperson “needs to confirm an order before mixing please mark the order accordingly, and clearly, and please follow up on it”.

[66] The letter for the 2020-2021 season is the first with any alteration of significance, as it instructs the salespersons to “[p]lease get e-mail addresses and write them on the order form as we are improving our software and this is essential. Please ensure when writing the e-mail address that the spelling is correct and legible”. Tommy and Mr. Noach testified that this was because of a change in how they wished to be able to communicate with their customers.

[67] The letter for the 2021-2022 season includes information about updates to the ProRich brochure and asks the salesperson to “please give them out”. There is a note that the website has been redone and is mobile friendly. They are launching a Facebook and Instagram page and they “ask you to tell your customers to follow us as this is a wonderful tool to connect between our company and them.” This letter also indicates that ProRich has made jackets and polo shirts for the salespersons and “we hope that you wear them”.

[68] There is also a request to the Salespeople, on a separate document that states “HELP US”. It provides some instructions on how to complete the Order forms properly because they waste a lot of time with orders not filled out correctly or completely. It also concludes with “LETS BEGIN TO USE MORE STANDARD MIXES!!!!!!”. Those *requests* are noted to be “critical” and “will help more than any of you can imagine”.

[69] It is noteworthy that the ProRich letters to the salespersons describe the customers as “your customers”. For example, in describing that prices have significantly increased, the letters state “Always know, if prices soften, though unlikely we will lower them and make adjustments to your customers. Don’t worry.”

[70] In my opinion, none of these letters establish that ProRich was an employer of the salespersons. As the company selling the product, it is not surprising that ProRich would set the pricing, and place constraints upon the discounts offered. No business could operate successfully if the salespeople were free to set their own prices and discounts. Otherwise, I find that the letters offer suggestions, not mandatory policies that must be followed, by the salespeople. They are largely to impart information to the salespeople to provide explanations for the customer.

[71] Tommy’s evidence was that there would not be consequences if salespeople did not follow the suggestions in the letter, unless there was significant deviation from the prices, which had never happened before.

[72] Mr. Faragher relies on the provision of clothing mentioned in the 2021-2022 letter as being a company “uniform” that is indicative of an employer-employee relationship. Mr. Noach and Tommy testified that it was not mandatory that the clothing be worn and that no salesperson was provided with enough of it to wear it on a daily basis. In fact, Mr. Faragher testified that he did not ever wear the jacket as it did not fit him, and he did not wear the t-shirt. He did wear the hat. Mr. Faragher also acknowledged during cross-examination that the pocket knife and hat were meant to be given to the customers.

[73] I note that these items of clothing were only provided to the salespersons late in the relationship between ProRich and Mr. Faragher. I do not find that he was given nor expected to wear a company uniform. The ProRich clothing does not assist Mr Faragher in establishing an employer-employee relationship.

[74] Mr. Faragher was given the use of a car and a cellphone, as per the October 2007 Agreement. The phone records indicate that this phone was also used by Mr. Faragher for his cattle transactions.

[75] The only other “tool” that Mr. Faragher had for completing the sales were printed brochures. I find that some of these were provided by ProRich, but also that Mr. Faragher made some of his own, claiming the expenses back from ProRich. From his Read-in evidence, Mr. Faragher indicated that he did his own marketing by blowing up pictures of ProRich products and showing them to farmers.

[76] I do note that Mr. Faragher was expected to ride with the delivery drivers to deliver the seed to his customers.

[77] As noted earlier, Mr. Faragher testified that he spent 40-50 hours per week doing ProRich work. Tommy could not say how much time Mr. Faragher expended on ProRich, although given his sales over the past few years, he had doubts about those hours. Ironically, this is some evidence that ProRich was not monitoring Mr. Faragher’s work as one might expect an employer to do of an employee. Tommy deposed that ProRich did not set working hours or conditions upon any of the salespersons. I accept that evidence, which is entirely consistent with Mr. Faragher’s evidence.

[78] The evidence was, and I find, that Mr. Faragher had his own existing customers, that he knew mainly through his experience with cattle. He was not provided with customers through ProRich, although Tommy did indicate that from time to time he would direct Mr. Faragher to a potential customer. ProRich did not assign any specific region or district to Mr. Faragher, and he was free to travel to customers as he pleased, with those expenses being covered by ProRich. From the Read-in evidence, Mr. Faragher admitted that he only was in communication with ProRich once or twice per week. He very rarely attended at the ProRich offices, only attending to pick up cheques approximately once per month.

[79] Finally, Ms. Pettman testified that ProRich does not have any employees on the payroll, although she later admitted that there are delivery drivers who would be employees. Mr. Noach, the current sales manager, who was a salesperson, testified that he was not an employee but an

independent contractor, which continued to the date of trial. However, as noted, this evidence seems largely based on the perception of these witnesses that commissioned salespeople cannot be considered employees, which is not an accurate understanding of the law.

Credibility:

[80] Before I review the law and apply it to my findings of fact, I will address credibility of the main witnesses.

[81] As is apparent from my findings of fact, I preferred the evidence of the defence witnesses over Mr. Faragher. In particular, I found Ms. Pettman's evidence to be entirely credible and reliable. I relied heavily upon her evidence in reaching my findings of fact.

[82] Mr. Faragher was a poor witness at trial whose evidence was, respectfully, suspect. He was argumentative and combative at times. His evidence was contradicted by documentary evidence that I found to be trustworthy. For example, although Mr. Faragher maintained that he was a salaried employee throughout his time selling seeds, the documents produced by Ms. Pettman show that he received meager commissions in the first two or three years, a proposition that I note Mr. Faragher agreed with during his examination for discovery. I reject any suggestion that the documents adduced by any of the defence witnesses were fabricated or that other evidence would have been better proof.

[83] I found Mr. Faragher's evidence about his cattle "hobby" to be totally unbelievable. I reject that it was his wife, Angela's business. There are social media documents that clearly connect Mr. Faragher, not Angela, to the cattle. The cattle are shown on Mr. Faragher's Facebook page, not Angela's. I accept the evidence of Mr. Martin and Benji with respect to the cattle business. Furthermore, I agree with the Defendant's argument that Mr. Faragher's income tax returns show expenses related to his cattle that far exceed what would be reasonable if Angela was maintaining the cattle as a hobby. Those expenses would not be business expenses claimed by Mr. Faragher.

[84] Mr. Faragher initially had no recollection of signing the October 2007 Agreement and thought he recognized his signature. During trial, this morphed into a flat out denial that he signed the Agreement. When he was asked to identify his handwriting on other documents, I found him to be unreasonably unreceptive to that request.

[85] In particular, Mr. Faragher struggled mightily to explain why he could not provide Order forms in 2021 when the matter blew up into the current dispute.

[86] It is not clear to me that Mr. Faragher has declared all of his income. He was very argumentative when questioned during his recall to the stand about his income tax returns, accusing the Defendant of lying about his taxes. I note that he was asked on examination for discovery to produce evidence that, in my view, was relevant, and did not do so. This includes documentary evidence about his cattle operations which are clearly relevant to the issue of whether or not Mr. Faragher could be considered a dependent contractor.

[87] Although I do not draw an adverse inference against the Plaintiff, I do note that Angela's evidence might have been corroborative of some of Mr. Faragher's evidence about the termination of his position as well as his cattle business. She did not testify.

[88] At times, it was my impression that Mr. Faragher was simply not particularly sophisticated, but there were times when I was of the view that his evidence was not truthful.

[89] By contrast, Ms. Pettman was an excellent, forthright and conscientious witness and I accept the majority of her evidence. I am alive to the fact that she is clearly affiliated with the Defendant. In fact, it is my view that she was an invaluable part of the Defendant's operation who was extremely well versed in how the company was managed. She was able to locate and produce documents that backed up her evidence. I accept that it was not possible to produce all of the evidence going back to 2002. I reject any assertion that she has fabricated any of the documentary evidence adduced.

[90] That being said, some of her evidence was based on her understanding of what, in law, constitutes an independent contractor or employee and she is not entirely correct in her views.

[91] Tommy was an interesting witness. He is, frankly, a blunt man, who is clearly accustomed to being the "boss" of his various farming operations. I found him to be a reasonable witness, although I did not accept all of his evidence. For example, I did not find him believable when he testified that there would be no consequences if a salesperson were to give too many discounts, although he cleaned this testimony up by saying that there would likely be consequences but it had not happened before. However, he also was fair in admitting when he did not have any specific evidence, for example, about Mr. Faragher's hours, or the negotiations concerning the 2007 Agreement. Tommy deferred to Ms. Pettman when appropriate.

[92] This is a case where emotions clearly flared, both during the time when the relationship was ending, and during the legal proceedings that followed. I accept that Tommy contributed to the emotionality of the legal proceedings, particularly at trial. However, I also accept that Mr. Faragher and Angela also contributed to the emotionality and were not blameless, for example, in the unfortunate need for police involvement during breaks during the trial. I agree with comments attributed to the police officers that there is no place for such conduct at the courthouse. However, any altercations that occurred out of the courtroom do not factor into my decision on the merits.

[93] In respect of the other witnesses, John Martin, Samuel Noach and Benji Faulkner, I found their evidence to be credible. Again, it was consistent with documentary evidence. John Martin, according to Mr. Faragher, used to be a friend and I did not detect any ill will on Mr. Martin's part. Rather, I found him to be simply motivated to assist the court. Obviously Mr. Noach and Benji have ties to the Defendant, which I have taken into account. I note that Benji's evidence about the number of cows traded by he and Mr. Faragher made a large jump from 500 to 800, but I accept that these were simply rough approximations. Accordingly, where there were disparities between Mr. Faragher's evidence and the evidence of these witnesses, I preferred these witnesses.

[94] Although I had considerable difficulties with much of Mr. Faragher's evidence, this case is not simply about credibility. Rather, it is my view that even though I have rejected much of Mr. Faragher's evidence, he is still entitled to redress on the applicable law and, in particular damages for the termination of his relationship with ProRich.

Position of the Parties:

[95] The Plaintiff argued that the evidence establishes that Mr. Faragher and ProRich were in an employer-employee relationship, or at the very least, Mr. Faragher was a dependent contractor.

[96] The Plaintiff argues that he should not be required to repay any amount pursuant to the October 2007 Agreement. First, he argues that there was no express provision in the Agreement, as acknowledged by Tommy in cross-examination, for rolling the surplus or deficit from one season into the next. Alternatively, it is argued that ProRich has disentitled itself from relying on the Agreement to seek repayment, having never done so before. In advancing this argument, the Plaintiff relies upon waiver, promissory estoppel, laches and the *Limitations Act, 2002*.

[97] The Plaintiff argues that he did not resign his position, but rather was constructively dismissed when ProRich refused to pay his monthly advance and made the assertion that he owed them \$50,000.

[98] The Plaintiff argues that the appropriate length of notice is 26 months, plus some amount for the car, his cellphone plus statutory vacation pay. He argues that the onus is on ProRich to prove he failed to mitigate his damages and ProRich has not met its onus. Thus, the amount of damages suggested is \$153,346.67. It is also argued that I should include extraordinary damages for bad faith.

[99] The Defendant argues that the October 2007 Agreement is a binding contract and "he owes us or we owe him" is an operable part of the contract. The Defendant argues that Mr. Faragher breached the contract between the parties when he performed little to no work in 2021, or alternatively, performed work but disposed of customers' orders without submitting them.

[100] The Defendant argues that Mr. Faragher was not an employee and is not entitled to any notice. His real job was that of a cattleman and the sale of ProRich seeds was a "side hustle".

[101] The Defendant agrees that I should fix damages regardless of my finding on liability. The Defendant argues that reasonable notice period in the circumstances of this case is no more than 20 months. The Defendant indicates that if Mr. Faragher is owed notice, he has failed to mitigate his damages by not obtaining new work, or alternatively, has done work but not fully disclosed the amount that he has generated.

[102] It should be noted that the Defendant takes the position that the Plaintiff has committed spoliation by not providing, or destroying the back up evidence to support his income tax returns.

Legal Analysis:

[103] Each party has referred to a substantial number of cases. I do not have the ability, nor inclination, to refer to each of the cases in this decision, as that would render this decision unduly long. However, I have reviewed all of the cases provided or referred to by each party and will cite only those that I find most relevant.

Spoliation:

[104] Spoliation arises out of the destruction of potentially relevant evidence and occurs where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation (see: *Trillium Power Wind Corporation v. Ontario*, 2023 ONCA 412 at para. 20). In *St. Louis v. Canada* (1896), 1896 CanLII 65 (SCC), 25 S.C.R. 649, at pp. 652-653, it was held that the destruction of evidence carries a rebuttable presumption that “the evidence destroyed would have been unfavourable to the party who destroyed it”.

[105] In this case, the Defendant argues that the Plaintiff has destroyed, or not produced, the documents underlying his income tax returns, particularly with respect to his cattle transactions.

[106] I am not prepared to find that there has been an intentional destruction of evidence, a necessary element for spoliation. Rather, there has been, arguably, non-production of records. However, income tax returns are sworn documents and in my view, the court may rely on those returns without all of the source documents in this case. It would, in my view, have been disproportionate to have required the Plaintiff to produce any and all records that may exist with respect to cattle transactions from 2002 onward. I also note that the Defendant did not bring a production motion in advance of trial with respect to outstanding undertakings and refusals.

[107] That is not to say that I accept the income tax returns at face value. I accept that there was likely further income undisclosed. It is simply that I believe that the court is possessed with sufficient evidence to reach a fair determination of this case on its merits.

Contractual Interpretation—the October 2007 Agreement:

[108] As noted, I reject Mr. Faragher’s evidence that there was a verbal contract that he would receive a wage plus commission from the beginning of his time selling ProRich seeds. That is inconsistent with the documentary evidence produced by Ms. Pettman.

[109] Whatever their arrangement, I am of the view that Mr. Faragher and ProRich, through Tommy, decided to create a written contract to preserve their understanding of a new arrangement through the October 2007 Agreement. I am of the view that both parties are bound by its terms, subject to my consideration of arguments concerning waiver and promissory estoppel, below.

[110] I reject the suggestion that Mr. Faragher is not bound by the Agreement because he did not have independent legal advice. Independent legal advice is not a prerequisite to a binding

agreement. Two or more competent parties may enter into a binding contract in the absence of independent legal advice. It was not suggested, nor would I find, that this was an unconscionable deal. To the contrary, the Agreement made good commercial sense at the time it was agreed upon. It permitted Mr. Faragher to receive regular advances on his commissions, and certain expenses that he had been lobbying for. It created “cashflow” for him.

[111] The “He owes us or we owe him” statement was intended to provide protection to both parties to ensure that Mr. Faragher received the compensation that had been agreed to in the Agreement, no more and no less.

[112] The overriding concern in the interpretation of contracts is to determine “the intent of the parties and the scope of their understanding”. The contract must be read 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 (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014 2 SCR 633]).

[113] The Agreement, although informally written, is not overly ambiguous. The parties settled past amounts owing as of October 23, 2007. On a go forward basis, the parties agreed that Mr. Faragher would receive 15-18% commission on his orders, and 5% towards people he starts but other salespersons sell to. He was to receive a monthly advance which would be reconciled at ProRich’s year-end. The “he owes us or we owe him” recognized that he may have to repay some amount to ProRich or that he might be entitled to additional commission depending on his sales.

[114] The court cannot write a new contract for the parties and, in this case, the parties did not include any provision that provided for a “rollover”. The Agreement includes the phrase “May 2008 and forward” which I find to be the only ambiguous aspect of the Agreement. Otherwise, the Agreement does not provide any express mechanism for rolling surpluses or deficits into future years. I find the word “forward” as used to be insufficient to demonstrate a mutual intention that either party could seek reconciliation years after the deficit or surplus accrued. Rather, the most sensible interpretation of that part of the Agreement is that reconciliation would occur at year end in all future years. I agree with the Plaintiff that the Agreement does not specifically state that the Defendant can apply future advances to past deficits.

[115] That ambiguity can be resolved by considering each party’s conduct in performing the contract. Neither party, on the evidence before me, took any steps to communicate with the other that surpluses or deficits would be rolled into future years. Clearly, ProRich did not act on the significant deficits that were accruing from 2016 onward until this litigation and did not even accurately know how much the deficits were, as their position fluctuated from \$50,000 to \$145,000 to \$168,000. All of this leads me to conclude that the word “forward” did not contemplate that the parties could roll deficits into future years indefinitely.

[116] The Agreement must contemplate, in my opinion, that the reconciliation or “evening up” occur within a reasonable period of time after year end. It is clear that the parties did not, in fact, do so even if Ms. Pettman provided annual reconciliation statements to Mr. Faragher. I will address the legal consequences of this later.

[117] However, I find that Mr. Faragher was to be paid strictly commissions, not a wage plus commissions, at least as of October 2007 on the basis of this Agreement. This was paid via monthly advances, initially of \$4,000 per month. The parties verbally agreed to amend this Agreement to increase the monthly advances to \$5,000 per month a few years later. That is their binding agreement on how Mr. Faragher was to be compensated and it is not ambiguous.

[118] In the context of the parties' relationship, as of October 2007, this arrangement made perfect sense. Had the reconciliations occurred, with money actually changing hands as contemplated, it would have been a workable arrangement, or the parties could have renegotiated the amount of the advances.

[119] It is my view that the intentions of the parties, at the time the Agreement was entered into is clear.

[120] I reject the argument of *contra proferentum*, advanced by the Plaintiff. This Agreement was not drafted by the Defendant and simply presented to the Plaintiff. I find that it was negotiated between Tommy and Mr. Faragher and then simply memorialized by Ms. Pettman before it was signed by both men.

Employee vs Contractor:

[121] As both parties recognized in their arguments, there are three potential worker classifications that determine whether Mr. Faragher is or is not entitled to reasonable notice. An employee is entitled to reasonable notice, or pay in lieu of, unless dismissed for just cause. An independent contractor is not entitled to reasonable notice upon termination. In between those two positions is a dependent contractor who despite not being an employee is nonetheless entitled to reasonable notice (see: *Carter v. Bell & Sons (Canada) Ltd.*, 1936 CanLII 75 (ON CA), [1936 O.R. 290 (C.A)]; *Braiden v. La-Z-Boy Canada Ltd.*, 2008 ONCA 464; *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916; *Keenan v. Canac Kitchens*, 2016 ONCA 79, aff'd 2015 ONSC 1055 and *Fisher v. Hirtz*, 2016 ONSC 4768).

[122] In *McKee v. Reid's Heritage Homes Ltd.*, MacPherson J.A. described, at para. 34, that the court must first determine whether a worker is a contractor or an employee. If the court determines that the worker is a contractor, the court must then determine whether the worker is a dependent or an independent contractor.

[123] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 SCR 983, the Supreme Court of Canada addressed the issue of employee vs independent contractor, although in the context of vicarious liability. The Court made it clear however, that the same test applies in the wrongful dismissal context at para. 36.

[124] In *Sagaz*, the Court reviewed the tests that had been developed over the years, concluding that there is no one conclusive test to be applied universally (at para. 46). However, at para. 47, Rothstein J. described as follows:

47 ...“The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker’s activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker’s opportunity for profit in the performance of his or her tasks.

[125] Rothstein J. noted that this was a non-exhaustive list of factors and that there was no set formula for their application.

[126] As noted in *Fisher v. Hirst*, at para. 32, there is a useful description of the control factor enunciated by Price J. in *Ford v. Keegan*, 2014 ONSC 4989. He states as follows at para. 75:

75 Control over the employee need not be complete in order to establish an employment relationship. Indicia of control include: the ability to decide when, where, and by what method the employee will perform his/her work; the ability to determine which customers can be served or sold goods, and which cannot; the requirement that the employee submit activity reports; the employee’s ability or inability to attend meetings; assistance and guidance that the employer gives to the employee in connection to the work being performed; the employer’s ability to set dress and conduct codes for the employee, and the discipline an employer exercises over the employee for breaches of company policy. The employer’s ability to select and dismiss the employee, and the general power to control the employee, are also important factors in determining the existence of an employment relationship.

[127] In *Ligocki v. Allianz Insurance Company of Canada*, 2010 ONSC 1166, Hennessy J. described at para. 25:

25 Control is the right to give orders and instructions to the employee regarding the manner in which to carry out the work (*Sagaz*, at para. 37). Indicia include mandatory presence in the workplace, a somewhat regular assignment of work, the imposition of rules and conduct or behaviour, an obligation to provide activity reports and control over the quantity and quality of the services: *Carola v. M.N.R.*, [2008] T.C.J. No. 432, 2008 TCC 508 (“*Carola*”), at para. 25. The issue is not whether the employer directed or controlled the work in fact, but whether it had the power to control the way the employee performs his duties.

[128] Little weight is given by courts as to how the parties describe their relationship in a contractual agreement, or their intention, although it may be relevant (see: *Omarali v. Just Energy*, 2016 ONSC 4094 at para. 20; *Ligocki*, *supra*, at para. 41; *Fisher*, *supra*, at para. 38).

[129] Similarly, it is not determinative how a worker categorizes his or her work for income tax purposes (see: *Omarali, supra*, at para. 21; *Moseley-Williams v. Hansler Industries Ltd.*, 2008 CanLII 57457; *Ligocki, supra*, at para 45; *Scamurra v. Scamurra Contracting*, 2022 ONSC 4222, at para. 35).

[130] In light of those applicable legal principles, it is my opinion that Mr. Faragher was not an employee of ProRich. In my view, ProRich exerted only minimal control over his activities, both generally and specifically. Mr. Faragher may (or may not have) worked as many hours as he stated, but I accept that ProRich imposed no demands as to his hours, his manner of sales, where he attended, or who his customers were. I reject that Mr. Faragher was under any obligation, explicit or implicit, to wear ProRich clothing, which was only provided to him late in the relationship. Mr. Faragher created his own promotional material. I do not find the restrictions or conditions addressing the price of seed, or discounts that were available, to be an employer imposition, but rather to reflect a marketplace reality that any salesperson would be constrained by.

[131] In terms of tools, I accept that Mr. Faragher was provided with a vehicle and a cellphone. I also accept that Mr. Faragher's risk was somewhat mitigated by the advance payments that were agreed to. However, since, on my interpretation, those were subject to claw back, his livelihood depended entirely on his own efforts, not ProRich. In that regard, Mr. Faragher had significant financial risk and potential for profit through high commissions if he could generate them.

[132] While not determinative, I do take note of how he characterized his income on his income tax returns, that the Defendant issued T4As, not T4s and the belief of the Defendant that it had very few employees.

[133] Considering all of the factors, I find that Mr. Faragher was not an employee of ProRich.

[134] Pursuant to *McKee*, the next question is whether or not Mr. Faragher was a dependent or an independent contractor. In *McKee*, the court noted that this determination hinges on economic dependency and exclusivity. Exclusivity can be complete or high-level (see: *Keenan, supra*, at para. 24).

[135] In *Marbry v. Avreca International Inc.*, 1999 BCCA 172, at para. 38, the BC Court of Appeal identified the following factors to consider, although none of these were alone determinative:

- (i) Duration/permanency of the relationship—the longer the duration of the relationship or the more permanent it is militates in favour of a reasonable notice requirement;
- (ii) Degree of reliance/closeness of the relationship—significant percentage of revenue
- (iii) Degree of exclusivity.

[136] In *Thurston v. Ontario (Children's Lawyer)*, 2019 ONCA 640, Huscroft J.A. held that exclusivity of service and of income is key. Exclusivity is the hallmark of the dependent contractor

category (at para. 25). He noted that the plaintiff in that case, a lawyer, had other clients that generated sufficient revenue such that the requisite exclusivity was absent.

[137] Gillese J.A., in *Keenan, supra*, added that exclusivity cannot be determined on a “snapshot” approach. A determination of exclusivity must involve a consideration of the full history of the relationship. In *Keenan*, although the workers had also done work for one of the employer’s competitors, they were nonetheless sufficiently economically dependent to qualify as dependent contractors.

[138] In *Thurston*, at para. 27, it was noted that substantially more than a majority of the dependent contractor’s income was earned from the contracting party. Later, Huscroft J.A, at para. 30, added that “near-exclusivity” requires substantially more than 50% of billings.

[139] In the present case, Mr. Faragher sold ProRich seed for approximately 19 years. That is a very significant duration and clearly favours a finding that he was a dependent contractor.

[140] With respect to exclusivity, I have already found that Mr. Faragher had other ongoing endeavours. His livelihood was not completely reliant on ProRich throughout the time of his work as a seed salesperson. The Defendant, rightly, has suspicions of Mr. Faragher’s income tax returns. There was credible evidence that he has earned revenue, i.e., from the sale of minerals, that does not seem to be reflected in his income tax returns. The Defendant is also suspicious of the income that was being generated by the cattle transactions, especially since the Plaintiff did not agree to produce that information prior to trial.

[141] In determining what percentage of Mr. Faragher’s income is derived from ProRich, it would also appear inaccurate to use the amount that he was advanced (\$60,000) as opposed to what he was actually entitled to. Since approximately 2016, Mr. Faragher should have received no more than his actual commissions earned, ranging from approximately \$15,000 (in 2020 to 2021) to \$42,000 (for 2018 to 2019).

[142] However, I am required to consider the full history of the relationship (*Keenan, supra*). Certainly, the evidence of both parties supports that up until 2016, Mr. Faragher was earning close to, if not in excess of, his advances. He was doing well enough to garner an increase in those advances from \$4,000 to \$5,000 per month in approximately 2010 or 2011.

[143] I acknowledge that there are gaps in the Plaintiff’s evidence. However, there is no evidence disputing Mr. Faragher’s claim that he generally invested 40-50 hours per week into ProRich. His income tax returns show some other revenue other than ProRich historically. For example, he declared \$35,800 from the sale of cattle in 2008. However, in most of those years he was only declaring a few thousand dollars from the sale of cattle. Even if some income has been omitted, I find that the significant majority of his income during the bulk of his time selling ProRich seeds was derived from that endeavour.

[144] I also find it noteworthy that post-termination, Mr. Faragher was able to generate regular income by selling seeds for another company. That bolsters, in my view, his claim for exclusivity

for the period of time he sold on behalf of ProRich. He was not selling seeds for any other company during that time period, which an independent contractor might be free to do.

[145] I also take into account the evidence of Ms. Pettman that Mr. Faragher's working career has been heavily intertwined with all of the Faulkner's farming operations, not just ProRich. It is clear that ProRich, and his relationship with the Faulkners was an integral aspect of Mr. Faragher's livelihood.

[146] Although it is not an easy call, I am persuaded that there is sufficient exclusivity of both time and income to support the characterization of Mr. Faragher as a dependent contractor. I find that Mr. Faragher, while not an employee, should be characterized as a dependent contractor. He would therefore be entitled to reasonable notice, or pay in lieu of, assuming he was terminated and did not resign.

Terminated or Resigned:

[147] Constructive dismissal requires that an employer's conduct evinces an intention to no longer be bound by the employment contract. There are two avenues to a finding of constructive dismissal. The first is that there was a breach or change in an express or implied term of the contract and then to determine if that breach or change was sufficiently serious to constitute constructive dismissal. The second branch is where the employer's conduct shows that it no longer intends to be bound by the contract (see: *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10).

[148] An employer who subjects employees to treatment that renders competent performance of their work impossible, or continued employment intolerable, exposes itself to an action for constructive dismissal (see: *Sweeting v. Mok*, 2015 ONSC 4154 at para. 37).

[149] The British Columbia Court of Appeal, in *Beggs v. Westport Foods Ltd.*, 2011 BCCA 76, described, at para. 36, as follows:

36 Both a dismissal by an employer and a voluntary resignation by an employee require a clear and unequivocal act by the party seeking to end the employment relationship. A finding of dismissal must be based on an objective test; whether the acts of the employer, objectively viewed, amount to a dismissal. A finding of resignation requires the application of both a subjective and objective test: whether the employee intended to resign and whether the employee's words and acts, objectively viewed, support a finding that he resigned.

[150] In order to constitute a resignation, Ontario courts have also held that the communicated resignation must be clear and unequivocal, and that it was accepted. A reasonable third party looking at the matter would unquestionably understand or conclude without doubt that the employee had unequivocally resigned (see: *Carmichael v. Mantis Racing Inc.*, 2009 CanLII 74196 (ON SC)).

[151] Asserting a claim of constructive dismissal, and to severance pay, is inconsistent with an intention to resign (*Danroth v. Farrow Holdings Ltd.*, 2005 BCCA 593, at para. 9).

[152] I do not find that Mr. Faragher resigned from ProRich. He was adamant in the text messages that he had been constructively dismissed. I find that there is no clear and unequivocal communicated resignation. Throughout his communications, he was demanding that he be paid.

[153] Does the withholding by ProRich of Mr. Faragher's next advance check constitute constructive dismissal? I find that it does.

[154] ProRich, since 2007, had been issuing monthly advance payments to Mr. Faragher, in the amount of \$4,000 and then \$5,000. Even if ProRich had a right to reconcile those advances with the actual commissions that were earned, it never, on the evidence, sought to do so at any point in the 13 years leading up to the summer of 2021. I accept that ProRich provided reconciliation statements to Mr. Faragher, but there was no evidence that until 2021 that it began to seek repayment or monitor his sales.

[155] A person's monthly cheque is a critical part of their ability to pay bills and budget for their day to day lives.

[156] Accordingly, having never withheld funds from Mr. Faragher before, it was a breach of their contract to do so in the summer of 2021. I note that both Ms. Pettman and Tommy testified that they did not provide Mr. Faragher any specific warning about his sales situation. Mr. Faragher was entitled in my view, to treat the contract as at an end and to pursue a claim for wrongful dismissal when it was clear he was not going to receive his September 1, 2021 advance. Accordingly, I find that Mr. Faragher was constructively dismissed as of September 1, 2021 when he did not receive his advance.

[157] I recognize that this put ProRich in a difficult position, given that Mr. Faragher was running deficits. In part, ProRich contributed to that conduct by allowing it to occur without redress. I also recognize that Mr. Faragher was failing to prove to Ms. Pettman's satisfaction that he was making sales and had orders. Nonetheless, in the particular circumstances of this case, simply withholding Mr. Faragher's next cheque was not the permissible route.

[158] To be clear, while a threat to break an employee or dependant contractor's legs by an employer would likely constitute constructive dismissal, I do not find that such a threat was actually made in this case.

Waiver, Estoppel, Laches and the Limitations Act, 2002:

[159] While these issues are perhaps more germane to the counterclaim, I am addressing them prior to dealing with damages. The quantum of damages, in my view, depends on whether or not Mr. Faragher is entitled to pay in lieu of notice based on \$60,000 per annum, or whether he remains bound by the terms of the 2007 October Agreement.

[160] There are two competing elements of unfairness in this case. In my opinion, it is unfair for the Defendant to permit such significant deficits, approximately \$168,000, to accumulate since 2016 and assert them by way of counterclaim. If Mr. Faragher had been advised that the Defendant would be pursuing repayment for his annual deficits as they were occurring, he may well have been able to organize his financial affairs to deal with such a large quantum. On the other hand, it must not be overlooked that Mr. Faragher has been paid far more than he would have otherwise been entitled to pursuant to the 2007 Agreement he entered into.

[161] Waiver occurs when one party to a contract takes steps that amount to foregoing reliance on a known right or defect in the performance of the other party. The evidence must demonstrate that the party waiving had (1) full knowledge of the deficiency that might be relied on and (2) an unequivocal and conscious intention to abandon the right to rely on it. The intention to relinquish the right must be communicated. The communication may be formal or informal and may even be inferred from conduct. The overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party (see: *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 1994 CanLII 100 (SCC), [1994] 2 SCR 490, at para 500; *Technicore Underground Inc. v. Toronto (City)*, 2012 ONCA 597, at para. 63).

[162] Promissory estoppel prevents a party from relying on strict performance where it has made a promise or assurance intended to affect a legal relationship and where the other party acts in reliance on that promise to its detriment. The promise must be unambiguous. It is not sufficient that one party has taken advantage of indulgences granted by the other (see: *Maracle v. Travellers Indemnity Company of Canada*, 1991 CanLII 58 (SCC), [1991] 2 S.C.R. 50, at p. 57; *1376273 Ontario Inc. v. Knob Hills Farms Limited*, 2003 CanLII 28382 (ON SC) at paras. 136-7).

[163] In *Knob Hills Farms*, Cameron J. described at para. 136 that:

136 Equity will intervene in appropriate circumstances where a party expressly or implicitly, by unambiguous representation or by its conduct or silence, waives compliance with a term in a contract or leads another party to suppose that strict rights arising under the contract will not be enforced. Such conduct invokes the principle of promissory estoppel or detrimental reliance.

[164] Although not identical, the doctrines of waiver and promissory estoppel are closely related. They are premised on the principle that a party should not be allowed to go back on a choice when it would be unfair to the other party to do so (*Saskatchewan River*, at para. 18).

[165] In the case at bar, there can be no issue that ProRich was aware that it was not annually reconciling Mr. Faragher's actual earned commissions with his advance payments. I heard no evidence that this was done at any time. Ms. Pettman testified that for the most part, his earned commissions were in line with his advances and ProRich was satisfied. When the first major discrepancy occurred in 2016, Ms. Pettman testified that ProRich could have demanded payment when they saw the deficits. She testified that "probably she decided not to pursue it and Tommy

authorized her not to try to collect it”. She also indicated that she did not forget about it. They assumed Mr. Faragher would make up the difference.

[166] Ms. Pettman also agreed that Mr. Faragher never indicated that he was going to pay back any amount.

[167] While I accept that Ms. Pettman placed annual reconciliation statements in envelopes to Mr. Faragher, and that he would have received such statements, neither Ms. Pettman nor Tommy testified that they actually spoke to Mr. Faragher about the deficits. In my view, it was incumbent that they do so. This is an issue that ought to have been addressed from the time that the significant deficits began.

[168] Accordingly, the Defendant cannot disavow the requisite knowledge of its right under the 2007 Agreement to reconcile at year end nor the fact that it was aware of the deficits when they were accruing. I find that ProRich had full knowledge of the deficiency that it could rely on required for waiver.

[169] The difficulty with applying the doctrine of waiver in this case is that I cannot find that ProRich had the requisite unequivocal intention to relinquish its rights under the Agreement. Ms. Pettman testified to the contrary and I accept that evidence. She simply did not address the deficits as they accumulated in a satisfactory manner. Accordingly, I would not apply the doctrine of waiver to these circumstances.

[170] Promissory estoppel is more difficult to dismiss. I find that there was no unambiguous representation to Mr. Faragher that ProRich would not be pursuing outstanding deficits. However, there was certainly silence. With full knowledge of the significant deficits occurring year after year starting in 2016, ProRich only provided the reconciliation statements. Again, there is no evidence that Ms. Pettman or Tommy discussed these deficits with Mr. Faragher. They did not advise him that they would be collecting these amounts, or even that they intended to roll it forward. Rather, they led Mr. Faragher to assume, in my view, that he was entitled to \$60,000 per year, a belief that he carried into this trial.

[171] Is there sufficient detrimental reliance? In my view, there is, although the evidence was not well developed in this regard. Mr. Faragher was accustomed to receiving a steady paycheque since 2007 in at least the amount of \$45,000, and then \$60,000 per annum, without any variation or even comment from ProRich. He, and his wife, would have fashioned their finances accordingly. Again, I am satisfied that Mr. Faragher’s main source of revenue was from ProRich.

[172] In these circumstances, I find that ProRich is estopped by its conduct, its silence, from relying on the reconciliation provisions for the year ends 2016 through May 31, 2020. For the 2020-2021 year, ProRich did advise Mr. Faragher’s of its intention to seek repayment and, in my view, it is equitable to both parties to hold him to the reconciliation for the 2020-2021 season and thereafter.

[173] I have considered whether the pleadings are sufficient to allow me to consider promissory estoppel. I do not believe that the Defendant raised the failure to plead promissory estoppel or waiver in argument. In any event, I am satisfied that paragraphs 5 and 6 of the Plaintiff's Reply adequately raised promissory estoppel, although not specifically. The gist of the pleading is that Mr. Faragher was unaware of any deficits nor did he ever have discussions with the Defendant about repayment of any outstanding amounts. This satisfactorily raises the issue of whether the Defendant is estopped, in my view from seeking repayment.

[174] My finding on promissory estoppel would disentitle the Defendant to pursue \$108,735.54 in monies advanced but not earned by the Plaintiff.

[175] In case I am in error by relying upon promissory estoppel, I will consider the application of the *Limitations Act, 2002* and the doctrine of laches. The *Limitations Act, 2002* was specifically pleaded. Laches was not.

[176] Section 4 of the *Limitations Act, 2002* sets out a basic limitation period of two years to commence a proceeding from the date on which the claim was "discovered". Section 5(1) provides as follows:

- (1) A claim is discovered on the earlier of,
 - (a) The day on which the person with the claim first knew,
 - (i) that the injury, loss or damage had occurred;
 - (ii) that the injury, loss or damage was caused by or contributed to by an act or omission;
 - (iii) that the act or omission was that of the person against whom the claim is made, and
 - (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
 - (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

[177] Factually, there is no issue in this case that ProRich was aware that Mr. Faragher was in a deficit position each year no later than the dates that the reconciliation statements were sent to him. There is a strong argument that it would have been aware of these deficits earlier than that, for example when the final order for each season was provided by Mr. Faragher.

[178] The October 2007 Agreement, as noted, does not include any specific mechanism to "roll forward" deficits and I reject that ProRich was unilaterally entitled to do so absent some agreement with Mr. Faragher.

[179] The Statement of Claim in this matter was issued on January 17, 2022. The Counterclaim was issued on March 4, 2022. Nothing in the *Limitations Act, 2002* delays the time to commence a claim that is advanced by way of Counterclaim. I must also take into consideration that due to COVID, limitation periods were suspended for six months as of March 16, 2020.

[180] The only part of the s.5(1) test that is contentious, in my view, is whether ProRich knew before the requisite date that a proceeding would be an appropriate means to seek repayment for the monies it was owed.

[181] ProRich argues that it was entitled to assume that Mr. Faragher would be able to make up the deficits. I reject that this means that a proceeding would not be an appropriate way to seek a remedy. I accept that ProRich may have been justified with respect to the first year of significant “underperformance” in assuming that he might be able to make it up. However, the reconciliation statement of September 26, 2019 makes it clear that Mr. Faragher was having repeated annual difficulty earning commissions that would justify his \$5,000 per month advances. As of 2019 year end, the amount of the deficits allegedly outstanding was \$76,672.83. It was entirely unrealistic to believe that Mr. Faragher would easily be able to make up that amount in future commissions through a simple rollover.

[182] While trivial losses do not trigger a limitation period (*Gillham v. Lake of Bays (Township)*, 2018 ONCA 667 at para. 22), in the context of a contractor paid \$60,000 in advances per annum, \$76,000 cannot be considered trivial.

[183] I also do not accept that the ongoing relationship between Mr. Faragher and ProRich justified ProRich not seeking repayment through a legal proceeding. There may have been good reasons why it did not wish to sue Mr. Faragher, but that does not equate to not knowing that a proceeding would be an appropriate means of seeking repayment. Otherwise, there would never be an applicable limitation period where there is such an ongoing relationship.

[184] It is my view that the October 2007 Agreement does not create a “demand obligation” for the purpose of s. 5(3) of the *Limitations Act, 2002*. Given the ambiguity in the Agreement, I find that the date for reconciliation was at year end.

[185] Accordingly, if I am in error with respect to the promissory estoppel argument, I would still find that the proceedings in respect of the repayment of the deficits between the commissions earned and the advances paid in respect of the seasons ending in 2019 and before are out of time. Those needed to be commenced within two years of when ProRich knew or ought to have known that Mr. Faragher was also in a deficit for 2019, which would be shortly after year end in my opinion. Although there would have been a six month suspension from March 16, 2020 to September 14, 2020. The suspension of the limitation period does not affect that result as the limitation period would still have expired prior to March 4, 2022 given year end was May of 2019. This would disentitle the Defendant to pursue the alleged deficits amounting to \$76,672.83.

[186] Laches is an equitable doctrine requiring a claimant in equity to prosecute his claim without undue delay. It does not fix a specific time limit, but considers the circumstances of each case. In

determining whether there has been a delay amounting to laches, the main considerations are (1) acquiescence on the claimant's part; and (2) any change of position that has occurred on the defendant's part that arose from reasonable reliance on the claimant's acceptance of the *status quo*. Two important circumstances are the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy (*Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 (CanLII), [2013] 1 SCR 623 at paras. 145-146).

[187] I note that ProRich has not claimed unjust enrichment, an equitable remedy in its Counterclaim, although it has claimed a set-off (the word "equitable" is not used). I also note that Mr. Faragher has not pleaded laches.

[188] I am not prepared to grant the defence of laches, given that it was not pleaded.

[189] In any event, it is my view that the passage of time not already covered by the limitation defence is insufficient to give rise to a defense of laches. There has not been significant delay in advancing claims that arose after the 2019 year end. I also do not find that there has been sufficient prejudice Mr. Faragher caused by the delay in advancing claims that arose after 2019 year end.

[190] Finally with respect to laches, it is not clear given the absence of a "laches-saving" provision in the *Limitations Act, 2002*, that the equitable defence of laches would be available to bar a claim that is brought within the basic limitation period described under the *Limitations Act, 2002* (see: *Intact Insurance Company of Canada v. Lombard General Insurance Company of Canada*, 2015 ONCA 764, at paras. 42-56). I make no specific finding on whether the defence of laches is available.

[191] In reaching my conclusion on laches, I note that it is an equitable defence and that Mr. Faragher, has, in fact, been overpaid on commissions that he did not, in fact, earn. It is not inequitable that he have to address those monies for which ProRich is not out of time.

Damages:

[192] Having found that Mr. Faragher was a dependent contractor entitled to reasonable notice upon the termination of his contract, or pay in lieu of, the remaining issue is the damages to which he is entitled.

[193] The primary purpose of the notice period is to provide the worker with an opportunity to seek alternative employment. When reasonable notice is not provided, damages are awarded for breach of contract to compensate for the economic consequences that flow from the lost opportunity to secure another job. In this case, the damages represent the commissions (as I have found that Mr. Faragher was not salaried) and other benefits that Mr. Faragher would have earned had he worked during the notice period, less any amounts credited for mitigation (see: *Manthadi v. ASCO Manufacturing*, 2020 ONCA 485). The goal is to place Mr. Faragher in the same financial position that he would have been in had he been given the opportunity to continue working

throughout a reasonable notice period (*Sylvester v. British Columbia*, 1997 CanLII 353 (SCC), [1997] 2 S.C.R. 315 at para. 1).

[194] In fixing the length of a reasonable notice period, the principles described in *Bardal v. Globe & Mail Ltd.*, 1960 CanLII 294 (ON HCJ) still apply. The Court should consider:

- (a) the character of the employment;
- (b) the length of service;
- (c) the age of the employee; and
- (d) the availability of similar employment.

[195] Courts have been prepared to increase the notice period to take into account the impact of COVID on a terminated employee's ability to find new employment (see, for example: *Chalmers v. Airways Transit Service Ltd. and Badder Capital Group Ltd.*, 2023 ONSC 5725, at para. 129). I am not prepared to do so in this case. I am not satisfied on the evidence that the loss of employment for a position that was primarily done "outside" in September of 2021 was adversely impacted by COVID. Mr. Faragher was, as I have found, primarily a cattleman and I am not satisfied that the restrictions imposed by COVID would have had the same impact upon him as it might have on other occupations. He did not lead sufficient evidence in that regard.

[196] Courts have also increased the amount of reasonable notice based upon the manner in which the termination has occurred. However, in this case I am not satisfied, for example, that Tommy threatened to break Mr. Faragher's legs. I do not find ProRich's wish to discuss Mr. Faragher's sales to be unreasonable. I would not increase the notice period due to any conduct on the part of ProRich or its agents.

[197] In fixing the amount of reasonable notice in this case, I consider that Mr. Faragher was 61 years of age at the time of his termination. While I accept that there are many people that age or older still active in the seed selling business, and farming for that matter, Mr. Faragher would still be disadvantaged in finding replacement work relative a younger candidate. His age is a factor in favour of a longer notice period.

[198] Mr. Faragher worked for ProRich since 2002, a period of approximately 19 years. He was, accordingly, in a very long term relationship with ProRich. An employee's length of service is an important factor in the determination of reasonable notice (see: *Drysdale v. Panasonic Canada Inc.*, 2015, ONSC 6878 at para. 14).

[199] I do not find that the character of Mr. Faragher's employment justifies a lengthy notice period. He was not a specialized worker, or in management.

[200] In considering the availability of other employment, I have evidence that Mr. Faragher returned to selling seeds for a competitor in June of 2023. I also consider that he would have been able to continue to be active in his cattle business.

[201] I have reviewed the cases provided by the Plaintiff to justify his suggested notice period of 26 months. I note that in *Keenan v. Canac Kitchens*, *supra*, it was described that there is no absolute upper limit on what constitutes reasonable notice, but only exceptional circumstances support a notice period in excess of 24 months.

[202] I find that the appropriate notice period in this case is 21 months.

[203] Having so found, it is my view that the Plaintiff's assertion that he be awarded damages based on a salary of \$60,000 is incorrect. He was not, as I have found, salaried. He had a clear agreement that he would be advanced \$5,000 per month, subject to reconciliation at year end. Although I have held that the Defendant is estopped from relying on the repayment of monies that it did nothing about, I do not believe that the Plaintiff should be compensated as a salaried worker when he was not.

[204] Obviously, the difficulty is determining what his actual commissions would have been during the notice period, especially since he did not turn in orders for his final season.

[205] In my view, a reasonable assessment of Mr. Faragher's damages, being the amount that he would have earned during the notice period, is to review the actual commissions that he earned from June 1, 2016 to May of 2021, before this dispute erupted, since he did not turn in his orders thereafter. From June 1, 2016 to May 31, 2020, Mr. Faragher generated commissions of \$141,402.34 over 5 years. This is \$2,356.70 per month. I would use that figure to calculate his damages.

[206] Accordingly, Mr. Faragher is entitled to damages of \$49,490.70 in commission income, without regard to other benefits, and without accounting for mitigation.

[207] There is no basis, in my opinion, for an award of punitive or aggravated damages given my findings of fact. I accept that Mr. Faragher was upset due to the end of his relationship with ProRich. However, there is no basis, in my view, to award aggravated damages.

[208] Mr. Faragher is entitled to compensation for the loss of use of his company issued cellphone (*Hunsley v. Canadian Energy Services LP*, 2020 ABQB 724, at para. 88) and the value of the use of the company funded vehicle (*Quesnelle v. Camus Hydronics Ltd.*, 2022 ONSC 6156 at paras. 33-36).

[209] However, as I have found that Mr. Faragher was not an "employee" I do not accept that he is entitled to statutory vacation pay or punitive damages owing to a failure to pay minimum statutory entitlements.

[210] I value the loss of use of the cellphone at \$100 per month for a total of \$2,100 throughout the period of reasonable notice. I accept the evidence of the Defendant that the car was an inexpensive used vehicle but it still provided the Plaintiff with a mode of transportation. I would accept the Plaintiff's suggested value for the use of the vehicle at \$2,500 per year, or \$210 per month. Thus, for 21 months this is a further \$4,410.

[211] Accordingly, the Plaintiff is entitled, before considering mitigation, to total damages of \$56,000.70.

Mitigation:

[212] The standard for mitigation is reasonableness, not perfection. The onus is upon the Defendant to prove that the Plaintiff has failed to mitigate his damages. In my view, the Defendant has failed to satisfy that onus.

[213] First of all, I am not considering the inadmissible medical evidence. I do note that the Defendant “read-in” evidence that the Plaintiff was depressed after the termination. Nonetheless, I do not accept that the depression prevented him from attempting to find other work.

[214] I accept the Plaintiff’s argument that it is inappropriate to consider as mitigating income any income from cattle transactions that he was likely to have received even if he had continued to work for ProRich. This includes, in my opinion, income that he earned for Triple Hill Sires during the notice period.

[215] Mr. Faragher did return to selling seeds as of June 2023 for another company, but that was outside the 21 month reasonable notice period.

Counterclaim:

[216] The Counterclaim has been addressed in the discussion above relating to estoppel. I find that that the Defendant cannot assert its counterclaim for the years before which it informed Mr. Faragher that it wanted to be repaid.

[217] I have found that ProRich may only assert its right to repayment for the 2020-2021 season and for the period June 1, 2021 to September 3, 2021. This amounts to \$59,334.19.

Summary and Disposition:

[218] For the foregoing Reasons, I have found that Mr. Faragher was not a ProRich employee but was a dependant contractor and therefore was entitled to reasonable notice upon the termination of his contract, or pay in lieu of.

[219] I have found that the parties were bound by the terms of the October 2007 Agreement. Mr. Faragher was not entitled to a “salary” and was not salaried. Rather, he was to receive monthly advance payments which were to be reconciled at year end with the amount of his earned commissions.

[220] However, and despite having provided Mr. Faragher with annual reconciliation statements, the parties did not enforce the reconciliation process at year end. I find that ProRich, knowing that Mr. Faragher was in a significant deficit position after the 2016-2017 season and not doing

anything about it until the summer of 2021, is estopped from claiming reimbursement for the overpayments it made to Mr. Faragher for any period prior to the 2020-2021 season.

[221] If I am in error with respect to promissory estoppel, I would find that they are barred by the *Limitations Act, 2002* from collecting any overpayment before the 2019-2020 season. This is an alternative position that would result in a larger award on the counterclaim. It is not, however, my award.

[222] I find that Mr. Faragher was constructively dismissed when ProRich withheld his advance for the first time in September of 2021. I find that his damages for the constructive dismissal, after considering mitigation, is \$56,000.70, based on a notice period of 21 months.

[223] However, I do find that ProRich is entitled to advance its counterclaim for overpayment of the advances for 2020-2021, for which I award \$59,334.19.

[224] The net result is that Mr. Faragher owes ProRich the sum of \$3,333.49. I grant judgment to ProRich in that amount.

[225] I recognize that this might seem like a harsh result to Mr. Faragher.

[226] I simply point out that the parties agreed in October of 2007 that Mr. Faragher would be paid through advances, not salary, with reconciliations at year end. Mr. Faragher, after 2016-2017, did not earn the amount of his advances but is nonetheless not being required to repay those amounts. He is being permitted to keep money he did not earn because ProRich did nothing to enforce this Agreement for many years.

[227] Mr. Faragher is being awarded compensation based on estimated commissions that he may or may not have earned for the 21 month notice period. However, it must also be kept in mind that ProRich did not receive any sales from Mr. Faragher's efforts during that period. In my view, on all of the evidence, Mr. Faragher is being treated fairly by this result.

[228] ProRich unreasonably allowed Mr. Faragher's deficits to accumulate. They have no one to blame but themselves for not collecting overpayments that were made to Mr. Faragher from 2016 onward.

Costs:

[229] Obviously, I do not know what the offers might have been. I suspect, however, that there is a clear winner and that the parties will be able to agree on who that is based on the offers. If the parties cannot agree on costs, the party seeking costs may serve and file written costs submissions no greater than three pages in length, double spaced, plus any relevant offers to settle, by August 14, 2026. The other party is to serve and file written costs submissions within the same parameters by August 28, 2026. If the parties cannot agree on who the "winner" was, the Defendant is to make their costs submissions first. All costs submissions are to be forwarded to Nadine.Long@ontario.ca.

[230] If I do not receive costs submissions by the deadlines, I will assume the parties were able to sort out the issue of costs.

Date: July 16, 2026

Justice Spencer Nicholson