Toronto Law Journal

Matthews v Ocean Nutrition: Supreme Court of Canada confirms fundamental employment obligations

Allyson Lee[1], Sherrard Kuzz LLP, Employment & Labour Lawyers

On October 9, 2020, the Supreme Court of Canada (the "Court") released its decision in *Matthews v Ocean Nutrition.*[2]

David Matthews had been constructively dismissed after what the Court held was a "campaign" against him by a senior executive at Ocean Nutrition ("Ocean"). But for the dismissal, thirteen months later Matthews would have been entitled to a Long Term Incentive Plan ("LTIP") payout of more than $1 million.

At trial, Matthews was awarded fifteen months notice (which had no value, as Matthews had immediately mitigated) and damages for the LTIP.

The majority of the Nova Scotia Court of Appeal upheld the notice period but allowed Ocean's appeal with regards to the LTIP.

On appeal by Matthews to the Supreme Court of Canada, *Ocean Nutrition* was argued on two main issues: whether Matthews was entitled to damages for the loss of the LTIP as part of his common law notice entitlement, and alternatively, if damages should arise for what Matthew argued was a breach of the *Bhasin v. Hrynew*[3] requirement to perform contracts honestly and in good faith.

The Court held there was no need to address *Bhasin.*[4] Instead, Matthews was entitled to damages for the loss of the LTIP based on existing doctrines of notice.

Ocean Nutrition has several important takeaways for the employment bar:

1. It resolves an inconsistency between the provincial appellate courts about what type of language is sufficient to restrict an employee's common law entitlements.

2. The Court adopts a clear two-step test to determine notice entitlement which opens the door to claims for bonuses and incentives during the notice period.

---

[1] Allyson Lee is a lawyer with Sherrard Kuzz LLP. Prior to joining Sherrard Kuzz LLP, Allyson was co-counsel for Matthews before the Supreme Court of Canada

[2] 2020 SCC 26 [*Ocean Nutrition*].

[3] 2014 SCC 71 [*Bhasin*].

[4] *Ocean Nutrition, supra* note 1 at para. 38.

3. The Court leaves open the possibility that *Bhasin* duties may apply throughout the duration of the employment contract.

Background

Matthews had spent twenty years with Ocean when a change in management led to a new Chief Operating Officer who had significant friction with Matthews; the Court found the COO engaged in dishonesty and sought to marginalize Matthews.[5]

The LTIP was a key reason Matthews remained.[6] Potential realization events for the LTIP included the sale of Ocean and, in 2010, Matthews became aware that there was a sale in progress.[7]

By 2011 Matthews was in negotiations with Ocean for a termination package.[8] These negotiations never crystallized, as Matthews took a position with a new employer in June 2011.[9]

Thirteen months later, Ocean was sold for $540 million.[10] Ocean advised that since Matthews was not "actively employed" as of that date, he was not entitled to any LTIP payment.[11]

The lower courts all agreed that Matthews had been constructively dismissed, and that the appropriate notice period was 15 months.[12]

The trial judge held Matthews' mistreatment by Ocean "was not motivated by a desire to deprive him of his LTIP entitlement"[13] but nevertheless awarded Matthews $1,086,893.36 for the LTIP.[14] However, the majority of the Court of Appeal held that no such damages should be ordered as the language of the LTIP was unambiguous and excluded any such entitlement.[15]

The Legal Context Prior to *Ocean Nutrition*

Prior to *Ocean Nutrition,* there had been inconsistency among the provincial appellate courts regarding treatment of LTIPs and bonuses during the notice period:

---

[5] *Ocean Nutrition, supra* note 1 at paras. 10-14.
[6] *Ocean Nutrition, supra* note 1 at paras. 15-18.
[7] *Ocean Nutrition, supra* note 1 at paras. 15-18.
[8] *Ocean Nutrition, supra* note 1 at para. 18.
[9] *Ocean Nutrition, supra* note 1 at para. 17.
[10] *Ocean Nutrition, supra* note 1 at para. 18.
[11] *Ocean Nutrition, supra* note 1 at para. 18.
[12] *Matthews v. Ocean Nutrition,* 2017 NSSC 16 at para. 368 [*Ocean Nutrition Trial*]; *Matthews v. Ocean Nutrition,* 2018 NSCA 44 at paras. 3, 45-54, 153 [*Ocean Nutrition COA*]; *Ocean Nutrition, supra* note 1 at para. 49.
[13] *Ocean Nutrition Trial, supra* note 12 at para. 325; *Ocean Nutrition, supra* note 1 at para. 18.
[14] *Ocean Nutrition Trial, supra* note 12 at para. 427.
[15] *Ocean Nutrition, supra* note 1 at para. 29.

- The British Columbia Court of Appeal in *Iacobucci v. WIC Radio Ltd.*[16] held that a wrongfully dismissed employee is not suing for the actual benefit.[17] This means exclusionary language might exclude entitlement to the benefit itself, but not damages for the failure to provide a working notice period (which includes damages for the lost opportunity to gain the benefit).

- The Court of Appeal for Ontario in *Paquette v. TeraGo Networks Inc.*[18] and *Lin v Ontario Teachers Pension Plan*[19] held that with clear language, parties could contract out of entitlement during the notice period —with the caveat that "active employment" language was *not* sufficient.

- In contrast, the Court of Appeal of Alberta in *Styles v. Alberta Investment Management Corporation*[20] held that "active employment" language *was* sufficient to deny Styles an incentive bonus.

The reconciliation of these decisions was one of the two main issues in *Ocean Nutrition*. The second issue was the application of bad faith: how did *Bhasin* apply in a case like *Ocean Nutrition*, and was there a remedy if Ocean had failed to perform the contract in good faith?

The Holding from the Supreme Court of Canada

The Court decided the case could be determined without resort to *Bhasin*; because the law should develop in an incremental fashion, the Court "would decline to decide whether a broader duty exists during the life of the employment contract..."[21].

However, this did not stop the Court from making certain points about good faith. Namely:

1. "Bad faith in manner of dismissal" allows the court to consider conduct that is beyond just the exact moment of termination,[22] and

2. A reciprocal duty of good faith throughout the duration of the employment contract may one day exist:

   > [85] … It might be that… a duty of good faith will one day bind the employer based on a mutual obligation of loyalty in a non-fiduciary sense during the life of the employment contract, owed reciprocally by both the employer and employee. I recognize, however, that whether the law should recognize this is a matter of fair debate.[23]

---

[16] 1999 BCCA 753 [*WIC Radio*].
[17] *Ibid.* at paras. 19, 24.
[18] 2016 ONCA 618 at paras. 28, 29, 35, 48 [*Paquette*].
[19] 2016 ONCA 619 at paras. 86, 89 [*Lin*].
[20] 2017 ABCA 1 [*Styles*].
[21] *Ocean Nutrition, supra* note 1 at para. 86.
[22] *Ocean Nutrition, supra* note 1 at paras. 40, 81.
[23] *Ocean Nutrition, supra* note 1 at para. 85.

Ocean Nutrition was ultimately decided, however, on principles of notice.

The Court held the test to be applied to benefits and bonuses in the notice period is as follows:

> [55] Courts should accordingly ask two questions when determining whether the appropriate quantum of damages for breach of the implied term to provide reasonable notice includes bonus payments and certain other benefits. Would the employee have been entitled to the bonus or benefit as part of their compensation during the reasonable notice period? If so, do the terms of the employment contract or bonus plan unambiguously take away or limit that common law right?

The Court held that Matthews did not have to prove that the LTIP was "integral" to his compensation to meet the first criteria: the realization event occurred during the notice period, and but for his dismissal, he would have received the LTIP payout.[24]

As for the language of the LTIP in question, the Court considered the two main clauses:

> 2.03 CONDITIONS PRECEDENT:
>
> [Ocean Nutrition] shall have no obligation under this Agreement to the Employee unless on the date of a Realization Event the Employee is a full-time employee of [Ocean Nutrition]. For greater certainty, this Agreement shall be of no force and effect if the employee ceases to be an employee of [Ocean Nutrition], regardless of whether the Employee resigns or is terminated, with or without cause.
>
> 2.05 GENERAL:
>
> The Long Term Value Creation Bonus Plan does not have any current or future value other than on the date of a Realization Event and shall not be calculated as part of the Employee's compensation for any purpose, including in connection with the Employee's resignation or in any severance calculation.

The Court held that contrary to *Styles* and similar cases, active employment language is insufficient to remove an employee's right to damages: if the employee had been given proper notice, they would have been "actively employed" or "full-time" throughout the notice period.[25] Clause 2.03 did not unambiguously limit Matthews' common law rights, such that he was entitled to damages equal to the LTIP.[26]

---

[24] *Ocean Nutrition, supra* note 1 at paras. 58-59.
[25] *Ocean Nutrition, supra* note 1 at para. 65.
[26] *Ocean Nutrition, supra* note 1 at paras. 67-70.

Concluding Thoughts and Impact

The decision in *Ocean Nutrition* is unequivocal: anything less than a clear exclusionary clause will fail to limit an employee's damages upon termination. Contrary to *Styles,* active employment language is now insufficient across Canada.

Second, counsel on both sides of the bar will want to pay close attention to what breach and remedies have been pled, as the Court held that "damages arising out of the same dismissal are calculated differently depending on the breach invoked"[27].

Third, bad faith "in the manner of dismissal" per *Wallace*[28] and *Keays*[29] is not confined to only the exact instant of termination.[30] A pattern of behaviour prior to dismissal may now fall under that umbrella. It is also possible that good faith in the performance of employment contracts may be a live issue in the years to come.

To learn more and/or for assistance contact Sherrard Kuzz LLP.

[27] *Ocean Nutrition, supra* note 1 at para. 45.
[28] *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC).
[29] *Honda Canada Inc. v. Keays,* 2008 SCC 39 at paras. 57-59.
[30] *Ocean Nutrition, supra* note 1 at para. 81.