<u>NOVA SCOTIA COURT OF APPEAL</u>

Citation: *Ocean Nutrition Canada Ltd. v. Matthews*, 2018 NSCA 44

Date: 20180524
Docket: CA 460556
Registry: Halifax

Between:

Ocean Nutrition Canada Limited

Appellant

v.

David Matthews

Respondent

Judges: Farrar, Bryson and Scanlan, JJ.A.

Appeal Heard: November 16, 2017, in Halifax, Nova Scotia

Held: Appeal allowed, in part, without costs per reasons for judgment of Farrar, J.A.; Bryson, J.A. concurring; Scanlan, J.A. dissenting.

Counsel: Nancy F. Barteaux, Q.C. and Krista Smith, for the appellant
Blair Mitchell and Michelle Morgan-Coole, for the respondent

Reasons for judgment:

Overview

[1] David Matthews worked for Ocean Nutrition Canada Limited or its predecessors from January 1997 to June 2011. In June 2011 he resigned and sued Ocean Nutrition for wrongful dismissal and for an oppression remedy under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. The application eventually morphed into a determination of whether Matthews had been constructively dismissed.

[2] The matter proceeded before Justice Arthur LeBlanc. In a decision dated January 30, 2017 (2017 NSSC 16) and a supplemental decision dated May 12, 2017 (2017 NSSC 123), the hearing judge found Matthews had been constructively dismissed, found the appropriate notice period to be 15 months and awarded him damages of approximately $1.085M. Most of the damages related to a Long Term Incentive Plan provided to executives of Ocean Nutrition. The hearing judge found the plan would have crystalized if Matthews had remained employed throughout the notice period.

[3] For the reasons that follow, I would allow the appeal, in part, and set aside the damages awarded under the Long Term Incentive Plan. I would not disturb the hearing judge's finding that Matthews was constructively dismissed. I would decline to award costs to either party on this appeal.

Background

[4] In March, 1997, Clearwater Fine Foods Inc. purchased Laer Products, a business that manufactured fish oil (omega-3) for commercial sale. Laer later became Ocean Nutrition, a wholly owned subsidiary of Clearwater. Ocean Nutrition was incorporated federally in March 1997. From June 2002 until October 25, 2005, Clearwater was Ocean Nutrition's only shareholder. (The record does not indicate the shareholdings of Ocean Nutrition between March 1997 and June 2002).

[5] Ocean Nutrition's head office was in Dartmouth, Nova Scotia. It had production plants in Dartmouth and Mulgrave, Nova Scotia; Arcadia, Wisconsin and Piura, Peru. The plant in Peru was acquired in January 2012 after Matthews' departure.

[6] On October 26, 2005, Richardson Capital Limited acquired 22½% of Ocean Nutrition's shareholdings. On October 18, 2007, Richardson acquired a further 2½% of Ocean Nutrition. On July 31, 2009, Richardson increased its shareholdings in Ocean Nutrition to approximately 45%. The remaining 55% of the shares continued to be held by Clearwater.

[7] Ocean Nutrition was sold to Royal DSM N.V. ("DSM") on July 18, 2012.

[8] Robert Orr was President and CEO of Ocean Nutrition from its creation until July, 2010, when Martin Jamieson took on both roles. From July 2010 until July 19, 2011, Orr was Chairman of the Board of Ocean Nutrition. He was also a director from December 9, 2005 until July 19, 2011.

[9] Jamieson remained President and CEO until the company was sold to DSM. Jamieson also became a director of Ocean Nutrition on July 19, 2011, replacing Orr.

[10] Matthews is a chemist who has worked in the omega-3 fish oil industry for decades. He was the first employee hired by Orr at Laer Products. On January 2, 1997, he started in the position of Operations Manager.

[11] Matthews became Senior Operations Manager of Ocean Nutrition on June 1, 2001; Vice-President, Healthy Food Ingredients on February 1, 2006; Vice-President, Engineering and Technical Services in October 2007; and lastly Vice-President, New and Emerging Technologies on July 17, 2009.

[12] In June 2007, Ocean Nutrition hired Daniel Emond as its Chief Operating Officer.

[13] As Chief Operating Officer, Emond assigned duties and responsibilities to Matthews. The relationship between Emond and Matthews was critical to the hearing judge's finding of constructive dismissal. I will address their relationship in more detail later.

[14] In early 2007, Orr and the Board of Directors of Ocean Nutrition created a Long Term Incentive Plan. Under the plan, 2% of the company's value created on the sale or public offering of the company in excess of $100M would be distributed among the executives who were party to the incentive plan. The plan was intended to be an incentive and a retention tool. On September 10, 2007, Matthews and Ocean Nutrition entered into what was titled an Executive Incentive Agreement.

This plan has been referred to variously as the Executive Incentive Plan, the LTIP and the Long Term Incentive Plan. I will refer to it as "the Long Term Incentive Plan" or "the Agreement".

[15] Also in 2007, Ocean Nutrition instituted what has been called a Short Term Incentive Plan structured around targeted company financial objectives. It was intended to reward contribution to the achievement of those objectives by the management team, which included Matthews.

[16] Matthews resigned from Ocean Nutrition on June 24, 2011. He commenced employment with TASA, a Peruvian company on August 1, 2011.

[17] On May 18, 2012, DSM and Ocean Nutrition issued press releases announcing that DSM had purchased Ocean Nutrition. On July 19, 2012, DSM announced the completion of the acquisition.

[18] I will provide additional background when addressing the grounds of appeal if the context requires it.

Issues

[19] The appellant outlined nine issues in its Notice of Appeal. The appellant reduced the grounds of appeal to five in its factum. I would further reduce the issues on this appeal to four and restate and address them in the following order:

i. Did the hearing judge err in finding that Matthews had been constructively dismissed;

ii. Did the hearing judge err in finding the reasonable notice period was 15 months;

iii. Did the hearing judge err in finding that the plaintiff was entitled to damages pursuant to the Long Term Incentive Plan or the Short Term Incentive Plan; and

iv. Did the hearing judge err in ordering the defendant to remit a specific amount to Canada Revenue Agency?

Standard of Review

[20] I will address the standard of review when considering the individual grounds of appeal.

Issue #1 Did the hearing judge err in finding that Matthews had been constructively dismissed?

Standard of Review

[21] A finding of constructive dismissal involves reviewing the evidence and drawing inferences or making findings of fact from that evidence. In *McPhee v. Canadian Union of Public Employees*, 2008 NSCA 104, Justice Cromwell summarized the standard of review in such cases (the highlighted portions are of particular significance to the appellant's arguments):

> [17] With respect to questions of fact and mixed questions of fact and law that do not reveal any underlying error of legal principle, the role of the appellate court is entirely different. An appeal to the Court of Appeal is not an opportunity for three judges to retry the case on the basis of a written transcript. Finding facts and drawing evidentiary conclusions from them are roles of the trial judge, not the Court of Appeal: ... An appellant cannot challenge a trial judge's findings of fact simply because the appellant does not agree with them. … Findings of credibility are "... a vital aspect of the trier of fact's role." : …
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> [18] Appellate intervention on questions of fact is permitted only if the trial judge is shown to have made a "palpable and overriding error": … Sometimes the standard has been expressed in different words, such as "clear and determinative error", "clearly wrong" and "hav[ing] affected the result." … However expressed, courts of appeal must accept a trial judge's findings of fact unless the judge is shown to have made factual errors that are clear and which affected the result.
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> [19] This deferential approach on appeal applies to all of the trial judge's findings of fact, whether or not based on the judge's assessment of witness credibility and whether based on direct proof or on inferences which the judge drew from the evidence:… [authorities omitted].

[Emphasis added]

[22] Here the appellant makes various allegations about the hearing judge's use of the evidence including he made unreasonable findings of fact not supported by the evidence; misapprehended the evidence; ignored evidence; and, improperly relied on disputed evidence.

[23] The appellant alleges these errors led the hearing judge to mistakenly conclude that Matthews had been constructively dismissed.

[24] Where the judge is said to have "forgotten, ignored or misconceived the evidence", there is a presumption that the full record was before the judge and the judge reviewed it. I refer to *Housen v. Nikolaisen*, 2002 SCC 33:

> 46 We note that in relying on the evidence of Mr. Anderson and Mr. Werner, the trial judge chose not to base her decision on the conflicting evidence of other witnesses. However, her reliance on the evidence of Mr. Anderson and Mr. Werner is insufficient proof that she "forgot, ignored, or misconceived" the evidence. The full record was before the trial judge and we can presume that she reviewed all of it, absent further proof that the trial judge forgot, ignored or misapprehended the evidence, leading to an error in law. It is open to a trial judge to prefer the evidence of some witnesses over others: *Toneguzzo-Norvell, supra*, at p. 123. Mere reliance by the trial judge on the evidence of some witnesses over others cannot on its own form the basis of a "reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (*Van de Perre, supra*, at para. 15). This is in keeping with the narrow scope of review by an appellate court applicable in this case.

[Emphasis added]

Analysis

[25] After extensive review of the documentary and *viva voce* evidence given at the hearing of this matter, the hearing judge made some very clear findings on credibility.

[26] He found that Matthews was, on the whole, a credible and reliable witness (¶279).

[27] He found Orr, although not interested in participating in the proceedings, was also a reliable and truthful witness (¶280).

[28] These findings of credibility can be contrasted with the hearing judge's opinion of Emond and Ocean Nutrition's other witnesses. To say the hearing judge considered Emond not to be a credible witness would be an understatement. The hearing judge went so far as to find him to be self-serving, deceitful, defensive and evasive on cross-examination:

> [281] Daniel Emond was, to say the least, an unsatisfactory witness. His testimony was self-serving and deceitful. Defensive and evasive on cross-examination, Mr. Emond's unwillingness to concede even the most minor points severely undermined his overall credibility. The two most striking examples of

> this were his refusal to concede that Matthews was instrumental in getting the plant in Peru up and running, and that PCB reduction was an important issue for ONC.
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> [282] Emond's testimony often conflicted with other, more reliable evidence. For example, his evidence that Mr. Matthews' responsibility for the Arcadia plant ended when he became VP Engineering and Technical Services conflicted with the PowerPoint presentation he himself prepared that included an announcement of Matthews' new position. Other portions of his evidence, including his testimony that Matthews declined repeated invitations to attend the grand opening in Peru, were entirely implausible. Where Emond's evidence diverges from that of other witnesses or the documentary evidence, I do not accept it.

[29] Considering that Emond was the Chief Operating Officer of Ocean Nutrition, to whom Matthews reported from June 2007 forward, the assessment of his credibility was a crucial factor in the determination of whether Matthews had been constructively dismissed.

[30] The hearing judge also commented unfavourably on the evidence of Martin Jamieson who was the President and Chief Executive Officer of Ocean Nutrition from July 3, 2010 to November 9, 2012. Jamieson provided a 358-paragraph affidavit and was cross-examined extensively during the hearing. The hearing judge found, although Jamieson was a polished and articulate witness, his evidence on the key issues in the application was of questionable reliability (¶283).

[31] Stanley Spavold was a director of Ocean Nutrition. His evidence was entered by way of discovery excerpts. He was not cross-examined at the hearing. The hearing judge was, similarly, unimpressed with Mr. Spavold’s evidence – finding that he had a significant animosity and contempt toward Matthews which was evident from his discovery:

> [287] <u>Mr. Spavold's evidence reveals a significant animosity toward Dave Matthews</u>. On April 13, 2012, three years before his discovery, Spavold sent the following "reply all" to an e-mail from Martin Jamieson updating members of the Board and the Executive Leadership Team on this litigation:
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>> This guy is a total and complete asshole, has been for years..since my involvement in 2002 anyway...kept moving him around in the organization to use his skills while preventing damage to almost everything he managed. ..has caused so much damage to ONC over the years in terms of operational issues. ..could not bring a project in under budget or on schedule ... he may know oil processing but he is basically incompetent at everything else. I think it is time to start to be nasty back and start to sue Mr Matthews for his breaches of his agreement and damages.

> [288] Mr. Spavold's contempt for Mr. Matthews was evident on discovery. He described Matthews' claim that he invented fractional distillation as a "bullshit statement" that "would have teed a few people off." He said that Matthews "was a very poor manager and motivator of people. He doesn't work well with people. He doesn't work well within an organization. He doesn't work well with peers, supervisors or employees. He's a very very poor people person." Spavold also described Matthews as a "disruptive" person who "wouldn't follow company policy", "a lone wolf in the organization that didn't want to evolve with the company", and "a very smart guy with very limited HR and management skills."
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> …
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> [290] In light of the above, I do not find Mr. Spavold's evidence in relation to Daniel Emond and Dave Matthews as reliable as other evidence, including that of Robert Orr, and, in some cases, Matthews himself.

[Emphasis added]

[32] Having made these findings on credibility, the hearing judge then made findings of fact. I will summarize his findings insofar as they relate to the wrongful dismissal claim. It is necessary to do so in considerable detail in light of the appellant's arguments:

- Matthews was an individual whose sense of identity and self worth was highly connected to his work. He valued honesty and integrity (¶292).
- When Clearwater was the sole owner of Ocean Nutrition, Matthews felt respected within the organization. However, that changed with the involvement of Richardson and the shift in focus from operating the company to selling it (¶292).
- After Emond was hired as COO in 2007, he became Matthews' boss. Friction quickly developed between Emond and Matthews (¶294).
- Emond did not like Matthews and did not consider him to be a valuable asset to the company (¶294).
- Emond's decision in October 2007 to make Matthews the VP Technical Services and Engineering was the first step in a campaign to push Matthews out of operations and minimize his influence at Ocean Nutrition (¶296).
- The appointment of Matthews as VP Technical Services and Engineering was followed shortly by two events; Emond acquiring

specialized equipment which was directly within Matthews' area of responsibility to acquire – and an attempt by Emond to remove oversight of the Arcadia Plant from Matthews to another individual, Paul Empey (¶296).

- Emond lied to Orr when he denied that he planned to have Empey take over the Arcadia Plant (¶296).
- The hearing judge accepted Empey's evidence that Emond told him, in 2007, that he was close to the ownership interests in Ocean Nutrition, Matthews and Orr would not be around much longer, and it was his goal to have Empey run all the operations at Ocean Nutrition (¶296).
- In 2008, Ocean Nutrition developed an initiative to produce omega-3s through Alicorp, a Peruvian contractor. The plan was for Ocean Nutrition to build a plant in Lima under Alicorp (¶84).
- Emond excluded Matthews from the Alicorp initiative (¶297).
- When it became clear Alicorp could not complete the project on time it was Orr, not Emond, who directed Matthews to go to Peru to fix the problem (¶297).
- Contrary to Emond's evidence, Matthews was instrumental in getting the Peru plant up and running on time (¶297).
- Matthews was not invited to the Peru facility's grand opening by Emond until Orr intervened and required Emond to invite him (¶297).
- In January or February 2009, Emond went behind Matthews' back and tried to change the Technical Services reporting structure. When confronted about this in front of Orr, Emond lied about trying to change the structure (¶298).
- In March 2009, a fire occurred at the Mulgrave plant. After Matthews was informed about the fire, and visited the plant, he attempted to speak to Emond about it but Emond ignored Matthews' request to speak to him and did not answer his phone calls (¶299).
- Following the Mulgrave fire, Matthews returned to Ocean Nutrition's offices and wrote a resignation letter that informed Emond of his view that Emond had been progressively removing his responsibilities and refusing to consult with him (¶300).

- Matthews' intention to resign was resolved in June 2009 when he was offered and accepted responsibility for what was known as the algal oil program. Ocean Nutrition planned to use a marine algal organism to: (1) produce omega-3's to add to food, and (2) produce fatty acids for bio-fuel (¶111-112).
- The hearing judge rejected Emond's evidence that Matthews was upset because he felt responsible for the fire (¶300).
- Emond's communication skills and dishonesty were a recurring source of tension between Orr and Emond while Orr was CEO (¶300).
- In October 2010, DSM began the due diligence process. Matthews was not involved in the process (¶305).
- Emond made a presentation to the Board in or around December 2010 which included a recommendation to disband the New and Emerging Technologies Department of which Matthews was V.P. In response to a question from Orr, Emond responded that there would be no place in the organization for the New and Emerging Technologies' employees, including Matthews. Orr told Matthews this at some point in early 2011 (¶308-309).
- In February 2011, Matthews told Emond that he did not have enough work to do and it was not the first time he had done so. Emond did not offer any options to increase Matthews' workload (¶310).
- In February 2011, Matthews confronted Emond about what he had been told by Orr about Emond wanting to get rid of him. Emond advised Matthews that there was no plans to terminate him. When Matthews asked what Ocean Nutrition's future plans were for him Emond responded, "I don't know" (¶311).
- In 2010 Ocean Nutrition was exploring the development of an omega-3 ingredient to be used in pharmaceuticals. This initiative was known by the acronym API which stood for active pharmaceutical ingredient (¶151).
- Ocean Nutrition's relationship with Orr began to deteriorate when Jamieson took over as CEO (July 2010) and Orr focused almost entirely on API. As a result, Matthews and Orr became progressively more ostracized within the company (¶314).

- Emond generally avoided dealing with Matthews – even where consulting Matthews would have been in Ocean Nutrition's best interests – and told Matthews that he did not know about Ocean Nutrition's plan for him (¶317).
- Emond had no qualms about leaving Matthews in a state of anxiety about his future (¶317).
- On May 26, 2011, Emond emailed Matthews to tell him that he was giving the lead on PCB reduction to David Elder. The loss of PCB reduction duties left Matthews with only one to two hours of work per day (¶313).
- On May 27, 2011, Matthews made it clear to Jamieson that he had no plans to go with API. He expressed the view that he was being constructively dismissed (¶318).
- From December 2010 to May 2011, Matthews was spending 70% of his time on PCB reduction, 10% on API and 20% on algal oil. From May 1 to May 26, he was spending 10% of his time on algal oil and 10% on API. (¶313).
- On June 24, 2011, Matthews resigned (¶322).
- On August 1, 2011, Matthews began working for TASA, a company also involved in omega oil production (¶324).

[33] There are other factual findings which were made by the hearing judge; however, these are the most germane to the issue of wrongful dismissal.

[34] The appellant, in its factum, from ¶80 to ¶157 dissects the hearing judge's findings, reviews the evidence in detail and asks us to come to a different conclusion, its theory being primarily that Matthews orchestrated his constructive dismissal so that he could have a claim for damages while going to work for TASA. The arguments being made on appeal are essentially the same arguments which were made at the hearing and rejected by the hearing judge. I agree with the respondent - the appellant is attempting to relitigate issues which have been decided. The hearing judge outlined the competing arguments in his decision:

> [333] Dave Matthews argues that ONC's "unilateral withdrawal of substantial responsibilities" from him meets the test for constructive dismissal under both branches. ONC says there is no evidence to support Matthews' claim that Emond

> was taking responsibilities away from him with a view to causing his constructive dismissal. It says Matthews voluntarily resigned in order to work for a competitor.

[35] The hearing judge soundly rejected Ocean Nutrition's argument. He found that the transfer of the PCB reduction project from Matthews to Empey on May 26, 2011, alone, was sufficient to amount to constructive dismissal:

> [338] During his tenure at ONC, Matthews was regularly brought in to oversee new and existing projects when his involvement was considered to be in the company's best interests. Two features distinguish the removal of responsibility for PCB reduction on May 26, 2011, from these earlier changes. First, removal of PCB reduction left Matthews with only one to two hours of work per day. There is no evidence that Matthews' duties had ever been reduced to this extent. Second, removal of PCB reduction -- which ONC conceded was important to the company -- left Matthews in a very different position in terms of duties and status within the company. The only two areas of responsibility that he had left were considered "non-core" elements of the company's business.
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> …
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> [343] I am satisfied that Daniel Emond, on behalf of ONC, was not authorized by any implied term of the employment contract to reduce Dave Matthews' responsibilities so substantially without reasonable notice and a proposal of alternate work that was substantially similar in terms of duties, responsibility and status. There was no evidence that Dave Matthews acquiesced to the reduction in his responsibilities. As a result, I conclude that ONC made a unilateral change amounting to a breach of the employment contract.

[Emphasis added]

[36] After finding that Ocean Nutrition made a unilateral change amounting to a breach in the employment contract, the hearing judge went on to determine whether a reasonable person in the same situation as Matthews would feel that the essential terms of the contract had been substantially changed. The hearing judge had no difficulty in finding they would:

> [344] At the second step of the first branch of the constructive dismissal test, the court must consider whether a reasonable person in the same situation as Dave Matthews would feel that the essential terms of the contract had been substantially changed. Whether ONC actually intended to change the essential terms of the contract is irrelevant. I have no difficulty concluding that a reasonable person in Dave Matthews' position would feel that the essential terms of the contract had been substantially changed. Any employee who had previously mentioned to their superior that they could use more work, only to have their workload further reduced to one to two hours per day, without prior consultation or any suggestion

> that alternate work was forthcoming, would feel that the employer had substantially changed the employment contract. I find that Mr. Matthews has established constructive dismissal under the first branch of the test.

[Emphasis added]

[37] In its factum, the appellant argues this finding by the hearing judge, i.e., that the removal of the PCB reduction amounted to a breach of contract, cannot be supported on any standard of review. It says the hearing judge ignored relevant evidence or misapprehended the evidence.

[38] With respect, I disagree. The hearing judge had voluminous affidavit evidence, and *viva voce* evidence in a hearing that lasted nine days. He made clear findings on credibility, rejecting, essentially, the evidence of all of Ocean Nutrition's witnesses of any significance and accepting Matthews' evidence. He accepted this unilateral change in Matthews' duties left him with very little responsibility and only two hours of work per day. Those are findings which he was entitled to make and are amply supported by the evidence as summarized by the hearing judge.

[39] The hearing judge went further. In addition to finding this one incident amounted to constructive dismissal, he found that Ocean Nutrition pursued a course of conduct that demonstrated an intention to no longer be bound by the employment contract (¶345).

[40] He concluded:

> [347] Over the next few years, Daniel Emond engaged in a course of conduct aimed at pushing Matthews out of operations and minimizing his influence and participation in the company. I have outlined these efforts earlier in this decision. Until 2010, Emond's communications with Matthews were monitored to an extent by Robert Orr, who had significant respect for Matthews and considered him to be an industry-leading resource of significant value to ONC. When Orr stepped down as CEO and Emond began reporting to Martin Jamieson, Matthews lost his only real ally at the company. Emond's communication with Matthews declined in quality and frequency, and Matthews, along with Orr, became increasingly ostracized.

[Emphasis added]

[41] Again, the hearing judge's findings on this point are supported by the evidence. What is telling about the appellant's argument on this ground of appeal

is that it does not argue that the hearing judge erred in law in the test he applied to determine that Matthews had been constructively dismissed. Rather, it seeks to have the hearing judge's factual findings overturned so that their application to the legal test would have a different result. Its arguments, on appeal, to a large extent, mirror its arguments before the hearing judge. Other than to suggest that the hearing judge misapprehended or ignored evidence in reaching his conclusion, the appellant points to no legal error in his analysis.

[42] The hearing judge reviewed the evidence in considerable detail in his decision. It comprises the first 64 pages of his decision or 264 paragraphs. He does this before he makes his findings of credibility and findings of fact.

[43] There is no plausible or credible argument that he ignored, misunderstood or misapprehended the evidence. His findings of fact are borne out by the evidence he accepted.

[44] I would dismiss this ground of appeal.

Issue #2 Did the hearing judge err in finding the reasonable notice period was 15 months?

[45] The appellant argues the hearing judge erred in setting the period of notice at 15 months. Although acknowledging that the determination of a period of notice is fact-driven and highly contextual and is, therefore, reviewable on a palpable and overriding error standard, it says the hearing judge "completely failed to consider several key facts in determining the notice" including:

- Matthews was only 50 years old;
- Matthews was one of a handful of individuals worldwide with similar skill and knowledge in omega-3;
- TASA sought out Matthews prior to his resignation;
- Matthews negotiated a period of 9 months' notice with TASA; and
- Matthews had negotiated a period of 12 months with Ocean Nutrition.

[46] In contrast to its argument on the first ground of appeal, its argument on the second ground of appeal occupies only two paragraphs of its factum and is unsupported by analysis or legal authorities. Perhaps for good reason – the submissions are devoid of any merit.

[47] First, the hearing judge starts off his analysis by citing case law which sets out the factors to be included in determining reasonable notice, including the age of the employee:

> [355] This court recently summarized the law in relation to the determination of the reasonable notice period in *Bellini v. Ausenco Engineering Alberta Inc*., 2016 NSSC 237, [2016] N.S.J. No. 338:
>
> > 44 The factors in *Bardal v Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. S.C. (H.C.J.) govern the quantification of reasonable notice. These factors are (1) the character of the employment; (2) the length of service of the employee; <u>(3) the employee's age</u>; and (4) the availability of similar employment, having regard to the experience, training, and qualifications of the employee. This analysis has been endorsed by the Nova Scotia Court of Appeal: *Silvester v. Lloyd's Register of North America Inc.,* 2004 NSCA 17, [2004] N.S.J. No. 37, at para. 20.

[Emphasis added]

[48] Clearly, the hearing judge directed himself to the appropriate test in determining reasonable notice, including the age of the employee.

[49] If that were not enough, the hearing judge actually references Matthews' age in a portion of his decision dealing with the determination of reasonable notice:

> [363] **Age of the employee**. There is a general presumption that, after a certain age, it becomes more difficult for an employee to find new employment: *Trudeau-Linley v. Plummer Memorial Public Hospital*, 1993 CarswellOnt 867, [1993] O.J. No. 2272 (Ont. Ct. J. Gen. Div.). <u>Dave Matthews was fifty years old when he left ONC</u>.

[Emphasis added]

[50] I fail to understand how the appellant can make any argument that the hearing judge "completely failed" to consider Matthews' age when determining the period of reasonable notice. His decision identifies it as part of the legal test and then references it in his analysis.

[51] Second, the fact that Matthews was one of a handful of individuals worldwide with similar skill and knowledge in omega-3 was specifically acknowledged by the hearing judge. In fact, he used the very words "handful of individuals":

> [291] I will now set out my findings of fact. I accept Robert Orr's evidence that Dave Matthews is one of only a handful of individuals in the world who can build and operate large-scale omega 3 plants and who understands the nuances of these plants. …

[Emphasis added]

[52] The hearing judge then addressed Ocean Nutrition's argument that Matthews negotiated a 12-month termination period with it in 2009 or 2010 and, therefore, the notice period should be capped at 12 months. It was not ignored by the hearing judge - he rejected it:

> [366] Nor has ONC satisfied me that I must consider the notice period the parties negotiated in late 2009 and early 2010. The draft employment contract was never executed and is not binding on the parties or this court.

[53] With respect to the other two factors, his negotiation of a 9-month termination period with TASA and having been sought out by TASA prior to resigning, the hearing judge was aware of this evidence. He set it out in his narrative when he reviewed the evidence of the parties and their theories. He did not ignore it. Furthermore, it is unclear to me how this evidence could possibly have any impact on the reasonable notice period for Matthews as a result of his dismissal from Ocean Nutrition. The appellant's submissions are of no assistance on this point.

[54] I would dismiss this ground of appeal.

Issue #3 Did the hearing judge err in finding that the plaintiff was entitled to damages pursuant to the Long Term Incentive Plan or the Short Term Incentive Plan?

Standard of Review

[55] The nature of the Long Term Incentive Plan was discussed in the hearing judge's decision:

> **The LTIP**
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> […]
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> [59] Robert Orr testified that John Risley, founder of CFFI, was generally averse to the creation of stock options, preferring other means of retaining and

> compensating senior management who had created value for his companies. Early on, when ONC was wholly owned by CFFI, there was a high degree of trust among senior management that Mr. Risley would look after those people who contributed to the development of his companies. According to Orr, Risley's word was his bond. However, when ONC began to grow, Mr. Orr recommended the introduction of a formal compensation structure.
>
> [60] Although Mr. Orr preferred stock options for senior management, the Board of Directors proposed a long-term incentive plan that was similar to stock options in terms of value creation. The LTIP was intended to be both an incentive and a retention tool.
>
> [61] Under the LTIP, two percent of the company's value created on the sale or public offering of the company in excess of one hundred million dollars (a "realization event") would be distributed among a limited number of executives. Under the formula, each individual was given a base value meant to reflect the company' value at the time the employee was hired. Since Mr. Matthews was the longest serving management employee subject to an LTIP, his base value was the lowest, meaning he would receive the highest payout upon a realization event.
>
> The LTIP contained the following recitals:
>
> A. ONC desires to establish a mechanism to provide an [*sic*] retention incentive and to reward certain of its employees, including the Employee, for their service to ONC in the event of a Realization Event (as defined below);
>
> B. The Employee has served as a management-level employee of ONC and has been deemed to be eligible to participate in the Long Term Value Creation Bonus Plan on the terms contained in this Agreement;

[56] There is no evidence to suggest that there was any negotiation or consideration of the contents of the agreement with Matthews. It applies to a number of employees and must have the same meaning for all. The factual matrix is of little significance in the interpretation of the contract. For these reasons, the hearing judge's reasons will be reviewed on a correctness standard.

[57] The comments of Wagner, J. (as he was then) in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, are relevant in the context where employers decide to grant additional benefits to employees:

> Indeed, while a proper understanding of the factual matrix of a case is crucial to the interpretation of many contracts, it is less relevant for standard form contracts because the parties do not negotiate the terms. <u>The contract is put to the receiving party as a take-it-or-leave-it proposition. Factors such as the purpose of the contract, the nature of the relationship it creates, and the market or industry in which it operates should be considered when interpreting a standard form</u>

> contract, but they are generally not inherently fact specific and will usually be the same for everyone who may be a party to a standard form contract.
>
> Moreover, the interpretation of a standard form contract itself has precedential value and can therefore fit under the definition of a pure question of law. In general, the interpretation of a contract has no impact beyond the parties to a dispute. While precedents interpreting similar contractual language may be of some persuasive value, it is often the intentions of the parties, as reflected in the particular contractual wording at issue and informed by the surrounding circumstances of the contract, that predominate. In the case of standard form contracts, however, judicial precedent is more likely to be controlling. Establishing the proper interpretation of a standard form contract amounts to establishing the correct legal test, as the interpretation may be applied in future cases involving identical or similarly‑worded provisions. The mandate of appellate courts — ensuring consistency in the law — is also advanced by permitting them to review the interpretation of standard form contracts for correctness. The result of applying the interpretation in future cases will of course depend on the facts of those cases.

[Emphasis added]

[58] The Short Term Incentive Plan, like the Long Term Incentive Plan, came into being without negotiation or input by Matthews or other members of the management team. Again, the standard of review that would apply to it is correctness. However, as will become apparent, the amount awarded by the hearing judge under the Short Term Incentive Plan becomes a moot point.

Analysis

Long Term Incentive Plan

[59] The key provisions of the Long Term Incentive Plan are:

> A. ONC desires to establish a mechanism to provide a retention incentive and to reward certain of its employees, including the Employee, for their service to ONC in the event of a Realization Event (as defined below);
>
> …
>
> 1.01(g)“Realization Event” means the happening any transaction that results in the sale of more than forty percent (40%) of the shares or substantially all the assets of ONC company, and includes a transaction that provides holders of common shares in ONC with liquidity with respect to the common shares in ONC, such as a listing on a recognized stock exchange, including by means of a reverse take over, merger, amalgamation, arrangement, take over bid, insider bid,

joint venture, sale of all or substantially all assets, exchange of assets or similar transaction or other combination with a reporting issuer. A "Realization Event" does not include a transaction or a series of transactions that is a corporate reorganization that does not involve the sale of its shares at arm's length.

…

2.01 PAYMENT OF EXECUTIVE INCENTIVE:

Provided the conditions precedent set out in Section 2.03 are satisfied **on the date on which a Realization Event occurs**, ONC shall pay to the Employee, in cash, less any appropriate withholding of other taxes, an amount calculated in accordance with Section 2.02, which payment shall be made within thirty (30) days of such Realization Event.

…

2.03 CONDITIONS PRECEDENT:

ONC 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 ONC. For greater certainty, this Agreement shall be of no force or effect if the employee ceases to be an employee of ONC, regardless of whether the Employee **resigns or is terminated, with or without cause**.

2.04 DEEMED EMPLOYEE:

For the purposes of Section 2.03, the Employee shall be deemed to be a full-time employee of ONC on the date of the Realization Event if (i) the Employee is age 55 or over and has retired from ONC, it being understood that whether an employee has retired from ONC shall be determined by the Board of Directors of ONC in its absolute discretion; or (ii) the Employee's employment with ONC is terminated in connection with the Realization Event.

2.05 GENERAL:

The Long Term Value Creation Bonus **Plan does not have any current or future value other than on the date of the 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**.

…

4.01 REALIZATION EVENT:

Nothing in this Agreement shall be interpreted to impose upon ONC any obligation to conclude a Realization Event at any time other than within the sole discretion of ONC.

[Emphasis added]

[60] As noted earlier, Matthews resigned from Ocean Nutrition on June 24, 2011, approximately 13 months before the Realization Event.

[61] The hearing judge said, before reviewing the terms of the Long Term Incentive Plan:

> [389] I find that Matthews has a common law right to damages for the loss of the payout he would have received <u>under the LTIP unless the agreement limits this right</u>. This court has previously held that "clear and express language" is required to deprive an employee of the common law right to reasonable notice: … As the Ontario Court of Appeal decisions illustrate, the same is true where an employer seeks to limit an employee's common law right to damages as compensation for losses arising from the employer's failure to give notice.

[Emphasis added]

[62] The hearing judge, in this paragraph, suggests that Matthews had a common law right to damages for the loss of the payout he would have received under the Long Term Incentive Plan unless the agreement limits this right. With respect, the hearing judge starts off on the wrong premise.

[63] The hearing judge confuses an employee's common law right to reasonable notice, with the employee's ability to recover damages arising under an incentive plan. The ability of Matthews to receive damages under the Long Term Incentive Plan is clearly governed by the words of the agreement. It is not a situation where the employer is seeking to limit the amounts that an individual would be entitled to at common law, but rather, whether the employee qualifies pursuant to the terms of the agreement.

[64] In any event, the hearing judge recognized the entitlement that Matthews had under the Long Term Incentive Plan was governed by the terms of that Agreement. After reviewing the Agreement and the case law, he concluded the Agreement did not in any way limit Matthews' right to participate in the Long Term Incentive Plan. His reasoning is quite short and I will repeat it here:

> [398] … <u>In my view, the condition that an individual must be a "full-time employee" at the time of the payout is similar to the condition in *Paquette* that an employee must be "actively employed</u>." Neither phrase unambiguously limits or removes the employee's common law right to compensation. Had Matthews not been constructively dismissed, he would have been a full-time employee when the LTIP payouts were made.

> [399] Nor are Matthews' common law rights limited by the reference to an individual who ceases to be an employee of ONC, whether he or she resigns or is terminated, with or without cause. ONC argues that the reference to termination "without cause" clearly means that any common law right to notice would not apply. I disagree. Termination without cause does not imply termination without notice. Under the common law, all employment contracts can be terminated on reasonable notice by either side. Where the termination is for cause, no notice is required. Where the termination is without cause, reasonable notice or compensation in lieu of notice must be provided.
>
> [400] Finally, I am not satisfied that the LTIP provision addressing retired employees or employees who have been terminated as a result of the "realization event" is of any assistance to ONC. As previously stated, the Rollover Plan provision in *Kieran* applied to employees terminated for any reason. Multiple exceptions to this broad general rule were explicitly outlined, and did not include employees terminated due to wrongful dismissal. The LTIP does not contain a general rule that is broad enough to include unlawful termination.

[Emphasis added]

[65] In the end result, the hearing judge found that Matthews was entitled to a payout under the Long Term Incentive Plan as damages for his dismissal without cause.

[66] To this extent, I would agree with the hearing judge - if the only condition precedent for a payout under the Long Term Incentive Plan were that the employee be a fulltime employee of Ocean Nutrition, that may not have been enough to preclude the damages under the Long Term Incentive Plan during a period of reasonable notice.

[67] However, the Long Term Incentive Plan does not stop there. Immediately below the words cited by the hearing judge, s. 2.05 contains the following:

> For greater certainty, this Agreement shall be of no force and effect if the employee ceases to be an employee of ONC, regardless of whether the Employee resigns or is terminated, with or without cause.

[Emphasis added]

[68] The hearing judge attempted to address this provision in the Agreement. In doing so, with respect, he misstated or misunderstood the argument of Ocean Nutrition at the hearing. For ease of reference, I will repeat what he said:

> [399] Nor are Matthews' common law rights limited by the reference to an individual who ceases to be an employee of ONC, whether he or she resigns or is terminated, with or without cause. ONC argues that the reference to termination "without cause" clearly means that any common law right to notice would not apply. I disagree. Termination without cause does not imply termination without notice. Under the common law, all employment contracts can be terminated on reasonable notice by either side. Where the termination is for cause, no notice is required. Where the termination is without cause, reasonable notice or compensation in lieu of notice must be provided.

[69] Before him, Ocean Nutrition argued that Matthews had not been constructively dismissed and, therefore, was not entitled to reasonable notice. However, Ocean Nutrition argued even if he were entitled to reasonable notice and the reasonable notice period overlapped with the Realization Event, he was precluded from recovering under the Long Term Incentive Plan by the plain wording of that Agreement. With respect, Ocean Nutrition was not arguing that reference to termination "without cause" meant that any common law right to notice would not apply to Matthews. Its argument was, even if reasonable notice applied, the terms of the Agreement precluded payment.

[70] The hearing judge himself had earlier recognized that the terms of the Long Term Incentive Plan would govern Matthews' entitlement to compensation. However, with respect, he failed to properly analyze the actual terms of the Agreement. His statement "termination without cause does not imply termination without notice" is true, however, it has no relevance or import in interpreting the Agreement.

[71] The Long Term Incentive Plan provides that it is of no force and effect if an employee ceases to be an employee of ONC, whether the employee resigns or is terminated without cause. In this case, Matthews resigned and there was a subsequent finding that he was dismissed without cause. There is no ambiguity in that clause that the Long Term Incentive Plan ceased to be of any force and effect on his resignation or termination.

[72] If there were any ambiguity with Paragraph 2.03 (and in my view there is not), 2.05 also addresses the issue . It reads the Long Term Incentive Plan "does not have any current or future value other than on the date of the Realization Event <u>and shall not be calculated as part of the Employee's compensation for any purpose, including in connection with the Employee's resignation or any severance calculation</u>". [Emphasis added]

[73] Again, there is no ambiguity in this clause. The Long Term Incentive Plan is not to be used in a calculation of any severance. However, that is exactly what the hearing judge did. He reasoned that the notice period was 15 months, the Realization Event occurred within that 15-month period, and therefore, Matthews was entitled to a payout under the Long Term Incentive Plan as part of his severance package.

[74] With respect, that ignores the plain and unambiguous language of the Long Term Incentive Plan.

[75] If the hearing judge was correct, it is difficult to imagine what other wording needed to be in the Long Term Incentive Plan to preclude its operation when someone resigned or was terminated without cause.

[76] This is analogous to the situation in *Kieran v. Ingram Micro Inc.*, [2004] O.J. No. 3118 (leave to appeal denied [2004] S.C.C.A. 423). In that case, the Ontario Court of Appeal addressed the appellant's entitlement to stock options that would have vested during his period of reasonable notice.

[77] The plans in question (there were three of them), all contained similar wording that if the participant's employment was "terminated for any reason", subject to certain conditions, the right to exercise the options ceased.

[78] One of the plans also provided that the employer could dismiss the employee at any time "free from any liability or any claim under the Plan or otherwise, unless, otherwise expressly provided in the Plan or in any Option Agreement".

[79] The Ontario Court of Appeal determined there was no ambiguity in the plans at issue and that Mr. Kieran's right to exercise the options was not extended by the period of reasonable notice (¶61).

[80] The hearing judge did not apply *Kieran* for two reasons:

i. *Kieran* was not binding on him; and
ii. The plan in *Kieran* referred to employees terminated "for any reason" was sufficiently broad to be interpreted to include wrongful dismissal, and an unlawful form of termination.

[81] Although the hearing judge was correct that *Kieran* was not binding on him, it is certainly persuasive. It is difficult to suggest, as the hearing judge did here,

that the Long Term Incentive Plan is ambiguous and could not include dismissal without cause when it specifically uses that term. In *Kieran*, the court concluded the reference to "any reason" was broad enough to include wrongful dismissal. I see no basis to distinguish *Kieran*.

[82] The Ontario Court of Appeal found that Mr. Kieran had been wrongfully dismissed, but concluded he suffered no damages because he was not entitled to payment under the plans.

[83] The hearing judge also distinguished the Alberta Court of Appeal decision in *Styles v. Alberta Investment Management Corp.*, 2017 ABCA 1 on the basis that:

> [404] The participant was required to sign a Participation Agreement ("PA"), the terms and conditions of which were part of the LTIP. Under the LTIP, the participant had to be "actively employed … without regard to whether the Participant is receiving, or will receive, any compensatory payments or salary in lieu of notice of termination on the date of payout, in order to be eligible to receive any payment." The 2011 version of the LTIP also stated that "entitlement to an LTIP grant, vested or unvested, may be forfeited upon the Date of Termination of Active Employment without regard to whether the participant is receiving, or will receive, any compensatory payment or salary in lieu of notice of termination." The PA echoed the requirements of the LTIP. Unlike Matthews' LTIP, the LTIP in *Styles* "left no doubt that any period of 'reasonable notice' required in lieu of notice of termination did not qualify as 'active employment'": *Styles*, 2017 ABCA 1, [2017] A.J. No. 1 at para. 6.

[Emphasis added]

[84] The wording of the long term incentive plan in *Styles* is very similar to the terms in Matthews' Long Term Incentive Plan. The *Styles* plan provides:

> *Eligibility for Payment*:
>
> Unless otherwise stipulated, participants **must be actively employed** by AIMCo, without regard to whether the Participant is receiving, or will receive, any compensatory payments or salary in lieu of notice of termination on the date of payout, in order to be eligible to receive any payment.
>
> As per the guidelines above, entitlement to an LTIP grant, vested or unvested, *may be forfeited* upon the Date of Termination of Active Employment without regard to whether the participant is receiving, or will receive, any compensatory payment or salary in lieu of notice of termination.
>
> "Date of Termination of Active Employment" means the termination date specified by AIMCo in the termination notice. (emphasis added)

[Underlining in original]

[Bold added]

[85] Like the *Styles* plan, the Matthews Plan makes it clear that to be eligible for payment, the employee must be a full-time employee of Ocean Nutrition and that the entitlement under the Long Term Incentive Plan shall not be used in the calculation of any severance package.

[86] In fact, the Matthews' Long Term Incentive Plan goes further to indicate that it is inoperative even if someone is dismissed without cause.

[87] The Alberta Court of Appeal concluded at ¶6:

> The contract therefore left no doubt as to whether the participant had to be actively employed on the vesting date. It also left no doubt that any period of "reasonable notice" required in lieu of notice of termination did not qualify as "active employment". This is not a case where the court has to imply terms in an agreement, fill in gaps, or interpret vague provisions.

[88] The hearing judge's finding that Mr. Matthews was entitled to compensation under the Long Term Incentive Plan flies in the face of the very clear and unambiguous wording of the Agreement. Whether Mr. Matthews resigned, or was dismissed without cause, once his employment terminated, any right he had to recover under the Long Term Incentive Plan ceased.

[89] This may have been a different case if the hearing judge had concluded that Ocean Nutrition had orchestrated Matthews' termination to avoid any liability it might have under the Long Term Incentive Plan. Matthews made this argument before the hearing judge.

[90] The hearing judge rejected that argument and specifically found that was not the case:

> [325] While I am satisfied that Daniel Emond did not like Dave Matthews, did what he could to diminish Matthews' role at ONC and avoided communicating with him whenever possible, there is no evidence that Emond's actions were motivated by a desire to deprive Matthews of his LTIP entitlement. Nor is there any evidence of a larger conspiracy involving Martin Jamieson and the Board to get rid of Matthews in order to deprive him of his LTIP entitlement.

[91] I would allow this ground of appeal, set aside the hearing judge's decision and reduce the damages awarded to Mr. Matthews by the sum of $1,086,893.36.

Short Term Incentive Plan

[92] Whether Mr. Matthews was entitled to payments under the Short Term Incentive Plan is a moot point. I say this because the amount he earned at TASA exceeded the amount he would have received for salary from Ocean Nutrition including the bonus.

[93] In his supplementary decision, the hearing judge calculated the short term incentive payment for the 15-month notice period as being $64,225. The hearing judge reasoned:

> [17] I am further satisfied that there is sufficient evidence upon which to conclude that Mr. Matthews customarily received STIP payments when such payments were made from 2007. The amounts ranged from $65,000 in 2007, to $6000 in 2008, nothing in 2009, and the fifty percent payment of $50,000 in 2010 (see paras. 412-416 of the main decision). Applying the *Penvidic* reasoning, I see no better way to settle on a quantum for the remainder of the notice period than to average the amounts that Mr. Matthews actually received. (I will use the full amount for 2010, rather than the 50 percent actually paid.) This results in an average of $42,750 ($171,000/4). I award this amount for 2011, and half this amount ($21,375) for 2012, in view of the fact the company was sold in the middle of the year. This results in a total STIP damages recovery of $64,125.

[94] In his original decision, the hearing judge found that Mr. Matthews' salary at Ocean Nutrition was $142,000 Canadian per annum. His salary increased to $220,000 US when he joined TASA. The hearing judge further found that any amounts earned at TASA would go to reduce the damages otherwise awarded to Mr. Matthews (¶430).

[95] Returning to the supplementary decision, using the hearing judge's numbers, he calculated Matthews' damages to be one month's salary he would have received from Ocean Nutrition ($142,000/12 = $11,833); the amount of the Short Term Incentive Plan ($64,125) and deducted from that amount the difference between his salary at TASA and the amount he would have received from Ocean Nutrition ($220,000 - $142,000 = $78,000). Therefore, in summary, the damages for the 15-month notice period would have been $11,833 + $64,125 - $78,000 = − $2,042.00.

[96] As a result, even if one accepts that Matthews was entitled to an STIP, he suffered no damages during the notice period.

[97] The hearing judge's math on the calculation of damages is somewhat difficult to follow. I say this because:

- The hearing judge limited the deduction for salary received from TASA to 12 months (Supplementary Decision, ¶19). There is no explanation why the amount that he received from TASA mitigating his damages would be limited to 12 months. Logically, it should have been 15 months which would have resulted in a higher mitigation number.
- The amount Matthews received from TASA was in US dollars. The amount he received from Ocean Nutrition was in Canadian dollars. Therefore, the actual amount he received from TASA could have been more (depending on the conversion rate used) than $220,000 Canadian dollars.

[98] Despite these discrepancies, it is abundantly clear that Matthews suffered no damages during the 15-month notice period.

[99] Finally, in summarizing the damages, the hearing judge said:

> [23] Accordingly, the applicant's recovery (both in this decision and the main decision at paras. 426-330) is summarized as follows:
>
> | | |
> |---|---|
> | Base salary for July 2011: | $11,833.00 ($142,000/12) |
> | LTIP: | $1,086,893.36 |
> | STIP: | $64,125.00 |
> | LESS TASA credits: | ($78,000.00) |
> | SUB-TOTAL: | $1,084,851.36 |
>
> LESS withholding income tax at 50 percent.

[100] As can be seen by this calculation, the hearing judge used the amounts earned at TASA to reduce the amount which he found was otherwise payable under the Long Term Incentive Plan.

[101] I see no basis on which, even if the Long Term Incentive Plan was payable, to reduce that amount by the amount earned at TASA. The Long Term Incentive Plan payment was based on a single discrete event (the sale of the company) and had nothing to do with Matthews' income during that period.

[102] In conclusion on this point, whether Matthews was entitled to payment of the amount of his salary and any bonus he may have been entitled to receive is of no significance as the amount he received from TASA during the notice period exceeded the amount payable under the Short Term Incentive Plan. Therefore, he has not proven any loss as a result of his inability to recover under the Short Term Incentive Plan.

[103] I would allow this ground of appeal.

Issue #4 Did the hearing judge err in ordering the defendant to remit a specified amount to Canada Revenue Agency?

Standard of Review

[104] Deciding the specific amount to be remitted to CRA is an extricable question of law that can only be answered by interpreting the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) and its Regulations. Therefore, this ground of appeal will be reviewed on the standard of correctness.

Analysis

[105] The hearing judge's treatment of the deduction for income tax purposes is set out in his supplementary decision and is very short:

> [19] All payments are to be paid by the respondent after deduction of the difference between the applicant's TASA salary of $220,000 US and his ONC salary of $142,000. I will limit this deduction to twelve months, resulting in a deduction of $78,000. A fifty percent tax rate should be applied to this recovery, in accordance with Mr. Jamieson's calculations of what Mr. Matthews would have recovered under the LTIP had he been employed at ONC on the realization date. There shall be no differentiation between US and Canadian currency for the purposes of the deduction.

[106] Although the hearing judge in his decision only required that Ocean Nutrition withhold the income tax, the subsequent order required it to be remitted to CRA. It provides:

> … (5) That the Respondent shall withhold and remit the amount of $542,425.68 and remit same to the Canada Revenue Agency; …

[107] The parties were not given an opportunity to address the issue of what amount should be withheld and remitted to Revenue Canada. The hearing judge based his decision on evidence at the hearing that when payments were made to current employees under the Long Term Incentive Plan, Ocean Nutrition remitted 50% of those payments to the CRA. However, the hearing judge did not consider whether a damage award would stand on the same footing as a payment made to individuals still employed with the company.

[108] I need not go into any detail with respect to the provisions of the *Income Tax Act* other than to say that the appellant argued convincingly in its factum, and at the appeal hearing, that the appropriate amount to be withheld should have been 30%.

[109] Having not given the parties an opportunity to make submissions on this issue, and having made a determination on his own without regard to the *Income Tax Act*, the hearing judge erred.

[110] As it turns out, as a result of this decision, no funds should have been remitted to the CRA.

[111] I would also allow this ground of appeal. Although from a practical point of view it does not impact the ultimate outcome of the appeal, it may provide assistance to the parties in having the funds returned from CRA.

Conclusion

[112] The appeal is allowed, in part, Matthews shall repay to Ocean Nutrition any amounts received from it, including any amount received under the Long Term Incentive Plan, any interest paid thereon and any costs paid by Ocean Nutrition as a result of the decision below.

Costs on the Appeal

[113] In its factum and on the oral hearing, the appellant spent most of its time arguing the issue of whether Mr. Matthews had been wrongfully dismissed. The time spent at the hearing below also addressed the same issue. Quite frankly, a lot of time at the hearing and a lot of time on this appeal could have been avoided by

arguing the discrete legal issue that arose under the Long Term Incentive Plan, i.e., even if Matthews was wrongfully dismissed was he entitled to recover under the Agreement? In any event, the appellant was unsuccessful in having the determination of wrongful dismissal set aside. Success was divided on the appeal even though the end result is that Ocean Nutrition will not pay anything to Mr. Matthews. As a result, I would decline to award costs to either party on this appeal.

The Dissent Judgment:

[114] I have had the benefit of reviewing Justice Scanlan's dissent. With respect, his analysis misses the mark and ignores a key finding of fact made by the hearing judge. I have cited it above in ¶88 and will repeat it here:

> [325] While I am satisfied that Daniel Emond did not like Dave Matthews, did what he could to diminish Matthews' role at ONC and avoided communicating with him whenever possible, <u>there is no evidence that Emond's actions were motivated by a desire to deprive Matthews of his LTIP entitlement. Nor is there any evidence of a larger conspiracy involving Martin Jamieson and the Board to get rid of Matthews in order to deprive him of his LTIP entitlement</u>.

[Emphasis added]

[115] The dissent ignores this finding of fact by the hearing judge and, indeed, purports to make a contrary finding when he says:

> [128] Only Ocean knows for sure why the company has fought so hard to prevent David Matthews from recovering under the LTIP. …

[116] There was a clear finding by the hearing judge that neither Ocean Nutrition nor Mr. Emond sought to prevent Mr. Matthews from recovering under the LTIP.

[117] The dissenting judge's analysis is hinged on Ocean Nutrition or Mr. Emond making concerted efforts to prevent Mr. Matthews from recovering under the Long Term Incentive Plan. As that theory was completely rejected by the hearing judge, it cannot be support for a finding of liability on the part of Ocean Nutrition.

[118] On the issue of damages, my colleague misunderstands the nature of the Long Term Incentive Plan. It was a contract. In order to recover under the contract, its terms had to be met. As I have outlined above, it required that Mr. Matthews be employed with Ocean Nutrition at the time of the sale of the

company. He was not. As a result, he cannot recover damages under the agreement.

[119] Justice Scanlan suggests that this case is analogous to one of a stolen lottery ticket. With respect, I fail to see any analogy between a contractual obligation which a company may have to an employee and a lottery ticket which depends on a fortuitous event.

[120] Justice Scanlan goes on to say:

> [201] …. To put it more succinctly, even if the LTIP could not be used to calculate severance, it is available to calculate damages as the hearing judge did in this case.

[121] This is a distinction without difference. The hearing judge determined damages based on what Mr. Matthews was entitled to receive from his employer as a result of being constructively dismissed. The damages he calculated were intricately related to the Long Term Incentive Plan. The hearing judge found that the wording of the Long Term Incentive Plan did not preclude it from being used to calculate severance for Mr. Matthews. Thus, he was entitled to recover its value as part of his damages. I have found he was in error in making this determination. The dissent would award damages based on an alternative theory which was not argued before the hearing judge and was not the basis of his damage calculation.

[122] It was open for the hearing judge to have awarded Mr. Matthews additional damages as a result of the manner in which he was treated such as punitive damages. However, given his finding that there was no bad faith on the part of Ocean Nutrition, he could not and did not do so.

[123] For these reasons, I must respectfully disagree with my colleague.

Farrar, J.A.

Concurred in:

Bryson, J.A.

Dissenting Reasons for Judgment: (Scanlan, J.A.)

Overview

[124] If there were ever a case that cried out for resolution, it is a case such as this. As I will explain below, the breakdown in relations between the respondent and the appellant company was largely due to one rogue employee: Emond. He went to great lengths to marginalize and diminish Ocean's management's view of the respondent. Based on the findings of the hearing judge, another senior manager, Jamieson, was either complicit or, at best, neglectfully unaware of Emond's actions towards Matthews. The best that can be said of Jamieson is that he had little interest in how Emond was treating Matthews as he had "bigger fish to fry". According to the findings of the hearing judge, Emond lied to the respondent, lied to Ocean management and lied to the court about what he did in relation to Matthews. Emond continues to be employed with Ocean, while Ocean has fought relentlessly to deny Dave Matthews any compensation for his constructive dismissal, going so far as to even deny that there was a dismissal.

[125] On June 24, 2011, the only thing that stood between the respondent and his entitlement to collect $1,086,893.36 on a Long Term Incentive Plan (LTIP) was time, and at least one middle level manager in the appellant company: Daniel Emond, the Chief Operating Officer. Emond was a central figure in dealings with Matthews after a new investor, Richardson Capital Limited, became involved in Ocean.

[126] The evidence supports the hearing judge's determination that Emond lied to Matthews, he lied to his superiors, and he lied to the hearing judge about his treatment of Matthews. He lied and deceived as to his efforts to minimize Matthews' importance to Ocean. He lied and deceived about his long term efforts to minimize Matthews' role in Ocean.

[127] Emond's long history of attempting to undermine Matthews is illustrated in the situation where Matthews was asked to assist in bringing a new plant in Peru on line where others had failed. Emond, in trying to minimize the importance of Matthews' contribution, was not going to invite Matthews to the grand opening of that plant until he was directed by Robert Orr to do so.

[128] Matthews has contributed much to the success of the appellant. In a memo written in March 2009, then CEO of Ocean, Robert Orr, said of Matthews:

> [104] … Despite his idiosyncrasies and our under-utilization of his technical and chemistry knowledge of fish oils – he is one of the top 2 or 3 people in the world in this area and we have no one in the organization that is remotely close to his knowledge base.

He also said:

> [66] "… everyone who has gotten any value created out of ONC in large part owes that in some measure to David."

[129] The respondent stayed with the appellant company, in part, because of the LTIP offered to only a few valued employees in 2007. That occurred at or about the same time Ocean learned Matthews was a final candidate for a position with another company.

[130] Only Ocean knows for sure why the company has fought so hard to prevent David Matthews from recovering under the LTIP. The answer to that question cannot be in the fact that, after he was constructively dismissed by Ocean, Matthews went to work for a competitor. He was one of less than a handful of people in the world that had the skillset that allowed Ocean to become a world player in commercial Omega 3 production. Upon dismissal by Ocean he used that expertise to support his family. Ocean knew this was a very narrow area of expertise, and even tried to negotiate a non-compete clause as Matthews was leaving. Matthews did not want to leave Ocean. He wanted to stay and obtain his LTIP benefits. He now works for a competitor in Peru, a continent away from where he wanted to live.

[131] Aside from the fact that Matthews took his expertise to a competitor, Ocean now stands to indirectly benefit from his new employment because Ocean asks this Court to deduct any income Matthews earned from his new employer during the notice period, from any damages award made against Ocean. I agree with the majority that such a deduction should be made.

[132] If one were to listen to Emond and a few others in the new management group, Matthews did not deserve much credit for the success of Ocean. That is at odds with their upset at him going to a competitor. It cannot be both ways.

[133] The hearing judge was convinced Matthews played a key role in Ocean's early success. It was little more than a start up company in 1997. In 2012 the company sold for more that half a billion dollars ($540 million). The hearing judge determined that Matthews was one of only a handful of people in the world

that had the knowledge required for Ocean to commercialize the extraction process for Omega 3. It was that very process which gave Ocean a competitive advantage on the world stage, eventually making it an attractive acquisition target for DSM. The value of the process is reflected in the sale price as noted above. I repeat what Robert Orr said of Matthews' contribution; *"...[e]veryone who has gotten any value created out of ONC in large part owes that in some measure to David."*

[134] Ocean had a single shareholder during the initial development stage of the company: John Risley, through his company, Clearwater Fine Foods Limited. Once the extraction technology advanced, commercial production commenced. The processing technology developed by Matthews gave the company a competitive edge in the world markets and there was an effort to maximize the sale value of the company. To do that, Ocean decided that strategic alignments were required. As part of this strategic realignment, Ocean took on new management team members. The original sole shareholder, John Risley, allowed new investors to acquire an equity position in the company (at first (2005) 22.5 %; later (in 2009) increasing to 45%). The new management team included Martin Jamieson, who became the President and CEO, as well as a director, replacing Robert Orr. Orr became Chairman of the Board and a director. Emond had previously joined the company as Chief Operating Officer in 2007. By 2010 his duties included having Matthews report to him.

[135] Even though John Risley continued to be the major shareholder, key management officials with the original group, including Risley and Orr were largely sidelined. Even when it was to the detriment of the company, they were ignored or marginalized. Risley continued to be the majority shareholder but enough vetoes and management agreements were in place to ensure the true management and control of Ocean after 2007 was vested in the new Richardson Capital management team; not the majority shareholder, or members of the previous management team.

[136] By December 2010, Emond told Orr that both Orr and Matthews had a time limited future in Ocean. Orr was still Chairman of the Board and a director. From Emond's perspective, even before that, he felt that both Orr and Matthews would not be with Ocean for long. This goes as far back as 2007. In this regard, I refer to ¶79-80 of the hearing judge's decision. In ¶79 he refers to a plant in Arcadia. Emond put a Mr. Empey in charge of that Arcadia plant. Once he found out this had occurred, then CEO, Robert Orr told Empey he was not in charge. The hearing judge then says:

> [80] When asked what Daniel Emond meant when he said "not to worry about it", Paul Empey explained that during Emond's first year at ONC, Emond told him that he was getting very close with John Risley and the Richardson group, and he would make sure that Empey was eventually given oversight of the entire operations side of ONC. Mr. Empey testified that Emond told him, on more than one occasion, that he would not have to worry about Dave Matthews or Robert Orr going forward because they would not be around for much longer.

[137] By February 2011, Matthews knew he was going to be removed from the company sometime in 2011. On February 18, 2011, he actually confronted Emond about rumours that his employment was going to be terminated. Emond's note to Jamieson made it clear that Matthews wanted to stay in order to collect on his LTIP. The hearing judge refers to the email at ¶194 of his decision (2017 NSSC 16) as follows:

> [194] On February 18, 2011, Mr. Matthews decided to confront Daniel Emond about what he had heard from Robert Orr concerning Emond's December 2010 recommendation to fire him. Matthews went to Emond's office and told him that he had heard through the grapevine that he was going to be terminated, and asked for confirmation. Emond told him that there were no plans for him to be fired. Matthews told Emond that he did not want to be part of any restructuring, and wanted to stay with the company so that he could realize on his LTIP. Finally, he asked Emond what ONC's plan was for him, and, according to Matthews, Emond responded, "I don't know." After this meeting, Daniel Emond sent the following e-mail to Martin Jamieson, with the subject line "here we go again":
>
> > Martin hope you are having fun, just so you know Dave Matthews came to see me saying that he is working with Robert on this API proposal again. That he is having a conference call this afternoon with Omthera etc .... Moreover he also ask me if he is part of the restructuring ???????? He said that he would like to stay as he believe the company will be sold to have is incentive on the sale ?????? Anyway I manage to get myself out of it not sure he believe me but he got an answer. About the API he told me that Robert was very angry after myself and you about our position in the matter.
> >
> > Just so you know.
> >
> > [*Errors in original*]

[138] Around the same time Matthews was convinced a buyer was doing a due diligence assessment leading up to a potential sale of the company. Emond attempted to convince Matthews that there was no potential sale. The hearing judge determined that Matthews was correct in his belief that he was being dismissed and that there was a due diligence underway.

[139] Matthews held a number of positions over the years and the titles for his positions changed as did his work. His job titles included:

- Operations Manager,
- Senior Operations Manager,
- Vice President Healthy Food Ingredients,
- Vice President Engineering and Technical Services, and
- Vice President New and Emerging Technologies.

[140] By the time of Matthews' dismissal, there were a number of persons in the management team who harboured significant animosity towards him. Witness the nasty email referred to in ¶287 of the hearing judge's decision:

> [287] Mr. Spavold's evidence reveals a significant animosity toward Dave Matthews. On April 13, 2012, three years before his discovery, Spavold sent the following "reply all" to an e-mail from Martin Jamieson updating members of the Board and the Executive Leadership Team on this litigation:
>
> > This guy is a total and complete asshole, has been for years .. since my involvement in 2002 anyway … kept moving him around in the organization to use his skills while preventing damage to almost everything he managed. .. had caused so much damage to ONC over the years in terms of operational issues. .. could not bring a project in under budget or on schedule. …. he may know oil processing but he is basically incompetent at everything else. I think it is time to start to be nasty back and start to sue Mr Matthews for his breaches of his agreement and damages.

[141] The hearing judge also noted:

> [288] Mr. Spavold's contempt for Mr. Matthews was evident on discovery. He described Matthews' claim that he invented fractional distillation as a "bullshit statement" that "would have teed a few people off." …

The balance of the passage, as noted by the judge, talks about Spavold's low opinion of Matthews' management and interpersonal skills. Spavold's and Emond's opinions of Matthews are in stark contrast with those of John Risley and Robert Orr.

[142] The hearing judge referred to the evidence of Robert Orr as being fair and unbiased. According to Orr, Emond's dishonesty was a recurring source of tension between management and Matthews. Emond was, according to the hearing judge:

> [281] … to say the least, an unsatisfactory witness. His testimony was self-serving and deceitful. Defensive and evasive on cross- examination, Mr. Emond's unwillingness to concede even the most minor points severely undermined his overall credibility. The two most striking examples of this were his refusal to concede that Matthews was instrumental in getting the plant in Peru up and running, and that PCB reduction was an important issue for ONC.
>
> [282] Emond's testimony often conflicted with other, more reliable evidence. …. Where Emond's evidence diverges from that of other witnesses or the documentary evidence, I do not accept it.

[143] Emond's superior in Ocean was Martin Jamieson, who joined the company in 2010. As noted in ¶283, even Jamieson's credibility was questioned. He was described by the hearing judge as "polished and articulate" but the judge was unimpressed with his evidence in some essential aspects of the case.

[144] For all the promises made by Ocean to David Matthews over the years, that he would be looked after and share in the proceeds of any sale of Ocean if he stuck with the company, he has been left to fend for himself. He had to move his family to another continent so he can work.

[145] The shareholders, including those who made promises that he would be looked after, have divided up over half a billion dollars that may not have even existed but for Dave Matthews' contributions and loyalty to Ocean. From a moral perspective that result is hard to digest.

[146] The law has traditionally ended up on the fair side of moral dilemmas. Ideally, fairness and justice arrive at the same destination, at the same time. Some might say that as judges we are not entitled to consider the morality of the result. To that I say that a result that is morally unconscionable is usually legally indefensible. I am convinced that this case requires a contextual assessment of the entire LTIP contract and the situation that existed surrounding the execution of that Agreement. The LTIP does not contemplate a rogue manager arriving on scene and embarking upon a campaign to undermine, and root-out, a valued long time employee, resulting in the loss of LTIP benefits. The terms of the LTIP make it clear that Matthews cannot recover under the LTIP Agreement. The just and legal

recovery is for the damages caused by the actions of Mr. Emond and the LTIP agreement is simply a means by which the damages are measured.

[147] The evidence of Martin Jamieson and others is that Ocean had a place for Matthews that would have seen him through to the "realization date" in 2012. It is hard to imagine that on the one hand the company wanted Matthews to stay with the company as a key person in "emerging technologies", yet a manager was taking steps to constructively dismiss that same employee. Either the CEO, Jamieson, was complicit in the dismissal, or Emond was acting on his own. At best, Emond was constructively dismissing an employee that the company wanted to retain. That is not something that was contemplated in the terms of the LTIP.

[148] Unlike the majority, I am satisfied there is a logical path of legal reasoning that provides compensation to Matthews based on what the parties intended at the time the LTIP was put in place. I do not accept that the parties intended to agree that a rogue manager such as Emond could engineer the dismissal of a valued long-term employee through a series of lies, deceit and manipulation so as to result in that employee not being entitled to share in the value he was so essential in creating. There was an implied agreement that the LTIP and the employment contract would be performed with honesty and integrity. For the reasons that follow, I am satisfied that the lower court decision to award Matthews $1,086,893.36 for the LTIP should be upheld.

[149] In order to support himself and his family, Matthews followed up on an earlier inquiry from a competitor of Ocean, TASA, in Peru, in relation to his working for that company. That was only done when it became apparent to him that he would not be allowed to stay with Ocean. Although he had discussed going to TASA earlier in 2011, as late as May 31st, 2011, he had hoped the situation with Ocean could be resolved.

[150] In February 2011, Matthews knew that if he could stay with the company he could share in the sale value through the LTIP. He was of the opinion that due diligence was being conducted at that time. His constructive dismissal resulted in him leaving the company before any sale (the "realization event"). Ocean denies Matthews is entitled to share in the proceeds of sale based on the terms of the LTIP. The LTIP required him to be an employee at the time of the sale. As my colleague notes, the LTIP provided that if he was dismissed, with or without cause, he could not collect under that agreement (see Clauses 2.03, 2.04, 2.05 as set out in the majority decision at ¶59).

[151] Matthews sued Ocean Nutrition for wrongful dismissal and for an oppression remedy under the *Canada Business Corporations Act*, R.S.C.1985, c. C-44. The application eventually morphed into a determination of whether Matthews had been constructively dismissed.

Constructive Dismissal

[152] As noted by the majority, Dave Matthews worked with the appellant company or its predecessors from January 1997 to June 2011. This Court is unanimous in upholding the hearing judge's finding that in June 2011 he was constructively dismissed by Ocean.

Notice Period

[153] This Court, on appeal, is unanimous in upholding the 15-month notice period.

Amount that would have been due to Matthews under the LTIP

[154] The matter proceeded before Justice Arthur LeBlanc. In a decision dated January 30, 2017 (2017 NSSC 16) and a supplemental decision dated May 12, 2017 (2017 NSSC 123), the hearing judge found that Matthews had been constructively dismissed. He determined that the appropriate notice period was 15 months, and awarded him damages of approximately $1.084M, plus interest.

[155] Most of the damages related to the LTIP. The hearing judge found the plan would have (did) crystalized during that notice period and said Matthews was entitled to collect the money as per the terms of the LTIP.

[156] I will explain below that although I am in agreement with many conclusions of the majority, I would not have allowed the appeal in relation to the amount that would have been owing to the respondent as damages for the loss of the LTIP. I am satisfied the monies Matthews would have been entitled to had he been employed by Ocean at the time of the sale to DSM are recoverable as damages under the employment contract. As I stated earlier, the LTIP is simply the means by which to measure the damages resulting from the unlawful dismissal.

[157] I agree with my colleague that the LTIP and loss of wages is to be reduced based on the income earned by Matthews during the notice period.

Analysis

[158] My colleague reviews the evidence related to issues of credibility and factual determinations as made by the hearing judge. I agree with the majority that the evidence supports the facts as determined by the hearing judge. There is a plethora of evidence to support the hearing judge's findings as to credibility.

[159] Where I differ is in relation to the extent of the damages Matthews is entitled to as a result of his dismissal. That divergence is based on our difference in application of the law to the facts as determined by the hearing judge.

[160] I disagree with my colleague in relation to Matthews' common law right to recovery. At ¶61, my colleague says he is of the view that the terms of the LTIP preclude Matthews' recovery under that plan, saying the plan required that Matthews be employed with Ocean at the time of the realization event. I am convinced that it is wrong to end the analysis at that point.

[161] Matthews was constructively dismissed from his employment through a prolonged and deliberate crusade by Emond. His crusade was founded on his own lies and deception. As I will explain below, there were two contracts in play in this case: one was the LTIP; and, the other was the employment contract itself. I am satisfied that both contracts include terms of an implied duty of trust, honesty and good faith.

[162] I focus first on the state of the law with regards to the duty of good faith and honesty in the performance of a contract in Canada. The hearing judge referenced *Bhasin v. Hrynew*, 2014 SCC 71. In the case at bar, Emond was largely responsible, or to blame, for how ONC performed its side of the employment contract/relationship with Matthews. Emond was dishonest in just about every material aspect of his relationship with Matthews. Dishonesty is the most apt descriptor for Emond in his relationship with Matthews.

[163] ONC is now to be held responsible for how Emond performed ONC's end of the contract with Matthews.

[164] In Canada there is a duty to perform a contract honestly. In *Bhasin,* Cromwell J., writing for the Court, explained the evolution of the implied duty of honesty in performance of contracts. The law has now morphed from a state of confusion into what Justice Cromwell has defined as principle of Canadian law:

[1] The key issues on this appeal come down to two, straightforward questions: Does Canadian common law impose a duty on parties to perform their contractual obligations honestly? And, if so, did either of the respondents breach that duty? I would answer both questions in the affirmative. Finding that there is a duty to perform contracts honestly will make the law more certain, more just and more in tune with reasonable commercial expectations. It will also bring a measure of justice to the appellant, Mr. Bhasin, who was misled and lost the value of his business as a result.

…

[15] The trial judge found that Can-Am acted dishonestly with Mr. Bhasin throughout the events leading up to the non-renewal: it misled him about its intentions with respect to the merger and about the fact that it had already proposed the new structure to the Commission; it did not communicate to him that the decision was already made and final, even though he asked; and it did not communicate with him that it was working closely with Mr. Hrynew to bring about a new corporate structure with Hrynew's being the main agency in Alberta. The trial judge also found that, had Can-Am acted honestly, Mr. Bhasin could have "governed himself accordingly so as to retain the value in his agency": para. 258.

[16] The Alberta Court of Appeal allowed the respondents' appeal and dismissed Mr. Bhasin's lawsuit. The court found his pleadings to be insufficient and held that the lower court erred by implying a term of good faith in the context of an unambiguous contract containing an entire agreement clause: 2013 ABCA 98, 84 Alta. L.R. (5th) 68.

…

[23] First, the trial judge decided that the 1998 Agreement was a type of agreement which as a matter of law requires good faith performance. She recognized that the 1998 Agreement did not fall within any of the existing categories of contract, such as employment, insurance and franchise agreements, which have been held to require good faith performance. She concluded, however, that the Agreement was analogous to a franchise or employment contract, and so by analogy to these cases, she implied a term of good faith performance as a matter of law. The contract was not balanced from its inception and the relationship placed the enrollment director in a position of inherent and predictable vulnerability: paras. 67-86.

…

[32] **The notion of good faith has deep roots in contract law and permeates many of its rules. Nonetheless, Anglo-Canadian common law has resisted acknowledging any generalized and independent doctrine of good faith performance of contracts. The result is an "unsettled and incoherent body of law" that has developed "piecemeal" and which is "difficult to analyze":** Ontario Law Reform Commission ("OLRC"), *Report on Amendment of the Law*

of Contract (1987), at p. 169. This approach is out of step with the civil law of Quebec and most jurisdictions in the United States and produces results that are not consistent with the reasonable expectations of commercial parties.

[33] **In my view, it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.**

[34] In my view, taking these two steps is perfectly consistent with the Court's responsibility to make incremental changes in the common law when appropriate. Doing so will put in place a duty that is just, that accords with the reasonable expectations of commercial parties and that is sufficiently precise that it will enhance rather than detract from commercial certainty.

(b) Good Faith as a General Organizing Principle

(i) Background

[35] The doctrine of good faith traces its history to Roman law and found acceptance in earlier English contract law. For example, Lord Northington wrote in *Aleyn v. Belchier* (1758), 1 Eden 132, 28 E.R. 634, at p. 138, cited in *Mills v. Mills* (1938), 60 C.L.R. 150 (H.C.A.), at p. 185, that "[n]o point is better established than that, a person having a power, must execute it *bona fide* for the end designed, otherwise it is corrupt and void." Similarly, Lord Kenyon wrote in *Mellish v. Motteux* (1792), Peake 156, 170 E.R. 113, "in contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith": p. 157. In *Carter v. Boehm* (1766), 3 Burr. 1905, 97 E.R. 1162, at p. 1910, Lord Mansfield stated that good faith is a principle applicable to all contracts; see also *Herbert v. Mercantile Fire Ins. Co.* (1878), 43 U.C.Q.B. 384 (Ont.); R. Powell, "Good Faith in Contracts" (1956), 9 Curr. Legal Probs. 16.

[36] **However, these broad pronouncements have been, for the most part, restricted by subsequent jurisprudence to specific types of contracts and relationships, such as insurance contracts, leaving unclear the role of the broader principle of good faith in the modern Anglo-Canadian law of contracts: *Chitty on Contracts* (31st ed. 2012), vol. I, *General Principles*, at para. 1-039; W. P. Yee, "Protecting Parties' Reasonable Expectations: A General Principle of Good Faith" (2001), 1 *O.U.C.L.J.* 195, at p. 195; E. P. Belobaba, "Good Faith in Canadian Contract Law", in *Special Lectures of the Law Society of Upper Canada 1985 — Commercial Law: Recent Developments and Emerging Trends* (1985), 73, at p. 75. One leading**

Canadian contracts scholar went so far as to say that the common law has taken a "kind of perverted pride" in the absence of any general notion of good faith, as if accepting that notion "would be admitting to the presence of some kind of embarrassing social disease": J. Swan, "Whither Contracts: A Retrospective and Prospective Overview", in *Special Lectures of the Law Society of Upper Canada 1984 — Law in Transition: Contracts* (1984), 125, at p. 148.

[37] This Court has not examined whether there is a general duty of good faith contractual performance. However, there has been an active debate in other courts and among scholars for decades over whether there is, or should be, a general or "stand-alone" duty of good faith in the performance of contracts. Canadian courts have reached different conclusions on this point.

…

[40] This Court ought to develop the common law to keep in step with the "dynamic and evolving fabric of our society" where it can do so in an incremental fashion and where the ramifications of the development are "not incapable of assessment": *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 670; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, at para. 93; see also *Watkins v. Olafson*, [1989] 2 S.C.R. 750, at pp. 760-64; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 85; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 46. This is even more appropriate where, as here, **what is contemplated is not the reversal of some settled rule, but a development directed to bringing greater certainty and coherence to a complex and troublesome area of the common law.**

[41] **As I see it, the developments that I propose are desirable as a result of several considerations. First, the current Canadian common law is uncertain. Second, the current approach to good faith performance lacks coherence. Third, the current law is out of step with the reasonable expectations of commercial parties, particularly those of at least two major trading partners of common law Canada** — Quebec and the United States: see, e.g., Hall, at p. 347. While the developments which I propose will not completely address these problems, they will bring a measure of coherence and predictability to the law and will bring the law closer to what reasonable commercial parties would expect it to be.

(ii) Survey of the Current State of the Common Law

[42] Anglo-Canadian common law has developed a number of rules and doctrines that call upon the notion of good faith in contractual dealings; it is a concept that underlies many elements of modern contract law: S. M. Waddams, *The Law of Contracts* (6th ed. 2010), at para. 550; J. D. McCamus *The Law of Contracts* (2nd ed. 2012), at pp. 835-38; OLRC, at p. 165; Belobaba, at pp. 75-76; J. F.

O'Connor, *Good Faith in English Law* (1990), at pp. 17-49; J. Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997), 113 *Law Q. Rev.* 433. The approach, not unfairly, has been characterized as developing "piecemeal solutions in response to demonstrated problems": *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.*, [1989] 1 Q.B. 433 (C.A.), at p. 439, *per* Bingham L.J. (as he then was). Thus we see, for example, that good faith notions have been applied to particular types of contracts, particular types of contractual provisions and particular contractual relationships. It also underlies doctrines that explicitly deal with fairness in contracts, such as unconscionability, and plays a role in interpreting and implying contractual terms. The difficulty with this "piecemeal" approach, however, is that it often fails to take a consistent or principled approach to similar problems. A brief review of the current landscape of good faith will show the extent to which this is the case.

[43] Considerations of good faith are apparent in doctrines that expressly consider the fairness of contractual bargains, such as unconscionability. This doctrine is based on considerations of fairness and preventing one contracting party from taking undue advantage of the other: G. H. L. Fridman, *The Law of Contract in Canada* (6th ed. 2011), at pp. 329-30; E. Peden, "When Common Law Trumps Equity: the Rise of Good Faith and Reasonableness and the Demise of Unconscionability" (2005), 21 *J.C.L.* 226; Belobaba, at p. 86; S. M. Waddams, "Good Faith, Unconscionability and Reasonable Expectations" (1995), 9 *J.C.L.* 55.

[44] Good faith also plays a role in the law of implied terms, particularly with respect to terms implied by law. **Terms implied by law redress power imbalances in certain classes of contracts such as employment,** landlord-lessee, and insurance contracts: *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, at p. 457, *per* McLachlin J. (as she then was); see also *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, *per* McLachlin J., concurring. The implication of terms plays a functionally similar role in common law contract law to the doctrine of good faith in civil law jurisdictions by filling in gaps in the written agreement of the parties: *Chitty on Contracts*, at para. 1-051. In *Mesa Operating*, the Alberta Court of Appeal implied a term that a power of pooling properties for the purpose of determining royalty payments be exercised reasonably. **The court implied this term in order to give effect to the intentions of the parties rather than as a requirement of good faith, but Kerans J.A. stated that "[t]he rule that governs here can, therefore, be expressed much more narrowly than to speak of good faith, although I suspect it is in reality the sort of thing some judges have in mind when they speak of good faith": para. 22. Many other examples may be found in Waddams, *The Law of Contracts*, at paras. 499-506.**

…

[46] Good faith also appears in numerous contexts in a more explicit form. The concept of "good faith" is used in hundreds of statutes across Canada, including

statutory duties of good faith and fair dealing in franchise legislation and good faith bargaining in labour law: S. K. O'Byrne, "Good Faith in Contractual Performance: Recent Developments" (1995), 74 *Can. Bar Rev.* 70, at p. 71.

…

[54] For example, **this Court confirmed that there is a duty of good faith in the employment context in *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362**. Mr. Keays was diagnosed with chronic fatigue syndrome and was frequently absent from work. Honda grew concerned with the frequency of the absences. It ordered Mr. Keays to undergo an examination by a doctor chosen by the employer, required him to provide a doctor's note for any absences, and discouraged him from retaining outside counsel. **The majority held that in all employment contracts there was an implied term of good faith governing the manner of termination. In particular, the employer should not engage in conduct that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive" when dismissing an employee**: para. 57, citing *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 98. Good faith in this context did not extend to the employer's reasons for terminating the contract of employment because this would undermine the right of an employer to determine the composition of its workforce: *Wallace*, at para. 76.

…

[60] **Commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings.** While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of commerce. The growth of longer term, relational contracts that depend on an element of trust and cooperation clearly call for a basic element of honesty in performance, but, even in transactional exchanges, misleading or deceitful conduct will fly in the face of the expectations of the parties: see Swan and Adamski, at §1.24.

[61] The fact that commercial parties expect honesty on the part of their contracting partners can also be seen from the fact that it was the American Bar Association's Section of Corporation, Banking and Business Law that urged the adoption of "honesty in fact" in the original drafting of the Uniform Commercial Code ("U.C.C."): E. A. Farnsworth, "Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code" (1963), 30 *U. Chicago L. Rev.* 666, at p. 673. Moreover, empirical research suggests that commercial parties do in fact expect that their contracting parties will conduct themselves in good faith: see, e.g., S. Macaulay, "Non-contractual Relations in Business: A Preliminary Study" (1963), 28 *Am. Soc. Rev.* 55, at p. 58; H. Beale and T. Dugdale, "Contracts Between Businessmen: Planning and the Use of Contractual Remedies" (1975), 2 *Brit. J. Law & Soc.* 45, at pp. 47-48; S. Macaulay, "An Empirical View of Contract", [1985] *Wis. L. Rev.* 465; V. Goldwasser and T. Ciro, "Standards of Behaviour in Commercial Contracting" (2002), 30 *A.B.L.R.* 369, at pp. 372-77. It is, to say the least, counterintuitive to think that reasonable

commercial parties would accept a contract which contained a provision to the effect that they were not obliged to act honestly in performing their contractual obligations.

[62] I conclude from this review that enunciating a general organizing principle of good faith and recognizing a duty to perform contracts honestly will help bring certainty and coherence to this area of the law in a way that is consistent with reasonable commercial expectations.

…

[69] The approach of recognizing an overarching organizing principle but accepting the existing law as the primary guide to future development is appropriate in the development of the doctrine of good faith. **Good faith may be invoked in widely varying contexts and this calls for a highly context-specific understanding of what honesty and reasonableness in performance require so as to give appropriate consideration to the legitimate interests of both contracting parties.** For example, the general organizing principle of good faith would likely have different implications in the context of a long-term contract of mutual cooperation than it would in a more transactional exchange: Swan and Adamski, at § 1.24; B. Dixon, "Common law obligations of good faith in Australian commercial contracts a relational recipe" (2005),33 ABLR 87.

…

Should There Be a New Duty?

[73] In my view, we should. I would hold that there is a general duty of honesty **in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract.** This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step. The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith: see Swan and Adamski, at § 8.135; O'Byrne, "Good Faith in Contractual Performance: Recent Developments", at p. 78; Belobaba; *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (C.A.), at p. 764; *Gateway Realty*, at para. 38, *per* Kelly J.; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.), at para. 69. **For example, the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts:** *Wallace*, at para. 98; *Honda Canada*, at para. 58.

…

[76] It is true that the Anglo-Canadian common law of contract has been reluctant to impose mandatory rules not based on the agreement of the parties,

because they are thought to interfere with freedom of contract: see *Gateway Realty*, *per* Kelly J.; O'Byrne, "Good Faith in Contractual Performance: Recent Developments", at p. 95; Farnsworth, at pp. 677-78. As discussed above, however, the duty of honest performance interferes very little with freedom of contract, since parties will rarely expect that their contracts permit dishonest performance of their obligations.

…

[80] Recognizing a duty of honesty in contract performance poses no risk to commercial certainty in the law of contract. A reasonable commercial person would expect, at least, that the other party to a contract would not be dishonest about his or her performance. The duty is also clear and easy to apply. Moreover, one commentator points out that given the uncertainty that has prevailed in this area, cautious solicitors have long advised clients to take account of the requirements of good faith: W. Grover, "A Solicitor Looks at Good Faith in Commercial Transactions", in *Special Lectures of the Law Society of Upper Canada 1985 — Commercial Law: Recent Developments and Emerging Trends* (1985), 93, at pp. 106-

…

[86] The duty of honest performance that I propose should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. However, **contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests.** That said, a dealership agreement is not a contract of utmost good faith (*uberrimae fidei*) such as an insurance contract, which among other things obliges the parties to disclose material facts: *Whiten*. But a clear distinction can be drawn between a failure to disclose a material fact, even a firm intention to end the contractual arrangement, and active dishonesty.

…

[93] A summary of the principles is in order:

> (1) There is a general organizing principle of good faith that underlies many facets of contract law.
>
> (2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships.
>
> **(3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the**

> **parties to be honest with each other in relation to the performance of their contractual obligations.**

[Emphasis added]

[165] A recurring theme in *Bhasin* was the reasonable expectation of honesty in the performance of contracts. In referencing *Keays v. Honda Canada Inc.*, 2008 SCC 39, it is clear that Justice Cromwell did not take employment contracts out of the scope of contracts that had an implied duty of honesty and good faith. Whether it is in the employment contract or in the case of the LTIP which was interrelated to the employment contract in this case, there is an implied duty of honesty in the performance of both contracts.

[166] I am satisfied that each of the parties in this case had reasonable expectations of good faith and honesty when they signed the LTIP. Recall that the evidence was that John Risley wanted to reward contribution and loyalty, and his word was thought to be his bond. That evidence alone speaks of good faith.

[167] I cannot envision Ocean or the LTIP contract having anticipated that a rogue employee, the likes of Emond, would, based on a series of lies and deceit, engineer the unlawful dismissal of Matthews. I say this because the LTIP was an agreement aimed at engendering loyalty and ongoing commitment of the employee to the company. Ocean would not have expected to gain the loyalty of key employees had they inserted or even hinted that a rogue manager could engineer their dismissal, preventing the employee from collecting on the LTIP.

[168] Justice Cromwell in *Bhasin* suggests that a party to a contract is entitled to assume that the contract will be performed honestly. Neither party should be able to rely upon lies, deceit and manipulation to deny the other side of the benefits of the contractual relationship, even if that was not the primary goal of the party acting dishonestly. The hearing judge did not find that Ocean acted to intentionally deny Matthews' entitlement to the LTIP benefits, but my colleague says a consequence of Emond's action, which resulted in Matthews leaving, was the loss of the LTIP benefits. I am satisfied Emond's actions are the type of dishonesty contemplated in *Bhasin,* and Ocean should be held liable for damages sustained by Matthews as a result of Emond's dishonesty.

[169] It is a less than happy irony that prior to July 2010 an agreement was reached at the Board level of Ocean that Emond was to be dismissed. Members of the Board were not pleased with Emond's overall performance, and were aware of

then CEO, Robert Orr's concerns about Emond's leadership, character and the quality of his communications with him and others at the company (see hearing judge's decision, ¶124). Emond was not a trusted employee, even when Robert Orr was CEO.

[170] The only thing that prevented dismissal of Emond was the company's concern for optics (¶128). They elected to keep Emond, whom management did not trust, and whom the court has since determined to have lied to both management and the court. Emond was the person most responsible for engineering the constructive dismissal of Matthews. Without Matthews, Ocean would not likely have been a world leader on Omega 3 extraction. A sad irony indeed.

[171] The dismissal, as engineered by Emond, is not a termination as contemplated in the LTIP nor in accordance with the law of employment contracts. Neither contract referred to management being able to lie and deceive within the context of the employment relationship and directly or indirectly profiting from their deceit and lies.

[172] The current CEO, Martin Jamieson, testified that there was no dismissal and that Ocean, in fact, planned on Matthews being with the company, working on emerging technology. That is inconsistent with the actions of Emond. If there is a shred of truth to what Jamieson says, then Emond would have had to continue his crusade on his own as a rogue member of the management team.

[173] I return to the point I made above, there are no implied or express terms in the LTIP or the general employment contract that suggest that an employee would be at the mercy of a rogue manager. At a minimum, the termination cannot be said to have been according to law.

[174] The law recognizes a continuation of employee rights after an unlawful termination. In *Veer v. Dover Corp. (Canada) Ltd.*, [1999] O.J. No. 1727 (C.A.) Justice Goudge stated:

> [14] … the termination contemplated must, I think, mean termination according to law. Absent express language providing for it, I cannot conclude that the parties intended that an unlawful termination would trigger the end of the employee's option rights. The agreement should not be presumed to have provided for unlawful triggering events. Rather, the parties must be taken to have intended that the triggering actions would comply with the law in the absence of clear language to the contrary. …

[175] The terms of the LTIP go to great lengths to close the door to any employee who is not in the active employment of Ocean at the time of a realization event. However, there was nothing in the LTIP Agreement which suggests either side intended it to be a parasitic arrangement. Neither side was entitled to suck all the good they needed out of the other and then have one or two rogue parasites toss the host, in this case, Matthews, aside. On its face, the agreement was a symbiotic arrangement predicated upon the parties working in a long-term arrangement to the mutual benefit of both.

[176] The main shareholder of Ocean, John Risley, did not like share options as a reward vehicle for valued employees. The LTIP showed he intended to reward both contribution and loyalty. Even near the very end of the employment relationship, John Risley recognized the value of Dave Matthews' contribution to Ocean and the value he still had to the company. By that time, however, the actions of Emond had diminished Matthews' role with Ocean to the point that he only had a few hours work per week. Matthews simply had to stay with Ocean if he was to collect on the LTIP, but despite his desire to stay, Emond was not going to allow that to happen.

[177] Emond's actions suggest that, from his perspective, Ocean had sucked all the company needed from Matthews. It was time to dispose of the carcass.

[178] Emails suggest that during the final days when Matthews was still trying to salvage either his position or something from the LTIP, Ocean's management was of the view that they were not liable to pay the LTIP amount. They even questioned where Matthews was getting his advice when he was suggesting that he had been constructively dismissed. They saw no downside to Ocean because they were of the mind that there had been no dismissal. The court below, and this Court have determined otherwise. Matthews was constructively dismissed; it is not clear where Ocean was getting its advice.

[179] Ocean is responsible for the actions of its employees, in this case, the actions of Emond. Ocean may well have failed to appreciate what Emond had done through his lies, manipulation and deception. If he was on a frolic of his own, and he did not let his colleagues or superiors understand the extent to which he undermined Matthews, then one could appreciate that even by the time of the application, Ocean was pressed to understand that a wrongful dismissal had occurred. That does not negate the effect of the lies in terms of Ocean's side of the performance of the employment contract.

[180] It is important that the context for the establishment of the LTIP be taken into account in deciding this case. I refer to the decision of the hearing judge where it was noted by Robert Orr, the former CEO of Ocean, that:

> [59] … Early on, when ONC was wholly owned by CFFI, there was a high degree of trust among senior management that Mr. Risley would look after those people who contributed to the development of his companies. According to Orr. Risley's word was his bond. …

It is in that context that the LTIP was established. Nothing in that contract could have contemplated a person such as Emond doing what he did.

[181] Even though John Risley continued to hold the majority shares, he was no longer in effective control of the company. He, and the original management team, was sidelined by the management team Richardson Capital had installed. Matthews was just one of the original management team of loyal builders shunted to the side as the new Richardson team continued to build and market the company so as to maximize their profits.

[182] As I have said, nothing in the LTIP contemplates a rogue employee, lying and deceiving both the employee and employer. If there was an implied term of honesty and good faith in the LTIP that prevented a rogue manager like Emond from dismissing Matthews, then recovery could occur under the terms of the LTIP. If, as my colleague says, the terms of the LTIP were sufficiently clear and the court determined that it was necessary that the claimant be a full-time employee at the time of the Realization Event, I am satisfied this appeal should not stand or fall on that point alone.

[183] There is a second path to recovery for Matthews. This path is through the employment contract, which I suggest would include an implied term of honesty as part of the prohibition against unlawful dismissal without notice. As the hearing judge noted:

> [343] I am satisfied that Daniel Emonds, on behalf of ONC, was not authorized by any implied term of the employment contract to reduce Dave Matthews' responsibilities so substantially without reasonable notice…

[184] If Emond was on a frolic of his own, having misled his superiors as to what he was doing vis-à-vis Matthews, Ocean is not now entitled to gain from that deception. The evidence, and the hearing judge's findings, make it clear that

Emond’s campaign to remove Dave Matthews extended over a number of years. The hearing judge said:

> [347] Over the next few years, Daniel Emond engaged in a course of conduct aimed at pushing Matthews out of operations and minimizing his influence and participation in the company. … Until 2010, Emond’s communications with Matthews were monitored to an extent by Robert Orr, who had significant respect for Matthews and considered him to be an industry-leading resource of significant value to ONC. When Orr stepped down as CEO and Emond began reporting to Martin Jamieson, Matthews lost his only real ally at the company. Emond’s communication with Matthews declined in quality and frequency, and Matthews, along with Orr, became increasingly ostracized.

[185] Even if clauses 2.03, 2.04 and 2.05 of the LTIP were sufficient to prevent Matthew from recovering under the LTIP, the LTIP serves as a means to measure the damages for the unlawful dismissal. In this regard, I accept the calculation of the damages as established by the hearing judge where he calculated the loss related to the LTIP as $1,086,893.36 .

[186] The LTIP contract was one that the employer presented to Matthews and other key employees. It was not the result of negotiation, but it was intended to foster loyalty and commitment. The contract spoke of the fact that it had no current value and that in order to collect Matthews had to be employed at Ocean and that it could not be used as a basis upon which to calculate severance. Severance and damages are distinct legal concepts. The court is here calculating damages consequent to the unlawful dismissal, not severance. In terms of wrongful dismissal the court is dealing with the issue of damages in an effort to make the aggrieved party whole again.

[187] *Blacks Law Dictionary*, 10th ed. (St. Paul, Thomson Reuters:2014), defines “damages,” “contract damages” and “severance pay”:

> **damages,** n. pl. (16c) Money claimed by, or ordered to be paid to, a person as compensation for loss or injury…
>
> **damage,** adj.
>
> > *“The term defined:* A sum of money adjudged to be paid by one person to another as compensation for a loss sustained by the latter in consequence of an injury committed by the former or the violation of some right.” Martin L. Newell, A Treatise on the Law of Malicious Prosecution, False Imprisonment, and the Abuse of Legal Process 491 (1982)

> "Damages are the sum of money which a person wronged is entitled to receive from the wrongdoer as compensation for the wrong." Frank Gahan, *The Law of Damages* 1 (1936).

Contract Damages. Remedies available for a breach of contract. See c*ompensatory damages, consequential damages, liquidated damages, punitive damages* under DAMAGES; SPECIFIC PERFORMANCE.

Severance pay. (1939) Money (apart from back wages or salary) that an employer pays to a dismissed employee.

> The payment may be in exchange for a release of any claims that the employee might have against the employer. – Sometimes shortened to *severance.* - Also termed *separation pay; dismissal compensation;* (BrE) *redundancy pay.*

[188] The LTIP expressly limits the right of employees to claim severance based on the LTIP, if the employee is not actively employed at the time of the Realization Event. The failure to provide proper notice of termination or payment in lieu of notice may result in an employee being entitled to damages. Damages are meant to compensate an employee for the harm caused by their dismissal. Those damages are meant to include all losses that are reasonably foreseeable, with the onus of proving both entitlement and quantum being on the claimant employee.

[189] In the unique circumstances of this case, Ocean should not benefit from Matthews' wrongful termination. I repeat, the CEO, Jamieson, said he did not want Matthews dismissed, yet a rogue employee constructively dismissed Matthews. If the operating mind of the company could be said to be Jamieson and other board members who testified, they did not want Matthews dismissed. Only Emond, through lies and deception, acted in a way that constituted constructive dismissal. Nothing in the LTIP even vaguely suggests that Ocean may avoid the payment of the benefit through lies, deception and engineering of the loyal employee by any member of the management team. That would, in this case, include Emond.

[190] At common law, the objective of damages for breach of contract is to put the injured party in the position he/she would have been in had the contract been performed. Here, had Matthews not been unlawfully dismissed, he would have benefitted from the LTIP. But for the unlawful dismissal, he would have been in the employ of Ocean at the time of the sale of the company which was the "Realization Event" under the LTIP.

[191] I refer to *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701:

> [115] These damages place the employee in the position that he or she would have been in had the contract been performed – the proper measure of damages for breach of contract.

[192] Although McLachlin, C.J. makes this comment in dissent in part, it is nevertheless an accurate statement of the law in damages. See also, S.M.Waddams, *The Law of Contract,* 7th ed., (Toronto: Thompson Reuters Canada Ltd., 2017) at p. 793.

[193] The right to damages is based on what is also know as the compensation principle (see: Angela Swan & Jakub Adamski, *Canadian Contract Law,* 3rd ed. (Markham, Ontario: LexisNexis Canada, 2012) at p. 381, s.6.11).

[194] In many cases the difficulty lies in ascertaining the extent of pecuniary loss flowing from the breach of contract. But in *Haack v. Martin*, [1927] S.C.R. 413 the court adopted the "general rule applicable to all breaches of contract" as stated in *Robinson v. Harmin,* (1848), 1 Exch 850, at 855:

> The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

[195] The law does distinguish between direct and indirect damages and an injured party is entitled to recover for either type of damage. This is noted by Swan and Adamski*, supra* at 6.15 – 6.16

> The terms "consequential", "incidental" and "indirect" damages refer to damages that are in addition to or that arise as a consequence of the direct damages of the promisor's breach.

[196] The law on damages extends at least as far back as *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145, where the court identified two cases where damages are recoverable:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things from such breach of contract itself, or such as may reasonably be

> supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. …(pp. 150-51)

The loss of the LTIP was clearly in the minds of Ocean and Matthews at the time of the dismissal. Ocean even attempted to extract a non-compete agreement as a pre-condition of negotiating a settlement on the issues related to the LTIP agreement.

[197] I return to the *Baxendale* rule. This rule was endorsed more recently in *Fidler v. Sun Life Assurance Co. of Canada,* 2006 SCC 30 and in *Keys, supra* (¶55). In *Fiddler* the court said:

> 55 …
>
> It follows that there is only one rule by which compensatory damages *for breach of contract* should be assessed: the rule in *Hadley v. Baxendale.* … [Emphasis in the original]

[198] *Honda* and *Fidler* have changed the method used for assessing damages in wrongful dismissal cases. In *Jean v. Pêcheries Roger L. Ltée,* 2010 NBCA 10, the court said:

> [55] Let there be no doubt regarding my view: the method of assessing damages for wrongful dismissal applied in the past must undergo fine-tuning to accord with the principles enunciated in *Fidler v. Sun Life Assurance Co. of Canada* and *Keys v. Honda Canada Inc.* Compensation in lieu of notice must now be calculated in accordance with the principles that inform the assessment of all damages for breach of contract. The purpose of such damages is to place the aggrieved employee in the same position he would have been in but for the breach by the employer of the implied terms of the contract of employment to give reasonable notice….

[199] In this case, Ocean knew that one consequence of Matthews leaving Ocean (the dismissal) was that his LTIP was at risk. In fact, there is reference in the evidence to one Ocean employee saying the LTIP was a retention plan not an exit strategy; they refused to negotiate a payment related to the loss of the LTIP. (see page 3286 re notes of a May 2011 meeting.)

[200] The loss of the opportunity to participate in the LTIP was a predictable loss. Emond was aware of DSM actively negotiating a purchase of Ocean at the time Matthews was constructively dismissed. Ocean was, at the time, in a better position to know what Matthews' losses might be. Matthews was struggling to stay with the company, until near the very end, in spite of all that Emond did to him over the years.

[201] It would not be inappropriate to compare this case to one of a stolen lottery ticket. The ticket is of nominal value before the winning numbers are drawn. If, however, a lottery ticket is wrongfully taken and the numbers on that ticket match, it is not the face value that the courts would order returned to the true owner. A court would order the return of the winnings.

[202] To continue the analogy, Matthews had paid handsomely for his lottery ticket, through many years of loyal service to Ocean. He stayed, in part, for the LTIP. He was dismissed as a result of the conniving actions of Emond. Like the lottery ticket that had nominal value on the day it was stolen, it was possible to calculate the value once the winning numbers were drawn. Matthews' losses, by the time of the application were easily calculable by reference to the LTIP. To put it more succinctly, even if the LTIP could not be used to calculate severance, it is available to calculate damages as the hearing judge did in this case.

[203] My colleagues and I agree with the hearing judge who determined 15 months was an appropriate period of notice in this case. The lottery ticket matured within that time, but because it was stolen by Emond/Ocean, Matthews stands to lose everything he worked for over many years. His many years of service was the price he paid for the ticket. There was nothing more to be done by Matthews or Ocean for Matthews to collect. What he lost was the opportunity to share in the value of the sale. That sale did occur within the notice period as established by the court.

[204] No amount of lies or deception by Emond should serve to deny Matthews of that benefit. Damages for wrongful dismissal are no longer limited to loss of wages. As noted by David Harris in *Wrongful Dismissal,* loose-leaf (consulted on 15 February 2018, last updated 2018) (Toronto, Ont: Thompson Reuters, 1997, 2017). vol. 2, ch. 4, s. 4.19, p.4-67:

> Aside from the assessment of the period of notice, further damages may also arise from the dismissal. *Batt on the Law of Master and Servant,* 5th ed. (1967) says:

> The law is that an employee's claim for damages is not limited to the wages or salary he would have received had he been given proper notice. The dismissal, if wrongful, is a breach of contract, and all damages flowing therefrom are recoverable. (pp. 262-263)

Acceptance of this principle is confirmed by the Ontario Court of Appeal in *Lawson v. Dominion Securities Corp.*, [1977] 2 A.C.W.S. 259:

> The recovery of lost income is not limited to salary. In this case the appellant conceded that the pension plan benefits should be included. *Carey v. F. Drexel Co. Ltd.* , [1974] W.W.R 492 exemplifies that rule that other items of income should be admitted including profit-sharing, a share-purchase option, and many fringe benefits such as a company car …. However, discretionary items such as bonus and profit distribution are not normally allowed: *Bardal v. Globe & Mail (The)*, [1960] O.W.N. 253.

[205] In the context of this case, the LTIP was not a bonus or profit sharing agreement or even a stock-option agreement. It was an essential part of his compensation package as was evidenced in a meeting he had with C. Wilson in May of 2011:

> DM I've had enough
>
> It's time for me to leave
>
> I was the final candidate with Nautel opp. RO found out about this and offered me to (sic) LTIP to stay – Sept. 2007
>
> CW … secondly, LTIP is a retention program, not an exit strategy. You know you have to be an active employee at the time of an event to qualify.

[206] As I said earlier, the LTIP came into existence when senior management felt the sole owner of the company was a person whose word was his bond. He was thought to be a person who could be trusted to look after his loyal employees, not use them, undermine them, and then dispose of them. Had that use and disposal approach been hinted at in the LTIP there is little doubt that the management team would have departed long before this became a half billion dollar company.

[207] My colleague says the hearing judge was wrong to distinguish *Kieran.* In that case, the Ontario Court of Appeal was addressing the appellant's entitlement to stock-options that would have vested during his period of reasonable notice. The majority decision here, however, fails to take into account the unique aspect of the present case. This case is an exception in that the dismissal was engineered over a period of years by a rogue manager. The dismissal was the result of a series

of lies and deception. The court must not condone the avoidance of contractual obligations that are founded on such a lack of integrity. On that basis alone, this case should be distinguished from *Kieran*. The same can be said of *Styles* even though the wording of the long term incentive plan in *Styles* is very similar to the terms in Matthews'/Ocean Long Term Incentive Plan.

[208] My colleague at ¶87 says:

> This may have been a different case if the hearing judge had concluded that Ocean Nutrition had orchestrated Matthews' termination to avoid any liability it might have under the Long Term Incentive Plan. Matthews made this argument before the hearing judge.

[209] It is not clear what the scope of that reference was, but I take it as meaning that there is an implied term in either the LTIP or the employment contract that provides that it would be unconscionable to dismiss Matthews simply to avoid payment under the terms of the LTIP and that Matthews could recover. With the greatest respect to my colleague, in this case this is a distinction without a difference. What difference would it make in the context of this case had Ocean set out to avoid the payment of the LTIP by firing Matthews, verses a rogue manager in the company setting out to get rid of him in a campaign that lasted a number of years? The damages are the same for Matthews. Ocean knew that Matthews stood to lose his LTIP and did nothing to right Emond's wrongs. A dismissal for the sole purpose of avoiding the payment of the LTIP would be contrary to an implied duty of good faith. The lies and deception employed by Emond, a person who was both an employee and director of Ocean, in his crusade against Matthews is no less offensive and contrary to an implied duty of good faith vis-s-vis both the LTIP and the employment contract.

[210] In summary, I am convinced Emond's actions, and the pivotal role he played in Matthews' dismissal, are of sufficient import to support the hearing judge's finding that Matthews is entitled to damages under the common law. There is nothing in the LTIP or the employment contract that implicitly allows Ocean to terminate Matthews based on lies and deception. The common law duty of honesty is implicit in both the LTIP and the employment contract. In spite of the terms of the LTIP, in the unique circumstances of this case, I am satisfied that Matthews is entitled to recover full damages for his wrongful dismissal. The LTIP provides a simple means by which to measure the damages. I would have maintained the award in relation to the loss of the LTIP.

[211] Based on success being largely in favor of Matthews, had I been in the majority I would have awarded costs on this appeal to Matthews in the amount of 30% of appropriate trial costs.

Scanlan, J.A.