SUPREME COURT OF NOVA SCOTIA
Citation: Matthews v. Ocean Nutrition Canada Ltd., 2012 NSSC 142

Date: 20120412
Docket: Hfx No. 353606
Registry: Halifax

Between:

David Matthews

Applicant

v.

Ocean Nutrition Canada Limited, Martin Jamieson, Daniel Emond and Richardson Capital Limited

Respondents

Judge:	The Honourable Justice Michael J. Wood
Heard:	March 1, 2012, in Halifax, Nova Scotia
Written Decision:	April 12, 2012
Counsel:	Blair Mitchell, for the Applicant Nancy Barteaux and Isabelle French, for the Respondents

By the Court:

[1] In June of 2011, David Matthews resigned from his position as Vice-President, New and Emerging Technologies, at Ocean Nutrition Canada Limited ("Ocean Nutrition"). He alleges that he was squeezed out by a reassignment of his job functions to others and claims that he was constructively dismissed. Mr. Matthews has commenced this proceeding against Ocean Nutrition, seeking damages for unjust dismissal.

[2] Mr. Matthews also claims that his mistreatment was motivated by a desire to end his entitlement to benefits under an Executive Incentive Agreement signed in September, 2007 ("the Incentive Agreement"). This agreement provided that Ocean Nutrition had no obligations to Mr. Matthews once his employment terminated. Mr. Matthews seeks an oppression remedy under the provisions of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*"). In addition to Ocean Nutrition, Mr. Matthews has named two of its officers, Martin Jamieson and Daniel Emond, as respondents, along with Richardson Capital Limited.

[3] The respondents have brought motions seeking the following:

1. Summary judgment dismissing the oppression claims in their entirety.

2. Alternatively, summary judgment dismissing the claims against Messrs. Jamieson and Emond and Richardson Capital Limited.

3. Conversion of this proceeding from an application in court to an action.

[4] These motions raise the following questions:

1. Are there undisputed facts not requiring trial that would allow the court to consider granting summary judgment to the respondents?

2. Has Mr. Matthews shown that he has a genuine issue requiring trial in relation to his oppression claim?

3. Do the allegations in the Notice of Application disclose a cause of action against Messrs. Jamieson and Emond and Richardson Capital Limited?

4. Are the circumstances of this proceeding such that it should be converted from an application in court to an action?

[5] The motions by the respondents will not result in a complete dismissal of the proceeding. If they are successful in obtaining summary judgment, it will eliminate the oppression claim and remove Messrs. Jamieson and Emond and Richardson Capital Limited as parties. What will remain is Mr. Matthews' claim for wrongful termination of this employment.

THE LAW

Summary Judgment

[6] The respondents are alternatively seeking summary judgment on the pleadings pursuant to Civil Procedure Rule 13.03, and summary judgment on evidence pursuant to Civil Procedure Rule 13.04.

[7] Rule 13.03 provides as follows:

> **Summary judgment on pleadings**
>
> **13.03** (1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:
>
> (a) it discloses no cause of action or basis for a defence or contest;
>
> (b) it makes a claim based on a cause of action in the exclusive jurisdiction of another court;
>
> (c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.
>
> (2) The judge must grant summary judgment of one of the following kinds, when a pleading is set aside in the following circumstances:

> (a) judgment for the plaintiff, when the statement of defence is set aside wholly;
>
> (b) dismissal of the proceeding, when the statement of claim is set aside wholly;
>
> (c) allowance of a claim, when all parts of the statement of defence pertaining to the claim are set aside;
>
> (d) dismissal of a claim, when all parts of the statement of claim that pertains to the claim are set aside.
>
> (3) A motion for summary judgment on the pleadings must be determined only on the pleadings, and no affidavit may be filed in support of or opposition to the motion.
>
> (4) A judge who hears a motion for summary judgment on pleadings may adjourn the motion until after the judge hears a motion for an amendment to the pleadings.
>
> (5) A judge who hears a motion for summary judgment on pleadings, and who is satisfied on both of the following, may determine a question of law:
>
> (a) the allegations of material fact in the pleadings sought to be set aside provide, if assumed to be true, the entire facts necessary for the determination;
>
> (b) the outcome of the motion depends entirely on the answer to the question.

[8] Although this rule refers to a "statement of claim", rule 13.02 defines this phrase to include the grounds in a notice of application. As a result, a summary judgment on pleadings is available in an application in court with the grounds set out in the notice being considered the pleading. On such a motion, the court must accept as proven all of the facts set out in the pleading and determine whether it is plain and obvious that it discloses no reasonable cause of action. A claim should only be struck out on a motion for summary judgment if it appears to be certain to fail or is absolutely unsustainable. (See *Body Shop Canada Limited v. Dawn Carson Enterprises Limited,* 2010 NSSC 25 at paras. 10-12.)

[9] A motion for summary judgment on evidence is governed by rule 13.04, which provides as follows:

> **Summary judgment on evidence**
>
> **13.04** (1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.
>
> (2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.
>
> (4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> (5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.
>
> (6) The motion may be made after pleadings close.

[10] The accepted test to be applied on a motion for summary judgment under this rule is set out by the Supreme Court of Canada in *Guarantee Company of North America v. Gordon Capital Corporation et al.*, [1999] 3 S.C.R. 423 at para. 27:

> The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 15; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164. D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has

> made this showing, the respondent must then "establish his claim as being one with a real chance of success" (*Hercules, supra,* at para. 15).

[11] The Nova Scotia Court of Appeal recently confirmed this approach in *Nova Scotia Power Inc. v. AMCI Export Corp.*, 2010 NSCA 41, as follows:

> **14** Here, the moving party on the application for summary judgment was NSPI, the plaintiff in this commercial dispute. As the moving party, NSPI had the burden of establishing that there was no genuine or arguable issue in dispute with respect to paragraph 8 which would necessitate a trial, and that therefore entitlement to summary judgment could be properly considered by the Chambers judge. Provided NSPI met this initial burden, then the responding party, AMCI, was required to show a real chance of success in its defence. *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165; and *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423.
>
> **15** Accordingly, the first question the judge had to ask himself was whether he was satisfied that there were no matters of fact, or of law, in dispute. Only if he were persuaded that NSPI had satisfied this initial threshold, would he then go on to ask himself the second question, whether AMCI had demonstrated that it had a real chance of success in advancing the pleading set out in paragraph 8 of its amended defence.

[12] In order to determine whether there are material facts in dispute or a real chance of success with respect to the plaintiff's claim, it is necessary to consider the requirements of the oppression remedy being sought.

Oppression Claim under Section 241 of the *Canada Business Corporations Act*

[13] Section 241 of the *CBCA* provides in part:

> **241.** (1) A complainant may apply to a court for an order under this section.
>
> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
> (a) any act or omission of the corporation or any of its affiliates effects a result,

> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

[14] There are two issues which arise out of these provisions that are relevant to the motions to be decided. The first is whether Mr. Matthews has the standing to initiate an application as a "complainant"; and the second is whether he has the type of interest in Ocean Nutrition that is intended to be protected by a remedial order under this legislation.

[15] The term "complainant" is defined in s. 238 of the *CBCA* as follows:

> "complainant" means
>
> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (b) a director or an officer or a former director or officer of a corporation or any of its affiliates,
>
> (c) the Director, or
>
> (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

[16] This indicates that a person holding the status of an officer or former officer of a corporation may initiate an application under s. 241. Section 2(1) of the *CBCA* defines "officer" as follows:

> "officer" means an individual appointed as an officer under section 121, the chairperson of the board of directors, the president, a vice-president, the secretary, the treasurer, the comptroller, the general counsel, the general manager, a managing director, or a corporation, or any other individual who performs

> functions for a corporation similar to those normally performed by an individual occupying any of those offices;

[17] The combined effect of these provisions is that the category of persons who may potentially bring an application seeking an oppression remedy is relatively broad. It includes not just named officers, but also those who perform functions similar to those normally performed by an officer. There is also a broad discretion in the court to determine who is a "proper person" to make such an application.

[18] In order to consider whether Mr. Matthews has the type of interest which falls within the scope of protection offered by the *CBCA* oppression remedy, it is necessary to examine the language used in the legislation and how it has been applied by the courts. Section 241(2) indicates that the court may provide a remedy where there has been conduct on the part of a corporation which is either: (i) oppressive, (ii) unfairly prejudicial, or (iii) that unfairly disregards the interest of a category of persons which includes creditors and officers. As noted above, officers is broadly defined and not limited to the formally appointed officers of a corporation.

[19] The Supreme Court of Canada discussed the nature and extent of the oppression remedy under the *CBCA* in *BCE Inc. et al. v. 1976 Debentureholders et al.,* 2008 SCC 69. In that case, the Court reviewed the evolution of the law of corporate obligations and, in particular, the development of remedies for various stakeholders whose interests may be adversely affected by corporate actions. One such remedy was an action for oppression, which was described by the Court as follows:

> [45] A third remedy, grounded in the common law and endorsed by the *CBCA*, is a s. 241 action for oppression. Unlike the derivative action, which is aimed at enforcing a right of the corporation itself, the oppression remedy focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors. This remedy is available to a wide range of stakeholders -- security holder, creditors, directors and officers.

[20] The Court went on to consider the best approach to the interpretation of s. 241(2) of the *CBCA* and made the following comments concerning the nature of the remedy:

> [58] First, oppression is an equitable remedy. It seeks to ensure fairness -- what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair: *Wright v. Donald S. Montgomery Holdings Ltd.* (1998), 39 B.L.R. (2d) 266 (Ont. Ct. (Gen. Div.)), at p. 273; *Re Keho Holdings Ltd. and Noble* (1987), 38 D.L.R. (4th) 368 (Alta. C.A.), at p. 374; see, more generally, Koehnen, at pp. 78-79. It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities: *Scottish Co-operative Wholesale Society*, at p. 343.
>
> [59] Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another.

[21] Given the equitable nature of the remedy, it is not surprising that its application is very fact specific. The Supreme Court of Canada makes this clear in its description of the expectations which will be protected:

> [62] As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.
>
> [63] Particular circumstances give rise to particular expectations. Stakeholders enter into relationships, with and within corporations, on the basis of understandings and expectations, upon which they are entitled to rely, provided they are reasonable in the context: see *820099 Ontario; Main v. Delcan Group Inc.* (1999), 47 B.L.R. (2d) 200 (Ont. S.C.J.). These expectations are what the remedy of oppression seeks to uphold.

[22] Although the Supreme Court was not prepared to define with precision the circumstances which might give rise to an oppression claim, they did provide some guidance with respect to the factors that should be considered:

> [71] It is impossible to catalogue exhaustively situations where a reasonable expectation may arise due to their fact-specific nature. A few generalizations, however, may be ventured. Actual unlawfulness is not required to invoke s. 241; the provision applies "where the impugned conduct is wrongful, even if it is not actually unlawful": Dickerson Committee (R.W.V. Dickerson, J.L. Howard and L. Getz), *Proposals for a New Business Corporations Law for Canada* (1971),

> vol. I, at p. 163. The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all of the interests at play: *Re Keho Holdings Ltd. and Noble*. It follows that not all conduct that is harmful to a stakeholder will give rise to a remedy for oppression as against the corporation.
>
> [72] Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

[23] It is important to note that the stakeholders referred to throughout the decision in *BCE Inc.* are those defined in s. 241(2) of the *CBCA*, which includes creditors and officers of the corporation. Typically oppression remedies are used to protect the corporate stakeholder from mistreatment by those who are in effective control of the corporate decision making. An obvious example is where a corporation's assets are diverted to the detriment of a minority shareholder.

[24] There are a number of cases which suggest that caution should be exercised by the court when a former employee wants to combine an oppression remedy with a wrongful dismissal action. This was the situation under consideration by the Ontario Superior Court of Justice in *Clitheroe v. Hydro One Inc.*, [2002] 21 C.C.E.L. (3d) 197. In that case, the plaintiff was the former chief executive officer of the defendant, whose employment had been terminated. The plaintiff brought proceedings seeking specific performance of the employment contract and an oppression remedy under the *Ontario Business Corporations Act*. The defendant made a motion to strike out the statement of claim as not disclosing a reasonable cause of action. The Court concluded that the oppression remedy was not available to the plaintiff as there was no pattern of oppressive conduct alleged in the statement of claim.

[25] The *Clitheroe* decision was referred in *Vlasblom v. NetPCS Networks Inc.* (2003), 31 B.L.R. (3d) 255, where an employee who had been terminated was held to have standing to raise an oppression claim because he had an agreement to purchase shares in the company. The fact that the shares had not, in fact, been purchased, was not a bar to the claim. The action for an oppression remedy was not combined with a claim for wrongful dismissal.

[26] In *Fedel v. Tan et al.*, 2010 ONCA 473, the Ontario Court of Appeal considered a proceeding in which a former employee sought damages for wrongful dismissal, as well as an oppression remedy under the *Ontario Business Corporations Act*. The Court of Appeal accepted the trial judge's findings that there was an oral agreement between the parties for the respondent to acquire shares in the corporation. The appellant had argued that the sole remedy which should have been available was a claim for breach of contract; however, the Court disagreed as indicated by the following comments:

> [56] In my view, J.S.M. does not assist Tan. In that case, the court held that a contractual remedy should be sought where the sole complaint is that of a breach of contract. It does not, however, suggest that the mere fact that a claim could be brought for breach of contract precludes the application of the oppression remedy where its application is otherwise appropriate. In J.S.M., at para. 66, the court reasoned that the oppression remedy is not intended to give a creditor after-the-fact protection against the risks assumed when entering into an agreement with a corporation, but is an appropriate remedy in situations where a creditor finds its "interest as a creditor compromised by unlawful and internal corporate manoeuvres against which the creditor cannot effectively protect itself". In my view, that reasoning applies equally to a case such as the present, where the interest asserted by the applicant is an ownership interest rather than that of a creditor and where the applicant establishes that its interest has been harmed by conduct that is protected by s. 248 of the OBCA.
>
> [57] In the result, I do not consider the fact that Fedel may have had an action against Tan in contract operates as a bar to his claim under s. 248 of the OBCA against Tan and the appellant corporations.

[27] The Court of Appeal granted an oppression remedy and concluded that the appellant held a sufficient interest in the corporation to qualify as a complainant under the *Ontario Business Corporations Act* even though he had not yet acquired any shares. In addition, damages were awarded for wrongful dismissal.

[28] The courts have also considered the nature of a creditor's interest which is sufficient to trigger an oppression remedy. This is another area that illustrates the flexibility and judicial discretion which are in play in these applications.

[29] In *Apotex Inc. v. Laboratoires Fournier S.A.*, [2006] O.J. 4555, the Ontario Superior Court of Justice concluded that a complainant must have the status of an

actual or potential creditor at the time of the alleged oppression. In addition, the status as creditor must not have arisen out of the oppressive conduct.

[30] The issue of a creditor's right to make an oppression claim was also considered in *1413910 Ontario Inc. v. McLennan*, [2009] O.J. 1828. In that case, the complainant held a liability judgment at the time of the alleged oppressive conduct, but the assessment of damages had not yet taken place. The issue was whether it was necessary to be a judgment creditor in order to qualify for an oppression remedy. The Court concluded that it was not, and explained its reasoning as follows:

> **29** Unless there is a compelling reason in the context of an oppression remedy application for construing the word in its technical sense of a "judgment creditor" or in the sense of a person to whom an obligor owes a liquidated sum certain whether reduced to a judgment or not, it is preferable to look to the context in which the term appears and to the purpose of the legislation itself.
>
> **30** There is, in my view, no compelling reason to hold that the term creditor should be construed in the narrow sense. It is by mere happenstance that there was a significant hiatus between the issuance of the declaration establishing liability and the judgment quantifying it. As of the date when the judgment for liability issued, a relationship arose in which Select owed an obligation to Bulls Eye and Bulls Eye was owed an obligation by Select. While those parties could reasonably disagree as to the monetary extent of the liability, it was clear that they were in a particular relationship of proximity and that the manner of conduct of the obligor's affairs could have significant consequences on the obligee.
>
> **31** Section 248(2) of the OBCA gives recognition to the fact that there are a number of classes of persons who have a legitimate stake in the manner in which the affairs of a business corporation are conducted, creditors among them, and it prevents those having power and control over the affairs of a business corporation from exercising that power with impunity.
>
> **32** The question that arises on the particular facts of this case is whether a person who has been adjudged to be entitled to as yet unquantified damages from the corporation is entitled to less protection from the unbridled exercise of power by those in control of the corporation than a person who is owed a liquidated amount, whether reduced to a judgment or not.
>
> **33** When one examines the list of persons whose interests are recognized in s. 248(2) -- "security holder, creditor, director or officer", it is apparent that the

> kinds of interests recognized and protected are (a) varied, (b) not necessarily pecuniary and (c) if pecuniary, not necessarily grounded in a present and crystalized loss.
>
> **34** The oppression remedy is designed to address, where oppression is found, the imbalance of power on the part of those in control with the vulnerability on the part of those having a genuine stake in the affairs of corporation but no control over its conduct. In my view, a person to whom the corporation owes an obligation affirmed by judgment but as yet unquantified by assessment of damages, is in no less vulnerable position vis à vis the corporation and has no less a legitimate stake or interest in the manner in which the affairs of the corporation are conducted than one to whom a liquidated such is owed.

[31] After reviewing the case law, I am satisfied that ,in appropriate circumstances, a claim for wrongful dismissal could be combined with an application for an oppression remedy. This would occur only where the claimant falls within the range of stakeholders entitled to protection under s. 241 of the *CBCA,* independent of their status as employee. This could arise where the employee was a shareholder, creditor, officer, or had an agreement entitling them to acquire shares at the time of the allegedly oppressive acts.

ANALYSIS

Summary Judgment on Pleadings

[32] The respondent's motion for summary judgment on pleadings is directed to the allegations against Martin Jamieson, Daniel Emond and Richardson Capital Limited. For purposes of this motion, the Court must assume that all of the facts alleged in the notice of application are true.

[33] Most of the allegations by the applicant say that his employment was wrongfully terminated by Ocean Nutrition. The oppression allegation is that the termination of employment was done in bad faith and for an ulterior purpose related to the Incentive Agreement. The references to the respondents, Jamieson, Emond and Richardson Capital in the notice of application are as follows:

> **Grounds for the order**
>
> The Applicant is applying for the order on the following grounds:

. . . .

3. The Executive Incentive Agreement was entered into when Ocean Nutrition Canada Limited was not subject to the extensive position of the interests of Richardson Capital Limited in the corporation which Richardson Capital achieved in or about the fall of 2008.

. . . .

5. The acts of constructive dismissal, consisting of the successive removal of responsibilities from the Applicant so altered or changed his terms and conditions of employment as to have fundamentally breached the terms and conditions of employment and to have forced the Applicant to resign his position. The Respondents Ocean Nutrition Canada Limited, Jamieson, Emond and Richardson Capital Limited knew and expected this resignation to have occurred.

. . . .

7. The acts of constructive dismissal represent the exercise of employment authority by Ocean Nutrition Canada Limited to recoup the position of the corporation prior to the execution of the Agreement with the Applicant and prior to Richardson Capital Limited's extensive acquisition to seek to benefit the interests of Richardson Capital Limited or those interests which it represented. They represent the exercise of that employment authority in bad faith and to an ulterior purpose. The Respondent, Daniel Emond executed these actions with the support of the Respondent Richardson Capital Limited with the support and acquiescence of the Respondent, Martin Jamieson.

[34] The specific allegations concerning oppressive conduct against all of the respondents are found in para. 8 of the applicant's grounds, which reads as follows:

8. The acts of constructive dismissal carried out effected a result, the termination of employment of the Applicant and were carried out in a manner oppressive of, unfairly prejudicial to and in unfair disregard of the interests of the Applicant within the meaning of s. 241(1) of the *Canada Business Corporations Act*. The acts, together with the exercise of the corporate authority and resources of Ocean Nutrition Canada Limited to this end were oppressive of the Applicant.

[35] Richardson Capital is described as having an interest in Ocean Nutrition, although the nature of that interest is not specified. Mr. Emond is described as the individual who exercised employment authority on the part of Ocean Nutrition, although it is not indicated whether he was an employee, officer or director. There is no indication of what relationship Mr. Jamieson has with Ocean Nutrition.

[36] A claim for oppression under the *CBCA* is fundamentally a claim against a corporation. If a court finds that there has been oppression and that a remedy ought to be granted, there may be circumstances in which that order needs to be directed against someone other than the corporation. This could include parties such as officers or directors in appropriate circumstances.

[37] The Ontario Court of Appeal in *Budd v. Gentra Inc.*, 111 O.A.C. 288 considered an application to strike out pleadings which named directors and officers in an oppression action. In deciding whether to strike the pleadings, the Court focussed on whether it was necessary for those officers and directors to be included in any potential remedial order.

[38] The Court allowed the defendants' application and struck out the pleadings against the individual officers and directors. There were no specific acts plead against the individuals which could provide a basis for finding oppressive action on the part of the corporation. The Court went on to consider the circumstances in which such personal orders might be available. It would appear that such individual orders will be relatively rare as indicated by the following comments from the Court's decision:

> **52** Even if the appellant had alleged specific acts against specific directors or officers, I would still hold that the claim as framed does not reveal a reasonable cause of action against them personally. As indicated above, the remedial reach of s. 241 is long, but it is not unlimited. Any order made must "rectify the matter complained of" by the parties seeking the remedy. To maintain an action for a monetary order against a director or officer personally, a plaintiff must plead facts which would justify that kind of order. The plaintiff must allege a basis upon which it would be "fit" to order rectification of the oppression by requiring the directors or officers to reach into their own pockets to compensate aggrieved persons. The case law provides examples of various situations in which personal orders are appropriate. These include cases in which it is alleged that the directors or officers personally benefitted from the oppressive conduct, or furthered their control over the company through the oppressive conduct. Oppression applications involving closely held corporations where a director or

> officer has virtually total control over the corporation provide another example of a situation in which a director officer may be held personally liable to rectify corporate oppression.

[39] In my view, the allegations against Messrs. Jamieson and Emond, and Richardson Capital, as set out in the notice of application do not establish a potential cause of action. Their connection to Ocean Nutrition is not set out, but more importantly, there is no basis on which they should be made a party to any potential remedial order. To the extent that Mr. Matthews is entitled to a monetary order, it should be against his employer, Ocean Nutrition. If part of his remedy for oppression is reinstatement of his employment, then that too falls to the corporation. There was nothing in the pleadings which suggested that the other respondents should be subject to those orders.

[40] On the basis of the foregoing, I will allow the motion for summary judgment on pleadings and strike out the allegations against Martin Jamieson, Daniel Emond and Richardson Capital Limited.

Summary Judgment on Evidence

[41] The respondents' motion for summary judgment on evidence is intended to dispose of the entire claim for an oppression remedy under the *CBCA*. For purposes of the motion, the respondents concede that the applicant's employment with Ocean Nutrition was constructively terminated and that this was unlawful. They say that all remaining material facts required to assess the oppression remedy are not in dispute and, therefore, do not require trial. In their motion brief, they list twenty points which they say represent the material facts.

[42] In order to consider what facts are material, it is necessary to understand the legal arguments being made on behalf of Ocean Nutrition. It says that Mr. Matthews is not a complainant who is entitled to initiate oppression proceedings because he is not an officer of the company. In addition, they say that he does not have a sufficient stake in the company to trigger a remedy for oppression. A related argument is that Mr. Matthews did not have a reasonable expectation sufficient to attract protection through the *CBCA* oppression provisions.

[43] With respect to Mr. Matthews' standing to bring these proceedings, the position of the respondents is that he is not a corporate officer according to the

records at the Registry of Joint Stock Companies and that is as far as the inquiry needs to go. As noted in the general discussion concerning oppression remedies under the *CBCA*, both the terms "complainant" and "officer" are defined in the legislation. It is clear from those statutory provisions that an assessment of whether someone can bring a claim for oppression goes far beyond whether they are shown as an officer on the official corporate filings. It involves a consideration of the nature of their job responsibilities, and whether these are similar to those of an officer. There is also a general discretion of the court to determine if someone ought to be given standing as a complainant.

[44] In this case, the evidence indicates that Mr. Matthews was a vice-president of Ocean Nutrition for many years and that he had responsibility over various divisions, some of which had more than one hundred employees.

[45] In my opinion, the facts with respect to Mr. Matthews' job responsibilities and how they compare to other officers of Ocean Nutrition cannot be said to be undisputed. Even if the respondents were to say that they accept Mr. Matthews' evidence completely, the Court's determination of who can be a complainant is very discretionary. In these circumstances, Mr. Matthews' assertion that he has standing has a sufficient likelihood of success that it should be determined by the trial judge and not on this motion.

[46] If Mr. Matthews is found to be a complainant, the respondents still say that he is not a stakeholder who should be entitled to invoke the oppression remedy. Part of this argument is premised on the position that he is not one of the class of people described in s. 241(2) of the *CBCA*, that is, a "security holder, creditor, director or officer". My comments concerning the statutory definition of officer are equally applicable to this argument.

[47] If Mr. Matthews establishes that he is an officer, security holder or creditor of Ocean Nutrition within the meaning of the *CBCA*, he must still prove that his interests have been unfairly disregarded.

[48] I agree with the submission of the respondents that courts should be cautious before allowing dismissed employees to include oppression remedies in their wrongful dismissal litigation. As indicated in the *Clitheroe* decision and the authorities which it cites, an oppression remedy should only be available to a dismissed employee if the dismissal is connected to the oppression of the plaintiff's

rights as a shareholder, officer, director or creditor. It is obvious that this will not be the case in most wrongful dismissal actions.

[49] Mr. Matthews says that his position is different from the circumstances described in *Clitheroe* because of the existence of the Incentive Agreement. This agreement was the subject of affidavit evidence and cross-examination from both parties on the summary judgment motion.

[50] The Incentive Agreement was entered into in September, 2007. Both parties agreed that its purpose was to provide an incentive to Mr. Matthews to continue his employment with Ocean Nutrition. The agreement called for a payment of an incentive calculated in accordance with a specified formula upon the occurrence of a "Realization Event" which was defined as follows:

> (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 of 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;

[51] The prescribed formula for calculation of the incentive amount was based upon the fair market value of the capital stock of Ocean Nutrition at the time of the Realization Event which triggered the payment. In simplistic terms, the Incentive Agreement provided for a payment to Mr. Matthews in the event of a sale of more than forty percent of the shares or substantially all of the assets of Ocean Nutrition, with the amount reflecting the increase in value of the company. Mr. Mitchell, on behalf of Mr. Matthews, argued that this allowed Mr. Matthews to be treated as if he was a minority shareholder in the event of a sale of a significant portion of the corporate shares or assets.

[52] Between the execution of the Incentive Agreement and the end of Mr. Matthew's employment, the respondents say that there were three potential Realization Events, none of which came to fruition. Mr. Jamieson, the President

and C.E.O. of Ocean Nutrition, deposes that there has never been a Realization Event as defined in the Incentive Agreement. As a result, they submit that Mr. Matthews would have no claim to a payment pursuant to that agreement even if he had continued as an employee. More importantly, they note that the Incentive Agreement includes the following provision:

> **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 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.

[53] As a result of this provision, the respondents say that Mr. Matthews can have no claim for an incentive payment once he ceases to be an employee, regardless of whether the termination was with or without cause.

[54] In his affidavit, Mr. Matthews described the circumstances leading to the Incentive Agreement. The respondents do not accept his version of events and argue that these facts are not material. Mr. Matthews' affidavit states:

> **Executive Incentive Agreement**
>
> . . . .
>
> 15. In 2007, Mr. Orr, the Chief Executive Officer of ONC, offered me an Executive Incentive Agreement. The Executive Incentive Agreement provides for a large cash payout in the event of the sale of a substantial ownership interest of the corporation or of the assets of the corporation, termed a "Realization Event." Under its terms, in such an event, I would receive a payment in the order of up to $750,000 or perhaps more. It gave me an entitlement to share in the relevant value of the company should it ever be sold. It was like an ownership interest in the company or its assets. If I had not received the Agreement, I would have left the company.
>
> 16. I was led to believe that a number of other senior people within the company were at one time or another being asked to enter into and were entering into a "Executive Incentive Agreement" of a nature equivalent to that which was offered to me. I have no reason to believe that Executive

> Incentive Agreements available to other executives of ONC at the time, did not contain similar cash payout provisions, in such an "Event."
>
> 17. Mr. Orr explained to me at the time, that I was being offered the Agreement because of the substantial contribution I had brought to the company and the increase in its worth and value, by reason of the introduction to it of Molecular Distillation and Fractional Distillation, the Omega-3 extraction and refinement, together with other contributions I had made.

[55] The Supreme Court of Canada decision in *BCE* is one of the leading authorities on oppression remedies. As discussed in the extracts previously quoted, it is an equitable remedy designed to ensure fairness between the parties. It is not limited to enforcing purely legal rights. (See paras. 58 and 71)

[56] The assessment of whether oppression exists is focussed on the particular circumstances. The Supreme Court was careful not to provide an exhaustive list of situations when oppression might arise. After reviewing the existing case law, the Supreme Court summarized some of the factors which might be used in assessing a claim for oppression:

> [72] Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

[57] For purposes of this motion, the respondents have conceded that Mr. Matthews' termination of employment was wrongful. Implicit in this is a concession that his resignation was not voluntary and was brought on by an unlawful change in the terms of his employment. What was not conceded was the reason why the employer would have done this. The cross-examination of the deponents who filed affidavits on behalf of the respondents indicated that Mr. Matthews was a valuable employee, who had contributed much to the success of Ocean Nutrition. He appeared to be a trouble shooter, who was called in to deal with difficult situations and special projects.

[58] I appreciate that the respondents' concession of wrongful dismissal was made solely to allow the Court to consider their legal arguments with respect to the

oppression remedy. In the affidavits and notice of contest, Ocean Nutrition alleges that Mr. Matthews' resignation was completely voluntary. The difficulty which arises from the concession is that it leads into an important part of Mr. Matthews' oppression argument, which is that the company had no reason to force him out, other than the desire to avoid potential liability on the Incentive Agreement.

[59] Even if I were to accept that there were no material facts in dispute, it is not clear to me that Mr. Matthews' oppression claim has no realistic chance of success at trial. Oppression under the *CBCA* is an equitable remedy which depends upon all of the circumstances. The Incentive Agreement arguably gives Mr. Matthews an interest in the company which is similar to that of a minority shareholder. This fact distinguishes him from other employees who seek to add oppression to a wrongful dismissal action.

[60] Mr. Matthews did not file any evidence showing that the termination of his employment was motivated by a desire to avoid obligations under the Incentive Agreement. The respondents argued that the absence of such evidence means that Mr. Matthews has not met the burden of showing that he has an arguable claim. It is important to recognize that this motion is brought before there has been any documentary disclosure or discovery examinations, and so the information concerning the employer's motivation is exclusively within the knowledge and control of the respondents. In such cases, the Court should be reluctant to grant summary judgment and dismiss a claim without giving that party a chance to obtain disclosure.

[61] In order to determine whether there was oppression in the termination of Mr. Matthews' employment, it will be necessary to consider all of the circumstances surrounding the negotiation of the Incentive Agreement and the events leading to the termination. These facts continue to be in issue between the parties and will have to be determined by the hearing judge.

[62] In the circumstances, I am not able to conclude that Mr. Matthews' claim for oppression under the *CBCA* is absolutely unsustainable. The evidence suggests that he may well fit within the status of a complainant under the *CBCA*, as well as a stakeholder entitled to protection. The assessment as to whether his expectations were reasonable and whether the respondents conducted themselves in a manner that unfairly disregarded those interests are fact driven inquiries, and I am not able

to conclude that Mr. Matthews is certain to fail in his efforts to have the Court exercise its discretion in his favour.

[63] For the above reasons, I will dismiss the respondents' motion for summary judgment on evidence.

Motion to Convert from Application to Action

[64] Civil Procedure Rule 6.02 governs the process of converting an application in court to an action, and provides as follows:

> **Converting action or application**
>
> **6.02** (1) A judge may order that a proceeding started as an action be converted to an application or that a proceeding started as an application be converted to an action.
>
> (2) A party who proposes that a claim be determined by an action, rather than an application, has the burden of satisfying the judge that an application should be converted to an action, or an action should not be converted to an application.
>
> (3) An application is presumed to be preferable to an action if either of the following is established:
>
> (a) substantive rights asserted by a party will be eroded in the time it will take to bring an action to trial, and the erosion will be significantly lessened if the dispute is resolved by application;
>
> (b) the court is requested to hold several hearings in one proceeding, such as with some proceedings for corporate reorganization.
>
> (4) An action is presumed to be preferable to an application, if the presumption in favour of an application does not apply and either of the following is established:
>
> (a) a party has, and wishes to exercise, a right to trial by jury and it is unreasonable to deprive the party of that right;
>
> (b) it is unreasonable to require a party to disclose information about witnesses early in the proceeding, such as information about a

witness that may be withheld if the witness is to be called only to impeach credibility.

(5) On a motion to convert a proceeding, factors in favour of an application include each of the following:

(a) the parties can quickly ascertain who their important witnesses will be;

(b) the parties can be ready to be heard in months, rather than years;

(c) the hearing is of predictable length and content;

(d) the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross-examination.

(6) The relative cost and delay of an action or an application are circumstances to be considered by a judge who determines a motion to convert a proceeding.

[65] In addition, Civil Procedure Rule 6.03 sets out the evidence to be provided in support of a motion to convert an application to an action:

Evidence for converting an application

6.03 (1) A party who makes a motion to convert an application to an action must, by affidavit, provide all of the following:

(a) a description of the evidence the party would seek to introduce;

(b) the party's position on all issues raised by the application;

(c) disclosure of all further issues the party would raise by way of either a notice of contest, if the proceeding remains an application, or a statement of defence, if the proceeding is converted to an action.

> (2) Despite Rule 6.03(1), a party who wishes to withhold disclosure of evidence the party will produce only to impeach a witness need not describe the evidence, or the investigations to be undertaken to obtain the evidence.

[66] A motion to convert an application in court to an action was considered by Pickup, J. of this Court in *Jeffrie v. Hendriksen*, 2011 NSSC 292. The applicant in that case alleged breach of a shareholders' agreement and sought an oppression remedy against the other shareholder. The Court dismissed the motion to convert after considering the factors set out in Civil Procedure Rule 6.02. The Court outlined three stages to be followed in analysing such motions:

> 13 Under Rule 6.02 there are three stages to the court's analysis as to whether a matter proceeds by application or action:
>
> a) first, the court must assess whether any of the presumptions in favour of an application are applicable under Rule 6.02(3);
>
> b) second, if the court determines that no presumptions apply in favour of an application, it must assess whether any presumptions in favour of an action apply under Rule 6.02(4);
>
> c) third, the court must determine the extent to which each of the four factors favouring an application are present under Rule 6.02(5) and determine the relative cost and delay as between an action and an application under Rule 6.02(6).

[67] In my view, neither the presumptions in favour of an application found in CPR 6.02(3), nor those in favour of an action found in CPR 6.02(4) exist and, therefore, the motion will be determined based upon a weighing of the factors set out in CPR 6.02(5) and (6).

[68] If this proceeding was limited to the claim for wrongful dismissal, I would have no difficulty concluding that the motion to convert to an action should be dismissed. For this reason, I will focus my analysis on the extent to which the addition of the oppression claim changes the nature of the proceeding, and whether this would justify converting the matter.

[69] With respect to the identification of witnesses, I see no reason why this could not be done relatively quickly. I note that the respondents have identified the possibility of obtaining evidence from eight individuals.

[70] The second factor to be considered relates to the speed with which the parties could be ready for a hearing. The proceeding was initially commenced in August, 2011 and there has been no exchange of documents or discovery examinations which was due, in part, to the scheduling of these motions. The parties have been required to marshal evidence which has been incorporated in the various affidavits, as well as prepare to cross-examine the deponents. This process would be of assistance in preparing for the ultimate hearing. I would expect that the parties should be in a position to be ready for this hearing within a matter of months, rather than years.

[71] The oppression claim raised by Mr. Matthews is quite specific. It relates to the circumstances surrounding the negotiation of the Incentive Agreement, and whether there was some corporate effort to force him out in order to avoid the obligations under that agreement. This is not a situation where the oppression claim relates to a complex series of events over a long period of time. The addition of the oppression claim does not change the predictability of the length and content of the ultimate hearing.

[72] It is not clear whether there will be significant credibility issues between the parties. There were no such disputes raised through the cross-examination of the deponents on the motion. To the extent to which credibility might be an issue at the hearing, I believe that it can be satisfactorily addressed through the tools available to the hearing judge whether the matter proceeds by way of action or application. The respondents essentially conceded this point in their brief.

[73] In my view, a consideration of the factors set out in CPR 6.02(5) does not favour conversion to an action. There is nothing in this proceeding as it presently stands that should prevent it from continuing as an application. This is particularly so since the burden is on the respondents to satisfy the Court that the conversion should take place.

[74] The final issue to consider is the relative cost and delay. The respondents submit that there is no significant difference between an action and an application on these issues and, therefore, these factors are neutral.

[75] In conclusion, I find that the respondents have not met the burden of satisfying me that this proceeding should be converted to an action. Any concerns

of the respondents with respect to the proceeding can be dealt with in the motion for directions which will take place.

CONCLUSION

[76] I have considered the affidavits filed, the cross-examination at the hearing, the written briefs and extensive submissions of counsel. Based upon these, I have concluded that the respondents' motions for summary judgment should be granted in part. I will allow the motion on pleadings to dismiss the claims against Martin Jamieson, Daniel Emond and Richardson Capital Limited. I will not allow the motion on evidence to dismiss the oppression claim in its entirety.

[77] I have also dismissed the respondents' motion to convert this application in court to an action. I do not see any particular advantage in the conversion and the respondents have not met the burden of satisfying me that Mr. Matthew's choice of proceeding ought to be disturbed.

[78] Since success has been somewhat divided, I will hear from the parties on the issue of costs.

[79] The motion for directions which takes place shortly after the filing of a notice of application did not occur by agreement of the parties. That motion should be the next step in this proceeding. I think that it would be most efficient for me to hear that motion since I am familiar with this matter. I would ask counsel to contact my office to schedule the hearing in the near future.

Wood, J.