S.C.C. Court File No. 38252

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM NOVA SCOTIA COURT OF APPEAL)

B E T W E E N :

DAVID MATTHEWS

APPLICANT

(Respondent)

- and -

OCEAN NUTRITION CANADA LIMITED

RESPONDENT

(Appellant)

RESPONSE TO THE NOTICE OF APPLICATION FOR LEAVE TO APPEAL ON BEHALF OF THE RESPONDENT, OCEAN NUTRITION CANADA LIMITED

(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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RESPONDENT'S MEMORANDUM OF ARGUMENT

PART I – Overview on Issues of Public Importance and Statement of Facts

1. The Applicant has not raised issues of national and public importance in seeking leave to appeal the Nova Scotia Court of Appeal's decision in *Ocean Nutrition Canada Ltd v Matthews*.[1] This case obviously does not engage constitutional issues, interpretation of commonly-occurring statutory provisions, or aboriginal rights. Rather, the Applicant has argued that it is a matter of public importance that this Honourable Court revisit the organizing principle of good faith articulated in *Bhasin v Hrynew*,[2] just fours years after it was decided, to clarify how it should apply in the employment context.
2. A review of decisions since *Bhasin* shows that courts are not struggling to apply the organizing principle of good faith in contractual dealings. There is no "epidemic" of misapplication[3] in Canadian courts; in the short time since *Bhasin* was decided, courts have been working through the subsidiary issues and the law has been evolving incrementally, as intended. There is no indication that "things have gotten out of control".[4] Specifically in the employment context, the organizing principle discussed in *Bhasin* is consistent with and stands in tandem to the requirement of good faith termination as set out in *Keays v Honda Canada Inc*.[5]
3. Contrary to the Applicant's suggestion, there is no divide between appellate courts regarding the determination of damages for entitlements arising during the notice period. The appellate case law applying *Bhasin* in the employment context has been consistent and reconciles the organizing principle of good faith with the two-step test used to determine whether a dismissed employee should recover damages for entitlements arising during the notice period.
4. The disagreement between the majority and dissent in the present case is not indicative of a broader schism in the law. Rather, the Dissenting Judge's reasons fall into the very trap that Justice Cromwell warned against in *Bhasin*; the dissenting reasons veer into a form of *ad hoc* judicial moralism that is based on a distorted recital of the Hearing Judge's findings of fact.

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[1] 2018 NSCA 44 [*Matthews*].
[2] 2014 SCC 71, 2014 CarswellAlta 2046, [*Bhasin*].
[3] Justice John Sopinka, "The Supreme Court of Canada" in D. Lynne Watt et. Al., eds, *Supreme Court of Canada Practice*, 17th ed. (Toronto: Thomson Reuters Canada, 2017) 479.
[4] *Ibid*.
[5] 2008 SCC 39, 2008 CarswellOnt 3743, [*Keays*].

5. The Applicant's arguments in support of leave rely heavily on the Dissenting Judge's reasoning and capitalize upon his distorted version of the facts. Although the Applicant's learned counsel may be skilled at framing intriguing legal questions for this Honourable Court's consideration, these questions have been superimposed upon a factual foundation that cannot support them.
6. Though we acknowledge that the Applicant's "right without a remedy" argument is eye-catching, it does not accurately characterize the circumstances of this case. The Applicant was awarded damages for constructive dismissal; he received his remedy. Because the Applicant had knowingly and voluntarily entered into an agreement that clearly and unambiguously required him to be an active employee on the date of the realization event, the LTIP simply was not a payment to which he was entitled.
7. To find otherwise would supplant well-accepted principles of contractual interpretation with a notion of "fairness" informed by moralism.
8. *Bhasin* was intended to clarify and simplify the law of contracts.[6] If it was applied in the manner that the Applicant suggests, the law would become less clear. The Applicant is asking this Honourable Court to tinker with first principles of contractual interpretation by resorting to the hydra of good faith.[7] Enlarging the application of *Bhasin* in this manner would jeopardize freedom of contract and certainty in contractual interpretation.
9. This is neither the right time nor the right case for this Honourable Court to consider these issues.

Response regarding the Applicant's Statement of Facts

10. The Respondent does not take issue with the facts as set out in the section entitled "Background" of the Applicant's argument (paras 16-34), but it does take issue with the conclusions he says are supported by those findings (e.g. – that the majority's summary of findings at para 32 amounts to a "a relentless course of dishonest and bad faith behaviour designed to drive him out" at para 6 of his argument).[8]

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[6] *Bhasin, supra* at para 40.
[7] *Bhasin, supra* at para 69 ("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.")
[8] Applicant's Memorandum of Argument at para 6.

11. As we will argue under Part B, the characterization of the facts has become increasingly distorted as this case has wended its way through the Courts. The Applicant capitalizes on the Dissenting Judge's moral indignation to present an exaggerated version of the facts that fit his legal arguments.

PART II – Statement of the Questions in Issue

12. The Applicant identified four issues which he says requires this Honourable Court's attention. The Applicant phrased the questions in such a way as to beg the answers. The Hearing Judge's findings of fact do not support the premises from which the Applicant has formulated his questions. Therefore we suggest that the issues before you can be less hyperbolically stated as follows:

    Issue #1: Does this Honourable Court's confirmation in *Bhasin* that contractual interpretation is subject to the general organizing principle of good faith require further clarification from this Court in the employment context?

    Issue #2: Should a finding of constructive dismissal override clearly-worded and unambiguous exclusion clauses in an ancillary contract? What is the proper remedy for constructive dismissal where the parties have entered into an ancillary contract separate and apart from the employment agreement?

    Issue #3: Is there a divide between appellate courts regarding the determination of damages payable during the notice period?

    Issue #4: What is the appropriate standard of review for interpreting remuneration and employment contracts for individual employees?

PART III – Statement of Argument

A. The law does not require this Honourable Court's clarification

Issue #1: The application of good faith principles in Bhasin *in the employment context is clear*

13. The Applicant, and the Dissenting Judge before him, overstate one of the key principles of law emerging from *Bhasin*. They say that *Bhasin* created a "duty" of good faith in contractual performance. However, Justice Cromwell was clear that no new "duty" was created. The primary purpose of *Bhasin* was to formally acknowledge what had long been assumed: good faith contractual performance is a "general organizing principle" of the law of contract. The

principle does not add to, but "underpins and informs", rules that already exist in the common law.[9] The Applicant goes too far in suggesting that adoption of a general principle equates to a freestanding duty.[10]

14. The only "duty" affirmed by *Bhasin* is a duty to perform one's contractual obligations honestly. In the present case there is no evidence that the Respondent (or any of its employees) were dishonest with respect to the LTIP Agreement.

15. The Applicant's submissions on this point treat termination itself as a breach of the employment contract, which it is not: an employer can terminate an employee on reasonable notice or by providing pay in lieu of reasonable notice.[11] A breach of the employment contract occurs not when an employee terminates an employee, but when it fails to provide reasonable notice. In turn, termination of employment does not constitute breach of an ancillary contract such as the LTIP Agreement in the present case, where the Agreement itself explicitly contemplates termination.

16. While the general organizing principle of good faith contractual performance reinforces the duty of good faith termination in *Keays*, it does not broaden it, as the Applicant has suggested.[12] The expectation that parties will perform their contractual obligations honestly and in good faith exists alongside the requirement of good faith termination. They neither overlap nor enlarge upon one another.

17. This Honourable Court has repeatedly confirmed that the duty of good faith termination has its limits, for example, the duty does 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."[13] In the course of discussing this passage, the Alberta Court of Appeal noted in *Styles v Alberta Investment Management Corporation* that there was no general duty of good faith imposed in termination of employment.[14]

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[9] *Bhasin, supra* at para 33.
[10] *Bhasin, supra* at para 64 ("An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations.")
[11] *Styles* at para 41.
[12] Applicant's Memorandum of Argument at para 49.
[13] *Bhasin*, *supra* at para 54, citing *Wallace v United Grain Growers Ltd*, 1997 3 SCR 701, at para 76, 1997 CarswellMan 455.
[14] 2017 ABCA 1 at para 50, 2017 CarswellAlta 1, [*Styles*].

18. The Applicant argues that because constructive dismissal can be accomplished without bad faith,[15] then *Bhasin* should be applied in the employment context to increase damages where the dismissal was in bad faith. Such argument ignores the option of punitive damages in favour of broadening claims of good faith. However, *Bhasin* was clear that only rarely, "where the existing law is found to be wanting", will the general organizing principle of good faith lead to creation of a new doctrine.[16] The law is not wanting here; the Applicant could have received punitive damages had there been a finding of bad faith, which there was not. Therefore, this is not an appropriate circumstance for this Honourable Court to create a new doctrine.

19. Interpretation of *Bhasin* in the employment context was central to the Alberta Court of Appeal's determination in *Styles*, where the Court reined in the lower court's expansion of *Bhasin*. The Court noted that while a party is permitted to act in its own best interests, a line must be drawn where such conduct crosses into deception and bad faith. The Court cautioned against drawing that line too quickly:

> The danger lies in imposing "legitimate contractual interests" that are contrary to the plain wording of the contract, or that involve the imposition of subjective expectations and interpretations on the contract. As a result, this "organizing principle" should only be applied to situations where it has previously been invoked, although there is a limited ability to extend the law: *Bhasin* at paras. 71, 93.[17]

20. The issues and circumstances considered in *Styles* have much in common with the present case. As will be discussed below, we say that *Styles* considers *Bhasin* and correctly states the law in this area, which has been consistently applied across Canada.[18] Put simply, the organizing principle of good faith cannot be used to override clear contractual provisions to which the parties have agreed. Matthews did not meet the contractually-required conditions of the LTIP contract, therefore he has no legal entitlement. At the time Matthews stopped working for ONC, no rights had vested under the LTIP contract. A common law principle cannot override that. As the Alberta Court of Appeal stated in *Styles*:

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[15] Applicant's Memorandum of Argument, *supra* at para 42, citing *Farber v Royal Trust*, 1996 CarswellQue 1158 at para 27.
[16] *Bhasin*, *supra* at para 66.
[17] *Styles*, *supra* at para 45.
[18] Courts, including in British Columbia and Ontario, have referred to the Court of Appeal's decision in *Styles* 17 times since it was released in 2017. Leave to appeal in *Styles* was refused, 2017 CarswellAlta 949 (SCC).

> …*Bhasin* does not make it dishonest, in bad faith, nor arbitrary to require that the other party perform the contract in accordance with its terms. If the contract clearly says that an employee must be employed on the vesting date to earn a bonus, it is not dishonest to insist that the employee is actually employed on the vesting date. The employment contract required payment of a bonus only if the preconditions were met. If the preconditions were not in fact met, the failure to pay the bonus cannot be described in any sense as being "dishonest."
>
> ...
>
> *Bhasin* is not to be used as a tool to rewrite contracts, and award damages to contracting parties that the court regards as being "fair", even though they are clearly unearned under the contract. The respondent contracted for Long Term Incentive Plan bonuses that would only vest if he stayed employed for at least four years, and nothing in *Bhasin* entitles him to anything more. The respondent did not earn the bonuses he claims, and he is not entitled to them.[19] [emphasis added]

21. The LTIP contract was not breached by Matthews' constructive dismissal. To the contrary, the LTIP contract contemplated with and without-cause termination, as acknowledged by both the majority and the dissent.[20] The decision in this case is consistent with the Alberta Court of Appeal's finding in *Styles* that *Bhasin* should not be expanded to treat termination without cause as a breach of contract that would result in a damage award for unvested contractual entitlements.[21]

22. The foregoing discussion is intended to show that appellate courts already have a coherent approach to applying *Bhasin* in the employment context, which was followed by the majority in the present case. The Applicant's suggestion that the present case presents an opportunity to impose a broad duty of good faith in the employment context is unnecessary and would create uncertainty in employment relationships. The public would not benefit from this Honourable Court's intervention in the manner advocated by the Applicant.

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[19] *Styles*, *supra* at paras 52 and 54.
[20] *Ocean Nutrition Canada Ltd v Matthews*, 2018 NSCA 44, Majority Reasons for Judgement of the Honourable Justice Farrar dated May 24, 2018 at paras 67 & 75; Dissenting Reasons for Judgement of the Honourable Justice Scanlan dated May 24, 2018 [Dissent] at para 150, Application for Leave ("Application") Tab 2D.
[21] *Styles*, *supra* at para 41.

Issue #2: The law of remedies and the application of exclusion clauses in wrongful dismissal cases is settled, but even if it were not, there has been no finding of bad faith in this case and so this issue cannot be reviewed as articulated by the Applicant

23. The Applicant's argument mischaracterizes Ocean's position and goes on to miss the point about remedies. He states, "In the majority's decision, there are no consequences to Ocean's breach of its duty to perform its contracts in good faith and honestly."[22] This is because there was no finding that Ocean had performed its contracts in bad faith or dishonestly. If such a finding been made, the Applicant would have stood to recover punitive damages. However, the Hearing Judge specifically considered and rejected the Applicant's claim for punitive damages, commenting that it was "something of a moving target" and ultimately finding:

> Had Matthews satisfied me that ONC's conduct was motivated by a desire to deprive him of his LTIP entitlement, his claim for punitive damages might have had some merit. As I noted earlier, however, there was no evidence to support this allegation.[23]

24. The majority of the Court of Appeal appropriately cited the Hearing Judge's finding that there had been no bad faith:

> 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.
>
> 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.[24]

25. The Respondent submits that the law of remedies in wrongful dismissal is clear and was properly applied in this case. The general principle is that a wrongfully dismissed employee has a common law entitlement to damages for the benefits they would have received had s/he remained an employee through the notice period, including bonuses where such bonuses are integral to the employee's compensation. Absent any clear contractual terms to the contrary that limit or displace this common law entitlement (as discussed in detail under Issue #3), the employee is entitled to be made whole for all such benefits. The Nova Scotia Court of Appeal didn't find it necessary to consider whether the LTIP was integral to the Applicant's

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[22] Applicant's Memorandum of Argument, *supra* at para 8.
[23] *Matthews v Ocean Nutrition Canada Ltd*, 2017 NSSC 16 at para 422 [Hearing Decision], Application Tab 2A.
[24] *Ibid* at paras 116-117.

compensation because it found that the exclusionary clauses unambiguously displaced the common law entitlement.

26. Since the LTIP contract clearly overcomes the common law, then no damages for loss of LTIP are payable; the terms of the LTIP govern.

27. Whether exclusion clauses should be enforceable is not a question of remedy, it is a question of contractual interpretation. In this instance, the Court of Appeal considered the terms of the LTIP contract and found that Matthews was not entitled to compensation according to its terms. The Applicant and the Dissenting Judge at the Court of Appeal draw a false equivalence between whether the applicable remedy is damages for constructive dismissal or for the benefit itself. The test is clear that the exclusionary language is not "irrelevant".[25] Rather it is the second part of the test. The majority of the Court of Appeal described this error and noted that it was open to the Hearing Judge to have awarded punitive damages, something he considered and rejected doing (as discussed at paragraph 23):

> 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.[26]
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> …
>
> … 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 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.
>
> 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.[27]

28. It is well established that parties have the ability to contract out of the common law. The question the Applicant raises is essentially whether the common law should now override the parties' freedom of contract. To consider this alternative approach is to consider introducing

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[25] Applicant's Memorandum of Argument, *supra* at para 13.
[26] Hearing Decision, *supra* at para 118.
[27] Hearing Decision, *supra* at paras 121-122.

significant uncertainty into contractual interpretation, the meaning of common law entitlement and the law of remedies for wrongful dismissal. More specifically, if common law entitlement under an employment contract has the potential to automatically override clear, unambiguous exclusion clauses in a contract which exists separate and apart from the employment contract itself, this introduces an unpredictable exception to the principle that clear and unambiguous wording will allow parties to contract out of the common law when they wish.

29. In short, the Applicant is asking this Honourable Court to tinker with first principles on which countless other contracts depend, not only in the employment context but in every area of contract law. To do so risks creating a gap in our collective, legal logic, and would require an activist approach to reforming the law of remedies in this area.

Issue #3: There is no divide in the case law with respect to the application of exclusion clauses in assessing damages during the common law notice period

30. The Applicant argues that there is a fundamental divide in the case law with respect to entitlement to benefits during the notice period: the British Columbia approach, which the Applicant suggests was followed by Justice Scanlan in his dissent, and the approach followed by the courts in Alberta, Ontario and the majority of the Nova Scotia Court of Appeal.[28]

31. The Respondent submits that the law of contractual interpretation is clear and was followed by the Nova Scotia Court of Appeal and other the courts in the cases cited by the Applicant. The cases cited by the Applicant can be reconciled as follows:

Ontario and Alberta Decisions:

(a) One of the more comprehensive statements of the law in this area cited by the Applicant comes from the Ontario Court of Appeal in the case of *Lin v Ontario Teachers' Pension Plan Board*.[29] The Court recognized that per *Sylvester v British Columbia*,[30] the first step of the analysis is that damages in lieu of reasonable notice should put the employee in the same financial position as if the employee had worked through to the end of the reasonable

[28] Applicant's Memorandum of Argument, *supra* at para 59 & 62.
[29] 2016 ONCA 619, 2016 CarswellOnt 12704, [*Lin*].
[30] [1997] 2 SCR 315, 1997 CarswellBC 1024.

notice period. The Court then cited *Paquette v TeraGo Networks Inc*[31] for the principle that damages in lieu of notice may include damages for a bonus the employee would have received or damages for the lost opportunity to earn a bonus where the bonus is integral to the employee's compensation. The second step of the analysis is to examine whether there is anything in the bonus plan which removes the employee's common law entitlement. The parties can bargain for terms that are different from what the common law provides, although per *Taggart v Canada Life Assurance Co,*[32] clear language is required to take away or limit a dismissed employee's common law rights. The Applicant is correct that in both *Lin* and *Paquette* neither contract was deemed sufficiently clear to deprive the employee of their common law entitlement.[33]

(b) In *Kieran v Ingram Micro Inc*, the issue was entitlement to stock options, not to a bonus, however the analysis was consistent: Kieran was entitled to damages for the loss of his stock option plans because they were an integral part of his compensation, absent any contractual terms to the contrary.[34] The Court of Appeal found that where there are contractual terms to the contrary, those terms govern and the parties are bound by their plain language.

(c) In *Styles*, the issue was focused narrowly on the matter of the plain wording of the entitlement provisions of the company's LTIP, which was a standard form contract and was therefore reviewed on a standard of correctness. The terms of the LTIP were comprehensive and specifically required that Styles 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."[35] Although the Alberta Court of Appeal did not apply the analysis articulated by the Ontario Court of Appeal in *Lin*, this decision is compatible with the second part of that analysis.

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[31] 2016 ONCA 618, 2016 CarswellOnt 12633, [*Paquette*].
[32] (2006) 50 CCPB 163 at paras 83-93, 2006 CarswellOnt 1141.
[33] Applicant's Memorandum of Argument, *supra* at para 63.
[34] 2004 CarswellOnt 3117 at para 56, 2004 CLLC 210-042.
[35] *Styles*, *supra* at para 6.

British Columbia Decisions:

(d) The Applicant cites *Iacobucci v WIC Radio Ltd* as the leading case from British Columbia which establishes that a plaintiff is entitled to recover damages equivalent to the benefits he would have received if he had been treated as an employee until the expiration of the period of reasonable notice.[36] Although there was a term in the contract which provided for a two-month expiration to exercise certain stock options following the date of termination, the Court determined that for the purposes of entitlement, the date of termination was properly the end of the common law notice period because the employee was entitled to be treated as an employee until this point. This is reconcilable with the results in the Ontario and Alberta cases in that determining entitlement at common law is the starting point for this type of case, and only clear wording can displace this. However, the result is also distinguishable from the issue of this Application because the contract in *Iacobucci* did not contain clear, unambiguous exclusionary clauses with respect to termination with or without notice.

(e) *Pakozdi v B&B Heavy Civil Construction Ltd* is similarly reconcilable.[37] The issue in *Pakozdi* was whether the wrongfully dismissed employee should be entitled to damages for the loss of the opportunity to contribute to an RRSP matching program in addition to damages for lost salary. The Court of Appeal found that he should be, and cited *Iacobucci* for the principle that an employee is entitled to compensation for the loss of whatever pecuniary benefits would have flowed from being an employee during the notice period.[38] Once again, this is the first step of the analysis set out in *Lin*. Unlike in *Lin*, and as in *Iacobucci,* there were no exclusionary clauses in *Pazkodi* which would have clearly overridden this common law entitlement, and so this case does not speak directly to the issue in this Application for Leave to Appeal.

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[36] 1999 BCCA 753, 1999 CarswellBC 2822, [*Iacobucci*]; Applicant's Memorandum of Argument at para 59.
[37] 2018 BCCA 23, 2018 CarswellBC 69, [*Pakozdi*].
[38] *Ibid* at para 56.

(f) The Applicant also attempts to distinguish the approach taken in *Gillies v Goldman Sachs Canada Inc*, arguing that "[d]espite exclusionary language requiring 'active employment' for participation, the Court held that Gillies would be entitled to participate in the IPO as long as it occurred during the notice period".[39] This is a misstatement of the result in *Gillies*. In fact, the Court of Appeal determined that as long as the IPO occurred during the notice period, Gillies was presumptively entitled to benefit from it. However, the Court specifically referred the issue of whether the terms of the IPO itself otherwise restricted Gillies' participation back to the trial court for determination, noting that the result was not so inevitable that the Court of Appeal should engage in fact-finding to resolve the issue:

> The trial judge did not address the application of the limitations on delivery of shares, given his conclusion that Mr. Gillies was not entitled to participate in the IPO. My review of the evidence persuades me that the result is not so inevitable that this Court should find the facts necessary to resolve this issue. Therefore, I would refer this matter to the trial court to resolve the application of the provisions limiting delivery of the shares.[40]

On this basis, the Respondent submits that *Gillies* is also reconcilable with the Ontario and Alberta jurisprudence. The Respondent notes that there is no subsequent trial decision indicating whether Gillies was entitled to participate in the IPO according to the terms of the IPO itself.

(g) In *Martell v Ewos Canada Ltd,* the Court of Appeal relied on *Gillies* in determining that an employee was entitled to participate in two incentive-based compensation plans which were instituted shortly after he was wrongfully dismissed.[41] The Court of Appeal agreed with the trial judge's finding that the language of the plans, which appeared to require continued employment and limited entitlement to options or bonuses which had vested as of the date of termination, did not limit the employee's common law entitlement to participate in these plans during his notice period. This result is consistent and reconcilable with the Ontario and Alberta case law. However, the Respondent submits that the Court

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[39] 2001 BCCA 683, 2001 CarswellBC 2716, [*Gillies*]; Applicant's Memorandum of Argument at para 62.
[40] *Ibid* at para 37.
[41] 2005 BCCA 554, 2005 CarswellBC 2700, [*Martell*].

of Appeal may have slightly misstated the result in *Gillies* at paragraph 27 of *Martell* in commenting that the result in *Gillies* was that the employee was entitled to participate in the IPO, without noting that this finding of common law entitlement was then subject to the trial judge's determination of entitlement under the terms of the IPO itself. This omission was likely not material to the analysis or the result in *Martell* as the trial judge had already considered the application of the language, but it is material to understanding this line of jurisprudence for the purposes of this Application.

(h) The Applicant also relies on *Haff v Valeant Pharmaceuticals International Inc*, in which a wrongfully dismissed employee was awarded damages for pay in lieu as well as loss of compensation via a quarterly commission-based bonus plan.[42] Although one of the terms of the bonus plan was that the employee needed to remain employed in order to receive the bonus at the end of the quarter, this term did nothing to disentitle the employee from receiving common law compensatory damages for the loss of the bonus in the event of termination or wrongful dismissal. This is distinguishable from this Application, as well as the facts in *Styles*. In terms of general principles, however, it is nonetheless reconcilable with the Alberta and Ontario case law.

32. Justice Scanlan's dissent was not based on the British Columbia approach. It was based on the kind of misplaced judicial moralism that Justice Cromwell cautioned against in *Bhasin*.[43]

Issue #4: The applicable standard of review for the LTIP as a standard form contract is correctness

33. The Applicant argues that this case presents an opportunity for this Honourable Court to clarify the applicable standard of review for the interpretation of "individual employers' contracts and benefits".[44]

34. The Respondent submits that this Honourable Court has recently clarified the issue of contractual review and interpretation in two decisions: *Creston Moly Corp v Sattva Capital*

[42] 2013 BCSC 1720, 2013 CarswellBC 2889.
[43] *Bhasin*, *supra* at para 70.
[44] Applicant's Memorandum of Argument, *supra* at para 65.

Corp[45] and *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co*.[46] In *Creston*, this Honourable Court confirmed that contractual interpretation is an exercise involving issues of mixed fact and law which weigh in favour of deference to the fact-finder.[47] In *Ledcor*, this Honourable Court carved out an exception for standard form contracts, which are reviewed on a standard of correctness.[48]

35. The Nova Scotia Court of Appeal cited and discussed the circumstances described in *Ledcor* in determining that the applicable standard of review for the LTIP is correctness. The Court noted that the terms of the LTIP were not individual to Matthews, but rather had been implemented without evidence of negotiation to apply to a group of Ocean employees for the same purpose, and therefore must have the same meaning for all. This is the type of "take-it-or-leave-it proposition" described by Wagner J. (as he was then) in *Ledcor*.[49]
36. The Applicant attempts to distinguish *Ledcor* by alleging that LTIP contracts are not standard form contracts because they are often specialized to the individual recipient.[50] Whether or not this general statement is true, it does not reflect the facts in this case.
37. Finally, the Applicant argues that there is significant uncertainty as to whether the standard of correctness described in *Ledcor* applies in the context of "specialized employment contracts", and cites *Machtinger v HOJ Industries Ltd.* for the principle that employment contracts are interpreted differently than other contracts.[51] The Respondent respectfully submits that *Machtinger* was about common law notice periods in a case involving contracts which provided for less than the minimum statutory notice period. The Applicant's reading of *Machtinger* has no bearing on the applicable standard of review in this case. The salient point remains that the LTIP is a standard form contract subject to the correctness exception set out in *Ledcor*, not whether *Ledcor* applies in the employment context. This is supported by the reasons of the Alberta Court of Appeal in *Styles* which also applied a standard of correctness per *Ledcor* in reviewing the company's standard form employee LTIP contract.[52]

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[45] 2014 SCC 53, 2014 2 SCR 633, [*Creston*].
[46] 2016 SCC 37, 2016 2 SCR 23, [*Ledcor*].
[47] *Creston*, *supra* at paras 50 and 52.
[48] *Ledcor*, *supra* at paras 19, 25, and 46.
[49] *Ledcor*, *supra* at para 28.
[50] Applicant's Memorandum of Argument, *supra* at para 67.
[51] 1992 1 SCR 986, 1992 CarswellOnt 892 [*Machtinger*]; Applicant's Memorandum of Argument at para 68.
[52] *Styles*, *supra* at paras 19-20.

B. The Applicant's Mischaracterization of the Facts

38. As this case has progressed, the factual narrative has become increasingly distorted. With respect, the Dissenting Judge hyperbolized the Hearing Judge's findings of fact. Without having benefit of hearing the evidence or having ever met the witnesses, the Dissenting Judge had no qualms about passing additional judgments on their characters. Respectfully, Justice Scanlan's characterizations were over-simplified and exaggerated. Imagery of parasites,[53] exile,[54] and stolen lottery tickets[55] were inapt. He relied on the Hearing Judge's findings without an appreciation of their underlying facts. In doing so, he boiled this case down to a simple story of a devious rouge employee set on destroying an esteemed expert. As any court well knows, factual building blocks can be used to build many styles of houses. While the characterization of facts to build a persuasive narrative is the lifeblood of lawyers, it should be far outside the domain of judges.

39. Perhaps the best indicator of what the Hearing Judge thought this case was <u>really</u> about is captured in the opening paragraph of his supplemental decision. He speaks not of rouges and devious misdeeds amounting to bad faith dismissal, but simply of a manager's course of conduct resulting in constructive dismissal. He wrote:

> I found that the applicant's efforts had been critical to the company's success, that the incentive agreement was important to his decision to stay after 2007, and that Emond had worked to reduce and ultimately to minimize the applicant's role. Accordingly, I held that the applicant was constructively dismissed, with an appropriate notice period of fifteen months.[56]

40. To illustrate the distortion of facts over time, it is helpful to review some of the Hearing Judge's key findings of fact:

> - 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</u> involving Martin Jamieson and the Board to get rid of Matthews in order to

[53] Dissent, *supra* at para 175.
[54] Dissent, *supra* at paras 130, 144 and 149.
[55] Dissent, *supra* at paras 201-203.
[56] Supplemental decision dated May 12, 2017, 2017 NSSC 123 at para 1, Application Tab 2D.

deprive him of his LTIP entitlement.[57] [emphasis added]

- I make no finding as to whether Daniel Emond realized his actions on May 26 amounted to constructive dismissal. Nor have I decided whether ONC actually intended to terminate Matthews at the end of June. My only finding with respect to ONC's intention is that Matthews failed to show that ONC planned to terminate him in order to deprive him of his LTIP.[58] [emphasis added]

41. Despite these findings, Justice Scanlan opined:

- 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.[59]
- Only Ocean knows for sure why the company has fought so hard to prevent David Matthews from recovering under the LTIP.[60]
- 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.[61]
- 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.[62]

42. In turn, the Applicant has capitalized on the Dissenting Judge's maudlin portrayal of the facts to argue that the bad behaviour of one of Ocean's employees means that Ocean should be ordered to pay the Applicant damages flowing from a contract whose terms he did not meet.

43. As the Alberta Court of Appeal commented in *Styles*, courts cannot award damages on the basis of what it thinks is "fair", when damages are for entitlements that were never earned under the contract.[63]

44. This is exactly the error Justice Scanlan commits in his dissenting opinion. Although he acknowledges that "[t]he terms of the LTIP make it clear that Matthews cannot recover under

[57] Hearing Decision, *supra* at para 325.
[58] Hearing Decision, *supra* at para 354.
[59] Dissent, *supra* at para 124.
[60] Dissent, *supra* at para 130.
[61] Dissent, *supra* at para 167.
[62] Dissent, *supra* at para 189.
[63] *Styles*, *supra* at para 54.

the LTIP Agreement", he concludes, on the basis of moralism, that the Applicant should recover damages in the amount of the LTIP for the harm caused by Mr. Emond. He stated:

> 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.[64] [emphasis added]

45. This Honourable Court cautioned against such moralism in *Bhasin*:

> The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.[65] [emphasis added]

46. In the same vein, the appellate court in *Styles* stated:

> *Bhasin* is not to be used as a tool to rewrite contracts, and award damages to contracting parties that the court regards as being "fair", even though they are clearly unearned under the contract. The respondent contracted for Long Term Incentive Plan bonuses that would only vest if he stayed employed for at least four years, and nothing in *Bhasin* entitles him to anything more. The respondent did not earn the bonuses he claims, and he is not entitled to them.[66]

47. The Applicant's argument is wholly dependent on the Dissenting Judge's belief that what is "fair" and "moral" according to his definitions of those terms will yield the same result as correct application of the law. The Applicant adopts the Dissenting Judge's suggestion that damages for dishonest performance are measured by the value of the LTIP.[67] But the law is consistent that parties can opt to limit damages at common law using the kind of clear and unambiguous language considered in the instant case.

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[64] Dissent, *supra* at para 146.
[65] *Bhasin*, *supra* at para 70.
[66] *Styles*, *supra* at para 54.
[67] Applicant's Memorandum of Argument, *supra* at para 41.

PART IV – Submissions in Support of Order Sought Concerning Costs

48. The Respondent requests its costs on this leave application.

PART V – Order or Orders Sought

49. The Respondent respectfully requests an order refusing leave to appeal with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 24th day of September 2018.

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Nancy F. Barteaux

PART VI – Table of Authorities

Jurisprudence

Tab	Case	Paragraphs
A	*Bhasin v Hrynew*, 2014 SCC 71, 2014 CarswellAlta 2046.	2, 8, 13, 17-18, 32, 45
B	*Creston Moly Corp v Sattva Capital Corp*, 2014 SCC 53, 2014 2 SCR 633.	34
C	*Gillies v Goldman Sachs Canada Inc*, 2001 BCCA 683, 2001 CarswellBC 2716.	31(f)-(g)
D	*Haff v Valeant Pharmaceuticals International Inc*, 2013 BCSC 1720, 2013 CarswellBC 2889.	31(h)
E	*Iacobucci v WIC Radio Ltd.*, 1999 BCCA 753, 1999 CarswellBC 2822.	31(d)-(e)
F	*Keays v Honda Canada Inc*, 2008 SCC 39, 2008 CarswellOnt 3743.	2
G	*Kieran v. Ingram Micro Inc*, 2004 CarswellOnt 3117, 2004 CLLC 210-042.	31(b)
H	*Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co*, 2016 SCC 37, 2016 2 SCR 23.	34-35, 37
I	*Lin v Ontario Teachers' Pension Plan Board*, 2016 ONCA 619, 2016 CarswellOnt 12704.	31(a), 31(e)
J	*Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986, 136 NR 40.	37
K	*Martell v Ewos Canada Ltd*, 2005 BCCA 554, 2005 CarswellBC 2700.	31(g)
L	*Pakozdi v B&B Heavy Civil Construction Ltd.*, 2018 BCCA 23, 2018 CarswellBC 69.	31(e)
M	*Paquette v TeraGo Networks Inc*, 2016 ONCA 618, 2016 CarswellOnt 12633.	31(a)
N	*Styles v Alberta Investment Management Corporation*, 2017 ABCA 1, 2017 CarswellAlta 1.	15, 17, 19-21, 31(c), 43, 46
O	*Sylvester v British Columbia*, [1997] 2 SCR 315, 1997 CarswellBC 1024.	31(a)
P	*Taggart v Canada Life Assurance Co*, 2006 50 CCPB 163, 2006 CarswellOnt 1141.	31(a)

Secondary Sources

Tab	Authority	Paragraphs
Q	Henry Brown et al, *Supreme Court of Canada Practice* (Toronto: Thompson Reuters, 2017).	2

PART VII – Legislation

N/A