SCC Court File No. 38252

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

B E T W E E N:

DAVID MATTHEWS

APPLICANT
(Respondent)

and

OCEAN NUTRITION CANADA LIMITED

RESPONDENT
(Appellant)

REPLY TO RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL

(DAVID MATTHEWS, APPLICANT)

(Pursuant to Rule 28 of the Rules of the *Supreme Court of Canada*)

LEVITT LLP
801 – 130 Adelaide Street West
Toronto, ON M5H 3P5

Howard Levitt
Allyson Lee
Tel: 416-594-3900
Fax: 416-597-3396
Email: hlevitt@levittllp.com
alee@levittllp.com

Counsel for the Applicant

SUPREME ADVOCACY LLP
340 Gilmour Street
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
Marie-France Major
Phone: 613-695-8855
Fax: 613-695-8580
Email: emeehan@supremeadvocacy.ca
mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Applicant

BARTEAUX DURNFORD
1701 Hollis Street
Suite L107
Halifax, NS B3J 3M8

Nancy Barteaux, Q.C.
Tel: 902-444-3492
Fax: 902-377-2234
Email: Nancy.barteaux@barteauxdurnford.com

Counsel for the Respondent

Dentons Canada LLP
1420 – 99 Bank Street
Ottawa, Ontario K1P 1H4

David R. Elliott
Corey A. Villeneuve (Law Clerk)
Tel: 613-783-9699
Fax: 613-783-9690
Email: corey.villeneuve@denton.com

Ottawa Agents to Counsel for the Respondent, Ocean Nutrition Canada Ltd.

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STATEMENT OF ARGUMENT IN REPLY

Employment Law: Literally of National and Public Importance to All Employers and All Employees

1. This test case involves employment, which this Honourable Court has recognized as fundamental to the lives of Canadians[1] but which this Honourable Court has dealt with on few occasions. This test case deals with bad faith, dishonest behaviour **during** employment which this Honourable Court has yet to deal with, *Keays v Honda Canada Inc.*[2] being limited to bad faith **at the time of termination**. Juridically, this is the other shoe, which has now dropped:

- if an employee can recover damages for bad faith in dismissal
- but not for dishonest bad faith treatment during employment
- there is a gap in the protection the law affords.

2. The trial judge found that "Matthews is an individual whose sense of identity and self-worth is highly connected to his work."[3] These are adjectives which this Honourable Court has found applies generally to Canadian employees: "A person's employment is an essential component of his... sense of identity, self-worth and emotional well-being." [4]

3. The Respondent pointedly fails to answer:

- how *Bhasin* applies in the performance of the employment contracts,
- as well as the remedy for when these *Bhasin* obligations are breached.

4. The Respondent also pointedly elects not to answer the following: if an employee is treated so brutally and dishonestly that they are forced to leave their job and, as a result, forfeit a fundamental element of their remuneration, what is the remedy when the employer did not misconduct itself for the purpose of depriving them of that entitlement? If the consequence of the dishonesty is this lost entitlement, should the damages be the quantum of that loss? Should the employer be able to rely on *any* restrictive or exclusionary covenant, including limits to notice periods, under those circumstances?

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[1] *Machtinger v HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at para. 30 [*Machtinger*]
[2] 2008 SCC 39 [*Keays*]
[3] *Matthews v Ocean Nutrition Canada Ltd.*, Reasons for Judgment of the Honourable Justice LeBlanc [LeBlanc Decision] at para. 292, Application for Leave ("Application") Tab 2A, and supplemental decision, Application Tab 2B.
[4] *Machtinger, supra* at para. 30

5. The issues are peculiar to employment contracts, which this Honourable Court has recognized are unique and not interpreted like other contracts. [5]

6. Ultimately, the court here found that Matthews was forced to leave because of bad faith and dishonest conduct. Matthews is not seeking 'palm-tree justice,' but *Bhasin*'s application for **the very purpose** set out in *Bhasin* – to make the law more just and more in tune with reasonable commercial expectations.[6] In both *Bhasin* and *Matthews,* the defendants misled the plaintiffs about their intentions and denied it when asked.[7]

Respondent Deliberately Misstates Factual Findings

7. The Respondent says "there was no finding that Ocean had performed its contracts in bad faith or dishonestly" and if there had been such a finding, the appropriate relief would be punitive damages – which the "Hearing Judge specifically considered and rejected…"[8]

8. This is a deliberate, obfuscating mischaracterization. The Trial Judge restricted this finding to whether the Respondent's conduct was motivated by a desire to deprive Matthews of his LTIP:[9]

> 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 is no evidence to support this allegation.

9. The Trial Judge did **not** find that there was **no** bad faith conduct in the treatment of Matthews. The Trial Judge found and the majority accepted that the Respondent, through Emond, was consistently dishonest in dealing with Matthew's employment, engaged in a "campaign to push Matthews out of operations and minimize his influence", and there was no legitimate reason to reduce Matthews' responsibilities so dramatically that he had to resign.[10] He found that Emond lied to Orr about his plans to remove a plant from Matthews' supervision, told others that "Matthews would not be around much longer", tried to change Matthews' department's reporting

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[5] *Machtinger, supra, Wood v Fred Deeley Imports Ltd.*, 2017 ONCA 158 at paras. 25-28
[6] *Bhasin v Hrynew,* 2014 SCC 71 at para. 1[*Bhasin*]
[7] *Bhasin, supra* at para. 15
[8] Response at para. 23
[9] LeBlanc Decision at para. 422, Application Tab 2A
[10] *Ibid* at paras. 296, 342, Application Tab 2A

structure and lied when confronted, and was dishonest to Matthews about his future.[11] These are the simple facts.

10. Even if awarded, punitive damages would not provide adequate or appropriate relief. Its purpose is different, as is its calculation and quantum, being the amount required to punish the wrongdoer rather than compensate Matthews for his loss.[12]

The Clear Split In The Appellate Caselaw

11. *Lin*[13] indeed provides a two-fold test in determining entitlement to bonus or LTIP amounts. But *Iacobucci*[14] and the cases following it have a completely different theoretical perspective:

- *Lin*, *Styles*,[15] and the majority decision is premised, in the second step, on whether an employee can successfully sue for the benefit.
- in the BC cases (and in the dissent), an employee is not suing for the benefit; the quantum of the benefit represents the damages for not receiving proper notice. [16]
- there was exclusionary language in *Iacobucci* (and *Haff*) which was disregarded, not because it was insufficiently clear, but because of the theory *Iacobucci* adopts.[17]
- what the Respondent deliberately pretends to misunderstand is that what underlies the BC caselaw is a completely different theoretical perspective.

12. The Respondent also fudges by deliberately engaging in a fundamental misunderstanding when it suggests Matthews is seeking damages for breach of the LTIP contract. [18] Matthews is not alleging that *Bhasin* allows parties to 're-write' contracts nor suing for the LTIP payment, but instead asks what remedy and damages flow <u>from</u> the bad faith and dishonest performance. As *per* the *Hadley v Baxendale* test (also used in *Keays*[19]) it asks what damages are reasonably foreseeable from the breach, rather than suing for the benefit itself.

13. Rather than "misplaced judicial moralism," and contrary to paragraph 32 of the Response,

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[11] *Ibid* at paras. 80, 194, 195, 296, 298, 308, 311, 317, 351, Application Tab 2A
[12] *Vorvis v Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 at para. 16; *Whiten v Pilot Insurance Co.*, 2002 SCC 18 at para. 36
[13] *Lin v Ontario Teachers' Pension Plan Board*, 2016 ONCA 619 [*Lin*]
[14] *Iacobucci v WIC Radio Ltd.*, 1999 BCCA 753 [*Iacobucci*]
[15] *Styles v Alberta Investment Management Corporation*, 2017 ABCA 1 [*Styles*]
[16] *Iacobucci, supra* at para. 24; *Martell v Ewos Canada Ltd.*, 2005 BCCA 554 at para. 27; *Haff v Valeant Pharmaceuticals International Inc.*, 2013 BCSC 1720 at paras. 79-81[*Haff*]
[17] *Iacobucci*, *supra* at paras. 12-13, 15; *Haff*, *supra*, at paras. 79-81
[18] Response at para. 14
[19] *Hadley v Baxendale* (1854), 9 Exch. 341 (Eng. Ex. Div) cited in *Keays*, *supra*, at paras. 54-55

the Dissent **clearly** follows the BC approach rather than the Ontario/Alberta one:[20]

> Even if clauses 2.03, 2.04 and 2.05 … were sufficient to prevent Matthew from recovering under the LTIP, the LTIP serves as a means to measure the damages for the unlawful dismissal

14. The Respondent elects to ignore the clear contradictions in the caselaw it cites. It relies on the following from *Styles* to argue there is no good faith in employment:[21]

> In some places the trial reasons rely on statements in *Bhasin* about the general "good faith" obligation, which was rejected by the Supreme Court as a universal principle, and identified as one that only manifests itself in certain discrete situations. Termination of employment is not one of those situations. …

15. This is the **reverse** of what this Honourable Court stated in *Keays*, i.e. bad faith *is* a consideration in manner of termination. *Styles* shows the courts' existing confusion in applying *Bhasin* and *Keays.*

16. While relying on *Styles*, the Respondent ignores the key difference: in *Styles*, the employer did not act in bad faith or dishonestly. *Bhasin* arose only because Styles argued the exclusion clause itself was bad faith. Even if you accept the Respondent's argument regarding *Lin*, and reject the *Iacobucci* analysis, as the Dissent noted[22] for the Respondent to rely on the exclusionary provisions of the LTIP contract they could not have acted in bad faith to prevent him from fulfilling its terms, whether the deprivation of the LTIP was their specific intention in doing so.

17. The judicial clash in the case law is also evident in the Alberta and Ontario Courts of Appeal coming to different conclusions on similar active employment language.

18. To speak plainly, the Respondent falsely distinguishes *Gillies v Goldman Sachs Canada Inc.*[23] *Gillies* dealt with whether breaching a non-competition clause would forfeit an entitlement but came to no conclusion. That issue has no relevance to this case.

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[20] *Ocean Nutrition Canada Ltd. v Matthews*, 2018 NSCA 44, Dissenting Reasons for Judgment of the Honourable Justice Scanlan ("Dissenting Decision") at paras. 156, 185, Application Tab 2D
[21] *Styles*, *supra* at para. 50
[22] Dissenting Decision paras. 146-148, Application Tab 2D.
[23] 2001 BCCA 683 [*Gillies*]

Standard of Review Is Not Settled

19. *Styles* is the **only** appellate employment case that the Respondent relies on to argue that the correctness standard applies. Though a deliberate oxymoron, the law is clearly unclear:

- in *Kieran v Ingram Micro Inc.,*[24] the Ontario Court of Appeal held deference should be given to the trial judge and the appeal court should not interfere unless the result falls outside an acceptable range of outcomes.
- in *Lin,* the Ontario Court of Appeal stated, "the trial judge's interpretation of the Code [of Conduct], as a provision of the respondent's contract of employment, is entitled to deference…",[25] which signals reasonableness absent a clear statement otherwise.

20. This is particularly confusing as the companion case to *Lin, Paquette v TeraGo Networks Inc.,* which was decided at the same time, applies a standard of correctness.[26]

21. The issue is neither clear nor settled as the Respondent paints it. This key area of employment law is still more akin to a messy, juxtaposed School of Cubism painting by Picasso than a serene Renaissance Mona Lisa. Ms. Lisa would be neither serene nor amused with the current state of the law.

Conclusion: Four Issues

22. The fact the Respondent takes the time to redraft in detail the four issues herein,[27] then forcefully argues the pros and cons of each at great length,[28] demonstrates how engaged the issues are and how there is a strong and robust juridical debate at play – that only this Honourable Court can, ultimately, umpire.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 4th day of October 2018.

Eugene Meehan Q.C. for Howard Levitt & Allyson Lee.

Howard Levitt
Allyson Lee
Counsel for the Applicant

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[24] [2004] O.J. No. 3118 [*Kieran*]
[25] *Lin, supra* at para. 30
[26] 2016 ONCA 618 at para. 15 [*Paquette*]
[27] Response at para. 12
[28] Response at paras. 13-40, i.e. most of the Response

TABLE OF AUTHORITIES

Jurisprudence

STATUTORY PROVISIONS

N/A