

SUPREME COURT OF CANADA LIKELY TO CONSIDER POST-TERMINATION BONUS ENTITLEMENTS

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The Supreme Court of Canada will soon have an opportunity to provide useful clarity on employers' ability to contractually bar employees from receiving bonus or incentive payments after their employment has ended.

The Supreme Court granted the plaintiff in *Matthews v. Ocean Nutrition Canada Limited* leave to appeal the Nova Scotia Court of Appeal's 2018 decision, in which it overturned a ruling that entitled the plaintiff to payment of a bonus after he was terminated without cause, despite contractual language stipulating that active employment was a condition precedent to receiving the bonus.

Trial decision

The Nova Scotia Supreme Court held in January 2017 that Ocean Nutrition, a Nova Scotia fish oil producer, constructively dismissed the plaintiff, a Senior VP, after he resigned because of reduced workplace responsibilities and negative working conditions. The court ordered that the plaintiff receive with 15 months' pay in lieu of notice as a result.

Most notably, the lower court held that the plaintiff was entitled to over \$1 million under the company's long-term incentive plan ("LTIP"), contained in the plaintiff's employment agreement ("Agreement"). The LTIP provided that if the company was sold while the plaintiff was employed, he was to receive a portion of the sale proceeds, with 2% of proceeds payable to a group of executives of which the plaintiff was a part.

The lower court held that the LTIP did not unambiguously limit or remove the plaintiff's common law right to pay in lieu of notice, which included payment under the LTIP.

Court of Appeal decision

The Nova Scotia Court of Appeal upheld the lower court's constructive dismissal finding but overturned its decision on the plaintiff's LTIP entitlement. The Court of Appeal found that because the plaintiff was not actively employed at the time of his resignation, notwithstanding that he was constructively dismissed, he was not entitled to a payment under the LTIP.

The plaintiff's Agreement provided that the plaintiff would receive a given payment in the event that the defendant company was sold if certain conditions were satisfied at the time of that event. The Agreement included the following provisions:

“2.03 CONDITIONS PRECEDENT:

ONC shall have no obligation under this Agreement to the Employee unless on the date of a Realization Event the Employee is a full-time employee of ONC. For greater certainty, this Agreement shall be of no force or effect if the employee ceases to be an employee of ONC, regardless of whether the Employee resigns or is terminated, with or without cause. [...]

2.05 GENERAL:

The Long Term Value Creation Bonus Plan does not have any current or future value other than on the date of the Realization Event and shall not be calculated as part of the Employee's compensation for any purpose, including in connection with the Employee's resignation or in any severance calculation.”

In overturning the lower court on the LTIP issue, the Court of Appeal emphasized the Agreement's express language. It held that the Agreement plainly made ongoing employment a condition precedent to receiving a payment under the LTIP. The Court wrote:

“There is no ambiguity in that clause that the Long Term Incentive Plan ceased to be of any force and effect on his resignation or termination.

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

Leave granted by the Supreme Court of Canada

Mr. Matthews has since sought and received leave to appeal the Nova Scotia Court of Appeal's decision to the Supreme Court of Canada. While the Supreme Court of Canada's leave decision does not offer any insight into why it has agreed to hear Matthews, it is likely that the Supreme Court sees some confusion in the treatment of bonuses that would have been payable had a terminated employee remained employed throughout the applicable notice period.

For example, the 2017 Ontario case of [*Paquette v. Tera-Go*](#) the Ontario Court of Appeal found that wrongful

dismissal damages should include bonus payments if those payments would have been made during the application reasonable notice period. In fact, the Nova Scotia Supreme Court cited Paquette in its now-overturned decision.

By contrast, the Nova Scotia Court of Appeal in *Matthews* emphasized the Alberta Court of Appeal's decision in *Styles v. Alberta Investment Management Corp.* (2017 ABCA 1), where the bonus plan in question obligated the employee to be "actively employed" at the time of payout. The *Matthews* court wrote:

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

The Supreme Court's input on *Matthews* may help bring some national clarity to the question of whether or not an employment agreement can exclude post-termination bonus entitlements substantially – such as during any common law, but not statutory notice period – or altogether. In the meantime (and even thereafter), employers should exercise caution both in ascertaining an employee's entitlements on termination without cause and in drafting contracts for employees who may be entitled to substantial bonuses or incentive pay.

by Kyle Lambert

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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