

## The Supreme Court Confirms Bonus Entitlements During the Reasonable Notice Period

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On October 9, 2020, the Supreme Court of Canada (the SCC) released a unanimous decision in *Matthews v Ocean Nutrition Canada Ltd.*, 2020 SCC 26 holding that a former employee of Ocean Nutrition Canada Ltd. (Ocean Nutrition) was entitled to \$1,000,000.00 in respect of damages for the lost opportunity to participate in Ocean Nutrition's Long Term Incentive Plan (LTIP) following his constructive dismissal.

Mr. Matthews had successfully claimed lost LTIP payments at trial, where the trial judge held that since Mr. Matthews would have been a "full time employee" within the meaning of the LTIP had he not been wrongfully dismissed and since the language of the LTIP did not specifically exclude common law damages, Mr. Matthews was entitled to be compensated for the lost LTIP that would have been payable during his common law notice period, which the trial judge fixed at fifteen months.

On appeal, Ocean Nutrition successfully argued that the exclusionary language in the LTIP was sufficiently clear and unambiguous to preclude Mr. Matthews from participation after the date of termination of his employment. The LTIP in question contained two clauses that purported to prevent departing employees from claiming damages for lost LTIP payments:

### *Section 2.03*

*[The employer] shall have no obligation under this [plan] to the Employee unless on the date of a [triggering] event the Employee is a full-time employee of [the employer]. For greater certainty, this [plan] shall be of no force and effect if the employee ceases to be an employee of [the employer], regardless of whether the Employee resigns or is terminated, with or without cause.*

...

### *Section 2.05*

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

Mr. Matthews then appealed to the SCC on the sole issue of entitlement to damages for lost LTIP over his

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fifteen-month notice period, arguing that the LTIP language was not sufficiently clear and unambiguous to preclude him from obtaining damages for lost LTIP entitlements over the notice period. The SCC agreed with Mr. Matthews and held that the decision of the Nova Scotia Court of Appeal must be overturned.

In its decision, the SCC affirmed the two-step test set out by the Ontario Court of Appeal in *Paquette v TeraGo Networks Inc.*, 2016 ONCA 619 for assessing entitlement to damages for lost incentives arising from an alleged wrongful dismissal:

1. Would the employee have been entitled to the bonus or incentive as part of their compensation during the reasonable notice period?
2. If so, do the applicable plan terms unambiguously remove or displace that common law right?

Applying the test to these facts, the SCC found that, but for Mr. Matthews' wrongful dismissal, he would have been an eligible plan participant at the time that the LTIP payout was triggered. The SCC emphasized that the purpose of damages in lieu of reasonable notice is to put the employee in the position they would have been had they continued to work through the end of the notice period. It did not matter, as Ocean Nutrition argued, whether the bonus was "integral" to Mr. Matthews' compensation. Thus, step one of the test was satisfied.

Turning to step two, the SCC held that the LTIP terms were not sufficient to displace Mr. Matthews' common law right to damages. Although Section 2.03 of the LTIP stated that full-time status was required for the employee to be eligible, the SCC held that since Mr. Matthews would have been a full-time employee had he not been constructively terminated, this alone could not remove his right to claim damages. Ocean Nutrition argued that since Section 2.03 specifically stated that the LTIP would be of no force or effect if the employee was terminated without cause, it captured the circumstances of Mr. Matthews' termination and thus prevented him from claiming damages. The SCC disagreed, holding that, in fact, Mr. Matthews' termination was an "unlawful termination" because he had been terminated without notice, which was distinct from termination without cause. As such, the LTIP did not address the specific circumstances applicable to Mr. Matthews.

The SCC applied similar reasoning to Section 2.05 of the LTIP, which stated that LTIP payments would not be considered to be part of the participating employee's compensation for the purpose of calculating any severance entitlements and held that damages for the failure to provide reasonable notice are separate and distinct from severance. Most employers would likely view this language as very clear and sufficient to address post-termination claims for compensation. However, the SCC drew a distinction here between "severance" and "damages." It noted that severance is intended to provide employees with compensation in recognition of their service with the employer but damages for the failure to provide reasonable notice protect employees by providing them with the opportunity to seek new employment. Since Section 2.05 spoke only to "severance" and was silent on whether or not payments could be included in "damages," it also did not preclude Mr. Matthews from making a claim for lost LTIP over his reasonable notice period.

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The Court reinstated the decision of the trial judge, subject to mitigation.

This decision serves as a reminder to employers of the need to carefully draft their incentive plans to exclude an employee's entitlement on termination. It also emphasizes the importance of a well drafted employment agreement containing a termination clause. Had Mr. Matthews been bound by an employment agreement that addressed his severance and incentive entitlements on termination, the Court would not have been tasked with assessing his entitlements over a reasonable notice period.

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