SUPREME COURT OF NOVA SCOTIA
Citation: *Matthews v. Ocean Nutrition Canada Ltd.*, 2017 NSSC 16

Date: 20170130
Docket: Hfx No. 353606
Registry: Halifax

Between:

David Matthews

Applicant

v.

Ocean Nutrition Canada Limited

Respondent

LIBRARY HEADING

Judge:	The Honourable Justice Arthur J. Leblanc
Heard:	November 2, 3, 4, 5, 9, 10, 12, 13, 2015, and January 28, 2016, in Halifax, Nova Scotia
Final Written Submissions:	January 20, 2017
Written Decision:	January 30, 2017
Subject:	Employment; constructive dismissal, oppression remedy, punitive damages
Summary:	The applicant was a chemist who worked for the respondent as Vice President New and Emerging Technologies until his resignation in June 2011. He alleged that the respondent's progressive removal of his responsibilities amounted to constructive dismissal. The applicant said the respondent was motivated by a desire to prevent him from receiving a payout under a Long-Term Incentive Plan ("LTIP"). He sought

damages for unjust dismissal, including compensation for loss of payouts under the LTIP and the Management Short-term Incentive Plan ("STIP"). In the alternative, he sought an oppression remedy under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. He also claimed punitive damages.

Issues:

(1) Was the applicant constructively dismissed by the respondent and, if so, what were his damages?

(2) Was the applicant entitled to an oppression remedy under s. 241 of the *CBCA*?

(3) Was the applicant entitled to punitive damages?

Result:

The applicant was constructively dismissed by the respondent. His damages included compensation for the loss of payouts under the LTIP and the STIP. It was unnecessary to consider the merits of the oppression claim. Although the respondent constructively dismissed the applicant, there was no evidence of bad faith. The claim for punitive damages was dismissed.

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Counsel:	Blair Mitchell, for the Applicant Nancy Barteaux, QC and Isabelle French, for the Respondent

By the Court:

Introduction

[1] David ("Dave") Matthews is a chemist who has worked in the omega-3 fish oil industry for the past three decades. In January 1997, he joined Laer Products Inc. ("Laer") as Operations Manager. Laer, which went on to become Ocean Nutrition Canada Limited ("ONC"), was a small company with only four employees. Fifteen years later, ONC was acquired by Royal DSM N.V. ("DSM") for a total enterprise value of $540 million. Mr. Matthews did not share in the profits of the sale, having resigned from ONC in June 2011. Matthews alleges he was constructively dismissed and seeks damages.

[2] Mr. Matthews attributes his alleged constructive dismissal to an intention on ONC's part to avoid its obligations to him under an Executive Incentive Agreement signed in September 2007. The agreement entitled Matthews to a significant payout in the event of a sale of ONC. In the event that his alleged loss of benefit under the agreement is not recoverable as damages for constructive dismissal, he seeks an oppression remedy under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. Matthew also claims punitive damages.

Issues

[3] This application in court raises the following issues:

1. Was the applicant constructively dismissed by the respondent and, if so, what are his damages?
2. Is the applicant entitled to an oppression remedy under s. 241 of the *CBCA*?
3. Is the applicant entitled to punitive damages?

Creation of ONC

[4] ONC's predecessor, Laer, supplied omega-3 fish oils to the veterinary industry and was developing a microencapsulation technology for the pet industry. After Clearwater Fine Foods Inc. ("CFFI") purchased the company, Robert Orr, then General Manager of Laer, began working with the CFFI group to set up what became ONC. ONC was formally incorporated in March 1997.

[5] When Dave Matthews joined Laer, the company had plans to develop a new technology for manufacturing omega-3s that was superior to the traditional processes used by other players in the industry. Mr. Matthews was given the mandate, along with several other individuals that he brought onto his team, of developing this technology and designing the plant where it would be applied.

[6] Before joining Laer, Mr. Matthews had experimented with the use of wiped film evaporators with fractional distillation to produce fatty oil esters from fish oil. Fractional distillation, a known process, had never been applied to the extraction of omega-3s from fish oils. After presenting the technology to ONC shareholders, Matthews was tasked with overseeing the renovation of a plant in Mulgrave for large-scale extraction of omega-3s using the wiped film evaporation and fractional distillation process.

[7] The fractional distillation process allowed ONC to process a greater volume of oil, with higher purity, more efficiently than its competitors. In other words, the process gave ONC a competitive edge in terms of quality and product cost. The company grew exponentially over the next fifteen years. What began as a company of four employees evolved into a major player in the omega-3 industry with over 400 employees in 2012.

Overview of ONC

[8] ONC was involved in the manufacture of omega-3 products from fish oil, which it would sell to other companies in the supplement and nutraceutical industry. ONC's head office was located in Dartmouth, Nova Scotia. The company had plants in Mulgrave and Dartmouth, as well as in Arcadia, Wisconsin, and Piura in Peru. The plant in Peru was acquired in January 2012.

[9] ONC was a privately-held, federally-incorporated company. From June 2002 until October 2005, CFFI was ONC's only shareholder. On October 26, 2005, Richardson Capital Limited ("Richardson") acquired 22.5 percent of the shareholdings in ONC. Two years later, it acquired a further 2.5 percent. Finally, on July 31, 2009, Richardson increased its shareholdings to 45 percent. The remaining 55 percent of the shares were held by CFFI. There were no further changes in the shareholdings of ONC until the sale to DSM was finalized on July 18, 2012.

[10] Under the shareholders' agreement, each of ONC's shareholders was entitled to make two appointments to the Board of Directors. Richardson appointed David Brown and James McCallum, while CFFI appointed John Risley and Stanley Spavold. Robert Orr, who was President and Chief Executive Officer of ONC until July 2010 and Chairman of the Board from July 2010 until July 19, 2011, was also a director. Martin Jamieson became President and CEO on July 3, 2010, and a director when Orr resigned.

Positions of the parties

[11] According to Dave Matthews, his problems at ONC began when Daniel Emond was hired as Chief Operating Officer and Matthews was required to report to him instead of Robert Orr.

[12] Prior to Mr. Emond's arrival in June 2007, Mr. Matthews had roughly sixty or seventy people reporting to him. In October 2007, Matthews says, Emond reassigned a major part of his portfolio to Paul Empey, another ONC employee. According to Matthews, this was the first of many efforts by Emond to diminish his role at ONC. He claims these efforts culminated in his constructive dismissal in May 2011, when Emond removed his last substantial responsibility, leaving him with only one or two hours of work per day. Matthews resigned from ONC on June 24, 2011.

[13] The applicant says ONC wanted to get rid of him in order to avoid honouring its obligations under an Executive Incentive Agreement – often called an LTIP within ONC – that the parties had signed in 2007. Under the LTIP, Mr. Matthews was entitled to a payout in the event of a sale of the company, described under the agreement as a "realization event." As the longest serving management

employee subject to an LTIP, he would receive the highest payout upon a realization event. Matthews' continued full-time employment with ONC was a condition precedent of a payout under the LTIP.

[14] ONC denies that it constructively dismissed Dave Matthews, or that it attempted to avoid its obligations to him under the LTIP. ONC says that it regularly adjusted the duties and responsibilities assigned to Matthews in accordance with the company's needs and best interests. Mr. Matthews not only agreed to these changes, he also requested changes of his own when he felt that he was not being challenged in his current role. According to ONC, Matthews voluntarily resigned in order to pursue employment with TASA, a company that recruited him to design and build a competing omega-3 manufacturing plant.

[15] ONC says that Mr. Matthews informed Martin Jamieson, President and CEO, of his desire to leave the company on May 27, 2011. He did not disclose his intention to join TASA. Matthews was not interested in severance but wanted an exit strategy that would protect his entitlement under the LTIP. ONC says Matthews was advised that a non-compete agreement would be a condition of any potential payout under the LTIP. Realizing a non-compete agreement would prevent him from building the plant for TASA, Matthews walked away from the negotiations, abandoning his LTIP entitlement.

Preliminary matters

[16] Before discussing the evidence, I will deal with four preliminary matters. The first relates to a ruling I made during the hearing to allow the applicant to call Paul Empey, a former ONC employee, as a witness.

[17] At the pre-hearing conference, Blair Mitchell, counsel for the applicant, indicated that he intended to call Mr. Empey, under subpoena, to rebut aspects of Mr. Emond's evidence. Mr. Mitchell chose not to obtain an affidavit from Empey, preferring that his evidence be given *viva voce*. According to Nancy Barteaux, counsel for the respondent, she learned that the applicant intended to call Empey some time prior to the conference by searching the subpoenas filed with the court.

[18] Cross-examination of the applicant's first two witnesses took longer than anticipated, and the court was informed that Daniel Emond, a witness for the

respondent, had travel plans that might interfere with his availability to testify. Accommodations were made to allow Mr. Emond to take the stand out of order, testifying between witnesses for the applicant. With Emond's testimony completed, the applicant's counsel sought to call Paul Empey before the respondent opened its case.

[19] Ms. Barteaux, relying on *Dunrite Contracting Ltd v. Christians*, 1996 NSCA 120 , [1996] N.S.J. No. 248; *Springer v. Aird & Berlis*, [2009] O.J. No. 1016 (Ont. Sup. Ct. J.); and *Halford v. Seed Hawk Inc*, 2003 FCT 141, [2003] F.C.J. No. 237, took the position that Mr. Empey should not be permitted to testify because his evidence was not proper reply evidence. Admitting the evidence would allow the applicant to unlawfully split his case.

[20] After considering the authorities cited by Ms. Barteaux, Mr. Mitchell conceded that Mr. Empey's evidence was not proper reply evidence. He noted, however, that the applicant's situation could be distinguished from the authorities on the basis that he had not yet closed his case. He argued that the court should exercise its discretion to allow Empey to be called as part of the applicant's case-in-chief.

[21] Although direct evidence on an application will ordinarily be provided by affidavit, the court controls the conduct of a hearing and has the discretion to allow *viva voce* evidence in appropriate circumstances: *Civil Procedure Rules* 53.01 and 53.03. I exercised my discretion to allow Mr. Empey to testify as part of the applicant's case-in-chief because I was not satisfied that, in the particular circumstances of this case, the respondent would suffer any prejudice as a result.

[22] Paul Empey's evidence was limited to two specific exchanges between himself and Daniel Emond. During Mr. Emond's cross-examination, he was questioned specifically about the exchanges and Empey's anticipated evidence was put to him directly. Ms. Barteaux was given the opportunity to interview Empey prior to his testimony. Since Mr. Empey's evidence related strictly to private conversations between himself and Emond, there was no additional relevant evidence that the respondent was deprived of the opportunity to call. Furthermore, unlike other witnesses, Paul Empey had no interest in the outcome of this application, and it was consistent with the fair and just disposition of this matter to hear his evidence.

[23] The second preliminary matter relates to objections by the respondent to hearsay and opinion evidence contained in Dave Matthews' affidavit. These

objections were raised *after* the hearing in the respondent's post-hearing written submissions.

[24] On the first day of the hearing, I informed the parties of my concern that the affidavit of Martin Jamieson was replete with hearsay. In the absence of any response by Ms. Barteaux to these concerns, Mr. Mitchell brought a motion to strike portions of the affidavit prior to the opening of the respondent's case. Ms. Barteaux expressed her "shock" that Mr. Mitchell was objecting to the affidavit at this late stage, having had the evidence in his possession since early 2015. She noted his failure to object to its contents at any of the motions for directions or during the pre-hearing telephone conference.

[25] Martin Jamieson's affidavit consisted of 358 paragraphs, with five large volumes of exhibits. I made it clear to the parties that I was prepared to adjourn the application to allow Ms. Barteaux to properly respond to the extensive challenge to the affidavit's contents. This proved unnecessary, as the parties reached agreement on some of the contested paragraphs and I ruled on the remainder. Ms. Barteaux was given the opportunity to amend Jamieson's affidavit, and that of Craig Wilson, and to obtain additional affidavits from any other potential witnesses in order to ensure that no relevant evidence was lost.

[26] During argument on the Jamieson affidavit, which occurred after Dave Matthews' cross-examination, Ms. Barteaux stated that Matthews' affidavit also contained inadmissible evidence and noted that the respondent might elect to bring a motion to strike those portions of the affidavit at a later time. She did not object to the content of Matthews' affidavit on the first day of the hearing when I raised my concerns about Jamieson's affidavit.

[27] No formal motion was made by the respondent during the hearing. However, in the respondent's post-hearing brief, Ms. Barteaux identified approximately seventy items within the applicant's affidavit that she argued were hearsay, opinion or submission and should be excluded. Mr. Mitchell says that Ms. Barteaux's failure to object to the affidavit's contents at an earlier time means the contested evidence must be admitted.

[28] I am concerned about the lack of attention paid to the rules of affidavit evidence in this proceeding. A judge should not need to point out to the parties on the first day of a hearing that their affidavits are brimming with potentially inadmissible evidence. An application in court is intended to be an efficient, cost-effective alternative to a trial. That intention is frustrated when arguments are

made during the hearing, or after the hearing, on the admissibility of evidence that has been in the hands of the parties for more than a year.

[29] It is unacceptable for counsel to review an opposing party's affidavit, see that it contains hearsay or other inadmissible evidence, and choose not to object unless or until the opposing party challenges counsel's own affidavits. Parties should arrive at the hearing having either reached agreement on the evidentiary issues, or had the matter resolved by a judge on a motion under Rule 39.04.

[30] Although Mr. Mitchell brought his motion to strike long after it was appropriate, the court went to great lengths to ensure that the respondent's case was not compromised as a result. Ms. Barteaux had ample opportunity to review Matthews' affidavit, including during her preparation for his cross-examination. She now attempts to challenge large portions of it after the hearing when the court is no longer in a position to offer the applicant the same accommodation it gave to the respondent.

[31] That said, most of the contested statements can be struck without prejudice to Mr. Matthews because the same evidence has been admitted through another witness, the evidence amounted to submissions or opinions that the court would have given no weight in any event, or the evidence was not being offered for the truth of its contents. There are three objections, however, that require closer scrutiny.

[32] The first objection relates to the acquisition of the "S-5" equipment. Matthews stated at paragraph 67 of the affidavit:

> In this December 2007 meeting where Mr. Emond disclosed this acquisition, Mr. Orr asked me whether I had been made aware of this project. When I stated that I had not Mr. Orr directed that I be given responsibility for the acquisition and its integration into ONC operations.

[33] Ms. Barteaux argues that the statements attributed to Robert Orr are hearsay and should not be admitted. Only statements offered for their truth offend the rule against hearsay. In order to determine whether the statement is subject to the exclusionary rule, it is necessary to inquire into the purpose for which it is being offered. In my view, the statement is being offered to show why Matthews subsequently took on the project, but also, more importantly, that Orr wanted Matthews to take responsibility for the S-5 acquisition because he considered it part of Matthews' role. The second purpose offends the rule against hearsay.

However, I find that the statement falls within the hearsay exception concerning statements of intention or state of mind, and is admissible. Even if I am wrong, I would allow the statement to be admitted for the truth of its contents. Ms. Barteaux did not raise her objection prior to – or even during – the hearing. She then chose not to question Matthews or Orr about the statement. It would be grossly unjust for the court to exclude the evidence at this stage.

[34] The next objection relates to evidence that Daniel Emond advised an employee in Mr. Matthews' department that she would no longer report to him. Matthews stated at paragraphs 79 to 83 of the affidavit:

> 79 … I learned from Sharon Spurvey, the Manager of Technical Services, who reported to me, that she had been called into a meeting by Mr. Emond in which Mr. Emond advised her that she and technical services would cease reporting to me and would thereafter report to ONC's Research and Development Vice-President.
>
> 80 Mr. Emond did not inform me or consult me in connection with this proposed change.
>
> 81 On this information from Ms. Spurvey I went to Mr. Emond and asked him to meet with me. I told him I wanted to meet with him in front of Mr. Orr. We went to Mr. Orr's office and I advised both men what I had heard of this change. Mr. Emond denied the change and denied that he had met with Ms. Spurvey on the topic.
>
> 82 I left Mr. Emond and Mr. Orr for a moment and went to the meeting room where the meeting involving Mr. Emond and Ms. Spurvey had occurred and retrieved the page of the flip chart showing the change in the reporting relationship and came back to Mr. Orr's office and produced it to Mr. Orr.
>
> 83 Mr. Orr directed that the change in reporting not be made.

[35] Ms. Barteaux argues that the underlined statements are hearsay. In my view, it is not necessary to admit the evidence as to what Ms. Spurvey told Matthews for the truth of its contents. The fact that the statement was made is relevant to Matthews' understanding or state of mind during the subsequent exchanges. The court can decide whether Emond and Spurvey did in fact meet, and what was said,

by weighing Matthews' evidence of the conversation he had with Emond and Orr as a result of the statement being made.

[36] As in the previous objection, Matthews gave evidence of a direction by Orr (para. 83). It is offered to show both that the statement was made, which is relevant to the context in which Matthews was operating, and that Orr did not want the change in reporting to be made because he had not approved it. For the same reasons outlined above, the statement is admissible as evidence of intention. If I am wrong, I would admit the evidence for the truth of its contents for the reasons I have previously explained.

[37] The final objection pertains to evidence of a conversation alleged to have occurred between James Peach, one of Matthews' direct reports, and Mr. Emond. Paragraph 115 states:

> Mr. Peach told me that Mr. Emond had come directly to him and told him that he wanted NET's budget. Mr. Peach told him he could give him the numbers he was responsible for, regulatory's numbers. Mr. Emond said he wanted the total for all of NET. Mr. Peach said he told Mr. Emond that I had the total budget. Mr. Emond told Mr. Peach, Mr. Peach said, that he wanted Mr. Peach to get him the total budget. Mr. Peach ultimately allowed that he could get the budget from Sharepoint and did so, providing it to Mr. Emond. …

[38] This paragraph is hearsay. The evidence is being offered to prove that a meeting took place between Peach and Emond in relation to the NET Department budget. Mr. Matthews was not present for the alleged meeting, and has no personal knowledge of the statements that were made. This evidence should have been entered through Mr. Peach, who could have been cross-examined on it.

[39] If this objection had been raised during the hearing, I would have offered Mr. Mitchell the opportunity to obtain an affidavit from Mr. Peach, without analyzing the probative value of the evidence. Since the evidence was relevant, Mr. Matthews would have been given the chance to enter it properly. Now that the hearing has concluded, however, the degree of relevance is pertinent.

[40] Considering this piece of evidence in the context of the entire evidentiary record, I am not satisfied that Dave Matthews will be prejudiced by its exclusion. The evidence goes to prove that Daniel Emond was reviewing aspects of Mr. Matthews' New and Emerging Technology department without his knowledge. There is ample evidence on the record that the algal oil initiative being managed by

Matthews' department was under review during this time period, and that he was not told about the review or invited to participate in it.

[41] The third preliminary matter relates to the use of discovery transcripts in this proceeding. Counsel for the respondent acted as the affiant for three affidavits attaching excerpts from the discovery examinations of Robert Orr, Stanley Spavold and Craig Wilson. Mr. Wilson's discovery excerpts were filed by Ms. Barteaux in addition to an affidavit from Wilson himself.

[42] At the start of the hearing I informed Ms. Barteaux of my understanding that discovery evidence in support of a party is inadmissible unless that party establishes that the witness in question is not available to testify, or is otherwise necessary. According to Ms. Barteaux, in the last motion for directions with Justice Gerald P. Moir, it was agreed that discovery excerpts could be filed as long as the witnesses were available for cross-examination. I have since reviewed the recordings of the two motions for directions before Justice Moir. As I understand it, Justice Moir's comments were in relation to the evidence of Robert Orr, who did not wish to participate in this proceeding on behalf of either party. In other words, neither party was in a position to obtain an affidavit from Mr. Orr. Justice Moir explained that the *Civil Procedure Rules* allowed for the filing of discovery excerpts as long as Mr. Orr was available for cross-examination. Justice Moir did not suggest that Ms. Barteaux was permitted to file discovery excerpts from her own witnesses in lieu of proper affidavits. Although Ms. Barteaux should have obtained an affidavit from Mr. Spavold, and limited Mr. Wilson's evidence to a single affidavit, Mr. Mitchell did not object, and no prejudice has been suffered by these procedural irregularities.

[43] The final preliminary matter relates to the Notice of Application. After the hearing, I asked the parties to comment on whether the applicant had adequately pleaded the material facts required to support the causes of action. Again, this is an issue that should have been dealt with long before the hearing. After considering the parties' submissions, I am satisfied that no prejudice has resulted from any potential deficiencies in the pleadings. The material facts were clearly outlined in Dave Matthews' affidavit and addressed by both parties in their pre-hearing submissions. Both parties had ample opportunity to cross-examine the witnesses in relation to the events underlying the applicant's claims. If the respondent had concerns, it could have moved to strike the pleadings at any time during the five years since this application was filed.

[44] I now turn back to the substance of this application.

Matthews' career prior to 2007

[45] Dave Matthews received his diploma in Chemistry from the Nova Scotia Agricultural College in 1982. His first job after graduation was with the Canadian Institute of Fisheries Technology, where he worked closely with Dr. Robert Ackman, an acclaimed researcher and expert in fish oil and fish oil extraction. It was through his work with Dr. Ackman that Matthews became familiar with the process of wiped film evaporation.

[46] After leaving the Institute in 1987, Mr. Matthews returned to NSAC to take additional course work while also working for a company called Vitashine, producing oils for use in the retail and pharmaceutical industries. In 1990, Matthews began working for EPA Limited making fish oil concentrates for dietary supplements. He managed the same plant at Mulgrave that Laer/ONC would eventually acquire.

[47] In 1992, Mr. Matthews rented facilities from the Institute to begin experimenting with using wiped film evaporators with fractional distillation to develop a process for producing fatty esters from fish oil.

[48] From 1992 to 1994, Mr. Matthews worked for PharmaGlobe Manufacturing as Plant Manager. In this role, he managed the contracts, plant construction and equipment purchases necessary for the production of bulk pharmaceutical products. The company became insolvent before completing the plant.

[49] From 1994 to 1996, Matthews worked for Sepracor Canada Ltd. As Operations Manager, he represented the company in the successful design, planning, construction and staffing of a bulk pharmaceutical facility.

[50] In late 1996, Matthews met Robert Orr, then General Manager of Laer, through Dr. Robert Ackman. When Mr. Orr told Dr. Ackman about CFFI's intention to develop a new technology for manufacturing omega-3s, Dr. Ackman told him about a former student who had gone on to build several omega-3 plants and had an excellent understanding of the science and technology involved. Mr. Matthews was the first person Orr hired into the company, accepting the position

of Operations Manager with Laer/ONC in January 1997. In this role, he was responsible for the supervision and organization of the Mulgrave plant.

[51] In 2001, Matthews was promoted to Senior Operations Manager. He continued to oversee the plant in Mulgrave and was involved in the construction of a small pilot plant at 101 Research Drive in Dartmouth. This plant, called DP1, was built to produce a spray-dried omega-3 powder derived from fish oil that could be added to food products. He also headed the design and renovation of a larger plant in Arcadia, Wisconsin, which would also manufacture omega-3 powder. By 2004, Matthews had approximately 160 people reporting to him.

[52] In January 2005, Mr. Matthews became Vice President Healthy Food Ingredients ("VP HFI"). He was asked to take over the powder division of ONC, supervising the DP1 and Arcadia plants, including the purchase of raw materials. Paul Empey was hired to replace him in overseeing the oil side of the business in Mulgrave. As VP HFI, Matthews had about sixty to seventy people directly or indirectly reporting to him.

[53] In October 2005, a serious explosion occurred at the plant in Arcadia. Mr. Matthews immediately traveled to Wisconsin where he assumed responsibility for the cleanup and rebuild. Having spearheaded the design and renovation of the plant, Mr. Matthews took the Arcadia explosion personally. Roughly two weeks after it occurred, Matthews told Robert Orr, then President and CEO of ONC, that if the Board of Directors expected anyone to resign, he would do so immediately to ensure that responsibility was not imputed to anyone else. Mr. Orr declined Matthews' offer.

The arrival of Daniel Emond

[54] On June 18, 2007, Daniel Emond was hired as COO of ONC. At that time he had more than thirty years of operations experience with companies in the food sector. During the recruitment process, several senior employees, including Dave Matthews, were consulted on whether Mr. Emond or another candidate should be selected for the position. After meeting with Emond and giving him a tour of the two Dartmouth plants, Matthews expressed support for his candidacy.

[55] According to Mr. Emond, he first met Mr. Matthews when he came to ONC for an interview in Dartmouth. During that first meeting, he said, Matthews told him that he was not happy at ONC, and that if things didn't change, he would resign. Mr. Emond did not report this exchange to anyone at ONC at any time before or after he accepted the position as COO. Matthews denied that this exchange took place.

[56] As COO, Daniel Emond was responsible for overseeing the activities of the Operations, Engineering, R&D, Supply Chain, Information Technology and Information Systems, Quality Assurances, Sales, and Health and Safety departments at ONC. The head of each department, and all other members of ONC's senior management team except Robert Orr and Megan Harris, the Chief Financial Officer, began reporting to Emond. Mr. Emond reported to Mr. Orr.

[57] Mr. Emond testified on cross-examination that after he joined the company, he did one-on-one interviews with the senior executives who would be reporting to him. During the interview with Mr. Matthews, Emond said Matthews again expressed discontent with his position at ONC, and Emond gave him assurances that, as COO, he would help to alleviate his concerns. There is no written record of the meeting, and it was not described in Mr. Emond's affidavit.

The LTIP

[58] In September 2007, Dave Matthews and ONC entered into an Executive Incentive Agreement, more commonly called an LTIP within the company.

[59] Robert Orr testified that John Risley, founder of CFFI, was generally averse to the creation of stock options, preferring other means of retaining and compensating senior management who had created value for his companies. Early on, when ONC was wholly owned by CFFI, there was a high degree of trust among senior management that Mr. Risley would look after those people who contributed to the development of his companies. According to Orr, Risley's word was his bond. However, when ONC began to grow, Mr. Orr recommended the introduction of a formal compensation structure.

[60] Although Mr. Orr preferred stock options for senior management, the Board of Directors proposed a long-term incentive plan that was similar to stock options

in terms of value creation. The LTIP was intended to be both an incentive and a retention tool.

[61] Under the LTIP, two percent of the company's value created on the sale or public offering of the company in excess of one hundred million dollars (a "realization event") would be distributed among a limited number of executives. Under the formula, each individual was given a base value meant to reflect the company' value at the time the employee was hired. Since Mr. Matthews was the longest serving management employee subject to an LTIP, his base value was the lowest, meaning he would receive the highest payout upon a realization event.

[62] The LTIP contained the following recitals:

> A. ONC desires to establish a mechanism to provide an [*sic*] retention incentive and to reward certain of its employees, including the Employee, for their service to ONC in the event of a Realization Event (as defined below);
>
> B. The Employee has served as a management-level employee of ONC and has been deemed to be eligible to participate in the Long Term Value Creation Bonus Plan on the terms contained in this Agreement;

[63] The LTIP defined a "realization event" as follows:

> (g) "Realization Event" means the happening any [*sic*] 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 in 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.

[64] Section 2.01 dealt with payment under the agreement:

> 2.01 PAYMENT OF EXECUTIVE INCENTIVE:
>
> Provided the conditions precedent set out in Section 2.03 are satisfied on the date on which a Realization Event occurs, ONC shall pay to the Employee, in cash, less any appropriate withholding of other [*sic*] taxes, an amount calculated in accordance with Section 2.02, which payment shall be made within thirty (30) days of such Realization Event.

[65] The LTIP included the following condition precedent:

> 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.

[66] Robert Orr testified that ONC's intention in providing Dave Matthews with an LTIP was that the company would be able to reward him for his contributions. According to Orr, there would have been little or no value in ONC without Matthews' work in the early days of the company, and the LTIP was long overdue. He noted that, "[e]veryone who has gotten any value created out of ONC in large part owes that in some measure to David." Orr explained that the LTIP anticipated a crystallization event not too far in the future and served the dual purposes of enabling Matthews to be a party to that while allowing ONC to retain him in the company.

[67] Mr. Matthews agreed on cross-examination that he understood the terms of the LTIP, including the condition precedent that he be employed with ONC at the time of the realization event.

Evolution of Mr. Matthews' role at ONC

[68] Both parties agree that Dave Matthews's role at ONC evolved with the company's needs. The changes before Daniel Emond's arrival in 2007 are not controversial and have been recounted above. I will now discuss the changes that took place from the time of Emond's arrival until September 2010, including those occasions where Matthews alleges that Emond tried to minimize his role in the company.

Removal of powder

[69] During Daniel Emond's first three months at ONC, he assessed the company's operations and prepared a presentation setting out his findings and recommendations. This presentation included a slide that stated:

> As we need to reinforce our integration to customer application (HFI/DS) it is imperative to strengthen our Technical Sales, Dave Matthews has accepted the responsibility of Technical Sales. With this change a new department will be created and be named: Technical Services. This group will work closely with customer application and also internally with R&D. In addition to his new role Dave will keep the engineering projects including the new facility and the operation of the Arcadia Plant.

[70] According to Dave Matthews, in October 2007, Mr. Emond informed him that responsibility for powder was being transferred to Paul Empey, who had joined the company in January 2005. Emond presented this change as a fait accompli. Matthews' evidence is that he told Emond he did not agree with the change, but Emond said he had discussed it with Robert Orr and had his approval. Since Mr. Orr was out of the province at the time, Matthews could not immediately verify Emond's story. He subsequently learned, however, that Emond had not discussed the change with Orr.

[71] In addition to the Engineering group, Mr. Emond advised Matthews that he would assume responsibility for the Technical Services group. With this change, his title became Vice President Engineering and Technical Services. The Technical Services group consisted of Mr. Matthews, Sharon Spurvey – who reported directly to Matthews – and six to eight other team members they selected. The group's focus was on how to get powder and fish oils into food applications.

[72] The removal of powder from Dave Matthews' authority and the addition of Technical Services reduced the number of people reporting to him, directly or indirectly, from about seventy to seven.

[73] Both parties agree that Mr. Matthews ultimately accepted the new role, and excelled in it. It is Matthews' position, however, this this incident was the first in a series of attempts by Mr. Emond to minimize his involvement at ONC.

S-5

[74] During a senior management meeting in December 2007, Mr. Matthews learned that Emond had submitted a purchase order to acquire $8 million in capital equipment for the production facility at Mulgrave, including wiped film evaporator and fractional distillation equipment. The equipment and associated project were

collectively referred to as "S-5." Both Mr. Orr and Mr. Emond were in attendance at the meeting.

[75] Mr. Matthews says the purchase of this equipment for ONC plants was his responsibility as VP Engineering and Technical Services. The Engineering group was responsible for capital expenditures in the Mulgrave Plant, and the plants in Dartmouth and Arcadia directly reported to him. Matthews had experience ordering this type of equipment at ONC, and it normally required months of advance planning, including consideration of how the equipment would integrate into the production process of the plant and how the resulting capacity would fit into the company's operation.

[76] During the meeting, Robert Orr asked Mr. Matthews whether he had been made aware of the project. When Matthews said that he had not, Orr directed that he be given responsibility for the acquisition and integration of the equipment into ONC operations. Mr. Matthews says that matters involving S-5 consumed more than fifty percent of his working time from January to August 2008.

[77] ONC did not address the matter of the S-5 acquisition and integration in its evidence, or cross-examine Matthews on his version of events.

Responsibility for Arcadia

[78] Also in December 2007, Daniel Emond is alleged to have tried to transfer responsibility for the Arcadia plant from Dave Matthews to Paul Empey.

[79] Mr. Empey testified that Emond asked him to oversee the Arcadia plant in addition to the Mulgrave facility. Mr. Empey confirmed that Matthews was in charge of Arcadia at the time. According to Empey, Emond assured him that he would be taking over the Arcadia plant. Relying on this information, Empey sent a Christmas greeting to the Arcadia facility. This upset Robert Orr who sent an e-mail to Empey telling him that he was not running the Arcadia, and querying why he considered it appropriate to send such a message. Mr. Empey brought the e-mail to Mr. Emond's attention. Emond's response was that everything would be taken care of, and not to worry about it.

[80] When asked what Daniel Emond meant when he said "not to worry about it", Paul Empey explained that during Emond's first year at ONC, Emond told him

that he was getting very close with John Risley and the Richardson group, and he would make sure that Empey was eventually given oversight of the entire operations side of ONC. Mr. Empey testified that Emond told him, on more than one occasion, that he would not have to worry about Dave Matthews or Robert Orr going forward because they would not be around for much longer.

[81] On December 7, 2007, Robert Orr sent an e-mail to Mr. Emond with the subject line "Arcadia Reporting structure." Orr indicated that he and Emond "need to get aligned on reporting structure", and that Shawn, the employee in charge at Arcadia, "is clearly under the impression that he is now reporting to Paul."

[82] Robert Orr testified that he told Daniel Emond several times that he did not approve of Paul Empey being given responsibility for the Wisconsin plant because, in Orr's estimation, Empey wasn't fulfilling all of his responsibilities effectively for the Mulgrave facility. Mr. Emond assured him that he did not intend, and had never intended, to give the role to Empey. Mr. Orr subsequently learned, through other communications and speaking with other employees, that Emond had already committed to Empey that he would be taking over Arcadia. Orr proceeded to have a "very stern communication" with Emond in which he made clear that this change was not going to occur and that he did not appreciate Emond's failure to be straightforward with him. According to Orr, this was one of several incidents where Emond either failed to disclose information, or provided "absolutely false" information to him.

[83] On cross-examination, Mr. Emond vigorously denied ever telling Paul Empey that he was close with Mr. Risley and the Richardson group, or that Mr. Matthews and Mr. Orr would not be around much longer. Furthermore, according to Emond, Matthews' responsibility for the Arcadia ended when he became VP Engineering and Technical Services in October 2007. Emond testified that when Orr refused to give responsibility for the Arcadia to Empey, he assumed that responsibility himself.

Alicorp-Peru

[84] In 2008, ONC developed an initiative to produce omega-3s through Alicorp, a Peruvian contractor. The plan was for ONC to build a plant in Lima under Alicorp, which had no prior experience with wiped film evaporators.

[85] Dave Matthews says that although the Alicorp initiative directly involved both engineering and technical responsibilities, he was excluded from participation in the project. Daniel Emond assigned it to Paul Empey without any discussion with Matthews.

[86] During a senior management meeting in May 2008, Mr. Matthews learned that Alicorp could not complete the project in the time frame required by ONC, and that certain individuals in the company had been aware of the problem for several months. Previous efforts to correct the situation had failed. To that point, Matthews had not been consulted by Emond or anyone else on the Alicorp program or its failure to meet specifications. Robert Orr directed Matthews to go immediately to Peru and take over the project. For the next four months, Matthews spent half of his working time on the Alicorp initiative. Under his direction, the work was completed and production began before the original deadline.

[87] In May 2009, ONC's Peru facility was set to formally open. Several executives from Halifax were designated by Daniel Emond to attend. Mr. Matthews was not one of them. Matthews' evidence is that he only received an invitation, which he accepted, because Orr intervened.

[88] Robert Orr testified that he was surprised Mr. Matthews had not been invited to the opening because he had been instrumental in "opening up" Peru, in terms of product procurement, and the development of both the technology and the relationship with Alicorp. He sent Mr. Emond an e-mail on May 1, 2009, stating:

> Dan,
>
> Please talk to Dave Matthews **today** about attending the grand opening.
>
> If we wait till Monday his flight will be less than 7 days and will cost us a lot more. Also we need to assure hotels, space on the Alicorp chartered plane and that his name is on the guest list etc.
>
> Thanks
>
> Robert
>
> [*Emphasis in original*]

[89] Daniel Emond's account of the events surrounding the Alicorp initiative is very different than that of Mr. Matthews. According to Emond, Paul Empey told him in March 2008 that although the plant would be ready to produce in time, there were delays. Mr. Emond testified that he began to doubt Empey's ability to meet the deadline and he recommended to Robert Orr that they seek Matthews'

assistance. Orr immediately agreed, and Emond asked Matthews to go to Peru. He denied that the matter was discussed during a May 2008 meeting or that it was Orr who decided to involve Matthews.

[90] When asked about Dave Matthews' contribution in Peru, Daniel Emond denied that Matthews was "instrumental" in getting the plant up and running. He would say only that Matthews was a "contributor" in getting the plant open and producing. With respect to the grand opening celebration, Mr. Emond testified that he had invited Matthews to attend several times, but Matthews told him he had no interest in going.

Responsibility for Technical Services

[91] Dave Matthews says that in January or February 2009, Sharon Spurvey, the Manager of Technical Services, informed him that Daniel Emond had told her that she and the rest of the Technical Services group would stop reporting to Matthews and report instead to ONC's Vice President Research and Development. On the basis of this information, Matthews asked Emond to meet in front of Robert Orr. They went to Orr's office, where Matthews advised both men of what he had heard from Ms. Spurvey. Mr. Matthews says Emond denied even meeting with Ms. Spurvey. Matthews briefly left the office, went to the room where the meeting between Mr. Emond and Ms. Spurvey had occurred, and retrieved a page from the flip chart showing the proposed change in the reporting relationship. When Matthews showed Orr the page, Orr directed that the change in reporting not be made.

[92] ONC did not address this incident in its evidence, and Matthews' version was not challenged on cross-examination.

The Mulgrave fire

[93] On the morning of Monday, March 9, 2009, a serious fire occurred at the Mulgrave plant, resulting in damages of $1 million. Dave Matthews was quite ill with a flu at the time. According to Matthews, Robert Orr called him at home later that day, told him about the fire, and asked where he was and whether he had heard

about it. He told Orr that he had not heard about the fire and would go to the site as soon as he was well enough.

[94] Mr. Matthews said he traveled to the plant on Wednesday. He arrived at lunch time and saw Daniel Emond, Ron Savoury – the plant manager – and another employee leaving the plant. When he went into the facility to inspect it, Matthews asked the receptionist to tell Emond where he would be when he returned from lunch so that Matthews could speak to him. According to Matthews, the receptionist told him she passed on the message, but Emond got in his car and drove away. Mr. Matthews testified that he was annoyed and called Emond's cellphone six or seven times during the three hours it would take him to drive back to Halifax. Emond did not answer.

[95] That evening, after returning to his hotel in Mulgrave, Mr. Matthews called Charlene McQuaid – the Human Resources Officer at ONC – to talk to her about his frustrations with Emond. He was unable to reach her.

[96] On cross-examination, Mr. Matthews was shown a number of e-mails in relation to the Mulgrave fire. The first was sent at 1:55 pm on March 9, 2009, from Daniel Emond to Robert Orr, Megan Harris, Dave Matthews and Joanna Lane, with the subject line "Events summary." Attached to the e-mail was a document entitled "Events to the fire in Mulgrave March 9th.doc." According to the attached document, which was almost completely redacted, the fire alarm at the plant went off at 9:45 am that morning. In the e-mail itself, Emond indicated that the situation was under control and the damage was being evaluated. He stated that he would stay in Mulgrave for the night and would be available by e-mail or phone.

[97] Megan Harris replied to Mr. Emond's email at 2:12 pm the same day, asking when they could have a conference call. Mr. Matthews replied to her at 4:56 pm, stating "I am sick with the flu will try to get to mulgae [*sic*] on Tuesday." Several minutes later, Matthews sent an e-mail to Kevin Hughes in IT at ONC, requesting that a purchase order system be set up called "Mulgrave Fire Recovery."

[98] On Tuesday, March 10, Ms. Harris sent an e-mail to Mr. Matthews and Ron Savoury, copied to Daniel Emond, discussing next steps, including the need for a call with Matthews in relation to the contractor and demolition the following day.

[99] On Wednesday, Dave Matthews went to Mulgrave and sent an email to Daniel Emond and Charlene McQuaid with the subject line, "Verbal report on

origin of the fire." He reported that the fire originated in the southeast corner of the plant, inside the pump shack.

[100] On Friday, March 13, Mr. Emond sent an e-mail to the Mulgrave employees, copied to ONC management – including Mr. Matthews – updating them on the fire and upcoming rebuild. He noted in the e-mail that, "Dave Matthews and his team have been working on a contingency/rebuilding plan."

[101] When Mr. Matthews was shown these e-mails on cross-examination, he stopped short of admitting that he had been notified of the fire by Mr. Emond several hours after it occurred and had taken initial steps to address the situation that evening. He said only that he had been sicker at that time than he had ever been in his life, and reiterated that he first learned of the fire through Robert Orr. He said it should have been Emond calling him first to tell him about the fire. When Ms. Barteaux pointed out that Emond happened to be in Mulgrave with Charlene McQuaid on the morning of the fire – something Matthews did not learn until discovery – Matthews conceded that it was reasonable for Emond not to call him while caught up in the event.

[102] For his part, Daniel Emond testified that he did not recall being told by the receptionist at Mulgrave that Matthews wanted to speak with him when he returned from lunch on Wednesday, March 10, 2009. Nor did he recall receiving six or seven phone calls from Matthews on his cellphone while driving back to Halifax.

Mr. Matthews attempts to resign

[103] When Dave Matthews returned to the ONC offices from Mulgrave, he wrote a letter to Daniel Emond which allegedly outlined his frustrations, including his view that Emond had been removing his responsibilities and refusing to consult with him on matters that remained within his authority. The letter also informed Emond that Matthews would be resigning from the corporation effective August 2009. According to Matthews, he chose this time for resignation in order to allow him to complete the Mulgrave rebuild and to give ONC reasonable time to respond to his resignation and present it appropriately within the organization.

[104] Mr. Matthews prepared three copies of the letter. On Friday, March 13, he gave one copy to Ms. McQuaid and left another on Mr. Emond's desk. Matthews

said he tried to talk with Emond several times that day, but did not recall ever connecting with him. At 5:50 pm, Robert Orr sent the following e-mail to Mr. Emond, copied to Charlene McQuaid:

> Daniel,
>
> I just spoke (by phone) to Dave Matthews who informed me that he is resigning. He said that he had communicated this to you earlier.
>
> Is there any reason why you would not call me when you heard this news?
>
> This is a significant loss for the company. Despite his idiosyncrasies and our under-utilization of his technical and chemistry knowledge of fish oils – he is one of the top 2 or 3 people in the world in this area and we have no one in the organization that is remotely close to his knowledge base.
>
> I have asked Dave to meet with me on Monday morning before he goes to Mulgrave, but given his tone I doubt that I can convince him to reconsider.

[105] Mr. Emond responded at 9:34 pm:

> Robert I came down but you where on the phone and really I have learn from him late this afternoon because I was in meeting most of the afternoon I am surely surprise mainly since we have improve our relationship in the last few months I agree with you that it will be a huge loss considering his knowledge and expertise and I felt excited to give him oil improvement that we have talk about the structure etc….. I told him that I was going to see you this week to finalize this and he felt excited about it so I really do not understand after our discussion I said to him to wait and we would talk this week and he agreed that we would meet on tuesday in mulgrave, and that whatever frustration he was experiencing that I was committed to help but do not know why but during the conversation he was referring to the fire in mulgrave and the explosion in arcadia a few times ??? is sentence did make any sense so I was sure that something tip him today even if we have very good meetings this week on the rebuild plan so again I was puzzle and confuse about the true reason of his decision. I apologize if I did not come to talk to you and was expecting that he would wait til Tuesday for our discussion. – was oing to talk to you monday morning to think about what we could do but seems things when faster than expected.
>
> I am still committed to talk to him and see what we could do.
>
> [*Errors and punctuation as in original*]

[106] When shown this e-mail on cross-examination, Dave Matthews testified that Daniel Emond had never spoken to him prior to his resignation about another role in the company relating to oil improvement or otherwise.

[107] When Robert Orr was asked about these e-mails, he testified that the resignation of a key member of the organization was a critical piece of information, and he was not surprised that Daniel Emond was cavalier in communicating that information.

[108] Although Matthews had an electronic copy of the resignation letter saved on his home computer, he later lost it due to a computer crash. None of the other copies were produced in this proceeding.

[109] Daniel Emond was questioned about the contents of the letter and denied that Mr. Matthews had alleged in it that Emond was not taking advantage of his knowledge and experience in relation to the Mulgrave fire. According to Emond, Matthews came to see him on March 13, 2009, and was very emotional about the Mulgrave fire. He testified that Matthews felt responsible for the fire because he designed and built the plant. Mr. Emond said he tried to convince Matthews that it was not his responsibility, and that things like this happen. Emond conceded that the fire was found to have been caused by a lack of cleanliness in the pump shack, not the plant's design. He testified, however, that there were rumours around the plant prior to Matthews' visit on March 11 that the fire was caused by bad design.

Mr. Matthews becomes VP NET

[110] Dave Matthews said Daniel Emond did not respond to his resignation letter until June 2009, when Matthews suggested that ONC should make an announcement about him leaving the company in August. Emond subsequently approached him about taking responsibility for the algal oil program.

[111] ONC intended to use a marine algal organism, known as ONC T-18, in two ways: (1) to produce omega-3s that would be added to food, and (2) to produce fatty acids for bio-fuel. Mr. Matthews would be responsible for the food side of the initiative, and Ian Lucas, Vice President New Business Development, would be responsible for development of the bio-fuel.

[112] In April or May, prior to being approached by Mr. Emond, Mr. Matthews had discussions with Robert Orr about potentially remaining with ONC. In an e-mail to Orr on June 6, 2009, Matthews indicated that he had discussed the matter with his wife, and the best options going forward appeared to be either working on the algal oil project, or assuming the role of Technology Officer. In the e-mail,

Dave Matthews asked for clarification as to the future plans for the algal oil position once the oil reached the marketplace. He testified that he was told that after the product entered the marketplace, the person in the algal oil position would oversee the manufacturing.

[113] According to Daniel Emond, it was him, not Robert Orr, who first raised the possibility of Mr. Matthews taking over the algal oil program. He said he suggested Matthews for the position in December 2008, while he and Orr were at a conference in California. Mr. Orr could not recall who initially raised the idea.

[114] On June 17, 2009, Mr. Emond formally offered Mr. Matthews the algal oil position in a letter which the two men later signed on July 10, 2009. The letter stated:

> Dear Dave,
>
> After few months thinking about the situation between you and me I wanted to assure you that I really acknowledge you capacity in resolving issues and driving project to end.
>
> I know that our relationship is based on mistrust and only our commitment from our part could solve this. Nevertheless I do believe that if we together we make and effort we will succeed and ONC will benefit of our relationship and commitment to make thing happen in a positive way.
>
> I wanted to offer you a new position to drive and deliver the algal project. The main purpose of your role is to manage all aspects of the project:
>
> R&D, Production, Outsourcing, Recruiting, Project Management, Quality and any other function required to make this a success. I strongly believe that you are the right Champion to make this project a success. Even this seems still a project stages in the next coming weeks I will required from you a final proposal on how this structure should and will work. I trust your judgment to come with the right solution and support needed to make this project a success.
>
> From this letter I am making a firm commitment from my side to support you in any way I can, to have a full transparency in our relationship and commitment in trusting you for your actions. I am truly committed improving our communication, I will include you more, being more open and honest with you on all matters and genuinely being invested and committed to help you be successful and respected by me and others.
>
> In return I want from you your personal commitment to be open and direct towards me, no sidebar agenda, communication should be as transparent as possible. I you see frustrating things you talk to me in return I will commit to have you in the loop for other matters if urgently needed your input. If you decide to take this project I wanted to be sure that you have a follow-up

> communication with me and Megan for cash flow keeping us updated and making sure in case of variances we could be there to support you. Your official salary will be at $142,000 per annum. You will keep the same actual benefits and bonus performance as in your prior role. Access of the employee rate for the biodiesel should be provided should be available for life-time.
>
> Hope this will convince you of my commitment to you and to this project.
>
> [*Errors in original*]

[115] When Dave Matthews was asked about this letter, he said he had explained to Daniel Emond that there had been several occasions in the past where Emond had not been honest with him, and had not allowed him to use the knowledge he acquired building ONC's plants to help the rest of the organization. Matthews testified that some of these conversations made their way into the letter.

[116] According to Mr. Matthews, the reference to a "sidebar agenda" related back to 2007, when Mr. Emond told him that he was transferring responsibility for powder to Paul Empey, with Robert Orr's approval. Matthews understood that Emond believed Matthews had subsequently called Orr behind his back. Mr. Matthews said he made it clear to Emond that he had never discussed the incident with Orr.

[117] As the author of the letter, Daniel Emond was questioned extensively about its contents. He said the "mistrust" between him and Matthews began around the time of the fire. He said he was getting e-mails from Robert Orr about issues within the company that could only have originated with Matthews. He reminded Matthews that he reported to him, not Orr. Mr. Emond said Matthews had a great affinity for Orr, and this made it difficult to create unity and trust within the larger organization.

[118] According to Mr. Emond, the references to "transparency" and "improved communication" related to Mr. Matthews' need to be informed about everything that was going on at ONC. He said Matthews was a pioneer of the company, having built the plants, but there were functions and responsibilities that he no longer needed to be involved in. In other words, Matthews wanted to be involved in decisions concerning the plants, even if those matters were no longer directly within his area of responsibility. Mr. Emond explained that he was committing in the letter to keep Matthews more informed.

[119] When asked about the sentence, "I will include you more, being more open and honest with you on all matters," Mr. Emond attributed his use of the word

"honest" to the fact that French is his first language. He said that he used the word to mean "straightforward", not to imply that he had been dishonest in the past. He suggested that focusing on the individual words in the letter was misleading.

[120] Mr. Matthews drafted a document in response to the letter on the same day he received it from Emond. In it, he asked for a salary of $150,000. He asked that the job description for the new position be developed and agreed to by July 15, and that the reporting structure be written into the job description. The document set out Matthews' thoughts on what the position should entail and how the new business unit should function. These thoughts served as the foundation for the subsequent job description.

[121] Mr. Matthews later agreed to the original offer of $142,000 per annum, and a job description was formalized on June 18, 2009. Matthews says the position was originally called Vice President Algal, but he pointed out that this title might signal to competitors that ONC was interested in algal production. He agreed that the title should be Vice President New and Emerging Technologies ("VP NET"). This explanation is consistent with an Employee Change Form dated July 27, 2009, which showed Matthews' new position as "VP Algal Technologies", with the "Algal" crossed out and replaced with the handwritten word "New".

[122] On June 25, 2009, Daniel Emond sent out the following announcement to all ONC employees:

> Dear Ocean Nutrition Associates,
>
> Ocean-nutrition has been developing an additional source of omega-3 coming from algal. The project that took place few years ago is approaching it's final phase of development and we will soon enter into the production cycle. This project is the result of ingenious scientific research and highly committed employees specifically within our R&D department. Moreover I want to also acknowledge a strong contribution from within our Ocean Nutrition support team to ensure this initiative is accomplished.
>
> Since this project is critical for Ocean-Nutrition growth in the years to come we will have to dedicate a multi-functional team and also a leader that will delivered the project from a R&D to a production state. Following this commitment and effective immediately I am pleased to announce that Dave Matthews will be leading the next phase of the project. With Dave's leadership and technical expertise we are committed to position this initiative for success. Dave Matthews, with my support will be building this multi-functional team over the next weeks.

> Also effective immediately and reporting to Dave will be Jason Blair, Blair Gray and Eric Chaytor. These three key individuals will support Dave in the production phase of the project.
>
> To permit Dave to focus on this project Sharon Spurvey, Director Technical Services, Heather Matthews, Manager Occupational Health and Safety will be reporting directly to me. The Engineering team will be reporting to Dave Elder, Senior Director Operations. …
>
> With these changes I am confident that this project will be a key success. Please join me to congratulated Dave Matthews in his new role and provide him and his team with your support in an effort to accomplish this new initiative.
>
> [*Errors in original*]

[123] The parties agree that from mid-July 2009 until September 2010, Dave Matthews performed well in his new role and had no difficulties in his relationship with Daniel Emond.

A plan to terminate Daniel Emond?

[124] Although he did not specify the precise timing, Robert Orr testified that before he stepped down as CEO in July 2010, an agreement was reached at the Board level that Daniel Emond would be terminated. He explained that members of the Board were not pleased with Emond's overall performance and were aware of Orr's concerns about Emond's leadership, character and the quality of his communications with him and others at the company.

[125] An e-mail sent by Robert Orr to Daniel Emond on February 13, 2008, exemplified Orr's longstanding concerns about Emond's communication:

> Daniel,
>
> I did not wish to get into this matter while you were leading the process on Oak Island but please see me immediately on your return to the office.
>
> In follow-up to our discussions the last 2 weeks on improving communications it is disconcerting to me that today you are introducing a new pricing policy and a new sales bonus program without having discussed and reviewed these matters with me. (finding out about these matters on Sunday when you issued the Agenda). I do not think it inspires confidence in the senior team when you do not include/consult other senior managers on such key decisions – "do as I say" on improving interdepartmental communications "not as I do". But even more

> significantly the fact that you have not reviewed these things with me is very troublesome to me.
>
> I have been with the company over 10 years and have never introduced a bonus program without first presenting it and clearing it with my boss. Apart from the concept of common courtesy of doing so with your supervisor – it is quite confusing to me why you think you have singular unilateral authority to create and issue bonus plans.
>
> Please see me at your earliest convenience.
>
> Robert

[126] Daniel Emond was asked about this e-mail on cross-examination. He stated that he had brought most of the company on an outing because he felt that they needed a morale boost. The bonus program was a topic on the agenda to be discussed, but nothing had been finalized at that time. Emond said he had been working on a presentation to Orr about the program but, as a result of "a leak", Orr found out about it before he had a chance to discuss it with him.

[127] In any event, Robert Orr testified that the plan to terminate Emond never came to fruition. He explained that the company had recently lost Dr. Colin Barrow, Vice President of Research and Development, and the Board members from Richardson did not want two senior management seats empty at the same time. Orr was informed that the Board would move on the recommendation to remove Emond in a few months when a replacement was found for Barrow.

[128] In his discovery evidence, Stanley Spavold agreed that Emond's employment had been in jeopardy but proposed his own theories as to the reasons for the conflict between Robert Orr and Daniel Emond. According to Spavold, the Board had given Emond too many responsibilities as COO. He explained that the Board had come to the realization that the company needed a different type of leadership and tried to achieve it by putting a strong COO underneath Robert Orr rather than replacing him as CEO. Spavold said Orr was not happy that the Board "had stripped most of [his] responsibilities and shifted it down to Daniel Emond. And there was always tension as a result of that transition." Considering the matter in hindsight, Spavold said the Board should have brought in a new CEO, rather than setting Emond up to fail by inserting him into the existing organization. The second source of conflict between Orr and Emond, according to Spavold, was that Daniel Emond was French, and "French people communicate differently than English people."

[129] Mr. Spavold gave evidence that he was a big supporter of Daniel Emond and he "continued to defend him through a lot of people who have criticized him, including Martin at times and – but again, he was a valued member of the company." In Spavold's view, some of Emond's shortcomings were due to Robert Orr's failure to give him "good management". He stated that Daniel Emond may have tried to avoid certain issues, and perhaps did not bring issues to the Board's attention as promptly as he should have, but, in Spavold's assessment, he did not lie or purposely misrepresent issues.

Arrival of Martin Jamieson

[130] In July 2010, Martin Jamieson became the President and CEO of ONC. Robert Orr was appointed Chair of the Board of Directors. Prior to joining ONC, Mr. Jamieson was involved in growing large multi-national companies in the international food industry. He had been an executive with Loblaw Companies, International MultiFoods, and Pillsbury Canada.

[131] According to Martin Jamieson, he was brought into ONC in order to lead the company on a journey "from small co. to big co." He believed the Board of Directors recognized that the company needed a different style of leadership as it continued to grow. Mr. Jamieson considered it his role to simplify processes and formalize various aspects of the company's operations in order to expedite the company's growth. On cross-examination, Jamieson denied that he was brought on by the shareholders of ONC to sell the company. He described his mandate as taking the company on the next stage of its journey toward a mature, fast-growth, well-organized global leader, at which point it would likely be more attractive for purchase and command a higher premium.

[132] After Mr. Jamieson became President and CEO, management of ONC was carried out through a multi-level executive structure. The top rung of the leadership structure was the Executive Leadership Team, which included Mr. Jamieson, Daniel Emond, Megan Harris, and Dr. Clint Brooks, Senior Scientific Advisor/Officer, among others.

The next rung was called the Senior Management Team and it consisted of approximately 25 individuals with the titles of Vice President or Director. Dave Matthews was a member of the Senior Management Team.

Change in direction for algal oil project

[133] According to Dave Matthews, a few months after Martin Jamieson's arrival and Robert Orr's transition from CEO to Chairman of the Board, the functions associated with his position began to change again, without notice or discussion.

[134] On October 7, 2010, Dr. Clint Brooks sent an e-mail to Mr. Jamieson stating that he and Daniel Emond had been working on creating an overview of the R&D component of the algal fermentation program. He suggested that Mr. Jamieson might find the information useful for a discussion with the Board regarding future value creation for ONC with respect to algal DHA for food and infant formula applications, and algal biofuel products. Dr. Brooks recommended a three-year fermentation program including food oil and biofuel. Attached to the e-mail were documents entitled "Timeline, Biofuel September.ppt", "Timeline Algal Oil, September 2010.ppt", and "Fermentation R&D 3 year plan.xlsx."

[135] Dave Matthews said that, notwithstanding his position as Vice-President of the algal program, he was not consulted about any prospective three-year plan. On cross-examination, he testified that while he was not in charge of the R&D component, the R&D people in fermentation reported to him on various aspects of the program.

[136] On October 15, 2010, Mr. Emond e-mailed Matthews the three documents mentioned above with the subject line "Fermentation." In the ensuing days, Matthews and James Peach, who reported to Matthews on the regulatory aspect of the algal oil project, provided budgetary and regulatory information to Emond and other members of the Executive Leadership Team on request.

[137] On October 25, Martin Jamieson met with Dr. Brooks in relation to the algal program. Later that day, Dr. Brooks e-mailed Jamieson a spreadsheet for a licensing strategy similar to the format of the three-year plan. He stated, in part:

> I would expect we would not need the production NET team led by Dave Matthews going forward with a licensing strategy. They could be deployed to other core needs in operations.

[138] On November 3, 2010, Martin Jamieson sent an e-mail to the Board of Directors explaining that the previous week he and three of the directors – David Brown, Stanley Spavold and James McCallum – discussed various aspects of the

business in lieu of a formal Q3 Board meeting. One topic of their discussion was the direction that ONC should take going forward to develop the potential of the algal organism. Jamieson confirmed that Ian Lucas' efforts to secure investments from oil companies and other potential stakeholders had not been fruitful and were using significant resources that could be more productively spent otherwise. He outlined two options:

> During the last quarter, work has also been done on developing an alternative path for the development of this organism. … The first of these options is more comprehensive and sees us complete legal, regulatory and process development work in addition to us completing R&D development work on the organism for its food and bio-fuel potential. Option 2 sees us complete the R&D work in full but restricts the balance of the work in legal, process development and regulatory (where we would complete toxicology studies and the current EU filings only). We would then seek to license the organism for food and bio-fuel use and invest the revenue stream in developing our core business of supplement and food ingredient manufacture and supply. Should we choose to license only in fuel and pursue the potential in food and infant formula ourselves eventually, this would remain open for us.
>
> Option 2 was recommended by the ONC senior leadership team including Dr. Clint Brooks and was well received by the Directors present for its simplicity and focus … Should we choose to pursue this option the various discussions ongoing in the present bio-fuel project would be wound down with immediate effect and we would cease, at least for now, to pursue these potential partners.

[139] The Board chose the second option, electing to wind down the bio-fuel consortium and work toward licensing the algal organism for food and bio-fuel use. This would allow the company to focus on developing its core business. As a result of this decision, Ian Lucas was terminated by ONC, and Dave Matthews was asked to slash $750,000 from the fermentation budget.

[140] According to Mr. Matthews, the decision to pursue a licensing strategy effectively ended his position and removed all but ten to twenty percent of his responsibilities in terms of time. He described the approach taken by ONC as "very below board." In his view, if the decisions being made were not motivated at least in part by a desire to diminish his role at ONC, he would have been asked to participate in the process.

[141] Daniel Emond testified that he was not involved in the work done by Dr. Brooks respecting the future options for the algal organism. He attributed the statement in Dr. Brooks' e-mail suggesting otherwise to Dr. Brooks "being polite."

Mr. Emond said that, unlike Dr. Brooks, he was not a scientist and had no real understanding of what Brooks was doing. According to Emond, Dr. Brooks offered to show him the timelines he prepared, but that was the extent of his involvement.

[142] As for the failure to consult Matthews, Mr. Emond said the Board was concerned about the amount of money being spent on the algal initiative and questioned its value. For that reason, Martin Jamieson asked Dr. Brooks to prepare a presentation outlining options for the future of the program. Emond described Matthews' role as being "on the operational side of the business", while Dr. Brooks was providing information from a "research perspective." Only when a decision was made between the two potential options would Matthews become involved. Mr. Emond denied knowledge of any discussion concerning disbanding the NET team or deploying its employees elsewhere within ONC.

[143] Martin Jamieson's evidence was that Daniel Emond would not have been in a position to tell Matthews about the strategic discussions regarding the algal program because they would have remained confidential within the Executive Leadership Team. Mr. Matthews would not be informed until a decision was made. According to Jamieson, the only termination contemplated as a result of the shift in direction of the algal oil initiative was that of Ian Lucas. There was no discussion of terminating Matthews.

Ian Lucas LTIP negotiations

[144] Prior to Ian Lucas' departure, he had discussions with Robert Orr and Stanley Spavold about whether he was entitled to a payout under his LTIP. On November 23, 2010, Orr sent the following e-mail to Martin Jamieson and Mr. Spavold:

> Martin/Stan,
>
> With respect to Ian's request for additional compensation related to his termination, I would like it clearly understood what I have previously communicated to Ian and what my position is on this matter.
>
> With respect to the LTIP, Stan and I went through this with Ian in March. Some of his statements in his letter are inaccurate. I did not say that I felt the board would pay him – I agreed that he had the right to request a payout and that I

> would take his case to the board. I did so and the board rejected his request and I told him that the "must be employed provision would not be waved [*sic*] and if a transaction took place while he was still here he would get paid – otherwise no payment was forthcoming. I have been very clear with him on this fact and also his original cover letter states this very clearly. I have also repeatedly told him that his 40% sale claim is completely invalid and to stop attempting to make this case because it is BS.
>
> From my point of view – Ian is not entitled to anything on the LTIP – but given the timing of the possible DSSM [*sic*] transaction – should the board want to protect themselves from the perception that the termination was made to avoid a payment (which it is not) it might be worth paying him a very modest amount to get him to sign off on any future recourse.

[145] Orr also commented on the question of Lucas' entitlement to the 2010 management bonus:

> On the 2010 mgmt bonus. The bonus plan, again, very clearly states that you must be in the employ of ONC at the time of PAYOUT. So technically and legally he has no "right" to a payout. In addition, technically speaking, while we will exceed the top of the EBITDA line, we will NOT get onto the bottom of the sales part of the grid ($150 million). There is no payment earned. However, there has been some indication that with Martin's support that the Board will approve some mgmt. bonus this year based on the excellent EBITDA result and currency impact on top line. Again, assuming Martin recommends it, the Board may decide (or not) to pay a modest amount to obtain the sign off and legal clearances that we would like from Ian in this matter.
>
> In summary, I made no commitments or indications to Ian at any time that he would receive any payment beyond what was in his revised letter of employment in March and any statement or inference to the contrary is completely false. Any additional payments against LTIP or 2010 bonus plan are at the sole discretion of the board and should be considered only in the context of "risk management" and quick termination.
>
> Robert

[146] Stanley Spavold's discovery evidence was that the Board was not concerned about any perception that Ian Lucas was terminated in order to avoid a payment under the LTIP.

PCB reduction

[147] Around the same time that decisions were being made about the future of the algal initiative, Dave Matthews was asked to travel to Munich to assist Charles Perez, ONC's Manager of Intellectual Property, in representing ONC in a lawsuit challenging a patent. The patent related to a process for the reduction of environmental contaminants – known as PCBs – from crude fish oil.

[148] During Mr. Matthews' cross-examination, ONC objected to the disclosure of details surrounding the litigation and agreed to stipulate that the issue of PCB reduction was important to ONC from both a financial and quality perspective. In other words, Matthews was being asked to assist with a significant issue within the company.

[149] ONC's attempt to have the patent revoked was unsuccessful. According to Mr. Matthews, when he returned from Germany in November 2010, Daniel Emond asked him to take over as lead of ONC's PCB reduction efforts. Mr. Emond admitted that he asked Matthews to bring his expertise to the project, but denied asking him to lead it. Emond also denied that the PCB reduction work was significant or urgent to ONC, despite the company's admissions to the contrary. According to Emond, Matthews was sent to Munich to act as a technical advisor to Charles Perez. After the trial, the pair were responsible for finding ways that ONC could lawfully work around the patent. Perez used his regulation expertise to identify weaknesses or flaws in the patent and devise options for ONC to avoid infringing it. Matthews provided technical advice and used his connections to arrange for three ONC employees to do experimental trials at Pfaudler Inc., an American equipment manufacturer he had done significant business with in the past.

[150] In May 2011, Matthews said, Emond took responsibility for PCB reduction away from him, leaving him with only one to two hours of work per day. This incident will be discussed in greater detail later.

The API initiative

[151] In 2010, ONC was also exploring the development of an omega-3 ingredient for use in pharmaceuticals. In order to become an active pharmaceutical ingredient ("API") supplier, ONC would need to comply with Canadian good manufacturing practices, a stricter set of standards than those applied to its existing products.

[152] Robert Orr gave evidence that ONC had been considering the addition of a pharmaceutical component to the business for several years. At some point, Orr secured a contract with a company called Omthera under which ONC would be the sole source of its finished API. From 2010 until his departure from ONC in August 2011, Orr spent the bulk of his time working on API.

[153] During his discovery, Orr was referred to an e-mail he sent to Dave Matthews in June 2010, a few weeks before Martin Jamieson took over as CEO, concerning API. When asked why he chose to involve Matthews, Orr explained that he knew Matthews was not happy about his relationship with Daniel Emond and might be looking for other alternatives. Orr thought that if he could develop an API business within ONC, Matthews might be able to move into that field, away from the core business. Orr saw it as a chance for Matthews to have "a new lease on life" within the organization.

[154] Martin Jamieson gave evidence that after starting at ONC, he had many discussions with the Board of Directors about ONC's involvement in API, and particularly about the possible forms that involvement might take in the future. These included: (1) getting into the business of creating a finished API for the pharmaceutical industry; (2) entering into a joint venture with another company to do so; (3) creating a subsidiary of ONC to do so; and (4) having no involvement in API other than as a feed stock supplier. "Feed stock" is an intermediate raw material produced by refining and concentrating crude fish oil, used by the final API producer as a starting material.

[155] On November 3, 2010, Jamieson e-mailed the directors – including Robert Orr – with his recommendation that ONC limit its future role in API to delivering a profitable and sustainable feed stock. The Board subsequently adopted this recommendation, making it ONC's official position at that time that it would be a feed stock provider only.

[156] The Board's decision raised the question of how to keep the value of the Omthera contract, and others, within ONC if the company did not make the investment to become a final API producer. One option was a joint venture with a PEI company, Biovectra. Another option was to spin the API business out of ONC, with Robert Orr running that company.

[157] For many months after adopting its formal position, the Board continued to deliberate on the model and methodology by which ONC could participate in the API market or API feedstock market. As of June 10, 2011, it was still an open question whether ONC would be involved in the joint venture. Martin Jamieson wrote to the Executive Leadership Committee as follows:

> As you are already aware, 2 hours will be built into the Exec meeting next week to review the API issue. We still do not have alignment of shareholders as to the path we should tread and I have committed to the Board that in addition to the external advice we are seeking on the subject, the newly completed management team of ONC will fully review all options and come forward in short order with a recommendation. This is serious……we are heading for a really ugly situation if we cannot agree on a way forward and gain the alignment that is so badly needed.

[158] Not long after this communication, the Board decided against the joint venture. Instead, CFFI would assume the portion of the shares of the new API company that would have been held by ONC. The company would be called Slanmhor Pharmaceuticals Inc., and Robert Orr would leave ONC to run it. The intention or expectation of Orr and CFFI was that the Board of Directors would agree to sign over the Omthera contract to the new company.

[159] While there is no question that Robert Orr involved Dave Matthews in the API initiative from a technical perspective, and considered his assistance critical to its success, there is a conflict in the evidence as to how much time Matthews was spending on API from October 2010 until his resignation in June 2011. There are also questions about whether ONC expected or understood that Matthews would be following Orr into API, whether ONC was involved or not.

[160] According to Robert Orr's discovery evidence, it was always a possibility that the production portion of an API business would be spun out of ONC. It was discussed openly with Martin Jamieson and the shareholders. Orr made it clear to everyone at ONC that if API was taken outside of ONC, he wanted to take Dave Matthews with him to run it.

[161] The documentary evidence respecting API includes a document entitled "API Update", with the subheading "JVNewco in PEI – May 18, 2011." The document contemplated a strategic partnership between ONC and the joint venture company, referred to as "JVNewco." The JVNewco would be jointly owned by the shareholders of ONC and Biovectra in a 60/40 partnership. In the event that Richardson did not wish to participate in the new venture, CFFI would assume the 60% shareholding of the JVNewco. The document indicated that ONC would assign its supply contract with Omthera to the JVNewco for the production of final API product, and JVNewco would buy feedstock concentrates from ONC. The next page of the document stated:

> Robert Orr will lead the JVNewco as CEO. His experience in managing start-ups, understanding of the Omega 3 space and relationships with the customer base are important assets for JVNewco.
>
> With ONC's permission it is JVNewco's intention to ask Dave Matthews to accept the position of Plant General Manager of the new facility. His 20 plus years experience in omega 3 processing, manufacturing and operations management will be invaluable to efficient operations. Dave M. has also built numerous manufacturing facilities and will also oversee the construction phase of the operations.

[162] When Mr. Matthews was asked about this document, he said he was not involved in its creation, and that he had told Robert Orr that he was not moving to PEI before that time. He did not recall Orr ever formally asking him to join the API business, but was adamant that he had been telling Orr since early 2011 that the API company was never going to happen. Matthews was certain that Richardson would never sign off and give Orr the right to pursue the Omthera business. Matthews did concede, however, that he knew Orr remained hopeful that he could be convinced to join the new company.

[163] For his part, Robert Orr testified that Dave Matthews never made a formal commitment to join the API company, but it was Orr's expectation. He said he continued to try and convince Matthews to join the company for six months after both men had left ONC.

Discussions regarding sale of ONC

[164] Martin Jamieson became aware of DSM's interest in the purchase of ONC in mid-to-late October 2010. Negotiations broke off in April 2011 and did not resume until 2012.

[165] DSM was a customer of ONC and was, at one point, interested in using ONC's DP2 facility in Dartmouth for vitamin E production. In late October and early November 2010, Thomas Herbrig from DSM had discussions with Dave Matthews about the DP2 facility and its capabilities.

[166] Matthews was asked to provide Mr. Herbrig with a tour of DP2 and to discuss the features and capacity of the facility. The request was made under the guise of an ordinary course inquiry from the customer. According to Mr. Jamieson, Matthews was not an "insider" so he was not told that the actual purpose of Herbrig's visit was to evaluate the DP2 facility as part of initial due diligence. While Herbrig toured the plant with Matthews, DSM executives attended confidential meetings with Martin Jamieson, Megan Harris and Charles Perez.

[167] On January 17, 2011, James McCallum, one of the ONC directors appointed by Richardson, was in Halifax to meet with Martin Jamieson and Megan Harris to discuss a potential sale of the company to DSM. The following day, the three exchanged e-mails about due diligence issues and identified the senior team members who would eventually become "insiders", as the need arose. Jamieson suggested ten potential insiders. Matthews was not listed because, according to Jamieson, his expertise was not necessary to the issues likely to be raised in a sale purchase process.

[168] Martin Jamieson testified that DSM approached ONC in February with a non-binding price and a list of critical observations emanating from their due diligence work. In ONC's view, the list was largely fiction, amounting to a negotiating tactic by which DSM would attempt to lower its price.

[169] On February 23, 2011, Martin Jamieson sent the following e-mail to the Board with the subject line "DSM Mulgrave and DP2 critique":

> Gents,
>
> Stan asked me to have Daniel and his team review a summary of the critical observations made by DSM and report back on what is correct, what is incorrect

> or could be challenged, what is already recognised by ONC ops team and in this year's capital plan and what remains to be done. He has also been asked to provide a summary of costs to contrast with the ridiculous DSM numbers.
>
> His paper is attached which follows each of the summary questions I asked him to review which I summarised from the DSM paper….the team's responses are in red and blue.
>
> Any comments or questions please just come back to me.

[170] Without Martin Jamieson's knowledge, Robert Orr forwarded the e-mail chain and attached document to Dave Matthews, with the subject line "Confidential," and the message, "See me about this when you have a minute." Jamieson described this act by Orr as unauthorized and disappointing.

[171] DSM made attempts to revive the negotiations in March and April 2011, sending a purchase price confirmation and a draft share purchase agreement, but Jamieson said ONC was not interested. Talks broke off in April and did not resume until 2012.

The NET Department under review

[172] In the months after he joined ONC, Martin Jamieson and his Executive Leadership Team developed a strategy for the company based on an OGSP model ("Objective, Goals, Strategies and Plans"). The OGSP was shared within the company in October 2010.

[173] In addition to the OGSP, Mr. Jamieson prepared an Organizational Development Plan ("ODP"). The first iteration of the ODP was prepared for the December 2010 Board of Directors meeting. However, Jamieson said it was not actually tabled at the December meeting because they ran out of time. Although the minutes are heavily redacted, there is no reference to the ODP in the unredacted portions.

[174] The ODP was eventually tabled at a Board meeting on April 20, 2011. In both iterations of the document, the following notation appeared under the heading "Other Actions" and subheading "COO":

> Emerging Technologies Department under Dave Matthew's [*sic*] leadership – under review

[175] On cross-examination, Martin Jamieson explained that the ODP was a "discussion guide" intended to help him share his thoughts on organizational development with the Board. He emphasized that it was the Emerging Technology function that was under review, not Dave Matthews' leadership. He explained that he used the phrase "under Dave Matthews' leadership" to provide context for the Board who may not have been aware that ONC even had a department called Emerging Technologies.

[176] According to Mr. Jamieson, at the time he presented this document, he simply wanted to understand more about the NET Department, its function and its contribution to ONC. When asked if he was trying to determine whether the Department was "irrelevant capacity", he responded emphatically that he was not. He said the NET Department was contributing to the success of ONC. The question for him was whether organizing it as a "mini department" was the right way to execute the tasks at hand, including the algal development, the "super critical CO2" work, the API project, and so on.

[177] Jamieson emphasized on cross-examination that it was also necessary to understand "the nature of this mini-department." He explained that although the NET Department would have some degree of structure and would pursue specific project work, he expected that Matthews and his team would, to a certain extent, set their own agenda. He expected the NET team to be "breaking new ground", "keeping current in the international world of technology and engineering", exploring "the unknown" and helping to guide the company into the future. In recommending a review of the NET Department, Jamieson said he merely wanted to ensure that ONC was approaching this very important subject matter in the most effective way.

[178] When asked whether he had ever communicated to Dave Matthews his expectation that the NET Department would seek out new technologies and set its own agenda, Martin Jamieson could not recall ever having done so. He stated that it was his "expectation that Mr. Matthews would eagerly tell me that. That's the job."

[179] Jamieson conceded that he was not at ONC in 2009 when Mr. Matthews became VP NET. As such, he did not participate in discussions concerning the

responsibilities of the position, and he was not involved in drafting the job description.

[180] In an e-mail on June 1, 2011, Martin Jamieson updated Stanley Spavold on a number of things going on at the company while Mr. Spavold was travelling in Europe. He wrote, in part:

> Dave Matthews wants to leave and has approached me on the subject (you will recall we already had **him and his mini department** under review.)[1]
>
> [*Emphasis added*]

[181] Dave Matthews' evidence was that he was not aware of any review.

Emond's Presentation in December 2010

[182] Although Martin Jamieson asserted that he did not raise the subject of a NET Department review with the Board until April 2011, Robert Orr testified that Daniel Emond proposed dissolving the business unit in December 2010. According to Orr, Emond made a presentation during a Board budget meeting at the end of 2010, when the 2011 plan was being developed, in which he recommended that the NET Department be dissolved. When Orr asked whether the employees would be terminated or deployed to other areas of the company, Emond replied that if the organizational restructuring was approved as presented, there was no place in the company for any of them, including Dave Matthews.

[183] When asked, Robert Orr rejected the possibility that he was confusing this presentation with the ODP presentation by Martin Jamieson at the April 2011 Board meeting. Orr specifically recalled that the issue was raised by Emond as part of a slide presentation identifying opportunities to optimize performance and profitability.

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[1]The e-mail also discussed Robert Orr and API: "With the news on Matthews and the debate continuing to rage on API we're clearly heading into a defining period on Robert's future with ONC. It is clear he doesn't have interest in doing what we would like him to do and so we should reach conclusions on this sooner rather than later. We are looking to implement the modest changes we are making to the organization at the end of June and a decision on Robert and perhaps API should fall in line with that."

[184] Daniel Emond emphatically denied ever making a recommendation to the Board concerning dissolution of the NET team. He testified that he would never do a presentation concerning any departments or matters of a human resources nature. He only made presentations about financials or operational issues.

[185] Stanley Spavold gave evidence on discovery that any recommendation to terminate a long-term employee like Matthews would have had to come before the Board. He was not asked whether Emond raised the issue at the December 2010 meeting, but did note that he did not remember a recommendation being made to "sever a long serving employee such as Mr. Matthews."

[186] ONC director David Brown filed an affidavit in support of a number of motions brought by ONC earlier in this proceeding, in which he stated:

> 17. The Directors of ONC never voted upon or passed a resolution regarding David Matthews at any of the Directors' meetings listed in paragraph 15.
>
> 18. No written resolutions were ever circulated to the Directors of ONC or Shareholders of ONC for signature regarding David Matthews prior to June 24, 2011.

[187] Dave Matthews testified that Robert Orr told him, near the end of January 2011, that Emond had given a presentation in December recommending his termination. According to Matthews, Orr told him Emond was doing everything he could to get Matthews fired and advised him to talk to Emond.

[188] Robert Orr testified that he could not recall specifically telling Matthews about the presentation. He believed he told Matthews in late spring 2011 that it was likely that neither of them would be at ONC after June.

Megan Harris leaves ONC

[189] In late January 2011, Megan Harris, CFO, was terminated from ONC. Prior to her departure, she negotiated an extension to her LTIP which enabled her to benefit from the sale of ONC to DSM in 2012. Ms. Harris had been with ONC since 2006. Stanley Spavold explained the thinking behind the Board's decision to extend the LTIP:

> Well Megan had been an extremely loyal employee. Very dedicated, very hardworking. She had sacrificed a lot, given that she was a working mother, to the organization. She had done everything we had asked her to do.
>
> And the decision had been made by management supported by the board to replace her as CFO because we did not believe that Megan had the skillset to take us to the next level in the organization.
>
> So we had – we were exiting Megan from the company. And as recognition of her outstanding service and the fact that there wasn't an ongoing role for her because it wouldn't be good for the incoming CFO. We had tried that once before and it failed.
>
> The – the decision was to grant her an extension to allow her to try to enjoy the benefits of that – of the LTIP that she had earned and in my mind was entitled to for her service to the organization.

[190] Dave Matthews testified that at some point thereafter, Robert Orr told him that Megan Harris made a "sweet deal" when she left ONC. Orr did not elaborate on exactly what that meant.

The February 2011 meetings with Emond

[191] In February, Daniel Emond approached Matthews with a question about ONC's industrial spray dryers. Emond told Matthews he was asking on behalf of a customer. Matthews was of the view that a customer would never ask about spray dryers. The question would only be of interest to a party undertaking an environmental assessment, which signalled a prospective purchase of ONC. Mr. Matthews told Emond that a customer would not ask this question, but Emond did not reply.

[192] Mr. Matthews reminded Mr. Emond that he had built ONC's plants and had overseen their frequent renovation. He had a detailed knowledge and understanding of how they operated, along with any environmental assessment implications for a possible sale. He told Emond that no other ONC employee had been given the opportunity to develop this knowledge. Matthews mentioned his LTIP, and told Emond that he had been involved on the technical side of all possible takeovers of ONC. According to Matthews, there had been approximately five potential takeovers in the past. He offered Emond his help with due diligence. Matthews also informed Emond during this meeting that he did not have enough work to do. Emond told him that ONC was not undergoing due diligence or a possible sale.

[193] Daniel Emond was asked about this conversation, and testified that he remembered it, but said he could not tell Matthews the truth about the potential sale at the time because he was under a confidentiality agreement. He said the Board, not him, decided who would be made aware of the approach by DSM, and he was not at liberty to disclose the information to Mr. Matthews. He conceded that Matthews came to him on more than one occasion and said he could use more work.

[194] On February 18, 2011, Mr. Matthews decided to confront Daniel Emond about what he had heard from Robert Orr concerning Emond's December 2010 recommendation to fire him. Matthews went to Emond's office and told him that he had heard through the grapevine that he was going to be terminated, and asked for confirmation. Emond told him that there were no plans for him to be fired. Matthews told Emond that he did not want to be part of any restructuring, and wanted to stay with the company so that he could realize on his LTIP. Finally, he asked Emond what ONC's plan was for him, and, according to Matthews, Emond responded, "I don't know." After this meeting, Daniel Emond sent the following e-mail to Martin Jamieson, with the subject line "here we go again":

> Martin hope you are having fun, just so you know Dave Matthews came to see me saying that he is working with Robert on this API proposal again. That he is having a conference call this afternoon with Omthera etc…….Moreover he also ask me if he is part of the restructuring ???????? He said that he would like to stay as he believe the company will be sold to have is incentive on the sale ?????? Anyway I manage to get myself out of it not sure he believe me but he got an answer. About the API he told me that Robert was very angry after myself and you about our position in the matter.
>
> Just so you know.
>
> [*Errors in original*]

[195] Daniel Emond explained that "here we go again" referred to the fact that he was getting a number of inquiries from employees about a potential sale of the company. He said he told Matthews that there was no internal restructuring going on, and, with respect to a potential sale, that they were simply rumours. He confirmed that Matthews asked him what ONC's plan was for him, and he responded that nothing was changing, and "we're going to continue doing what we're doing, and we're going to continue planning to do stuff." Emond denied ever telling Matthews he did not know the plan for his future at ONC.

[196] Martin Jamieson gave evidence as to his understanding of the e-mail from Emond. He interpreted the subject line “here we go again” to relate to the fact that Matthews told Emond he was working with Orr on the API proposal again. The question about “restructuring” suggested to him that Dave Matthews had become aware of the work the Executive Leadership Team was doing on the OGSP where a restructuring was being discussed, but this term was used only in relation to introducing an element of matrix management into the organization along with multi-functional business teams to prepare the company for further growth. Jamieson assumed Matthews misinterpreted the term as meaning job losses or downsizing.

CT Partners contacts Matthews

[197] At some point around February 2011, Dave Matthews received a phone call from a headhunting company about a potential job. According to Matthews, the company would not identify itself or provide him with other relevant information, so he hung up. He subsequently learned that the call was from CT Partners, a search agency in Lima, Peru.

[198] By April 2011, Mr. Matthews had participated in one interview with CT Partners and the agency was scheduling telephone discussions between Matthews and TASA, the prospective employer. He traveled to Peru on May 3, returning two days later.

Emond removes PCB reduction from Matthews

[199] According to Dave Matthews, his involvement with reducing PCB contaminants in fish oil dated back to 1982, and he had technical responsibility over the area within ONC since joining the company in 1997. In November 2010, when he returned from the Munich trial, Daniel Emond asked him to increase his activities in relation to PCB reduction. From December 2010 to May 25, 2011, Matthews says he was spending seventy percent of his time working on PCB reduction, ten percent on API, and twenty percent on algal oil.

[200] On May 26, 2011, at 5:39 pm, Matthews received an e-mail from Daniel Emond informing him that Emond was giving the lead on PCB reduction to David Elder. With PCB reduction removed from his portfolio, Matthews said, his workload was reduced to one or two hours per day. He had nothing else to do.

[201] Matthews' evidence is that Emond gave him no prior notice of this transfer in responsibility and did not discuss with him the potential impact on his work volume, or suggest any alternative work he might be assigned within ONC. Moreover, the transfer occurred at a time when the PCB reduction effort was "nowhere close to commercial", the stage at which transfer to operations would normally be appropriate.

[202] Mr. Matthews' recalled receiving the e-mail from Daniel Emond moments after he pulled into his driveway. He immediately called Emond and left a message when the call went unanswered. He called several more times, to no avail.

[203] According to Daniel Emond, the PCB reduction process was a combination of technical and operational aspects. He said Matthews had only been responsible for the technical aspects, and at the point that he transferred the area to David Elder, the process was at the operational stage, Matthews' role was largely completed, and it was time for the operations team to take the lead. He said Matthews would still be available to the operations team members conducting the experimental trials at Pfaudler if they encountered a problem and needed his expertise.

[204] Daniel Emond denied that the transfer of PCB reduction left Matthews with only an hour or two of work every day. According to Emond, Matthews was working almost full time on API.

[205] On May 27, 2011, the day after he received the e-mail from Emond, Matthews went to see Martin Jamieson. He told Jamieson that he was not "going with" API. He explained to Jamieson that, in his view, there were two camps in ONC – the Richardson camp, and the Robert Orr camp. He referred to his history with the company and told Jamieson that he considered himself an "ONC person." Matthews told Jamieson that it was unfair that PCB reduction was being taken from him, that he had been involved in that area for thirty years, and it was his last substantial work responsibility. He said he was being constructively dismissed and was concerned about his LTIP. Matthews told Jamieson that if there were plans to terminate him, it would be nice if the company would be straightforward about it.

[206] According to Matthews, Jamieson described him as being "marginalized." Jamieson said there were no plans to terminate him. He informed Matthews that he would brief the Vice President Human Resources, Craig Wilson, and asked Matthews to speak with Mr. Wilson the next week while Jamieson was away from the office.

[207] Martin Jamieson's version of the conversation is as follows. The meeting took place in Matthews' office and lasted about fifteen minutes. Matthews told Jamieson that he was unhappy, that he was not enjoying his job, that he had difficulties with his boss Daniel Emond, that he did not have enough to do, that this was not what he wanted to do with his career and his future, and that he wanted to leave.

[208] Martin Jamieson denied using the term "marginalized" to describe Matthews' situation. Jamieson said when Matthews told him that he wanted to leave, he expressed his concern and said it was a surprise to him. He said, "Dave, let's discuss this and try and sort this out." According to Mr. Jamieson, Matthews told him that he had no interest in the API project, which was also a surprise to Jamieson. Matthews said he had not told Robert Orr that he did not intend to continue with that project. Jamieson advised Matthews that his next meeting should be with Orr to inform him of the situation. Regardless, Jamieson felt obligated to advise Orr of the discussion himself. He said he did so because he was aware that Orr was working on API and that Matthews was "heavily engaged" in that project. Jamieson had been of the view that if the project proceeded, Matthews and Orr would continue to work together very closely on it, either inside or outside ONC.

[209] Martin Jamieson asked Matthews' permission to brief Craig Wilson on the matter so that Matthews and Wilson could get together to discuss the situation more formally, and in greater depth, to determine how best to deal with it. Matthews gave his permission.

The first meeting with Craig Wilson

[210] Craig Wilson joined ONC as Vice President Human Resources on April 4, 2011. Not long after arriving, he set up one-on-one interviews to get to know the senior management team and familiarize himself with the company. Wilson's

evidence was that he met with Dave Matthews in April or early May 2011, and they spoke for about thirty minutes. According to Wilson, Matthews made no reference to Daniel Emond and did not say he was unhappy or that he did not have sufficient work to do. He said Matthews offered him some perspective in terms of the role he was about to take on and areas that Matthews believed Wilson should be addressing.

[211] On the morning of Saturday, May 28, Mr. Wilson received a call at home from Martin Jamieson about the situation with Matthews. The call lasted about ten minutes, during which Wilson learned from Jamieson that Matthews had come to see him, agitated and upset, and expressed his intention to resign. Matthews had said he felt marginalized in his role and suggested he had a case for constructive dismissal. These feelings were related to his relationship with Daniel Emond. Jamieson asked Wilson to meet with Matthews to determine his issues, then come back to him with his recommended actions.

[212] Mr. Matthews and Mr. Wilson arranged to meet on May 31, 2011. The day before, Wilson sent an e-mail to Daniel Emond and Martin Jamieson concerning David Elder's company vehicle. Wilson referred to "David", which Emond misinterpreted as a reference to Dave Matthews, and responded:

> sounds good. Also just so you know in my 4 years at ONC it is the third time dave wants to leave!!!!!!

[213] After clarifying that he had been talking about David Elder, Wilson asked Emond to elaborate on his comments about Matthews. Emond replied:

> Yes Dave m he wanted to leave 2 years ago soi offer him the algal production role but I am sure he is not happy and wants to so something else Dan
>
> [*Errors and punctuation as in original]*

[214] The meeting on May 31 took place in Mr. Matthews' office and lasted about an hour and a half. Matthews was agitated and concerned. Mr. Wilson informed Matthews that he would be taking handwritten notes. Matthews began by outlining his issues with Emond. Wilson asked if Matthews had ever told Emond about his concerns and he replied, "I can't talk to Daniel." According to Wilson's notes, Matthews told him the last straw was Emond taking away his responsibility for the PCB reduction trials. He said his role had been marginalized and his responsibilities taken away. Matthews said he had long-term issues with Emond and could not work with him. They never got along, and Emond viewed Matthews

as a “Robert Orr person.” Matthews explained that Orr and Emond had never gotten along, and Emond did not get along with anyone he considered to be a “Robert Orr person.” Matthews said he had had enough of the lies and was convinced that his relationship with Emond was never going to get better.

[215] Wilson asked Matthews why he had not taken his concerns with Emond to Martin Jamieson. Matthews said he did not think it would do any good. Jamieson was new, while Matthews had been at ONC for fourteen years and had worked up to his current role. He said Daniel Emond would not listen to any of his suggestions or ideas, and it was never going to get better. Wilson replied that things were unlikely to get better if Matthews did not take the next steps to address his concerns. Matthews responded that he’d had enough, and it was time for him to leave.

[216] Mr. Matthews explained that he had been a final candidate for a job outside ONC but Robert Orr found out about it and offered him the LTIP to stay. Wilson asked, “So what are you saying? Are you resigning? What are you looking for from ONC?” Matthews said he was looking to leave the company.

[217] Mr. Wilson mentioned that since his arrival at ONC, he knew Matthews had been working on the API project. He therefore assumed Matthews was going with Robert Orr to the API company. Matthews replied that he was not convinced this was going to happen. He explained that Martin Jamieson had previously said there was no way that Richardson would allow the business to go ahead. John Risley was going to have to go it alone, as Richardson was committed to ensuring ONC had no involvement in the PEI project.

[218] Wilson explained that he understood options for ONC involvement in API had been discussed, and, in any event, he knew that Matthews had a role in the new venture as a senior executive. Matthews responded that although Orr had mentioned this, he was not convinced it would happen. He said it was possible that he would be interested, if it happened. Matthews said he had been hanging around since 2007 for the LTIP, and no one had spoken with him about a specific role in the API company. He was not sure if he was interested, and he had already told Martin he was not living in PEI. He said he had already done that kind of work for fourteen years, and wanted to expand his role.

[219] After summarizing the meeting to that point, Wilson asked Matthews what he wanted. Matthews again said he and Emond could not work together. Emond showed a lack of respect for him. Matthews had worked for fourteen years at

ONC, and Wilson had just arrived so he did not know what Emond was like. Matthews said he wanted to protect his "value creation", and if Richardson wanted to hold the company for 2 years, he would like to leave. He would give up any severance in order to protect his LTIP at a $300 million valuation. According to Matthews, he was looking for an exit strategy that would protect his LTIP.

[220] Mr. Wilson went on to express his opinion that Matthews had no constructive dismissal case against ONC. He said he did not know where Matthews was getting his advice, but he did not believe it was valid. Next, he told Matthews that the LTIP was a retention tool, not an exit strategy, and Matthews knew he had to be an active employee at the time of the realization event in order to qualify. Finally, Wilson said the formula in the LTIP agreement – which included a sample calculation using a realization value of $300 million – was for illustrative purposes only. It did not confirm the value of the company, which could only be determined at the time of the realization event. Matthews responded that he knew, through the rumour mill, that others had gotten this type of deal. Wilson said he would have to look into that.

[221] Mr. Wilson indicated that while he had not entered the meeting expecting to negotiate an exit deal, he was prepared to discuss what a recommendation to Martin Jamieson and the Board would look like. He reiterated Matthews' proposal of no severance in exchange for an LTIP payout or some form of LTIP security. Wilson told Matthews that in order for him to go to the Board with a recommendation, he needed to have a "balanced ask" that they would see as fair. From his perspective, any contemplation of an LTIP payout would be gratuitous and subject to a stringent non-compete clause and a full release.

[222] Mr. Wilson repeated that he could not confirm that $300 million was an accurate valuation of the company, and asked Matthews how he had arrived at that figure. Matthews told him there was a time "not too long ago", before Wilson's arrival, when ONC was almost sold. The company was valued at that time. He also said he had heard that a valuation done in August was $300 million. The notes suggest Matthews made reference to a valuation being done by CIBC, although it is not clear which valuation he meant.

[223] According to the notes, Matthews had a strong reaction to the notion of a non-compete and told Wilson that prohibiting him from working in the omega-3 industry was off the table. Wilson told Matthews that ONC would seek a non-compete with specific details, likely listing specific companies, activities,

consulting agreements, types of work, and so on. Matthews mentioned that ONC might want him to appear as an expert witness from time to time, and suggested he would be open to that.

[224] Wilson told Matthews he would need to consider all of the information, talk to Martin Jamieson, and get back to him. Matthews stated, "I can hang around and be a pain in the ass, or I can leave. This company is going to let me go anyways." Wilson asked what he was talking about. Matthews said he knew his name was on a list of people to be let go at the end of June. Wilson asked how he knew that, and Matthews again cited the rumour mill. Wilson told him that as VP Human Resources, all re-organization would go through him, and he was not aware of any list, nor had he ever participated in discussions or meetings where Matthews' name was raised in relation to termination. As a matter of fact, he said, it was assumed that Matthews would be joining Robert Orr in PEI. Matthews responded, "That's not my understanding." When Wilson questioned whether he had asked anyone if what he had heard was true, Matthews said there was "no point."

[225] The meeting wrapped up with a promise from Wilson that he would meet with Martin Jamieson and get back to Matthews. Wilson's evidence is that he left the meeting with the impression that Matthews was intent on leaving ONC.

[226] Matthews testified that his original intent when he approached Martin Jamieson was to discuss the problems he had with Emond, but during the course of the meeting, the discussion evolved into "a departure type mode."

Events between May 31 and June 16

[227] In the interim between the first meeting with Matthews on May 31 and the second one on June 16, Mr. Wilson was engaged in what he called "fact finding." His efforts were hindered to an extent because Jamieson, Orr and Emond were all traveling at the time.

[228] Immediately after the first meeting with Matthews, Wilson phoned Martin Jamieson and gave him a brief report. He did not make notes of this discussion. When Jamieson returned from his travels, they met and Wilson gave him a thorough briefing, going through his notes from the meeting. They discussed whether there was anything to be done, since Matthews' concerns were related to

Emond and not to ONC generally. Wilson stated in his affidavit that he understood Matthews to be more interested in exiting than in conflict resolution.

[229] During their meeting, Wilson and Jamieson discussed the valuation issue. Wilson explained that Matthews had suggested a $300 million valuation and understood him to have said that the number came from a CIBC valuation. Wilson asked Jamieson whether that figure was high, low or in between, and whether a valuation had ever been done.

[230] According to Jamieson's evidence, Wilson asked him whether there were any valuations of the company that could be plugged into the LTIP formula in order to determine an appropriate amount as a basis for discussing a potential payout with Matthews. Jamieson was aware that a CIBC valuation had been prepared in March 2009, when Richardson was considering further investment. CIBC estimated ONC's net equity value at that time to be between $119 million and $184 million, based on an estimated total enterprise value of between $234.5 million and $299.4 million, less debt of $115.4 million.

[231] Jamieson's evidence is that he told Wilson he could not provide a valuation because he was not a chartered business valuator, and his only reference point was the CIBC valuation. He said he did not provide Wilson with the amount of DSM's proposed purchase price to use as the "value" of the company for the purpose of the LTIP because a non-binding offer is not the value of the organization, which could only be determined upon a realization event.

[232] Martin Jamieson was aware that the working number in Matthews' LTIP was based on net equity value, not total enterprise value. For that reason, he gave Wilson a figure of $200 million, which was at the low end of the CIBC valuation enterprise value, but toward the high end of the net equity value. Jamieson said he increased the CIBC net equity value from $184 million to $200 million because the valuation was over two years old at the time. Wilson asked whether he could disclose the figure to Matthews, who clearly believed the $300 million value was credible. Jamieson told Wilson he could disclose the figure, provided it remained confidential.

[233] Wilson also met with Daniel Emond. According to Wilson's evidence, he did not suggest solutions to the problems between Matthews and Emond because he was still trying to understand the issues and did not want to act in haste. He asked Emond about the decision to give the lead on PCB reduction to David Elder. Emond told him that it was a logical transition.

[234] Eventually Martin Jamieson advised Mr. Wilson to speak to Mr. Matthews to try to negotiate a balanced outcome, and to bring back an acceptable recommendation, which Jamieson would take to the Board.

[235] While Wilson was fact-finding, Mr. Matthews continued to communicate with TASA. On June 10, 2011, Carlos Pinillos of TASA e-mailed him an offer letter. Matthews responded the next day with certain revisions to the contract, telling Mr. Pinillos that he believed they were "very close." He said he would like to come to Lima the next week with his wife "to get started." Matthews also indicated that he would also like to start in July as a consultant until the proper paperwork came through.

[236] Also on June 10, Matthews met with John Risley. Several days later, Mr. Risley and Robert Orr were involved in an e-mail chain where this meeting was discussed. On June 15, 2011, Risley e-mailed Martin Jamieson concerning Deutsche Bank, which was advising ONC on a number of issues, including its future in API. Mr. Risley wrote:

> Martin, a point for you which I'm happy to leave with you….DB's recommendations on the API thing are only as good as the info input and I worry whether you are in a position to give them answers to all their questions. Obviously Robert's presentation on Thursday will improve your understanding but you may wish to have the DB guys talk to Robert as well.

[237] John Risley forwarded this e-mail to Robert Orr immediately afterwards, and wrote, "It will be interesting to see if he asks you to speak to them." Orr replied:

> He has not taken your advice in the past and do not expect this will be different. EG on the Alicorp deal – does not want me or Dave M involved. The reality is that there is no interest from Martin or Daniel in accessing any knowledge or expertise resident in Matthews and myself. We are completely ostracized – receive no info and are not asked for input on any matters what so ever. Pretty frustrating, disappointing and not in the best interests of ONC.

[238] John Risley responded several minutes later:

> forgot to tell you abt my mting with Dave M. He is worried abt his LTIP entitlement. I told him to get ONC's proposal in that respect and that, in the end, I would ensure he was fairly treated.
>
> I told him we needed his help to build these 2 plants, indeed we couldn't do it without him, but he seemed to be a bit non-committal on the subject.

[239] According to Matthews, Mr. Risley did not tell him he would ensure that he was fairly treated. Matthews testified that if Risley had said this, he would have asked for it in writing. He said they did discuss API, but Matthews made clear his opinion that the API business would never happen.

[240] On June 15, Matthews, Robert Orr and another ONC employee, Roar Askheim, were meeting to work on a presentation about API that Orr was to deliver to the Board of Directors the following day. Matthews testified that during this meeting, Orr blurted out that Matthews was going to be fired from ONC on June 28. This incident was not described in Matthews' affidavit.

[241] On cross-examination, Robert Orr said he never told Matthews that he would be terminated on a specific date.

The second meeting with Wilson

[242] On June 16, 2011, Dave Matthews met with Craig Wilson for a second time. According to Wilson, he did not expect that meeting to be their last.

[243] Wilson went into the meeting with a page of notes. According to the notes, after an "update discussion", he intended to address two points. First, he would update Matthews regarding his discussions with Martin Jamieson, Robert Orr and John Risley. Wilson had written, "Are you in or are you out?" Second, he would relay to Matthews that the CIBC valuation was closer to $200 million.

[244] According to Wilson's notes, he told Matthews that he had spoken with Martin Jamieson, and the company was concerned about where Matthews might end up if he did not go to PEI with API. Matthews said he did not know if he was "going to pharma", and that he'd had "absolutely no conversation or commitment of that from them." He said he had told Jamieson that he had met with John Risley, but did not know "where John's head is at." Matthews said he had brought up with Robert Orr and John Risley that he was being constructively dismissed. He had also told Risley that he felt he was going to "get screwed on the LTIP if Daniel has his druthers."

[245] Mr. Wilson told Matthews that he and Jamieson would be prepared to go to the Board with a recommendation for an exit strategy, provided the parties could

agree on what it should look like. He said Martin Jamieson had at least received Board approval to continue. Wilson informed Matthews that the "real number" for purposes of the LTIP was closer to $200 million. They proceeded to discuss the terms and conditions of an LTIP payment, including a non-compete linked to specific companies. According to the notes, Matthews remained unhappy with the idea of a non-compete.

[246] Mr. Matthews then reiterated the point he made in the first meeting that, prior to Mr. Wilson joining ONC, Martin Jamieson had indicated that Richardson would never allow the API business to proceed. Matthews said he told John Risley that Richardson was not going to let him "get into pharma."

[247] Mr. Wilson told Matthews he was not sure whether it was appropriate to discuss any exit plan due to Matthews' pending transfer to API. Matthews responded that he did not factor into the future of the company. Wilson said that that was Matthews' point of view, and asked whether he had ever discussed that with Daniel Emond. Matthews said he had told Emond that he thought he was going to be let go, and Emond denied it. Wilson replied that this response was consistent with what he knew. He explained that from his perspective, it was more likely that Matthews was an employee who would be transferring to a new position within the ownership group. The notes indicate that Matthews made the following statements:

> "I'm hearing stuff through the rumour mill."
>
> "All of my responsibility has been taken away."
>
> "There is a re-org. coming."
>
> "No role in the future."
>
> "John stated he did not know there is a re-org. at the end of the month."
>
> "The board is dysfunctional."
>
> "I have no input / control / engagement."

[248] Wilson asked Matthews how he could say all of that when he was clearly going to API, which Matthews denied. Wilson told him he had seen an advance copy of the presentation that Robert Orr and Matthews would be making to the ONC executive committee the next day, and it listed Matthews as COO of the new company. At that point, they agreed to break and to meet again to finalize a recommendation to Martin Jamieson and the Board. Mr. Wilson told Matthews he

would be in Ontario moving his family to Halifax, and Matthews said he was going on vacation, so they agreed to meet when Matthews returned, to finalize the plan.

[249] On cross-examination, Dave Matthews testified that he had heard that ONC had previously been offered $385 million, and when Craig Wilson came into their second meeting with a valuation of $200 million, he "knew I was getting screwed", and "knew it was over." He said that after the meeting, and the recent incident when Robert Orr told him he was going to be terminated at the end of the month, he knew he had to go to Peru and join TASA.

[250] When Craig Wilson was asked about Matthews' reaction to the $200 million figure, he testified that Matthews did not really react. He appeared to Wilson to be simply listening and absorbing it. According to Wilson, Matthews gave no indication that he was happy or unhappy with the content of their discussion.

Events leading to Matthews' resignation

[251] Following Matthews' meeting with Wilson, Robert Orr delivered the API presentation to the Board. One of the slides listed Dave Matthews as the COO of the JVNewco. Mr. Matthews testified that he did not draft the presentation and he asked Orr to remove his name as soon as the Board meeting ended. He said he also told Orr at that time that he was not going to PEI.

[252] On cross-examination, Robert Orr was asked whether he recalled Matthews taking any issue with the slide showing him as COO. Orr said he did not recall, but that Matthews told him on occasion that he had not made any commitments to API, and wanted to see how things unfolded. Orr said he did not pay much attention to these comments because it did not enter his mind that Matthews would be looking to go elsewhere.

[253] Daniel Emond testified that he recalled seeing Dave Matthews identified as COO during a presentation by Robert Orr about the API business. According to Emond, Matthews was not happy about this and came to see him right away. He was adamant that he did not want to be involved in the API business and did not want to live in PEI. Matthews told Emond he wanted to do something else.

[254] Later that day, Martin Jamieson sent Dave Matthews an e-mail, with the subject "API", expressing his confusion as to Matthews' intentions:

> Hi Dave,
>
> Thanks for your contributions to the API presentation and discussion today, it was very comprehensive and helpful. I have to seek a firm answer from you on a key and material question that was not appropriate to be asked in open forum today. This question is material to management's review of what was presented and in making our reco to the Board.
>
> About two weeks ago now you sat me down and told me that you were unhappy and wanted to resign from ONC. Moreover you clearly stated that you had no intention of participating in the [redacted] venture should it proceed after leaving ONC. You undertook to inform Robert Orr of this in short order after our meeting. You were today positioned as Chief Operating Officer of the enterprise. We are understandably confused.
>
> Could you please let me know as a matter of some urgency whether you are intending to be involved in the venture or not.
>
> Many thanks,
>
> Martin

[255] The e-mail was copied to Daniel Emond, Craig Wilson, and Don Habbick, the CFO at that time. Dave Matthews testified that he did not respond to this e-mail because he was sitting in his office when it was sent, approximately fifty feet away from Jamieson's office, and Jamieson had "copied everybody under the sun." Matthews suggested that a simple walk across the aisle to ask him to clarify would have been more appropriate.

[256] On June 20, 2011, Matthews and his wife flew to Peru to determine whether they could find safe living quarters and an appropriate school for their children. They were successful on both fronts.

[257] On June 21, Robert Orr sent Matthews an e-mail asking if he had a minute later that night or the following day to "touch base and to get an update on your latest thinking." He also informed Matthews that Jamieson had sent a letter to the Board that morning recommending that API and JVNewco be transferred to CFFI as soon as possible. Mr. Matthews testified that he did not see this e-mail while he was in Peru.

[258] On Wednesday, June 22, Mr. Matthews signed a contract with TASA. He and his wife flew back to Halifax that night. What happened next was described

by Paul Empey in an e-mail to Craig Wilson. Matthews did not dispute its contents.

[259] On the morning of Friday, June 24, Matthews sent Empey an e-mail asking if he was in the office. Mr. Empey was working in Human Resources at ONC at that time. He told Matthews that he was in the office, but had a few meetings. At 11:45 am, Empey came to Matthews' office. Matthews informed him that he was leaving the organization effective immediately, and placed his cell phone, keys, swipe card and company car keys on the table. Empey asked why. Matthews did not elaborate but said that he needed to move on, and mentioned that his relationship with Daniel Emond was strained.

[260] Paul Empey asked why it could not wait until Monday when Craig Wilson would be back in the office. Matthews said he had made his decision after taking several days off with his family. Empey asked whether Matthews had told Martin Jamieson. Matthews told him that Jamieson was tied up on the phone until 1 pm, and he was going to meet his wife who was waiting in the parking lot. Mr. Empey tried to call Robert Orr while Matthews was still in his office, but Orr was unavailable. Matthews said he would contact Orr after the weekend. At this point, he told Empey that he had recently discussed his concerns with both Jamieson and Wilson and they were both "up to speed." Mr. Empey then walked Matthews out to the lobby and called Craig Wilson to tell him what had transpired. Mr. Empey also gave the news to Martin Jamieson after he had finished his conference call.

[261] On the same day Matthews resigned, David Brown sent a letter to John Risley enclosing a draft of the API term sheet, stated to be consistent with a conversation they had that morning. The term sheet set out, *inter alia*, the assets that would be assigned by ONC to the JVNewco and the purchase price for those assets. Under the heading "Transferred Employees" it was noted that effective July 1, 2011, Orr and Matthews would tender their resignations to ONC and that any and all severance obligations arising with respect to Matthews in the future would be assumed by JVNewco.

[262] Dave Matthews testified that he was never informed by Robert Orr, Martin Jamieson or anyone else at ONC that the company intended to assign its obligations to him under the LTIP to the new API company. For his part, Orr could not recall what Matthews was told and when.

Negotiations with Matthews after his resignation

[263] After Martin Jamieson learned of Matthews' resignation, he e-mailed Robert Orr, telling him that Matthews had resigned with immediate effect, with no letter, no notice, no indication of his intentions with respect to API, and no mention of his LTIP. Orr responded, "I am SHOCKED!! No indication of this whatsoever. I know nothing of this and will call him over the weekend." Robert Orr forwarded Jamieson's e-mail to John Risley, who replied, "I know nothing about it but don't like the sound of it."

[264] A flurry of e-mails were sent on June 27, 2011. Jamieson wrote to Orr, copied to Wilson, advising that ONC had heard nothing further from Matthews and the company needed to formally follow up. He asked Orr whether he had spoken with Matthews. John Risley e-mailed the other directors to inform them that Matthews had resigned, and noted:

> This is bad news as he may well be going to a competitor who may have offered to make him whole in respect of his LTIP. I spoke to him on the week-end and he is very unhappy with how he feels he has been treated. He has agreed to come and see me tomorrow so I'll know more then.
>
> He is a crucial component for building both the API and the bio-fuel plant.

[265] Risley forwarded his e-mail to Robert Orr, telling him to ask Matthews to come talk with them the next morning. Orr replied that he had spoken with Matthews that morning and asked if Risley was available for a meeting or phone call. Later that day, Daniel Emond sent an e-mail to all ONC employees announcing Matthews' resignation. Orr forwarded the e-mail to Matthews.

[266] Robert Orr and John Risley arranged to meet Matthews at 9 am on June 29, 2011, at the Sunnyside Restaurant in Bedford. Orr summarized the meeting in an e-mail to Martin Jamieson and Craig Wilson sent that night:

> Martin/Craig
>
> I was not able to meet with Craig face to face today – so in summary – here is the outcome of the meeting between John, Dave M. and myself, that took place this morning.
>
> 1) Dave remains quite emotional about his departure from ONC, about leaving after 14 years of building the company and about what he perceives to be the poor manner in which he was treated over the last couple of years. As a result

> he remains somewhat "stuck in this unpleasant past" and has some difficulty focusing on "what is next" – career wise – and is having a tough time rationally think [*sic*] through his various options.
>
> 2) Dave has been in discussion with another company but says he has not signed on to do anything at this point. (we do not know who this is)
> 3) Bottom line is he needs some time.
> 4) We agreed that he will take the next 10 to 14 days to try and actually put the past behind him. He wants to be away from the business for some days – do some work on his house and farm, clear his mind and then evaluate his options.
> 5) We think this is a very sensible approach and we all agreed that he will come back to us some time in the next 2 weeks with his thoughts on how we might all move forward together and determine if he can merge his personal objectives and motivations in some way with the API project.
> 6) He is not going to a new job over the next few weeks and so there is no real risk to us in the short term. It is probably best if we can refrain from sending any correspondence or legal documentation to Dave during this time – until he decides on his course of action and next steps in his career. He will not under any circumstances be returning to ONC but we think we can find an amicable and mutually satisfactory closure to the ONC situation. Perhaps Craig and I can discuss the implications for this for ONC, tomorrow (Thursday).
>
> Please let me know if you have any questions or comments.
>
> Robert

[267] Dave Matthews testified that he never told Orr or Risley that he had not signed on with another company. He told them he was moving on, which he considered to be the extent of his obligation. He said he did not lie, and that he made no promises to them.

[268] Craig Wilson replied to Orr, agreeing not to send any company correspondence to Matthews for the time being. He noted that since Matthews' departure, several employees had reported that Matthews had approached them and solicited them to work at MARA – another company owned by John Risley – and/or the API company. Wilson described this as "quite concerning."

[269] On July 6, 2011, Robert Orr sent an e-mail to Dave Matthews, copied to John Risley, with the subject "Formal Proposals." Orr noted that he had realized over the weekend that Matthews did not have a formal written offer from either the new company, recently registered and known as Slanmhor, or from CFFI. He went on to outline four proposals for Matthews.

[270] The first option was for Matthews to join Slanmhor as COO and report to Robert Orr as CEO. He would also be the General Manager of the JV Newco (Slanmhor and Biovectra). Under this option, Matthews would receive an annual salary of $200,000, and a signing bonus of $500,000, with the only condition being that he stay with the company for at least two years. Matthews would also be entitled to a performance bonus of $1 million on completion of the building and start up of the plant.

[271] The second option was that Matthews would be hired by CFFI as an independent contractor for a period of two years to act as the General Contractor and be responsible for leading the design, building and start-up of the API plant. CFFI would pay a signing bonus of $250,000. The contract would pay Matthews $18,000 per month plus expenses, and on successful completion and start up of the API plant he would receive a completion bonus of $750,000.

[272] The third option was that Matthews would become an employee of Omthera.[2] Orr noted that, "[w]hile it is not our position to make an offer to you on Omthera's behalf, the offer would likely be similar to the one offered by Slanmhor."

[273] The fourth and final option was that Matthews would enter into a short term transition contract, which Orr described as follows:

> 1) We are aware that you are in discussions with another company and contemplating joining their organization on August 1, 2011.
> 2) In the event that you find all of the Options, 1 through 3 above, unacceptable to you; we would propose to enter into a 4 month services contract with you. During that time you would support Slanmhor and CFFI with the design, layout and planning of the new API facility and assist in an advisory capacity to Slanmhor in the hiring of appropriate engineering, construction management and plant personnel to ensure successful completion of the project.
> 3) Slanmhor would pay for these services at a rate of $35,000.00 per month, plus expenses.
> 4) You would obviously have to negotiate some time availability with your new employer to complete this contract.

[2]Matthews gave evidence that he would not have considered working for Omthera due to the company's close relationship with ONC and its lack of a manufacturing site. He said working with Omthera would require him to visit the ONC plant, take in the product, and do the inspections.

[274] Dave Matthews did not respond to this e-mail. On July 11, 2011, John Risley received a letter from Matthews' lawyer saying he was prepared to act as a consultant to Slanmhor for four months at $60,000 per month.

[275] On August 9, 2011, while acting as a consultant to Slanmhor, Matthews filed this application against ONC. Although Robert Orr tried to convince him to drop the lawsuit, Matthews refused.

[276] Matthews received approximately $190,000 for his consulting work, rather than the full $240,000, because the deal with ONC to assign the Omthera contract to Slanmhor fell apart in November before the end of the four-month term. Much to Robert Orr's disappointment, ONC chose to assign the Omthera contract to a competitor.

The sale of ONC

[277] On May 18, 2012, DSM and ONC both issued press releases announcing that DSM had purchased ONC for a total enterprise value of $540 million. The net equity value was $454,757,344. On July 19, 2012, DSM announced that it had successfully completed the acquisition of ONC.

Credibility and findings of fact

[278] Before setting out my findings of fact, I will briefly comment on the credibility of several key witnesses. In *Bocaneala v. Liberatore*, 2013 NSSC 372, [2013] N.S.J. No. 609, Warner J. provided a useful summary of the tools courts use to assess credibility:

> **33** To assist in the assessment of credibility courts have approved many tools. I have done so in several decisions … Among the tools used are:
>
> > i) a consideration of the motives that witnesses may have to give the evidence as they do;

> ii) the consistency or inconsistency over time between the witness's different iterations of the facts, and internal inconsistencies within a witness's testimony;
>
> iii) the presence of collaborative or supporting evidence;
>
> iv) the demeanor or the manner of giving evidence, but with caution; and,
>
> v) above all, the court has to assess what appears to make common sense; in that regard, this Court notes the words of Justice O'Halloran of the British Columbia Court of Appeal in *Faryna* v. *Chorny*, [1951] B.C.J. No. 152, 1951 CarswellBC 133, at paragraphs 9 and 10:
>
> > If a trial judge's finding of credibility is to be depend solely on which person he thinks makes the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and just would then depend upon the best actors in the witness box ... . the appearance of telling the truth is but one of the elements ... . Opportunities for knowledge, powers of observation, judgment, memory, ability to describe clearly what the witness has seen or heard, as well as other factors, combine to produce what is called credibility ... . The credibility of interested witnesses, that is ... cannot be gauged solely by the test of whether the personal demeanor of particular witness carried conviction of the truth.
>
> The key passage is this:
>
> > The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of truth of the story of a witness in such a case must be its harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.
>
> **34** It is not required that a trier of fact believes or disbelieves a witness's evidence in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and attach different weight to different parts of it.

[279] Although he was occasionally evasive and emotional on cross-examination, Dave Matthews was, on the whole, a credible and reliable witness. Critical aspects of his evidence were corroborated by the documents and other witnesses whom I considered credible. I accept most of Matthews' evidence.

[280] Robert Orr was not interested in participating in this proceeding and gave his testimony under subpoena. He was an impressive witness whose testimony was straightforward, sincere and convincing. Although he holds Dave Matthews in

high regard, Mr. Orr's evidence was fair and unbiased. He was, in my estimation, a reliable and truthful witness.

[281] Daniel Emond was, to say the least, an unsatisfactory witness. His testimony was self-serving and deceitful. Defensive and evasive on cross-examination, Mr. Emond's unwillingness to concede even the most minor points severely undermined his overall credibility. The two most striking examples of this were his refusal to concede that Matthews was instrumental in getting the plant in Peru up and running, and that PCB reduction was an important issue for ONC.

[282] Emond's testimony often conflicted with other, more reliable evidence. For example, his evidence that Mr. Matthews' responsibility for the Arcadia plant ended when he became VP Engineering and Technical Services conflicted with the PowerPoint presentation he himself prepared that included an announcement of Matthews' new position. Other portions of his evidence, including his testimony that Matthews declined repeated invitations to attend the grand opening in Peru, were entirely implausible. Where Emond's evidence diverges from that of other witnesses or the documentary evidence, I do not accept it.

[283] Martin Jamieson was a polished and articulate witness. While portions of his testimony were helpful to the court in understanding ONC's products and initiatives, his evidence on the key issues of this application was of questionable reliability. His credibility was weakened by the e-mail he sent to Stanley Spavold on June 1, 2011, which, for some reason, was not produced when he searched his computer for relevant documents. On cross-examination, Jamieson emphasized that the NET Department review was intended only to help him understand its function and contribution, and to determine whether, from an organizational standpoint, the "mini-department" was the best vehicle for executing projects like the algal oil initiative and the "super critical CO2" work. He stressed that neither Dave Matthews' place in the company, nor his leadership, was under review. In his e-mail to Mr. Spavold, however, Jamieson stated, "Dave Matthews wants to leave and has approached me on the subject (you will recall we already had him and his mini department under review)." In my view, this e-mail suggests that Matthews' departure from ONC was a possible consequence of the review.

[284] I was also unimpressed by Martin Jamieson's evidence concerning the NET Department's role within ONC. He said Matthews' claim that he did not have enough work to do "beggars belief", because Matthews was responsible as VP NET to set his own agenda and to always be innovating and searching out

"newness." He confidently described the position as "a very privileged and senior role where the expectation of the individual is to be a self-starter, to create, to go to areas where the company has previously not gone." He then conceded that he was not with ONC at the time the position was created, had no involvement in drafting the job description and had not, at any time, informed Matthews of his expectations for the role or the NET Department in general.

[285] Stanley Spavold's evidence was entered by way of discovery excerpts. As a result of the applicant's surprising last-minute decision not to cross-examine him, the court must assess his credibility without having observed him on the stand. This is obviously not ideal.

[286] It is clear from his evidence that Mr. Spavold liked and respected Daniel Emond during his time at ONC, and believed Emond would not deliberately lie or misstate information. While that may have been Spavold's impression of Emond, it is inconsistent with other, more convincing evidence in this proceeding, and with my own assessment of Emond's credibility.

[287] Mr. Spavold's evidence reveals a significant animosity toward Dave Matthews. On April 13, 2012, three years before his discovery, Spavold sent the following "reply all" to an e-mail from Martin Jamieson updating members of the Board and the Executive Leadership Team on this litigation:

> This guy is a total and complete asshole, has been for years..since my involvement in 2002 anyway…kept moving him around in the organization to use his skills while preventing damage to almost everything he managed. ..has caused so much damage to ONC over the years in terms of operational issues. ..could not bring a project in under budget or on schedule ….. he may know oil processing but he is basically incompetent at everything else. I think it is time to start to be nasty back and start to sue Mr Matthews for his breaches of his agreement and damages.

[288] Mr. Spavold's contempt for Mr. Matthews was evident on discovery. He described Matthews' claim that he invented fractional distillation as a "bullshit statement" that "would have teed a few people off." He said that Matthews "was a very poor manager and motivator of people. He doesn't work well with people. He doesn't work well within an organization. He doesn't work well with peers, supervisors or employees. He's a very very poor people person." Spavold also described Matthews as a "disruptive" person who "wouldn't follow company policy", "a lone wolf in the organization that didn't want to evolve with the company", and "a very smart guy with very limited HR and management skills."

[289] It is difficult to reconcile Mr. Spavold's description of Mr. Matthews and the contents of his e-mail with the uncontested evidence that John Risley and Robert Orr were anxious to hire Matthews to work in their new company, and that the President and CEO of Omthera tried to hire him as soon as he learned that Matthews had left ONC. Clearly these individuals did not share Mr. Spavold's opinion of Matthews' personality or skillset. The comment by Spavold that Matthews "could not bring a project in under budget or on schedule" is inconsistent with the evidence that Matthews got the Alicorp facility producing on schedule. Although Daniel Emond refused to say that Matthews was a "significant contributor" to the plant's start, even he could not deny that the plant began production on time after Matthews was sent to Peru.

[290] In light of the above, I do not find Mr. Spavold's evidence in relation to Daniel Emond and Dave Matthews as reliable as other evidence, including that of Robert Orr, and, in some cases, Matthews himself.

[291] I will now set out my findings of fact. I accept Robert Orr's evidence that Dave Matthews is one of only a handful of individuals in the world who can build and operate large-scale omega 3 plants and who understands the nuances of these plants. I find that without Matthews and his innovative fractional distillation process, ONC would never have become the company DSM purchased in 2012 for an enterprise value of $540 million. His involvement in the company was critical to ONC's success.

[292] I find that Matthews is an individual whose sense of identity and self-worth is highly connected to his work. He is a person who values honesty and integrity, and is willing to work hard in exchange for fair treatment and respect. I find that while CFFI was ONC's sole shareholder, Matthews felt respected within the organization. Although he had his idiosyncrasies, ONC recognized his value to the company. The situation changed, however, with the involvement of Richardson Capital, and the accompanying shift in focus toward the sale of the company.

[293] Richardson became an ONC shareholder in October 2005 when it acquired 22.5 percent of the company's shares. In October 2007, Richardson acquired a further 2.5 percent. Finally, on July 31, 2009, Richardson increased its shareholdings to 45 percent. Although CFFI remained the majority shareholder, I accept Robert Orr's evidence that Richardson held a number of significant vetoes that allowed it to make most of the key decisions.

[294] Daniel Emond was hired as COO in June 2007, and became Matthews' boss. While Matthews was supportive of the decision to hire Emond, friction quickly developed between them. I find that Emond did not like Dave Matthews and did not consider him to be a valuable asset to the company. While there is some evidence that Matthews' personality was not to everyone's taste, the reason for Emond's antipathy toward him is irrelevant to the issues in this application.

[295] In September 2007, Dave Matthews and ONC entered into an LTIP agreement. I accept Robert Orr's evidence that ONC contemplated a sale of the company in the foreseeable future and the LTIP was intended to both compensate Matthews for his previous contributions and to give him an incentive to stay with ONC and continue contributing to its success. I find that the LTIP was a key reason Matthews stayed with ONC after 2007, and likely the primary reason he stayed once his problems with Daniel Emond began. I accept Craig Wilson's evidence that the LTIP he signed in 2011 helped offset the risks inherent in accepting a position with a jointly-owned, privately-held company.

[296] I find that Daniel Emond's decision in October 2007 to make Matthews the VP Technical Services and Engineering was the first step in a campaign to push Matthews out of operations and minimize his influence at ONC. This was followed shortly thereafter by Emond's acquisition of the S-5 equipment – which I find was directly within Matthews' area of responsibility – and an attempt by Emond to transfer oversight of the Arcadia plant from Matthews to Paul Empey. I find that Emond lied to Robert Orr when he denied that he planned to have Empey take over at Arcadia. I accept Mr. Empey's evidence that Emond said he was close to Mr. Risley and the Richardson group, that Matthews and Orr would not be around much longer, and that his goal was to have Empey run all of the operations at ONC.

[297] Emond's next step was to exclude Dave Matthews from the Alicorp initiative in Peru. I find that when it became clear that Alicorp could not complete the project on time, Robert Orr, not Daniel Emond, directed Matthews to go to Peru to fix the situation. Contrary to Emond's evidence, I find that Matthews was instrumental in getting the plant up and running on time. Notwithstanding the critical role Matthews played in making the Alicorp initiative a success, I find that Emond did not invite him to the facility's grand opening until Orr intervened.

[298] I accept Matthews' evidence that in January or February 2009, Daniel Emond went behind his back and tried to change the Technical Services reporting

structure. I find that when confronted in front of Robert Orr, Emond lied, denying that he met with Sharon Spurvey.

[299] In March 2009, the Mulgrave fire occurred. In my view, the documentary evidence proves that Daniel Emond contacted Dave Matthews at the earliest reasonable time to inform him and others of the fire, and that Matthews received and responded to this correspondence on the same day it was sent. That said, I find that Emond ignored Matthews' request to speak with him when he visited the facility and Matthews' phone calls during Emond's drive back to Halifax.

[300] I accept Matthews' evidence that upon his return to ONC's offices, he wrote a resignation letter that informed Emond of his view that Emond had been progressively removing his responsibilities and refusing to consult with him. I reject Emond's evidence that Matthews was upset because he felt responsible for the fire. I find that Emond was reluctant to tell Robert Orr about the letter. I further find that Orr was frustrated with Emond for his role in Matthews' resignation and his failure to immediately inform Orr of what had transpired. I accept Orr's evidence that Emond's communication skills and dishonesty were a recurring source of tension between them while Orr was CEO.

[301] I find that Daniel Emond did not respond to Dave Matthews' resignation letter until June 17, 2009, when he gave him the letter formally offering him the algal oil position. I do not attribute this offer to a newfound respect or appreciation for Matthews, but to Emond's desire to protect his own position within the company. I find that Emond's use of the word "honest" in the letter was intended to mean exactly that, with the implication being that he had been dishonest with Matthews in the past.

[302] I find that Matthews drafted the job description for the position of "VP New and Emerging Technologies," a name which was selected over VP Algal in order to avoid alerting competitors to ONC's interest in algal. Nothing in the job description required Matthews to set his own agenda and seek out new technologies unrelated to the algal organism.

[303] I accept Robert Orr's evidence that, prior to his stepping down as CEO, an agreement was reached at the Board level that Daniel Emond would be terminated. I find that Emond's employment was not severed at that time because the Board members from Richardson were reluctant to have two senior management seats empty at the same time.

[304] Martin Jamieson joined ONC as CEO in July 2010. At that time, Robert Orr stepped away from running the company and became Chair of the Board of Directors. I accept Orr's evidence that ONC had been looking to sell the company since at least 2008, that several potential takeovers had subsequently fallen apart during due diligence, and that the sale of ONC remained the company's goal in 2010. I find that the Board of Director's primary motive for bringing Jamieson in as CEO was to make the company more attractive for purchase.

[305] In October 2010, DSM began the due diligence process. Around the same time, the Board began reconsidering the future of the algal fermentation program, ultimately opting to wind down the bio-fuel consortium and license the algal organism for food and bio-fuel use. I find that Matthews was not informed of the discussions, nor was he asked to participate. Although I find that the decision was motivated by legitimate business considerations, the claim that Matthews should not have been consulted, even as a matter of professional courtesy, is dubious. I accept Matthews' evidence that the Board's decision effectively ended his position, removing all but ten to twenty percent of his responsibilities in terms of time.

[306] While the Board was making a decision about the algal program's future, Dave Matthews was asked to travel to Germany to assist Charles Perez in a patent lawsuit. I accept that on his return in November, Daniel Emond asked him to take the lead on ONC's PCB reduction efforts, which, as ONC stipulated during the hearing, were important to the company from both a financial and a quality perspective. I find that Matthews was also asked to take Thomas Herbrig on a tour of DP2 which, unbeknownst to Matthews, was part of DSM's initial due diligence. The decision to keep Matthews in the dark was made by Jamieson and the Board. I find that until Jamieson's arrival, Matthews had been involved in every potential takeover of the company.

[307] In preparation for the December 2010 Board meeting, Martin Jamieson drafted an Organizational Development Plan which contained the notation, "Emerging Technologies Department under Dave Matthew's [*sic*] leadership – under review." I find that, contrary to Jamieson's evidence, this review concerned the value to ONC of both the NET Department and Dave Matthews himself.

[308] I accept Robert Orr's testimony that Daniel Emond made a presentation to the Board in or around December 2010 that included a recommendation to disband the NET Department, and, in response to a question from Orr, said that there would be no place in the organization for its employees, including Matthews. I accept

that the Board never voted upon or passed a resolution regarding Dave Matthews, but I find that disbanding the NET Department was raised by management as a possible means of maximizing performance and profitability. Although Orr could not recall whether he told Matthews about this recommendation, I accept Matthews' evidence that Orr did tell him at some point in early 2011.

[309] I find that on January 17, 2011, in an e-mail exchange with Megan Harris and James McCallum, Martin Jamieson identified the senior team members who would eventually become "insiders" in relation to the potential sale to DSM. This list did not include Matthews, who had built the plants, but did include David Elder, who had taken over responsibility for the Engineering Department when Matthews became VP NET. I do not accept Jamieson's evidence that Matthews was excluded because his expertise was "not necessary to the likely issues raised in a sale purchase process." His expertise had been considered necessary when he was asked to show Thomas Herbrig around DP2 under the guise of an ordinary customer inquiry, and, as discussed below, when Emond needed information about industrial spray dryers. I find that Matthews was intentionally excluded from the insiders list because Jamieson did not want him involved. I further find that, as a matter of common sense, Matthews' lack of involvement would hamper his ability to form a relationship with DSM, a company that both Daniel Emond and Martin Jamieson continued to work for after its acquisition of ONC in 2012. Mr. Emond was still employed with DSM at the time of this hearing.

[310] In February 2011, Daniel Emond approached Matthews with a question about ONC's industrial spray dryers. I find that, contrary to what Emond told Matthews, this question was part of the due diligence process, and that Matthews recognized this from past experience. I find that during this conversation, Matthews told Emond that he did not have enough work to do, and that this was not the first time he had done so. Emond did not offer any options to increase Matthews' workload.

[311] On February 18, 2011, Matthews decided to confront Daniel Emond about what he had been told by Orr about Emond wanting to get rid of him. I find that Matthews asked if he was part of "the restructuring." He told Emond that he wanted to stay with the company, that he believed the company was going to be sold and he wanted to realize on his LTIP. Emond told Matthews that there were no plans to terminate him, and when Matthews asked what ONC's plan was for him, Emond responded, "I don't know."

[312] Also in February 2011, Dave Matthews was first contacted by CT Partners, a search agency, on behalf of TASA. By April, Matthews had participated in an interview with the agency and discussions were being scheduled between Matthews and TASA. Matthews traveled to Peru on May 3, returning on May 5. I find that he did not make any formal commitments to TASA at that time.

[313] On May 26, 2011, Daniel Emond e-mailed Dave Matthews to tell him that he was giving the lead on PCB reduction to David Elder. I do not accept Emond's evidence that the transfer to operations was simply a logical transition. I find that the loss of PCB reduction duties left Matthews with one to two hours of work per day. I accept Matthews' evidence that from December 2010 to May 2011, he was spending seventy percent of his time on PCB reduction, ten percent on API, and twenty percent on algal oil, and that from May 1 to May 26, he was spending ten percent of his time on algal oil and ten percent on API. I do not accept Emond's evidence that Matthews was working almost full time on API.

[314] In relation to API, I find that ONC's relationship with Robert Orr began to deteriorate when Jamieson took over as CEO and Orr began to focus almost entirely on API. I find that API was not part of the company's core business, and those employees who were assisting Orr with this venture, including Matthews, were viewed in a negative light within the company, even though they did the work with ONC's knowledge and permission. I find that Matthews and Orr became progressively more ostracized within the company.

[315] I find that as of May 26, 2011, Dave Matthews had never been formally offered a position with the proposed API company, nor had he made a commitment to join Robert Orr in this venture. I find that he was reluctant to tell Orr, a man for whom he had great respect, that he had no interest in API. He preferred to say only that he did not want to live in PEI, and that Richardson would never allow the business to go ahead (a prediction that ultimately proved to be correct).

[316] While Matthews could have been more direct with Orr, I find that Orr was a difficult man to say no to, and his assumptions kept him from seeing the writing on the wall. He disregarded what Matthews was actually telling him and assumed he could convince him to join the company once it came into existence.

[317] I find that neither Jamieson nor Emond was particularly concerned about where Matthews was going to end up. Until Matthews came to see him to say he was leaving ONC, Jamieson had little interest in the relationship between Matthews and Emond. Matthews was Emond's responsibility, and Jamieson had

bigger fish to fry, so to speak. I find that Jamieson simply assumed, based on conversations with Robert Orr, that Matthews would follow Orr into API (whether inside or outside ONC) and took no steps, including speaking with Matthews or Emond, to confirm whether this was indeed the case. I find that Emond, for his part, generally avoided dealing with Matthews – even where consulting Matthews would have been in ONC's best interest – and had already told Matthews that he did not know what ONC's plan was for him. In my view, Emond had no qualms about leaving Matthews in a state of anxiety about his future.

[318] On May 27, 2011, I find that Matthews made it clear to Jamieson that he had no plans to go with API, expressed his view that he was being constructively dismissed, and asked Jamieson whether the company planned to get rid of him. Jamieson told him that there were no plans to terminate him. Jamieson asked Matthews to meet with Craig Wilson to discuss the matter more formally.

[319] I find that when Matthews went into the meeting with Wilson on May 31, 2011, he was still open to the possibility that the situation could be resolved. Before long, however, the conversation shifted to Matthews leaving the company. I am satisfied that Wilson's notes accurately reflect the content of the discussion. I find that Matthews told Wilson that he was on a list to be terminated at the end of June. Matthews gave evidence that Robert Orr told him this in June during a meeting to work on the API presentation. Robert Orr testified that he did not tell Matthews that he would be terminated on a specific date, but recalled saying that it was likely that neither he nor Matthews would be at ONC after June. Orr believed he said this to Matthews in late spring 2011. The fact that Matthews told Wilson on May 31 that he was going to be terminated at the end of June, coupled with his having asked Martin Jamieson on May 27 whether ONC planned to fire him, leads me to conclude that Orr said this to Matthews at some point prior to Emond removing responsibility for PCB reduction from Matthews on May 26, 2011.

[320] Both parties left the meeting agreeing to reconvene at a later date. Wilson briefed Jamieson, and I find that both men understood that Matthews was determined to leave the company. Wilson asked Jamieson about the valuation issue, and Jamieson gave him the $200 million figure for the reasons he outlined in his affidavit and on cross-examination. Meanwhile, Matthews continued to communicate with TASA, making revisions to a proposed employment contract. He also met with John Risley. I accept Matthews' evidence that Risley did not explicitly promise to ensure that Matthews was treated fairly, even if this was his intention.

[321] Craig Wilson and Dave Matthews met again on June 16, 2011. Again, I accept that Wilson's notes accurately reflect their discussion. Later that day, Orr gave a presentation to the Board that showed Matthews as COO of the new API business. I find that Matthews did not agree to the slide and, immediately after the presentation, asked Orr to remove his name and told him he was not going to PEI. Matthews then went to see Daniel Emond and told him that he did not want to be involved in the API business and did not want to live in PEI. I find that Jamieson was confused by the presentation and e-mailed Matthews for clarification. Matthews did not respond.

[322] On June 20, 2011, Dave Matthews and his wife flew to Peru. The next day, Orr e-mailed Matthews telling him that Jamieson had sent a letter recommending that API and JVNewco be transferred to CFFI as soon as possible. On Wednesday, June 22, Matthews signed the contract with TASA and flew back to Nova Scotia. I accept that Matthews did not see Orr's e-mail until he returned from Peru. On June 24, 2011, Matthews resigned from ONC. I find that Orr was not aware of Matthews' intention to resign.

[323] I find that Dave Matthews met with Robert Orr and John Risley on June 29, 2011, at the Sunnyside restaurant in Bedford. Matthews' options for the future were discussed, but he made no commitment to Orr or Risley, saying only that he was moving on. On July 6, 2011, Orr e-mailed Matthews four formal proposals. Matthews did not reply to the e-mail, but sent a letter through his lawyer on July 11, 2011, proposing to act as a consultant to Slanmhor for four months at $60,000 per month.

[324] Matthews began working for TASA on August 1, 2011. On August 9, he filed this application against ONC. In addition to working for TASA, Matthews worked as a consultant to Slanmhor until November, when the deal with ONC collapsed. He earned $190,000 for his consulting work.

[325] 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, 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 involving Martin Jamieson and the Board to get rid of Matthews in order to deprive him of his LTIP entitlement.

[326] I find that DSM and ONC announced on May 18, 2012, that DSM had purchased ONC for a total enterprise value of $540 million. I accept Martin

Jamieson's evidence that the value of the company had increased considerably following ONC's acquisition of an Alicorp facility in early 2012, after Matthews' departure. On July 19, 2012, DSM announced that it had successfully completed the acquisition of ONC. I accept Jamieson's evidence that July 18, 2012, was treated as the date of the "realization event" within ONC for the purposes of the LTIP agreements.

Analysis

[327] In *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] S.C.J. No. 10, Wagner J., for the majority, described the doctrine of constructive dismissal:

> **30** When an employer's conduct evinces an intention no longer to be bound by the employment contract, the employee has the choice of either accepting that conduct or changes made by the employer, or treating the conduct or changes as a repudiation of the contract by the employer and suing for wrongful dismissal. … Since the employee has not been formally dismissed, the employer's act is referred to as "constructive dismissal". The word "constructive" indicates that the dismissal is a legal construct: the employer's act is treated as a dismissal because of the way it is characterized by the law …

[328] The question to be answered in this proceeding is whether ONC's conduct evinced an intention to no longer be bound by its employment contract with Dave Matthews. The burden is on Mr. Matthews to establish that he was constructively dismissed. Determining whether an employee has been constructively dismissed is a highly fact-driven exercise that requires a flexible approach: *Potter*, at paras 32 and 40.

[329] The test for constructive dismissal has two branches, either of which may establish liability. Under the first branch, the employee must identify a single unilateral act by the employer that breached an essential term of the contract. The act must be detrimental to the employee. Under the second branch, the employee must identify a series of acts that, taken together, show that the employer no longer intended to be bound by the employment contract: *Potter*, at para. 43.

[330] The first branch has two steps. At the first step, the court determines, on an objective standard, whether the employer has unilaterally changed the contract of

employment. Where an express or implied term authorizes the employer to make the change, or an employee consents or acquiesces in it, the change is not unilateral and cannot amount to a breach: *Potter*, at para. 37. "Often, the first step of the test will require little analysis, as the breach will be obvious": *Potter*, at para 34. At this step, the court may consider evidence not known to the employee: *Potter*, at para 64.

[331] Once a breach has been established, the court moves on to the second step of the first branch. Under this step, the court, applying a modified objective standard, asks whether a reasonable person in the same situation as the employee would feel that the essential terms of the contract had been substantially changed: *Potter*, at para 39. Because the perspective at this step is that of a reasonable person in the same circumstances as the employee, the employer's actual intention is irrelevant. For the same reason, the court may only consider evidence known to the employee at the time of the breach: *Potter*, at para 63.

[332] The second branch of the test does not require the employee to identify a specific breach of a substantial term of the contract. As Wagner J. explained:

> 42 The second branch of the test for constructive dismissal necessarily requires a different approach. In cases in which this branch of the test applies, constructive dismissal consists of conduct that, when viewed in the light of all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract. …

[333] Dave Matthews argues that ONC's "unilateral withdrawal of substantial responsibilities" from him meets the test for constructive dismissal under both branches. ONC says there is no evidence to support Matthews' claim that Emond was taking responsibilities away from him with a view to causing his constructive dismissal. It says Matthews voluntarily resigned in order to work for a competitor.

[334] It is well established that the reduction of an employee's responsibilities can constitute constructive dismissal. The seminal text, *Quitting for Good Reason, The Law of Constructive Dismissal In Canada* by Randall S. Echlin (now Justice Echlin) and Jennifer M. Fantini, (Aurora: Canada Law Book, 2001) states at pages 246-247:

> (a) Reduced Responsibilities
>
> A demotion is often characterized by reduced or narrowed responsibilities, or a gradual dilution of job duties. In many cases, reduced responsibilities are accompanied by a change in the employee's overall remuneration or the method

> by which the employee is remunerated. Reduced responsibilities need not be accompanied by a pay loss to result in a finding of fundamental breach. … Reduced responsibilities may alter an employee's status, though this is not required for a finding of demotion, where responsibilities have been reduced. A diminution or dilution of an employee's responsibilities, in itself, is enough to trigger a constructive dismissal.

See also: *Schumacher v. Toronto-Dominion Bank*, [1997] O.J. No. 2004, aff'd [1999] O.J. No. 1772 (Ont. C.A.), leave to appeal denied [1999] S.C.C.A. No. 369; *Johnston v. Household Financial Corp.*, [1997] OJ No 2368, 1997 CarswellOnt 254 (Ont. Sup. Ct. J.), and Peter Barnacle and Michael Lynk, *Employment Law in Canada* (Toronto: LexisNexis, loose-leaf, updated to 2016), vol. II, at §13.42.

[335] In order to determine whether the reduction in Matthews' responsibilities was a unilateral change to the contract, I must consider whether an express or implied term of the employment contract authorized ONC to make the change.

[336] The parties agree that the only written contract between them was executed in 1997 when Matthews joined Laer as Operations Manager. In late 2009 and early 2010, Emond and Matthews exchanged several versions of a draft employment contract for the VP NET position, but the document was never executed. As a result, the terms of the contract must be implied based on the nature and history of the relationship between the parties.

[337] I find that it was an implied term of the contract that ONC was entitled to adjust Mr. Matthews' duties and responsibilities at various times in accordance with the company's needs and best interests. Put another way, I accept ONC's statement in its post-trial brief that, "it was never implied to Matthews, under either the terms of his employment contract, job description or otherwise, that he would maintain his current role in any particular project in perpetuity." However, it was also an implied term that Matthews would be assigned work "which is substantially similar in terms of job duties, pay, responsibility and status to that which he … was hired to perform under the employment contract": *Employment Law in Canada*, vol. I, at §13.42.

[338] During his tenure at ONC, Matthews was regularly brought in to oversee new and existing projects when his involvement was considered to be in the company's best interests. Two features distinguish the removal of responsibility for PCB reduction on May 26, 2011, from these earlier changes. First, removal of

PCB reduction left Matthews with only one to two hours of work per day. There is no evidence that Matthews' duties had ever been reduced to this extent. Second, removal of PCB reduction – which ONC conceded was important to the company – left Matthews in a very different position in terms of duties and status within the company. The only two areas of responsibility that he had left were considered "non-core" elements of the company's business.

[339] In *Potter*, the Supreme Court of Canada clarified the law concerning an employer's authority to withhold work. Although the Court's comments were in the context of an administrative suspension, they are of general application. Historically there was no general common law duty on an employer to provide work, except where the employee's remuneration was by commission or the employee derived a reputational benefit from the performance of his or her work: *Potter*, para. 76. Wagner J. emphasized that this approach has been overtaken by modern developments in employment law:

> 83 Work is now considered to be "one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being" (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 368). Thus, it is clear that the benefits derived from performing work are not limited to monetary and reputational benefits. Although I accept that employees who receive earnings from commissions or who derive a reputational benefit from the performance of their work are placed at a particular disadvantage should their employers refuse to provide them with work and that this justifies finding that an obligation to provide work is implied in the contract, I would caution against assuming that the converse is also true, namely that workers who are not included in those narrow categories derive no benefit whatsoever from the performance of their work and that their employers therefore have an unfettered discretion to suspend them with pay. Is it really the case that a president and CEO has, by virtue of his or her reputation, an implied right to work, whereas an administrative assistant, because his or her reputation is not valued, lacks any such right?
>
> 84 In my view, the trial judge, in taking this category-based approach, on which the Commission relies, paid insufficient attention to the role of proportionality and balancing in modern employment law: *McKinley*, at para. 53. Even at common law, where the employer is not under a general obligation to provide work, the employer may not withhold work in bad faith or without justification. It may reduce an employee's workload or abolish his or her position for legitimate business reasons, as was done in *Suleman*, in which the employee's workload was reduced pending her termination owing to a shortage of work. However, I reject the proposition that an employer can refuse to provide work to an employee to

> whom the exceptions discussed above do not apply … for just any reason. That would undermine the non-monetary benefit all workers may in fact derive from the performance of their work. It would also be inconsistent with the employer's duty of good faith and fair dealing that has been gaining acceptance at common law . …

[340] When Daniel Emond removed PCB reduction from Dave Matthews' duties, there was no indication that additional work was forthcoming. To the contrary, Emond had told Matthews in February 2011 that he did not know what ONC's plan was for him going forward, and he had ignored Matthews' requests for more work. There had been no formal offer extended to Matthews to join the new API company – whether inside or outside ONC – and neither Emond nor Martin Jamieson had ever spoken with Matthews to determine whether he was interested in joining the API company.

[341] Despite being his immediate supervisor, Emond avoided communicating with Matthews whenever he could get away with it. For his part, Martin Jamieson relied on Robert Orr's belief that Matthews would follow him into API, notwithstanding that Orr was no longer involved in the day-to-day operations of the company and was not responsible for determining Matthews' future with ONC. As ONC's counsel noted during Matthews' cross-examination, "[Orr] wasn't running the operations any longer. He wasn't making the decisions on employees." This fundamental breakdown in communication left Matthews in a prolonged state of anxiety and uncertainty about his future.

[342] Were Matthews' responsibilities reduced for legitimate business reasons? I did not accept Daniel Emond's testimony that the transfer of responsibility for the PCB reduction to David Elder was a logical transition. Nor was I persuaded by Martin Jamieson's reiteration of that position. However, even if I had accepted that it was an appropriate time to transfer PCB reduction to Mr. Elder, there is no evidence of a legitimate business reason for Emond's failure to give Matthews reasonable notice of his intentions and to suggest additional work before removing him from the PCB project.

[343] I am satisfied that Daniel Emond, on behalf of ONC, was not authorized by any implied term of the employment contract to reduce Dave Matthews' responsibilities so substantially without reasonable notice and a proposal of alternate work that was substantially similar in terms of duties, responsibility and status. There was no evidence that Dave Matthews acquiesced to the reduction in

his responsibilities. As a result, I conclude that ONC made a unilateral change amounting to a breach of the employment contract.

[344] At the second step of the first branch of the constructive dismissal test, the court must consider whether a reasonable person in the same situation as Dave Matthews would feel that the essential terms of the contract had been substantially changed. Whether ONC actually intended to change the essential terms of the contract is irrelevant. I have no difficulty concluding that a reasonable person in Dave Matthews' position would feel that the essential terms of the contract had been substantially changed. Any employee who had previously mentioned to their superior that they could use more work, only to have their workload further reduced to one to two hours per day, without prior consultation or any suggestion that alternate work was forthcoming, would feel that the employer had substantially changed the employment contract. I find that Mr. Matthews has established constructive dismissal under the first branch of the test.

[345] Although I am not obliged to do so, I will now consider whether Dave Matthews has also established constructive dismissal under the second branch of the test. Under this branch, he is not required to point to a single substantial change to the employment contract. Instead, the focus is on whether ONC pursued a course of conduct that demonstrated an intention to no longer be bound by the contract. Such a course of conduct amounts cumulatively to an actual breach. The perspective under this branch is that of a reasonable person in the same circumstances as Mr. Matthews. As such, the court must consider only those facts known to Matthews at the time.

[346] As will be apparent from my findings of fact, Richardson's investment in ONC was accompanied by a shift in focus toward maximizing growth and profitability in order to make the company attractive for sale. Hiring decisions, formerly made by CFFI as ONC's sole shareholder, became a combined effort. Daniel Emond joined ONC in 2007, long after Dave Matthews had made his most significant contributions to the company, and, for whatever reason, he was not impressed by Matthews.

[347] Over the next few years, Daniel Emond engaged in a course of conduct aimed at pushing Matthews out of operations and minimizing his influence and participation in the company. I have outlined these efforts earlier in this decision. Until 2010, Emond's communications with Matthews were monitored to an extent by Robert Orr, who had significant respect for Matthews and considered him to be

an industry-leading resource of significant value to ONC. When Orr stepped down as CEO and Emond began reporting to Martin Jamieson, Matthews lost his only real ally at the company. Emond's communication with Matthews declined in quality and frequency, and Matthews, along with Orr, became increasingly ostracized.

[348] In late 2010, Matthews was informed that the Board had decided to license the algal organism for food and bio-fuel use. Although this decision effectively ended Matthews' position – initially called VP Algal – he was neither aware that changes to the algal fermentation program were being considered, nor was he consulted prior to the decision being made. In early January 2011, Robert Orr, then Chairman of the Board of ONC, told Matthews that a recommendation had been made to the Board to disband the NET Department.

[349] Several weeks later, Matthews' suspicion that ONC was in talks with DSM was confirmed when Emond asked him about the company's industrial spray dryers. Having been involved in other potential takeovers, Matthews knew this question was part of the due diligence process. His offer to assist was rebuffed, with Emond denying that due diligence was even taking place. A reasonable employee in Matthews' position would recognize that he was being excluded from the takeover process, thereby hindering his ability to secure employment with the purchaser in the event that a sale took place. If Matthews had any lingering doubt that DSM was considering purchasing ONC, it was eliminated on February 23, 2011, when he received an e-mail from Robert Orr about DSM's list of critical observations.

[350] During this conversation about due diligence, Matthews told Emond that he did not have enough work to do. This was not the first time Matthews had raised this issue with him. Emond did not offer to find additional work for Matthews.

[351] Also in February 2011, Dave Matthews asked Daniel Emond if he was going to be terminated. Although Emond denied that the company had any plans to terminate Matthews, he said he did not know what ONC's plans were for him.

[352] At some point thereafter, but before May 26, 2011, Robert Orr told Matthews that it was unlikely that either of them would be with ONC after June.

[353] This was the context in which Matthews was operating when he learned from Emond on May 26 that he would no longer have responsibility for PCB reduction. In my view, a reasonable person in Matthews' position would feel that

ONC had engaged in a course of conduct that evinced an intention no longer to be bound by the contract.

[354] Before moving on to consider the appropriate notice period, I wish to emphasize that 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.

Reasonable notice

[355] This court recently summarized the law in relation to the determination of the reasonable notice period in *Bellini v. Ausenco Engineering Alberta Inc*., 2016 NSSC 237, [2016] N.S.J. No. 338:

> 44 The factors in *Bardal v Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. S.C. (H.C.J.) govern the quantification of reasonable notice. These factors are (1) the character of the employment; (2) the length of service of the employee; (3) the employee's age; and (4) the availability of similar employment, having regard to the experience, training, and qualifications of the employee. This analysis has been endorsed by the Nova Scotia Court of Appeal: *Silvester v. Lloyd's Register of North America Inc*., 2004 NSCA 17, [2004] N.S.J. No. 37, at para. 20.
>
> …
>
> 47 There are several approaches in the caselaw to the assessment of the *Bardal* factors. One line of cases in Ontario, such as *Ryshpan v. Burns Fry Ltd.* (1995), 10 C.C.E.L. (2d) 235, [1995] O.J. No. 1132 (Ont. Ct. J. (Gen. Div.), adopted a "rule of thumb" using the formula of one month of notice per year of service as a starting point. This approach was rejected by the Ontario Court of Appeal in *Minott v. O'Shanter Development Co.* (1999), 168 D.L.R. (4th) 270, [1999] O.J. No. 5, where Laskin J.A. said, for the court:
>
> > 71 Those who support the rule of thumb approach to calculating the period of reasonable notice argue that it accords with popular perception, that it is reflected in corporate severance policies, and, most important, that it provides "some predictability and certainty to the calculation ... while at the same time allowing for flexibility by adjusting for various factors."
> >
> > 72 Predictability, consistency and reasonable certainty are obviously desirable goals in employment law - both for employers and for those

> advising employees who have been or are about to be dismissed - a point emphasized by Lacourciere J.A. in his majority reasons in *Cronk* [1994] O.J. No. 1564. These goals, however, are best achieved by a careful weighing and blending of the *Bardal* and other factors relevant to the calculation of reasonable notice, by establishing reasonable ranges for similar cases, recognizing that no two cases are the same, and even by establishing upper limits for particular classes of cases where appropriate.
>
> 73 The rule of thumb approach suffers from two deficiencies: it risks overemphasizing one of the *Bardal* factors, "length of service", at the expense of the others; and it risks undermining the flexibility that is the virtue of the *Bardal* test. The rule of thumb approach seeks to achieve this flexibility by using the other factors to increase or decrease the period of reasonable notice from the starting point measured by length of service. But to be meaningful at all, this approach must still give unnecessary prominence to length of service. Thus, in my opinion, the rule of thumb approach is not warranted in principle, nor is it supported by authority.

> 48 Similarly, in *Capital Pontiac Buick Cadillac GMC Ltd. v. Coppola*, 2013 SKCA 80, [2013] S.J. No. 454, the Saskatchewan Court of Appeal held that a "rule of thumb" approach "is not supported by the jurisprudence and is inconsistent with *Bardal*" (para. 22). The Nova Scotia courts have not addressed this point in detail. In *MacKinnon v. Acadia University*, 2009 NSSC 269, [2009] N.S.J. No. 411, Warner J. stated that the "rule of thumb" had no place in the assessment, being in-consistent with *Bardal* (para. 113). I am satisfied that the weight of the caselaw militates against employing the "rule of thumb." As *MacKinnon* suggests, what is required is an individualized approach to assessing the *Bardal* factors.

[356] The applicant submits that he is entitled to a reasonable notice period of at least fourteen months. He says the fact that he obtained new employment with TASA should not reduce his period of notice. The respondent says the court should consider how little time it took the applicant to find comparable employment and award only three months' notice. In the alternative, ONC submits that the court should limit the notice period to the twelve months the parties agreed on during contract negotiations in late 2009 and early 2010.

[357] The applicant relies on the following authorities: *Schumacher*; *Boulé v. Ericatel Ltd.*, [1998] B.C.J. No. 1353, 1998 CarswellBC 1273 (B.C. S.C.); *Giovanatti v. Plummer Memorial Public Hospital*, 1997 CarswellOnt 4987 (Ont. Ct. J. Gen. Div.); *Johnston v. Household Financial Corp.* [1997] O.J. No. 2368, 1997 CarswellOnt 2514 (Ont. Ct. J. Gen. Div.); and *Walsh v. Alberta and Southern Gas Co.*, [1991] A.J. No. 1071, 1991 CarswellAlta 218 (Alta. Q.B.). The

respondent provided the court with no cases on the issue of reasonable notice other than *Bardal*.

[358] In addition to those relied on by the parties, I have considered the following authorities: *Widmeyer v. Municipal Enterprises Ltd.*, [1991] N.S.J. No. 186, 1991 CarswellNS 392 (N.S. S.C.); *Nosovel v. Riegl*, [1993] O.J. No. 656, 1993 CarswellOnt 936 (Ont. Ct. J. Gen. Div.); *Greaves v. Ontario Municipal Employees Retirement Board*, [1995] O.J. No. 3215, 1995 CarswellOnt 1018 (Ont. Ct. J. Gen. Div.); *Ryan v. Laidlaw Transportation Ltd.*, 1995 CarswellOnt 1015 (Ont. C.A.); *Correa v. Dow Jones Markets Canada Inc.*, [1997] O.J. No. 3356, 1997 CarswellOnt 3152 (Ont. Ct. J. Gen. Div.); *Burke v. Royal Bank*, [1999] O.J. No. 4810, 1999 CarswellOnt 4087 (Ont. Sup. Ct. J.*); Letendre v. Deines Micro-Film Services Ltd.*, 2001 ABQB 26, 2001 CarswellAlta 27; *Zander v. Tractel Ltd.*, 2002 CarswellOnt 3546 (Ont. C.A.); *MacLean v. CrossOff Inc.*, 2005 NSSC 185, 2005 CarswellNS 584; *Day v. JCB Excavators Ltd.*, 2011 ONSC 6848, 2011 CarswellOnt 13250; *Vist v. Best Theratronics Ltd.*, 2014 ONSC 2867, 2014 CarswellOnt 7189; *Christie v. CitiFinancial Canada Inc.*, 2015 ABQB 487, 2015 CarswellAlta 1455 and *Paquette v. TeraGo Networks Inc.*, 2015 ONSC 4189, [2015] O.J. No. 3435, varied on other grounds 2016 ONCA 618, [2016] O.J. No. 4222.

[359] The authorities suggest a range of twelve to eighteen months' notice for an employee in Matthews' circumstances. While these decisions are a helpful guide, every case must be decided on its own facts.

[360] **The character of the employment.** In *Paquette*, Perell J. noted that "[t]he character of employment factor tends to justify a longer notice period for senior management employees or highly skilled and specialized employees and a shorter period for lower rank or unspecialized employees …"

[361] Having spent virtually his entire career in the omega 3 industry, Dave Matthews possesses highly specialized technical knowledge and abilities. He was a member of ONC senior management, serving as a Vice President since 2004. His supervisory responsibilities fluctuated during his tenure with the company. At the time of his dismissal, Matthews was in charge of the NET Department and had approximately eleven or twelve employees reporting to him.

[362] **Length of service of the employee.** At the time of his dismissal, Mr. Matthews had worked for ONC for fourteen years.

[363] **Age of the employee.** There is a general presumption that, after a certain age, it becomes more difficult for an employee to find new employment: *Trudeau-Linley v. Plummer Memorial Public Hospital*, 1993 CarswellOnt 867, [1993] O.J. No. 2272 (Ont. Ct. J. Gen. Div.). Dave Matthews was fifty years old when he left ONC.

[364] **Availability of similar employment.** The availability of similar employment is "a primary factor for determining the period of reasonable notice": *Bellini*, at para. 52. Although the evidence does not indicate the exact size of the omega 3 industry, it does permit the inference that suitable positions for Mr. Matthews would be rare.

[365] Fortunately for Mr. Matthews, so few individuals share his knowledge and experience that TASA was eager to retain him, and he was willing to uproot his family and relocate to Peru. That said, I do not accept ONC's argument that the notice period should be reduced because Matthews quickly obtained alternate employment. The trial judge in *Schumacher* correctly stated the law on this issue in response to a similar argument by the defendant in that case:

> 205 Mr. Harrison submits that the Bank's liability for damages should cease as of September 11, 1995, when Schumacher commenced employment with CitiBank as Vice President, Head of Exposure Management Trading Desk and Fixed Income Trading Desk. I disagree. It has been held that the notice period does not end at the point when the employee gets a new job: *Meyer v. Jim Pattison Industries Ltd.* (1991), 38 C.C.E.L. 101 (B.C.S.C.). The proper approach is to look at the entire picture and determine the appropriate notice period. This is then set-off against whatever the employee was able to earn during that period: *Bremner v. Trend Housewares Ltd.* (1985), 51 O.R. (2d) 101, 7 C.C.E.L. 272 (H.C.).

[366] Nor has ONC satisfied me that I must consider the notice period the parties negotiated in late 2009 and early 2010. The draft employment contract was never executed and is not binding on the parties or this court.

[367] Finally, the applicant briefly raised the issue of inducement in his submissions. He suggested that he was induced by the LTIP not to leave ONC in 2007, and that this warrants an increased period of notice. Some courts have increased the period of reasonable notice where the employer has actively induced the plaintiff to leave a previous secure position, then dismissed him or her without cause after a relatively brief term of employment: David Harris, *Wrongful*

Dismissal (Toronto: Thomson Reuters, 2016), vol. II at §4.5. I am not satisfied that this factor has any application here.

[368] After considering all of the circumstances, I have concluded that the applicant was entitled to a reasonable notice period of fifteen months from the time of his constructive dismissal on May 26, 2011.

LTIP and Management Short-term Incentive Plan ("STIP")

[369] The applicant submits that his damages for constructive dismissal should include compensation for the loss of payouts under the LTIP and the Management Short-term Incentive Plan, known as the "STIP". The respondent says the applicant is not entitled to any damages under the LTIP or the STIP because both programs required him to be an ONC employee at the time of the payout.

[370] ONC relies, *inter alia*, on the Ontario Superior Court of Justice's decision in *Paquette*. Paquette worked for TeraGo Networks Inc. for fourteen years when he was terminated without cause in November 2014. He was 49 years old at the time of his dismissal. As Director Billing and Operations Support Services, Paquette had earned a base salary and bonuses. He commenced an action for wrongful dismissal when the parties were unable to agree on a severance package. On a motion for summary judgment Paquette brought to determine the period of reasonable notice and damages, including compensation for lost bonuses, the motions judge fixed the notice period at seventeen months.

[371] Under the TeraGo Bonus Program, an employee who was "actively employed by TeraGo on the date of the bonus payout" would receive a bonus if the employee met his or her personal objectives and TeraGo's performance met its corporate objectives. The motions judge rejected the claim for lost bonus payments:

> 64 I conclude that Mr. Paquette is not entitled to any bonus payments. Although the Bonus Program at TeraGo was an integral part of Mr. Paquette's employment, there is no ambiguity in the contract terms of the Bonus Program. Mr. Paquette may be notionally an employee during the reasonable notice period; however, he will not be an "active employee" and, therefore, he does not qualify for a bonus.

[372] Paquette appealed the decision to deny the claim for lost bonuses. The Court of Appeal released its decision, along with *Lin v. Ontario Teachers' Pension Plan Board*, 2016 ONCA 619, [2016] O.J. No. 4221, on August 9, 2016, while I was preparing this decision. I contacted the parties and allowed them to make submissions on these decisions.

[373] The Court of Appeal in *Paquette* summarized the law of damages for wrongful dismissal in general, and an employee's entitlement to lost bonuses in particular:

> 16 The basic principle in awarding damages for wrongful dismissal is that the terminated employee is entitled to compensation for all losses arising from the employer's breach of contract in failing to give proper notice. The damages award should place the employee in the same financial position he or she would have been in had such notice been given …. In other words, in determining damages for wrongful dismissal, the court will typically include all of the compensation and benefits that the employee would have earned during the notice period …
>
> 17 Damages for wrongful dismissal may include an amount for a bonus the employee would have received had he continued in his employment during the notice period, or damages for the lost opportunity to earn a bonus. This is generally the case where the bonus is an integral part of the employee's compensation package … This can be the case even where a bonus is described as "discretionary". …
>
> 18 Where a bonus plan exists, its terms will often be important in determining the bonus component of a wrongful dismissal damages award. The plan may contain eligibility criteria and establish a formula for the calculation of the bonus. And, as here, the plan may contain limitations on or conditions for the payment of the bonus. …

[374] According to the Court, the appellant's claim was not for the bonuses themselves, but for common law contract damages as compensation for the income he would have received had TeraGo not breached his employment contract by failing to give reasonable notice of termination: para. 23. Rather than narrowly focusing on whether the term "active employment" was ambiguous, the motions judge should have asked whether the wording of the bonus plan was sufficient to limit the appellant's common law right to damages: para. 24. The Court emphasized that clear language is required to take away or limit a dismissed employee's common law rights, and a condition requiring "active service" is insufficient: paras. 28-29. The Court summarized the proper approach:

> 30 The first step is to consider the appellant's common law rights. In circumstances where, as here, there was a finding that the bonus was an integral part of the terminated employee's compensation, Paquette would have been eligible to receive a bonus in February of 2015 and 2016, had he continued to be employed during the 17 month notice period.
>
> 31 The second step is to determine whether there is something in the bonus plan that would specifically remove the appellant's common law entitlement. The question is not whether the contract or plan is ambiguous, but whether the wording of the plan unambiguously alters or removes the appellant's common law rights. …

[375] The Court rejected the respondent's assertion that its earlier decision in *Kieran v. Ingram Micro Inc.*, 2004 CarswellOnt 3117, [2004] O.J. No. 3118, leave to appeal denied [2004] S.C.C.A. No. 423, a stock option case, mandated a different approach:

> 40 *Kieran* is one of a number of cases from this court considering the exercise of stock options on termination of employment. Like bonus plans, stock option plans will contain terms and conditions for eligibility, and both types of plans can provide valuable compensation to reward, incent and retain employees. Typically, bonuses are in amounts fixed by the employer and based to some extent on an employee's past performance. With stock options, however, employees who hold vested rights are able to exercise their options when they see fit to do so, in order to maximize value. The timing of the exercise of an option is key to its value to the employee. And stock option plans prescribe and limit the timing of the exercise of options, typically including provisions for the termination of the options when certain events occur, including termination of employment.
>
> 41 Recognizing that the loss of the right to exercise stock options during the notice period is compensable in wrongful dismissal actions, the stock option cases have required clear language to limit the right to exercise stock options on termination. In a number of cases, the courts have found that the time for the exercise of stock options following the "termination" or "cessation" of employment was extended by the reasonable notice period: see *Gryba v. Moneta Porcupine Mines Ltd.* (2000), 5 C.C.E.L. (3d) 43 (Ont. C.A.), leave to appeal refused, [2001] S.C.C.A. No. 92 (the "effective date" of termination occurred at the end of the notice period); *Veer v. Dover Corporation (Canada) Limited* (1999), 45 C.C.E.L. (2d) 183 (Ont. C.A.) ("whether such termination be voluntary or involuntary" not sufficient to oust presumption that termination would be lawful); and *Schumacher* (recovery of damages for lost opportunity to exercise stock options was permitted under a "phantom" stock option plan referring to cessation of employment, but not in respect of a second plan providing for the exercise of options within 60 days following the employee's termination "without cause"). By contrast, in *Brock v. Matthews Group*, this court held that there was

no recovery of damages for the lost opportunity to exercise certain stock options where the plan required the exercise of options within "15 days from the date notice of dismissal is given".

42 The approach in these cases can be summed up in the words of Goudge J.A. in *Veer*, at para. 14, "the parties must be taken to have intended that the triggering actions [for the cancellation of an employee's stock option rights] would comply with the law in the absence of clear language to the contrary."

43 In *Kieran*, Lang J.A. stated that there was no ambiguity in the plans at issue. They did not speak only of termination or cessation of employment as the triggering event. Rather, the plans anticipated the very event that occurred -- the termination of employment without just cause or notice. In such circumstances, the plans required the employee to exercise the options within the allocated time.

44 I do not regard *Kieran* as requiring that a different or new test be applied to bonus cases. Lang J.A. explained, at para. 56, that the employee "would be entitled to damages for the loss of the plans, as they formed part of his compensation, absent contractual terms to the contrary." **Without deciding whether the test that applies in stock option cases is the same as that applicable in bonus cases, I note the similarity between the approach I have set out above and that of Lang J.A., as well as the tests adopted in other stock option cases.**

45 In the present case, although the motion judge referred to the approach set out in *Kieran*, he erred in principle by focusing too narrowly on the question of whether the term "active employment" was ambiguous. He should have focused on whether the wording of the bonus plan, and in particular these words, were sufficient to limit the appellant's common law right to compensation in lieu of notice. **In my view, that is what Lang J.A. did when she decided that the employer in *Kieran* had effectively limited the employee's right to exercise stock options on termination of employment, which would be presumptively extended by the notice period, by specific wording that limited that right. This is clear when she contrasts, at para. 58, the wording of the plan in question with the wording of the "phantom" stock option plan in *Schumacher*.**

[*Emphasis added*]

[376] Allowing the appeal, the Court concluded:

46 In summary, the question in this case was not whether the bonus plan was ambiguous, but whether the wording of the plan (which in this case formed part of the appellant's employment contract) was effective to limit his right to receive compensation for lost salary and bonus during the period of reasonable notice.

47 A term that requires active employment when the bonus is paid, without more, is not sufficient to deprive an employee terminated without reasonable

> notice of a claim for compensation for the bonus he or she would have received during the notice period, as part of his or her wrongful dismissal damages.

[377] In *Lin*, the Court of Appeal applied the analysis it endorsed in *Paquette* to determine a terminated employee's entitlement under both a short-term and a long-term incentive plan. Lin was employed by the Ontario Teachers' Pension Plan Board as an investment professional. After eight years in his position, Lin was terminated in March 2011 and he filed an action for wrongful dismissal. The trial judge concluded that Lin had been terminated without cause and fixed the reasonable notice period at fifteen months. Lin's claim for lost incentive plan payments was allowed.

[378] The Board appealed the decision on several grounds, including that the trial judge erred by awarding damages for amounts under the incentive plans. More specifically, the Board said the trial judge erred in failing to find that the forfeiture provisions of its new plans, introduced in 2010, were applicable, which would have disentitled Lin to any bonus after his employment was terminated. In the alternative, it argued that the limiting terms of the pre-amendment plans, which provided for no bonus payments after termination of employment, disentitled Lin to compensation.

[379] Lin participated in two incentive compensation plans: the Annual Incentive Plan ("AIP") and the LTIP. Payments under these plans accounted for approximately sixty percent of his annual compensation. Under both plans, payments were made annually to participants in April in respect of the "performance period" ending on December 31 of the previous year. Before the revisions in 2010, the AIP provided:

> In the case where a Participant resigns or the Participant's employment is terminated by [Teachers'] prior to the payout of a bonus (normally the first pay period in April), no bonus shall be earned by or payable to the Participant.

[380] The LTIP contained similar language:

> In the case the Participant resigns or the Participant's employment is terminated by [Teachers'], the Participant's Dollar Grants not yet vested at the time of termination shall be forfeited forthwith without any right to compensation.

[381] The wording the Board sought to introduce in the 2010 AIP provided:

> In the event that a Participant resigns his or her employment with [Teachers'] or the Participant's employment with [Teachers'] is terminated for any reason (whether with or without Cause), the Participant shall on the Termination Date forfeit any and all rights to be paid a bonus under the Plan (or any amount in lieu thereof) or to accrue any further bonus under the Plan. For further certainty, in the event a Participant's employment terminates after completion of a calendar year in respect of which a bonus had been earned by the Participant under the Plan but prior to payment of that bonus, no bonus (or any amount in lieu thereof) shall be paid to the Participant.

[382] "Termination Date" was defined as:

> The date on which a Participant ceases to be employed by or provide services to [Teachers'] and, for greater certainty, does not include any period following the date on which a Participant is notified that his or her employment or services are terminated (whether such termination is lawful or unlawful) during which the Participant is eligible to receive any statutory, contractual or common law notice or compensation in lieu thereof or severance payments unless the Participant is actually required by [Teachers'] to provide services during such notice period.

[383] The 2010 version of the LTIP contained substantially identical language. The evidence at trial was that the Board decided to introduce changes to the programs in late 2009. Between February and April 2010, affected employees were asked to sign off on the proposed changes. Employee reaction was almost universally negative. As a result, the Board withdrew the request for a sign off. There was no evidence that it communicated to Lin or any other employee that the changes would take effect in any event.

[384] The trial judge concluded that the 2010 amendments did not form part of Lin's contract, and awarded damages for the bonuses he would have received if he had been employed during the notice period. The Court of Appeal upheld the trial judge's findings. After restating the law on a terminated employee's entitlement to bonus payments, the Court dismissed the argument that the wording of the incentive programs disentitled Lin to compensation:

> **89** I reject the appellant's assertion that these terms restrict Lin's entitlement to compensation for lost bonuses in the event of wrongful dismissal. The wording does not unambiguously alter or remove the respondent's common law right to damages, which include compensation for the bonuses he would have received while employed and during the period of reasonable notice. A provision that no bonus is payable where employment is terminated by the employer prior to the payout of the bonus is, in effect, the same as a requirement of "active employment" at the date of bonus payout. Without more, such wording is

> insufficient to deprive a terminated employee of the bonus he or she would have *earned during the period of reasonable notice, as a component of damages for* wrongful dismissal …
>
> **90** And, as Goudge J.A. explained in *Veer v. Dover Corporation (Canada) Limited* (1999), 45 C.C.E.L. (2d) 183 (Ont. C.A.), at para. 14:
>
> > [T]he termination contemplated must, I think, mean termination according to law. Absent express language providing for it, I cannot conclude that the parties intended that an unlawful termination would trigger the end of the employee's option rights. The agreement should not be presumed to have provided for unlawful triggering events. Rather, the parties must be taken to have intended that the triggering actions would comply with the law in the absence of clear language to the contrary.
>
> **91** While the issue in *Veer* was the employee's entitlement to certain stock options following his dismissal without cause, this court's interpretation of the effect of the "termination" term is equally apt in the present appeal. The phrase "employment is terminated by [Teachers']" must be taken to refer to an employee's lawful termination absent clear language to the contrary.
>
> **92** … For the reasons I have set out, I agree that these provisions did not limit the respondent's common law rights.

[385] The applicant submits that the decisions in *Paquette* and *Lin* support a finding that he is entitled to compensation under the LTIP and the STIP.

[386] Focusing primarily on the LTIP, the respondent offers several reasons why *Paquette* and *Lin* support its position that the applicant is not entitled to payment under the LTIP as part of his damages. First, the Court in *Paquette* did not decide whether the test applied in stock option cases is the same as the test in bonus cases. It simply noted the similarity between the two approaches. Second, the case before this court (in relation to the LTIP) is neither a bonus case, nor a stock option case. The respondent argues that, unlike the bonus and stock option plans considered by the Ontario Court of Appeal in *Paquette* and *Lin*, a payout under the LTIP was too speculative to be considered integral to Matthews' compensation. The stock option cases considered by the Court in *Paquette* each involved employees holding vested rights or redeemable phantom units at the date of termination. According to the respondent, such vested interests are a prerequisite to a finding that stock options are integral to an employee's compensation. Since Matthews had no vested right to a payout under the LTIP, it cannot be considered integral to his compensation. In the alternative, the respondent says the terms of the LTIP limit the applicant's common law right to receive compensation for lost payouts during the reasonable notice period.

[387] In my view, the respondent is introducing a requirement into the stock option analysis that is not supported by the case law. When the Court in *Paquette* commented on the similarity between the test it outlined for bonus cases and the approach taken in stock option cases like *Kieran*, *Gryba* and *Veer*, it was not implying that an employee will recover for the lost opportunity to exercise stock options only where the stock option plan was integral to his compensation. The Court merely noted that the approach in stock option cases, as in bonus cases, is to examine the specific wording of the plan to determine whether it limits or removes the employee's common law right to compensation for all losses arising from the employer's failure to give proper notice.

[388] Even if I am wrong on the foregoing issue, I am satisfied that the LTIP was integral to the applicant's compensation. I do not accept ONC's argument that a payout under the LTIP was too speculative to be included in Matthews' compensation for damages. It was, in my view, only a matter of time before ONC was sold. As Robert Orr put it, there had been "a move afoot" to sell the company since at least 2008. After several failed takeover bids, Martin Jamieson was brought in as President and CEO to make the company more attractive to potential purchasers. Furthermore, as the longest serving management employee, Matthews was entitled to the largest payout under the LTIP. Even at the $200 million valuation suggested by Jamieson, Matthews' payout would have exceeded $400,000, before taxes. As I have previously stated, I am satisfied that the LTIP was a key reason Matthews stayed with ONC after 2007, and, in his final years with the company, likely the primary reason.

[389] I find that Matthews has a common law right to damages for the loss of the payout he would have received under the LTIP unless the agreement limits this right. This court has previously held that "clear and express language" is required to deprive an employee of the common law right to reasonable notice: *Bellini*, paras. 7-11. As the Ontario Court of Appeal decisions illustrate, the same is true where an employer seeks to limit an employee's common law right to damages as compensation for losses arising from the employer's failure to give proper notice.

[390] ONC says the following portions of the LTIP agreement clearly limit Matthews' common law right to damages:

2.01 PAYMENT OF EXECUTIVE INCENTIVE:

Provided the conditions precedent set out in Section 2.03 are satisfied on the date on which a Realization Event occurs, ONC shall pay to the Employee, in cash, less any appropriate withholding of other taxes, an amount calculated in accordance with Section 2.02, which payment shall be made within thirty (30) days of such Realization Event.

…

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.***

2.04 DEEMED EMPLOYEE:

For the purposes of Section 2.03, ***the Employee shall be deemed to be a full-time employee*** of ONC on the date of a Realization Event if (i) the Employee is age 55 or over and has retired from ONC, it being understood that whether an employee has retired from ONC shall be determined by the Board of Directors of ONC in its absolute discretion; or (ii) the Employee's employment is terminated in connection with the Realization Event.

[*ONC's emphasis*]

[391] ONC sets out its argument as follows:

The foregoing clauses bear great similarity to those in *Kieran* that caused the Court to find there was clear language to limit the common law rights of Mr. Kieran. The use of the term "full-time" to describe "employee" obviously requires the employee to be actually employed, but also Article 2.03 goes further to provide "greater certainty" that if the employee "ceases to be an employee" for the reasons stated which include that the employee "resigns or is terminated…without cause", the Respondent shall have no obligation upon a realization event to the employee who ceased employment for that reason. This is the very language required to make clear that the prohibition applies to a without cause termination thereby limiting the common law right. And further, like in *Kieran*, the [LTIP] goes on to contemplate when someone who may have otherwise lost entitlement is deemed to be an employee nonetheless at the time of a Realization Event. Again, it was significant in *Kieran* that the language allowed

> employees, for situations like retirement or death, to take under the plan, but not otherwise (terminated without cause).

[392] ONC relies heavily on similarities between the wording of its LTIP and that used in the Rollover Plan considered in *Kieran*. The Court in *Kieran* considered three stock options plans: the Restricted Plan, the Equity Plan, and the Rollover Plan. The Restricted Plan provided:

> **If Participant's employment** with Micro or any Affiliate **is terminated for any reason** other than death, disability … or retirement … prior to the time when all Shares have become Unrestricted Shares …, Restricted **Shares** … **shall be repurchased by Micro at the lower of** (x) the Purchase Price and (y) the Fair Market Value of such Shares on the Repurchase Date. … **[A]ny termination of a participant's employment for any reason shall occur on the date Participant ceases to perform services** for Micro or any Affiliate **without regard to whether Participant continues thereafter to receive any compensatory payments therefrom** or is paid **salary** thereby **in lieu of notice** of termination.
>
> [*Lang J.A.'s emphasis*]

[393] The Equity Plan provided:

> **Except as** the Committee may at any time otherwise provide or as **required to comply with applicable law, if the Participant's employment** with Micro or its Affiliates **is terminated for any reason** other than death, disability, or retirement, **the Participant's right to exercise** any Non-Qualified Stock **Option** or Stock Appreciation Right **shall terminate** and such Option or Stock Appreciation Right shall expire, on … the sixtieth day following such termination of employment.

[394] The Equity Plan also gave an employee leaving the company due to death, disability or retirement the right to exercise his or her options for a one year period. Like the Restricted Plan, it went on to define the date at which an employee ceased to perform services as one made "without regard to whether the employee continues thereafter to receive any compensatory payments therefrom or is paid salary thereby in lieu of notice of termination."

[395] The Rollover Plan provided:

> **Except as** the Committee may at any time otherwise provide or as **required to comply with applicable law, if the Participant's employment** with the Participant's Employer or any of its Subsidiaries **is terminated for any reason** other than death, permanent and total disability, retirement or **Cause, the**

> **Participant's right to exercise any Non-Qualified Stock Option shall terminate**, and such Option shall expire on … the 60th day following such termination of employment.
>
> [*Lang J.A.'s emphasis*]

[396] As Lang J.A. observed, the Rollover Plan did not specifically address a situation where an employee was receiving compensatory payments in lieu of notice, but it did contemplate dismissal for cause. In the case of all three plans, the Court held that Mr. Kieran's right to exercise his options was not extended by the period of reasonable notice:

> 56 Under Ontario law, Mr. Kieran would be entitled to damages for the loss of the Plans, as they formed part of his compensation, absent contractual terms to the contrary. In the presence of contrary contractual terms, those terms govern. …
>
> 57 Mr. Kieran argues that the Plan provisions should be interpreted to find that they do not address a situation of dismissal without cause, and should be construed strictly against the employer who controlled their drafting. Interpreted in that context, the Plans, it is said, would be found to include as "employment", the period of notice given a wrongfully dismissed employee. That argument, applied to this case, would mean that Mr. Kieran would be considered an employee during the nine months of notice after his termination and entitled, during that period, to exercise his options.
>
> 58 There is, however, no ambiguity in the Plans at issue. This is not a plan such as the one examined by Kiteley J. in *Schumacher v. Toronto-Dominion Bank* (1997), 29 C.C.E.L. (2d) 96 (Ont. Gen. Div.). In that case, the "Phantom Options" contained contractual terms that negatived the participant's right to his options when he "ceases to be an employee". A person ceases to be an employee, in the case of a wrongful dismissal, after the period of reasonable notice: see paras. 237-240. While a plan that addresses only "cessation of employment" may create an ambiguity, the plans at issue in this case do not. The focus of the inquiry is on the wording of the particular plan. …
>
> 59 **The Ingram Plans differentiated between termination for death, permanent and total disability, and retirement and termination for any other reason. Mr. Kieran's employment was terminated for another reason: he was wrongfully dismissed.** The Restricted and Equity Plans specifically provided that Mr. Kieran's employment terminated on the date he ceased to perform services, without regard to whether he continued to receive compensatory payments or salary in lieu of notice.
>
> 60 **The Rollover Plan differentiated in result between employees terminated for cause, those terminated by reason of death, disability or retirement, and those terminated for any other reason, in this case, wrongful dismissal.**

> 61 These plans are not ambiguous. Mr. Kieran is bound by their plain language, which is determinative. Mr. Kieran's right to exercise those options was not extended by the period of reasonable notice. He is not entitled to damages for the stock options.
>
> [*Emphasis added*]

[397] *Kieran* is not binding on me. Even if it were, however, I disagree with ONC's view that the wording at issue in *Kieran* is substantially similar to that of its LTIP. The relevant provision of the Rollover Plan in *Kieran* applied to employees terminated *for any reason*, excluding only death, disability, retirement and cause. Lang J.A. was satisfied that "any reason" was sufficiently broad to rebut the presumption that the triggering event was intended to be a lawful one. In other words, "any reason" had to be interpreted to include wrongful dismissal, an unlawful form of termination.

[398] The LTIP wording is very different. Section 2.03 of the LTIP provided that in order to be eligible for a payout, an individual must be a "full-time employee" of ONC. The next sentence purported to provide greater certainty by stipulating that the LTIP "shall be of no force and effect if the employee ceases to be an employee of ONC," with cessation of employment including resignation or termination, with or without cause. The LTIP further provided that an employee who retires or is terminated as a result of the "realization event" will be deemed a "full-time employee" for the purposes of the agreement. In my view, the condition that an individual must be a "full-time employee" at the time of the payout is similar to the condition in *Paquette* that an employee must be "actively employed." Neither phrase unambiguously limits or removes the employee's common law right to compensation. Had Matthews not been constructively dismissed, he would have been a full-time employee when the LTIP payouts were made.

[399] Nor are Matthews' common law rights limited by the reference to an individual who ceases to be an employee of ONC, whether he or she resigns or is terminated, with or without cause. ONC argues that the reference to termination "without cause" clearly means that any common law right to notice would not apply. I disagree. Termination without cause does not imply termination without notice. Under the common law, all employment contracts can be terminated on reasonable notice by either side. Where the termination is for cause, no notice is required. Where the termination is without cause, reasonable notice or compensation in lieu of notice must be provided.

[400] Finally, I am not satisfied that the LTIP provision addressing retired employees or employees who have been terminated as a result of the "realization event" is of any assistance to ONC. As previously stated, the Rollover Plan provision in *Kieran* applied to employees terminated for any reason. Multiple exceptions to this broad general rule were explicitly outlined, and did not include employees terminated due to wrongful dismissal. The LTIP does not contain a general rule that is broad enough to include unlawful termination.

[401] For the foregoing reasons, I find that Matthews is entitled to compensation for the loss of a payout under the LTIP as damages for wrongful dismissal.

[402] Before turning to the STIP, I will address a further point about the LTIP. The parties each made submissions in their post-hearing briefs on *Styles v. Alberta Investment Management Corp.* 2015 ABQB 621, [2015] A.J. No. 1069, a decision of the Alberta Court of Queen's Bench. The Alberta Court of Appeal released its decision in *Styles* while I was preparing this decision (2017 ABCA 1, [2017] A.J. No. 1). Ms. Barteaux provided a copy to the court and to Mr. Mitchell. I allowed the parties to make additional submissions if they wished. Both parties took advantage of the opportunity and I have considered their comments.

[403] Mr. Styles moved from Ontario to Alberta in 2010 to take up a position with AIMCo as an investment manager. In addition to his base salary, he could earn bonuses under an Annual Incentive Plan and a Long Term Incentive Plan. The LTIP provided for yearly grants in the nature of an "allocation" or "base calculation" that would eventually be used in the bonus formula at the end of a four-year cycle. In other words, no bonus became payable under the LTIP for at least four years, and a participant whose employment was terminated before that would never receive a bonus.

[404] The participant was required to sign a Participation Agreement ("PA"), the terms and conditions of which were part of the LTIP. Under the LTIP, the participant had to 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." The 2011 version of the LTIP also stated that "entitlement to an LTIP grant, vested or unvested, may be forfeited upon the Date of Termination of Active Employment without regard to whether the participant is receiving, or will receive, any compensatory payment or salary in lieu of notice of termination." The PA echoed the requirements of the LTIP. Unlike Matthews' LTIP, the LTIP in

Styles "left no doubt that any period of 'reasonable notice' required in lieu of notice of termination did not qualify as 'active employment'": *Styles*, 2017 ABCA 1, [2017] A.J. No. 1 at para. 6.

[405] Mr. Styles' employment contract was terminated without cause in 2013. Notwithstanding the clear language of the LTIP, the trial court, relying on *Bhasin v. Hrynew*, 2014 SCC 71, [2014] S.C.J. No. 71, found that the bonuses were payable.

[406] In *Bhasin*, the Supreme Court of Canada recognized a general requirement of honesty in the performance of contracts as a "general organizing principle" of the law of contract. The trial court expanded upon this concept to include a related general organizing principle described as a "common law duty of reasonable exercise of discretionary contractual powers." According to the trial judge's reasons, the wording in the 2011 LTIP providing that grants "may be forfeited" – which had not appeared in earlier versions – implied an element of employer discretion. This discretion, along with the discretion under the contract to terminate without cause, had to be exercised "fairly and reasonably" under the duty of reasonable exercise of discretionary contractual powers. The trial judge concluded:

> **115** While there is no evidence that the termination in this case was done in bad faith, the employer's actions have created circumstances under which the employee is unable to receive his LTIP grants. The employer has provided no evidence as to the reasons for termination and no reasonable explanation for the associated or consequential denial of the LTIP grants. The contractual power of the employer to terminate without cause cannot be considered in isolation from the consequences to the employee when the termination also has the effect of undermining the condition necessary for the employee to receive his LTIP grants. The exercise of the discretion to terminate in this case is not just about termination. It is also about triggering a deprivation of employee earned benefits on which the contract was based. It is not fair for the employer to take the benefit of the employee's hard word and then exercise a discretion which has the effect of depriving the employee of the compensation earned for that hard work. When the exercise of the employer's discretionary contractual power to terminate without cause is combined with the exercise of the discretion to deny the employee of any LTIP grants, the resulting deprivation of LTIP benefits previously awarded to and approved for the Plaintiff employee is unfair; and, given the inexplicable or unjustifiable nature of the deprivation outside the framework of discretion, appears to be arbitrary.

[407] The Court of Appeal held that the trial judge erred in her conclusion that the phrase “may be forfeited” in the 2011 version of the LTIP was intended to introduce an element of discretion:

> 27 Read as a whole, the terms of the Plan and the Participation Agreement make it clear that continued employment on the vesting date is a condition precedent to entitlement. As the appellant pointed out, the documents say so in no less than six places. The Plan states under the scenario "termination without cause" that "All vested grants are forfeited as of the Date of Termination of Active Employment . . .". The Participation Agreement states that a participant "shall have no rights to any particular grants" unless he is employed on the vesting date. This wording is inconsistent with any discretion being involved. It is unreasonable to suggest that the three words "may be forfeited" override all of the other wording in the Plan and the Participation Agreement that emphatically state that bonuses are forfeited when employment terminates.
>
> …
>
> 30 Properly interpreted, there was no right to receive a bonus unless the respondent was actively employed on the vesting date. There was no discretion involved. Whatever the test for review by the courts of the exercise of contractual discretions, there was in fact no discretion here to be exercised.

[408] The trial court also erred by characterizing the decision to terminate without cause as a “discretion”:

> 38 The trial reasons approach the problem from the wrong direction. They first analyze (starting at para. 89) what are described as the "legitimate contractual interests of the Plaintiff" in the Long Term Incentive Plan. After establishing those expectations, they then conclude at para. 103:
>
> > 103 Accordingly, these legitimate contractual interests of the Plaintiff are the rights to which the employer should have had appropriate regard when exercising its discretion to terminate without cause.
>
> This conclusion assumes that when an employer proposes to terminate employment without cause, it must have a reason that includes "an appropriate regard" for the employee's expectations, beyond what the contract actually provides for. This approach assumes that there is a concept of "near cause" which examines whether the employer's motivation for termination is justifiable in some way, short of "cause". An "unreasonable" termination changes an ordinary "termination without cause" from the exercise of an implied term of the contract into a breach of the contract, entitling the respondent to damages. This is inconsistent with the right to terminate without cause on payment in lieu of notice, without providing any reason. The rule is not that there can be termination

> without cause so long as there is payment in lieu of notice, plus compensation for "legitimate contractual expectations".
>
> …
>
> 41 In summary, it is inaccurate to describe the decision to terminate without cause as a "discretion": ***Bhasin*** at para. 72. It is a further error to suggest that such a decision can be reviewed by the court for reasonableness. This approach treats termination without cause as a breach of contract. An employer can terminate the contract of employment on reasonable notice - no explanation need be given. The employee is entitled to notice or pay in lieu of notice and any other compensation provided for in the written employment contract. In this case the respondent was not entitled to any unvested bonuses on termination. There is no common law principle that he would nevertheless be entitled to bonuses unless a reasonable basis for the termination was shown.

[409] The Court explained that the common law duty to act honestly in the performance of contractual obligations recognized in *Bhasin* is a narrow concept, requiring only that the contracting parties do not lie to each other, knowingly mislead each other with respect to performance of the contract, or act dishonestly: paras. 46-47. The Court continued:

> 52 … ***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 <u>is</u> 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". Declining to perform contractual covenants and promises that were never given is entirely reasonable. Refusing to pay a bonus that is not payable is not dishonest.

[410] The proposed common law duty of reasonable exercise of discretionary contractual power was unsupported by – and inconsistent with – the decision in *Bhasin*: para. 54. The Court rejected Mr. Styles' alternative argument that the contract was unconscionable, and allowed the appeal.

[411] In his post-hearing submissions, Dave Matthews relied on the trial court's decision in *Styles* when he alleged that ONC exercised its "discretion" to terminate him in bad faith. He argued that ONC could not rely upon this discretion to (constructively) dismiss him in order to avoid its obligation to him under the LTIP. I agree with the Alberta Court of Appeal's conclusion that an employer's decision to terminate without cause is not a "discretion." That said, I have already concluded that the wording of the LTIP was insufficient to limit Mr. Matthews'

common law right to compensation for loss of a payout thereunder. Nothing in the *Styles* decision conflicts with that finding.

[412] I now turn to the Management Short Term Incentive Plan. In addition to his salary, Matthews received annual bonuses. Prior to 2007, these bonuses were somewhat informal. In 2007, the ONC STIP was introduced. Payments under the STIP were discretionary and typically disbursed between February and May of the following year. Eligibility for an STIP bonus payment was subject to the following conditions:

> It is important to note in order to be eligible for any earned incentive bonus payout, you must:
>
> 1) Be in the employ of the company at the time of the earned payout. Payout date is anticipated to be between February 7th and February 28th, 2008.
> 2) Be deemed to have made a contribution to the result and be considered by the company to be performing your job responsibilities at an acceptable level or above.

[413] For the year 2007, Dave Matthews received a bonus of $65,000. Due to ONC's failure to meet its budgeted sales and profit targets in 2008, he received a bonus of only $6,000 for that year. The company continued to struggle in 2009. On March 18, 2010, Robert Orr stated, in a letter to Matthews:

> As you are aware 2009 was a difficult year for the company. Despite achieving sales growth of about 16% our 2009 EBITDA performance was well below budget – almost 40% - and this resulted in no management bonuses being achieved or paid for 2009. There were many factors at work, last year, including the global economic crisis, falling US dollar values, declining fish oil pricing and management of our margin performance. But 2010 is a new year and we get to start fresh with many of those issues behind us. …

[414] The tide turned in 2010. In an undated letter to Matthews, Martin Jamieson wrote:

> 2010 was an extraordinary year in the development of our company with significant positive change taking place and the promise of more to come. Throughout this challenging period our management team remained strong and focused and delivered some of the best results in the company's history.
>
> I am pleased to inform you confidentially that the company achieved its EBITDA target for the year although we did not hit our revenue target due to challenging competitive conditions in the marketplace. Based on these results, our Board of Directors has approved STIP payments at 50% of target. As a participant in the

> management STIP scheme you will be receiving a bonus payment of $50,000.00 by the end of February. …

[415] Matthews says he did not receive STIP payments for the years 2011 or 2012. He seeks damages for lost bonus payments. ONC says Matthews is not entitled to damages for lost STIP payments because he was not an employee at the time of the bonus payouts.

[416] I am satisfied that the STIP bonuses were integral to Matthews' compensation. Although the bonuses depended upon ONC reaching certain targets, the Board approved a management bonus every year except 2009. The bonuses in 2007 and 2010 were substantial. It appears that when Matthews left ONC, the company was performing better than ever.

[417] I must now consider whether the wording of the STIP limited or removed Matthews' common law right to damages. In my view, the condition precedent requiring that the employee "be in the employ of the company at the time of the earned payout" does not clearly oust Mr. Matthews' right to damages for loss of bonus payments. He is entitled to compensation for the loss of any bonuses paid by ONC to under the STIP during the reasonable notice period.

Oppression

[418] Having concluded that the applicant was constructively dismissed and that his damages include compensation for loss of a payout under the LTIP, it is unnecessary to decide whether he would be entitled to the same compensation under the oppression remedy provisions of the *CBCA*.

Punitive damages

[419] The applicant claims that the respondent breached its duty of good faith and the circumstances of his constructive dismissal warrant punitive damages. The Court of Appeal summarized the law on punitive damages in *Industrial Alliance*

Insurance and Financial Services Inc. v. Brine, 2015 NSCA 104, [2015] N.S.J. No. 486:

> 184 Punitive damages are "designed to address the purposes of retribution, deterrence and denunciation": *Whiten* at para 43, as quoted in *Fidler* at para 61. In breach of contract cases, "the impugned conduct must depart markedly from ordinary standards of decency -- the exceptional case that can be described as malicious, oppressive or high-handed and that offends the court's sense of decency": *Fidler* at para 62; *Whiten*, para 36; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para 196. The misconduct must exceed "the usual opprobrium that surrounds breaking a contract" and must "straddle the frontier between civil law (compensation) and criminal law (punishment)": *Fidler*, para 62; *Whiten*, para 36.

[420] The applicant's submissions on ONC's alleged bad faith were something of a moving target. The argument in his pre-hearing submissions can be summarized as follows. In 2007, ONC induced Matthews to stay with the company by dangling the prospect of an LTIP payment in front of him. Four years later, with a "realization event" looming, ONC constructively dismissed him by e-mail from Daniel Emond. Twelve months later, ONC announced that it had been sold to DSM. As a result of ONC's conduct, Matthews was deprived of a substantial payout.

[421] In his post-hearing submissions, the applicant added the allegation that ONC breached its duty of good faith when Martin Jamieson represented to Craig Wilson that the value of the company was $200 million for the purposes of negotiation with Matthews, when Matthews had been told that DSM's offer in January 2011 was close to $385 million.

[422] 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.

[423] As to the claim that Martin Jamieson acted in bad faith when he suggested to Mr. Wilson that ONC's value was $200 million, I am not satisfied that Jamieson's approach was unreasonable. His explanation as to why he did not consider DSM's January 2011 proposed purchase price to reflect the company's value was sound, and revealed no evidence of bad faith.

[424] I further note that although Matthews remained at ONC until June 2011, I have found that ONC effectively repudiated the employment contract – and by extension, any good faith obligations under it – on May 26, 2011, when it constructively dismissed him.

[425] For the foregoing reasons, I decline to award punitive damages.

Mitigation and damages

[426] Dave Matthews continued to receive his salary from ONC until June 24, 2011. He began working for TASA on August 1, 2011. He therefore limits his claim for lost wages to July 2011.

[427] In addition to one month's lost earnings, Mr. Matthews is entitled to compensation for loss of the payout he would have received under the LTIP – $1,086,893.36, less applicable tax deductions – and any bonuses awarded under the STIP during the reasonable notice period.

[428] A wrongfully dismissed employee cannot recover from the employer for losses that could reasonably have been avoided. The burden of proof is on the employer to show that the employee could reasonably have avoided some part of the loss claimed: *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324, 1975 CarswellAlta 57, at para. 11.

[429] ONC argues that Mr. Matthews failed to mitigate his damages because he turned down lucrative offers from Robert Orr and John Risley in favour of pursuing employment with TASA. As I stated in my findings of fact, formal offers from Orr and Risley were not made until after Matthews had signed a contract with TASA. These offers are therefore irrelevant to the issue of mitigation.

[430] Consistent with his duty to mitigate, Mr. Matthews quickly secured new employment at a higher salary. In his last several years at ONC, Matthews' gross salary was $142,000 CAD *per annum*. His salary increased to a net amount of $220,000 USD *per annum* when he joined TASA. Any salary or benefits Matthews received from TASA in excess of what he would have earned at ONC during the reasonable notice period must be deducted from his damage award.

[431] Although Matthews earned $190,000 in consulting fees during the notice period, ONC has not satisfied me that these fees should be considered a form of mitigation and must be deducted from his damages. There is no evidence that if ONC had not breached its duty to provide reasonable notice, Matthews would have been prohibited from consulting for Slanmhor during the notice period. On the contrary, the evidence shows that at the time the consulting contract was entered into, ONC intended to assign the Omthera contract to Slanmhor with the expectation that Slanmhor would purchase feed stock from ONC. Common sense suggests that allowing Mr. Matthews to assist Mr. Risley and Mr. Orr to get the new company up and running would have been in ONC's best interests.

[432] I will leave it to counsel to calculate the appropriate quantum based on my findings. I will hear from them if they are unable to reach agreement.

Costs

[433] If the parties are unable to agree on costs, they may provide written submissions within 45 days of the release of this decision.

LeBlanc, J.