NOVA SCOTIA COURT OF APPEAL

Citation: ***Ocean Nutrition Canada Ltd. v. Matthews***, 2012 NSCA 127

Date: 20121221
Docket: CA 391703
Registry: Halifax

Between:

Ocean Nutrition Canada Limited

Appellant

v.

David Matthews

Respondent

Judges:	Hamilton, Fichaud and Bryson, JJ.A.
Appeal Heard:	November 20, 2012, in Halifax, Nova Scotia
Held:	Leave to appeal granted and appeal dismissed with costs payable forthwith by the appellant to the respondent in the amount of $4,000 plus disbursements, per reasons for judgment of Hamilton, J.A.; Fichaud and Bryson, JJ.A. concurring.
Counsel:	Nancy F. Barteaux, for the appellant Blair Mitchell and Marion Ferguson, for the respondent

Reasons for judgment:

[1] The appellant, Ocean Nutrition Canada Limited ("ONC"), applies for leave to appeal, and if granted, appeals the April 12, 2012 decision of Justice Michael J. Wood (2012 NSSC 142) dismissing its motion for summary judgment on evidence with respect to the respondent's, David Matthews, claim for an oppression remedy under the provisions of the **Canada Business Corporations Act,** R.S.C. 1985, c. C-44 ("**CBCA**").

[2] The background is set out in the judge's reasons:

> [1] In June of 2011, David Matthews resigned from his position as Vice-President, New and Emerging Technologies, at Ocean Nutrition Canada Limited ("Ocean Nutrition"). He alleges that he was squeezed out by a reassignment of his job functions to others and claims that he was constructively dismissed. Mr. Matthews has commenced this proceeding against Ocean Nutrition, seeking damages for unjust dismissal.
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> [2] Mr. Matthews also claims that his mistreatment was motivated by a desire to end his entitlement to benefits under an Executive Incentive Agreement signed in September, 2007 ("the Incentive Agreement"). This agreement provided that Ocean Nutrition had no obligations to Mr. Matthews once his employment terminated. Mr. Matthews seeks an oppression remedy under the provisions of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("CBCA"). ...
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> ...
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> [50] The Incentive Agreement was entered into in September, 2007. Both parties agreed that its purpose was to provide an incentive to Mr. Matthews to continue his employment with Ocean Nutrition. The agreement called for a payment of an incentive calculated in accordance with a specified formula upon the occurrence of a "Realization Event" which was defined as follows:
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> > (g) "Realization Event" means the happening of any 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 of 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;

[51] The prescribed formula for calculation of the incentive amount was based upon the fair market value of the capital stock of Ocean Nutrition at the time of the Realization Event which triggered the payment. In simplistic terms, the Incentive Agreement provided for a payment to Mr. Matthews in the event of a sale of more than forty percent of the shares or substantially all of the assets of Ocean Nutrition, with the amount reflecting the increase in value of the company. Mr. Mitchell, on behalf of Mr. Matthews, argued that this allowed Mr. Matthews to be treated as if he was a minority shareholder in the event of a sale of a significant portion of the corporate shares or assets.

[52] Between the execution of the Incentive Agreement and the end of Mr. Matthew's employment, the respondents say that there were three potential Realization Events, none of which came to fruition. Mr. Jamieson, the President and C.E.O. of Ocean Nutrition, deposes that there has never been a Realization Event as defined in the Incentive Agreement. As a result, they submit that Mr. Matthews would have no claim to a payment pursuant to that agreement even if he had continued as an employee. More importantly, they note that the Incentive Agreement includes the following provision:

> **2.03 CONDITIONS PRECEDENT:**
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> 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.

[53] As a result of this provision, the respondents say that Mr. Matthews can have no claim for an incentive payment once he ceases to be an employee, regardless of whether the termination was with or without cause.

[54] In his affidavit, Mr. Matthews described the circumstances leading to the Incentive Agreement. The respondents do not accept his version of events and argue that these facts are not material. Mr. Matthews’ affidavit states:

Executive Incentive Agreement

. . . .

15. In 2007, Mr. Orr, the Chief Executive Officer of ONC, offered me an Executive Incentive Agreement. The Executive Incentive Agreement provides for a large cash payout in the event of the sale of a substantial ownership interest of the corporation or of the assets of the corporation, termed a "Realization Event." Under its terms, in such an event, I would receive a payment in the order of up to $750,000 or perhaps more. It gave me an entitlement to share in the relevant value of the company should it ever be sold. It was like an ownership interest in the company or its assets. If I had not received the Agreement, I would have left the company.

16. I was led to believe that a number of other senior people within the company were at one time or another being asked to enter into and were entering into a "Executive Incentive Agreement" of a nature equivalent to that which was offered to me. I have no reason to believe that Executive Incentive Agreements available to other executives of ONC at the time, did not contain similar cash payout provisions, in such an "Event."

17. Mr. Orr explained to me at the time, that I was being offered the Agreement because of the substantial contribution I had brought to the company and the increase in its worth and value, by reason of the introduction to it of Molecular Distillation and Fractional Distillation, the Omega-3 extraction and refinement, together with other contributions I had made.

[3] The judge's reasons for dismissing ONC's motion are thorough. He correctly outlined the test to be applied on a summary judgment motion on evidence pursuant to **Civil Procedure Rule 13.04**:

> [10] The accepted test to be applied on a motion for summary judgment under this rule is set out by the Supreme Court of Canada in *Guarantee Company of North America v. Gordon Capital Corporation et al.*, [1999] 3 S.C.R. 423 at para. 27:
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> > The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper

> question for consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 15; *Dawson v. Rexcraft Storage and Warehouse Inc*. (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" (*Hercules, supra*, at para. 15).

[4] He considered sections 241, 238 and 2(1) of the **CBCA**, along with the case law, to determine the requirements of the oppression remedy being sought by Mr. Matthews, so he could assess whether there were any genuine issues of material fact requiring trial (step one), and, if not, whether Mr. Matthews' application for an oppression remedy had a real chance of success (step two).

[5] Based on ONC's arguments as to why Mr. Matthews' application for an oppression remedy would ultimately fail, the judge concluded that facts relating to whether Mr. Matthews had standing to initiate an application for an oppression remedy, whether he had the type of interest intended to be protected by such a remedy, and whether his interests had been unfairly disregarded, would be material.

[6] With respect to standing, the judge noted that a "complainant" may make an application for an oppression remedy under s. 241, that an "officer or a former officer" and "any other person who, in the discretion of a court, is a proper person to make an application" were included in the definition of "complainant" in s. 238 and that the definition of "officer" in s. 2(1) was relatively broad:

> "officer" means an individual appointed as an officer under section 121, the chairperson of the board of directors, the president, a vice-president, the secretary, the treasurer, the comptroller, the general counsel, the general manager, a managing director, or a corporation, **or any other individual who performs functions for a corporation similar to those normally performed by an individual occupying any of those offices**; (emphasis added)

[7] He concluded:

> [17] The combined effect of these provisions is that the category of persons who may potentially bring an application seeking an oppression remedy is relatively broad. It includes not just named officers, but also those who perform

> functions similar to those normally performed by an officer. There is also a broad discretion in the court to determine who is a "proper person" to make such an application.

[8] With respect to the type of interests intended to be protected by an oppression remedy, the judge concluded that the court may provide a remedy where there has been conduct on the part of a corporation which unfairly disregards the interest of a category of persons which includes creditors and **officers**, noting the broad definition of "officer".

[9] Referring to the reasons of the Supreme Court of Canada in **BCE Inc. v. 1976 Debentureholders**, 2008 SCC 69, the judge also noted that the oppression remedy is an equitable one, giving the court a broad equitable jurisdiction to enforce not only what is legal but what is fair, and that such a determination is very fact-specific. He referred to the factors the Court in **BCE** indicated should be considered in deciding whether an oppression remedy is available:

> [22] Although the Supreme Court was not prepared to define with precision the circumstances which might give rise to an oppression claim, they did provide some guidance with respect to the factors that should be considered:
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> > [71] It is impossible to catalogue exhaustively situations where a reasonable expectation may arise due to their fact-specific nature. A few generalizations, however, may be ventured. Actual unlawfulness is not required to invoke s. 241; the provision applies "where the impugned conduct is wrongful, even if it is not actually unlawful": Dickerson Committee (R.W.V. Dickerson, J.L. Howard and L. Getz), *Proposals for a New Business Corporations Law for Canada* (1971), vol. I, at p. 163. The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all of the interests at play: *Re Keho Holdings Ltd. and Noble*. It follows that not all conduct that is harmful to a stakeholder will give rise to a remedy for oppression as against the corporation.
> >
> > [72] Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

[10] He concluded:

> [31] After reviewing the case law, I am satisfied that, in appropriate circumstances, a claim for wrongful dismissal could be combined with an application for an oppression remedy. This would occur only where the claimant falls within the range of stakeholders entitled to protection under s. 241 of the *CBCA*, independent of their status as employee. This could arise where the employee was a shareholder, creditor, officer, or had an agreement entitling them to acquire shares at the time of the allegedly oppressive acts.

[11] At step one, when considering whether ONC had satisfied him that there were no genuine issues of material fact requiring trial, the judge recognized that there was no dispute of fact as to whether Mr. Matthews was wrongfully dismissed. ONC had conceded this for the purpose of the motion. He found, however, with respect to both standing and whether Mr. Matthews had the type of interest protected by an oppression remedy, that there was a material fact in dispute, namely: whether Mr. Matthews was an "officer or former officer":

> [43] With respect to Mr. Matthews' standing to bring these proceedings, the position of the respondents is that he is not a corporate officer according to the records at the Registry of Joint Stock Companies and that is as far as the inquiry needs to go. As noted in the general discussion concerning oppression remedies under the *CBCA*, both the terms "complainant" and "officer" are defined in the legislation. It is clear from those statutory provisions that an assessment of whether someone can bring a claim for oppression goes far beyond whether they are shown as an officer on the official corporate filings. It involves a consideration of the nature of their job responsibilities, and whether these are similar to those of an officer. There is also a general discretion of the court to determine if someone ought to be given standing as a complainant.
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> [44] In this case, the evidence indicates that Mr. Matthews was a vice-president of Ocean Nutrition for many years and that he had responsibility over various divisions, some of which had more than one hundred employees.
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> [45] In my opinion, the facts with respect to Mr. Matthews' job responsibilities and how they compare to other officers of Ocean Nutrition cannot be said to be undisputed. Even if the respondents were to say that they accept Mr. Matthews' evidence completely, the Court's determination of who can be a complainant is very discretionary. In these circumstances, Mr. Matthews' assertion that he has

> standing has a sufficient likelihood of success that it should be determined by the trial judge and not on this motion.
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> [46] If Mr. Matthews is found to be a complainant, the respondents still say that he is not a stakeholder who should be entitled to invoke the oppression remedy. Part of this argument is premised on the position that he is not one of the class of people described in s. 241(2) of the *CBCA*, that is, a "security holder, creditor, director or officer". My comments concerning the statutory definition of officer are equally applicable to this argument.

[12] The judge could have dismissed ONC's summary judgment motion after finding ONC had not met its onus under step one, because summary judgment is not to be granted where there is a genuine issue of material fact requiring a trial.

[13] He went further, however, and considered whether there were any material facts in dispute concerning whether Mr. Matthews' interests had been unfairly disregarded. Focussing on the equitable nature of the oppression remedy, which looks beyond legality to what is fair, the judge found the question of why Mr. Matthews was wrongfully dismissed was another material fact in dispute:

> [48] I agree with the submission of the respondents that courts should be cautious before allowing dismissed employees to include oppression remedies in their wrongful dismissal litigation. As indicated in the *Clitheroe* **[Clitheroe v. Hydro One Inc**., [2002] O.J. No. 4383 (Ont S.C.J.)] decision and the authorities which it cites, an oppression remedy should only be available to a dismissed employee if the dismissal is connected to the oppression of the plaintiff's rights as a shareholder, officer, director or creditor. It is obvious that this will not be the case in most wrongful dismissal actions.
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> [49] Mr. Matthews says that his position is different from the circumstances described in *Clitheroe* because of the existence of the Incentive Agreement. This agreement was the subject of affidavit evidence and cross-examination from both parties on the summary judgment motion.
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> ...
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> [57] For purposes of this motion, the respondents have conceded that Mr. Matthews' termination of employment was wrongful. Implicit in this is a concession that his resignation was not voluntary and was brought on by an unlawful change in the terms of his employment. What was not conceded was the reason why the employer would have done this. The cross-examination of the

> deponents who filed affidavits on behalf of the respondents indicated that Mr. Matthews was a valuable employee, who had contributed much to the success of Ocean Nutrition. He appeared to be a trouble shooter, who was called in to deal with difficult situations and special projects.
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> [58] I appreciate that the respondents' concession of wrongful dismissal was made solely to allow the Court to consider their legal arguments with respect to the oppression remedy. In the affidavits and notice of contest, Ocean Nutrition alleges that Mr. Matthews' resignation was completely voluntary. The difficulty which arises from the concession is that it leads into an important part of Mr. Matthews' oppression argument, which is that the company had no reason to force him out, other than the desire to avoid potential liability on the Incentive Agreement.

[14] Despite being satisfied ONC had not met step one of the test for summary judgment on evidence because of these material facts in dispute, the judge considered the second step of the test, whether Mr. Matthews' oppression claim had a real chance of success. He found it did:

> [59] Even if I were to accept that there were no material facts in dispute, it is not clear to me that Mr. Matthews' oppression claim has no realistic chance of success at trial. Oppression under the *CBCA* is an equitable remedy which depends upon all of the circumstances. The Incentive Agreement arguably gives Mr. Matthews an interest in the company which is similar to that of a minority shareholder. This fact distinguishes him from other employees who seek to add oppression to a wrongful dismissal action.

[15] The judge also found that he should be reluctant to dismiss Mr. Matthews' oppression claim where the motivation for Mr. Matthews' wrongful dismissal was exclusively within the knowledge and control of ONC and there had not yet been any documentary disclosure or discovery examinations ("disclosure"):

> [60] Mr. Matthews did not file any evidence showing that the termination of his employment was motivated by a desire to avoid obligations under the Incentive Agreement. The respondents argued that the absence of such evidence means that Mr. Matthews has not met the burden of showing that he has an arguable claim. It is important to recognize that this motion is brought before there has been any documentary disclosure or discovery examinations, and so the information concerning the employer's motivation is exclusively within the knowledge and control of the respondents. In such cases, the Court should be reluctant to grant

> summary judgment and dismiss a claim without giving that party a chance to obtain disclosure.

[16] This Court will not intervene in a summary judgment decision unless the judge applied wrong principles of law or a patent injustice results; **2420188 Nova Scotia Ltd. v. Hiltz**, 2011 NSCA 74 at ¶ 14.

[17] The two issues that need to be dealt with are whether the judge erred (1) in finding there were genuine issues of material fact requiring trial or (2) in applying a different threshold of success to ONC's motion on the basis it was brought and heard before there had been any disclosure.

[18] On the first issue, ONC's position is that the judge erred when he found there was a material factual dispute as to whether Mr. Matthews was an "officer or former officer" of ONC and hence a "claimant" or "stakeholder" for purposes of s. 241(1). ONC agrees that its position before the judge was that Mr. Matthews was not an "officer of former officer", contrary to Mr. Matthews' position, but states in its factum:

> 31. ... despite ONC having suggested that Matthews may not be either an "officer" or "complainant", the Chambers Judge should have weighed the evidence before him and determined that, despite the parties putting forth conflicting positions, there was no genuine issue of material fact with respect to Matthews' status under the *CBCA.*

[19] I disagree that the judge erred in this regard. Whether he erred must be determined on the basis of the parties' positions on the facts at the time they appeared before him, not on what their positions are on appeal. It was not his function on a summary judgment application to resolve disputed facts, as ONC argues he should have done. The judge did not err in finding there was a genuine issue of material fact for trial with respect to whether Mr. Matthews was an "officer or former officer" based on the evidence and the positions of the parties before him.

[20] Even if ONC had admitted before the judge that Mr. Matthews was an "officer or former officer", that would not have resulted in ONC's motion being granted. There remains the dispute of fact as to why Mr. Matthews was wrongfully dismissed. Mr. Matthews' position is that he was wrongfully dismissed "in bad

faith and to an ulterior purpose" to relieve ONC of its obligations to him under the Incentive Agreement in the event of a "Realization Event". ONC denies this.

[21] ONC argues that this is not a material fact. I disagree. The Supreme Court of Canada in **BCE** makes clear the equitable nature of the oppression remedy and points out that in determining whether an oppression has occurred, a court is to look beyond legality, to determine what is fair given all of the interests at play. It notes the importance of context in deciding whether a person's interests have been unfairly disregarded. The question of why Mr. Matthews was wrongfully dismissed could affect the outcome of his claim. The judge did not err in finding the question of why Mr. Matthews' employment was terminated was a genuine issue of material fact requiring trial.

[22] The second issue to be determined is whether the judge erred in applying a different threshold of success to ONC's motion on the basis that there had not been any disclosure prior to the motion.

[23] ONC argues the state of disclosure cannot be taken into account on a summary judgment motion because (1) **Civil Procedure Rule 13.04** permits summary judgment applications on evidence to be made immediately after pleadings close and before disclosure is required, (2) there is nothing in the **Rule** saying the threshold changes depending on whether disclosure has taken place and (3) Mr. Matthews had the opportunity to obtain any evidence in ONC's knowledge and control by cross-examination at the hearing.

[24] In ¶ 60 quoted in ¶ 15 above, the judge found that he should be reluctant to grant summary judgment and dismiss Mr. Matthews claim before there had been any disclosure, because the information concerning ONC's motivation to dismiss Mr. Matthews is exclusively within its knowledge and control.

[25] The principle applied by the judge has already been approved by this Court in **Innocente v. Canada (Attorney General)**, 2012 NSCA 36:

> [43] The third point - what the Crown did or failed to do - is a topic within the personal knowledge of the Crown, and not within Mr. Innocente's knowledge before discovery. Before Mr. Innocente has had a reasonable opportunity for discovery, his claim may not be dismissed by summary judgment, simply for failure to particularize that topic.

See also **Combined Air Mechanical Services Inc. v Flesch**, 2011 ONCA 764, ¶ 58 and **Halifax (Regional Municipality) v. Casey**, 2011 NSCA 69, ¶ 31.

[26] The judge's reluctance on the facts before him was particularly appropriate. ONC's motion for summary judgment was set down at the initial appearance of the parties before the court for directions. ONC had not produced its documents despite having been requested to do so by Mr. Matthews for the purpose of enabling him to put his best foot forward on the motion. Mr. Matthews wrote to ONC on February 17, 2012 requesting production:

> 3. Access to documents
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> In the interim, as you know, a party is require(d) to put its best foot forward on an application such as this. ONC has not done so. Referring at this stage specifically to paragraphs 12 and 15 of Ms. Barteaux's affidavit together with the plain implication of the pleadings in this matter, we require access to these documents.
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> In addition to this, we will require access to documents comprising the long term agreements of employees Jamieson, Emond, Wilson, Habbick, Robert Orr, and the former employee Meaghan Harris. If there are employees or others with the enterprise who had such agreements with the corporations we likewise require the same. We further require access to the employment files on each in such respect as the same touch upon or concern how such agreements were offered and entered into, their terms, whether they were honoured and for the purposes of anyone subject to such agreements who have departed the company, the terms of such departure.

[27] ONC refused such production, also by letter of February 17, 2012:

> 7. An estimate of the length of the hearing required by this matter as well as the types of documents we would seek to introduce do not trigger an entitlement to access any documents not previously disclosed in this matter. We remain of the view that we are not required to disclose any documents to you at this time. Further more, it is unclear to us upon what basis you claim to know who the employees who have signed long term agreements are and make no comment on the accuracy or lack thereof of your "guess". We nonetheless are unwilling to provide you with copies of any agreements that do exist as they are not relevant to this action. You are

> free to cross-examine Martin Jamieson on the signing of any other long term agreements by employees of ONC.
>
> 8. With respect to your request for access to "all communications surrounding Mr. Matthews in respect of any matter touching upon or concerning the terms and conditions of his executive incentive agreement, inclusive of electronic communications pertaining to same", we are of the view that we are not required to provide you with those materials or access at this time.

[28] There is no merit to ONC's argument on this issue.

[29] There is however one aspect of the judge's reasons that should be pointed out. In ¶ 62 he misstated step two of the test for summary judgment on evidence when considering whether Mr. Matthews had established his claim as being one with a real chance of success:

> [62] **In the circumstances, I am not able to conclude that Mr. Matthews' claim for oppression under the *CBCA* is absolutely unsustainable**. The evidence suggests that he may well fit within the status of a complainant under the *CBCA*, as well as a stakeholder entitled to protection. The assessment as to whether his expectations were reasonable and whether the respondents conducted themselves in a manner that unfairly disregarded those interests are fact driven inquiries, and I am not able to conclude that Mr. Matthews is certain to fail in his efforts to have the Court exercise its discretion in his favour. (Emphasis added)

[30] Rather than asking the question mandated by **Guarantee** – did Mr. Matthews establish his claim as being **one with a real chance of success** – as he appears to have done earlier in ¶ 59, it appears the judge may have asked himself the question applicable to an application for summary judgment on pleadings – was Mr. Matthews' claim absolutely unsustainable? This apparent misstatement, however, is of no consequence in this appeal because it was unnecessary for the judge to consider step two of the test as he had already correctly determined at step one that there were material facts in dispute which required him to dismiss ONC's motion.

[31] I would grant leave to appeal but dismiss the appeal. The judge did not apply any wrong principles of law that affected his dismissal of the motion and the result is not patently unjust. I would also order costs in the amount of $4,000 (the

amount both parties agreed was appropriate) plus disbursements to be paid by the appellant to the respondent forthwith.

Hamilton, J.A.

Concurred in:

Fichaud, J.A.

Bryson, J.A.