STATUTORY UNFAIR DISMISSAL IN CANADA: WHAT IS THE VALUE OF A LOST JOB?

By David J. Doorey* & Andrew Hills**

Nihal Mathur was hired by the Bank of Nova Scotia (BNS) in 1984, but in 1992 his employment was terminated for cause due to an 'inability to interact with supervisors, peer and subordinates in a manner acceptable to the Bank or at all.'[1] Fortunately for Mr. Mathur, banks are governed by federal law in Canada and the federal jurisdiction is one of only three in Canada, along with the provinces of Quebec and Nova Scotia, with unfair dismissal legislation.[2] Outside of these three jurisdictions, Canadian employers are generally free to terminate non-union employees for any or no reason at all, although they are usually required to provide notice of termination.[3] Mathur filed a complaint under the Canada Labour Code alleging he had been unjustly terminated, and in 1994 an adjudicator ordered that he be reinstated to his job at BNS with full back pay.

However, that was not the end of Mathur's ordeal. After he returned to work, hostilities continued between Mathur and his supervisors. By early 1998, BNS's management decided that Mathur was 'unmanageable'. BNS then initiated a year-long restructuring process with the intention of eliminating Mathur's position. When the restructuring was complete, in April 1999, Mathur once again found himself out of a job. This time BNS argued that the termination was due to the 'discontinuance' of Mathur's position which, if true, excluded the termination from the unfair dismissal legislation.[4] Mathur filed a second unfair dismissal complaint, which also succeeded. The adjudicator ruled that BNS had schemed to rid itself of Mathur by orchestrating

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[1] Mathur v Bank of Nova Scotia, [2001] CCEL (3d) 280

[2] Canada Labour Code, RSC 1985, c L-2, ('CLC'), s 240

[3] In Canada, primary legislative jurisdiction over the employment relationship falls to the provinces. However, three categories of employers fall within federal jurisdiction, including employees of the federal government, employees of businesses that are expressly assigned to federal jurisdiction by Section 91 of the Constitution Act, 1867 (including banks), and employees of business that provide an integral service to the functioning of a federally regulated business. See discussion in David Doorey, *The Law of Work, 2nd* (Emond 2020) 273-274.

[4] CLC, supra note 2, s 242(3.1) excludes from the unfair dismissal legislation terminations due to 'lack of work or because of the discontinuance of a function'.

the elimination of his job. However, this time the adjudicator refused to reinstate Mathur, finding that the relationship between employee and employer had been 'damaged beyond repair'.[5]

The question then became what damages should be ordered in lieu of reinstatement. The remedial principle that guides the federal unfair dismissal legislation is that the dismissed employee should be 'made whole'.[6] Calculating Mathur's economic losses (wages and benefits) from the date of his second termination until the date of the adjudicator's order was a straightforward exercise. That amounted to lost wages and benefits for a period of 37 months.[7] Less clear was how to calculate his future losses related to his unfair dismissal. Despite efforts to find new employment, Mathur remained unemployed at the time of the adjudicator's decision on damages nearly two years after his termination. Mathur was 63 years' old when the adjudicator issued the final damages award. Ultimately, the adjudicator concluded that it was possible that Mathur would not find new employment before his regular retirement age of 65. Therefore, the adjudicator ordered BNS to continue paying Mathur's salary until his 65th birthday unless he found new employment and subject to Mathur reporting to BNS quarterly on his efforts to find new employment.[8]

To summarize, the cost to BNS of unfairly terminating Mathur, an employee with 15 years' service, amounted to full wages and benefits for a period of over 4 years (51 months) running from the date of termination (April 1999) to Mathur's 65th birthday (in July 2003). The adjudicator also ordered BNS to pay Mathur's legal costs at the highest level available in Canadian law.[9] To place this outcome into context, had Mathur not had access to unfair dismissal legislation, and he instead filed a wrongful dismissal lawsuit in the common law courts, there would have been no possibility of reinstatement and his recovery would have been limited to wages and benefits for a period of notice that the employer should have been provided. How much notice would depend on the terms of the contract, but the upper boundary of implied 'reasonable notice' is in the range of 24 months, although most employees are entitled to much less notice than that. BNS gave Mathur 17 months'

[5] Mathur v Bank of Nova Scotia, supra note 1 [96].
[6] Murphy v Purolator Courier Ltd, [1993] 110 DLR (4th) 682 (Fed CA) 682
[7] The employer had already paid Mathur 17 months' wages and benefits in a termination package, so the adjudicator ordered an additional 20 months' wages and benefits to bridge the time from the end of that payment to the date of the award in May 2002.
[8] Mathur v Bank of Nova Scotia, [2002] 18 CCEL (3d) 150 [34]
[9] The adjudicator ruled that BNS has acted inappropriately in scheming to restructure Mathur out of his job, justifying 'solicitor-client costs' which are closer to actual legal costs paid rather than 'party-and-party' costs, which assigns costs based on a fixed schedule that covers only partial legal costs.

notice, and it is possible that amount would have been deemed appropriate by a common law court. It is also possible that a court would have disapproved of BNS's conduct and ordered aggravated or punitive damages as well, but those damages are rarely ordered. In the end though, there is little doubt that Mathur benefitted substantially in financial terms from having access to the statutory unfair dismissal legislation, even though ultimately he lost his job.

Mr. Mathur's case provides a useful launching point for this essay about unfair dismissal legislation in Canada. In the historical build-up to the enactment of unfair legislation in the federal jurisdiction (enacted in 1978), Quebec (1979), and Nova Scotia (1975), politicians expressed their desire to extend protections against arbitrary and unfair termination long available to unionized workers under collective agreement 'just cause' provisions to non-union workers. In all three jurisdictions, the intention was that reinstatement would be the primary remedy when an employee is unfairly dismissed, following the usual pattern in unionized workplaces. The remedy of reinstatement recognized the personal interest that employees have in their jobs and the importance of work to people's personal identify and self-worth.[10] Unfair dismissal legislation was about protecting personal dignity at work and removing a source of potential arbitrary unfairness that people can experience in their everyday lives. However, a quarter-century into the experiment with unfair dismissal legislation, experience demonstrates that in practice most non-union employees who win their statutory unfair dismissal complaints do not get reinstated.

A study of successful unfair dismissal complaints decided under the Canada Labour Code found that reinstatement was ordered in only a third of cases.[11] An earlier study found that among employees who had won their unfair dismissal complaint in Quebec and obtained a reinstatement order, only 54 percent actually returned to work, most of those workers (67 percent) felt they had been mistreated once they returned, and 38.5 percent left their jobs within three months of being reinstated.[12] When we then factor in the reality that the vast majority of unfair dismissal complaints are settled with a cash payment before litigation, we get a clearer picture of what is happening on the ground. Most non-union employees who are terminated unfairly in Canada's three unfair dismissal jurisdictions never return to their jobs.

[10] Machtinger v HOJ Industries Ltd. [1992] 1 SCR 986 (Sup Ct) 1002-1003
[11] Geoffrey England, 'Unjust Dismissal and Other Termination-Related Provisions' (Report to the Federal Labour Standards Review: HRSDC 2006) 51
[12] Gilles Trudeau, 'Is Reinstatement a Remedy Suitable to At-Will Employees?' (1991) 30(2) Industrial Relations 302

This result shines a spotlight on how adjudicators exercise the broad remedial authority granted by the unfair dismissal legislation to craft remedies to compensate the employee for the loss of a job with just cause protection. Given that the purpose of the legislation was to redress deficiencies in the common law model of wrongful dismissal, it is reasonable to expect that adjudicators would have charted a fundamentally different course than the common law in terms of compensating employees for the loss of their job. For example, whereas the common law generally limits damages to lost wages and benefits for a period of notice that the employee ought to have been given, a 'make whole' approach would presumably require adjudicators to assess the actual loss the employee suffered due to being unfairly terminated. Mr. Mathur's case provides an example of how these differing approaches to remedies can produce widely different results.

However, this essay will explain that the 'make whole' approach adopted by the adjudicator in Mathur's case may be more the exception than the rule in Canada. In Nova Scotia and Quebec, adjudicators have mostly eschewed the 'make whole' approach to crafting damages in lieu of reinstatement and have instead reverted to a formula more consistent with the common law approach of simply requiring the employer to pay some additional amount of money on top of back wages that is unrelated to the employee's real loss. It is difficult to see how this approach is consistent with the legislative goal of replacing the common law model with a remedial approach that better respects the value of the lost job to the employee.

On the other hand, some adjudicators acting under the federal legislation have stayed true to the spirit and intent of the unfair dismissal legislation by adopting an approach used to assess damages in lieu of reinstatement in labour arbitration for unionized employees in Canada. That approach treats an employment contract governed by protection against unfair dismissal as a form of fixed-term contract that would have lasted indefinitely or until the employee retired but that has been terminated early. This approach requires the adjudicator to assess what the employee has lost because of not being permitted to remain in the job indefinitely into the future. It is a more complex and uncertain approach to crafting a remedy than simply making up a number, but it is also more consistent with the 'make whole' philosophy that drives the unfair dismissal legislation.

This essay explores the emergence and development of unfair dismissal legislation in Canada. In Part 1, we provide an overview of the Canadian legal landscape to set the context for the introduction of unfair dismissal legislation in three jurisdictions in the 1970s. Part 2 describes academic debates in Canada and the United States beginning in the 1970s advocating for unfair

dismissal legislation to address the common law's failure to respect workers' personal interest in their jobs and to protect workers from arbitrary and unjust termination of employment. Part 3 then summarizes the key elements of the unfair dismissal legislation regimes in Nova Scotia, Quebec, and the federal jurisdiction. Finally, in Part 4, we evaluate the extent to which the remedial approach taken by adjudicators in the three unfair dismissal jurisdictions has lived up to the promise of unfair dismissal legislation to protect and respect employees' investment and personal interest in their job.

1. THE LEGAL CONTEXT

At the outset, it is useful to provide a brief description of the legal structure of Canadian employment law to situate the introduction of unfair dismissal regulation in this broader context. As in the United Kingdom, the legal concept of the employment contract is the starting point of the Canadian common law of employment. The guiding presumption is that either party can terminate the employment at any time and for any (or no) reason provided they give the other party 'reasonable notice'. This requirement to provide reasonable notice arises from a standardized implied term that dates to the early twentieth century.[13] Judges decide what amount of notice is 'reasonable' by considering a menu of well-known criteria of which length of service is by far the most significant.[14] Reasonable notice can range from as little as a few weeks for a short-term employee up to two years or more for long-term employees.

If an employer terminates the employment contract with less than the required amount of notice, the employee can file a 'wrongful dismissal' lawsuit in the courts. If that action succeeds, the court will order general damages calculated based on the value of lost wages and benefits that the employee would have received had they worked through the required notice period and, following *Hadley v. Baxendale,* any other damages that can be said to have been in the reasonable contemplation of the parties.[15]

The obligation for an employer to provide reasonable notice of termination arises whenever the employer 'terminates' an indefinite term employment contract, subject to some exceptions described below. A termination includes a 'constructive dismissal', which can take the form of a

[13] Speakman v City of Calgary [1908] 9 WLR 264 (Alta CA)*;* Carter v Bell & Sons (Canada) Ltd [1936] CanLII 75 (Ont CA). See discussion in Doorey (n 3) Chapter 10.
[14] Bardal v Globe and Mail Ltd [1960] CanLII 294 (Ont SCJ). See description of criteria applied by courts in assessing reasonable notice in Doorey, ibid Chapter 10.
[15] [1854] 156 ER 145. See discussion in Ojanen v Acumen Law Corporation [2021] BCCA 189.

repudiatory breach by the employer of a fundamental term of contract, or behaviour by the employer that does not constitute a breach of a contract term but that renders continued employment by the employee 'intolerable.'[16] The employee must 'accept' the employer's repudiation of the contract within a reasonable period of time in order to claim that the employer's actions constituted a constructive dismissal. A permanent layoff due to a lack of work is a termination, and a 'temporary layoff' that includes the expectation of a recall at a subsequent date may be treated as a constructive dismissal (and therefore a termination) by an employee if the contract does not grant the employer a right to temporarily layoff.[17] Reasonable notice is not required to terminate a fixed-term or fixed-task contract, however courts have occasionally found that a termination occurred when an employer declined to renew a fixed-term contract in circumstances that suggest the parties had an expectation of renewal.[18]

Several exceptions have been carved out from the general presumption that reasonable notice of termination is required.[19] Firstly, because the requirement to provide reasonable notice is an implied term, the parties are free at common law to contract out of the requirement. However, the parties are not entirely unencumbered in this regard, because beginning in the 1960s, Canadian governments introduced legislative mandatory minimum periods of notice of termination. As a result, in relation to employees who are covered by the legislative notice requirements, the parties may no longer agree to termination with less notice than required by statute.[20] In practice, many employers seek to limit their notice obligations to the minimum statutory period, which is usually much less than implied "reasonable" notice, measured in weeks rather than months.[21] Secondly, there are a variety of statutory restrictions on the right of employers to terminate employees for any reason at all, including human rights statutes (banning termination based on prohibited grounds of discrimination), collective bargaining statutes (banning termination based on trade

[16] Potter v New Brunswick Legal Aid Services Commission, [1997] 1 SCR 846; Shah v Xerox Canada Ltd [2000] CanLII 2317 (Ont CA). See D Doorey, 'Employer Bullying: Implied Duties of Fair Dealing in Canadian Employment Contracts' [2005] 30 Queens Law Journal 500.
[17] Elsegood v Cambridge Spring Service, [2011[ONCA 831
[18] Ceccol v Ontario Gymnastics Federation, [2001] CanLII 8589 (Ont CA)
[19] In addition to the exceptions discussed below, the parties are also released from their obligation to provide reasonable notice of termination in the case of frustration of contract: see Doorey (n 3) Chapter 11.
[20] Machtinger (n 10)
[21] Canadian courts have required precise and unambiguous language to affect a valid contracting out of statutory notice. In addition, at least in Ontario, courts have ruled that a contractual notice clause is unlawful if at any time in the life of an employment relationship the clause would allow for termination with less notice than required by legislation: Wright v The Young and Rubicam Group of Companies, [2011] ONSC 4720

union activities), and anti-reprisal provisions found in most employment-related statutes (banning terminations based on reprisals for attempts by employees to enforce their statutory rights).

Thirdly, employers are relieved of their obligation to provide notice of termination when the employee has engaged in a serious or fundamental breach of the contract ('summary dismissal for cause'). In a seminal 1967 decision, the Ontario Court of Appeal explained the law of summary dismissal as follows:

> If an employee has been guilty of serious, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial to the employer's business, or if he has been guilty of wilful disobedience to the employer's orders in a matter of substance, the law recognises the employer's right summarily to dismiss the delinquent employee.[22]

In 2001, the Supreme Court of Canada (SCC) ruled that courts must apply a 'principle of proportionality' in assessing whether cause for summary dismissal exists, which involves an assessment of all relevant circumstances, including mitigating factors that might explain or contextualize the employee's behaviour, to determine if the employee's misconduct was sufficiently serious to undermine the foundation of the employment relationship.[23]

It is within the context of the law of summary dismissal that the issue of cause for termination most often arises in the Canadian common law. In the typical scenario, an employer terminates the employment contract without notice asserting cause to avoid the notice obligation, and the employee responds by launching a wrongful dismissal lawsuit arguing that the standard for cause was not satisfied. The court must then determine whether the employee in fact committed the breach alleged by the employer and, if so, whether the breach was sufficiently serious to meet the test for summary dismissal. If the employer fails to satisfy the standard for summary dismissal the court will assess damages based on an assessment of lost wages and benefits for the period of notice that ought to have been provided to the employee. Therefore, common law damages for wrongful dismissal do not compensate the employee for actual loss suffered due to the termination. Rather, damages are restricted to loss suffered from the failure to provide notice. In exceptional cases, aggravated and punitive damages can be ordered if the employer engaged in bad faith in the manner of dismissal or malicious treatment of the employee.[24]

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[22] R v Arthurs, Ex parte Port Arthur Shipbuilding Co[1967] CanLII 30 (Ont CA), aff'd [1969] SCR 85.
[23] McKinley v BC Tel [2001] SCC 38
[24] Honda Canada v Keays [2008] SCC 39; Galea v Wal-Mart Canada Corp [2017] ONSC 245 [ordering $250,000 in aggravated damages and $500,000 in punitive damages in a wrongful dismissal action]

As in the UK, Canadian courts have declined to order specific performance of employment contracts in wrongful dismissal cases, emphasizing the fact the employer's wrongful behaviour is not the termination of the employment contract without cause, but rather the procedural failure of the employer to provide the employee with advance warning of the termination. The SCC has rejected the argument that the common law should recognize a claim of 'bad faith discharge' that would require employers to demonstrate cause for termination. In *Wallace v United Grain Growers,* the SCC ruled that recognizing a requirement for cause would 'deprive employers of the ability to determine the composition of their workforce' and would be 'overly intrusive and inconsistent with established principles of employment law'.[25] The SCC ruled that any introduction of requirement for cause for termination of employment contracts should be left to the legislature.

This general legal framework is mimicked in Canadian statutory provisions requiring minimum notice of termination. Employers are relieved of the obligation to provide statutory notice when the employee has engaged in serious misconduct in violation of the terms of the employment contract. The standard for cause applied varies slightly across jurisdictions. In some jurisdictions, such as British Columbia, the employment standards statute simply states that the employer is relieved of the obligation to provide statutory notice if there is 'just cause'.[26] In applying that language, the Employment Standards Tribunal has essentially adopted the common law test of proportionality.[27] In other jurisdictions, the statute defines cause more narrowly than in the standard common law approach. For example, in Ontario, an employee is only disqualified from receiving statutory minimum notice if they engage in 'wilful misconduct, disobedience or wilful neglect of duty.'[28] This approach can result in a situation in which the employee's misconduct meets the standard for summary dismissal in the common law—thereby relieving the employer of the obligation to provide reasonable notice—but does not meet the standard to disqualify the employee from statutory notice.[29]

So far, we have summarized the obligation imposed upon Canadian employers to provide notice of termination to employees under both the common law and employment standards

[25] Wallace v United Grain Growers Ltd [1997] CanLII 332 (SCC)[76] (Iacobucci J)
[26] See British Columbia Employment Standards Act, RSBC 1996 c 113 s 63(3)
[27] Costco Wholesale Canada Ltd (Re) [2017] CanLII 149752 (BC EST)
[28] Ontario Regulation 288/01 s 2(1)(3). See also Nova Scotia Labour Standards Code, s 72(1).
[29] Render v ThyssenKrupp Elevator (Canada) Ltd [2022] ONCA 310; Oosterbosch v FAG Aerospace Inc [2011] ONSC 1538

legislation. We have seen that the *reason* for termination of an employment contract is generally only relevant if the employer seeks to avoid contractual and statutory notice obligations entirely by arguing that the employee committed a repudiatory breach of contract. The situation is very different for unionized employees, who constitute approximately 31 percent of non-agricultural employees in Canada. Unionized employees are protected by 'just cause' provisions found in collective agreements.[30] Unlike in Britain, collective agreements supplant individual employment contracts in Canada, and collective bargaining legislation requires that all disputes regarding the interpretation and application of collective agreements be referred to binding labour legislation.[31]

A consequence of this legal structure is that unionized workers in Canada do not have access to the courts to challenge the employer's decision to terminate their employment, but they can file a grievance under the collective agreement challenging discipline and dismissals as lacking just cause.[32] Most collective agreements assign the decision whether to refer a grievance to arbitration to the union. In this way, unions act as a gatekeeper to arbitration, weeding out unmeritorious grievances. Therefore, even though unionized employees in Canada are protected by contractual 'just cause' provisions, those employees are not guaranteed a right to have their grievances litigated. A union can withdraw a grievance provided that the merits of the case are fairly evaluated, and the decision is not otherwise tainted by discrimination or bad faith.[33]

When grievances filed by disciplined or terminated unionized employees alleging a lack of just cause proceed to arbitration, arbitrators apply what is known as the 'William Scott Test'.[34] According to that three-step test, the employer must first establish on a balance of probabilities that the employee engaged in the alleged misconduct. If the answer is yes, then the arbitrator next decides whether, considering all the circumstances, including any mitigating factors that help to

[30] Some provinces require that just cause provisions be included in all collective agreements: see eg Manitoba Labour Relations Act, CCSM c L10, s 79; British Columbia Labour Relations Code, RSBC 1996, c 244, s 84. All Canadian jurisdictions require that any disputes relating to the application, interpretation and administration of the collective agreement be referred to binding labour arbitration. Mid-contract strikes are prohibited in Canada. In practice, Canadian unions uniformly negotiate 'just cause' provisions into collective agreements.

[31] See for example CLC (n 2) s 57

[32] McGavin Toastmaster v Ainscough, [1976] 1 SCR 718. See also discussion in Judy Fudge, 'The Limits of Good Faith in the Contract of Employment: From Addis to Vorvis to Wallace and Back Again' (2007) 32 Queens Law Journal 529 at 535-536.

[33] The duty of fair representation by a union is statutory in most Canadian jurisdictions and prohibits unions from acting in a manner that is arbitrary, in bad faith, or discriminatory in the processing of grievances. See eg Ontario Labour Relations Act, 1995, SO 1995, c 1 Sch A, s 74.

[34] The test was first applied in Wm Scott and Company Ltd v Canadian Food and Allied Workers Union [1977] 1 CLRBR 1 (BC LRB). See discussion in Doorey (n 3) 621-635.

explain the employee's behaviour, the employer's response was excessive. If the arbitrator decides that the employer's response was excessive, then the arbitrator crafts a remedy. The arbitrator's remedial powers are broad and include the right to reinstate unjustly dismissed employees, to substitute lesser penalties, and to order damages to make the employee whole, including damages in lieu of reinstatement if the arbitrator believes reinstatement is inappropriate due to an irreparable breakdown of the relationship. There is a rich and expansive body of Canadian arbitral jurisprudence spanning more than a half century exploring the meaning of 'just cause' for discipline and dismissal and the appropriateness of various remedial orders.[35]

2. EARLY ADVOCATES FOR UNFAIR DISMISSAL PROTECTIONS IN NORTH AMERICA

Canada's delegation to the International Labour Organization (ILO) was an early supporter of the 1963 Termination of Employment Recommendation (R119), which encouraged governments to protect employees against terminations lacking a 'valid reason'.[36] However, this support did not immediately translate into unfair dismissal legislation. While unionized employees in Canada were protected by 'just cause' provisions in collective agreements, as previously discussed, non-union employees, comprising most Canadian workers, could be terminated for any or no reason at all, subject only to the common law and statutory obligation to provide notice of termination. Canadian employment law prioritized employer flexibility to terminate employment contracts at any time but offered residual protection to employees in the form of a notice requirement to allow employees to prepare for pending job loss.

There was never a strong popular movement advocating for unfair dismissal legislation in Canada. Employers resisted new regulation that would restrict managerial prerogative, and unions were not pushing for unfair dismissal legislation presumably because the offer of 'just cause'

[35] See Donald Brown and David Beatty, *Canadian Labour Arbitration, 5th Ed* (Carswell 2019) Chapter 7.

[36] International Labour Organization, Record of Proceedings: 47th Session of the International Labour Conference, June 1963 at 658 . Recommendation 119 provided at article 2(1): 'Termination of employment should not take place unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.' The proposal was supported not only by Canada's government and labour representatives to the ILO, but also by its management representative, see ILO 47th Session, above, at 443. See also Gordon Simmons, 'Unjust Dismissal of the Unorganized Workers in Canada' (1984) 20:2 Stanford J International Law 473 at 474; Geoffrey England, *Individual Employment Law* (Irwin Law 2008) at 364 (noting that the federal unfair dismissal law was introduced 'in response to ILO Recommendation 119'.)

protection in collective agreements is among the labour movement's strongest selling points.[37] The focus of advocates of non-union, precarious workers has long been directed at more fundamental and systemic flaws in the regulatory model, such as discrimination, dangerous working conditions, low wages, and poor enforcement of existing minimum labour standards rather than the introduction of new unfair dismissal legislation.[38] There was also a comparative element at play that might help explain the general lack of interest in unfair dismissal legislation in Canada: the Canadian legal model at least entitled most non-union workers to notice, which is superior to the default 'at-will' model of employment that governed south of the border in the United States.[39]

By the early 1970s, labour law scholars in the U.S. had turned their collective attention to the deficiencies of this at-will model. Most of this literature advocated 'just cause' legislation that would extend job protections to non-union workers already available to most unionized workers under collective agreements.[40] These scholars argued that just cause legislation would recognize workers' valuable interests in their jobs and the importance of those jobs to personal identity and well-being that was entirely disregarded in a system of at will employment.

For example, in 1976, Professor Clyde Summers published an important article calling for the adoption of statutory unjust dismissal protections.[41] Summers described unfair dismissal legislation in France, Germany, Great Britain, and Sweden. He recognized that protection for employees from arbitrary termination was unlikely to emerge in the U.S. common law and therefore that any such protection must come via legislation. Summers argued that a just cause standard was 'an essential element of a tolerable and humane employment relationship' that 'expresses an increasing recognition that employees have valuable rights in their jobs that society

[37] See England (n 36) at 10, n 11 [noting that 'the reaction of organized labour [to the proposal for unfair dismissal legislation] was largely negative']
[38] Judy Fudge, 'Labour Law's Little Sister: The Employment Standards Act and the Feminization of Labour' (1991) 7:3 J of Law and Social Policy
[39] Rachel Arnow-Richman, 'From Just Cause to Just Notice in Reforming Employment Termination Law' in *Research Handbook on the Economics of Labor and Employment Law*, Michael L Wachter and Cynthia L Estlund, eds (Edward Elgar 2012) 296; Jeffrey Hirsch and Samuel Estreicher, 'Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism' (2014) 92 North Carolina Law Review 343.
[40] There is a vast literature running from the late 1960s -1980s arguing for just cause protection to replace the default 'at will' model in the United States. Some examples include Clyde Summers, 'Individual Protection Against Unjust Dismissal: Time for a Statute' (1976) 62 Virginia Law Rev 481; Lawrence Blades, 'Employment at Will vs Individual Freedom: On Limiting the Abusive Exercise of Employer Power' (1967) 67 Columbia Law Rev. 1404; Cornelius Peck, 'Unjust Discharge From Employment: A Necessary Change in the Law' (1979) 40 Ohio State Law J 1; Jack Steiber and Michael Murray, 'Protection Against Unjust Discharge: The Need for a Federal Statute' (1983) 16 U of Michigan J of Law Reform 319. A strong counterargument in defence of 'at will' employment was also made, particularly by Richard Epstein, 'In Defense of the Contract At Will' (1984) 51 U of Chicago Law Rev 947.
[41] Summers (n 40).

ought to protect against arbitrary action.'[42] He explained that for most employees, 'their job is the most valuable thing they possess' and therefore there was a compelling claim for legal protection against arbitrary and unfair termination of job rights.[43] He proposed a statutory just cause requirement to replace the 'primitive' default at will model that would be enforced by labour arbitrators applying principles developed over the years interpreting collective agreement just cause provisions.

By the 1980s, Professor Paul Weiler had concluded that 'the case for protection against unjust dismissal now seems virtually self-evident'; the more difficult question was how to implement just cause protections into an American legal model notoriously resistant to limitations on 'freedom of contract'.[44] Weiler too recognized that a job is crucial to employees not just for economic reasons, but also 'because work is so important to the personal identity and sense of self-worth of the employee.'[45] While Weiler noted that the remedy of reinstatement for unjust dismissal was the ideal solution to the loss of one's job, he also expressed doubt that reinstatement would work well in the non-union setting owing to the employee's lack of power in the face of an employer that no longer supported the employment relationship.[46]

While the lack of just cause protection for non-union workers attracted less scholarly attention in Canada than in the U.S., the argument for unfair dismissal protection was taken up in two important essays written in the late 1970s by University of Toronto law Professors David Beatty and Katherine Swinton.[47] Like Summers, both Canadian authors emphasized the 'personal aspects' of the employment relationship, which are central to 'the individual's existence serving his personal needs and shaping his daily existence'.[48] In 'Labour is Not a Commodity', Beatty argued that the law of contracts generally, and the common law rules governing termination of employment contracts specifically, are 'institutionally incapable' of protecting workers' interest in the personal aspects of employment because they are so deeply rooted in the principles of market theory:

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[42] ibid 520.
[43] ibid 532
[44] Paul Weiler, *Governing the Workplace: The Future of Labor and Employment Law* (Harvard U. Press 1990) 50.
[45] ibid 49.
[46] ibid 85-87.
[47] David Beatty, 'Labour is Not a Commodity' in Barry Reiter and John Swan, *Studies in Contract Law* (Butterworths 1980) 315; Katherine Swinton, 'Contract Law and the Employment Relationship: The Proper Forum for Reform' in Barry Reiter and John Swan, *Studies in Contract Law* (Butterworths 1980) 357. See also discussion in Fudge (n 38).
[48] Beatty, ibid 319.

> Indeed, on closer inspection it can be seen that the law of termination that is called for by the principles of contract is utterly inconsistent with all of the personal aspects of employment. With the power of unilateral termination vested in the hands of the employer, access to the means by which labour is exerted and well-being is secured, is put beyond the control of the individual…. With a legal right to truncate the relationship at any time, all efforts at exercising one's capabilities are valued exclusively as means of serving the societal production function.[49]

Beatty advocated a legal rule that would require employers to establish 'just cause' or, in the case of redundancies, to find an alternative comparable job if possible. Only if such a rule replaced the employer's right to unilaterally terminate with notice could we then 'speak meaningfully of [the employment] relationship as an industrial democracy.'[50]

Swinton similarly criticized the common law's fixation on reasonable notice of termination because it ignored entirely the employee's ongoing interest in their job:

> …the damage remedy based on general contract law principles is usually inadequate to compensate in wrongful dismissal cases, for it fails to give the employee what he really seeks: the opportunity to continue his employment until he breaches his contract by failing to fulfil his obligations to his employer.[51]

Professor Swinton argued that common law judges should imply a term into employment contracts that permits 'termination only for just cause'.[52]

Therefore, advocates for protections against unfair dismissal in North America emphasized the value of jobs to personal self-esteem, autonomy and identity and, in Canada, on how the common law's fixation on notice of termination entirely disregarded that value. Imposing limits on the contractual right of employers to terminate employees for any or no reason at all was a necessary step towards true industrial citizenship and fairness in labour markets. Writing for a collection on contract law, the focus of Professors Beatty and Swinton was on the inadequacies of the common law presumption of termination with reasonable notice. However, it was unlikely that common law judges would suddenly reverse course and substitute an implied 'just cause' requirement for the long-standing presumption in favour of termination with notice.[53] Moreover, an implied term requiring cause for termination would not likely solve the problem identified by

[49] ibid 328
[50] ibid 355.
[51] Swinton (n 47) 371.
[52] ibid374.
[53] As noted earlier, years later the SCC rejected the argument that the common law should recognize an action for 'bad faith discharge'.

Beatty and Swinton, because the employer would presumably still be able to contract out of the implied term by including expressed contract language permitting termination with notice. As in Great Britain and the U.S., unfair dismissal protection for non-union employees would require legislative intervention.

3. THE INTRODUCTION OF UNFAIR DISMISSAL LEGISLATION IN CANADA

The first Canadian jurisdiction to take this step was the small maritime province of Nova Scotia in 1975, followed by the federal jurisdiction in 1978 and Quebec in 1979. No other Canadian jurisdiction has followed suit, so unfair dismissal legislation remains exceptional in Canada. According to Professor Geoffrey England, the 'reasons so few provinces have enacted unjust dismissal protections are, first, to spare the public purse the costs of administrating the scheme, and second, to maintain the employer's flexibility in dismissing employees.'[54] The legislation in the three jurisdictions follows a similar structure, imposing an obligation on employers to meet a standard of just cause in cases of terminations other than when the cause is a lack of work or elimination of the employee's job. Eligible employees may file complaints alleging unjust termination, which triggers an administrative process that can lead ultimately to a hearing before an administrative tribunal or arbitrator. The statutes address major flaws in the common law model by empowering the adjudicators to reinstate unfairly dismissed employees and to order damages for losses sustained due to the unfair dismissal. The following summary provides a general overview of the main elements of the legislation beginning with the two provincial schemes, followed by the federal legislation.

a. Nova Scotia's Unfair Dismissal Legislation (1975)

In 1975, the Legislative Assembly of Nova Scotia amended the Labour Standards Code to extend unjust dismissal protection to employees with at least 10 years' service with the employer.[55] During the parliamentary debates, legislators referenced the problem of older workers being put "out to pasture" by their employers and of the desire to ensure these workers have similar

[54] Geoffrey England, *Individual Employment Law* (Irwin 2008) 364.
[55] Labour Standards Code, RSNS 1989, c 246, s 71.

protections against arbitrary termination to those already enjoyed by unionized workers.[56] The Premier of Nova Scotia, Gerald Regan, echoed those concerns while speaking in the Legislative Assembly:

> We live in an age when some special consideration and, I suggest, protection may be necessary for the older workers. Let me express my long-held belief on this subject in these words and that is, that it is my belief that a man who has, over a long period of years, worked at one job or for one company, has as a result a form of vested interest in that job and in that position…. The terminology is of such a nature that it gives the worker in a plant or a store that is not unionized, only the type of seniority, only the type of protection that everyone who is subject to a collective agreement… has always had in this and every other province. And so, it's saying in effect that you don't have to belong to a union in order to have this piece of protection.[57]

Politicians also referenced a series of industrial bankruptcies and coupled the unjust dismissal sections with other protections for workers whose employer had defaulted. There was concern over the continued fallout from the 1973 Oil Crisis and the unfair dismissal legislation was part of a broader strategy to sheild older workers from the worst of its effects.

The 10-year threshold, combined with other exclusions, led the authors of a leading text to proclaim that the unfair dismissal protections are 'probably more apparent than real'.[58] The Labour Board does not produce statistics showing the number of unfair dismissal complaints filed in a typical year, but we can estimate that the number is very low.[59] For those employees covered by the legislation, the law provides that 'the employer shall not discharge or suspend' the employee 'without just cause.'[60] A termination due to a layoff caused by a lack of work or elimination of the employee's position is not a termination.[61] The onus is on the employer to demonstrate that just cause for termination existed.[62] Once a complaint is filed, the Director of Labour Standards is

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[56] See Nova Scotia, Legislative Assembly, *House of Assembly Debates and Proceeding,* 51st Assembly, 2nd Sess, No 2 (24 March 1975) 1500-1501 (Mr. Akerman) ["NS Debate"].
[57] NS Debate (n 56) 1501-1502.
[58] Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada,* 2nd ed (Butterworths 1993)667. The legislation also excludes unionized employees, most professionals and students training to become professionals, employees who are terminated 'for any reason beyond the control of the employer … if the employer has exercised due diligence to foresee and avoid the cause of the discharge', and a range of other employees exempted in regulations: NS Labour Standards Act, s 71, 72(3); Labour Standards Code Regulations, NS Reg 298/90.
[59] The Nova Scotia Labour Board's Annual Report for 2016, the last Report published, lists a total number of labour standards complaints filed in 2016 of 40. It can be presumed that only a small fraction of those alleged a breach of the unfair dismissal provisions: https://novascotia.ca/lae/labourboard/reports/documents/LabourBoardAnnualRpt2015-2016.pdf
[60] NS Labour Standards Act, s 71(1)
[61] Decker v Ben's Ltd [1995] NSCA 103 (CanLII); Cowper v Dymaxion Research Limited [2016] NSLB 300 (CanLII)
[62] Grafton Street Restaurant Limited (Taboo Night Club) v Leonardo [2019] NSLB 3 (CanLII)

authorized to attempt a mediated settlement failing which the complaint may be referred to adjudication before the provincial Labour Board.[63]

What constitutes just cause is not defined in the statute and adjudicators have drawn primarily from labour arbitration jurisprudence interpreting collective agreement just cause provisions, although the common law test of cause for summary dismissal is also sometimes considered.[64] The influence of labour arbitration jurisprudence can be seen in the requirement for 'progressive discipline' that has been applied by the Nova Scotia Labour Board in unfair dismissal cases:

> The cases are clear that the test for determining whether just cause exists is closer to the labour relations model than the common law one…. As a result, the Tribunal requires that employer use progressive discipline when allegations of incompetence or misconduct arise, allowing the employee the opportunity to correct their performance before the ultimate step of termination is used against them.[65]

Therefore, an important normative influence of the unfair dismissal legislation in Nova Scotia has been to import a requirement for employers to warn employees of performance problems and to provide training and time to improve prior to termination.[66]

If a termination is ruled to have been without just cause, the Labour Board is granted broad remedial powers to provide a remedy, including reinstatement and damages that 'rectify an injury caused to the person injured or to make compensation therefor', subject to the duty to mitigate.[67] In some cases, the Board has reinstated employees but reduced the amount owing in back wages because the Board believed that some discipline short of termination was justified.[68] This approach is consistent with that taken by labour arbitrators in unionized workplaces. However, the Board may also decide that reinstatement is unavailable (for example, if a job no longer exists) or inappropriate (if the relationship has been irreparably damaged). If a termination is ruled to have

[63] NS Labour Standards Act, s 21

[64] See Mosher v Northwood Homecare Incorporated [2018] NSLB 123 (CanLII) [applying the common law test for cause in McKinley v BC Tel (n 10)]; Asplundh Tree Service v Chapman [2021] NSLB 81; Michelin North America (Canada) Inc v Nova Scotia (Labour Standards Tribunal) [2003] NSCA 40 (CanLII) [applying the test for innocent absenteeism applied by labour arbitrators in assessing whether employer had just cause under the Labour Standards Act]

[65] Roberts v Colchester Young Men's Christian Association (LST No 1338, July 1996) [57]. See also Grafton Street Restaurant Limited (Taboo Night Club) v Leonardo [2019] NSLB 3 (CanLII)

[66] ibid; RG Church Fuels Ltd v Canavan [2018] NSLB 55 (CanLII) [no just cause because employer failed to apply progressive discipline]

[67] NS Labour Standards Act, s 26(2). See Coleman v Sobeys Group Inc [2005] NSCA 142 (CanLII) [reinstatement ordered after unfounded termination for theft]

[68] Marchand v Regional Occupational Centre Society [2011] NSLRT 29

been without just cause but reinstatement is denied, the Board can order damages in lieu of reinstatement. However, in assessing those damages, the Board has often simply adopted common law 'reasonable notice'.[69] The Nova Scotia Court of Appeal recently approved this approach, finding that the broad remedial powers conferred under the legislation permit the Tribunal to order damages in lieu of reinstatement by applying common law reasonable notice.[70] As discussed below, this is a curious approach given that the unfair dismissal legislation was intended to provide a statutory alternative to a common law action in wrongful dismissal.

b. Quebec's Unfair Dismissal Law: 1979

Quebec introduced its unfair dismissal legislation in 1979 in the *Act Respecting Labour Standards* ['ALS'].[71] The law initially applied to employees with at least five years' service, but over time that threshold was reduced to its current two years.[72] Therefore, the Quebec legislation reaches a much larger percentage of the workforce than the Nova Scotia legislation. Section 124 of the ALS permits an eligible employee 'who believes that he has not been dismissed for a good and sufficient cause' to file a complaint with the Labour Commission.[73] A complaint will not be processed if there exists an equivalent remedy available to the employee in a statute or collective agreement.[74] The SCC has explained the function of section 124 as follows:

> Although procedural in form, s. 124 does not just create a remedy, as it also establishes a substantive labour standard that prohibits the dismissal or termination of an employee without good and sufficient cause once the employee has completed the required period of service. … It accordingly constitutes an exception to the traditional principles of freedom of contract, and it limits the employer's discretion to terminate any contract of employment with an indeterminate term at will upon giving sufficient notice.[75]

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[69] Grafton Street Restaurant (n 62) [83]. See also: Abridean International Inc v Bidgood [2017] NSCA 65 (CanLII); Gerald Archibald Morine v L & J Parker Equipment Incorporated [2001] CanLII 59714 (NS LST) [reinstatement denied, 12 months' notice ordered]; RG Church Fuels Ltd v Canavan [2018] NSLB 55 (CanLII) [160].
[70] Abridean International, ibid.
[71] *Act Respecting Labour Standards*, CQLR c N-1.1 ["ALS"]
[72] ibid s 124.
[73] ibid. The Tribunal is known in French as the Commission des normes, de l'équité, de la santé et de la sécurité du travail.
[74] ALS (n 71) s 124. If a collective agreement provides the employee with access to arbitration at no cost and the arbitrator has authority to reinstate and make the employee whole, then an employee covered by that agreement may be blocked from filing a complaint alleging unfair dismissal under the ALS: see discussion in Lessard v Quebec [2016] QCCA 1172.
[75] Syndicat de la fonction publique du Québec v Quebec (Attorney General) [2010] SCC 28

Once a complaint is filed, the Commission may with the agreement of the parties appoint a mediator but failing a resolution, the complaint is referred to the provincial labour Tribunal.[76] The ALS provides that the Commission may act as the representative of a non-union employee before the Tribunal.[77] The Commission may also require the employer to provide written reasons explaining the decision to termination.[78]

In its interpretation of 'good and sufficient cause', the Tribunal has borrowed from labour arbitration jurisprudence in unionized settings. For example, as in Nova Scotia, the Quebec Tribunal has adopted the labour arbitration principle of progressive discipline, requiring employers to demonstrate that an employee was warned about performance problems and provided with a fair opportunity to improve before the ultimate step of termination was imposed.[79] The requirement for cause does not prohibit an employer from terminating an employee due to a lack of work, but the employer must establish that this was the real reason and that the employee was not singled out in the decision as to which workers were to be terminated.[80] 'Good and sufficient cause' has been interpreted as being synonymous with 'serious cause' in relation to blameworthy misconduct.[81]

As in the other two Canadian jurisdictions with unfair dismissal legislation, the Quebec model grants the Tribunal broad remedial authority to make an unfairly terminated employee whole, including by ordering reinstatement (often referred to as 'reintegration') and damages.[82] Reinstatement is the presumptive remedy, as explained by the Quebec Court of Appeal:

> …according to consistent case law, endorsed by our court in 1985, reinstatement is the normal remedy in the event of dismissal without good and sufficient cause. This is the very purpose of the remedy provided for in Articles 124 … –-one could even say its raison d'être—and what distinguishes it from common law recourse. It is not only that reinstatement can be ordered by the [Tribunal], it must be, unless the employee waives it or the employer demonstrates the existence of a real and serious obstacle and the impossibility or infeasibility of such a measure. Admittedly, the [Tribunal] enjoys discretionary power in this regard, but a well-defined discretionary power that cannot disregard the principle of reinstatement.[83]

[76] ALS (n 71), s 125, 126.
[77] ibid, s 126.1
[78] ibid, s 125
[79] Richard c Hydro-Québec [2021] QCTAT 5578 (CanLII)
[80] Kenney v Prestige Dental Clinic [2021] QTAT 5699 (CanLII) [34]
[81] Pisimisis c Laboratoires Abbott ltée [1999] CanLII 32059 (QC CS); CA c Compagnie A [2008] QCCRT 91 (CanLII)
[82] ibid, s 128
[83] Carrier c Mittal Canada Inc [2014] QCCA 679 (CanLII) [129].

However, as in the other two jurisdictions, the Quebec Tribunal can refuse to reinstate when it finds that it would be inappropriate to do so.[84] In fact, despite the Court of Appeal's direction that reinstatement should be the normal remedy, the Tribunal more often refuses reinstatement. A recent study found that reinstatement was ordered in only 38 percent of cases where unjust dismissal was found.[85]

The remedial section of the statute empowers the Tribunal to order indemnity 'to a maximum equivalent to the wage he would normally have earned had he not been dismissed.'[86] Applying that language, the Tribunal regularly awards damages for lost wages and benefits from the date of termination to the date of the damage award. However, less coherent is the Tribunal's approach to assessing forward looking damages when the employee is not reinstated. The remedial section empowers the Tribunal to make 'any other decision' it 'believes fair and reasonable, taking into account all the circumstances of the matter'.[87] In applying this broad language to the question of compensation for future loss attributed to not being reinstated into their former job (what the Tribunal calls a 'loss of job indemnity'), the Tribunal appears to just make up a number, ordering the employer to pay an additional number of weeks' pay, usually ranging from 1-4 weeks per year of service, taking into account factors similar to those considered by common law judges in determining implied reasonable notice, such as seniority, age, and position.[88] Therefore, in Quebec, as in Nova Scotia, there is no effort to make the employee whole for the loss of their job by examining evidence of actual harm incurred do the decision to not reinstate the employee. Instead, a simple calculation is used that leads to an order for the employer to pay a certain dollar amount that is unrelated to actual loss.

c. Unfair Dismissal Legislation in the Federal Jurisdiction: 1978

[84] ibid*;* Guzman and 9127-4761 Quebec inc [2019] QCTAT 4861 (CanLII)
[85] François-Olivier Guay, *La réintégration en emploi: Analyse empirique de l'effectivité d'un remède au congédiement sans cause juste et suffisante* (LLM Thesis, Université du Québec à Montréal, 2018) [unpublished] at 56 and 79 [an increase from 26% in 2003].
[86] ALS (n 71) s 128
[87] ibid*,* s 128(3)
[88] Guzman (n 84) [Tribunal orders 2 weeks' pay per year of service]. Our thanks to Professor Dalia Gesualdi-Fecteau for a discussion of this point.

In 1978 the federal government followed Nova Scotia's lead when the Canada Labour Code was amended to introduce unjust dismissal protections.[89] The federal government echoed Nova Scotia's desire to extend collective agreement-like protections to the approximately 550,000 non-union workers employed in the federal jurisdiction in order to address perceived deficiencies with common law wrongful dismissal, including the unavailability of reinstatement and the limited scope of damages available. In his introduction to the legislation, the Minister of Labour stated:

> It is our hope that [the new unfair dismissal provisions] will give at least to the unorganized workers some of the minimum standards which have been won by the organized workers and which are now embodied in their collective agreements. We are not alleging for one moment that they match the standards set out in collective agreements, but we provide here a minimum standard.[90]

In its 2018 decision in Wilson v Atomic Energy, the SCC explained that 'Parliament intended to expand the dismissal rights of non-unionized federal employees in a way that, if not identically, then certainly analogously matched those held by unionized employees.'[91]

The federal law applies to non-managerial, non-union employees who have 'completed twelve consecutive months of continuous employment'.[92] As in the other jurisdictions, the unfair dismissal law does not apply when an employee has been terminated because of 'lack of work or discontinuance of a function'.[93] A terminated employee has 90 days from the date of termination to submit a complaint to the Head of Compliance and Enforcement alleging that the termination of their employment contract was 'unjust'.[94] Complaints are assigned to an inspector who then endeavors to help the parties reach a settlement, failing which the case is sent back to the Minister of Labour who decides whether to refer the matter to adjudication before the Canadian Industrial

[89] Canada Labour Code, RSC 1985 c L-2. The unfair dismissal provisions are now at ss 240-246.
[90] *House of Commons Debates,* 30th Parl, 3rd Sess, No 2 (13 December 1977) at 1831 (John Munro) ["*Commons Debate*"]. See also discussion in Beothuk Data Systems Ltd, Seawatch Division v Dean [1997] CanLII 6360 (FCA) [noting that the purpose of the legislation was provide collective agreement-like just cause protections to non-union employees]
[91] Wilson v Atomic Energy of Canada Ltd [2016] SCC 29 (CanLII) ('Wilson') [44]. Prior to Wilson, a small number of adjudicators had ruled that the introduction of the federal unfair dismissal legislation had not extinguished the right of employers to terminate without cause and with notice. The SCC rejected that interpretation in Wilson.
[92] "Managers" are excluded by section 167(3) of the CLC. For a more detailed description of the case law than we can provide here, see Stacey Ball, *Canadian Employment Law* (Thomson Reuters 2022) Part 6; Christie (n 58); England (n 11).
[93] CLC (n 2) s 242(3.1). See discussion in Manitoba Association of Native Fire Fighters Inc v Perswain, [2003] 25 CCEL (3d) 110 (FCTD). However, the choice of employee for layoff will be scrutinized as will the circumstances of the layoff to ensure that an economic termination was legitimate and not a 'sham': Kassab v Bell Canada, [2008] FC 1181 (CanLII) [24-25]; Mathur v Bank of Nova Scotia [2002] 18 Canadian Cases in Employment Law (3d) 150
[94] CLC (n 2) s 240(1)

Relations Board. The legislation also requires employers to provide reasons for the termination if requested to do so by the employee.[95]

The CLC does not define what constitutes an 'unjust' termination. In developing the test for unjustness, adjudicators have looked to the common law test for summary dismissal[96], but labour arbitration jurisprudence interpreting 'just cause' provisions in collective agreements has been more influential. The SCC has cited with approval an early decision interpreting the statutory unfair dismissal provision by adjudicator George Adams, who concluded as follows:

> I am of the view that when Parliament used the notion of "unjustness" … it had in mind the right that most organized employees have under collective agreements — the right to be dismissed only for "just cause".[97]

In Wilson v Atomic Energy, Justice Abella noted that CLC adjudicators have 'drawn heavily' from labour arbitration case law while recognizing that sometimes modifications are needed to account for differences between unionized and non-unionized workplaces.[98] One adjudicator looked to Professor Hugh Collins' *Justice in Dismissal* and concluded that for a termination to be just, the employer's decision must further a legitimate business interest, be proportional in the amount of harm the employee's actions caused the production process, be made in good faith and implemented in a procedurally fair manner.[99]

The burden rests with the employer to establish on a balance of probabilities "with clear, cogent, and convincing evidence" that just cause for termination exists. Drawing on labour arbitration jurisprudence, the SCC has found that the standard of 'unjust' termination incorporates an obligation for employers to practice progressive discipline before termination, including by making employees aware of performance problems and applying 'a graduated repertoire of sanctions' before resorting to termination.[100] Like labour arbitrators interpreting collective agreement just cause provisions, adjudicators are expected to consider a range of mitigating factors

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[95] See CLC s 240(1)

[96] That test of 'proportionality' is described in McKinley v BC Tel (n 10). See also Shaw Communications Canada Inc v Amer, [2020] FC 1026 (CanLII) [24-25]; Payne v Bank of Montreal [2013] FCA 33 [45].

[97] Wilson v Atomic Energy (n 91) [53], citing Roberts v Bank of Nova Scotia, [1979] CanLII 4019 (CA LA). See also Re Cameron and Rolling River First Nation, [2020] CIRB 945 [71], [80].

[98] Wilson v Atomic Energy (n 91) [52]

[99] Re Iron and Kanaweyimik Child and Family Services, [2002] CLAD No 517 (Lab Arb) [12], referencing Hugh Collins, *Justice in Dismissal* (Claredon Press 1992). See also Lockwood v B&D Walter Trucking Ltd [2010] CLAD No 172.

[100] ibid[54], citing Roberts v Bank of Nova Scotia, ibid.

that might explain the employee's behaviour when assessing if the employer's decision to terminate was unjust.[101]

The CLC, like the unfair legislation in Nova Scotia and Quebec, grants broad remedial authority to adjudicators. The remedial section provides as follows:

> s. 242 (4**)** If the Board decides … that a person has been unjustly dismissed, the Board may, by order, require the employer who dismissed the person to:
> **(a)** pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
> **(b)** reinstate the person in his employ; and
> **(c)** do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

Section 242(4)(c) has been interpreted as empowering the adjudicator to craft a 'make whole' remedy.[102] The presumptive remedy when unjust dismissal is found is reinstatement with full back pay and benefits and reimbursement for all losses causes by the termination.[103] In cases involving employee misconduct that falls short of grounds for termination, adjudicators can reinstate the employee and substitute a lesser penalty, such as a suspension.[104] The adjudicator can also order reinstatement to a different job than that which the employee previously held ('re-engagement') or a 'conditional reinstatement' that effectively places the employee on a form of probation to demonstrate adequate performance.[105]

However, while reinstatement is the presumptive remedy when a dismissal is found to be unfair, reinstatement remains a discretionary remedy. Adjudicators may (and often do) refuse to reinstate employees when they believe it would be inappropriate to do so. A 2006 study found that reinstatement is ordered in only about 30 percent of successful unfair dismissal complaints.[106] As in Quebec and Nova Scotia, adjudicators who decline to reinstate will order damages in lieu of

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[101] See discussion in Ball (n 92) § 23:114, describing mitigating factors such as provocation, remorse, prior disciplinary record, seriousness of the offence, post-discharge events, employee hardship, premeditation, and the employer's response to similar misconduct in the past.
[102] Wilson (n 91) [64]; Kouridakis v CIBC [2019] FC 1226 (CanLII); Re Harbour Air Ltd and Maloney [2012] CLAD No 105 [161]; First Nation Sipekne'katik v Paul [2016] FC 769 (CanLII); Chalifoux v Driftpile First Nation et al [2002] FCA 521 (CanLII); Murphy v Purolator Courier Ltd [1993] 110 DLR (4th) 682 (Fed CA) at 69; Ball (n 92) § 23:144; England (n 36)383-384.
[103] Payne v Bank of Montreal [2013] FCA 33 (CanLII) [86]; Regional Cablesystems Inc v Wygant, [2001] CLAD No 427. See also discussion in England (n 36) 383; Ball (n 92) § 23:132.
[104] See Moulton v MCQ Handling Inc [2000] Canadian Labour Arbitration Decisions No 498 (Lynk) [reinstating with a 2-day unpaid suspension]
[105] Murphy v Purolator Courier Ltd [1993] 110 DLR (4th) 682 (FCA)
[106] Harry W Arthurs, 'Fairness at Work: Federal Labour Standards for the 21st Century' (HRSDC 2006) at 184; G England, 'Unjust Dismissal and Other Termination-Related Provisions' Report to the Federal Labour Standards Review (HRSDC 2006) at 51.

reinstatement.[107] However, in contrast to the approach taken in the two provinces, adjudicators interpreting the federal legislation's remedial provisions have said that they cannot fall back on the common law notion of notice of termination.[108] Indeed, courts have ruled that it is an error in law for an adjudicator to restrict damages to what an unfairly dismissed employee could receive under the common law.[109] In Wolf Lake First Nation, the Federal Court wrote:

> Subsection 242(4) of the Code is clear in its application it is designed to fully compensate an employee who is unjustly dismissed. It is not limited to the amount of severance pay to which the employee is entitled. It is not calculated by determining the notice period which should have been given to the employee… *Limiting the amount of damages for unjust dismissal to the amount of severance pay or on the basis of the common law is clearly an error.*[110] [emphasis added]

Instead, applying a 'make whole' approach, adjudicators have applied a 'but for' standard, asking what remedy is required to place the employee in the position they would have been in but for the unlawful termination.[111]

Damages awarded to unfairly dismissed employees who are not reinstated tend to fall into one of four categories. Firstly, ordinary or general damages are awarded based on the employee's financial losses (wages and other benefits) incurred from the date of termination until the date of the adjudicator's decision. This period is unrelated to statutory or common law notice of termination and therefore, depending on how long it takes for the decision to be issued, the backpay component of the statutory remedy may exceed what the employee would have received in a common law wrongful dismissal action. These backward-looking damages are subject to the duty to mitigate. Secondly, adjudicators consider whether any non-monetary remedies are appropriate, such as letters of reference. Thirdly, adjudicators consider whether special aggravated or punitive damages should be ordered due to bad faith in the manner of dismissal, applying similar legal tests to those applied by the common law courts.

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[107] Atomic Energy of Canada Ltd v Sheikholeslami [1998] CanLII 9047 (FCA); Bank of Montreal v Sherman [2012] FC 1513 (CanLII) [17]; AUPE v Lethbridge Community College [2004] SCC 28; Mathur v Bank of Nova Scotia (n 1).

[108] See discussion in Geoffrey England, 'Section 240 of the Canada Labour Code: Some Current Pitfalls' (1999) 27 Manitoba L Rev 17 at 18-20, discusses four additional approaches to assessing damages in lieu of reinstatement that had been applied by adjudicators.

[109] Young v Wolf Lake First Nation [1997] CanLII 5057 (FC); Kouridakis v CIBC (n 102).

[110] Wolf Lake First Nation, ibid, [51]. See also Ball (n 92) § 23:144.

[111] Re Cascade Aerospace Inc and McCluskie [2005] CLAD No 67 [50]; Mathur v Bank of Nova Scotia (n 1).

Finally, and of particular interest for us, adjudicators consider forward-looking damages to compensate the employee for 'the loss of a job".[112] This head of damages marks a significant departure from the common law approach to damages in wrongful dismissal actions. The difference between assessing damages based on a failure to provide notice (in the common law) and awarding damages based on the lost value of the job (under the Canada Labour Code) can lead to substantially higher damage awards under the statute. As noted by one adjudicator:

> Under sec. 242 of the Canada Labour Code, where reinstatement is not just a possibility, but the preferred option, damages are awarded to put the person in the same position they would have been had they not lost the job at all not simply been denied reasonable notice of that loss.[113]

The 'make whole' approach to assessing damages in lieu of reinstatement requires the adjudicator to cast their gaze into the future to predict what likely would have happened to the employee had they not been unfairly terminated. This can prove to be a difficult exercise for the obvious reason that the future is uncertain, but complexity does not relieve an adjudicator of the responsibility to properly assess damages in accordance with the statute.[114]

Therefore, adjudicators must decide the value of future lost earnings 'up to the time when he or she would probably secure alternative employment at the rate of pay of his or her previous job.'[115] This exercise requires adjudicators to make a 'reasoned and rational judgment about this probability having regard to the circumstances in each case.'[116] Some adjudicators have looked to actuarial evidence to assess the future value of the lost opportunity to continue in the job.[117] Another explained that making an employee whole for 'real losses' resulting from an unfair dismissal requires an assessment of when the employee is likely to secure work with similar compensation, as well as any real estate losses, income tax losses, loss of professional reputation, injuries to dignity, and any other losses that can be attributed to the termination.[118]

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[112] Harbour Air (n 103) [170]; Regional Cablesystems Inc v Wygant [2001] CLAD No 427 [56]; Greyeyes v Ahtahkakoop Cree Nation [2003] CLAD No 50 [50].
[113] Harbour Air (n 103) [170].
[114] Lakehead University v Lakehead University Faculty Association [2018] CanLII 112409 (ON LA) [113]: 'An arbitrator's job is to make a proper assessment of damages based on the evidence presented …, difficult though that may be, not to take an easier less principled way out. We do not sacrifice principles on the altar of convenience.'
[115] Greyeyes (n 112) [50].
[116] ibid.
[117] Banca Nazionale Del Lavoro of Canada v Lee-Shanok[1988] Unreported (Arb. Teplitksy)
[118] Lockwood (n 99)[86-87]

Some adjudicators have found guidance in the task of assessing damages for the loss of a job in the decisions of labour arbitrators, who have long wrestled with the challenge of assessing damages in lieu of reinstatement.[119] Their approach is instructive because, as noted earlier, the intention of the legislators in introducing unfair dismissal legislation was to extend collective agreement-like just cause protection to non-union workers. Arbitrators have recognized that when an employee is unjustly terminated but not reinstated, they lose not only the value of lost wages and benefits but also the enhanced value of being covered by a collective agreement that includes rights and protections, including just cause protection, not available to most non-union workers.[120] To assign value to this lost job opportunity and to recognize that just cause protection fundamentally alters the common law model, many arbitrators have adopted what is known as a 'fixed-term approach', which treats the lost unionized job as a form of fixed-term contract that has been terminated prematurely.[121]

The task of the arbitrator is then to assume that employment would have continued until retirement, but then examine 'contingencies that operate against that assumption in a particular case'.[122] Contingencies can include the employee's disciplinary record and health, evidence about turnover at the workplace and in the industry, and other factors relevant to estimating how long the employee would probably have remained employed had they been reinstated, and subject to a duty on the employee to mitigate by looking for new work. In some decisions, labour arbitrators have decided that there was a good chance that the employee would have been terminated again with just cause before retirement had they been reinstated, considering the employee's past record, and adjusted the damages downwards to account for that possibility.[123]

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[119] See extensive discussion of the labour arbitration case law in Lakehead University (n 114). Also: Hay River Health & Social Services Authority v. P.S.A.C., (2010) 201 L.A.C. (4th) 345 (Can. Arb.); Canadian Labour Arbitration (n 36) 2:1507; Adam Beatty, 'When are Damages in Lieu of Reinstatement Appropriate and How Are They Calculated?', Canadian Labour Arbitration, (n 36) Appendix § IF:4

[120] Lakehead University, ibid [103]

[121] As explained in Lakehead (n 114), not all arbitrators have accepted the 'fixed-term approach' and some continue to calculate damages in lieu of reinstatement by simply apply some amount of notice of termination finding that the 'fixed-term approach' plus contingencies is too uncertain and hypothetical: see Birchwood Terrace Nursing Home v UFCW, Local 175[2017] CanLII 70617 (ON LA); Humber River Hospital v Ontario Nurses' Association, [2017] 285 LAC (4th) 258 (Lab Arb)

[122] Lakehead (n 114) [77]. See also Cohnstaedt v University of Regina[1994] CanLII 4566 (Sask CA), aff'd [1995] CanLII 68 (SCC); Hay River Health & Social Services Authority v PSAC [2010] 201 LAC (4th) 345; George Brown College v OPSEU [2011] CanLII 60727 (ON LA); Bahniuk v Canada Revenue Agency [2014] 245 LAC (4th) 368

[123] Lakehead, ibid; Bahniuk, ibid.

4. Assessing the Value of Canadian Unfair Dismissal Legislation

When Canadian governments in three jurisdictions introduced unfair dismissal legislation in the 1970s, the stated intent was to extend to non-union employees a crucial job protection that had long been available to unionized employees. The legislation was inspired by the philosophy underlying ILO Recommendation 119, which included protecting employees' autonomy and dignity in employment and therefore a right to not be stripped of a job without good reason.[124] Labour law scholars in the 1970s were advocating for legal protections against arbitrary and unfair terminations to protect the important psychological, as well as economic interests associated with a job. Unfair dismissal legislation addressed this desire to better protect employees' interest in retaining their job by remedying inadequacies of the common law approach to wrongful dismissal.

The main concerns were that common law courts do not order specific performance of employment contracts and therefore the common law fails to respect an employee's interest in job retention; that the common law permits arbitrary and without cause terminations; and that damages in wrongful dismissal lawsuits are insufficient because they are usually limited to lost wages and benefits for a period of notice.[125] In theory, unfair dismissal legislation addressed these deficiencies by granting adjudicators broad remedial powers to reinstate unfairly dismissed employees and to order 'make whole' remedies that compensated employees for the actual harm they suffer as a result of being terminated without cause. As noted by Professor England, reinstatement is preferrable to damages because it 'is the obvious tool for restoring the psychological satisfaction that an employee derives from his or her job.'[126]

However, we have explained that in practice, reinstatement is not the usual remedy in Canada's unfair dismissal jurisdictions. In Quebec, reinstatement is ordered in less than 40 percent of successful unfair dismissal cases and in only about 30 percent of successful cases filed under the federal legislation.[127] Sometimes the refusal to reinstate is due to concerns that the relationship has deteriorated beyond repair. Sometimes the employee does not want to be reinstated and there may be good reasons for this; evidence from Quebec supports the notion that reinstated non-union

[124] Regional Cablesystems and Wygant, [2001] CLAD No 427[19].
[125] England (n 107) at 10.
[126] England (n 37) at 383.
[127] Fairness at Work (m 106) at 184; England (n 107) at 51.

employees often confront a hostile work environment, and there is no union present to protect the employee from these hostilities.[128]

Since most unfairly dismissed non-union employees are not reinstated, Canada's unfair dismissal legislation should be evaluated based on how well adjudicators have exercised the broad remedial powers granted by the legislation to compensate those employees for the loss of their job so as make them whole. The common law approach of restricting damages to lost wages and benefits for a period of notice is not intended to make the employee whole, but rather to provide them with a cushion to find alternative employment. The unfair legislation was intended to override that narrow approach. However, in the approach to assessing damages in lieu of reinstatement in Quebec and Nova Scotia, we can see a strong residual influence of the common law approach. In Nova Scotia, adjudicators simply step into the shoes of a judge and apply common law 'reasonable notice'. In Quebec, the Tribunal just makes up a number, requiring the employer to pay the employee a specified additional number of weeks' pay as indemnity for the loss of reinstatement in addition to backpay from the date of termination up to the date of the award.

Therefore, in both provinces, there is little attempt to make the unfairly dismissed employee whole once the decision has been made to eschew reinstatement. Instead, the adjudicators simply top up the damages by some amount which is entirely unconnected with the employee's actual loss. Little rational is provided to justify this response or to explain how it is consistent with the underlying objective of the legislation, which as we have noted, was to replace the common law approach with one that better protects the value an employee holds in their job. If all that an unfairly dismissed employee receives is a payment approximating what they would have received in a wrongful dismissal action, then it is difficult to see how the unfair dismissal legislation has achieved its fundamental objective of improving upon the common law model.

The federal legislation appears to be doing better than the provinces at assigning value to the loss of the opportunity to be reinstated to a job with just cause protection. The 'fixed-term approach' used by many labour arbitrators and that has been adopted by some Canada Labour Code adjudicators is liberated from the common law model and instead seeks to assess the real value of the lost opportunity to remained employed. Insofar as money can substitute for reinstatement, this approach at least requires the adjudicator to consider evidence about the real

[128] See Genevieve Eden "Reinstatement in the Nonunion Sector: An Empirical Analysis" (1994) 49:1 Industrial Relations 87 at 89; see Trudeau (n 12)

harm to the employee that can be attributed to the termination. As we saw in the case that opened this essay involving Mr. Mathur, sometimes adjudicators assume that older workers would have continued to be employed until their normal retirement date but then add in a contingency for the possibility of the worker obtaining new employment elsewhere. When the worker is younger, it is more difficult to estimate how the future might have played out absent the unlawful termination. However, by considering actuarial or other evidence that tracks the potential of the employee finding new, comparable employment, this approach more closely aligns with the remedial goal of making the employee whole.

Finally, there is a risk that in focusing solely on the written decisions we underestimate the full impact of the unfair dismissal legislation. There are also important *in terrorem* effects that should be recognized. The threat of reinstatement and damage orders that could vastly exceed common law damages for failure to provide notice, particularly in the federal regime, has encouraged some employers to be better managers by implementing progressive discipline systems and thinking more carefully about whether termination is justified. Perhaps more importantly, the legislation alters the balance of power in negotiated settlements. Most unfair dismissal complaints settle before litigation occurs and anecdotal evidence suggests that employees in unfair dismissal legislation jurisdictions have harnessed the threat of reinstatement to obtain more favourable settlement packages than would otherwise be possible if the only threat to the employer was an order to pay damages related to a period of notice.[129]

Moreover, damages paid in lieu of reinstatement are not taxable as employment earnings under Canadian tax law, unlike damages for wrongful dismissal which are typically treated as reimbursement for lost earnings. Nor are monies received in lieu of reinstatement clawed back under the Canadian unemployment insurance model for unfairly dismissed employees who received unemployment insurance benefits.[130] Therefore, an unfairly dismissed employee who receives a money settlement in lieu of reinstatement may take home a larger share of the settlement than an employee who receives an award or settlement in a common law wrongful dismissal lawsuit. Therefore, a significant and perhaps unanticipated effect of the statutory unfair dismissal

[129] This conclusion is based on conversations and email exchanges with practitioners with unfair dismissal legislation practice experience.

[130] Meehan v Canada (Attorney-General) [2003] FCA 368 (CanLII); Ball (n 92)§ 23:145: 'These monies are not intended to be taxable or subject to any repayment claims by Service Canada for EI, as damages in lieu of the right to reinstatement are not wages.'

provisions has been to empower employees to obtain more favourable settlements than they would otherwise be entitled to recover in a common law wrongful dismissal action.

5. Conclusion

If we stand back and reflect upon a quarter century of experience with unfair dismissal legislation in Canada, we find mixed results. Insofar as legislators envisioned that the laws would extend to eligible non-union workers protections against unfair termination backed by a strong and effective reinstatement remedy, the evidence suggests that the goal has only partially been achieved. In practice, it is more common for adjudicators to decide that reinstatement is inappropriate. This does not mean that the legislation has failed to achieve any benefits for unfairly dismissed employees who are not reinstated. A full analysis requires a close inspection of how the legislation has affected power relations in settlement negotiations, how the laws have influenced human resources practices with regards to termination decisions, and how adjudicators have exercised remedial authority to compensate unfairly dismissed employees who are not reinstated.

We have argued that adjudicators who have approached the challenge of assessing damages in lieu of reinstatement guided by a make-whole philosophy have better captured the intent and spirit of the legislation. Those adjudicators have engaged in the sometimes difficult but necessary exercise of assessing the real future loss to the employee that can be attributed to the unfair dismissal. To do otherwise, such as by simply falling back on some measure of damages for a failure to provide notice, is intellectually lazy and disloyal to the intention of the legislation, which was to introduce a model that does a better job than the common law of recognizing the value of a job to a person's autonomy and self-worth. Ultimately, while some jurisdictions have done a far better job than others at developing a model of unfair dismissal that is true to the mission of extending collective bargaining-like protections to non-union workers, and there is space for improvement, experience demonstrates that the introduction of unfair dismissal legislation in the 1970s has benefited the small percentage of Canadians fortunate enough to be covered.