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## Unjust Dismissal Under the Canada Labour Code: New Law, Old Statute

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# Unjust Dismissal Under the Canada Labour Code: New Law, Old Statute

## Abstract

In *Atomic Energy of Canada Ltd v Wilson (Wilson)*, the Federal Court held for the first time that an employer may terminate an employee without cause, so long as the employer provides notice or severance pay. *Wilson* overturned decades of jurisprudence regarding unjust dismissal and interpretation of the *Canada Labour Code*. This paper critically reviews *Wilson* and the subsequent decision by the Federal Court of Appeal upholding this ruling. This paper ultimately argues the *Wilson* decision is wrong because it frustrates the purpose of the *Canada Labour Code* and unfairly shifts the burden of proof from the employer to the employee.

This article is helpful for readers seeking to learn more about:

- *Canada Labour Code*, unjust dismissal, notice, termination notice, severance, labour law, employment law, employee, without cause, just cause, layoff, layoffs, reinstatement, arbitration, law arbitration

Topics in this article include:

- Federal Court, Federal Court of Appeal, adjudicators, frustration, frustrate, evidentiary onus, arbitrariness, procedural fairness, procedural considerations, burden of proof

Key authorities cited in this article include:

- *Atomic Energy of Canada Ltd v Wilson*
- *Champagne v Atomic Energy of Canada Limited*
- *Sigloy v DHL Express (Canada) Ltd*
- *Wright v Nisga'a Lisims Government*
- *Taypotat v Mucospetung First Nation*

## Keywords

Canada Labour Code, unjust dismissal, notice, termination notice, severance, labour law, employment law, employee, without cause, just cause, layoff, layoffs, reinstatement, arbitration, law arbitration, Federal Court, Federal Court of Appeal, adjudicators, frustration, frustrate, evidentiary onus, arbitrariness, procedural fairness, procedural considerations, burden of proof

## UNJUST DISMISSAL UNDER THE *CANADA LABOUR CODE*: OLD STATUTE, NEW LAW

REAGAN RUSLIM\*

### INTRODUCTION

Many employment lawyers and law students are often surprised to learn that the *Canada Labour Code* (*Code*) provides an extraordinary remedy to non-unionized employees in the federal sector not available to other employees under the common law. Specifically, Division XIV, ss. 240 to 246 of the *Code* permits certain employees to challenge their dismissal on the basis that it was “unjust.” If the complainant is successful, an adjudicator under the *Code* can order significant remedies beyond those of the common law. This includes the remedy of reinstatement.

Recently, the broad scope and liberal interpretation given to the language of the *Code* vis-à-vis the complaint of unjust dismissal has undergone significant—and arguably unjustified—change. The law on unjust dismissal and the interpretation of the *Code* has become bifurcated into two camps. The first camp holds the view that the protections afforded to non-unionized employees governed by the *Code* are akin to those available to unionized employees under collective agreements in that dismissal would only be permitted where an employer demonstrated just cause.

The second camp holds the view that s. 240 of the *Code* permits employers to dismiss employees without cause so long as notice and severance pay are provided, in conformity with ss. 230 (notice) and 235 (severance) of the *Code*. This bifurcation has

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resulted in two appeals: one to the Federal Court of Appeal<sup>1</sup> and another before the Federal Court.<sup>2</sup>

The first part of this paper provides an overview of the elements of a complaint of unjust dismissal under the *Code*. The second part looks at the bifurcation and differences of interpretation between the two aforementioned camps of thought. It pays particular attention to the recent decision of the Federal Court in *Atomic Energy of Canada Ltd. v Wilson*.<sup>3</sup> The *Wilson* decision is significant because it represents the first time that a federal court ruled that an employer may terminate an employee without cause “so long as it gives notice or severance pay.”<sup>4</sup> The third part of this paper takes a position critical of the Federal Court’s decision in *Wilson*. It argues that the decision of *Wilson* is wrong for the following reasons:

1. Section 240 must be given the meaning intended by the Legislature. The Court’s interpretation in *Wilson* would render s. 240 of the *Code* virtually meaningless.
2. Alternatively, the *Code* grants adjudicators broad remedial powers to remedy an unjust dismissal. Those remedial powers would be rendered unduly and improperly limited if an employer could circumvent the unjust dismissal provisions of the *Code* by paying what the employer determined to be reasonable notice, as defined by the common law.
3. The unjust dismissal provisions of the *Code* were introduced to address the shortfalls of the common law as it applies to federal employees, not to reinforce them.
4. The decision in *Wilson* unfairly and unnecessarily shifts the burden of proof from the employer to the employee, leading to unjust outcomes.

To further elaborate on these reasons, this paper examines the decision of Arbitrator and Professor Joseph Roach in *Champagne v Atomic Energy of Canada*

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<sup>1</sup> *Atomic Energy of Canada Ltd. v Wilson* Federal Court of Appeal Court Number A-312-13.

<sup>2</sup> *Sigloy v DHL Express (Canada) Ltd* Federal Court of Justice File T-904-14.

<sup>3</sup> 2013 FC 733 (*Wilson*).

<sup>4</sup> *Ibid* at para 35.

*Limited*.<sup>5</sup> *Champagne* provides a noteworthy decision to compare and contrast to the Federal Court's decision in *Wilson*. Both cases involved the same employer, the same counsel for the employer, and similar facts: the termination of an employee ostensibly on a without-cause or non-cause basis under the *Code*.

The fourth and final part of this paper examines the aftermath of *Wilson* vis-à-vis its application by adjudicators when addressing complaints of unjust dismissal under the *Code*. The decisions rendered and published post-*Wilson* are examined in further detail to ascertain whether there is any discernible pattern or change in the case law of unjust dismissal under the *Code*. Specifically, the following post-*Wilson* cases are analyzed:

- a. *Taypotat v Mucospetung First Nation*,<sup>6</sup>
- b. *Wright v Nisga'a Lisims Government*,<sup>7</sup>
- c. *Sigloy v DHL Express (Canada) Ltd.*<sup>8</sup>

On January 22, 2015, the Federal Court of Appeal released its decision on the *Wilson* appeal, upholding the Federal Court's ruling.<sup>9</sup> This paper was written prior to the Federal Court of Appeal's decision. However, the criticisms presented herein apply directly to the conclusions drawn in this new decision.

## I: LEGISLATIVE SCHEME

### **Historical Background**

Prior to 1978, if non-unionized employees believed that they had been wrongly dismissed, they had to resort to the courts for relief. However, because the courts generally refused to order reinstatement, the only remedy they were able to garner for unjust dismissal was monetary compensation.

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<sup>5</sup> 2012 CarswellNat 4950 (*Champagne*).

<sup>6</sup> *Taypotat v Mucospetung First Nation*, [2014] CLAD No 53 (*Taypotat*).

<sup>7</sup> *Wright v Nisga'a Lisims Government*, [2014] CLAD No 97 (*Wright*).

<sup>8</sup> *Sigloy v DHL Express (Canada) Ltd.*, [2014] CLAD No 67 (*Sigloy*).

<sup>9</sup> *Wilson v Atomic Energy of Canada*, [2015] FCA 17 (*Wilson FCA*).

The *Code* was amended in 1978. Sections 240 to 246 introduced a procedure that enabled federally non-unionized workers to seek redress in cases where they have been dismissed without just cause, which the *Code* refers to as “unjust dismissal.” Historically, the unjust dismissal provisions of the *Code* have been interpreted to provide non-unionized employees with the same protections against unjust dismissal available to unionized employees under a collective agreement.<sup>10</sup>

The protections provided by ss. 240 to 246 remedied two shortcomings in the common law governing non-unionized employees. First, they set standards for defining “just cause” more in line with modern industrial relations rather than historical common law standards. Accordingly, the *Code* permits the Minister of Labour to appoint an adjudicator to determine whether an employee has indeed been dismissed for just cause. Second, they make reinstatement an available remedy to employees found to have been unjustly dismissed. The power to reinstate is added to other broad and remedial powers granted to adjudicators by the *Code*, including the ability to award back pay and damages. The *Code* effectively allows an adjudicator to order an employer to take whatever steps the adjudicator believes are necessary to counteract the consequences of the wrongful dismissal.<sup>11</sup>

### *Notice*

Part III of the *Code* provides employees in non-unionized work places in the federally regulated sector with certain protections in the event they are dismissed. Section 230 of the *Code* provides that employees with more than three consecutive months of service must be given two weeks’ pay in lieu of notice of their termination.

### *Severance*

Section 235 of the *Code* provides the following with regard to severance pay:

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<sup>10</sup> See also Geoffrey England, *Unjust Dismissal and Other Termination-Related Provisions, Report to the Task Force on Part III of the Canada Labour Code* regarding the termination of employment provisions of the Canada Labour Code, Human Resources and Skills Development Canada; (2006).

<sup>11</sup> DS Nirman, “Unjust Dismissal and Non-Unionized Employees” Ontario Bar Association, August 2004, Vol 7, No 1.

- (1) An employer who terminates the employment of an employee who has completed twelve consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for **just cause**, pay to the employee the greater of,
  - (a) two days wages at the employee's regular rate of wages for his regular hours of work in respect of each completed year of employment that is within the term of the employee's continuous employment by the employer; and,
  - (b) five days wages at the employee's regular rate of wages for his regular hours of work . . . [emphasis added]

### **Unjust Dismissal**

Sections 240 to 246 deal with unjust dismissals. Section 240 gives non-unionized employees in the federally regulated sector the ability to file complaints if it is felt that a dismissal was unjust. The following criteria must be met for an adjudicator to have jurisdiction to hear a complaint of unjust dismissal under the *Code*:

- a) the employee must have completed 12 months of continuous employment with a federally regulated employer (s. 240(1)(a));
- b) the employee cannot be subject to a collective agreement (s. 240(1)(a));
- c) the employee cannot be a manager (s. 167(3));
- d) the complaint must be filed within 90 days of the dismissal (s. 240(2));
- e) the dismissal cannot be the result of a "lack of work or discontinuance of a function" (242(3.1)); and,
- f) the employee does not have a "procedure for redress" available elsewhere, for example, under the *Canadian Human Rights Act* or even under Part 1 of the *Code*.

## Remedial Authority

Where an adjudicator finds that an employee has been unjustly dismissed, her remedial authority pursuant to s. 242(4) of the *Code* is very broad:

Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator 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 is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

As a result of the broad remedial authority provided under the *Code*, federally regulated employers have tried previously to contract out of the *Code* with a dismissed employee. For example, in *National Bank of Canada v Canada (Minister of Labour)* the employer terminated the employee's employment. In return for a settlement package, the employee signed a release agreement discharging the employer from any future claims, demands, or actions, including any recourse under the *Code*.<sup>12</sup> Subsequently, the employee filed a complaint of unjust dismissal. The employer sought to have the complaint dismissed in light of the language prohibiting such a complaint under the *Code*. The issue before the Court was whether such a release agreement was binding. The Federal Court of Appeal ruled against the employer. It cited s. 168 of the *Code* to find in favour of the employee's right to have her complaint heard. Section 168 of the *Code* provides the following:

This Part and all regulations made under this Part apply notwithstanding any other law, or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law,

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<sup>12</sup> [1997] 3 Admin LR (3d) 51 (FCTD) aff'd (1998) 151 FTR 302 (FCA).



custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.

The Federal Court of Appeal applied this section to rule that the release agreement's waiver of a right to proceed to adjudication was of no force and effect because such a provision would be *ipso facto* less favourable than the provisions of Part III of the *Code*.<sup>13</sup>

### **What exactly is unjust dismissal?**

In summary, the *Code* provides that most federally regulated non-unionized, non-managerial employees who are terminated without cause are to receive two weeks' notice plus severance calculated in accordance with the prescribed formula in the *Code*. It allows for non-managerial, federally regulated employees to file a complaint if they meet the eligibility criteria and allege that their termination is unjust.

Unfortunately, the *Code* does not define the term "unjust dismissal." This lack of clarity has resulted in a debate over whether or not s. 240 allows employers to dismiss employees without cause. The issue before the Federal Court in *Wilson* was the following: consistent with the traditional common law, does the *Code* allow for an employer to terminate an employee on a without cause basis, so long as the employer provides compensation greater than the notice and severance required under ss. 230 and 235 of the *Code*?

## II: THE *WILSON* DECISION

After four-and-a-half years of employment, Atomic Energy of Canada Limited (AECL) terminated Mr. Wilson's employment on a without-cause basis. Mr. Wilson filed a complaint with Human Resources Skills Development Canada (HRSDC) pursuant to s. 240 of the *Code*, complaining that he had been unjustly dismissed.

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<sup>13</sup> See also *Con-way Central Express v Armstrong* [1997] 153 FTR 161 (TD).

The complaint went before an adjudicator, Professor Stanley Schiff, who concluded that Mr. Wilson was unjustly dismissed because the *Code* only permits dismissal with cause. Specifically, Professor Schiff noted that,

. . . A.E.C.L. may not avoid a determination of whether Mr. Wilson's termination was unjust under ss. 240 to 242 by invoking ss. 230 and 235 and giving the sizable severance package.<sup>14</sup>

The AECL applied for judicial review of Professor Schiff's decision. The Federal Court heard the arguments of this judicial review in July 2013. O'Reilly J. reviewed the decision. He found that Adjudicator Schiff had wrongly decided that a number of the decisions reviewed during the original adjudication stood for the proposition that the *Code* only permits dismissal for cause. O'Reilly J. went on to discuss what he determined to be the proper interpretation of the unjust dismissal provisions of the *Code*:

An employer can dismiss an employee without cause so long as it gives notice or severance pay (ss. 230, 235). If an employee believes that the terms of his or her dismissal were unjust, he or she can complain (s. 240). The only exceptions to the general right to make a complaint are where the dismissal resulted from a layoff for lack of work or a discontinuance of the employee's position, or the employee has some other statutory remedy (s. 242(3.1)).

In addition, an employee can complain if he or she believes that the reason given by the employer for the dismissal was **unjustified or if the dismissal is otherwise unjust (eg, based on discrimination or reprisal)** (s. 240(1)). If the adjudicator appointed to entertain the complaint concludes on any basis that the dismissal was unjust, he or she has broad remedial powers to compensate the employee, reinstate the employee, or grant any other suitable remedy (s. 242(4)).

The fact that an employer has paid an employee severance pay does not preclude an adjudicator from granting further relief where the adjudicator concludes that the dismissal was unjust. **Similarly, there is no basis for concluding that the CLC only permits dismissals for cause.** That conclusion would fail to take

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<sup>14</sup> *Wilson v Atomic Energy of Canada Ltd.* [2012] CLAD No 234 at para 5.

account of the clear remedies provided in ss. 230 and 235 (*ie*, notice and severance) for persons dismissed without cause.<sup>15</sup> [emphasis added]

The decision in *Wilson* was the first time the Federal Court openly endorsed the notion that the *Code* allowed employers to terminate on a without-cause basis. This decision apparently narrowed the ambit of the phrase “unjust dismissal” to instances of dismissal based on “discrimination” or “reprisal.” Unfortunately, in rendering this decision, O’Reilly J. failed to consider in appropriate detail the numerous authorities and policy reasons for why the *Code* prohibits termination on a without-cause or non-cause basis. These authorities and policy reasons have been accumulating within the jurisprudence since the unjust dismissal provisions of the *Code* were first established in 1978.

### III: WHY THE DECISION IN *WILSON* IS WRONG

There are four key reasons why termination under the *Code* requires just cause:

1. Section 240 must be given the meaning intended by the Legislature. The Court’s interpretation in *Wilson* would render s. 240 of the *Code* virtually meaningless.
2. Alternatively, the *Code* grants adjudicators broad remedial powers to remedy an unjust dismissal. Those remedial powers would be rendered unduly and improperly limited if an employer could circumvent the unjust dismissal provisions of the *Code* by paying what the employer determined to be common law reasonable notice.
3. The unjust dismissal provisions of the *Code* were introduced to address the shortfalls of the common law as it applies to federal employees, not to reinforce them.
4. It unfairly and unnecessarily shifts the burden of proof from the employer to the employee.

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<sup>15</sup> *Wilson*, *supra* note 3 at paras 35-37.

## Section 240 must be given the meaning intended by the Legislature

The *Code* provides non-unionized employees with a remedy for unjust dismissal even where the employee has been given proper notice.<sup>16</sup> Accordingly, an employee covered by the *Code* can only be terminated for just cause. Adjudicator G.W. Adams first articulated this conclusion in the seminal decision of *Roberts v Bank of Nova Scotia*:

I am of the view that when Parliament used the notion of "unjustness" in framing s. 61.5, it had in mind the right that most organized employees have under collective agreements **the right to be dismissed only for "just cause"**. I am of this view because the common law standard is simply "cause" for dismissal whereas **"unjust" denotes a much more qualitative approach to dismissal cases**. Indeed, in the context of modern labour relations, the term has a well understood content . . .<sup>17</sup> [emphasis added]

Historically speaking, the government that introduced s. 240 of the *Code* in 1978 expressly recognized the goal of equal treatment of unionized and non-unionized workers. The Minister of Labour, before the Standing Committee of Labour, Manpower, and Immigration, described the purpose of the legislation as follows:

Unjust dismissal: The intention of this provision is to provide employees not represented by a union, including managers and professionals, with the right to appeal against arbitrary dismissal—protection the government believes to be a fundamental right of workers and already a part of all collective agreements.<sup>18,19,20</sup>

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<sup>16</sup> See: Donald D. Carter et al., *Labour Law in Canada*, 5th ed (New York: Butterworth 2002) at 347.

<sup>17</sup> *Roberts and Bank of Nova Scotia*, [1979] CLAD No 11 at para 16.

<sup>18</sup> For example, see the comments to the Minister of Labour when he introduced the section in 1978, "Minutes of Proceedings and Evidence of the Standing Committee in Labour, Manpower and Immigration", 3<sup>rd</sup> session, 30<sup>th</sup> Parliament, March 16, 1978" at. Pp. 11.46-47.

<sup>19</sup> Quote also reproduced by Stacy Reginald Ball, *Canadian Employment Law*, (Canada Law Book, Toronto, ON) at para 21:10.

<sup>20</sup> See also: Geoffrey England "Section 240 of the Canada Labour Code: Some Current Pitfalls" 27 Man LJ 17 Gordon Simmons, "Unjust Dismissal of Unorganized Workers in Canada" (1984), 20 Stan J Int'l L 473. *Roberts v Bank of Nova Scotia* (Can Arb Bd) (1979) 1 LAC (3d) 259 at paras 11, 16-19. (Adams).

Furthermore, as remedial legislation, the *Code* must be interpreted broadly so as to protect the rights of employees. Specifically, the provisions of the *Code* must be interpreted in a manner consistent with s. 12 of the *Interpretation Act*.<sup>21</sup>

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

By narrowing the definition of “unjust dismissal” to terminations based on “discrimination or reprisal,”<sup>22</sup> the Federal Court ignored the express intent of the Legislature and the clear requirements of the *Interpretation Act*.

### **The *Code* grants adjudicators broad remedial powers**

Section 242(4) sets out the broad and remedial powers of an adjudicator where it has been determined that the dismissal was unjust. These remedial powers go beyond determining whether the quantum of reasonable notice provided or offered by the employer is sufficient. Section 242(4) provides the adjudicator with the following powers:

- (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(3.1) sets out the *only* statutory limitation on an unjust dismissal complaint:

No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where

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<sup>21</sup> *Interpretation Act* RSC 1985, c I-21.

<sup>22</sup> *Wilson*, *supra* note 3 at para 35.

(a) that person has been laid off because of lack of work or because of the discontinuance of a function; or

(b) a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament.

Nowhere does the *Code* state that an adjudicator may refuse to consider a complaint, provided the employer has terminated the employee on a without-cause or non-cause basis and has provided payment, in accordance with ss. 230 and 235 of the *Code*. Yet such an outcome is permitted by the Federal Court's judgment in *Wilson*.

The above provisions, construed together, permit an employee who has been dismissed from employment, for reasons other than layoff or discontinuance of a function, to seek written reasons for the dismissal.<sup>23</sup> Further, if the employee feels those reasons are unjust, the provisions permit an employee who has been dismissed to file a complaint of unjust dismissal. Once the complaint is filed and referred to an adjudicator, the employee is entitled to have an adjudicator render a decision and grant a remedy that would include reinstatement, the payment of compensation equivalent to the remuneration that would have been paid by the employer, or any other like thing that is equitable to require to counteract the consequences of the dismissal.

Yet O'Reilly J.'s approach in *Wilson* suggests one of two possibilities:

1. A complainant is barred from making a complaint of unjust dismissal by the offering of a settlement package in excess of the statutory minimums required under ss. 230 and 235; or

2. The adjudicator must determine the dismissal is just.

The employer's interpretation would make the aforementioned unjust dismissal provisions of the *Code* practically meaningless. In any event, it is notable that at the time of the judicial review in *Wilson*, the AECL had paid Mr. Wilson a sum of money that it felt was reasonable according to common law notice. Accordingly, in such

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<sup>23</sup> Per s 241(1) of the *Code*.

circumstances, an adjudicator should be able to determine whether or not the dismissal was unjust and, if necessary, to fashion an appropriate remedy in accordance with s. 242(4) of the *Code*.

The decision in *Wilson* ignores the fact that the legislature expressly turned its mind to what constitutes an exception to the unjust dismissal provisions of the *Code*. As noted previously, the only stated exception is where an employee was laid off or where there was a discontinuance of a function. In considering the exemptions to the unjust dismissal provisions of the *Code*, it was open to the Legislature to exclude termination of employment without cause upon payment of the statutory notice, statutory severance, or common law notice. The Legislature declined to provide such an exemption. Where a statute includes an express exemption to a specified provision, the correct interpretation is that the articulated exemption is the only permissible exemption—exceptions are strictly construed.<sup>24</sup> Accordingly, termination of employment without cause does not constitute an exemption to the unjust dismissal provisions of the *Code*. In the absence of layoff or discontinuance of a function, an employee who is dismissed may assert that his or her dismissal was unjust and obtain a remedy as provided for in s. 242(4) of the *Code*.

In *Iron v Kanaweyimik Child and Family Services Inc.*,<sup>25</sup> Adjudicator Geoffrey England reviewed the purpose of the *Code* in the context of Adjudicator Wakeling's decision in *Chalifoux v Driftpile First Nation River Band No. 450* and other cases similar to those cited by the Federal Court in *Wilson*.<sup>26</sup> In *Kanaweyimik*, the employer purported to terminate Ms. Iron's employment because of a personality conflict with her supervisor. Rather than assert cause or manage the issue, the employer took the position that the termination was without cause and offered Ms. Iron three months' pay in lieu of notice. Adjudicator England rejected the employer's proposition that it could terminate employment upon the provision of common law notice, and held that such dismissal was therefore unjust.

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<sup>24</sup> Sullivan & Driedger, *On the Construction of Statutes* (4th ed) at 396.

<sup>25</sup> 2002 CLAD No 517 (*Kanaweyimik*).

<sup>26</sup> *Wilson*, *supra* note 3 at para 38.

The legal issues in *Kanawayimik* are virtually the same as those before the Federal Court of Appeal in *Wilson*. Thus, it is worth quoting Adjudicator England's reasoning in some detail:

The issue, therefore, is whether giving pay in lieu of notice such as would suffice to lawfully terminate the employment contract at common law in a civil suit for wrongful dismissal automatically constitutes "just cause" for dismissal in an action under section 240 of the Canada Labour Code.

The correct interpretation of the word "unjust" in section 240 must be gleaned from the overall scheme and purpose of the section and the Code as a whole. In this regard, the courts have frequently held that employee rights under protective employment standards acts such as Part III of the Canada Labour Code must be given a broad, generous and liberal interpretation so as to further the general remedial goal of such legislation. (See, for example, the remarks of Iacobucci J. to this effect in *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, at p. 36, involving the meaning of the word "terminated" in the Ontario Employment Standards Act).

In my view, it would be repugnant with the remedial policy of section 240 if an employer were allowed to dismiss an employee for "cause" according to the employer's whim and fancy simply by providing the employee with the requisite pay in lieu of notice required to terminate the contract lawfully at common law . . . .

Indeed, assuming that the very purpose for enacting section 240 in the first place was to remedy the deficiencies of the common law wrongful dismissal action—**such an assumption is highly plausible for otherwise there would seem to be no reason for the enactment**—one such deficiency is that the employer can insulate its substantive reasons for dismissal from review by a neutral adjudicator by the simple technical device of complying with the contractual notice requirement. It seems to me that the legislators intended a section 240 "just cause" review to pierce the technical veil of the contractual notice requirement and focus on the substance of the employer's grounds for dismissal by applying criteria such as rationality, proportionality, good faith, discrimination, arbitrariness and procedural fairness.<sup>27</sup> [emphasis added]

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<sup>27</sup> *Ibid* at paras 12-14.



Other adjudicators have endorsed the rationale of Adjudicator England cited above.<sup>28</sup> In *Lockwood v B&D Walter Trucking Ltd.*,<sup>29</sup> Adjudicator K. Williams-Whitt confronted a set of facts very similar to those in both *Wilson* and *Kanaweyimik*. In *Lockwood*, B&D Walter Trucking terminated the employment of Mr. Lockwood, a full-time truck driver, after nine years of employment. As part of its submissions, the employer noted that the employer had:

. . . never alleged that Mr. Lockwood's performance was an issue and there is no evidence to suggest that they dismissed Mr. Lockwood for just cause . . .

It is the position of the employer that as a necessary part of running the business, they are allowed to terminate an employee as long as they follow the rules in the *Canada Labour Code*, particularly sections 230 and 235 . . .<sup>30</sup>

After reviewing the jurisprudence, including *Roberts v Bank of Nova Scotia* and *Kanaweyimik*,<sup>31</sup> Adjudicator Williams-Whitt ruled against the employer's position:

I have no doubt that the principals of B&D Walter Trucking sincerely believed they were complying with the requirements of the Canada Labour Code. However, their understanding of the just cause requirement and **their argument that there is a common law right to dismiss employees as long as they provide the requisite pay in lieu of notice and severance must fail. They needed to have just cause to dismiss Mr. Lockwood.**<sup>32</sup> [emphasis added]

Many adjudicators have held that the suggestion that the provision of notice in accordance with common law notice may lead to a conclusion that a termination was not unjust should only occur after weighing *all* of the evidence and considerations underpinning a particular complaint. To do otherwise would overly restrict the broad and remedial powers granted to adjudicators under the *Code*. In *Mathur v Bank of Nova*

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<sup>28</sup> For example, see *Furber v Polymer Distribution* [2011] CLAD No 112 at paras 85-86; *Morrison v Gitanmaax Band* [2011] CLAD No 23 at para. 27; and, *Stack Valley Freight Ltd. v Moore* [2007] CLAD No 191 at para 33.

<sup>29</sup> [2010] CLAD No 172 (*Lockwood*).

<sup>30</sup> *Ibid* at para. 60.

<sup>31</sup> *Ibid* at paras. 69-70.

<sup>32</sup> *Ibid* at para 71.

*Scotia*, Adjudicator Armstrong specifically reviewed the decisions of Adjudicator Wakeling in detail.<sup>33</sup> The adjudicator noted,

[It] is unnecessary for me to embrace or repudiate the contending views to which adjudicator Wakeling refers. Nor is it necessary for me to express an opinion, in determining the meaning of s. 240 of the Code, as to whether there is a meaningful distinction between “just cause” and “unjust dismissal.” Whether Wakeling’s analysis of that issue is correct or not, he concludes in Knopp, at page 15 of the award, that s. 242(4) does nothing more than giv[e] the adjudicator the power to order remedies not available at common law. The adjudicator may nonetheless decide that remedies at common law are equitable.<sup>34</sup>

As noted by Adjudicator Armstrong, the above statement by Adjudicator Wakeling affirms the broad and remedial powers of an adjudicator with respect to both the inquiries and the remedies of an unjust dismissal complaint:

Thus while adjudicators Wakeling and Ross may favour the view that the “unjustness” of a dismissal is purged by the payment of an amount required to satisfy the common law reasonableness test, **neither adjudicator holds this to be an inflexible test or rule, nor do they state that there is a limitation on the fashioning of whatever equitable remedy the adjudicator determines appropriate under s. 242(4)(b) or (c) of the Code in light of the evidence in the particular case . . .**

I have concluded that my **right to consider broad spectrum of remedies, including reinstatement, is unfettered.**<sup>35,36</sup> [emphasis added]

In the case of *Sherman v Bank of Montreal*,<sup>37</sup> Adjudicator David Murray continued to hear and review all of the submissions and evidence of the parties in accordance with the *Code*. This proceeded despite the fact that the termination of the

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<sup>33</sup> [2001] CLAD No 524.

<sup>34</sup> *Ibid* at para 58.

<sup>35</sup> *Ibid* at para 61.

<sup>36</sup> See also *Collins v Driftpile First Nation Band* [2002] CLAD No 428, para 134 where Adjudicator Dunlop also rejected a narrow interpretation of an Adjudicator’s remedial powers under the *Code*.

<sup>37</sup> [2011] CLAD No 213.

44-year-old individual's employment of 12 years was on a without-cause basis and the employer had provided 68 weeks of notice. Ultimately, Ms. Sherman was awarded reinstatement, albeit at a different bank location.

The full approach taken by the adjudicators in *Mathur* and *Sherman* is consistent with the language of s. 242(2)(b) of the *Code*:

An adjudicator to whom a complaint has been referred under subsection (1):

(b) shall determine the procedure to be followed, but shall **give full opportunity** to the parties to the complaint **to present evidence and make submissions to the adjudicator** and shall consider the information relating to the complaint . . . [emphasis added]

### **Unjust dismissal provisions were introduced to address common law shortcomings**

In *Duhamel v Bank of Montreal*,<sup>38</sup> Adjudicator Hickling referred to several of the problems with the common law of wrongful dismissal that Parliament attempted to ameliorate:

There are no procedural safeguards to protect the aggrieved employee. Provided he gives proper notice the employer can lawfully terminate the contract of employment even if he has taken no steps at all to investigate charges of misconduct, or has failed to listen to the employee's side of the story. He can refuse to give any reasons, and if those he does give at the time are insufficient to justify dismissal, he can nevertheless rely at trial on others which he may have discovered only after the dismissal. There is no time limit on the right to dismiss without notice (provided he has not condoned the misconduct) and no obligation to provide an internal appeal procedure. Further there is no general duty to warn the employee whose performance is unsatisfactory and give him an opportunity to improve.

To allow the decision in *Wilson* to stand would violate the unjust dismissal provisions of the *Code*. It would perpetuate the many particular flaws of the common law of dismissal that the *Code* was clearly intended to address and overcome.

### **Champagne v Atomic Energy of Canada Ltd (AECL)**

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<sup>38</sup> Unreported, October 26, 1981, Hickling (Ref No 74-BC). See also G England & I Christie, *Employment Law in Canada*, (Canada: Butterworths, 2002) at 17-71.

Prior to litigating the without-cause termination of Mr. Wilson before Adjudicator Schiff and the Federal Court, the AECL terminated the employment of Mr. Stephane Champagne. Mr. Champagne worked as a fire prevention officer at the AECL's Chalk River facility starting on October 31, 2006. On January 12, 2011, the AECL terminated his employment by way of the following termination letter:

This letter will confirm our discussion today that your employment with Atomic Energy of Canada Limited is **terminated effective immediately “without cause”** . . .<sup>39</sup> [emphasis added]

Mr. Champagne filed a complaint of unjust dismissal on March 10, 2011. On April 26, 2011, pursuant to s. 241(1) of the *Code*, the employer provided the following written reasons for Mr. Champagne's without-cause dismissal:

Further to your letter dated 25 April 2011 in respect of the above-captioned and in particular, your request for a section 241(1) CLC letter, we advise that the complainant was terminated by AECL on a non-cause basis. In view of a number of recorded incidents over the course of his employment, it was determined that he was not a proper fit and was provided the appropriate dismissal package in accordance with the CLC (Canada Labour Code) provisions and the common law . . .<sup>40</sup>

Throughout the adjudication, the AECL and its counsel, Mr. Ronald Snyder, took the position that the termination of Mr. Champagne's employment was not unjust because it had complied with the notice and severance provisions of the *Code*.

The author of this paper, Mr. Reagan Ruslim, represented Mr. Champagne. Mr. Champagne argued that the *Code* should be given a broad and liberal interpretation, not the parochial and overly technical view proffered by the AECL. A review of Adjudicator Roach's decision shows that he gave thorough consideration to a number of the decisions and authorities presented by both parties. Many of the arguments,

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<sup>39</sup> *Champagne*, *supra* note 5 at 1.

<sup>40</sup> *Ibid* at 4.

authorities and jurisprudence raised by Mr. Champagne have been described earlier in this paper.

Ultimately, Adjudicator Roach ruled in favour of Mr. Champagne and against the AECL. In doing so, Adjudicator Roach acknowledged the “benefits conferring” nature of the *Code*:

In *Rizzo*, supra, Justice Iacobucci provided the following guideline to resolve the kind of conflict which exists between the two distinct divisions of Part III of the Code, as relied upon by the parties: “Any doubt arising from difficulties of language should be resolved in favour of the claimant.”

Moreover, to borrow the words of Justice Iacobucci, section 240 must be given a “broad, generous and liberal interpretation so as to further the general remedial goal of such legislation”. When a person considers his or her dismissal to be unjust and choose to file a complaint in accordance with the provision of the said section 240, full affect must be given to the benefit conferring legislation notwithstanding the fact that he or she has been served with a notice of termination in accordance with sections 230 and 235 of the *Code*.<sup>41</sup>

Although *Champagne* was put before both Adjudicator Schiff and the Federal Court, neither body referred to the analysis of Adjudicator Roach in any great detail. This is unfortunate because the elements in *Champagne* paralleled those in *Wilson* in several key ways:

- Both cases involved the same employer, the AECL;
- Both cases involved employees who had contracts of an indefinite duration; and
- Both employees were terminated by the AECL, ostensibly on a without-cause or non-cause basis under the *Code*.

#### IV: THE *WILSON* AFTERMATH

Since the Federal Court’s decision in *Wilson*, two noteworthy events have occurred:

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<sup>41</sup> *Champagne*, supra note 5 at 33-34.

1. Mr. Wilson filed an appeal to the Federal Court of Appeal. This appeal was heard on May 13, 2014. A decision was released on January 22, 2015, upholding the Federal Court's ruling.<sup>42</sup>
2. Three other adjudications have referred to the Federal Court's decision in *Wilson* and have rendered decisions reflecting their understanding and interpretation of it. The noteworthy post-*Wilson* decisions include:
  - a. *Taypotat v Mucospetung First Nation*,<sup>43</sup>
  - b. *Wright v Nisga'a Lisims Government*,<sup>44</sup>
  - c. *Sigloy v DHL Express (Canada) Ltd.*<sup>45</sup>

### **Taypotat v Mucospetung First Nation**

In *Taypotat*, the employer terminated the employment of Ms. Kim Taypotat on a without-cause basis. In accordance with the notice and severance provisions of the *Code*, the employer provided her with two weeks' pay in lieu of notice. Ms. Taypotat responded by complaining that her without-cause dismissal was actually an unjust dismissal. An adjudication session was convened.

The employer did not attend the hearing. Instead, it asserted that the adjudication could not proceed because Ms. Taypotat's dismissal was without-cause, and notice and severance had been given in accordance with the *Code*. After reviewing the Federal Court's decision in *Wilson*, Adjudicator Cameron ruled against the employer:

Ms. Taypotat's termination was not a layoff for lack of work or the discontinuation of the employee's function. Evidence reveals that the functions she performed are now being carried out by another employee.

Thus it is clear that an employee can appeal a without just cause termination under the Canada Labour Code claiming it unjust. Further, that the employer can not avoid the justification that may be required in a "with cause" termination by simply by giving notice and severance pay under the Code, ie: sections 240, 230

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<sup>42</sup> *Wilson FCA*, *supra* note 9.

<sup>43</sup> *Taypotat*, *supra* note 6.

<sup>44</sup> *Wright*, *supra* note 7.

<sup>45</sup> *Sigloy*, *supra* note 8.

and 235. Finally, that an adjudicator can probe to determine the real reason for the termination.<sup>46</sup>

*Taypotat* is interesting because it effectively turns the Federal Court's decision in *Wilson* on its head by upholding the necessity of just cause to effect a termination of employment under the *Code*.

### **Wright v Nisga'a Lisims Government**

In *Wright*, the Nisga'a Lisims Government terminated the employment of Pamela Wright on a without-cause basis. At the time of this termination, the employer paid Ms. Wright a severance package in accordance with its policies. This package was in excess of the prescribed minimums of ss. 230 and 235 of the *Code*. The employer offered additional money in return for a full and final release. Ms. Wright did not accept the additional offer and filed a complaint of unjust dismissal pursuant to the *Code*. The employer objected to this complaint on the basis that it had “. . . fulfilled all of its obligations and Ms. Wright had provided no evidence to support her complaint that the dismissal was unjust.”<sup>47</sup>

Adjudicator Dorsey rejected the employer's objection. After reviewing the Federal Court's decision in *Wilson*, the adjudicator identified several flaws with the judgment. One significant criticism noted by Adjudicator Dorsey was the Federal Court's lack of guidance and specificity when distinguishing between unjust dismissals and just-cause dismissals. According to Adjudicator Dorsey,

Except for references to discrimination or reprisal, the Court identifies **no standard** for determining when a dismissal with a severance payment will be considered an unjust dismissal and warrant reinstatement, additional compensation or other suitable remedies.<sup>48</sup>

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<sup>46</sup> *Taypotat*, *supra* note 6 at paras 45-46.

<sup>47</sup> *Wright*, *supra* note 7 at para 4.

<sup>48</sup> *Ibid* at para 13.

The other key deficiency identified by Adjudicator Dorsey relates to the issue of procedure, onus, and burden of proof. Normally, an employer faced with a complaint of unjust dismissal bears the evidentiary burden of demonstrating that it had just cause for termination. Adjudicator Dorsey noted that the decision in *Wilson* essentially flips the evidentiary onus to the dismissed employee,

There are procedural considerations when an employer asserts the complaining employee was dismissed without cause and it paid the minimum or more severance pay at the time of the dismissal. One is the burden falls to the employee to adduce evidence to persuade the adjudicator otherwise. Perhaps, the evidence will establish at first blush that all or part of the reason for the dismissal was discrimination, reprisal, personal or political animosity, favouritism for the replacement employee hired or some other bad faith reason so that the without cause dismissal with severance pay was a sham or subterfuge. The evidence might shift the burden to the employer to provide some reasonable explanation for the dismissal.<sup>49</sup>

Adjudicator Dorsey dismissed the employer's position on the basis that Ms. Wright's complaint contained no evidence that the dismissal was unjust. He proceeded to hear the merits of the complaint.<sup>50</sup> The employer was then ordered to produce particulars regarding the events leading to Ms. Wright's dismissal.

*Wright* is important because of the two deficiencies it identifies with respect to *Wilson*. Although *Wilson* appears to narrow the definition of "unjust dismissal" to instances of "discrimination or reprisal," it does not provide any further guidance when a dismissal with the payment of notice and/or severance under the *Code* is just versus unjust. Furthermore, *Wilson* does not specifically identify which party bears the evidentiary onus in an unjust dismissal complaint, i.e., does the employee bear the initial burden of showing that the termination was "unjust," or does the employer bear the initial onus of showing that the termination was "just"? These critical questions remain unaddressed and demonstrate some of the practical problems for adjudicators trying to follow and apply *Wilson* in the real world.

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<sup>49</sup> *Ibid* at para 16.

<sup>50</sup> *Ibid* at para 44.



It is unfortunate that Adjudicator Dorsey did not devote more thought to the issue of burden of proof beyond a single paragraph of his decision in *Wright*.

The shift in onus caused by *Wilson*, and identified by Adjudicator Dorsey, is a significant issue and marks a vast change in the law. At the hearing, the burden of proof shifted to the employee to show that her dismissal was unjust. The multitude of problems created by having the employee bear the burden of proof in a termination of employment has been addressed in labour law jurisprudence.

As noted in the leading textbook *Canadian Labour Arbitration, Fourth Edition*:

Cases in which employees claim they have been unjustly disciplined are a major exception that the person or party filing a grievance has the burden of proving that the collective agreement has been breached. In discipline cases, even when the employee is a probationer, the rule is that the employer has the burden of proving that it was justified in taking the action it did . . .<sup>51</sup>

The rationale for this rule is that the employer alone knows the reason that caused it to exercise its disciplinary powers and the employee is entitled to know what they are before having to respond. Obliging the grievor to bear the burden of proof would mean he or she would have to provide a negative (i.e., that the employer had no just cause, which is notoriously difficult thing to do and is both highly inefficient and unfair.<sup>52</sup>

The fundamental issue of who bears the burden of proof for discipline cases in labour arbitration is addressed in the decision *Re: United Steelworkers v International Nickel Co. of Canada Ltd.*<sup>53</sup> In this decision, Arbitrator Brown found that,

[He] further cannot agree that there is an obligation in the first instance on the grievor to establish sufficient evidence to show a prima facie case of “unjust discipline.”<sup>54</sup>

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<sup>51</sup> Brown, D.J.M. & Beatty, D. M. (Eds.). (2006) *Canadian Labour Arbitration, 4th ed* (Toronto: Canada Law Book) at para 7:2300.

<sup>52</sup> *Ibid.*

<sup>53</sup> 20 LAC 51 (*Steelworkers*).

<sup>54</sup> *Ibid* at 58.

Citing the decision of the British Columbia Supreme Court in *Re Endako Mines Ltd. (N.P.L.O and Hazelton and District Mine and Mill Workers Union, et. al.*,<sup>55</sup> Adjudicator Brown quoted Smith J. to support the above conclusion:

From the practical point of view, the employer or a discharged grievor is the only person who can say why the discharge occurred. The burden of establishing these reasons must in my view, be the person whose reasons they are, i.e., the employer. This accords with the view that the word ‘proven’ here is used in the sense of the legal or persuasive burden of proof, rather than the evidential burden.<sup>56</sup>

Adjudicator Brown then went on to quote the American book *Arbitration in Labour Disputes*:

The right to put one’s evidence first is generally considered an advantage and it is given to the party who carries the burden of proof partly to offset the disadvantages inherent in that burden, but, party also because the logical method of proceedings is for the one who has advance a grievance to state it and prove it. Yet, this will not always be the method best calculated the gain of a quick understanding of the controversy or to bring the parties to the real issue of fact. Often in a discipline case, layoff or discharge, the Union’s spokesperson will not know all the facts on which the Company intends to justify the discipline imposed. If compelled to proceed first, the union would introduce a staggering amount of evidence in a more or less **blind effort to prove a negative**, namely, that no sufficient cause for discipline existed.<sup>57</sup>

The problem with shifting the burden of proof to the employee, as required by *Wilson*, is exemplified in the most recent post-*Wilson* decision of *Sigloy*. *Wilson* unfairly and unnecessarily shifts the burden of proof from the employer to the employee, leading to unjust outcomes.

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<sup>55</sup> (1968) 69 DLR (2nd) 491.

<sup>56</sup> *Steelworkers*, *supra* note 53.

<sup>57</sup> *Ibid*, citing Updegraff and McCoy, *Arbitration in Labour Disputes*, 2nd ed (Washington DC: Bureau of National Affairs Inc 1961).

## Sigloy v DHL Express (Canada) Ltd

After less than two years of employment, Mr. Sigloy was promoted on May 1, 2012 to a non-bargaining unit position. Upon this promotion, he signed an employment contract that contained the following provision:

The Company may terminate your employment at any time giving you the greater of two (2) weeks' notice in writing or the minimum notice and severance required by the Canada Labour Code. No other notice or severance requirement expressed or implied shall apply.<sup>58</sup>

DHL terminated Mr. Sigloy's employment on a without-cause basis less than six months later. He received a lump sum payment representing two weeks' pay in lieu of notice and five days' severance, less the requisite deductions. Six days later, on October 15, 2012, the employer provided its reasons for this termination pursuant to s. 241(1) of the *Code*. These reasons included poor performance, attitude, and attendance, as well as "demonstrated inability to sustain the requirements of his position."<sup>59</sup>

Mr. Sigloy raised a complaint of unjust dismissal under s. 240 of the *Code*. Consistent with the decision in *Wilson*, DHL took the preliminary position that the Adjudicator, Joseph B. Rose, was without jurisdiction to conduct any hearing on the merits of this unjust dismissal complaint.<sup>60</sup> Adjudicator Rose reviewed the competing lines of authority regarding without-cause versus just-cause termination under the *Code*. DHL relied heavily on the Federal Court's decision in *Wilson*.<sup>61</sup> Mr. Sigloy tried to raise many of the arguments and authorities against *Wilson* discussed in this paper.<sup>62</sup> However, at the preliminary hearing, Mr. Sigloy did not raise any specific allegations of unjustness, i.e., discrimination or reprisal.<sup>63</sup>

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<sup>58</sup> *Sigloy*, *supra* note 8 at para 2.

<sup>59</sup> *Ibid* at para 3.

<sup>60</sup> *Ibid* at para 1.

<sup>61</sup> *Ibid* at para 6.

<sup>62</sup> *Ibid* at paras 13-20.

<sup>63</sup> *Ibid* at para 31.

Because Mr. Sigloy did not raise allegations of unjustness, he was unable to meet the evidentiary burden of proving the negative, i.e., that the employer did not have “just cause” to terminate his employment. Accordingly, Adjudicator Rose followed the ratio in *Wilson* and ruled in favour of the employer’s objection:

[T]he Complainant’s initial complaint does not allege the dismissal involved **discrimination, reprisal or bad faith**. In the circumstances I find **I am without jurisdiction and grant the employer’s preliminary objection**. Accordingly, the complaint is dismissed.<sup>64</sup> [emphasis added]

*Sigloy* is noteworthy because it appears to have expanded the definition of “unjust dismissal” as originally pronounced in *Wilson*. Whereas O’Reilly J. referred to an “unjust dismissal” as one “based on discrimination or reprisal,”<sup>65</sup> Adjudicator Rose expanded the definition to include “discrimination, reprisal **or bad faith**.” He does not explain the basis for this expansion. The definition of “unjust dismissal” remains unclear despite this expansion of terms. Are there other situations where the dismissal of an employee may be found “unjust” even if it is not characterized by findings of discrimination, reprisal, and/or bad faith? Furthermore, does the fact that Mr. Sigloy signed a contract of employment and did not raise at the outset accusations of “discrimination, reprisal or bad faith,” mean that the merits of his complaint should not, at the very least, be heard?

By strictly following the ratio of *Wilson*, Mr. Sigloy was forced to bear the difficult burden of proving a negative. To dispel the notion that his termination was “just,” post-*Wilson*, Mr. Sigloy had to lead the adjudication by calling evidence to prove that DHL **did not have just cause**. The inherent flaw of this burden was underscored and complicated further by the employer’s response—DHL responded to Mr. Sigloy’s “negative assertion” with a “negative response.” The essential position of both parties before Adjudicator Rose can be distilled as follows:

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<sup>64</sup> *Ibid* at para 35.

<sup>65</sup> *Wilson*, *supra* note 3 at para 36.

Mr. Sigloy to DHL: “The termination of my employment was an ‘unjust dismissal’ because you cannot show ‘just cause.’”

DHL to Mr. Sigloy: “The termination was ‘not an unjust dismissal’ because we are not asserting ‘just cause.’”

As a result of the illogical outcome described above, it is not surprising that Mr. Sigloy filed a Notice of Application for judicial review of Adjudicator Rose’s decision with the Federal Court on April 14, 2014.

### CONCLUSION

The *Wilson* decision was supposed to provide clarity to the issue of whether an employer may terminate an employee on a without-cause basis, as long as the employer is prepared to give notice per s. 230, severance per s. 235, or common law reasonable notice. *Wilson* has created no clarity—it has only created confusion.

The *Wilson* decision defies the majority of the jurisprudence regarding “unjust dismissal” under the *Code*. The Federal Court’s decision ignores the object and spirit of the legislation. Out of the three reported adjudications rendered post-*Wilson*, two have held that a termination on a without-cause basis coupled with payment of notice and severance under the *Code* cannot be used as a shield to the unjust dismissal provisions of the *Code*. Supporters of the without-cause school may argue that the recent decision of *Sigloy* can be factually distinguished on the basis that it involved specific contractual terms agreed to in advance by the employer and employee in the event of a termination without cause. Whether this distinction fosters further clarity in the law remains questionable. Post-*Wilson*, one can reasonably expect terminated employees and their lawyers to raise allegations of discrimination, reprisal, or bad faith when raising a complaint of unjust dismissal, regardless of whether there are factual bases to support such allegations. Gratuitous allegations of discrimination, reprisal, or bad faith will only add to the length, complexity, and costs of future adjudications, and this further undermines the integrity of the unjust dismissal provisions.

This paper remains steadfast in its view that the *Wilson* decision is erroneous and not helpful. The decision ignores the legislative intent underpinning ss. 240 to 246 of the *Code*, which was clearly expressed by the Minister of Labour when these sections were introduced. *Wilson* unduly and unnecessarily restricts the broad and remedial powers granted to adjudicators under the *Code*. It artificially limits the exercise of these powers to termination involving “discrimination,” “reprisal,” and now, according to *Sigloy*, “bad faith.” Neither the Court in *Wilson* nor its subsequent adjudications have explained fully how these three terms affect or inform the notion of unjust dismissal under the *Code*. The decision in *Wilson* also fails to acknowledge that the unjust dismissal provisions of the *Code* were introduced to address the shortfalls of the common law. Instead, these sections can now be used to perpetuate these shortfalls. Finally, *Wilson* shifts the evidentiary burden from the employer to the employee. As demonstrated in *Sigloy*, this shift can lead to absurd and unjust results.

It will be interesting to see whether the judicial review of *Sigloy* or the appeal in *Wilson* will return the law to the proper interpretation of the *Code*, as exemplified in Adjudicator Roach’s decision in *Champagne*. In the meantime, it appears that the unjust dismissal provisions of the *Code* remain open to novel interpretation post-*Wilson*. Given that ss. 240 to 246 of the *Code* have been in existence for over 35 years, and have been subject to over 1,740 adjudications and decisions before *Wilson*,<sup>66</sup> it is hard to believe that such new and novel law can be created from an old statute.

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<sup>66</sup> Per Westlaw “cite up” function of section 242 on August 7, 2014.