4-1997

Lazarowicz v. Bardal: Reasonable Notice and Relational Contracts in Canada

Chios Carmody
The University of Western Ontario

CANADIAN CASES ON EMPLOYMENT LAW

Second Series/Deuxième série

Recueil de jurisprudence canadienne en droit du travail

Vol. 24 Part 2 April 1997 24 C.C.E.L. (2d) 167-320

CASES REPORTED/DÉCISIONS PUBLIÉES

ARTICLES

CARSWELL

Lazarowicz v. Bardal:

Reasonable Notice and Relational Contracts in Canada

by

Chi Carmody and M. Norman Grosman*

On February 20, 1959 the Conservative government of Prime Minister Diefenbaker announced the cancellation of an ambitious attempt to build a Canadian fighter jet, the Avro Arrow. Nationalists criticized the decision as a sellout to American interests. Among the criticisms was the fact that the Arrow's cancellation meant a loss of highly skilled labour for Canada. Hundreds of technical experts left to seek jobs elsewhere.[1] Mr. Lazarowicz, a 49-year-old productibility engineer, was one of them. After a brief stint working in Michigan, Lazarowicz returned to Ontario and sued his former employer, Orenda Engines Ltd., alleging wrongful dismissal.

Two months after Lazarowicz was dismissed Mr. Bardal, the advertising director of a well-known Toronto newspaper, was terminated in very different circumstances and offered the equivalent of six months' notice. Bardal, like Lazarowicz, also sued his ex-employer for wrongful dismissal.

As fate would have it both claims made their way through the Ontario courts at the same time. *Lazarowicz v. Orenda Engines Ltd.*[2] was decided at trial on February 18, 1960. The plaintiff was awarded 3 months' notice and the defendant appealed. *Lazarowicz* was finally decided in November 1960 when Roach J.A. of the Ontario Court of Appeal rendered that court's decision. In the interim McRuer C.J.H.C. had decided *Bardal v. Globe & Mail (The)*[3] in April, 1960. His decision was not appealed.

Roach J.A.'s opinion in *Lazarowicz* did not refer to McRuer C.J.H.C.'s reasons in *Bardal*. Each judge adopted a distinct approach

---

*Grosman, Grosman & Gale, Toronto.

[1]See E.K. Shaw, *There Never Was an Arrow* (Ottawa: Steel Rail Educational Publishing, 1981) at p. 106

[2]*Lazarowicz v. Orenda Engines Ltd.* (1960), 26 D.L.R. (2d) 433 (Ont. C.A.), affirming (1960), 22 D.L.R. (2d) 568 (Ont. H.C.).

[3]*Bardal v. Globe & Mail (The)* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.).

to the calculation of reasonable notice and over time their respective opinions evolved into two conflicting lines of precedent in Canada. The two decisions have never been fully reconciled.

Briefly stated, the distinction between *Lazarowicz* and *Bardal* is whether reasonable notice, if not explicitly provided for in a written employment contract, is determined in light of the parties' intent at the time the contract was made (the "*Lazarowicz*" or "implied intent" approach) or with regard to circumstances on the date the contract was terminated (the "*Bardal*" or "public policy" approach). Recent appellate decisions in Canada favour *Bardal*. This paper examines why *Lazarowicz* is theoretically suspect, whether it continues to have a role in Canadian law, and how a new legal construct, the relational contract, is being recognized in employment law. Recent Ontario authority[4] suggests that while *Bardal* is the appropriate method for calculating notice, *Lazarowicz* remains valuable in interpreting certain employment contracts where intent is readily and equitably determined. Courts must therefore recognize that the two methods can complement each other.

The divergence between implied intent and public policy is, in a sense, a microcosm of the greater tension in employment law between the strict and policy driven interpretation of employment contracts. Courts have followed different approaches at different times. Today it appears that strict contractualism is in retreat if for no other reason than judicial recognition that long-term employment contracts, like distributorships and loan transactions, embody ongoing relationships and hence evolving expectations.

Until recently the idea of a contract embodying a fluid, continuing relationship has attracted little attention in Canada. Perhaps this is because, as Professor Fridman observes, relationalism requires considerable rethinking of the content and application of classic contractual doctrine.[5] This challenge has not deterred theorists in the United States where relationalism has been hotly debated for at least two decades. Practically speaking there is no reason why relationalism, which focuses on fairness and the interdependence of parties rather than the literal terms of their agreement, should not invoke similar debate in Canada. Today we are more aware of the impact of context on the law and relationalism is, above all, a recognition of context. In short, the relational contract deserves greater examination in Canada.

---

[4]See *Slater v. Sandwell* (1994), 5 C.C.E.L. (2d) 308 (Ont. Gen. Div.) and *Ditchburn v. Landis & Gyr Powers Ltd.* (1995), 16 C.C.E.L. (2d) 1 (Ont. Gen. Div.).

[5]G.H.L. Fridman, *The Law of Contract* (Toronto: Carswell, 1994) at p. 2.

Part I of this paper reviews the origins of reasonable notice in Canada. Part II examines *Lazarowicz* and *Bardal* in depth, while Part III analyzes the cases that followed *Lazarowicz*. Part IV suggests why, in light of recent jurisprudence, *Lazarowicz* alone is no longer a sound basis for calculating notice in most instances. Part V concludes with some observations about employment agreements as relational contracts and discusses the future role of *Lazarowicz* and *Bardal*.

PART I – The Development of Reasonable Notice in Canada

Labour has been regarded as a unique commodity in western legal thinking for several centuries.[6] This view can be traced to the rise of individualism and to the idea that coerced labour is morally repugnant. One cannot make a person do what they will not do, nor can one make them work in conditions in which they will not work. Fairness has always been, therefore, important in labour regulation. Because Western law stressed fairness in labour relations a central issue became regulating the duration of employment. If the relationship could be terminated by either party, when was this right available, and on what terms?

Under the common law of England the answer to this question was embodied in the presumption that a hiring of indefinite duration was for a year. The presumption was rebuttable by evidence demonstrating the parties' contrary intent. Over time the common law reduced the length of the typical contract of employment from a yearly hiring to one of a shorter period, usually the pay period. In England and Canada this effect was modified by judges, who developed the concept of reasonable notice. The concept meant that either party had to notify the other when it wanted to end the employment relationship. Reasonable notice became a legally sanctioned interval when the parties could put their affairs in order. For the departing employee termination meant finding a new job; for the employer it meant finding a replacement worker. As such, the function of notice for each party was different. On the one hand the employee usually had the onerous task of finding a new position, therefore, the employee's notice period was relatively lengthy. On the other hand the employer often had many qualified workers from which to choose a replacement, therefore, the employer's notice period was relatively short. This distinction in notice periods survives today, although it has been a source of confusion to some Canadian judges.

---

[6]See D.M. Beatty, *Putting the Charter to Work: designing a constitutional labour code* (Kingston: McGill-Queen's University Press, 1987) at p. 21 et seq.

The development of reasonable notice in England and Canada is to be contrasted with the common law of termination as it evolved in the United States. There "Wood's rule", or termination at will, became prevalent. In New York, for example, a hiring is presumed to be terminable at will unless the parties express a contrary intent. Only in certain limited circumstances will a judge imply a term of reasonable notice in an employment contract.[7]

The beginning of any discussion of reasonable notice in Canada is generally taken to be *Carter v. Bell & Sons (Can.) Ltd.*[8], a 1936 Ontario decision. *Carter*, however, is now most frequently cited as authority for the "implied term" principle of reasonable notice. The concept of reasonable notice itself is older, being discernible at least as early as *Bain v. Anderson & Co.*[9], an 1898 Supreme Court of Canada decision. There Taschereau J. said,

> The learned judge who tried the case found that the appellant had been dismissed without *reasonable notice* and was entitled to damages. The Court of Appeal, however, held that upon the evidence there was no definite engagement of the appellant, but merely a temporary employment, and dismissed his action. It cannot at the present day be contended that, as a rule of law, where no time is limited for the duration of the contract of hiring and service, the hiring has to be considered a hiring for a year. The question is one of fact, or inference from facts, the determination of which depends on the circumstances of each case.[10] (emphasis added)

Unfortunately Taschereau J. did not specify *how* reasonable notice should be calculated. Instead, he made a passing reference to what Bain must have expected as notice given that his employer was losing money. Ultimately Taschereau J. denied any entitlement.

Other decisions are of greater assistance. Two early appellate cases which appear to use elements of the employee's termination date

---

[7]See G. Minda, "Employment At-Will in the Second Circuit" (1986) 52 Brooklyn L.R. 913 at 915. Minda notes that 40 states have placed restrictions on the employers absolute right to fire at will, although protection in most cases is less than that provided in Canadian jurisdictions. See also M.J. Weinstein, "The Limits of Judicial Innovation: A Case Study of Wrongful Dismissal Litigation in Canada and the United States" (1993) 14 Comp. Lab. L.J. 478 at 480.

[8][1936] 2 D.L.R. 438 (Ont. C.A.).

[9](1898), 28 S.C.R. 481.

[10]Ibid. at 484.

in calculating notice are *Speakman v. Calgary (City)*[11] and *Bole v. Pelissier's Ltd.*[12] In *Speakman*, Beck J. referred to the factors underlying the calculation of reasonable notice as depending on,

> the capacity in which the employee is engaged, the general standing in the community of the class of persons, having regard to their profession, to which the employee belongs, the probable facility or difficulty the employee would have in procuring other employment in case of dismissal, having regard to the demand for persons of that profession, and the general character of the services which the engagement contemplates.[13]

Similarly in *Bole*, Martin J.A. observed that there was no rule as to the length of reasonable notice. Entitlement ultimately depended upon "the grade of employment" and the trier of fact's finding.[14]

Speakman and *Bole* are inconclusive as to the date as of which the contract is to be interpreted but their methods use some factors measured as of termination. These decisions suggest that even in this early period, employment was not regarded as a simple transaction governed by fixed terms. Rather, courts viewed employment contracts as embodying relationships, with the possibility that interim change and circumstances at termination could vary entitlement to notice.

Carter v. Bell & Sons (Can.) Ltd. also implicitly recognized the relevance of the date the contract was terminated for the purpose of calculating notice; the key principle derived from this seminal precedent is that, unless otherwise stated, notice is to be implied in an employment contract. The facts of *Carter* were that the plaintiff had been hired by the defendant, an English company, in Toronto in October 1933. A year later Carter concluded an agreement with the company whereby he moved to Winnipeg to serve as sales supervisor for new territory that Bell & Sons wanted to open to their products. Under the agreement's terms, Carter took his family to Manitoba with him and proceeded to build a local sales force. His efforts were cut short by his dismissal in December 1934.

Carter sued and was awarded six months' notice at trial. On appeal Middleton J.A. articulated the implied term principle, observing that the origins of the principle arose largely out of custom,

---

[11](1908), 9 W.L.R. 264 (Alta C.A.).

[12][1930] 3 W.W.R. 510 (Alta C.A.).

[13]*Speakman*, supra, note 11 at p. 265.

[14]*Bole*, supra, note 12 at pp. 517-518.

> In the case of a master and servant there is implied in the contract of hiring an obligation to give reasonable notice of an intention to terminate the arrangement. This notice in a case of indefinite hiring is generally six months, but the length of notice is always a matter for inquiry and determination, and in special circumstances must be less. This is a peculiar incident of the relationship of master and servant based largely upon custom. The master and servant, when nothing is said, are presumed to contract with reference to this usage and so a stipulation as to notice is implied.[15]

After examining the facts Middleton J.A. ultimately reduced the award to three months. The judge did not appear to examine the parties' intent at the time the agreement was concluded, nor did he engage in second-guessing how the parties thought their relationship would evolve at the time of their negotiations. Instead, the judge's conclusion fixed on the actual attributes of the relationship, as in *Speakman* and *Bole*. He observed,

> There are many cases of an intermediate nature where the relationship of master and servant does not exist but where an agreement to terminate the agreement upon reasonable notice may be implied. This is I think such a case . . . The choice of sub-agents and their training, the recommendation of them to the company for appointment, the supervision of these men when appointed, all point to this more permanent relationship. The fact that the plaintiff was entering a new territory as representative of the defendant and was endeavouring to create a market for the defendant's products and that to their knowledge he was taking his wife and children with him to the West indicates a relationship that could not be terminated at will by either party.[16]

Although Middleton J.A. spoke about the existence of an implied term of notice, the factors he relied on to find one no doubt influenced his calculation. Each of these factors, such as the exact nature of Carter's tasks and the taking of his family to the west, arose after the employment relationship began. They could only be assessed with accuracy as matters stood after Carter assumed his duties, not before. The Ontario Court of Appeal evidently analyzed *Carter* according to circumstances toward the end of the relationship, not the beginning.

Of particular importance is the emphasis Middleton J.A. placed on the "more permanent relationship" which arose between the parties when they entered into the employment agreement. His Lordship recognized that the position in Winnipeg created a relationship between the parties upon which reasonable expectations rested. It would

---

[15]*Carter*, supra, note 8 at p. 439.

[16]Ibid. at p. 440.

take time for Carter to arrange his network of agents, to achieve sales in the new territory, and to be fairly evaluated by the head office. There was also the fate of his family to be considered. All of these arrangements could not be swept away in an instant without creating undue hardship for Carter. Law and equity demanded a reasonable notice period based on the relationship as it actually came to be, not as the parties may have intended at the outset.

PART II – LAZAROWICZ v. BARDAL

Carter formalized the implied term principle in 1936. It also established a customary six-month ceiling for reasonable notice in Canada. When *Bardal* was decided in 1960 it became best known and is still best remembered for breaking the notice ceiling set by *Carter*. Only over time did *Bardal*, when compared with *Lazarowicz*, give rise to a new problem in the law of dismissal, namely, at what point are circumstances to be assessed in fixing reasonable notice?

In *Bardal* the plaintiff was approached by *The Globe & Mail* in 1942 with an offer of a position as assistant advertising manager. At that time Bardal indicated that he was interested in permanent employment given his advanced age. Bardal was eventually hired in October 1942 and promoted to advertising manager in 1954. He was terminated in April 1959 because the newspaper was losing money and the publisher wanted to improve advertising revenue.

McRuer C.J.H.C. began his analysis by examining the older authorities on the length of reasonable notice. He went on to state the now famous and oft-quoted passage,

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.[17]

He then applied the above criteria to the circumstances. The chief justice found that the newspaper had hired Bardal knowing that he wanted permanent employment. Bardal also had limited transferrable skills, and consequently fewer re-employment opportunities. McRuer C.J.H.C. concluded that one year's notice was reasonable.

Seven months after *Bardal* was released the Ontario Court of Appeal rendered its decision in *Lazarowicz*. The decision was an appeal from the reasons of Spence J., who gave judgment prior to *Bardal*

---

[17] *Bardal*, supra, note 3 at p. 145.

in February 1960. It is important to review the trial decision in *Lazarowicz* carefully because much of Roach J.A.'s opinion rested upon it.

Spence J. concluded that Lazarowicz was employed on an indefinite hire. As in *Speakman, Bole* and *Carter*, the judge's conclusion as to notice was based on the nature of the position as it was actually performed, not as it was contemplated by the parties at the beginning of the relationship. Spence J.'s approach is illustrated as follows,

> I am of the opinion that the plaintiff's position and status was certainly superior to that of the vulcanizer considered in *Mitchell v. Sky* (*supra*) and that, despite the fact that the plaintiff was not engaged in any management or supervising duties, such as the plaintiff in *Wyatt v. Combination Storm Window* (*supra*), he was engaged in tasks requiring a very considerably greater degree of skill and experience than was the plaintiff in that case and he should be entitled to the same amount of notice that Judson J. found the plaintiff there was entitled to.[18]

In substance if not in form, Spence J.'s assessment followed very closely a public policy approach. There was no discussion of the parties' intent.

On appeal, the court did not question Spence J.'s analysis. Instead, Roach J.A. set out "a reasonable test" for the determination of notice as follows,

> Opinions might differ as to what was reasonable, but in reaching an opinion a reasonable test would be to propound the question, namely, if the employer and the employee *at the time of hiring* had addressed themselves to the question as to the notice that the employer would give in the event of him terminating the employment, or the notice that the employee would give on quitting, what would their respective answers have been?[19] (emphasis added)

Revealingly, Roach J.A. never answered his own question. The balance of his opinion reads,

> We are not prepared to say that the learned trial Judge's view as to the length of notice, namely 3 months, was wrong. We think it was reasonable, particularly having regard to the availability to the defendant of comparable positions upon his employment having been terminated by this defendant or, as I put it earlier, conversely, the replacement problem that would confront the defendant if the plaintiff quit and the defendant was called upon to get someone with the same

---

[18]*Lazarowicz*, supra, note 2 at p. 578 (Ont. H.C.).

[19]Ibid. at p. 436 (Ont. C.A.).

> qualifications to fill his shoes. I think we need to say no more. The appeal is dismissed with costs.[20]

Many subsequent decisions citing the first passage of Roach J.A. above do not bother with the second. Reading the two passages together confirms that Roach J.A. never actually applied his own analysis. Indeed, if Roach J.A. tried to imply intent he probably erred. He was certainly mistaken in considering the availability of comparable employment on termination, unless he was trying to imply intent on hiring. There is no indication in his opinion of such an effort.

From the outset, then, the *Lazarowicz* approach posed several problems. A review of Canadian precedent prior to 1960 reveals that judicial analysis had been arguably more akin to *Bardal*-style inquiry than to assessing the parties' contractual intent at the outset of their relationship. Roach J.A. based his opinion on a trial decision which, closely scrutinized, followed a *Bardal*-type analysis. A point made elsewhere is that Roach J.A.'s reference to his approach as "a reasonable test", rather than the definitive method, could mean that he never intended his words to be taken with the authority they later assumed.[21] Finally, it is curious that Roach J.A. never referred to *Bardal*. In fact the court of appeal came to its conclusion without a single reference to any precedent. taken together, all of these problems cause us to question why and how *Lazarowicz* – an imprecise test articulated without the benefit of clear application – could become, for many years, the leading appellate decision on the calculation of reasonable notice in Canada?

PART III – LAZAROWICZ APPLIED

At this point our paper takes a decided turn. The turn – towards *Lazarowicz* and away from *Bardal* – assumes that *Lazarowicz* has been the road less travelled. Our assumption is buttressed by a review of the *Canadian Cases Judicially Considered.* Its entries indicate that

---

[20]Ibid.

[21]See Ferguson J. in *Garvin v. Rockwell International of Canada Ltd.* (1993), 50 C.C.E.L. 295 (Ont. Gen. Div.).

Bardal has been followed far more frequently than *Lazarowicz*.[22] One purpose of this paper is to examine why.

There are many ways to organize an overview of case law. Two have been selected here. The first, set out in this part, identifies three judicial methods of applying *Lazarowicz*. In the authors' view none has been entirely successful, largely because *Lazarowicz* is an indeterminate test and indeterminacy cannot provide courts with guidance. The second, set out in Part IV, reviews judicial criticism of *Lazarowicz*. Important authority has now made clear its wariness of the implied intent approach.

Applying Lazarowicz – Three Approaches

(a) *Lazarowicz and Bardal "Reconciled"*

A review of the cases suggests that *Lazarowicz* has been applied in three ways. The first consists of cases where the divergent tests in *Lazarowicz* and *Bardal* are superficially reconciled, usually by simply citing both. Meaningful reconciliation, achieved through contrast and comparison of the authorities, is absent. In the end the "reconciliation" often winds up looking very much like the public policy approach.

An example of the "reconciled" approach is Saunders J.'s decision in *Bohemier v. Storwal International Inc.*[23] In that case 60-year-old Charles Bohemier was terminated after 35 years of service with

---

[22]The *Canadian Cases Judicially Considered* lists a variety of decisions as either following or referring to *Lazarowicz*. Among the most important are: *Woodlock v. Novacorp Consulting International Ltd.* (1990), 72 D.L.R. (4th) 347 (B.C. C.A.); *Bartlam v. Saskatchewan Crop Insurance Corp.* (1993), 49 C.C.E.L. 141 (Sask. Q.B.); *Heinz v. Cana Construction Co.* (1987), 55 Alta. L.R. (2d) 382 (Q.B.); *Gilman v. Winnipeg Board of Jewish Education Inc.* (1986), 39 Man. R. (2d) 21 (Q.B.); *Pitre v. Gordie's Auto Sales Ltd.* (1979), 16 N.B.R. (2d) 328 (C.A.); *Yosyk v. Westfair Foods Ltd.* (1988), (sub nom. *Vernon v. Westfair Foods Ltd.*) 49 D.L.R. 269 (Man. C.A.); *Stewart v. British Columbia Sugar Refinery Co.* (1994), 2 C.C.E.L. (2d) 125 (Man. Q.B.); *Antonaros v. SNC Inc.* (1984), 6 C.C.E.L. 264 (Ont. H.C.); *Erskine v. Viking Helicopter Ltd.* (1990), 35 C.C.E.L. 322 (Ont. Gen. Div.); *Carson v. Dairy & Poultry Pool* (1966), 56 W.W.R. 629 (Sask. Dist. Ct.); *Tracey v. Swanseu Construction Co.* (1964), [1965] 1 O.R. 203 (H.C.); *Garvin v. Rockwell International of Canada Ltd.*, supra, note 21; *Moore v. Zurich Insurance Co.* (1984), 4 C.C.E.L. 188 (Ont. Co. Ct.); *Mann v. Andres Wines Ltd.* (1985), 9 C.C.E.L. 63 (Ont. Dist. Ct.); *Bohemier v. Storwal International Inc.* (1982), 40 O.R. (2d) 264 (H.C.), varied in part (1983), 44 O.R. (2d) 361 (C.A.). Cases cited as following or referring to *Bardal* are too numerous to be listed here.

[23](1982), 40 O.R. (2d) 264 (H.C.), varied (1983), 44 O.R. (2d) 361 (C.A.).

Storwal International, a furniture maker. The circumstances of his dismissal provoked sympathy – after three decades of faithful service he was terminated by letter, delivered to his home by cab one Friday afternoon.

Saunders J. cited McRuer C.J.H.C.'s statement in *Bardal* at the outset of his reasons and observed that the case enunciated "the principles which should guide the Court in determining the amount of notice . . .".[24] Two pages later Saunders J. continued with a *Lazarowicz*-type analysis, but diverged from it by referring to "the age and length of loyal service by the plaintiff and the condition of his health." These factors are irrelevant to any reconstructed intent unless the judge engages in the artificial exercise of calculating notice had these factors been considered by the parties at the outset. The task is fraught with retrospective guessing based on conditions as they actually turned out and not as they may have appeared to the parties at the time of their negotiations. Saunders J. concluded his analysis as follows,

> If the issue [of notice] had been addressed at the time [Bohemier] was first employed, it would not have been reasonable for his employer to have agreed to a notice period sufficient to enable him to find work in difficult economic times. In saying this, I hope that it is not thought that I am unsympathetic to the plight of the plaintiff. His claim, however, is based on contract and it is not reasonable to expect that his employer would or could have agreed to assure that his notice of termination would be sufficient to guarantee that he would obtain alternative employment within the notice period.
>
> It is, however, my view that the age and length of loyal service by the plaintiff and the condition of his health, which was known to Storwal, entitled him to a considerably longer period of notice than might otherwise be the case.[25]

The judgment was appealed. Brooke J.A. varied the trial judge's findings as follows,

> As to the award for inadequate notice, each case must turn on its own facts, there really is no precedent. We agree Saunders J. was right in taking into account the economic factor when considering the case for each of the parties. We think he correctly discerned all the principles but we think he did not give sufficient weight to the length of the term of employment and the various work which [Bohemier] performed with the company over his working life (some 35 years and 10 months) and the fact that the separation was but two years before he

[24]Ibid. at p. 267.

[25]Ibid. at p. 269.

> earned full pension entitlement. In our opinion, giving proper weight to these facts and the fact that this employer was really the major employer in a small community, we think 11 months' salary in lieu of notice would have been appropriate and the judgment is varied accordingly.[26]

Brooke J.A.'s remarks are of interest. He asserted that determinations of reasonable notice are unique exercises conducted without precedent. It is difficult to belief that His Lordship was suggesting that neither *Lazarowicz* nor *Bardal* had any relevance. Rather, Brooke J.A. seemed to agree with Saunders J.'s own brand of the "reconciled" approach.

As well, Brooke J.A. specifically referred to factors uniquely determinable at the time of termination such as length of employment, the character of the work, the plaintiff's having fallen short of pensionable age and the position of the employer within the community. These are at odds with a faithful *Lazarowicz* analysis. In essence, it appears that the court of appeal travelled the same path Saunders J. did, claiming to follow *Lazarowicz*, but actually evaluating circumstances as they stood at the end of Bohemier's relationship with Storwal. At both levels the decision makers seemed preoccupied with the inequity of Bohemier's termination and referred to facts existing then, as opposed to how these factors may have appeared to the parties actually negotiating on hiring, to justify their conclusions.

Another putative "reconciliation" of *Bardal* and *Lazarowicz* occurred in *Mann v. Andres Wines Ltd.*[27] In that case the plaintiff was hired as a sales secretary by a winery in 1975. In December 1983 she was laid-off and eventually terminated four months later. She then began a suit for wrongful dismissal, claiming nine months' salary.

The trial judge canvassed *Lazarowicz*, which he labelled "a further test" to *Bardal*. Curiously Lazier J. did not attempt to reconstruct the fictive intent of the parties at the time Andres Wines hired Mann. Instead, he focused on the plaintiff's mitigation efforts and concluded that the 12 weeks' notice provided by Andres Wines was sufficient. As in *Bohemier*, each of the factors Lazier J. mentioned in coming to his conclusion was assessed as of the time of Mann's termination, not as of the time of her hiring.

In *Moore v. Zurich Insurance Co.*,[28] the court explicitly stated that *Bardal* set out the principles which should guide it in assessing

---

[26]Ibid. at p. 362 (C.A.)

[27](1985), 9 C.C.E.L. 63 (Ont. Dist. Ct).

[28](1984), 4 C.C.E.L. 188 (Ont. Co. Ct).

reasonable notice. Later in her reasons however, Weiler J. relied on *Lazarowicz* for the subsidiary proposition that what is reasonable notice must be regarded from the point of view of both employer and employee. Weiler J. interpreted *Lazarowicz* to mean that the court must determine the factors which adversely affect both parties. The judge stated that "[o]nce these factors have been determined, however, the factors that are unique to the employee must be weighed carefully in calculating the time required by him or her to obtain a similar position."[29] The judge then determined that, having regard to circumstances as they existed upon termination such as the plaintiff's job as a dicta typist, her age, length of employment, re-employment prospects and efforts to mitigate, Zurich's notice had been insufficient. Therefore the plaintiff was entitled to an additional 12 weeks' notice. Once again the decision was silent regarding the parties' intent.[30]

From this survey of cases where *Lazarowicz* and *Bardal* were nominally reconciled, two observations can be made. First, judges in many instances appear to let circumstances as they existed at the end of the employment relationship shape their conclusions as to the reasonableness of notice, probably because these facts are the most vivid and compelling ones brought forth at trial. Intent at the time of hiring – a time that is usually far in the past for most litigants – is a hard thing to recall and illustrate in court, let alone imply as *Lazarowicz* requires. The process of *Bardal* is therefore better suited to human nature and to the need for certainty in litigation.

Second, this survey suggests that some judges have difficulty keeping in mind the technical distinctions and the correct emphases of both approaches. Roach J.A. referred to "respective answers" for employers and employees as to reasonable notice, yet judges like Saunders J. in *Bohemier* and Weiler J. in *Moore* appeared to take the analysis one step further by importing a reasonability requirement and making any calculation acceptable to both sides. "Reconciliation"

---

[29]Ibid. at p. 193.

[30]See also *Carson v. Dairy & Poultry Pool* (1966), 56 W.W.R. 629 (Sask. Dist. Ct). In *Carson* a university student was hired to work in the defendant's repair shop. Twelve days after being hired he was terminated. The judge cited both *Lazarowicz* and *Bardal*, but made no finding about the intent of the parties as to reasonable notice at the outset of their relationship. This is noteworthy given that the period of employment was brief and intent presumably evident. Likewise in *Tracey v. Swansea Construction Co.* (1964), [1965] 1 O.R. 203 (H.C.), the plaintiff was a corporate controller allegedly terminated for cause. At trial the judge dismissed the allegations of cause as unfounded. He then went on to cite both *Lazarowicz* and *Bardal* for the proposition that the plaintiff was entitled to reasonable notice, ignoring any distinction between the two, and awarded six months' pay.

therefore permits an elasticity of approach where equity, as opposed to precedent, is the most important principle. This has been encouraged by the ad hoc process of judicial opinion making in the calculation of reasonable notice and the failure of appellate courts to squarely address the divergent jurisprudence in the area.

Unfortunately, because none of these "reconciled" cases actually applied *Lazarowicz*, they did not encounter the practical problem of putting the implied intent approach to work. Other cases did. This group forms the subject of our second major category.

(b) *Lazarowicz Applied*

The second category of cases consists of decisions where *Lazarowicz* was actually applied. This group can in turn be divided into two subcategories. The first consists of cases where *Lazarowicz* was nominally applied but no genuine effort was made to imply an intent to the parties regarding reasonable notice at the time of hiring. We have referred to this class of cases as "Nominal *Lazarowicz*" because in these decisions judges purported to follow an implied intent analysis and generally took a few tentative steps in that direction, but yet were influenced by public policy factors. What differentiates "Nominal *Lazarowicz*" from those in the "Reconciled" category reviewed above is that the *Bardal* influence is, if anything, less pronounced. Reference to *Bardal* in "Nominal *Lazarowicz*" cases is less evident or non-existent. The distinction is at times slight, but nonetheless real: "Nominal *Lazarowicz*" judges do attempt to follow *Lazarowicz*, with varying degrees of success.

(i) *"Nominal Lazarowicz"*

A well-known example of "Nominal *Lazarowicz*" is of that of McLachlin J., as she then was, in *Nicholls v. Richmond (Township)*.[31] Nicholls was hired in 1975 as a solicitor with a municipal corporation. Over time his performance did not meet the municipality's requirements. In April 1981 he had a heart attack. He eventually returned to his position but his duties were modified and his performance monitored. In March 1982 Nicholls' employment was terminated. He was paid a year's salary and benefits as severance. Because of his deteriorating physical condition and an economic slowdown, the plaintiff was unable to find alternate work.

---

[31](1984), 52 B.C.L.R. 302 (S.C.).

McLachlin J. cited *Bardal*, but chose to take a strict contractualist view of the employment relationship. Without reconciling her *Lazarowicz*-type approach with her reference to *Bardal*, she held that the appropriate amount of damages must depend on the reasonable expectations of the parties at the time the contract was made. According to McLachlin J.,

> [i]t may be said with some confidence that had the parties considered the matter in 1975, when the contract of employment was formed, they would have agreed that in the event of termination the employee should receive notice commensurate with his contribution, the duration of his employment, his age, and the availability of similar employment as then foreseeable. However, it cannot be said that the parties would have agreed that the length of notice or payment in lieu of notice should be increased in the event the defendant were to suffer a debilitating sickness which reduced his employability or in the event worsened economic conditions were to reduce the number of similar positions available. Such a term would require the employer to insure the employee against the impact of unforeseeable future events unrelated to the employment and entirely out of the employer's control.[32]

McLachlin J.'s analysis is subject to scrutiny because of her arbitrary limitation of implied intent to certain factors the parties' might have plausibly considered, namely work quality, length of tenure, age and alternate employment prospects. Yet there is no reason why Nicholls and the municipality might not have contemplated other factors, such as the state of Nicholls' health at termination, as going to lengthen the notice period. Indeed, a strict contractualist view of the employment relationship would seem to uphold the parties' right to contract about anything. On this view the trial judge could consider a range of factors. The only legitimate limit would be the judge's assessment of the parties' inclination, that is, how would Nicholls or the municipality have contemplated the factor at the outset?

The danger posed by McLachlin J.'s formulation of the *Lazarowicz* approach is its indeterminacy. There is nothing to stop a judge from considering any potential factor as adding to, or subtracting from, the notice period. According to this method, it is ultimately the judge who determines which factors the parties might reasonably have contemplated, not the parties themselves. McLachlin J. was aware of this. In *Nicholls* she deliberately constrained her analysis by pointing to policy factors that should make courts wary of implying too great a contractual intent to the parties. She said,

---

[32]ibid. at p. 310.

> Moreover, there are reasons of policy why the court should be reluctant to increase the period of notice because of intervening ill health or deteriorating economic conditions. Consider the extreme case where these factors render the employee permanently unemployable. (I do not say that this is such a case.) Is the employer bound to continue full salary and benefits for the rest of the employee's working life? In my view, that would be too great a burden to place on an employer. Nor would such a policy benefit employees in the final analysis. The result would be that the employers would decline to hire persons with potential health problems or dismiss current employees before serious health problems developed or economic conditions worsened.[33]

McLachlin J.'s attempt to curb the court's consideration is problematic because it is at odds with the basic premise of a contractualist approach that the parties are free to negotiate over any and all terms, subject only to statutory limitations. In theory there should be no restriction on what factors a party might reasonably have negotiated, barring public policy concerns or statutory employment standards. In *Nicholls* McLachlin J. told us why ill heath and poor economic conditions should not, as a rule, be considered. What of other factors, such as Nicholls' familial responsibilities, or the probable expectation the he would remain with the municipality until his retirement? McLachlin J. omitted to demonstrate why these seemingly reasonable factors were not considered.

Of course, this view can be taken to absurdity, but perhaps absurdity here is the point. The approach posited by McLachlin J. – of two parties sitting down and negotiating over the notice period – leads to highly subjective results. It is the judge who retrospectively defines the contours of the parties' negotiations and supplies the result. *Lazarowicz* as interpreted by McLachlin J. encounters subjectivity at two levels: at the first, we must accept the judge's view of the particular matters the parties would have agreed to contract about; second, we must accept the judge's view of the parties' reasonable agreement on this point. The contract and the notice period are therefore entirely judge-made.

A more recent instance of "Nominal *Lazarowicz*" is *Stewart v. British Columbia Sugar Refinery Co.*[34] Stewart had been employed by the defendant as a sales manager of one of its subsidiaries, Manitoba Sugar, for 81/2 years at the time of his dismissal. Oliphant A.C.J.Q.B. considered *Lazarowicz*, as interpreted and applied, largely as a compendium of the factors relevant to the calculation of reason-

---

[33]Ibid.

[34](1994), 2 C.C.E.L. (2d) 125 (Man. Q.B.).

able notice. Among these factors were "the nature and duration of previous employment, the security the employment would have provided the employee, the character of the employee's work, the length of service and, from the employer's perspective, the availability of alternative employment."[35] Scrutinized carefully, the factors seem to be ones ascertained more accurately at the end of an employment relationship rather than at the beginning. As in many cases of this kind Oliphant A.C.J.Q.B. never indicated how each factor impacted on the parties' intent, nor how the final determination might have been mediated by the parties' personalities.

(ii) *"Pure Lazarowicz"*

The last group of cases is composed of decisions wherein judges have made some explicit effort to reconstruct the parties' intent had notice been contemplated at the outset of the employment relationship. We have named this subcategory "Pure *Lazarowicz*". Of particular interest in this faithful application of precedent are judicial assumptions about the parties and their circumstances. Here those assumptions are laid bare. In this type of analysis we are free to question the implied expectations, to examine the jurisprudential perspectives underpinning them, to make different assumptions generating different notice periods and ultimately, to discover that the implied intent approach is little more than a thinly veiled exercise in judicial discretion.

An early case involving some scrutiny of the parties' implied intent is *Pitre v. Gordie's Auto Sales Ltd.*[36] Pitre was offered a job as shop foreman in the defendant's garage. At the time of the offer Pitre was steadily employed as counter service manager at another auto parts dealer. Eventually, the plaintiff accepted the offer and quit his position in reliance on the promised position. When the defendant later decided it could not afford Pitre's services, Pitre commenced an action for wrongful dismissal.

At trial the judge referred to a number of cases involving the length of service – clearly following a *Bardal* approach – and held that the plaintiff was entitled to three months' notice. No evidence of the parties' intent was apparently led. On appeal this left Hughes C.J.N.B. in the position of taking the facts as he found them in order to assess intent. His Lordship struck a balance between the two sides' intent and the bargaining that would have gone on over the notice period as follows,

---

[35]Ibid. at p. 131.

[36](1976), 16 N.B.R. (2d) 328 (C.A.).

> The circumstances of the hiring in the present case satisfy me that if the parties had considered the matter of notice the plaintiff, who was not an unemployed person seeking a job but rather an employed person who was being offered one, would not have agreed to place himself in a position where he could be dismissed on a week's notice [as the defendant had contended]. On the other hand it would seem unlikely that the plaintiff would have insisted upon or that the defendant would have agreed to a requirement of three months' notice to terminate the employment, the job being a non-professional one of the rank of foreman in a small shop.[37]

The court found seven week's notice reasonable.

What was important to Hughes C.J.N.B. was the work history of the plaintiff and the leverage Pitre presumably enjoyed during the negotiations because he had been enticed. Job rank was also important. Yet if we change the assumptions above, the notice period could be different. For example, it is plausible to assume that there were many people in Bathurst, New Brunswick – an economically depressed community – who would have competed for a position as shop foreman. Similarly there were few alternate positions, a fact mentioned by the court. These circumstances would have put Gordie's Auto Sales Ltd. in a stronger position when negotiating with Pitre over reasonable notice. What about the plaintiff's personality? Was he the kind of person who would forcefully negotiate for greater notice? Wouldn't the defendant's weak financial position have forced it to assume an aggressive negotiating strategy? How would job status affect the parties' intent? Wouldn't virtually every employer want a shorter notice period? Once we modify some of the assumptions and ask additional questions, the foundation upon which the judge laid his conclusion begins to crumble. We can easily see how an altered

[37]Ibid. at p. 335.

expectation or shift in emphasis can change the notice period.[38]

A twist on "Pure *Lazarowicz*" is the decision of Stratton J. in *Heinz v. Cana Construction Co.*[39] In that case a maintenance worker with 31 years' service had been terminated. Stratton J.'s variant was to ask a question that derived from Roach J.A.'s words in *Lazarowicz* and which stressed the *Bohemier* factor. Heinz was hired as a labourer in 1958, an age when labour was arguably less mobile, job security greater, and notice periods shorter than they are today. However, Stratton J. looked back to 1985 and concluded that 12 months' notice would have been reasonable, without apparently considering the pre-*Bardal* ceiling of six months. His conclusion demonstrates how

---

[38]*Antonaros v. SNC Inc.* (1984), 6 C.C.E.L. 264 (Ont. H.C.) is another case where judicial assumptions regarding the fictive intent of the parties are open to question.

See also *Bartlam v. Saskatchewan Crop Insurance Corp.* (1993), 49 C.C.E.L. 141 (Sask. Q.B.), a very detailed exposition of the "Pure *Lazarowicz*" method. Bartlam was hired 1974 by the Saskatchewan Crop Insurance Corporation ("SCIC") as a part-time claims adjuster. He eventually rose to a senior position within the corporation but was terminated in early 1992.

The trial judge, Klebuc J., recognized both the divergence between *Bardal* and *Lazarowicz* and the fact that *Bartlam* had numerous progeny in Saskatchewan, thereby implying that it was the correct authority. However he opened the door to a reinterpretation of the law by observing that "[n]one of the decisions rendered in these cases considered whether the *Bardal* Approach or the *Lazarowicz* Approach is the law in Saskatchewan". Klebuc J. then proposed his own variant on *Lazarowicz* by stating that none of the *Bardal*-inspired Saskatchewan decisions had "overtly considered (a) what the parties would have contemplated at the time of entering into their employment contract; (b) the nature of the employer's operations, or; (c) macro economic factors impacting on both the employer and the employee". (at p. 151)

From the perspective of strict adherence to *Lazarowicz*, Klebuc J.'s factors (b) and (c) are inappropriate. Furthermore, they are necessarily viewed as of the day the judge makes his or her assessment, not as of the time when the parties intended to contract, as Roach J.A.'s method requires.

Klebuc J. articulated a three-part test, only one part of which he followed, and that without any evidence. He did not go on to assess the nature of the employer's operations or "macro economic factors" impacting on both Bartlam and the SCIC as his test required. He also did not probe why so many cases had already followed *Bardal*, nor why *Bardal* remained good authority in Ontario. *Bartlam* is therefore a supreme example of the freewheeling *Lazarowicz* approach which violates Klebuc J.'s very own criticism of *Bardal* that "the court's decision will be a subjective one based on what the judge perceives to be reasonable at the time the employment contract was breached".

[39](1987), 55 Alta. L.R. (2d) 382 (Q.B.).

difficult *Lazarowicz* is to faithfully apply without retrospective second-guessing. In addition *Heinz* demonstrates that *Lazarowicz*'s strict application requires conclusions that can lead to injustice for there is no means of adjusting the parties' evolving expectations.

A line of cases which attempted to remain loyal to the "Pure *Lazarowicz*" approach but account for changing assumptions over time, thereby tempering the inequity of an application like *Heinz*, began in western Canada with *Gilman v. Winnipeg Board of Jewish Education Inc.*[40] The plaintiff was the principal of a Jewish elementary school, originally hired on a one-year contract as vice-principal and later promoted, on a three-year contract, to principal. After a school board amalgamation Gilman's position was made redundant. Jewers J. observed that,

> When the original board first hired Mr. Gilman, they decided that because of the comparative difficulty in finding employment in the Jewish school system, it would be reasonable for the Board to notify the principal in the fall at or about the beginning of the school year that his services would not be required beyond the end of the school year – in other words, ten months' notice.
>
> However, Mr. Gilman was no longer dealing with his original employer but with the defendant Board. Applying the test in *Lazarowicz v. Orenda Engines* . . . if he and the Board had addressed themselves to the question, what would they have agreed to? The Board would by then have completed the contract with the other principal, Mr. Cohen, who was to get six months' notiee of termination. It seems to me unlikely that they would have agreed to a longer period for Mr. Gilman. Indeed, he said he wanted a contract similar to the Cohen agreement. One reason given for the ten months' notice period granted by the predecessor Board was the difficulty of finding alternate employment in the smaller parochial school system. But, as it turned out, Mr. Gilman was prepared to, and did, look beyond the system for employment. He now works for Winnipeg School Division #1. I conclude that the parties likely would have agreed to six months' notice as being reasonable.[41]

In *Gilman* the court dated the new contractual relationship as of the time when the employer changed. Therefore, the intent to be examined was that of the parties at the time the new employer, the amalgamated school board, came into being.

---

[40](1986), 39 Man. R. (2d) 21 (Q.B.).

[41]Ibid. at pp. 27-28.

It took another case, *Yosyk v. Westfair Foods Ltd.*[42] to articulate the "refinement" that Jewers J. had first applied. The plaintiffs, all beautician supervisors with a retail food and drug company, had been dismissed for alleged insubordination. After reviewing the evidence, the trial judge held in favour of the plaintiffs. The issue before the Manitoba Court of Appeal was solely the amount of notice. Twaddle J.A. cited *Gilman* as an example of the "modern" application of *Lazarowicz* and went on to judicially approve of the modification made in *Gilman* thus,

> In my opinion, it is the proper opinion in all these cases, save for one refinement. The relationship between an employer and an employee is not a static one. During it, the contract is often amended by agreement on such fundamental terms as remuneration and the responsibilities of the employee. In a similar manner, the intention of the parties as to the length of notice required to end their relationship may change. The relevant intent is that which the parties had when their contract was last changed prior to the events leading to its termination.[43]

Yosyk was held to have stated the "correct principle" in Southin J.A.'s majority opinion in *Woodlock v. Novacorp International Consulting Inc.*[44] The case is of interest because it is an appellate decision emphasizing the cleavage between *Lazarowicz* and *Bardal*, and because the majority clearly favoured the former. Southin J.A. was keen to find the "proper approach", yet she acknowledged that "the law on reasonable notice . . . has in the last 30-odd years taken a peculiar turn". She said,

> [t]he law appears to have come, without the profession realizing what was happening, to the proposition that reasonable notice is to be determined as of the termination of the contract according to the judge's opinion of reasonableness and it is not relevant to consider whether if the employee wanted to leave he had to give 18 months' or two years' notice to the employer.[45]

She went on to observe perplexedly,

---

[42](1989), (sub nom. *Vernon v. Westfair Foods Ltd.*) 49 D.L.R. (4th) 260 (Man. C.A.).

[43]Ibid. at p. 264.

[44](1994), 72 D.L.R. (4th) 347 (B.C. C.A.).

[45]Ibid. at pp. 351-352.

> I do not understand how we came to rely on *Bardal v. The Globe & Mail Ltd.*, a judgment of a single judge, when, upon the construction given it, it cannot be reconciled with *Lazarowicz v. Orenda Engines Ltd.*[46]

The facts in *Woodlock* were that the appellant was a professional engineer with expertise in subsea technology. In 1971 he began working for Novacorp, an engineering consultancy. By 1986 he had risen to the vice-presidency of one of the company's subsidiaries. The subsidiary was sold that year and Woodlock refused an offer of employment with the new management. Subsequently he sued his former employer for breach of contract, received 12 months' notice on an application for judgment, and then appealed.

Southin J.A. took the critical or measuring moment as 1981 when the appellant assumed the vice-presidency. The essence of her conclusion expressed itself thus,

> If one accepts that the date of his appointment as vice-president is the crucial date, then the availability or non-availability of employment and economic difficulties of the employer at the time of termination are both irrelevant to the issue of length of notice. I cannot conceive that, in 1981, the employer would have agreed that the absence of jobs for the plaintiff should be a factor in increasing notice unless the plaintiff also agreed that economic difficulties of the employer should reduce it.
>
> What I do think is that, if business was booming, the employer for its part would have wanted a substantial period of notice from the plaintiff so as not to be without, so to speak, a captain of CanOcean [the subsidiary] and the employee for his part would not have wanted to be obliged to give such a long period of notice as to be unable to take a position offering more money and prestige. Each would, I think, have said, however; "In fairness, some consideration, if one or the other wants to terminate our relationship, must be given to the length of time our relationship has lasted since it first began in 1971, but that is not the chief factor."
>
> . . .
>
> On that paucity of evidence I cannot say that the parties, in 1981, if they had addressed the issue, would have fixed a longer period than 12 months.[47]

Southin J.A. went on to dismiss the appeal. It was a result she came to with some difficulty. She voiced her concern as follows,

---

[46]Ibid. at p. 356.

[47]Ibid. at p. 359.

> Assuming that *Lazarowicz v. Orenda Engines Ltd.* remains the law in Ontario and knowing that *Yosyk v. Westfair Foods* is the law of Manitoba and being doubtful of the law in British Columbia, I hope there will be an occasion for the Supreme Court of Canada to determine the correct principle. Differences on a matter such as this from common-law province to common-law province cannot be helpful to the conduct of commerce.[48]

The majority opinion in *Woodlock*, then, is a curious combination of assertion and uncertainty. It follows a version of *Lazarowicz* modified in *Yosyk* but, like any application of *Lazarowicz*, it is hobbled by lack of evidence of implied intent and the glaring reality that most precedent to that time had followed *Bardal*. Nor did *Woodlock* go on to change things. As we shall see, Southin J.A.'s method and views were not shared by other judges in this area of the law.

PART IV – THE EVOLVING JURISPRUDENCE

On the review of cases conducted thus far one might be tempted to conclude that the implied intent approach has played a major role in the evolution of the jurisprudence. Little could be further from the truth. The number of cases following *Lazarowicz* has been negligible when compared with those following *Bardal*. We return to the question posed earlier, why?

A number of cases have exposed the weaknesses of implying intent. In *Erskine v. Viking Helicopter Ltd.*[49], for example, Matheson J. astutely observed that it would be "unrealistic" to assume that either the plaintiff or his employer would have raised the "awkward question of notice" at the time of hiring. The judge went on to give the circumstances of implied intent their proper context, underlining there how unrealistic it would be to assume any "bargain" on the subject of reasonable notice. He said,

> [a]pplying the [*Lazarowicz*] test to this situation, at the moment of hiring, Erskine was a 23-year-old, freshly qualified as a radio technician, with 8 months' work experience. Viking already employed Graham Smith, an avionics veteran of 10 years. Had the issue of notice on termination been raised, Erskine's bargaining power would have been minimal. Is it reasonable to think he would have dared

---

[48]Ibid. at p. 360.

[49](1990), 35 C.C.E.L. 322 (Ont. Gen. Div.).

> suggest more notice than that provided for by the statute?[50]

Not surprisingly, the judge went on to apply *Bardal*.

In *Garvin v. Rockwell International of Canada Ltd.*[51] Ferguson J. observed that the *Lazarowicz* approach seemed "troublesome" for several reasons. Among these he noted that opinions might differ as to what was reasonable, that *Lazarowicz* was self-admittedly "a" reasonable test, not the definitive one, and that the employer and the employee would have had respective answers as to what was reasonable.

Wood J.A., dissenting in *Woodlock*, had several criticisms of *Lazarowicz*. Wood J.A. applied a purposive approach to the issue of notice. To do this he focused on the policy considerations, clearly identifying the central purpose of notice as affording the terminated employee the opportunity to find new employment. Wood J.A. noted that,

> . . . while the general principles of contract law apply to the relationship of master and servant, when it comes to the law of wrongful dismissal, and in particular the rules governing the determination of reasonable notice, it must be said that over the years those principles have frequently yielded to rules of both commercial pragmatism and fairness, all of which fall under the heading of policy rather than law.[52]

Wood J.A. traced the evolution of the concept of notice, observing that it grew from "a confusion of conflicting authorities" due to five centuries of regulation in the field of labour relations and employment. Application of policy considerations was important, and not all of the rules established could be attributed to the "measured evolution of strict legal principles".

In *Tysoe v. Plant Forest Products Corp.*[53] Hutchinson J. favoured *Ansari v. British Columbia Hydro & Power Authority*[54], the leading British Columbia application of *Bardal*, over Southin J.A.'s approach in *Woodlock*, although he did so with some reluctance. Then

---

[50]Ibid.

[51]See supra, note 21.

[52]*Woodlock*, supra, note 44 at p. 368.

[53](1990), 34 C.C.E.L. 124 (B.C. S.C.).

[54][1986] 4 W.W.R. 123 (B.C. S.C.).

in *Porter v. Highmont Operating Corp.*[55] McEachern C.J.B.C. strongly reaffirmed the *Bardal* approach.

Subsequently in *Wiebe v. Central Transport Refrigeration (Man.) Ltd.*[56] the Manitoba Court of Appeal reversed itself. In an unusual about-face the author of *Yosyk*, Twaddle J.A., admitted to having "taken a closer look at both the Canadian and English case law which preceded *Yosyk*" and to finding "little support for the decision in *Lazarowicz* or my refinement of it". He attributed *Yosyk* to his misunderstanding of the law. Twaddle J.A. concluded,

> [i]t seems to me that the law now is that the intention of the parties governs only if their agreement as to a period of lawful notice can be ascertained by reference to an express or implied term of their agreement. Failing this, whether one calls it presumption or a term implied by law, the obligation of an employer is to give reasonable notice. The length of such notice is a period the court will fix, not with reference to the parties' intent, but with reference to what the court thinks reasonable in all the circumstances.

The Supreme Court of Canada has also had an opportunity to make comments about contractual intent in *Machtinger v. HOJ Industries Ltd.*[57] That case dealt with the question of notice only indirectly but the court's dicta on that occasion have had a substantial impact in more recent cases. The majority opinion, written by Iacobucci J., held that the intent of the parties could be a factor in determining an implied term of notice. However, the judge cryptically observed that "the relationship between intention and the implication of contractual term is complex".[58]

McLachlin J., in a separate concurring decision, held that precedent required analysis under terms implied either by law, by fact or by mixed law and fact. Because notice is a question of law and not one of fact, Her Ladyship held that the parties' intent was irrelevant. Notice is a function of factors independent of intent, such as those set out in *Bardal*. On either of the views taken by the Supreme Court of Canada in *Machtinger* therefore, *Bardal* clearly appears to be the preferred authority.

This view was reinforced very recently by the Ontario Court of

---

[55](1991), 36 C.C.E.L. 1 (B.C. C.A.) at 5.

[56](1994), 3 C.C.E.L. (2d) 1 (Man. C.A.).

[57](1992), 91 D.L.R. (4th) 491 (S.C.C.).

[58]Ibid. at p. 503.

Appeal in *Cronk v. Canadian General Assurance Co.*[59] In that case Lacourcière J.A., speaking for the majority, endorsed *Bardal* without even so much as mentioning *Lazarowicz* and referred to McRuer's C.J.H.C.'s classic statement as ". . . a principle which has been widely accepted and applied by trial judges and Canadian appellate courts and which has found favour with the Supreme Court of Canada in *Machtinger* . . ."[60] The court went on to refer to the *Bardal* factors as the "traditional factors" observed in determining notice.

PART V – BEYOND BARDAL: THE RELATIONAL CONTRACT

In sum then, what conclusions can be drawn about the implied intent approach to interpreting employment contracts? The preceding sections suggest there are at least three.

First is the difficulty of consistently applying *Lazarowicz*. Implied intent requires a decision maker to make highly subjective choices at several steps in the analysis. Each conclusion is the result of value judgments that vary from person to person. Each also has the potential to influence the calculation of reasonable notice according to the weight given it. The infinite variety of value judgments means there will be a broad spectrum of notice periods for any given case. To illustrate, let us take the fictional situation to Ms. Ito and her former employer, Compco. Let us suppose that Ms. Ito has just been terminated by Compco and a judge determines the reasonable notice by implying the intent of the parties. What conclusions will the judge have to make?

> (1) The judge will have to assess the personalities of the parties. Would Ms. Ito be the kind of person to bargain skilfully for extended notice? Would Compco, a large company, have been in a position to offer extended notice to her, and if so, was this likely?
>
> (2) The judge will have to assess the circumstances at the time the employment contract was negotiated. Was the employment market a soft one, and therefore Ms. Ito one candidate among many? Was Ms. Ito a good saleswoman and therefore a desirable employee meriting a shorter notice period because, presumably, she could find another position quickly? Or could

---

[59](1995), 14 C.C.E.L. (2d) 1 (Ont. C.A.).

[60]Ibid. at pp. 14-15.

> Ms. Ito be characterized as a specialized employee and therefore entitled to longer notice? Would Ms. Ito have considered her health in negotiating notice, as contended in *Nicholls*? Would Ms. Ito have been seeking permanent employment, and therefore a longer notice period? What about other factors?
>
> (3) Given the unique choice of factors assessed in (1) and (2), the judge will then have assess what their effect would be on Ms. Ito and Compco's answers to the question of reasonable notice had the parties addressed themselves to this subject at the time of hiring.

The considerations laid out above highlight the difficulty of implying intent. Simply put, one judge may emphasize one factor in arriving at a judgment that another judge trying the same case would not mention. The quantum of reasonable notice is therefore bound to vary, sometimes substantially so. Furthermore, any figure thus derived is suspect because it is almost entirely judge-made.

Of course, the very same criticisms could be levelled at *Bardal*. Different judges will accentuate differently the factors set out by McRuer C.J.H.C. Some judges will pay a great deal of attention to them, others none at all. *Bardal* also generates judge-made answers. However, *Bardal* possesses one important advantage over *Lazarowicz*: this is the common practice in using *Bardal* of comparing the notice arrived at with other cases to ensure the consistency and predictability of awards. *Bardal* therefore provides a lesser number of possible answers to the question of reasonable notice and concomitantly greater guidance for judges applying the law. *Lazarowicz* is missing this feature because the calculation of notice is made without reference to any external standard of reasonableness, but with regard to the intent of the parties at the time the contract was made.

The second conclusion to be drawn about implied intent is a practical one. *Lazarowicz* makes for poor precedent because of the view that it is premised on, namely that parties to an employment contract actually negotiate notice, is flawed. This believed, discernible in McLachlin J.'s opinion in *Nicholls*, is a quaint one, the relic of an earlier age. True, some employees still actually do sit down and negotiate the terms of their employment contracts, including notice, with prospective employers. Nevertheless in this era of high joblessness and fickle employment the vast majority of employees are often met with a corporate "take-it-or-leave-it" attitude. As Matheson J. sensibly observed in *Erskine*, few workers are now likely to raise "the awkward question of notice" on hiring. Who would risk losing a hard-earned job by protesting the length of notice? The answer suggests that negotiated notice is exceptional in the modern world and cannot be the basis for a theory of reasonable notice.

The third conclusion about *Lazarowicz* is its failure to deal with the changing expectations of the parties. Contracts are meant to protect the reasonable assumptions of the people entering into them. As seen in *Heinz*, strict application of the implied intent approach can yield injustice, particularly where the employment relationship has taken on a form that the parties never contemplated at the outset. In *Heinz* this meant that a veteran of 31 years' service was entitled to a mere 12 months' notice. A line of cases commencing with *Gilman* tried tempering the harshness of the implied intent approach by taking as the relevant intent that which the parties had when their contract was last changed. Aside from the obvious problem this modification poses – for who is to agree when the contract was last changed? – it compounds the difficulty of using *Lazarowicz* by introducing yet another subjective variable into the calculus of reasonable notice.

The above deficiencies were recently addressed to some extent by Epstein J. in *Slater v. Sandwell Inc.*[61] The case concerned the impact of an explicit, but expired, notice period on the parties' intent. Alan Slater was hired by Sandwell Inc. in October 1989. It was agreed that during the first 24 months of his employment either party could terminate the contract on two weeks' written notice. The contract was otherwise silent as to notice. Some 25 months into the job Slater was terminated.

Slater argued that the contractual notice period was irrelevant to the intent of the parties. Notwithstanding the proximity of the expiration of the notice period to the termination, Slater's entitlements were governed by the common law. For its part Sandwell argued that the intent of the parties was a factor in determining notice and that, following *Lazarowicz*, the only relevant intent was what the parties had agreed to at the commencement of the relationship.

Epstein J. reviewed the jurisprudence, focusing particularly on the Supreme Court's decision in *Machtinger*. Her conclusion was that, while *Machtinger* had not specifically overruled *Lazarowicz*, "the Supreme Court of Canada has indicated a clear support for the *Bardal* approach".[62] She went on to note however,

> But, that is not to say that the door has been closed to the parties' being able to negotiate reasonable rights and obligations at the beginning of the relationship and their being able to rely upon the courts to enforce them. Obviously, there may still be some situations where it remains appropriate to determine the bargain between the parties by

---

[61](1994), 5 C.C.E.L. (2d) 308 (Ont. Gen. Div.).

[62]Ibid. at p. 315.

following the *Lazarowicz* approach.[63]

Epstein J. also referred to judicial recognition of the dichotomy between what she called "relationship" agreements and "transactional" agreements, pointing to the opinions of Twaddle J.A. in *Yosyk* and Robins J.A. in *Toronto-Dominion Bank v. Wallace*[64] as illustrative of relationalism. She observed that in both decisions there was implicit recognition that the parties' intent could metamorphose so greatly over time that the original expressions of contractual intent would be inaccurate. For this reason she proposed a new approach to contractual interpretation generally,

> In my opinion in looking at relationship type contracts such as contracts of employment, it is incumbent on the court to examine the expectations of the parties and risks they assumed throughout the evolution of the relationship in order to determine the nature of the agreement that was breached. This will necessitate an analysis of the facts of each case not only with the criteria set out by Justice McRuer in *Bardal* but also an examination of the contractual relationship itself at the time of termination. At that point in time, what can be fairly said of the risks that each party to that relationship was then assuming?
>
> Using this type of approach, courts will be in a position to articulate rules that allow for the use of private contracts to be more efficient. This requires first the identification of the contract in question as a relationship or transaction, followed by more flexibility in the establishment of the rules governing the determination of whether there has been a breach and the assessment of damages arising from that breach, rules that involve an acknowledgement of the principles of good faith and fairness . . .[65]

These statements reveal that Epstein J. has arrived at a position that is close, if not identical to, the thesis of Professor Ian Macneil. In his seminal 1974 article "The Many Futures of Contracts"[66] Professor Macneil argued that classical contract theory works for discrete transactions, or what have been referred to as "one shot deals with few tag

---

[63]Ibid.

[64](1983), 41 O.R. (2d) 161 (C.A.).

[65]Ibid. at pp. 15-16.

[66]I.R. Macneil, "The Many Futures of Contracts" (1974) 47 Southern California L. Rev. 691 (1974).

ends".[67] However, these discrete transactions are rare, rarer in fact than one would think, largely because most contracts are surrounded by expectations not accounted for in doctrine but which invariably impact on the parties' behaviour. For example, when a party fails to perform on a contract, the parties will often negotiate a compromise without reference to the contract because they ascribe a value to their ongoing relationship. Similarly, parties will allow for some play in their agreements because they realize that they cannot fix every conceivable term at the moment of contracting. These informal "relational" links rebut the argument that the parties' intent should be taken as of the time the contract was entered into, as *Lazarowicz* mandates. Tidwell and Linzer have described relational contracts thus,

> The parties know each other and will have other exchanges. Instead of drafting precise rules to govern every contingency and insisting on every advantage, the parties expect things to change over the years and understand that they will have to work out new problems as they arise. These "relational" dealings include long-term supply and service arrangements, employment, franchises, and even loan transactions. While the courts have not often cited the academics, the reports contain increasing numbers of cases finding rights and duties, often a duty of good faith and fair dealing, because of the way parties have dealt with each other over the years – and a sense of how they ought to have dealt with each other.[68]

The coincidence of the views expressed above with those of Epstein J. is striking. Then again, the coincidence creates its own question: what will the future of transactional and relational contracting look like?

Epstein J. went on to answer this in a very recent case, *Ditchburn v. Landis & Gyr Powers Ltd.*[69] Kenneth Ditchburn was employed by Landis & Gyr for 27 years when he became involved in a drunken altercation with a company customer which resulted in his dismissal. In *Ditchburn*, Epstein J. called for a more nuanced approach to the interpretation of relational contracts. She said,

> An employment relationship is based on contract. However, it is not like purchasing a car – a contract governing a discrete transaction. It is a transitional contract in which each of the employer and the employee can reasonably expect more from each other as the relationship extends in time.

---

[67]P.A. Tidwell & P. Linzer, "The Flesh Coloured Band Aid – Contracts, Feminism, Dialogue, and Norms" (1991) 28 Houston Law Review 791 at 795.

[68]Ibid.

[69]Supra, note 5.

> It is a contract governing a relationship between the parties. Almost by definition it continually changes. Contracts of this nature have been identified as being "relationship" agreements rather than "transaction agreements". There has also been some judicial recognition of this important distinction.
>
> . . . .
>
> In my opinion, in looking at relationship-type contracts such as contracts of employment, it is incumbent on the court to examine the expectations of the parties and the risks they assumed throughout the evolution of the relationship in order to determine the nature of the agreement that was breached. This will necessitate an analysis of the facts of each case, not only in accordance with the criteria set out by Chief Justice McRuer in *Bardal* . . . but also an examination of the contractual association itself at the time of termination. At that point in time, what can be fairly said of the reasonable expectations that each party to that relationship was then entitled?[70]

While Epstein J. found that both Ditchburn and Landis & Gyr were entitled to "considerable support" from each other as a result of their long-term relationship, she focused on the company's duty to provide a "response of loyalty, support and then additional support" to Ditchburn when he assaulted a client. The judge came to this conclusion within the context of a more general finding that the employer wanted "to rid itself of an employee who did not fit into the company's direction in the 1990s". Although she adverted at several points to the reciprocal nature of loyalty obligations, Epstein J. omitted any searching analysis of Ditchburn's concomitant duty to refrain from inappropriate behaviour with customers. This is the flip-side of Epstein J.'s emphasis on Landis & Gyr's duty to Ditchburn. However the judge never balanced these competing responsibilities. Instead, she went on to award the plaintiff 24 months' reasonable notice pursuant to *Bardal*, plus $15,000.00 in damages for mental distress.

Ditchburn reveals that *Lazarowicz* and *Bardal*, which were traditionally conceived of as two competing interpretive approaches, can be reconciled. The concluding view is that we no longer have *Lazarowicz* versus *Bardal* so much as *Lazarowicz and Bardal.* In *Slater* Epstein J. envisaged a residual role for *Lazarowicz* where circumstances permit. Now each method has a role to play depending on the type of employment contract involved and on whether it is just to imply intent. Future cases will have to define when *Lazarowicz* is appropriate.

---

[70]Ibid. at pp. 9-10.

Thus, the analytic framework proposed by Epstein J. in *Slater* and *Ditchburn* is coherent and conceptually attractive. It is also timely, for in the mid-1990s there is perhaps a growing sense that society has gone beyond polar extremes. Now we strive for balance, for reconciliation of opposites, for a wholistic appreciation of the law capable of resolving conflicts. Epstein J.'s method in *Slater* and *Ditchburn*, properly applied, attempts to achieve this resolution.

* * * * *