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You Can't Fire Me: The Problems with Wrongful Dismissal Damages in Canada

Chenyang Li
The University of Western Ontario, cli247@uwo.ca

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You Can't Fire Me: The Problems with Wrongful Dismissal Damages in Canada

Abstract
The assessment of wrongful dismissal damages in Canadian law has long been governed by the principles established in *Bardal v Globe & Mail Ltd*. Although this model of analysis has been met with near universal approval in every decision-making forum in Canada, the principles underlying *Bardal* warrant further discussion. This work focuses on the contractual core of employment disputes and analyzes the interpretive framework for common law claims for wrongful dismissal. It will show that the traditional law of private remedies has been distorted in the context of wrongful dismissal as a result of the wholesale adoption of the *Bardal* Factors. The *Bardal* approach requires courts to depart from traditional doctrines of remedies and contract law and extends beyond the traditional goal of *restitutio in integrum* to a distributive theory of damages. This ultimately results in outcomes that depart from the original goal of wrongful dismissal remedies: protecting society’s vulnerable workers from unfair employment practices. This paper will suggest that damages from the breach of the employment contract should be objectively assessed from the intention of the parties at the time of contract formation. The courts in *Lazarowicz* and *Bartlam* have provided useful guidance with respect to how this method can be successfully applied. Returning to the goal of *restitutio in integrum* and corrective justice in wrongful dismissal damages would provide needed predictability and stability in employment relationships.

Keywords
Employment, Contract, Remedies, Breach, Ontario

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YOU CAN'T FIRE ME:
THE PROBLEMS WITH WRONGFUL DISMISSAL DAMAGES IN CANADA

CHENYANG LI*

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.¹

Who could have foreseen that this paragraph, from the short seven-page judgement in *Bardal v Globe & Mail Ltd*,² would come to have such great impact on nearly every Canadian individual and enterprise? This passage, which has given rise to what are known as the *Bardal* Factors,³ has been cited in over 1,500 subsequent judgments with near universal approval and application.⁴ Few other trial court judgments can claim to have been so persuasive on every decision-making forum in Canada, from the lowest labour tribunals through to the country’s apex court.

This feat is especially impressive given the lack of appellate court discussion of the legal principles underlying *Bardal*’s interpretation of reasonable notice in employment law. However, such a discussion is warranted given the pervasive impact reasonable notice has on the lives of most Canadians. Dickson CJ perhaps most elegantly stated the integral connection between our lives and our work:

Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory

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¹ *Bardal v Globe & Mail Ltd* (1960), 24 DLR (2d) 140 (Ont HCJ) at para 21 [*Bardal*].
² Ibid.
³ The *Bardal* Factors are commonly distilled as: (1) character of employment at the time of dismissal, (2) length of service of employee, (3) age of the employee at the time of dismissal, and (4) availability of similar employment.
⁴ Electronic searches on the LexisNexis Quicklaw and WestlawNext Canada databases generated results of 1,583 and 1,450 cases and decisions, respectively.

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* Chenyang obtained an undergraduate degree in business and a JD from the University of Western Ontario. He previously worked in corporate strategy and marketing. He is currently completing his articles at Davies Ward Phillips & Vineberg LLP in Toronto and is excited to start clerking at the Court of Appeal for Ontario in August 2017.
role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.5

While employment law invokes many aspects of private law, statute, and public law, at its core, contract law governs.6 Employment law’s social importance should not justify a wholesale departure from the principles of private law damages. This paper will focus on the contractual core of employment disputes and analyze the remedial laws that purport to address the common law claim for wrongful dismissal.

This paper will show that the traditional law of private remedies has been distorted in the wrongful dismissal context as a result of the wholesale adoption of the Bardal Factors for the following three reasons. First, the Bardal Factors require the courts to depart from traditional doctrines of remedies and contract law. Second, the current wrongful dismissal damages model extends beyond the traditional goal of *restitutio in integrum* to a distributive theory of damages. Third, this distributive ideology has resulted in a pattern of plaintiff-favoured decisions, which, in turn, has likely produced an increase in employment litigation. Additionally, the law’s departure from traditional principles has resulted in outcomes that drastically depart from the original goal of wrongful dismissal law: protecting society’s vulnerable workers from unfair employer practices.

I. OVERVIEW OF EMPLOYMENT LAW

The core of modern employment law is the employment contract.7 Employment contracts were historically viewed as contracts for renewing definite periods of employment in which the period of employment usually equated to the pay period.8 Conversely, master and servant laws, which predated the concept of the employment contract, governed arrangements for indefinite periods of service. The customary practice in master and servant relationships was a presumption of annual hiring and reasonable notice of termination.9 The concept of reasonable notice was originally

9 *Jacoby*, supra note 7; *Personal Employment Contract*, supra note 7 at 356.
incorporated into the common law of dismissal to bypass the need to pay full compensation for the remaining year, should a master choose to dismiss a servant.\textsuperscript{10} Thus, in the context of master and servant laws, damages for wrongful dismissal initially evolved as means to \textit{limit liability} from the termination of an employment relationship. This is quite distinct from the way that damages are employed in the present day.

Over time, the master and servant relationship became obsolete as society began to rely instead upon employment contracts to govern workplace relationships.\textsuperscript{11} The law adapted to this shift by importing elements of master and servant laws into the employment contract, including, most notably, the concept of implied reasonable notice of termination.\textsuperscript{12} In addition, employment contracts are no longer presumed to refer to defined periods of employment. Rather, indefinite employment has become the default.\textsuperscript{13}

The content of the implied obligation of reasonable notice remained contested until the landmark decision in \textit{Addis v Gramophone Co Ltd}.\textsuperscript{14} In that case, the House of Lords held that damages were available in a wrongful dismissal claim for a breach of the obligation to provide reasonable notice of termination. This principle forms the basis of modern wrongful dismissal claims.

\textbf{Wrongful Dismissal Today}

Today, wrongful dismissal affords very few defences to the employer.\textsuperscript{15} In fact, employers are almost always automatically liable.\textsuperscript{16} Thus, the "principles governing the award of such damages are of far-reaching importance. They delimit the extent to which the law will uphold and enforce the employer's obligation to employ … They also dictate the scope of the legal recognition of the various interests of the employee which are affected by wrongful dismissal…."\textsuperscript{17} The importance of the principles underpinning

\begin{footnotesize}
\begin{enumerate}
\item Jacoby, supra note 7 at 92.
\item Ibid; Echlin, supra note 7 at para 36ff.
\item Mark Freedland, \textit{The Contract of Employment} (Oxford: Oxford University Press, 1976) at 21-23 \[Contract of Employment\]; Echlin, supra note 7 at paras 41ff; Carter v Bell, [1936] OR 290 (CA) \[Carter\];
\item Machtinger v HOJ Industries Ltd, [1992] 1 SCR 986, at para 19 [Machtinger].
\item Wrongful Dismissal Handbook, supra note 6 at 3-14.
\item [1909] AC 488 (UKHL) [\textit{Addis}], implicitly aff’g Emmens v Elderton (1853) 13 CB 495 (UKHL) For a description of early English judicial views that there was no expectation interest in an employment contract beyond the contemporaneous exchange of labour and/or knowledge for compensation, see also: \textit{Contract of Employment}, supra note 14 at 21-22 citing Aspdin v Austin (1844), 5 QB 671 (UK QBD); and Dunn v Sayles (1870), 5 QB 685 (UK QBD).
\item Personal Employment Contract, supra note 7 at 349ff.
\item Ibid.
\item Contract of Employment, supra note 12 at 235.
\end{enumerate}
\end{footnotesize}
the determination of wrongful dismissal damages is further magnified by the fact that damages are, effectively, the only remedy granted in a wrongful dismissal action. \(^\text{18}\)

In Canada, damages in wrongful dismissal actions were considered "capped" at six months' notice until the *Bardal* decision was rendered in 1960. \(^\text{19}\) In *Bardal*, McRuer CJO established that reasonable notice was a fact-specific assessment and laid out four non-exhaustive factors that should be used when calculating the length of notice:

- (1) the character of employment at the time of dismissal;
- (2) the length of service of employee;
- (3) the age of the employee at the time of dismissal; and
- (4) the availability of similar employment. \(^\text{20}\)

*Bardal*'s public policy-oriented approach to the calculation of reasonable notice has since been endorsed by the Supreme Court of Canada (SCC) in *Machtinger v HOJ Industries*, \(^\text{21}\) *Wallace v United Grain Growers*, \(^\text{22}\) and *Honda Inc v Keays*. \(^\text{23}\)

II. THE DOCTRINAL INCONSISTENCIES BETWEEN *BARDAL* AND TRADITIONAL CONTRACT LAW PRINCIPLES

The SCC has affirmed that the common law implies a term of reasonable notice of termination in an employment contract where an express provision is absent. \(^\text{24}\) While the implication itself is uncontested, the content of such an implied obligation warrants more investigation. In particular, further examination reveals that the SCC’s conception of reasonable notice is inconsistent with contract law’s fundamental principles.

The essential elements of contract law are offer, acceptance, consideration, and *consensus ad idem* (i.e., “the meeting of the minds”). \(^\text{25}\) However, it appears that, with respect to employment contracts, the courts have overlooked the cornerstone meeting of the minds requirement. A comparison of two differing Canadian approaches to determining the length of the implied reasonable notice period illustrates this omission. The first approach, articulated in *Lazarowicz v Orenda Engines Ltd*, \(^\text{26}\) heeds the

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\(^{19}\) An implied obligation of reasonable notice on termination of the employment contract was affirmatively recognized in Canada as early as 1936 in *Carter*, supra note 12. See also: *Echlin*, supra note 7 at paras 44-47; *Bardal*, supra note 1 at para 14.

\(^{20}\) *Bardal*, supra note 1 at para 21.

\(^{21}\) *Machtinger*, supra note 12 at para 22.

\(^{22}\) *Wallace v United Grain Growers Ltd* [1997] 3 SCR 701 at para 81, [Wallace].

\(^{23}\) *Honda Canada Inc v Keays*, 2008 SCC 39 at para 25 [Honda].

\(^{24}\) *Machtinger*, supra note 12 at para 19; *Honda*, supra note 23 at para 50; *Carter*, supra note 12; and *Bardal*, supra note 1 at para 12. See also: *Canadian Pacific Hotels Ltd v Bank of Montreal* [1987] 1 SCR 711 (discussion on the implication of terms into contracts).

\(^{25}\) *Scotsburn Co-operative Services Ltd v WT Goodwin Ltd* [1985] 1 SCR 54 at para 22.

\(^{26}\) [1960] OR 202, [*Lazarowicz Trial*] aff’d (1960), [1961] OR 141, [*Lazarowicz Appeal*].
objective intent of the contracting parties. In contrast, the second approach, originating in *Bardal*, departs from this fundamental principle of contractual interpretation.27

**Affirmation of Consensus Ad Idem: Lazarowicz v Orenda Engines Ltd**

Roach JA, writing for the Court of Appeal for Ontario in *Lazarowicz Appeal*, articulated how to determine whether an employment contract was for an indefinite period and, if so, how the implied reasonable notice period should be determined. He reasoned as follows:

…the Court, in determining the question whether [the plaintiff was hired] on a weekly basis or for an indefinite period, is entitled to look […] first of all at the character of work which the plaintiff was called upon to perform while in the employ of the defendant … [S]econdly, his position at the time that he changed from his preceding employer and entered the employment of the defendant, and […] the Court is entitled to enquire whether or not, having regard to the nature of his employment with that preceding employer, and the inference to be drawn from the evidence concerning it as to his security in that employment as compared with his new position, he would surrender the security of that prior employment to take a position, even at an advancement of salary, with this defendant merely on a weekly basis. The Court is entitled to also consider in determining this question of duration, the availability to the employer of employees having the qualifications of this particular plaintiff for the particular job that he was doing for the defendant. And, conversely, the availability to this plaintiff of other comparable employment in the event that his employment by this defendant should be terminated.28

[...]  
[If the contract was for an indefinite period the plaintiff would be entitled to reasonable notice of termination]. [But] what is reasonable? [A] reasonable test would be to propound the question, namely, if the employer and the employee at the time of the hiring had addressed themselves to the question as to 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?29

The factors enumerated in *Lazarowicz* are markedly similar to the *Bardal* Factors.30 However, the Court of Appeal’s application of these factors extended only to the determination of the term of the employment contract, not to the length of the reasonable notice period. *Lazarowicz* states that the implied notice period should be determined according to what the employer and employee reasonably contemplated at

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27 Supra note 1.  
28 Lazarowicz Appeal, supra note 26 at para 3.  
29 Ibid at para 7 (emphasis added).  
30 Supra note 1 at para 21.
the time of contract formation. This test properly turns a court's attention to the legal principles of *consensus ad idem* and the mutuality of obligations and, in doing so, preserves the notion that contracts are voluntary agreements among parties.

**A Departure from Contractual Principles: The Bardal Factors**

In contrast to the *Lazarowicz* approach, the *Bardal* Factors require the courts to determine the content of the implied obligation of reasonable notice of termination at the time of the breach of contract. This is problematic because it implicitly conveys gratuitous contractual rights on the employee at the expense of the employer, and it entails the concept of mutual obligations and voluntary undertakings. Moreover, it is contrary to contract law’s reasonable contemplation principle in *Hadley v Baxendale*.

The strong focus on an employee's length of service in the calculation of the notice period is a prime example of how the *Bardal* analysis is backward-looking and problematic. The rights and obligations conveyed under a contract should be preserved as voluntary undertakings between the contracting parties. However, at its commencement, neither the employer nor the employee are in a position to evaluate or to foresee the eventual length of the relationship. Looking at the tenure of an employee when determining termination entitlements where no contractual bargain exists results in a one-sided accrual of contractual rights. As a result, a fundamental inequity occurs since, while the employer's liability in relation to an employee's termination entitlements increases as the employment relationship continues, there is no commensurate increase in the employee's obligations. The imbalance between an employee's increasing benefits and her employer's increasing obligations created by this *Bardal* factor is especially pronounced, since it has been shown that an employee’s length of service is the most influential factor in a court's calculation of wrongful dismissal damages.

The implication of gratuitous contractual rights warps the foundation of contract law. Contracts, in the Anglo-Canadian legal tradition, are mechanisms through which individuals can assert free agency. Contracts are legal devices conjured into existence by voluntary agreements, some of which are expressed as implied mutual obligations. In employment law, the implied mutual obligation of reasonable notice grants that an employer will not terminate an employee without providing such notice, and that the employee will likewise not resign without providing such notice. While an action for wrongful resignation exists in law for the employer, the scarcity of jurisprudence

31 Supra note 26 at para 8.
32 (1854), 156 ER 145 (UK Ex Ct) [*Hadley v Baxendale*].
34 *Systems Engineering and Automation Ltd v Power* [1989] NJ No 262 (Nfld SCTD).
suggests it is rarely effective in practice.\textsuperscript{35} The \textit{Bardal} factors effectively override the employer's original contractual bargain and as such are incompatible with contract law's core tenants. For these reasons, Canadian law should adopt the analytical framework espoused in \textit{Lazarowicz}.

III. WRONGFUL DISMISSAL DAMAGES BASED UPON BARDAL ARE INCONSISTENT WITH \textit{HADLEY V BAXENDALE}

The \textit{Bardal} approach is also troublesome because it ignores the remoteness rule described in \textit{Hadley v Baxendale}. According to this principle, damages are recoverable for a breach of contract if they are "such as may be fairly and reasonably be considered either arising naturally … from such breach of contract itself, or such as may be reasonably be supposed to have been in the contemplation of both parties."\textsuperscript{36} The SCC, in cases such as \textit{Fidler v Sun Life Assurance Co}\textsuperscript{37} and \textit{Honda},\textsuperscript{38} has recognized this statement as the general organizing rule of contract damages in Canadian law.

How, then, can a liability arising from unknown future circumstances, such as the length of service of an employee, be within the reasonable contemplation of the parties? It cannot. In fact, the SCC has recognized that the concept of reasonable notice of termination is likely not within the contemplation of most employees at the time of contract.\textsuperscript{39} As McLachlin J (as she then was) stated, the law recognizes the obligation of reasonable notice as a legal implication resulting from the nature of the employment contract.\textsuperscript{40} However, the idea that this legal implication should give a court free reign to ascribe one-sided rights to the employee is antithetical to the fundamental concept of a contract.

Some judges have recognized the irreconcilable difference between the \textit{Lazarowicz} and \textit{Bardal} approaches to the calculation of wrongful dismissal damages.\textsuperscript{41} Depending on which approach is taken, the differences in the length of the notice period can be significant.\textsuperscript{42} In \textit{Yosyk v Westfair Foods Ltd}, the Manitoba Court of Appeal

\begin{footnotesize}
\textsuperscript{35} A search on Westlaw Canada and Quicklaw for "wrong! resign!" yields 25 primary source results at most.
\textsuperscript{36} \textit{Hadley v Baxendale}, supra note 32 at 151 (emphasis added).
\textsuperscript{37} \textit{Fidler v Sun Life Assurance Co}, 2006 SCC 30 at para 44 [\textit{Fidler}].
\textsuperscript{38} \textit{Honda}, supra note 23 at paras 54-56.
\textsuperscript{39} \textit{Machttinger, supra} note 12 at para 32.
\textsuperscript{40} \textit{Machttinger, supra} note 12 at paras 45-47, McLachlin J concurring.
\textsuperscript{42} \textit{Tysoe}, supra note 41 at para 9.
\end{footnotesize}
refined and applied the *Lazarowicz* approach, explaining the shortcomings of *Bardal* as follows:

The length of notice which is reasonable is not a matter for subjective judgment. It must be determined having regard to the intention of the parties…

[…] The relevant intent is that which the parties had when the contract was last changed prior to the events leading to its termination.

The learned trial judge did not … apply the correct principles in determining the proper notice period. He … gave no consideration to the factors which the parties themselves would have considered if they had addressed their minds to the question before the events leading to termination.

…[T]he parties did not invite the trial judge to decide the length of notice on proper principles. Instead they attempted to compare the facts in this case with those in other cases already decided and to say that, because of similarity, the period of notice in this case should be equated to the period of notice allowed in the allegedly comparable case.43

The Ontario High Court of Justice and the Saskatchewan Court of Queen's Bench also highlighted problems with the *Bardal* approach in *Bohemier v Storwal International Inc*44 and *Bartlam v Saskatchewan Crop Insurance Corp*,45 respectively. In *Bartlam*, the judge was alive to the issue of judicial subjectivity inherent in the *Bardal* approach, stating:

Any approach to imply a period of reasonable notice … must be [equitable]. In my opinion, the *Bardal* Approach, narrowly applied, is incapable of such role. It requires the court to imply a reasonable notice period having regard only to limited criteria. Hence, 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. Such decision may be substantially different than what the parties … consider appropriate having regard to all relevant factors.46

The Court further concluded that the *Bardal* approach hampered the furtherance of certain policy rationales. For example, it does not consider the economic realities under which the employment relationship was formed, and it fails to create a sense of certainty with respect to the rights and obligations of the employer and employee in the context of reasonable notice.47

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43 *Yosyk, supra* note 41 at paras 15-17 (emphasis added).
44 *Bohemier, supra* note 41.
45 Ibid.
46 *Ibid* at para 38 (emphasis added).
47 *Ibid* at paras 43-44.
Bardal’s tendency towards an employee-favoured analysis was also highlighted in Bohemier. The Court in that case held that the implied obligation of notice must be reasonable for both parties. This key point was prominent in Hadley v Baxendale. It was also the Court’s view that the reasonable notice bargain could not be created through the Bardal Factors. Rather, it should only be objectively determined by turning the analysis to what the parties reasonably contemplated at the time of contract formation. Moreover, it appears that McLachlin J (as she then was), while sitting on the British Columbia Supreme Court, also agreed with the Lazarowicz approach to reasonable notice:

The requirement [of reasonable notice] is a term of the contract of employment which, in the absence of express agreement between the parties, is implied by the law. In the latter case, notwithstanding that the term is fixed by the court, it must conform to what the parties would have manifestly agreed had their attention been drawn to the matter at the time of making the contract.

Therefore, this case underscores the need for attention to be paid to the legal principles of consensus ad idem and the mutuality of obligations, which preserves the notion that contracts are voluntary agreements among parties.

In response to the contention that the rules in Hadley v Baxendale should apply to wrongful dismissal damages, proponents of the current Bardal approach may argue that wrongful dismissal damages are substitutive rather than consequential in nature. Substitutive damages are meant to compensate the plaintiff for the value of the contractual right, whereas consequential damages are intended to ameliorate other compensable losses that flow from the breach of the primary contract right. It is helpful to a pro-Bardal view to characterize wrongful dismissal damages as substitutive since remoteness principles, such as those pronounced in Hadley v Baxendale, only apply to consequential damages and not to substitutive damages.

48 Bohemier, supra note 41 at para 13.
49 Nichols v Richmond, [1984] 3 WWR 719 (BCSC) at 26. McLachlin J endorsed the Bardal approach six years later in her concurrence in Machtinger, supra note 12 at para 48: “[t]erms implied in contracts of employment imposing reasonable notice requirements depend … on a number of factors, which ’…must be decided with reference to each particular case, having regard to the character of 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.’ These considerations determine the appropriate notice period on termination. They do not depend on contractual intention. Indeed, some of them – such as the length of service and prospects of employment – are usually not known at the time the contract is made.”
Defining wrongful dismissal damages as substitutive damages reveals several inconsistencies. For instance, courts have accepted that wrongful dismissal damages are subject to rules of mitigation,\(^{52}\) avoided loss,\(^{53}\) and collateral benefits.\(^{54}\) These damage reduction rules only apply against consequential damages.\(^{55}\) It would be doctrinally inconsistent for the law to exempt wrongful dismissal damages from \textit{Hadley v Baxendale} yet subject them to these other limiting principles. Moreover, since substitutive damages are meant to compensate a plaintiff for the value of a contractual right, the nature of the right of reasonable notice must first be defined. Some courts have described the purpose of wrongful dismissal damages as intending to compensate the employee until similar alternative employment can be found.\(^{56}\) However, the effect of forcing the defendant to pay damages \textit{until} similar alternatives could reasonably be found means that the courts have given the employee an implicit contractual right to continuing employment. Such a right is akin to a property right to employment, which is economically inefficient without justification.\(^{57}\) It is also contrary to the traditional view that the employment contract right is nothing more than a right to notice.\(^{58}\) Furthermore, this conception of rights in employment law and wrongful dismissal is inconsistent with traditional private law theory. These are issues to which I now turn.

IV. THE THEORETICAL FLAWS OF THE \textsc{BARDAL} APPROACH TO WRONGFUL DISMISSAL DAMAGES

There are competing theories that purport to provide coherence to the operation and purpose of private law remedies. The orthodox, and in my view, correct approach is the restorative and compensatory theory. \textit{Restitutio in integrum} is the fundamental principle underlying the private law of remedies. Remedies in private law are meant to be compensatory: the aim is to place the plaintiff in the position he or she would have been in had the wrong not occurred.\(^{59}\) In contract law, the compensation principle requires that a plaintiff be restored to the position he or she would have occupied had the contract been performed.\(^{60}\)

\(^{53}\) Cockburn v Trusts & Guarantee Co (1917), 55 SCR 264.
\(^{54}\) IBM Canada Ltd v Waterman, 2013 SCC 70.
\(^{55}\) Winterton, \textit{supra} note 51.
\(^{56}\) \textit{Machtinger, supra} note 12 at para 19; \textit{Wallace, supra} note 22 at para 115 \textit{per} McLachlin J (as she then was) dissenting in part; \textit{Honda, supra} note 23 at para 50.
\(^{57}\) Justice in Dismissal, \textit{supra} note 8 at 144-53.
\(^{58}\) \textit{Personal Employment Contract, supra} note 7 at 294-95, 305ff, 349-68.
\(^{60}\) Winterton, \textit{supra} note 51 at 2-3, 24, citing \textit{Robinson v Harman} (1848), 1 Exch Rep 850 (UK Ex Ct) at 855. See also: \textit{Wertheim v Chicoutimi Pulp Co}, [1911] AC 301 (UKPC).
In the Canadian employment context, damages have evolved into a means of advancing distributive justice and promoting wealth redistribution. The purpose of wrongful dismissal damages has repeatedly been articulated as the provision of reasonable notice such that a terminated employee can find similar alternate employment.\(^{61}\) However, this definition is at odds with *restitutio in integrum* because the employee never had a *right* to her livelihood; the employee only has a right to compensation for reasonable notice. Any time between the end of that notice period and the start of new employment should not be a consideration in what the employee is owed under an employment contract. Doing so unduly restrains the concept that both the employer and employee may terminate an employment relationship without cause.\(^{62}\)

**Bardal and the Implied Obligation of Reasonable Notice**

The purpose of wrongful dismissal damages has been varyingly described, but all definitions share a common thread. McLachlin J (as she then was) has stated:

> The remedy for breach of contract is an award of damages based on the period of notice … The length of the notice period is based on the time reasonably required to find similar employment … These damages place the employee in the position that he or she would have been in had the contract been performed – the proper measure of damages for breach of contract.\(^{63}\)

However, damages in employment law are no longer solely compensatory. The shift toward a distributive ideology may be a response to the SCC’s repeated characterization of the employment relationship as fundamentally unequal. The current philosophy holds that, because of an inherent power imbalance—made manifest by such factors as differing financial resources, roles in contract drafting, and bargaining power, to name a few examples—the law should favour the employee.\(^{64}\) The *Bardal* approach, which mandates "having regard to … the availability of similar employment,"\(^{65}\) incorporates a policy of wealth redistribution into wrongful dismissal damages.

Assessing damages based partially on the time it may take an employee to find similar employment means that the law of reasonable notice has essentially made the employer the insurer of an employee’s livelihood. This policy rationale for wrongful

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\(^{61}\) *Machtinger*, supra note 12 at para 19; *Wallace*, supra note 22 at para 115 *per* McLachlin JA dissenting in part; *Honda*, supra note 23 at para 50.

\(^{62}\) See *Contract of Employment*, supra note 12; *Personal Employment Contract*, supra note 7.

\(^{63}\) *Wallace*, supra note 22 at para 115, McLachlin JA dissenting.


\(^{65}\) *Bardal*, supra note 1 at para 21.
dismissal damages would have damaging effects in anaemic business climates where employers may suffer increased liability for a dismissed employee's lack of alternative employment prospects—even though the lack of opportunity is the result of independent factors. Effectively, those economic forces that reduce employment at large are transformed into an implicit penalty on the employer, since the employer becomes liable for extended notice periods.

One need only ask oneself “What employer would reasonably bind itself to an obligation to insure an employee of her livelihood in the event of unemployment?” to see how unreasonable such a proposition is. Yet this is the proposition that Canadian courts have essentially imposed onto every employment contract.

The courts, and some scholars, have attempted to justify wrongful dismissal damages as a means of protecting the employee's reliance and expectation interests. While an expectation interest is certainly present in an employment contract, the interest is far narrower than how it is currently defined.

Lon L. Fuller and William R. Purdue define the expectation interest as "the value of the expectancy which the promise created." In the employment relationship, employees enter into an employment contract to exchange their labour for compensation. The broader expectation interest, if any, is merely the value of reasonable notice. The idea that the law should work to protect some larger expectation interest in the reasonable notice of termination, especially one that is not evaluated based on the intentions of the parties at contract formation, goes against the traditional doctrines of contract law.

The Shift Toward a Distributive Justice Theory of Damages

Courts and the common law should be wary of straying from the traditional theories of contract law when assessing wrongful dismissal damages. Private law damages are premised on the principle of restitutio in integrum—the idea that damages should return the party who has been harmed to her original position. The SCC’s adoption of Bardal, along with the policy considerations afforded to employment law generally, result in an inappropriate focus on distributive justice considerations. This shift towards distributive justice results in inequitable outcomes that systematically disadvantage employers.

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68 Distributive justice is concerned with the just allocation of resources in society. For a discussion of distributive and corrective justice see Ernest J Weinrib, “Corrective Justice in a Nutshell”, 52:4 UTLJ 349.
It is inequitable to impose a burden on one contracting party in response to concerns about underlying systemic injustice. Why should an employer bear the burden of the costs of unemployment rather than the employee or society? The idea that the employer is some disproportionately powerful party sufficient to warrant a special distributive ideological underpinning to employment contracts is a fallacy in the majority of employment relationships. Small businesses in fact, employ 69.7 per cent of employees in Canada. Courts would do well to keep these and other commercial realities in mind. The law should not be concerned with correcting the distribution of benefits in the absence of a bargain between employer and employee.

Some proponents of distributive justice point to the unconscionability doctrine as an example of where the law does not give effect to the express intent of parties due to fairness considerations. However, the test for unconscionability is stringent. There must be an imbalance of power such that one party is incapable of protecting his or her interests and the transaction must be shown to be manifestly unfair. Unconscionability voids a contract ab initio by deeming the subordinate party to have not had capacity to fully appreciate the terms of the agreement. The existence of the unconscionability doctrine reinforces the idea that the current policy rationales for wrongful dismissal damages are unwarranted, since the law already provides equitable remedies as well as independent heads of damage for bad faith discharge and independent tort actions designed to address issues of fundamental inequality.

Nonetheless, some scholars argue that the normative view of contract law should welcome an elevated role for distributive justice. They recognize that distributive justice concerns society's distribution of benefits and obligations, but they argue that justice as a whole is a creation of our social institutions. To them, if it is arbitrary to make parties responsible through distributive justice, then it is equally as arbitrary to place responsibility based on the traditional rights-based theory of contracts, since both are emanations of the same social institutions. However, these arguments

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70 Industry Canada, "Key Small Business Statistics – August 2013" (13 September 2013), online: <https://www.ic.gc.ca/eic/site/061.nsf/eng/02805.html>. Small Business is defined as having between 1 and 99 employees (inclusive). The total number of employees employed by organizations with fewer than 500 employees is 89.9%.
73 Mundinger v Mundinger (1968), [1969] 1 OR 606 (CA).
76 Aditi Bagchi, supra note 74 at 198. See also: Tsachi Keren-Paz, Torts, Egalitarianism and Distributive
fail to rebut the key role played by free agency and consent in the philosophical foundations of Anglo-Canadian common law. A focus on distributive justice undermines the fundamental importance of freedom of contract. In any event, judicial attempts to correct distributions in contract law are also economically inefficient and counterproductive.

Bardal Results in a Plaintiff-Favoured Process

The development of wrongful dismissal decisions in the wake of Bardal has been largely plaintiff-favoured. As Sproat J stated, "[T]he principles of law pertaining to wrongful dismissal generally incline in favour of the employee. This is stated as a fact..." A quick search for decisions involving "wrongful dismissal" reveals that the number of cases reaching a public decision-making forum in Canada has grown from approximately 150 per year in the 1980s and 1990s to around 300 per year by 2010. Furthermore, the results of such litigation have become increasingly removed from the protection of vulnerable workers in society—this was purportedly the original policy goal underlying wrongful dismissal.

The empirical evidence shows that not only have wrongful dismissal cases proliferated but they are also almost invariably decided in favour of the employee. One study analyzed a random sample of wrongful dismissal court cases from 1970 to 1997. The study found that over 90 per cent of employees received a favourable decision from the courts in the form of an award for additional notice above that which was provided by the employer. Judges found that the employer had only provided "reasonable" notice in ten per cent of the cases. Significantly, every wrongful dismissal claim analyzed in the study was resolved with an award of damages in lieu of reasonable notice. This trend emphasizes the near impossibility of an employer's ability to raise a defence of just cause against a claim for wrongful dismissal and is
illustrative of a pattern of success that is likely a strong factor contributing to the proliferation of wrongful dismissal claims.

More telling of the trend to favour plaintiffs in wrongful dismissal cases are the reasons for judges’ decisions. If judges incorporated public policy rationales into their determination of wrongful dismissal damages, one would think decisions would favour the employer during particularly hard economic times. However, it appears that policy rationales flow only in favour of the employee. In *Swinamer v Unitel Communications Inc*, the Nova Scotia Supreme Court stated:

> An employer has every right to determine its priorities, and take what steps it deems necessary to address market and economic conditions as it sees fit. However, it cannot do so and plead an entitlement to diminish its responsibility in law when it comes to the termination of the employment of its employees…

Yet these economic factors are exactly the ones contemplated in *Bardal* (character of employment and availability of similar employment), and they are also the ones that should form part of the basis of calculating the reasonable notice period for the employee. The *Bardal* Factors effectively hold the employer privately responsible for the costs of unemployment when job losses are caused by larger systemic changes, such as economic recessions and structural economic changes. The policy reasons provided in judgments reveal yet more sanctioned judicial bias in favour of employees in wrongful dismissal claims.

Critics may argue that wrongful dismissal damages provide a substitute for the remedy of specific performance, which would take the form of reinstatement, and are therefore a potential benefit to the employer. However, as with all equitable remedies, specific performance is a discretionary remedy. Damages are the default remedy in private law. Therefore, there is no basis to the argument that wrongful dismissal damages should include an element to compensate for an employee’s inability to request reinstatement, since the employee never had a contractual "right" to reinstatement in the first place.

Critics may also submit that human labour is inherently special and deserving of its own set of contract laws. This criticism is based upon the assumption that human labour is qualitatively different from the contractual exchange of other goods and services. I disagree.

To start with, the categories of human labour that are protected by wrongful dismissal damages are restricted. An individual must first be defined as an "employee"

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85 (1996), 147 NSR (2d) 249 Goodfellow J [Swinamer].
86 Ibid at 10 (emphasis in original).
87 Nierobisz Article, supra note 82 at 405-08, 436.
88 Ibid at 407-08.
before a right to wrongful dismissal damages exists. In contrast, contractors are not protected—yet most are contracted for their labour in the same way as employees. Indeed, some independent contractors may work for periods of time exceeding the average employment relationship. Yet according to this critique, only the "employment" category of labour deserves the unique protections afforded by wrongful dismissal damages as calculated by the Bardal Factors.

Furthermore, the assumption that human labour is a differentiating factor between an employment contract and other contracts is demonstrably false. A car does not build itself. A box will not ship itself. A computer program or machine will not code itself. Human labour is traceable at some level in every contract and is not unique to the employment contract alone.

### The Current Law of Wrongful Dismissal Fails to Protect Vulnerable Employees

Proponents of the Bardal approach argue that the current wrongful dismissal damages paradigm is required, in large part, to protect vulnerable employees from the disproportionate power of the employer. The irony is that, in current practice, those employees most protected by wrongful dismissal remedies are the least vulnerable ones. Bardal's "character of employment" factor provides that employees with more senior or complex roles are entitled to a greater period of reasonable notice. The law implies that such employees are entitled to a longer notice period because of their specialization, which theoretically reduces other job opportunities. This notion is further enforced by the idea that the notice period should be longer where there are fewer opportunities of alternative similar employment. Again, the more organizationally senior an employee is, the fewer the number of similar jobs exist in the marketplace.

The application of the Bardal factors leads to a situation where senior employees are awarded comparatively longer notice periods than their organizationally junior counterparts. Employees in senior positions are generally also the employees who earn the most, have higher levels of education, and who have the most developed professional networks. They are the employees who are least likely to be disadvantaged by unemployment and who have the greatest amount of bargaining power with the employer. In contrast, the most vulnerable employees in the workforce—those in hourly wage, shift-based work—are effectively excluded from being able to claim wrongful

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90 I note there is now a category of "dependent contractor" in Ontario. See [McKee v Reid Heritage Homes Ltd] (2009), 315 DLR (4th) 129 (Ont CA). Some critics argue that this shows human labour even in the contractor context retains a special quality. This is inaccurate because the differentiating factor between an independent contractor and a dependent contractor is the dependency on a single employer. This shows that it is not the fact that the contract is one of human labour that makes it deserving of additional protections. Rather, it is the dependency or control, which are already protected by equitable doctrines such as unconscionability.
dismissal due to cost-benefit trade-offs when accounting for costs of litigation.\textsuperscript{91} Even if a common law wrongful dismissal claim is advanced, the greater availability of similar positions in the economy, combined with their junior level and usually short length of service, results in token amounts of recovery.\textsuperscript{92}

The Ontario Court of Appeal has also effectively endorsed the disparity between senior and junior employees in \textit{Cronk v Canadian General Insurance Co.}\textsuperscript{93} Empirical evidence also confirms the tendency of the \textit{Bardal} Factors to disproportionately protect employees who need such protection the least.\textsuperscript{94} \textit{Love v Acuity Investment Management Inc}\textsuperscript{95} is a prime example of how out of touch the award of wrongful dismissal damages has become. In that case, a senior vice-president holding a Chartered Accountant designation, making over $300,000 per year, and employed for two and a half years was dismissed. At trial, the judge awarded five months' reasonable notice. The Court of Appeal overturned the order and awarded nine months' notice instead. The Court of Appeal based its reasoning primarily on the lack of similar senior roles in the marketplace,\textsuperscript{96} implicitly placing the burden of the employee's livelihood upon the employer.

The "availability of similar employment" factor results in further unintentional alterations of the original purpose of wrongful dismissal damages. The factor perpetuates class divisions because employees need only reasonably mitigate damages from dismissal with similar jobs.\textsuperscript{97}

This compounds the initial difficulty an employer faces in proving an employee’s failure to mitigate,\textsuperscript{98} since it entitles an employee who is dismissed from a senior position to wait for another senior role. The employee need not "lower herself" to a more junior level to earn a livelihood. In my view, this philosophy is inequitable. Our justice system should not be endorsing the view that certain occupations, from which millions of other Canadians earn their livelihood, are beneath the value of certain

\textsuperscript{91} However, such employees are likely to have rights under the \textit{Employment Standards Act, 2000}, SO 2000, c 41 and such statutory claims can be freely brought to the Ontario Labour Rights Board.

\textsuperscript{92} Justice in Dismissal, \textit{supra} note 8 at 31.

\textsuperscript{93} (1995), 25 OR (3d) 505 (CA) [\textit{Cronk}].

\textsuperscript{94} Barry B Fisher, "Is Occupation Still a Relevant Factor in Determining Notice Periods in Wrongful Dismissal Cases?" Case Comment on \textit{Cronk, ibid}, (1994), 6 CCEL (2d) 29.

\textsuperscript{95} 2011 ONCA 130.

\textsuperscript{96} \textit{ibid} at para 22.

\textsuperscript{97} \textit{Michaels v Red Deer College}, [1976] 2 SCR 324 at 332 [\textit{Michaels}]. Laskin CJ stated, "[i]t seems to be the generally accepted rule that the burden of proof is upon the defendant to show that the plaintiff either found, or, by the exercise of proper industry in the search, could have procured other employment of an approximately similar kind reasonably adapted to his abilities, and that in absence of such proof the plaintiff is entitled to recover the salary fixed by the contract."

\textsuperscript{98} \textit{Wrongful Dismissal Handbook, supra} note 6 at 6-40.14 discussing judicial interpretation of \textit{Michaels, ibid}. Sproat J stated "[\textit{Michaels}] has been interpreted … to mean that the employer must actually prove that a similar job was available and that the employee could have obtained [it] acting reasonably and diligently."
individuals in society. A dismissed employee should be required to mitigate wrongful dismissal damages via other employment opportunities even if they may be less senior than the employee's previous role.

The Bardal Factors have resulted in an inequitable shift in Canadian employment law, where employers have become increasingly burdened with the costs of dismissal and the costs of litigation that have resulted from Bardal’s plaintiff-favoured analysis. Wrongful dismissal has failed to achieve its basic purpose as a shield to protect truly vulnerable workers and has instead become a sword for society's comparatively privileged members to further advance their own interests.

V. CONCLUSION

Bardal constitutes the current common law position with respect to the calculation of wrongful dismissal damages. The SCC has advanced this approach through its implicit endorsement of Bardal in cases such as Machtinger, Honda, and Wallace. It is regrettable that the law has developed in such an inequitable fashion that is a drastic departure from traditional doctrines of contracts and contractual remedies. In my view, wrongful dismissal damages are determined through a fundamentally unequal process that overtly shifts what should be the individual's and society's responsibility arbitrarily onto another private entity. It is odd that our courts, before whom all are held to be equal, would condone such unfairness.

The departure from the notion that contracts are legal rights and obligations bargained by free agents has resulted in the courts' subjective imposition of their own sympathies onto the employment relationship. Driven by a distributive rather than compensatory notion of justice, damages in wrongful dismissal no longer conform to Hadley v Baxendale. The result is a rapid increase in one-sided litigation that, ironically, fails to achieve the basic distributive purposes that provided the impetus for the undue change in the law of wrongful dismissal damages.

A return to first principles of contracts and private law damages is overdue in wrongful dismissal. Returning to the goal of restitutio in integrum and corrective justice in wrongful dismissal damages would provide needed predictability and stability in employment relationships. Employers would be relieved from the liability that arises from arbitrary and independent employee-related factors during the employment relationship. Rather, damages from the breach of the employment contract would be objectively assessed from the intention of the parties at the time of contract formation. The courts in Lazarowicz and Bartlam have provided useful guidance with respect to how this method can be successfully applied. The employee would not be placed at a disadvantage. Independent heads of damage for bad faith discharge and independent tort actions still exist in law to protect employees from high-handed actions of employers. A return to first principles merely means that employers should not be
disadvantaged for circumstances that necessitate dismissals in a changing and dynamic economy and, further, that all parties should be treated equitably by the law.