The Enforcement of Harsh Termination Provisions in Personal Employment Contracts: The Rebirth of Freedom of Contract in Ontario

Brian Etherington*

Can employees look to the courts to ensure fair employment contracts and reasonable job security? The author argues that recent decisions of the Ontario Court of Appeal underscore the fact that courts offer little protection for the job security of the vast majority of employees.

The recent Ontario Court of Appeal decision in *Machtinger* v. *HOJ Industries Ltd.* continues, according to the author, the movement away from a paternalistic interpretation of harsh termination provisions in personal employment contracts. In its place the court has substituted a classical liberal freedom of contract orientation. The end result of this is to restrict the implication of a term of reasonable notice to those situations where there is evidence that the parties intended it.

After summarizing this development, the author examines the common law origins of the implied term of reasonable notice and the relationship of this notion to the idea of freedom of contract. He queries the extent to which the implied term actually reflected a paternalistic desire on the part of judges to protect employees. In light of this analysis, the author asks whether judges ought to be called upon to undertake such protection. He suggests that the liberal values and status-consciousness of most judges render them ill-suited to this task. Given this judicial predisposition, the author argues that specific legislative notice requirements for all employees are preferable to the Ontario Law Reform Commission's recommendation that judges be given increased discretion to set aside unconscionable bargains.

Les tribunaux peuvent-ils assurer aux employés la sécurité d'emploi et l'équité dans leurs contrats de travail? Les récentes décisions de la Cour d'appel de l'Ontario indiquent, selon l'auteur, que les tribunaux n'offrent pas, pour la majorité des employés, la protection requise. L'auteur soumet que la décision de la Cour d'appel de l'Ontario dans *Machtinger* v. *HOJ Industries Ltd.* s'inscrit dans la conception libérale classique de la liberté de contrat qui tend à remplacer, dans le domaine du droit du travail, l'interprétation paternaliste des clauses de congédiement abusives. Il s'ensuit que les parties seront soumises à un délai raisonnable seulement s'il est prouvé qu'elles avaient l'intention d'inclure un terme à cet effet dans le contrat en question.

Ayant présenté, en résumé, ce développement jurisprudentiel, l'auteur examine les origines du "implied term of reasonable notice", et fait le rapport entre ce concept du Common Law et la liberté de contrat. L'auteur se demande si l'imposition d'un délai raisonnable était vraiment, pour les employés, une forme de paternalisme, et tente d'établir s'il est du ressort des juges d'accorder une telle protection. Il soumet que les juges, avec leurs valeurs libérales et l'importance qu'ils accordent à la hiérarchie sociale, ne sont peut-être pas les mieux placés pour assumer cette tâche. Par conséquent, l'auteur propose qu'au lieu d'adopter les recommendations de la Commission de la réforme du droit d'Ontario, et d'accorder aux juges la discrétion de résilier les contrats lésionnaires, le législateur devrait intervenir et stipuler le préavis qui devra être donné aux employés.

*Associate Professor, Faculty of Law, University of Windsor. The author wishes to thank his colleagues Robert Kerr, Jeffrey Berryman and W.A. Bogart for providing comments on drafts of this paper.

Synopsis

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Introduction

With its recent decision in *Machtinger* v. *HOJ Industries Ltd.*,[1] the Ontario Court of Appeal has capped a remarkably consistent series of decisions revealing a judicial predisposition to classical liberal notions of freedom of contract within the employment relationship. This seems contrary to numerous precedents from other jurisdictions and lower Ontario courts in which wrongfully dismissed employees were held entitled to reasonable notice at common law despite harsh contractual termination provisions requiring minimal or no notice prior to dismissal. Such provisions had, for the most part, been found to be unenforceable on a number of grounds: unconscionability, inequality of bargaining power, absence of *consensus ad idem*, changed circumstances removing the substratum of the contract, narrow construction of the contract against the employer/drafter, or violation of employment standards legislation.[2] Despite

[1](1988), 66 O.R. (2d) 545 [herinafter *Machtinger*].

[2]*Chadburn* v. *Sinclair Canada Oil Co.* (1966), 57 W.W.R. 477 (Alta. S.C.); *Allison* v. *Amoco Production Co.* (1975), 58 D.L.R. 233, [1975] 5 W.W.R. 501 (Alta. S.C.); *Nardocchio* v. *Canadian Imperial Bank of Commerce* (1979), 41 N.S.R. (2d) 26, 76 A.P.R. 26 (S.C.T.D.); *Lyonde* v. *Canadian Acceptance Corp.* (1983), 3 C.C.E.L. 220 (Ont. H.C.); *Pickup* v. *Litton Business Equipment Ltd.* (1983), 3 C.C.E.L. 266 (Ont. Co. Ct.); *Collins* v. *Kappele, Wright & Macleod Ltd.* (1983), 3 C.C.E.L. 228 (Ont. Co. Ct.), grounds aff'd but award var'd (1984), 3 C.C.E.L. 228 (Ont. C.A.); *Dolden* v. *Clarke Simpkins Ltd.* (1983), 3 C.C.E.L. 153 (B.C.S.C.); *Doyle* v. *London Life Insurance Co.* (1985), 23 D.L.R. (4th) 443, 68 B.C.L.R. 285 (C.A.), leave to appeal ref'd (1986), 64 N.R. 318n (*sub. nom. London Life Ins. Co* v. *Doyle*); *Sawko* v. *Foseco Canada Ltd.* (1987), 15 C.C.E.L. 309 (Ont. Dist. Ct.). See also *Jobber* v. *Addressograph Multigraph of Canada Ltd.* (1980), 10 B.L.R. 278 (Ont. H.C.), rev'd (1983), 1 C.C.E.L. 87 (Ont. C.A.); *Wallace* v. *Toronto Dominion Bank* (1981), 39 O.R. (2d) 350, 81 C.L.L.C. 14,122 (H.C.), rev'd (1983), 41 O.R. (2d) 161, 145 D.L.R. (3d) 431, 83 C.L.L.C. 14,031 (C.A.); *Mathewson* v. *Aiton Power Ltd.* (1984), 3

this, the Ontario Court of Appeal, at virtually every opportunity since 1980, has opted in favour of enforcement of such termination provisions. In *Machtinger* it even enforced, as far as was possible, a contractual notice clause that was rendered null and void by the *Employment Standards Act*.[3]

My purposes herein are threefold. First, I will demonstrate the Ontario Court of Appeal's progression in recent years towards a classical liberal freedom of contract orientation and away from a paternalistic approach to the enforceability of harsh termination clauses in personal employment contracts. Second, I will discuss the origins of the development at common law of an implied term requiring reasonable notice for termination without cause, its relationship to the development of freedom of contract doctrine in the employment context, and the extent to which it evidenced judicial paternalism in favour of the well-being of employees. Third, I will discuss the more important question of whether courts ought to be called on to develop a more paternalistic approach under the common law in cases involving the employment relationship and to interfere on the basis of the absence of substantive fairness in the bargain struck. This final inquiry questions the competence of our courts to perform such functions and the relative merits of the judiciary and legislatures in confronting issues of distributive fairness raised by the inherently unequal relations of production in our society. In the final analysis, it may be that the basic liberal values and assumptions concerning freedom of contract held by most of our judges, as well as their status consciousness when confronting employment termination issues, render them ill-suited to interfere in employment bargains in a manner conducive to the protection of employees from the improvident bargains that result from inequality of bargaining power. Instead what is required is more overt action in the form of employment standards legislation which dictates fairer substantive terms of employment security for all employees, including those who suffer the most from economic inequality but at present find little or no protection under the common law of wrongful dismissal.

I. Enforcement of Harsh Termination Provisions

The Ontario Court of Appeal first signalled its predilection for enforcement of harsh contractual notice provisions in *Jobber* v. *Addressograph Multigraph of Canada*.[4] The plaintiff had worked for the defendant for eighteen years, beginning as a salesperson. By the time of his dismissal he had risen to the second highest position in his company (director of sales and marketing for Canada). With each change of position, including the last one in 1975, he had signed written employment contracts which were virtually identical. The

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C.C.E.L. 69 (Ont. Co. Ct.), rev'd (1985), 8 C.C.E.L. 312 (Ont. C.A.); *Aldo Ippolito & Co.* v. *Canada Packers Inc.* (1984), 29 B.L.R. 167 (Ont. H.C.), rev'd (1986), 14 C.C.E.L. 76 (Ont. C.A.).

[3]See discussion *infra*, at notes 23 to 30.

[4]*Supra*, note 2 (C.A.).

unchanged termination clause provided for termination without cause, but promised that in such cases the employer would "give ... at least thirty days advance notice of termination plus any additional notice that may be required by any applicable legislation ...".[5] The trial judge refused to enforce this clause against the plaintiff and awarded him damages at common law for breach of an implied term of reasonable notice amounting to eighteen months. He held that the employer's failure to adhere to the notice provision at the time of dismissal made it unenforceable. Alternatively, he construed the clause narrowly as merely stating a minimum notice period which did not affect the employer's common law obligation to provide reasonable notice where such notice would be greater than the stipulated minimum.[6] The Court of Appeal rejected both arguments and awarded eighty-six days notice, representing thirty days plus the employment standards requirement of eight weeks for an employee with the plaintiff's seniority.

The appellate court chose to ignore precedents which suggest that any attempt to remove or reduce the term of reasonable notice implied at common law should be construed narrowly and would require very clear expression of an intent to do so to be effective.[7] In the Court of Appeal's view, the clause was "clear and unambiguous" in its statement of the required length of notice for termination and should be enforced as the parties' intended estimate of damages that would flow in the event of dismissal without notice.[8] In the absence of evidence of coercion or undue influence of any kind such clauses had to be enforced.[9]

The Court of Appeal's 1983 decision in *Wallace* v. *Toronto-Dominion Bank*[10] received more attention as a declaration of antipathy to the application

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[5]*Ibid.*, at 90.

[6]*Supra*, note 2 at 282-83 (Ont. H.C.).

[7]See *Chadburn* v. *Sinclair Canada Oil Co.*, *supra*, note 2, where the following language was found to be ineffective to limit the employer's common law obligation to provide reasonable notice:

> Either party may terminate this contract at any time, with or without cause. In event of termination employer shall not be liable to employee for wages or salary, except as may have been earned at the date of such termination.

These words were found insufficient to provide the "clear" and "express" intention necessary to indicate a contrary intention to the implied requirement for reasonable notice in the absence of cause (at 480-82).

See also *Allison* v. *Amoco Production Co.*, *supra* note 2. There the words "If Company desires to terminate employment of Employee Company shall give Employee thirty days' notice thereof" were not sufficiently clear to displace the doctrine of reasonable notice because "the words used [did] not clearly state that the contract would terminate on 30 days' notice but only that if the company desires to terminate it shall give 30 days' notice" (at 240).

[8]*Supra*, note 2 at 91-92 (C.A.).

[9]*Ibid.*

[10]*Supra*, note 2 (C.A.).

of paternalistic doctrines to relieve against the enforcement of harsh notice provisions in employment contracts.[11] The plaintiff had commenced employment with the employer in 1970. After completion of a short probationary period, he signed a standard form contract of indefinite duration which provided that the bank could terminate without cause by giving four weeks' notice or equivalent payment in lieu thereof. In 1978, after moving through several positions at the behest of the bank and training for senior management, he was dismissed while in the position of senior assistant branch manager. The trial judge, noting the absence of any employee bargaining power to renegotiate the standardized bank employment contract and the absence of any evidence of discussion of the termination provisions at the time of hiring, held that the contractual notice clause was unenforceable because it was an unfair bargain which resulted from inequality of bargaining power.[12] The plaintiff was awarded the equivalent of twelve months' salary and benefits as the amount of reasonable notice required at common law.

At the Court of Appeal, however, this holding was reversed and the contractual notice clause enforced. While the Court pointed to the plaintiff's failure to properly plead or present evidence of unconscionability or lack of *consensus ad idem* as one basis for its decision, it is incorrect to assert that the decision centered merely on poor pleading and therefore does not affect the substantive law.[13] Robins J.A. made it clear that the inequality of bargaining power inherent in the employment hiring context would not, by itself, be enough to render harsh notice provisions unenforceable:

> Furthermore, apart from any question of pleadings, the meager evidence to be found with respect to the contract, in my opinion, does not provide the necessary legal basis upon which the contract can be held unenforceable by reason of unfairness or unconscionability.... Nor can I accept the argument that the bank document in question is to be dealt with as though it were the kind of standardized

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[11]M. Macneil, "Case Comment on *Wallace* v. *Toronto-Dominion Bank*" (1984) 62 Can. Bar Rev. 84.

[12]*Wallace* v. *Toronto-Dominion Bank*, *supra*, note 2 (S.C.). Osborne J. relied heavily on Lord Denning's controversial statements in *Lloyds Bank Ltd* v. *Bundy*, [1975] 1 Q.B. 326 concerning inequality of bargaining power as an apparently broadly applicable basis for paternalistic judicial oversight of improvident bargains. Because the plaintiff had not originally pleaded unconscionability, the only evidence relating to the circumstances of entry into the contract were that it was a standardized form contract, the employee did not recall signing the form or any discussion of it but admitted it was his signature, and the employer admitted it was not standard practice to give the employee time to consider the terms of the contract or discuss its provisions or get independent legal advice. The trial decision reasons appear to implicitly acknowledge that in normal circumstances there is enormous inequality of economic power inherent in the employment relationship and that such inequality in itself can represent a basis for relief against harsh termination provisions, in the absence of positive evidence that the employer brought such provisions and their significance to the attention of the employee.

[13]David Harris implies this in his discussion of the case. D. Harris, *Wrongful Dismissal* (Toronto: Richard de Boo, 1984) at 9-12.

> form agreement in issue before this court in *Tilden Rent-A-Car* v. *Clendenning* (1978), 18 O.R. (2d) 601.... Here, the terms were not hidden in a maze of fine print but were set forth clearly and understandably; on the evidence, there was no attempt to take advantage of the plaintiff or to exert influence over him so as to procure a contract that otherwise would not have been made; and nothing that transpired can be treated as being oppressive of him or as constituting the type of coercion that may vitiate consent.[14]

Although the majority admitted that the notice clause might have seemed harsh and unfair at the time of dismissal, they held that the test for unconscionability had to turn on whether the terms were "onerous or blatantly unfair" in light of the circumstances existing at the time the contract was made. Further, although the Court stated that there could be imaginable cases where the employee's responsibilities and status had escalated so much during employment that it could be concluded the substratum of the contract entered into at time of hiring had disappeared, it indicated that such cases would be very limited and enforceability would therefore be the rule rather than the exception.[15]

However, the freedom of contract bent of the majority was not a foregone conclusion, despite the *Jobber* decision. While case law from the latter part of the nineteenth century and the early part of this century "was more prone to uphold the validity of such a severance provision",[16] both the trial judge and Houlden J.A. (in dissent) in *Wallace* reflected the more modern trend in their reluctance to enforce the harsh termination clause agreed to on hiring. Both relied heavily on then-recent jurisprudence from other jurisdictions. These cases had developed a very paternalistic approach to the interpretation of such clauses and the determination of whether they represented unconscionable bargains or were unenforceable under the broader rubric of harsh terms arising from inequality of bargaining power. The courts seemed to be saying that the broadly applicable notion of inequality of bargaining power introduced by Lord Denning in *Lloyds Bank Ltd.* v. *Bundy*[17] in the bank guarantee context could be

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[14]*Supra*, note 2 at 180 (C.A.).

[15]The majority also indicated that the employer could preclude such changes rendering a harsh notice provision unenforceable by simply making it clear in personnel manuals or company declarations that the termination provisions remained applicable to employees of any status. *Ibid.* at 181.

[16]Harris, *supra*, note 13 at 9-8, citing *Bank of British North America* v. *Simpson* (1874), 24 U.C.C.P. 354 and *Ellis* v. *Fruchtman* (1912), 3 W.W.R. 558 (Alta C.A.).

[17]In *Lloyds Bank Ltd.*, Lord Denning held:

> There are cases in our books in which the courts will set aside a contract, or a transfer of property, when the parties have not met on equal terms — when the one is so strong in bargaining power and the other so weak — that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall.
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> Other instances of undue pressure are where one party stipulates for an unfair advantage to which the other party has no option but to submit. As where an employer —

transposed generally to the employment hiring context. And they implied an almost open recognition that the typical employment relationship, particularly in the hiring context, was characterized by such gross inequality of economic power as to render employee voluntariness presumptively suspect. Hence the suggestion in several of these cases, including in Houlden J.A.'s dissent in *Wallace*, that in the absence of evidence that the employer drew the employee's attention to the termination provisions and explained their potential future significance or provided an opportunity for the employee to get independent legal advice, if such provisions after passage of time appear harsh, they should be held unenforceable as unconscionable terms or terms lacking the necessary *consensus ad idem*.[18]

> the stronger party — has employed a builder — the weaker party — to do work for him.
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> ...
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> I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other.

Supra, note 12 at 336-39.

[18]Perhaps the most notable decision along these lines, apart from *Wallace* at trial, is *Nardocchio* v. *Canadian Imperial Bank of Commerce, supra*, note 2. Despite the majority's attempt to distinguish this case in *Wallace* (*supra*, note 2 at 177-78 (C.A.)) the fact pattern was remarkably similar. The plaintiff was hired at an entry level position in 1966 and during the next twelve years rose through several positions before she was dismissed without cause while an assistant accountant in 1978. The standard form contract signed on hiring contained a far more reasonable termination provision than that in *Wallace* in that it provided for a one year probationary period with two weeks' notice required for dismissal in the first six months and one month's notice required to terminate during the last six months of probation. Thereafter the contract required three months' notice to be given. The plaintiff was given three months' notice on dismissal. At trial she testified that she did not recall signing the hiring contract or receiving any explanation of its terms, although the employer presented evidence that in normal practice she would have received a fifteen minute explanation of the contract's terms. The court held that the termination provisions were not unreasonable at the time of hiring but were unfair and harsh at the time of firing and as such unenforceable. It also seemed to suggest that in the absence of evidence from the employer as to the explanation of the terms to the employee it should find there was not *consensus ad idem* on the notice provisions. The court's paternalism caused it to ignore the normal rule that a party which has signed a written document is taken to have manifested its assent to the contents in the absence of evidence of fraud, misrepresentation, mistake or *non est factum*. Instead, the court seems to have implied, because of the relative bargaining power of the parties, a requirement that the employer prove that the significance of the terms was explained to the employee or the employee was sent to get independent legal advice before signing (at 39-41). As Houlden J.A. pointed out in his dissent, the facts in *Wallace* were similar in that the plaintiff there also said he did not remember sign-

The Court of Appeal's adherence to a classical liberal contractual paradigm for the employment relationship, one which viewed the parties as formally equal and autonomous individuals free to accept or reject the terms of a proposed bargain, was affirmed again in 1985 in *Matthewson* v. *Aiton Power Ltd.*[19] The plaintiff had commenced employment as a chief estimator with the defendant in 1979. At the time of hiring, the plaintiff was unemployed and, to use the words of the Court of Appeal, "needed work desperately".[20] Despite raising some concerns about the short notice provided, he signed a contract which stipulated that the contract could be terminated by either party by giving "not less than two weeks' prior notice in writing". The contract was renewed, with substantial salary increases, in each of the following three years. Then, in 1982, the plaintiff was dismissed.

The trial judge held the termination provisions unenforceable on the grounds of inequality of bargaining power. In his view, the employee's need for employment, the absence of any evidence of negotiation of the contract, and the "take it or leave it" position of the employer with respect to the terms of employment were sufficient evidence of inequality of bargaining power to render the clause ineffective.[21] The plaintiff was awarded the equivalent of six months' salary as reasonable notice.

The Court of Appeal quickly squelched any chance that the typical hiring situation, where an employer dictates terms to an employee who has little or no practical alternative to acceptance, could provide a basis for relief against harsh terms. Absent evidence of manifest "oppressive or unconscionable acts" on the part of the employer:

> [t]he fact that he was unemployed and needed a job ... is not a ground for holding that there was "inequality of bargaining power" and setting aside the contract on that ground.[22]

Although these decisions can be viewed as manifestations of judicial support for freedom of contract, they pale in significance when compared to the Court's most recent decision in *Machtinger* v. *HOJ Industries Ltd.*[23] The plaintiffs, Lefebvre and Machtinger, had joined the employer in 1978 as car salespersons. Both were dismissed without cause in 1985 and given four weeks' pay, the statutory minimum under the *Employment Standards Act*.[24] At the time of dis-

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ing the contract or having it explained and the bank said it was not their practice to explain the terms or to offer an opportunity to obtain legal advice before signing (*supra*, note 2 at 168, 170 (C.A.).

[19]*Supra*, note 2 (C.A.).

[20]*Ibid.* at 314.

[21]*Supra*, note 2 at 71 (Ont. Dist. Co.).

[22]*Supra*, note 2 at 314 (C.A.), MacKinnon A.C.J.O.

[23]*Supra*, note 1.

[24]R.S.O. 1980, c. 137, s. 40(1)(c).

missal Lefebvre was sales manager and Machtinger was a salesperson. Both had signed employment contracts at the time of hiring which had been updated periodically. Throughout the employment relationship the contracts had provided for termination without cause with two weeks' notice in the case of Lefebvre and no notice at all in the case of Machtinger. These termination provisions were expressly rendered "null and void" by the *Employment Standards Act*.[25] The trial judge, sensing that "null and void" meant what it said (that the provisions were not to be given any effect whatsoever), held that the employees were entitled to their common law remedy of damages based on the implied period of reasonable notice. Consequently, Lefebvre was awarded seven and one half months and Machtinger seven months'notice.

Despite the fact that all precedent supported the trial judge's decision,[26] a unanimous Court of Appeal held that the "null and void" contract term had to be given effect to the extent of limiting the employees to the minimum notice required under the statute. The reasoning of Howland C.J.O. was relatively simple, if somewhat bizarre given the statutory context.[27] He began by acknowledging that in the case of an indefinite hiring, "where there is no express contractual legal limitation on the notice to be provided, there is an implied term at common law that the employee is entitled to reasonable notice of termination."[28] This should have been the end of the matter, for surely if the statutory directive to render the termination clause "null and void" is to be given any significance

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[25]*Ibid.*, s. 3 provides:

> Subject to section 4, no employer, employee, employers' organization or employees' organization shall contract out of or waive an employment standard, and any such contracting out of or waiver is *null and void.*

[26]See *Pickup* v. *Litton Business Equipment Ltd.*, *supra*, note 2 (Ont. Co. Ct) and *Collins* v. *Kappele Wright & MacLeod Ltd.*, *supra*, note 2 (Ont. Co. Ct), appeal allowed to extent of reduction of notice awarded from ten months to seven months, (1984), 3 C.C.E.L. 228 (Ont. C.A.). The latter decision was distinguished in *Machtinger*, *supra*, note 1 at 551, on the basis that the appeal did not raise the issue of whether a provision for reasonable notice on termination should be implied when the contractual provision is null and void due to the *Employment Standards Act*, *Supra*, note 24.

[27]The trial judge, I think correctly, held that his conclusions about the effect of the statutory provision were supported by the overall statutory context. In addition to the clear prescription of "null and void" found in s. 3, the lower court ruling was supported by the terms of ss. 4 and 6 of the *Employment Standards Act*, *supra*, note 24. See discussion in reasons of Court of Appeal, *supra*, note 1 at 547. Ss. 4 and 6 are as follows;

> 4 (1) An employment standard shall be deemed a minimum requirement only.
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> (2) A right, benefit, term or condition of employment under a contract, oral or written, express or implied, or under any other Act or any schedule, order or regulation made thereunder that provides in favour of an employee a higher remuneration in money, a greater right or benefit or lesser hours of work than the requirement imposed by an employment standard shall prevail over an employment standard.
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> 6 No civil remedy of an employee against his employer is suspended or affected by this Act.

[28]*Supra*, note 1 at 548.

whatsoever it must mean, at minimum, that there is no express contractual legal limitation on the notice to be provided. However the Court's commitment to freedom of contract was far too strong to be dissuaded by a mere statutory directive designed to protect employees from the inequalities of the free market. Howland C.J.O. held that an issue still remained as to whether there was an implied term of reasonable notice when the employer and employee had expressly specified the notice to be given, but they specified an amount that was less than the minimum required by the *Employment Standards Act*. He then made reference to several cases which did not concern wrongful dismissal as support for the principle that whether a term should be implied in a contract depends on the intention of the parties as evidenced by the words of the agreement and the surrounding circumstances.[29] He concluded:

> In my opinion, a term should not be implied that a contract of employment could only be terminated on reasonable notice where the parties have by agreement over a period of time expressly provided for either no notice or for two weeks' notice. While the express termination provisions are null and void under the *Employment Standards Act*, there is evidence before the court as to the prior dealings between the parties and the existence of employment contracts whose terms represented the agreement of the parties. In those circumstances, a term requiring reasonable notice should not be implied. The parties never intended that there should have been a period of seven or seven and one-half months' notice. [30]

In short, he refused to treat the termination provisions as null and void.

However, there are other reasons, apart from the Court's apparent flouting of a statutory directive, to be concerned about the *Machtinger* decision. First, there is the inference that it is only permissible to imply a term for reasonable notice in an employment contract when it "is reasonably necessary, having regard to the surrounding circumstances,"[31] to reflect the intentions of the parties. Certainly it has been argued that the common law rule of entitlement to reasonable notice in the absence of writing to the contrary exists to reflect the parties' reasonable expectations. However, there is little evidence that this is the case either in terms of the origins of the reasonable notice requirement or current practice. In light of modern day practice, it is probably more accurate to suggest that the majority of unorganized employees would not even expect reasonable notice prior to dismissal and many would be surprised to learn they are not employed at the employer's discretion.[32] Perhaps, unorganized employees

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[29]*Ibid.* at 549. Howland C.J.O. relied heavily on some general statements about implied terms from J. Morris, ed., *Chitty on Contracts*, 25th ed. (London: Sweet & Maxwell, 1983) at 451.

[30]*Ibid.* at 549-50.

[31]*Ibid.* at 549, citing G.H.L. Fridman, *The Law of Contract in Canada*, 2d ed. (Toronto: Carswell, 1986) at 449.

[32]K.E. Swinton, "Contract Law and the Employment Relationship: The Proper Forum for Reform" in B.J. Reiter & J. Swan, eds, *Studies in Contract Law* (Toronto: Emond Montgomery, 1980) 357 at 363. However, the fact the parties likely neither intend or expect a reasonable notice

would have a vague notion that there is statutory protection for a minimal notice period after a specified duration of employment. However, they would probably not be aware of additional common law entitlements. Similarly, the criteria commonly used by the courts to determine the length of reasonable notice in individual cases do not appear to have much connection with the actual intentions or expectations of the parties at the time of contracting.[33]

These factors indicate that the inference of the *Machtinger* decision — that the requirement of reasonable notice should only be imposed when circumstances reveal that this accords with the initial expectations of the parties — is not consonant with current practice and would significantly undermine the already limited protection accorded to employees by the current common law of wrongful dismissal.

II. Origins and Purposes of the Requirement for Reasonable Notice Implied at Common Law

The origins of the common law requirement for reasonable notice in indefinite hirings also undermine the Ontario Court of Appeal's liberal assumptions about its purpose and function. The Court's analysis of the implied term as solely dependent on the parties' intention at the time of contracting fits well with the classical liberal paradigm of contract in the employment context which became popular with the ascendancy of laissez-faire free market economic theories at the end of the eighteenth century and beginning of the nineteenth century.[34] According to this view, the courts were to enforce only those terms of the

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period is not viewed by Professor Swinton as a reason for ceasing to require it at common law. In her view, common law rules of contract should exist to serve interests other than the parties expectations, particularly in the employment context. In her words, the "reasonable expectations" measure:

> may not be suitable to all contractual situations, and the courts have refused to enforce reasonable expectations which fail to comport with competing public policies, such as restraint of trade, prevention of slavery, contracts against public policy, and unconscionability. In the employment context, they have refused to treat employment for an indefinite term as at will and have required reasonable notice to terminate.

[33]The factors most commonly looked to are character of employment or job status, length of service with employer, age of employee, availability of similar employment, and perhaps quality of plaintiff as employee. See *Bardal* v. *The Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 at 145, [1960] O.W.N. 253 (H.C.) and S. McShane, "Reasonable Notice Criteria in Common Law Wrongful Dismissal Cases" (1983) 38 Ind. Rel. 618.

[34]See P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979), and S. Jacoby, "The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis" (1982) 5 Comp. Lab. L.J. 85. Atiyah's work is particularly good in describing the extent to which the law's development was influenced by the economic liberalism of thinkers like Smith and Ricardo. However, I do not wish to imply that there was a sudden and simplistic transformation of the law of employment brought on by these thinkers and their theories. As Atiyah explains in some detail, there were many signs of a rising adherence to economic liberalism among prominent lawyers and judges from the sixteenth century onwards. See Atiyah at

contract on which the employer and employee, as voluntary individuals, had agreed. The courts were not to impose the kind of paternalistic obligations between master and servant which had existed when the relationship had been one of status.[35] Only such obligations as the parties had manifested their intention to include in their contract should be enforced. The gross disparity in economic power between employer and employee which made it possible for employers to dictate the terms of the bargain was not relevant to the validity or enforceability of the contract for classical liberal economists like Adam Smith or Ricardo. Nor was it appropriate for judges in this era of formalism to take it upon themselves to assess the justice or fairness of the bargain and intervene on that basis.[36] Instead the parties were viewed as formally equal in their free-

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112-28. One prominent example described by Atiyah was the refusal by the courts during the late 1600's and early 1700's to enforce the *Statute of Apprentices* restrictions on the entrance into and the practice of a trade in all but the most limited circumstances (at 127-28).

[35]Jacoby, *ibid.* at 92-93. This has been described as the transformation of the master and servant relationship from the familial model to a formalistic freedom of contract model. Under the former model, the common law had placed several paternalistic obligations on the master including obligations to provide medical care, moral guidance and literacy instruction and pay wages during illness. Of course the familial model also allowed masters to issue corporal punishment to servants and imposed numerous moral obligations on the servant (i.e. duties of obedience, loyalty, honesty, good moral character, etc.) which made it relatively easy for the courts to conclude that the master had cause for dismissal, particularly given their general predisposition to favour the master's position. Jacoby, *ibid.* at 88-89. See also Atiyah, *ibid.* at 522, commenting on the partiality of judges towards the interests of mill owners dealing with legislation for the protection of workers during the 1800's.

[36]As Atiyah and Horwitz have both pointed out, the growth of formalism fit hand in glove with the rise of freedom of contract and laissez-faire economic liberalism during the industrial revolution. Atiyah suggests that the basic tenets of formalism — that all law is really based on legal doctrine and principles derived from precedents, that there is a correct answer for each case, that it is not for judges to impose policy decisions or weigh the relative justice of competing parties' claims, and that the judge is to play a purely passive role — were important to the development of the following pivotal aspects of the growth of freedom of contract doctrine:

> First, the idea that it is for the parties to make their own contract, and to select their own terms, and not for the Courts to interfere in this process. Secondly, the idea that the effect of a contract once made is, again, not for the Courts to determine in any active sense. The Court's function is purely passive and interpretive; the Court must determine what the contract means, to be sure, but in doing so it is only giving effect to the intentions of the parties. Thirdly, generally speaking the process of formalism was combined with a tendency to 'literalism', that is, a refusal to read into the contract anything which the parties had not expressly provided for, and an insistence that implications could only be made when absolutely necessary to make the contract workable. Fourthly, formalism meant that the Courts basically disclaimed any power or right to 'interfere' in order to achieve a just result.... It was for the parties to choose their own terms and make their own bargains, and if one chose skillfully while the other chose foolishly, this was merely the working of the free market system. A fifth identifiable feature of formalism was the tendency to construe rights in absolute terms. The Courts were unwilling to examine what motivated a contracting party to act in any particular manner.

dom to choose to enter into the contract and in the voluntariness of their actions. However, the origins of the implied term of reasonable notice at common law had little to do with this liberal contractual paradigm. Rather the notion appears to have arisen in England in part as a holdover from the paternalism of pre-industrial master and servant law and in part as a necessary rule to ensure that the courts and the common law were available to employers to prevent and bring an end to interruptions in production caused by concerted action by workers.

The paternalism of the pre-industrial regulation of the master and servant relationship by statute and common law was not of a purely benevolent variety. It is true that the 1563 *Statute of Artificers*[37] required that dismissals for cause could only be effected legally with approval of two magistrates and provided that hirings were to be for not less than one year with at least one quarter of a year's notice for termination by either party. However, the dominant motivations for such provisions were the scarcity of labour[38] and the need to minimize the costs of a parochial system of poor relief. The common law presumption that an indefinite hiring was a yearly hiring developed over the next two centuries for the same reasons. The presumption meant that a master who had employed a servant through the growing or production season had to maintain him for the rest of the year, thus preventing him from becoming a charge on the parish of his settlement, the unit responsible for poor relief. It also meant that the servant who had been kept by the master during the seasons of little employment had to remain with the master during the production season.[39] Later the annual hiring presumption took on added significance when the *Settlement Laws* were amended to permit a person to obtain settlement in a given parish by proving he had been hired to serve and had served for one year in that parish.[40]

Atiyah, *supra*, note 34 at 388-89 and M. Horwitz, "The Rise of Legal Formalism" (1975) 19 Am. J. of Leg. Hist. 251.

[37]5 Eliz. c. 4, s 5. Cited in Jacoby, *supra*, note 34 at 88.

[38]Jacoby points out that the yearly hiring provision was designed to compel labour and restrict labour competition and movement. Under the *Statute of Artificers*, a worker who quit before the end of the year or did not give proper notice could be jailed and lose his entire wages for the period, while a master who dismissed an employee improperly faced a maximum fine of forty shillings. Jacoby, *supra*, note 34 at 90. Note also that the magistrates tended to be predisposed to favour the master's position on the issue of cause for dismissal. See *supra*, note 35.

[39]Jacoby, *ibid.* at 86-90. Jacoby concludes (at 90):

> [T]he presumption owed its origins less to equity between servant and master than to the two foundations of early employment law: the alleviation of the effects of labor scarcity and the imperatives of a parochial system of poor relief.

[40]3 Wm. and Mary, c. 11, 1691, discussed in Jacoby, *supra*, note 34 at 90-91. Of course settlement was critical in a poor relief system which determined parish responsibility on the basis of settlement. The presumption of yearly hiring was important in extensive litigation during the eighteenth and nineteenth centuries between parishes over which one was responsible for a pauper's relief.

The English courts of the early nineteenth century extended the presumption of yearly hiring, terminable only by notice, to new urban industrial manual and non-manual occupations, despite the absence of a labour scarcity or a seasonal employment problem. This extension has been described as peculiar given the changed labour market and the general new freedom of contract approach to employment contracts.[41] Nevertheless, it has been explained by several factors: its importance in widespread poor relief litigation throughout the nineteenth century between rural and urban industrial parishes over responsibility for migrant industrial workers who suffered from the reversal in the labour market; the prevalence of long-term fixed contracts in certain branches of industry; and the utility of long-term contracts in employer efforts to suppress trade union activity and collective bargaining.[42]

However, by the middle of the nineteenth century the presumption of annual hiring was no longer applied to industrial manual occupations and was beginning to be replaced by a presumption of terminability on reasonable notice for non-manual workers as well. Its demise in the manual industrial sector was hastened by the abolition of settlement by hiring and the preference of large employers for short term hires to provide the kind of dispensable workforce suitable to their needs in a period of plentiful labour. Unions also urged members to seek short-term contracts to prevent prosecutions for breach and to facilitate collective bargaining. At its extreme, this led unions to seek "minute contracts" which would allow them to drop their tools and quit on a minute's notice. However, most employers did not want employment at will or minute notice contracts. They usually hired employees on weekly, biweekly or monthly pay periods and the courts often implied reasonable notice periods which corresponded to the pay period. The notion of at will terminability was not sought by employers, nor was it implied by courts in the face of silence, because the requirement for some period of reasonable notice, albeit in most cases a very short period for industrial workers, was vital in enabling employers to obtain judicial assistance to stem collective action by workers. Although the *Master and Servant Acts* allowed the employer to have workers imprisoned for breach of contract if they quit without giving proper notice, this tool for prosecuting strikers would have been lost if the courts had not implied a reasonable notice requirement into the contract. The judicially implied term of reasonable notice also allowed union leaders and members to be prosecuted criminally for con-

[41]Jacoby, *ibid.* at 95. Jacoby notes that the courts would have been more consistent with their "new" approach had they tried to determine what the parties intended about duration. However, the parties' intention did not lie behind the implied yearly hiring or notice requirements.

[42]*Ibid.* at 95-97. As Jacoby explains, until 1875 a master could have his servant imprisoned for breach of contract, under the various Master and Servant Acts in effect up to that time, if he disobeyed his master by following a union rule or seeking higher wages during the term of the contract. Long-term contracts also made collective bargaining difficult because different workers' personal contracts expired at different times.

spiracy to entice breach of contract and to be sued civilly for inducing breach of contract in the case of planned or actual strikes. Even after the 1875 legislative abolition of criminal prosecution for breach of contract and other strike activity, the reasonable notice requirement was still important as the basis for civil actions against union leaders and striking members.[43]

The courts clung to the presumption of yearly hiring a little longer for white collar workers. However, by the end of the nineteenth century they had replaced it with the presumption of an implied requirement for termination on reasonable notice. For a time the courts continued to imply yearly hirings but held them to be defeasible on reasonable notice for lower level white collar occupations. Even with the final transition to implied indefinite hirings terminable on reasonable notice for all occupations, the courts continued to be quite status and class-conscious in their practice of making an employee's job security, in the guise of reasonable notice, dependent on occupational status and income.[44]

In the final analysis, the origins of the implied term of reasonable notice at common law do not lie in any liberal contractual paradigm nor in an attempt by the courts acting within that paradigm to determine and enforce the intentions of the parties. Although the transformation from a master-servant to a contractual relationship was influenced by the classical liberal economic theories of the day and the accompanying movement to freedom of contract and formalism, implied notice requirements at common law were really the result of poor relief considerations, labour market circumstances, employer needs for judicial control of strike activity, and vestiges of paternalism and status-consciousness among judges. The choice of English courts to opt for a reasonable notice requirement while American courts opted for an implied at will contract has been explained as follows:

> If there had been a greater variety of tools than just notice periods to suppress strikes, it is possible that employment at will would have become the norm for

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[43]*Ibid.* at 98-99. I have relied heavily on Jacoby's article in my summary of the development of the implied term of reasonable notice in this paragraph and the next.

[44]*Ibid.* at 101. The implication of a reasonable notice period combined greater flexibility for the employer with a "vestige of the employment security salaried employees had enjoyed under an annual contract." Jacoby also views the implied reasonable notice requirement as a creature of the status-consciousness of English courts, for it allowed them to differentiate between occupations to give greater employment security to the middle and upper class occupations, something the American courts forbade themselves when they opted for implied at will terminability during the last quarter of the nineteenth century. *Ibid.* at 119-20.

Although some commentators have suggested that the courts are becoming less status-conscious in determining reasonable notice requirements (Swinton, *supra,* note 32 at 367), the bulk of the caselaw still reveals strong evidence of the importance of job status to employment security in the form of reasonable notice at common law. See McShane, *supra,* note 33 at 622.

> English workers. And had English courts been less concerned with status distinctions, the same may have become true of salaried employment.[45]

III. A Significant Judicial Bent

Jobber, *Wallace*, *Matthewson*, and particularly *Machtinger* are disturbing because they reveal the Ontario Court of Appeal's very strong commitment to the values and assumptions of the classical liberal paradigm of contract. According to this paradigm, the employee and employer are viewed as formally equal in their freedom to accept or reject the terms of the employment contract. Consequently, the terms are taken as truly indicative of the actual intent of both parties at the time of hiring and must be enforced by the court as such. Gross disparity in bargaining power at the time of hiring, even in cases such as *Matthewson*, where evidence of the desperate need for employment is led, is not to be regarded as a basis for judicial interference in the bargain, for this would hamper the freedom and autonomy of the individuals and the unfettered operation of the market. When taken to its extreme, as in *Machtinger*, this view leads the court to find that a termination provision depriving an employee of any notice whatsoever must be accepted as revealing the free will and intention of the employee as well as the employer. Hence, it will be enforced as far as possible, even where it contravenes the legislated standards for minimum notice on termination, a violation of employment standards that one might have thought was a persuasive indication of unequal bargaining power and oppression by the employer.[46]

The cases also reveal continuing strong status or class-consciousness on the part of judges in their treatment of wrongful dismissal issues generally, and, more particularly in their enforcement of harsh termination provisions. Both

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[45]Jacoby, *supra*, note 34 at 102. Jacoby concludes that for manual workers:

> Long notice periods did not represent a form of security but were a vestige of servility that could be used to weaken trade unionism. The manual workers' security was determined by the strength of the closed shop in his trade. He did not have to depend on the courts for employment security, nor were the courts very dependable, as they awarded only very slight damages to a worker dismissed without notice.

[46]A rather peculiar argument often used by the courts in these cases is that fairness or unconscionability has to be determined by what the parties would have thought about the fairness of the notice provisions as judged at the time of entry into the bargain. For example, there is the simplistic assertion in *Wallace* that no one would have found a provision for four weeks notice unreasonable when the employee is just starting with the employer or during the first year or two of employment, so the term cannot be judged unfair or unreasonable. But surely this is to ask the wrong question. For the pertinent question should be whether at the time of hiring a well informed employee would have regarded a provision limiting him to only four weeks notice should the employer terminate him after eight or ten or twelve years service with the company as a fair and reasonable provision. Similarly in *Machtinger* the relevant question would be whether a person being hired as a car salesperson would consider a provision entitling the employer to dismiss him without notice after seven years to be an unfair provision.

Wallace[47] and *Machtinger*[48] suggest that the only circumstance in which a harsh termination clause will be held unenforceable on the basis of unconscionability is where:

> an employee's level of responsibility and corresponding status has escalated so significantly during his period of employment that it can be concluded that the substratum of an employment contract entered into at the time of his original hiring has disappeared or it can be implied that the contract could not have been intended to apply to the position in the company ultimately occupied by him.[49]

What is notable is that it is elevation in job status, and not length of service, which will win the sympathy of the court. This is, perhaps, understandable given the importance of status-consciousness on the part of judges in the development of the implied requirement for reasonable notice at common law[50] and the continued significance of job status as one of the most important variables in contemporary judicial determinations of reasonable notice.[51] There has always been a curious irony to the courts' greater recognition of the interests of higher status or upper class callings. Greater protection was provided to those least in need of it, in terms of their ability and bargaining power to negotiate better express contractual terms to protect their job security and their general economic capacity to survive the consequences of dismissal.[52] The same irony can

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[47]*Supra*, note 2 at 180-81 (C.A.).

[48]*Supra*, note 1 at 551.

[49]*Wallace*, *supra*, note 2 at 180-81 (C.A.).

[50]See discussion *supra*, note 44 and accompanying text. The courts' failure to protect the job security interests of lower status workers (the vast majority of workers) at common law following the transition of the relationship to one of contract was the primary cause of employment standards legislation to provide some minimum notice protection. The courts and the common law have traditionally been a viable and responsive process for only the higher status occupations. Other workers have had to rely on more democratic processes, legislatures and collective action through unions, to protect their job security interests.

[51]McShane, *supra*, note 33 at 622, 627, 629. For a recent example of the importance of job status, see *Augustine* v. *Nadrofsky Corp.* (1986), 17 O.A.C. 297 (Div. Ct.), where on appeal a shop helper's trial award of 4 months notice was reduced to 2 months, in large part because of "the nature of [his] employment, that of a semi-skilled employee" (at 298).

[52]I am aware of the putative rationale offered for this preferred treatment on the basis of job status. It has been suggested that the principal reasons for longer notice periods for those higher up on the employment scale are that there are fewer openings for alternate employment at the top of the scale, persons with higher job status are in positions of greater risk and need greater protection so they are not discouraged from accepting or continuing in such positions, and finally "a person holding a job of higher status is a person of higher qualification and entitled to greater reward for his work." See *Collins* v. *St. John's Publishing Co.* (1980), 27 Nfld & P.E.I.R. 45 at 56-57, 74 A.P.R. 45 (Nfld S.C.T.D.), quoted in McShane, *supra*, note 33 at 622. All of these premises are questionable as rationales for longer notice periods for a long-term executive than a long-term manual or semi-skilled worker and may depend heavily on changes in job market conditions from time to time. The last premise concerning people of higher job status being more deserving is not only revealing of status and class-consciousness in judges but also fails to recognize that gross dis-

be noted in the trend in the harsh termination cases to offer the courts' assistance to those who have risen during the course of employment to senior or high status positions. These persons are far more likely to enjoy at least some bargaining power, enabling them to renegotiate harsh provisions in their original contract as they rise through the ranks. Further, they are more likely to have reason to think about the renegotiation of terms in general than employees who may serve a long time with little change in job status. And they should also be better situated to handle the economic consequences of dismissal than less upwardly mobile employees. Status-consciousness appears to be the only explanation that can account for supporting a clause which limits an employee to only four weeks' notice after twenty-five years of faithful service in the same position, while invalidating the same provision when it applied to an employee with several years of service (i.e. eight to ten) who had risen from sales person to senior vice-president. The employee in both cases, if made aware of the consequences, would surely have said the clause was unreasonable and unfair at the time of hiring.

These significant developments cast doubt on the wisdom of recent suggestions that the courts and the common law can be looked to for better protection of the employment security interests of unorganized employees.[53] It was the apparent unwillingness of the courts to adapt the common law to protect the interests of employees with little bargaining power, and their creative transformation of the common law to impede employee efforts to take concerted collective action[54], that finally forced legislatures to act to protect employee interests.

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parities in rates of pay between low and high status workers will result in much greater rewards for high job status even if low status workers are given the same length of notice.

[53]See Swinton, *supra*, note 32 at 372-77. Swinton has called for the courts to reinterpret the implied contract for an indefinite duration to exclude the possibility of termination by reasonable notice. Instead they should imply at common law a term of "termination only for just cause", although perhaps adjusting the concept of just cause to include job redundancy or lack of work, as do the *Canada Labour Code* provisions for unjust dismissal protection of unorganized employees (R.S.C. 1970, c. L-1. as am. S.C. 1977-78, c. 27, s. 61.5 (3)(a)). Swinton's suggestion that the courts might provide this kind of protection at common law appears totally unrealistic in the face of decisions like *Machtinger* where the Court allowed its liberal values and assumptions to undermine a statutory directive to disregard a harsh termination provision.

[54]H.W. Arthurs, "'The Right to Golf': Reflections on the Future of Workers, Unions and the Rest of Us Under the *Charter*" in *Labour Law under the Charter: Proceedings of a Conference Sponsored by the Industrial Relations Center and Queen's Faculty of Law* (Kingston, Ont.: Queen's Law Journal, 1987). Arthurs first makes the point that the courts at common law "virtually never, not on any given occasion, created a right which might be asserted by or on behalf of working people" nor had they generally been willing to "venture to expand the range of rights and remedies available to anyone else" (at 18-19). Arthurs then continued:

> In this record of restrained and limited creativity, there has been one glaring anomaly, one arena of adjudication where the courts have been singularly inventive. I refer to the creation of rights and remedies to protect employers against labour and labour unions. Let me count the ways: (i) the labour injunction and its interim, interlocutory,

Legislatures acted on two fronts: first, they created a statutory framework for collective bargaining to allow for some degree of equalization of bargaining power which would hopefully result in fairer terms of employment; second, they enacted employment standards to provide certain minimum protections for both organized and unorganized employees in critical areas like job security, health and safety, workers' compensation and human rights (non-discrimination). The common law of wrongful dismissal did continue to develop in the years following these legislative initiatives. In fact, since the 1960's, it is commonly viewed as having progressed rapidly in ways favourable to individual employees as a result of the judiciary's paternalistic protection of greater job security in the form of longer notice periods and a wider range of damages. However, as I have noted, the emphasis on job status ensures that these improvements in job security have not been significant for the vast majority of employees who are most in need of protection. Although a small number of employees from the upper echelons of the occupational hierarchy have gained from these developments, for the multitude outside this select group the courts remain an expensive forum to enter particularly since the returns granted by judges are usually too small to make court action a realistic option.[55] The result is that the vast majority of employees must continue to rely on collective bargaining or employment standards legislation to provide protection for their employment security interests.

Nor does this historical experience and the recent caselaw on enforcement of harsh termination provisions give employees any hope that the recent Ontario

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ex parte and *quia timet* varieties; (ii) the torts of conspiracy, inducing breach, intentional interference, nuisance and *per se* illegality; (iii) civil remedies to enforce regulatory statutes with their own criminal or administrative remedies; (iv) the proscription of organizational, secondary, and political pressures in order to either give effect to labour relations acts or remedy their presumed omissions; and, (v) the restraining of individuals who are strangers to proceedings, the imposition of civil liability on entities otherwise unknown to law, and the enforcement of service obligations not enforceable in other contexts. (at 19)

[55]The need to provide more meaningful protection for employment security for unorganized employees than that provided at common law has led several Canadian jurisdictions to enact statutory protections against dismissal without just cause for unorganized workers who meet some minimum threshold of service time with the employer. These jurisdictions have also created an inexpensive and accessible administrative mechanism to allow employees a practical process for the enforcement of these new statutory rights. See *Canada Labour Code*, R.S.C. 1970, c. L-1, as am. S.C. 1977-78, c. 27, s. 61.5; *Quebec Labour Standards*, S.Q. 1979, c. 45, as am., s. 124; and *Nova Scotia Labour Standards Code*, S.N.S. 1972, c. 10, as am., s. 67a. These provisions are discussed in Swinton, *supra*, note 32 at 373; G. England, "Recent Developments in Wrongful Dismissal Law and Some Pointers for Reform" (1978) 16 Alta. L. Rev. 470, and "Unjust Dismissal in the Federal Jurisdiction: The First Three Years" (1982) 12 Man L.J. 9; and R. Litwack, "Firing May Mean Rehiring: Federal Legislative Changes to the Law Concerning Wrongful Dismissal" (1986) 20 R.J.T. 55.

Law Reform Commission proposal[56] — that judges be given a wide-ranging mandate to apply a more "clearly" (statutorily) defined general doctrine of unconscionability to police the fairness of all contracts in the marketplace[57] — will be more successful in protecting their employment security interests. Without wishing to rehash the long term debate amongst contract academics about the wisdom of courts taking general jurisdiction to interfere on the basis of fairness or unconscionability,[58] it is apparent even from a cursory reading of the recommendations, that the enumeration of the twelve suggested non-exclusive factors for guidance in determining unconscionability will do little to increase certainty in the doctrine's application or to restrain judicial discretion in terms of which interests will ultimately be protected. As Professor Vaver has pointed out, the OLRC's claim that under its recommendations judges will not be able "to impose their view of public policy on the market place"[59] rings hollow:

> Judges are already imposing these views without unconscionability; why would they not do so *with* the doctrine? Moreover, one avowed purpose of the OLRC Report was to encourage judges to declare openly their views instead of using covert tools. It is not clear that the Report invites them to *change* their views; if so, the invitation is discreetly veiled. In the end, it is likely to be some expressed or unexpressed judicial ode to individual liberty or to collective responsibility as a

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[56]Ministry of the Attorney-General, *Report on the Amendment of the Law of Contract* (1987), c. 6. At 136-37, the Commission recommends the enactment of a doctrine of unconscionability setting out a list of twelve non-exclusive factors which a court might consider to decide whether terms should be enforced. The doctrine is to be applicable to all contracts but does not indicate any priority or weighting of the suggested factors, which had been gleaned from Canadian, Australian, and U.K. statutory precedents.

[57]For an excellent critical assessment of the recommendations see D. Vaver, "Unconscionability: Panacea, Analgesic or Loose Can(n)on?" (1988) 14 Can. Bus. L.J. 40.

[58]For arguments on all sides of the general issue, see articles from the Symposium on Unconscionability in Contract Law, published in (1979-80) 4 Can. Bus. L.J. 383 *et seq.* See, in particular, R. Hasson, "Unconscionability in Contract Law and in the New Sales Act — Confessions of a Doubting Thomas" (at 383) for arguments against a broad discretionary mandate for judges to protect and further fairness in contracts under the rubric of unconscionability, and B. Reiter, "Unconscionability: Is there a Choice? A Reply to Professor Hasson" (at 403) for strong arguments in favour of judges playing an important role in policing and preserving our institutions for private ordering to accommodate efficiency and fairness concerns.

However, it is important to recognize that Professors Hasson and Vaver, although critics of judicial supervision under the guise of unconscionability at common law, are not strong supporters of the free market as a system of private ordering to determine questions of distributive justice. Rather their concern is with the appropriate institution for the working out and implementation of policy to deal with questions of distributive justice. Both appear skeptical of the ability and inclination of courts to develop solutions which are sensitive to the interests of all parties and collective interests. Further, they point to the undemocratic nature of leaving such questions to the courts. They are particularly concerned that giving the courts too prominent a role will deflect attention and responsibility from the democratic process which should be responsible for such issues.

[59]*Supra,* note 56 at 127-28.

> value to be promoted, rather than a turgid cogitation over unconscionability's 12 or more factors, that will dictate the result of an individual case.[60]

To put this point in more concrete terms, a court which enforces as far as possible — as an expression of the employee's actual intention — a provision in an indefinite term employment contract which denies any notice of termination, in contravention of a statutory minimum, is unlikely to find harsh termination clauses in employment contracts unconscionable under the wide discretion allowed by the OLRC proposals.

In the final analysis, there are non-judicial avenues workers can follow to seek enhanced job security. They can organize and seek protection through collective bargaining. They can seek legislative reform on a number of fronts, including the creation of government supported non-judicial mechanisms for the pursuit of unjust dismissal claims,[61] the enactment of a statutory right to employment security in the form of a right to dismissal for cause only (or for cause or redundancy only),[62] or the enactment of much longer minimum notice periods — based on years of service — than are presently guaranteed.[63] The latter type of legislative change is probably the most viable short-term strategy for increasing the employment security of those in "lower status" occupational groups and those least able to protect themselves from the consequences of inequality of bargaining power. Although legislative institutions are fraught with their own complexities and their inertia is a force to be reckoned with, the likelihood of success remains, as in the past, much greater than with the courts.

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[60]Vaver, *supra*, note 57 at 66-67.

[61]Similar mechanisms have been adopted in some Canadian jurisdictions. See discussion of Canadian, Nova Scotian and Quebec schemes referred to *supra*, note 55.

[62]See discussion in Swinton, *supra*, note 32, where argument for such was made primarily in relation to the possibility of courts implementing it at common law as an implied term in indefinite employment relationships. Of course this suggestion, as proposed by Swinton, would still enable employers to contract out of employment security for the worker in most cases, relying simply on their bargaining power.

[63]Professor Vaver has also proposed this solution as an example of how we can achieve better results in our attempts to correct imbalances in the contractual marketplace by focusing legislative attention on particular problem areas rather than giving broad discretionary mandates to judges. He proposed that the Ontario legislature amend its employment standards legislation to provide all employees with at least one month's notice for every year worked with an employer or associated corporation: *supra*, note 57 at 72.