

SUPREME COURT OF CANADA DECISIONS AND THE COMMON LAW OF EMPLOYMENT IN THE 1990'S: SHIFTING THE BALANCE BETWEEN RIGHTS AND EFFICIENCY CONCERNS?

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In this article, the author examines the decisions of the Supreme Court of Canada in the 1990's on the common law of employment to determine whether they are consistent with the view that we are in the midst of a shift from a rights paradigm to an efficiency paradigm in our approach to regulation of the employment relationship. The author begins by identifying the primary characteristics of the rights and efficiency paradigms. He notes that some academic writers have suggested that significant changes in our social and economic context since the 1980's have created pressures on our regulators to move toward the efficiency paradigm. He then moves on to an analysis of the Court's 1990's rulings on a variety of common law of employment issues to see if the Court has been affected by such pressures. The author concludes that there is little evidence of a recent shift on the part of the Court toward greater commitment to the tenets of the efficiency paradigm. Instead there is significant evidence of recognition on the part of members of the Court of the importance of the common law as a device to protect the interests of vulnerable employees in their dealings with employers.

Dans cet article, l'écrivain examine les décisions de la Cour suprême du Canada des années 90 en matière de droit du travail en common law. Il cherche à vérifier si elles sont cohérentes avec l'opinion selon laquelle nous nous trouvons en plein glissement d'un paradigme de droits vers un paradigme d'efficacité, dans notre approche de la législation sur la relation de travail. L'auteur commence par identifier les caractéristiques fondamentales des paradigmes de droits et d'efficacité. Certains universitaires, note-t-il, ont suggéré que des changements significatifs survenus dans notre contexte social et économique depuis les années 80 aient fait pression sur nos législateurs pour qu'ils évoluent vers le paradigme de l'efficacité. Puis il analyse les décisions de la Cour dans les années 90, sur un éventail de questions en droit du travail, afin de voir si elle a été affectée par une telle pression. L'auteur conclut qu'il y a fort peut de traces d'un glissement récent de la part de la Cour vers la doctrine de l'efficacité. Au contraire, on a la preuve que les membres de la Cour reconnaissent l'importance de la common law comme mécanisme pour protéger les intérêts des employés vulnérables dans leurs rapports avec leurs employeurs.

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I. Introduction

In the recently released third edition of *Employment Law in Canada*, Professor Geoff England posits the thesis that there is a paradigm shift underway in our approach to regulation of the employment relationship.¹ He argues that from 1950 until the late 1980's our legislators and courts were operating primarily under a "rights paradigm" in their approach to legal regulation of employment. Under a rights paradigm legislators and courts recognize significant employee interests and rights and are far more willing to intervene to protect those rights and interests, recognizing that employees will generally be quite vulnerable under a pure freedom of contract model in their dealings with employers who generally have far greater bargaining power than their employees. Adherence to the rights paradigm is evidenced by tremendous growth in human rights, employment equity, and employment standards legislation, the adoption of the *Charter of Rights and Freedoms*, the growth of more employee interest based doctrines under labor arbitration for organized employees, and the development of more employee-friendly contract and tort law doctrines.² However, England suggests that by the late 1980's significant changes in our social and economic context were putting pressure on our regulators to move toward a new "efficiency paradigm". Globalization of capital and industry, technological change, and new free trade arrangements have created significant pressures on employers, legislators and courts to adopt a new approach to regulation of the employment relationship. Government policy statements and mainstream media culture are rife with expressions of the values of the efficiency paradigm. This paradigm gives preeminence to the values of the market and freedom of contract and insists that employment law should not interfere significantly with the operation

¹ England, Christie and Christie, *Employment Law in Canada*, 3d. ed. (Butterworths, Looseleaf, 1998) at para. 1.1 to 1.52.

² Examples could include extension of the period of reasonable notice for termination, extending categories of damages for wrongful dismissal by awarding aggravated damages for mental distress and punitive damages, interpreting harsh contract provisions concerning termination against the employer's interests or refusing to enforce them, raising the standard for just cause in areas such as incompetence or obedience and fidelity, recognition of some form of implied duty of fairness on the part of the employer, and recognizing potential liability in tort for negligent representations by the employer.

of market forces to determine terms and conditions of employment. Freedom of contract should generally be allowed to enable employers to organize their workforces in a manner which provides for the greatest flexibility, efficiency and productivity. This will enable them to preserve and enhance their competitiveness in the new economy. When courts or regulators are faced with choices concerning interpretation of a contract or application of a common law doctrine they should opt for the interpretation or application which will maximize efficiency and competitiveness. So, for example, damage awards for wrongful dismissal should not be allowed to rise too high lest the costs of terminating employees become prohibitive and interfere with the flexibility of an employer to downsize to remain competitive.³ Adherents to the efficiency paradigm would not welcome judicial recognition of an implied obligation of fairness on the part of the employer because of the potential for increased uncertainty and cost in employer reorganization and downsizing decisions.

The notion that the development of common law principles and values will be influenced and transformed by changes in the socio-economic context and the thoughts of writers on the political economy has been put forward in some of the most compelling works on legal history. In *The Rise and Fall of Freedom of Contract*, Atiyah describes how the ascendancy of legal formalism and the rise of freedom of contract was influenced by the growth of economic liberalism in English society and the growing popularity of the ideas of writers like Adam Smith and Ricardo before and during the industrial revolution.⁴ Morton Horwitz provides an overview of the interaction between the development of a market economy and the development of contract and commercial law doctrines which would serve interests of such an economy in *The Transformation of American Law 1780-1860*.⁵ If our past is a guide to our future, we should not be surprised if Professor England's suggestion that a transformation is currently underway in the approach of our courts to regulation of employment law issues turns out to be accurate.

My objective in this paper is to analyze the decisions of the Supreme Court of Canada in the 1990's for their consistency with the thesis that we are in the midst of a shift from a rights paradigm to an efficiency paradigm in our approach to regulating the employment relationship. To what extent has the Supreme Court been bitten by the efficiency bug? My conclusion is fairly straightforward. With one notable exception there is little evidence of any commitment to the tenets of the efficiency paradigm in the Court's decisions in the 1990's. But

³ See for example the reasoning of Lacourciere J.A. in *Cronk v. Canadian General Insurance Co.* (1995), 128 D.L.R. (4th) 147 (Ont. C.A.). He rejects the rights based reasoning of Macpherson J. at trial for longer notice periods for lower status employees on the basis of the prohibitive costs and uncertainty this would create for employers in the new economy.

⁴ Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979).

⁵ Horwitz, *The Transformation of American Law 1780-1860* (Cambridge: Harvard University Press, 1977).

there are several strong statements by the Court which can be interpreted as evidence of renewed support for recognition of the significance of employment and the method and consequences of termination of employment for the average employee. And the Court has, on more than one occasion, recognized the importance of the common law as a device to protect the interests of vulnerable employees in their dealings with employers. Lets look at the cases.

(i) *Machtinger v. HOJ Industries Ltd.*⁶

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*.⁷ At the time of dismissal 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*.⁸ 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.

The Ontario 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. Howland C.J.O., writing for the panel, acknowledged 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. 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 whatsoever it must mean, at minimum, that there is no express contractual legal limitation on the notice to be provided. Nevertheless, Howland C.J.O. held that although the harsh termination provisions were null and void they could still be used as evidence of the parties' true intentions concerning termination and in the circumstances no entitlement to reasonable notice at common law could be implied. Both plaintiffs were only entitled to the statutory minimum under the *Employment Standards Act*.⁹

⁶ [1992] 1 S.C.R. 986.

⁷ S. 57(1)(c), R.S.O. 1990, c. E.14.

⁸ 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.

⁹ (1988), 66 O.R. (2d) 545, at 549-50.

This decision represented the high water mark of a number of Ontario Court of Appeal decisions in the 1980's which gave preeminence to freedom of contract in determining arguments concerning the enforcement of harsh termination provisions in employment contracts.¹⁰

At one level the Supreme Court's decision to reinstate the reasonable notice damages award of the trial judge is merely a straightforward application of the null and void provisions of the *Employment Standards Act*. If a contract provision is null and void for contravention of employment standards legislation it is contrary to that legislation to give it effect to displace the implied obligation to provide reasonable notice at common law. But the case has far greater significance because of the statements made by Iacobucci J., on behalf of the majority, concerning the policy considerations which should guide the Court's interpretation of the legislation and application of common law doctrines. He began by recognizing the importance of work to the individual employee as "an essential component of his or her sense of identity, self-worth and emotional well-being."¹¹ He went on to add, "... not only is work fundamental to an individual's identity, but also that the manner in which employment can be terminated is equally important."¹² Employment standards legislation is remedial legislation designed to protect minimum standards for individual employees who are often in an unequal bargaining position in relation to their employers under a purely contractual approach. Iacobucci J. recognized that many individual employees will be vulnerable to abuses of the legislation because of unequal bargaining power and lack of knowledge of their statutory and common law rights. Because of this, the Court should interpret the legislation and apply the common law doctrine concerning reasonable notice in a manner which will encourage employer compliance with the legislation and

¹⁰ The Court upheld harsh termination provisions under the rubric of freedom of contract and rejected arguments concerning the unenforceability of such clauses (unconscionability, contra proferentum, lack of consensus ad idem) that had been successful in courts in other provinces. See *Jobber v. Addressograph Multigraph of Canada Ltd.* (1980), 10 B.L.R. 278 (Ont. S.C.), rev'd (1983), 1 C.C.E.L. 87 (Ont. C.A.); *Wallace v. Toronto Dominion Bank* (1981), 39 O.R. (2d) 350 (S.C.), rev'd (1983), 41 O.R. (2d) 161 (C.A.); *Mathewson v. Aiton Power Ltd.* (1984), 3 C.C.E.L. 69 (Ont. Dist. Ct.), rev'd (1985), 8 C.C.E.L. 312 (Ont. C.A.). For commentary on these cases see Etherington, "The Enforcement of Harsh Termination Provisions in Personal Employment Contracts: The Rebirth of Freedom of Contract in Ontario" (1990), 35 McGill L.J. 459.

¹¹ Iacobucci J. quoted this from Dickson C.J.'s dissent in *Reference Re Public Service Employee Relations Act* (Alta), [1987] 1 S.C.R. 313, at 368. Similar sentiments were reiterated by Dickson C.J. in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. In *Slaight* the Chief Justice adopted the view of David Beatty that "labour is not a commodity", restated his position from *Reference Re Public Service Employee Relations Act* (Alta) that a person's employment is essential to his or her identity, self-worth and emotional well-being, and held that viewing labour as a commodity is inconsistent with that perspective. These views were also reiterated and endorsed by Madame Justice Wilson in *Lavigne v. OPSEU*, [1991], 2 S.C.R. 211. See also Beatty, "Labour is not a Commodity", in Reiter and Swan (eds.), *Studies in Contract Law* (1980).

¹² Machtinger, *supra* note 6 at 1002.

protection of employee rights. The decision of the Supreme Court would provide much greater incentive to the employer to observe the protections for employee rights under the Act.¹³

This is a decision which fits much more comfortably within the rights paradigm. The Court had before it a strong example of a freedom of contract, efficiency based approach in the judgment of the Ontario Court of Appeal. This was rejected in favour of a decision concerning the interaction of employment standards and common law that recognizes the vulnerability of employees under a freedom of contract approach and opts for maximizing the protection of employee rights both at common law and under the employment standards legislation.

(ii) *Queen v. Cognos Inc.*¹⁴

The employer was an Ottawa-based computer software company. It advertised for an accountant to help with a new project to develop a particular line of accounting software. Queen, a chartered accountant for eight and a half years, applied and interviewed for the position. At the time, he was living in Calgary with his family and had a well-paid and secure managerial position. During the interview, the employer representative (Johnson) told Queen that the project in question was a major one which would be developed over a period of two years and would be maintained and enhanced after that period. Queen was not told that there was no guarantee of funding for the project or that the position he was applying for was subject to budgetary approval by senior executives at Cognos. Queen was offered and accepted the job of Manager, Financial Standards. He signed a written employment contract which allowed Cognos to terminate him without cause, or reassign him to a new position within the employer's operation with no reduction in salary, upon one month's notice or payment of one month's salary in lieu of notice.

Queen started work for Cognos in April 1983. The project for which Queen was hired was not approved and he was assigned other duties. In July 1984, Queen received a notice of termination effective October 25, 1984. He worked until that day and was paid until November 15, 1984. Queen commenced an action against the employer for negligent misrepresentation, founded solely in tort, arguing that the elements required for such liability under the *Hedley Byrne & Co. v. Heller & Partners Ltd.* decision were present.¹⁵ The trial judge found in favour of the plaintiff and awarded \$67,224 in damages.¹⁶ The Ontario Court of Appeal set aside the judgment and dismissed the action, ruling that to the extent *Hedley Byrne* principles were applicable to the pre-contractual

¹³ "... an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not." *Ibid.* at 1003.

¹⁴ [1993] 1 S.C.R. 87.

¹⁵ [1964] A.C. 465 (H.L.).

¹⁶ (1987), 63 O.R. (2d) 389, per White J.

representations the employer's representative had not breached the standard of care because he had acted in good faith. The Court of Appeal further held that the termination and change of duties provisions of the subsequent contract constituted an effective disclaimer of the representations made as to the existence and nature of the job Queen accepted.¹⁷

The Supreme Court, Iacobucci J. writing for the majority, held that all the elements required for liability under *Hedley Byrne* were satisfied and reinstated the trial judgment. Given the special relationship between employers and employees, employers have a duty to ensure that any pre-contractual representations made are accurate and not misleading. The employer owed Queen a duty to use reasonable care and diligence in making representations concerning employment. In failing to tell Queen that the position he was applying for was dependant on financing for the project being approved, the company negligently misrepresented the nature and existence of the position offered. Johnson knew that Queen would be relying on the information he provided during the interview to make his decision as to whether he should quit his job and move his family to Ottawa to work for Cognos. The Court found that Johnson knew, or ought to have known, that approval for the project was uncertain and there was considerable risk that senior management would not give the required budgetary approval. The employer had misrepresented the nature of the position and was therefore liable in tort for the damages suffered by Queen.

The Court also found that the fact that Queen had signed an employment contract did not negate or limit his claim for negligent misrepresentation in tort. Iacobucci J. rejected outright the argument of the Ontario Court of Appeal that the termination notice and change of duties clauses of the subsequent contract could be interpreted broadly as terms which contradicted or were inconsistent with the pre-contractual representations. A subsequent contract between the parties may limit the liability of the employer in tort, but only if the contract either creates a situation of concurrency by expressly incorporating the pre-contractual representation as a term of the subsequent contract,¹⁸ or expressly and specifically negates the pre-contractual promise. The termination and change of duties clauses in the contract were not general limitations clauses relating to employer negligence in pre-contractual statements and were not inconsistent with the specific misrepresentations made by the employer in this case. The misrepresentations alleged by the plaintiff related to the nature and existence of the employment opportunity offered, not the plaintiff's security of employment or the terms under which his employment could be terminated or changed fundamentally.¹⁹

This is another decision in which it is difficult to find support for the efficiency approach to employment law issues. The Court does recognize

¹⁷ (1990), 74 O.R. (2d) 176, per Finlayson J.A.

¹⁸ See discussion of concurrency and implications for tort liability in *Queen*, *supra* note 14 at 112-15, and see *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147.

¹⁹ *Queen*, *supra* note 14 at 138-40.

freedom of contract to the extent of its recognition that an employer could carefully draft a limitation clause in the subsequent contract to protect itself from liability in tort. However, the Court expressly rejected the more efficiency oriented findings of the Court of Appeal concerning the standard of care to be expected of employers in these situations and the stringency of the construction of potential limitation clauses in the employment contract itself. On both of these critical issues the Court opted for the trial judgment's positions which were far more concerned with protecting employee interests in a context in which employees are generally quite vulnerable to employer misrepresentations.

(iii) *Farber v. Royal Trust Co.*²⁰

Farber began working for the Royal Trust Co. in November 1966 as a real estate agent. Farber was an excellent employee who was promoted on several occasions prior to his dismissal. In 1982, he was promoted to regional manager for Western Quebec, a position which required him to supervise and administer 21 offices employing more than 400 real estate agents and 35 secretaries. In 1983, Farber's region generated more than \$16,000,000 in sales. His remuneration was \$150,000 for that year, made up of \$48,000 in guaranteed base salary plus commissions and benefits. In June 1984, the employer, as part of a major restructuring, decided to eliminate 11 of its 12 regional manager positions, including Farber's. Royal Trust offered Farber financial compensation and a manager's position at the Dollard branch, a position he had held eight years earlier. The financial compensation being offered included \$40,000 as a one-time reorientation allowance payable within 2 years, and a higher than normal commission for two years on the net commissions of the real estate agents at the Dollard branch. Farber was not offered any guaranteed base salary for the new position.

Farber was aware that the Dollard branch was one of the least profitable in the province. In 1983 it had only 22 real estate agents with low levels of sales. Farber considered the new position unacceptable and initiated discussions with the company to see whether he could be appointed manager of a more profitable branch or receive a guaranteed base salary for the following three years. Based on the information available at the time of restructuring, he believed that his remuneration would be cut in half. Royal Trust told Farber to assume his new position or it would assume that he had resigned. Farber refused to go to the Dollard branch and sued Royal Trust for damages for constructive dismissal.

Evidence at trial showed that sales at the Dollard branch increased dramatically after Farber left and that Farber's earnings would not have dropped

²⁰ [1997] 1 S.C.R. 846.

if he had accepted the new position. Primarily on the basis of this evidence concerning compensation, the trial judge dismissed the action, finding that the employer's offer of reassignment to Dollard was reasonable in the circumstances. The dismissal of the action was upheld by a majority of the Quebec Court of Appeal.²¹ Although the case fell to be decided under the provisions of the Civil Code of Quebec, both the Quebec Court of Appeal and the Supreme Court of Canada recognized that principles concerning constructive dismissal were similar or identical under both legal systems and thus common law precedents could be useful to help resolve the case.

The Supreme Court of Canada held that where an employer makes substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves the job, the employee has been constructively dismissed. To determine if the employer's changes substantially alter the essential terms of the contract, a judge must ask whether, at the time the offer was made, a reasonable person in the same circumstances as the employee would have felt that the essential terms had been substantially changed. The new position offered to Farber was a substantial change sufficient for constructive dismissal on two fronts. The new assignment involved a significant demotion for Farber due to the drastic cut in responsibilities assigned to him, resulting in a considerable loss of status and prestige. The change from a base salary plus commission to remuneration based totally on commissions was also very significant. Farber acted reasonably based on information available at the time he was faced with the choice of whether to accept the new assignment. The test of whether the reasonable person would have considered that there had been a substantial change to essential terms of the contract had to be based on what the employee knew or ought to have foreseen *at the time of the changes*. Royal Trust had constructively dismissed Farber.

Farber was entitled to compensation in lieu of notice. Since the purpose of remuneration in lieu of notice is primarily compensatory, it must be fair and reasonable in light of all the circumstances and should be based on the value of the employee's remuneration prior to the constructive dismissal. The Court awarded Farber \$150,000 as one year's remuneration in lieu of notice.

In holding that the test of substantial alteration of essential terms was appropriate for constructive dismissal, Gonthier J. relied on a quote from a treatise on Quebec employment law which emphasized the employee interests at stake in changes to positions and duties of employment.

Moreover, to what extent can the employer change the nature of the employee's work or the employee's duties and responsibilities? This issue is increasingly important, *inter alia* because it is often an essential consideration for employees

²¹ [1995] Q.J. 466 (C.A.).

in their employment that they be able to do the job for which they were hired, given both the satisfaction they legitimately wish to derive from it and their concern to maintain and develop their qualifications and skills in their field of work.²²

Unfortunately the Supreme Court refused to rule on the question of whether Farber should have his damages reduced by the amount he would have earned if he had accepted the new position because he should have accepted the offer under his duty to mitigate his damages. The Courts of Appeal in several provinces have now held that despite a finding of constructive dismissal the dismissed employee may be under a duty to accept the new position under his or her obligation to mitigate damages. Gonthier J. said that he could not consider that argument because it was raised for the first time at the hearing in the Supreme Court without notice. Because of the controversy surrounding this issue in several provinces, guidance from the Supreme Court would have been examined closely.²³

The doctrine of constructive dismissal is an area where Professor England has argued that the efficiency paradigm will require some relief from the purely contractual approach applied by courts in the past to give employer's more flexibility to restructure and reorganize employment duties. He is able to point to some evidence in recent decisions in courts in some provinces indicating a move to more flexibility for changes in assigned duties or geographical location. Also, the decision in some cases to impose an obligation on the constructively dismissed employee to accept the new position under the duty to mitigate damages appears to recognize the efficiency concerns of employers, albeit indirectly. Nevertheless, the ruling in *Farber* is a fairly straightforward application of the traditional contractual approach which favours protection of the employee's contractual rights in the struggle to find a balance between those rights and the employer's management rights in constructive dismissal cases. Once again lower court decisions which appeared to reflect the efficiency concerns of the employer were rejected in favour of protection of employee interests. Of course the Court's ultimate position on the duty to mitigate in constructive dismissal situations will be even more revealing of its commitment to one paradigm or the other.

(iv) *Sylvester v. British Columbia*²⁴

Sylvester worked for the Government of British Columbia under an oral contract of employment. On June 1, 1992, Sylvester became ill and

²² Farber, *supra* note 20 at 859, quoting from P. Gagnon, *Le droit du travail du Québec: pratiques et théories*, 3^e ed. (Montréal 1996) at 66.

²³ See discussion of these issues in England et. al., *supra* note 1 at paras. 13.68 and 16.74 - 16.80. See *Mifsud v. MacMillan Bloedel Inc.* (1989), 28 C.E.L. 228 (Ont. C.A.).

²⁴ [1997] 2 S.C.R. 315.

started receiving short-term disability benefits pursuant to the Short Term Illness and Injury Plan (STIIP). Sylvester received \$33,688.04 under the STIIP from June 1, 1992 to December 31, 1992. He also received benefits under a Long Term Disability Plan (LTDP) from Jan. 1, 1993 to Dec. 31, 1993. Both the STIIP and LTDP were funded entirely by the Government of British Columbia. Employees did not contribute directly to these plans.

On July 23, 1992, Sylvester was notified that he would be terminated because of reorganization. The Government of British Columbia offered Sylvester a severance payment of 12.5 months, less any disability benefits received during that time. Sylvester sued the Government of British Columbia for wrongful dismissal. He claimed damages consisting of the salary for a 24 month period of reasonable notice, without deduction for disability benefits received during that period. The trial judge awarded Sylvester damages for a 15 month notice period, less the disability benefits received during that period. At the Court of Appeal, Sylvester was awarded damages equivalent to his salary for a period of 20 months, with no deduction for disability benefits received during that period.

The Supreme Court of Canada, with Major J. writing for a unanimous Court, held that an employee who is wrongfully dismissed without adequate notice is entitled to damages consisting of the salary the employee would have earned had the employee worked during the notice period. The fact that the employee could not have worked during the notice period is irrelevant to the measure of damages. Sylvester was not entitled to receive disability benefits in addition to compensation for salary during the notice period. The Court said its findings were based on the terms of the employment contract and the intentions of the parties. The Court found that in Sylvester's case, the short and long term disability plans were not separate contracts from the employment contract but rather were integral components of it. The disability benefits were intended to be a substitute for Sylvester's regular salary. Therefore, paying disability benefits as well as damages for wrongful dismissal was inconsistent with the employment contract. The Court concluded that, absent an intention by the parties to provide otherwise, employees who are dismissed should be treated equally whether they were working or receiving disability benefits at the time of termination. Disability benefits should be deducted to ensure that all employees receive equal damages consisting of damages for the appropriate notice period.

The Court was concerned that employers who establish disability benefit plans which they are fully funding should not be required to pay more to employees upon termination than employers who do not set up such plans. However, Major J. made it clear that his judgment did not address the case where an employee contributes to the cost of the disability benefit plans or where there is a third party insurer.

The Supreme Court's decision in *Sylvester* appears to overrule the position adopted by courts in Ontario and several other provinces to view disability

benefits and payment for reasonable notice on termination as arising from two separate and independent rights of an employee under the employment contract. This position was best represented by the Ontario Court of Appeal decision in *McKay v. Camco Inc.*²⁵. In *McKay* Blair J.A. held that both types of payments were recoverable because they served different purposes and were based on different legal rights under the contract. Disability benefits are provided to maintain an employee's income during a period of disability, whereas the requirement to provide reasonable notice is to give the dismissed employee an opportunity to find other employment while he or she is ready and able to work. If disability payments are deductible from damages for reasonable notice the right of the employee to reasonable notice will be completely frustrated because the employee would be unable to use it to search for employment while he or she is disabled.²⁶

Undoubtedly *Sylvester* is the strongest example among recent Supreme Court decisions of adherence to the efficiency paradigm put forward by Prof. England. The Court appears to reject the focus on protection of employee rights that was front and center in the *McKay v. Camco Inc.* decision. The Court stresses adherence to a freedom of contract model that allows the parties' intentions to determine entitlement to the different types of payments on termination. But even more significantly, Justice Major's decision deals expressly with the cost concerns of employers surrounding the termination of disabled employees. He addresses concerns about unfairness to employers with disability plans because they will have higher costs on termination than employers who do not have such plans.²⁷

Major J. also applies a very outmoded formalistic notion of equality to suggest providing both types of payment would lead to inequality between disabled and non-disabled employees because the disabled employee would receive more compensation upon termination. The notion that equality requires both disabled and non-disabled employees to be treated in identical fashion upon termination appears somewhat questionable given modern notions of equality adopted by the Supreme Court which recognize that in some cases providing real equality requires us to recognize differences and accommodate those differences to avoid adverse effect discrimination. In some respects this is what the *McKay* decision was about with its recognition that the disabled worker should be entitled to both types of payment on termination because he or she could not exercise the right to search for employment during the period of reasonable notice. But the failure of Major J. to recognize and apply more modern notions of equality

²⁵ (1986), 53 O.R. (2d) 257 (C.A.).

²⁶ *Ibid.* at 269. For a detailed discussion of the impact of *Sylvester* on the deductibility of disability benefits and other types of payments for disabled or unemployed workers see Payne, "Terminating the Disabled Employee in Ontario: Assessing the Impact of *Sylvester v. British Columbia* (1998), 6 C.L.E.L.J. 99.

²⁷ *Sylvester*, *supra* note 24.

is quite consistent with rejection of a rights paradigm approach and movement towards an efficiency based approach. The absence of discussion of the "vulnerability" of the sick or disabled employee at the time of termination in the *Sylvester* decision is quite notable when one considers that the vulnerability factor emphasized by the Court in *Machtinger* and *Wallace* would likely be more pronounced in the case of employees who are in receipt of disability benefits at the time of termination.

(v) *Wallace v. United Grain Growers Ltd.*²⁸

The decision in *Wallace* dealt with issues concerning whether employers can be held subject to an implied duty of fairness and good faith in dealings with their employees and the limitations on recovery of damages for mental distress and punitive damages in wrongful dismissal suits. In 1972 the marketing manager of the defendant employer's publishing and printing divisions contacted Wallace to discuss possibilities of employment. Wallace explained that given his age (45) and 25 years experience working for a competitor, he wanted a guarantee of job security before he would leave his employer to join the defendant firm. Wallace also asked for several assurances from the marketing manager on fair treatment and remuneration. Wallace received the assurances he sought and was told by the employer's representative that if he performed as expected, he could work for the company until retirement.

Wallace made the move to United Grain Growers and was its top salesperson for each of the next 14 years. In 1986 Wallace was summarily discharged without explanation, just a few days after he had been complimented on his work by his supervisor and sales manager. Since Wallace had made a voluntary assignment into personal bankruptcy prior to his dismissal, he launched a wrongful dismissal action while an undischarged bankrupt. In its statement of defence, the company alleged that Wallace had been dismissed for cause. The allegation was without basis but the employer continued to use hardball tactics and refused to drop the allegation until the eve of trial to pressure the plaintiff to drop his suit. As a result of the termination and the allegation of cause, Wallace suffered emotional difficulties and received psychiatric treatment. Because of the employer's improper treatment and its consequences, Wallace sought to recover aggravated damages for mental distress and punitive damages in addition to reasonable notice damages.

The trial judge held that the plaintiff lacked capacity to maintain the action as an undischarged bankrupt but determined that damages of 24 months salary for reasonable notice and \$15,000 for mental distress would be appropriate in

²⁸ [1997] 3 S.C.R. 701. See O'Byrne, Comment, (1998), 77 Can. Bar Rev. 492.

the event he was wrong on the issue of capacity to sue.²⁹ The Court of Appeal found for the plaintiff on the capacity issue but ordered a reduction in damages to 15 months salary for reasonable notice. It also quashed the award for damages for mental distress because the *Vorvis*³⁰ requirement — that the plaintiff must prove the existence of an actionable wrong independent of the contractual duty to give reasonable notice to succeed on such a claim — could not be met on the facts of this case.

The majority of the Supreme Court of Canada held that Wallace could maintain, as an undischarged bankrupt, an action for wrongful dismissal in his own name, and restored the trial judge's award of 24 months damages for the appropriate period of reasonable notice. The majority considered the following factors in awarding Wallace a lengthy period of notice: his advanced age; his 14 years of service; his limited prospects for re-employment; and the fact that he had been induced to leave previous secure employment. Iacobucci J., writing for the majority, also noted that while the promises of job security used to induce Wallace to come to the employer were not sufficient to constitute a contract of employment until retirement, they could nevertheless be a factor in lengthening the period of reasonable notice.

The majority noted the large amount of criticism of *Vorvis*³¹ but confirmed the holding in *Vorvis* that precluded the award of damages for mental distress or punitive damages in actions for wrongful dismissal unless the plaintiff could prove an independently actionable wrong. Iacobucci J. rejected the notion of a general implied duty of good faith and fair dealing on the part of the employer, either as an implied term of the employment contract or a tort duty. Thus there could be no independently actionable wrong of bad faith discharge sounding in contract or tort to satisfy the requirements of the *Vorvis* doctrine and enable recovery for aggravated damages. The majority expressed concern that the imposition of an implied duty of fairness in termination situations could unduly interfere with the flexibility of employers to determine the composition of its own workforce. Mr. Justice Iacobucci was concerned with the potential for interference with the employer's traditional right at common law to terminate the employment relationship provided that appropriate notice was given. The implication of such a duty under contract or tort law would constitute radical change and should be left to legislative pronouncement if it is to be done.³²

²⁹ (1993), 87 Man. R. (2d) 161 (Q.B.). Lockwood J. found that the requirement for an independently actionable wrong for mental distress damages was met by breaches of duty under a contractual guarantee of job security and under tort in breach of a duty of care not to negligently cause mental distress (at 169-70).

³⁰ *Vorvis v. Insurance Corp. of B.C.*, [1989] 1 S.C.R. 1085.

³¹ See for example, J. Swan, "Punitive, Exemplary and Aggravated Damages", in *1991 Isaac Pitblado Lectures — Recent Developments in the Law of Damages* (Ed. P. Morse, Winnipeg 1991) at 35.

³² Wallace, *supra* note 28 at 735-6.

Nevertheless the majority held the bad faith conduct by the employer in the manner of dismissal is a factor which can be compensated for by adding to the notice period used to award damages for failure to give reasonable notice. The decision of the majority refers to the special relational nature of employment which sets it apart from the ordinary commercial contract, and the power imbalance that is inherent in the employment context and informs all facets of the relationship.³³ Iacobucci J. stated that an employee is most vulnerable and, therefore, most in need of protection when the employment relationship is terminated. For this reason, the law should encourage employer conduct that minimizes the damage (both economic and personal) that could result from termination. To ensure that employees are adequately protected, employers have an obligation to act in good faith and deal fairly when dismissing an employee. This requires employers to be candid, reasonable, honest and forthright with their employees when dismissing them. Employers should also refrain from engaging in conduct that is unfair or bad faith conduct, such as being untruthful, misleading or unduly insensitive. Employees will be compensated for a breach of this duty by adding to the length of the notice period to which they are otherwise entitled. The Court refused to attempt a comprehensive definition of bad faith or unfair conduct but gave the following examples of bad faith on termination: unfounded allegations of cause (including theft), abrupt termination of a long-term relationship without any form of warning, the employer's refusal to provide appropriate references, and the firing of an employee who was suffering from a major depression.³⁴ Iacobucci J. stressed that unfair or bad faith treatment in the manner of dismissal should lead to augmentation of the notice period not only in cases where the mistreatment increased the employee's difficulty in finding new employment, but also in cases where the injuries caused were the more intangible consequences of humiliation, emotional distress or embarrassment.³⁵ The majority held that while a notice period of 24 months might normally be thought to be at the high end of the scale for an employee with Wallace's record it was a reasonable period given the employer's unfair treatment of Wallace at the time of the dismissal.

MacLachlin J., writing for the minority in partial dissent, found that it was improper to roll damages for unfair or bad faith treatment into damages based on reasonable notice and held that such damages could only be recovered if there was an independently actionable wrong. Concerns about mistreatment of the employee in the manner of dismissal should be addressed more directly. It was time for the common law to recognize a new cause of action: breach of an

³³ *Ibid.* at 740-41. Iacobucci J. reiterates many of the statements he quoted and made in *Machtiger* concerning the nature and importance of the employment relationship and the manner of termination of the relationship.

³⁴ *Ibid.* at 742-44.

³⁵ *Ibid.* at 745.

implied contractual term to act in good faith in dismissing an employee. She also relied on the unique nature of the employment contract and the vulnerability of employees that is especially acute at the time of dismissal to justify the implied obligation to act in good faith when dismissing employees.³⁶ MacLachlin J. found that the trial judge's award of \$15,000 for mental distress was appropriate given the independently actionable breach of the implied term of good faith.

Professor England has already described this case as somewhat of a saw-off between the efficiency and rights paradigms. The majority's refusal to recognize an implied duty of good faith and fairness at common law sufficient to form the basis for an action in contract or tort was based on concerns that this would be overly intrusive into the employer's ability to determine the composition of its workforce. This is strong recognition of the importance of efficiency concerns in the development of the common law. On the other hand, damages for reasonable notice can be increased if the employer falls below a certain standard of good faith and fairness in the manner of dismissal, as a measure necessary to protect employee interests given their vulnerability in termination situations. This would appear to be strongly motivated by a desire to protect employee interests at a time when they are most vulnerable.³⁷ Thus the majority's position, one that has already been criticized for its indirect manner of dealing with the issue of damages for employer mistreatment in a dismissal context,³⁸ can be viewed as a compromise which attempts to balance employee rights concerns with employer efficiency concerns. However, when one considers that the decision was an attempt to deal with the issue against the background of the Court's 1989 decision in *Vorvis*,³⁹ which was even more

³⁶ *Ibid.* at 757-8.

³⁷ See discussion in England et. al., *supra* note 1 at paras. 10.37 - 10.39.

³⁸ See Swan, "Damages for Wrongful Dismissal: Lessons from *Wallace v. United Grain Growers Ltd.* (1998), 6 C.C.E.L.J. 313.

³⁹ *Supra* note 30. The Court's decision in *Vorvis* clearly reflects the values of the efficiency paradigm. The Court was confronted with an explosion of successful claims for damages for mental distress and punitive damages in lower courts in the 1970's and 1980's and attempted to place significant limits on the availability of such damages by holding that they would not be available in wrongful dismissal actions unless the employee could prove an independently actionable wrong. Lower courts were not always consistent in following these requirements. See for example *Francis v. C.I.B.C.* (1994), 7 C.C.E.L. (2d) 1 (Ont. C.A.) in which the Court rejected a claim for aggravated damages on the basis that the plaintiff had had not established an independently actionable wrong. Nevertheless, the Court increased significantly the trial judge's award of punitive damages and cited *Vorvis* as the authority for both rulings. See also *Ribeiro v. C.I.B.C.* (1992), 44 C.C.E.L. 165 (Ont. C.A.) in which the Court increased awards for damages for mental distress and punitive damages made at trial prior to *Vorvis* without reference to *Vorvis* or any requirements that the employer's actions constitute an independently actionable wrong. See also *Hughes v. Gemini Food Corp.* (1992), 45 C.C.E.L. 113 (Ont. Gen. Div.) where aggravated damages for mental distress were awarded without mention of any requirement for an independently actionable wrong. Nevertheless, the intent of the Supreme Court to limit the uncertainty of the costs of termination for employers is evident in *Vorvis* itself.

restrictive of recovery for damages for employer mistreatment at the time of dismissal, perhaps the decision has to be viewed as falling more on the side of the rights paradigm.

(vi) *Dowling v. Halifax (City)*⁴⁰

In *Dowling* the Supreme Court issued a one page oral judgment in which it categorically refused to “accept any argument relating to near cause.” The appellant was a works supervisor for the City of Halifax when he was dismissed for cause in 1993 following allegations of serious impropriety on his part in the awarding of contracts to a waste removal company. Some of the allegations turned out to be false and the trial judge ultimately found that while there was some evidence of improper behaviour there was not sufficient evidence of fraud or dishonesty to constitute proof of just cause. However, applying the concept of “modified damages” or near cause the trial judge awarded the plaintiff a mere 6 months for reasonable notice despite his 25 years of service, obviously taking into account the employee’s improper conduct falling short of just cause as a factor to reduce the period of notice. The Nova Scotia Court of Appeal upheld the trial judgment and strongly endorsed the doctrine of near cause, despite its rejection by appellate courts in several other provinces.⁴¹ The Supreme Court of Canada set aside the lower court rulings and remitted the matter back to the trial judge to determine the appropriate notice period without consideration of any arguments based on the concept of near cause.

The court decisions which have rejected near cause as a device to reduce damages where the employee is found to have engaged in some form of misconduct have generally been founded on its inconsistency with a contractual approach to the employment relationship.⁴² Under the traditional contractual approach if there has been a repudiatory breach such as to warrant termination by the employer then summary dismissal is justified and there should be no damages. If there has not been a repudiatory breach then the employer is not justified in terminating the contract and full damages should be awarded. Employee misconduct which does not amount to repudiatory breach but nevertheless may be viewed as inconsistent with the employee’s contractual duties can be addressed by the employer counter-claiming for damages for breach of the contract by the employee. The Supreme Court’s commitment to this orthodox contractual approach to the question of near cause is evidenced by its closing statement in *Dowling* that its rejection of near cause is without prejudice to the employer’s ability to bring a separate action “to address any claims it may have against the

⁴⁰ [1998] 1 S.C.R. 22.

⁴¹ [1996] N.S.J. No. 244 (C.A. No. 124638).

appellant apart from reducing the period of reasonable notice owing to the appellant."⁴³

While it is difficult to make too much of the cryptic rejection of near cause in *Dowling*, I would argue that the ruling is more consistent with a focus on protection of employee rights rather than efficiency concerns. The near cause approach would increase employer flexibility to rid itself of less productive or troublesome employees by reducing the cost of termination in cases where the misconduct fell short of a repudiatory breach. In this manner it could operate to enhance the efficiency of the employer operations. The traditional approach that requires payment of damages for the full period of reasonable notice despite the presence of misconduct falling short of just cause is admittedly based on a contractual approach to the employment relationship. Nevertheless, the insistence on a contractual approach is more consistent with the employee rights paradigm because the case deals with the one area of the employment contract that is most important to protection of the employee interests in job security and fair compensation upon termination — the requirement of repudiatory breach for just cause and the implied term requiring reasonable notice in the absence of just cause.

II. Conclusion

Clearly the results in these six cases dealing with the common law of employment in the 1990's do not support inferences of a paradigm shift on the part of the Supreme Court of Canada towards an efficiency based approach. With the notable exception of *Sylvester*, it is difficult to find judicial pronouncements or significant judicial discussion which focuses on the efficiency concerns of employers. Far more notable is a fairly consistent thread of judicial recognition of the importance of employment and the manner of termination of employment to the average employee's economic and personal well-being. At the same time, the Court has expressly acknowledged the relational nature of the employment contract and the inequality of bargaining power and vulnerability of the employee as factors that are almost endemic to the average employment relationship. More importantly, the Court has in several cases indicated the need to take these features of the employment relationship into account when developing the common law to govern the relationship and its termination. These statements are made most directly in the *Machtinger* and *Wallace* decisions, but similar sentiments are indicated, albeit more indirectly, in the decisions

⁴² Two examples of refusals to apply the near cause concept are *Helbig v. Oxford Warehousing Ltd.* (1985), 9 C.C.E.L. 75 (Ont. C.A.); and *Jim Pattison Industries Ltd. v. Page* (1984), 4 C.C.E.L. 283 (Sask. C.A.).

⁴³ *Dowling*, *supra* note 40.

in *Queen and Farber*.⁴⁴ It is difficult to categorize such sentiments as other than solid support for the rights paradigm.

Perhaps more importantly, the results in these four cases and *Dowling* are quite consistent with a rights based approach. While the result in *Wallace* is the most ambiguous and potentially troublesome for strong supporters of the rights paradigm,⁴⁵ it has to be viewed as opening up the potential for greater protection of employee interests against employer misconduct on termination than was the situation under *Vorvis*. It is also important to note that in all five cases which appear to be consistent with an employee rights based approach the Supreme Court considered and reversed Court of Appeal decisions which appeared to give prominence to employer efficiency concerns.

My purpose here is not to disagree with the thesis put forward by Professor England in the third edition of *Employment Law of Canada*. Certainly the court of appeal rulings in *Machtinger*, *Queen*, *Farber*, *Wallace*, and *Dowling*, provide evidence to support the suggestion that Canadian courts are moving towards greater recognition of efficiency concerns. There are also numerous other decisions by provincial appellate courts in recent years that support Professor England's thesis. Recent examples are found in the decisions of the Ontario Court of Appeal in *Mifsud v. MacMillan Bloedel Inc.*,⁴⁶ *Stevens v. Globe and*

⁴⁴ It should also be noted that these sentiments have been repeated again more recently in the Court's decision in *Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27. That case dealt with the interpretation of the termination pay provisions of the *Employment Standards Act* of Ontario to decide whether employees whose employment ceased when their employer went bankrupt had been "terminated" for the purposes of entitlement to termination and severance pay under the Act. Iacobucci J. relied heavily on his earlier judicial pronouncements in *Wallace* and *Machtinger* to support the interpretation of the Act which would best protect the rights of the vulnerable employees (at 41-42).

⁴⁵ Several critics of the majority decision in *Wallace* have already expressed concern that it could spell the death knell of what some hoped was the early stages of recognition of a full blown implied obligation of good faith and fair dealing. See England et. al., *supra* note 1 at para. 10.37. For some it also creates too much uncertainty in terms of when and how much the notice period should be augmented to deal with particular types of employer behaviour. One can certainly argue that *Wallace* means that previously recognized upper limits for reasonable notice in some jurisdictions must now be disregarded in cases of bad faith conduct by the employer at the time of dismissal. The majority also appears to allow freedom of contract to prevail if the employer ensures there is a contractually defined termination notice period. Arguably in such cases employer mistreatment which falls short of an independently actionable wrong can not be taken into account in a damages award for reasonable notice because the court will be limited by the contractual period of notice and cannot award damages for reasonable notice. Otherwise the efforts of Iacobucci J. to reject a general implied duty of good faith in manner of dismissal sufficient to form the basis for an independent cause of action will have been meaningless.

⁴⁶ (1989), 28 C.C.E.L. 228 (Ont. C.A.). The Court held that an employee found to have been constructively dismissed may have an obligation to accept the offer of a position which amounts to a repudiatory breach of the employment contract pursuant to his or her duty to mitigate damages. This will obviously operate to keep employer costs resulting from restructuring or reorganization to a minimum.

Mail,⁴⁷ and *Cronk v. Canadian General Insurance Co.*,⁴⁸ in which the Court of Appeal consistently opted for decisions which addressed the efficiency interests of employers at the expense of protection of employee interests upon termination. But these developments merely highlight the significance of the apparent commitment of the Supreme of Court of Canada, and in particular Mr Justice Iacobucci, to recognition of employee vulnerability in the employment relationship and the need to protect employee rights and interests at the time of termination of that relationship.

The Court undoubtedly views its role in most employment cases as one of finding an appropriate balance between protection of employer efficiency concerns and employee rights and interests. Justice Iacobucci's reasons in *Wallace* are probably the most explicit example of such a balancing approach. My comments in this paper should not be perceived as an attempt to characterize the Court's approach in recent cases as falling too far on the employee rights side in attempting to find the right balance. I think it is entirely appropriate and very important for the Court to identify the importance of employee interests arising in the employment relationship and recognize the need for the Court to be protective of such interests in the economic and social context of the 1990's. We face a fairly constant barrage of expression of the values of the efficiency paradigm and the new economy in our general media culture, editorial pages and government policy statements in the 1990's. In that context, the Court's support for the values of the rights paradigm is not so much a movement in the direction of a rights orientation as an attempt to maintain an appropriate balance despite being buffeted by the onslaught of the values of the efficiency paradigm as we approach the new century.

⁴⁷ (1996), 19 C.C.E.L. (2d) 153 (Ont. C.A.). The Court required the deduction of severance payments paid under employment standards legislation from damages for wrongful dismissal.

⁴⁸ (1995), 128 D.L.R. (4th) 147 (Ont. C.A.). The Court rejected longer notice periods for lower status employees on the basis of the prohibitive costs and uncertainty this would create for employers in the new economy.