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Good Faith in Wrongful Dismissal:

Canadian Employment Law after *Wallace v. United Grain Growers Ltd.*

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Executive Summary

In ***Wallace*** v. ***United Grain Growers Ltd.***, the Supreme Court of Canada had an opportunity to revise Canada's traditional approach to assessing damages for wrongful dismissal. This development is important for both employers and employees alike because it directly affects the amount of money owed by the employer to the employee and this amount can be substantial. The law of wrongful dismissal comes into play when an employer breaches an implied obligation to provide his or her employee with notice, or pay in lieu of notice, upon termination of the employee's contract of employment. The quantum of damages available in a wrongful dismissal action was outlined close to one hundred years ago in the English House of Lords decision, ***Addis*** v. ***Gramophone Co., Ltd***. In ***Addis***, damages for wrongful dismissal were confined to the reasonable notice period, and the House of Lords specifically ruled out recovery for other damages arising from the manner of dismissal or mental distress. Prior to ***Wallace***, this reasoning was most recently endorsed by the Supreme Court of Canada in ***Vorvis*** v. ***Insurance Corporation of British Columbia***.

However, society has been transformed in the last hundred years, and the author argues that the rules of recovery in wrongful dismissal are no longer adequate. From the early 1980s until the mid 1990s, lower courts began to depart from a strict adherence to ***Addis*** and ***Vorvis***, in order to compensate victims of harsh employment terminations more fully. The author argues that ***Wallace*** provided the Supreme Court with a perfect fact situation to endorse attempts to relax the traditional rules of recovery for wrongfully dismissed employees by way of recognizing an implied or express obligation of good faith and fair dealing. The author's main conclusion from his examination of ***Wallace*** is that the majority of the Supreme Court unfortunately used the case to reinforce the traditional rules of recovery of ***Addis*** and ***Vorvis***. However, the author sees enormous potential in the minority judgement delivered by the new Chief Justice of Canada, Beverly McLachlin, who sanctioned implying a term of good faith and fair dealing into every employment contract that would create a new head of recovery for dismissed employees. Recent developments in England, namely the ***Malik*** decision which overruled ***Addis*** in that country several weeks after ***Wallace*** was released in Canada, lend support to the minority's finding. The author believes, given recent developments and

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shifts in the composition of the Supreme Court, this issue will be revisited in the near future.

This paper provides a detailed examination of the issues in the ***Wallace*** decision, the way they were addressed by the both the majority and minority of the Supreme Court of Canada, and a preliminary overview of how the case has been interpreted and applied by lower courts. Some of the highlights from this paper include:

- A comprehensive analysis of the ***Wallace*** decision from the Court of Queens Bench, to the Manitoba Court of Appeal and ultimately to the Supreme Court of Canada. The author examines how each court assessed the issues of appropriate reasonable notice, mental distress and aggravated and punitive damages.

- An examination of the current status of and potential usefulness of the doctrine of good faith in Canadian employment law. Specifically, the author examines how the majority of the Supreme Court in ***Wallace***, chose to address the doctrine of good faith by extending the reasonable notice period in contrast to the minority's approach of implying the term into all employment contracts. The author also examines the ***Malik*** decision, which overruled ***Addis*** in England and consequently casts persuasive doubt as to the soundness of the majority's decision.

- The author reviewed dozens of reported and non-reported decisions that applied ***Wallace***, and concludes that in most cases, the decision has been used to shrink the monetary awards for wrongful dismissal. The author highlights and provides summaries of over fifteen important post-***Wallace*** decisions that elaborate on the usefulness of the case. Important decisions discussed in this paper include, ***Kilpatrick*** v. ***Peterborough Hospital, Whiting*** v. ***River Borkenhead Community Futures Development Corp***. and ***Noseworthy*** v. ***Riverside Pontiac Buick Ltd.***

- The paper provides a thorough examination of the law of wrongful dismissal from its historical, nineteenth century contractual origins, to its Pre-***Wallace*** modernization in the twentieth century. The author endorses a more relational approach to the employment law and a more humane approach to the law of wrongful dismissal.

Introduction

In ***Wallace*** v. ***United Grain Growers Ltd***. the Supreme Court of Canada heard an appeal that challenged the long-established legal principles of Canadian wrongful dismissal law. The fact scenario of ***Wallace*** presented the Supreme Court with a particularly harsh termination where the defendant, the United Grain Growers (UGG), played 'hardball' with the plaintiff, Jack Wallace, by not only subjecting him to great mental distress in the manner of his dismissal, but also by deliberately maintaining a groundless allegation of just cause for over two years. The combined effect of UGG's behaviour was to rob Wallace of much of the economic security, human dignity, and self-respect people obtain from their employment. Wallace, however, was unable to recover damages for the harsh manner of his dismissal separate and apart from damages for lack of reasonable notice. In reaching this conclusion, the Supreme Court of Canada continued to adhere to the decision in ***Vorvis*** v. ***Insurance Corp. of British Columbia*** that aggravated and punitive damages may only be recovered where an action exists that is independent of the breach of the employment contract.

With ***Wallace***, the Supreme Court had an opportunity to revise Canada's traditional approach to the law of wrongful dismissal. The court was asked to decide the following two novel issues: first, do all employment contracts contain an implied condition in contract or tort which would compel employers to treat their employees in 'good faith' and 'fair dealing' in both the justification for and in the manner of dismissal; and second, if so, would breach of the obligation to act in good faith constitute an independent cause of action in cases of wrongful dismissal. Unfortunately for employees, the majority of the court decided both questions in the negative, but in doing so the court did not reject the concept of good faith completely. Rather, the court considered good faith to be a factor to be taken into account when calculating the period of reasonable notice to which Wallace was entitled under his employment contract.

The purpose of this paper is to examine the impact that ***Wallace*** has had on subsequent cases of wrongful dismissal where the 'Wallace Rule,' as it is now known, has been applied. Throughout this analysis I will argue that by choosing not to recognize an obligation of good faith as an implied term of contract or, in the alternative, as an independent action in tort, the majority of the Supreme Court has chosen to pursue a direction in employment law which favours employer rights over the rights of employees.

The Law of Wrongful Dismissal and Pre-*Wallace* Authority

A major theme that will emerge from the following analysis is that the difference in opinions between the majority and the minority of the Supreme Court in ***Wallace*** mirrors a broader divergent trend in employment law between what has been called the 'efficiency' paradigm and the 'rights' paradigm. England (1995, 558) has argued that the efficiency paradigm gives paramountcy to the employer's freedom to pursue profitability, while the rights paradigm is directed at protecting the employee's dignity and autonomy. Although the two paradigms are not mutually exclusive, England notes that the distinctions between them are useful in identifying and predicting general trends in the law (558).

In discussing the rights and the efficiency paradigms, England, Christie, and Christie (1998) argue that the basis of employment law is the employment contract (1.4). In this model, the authors suggest that the courts do more than simply resolve disputes and

interpret contracts. Rather, the courts fulfill the socioeconomic function of facilitating the prevailing system of work organization and personnel management. Consequently, court decisions will reflect and reinforce society's moral vision of how work relations ought to be carried on (1.4). The courts accomplish this goal in two ways: by applying the express provisions of a contract, and, in the absence of such express terms, by implying terms into a contract (1.3–1.6). When the courts imply terms they are not acting in a vacuum, but instead are influenced by either the rights or the efficiency paradigm, and the course chosen will be designed to achieve a specific public policy, objective or goal.

The law of wrongful dismissal comes into play when an employer breaches an implied obligation to provide his or her employee with notice, or pay in lieu of notice, upon termination of the contract. While commercial contracts are governed by the rule in ***Sally Wertheim*** v. ***Chicoutimi Pulp Co***., in that the courts will attempt to put the plaintiff in the same economic position he or she would have been in had the contract been performed, the law governing the employment relationship provides a narrower range of remedies. For instance, equitable relief such as specific performance is generally not available in employment law.

The granting of punitive and exemplary damages for breach of contract has been problematical. The leading case for a number of decades was the 1909 House of Lords decision ***Addis*** v. ***Gramophone Co. Ltd.***, where Lord Loreburn stated that,

> an employee cannot recover damages for the manner in which the wrongful dismissal took place, for injured feelings or for any loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment. (491)

Reflecting the currents of classical economics and contract of the age, the House of Lords effectively ruled out recovery for damages, like mental distress, that were not deemed part of the reasonable notice period. Canada informally applied this rule until 1966 when it was explicitly adopted by the Supreme Court of Canada in ***Peso Silver Mines Ltd***. v. ***Cropper***.

The courts have been grappling with ways to compensate victims of harsh termination for years.

The issues addressed in ***Wallace***, particularly those regarding the manner of dismissal are not new. The courts have been grappling with ways to compensate victims of harsh termination for years without straying too far from ***Addis*** and ***Peso***. A number of cases decided in the 1980s represented the first movement in the employment context to depart from *Peso*, in that judges attempted to integrate claims of extended damages, which generally included claims for aggravated and/or punitive damages, within the traditional rules of wrongful dismissal. For instance, Justice Linden of the Ontario Court, General Division, concluded in ***Brown*** v. ***Waterloo (Region) Commissioners of Police*** that mental distress could be ahead of damages only where at the time of contract formation both parties contemplated that the breach of such contract would cause mental distress. In ***Speck*** v. ***Greater Niagara General Hospital***, on the other hand the court found the plaintiff to be entitled to damages for mental distress owing to the defendant's failure to give proper notice.[1] It appeared that the lower courts believed Canadian law had matured enough to recognize the need to compensate for intangible injuries incurred during the course of one's employment (Schai 1991, 352–54).

The contradictory lower court decisions allowed the Supreme Court of Canada to address the issue squarely in the 1989 decision of ***Vorvis***. In ***Vorvis***, the plaintiff had been dismissed in a particularly harsh manner, and the issue of how to compensate him by way

1 Also see, ***Pilon*** v. ***Peugeot Canada Ltd***. and ***Bohemier*** v. ***Storwal International Inc***.

of reasonable notice or aggravated and/or punitive damages was what confronted the Supreme Court. Speaking on behalf of the majority, Justice McIntyre said:

> The rule long established in the ***Addis*** and ***Peso Silver Mines*** cases has generally been applied to deny such damages and therefore the only damage which could arise would result from a failure to give such notice. I would not wish to be taken as saying that aggravated damages could never be awarded in a case of wrongful dismissal, particularly where the acts complained of are also independently actionable, a factor not present here. (1103)

Vorvis can be interpreted as reintroducing the efficiency paradigm into Canadian employment law in order to restore the original purpose of damages as outlined in *Addis* (Jack and Southren 1996).

Vorvis reintroduced the efficiency paradigm into Canadian employment law.

Such a narrow approach to the assessment of damages for breach of an employment contract has been recently questioned in England by the House of Lords in ***Malik*** v. ***Bank of Credit and Commerce International SA***. In ***Malik***, as with ***Wallace***, the plaintiffs, who were terminated by the creditor of the collapsed bank, put forth the argument that every employment contract had an implied condition of trust and confidence, or what Canadian courts would call an obligation of good faith. Lords Nicholls and Steyn provided separate but concurring judgments for the majority. Lord Nicholls elaborated on what the trust and confidence term entailed:

> The starting point is to note that the purpose of the trust and confidence implied term is to facilitate the proper functioning of the contract. If the employer commits a breach of the term, and in consequence the contract comes to an end prematurely, the employee loses the benefits he should have received had the contract run its course until it expired or was duly terminated. (6–7)

Lord Nicholls continued by noting that such a breach would be compensable by damages:

> ***Prima facie***, and subject always to established principles of mitigation and so forth, the dismissed employee can recover damages to compensate him for these promised benefits lost to him in consequence of the premature termination of the contract. (7)

Consequently, the effect of ***Malik*** on the law of wrongful dismissal is that it overruled ***Addis***. According to Lord Nicholls, '***Addis*** is generally understood to have decided that any loss suffered by the adverse impact on the employee's chances of obtaining alternative employment is to be excluded from an assessment of damages for wrongful dismissal'(9). ***Vorvis***was then cited by the House of Lords as evidence of this hard-line approach to limiting damages (9). However, the majority of the House of Lords reasoned that:

> ***Addis*** v. ***Gramophone Co. Ltd***. was decided in the days before this implied term was adumbrated. Now that this term exists and is normally implied in every contract of employment, damages for its breach should be assessed in accordance with ordinary contractual principles. (11)

Lords Nicholls and Steyn, on behalf of the majority, agreed that the implied term of trust and confidence enables plaintiffs to claim financial compensation for all losses arising beyond those associated with notice. Lord Nicholls then stated: 'unlike the courts below, this House is not bound by the observations in ***Addis*** v. ***Gramophone Co. Ltd.*** . . .

regarding irrecoverability of loss flowing from the manner of dismissal' (13). ***Malik*** has since become the leading case on wrongful dismissal in England.

Had ***Malik*** been decided months earlier it might have had a profound impact on the Supreme Court of Canada's decision in ***Wallace***. ***Malik*** would not have been binding on the Supreme Court, but it would have provided the court with an instructive approach for a more generous interpretation of the ***Addis*** principle. Instead, the Supreme Court addressed the issues in ***Wallace*** on the basis that the principle of ***Addis*** was still sound.

The Employment Relationship and the Employment Contract

In order to fully understand the positions of the majority and minority judgments in ***Wallace***, some important background information on the legal and historical underpinnings of the employment relationship, the employment contract, and the contractual analysis of wrongful dismissal must be examined. This is necessary because each factor has influenced both the theoretical potential and the actual application of the legal concept of good faith.

The Nature of the Modern Employment Relationship

Swinton (1980) observes that, historically, an individual's labour was an economic asset used to provide subsistence and financial security (359). But, Beatty (1980) argues that in contrast to our subsistence roots, 'labour is no longer a commodity' (324). Instead, employment defines our social status, enhances our social rights and obligations, and serves our deep psychological needs as well. Former Chief Justice Brian Dickson captures the essence of this argument in ***Reference re: Public Service Employee Relations Act*** when he makes the following statement on the importance of employment:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in a society. A person's employment is an essential component of his or her sense of identity, self-worth, and emotional wellbeing. (199)

The court has held that the manner in which employment can be terminated is fundamentally important.

Ball (1944, 595) has noted other Supreme Court of Canada references to the special nature of the employment contract: the court has held that the manner in which employment can be terminated is fundamentally important (see ***Machtinger*** v. ***Hoj Industries***), the protection of employees as a vulnerable group in society is an objective with a high degree of importance attached to it (see ***Slaight Communications Inc***. v. ***Davidson***, 1057), and the law governing the termination of employment significantly affects the economic and psychological welfare of employees (see ***Machtinger***, 1010).

The Contract of Employment

In recent decades, much academic effort has been invested in exposing classical contract law's inability to address the realities of a modern economy and, in particular, the modern employment relationship (Collins 1992). Academics such as Swan and Reiter advocate the adoption of Macneil's (1985) theory of relational contracts that challenges several assumptions rooted in 19th century contract theory.

Collins (1986, 8) observed that, in the 19th century the common law defined its conception of a just market order in a rigorous set of doctrines referred to as the classical law of contract. The banner 'freedom of contract' reigned supreme. Collins notes that the phrase freedom of contract encompassed the following three pillars: liberty, equality, and reciprocity. First, everyone was free to make contracts; second, the law would respect their choice of terms; and finally the voluntariness of an individual's choice would be protected from coercion (Collins 1986, 9).This model was based on the assumption that all contracts were discrete contracts—a relation created for one transaction that had neither history nor future.

Premised largely on laissez-faire market ideology of the 19th century, classical contract law advanced the interests of the labour-employing, commercial elite (Mensche 1982, 764).[2] On the subjection of the employment contract to the market forces of supply and demand, England, Christie, and Christie (1998) have argued that:

> Unquestionably, workers have not been well served by this contractual analysis, for the reality of the labour market is that employers have disparate bargaining power over most workers when negotiating terms. It is fair to say that the common law of the employment contract rests on a veneer of formal legal equality, but underneath lies the reality of economic and social inequality. (1.4)

In response to classical contract law's inability to reflect accurately the true social reality of a modern economy, Macneil (1985) proposed a relational theory of contract. Macneil argued that the premises of classical and neo-classical law were improperly based on a model that treated 'discrete exchanges as the sole economic function essential to production, distribution, and final consumption' (481–82). In contrast, Macneil proposed that all contractual relations are relational in nature. This means that (1) the transaction extends over time, (2) parts of the exchange cannot be measured or specified precisely, and (3) the interdependence of the parties to the exchange extend at any given moment beyond simple discrete transactions to a range of social interrelationships (Kornhauser 1982, 190). Consequently, Macneil (1980, 84–90) argued that relational contracts should receive a legal interpretation that respects the power dynamics and social significance inherent in such contracts.[3] Acceptance of the principles of relational contract would enhance established and future legal protections for employees.

Deficiencies in the Classical Analysis of Employment

Freedom of contract disguises the unequal bargaining power between employee and employer. This power imbalance stems from the reality that employers own capital, and in our modern socioeconomic reality employees are dependent on wages for most human functions (Collins 1986, 11–12). Consequently, despite the slogan 'freedom of contract,' most employment contracts are one-sided because employees are unable to negotiate their own terms, there is often no real ***consensus ad idem***, and there is often a wanton disregard for the doctrine of mutuality (Swinton 1980, 362–65). Moreover, employment contracts are not discrete—according to Macneil (1985) they are enduring relationships, and should be treated as such.

Employment contracts are enduring relationships, and should be treated as such.

It is in terms of remedies, however, where the deficiencies of the contractual analysis of wrongful dismissal become most obvious. The root of the strict adherence to the

2 On the importance of ideology to the law also see **Atiyah** (1986) and **Hay** (1974).

3 For a critique of Macneil, see **Barnett** (1992).

efficiency paradigm of contract remedies is based on the rule established in ***Hadley*** v. ***Baxendale***: foreseeability and remoteness of damages. Baron Alderson stated:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be (I) such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or (II) such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. (Numerals added) (Swan, Bola, and Reiter 1997, 57)

We have seen the increasing tendency of the lower courts to rely on longer notice periods and monetary awards for mental distress/ aggravated damages or punitive damages.

An injured party can therefore only be awarded those damages which arose reasonably and naturally from the breach of the agreement made by the parties, and which were 'foreseeable' as likely to have resulted at the time the parties entered the contract (Swan, Bola, and Reiter 1997, 57). While this rule should have limited damages to reasonable notice (Swinton 1980, 366), the law is not a precise science, and judges are able to use their discretion to add additional compensation where they see fit.

As noted before, we have seen the increasing tendency of the lower courts to rely on longer notice periods (see ***Cronk*** v. ***Canadian General Insurance Company*** and ***McKay*** v. ***Eaton Yale Ltd. et al.***) and monetary awards for mental distress/aggravated damages[4] or punitive damages[5] which has created inconsistency in the area of wrongful dismissal suits. For instance, in ***Wiebe***v. ***Central Transport Refrigeration (Man.) Ltd***., Justice Twaddle of the Manitoba Court of Appeal stated:

> I mean to demonstrate my concern about the excessive length of the notice period for which employers, acting wrongfully but not in bad faith, have been found liable in recent years. This trend cannot be explained by inflation and only to a limited degree by other economic factors. It is obvious why money judgments in personal injury cases grow as the value of the dollar shrinks, but I do not understand why, when the principles to be applied in determining reasonable notice remains constant, the amount of time determined should be significantly larger now than it was in the past. (79)

Practitioners and academics alike have suggested that neither the efficiency paradigm nor the rights paradigm is supportive of the recent developments in the law.

Jack and Southren (1996, 46–47), proponents of the efficiency paradigm, argue that the recent departure from the basic legal principles of ***Addis*** by the lower courts has confused the realm of contract. Rather than rely on the limited remedies of contract to resolve issues of extended damages, Jack and Southren suggest that plaintiffs should use the law of torts. Where non-contractual causes of action arise in an employment context, such as the need to compensate for the manner of dismissal as in ***Wallace***, these critics argue that heads of damage in tort should be added to the action in contract, and both would then be litigated concurrently, in order to bring consistency back to the law of contract.

Proponents of the rights paradigm also recognize the need for new causes of action in contract or in tort, but for different reasons. Rather than adhere to the strict rules of ***Addis***,

4 In ***Linkson*** v. ***UTDCInc.*** the plaintiff was given $5000 for mental distress for the defendants failure to provide the minimum notice required by law; and in ***Hughes*** v. ***Gemini Food Corp.***, a CEO received $75,000 for the defendants failure to properly investigate allegations.

5 ***Williams*** v. ***Motorola Ltd.*** where an employee received $20,000 for a particularly harsh termination; and ***Dixon*** v. ***British Columbia Transit***where a CEO received $75,000 for a public defamation of character in a wrongful dismissal.

rights advocates would prefer to see an expansion of the rules of contract. For example, Swan (1990) has asked if there was anything other than antiquated classical contract rules that would prevent recovery for things other than salary in wrongful dismissal claims. On this note he has argued that ***Hadley*** v. ***Baxendale*** is the 'most misunderstood and misused case in the history of the common law' (Swan 1990, 222). The rule in ***Hadley***, according to Swan, operates when the parties are allocating tangible risk in a contract, but it fails to conceptualize the intangible problems of a poorly conducted and harmful dismissal. Swan notes that the courts could continue to try and compensate such wrongs by way of the traditional rules of contract, or they could create a new and independent cause of action for recovery in cases of bad faith discharge in employment law (228–29). This is precisely the role good faith was intended to play in ***Wallace***.

The Doctrine of Good Faith

Schai (1991) has observed that the employment relationship is a relational one, one that affects every element of the employee's being. But, as previously observed, only the monetary expectation is protected in law (Schai 1991, 349).The duty of good faith could serve to protect employees either in contract or in tort, and either way it could reconcile the confusion over the current law of wrongful dismissal.

General Theory of Good Faith

The leading Canadian case on good faith is ***Gateway Realty Ltd.*** v. ***Arton Holdings Ltd. and Lahave Developments Ltd.*** The facts of ***Gateway*** involved the bad faith assignment of a shopping mall lease between competing department stores. Justice Kelly of the Nova Scotia Trial Division used good faith as a means to terminate the assignment and award damages for breach of contract. Justice Kelly defined good faith as follows:

> The law requires that parties to a contract exercise their rights under that agreement honestly, fairly, and in good faith. This standard is breached when a party acts in a bad manner in the performance of its rights and obligations under the contract. 'Good faith' conduct is the guide to the manner in which the parties should pursue their mutual contractual objectives. Such conduct is breached when a party acts in 'bad faith'—as conduct that is contrary to community standards of honesty, reasonableness, or fairness. (191–92)

This articulation of good faith was subsequently confirmed by the Nova Scotia Court of Appeal, and has been used as precedence in many cases involving arm's length, relational contracts. However, many commentators note that there is still a judicial reluctance in Canada to recognize an obligation of good faith and fair dealing, a reluctance that is largely based on the fear that:

There is still a judicial reluctance in Canada to recognize an obligation of good faith and fair dealing.

> an undefined good faith doctrine would jeopardize such Anglo-Canadian contractual traditions as individual autonomy and freedom of contract, and fundamentally undermine values of certainty and predictability in contractual dealings and commercial adjudication. (Belobaba 1985, 78)

O'Byrne (1995, 71), however, has observed that many current common law principles are grounded in the duty of good faith. Within contract law she observed that unconscionability, various kinds of estoppel, forbearance, capacity, and the enforceability of exculpatory clauses are all linked to good faith considerations. Belobaba (1985, 71) has

concluded that Canadian contract law requires a workable definition of good faith, a realization that we already use a de facto standard of good faith, and explicit Supreme Court recognition of that standard.

In ***Gateway***, Justice Kelly relied on two American academics in constructing his definition of good faith. Summers (1982, 818–19) has defined good faith by what types of bad faith it prohibits. The difficulty with this kind of definition is that it is tantamount to saying that the good faith duty is breached whenever a judge decides that it has been breached (Bridge 1984, 398).

Justice Kelly also relied on the argument of Burton (1980), who insists that good faith establishes a standard for contract interpretation that is implied in every contract. Bad faith will occur when one party, without reasonable justification, acts in a way that substantially nullifies the bargained objective or benefit contracted for by the other party (Burton 1980, 371–73).

Development of a doctrine of good faith has been impeded by a lack of explicit Supreme Court recognition.

Belobaba (1985) states that a careful study of the three major stages of the contracting process in Canada—formation, performance, and enforcement—shows a consistent, although implicit, judicial vigilance against bad faith behaviour. Development of a doctrine of good faith, however, has been impeded by a lack of explicit Supreme Court recognition.

Movement has been made by the Supreme Court towards recognizing an obligation of good faith in civil law cases in Quebec (see ***Canadian Pacific Hotels Ltd.*** v. ***Bank of Montreal, National Bank of Canada*** v. ***Soucisse, Canadian National Bank*** v. ***Houle***, Hakins (1990), Girard (1983)). The only common law decisions to advance the proposition were ***Dynamic Transport Ltd***. v. ***O.K Detailing Ltd***. and ***Lac Minerals Ltd.*** v. ***International Corona Resources Ltd***., where, like promissory estoppel, good faith was used as a shield to protect the interests of the plaintiff. Consequently, ***Wallace*** was the first time that the Supreme Court of Canada had directly addressed the issue of good faith.

Good Faith as an Implied Term in Contract or as a Tort

There are two ways in which one can construct an action of bad faith: either as an implied term of contract or as an independent tort.

Ball has noted that one approach would be to imply an obligation of good faith and fair dealing as a condition in all employment contracts.[6] Etherington (1990, 471–72) points out that the courts have implied terms into contracts, beginning as early as the 18th century, in order to advance the law of employment or implement desired public policy. Ball (1994, 598) argues that an implied obligation of good faith would require good faith reasons for dismissal, and in the absence of such good faith reasons an employee would be able to claim losses flowing from the breach. Unfortunately, Ball laments that:

> many intangible losses due to abusive discharges are easily foreseeable in light of our society's better understanding of industrial relations, the courts have improperly used and interpreted the remoteness doctrine in ***Hadley*** v. ***Baxendale*** to foreclose these losses by treating the contract of employment as an ordinary commercial contract. (1994, 599)

Nevertheless, a more significant way to introduce good faith into the employment context would be to recognize an independent tort of bad faith conduct. From a doctrinal perspective, the major distinction between tort and contract is the absence in tort of a bargained agreement. While in contract, the parties voluntarily assume duties and allocate

6 In the United States, the Courts have implied good faith into commercial contracts through Article 2 of the ***Uniform Commercial Code***, and the ***Restatement of the Law of Contracts***. For more information, see Burton (1981), Duan (1980), Newman (1969).

risks; in tort, the law imposes duties and shifts losses (Cohen 1985, 1305). By suing in tort, an employee discharged in a bad faith manner would be free of the limitation of damage recovery established by ***Addis*** and ***Vorvis***.

Two recent decisions from the Supreme Court of Canada have answered the question of whether one can sue in tort even when the relationship between the parties, as in the employment context, is governed by contract (Fridman 1994, 694–97). The case of ***BG Gheco International Ltd.*** v. ***British Columbia (Hydro and Power Authority)*** confirmed the earlier decision of ***Central Trust Co***. v. ***Rafuse***. La Forest and McLachlin JJ. for the majority in ***BG Gheco*** held that:

> The general rule emerging from this Court's decision in ***Central Trust Co.*** v. ***Rafuse*** is that where a given wrong prima facie supports an action in contract and in tort, the party may sue in either or both, subject to any limit the parties themselves have placed on that right by their contract. (14)

Thus, Bloom (1989, 398) notes that if the plaintiff and the defendant have agreed on which party shall bear the risk of the consequences of the act or omission in question, it is this express term of the contract that will prevail.

If the plaintiff and the defendant have agreed on which party shall bear the risk of the consequences of the act or omission, it is this express term of the contract that will prevail.

There are essentially two kinds of torts: intentional and negligent (Echlin and Thomlinson 1996, 252). In tort, the basis in principle for the claim and so for the remedy is that, under the circumstances in question, the wrongdoer ought to have known better than to behave as he did. Ball argues that the special nature of the employment relationship creates a duty of care and reliance. Thus, when an employer discharges an employee in bad faith, a tort of bad faith would make it possible for the courts to reinforce enlightened values of the employment relationship, compensate discharged employees, and, to a lesser extent, punish employers who act in a manner which harms an employee psychologically, causes undue losses, or destroys an employee's future career prospects (Ball 1994, 594).

While the House of Lords chose to adopt a good faith standard in contract in ***Malik***, the Supreme Court of Canada in ***Wallace*** was not only unwilling to recognize a contractual obligation but also refused to accept a tort of bad faith.

The *Wallace* Decisions

The Facts

In 1993, the facts of ***Wallace*** were outlined by Justice Lockwood of the Manitoba Court of Queen's Bench, trial division. According to Justice Lockwood's finding of fact, Jack Wallace was induced to leave his secure employment with Lawson Graphics by Public Press, the forerunner to the present day UGG. The defendant, UGG, actively pursued Wallace to lead their newly re-equipped printing operations in 1972. Although Wallace had reservations about leaving Lawson's after 25 years of secure and profitable employment and where he had become an accomplished salesman, a representative of the defendant offered him assurances that his employment security and his preferred means of compensation, that being commission, would be guaranteed until his retirement at age 65. In addition, Wallace was guaranteed that he would be dealt with fairly for the duration of his career.

Although Wallace never had these conditions expressly written out in an employment contract, he relied on the representations made by UGG and left Lawson Graphics to join the defendant in 1972. For the next 14 years, Wallace was UGG's top salesman. However,

in late 1985, new management took over. The new leadership wanted to introduce a new compensation plan for all employees, and this plan would replace Wallace's commission-based remuneration with a salary. Wallace objected to the proposed changes and refused to sign a new employment contract on the basis that his assurances from 1972 were valid and contractually sound.

Tensions built up over the compensation issue for a number of months until UGG dismissed Wallace on August 23, 1986. It took UGG one month to provide Wallace with an explanation of his dismissal. In a letter sent to Wallace's home, UGG alleged just cause based on Wallace's 'inability to perform satisfactorily the duties of his position.' At trial, Wallace's supervisor testified that he had personally believed there was no reason to dismiss the plaintiff, but he was instructed by senior management to go through the plaintiff's files and find anything that could constitute just cause.

By asserting just cause, UGG was attempting to escape its obligations at common law to provide Wallace with reasonable notice of his termination or pay in lieu thereof. Moreover, in a small industry such as printing, the evidence showed that Wallace's reputation was destroyed by the groundless and vexatious allegation of just cause that UGG ultimately dropped on the first day of trial. Not only did Justice Lockwood find that the charge was malicious to begin with, it also prolonged Wallace's efforts at finding alternate work by several years.

The saddest aspect of Wallace's dismissal was the personal toll the manner of dismissal had on his mental health and well-being.

Finally, the saddest aspect of Wallace's dismissal was the personal toll the manner of dismissal had on his mental health and well-being. Wallace's wife testified that she thought that although he had been under doctor's care, he was just one step away from suicide. Wallace's psychiatrist testified that the manner of the dismissal and subsequent events shattered the plaintiff's sense of worth. He displayed multiple symptoms of anxiety and depression. The trauma of the dismissal itself may have caused him permanent, psychological damage (175–76).

The Issues in Wallace's Wrongful Dismissal Claim

After two months of an unsuccessful job search, Wallace commenced an action for wrongful dismissal. First, he alleged that he had a fixed-term contract which entitled him to work until the age of 65 (166). Second, in the alternative he sought reasonable notice. Third, Wallace pleaded that he should be compensated for damages arising from mental distress. Fourth, Wallace sought punitive damages for the conduct of UGG. Finally, Wallace claimed that a separate independent cause of action existed in tort and/or in contract called bad faith discharge for breach of an implied condition of fair dealing and good faith obligation during or after the termination of an employee.

Decision of the Trial Court

Fixed-Term Contract

Wallace maintained that his conversation with the representatives of UGG and subsequent correspondence had established a fixed-term contract that entitled him to damages for the remaining period of service. The defendant's position was that such a term would have required explicit contractual expression, and there was simply no evidence of such an agreement. Justice Lockwood concluded that while:

> the making of a fixed-term contract, whilst not inconceivable, would happen rarely if at all. In the present case with 20 years still to go before retirement at 65, it is unlikely that either side would have wanted to limit itself to a fixed term contract. (178)

Justice Lockwood agreed with the defendant that no contract of employment with UGG or its predecessor Public Press included a term or condition that employment would continue until retirement.

Reasonable Notice

In determining reasonable notice, Justice Lockwood began by defining the damages that were owed to an employee by the employer at common law in cases of wrongful dismissal. Justice Lockwood cited Vorvis as the leading case in defining this obligation, where Justice McIntyre said:

> The law has long been settled that in assessing damages for wrongful dismissal, the principal consideration is the notice given for the dismissal. A contract of employment does not in law have an indefinite existence. It may be terminated by either employer or employee and no wrong in law is done by the termination itself. An employee who is dismissed is entitled to the notice agreed upon in the employment contact or where no notice period is specified in the contract, the reasonable notice. He is entitled in the alternative in the absence of due notice to payment of remuneration for the notice period. (1096–97)

In addition, Justice Lockwood considered the famous ***Bardal*** v. ***The Globe and Mail*** factors. In ***Bardal***, Chief Justice McRuer of the Ontario Court of Appeal outlined the basic subjective factors courts were to consider when assessing the length of reasonable notice:

> There could be no catalogue laid down as to what was reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant. (255)

Taking the above factors into account and the fact that the plaintiff had tried to mitigate his losses, Justice Lockwood decided to give Wallace the 'high end' of the scale, and he awarded him 24 months' pay in lieu of notice.

Mental Distress

Wallace's claim for mental distress was made concurrently in both contract and in tort. It can be deduced that Justice Lockwood liberally interpreted ***Vorvis*** to mean that if the mental distress was foreseeable, it could be compensated for by way of damages.[7] Consequently, he concluded that it was reasonably foreseeable that mental distress would result from the manner in which the dismissal was handled, and because of UGG's groundless two-and-a-half-year defense of just cause. Because of the manner of dismissal, and a breach of an implied obligation of good faith based in tort, Justice Lockwood awarded Wallace an additional $15,000.

Punitive Damages

Justice Lockwood held that it is settled law that punitive damages are not awarded to compensate the plaintiff, rather they are intended to punish wrongdoers and act as a deterrent to others. The judgment in ***Vorvis*** made it clear that punitive damages should only be.

Punitive damages are not awarded to compensate the plaintiff, rather they are intended to punish wrongdoers and act as a deterrent to others.

7 Lockwood J. relied on ***Pilon v. Peugeot Canada Ltd***., Newell et al. v. Canadian Pacific Airlines, Ltd., and ***Rahemtulla v. Vanfed Credit Union*** as support for this proposition

awarded if the defendant's misconduct was so malicious, oppressive, and high-handed that it offended the court's sense of decency. Justice Lockwood found that the evidence did not support such a claim for punitive damages.

Court of Appeal

In 1995, UGG appealed the judgment of Justice Lockwood and Wallace cross-appealed the finding that there was no fixed term contract, or in the alternative, the court should have found an implied obligation of good faith. Chief Justice Scott of the Manitoba Court of Appeal delivered the judgment which addressed the following three issues. First, was the award of 24 months' salary excessive? Second, did Justice Lockwood properly apply the law of aggravated damages as it was outlined in Vorvis? Finally, did Canadian employment law recognize bad faith discharge? Chief Justice Scott agreed with Justice Lockwood's reasoning on the fixed term contract and punitive damages so that further reference to them will be omitted.

Reasonable Notice

While Chief Justice Scott agreed that Wallace should have received the high end of the reasonable notice period, he believed that 'an element of aggravated damages must have crept into the determination by the trial judge that Wallace was entitled to 24 months' (180). Chief Justice Scott seemed concerned that the original notice standards established in ***Bardal***, which were intended to compensate an employee only for the notice he or she should have received, was not being faithfully followed (179).[8] Other than the factors enumerated in ***Bardal***, what other factors could extend reasonable notice (179)?

Chief Justice Scott did not believe that the manner of dismissal should constitute an independent category to consider when determining reasonable notice.

Chief Justice Scott cited ***Trask*** v. ***Terra Nova Motors Ltd.***, for the suggestion that malicious factors alleged during the dismissal, such as an unsubstantiated allegation of theft in ***Trask***, could prolong the notice period. While the manner of dismissal and the circumstances surrounding it may well be relevant in determining the appropriate period of reasonable notice where it impacts on the future employment prospects of the dismissed employee, he did not believe that the manner of dismissal should constitute an independent category to consider when determining reasonable notice. Applying this reasoning and considering the manner of Wallace's dismissal, Chief Justice Scott held that (180), '24 months, even after making allowance for the findings of the trial judge, is simply too long if we are to remain faithful to the principles in ***Bardal***. Rather, 15 months' notice would have been appropriate.'

Mental Distress

Wallace also advanced a separate claim for mental distress in tort as well as a claim for damages from mental distress in contract, all arising out of the circumstances surrounding his wrongful dismissal. First, Chief Justice Scott provided a summary of the law of contract in order to demonstrate that historically, the courts have not generally recognized mental distress as an appropriate head of damage for breach of contract. Chief Justice Scott began by confirming ***Addis***, which established the rule that claims for mental distress should not be allowed unless contracted for at the formation of the contract, as the law.

In order to justify such a position on a 'policy level,' Chief Justice Scott relied on a strict application of the rules of contract. His reasoning was based on the following two decisions. First, ***Vorvis*** made it clear that:

8 See **Wiebe** for a detailed analysis by Justice Kroft of the Manitoba Court of Appeal.

> A contract of employment does not in law have an indefinite existence. It may be terminated by either employer or employee and no wrong in law is done by the termination itself. An employee who is dismissed is entitled to the notice agreed upon in the employment contract or, where no notice period is specified in the contract, to reasonable notice. (1096)

Thus, the act of termination itself is not what is being addressed in the law of wrongful dismissal; rather it is the reasonable notice period.

Although not explicitly stated, Chief Justice Scott's reasoning was grounded in the authoritative decision of ***Hadley*** v. ***Baxendale***, which as discussed before established the rules of remoteness and foreseeability of damages in all cases of Anglo-Canadian contract law. Accordingly, unless mental distress was specifically contemplated and addressed by the parties during the formation of the contract, there is no liability.[9] Further, as was demonstrated in ***Vorvis*** above, damages in employment contracts are not meant to compensate for the manner of the dismissal, rather they are confined to the reasonable notice period.

Unless mental distress was specifically contemplated and addressed by the parties during the formation of the contract, there is no liability.

Chief Justice Scott explained that the confusion surrounding awards for damages for mental distress stemmed from confusion over its similarity with aggravated damages.[10] On the subject of aggravated damages, Chief Justice Scott noted that courts consider only harsh and reprehensible conduct of the defendant at the time of the breach (Schai 1991).[11] Damages for mental distress, on the other hand, do not depend on the oppressive manner in which the defendant behaves. However, there is an obvious overlap in a wrongful dismissal case where it is alleged that the same misconduct and mistreatment by the defendant employer that caused mental distress was of such magnitude to justify a claim for aggravated damages. Chief Justice Scott considered that in such circumstances, to award damages for both mental distress and aggravated damages would result in the double compensation of the employee (183).[12] The issue of double compensation had already been resolved by the court in ***Vorvis***, where Justice McIntyre held that aggravated damages had to be independently actionable in order to be recoverable (1107–08). Consequently, Chief Justice Scott held that the evidence did not support the finding of an independent wrong, and therefore the trial judge erred in awarding $15,000.

Bad Faith Discharge

Chief Justice Scott rejected Wallace's cross-appeal for breach of the tort of good faith and fair dealing in the manner of dismissal, which could cause mental suffering. He did so because no authority was advanced in support of the proposition except for one academic article (Ball 1994).

The Supreme Court of Canada: The Majority

The issues before the Supreme Court remained the same: the right to damages for mental distress; whether or not an employee could sue for bad faith discharge; and what would constitute reasonable notice. As we shall see, there was a clear divergence of opinion between the majority and the minority.

9 This was the position taken by Justice Wilson in the minority of ***Vorvis***.

10 Refer to the case of ***Ribeiro*** v. ***Canadian Bank of Commerce***and ***Francis*** v. ***Canadian Imperial Bank of Commerce*** to see how, even after ***Vorvis***, the courts misapplied the rules.

11 Aggravated damages have traditionally been awarded in tort in order to provide compensation for the injured feelings of the plaintiff where such injury has been caused by the tortfeasor's malice or outrageous conduct.

12 Also see ***Brown*** v. ***Waterloo (City) Regional Board of Police Commissioners.***

Mental Distress

While admitting that the law pertaining to mental distress had been thoroughly criticized, Justice Iacobucci, speaking for the majority, upheld the decision outlined in ***Vorvis*** as the law. Justice Iacobucci emphasized that an employment contract is not one in which peace of mind is the very matter contracted for,[13] and so absent an independently actionable wrong, the foreseeability of mental distress or the fact that the parties contemplated its occurrence was of no consequence. However, this was all subject to the 'Wallace Rule' outlined below.

Bad Faith Discharge

Having found that there was no fixed term contract, Wallace's counsel urged the court to find that an employee could only be dismissed for good faith or legitimate business reasons. Absence of such good faith reasons for dismissal would constitute a breach of an implied term either in contract or in tort and would be compensable by damages. Justice Iacobucci did not agree with either suggestion for a new head of damages.

Citing Justice Gonthier in ***Farber*** v. ***Royal Trust,*** Justice Iacobucci reaffirmed the rule that at common law either the employee or the employer could renounce an employment contract with proper notice. He then stated that:

> A requirement of good faith reasons for dismissal would, in effect, contravene these principles and deprive employers of the ability to determine the composition of their workforce. Such a matter would be more appropriately left to legislative enactment rather than judicial pronouncements. (28)

Justice Iacobucci also rejected the tort of good faith because it also lacked authority and would present the same dilemma as the contractual obligation.

Reasonable Notice

The majority began by surveying the ***Bardal*** factors in order to determine reasonable notice. In addition to character of employment, length of service, age, and availability of similar employment, Justice Iacobucci also suggested that other factors should have been considered by the lower courts such as the inducements made by UGG for fair treatment, commission, and job security when they were determining reasonable notice.[14] He held that all of these factors would support an award of notice at the high end of the scale.

While the termination of one's employment is always a traumatic event, when it is 'accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating.'

Then Justice Iacobucci's analysis turned to the issue of good faith, in particular to the way that some employers subject their employees to callous and insensitive treatment in their dismissal. Justice Iacobucci said that the general principles of contract law had failed to take into account the unique characteristics of the employment contract. While the termination of one's employment is always a traumatic event, when it is 'accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating' (33).

Justice Iacobucci concluded that the only way to ensure that employees received adequate protection during dismissal would be to hold their employers to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which would be compensated for by extended notice (see ***Farber***). Justice Iacobucci refrained from offering a

13 Refer to the following cases, known as the 'holiday' cases, which are an exception to the rule Iacobucci is discussing, where peace of mind was in fact found to have been within the contemplation of the parties and in fact contracted for: ***Jarvis*** v. ***Swan Tours Ltd.*** and ***Jackson*** v. ***Horizon Holidays Ltd.***

14 Similar inducements had been made in the case of ***Robertson*** v. ***Weavexx Corp.*** and were accounted for in the determination of reasonable notice.

precise definition of what would constitute bad faith conduct; however, at minimum he believed that in the course of dismissal:

> employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive. (44)

Nevertheless, this was not an exhaustive list of the factors to consider.

The majority reasoned that the time had come for the law to be more sensitive to the intangible injuries which could prolong one from finding work, and this is precisely what the obligation of good faith was intended to address. Justice Iacobucci stated that the actions of UGG had seriously diminished Wallace's prospects of finding similar employment and thus because of the bad faith manner of the dismissal, the majority restored the trial judge's original decision to award Wallace 24 months' pay in lieu of notice.

The majority reasoned that the time had come for the law to be more sensitive to the intangible injuries which could prolong one from finding work.

The Supreme Court of Canada: The Minority

Reasonable Notice

Justice McLachlin, writing on behalf of the minority, agreed with the majority that wrongful dismissal was the failure on the part of the employer to give the dismissed employee reasonable notice. However, the minority did not agree that all bad faith behaviour in dismissal would require additional notice because bad faith would not necessarily affect the time it would take to find similar work. According to the minority:

> the manner of dismissal should only be considered in defining the notice period where the manner of dismissal impacts on the difficulty of finding replacement employment, and that absent this connection, damages for the manner of termination must be based on some other cause of action. (44)

In support of this position, the minority offered the following four arguments. First, according to ***Bardal*** and the nature of actions for wrongful dismissal, only factors relevant to finding alternative employment should be considered in determining reasonable notice. Second, such an approach would be consistent with the principle that damages must be grounded in a cause of action. Consequently, damages in wrongful dismissal are limited to the wrong, which is the failure to give reasonable notice. Third, such an approach is consistent with the authorities, namely ***Addis, Pesb, Bardal*** and ***Vorvis***. Finally, such an approach would ensure certainty and predictability in the law.

Bad Faith

The minority believed that rather than allow courts to consider factors unrelated to the employment relationship when determining reasonable notice:

> The law has now developed to the point that to these traditional actions may now be added another: breach of an implied contractual term to act in good faith in dismissing an employee. (44)

The minority decided that Canadian employment law should recognize an implied obligation of good faith in every employment contract. This implied obligation would constitute an independent cause of action such as willful infliction of mental distress or negligent misrepresentation. The minority believed that good faith would simply be the next

Employment contracts are distinct from other types of contracts as a result of the unequal bargaining power typically involved in the relationship.

cause of action in the modernization of Canadian employment law. The minority agreed with the majority's definition of what would constitute bad faith, and they also agreed that employers would not need good faith reasons to dismiss their employees. (45)

The rationale of the minority's position was similar to that of the majority: employment contracts are distinct from other types of contracts as a result of the unequal bargaining power typically involved in the relationship. Consequently, the implied obligation of good faith would be designed to redress the power imbalance that:

> results in employee vulnerability—a vulnerability that is especially acute at the time of dismissal. The nature of the relationship thereby necessitates some measure of protection for the vulnerable party. Requiring employers to treat their employees with good faith at the time of dismissal provides this special measure of protection. It follows that an implied term is necessary in the sense required to justify implication of a contractual term by law. (45)

Mental Distress and Disposition of the Case

The minority agreed with the trial judge's findings that Wallace's mental anguish was caused by the manner of dismissal and following events. According to the minority, these damages would be compensable 'providing they flow[ed] from the employer's failure to treat Mr. Wallace in good faith at the time of dismissal' (49). Justice McLachlin concluded that UGG's decision to:

> (1) [terminate] Mr. Wallace in an abrupt manner after having complimented him numerous times prior to the dismissal; and (2) UGG's decision to play hardball with Mr. Wallace by maintaining completely unfounded allegations of just cause up until the start of the trial which resulted in Mr. Wallace being essentially ostracized from the printing business . . . would breach the implied term of good faith and fair dealing. (49)

Consequently, rather than adhere to the rule of Vorvis that insisted that damages for mental distress be independently actionable, the minority reasoned that the damages claimed by Wallace flowed directly from the employer's breach of the implied term and were therefore compensable. Accordingly, the minority would have restored the trial judge's award of 24 months' salary and the $15,000 representing compensation for mental distress and loss of reputation that were caused by the bad faith manner of dismissal.

Analysis of the Supreme Court's Decision in *Wallace*

The Majority

Wallace essentially had two concurrent good faith claims. In the first instance, Wallace argued that businesses should be required to have good faith reasons to dismiss their employees. Stacey Ball, who acted as Wallace's counsel at the Supreme Court, has long argued that this obligation should be found as an implied condition of every employment contract:

> Except for damages for mental distress, and in the rare case where there is an award for punitive damages, employers are currently free to discharge in bad faith with the knowledge that their potential liability is relatively low compared to the real economic and non-economic losses suffered by discharged employees. (Ball 1994, 573)

Ball urged the court to use good faith as a shield to bar such conduct by requiring businesses to have good faith reasons for dismissal. This was essentially the position adopted by the House of Lords in ***Malik***, where Lord Nicholls noted that compensation would be available for the breach of the trust and confidence term except if the contract was terminated for good faith reasons such as 'redundancy or if the employee [left] of his own volition.'

However, the majority was not persuaded by this argument. They believed it to be too radical a development in the law of wrongful dismissal, one better left for the legislature. The majority's position on this issue can be defended on the following two grounds: first, even if there were a breach of an implied condition of good faith in contract, damages would be confined to the reasonable notice period or to an independently actionable wrong as established in ***Vorvis***. Unlike the House of Lords, the Supreme Court had not yet overruled ***Addis*** (O'Byrne 1998, 498). Second, there is already a ***de facto*** obligation of good faith in dismissal: employers are required to provide reasonable notice, by way of an implied condition, for all dismissed employees, unless there is just cause. Therefore, to 'superadd another level of good faith would result in the collapse of an important distinction between indeterminate and fixed term contracts' (O'Byrne 1998, 498).

Wallace argued in the alternative that there was a tort of bad faith that required employers to treat their employees in good faith in the manner of dismissal. This tort was intended to compensate employees for all their losses, financial or otherwise, flowing from the employer's bad faith. Considering the relational nature of employment, the tort could be used to substantially increase the damages long-serving employees could receive in cases of wrongful dismissal. For instance, middle-aged employees, unable to find similar employment after having devoted the greater part of their lives to one company, would be compensated accordingly if they could prove bad faith dismissal. However, the majority decided that:

> The Court of Appeal noted the absence of persuasive authority on this point and concluded that such a tort has not yet been recognized by Canadian courts. I agree with these findings. To create such a tort in this case would therefore constitute a radical shift in the law, again a step better left to be taken by the legislatures. (28)

In so doing, the majority has effectively barred the development of a new independent action of good faith in contract or in tort.

In contrast to the decision of the House of Lords in ***Malik, Wallace*** represents more than a reliance on precedence; it is a decision by the court to adhere to the efficiency paradigm. It is a step back from the trend in the rights paradigm that saw the following cases decided in the previous eight years.

Wallace represents more than a reliance on precedence; it is a decision by the court to adhere to the efficiency paradigm.

In ***Machtinger***, the court implied the right to reasonable notice of dismissal into every contract absent any express provisions to the contrary in order to escape the harsh notice provisions of standard-form employment contracts. The notice also had to abide with the relevant ***Employment Standards Act.*** In ***Queen*** v. ***Cognos***, the Supreme Court recognized the right of an employee to sue for negligent misrepresentation based on false statements made prior to entering into an employment contract. Finally, in ***Farber***, the court addressed the employer's dual obligations to either find alternate suitable employment or provide adequate compensation in a case of constructive dismissal occurring in Quebec. ***Wallace*** presented the court with another opportunity to enhance protections for vulnerable employees.

As noted earlier, the courts do not decide cases in a vacuum—they facilitate societies' prevailing system of work organization and personnel management strategies. Unlike ***Cognos*** for instance, which recognized and extended the existing contractual principle of negligent misrepresentation into the employment context, ***Wallace*** presented the court

Rather than risk disturbing the existing law of wrongful dismissal, the majority sided with caution and decided not to recognize an obligation of good faith.

with a much more difficult decision. As noted before, good faith has yet to receive explicit Supreme Court recognition. While the acceptance of negligent misrepresentation to employment was a sound and proven logical extension, the acceptance of good faith presented the Supreme Court with a novel yet untried legal principle. Rather than risk disturbing the existing law of wrongful dismissal, the majority sided with caution and decided not to recognize an obligation of good faith.

Rather than address the issue of bad faith directly, the majority decided to address it in part. In accordance with ***Addis*** and ***Vorvis*** the court decided to recognize bad faith as deserving compensation, but they confined damages for it to additional notice. By recognizing bad faith as an additional factor to consider in determining notice, the court was attempting to balance the interests of employers with those of employees.

The Supreme Court was adhering to the traditional approach of wrongful dismissal. O'Byrne (1998, 501) has observed that while the traditional ***Bardal*** factors have factual qualities which have a direct and predictable effect of either lengthening or shortening the notice period, bad faith in the manner of dismissal may not. For instance, some bad faith conduct, such as defamation of character in the ***Wallace*** case, would be appropriately compensated for by reasonable notice because UGG's conduct negatively impacted on Wallace's attempts to find alternative work. In contrast, damages such as injured self-esteem or a hurtful termination letter, which were not independently actionable, would not get compensation unless they affected the time it took the employee to find other employment. The lack of clear guidance in ***Wallace*** left the lower courts to decide how to apply the decision.

The Minority

In contrast to the majority's reliance on the traditional rules of wrongful dismissal, the minority's approach would have resolved a number of difficulties. First, the minority argued for the creation of good faith as a separate action in contract. This would have been consistent with the basic contract law principle that remedies should not exist in the air, but should be tied to a breach of an identified right or entitlement (O'Byrne 1998, 505). Second, by compelling employers to pay additional sums on top of reasonable notice, the obligation of good faith could have acted as an effective judicial policing technique to control bad faith dismissal. Arguably, the extra costs of extended notice would deter employers from engaging in bad faith conduct.

Lower Court Application of *Wallace*

As previously discussed, the majority constructed their articulation of good faith primarily on Summers' (1982) model of good faith that defined the obligation by identifying the bad faith conduct it was intended to prohibit. The only guidance the majority provided the lower courts with was that the conduct they would consider being bad faith would be conduct that was, 'untruthful, misleading or unduly insensitive' (34). However, Justice Iacobucci noted that this was by no means an exhaustive list of all the types of bad faith conduct the courts would compensate with additional notice.

The real issue after the release of ***Wallace*** was whether the lower courts would interpret the case liberally to enhance damages or whether they would use it to constrain what some commentators believed to be the over-compensation of ever increasing damage awards that began in the 1980s. In other words, would ***Wallace*** be used to accomplish what ***Vorvis*** was unable to do eight years earlier by reinforcing the traditional approach to wrongful dismissal? By eliminating any latent misunderstanding of the law, would ***Wallace*** provide the lower courts with the potential to constrict and align both the law and damages awarded in wrongful dismissal?

The case law to date seems to indicate that the lower courts have interpreted ***Wallace*** and behaviour that constitutes bad faith differently and are compensating bad faith conduct in divergent ways. The result is that identical conduct will be treated differently depending on the jurisdiction.

The lower courts have interpreted Wallace and behaviour that constitutes bad faith

Examples of Wallace Claims that Extended Notice

Although I have argued throughout this paper that the Supreme Court had pursued an efficiency approach over a rights approach, the following decision reveals that at the appellate level, judges are acknowledging the inherent power imbalance in the employment relationship that favours employers over employees. It is reassuring to see that at least one court was willing to use ***Wallace***, as the minority had intended, to redress this power imbalance.

Cassady v. ***Wyether-Ayerst Canada Inc.*** was decided after the release of Wallace by the British Columbia Court of Appeal. In ***Cassady*** a junior employee was dismissed after only four months of employment in a callous manner with an unsubstantiated allegation of cause against her. She was extremely vulnerable to her employer because of her age and her lack of work experience.

At trial, before the release of ***Wallace***, the plaintiff was awarded eight months' notice and $72,000 for aggravated and punitive damages. On appeal by the defendant, and after the Supreme Court release of ***Wallace***, the plaintiff relied on the bad faith conduct of the defendant as a new means to maintain the jury's original award. After reviewing ***Addis, Peso*** and ***Vorvis***, Justice Fsson surveyed Wallace and noted:

> It is significant that the damages which can be awarded by the extended period of notice are not limited to matters which negatively affect the employee's chances of finding alternative employment. Indeed, it is that aspect which may properly be termed revolutionary.

Justice Fsson continued by stating that

> The reasonable period of notice is no longer to be limited to providing enough time to find new employment. There is now to be an element of deterrence to employers by discouraging them from bad faith conduct on dismissal. (184)

Thus the British Columbia Court of Appeal has interpreted ***Wallace*** liberally, to be used to compensate for bad faith dismissal by extending the reasonable notice period.

After considering the factors in ***Bardal***, Justice Fsson concluded that despite the fact the plaintiff had only worked for the defendant for four months, the ***Wallace*** rule entitled her to additional four months' notice for a total of 12 months. The British Columbia Court of Appeal recognized the difficulties associated with ***Bardal*** and status discussed earlier in that junior employees often find it difficult to find work in the current labour market. The majority noted that:

> The traditional approach was realistic in the quarter century or so after the end of World War II when employment opportunities for the young and energetic seemed almost limitless. In more recent decades, there has been a substantial change so that, even when the economy is healthy, job opportunities are eaten up in the maw of downsizing. (177)

However, at trial the plaintiff had also been awarded $10,000 for aggravated damages and $62,000 punitive damages. The Court of Appeal followed ***Wallace***, which reaffirmed

Vorvis, and stated that aggravated and punitive damages had to be independently actionable. Since neither claim was independently actionable, both awards were reversed. However, the majority believed the addition of four months' notice under ***Wallace*** would justly compensate the plaintiff for the loss of $72,000 in monetary damages.

In ***Wallace*** the majority considered inducement to be an important factor in determining the reasonable notice period:

> Many courts have sought to compensate the reliance and expectation interest of terminated employees by increasing the period of reasonable notice where the employer has induced the employee to quit a secure, well-paying job . . . on the strength of promise of career advancement and greater responsibility, security and compensation with the new organization. In my opinion, such inducements are properly included among the considerations which tend to lengthen the amount of notice required. (30)

In ***Kilpatrick*** v. ***Peterborough Civic Hospital***, the Ontario Court General Division relied on ***Wallace*** to liberally extend the notice period for an upper middle-aged, highly skilled employee.

The plaintiff was 60 years old and had been actively recruited with multiple inducements to leave his previous position of 30 years employment in New Brunswick, to move to Peterborough where he would assume the duties of CEO of the local hospital. A few years after writing the province's policy on hospital restructuring, he himself was terminated as hospitals were merged. Although nothing in the manner of dismissal itself was harsh, Justice Wilkins believed that ***Wallace*** had established that the courts should consider the inducement and the length of time an employee worked after the inducement. Applying this reasoning along with the other traditional ***Bardal*** factors, Justice Wilkins stated that:

> A high-minded employer cognizant of the vulnerability in which it has placed its chief executive officer might well have made special arrangements to protect that employee up to natural retirement or by arranging for a satisfactory retirement. Simply paying salary and arranging for coverage for benefits pending the outcome of litigation is a far cry from the exercise of any responsibilities or duties of good faith. (278)

Justice Wilkins noted that for the defendant to be able to approach and 'woo the plaintiff to leave [his original] hospital and come to Peterborough, only to be placed in circumstance of catastrophic disadvantage would be an injustice in the extreme' (278). Considering similar cases, Justice Wilkins increased the suggested 24-month, high-end notice period established by ***Wallace*** and awarded the plaintiff 30 months' notice.

The Ontario Court of Appeal has recently reversed ***Kilpatrick***. While Justice Borins of the Court of Appeal agreed with the notice period awarded by Justice Wilkins, the rules of civil procedure were improperly followed and a new trial was ordered based on this technicality.

The lower courts have also used Wallace to find that the manner of dismissal can affect one's notice.

The lower courts have also used ***Wallace*** to find that the manner of dismissal can affect one's notice. In ***Whiting*** v. ***Winnipeg River Brokenhead Community Futures Development Corp.*** the plaintiff was constructively dismissed. As established by ***Wallace***, it was the act of dismissal itself that constituted the bad faith. Justice Kroft of the Manitoba Court of Appeal noted that 'were it not for the manner in which the constructive dismissal was implemented and its effect, I would have thought that a notice period of five to six months was adequate' (31). However:

> The manner of termination, which was engineered by Ms. Seier, was callous, improper, and totally without sensitivity. There can be no doubt that being pushed out of a job that she enjoyed and in which she was performing admirably was a traumatic experience, and I am bound to find that along with any actual incapacity which she experienced, the manner of dismissal itself was a factor which bears upon the question of reasonable notice. (31)

Having found that the manner of dismissal warranted a longer notice period, Justice Kroft used ***Wallace's*** award of 24 months as a benchmark and set the period of reasonable notice for the plaintiff at 12 months. Based on ***Wallace***, Justice Kroft reasoned this to be an appropriate award because Wallace had been employed longer and he had been induced to give up a 25 year job, factors that the plaintiff did not face.

In separate concurring reasons, Justice Twaddle elaborated on the approach the Manitoba courts would use in applying the ***Wallace*** principle. Justice Twaddle emphasized that the traditional approach to wrongful dismissal was still the dominant approach in that:

> Although the consequences of a bad faith discharge are to be taken into account in assessing the length of reasonable notice, the notice period once properly assessed is not to be lengthened with specific reference to mental stress or other consequences. (35)

Consequently, the Manitoba Court of Appeal had used ***Wallace*** to uphold ***Vorvis***, and they would only compensate bad faith if it was believed to have had a causal link to the notice period.

In contrast to the conservative approach adopted by the Manitoba Court of Appeal above, a more liberal approach, like that used by the British Columbia Court of Appeal in ***Cassady***, was used by the Newfoundland Court of Appeal in ***Squires*** v. ***Corner Brook Pulp and Paper Ltd.*** In ***Squires***, an engineer of 13 years had been dismissed by a harsh termination letter. While his action had succeeded at trial, the plaintiff believed he was entitled to more damages. During the interim period between the trial decision and the hearing at the Newfoundland Court of Appeal, ***Wallace*** was released. The plaintiff then asserted that he was dismissed in a bad faith manner that entitled him to elongated notice.

Justice Cameron, on behalf of the majority, noted that the basic principles expressed in ***Vorvis*** were affirmed. However, he observed that ***Wallace*** had 'opened the possibility that behaviour that does not give rise to a separate action, and therefore could not support a claim for aggravated or punitive damages, may support a claim for an extended notice period' (para. 78). Consequently, in the case at bar he concluded that the manner of the defendant's dismissal 'fell short of the fair dealing required by ***Wallace***' (para. 86). Accordingly, Justice Cameron added an additional six months to the plaintiffs reasonable notice period.

A similar position to Squires was adopted by the Saskatchewan Court of Queen's Bench in ***McGeady*** v. ***Saskatchewan Wheat Pool***. and ***Zimerman*** v. ***Kindersley Transport Ltd.,*** both cases involving insensitive dismissal. In ***McGeady***, where the plaintiff had been forced to terminate a friend before being terminated herself, the evidence clearly showed that the plaintiff suffered harm, including mental distress during and following her dismissal. The Saskatchewan court liberally used the ***Wallace*** rule to compensate for this mental distress by adding an additional six months' notice, despite the fact that the mental distress was found not to pass the threshold required to establish the tort of willful infliction of mental distress. This decision, while not explicitly stated, seemed to be heavily influenced by Justice McLachlin's minority judgment in ***Wallace***.

Similarly, in ***Zimmerman***, Justice Goldstein applied the ***Wallace*** principle and extended the notice period from a contractual requirement of four weeks to eight weeks, after finding that the employer terminated the employee in a humiliating and insensitive manner and had done so without any consideration for the employee's feelings.[15]

Although negligent misrepresentation was the subject matter of ***Queen*** v. ***Cognos***, the following case from the Ontario Superior Court of Justice demonstrated that such representations could also be compensated for by the ***Wallace*** rule. In ***Budd*** v. ***Bath Creations Ltd.***, the plaintiff founders of a corporation found themselves heavily in debt. In order to avoid foreclosure, they sold their company to their main competitor, the defendant. The defendant knew at all times he would not be hiring the plaintiffs indeterminately, but he made representations to the contrary. Moreover, he got the plaintiffs to sign non-competition agreements that were effective for one year.[16] After the plaintiffs successfully streamlined their operations with the defendant company they were terminated without cause. Justice Brennan held that:

> The employer was less than forthright and candid about his prospects. [The employee] should have been told that he was there for the transition and [he should have been] given the opportunity to secure a new position for himself in a reasonable time. (para. 38)

Failure to treat the employees reasonably resulted in bad faith, and Justice Brennan used ***Wallace*** to add an additional three months' notice.

The British Columbia Supreme Court relied on ***Wallace*** in the case of ***Stolle*** v. ***Daishinpan (Canada) Inc.*** After five years of employment, the plaintiff had advanced to the position of assistant manager with the defendant. She took a maternity leave, and upon arriving back to work realized that she had been made redundant. In addition to this, the defendant attempted to force the plaintiff into signing a release of legal action in exchange for wages they were withholding. Justice Lander found as a matter of fact that:

> the defendant manager withheld the plaintiff's statutory severance payment in order to obtain the execution of the plaintiff of the release protecting the defendant from an action by the plaintiff pursuant to the ***Employment Standards Act*** and ***Human Rights Act.*** This conduct was in the circumstances inappropriate amounting to high-handed conduct. (para. 21)

Thus, while attempting to secure a release was not improper conduct in itself, Justice Lander found that the insensitive manner in which the employer attempted to get the release warranted the awarding of an additional three months, according to ***Wallace***.[17]

The law should be mindful of the acute vulnerability of terminated employees.

Sometimes, when an employee is dismissed, false allegations of theft, fraud or other conduct is alleged to substantiate just cause. By maintaining a groundless allegation, as perpetrated by UGG against Wallace, an innocent employee may suffer a number of losses. The majority noted that:

> The law should be mindful of the acute vulnerability of terminated employees and ensure their protection by encouraging proper conduct and preventing all injurious

15 Also see ***Frank*** v. ***Federated Co-operative Ltd.***

16 For a case specifically addressing non-competition agreement, see ***Murrell*** v. ***Burns International Security Services Ltd.***

17 For a similar fact scenario, but an unsuccessful claim, see ***Whelehan*** v. ***Laidlaw Environmental Services Ltd.***

> losses which might flow from acts of bad faith or unfair dealing on dismissal, both tangible and intangible. I note that there may be those who would say that this approach imposes an onerous obligation on employers. I would respond simply by saying that I fail to see how it can be onerous to treat people fairly, reasonably, and decently at a time of trauma and despair. (37)

The following two cases demonstrate the courts willingness to use ***Wallace*** to deter such conduct.

In ***Clendenning*** v. ***Lowndes Lambert (B.C.) Ltd.,*** the British Columbia Supreme Court found that the false allegations made by the defendant insurance company were so severe as to bar the plaintiff from working in the industry:

> The allegations and suggestions of forgery, insurance fraud, mortgage fraud, incompetency, unprofessional organizational abilities, disobedience, drug and/or alcohol abuse, and misuse of the cellular phone made the possibility of the plaintiff finding alternate employment virtually impossible. (92)

The trial court found that the employer had made these false allegations known to all prospective employers the plaintiff had applied to. Relying on ***Wallace*** the court found that 'the bad faith conduct of defendant is worthy of considerably more compensation than that which would ordinarily be available' (92). In addition, the trial judge condemned the conduct of the defendant's council for not withdrawing any of the allegations, even after it became quite obvious that they were false and unsubstantiable.

In ***Saulnier*** c. ***Banque Laurentienne du Canada***, a false and unsubstantiated allegation of alcoholism was made against a new employee and resulted in his immediate dismissal. At trial, the plaintiff was awarded 12 months' notice. On appeal to the Quebec Court of Appeal, Justice Forget relied on ***Wallace*** to assess damages with respect to 'moral harm.' Regarding the false allegation of just cause, Justice Forget concluded that '[i]t was insulting and hurtful for the employee to be falsely accused of being an alcoholic; the employer should have investigated the validity of this allegation' (310). The Court of Appeal then noted that the false allegation, in a small industry, would definitely hurt the plaintiff's chances in obtaining similar employment. The court seemed to interpret ***Wallace*** as requiring causal connection between the bad faith conduct and the extension in notice. Consequently, the Quebec Court of Appeal concluded that while the sum awarded by the trial judge was generous, it was not so generous that appellate intervention was justified.

Unsuccessful Claims for Recovery under Wallace

The analysis thus far would seem to indicate that most jurisdictions have used ***Wallace*** to reinforce ***Vorvis*** and the traditional rules of wrongful dismissal. However, there was a divergence in approach: some courts such as the Manitoba Court of Appeal in ***Whiting*** and the Quebec Court of Appeal in ***Saulnier***, would only compensate based on factors causally related to the notice period. In contrast, some courts such as the British Columbia Court of Appeal in ***Cassady***, and the Newfoundland Court of Appeal in ***Squires***, were willing to compensate for behaviour completely unrelated to the notice period, but still considered to be bad faith. This pattern probably results from the lower courts appreciation of the minority's decision, and their desire to compensate for bad faith conduct as far as possible without straying too far from the reinforced rules of wrongful dismissal. This pattern was also followed in the cases where ***Wallace*** was pleaded unsuccessfully.

Most jurisdictions have used Wallace to reinforce Vorvis and the traditional rules of wrongful dismissal.

Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favorable contract provisions than those offered by the employer, particularly with regard to tenure.

In ***Leerdam*** v. ***Stirling Douglas Group Inc.*** a young employee was dismissed after completing only seven months of a fixed-term contract. The plaintiff argued that there was no just cause, and in the alternative, that he should not be bound by the express notice provision in his contract of employment. In support of his claim, he advanced numerous examples of judicial recognition of the vulnerability of employees from ***Machtinger*** and ***Wallace*** that collectively suggested that:

> The terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favorable contract provisions than those offered by the employer, particularly with regard to tenure. (32)[18]

Justice Macdonald considered ***Wallace*** and concluded that the plaintiff was not in an unequal bargaining position. Because of his education, intelligence, and business experience, the plaintiff was found to be fully capable of negotiating contractual provisions on his own behalf. Then, Justice Macdonald used ***Wallace*** to reaffirm ***Machtinger***:

> I conclude that ***Machtinger*** confirms that the common law requirement of reasonable notice upon termination of an employment relationship may be overcome by a valid and effective contract which provides a specific notice period, unless a statute requires a different result. (para. 37)

The trial judge then stated overall, ***Wallace*** confirmed the general approach established in ***Vorvis.***

Although the facts did not support the plaintiffs claim, the trial judge made it clear that ***Wallace*** would be used to realign the law of wrongful dismissal with the traditional approach.

The following case had a similar fact scenario to ***Wallace*** regarding inducement but was improperly decided owing to the trial judge's complete misinterpretation of the Supreme Court's decision. In ***Baldwin*** v. ***Quinsam Coal Corp.*** the plaintiff was a senior employee who was actively recruited from his position in Nova Scotia, and persuaded to move to British Columbia to take up similar, yet more secure employment. At age 43, he was hesitant, but he was provided with assurances that his employment would be guaranteed until retirement. Unfortunately, he was dismissed after only a couple of years of service. The facts adduced revealed that the company was less than forthright in informing the plaintiff of his dismissal. Rather than telling him directly they left him 'hanging in the air for close to six months' by maintaining that he had employment, when they knew he had in fact been terminated.

After reviewing ***Wallace***, Justice Shaw concluded that there was no bad faith conduct, because he did not believe the mental distress suffered by the plaintiff was as pronounced as it was in ***Wallace*** or ***Cassady***. However, this was a misreading of ***Wallace***, for mental distress did not have to be present, nor was it the only factor that the ***Wallace*** rule was intended to compensate. Rather, the trial judge failed to realize that the plaintiff was relying on the inducement made to him by the defendant to extend reasonable notice, not the mental distress resulting from the manner of dismissal. Considering the plaintiff's recruitment and the assurances made to him about long-term employment, Justice Shaw erred in finding that these conditions, taken collectively, were insufficient to prolong the notice period in accordance with ***Wallace***.[19]

18 Also refer to Swinton (1980).

19 Also see ***Bennett-O'Brien*** v. ***Village Green Inns Ltd.***

In ***Burry*** v. ***Unitel Communications Ltd***., the British Columbia Court of Appeal, in contrast to its decision in ***Cassady***, chose to interpret ***Wallace*** in a very restrictive and traditional manner. The wrongful dismissal in this case was not in dispute. Having been dismissed after 33 years of faithful service, the plaintiff was forced to accept a 'take it or leave it' settlement of 15 months' notice when it was known that the plaintiff would be entitled to 24 months' notice at common law. Justice Newbury noted that:

> Unitel's attempt to encourage Mr. Burry to accept his minimum statutory payment in settlement of his much larger claim at common law was not particularly commendable. However, I cannot agree that Unitel's conduct amounted to bad faith or even undue insensitivity within the meaning of ***Wallace***. (320–21)

In arriving at this decision, Justice Newbury simply compared and contrasted the facts of ***Wallace*** with those in the present case. The majority of the Supreme Court in ***Wallace*** had made it clear that the case did not contain a comprehensive list of bad faith conduct. The Court of Appeal could have expanded the original list of bad faith behaviour and found the defendant's conduct to be an example of unequal bargaining power or unconscionability, both of which could be interpreted as examples of bad faith. Yet, the learned justices refrained from elaborating on the law. The Court of Appeal should have been more careful in interpreting ***Wallace***, for they have done a substantial disservice to a potentially progressive and useful ruling by failing to give it the attention it deserves.

The majority of the Supreme Court in Wallace had made it clear that the case did not contain a comprehensive list of bad faith conduct.

The case of ***Havens*** v. ***John Watson Ltd.*** demonstrates yet another failure on the part of the lower courts to properly use the ***Wallace*** rule. The plaintiff had been a warehouse foreman of a glove depot. Aside from his regular employment, the plaintiff and his family also tagged and sold gloves from the warehouse at flea markets under an agreement with the owner. After conducting an inventory analysis, the defendant noted that some boxes of gloves had gone missing. The defendant supervisor forced the plaintiff to explain where the missing boxes were. Although the supervisor knew of the plaintiff's business with the gloves, he nonetheless fired him for cause because he believed that the plaintiff's explanation as to the whereabouts of the gloves was insufficient. In addition, at trial it became clear that there was no proper investigation of the plaintiff and that the defendant had more credible evidence that another employee had actually stolen the gloves.

Despite these revelations, the malicious manner of the dismissal, and the impact it had on the sense of worth and reputation of the senior employee, Justice Mackenzie of the British Columbia Supreme Court interpreted ***Wallace*** as requiring the presence of mental distress in order to award additional notice. Justice MacKenzie noted:

> In this case there is no evidence that the manner of dismissal caused the plaintiff emotional trauma in excess of that normally associated with losing one's job. He was not forced to seek psychiatric help. The defendant did not deliberately decide to play 'hard ball' with the plaintiff. (para. 54)

This threshold standard is obviously well above that established by the majority in ***Wallace***. Rather it seems heavily influenced by the threshold in ***Vorvis*** of what is required to prove a claim for mental distress. This decision confused the high standard of ***Vorvis*** regarding aggravated and punitive damages with the lower standard of ***Wallace*** with respect to damages arising from the manner of dismissal.

However, Justice MacKenzie justified his misuse of ***Wallace*** on the basis that the defendant supervisor's conduct was tolerable because he had had a minimum 'objective belief'

that the plaintiff had stolen the gloves. Justice MacKenzie erred in his final conclusion when he said 'it cannot be that any unsuccessful allegation of theft as just cause for dismissal should result in an extended notice period [for] ***Wallace*** does not go that far' (para. 55). If one cannot claim extended notice for an unfounded allegation of theft that causes one to be terminated what purpose does the ***Wallace*** rule serve?

Wallace's Impact on Aggravated and Punitive Damages

Actions warranting recovery for aggravated or punitive damages must also be independently actionable.

The most significant effect of ***Wallace*** has been its use as affirmation of the requirement of ***Vorvis***, which insists that actions warranting recovery for aggravated or punitive damages must also be independently actionable. In each case involving ***Wallace***, where such awards were claimed, or appealed, the ***Vorvis*** rule was strictly applied. I believe the following decision from the Ontario Court of Appeal provides proper guidance to lower courts for interpreting ***Wallace***.

In the case of ***Noseworthy*** v. ***Riverside Pontiac-Buick Ltd***., the Ontario Court of Appeal explicitly relied on Wallace to realign a confusing trial judgment with the law. At the time of dismissal, the plaintiff was sixty years old, and had worked at the dealership for four years. The defendant had threatened the plaintiff with criminal charges and attempted to dismiss him for cause by alleging that he had forged his supervisor's signature in the signing of cheques. However, at trial this ground for just cause was found to have been malicious and unsupported by the facts. As in ***Wallace***, the trial judge concluded that the plaintiff had suffered, 'traumatic stress disorder with only a fair prognosis for recovery' (39).

At trial, and before ***Wallace*** had been delivered, Justice Cosgrove found the dismissal to be wrongful and 'highhanded, repulsive, and unacceptable by any standard of decency' (39). Justice Cosgrove awarded Noseworthy the following damages: ten months reasonable notice; five months for aggravated damages because of the unfounded allegations of criminal activity (not for the mental distress); $15,000 punitive damages; and one year's salary for mental distress.

Justice Goudge of the Ontario Court of Appeal began his reassessment of Justice Cosgrove's decision by noting that:

> The trial judgment was rendered prior to the decision of the Supreme Court of Canada in ***Wallace*** v. ***United Grain Growers Ltd.***, [1997] 3 S.C.R. 701. For the reasons that follow I have concluded that, in light of ***Wallace***, the awards of aggravated damages, punitive damages, and damages for mental distress cannot stand and that the calculation of appropriate notice must be addressed. (38)

It was evident that the Court of Appeal was going to use ***Wallace*** to bring order back to the law of wrongful dismissal.

Justice Goudge systematically reversed each one of Justice Cosgrove's awards. Justice Goudge began by noting that the trial judge erred in basing his award of aggravated damages on certain factors which he viewed to be aggravating circumstances. Rather, the trial judge was required to assess whether the manner of the dismissal caused the plaintiff mental distress, and whether that constituted a separately actionable wrong by the employer according to ***Vorvis***. Only if both conditions were met would Justice Cosgrove's award be sustainable. In this instance, Justice Goudge found that the record would not support such a finding. For similar reasons, the award for punitive damages was reversed.

Regarding the reasonable notice period, Justice Goudge concluded that the original award of ten months would have been too generous on the basis of ***Bardal*** alone. However, he observed that ***Wallace*** had changed the law by introducing bad faith conduct as a factor to consider when assessing notice.

Justice Goudge noted that the trial judge had used bad faith 'erroneously . . . to underpin his awards of aggravated damages and punitive damages' (42). Rather, ***Wallace*** represented a significant new step in the evolution of the way in which reasonable notice is determined. According to Justice Goudge:

> Bad faith is relevant, even where the employee suffers mental distress as a result but cannot show that the manner of dismissal affected his future job prospects although if the latter occurs as well, the resulting extension of the notice period would likely be considerably greater. (43)

Wallace represented a significant new step in the evolution of the way in which reasonable notice is determined.

Thus, the Ontario Court of Appeal believed that all bad faith conduct should be compensated. However, causal connection between the bad faith and finding new work would increase the notice period beyond what it otherwise would have been.

Then after assessing the factors enumerated in ***Bardal*** and applying the reasoning of ***Wallace***, Justice Goudge concluded that:

> While the employer was found to have acted in bad faith in effecting the dismissal, neither the allegation of forgery nor the threat of criminal charge which grounded this finding appear to have been sustained beyond the initial meeting. It is, in my view, far from the most egregious example of bad faith conduct. Regrettably, however, the consequences of this conduct to Mr. Noseworthy's mental health were significant. (45)

He then awarded the plaintiff ten months' notice.

Noseworthy is significant for providing an excellent example of how the lower courts could use ***Wallace*** in accordance with the traditional approach. Justice Goudge observed that:

> Iacobucci J. does not contemplate that the dismissed employee should recover damages for all the harm caused by the bad faith conduct. To do so would be to treat 'bad faith discharge' as a stand-alone cause of action either in contract or in tort, something he clearly rejects. (43)

Rather, the bad faith conduct would be used to extend notice. In addition, the more pronounced the connection between the bad faith conduct and finding similar work, the longer the notice.

Conclusions

The lower court interpretation of ***Wallace*** has proved to be a partial success. The decision has worked well where the bad faith manner alleged has had a real impact on one's notice period, and a plaintiff received elongated notice as compensation. However, in other situations, extended notice may not be the most appropriate remedy. As the above survey of recent decisions indicates, the lower courts are interpreting Wallace inconsistently, or misinterpreting it altogether.

A major theme that emerged from this discussion of ***Wallace*** is that the lower courts are using the decision as a means to control wrongful dismissal claims. Confusion over claims for mental distress, aggravated damages and punitive damages began in the early 1980s. The Supreme Court had believed ***Vorvis*** resolved them, however this was not the case. The wording in ***Vorvis*** was vague and provided room for the exercise of judicial discretion that again led to the problem with consistency in wrongful dismissal decisions. Consequently,

Wallace was used as affirmation of ***Vorvis*** and a way to bring order back to the law. This was clearly demonstrated in the divergent judgments between the lower court and the Court of Appeal in ***Noseworthy***, outlined above.

This process of realigning wrongful dismissal claims with ***Vorvis*** has been undertaken in some jurisdictions such as Ontario, British Columbia, Manitoba and Quebec. The appellate courts of each of these provinces have required that relief for bad faith conduct be rationally connected to the notice period in some way. Although this was not a requirement of the majority's decision, only a few cases such as ***Squires*** have not explicitly or implicitly insisted on it. The result is that the potential breadth of the majority's decision has been narrowed. In addition, some lower court decisions, namely ***Baldwin*** and ***Havens***, demonstrate that trial judges often misinterpret and misapply ***Wallace*** irrespective of whether the decision received a liberal or restrictive interpretation.

Yet, the minority judgment still seems to have been the preferred route, for an independent action would have provided employees dismissed in a bad faith manner with more protection than simply extending notice. Accordingly, one can always get around the rigid rules of a judicial rule, such as the ***Wallace*** rule, by way of legislative enactment.

Stuesser (1997–98, para. 27) recently observed that this is precisely what was done in New Brunswick, where the ***Vorvis*** rule was recently statutorily removed by allowing for punitive and aggravated damages to be awarded without the need for an independent actionable wrong.[20] In this way, the provincial legislature of New Brunswick has adhered to a right's approach by making extended damages accessible. This legislative route is more significant than the ***Wallace*** rule or the minority's proposed head of action in contract, for it opens up all contractual damages to independent recovery.

The most promising development to date, however, has been the House of Lords decision, ***Malik***. O'Byrne (1998) has observed that it remains to be seen whether this novel English approach will ultimately find footing in Canada, noting that there is nothing in ***Wallace*** to prevent such development. First, the leading Canadian good faith decision, ***Gateway Realty*** was not even mentioned, let alone considered by the Supreme Court (O'Byrne 1998, 507). If the Supreme Court recognized the good faith standard of ***Gateway Realty***, it could possibly supplant the ***Wallace*** rule with official doctrinal recognition.

Second, O'Byrne argued that:

> Since the majority in Wallace was able to do justice by invoking what it considered to be the less drastic means of simply extending the length of the notice period, it may even have decided to postpone a consideration of larger matter to another day, though this is not stated in the judgment. When faced with circumstance where the escape valve of lengthening the notice is not available, a future court may well find that a more generalized, implied contractual obligation of good faith and fair dealing is the default standard after all. (508)

As the courts become more familiar with bad faith, perhaps an Independent action for bad faith dismissal will seem appropriate.

Armed with ***Malik***, and Justice McLachlin's minority judgment, when the Supreme Court encounters an appropriate fact scenario in the future, it may introduce an independent doctrine of good faith. As the courts become more familiar with bad faith, perhaps an independent action for bad faith dismissal will seem appropriate.

20 The legislation is: ***Law Reform Act***, R.S.N.B. 1998, c. L-1.2, s. 3(1). The New Brunswick legislation reads as follows:

> s. 3(1) Where in any proceedings a claim is made for aggravated, exemplary or punitive damages, it is not necessary that the matter in respect of which those damages are claimed be an actionable wrong independent of the alleged wrong for which the proceedings are brought.

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