Wrongful Termination Claims in the Supreme Court of Canada: Coming Up Short

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The author concludes that the Supreme Court of Canada's narrow interpretations in Wal-Mart and Honda undermine the purposes of collective bargaining and human rights legislation, respectively. Wal-Mart involves an unfair labour practice complaint following the closing of a store in Jonquière, Quebec. The author contests the analysis of the Supreme Court of Canada, as being far removed from the context of the real difficulties in dealing with determined anti-union employers, instead facilitating statutory evasion. Honda involves a claim for wrongful dismissal, where the issue at the Supreme Court of Canada level is one of remedy, premised on the dismissal amounting to disability discrimination in breach of human rights legislation. The author criticizes the majority holding that the case did not involve such a breach, as flying in the face of well-established human rights law.

L'auteur conclut que les interprétations étroites de la Cour suprême du Canada dans les arrêts Wal-Mart et Honda minent les objectifs de la négociation collective et les lois sur les droits de la personne. L'arrêt Wal-Mart porte sur une plainte relative à des pratiques déloyales de travail à la suite de la fermeture d'un magasin à Jonquière, Québec. L'auteur conteste l'analyse de la Cour suprême du Canada qui, selon lui, est éloignée du contexte des difficultés réelles qui affectent les relations avec les employeurs antisyndicaux et qui aide plutôt ces derniers à se soustraire aux dispositions de la loi. L'arrêt Honda porte sur une réclamation pour congédiement injustifié, la question que devait trancher la Cour suprême du Canada ayant trait au recours fondé sur l'allégation que le congédiement constituait de la discrimination en raison d'incapacité, en violation des lois sur les droits de la personne. L'auteur critique la décision de la majorité que le congédiement ne constituait pas une telle violation, car selon lui elle bat en brèche les lois sur les droits de la personne.

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Introduction

In the last few years the Supreme Court of Canada has had the opportunity to address wrongful termination claims in both unionized and non-unionized contexts. This article will focus on two such cases that have had high profiles, *Plourde v Wal-Mart Canada Corp.*,¹ an unfair labour practice complaint under Quebec legislation, and *Honda Canada Inc. v. Keays*,² a common law wrongful dismissal claim by an individual who had been diagnosed with chronic fatigue syndrome. A less well-known case, *Evans v. Teamsters Local Union No. 31*,³ involving a common law wrongful dismissal claim against a union as employer, concerns the issue of under what circumstance the duty to mitigate requires accepting a term contract with the wrongfully dismissing employer. *Evans* is included in the purview of this article primarily because it helps shed some light on the issues raised in *Wal-Mart* and *Honda*.

*Wal-Mart* and *Honda* merit considerable attention because of their potential to have been leading-edge cases. *Wal-Mart* could have been a case about the capacity of labour law to deal with a determined anti-union employer. *Honda* could have been a case about the capacity of employment law to deal with an employer determined to avoid its duty to accommodate a disabled employee. That neither case lived up to such potential in the Supreme Court of Canada is, in my assessment, a mark of these cases coming up short.

In some respects both *Wal-Mart* and *Honda* can be said to have limited precedential value. *Wal-Mart* turns on statutory language particular to Quebec, and *Honda* is very dependent on factual findings specific to that case. But both also entail approaches that have long-run significance.

Both the majority and dissent in the Supreme Court of Canada in *Wal-Mart* pay lip-service to the standard of judicial review being reasonableness.⁴ Nonetheless, neither can resist putting forth their version of the correct interpretation of the statute. Since I am not constrained by

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⁴. Supra note 1 at paras 34 and 63, per Binnie J for the majority; para 67 per Abella J for the dissent.
the dictates of a judicial review application, I do not even pretend to assess only the reasonableness of the interpretation, and address the full merits. In *Honda* the majority purports to be reviewing the trial judge’s decision only for “palpable and overriding errors”5 of fact. However, I contend that the majority’s analysis rests on untenable factual and legal readings of key documents and testimony. Significant legal issues emerge that transcend the specific factual context.

I. Wal-Mart

Wal-Mart is notorious for its desire to avoid dealing with unions.6 In that context, it was a big deal when, in 2004, a store in Jonquière, Quebec became the first Wal-Mart location in North America to have a union (United Food and Commercial Workers Union, Local 503) secure majority support in a store-wide bargaining unit to entitle it to be certified as the employees’ exclusive bargaining agent.7 Because of the availability of first contract arbitration in Quebec, Wal-Mart could not rely on its ability to just hang tough at the bargaining table; it was facing the prospect of an imposed collective agreement that it was bound not to like. Wal-Mart announced its decision to close the Jonquière store the same day that the Quebec Minister of Labour referred this dispute to first contract arbitration.8 Shortly thereafter the store was indeed closed, and the employees lost their jobs. To contend there was not a causal connection between the union certification and the store closing strains credulity,9 but the majority of the Supreme Court of Canada manages to make such a determination legally irrelevant.

7. In 1997 the Ontario Labour Relations Board certified the United Steelworkers of America as exclusive bargaining agent for employees of a Wal-Mart store in Windsor, Ontario under the then s 11 of the Ontario *Labour Relations Act, 1995*, SO 1995, c 1, Sched A; *Wal-Mart*, [1997] OLRBR Jan/Feb 141. The certification was a consequence of substantial unfair labour practices by Wal-Mart which persuaded the majority of the Board to certify despite the union’s loss of a representation vote. Wal-Mart’s judicial review application was dismissed, [1997] OLRBR Jul/Aug 81 (Div Crt), leave to appeal dismissed, [1997] OLRBR Sept/Oct 963 (CA). Negotiations produced a “draft collective agreement” on 17 December 1997, but the legal validity of that document and the purported ratification of it on 22 December 1997 were contested. Numerous grievances were filed under the purported collective agreement, and numerous applications were filed before the Ontario Labour Relations Board. The purported collective agreement reached the end of its term without any determination having been made as to its validity. Ultimately there was a mediated settlement involving the withdrawal of all of the grievances and all of the complaints to the Labour Relations Board by the union, the employer, and individual employees. In addition, the Canadian Auto Workers, as a successor union to the United Steelworkers, abandoned its representation rights: [2000] CanLII 11964 (ON LRB).
What is labour law’s capacity to deal with resolute anti-union employers? Innis Christie faced that challenge during his tenure as Chair of the Nova Scotia Labour Relations Board in relation to Michelin Tires. And Innis tried. He concluded that the Granton plant alone was an appropriate bargaining unit in order to give unionization at least a ghost of a chance. But the Nova Scotia legislature intervened to override that decision, and say that an employer with interdependent manufacturing locations could insist on a multi-location bargaining unit. In practical terms that meant no unionization at all. Innis also found that Michelin had committed an unfair labour practice in applying its “no solicitation” rule during breaks on company property, an interpretation shared by labour boards across the country. But the majority of the Nova Scotia Court of Appeal thwarted enforcement of that ruling, concluding that Innis’ interpretation improperly interfered with the employer’s property rights. Innis did conclude, however, and properly I think, that s. 24(9) [now 25(9)] of the Trade Union Act did not apply to Michelin, i.e. that Michelin’s unfair labour practices were not egregious enough to warrant a union’s certification despite loss of a certification vote. Although Michelin was and is avowedly anti-union, it exercised some restraint in how far it was prepared to go in pursuit of that goal. In contrast, in Ontario, Wal-Mart exercised little restraint, and engaged in extensive unfair labour practices that prompted the Ontario Labour Relations Board (OLRB) in 1997 to use the then s. 11 of the Ontario Labour Relations Act, 1995 to certify the United Steelworkers of America at the Windsor Wal-Mart despite the union’s loss of the representation vote. In 1998, the Ontario legislature changed s. 11 so that it was no longer possible to certify without majority

14. United Rubber, Cork, Linoleum and Plastic Workers of America v Michelin Tires (Canada) Ltd. (1979), 35 NSR (2d) 104 (AD) per MacDonald JA.
15. Trade Union Act, RSNS 1989, c 475.
17. Labour Relations Act, SO 1995, c 1, Sched A.
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union support, no matter how egregious the unfair labour practices; the most the Board could do was order another representation vote. In 2005 Ontario further amended s. 11 to again allow, as a last resort, certification despite the loss of a vote. These are examples of significant legislative and judicial resistance to providing a serious challenge to determined anti-union employers. This constitutes part of the backdrop to the Supreme Court of Canada’s Wal-Mart decision.

A further part of that backdrop is the Supreme Court of Canada’s decision, almost a quarter century earlier, in National Bank of Canada v. Retail Clerks’ International Union, an early sign of the difficulties in confronting a steadfast anti-union employer. The case arose in response to the closing of a bank branch because of the certification of a union as exclusive bargaining agent. Although the Supreme Court of Canada upheld the Canada Labour Relations Board (CLRB) finding of a sale of business, resulting in the transfer of the union’s certificate from one branch to another, it invalidated a $144,000 trust fund, and an accompanying letter to all bank employees. The CLRB ordered creation of the trust fund and letter to counteract the strongly anti-union message sent to bank employees across the country. The Supreme Court of Canada, however, was unable to see any relationship between the remedy ordered by the CLRB and the unfair labour practice

However, remedy No. 6, regarding the creation of a trust fund to promote the objectives of the Code among other employees of the Bank, which in my view means promoting the unionization of those other employees, is not something intended to remedy or counteract the consequences harmful to realization of those objectives that may result from closure of the Maguire Street branch and its incorporation in the Sheppard Street branch. The fact that a large number of the Bank’s other employees are not unionized is not a consequence of closure of the Maguire Street branch, where the Union continued to exist and had its certificate extended. Thus, I consider that this remedy should be set aside.

The Supreme Court of Canada was somewhat naïve in failing to appreciate how the closing of a bank branch could send a not-so-subtle warning to other employees across the country that other branches could close if they dared opt for unionization. On the other hand, the CLRB was also naïve in

19. SO 1998, c 8, s 5.
22. Ibid at 281.
23. Ibid at 292.
thinking that the $144,000 trust fund (an amount calculated by the bank’s
cost savings over three years as a result of the branch closing) could
practically operate when the expenditure of funds depended on agreement
between the bank and the union. Effective remedies against a blatantly
anti-union employer are indeed a challenge.

Back to Quebec and to Wal-Mart. The closing of the Jonquière store
prompted numerous unfair labour practice complaints. The cases that got
to the Supreme Court of Canada24 were filed under ss. 15-17 of the Quebec
Labour Code:25

15. Where an employer or a person acting for an employer or an
employers’ association dismisses, suspends or transfers an employee,
practises discrimination or takes reprisals against him or imposes any
other sanction upon him because the employee exercises a right arising
from this Code, the Commission may

(a) order the employer or a person acting for an employer or
an employers’ association to reinstate such employee in his
employment, within eight days of the service of the decision,
with all his rights and privileges, and to pay him as an indemnity
the equivalent of the salary and other benefits of which he was
deprived due to dismissal, suspension or transfer.

That indemnity is due in respect of the whole period comprised between
the time of dismissal, suspension or transfer and that of the carrying out
of the order, or the default of the employee to resume his employment
after having been duly recalled by his employer.

If the employee has worked elsewhere during the above mentioned
period, the salary which he so earned shall be deducted from such
indemnity;

(b) order the employer or the person acting for an employer or an
employers’ association to cancel the sanction or to cease practising
discrimination or taking reprisals against the employee and to pay
him as an indemnity the equivalent of the salary and other benefits
of which he was deprived due to the sanction, discrimination or
reprisals.

16. The employees who believe that they have been the victim of a
sanction or action referred to in section 15 must, if they wish to avail
themselves of the provisions of that section, file a complaint at one of the
offices of the Commission within thirty days of the sanction or action.

24. The companion case to Plourde before the SCC was Desbiens v Wal-Mart, 2009 SCC 55, [2009]
3 SCR 540. At its initial stages, Desbiens was decided on the assumption that it was not yet clear
whether the store had closed for good, but that premise was overtaken by subsequent events.
17. If it is shown to the satisfaction of the Commission that the employee exercised a right arising from this Code, there is a simple presumption in his favour that the sanction was imposed on him or the action was taken against him because he exercised such right, and the burden of proof is upon the employer that he resorted to the sanction or action against the employee for good and sufficient reason.26

There was a longstanding line of Quebec authority that said that the closing of a place of business, no matter what the cause, was a “good and sufficient reason” under s. 17, precluding a successful s. 15 complaint.27 The union tried to argue that developments concerning freedom of association under the Quebec28 and Canadian29 Charters meant these cases were no longer good law. Neither the Commission des relations du travail (CRT) nor the majority of the Supreme Court of Canada was persuaded to depart from the established jurisprudence.

I would agree, as the majority contends, that Charter claims of freedom of association of employees do not assist in sorting out the obligations of employers to this extent. Freedom of association does not guarantee a particular statutory scheme.30 Therefore, one particular section’s interpretation cannot be driven by constitutional imperatives, when other sections are available to fill the alleged void, as the majority affirms.31 Justice Abella’s dissent in the Supreme Court of Canada in Wal-Mart does not rely on the Charter. Instead, she seeks to re-examine the premises relied upon by the CRT and Justice Binnie for the majority of the Supreme Court of Canada. I want to re-examine those premises at an even more fundamental level.

The argument against the application of ss.15-17 is this. Section 15 provides for a remedy of reinstatement. If the place of business is completely closed, reinstatement is not possible. The reverse onus of s. 17 is not triggered when the place of business is completely closed, because it is the closed business that explains the absence of a job, and not a reprisal for exercising labour rights. How does this stack up as a matter of statutory interpretation?

27. Wal-Mart, supra note 1 at paras 6-7.
28. Charter of Human Rights and Freedoms, RSQ, c C-12, s 3.
31. As discussed below, the alternatives do not engage the reverse onus. Although a reverse onus is very significant as a matter of labour policy, I do not see how it could be held to be a matter of constitutional dictate.
There is a starting premise that everyone in the Wal-Mart saga in the Supreme Court of Canada is prepared to accept, but which I want to question. Plourde "did not seek re-opening of the store." Justice Abella, in dissent, does not engage with the issue, merely putting it aside:

It is important to note that the issue is not whether an employer has the right to close a business, a proposition no one challenged before us, nor is it whether an employer can be required to open a business.  

Justice Binnie, for the majority, takes these premises as given, saying, without elaboration, that "Re-instatement in a closed workplace is not a feasible or appropriate remedy." No statutory dictate to this effect is relied upon. At earlier stages in the proceeding Plourde did seek re-instatement. This argument was abandoned, at the Supreme Court of Canada, apparently on the basis that an employer cannot be ordered to operate a business against its will. Where does that notion come from?

In 1980 the OLRB addressed that question in United Electrical, Radio, and Machine Workers of America and its Local 504 and Westinghouse Canada Limited. Westinghouse had closed part of its Hamilton operations and moved to smaller locations (not within an easy commute from Hamilton) thought to be unsympathetic to unions. The majority of the Board found that there were some legitimate business reasons for a move, but that the move and the choice of the new locations were tainted by anti-union animus. The Westinghouse decision is well-known for ordering extensive remedies, including union organizing costs at the new locations, and relocation or transportation costs for employees exercising a Board-granted right to relocate with red-circled salaries and protected seniority and benefits. But Westinghouse is also noteworthy for the Ontario Board’s refusal to order the employer to re-open in Hamilton. Yet it needs to be emphasized that the OLRB in Westinghouse did not deny that it had jurisdiction to order Westinghouse back to Hamilton.

The Board has the authority under section 79(4) [currently s. 96(4)] of the Act to order the respondent company back to Hamilton and thereby re-establish the status quo.

32.  Wal-Mart, supra note 1 at para 74.
33.  Ibid at para 78.
34.  Ibid at para 6.
35.  Ibid at para 1.
37.  OLRB, ibid at 507-08.
38.  Ibid at 507.
39.  Ibid at 505.
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Westinghouse was decided in light of the then s. 68 [now 84] of the Ontario Labour Relations Act:

Nothing in this Act prohibits any suspension or discontinuation for cause of an employer’s operations or the quitting of employment for cause if the suspension, discontinuation or quitting does not constitute a lock-out or strike. [emphasis added]

The majority concluded that “the ‘cause’ that is referred to in s. 68 [now 84] of the Act is cause that is not tainted by anti-union motive,” rejecting the position of both the employer and union that, so long as the predominant motive was not anti-union, the business decision was “for cause” and protected by s. 68 [now 84]. The majority rejected an interpretation that distinguished between unfair labour practices involving individual employees (where the taint theory had long been applied) and unfair labour practices involving major business decisions. The majority ruled that, in either context, a decision tainted by anti-union motive amounts to an unfair labour practice. The majority found that there were both legitimate and anti-union motives in Westinghouse’s closure of part of the Hamilton operations, making out the unfair labour practice complaints. It further found, however, that the mixed motives were relevant to the remedy.

On the assumption that the Board had no jurisdiction to order Westinghouse to re-invest in updated equipment in Hamilton, it ruled out forcing Westinghouse to return to Hamilton, and instead fashioned a remedy that followed Westinghouse’s move (though without extending the collective agreement). The dissent chided the majority for inconsistency. The dissent accepted the predominant motive interpretation of s. 68 [now 84], concluding that in this particular case the predominant motive was not anti-union, and found no unfair labour practice. However, the dissent contended that if there were an unfair labour practice (because

42. *Ibid* at 491, 517.
43. *Ibid* at 494.
44. *Ibid* at 500-01.
45. *Ibid*. at 495, 505.
46. There were cross-cutting majorities in *Westinghouse*, *ibid*. Alternate Chair Burkett found unfair labour practices, but was unprepared to either order the employer back to Hamilton (at 505) or extend the Hamilton collective agreement to the new locations (at 506-07). Member Rutherford agreed the employer had committed unfair labour practices, and that the employer should not be ordered back to Hamilton, but would have extended the collective agreement to the new locations (at 523). Member Ronson did not agree there was any unfair labour practice, and thus would have ordered no remedy (at 519). There was thus no majority decision to order an extension of the collective agreement.
47. *Ibid* at 517-19.
of the absence of “cause,”) the logical remedy would have been to order Westinghouse back to Hamilton. The dissent was clearly saying that the majority’s refusal to order Westinghouse back to Hamilton undermined the majority’s determination that there had been an unfair labour practice. In contrast to the dissent, the majority was making a point of drawing a distinction between the breach and the remedy.

The majority in Westinghouse concluded that ordering a business to re-open against its will was theoretically possible, but not appropriate or feasible in the particular circumstances despite especially egregious unfair labour practices. In Wal-Mart the Supreme Court of Canada unanimously accepts that requiring a business to re-open against its will is neither feasible nor appropriate no matter what the circumstances. And this is taken as self-evident, requiring no explanation. But why? Why is the employer’s right to close a business not in issue? Why can’t an employer be required to re-open a business? If a foundation of the statutory scheme is that employees are entitled to engage in union activities and to seek certification of a union as their exclusive bargaining agent, is it not the obvious remedy (at least as an option to consider) for a store closing for anti-union reasons to order that the store be re-opened? It is an odd system that says if you fire some of your employees for anti-union reasons, you can be ordered to reinstate them, but if you fire all of your employees at a particular place of business by closing it, reinstatement is not available. It tells employers they are better off going all-out in their anti-union activities, rather than using half-measures.

I think the explanation lies not in the principles of statutory interpretation, but in the realities of political economy. As Harry Arthurs put it in his keynote address to the Inaugural Innis Christie Symposium:

Like all law, labour law has its foundations in the deep structures of political economy. Consequently, how power is organized and wealth is distributed significantly determine the main direction and material outcomes of labour law, if not its detailed content and form. Or to put this point the other way round, public policies and legal strategies that ignore the realities and assumptions of wealth and power are unlikely to succeed.

The fact that, in Westinghouse, even the union was prepared to concede away the taint theory for major business decisions - was prepared to accept that only if anti-union reasons were the predominant motive would the

48. Ibid at 521.
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The majority of the OLRB panel rejected this concession as a matter of statutory interpretation, concluding that an unfair labour practice would be made out where a business decision was tainted by anti-union motives even if the predominant motive was not anti-union (while finding as a matter of fact that anti-union reasons were Westinghouse’s predominant motive). Its timidity manifested itself at the remedy stage. The Supreme Court of Canada in Wal-Mart is even less inclined to challenge the “realities and assumptions of wealth and power.” Brian Langille and Patrick Macklem similarly describe the interpretation of statutory schemes of labour relations as resisting serious restraint of employers’ economic power. Only moderate interference with entrepreneurial economic freedom is contemplated. There are unmistakable limits on the tolerance of union power that overarch the statutory interpretation exercise. And it has its parallel in the common law individual contract of employment.

The starting point for an action for wrongful dismissal under an individual contract of employment at common law is that reinstatement is not available. In Innis Christie’s employment law text, the first heading under “Common Law Remedies for Wrongful Dismissal” is “Specific Performance Will Not Be Ordered.” The basis of the cause of action is failure to provide reasonable notice of termination or pay in lieu. Termination per se is not legally wrongful at common law. There has long been ambivalence about why specific performance of an individual employment contract will not be ordered at common law: whether refusal is a matter of principle, or a function of the difficulty in enforcing it as a practical matter. Innis cites commentary that the real explanation is “to enshrine the absolute power of the employer to hire and fire at will.” Although none of the judges in Wal-Mart actually explains their refusal to even contemplate ordering an employer to re-open a business, the “absolute power of the employer” seems to underpin it.

As regards individual employees, there are many contexts where the law has overcome the supposed problems with a remedy of reinstatement. Under collective agreement arbitration, reinstatement is commonplace.

50. Supra note 36 at 491, 517.
51. Ibid at 500.
54. Ibid.
55. Ibid at 386, citing Clark, “Unfair Dismissal and Reinstatement” (1969) 32 Mod L Rev 532 at 538.
Statutory human rights adjudication considers reinstatement a standard remedy.\textsuperscript{57} Unfair labour practice complaints where the business is still operating routinely result in reinstatement orders.\textsuperscript{58} Some labour standards codes, such as Nova Scotia's s. 71, provide for reinstatement under certain circumstances after a stipulated length of time in the job.\textsuperscript{59} Even for purely common law claims, the walls are starting to crack. In \textit{Evans}, the majority of the Supreme Court of Canada adopted an objective test as to whether a wrongfully dismissed employee was, as a matter of mitigation, expected to accept a term contract with the wrongfully dismissing employer.\textsuperscript{60} Strictly speaking, there is no obligation on a wrongfully dismissed employee to accept a term contract with the employer that had just fired him or her. However, the consequence for \textit{Evans} was that he was disentitled to all damages because he had refused. "Work or else lose all" is quite close to an order of specific performance.

If, on an individual basis, the law can incorporate reinstatement as a remedy, why can't there be collective reinstatement where a business has closed for reasons the statute determines to be impermissible? If a business that is not otherwise economically viable can obtain substantial government subsidies to remain open, why cannot it be the corollary that an economically viable business can be forced to re-open where the reason for closure is an illegal one? Enforcement difficulties may dictate hesitation, but the Supreme Court of Canada has gone way beyond hesitation to categorical exclusion.

In any event, this is all beyond what was actually on the table in \textit{Wal-Mart} in the Supreme Court of Canada. What flows from accepting, as all

\textsuperscript{57.} Ibid at 107. A 2006 amendment to the Ontario Human Rights Code, adding s 46.1, SO 2006, c 30, s 8, would seem to entitle a court hearing a wrongful dismissal claim at common law to order reinstatement if the dismissal is in breach of the Human Rights Code.

\textsuperscript{46.1(1)} If, in a civil proceeding in a court, the court finds that a party to the proceeding has infringed a right under Part I of another party to the proceeding, the court may make either of the following orders, or both:

\begin{enumerate}
  \item An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.
\end{enumerate}


\textsuperscript{58.} Carter \textit{et al}, \textit{ibid} at 246.

\textsuperscript{59.} Labour Standards Code, RSNS 1989, c 246, s 71 (after ten years); Canada Labour Code, RSC 1985, c L-2, as am., ss 240-246 (after one year); \textit{An Act Respecting Labour Standards}, RSQ c N-1.1, ss 124-131 (after two years).

\textsuperscript{60.} \textit{Supra} note 3, per Bastarache J. Justice Abella, in dissent, would have applied a subjective test, or at least an objective test that took into account the circumstances of the plaintiff. I am persuaded by the dissenting view in this case.
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involved do in *Wal-Mart*, that an order to re-open the store is not possible, such that reinstatement is not an available remedy? The question is whether the remedy can be separated from the breach, as the majority of the OLRB did in *Westinghouse*, or whether the absence of a remedy of reinstatement also determines that there is no breach, i.e. no unfair labour practice at all.

Justice Binnie, for the majority in *Wal-Mart*, does not hold that there is no remedy available for closing a location for anti-union reasons, only that ss. 15-17 cannot be relied upon. Justice Binnie contemplates use of ss. 12-1461 in response to a closure for anti-union reasons.62 Although such complaints related to the closing of the Wal-Mart store in Jonquière had foundered,63 for future reference is potential availability of relief under ss. 12-14 a sufficient answer to cutting off recourse to ss. 15-17?

One of the reasons Justice Binnie says ss. 15-17 are not engaged where there is a closure of a business is that to rule otherwise would be "duplicative" of ss. 12-14.64 With respect, only a non-labour lawyer would think that was a problem. And it is worth noting that the three dissenters in the Supreme Court of Canada (Abella, LeBel, and Cromwell JJ.) all have, and are the only ones who have, significant labour law experience prior to

61. Full text:

12. No employer, or person acting for an employer or an association of employers, shall in any manner seek to dominate, hinder or finance the formation or the activities of any association of employees, or to participate therein.

No association of employees, or person acting on behalf of any such organization, shall belong to an association of employers or seek to dominate, hinder or finance the formation or activities of any such association, or to participate therein.

13. No person shall use intimidation or threats to induce anyone to become, refrain from becoming or cease to be a member of an association of employees or an employers' association.

14. No employer nor any person acting for an employer or an employers' association may refuse to employ any person because that person exercises a right arising from this Code, or endeavour by intimidation, discrimination or reprisals, threat of dismissal or other threat, or by the imposition of a sanction or by any other means, to compel an employee to refrain from or to cease exercising a right arising from this Code.

This section shall not have the effect of preventing an employer from suspending, dismissing or transferring an employee for a good and sufficient reason, proof whereof shall devolve upon the said employer.

62. *Ibid* at para 2. There is also the possibility of a breach of the statutory freeze in s 59 of the Quebec Labour Code, RSQ, c C-27. In the Wal-Mart saga that issue is currently still being litigated. An appeal to the Quebec Court of Appeal is currently pending (2010 QCCA 2225) from a dismissal of a judicial review application by Wal-Mart (2010 QCCS 4743). The Quebec Superior Court dismissed an application for judicial review of an arbitrator’s decision holding that the firing of employees consequent on the closure of the Jonquière store was a breach of the statutory freeze. The issues are both the jurisdiction of the arbitrator (whether the Labour Commission has jurisdiction instead) and the interpretation of s 59. The question of remedy had been a matter over which the arbitrator had retained jurisdiction, in the event that the parties were unable to agree. Re-opening of the store was implicitly assumed to be outside the realm of possibility.

63. *Supra* note 1 at para 38.
becoming judges. Overlap in unfair labour practice provisions is standard. For example, the OLRB majority in *Westinghouse* had no trouble finding the employer in breach of two unfair labour practice provisions arising out of the same facts.65 There is good reason for overlap of unfair labour practice provisions. Our current statutory labour law regimes emerged from a history of sometimes extreme employer resistance to unions.66 Clever employers are apt to find loopholes in the statutory prohibitions, such that it important to have multiple opportunities to catch anti-union activities, the precise manifestation of which might not have been contemplated by statutory drafters. Broad, and overlapping, interpretations are needed to fulfill the statutory purpose.

The rationale for the line of authority holding that ss. 15-17 of the Quebec statute do not apply to a closed business is:

Where the closure is real, genuine or permanent, the reason for the termination of employment is the closure, not the union activities of certain employees.67

On what basis are these reasons seen as mutually exclusive? If the motivation for the closure is the result of successful union activities of some employees, how can it be pretended that anti-union animus does not explain the closure? Disconnecting the closure from its context would be laughable logic if it did not come from authoritative decision-makers. Rejecting a chain of causation provides an easy end-run around the statute, undermining its purpose. Even the dissent in *Westinghouse* did not go that far, accepting that Westinghouse would have committed unfair labour practices if its predominant motive had been anti-union, such that the closure would not have been “for cause” within the meaning of s. 68 [now 84].68

The majority of the OLRB in *Westinghouse* acknowledged a tension between union rights and legitimate employer business interests.

Can an employer faced with economic difficulties caused by collective bargaining-related factors (wages, benefits, seniority, work practices etc.) act to remove himself from his collective bargaining relationship? It may well be that it is more profitable to operate without a union than with one but if an employer can react to this reality simply by moving

65. *Supra* note 35 at 500-01, finding both refusal to continue to employ because the person is a member of a trade union (roughly equivalent to Quebec’s s 15) and interference in the representation of employees by a trade union (roughly equivalent to Quebec’s s 12).
68. *Supra* note 36 at 517.
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his business the right of employees to engage in collective bargaining would be seriously undermined. What of the employer who is faced with an economic crisis caused by collective bargaining related factors, seeks relief from the union and is met with an unsympathetic or unsatisfactory response? Assuming that these factors could be established, the answer is by no means clear. The question, however, is not raised by the facts of this case. This company was not faced with an economic crisis and notwithstanding the constraints to productivity perceived by it, there is no evidence that the company ever raised its concerns with the trade union prior to making its decision to relocate.69

Justice Binnie’s majority judgment in Wal-Mart decides that such questions cannot even arise under s. 15 of the Quebec statute. Political economy does not just dictate potential limits on statutory restraint of entrepreneurial freedom, it completely immunizes it. The “good and sufficient reason” in s. 15 is stripped of any qualifying effect in the context of a store closure.

An aside related to the Nova Scotia legislation merits consideration. The Quebec statute has no equivalent to s. 49(3) of the Nova Scotia Trade Union Act:

Nothing in this Act shall be interpreted to prohibit the suspension or discontinuance of operations in an employers establishment, in whole or in part, not constituting a lockout or strike.70

This section has been in the Nova Scotia statute since Innis Christie’s 1972 draft, but I am unaware of any case interpreting this provision. Unlike s. 15 of the Quebec statute or s. 84 of the Ontario statute, s. 49(3) contains no express “reason” or “cause” qualification. That might suggest that it would be even easier than in Wal-Mart to conclude that any closure is protected, even one implemented for anti-union reasons. However, I would contend that the placement of s. 49(3) points to a different conclusion. Unlike s. 15 in Quebec, where it is included as one of the unfair labour practice provisions, s. 49(3) in Nova Scotia is amongst the unlawful strike/lockout provisions. As such, a purposive interpretation of s. 49(3) means only that an uneconomic business can be closed without its being held to be an untimely, and hence illegal, lockout.71

Clearer language would be needed to treat s. 49(3) as a blanket subtraction from the unfair labour practice provisions of s. 53 of the

69. Ibid at 497. For an argument that this analysis, especially as applied in subsequent OLRB cases, too readily collapses the distinction between anti-union and economic motives see Brian Langille, “‘Equal Partnership’ in Canadian Labour Law” (1983) 21 Osgoode HLJ 496 at 530-32.
70. Trade Union Act, RSNS 1989, c 475.
71. The flip side is that a collective quit by employees accepting better jobs elsewhere does not constitute an illegal strike.
Nova Scotia *Trade Union Act*72 precluding anti-union activities. Even for unfair labour practice provisions not including a requirement of anti-union motive, the Nova Scotia Board has asserted, without comment on s. 49(3), that the Board can weigh the competing interests of employers and unions in applying s. 53(1)(a) (interference in the representation of employees by a trade union). Chair Peter Darby, in *Amalgamated Transit Union Local 508 v. Zinck's Bus Company Limited,*73 said the following.

By contrast, Section 53(1)(a) speaks of “interference” with the formation or administration of or representation of employees by a union, and makes no reference to motive. Read literally, then, any conduct of the employer, regardless of motivation, that had the effect of “interfering” with the Union would be prohibited. It became apparent to labour relations boards early on that such an interpretation caught too much since it would prohibit all conduct that had the effect of “interfering” regardless of motive. Literally, then, an employer which shut a plant whose employees were in the process of being “unionized” at the time, would violate Section 53(1)(a) even if, factually, it knew nothing of the campaign, was going bankrupt and closed the plant for exclusively business reasons.

... 

In our view, some conduct is so inherently destructive of significant union or employee rights under the Act that it cannot be permitted - even if there is no “proof” that any employee or the Union was actually “interfered with”, ... Into this category we place eg., the interrogation of employees, the employment of professional strikebreakers, (into which category we do not place genuine replacement workers, in relation to whom different issues apply and about whom we express no opinion one way or the other here), the infiltration of union meetings by agents or representatives of the employer, disproportionate discipline, and cases of clear mistake ... On the other hand, some conduct by an employer can be justified and, in our view, proof of actual interference ought to be required as a precondition to the further assessment of whether such “interference” ought to be proscribed as unlawful interference under Section 53(1)(a). In making this latter determination, we believe that the proper role of the Board is to weigh the competing interests and arrive at a conclusion. Only if these interests are equal, will we look at motive. In this category eg., we place the closure of a plant or part thereof, the contracting out of work that would otherwise be performed by members of the bargaining unit (or proposed unit), the discipline or discharge of an employee (in cases other than those of clear mistake or disproportionate discipline), non-solicitation rules, captive audience

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meetings, and employer “messages”.

It would completely undermine s. 53 if s. 49(3) were held to provide total immunity for any closure of business. In contrast to Justice Binnie’s decision in \textit{Wal-Mart}, such an interpretation of s. 49(3) in Nova Scotia, since it is not tied to any particular unfair labour practice provision, would leave no room for other unfair labour practice provisions to fill the void.

As discussed above, Justice Binnie is careful to limit his conclusions to ss. 15-17 of the Quebec legislation. Additional considerations in that respect are addressed by Justice Binnie in \textit{Wal-Mart}.

Justice Binnie relies on the specific language of s. 15 respecting reinstatement to rule out other remedies following dismissal, concluding against reliance on the general remedial provisions in ss. 118 and 119.\footnote{Abella J. also contends that the general remedial powers under ss. 118 and 119 are available to the CRT on a s. 15 application (paras. 140-141). I do not agree. Section 15 provides a summary remedy backed by a presumption against the employer. The legislature has specified in s. 15 the remedies available for its breach. Adding the generality of ss. 118 and 119 remedies to a s. 15 violation would give the s. 17 presumption an expanded (and comprehensive) effect beyond the reinstatement and associated relief contemplated in the ss. 15 to 17 group of provisions for an illegal dismissal. Employees in search of general remedies would never have to establish anti-union misconduct. Its existence would always be presumed in their favour as soon as they established they had exercised “a right arising from this Code”. This, in my view,}

\begin{footnotesize}
\begin{enumerate}
\item \textbf{118.} The Commission may, in particular,
\begin{enumerate}
\item summarily reject any motion, application, complaint or procedure it considers to be improper or dilatory;
\item refuse to rule on the merits of a complaint…;
\item make any order, including a provisional order, it considers appropriate to safeguard the rights of the parties;
\item determine any question of law or fact necessary for the exercise of its jurisdiction;
\item confirm, modify or quash the contested decision or order and, if appropriate, render the decision or order which, in its opinion, should have been rendered or made initially;
\item render any decision it considers appropriate;
\end{enumerate}
\end{enumerate}

\item \textbf{119.} Except with regard to an actual or apprehended strike, slowdown, concerted action, other than a strike or slowdown, or lock-out in a public service or in the public and parapublic sectors within the meaning of Chapter V.1, the Commission may also
\begin{enumerate}
\item order a person, group of persons, association or group of associations to cease performing, not to perform or to perform an act in order to be in compliance with this Code;
\item require any person to redress any act or remedy any omission made in contravention of a provision of this Code;
\item order a person or group of persons, in light of the conduct of the parties, to apply the measures of redress it considers the most appropriate;
\end{enumerate}
\end{footnotesize}
would significantly alter the balance between employers and employees intended by the Quebec legislature. The better view, I believe, is that where employees seek relief under the general remedial provisions of the Code, their remedy lies under ss. 12 to 14, as already discussed.75

Justice Binnie seems to overlook the basic point that the reverse onus still enables the employer to establish that anti-union motives were not present. Consider the situation where the employer’s anti-union animus is so strong that it is willing to close a very profitable store, rather than deal with a union. This is an employer who is at the extreme end of the spectrum of resistance to the statutory scheme. Is this not the situation where a reverse onus is most needed to uphold the purpose of the statutory scheme? Although in some cases it may not be if, as with Wal-Mart, the employer’s anti-union stance is notorious. But even where the employer’s anti-union motive may be easy to prove, Wal-Mart establishes that picking the wrong section to file under is fatal.

Justice Binnie’s analysis is also troubling for its implications for the interpretation of remedial provisions generally. If a specific remedy in one section precludes recourse to general remedies elsewhere, this could significantly hamper effective remedies. Given the frequently incremental nature of labour law reform, it is often the case that expanded remedial authority is added, while leaving intact prior more limited provisions. Such is true for the current s. 78 of the Nova Scotia Trade Union Act. My understanding is that s. 78 [then s. 75A]76 was added with the support of both unions and employers. Unions wanted greater remedial authority for unfair labour practice complaints and duty to bargain complaints, and employers wanted greater remedial authority for unlawful strike situations.77 It would be very odd if neither got what they wanted.

Justice Binnie is right to say that interpretations of different statutory provisions in other jurisdictions cannot dictate the interpretation of particular language in the Quebec statute.78 But it is still important to interpret the Quebec statute in a way consistent with its purpose. Justice Binnie’s analysis is far removed from the context of the real difficulties in dealing with determined anti-union employers. Rather than adopting an expansive interpretation that tries to cope with the most challenging

75. Supra note 1 at para 39.
76. Added by SNS 1984, c 49; now RSNS 1989, c 475, s 78.
77. Labour and Manpower Minister David Nantes, at second reading debate, said “I think it is fair to say that the amendment does have support in many areas of the province,” noting specifically the Nova Scotia Federation of Labour; Debates of the Nova Scotia Legislative Assembly, Vol 3, 1984 at 2071 (3 May 1984).
78. Supra note 1 at para 58.
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cases, Justice Binnie facilitates statutory evasion. One wonders why the majority was not given pause by the fact that all the labour law experts in the Supreme Court of Canada were in the dissent.

II. Honda
The official reason for Kevin Keays’ termination was insubordination. He was ordered to report to a company doctor. He asked for clarification of the purpose of the meeting, and said he would not report for the meeting without it. Honda refused to clarify, and fired Keays when he did not report to the doctor.

The larger context, however, was a dispute about accommodation of Keays’ chronic fatigue syndrome. The trial judge, after a 29 day trial, clearly considered this to be an especially egregious case. He found a wrongful dismissal warranting 15 months of pay in lieu of reasonable notice. He increased the notice period to 24 months based on the bad faith manner of the dismissal (Wallace79 damages). He made a punitive damages award of half a million dollars. And he made a substantial costs award. On appeal to the Ontario Court of Appeal, Justice Goudge would have upheld all but part of the costs award. The majority, per Rosenberg J.A., however, while agreeing with Goudge J.A. on costs, would also have reduced the punitive damages award to $100,000. In the Supreme Court of Canada all agree that there was no basis for a punitive damages award. The majority, per Bastarache J., further holds there was no bad faith discharge, thus no basis for Wallace damages; Justice LeBel (Fish J. concurring) dissents on that point. The Supreme Court of Canada upholds the 15 month notice period. In the Supreme Court of Canada Honda did not contest the holding below that the dismissal was wrongful. Honda perhaps made a mistake in so doing. Reading the majority’s decision, it is difficult to identify in what manner Honda did anything wrong. The gulf between the majority of the Supreme Court of Canada and the trial judge could hardly have been wider.

The Supreme Court of Canada provides some useful reconceptualization of Wallace damages for bad faith conduct in the manner of dismissal. As noted above, the trial judge had, following Wallace, assessed bad faith damages by lengthening the notice period. The Supreme Court had already started to reassess mental distress damages by abandoning, in Fidler v. Sun Life Assurance Co. of Canada, the notion that such damages required an independent actionable wrong.80 Also, in Evans, the Court had said that

damages for bad faith in the manner of dismissal should not be subject to mitigation. In \textit{Honda} the Court expressly rejects the use of an extension of the notice period as the measure of damages. This all comes to the sensible result that damages for mental distress in a wrongful dismissal case must follow the regular rules on foreseeability of damages.

The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages.

The Court in \textit{Honda} reaffirms the \textit{Wallace} factors for awarding mental distress damages.

Damages resulting from the manner of dismissal must then be available only if they result from the circumstances described in \textit{Wallace}, namely where the employer engages in conduct during the course of dismissal that is “unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive” (para. 98).

I do not quarrel with the legal realignment of \textit{Wallace} damages, subject to a point raised by Justice LeBel in dissent to which I will return below, but am troubled by the application of these principles by the majority of the Supreme Court of Canada, speaking through Justice Bastarache, to the facts in \textit{Honda}.

Among other things, Justice Bastarache rejects, as a palpable and overriding error, the trial judge’s conclusion that there had been untruthful and misleading comments in Honda’s 28 March 2000 letter to Keays.

In reviewing the facts and reading the letter, it is clear that Honda was relying on expert advice and simply conveying the information obtained from experts to Keays. The following two paragraphs were the most “contentious” of the letter:

1. You were told that we have been reviewing your absenteeism as well as the doctor’s notes that you had been providing to cover those absences. We discussed your situation with Dr. Affoo who is familiar with your case. In addition, we had Dr. Brennan (a new physician) review your

\begin{enumerate}
\item \textit{Supra} note 3 at para 32.
\item \textit{Supra} note 2 at para 59.
\item \textit{Ibid}.
\item \textit{Ibid} at para 57.
\item But see an argument that \textit{Honda} will make damages for psychological and economic harm more difficult to prove than had been the case under \textit{Wallace}; England, \textit{supra} note 57 at 335-39.
\end{enumerate}
complete medical file. Both doctors advised us that they could find no diagnosis indicating that you are disabled from working.

4. When we met on March 21, 2000, we advised you that we would no longer accept that you have a disability requiring you to be absent. Dr. Brennan and Dr. Affoo both believe that you should be attending work on a regular basis. In order for Dr. Brennan to get to know you and understand completely your condition, we advised that we would arrange for Dr. Brennan to meet with you. The plan was that Dr. Brennan would then communicate directly with your doctor to effectively manage your condition. [underlining added by the Court; italics added by me.]

Justice Bastarache ignores the italicized portion of the above passage, as well as a later passage in the letter saying: “Kevin, we do not accept the need for your recent absence.” Justice Bastarache also fails to mention here that the OHRC accommodation policy that Honda had been applying to Keays was withdrawn effective 21 March 2000.

Justice Bastarache’s conclusion about the March 28 letter is as follows:

The whole context is one in which Honda recognizes that Keays has a disability and that it has to be dealt with; this is an important consideration in determining good faith on the part of Honda.

Such a benign interpretation of the March 28 letter is untenable. Honda is doing far more than trying to deal with Keays’ disability. It has predetermined that disability related absences will no longer be tolerated. And as Justice Bastarache himself points out, Dr. Affoo did still anticipate some legitimate CFS absences, which the letter did not accurately reflect. Justice Bastarache says that “Honda was simply trying to confirm Keays’ disability.” Yet the March 28 letter indicates that Honda will accept that Keays has a disability only if it has no impact on his attendance at work. It has determined that there will be no further accommodation of Keays’ disability. Justice LeBel’s dissent elaborates:

[I]t may be that the trial judge exaggerated the extent of Honda’s misconduct. However, the evidence supports the trial judge’s view that Honda was unfairly skeptical of Mr. Keays’ condition and was seeking to justify its skepticism. It should be kept in mind that Honda’s intention in seeking to justify its skepticism was clearly: (1) to preclude Mr. Keays

86. _Supra_ note 2 at para 37 [underline emphasis by the Court; italic emphasis added].
88. Mentioned only later, _ibid_ at para 47.
89. _Ibid_ at para 42.
90. _Ibid_ at para 39.
91. _Ibid_ at para 47. A similar comment is made at para 76.
from using his condition to justify absences from work and thereby avoiding disciplinary action; and/or (2) to justify the termination of Mr. Keays for any continued absences. In either case, Honda’s conduct was to Mr. Keays’ detriment.

The implication of the facts as found by the trial judge is that Honda wanted to introduce Dr. Brennan into the process in order to legitimize its conduct. Either Mr. Keays would meet with Dr. Brennan, who would justify Honda’s skepticism and avert any further absences, or he would be fired for insubordination (or for continued illegitimate absences) and any need to accommodate him would disappear.92

Justice Bastarache’s defends Honda’s stance on the basis that it was relying on expert advice from doctors.

However, even if one were to conclude that Dr. Brennan was taking a somewhat “hardball” approach to workplace absences, Honda cannot be faulted for accepting his expert advice unless a conspiracy exists. As concluded by the Court of Appeal, there simply was no conspiracy to terminate Keays.93

What does conspiracy have to do with reliance on expert advice? The problematic point here is that Justice Bastarache never questions whether the expert medical advice is consistent with legal obligations. Justice LeBel, in dissent, however, points out the legal short-comings of Dr. Brennan’s medical model of disability.

The implication is that Dr. Brennan’s objective is to recommend the “accommodation” that is best for Honda, not the one that is best for the employee. Although he suggests that he is only giving a “medical” opinion, his opinion is focussed on maximizing an employee’s productivity for Honda in light of the employee’s condition. His goal is clearly not to find ways for Honda to make it easier for the disabled employee to do his or her current job. Certainly, disabilities may make it impossible for individuals to continue in their current positions. But if accommodation is truly a cooperative and collaborative process, it requires give and take on both sides. Dr. Brennan’s approach suggests that rather than assisting disabled employees to continue in their current roles, employers can simply place disabled employees in other roles that do not require any true accommodation on the employers’ part. This approach makes the disability the employee’s problem, not a problem shared with the employer. This is of concern from an equality perspective because it limits the employment options available to disabled persons.

92. Ibid at paras 87, 90.
93. Ibid at para 45.
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His objective is not to provide medical care for the individual employee but, as I mentioned above, to maximize productivity. In my view, the above passages provide ample support for the trial judge’s view that Dr. Brennan took a “hardball” approach to absences, and to accommodation generally.94

This brings up a final point about bad faith damages that Justice Bastarache does not discuss, but which Justice LeBel, in dissent, emphasizes.

But any revision must reflect the view accepted by this Court that the contract of employment is a good faith contract that is informed by the values protected by and recognized in the human rights codes and the Canadian Charter of Rights and Freedoms, particularly in respect of discrimination.95

Justice Bastarache does not deal with this point in the discussion of mental distress damages, presumably for the sane reason that he ultimately finds it unnecessary to decide whether a breach of human rights legislation can be the independent actionable wrong that could underlie punitive damages. Justice Bastarache simply finds, as a matter of fact, that there was no discrimination.96

This is, in my opinion, the most disturbing aspect of Justice Bastarache’s judgment. Justice Bastarache explains his conclusion primarily by defending the OHRC accommodation policy as it was being applied to Keays, including the insistence on doctor’s notes.97 Justice LeBel points out the absence of an individualized assessment to sustain this analysis.98 But more fundamentally, this accommodation policy for Keays was cancelled a week before his termination. Honda had unilaterally decided it was no longer willing to accommodate Keays in any way that involved any absence from work due to his disability. Honda did not establish, or even try to establish, undue hardship. This flies in the face of well-established human rights law.99 Why is the Supreme Court of Canada so willing to

94. Ibid at paras 100, 101.
95. Ibid at para 81.
96. At para 64 of Honda, ibid, Justice Bastarache affirms that Seneca College of Applied Arts and Technology v Bhadauria, [1981] 2 SCR 181, precludes a breach of human rights legislation constituting an independent actionable wrong to sustain punitive damages. He then, at paras 65 and 66, alludes to arguments that the Court should reverse Bhadauria and arguments to the contrary. At para 67 he concludes that the absence of discrimination relieves the Court of the need to decide the Bhadauria issue.
97. Ibid at paras 67-71.
98. Ibid at paras 120-123.
defer to employer *fiat*? As in *Wal-Mart*, is political economy trumping proper legal analysis?

There is an uneasy juxtaposition between a common law cause of action that allows for dismissal for any reason as long as reasonable notice (or pay in lieu) is given, and legislative dictates that make some kinds of terminations illegal. Justice LeBel’s conclusion that a discriminatory firing needs to factor into bad faith damages in a wrongful dismissal suit would seem to be an appropriate way to reconcile tensions between the common law and human rights legislation, absent a major overhaul of legal redress for wrongful dismissal.

I think it is unrealistic to expect that a cause of action that accepts the right to terminate without cause as long as enough money is paid can ever be an effective forum for further developing an employer’s duty to accommodate a disabled employee. The conditions under which an employee can be facilitated in continuing to work will not be the focus when the starting point is that the employee has been terminated with no contemplation of reinstatement. This is especially true given a wrongful dismissal claim is an individual claim, unlike a claim under either human rights legislation or collective agreement administration, which may have a systemic angle to it. But the majority in *Honda* does much more than fail to further develop the duty to accommodate. It takes a huge step backwards by failing to even acknowledge well-established law developed in the human rights context.

Justice LeBel’s conclusion that a discharge in breach of human rights legislation can give rise to bad faith damages is important in not confining anti-discrimination law to a legal silo. It is consistent with the importation of human rights legislation into the interpretation of collective agreements, such that a collective agreement must be interpreted in grievance arbitration so as to be consistent with human rights obligations.\(^{100}\) To uphold the position that it is not lawful to contract out of human rights legislation,\(^{101}\) Justice LeBel’s starting point in reassessing *Wallace* damages, treating discrimination contrary to human rights legislation as an element of bad faith, is imperative.

The consideration of human rights legislation in the context of a wrongful dismissal claim raises the question of the impact of the Supreme Court of Canada’s 1981 decision in *Seneca College v. Bhaduria*.\(^{102}\)

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102. *Supra* note 96.
Counsel for Keays had asked the Court to set aside that decision's conclusion rejecting a common law tort of discrimination. Both the majority and the dissent in *Honda* decline that invitation. Justice LeBel, however, expresses some equivocation:

I agree that it is not necessary to reconsider *Bhadauria* in the present appeal. But in my opinion Laskin C.J. went further than was strictly necessary in *Bhadauria*. The main thrust of the decision was that Ms. Bhadauria did not have a legally protected interest at common law that had been harmed by the defendant's allegedly discriminatory conduct (pp. 191-92). However, rather than stop there, Laskin C.J. went on to hold that the Ontario *Human Rights Code* “foreclose[s] any civil action based directly upon a breach thereof [and] also excludes any common law action based on an invocation of the public policy expressed in the Code” (p. 195). These conclusions imply (and have been interpreted to mean) that any allegations resembling the type of conduct that is prohibited by the Code cannot be litigated at common law. The Code covers a broad range of conduct in promoting the goal of equality. Yet the conduct at issue in *Bhadauria* was limited to the facts of that case. It would have been sufficient to simply conclude that the interest advanced by Ms. Bhadauria was not protected at common law. It was not necessary for this Court to preclude all common law actions based on all forms of discriminatory conduct.103

It is important to note a fundamental difference between the context of the claims by Bhadauria and those of Keays. Bhadauria’s was a failure to hire case, and she was attempting to gain recognition of an *intentional* tort of discrimination as a free-standing cause of action. Because Keays had already had a job, his cause of action was wrongful dismissal, as a breach of contract. Such a difference between a previously recognized (wrongful dismissal) and new cause of action (intentional tort of discrimination in failing to hire), has long been used to distinguish *Bhadauria*.104 Moreover, recognition of a free-standing tort of discrimination enforceable in a common law court could actually inhibit anti-discrimination law. The *intentional* tort sought in *Bhadauria* stands in marked contrast to the human rights legislation jurisprudence that rejects the requirement of intention.105 Even to broaden the tort analysis to negligence would still be at odds with human rights jurisprudence which, absent specific statutory language to

103. *Supra* note 2 at para 118.
the contrary, rejects fault as the basis for liability.\textsuperscript{106} However, fault may be relevant to the award of remedies under human rights legislation.\textsuperscript{107} Holding the Bhadauria line on a free-standing tort of discrimination, but allowing human rights principles to be incorporated into other causes of action, facilitates a distinction between liability and remedy that does not make liability dependent on fault, as would be the case for a tort of discrimination. Fault-based analysis for a tort of discrimination could creep into human rights legislation jurisprudence, to its detriment, undermining the focus on eliminating the effects of discrimination.

The Ontario Human Rights Code, by a 2006 amendment,\textsuperscript{108} now expressly makes such a distinction between remedy and liability. While s. 46.1(1) enables courts in civil proceedings to make orders consequent on a finding of breach of the Human Rights Code, s.46.1(2) affirms the Bhadauria position.

Subsection (1) does not permit a person to commence an action based solely on an infringement of a right under Part I.

The new s. 46.1(1) is also consistent with Justice LeBel’s incorporation of human rights discrimination analysis into bad faith damages as remedies in a wrongful dismissal case. The provision expressly includes monetary compensation and restitution for “injury to dignity, feelings and self-respect”,\textsuperscript{109} consequent on breach of the Human Rights Code, as matters of compensatory remedies. Justice Bastarache does not disagree with this point as regards bad faith damages, but relies on these provisions to preclude, by implication, punitive damages since they are not mentioned in s. 46.1.

Moreover, the recent amendments to the Code (which would allow a plaintiff to advance a breach of the Code as a cause of action in connection with another wrong) restrict monetary compensation to loss arising out of the infringement, including any injuries to dignity, feelings and self-

\textsuperscript{107} Robichaud, ibid at 96.
\textsuperscript{108} Human Rights Code, SO 2006, c 30, s 8.
\textsuperscript{109} Ibid, per added ss 46.1(1)1 and 2.
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respect. In this respect, they confirm the Code’s remedial thrust.110

Punitive damages raise further complications, given the starting point that punitive damages in a wrongful dismissal case require an “independent actionable wrong.” The Ontario Court of Appeal had assumed in Honda that a human rights violation could so count, i.e. that the availability of an administrative enforcement route was sufficient even if Bhadauria precluded a court action.111 As noted above, Justice Bastarache for the majority in Honda both disagrees with the Court of Appeal and says it is not necessary to decide the point given his conclusion that there was in fact no discrimination against Keays.

It is my view that the Code provides a comprehensive scheme for the treatment of claims of discrimination and Bhadauria established that a breach of the Code cannot constitute an actionable wrong; the legal requirement is not met.

I conclude that it is not necessary to reconsider whether breaches of the Ontario Human Rights Code are independent actionable wrongs for the purposes of punitive damages.112

Thus the majority affirms that a breach of human rights legislation is not an independent actionable wrong for the purposes of allowing punitive damages, while seeming to invite an opportunity to reconsider the issue in a future case.

If punitive damages were available in proceedings under human rights legislation, allowing punitive damages in a wrongful dismissal court case would further the objectives of the statute, in much the same way as does enforcement of human rights legislation through collective agreement

110. Supra note 2 at para 63. In discussing statutory caps on damages in human rights legislation in other jurisdictions, notably Saskatchewan and federal legislation, Geoffrey England, supra note 57, treats them as punitive damages (at 339-40). Saskatchewan’s Human Rights Code has a $10,000 cap that covers both damages with “respect to feeling, dignity or self-respect” and contraventions that are done “wilfully and recklessly”; s 31.4, as enacted by SS 2000, c 26, s 27. The federal Canadian Human Rights Act, RSC 1985, c H-6, has two separate caps of $20,000 each, s 53(2)(e) re “pain and suffering” and s 53(3) re “wilfully or recklessly”; England refers only to the latter. Damages respecting pain and suffering or feeling, dignity or self-respect are not punitive damages, but rather are non-pecuniary compensatory damages. See Andrews v Grand & Toy Alberta Ltd, [1978] 2 SCR 229. Although the language of “wilfully” and/or “recklessly” may be suggestive of punitive damages, both the Saskatchewan and federal statutes refer to such damages as “compensation.” Ontario no longer makes reference to “wilfully” or “recklessly”, and its only statutory cap ($25,000) is for fines upon prosecution, s 46.2, enacted by SO 2006, c 30, s 8. Thus, despite England’s assumption, none of the statutory caps relates to punitive damages paid to a plaintiff.

111. Honda, ibid at paras 14, 64.

112. Ibid at paras 64, 24. See also para 67.
arbitration. But given my assumption that punitive damages are not currently available in proceedings under human rights legislation, it would undermine the human rights scheme to make them available in a court proceeding. If punitive damages are considered important in promoting anti-discrimination, the direct route of advancing that objective through human rights adjudication, by changes to human rights legislation, is preferable to an indirect route of allowing them in common law suits invoking human rights in aid. However, if human rights adjudication did allow for punitive damages, I think it would be appropriate to re-open the issue of an “independent actionable wrong.” In that context, the significance of the Bhadouria impact on liability rather than remedy would not dictate a restriction on punitive damages.

Both Justices Bastarache and LeBel express concern about overlap between the assessment of discrimination underlying compensatory bad faith damages and punitive damages. Justice Bastarache notes the basic distinction.

Damages for conduct in the manner of dismissal are compensatory; punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own. This distinction must guide judges in their analysis.

No one in the Supreme Court of Canada thinks Honda met the necessary malicious and outrageous threshold to warrant punitive damages, even if there were no other legal bars. In dissent, Justice LeBel’s denial of punitive damages is not so stark, given his affirmation of the finding of discrimination, combined with his recognition of the importance of factoring in discrimination when considering bad faith compensatory damages. For the majority, Justice Bastarache’s conclusion of no discrimination in contradiction to established jurisprudence, in contrast, is very worrisome.

Conclusion
The Supreme Court of Canada majority judgments in Wal-Mart and Honda are troubling. Their willingness to defer to high-handed employer conduct is stark. In both cases the majority fails to sufficiently distinguish issues of liability and remedy. Through narrow interpretation, they undermine the purposes of collective bargaining and human rights legislation.

113. Parry Sound, supra note 100.
114. See supra note 110.
116. Supra note 2 at para 62 (per Bastarache J) and para 81 (per LeBel J).
117. Ibid at para 62.
respectively. That is not what one would hope for in honouring the legacy of Innis Christie.