The Contract of Employment at the Supreme Court of Canada: Employee Protection and the Presumption of Employer Freedom

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This article critically examines the Supreme Court of Canada's treatment of the contract of employment in its wrongful dismissal jurisprudence over the last 25 years, with the aim of challenging the view that only by exempting the contract of employment from the ordinary workings of contract doctrine or by resorting to public policy considerations can the common law of dismissal provide adequate protection for employees. The Court's jurisprudence reveals a commitment to what this paper calls the presumption of employer freedom, a view of the contract of employment which has its origins in the status-based master and servant relationship and which continues to permeate the common law of wrongful dismissal. This paper offers a more straightforwardly contract-based account of these same entitlements, grounding them not in policy but instead in the work-for-wages exchange at the core of the contract of employment.

L'article fait un examen critique de la façon dont, au cours des 25 dernières années, la Cour suprême du Canada a traité le contrat d'emploi dans ses arrêts sur le congédiement injustifié. L'article vise à contester l'opinion que ce n'est qu'en soustrayant le contrat d'emploi à l'application de la théorie des contrats ou en recourant à des considérations de politique publique que la common law sur le congédiement offre une protection adéquate pour les employés. Les arrêts de la Cour révèlent une détermination à appliquer ce que l'auteure appelle la "présomption de liberté de l'employeur," opinion sur le contrat d'emploi dont l'origine remonte à la relation entre maître et serviteur fondée sur le statut social qui continue de se manifester dans la common law sur le congédiement injustifié. L'article présente une vision plus directement fondée sur le modèle de contrat des mêmes droits, l'arrimant non sur la politique, mais sur le travail fait contre rémunération au cœur même du contrat d'emploi.

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Introduction

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Introduction

Otto Kahn-Freund famously identified the contract of employment as the "corner-stone" of the modern employment relationship.\(^1\) R. W. Rideout later declared this cornerstone to have a "core of rubble," the common law of contract being ill-suited, without endless distortion, to govern the employment relationship.\(^2\) Kahn-Freund himself saw the contract of employment, although the legal foundation of the employment relationship, as no less a "mask,"\(^3\) a "fiction"\(^4\) and a "figment of the legal mind."\(^5\) More recently, Bob Hepple has added "riddle"\(^6\) to the list and Bruno Veneziani has added "façade."\(^7\) Hugh Collins has accused the contract of employment of being "dysfunctional"\(^8\) and Simon Deakin has cautioned that the employment relationship is not "a contract in the normal sense."\(^9\)

Canadian courts too have frequently noted the special nature of the contract of employment, pointing to its "many characteristics that set it

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4. Ibid.
5. Ibid at 18.
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apart from the ordinary commercial contract." Perhaps most frequently cited by our courts in support of the need for special consideration of the uniqueness of the employment contract is Dickson C.J.'s observation, almost 25 years ago, that "[w]ork 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 society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being." Justice Iacobucci, in a series of important wrongful dismissal cases, regularly invoked the former Chief Justice Dickson's words, stressing the importance of judicial attentiveness to these personal and sociological aspects of work, adding that "not only is work fundamental to an individual’s identity, but also...the manner in which employment can be terminated is equally important." In those cases, Iacobucci J. also emphasized the unequal balance of bargaining power that most often marks the employment relationship and that underscores the vulnerability of employees, particularly at the time of dismissal. Given the special nature of work and the inequality in bargaining power that places employees in a vulnerable position in relation to their employers, he often reminded us, care must be taken in fashioning rules and principles of law governing the contract of employment.

My aim in this paper is to critically examine the judicial treatment of the contract of employment in the Supreme Court of Canada's wrongful dismissal jurisprudence over the last two decades. In particular, I set out to challenge the view, most explicitly found in Iacobucci J.'s judgments, that only by exempting the contract of employment from the ordinary workings of contract doctrine or by resorting to public policy considerations can the common law of dismissal provide adequate protection for employees. I will examine three key employee-protecting doctrines in the Canadian common law of wrongful dismissal: first, the employee’s default implied right to reasonable notice of dismissal under an indefinite term contract; second, the common law doctrine of just cause, which extends to employees protection from summary dismissal; and third, the employer’s implied duty to refrain from harsh and unfair conduct in terminating the contract of employment. Each of these doctrines have been justified by the Court on the basis of what most would regard
as extra-contractual considerations, most commonly on the grounds of the personal and sociological importance of work and the desire to mitigate the vulnerability of employees as a group. I will argue that those same doctrines might alternatively be defended in purely contractual terms—that is, they might instead be justified more narrowly in terms of the work-for-wages exchange at the core of the contract of employment. While often in the Court’s wrongful dismissal jurisprudence the contractual foundation of the employment relationship seems to be regarded as an obstacle to the recognition of important employee protections at common law, I will propose how the contract of employment can alternatively be seen as, far from an obstacle, instead the source of and justification for these employee rights and protections at common law.

I will further argue that what has prevented the Court from recognizing the contractual foundation of the employee’s common law rights is a commitment to what I will call the “presumption of employer freedom.” This presumption has its roots in the historical evolution of employment from the status-based master and servant relationship to the modern conception of the contract of employment and, as I will argue, continues to permeate the common law of dismissal in Canada. The presumption of employer freedom is, in effect, a lens through which the Court views the contract of employment and which has the effect of distorting the parties’ rights and duties in a way that favours employers. Only when the contract is viewed through the lens of the presumption of employer freedom do the employee’s law common rights and protections appear to be in need of justification from outside the parties’ contractual relationship. When viewed in this way by someone like Iacobucci J. who was not only willing, but seemed to prefer, to base the Court’s (pro-employee) decisions on extra-contractual grounds, thereby making explicit the relevance of public policy to matters of employment, the presumption of employer freedom is not worrisome for employees. But what is worrisome is that the presumption of employer freedom threatens to deny employees important protections, when a putatively straight-forward “contractual” approach to the employment relationship is adopted. In its most recent jurisprudence, following the retirement of Iacobucci J. in 2004, there has been a discernable move away from the policy-based decisions in wrongful dismissal law in favour of a seemingly strictly contractual approach to the employment relationship. As it turns out, there have been a handful of recent notable

14. The Supreme Court of Canada has recently endorsed the view that employment represents a work-for-wages exchange, in Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000, 2008 SCC 43 at para 15, [2008] 2 SCR 561.
victories for employers at the Supreme Court.\textsuperscript{15} It is therefore tempting to conclude that a strictly contract-based, as opposed to a broader policy-based, approach to the employment relationship will inevitably favour the interests of employers. My aim in this paper is to suggest, however, that this need not be the case. The contract of employment can, itself, ground and justify important protections for employees. While the employer-employee relationship undoubtedly possesses characteristics that set it apart from the typical commercial transaction, the contractual core of the employment relationship—the work-for-wages exchange—can on its own serve as the justificatory basis for the employee’s common law rights and protections. To see that, however, we must cease to view the contract of employment through the lens of the presumption of employer freedom.

I will begin with a discussion of the presumption of employer freedom and its origins in the status-based relationship of master and servant that pre-dated the modern employment relationship’s form as a species of contract. I will then turn to consider the Supreme Court of Canada’s recent dismissal jurisprudence, in which the Court seems to have struggled to reconcile employee entitlements at common law with the contractual nature of the employer-employee relationship: the implied right to reasonable notice of termination under an indefinite term contract in \textit{Machtinger v. HOJ Industries},\textsuperscript{16} the implied right to protection against unjust dismissal in \textit{McKinley v. B.C. Tel},\textsuperscript{17} and the implied right to be treated fairly upon termination of employment in \textit{Wallace v. United Grain Growers}.	extsuperscript{18} The majority opinion in each case, written by Iacobucci J., subscribes to the presumption of employer freedom, leaving the Court with only extra-contractual and public policy considerations upon which to justify its finding for the employee. In each case, I will suggest how the same outcomes could be justified in purely contractual terms. To be clear, my aim in offering a contract-based alternative to the majority’s policy-based decision in each of these cases is not to question the relevance of public policy and extra-contractual considerations in matters of employment. Rather, it is to offer an additional, and perhaps more doctrinally secure, justification for the employee’s entitlements at common law—one not dependent on prevailing conceptions of fairness and sound public policy.


\textsuperscript{16} Machtinger, supra note 12.

\textsuperscript{17} McKinley, supra note 12.

\textsuperscript{18} Wallace, supra note 10.
which can shift and change over time, and instead grounded in basic principles of contract law.

I. The presumption of employer freedom

The presumption of employer freedom can be traced to the employer's implied contractual right of managerial prerogative at common law as it has evolved from the status-based master and servant relationship. The employer's right of managerial prerogative, a default implied term at common law, gives the employer the sole legal authority to manage the labour process in its workplace. The employer's managerial prerogative is buttressed by an implied obligation on the part of the employee to serve the employer loyally, a duty often referred to simply as the duty to serve. The employee's duty to serve is correlative to the employer's right of managerial prerogative but the duty does not merely stand for the idea that the employee must submit to the employer's right to control the work. The employee's implied duty to serve grants the employer not only the unilateral authority to set the terms and conditions under which the work will be performed, but also the unilateral authority to set the scope of managerial prerogative—that is, the right to set what counts as an exercise of that authority. In other words, because it demands the employees' obedience and deference to the employer's authority, the implied duty to serve effectively affords the employer freedom to determine whether its exercise of control falls within the scope of that right.

A few commentators have drawn attention to this hierarchical structure created by the common law implied terms of managerial prerogative and the employee's duty to serve. Selznick, for instance, has observed that

[b]y the end of the nineteenth century the employment contract had become a very special sort of contract—in large part a legal device for guaranteeing to management the unilateral power to make rules and exercise discretion. For this reason we call it the prerogative contract.

19. The British Columbia Court of Appeal described the effect of these two implied terms in the following passage:

[A]n employer has a right to determine how his business shall be conducted. He may lay down any procedures he thinks advisable so long as they are neither contrary to law, nor dishonest, nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee was hired. It is not for the employee nor for the court to consider the wisdom of the procedures. The employer is the boss and it is an essential implied term of every employment contract that, subject to the limitations I have expressed, the employee must obey the orders given to him.

Stein v British Columbia (Housing Management Commission) (1992), 65 BCLR (2d) 181 (CA).

And he continues,

[W]hat is the legal meaning of the norm that the employer may set the rules of plant behavior? Is the employer the sole judge of whether his rules are arbitrary or exceed the scope of his authority? Ideally, even under contract doctrine, the employer might be granted the right to make rules, but he would not have the unrestricted right to decide whether the rules he has made are consistent with the contract. But the prerogative contract gives to the employer just such authority.21

Selznick explains that the prerogative contract, that is, the contract of employment shaped as it is by the implied terms of managerial prerogative and the employee’s duty to serve, represents a "marriage of old master-servant notions to an apparently uncompromising contractualism."22 But, as he notes, the master-servant model was only partially incorporated into the contract of employment. In managerial prerogative, the employer inherited the traditional authority of the master but, as Selznick puts it, that authority was "stripped of the sense of personal duty, commitment, and responsibility that once accompanied it"23 such that, with the transition from status to contract, employers were no longer held to the same kinds of duties and responsibilities that masters had historically owed to their servants.24 Correspondingly, employees no longer enjoyed the benefit of managerial benevolence that servants had once enjoyed and yet, through the common law implied term of the duty to serve, continued to owe their employers essentially the same duty of obedience and loyalty.

According to Alan Fox, this selective borrowing from the law of master and servant was deliberately designed to favour employers. For Fox, the contractual model of the employment relationship, which envisions the relationship to be shaped by mutual agreement, represented an incipient

21. Ibid.
22. Ibid at 136.
23. Ibid.
24. Simon Deakin writes, Neither did the concept of mutuality extend to the continuation of the master’s traditional obligations of care under the service relationship...Old authorities, to the effect that a master had an obligation to maintain a servant or to provide them with medical care and expenses in the event of sickness or injury, were largely overturned [in the nineteenth century.]

Deakin, supra note 9 at 35. As Sanford M Jacoby puts it, One result of this formal approach to the employment contract was the demise of the familial model in master and servant law. The courts developed a new common law rule that masters did not have to provide medical or surgical care for their servants....The other obligations of the master, such as moral indoctrination and Christian training, were “increasingly neglected” by employers and the courts since these now were viewed as “encumbrances upon a contractual arrangement of limited purpose.”
threat to the entrepreneur’s “unfettered command over labour resources.”

In order to preserve the “organizational strength of the business enterprise,” he writes, the common law courts “imported into the employment contract a set of implied terms reserving full authority of direction and control to the employer.”

Against the background of these employer-favouring remnants of the master and servant relationship, courts applied what Selznick calls an “uncompromising contractualism” to the contract of employment. With the hierarchical structure created by the implied terms of managerial prerogative and the employee’s duty to serve in place, it was then presumed that each party would take care of his own interests and provide for them in a freely bargained agreement. Of course, the employer’s interests were already well taken care of by the broad right of managerial prerogative and the right to demand obedience and loyalty from its employees. It is hard to imagine what rights—beyond the unilateral authority and unfettered discretion to manage the workplace—an employer might be pressed to bargain for. Indeed, the employee, already under a duty of obedience and loyalty to her employer, would have little else in the way of a positive obligation to offer the employer. While the employer’s rights and the employee’s duties are nearly fully captured by the implied terms of managerial prerogative and the duty to serve, the employee’s rights and the employer’s duties, in contrast, are left to be negotiated as express terms of their agreement. The result is that the employee’s rights under the contract are taken to be limited to those found in the express terms and, in turn, the duties that the employer owes its employees are limited to those duties expressly agreed to by the parties.

It is this feature of the common law of employment that I call the presumption of employer freedom. Under the presumption of employer freedom, the employer is presumed to enjoy the authority to set the terms and conditions of employment subject only to the express terms of the contract and the employer’s duties to the employee are presumed

27. Selznick, supra note 20 at 136.
28. Ibid.
29. As Selznick puts it, “[t]he terms of the agreement, not the law of the employment contract, would have to be relied on for substantive justice in the plant”: Ibid.
to be limited to those expressly agreed to by the parties. The employer’s freedom, in short, is taken to be limited only by the express terms of the parties’ agreement. Absent an express term in the contract of employment restricting the employer’s freedom to manage the workplace in a certain respect, the employer is presumed to be free to manage as it best sees fit. The presumption of employer freedom thus invites the court to see employee-protecting doctrines, such as the employee’s implied common law entitlement to reasonable notice of termination of her employment, as extra-contractual benefits justifiable only on grounds external to the work-for-wages exchange. I turn now to review several key recent cases in the Supreme Court of Canada’s jurisprudence on wrongful dismissal, in order to expose the Court’s commitment to the presumption of employer freedom and to consider how this approach to the contract of employment has shaped the common law of dismissal over the years.

II. Reasonable notice of termination

*Machtinger* afforded the Supreme Court of Canada the opportunity to consider the basis of an employee’s entitlement at common law to reasonable notice of the termination of their employment. The appellants, Machtinger and Lefebvre, had been employed by the respondent car dealership for seven years when they were dismissed without cause and without notice. Both employees had signed standard form contracts of employment according to which Machtinger would be entitled to no notice of termination of his contract and Lefebvre would be entitled to two weeks’ notice. The issue at trial in this case was whether the contracts of employment rebutted the presumption at common law that an employee is entitled to reasonable notice of termination of his or her employment. Both contracts violated the minimum standards for notice of termination under the Ontario *Employment Standards Act*. The Supreme Court declared the notice provisions null and void and awarded both employees common law damages in lieu of reasonable notice. In the result, Machtinger was awarded damages equal to seven months notice and Lefebvre damages equal to seven and a half months notice.

In his majority decision, Iacobucci J., quoting from Mark Freedland’s leading work, explained that a contract of employment “in the absence of evidence to the contrary is one of employment for an indefinite period terminable by either party upon reasonable notice, but only upon reasonable notice.”30 The amount of notice to which an employee is entitled will

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depend on the facts of the case, including the employee's length of service, the employee's position, the employee's age at the time of dismissal and the availability of similar employment. Justice Iacobucci did not, however, explain why under an indefinite term contract the parties are implicitly bound to provide reasonable notice in order to lawfully terminate the contract. He noted counsel's "considerable attention in argument before [the court] to the law governing the implication of contractual terms, and specifically to the relevance of the intention of the parties to the implication of a term of reasonable notice of termination in employment contracts." But, Iacobucci J. explained, the issue raised in this case could be resolved on "narrower grounds." Those grounds, it seems, are what he labels as "policy considerations." Given the importance of work to society and in light of the inferior market power of most employees, he reasoned, it is necessary to provide "protection for employees." Holding that the common law presumption of reasonable notice has not been rebutted if the contract of employment fails to comply with the minimum notice provisions under employment standards legislation would provide employers with an "incentive to comply with the Act."

Whatever its rationale, the entitlement to any notice of termination makes Canadian employees better off than American employees for whom the default rule is employment-at-will. Under the presumption of employment-at-will, an employer may dismiss an employee without notice and for any reason. American law, like Canadian law, conceives of the employment relationship as a contract, and for Richard Epstein, for example, it is because the employment relationship is a contract that the

31. Machtinger, supra note 12 at 999. These factors, used in assessing the amount of reasonable notice of termination to which an employee, are set out in Bardal v Globe & Mail Ltd (1960), 24 DLR (2d) 140 (Ont H Ct J) at 145.
32. Machtinger, supra note 12 at 998.
33. Ibid.
34. Ibid at 1002.
35. Ibid at 1004.
36. Ibid.
37. Richard A Epstein, "In Defense of the Contract At Will" (1984) 51:4 U Chicago L Rev 947. On most accounts, the American presumption of employment-at-will dates back to HG Wood, A Treatise on the Law of the Master and Servant Covering the Relation, Duties and Liabilities of Employers and Employees, 2nd ed (San Francisco: Bancroft-Whitney, 1886). See Jay M Feinman, "The Development of the Employment at will Rule" (1976) 20:2 Am J Leg Hist 118 and Jacoby, supra note 24. While the contract of employment has its roots as a status-based relationship in both English and American law, the legal presumptions that govern the modern contract differ in the two jurisdictions. I do not in this paper attempt to account for or explain the evolution of the different presumptions, though of course different legal and political forces were at work in each country to shape the evolution of the law. See Feinman and Jacoby (cited in this note) and Fox, Beyond Contract, supra note 25.
default rule should be employment-at-will. Where the contract does not specify a fixed term of employment, Epstein argues, it must be presumed that either party can terminate the contract at-will—that is, without providing notice or reasons for the termination. For Epstein, the employment-at-will doctrine respects both the principle of freedom of contract and the rules governing the interpretation of contracts. Freedom of contract, he argues, requires that both parties be free to terminate the contract. And, he adds, where a contract does not provide for an entitlement to notice of termination, principles of contractual interpretation require that no entitlement be conferred, out of respect for the obvious intentions of the parties. Thus while under both American and Canadian law, the employment relationship is conceived of as a contract, the two jurisdictions subscribe to opposite presumptions: for Canadians, a presumption of employee entitlement to reasonable notice of termination and for Americans, a presumption of no entitlement to notice of termination.

Under the status-based master and servant relationship, masters were generally legally obligated to provide servants with notice of termination. With the employment relationship’s transition from status to contract, American employment law diverged from English law which continued to read into contracts of employment an obligation to provide notice of termination. So it might be said that the difference between Canadian and American law on the question of an employee’s implied entitlement to notice of termination reveals that the Canadian law has not yet fully embraced the contractual model, or perhaps that it has returned to a status-based conception of the employment relationship. The question, in other words, is whether the difference between the two jurisdictions suggests that the Canadian worker’s entitlement to notice of termination goes beyond the entitlements to which an employee is entitled in virtue of the promises exchanged under the contract.

38. Epstein, supra note 37. See also Mayer G Freed & Daniel D Polsby, “Just Cause for Termination Rules and Economic Efficiency” (1989) 38:4 Emory LJ 1097. Defenders of the at-will presumption frequently point to the employee’s parallel freedom to terminate the contract without notice in support of the presumption. Richard A Posner, “Hegel and Employment at Will: A Comment” (1989) 10:5-6 Cardozo L Rev 1625 at 1627, for example, writes: “Employment at will happens to be the logical terminus on the road that begins with slavery and makes intermediate stops at serfdom, indentured servitude, forced servitude, and guild restrictions. That should be a point in its favor.”


40. Ibid at 951.

41. English common law presumed that employment for an indefinite period was for one year, in the absence of custom or evidence to the contrary: see William Blackstone, Commentaries on the Laws of England (Chicago: University of Chicago Press, 1979) vol 1 at 413. Courts subsequently qualified the rule by allowing termination after reasonable notice. See Feinman, supra note 37 at 119-122.

42. Jacoby, supra note 24.
Much depends on whether we characterize the employee’s entitlement to reasonable notice as a benefit or as an absence of a burden, and whether we characterize the employer’s duty to provide reasonable notice of termination as a burden or as an absence of a benefit. The presumption of employer freedom encourages us to think of an employee’s entitlement to notice of termination as a(n) (extra-contractual) benefit and the employer’s duty to provide notice as a(n) (extra-contractual) burden. Having not expressly agreed to provide notice of termination, the employer, with the help of the presumption of freedom, is presumed not to owe any such duty. To hold the employer to an implied obligation to provide reasonable notice of termination of an indefinite term contract is therefore to hold the employer to an obligation that it did not agree to owe, and one that, according to Epstein, is inconsistent with the obvious intentions of the parties.

The parties’ intentions under an indefinite term contract seem obvious, however, only if one subscribes to what I have called the presumption of employer freedom. Where the parties have not specified a fixed term for the contract, it seems fair to say that both have agreed that it will be of indefinite duration and indeed, this is the view taken by both American and Canadian employment law. For one party to then be able to unilaterally terminate the contract at a later date, without cause and without notice to the other party—as the doctrine of employment-at-will permits—is to allow that party unilaterally to set an essential term of their agreement, namely, the duration of the contract. In other words, to allow an employer (or an employee) to terminate the contract at will is to allow the employer (or the employee) to effectively turn an indefinite term contract into a fixed term contract and to thus hold the employee (or the employer in the case of termination by the employee) to a term to which she did not agree to be bound. This is not because an indefinite term contract is presumed to permanently bind the parties but because their agreement manifests no consensus whatever on the duration of the agreement.

Consider the case of an employer who unilaterally terminates an indefinite term contract five years into the relationship. At the contract’s inception, the employee did not agree to a five-year term. Holding the employer to a duty to provide reasonable notice of termination of an indefinite term contract can be understood as an attempt to put the employee in the position she would have been had she, at the time of the contract’s inception, agreed to, in this example, a fixed term contract of five years duration. The notice period affords the employee the opportunity to seek alternative employment, something that presumably she would have done (or at least have been aware that she ought to do) if she desired
to continue to be gainfully employed. Put another way, the notice period makes it possible to conduct her affairs as though she had agreed to the employer’s demand for a five-year contract. Mutual agreement on the term of the contract is constructed retroactively by extending to the employee an entitlement to a period of notice in which she can conduct her affairs as though she had voluntarily agreed with the employer that the contract would terminate on the date desired by the employer.43

Although once grounded in notions of status, the duty to provide notice of termination under an indefinite term contract can thus alternatively be grounded in the contractual foundation of the employment relationship. The Canadian presumption appears to impose duties not grounded in the reciprocal exchange of contractual promises under an indefinite term contract only if, as Epstein does in his defence of employment-at-will, one presumes that to hold an employer to a duty that it has not expressly agreed to owe is to confer on the employee an extra-contractual benefit.

In Machtinger, the majority of the Supreme Court of Canada seems to have subscribed to just that presumption. Rather than derive the employee’s right to reasonable notice of termination from the absence of her consent to the employer’s demand that the contract terminate at a certain date, the Court in Machtinger seems to have taken the absence of the employer’s express promise to provide notice of termination to leave the Court with only public policy justifications upon which to base the employee’s entitlement. By viewing the contract of employment through the lens of the presumption of employer freedom and thus holding the employer’s contractual duties and the employee’s contractual rights to be limited to those that the parties have expressly agreed to, the Supreme Court failed to appreciate that the contract of employment itself can ground the employee’s right to notice of termination and the employer’s duty to provide such notice. Instead, it seems that the Court could only see in the employee’s common law right of notice of termination the conferral of an extra-contractual benefit to the employee rather than the denial of an extra-contractual benefit to the employer.

III. The law of summary dismissal

In McKinley, the Supreme Court considered the common law doctrine of just cause. McKinley was a chartered accountant employed by B.C. Tel for nearly 17 years when in 1993 he began to experience hypertension, a

43. While in this example it is the employer who must provide notice of termination, the same reasoning supports the employee’s corresponding obligation under Canadian employment law to provide reasonable notice to his/her employer of his/her intention to resign from his/her employment under an indefinite term contract: Oxman v Dustbane Enterprises Ltd (1988), 23 CCEL 157 (Ont CA).
condition that was initially brought under control through medication and a short leave of absence from work. In 1994, his condition worsened and on the advice of his physician, McKinley took another leave of absence. Three months into this second leave, McKinley was advised that his employment with B.C. Tel was terminated. He commenced an action for wrongful dismissal. In its defence, the employer argued that because McKinley had been dishonest about his medical condition and its treatment, the employer had just cause to terminate his employment without notice. Specifically, the employer alleged, McKinley had deliberately withheld information regarding his physician’s recommendation of a particular medication that was not prescribed but could have enabled him to return to work without incurring any health risks.

At trial, the jury found in favour of McKinley, awarding him general, special and aggravated damages. The British Columbia Court of Appeal set aside the jury’s award and ordered a new trial on the grounds that the trial judge had erred in instructing the jury that McKinley’s alleged dishonesty would merit dismissal only if it was of a degree that was incompatible with the employment relationship. According to the Court of Appeal, “as a matter of law, all dishonesty within an employment relationship provides just cause.”

McKinley appealed.

The main issue before the Supreme Court was whether the employee’s dishonesty, in and of itself, necessarily gives rise to just cause for summary dismissal. Justice Iacobucci, writing for the unanimous Court, observed that one line of Canadian authorities subscribed to a contextual approach under which the nature and surrounding circumstances of the dishonest conduct must be considered. The other line of cases held that dishonest conduct, regardless of its degree or the circumstances in which it occurred, is necessarily cause for an employee’s dismissal. Justice Iacobucci then proposed a test that in his view was consistent with both lines of authority. He formulated the test variously as whether “the employee’s dishonesty gave rise to a breakdown in the employment relationship,” whether “the dishonesty violates an essential condition of the employment contract,” whether the dishonest conduct “breaches the faith inherent to the work relationship,” and whether the conduct “is fundamentally or directly

44. McKinley, supra note 12 at paras 16-26.
45. See, e.g., Regina v Arthurs, Ex parte Port Arthur Shipbuilding Co, [1967] 2 OR 49 (CA).
47. McKinley, supra note 12 at para 48.
48. Ibid.
49. Ibid.
inconsistent with the employee’s obligations to his or her employer.”

However the test is formulated, Iacobucci J. explained, it requires an assessment of the context of the alleged dishonest conduct.

According to Iacobucci J., the principle underlying this contextual approach is “proportionality.”

An effective balance must be struck between the severity of an employee’s misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment.

He then added,

Given this recognition of the integral nature of work to the lives and identities of individuals in our society, care must be taken in fashioning rules and principles of law which would enable the employment relationship to be terminated without notice. The importance of this is underscored by the power imbalance that this Court has recognized as ingrained in most facets of the employment relationship. In Wallace, both the majority and dissenting opinions recognized that such relationships are typically characterized by unequal bargaining power, which places employees in a vulnerable position vis-à-vis their employers. It was further acknowledged that such vulnerability remains in place, and becomes especially acute, at the time of dismissal.

To adopt the approach of the British Columbia Court of Appeal and allow termination for cause in cases where an employee engaged in dishonest conduct regardless of its degree or the surrounding circumstances, according to Iacobucci J., “would further unjustly augment the power employers wield within the employment relationship.” In the end, the Court concluded that there was no basis upon which to interfere with the jury’s verdict that McKinley’s conduct did not give the employer just cause for his dismissal.

In McKinley, Iacobucci J. justifies the employee’s entitlement to protection against unjust dismissal on the policy grounds of the integral nature of work to the lives and identities of individuals in our society and the unequal bargaining power, which places employees in a vulnerable position vis-à-vis their employers. That he turns to these policy considerations suggests that he viewed the work-for-wages exchange at

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50. Ibid.
51. Ibid at para 53.
52. Ibid at para 54 [emphasis in original].
53. Ibid at para 56.
54. Ibid at para 61.
55. Ibid at para 54.
the heart of the employer-employee relationship as incapable itself of justifying the employee’s right to protection from unjust dismissal.

Justice Iacobucci could have instead grounded the common law doctrine of just cause in the work-for-wages exchange at the core of the contract of employment. And to a limited extent he did just that, though he used language that suggests otherwise. On Iacobucci J.’s contextual approach, the question of whether an employee may be dismissed for just cause is to be determined by reference to the employee’s obligations under the contract. Where an employee is in breach of her obligations under the contract of employment, the employer is entitled to treat the contract as at an end and therefore to no longer be under an obligation to provide notice of termination to the employee. It is the contract of employment, then, that limits the employer’s freedom to dismiss an employee: only where the employee can be said to have breached a fundamental term of the contract is the employer entitled to dismiss the employee without notice.

However, on Iacobucci J.’s analysis, it seems that the employee’s right to protection against dismissal without cause or notice does not, in itself, flow from the contract of employment. On the contextual approach, the contract of employment serves as the measure of whether the employee’s right to protection against unjust dismissal has been violated by the employer, but the right itself is instead grounded in the employee’s status as an employee. Justice Iacobucci refers to dismissal as a “sanction” imposed on an employee, implying that dismissal is a kind of punishment meted out by the employer for malfeasance by the employee.56 The “proportionality” underlying his contextual approach, he explains, requires that “[a]n effective balance… be struck between the severity of an employee’s misconduct and the sanction imposed.”57 For him, it seems that the protection against summary dismissal is a protection that an individual earns in virtue of her status as an employee because of the integral nature of work to the individual’s sense of identity and because of her inferior market power, but one that, through her misconduct, she may be denied.

The employee’s common law protection against summary dismissal only calls for the kinds of justifications that Iacobucci J. invokes in his decision in McKinley if one assumes, as it appears Iacobucci J. did,
that the contract of employment itself grants the employer the right to dismiss the employee without notice and without just cause. But again, much depends on whether we characterize the protection that employees enjoy under the common law doctrine of just cause as a benefit or as the absence of a burden to the employee. The presumption of employer freedom encourages us to see the employee’s common law protection against dismissal without cause or notice as an extra-contractual benefit—that is, as one the employee enjoys over and above what she received in exchange for her promise to work. This is because under the presumption of employer freedom, the employer’s right to set the terms and conditions under which the work will be performed—the employer’s exercise of its managerial prerogative, in other words—is regarded as limited only by the express terms of the contract.

To have allowed the employer to dismiss McKinley without notice on the basis of his alleged dishonesty would have been to grant the employer the right to unilaterally dictate a term under the contract according to which (1) the employer would continue to employ McKinley on the condition that should he take a leave of absence for illness he not withhold medical information that the employer considers relevant to his ability to perform the job such that (2) when McKinley failed to do so the employer was entitled to treat the contract as at an end. Limiting the grounds upon which an employer is entitled to treat the employment contract as at an end to those grounds that the common law holds to amount to just cause for dismissal does not interfere with the employer’s contractual right of managerial prerogative but, instead, respects the conditions under which managerial prerogative can be said to be a contractual right. Managerial prerogative can be understood as a contractual right where, as in most cases, the employee, either expressly or implicitly, agrees that the employer will enjoy the right to control the work.¹⁸ We can read the Supreme Court’s decision in McKinley as holding that in dismissing McKinley—that is, in making it a condition of McKinley’s employment that he divulge medical information that the employer considered relevant to his ability to perform the job—the employer went beyond its right in managerial prerogative to control the work, by attempting to control not the work, but the worker, McKinley himself.

Now, of course, in controlling the work, the employer will also in some sense control the worker herself because the labourer and her labour are

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¹⁸ The employer’s control over the work has traditionally been considered the hallmark of the contract of employment. See Judy Fudge, Eric Tucker & Leah F Vosko, “Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada” (2003) 10 CLELJ 193.
inextricably bound together. Labour cannot be separated or alienated from the worker in the same way that commodities such as a car or money can be separated from the seller and the purchaser. That labour is inseparable from the labourer herself gives rise to concerns about the commodification of labour: where, as under the contract of employment, labour is conceived of as a commodity, the worker herself is in some sense therefore also a commodity.\(^{59}\) Thus, while the contract of employment may conceive of the employment relationship as a wages for work exchange, the exchange is in some sense a wages-for-the-worker exchange because with the work comes the worker herself.

However, while work may be inextricably bound up with the worker, we can nonetheless distinguish between a condition of employment that seeks to control the work and one that seeks to control the worker herself.\(^{60}\) Under the status-based master and servant relationship, the master enjoyed the right to control the worker herself, because as Selznick has commented, “[i]n some vague but important sense, it was assumed that the whole person was committed to the relation.”\(^{61}\) A typical agreement between master and servant included terms preventing the servant from visiting taverns, from playing cards or dice, from marrying or having sexual relations, and from leaving the household without the consent of the master.\(^{62}\) The whole of the servant’s person being committed to the relation, the master was entitled (and indeed even seen as morally obligated) to control (and attend to the well-being of) the servant herself.

With the relationship’s legal transition from status to contract, labour was reconceived as an alienable commodity\(^ {63} \) and the employment relationship came to be regarded, if only on the employer’s side, as one of limited commitment. While the master’s right to control the servant, from which the employer’s implied right of managerial prerogative was inherited, was justified by the respective status of master and servant, managerial prerogative as a contractual right must be justified by the

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\(^{59}\) John Nelson asks, “[s]ince [labour] is not something apart and separate from the worker but is a commodity, how can we buy it without at the same time buying the worker himself?” John O Nelson, “That a Worker’s Labour Cannot be a Commodity” (1995) 70:272 Philosophy 157 at 158.

\(^{60}\) This distinction is akin to Marx’s distinction between labour and labour power. On Marx’s view, one can relinquish control over one’s labour power, that is, one can alienate one’s skills abilities in the sense that one contracts to give the employer the right to control those skills and abilities for a definite period. See Guy Robinson, “Labour as Commodity” (1996) 71:275 Philosophy 129 at 130.

\(^{61}\) Selznick, supra note 20 at 124.

\(^{62}\) See Peter Laslett, The World We Have Lost (New York: Charles Scribner’s Sons, 1971) at 3.

exchange of promises between employer and employee. Justified in terms of personal status, the master’s right to control the servant was much broader in scope than the employer’s right of control under managerial prerogative which, under the contract of employment, must be justified by the employee’s promise to submit to the employer’s control over the work. The common law doctrine of just cause can be understood as making an important contribution to this transition from status to contract. Its role in contemporary employment law, I suggest, is, in part, to distinguish between control over the work and control over the worker and to limit the employer’s rights under managerial prerogative to the former such that managerial prerogative can be derived from the employee’s express or implied promise to submit to the employer’s control over the work.

Under contemporary employment law, to establish just cause for an employee’s dismissal without notice an employer must point to conduct on the part of the employee that is objectively incompatible with the employee’s duties. Conduct considered incompatible with the worker’s status under the master and servant relation (such as visiting taverns, gambling, entering marriage) is not incompatible with the employee’s duties under a contract of employment, absent some connection between that conduct and the employee’s ability to do the work she has promised to perform for the employer’s benefit. To establish just cause for dismissal, which is in effect to allege that the employee has violated an essential term or condition of employment, entitling the employer to treat the contract as at an end, the employer must establish that the term or condition allegedly violated by the employee is one that is connected to the employee’s fulfillment of her promise under the contract. If the term or condition alleged to have been violated is not connected to the employee’s duties under the contract, then the employer will not have just cause for dismissal. In other words, where just cause has been found not to exist, it is as though the employer has been found to have exceeded its right in managerial prerogative to set terms and conditions of employment, by dismissing an employee for violating a term or condition of employment that is not connected to the employee’s duties under the contract. A finding that the employer dismissed an employee without just cause amounts to a finding that the employer’s condition of employment—in McKinley, the

64. In *Rhodes v Zehrmart Ltd* (1986), 15 CCEL 137 (Ont Div Ct) the fact that an employee purchased narcotics from a fellow employee outside working hours was found not to amount to just cause for his summary dismissal, there being no connection between the employee’s conduct and his ability to perform his job. Similarly, in *Bell v General Motors of Canada* (1989), 27 CCEL 110 (Ont H Ct J) the fact that the employee had assaulted another worker off company premises was found not to constitute just cause for dismissal.
condition that McKinley divulge all medical information that the employer
considered relevant to McKinley’s abilities to perform the work—fell
beyond the scope of its contractual right in managerial prerogative to
control the work.

The condition being insufficiently connected to the performance of
the employee’s work, it amounts to an attempt not to control the work but
something more than the work. In *McKinley*, we might say, for example,
that the employer in dismissing McKinley for dishonesty was attempting
to control McKinley by requiring him to be (or at least behave like) the
kind of person who divulges all medical information to his employer, even
where he is not under a duty to do so—a person, more generally, willing
to make himself vulnerable to the judgment of others in their personal
affairs. In agreeing to submit to the employer’s control over the work,
McKinley did not also thereby agree to submit to the employer’s control
over what kind of person he should be. The decision in *McKinley*, and
the doctrine of just cause more generally, can thus be seen as limiting the
employer’s right in managerial prerogative to the right to control the work
and as denying the employer the right unilaterally to set what counts as
an exercise of that right, at least in cases where the employer exceeds the
scope of managerial prerogative by dismissing an employee for reasons
insufficiently connected to the terms of their agreement.

IV. *Extended damages for wrongful dismissal*

In *Wallace*, the Supreme Court of Canada considered the availability
of extended damages to an employee who had been subjected to
particularly harsh or bad faith conduct by his employer upon termination
of employment. Attracted by the employer’s offer of secure employment
until retirement and assurances of its fair treatment of employees, Wallace
had left secure employment and accepted a position as a salesperson with
the defendant employer. After 14 years of impeccable service in his new
position, Wallace was dismissed without notice and without explanation.
When he initiated an action for wrongful dismissal, the employer
defended the action on the grounds that the dismissal had been for just
cause, maintaining that position until trial when it then conceded that it
had no basis for the defence. The majority of the Supreme Court of Canada
awarded *Wallace* damages equal to twelve months’ reasonable notice of
termination and an additional twelve months’ notice to reflect the callous
and insensitive manner of his dismissal.

Justice Jacobucci, writing for the majority in *Wallace*, held that the
importance of work and the inferior market power of employees justified
holding employers to what it labeled “an obligation of good faith and fair
dealing."65 His opinion makes it clear that the duty is not grounded in principles of private law (having considered and rejected both contract and tort principles in the course of his reasons), but instead in the unique features of the contract of employment that "set it apart from the ordinary commercial contract."66 It seems, then, for Iacobucci J., that the contract of employment, in itself, could not protect an employee from her employer's unfair or bad faith conduct. Indeed, for him, the contractual of employment was an obstacle to be overcome in his attempt to reform the common law rights and duties of employees and employers upon termination of the relationship.

Only when viewed through the lens of the presumption of employer freedom, however, does the contract of employment appear to be such an obstacle. For McLachlin J., writing in dissent, the contract of employment was not an obstacle to be overcome in holding employers to a duty to treat employees fairly upon termination but was instead the vehicle through which that duty could be imposed. The differences between the majority and dissenting opinions in Wallace, I suggest, can be traced to the presumption of employer freedom to which the majority, more than the minority, is clearly committed. Justice McLachlin's dissent also arguably betrays a hint of the presumption of employer freedom, however, in light of the particular justifications she favours for holding the employer in Wallace to the novel duty of good faith and fair treatment.

One of the main issues before the Court was whether Wallace could claim aggravated and punitive damages for the harsh and insensitive manner in which his employer terminated his employment. Justice Iacobucci held that there was no basis for either claim, whereas McLachlin J. would have awarded Wallace $15,000 in aggravated damages. Their difference of opinion on Wallace's entitlement to aggravated damages reflects their different views of the contract of employment. Both Iacobucci and McLachlin JJ. followed the Supreme Court's earlier decision in Vorvis v. Insurance Corp. of British Columbia in which the Court held that "any award of damages beyond compensation for breach of contract for failure to give reasonable notice of termination 'must be founded on a separately actionable course of conduct.'"67 For Iacobucci J., the employer's conduct in Wallace gave rise to no independently actionable wrong. Justice McLachlin disagreed.

65. Wallace, supra note 10 at 95.
66. Ibid at para 91.
Justice Iacobucci considered and rejected two candidate independent wrongs. He gave very short shrift to the appellant’s argument that the employee could sue in tort for “bad faith discharge,” citing the absence of any persuasive authority in support of the introduction of such a novel cause of action. Justice Iacobucci also considered whether the employer in this case could be said to have breached an implied contractual term that the employee would not be dismissed except for cause or legitimate business reasons or upon reasonable notice of termination. To hold employers to such an implied term, he claimed, would “be overly intrusive and inconsistent with established principles of employment law, and more appropriately, should be left to legislative enactment rather than judicial pronouncement.” Justice Iacobucci thus seems to have been of the opinion that since the employer did not expressly agree to be bound by a duty to treat Wallace fairly, it would be “overly intrusive” for the court to hold the employer to such a duty. In other words, it seems that Iacobucci J. subscribed to the presumption of employer freedom: the employer is presumed to be under no obligation to act in good faith and to treat its employees fairly. In the absence of express agreement to such a term, the employer is understood to be under no contractual obligation to treat Wallace fairly upon termination of his employment.

By contrast, McLachlin J. saw no reason why such a term could not be implied. On the precise basis for the implication of the term, however, she is ambiguous. At first, she claims that it is “necessary in the sense that it is required by the nature of the contract rather than the presumed intentions of the particular parties.” But she then goes on to cite two decisions, one of the British Columbia Court of Appeal and the other of the New Zealand High Court, in which an implied obligation of fairness and good faith was found to be implied under a contract of employment on the basis of the presumed intentions of the parties. In the British Columbia case, the court held that if the parties had turned their minds to the issue, they would have mutually agreed that “they would take reasonable steps to protect each other from such harm, or at least would not deliberately and maliciously avail themselves of an opportunity to cause it.” In the

69. Wallace, supra note 10 at para 73.
70. Ibid at para 75.
71. Ibid at para 76.
72. Ibid at para 137.
73. Deildal v Tod Mountain Development Ltd, [1997] 6 WWR 239 (BC CA) [Deildal].
74. Whelan v Waitaki Meats Ltd, [1991] 2 NZLR 74 (HC) [Whelan].
75. Wallace, supra note 10 at para 139, citing Deildal, supra note 73 at para 77.
New Zealand case, the High Court held that the employee "was entitled to assume that he would be treated by his employer in such a manner as to enable him to retain his dignity."\(^{76}\)

In further support of her view that the employer in \textit{Wallace} was bound by an implied term to act fairly and in good faith, McLachlin J. noted that "implying an employer obligation of good faith would provide symmetry to this area of the law since employees already owe their employers a duty to act reasonably in the best interests of their employer,"\(^{77}\) and that duties of good faith and fair dealing have been implied in commercial contracts, insurance contracts and real estate contracts.\(^{78}\) In the end, McLachlin J. concluded that the employer’s breach of the implied duty of good faith constituted an independent wrong for which Wallace was entitled to aggravated damages.\(^{79}\)

Unlike Iacobucci J., then, McLachlin J. did not view the implication of a contractual duty requiring the employer to act fairly and in good faith to be an overly intrusive step. But while she cited cases standing for the proposition that an employer obligation to act in good faith can be implied under a contract of employment on the basis of the parties’ presumed intentions, McLachlin J. ultimately justified the implied duty on the grounds of necessity and fairness. So while she does not see the contract of employment and the absence of express employer agreement to be bound by such a duty as obstacles to finding such an implied term under the contract as Iacobucci J. plainly did, it does seem as though McLachlin J. shares with Iacobucci J. the opinion that the exchange of promises between employer and employee, on its own, is insufficient to ground the employer’s duty to act in good faith and to treat its employees fairly.

The contract of employment itself can justify an employee’s entitlement to be free from the kind of harsh and insensitive treatment that Wallace suffered. While the employer in \textit{Wallace} might not have expressly agreed that it would be under a duty of good faith and fair treatment, nor did the employee expressly agree that the employer would enjoy the right to treat him however the employer pleased, no matter what the cost to the employee. The presumption of employer freedom, to which it seems Iacobucci J. implicitly subscribed, favours the employer’s interests over the employee’s by noting only the absence of express employer agreement to the duty and not the absence of express agreement by the employee that

\(^{76}\) Whelan, supra note 74 at 89.

\(^{77}\) Wallace, supra note 10 at para 144.

\(^{78}\) Ibid at para 145.

\(^{79}\) Ibid at para 147.
the employer would enjoy the right. In the absence of express employer agreement to be bound by a duty of good faith and fair treatment, the contract of employment is taken to give the employer the right to act in bad faith and to treat its employees unfairly. While Iacobucci J. regarded the implication of an employer duty of good faith and fairness to be overly intrusive on the employer's interests, the absence of such a term is at least equally intrusive to the employee because its absence effectively imposes a burden on the employee—the cost of the kind of callous treatment we see in Wallace—that the employee did not expressly agree to bear.

The employer's duty of good faith and fair dealing upon termination, for which Wallace has been much applauded for introducing into Canadian employment law, like the implied term of reasonable notice of termination and the doctrine of just cause, can thus be understood not as the conferral of an extra-contractual benefit or protection on employees but instead as a limit on employer freedom required by the contract of employment itself. In other words, rather than confer an extra-contractual benefit on the employee, the employer duty of fair treatment relieves the employee of an extra-contractual burden and the employer of an extra-contractual benefit and thus can be grounded in the contractual basis of the employer-employee relationship.

In Keays, decided ten years after Wallace, and following Iacobucci J.'s retirement, the Supreme Court reconsidered so-called Wallace damages. Keays had been employed by Honda Canada for approximately 11 years when he was diagnosed with chronic fatigue syndrome in 1997. He ceased work and received disability benefits until 1998, when Honda's insurer discontinued his benefits. Following his return to work, Honda exempted Keays from its absenteeism discipline policy and agreed to permit his absences on the condition that he produce documentation from a physician confirming that each absence was related to his disability. When Keays's absences continued, Honda requested that he attend a medical evaluation to determine how his disability could be accommodated. On the advice of his lawyer, Keays refused to meet with the medical expert without an explanation of the purpose and scope of the requested evaluation. Honda refused to clarify its request and ultimately terminated Keays' employment on the grounds of insubordination.

At trial, the termination was found to have been without just cause. The trial judge awarded Keays 15 months' notice as well as a nine-month extension of the notice period on the basis of Wallace. The judge also awarded $500,000 in punitive damages on the basis of the discrimination and harassment Keays had endured owing to his disability. The Ontario Court of Appeal upheld the trial judgment in all respects, except for the
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amount of punitive damages. The Court of Appeal agreed with the 15-month notice period and the award of nine months of Wallace damages. However, while the Court of Appeal found that an award of punitive damages was warranted in this case, they reduced the trial judge’s award to $100,000, stating that some of the trial judge’s findings of fact were not supported by the evidence.

At the Supreme Court of Canada, Bastarache J., writing for the majority, upheld the lower courts’ finding that Keays’ dismissal was without just cause. While upholding the award of 15 months reasonable notice, the majority ruled that there was no factual basis for either the award of Wallace damages or the award of punitive damages. In assessing the claim for damages for mental distress, Bastarache J. explained that traditionally in accordance with the House of Lords’ 1909 decision in Addis v. Gramophone Ltd.,80 damages for wrongful dismissal have been confined to the losses flowing from the employer’s failure to give adequate notice and have not included compensation for the pain and distress experienced by the employee consequent upon the termination of her employment. The Supreme Court had confirmed this rule in its 1966 decision in Peso Silver Mines Ltd. v. Cropper,81 and then again in 1989 in Vorvis.82 In Vorvis, the Court left open the possibility of an award of damages for mental distress in a wrongful dismissal case where the defendant employer’s conduct was “independently actionable.”83 In Wallace, recall, Iacobucci J. followed the approach in Vorvis, and finding the employer’s conduct to not give rise to an independently actionable wrong, rejected the possibility of either an implied contractual duty of good faith and a tort of bad faith.

Almost ten years after Wallace, as Bastarache J. explains in Keays, the Court held in an insurance case, Fidler v. Sun Life Assurance Co. of Canada,84 that it was no longer necessary to establish an independent actionable wrong to ground a claim for damages for mental distress for breach of contract. Such damages, the Court held in Fidler, are recoverable under the well-established principle in Hadley v. Baxendale—that is, where the damages alleged are “such as may fairly and reasonably be considered as either arising naturally...from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties.”85 In Keays, Bastarache J. adopted the Hadley approach which,

82. Vorvis, supra note 67.
83. Ibid at 1103.
85. Hadley v Baxendale (1854), 156 ER 145 at 151 (Exch Ct) [Hadley].
he explained, requires the Court, when faced with a claim for damages for mental distress damages in a wrongful dismissal case, as in any other breach of contract case, to "begin by asking what was contemplated by the parties at the time of the formation of the contract... 'what did the contract promise'?" Since the time of the decision in Wallace, he stated, there has been an expectation by both employers and employees that employers will act in good faith in the manner of dismissal. On the Hadley principle, an employer's failure to do so can lead to foreseeable, compensable damages. Justice Bastarache made it clear that these damages are to take the form of ordinary contract damages, not an extension to the notice period as Iacobucci J. had done in Wallace:

Damages attributable to conduct in the manner of dismissal are always to be awarded under the Hadley principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid.... [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.

While in the end, the Court dismissed Keays's claim for damages for mental distress on the facts of the case, its recasting of the sui generis Wallace damages in terms of ordinary contract damages under the long-standing Hadley principle reveals that the contract of employment itself can do the work that Iacobucci J. sought to achieve in Wallace on extra-contractual grounds. In Wallace, Iacobucci J. had justified the award of compensation for the bad faith dismissal not on the basis of Wallace's contractual rights or the employer's contractual duties—indeed, recall, for Iacobucci J., the implication of an employer duty of good faith was too intrusive, and something better left to the legislature—but instead on the special nature of employment, its importance to the individual and to society, and on the general vulnerability of employees particularly upon termination of employment. Both the contract-based approach in Keays and the policy-based decision in Wallace allow an employee to seek additional damages on the grounds of the manner in which she was dismissed. The contract-based approach in Keays merely translates the sui generis policy-based Wallace damages into ordinary contract damages which rest on proof of a reasonably foreseeable loss (rather than on the severity of the employer's...
misconduct in and of itself) and are to be measured based on the extent of the loss (rather than an arbitrary extension of the notice period.)

*Keays* has been applauded for eliminating *Wallace* damages from the remedial landscape in wrongful dismissal law,⁸⁹ and given the numerous conceptual and practical problems to which *Wallace* damages gave rise,⁹⁰ the applause is, in my view, merited. And yet, while, as I have argued, *Keays* reveals the potential that the contract of employment holds as the basis for important employee rights such as the right to be free of harsh and unfair dismissal, the decision in *Keays* still implicitly depends upon the policy-based *Wallace* decision. The Court in *Keays* did not directly revisit the question of whether an employer is contractually bound to refrain from bad faith conduct upon dismissal, a development that Iacobucci J. resisted in *Wallace* on the grounds that such an implied term was overly intrusive, but instead merely reformulated the damages that Iacobucci J. had held, on extra-contractual grounds, to be available to an employee in such a case. Even if satisfaction of the *Hadley* principle—that is, a finding that the losses flowing from employer bad faith conduct were reasonably foreseeable at the time of contract formation—is tantamount to a finding that it was an implied term that the employer would refrain from such conduct or else pay damages for the consequent losses, the Court’s use of the contract-based *Hadley* principle in *Keays* still appears to ultimately rest upon the policy-based decision in *Wallace*, since for Bastarache J. it seems that it is *Wallace* itself that makes it a reasonable expectation of employer and employee that the employer will refrain from bad faith conduct upon dismissal:

In *Wallace*, the Court held “employers to an obligation of good faith and fair dealing in the manner of dismissal”... and created the expectation that, in the course of dismissal, employers would be “candid, reasonable, honest and forthright with their employees...” At least since that time, then, there has been expectation by both parties to the contract that employers will act in good faith in the manner of dismissal.⁹¹

Thus, while *Keays* represents a move away from Iacobucci J.’s policy-based approach towards a contract-based approach to the employment relationship, it is arguably still Iacobucci J.’s invocation of policy, and not the contract of employment, in which the employee’s right to be free from harsh and bad faith dismissal is ultimately grounded. For this reason,

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⁹¹. *Keays*, supra note 15 at para 58 [citations omitted].
Keays represents a missed opportunity to challenge the presumption of employer freedom that seems to have steered Iacobucci J. towards policy, rather than contract, in holding the employer to that obligation of good faith and fair dealing upon dismissal.

Conclusion

A common law action for wrongful dismissal represents a claim that the employer has breached the contract of employment and that damages are owed to the employee as a result of that breach. At the core of the contract of employment, as with any other contractual relationship, is an exchange between the parties. My aim in this paper has been to ground the employee’s basic common law entitlements under Canadian employment law in that exchange. While the legal recognition of those entitlements—to an implied right of reasonable notice of termination, to protection against summary dismissal, and to compensation where losses flow from an employer’s bad faith conduct—is justifiable on grounds of the special nature of employment, its importance to the individual and to society, and grounds of the general vulnerability of workers particularly upon termination of an employment relationship, these same entitlements can also be grounded, as I have argued, directly in the work-for-wages exchange at the core of the contract of employment. The presumption of employer freedom, I have argued, has tainted our view of the contract of employment in a way that threatens to make the employee’s basic contractual rights appear instead as extra-contractual entitlements, justifiable only on policy grounds on the basis of the individual’s status as a (potentially vulnerable) worker. This view in turn fuels the concern that the judicial recognition of employee entitlements threatens the sanctity of the contract of employment and the employer’s freedom of contract.

In this paper I have urged a second look at the contract of employment—the “corner-stone” of the modern employment relationship—as the source of the employee’s common law rights. Once we rid the common law of what I have called the presumption of employer freedom, we can see in the contract of employment not a source of worker oppression to be remedied by legislative or judicial act, but the very foundation of the employee’s common law entitlements and protections.