Canadian Labour & Employment Law Journal

Vol. 22 No. 2, 2020

Member, International Association of Labour Law Journals

TABLE OF CONTENTS

LancasterHouse

FACULTY OF Law CENTRE FOR LAW IN THE CONTEMPORARY WORKPLACE Queen's University

GUIDELINES FOR AUTHORS

The Canadian Labour and Employment Law Journal is a refereed, scholarly review with an established readership among researchers, practitioners, adjudicators and policymakers. We welcome submissions in both English and French. The deadline for submissions is May 1 for the Fall issue and September 1 for the Spring issue. We accept electronic submissions in .doc or .docx format.

Length should not normally exceed 10,000 words for articles, 5,000 words for comments, and 3,000 words for book reviews. Citations should be in footnotes, in the format set out in the *Canadian Guide to Uniform Legal Citation*, 7th ed. (Toronto: Carswell, 2010). Each citation should be as complete as possible, including pinpoints or paragraphs when appropriate.

We only consider submissions that consist entirely of original unpublished work and are not simultaneously being considered for publication elsewhere. Authors who write on matters in which they have been directly involved must state the nature of their involvement.

Assessment Process

Assessing a submission usually takes six to eight weeks. Among the factors taken into account are originality of content and approach, significance of the subject matter and its suitability for the Journal, depth and clarity of analysis, and quality of expression. For articles, an editorial team conducts an initial internal review, and submissions which pass this review are sent for double-blind external refereeing by experts in the relevant subject area. Comments and other shorter papers will be internally reviewed, and may also be externally refereed. The decision on whether to accept a paper is made by the editorial board, based on the results of the assessment process. Acceptance may be conditional on the making of satisfactory revisions by the author.

Editorial Process

When the assessment process is complete, the author will be advised whether the paper has been accepted for publication, and will be informed of any necessary or recommended revisions. When such revisions are complete, the paper will be edited by the Journal's student editors at the Queen's Centre for Law in the Contemporary Workplace, under the supervision of the Editor-in-Chief or other members of the editorial board. Final preparation for printing is done by Lancaster House.

For More Information

Please email submissions to the Canadian Labour and Employment Law Journal, at <clelj@queensu.ca>. For information on subscriptions, please contact Lancaster House at (416) 977-6618 or <customerservice@lancasterhouse.com>.

The CANADIAN LABOUR AND EMPLOYMENT LAW JOURNAL is published two times a year by Lancaster House, 1881 Yonge Street, Suite 200, Toronto, Ontario, Canada, M4S 3C4. Telephone (416) 977-6618. Subscription rate: $235 + HST in Canadian funds.

ISSN: 1196-7889
ISBN: 978-0-920450-26-0

LIGNES DIRECTRICES POUR LES AUTEURS

Le Revue canadienne de droit du travail et de l'emploi est une référence, scolairement révisé avec un contrôle de lecture établi auprès des chercheurs, praticiens, arbitres et décideurs. Nous admettons les dossiers en anglais et en français. La limite d'envoi des dossiers est le 1er mai pour une réponse à l'automne, et le 1er septembre pour réponse au printemps. Nous acceptons les inscriptions électroniques au format .doc ou .docx.

La longueur ne devrait normalement pas dépasser 10,000 mots pour un article, 5,000 mots pour un commentaire, et 3,000 mots pour un résumé de livre. Les citations devront être en notes, au format indiqué dans la 7ème édition du *Manuel canadien de la référence juridique* (Toronto: Carswell, 2010). Chaque citation doit être aussi complète que possible, ainsi que les mises en avant ou les paragraphes si besoin.

Nous ne prendrons en compte que les inscriptions entièrement constituées d'un travail non publié ou qui n'est pas simultanément considéré comme une publication ailleurs. Les auteurs qui écrivent sur les questions dans lesquelles ils ont été directement impliqués doivent expliquer la nature de leur implication.

Processus d'évaluation

Evaluer un dossier prend généralement 6 à 8 semaines. Parmi les facteurs pris en compte on retrouve l'originalité du contenu et de l'approche, l'importance du sujet et sa pertinence pour le journal, la profondeur et la clareté de l'analyse, et la qualité d'expression. Pour les articles, une équipe éditoriale conduit un examen en interne, et les inscriptions qui réussissent cette lecture sont envoyées pour un arbitrage externe en double-aveugle par des experts du sujet traité. Les commentaires et autres papiers plus courts seront examinés en interne et peuvent aussi être relus en externes. La décision d'accepter un papier est prise par le comité de rédaction, basé sur les résultats de l'évaluation.

Processus éditorial

Lorsque le processus d'évaluation est terminé, l'auteur sera avisé si le papier a été accepté pour publication et sera informé de toute révisions recommandée ou obligatoire. Quand une telle révision est finie, le papier sera édité par l'étudiant éditeur du journal au Centre pour le droit au travail contemporain à Queen's University sous contrôle d'un éditeur en chef ou tout autre membre du comité éditorial. Les préparatifs finaux pour l'impression sont fait par Lancaster House.

Pour plus d'information

Envoyez vos dossiers par email au Revue canadienne de droit du travail et de l'emploi à <clelj@queensu.ca>. Pour toute information concernant les abonnements, contactez Lancaster House au (416) 977-6618 ou par email à <customerservice@lancasterhouse.com>.

Canadian Labour and Employment Law Journal

Revue canadienne de droit du travail et de l'emploi

VOLUME 22

INTERNATIONAL ASSOCIATION OF LABOUR LAW JOURNALS

www.labourlawjournals.com

Análisis Laboral (Peru)
Arbeit und Recht (Germany)
Australian Journal of Labour Law (Australia)
Bulletin of Comparative Labour Relations (Belgium)
Canadian Labour & Employment Law Journal (Canada)
Comparative Labor Law & Policy Journal (United States)
Diritti Lavori Mercati (Italy)
Employees & Employers: Labour Law and Social Security Review (Slovenia)
Europäische Zeitschrift für Arbeitsrecht (European Union)
European Labour Law Journal (Belgium)
Giornale di Diritto del Lavoro (Italy)
Industrial Law Journal (South Africa)
Industrial Law Journal (United Kingdom)
International Journal of Comparative Labour Law & Industrial Relations (The Netherlands)
International Labour Review (International Labour Organization, Switzerland)
Japan Labor Review (Japan)
Labour and Social Law (Belarus)
Labour, Society and Law (Israel)
Lavoro e Diritto (Italy)
Pécs Labour Law Journal (Hungary)
Relaciones Laborales (Spain)
Revista de Derecho Social (Spain)
Revue de Droit Comparé du Travail et de la Sécurité Sociale (France)
Revue de Droit du Travail (France)
Rivista Giuridica del Lavoro e della Previdenza Sociale (Italy)
Russian Yearbook of Labour Law (Russia)
Temas Laborales (Spain)
Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht (Germany)

The International Association of Labour Law Journals was established for the following purposes:

1. Advancing research and scholarship in the fields of labour and employment law;
2. Encouraging the exchange of information regarding all aspects of the publishing process;
3. Promoting closer relations among editors of national and international labour and employment law journals.

Fixing the Broken Law of Termination Clauses

*Stephen J. Moreau**

Almost three decades after the Supreme Court of Canada's seminal decision in Machtinger *on restrictive termination clauses in employment contracts, the case law in this area is divided and inconsistent. Counsel can do little more than guess at the answers to the central questions of when a termination clause will be upheld as valid and enforceable, and as displacing the employee's common law entitlement to reasonable notice or pay in lieu thereof. In the author's view, the reason for the confused state of the jurisprudence does not lie in differences of wording between clauses or in a failure to draft clauses with sufficient clarity, but in the frequent absence of agreement between the employer and the employee regarding their mutual intentions. The employee, in particular, is not likely to have the requisite understanding of the consequences of signing an agreement that contains a restrictive termination clause. The remedy which the author proposes is a return to first principles in contract law, by focusing on what the parties actually intended. The framework needed to give effect to mutual intent is already well established in other areas of contract law, and would enable the courts to take into account all the circumstances surrounding the formation of an employment agreement. These would include inequality of bargaining power, the employee's relative lack of knowledge about the law, and the employee's vulnerability at the point of termination — factors emphasized by the Supreme Court itself in* Machtinger.

1. INTRODUCTION

> "Well, then, my dear Glaucon," I said, "this image as a whole must be connected with what was said before. Liken the domain revealed through sight to the prison home, and the light of the fire in it to the sun's power; and, in applying the going up and the seeing of what's above to the soul's journey up to the intelligible place, you'll not mistake my expectation, since you desire to hear it. A god doubtless knows if it happens to be true. At all events,

---

* Stephen Moreau, LL.B., LL.M., is a Partner at Cavalluzzo LLP and chairs its Employment Law group. His practice incorporates labour and employment law, civil litigation, and class actions. I am indebted to several people for research that went into the preparation of this paper and for others who read it and offered comments, including Brian Langille, Elichai Shaffir, Chris Perri, Genevieve Cantin, Kaley Duff, and Patrick Enright. The errors in this paper are my own.

> this is the way the phenomena look to me: in the knowable the last thing to be seen, and that with considerable effort, is the idea of the good; but once seen, it must be concluded that this is in fact the cause of all that is right and fair in everything — in the visible it gave birth to light and its sovereign; in the intelligible, itself sovereign, it provided truth and intelligence — and that the man who is going to act prudently in private or in public must see it."
>
> *The Republic of Plato*, Book VII[1]

The law of termination clauses in employment contracts is broken.

Several years ago, after my daughter was born, my wife and I contacted an agency to find a nanny. The agency sent us candidates, we selected one, and the agency drafted an employment agreement for our review. I read the termination clause in the proposed agreement, a reasonably well drafted but imperfect set of words, and asked that it be amended so as to read exactly like a clause that had been upheld as both legal and as displacing the common law in a fairly recent decision.[2] The contract, with this perfectly legal clause, was sent to the agency and signed without apparent protest by the nanny. Like most employers, I had no intention of terminating this nanny's employment unless I had good reason to do so, but I could sleep soundly knowing that I had secured a minimum of liability should the worst be required. In the end, we terminated the nanny's employment.[3]

One would think that the perfectly common situation of an employer inserting a termination clause into an offer or contract that is then executed by an employee would yield a simple interpretive jurisprudence. Surely, both sides could move on from the relationship knowing, throughout the relationship and at termination, the precise price to be paid to end it.

Yet nothing could be further from the truth. This area of the law is nothing short of completely broken. With every decision in this area (and there are many), counsel are left increasingly confused as to which clauses are enforceable and which are not, and why (or why not). Worse, when counsel and the courts are confused on this

---

1 2d ed, trans Allan Bloom (New York: Basic Books, 1991) at 517.

2 I went with the clause in *Clarke v Insight Components (Canada) Inc*, 2008 ONCA 837 at paras 1, 4, 6, 243 OAC 196, which the Court of Appeal conveniently reproduced in full at paragraph 1 of its reasons before stating that it was lawful and enforceable.

3 The nanny's employment was terminated on the provision of notice in excess of the contract's requirements, I hasten to add.

point, those who have entered into these contracts are then left, at termination, having to litigate on a point of great uncertainty that has severe consequences for both sides. If the clause is declared void or is not enforced, the employee will be entitled to damages measured as the amount that would have been paid during a somewhat uncertain "common law reasonable notice" period. If it is enforced, a much lower amount will be owed. At a time of acute vulnerability, employees need to know where they stand. A reasonable notice period allows them to make a "clean break" from an employment relationship by offering time to find new work, while also acknowledging loyalty and past service. With every decision, one can find three or four blog posts, law firm website summaries, and CanLII commentaries, all dissecting the minutiae of this or that clause in order to try to tease out why one set a "floor" and the other a "ceiling" in an effort to figure out why one "ceiling" was held to be an enforceable contracting out and the other was not. Lawyers, human resources professionals, and other *disjecta membra* in this field are like Socrates' prisoners in the cave, watching moving shadows and trying to out-guess the next person as to which figure will appear next.

One would think — after so many decisions upholding certain termination clauses and so many others declaring other clauses unenforceable or inadequate in their attempts to limit liability — that employers and their advisors would have "caught up" and built a better widget: the truly perfect employment agreement with the truly perfect (and fair?) termination clause that will unquestionably be enforced by any court on any given day. After all, Iacobucci J., in the leading *Machtinger* decision, believed this could be the case:

> . . . an employer can readily make contracts with his or her employees which referentially incorporate the minimum notice periods set out in the Act or otherwise take into account later changes to the Act or to the employees' notice entitlement under the Act . . . . This point was recognized by Lysyk J. in *Suleman*, *supra*, at p. 214:
>
> > An employer who wishes to guard against being called upon to give any more notice or severance pay than legislation demands can readily draw a contractual clause which, in effect, converts the statutory floor into a ceiling.[4]

4 *Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986 at para 35, [1992] SCJ 41 [*Machtinger*].

Twenty-five years of post-*Machtinger* jurisprudence has proven the opposite; apparently employers cannot "readily make contracts" which legally displace the common law of reasonable notice.

This paper traces some of the possible reasons why this may be so, summarizes the deplorable state of the jurisprudence, and offers what this author has concluded is the only plausible and principled way forward. Unlike the authors of most of the papers on this topic, I will try not to out-guess others as to the meaning of the shadows on the wall (though I have certainly tried many times, with some success and one notable failure[5]), but will instead seek out the "cause of all that is right and fair in everything."

What will be argued is that the courts' inability to apply a uniform standard when interpreting termination clauses is due, in large part, to their failure to apply established principles of contract law. What is missing is an analysis of whether an employment contract truly represents a "meeting of the minds," i.e. whether it accurately reflects the intention of the parties at the time of contract. This can only be remedied by looking at the entirety of the circumstances which led to the agreement itself: any discussions that may have occurred, the character of the employee, the sophistication of the actors, or the presence or absence of undue influence (to name but a few).

Up until this time, courts have largely ignored these principles. Rather than remember that employment law is, at its core, an extension and expansion of contract law, the courts have applied an unduly formalistic approach to interpreting employment contracts, parsing and dissecting clauses in an effort to find sufficient definitiveness or to tease out ambiguity. What is needed is a richer understanding of the first principles of contract law — one that accounts for the inequality of bargaining power between workers and employers, but that uses this framework to shine light on the parties' intentions as well as their reasonable expectations at the time the contract crystallized.

---

5 See notably *Oudin v Centre Francophone de Toronto Inc*, 2016 ONCA 514, 34 CCEL (4th) 271 [*Oudin* ONCA], affirming Justice Dunphy's widely criticized, and arguably overruled, decision in *Oudin v Centre Francophone de Toronto Inc*, 2015 ONSC 6494, 27 CCEL (4th) 86 [*Oudin* ONSC].

2. THE DEPLORABLE STATE OF THE LAW

In *Machtinger*, the Supreme Court outlined a series of principles that ought to be applied in the interpretation of termination provisions. Overall, the Court favoured interpretations that provide employees with full common law reasonable notice or pay in lieu thereof upon termination except in cases where (1) a clear termination provision ousts the common law; and (2) the termination clause does not effectively provide the employee with less than what the applicable provincial or federal employment standards laws command.

Machtinger sets out a number of solid policy reasons for these general conclusions, policy reasons which were clarified or re-stated recently in a well-known passage in *Wood*, worth reproducing in full:[6]

> The importance of employment and the vulnerability of employees when their employment is terminated give rise to a number of considerations relevant to the interpretation and enforceability of a termination clause:
>
> - When employment agreements are made, usually employees have less bargaining power than employers. Employees rarely have enough information or leverage to bargain with employers on an equal footing: *Machtinger*, p. 1003.
> - Many employees are likely unfamiliar with the employment standards in the *ESA* and the obligations the statute imposes on employers. These employees may not seek to challenge unlawful termination clauses: *Machtinger*, p. 1003.
> - The *ESA* is remedial legislation, intended to protect the interests of employees. Courts should thus favour an interpretation of the *ESA* that "encourages employers to comply with the minimum requirements of the Act" and extends its protections to as many employees as possible" over an interpretation that does not do so: *Machtinger*, p. 1003.
> - Termination clauses should be interpreted in a way that encourages employers to draft agreements that comply with the *ESA*. If the only consequence employers suffer for drafting a termination clause that fails to comply with the *ESA* is an order that they comply, then they will have little or no incentive to draft a lawful termination clause at the beginning of the employment relationship: *Machtinger*, p. 1004.

---

6 *Wood v Fred Deeley Imports Ltd*, 2017 ONCA 158 at para 28, 134 OR (3d) 481 [*Wood*].

- A termination clause will rebut the presumption of reasonable notice only if its wording is clear. Employees should know at the beginning of their employment what their entitlement will be at the end of their employment: *Machtinger*, p. 998.
- Faced with a termination clause that could reasonably be interpreted in more than one way, courts should prefer the interpretation that gives the greater benefit to the employee: *Ceccol v. Ontario Gymnastics Federation* (2001), 2001 CanLII 8589 (ON CA), 149 O.A.C. 315, *Family Counselling Centre of Sault Ste. Marie and District* (2001), 2001 CanLII 4698 (ON CA), 151 O.A.C. 35.

Since *Machtinger*, appellate and superior courts have struggled with the application of these principles to termination clauses, clauses that often seem similar, with the result that a great deal of inconsistency prevails.

In the 25 years since *Machtinger*, a considerable amount of litigation has taken place, and a corresponding body of jurisprudence has developed, over the issue of the enforceability and interpretation of termination clauses. I had occasion not long ago to draw up a table summarizing 107 considered decisions by various levels of court in almost every common law jurisdiction across the country where the principles in *Machtinger* were applied to termination clauses.[7] The split in results is remarkable. It is nearly 50-50: about 50 percent of the clauses involved in these cases were declared void (and/or common law notice was awarded), and around 50 percent were upheld as valid and legal, providing the employee with less than reasonable notice.[8] To provide a fuller sense of the bewildering difference in outcomes, I have included the table at the end of this paper as an Appendix, and invite readers to consult the detailed breakdown of cases by jurisdiction and statute, clause, and result/reasoning.

---

7 This table was intended to represent the universe of post-*Machtinger* jurisprudence on the subject, although some minor cases may have been inadvertently overlooked. Wide search terms were applied to electronic databases, and many more than the 107 decisions were read in detail to put together this list. The table is current to the end of 2018.

8 The precise figures one can draw from the table are 107 reported decisions, 59 upholding the clause (55 percent) and 48 declaring the clause void or not enforcing it (45 percent).

Such a situation could be thought of as a natural consequence of the litigation process. As any experienced litigator knows, difficult disputes are often settled at an early stage, leaving only borderline cases to be decided by the courts. It would, for example, be unsurprising if the application of a vague standard such as "reasonable in all the circumstances" led to disparate outcomes. In such instances, patently unreasonable conduct would be washed away by the settlement process, leaving only tough cases to be decided by judges who themselves have their own views about what is "reasonable."

However, as will be shown, this is not true of the law of termination clauses post-*Machtinger*. The case law has often divided sharply on what can only be described as the most pedantic or trivial of grounds. The failure to insert, or not insert, a word has often been fatal. In other cases, the same word or the same omission has been upheld as clear and unambiguous.

To put this uncertainty into perspective, we can take the straightforward case of an employee with 25 years' service whose employment is terminated at age 55. The employee's entitlements under the Ontario *Employment Standards Act* would be: (a) 8 weeks of pay and benefits/bonus, plus (b) 25 weeks of salary only.[9] The same employee, at common law, would likely receive 24 months of salary, benefits, and bonus (or near to it). For such a 55-year-old, a termination clause could mean the difference between continued health benefits for herself and her family for two years as well as a significantly better retirement pension and an almost immediate discontinuance of benefits and pensionable service accumulation, not to mention the loss of well over one year's salary. The wide difference, moreover, would apply at a point of acute vulnerability, a point recognized in *Machtinger* and countless decisions since.

This near-even split on a matter of such significance should be cause for grave concern and viewed as proof of unacceptable uncertainty.

---

9 Entitlements in most other provinces would be considerably less, thereby raising the stakes.

3. CAUSES OF THE PROBLEM

(a) The Proximate Cause

While it is easy to identify the problem, it is harder to determine why it exists. To arrive at a full answer, I would have to review a considerable amount of jurisprudence. Even then, I might do only a little better than others at intuiting what word or turn of phrase played the key role in one case, and what similar word or turn of phrase, in another case, did not.[10]

In my estimation, the simplest explanation for the problem is perhaps an obvious one, but no less valid for that reason: so many termination clauses exist, each one slightly different than the other, that different outcomes abound. What almost inevitably takes place is that the court reads the clause (typically one or two sentences long) in isolation, without reference to other factors, and asks "what does this clause mean?" and "is it void or is it enforceable?" The result then turns on what would seem to an outsider (and, frankly, even to the parties themselves) a seemingly incomprehensible game played out over the meaning of one or two words: if one magic word is placed in the contract, the clause is void, and if that magic word is not there, a virtually identical clause is valid (or, in other cases, the clause is determined to be a mere "floor," filled in neatly by obligating the provision of common law notice).

By way of example, let me offer the following table, which quotes several similarly worded termination clauses, drawn from actual cases in which very slight differences between one clause and another led to completely different results.

---

10 For just a few examples of the dozens of papers and case comments in this area, see The 2016 Annotated Employment Agreement: A Focus on Key Clauses; The 2014 Annotated Employment Agreement: A Focus on Key Clauses; The Six-Minute Employment Lawyer 2014: Employment Contracts Update; 14th Annual Employment Law Summit: Attacking Termination Language in Employment Contracts; The 2011 Annotated Employment Agreement; 11th Annual Employment Law Summit: Since *Machtinger* – Effectiveness (or not?) of Termination Clauses that provide for the minimum statutory entitlements; The Six-Minute Employment Lawyer 2009: Employment Contracts: Clarke v Insight; Special Lectures 2007 Employment Law: Employment Contracts: Enhancing Enforceability Through Drafting and Implementation; and, 8th Annual Six-Minute Employment Lawyer: Oracle – Enforcement of Termination Clauses.

TABLE 1

Decision	*The Clause*	*Declared Null and Void?*	*Comments*
Roden v The Toronto Humane Society, [2005] OJ No 3995 at para 55, 142 ACWS (3d) 441 (Ont CA) [*Roden*]	Otherwise, the Employer may terminate the Employee's employment at any other time, without cause, upon providing the Employee with the minimum amount of advance notice or **payment in lieu thereof** as required by the applicable employment standards legislation.	NO	The words "payment in lieu therof" satisfy the *ESA*.
Miller v ABM Canada Inc, 2014 ONSC 4062 at para 11, 16 CCEL (4th) 294 ; aff'd 2015 ONSC 1566, 27 CCEL (4th) 190 (Div Ct) [*Miller*]	Regular employees may be terminated at any time without cause upon being given the minimum period of notice prescribed by applicable legislation, or by being paid **salary in lieu of such notice** or as may otherwise be required by applicable legislation.	YES	There is a difference between "payment in lieu thereof" (*Roden*) and the payment of salary ("salary in lieu"), rendering the latter void.
Carpenter v Brains II, Canada Inc, 2015 ONSC 6224 at para 9, [2015] OJ No 5235	In the event the [*sic*] termination of employment, except where such termination is for just cause, the company will provide you with notice **(or salary in lieu thereof)**, and severance pay [if applicable] pursuant to its obligations as an employer and successor employer to NexInnovations Inc. under Employment Standards legislation, as amended.	YES	As in *Miller*, the potential payment solely of "salary" is enough to invalidate this clause.

continued on next page

Decision	*The Clause*	*Declared Null and Void?*	*Comments*
King v Weber Manufacturing Technology Inc, [2008] OJ No 4033 at para 29, 172 ACWS (3d) 402	Your employment may be terminated by the Company . . . on giving you that length of notice or equivalent pay in lieu of notice, and severance pay (if applicable) to which you are entitled under the Act.	NO	As in *Roden*, the clause anticipates "pay" in lieu of notice and not just "salary" in lieu.
King v DST Systems Inc, 2018 ONSC 533 at para 2, 290 ACWS (3d) 106	Employee could be terminated without cause "with such notice (or pay in lieu thereof) and severance pay as may be prescribed by the *ESA* (or such other applicable legislation as may then be enforced)" and have "no other entitlements in that regard."	YES	The employee received additional benefits beyond salary and severance. The phrase "no other entitlements in that regard" negates the continuation of these benefits and renders the clause void.

Every reader can pick two or three cases, place them side by side, and ask, rightly, "why was this clause held to lawfully displace the common law while this one was not?" or, "why was this one held to have done so *illegally* (by offering less than the applicable employment standards) while the other was held not to have done so?"

To illustrate the point with two examples of my own, one may well wonder why the words

> the Employer may terminate the Employee without just cause simply upon providing him/her with the entitlements prescribed in the *Employment Standards Act, 2000*

were held in 2017 to displace the common law when, six months later, the words

> Movati . . . may terminate your employment without cause at any time during the term of your employment upon providing you with notice or pay in lieu of notice, and severance, if applicable, pursuant to the *Employment Standards Act, 2000*

were held not to?[11] Is it really the case that insertion of the word "simply" before "upon providing" in the first clause gives that provision a completely different meaning than the second one? If the employment of the proverbial 25-year employee, age 55, was terminated under one clause rather than the other, would it be just that this employee receive 33 weeks' salary (plus eight weeks' benefits) while another, similarly situated employee whose employment was terminated under the other clause receive 24 months' total compensation?[12]

There are other theories as to why the state of the law is so uncertain. Returning to the passage from *Wood* quoted above, one reads a series of principles, taken mostly from *Machtinger*, the application of which would result in most clauses being struck down as illegal or regarded as insufficient to rebut the common law presumption of reasonable notice. Yet set against these many policy reasons for such a result nearly every time, there remains Iacobucci J.'s one-line remark predicting that, surely, there are clauses that accomplish the delicate job of clearly rebutting the common law without overshooting the mark and taking the clause below statutory requirements. *Wood*, too, devotes only one unhelpful sentence to this point: "[a] termination clause will rebut the presumption of reasonable notice only if its wording is clear."[13]

The effect of the passage from *Wood* quoted above is to set up a tension between principles whose application would lead to a

---

11 See *Farah v EODC Inc*, 2017 ONSC 3948, 40 CCEL (4th) 273, for the first clause and *Bergeron v Movati Athletic (Group) Inc*, 2018 ONSC 885, 288 ACWS (3d) 279 [*Bergeron* ONSC], for the second. Incidentally, like many cases in this area, *Bergeron* was appealed. It was upheld on appeal: 2018 ONSC 7258, 52 CCEL (4th) 32 (Ont Div Ct), in reasons that suggested that, had the word "only" been added to the clause, it would have limited the employee's claim to statutory minima.

12 I wonder if anyone grasps the irony here. The crucial word "simply" is defined in *The Oxford English Dictionary*, 2d ed, *sub verbo* "simply," as "merely." But that is its secondary meaning. Its primary meaning is, "in a straightforward or plain manner." Imagine the first clause says "we will give you *ESA* in a straightforward manner" and the second one says "we will give you your *ESA*." They would mean the same thing. But more ironically, the cause of two radically different results is a single word that is defined in English to mean "straightforward." Would any reader of these decisions think that the law has resolved the two disputes "in a straightforward manner"?

13 *Wood*, *supra* note 6 at para 28, affirming *Machtinger*.

far better outcome for vulnerable employees at a particularly acute moment, and another principle, albeit one that is hard to apply, that would see the court do what courts are primarily supposed to do: give effect to the contract, not their sense of what is right or fair. A reader of the phrase "[a] termination clause will rebut the presumption of reasonable notice only if its wording is clear" can thus understand the word "simply" in the clause just quoted as accomplishing that objective. However, a judge steeped in the policy rationales outlined in *Machtinger* and *Wood* might well say, "simply" is not clear enough, at least when measured against this or that policy rationale.[14]

There are two other explanations for the confusion in the law. One is that the disparate results reflect philosophical or political differences between judges (the old management-labour divide) or differences in approach between lower-court judges and appellate judges, the latter supposedly favouring a "black letter law" approach and the former a "personalized justice" approach. I cannot subscribe to either theory, because one can easily find examples of judges who used to be management-side lawyers awarding common law notice in such cases,[15] and one can just as easily find examples of judges who have not consistently ruled in favour of one side or the other in otherwise similar cases, which suggests that they do not bring to bear a preconceived philosophical belief.[16]

---

14 The fact is that many judges do not like clauses that limit liability in this way. This is reminiscent of the commercial law problem of exclusionary clauses, which led courts to engage in all kinds of contortions in order to avoid giving effect to them. See Stephen Waddams, *The Law of Contracts*, 7th ed (Toronto: Thomson Reuters, 2017) at 475-484 [Waddams, *Contracts*]. As Waddams concludes, reminiscent of the situation with employment contract termination clauses: "The drafter redrafts, repeats and adds 'and I really mean it'. While the courts are tied to a technique of construction, the drafter is at least occasionally bound to succeed" (at 479).

15 *Bergeron* ONSC, *supra* note 11, is a decision by a recently elevated "management-side lawyer."

16 See *Covenoho v Pendylum Ltd*, 2017 ONCA 284, 281 ACWS (3d) 554 [*Covenoho*] (Justices Rouleau and Roberts rule in favour of declaring a problematic termination claue void). See also *Oudin* ONCA, *supra* note 5 (Justice Rouleau sat on the panel)). See also *Nemeth v Hatch Ltd*, 2018 ONCA 7, 418 DLR (4th) 542 [*Nemeth*] (Justice Roberts authored the decision). See also *Roden v Toronto Humane Society*, [2005] OJ No 3995, 142 ACWS (3d) 441 [*Roden*] (Laskin JA sat on this panel and wrote the reasons in *Wood*, *supra* note 6)

(b) The Root Cause

In the previous section, the main cause of the contradictions in the jurisprudence was identified as the fact that each termination clause is a bit different. If 107 different termination clauses are read by 107 different judges or panels of judges, it surely follows that the results will vary widely. Most lawyers, I feel, subscribe to this view. And most bloggers and conference paper writers, having identified the problem, then propose a solution: draft clearer clauses! However, "draft clearer clauses" has been prescribed since 1992 and, 25 years after *Machtinger*, the same prescription is being dispensed for the same disease (a sure sign that the disease may have been misdiagnosed).

A more searching review of some of the leading cases belies the theory that greater clarity in clauses will increase the likelihood that they will be held to be both legal and to have displaced the common law. Examples abound, but two recent cases stand out. In *Nemeth*, the termination provision was a single 27-word sentence (if you exclude the prior sentence, which merely stated that the employer's "policy" is to give notice in writing):

> The notice period shall amount to one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation.[17]

Far from being found to be perfectly clear, the clause was held by the Court of Appeal to be ambiguous. Despite this finding, and despite the statements in both *Machtinger* and *Wood* that ambiguous clauses should be construed in the employee's favour and, more importantly, that ousting the common law of notice requires a clear termination provision, this ambiguous clause was nonetheless determined to have ousted the common law of reasonable notice, providing the employee with an amount in excess of provincial standards but not up to the level of common law reasonable notice. The employee was awarded nineteen weeks' notice of termination, not the nineteen to twenty

17 *Nemeth*, *supra* note 16 at para 3

months' notice he would have been awarded, in my estimation, at common law.[18]

By contrast, in *Holm v. AGAT Laboratories Ltd.*,[19] a one-page termination clause was picked apart by both the motions judge and the majority in the Court of Appeal, and found wanting. Despite the length of the clause, both the majority and the lower-court judge were unable to tease out of the language any limiting wording — that is, wording to the effect of "what you get here is all you get, period, full stop." The Court found that the clause did contain words like "only," suggesting that the parties intended that the amounts outlined in the termination clause were the "only" amounts to be paid. The Court held, however, that "only" was meant to cover just the provincial employment standards requirements: in other words, that the parties had agreed that the employer would comply with those minimum requirements, not that those requirements were to be converted into the sum total the employee would receive.

Unlike *Nemeth*, where an ambiguity in a 27-word clause was held to give rise to an amount in excess of provincial standards but not the common law entitlement, the Court in *Holm* — which found a one-*page* clause to be, at best, ambiguous — awarded full common law notice. *Wood* was cited in support of this award. In a concurring judgment, Justice O'Ferrall rightly asked how it could be that the parties took an entire page just to confirm that the common law notice period would be awarded (when that is awarded by default):

> A reasonable observer might question why the parties needed a termination clause as lengthy and detailed as the one employed in this case to merely indicate their intention to be governed by the common law's reasonable notice requirement. In other words, if the termination provision of the employment contract was not intended to limit termination notice or pay in lieu, what was it there for?[20]

---

18 Nemeth's income is not set out in the lower court's or the Court of Appeal's reasons. In his claim, his annual salary is set out as $115,900. The difference therefore between common law notice of 20 months' and 19 weeks' pay is $150,670 (salary alone, before his claimed bonus and benefits). I am not the first to notice, incidentally, the radically different outcomes between statutory notice and common law notice. In *Ceccol*, the Court of Appeal, *per* MacPherson JA, observed that the difference between the parties' interpretation of a 22-word provision was the difference between $7,700 and $66,700, a relatively large sum for an administrator: See *Ceccol v Ontario Gymnastic Federation*, [2001] OJ No 3488 at para 46, 107 ACWS (3d) 1015 (Ont CA) [*Ceccol*].

19 2018 ABCA 23 at paras 4, 25, 422 DLR (4th) 588 [*Holm*].

20 *Ibid* at para 39.

Justice O'Ferrall's rhetorical question captures the real problem. While most commentators would argue that the solution is to draft clearer clauses and dismiss the *Nemeth* and *Holm* results as perplexing applications of the principles to different clauses, such commentators could not possibly explain how three judges found that an ambiguous 27-word clause displaced the common law, whereas an ambiguous one-page clause did not. Presumably, the use of an entire page, in and of itself, would seem to evidence an intention to do something other than say "we confirm the default standard."

I believe that the answer to Justice O'Ferrall's question is that the parties really did not know what they were doing; or, more precisely, that the parties did not mutually agree what they intended. As in virtually every wrongful dismissal case that I have participated in or considered, evidence of what the parties "intended" was confined to the words of the termination clause. I have never seen a motion record or trial record in which the parties outlined their "intentions" with reference to the kinds of evidence routinely put forward, and accepted, in commercial cases — evidence such as bargaining history and prior drafts, memoranda, previous agreements, and correspondence.[21] So prevalent is the use of these interpretive aids to uncover the parties' intention that they are known by a special name (the "factual matrix"), and an entire textbook has been written on contractual

---

21 In commercial law, the "factual matrix" surrounding the formation of the contract has been held by the Supreme Court and the House of Lords to be decidedly wide: *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras 56-58, [2014] 2 SCR 633 (quoting *Investors Compensation Scheme Ltd v West Bromwich Building Society*, [1997] UKHL 28, [1998] 1 All ER 98 at 114); *Bank of Credit and Commerce International SA v Ali*, [2001] UKHL 8, [2002] 1 AC 251 at 269. For examples of the width and breadth of this factual matrix, see *Dumbrell v Regional Group of Cos Inc*, 2007 ONCA 59 at paras 13, 51-55, 85 OR (3d) 616; *Corporate Properties Ltd v Manufacturers Life Insurance Co* (1989), 70 OR (2d) 737 at 8, 63 DLR (4th) 703 (CA); *Kentucky Fried Chicken Canada v Scott's Food Services Inc*, [1998] OJ No 4368 at paras 33-45, 114 OAC 357 (CA); *Ventas Inc v Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205 at para 24, 85 OR (3d) 254; *Chuang v Toyota Canada Inc*, 2015 ONSC 885, at para 35, 250 ACWS (3d) 255, aff'd 2016 ONCA 584, [2016] OJ No 3904; *Glaswegian Enterprises Inc v BC Tel Mobility Cellular Inc*, [1997] BCJ No 2946 at paras 1-5, 76 ACWS (3d) 470 (BCCA); *Nexxtep Resources Ltd v Talisman Energy Inc*, 2013 ABCA 40 at paras 13, 20-38, 542 AR 212; *Bank of Scotland v Dunedin Property Investment Co Ltd*, 1998 CSOH 657 (Scot) at 7; *Investec Bank (Channel Islands) Ltd v Retail Group plc*, [2009] EWHC 476 (Ch) at paras 71-75, 2009 WL 635022.

interpretation which has chapter upon chapter devoted to the "factual matrix."[22]

The fact that parties to such agreements are unaware of what they are doing explains several decisions where termination clauses that obviously fall well below minimum standards were willingly entered into. For instance, in *Oudin*, the employer and employee entered into an agreement providing that the employee's employment would end immediately without notice if he became totally disabled — an agreement that is unquestionably illegal.[23] Parties have likewise agreed to termination clauses allowing employers to terminate employment on two weeks' notice[24] or, more commonly, 30 days' notice.[25] Such notice periods are plainly well below the statutory minimums.

Famously, *Machtinger* itself involved a contractual termination clause that left the number of weeks of notice blank.[26] The employer had hand-written the digit "0" before "weeks" in the contract and "two" into a co-plaintiff's contract. The only issues in *Machtinger* were:

> (1) What is the effect of this illegal contract? (2) Does the fact that the parties "agreed" to a lesser figure mean that the common law figure should be lowered

---

22 Geoff R Hall, *Canadian Contractual Interpretation Law*, 3rd ed (Toronto: LexisNexis, 2016). The author published the third edition only four years after the second because so many decisions on the "factual matrix" had appeared in the intervening period that a new edition was in order.

23 *Oudin* ONSC, *supra* note 5. In 2005, O Reg 549/05 amended employment standards regulations that had hitherto provided that, on disability, a frustration of contract would take place, disentitling the employee to statutory notice of termination. That provision had been declared to violate the *Charter*: *Ontario Nurses' Assn v Mount Sinai Hospital* (2005), 75 OR (3d) 245, [2005] OJ No 1739 (CA).

24 *Slepenkova v Ivanov*, [2007] OJ No 4708, 60 CCEL (3d) 303 (Ont Sup Ct), aff'd 2009 ONCA 526, 74 CCEL (3d) 163.

25 *Shore v Ladner Downs* (1998), 52 BCLR (3d) 336, 160 DLR (4th) 76 (CA); *Nygård International Partnership Associates v Michalowski*, 2006 MBCA 115, 53 CCEL (3d) 195; *Riskie v Sony of Canada Ltd*, 2015 ONSC 5859, 258 ACWS (3d) 330. The most often cited pre-*Machtinger* decision in this area involved a 30-day notice clause: *Suleman v BC Research Council* (1989), 38 BCLR (2d) 208, 27 CCEL 23 (SC). As *Riskie* indicates, contracts continued to use this language for many years after a 30-day notice clause had been declared void and illegal in 1989.

26 *Machtinger*, *supra* note 4 at para 4.

to account in some way for that agreement? In short, the illegality of the contract was never challenged in *Machtinger*.

Given the large number of cases in which parties have entered into what are patently illegal contracts, it is fair to ask: do the words of the contract actually reflect some kind of *mutual* intention to provide for a notice period in excess of statutory minimums and below (if not far below) common law norms? In other words, while O'Ferrall J.A. asks what were the parties' intentions based on a one-page termination clause, I would pose the question somewhat differently, in a way that does not assume that the words themselves are synonymous with the parties' intent. My question would be simply this: what did the parties mutually intend?

That, of course, is the core question contract law seeks to answer. While the parties' intentions are often set out, largely, if not exclusively, in the words of their agreement, there are very many cases in which a detailed understanding of the *formation* of the contract has informed the interpretation of the words used. In certain well-known cases, evidence regarding the contract's formation has led courts to disregard the words entirely, as they failed to express the end-product of a proper mutual interchange or understanding.

I will review some of these decisions in the next section, but first, I will look at a few employment law cases to illustrate the point. Based on what we know of the facts in those cases, it is difficult to discern a mutual intention to be bound to an understanding that severely restricts the employee's rights. Considering both the contract's formation and the parties' mutual understanding in these cases allows one to make some sense of the disparate results in the jurisprudence. If I am right that the jurisprudence can be understood as a failure to give effect to mutual intentions, then the remedy for this failure is not to constantly beat the drum of "clearer clauses." Clearer clauses are not the antidote to a lack of clear-mindedness on the part of those who draft them, or on the part of those who affix their signature to them and are therefore said, somehow, to have "accepted" them.

Let us return to my nanny. I drafted a clause that the Ontario Court of Appeal had declared was legal and clearly displaced the common law. The nanny signed the contract and therefore agreed to it. In this case, I knew what I was doing: I was an employment lawyer who had read the case that formed the basis of the contract. Critically,

however, I did not ask whether the nanny understood what she was entering into. She had had time to read the contract. She had signed it. Was I to assume that she knew what she was doing?

Looking at the few available facts, the answer seems to be "yes": she had signed a seemingly important document after having taken time to review it. But could the addition of certain facts make it possible that she did not understand the clause? For instance, the nanny had been born and raised in Germany, moving to Canada some time in the last 10 to 15 years. She had no education beyond high school. She had presumably never been involved in litigation of any sort, let alone anything to do with employment law. In the contract itself, many terms that were included were so obvious as to require no thought: her first day of work, her hourly rate, the name of her employers, her hours of work, her duties, and the location of her work. Had I added other stipulations, many of those would have simply reflected understandings that would exist without requiring that they be spelled out, such as: that she must be legally entitled to work in Canada, that she will litigate disputes in the Ontario courts, that Ontario law applies, that she cannot assign the work to others, etc. Put simply, in this situation is it realistic to expect that the insertion of a provision, even one clearly upheld as legal, necessarily meant that the nanny understood the provision and, more importantly, that she had agreed to exchange common law rights for the well-defined but weaker rights on termination now being offered? Apart from the words of the termination clause itself, every other factor would say "no."

Going back to those cases in which the clause was plainly illegal, it might be said that the problem was the absence of clear language. However, if ones asks *why* those clauses were included, the answer would likely be the absence of an informed mutual understanding. And if such a lack of understanding is evident there, is it not easy to see evidence of a similar lack of understanding in cases where the clause truly is not clear, such as the "ambiguous" clauses in *Nemeth* and *Holm*? If the parties' agreement leads to so much jurisprudential wrangling among learned counsel and the courts, is it possible that the poor drafts are not to blame but the drafters themselves? How did parties get themselves into such contracts in the first place?

With those questions in mind, consider for a moment the *Nemeth* case. According to the reasons of the lower court and Court of Appeal, Nemeth joined Hatch, the employer, 19 years before the

termination of his employment. While the termination date is not known, the court file indicates that he commenced the action in 2016. Thus, he likely joined Hatch in 1996 or 1997. Based on the pleadings and my personal knowledge of the case and company, Nemeth can be described as a modestly educated designer and engineer.[27]

When Nemeth joined the company, he executed the employment agreement containing the 27 words quoted above. Recall that those words read as follows: "The notice period shall amount to one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation."[28] Taking the words at face value, Nemeth agreed that he would be bound by "the applicable labour legislation." As employment lawyers, we are trained to know that the words "applicable labour legislation" are probably a reference to the *Employment Standards Act*[29] or, possibly, the *Canada Labour Code*.[30] When we appear in court, we and the judge would at least know that much; the question the court would then decide, and did decide in the *Nemeth* case, will be how to make sense of this clause as it is worded, knowing that either the *ESA* or the *Code* is involved (by the time of the hearing, we would know that the employer was provincially regulated and fell under the *ESA*). In other words, those of us "in the know" can substitute for "the applicable labour legislation" the "*Employment Standards Act*."

But could Nemeth have agreed to receive four weeks' notice or *ESA* notice (which would have been less notice in his first years of employment, and more after four years had passed) by agreeing to such a clause? Would he even have known what "the applicable labour legislation" was? In 1996 or 1997, when he was hired, he would have had to open a legal textbook or go to a library to find all of the potential "labour" laws that might apply. In 1996-1997, he might have spotted well over a dozen. Had he looked carefully,

---

27 Nemeth's LinkedIn profile confirms that he had no legal background and that his post-secondary education consisted of a single engineering diploma from Centennial College obtained some time before he joined the workforce in 1981. See LinkedIn, "Joe Nemeth," online: *LinkedIn* <www.linkedin.com/in/joe-nemeth-079099117/>.

28 *Nemeth*, *supra* note 16 at para 3.

29 *Employment Standards Act*, SO 2000, c 41 [*ESA*].

30 *Canada Labour Code*, RSC 1985, c L-2 [*Code*].

he would have noticed that the *ESA*'s predecessor, the consolidated version in effect from 1990 on, did not contain "labour" in its title (neither, for that matter, does the successor statute now in effect). He might have noticed in the *ESA* that the word "labour" does appear in parts of the statute, in reference to the *Labour Relations Act, 1995*.[31] Getting hold of the latter statute, he would see nothing to guide him. If he could somehow have had access to CanLII, a search for the keyword "labour" in the Ontario statutes/regulations field would yield 455 possibilities (though in fairness, certain statutes would be easily eliminated, like the *Trees Act*[32] which refers to the Ministry of Labour at points). Put simply, it is fair to question how Nemeth was supposed to understand what he was signing when the operative phrase, "labour legislation," is so broad and equivocal. Indeed, the purist will note that "labour" law is a branch of workplace law devoted to unionized environments, and Nemeth was not a unionized employee.

It can be realistically concluded, then, that Nemeth would have been at sea trying to discover what the "applicable labour legislation" was. Now consider this question: was Nemeth capable of understanding something that is not set out in words at all, namely, that in the absence of a termination clause, he would be entitled to reasonable notice of termination? Nemeth would need to know this without having guidance from the contract. He would need to know that, by signing on to these words, he was giving up something not mentioned anywhere.

In the Court's reasons in *Nemeth*, there is nothing to tell us how Nemeth found himself agreeing to this clause. Had he conducted research? Did he have legal counsel? If the rejoinder is, "he could have sought counsel," the next questions that come to mind are: what aspects of this very short clause, a clause that assumes a great deal, would suggest to him that it would be worth the bother of seeing a lawyer? After all, every other aspect of the agreement would have been "standard," such as hours of work, salary, start date, and position. Would he have known that only one provision, this one, fundamentally altered his rights? Would he have known that over 19 years'

31 *Labour Relations Act*, *1995*, SO 1995, c 1 [*LRA*].
32 *Trees Act*, RSO 1990, c T.20.

later the decision to sign on to these 27 words would cost him over $150,000 in damages?

I could repeat this exercise by pointing to countless other employees who, while no doubt very good in their chosen field, did not have, between them, so much as a minute of training in the law of employment. Such training would have been required in all of these cases to know that something unwritten exists, the "common law," that supersedes legislative standards. Anecdotally, of the thousands of people I have acted for, I can think of no more than three who knew what they were getting into when they signed a contract with a restrictive termination clause. In all of them, the person received legal advice that the clause was potentially restrictive and that the clause should be replaced with one that merely provided for "reasonable notice."

4. THE CORRECT CURE FOR THE NOW CORRECT DIAGNOSIS

If we accept my diagnosis of the root cause of the problem, two questions remain: is this problem one that the law ought to remedy and, if so, in what way should it be remedied? I have suggested that the virtually incomprehensible state of employment law jurisprudence is in itself an answer to the first question. With respect to the second question, it is noteworthy that contract law jurisprudence outside the employment field has sought to address the problem of a lack of understanding on the part of one of the parties. Possible remedies for the dilemma can also be found in other areas of contract law.

(a) Should the Courts Care about the Diagnosis?

To reiterate, the problem with employment law is the complete absence of understanding on the part of the employee as to what he or she is entering into when faced with a restrictive termination clause. If the employer too lacks this understanding, there can certainly be no *mutual* understanding. If the employer is fully aware of the effect of the clause and the employee is not, and the employer does not know whether or not the employee understands it but fails to take adequate steps to ensure that the employee understands, in my opinion no mutual understanding exists. Is this a problem the courts should care about? To me, the answer is a decided "yes."

Indeed, the leading employment decisions all indicate that the answer is, or should be, "yes." In other words, insisting that employees understand the agreements into which they are entering forms the core policy basis of employment law in Canada, however tangled its current state. Thus, in *Machtinger*, Iacobucci J. premised his entire decision on the fact that employees do not understand the law, do not especially understand their unwritten common law rights, and therefore require court protection in the form of a particular interpretive lens through which employment agreements are to be read.[33] Iacobucci J. opted, in short, to base his very strongly worded reasons on broad policy prescriptions. Arguably, he ignored entirely the employer's arguments that, in ordinary "implied terms" cases, the term to be implied should be informed in some measure by the parties' actual intentions. In *Machtinger* itself, the employer argued that those intentions were embodied in the very restrictive and admittedly illegal contract terms, which, the employer contended, should at least be taken into account in setting a shorter implied reasonable notice period. This position was rejected in part because the majority believed that no mutual intent could be discerned. Iacobucci J. was deeply concerned to prevent the words of the contract, after the pronouncement of their death, from governing from the grave, given that the signatories to those words did not know (or it should be assumed did not know) what they were doing.

This concern was echoed in the *Wood* principles cited above. In his reasons in *Wood*, Laskin J.A. was cognizant that what happens in cases such as this is the enforcement, at termination, of a mutual intention formed years earlier. Thus, in his first principle of interpretation, Laskin J.A. emphasized that one must be wary of imbalances in bargaining power "[w]hen agreements are made."[34] On a related point, *Wood* stands for the obvious proposition (though apparently not obvious to all judges who have waded into the field[35]) that a defect stemming from the formation of the contract cannot be cured by

---

33 *Machtinger*, *supra* note 4.

34 *Wood*, *supra* note 6 at para 28.

35 See Justice Dunphy's reasons in *Oudin* ONSC, *supra* note 5 at paras 40-42, where in interpreting a contract, significant weight was given to the fact that, at termination, the employer attempted to cure a serious defect by complying with the *ESA*.

complying with legislative standards after termination.[36] What occurs at formation matters.

(b) Courts in Other Areas Will Look into the Circumstances of the Contract's Formation and Have the Tools Required to Give Effect to Mutual Intention

Outside of the employment law field, the need to give effect to mutual intentions defines the core of contract law. This is seen in the attention paid to how contracts are formed.

Long before *Machtinger*, courts across the country had established that special circumstances often exist where the parties do not have equal bargaining power, and the principles of contractual interpretation must be adapted to meet those circumstances. For example, in *Tilden Rent-a-Car v. Clendenning*,[37] the Ontario Court of Appeal held that a signature can be relied on as manifesting assent only when it is reasonable for the party relying on the document to believe that the signatory really did assent to its contents.[38]

The Court in *Tilden* concluded that the plaintiff was ultimately not bound by his signature on the insurance contract to an onerous exclusionary provision that it contained. Unlike in the commercial sphere, it is common for parties to a consumer contract not to understand, or to be unaware of, certain onerous terms. Whether a signature truly manifests assent will vary according to the factual circumstances. In the commercial context, where both parties are presumed to have equal bargaining power, a signature will usually indicate assent to all the terms within the contract. This inference will be much weaker in the consumer context, particularly where it is known that the consumer signed the contract without reading it.

Where the party seeking to rely on the signed document knows or has reason to know that the other party has not read the provision, or that the other party does not understand the provision and its implications, then the party cannot rely on a signature as representing assent. In other words, the signature does not represent the parties'

---

36 *Wood*, *supra* note 6 at paras 41-51.

37 (1978), 18 OR (3d) 601, 83 DLR (3d) 400 (CA).

38 *Ibid* at 609

true intentions, and the agreement cannot be enforced. As Professor Waddams, in discussing this proposition from *Tilden*, writes in his treatise, *The Law of Contracts*:

> There is nothing radical in this proposition. It springs naturally from the notion that the law of contracts exists to protect reasonable expectations. Yet the courts have been very slow to recognize the implications . . . .[39]

Tilden clearly places what it sees as commercial and consumer contracts on opposite ends of a spectrum. In the former, a signature almost certainly manifests assent. In the latter, a signature may manifest assent only if the party has taken reasonable measures to draw onerous terms to the other, less sophisticated, party's attention. Surely employment contracts, considering the parties' inherently unequal bargaining power and the employee's lack of knowledge (propositions endorsed in *Machtinger*), are somewhere closer to consumer contracts than commercial contracts. Does it not therefore follow that the more sophisticated and principled contractual analysis that emerges from the widely cited *Tilden* decision ought to inform the law of employment?

The jurisprudence I have discussed sets the stage for two recent cases decided by the Supreme Court of Canada: *Sabean v. Portage La Prairie Mutual Insurance Co.*,[40] and *Douez v. Facebook Inc.*[41] These cases, involving contracts in the insurance and consumer contexts, provide helpful guidance as to the Court's approach to contractual interpretation in contexts analogous to employment law.

Sabean concerned a clause in a contract for insurance. The Supreme Court held that provisions in insurance policies must be interpreted in the way the insured person would understand them, and not the way a legally-informed person with significant knowledge of past jurisprudence would read them. In other words, an insurance contract must be interpreted from the viewpoint of the average insured person. This is consistent with *Tilden*: where the parties are of unequal bargaining power, the courts must interpret the contract

39 Waddams, *Contracts*, *supra* note 14 at 337.
40 2017 SCC 7, [2017] 1 SCR 121 [*Sabean*].
41 2017 SCC 33, [2017] 1 SCR 751 [*Douez*].

through the eyes of the less sophisticated party in order to ensure that true assent was given.[42]

Indeed, in *Sabean*, the insurer argued that its interpretation of the provision in question merely reflected terminology taken from other Supreme Court decisions. Should that wording not govern, it asked? This is reminiscent of my nanny's situation. The contract merely incorporated the wording the Ontario Court of Appeal had just interpreted and endorsed. The Court's reasons in *Sabean* were, in effect, that while the insurer may have known this, a reasonable insured person would not. And more critically, if the reasonable insured person did not, then the insurer's understanding could not prevail absent the necessary mutual understanding.

The Supreme Court's recent decision in *Douez* provides another reminder that contract formation matters. In *Douez*, the Supreme Court considered no-click consumer contracts. In this instance, the impugned provision was a forum selection clause which Facebook had inserted into its "take it or leave it" Terms of Service. The Supreme Court conducted a very detailed and lucid analysis of the rules of contract interpretation, including the rules of assent. Justice Abella, in her concurring judgment, held that increased legal scrutiny must be given to contract provisions which impair the consumer's access to remedies in situations where the "consent" was automatic in nature.[43]

In reaching this conclusion, Justice Abella relied on the works of several academics including, among others, a key article by Professor Waddams where he observes, in a passage germaine to the law of termination clauses:

> A new kind of formalism appears to be creeping into contract law: there is the form, but not the reality, of consent . . . the triumph of realism over every other perspective on law tends to lead eventually to a disdain for legal doctrine, and to a consequent neglect of, and impatience with, all subtleties that modify and complicate a simple account of legal rules. This leads in turn to a neglect of history, and to a failure to give due attention to the actual effects of legal rules in day-to-day practice, a perspective that was, in the past, central to common-law thought. The only thing left then is a kind of over-simplified

---

42 *Sabean*, *supra* note 40 at para 13 (citing *Gibbens v Co-operators Life Insurance Co*, 2009 SCC 59 at para 21, [2009] 3 SCR 605).

43 *Douez*, *supra* note 41 at para 99.

> formalism, ironically far more rigid than anything that the realists originally sought to displace.[44]

In holding that increased legal scrutiny must be given to contracts where consent is automatic in nature, Canada's highest court has once again affirmed the importance of paying attention to parties' unequal bargaining power.

These principles have been adapted to family law as well. When considering a domestic contract, courts will carefully analyze the context of the contract's negotiation and signature. Even where a contract would otherwise appear to be legitimate, the courts will carefully consider the context of bargaining and signature in order to determine the quality of the assent.[45] For example, when signing a marriage contract or a separation agreement, spouses cannot be held accountable to terms they did not truly understand. In other words, where there is no comprehension, there can be no assent.

Although courts may employ "traditional" contract terminology when interpreting domestic contracts, the Supreme Court has strongly cautioned against "borrowing terminology rooted in other branches of the law and transposing it into a unique legal context"[46] such as family law. This is so because principles of contract law, such as unconscionability or mistake, have different meanings according to the context of a contract. What may establish unconscionability in a domestic contract, for example, might fall well short of what is required to establish the same in a commercial contract.[47]

Thus, where one party to a domestic contract does not have the information needed to properly assess all terms of the contract, assent cannot truly be given. In other words, the presence of any "informational asymmetry" will affect the parties' ability to make an acceptable bargain.[48] The development of the law of contracts in the family law context demonstrates the Supreme Court's willingness, and the necessity, to interpret contracts with a robust understanding of their context. In family law, important characteristics evidently

---

44 Stephen Waddams, "Review Essay: The Problem of Standard Form Contracts: A Retreat to Formalism" (2012) 53 Can Bus LJ 465 at 485-486.

45 This principle has been codified in the *Family Law Act*, RSO 1990 s 56 (4).

46 *Miglin v Miglin*, 2003 SCC 24 at para 82, [2003] 1 SCR 303.

47 *Rick v Brandsema*, 2009 SCC 10 at para 43, [2009] 1 SCR 295.

48 *Ibid* at paras 45-46.

include power imbalances and the subjective understanding of each party. Where one party does not truly understand the agreement or is mistaken as to a part of it, there can be no assent.

A dictum in the family law context provides that "what you don't know matters." Were this to be applied to employment law termination clauses, it would ameliorate the defect so evident in cases like *Nemeth*. *Nemeth*, in holding that the clause displaced the common law, relied on the presence of Nemeth's signature whereas, in family law, the fact that one party lacked key information would preclude a comparable interpretation of the clause. If Nemeth did not know that he could be entitled to common law reasonable notice in the absence of a termination clause, his view of what the termination clause said, and of what it purported to displace, might have been different.

(c) Employment Law is Ripe for a Return to First Principles, Guided by a Modern Understanding of the Employment Relationship

Not only is the approach taken by employment law to termination clauses ripe for reevaluation, it was ready for such a reevaluation in *Machtinger* itself. Unfortunately, because of the way in which *Machtinger* was argued, all of Iacobucci J.'s first principles have had to be applied to the interpretation of the contract itself rather than to the quality of its formation. While many have read and re-read the key passages of *Machtinger*, few recall that both sides had conceded that the contract itself, in formation, was otherwise valid. Iacobucci J. was at pains to point this out — twice — in his reasons:

> The appellants acknowledged at trial that, save for the effect of the provisions of the [*ESA*], the termination provisions were valid.
>
> . . .
>
> It was acknowledged by the appellants and the respondent that, but for the possible effects of the [*ESA*], no issue as to the validity of the employment contracts would have arisen.[49]

My guess is that Iacobucci J. asked the parties about the contract's validity, and that is why the concession is emphasized. If he did ask, then he might also have been attuned to the question of whether — in

---

49 *Machtinger*, *supra* note 4 at paras 6, 23.

light of the policy imperatives he outlined — a real question of formation would have arisen but for the concession.

In any event, Iacobucci J.'s policy rationale for the interpretive principles he set out would, in the contexts I outlined above, give rise to a very different set of conclusions concerning the enforceability of restrictive clauses. In other types of cases, the findings in *Machtinger* respecting the employees' general lack of knowledge would doom attempts to enforce restrictive provisions, on the basis that no valid agreement was entered into in the first place. Put simply, owing to the way *Machtinger* was argued, we are left with a series of first principles we are to apply wholly to the *interpretation* of termination clauses, giving rise to the problems I have described.

The Supreme Court's policy outlook in employment law seems to support the reappraisal I propose here. While Iacobucci J. in *Wallace* repeated some of the observations he made in *Machtinger*, such as the suggestion that "[t]he contract of employment has many characteristics that set it apart from the ordinary commercial context," this has not precluded the use of first principles in contract law to guide the interpretation process in employment cases.[50] In *Keays*, the Court explicitly rejected the idea that damages for the manner of dismissal could be interpreted apart from the ordinary commercial context. Instead, liability for damages for mental distress caused by the manner of dismissal was to be assessed on the basis of the basic principle set out in *Hadley v. Baxendale* — namely, that such damages can be awarded if they were reasonably foreseeable at the time of contracting.[51] The law on damages for mental distress arising from breach of contract was thus more than sufficient to do justice to the claims of employees who had been dismissed in bad faith, without the need to artificially extend the length of an employee's notice period.[52]

Although I advocate a return to first principles grounded in contract interpretation law, I appreciate that historically these principles were subsumed within a classical liberal contractual paradigm that

---

50 *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701 at para 91, 152 DLR (4th) 1 [*Wallace*].

51 *Keays v Honda Canada Inc*, 2008 SCC 39 at para 56, [2008] 2 SCR 362 [*Keays*]; *Hadley v Baxendale*, [1854] EWHC J70, 9 ExCh 341.

52 *Keays*, *ibid* at para 58.

assumed equality of bargaining power and a free exchange of promises, and that eschewed any attempt to interpret contracts through the lens of unfairness, save in extreme cases. As Etherington notes in his review of the *Machtinger* decision in the Court of Appeal, published on the eve of the Supreme Court's decision, the Court of Appeal had routinely rejected attempts, in employment law, to recognize the unfairness and inequality inherent in harsh termination clauses.[53] I would simply say that the nineteenth-century paradigm evidenced in such employment law decisions, including the Court of Appeal's *Machtinger* decision overturned by the Supreme Court, cannot realistically be argued as holding much sway in Canada in 2020.

The fact that context matters was put most famously by Lord Devlin in his final decision, in which he did not permit a contracting party to rely on certain limiting clauses in an agreement entered into in circumstances where mutual understanding could not be assured. As Lord Devlin noted, constructing a contract should not be about finding the signature or other forms of contract but on discerning whether, in fact, an agreement was consummated.[54]

I suggest that the proper response to a clause that says "0 weeks' notice" (*Machtinger*), "no notice if disabled" (*Oudin*), or "in 27 words, give up over $150,000 in 19 years on termination" (*Nemeth*) is to either: (a) carry on as we have done, live in a world of "make believe," and enforce the clause as written; or (b) to break the bonds that have prevented Iacobucci J.'s policy statements from taking the same shape they have taken in other areas of the law. Were it not for the concession made in *Machtinger*, the debate today might well be about how best to give effect to parties' intentions in the real world rather than in the "world of make believe which the law has created," as Lord Devlin called it.

---

53 Brian Etherington, "The Enforcement of Harsh Termination Provisions in Personal Employment Contracts: The Rebirth of Freedom of Contract in Ontario" (1990) 35 McGill LJ 459.

54 See *McCutcheon v David MacBrayne Ltd*, [1964] UKHL 4, [1964] 1 WLR 125 (HL) at 133, where Lord Devlin observed:

> If it were possible for your Lordships to escape from the world of make believe which the law has created into the real world in which transactions of this sort are actually done, the answer would be short and simple.

5. CONCLUSION

There is no doubt in my mind that a considerable reappraisal of this area of employment law is called for. Employment lawyers have long enjoyed working in a specialized field, and have perhaps grown accustomed to dealing with common types of employment agreement, lionizing their words and forgetting that they are supposed to be the end product of a mutual interchange. Employment lawyers are first and foremost contract law lawyers. But they have lost their way. Courts, for their part, have not taken the lead by advising parties to present a record that would be sufficient to determine whether the vulnerable party was given the information required to enter into a mutually understandable contract. If employers wish to opt out of paying employees their common law entitlements, it is reasonable to expect, first, that employees should be made to understand what those entitlements are, and, second, that the record disclose an understanding on their part of what they are forfeiting.[55]

Our clinging to the words of employment contracts is excusable only for as long as no one realizes that the words are mere shadows. While we may at first, as was Socrates' character, be blinded by the light blazing from beneath the shadows (or, to adapt the comparison to employment law, blinded by the contractual principles underlying the words of an agreement), we may, I hope, respond in the same way, unable to return to the cave quite the same, and better for it.

---

55 This may, in some circumstances, impose a positive duty on employers to point out the termination clause in the employment contract and alert the prospective employee as to its terms. One might think of this as a sort of employment law "Miranda Warning."

APPENDIX
Post-*Machtinger* Enforcement of Termination Clauses

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Goebel v Jardine Rolfe Limited (1992), 33 ACWS (3d) 250 at para 11, 42 CCEL 290 (BCSC).	The Employee's employment may be terminated in the following circumstances, with the following results: . . . (f) In the event of the termination of the Employee's employment by LW&R for any other reason than those set forth in clauses (a) to (e) above, the Employee shall be entitled to receive the compensation provided for in the "Termination of Employment" provisions of the Employment Standards Act of British Columbia, in its then operative form, upon termination of employment (in addition to any outstanding unpaid holiday pay, salary and commissions due, if any).	British Columbia *Employment Standards Act*, RSBC 1996, c 113	Yes	Reasonable notice at common law applies. Read in the context of the rest of the contract, the termination provision is not sufficiently clear and unambiguous to deprive the employee of common law notice. [at paras 25-26, 32]
McLennan v Apollo Forest Products Ltd (1993), 49 CCEL 172 at para 10, [1993] BCJ No 2078 (BCSC).	The terms and conditions of employment at Apollo Forest Products Ltd. are in accordance with the Employment Standards Act and other legislation of the Province of British Columbia governing the Employer/Employee relationship in the workplace.	British Columbia *Employment Standards Act*, RSBC 1996, c 113	Yes	The provision incorporated the *Employment Standards Act* (BC), which uses the phrase "at least" in the statutory notice section, thereby permitting common law reasonable notice. [at paras 11-14]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Wegg v National Trust Co (1993), 39 ACWS (3d) 312 at para 6, [1993] OJ No 680 (Ont Gen Div).	For regular employees, the maximum written notice for severance pay, which the company must give upon termination shall be the notice or pay required by Provincial employment standards legislation. The employee must give the maximum written notice to the company as required by provincial legislation.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	The termination clause is valid and does not contravene the test for minimum reasonable notice as defined in *Machtinger*. The clause was not in fine print nor was it in a printed form that would indicate it could not be altered. There was no coercion or undue influence. [at para 19]
Hine v Susan Shoe Industries Ltd (1994), 18 OR (3d) 255 at para 1, 48 ACWS (3d) 105 (CA).	Six months' notice is necessary to terminate or change the provisions of this agreement, unless by mutual consent.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	Unlike the situation in *Machtinger*, the period prescribed in the employment contract exceeded the minimum employment standard for notice of termination. The termination clause did not address the issue of severance pay, nor did it purport to contract out of or waive the employment standard on that subject which the *Employment Standards Act* (ON) set out at the time of the termination. The statutory provision did not apply and did not operate to render the contractual provision null and void. [at para 4]
Schulz v NRS Block Bros Realty Ltd (1994), 92 BCLR (2d) 109 at para 3, 45 ACWS (3d) 888 (SC).	This appointment is made expressly on a month to month basis, and shall continue in that capacity despite any conditions of the appointment to the contrary that may now or hereafter be agreed upon.	British Columbia *Employment Standards Act*, RSBC 1996, c 113	No	The contract is not void. On the evidence and argument, it could not be held that the notice entitlement in the employment contract was void or that the condition had the effect of avoiding the requirements of the Act. [at para 20]

Relph v British Columbia Native Housing Corp (1996), 67 ACWS (3d) 1129 at para 10, 1996 CanLII 3435 (BCSC).	The employee acknowledges and understands that this employment contract may be terminated forthwith upon N.P.S. receiving written notice from U.N.N.S. that a placement is no longer required for the position the employee is filling.	British Columbia *Employment Standards Act*, RSBC 1996, c 113	Yes	The requirements of the *Employment Standards Act* (BC) are minimum requirements and an agreement to waive any of those requirements is of no effect. Where an employment contract fails to comply with the minimum notice provisions set out in the *ESA*, the employee can only be dismissed without cause with reasonable notice. [at para 16]
Layne v Computer Associates International Inc (1997), 74 ACWS (3d) 413 at para 4, [1997] OJ No 4147 (Ont Gen Div).	Employment with Computer Associates is not for any specific period of time. You are free to resign at any time, and likewise, Computer Associates may terminate this employment with you at any time with or without cause or advance notice.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	The "at will" provision is null and void and reasonable notice at common law applies. [at para 27]
Boulé v Ericatel Ltd (1998), 80 ACWS (3d) 85 at para 3, [1998] BCJ No 1353 (BCSC).	If your employment is terminated for any reason other than "just cause" in law, then you will [*sic*] receive one week's notice of termination, or pay in lieu, for each year of employment in addition to whatever entitlement you have under the applicable provincial law.	British Columbia *Employment Standards Act*, RSBC 1996, c 113	Yes	Reference to "provincial law" was ambiguous and not sufficiently clear to rebut presumption of reasonable notice. The ambiguity cannot be resolved by applying the rules of construction, by examining the factual matrix, or by considering the subsequent actions of the parties. [at paras 19-24]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Canadian Crude Separators Ltd v Jacobson, 1998 ABQB 590 at para 8, [1998] AJ No 787.	If the Company terminates the employment of the Vice President during the term of this Agreement, the Vice President will receive one month salary for every full year the Vice President was employed by the Company unless the Vice President is terminated for just cause.	Alberta *Employment Standards Code*, RSA 2000, c E-9	No	The court upheld the arbitrator's view that the contract did not contravene the *Employment Standards Code* (AB). A contractual provision that an employee is to receive greater benefits than those provided for under statute is not an improper attempt to contract out of the provisions of the legislation. Parties can "contract out" of such legislation if the effect is to raise and further protect the rights of the affected employees.
Shore v Ladner Downs (1998), 160 DLR (4th) 76 at para 2, 52 BCLR (3d) 336 (CA).	Firm policy dictates your employment to be probationary for the first 6 months during which employment may be terminated at the sole discretion of the Firm without cause. Notice period within and after the probation period to be 30 days by either party.	British Columbia *Employment Standards Act*, RSBC 1996, c 113	Yes	The clause failed to comply with minimum notice periods set out in the *Employment Standards Act* (BC) and the common law applied. The court reached this conclusion despite the fact that at the time of termination, the clause provided the employee with more than the *ESA* entitlements. The court held that the policy considerations applied in *Machtinger* would not be served if the contract were to be interpreted in favour of the employer so as to leave the individual employee responsible for determining, at the point of termination, whether the statutory minimum had risen above the notice period stated in the contract. [at para 16]

MacDonald v ADGA Systems International Ltd (1999), 85 ACWS (3d) 586 at para 3, 117 OAC 95 (CA).	The Company may terminate this Agreement without notice at any time by reason of the Employee's dissipations, violation of any instruction or rule of the Company, or failure to comply with any of the agreements on the part of the Employee as herein set out. In addition it is also agreed that either party to this Agreement may terminate this Agreement at any time by giving not less than one (1) month's prior written notice sent either by registered mail or bailiff.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	The termination clause is distinguishable from the provision in *Machtinger* setting out a specific notice period which, on its face, violated the *Employment Standards Act* (ON). Here, the termination clause, on a plain reading, does not conflict with any legislative entitlement. There is a clear term providing for not less than one month's notice. Neither on its face, nor inferentially, does this term provide for a notice period less than that required by the *Employment Standards Act*, nor reflect an attempt to contract out of that requirement. Accordingly, the contractual term prevails over the common law presumption. [at paras 20-24]
McCabe v Simon Fraser Campus Radio Society (1999), 90 ACWS (3d) 236 at para 9, [1999] BCJ No 1834 (BCSC).	Employees, in the case of discharge, shall receive one (1) month's notice or one (1) month's pay in lieu of notice.	British Columbia *Employment Standards Act*, RSBC 1996, c 113	No	The contract of employment was only for 12 months. Accordingly, it would not have been possible for this particular paragraph to conflict with the minimum requirements set out in the *Employment Standards Act* (BC). The provision of one month's notice was in excess of what would be available under the Act if the contract of employment had been silent. This is the case no matter when the termination took place within the contract period. The provision is not void because it did not attempt to reach an agreement "to waive" the requirements of s 42(1) of the *Employment Standards Act* (BC) setting out minimum weeks of notice. There are no circumstances under which the provision of one month's notice would be less than what would be available to an employee under a one-year contract. [at para 24]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Widney v Nor-Pac Marketing, [1999] BCJ No 1325 at para 16, 1999 CarswellBC 4066 (BC Sup Ct).	Termination clause not reproduced in decision.	British Columbia *Employment Standards Act*, RSBC 1996, c 113	Yes	An agreement to pay one month of salary and benefits in lieu of notice is contrary to s 4 of the *Employment Standards Act* (BC). The clause is therefore null and void. [at para 16]
Nikolic v Computer Associates, [2000] OJ No 2463 at para 4, 98 ACWS (3d) 131 (Ont Sup Ct J).	After the successful completion of your probationary period, C.A. may terminate your employment for any reason whatsoever, by satisfying the notice and severance pay requirements contained in the applicable employment standards legislation, unless your termination is for cause. No other notice or severance whatsoever either at common law or other statutes shall be payable by C.A. to you. This provision will continue to be in effect regardless of the duration of your employment, and despite any changes that may occur in your compensation, job functions, responsibilities or title, so long as you continue to hold the position with C.A. or its related companies.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	The clause is not void. It was a term and condition of employment that the employee could be terminated without cause on payment of the minimum requirements under the *Employment Standards Act* (ON). Since such payment was made, the employer owes nothing further to the employee. [at para 19]

Sullivan v Graydon, 2000 BCSC 999 at para 36.	6.01 – The Company may terminate the employment of the Employee at any time for any reason. For termination other than cause, after the Employee has served the Company in his duties for a minimum period of six months, the Company shall give to the Employee advance notice of termination or severance pay in lieu thereof in accordance with the minimum standard requirements of the *Employment Standards Act*, S.B.C. 1980, c. 40, as amended from time to time. The Employee further understands and agrees that the notice requirements contained in this section 6.01 constitute a material inducement to the Company to enter into this agreement and to employ the Employee, and that the Company would not enter into this agreement absent such inducement. The Employee further understands and agrees that this section 6.01 shall continue to apply at any time in the future, regardless of what position the Employee may occupy at the time notice of termination or pay in lieu thereof or severance is given.	British Columbia *Employment Standards Act*, RSBC 1996, c 113	Yes (in part)	Even though the specific provision with respect to the length of notice is void, articles 2.02, 2.03, and the balance of 6.01 remain intact. This case is distinguishable from both *Suleman* and *Machtinger* because there was evidence of what the parties intended if the notice provisions were found null and void. [at paras 48-50] Both parties intended the statutory minimum to apply in the case of dismissal without cause. Accordingly, the void notice provision should be replaced with the *Employment Standards Act* (BC) entitling the employee to compensation for one week of wages on dismissal. [at para 52]
Wood v Industrial Accident Prevention Assn, [2000] OJ No 2711 at para 2, 98 ACWS (3d) 358 (Ont Sup Ct J).	Letter of Employment . . . 13. While we do not anticipate the situation arising, we feel you would wish to know that should it be necessary to terminate your employment without cause it will be in accordance with the *Employment Standards* Act of Ontario.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	The contractual term in question is clear, and set out the applicable notice period with sufficient clarity to displace the common law. The contract clearly provides an entitlement to a period of notice not less than that required by the *Employment Standards Act* (ON). [at para 16]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Barnard v Testori Americas ***Corp***, 2001 PESCAD 4 at para 2.	If the Company decides, at the sole option, to terminate your employment for any reason other than negligence in the performance of your duties, the Company will pay you 8 weeks salary in case your termination happens in the first 12 months of your employment and 4 weeks salary afterwards.	Prince Edward Island No statute considered	No	The clause was express, thereby precluding the common law presumption of reasonable notice. [at para 7]
Ceccol v Ontario Gymnastic Federation (2001), 55 OR (3d) 614 at para 5, DLR (4th) 688 (CA).	5.1 The Federation may terminate this Agreement at any time according to the current Employment Standards Act by reason of the Employee's dissipation, violation of reasonable instructions or policies/procedures of the Federation, failure to comply with provisions of this Agreement as herein set out or for other cause. Any termination is subject to ratification by the Board of Directors. Participation/involvement in activities during business hours, which are contrary to or, violate the Criminal Code of Canada will be grounds for immediate dismissal. . . . 5.3 The Employee shall have the right to terminate this Agreement at any time by giving reasonable written notice (a minimum of 2 weeks) to the Federation. In terminating this Agreement, pursuant to the terms of this subparagraph, the Employee must give reasons in writing explaining such termination. 5.4 The Federation and the Employee agree to abide by the Ontario Employment Standards Act and regulations concerning notice of termination of employment.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	There are two plausible interpretations of article 5.4 of the employment contract. The interpretation favouring the employee is preferred. The common law entitlement to reasonable notice is preserved. [at para 51]

Christensen v Family Counselling Centre of Sault Ste Marie & District, [2001] OJ No 4418 at para 5, 12 CCEL (3d) 165 (Ont CA).	Termination of Employment – Section A. 1) By Employee b) Professional Staff: will require one month notice in writing to the Executive Director and their supervisor. 2) By Employer b) Professional and Clerical Staff: will be in writing from the Executive Director and the same ratios as above will apply, that is one month's notice to professional staff . . . and/or as established by legislation.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	The termination provision in the employee manual has four possible interpretations. Because two of the four interpretations permit a claim of damages for wrongful dismissal, the provision fails to rebut the presumption of reasonable notice at common law. [at paras 8-12]
Goering v Mayfair Golf and Country Club Co, 2001 ABQB 398 at para 8.	Upon 90 days written notice, this agreement may be terminated by either party. Should the Club wish to terminate the contract, severance would be paid at 1 months basic salary per year of employment or a minimum of 3 months basic salary.	Alberta No statute considered	No	The clause was upheld. The clause entitled the employer to terminate employment with 90 days of notice, with the option to have the employee continue to work during that 90-day time period. The employee continued to work, and was thus entitled to 90 days salary in addition to 90 days severance. [at paras 38, 57]
Kaiser v Dural, 2001 NSSC 131 at para 33, aff'd in ***Kaiser v Dural***, 2002 NSCA 69.	Termination clause not reproduced in the decision.	Nova Scotia *Labour Standards Code*, RSNS 1989, c 246	Yes	The provision is ambiguous because no reference is made to the statute, but merely to the minimum notice required by law. Having been drafted by the employer's lawyer, the contract must be read *contra proferentem*. On this basis, reasonable notice was held to apply. [at para 33]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Waddell v Cintas Corp, 2001 BCCA 717 at para 3.	By Cadet, at any time, upon Cadet giving the Team Member written notice of termination or pay in lieu thereof and severance pay, if any, in accordance with the requirements set out in the Ontario Employment Standards Act. Cadet agrees that in the event that the relevant termination notice requirement in the Ontario Employment Standards Act is less than four weeks, Cadet shall give written notice of termination of four weeks or pay in lieu thereof. The parties hereto agree that the notice of termination of employment provided for in this Agreement constitutes reasonable notice.	British Columbia *Employment Standards Act*, RSBC 1996, c 113	Yes	The British Columbia legislation looks back at the eight weeks prior to dismissal to determine what is owed on dismissal, while the Ontario legislation looks forward at the weeks ahead to determine the amount. The employee in this case transferred from Ontario to British Columbia. The court held that it is enough to demonstrate the possibility that the termination clause could fail to meet the requirements of the BC legislation to nullify the clause. [at paras 10-11]
Hutchison v Enreach Software Canada Inc, [2002] OJ No 4467 at para 5, 2002 CarswellOnt 4058 (Ont Sup Ct J).	You should be aware that your employment with the Company is for no specified period and constitutes at will employment. As a result, you are free to resign at any time, for any reason or for no reason. Similarly, the Company is free to conclude its employment relationship with you at any time, with or without cause, and with or without notice.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	Drawing on the reasoning in *Machtinger*, the termination-at-will clause was held to be void and of no effect on the basis that it attempted to contract out of the statutory minimum. [at paras 12-13]
Mesgarlou v 3XS Enterprises Inc, [2002] OJ No 4323 at para 3, 2002 CarswellOnt 3834 (Ont Sup Ct J).	After the first three (3) months of employment, both parties shall give notice in accordance to the Ontario Employment Standards Act prior to terminating this employment agreement.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	The clause is sufficiently clear and rebuts the common law presumption of reasonable notice. [at para 12]

llie v S210 Technologies Corp, [2003] OJ No 4639 at para 9, 2003 CanLII 5808 (Ont Sup Ct J).	S210 is free to terminate your employment at any time by providing you with (i) 2 weeks prior written notice (or such greater minimum notice as may be required under the Employment Standards Act (Ontario), or with the equivalent pay in lieu of notice calculated in accordance with the requirements of the Employment Standards Act (Ontario); plus (ii) such other amounts or entitlements which are required to be provided to you in accordance with, and are limited to, the minimum requirements of the Employment Standards Act (Ontario). By signing below, you confirm that the above provisions respecting termination of your employment are reasonable and you agree to accept such notice and/or amounts payable as outlined therein in full satisfaction of any and all claims you have or may have against S210 and the termination thereof.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	The termination clause in this employment agreement is confusing and lacks clarity; however, it does not offend the provisions of the *Employment Standards Act* (ON); rather it relies upon the provisions of the statute as being the baseline for termination notice. [at para 21]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
MacAlpine v Medbroadcast Corp, 2003 BCPC 133 at para 9.	In the absence of cause, Medbroadcast may terminate your employment at any time and for any reason by providing to you, in writing, such notice as is required by the termination of employment provisions of the British Columbia Employment Standards Act, as amended from time to time . . .	British Columbia *Employment Standards Act*, RSBC 1996, c 113	No	The clause sets out an agreement that the minimum notice prescribed by the *Employment Standards Act* (BC) would be given, but it does not represent a waiver by the employee to reasonable notice if the circumstances of the employment and termination warrant it, neither does it preclude a court from deciding what was reasonable notice given the circumstances of the termination and the employment. In other words, it was unnecessary to include the clause in the contract because that minimum is already guaranteed under the legislation and is therefore surplusage in the contract. The reciting of this provision of the Act in a contract merely states the minimum required by law, and should not be otherwise construed without a clear and express waiver of reasonable notice by the employee, after the implication of such waiver has been specifically brought to the attention of the employee by the employer. [at para 26]

Lloyd v Oracle Corp Canada Inc, [2004] OJ No 1806 at para 4, 2004 CanLII 18084 (Ont Sup Ct J).	Oracle may terminate your employment at any time, without cause, upon giving prior written notice in accordance the Ontario Employment Standards Act, or any similar legislation which is in force in the province within which Oracle's offer of employment is accepted.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	The termination clause is drafted in straightforward language. A termination clause limited to the *Employment Standards Act* (ON) minimum notice requirements is not unenforceable unless the employer commits to paying an amount in excess of these minimum notice requirements for some period of time. The evidence establishes that the employee was aware of the existence of the termination clause and had sufficient time between the receipt of the Employment Letter and the time for acceptance to consider its significance and to obtain legal advice as to its legal effect. The termination clause evidences an intention to exclude the common law presumption of a reasonable notice period on termination without cause and to limit the employee to termination pay calculated in accordance with the *ESA*. [at paras 64-67]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Krieser v Active Chemicals Ltd, 2005 BCSC 1370 at para 5.	6. The employment of the Employee may be terminated by the Employer on the following basis: – (A)(1) With no notice or pay in lieu thereof during the first six (6) months of the Employee's employment with the Employer (hereinafter called the "probationary period"); (2) Upon two weeks notice in writing or pay in lieu thereof at the Employer's option, where the Employee has less than one year of service with the Employer after the probationary period; (3) Upon one months notice in writing or pay in lieu thereof at the Employer's option where the Employer has one year or more, but less than two year's service after the probationary period; (4) Upon two months notice in writing or pay in lieu thereof at the Employer's option where the Employee has two year's or more, but less than three years of service after the probationary period; (5) Upon three months notice in writing or pay in lieu thereof at the Employer's option where the Employee has three years or more, but less than five years of service after the probationary period; (6) Upon four months notice in writing or pay in lieu thereof at the Employer's option where the Employee has five years or more, but less than seven years of service after the probationary period;	British Columbia *Employment Standards Act*, RSBC 1996, c 113	No	The contract is not unenforceable because of non-compliance with the *Employment Standards Act* (BC). There is no suggestion that the employer sought to subvert the legislative intent and policy of the Act in its dealings with the employee. Any departure from the Act has operated to the employee's benefit. Alternatively, paragraph 6(A)(1) can be severed from the contract without doing violence to the policy considerations enunciated in *Machtinger*. [at paras 12-14]

	(7) Upon the [*sic*] six months notice in writing or pay in lieu thereof at the Employer's option where the Employee has seven or more years of service after the probationary period; (8) For just cause, at any time without notice or recompense; (9) Any profit sharing that may be in effect at the time of termination will accrue to the Employee to the end of the month in which termination occurred only, assuming the terminated Employee would have qualified for profit sharing under the normal requirements of the Employer. The amount of profit sharing payable to the Employee terminated would be that amount he would have received had his employment continued.			
Roden v Toronto Humane Society (2005), 259 DLR (4th) 89 at para 55, 2005 CanLII 33578 (ONCA)	Otherwise, the Employer may terminate the Employee's employment at any other time, without cause, upon providing the Employee with the minimum amount of advance notice or payment in lieu thereof as required by the applicable employment standards legislation.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	Failure to refer to benefits in the provision did not render it void for violation of the *Employment Standards Act* (ON). The without-cause provisions referentially incorporate the minimum notice period set out in the Act and are therefore valid. The without-cause provisions do not attempt to provide something less than the legislated minimum standards; rather, they expressly require the employer to comply with those standards.

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Strench v Canem Systems Ltd, 2005 BCSC 1736 at para 9.	The Company reserves the right to terminate your employment at any time for any reason. Should you be terminated for cause, then you will not be entitled to any advance notice of termination or severance pay in lieu thereof. Should you be terminated for reasons other than cause, then you will be entitled to advance notice of your termination, or severance pay in lieu thereof, or any combination of advance notice and severance pay, in accordance with the following formula: (a) more than three months but less than one year's employment – in accordance with the Employment Standards; (b) more than one year but less than five years' continuous employment – two weeks' notice for each completed year of employment or severance pay in lieu thereof; (c) more than five years – two weeks' per completed year of employment.	British Columbia *Employment Standards Act*, RSBC 1996, c 113	No	There is no ambiguity in the termination clause. It is clear and unambiguous and incapable of more than one reasonable interpretation. Consequently, the clause is enforceable. [at para 47]

Charles River Consultants Corp v Coombs, 2006 NLTD 174 at para 10.	Our employment relationship will be terminable at will, which means that either you or the Company may terminate your employment at any time and for any reasons or for no reason. In the event that a dispute does arise, this letter, including the validity, interpretation, construction and performance of this letter, shall be governed by and construed in accordance with the substantive Canadian employment laws.	Newfoundland & Labrador *Labour Standards Act*, RSNL 1990, c L-2	No, but reasonable notice warranted	The phrase "substantive Canadian employment laws" in the clause incorporates both the statutory minimum and the common law presumption of reasonable notice. The wording of the terminable-at-will clause is not clear enough to rebut the presumption of common law notice. Had the parties intended to limit the notice to the statutory minimum, it would have been quite simple to do so. They chose to incorporate all substantive employment laws, thus specifically incorporating both the presumption of reasonable notice and the statutory minimum. [at paras 34-35]
Dodich v Leisure Care Canada, 2006 BCSC 93 at para 6.	Should it be necessary, Lifestyle may end the employment relationship by providing you with a minimum of two (2) weeks' notice, or pay in lieu of notice, or such that is required by the Employment Standards Act, whichever is greater. In any event, we guarantee that you will be provided compensation upon the severance of the employment relationship, on a without cause basis, which shall not be less than two (2) weeks per year of service. This payment will include any statutory obligations Lifestyle may have under the Employment Standards Act.	British Columbia *Employment Standards Act*, RSBC 1996, c 113	Yes	The termination clause is ambiguous. The first provision for the greater of two weeks' notice or the entitlement under the *Employment Standards Act* (BC) standing alone sets a maximum or limit on compensation to be paid. The entitlement under the Act is statutory and does not require the contract of the parties. The guarantee portion of the termination clause in contrast does not set a maximum and therefore leaves open the interpretation that if, for example, reasonable notice were found to be less than a period of two weeks for each year of service, the employee would have the protection of a minimum guarantee. The employer drafted the termination clause and the principle of *contra proferentem* where competing interpretations are put forth must be construed against it. The termination provision of the letter of employment has not displaced the employee's common law entitlement to reasonable notice. [at paras 14-16]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Finlan v Ritchie Bros Auctioneers (Canada) Ltd, 2006 BCSC 291 at para 1.	Termination clause not reproduced in the decision. [The court noted that a term of the employee's contract of employment provided that upon termination, he would receive five weeks' notice or payment in lieu, for five years of employment.]	British Columbia *Employment Standards Act*, RSBC 1996, c 113	No	The contract of employment is enforceable. No evidence was led suggesting the employer pressured or coerced the employee into signing the contract. A contract of employment that includes a defined notice period in accordance with the *Employment Standards Act* (BC), but not the reasonable notice that an employee could expect to receive at common law is not, by itself, grounds for finding a contract unconscionable. There was no inequality of bargaining position. The terms were clear and unambiguous. [at paras 41-42]
Nygård International Partnership Associates (Re), 2006 MBCA 115 at para 3.	The notice period to terminate this agreement will be thirty (30) days, in writing, by either party. In the event that you choose to terminate this agreement, the Company reserves the right to accept your termination immediately without further remuneration. No "forced termination implication" would be applicable in this clause in any manner.	Manitoba *Employment Standards Code*, CCSM, 1998, c E110	Yes	The provision in the agreement permitting the employer to accelerate the resignation without remuneration is contrary to the *Employment Standards Code* (MB) and therefore null and void. [at para 13]
University of British Columbia v Wong, 2006 BCCA 491 at para 8.	An employee terminated during the probationary period for reasons other than just cause shall receive notice or pay in lieu of notice in accordance with the provisions of the Employment Standards Act.	British Columbia *Employment Standards Act*, RSBC 1996, c 113	No	The termination clause is valid because it incorporates the language of the *Employment Standards Act* (BC) providing for notice or pay in lieu of notice. The effect is that such language is part of the contract. [at para 34]

Joseph v June Warren Publishing Ltd, 2007 ABPC 309 at para 8.	The Employer may terminate this Agreement without cause by providing the Employee with written notice of termination of this Agreement, subject to the Employer complying with its minimal obligations, if any, under the Alberta Employment Standards Code.	Alberta *Employment Standards Code*, RSA 2000, c E-9	Yes	The agreement in this case says that the employer may terminate the employment without cause, subject to the employer "complying with its minimal obligations, if any, under the [*Code*]." Any agreement that derogates from the common law rights of employees is to be read strictly and will not be extended beyond a strict literal interpretation of the words used, notwithstanding that there is a strong inference that the probable intent would go further. The words of the agreement in this case do not confine the employee to compensation pursuant to s 56 and s 57(1) of the *Employment Standards Code* (AB), and, furthermore, do not give any notice nor pay any termination pay, "minimal" or otherwise. [at para 16]
Kosowan v Concept Electric Ltd, 2007 ABCA 85 at para 1.	The company reserves the right to terminate your employment at any time. Should you be terminated for cause, then you will not be entitled to any advance notice of termination or severance pay in lieu thereof. Should you be terminated for reasons other [than] cause then you will be entitled to advance notice or severance pay thereof in accordance with the Employment Standards Act of Alberta.	Alberta *Employment Standards Code*, RSA 2000, c E-9	N/A	The provision is clear and unambiguous. The clause does not, on its face, confine the employee to compensation pursuant to s 56 and s 57(1) of the *Employment Standards Code* (AB). On the contrary, the choice of language leaves open to the employee the ability to pursue an action. To do so would be "in accordance with the *Employment Standards Code*." [at para 4]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Slepenkova v Ivanov, [2007] OJ No 4708 at para 18, 2007 CarswellOnt 5643, aff'd 2009 ONCA 526.	This agreement can be terminated with 2 weeks written notice by both parties. In this case the Subcontractor agrees to continue [*sic*] to perform his/her duties as usual for the remaining period. The Contractor agrees to compensate the Subcontractor as previously agreed for the remaining 2 weeks period. If the Subcontractor terminates this agreement or quit [*sic*] on shorter than specified (2 weeks) writer [*sic*] notice with or without a notice the Subcontractor agrees to pay a penalty of $1,000.00 (one thousand dollars).	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	The terms of the contract significantly vary from the conduct of the parties. Despite yearly renewals, the contract in this case does not contain the "unequivocal and explicit language" necessary to establish a fixed-term contract. It is treated as an indefinite term contract. The termination clause was void for non-compliance with the statutory notice provisions. The presumption of reasonable notice is not therefore rebutted by the contract. [at paras 69-73]
Braiden v La-Z-Boy Canada Ltd, 2008 ONCA 464.	Termination clause not reproduced in decision.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	The employment agreement as a whole failed due to lack of consideration. [at para 46] However, the majority noted that, had the contract been binding, the 60-day notice period would have exceeded (by 4 days) the *Employment Standards Act* (ON) statutory notice requirements. [at para 42]

Clarke v Insight Components (Canada) Inc, 2008 ONCA 837 at para 1.	Your employment may be terminated for cause at any time in which event you shall be entitled to only the amount of your salary and vacation pay earned up to the effective date of termination. Your employment may be terminated without cause for any reason upon the provision of reasonable notice equal to the requirements of the applicable employment or labour standards legislation. By signing below, you agree that upon the receipt of your entitlements in accordance with this legislation, no further amounts will be due and payable to you whether under statute or common law.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	When read in their proper context, the words "reasonable notice" cannot be taken to import the general common law standard. Rather, the clause clearly provides that the reasonable notice period to which the employee is entitled is "equal to the requirements of the applicable employment or labour standards legislation." To resolve any possible doubt, the concluding words of the clause exclude any further amounts "whether under statute or common law." *Machtinger* is distinguishable. The provision at issue here meets that statutory standard and is not void. [at paras 4, 6]
Churchill v Stockgroup Media Inc, 2008 BCSC 578 at para 62.	Your employment may be terminated without cause upon receipt of written notice or pay in lieu thereof pursuant to the Employment Standards Act as amended from time to time.	British Columbia *Employment Standards Act*, RSBC 1996, c 113	No	The termination clause is unambiguous and enforceable. It was not contended that there was a basis in fact or in law on which the termination clause should be found unenforceable. The pleadings raise no issue over the validity of the contract. The evidence would not support an inference that the employee did not consider the terms of the contract at the time the relationship commenced, or was unaware of the effect of those terms. [at paras 61-63]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
King v Weber Manufacturing Technology Inc, [2008] OJ No 4033 at para 29, 70 CCEL (3d) 30 (Ont Sup Ct J).	Your employment may be terminated by the Company, at any time after any applicable Probationary Period on giving you that length of notice or equivalent pay in lieu of notice, and severance pay (if applicable) to which you are entitled under the Act. In the event you are given pay in lieu of notice, you agree that accepting such pay will constitute your waiver of any common law termination of rights and damages. Should you obtain other employment prior to the end of this notice period, the Company's obligations shall cease as at the date you obtain the other employment, except for the amounts payable under the Act. The Company will have no further obligations to you upon termination at common law or otherwise, apart from the payment of accrued wages and vacation pay to the date of termination.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	The wording is clear and unambiguous. The employee's entitlement to payment in lieu of notice and severance is solely in accordance with the provisions of the *Employment Standards Act* (ON). The common law presumption to reasonable notice is rebutted. The employment contract between the parties limiting the employee to notice and severance pay pursuant to the *ESA* is enforceable. [at para 47]
Pennock v United Farmers of Alberta Co-Operative Limited, 2008 ABCA 278 at para 5.	Termination clause not reproduced in decision. [The court noted that the term of the contract was three years, subject to the right of either party to terminate by giving 30 days' notice in writing of its intention to do so.]	Alberta *Employment Standards Code*, RSA 2000, c E-9	No	The provision is not ambiguous. There is no allegation of unconscionability or oppression, nor did the employer seek to uphold the judgment on this basis. It is not possible to overcome or displace the express terms of the contract dealing with termination by implying a reasonable notice provision. [at paras 5-6, 16]

Dwyer v Advanis, [2009] OJ No 1956 at para 6, 177 ACWS (3d) 714 (Ont Sup Ct J).	. . . should it be determined at any time that there is not a fit between your skills and the requirements of the job, your employment with Advanis will be terminated and you will receive severance as determined by the applicable provincial Employment Standards Act.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	The clause is ambiguous. It does not specify whether it limits the employee's entitlement to the *Employment Standards Act* (ON) and nothing more. The written employment contract did not rebut the presumption of reasonable notice at common law. [at paras 36-38]
McKay v Lightroom F/X Inc, 2009 BCPC 321 at para 11.	If at any time the Employee chooses to terminate the agreement, two weeks notice in writing must be provided, commencing the day the written notice is received by LightRoom. If at any time LightRoom chooses to terminate the agreement, terms of the termination will be in accordance with the Employment Standards Act of British Columbia.	British Columbia *Employment Standards Act*, RSBC 1996, c 113	No	The clause sets out the applicable notice period with sufficient clarity and particularity to rebut the presumption of reasonable notice. The employee was allowed to take the employment offer home with him to consider it carefully and seek legal advice before signing. The contractual term is clear and enforceable. [at paras 45-46]
Wernicke v Altrom Canada Corp, 2009 BCSC 1533 at para 19.	Altrom may terminate your employment, once the probationary period is completed, by giving you 30 days notice of termination, or, at Altrom's discretion pay in lieu thereof, or all payments or entitlements prescribed by the provincial employment standards legislation, whichever is greater, including notice of termination, or at Altrom's option pay in lieu of notice and severance pay if applicable. The provisions of this paragraph will not apply in circumstances where an employee resigns from employment or is terminated for cause in accordance with common law.	British Columbia *Employment Standards Act*, RSBC 1996, c 113	No	Although not well drafted, the provisions are clear and not ambiguous. The meaning was especially clear to the employee, who played some role in drafting it. [at paras 59, 70]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Amanda Van't Slot v OncoGenex Technologies Inc, 2010 BCPC 249 at para 9.	At any time after the Probationary Period, the Company may terminate the employment of the Employee in accordance with this Article 5.5. In the event employment of the Employee is terminated by the Company for reasons other than for just cause, or the Employee resigns as a result of a Constructive Dismissal, the Employee shall be entitled to the following: (a) notice or severance payments to the Employee as required pursuant to the provisions of the Employment Standards Act (British Columbia) as amended from time to time . . .	British Columbia *Employment Standards Act*, RSBC 1996, c 113	No	The provision is not ambiguous such that the principle of *contra proferentem* would apply. It provides for notice in accordance with the *Employment Standards Act* (BC). Although the employee did not understand the import of the termination provision at the time of signing the employment agreement, she had the opportunity to consider the agreement, ask questions, and obtain legal advice, had she chosen to do so. [at para 25]
Rogers v Tourism British Columbia, 2010 BCSC 1562 at para 4.	This Contract will terminate automatically on the expiration of the Term. Additionally, this Contract may be terminated: a) For Reasons other than Cause . . . (ii) by us, for reasons other than cause, by giving 21 days written notice to you or upon any other period of written notice as may be agreed between the parties. At our sole discretion, we may terminate this Contract effective immediately upon payment of an amount equal to the amount of Fees described in Schedule "B" that would have been earned during this notice period.	British Columbia *Employment Standards Act*, RSBC 1996, c 113	No	The notice provision does not conflict with the *Employment Standards Act* (BC) and is enforceable. [at paras 31-32]

Bingham v Ontario (Ministry of Government Services) (2011), 104 CLAS 183 at para 3, 2011 CarswellOnt 15942 (Ont PSGB)	This case dealt with an agreement for "full and final separation of employment," which included the following terms: 1. The Complainant agrees irrevocably that his employment with the employer fully, completely and unconditionally ceases and terminates effective June 21, 2010. 4. The parties agree that the complainant shall have no additional claim for payment of salary, benefits, severance pay, termination pay or payments of any other kind arising from his employment with the Employer. 6. The employer agrees that the ROE [Record of Employment] issued by the Employer will be consistent with this Memorandum of Settlement.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	The parties agreed in clear language to go their separate ways on terms which are unambiguous and clearly set out in writing. It is fundamental to the law of contract that the intentions of the parties, gathered from the words they have used, be given effect. There is nothing illegal or contrary to statute in the parties' mutual covenants, including the full and final release of all further entitlements given by the employee to the employer. The employee could have insisted on terms different from those agreed to, or continued on with the complaints and applications he had filed. [at para 20]
Cybulski v Adecco Employment Services Limited, 2011 NBQB 181 at para 3.	This contract is subject to provincial legislation regarding termination of employment. The first three months of this contract are considered to be a probationary period.	New Brunswick *Employment Standards Act*, SNB 1982, c E-7.2	Yes	The employment contract could not fix the notice period on termination as the period set out in the *Employment Standards Act* (NB) because the statute itself, by providing that notice was required of "at least" the minimum statutory period, does not fix the notice period. The contract only converts the provisions of the *ESA* to a floor for benefits rather than a ceiling. Accordingly, since the contract failed to fix the notice period with sufficient clarity, the common law presumption of reasonable notice continues to operate. The common law presumption in favour of reasonable notice has not been rebutted with express contractual language to the contrary. [at para 19]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Thomas v EDS Canada Inc, 2011 ONSC 7534 at para 8.	5. I understand and agree that my employment at EDS Canada is not for any specified term. I may terminate the employment relationship on a minimum of two weeks' prior written notice. I also agree and understand that the employment relationship may be terminated by EDS Canada in the following manner in the following circumstances: (a) at any time during my period of probation by notice in writing from EDS Canada to me (my period of probation shall be ninety calendar days or, if ninety calendar days exceeds the maximum period of probation under the laws of the province in which I first report to work, my period of probation shall be such shorter maximum period); (b) at any time by notice in writing from EDS Canada to me for Cause; (c) at any time by notice in writing from EDS Canada to me for default, non-performance or non-observance of any of the terms of provisions of this agreement; or (d) in the event of my death. Any termination of my employment for any of the reasons in paragraph 5(a), 5(b) or 5(c) above shall be effective immediately upon notice in writing being given to me and I understand and agree that EDS Canada will be under no further obligation to provide me with pay in lieu of reasonable notice, severance pay or termination pay, whether under statute or at common law. I also agree and understand that the employment relationship may be terminated by EDS Canada without cause on two weeks' prior written notice or such greater period of notice as is prescribed by statute or regulation or pay in lieu thereof.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	The use of the terms "at least" and "not less than" does not render the provisions of the *Employment Standards Act* (ON) or the termination clause in the agreement ambiguous. To the contrary, these words are designed to ensure that the employer will abide by the provisions of the *ESA* and that the employee will get a minimum notice entitlement. The fact that the employee may get a greater entitlement at the employer's discretion does not render the termination provision vague and ambiguous. That the *ESA* of Ontario is not specifically referred to but rather the words "as is prescribed by statute or regulation" are used does not render the provision unenforceable because of its vagueness. [at paras 23-25]

Wright v Young & Rubicam Group of Cos, 2011 ONSC 4720 at para 4.	The employment of the Employee may be terminated by the Employee at any time on 2 weeks prior written notice (one week's notice during Probationary Term), and by the Company upon payment in lieu of notice, including severance pay as follows: a) during Probationary Term – one week's notice; b) within two years of commencement of employment – four (4) weeks Base Salary; c) after two and up to three years after commencement of employment – six (6) weeks' Base Salary; d) after three but less than five years after commencement of employment – eight (8) weeks' Base Salary; e) five years or more and up to ten years after commencement of employment – thirteen (13) weeks' Base Salary, plus one (1) additional week of Base Salary for every year from 6-10 years of service up to a maximum of 18 weeks; f) after more than ten years but less than 19 years from the commencement of employment – six months' Base Salary; g) After 19 years or more from the commencement of employment – 34 weeks' Base Salary (or eight months) This payment will be inclusive of all notice statutory, contractual and other entitlements to compensation and statutory severance and termination pay you have in respect of the termination of your employment and no other severance, separation pay or other payments shall be made.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	The language of the all-inclusive clause evidences an intention to treat the payment of base pay under the termination provisions as the totality of the employee's entitlements to compensation on termination regardless of whether the contractual provisions meet the statutory minimums or not. As some of the contractual provisions fall short of the statutory minimums, assuming no change in the applicability of severance pay, the agreement is in violation of s 5(1) of the *Employment Standards Act* (ON). The termination provision is void and the presumption that termination will only be upon reasonable notice is not rebutted. [at paras 28, 37]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Dimson v KTI Kanatek Technologies Inc, 2012 ONSC 6556 at para 4.	In addition, KANATEK may terminate this Agreement at its sole discretion for any reason, upon providing Employee all payments or entitlements in accordance with the standards set out in the Ontario Employment Standards Act, as may be amended from time to time.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	The termination provision is acceptable in that it provides expressly for payments or entitlements to the terminated employee in accordance with the standards set out in the *Employment Standards Act* (ON). [at para 20]
Gillespie v 1200333 Alberta Ltd, 2012 ABQB 105 at para 45.	Notice of termination for regular full or part-time employees will for [*sic*] the guidelines as set out by Albert [*sic*] Labour – Employment Standards.	Alberta *Employment Standards Code*, RSA 2000, c E-9	Yes	This clause makes general reference to the *Employment Standards Code* (AB), although it also references "guidelines." "Guidelines" is not specific enough to put the employee on notice that his or her rights are limited to those under Division 8 of the *Code*. The *Code* includes s 3, which preserves the employee's ability to pursue damages for wrongful dismissal at common law. The employer's choice of language does not clearly and unambiguously confine the appellant to the notice provided for in ss 56 and 57(1) of the *Code*. As such, reasonable notice applies. [at para 45]
Musoni v Logitek Technology Ltd, 2012 ONSC 6782 at para 4, aff'd 2013 ONCA 622, leave to appeal refused 2014 CarswellOnt 1911 (SCC).	QLOGITEK or EMPLOYEE shall have the right, to terminate this employment agreement by notice in writing. A fifteen (15) days notice period will be required by the appropriate party, if agreement is terminated.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	Written notice together with two weeks' pay complied with the employer's requirements under ss 54 and 57 of the *Employment Standards Act* (ON). [at para 5]

Stanley v Advertising Directory Solutions Inc, 2012 BCCA 350 at para 43.	Termination clause not included in the decision.	British Columbia *Employment Standards Act*, RSBC 1996, c 113	Yes	The employer claimed that the employee's employment was "at-will." Such a condition of employment is not consistent with the requirements of the *Employment Standards Act* (BC). It is an attempt to have an agreement for less notice than the Act mandates. The employee was entitled to proper notice at common law and any agreement providing for less notice was void. [at para 43]
Stevens v Sifton Properties Ltd, 2012 ONSC 5508 at para 4.	With respect to termination of employment, the following terms and conditions will apply: (a) The Corporation may terminate your employment for what it considers to be just cause without notice or payment in lieu of notice; (b) The Corporation may terminate your employment without cause at any time by providing you with notice or payment in lieu of notice, and/or severance pay, in accordance with the Employment Standards Act of Ontario; (c) You agree to accept the notice or payment in lieu of notice and/or severance pay referenced in paragraph 13(b) herein, in satisfaction of all claims and demands against the Corporation which may arise out of statute or common law with respect to the termination of your employment with the Corporation.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	Termination provisions attempt to "draw the circle" of employee rights and entitlements on termination with an all-encompassing specificity that results in the effective and impermissible exclusion and denial of the benefit continuation rights mandated by the legislation. As such, the "termination provision package" is null and void. [at para 64]
Acadie-Presse Ltée v Blanchard, 2013 NBCA 58 at para 18.	Notice of resignation or of termination must be provided in writing no less than twenty (20) working days in advance.	New Brunswick *Employment Standards Act*, SNB 1982, c E-7.2	Yes	The provision in question is null and void. This is so because the *Employment Standards Act* (NB) requires the employer to give notice of termination no less than four weeks in advance, a period longer than "20 working days." [at para 9]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Bernier v Nygard International Partnership, 2013 ONSC 4578 at para 14, aff'd 2013 ONCA 780.	Termination clause not included in the decision. [The court noted that the agreement provided that employment may be terminated with 30 days' notice by either party.]	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	The notice clause is void because it did not meet the minimum notice requirements contained in the *Employment Standards Act* (ON). The common law standard of reasonable notice applied. Furthermore, there was nothing in the evidence to warrant the conclusion that the parties, had they turned their minds to the subject, would have agreed to substitute for the void contractual term the minimum period of notice required by statute instead of looking to the common law standard of reasonable notice. [at paras 37-39].
Gibson v Alberta, 2013 ABQB 695 at para 5.	This Agreement applies for the term of the Officer's appointment commencing June 12, 2006. Pursuant to section 3(3) of the Act, such employment shall terminate 12 months after polling day for the next general election unless sooner terminated as set out in paragraph 11, or unless the Officer is reappointed.	Alberta *Employment Standards Code*, RSA 2000, c E-9	No	The fixed-term provision of the contract was not an attempt to contract out of the termination notice provisions of the *Employment Standards Code* (AB) or the remedies provided by it, and is therefore not rendered void by s 4. [at para 44] Furthermore, no reason had been suggested to find that a fixed-term contract is contrary to public policy. Fixed-term contracts benefit employees as well as employers. Employers who seek to terminate a fixed-term contract prior to the expiry of the term will not be able to rely on reasonable notice of termination. If the contract does not contain an express provision for early termination, the employer will be required to pay out the employee for the term of the contract. [at para 43]

Lovely v Prestige Travel Ltd, 2013 ABQB 467 at para 45.	The Employee understands and agrees that on or about March 31, 2009, the Corporation may, in its absolute discretion, terminate the employment of the Employee without notice and without reason or cause. If the employment of the Employee is terminated but the Employee has met the overall objective set out in Schedule "A", the Employee shall be entitled to severance in the amount of $85,000, subject to normal and applicable statutory deductions. However, no severance will be provided upon the termination of the employment of the Employee if the Employee has failed to meet the overall objectives as set out in Schedule "A". It is the Corporation's absolute and sole discretion to determine whether the Employee has met the overall objectives set out in Schedule "A".	Alberta *Employment Standards Code*, RSA 2000, c E-9	Yes	The employee did not agree, either orally or in writing, to the termination term and the employer did not produce a signed employment agreement containing the term. Regardless, the no-notice termination term is obviously less than the minimum standard recorded in s 56(a) and s 57(1) of the *Employment Standards Code* (AB). The termination provision is therefore unlawful and unenforceable. [at paras 99-102]
Meagher v Citco (Canada) Inc, 2013 NSSM 2 at para 5.	In the unhappy event of cessation of your employment by Citco, other than in the case of just cause for termination, you will be provided with the minimum notice required by the Nova Scotia Labour Standards Code. You agree that such notice, or payment in lieu thereof, fully satisfies any and all claims, causes or action, complaints that you might have against Citco, its subsidiaries, affiliates and each of their respective officers, directors, employees, servants, agents and assigns, jointly and severally, respecting termination notice, pay in lieu thereof, severance pay or damages from wrongful dismissal.	Nova Scotia *Labour Standards Code*, RSNS 1989, c 246	No	The contract is enforceable. The employer met the minimum standards as allowed pursuant to the contract of employment with the employee and based on the circumstances of the employee's situation, such as a short period of time working with the employer, the relatively young age of the employee, and the possibility of other employment, the notice period was not unconscionable. [at para 6].

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Brown v Utopia Day Spas and Salons Ltd, 2014 BCSC 1400 at para 5.	4. The Employee shall be entitled to statutory holidays in accordance with the provisions of the Employment Standards Act. . . . 8. The Employer may terminate the Employment of the Employee without cause or notice in accordance of [*sic*] the Employment Standards Act of British Columbia . . .	British Columbia *Employment Standards Act*, RSBC 1996, c 113	No	The parties intended to incorporate the BC *Employment Standards Act*'s statutory terms for notice and wages instead of notice. The minor grammatical errors contained in the clause do not create a material ambiguity. The termination clause refers to the *ESA*, a reference that serves to incorporate its termination provisions into the parties' termination clause. [at para 22]
John A Ford & Associates Inc v Keegan, 2014 ONSC 4989 at para 12.	Termination clause not reproduced in decision. [The court noted that the agreement provided that it would be in effect for one year, with an automatic one-year renewal, unless either party terminated the agreement before that time. Either party could terminate the agreement at any time, by the employee giving Training Services 60 days' notice, or by Training Services giving the employee 30 days' notice.]	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	The notice period in the agreement was not void from the outset, and rebuts the presumption existing at common law that the employee was entitled, if terminated without cause, to "reasonable notice" of the termination. [at para 152] The termination clause did not violate the *Employment Standards Act* (ON). [at para 152]

				An employer who drafts an agreement prescribing a fixed notice period, rather than one that increases with the employee's years of service, and who does not negotiate a new employment agreement when the employee's years of service entitles him/her to a longer period of notice, assumes the risk that the clause will become invalid at that point and that the common law will prevail to determine the period of notice required. It is only invalid at that point and not invalidated from when the contract was initially executed. [at para 150]
Miller v ABM Canada Inc, 2014 ONSC 4062 at para 11.	You are not entitled to any notice of the termination of your employment or salary in lieu of notice where your employment is terminated for any breach of this Agreement or any other cause deemed sufficient in law or in any other circumstances in which no notice or salary in lieu thereof is required by law. Subject to the provisions of applicable legislation, probationary employees may be terminated at any time without notice or cause. Regular employees may be terminated at any time without cause upon being given the minimum period of notice prescribed by applicable legislation, or by being paid salary in lieu of such notice or as may otherwise be required by applicable legislation. Should you resign your employment you are not entitled to any payment and shall give A.B.M. Canada at least 30 days' notice of such resignation.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	A reading of the termination clause leads to the result that the 6% pension contribution and the car allowance are not included in the amounts to be paid during the period of notice, contrary to the *Employment Standards Act* (ON). [at para 47] The termination provision is adequate in terms of how it purported to stipulate the length of the notice period. It breaches the statute in that it does not provide for the payment of benefits during the period of notice, or in the alternative, is ambiguous. [at para 47] The termination clause in the within contract fails to comply with the provisions of the *ESA* and for that reason is null and void and incapable of refuting the common law presumption. [at para 47]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Miller v Convergys CMG Canada Limited Partnership, 2014 BCCA 311 at para 3.	Termination – Convergys may terminate your employment for cause, or by providing you with notice, or pay in lieu of notice in accordance with the Employment Standards Act of British Columbia. Severability – Each paragraph of this agreement and the attached Schedules are separate and distinct covenants, severable one from the other and if such covenant is determined to be invalid or unenforceable, such invalidity or unenforceability shall attach only to the covenant to the extent of such invalidity or unenforceability, and all other covenants shall continue in full force and effect.	British Columbia *Employment Standards Act*, RSBC 1996, c 113	No	The severability clause in the agreement is unambiguous. It stipulates that the units of the agreement are paragraphs, and each paragraph is a separate and distinct covenant severable from the others. In the event a paragraph is invalid, it provides that the offending provision should be read down to the extent of the invalidity and that all other provisions will remain in full force and effect. The clear intent is that if one clause becomes invalid, the balance of the contract should remain enforceable to the extent possible. [at para 43] The trial judge did not err in concluding that the probation clause could be severed from the agreement. Its removal has no impact on the termination clause, the balance of the contract, or the employment relationship. [at para 45]

Paquette c Quadraspec Inc, 2014 ONCS 2431 at para 39.	13 (b) The Corporation may terminate your employment without cause at any time by providing you with notice or payment in lieu of notice, and/or severance pay, in accordance with the Employment Standards Act of Ontario.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	The court reasoned that an employer should not expect a court to imply terms into a contract that it drafted in circumstances where the intent of the contract was to limit an employee's notice entitlement to that found in the *Employment Standards Act* (ON). The court found that ss 57 and 61 of the *ESA* are not complex and that it is unreasonable to expect terminated employees to continue to argue about their meaning. [at para 43]
Simpson v Global Warranty Management Corp, 2014 ONSC 724 at para 8.	As discussed previously with you, the Employer also has a specific severance policy [*sic*]. In this regard, unless an employee is terminated for cause, an employee's employment may be terminated at the sole discretion of the Employer and for any reason whatsoever upon providing the employee with one (1) weeks notice or pay in lieu thereof, subject to any additional notice, pay in lieu thereof or severance that may be required to meet the minimum requirements of the Employment Standards Act, R.S.O. 1990, c. E14, as amended from time to time.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	The employment contract provisions in the present case limiting damages are valid for similar reasons as expressed in both *Machtinger* and *Roden*. [at para 65] Reading the employment contract as a whole and considering the circumstances at the time the employment contract was entered into, the court held that the purpose of the limitation clause was to limit the employee's entitlement to damages to the minimum provisions contained in the *Employment Standards Act* (ON) when the dismissal was without cause. There is no ambiguity and the employee signed the employment contract voluntarily and understood what he was signing. [at para 77]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Allison v Kancorin Enterprises Ltd, 2015 ABPC 139 at para 7.	Either party may terminate this contract on one day's notice within a three-month probation period ending September 19, 2009. On or after September 20, 2009, either party requires two week's termination notice.	Alberta *Employment Standards Code*, RSA 2000, c E-9	Yes	The notice provision is void. "[T]he employment contract is in violation of the [*Employment Standards Code* (AB)]. It provides for 2 weeks of termination notice (or pay in lieu of notice) regardless of the length of employment once the probation period has expired. Pursuant to section 56 of the *Code*, 2 weeks of notice is the minimum notice required of an employer terminating an employee who has been employed by the employer for 2 years or more but less than 4 years. It is not the minimum notice required for an employee who has been employed for 4 years or more." [at para 13] Without a legally enforceable notice provision in a contract of employment, common law principles dictate that an employee is entitled to reasonable notice of termination. [at para 17]

Carpenter v Brains II*, *Canada Inc, 2015 ONSC 6224 at para 9, aff'd [2016] OJ No 2928 (Div Ct).	In the event the [*sic*] termination of employment, except where such termination is for just cause, the company will provide you with notice (or salary in lieu thereof), and severance pay [if applicable] pursuant to its obligations as an employer and successor employer to NexInnovations Inc. under Employment Standards legislation, as amended. You will also be paid all salary amounts that may have accrued to you to the date of termination. This includes all your entitlements to both termination pay and severance pay under the applicable Employment legislation [*sic*] as well as any outstanding vacation or statutory holiday pay. You agree and acknowledge that you will not be entitled to any other compensation, under common law or equity, by reason of the termination of your employment by the Company. At all times, should the requirements under statutory law, or successor legislation be amended, the Company will provide you with your entitlements under such legislation in lieu of your entitlements under this Agreement.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	The contract in this case purports to exempt the employer from paying anything other than salary. As such, it amounts to a waiver of the employee's rights under s 61(1)(b) of the *Employment Standards Act* (ON). Pursuant to s 5(1) of the *ESA*, any contracting out of the statute is void. The elimination of the employee's common law right to sue for damages is unenforceable. [at para 18]
Howard v Benson Group Inc, 2015 ONSC 2638 at para 9, rev'd 2016 ONCA 256 (with respect to another issue).	Employment may be terminated at any time by the Employer [the defendant] and any amounts paid to the Employee [the plaintiff] shall be in accordance with the Employment Standards Act of Ontario. [*sic*]	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	According to the Superior Court, the language used in the termination clause is "sufficiently ambiguous as to the true extent of the employee's entitlement" under the *Employment Standards Act* (ON), and as such the ambiguity must be construed against the employer in light of the power imbalance that exists between an employer and employee. [at para 58].

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
King v Cannon Design Architecture Inc, 262 ACWS (3d) 941 at paras 10-11, [2015] OJ No 7063 (Ont Sup Ct J).	Either you or Cannon Design may terminate your employment for cause or upon notice set out as follows without cause. You may resign upon giving the firm a minimum of two (2) week's written notice, or notice as defined in the officer agreement, whichever is greater. The firm may terminate your employment without cause upon providing to you the greater of the notice required in your Officer's Agreement, or four weeks notice, or payment of four weeks base salary in lieu of notice. It is agreed that in the event of termination of employment, neither you, nor the firm shall be entitled to any notice, or payment, in excess of that set out in this letter. If the Employment Standards Act or any other applicable legislation requires a period of notice that is greater than what is set forth in this letter, the firm shall comply with that legislation and you shall be entitled to receive the notice of termination prescribed therein. Please take the appropriate time to review the terms of this agreement. We recommend that you seek advice, to include legal advice that may be necessary. Officer Agreement 3.a. Employee and the Company agree that each shall give the other two (2) months written notice of termination of the employment relationship. This can be modified or waived by mutual consent, in writing, and such consent shall not be unreasonably withheld.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	There is nothing ambiguous about the agreement. [at para 30] The parties reached a clear agreement about the amount of base salary to be paid and the length of notice that would be paid upon any termination without cause. [at para 30] The clause is more reasonably regarded than not as fully compliant with the *Employment Standards Act* (ON) and is clearly enforceable. [at para 21]

	[The court also noted as follows: "3b of the Officer Agreement provides for a longer notice period once the plaintiff has achieved a minimum of shares or DS Units. Neither party claims that 3b applies here."]			
Luney v Day & Ross Inc, 2015 ONSC 1440 at para 7.	If your employment is terminated for other than 'just cause', or if a competent tribunal should rule that your termination was 'unjust', you will be entitled to two weeks [*sic*] notice or pay in lieu of notice and a severance of one week's regular pay for each full year of service, less statutory deductions. The payments are not to exceed the equivalent of 15 weeks [*sic*] pay. It is understood and agreed that in the event the aforesaid notice and severance entitlements are not in conformity with the notice and severance provisions prescribed in the Canada Labour Code or other similar legislation, the statutory minimum's [*sic*] shall apply and be considered reasonable notice and severance. Discussion of individual salaries may be grounds of dismissal. The foregoing notice and severance payments will satisfy any and all obligations to you by Day & Ross Inc. or any affiliated company arising out of or in any way connected with the termination of your employment, including any obligations arising under the Canada Labour Code and similar legislation for notice, severance pay or reinstatement.	Federal *Canada Labour Code*, RSC 1985, c L-2	No	Affirmed the motion court's finding that the termination provision rebutted the presumption of reasonable notice. "The language is clear and cannot be read as confined to legislative entitlements. The use of the phrase 'any and all' is broad enough to cover the employer's obligations at common law and the word 'including' makes it clear that these obligations are not limited to the ones arising under statute." [at para 12]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Michela v St Thomas of Villanova Catholic School, 2015 ONSC 15 at para 11.	Notwithstanding any other provision of this Agreement the parties agree that the Teacher's employment under this Agreement may be terminated at any time by VC at its sole discretion and for any reason whatsoever upon providing the Teacher with one month's written notice or pay in lieu thereof less standard employee deductions, subject to any additional notice or pay in lieu that may be required to meet the requirements of the Employment Standards Act R.S.O. 1990, as amended from time to time. The Teacher further understands and agrees that the notice requirements contained in this clause constitute a material inducement to the Teacher, and that the VCS would not enter into this Agreement absent such inducement.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	These are not fixed-term contracts. They are contracts of an indefinite term. [at para 64] The authorities are unanimous in holding that provisions of an employment agreement that are ambiguous or even unclear are to be construed in favour of the employee. [at para 63] As such, the common law applies. The employee is owed reasonable notice or payment in lieu of that notice. [at para 64]

Moarbes v Heka Electronics Inc, 2015 NSSM 2 at para 35.	The following terms of termination apply after the first six months of employment: Moarbes is not entitled to any notice of termination of employment, nor to any salary or other payment in lieu of notice, where Moarbes's employment is terminated by Heka for breach of this Offer of Employment by Moarbes or for any other cause deemed sufficient in law, or in any other circumstances in which no notice or salary in lieu thereof is required by law. The employment of Moarbes, regardless of his position, responsibility or authority, may be terminated by Heka at any time without cause by giving Moarbes seven days advance notice of termination for each complete year or partial year of employment or by paying Moarbes's salary in an amount equal to that he would have earned during such a period of notice. Any unused annual leave will be compensated. No unused Well Leave will be compensated. If this provision is in conflict with the Labour Standards Code of Nova Scotia, or any successor legislation, then that legislation will override this specific provision. Moarbes agrees that his rights to any notice of termination of his employment or to any salary or payment in lieu thereof are limited to those provided in this Offer of Employment.	Nova Scotia *Labour Standards Code*, RSNS 1989, c 246	No	The revised Offer of Employment is not null and void. [at para 70] The revised Offer of Employment does not violate the statutory minimums of advance notice of termination set out in s 72(1) of the *Labour Standards Code* (NS) when it comes to a "without cause" termination. [at para 60] Even if the resignation provision were null and void from a legal perspective, then that provision and that provision alone is null and void. It is easily severable from the balance of the revised Offer of Employment, including the rest of the termination provisions. [at para 65]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Riskie v Sony of Canada Ltd, 2015 ONSC 5859 at para 49.	TERM: The term of this Agreement commences July 28, 2014 and ends on March 31, 2015 ("Term"). The term is for an eight (8) month period commencing July 28, 2014, and either party may terminate this employment contract upon thirty (30) days prior written notice to the other party, on a without cause basis.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No (although one sentence in clause was void)	The fixed-term provision of the employment agreement which provided for termination on March 31, 2015 is not null and void pursuant to the *Employment Standards Act* (ON). [at para 65] The "fixed term" and the "early termination" provisions are logically and textually independent of each other. The employment agreement is neither incomplete nor incoherent in the absence of one or the other of those two sentences. [at para 64] *Machtinger* does not create any sort of hard-and-fast rule that any time there is an instance of an invalid attempt to contract out of the *ESA* that nothing short of the entire offending paragraph can be excised. [at para 62] The only "clause" or "term" that is null and void is the second sentence of the "Term" paragraph which permitted optional early termination on 30 days' notice. [at para 63]

Oudin v Centre Francophone de Toronto, 2015 ONSC 6494 at para 35, aff'd 2016 ONCA 514.	This agreement may be terminated by the CFT without prior notice or compensation for the reasons set out in section 4 of this agreement. The CTF may also terminate this agreement for any other reason by giving the employee fifteen (15) days' notice or the minimum notice required under the Employment Standards Act, or by paying them monetary compensation equal to the wage they would have been entitled to receive during the notice period (after deduction and/or withholding at source), at the sole discretion of the CTF.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	The termination clause was upheld. The basis for upholding the termination of employment clause was to give effect to a "fair construction" or "reasonable" interpretation of the clause in order to further the intentions of the parties. [at paras 51-52]
Goldsmith v Sears Canada Inc, 2015 ONSC 3214.	Termination clause not reproduced in decision.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	The court rejected the argument that the termination provision of the employment agreement violated the *Employment Standards Act* (ON). The court rejected the argument that the employment agreement could potentially result in a violation of the *ESA* and assessed whether there had been an actual violation of the *ESA*. [at para 39]
Bellini v Ausenco Engineering Alberta Inc, 2016 NSSC 237 at para 2.	Although the Company anticipates a long term employment relationship, our business is subject to economic factors which sometimes necessitates a reduction in workforce. We have therefore adopted a policy of specifying termination conditions in our employment letters. If it becomes necessary for us to terminate your employment for any reason other than cause, your entitlement to advance working notice or pay in lieu of such notice, will be in accordance with the provincial employment standards legislation.	Nova Scotia *Labour Standards Code*, RSNS 1989, c 246	Yes	The right to common law notice prevails. The provision is at best ambiguous as to whether the parties intended the statutory minimum to apply, or simply whether the applicable notice would be consistent with the *Labour Standards Code* (NS). It would not be difficult for an employer to draft a termination clause that leaves no doubt as to the parties' intention to oust common law notice. [at para 43]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Garreton v Complete Innovations Inc, 2016 ONSC 1178 at paras 5-6.	The agreement provided, among other things, that it could be terminated immediately without notice or payment in lieu thereof for a number of enumerated events including failure to discharge duties to CI and "for cause under common law or statute law or for breach of the terms of the Agreement." The agreement further provided: Otherwise Complete Innovations Inc. may at any time terminate this agreement by providing the Employee with (1) one week notice if their duration of continuous employment with the Company is more than 3 months but less than 1 year. (2) weeks prior written notice of intention to terminate if the Employee duration of continuous employment with the Company is more than 1 year but less than (3) years. If the duration of continuous employment with the Company is more than 3 years each additional year will entitle the Employee to (1) one additional week of notice to a maximum of 8 weeks . . . Complete Innovations Inc. shall maintain on your behalf your employee benefits for a period of not less than the period required by applicable statute.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	The termination provisions of the agreement respecting notice are void and unenforceable. [at para 43] The employment contract must be considered at the time it is executed. If the termination provision is not onside with notice provisions and severance provisions (if applicable) of the *Employment Standards Act* (ON) at the outset, then it is void and unenforceable. Potential violation in the future is sufficient. [at para 27]

Pisko v Trican Well Service Ltd, 2016 ABQB 500 at para 6.	Clause 9: Compensation – your base salary will be $110,652.00 per year ("Base Salary"). In addition, you will receive a Rotational Assignment Allowance ("RAA") of 25% of your base salary in accordance with the Rotational Policy, bringing your total compensation to $138,315.00 per year, less applicable statutory deductions. The RAA percentage is subject to change in Trican's sole discretion. Clause 14: Termination – In the event that this Agreement or your employment is terminated by Trican after completion of your probationary period, for any reason other than cause, Trican will provide you with either: (i) sixty (60) calendar days notice of such termination, i.e. the equivalent of one full rotation; or (ii) a severance payment equivalent to sixty (60) calendar days of your Base Salary, excluding the RAA and less applicable statutory deductions; or (iii) a combination of notice and Base Salary, excluding the RAA and less applicable statutory deductions, equivalent to sixty (60) calendar days total. Clause 19: Severability – If any provision of this Agreement is determined to be void or unenforceable in whole or in part, it will not be deemed to affect or impair the validity of any other covenant or provision of this agreement.	Alberta *Employment Standards Code*, RSA 2000, c E-9	No	There are no issues with respect to the notice period provision itself, and there is no attempt to contract out of the prescribed minimum notice periods under the *Employment Standards Code* (AB). The *Code* calls for a notice period of at least 56 days on these facts. The 60 days that is provided for in the employment contract is more than the required minimum. [at para 19] There was no suggestion in the evidence or argument that anyone was attempting to intentionally avoid the provisions of the *Employment Standards Code* in the drafting of the payment in lieu of notice provisions. [at para 29] It is sufficient for the employer to simply have paid more than the correct amounts without the exclusion of the RAA as was done by the employer. [at para 35]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Stangenberg v Bellamy Software, 2016 ABQB 160 at para 12.	In the event that Sylogist terminates your employment without cause, Sylogist will provide the notice or pay in lieu of notice required by the Alberta Employment Standards Code or other applicable legislation. You are not entitled to any other termination notice, pay in lieu of notice, or other benefits.	Alberta *Employment Standards Code*, RSA 2000, c E-9	No	The provision is enforceable. The provision is clear, express and unambiguous, and "it is difficult to think of wording that might make the employer's intention any clearer." [at para 66]
Singh v Qualified Metal Fabricators Ltd, [2016] OJ No 4219 (Ont Sup Ct J), CCEL (4th) 308 at para 9.	Three months to one year – one-week notice. One year to three years – two weeks' notice. Three years and over – one week notice for each year of employment to a maximum of eight weeks.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	The agreement breaches the *Employment Standards Act* (ON) and is therefore unenforceable because the language is ambiguous. "Applying the principle of *contra proferentem* . . . [the provision] breaches the statute." Under the agreement a one-year employee would be entitled to one week's notice only, whereas the *ESA* provides an employee who has one year or more with at least two weeks' notice. [at para 20]
Nutting v Franklin Templeton Investments Corp, 2016 ABQB 669 at para 5.	Additionally, your employment may be terminated at any time without cause upon the provision by FTIC of the minimum notice of termination, or pay in lieu of notice, benefits and, if applicable, severance pay prescribed by applicable employment standards legislation in the province in which you are employed. The provision of such notice or pay in lieu of notice, benefits and severance pay constitutes full and final satisfaction of all rights or entitlements which you may have arising from or related to the termination of your employment (including notice, pay in lieu of notice, severance pay, etc.), whether pursuant to contract, common law, statute or otherwise.	Alberta *Employment Standards Code*, RSA 2000, c E-9	No	The court found that the parties intended to oust the common law notice period. Because the clause clearly and unambiguously limits entitlement to the statutory minimum upon dismissal, the common law notice period is displaced. [at para 39]

Cook v Hatch Ltd, 2017 ONSC 47 at para 4.	The Company's policy with respect to termination is that employment may be terminated by either party with notice in writing. The notice period shall amount to one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	It is unnecessary to explicitly address the employer's obligation under the *Employment Standards Act* (ON). Provided the termination clause does not attempt to contract out of the employer's obligation to provide benefits, the termination clause will be upheld. [at para 45]
Wood v Fred Deeley Imports Ltd, 2017 ONCA 158 at para 3.	[The Company] is entitled to terminate your employment at any time without cause by providing you with 2 weeks' notice of termination or pay in lieu thereof for each completed or partial year of employment with the Company. If the Company terminates your employment without cause, the Company shall not be obliged to make any payments to you other than those provided for in this paragraph, except for any amounts which may be due and remaining unpaid at the time of termination of your employment. The payments and notice provided for in this paragraph are inclusive of your entitlements to notice, pay in lieu of notice and severance pay pursuant to the *Employment Standards Act, 2000*.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	The termination clause excluded the employer's obligation to contribute to the employee's benefit plans during the notice period, and also did not satisfy the employer's obligation to pay severance. On either ground the clause is unenforceable. [at para 79]
Nemeth v Hatch Ltd, 2017 ONSC 1356 at para 2, rev'd in part 2018 ONCA 7.	The notice period shall amount to one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation.	Ontario *Employment Standards Act*, 2000, SO 2000, c. 41	No	The termination clause is enforceable because it reflects the clear intention of the parties to rebut the presumption of reasonable notice. It is not ambiguous and does not go below the statutory minimum. Therefore it is enforceable. [at para 37]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Covenoho v Pendylum Ltd, 2017 ONCA 284 at para 2.	2.1 The term of this Agreement will commence on the date of this Agreement and will continue in full force and effect unless the Agreement is terminated as follows: (a) immediately by PENDYLUM providing written notice to you if you violate or fail to honor any of these provisions of this Agreement or fail to perform your duties as set out in Appendix A in a satisfactory manner as determined by PENDYLUM (known as Cause); or if the PENDYLUM Client to which you have been contracted terminate[s] its contract with PENDYLUM for your services; OR (b) by either party providing written notice of at least two (2) weeks to the other. 2.2 In the event of termination, we will have no liability to you, save and except to pay any accrued and earned compensation up to and including the date of termination.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	The termination clause is void in that it purports to allow the employer to terminate, without cause, the employee without notice in the event that she had been continuously employed for more than three months. The common law therefore applies and the employee is entitled to notice equivalent to the remainder of the fixed-term employment contract. [at para 7]
Inayat v Vancouver Career College (Burnaby) Inc, 2017 ABPC 124 at para 6.	The Instructor is not entitled to any additional notice or payment in lieu of notice in excess of what is required to be given or paid under the provisions of the *Alberta Employment Standards Code* [*sic*] and the *Employment Standards Regulation*, as amended.	Alberta *Employment Standards Code*, RSA 2000, c E-9	No	The term is clear and unambiguous. While it does not specifically state the word "minimum," it states a clear equivalent. [at para 22]

Abridean International Inc v Bidgood, 2017 NSCA 65 at para 61.	Abridean may terminate your employment at any time without cause by giving you the following written notice, or pay in lieu of notice, according to your length of employment service in accordance with the following table (based on a start date of August 28, 2000): Service Notice Up to 2 years 4 weeks Every year thereafter 2 additional weeks of notice to a maximum of 26 weeks all inclusive	Nova Scotia *Labour Standards Code*, RSNS 1989, c 246	Yes	Pursuant to the *Labour Standards Code* (NS), the claimant had a statutory right of reinstatement as a "tenured" employee. His contract with the employer permitted termination with notice. That contract violated the *Code* and was therefore void. The court upheld the Labour Board's determination that reinstatement would not be an appropriate remedy in this case, as well as its decision to award the employee what he was owed at common law. [at para 64]
Tsai v Atlas Anchor Systems (BC) Ltd, 2016 BCPC 406 at para 12.	Until successful completion of the probationary period, the Employer shall be entitled to terminate your employment for cause at any time without notice or payment of compensation in lieu. In addition, after completion of the probationary period, the Employer may terminate your employment at any time without cause by providing you with such notice or severance pay as may be required by applicable Employment Standards Legislation. You expressly agree that the Employer shall be under not further obligation to you. You also agree to provide at least four (4) weeks advance notice of your intention to resign.	British Columbia *Employment Standards Act*, 1996 RSBC, c 113	No	The provision is enforceable. The contract properly incorporated provisions of the *Employment Standards Act* (BC) and the parties agreed to be bound by these terms. There was no evidence of unconscionability. [at para 31]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
North v Metaswitch Networks Corp, 2017 ONCA 790 at para 5.	9. Termination of Employment (c) Without Cause – The Company may terminate your employment at any time in its sole discretion for any reason, without cause, upon by [*sic*] providing you with notice and severance, if applicable, in accordance with the provisions of the Ontario Employment Standards Act (the "Act"). In addition, the Company will continue to pay its share all [*sic*] of your employee benefits, if any, and only for that period required by the Act. The reference to notice in paragraphs 9(b) and (c) can, at the Company's option, be satisfied by our provision to you of pay in lieu of such notice. The decision to provide actual notice or pay in lieu, or any combination thereof, shall be in the sole discretion of the Company. All pay in lieu of notice will be subject to all required tax withholdings and statutory deductions. In the event of the termination of your employment, any payments owing to you shall be based on your Base Salary, as defined in the Agreement.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	The clause here was quite obviously void because it permitted a termination on the payment of "base salary," with the effect of excluding payment of commission to which the employee was entitled, and it therefore contravened the *Employment Standards Act* (ON). [at paras 10-12] The clause could not be saved by severing only the offending sentence that referred to using only base salary to calculate termination in pay in lieu of notice. [at para 25]
Nogueira v Second Cup, 2017 ONSC 6315 at para 3.	If the Second Cup terminates your employment, it will comply with its obligations under the employment standards legislation in the province in which you work (the "Employment Standards Act").	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	Confirming that one will "comply" with the *Employment Standards Act* (ON) is not inconsistent with also providing common law notice. The interpretation that preserves common law entitlement to reasonable notice is preferable. [at paras 8, 13, 21]

Farah v EODC Inc, 2017 ONSC 3948 at para 13.	At any time, following the conclusion of the Probationary Period, the Employer may terminate the Employee without just cause simply upon providing him/her with the entitlements prescribed in the Employment Standards Act, 2000 ("the Act") or any amendments thereto. The Employee hereby acknowledges that he/she has had the opportunity to review the relevant portions of the Act and/or to consult with legal counsel about their impact on his/her current entitlements upon termination of his/her employment.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	The termination clause is not ambiguous and sufficiently rebuts the common law presumption of termination only upon reasonable notice, effectively limiting the notice requirements to those as set out in the *Employment Standards Act* (ON). [at paras 53-62]
Lopez v EMD Inc (Canada), 2017 ONSC 7716 at para 12.	EMD Serono may terminate your employment without cause upon giving you the applicable statutory notice, termination pay and/or severance pay to which you may be entitled. . . . You confirm that the termination provisions above, and specifically, the notice and pay in lieu of notice provisions above [*sic*] are fair and reasonable and are necessary to protect both parties. You further agree that, upon termination of your employment under the provisions of this Agreement, you will not be entitled to any additional notice, pay in lieu of notice or compensation whether under statute, at common law or otherwise. Therefore, you agree that upon termination of your employment under the provisions of this Agreement, you will have no action, cause of action, claim, complaint or demand against EMD Serono or any other person as a consequence of such termination and that you will not file or commence any such action, cause of action, claim or demand against EMD Serono.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	The lengthy second paragraph providing that the *Employment Standards Act* (ON) provisions constitute the only amounts to be received was held to clearly articulate that the *ESA* was all that this employee would receive. Decisions that were not based on such language were distinguished, while decisions involving agreements that had some of that language and upholding the clause as a valid contracting out of the common law, were relied upon. [at paras 36-39]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Hampton Securities Limited v Dean, 2018 ONSC 101 at para 96.	In the event Hampton wishes to terminate your employment without cause they may do so by paying you the minimum amounts required pursuant to the Employment Standards Act of Ontario in force at the time of termination; no further compensation shall or will be provided. You agree by signing this agreement that such amounts are the total compensation you will receive if terminated without cause.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	The reference to "paying you" certain "amounts" was an attempt to provide for monies only, and no benefits, on termination. This was an impermissible contracting out of the *Employment Standards Act* (ON) requirement to maintain benefits coverage during the notice period. [at paras 105-108]
Bergeron v Movati Athletic (Group) Inc, 2018 ONSC 885 at para 2, aff'd 2018 ONSC 7258 (Div Ct).	Movati Athletic Inc. may terminate your employment without cause at any time during the term of your employment upon providing you with notice or pay in lieu of notice, and severance, if applicable, pursuant to the Employment Standards Act, 2000 and subject to the continuation of your group benefits coverage, if applicable, for the minimum period required by the Employment Standards Act, 2000, as amended from time to time.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	Had the word "only" been added to the clause, it would have been upheld. As written, the clause is not clear enough to displace the common law. [at para 24]

Holm v AGAT Laboratories Ltd, 2018 ABCA 23 at para 4.	2(2) In the event we wish to terminate your employment without just cause, we agree that we will give you notice of the termination of your employment, or at our absolute discretion, we will pay you, in lieu of such notice, a severance payment equal to the wages only that you would have received during the applicable notice period. This will be in accordance with the provincial legislation for the province of employment. 2(3) You should realize that other than the foregoing notice, or at our absolute discretion wages only in lieu of such notice, you will not be entitled to any further compensation or notice arising out of the termination of your employment by us without just cause. . . . 2(5) You understand and agree that other than the severance set out in paragraph 2(2) above, you shall not be entitled on the termination without just cause of your employment by AGAT to any other claim or compensation, damages, payment in lieu of notice, further notice of termination, or any other claim or compensation whatsoever, whether arising out of your employment by AGAT or the termination without just cause of your employment by AGAT. 2(6) In the event of the termination of your employment by AGAT for just cause, should a court of competent jurisdiction find that AGAT in fact did not have just cause, you further agree that you will not have any claim against AGAT greater than the severance payment referred to in paragraph 2(2) herein.	Alberta *Employment Standards Code*, RSA 2000, c E-9	Yes	The clause does not limit the employee's claim to common law entitlements. The clause was at most ambiguous and lacked the explicit, restrictive language necessary to displace the common law. [at paras 22-24, 36]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Ariss v NORR Limited Architects and Engineers, 2018 ONSC 620 at para 46.	[The Employer] will provide notice of termination in writing to the employee in accordance with the [*ESA*]. [The court also noted that this provision was accompanied by a table that delineated the employee's award for various lengths of service.]	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	The provision itself, as well as the table specifically outlining the employee's entitlements on termination, is unambiguous. [at para 79]
Amberber v IBM Canada Ltd, 2018 ONCA 571 at para 6.	If you are terminated by IBM other than for cause, IBM will provide you with notice or a separation payment in lieu of notice of termination equal to the greater of (a) one (1) month of your current annual base salary or (b) one week of your current annual base salary, for each completed six months worked from your IBM service reference date to a maximum of twelve (12) months of your annual base salary. This payment includes any and all termination notice pay, and severance payments you may be entitled to under provincial employment standards legislation and Common Law. Any separation payment will be subject to applicable statutory deductions. In addition, you will be entitled to benefit continuation for the minimum notice period under applicable provincial employment standard legislation. In the event that the applicable provincial employment standard legislation provides you with superior entitlements upon termination of employment ("statutory entitlements") than provided for in this offer of employment, IBM shall provide you with your statutory entitlements in substitution for your rights under this offer of employment.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	The clause is unambiguous. The trial judge erred in dividing the provision into its constituent clauses and evaluating it accordingly. The correct approach was to interpret the provision as a whole. When this was done, it was clear that the statutory minimum would only apply if it was greater than what was offered by the stated formula. [at paras 63-66]

Andros v Colliers Macaulay Nicolls Inc, 2018 ONSC 1256 at para 13.	4. The Company may terminate the employment of the Managing Director by providing the Managing Director the greater of the Managing Director's entitlement pursuant to the Ontario Employment Standards Act or, at the Company's sole discretion, either of the following: a. Two (2) months working notice, in which case the Managing Director will continue to perform all of his duties and his compensation and benefits will remain unchanged during the working notice period. b. Payment in lieu of notice in the amount equivalent of two (2) months Base Salary.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	The provision was unenforceable because it was ambiguous – in particular, it failed to provide for the minimum of severance and continuation of benefits as set out in the *Employment Standards Act* (ON). [at paras 32-38].
King v DST Systems Inc, 2018 ONSC 533 at para 2.	Employee could be terminated without cause "with such notice (or pay in lieu thereof) and severance pay as may be prescribed by the ESA (or such other applicable legislation as may then be enforced)" and have "no other entitlements in that regard."	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	The phrase "no other entitlements in that regard" negates the continuation of the employee's benefits because the employee received additional benefits that went beyond salary and severance. The court held that this was in violation of the *Employment Standards Act* (ON).
Tomie v May, 2018 NSSM 70 at para 3.	The Employee's employment may be terminated by the Employer at any time, without cause, upon providing to the Employee all accrued and unpaid wages, benefits and vacation pay and accrued entitlements in law, along with the minimum entitlements under the *Labour Standards Code*, Nova Scotia. The Employee agrees that the minimum entitlements are fair and reasonable.	Nova Scotia *Labour Standards Code*, RSNS 1989, c 246	No	Although courts have "ben[t] over backwards" to void termination clauses that contain any ambiguity, none existed here. While the language used may not have been the most clear, it is unambiguous in its intended meaning – that the minimum entitlements under the *Labour Standards Code* (NS) are a fair and reasonable measure of the employee's entitlement. Furthermore, the employee knew, or ought reasonably to have known, what he was agreeing to. [at paras 15-18]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
Raposo v CA Canada Company, 2018 ONSC 4226 at para 10.	After the successful completion of your probationary period, CA may terminate your employment for any reason whatsoever, by satisfying the notice and severance pay requirements, including the requirements with respect to the continuation of contributions to benefit plans, in the applicable employment standards legislation, unless your termination is for cause. No other notice or severance, whatsoever, either at civil-law, common-law or under statute, shall be payable by CA to you. This provision will continue to be in effect regardless of the duration of your employment and despite any changes that may occur in your compensation, job functions, responsibilities or title, so long as you continue to hold a position with CA or its related companies.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	The termination provision is merely "silent" on the question of benefits, as opposed to actively negating the payment of such benefits (as was the case in *Wood*). The termination provision is not ambiguous nor does it fall short of the *Employment Standards Act* (ON) minimum. Therefore, it is not void. [at paras 46-47]

Deak v GreenMantra Recycling Technologies Ltd, 2018 ONSC 3715 at para 25.	[W]ritten working notice of termination to the employee shall be two (2) weeks per completed year of service with a minimum of two (2) weeks' notice and a maximum of fourteen (14) weeks' notice, or at the option of the Company by providing the Employee with pay in lieu of such notice or any combination of working notice and pay in lieu, at the Employer's sole discretion. [The clause goes on to provide that the calculation of the pay in lieu of notice shall be based exclusively on the Employee's base salary.] There shall be no other forms of remuneration, including without limitation, any bonus payments or stock options to which the Employee might otherwise be entitled shall be considered in calculating Pay in Lieu, nor shall they be paid to the Employee in respect of Notice Period.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	No	The clause is merely silent on the question of benefits payments. It does not seek to limit any benefits short of the *Employment Standards Act* (ON) minimum. As such, it is not void. [at para 27]

Case Name	*Termination Clause*	*Jurisdiction & Statute*	*Clause Void or Not Enforced?*	*Court's Decision/Reasoning*
McMichael v New Zealand & Australian Lamb Company, 2018 ONSC 5422 at para 20.	3(d) This Agreement and the employment of the Employee hereunder may be terminated by the Employer giving notice of termination (or at the Employer's option, pay in lieu of notice) as follows: (i) during the first three years of employment 12 months' notice; 3(e) Pay in lieu of notice will be calculated on the basis of the Employee's annual base salary as of the date he receives notice of termination. Bonuses and other forms of additional compensation will not be considered part of the Employee's annual base salary. The Employee's rights and entitlement under any performance bonus shall terminate effective as of the date of his or her termination of employment, or as at the date he or she receives notice of termination, if pay in lieu of notice is provided. Pay in lieu of notice will be provided in regular monthly instalments and shall be subject to all deductions and withholdings required by law.	Ontario *Employment Standards Act*, 2000, SO 2000, c 41	Yes	The clause is anything but clear. The inclusion of clause 3(d)(i) seems to, on its face, distinguish between the employee's reasonable notice before and after he completes three years of employment, although the clause appears incomplete. Under Ontario law and the principles of contractual interpretation, after three years of employment, the employee is thus entitled to his common law reasonable notice. [at para 24]

Labour Rights Arbitration in Canada: An Empirical Investigation of Efficiency and Delay in a Changed Legal Environment

*Kevin Banks, Richard Chaykowski & George Slotsve**

Despite being entrusted with an important public policy mandate to provide expeditious resolution of rights disputes arising under collective agreements and statutes, Canadian labour arbitration is increasingly prone to extensive delay. The authors examine causes and propose solutions. They theorize delay as a consequence of exogenously and endogenously produced failure in markets for fair and expeditious private dispute resolution; compile a database containing party, institutional and subject-matter characteristics of every publicly reported rights arbitration decision in Ontario in 2010; and employ formal hazard models to identify causes of delay. They find little support for current theories that expansion of the jurisdiction of arbitrators, undue legalization of arbitration proceedings, shortages of qualified arbitrators, preferences of parties for particular arbitrators or for more formal or slower procedures or for mediation-arbitration, are significant causes of delay. They infer that primary causes probably lie in resource and incentive problems with clearing caseload backlogs, aggravated by unnecessarily slow fact-finding processes.

1. INTRODUCTION

Arbitration of rights disputes under collective agreements is an essential pillar and mandatory requirement of labour relations laws in every Canadian jurisdiction. It serves as the quid pro quo for legislative bans on strikes and lockouts during the term of collective agreements. It is key to the labour policies adopted after the Second World War that were designed to reconcile industrial peace with the rights of

* Associate Professor of Law, Queen's University; Professor, Industrial Relations, Queen's University; and Professor, Economics, Northern Illinois University, respectively. This research was made possible by a grant from the National Academy of Arbitrators Research and Education Fund.

workers to organize and bargain collectively,[1] and is thus an essential feature of the governance of workplaces in which approximately 30% of Canadians are employed.[2] To serve these functions well, grievance arbitration must be quick, inexpensive and relatively informal, so that it remains accessible to both unions and employers, and deals with their differences in a timely manner that is sensitive to their ongoing relationships.[3] Studies have shown that delay in labour arbitration can harm contract negotiations, cause financial loss to the employer, harm the quality of the arbitration hearing itself as memories of the material events dim with the passage of time, inhibit productivity by generating both employee restiveness and uncertainty among supervisors, and impose injustice on employees whose rights under collective agreements are less likely to be fully vindicated as time elapses.[4] Arbitration is also increasingly the forum in which unionized workers in Canada must vindicate statutory rights such as the right to work free from discrimination.[5]

Yet researchers and commentators have argued since the early 1970s that the system is prone to unnecessary delay,[6] and empirical research on delay in arbitration demonstrates a steady increase in the average time from the initiation of a grievance to the rendering of an arbitration award in all Canadian jurisdictions studied from that

1 Judy Fudge & Eric Tucker, "The Freedom to Strike in Canada – A Brief Legal History" (2010) 15:2 CLELJ 333.

2 Sharanjit Uppal, "Unionization 2010" (2010) 11:10 Perspectives on Labour and Income 18 at 18.

3 Warren K Winkler, "Arbitration as a Cornerstone of Industrial Justice," *Industrial Relations Series of the School of Policy Studies* (Kingston, Ont: Queen's University, School of Policy Studies, 2011).

4 Allen Ponak et al, "Using Event History Analysis to Model Decay in Grievance Arbitration" (1996) 50:1 Indus & Lab Rel Rev 105.

5 Elizabeth Shilton, "Labour Arbitration and Public Rights Claims: Forcing Square Pegs into Round Holes" (2016) 41:2 Queen's LJ 275.

6 Howard Goldblatt, *Justice Delayed – The Arbitration Process in Ontario* (Toronto: Labour Council of Metropolitan Toronto, 1973).

time to the present date.[7] In a 2010 speech, Ontario's Chief Justice at the time, and himself a very experienced and distinguished labour lawyer, argued that "the present system of grievance arbitration can be slow, expensive and detached from the realities of the workplace," "has lost its course, has lost its trajectory, has lost its vision," and "is at risk of becoming dysfunctional and irrelevant."[8]

It is therefore vital both to labour policy and to the administration of justice in Canadian workplaces to understand the causes of delay in rights arbitration. Chief Justice Winkler posited that the dominant factors driving these trends were the increased complexity of legal issues facing arbitration due to the expansion of arbitral jurisdiction — itself the result of decisions by the Supreme Court of Canada designating arbitration as the appropriate forum for an increasing number of work-related disputes — and the growing legalization of arbitration processes. Others have made similar arguments.[9] But the literature provides no systematic theorization or recent empirical examination of the causes of delay in arbitration.

This paper first theorizes delay as the consequence of exogenous and endogenous causes of failure in a market for fair and expeditious private dispute resolution. It then analyzes a unique database compiled by the authors containing the detailed party, institutional and subject-matter characteristics of every publicly reported rights arbitration decision in Ontario in 2010. We employ regression analysis

---

7 *Ibid*; Joseph B Rose, "Statutory Expedited Grievance Arbitration: The Case of Ontario" (1986) 41:4 Arbitration J 30 at 30-35; JG Fricke, *An Empirical Study of the Grievance Arbitration Process in Alberta* (Edmonton: Alberta Labour, 1976); Allen Ponak & Corliss Olson, "Time Delays in Grievance Arbitration" (1992) 47:4 RI 690; Kenneth W Thornicroft, "Lawyers and Grievance Arbitration: Delay and Outcome Effects" (1994) 18:4 Labour Studies J 39; Gilles Trudeau, "The Internal Grievance Process and Grievance Arbitration in Quebec: An Illustration of the North-American Methods of Resolving Disputes Arising from the Application of Collective Agreements" (2002) 44:3 Managerial L 46; Bruce J Curran "Event History Analysis of Grievance Arbitration in Ontario: Labour Justice Delayed?" (2017) 72:4 RI 621.

8 Warren K Winkler, "Labour Arbitration and Conflict Resolution: Back to Our Roots" (Donald Wood Lecture, delivered at Queen's University, 30 November 2010) (Kingston, Ont: Queen's University, School of Policy Studies, 2010) at 1.

9 Denis Nadeau, "The Supreme Court of Canada and the Evolution of a Pro-Arbitration Judicial Policy" in Alan Ponak, Jeffrey Sack & Brian Burkett, eds, *Labour Arbitration Yearbook, 2012-2013* (Toronto: Lancaster House, 2012) 325.

based on formal hazard models to identify factors causing increases or decreases in the time required to complete each stage of the arbitration process. This enables us to make observations and draw inferences about the extent to which delay at arbitration is due to (1) exogenous demands and constraints on the institution of arbitration, namely, expanded arbitral jurisdiction and legalization; (2) preferences of parties for matters other than efficiency; (3) a shortage in the supply of expeditious arbitration services; or (4) cost, incentive or coordination problems facing the parties. On this basis we formulate recommendations for public policy and for further research.

2. THEORIZING POSSIBLE CAUSES OF DELAY

Most arbitrators are professionals appointed *ad hoc* by agreement of the parties to a collective agreement. Arbitrators depend on their continuing acceptability within the labour relations community for new appointments. Rights arbitration is thus a form of private dispute resolution provided through a competitive market. In principle, therefore, the parties should be able to control the process so as to ensure its efficiency. While arbitrators obtain their formal powers to manage the arbitration process from the Ontario *Labour Relations Act*,[10] the practical extent of the mandate of an arbitrator to do so beyond ensuring basic procedural fairness flows from the agreement or expectations of the parties. There is generally nothing to prevent parties from streamlining the entire arbitration process to provide for rapid appointment of arbitrators and scheduling of hearings, limited presentation of oral evidence, compressed time for the presentation of legal argument, and short deadlines for rendering arbitral awards. Privately-developed expedited arbitration systems have for many years reduced case handling times in industries such as garment production, rail transportation, and longshoring.[11] Grievance mediation

10 *Labour Relations Act, 1995*, SO 1995, c 1, Sch A.

11 Rose, *supra* note 7; Mark Thompson, "Expedited Arbitration: Promise and Performance" in William Kaplan et al, eds, *Labour Arbitration Yearbook, 1992* (Toronto: Lancaster House, 1992); DC McPhillips, PR Sheen & W Moore, "Expedited Arbitration: A New Experience for British Columbia" in William Kaplan et al, eds, *Labour Arbitration Yearbook, 1996-97* (Toronto: Lancaster House, 1996) 29.

systems have also proven effective at reducing backlogs of cases that can clog arbitration schedules.[12] Alternatively, parties might ask an arbitrator to manage a given hearing in some of the ways listed above, so as to expedite it.

Nevertheless, privately-administered expedited arbitration systems remain uncommon,[13] and the use of Ontario's statutorily-provided optional expedited arbitration system has actually declined in recent years.[14] This suggests that parties either prefer traditional arbitration proceedings, despite the delays increasingly associated with them, or have trouble agreeing upon or implementing alternatives.[15] It helps to shed light on these apparent difficulties to consider the market for dispute resolution services as one that is potentially subject to exogenous constraints and endogenously produced failures.

(a) Exogenous Demands and Constraints

Expansion of the jurisdiction of arbitrators may have combined with a culture of legalism to place demands and constraints upon labour rights arbitration that limit its efficiency.

---

12 Elizabeth Rae Butt, "Grievance Mediation – The Ontario Experience" in ER Butt, ed, *School of Industrial Relations Research Essay Series No 14* (Kingston, Ont: Industrial Relations Centre at Queen's University, 1988); Mitchell S Birkin, "Grievance Mediation: The Impact of the Process and Outcomes on the Interests of the Parties" in *Current Issues Series* (Kingston, Ont: Industrial Relations Centre at Queen's University, 1988).

13 Thompson, *supra* note 11; Winkler, *supra* note 3.

14 Kevin Banks, Richard Chaykowski & George Slotsve, "Arbitration as Access to Justice: An Update on the Profile of Labour Arbitration Cases in Ontario" (Presentation at the Industrial Relations Conference, delivered at the Canada Industrial Relations Board, Ottawa, 16-17 June 2011) (we note, however, that Curran's results, *supra* note 7, indicate that the use of contractually expedited procedures grew from about 1% of cases in 1994 to almost 22% of cases in 2012. The general unpopularity of statutory expedited arbitration might be due to a reluctance of parties to choose it because it does not allow for the jointly-agreed upon appointment of an arbitrator, or because of its rigid and demanding time frames (Shannon R Webb & TH Wagar, "Expedited Arbitration: A Study of Outcomes and Duration" (2018) 73:1 RI 146)).

15 Webb & Wagar, *supra* note 14.

(i) *Increased Frequency of Complex Disputes Due to the Expansion of Jurisdiction*

The past 25 years years have seen an ongoing expansion of arbitral jurisdiction in Canada, by way of legislative enactment or court decision, which may have increased the proportion of cases raising multiple complex legal or factual issues that must be decided through labour arbitration.[16] In legally and factually complex cases, the goal of timeliness has always been in tension with the overriding imperative to provide a forum in which legal issues can be fully and fairly adjudicated. Since the Supreme Court of Canada's 1995 decision in *Weber v. Ontario Hydro*,[17] arbitrators in Ontario and elsewhere have been tasked with interpreting and applying a wide variety of laws that go beyond the parameters of collective agreements. As a consequence of *Weber*, arbitrators can be called upon to interpret and apply tort law, Canada's constitutional *Charter of Rights and Freedoms*,[18] and rights under pension, benefit, and welfare plans. The Supreme Court of Canada's decision in *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324*[19] in 2003 confirmed, in addition, that arbitrators are required to interpret and apply the provisions of human rights and other employment-related statutes as though they formed part of the collective agreement. *Charter*, common law and human rights claims, claims under other employment-related statutes, and pension and benefit claims, all arguably tend to raise issues of greater factual

---

16 Winkler, *supra* note 3; Trudeau, *supra* note 7; Curran, *supra* note 7; Nadeau, *supra* note 9. Effects on timeliness were not the only concerns raised by informed observers. Some also questioned whether arbitrators had sufficient institutional independence and expertise to respond to the public law aspects of their new mandate, and whether arbitration was sufficiently accessible to employee associations seeking to raise public law claims, given the high costs associated with its use. See Gilles Trudeau, "L'arbitrage des griefs au Canada: plaidoyer pour une réforme devenue nécessaire" (2005) 84 Can Bar Rev 249; Gérard Notebaert, "Faut-il reformer le système de l'arbitrage de griefs au Québec?" (2008) 53 McGill LJ 103.

17 [1995] 2 SCR 929, [1995] SCJ No 59 [*Weber*].

18 *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

19 2003 SCC 42 [*Parry Sound*].

or legal complexity than do claims raised under terms and conditions negotiated into collective agreements. Such non-collective agreement claims may also raise issues of fact and law that are not as familiar to the arbitrator or party representatives and may therefore require more time to address.

(ii) *Increased Litigation of the Scope of Jurisdiction*

Weber might also have contributed to delay by leaving the scope of arbitral jurisdiction ambiguous and thus increasing the proportion of cases raising jurisdictional issues that must be decided prior to dealing with the merits of a dispute.[20] Overlapping jurisdiction may also produce delay, as arbitration proceedings are deferred pending outcomes in other forums.[21]

(iii) *Culture of Legalism*

Some have argued that a culture of legalism has infected labour arbitration, leading to greater use of tactics such as procedural objections, unnecessarily lengthy presentation of witness evidence, unduly extensive cross-examination of witnesses and a tendency on the part of arbitrators to issue legally rigorous and extensive reasons not necessarily of direct interest to the parties.[22] Consistent with these contentions, previous research has found that the use of lawyers as representatives can increase delay.[23] Furthermore, arbitrators as a group — particularly those trained as lawyers — may be caught up in a culture of legalism, producing awards which have a level of detail in legal and factual analysis that is out of proportion to the matter under consideration.[24]

---

20 Curran, *supra* note 7.

21 Randi H Abramsky, "The Ontario Law Reform Commission Report on Delay and Multiple Proceedings: A Critique" (1996) 4 CLELJ 353; Bernard Adell, "Jurisdictional Overlap Between Arbitration and Other Forums: An Update" (2000) 8 CLELJ 179; Craig Flood, "Efficiency v. Fairness: Multiple Litigation and Adjudication in Labour and Employment Law" (2000) 8 CLELJ 383.

22 Winkler, *supra* note 3; Curran, *supra* note 7.

23 Thornicroft, *supra* note 7; Webb & Wagar, *supra* note 14; Curran, *supra* note 7.

24 Winkler, *supra* note 3; Curran, *supra* note 7.

(b) Endogenous Demand Factors: Party Preferences

The use of traditional arbitration proceedings may also reflect party preferences that impede or trump the goal of efficient dispute resolution.

(i) *Control: Minimizing the Risk of Unpredictable Outcomes*

Analysts have hypothesized that the tendency of collective agreement parties to prefer a small number of the busiest and most experienced arbitrators may reflect an effort to minimize risk of an unpredictable and negative outcome.[25] For similar reasons, a party or both parties may hire a preferred lawyer as a representative despite the potential for delay in scheduling a hearing in order to accommodate his or her schedule.[26]

(ii) *Greater Value Placed on Perceived Fairness or Correctness*

Parties may attach greater value to the fairness or perceived fairness of arbitration proceedings, or the substantive correctness of the decision, than to timeliness. Some researchers have theorized that parties may be hesitant to pursue alternatives to traditional arbitration, such as expedited arbitration, because of the increasing complexity of cases or the perception that expedited processes may affect the outcome of the grievance.[27] In one study, employers ranked quality of arbitral awards as a greater concern than timeliness.[28] Unions, on the other hand, may seek to minimize the risk that grievors will perceive the process to be unfair if grievors tend to place greater weight on procedural fairness than on substantive outcomes in deciding whether they are satisfied with grievance processes.[29] Unions may also take

---

25 Trudeau, *supra* note 7; Curran, *supra* note 7.

26 Ponak et al, *supra* note 4; Curran, *supra* note 7.

27 Webb & Wagar, *supra* note 14.

28 Arthur Elliott Berkeley, "The Most Serious Faults in Labor-Management Arbitration Today and What Can Be Done to Remedy Them" (1989) 40:11 Labor LJ 728.

29 Michael E Gordon & Roger L Bowlby, "Propositions About Grievance Settlements: Finally, Consultation with the Grievants" (1988) 41:1 Personnel Psychology 107.

a cautious approach to procedural formalities in order to attempt to minimize the risk of the legal costs and political problems associated with a duty of fair representation complaint by a dissatisfied grievor, even though expedited arbitration procedures generally do not violate legal duties of fair representation.[30] For the same reason, unions may take a cautious approach to arbitrator selection.

(iii) *Allowing Time for Public-Sector Decision-Making Processes*

Earlier research suggests that public-sector employers and unions are associated with greater delay.[31] One possible explanation for this may be that public-sector actors may place less emphasis on speed and may have more cumbersome decision-making processes for grievance resolution.

(iv) *Allowing Time for Healing*

In some cases, delaying the resolution of a dispute may benefit one or both parties by allowing time to repair personal relationships in a non-adversarial forum, to find alternative job opportunities in order to separate antagonists, or to enable persons suffering from illnesses such as addiction to seek treatment sufficient to obtain a favourable prognosis. One party or both parties might therefore deliberately delay the attempted resolution of a dispute to provide a cool-down period, so that the dispute can "ripen" to a state that makes it capable of resolution. Growing awareness of such problems may have led to increased delay across the system.

(v) *Preference for Prior Mediation*

In Ontario, the use of mediation-arbitration (med-arb) — a procedure under which the appointed arbitrator initially seeks to mediate a settlement and only if unsuccessful then hears the evidence and

30 Clarence R Deitsch & David A Dilts, "Case Characteristics Affecting the Method of Grievance Dispute Settlement" (1988) 1 Employee Responsibilities & Rights J 113; Thompson, *supra* note 11; Donald D Carter, "Grievance Arbitration and the Charter: The Emerging Issues" (1989) 44:2 RI 337.

31 Ponak & Olson, *supra* note 7; Thornicroft, *supra* note 7.

arguments of the parties — has expanded markedly in recent years.[32] This likely reflects a preference of parties to seek a negotiated settlement, giving them "ownership" of the outcome and allowing them to avoid the possible additional expense and delay of litigation. An unintended consequence of the increased use of med-arb might, however, be increased disposition time for cases that cannot be resolved through mediation. First, the mediation process will inevitably delay the start of arbitration. Second, med-arb may successfully resolve a high proportion of simpler disputes, leaving relatively more cases presenting complex legal or factual issues for arbitration. It might thus change the composition of the population of cases decided at arbitration and increase delay within that population, despite making resolution of the overall population of disputes referred to arbitration more efficient. Curran's recent paper found that mediation-arbitration was associated with greater delay at the prehearing stage and in the total time required for arbitration.[33]

(c) Supply of Expeditious Dispute Resolution Services

Some studies have found certain arbitrators to be associated with greater delay in a statistically significant way.[34] Other research suggests, however, that procrastination is unlikely to be widespread among arbitrators, and that as a group arbitrators are less prone to procrastination than the general population.[35] On the other hand, it has been hypothesized that leading arbitrators are often too busy to write awards in a timely manner,[36] while less experienced but more available arbitrators often lack the skills and experience required by the parties. One study found that arbitrators who are trained lawyers are associated with delay, and suggested that this was due to a

---

32 MG Picher, "The Arbitrator as Grievance Mediator: A Growing Trend" in Alan Ponak, Jeffrey Sack & Brian Burkett, eds, *Labour Arbitration Yearbook, 2012-2013* (Toronto: Lancaster House, 2012).

33 Curran, *supra* note 7.

34 Thornicroft, *supra* note 7; Curran, *supra* note 7.

35 Allen Ponak, Daphne G Taras & Piers Steel, "Personality and Time Delay Among Arbitrators" in Paul D Staudohar & Mark I Lurie, eds, *Arbitration 2010: The Steelworkers Trilogy at 50: Proceedings of the Sixty-Third Annual Meeting, National Academy of Arbitrators* (Arlington: BNA Books, 2011).

36 Curran, *supra* note 7.

tendency toward increased legalism on their part.[37] As a result, there might effectively be a shortage in the supply of expeditious dispute resolution.

(d) Coordination, Cost or Incentive Problems

There are a number of ways in which cost, incentive or coordination problems may prevent the use of more timely arbitration procedures, even where parties generally consider timeliness a priority of the highest order.

(i) *Lack of Information*

First, lack of information about the workings of expedited arbitration procedures may create uncertainty about whether it will pay off to make the investment of time and political or institutional capital in negotiating, obtaining support for and administering such procedures.

(ii) *Transaction Costs*

Second, the transaction costs of negotiating and implementing expedited procedures, other than *ad hoc* measures such as agreed statements of fact, may exceed the costs of delay where the parties have a single case or a small number of cases going to arbitration. For example, the costs of negotiating agreements for rapid scheduling of hearings by mutually acceptable arbitrators, or for case management processes providing for early disclosure, identification of issues, and agreement on undisputed facts, may exceed their return on investment.

(iii) *Risk of Defection*

Third, particular kinds of cases will often present parties with reasons for tactical delay. For example, an employer with a relatively weak case but internal political problems with a likely remedy may

---

37 *Ibid.*

seek to delay resolution. Alternatively, an employer might choose delay tactics in order to raise costs for a union and weaken its position within the overall bargaining relationship or with respect to a particular case. A union may advance a grievance for internal political reasons, despite its weakness as a legal claim, and choose to delay resolution in the hopes of reaching a negotiated settlement or at least delaying the political fallout that will result from the dismissal of the grievance. In each situation, short-term incentives may trump longer-term interests in expeditious dispute resolution.

Resisting incentives to delay in such a case is a form of cooperation that depends on trust that the other party will do the same. Important aspects of expedited procedures, such as early disclosure, the negotiation of agreed statements of fact or the willingness to use arbitrator selection systems that limit party control over which arbitrator is chosen in a given case, also require such cooperation. Without some form of assurance that the other party will not seek to seize immediate advantage where such procedures present it, and then later resile from expedited procedures once they no longer do so, a party may correctly judge that it should not pursue expedited procedures. This will be so even where expedited procedures would make the party better off, if implemented on an ongoing basis. The stability of any commitment to expeditious dispute resolution may be further weakened where a lack of trust or a history of conflict undermines the confidence of parties that cooperation to implement expedited procedures will overcome incentives to strategically defect.

(iv) *Up-Front Costs*

Fourth, moving to a system in which arbitration cases are dealt with expeditiously may require clearing a backlog of earlier cases. If the backlog of cases is sufficiently large, one or more of the parties may be unwilling or unable to allocate sufficient resources to do so. A large backlog could accumulate over a period of years if parties initiate somewhat more cases than they resolve in a given year, over a number of years. A relatively small shortfall in resources or capacity to deal with grievances could eventually require making a large investment of new resources, by hiring new representatives or shifting work to new representatives, to clear the backlog. These resources would mostly no longer be needed once the backlog is cleared. Such investments

in temporary capacity may prove difficult for a union or employer to make, due to shortages of funds, lack of availability on a temporary basis of personnel with the required experience and abilities, or a preference for continuing with known and trusted representatives.

Backlogs may arise because of bottlenecks prior to referral to arbitration (in the pre-arbitration grievance resolution process), at the point of referral, or in the arbitration process itself. Backlogs in the grievance resolution steps prior to arbitration could arise out of shortfalls in the number of union or employer officials tasked with resolving grievances. Backlogs at referral to arbitration might arise in one of three ways. First, if one of the parties is represented at arbitration by staff representatives or in-house counsel and those representatives have caseloads that continue to grow over time, delay in scheduling cases for arbitration will increase. Second, where a party uses outside counsel, delay in scheduling arbitrations may increase if that counsel adds the case to a growing list of cases (on behalf of this and other clients) scheduled to be heard first. Third, if parties tend to use busy arbitrators whose wait times are growing, this bottleneck may cause backlogs to accumulate. These dynamics could be aggravated by slower, more legalistic arbitration proceedings consuming more of the time of busy arbitrators and party representatives. We note that Curran finds that over the 1994 to 2012 period the hearing phase of arbitrations became about 30% slower.[38]

(v) *Incentive Problems*

Fifth, the incentives of agents may be misaligned — those dealing with arbitration of grievances may not have incentives to resolve grievances expeditiously or reduce backlogs. This may be the case, for example, where the remuneration or career advancement of outside or in-house counsel or a staff representative does not depend upon timely resolution of a particular case or set of cases, where representatives are expected to minimize preparation time with the unintended consequence that they are not prepared to consider whether expedited presentation of cases would be in their client's interest, where timely resolution of disputes may simply increase

38 *Ibid.*

the representative's workload but not his or her remuneration, where counsel's future income is not significantly dependent upon the particular client in question, or where the client does not sufficiently monitor and emphasize timeliness in awarding further work. Where a lawyer at a law firm does not have longer-term retainers or other assurances of a continued supply of work from his or her client base, being fully booked up for several months may provide the advantage of income security over that period of time. Such incentive structures would not encourage the clearing of backlogs. They might also combine with client preferences for a particular lawyer or other representative, which may also generate a backlog.

3. EMPIRICAL RESEARCH QUESTIONS AND METHODS

This paper seeks to determine whether and to what extent delay in labour arbitration in Ontario is attributable to causes among the first three types hypothesized above, namely: (1) external demands and constraints on the institution of arbitration; (2) preferences of parties for matters other than efficiency; or (3) a shortage in the supply of expeditious arbitration services. These determinations may permit inferences with respect to whether the length of delays is influenced by incentive and coordination problems at the level of the parties.

(a) The Database

The database for our analysis contains the main characteristics of every publicly reported arbitration decision in Ontario in 2010. The year 2010 is a good one to study because it is seven years after the most important expansion of arbitral jurisdiction, i.e. the one resulting from the Supreme Court's *Parry Sound* decision, and that is enough time for the implications of that Supreme Court decision to have worked their way into the day-to-day practice of labour arbitration. Arbitrators are required by law in Ontario to file their awards with the Ontario Ministry of Labour. The Ministry makes those awards publicly available. They are also published in Quicklaw's Ontario Labour Arbitration Awards (OLAA) database. This provides access to a complete census of awards outside of the Ontario public service (provincial government employees), which has a separate grievance dispute settlement system.

Using a coding frame for the arbitration decisions piloted in and adjusted following initial research, detailed information regarding the characteristics of the arbitration decisions was recorded using the decision as the unit of observation.[39] The final database includes a total of 648 cases; in the analysis the number of observations varies because of missing values for certain variables in individual cases.

The database included detailed information (refer to Table 1, Panel A) about the characteristics of the case and the parties involved, including the following: (1) the arbitrator; (2) the type of arbitration board (sole arbitrator or three-person panel); (3) the gender of the arbitrator; (4) the gender of the grievor; (5) whether the employer is in the government, health, education or private sector; (6) whether the award was issued under expedited arbitration or the med-arb provisions of the Ontario *Labour Relations Act*; (7) whether the parties used an agreed statement of fact; and (8) whether the employer or union was represented by counsel. On the basis of our arbitrator data we were able to identify the number of decisions that an arbitrator wrote in 2010. We use this as a proxy for how busy an arbitrator was that year. We recognize that this measure will omit some arbitrators who are highly in demand but who tend more often to settle cases during mediation-arbitration. Nonetheless, we can be confident that an arbitrator who issued numerous awards was likely to be highly in demand, given that it is well-known in the Ontario labour relations community that many cases tend to be settled even after they are referred to arbitration, often without any intervention by the arbitrator, so that an arbitrator would need a heavy caseload to generate a high volume of awards.

The database also included the procedural and substantive subject matters decided in the award, which formed the basis of case subject-matter variables that are a main focus of this analysis. Each subject was constructed as a dichotomous variable (coded 1 if a

39 Coders were instructed in the application of the coding frame. Their data was recorded on paper coding sheets and then entered into a database. A doctoral student with three years of labour law practice experience then reviewed all of the coding sheets against the arbitration awards and corrected any errors. One of the authors then reviewed a sample of code sheets against the actual awards. Where he encountered inconsistency in the coding of a variable, he recoded that variable himself.

subject of the case and 0 if not). A detailed list of the subjects is provided in Table 1, Panel A. The subject-matter categories capture the main substantive and procedural issues that have been traditionally litigated at arbitration, as well as issues that have been added to the jurisdiction of arbitrators, as described above. The coding frame also captures findings of fact on a disputed matter.

We chose to record only decisions by arbitrators with respect to legal or factual issues, as opposed to all issues raised by the parties in their arguments.[40] We see a number of advantages to this approach. Where an issue is decided by an arbitrator, not only does there tend to be a fully pleaded question supported by a factual record, but the arbitrator will also have fully deliberated upon it. This means that when we measure the impacts of particular legal issues on delay, our observations will not be affected by the lack of centrality of a given issue to the case, as would happen where parties raise an issue that the arbitrator does not in the end need to decide, and therefore spends no time deciding.

For each decision, the database includes, where the information is available in the decision, the date intervals at each of the following three stages of the arbitration process: (1) event giving rise to the grievance and/or the initiation of the grievance to the commencement of hearings; (2) the commencement of hearings to the close of hearings; and (3) the close of hearings to the rendering of an award. This information formed the basis for the construction of the dependent time variables utilized in the analysis, including: Event to First Hearing Time; Grievance to First Hearing Time; Hearing Days; Hearing Time; and Award Time (refer to Table 1, Panel B for definitions of these variables). We work with the date of events giving rise to grievances and not simply the dates of grievances themselves. This is because the dates of events are recorded far more often than the dates of grievances in the population of arbitral awards. We thus have a much larger number of observations of event dates than of grievance dates. While event dates are not a perfect substitute for grievance dates, in that events necessarily take place before the initiation of grievance proceedings, we contend that they are a reasonably good substitute because under most collective agreements grievances

40 For a study taking the latter approach, see Curran, *supra* note 7.

must be filed promptly upon the discovery of an alleged agreement violation.

(b) Statistical Methods

We estimate formal hazard models where the dependent variable of interest is the duration of a process, or the time to exit from a state. In this analysis, the variable is the elapsed time between the close of arbitration hearings to the rendering of an award.[41] The duration distribution function represents the probability of exit from the state after a specified amount of time has elapsed. An alternative representation is the probability of survival in a given state to a given point in time. The basic building block in duration modelling is the exit rate or hazard function at some given point in time. For example, in discrete terms, the hazard function is the probability that a grievance for which the hearing has been concluded for "x" days will have an award rendered in the near future (short time interval of length x + y days). The survival function, or the duration density, can be completely described in terms of the hazard function.[42]

The hazard rate can be allowed to depend on observed characteristics of the grievance process. It is useful to distinguish between two classes of covariates.[43] The first class of covariates are termed time-invariant covariates, where the values of the covariates do not depend on the period of duration in a state, for example the gender of the grievor. In the case of time-invariant characteristics, the duration in a state does not influence the value of the covariate since it does not change with time; therefore one would treat these covariates as exogenous to the duration process.

---

41 John D Kalbfleisch & Ross L Prentice, *The Statistical Analysis of Failure Time Data*, 2d ed (New York: John Wiley & Sons, 2002).

42 The characteristics of the hazard function have important implications for the pattern of the probability of exit from some state over time. Negative (positive) duration dependence represents a situation in which the probability of exit decreases (increases) as the elapsed time increases. The potential patterns of duration dependence depend on the form of the hazard function rate. For example, the hazard rate may first increase with elapsed time before decreasing, as the elapsed time increases.

43 Mario A Cleves, William W Gould & Roberto G Gutierrez, *An Introduction to Survival Analysis Using Strata,* 2d ed (College Station, Tex: Strata Press, 2004).

On the other hand, for time-varying covariates, for example, arbitrator caseload, the level of the covariate depends on the duration in the state in question. There are various parametric and non-parametric specifications to introduce covariates into duration and survival analysis.[44] For example, an oft-used mechanism is the proportional hazard specification, which adjusts the conventional hazard specification by assuming that a baseline hazard is proportional to a covariate function, where the covariates are thought to influence the duration in a state and the exit rate. The specific mechanism(s) to introduce covariates is an empirical issue and will be determined when we analyze the data.[45]

We first estimated each model as a Cox proportional hazard and tested the proportional-hazards assumption using the Schoenfeld residuals. If the model Cox proportional hazard was rejected, we then estimated an accelerated failure time (ATF) model for each of the following distributions: exponential, loglogistic, weibull, lognormal, and gamma. We chose the preferred distribution based on a Likelihood Ratio test in cases where the distributions were nested, and based on Akaike's information criteria in cases where the distributions were not nested.[46] We also estimate each AFT model as a frailty model (a model with unobservable heterogeneity), using both gamma and inverse-gamma distributions. In all cases the frailty models were rejected based on a likelihood ratio test.

We control for the economic sector of the employer because previous research indicates that arbitration in the public sector tends to take longer, as noted above. We also control for whether the parties invoked expedited arbitration or mediation under the *Labour Relations Act, 1995*, as this tends to shorten the time to reach a hearing. We control for possible gender biases by controlling for the

---

44 Marc Nerlove & S James Press, *Univeriate and Multivariate Log-Linear and Logistic Models,* (Santa-Monica, Cal: Rand – R1306-EDA/NIH, 1973).

45 Nicholas M Kiefer, "Economic Duration Data and Hazard Functions" (1988) 26:2 J of Economic Literature 646.

46 Hirotogu Akaike, "Information Theory and an Extension of the Maximum Likelihood Principle" in BN Petrov & F Csaki, eds, *2nd International Symposium on Information Theory* (Budapest: Akadémia Kiadó, 1973); Hirotogu Akaike, "Likelihood of a Model and Information Criteria" (1981) 16:1 J of Econometrics 3.

gender of both the grievor and the arbitrator. In addition, we control for whether the parties used an agreed statement of fact, as this would tend to shorten the hearing of evidence (though it may increase preparation time and may therefore increase the time required to reach a hearing). Interim and consent awards were excluded from the population of final awards subject to analysis.

4. PROFILE OF CASES AND TRENDS IN THE TIME ELAPSED AT EACH STAGE OF GRIEVANCE ARBITRATION PROCEEDINGS

(a) Overall Profile of the Cases

The sample of cases is balanced by sector, with a slight majority of cases (about 54%) arising in the broader public sector (Table 2); that 54% is composed of about 29% from the health sector, 13% from government, and 12% from education (Table 4).

The range of subject-matters of the grievances is quite broad, as expected (refer to Table 1 Panel A). Decisions included a finding of fact on a disputed matter in about 37% of the cases (Table 2). The most frequent subject-matter of the grievance cases were: Wages or Related Benefits (21%), Disciplinary Discharge (20%), and Assignment or Scheduling of Work (17%) (Table 4). The second tier, in terms of frequency, included three legal subject-matters associated with the expanded jurisdiction of arbitrators: Human Rights or Other Discrimination (9%), Non-Human Rights Legislation (5%), and Benefit or Welfare Plan (whether insured or not) (5%); and two arguably associated with a culture of legalism: Jurisdiction (7%) and Matter of Procedure (7%). The frequency of issues in our study is somewhat lower than that of comparable issues recorded in Curran's 2017 paper. This likely reflects our decision to code by issues decided rather than to code by content analysis.

Representation by legal counsel was relatively pervasive. The employer (at about 79%) was more likely to be represented by counsel than the union (at roughly 63%). Both the union and employer used counsel in about 61% of the cases; in 2.4% of cases only the union used counsel, whereas in about 18% of the cases only the employer used counsel (see Table 2). Taken together, counsel are used in a

high proportion of the cases, and management is much less likely to proceed without counsel than is the union. The average number of lawyer representatives in our study (1.42) is very similar to that recorded by Curran[47] for the year 2012 (1.47).

In terms of choice of procedures, about 95% of the cases were decided by a sole arbitrator (and about 4.5% by a tripartite board) (Table 2). The parties used statutory expedited arbitration only about 6.9% of the time, and statutory mediation-arbitration procedures only about 1.3% of the time.[48] The parties provided an agreed statement of fact to the arbitrator in only about 13% of cases.

(b) Time Elapsed at Each Stage of Grievance Proceedings

The grievance process itself extends from the date of the initial event through a hearing to the issuance of the final award (refer to Table 3). We observe the following median durations:

- Event to first hearing: 215 days
- Grievance to first hearing: 275.5 days[49]
- First to last hearing: 1 day (0 days elapsed between these two points in time)
- First hearing to award: 48 days
- Last hearing to award: 26 days
- Event to final award: 345 days
- Grievance to final award: 380 days

47 Curran, *supra* note 7.

48 We note that it is possible that these numbers understate the use of such procedures, since an arbitrator may not mention in the text of an award that he or she was appointed pursuant to statutory expedited procedures.

49 Note once again that not all awards record the date of the grievance or the date of the events giving rise to the grievance, and in many cases the award records one date but not the other. It is thus not contradictory that the median number of days from grievance to first hearing would be longer than the median number of days from event to first hearing. The data providing those measurements are taken in large part from different decisions.

The number of hearing days ranged from 0 to 24 days, with 50% taking only 1 (or no) day(s), about 68% of cases requiring 2 or fewer hearing days, and 95% taking 8 or fewer days. Thus, the overwhelming majority of cases are decided within 8 hearing days.

These results suggest that a large proportion of total time is accounted for by the period from the event or grievance to the first hearing.[50] This result is consistent with the very high correlations observed between "Event to First Hearing" and "Event to Final Award" (.85) and "Grievance to First Hearing" and "Grievance to Final Award" (.82) (refer to Appendix Table 1 at the end of this article).[51] We note that the median time lapses at each stage of the proceedings that we observe are nearly identical to those observed by Curran in his composite sample taken in 1994, 2004 and 2012.[52]

These descriptive results suggest that hearings tend to move forward relatively quickly compared to their scheduling, and that most awards are issued in a timely manner. The time it takes to get to the first hearing — whether it be the time from the event or the actual grievance to the first hearing — appears to be where most of the time is taken up in the process. We note that Curran finds that between 1994 and 2012 the transition from the prehearing to the hearing stage slowed by 40%, all else being equal. This is consistent with the presence of growing backlogs in the prehearing stages.

---

50 This result must be interpreted with caution because the number of observations for the "Grievance to First Hearing" and "Grievance to Final Award" variables is low and we expect that it may skew the result in favor of longer duration.

51 In addition, the "Event to First Hearing" and "Grievance to First Hearing" variables are very highly correlated (at .96), as are "Event to Final Award" and "Grievance to Final Award" (at .98) (refer to Appendix Table 1). These correlations are all statistically significant at the 99% level.

52 Curran, *supra* note 7 at 629.

TABLE 1
Variable Definitions

TABLE 1 PANEL A
Explanatory Variables

Variable	*Variable Definition*	*Coding*
year	Year	Number
caseid	Case ID	Alpha
filedby	Grievance filed by employer or union	0 "Employer" 1 "Union" 2 "Both"
ind	Industry of firm/employer	0 "Government" 1 "Health" 2 "Education" 3 "Other"
aname	Arbitrator or Chair's name	Alpha (Converted to Numeric)[3]
agender	Arbitrator or Chair's gender	0 "Male" 1 "Female"
tripartite	Sole arbitrator or tripartite board [pubtri is interaction of public sector and tripartite]	0 "Sole Arbitrator" 1 "Tripartite Board"
exped	Award issued under the expedited arbitration provisions	0 "No" 1 "Yes"
sec50	Award issued under the expedited mediation/arbitration provision of Labour Relations Act (section 50)	0 "No" 1 "Yes"
juris	Subject: Jurisdiction	0 "No" 1 "Yes"
admiss	Subject: Admissibility of evidence	0 "No" 1 "Yes"
proced	Subject: Matter of procedure	0 "No" 1 "Yes"
hrights	Subject: Human rights or other discrimination	0 "No" 1 "Yes"
nhr	Subject: Non-human-rights legislation	0 "No" 1 "Yes"
pp	Subject: Pension plan	0 "No" 1 "Yes"
bwp	Subject: Benefit or welfare plan (whether insured or not)	0 "No" 1 "Yes"
cc	Subject: Canadian Charter	0 "No" 1 "Yes"
estop	Subject: Estoppel	0 "No" 1 "Yes"
cba	Subject: Interpretation of collective agreement	0 "No" 1 "Yes"
discd	Subject: Discharge as discipline	0 "No" 1 "Yes"

Variable	*Variable Definition*	*Coding*
discip	Subject: Discipline (non-discharge)	0 "No" 1 "Yes"
assign	Subject: Assignment or scheduling of work	0 "No" 1 "Yes"
senior	Subject: Seniority	0 "No" 1 "Yes"
wages	Subject: Wages or related benefits	0 "No" 1 "Yes"
urights	Subject: Union rights and liabilities	0 "No" 1 "Yes"
ndterm	Subject: Non-disciplinary termination	0 "No" 1 "Yes"
other	Award also dealt with other issues	0 "No" 1 "Yes"
only	Award dealt with ONLY subjects NOT LISTED	0 "No" 1 "Yes"
nsubj	Total number of subjects dealt with in the award	Number
afact	Did the parties provide the arbitrator with an agreed statement of fact?	0 "No" 1 "Yes"
dfact	Finding of fact on a disputed matter	0 "No" 1 "Yes"
frep	Employer represented by legal counsel	0 "No" 1 "Yes" 2 "Unknown"
urep	Union represented by legal counsel	0 "No" 1 "Yes" 2 "Unknown"
Ccount	Number of cases arbitrator carried in the year	Number
wcount	Total word count	Number

TABLE 1 PANEL B
Dependent Variables

Variable	*Variable Definition*	*Coding*
Efdur	Days (duration) between event and first hearing dates	Number
Eadur	Days (duration) between event and award dates	Number
Gfdur	Days (duration) between grievance and first hearing dates	Number
Gadur	Days (duration) between grievance and award dates	Number
Fldur	Days (duration) between first hearing and last hearing dates	Number
fadur	Days (duration) between first hearing and award dates	Number
ladur	Days (duration) between last hearing and award dates	Number
ndays	Number of hearing days	Number

TABLE 1 PANEL C
Variables Used to Construct the Duration Variables

Variable	*Variable Definition*	*Coding*
edate	Event date	Day – Month – Year
gdate	Grievance date	Day – Month – Year
Fdate	Date of first hearing day	Day – Month – Year
Ldate	Date of last hearing day	Day – Month – Year
Adate	Award date	Day – Month – Year
arbdate	Appointment date of arbitrator	Day – Month – Year

TABLE 2
Proportion of Cases by Major Characteristic

		Obs	*Mean*	*Std. Dev.*	*Min*	*Max*
% Cases Decided by Three-Person Panel (Tripartite Board)		580	0.044828	0.207104	0	1
% Cases by Jurisdiction	Private	581	0.45611	0.498499	0	1
	Public	581	0.54389	0.498499	0	1
% Cases by Selected Matter/Issues:	Finding of fact on a disputed matter	576	0.366319	0.482217	0	1
	In which jurisdictional issues are raised	575	0.073044	0.260434	0	1
	In which procedural issues are raised	575	0.074783	0.263269	0	1
Use of Counsel	Neither party used counsel	572	0.183566	0.387469	0	1
	Only union used counsel	572	0.024476	0.154655	0	1
	Only employer used counsel	572	0.18007	0.384582	0	1
	Both union and employer used counsel	572	0.611888	0.487747	0	1

TABLE 3
Elapsed Time by Stage

Percentiles	*Event to First Hearing (Efdur) (1)*	*Event to Final Award (Eadur) (2)*	*Grievance to First Hearing (Gfdur) (3)*	*Grievance to Final Award (Gadur) (4)*	*First to Last Hearing (Fldur) (5)*	*First Hearing to Award (Fadur) (6)*	*Last Hearing to Award (Ladur) (7)*	*Hearing Days (Ndays) (8)*
1%	27	42	19	21	0	0	0	0
5%	56	97	39.5	36	0	1	1	1
10%	80	122	62.5	87	0	3	2	1
25%	123.5	189	131	205	0	11	9	1
50%	215	345	275.5	380	0	48	26	1
75%	404	602	496	665	105	186	62	3
90%	648	964	788	1043	288	383	125	5
95%	870	1231	931	1290	432	559	178	8
99%	1365	1935	1442	2983	826	1096	337	20
Obs	268	299	180	198	506	507	507	529
Mean	306.6045	460.9833	364.7944	515.1313	89.97036	141.8915	51.38264	2.47259
Std Dev.	287.4381	378.6675	346.4932	468.4913	189.9446	227.9139	95.60062	3.267683
Variance	82620.66	143389.1	120057.5	219484.1	36078.95	51944.74	9139.478	10.67775

TABLE 4
Descriptive Statistics by Key Variable

Variable	*Number of Observations*	*Mean*	*Standard Deviation*	*Minimum Value*	*Maximum Value*
gov	581	0.1342513	0.3412159	0	1
health	581	0.292599	0.4553479	0	1
educ	581	0.1170396	0.3217445	0	1
frep	573	1.010471	0.3446321	0	2
urep	573	0.9179756	0.584091	0	2
furep	572	0.993007	0.8514663	0	4
tripart	580	0.0448276	0.2071039	0	1
pubtri	580	0.0396552	0.1953162	0	1
exped	580	0.0689655	0.2536142	0	1
sec50	581	0.1273666	0.3336705	0	1
afact	577	0.135182	0.3422145	0	1
ccount	581	20.29088	25.4555	1	82
ccount2	581	1058.587	2285.867	1	6724
nsubj	576	1.5	0.7890556	0	5
nsubj2	576	2.871528	3.385004	0	25
juris	575	0.0730435	0.2604344	0	1
admiss	575	0.0208696	0.1430721	0	1
proced	575	0.0747826	0.2632693	0	1
dfact	576	0.3663194	0.482217	0	1
hrights	575	0.093913	0.2919617	0	1
cc	575	0.0017391	0.0417029	0	1
pp	575	0.0104348	0.1017049	0	1
bwp	575	0.0452174	0.2079615	0	1
nhr	575	0.053913	0.2260427	0	1
estop	575	0.0452174	0.2079615	0	1
cba	575	0.0434783	0.2041087	0	1
discd	575	0.2017391	0.4016479	0	1
discip	574	0.0574913	0.232982	0	1
assign	575	0.173913	0.3793647	0	1
senior	575	0.0347826	0.1833883	0	1
wages	575	0.2052174	0.404212	`	1
urights	575	0.0469565	0.2117299	0	1
ndterm	576	0.0607639	0.2391044	0	1
other	575	0.0695652	0.2546344	0	1
only	574	0.1620209	0.3687914	0	1
wcount	577	4693.236	4825.638	97	41538
wcount2	577	4.53E+07	1.34E+08	9409	1.73E+09
agender	581	0.1893287	0.3921071	0	1

5. RESULTS OF REGRESSION ANALYSIS

In order to investigate the factors affecting time taken at each stage of the grievance process, separate regressions were calculated for each of the eight dependent time period variables (Table 1, Panel B). The list of explanatory variables, and descriptive statistics for each of these variables, is provided in Table 4. Tables 5 through 8 provide the results for each of these regressions. Coefficients that are statistically significant at the 90% level are highlighted. We first discuss the total time required to process a grievance to a final decision. Next we analyze the time required at each stage of the grievance arbitration process. We do not discuss results for time periods beginning at the date of the formal grievance because they are consistent with but less probative than results for time periods beginning with the event giving rise to the grievance, owing to a smaller number of observations.[53]

(a) Event to Final Award

In our overall measure of the time required to process a grievance to a final decision, we find no statistically significant evidence that the changing legal environment of labour arbitration has caused increasing delay. None of the issues falling within expanded arbitral jurisdiction is associated with increased delay. The number of legal issues decided in a given case is not associated with increased delay. While the word count of the final award is associated with increased delay, the coefficient associated with this variable is very small (.00009), indicating that any effects of longer awards on overall delay are also very small. Nor do our data provide any direct support for the "culture of legalism" hypothesis: no procedural issue is associated with increased delay; jurisdictional issues are not associated with delay; the use of counsel is not associated with delay in a statistically significant manner.

---

53 The one exception is that jurisdictional issues appear to cause delay in the time from grievance to first hearing, but not in the time from event to first hearing. This result should be treated with caution. The positive coefficient was significant only at the 90% level.

Disciplinary discharge, other discipline cases and pension plan cases are associated with significantly reduced delay, as are to a somewhat lesser extent cases involving wages and work assignments. By contrast, cases involving the interpretation of provisions of the collective agreement falling outside of our substantive issue categories were associated with increased delay. We believe that this indicates that the parties prioritize some issues over others with respect to the speed of disposition. There is no reason to think that collective agreement interpretation issues are systematically more complex or time-consuming to resolve through arbitration. There is, however, reason to think that their speedy resolution may matter less to the parties than the resolution of "bread and butter" issues like wages, benefits, seniority, work assignments and pensions, or of human rights issues, which often involve individual dignity.

The number of decisions by an arbitrator was positively associated with increased time lapse, though the effect was small (coefficient = .019). This suggests that the time from event to final decision will be slightly longer with busy arbitrators.

Consistent with previous studies, we find that the use of tripartite panels causes significant delay, the government sector is associated with increased delay, and the use of statutory expedited arbitration markedly reduces delay. We also found that the use of statutory expedited mediation-arbitration reduces delay.

(b) Event to First Hearing

Contrary to the hypothesis that more legally or factually complex cases would require additional preparation time and thus lead to longer times from event to first hearing, no procedural or substantive issue caused delay at this stage of proceedings; nor did the number of legal issues. While the eventual length of the decision is associated with some increased delay, the coefficient on this variable is very small. The results overall indicate that the subject-matter of arbitration plays little role in overall patterns of timeliness and delay at this stage of proceedings.

Perhaps surprisingly, the use of legal counsel did not increase delay either. This does not necessarily indicate that the use of legal counsel has no relationship to increases in delay in scheduling hearings however. It may be that the alternatives to the use of lawyers

— for example, union staff representatives, employer labour relations representatives, or labour relations consultants — produce no measurable time savings at this stage, because all are more or less equally busy. If this were the case, the choice to use a lawyer would not *per se* impact the length of time to get to a hearing. Yet it could be that the way in which the parties make use of lawyers, and the way in which law firms schedule lawyers' work, still contributed to an increase in the amount of time needed to reach a hearing.

The number of decisions by an arbitrator was positively associated with increased time lapse, though the effect was small (coefficient = .028). This suggests that the time from event to first hearing will be slightly longer with busy arbitrators.

The parties appear to prioritize the scheduling of disciplinary cases. This is reflected in large and statistically significant negative coefficients associated with discipline and disciplinary discharge variables. Cases dealing with wage issues also tend to be brought to a hearing more quickly.

At this stage of proceedings, the government sector is associated with increased delay, the use of tripartite panels results in substantially more delay, and the use of statutory expedited arbitration very substantially reduces delay. These results are consistent with those of previous studies, as noted above.

(c) First Hearing to Last Hearing (Hearing Time)

Perhaps surprisingly, the number and nature of legal issues decided at arbitration appears to have little bearing on the time that elapses from the first to the last hearing dates. On the other hand, disputed factual issues are associated with significantly longer times. Cases which call for the application of the *Canadian Charter of Rights and Freedoms* also take significantly more time. Adjudicating disputes raising issues of jurisdiction took less time, all other things being equal. While this may seem counter-intuitive, it must be borne in mind that a jurisdictional objection may result in a case being dismissed without a hearing of the merits of a grievance, shortening the time that would otherwise have been required to dispose of a matter. We find some evidence supportive of this in our data with respect to the number of hearing days, discussed below: all other things being equal, as a group, cases involving issues of jurisdiction take fewer

hearing days to resolve. While we find a statistically significant effect of the length of award (perhaps a proxy for the complexity of matters dealt with at arbitration), it is very small (coefficient = .0003).

The use of counsel by trade unions causes increased time lapse at this stage. The coefficient on the employer counsel variable is also positive and large, but the result is not statistically significant. The sign on interaction of the union and employer counsel variables was negative, suggesting that where both parties use counsel the delay produced by the use of counsel is less. This suggests that there are efficiencies in dealings between counsel that partially offset the effects that the approach taken by lawyers to presenting a case has in prolonging hearing time.

Not surprisingly, we find that the use of agreed statements of fact very significantly reduces time at this stage of the proceedings. Finally, the government sector is associated with increased delay at this stage of proceedings as well.

(d) Final Hearing to Final Award (Award Preparation Time)

There is little evidence of any relationship between substantive or procedural legal issues and delay at this stage of the proceedings. With the exception of issues involving benefit and welfare plans (which are associated with shorter times), none of the relationships between legal issues and time from final hearing to final award were statistically significant. On the other hand, decisions on disputed questions of fact are again associated with longer times. There was a statistically significant positive relationship between the word count of awards and elapsed time, but again it was small (coefficient = .0001).

The number of cases decided by the arbitrator was associated with shorter times, suggesting that busy arbitrators take less time in award preparation, but again the effect was small (coefficient = -.024). Interestingly, female arbitrators appear to have shorter award preparation times. This effect was larger (coefficient = .205).

Perhaps counter-intuitively, at this stage of proceedings, the use of an agreed statement of fact produced longer times to final award. The government sector was associated with longer times from final hearing to final award. The use of a tripartite panel does not cause delay at this stage, suggesting that the delay resulting from the use of such panels occurs in the scheduling of hearings rather than later in

the process. Statutory expedited mediation-arbitration resulted in significantly shorter award preparation times. This is consistent with the conjecture that much of the content of mediation-arbitration awards may often have been negotiated between the parties, thus requiring less writing and analysis from the arbitrator, even if the final award is not described as a consent award.

(e) First Hearing to Final Award

We also analyzed the time lapse between first hearing and final award in order to capture any effects that, while too subtle to show up distinctly during either the hearing or the award production stage, nonetheless influence the time required to dispose of the case once litigation has begun.

As with hearing time and award preparation time, the resolution of a disputed question of fact tended to lengthen the time from first hearing to final award. Again, a longer word count was associated with longer time, but the effect was very small (coefficient = approximately .0003). The only legal issue associated with longer times was the application of the *Charter of Rights and Freedoms*.

The use of statutory expedited mediation-arbitration was associated with significant time savings, while the government sector was associated with longer times.

Finally, we find that use of counsel by both the union and the employer tends to prolong the time from first hearing to final award. As was the case with hearing times, the interaction variable is associated with a reduction in delay at this stage.

(f) Hearing Days

The number of hearing days increases with the presence of a disputed factual issue requiring resolution, and with the presence of a *Charter* issue, but actually decreases in the case of a range of other types of issues, including arbitral jurisdiction, admissibility of evidence, procedural objections, human rights, pension plan, benefits and welfare plan, discipline, work assignment and wages. The effects of a longer award are once again very small. These observations tend to further confirm the inference that the expanded jurisdiction of arbitrators has not caused increased delay by adding complexity to the arbitral mandate.

TABLE 5
Regression Results for Event to First Hearing and Event to Final Award

	Event to First Hearing (efdur) Generalized gamma regression			*Event to Final Award (eadur) Loglogistic regression*		
Variable	*Coefficient*	*Robust Std Error*	*P>|z|*	*Coefficient*	*Robust Std Error*	*P>|z|*
gov	**.5446673***	.1373517	0.000	**.583792***	.1322155	0.000
health	.1345985	.1223235	0.271	.180735	.1153659	0.117
educ	.1425699	.174359	0.414	.0322816	.1549958	0.835
frep	.192838	.1873045	0.303	.0991864	.1910447	0.604
urep	.1226297	.1615381	0.448	.2010854	.1662556	0.226
furep	-.1656511	.1284671	0.197	-.1648445	.1398916	0.239
tripart	**1.619008***	.3792891	0.000	**1.375118***	.2966958	0.000
pubtri	**-1.3773***	.38513	0.000	**-1.004985***	.3346773	0.003
exped	**-1.144759***	.1761919	0.000	**-.7796332***	.2620868	0.003
sec50	-.1965268	.1403961	0.162	**-.2790461***	.163594	0.088
afact	.0728336	.1269738	0.566	-.0979539	.1092254	0.370
ccount	**.0284522**	.0115671	0.014	**.0189016***	.0113578	0.096
ccount2	**-.0003176***	.0001305	0.015	**-.0002474***	.0001295	0.056
nsubj	.0207629	.223856	0.926	.1184419	.214773	0.581
nsubj2	.0085947	.0397968	0.829	.009316	.0431684	0.829
juris	.0620236	.236348	0.793	-.1778892	.2411803	0.461
admiss	.7625002	.5651308	0.177	.2459203	.3263929	0.451
proced	-.2259509	.2168461	0.297	**-.3947002***	.1809825	0.029
dfact	.0326135	.1114074	0.770	-.009392	.0999116	0.925

Variable	*Coefficient*	*Robust Std Error*	*P>|z|*	*Coefficient*	*Robust Std Error*	*P>|z|*
hrights	-.0427247	.2715706	0.875	-.2031521	.2389554	0.395
cc	0	(omitted)		0	(omitted)	
pp	-.3634728	.3865473	0.347	**-.9372596**	.2995209	0.002
bwp	-.2628679	.2695969	0.330	-.2597693	.2319945	0.263
nhr	-.1475317	.2582274	0.568	-.0724201	.23941	0.762
estop	-.2137122	.2623312	0.415	-.210259	.2945971	0.475
cba	.4545735	.288192	0.115	**.5166088***	.2672921	0.053
discd	**-.9071809***	.187348	0.000	**-.6142832***	.1663575	0.000
discip	**-.5574363***	.2122712	0.009	**-.4583259***	.1782109	0.010
assign	-.2262173	.189997	0.234	**-.2761233***	.1620521	0.088
senior	-.2339456	.2703484	0.387	-.1053009	.2119437	0.619
wages	**-.3404566***	.1799957	0.059	**-.3955488***	.1783907	0.027
urights	-.3417077	.3205102	0.286	-.1772275	.2344825	0.450
ndterm	-.151393	.2138161	0.479	-.2238566	.1924144	0.245
other	-.110641	.2024485	0.585	.0785794	.182338	0.667
only	**-.4910607***	.2070819	0.018	**-.3494188***	.2006629	0.082
wcount	**.0000414***	.0000201	0.040	**.0000947***	.0000184	0.000
wcount2	-7.81e-10	5.58e-10	0.161	**-1.68e-09***	4.62e-10	0.000
agender	.2127036	.1358857	0.118	.1352275	.1259595	0.283
CONSTANT	**5.371993***	.3112198	0.000	**5.400345***	.3398638	0.000
Number of Observations	259			289		
Log Pseudo-Likelihood	-243.71633			-252.37577		
AIC	563.4327			580.7515		

TABLE 6
Regression Results for Grievance to First Hearing and Grievance to Final Award

	Grievance to First Hearing (gfdur) Loglogistic regression			*Grievance to Final Award (gadur) Loglogistic regression*		
Variable	*Coefficient*	*Robust Std Error*	*P>|z|*	*Coefficient*	*Robust Std Error*	*P>|z|*
gov	**.6135371***	.2860838	0.032	.2208581	.2287227	0.334
health	**.4018184***	.1912576	0.036	**.4216898***	.1529707	0.006
educ	.0499697	.2781892	0.857	.0829682	.2493182	0.739
frep	.4888595	.4988285	0.327	.4229262	.4635281	0.362
urep	.6646496	.5110171	0.193	.6914149	.4558357	0.129
furep	-.5988871	.4692665	0.202	-.5537914	.4260445	0.194
tripart	**.7149534**	.2949769	0.015	**.5421343***	.2318945	0.019
pubtri	0	(omitted)		0	(omitted)	
exped	**-1.028315***	.3171598	0.001	**-1.370283***	.3797429	0.000
sec50	.0670737	.3498588	0.848	-.2075843	.3543454	0.558
afact	-.1468672	.2714196	0.588	-.2941922	.1980736	0.137
ccount	.0185941	.0193768	0.337	.0034553	.018904	0.855
ccount2	-.0001332	.0002106	0.527	.00002	.0002075	0.923
nsubj	-.4637951	.3739835	0.215	-.2046716	.3121232	0.512
nsubj2	.0122776	.0585038	0.834	.0339895	.0631713	0.591
juris	**.6268444***	.378319	0.098	.1981921	.2942272	0.501
admiss	.437974	.3269441	0.180	.3719895	.3022474	0.218
proced	.1177617	.3535403	0.739	-.1886454	.2805101	0.501
dfact	-.1548723	.2119128	0.465	-.1685752	.1710248	0.324

Variable	*Coefficient*	*Robust Std Error*	*P>|z|*	*Coefficient*	*Robust Std Error*	*P>|z|*
hrights	.3344499	.3903577	0.392	-.0877168	.4014182	0.827
cc	0	(omitted)		0	(omitted)	
pp	.53156	.545261	0.330	.7335692	.9577149	0.444
bwp	-.1970284	.418418	0.638	-.6227453	.4398388	0.157
nhr	.2044165	.3835551	0.594	.1453197	.3079985	0.637
estop	.4215094	.4118349	0.306	.1662031	.328174	0.613
cba	.197782	.391096	0.613	.0646437	.3194269	0.840
discd	-.2939062	.3361456	0.382	-.1762816	.2671601	0.509
discip	-.5257325	.6864452	0.444	-.2858616	.3484133	0.412
assign	.2859518	.3421247	0.403	.1204183	.2446906	0.623
senior	.0889999	.5921139	0.881	-.1527165	.3612836	0.673
wages	.1636644	.3583761	0.648	-.0503581	.2764569	0.855
urights	.018803	.492602	0.970	-.0500725	.3284813	0.879
ndterm	.3221059	.3634714	0.376	.0073019	.301921	0.981
other	.5192148	.3611234	0.150	.2615581	.2932487	0.372
only	.19235	.3151303	0.542	-.2418568	.2816821	0.391
wcount	.0000526	.0000336	0.117	**.0000898***	.000033	0.006
wcount2	-8.91e-10	8.20e-10	0.277	**-1.38e-09***	7.58e-10	0.069
agender	.15997	.1873951	0.393	**.3553768***	.1739572	0.041
CONSTANT	**4.799972***	.5236687	0.000	**5.091831***	.5591659	0.000
Number of Observations	173			190		
Log Pseudo-Likelihood	-198.64288			-206.97123		
AIC	471.2858			487.9425		

TABLE 7
Regression Results for First to Last Hearing Time and First Hearing to Final Award

	First to Last Hearing – Hearing Time (fldur)(ldate) Lognormal Regression			*First Hearing to Final Award – Total Time (fadur)(adate) Generalized Gamma Regression*		
Variable	*Coefficient*	*Robust Std Error*	*P>|z|*	*Coefficient*	*Robust Std Error*	*P>|z|*
gov	**.7892528***	.3213317	0.014	**.5797034***	.1943806	0.003
health	.2817095	.241852	0.244	.1772968	.1580368	0.262
educ	.0320299	.311879	0.918	.1838742	.2063003	0.373
frep	.5721277	.364029	0.116	**.7183159***	.3542759	0.043
urep	**.7119005***	.3280869	0.030	**.6238629***	.2716765	0.022
furep	**-.5050607***	.263127	0.055	**-.7247365***	.2419765	0.003
tripart	-.4794545	.4246831	0.259	.1486983	.6159574	0.809
pubtri	.4566294	.7776786	0.557	.3402946	.7911203	0.667
exped	-.0678663	.3750203	0.856	-.1465303	.3122294	0.639
sec50	.2191282	.4108134	0.594	**-.6850176***	.3615127	0.058
afact	**-.9609099***	.2812066	0.001	-.0510343	.1741359	0.769
ccount	-.0379541	.0236805	0.109	**-.0330022***	.0146851	0.025
ccount2	.0001488	.0002588	0.565	**.0002895***	.0001697	0.088
nsubj	.6400872	.5775739	0.268	.6348001	.4718312	0.178
nsubj2	-.0866784	.1092766	0.428	-.1154162	.1011175	0.254
juris	**-1.005652***	.500835	0.045	-.1478179	.2901671	0.610
admiss	-.1284656	.7308632	0.860	.4775009	.3511288	0.174
proced	-.7470386	.5275058	0.157	-.5248132	.3518386	0.136
dfact	**.718098***	.2779666	0.010	**.4785269***	.1695087	0.005

Variable	*Coefficient*	*Robust Std Error*	*P>|z|*	*Coefficient*	*Robust Std Error*	*P>|z|*
hrights	-.6833677	.5448208	0.210	-.3580106	.3553009	0.314
cc	**2.013128***	1.029518	0.051	**1.678235***	.9713465	0.084
pp	-.9063508	.823903	0.271	.3179605	1.193158	0.790
bwp	**-1.038171***	.5139388	0.043	**-.7679718***	.3656309	0.036
nhr	-.2347691	.5356152	0.661	-.5495212	.396653	0.166
estop	.093942	.5273888	0.859	.3246066	.3437751	0.345
cba	.4734019	.5441128	0.384	.3210335	.3312225	0.332
discd	-.0927113	.4294511	0.829	-.3236741	.2585669	0.211
discip	-.3455206	.5188306	0.505	-.1186256	.3419788	0.729
assign	-.4131933	.398203	0.299	-.1270238	.2235949	0.570
senior	-.6197363	.6115212	0.311	-.2906245	.3252005	0.371
wages	**-.8808779***	.4073414	0.031	**-.4543342***	.2387224	0.057
urights	.1667883	.5411856	0.758	.1772767	.3613376	0.624
ndterm	-.5554483	.5232267	0.288	-.3193951	.3271793	0.329
other	.5142532	.5404196	0.341	.1639256	.3392288	0.629
only	-.5186153	.4454552	0.244	**-.4621125***	.2599129	0.075
wcount	**.0003285***	.0000436	0.000	**.0002629***	.0000351	0.000
wcount2	**-6.40e-09***	1.19e-09	0.000	**-5.42e-09***	1.26e-09	0.000
agender	**-.5411169***	.2510781	0.031	**-.3333833***	.1599084	0.037
CONSTANT	.3262724	.6474695	0.614	**2.015491***	.6587437	0.002
Number of Observations	487			488		
Log Pseudo-Likelihood	-1009.7515			-813.57133		
AIC	2097.503			1707.143		

TABLE 8
Regression Results for Final Hearing to Final Award and Hearing Days

	Final Hearing to Final Award – Award Time (ladur)(adate) Generalized Gamma Regression			*Hearing Days (ndays)(ldate) Generalized Gamma Regression*		
Variable	*Coefficient*	*Robust Std Error*	*P>|z|*	*Coefficient*	*Robust Std Error*	*P>|z|*
gov	**.3312499***	.1547408	0.032	**.1408479***	.047444	0.003
health	.0630612	.1255455	0.615	.054082	.0359881	0.133
educ	.1355364	.1558031	0.384	**.1065397***	.0404635	0.008
frep	.3997437	.2949381	0.175	.0437777	.0533918	0.412
urep	.3129063	.2312829	0.176	.0389004	.0601963	0.518
furep	**-.4536643***	.1977725	0.022	-.0321317	.0496442	0.517
tripart	.335979	.5765828	0.560	.1092451	.0742794	0.141
pubtri	.3808548	.7098992	0.592	**-.1982398***	.1180337	0.093
exped	-.1306436	.3007245	0.664	.0397439	.0478344	0.406
sec50	**-.9167097***	.3060811	0.003	.0369859	.0501534	0.461
afact	**.2822277***	.1339538	0.035	**-.166312***	.0379779	0.000
ccount	**-.0243259***	.0111504	0.029	-.0034878	.0034028	0.305
ccount2	**.0002911***	.0001292	0.024	.0000138	.0000376	0.713
nsubj	.3034405	.411362	0.461	.0949673	.1152513	0.410
nsubj2	-.0484104	.0878024	0.581	.0104602	.024284	0.667
juris	.1199849	.2515129	0.633	**-.2198872***	.0854669	0.010
admiss	-.0232129	.4360948	0.958	**-.4477006***	.1961076	0.022
proced	-.5059089	.3118422	0.105	**-.2517229***	.0951159	0.008
dfact	**.3259059***	.1328653	0.014	**.1339808***	.0388015	0.001

Variable	*Coefficient*	*Robust Std Error*	*P>|z|*	*Coefficient*	*Robust Std Error*	*P>|z|*
hrights	-.0667895	.3015374	0.825	**-.2979273***	.1070784	0.005
cc	1.673814	1.032228	0.105	**.8843422***	.3487108	0.011
pp	.3385897	1.689915	0.841	**-.2192395***	.1242407	0.078
bwp	**-.6500781***	.354564	0.067	**-.1953321***	.0964462	0.043
nhr	-.5584061	.3671066	0.128	**-.210195***	.1258284	0.095
estop	.20397	.3676256	0.579	-.0471527	.0939047	0.616
cba	.1098039	.3397182	0.747	.0221396	.1038781	0.831
discd	-.3408992	.2319177	0.142	-.0429833	.0892732	0.630
discip	-.1313492	.284438	0.644	**-.2475719***	.1127434	0.028
assign	-.0119143	.2251777	0.958	**-.2101365***	.0793592	0.008
senior	-.0912859	.2950203	0.757	-.0607835	.1003491	0.545
wages	-.1974621	.2222237	0.374	**-.2061396***	.0773787	0.008
urights	.2588326	.29876	0.386	-.163546	.1007174	0.104
ndterm	-.05875	.3019747	0.846	**-.1787502***	.0995356	0.073
other	.0101646	.2742043	0.970	.0595439	.0853351	0.485
only	-.3981872	.2430302	0.101	**-.2349769***	.0839597	0.005
wcount	**.0001825***	.0000346	0.000	**.0000468***	.0000102	0.000
wcount2	**-3.63e-09***	1.35e-09	0.007	**-8.25e-10***	4.04e-10	0.041
agender	**-.2050394***	.1198036	0.087	-.054829	.0379208	0.148
CONSTANT	**2.09855***	.5814875	0.000	**.692694***	.1146269	0.000
Number of Observations	489			509		
Log Pseudo-Likelihood	-712.86501			-219.93364		
AIC	1505.73			519.8673		

6. DISCUSSION

Returning to our theorization of the possible causes of delay, we consider whether increasing delay appears to be due to (a) the exogenous demands of expanded jurisdiction or a culture of legalism; (b) party preferences; (c) short supply of arbitrators willing and able to provide expeditious dispute resolution; or (d) coordination, cost, and incentive problems.

(a) Exogenous Change in the Legal Environment – Expanded Jurisdiction and the Culture of Legalism

Our findings generally run contrary to arguments that the expanded jurisdiction of arbitrators has increased delay. We found no evidence that the number or type of jurisdictional or substantive legal issues in the labour arbitration system increased the length of time required to complete any stage of the arbitration process. The only subject consistently resulting in longer times was the *Charter of Rights and Freedoms*. But it arose very infrequently and could not account for any increase in delay throughout the system. This indicates that the novelty or complexity of additions to arbitral jurisdiction has not increased delay. Our results in this regard are consistent with the descriptive findings of Curran.[54]

Our results provide only modest support for the theory that a culture of legalism is increasing delay. We found no significant evidence that deciding procedural, evidentiary or jurisdictional issues at arbitration causes delay. The length of arbitral awards had no substantial effect on delay. On the other hand, we do find that the use of lawyers prolongs the time from first hearing to final award. This suggests that the way lawyers present cases takes longer than the way non-lawyers present cases, or that the submissions of lawyers take arbitrators longer to deal with in writing decisions, or both. But it should be borne in mind that most delay by far occurs prior to the hearing. A culture of legalism cannot account for this on its own.

---

54 Curran, *supra* note 7. *Our* overall findings suggest that Curran's observation that human rights issues were associated with delay at the decision preparation stage may not indicate causation. Curran observed an association between *Employment Standards Act* issues and increased prehearing and total times over the course of his sampling period; we did not identify *Employment Standards Act* issues in our coding frame and therefore cannot confirm or contradict his observations.

(b) Party Preferences

We also conclude that the preferences of the parties probably do not account for much of the observed delay in the arbitration process. Our data do not include direct observations of party preferences. But they do permit inferences about those preferences and their likely effects on delay. First, we observe that any preference for procedural formality at the hearing could account only for a relatively small fraction of total delay, since most of it occurs prior to the hearing. Second, even if there is a widespread preference among parties for a small set of experienced arbitrators (based on concerns about control over the process or to ensure correct outcomes, as discussed above), that preference probably did not operate in the 2010 environment as a constraint on timeliness. In that year, the parties often chose arbitrators who were not among the busiest. Many arbitrators who are not among the busiest are available on relatively short notice. This has been the case for a long time, and was almost certainly the case in 2010. If the availability of the arbitrator were a determinant of the length of prehearing time, decisions to use busy arbitrators would therefore have resulted in significant delay relative to cases in which other arbitrators were selected. But the availaibility of the arbitrator had only a small effect on time to first hearing. The primary cause of delay, the one that operates as a binding constraint on timeliness, must therefore lie somewhere else.

Third, even if public-sector employers and unions required more time for decision-making with respect to grievances, it is unlikely in our view that this would explain the current delays, under which the median case takes over a year to complete. It is more likely that the additional delay present in the public sector reflects higher tolerance for delay or greater accumulated backlogs resulting from resource constraints rather than party preferences for it. We also note that some successful expedited arbitration systems have been implemented in the broader public sector.[55]

---

55 S Stewart, "The OPSEU and MCSS Protocol – Expediting Dispute Resolution" (2012) [unpublished]; Christopher M Dassios, "Taking a Walk on the Wild Side: Over a Decade of Expedited Arbitrations in the Ontario Electricity Industry" in Paul D Staudohar & Mark I Lurie, eds, *Arbitration 2010: The Steelworkers Trilogy at 50: Proceedings of the Sixty-Third Annual Meeting, National Academy of Arbitrators* (Arlington: BNA Books, 2011).

Fourth, we would make the same observation in response to the argument that parties often prefer delay in order to permit time for healing of workers or relationships. There is no association between the types of cases in which such healing would be beneficial (cases involving unjust discipline or human rights cases, for example) and additional delay.

Finally, we acknowledge that the growing preference for mediation-arbitration may be contributing to delays, for the reasons described above. But failed mediations do not likely account for median wait times of close to a year before the start of hearings. Moreover, at least during the time considered in our study, mediation-arbitration was probably used in only a relatively small fraction of cases. Curran finds that mediation-arbitration was used in only about 20% of cases in 2012.[56] Moreover, the tendency towards increased delay predates the growing use of med-arb by at least two decades. We think that most of the explanation of that tendency still lies elsewhere.

(c) Supply of Expeditious Dispute Resolution Services

We find no evidence that limited supply of experienced arbitrators is a primary cause of increased delay. If this were the case, the use of busy arbitrators would be associated with much more delay at the prehearing stage than it is. It may be that if, as discussed below, coordination, cost and incentive conditions facing the parties were different, a preference for the most experienced and busy arbitrators would then become more of a constraint on timeliness. But in 2010 this appears not to have been the case.

(d) Coordination, Cost and Incentive Problems

All of this suggests that the determinants of increased delay in arbitration lie not in the changed legal environment, the preferences of parties with respect to procedures or representation, or the supply of arbitration services but rather in incentive, cost or coordination problems facing the parties, most particularly in prompt scheduling

56 Curran, *supra* note 7.

of first hearings. Our data do not permit us to identify those problems with precision. Nonetheless, it is possible to offer some reasonable conjecture about the likely relative importance of various sources of incentive or coordination problems.

First, we doubt that lack of information about more efficient arbitration systems constitutes a binding constraint for many employers and unions. Privately-created expedited arbitration systems have existed for many years in Canada. At least for larger unions and for larger employers with access to sophisticated human resource professionals, information about these systems has been available for some time.

We also doubt that the transaction costs and risks of defection described above constitute a binding constraint, at least for larger employers and unions who repeatedly deal with each other in grievance and arbitration proceedings. Such employers and unions negotiate complex collective agreements covering a range of issues with far greater cost implications than the associated arbitration procedures. They are often in a long-term relationship. The incentives and costs involved in building and maintaining expedited arbitration systems would seem to be well within their capacity to manage through bargained arrangements. In any event, the increase in delay is not primarily due to failure to adopt expedited arbitration hearing procedures (though doing so may be part of the solution, as discussed below). Rather, it is most significantly due to the length of time required to get to a hearing within regular arbitration processes.

This leaves up-front costs, accumulated backlogs, and incentive problems affecting the parties' agents as the most likely primary and systemic factors contributing to delay in arbitration in Ontario.[57] This suggests that the root causes of delay in labour arbitration may be the habituation of parties to delay, their resource constraints, and the incentive structures of employer and union representatives facing backlogs. This may be the most critical diagnosis — the condition

57 It is worth noting that tactical delay may play a role here. But there are limits to how much tactical delay is possible when the calendars of party representatives are in fact open. Legal counsel have professional obligations not to misrepresent such matters. Non-legal representatives often deal with each other on a recurring basis and need the trust of their counterparts to effectively represent their client or employer, which again constrains the scope for purely tactical delay.

that creates symptoms of increasing delay notwithstanding any other factors that might otherwise cause them. It may be that if backlogs and agency problems were removed, the changed legal environment (including the range of new legal issues and elements of a culture of legalism), tactical delay, or the busy schedules of arbitrators would then operate as binding constraints on further improvements in the efficiency of the system. But until that time arrives, it will probably be impossible to know whether this would be the case.

We cannot discount the possibility that the changed legal environment — whether expanded arbitral jurisdiction or a culture of legalism — contributed to backlogs in the first place, by increasing the number of grievances and legal issues litigated per unionized employee, thus creating pressure on the resources of unions and employers. On such a theory, it would not be changes in the quality but rather in the quantity of legal issues at a systemic level that lie at the root of delay. To figure out whether this was the case, we would need to study how the volume of legal issues raised at arbitration evolved in relation to the relevant population of unionized employees over time. A full inquiry into this question lies outside the scope of our data.

7. CONCLUSIONS

A labour arbitration system in which the median case takes about one year to reach a final decision and 25% of cases remain unresolved after over 600 days is not serving as well as it should the important public policy goals that led to its establishment and that have since been added to its mandate. Delays in the system should be a matter of public concern. Our research suggests that some lines of further enquiry and public policy response are likely to be more promising than others.

First, we find no evidence indicating that returning to more limited arbitral jurisdiction would improve efficiency at this point in time. Our research demonstrates that the type of legal or factual issue at play does not have an impact on the efficiency of the system. Moreover, human rights and other statutory rights issues were added to the jurisdiction of arbitrators because collective agreements must be interpreted and applied consistently with such legislation. It makes more sense to have arbitrators rule on such interpretations than to

suspend arbitration proceedings pending such rulings by statutory tribunals. While it is more debatable whether other additions to arbitral jurisdiction under the *Weber*[58] decision were a salutary development, our earlier research indicates that they have not been a factor in increased delay at arbitration.[59]

Rather, this paper points to the primary importance of doing more work to identify and address possible resource constraints and incentive problems that may be creating backlogs at prehearing stages. It would be valuable to know how often bottlenecks occur in pre-arbitration grievance steps and how often they occur at the point of scheduling an arbitration hearing (we suspect but cannot prove that it is more often the latter). Once this is known, unions and employers could be encouraged or assisted in addressing resource constraints that may be producing such bottlenecks, and to align incentive structures with solutions. Possible measures could include assisting parties, perhaps through information resources and mediation services, to put temporary or permanent expedited dispute settlement systems in place to help clear backlogs and prevent their recurrence. Changes to incentive structures might include moving towards instructing and remunerating representatives in ways that allow for and encourage the prehearing preparation and cooperation necessary to make such expedited systems work. Such preparation and cooperation should focus on possibilities for settlement, and in the event that settlement is not possible, on expedited and proportional presentation of evidence. We will say a little more about this below.

Third, more work should be done on the effects of mediation-arbitration on timeliness. While Curran's (2017) research indicates an association between med-arb and longer times at arbitration, we suspect that mediation-arbitration has an overall beneficial impact on delay by removing cases from the arbitration system through settlement, and thus reducing backlogs. If backlogs are at the root of the problem, the overall net effect of med-arb may be very beneficial.

---

58 *Supra* note 17.

59 Kevin Banks, Richard P Chaykowski & George A Slotsve, "Did Weber Affect the Timeliness of Arbitration?" in Elizabeth Shilton & Karen Schucher, eds, *One Law for All? Weber v. Ontario Hydro and Canadian Labour Law: Essays in Memory of Bernie Adell* (Toronto: Irwin Law, 2017) 201.

Finally, our research indicates the potential value of promoting more efficient hearing procedures. While our research, like earlier studies, indicates that prehearing delays are the main problem, we take note of Curran's (2017) research indicating that hearing times have increased 30% over the period 1994 to 2012, suggesting that there may be significant room for improved efficiency at this stage. Such improvement might also make arbitrators and lawyers who are in demand by the parties more available (since hearings would require less of their time), which in turn might prevent backlogs from persisting or recurring once parties have made themselves more available for earlier hearings.

Further work is needed to determine why the overall length of hearings has increased. But our research and that of Curran (2017) indicate that resolving disputes of fact and hearing witness testimony are significant factors that contribute to prolonging hearings. Both are of course often necessary to a fair and full disposition of a dispute. Nonetheless, as Justice Winkler suggests, there may be more efficient ways of presenting evidence.[60] These might include preparing oral or written statements of material facts and only calling and examining witnesses as necessary, and in Justice Winkler's words, in a manner which is "proportional," that is, which reflects the complexity, monetary value, and importance of the dispute.[61] More research into which "proportional" practices are best — that is, both fair and efficient — would be of assistance. Ministries of Labour could then make available, to the parties and to arbitrators, information and training on expedited or proportional presentation of cases. More generally, labour ministries could support the creation of a culture of proportionality with respect to the presentation of evidence and argument that would inform party representatives and arbitrators of what is expected of them in the conduct of hearings. We might then expect the practices of parties in remunerating and instructing their representatives and in conveying their expectations regarding procedures to arbitrators to follow suit, allowing for and incentivizing both the preparation and the hearing administration necessary to ensure an efficient and fair disposition of rights arbitration cases.

---

60 Winkler, *supra* note 3.

61 *Ibid*.

APPENDIX
TABLE 1
Pairwise Correlations in Time, Across Stages

		Event to First Hearing	*Event to Final Award*	*Grievance to First Hearing*	*Grievance to Final Award*	*First to Last Hearing Duration*	*First Hearing to Award Duration*	*Last Hearing to Award Duration*	*Number of Days*
Event to First Hearing	**Correlation**	1							
	Significant Level								
	Number of Observations	268							
Event to Final Award	**Correlation**	**0.8463**	1						
	Significant Level	0							
	Number of Observations	268	299						
Grievance to First Hearing	**Correlation**	**0.9607**	0.7526	1					
	Significant Level	0	0						
	Number of Observations	95	95	180					

continued on next page

		Event to First Hearing	*Event to Final Award*	*Grievance to First Hearing*	*Grievance to Final Award*	*First to Last Hearing Duration*	*First Hearing to Award Duration*	*Last Hearing to Award Duration*	*Number of Days*
Grievance to Final Award	**Correlation**	0.7733	**0.9766**	**0.8158**	1				
	Significant Level	0	0	0					
	Number of Observations	95	103	177	198				
First to Last Hearing Duration	**Correlation**	0.122	0.6119	0.0832	0.5756	1			
	Significant Level	0.0473	0	0.2684	0				
	Number of Observations	265	265	179	176	506			
First Hearing to Award Duration	**Correlation**	0.1332	0.6406	0.1398	0.6868	0.9113	1		
	Significant Level	0.0292	0	0.0634	0	0			
	Number of Observations	268	268	177	177	503	507		

		Event to First Hearing	*Event to Final Award*	*Grievance to First Hearing*	*Grievance to Final Award*	*First to Last Hearing Duration*	*First Hearing to Award Duration*	*Last Hearing to Award Duration*	*Number of Days*
Last Hearing to Award Duration	**Correlation**	0.0973	0.3979	0.1499	0.484	0.1852	0.5735	1	
	Significant Level	0.114	0	0.047	0	0	0		
	Number of Observations	265	266	176	176	503	503	507	
Number of Days	**Correlation**	0.0283	0.4215	0.0257	0.4511	0.7718	0.73	0.2067	1
	Significant Level	0.6441	0	0.7322	0	0	0	0	
	Number of Observations	268	275	180	183	505	506	506	529

Demystifying the Employee Fiduciary Identity

*Jonathan Shepherd**

Canadian courts have applied two distinct approaches when determining whether an employee should be held to be a fiduciary in relation to the employer: the "key employee" approach, and the ad hoc *characteristics approach. The first, which has arguably been elevated to a status-based inquiry, seeks to identify employees who are accountable as fiduciaries by making a categorical distinction between "key employees" and "mere employees"; the second entails a factual inquiry into the particular employer-employee relationship in order to ascertain whether fiduciary characteristics are present. In the author's view, both of the current approaches are flawed. The distinction between "key" and "mere" employees is in practice unworkable. Furthermore, the "key employee" approach raises the risk of results-driven judicial reasoning, and tends to circumvent the important requirement for proof of a fiduciary undertaking on the part of the employee. The problem with the* ad hoc *approach is that the characteristics invoked in the analysis are imprecise, overly broad, and difficult to apply in the context of employment. To overcome these defects, the author proposes a new analytical model, one that incorporates useful features of the existing approaches. In accordance with that model, the indicia that have been developed by the courts in applying the "key employee" approach — the employer's vulnerability, and the employee's ability to exercise discretion — would still be used, but for the purpose of informing the inquiry under the* ad hoc *characteristic approach into whether the employee is a fiduciary. The author argues that this working model will instill greater clarity into the law, be more consistent with fiduciary principles in general, and solve the problem of the courts' frequent avoidance of the requirement to find a fiduciary undertaking.*

---

* Cassels Brock & Blackwell LLP. The author would like to thank Gabrielle Lemoine for her insightful comments and attentive reading of earlier drafts of this paper.

1. INTRODUCTION

> Like law in general, fiduciary law is not a pure category. It is messy.[1]
>
> *Tamar Frankel*

Employees in Canada are sometimes characterized as fiduciaries in their employment relationships. The process of arriving at an appropriate characterization has, unfortunately, been complicated by the fact that Canadian jurisprudence advances two distinct approaches to identifying an employee who is a fiduciary. These differing approaches make it challenging to identify when and how an employee will be burdened with such an exacting equitable duty.

The first is known as the "key employee" approach. It is the approach most often cited in case law. Here, courts seek to identify employees as fiduciaries based on whether they fit within the jurisprudential definition of "key employee," which rests on a categorical distinction between "key" employees and "mere" employees. The second approach is the *ad hoc* characteristic approach. Here, courts identify employees as fiduciaries without resort to fixed categories; instead, they draw a distinction based on whether or not fiduciary characteristics are present in the employee-employer relationship.

These contrasting approaches are grounded in broader legal principles that apply outside of the employment context. Generally, in fiduciary law, two justifications exist for finding an individual to be a fiduciary: the courts may look either to the individual's status or to the factual matrix of a given relationship. These two approaches are referred to, respectively, as *per se* (status) and *ad hoc* (in fact) identification. The "key employee" approach in employment law has arguably been elevated to a *per se* category. Once an employee has been characterized as "key" — through a status-based inquiry — fiduciary obligations are often imposed on the individual. In contrast, the *ad hoc* characteristic approach operates on the understanding that employees do not fit within a traditional fiduciary class. Instead, it attempts to discern whether general fiduciary characteristics are present on a case-by-case basis.

---

1 Tamar Frankel, "Toward Universal Fiduciary Principles" (2014) 39:2 Queen's LJ 391 at 407.

Each of the justificatory approaches that courts apply in the employment context is problematic. The "key employee" approach is founded on a legal fiction. Courts assert that there is a reasoned distinction between "key" and "mere" employees when there is, in reality, none. Courts have attempted to give legal validity to the "key employee" approach by setting out indicia to determine whether an employee is "key." Meanwhile, under the *ad hoc* approach, courts consider characteristics that are overly broad and imprecise in the employment context, such as the employer's vulnerability and the employee's ability to exercise discretion. Due to the inherent malleability of such broadly framed characteristics, and the difficulties to which they can give rise, courts predominantly utilize the "key employee" approach.

This paper argues that the judicial reliance on "key employee" categorization is the primary cause of confusion in the identification of fiduciary employees. Courts should focus on whether fiduciary characteristics exist in the specific employment relationship rather than on whether the employment relationship fits within the "key employee" category. This paper critiques the operational principles of each approach, and then proposes a new working model that amalgamates the useful aspects of both so that each informs the other. The model strives to embed, rather than remove, the indicia that are cited to identify "key employees," applying them to help define the characteristics used to identify fiduciaries by way of an *ad hoc* analysis.

2. THE CURRENT APPROACHES TO IDENTIFYING EMPLOYMENT RELATIONSHIPS AS FIDUCIARY

When it comes to determining whether an employee is considered a fiduciary, Canadian common law sets out two lines of reasoning that follow the loose dichotomy found in fiduciary law between *per se* and *ad hoc* fiduciary relationships.[2] The "key employee"

2 *Imperial Sheet Metal Ltd v Landry and Gray Metal Products Inc*, 2007 NBCA 51 at para 5 [*Imperial Sheet*]. Justice Robertson, discussing the various approaches to identifying when an employee is a fiduciary, referred to the focus on whether or not the individual was a "key employee" as being a narrow approach, whereas a focus on "vulnerability" was the broad approach. The broad approach was so named, Justice Robertson thought, because even "low-level" employees could be characterized as fiduciary, thus extending the concept of the fiduciary employee. I question Justice Robertson's logic on this point and therefore do not adopt this additional distinction.

approach resembles a *per se* category. For example, employees who are identified by the court as "top management" — a term that has been interpreted by some courts over the years to be synonymous with "key employee" — are considered to owe a fiduciary duty to their employer. The *ad hoc* approach looks to the characteristics advanced in a more general *ad hoc* fiduciary analysis, and adapts them to the context of an employee-employer relationship.

(a) The Distinction between *Per Se* and *Ad Hoc* Fiduciary Relationships

The debate about who owes a fiduciary duty to whom has developed considerably over the past century. On the one hand, Canadian jurisprudence has relied heavily on *per se* identification — the status of the relationship — when identifying which individuals owe a fiduciary duty. Confronted with a claim that a particular relationship should be treated as fiduciary, courts often ask whether the relationship fits within a recognized fiduciary category.[3] The relationships between solicitor and client, agent and principal, and director and corporation are some examples of relationships that the courts have classified as fiduciary. The reasoning behind the recognition of classes of *per se* fiduciary relationships is that "certain categories of relationships are considered to give rise to fiduciary obligations because of their inherent purpose or their presumed factual or legal incidents."[4] Where a relationship is one that the courts have previously found to carry with it fiduciary status, the relationship is almost always deemed to be fiduciary in nature.[5] When a relationship that does not clearly fall within any of the previously recognized classes comes before the courts, they tend to engage in analogical reasoning

---

3 Paul Miller, "Justifying Fiduciary Duties" (2013) 584 McGill LJ 969 at 1010 [Miller, "Justifying Fiduciary Duties"].

4 *Galambos v Perez*, 2009 SCC 48 at para 36 [*Galambos*].

5 Miller, "Justifying Fiduciary Duties," *supra* note 3; *Lac Minerals Ltd v International Corona*, [1989] 2 SCR 574 at para 130, [1989] SCJ No 83 [*Lac Minerals*]. Keep in mind that the "traditional" relationships do not invariably give rise to fiduciary obligations. Identity is separate and distinct from obligation. Not all obligations existing between the parties to a well-recognized fiduciary relationship will be fiduciary in nature.

and ask whether the relationship in question is similar to an existing *per se* fiduciary relationship.[6]

However, courts have not exclusively relied on existing categories.[7] In more recent years, they have often found relationships to be fiduciary based on their *ad hoc* characteristics. This line of reasoning can be traced back to the dissenting opinion of Justice Wilson in *Frame v. Smith*,[8] where the factors of discretionary power, inequality, and vulnerability were used to determine whether a fiduciary relationship existed.[9] The *ad hoc* approach was developed precisely because the courts recognized that the *per se* approach lacked flexibility.[10] Rather than imposing fiduciary duties upon a class as a whole, courts have used this approach to conduct a factual inquiry on a case-by-case basis.[11]

The characteristics identified in Wilson J.'s dissent in *Frame* — employee discretion and employer vulnerability — were adopted by the Supreme Court of Canada in later cases, but in a revised form. For example, in *Norberg v. Wynrib*,[12] Justice McLachlin (as she then was) focused on trust, power, and vulnerability. In *Lac Minerals*,[13] Justice La Forest emphasized the factors of discretion, unilateral power, and vulnerability. Most recently, former Chief Justice McLachlin, speaking for a unanimous Court in *Alberta v. Elder Advocates of Alberta Society*,[14] held that vulnerability (arising from the relationship) alone was insufficient to bring a relationship into the fiduciary realm and identified three additional characteristics that must be present: vulnerability arising from the fiduciary's control; discretion on the part of the fiduciary affecting a legal or substantial practical interest of

---

6 Miller, "Justifying Fiduciary Duties," *supra* note 3.

7 Stacey Reginald Ball, *Canadian Employment Law* (Aurora, Ont: Carswell, 1996) (loose-leaf, updated 2017) at 13:20 [Ball].

8 [1987] 2 SCR 99 at 102, [1987] SCJ No 49 [*Frame*].

9 Miller, "Justifying Fiduciary Duties," *supra* note 3; Ball, *supra* note 7 at 13:30.

10 Paul Miller, "A Theory of Fiduciary Liability" (2011) 562 McGill LJ 235 at 249 [Miller, "Theory of Fiduciary Liability"].

11 *Ibid*.

12 [1992] 2 SCR 226, [1992] SCJ No 60 [*Norberg*].

13 *Lac Minerals*, *supra* note 5 at para 26. See generally Miller, "Theory of Fiduciary Liability," *supra* note 10 at 250 for a complete overview of the evolution of the *ad hoc* characteristics.

14 2011 SCC 24 [*Elder Advocates*].

the beneficiary; and an undertaking by the fiduciary to act in the best interests of the alleged beneficiary.[15] She noted that the particular relationships on which fiduciary law focuses are those in which one party is given a discretionary power to affect the legal or vital practical interests of the other.[16]

(b) The General Distinction Brought into the Employment Context

(i) *The* Per Se *Category of "Key Employee"*

The imposition of fiduciary duties on employees was instilled in Canadian law by the Supreme Court of Canada in *Can Aero v. O'Malley*.[17] Justice Bora Laskin, writing for the Court, held that two senior managers "were 'top management' and not mere employees."[18] Due to the nature of the senior managers' relationship with their employer, the Court found that they owed a duty to the employer similar to that owed by a director to the corporate body.[19] This duty was a fiduciary one. The senior officer, much like the director, was precluded from obtaining personal benefit from any property or any business advantage of the company.[20] The Court relied heavily on analogical reasoning to determine whether the senior employees were fiduciaries. Justice Laskin noted the similarity between senior employees and directors, but also the distinction between agent and servant. He held that, although the employees were supervised, their position as senior officers "charged them with initiatives and with responsibilities far removed from the obedient role of servants."[21] Senior officers, like agents, had a fiduciary duty.

Underlying the *O'Malley* decision was a partial rejection of the proposition that employees in general constituted a class of status

---

15 *Ibid* at para 36.
16 *Ibid* at para 35. See also *Galambos*, *supra* note 4 at para 70.
17 [1974] SCR 592 at 606, [1973] SCJ No 97 [*O'Malley*].
18 *Ibid*.
19 *Ibid*.
20 *Ibid* at 607.
21 *Ibid* at 606.

fiduciaries.[22] Imposing fiduciary obligations on all employees has been likened by some to committing "a high proportion of employees . . . to slavery."[23] The *O'Malley* decision attempted to strike a balance between the "need to protect companies from persons who occupied such high positions to prevent them from serving two masters and freedom of trade."[24]

While courts have not imposed a fiduciary duty on employees in general, since *O'Malley* senior employees have often been considered status fiduciaries.[25] The distinction between senior and mere employees, first articulated in *O'Malley*, has seemingly been treated as dogma in many decisions.[26] As with *per se* fiduciaries, once an individual is found to fit within the category, fiduciary obligations often attach. Decisions after *O'Malley* have expanded the scope of employees who are considered "top management." In *W.J. Christie & Co. v. Greer*,[27] the Manitoba Court of Appeal held that senior management employees, key management persons, and existing "top management" owed fiduciary obligations to their employers.[28] Beginning with *Wilcox v. GWG Ltd.*,[29] courts then broadened fiduciary obligations to "key employees."[30]

Judicial reliance on the category of "key employee" has, however, created considerable confusion. Appellate and lower courts have adopted factors they believe are helpful in determining whether an employee is a "key employee" and therefore a fiduciary.[31] The result has been that many courts have resorted to a factual case-by-case inquiry within a status-based analysis. While the categorical

---

22 Robert Flannigan, "The [Fiduciary] Duty of Fidelity" (2008) L Q Rev 274 at 287 [Flannigan].

23 *RW Hamilton Ltd v Aeroquip Corp*, [1988] OJ No 906 at para 29, 65 OR (2d) 345 (HCJ).

24 *Ibid*.

25 Flannigan, *supra* note 22.

26 *Ibid* at 289.

27 [1981] 4 WWR 34, [1981] MJ No 77 [*WJ Christie*].

28 Ball, *supra* note 7 at 13:12; *WJ Christie*, *supra* note 27 at 40.

29 (1984), 31 Alta LR (2d) 42, [1984] 4 WWR 70, as cited in *Ford v Keegan*, 2014 ONSC 4989 at para 194 [*Keegan*].

30 Keegan, *ibid* at para 21.

31 *Planit Search Inc v Mann*, 2013 ONSC 6847 at para 31 [*Planit*], citing *Boehmer Box LP v Ellis Packaging Ltd*, [2007] OJ No 1694 at para 46, 2007 CLLC ¶210-025.

distinction between key and mere employees frames the discussion, courts tend to look at the relationship between the employee and the employer in much the same way as they would if they were engaged in an *ad hoc* analysis.

Consider, for example, two cases that are repeatedly cited in Canadian jurisprudence for the indicia they set out: *Imperial Sheet*[32] and *MEP Environmental Products Ltd. v. Hi Performance Coatings Co*.[33] The New Brunswick Court of Appeal in *Imperial Sheet* set out three indicia for deciding who "is a fiduciary or key employee":

(1) An integral and indispensable component of the management team that is responsible for guiding the business affairs of the employer;
(2) Necessarily involved in the decision-making process; and
(3) Therefore, has broad access to confidential information that if disclosed would significantly impair the competitive advantages that the former employer enjoyed.[34]

Similarly, the Manitoba Court of Queen's Bench in *MEP Environmental* enumerated broadly worded indicia to determine whether an employee could be considered "key" and, consequently, a fiduciary:

(1) What were the employee's job duties with the former employer?
(2) What was the extent or frequency of the contact between the employee and the former employer's customers and/or suppliers?
(3) Was the employee the primary contact with the customers and (or) suppliers?
(4) To what extent was the employee responsible for sales or revenue?
(5) To what extent did the employee have access to and make use of, or otherwise have knowledge of, the former employer's customers, their accounts, the former employer's pricing practices, and the pricing of products and services?

---

32 *Imperial Sheet*, *supra* note 2 at para 63.
33 2006 MBQB 119 at para 18 [*MEP Environmental*], aff'd 2007 MBCA 71.
34 *Imperial Sheet*, *supra* note 2 at para 63, cited in *ADM Measurements Ltd v Bullet Electric Ltd*, 2012 ABQB 150 at para 73 [*ADM Measurements*]; *M-I Drilling Fluids Canada, Inc v Cottle*, 2018 ABQB 143 at para 30 [*Cottle*].

(6) To what extent was the former employer's information as regards customers, suppliers, pricing, etc., confidential?[35]

In each case, the indicia of key employee status are open-ended and lead to what is essentially an *ad hoc* inquiry.

(ii) *The Application of* Ad Hoc *Characteristics*

The *ad hoc* factual inquiry into whether a fiduciary relationship exists in the employment context stems from the "vulnerability" test first articulated by Justice Wilson in *Frame*.[36] Although subsequent iterations of the factual inquiry approach[37] occurred outside of the employment context, some lower courts have relied on the *ad hoc*

---

35 *MEP Environmental*, *supra* note 33 at para 18, cited in *GasTops v Forsyth*, 2009 CanLII 66153 at para 83 [*GasTops*]; *Computer Enhancement v JC Options*, 2016 ONSC 452 at para 72 [*Computer Enhancement*]; *Guzzo v Randazzo*, 2015 ONSC 6936 at para 127; *Zoic Studios BC Inc v Gannon*, 2012 BCSC 1322 at para 97, aff'd 2015 BCCA 334.

36 *Frame*, *supra* note 8, as cited in *Imperial Sheet*, *supra* note 2 at para 5.

37 The most recent pronouncement of the *ad hoc* characteristic approach was made by then-Chief Justice McLachlin in *Elder Advocates*. The Chief Justice held that, to establish an *ad hoc* fiduciary duty, the claimant must show, in addition to the vulnerability arising from the relationship as described by Justice Wilson in *Frame*, that is, "the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power":

(1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;
(2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and
(3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

Elder Advocates, *supra* note 14 at para 36. The consistent use of the word "must" in *Elder Advocate* colours the *ad hoc* framework with more rigidity, with the result that the Supreme Court of Canada seems to be setting out a legal test rather than a description. This is in stark contrast to the comments of Justice Sopinka in *Lac Minerals*, *supra* note 5 at para 131, where he stated that "it is possible for a fiduciary relationship to be found although not all of these [*Frame*] characteristics are present."

characteristic approach to impose fiduciary duties on certain employees.[38] Using the *ad hoc* approach as a "rough and ready guide,"[39] a few courts have been able to arrive at well-reasoned conclusions without relying on the fiduciary category of "key employee." In *Atlantic Business Interiors v. Hipson*,[40] the Nova Scotia Court of Appeal agreed with lawyer Mark Ellis that "[i]t is always a question to be decided on the individual facts of each case whether the degree of responsibility, dependency and vulnerability is strong enough to support a finding of fiduciary status."[41] In *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*,[42] Justice Abella, dissenting on other grounds, stated that "[f]iduciary duties do not arise from an employee's title, such as branch manager, but from his or her actual authority or control over the employer's operation."[43]

3. THE PROBLEMS WITH THE CURRENT APPROACHES

In the employment context, both of the approaches for identifying a fiduciary relationship have failed, albeit in different ways. The *ad hoc* approach has failed because the characteristics are too broad and are difficult to apply to employment. The problem with the "key employee" approach is more complex. First, the foundation for the approach is based on a legal fiction. Simply put, the concept of a "key employee" is meaningless. Secondly, the "key employee" approach can increase the risk of result-driven reasoning. Thirdly, the "key employee" approach permits the courts to circumvent a vital part of the legal analysis, namely, the necessary undertaking on the part of the fiduciary employee.

---

38 *Imperial Sheet*, *supra* note 2 at para 5. Lower courts aptly note that the employee-employer relationship is not considered a fiduciary category. Although an employee has "a basic common law obligation to render faithful and loyal service to his employer during his employment," only particular employment relationships raise fiduciary obligations and warrant the intervention of equity: *HRC Tool & Die Mfg Ltd v Naderi*, 2015 ABQB 437 at para 28, rev'd in part 2016 ABCA 334 [*HRC Tool & Die* CA]; *ADM Measurements*, *supra* note 34 at para 59.

39 *Lac Minerals*, *supra* note 5 at p 645.

40 2005 NSCA 16 [*Hipson*]; *Planit*, *supra* note 31 at para 31.

41 *Hipson*, *ibid* at para 90; *Planit*, *supra* note 31 at para 31.

42 2008 SCC 54.

43 *Ibid* at para 50, as cited in *ADM Measurements*, *supra* note 34 at para 62.

(a) The Difficulty of Applying the *Ad Hoc* Characteristics

As noted, the *ad hoc* characteristic approach is not without fault. Lower courts have often had difficulty adapting the *ad hoc* characteristics in a way that can be applied to the employment context. Regarding vulnerability, commentators have remarked that it is difficult to characterize the employer rather than the employee as the vulnerable party in an employment relationship.[44] The Supreme Court of Canada has commonly referred to the employer as "the bearer of power"[45] — not the other way around. The question of the "extent to which [employer] vulnerability arises from the relationship"[46] becomes a vital question. Conversely, some courts have treated even relatively minor employer vulnerability as sufficient. Justice Robertson in *Imperial Sheet* criticized other courts' application of the vulnerability criterion, which he believed would lead to "every lorry driver in this country [owing] the same post-employment obligations [as those] encumbering the executives of our largest corporations."[47]

The discretion exercised by the employee, another of the characteristics set out in *Elder Advocates*, is also problematic in the employment context. Discretion is pervasive in employment. In all employment relationships, parties can identify a "legal or practical interest . . . affected by the fiduciary's exercise or control."[48] The range of employees who possess a degree of discretion is extensive. Commentators have often cited the comments of Lord Steyn, who said that "there can be discretion even in the hammering of a nail."[49] Courts have been given little guidance with respect to how much discretion is required in an employee's role before a finding of fiduciary can properly be made.

The final element set out in *Elder Advocates* is the required undertaking on the part of a fiduciary. In *Galambos*, the Supreme Court of Canada held that the required undertaking "may be the result

---

44 Douglas Brodie, "The Employment Relationship and Fiduciary Obligations" (2012) 16:198 Edinburgh L Rev 198 at 200.

45 *Ibid* at 208.

46 *Galambos*, *supra* note 4 at para 68.

47 *Imperial Sheet*, *supra* note 2 at para 58.

48 *Elder Advocates*, *supra* note 14 at para 36.

49 Miller, "Justifying Fiduciary Duties," *supra* note 3 at 204.

of . . . the express or implied terms of an agreement" and that "[i]n cases of *per se* fiduciary relationships, [the] undertaking will be found in the nature of the category of the relationship in issue."[50] *Galambos* further clarified that an implied undertaking can be found having regard to "the particular circumstances of the parties' relationship," which could include "professional norms, industry or other common practices."[51]

(b) Misconceptions Surrounding the "Key Employee" Category

(i) *The Legal Fiction of "Key Employee"*

There is little consensus on the definition of "key employee" in judicial reasoning, nor is there consensus on whether certain employees fit within the elected meaning where it has been defined. Canadian jurisprudence has generally accepted the theory that the "key employee" approach attempts to look at the role the employee plays in the enterprise.[52] However, the distinction has become unworkable because some judges have looked to an employee's position within the company, while others have looked to the scope of the employee's discretion and autonomy.[53]

There are obvious problems with relying solely on an employee's position or title. Appellate and lower courts are wary of imposing fiduciary obligations on employees simply because they have official titles. In *Tomenson Saunders Whitehead Ltd. v. Baird*,[54] Justice Keith stated: "notwithstanding the impressive titles of 'Vice-President' . . .

---

50 *Elder Advocates*, *supra* note 14 at para 32 (citing *Galambos*, *supra* note 4 at para 77).

51 *Galambos*, *supra* note 4 at para 79.

52 Ian Roland & Morgan Sim, "Fiduciary Obligations in Employment Relationships in Canada" (Paper prepared for the 2011 Annual Meeting of the American Bar Association, Labor and Employment Law Section, August 2011) at 10, online: American Bar Association <http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/annualmeeting/013.authcheckdam.pdf> [Roland & Sim].

53 Aline Van Bever, "When Is an Employee a Fiduciary?" (2014) 18:1 CLELJ 39 at 63.

54 [1980] OJ No 386, 7 CCEL 176.

not only was [the employee] not the 'directing force' of this very large organization, but was many levels below 'top management.'"[55] Similarly, in *3464920 Canada Inc. v. Strother*,[56] the British Columbia Court of Appeal refused to hold a company's chief operating officer and chief financial officer (the same employee) accountable as a fiduciary. Justice Newbury, for the Court, reiterated the trial judge's finding that "[the employer] was a small company where impressive titles were readily available."[57]

Appellate and lower courts have also had difficulty distinguishing "key employees" from high-quality employees. In *Westcan Bulk Transport Ltd. v. Stewart*,[58] the Court pointed out that "all companies should consider good employees to be key employees."[59] In *Crystal Tile & Marble Ltd. v. Dixie Marble & Granite Inc.*,[60] the Court of Appeal for Ontario held that the mere fact that a business relied heavily on an employee was not sufficient to brand the employee as a fiduciary. The Court reiterated the trial judge's conclusion that "to find otherwise would mean the salesperson, regardless of his or her position or authority in the business, would have a fiduciary duty simply because of his or her success in sales."[61]

Given that the definition of "key employee" has not been clearly delineated, courts have relied on indicia to help determine when an

---

55 *Ibid* at para 58; Ball, *supra* note 7 at 13:30.2.

56 2005 BCCA 35, rev'd in part 2007 SCC 24.

57 *Ibid* at para 65. On appeal to the Supreme Court of Canada, Justice Binnie, writing for the majority, dismissed the fiduciary claim for the reasons given by the British Columbia Court of Appeal. See *Strother v 3464920 Canada Inc*, 2007 SCC 24 at para 112 [*Strother* SCC].

58 2005 ABQB 97.

59 *Ibid* at para 66.

60 2007 ONCA 566.

61 *Ibid* at para 5, as cited in Roland & Sim, *supra* note 52 at 11. See also *Cantol v State Chemical*, 2019 ONSC 531 at para 19. Justice Nakatsuru found that a top salesperson was not a fiduciary employee, in part because the salesperson's superior knowledge of the product did not leave the employer dependent on the employee or otherwise vulnerable. Justice Nakatsuru commented that characterizing as a fiduciary an employee who becomes familiar with a product and creates or maintains successful relationships with customers would be a significant extension of the concept.

individual will fit within this *per se* category, engaging in inquiries that resemble *ad hoc* ones.[62]

(ii) *The Risk of Result-Driven Reasoning*

Canadian jurisprudence has forewarned about the danger of result-driven reasoning during the process of identifying fiduciaries. This warning was reiterated in *Sateri (Shanghai) Management Ltd. v. Vinall*,[63] where Justice Ballance quoted Justice Perell (as he now is), who wrote:

> . . . a fallacy may occur in the determination of whether a person should be classified as a fiduciary. The fallacy is that of determining fiduciary status and fiduciary duty by reasoning from misbehaviour or from remedy to duty. This result-driven reasoning process begs the question of whether a person has fiduciary status by moving from the breach of a duty or the desired remedy to a finding that the person had a duty.[64]

The Supreme Court of Canada has also cautioned courts against this type of reasoning. In *Lac Minerals*, Justice Sopinka wrote that "the presence of conduct that incurs the censure of a court of equity in the context of a fiduciary cannot itself create the duty."[65] In *Hodgkinson v. Simms*, the Court endorsed an English authority for the following proposition: "if there is a fiduciary duty, the equitable rules about self-dealing apply: but self-dealing does not impose the duty."[66]

Nonetheless, in applying the "key employee" approach, courts often look at the conduct — invariably linked to misconduct — of an individual to inform themselves as to whether the "key employee" rubric applies. In effect, this kind of analysis links fiduciary duty to misbehaviour. When courts scrutinize the conduct of an employee to determine whether the employee should be considered "key," the process often involves an examination of whether the individual had access to confidential information[67] or of the individual's connection

62 *Imperial Sheet*, *supra* note 2 at para 63; *MEP Environmental*, *supra* note 34 at para 18.
63 2017 BCSC 491.
64 *Ibid* at para 364.
65 *Lac Minerals*, *supra* note 5 at 600.
66 3 SCR 377 at para 121 [*Hodgkinson*].
67 *Imperial Sheet*, *supra* note 2 at para 63.

with clients.[68] This examination almost always results in a finding that the employee in question has breached his or her fiduciary duty. But courts should not jump to the conclusion that because an individual had access to confidential information and was disloyal, the individual had a fiduciary duty to be loyal.

(iii) *Circumventing an Undertaking through Presumptions*

Some courts' reliance on the categorical "key employee" approach circumvents proof of the fiduciary undertaking that would otherwise be required,[69] by bringing into play presumptions. The Supreme Court of Canada has ruled that in the case of *per se* fiduciary relationships, the undertaking is to be found in the nature of the category of relationship in issue, not in the expressed or implied terms of the agreement.[70] Within the employment context, some courts have presumed an undertaking on the basis of "key employee" status. For example, in *ADM Measurements*, the Alberta Court of Queen's Bench held that no explicit undertaking on the part of a "key employee" was required because

> . . . the contract of employment for a senior manager of this kind does not require explicit language that identifies the employee as operating in a fiduciary relationship. The director-like authority of this kind of employee warrants a special duty.[71]

The Alberta Court of Appeal took a similar approach to the required undertaking on the part of a "key employee" in *HRC Tool & Die*, stating that "[b]y agreeing to become key employees, [the employees] implicitly undertook to discharge the fiduciary duties inherent in that employment."[72]

---

68 *Cottle*, *supra* note 34 at para 35; *GasTops*, *supra* note 35 at para 178; *Computer Enhancement*, *supra* note 35 at para 78.

69 *Elder Advocates*, *supra* note 14 at para 29. Former Chief Justice McLachlin states at para 30 that "the evidence *must* show that the alleged fiduciary gave an undertaking," evoking a sense that the undertaking is a necessary precondition [emphasis added].

70 *Galambos*, s*upra* note 4 at para 77.

71 *ADM Measurements*, *supra* note 33 at para 44.

72 *HRC Tool & Die* CA, *supra* note 38 at para 19. See also *Jetco Heavy Duty Lighting v Fonteyne*, 2018 ABQB 345 at para 57. Justice Mah relied on *HRC Tool & Die* CA for the proposition that the undertaking "may be implied simply from the employee's participation in his or her employment role."

The presumed undertaking within the "key employee" approach is problematic, given the breadth and lack of clarity of the definition of "key employee" itself. Unlike a lawyer or a director of a company, employees do not know when or how they will be burdened with such an exacting duty, so it is difficult to predict in what kinds of circumstances an undertaking will be presumed. Presuming an undertaking on the part of a person found to be a "key employee" can completely alter an employee's expectations, imposing a duty that the employee did not anticipate. This is particularly likely to happen where a court fails to address the unequal bargaining power between the parties.

4. A WORKING MODEL: REFRAMING THE ANALYSIS

The two existing approaches for identifying which employees are fiduciaries, though flawed, are not incompatible. One approach can inform the other to create a coherent legal framework. With the two existing approaches in mind, this paper proposes a working model to help identify fiduciary relationships in the employee-employer context. The working model brings the *ad hoc* characteristics — vulnerability (arising from the relationship and from the control exercised by the employee), the discretion vested in the employee, and the undertaking on the part of the employee — to the forefront of the analysis. This ensures that the foundational principles in *Elder Advocates* are put to use.

The working model strives to make the *ad hoc* characteristics, described by certain commentators as overbroad and imprecise,[73] workable in the employment context. To do this, the model proposes that the indicia that have been used to clarify the categorization of "key employees" are used instead to inform and support the analysis of whether vulnerability and discretion are present in a particular employee-employer relationship. Although some have argued that the "key employee" indicia were picked arbitrarily,[74] I argue that the indicia selected by courts pursue the same goal that underlies an *ad hoc* analysis: explaining the source of fiduciary duty.[75]

---

73 Miller, "Theory of Fiduciary Liability," *supra* note 10 at 264.

74 Van Bever, *supra* note 53 at 63.

75 *Elder Advocates*, *supra* note 14 at para 29.

Some Canadian courts have recognized that there is little substantive difference between the categorical "key employee" approach and the *ad hoc* characteristics described by the Supreme Court of Canada. In *Pan Pacific*,[76] Justice Sigurdson insisted that although courts may categorize individuals as "key employees," the underlying principles they rely on are really the same as the characteristics set out in *Frame*.[77] In his decision, Justice Sigurdson followed the *Frame* characteristics to shed light on whether the employee should be considered a "key employee."

I agree with Justice Sigurdson's logic but disagree with his application. The courts' legal analysis should use the "key employee" indicia to inform the determination of whether the employee is a fiduciary under the *ad hoc* characteristics, not the other way around. Not only is this approach more consistent with the principles of fiduciary law, it addresses the problem of the frequent circumvention of the requisite undertaking under the "key employee" approach. Courts ought to look to the particular contractual relationships between employers and employees for guidance on whether an employee has explicitly or by implication undertaken to become a fiduciary. In this regard, the question that should be asked is whether the parties had a reasonable expectation that they would enter into a fiduciary relationship.

(a) The Role of the "Key Employee" Indicia in the *Ad Hoc* Characteristic Analysis

The Supreme Court of Canada in *Elder Advocates* clearly set out the framework to assess when an *ad hoc* fiduciary relationship may arise. Nevertheless, confusion still lingers in cases where courts are tasked with assessing whether the requisite degree of vulnerability and discretion are present in a relationship. The working model, as set out in Figure 1 below, provides a way of bridging the gap between overly broad, imprecise fiduciary characteristics and their application to the employee-employer relationship.

---

76 *Pan Pacific Recycling Inc v So*, 2006 BCSC 1337 at paras 81-82 [*Pan Pacific*].
77 *Ibid* at para 82.

FIGURE 1
The Working Model: How the "Key Employee" Indicia Can Inform the *Ad Hoc* Characteristic Analysis

I. Vulnerability

Arising from the relationship: there must be an inability on the part of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion (*Frame*, para. 63, as cited in *Elder Advocates*, para. 36).

Arising from the fiduciary's control: the duty must be owed to a defined person or class of persons who must be vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them (*Elder Advocates*, para. 33).

These elements can be identified in the employment relationship by asking:

- Was the employee an integral and indispensable component of the management team that is responsible for guiding the business affairs of the employer (*Imperial Sheet*, Indicia 1); and/or
- What were the employee's job duties, including the extent and frequency of the contract between the employee and the employer's customers and/or suppliers (*MEP Environmental*, Indicia 1, 2, 3).

II. Discretion

On the part of the fiduciary: a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control (*Elder Advocates*, para. 36).

This element can be identified in the employment relationship by asking:

- Was the employee necessarily involved in the decision-making process (*Imperial Sheet*, Indicia 2); and/or
- To what extent was the employee responsible for sales or revenue and to which extent the employee had access to the employer's confidential practices or accounts (*MEP Environmental*, Indicia 4, 5).

III. Undertaking

To act in the best interest of the beneficiary.

This element can be identified in the employment relationship by looking at the parties' reasonable expectations.

(i) *Vulnerability (Arising from the Relationship and from the Control Exercised by the Fiduciary)*

The Supreme Court of Canada has stressed the importance of vulnerability as a hallmark of a fiduciary relationship. In *Hodgkinson*, Justice La Forest suggested that vulnerability was the "golden thread" that united equitable causes of action.[78] Yet, in *Elder Advocates*, the Supreme Court of Canada also affirmed that vulnerability alone was insufficient to support a fiduciary claim.[79] In *Elder Advocates*, the Supreme Court reminded jurists that, when seeking to identify fiduciaries through an *ad hoc* analysis, they must look at both the vulnerability arising from the relationship and the vulnerability of the beneficiary to the fiduciary's control.[80]

The Court in *Elder Advocates* outlined two lines of inquiry that had to be pursued to determine whether vulnerability is present in a particular relationship.[81] Former Chief Justice McLachlin not only breathed life back into the vulnerability analysis of Justice Wilson in *Frame*, but articulated her own version of it.[82] If a court is to follow the framework set out in *Elder Advocates*, it must carry out (i) an inquiry into vulnerability arising from the relationship, which is assessed by looking at an "inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power";[83] and (ii) an inquiry into vulnerability arising from the fiduciary's control, which requires the court to ascertain whether the fiduciary duty is "owed to a defined person or class of persons who [are] vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them."[84]

---

78 *Hodgkinson*, *supra* note 66 at para 25.

79 *Elder Advocates*, *supra* note 14 at para 28.

80 *Ibid* at para 36.

81 *Ibid*.

82 *Ibid* at para 34, where former Chief Justice McLachlin identifies the elements that "the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame* . . . ."

83 *Frame*, *supra* note 8 at para 63. An interesting aspect of the vulnerability analysis in *Frame* is the required inadequacy of other legal remedies, an articulation of an equitable threshold which seems to have been ignored in later cases.

84 *Elder Advocates*, *supra* note 14 at para 33.

Although these inquiries seem daunting, several of the indicia described in *Imperial Sheet* and *MEP Environmental* can assist in finding whether vulnerability does in fact arise from the relationship and from the fiduciary's control. In *MEP Environmental*, the Court considered the employee's job duties, including the extent and frequency of the contact between the employee and the employer's customers and/or suppliers.[85] The employee's frequency of contact and whether the employee is considered the main contact for customers and/or suppliers[86] are important factors in determining the employer's level of vulnerability.

Another aspect of vulnerability is the employee's power and ability to direct the affairs of the employer.[87] The first indicia in *Imperial Sheet* provides guidance on how this factor can be applied in the employment context. The question is whether the employee was "an integral and indispensable component of the management team that is responsible for guiding the business affairs of the employer."[88] If the employee is an integral and indispensable part of the company, there is vulnerability.

(ii) *Discretion on the Part of the Fiduciary*

The Supreme Court of Canada in *Galambos* clarified the basic principles of fiduciary law, affirming that the ability to exercise discretion is a fiduciary characteristic. The Court stated that "the particular relationships on which fiduciary law focuses are those in which one party is given a discretionary power to affect the legal or vital practical interests of the other."[89] Discretion is consistently used as an identifying characteristic of fiduciary relationships. Legal academic Ernest Weinrib was one of the first to argue that discretion was an essential characteristic of all fiduciary relationships.[90] Weinrib stated

85 *MEP Environmental*, *supra* note 33. See indicia 1 and 2.

86 *Ibid*. See indicia 3.

87 Peter Barnacle & Michael Lynk, "Employment Law in Canada" (Toronto: LexisNexis, 2017) at 11:179.

88 *Imperial Sheet*, *supra* note 2 at para 63. See indicia 1.

89 *Galambos*, *supra* note 4 at para 70.

90 Miller, "Justifying Fiduciary Duties," *supra* note 3 at 1012; Ernest J Weinrib, "The Fiduciary Obligation" (1975) 25:1 UTLJ 1 at 7 [Weinrib, "The Fiduciary Obligation"].

that "two elements thus form the core of the fiduciary concept and these elements can also serve to delineate its frontiers. First, the fiduciary must have scope for the exercise of discretion, and second, this discretion must be capable of affecting the legal position of the principal."[91] The Supreme Court of Canada in *Elder Advocates* followed this reasoning, holding that "the claimant must show that the alleged fiduciary's power may affect the legal or substantial practical interests of the beneficiary."[92]

Again, the indicia undergirding the "key employee" approach can provide guidance when identifying where discretion may exist in an employment relationship. In *MEP Environmental*, the Manitoba Court of Appeal looked at the extent to which an employee was responsible for sales or revenue,[93] and the extent to which the employee had access to the employers' confidential practices or accounts[94] to determine whether the employee was a "key employee." These factors relate directly to a discretionary authority (of the employee) relative to the practical interest of the beneficiary (the employer).[95] The New Brunswick Court of Appeal in *Imperial Sheet* focused on similar indicia. The Court looked at whether the employee was necessarily involved in the decision-making process,[96] and whether the employee had broad access to confidential information that, if disclosed, would hinder the employer.[97] These indicia inform the inquiry into whether the relationship is discretionary in nature, since "discretion entails latitude for judgment by the person invested with authority in determining its exercise."[98]

(b) Responding to the Required Undertaking on the Part of the Fiduciary

Unlike the "key employee" approach, which has allowed courts to circumvent the required undertaking on the part of the fiduciary,

---

91 Weinrib, "The Fiduciary Obligation," *supra* note 90 at 4.
92 *Elder Advocates*, *supra* note 14 at para 34.
93 *MEP Environmental*, *supra* note 33. See indicia 4.
94 *Ibid*. See indicia 5.
95 Miller, "Justifying Fiduciary Duties," *supra* note 3 at 1014.
96 *Imperial Sheet*, *supra* note 2 at para 63. See indicia 2.
97 *Ibid*. See indicia 3.
98 Miller, "Justifying Fiduciary Duties," *supra* note 3 at 1013.

the *ad hoc* characteristic approach reminds courts to focus on this important fiduciary element. The working model alerts courts to the fact that circumventing the undertaking requirements because of the status of a "key employee" may undermine the contractual relationship the parties intended to rely on.

Although the point was settled in *Galambos* that one cannot be made a fiduciary against one's will, the decision did leave unresolved the issue of whether mutual understanding was necessary.[99] In *Hodgkinson*, Justice La Forest, for the majority, held that courts may take into account the parties' contract, as part of the factual inquiry, to determine whether a fiduciary duty is owed.[100] Justice La Forest further stated that in cases where fiduciary obligations arose as a matter of fact, "the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue."[101]

Due to the contractual nature of the relationship between an employee and employer, an examination of the parties' reasonable expectations is the vehicle that is best suited to the task of determining if there was such an undertaking. In her minority ruling in *Strother*,[102] former Chief Justice McLachlin stated that the terms of the contract should shape the fiduciary relationship, not the other way around.[103]

There is support from appellate and lower courts for the notion of relying on employment contracts, in particular on the use of restrictive covenants, to inform consideration of whether there was a

---

99 Anthony Duggan, "Fiduciary Obligations in the Supreme Court of Canada: A Retrospective" (2011) 50 Can Bus LJ 453 at 463.

100 *Hodgkinson*, *supra* note 66 at para 37.

101 *Ibid* at para 32.

102 *Strother* SCC, *supra* note 57 at paras 140-142. See also *Genesis Fertility Centre Inc v Yuzpe*, 2019 BCSC 233 at para 99. In *Genesis*, Justice Sewell, following the *Strother* minority decision, held that the contractual relationship between the parties is relevant to a determination of whether there has been a breach of fiduciary duty.

103 See *Strother* SCC, *supra* note 57 at para 141:

> The fiduciary duty between lawyer and client is rooted in the contract between them. It enhances the contract by imposing a duty of loyalty with respect to the obligations undertaken, but it does not change the contract's terms. Rather, it must be molded to those terms.

fiduciary undertaking.[104] The Nova Scotia Court of Appeal in *Hipson* found that, although the restrictive covenant between the parties was unenforceable, the covenant went "to the intentions, reasonable or otherwise, of the parties at the time of the employment agreement."[105] (The Court of Appeal then clarified that the inquiry contemplated by *Hodgkinson* was not merely into the expectations of the parties but their "reasonable expectations."[106]) Similarly, in *Keegan*, Justice Price relied on the employment contract as evidence of the parties' reasonable expectations as to the nature of the fiduciary duties that arose.[107]

(c) Practical Effects: Applying the Working Model to Previously Decided Cases

The proposed working model instills clarity. Its benefits are illustrated when it is applied to the facts presented in recent case law. In *Computer Enhancement*,[108] the Court held that a top sales representative was a "key employee" and therefore a fiduciary.[109] After 14 years with Computer Enhancement, that salesperson quit to start his own company and compete directly with the plaintiff. The employee was a commission salesperson, never attended any management meetings, had no supervisory role in the company, and aspects of his sales had to be approved by management.[110] If a court were to apply the working model to *Computer Enhancement*, it would find that the facts do not establish the characteristics required of a

---

104 See *IBM Canada Ltd v Almond*, 2015 ABQB 336 at paras 95-99. Justice Pentelechuk looked at the non-solicitation agreement, which expressly elevated the employee to a fiduciary position, but found that the agreement was not in itself dispositive of the issue. She went on to consider whether vulnerability and discretion were actually present in the relationship. In the result, the discordance between the employee's actual role and the description of her position as "fiduciary" led Justice Pentelechuk to have reservations about whether the employee could in fact be properly characterized as a fiduciary.

105 *Hipson*, *supra* note 40 at para 94.

106 *Ibid*.

107 *Keegan*, *supra* note 29 at para 224.

108 *Computer Enhancement*, *supra* note 35 at paras 66-79.

109 *Ibid* at para 78.

110 *Ibid* at para 4.

fiduciary employment relationship. The working model indicates that vulnerability can exist where an employee has power and ability to direct the affairs of the employer, and that discretion can be identified where the employee is necessarily involved in the decision-making process.

Applying the working model to the facts of *Computer Enhancement* also calls into question the Court's finding of fiduciary status. The sales representative was not part of management, and there was no evidence that he had access to financial information. Furthermore, there was little evidence of discretion. He did not hire, fire, or supervise any other employee, and had to have certain aspects of his sales deals authorized by the owner. Based on the facts of *Computer Enhancement*, the salesperson had almost no power within the company other than being a highly successful employee.

In *Cottle*,[111] a sales and procurement manager received personal payments from suppliers without the knowledge of the employer. The Court found that Cottle had breached his common law duties of good faith, fidelity, and loyalty.[112] The Court also characterized him as a "key employee" having fiduciary obligations that were, in turn, breached.[113] Applying the working model to *Cottle* would remedy a problem of transparency in the Court's analysis. Although the *ad hoc* characteristics were implicitly included in the analysis, they were not presented clearly in the Court's reasons. Rather, the Court relied on comparisons drawn from "key employee" case law.[114] In *Cottle*, applying the working model would have shown which facets of the employment relationship went to vulnerability and which ones to discretion.

---

111 *Cottle*, *supra* note 34 at paras 24-37.

112 *Ibid* at para 23.

113 *Ibid* at para 35.

114 See also *Enerflow Industries Inc v Surefire Industries Ltd*, 2013 ABQB 196 at para 50. Justice McCarthy engaged in similarly problematic reasoning. The conclusion reached by Justice McCarthy was informed more by a comparison of other "key employee" cases than his own analysis as to whether certain characteristics existed in the employment relationship that was before him. In his concluding remarks he compared two "key employee" cases and found that the employee in *Enerflow* was "more akin" to one case than the other, and that therefore the individual was not a fiduciary.

Missing from the courts' reasoning in both *Cottle* and *Computer Enhancement* is an appreciation of the required undertaking on the part of the fiduciary. The working model would at least have reminded the court that the undertaking is a necessary element before an employee can be found to be a fiduciary. In both cases, the courts could have examined the employment contract for evidence of reasonable expectations regarding the imposition of fiduciary duties.

5. CONCLUSION

The "key employee" approach to identifying employees who are fiduciaries is unworkable and unjustified. It creates confusion. This paper has outlined a coherent alternative framework. The *ad hoc* characteristics of fiduciary relationships, developed outside of the employment law context, are best suited to identifying fiduciary employees. Courts can and should apply the indicia that are used to identify "key employees" as factors demonstrating *ad hoc* fiduciary relationships. Those indicia are more useful as evidence of vulnerability, control, or discretion within the employment relationship.