# Bad Faith Discharge

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While employees owe employers a common law duty of good faith, there is no such general reciprocal obligation flowing from employer to employee. The author first demonstrates how the relationship between employer and employee is governed by an outmoded legal structure that does not reflect the reality of contemporary Canadian society, and then argues for the recognition by the courts of a new action in tort for bad faith discharge. Due to the numerous deficiencies inherent in the current state of the common law in Canada, often employees who have been the victims of a bad faith discharge are not fully compensated. An historical analysis reveals that the current law continues to reflect the *laissez-faire* and class-oriented values of England during the height of the Industrial Revolution. By examining the experience of the United States, and in particular the states of California and Montana, the author shows that the recognition of such a new tort can be accomplished by extending existing principles. In light of, *inter alia*, the judicially recognized goal of protecting employees as a vulnerable class, the courts should draw on the fundamental principles of tort law, as well as general considerations of policy, and recognize an action in tort for bad faith discharge. Should the courts for some unfortunate reason not permit a tort action, it is very difficult to see how the proposed contractual action would also fail given the numerous developments in society and the common law discussed in this article.

L'obligation de *common law* d'agir avec bonne foi n'incombent qu'aux employés, les employeurs n'ayant pas à assumer une telle obligation à l'égard de leurs employés. L'auteur démontre tout d'abord comment la relation qui lie un employeur à son employé est régie par une structure juridique dépassée qui ne reflète plus la réalité contemporaine de la société canadienne, pour ensuite prôner l'introduction par les tribunaux d'un nouveau délit de *common law* relatif au congédiement fait par mauvaise foi. En raison des nombreuses insuffisances inhérentes à la *common law* telle qu'elle existe actuellement au Canada, il arrive souvent que des employés victimes d'un congédiement fait par mauvaise foi ne soient pas entièrement indemnisés. Une analyse historique du problème permet de constater que le droit actuel reflète toujours certaines valeurs basées sur les distinctions sociales et une attitude de laissez-faire propres à l'Angleterre au moment de la révolution industrielle. À la lumière de l'expérience des États-Unis, et en particulier des états de la Californie et du Montana, l'auteur démontre qu'en élargissant les principes actuels, il est possible de reconnaître l'existence de ce nouveau délit. En s'inspirant des principes fondamentaux du droit de la responsabilité civile délictuelle ainsi que de considérations d'ordre public générales, les tribunaux devraient, à la lumière de l'objectif judiciairement reconnu de protection des employés appartenant à une classe vulnérable, reconnaître l'existence d'un délit de *common law* relatif au congédiement fait par mauvaise foi. Malgré l'absence d'une telle reconnaissance, il est difficile de concevoir comment le recours contractuel actuel pourrait aussi être rejeté compte tenu des nombreux développements dans la société et dans la *common law* discutés dans cet article.

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*If we would guide by the light of reason,*
*we must let our minds be bold.*[1]

## Introduction

Ordinary employees owe their employers a common law duty of good faith[2] and have an obligation to serve faithfully.[3] Equity imposes upon some employees even more onerous fiduciary obligations.[4] If one of the purposes of the law is, as Blackstone says, to protect "the weak from the insults of the stronger"[5] one would think there would be a reciprocal obligation flowing from employers to employees. Although there is some evidence that the law is now moving in this direction in Canada,[6] some two hundred years after Blackstone's *Commentaries on the Laws of England*, it is still not a generally recognized principle that employers have an implied obligation of good faith and fair dealing.[7]

The thesis of this article is that the common law should recognize an obligation of good faith and fair dealing owed by employers in all employment relationships.[8] Employers who terminate employment in bad faith[9] and not in the

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[1]*New York State Ice Co.* v. *Liebmann*, 285 U.S. 262 at 311 (1932), Brandeis J.

[2]See *57134 Manitoba Ltd.* v. *Palmer* (1989), 26 C.P.R. (3d) 8, 44 B.L.R. 94, 37 B.C.L.R. (2d) 50 (C.A.) [hereinafter *Palmer*]; *Wilson Trophy Co. (B.C.)* v. *Chorney* (1991), 35 C.P.R. (3d) 161 (B.C.S.C.); *Faccenda Chicken Ltd.* v. *Fowler*, [1986] 1 All E.R. 617 (C.A.).

[3]See Esher M.R.'s remarks in *Pearce* v. *Foster* (1886), 17 Q.B.D. 536 at 539 (C.A.). *Pearce* v. *Foster* was applied in *Canadian Imperial Bank of Commerce* v. *Boisvert*, [1986] 2 F.C. 431, 13 C.C.E.L. 264 (C.A.).

[4]Some courts have gone to remarkable lengths to impose fiduciary obligations on relatively low ranking employees. In *Hudson's Bay Co.* v. *McClocklin*, [1986] 5 W.W.R. 29, 42 Man. R. (2d) 283 (Q.B.), fiduciary obligations were imposed upon the manager of the hearing department of a department store. Several decisions have imposed fiduciary obligations upon ordinary sales representatives. See generally P. Wardle, "Post-Employment Competition – Canaero Revisited" (1990) 69 Can. Bar Rev. 233. *Quaere* whether this trend is reversing. See *Crain-Drummond Inc.* v. *Hamel* (1991), 35 C.C.E.L. 55, 36 C.P.R. (3d) 151 Ont. Ct. (Gen. Div.), aff'd (1991), 36 C.P.R. (3d) 163 (Ont. Div. Ct.); *R.W. Hamilton Ltd.* v. *Aeroquip Corp.* (1988), 65 O.R. (2d) 345, 22 C.P.R. (3d) 135 (H.C.J.); *Palmer*, *supra* note 2.

[5]W. Blackstone, *Commentaries on the Laws of England*, vol. 3 (Chicago: University of Chicago Press, 1979) at 2.

[6]See Part V.*B.*, below, for a discussion of this issue.

[7]See generally I. Christie, G. England & W.B. Cotter, *Employment Law in Canada*, 2d ed. (Toronto: Butterworths, 1993) at 414-17.

[8]I refrain from referring to the traditional phrase "contract of employment" because it will be argued that the use of contract law to protect employees has failed dismally, and we should now be thinking in terms of tort to protect the interests and expectations of employees. On the use of a tort model, see generally L. Blades, "Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power" (1967) 67 Colum. L. Rev. 1404; M. Cohen, "Reconstructing Breach of the Implied Covenant of Good Faith and Fair Dealing as a Tort" (1985) 73 Calif. L. Rev. 1291.

Not all commentators have given up hope of using a contractual paradigm to prevent abusive discharges. See K. Swinton, "Contract Law and the Employment Relationship: The Proper Forum for Reform" in B. Reiter & J. Swan, eds., *Studies in Contract Law* (Toronto: Butterworths, 1980) 357; J. Shapiro & J. Tune, "Implied Contract Rights to Job Security" (1974) 26 Stanf. L. Rev. 335.

[9]The courts are comfortable without a specific definition of bad faith. The words "good faith" and "bad faith" are already used in, and defined by, statutes. E.P. Belobaba, "Good Faith in Canadian Contract Law" in *Commercial Law: Recent Developments and Emerging Trends* (Toronto: De Boo, 1985) 73 at 76, states that in 1985 "[s]ome 153 federal statutory provisions and 285 pro-

*bona fide* best interests of their businesses should not benefit from the inherent deficiencies in a wrongful dismissal action, which often fails to make whole the real losses of employees who are victims of bad faith discharges. It will be argued that, given social evolution and a view on how we treat individual members of society which has changed drastically over the last one hundred years,[10] a progressive and enlightened society has a legitimate economic and moral interest in preventing bad faith discharges.

Oliver Wendell Holmes accurately stated that the common law represents societal values which have progressed through history.[11] It will be argued that the blind use of the commercial contractual paradigm to determine rights and obligations in the employment relationship in the common law provinces is no longer adequate to enforce community values which have long since progressed since the height of the Industrial Revolution. Furthermore, it will be submitted that the courts have inadvertently imposed the *laissez-faire* attitudes, values and presumptions of a society long since faded into history onto a society with a fundamentally different view on industrial relations and the degree of protection the common law ought to afford its vulnerable members.

This article will conclude with a proposal that common law jurisdictions ought to recognize a tort action for bad faith discharge. If the courts are not willing to recognize a new nominate tort, they should recognize a new contractual action based upon an implied term of good faith and fair dealing, a term to be implied by law.[12]

## I. Deficiencies in the Common Law of Wrongful Dismissal

An action for wrongful dismissal is based on a "contract of employment". In every such contract there is at least a "presumption"[13] that the employer will

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vincial provisions employ[ed] a good faith standard without further amplification or statutory definition" and that "[i]n our everyday vocabulary and in much of our law, good faith remains a functional and familiar concept." Termination in bad faith is distinguishable from a "wrongful dismissal", which is merely termination without reasonable notice as required by the contract of employment. A termination can be technically wrongful but without *mala fides* on the part of the employer, simply because the employer has not provided adequate notice.

[10]For a discussion of the role of the individual during the Industrial Revolution, see P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979) at 256-91.

[11]*The Common Law* (Toronto: General, 1991) (originally, Boston: Little, Brown, 1881) at 1. Holmes' progressive approach to the common law is to be contrasted with the concept of formalism, the prevalent philosophy during the Industrial Revolution, which held that legal principles were to be purely based on "logic" and precedent. The courts were not, for example, to interfere with the written text of contracts to achieve a just result. The reasons and policies behind legal rules were irrelevant to those who espoused formalism. See generally Atiyah, *ibid.* at 388-97.

[12]A term implied by law is preferable and more honest than an oblique and artificial consideration of what the parties would have considered at the formation of the contract of employment. It is submitted that the law should, for strong public policy reasons, require employers to act in good faith since at the formation stage of most contracts of employment the employee does not specifically contemplate the potential of a bad faith discharge. See generally *infra* notes 13, 208 and accompanying text; S. Ball, "Social Strata and Wrongful Dismissal Notice: The Decision of *Petch* v. *Hyundai Auto Canada Inc.*" (1993) 14 Advocates' Q. 343. Equally, if not more importantly, by creating a new term implied by law, the courts will be able to start afresh in an area where the common law has failed to keep pace with modern social values (see Part II, below).

[13]In *Machtinger* v. *HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, 7 O.R. (3d) 480, 40 C.C.E.L. 1

provide the employee adequate notice of its intention to terminate the relationship. While terminating employment will not necessarily constitute a breach of contract, should an employee be discharged without adequate notice, his or her dismissal will be "wrongful" and the employer will have to pay damages resulting from the failure to give adequate notice.[14] The common law action for wrongful dismissal is inadequate to protect employees who are dismissed in bad faith and for reasons which are not based upon the *bona fide* business interests of the employer.[15]

Although the traditional view as to an employer's potential liability for wrongful dismissal has been considerably eroded over the last twenty years in Canada, it was recently reiterated by McIntyre J. in *Vorvis* v. *Insurance Corporation of British Columbia*:

> [T]he employer/employee relationship (in the absence of collective agreements which involve consideration of the modern labour law régime) has always been one where either party could terminate the contract of employment by due notice, and therefore the only damage which could arise would result from a failure to give such notice.[16]

Even though a normal employment relationship is one of "indefinite hiring", the courts really do not treat the contract of employment as truly an indefinite term contract given the employer's right to terminate employment arbitrarily, capriciously and in bad faith.[17]

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[hereinafter *Machtinger* cited to S.C.R.], the majority refused to rule on the nature of the implied term of reasonable notice, characterizing it instead as a "presumption". It is submitted that it is for public policy reasons that the term of reasonableness is normally a term implied by law, reasons which find no application in findings of fact or business efficacy (see generally the reasons of McLachlin J. in *Machtinger*). Given that the majority opinion confirmed that many employees are unaware that they have a right to reasonable notice, and since terms implied by law do not depend upon the intention of the parties, it is submitted that Madame Justice McLachlin's view on this point is correct. See also *Pitre* v. *Gordie's Auto Sales Ltd.* (1976), 16 N.B.R. (2d) 328 at 333, 73 D.L.R. (3d) 559 (C.A.); Ball, *ibid.*

[14]In *Prince* v. *T. Eaton Co.* (1992), 91 D.L.R. (4th) 509, 67 B.C.L.R. (2d) 226, 41 C.C.E.L. 72 (C.A) [hereinafter *Prince*], the Court re-affirmed the principle that the employer's obligation is to give reasonable notice and not merely to pay damages for loss of remuneration which would have been earned during the notice period. In this case, the employer was held liable for long term disability benefits due to the employee had the employer given reasonable notice.

[15]Jung and Harkness found that discharges without cause, *coupled with bad faith* on the employer's part, are very common. Their study found that well over half of the time when a plaintiff could prove that he or she was fired without cause, he or she could also prove that the termination was carried out in bad faith (D. Jung & B. Harkness, "Life after *Foley*: The Bottom Line" (1989) 5 *The Labour Lawyer* 667 at 677).

[16][1989] 1 S.C.R. 1085 at 1103, 58 D.L.R. (4th) 193, 25 C.C.E.L. 81 [hereinafter *Vorvis* cited to S.C.R.].

[17]Employers are currently allowed to terminate at will with caprice and malice, as long as they provide reasonable notice. Swinton (*supra* note 8 at 373-74) argues that employees could be better protected by reading in an implied term of "termination only for just cause". Etherington doubts whether Swinton's suggestion is realistic in light of some courts' commitment to freedom of contract, in particular, the Ontario Court of Appeal (see B. Etherington, "The Enforcement of Harsh Termination Provisions in Employment Contracts: The Rebirth of Freedom of Contract in Ontario" (1990) 35 McGill L.J. 459). It should, however, be noted that Etherington's remarks appear in a case comment on the Court of Appeal decision in *Machtinger*, which was later reversed by the Supreme Court of Canada, and some of his comments were actually adopted by the Court (see *Machtinger*, *supra* note 13).

McIntyre J.'s comments beg the questions of why the common law has fallen so out of touch with the realities of the employment relationship that a separate but parallel body of jurisprudence (arbitral jurisprudence) has had to develop; and why common law judges have not attempted to emulate the normal requirement found in arbitral jurisprudence that a dismissal cannot take place unless there is just cause or economic redundancy.[18]

When an employer is acting in good faith and pursuant to legitimate economic interests, delimiting the employer's exposure to liability for a failure to provide adequate notice is normally reasonable and appropriate. No employer should have to act as an insurer of its employees when it is not economically justifiable to continue the employment relationship. An employer who, however, dismisses an employee in bad faith and not pursuant to a legitimate business need or interest warrants different considerations. Except for damages for mental distress, and in the rare case where there is an award for punitive damages, employers are currently free to discharge in bad faith with the knowledge that their potential liability is relatively low compared to the real economic and non-economic losses suffered by discharged employees. It is submitted that employers who discharge employees in these circumstances should not necessarily benefit from the inherent deficiencies in the common law action for wrongful dismissal, which does not allow employees to be made whole from the consequences of a bad faith discharge. As it will be later argued, society has a legitimate interest in ensuring that these employers are the subject of special treatment and consideration by the courts.

Employers who discharge in bad faith, regardless of the actual consequences to the terminated employee's career, reputation and future ability to earn a livelihood, benefit from the following deficiencies in the common law action for wrongful dismissal.

### *A. Capped Notice Periods*

As noted above, in contracts of employment of indeterminate duration there is a presumption that the employer must give the employee reasonable notice of the termination of his or her employment. It has been held that the obligation to provide reasonable notice has been capped,[19] and that employers

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[18]It has been noted that "[m]odern social expectations support the concept of dismissal only for good reason" (New Zealand Law Commission, *Aspects of Damages: Employment Contracts and the Rule in* Addis *v.* Gramophone Co. (Wellington, N.Z.: New Zealand Law Commission, 1991) at 8 [hereinafter N.Z. Law Comm.]). See also Swinton, *ibid.* at 376-77; G. England, "Recent Developments in Wrongful Dismissal Laws and Some Pointers for Reform" (1978) 16 Alta. L. Rev. 470 at 471-72; C. Summers, "Individual Protection against Unjust Dismissal: Time for a Statute" (1976) 62 Va. L. Rev. 481; D. Beatty, "Labour is Not a Commodity" in Reiter & Swan, eds., *supra* note 8, 313 at 355.

[19]In *Ansari* v. *British Columbia Hydro & Power Authority*, [1986] 4 W.W.R. 123 at 132, 2 B.C.L.R. (2d) 33, 13 C.C.E.L. 238 (S.C.), aff'd (19 November 1986), Vancouver 005827 (C.A.) [hereinafter *Ansari*], McEachern C.J.S.C. (as he was then) said that 18 to 24 months is the rough upper limit for reasonable notice, and other cases should be scaled downward. See also *Webster* v. *British Columbia Hydro & Power Authority* (1992), 91 D.L.R. (4th) 272, 42 C.C.E.L. 105 (B.C.C.A.).

are not to be considered as insurers against unemployment.[20] The quantum of notice in a wrongful dismissal case is normally determined by the variables enumerated in the well-known decision of *Bardal* v. *Globe and Mail*.[21]

The problem with the current state of the law is that it will often be deemed irrelevant that the actual length of unemployment experienced by an employee victimized by a bad faith dismissal is longer than the normal notice period accorded to an employee.[22] The employer is not responsible to make whole the real loss to the employee, even when acting in bad faith. The problem is obvious when a middle manager with few years of service, thus normally entitled to less than one year's notice, has his or her entire career ruined because of the manner of the dismissal.[23] The law's inadequacy is even more apparent when there is a contract of employment clearly stating what the notice period is.[24]

### *B. Loss of Reputation*

The inadequacy of an action based in contract is further demonstrated by the general unavailability of damages for loss of reputation for a wrongfully dismissed employee.[25] If the common law were to be recreated, given the evolution of social values, it would not be surprising if damages for loss of reputation in wrongful dismissal cases were available in appropriate situations.[26] The com-

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[20]Notice periods thus may be and are often shorter than the period of unemployment. See *Fonceca* v. *McDonnell Douglas Canada Ltd.* (1983), 1 C.C.E.L. 51 (Ont. H.C.J.); *Harper* v. *Bank of Montreal* (1989), 27 C.C.E.L. 54 (Ont. Div. Ct.); *Ansari, ibid.* The significance of the length of the notice period is that it forms the basis for damage assessment in wrongful dismissal cases. See *Prince, supra* note 14.

[21](1960), 24 D.L.R. (2d) 140 at 145, [1960] O.W.N. 253 (H.C.J.). McRuer C.J.H.C. said:

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

[22]In *Gillman* v. *Saan Stores Ltd.* (1992), 6 Alta. L.R. (3d) 72, 45 C.C.E.L. 9 (Q.B.), an employee took 14 months to find new employment because of unproven fraud allegations and a refusal by the employer to provide a positive reference, yet was only awarded six months notice.

[23]In *Pilato* v. *Hamilton Place Convention Centre Inc.* (1984), 45 O.R. (2d) 652 at 664, 7 D.L.R. (4th) 342, 3 C.C.E.L. 241 (H.C.J.) [hereinafter *Pilato*], Fitzpatrick J. noted that the plaintiff would probably never get a position in Canada again, in his field, because of the manner and circumstances of the dismissal. See also *Rahemtulla* v. *Vanfed Credit Union*, [1984] 3 W.W.R. 296, 51 B.C.L.R. 200, 4 C.C.E.L. 170 (S.C.) [hereinafter *Rahemtulla* cited to W.W.R.]; *Ribeiro* v. *Canadian Imperial Bank of Commerce* (1989), 67 O.R. (2d) 385, 24 C.C.E.L. 225 (H.C.J.), rev'd on quantum (1992), 13 O.R. (3d) 278, 44 C.C.E.L. 165 (C.A.) [hereinafter *Ribeiro* cited to O.R. (2d)], as other examples where careers were effectively ruined because of the circumstances of the dismissal.

[24]See *e.g. Ribeiro, ibid.* at 421.

[25]This is to be contrasted with the civil law, as applied by the Quebec courts, where damages for loss of reputation have been recognized. See *Carle* v. *Comité paritaire du vêtement pour dames*, [1987] R.J.Q. 2553, 22 C.C.E.L. 281 (Sup. Ct.). In *Stewart* v. *Standard Broadcasting Corp.* (1989), 29 C.C.E.L. 290 (Que. Sup. Ct.), $75,000 was awarded for injury caused by publicity surrounding the plaintiff's dismissal even though the defendant was not directly responsible for the publicity.

[26]The New Zealand Law Commission believes that common law barriers should be legislatively overruled, and that employees should be able to recover damages for loss of reputation without having to resort to separate tort claims or submit to the special delimiting factors associated with an action for defamation (N.Z. Law Comm., *supra* note 18 at 8, 51). Swinton (*supra* note 8 at 364)

mon law has traditionally been reluctant to recognize damages for loss of reputation engendered by a discharge,[27] even when the employer has acted in bad faith.[28] The common law's general refusal to recognize damages for loss of reputation in wrongful dismissal cases is baffling in light of the fact that loss of reputation has long been recognized as a head of damages in commercial cases.[29] Several Canadian courts have refused to blindly follow the view of the law lords, expressed in the nearly century-old decision of *Addis* v. *Gramophone Co.*, on the nature of the employment relationship, and have noted that the *Addis* bar against damages for loss of reputation in a wrongful dismissal case has been eroded.[30]

An argument for allowing damages for loss of reputation is illustrated by Madame Justice McLachlin's observations in *Rahemtulla*.[31] In *Rahemtulla*, an employee was falsely accused of misappropriating funds, and her employment was terminated. Concerning the plight of employees who have been dismissed on alleged grounds which are without merit, McLachlin J. accurately noted:

> As the plaintiff's experience demonstrates, an employee dismissed for cause, and in particular a cause as serious as the charge of theft which was made against the plaintiff in the case at bar, may have an extremely difficult time finding new employment. Mr. Lundhol, the plaintiff's manager, agreed that it would be doubtful indeed that an employee dismissed from a credit union on grounds of theft would be hired for a similar position by a bank or credit union. *If the plaintiff is honest with prospective employers, as she should be, she must tell them of the cir-*

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suggests that damage to existing reputation due to termination should be compensable even if traditional legal theory fails to acknowledge the legitimacy of this claim. Swan notes that the contractual model now used by the courts does not protect the employee's reasonable expectation of professional development (J. Swan, "Extended Damages and Vorvis v. Insurance Corporation of British Columbia" (1990) 16 Can. Bus. L.J. 213 at 221).

[27]*Addis* v. *Gramophone Co.*, [1909] A.C. 908 (H.L.) [hereinafter *Addis*]; *Peso Silver Mines Ltd.* v. *Cropper*, [1966] S.C.R. 673, 58 D.L.R. (2d) 1 [hereinafter *Peso* cited to S.C.R.]; *McMinn* v. *Oakville (Town of)* (1978), 19 O.R. (2d) 366, 85 D.L.R. (3d) 131 (H.C.J.).

[28]Exceptions are recognized for individuals such as entertainers, performers and professional athletes. See *Herbert Clayton & Jack Waller Ltd.* v. *Oliver*, [1930] A.C. 209 (H.L.); *Withers* v. *General Theatre Corporation* (1933), 149 L.T. 487; *Marbe* v. *George Edwardes Ltd.*, [1928] 1 K.B. 269; *Racine* v. *C.J.R.C. Radio Capitale Ltée* (1977), 17 O.R. (2d) 370, 80 D.L.R. (3d) 441 (Co. Ct.). See also D. Harris, *Wrongful Dismissal* (Toronto: De Boo, updated to 1994) §§ 4.52, 4.56.

[29]See generally S.M. Waddams, *The Law of Damages*, 2d. ed. (Toronto: Canada Law Book, 1991) ¶¶ 4.230-4.310. In *Wilson* v. *United Counties Bank Ltd.*, [1920] A.C. 102, the House of Lords upheld a jury's verdict awarding 7,500 pounds for injury to reputation and credit due to a bank's negligent performance of a contract to supervise the plaintiff's business. Lord Atkinson (a member of the *Addis* panel) unconvincingly distinguished *Addis* on the basis that the damages in *Addis* were too remote. It should be apparent at the time of hiring that one's professional reputation could be ruined depending upon the manner in which one's employment is terminated.

[30]See *Ribeiro*, *supra* note 23; *Perkins* v. *Brandon University* (1985), 35 Man. R. (2d) 177, [1985] 5 W.W.R. 740, 12 C.C.E.L. 112 (C.A.) [hereinafter *Perkins* cited to Man. R.]; *Ribeiro* v. *Canadian Imperial Bank of Commerce* (1986), 11 C.C.E.L. 213 (Ont. H.C.J.). Harris states that the current judicial trend is to regard *Addis* as being of dubious value as modern precedent (*supra* note 28, § 4.52). While it has been suggested that the trend to move away from the traditional approach is wrong given the weight of the authority to the contrary (see Christie, England & Cotter, *supra* note 7 at 754), it should be noted that the Court of Appeal for Ontario specifically left the issue open in *Ribeiro*.

[31]*Supra* note 23.

*cumstances of her dismissal. Her accompanying protests of innocence would, not surprisingly, be received with suspicion.*[32]

A tort action for defamation may not necessarily help an employee who cannot obtain new employment because of the manner of the termination, and it may be unhelpful when an employer can hide behind the oblique defence of qualified privilege.[33]

### C. *Re-Instatement*

Unlike the remedy available to unorganized employees found in statutes such as the *Canada Labour Code*,[34] the practice of labour arbitrators and the remedy for office holders,[35] the common law has eschewed specific performance of the contract of employment and therefore has normally refused to re-instate employees.[36] The common law approach has remained essentially unchanged, even though studies have shown that the majority of re-instatements ordered by arbitrators actually work out for both the employer and employee.[37]

### D. *Mental Distress*

Another failure of the contractual action for wrongful dismissal relates to the awarding of damages for mental distress.[38] As late as 1966, the Supreme

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[32]*Ibid.* at 306 [emphasis added].

[33]Several cases have held that the defence of qualified privilege will be available to the employer as long as he honestly believes his statement, even if the belief is not based on any reasonable ground or if the employer is irrational, hasty or credulous in jumping to his conclusion. See G.H.L. Fridman, *The Law of Torts in Canada*, vol. 2 (Toronto: Carswell, 1990) at 178. The defence of qualified privilege allows employers to effectively ruin careers of former employees through reckless statements. The current state of the law of defamation, as it affects the employment relationship, is no longer acceptable. Ironically, an employer who negligently makes a positive statement about an employee, may be liable for negligent misrepresentation.

[34]R.S.C. 1985, c. L-2, ss. 240-46. See also Quebec's *Act Respecting Labour Standards*, R.S.Q. c. N-1.1, s. 124; Nova Scotia's *Labour Standards Code*, R.S.N.S. 1989, c. 246, s. 71.

[35]See generally Harris, *supra* note 28, § 5.13; Christie, England & Cotter, *supra* note 7 at 723-28.

[36]*Philp* v. *Expo 86 Corp.* (1987), 45 D.L.R. (4th) 449, 19 B.C.L.R. (2d) 88 (C.A.); *Red Deer College* v. *Michaels*, [1976] 2 S.C.R. 324, 57 D.L.R. (3d) 386; *Decro-Wall International SA* v. *Practitioners in Marketing Ltd.*, [1971] 2 All E.R. 216, Salmon L.J. Contrast *Hill* v. *C.A. Parsons & Co.*, [1971] 3 All E.R. 1345 (C.A.); *Vine* v. *National Dock Labour Board*, [1957] A.C. 488 (H.L.).

While the courts have used the contractual paradigm for employment relationships, they do not, however, allow employees to elect either to accept the employer's repudiation of the contract of employment or to treat the contract as being alive. The employee is only able to sue for wrongful dismissal damages and not for unpaid wages as a debt. See *Prozak* v. *Bell Telephone Co. of Canada* (1984), 46 O.R. (2d) 385 at 402-403, 10 D.L.R. (4th) 382, 4 C.C.E.L. 202 (C.A.).

[37]G. Adams, *Grievance Arbitration of Discharge Cases: A Study of the Concepts of Industrial Discipline and Their Results* (Kingston, Ont.: Industrial Relations Centre, Queen's University, 1978); P. Barnacle, *Arbitration of Discharge Grievances in Ontario: Outcomes and Reinstatement Experiences* (Kingston: Industrial Relations Centre, Queen's University, 1991). See also G. de N. Clark, "Unfair Dismissal and Reinstatement" (1969) 32 Modern L.R. 532.

[38]Concerning the reluctance of judges to award contractual damages for mental distress in wrongful dismissal cases, see the comments of Saunders J. in *Bohemier* v. *Storwal International Inc.* (1982), 40 O.R. (2d) 264 at 273, 142 D.L.R. (3d) 8 (H.C.J.), rev'd on other grounds (1983), 44 O.R. (2d) 361 (C.A.) [hereinafter *Bohemier*]. See also *Rahemtulla*, *supra* note 23, where the

Court espoused the *Addis* approach in *Peso Silver Mines Ltd.* v. *Cropper*, and stated:

> [T]he claim being founded on breach of contract the damages cannot be increased by reason of the circumstances of dismissal whether in respect of the respondent's wounded feelings or the prejudicial effect upon his reputation and chances of finding other employment.[39]

Although the decision makes no specific reference to *Addis*, the *Peso* court effectively applied the approach advocated by law lords whose view on employment law was likely formulated during their younger years at the height of the Industrial Revolution. Such a view, it will be argued, is thoroughly inconsistent with modern industrial relations.

In *Vorvis*, both the majority and minority opinions retreat from the approach taken in *Peso* regarding damages for mental distress. McIntyre J. noted that aggravated damages could be awarded in a wrongful dismissal case, particularly where the acts complained of were also independently actionable.[40] Notwithstanding the particularly brutal manner of the employer's conduct prior to the dismissal, it was found that mental distress did not occur as a result of the dismissal. The majority in *Vorvis* consequently refused to award damages for mental distress.[41]

The minority refused to award aggravated damages. Wilson J. felt that mental distress in this particular case would not have been in the reasonable contemplation of the parties, at the time the contract was entered into, as flowing from the appellant's unjust dismissal.[42] In other words, the plaintiff could not meet the remoteness test in *Hadley* v. *Baxendale*.[43] The minority would have held that *Addis* was no longer good law, and that the employer's conduct need not be independently actionable.[44]

The majority and minority opinions have been criticized as being inchoate[45] and confusing,[46] and are said to have left the law in disarray.[47]

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Court would not award contract damages for mental distress due to a callous dismissal, but did allow a tort action for the intentional infliction of mental suffering. Swan (*supra* note 26 at 230) suggests that damages for mental suffering are not allowed as often as they should be due to inadequate treatment of contract damages in the Anglo tradition.

[39]*Peso*, *supra* note 27 at 684.

[40]*Supra* note 16 at 1103.

[41]*Ibid.* at 1104.

[42]*Ibid.* at 1124.

[43](1854), 9 Exch. 341, 156 E.R. 145. The *Hadley* principle presumes that an injured party can only be compensated for those damages which the parties, at the time of entering the contract, contemplated as likely to occur as a result of the breach at issue (see Swinton, *supra* note 8 at 364). Swan forcefully argues that the courts have incorrectly applied *Hadley* in treating the contract of employment as an ordinary commercial contract, and have thereby foreclosed claims of damages which ought to be recoverable (*supra* note 26).

[44]*Vorvis*, *supra* note 16 at 1113, 1118.

[45]See A. Beck, "The Demise of Addis" [1990] N.Z.L.J. 88 at 89.

[46]Christie, England & Cotter, *supra* note 7 at 749-50.

[47]See R. Schai, "Aggravated Damages and the Employment Contract" (1991) 55 Sask. L. Rev. 346 at 355. For a thorough and, with respect, persuasive criticism of *Vorvis*, see Swan, *supra* note 26.

## II. The Employment Relationship in Historical Perspective

By concentrating on and applying general contractual principles to the employment relationship,[48] the courts fail to protect the legitimate interests and reasonable expectations of employees of the present era.[49] The inadequacy of the modern contract of employment becomes understandable if its antecedents are examined. Looking at history we see that the courts are applying a paradigm which reflects outdated societal values. We further discover that the modern contract of employment enforced by the courts today is only a half-completed creature.

The genesis of the modern contract of employment is attributed to Edward III and the two labour statutes passed in 1349[50] and 1350.[51] The purpose of this legislation was to combat the scarcity of labour caused by the Black Death,[52] and to serve as a substitute for the disintegrating system of serfdom and villeinage.[53] The legislation also controlled the mobility and the price of labour in an attempt to lessen the impact of labour shortages. Labourers had no choice but to work at set wages.[54] Edward III's legislation was elaborated upon by Elizabeth I with the enactment of the *Statute of Artificers and Apprentices* of 1562.[55] The rights and obligations flowing from the employment relationship were thus created by status imposed by statute, and not by intention and contract.[56]

Under the *Statute of Artificers*, hirings were required to be for a duration of no less than one year. This not only restricted the mobility of labour, but also shielded the parishes. Local parishes were responsible for relief of paupers under the *Poor Law*,[57] and year-long employment contracts protected the taxpayers in parishes from being obligated to provide relief to the poor during winter months.

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[48]Professor M.R. Freedland in his text, *The Contract of Employment* (Oxford: Clarendon Press, 1976) at 19-21, suggests that the employment contract ought to be studied as a class by itself so that appropriate attention can be given to its special structure. Beatty and Swinton also argue that one must focus on the special features of the employment relationship which set it apart from the mainstream commercial contract (Beatty, *supra* note 18; Swinton, *supra* note 8 at 376-77). See also B. Grossman & S. Marcus, "New Developments in Wrongful Dismissal Litigation" (1982) 60 Can. Bar Rev. 656 at 660.

[49]See N.Z. Law Comm., *supra* note 18; Swan, *supra* note 26 at 228-29; Summers, *supra* note 18; Beatty, *ibid.* at 327-30.

[50]*Statute of Labourers* (U.K.), 23 Edw. 3.

[51]*Ordinance of Labourers* (U.K.), 23 Edw. 3, Stat. 2.

[52]S. Jacoby, "The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis" (1982) 5 Comp. Labour L. 85 at 86.

[53]S. Fitzjames, *History of the Criminal Law of England*, vol. 3 (London: MacMillan, 1883) at 204, 274.

[54]Local justices of the peace set wages annually, and employers who paid more than the maximum could be fined. Labourers who refused to work at the maximum rate could be imprisoned for up to three months. Servants who left their masters employ before the end of their term of employment could be compelled to continue work.

[55](U.K.), 5 Eliz. I., c. 4 [hereinafter *Statute of Artificers*]. The Elizabethan statute was also passed due to a shortage of labour brought about by an epidemic.

[56]F. Batt, *The Law of Master and Servant*, 5th ed. by G. Webber (London: Sir Isaac Pitmann and Sons, 1967) at 26; R. Harrison, "Termination of Employment" (1972) 10 Alta. L. Rev. 250 at 251.

[57](U.K.), 27 Henry VIII, c. 25.

While the servant was compelled to work at fixed wages, the master did owe certain obligations. The servant could not be dismissed without cause.[58] Furthermore, the common law conceived of the master as having an *in loco parentis* obligation to his servants, thus being required to provide medical assistance to servants who were injured, and to provide for their physical and moral well-being.[59] It is therefore not surprising, as Professor Kahn-Freund notes, that the law of master and servant, until recent times, was derived from books on the law of domestic relations.[60]

This status-based notion of employment relations was so pervasive that when Blackstone completed his famous *Commentaries on the Laws of England*, the contractual aspect of the employment relationship was virtually ignored. The significance of this is enormous since the *Commentaries* from 1770 to at least 1845 remained the predominant text and had an immense impact on English law.[61] As a consequence of the *Commentaries*, common lawyers could only draw on a severely outdated legal model to determine rights and obligations arising from the employment relationship during the heart of the Industrial Revolution. Since legal reality did not conform to social reality, the common law's development was retarded.

The nineteenth century saw the rise of classical liberalism, and the common law responded to the times by paying homage to the banner of freedom of contract.[62] The gross disparity in bargaining power between masters and servants was ignored,[63] and "agreements" were deemed to reflect expectations, even though, given the abundance of labour during the Industrial Revolution, servants often had no real choice in the matter.[64] Formalism ruled the day.

Although masters and servants were notionally free to contract as they wished, the common law implied various terms into the contract of employment which benefited the master, but not necessarily the servant. The courts in England imposed an obligation under which the contract could only be terminated with notice, not merely for the purpose of protecting employees, but so

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[58]*Statute of Artificers*, *supra* note 55, s. 5. Two justices of the peace had to determine the existence of cause. A servant could not be dismissed simply because the master was facing poor economic conditions, and thus the parishes were not forced to absorb the cost of social assistance.

[59]Jacoby, *supra* note 52 at 89.

[60]O. Kahn-Freund, "Blackstone's Neglected Child: The Contract of Employment" (1977) 93 L.Q. Rev. 508 at 508-509.

[61]*Ibid.* at 523-24.

[62]See Atiyah, *supra* note 10 at 388-97, for a description of the rise of formalism during the Industrial Revolution. Formalism ignored policy considerations and was not concerned with the relative justice of the parties' claims. Atiyah states that the rise of formalism coincided with the decline of the courts of equity in England, and indeed equity in a broader sense as a form of mercy. Adherence to principle was paramount, even when the result seemed harsh or unjust. Legal doctrine was the crux of formalism and the law of precedent ruled the day. It was ultimately rejected in the United States by writers such as Holmes (*supra* note 11).

[63]Pursuant to formalism, inequality of bargaining power was irrelevant and had to be ignored. See Atiyah, *ibid.*

[64]See also Jacoby, *supra* note 52 at 95, who notes that there was no shortage of labour in England during the Industrial Revolution. England was actually regarded as becoming over-populated during this period (Atiyah, *ibid.* at 272).

that the tort of inducement of breach of contract could be used as a weapon against trade unions.[65] Other implied obligations created to protect masters included an obligation of faithful service, to be honest and diligent in the master's service, and not to abuse the master's confidence in matters pertaining to his service.[66] Interestingly, the aforementioned obligations of the master, with the exception of the obligation to pay damages for failing to provide reasonable notice of dismissal, did not materialize as implied terms in the contract of employment in the nineteenth century. The law's bias in conceptualizing the employment relationship is demonstrated by the fact that until 1875 it was a *criminal* offence for the servant, but not the master, to break the contract of employment.[67]

By creating a legal fiction that servants were free to contract or not contract with their masters, and at the same time creating a set of implied terms which were intended to benefit the employer, the common law was simply imposing the will and values of those who actually ran society during the Industrial Revolution.[68] Servants were not an important part of the political process[69] and had generally no economic clout. Victorian society stressed self-reliance[70] — there was nothing wrong with looking down upon inferiors, and it was widely thought that to be weak was to be wretched. The lot of working class people was not helped by the fact that by the end of the Industrial Revolution some even regarded them as a "separate race" from their employers.[71] It is not surprising that common law judges, who were part of the dominant class in society, did not feel morally compelled to use the common law to protect the servant.

Since the courts normally respond to the dominant values in society, as Oliver Wendell Holmes argued,[72] it is unremarkable that the rights and obligations which arose from the nineteenth century paradigm almost totally favoured the master. By examining the antecedents of the contract of employment, it becomes very clear that the failure to impose a reciprocal obligation on employers to act in good faith was not a historical accident. Victorian society merely paid lip-service to the concept of freedom of contract and to the abolition of the role of status in private law. In reality, this society prided itself not on its equal-

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[65]Etherington, *supra* note 17 at 472-73; Jacoby, *ibid.* at 96-97. Trade unionism would have been more difficult to curb without the existence of notice periods which assisted in the creation of economic tort claims against union officials.

[66]The speech of Lord Tucker in *Lister* v. *Romford Ice and Storage Co.*, [1957] A.C. 555 at 594, enumerates some of the servant's duties implied by law.

[67]Kahn-Freund, *supra* note 60 at 525.

[68]Atiyah, *supra* note 10 at 390, observes that while formalism was purported to be value-free, in reality this new approach to the law of contract was "in the interests of the new commercial and industrial classes." Jacoby, *supra* note 52 at 102, notes that for English courts, their "class bias was their only form of consistency."

[69]Atiyah, *ibid.* at 262, remarks that England was not a democracy in any true sense during the Industrial Revolution. Even after the 1832 Reform Act (*Representation of the People Act*, 1832, 2 & 3 Will. 4, c. 45), the vote was confined to the upper and middle classes.

[70]Atiyah. *ibid.* at 256-91.

[71]See S. Novick's introduction to Holmes, *supra* note 11 at xvii. Social Darwinism, however, never had the following in England that it enjoyed in the United States, where it flourished for many years after its demise in England. See Atiyah, *ibid.* at 285-86.

[72]Holmes, *ibid.*

ity, but on its nuances of social status.[73] Thus, the modern contract of employment, which was developed during the Victorian era, contains a myriad of implied terms in favour of employers because it is the product of a bizarre combination of formalism and status.

It is trite to say that modern Canada, as an enlightened and compassionate society, has undergone a social evolution since the end of the Industrial Revolution. This is evidenced by the nation's extensive social security system and legislative schemes designed to ensure a safe and humane work place. Curiously, however, notwithstanding a dramatic change in community values, which has engendered modern social legislation, the employment relationship is still primarily based on a model that has changed little over the last hundred years — the contract of employment.[74] The common law's approach to industrial relations is akin to a stock market severely out of tune with the economy. When the common law is not in sync with prevailing social values, it is, like a market, due for a correction.[75]

## III. The American Approach

To illustrate that the Canadian courts' reluctance to impose an obligation of good faith and fair dealing on employers is not justified, it is useful to examine developments in several American jurisdictions where employees have traditionally enjoyed even fewer presumptive rights under the common law than in Commonwealth jurisdictions.

Unlike the English approach, the employment relationship in the United States has traditionally been "at will".[76] The employer is allowed to discharge employees for any reason, without reasonable notice and without cause.[77] While employment at will has prevailed as doctrine in American jurisprudence for over a hundred years, its genesis is, interestingly, the erroneous statements of Horace G. Wood, a treatise writer in the nineteenth century.[78] The nineteenth

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[73]Atiyah, *supra* note 10 at 287. Jacoby, *supra* note 52 at 102, argues that had English courts not been so concerned about social status, they probably would have espoused the position which dominated American jurisprudence: employment "at will".

[74]G. Simmons, "Unjust Dismissal of the Unorganized Workers in Canada" (1984) 20 Stanf. J. Int'l L. 473 at 474.

[75]Swan, *supra* note 26 at 219-20, states that "the most obvious question that is not asked is why it is assumed that the views of the House of Lords in 1909 in *Addis* v. *Gramophone* on what a contract of employment gave or provided to the employee must be accepted as still valid today."

[76]In *Monge* v. *Beebe Rubber Company*, 316 A.2d 549 at 551 (N.H. 1974) [hereinafter *Monge*], the Court, while noting that the law appeared to be evolving to reflect changing legal, social and economic conditions, said that "[t]he employer has long ruled the workplace with an iron hand by reason of the prevailing common-law rule that such a hiring is presumed to be at will and terminable at any time by either party."

[77]A. Blumrosen, "Settlement of Disputes Concerning the Exercise of Employer Disciplinary Power: United States Report" (1964) 18 Rutgers L. Rev. 428 at 432. For a statutory enactment, see section 2922 of the *California Labour Code*, which provides, "An employment, having no specified term, may be terminated at the will of either party on notice to the other. ..." (Cal. Labour Code § 2922 (West 1989)).

[78]See Blumrosen, *ibid.* at 432-33, citing H.G. Wood, *A Treatise on the Law of Master and Servant*, 1st ed. (1877), § 134, who espoused freedom of contract in the employment relationship. See

century American courts were nevertheless quick to approve of a model of employment relations based on freedom of contract, as opposed to one based on status and customary duties.[79] So cherished was the concept of freedom of contract in the employment sphere that the at-will rule actually achieved constitutional protection between 1908 and 1937.[80]

### *A. Exceptions to the At-Will Approach*

The at-will approach has been heavily criticized by numerous commentators.[81] It has been eroded considerably in almost all American jurisdictions by developments in the common law and progressive steps taken by at least one state legislature.[82] There are at least three recognized common law exceptions to the employer's right to discharge employees "at will":[83] actions based on an implied-in-fact covenant, violation of public policy and an implied duty of good faith.

#### 1. Action Based on an Implied-In-Fact Covenant

The presumption of employment at will may be displaced by an express or implied contract allowing discharge only for good cause.[84] If the court finds a contractual limitation curtailing the employer's right to terminate the employ-

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also Shapiro & Tune, *supra* note 8 at 341, where it is noted that Wood "cited only four American cases as authority for his approach to general hirings, none of which supported him." Not only did Wood state American law incorrectly, he offered no analysis to justify his rejection of the English approach.

[79]See K. Geariety, "At-Will Employment: Time for Good Faith and Fair Dealing between Employers and Employees" (1992) 28 Willamette L. Rev. 681; Shapiro & Tune, *ibid.* at 343.

[80]See Geariety, *ibid.* Although no reference was made to the American experience, the majority opinion in *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038 at 1052, 59 D.L.R. (4th) 416, 26 C.C.E.L. 85 [hereinafter *Slaight Communications* cited to S.C.R.], a *Charter* decision, noted that "the Courts must be ... concerned to avoid constitutionalizing inequalities of power in the workplace."

[81]Note, "Protecting At Will Employees against Wrongful Discharge: The Duty to Terminate Only in Good Faith" (1980) 93 Harv. L. Rev. 1816 [hereinafter "Protecting At Will Employees"]; Note, "A Common Law Action for the Abusively Discharged Employee" (1975) 26 Hastings L.J. 1435; Shapiro & Tune, *supra* note 8; Summers, *supra* note 18; W. Mauk, "Wrongful Discharge: The Erosion of 100 Years of Employer Privilege" (1985) 21 Idaho L. Rev. 201; M.H. Cohen, "Reconstructing Breach of the Implied Covenant of Good Faith and Fair Dealing as a Tort" (1985) 73 Calif. L. Rev. 1291; Blades, *supra* note 8; A. Blumrosen, "Workers' Rights against Employers and Unions: Justice Francis–A Judge for Our Season" (1970) 24 Rutgers L. Rev. 480; P.J. Levine, "Towards a Property Right in Employment" (1973) 22 Buffalo L. Rev. 1081. Compare Comment, "Employment-At-Will — Employers May Not Discharge At-Will Employees for Reasons That Violate Public Policy" [1986] Ariz. St. L.J. 161 [hereinafter "Employment-At-Will"], which espouses only a narrow exclusion of the at-will rule carved out by the Arizona Supreme Court, but acknowledges that "the harshness of the rule should be mitigated" (*ibid.* at 182); R.A. Epstein, "In Defense of the Contract At Will" (1984) 51 U. Chicago L. Rev. 947.

[82]*Wrongful Discharge from Employment Act*, Mont. Code Ann. §§ 39-2-901 – 39-2-914 (1991).

[83]M. Miller & R. Estes, "Recent Judicial Limitations on the Right to Discharge: A California Trilogy" (1982) 16 U.C. Davis L. Rev. 65. See also *Shapiro* v. *Wells Fargo Realty Advisors*, 199 Cal. Rptr. 613, 152 Cal. App. 3d 467 (Ct. App. 1984) [hereinafter *Shapiro*].

[84]*Strauss* v. *A.L. Randall Co.*, 194 Cal. Rptr. 520, 144 Cal. App. 3d 514 (1983); *Drzewiecki* v. *H & R Block, Inc.*, 101 Cal. Rptr. 169, 24 Cal. App. 3d 514 at 517 (1972).

ment relationship, this limitation need not be supported by additional or independent consideration separate from continued service.[85]

An implied obligation to terminate only for good cause may be found by the court after an examination of the parties' entire relationship,[86] and thus represents a significant modification to the at-will approach.[87] The demise of the employer's right to terminate at will is a finding of fact.[88] Indicia which support a conclusion that the at-will relationship has been altered include the personnel policies[89] or practices[90] of the employer, the employee's longevity of service,[91] actions or communications by the employer reflecting assurances of continued employment,[92] and practices of the industry in which the employee is engaged.[93]

### 2. Action Based on Public Policy

One early exception to the employment-at-will doctrine was tortious discharge in contravention of public policy.[94] The "public policy" exception occurs in situations where an employee is dismissed for failing to commit criminal or illegal acts, to conceal wrongdoing, or to take other action harmful to "the public weal".[95] An at-will contractual relationship does not prevent a tort action which is independent of the terms of employment.[96]

### 3. Action Based on an Implied Duty of Good Faith

In several American jurisdictions there is now a tort or contractual action based upon breach of the duty of good faith and fair dealing when employment

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[85]*Pugh* v. *See's Candies, Inc.*, 171 Cal. Rptr. 917, 116 Cal. App. 3d 311 (Ct. App. 1981) [hereinafter *Pugh* cited to Cal. Rptr.].

[86]See Blumrosen, *supra* note 77.

[87]Miller & Estes, *supra* note 83 at 101.

[88]*Khanna* v. *Microdata Corp.*, 215 Cal. Rptr. 860 at 865, 170 Cal. App. 3d 260 (Ct. App. 1985) [hereinafter *Khanna*]; *Pugh*, *supra* note 85; *Crosier* v. *United Parcel Service, Inc.*, 198 Cal. Rptr. 361 at 364, 150 Cal. App. 3d 1132 at 1137 (Ct. App. 1983) [hereinafter *Crosier*]; *Shapiro*, *supra* note 83. See also Miller & Estes, *ibid.*

[89]*Toussaint* v. *Blue Cross & Blue Shield*, 292 N.W.2d 880, 408 Mich. 579 (1980).

[90]*Pugh*, *supra* note 85 at 925-26; *Cleary* v. *American Airlines, Inc.*, 168 Cal. Rptr. 722, 111 Cal. App. 3d 443 (Ct. App. 1980) [hereinafter *Cleary* cited to Cal. Rptr.]; *Greene* v. *Howard University*, 412 F.2d 1128 (D.C. Cir. 1969) [hereinafter *Greene*].

[91]*Pugh*, *ibid.*; *Cleary*, *ibid.*; *Perry* v. *Sindermann*, 408 U.S. 593 at 602, 92 S. Ct. 2694 (1972); *Maloney* v. *E.I. Du Pont de Nemours & Co.*, 352 F.2d 936 at 939, cert. den. 383 U.S. 948 (1965).

[92]*Greene*, *supra* note 90; *Fulton* v. *Tenn. Walking Horse Breeders' Ass'n of America*, 476 S.W.2d 644 (Tenn. Ct. App. 1971); *Zimmer* v. *Wells Management Corp.*, 348 F. Supp. 540 (S.D.N.Y. 1972) [hereinafter *Zimmer*].

[93]*Pugh*, *supra* note 85.

[94]*Petermann* v. *International Brotherhood of Teamsters*, 344 P.2d 25, 174 Cal. App. 2d 184 (Ct. App. 1959); *Tameny* v. *Atlantic Richfield Co.*, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980) [hereinafter *Tameny*].

[95]*Foley* v. *Interactive Data Corp.*, 765 P.2d 373 at 376, 254 Cal. Rptr. 211 (1988) [hereinafter *Foley* cited to P.2d].

[96]*Koehrer* v. *Superior Court*, 226 Cal. Rptr 820, 181 Cal. App. 3d 1155 at 1166 (1986) [hereinafter *Koehrer*].

is improperly terminated.[97] Both the *Uniform Commercial Code*[98] and the *Restatement (Second) of Contracts*[99] import an obligation of good faith into all contracts. While an action based on bad faith in non-employment cases has existed for some time,[100] its availability in the employment context is a relatively recent development.

In *Monge* v. *Beebe Rubber Company*[101] the New Hampshire Supreme Court was asked to find that the employment-at-will doctrine did not apply to situations where the contract of employment was terminated in bad faith. The majority in *Monge* agreed with the plaintiff and held that terminating employment on motives based upon bad faith is actionable. In this case, the employee claimed that she was being harassed by her foreman because she refused to go out with him, and that his hostility, condoned, if not shared by the employer's personnel manager, ultimately resulted in her being fired.

The *Monge* court recognized that employment law needed to evolve in step with other areas of the law to conform with modern circumstances associated with changing legal, social and economic conditions.[102] The majority held:

> The law governing the relations between employer and employee has similarly evolved over the years to reflect changing legal, social and economic conditions. ... Although many of these changes have resulted from activity and influence of labour unions, the courts cannot ignore the new climate prevailing generally in the relationship of employer and employee. ...
>
> In all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two. ... *We hold that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not [in] the best interest of the economic system or the public good and constitutes a breach of the employment contract* ...[103]

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[97]*Foley, supra* note 95; *Cleary, supra* note 90; *Court* v. *Bristol-Myers Co.*, 431 N.E.2d 908, 385 Mass. 300 (1982); *K-Mart Corp.* v. *Ponseck*, 732 P.2d 1364, 103 Nev. 39 (1987); *Howard* v. *Dorr Woolen Co.*, 414 A.2d 1273 (N.H. 1980); *Hall* v. *Farmers Insurance Exchange*, 713 P.2d 1027 (Okl. 1985); *Fortune* v. *National Cash Register Co.*, 364 N.E.2d 1251, 373 Mass. 96 (1977) [hereinafter *Fortune* cited to N.E.2d]; *Magnan* v. *Anaconda Industries Inc.*, 479 A.2d 781, 193 Conn. 558 (1984); *Wagenseller* v. *Scottsdale Memorial Hospital*, 710 P.2d 1025, 147 Ariz. 370 (1985); *Mitford* v. *de Lasala*, 666 P.2d 1000 (Alaska 1983); *Zimmer, supra* note 92; *Monge, supra* note 76.

[98]U.C.C. § 1-203 (1990) [hereinafter *Uniform Commercial Code*] states, "Every contract ... imposes an obligation of good faith in its performance or enforcement."

[99]*Restatement (Second) of Contracts* § 205 (1981). The provision provides that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

[100]See *Murcach* v. *Mass Bonding & Ins. Co.*, 158 N.E.2d 338 (Mass. 1959), where an insurer had a duty to exercise discretionary power to settle claims in good faith. In *Uproar Co.* v. *National Broadcasting Co.*, 81 F.2d 373 at 377 (1st Cir. 1936), petition for writ of *certiorari* to the Circuit Court of Appeals for the First Circuit denied in 298 U.S. 670, citing from *Kirke La Shelle Co.* v. *Paul Armstrong Co.*, 188 N.E. 163 at 167, 263 N.Y. 79 at 87 (1933), where it was held that "in every contract there exists an implied covenant of good faith and fair dealing." See also *Clark* v. *State Street Trust Co.*, 169 N.E. 897 (Mass. 1930).

[101]*Supra* note 76.

[102]*Ibid.* at 551.

[103]*Ibid.* [emphasis added, references omitted]. See also *Fortune, supra* note 97 at 1257.

Clearly, the *Monge* court weighed the economic and social consequences which would be engendered by a rule that contracts of employment could not, without actionable repercussions, be terminated in bad faith or with malice. This required the Court to look at the proposed rule's effect on both employers and employees. The majority felt that such an approach affords "the employee a certain stability of employment and does not interfere with the employer's normal exercise of his right to discharge, which is necessary to permit him to operate his business efficiently and profitably."[104]

While other American jurisdictions have circumvented the century-old rule stipulated by Mr. Wood and have found that there is a duty of good faith and fair dealing in every employment contract,[105] the California appellate courts have been the most influential in the United States in curtailing bad faith discharges in the American workplace.

### *B. The California Decisions*

A review of California law is useful in light of the extensive consideration that this issue has been given by its appellate courts.

In *Cleary* v. *American Airlines, Inc.*,[106] an employee alleged he was wrongfully discharged for union organizing, and not for the reasons purported by the employer, which would have amounted to just cause in law. In determining whether the plaintiff had pleaded a valid cause of action, the Court of Appeal noted that there is a "continuing trend toward recognition by the courts and the Legislature of certain implied contract rights to job security, necessary to ensure social stability in our society."[107] The *Cleary* court held that:

> Termination of employment without legal cause after ... a period of time offends the implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts. As a result of this covenant, a duty arose on the part of the employer, American Airlines, to do nothing which would deprive plaintiff, the employee, of the benefits of the employment bargain ...[108]

After *Cleary*, it was widely acknowledged in California that there was an implied-in-law covenant of good faith and fair dealing in contracts of employ-

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[104]*Monge*, *ibid.* at 552. See also *Fortune*, *ibid.* Contrast with the traditional American view expressed in "Employment-At-Will", *supra* note 81 at 181, where the author states that implying a covenant of good faith and fair dealing in employment-at-will situations would expose the employer to a lawsuit each time he discharged an at-will employee and would be "improperly creating a collective bargaining agreement between the parties."

[105]See *Stevenson* v. *ITT Harper, Inc.*, 366 N.E.2d 561, 51 Ill. App. 3d 568 (1977). In *Rees* v. *Bank Building and Equipment Corporation*, 332 F.2d 548 at 551-52 (7th Cir. 1964), the United States Court of Appeals for the 7th Circuit, applying Missouri law, acknowledged in an employment case that there is an implied covenant of good faith and fair dealing. See also *Zimmer*, *supra* note 92, which utilizes the concept of good faith in an employment contract dispute. See also *Brehany* v. *Nordstrom, Inc.*, 812 P.2d 49 (Utah 1991); *Murphy* v. *American Home Products Corp.*, 448 N.E.2d 86, 58 N.Y.2d 293 (1983).

[106]*Supra* note 90.

[107]*Ibid.* at 729.

[108]*Ibid.* In the earlier decision of *Tameny*, *supra* note 94, the California Supreme Court suggested in *obiter* that there was an obligation of good faith owed by employers. The existence of the employer's obligation was alluded to in an even earlier decision of the California Supreme Court, *Coates* v. *General Motors Corp.*, 3 Cal. App. 2d 340 at 348, 39 P.2d 838 (1934).

ment. An employer discharging an employee in breach of the implied covenant could be successfully sued for damages even in at-will employment relationships.[109] The only question remaining was whether a breach of the implied covenant of good faith and fair dealing gave the employee a tort action or merely a contractual one. A tort remedy was already available in insurance cases,[110] but it was uncertain whether an action sounding in tort was or ought to be available for employment cases. A tort remedy was obviously superior from an employee's perspective since it, *inter alia*, permitted punitive damages, allowed damages for mental suffering and was not subject to the limitations of *Hadley* v. *Baxendale*.

### *C. Tort or Contract?*

#### 1. Rise of Action *Ex Delicto*[111]

In the United States, several jurisdictions have allowed a tort action for the violation of a duty of good faith and fair dealing. The tort action originated in insurance cases.

In *Comunale* v. *Traders & General Insurance Co.*,[112] the California Supreme Court recognized that the duty of good faith and fair dealing did not arise from the underlying contract itself, but was implied by law.[113] *Comunale* was applied in *Crisci* v. *Security Insurance Co.*,[114] where the same court expressly stated that tort damages could be awarded against an insurer for its unreasonable and unwarranted refusal to settle a claim when the insurer's conduct could be said to impugn the obligation of good faith and fair dealing.[115] In the insurance context, a tort remedy for the infringement of the obligation of good faith and fair dealing has been widely acknowledged in the United States.[116] It has also been recognized that a tort action may extend to contracts

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[109]*Khanna*, *supra* note 88; *Seaman's Direct Buying Service, Inc.* v. *Standard Oil Co.*, 686 P.2d 1158, 36 Cal. 3d 752, 206 Cal. Rptr. 354 (1984) [hereinafter *Seaman's* cited to P.2d]; *Koehrer*, *supra* note 96; *Quigley* v. *Pet, Inc.*, 162 Cal. App. 3d 877, 208 Cal. Rptr. 394 (Ct. App. 1984); *Wallis* v. *Superior Court (Kroehler Manufacturing Co.)*, 207 Cal. Rptr. 123, 160 Cal. App. 3d 1109 (Ct. App. 1984) [hereinafter *Wallis* cited to Cal. Rptr.].

[110]See text accompanying note 115ff.

[111]Cohen, *supra* note 8.

[112]328 P.2d 198, 50 Cal. 2d. 654 (1958) [hereinafter *Comunale* cited to P.2d].

[113]*Ibid.* at 200.

[114]66 Cal. 2d 425, 58 Cal. Rptr. 13, 426 P.2d 173 (1967) [hereinafter *Crisci*].

[115]*Gruenberg* v. *Aetna Insurance Co.*, 9 Cal. App. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032 (1973), held that even if an insurance company complied with its contractual obligations, its obligation of good faith and fair dealing was unconditional and independent of its contractual duties, and an insurer's unreasonable failure to make payments to the insured constituted a tortious breach of the obligation. In *Neal* v. *Farmers Insurance Exchange*, 21 Cal. 3d 910, 582 P.2d 980, 148 Cal. Rptr. 389 (1978), punitive damages were awarded against an insurer who denied a claim without investigating it.

[116]See *Christian* v. *American Home Assurance Co.*, 577 P.2d 899 at 903 (Okl. 1977); *Escambia Treating Co.* v. *Aetna Casualty & Surety Co.*, 421 F. Supp. 1367 (N.D. Fla. 1976); *United Services Auto Association* v. *Werley*, 526 P.2d 28 (Alaska 1975); *Ledingham* v. *Blue Cross*, 29 Ill. App. 3d 339, 330 N.E.2d 540 (1975); *Anderson* v. *Continental Ins. Co.*, 85 Wis. 2d 675 at 691, 271 N.W.2d. 368 at 376 (1978); *Viles* v. *Security National Insurance Co.*, 788 S.W.2d 566 (Tex. 1990). See gen-

outside of the insurance context, provided they are not of an ordinary commercial nature and share some characteristics with insurance contracts.[117]

2. Application to the Employment Relationship

*a. The California Decisions*

In *Wallis*,[118] the California Court of Appeal held that an employer who violated the implied covenant of good faith and fair dealing could be liable in tort. The Court, while noting that an action in tort was found to occur most often in insurance cases, held that there were enough similar characteristics to allow this action in employment cases. The *Wallis* court, following the lead set out in an earlier decision by the California Supreme Court,[119] stated that for an action sounding in tort the following characteristics must be present in a non-insurance contract:

> (1) [T]he contract must be such that the parties are in inherently unequal bargaining positions; (2) the motivation for entering the contract must be a non-profit motivation, i.e., to secure peace of mind, security, future protection; (3) ordinary contract damages are not adequate because (a) they do not require the party in the superior position to account for its actions, and (b) they do not make the inferior party "whole"; (4) one party is especially vulnerable because of the type of harm it may suffer and of necessity places trust in the other party to perform; and (5) the other party is aware of this vulnerability.[120]

The *Wallis* court concluded that the above characteristics could be present in an employment contract and allowed the plaintiff's action to proceed.[121] It specifically stated that "the characteristics of the insurance contract which give rise to an action sounding in tort are also present in most employer-employee relationships."[122] The Court clearly believed that employees are often in inherently weaker bargaining positions than their employers; an employment contract from an employee's perspective is not purely commercial and is made to ensure financial stability and peace of mind; ordinary contract damages do not necessarily offer an incentive for employers not to breach them; a lump sum payment of damages several years after termination is not adequate when an employee's immediate situation after discharge is precarious because of the discharge; and employers are often aware of the vulnerability of their employees.[123]

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erally J.E. Tankersley, "Good Faith and Fair Dealing" (1991) 22 Texas Tech. L. Rev. 257; Cohen, *supra* note 8.

[117]*Seaman's*, *supra* note 109.

[118]*Supra* note 109.

[119]In *Seaman's*, *supra* note 109 at 1166, in discussing the availability of tort remedies for breach of the covenant of good faith and fair dealing in the employment relationship, the majority noted that the employment "relationship has some of the same characteristics as the relationship between insurer and insured."

[120]*Wallis*, *supra* note 109 at 129.

[121]*Ibid.* Bird C.J.'s partial dissent in *Seaman's*, *supra* note 109 at 1174-75, is insightful as to why an action in tort is warranted in employment cases.

[122]*Wallis*, *ibid.* at 127.

[123]*Ibid.* The Court noted that "money damages paid pursuant to a judgment years after ... do not remedy the harm suffered ... namely the immediate inability to support oneself and its attendant horrors" (*ibid.* at 128).

In late 1988, the California Supreme Court ultimately decided in a split decision (4-3) to abolish a tort cause of action in California for bad faith discharge. In *Foley* v. *Interactive Data Corp.*,[124] while a tort action for discharge contrary to public policy was maintained, it was held that only a contractual action existed for breach of the implied covenant of good faith and fair dealing. The majority opinion held that although a tort action for breach of the implied covenant was appropriate in insurance cases, it was not appropriate in employment cases. While conceding that contractual damages may be inadequate in bad faith discharge cases,[125] the majority concluded that commercial certainty was more important and that the employment relationship was not special enough to warrant the additional protection the law affords to victims of insurers who infringe the implied covenant of good faith and fair dealing.[126] In coming to its conclusion on the issue of tortious bad faith discharge, the *Foley* court thus overruled eight unanimous panels of the California Court of Appeal and *obiter* of the California Supreme Court supporting such a cause of action in tort,[127] and disapproved of a unanimous decision of the United States Court of Appeal for the Ninth Circuit espousing a broader application of tort remedies for bad faith discharge.[128] The tort action for bad faith discharge had achieved a very broad base of support in California.[129]

Given the timing of the decision, it is apparent that the *Foley* court was ideologically different from the court of former Chief Justice Rose Bird, and that the California Supreme Court reflected the conservative direction of the Bush-Reagan era.[130] Notwithstanding a much more conservative bench, it is noteworthy that the California Supreme Court refused to abolish the contractual obligation of good faith and fair dealing in contracts of employment, and continued to permit a tort action for discharge against public policy. Since social policy issues, such as universal health care, are now again at the top of the American political agenda,[131] one has to wonder how the case would be decided today.

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[124]*Supra* note 95.

[125]*Ibid.* at 401.

[126]*Ibid.* at 396. In *Gateway Realty* v. *Arton Holdings Ltd. (No. 3)* (1991), 106 N.S.R. (2d) 180, 288 A.P.R. 163 (T.D.), aff'd on other grounds (1992), 112 N.S.R. (2d) 180 (C.A.) [hereinafter *Gateway* cited to 106 N.S.R. (2d)], Kelly J. rejected the argument that a good faith obligation should be eschewed because of commercial uncertainty. Clarity and certainty were held not to be "superior objectives to fair dealing and good faith dealing" (*ibid.* at 198). It is submitted that Kelly J.'s reasoning avoids the mischief engendered by formalism.

[127]*Cleary, supra* note 90; *Crosier, supra* note 88; *Shapiro, supra* note 83; *Rulon-Miller* v. *International Business Machines Corp.*, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (Ct. App. 1984); *Khanna, supra* note 88; *Koehrer, supra* note 96; *Wallis, supra* note 109; *Wayte* v. *Rollins Intern., Inc.*, 169 Cal. App. 3d 1, 215 Cal. Rptr. 59 (Ct. App. 1985).

[128]*Huber* v. *Standard Ins. Co.*, 841 F.2d 980 (9th Cir. 1988).

[129]See H. Klein, Case Comment (1989) 23 Suffolk U.L. Rev. 1155 at 1164.

[130]*Foley* was first argued at the Supreme Court in June of 1986, but the Court did not decide the case before the ousting of three elected justices, including Chief Justice Rose Bird. The case was consequently reargued in April of 1987, and the decision released in December of 1988. See Klein, *ibid.* at 1157. While the fact that Chief Justice Bird voted to reverse all of the 59 death penalties imposed in California may have been considered popular among progressives, it did, however, alienate other parts of the California electorate in 1986. See S. Yerton, "'86" *The American Lawyer* (March 1994) 76 at 79.

[131]See *e.g.* (1992) 10:2 Yale L. & Pol'y Rev., where the entire issue was dedicated to health care.

Of interest to Canadians is that the policy considerations concerning the employment relationship, which motivated the minority in *Foley* to support a tort action for bad faith discharge, are virtually the same as those considered important in three recent Supreme Court of Canada decisions.[132] It is the dissent in *Foley* which is helpful to Canadians interested in reforming the common law so that it reflects modern social conditions.[133]

### *b. Outside California*

Tort damages for breach of the implied covenant of good faith and fair dealing in employment contracts have been recognized in at least two other American jurisdictions at the appellate level.[134] In Montana, the Supreme Court held that the duty of good faith and fair dealing in the "employment relationship" (as opposed to the contract of employment) is imposed *by operation of law*, and therefore its breach should find a remedy in tort.[135]

## IV. Building a Canadian Model

An implied obligation of good faith and fair dealing appears to be evolving as an accepted part of Canadian contract law.[136] There is considerable evidence

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[132]*Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161, 51 Alta. L.R. (2d) 97 [hereinafter *Re Public Service Employee Relations Act* cited to S.C.R.]; *Machtinger*, *supra* note 13; *Slaight Communications*, *supra* note 80. See text accompanying notes 176-83 for a discussion of the policy principles of the Supreme Court of Canada in connection to the employment relationship.

[133]It is noteworthy that an empirical study of 326 pre-*Foley* bad faith discharge actions has shown that the tort remedy did not create a disproportionately harsh and unpredictable burden on employers as the media and a majority of the California Supreme Court would lead one to believe. See Jnng & Harkness, *supra* note 15.

[134]See *K Mart Corp.* v. *Ponsock*, 732 P.2d 1364 (Nev. 1987); *Gates* v. *Life of Montana Insurance Co. (Gates I)*, 638 P.2d 1063 (Mont. 1983); *Gates* v. *Life of Montana Insurance Co. (Gates II)*, 668 P.2d 213 (Mont. 1983) [hereinafter *Gates II*]. In *Gates II*, the Montana Supreme Court held (*ibid.* at 214) that the duty existed apart from, and in addition to, any terms agreed to by the parties. See also G.L. Graham & B.J. Luck, "The Continuing Development of the Tort of Bad Faith in Montana" (1984) 45 Mont. L. Rev. 43.

In 1987, Montana's legislature passed the *Wrongful Discharge from Employment Act*, *supra* note 82. Under the Montana statute, unorganized non-probationary employees may recover punitive damages and up to four years of lost wages and fringe benefits when dismissed without "good cause". See generally L.H. Schramm, "Montana Employment Law and the 1987 Wrongful Discharge from Employment Act: A New Order Begins" (1990) 51 Montana L. Rev. 94; L. Bierman & S.A. Youngblood, "Interpreting Montana's Pathbreaking Wrongful Discharge from Employment Act: A Preliminary Analysis" (1992) 53 Montana L. Rev. 53.

[135]*Gates II*, *ibid.* at 215.

[136]There is a growing movement to create an obligation of good faith and fair dealing in all contracts. See D. Clark, "Some Recent Developments in the Canadian Law of Contracts" (1993) 14 Advocates' Q. 435; Belobaba, *supra* note 9; B. Reiter, "Good Faith in Contracts" (1983) 17 Valpataiso U.L. Rev. 208. See also *Gateway*, *supra* note 126; *LeMesurier* v. *Andrus* (1986), 54 O.R. (2d) 1, 25 D.L.R. (4th) 424 (C.A.); *McKinlay Motors Ltd.* v. *Honda Canada Inc.* (1989), 80 Nfld. & P.E.I.R. 200, 249 A.P.R. 200, 46 B.L.R. 62 (Nfld. S.C.). The obligation is now firmly entrenched in Quebec law. See *National Bank of Canada* v. *Houle*, [1990] 3 S.C.R. 122, 74 D.L.R. (4th) 577, 35 Q.A.C. 161 [hereinafter *Houle*]. Concerning the duty to bargain in good faith, see J. Cassels, "Good Faith in Contract Bargaining: General Principles and Recent Developments" (1993) 15 Advocates' Q. 56.

suggesting that this type of duty will eventually be imposed on Canadian employers. Furthermore, it will be argued that such an evolution would not necessarily constitute a drastic change. The notion of good faith and fair dealing has recently emerged in several aspects of the employment relationship, and the judicial trend to impute such obligations is evidenced in the following ways.

### *A. Judicial Controls on Expressed Contractual Discretion*

In *Greenberg* v. *Meffert*,[137] the Ontario Court of Appeal held that an employer had an obligation to act reasonably, honestly and in good faith when exercising a discretionary power to remunerate a sales agent under a contract of employment. Robins J.A., speaking for the Court, stated that "[this] proposition is so fundamental as to require no elaboration. ... Fair dealing is implicit in the contract."[138]

In the recently released decision of *Truckers Garage Inc.* v. *Krell*,[139] the Ontario Court of Appeal considered an employer's right to exercise a termination provision in a written employment contract. The contract in question was a fixed term contract of two years duration, but allowed the employer to terminate it before the end of the term on the grounds of "incompatability". Osborne J.A., speaking for the Court, stated:

> The termination clause in issue imposed *an obligation of good faith and fair dealing* on both Temperman and Krell. See *Lac Minerals* v. *International Corona Resources Ltd.*, [1989] 2 S.C.R. 574. The existence of such a duty is consistent with the parties' reasonable expectation.[140]

The courts are now clearly willing to control discretion found in written employment contracts, including the discretion to terminate employment, through an implied obligation of good faith and fair dealing. There is no longer a logical reason for the courts not to recognize an implied obligation to terminate in good faith in all employment relationships.

### *B. Common Law Procedural Fairness*

Traditionally, the common law has not required the master to inform the servant of alleged misconduct,[141] nor has it afforded an opportunity for the

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[137](1985), 50 O.R. (2d) 755, 7 C.C.E.L. 15 (C.A.), leave to appeal refused 56 O.R. (2d) 320 (S.C.C.) [cited to 50 O.R. (2d)].

[138]*Ibid.* at 764. As early as *Hurley* v. *Roy* (1921), 50 O.L.R. 281, 64 D.L.R. 374 (C.A.), it was recognized that a "sole discretion" clause had to be exercised "honestly and in good faith". See also *Moir* v. *J.P. Porter Co.* (1979), 33 N.S.R. (2d) 685, 57 A.P.R. 685 (S.C.).

[139](24 December 1993), Toronto C10757 (Ont. C.A.) [hereinafter *Truckers Garage*].

[140]*Ibid.* at 9 [emphasis added].

[141]*Lake Ontario Portland Cement Co.* v. *Groner*, [1961] S.C.R. 553, 28 D.L.R. (2d) 589. See also Lord Hailsham of St. Marylebone, ed., *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1992) at 307, para. 299, where the traditional common law approach is contrasted with the statutory obligation in the United Kingdom of an employer to give reasons to employees with two years of service. The British statute is another example of unjust dismissal legislation being promulgated by a Commonwealth legislature to ameliorate one of many deficiencies in the common law.

employee to rebut the allegations.[142] The employer who dismisses an employee has no obligation to state the grounds for dismissal, and may dismiss with impunity even if there are no known grounds for dismissal at the time of termination, so long as subsequently discovered facts amounting to cause can be produced at the time of trial.[143] The traditional common law approach to the duty of fairness contrasts sharply with that used in employment relationships which are not purely master and servant. An example of the application of the duty of fairness is the decision of *Nicholson* v. *Haldimond-Norfolk Regional Board of Commissioners of Police*,[144] where the employer was held to have an obligation to give a probationary police constable the reasons for his dismissal and an opportunity to respond. It is submitted that there is no policy reason why the common law's approach to the rights implied into the contract of employment should differ from those employment relationships which are not purely master and servant (*i.e.* not based on the contract of employment), and which impose upon the employer a duty of fairness.

There is, however, a developing principle that *all* employers have a common law obligation to give employees an opportunity to respond when faced with allegations amounting to cause for dismissal.[145] In two cases involving particularly ruthless terminations by the same employer, it was further held that there was an onus on an employer conducting an investigation to conduct a fair[146] and full one.[147]

### C. Canada Labour Code *as Evidence of Modern Social Policy*

In 1978 the federal government amended the *Canada Labour Code*[148] to provide non-organized employees under federal regulation new protection against unjust dismissal.[149] Similar statutory protection has been enacted in Quebec[150] and Nova Scotia.[151] It was the federal government's belief that the common law was severely deficient[152] and that non-organized employees

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[142]See *e.g. Ridge* v. *Baldwin*, [1964] A.C. 40 at 65 (H.L.), Lord Reid. See also *GTE Sylvania Canada Ltd.* v. *Pulsifer* (1983), 51 N.S.R. (2d) 298, 1 C.C.E.L. 62 (C.A.), rev'g (1982), 1 C.C.E.L. 62 (N.S.S.C.).

[143]*Tracey* v. *Swansea Construction Co.* (1965), 1 O.R. 203, 47 D.L.R. (2d) 295 (H.C.J.), aff'd (1965), 2 O.R. 182n, 50 D.L.R. (2d) 130n (C.A.).

[144](1978), [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671.

[145]*Pilato, supra* note 23; *Francis* v. *Canadian Imperial Bank of Commerce* (1992), 41 C.C.E.L. 37, 92 C.L.L.C. 14,014 (Ont. Ct. (Gen. Div.)) [hereinafter *Francis*]; *Robarts* v. *Canadian Railways Company* (1980), 2 C.C.E.L 168 (Ont. H.C.J.); *Reilly* v. *Steelcase Canada Ltd.* (1979), 26 O.R. (2d) 725, 103 D.L.R. (3d) 704 (H.C.J.).

[146]*Ribeiro, supra* note 23.

[147]*Francis, supra* note 145.

[148]*An Act to Amend the Canada Labour Code*, S.C. 1977-78, c. 27. The current provisions relating to unjust dismissal are found at Division XIV of the *Canada Labour Code*, *supra* note 34.

[149]England, *supra* note 18; G. England, "Unjust Dismissal in the Federal Jurisdiction: The First Three Years" (1982) 12 Man. L.J. 9.

[150]*Act Respecting Labour Standards*, *supra* note 34, as am. by S.Q. 1990, c. 73, ss. 59ff.

[151]*Labour Standards Code*, *supra* note 34.

[152]See generally England, *supra* note 149; G. Simmons, "Unjust Dismissal of Unorganized Workers in Canada" (1984) 20 Stanf. J. Int'l L. 473; R. Heenan, "Mandatory Arbitration of Dismissals in Employment Law: The Canadian Experience" in Southwestern Legal Foundation,

should be given the protection and remedies afforded to unionized employees.[153]

When an adjudicator appointed by the Minister of Labour finds a dismissal "unjust", he or she may re-instate the employee with complete back-pay and fashion a supplementary remedy to help counteract any consequence of the dismissal.[154] The adjudicator also has the power to award flexible remedies such as requiring the employer to write a letter of reference[155] and to amend its personnel files to show that a re-instated employee was unjustly dismissed.[156]

The federal legislation assists Parliament in meeting its obligations under international law. In *Slaight Communications Inc.* v. *Davidson*, Dickson C.J.C. referred to Canada's international obligations while expounding on the importance of the objectives reflected in the *Canada Labour Code*.[157] After noting that the right to work in its various dimensions was sanctioned by the *International Covenant on Economic, Social and Cultural Rights*,[158] Dickson C.J.C. stated that

> the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective. This is consistent with the importance that this Court has placed on the protection of employees as a vulnerable group in society.[159]

The Court in *Slaight Communications* held that an order by an adjudicator requiring an employer to write a letter of reference infringed an employer's constitutional rights under subsection 2(*b*) of the *Canadian Charter of Rights and Freedoms*.[160] However, the legislative aim of protecting employees as a vulnerable group was an objective of such great importance that the remedial powers of the adjudicator were justified under section 1 of the *Charter*.

In *Sobeys Stores Ltd.* v. *Yeomans*, La Forest J. examined and compared the policy behind Nova Scotia's unjust dismissal statute with the traditional approach of the common law:

> The underlying social and economic philosophy of this legislation could not be in sharper contrast to that which existed at Confederation. At that time, the philosophy of laissez-faire was at its zenith. This was reflected in a legal environment that promoted strict individual equality and freedom of contract. Legislative con-

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*Labour Law Developments* (New York: Matthew Bender, 1992) 51; N. Grossman, *Federal Employment Law* (Toronto: Carswell, 1990) at 87-204; Christie, England & Cotter, *supra* note 7 at 669-723; Harris, *Wrongful Dismissal* (Toronto: Carswell, 1992) c. 6.

[153]*House of Commons Debates* (13 December 1977) at 1831.

[154]*Canada Labour Code*, *supra* note 34, s. 242.

[155]*Slaight Communications*, *supra* note 80.

[156]*Purolator Courier Ltd.* v. *Lalach* (25 March 1993), No. 1924-Ont. (Marentette, Adjudicator).

[157]*Supra* note 80 at 1056-57.

[158]16 December 1966, Can. T.S. 1976 No. 46, 993 U.N.T.S. 3. Canada acceded to the Covenant on 19 May 1976, and it came into effect 19 August 1976. See Dickson C.J.C's comments in *Re Public Service Employee Relations Act*, *supra* note 132 at 350-51.

[159]*Supra* note 80 at 1057.

[160]Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.). 1982, c. 11 [hereinafter *Charter*].

trol of economic activity was minimal. In the field of labour relations, then, what the courts enforced were individual contracts (governing what was then appropriately called a "master-servant" relationship).[161]

### *D. Labour Relations*

In the collective bargaining regime it is becoming recognized that management must use its powers and discretion in good faith, reasonably and fairly.[162] As stated earlier, there is no reason why the common law is not as progressive as arbitral jurisprudence, and one must seriously question whether lawyers and judges have until recently been abdicating their responsibility of ensuring that the common law progresses with modern community values.

## V. Bad Faith as a Tort in Canada

As in the United States, Canadian jurisdictions have now acknowledged bad faith claims against insurers.[163] The law in this area is, however, nowhere near as developed as it is in the United States, and it is unclear whether liability in Canada originates in contract, tort or equity.[164] Given that the development of bad faith claims against insurers is relatively embryonic in Canada, in building a model for the tort of bad faith discharge we should not rely on Canadian insurance cases alone. Since we do not have a domestic tort model for bad faith discharge, it is useful to go back to fundamental principles germane to tort law.

### *A. Policics and Goals of Tort Law*

It is said that the purpose of modern tort law is to adjust and redistribute losses, and to compensate for injuries sustained by an individual due to the conduct of another.[165] Liability in tort arises from socially unreasonable behaviour

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[161][1989] 1 S.C.R. 238 at 283, 57 D.L.R. (4th) 1, 25 C.C.E.L. 162 [hereinafter *Sobeys*].

[162]See generally D. Brown & D. Beatty, *Canadian Labour Arbitration*, 3d ed. (Aurora, Ont.: Canada Law Book, 1993) at 4: 2320.

[163]See *Pelky* v. *Hudson Bay Insurance* (1981), 35 O.R. (2d) 97 (H.C.J.), which quoted from the Supreme Court of California's decision in *Crisci*, *supra* note 114.

[164]In *Shea* v. *Manitoba Public Insurance Corporation* (1991), 55 B.C.L.R. (2d) 15, [1991] I.L.R. 1-2721 (S.C.) [hereinafter *Shea*], Finch J. held that the insurer-insured relationship is a commercial one without fiduciary obligations, but there is nonetheless a duty of good faith and fair dealing because of the insured's vulnerability. In *Fredrikson* v. *I.C.B.C.* (1990), 44 B.C.L.R. (2d) 303, 69 D.L.R. (4th) 399, 42 C.C.L.I. 250 (S.C.), Esson C.J. rejected a fiduciary theory of liability and refused to wholly import the American approach into British Columbian law. He noted, however, that there is a duty on the insurer to settle in appropriate circumstances because of the potential vulnerability of the insured, but decided that the case at bar did not require the formation of the appropriate test for British Columbia. In *Plaza Fiberglass Manufacturing Ltd.* v. *Cardinal Insurance Co.* (1990), 68 D.L.R. (4th) 586, [1990] I.L.R. 1-2658 (Ont. H.C.J.), rev'd (12 May 1994), Toronto C8505 (Ont. C.A.), a theory of liability based on fiduciary obligations flowing from the excess insurer to the primary insurer succeeded. In *Maschke* v. *Gleeson* (1986), 54 O.R. (2d) 753, 18 C.C.L.I. 129 (Div. Ct.), a claim for punitive damages was allowed to stand notwithstanding that it was found that a claim for bad faith arises out of contract. In *Labelle* v. *Guardian Insurance Co. of Canada* (1989), 38 C.C.L.I. 274, I.L.R. 1-2465 (Ont. H.C.J.), the duty of the insurer to act fairly was held to have arisen out of a fiduciary obligation, and punitive damages were allowed.

[165]C.A. Wright, "Introduction to the Law of Torts" (1944) 8 Cambridge L.J. 238 at 238; W.B.

which engenders injury.[166] Whether conduct is socially unreasonable must be viewed from the perspective of the community as a whole.[167]

Another goal of tort law, especially when punitive damages are involved, is deterrence and punishment.[168] Although being required to pay compensation may not be considered punishment, deeming certain conduct as actionable which was previously held not to be certainly serves as a deterrent. Once a member of society knows that certain behaviour constitutes a wrong for which he or she will have to pay, there is a strong incentive for that person not to engage in the forbidden conduct. Linden aptly notes that "it is a mark of nobility when a society directs its members to conduct themselves reasonably in their relations with fellow citizens or pay the consequences."[169] Tort law emphasizes respect for others and the exercise of individual restraint. By re-enforcing public disapproval of certain types of conduct, tort law thus acts as a method of social reform. Unlike the law of contract, tort law implicitly attaches a moral stigma to liability.[170]

The fact that there is not yet a nominate tort of bad faith discharge in Canada does not prevent the courts from creating one. Outside of existing nominate torts, there may be additional wrongs which are tortious, but whose existence has not yet been "discovered" by the courts.[171]

Duties sounding in tort are primarily fixed by law, while contractual obligations are normally fixed by the parties themselves.[172] It was based on this distinction that the Montana Supreme Court held that bad faith discharge can be an action sounding in tort.[173]

### *B. Application of Tort Goals to Bad Faith Discharge*

There should be a duty of good faith and fair dealing owed by employers to employees with regard to dismissals ordered in bad faith in violation of this obligation. Such an obligation should be imposed as a matter of policy, and should not necessarily be imposed as the result of the intention or will of the parties to a contract of employment. Our society as a whole now believes abusive discharges constitute socially unreasonable behaviour.

The special nature of the employment relationship and the reason why tort liability should be imposed in appropriate situations have been alluded to by the Supreme Court of Canada. The Supreme Court clearly considers that "employ-

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Keeton, ed., *Prosser & Keeton on Torts*, 5th ed. (St. Paul, Minn.: West, 1984) at 6 [hereinafter *Prosser & Keeton*].

[166]*Prosser & Keeton, ibid.*

[167]*Ibid.*

[168]See A. Linden, *Canadian Tort Law*, 5th ed. (Toronto: Butterworths, 1993) at 58.

[169]*Ibid.* at 14.

[170]Cohen, *supra* note 8 at 1290.

[171]W.V.H. Rogers, *Winfield and Jolowicz on Tort*, 13th ed. (London: Sweet & Maxwell, 1989) at 50.

[172]R.F.V. Heuston & R.A. Buckley, *Salmond and Heuston on the Law of Torts*, 20th ed. (London: Sweet & Maxwell, 1992) at 11.

[173]*Gates II, supra* note 134.

ment is of central importance to our society";[174] the manner in which employment can be terminated is fundamentally important;[175] and "the protection of employees as a vulnerable group in society" is an objective with a high degree of importance attached to it.[176] Dickson C.J.C. noted in *Slaight Communications* that the protection of the right to work represents a value which has the status of an international human right.[177] The Court recognizes that the law governing the termination of employment significantly affects the economic and psychological welfare of employees.[178] A person's employment is regarded as an essential component of his or her sense of identity, self-worth and emotional well-being.[179] Work is one of the most fundamental aspects of a person's life, providing the individual with a means of financial support, and as importantly, a contributory role in society.[180] The Supreme Court refuses to view labour as a commodity.[181]

There is arguably no relationship in which one party places more reliance upon the other and is more vulnerable to the abuse of the other than the relationship between an employer and an employee.[182] Ironically, the longer the relationship, the more likely the employee will lose whatever strength he or she had when it was formed.[183] Economic reality dictates that there is rarely a market for individuals like a middle-aged executive or a factory worker, employed by the same employer for a long time, who is then purportedly dismissed for cause when there is no cause.[184]

By endorsing the tort of bad faith discharge it will be possible for the courts to re-enforce values of modern society. Modern community values are reflected in the body of arbitral jurisprudence and statutes such the *Canada Labour Code*, which have developed alongside the common law because of its deficiencies. The creation of a bad faith discharge tort would reform labour relations in non-union operations by making some types of dismissals more expensive than others. If employers who choose to terminate employment in improper ways were subjected to additional damages it would "perhaps surprise only a few and be accepted by most."[185] With tort law designed to protect society's members from nonconsensual conduct, and in view of the special features of the employment relationship acknowledged by the Supreme Court, the creation of a tort action for bad faith discharge could assist the courts in doing more than simply paying lip-service to community values that have already been judicially recognized as important and worth protecting.

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[174]*Machtinger*, *supra* note 13 at 1002.
[175]*Ibid.*
[176]*Slaight Communications*, *supra* note 80 at 1057.
[177]*Ibid.*
[178]*Machtinger*, *supra* note 13 at 990.
[179]*Re Public Service Employee Relations Act*, *supra* note 132 at 368.
[180]*Ibid.*
[181]*Slaight Communications*, *supra* note 80 at 1054, citing with approval, Beatty, *supra* note 18 at 323-24.
[182]*Foley*, *supra* note 95 at 415, Kaufman J. dissenting in part.
[183]*Ibid.*
[184]*Ibid.* at 407, Broussard J. dissenting in part.
[185]See *Perkins*, *supra* note 30 at 178.

In determining the nature of the obligation not to discharge in bad faith, Canadian courts should look at the remedy they want to afford discharged employees.[186] The common law of wrongful dismissal is severely deficient in making whole the real loss suffered by many employees, and it is unclear why someone discharging an employee in bad faith should benefit from these limitations. When an employer acts in a manner which devastates an employee's career in his or her chosen field, there is no apparent reason why the former employer should not be required to make whole the real loss incurred by the dismissed employee.

Canadian judges have demonstrated a preference for tort remedies over a contractual wrongful dismissal action to make whole and to remedy intangible losses suffered by employees.[187] By resorting to tort law to compensate victims of bad faith discharges, not only would socially unreasonable behaviour be deterred, but employees would be more likely to be made whole in appropriate cases.

Tort law also functions to adjust losses. Viewed from a macro-economic perspective, the tort of bad faith discharge could play an important role. By permitting terminations pursuant to a legal model created during the Industrial Revolution, society is paying a high price. Individuals unnecessarily terminated in Canada often become a burden on the nation's extensive social system — a system which is already taxed to its limit, leaving in doubt the nation's ability to adequately fund it in the future.[188] A victim of a bad faith discharge may require counselling and medical treatment, services the State will normally pay for in Canada. In addition, these individuals must often be retrained at considerable cost, especially when their careers have been destroyed by the manner of their dismissal. In Canada, it is the State that pays the lion's share of these costs. From a macro-economic perspective, an argument can be made that there is greater need for a tort of bad faith discharge in Canada than in American at-will jurisdictions with less extensive social systems.

The State also has a direct economic interest in preventing discharges contrary to public policy, as for example, when employees are dismissed for "whistle blowing".[189] Given the spending restraints governments are now facing, and will continue to face in the foreseeable future, tort law could assist badly underfunded enforcement agencies by protecting employees who try to ensure that their employers comply with the law. If employers know that they cannot retaliate against employees who attempt to compel them to operate law-

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[186]Swan, *supra* note 26.

[187]See *Bohemier*, *supra* note 38; *Rahemtulla*, *supra* note 23. American experience appears to be similar to Canadian experience in this regard, and it has thus been argued that "there may be strong reasons for preferring a tort theory over a contract theory of recovery" ("Protecting At Will Employees", *supra* note 81 at 1844).

[188]The front page of the 29 May 1993 edition of the *Financial Post* reports that Canada's public debt is approaching $700 billion and, "[t]o their credit, most of the provinces are trying to cut spending."

[189]See generally J.H. Conway, "Protecting the Private Sector At Will Employee Who 'Blows the Whistle': A Cause of Action Based upon Determinants of Public Policy" [1977] Wisconsin L. Rev. 777.

fully, employers will be more likely to comply with statutes which are germane to their operations. Fewer public dollars would have to be spent on monitoring and enforcement.

If tort law were used to prevent and remedy bad faith discharges, it would serve many of the same purposes served by vicarious liability when it is used to render employers liable.[190] It would force employers to pay attention to their operations and ensure that human resource decisions are made responsibly.[191] Employers would be compelled to absorb the costs of bad faith discharges. While employers may pass some of these costs on to consumers, at least it would not be the employee, normally in the weaker economic position, who is paying for the costs of a bad faith discharge.[192] Rather than the State absorbing the costs of antisocial conduct, these costs would ultimately be passed on to the consumers.[193] Employers who commit bad faith discharges in excess of the industry standard would be uncompetitive and less profitable.

Our nation must be competitive in the global economy where, interestingly, the experience of other countries suggests that job security tends to increase productivity and cooperation in the work place.[194] It is therefore not surprising that employees within many nations which are Canada's trading partners benefit from legal and effective informal protection ensuring job security.[195]

## VI. Bad Faith Discharge as a Contractual Action

An alternative approach would be to restrict the implied obligation of good faith and fair dealing to a mere contractual term, with the remedy being limited to damages for breach of contract.

The obligation would be a term implied by law, and not an issue of fact or business efficacy, since terms implied by law do not depend upon the intentions of the parties to a contract.[196] They are imposed because of a legal incident of

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[190]For the policy reasons behind the principle of vicarious liability, see generally P.S. Atiyah, *Vicarious Liability in the Law of Torts* (London: Butterworths, 1967) at 22-28; R. Flannigan, "Enterprise Control" (1987) 37 U.T.L.J. 25.

[191]This is analogous to the control justification for vicarious liability. See Fridman, *supra* note 33 at 315.

[192]The employer normally has much greater resources than the employee, and the deeper pockets of the employer have been another reason used to justify vicarious liability of employers. See generally *Limpus* v. *London Omnibus Co.* (1862), 1 H. & C. 526 at 539, 158 E.R. 993 at 998; J.E. Magnet, "Vicarious Liability and the Professional Employee" (1978) 6 C.C.L.T. 208 at 212.

[193]For the view that there should be a social distribution of tort losses by making the employer responsible, see generally H. Laski, "The Basis of Vicarious Liability" (1916) 26 Yale L.J. 105 at 106-12; Y.B. Smith, "Frolic and Detour" (1923) 23 Colum. L. Rev. 444 at 456; W.O. Douglas, "Vicarious Liability and the Administration of Risk" (1928-29) 38 Yale L.J. 584 at 585-86. These articles were a partial response to writers such as Oliver Wendell Holmes Jr., who believed that the doctrine of vicarious liability was an affront to common sense. See O.W. Holmes Jr., "Agency" (1891) 5 Harv. L. Rev. 1.

The principle that injuries should be borne by an industry was an important idea behind the creation of workers' compensation legislation. See Atiyah, *supra* note 190 at 24.

[194]See "Protecting At Will Employees", *supra* note 81 at 1836.

[195]See *ibid.* at 1835-36, where German and Japanese protections are discussed.

[196]See *Canadian Pacific Hotels Ltd.* v. *Bank of Montreal*, [1987] 1 S.C.R. 711, 40 D.L.R. (4th) 711 [hereinafter *C.P. Hotels*]; *Machtinger*, *supra* note 13 at 1008, McLachlin J.

a particular kind of contractual relationship[197] and flow from general policy considerations affecting the type of contract in question.[198]

Finding such an implied term would not necessarily be a drastic step for Canadian courts to take. In the United States, both the *Restatement (Second) of Contracts*[199] and the *Uniform Commercial Code*[200] endorse an implied obligation of good faith and fair dealing for all contracts. It appears that Canadian common law, by accepting the civilian approach[201] of implying a good faith obligation for all contracts, is moving in a similar direction.[202] It would be perverse for Canadian courts to create an implied contractual term of good faith and fair dealing for ordinary commercial contracts, but fail to imply such a term for unwritten employment contracts where one party is inherently in a weaker position to adequately protect itself from acts done in bad faith.

An implied contractual term of good faith and fair dealing in all employment contracts would protect an employee's reasonable expectation of continued employment when job performance is satisfactory.[203] It is because of this normal expectation that individuals take out mortgages, purchase houses, plan and raise families and plan their retirement.[204] The economy, and indeed society, could not function as it does without this expectation being held by the vast majority of Canadians.

An action based on an implied term of good faith and fair dealing would serve to circumvent some inherent deficiencies, such as capped notice periods and inability to claim for loss of reputation, since the action would not be instituted because of the employer's failure to give reasonable notice, but for having terminated employment in circumstances amounting to bad faith.[205]

Finally, a requirement that employers terminate in good faith would effectively reduce potential transaction costs and information barriers which exist during negotiations between employers and employees.[206]

The danger of having an action for bad faith discharge based only in contract is alluded to by Professor Swan.[207] There is simply no guarantee that the

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[197]Le Dain J. in *C.P. Hotels*, *ibid.*, expressly recognized the existence of a third category, terms implied by law, separate from the business efficacy and "officious bystander" tests. Treitel describes terms implied by law as "legal duties". See G. Treitel, *The Law of Contract*, 8th ed. (London: Sweet & Maxwell, 1991) at 190.

[198]Treitel, *ibid.* at 193.

[199]*Supra* note 99.

[200]*Supra* note 98.

[201]See *Houle*, *supra* note 136. See Belobaba, *supra* note 9 at 74, for a discussion of the approach of numerous European civil codes in imposing an obligation of good faith and fair dealing.

[202]See *Gateway*, *supra* note 126; *Shea*, *supra* note 164; *Truckers Garage*, *supra* note 139. See also Clark, *supra* note 136.

[203]See England, *supra* note 18 at 501-502; "Protecting At Will Employees", *supra* note 81 at 1841.

[204]*Foley*, *supra* note 95 at 405-406.

[205]Schai, *supra* note 41, argues that an implied obligation of good faith in employment contracts would allow the courts to more readily award aggravated damages.

[206]See "Protecting At Will Employees", *supra* note 81 at 1830-33.

[207]*Supra* note 26.

courts are going to recognize the special features of the contract of employment.[208] While many intangible losses due to abusive discharges are easily foreseeable in light of our society's better understanding of industrial relations, the courts have improperly used and interpreted the remoteness doctrine in *Hadley* v. *Baxendale* to foreclose these losses by treating the contract of employment as an ordinary commercial contract.[209]

## Conclusion

It is not a recent occurrence that commentators, and occasionally the courts, have suggested that the model we are still using to determine the rights and obligations which are imputed into every employment relationship is out of date.[210] Sadly, neither the individual suffering caused by bad faith discharges nor the accompanying social consequences are recently discovered phenomena.[211]

There is some encouragement. In at least two recent cases, Canadian judges have allowed tortious actions for retaliatory discharge (discharge contrary to public policy) to proceed to trial.[212] At least one judge has allowed an action for bad faith discharge to proceed to trial.[213] As noted above, the Ontario Court of Appeal held in *Truckers Garage* that a written termination clause could only be used when the employer was acting fairly and in good faith.[214] These decisions implicitly recognize that the common law is not inflexible, but rather is capable of evolving in step with society's values.

The law must evolve. We now live in a society which is very different from the society that raised and socialized the law lords who decided *Addis*. Individ-

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[208]Both Freedland (*supra* note 48) and Swinton (*supra* note 8) refer to this problem in the courts. See also the concerns of Broussard J. in *Foley* on the inadequacy of contract damages based on a commercial contractual model when the court is considering a bad faith discharge (*supra* note 95). These concerns are also shared by Grossman & Marcus (*supra* note 48).

[209]Swan argues that the error of the courts is to focus on foreseeability of mental distress and other intangible losses, rather than the employee's legitimate expectations, such as security and peace of mind. A factual inquiry usually cannot support a conclusion of an allocation of risk between the parties (*supra* note 26 at 223-24).

Several decisions have confronted this issue in the context of the calculation of reasonable notice, and have recognized the special features of the contract of employment. Osbourne J., as he then was, in *Thomson* v. *Bechtel Canada Ltd.* (1983), 3 C.C.E.L. 16 at 19 (Ont. H.C.J.), aff'd (1985), 6 C.C.E.L. XXXV (Ont. C.A.), stated there are two possible approaches to justifying a term of reasonable notice: to justify it by public policy considerations or to found it on an oblique consideration of what the parties would have agreed to had they considered the issue at the time of hiring. Osbourne J. noted that the policy approach seemed to be more realistic than an artificial determination of what the parties would have considered at the time of hiring. See also *McBride* v. *W.P. London & Associates Ltd.* (1984), 47 O.R. (2d) 333, 5 C.C.E.L. 314 (H.C.J.); McLachlin J. in *Machtinger*, *supra* note 13.

[210]R. Harrison, "Termination of Employment" (1972) 10 Alta. L. Rev. 250 at 251.

[211]As early as 1862, Victor Hugo, in *Les Misérables* (London: Penguin, 1976), described with considerable detail the plight and suffering of the character Fantine after she was arguably the victim of a bad faith discharge.

[212]*Duplessis* v. *Walwyn Stodgell Cochran Murray Ltd.* (1988), 20 C.C.E.L. 245 (B.C.S.C.); *Ruggeiro* v. *Emco Limited* (4 May 1993), 92-CQ-28566 (Ont. Ct. (Gen. Div.)).

[213]*Ruggeiro*, *ibid.*

[214]*Supra* note 139.

ual rights are now perceived very differently, and the degree of protection the State provides to its citizenry, as well as the role individuals are expected and permitted to play in society, have also changed. In Canada, there is near universal literacy, publicly funded mass post-secondary education and full political participation even without ownership of real property — phenomena probably unimaginable during the height of the Industrial Revolution. The State now invests considerable sums developing the skills of its citizens and has passed extensive legislation to render the work place humane. In the unionized context, a substantive body of arbitral jurisprudence has developed to ameliorate the deficiencies of the common law of wrongful dismissal. It is intolerable that the common law is still premised upon a view of individual rights and of industrial relations which for many decades now has been considered unacceptable.

Compared to the effective political clout of employers' organizations, non-organized employees do not have adequate political force to convince provincial legislatures to pass unjust dismissal legislation.[215] Moreover, unions are unlikely to lobby in favour of unorganized employees.[216] There is presently little political incentive for provincial legislatures to pass a comprehensive scheme of protection such as the *Canada Labour Code*.[217] This does not, however, mean that most Canadians believe that bad faith discharges are socially acceptable; rather the better view is that most believe that employers who act in this manner should be held both financially[218] and publicly accountable.[219]

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[215]See the comments of Kaufman J. in *Foley*, *supra* note 95 at 413. Beatty expresses the same concern (*supra* note 18 at 330). Even if provincial legislatures were to enact legislation, it is probable that at least some managerial employees would be exempted from protection against unjust dismissal and would have to rely upon common law remedies. Subsection 167(3) of the *Canada Labour Code*, for example, specifically excludes "managers" from unjust dismissal protection. It is quite likely that new provincial legislation would resemble the *Canada Labour Code*. For a discussion of the managerial exemption under the *Canada Labour Code*, see S. Ball, "Case Comment: *Island Telephone Co.* v. *Canada*" (1993) 44 C.C.E.L. 169. The common law will probably have to continue to evolve, even if the provinces were to promulgate statutory protection.

[216]It is significant that neither the Ontario, Saskatchewan nor British Columbia New Democratic governments have passed unjust dismissal legislation to protect unorganized employees. Prior to the federal unjust dismissal legislation being passed, the Honourable John Munro, then Minister of Labour, noted that organized labour opposed the proposed legislation. The bias of the Canadian Labour Congress is demonstrated by its stated position that unjust dismissal legislation would not help non-organized employees and would be "potentially destructive" to organizing drives. See Submission by the Canadian Labour Congress to the Standing Committee on Labour, Manpower and Immigration of the House of Commons on Bill C-8, *An Act to Amend the Canadian Labour Code*, *Minutes of Proceedings and Evidence of the Standing Committee on Labour, Manpower and Immigration* (9 March 1978) App. LMI-6 at 8A:35-36. It is submitted that this position is suspect, and practical experience under the *Canada Labour Code* unjust dismissal provisions suggests that privately retained litigators with the appropriate experience are at the very least as effective, if not more so, in prosecuting unjust dismissal complaints under the *Code*, as are lay union representatives (who are not selected by the employee) at arbitration hearings.

[217]In *Foley*, *supra* note 95 at 412-13, Broussard J., noting that the courts have an obligation to protect unorganized employees, said that unorganized employees would not be an effective force in causing legislative change, whereas employers who are well-financed and organized could do so with much greater ease.

[218]See *e.g.* Hall J.A.'s comments in *Perkins*, *supra* note 30 at 178.

[219]The fact that the Ontario Court of Appeal increased the punitive damages against an employer for a particularly brutal discharge in *Ribeiro*, *supra* note 23, was considered of such public impor-

Iacobucci J., in *London Drugs Limited* v. *Kuehne & Nagel International Ltd.*, re-affirmed that in appropriate circumstances the courts have not only the power but the *duty* to modify the common law to reflect emerging needs and values in our society.[220] In this light, and for the above stated reasons, it is submitted that the courts have an obligation to recognize the tort action of bad faith discharge, to supplement the existing contractual action for wrongful dismissal, when presented with an appropriate opportunity to do so. Should the courts for some unfortunate reason not permit a tort action, it is very difficult to see how the proposed contractual action would also fail given the numerous developments in society and the common law discussed in this article.

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tance to Canada's largest daily paper that the story was placed on the front page (T. Tyler, "Fired Loan Officer Awarded $70,000" *The Toronto Star* (26 November 1992) A1).

[220][1992] 3 S.C.R. 299 at 438, [1993] 1 W.W.R. 1, 43 C.C.E.L. 1.