In the Matter of an Arbitration

Between

International Association of Machinists and Aerospace Workers, Local Lodge 1579

and

L-3 Communications Spar Aerospace Limited

Decision and Reasons

Thomas W. Wakeling, Q.C., Arbitrator

David B. Mercer, counsel for the International Association of Machinists and Aerospace Workers, Local Lodge 1579

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Heard at Edmonton, Alberta on December 16, 2009 and January 8, 2010

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Decision and Reasons

I. Introduction

1. On January 22, 2009 L-3 Communications Spar Aerospace Limited ("Spar Aerospace" or the "company") notified its Edmonton facility employees of the permanent closure of their workplace.

2. Both before and after January 22, 2009 Spar Aerospace laid off a large number of its Edmonton employees and placed them on a recall list in accordance with the collective agreement between Spar Aerospace and Northgate Lodge, 1579 of the International Association of Machinists and Aerospace Workers ("Machinists Union"). The company also provided notice or made payments to its employees required under sections 230(2) and 235(1) of the Canada Labour Code, R.S.C. 1985, c. L-2 ("Canada Labour Code").

3. On March 10, 2009 the Machinists Union presented a grievance alleging that Spar Aerospace "has failed to give appropriate and proper notice and pay to employees with respect to their termination of employment". The Machinists Union asks for an order directing Spar Aerospace to pay each employee who is on the recall list a sum equal to the wages the employee would earn in a month multiplied by his or her's years of service. Making the conservative assumptions set out in schedule A to this decision, the sum the Machinists Union claims on behalf of its members exceeds $9.3 million. I estimate the claim to be approximately $10.5 million. This is a lot of money.

II. Questions Presented

4. Does the collective agreement between Spar Aerospace and the Machinists Union oblige Spar Aerospace to provide employees who are laid off and on the recall list with pay in lieu of reasonable advance notice of their last day of work.

5. Does Part III of the Canada Labour Code extend to an employee who is bound by a collective agreement and is laid off as a result of a permanent plant closure, the protection the common law accords an employee who is terminated without cause?

III. Brief Answers

6. Spar Aerospace has no obligation to pay an Edmonton facility employee represented by the Machinists Union who is laid off and placed on the recall list a sum equal to the wages the employee would earn in a month multiplied by his or her's years of service or any other sum based on individual common law employment contract principles.

7. This is because neither the collective agreement binding Spar Aerospace nor Part III of the Canada Labour Code compels Spar Aerospace to do this.

8. For the purposes of the collective agreement, Spar Aerospace has not terminated the employment of the employees represented by the Machinists Union. It laid them off. Most of them are currently on a recall list.

9. According to the Canada Labour Code, Spar Aerospace has terminated the employment of its Edmonton facility employees and must discharge the obligations the Canada Labour Code imposes on an employer who has terminated an employee. But the Canada Labour Code does not require Spar Aerospace to make the payments the Machinists Union seeks on behalf of its members. The obligations Spar Aerospace has under the Canada Labour Code it has discharged. Spar Aerospace has complied with section 230(2) and 235(1) of the Canada Labour Code. The former obliged Spar Aerospace to give designated notice to the Machinists Union and an employee. The latter addresses severance pay.

10. The collective agreement does not allow Spar Aerospace to dismiss an employee covered by the collective agreement without cause. K-Line Maintenance & Construction Ltd. v. International Brotherhood of Electrical Workers, Local 1928, 35 L.A.C. 3d 358, 365 (Cromwell 1988). Layoff and recall provisions in the collective agreement do not support the conclusion that Spar Aerospace may terminate an employee's employment at any time for any reason. A person who is laid off remains an employee while he or she is on the recall list. Several collective agreement provisions are totally inconsistent with the notion that the company has the right to dismiss an employee for any reason at any time. First, article 13(5) stipulates that an employee may challenge a dismissal on the ground that it was "without just cause". This provision would not be worded this way if the employer could dismiss an employee for any reason. Why would an employee not be entitled to contest a without cause dismissal if he or she can contest a with cause dismissal? In a without cause dismissal the grievor would claim that the employer provided inadequate termination notice or termination pay. It makes no sense to draw this distinction. This leads to the conclusion that Spar Aerospace has no right to dismiss without cause. Carling O'Keefe Breweries of Canada Ltd. v. Western Union of Brewery Beverage, Winery & Distillery Workers, Local 287, 4 L.A.C. 3d 374, 376 (Beattie 1982). Second, article 13(1) obliges Spar Aerospace to provide reasons if it gives an employee a written warning or suspends or dismisses an employee. It contemplates that the employer must have a reason for terminating an employee's employment. This provision makes sense only if the employer may dismiss for cause and no other reason. At common law an employer does not need a valid reason to dismiss an employee without cause. Third, article 8(4) provides that an employee who is "discharged for cause" loses his or her seniority. Does this mean an employee discharged without cause keeps his or her seniority? No. It means Spar Aerospace cannot dismiss an employee without cause. Burns Food Ltd. v. Canadian Food & Allied Workers, Local P233, 1 L.A.C. 2d 435, 440 (Redmond

1972) & Torngait Services Inc. v. Labourers' International Union of North America, Local 1208, 81 L.A.C. 4th 294, 311 (Alcock 1999). Fourth, the seniority, layoff and recall rules recorded in articles 8, 9 and 10 would be of little value to an employee if Spar Aerospace could end the employment relationship by providing reasonable advance notice of termination or pay in lieu of advance reasonable notice. Zeller's (Western) Ltd. v. Retail, Wholesale and Department Store Union, Local 955, [1975] 1 S.C.R. 376, 380 (1973); Retail, Wholesale & Department Store Union v. Hershey Chocolate of Canada (1967) Ltd., 21 L.A.C. 83, 87-93 (Christie 1970) & Wm. Scott & Co. v. Canadian Food and Allied Workers Union, Local P-162, [1977] 1 Can. L.R.B.R. 1, 3 (B.C. 1976).

11. If Spar Aerospace does not have the right to dismiss an employee without cause, an employee is not entitled to reasonable advance notice of the date Spar Aerospace intends to terminate his or her employment or pay in lieu of notice, as assessed by the common law. The two rights are interdependent. One does not exist without the other. Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27, 52; Graphic Communications Union, Local 255-C v. Quebecor Jasper Printing Ltd., 333 A.R. 204, 208 (Q.B. 2002); Quebecor Jasper Printing Ltd. v. Graphic Communications Union, Local 2550, [2002] Alta. G.A.A. No. 37, ¶161 (Sims); Motorways (1980) Ltd. v. Teamsters Union, Locals 979, 990, 395 & 362, 70 L.A.C. 4th 165, 186 (Soronow 1998) & Glenrose Rehabilitation Hospital v. Canadian Health Care Guild, 10 Alta. G.A.A. 95-099, p. 10 (Smith 1995).

12. Part I of the Canada Labour Code, and comparable provincial acts which are the progeny of the Wartime Labour Relations Regulations, P.C. 1003/1944 ("Wartime Labour Relations Regulations" or "P.C. 1033/1944") create a collective legal regime which is not compatible with the common law rules relating to individual employment contracts. This is the unequivocal message of Supreme Court of Canada judgments in McGavin Toastmaster Ltd. v. Ainscough, [1976] 1 S.C.R. 718, 724-25 (1975) and Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27, 44. It would take an express provision in Part III of the Canada Labour Code compelling an employer of employees bound by a collective agreement to provide common law notice or pay in lieu of notice in a fact pattern like this to give the Machinists Union the remedy it seeks in this grievance. There is no provision in Part III of the Canada Labour Code with these features.

13. The Canada Labour Code grants a trade union exclusive bargaining power so that it may protect the collective interests of the employees in the bargaining unit it represents. A collective agreement is the measure of the manner in which a union discharges its statutory mandate. The collective agreement the Machinists Union negotiated with Spar Aerospace constructed a workplace regime which provided its members with secure employment at fair rates for many years. Common law rights and obligations of an employee and an employer in the event of a without cause dismissal were not part of that workplace regime. And this is not because the parties overlooked the possibility of a plant closure. Article 9(3)(c)

of the collective agreement between Spar Aerospace and the Machinists Union makes express reference to "a plant closure".

14. I recognize the unfortunate plight of Spar Aerospace employees who no longer receive the very good wages they enjoyed while working at the Edmonton facility and whose place on the recall list is probably of no value. But the legal principles applying to employees who are represented by a trade union under the Canada Labour Code and the unequivocal terms of this collective agreement preclude me from concluding that they have the protection the common law would have accorded them had they worked under individual employment contracts.

IV. Statement of Facts

15. Spar Aerospace is in the aircraft life extension, maintenance, repair, overhaul and technical services business. From facilities across Canada and the United States the enterprise serves military and nonmilitary customers.

16. Regrettably, the Edmonton facility is no longer part of Spar Aerospace's operations. The company closed its Edmonton facility in the last half of 2009. Tools, equipment and inventory have either been sold or transferred to other operations. The hangars at the Edmonton International Airport and the Edmonton Municipal Airport from which the company operated are now empty.

17. This unhappy development was directly attributable to the 2006 loss of a major Hercules maintenance contract with the Canadian government to a competitor. Despite its best efforts, Spar Aerospace was never able to attract sufficient replacement work to justify keeping the doors open in Edmonton.

18. The negative effects of this business loss manifested itself early in 2008. Many redundant employees were laid off. By the start of 2009 Spar Aerospace had concluded that it could not operate its Edmonton facility on a profitable basis and that it was necessary to permanently close it. This message was delivered in a January 22, 2009 memorandum to Edmonton facility employees, which reads as follows:

> As you are all aware, our Edmonton facility lost a core contract three years ago when the Federal Government awarded the renewal of the CC130 contract to our competitor in Vancouver. We have all worked hard these past three years to replace that business. However, the loss was a blow to this facility and it has been a tough challenge to come back from that loss. We have made every effort to source business from all over the world for the facility in the meantime; however, despite all of our best efforts, we have not succeeded in signing enough new business to ensure the viability and long-term profitability of this facility.

> It is therefore with deep regret that I have to tell you that we are announcing today that the Edmonton facility will be closed permanently. The final closing of the facility is expected to take place no later than June 30, 2009.
>
> All employees will be provided with severance benefits. As the decision to close the facility was taken recently, severance details are still being worked out. We will speak with each employee individually in the coming days to inform you of your severance package and how long each of you can expect to stay with us.
>
> This is a sad day for all of us. It is not a decision that we made easily. You are all good people with strong professional credentials, and I am confident you will fare well in your future endeavours.
>
> We are grateful for the support and dedication of everyone at our Edmonton facility, and for your contribution over many years. We know we can count on your continued support and professionalism to ensure a smooth transition for our customers.

19. After January 22, 2009 Spar Aerospace delivered to employees who were laid off before January 22, 2009 a letter in the form set out below:

> On March 5, 2008, you were Laid Off from your employment with L-3 Communications SPAR Aerospace Ltd. and put on L-3 SPAR's Recall List in accordance with the Terms and Conditions of our Collective Bargaining Agreement.
>
> At that time, you either duly received a Notice and/or payment in lieu of Notice as required pursuant to the Canada Labour Code.
>
> As of today, we hereby wish to advise you that said Lay Off shall also be deemed to be a Termination pursuant to the Canada Labour Code requiring payment of your severance pay.
>
> Accordingly, you shall receive, forthwith, your severance pay which will be the greater of three days wages at your regular rate of wages for regular hours of work in respect of each completed and partial year of employment that is within the term of your continuous employment by the Company, and five days wages at your regular rate of wages for your regular hours of work, and which exceeds the requirements of the Canada Labour Code.
>
> We would like to express our sincere appreciation for your contributions to L-3 Communications, SPAR Aerospace Limited.
>
> If you have any questions, please contact Ms. Shelley Jones, HR Advisor at (780)890-6495.

20. Employees who received layoff notices after January 22, 2009 received a different letter in 2009. A letter one employee in this group received reads as follows:

> Due to the Company's upcoming plant closure of Edmonton operations, you are being laid off from your position of Structures Technician, effective at the end of your shift on Friday, August 7, 2009. This letter shall serve as formal working notice of your Lay-off from work.
>
> The Company also wishes to advise that this Lay-off shall also be deemed to be a Termination pursuant to the Canada Labour Code, requiring payment of your severance pay.
>
> Accordingly, you shall receive, forthwith, your severance pay which will be the greater of three days wages at your regular rate of wages for regular hours of work in respect of each completed and partial year of employment that is within the term of your continuous employment by the Company, and five days wages at your regular rate of wages for your regular hours of work, and which exceeds the requirements of the Canada Labour Code.
>
> We would like to express our sincere appreciation for your contributions to L-3 Communications, SPAR Aerospace Limited.
>
> If you have any questions, please contact Ms. Shelley Jones, HR Advisor at (780)890-6495.

21. The company provided employees with a record of employment stating that the company issued the record because of "closure of the Edmonton operations". Watson Wyatt Canada ULC issued letters to Spar Aerospace employees outlining pension options arising from the termination of their membership in the pension plan.

V. Statutory and Collective Agreement Provisions

A. Canada Labour Code Provisions

22. Sections 57, 168, 230, 235, 236(a) 240(1) and 241(1) of the Canada Labour Code are as follows:

> Part I
>
> 57(1) Every collective agreement shall contain a provision for final settlement of stoppage of work, by arbitration or otherwise, of all differences between the parties to ... the collective agreement, concerning its interpretation, application, administration or alleged contravention.
>
> Part III
>
> 168(1) This Part [Part III] and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.

(1.1) Divisions II, IV, V and VIII do not apply to an employer and employees who are parties to a collective agreement that confers on employees rights and benefits at least as favourable as those conferred by those respective Divisions in respect of length of leave, rates of pay and qualifying periods for benefits, and, in respect of employees to whom the third party settlement provisions of such a collective agreement apply, the settlement of disagreements relating to those matters is governed exclusively by the collective agreement.

230(1) Except where subsection (2) applies, an employer who terminates the employment of an employee who has completed three consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, give the employee either

> (a) notice in writing, at least two weeks before a date specified in the notice, of the employer's intention to terminate his employment on that date, or
>
> (b) two weeks wages at his regular rate of wages for his regular hours of work, in lieu of the notice.

(2) Where an employer is bound by a collective agreement that contains a provision authorizing an employee who is bound by the collective agreement and whose position becomes redundant to displace another employee on the basis of seniority, and the position of an employee who is so authorized becomes redundant, the employer shall

> (a) give at least two weeks notice in writing to the trade union that is a party to the collective agreement and to the employee that the position of the employee has become redundant and post a copy of the notice in a conspicuous place within the industrial establishment in the which the employee is employed: or
>
> (b) pay to an employee whose employment is terminated as a result of the redundancy of the position two weeks wages at his regular rate of wages

(3) Except where otherwise prescribed by regulation, an employer shall, for the purposes of this Division, be deemed to have terminated the employment of an employee when the employer lays off that employee.

235(1) An employer who terminates the employment of an employee who has completed twelve consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, pay to the employee the greater of

> (a) two days wages at the employee's regular rate of wages for his regular hours of work in respect of each completed year of employment that is within the term of the employee['s continuous employment by the employer, and

(b) five days wages at the employee's regular rate of wages for his regular hours of work.

(2) For the purposes of this Division,

(a) except where otherwise provided by regulation, an employer shall be deemed to have terminated the employment of an employee when the employer lays off that employee; and

(b) an employer shall be deemed not to have terminated the employment of an employee where, either immediately on ceasing to be employed by the employer or before that time, the employee is entitled to a pension under a pension plan contributed to by the employer that is registered pursuant to the *Pension Benefits Standards Act*, 1985, to a pension under the *Old Age Security Act* or to a retirement pension under the *Canada Pension Plan* or the *Quebec Pension Plan*, (R.S.C. 1985 (2nd Supp.), c. 32, s. 41, (Sch., item 1.)

236 The Governor in Council may make regulations for the purposes of this Division

(a) prescribing circumstances in which a lay-off of an employee shall not be deemed to be a termination of the employee's employment by his employer;

240(1) Subject to subsections (2) and 242(3.1), any person

(a) who has completed twelve consecutive months of continuous employment by an employer, and

(b) who is not a member of a group of employees subject to a collective agreement,

may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

241(1) Where an employer dismisses a person described in subsection 240(1), the person who was dismissed or any inspector may make a request in writing to the employer to provide a written statement giving the reasons for the dismissal and any employer who receives such a request shall provide the person who made the request with such a statement within fifteen days after the request is made.

23. Section 30 of the Canada Labour Standards Regulations, C.R.C. 1978, c. 986 ("Canada Labour Standards Regulations") is as follows:

30 For the purposes of Divisions IX, X and XI of the Act and subject to subsection (2), a lay-off of an employee shall not be deemed to be a termination of the employee's employment by his employer where

...

(b) the term of the lay-off is 12 months or less and the lay-off is mandatory pursuant to a minimum work agreement in a collective agreement;

(c) the term of the lay-off is more than three months and the employer

(i) notifies the employee in writing at or before the time of lay-off that he will be recalled to work on a fixed date or within a fixed period neither of which shall be more than six months from the date of the lay-off, and

(ii) recalls the employee to his employment in accordance with subparagraph (i);

...

(f) the term of the lay-off is more than three months but not more than twelve months and the employee, throughout the term of the lay-off, maintains recall rights pursuant to a collective agreement;

2 In determining the term of a lay-off for the purposes of paragraph 1(c),(d) and (f), any period of re-employment of less than two weeks duration shall not be included.

B. Collective Agreement Provisions

24. The following articles from the collective agreement merit review:

Article 2 – Union Recognition

2(1) The Company recognizes the Union to be the sole bargaining agent for all employees of SPAR Aerospace Limited with the exception of ... those above the rank of ... supervisor.

(7) All employees covered by this Agreement shall become members of the Union within thirty ... days of here. Employees must remain members of the Union in good standing as a condition of contained employment.

Article 3 – Management's Rights

3(1) The Union recognizes and acknowledges that, except as otherwise specifically provided in this Agreement, the management of the Company's operations and the selection and direction of all employees shall be exclusively vested with the Company.

Article 8 – Seniority

Seniority of employees covered by this Agreement shall be governed by the following rules:

...

Probationary Employee: An employee who has not completed three ... months of continuous employment. ... Employees terminated during their probationary period do not have access to the grievance process with respect to the decision to terminate.

8(1) An employee shall acquire seniority status upon completion of the probationary period.

...

(4) Employees resigning from the service of the Company or discharged for cause, shall lose all seniority accrued to the date of resignation or discharge, unless such discharge is reversed through the grievance procedure.

Article 9 – Lay-off

2(a) During a lay-off situation, employees may request a voluntary lay-off outside of the normal seniority order.

...

(3) In the event of a lay-off, the employees that are declared redundant will be given:

(a) Ten ... working days written notice or pay in lieu thereof for non-probationary employees

...

(b) Should an employee be on approved vacation ... at the time of lay-off, it is agreed that his two week notice period will commence immediately upon his return to work, except in the case of a plant closure.

...

(4) In the event of a reduction in the working forces within any trade, all probationary employees within the trade shall be laid-off first.

(5) If a further lay-off is necessary, seniority will be adhered to in the affected trade groups ... provided the employees retained have the skills and ability ... to perform the work available.

Article 10 – Recall

1(a) An employee who fails to signify within four ... working days his intention to accept recall ... shall lose recall rights.

(b) An employee laid off shall have recall rights equal to his seniority but not exceeding seven ... years.

...

(2) On the occasion of an increase in personnel, the Company will recall employees to the affected trade in order of seniority provided the employees recalled have the ability to perform the available work.

Article 13 – Disciplinary Action

(1) When an employee is to be given a warning in writing, suspension or dismissed from employment, the employee shall be informed in writing as to the reasons(s) for such action. The employee will be advised of the time and place of the meeting and will also be advised of his right to have a Shop Steward present.

...

(5) A claim by an employee that he has been discharged or suspended for just cause shall be treated as a grievance ... .

Article 15 – Arbitration

(1) Failing settlement under the grievance procedure, a grievance ... arising from the interpretation, application, non-application or violation of any of the provisions of this Agreement including the question as to whether a matter is arbitral may be referred to arbitration ... .

...

(3) ... [T]he jurisdiction of the Arbitrator shall be limited to deciding the matters at issue as set out in the written grievance and within the provisions of the Agreement, and in no event shall the Arbitrator have power to add to, subtract from, alter or amend this Agreement in any respect.

Article 31 – Relationship

(1) The Company and the Union agree that there will be no intimidation, interference, discrimination, restraint or coercion unjustly exercised by the Company or the Union or any of their respective representatives on any employee by any reason of activity or non-activity in the Union, or for any other reason.

VI. Analysis

A. Introduction

25. In the analysis part of my reasons I first record the statutory regimes enacted in Canada after the passage in 1935 by the American Congress of the National Labor Relations Act, 49 Stat. 449 ("National Labor Relations Act" or the "Wagner Act"). They created new labour relations regimes promoting collectivism at the expense of individualism and freedom of contract. This historical backdrop forms an important part of my decision. My second task is to explain the rights and obligations this new regime placed on trade unions and the results legislators expected trade unions to accomplish. Legislators gave trade unions extensive powers and expected them to use these statutory powers to improve the lot of working men and women they represented. Then I consider the legislative reserve Parliamentarians carved out for themselves to protect interests which they regarded as of sufficient importance that they must apply to both nonunion and union workers. There are some workplace issues legislators are unwilling to let trade unions protect by themselves. At the end of my analysis I record my reasons for concluding that neither this collective agreement nor the Canada Labour Code preserves for Machinists Union members the common law rights given to an employee dismissed by his or her employer without cause. I also review Arbitrator McFetridge's opinion in Reliable Printing Ltd. v. Graphic Communications International Union, Local 255-C, 39 L.A.C. 4th 212 (1994) , a case the Machinists Union heavily relied on, and conclude that it is not good law. It is inconsistent with the Supreme Court of Canada's judgment in Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27 and other landmark Supreme Court of Canada cases.

B. Transformative Statutory Legal Regimes Implementing Collective Bargaining Supplanted the Common Law Governing the Individual Employer – Employee Relationship

26. The enactment in the United States of the 1935 National Labour Relations Act and in Canada of comparable laws passed in the 1940s marked the beginning of a new legal order in labour relations in North America.

27. Professors Gorman and Finkin provide an overview of the features of the National Labour Relations Act in their Basic Text on Labor Law Unionization and Collective Bargaining 6-7 (2d ed. 2004):

> In the National Labour Relations Act, Congress declared to be federally protected "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection". Section 8 went on to declare illegal certain employer acts, such as restraint, interference or coercion of employees in the exercise of their section 7 rights;

> domination of unions; discrimination in terms of employment so as to discourage union membership; and refusal to bargain in good faith with the majority employee representative. These "unfair labour practices" were to be monitored through judicial-type proceedings before a newly created administrative agency, the National Labour Relations Board. The Board was also authorized, under section 9, to conduct free elections by which employees could freely select a labor organization to represent them in dealing with their employer. The Board was authorized to order the employer to remedy its unfair labor practices, and such Board orders were made enforceable or reviewable in the United States court of appeals.

28. Professors Carrothers, Palmer and Rayner document these momentous historical events in the following passage from Collective Bargaining Law in Canada 50 (2d ed. 1986):

> [The Wartime Labour Relations Regulations] reflected experience under the *Industrial Disputes Investigation Act* [S.C. 1907, c. 20], the American *Wagner Act* of 1935, the British Columbia Act of 1937, the Ontario Act of 1943 and the two wartime Orders-in-Council establishing the National War Labour Board and creating the Industrial Disputes Investigation Commission. ... It may fairly be described as Canada's first comprehensive labour policy, embracing union organization, contract negotiation and contract administration. Of all the sources that influenced the contents of post-war legislation, the Wartime Labour Regulations of 1944 had the most direct impact.

29. Post-Wagner Act Canadian statutes authorized boards or a labour court to enforce the rights of workers to join trade unions, to grant trade unions the exclusive right to represent groups of an enterprise's employees, to condemn unfair labour practices and to implement compulsory collective bargaining and binding arbitration processes for the resolution of disputes. In this new legal environment employees represented by certified trade unions and employers interacted in ways completely different than employees not represented by trade unions and employers whose relationship was regulated by the common law. In general, these enactments provided a legal framework under which trade unions were given legal means to advance the interests of groups of workers. See generally 1 G. Adams, Canadian Labour Law ch. 1 (2d ed. looseleaf release no. 36 August 2010). 16; R. Gorman & M. Finkin, Basic Text on Labour Law Unionization and Collective Bargaining 4-8 (2d ed. 2004); American Bar Association, The Labour Relations Law of Canada 54-60 (1977) & S. Jamieson, Industrial Relations in Canada 120-24 (2d ed. 1973).

30. Justice Judson, in Syndicat Catholique des Employés de Magasins de Quebec Inc. v. La Compagnie Paquet Ltée, [1959] S.C.R. 206, was one of the first Canadian judges to record the dramatic impact the new wave of Canadian labour relations legislation passed after 1935 had on the common law. E.g., Industrial Relations and Disputes Investigation Act, S.C. 1948, c. 54; The Alberta Labour Act, S.A. 1947, c. 8; Labour Relations Act, S.O. 1948, c. 51 & The Trade Union Act, S.S. 1944, c. 69. The Supreme

Court of Canada had to determine whether a provision in a collective agreement obliging the employer to withhold from an employee's wages and remit to the certified union a sum equal to the union's dues was lawful. Almost half of the employees notified the employer that they did not authorize the company to make this payment to a union to which they did not belong. Common law principles would not sanction this unpopular collective agreement provision. But the dissenters' wishes were not controlling under the new labour relations regime which applied to them. According to Justice Judson,

> [t]he union is, by virtue of its incorporation under the *Professional Syndicates' Act* and its notification under the *Labour Relations Act*, the representative of all the employees in the unit for the purpose of negotiating the collective agreement. There is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated. The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations. When this collective agreement was made, it then became the duty of the employer to modify his contracts of employment in accordance with its terms so far as the inclusion of those terms is authorized by the governing statute. ... It was not within the power of the employee to insist on retaining his employment on his own terms or on any terms other than those lawfully inserted in the collective agreement.
>
> ...
>
> ... [T]he employer must negotiate and contract with the collective representative and the collective representative represents all employees, whether union members or not, not because of a contractual relation of mandate between employees and union but because of a status conferred upon the union by the legislation.
>
> ... The union contracts not as agent or mandatary but as an independent contracting party and the contract it makes with the employer binds the employer to regulate his master and servant relations according to the agreed terms.
>
> ...
>
> ... The collective agreement is a recent development in our law and has a character all of its own.

[1959] S.C.R. 206, 212-14 (emphasis added).

31. More than fifteen years later, Chief Justice Laskin authored what is generally recognized as the definitive Canadian opinion on the effect labour relations legislation had on the common law governing individual employment contracts. In McGavin Toastmaster Ltd. v. Ainscough, [1976] 1 S.C.R. 718, 724-

25 (1975) Chief Justice Laskin confirmed that the law of the collective agreement displaces the common law relating to individual employment contracts:

> I do not think that in the face of labour relations legislation such as existed at the material time in British Columbia, in the face of the certification of the union, of which the plaintiffs were members, as bargaining agent of a specified unit of employees of the company and in the face of the collective agreement between the union and the appellant company, it is possible to speak of individual contracts of employment and to treat the collective agreement as a mere appendage of individual relationships. ...
>
> The reality is, and has been for many years now throughout Canada, that individual relationships as between employer and employee have meaning only at the hiring stage and even then there are qualifications which arise by reason of union security clauses in collective agreements. The common law as it applies to individual employment contracts is no longer relevant to employer – employee relations governed by a collective agreement which, as the one involved here, deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and company as the principal parties thereto. (emphasis added).

32. A more recent judgment of the Supreme Court of Canada, Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27, confirms that the opinions Chief Justice Laskin and Justice Judson expressed years ago, are valid today. Justice Deschamps, for the majority, opined that "[d]uring the term of the collective agreement ... the individual contracts of employment cannot be relied on as a source of rights". [2006] 1 S.C.R. 27, 44. See also Noël v. Société d'energie de la Baie James, [2001] 2 S.C.R. 207, 229 ("A collective framework supersedes the traditional contractual process, which is based on individual relations between the employer and its employees") & [1998] R.J.Q. 2270, 2275 (C.A.) ("For all practical purposes, employees who benefit from collectivization, no longer have individual rights"); Hémond v. Coopérative fédérée du Quebec, [1989] 2 S.C.R. 962, 975 ("When a collective agreement exists, the individual rights are for all practical purposes superseded"); Canadian Association of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd., [1989] 2 S.C.R. 983, 1007-08 ("The scheme of the Labour Code ... does not leave any room for the operation of common law principles"); Canadian Pacific Railway v. Zambri, [1962] S.C.R. 609, 624 ("when there is a collective agreement in effect, it is difficult to see how there can be anything left outside, except possibly the act of hiring"); United Electrical, Radio & Machine Workers of America, Local 527 v. Peterboro Lock Mfg. Co., 4 L.A.C. 1499, 1502 (Laskin 1954) ("The change from individual to [c]ollective [b]argaining is a change in kind and not merely a difference in degree. The introduction of a collective bargaining regime involves the acceptance by the parties of assumptions which are entirely alien to an era of individual bargaining"); St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 269, [1986] 1 S.C.R. 704, 718-19 ("The more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour

relations, and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks"); Bourne v. Otis Elevator, 45 O.R. 2d 321, 325 (H.C.J. 1984) ("There is no room for any continuing individual contracts of employment, which might be held to provide for reasonable notice to such employees") & Lordon, "Legislative Context of Labour Arbitration" in Collective Agreement Arbitration in Canada ¶4-14 (R. Snyder ed. 4th ed. 2009) ("the common law concept of individual contracts of employment has been displaced").

33. As one would expect, given that the Wagner Act preceded comparable Canadian legislation by roughly ten years, American jurists had already considered some aspects of the issues canvassed by Chief Justice Laskin and Justice Judson before their Canadian counterparts expressed their opinions. In J.I. Case Co. v. National Labour Relations Board, 321 U.S. 332, 334, 338 & 339 (1944), Justice Jackson, an outstanding jurist, unequivocally emphasized the primacy of collectivism under the new order:

> Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment.
>
> ...
>
> The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever type or terms of his pre-existing contract of employment.
>
> ... The workman is free, if he values his own bargaining position more than that of the group, to vote against representation, but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally go in as a contribution to the collective result. (emphasis added).

34. The new statutory regime gave collective agreements a legal status unknown at common law. Because trade unions did not have the capacity at common law to enter into enforceable agreements, the collective agreements they negotiated were not enforceable at common law. As well, the common law characterized collective agreements as the depository of terms the parties did not intend courts to enforce. E.g., Young v. Canadian Northern Railway, [1930] 3 D.L.R. 352, 357-58 (Man. C.A.) ("If

employers do not live up to the terms of their agreements the workmen may apply for a Board of Investigation under the Industrial Disputes Investigation Act ... and failing a satisfactory adjustment may go on strike, but in my opinion they cannot enforce the terms of such agreements through the Courts"). Section 18(1) of the Wartime Labour Relations Regulation stipulated that collective agreements must contain a procedure for the final resolution of disputes over its application without a work stoppage. Every Canadian jurisdiction contains a similar provision. E.g., Canada Labour Code, s. 57(1) & Labour Relations Code, R.S.A. 2000, c. L-1, s. 136. Arbitration awards are the vehicles through which collective agreements have been administered for over fifty years now. 1 D. Brown & D. Beatty, Canadian Labour Arbitration (4th ed. looseleaf release No. 15, June 2010) & F. Elkouri & E. Elkouri, How Arbitration Works 493 (5th ed. 1997). In this relatively short period of time, arbitrators have fashioned the law of the workplace.

35. Trade unions have capitalized on the enormous advantage they possess as the holder of the legal right to act as the exclusive bargaining representative of the workers they represent. Alone, workers compete with each other for the employment opportunities an enterprise presents. Giving a union the power to bargain for all workers in a section of an enterprise removes the impediment to unequal bargaining power individual employment agreements represent. Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27, 48 ("The objective of ... exclusive union representation is to improve the employee's position in the balance of power with the employer"); Gagnon v. Public Service Alliance of Canada Local 50057, [1990] 1 S.C.R. 1298, 1312 ("the union's status as exclusive bargaining agent operates to counteract the economic power of the employer"); W. Rayner, Canadian Collective Bargaining Law 18 (2d ed. 2007) ("In an industrialized society ... an individual employee cannot bargain effectively with his employer"); Pellettier, "Union Security and the Religious Objector", 4 Queen's L.J. 256, 257 (1978) ("The purpose of our labour relations legislation is to give employees more power as against their employer by allowing them ... to act collectively in dealing with their employer") & D. Beatty, "Ideology, Politics and Unionism" in Studies in Labour Law 304-05 (K. Swan & K. Swinton 1983) ("by bringing individual employees together as a cohesive group, collective bargaining can give some employees the quite effectual power of being able to expose their employer to a serious economic loss. ... [C]ollective bargaining is able to establish a real countervailing power to that of the investors and is able ... to extract a correspondingly fairer bargain in the return"). As legislatures expected, trade unions have leveraged this statutory right to introduce into unionized environments employment security and superior compensation. D. Beatty, "Ideology, Politics and Unionism" in Studies in Labour Law 305 (K. Swan & K. Swinton eds. 1983) ("[Collective bargaining] is able to deliver an employment packet which is fatter and richer from the perspective of the individual employee, more sensitive to her dignity than any she could have negotiated by herself"). The legal mechanism which produces this result is a collective agreement. Almost all collective agreements which I have read deny employers the right to terminate employees without cause

and introduce layoff and seniority rules. Justice Veit recognized this in Canadian Health Care Guild v. Glenrose Rehabilitation Hospital, [1996] A.J. No. 675, ¶14:

> The decision of the arbitration board that the employer cannot fire unionized employees at will and whim is surely reasonable. The overall approach of unions is that employment gives dignity and security and should be carefully protected. Security of employment is often one of the main demands of a union ... . That dignity and security are surely eroded if the unionized employee can be fired for no reason. ... [U]nions attempt to protect their members from these very risks of unemployment.

36. The concept of seniority is vital to unionized workers, a point famously made in United Electrical Workers, Local 512 v. Tung-Sol of Canada Ltd., 15 L.A.C. 161, 162 (Reville 1964): "Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process". See also Wm. Scott & Co. v. Canadian Food and Allied Workers Union, Local P-162, [1977] 1 Can. L.R.B.R. 1, 3 (B.C. 1976) ("an employee who has served the probation period secures a form of *tenure*, a legal expectation of continued employment as long as he gives no specific reason for dismissal"). Professor Aaron emphasized this as well: "[T]he seniority principle is so important that it is embodied in virtually every collective agreement". "Reflections on the Legal Nature and Enforceability of Seniority Rights", 75 Harv. L. Rev. 1532, 1534 (1962). As I stated in Woodlands Enterprises Ltd. v. International Woodworkers of America, Local 1-184, at 7 (1978), "Seniority can determine a worker's competitive status in relation to job entitlement". See also Re Rizzo & Rizzo Shoes Ltd., [1998] 1 S.C.R. 27, 43 ("in a unionized workplace ... seniority is a factor in determining the order of lay-offs"); Droste v. Nash-Kelvinator Corp., 64 F. Supp. 716, 721 (E.D. Mich. 1946) ("the right of seniority is the right of employees who have served longest to a preference as respects continuous employment") & Lordon, "Rights of Seniority" in Collective Agreement Arbitration in Canada ¶16-27 (R. Snyder ed. 4th ed. 2009) ("employee seniority should only be affected by clear collective agreement language and that such limiting provisions should be strictly construed").

37. The common law continues to apply to the relationship between a trade union which is a lawful bargaining agent, an employer who has employees represented by a trade union and the employees represented by a trade union only if the rules established by the labour relations legislation of the jurisdiction are not inconsistent with the common law. Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27, 56 & Retail Wholesale Department Store Union v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, 589 ("Since the *Canada Labour Code* is silent on the question of picketing, the common law applies").

C. Legislators Reserve the Right to Protect the Interests of Workers Represented by Trade Unions

38. Labour relations enactments bestow on trade unions the right to serve as the exclusive bargaining agent of units of workers with the expectation that trade unions will utilize this grant of power to improve the working conditions and compensation of the employees they represent. But this purposive act was not a legislative signal that trade unions could exercise this enormous statutory power without regard to other equally salutary goals. Lawmakers recognized that trade unions could misuse statutory authority and introduced measures to guard against misconduct. To counteract this potential threat, legislators imposed a duty of fair representation on the trade union. R. Gorman & M. Finkin, Basic Text on Labor Law Unionization and Collective Bargaining 985 (2d ed. 2004) ("the duty of fair representation was abstracted by the Court from the statutory principle of exclusive representation") & Gagnon v. Public Service Alliance of Canada Local 50057, [1990] 1 S.C.R. 1298, 1312 (to ensure that unions played the positive role assigned to them the law must demand that they "wield ... their power fairly"). As well, legislators understood that some values which they regarded as of overriding importance for workers, may not be held in such high esteem by trade union leaders and not be contained in collective agreements. In these cases, the legislators were willing to substitute their views on the primacy of these values for those of the trade unions. This explains, in part, the existence of statutory minimum standards which govern both unionized and nonunion employees.

1. Duty of Fair Representation

39. In Steele v. Louisville & Nashville Railroad, 323 U.S. 192, 199 & 202 (1944), Chief Justice Stone of the United States Supreme Court recorded the legislative barriers embedded in the Railway Labour Act which lessened the hurtful consequences of the tyranny associated with the majority:

> [W]e think that Congress, in enacting the Railway Labour Act and authorizing a labour union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without any duty to protect the minority. ...
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> ...
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> ... The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and to act for it and not against those whom it represents. It is a principle of general application that the exercise of granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed.

See also Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) (the duty of fair representation also exists under the National Labour Relations Act) & Vaca v. Sipes, 386 U.S. 171, 177 (1967) ("the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with compete good faith and honesty and to avoid arbitrary conduct").

40. Trade unions in Canada which hold statutory grants of bargaining power are subject to similar codes of conduct. Canada Labour Code, s. 37 (a bargaining agent may "not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement"); Labour Relations Code, R.S.A. 2000, c. L-1, s. 153 ("No trade union [may] ... deny an employee or former employee who was or is in the bargaining unit the right to be fairly represented by the trade union with respect to the employee's or former employee's rights under the collective agreement"); Labour Relations Act, 1995, S.O. 1995, c. 1, s. 74 ("A trade union [may] ... not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit ..."); Labour Code , R.S.Q. 1977, c. C-27, s. 47.2 ("A certified association shall not act in bad faith or in an arbitrary or discriminatory manner or show serious negligence in respect of employees comprised in a bargaining unit represented by it") & The Trade Union Act, R.S.S. 1978, c. T-17, s. 25.1 ("Every employee has the right to be fairly represented in grievance or rights arbitration proceedings ... in a manner that is not arbitrary, discriminatory or in bad faith"). See generally, 2 G. Adams, Canadian Labour Law ch. 13 (2d ed. looseleaf release no. 36 August 2010); Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27, 66-67 & Noël v. Société d' energie de la Baie James, [2001] 2 S.C.R. 207, 228.

41. I discuss the duty of fair representation because it emphasizes the magnitude of the power collectivism labour laws bestow on trade unions. Much can be expected of those who exercise the great power associated with the status of an exclusive bargaining agent. In an environment where collective interests prevail, the scope of individual self-determination is not great. Justice LeBel's comments in Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27, 81 emphasize this: "The principle of freedom of contract in the workplace, which applies in conformity with the framework established by the ... Civil Code of Quebec and specific statutes, becomes totally irrelevant. ... To negotiate conditions of employment individually becomes legally impossible". This is an important point.

2. Norms Which Advance the Dignity and Welfare of All Employees

42. Legislators also believe that some workplace norms are so important to the dignity and welfare of an employee that all workers, even those for whom a trade union is the exclusive bargaining agent, should be able to invoke them. E.g., Labour Standards Code, R.S.A. 2000, c. E-9 s. 12(3) (a provision in

a collective agreement authorizing the employer to deduct from earnings a sum for faulty workmanship is void). Justice LeBel referred to this principle in Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27, 83:

> [T]he parties' ability to freely negotiate the substantive standards that will govern them is limited by the obligation to respect, or incorporate into the agreement, the rights and values protected by the charter and legal rules imposed by the legislature, including the general principles of law, particularly those that are of public order.

This means that trade unions do not have the sole responsibility of protecting the interests of employees. In these cases, legislators enact overriding standards. E.g., Canada Labour Code, R.S.C. 1985, c. L-2, Part III ss. 167 & 168(1); Employment Standards Code, R.S.A. 2000, c. E-9, s. 2; Employment Standards Act, 2000, S.O. 2000, c. 41, s. 3 & The Labour Standards Act, R.S.S. 1978, c. L-1, s. 4(1).

43. Legislative standards of this nature are by law terms of employment, regardless of the contract terms both individuals and trade unions negotiate with the enterprises which employ the workers. E.g., Canada Labour Code, s. 168(1); Employment Standards Code, R.S.A. 2000, c. E-9, s. 4; Employment Standards Act, 2000, S.O. 2000, c. 41, s. 5 & The Labour Standards Act, R.S.S. 1978, c. L-1, s. 4(1).

44. McLeod v. Egan, [1975] 1 S.C.R. 517 (1974) and Parry Sound Social Services Administration Board v. Ontario Public Service Employees Union, Local 324, [2003] 2 S.C.R. 157 illustrate this concept.

45. In McLeod v. Egan, [1975] 1 S.C.R. 517 (1974), the Supreme Court of Canada held that Galt Metal Industries Limited could not direct an employee to work hours in excess of those prescribed by Ontario's Employment Standards Act. This was so even though the collective agreement binding the United Steelworkers of America, Local 2894, Galt Metal Industries Limited and its employees allowed the employer to direct the work force and the collective agreement contained no norms comparable to the Employment Standards Act overtime limit. Justice Martland, for the majority, was unequivocal:

> Any provision of an agreement which purported to give to an employer an unqualified right to require working hours in excess of those [statutory] limits would be illegal, and the provisions of art. 2.01 of the collective agreement, which provided that certain management rights should remain vested in the Company, could not, in so far as they preserved the Company's right to require overtime work by its employees, enable the Company to require overtime work in excess of those [statutory] limits.

[1975] 1 S.C.R. 517, 523 (1974).

46. In the second illustrative case, the Supreme Court of Canada again discussed the type of legislative enactments which were deemed to be part of a collective agreement and hence subject to review by an arbitration board. Justice Iacobucci, for the majority, said this:

> Just as the collective agreement in McLeod could not extend to the employer the right to require overtime in excess of 48 hours, the collective agreement in the current appeal cannot extend to the appellant the right to discharge an employee for discriminatory reasons. Under a collective agreement, as under laws of general application, the right to direct the work force does not include the right to discharge a probationary employee for discriminatory reasons [prohibited by the Human Rights Code, S.O. 1990, c. H-19, s. 5(1)]. The obligation of an employer to manage and direct the work force is subject not only to express provisions of the collective agreement but also to statutory rights of its employees, including the right to equal treatment in employment without discrimination.

[2003] 2 S.C.R. 157, 178.

47. The Parry Sound Social Services Administration Board argued that the Legislative Assembly of Ontario, by enacting section 48(12)(j) of the Labour Relations Act, a provision which empowered an arbitrator "to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement", constituted an express repudiation of the principles established in McLeod v. Egan. [2003] 2 S.C.R. 157, 181. Justice Iacobucci rejected this argument, satisfied that the Labour Relations Act provision affirms that "grievance arbitrators have not only the power but also the responsibility to implement and enforce the substantive rights and obligations of human rights and other employment-related statutes as if they were part of the collective agreement". [2003] 2 S.C.R. 157, 181-82.

48. I mention this to introduce an important qualification on the McLeod v. Egan and Parry Sound doctrine. The legislature may, by express enactment or by necessary implication, stipulate that a law of general application does not form part of the law of a workplace governed by a collective agreement. This is not an unheard of legislative conclusion. When the legislature does this, it accepts the private ordering regimes constructed by trade unions and the enterprises whose employees' trade unions represent as satisfactory substitutes for public ordering. Section 168(1.1) of the Canada Labour Code illustrates this reliance on private ordering:

> Divisions II [minimum wages], IV [annual vacations], V [general holidays] and VII [bereavement leave] do not apply to an employer and employee who are parties to a collective agreement that confers on employees rights and benefits at least as favourable as those conferred by those respective Divisions in respect of length of leave, rates of pay and qualifying periods for benefits, and in respect of employees to whom the third party settlement provisions of such a collective agreement apply, the settlement of disagreements relating to those matters.

See also Employment Standards Code, R.S.A. 2000, c. E-9, s. 18(b) (rest provisions in a collective agreement trump the rest period standard in the Code).

49. Sometimes the legislature will create special rules for employees bound by collective agreements. E.g. Employment Standards Act, 2000, S.O. 2000, c. 41, s. 55 (an employee represented by a trade union is subject to different rules regarding termination pay) & Storeimage Programs Inc. v. United Steel Workers, Local 16506-44, 195 L.A.C. 4th 102, 122-23 (Kennedy 2010) (grievor entitled to both severance and termination pay under Ontario's Employment Standards Act, 2000). But this is an entirely different statutory solution than exempting a group of union employees from a general rule and allowing their representative to negotiate with employers superior substitute rules.

50. In Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27 and Fillion et Frères (1976) inc. v. Syndicat national des employés de Garage du Québec inc., [2006] 1 S.C.R. 27 the Supreme Court of Canada had to decide whether a statutory provision relating to individual employment contracts applied to employees bound by a collective agreement. The issue arose because two employers bound by a collective agreement closed their businesses. Neither collective agreement contained plant closure provisions. [2006] 1 S.C.R. 27, 35. Both unions filed grievances alleging that the employers failed to comply with article 2091 of the Civil Code of Quebec. Article 2091 of the Civil Code of Quebec reads as follows:

> 2091 Either party to a contract with an indeterminate term may terminate it by giving notice of termination to the other party.
>
> The notice of termination shall be given in reasonable time, taking into account, in particular, the nature of the employment, the special circumstances in which it is carried on and the duration of the period of work.

51. Justice Deschamps, the author of the majority opinion in these two cases, recognized that no part of the Civil Code of Quebec expressly limited the force of article 2091 to nonunion employees, a subclass of workers who are employees. But her understanding of the essential features of collective labour relations led her to conclude that article 2091, a rule designed for individual employment contracts, did not apply to unionized employees covered by a collective agreement. She held that article 2091 was incompatible with collective labour relations:

> Under a collective scheme ... conditions of employment are not negotiated individually by the employer and the employee. Three of this Court's decisions, *McGavin*, *Hémond* and *Noël*, state the rule that "[c]ertification, followed by the collective agreement, takes away the employer's right to negotiate directly with its employees" and to "negotiate[e] different conditions of employment with individual employees" ... . The objective of this prohibition and of its corollary, exclusive union representation, is to improve the employee's position in the balance of power with the employer. Collective conditions of employment were negotiated for future employees. ... In the collective scheme the employee agrees to work under the conditions negotiated by the union, which is not the employee's mandatary but is designated by

> law to negotiate conditions of employment. Apart from the minimum standards laid down by the [Act respecting labour standards, R.S.Q., c. N-1.1], the length of notice of termination is therefore a matter to be determined in the bargaining process between the union and the employer. ...
>
> The parties' failure to specify in the collective agreement what will happen if the business closes does not make the general law relating to individual contracts of employment applicable.

[2006] 1 S.C.R. 27, 48-49.

52. Article 2091 of the Civil Code of Quebec is an example of a statute of general application which the legislature did not intend to apply to workers bound by a collective agreement. The legislature never said this expressly, unlike Parliament's express declaration in section 168(1.1) of the Canada Labour Code, but this was the implicit message taking into account the special features of collectivism in labour relations. Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27 demonstrates that the search for an express legislative stipulation that a general norm does not apply to union employees is only part of a careful study. Often the more difficult inquiry is a resolution of the question whether there exists an implied statement to this effect in the applicable enactments.

D. Part III of the Canada Labour Code Does Not Preserve the Common Law on Termination of Employment for Employees Represented by a Trade Union

53. Part III of the Canada Labour Code imposes two specific obligations on an employer who wishes to terminate the employment of an employee for a reason other than just cause that are not dependent on any action by the employee. First, under Division X section 230(1), an employer must give "an employee who has completed three consecutive months of continuous employment" either two weeks prior written notice of the date his or her employment will end or the wages he or she would receive over a two week period. This applies to an employer of employees who are not represented by a trade union and some employers whose employees are represented by a trade union bound by a collective agreement without a specific seniority provision described in section 230(2). Division X section 230(2) imposes a comparable obligation on "an employer ... bound by a collective agreement that contains a provision authorizing an employee who is bound by the collective agreement and whose position becomes redundant to displace another employee". The collective agreement between Spar Aerospace and the Machinists Union contains a section 230(2) term. Second, under Division XI section 235(1) an employer must give "an employee who has completed twelve consecutive months of continuous employment" the greater of two days wages for "each completed year of employment ... within the term of the employee's continuous employment" or five days wages. In other words, after an employee has completed three years of continuous employment he or she is entitled to severance pay equal to two

days wages for each completed year of employment. This is because five days wages will always be the smaller number.

54. Division XI section 235(2) of the Canada Labour Code stipulates that an employer is deemed, for the purposes of Division XI, to have terminated the employment of an employee who the employer lays off unless the Governor in Council, exercising authority under Division XI section 236(a), makes a regulation containing contrary terms. The Governor in Council has made regulations which have this effect. There are sections in the Canada Labour Standards Regulations which deem a layoff not to be a termination. Section 30(1)(f) of the Canada Labour Standards Regulations reads as follows: "For the purposes of ... [Division XI] of the Act ..., a lay-off of an employee shall not be deemed to be a termination of the employee's employment ... where the term of a lay-off is more than three months but not more than twelve months and the employee, throughout the term of the lay-off, maintains recall rights pursuant to a collective agreement".

55. I am satisfied that section 30(1)(f) of the Canada Labour Standards Regulations does not apply to this fact pattern. We now know that the term of the Spar Aerospace layoff was in excess of twelve months. The Edmonton facility is still closed, more than twelve months after January 22, 2009. And, there was nothing in the company's January 22, 2009 memorandum that suggested the duration of the layoff would be more than three months and less than twelve months. The January 22, 2009 memorandum Spar Aerospace gave to its employees declared that the "Edmonton facility will be closed permanently". There is no suggestion that this statement did not reflect the true intentions of the employer.

56. It follows that Spar Aerospace has terminated the employment of its Edmonton facility employees for the purpose of Part III Divisions X and XI of the Canada Labour Code. This determination means that Spar Aerospace must discharge the obligations imposed on an employer under sections 230(2) and 235(1) of the Canada Labour Code. Spar Aerospace has discharged its obligations under section 230(2) and 235(1) of the Canada Labour Code to the Edmonton facility employees it terminated in 2009. The Machinist's Union acknowledged this during the hearing.

57. There is one other issue. What is the effect of section 168(1) of the Canada Labour Code? This provision declares that "nothing in ...Part [III which includes Divisions X and XI] shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his or her rights or benefits under this Part".

58. There is no "law, custom, contract or arrangement" which provides rights or benefits that are more favourable to an employee represented by a trade union than those under Part III of the Canada Labour Code.

59. I am not aware of any statute of the Parliament of Canada other than the Canada Labour Code which compels an employer bound by a collective agreement to provide notice or pay to employees who are adversely affected by a plant closure. This could be done but it has not been.

60. Assuming that "law" also includes the common law, does the common law provide rights more favourable than those accorded Machinists Union members under sections 230(2) and 235(1) of the Canada Labour Code? While the common law principle which obliges an employer who dismisses an employee without cause to give the employee party to an individual employment contract reasonable advance notice of the date the employee's employment will end or pay him or her a sum equal to the value of the pay and benefits the employee would have received had the employee worked in this period would provide Machinists Union members with superior notice and pay packages, this part of the common law does not apply to an employee who works under the aegis of a collective agreement. Justice Southey, in Bourne v. Otis Elevator Co., 45 O.R. 2d 321, 325 (Ont. H.C. 1984), stated that "[t]here is no room for any continuing individual contracts of employment, which might be held to provide for reasonable notice to such employees". The Supreme Court of Canada in Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27, 46, McGavin Toastmaster Ltd. v. Aiscough, [1976] 1 S.C.R. 718, 724-25 (1975), Syndicat Catholique des Employés de Magasins de Quebec Inc. v. La Compagnie Paquet Ltée, [1959] S.C.R. 206, 212-14 and several other Supreme Court cases have expressed opinions which unequivocally support my conclusion.

61. Nor am I aware of any "custom" or "arrangement" that assists employees who have effectively lost their jobs because of a plant closure. The Machinists Union made no claim of this nature.

62. There is another very important reason why common law wrongful dismissal principles are not available under the Canada Labour Code to protect the interests of employees covered by a collective agreement. Part III of the Canada Labour Code denies this class of workers access to these principles. Division XIV 240(1)(b) of the Canada Labour Code expressly provides that an employee who is "a member of a group subject to a collective agreement" may not file a complaint alleging his or her dismissal to be unjust. See R. Snyder, The 2010 Annotated Canada Labour Code 914 (2009).

63. Division XIV section 240 allows an employee "who has completed twelve consecutive months of continuous employment and ... who is not a member of a group of employees subject to a collective agreement" to file a complaint with an inspector alleging that the complainant "has been dismissed and

considers the dismissal to be unjust". If the parties fail to resolve their differences within a reasonable period of time, the complainant may ask that the complaint be referred to an adjudicator.

64. As an adjudicator appointed to hear unjust dismissal complaints under the Canada Labour Code, I have frequently held that an employer unjustly dismisses an employee who had an individual employment contract under the Canada Labour Code if the employer does not have just cause for dismissal and fails to provide the dismissed employee with the greater of the notice or compensation stipulated by sections 230(1) and 235(1) of the Canada Labour Code or the common law. In Chalifoux v. Driftpile First Nation – Driftpile River Board No. 450, at 4 (June 8, 2000), after studying the International Labour Organization's Termination of Employment Recommendation, 1963 and the legislative history of Bill C-8, An Act to amend the Canada Labour Code, S.C. 1977-78, c. 27, I asserted that my long held position is "consistent with the Federal Court of Appeal's decision in Atomic Energy of Canada Ltd. v. Sheikloleslami, [1998] 3 F.C. 349" and noted that it was adopted by Associate Dean June Ross of the University of Alberta Faculty of Law, as she then was, in Jalbert v. Westcan Bulk Transport Ltd., 7-8 (July 18, 1996). This opinion has survived judicial review. Chalifoux v. Driftpile First Nation, 2001 FCT 785, aff'd 2002 FCA 521, leave to appeal denied [2003] 2 S.C.R. vi. I still subscribe to this view of the law. Contra 2 P. Barnacle, Employment Law in Canada §17.87 (4th ed. looseleaf release 27 August 2010) ("this approach is incorrect since it flies in the face of the purpose of s. 240 which is remedial in nature, namely to counteract the deficiencies in these very common law principles of wrongful dismissal").

65. A person subject to the Canada Labour Code who is not bound by a collective agreement may successfully advance a claim for unjust dismissal before an adjudicator if the employer did not have just cause for dismissal and either an express termination provision in the employee's agreement with the employer or the common law obliged the employer on termination to provide notice or compensation greater than that to which the employee was entitled under sections 230(1) and 235(1) of the Canada Labour Code.

66. This statutory framework supports my conclusion that the Parliament of Canada did not intend Part III of the Canada Labour Code to serve as the legal foundation for persons bound by a collective agreement to invoke the part of the common law which obliges an employer who dismisses an employee without cause to provide reasonable advance notice of its intention to terminate the employee's employment or pay in lieu of reasonable advance notice. Soost v. Merrill Lynch Canada Inc., 2010 ABCA 251, ¶¶12 & 13.

67. Parliament must have been confident that a trade union which negotiated a collective agreement binding the employees it represented would have sufficient bargaining power to adequately protect the interests of the work force in the event the employer terminated the employment of employees because

of plant closures or for other nondisciplinary reasons, such as lack of work. Legislators may reasonably have come to this conclusion. First, the collectivization features of Part I of the Canada Labour Code gave trade unions significant bargaining power. See Sidhu v. Affinia Canada Corp., 2010 ONSC 2829 (after a plant closure announcement the union and the employer negotiated a plant closure agreement which provided very minor benefits not included in the collective agreement). Second, the Part I right unions have to the information necessary for rational discussion during collective bargaining would increase the likelihood that a plant closure would not come as a surprise to a union. Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27, 49 ("The terms and conditions applicable to termination of employment ... fall within the natural scope of union-employer bargaining on conditions of employment"); McGavin Toastmaster Ltd. v. Aiscough, [1976] 1 S.C.R. 718 (1975) (the collective agreement the union sought to enforce contained severance provisions); International Woodworkers of America, Local 2-69 v. Consolidated Bathurst Packaging Ltd., 14 C.L.L.C. 14,517 at 14,538 (Ont. L.R.B. 1983) ("it is 'tantamount to a misrepresentation' for an employer not to reveal during bargaining a decision it has already made which will have a significant impact on terms and conditions of employment such as a plant closing and which the union could not have anticipated"); United Electrical, Radio & Machine Workers of America, Local 504 v. Westinghouse Canada Ltd., 11 C.L.L.C. 785, 800 (Ont. L.R.B. 1980) ("an employer is under a section 14 obligation to reveal to the union on his own initiative those decisions already made which may have a major impact on a bargaining unit"); R. Snyder, The 2010 Annotated Canada Labour Code 461-63 (2009) & Note, "Duty to Bargain About Termination of Operations: *Brockway Motor Trucks v. NLRB*", 92 Harv. L. Rev. 768 (1979).

68. Now that I have discussed each of "law", "custom" and "arrangement", as those terms are used in section 168(1) of the Canada Labour Code, this leaves only "contract" to consider. While I am not aware of any case law interpreting the meaning of "contract" under section 168 of the Canada Labour Code, I am satisfied that a collective agreement is a contract. Section 166 of the Canada Labour Code states that a " 'collective agreement' means an agreement in writing containing terms or conditions of employment ... between an employer ... and a trade union acting on behalf of the employees in collective bargaining ... ". In this situation an agreement and a contract have the same meaning.

69. In the next section I will review the collective agreement between Spar Aerospace and the Machinists Union and explain why it does not give Spar Aerospace the right to dismiss an employee without cause. If Spar Aerospace does not have the right to dismiss without cause, it follows that Machinist Union members do not have a right to receive reasonable advance notice of the date their employment will end or pay in lieu of such notice. Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27, 52; Graphic Communications Union Local 255-C v. Quebecor Jasper Printing Ltd., 333 A.R. 204, 208 (Q.B. 2002); Quebecor Jasper Printing Ltd. v. Graphic Communications Union, Local 2550, [2002] Alta. G.A.A.

No. 37, ¶161 (Sims); Motorways (1980) Ltd. v. Teamsters Union, Locals 979, 990, 395 & 362, 70 L.A.C. 4th 165, 186 (Soronow 1998) & Glenrose Rehabilitation Hospital v. Canadian Health Care Guild, 10 Alta. G.A.A. 95-099, p.10 (Smith 1995).

70. Section 168 of the Canada Labour Code does not assist the Machinists Union.

E. The Collective Agreement Does Not Give Spar Aerospace the Right to Dismiss an Employee Without Cause

71. A fair reading of the collective agreement as a whole leaves me with no doubts whatsoever that Spar Aerospace does not have the right to dismiss an employee covered by the collective agreement without cause. K-Line Maintenance & Construction Ltd. v. International Brotherhood of Electrical Workers, Local 1928, 35 L.A.C. 3d 358, 365 (Cromwell 1988) (the notion that the collective agreement allows the employer "to discharge employees at will and without just cause ... seems to me to be fundamentally at odds with the reasonable expectations of the parties") & H & S Reliance Ltd. v. Graphic Arts International Union, Local 211, 8 L.A.C. 3d 313, 318 (McLaren 1983) ("Any collective agreement which desires to place employment at the will of the employer ... must do so in the most clear, explicit and unambiguous language for it is the very antithesis of what is widely recognized as a fundamental purpose of a collective agreement in a modern society"). In most cases, a trade union would enthusiastically endorse this determination. E.g., McLeod, "Severance Pay at Arbitration: a Union Viewpoint" in Labour Arbitration Yearbook 1998, at 273 (1998) ("The problem with the residual common law rights theory is that it is inconsistent with the collective bargaining relationship, and the status of the union as exclusive bargaining agent").

72. The fact that the collective agreement contains layoff and recall provisions is not evidence that Spar Aerospace may terminate an employee's employment without cause. Quebecor Jasper Printing Ltd. v. Graphic Communications Union, Local 255C, [2002] A.G.A.A. No. 37, at ¶155 (Sims) ("The fact that a lay-off is de facto permanent does not turn it back into a discharge so that it cannot be accomplished without just cause. It remains a lay-off"). A person who is laid off continues to be an employee while he or she is on the recall list. Article 10(2) of the collective agreement between Spar Aerospace and the Machinists Union confirms that this is so in this case: "On the occasion of an increase in personnel, the Company will recall employees to the affected trade in order of seniority provided the employees recalled have the ability to perform the available work" (emphasis added). According to article 10(1)(b), an employee has "recall rights equal to his seniority but not exceeding seven ... years".

73. Arbitrator Sims, in Quebecor Jasper Printing Ltd. v. Graphic Communications Union, Local 255-C, [2002] A.G.A.A. No. 37, ¶155 recognized that, on occasion, a recall right might be "an empty right or, after time, an expired right". Spar Aerospace employees who are on the recall list may, unfortunately,

fall into this group. But this regrettable possibility does not alter their status under the collective agreement as Spar Aerospace employees.

74. Recall rights holders under collective agreements are not the only rights holders who may never benefit from being a rights holder. This is the plight of a corporate executive who owns options on common shares the price of which never exceeds that on the date of the grant. In this situation, the corporate executive will never exercise his or her rights as an option holder. Levin, Structuring Venture Capital, Private Equity and Entrepreneurial Transactions ¶408 (2006).

75. Several collective agreement provisions deliver the message that Spar Aerospace may not discharge employees for any reason at any time. These provisions are inconsistent with the premise that the collective agreement grants Spar Aerospace the right to dismiss an employee without cause. To adopt the Machinist Union's argument would make these articles meaningless. Interpretations which deprive a provision of meaning must be avoided if possible. Canadian Pacific Railway v. Zambri, [1962] S.C.R. 609, 617 & 623; Sealy (Western) Ltd. v. Upholsterers' International Union, Local 34, 20 L.A.C. 3d 45, 52 (Wakeling 1985); F. Elkouri & E. Elkouri, How Arbitration Works 493 (M. Voltz & E. Goggin eds. 5th ed. 1997) & R. Sullivan, Sullivan on the Construction of Statutes 210 (5th ed. 2008).

76. I will identify the collective agreement provisions I have in mind. First, article 13(5) stipulates that an employee may challenge a dismissal on the ground that the dismissal was "without just cause". This provision supports the conclusion that the employer does not have the right to dismiss an employee for any reason at any time. If the employer had this right, would the employee not be able to challenge a without cause termination on the basis that Spar Aerospace did not provide reasonable advance notice or pay in lieu of advance reasonable? I think so. If the employer had the right to dismiss for any reason, would the parties create such a dichotomy? I do not think they would have. Bourne v. Otis Elevator Co., 45 O.R. 2d 321, 326 (H.C. 1984) ("the collective agreement, by providing that the Company may discharge for just cause, clearly implies that the Company is bound by the collective agreement not to discharge where no just cause exists"); Carling O'Keefe Brewery of Canada Ltd. v. Western Union of Brewery, Beverage, Winery & Distillery Workers Local 287, 4 L.A.C. 3d 378, 376 (Beattie 1982) (a provision authorizing the arbitrator to set aside a disciplinary decision makes sense only if the employer could not dismiss without cause) & Qubecor Jasper Printing Ltd. v. Graphic Communications Union, Local 255C, [2002] A.G.A.A. No. 37, ¶150 (Sims) ("These [disciplinary discharge] provisions rebut any suggestion that where an employee is being discharged for cause that employees may, instead, be terminated without recourse on the payment of reasonable notice at common law"). Second, article 13(1), set out below, is based on the assumption that an employer must have a reason for terminating an employee's employment: "When an employee is to be given a warning in writing, suspension or dismissal from employment, the employee shall be informed in writing of the reason(s) for such action".

This provision, in the context of this collective agreement, makes sense only if the employer must have cause to dismiss an employee. At common law an employer does not need to provide an employee with a reason for his or her dismissal if the employer is prepared to provide reasonable advance notice of the termination date or pay in lieu of reasonable advance notice. Soost v. Merrill Lynch Canada Inc., 2010 ABCA 251, ¶10 (an employer who provides an employee reasonable advance notice need not act reasonably, "the dismissal ... may be whimsical or inexplicable") & 2 P. Barnacle, Employment Law in Canada §14.3 (4th ed. looseleaf release 27 August 2010). Cf. Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27, 52 (under the Civil Code of Quebec an employer who gives an employee reasonable advance notice of termination need not provide reasons). Third, article 8(4) stipulates that an employee loses his or her seniority upon being "discharged for cause". Does this mean that an employee dismissed without cause maintains his or her seniority? No. This interpretation would make no sense. It must mean that Spar Aerospace cannot dismiss an employee for any reason at any time. Burns Food Ltd. v. Canadian Food & Allied Workers, Local P233, 1 L.A.C. 2d 435, 440 (Redmond 1972) (a seniority provision which stipulates that an employee discharged for cause loses seniority "carries with it the clear and necessary implication [that an employee with seniority] ... retains the status of employee unless discharged for cause") & Torngait Services Inc. v. Labourers' International Union of North America, Local 1208, 81 L.A.C. 4th 294, 311 (Alcock 1999) (a seniority provision stipulating that an employee loses seniority if discharged for cause undermines the argument that the employer could dismiss an employee for any reason). Fourth, the seniority, layoff and recall norms declared in articles 8, 9 and 10 all are predicated on the assumption that Spar Aerospace cannot dismiss an employee without cause. Zeller's (Western) Ltd. v. Retail Wholesale and Department Store Union, Local 955, [1975] 1 S.C.R. 376, 380 (1973) ("It is not clear that an employee with significant seniority can be discharged at the whim of Zeller's on one week's notice"); Bourne v. Otis Elevator Co., 45 O.R. 2d 321, 326 (H.C. 1984) ("the agreement that management may lay off employees in connection with the reduction in the necessary working force clearly implies that management may not lay off employees where there is no reduction in the necessary working force"); Retail, Wholesale & Department Store Union v. Hershey Chocolates of Canada (1967) Ltd., 21 L.A.C. 83, 87-93 (Christie 1970) (seniority, layoff and grievance provisions were inconsistent with an employer retaining the right to dismiss without cause); Canada Safeway Ltd. v. United Food and Commercial Workers Union, Local 401, 26 L.A.C. 4th 409, 429 (Wakeling 1992) (collective agreement law is "more sensitive to employee interests because the employee has a tenure of employment unknown at common law") & Wm. Scott & Co. v. Canadian Food and Allied Workers Union, Local P-162, [1977] 1 Can. L.R.B.R. 1, 3 (B.C. 1976) ("under the standard seniority clause an employer no longer retains the unilateral right to terminate a person's employment simply with notice or pay in lieu of notice"). If the company could end the employment relationship by providing reasonable advance notice of termination of employment or pay in lieu of advance reasonable notice, these provisions would be of little value to the Machinist Union's members. Seniority, layoff and recall provisions are the benchmarks of a workplace

in which there is a reasonable level of job security. D. Brown & D. Beatty, Canadian Labour Arbitration 7-3 (4th ed. looseleaf no. 15 June 2010) ("it is now common for arbitrators to rule that in agreeing to the inclusion of seniority rights, probationary periods ... [and] grievance and arbitration clauses in a collective agreement, management has implicitly relinquished its right to terminate without cause on notice") & Lordon, "Benefits of Seniority to Employees" in Collective Agreement Arbitration in Canada ¶17-11 (R. Snyder ed. 4th ed. 2009). Job security does not exist if Spar Aerospace may terminate an employee at any time for any reason by providing common law notice or pay in lieu of common law notice.

77. If Spar Aerospace does not have the right to dismiss an employee without cause, it logically follows that an employee has no right to reasonable advance notice of termination or pay in lieu of reasonable advance notice of termination. At common law the two concepts are interdependent. One cannot exist without the other. Graphic Communications Union Local 255-C v. Quebecor Jasper Printing Ltd., 333 A.R. 204, 208 (Q.B. 2002) ("There can be no right to reasonable notice if there is no right to discharge without cause") aff'g [2002] A.G.A.A. No. 37, at ¶146 (Sims) ("The common law does not provide for the one without the other"); Motorways (1980) Ltd. v. Teamsters Union, Locals 979, 990, 395 & 362, 70 L.A.C. 4th 165, 186 (Soronow 1998) ("In the absence of a right to discharge without just or proper cause, there cannot logically be implied a common law notion of reasonable notice") & Glenrose Rehabilitation Hospital v. Canadian Health Care Guild, 10 Alta. G.A.A. 95-099, p. 10 (Smith 1995) ("Where there is no right to discharge without just cause, there is no need to consider whether or not there is a requirement for reasonable notice as management retains no common law right that would give rise to such obligation").

78. I am aware that Justice LeBel expressed an opinion on the civil law in Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27, 101-02 which does not support my view:

> In short, the incompatibility argument made by the appellants regarding the application of the mechanisms of reinstatement and protection against dismissal without good and sufficient cause does not provide an accurate picture of the parties' situation. The employee's right to reasonable notice of termination is not the essential counterpart of the employer's power to terminate the contract of employment unilaterally.

In assessing Justice LeBel's opinion, two points must be kept in mind. First, he spoke for the minority on this issue. Justice Deschamps' judgment was the voice of the majority and she unequivocally rejects Justice LeBel's position:

> The right of employees to claim reasonable notice of termination under the ... [Civil Code of Quebec] is the counterpart of the employer's right to terminate the employment relationship by providing pay in lieu of notice, without having to show good and sufficient cause. The fact that it is possible to resiliate a contract of employment by giving notice, without

> having to give reasons, emerges, *a contrario*, from art. 2094 ... [Civil Code of Quebec].
>
> > 2094. One of the parties may, for a serious reason, unilaterally resiliate the contract of employment without prior notice.

[2006] 1 S.C.R. 27, 52. Second, there is no reason to dismiss either the majority or the minority position simply because it dealt with the Civil Code of Quebec as opposed to the common law. Both the common law and the Civil Code of Quebec, on this topic, have identical underlying principles.

F. There Is No Arbitral Consensus That Common Law Principles Governing Termination Without Cause Are Part of the Governing Arbitral Case Law in Force in Unionized Workplaces

79. In another case between these parties, I commented on the factors which shape the subjects covered in collective agreements or the nature of the coverage:

> Some collective agreements are limited in scope. ... There are many reasons why a topic may not find its way into the final document. It may have disappeared in the course of compromise or the price of inclusion may be too high to justify persistence. ...
>
> ...
>
> Negotiators work against a historical background that has fashioned many norms which have been sanctioned by arbitrators so regularly that negotiators realize failure to include a provision expressly rejecting the arbitral norms means that the arbitral norms will be incorporated into the agreement. ...
>
> ...
>
> The law also contains other themes of which prudent contract negotiators must be mindful. The Supreme Court of Canada in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U. Local 324* ... concluded that "human rights and other employment-related statutes establish a floor beneath which an employer and a union cannot contract". This means that the collective agreement is deemed to incorporate the applicable features of "human rights and other employment related statutes" and that the parties cannot limit by agreement the effect of these terms in the workplace.

L/3 Communications/ Spar Aerospace Ltd. v. International Association of Machinists and Aerospace Workers, Northgate Lodge 1579, 127 L.A.C. 4th 225, 246-50 (Wakeling 2004). See also Wright Lithographing Co. v. Graphic Communications International Union, Local 517, 91 L.A.C. 129, 144 (Howe 2000) (parties may never have contemplated the problem).

80. The collective agreement under which the grievance I am considering was filed is the work product of organizations with a wealth of experience negotiating collective agreements. It consists of thirty-two articles that cover a range of topics, including a comprehensive union recognition term that obliges an employee covered by the agreement to become a union member and maintain his or her membership in good standing while employed by Spar Aerospace and overtime, seniority, lay-off, grievance and arbitration, vacation and income security provisions.

81. My review of the collective agreement leads me to conclude that the Machinists Union is a capable organization well suited to discharge the important tasks Parliament granted trade unions under the Canada Labour Code. There is no reason to conclude that it did not prioritize its collective bargaining goals and give careful consideration to the potential benefits associated with a plant closure article imposing obligations on Spar Aerospace in excess of those set out in sections 230(2) and 235(1) of the Canada Labour Code. See McLeod, "Severance Pay at Arbitration: A Union Viewpoint" in Labour Arbitration Yearbook 1998, at 269 ("most collective agreements do not contain ... generous severance terms in the event of termination"). The reasons which account for the absence of such contract terms are no doubt based on sound strategic determinations on the part of the Machinists Union and the difficult situation it faced after learning in 2006 that Spar Aerospace lost the Hercules maintenance contract with the Canadian government. Parry Sound Social Services Administration Board v. Ontario Public Service Employees Union, Local 324, [2003] 2 S.C.R. 157, 203 ("Collective agreements reflect the outcome of a sometimes difficult process of negotiation") & MacLean-Hunter Cable TV Ltd. v. Retail Clerks International Union, Local 206, [1981] 1 Can. L.R.B.R. 454, 464 (Can. 1980) ("[In collective bargaining] one gives concessions that he is obliged to give, no more, no less"). It would be unfair for me to conclude otherwise. See Motorways (1980) Ltd. v. Teamsters Union, Locals 979, 990, 395 & 362, 70 L.A.C. 4th 165, 184 (Soronow 1998) ("In the economic environment of the late 1980s and early 1990s, with closures and downsizing being reasonably common place, it is difficult to believe that a sophisticated party, such as the Teamsters would not have been aware of the potential closure of the Employer's operations and therefore taken steps to address the issue specifically in the [c]ollective [a]greement").

82. I will next explore the arbitral case law discussing the level of protection the common law offers to employees bound by a collective agreement.

83. Brown and Beatty, in Canada Labour Arbitration 8-113 (4th ed. looseleaf release no. 15, June 2010), comment that "employees whose right to severance pay under either the collective agreement or legislation is less than the period of reasonable notice of termination required under the common law may be entitled to claim the latter". (emphasis added). They cite two decisions of Arbitrator McFetridge (Reliable Printing Ltd. v. Graphic Communications International Union, Local 255-C, 39 L.A.C. 4th 212 (1994) and Alberta v. Alberta Union of Provincial Employees, 36 L.A.C. 4th 375 (1993)) in support of the

proposition that the common law may be invoked for the benefit of the grievors and one contrary case (Motorways (1980) Ltd. v. General Teamsters, Local Union No. 179, 70 L.A.C. 4th 165 (Soronow 1998)). I am aware of many other cases which deny the benefits of the common law to employees represented by a trade union who have been laid off. They are recorded in paragraph 84.

84. It is impossible to claim that the arbitral case law in force in unionized workplaces uniformly declares that an employee bound by a collective agreement enjoys the protection the common law provides to an employee subject to an individual employment contract dismissed without just cause. But it is safe to assert that the great majority of arbitrators hold the opinion that these common law principles are seldom in play. K-Line Maintenance & Construction Ltd. v. International Brotherhood of Electrical Workers, Local 1928, 35 L.A.C. 3d 358, 365 (Cromwell 1988) (the notion that the collective agreement allows the employer to "discharge employees at will and without just cause seems to me to be fundamentally at odds with other aspects of the collective agreement, in particular the provision relating to probationary employees and it seems to me to be fundamentally at odds with the reasonable expectation of the parties"); Foothills Provincial General Hospital v. Civil Service Assoc. of Alberta Branch 45, 7 L.A.C. 2d 436, 440 (Miller 1974) ("where a collective agreement contains seniority protection provisions ... it follows that the employer ... has given up ... his common law rights to terminate without just cause"); Town of Kamsack v. Canadian Union of Public Employees, Local 1881, 89 L.A.C. 4th 153, 188 (Pelton 2000) (the employer had no right to terminate an employee without cause, because, in part, the collective agreement has a seniority provision); POS Pilot Plant Corp. v. United Food and Commercial Workers Local 342-83, [2004] S.L.A.A. No. 1, ¶54 (Priel) (a collective agreement provision restricting the employer's right to discharge except for just cause and incorporating seniority provisions denies the employer the right to dismiss without cause); Morganite Canada Corp. v. United Steelworkers, Local 16506, 26 L.A.C. 4th 353, 359 (Dissanayake 1992) (a management rights clause which preserves management's right to discharge for just cause by itself is adequate evidence the parties intended to deny the employer the right to discharge an employee for any reason); Burns Foods Ltd. v. Canadian Food & Allied Workers, Local P233, 1 L.A.C. 2d 435, 440 (Redmond 1972) (a seniority provision which stipulates that an employee discharged for cause loses seniority "carries with it the clear and necessary implication [that an employee with seniority] ... retains the status of employee unless discharged for cause"); Retail, Wholesale & Department Store Union v. Hershey Chocolate of Canada (1967) Ltd., 21 L.A.C. 83, 87-93 (Christie 1970) (seniority, layoff and grievance provisions are inconsistent with an employer retaining the right to dismiss without cause); Torngait Services Inc. v. Labourers' International Union of North America, Local 1208, 81 L.A.C. 4th 294, 311 (Alcock 1999) (a seniority provision stipulating that an employee loses seniority if discharged for just cause undermines the argument that the employer could dismiss an employee for any reason); Mississauga Hydro-Electric Commission v. International Brotherhood of Electrical Workers, Local 636, 13 L.A.C. 4th 103, 108 (Springate 1990) (seniority and

grievance provisions "indicates a clear intention on the part of the parties to place a restriction on the commission's right to terminate a regular employee"); Carling O'Keefe Breweries of Canada Ltd. v. Western Union of Brewery, Beverage, Winery & Distillery Workers Local 287, 4 L.A.C. 3d 374, 376 (Beattie 1982) (a provision authorizing the arbitrator to set aside a disciplinary act makes sense only if the employer could not dismiss without cause); Motor Employees (Windsor) Credit Union v. United Auto Workers, Local 240, 7 L.A.C. 3d 35, 38 (Gorsky 1982) (a seniority provision is evidence that the "collective agreement limits the right of the company to discharge only for just cause"); Ottawa Citizen v. Ottawa Typographical Union, Local 102, 7 L.A.C. 4th 384, 384 (Weatherhill 1989) (the existence of a grievance procedure is enough to support the conclusion that the employer could dismiss only for just cause); National Arts Centre Corp. v. Public Service Alliance of Canada, 28 L.A.C. 2d 79, 81 (Weatherill 1980) (generally provisions allowing for grievances and arbitration deprive the employer of the right to dismiss without cause); Martindale Sash & Door Ltd. v. United Brotherhood of Carpenters & Joiners of America, Local 802, 1 L.A.C. 2d 324, 325 (Fox 1972) (a term allowing an employee to grieve an unjust discharge is inconsistent with an employer having the "liberty to discharge an employee arbitrarily"); Alberta Teachers' Assoc. v. Communications, Energy & Paperworkers Union, Local 777, [1998] A.G.A.A. No. 77, ¶12 (Smith) ("it should be only in the clearest circumstances that rights clearly bargained for in the [c]ollective [a]greement can be rendered nugatory by an interpretation ... which would allow the employer to terminate simply on notice"); Alberta Educational Communication Corp. v. International Brotherhood of Electrical Workers, Local 348, 2 L.A.C. 3d 135, 140 (Sychuk 1981) (management rights clause and other provisions contemplate discharge only for just cause); Quebecor Jasper Printing Ltd. v. Graphic Communications Union, Local 255C, [2002] A.G.A.A. No. 37, ¶150 (Sims) (a grievance procedure which allows a grievor to grieve an unjust discharge is inconsistent with the employer's retention of the right to dismiss without cause); Red Deer Co-op Ltd. v. United Food & Commercial Workers, Local 401, 110 L.A.C. 4th 218, 231 (Jolliffe 2002) (management rights and seniority provisions contemplated that employees could only be dismissed for cause); Herlitz Inc. v. Local 755, United Paperworkers International Union, 89 L.A. 436, 441 (Allen 1987) ("If management can terminate at any time for any reason, such as one finds in the 'employee-at-will' situation, then the seniority provision and all other 'work protection' clauses of the labour agreement are meaningless"); Motorways (1980) Ltd. v. Teamsters Union, Locals 979, 990, 395 and 362, 70 L.A.C. 4th 165, 186 (Soronow 1998) ("this [c]ollective [a]greement neither creates nor preserves the common law right to discharge without just ... cause. In the absence of a right to discharge without just ... cause, there cannot logically be implied a common law notion of reasonable notice"); Quebecor Jasper Printing Ltd. v. Graphic Communications Union, Local 2550, [2002] Alta. G.A.A. No. 37, ¶161 (Sims) ("if the employee has 'retained a right to common law notice of termination' then it is axiomatic that the Employer has also retained the common law right to terminate an employee without recourse upon giving or paying such notice. The right cuts both ways") & Glenrose Rehabilitation Hospital v. Canadian Health Care Guild, 10 Alta. G.A.A. 95-099, at 10 (Smith

1995) ("Where there is no right to discharge without just cause, there is no need to consider whether or not there is a requirement for reasonable notice as management retains no common law rights that would give rise to such obligation"). Obiter comments from the Supreme Court of Canada and the Alberta Court of Appeal are supportive of these arbitral opinions. Zeller's (Western) Ltd. v. Retail Wholesale and Department Store Union, Local 955, [1975] 1 S.C.R. 376, 380 (1973) ("It is not clear that an employee with significant seniority can be discharged at the whim of Zeller's on one week's notice") & Alberta Union of Provincial Employees v. Lethbridge Community College, 215 D.L.R. 4th 174, 191 (C.A. 2002) ("An employer's common law right to dismiss an employee without just cause, but on reasonable notice does not exist under a collective bargaining regime") rev'd on other grounds [2004] 1 S.C.R. 727.

85. A discussion of this topic is not complete without reference to the small body of arbitral law which provides support for the proposition that under some circumstances a union employer may dismiss without cause an employee covered by a collective agreement.

86. Professor Laskin, as he then was, is the author of an early award, International Chemical Workers Union, Local 424 v. A.C. Horn Co., 4 L.A.C. 1524 (1953), on which considerable reliance has been placed by several arbitrators who have held that the employer has the right to discharge an employee without cause under collective agreements that feature minimal job security protection. The issue in A.C. Horn Co. was not whether the employer had this right to discharge without cause but whether the collective agreement's anaemic arbitration provision gave the arbitrator jurisdiction to hear an unjust dismissal grievance:

> It may well be urged that it is unthinkable that a [c]ollective [a]greement should fail to contain a clause respecting grievance rights to challenge a discharge. Such rights stand in the very forefront of [c]ollective bargaining understandings, and are among the basic guarantees that [u]nions seek in [a]greement negotiations. This being so, an arbitrator (so it may be argued) should be astute to find these guarantees somewhere within the terms of the [a]greements or perhaps he should imply them as basic presuppositions of the [a]greement.

4 L.A.C. 1524, 1526 (1953). No doubt frustrated by the paucity of job security provisions in the collective agreement, Arbitrator Laskin concluded that the collective agreement precluded him from hearing the grievance:

> There is a limit, however, to the extent to which words may be tortured into a meaning they do not ordinarily bear ... . Perhaps the parties meant to provide for review of discharge through the grievance procedure but they have not done so either expressly or through any reasonable implication which can be found in any of the express terms of the [a]greement.

4 L.A.C. 1524, 1526 (1953).

87. Most surprisingly, Arbitrator Laskin failed to explain why the seniority provision, to which he made reference in his award but did not reproduce, did not serve as the provision which would be the basis for an implication interpretation. At the very least, one would have expected Arbitrator Laskin to explain why the seniority provision was not relevant.

88. Two very distinguished scholars and adjudicators have scrutinized the A.C. Horn Co. case and the few cases which adopted its reasoning. Professor Christie, in Retail, Wholesale & Department Store Union v. Hershey Chocolates of Canada (1967) Ltd., 21 L.A.C. 83, 86 (1970), "concluded that on a proper interpretation of art 2:01 [the management's right clause] the company may not discharge an employee except for cause and thus the grievor has properly invoked the jurisdiction of the board". The seniority provision supported Arbitrator Christie's conclusion:

> If the company need not show any cause at all for discharge it would simply discharge a senior employee if it wished to retain a junior one, or recall the senior employee only to discharge him so that the junior one could be recalled. The agreement is clearly based on the understanding that employees generally may not be discharged at will.

21 L.A.C. 83, 88 (1970). Arbitrator Christie distinguished the managements rights clauses in the A.C. Horn Co. case and his case, but made his views of A.C. Horn Co. clear by noting that "[i]f the *A.C. Horn* case cannot be distinguished on these grounds ... I am forced to say that I simply disagree that a similar result should be reached here". 21 L.A.C. 83, 91 (1970).

89. Arbitrator Cromwell, now a justice of the Supreme Court of Canada, is the second distinguished arbitrator I had in mind. In K-Line Maintenance & Construction Ltd. v. International Brotherhood of Electrical Workers, Local 1928, 35 L.A.C. 3d 358, 365 (1988), Arbitrator Cromwell dismissed the employer's argument that the collective agreement did not deprive the employer of the right to dismiss without cause:

> The submission that the employer can discharge employees at will and without just cause seems to me to be fundamentally at odds with other aspects of the collective agreement, in particular the provision relating to probationary employees and it seems to me to be fundamentally at odds with the reasonable expectations of the parties to this agreement ... .

In reaching his decision, Arbitrator Cromwell criticized Retail Wholesale Department Store Union, Local 414 v. Retail Wholesale Department Store Union Representatives Association of Ontario, 28 L.A.C. 2d 164 (MacDowell 1980), an award strongly influenced by the A.C. Horn Co. case:

> I have serious doubts as to whether ... [Arbitrator MacDowell's] case was correctly decided. The arbitrator's willingness to imply the existence of a power to discharge where there was no explicit provision in the agreement and his unwillingness to imply that such power could be exercised only for just cause is, in my view, a highly dubious exercise in giving full effect to the fair implications of the parties' agreement. However, even if the case is accepted as authoritative and correct (and in my view it is neither)... .

35 L.A.C. 358, 366 (1988).

G. Reliable Printing Is Not Good Law

90. The theory on which Reliable Printing Ltd. v. Graphic Communications International Union, Local 255-C, 39 L.A.C. 4th 212 (McFetridge 1994) is based is unsound. It is inconsistent with the values post P.C. 1033/1944 labour relations legislation promote and many Supreme Court of Canada judgments.

91. In Reliable Printing Ltd. Arbitrator McFetridge had to consider whether a collective agreement provision that incorporated the severance pay provisions of Alberta's Employment Standards Code served as the conduit along which common law norms travelled. He concluded that it did. There is nothing controversial about his determination that the Employment Standards Code "does not set a ceiling on the terms and benefits which may be negotiated between individuals ... with their employer". 39 L.A.C. 4th 212, 219 (1994). He is undoubtedly correct. Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986, 999-1000. That is the consequence of section 3 of the Employment Standards Code, R.S.A. 2000, c. E-9: "Nothing in this Act affects ... a right at common law ... that imposes on an employer an obligation or duty greater than that under this Act". Of great interest is his underlying theory that common law "rights are lost only if the collective agreement contains clear, express language that they have been replaced or excluded":

> In collective bargaining relationships, common law standards and principles are frequently relied on to deal with matters not specifically covered in the agreement. For example, the management rights clause [article 17] in this agreement preserves for management all rights that have not been abridged by any term of the agreement. This is typical of management rights clauses generally. The "rights" which have been preserved are those rights at common law which the employer had prior to entering into the collective agreement. ...
>
> Nothing presented by counsel persuades me that by entering into a collective agreement, an employee forfeits his common law rights to notice of termination. These rights are lost only if the collective agreement contains clear, express language that they have been replaced or excluded .... It is therefore appropriate for us to begin our analysis of the collective agreement from the perspective that unless the common law right is expressly extinguished or some other period of

> notice is clearly specified, employees are entitled to reasonable notice of termination.

39 L.A.C. 4th 212, 218-19 (1994) (emphasis added).

92. Most unfortunately, the opinions of the Reliable Printing arbitration panel (39 L.A.C. 4th 212 (1994)) and the judicial review judge (Reliable Printing Ltd. v. Graphic Communications International Union, Local 255-C, Alta. Q.B. action no. 9403 04018 (June 2, 1994)) reproduce very little of the collective agreement. This makes it impossible to independently form an opinion as to whether collective agreement provisions implicitly supported the notion that the employer had the right to dismiss without cause.

93. Given the outstanding reputation of Arbitrator McFetridge I must assume that his failure to refer to grievance, seniority and layoff provisions is attributable to the fact that there were none. He must have been aware of the relevance of these provisions. In Spantec Constructors Ltd. v. International Union of Operating Engineers, Local 955, 51 L.A.C. 4th 267, 274 (1974), a case raising the same issue, he specifically observed that "there are no seniority or job security provisions contained in the agreement". If I am correct in this assumption, Reliable Printing Ltd., like Haldimand-Norfolk Regional Board of Commissioners of Police v. Haldimand-Norfolk Regional Police Association, 21 L.A.C. 2d 145, 147 (Brent 1979) (a collective agreement which contained "no clause which limits in any way the Commissioner's right to discharge or discipline" and "no seniority clause of any kind" did not give the arbitrator jurisdiction to review discharge with cause or without cause), Retail Wholesale and Department Store Union, Local 411 v. Retail, Wholesale and Department Store Union Representatives Assoc. of Ontario, 28 L.A.C. 2d 164, 171 (MacDowell 1980) ("there is nothing in the collective agreement which expressly, or by necessary implication, [gave the arbitrator jurisdiction to hear a complaint of dismissal]") and Spantec Constructors Ltd. v. International Union of Operating Engineers, Local 955, 51 L.A.C. 4th 267, 274 (McFetridge 1994) (a collective agreement which had "no seniority or job security provisions" and contained a management rights clause which gave management the "rights of [m]anagement at common law" did not deprive the employer of the right to dismiss an employee without cause), is an anomaly and, at best, of precedential value only if the collective agreement is devoid of job and income security provisions found in most collective agreements. See also International Chemical Workers Union, Local 424 v. A.C. Horn Co., 4 L.A.C. 4th 1524, 1526 (Laskin 1953) ("Perhaps the parties meant to provide for review of discharges through the grievance procedure but they have not done so either expressly or through any reasonable implication"); International Woodworkers of America v. Canadian Gypsum Co., 19 L.A.C. 341, 347-48 (Weiler 1968) (arbitration board had no jurisdiction to hear discharge grievance because "there was no provision in the agreement which explicitly limited the company's power in this regard"); Edmonton Public Library Board v. Canadian Union of Public Employees, Local 52, 1 L.A.C. 2d

333, 336-37 (Williams 1972) (collective agreement did not bestow jurisdiction on arbitration board to review discharge grievance) & Tar Sands Machine and Welding Co. (1975) v. International Brotherhood of Electrical Workers, Local 424, 25 L.A.C. 2d 425 (Owen 1980) (collective agreement did not bestow jurisdiction on arbitration board to review grievance alleging discharge was unjust).

94. Arbitrator McFetridge is a member of a very small group of arbitrators who have imported into a collective agreement a provision according an employer the right to terminate an employee without cause. 39 L.A.C. 4th 212, 218-19 (1994). That an adjudicator is alone or one of a very small group of adherents to a position is no reason to conclude that the position adopted by the minority group is unsound. The strength of an argument is a function of its persuasiveness, not its precedential pedigree. This is precisely the message Justice Laskin, as he then was, delivered in Thorsen v. Canada, [1975] 1 S.C.R. 138, 152 (1974) when he observed that "[c]ounsel for the respondents ... could cite no authority for [his position] ... nor could I find any. However, want of authority is not an answer if principle supports the submission". Neither courts nor arbitrators should reject an argument because of a dearth of supporting precedents. In Laporte v. The Queen, 29 D.L.R. 3d 651 (Que. Q.B. 1972), Justice Hugesson exhorted judges to consider principled arguments. He stated that "[s]imply because something has never been done before is no good reason that it should not be done now". 29 D.L.R. 3d 651, 655 (Que. 1972). See also Home Office v. Harman, [1982] 1 All E.R. 532, 550 (H.L.) per Lord Roskill (courts must not reject submissions just because they are novel).

95. I will next review Arbitrator McFetridge's underlying theory and then explain why Reliable Printing Ltd. v. Graphic Communications International Union, Local 255-C, 39 L.A.C. 4th 212 (1994) and Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27 are irreconcilable.

96. Arbitrator McFetridge's observation that "[n]othing presented by counsel persuades me that by entering into a collective agreement, an employee forfeits his common law rights to notice of termination" requires comment. First, Arbitrator McFetridge seems to suggest that employees enter into a collective agreement. Employees do not enter into collective agreements. Trade unions do. J. I. Case Co. v. National Labour Relations Board, 321 U.S. 332, 334 (1944) & McGavin Toastmaster Ltd. v. Ainscough, [1976] 1 S.C.R. 718, 724-25 (1975). A trade union enters into a collective agreement in its capacity as a principal and not an agent. Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27, 48. This is a fundamental point. As Justice LeBel notice in Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27, 81, "Since the certified union now has a monopoly on representation and bargaining, the employee and the employer can no longer agree on conditions that differ from those set out in the collective agreement". In the collective environment established by P.C. 1003/1944 and its progeny a trade union discharges an important role as the sole representative of the workers who have selected it to play a statutory role as their exclusive representative. Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27, 48 & 81. Second, in

a workplace which features a collective agreement, it is unhelpful to think of individual employment contracts under the common law. Individual employment contracts do not have a role in a collectivism environment – one in which a collective agreement is the workplace constitution. Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27, 44; Hémond v. Cooperative fédérée du Quebec, [1989] 2 S.C.R. 962, 975 & McGavin Toastmaster Ltd. v. Ainscough, [1976] 1 S.C.R. 718, 724-25 (1975). Third, while a worker in a collective environment is an employee of the undertaking bound by the collective agreement, this status is attributable to the collective agreement. The collective agreement is predicated on the understanding that the undertaking will provide employment to workers in accordance with the terms of the collective agreement. Both the trade union and the enterprise assume that the workers will find the terms of the collective agreement sufficiently attractive to cause them to provide their services under its terms. Fourth, there is only one contract to which the trade union, the enterprise and the employees turn to when asserting their rights in the workplace. It is the collective agreement. Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27, 54 & 81. A corollary of this point is that individual workers and the employer cannot negotiate terms inconsistent with those in the workplace constitution. Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27, 49 & 81; Noel v. Société d' energie de la Baie James, [2001] 2 S.C.R. 207, 228 & Loyalist College of Applied Arts and Technology v. Ontario Public Service Employees Union, 63 O.R. 3d 641, 654 (C.A. 2003). This is another reason why it is misleading to assert that individual employment contracts complement the collective agreement. Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27, 49 & 81. Fifth, Arbitrator McFetridge accepted that there was a direct and necessary relationship between the concepts that at common law an employer could dismiss an employee without cause and that an employee dismissed without cause is entitled to reasonable advance notice of the date his or her employment will end. 39 L.A.C. 4th 212, 218-19 (1994). By holding that an employee dismissed without cause is entitled to reasonable advance notice or pay in lieu of reasonable advance notice, he implicitly adjudged that the employer could dismiss an employee without cause. The notion that an employee bound by a collective agreement may be dismissed without cause, to adopt Arbitrator Cromwell's words, is "fundamentally at odds with the reasonable expectation of the parties". K-Line Maintenance & Construction Ltd. v. International Brotherhood of Electrical Workers, Local 1928, 35 L.A.C. 358, 365 (Cromwell 1988). See also Graphic Communications Union Local 255-C v. Quebecor Jasper Printing Ltd., 333 A.R. 204, 208 (Q.B. 2002) ("There can be no right to reasonable notice if there is no right to discharge without cause") aff'g [2002] A.G.A.A. No. 37, at ¶146 (Sims) ("The common law does not provide for one without the other"). It is also inconsistent with the generally accepted understanding that trade union representation enhances job and income seniority. Canada Safeway Ltd. v. United Food and Commercial Workers Union, Local 401, 26 L.A.C. 409, 429 (Wakeling 1992) (collective agreement law is "more sensitive to employer interests because the employee has a tenure of employment unknown at common law") & International Chemical Workers union, 424 v. A.C. Horn Co., 4 L.A.C.1524, 1526 (Laskin

1953) (trade unions value a "protective provision against unjustified discharge" as highly as any other rule).

97. I strongly disagree with Arbitrator McFetridge's opinion that an employee's common law right to reasonable notice is "lost only if the collective agreement contains clear, express language that they have been replaced or excluded ...". 39 L.A.C. 4th 212, 219 (1994). I agree that the mere existence of a collective agreement may not deprive the employer of its right at common law to terminate an employee without cause and an employee so terminated of the right to receive reasonable advance notice of the date his or her employment ends or pay in lieu of notice. Reliable Printing Ltd. v. Graphic Communications International Union, Local 255-C, Alta. Q.B. action no. 9403 04018, at 11 (June 2, 1994) ("The mere existence of a collective agreement does not exclude ... [the continued presence of the common law]"); Torngait Services Inc. v. Labourers' International Union of North America, Local 1208, 81 L.A.C. 4th 294, 308 (Alcock 1999) ("no union should presume that ... certification ... automatically protects employees from being dismissed at common law. Such protection must be negotiated into a collective agreement") & Retail, Wholesale and Department Store Union, Local 414 v. Retail, Wholesale and Department Store Union Representatives Association of Ontario, 28 L.A.C. 2d 164, 168 (MacDowell 1980) ("almost all of the distinguished arbitrators" agree that an employer is not deprived of the right to dismiss without cause just because it has signed a collective agreement). I accept that a collective agreement may contain a provision expressly recognizing that the employer has this right to discharge an employee at any time for any reason. If such a provision exists, the parties must have intended to bestow on an employee so discharged an entitlement to reasonable advance notice or pay in lieu of such notice unless other termination obligations are included in the collective agreement. Of course, the collective agreement may expressly limit the employee's entitlement on without cause termination pay to no more termination notice or termination pay than the minimums set out in the applicable employment standards act. The following provision would produce this result: "The employer has the right to terminate the employment of an employee for any reason at any time by providing the employee with no more than the minimum termination notice or termination pay under the Employment Standards Code, R.S.A. c. E-9, ss. 56 and 57, as amended". But there will be very few collective agreements which expressly recognize the right of the employer to terminate without cause. D. Brown & D. Beatty, Canadian Labour Arbitration 7.2 (4th ed. looseleaf release no. 15 June 2010). Those that exist probably reflect a trade union's marginal workplace support when it negotiated the collective agreement or some extraordinary circumstance.

98. Here is my key point. In my opinion, an employer bound by a collective agreement retains the common law right to dismiss an employee without cause only if there is an express provision in the collective agreement which recognizes this right or there are provisions which implicitly deliver this message. H & S Reliance Ltd. v. Graphics Arts International Union, Local 211, 8 L.A.C. 3d 313, 318

(McLaren 1983) ("Any collective agreement which desires to place employment at the will of the employer ... must do so in the most clear, explicit and unambiguous language for it is the very antithesis of what is widely recognized as a fundamental purpose of a collective agreement in a modern society"); K-Line Maintenance & Construction Ltd. v. International Brotherhood of Electrical Workers, Local 1928, 35 L.A.C. 3d 358, 365 (Cromwell 1988) ("the notion that the collective agreement allows the employer to discharge at will without just case ... seems to me to be fundamentally at odds with the reasonable expectations of the parties") & Cameron Iron Works v. International Association of Machinists, Lodge 12, (Boles 1955) ("a 'just cause' basis for consideration of disciplinary action is, absent a clear provision to the contrary, implied in a modern collective bargaining agreement"). My position and that of Arbitrator McFetridge are totally different.

99. My opinion is consistent with the Supreme Court of Canada judgments rendered in the last fifty years declaring that there are no individual employment contracts under a collective agreement. Syndicat Catholique des Employés de Magasins de Quebec Inc. v. La Compagnie Paquet Ltée, [1959] S.C.R. 206, 212-14; Canadian Pacific Railway v. Zambri, [1962] S.C.R. 609, 624; McGavin Toastmaster Ltd. v. Ainscough, [1976] 1 S.C.R. 718, 724-25 (1975) & Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27, 44. If there are no individual employment contracts in a workplace governed by a collective agreement, why would one assume that common law values associated with nonexistent individual employment contracts are the default norm? This makes no sense to me.

100. The legislative backdrop discussed in VI B above also supports the approach I favour. Legislators in Canada have enacted labour relations legislation which bestows enormous power on trade unions so that the lot of working men and women who select trade unions to exercise the tasks legislation has assigned trade unions is improved. Parliament intended arbitrators to approach collective agreements with the assumption that their terms provide at least a modest level of job security unless the language of the collective agreement cannot reasonably bear this interpretation. Job security is one of the goals of the union movement. International Chemical Workers Union, 424 v. A.C. Horn Co., 4 L.A.C. 1524, 1526 (Laskin 1953). Most collective agreements provide at lease a modest level of job security. Professor Bilson makes this point: "The principle, almost universal in collective agreements, that an employer may only discharge ... an employee for 'just cause', is one of the hallmarks of collective bargaining relationships, and one of the major achievements of unions in creating a procedural regime in the workplace to restrict unilateral action by employers". Bilson, "Discipline and Discharge" in Collective Agreement Arbitration in Canada ¶10.1 (R. Snyder ed. 4th ed. 2009). My viewpoint promotes job security.

101. An adjudicator must be mindful of the overriding legislative objective when working through any problem legislation affects. See National Arts Centre v. Public Service Alliance of Canada, 28 L.A.C. 2d

79, 81-82 (Weatherill 1980) (the Canada Labour Code contemplates that an arbitrator may review a dismissal to determine if cause existed) & National Automobile, Aerospace Transportation and General Workers Union of Canada (C.A.W. - Canada) Local No. 27 v. London Machinery Inc., 264 D.L.R. 4th 428, 453 (Ont. C.A. 2006) (an arbitrator must not interpret a statute so as "to defeat the protective purpose of the statutory termination pay scheme"). See also GreCon Dimter Inc. v. J.R. Normand Inc., [2005] 2 S.C.R. 401, 414-15 (courts must accord commercial arbitrators jurisdiction to discharge the significant mandate accorded them by commercial arbitration legislation that recognizes the primacy of party autonomy) & Sarabia v. "Oceanic Mindoro", 26 B.C.L.R. 143, 151 (C.A. 1996) (a commerical arbitration jurisdiction clause must be interpreted broadly to reflect legislative approval of commercial arbitration). The failure to adopt a purposive perspective can considerably reduce the likelihood that any determination is sound, both in terms of consistency with legislative goals and private ordering goals under collective agreements, which exist within the legislative milieu. The Queen v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 331 ("All legislation is animated by an object the legislature intends to achieve") & Alberta Union of Provincial Employees v. Alberta Research Council, [1992] C.L.L.R. 14,390 at 14,392 (Alta. P.S.E.R. Bd.) ("Knowledge of a purpose which explains why a provision exists will always be valuable information to a person responsible for the application of the text in a concrete fact situation").

102. I am satisfied that the result in Isidore Garon Lteé v. Tremblay, [2006] 1 S.C.R. 27 and its companion case, on the one hand, and Reliable Printing Ltd. v. Graphic Communications International Union, Local 255-C, 39 L.A.C. 4th 212 (McFetridge 1994), on the other, are irreconcilable. And given that the Supreme Court of Canada is at the apex of the judicial pyramid, Reliable Printing does not survive this conflict.

103. In all three cases trade unions grieved the employers' failure, on the cessation of the enterprises which the employers operated, to provide pay allegedly due on account of extra-collective agreement norms. The two Quebec unions invoked article 2091 of the Civil Code of Quebec. [2006] 1 S.C.R. 27, 35. Their Alberta counterpart relied on Alberta's Employment Standards Code, in particular section 9(1) which reads, in part, as follows:

> 9(1) Nothing in this Act affects
>
> (b) a ... right at common law ... that
>
> (ii) imposes on an employer an obligation or duty greater than that provided for under this Act.

104. Article 2091 of the Civil Code of Quebec and section 9(1) of the Employment Standard Code compell an employer who dismisses an employee without cause to provide reasonable advance notice of the date the employee's employment would end. Article 2091 does so expressly and section 9(1) does so

by incorporating the common law. All three employers argued that their legal obligation was limited to complying with minimum statutory rules set out in provincial employment standards legislation. One Quebec collective agreement did not contemplate cessation of the business. [2006] 1 S.C.R. 27, 35. The other Quebec collective agreement stipulated that the employer must provide the notice set out in the employment standards act if a layoff exceeded six months. [2006] 1 S.C.R. 27, 35. The Alberta collective agreement committed the employer to provide "severance pay in accordance with the Employment Standards Act". 39 L.A.C. 4th 212, 213 (1994). The Quebec unions sought roughly one month's pay for each year of service for each employee. [2006] 1 S.C.R. 27, 50. This is the relief the Machinists Union seeks in this case.

105. The Supreme Court of Canada determined that extra-collective agreement statutory norms which are "incompatible with the collective labour relations scheme ... cannot be incorporated and must be disregarded". [2006] 1 S.C.R. 27, 43. The norms in the Civil Code of Quebec were adjudged to be incompatible:

> The rules governing collective labour relations constitute a body of law whose governing principles are distinct from the rules that serve as foundations for the individual contract of employment in Quebec civil law. The very nature of notice of termination demonstrates that it is not compatible with a context in which a collective agreement exists. ... The way termination of employment is dealt with under the two schemes also demonstrates the gulf that divides them. The right to notice of termination is the counterpart of the employer's right to dismiss an employee bound by an individual contract. The right is incompatible with the collective labour relations context.

[2006] 1 S.C.R. 27, 43.

106. While acknowledging that minimum termination provisions set out in the Quebec Act respecting labour standards had universal application in Quebec workplaces, the majority opined that the "length of notice of termination is ... a matter to be determined in the bargaining process between the union and the employer" ([2006] 1 S.C.R. 27, 48) and that "[t]his is a clear case in which the collective scheme supplants the individual contract of employment" ([2006] 1 S.C.R. 27, 49).

107. There is no valid basis for distinguishing the Supreme Court of Canada's judgment in Isidore Garon Lteé v. Tremblay, [2006] 1 S.C.R. 27 and Arbitrator McFetridge's opinion in Reliable Printing Ltd. v. Graphic Communications International Union, Local 255-C, 39 L.A.C. 4th 212 (1994). Article 2091 of the Civil Code of Quebec and section 9(1) of Alberta's Employment Standards Code serve precisely the same purpose. They both declare that individual assessments of reasonable termination notice or termination pay are required in cases of termination of employment without cause. Just as article 2091 of the Civil Code of Quebec did not apply to the benefit of employees represented by a trade union, neither does

section 9(1) of the Employment Standards Code carry along the common law to the benefit of this group of employees. Justice Deschamps unequivocally declared that individual assessments are "incompatible with the collective labour relations context". [2006] 1 S.C.R. 27, 49. Arbitrator McFetridge's underlying theory gives a place of prominence to common law individual employment principles not warranted in a legal environment which promotes collectivism and values individualism very little. To repeat, section 9(1) of Alberta's Employment Standards Code, properly interpreted, does not allow an employee bound by a collective agreement to claim the benefits of common law individual employment contract principles governing an employee dismissed without cause.

108. Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27 was not the first Supreme Court of Canada case to state that an extra-collective agreement norm which "is incompatible with the collective labour relations scheme ... must be disregarded". McGavin Toastmaster Ltd. v. Ainscough, [1976] 1 S.C.R. 718 (1975) stands for precisely this proposition. The only difference between the two cases is that the 2006 opinion dealt with a statutory norm and the 1975 judgment dealt with a common law norm.

109. McGavin Toastmaster Ltd. asserted that it was relieved of its obligation to provide employees with the severance pay due under the collective agreement because the trade union representing the employees had called an illegal strike and that this constituted a fundamental breach under the common law. Chief Justice Laskin, for Justices Martland, Judson, the author of the Supreme Court opinion in Syndicat Catholique des Employés de Magasins de Quebec Inc. v. Campagnie Paquet Ltée, [1959] S.C.R. 206, Dickson and Beetz, rejected the common law fundamental breach doctrine because it was incompatible with the new labour relations order:

> [Q]uestions such as repudiation and fundamental breach must be addressed in the collective agreement if they are to have any subject matter at all. When so addressed, I find them inapplicable in the face of the legislation which, in British Columbia and elsewhere, in Canada, governs labour-management relations, provides for certification of unions, for compulsory collective bargaining, for the negotiation, duration and renewal of collective agreements. The *Mediation Services Act*, which was in force at the material time in this case, provided in s. 8 for a minimum one year term for collective agreements unless the responsible Minister gave consent to earlier termination, and provided also for the making of collective agreements for longer terms, subject to certain termination options before the full term had run. Neither this Act nor the companion *Labour Relations Act* could operate according to their terms if common law concepts like repudiation and fundamental breach could be invoked in relation to collective agreements which have not expired and where the duty to bargain collectively subsists.

[1976] 1 S.C.R. 718, 726-27 (1975). See also Canadian Pacific Railway v. Zambri, [1962] 609, 617 (the common law was not applied to characterize the legal effect of a strike because "[w]hatever the

relationship be, it is obvious that if the employer is entitled to terminate [the employment relationship] ... on the sole ground that the employee refuses to work where the strike continues, ... [The Labour Relations Act provision deeming employment to continue while a strike is underway] is rendered nugatory").

110. Justice Deschamps emphasized the importance of individual assessment under article 2091 of the Civil Code of Quebec in Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27, 50-51:

> The claims filed by the unions do not recognize the individual nature of the right provided for in art. 2091 ... [of the Civil Code of Quebec]. The unions are not asking the arbitrator to determine or assess the appropriate notice of termination for each employee based on each employee's personal circumstances. Rather, they are claiming four weeks' notice per year of service for each and every employee, regardless of their individual situation. Under the ... [Civil Code of Quebec], the claims have to be made by the employees themselves and must be based primarily on the specific characteristics of each employee. The unions' claims therefore violate the spirit of art. 2091 ... [of the Civil Code of Quebec].

The same criticism can be made against the position adopted by the Machinists Union. A brief review of the common law confirms this.

111. At common law, an employer may lawfully dismiss an employee who has not engaged in misconduct of the kind described in The Queen v. Arthurs ex p. Port Arthur Shipbuilding Co., 62 D.L.R. 2d 342, 348 (Ont. C.A. 1967), by providing the employee with either reasonable advance notice of the date the employer intends to end the employment relationship or payment of the value of the wages and benefits the employee would have earned had he or she been given reasonable advance notice, provided that no term in the employment contract revealed a contrary intention. Justice McIntyre's opinion in Vorvis v. Insurance Corp. of British Columbia, [1989] 1 S.C.R. 1085, 1096 supports this statement of the common law:

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

112. If there is no agreement on the part of both the employer and the employee to a specific termination provision, recourse must be had to the general common law principle governing the judicial assessment of reasonable notice. Justice Iacobucci, in Machtinger v. HOJ Industries, [1992] 1 S.C.R. 986, 998-99, referred to the criteria Chief Justice McRuer noted in Bardal v. Globe & Mail Ltd., 24 D.L.R.

2d 140, 145 (Ont. H.C. 1960), part of which is set out below, "as the most frequently cited enumeration of factors relevant to the assessment of reasonable notice":

> There can be no catalogue laid down as to what is 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 ... [employee], the age of the ... [employee] and the availability of similar employment, having regard to the experience, training and qualifications of the ... [employee].

113. Some courts have concluded that the list Chief Justice McRuer fashioned needs to be expanded to properly reflect market conditions and the true nature of the bargain. Justice Klebec, now Chief Justice of Saskatchewan, in Bartlam v. Saskatchewan Crop Insurance Corp., 49 C.C.E.L. 141, 156 (Sask. Q.B. 1993), favoured a more comprehensive list, taking into account other factors that would have influenced the parties themselves had termination terms been addressed at the outset of the employment relationship. He had in mind the business climate, industry practices, the size of the business and the likely life of the business.

114. Mr. Barnacle, in 2 Employment Law in Canada ¶14.106 (4th ed. looseleaf release 27 August 2010), observed that "[t]he standards set by the common law are loose, making predictions difficult and judicial precedents are not always illuminating". This viewpoint is certainly consistent with the opinion of Justice Laskin in Minott v. O'Shanter Development Corp., 168 D.L.R. 4th 270, 292 (C.A. 1999) that "[d]etermining the period of reasonable notice is an art not a science. In each case, trial judges must weigh and balance a catalogue of relevant factors. No two cases are identical, and ordinarily, there is no one 'right' figure for reasonable notice".

115. In short, the common law factors demand an individual assessment to determine an employer's obligation to an employee on dismissal without cause. Certainty and predictability in this area of the common law are unrealistic objectives. There is no standardized formula, such as one month notice for each year of service, which is available. See Minott v. O'Shanter Development Co., 168 D.L.R. 4th 270, 294 (Ont. C.A. 1999) (the rule of thumb approach –one month of notice for every year of service – accords too much weight to seniority) & Milson v. Corporate Computers Inc., 17 Alta. L.R. 4th 124 ("Courts cannot apply rules of thumb to set the length of notice required in an individual case"). Similar principles govern the obligations of an employer and the entitlement of an employee bound by an individual employment contract under the Civil Code of Quebec. Isidore Garon Ltée v. Tremblay, [2006] 1 S.C.R. 27, 94 ("to determine the length of the notice period, a court must take into account the circumstances of each case").

116. If I am wrong and an employer bound by a collective agreement may dismiss an employee without cause unless the collective agreement contains terms which expressly or implicitly deny the employer this right, the opinion Justice Russell expressed in Reliable Printing Ltd. v. Graphic Communications International Union, Local 255-C, Alta. Q.B. action no. 9403 04018, at 11 (June 2, 1994), the Machinists Union still would not prevail. While there is no express provision in this collective agreement which states that the employer has no right to dismiss an employee without cause, the collective agreement implicitly denies Spar Aerospace this right.

117. Reliable Printing Ltd. does not assist the Machinists Union.

H. My 2004 Decision Does Not Help the Machinists Union

118. My decision in L/3 Communications/Spar Aerospace Ltd. v. International Association of Machinists and Aerospace Workers Ltd., 127 L.A.C. 4th 225, 254 & 260 (2004) holding that "principled rational decision making is an important feature of a workplace governed by a collective agreement" and that an employer, exercising a discretionary power under the collective agreement, must act to promote a "legitimate business reason" does not advance the Machinists Union's case.

119. The Machinists Union can not logically argue that the absence of plant closure provisions in the collective agreement violates the values I celebrated in my 2004 award. The steps Spar Aerospace took to secure collective agreement terms which were satisfactory to it and imposed minimal obligations on the company in the event of a plant closure were not irrational business decisions. A party to a collective agreement may lawfully adopt bargaining tactics that result in it making as few concessions as possible. MacLean-Hunter Cable TV Ltd. v. Retail Clerks International Union, Local 206, Northgate Lodge 1579, [1981] 1 Can. L.R.B.R. 454, 464 (Can. 1980).

120. And Spar Aerospace's decision to give employees more severance pay than section 235(1) of the Canada Labour Code required is not conduct which falls below the standard I fashioned in 2004. Giving long service employees more money than they are entitled to and assisting them to meet their financial responsibilities is not an irrational act. Every employee's overpayment was calculated using a common formula. It recognized, albeit in a modest way, the employees' contribution to Spar Aerospace over many years. The company must have concluded that this payment was a legitimate use of corporate resources. To my mind, these payments were not made on an irrational or discriminatory basis. They promoted a legitimate business reason.

I. The Machinists Union Cannot Prevail Without an Amendment to the Canada Labour Code Expressly Stating That an Employee Bound by a Collective Agreement and Permanently Laid Off Is Entitled To Common Law Reasonable Advance Notice or Pay in Lieu of Notice

121. In the absence of a plant closure provision in the collective agreement which imposes on Spar Aerospace obligations of the nature the Machinists Union advocates in support of this grievance, the position the Machinists Union has advanced can only prevail with legislative assistance. Unions similarly situated to the Machinists Union need the Parliament of Canada to amend the Canada Labour Code so that it expressly states that an employee bound by a collective agreement and permanently laid off is entitled to reasonable advance notice of the termination of his or her employment as determined by the common law or pay in lieu of reasonable advance notice. See generally D. Beatty, "Ideology, Politics and Unionism" in Studies in Labour Law 338-40 (K.Swan & K. Swinton eds. 1983). Parliament, before agreeing to do this, undoubtedly would have to determine that the introduction of this workplace norm is necessary to preserve the dignity and welfare of employees represented by a trade union. If so, Parliament would then ask whether the current legislative framework provides trade unions with the tools needed to adequately protect the interests of union workers who are permanently laid off. See Isidore Garon Lteé v. Tremblay, [2006] 1 S.C.R. 27, 54. I am not sure how Parliamentarians would answer these questions.

122. Neither I nor any other adjudicator has the authority to act as if this significant legislative change has been made. The words of Lord Bridge in The Siskina, [1979] A.C. 210, 243 (H.L.) are apt: "I am clearly of the opinion that we should not allow the urgent merits of the particular plaintiffs, whom we see in peril of being denied an effective remedy, to tempt us to assume the mantle of legislators". See also Isidore Garon Lteé v. Tremblay, [2006] 1 S.C.R. 27, 56 ("Where the legislature has not chosen to [act], I believe that it is not the role of this Court to do so").

J. Conclusion

123. I am keenly aware of the consequences my decision has on the members of the Machinists Union who worked for Spar Aerospace at its Edmonton facility and hoped that my decision might provide them with some financial assistance. A large number of them attended the hearing, a clear sign, not lost on me, that the outcome of this grievance was very important to them. But I have had to remind myself that an adjudicator has a mandate to apply legal principles to the facts and "is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. ... He is not to yield to spasmodic sentiment, to vague and unregulated benevolence". B. Cardozo, The Nature of the Judicial Process 141 (1921). See also Isidore Garon Lteé v. Tremblay, [2006] 1 S.C.R. 27, 41 ("A desire to achieve a favourable outcome to the employees in a particular case cannot dictate which principles apply").

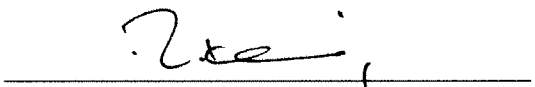
124. Knowing how keenly disappointed the Machinists Union and its members who worked at the Edmonton facility would be with my decision, I have recorded in detail my reasons. By doing so, I intend to convey the message that I have carefully considered every aspect of this case.

125. Counsel capably discharged their obligations to their clients. This grievance raised extremely complicated issues. It demanded a detailed and careful analysis of the interplay between the common law governing individual employment contracts and its celebration of individualism and freedom of contract and Part I of the Canada Labour Code which emphasizes collectivism, as well as proper integration of Parts I and III of the Canada Labour Code. Counsels' oral and written presentations helped me work my way through the challenging questions this grievance presented. I am grateful for their help.

VII. Decision

126. The collective agreement does not give Spar Aerospace employees who are laid off and on the recall list the right to receive pay in lieu of reasonable advance notice of their last day of work, as alleged by the Machinists Union. It follows that Spar Aerospace has not violated the collective agreement.

127. I dismiss this grievance.



Thomas W. Wakeling, Q.C.
Arbitrator
November 12, 2010

(2552020-1)

Schedule A (1)

Name (2)	Position	Hourly Rate (3)	Layoff Date	Years of Service (4)	Termination Pay (5) Low	High	Median (6)
GY	Aircraft Interior Technician	16.31-30.56	12-Jun-09	11 years	29,961.47	56,138.72	43,050.10
WC	Aircraft Interior Technician	15.68-27.97	13-Mar-09	8 years	20,948.48	37,367.92	29,158.20
NT	Aircraft Interior Technician	15.68-27.97	13-Mar-09	5 years	13,092.80	23,354.95	18,223.88
AM	Aircraft Refinisher/Cleaner	16.31-29.08	26-Jun-09	24 years	65,370.48	116,552.64	90,961.56
NG	Aircraft Refinisher/Cleaner	16.31-29.08	26-Jun-09	24 years	65,370.48	116,552.64	90,961.56
AP	Aircraft Refinisher/Cleaner	16.31-29.08	05-Jun-09	21 years	57,199.17	101,983.56	79,591.37
PW	Aircraft Refinisher/Cleaner	16.31-29.08	12-Jun-09	20 years	54,475.40	97,127.20	75,801.30
RW	Aircraft Refinisher/Cleaner	16.31-29.08	12-Jun-09	17 years	46,304.09	82,388.12	64,346.11
AM	Aircraft Refinisher/Cleaner	16.31-29.08	19-Jun-09	17 years	46,304.09	82,388.12	64,346.11
EM	Aircraft Refinisher/Cleaner	16.31-29.08	29-May-09	13 years	35,409.01	63,132.68	49,270.85
TP	Aircraft Refinisher/Cleaner	16.31-29.08	29-May-09	11 years	29,961.47	53,419.96	41,690.72
JP	Aircraft Refinisher/Cleaner	16.31-29.08	23-Apr-09	9 years	24,513.93	43,707.24	34,110.59
GA	Aircraft Refinisher/Cleaner	16.31-29.08	23-Apr-09	8 years	21,790.16	38,850.88	30,320.52
GM	Aircraft Refinisher/Cleaner	16.31-29.08	19-Jun-09	8 years	21,790.16	38,850.88	30,320.52
RW	Aircraft Refinisher/Cleaner	16.31-29.08	23-Apr-09	8 years	21,790.16	38,850.88	30,320.52
RL	Aircraft Refinisher/Cleaner	16.31-29.08	23-Apr-09	8 years	21,790.16	38,850.88	30,320.52
DS	Aircraft Refinisher/Cleaner	16.31-29.08	23-Apr-09	5 years	13,618.85	24,281.80	18,950.33
GA	Aircraft Technician	16.31-30.56	07-Aug-09	31 years	84,436.87	158,209.12	121,322.96
HS	Aircraft Technician	16.31-30.56	22-May-09	28 years	76,265.56	142,898.56	109,582.06
WS	Aircraft Technician	16.31-30.56	07-Aug-09	24 years	65,370.48	122,484.48	93,927.48
RB	Aircraft Technician	16.31-30.56	08-May-09	20 years	54,475.40	102,070.40	78,727.90
GW	Aircraft Technician	16.31-30.56	03-Jul-09	20 years	54,475.40	102,070.40	78,727.90
RG	Aircraft Technician	16.31-30.56	08-May-09	20 years	54,475.40	102,070.40	78,727.90
AA	Aircraft Technician	16.31-30.56	07-Aug-09	19 years	51,751.63	96,966.88	74,359.26
OC	Aircraft Technician	15.68-29.38	11-Mar-09	18 years	47,134.08	88,316.28	67,725.18
AM	Aircraft Technician	16.31-30.56	07-Aug-09	17 years	46,304.09	86,759.84	66,531.96
SG	Aircraft Technician	16.31-30.56	07-Aug-09	17 years	46,304.09	86,759.84	66,531.96
FN	Aircraft Technician	15.68-29.38	02-Feb-09	17 years	44,515.52	83,409.82	63,962.67
PG	Aircraft Technician	16.31-30.56	07-Aug-09	17 years	46,304.09	86,759.84	66,531.96
BH	Aircraft Technician	16.31-30.56	07-Aug-09	13 years	35,304.09	66,345.76	50,824.93
CA	Aircraft Technician	16.31-30.56	28-Jul-09	13 years	35,304.09	66,345.76	50,824.93
GG	Aircraft Technician	16.31-30.56	25-May-09	12 years	32,685.24	61,242.24	46,963.74
AL	Aircraft Technician	15.68-29.38	10-Dec-08	12 years	31,422.72	58,877.52	45,150.12
PG	Aircraft Technician	16.31-30.56	25-May-09	10 years	27,237.70	51,035.20	39,136.45

DJ	Aircraft Technician	16.31-30.56	25-May-09	9 years	24,513.93	45,931.68	70,445.61
LJ	Aircraft Technician	15.68-29.38	21-Nov-08	9 years	23,567.04	44,158.14	33,862.59
KL	Aircraft Technician	15.68-29.38	30-Oct-08	9 years	23,567.04	44,158.14	33,862.59
RG	Aircraft Technician	15.68-29.38	13-Mar-09	9 years	23,567.04	44,158.14	33,862.59
KA	Aircraft Technician	15.68-29.38	13-Mar-09	8 years	20,948.48	39,251.68	30,100.08
PK	Aircraft Technician	15.68-29.38	13-Mar-09	8 years	20,948.48	39,251.68	30,100.08
CH	Aircraft Technician	15.68-29.38	09-Feb-09	8 years	20,948.48	39,251.68	30,100.08
CA	Aircraft Technician	15.68-29.38	13-Mar-09	8 years	20,948.48	39,251.68	30,100.08
PK	Aircraft Technician	15.68-29.38	13-Mar-09	8 years	20,948.48	39,251.68	30,100.08
CY	Aircraft Technician	16.31-30.56	08-May-09	8 years	21,790.16	40,828.16	31,309.16
BH	Aircraft Technician	15.68-29.38	13-Mar-09	8 years	20,948.48	39,251.68	30,100.08
BM	Aircraft Technician	15.68-29.38	13-Mar-09	7 years	18,329.92	34,345.22	26,337.57
BH	Aircraft Technician	16.31-30.56	25-May-09	7 years	19,066.39	35,724.64	27,395.52
JL	Aircraft Technician	15.68-29.38	20-Feb-09	7 years	18,329.92	34,345.22	26,337.57
GM	Aircraft Technician	15.68-29.38	20-Feb-09	7 years	18,329.92	34,345.22	26,337.57
WC	Aircraft Technician	16.31-30.56	25-May-09	6 years	16,342.62	30,621.12	23,481.87
DG	Aircraft Technician	15.68-29.38	20-Feb-09	6 years	15,711.36	29,438.76	22,575.06
FD	Aircraft Technician	15.68-29.38	20-Feb-09	6 years	15,711.36	29,438.76	22,575.06
HM	Aircraft Technician	15.68-29.38	20-Feb-09	6 years	15,711.36	29,438.76	22,575.06
MB	Aircraft Technician	15.68-29.38	20-Feb-09	6 years	15,711.36	29,438.76	22,575.06
DB	Aircraft Technician	15.68-29.38	20-Feb-09	6 years	15,711.36	29,438.76	22,575.06
DB	Aircraft Technician	15.68-29.38	20-Feb-09	6 years	15,711.36	29,438.76	22,575.06
JS	Aircraft Technician	15.68-29.38	20-Feb-09	6 years	15,711.36	29,438.76	22,575.06
WJ	Aircraft Technician	15.68-29.38	20-Feb-09	6 years	15,711.36	29,438.76	22,575.06
WB	Aircraft Technician	15.68-29.38	20-Feb-09	5 years	13,092.80	24,532.30	18,812.55
LB	Aircraft Technician	15.68-29.38	20-Feb-09	5 years	13,092.80	24,532.30	18,812.55
MM	Aircraft Technician	15.68-29.38	20-Feb-09	4 years	10,474.24	19,625.84	15,050.04
CL	Aircraft/Components Cleaner	16.31-24.67	12-Jun-09	20 years	54,475.40	82,397.80	68,436.60
JT	Aircraft/Components Cleaner	16.31-24.67	23-Apr-09	8 years	21,790.16	32,959.12	27,374.64
SR	Aircraft/Components Cleaner	16.31-24.67	23-Apr-09	5 years	13,618.85	20,599.45	17,109.15
MS	Avionics Technician	16.31-30.56	08-May-09	30 years	81,713.10	153,105.60	117,409.35
JN	Avionics Technician	16.31-30.56	15-May-09	29 years	78,989.33	148,002.08	113,495.70
LM	Avionics Technician	16.31-30.56	19-Jun-09	28 years	76,265.56	142,898.56	109,582.06
TC	Avionics Technician	16.31-30.56	24-Jun-09	29 years	78,989.33	148,002.08	113,495.70
DL	Avionics Technician	16.31-30.56	28-Jun-09	28 years	76,265.56	142,898.56	109,582.06
FB	Avionics Technician	16.31-30.56	05-May-09	25 years	68,094.25	127,588.00	97,841.13
MK	Avionics Technician	16.31-30.56	01-May-09	21 years	57,199.17	107,173.92	82,186.55
DT	Avionics Technician	16.31-30.56	17-Apr-09	17 years	46,304.09	86,759.84	66,531.97
RF	Avionics Technician	16.31-30.56	26-Jun-09	16 years	43,580.32	81,656.32	62,618.32

RS	Avionics Technician	16.31-30.56	07-Aug-09	16 years	43,580.32	81,656.32	62,618.32
DP	Avionics Technician	16.31-30.56	03-Apr-09	14 years	38,132.78	71,449.28	54,791.03
WC	Avionics Technician	15.68-29.38	27-Mar-09	13 years	34,041.28	63,783.98	48,912.63
KB	Avionics Technician	15.68-29.38	27-Mar-09	13 years	34,041.28	63,783.98	48,912.63
MA	Avionics Technician	15.68-29.38	27-Mar-09	13 years	34,041.28	63,783.98	48,912.63
RR	Avionics Technician	15.08-28.25	30-Oct-08	12 years	30,220.32	56,613	43,426.68
GS	Avionics Technician	15.08-28.25	30-Oct-08	12 years	30,220.32	56,613	43,426.68
DS	Avionics Technician	15.68-29.38	27-Mar-09	13 years	34,041.28	63,783.98	48,912.63
DB	Avionics Technician	16.31-30.56	15-Apr-09	13 years	35,409.01	66,345.76	50,877.39
CK	Avionics Technician	15.68-29.38	27-Mar-09	10 years	26,185.60	49,064.60	37,625.10
EB	Avionics Technician	16.31-30.56	03-Apr-09	10 years	27,237.70	51,035.20	39,136.45
LH	Avionics Technician	15.08-28.25	12-Dec-08	9 years	22,665.24	42,459.75	32,570.01
LD	Avionics Technician	15.68-29.38	27-Mar-09	9 years	23,567.04	44,158.14	33,862.59
TN	Avionics Technician	15.68-29.38	26-Feb-09	8 years	20,948.48	39,251.68	30,100.08
JM	Avionics Technician	15.68-29.38	06-Feb-09	8 years	20,948.48	39,251.68	30,100.08
BS	Avionics Technician	15.08-28.25	30-Oct-08	1 year	2,518.36	4,717.75	3,618.89
AR	Avionics Technician	15.08-28.25	30-Oct-08	1 year	2,518.36	4,717.75	3,618.89
DQ	Cafeteria Attendant	16.31-17.21	05-Jun-09	16 years	43,580.32	45,985.12	44,782.72
SA	Cafeteria Attendant	16.31-17.21	29-May-09	9 years	24,513.93	25,866.63	25,190.28
SK	Cafeteria Attendant	15.68-16.55	13-Mar-09	5 years	13,092.80	13,819.25	13,456.03
RK	Facilities Technician	16.31-30.56	19-Jun-09	19 years	51,751.63	96,966.88	74,359.26
MA	Inspector-NDT	16.31-30.56	29-May-09	22 years	106,839.92	112,277.44	109,558.68
JB	Inspector-Standards Processes	26.22-30.56	10-Jul-09	20 years	87,574.80	102,070.40	94,822.60
TH	Inspector-Standards Processes	26.22-30.56	05-Jun-09	19 years	83,196.06	96,966.88	90,081.47
GM	Inspector-Standards Processes	26.22-30.56	26-Jun-09	12 years	52,544.88	61,242.24	56,893.56
AK	Inspector-Standards Processes	22.62-30.56	17-Apr-09	8 years	35,029.92	40,828.16	37,929.04
AI	Instrument Overhaul Technicia	16.31-30.56	15-May-09	14 years	38,132.78	71,449.28	54,791.03
PS	Instrument Overhaul Technicia	15.68-29.38	13-Mar-09	6 years	15,711.36	29,438.76	22,575.06
AD	Janitor/ Labourer	13.04	18-Sep-09	24 years	52,264.32	52,264.32	52,264.32
FS	Machinist	16.31-30.56	19-Jun-09	21 years	57,199.17	107,173.92	82,186.55
TB	Machinist	16.31-30.56	29-May-09	10 years	27,237.70	51,035.20	39,136.45
RL	Machinist	16.31-30.56	26-Jun-09	8 years	21,790.16	40,828.16	31,309.16
LS	Material Handler	16.31-26.22	15-May-09	40 years	108,950.80	175,149.60	142,050.20
BP	Material Handler	16.31-26.22	19-Jun-09	21 years	57,199.17	91,953.54	74,576.36
CG	Material Handler	16.31-26.22	17-Apr-09	20 years	54,475.40	87,574.80	71,025.00
TR	Material Handler	16.31-2622	31-Jul-09	19 years	51,751.63	83,196.06	67,473.85
TC	Material Handler	16.31-26.22	31-Jul-09	17 years	46,304.09	74,438.58	60,371.34
DO	Material Handler	16.31-26.22	10-Jul-09	16 years	43,580.32	70,059.84	56,820.08
JG	Material Handler	16.31-26.22	03-Apr-09	9 years	24,513.93	39,408.66	31,961.30

RH	Material Handler	16.31-26.22	03-Apr-09	8 years	21,790.16	35,029.92	28,410.04
JH	Material Handler	16.31-26.22	03-Apr-09	8 years	21,790.16	35,029.92	28,410.04
TB	Material Handler	16.31-26.22	03-Apr-09	6 years	16,342.62	26,272.44	21,307.53
RS	Material Handler	16.31-26.22	03-Apr-09	6 years	16,342.62	26,272.44	21,307.53
DD	Material Handler	16.31-26.22	03-Apr-09	5 years	13,618.85	21,893.70	17,756.28
GD	Structures Technician	16.31-30.56	07-Aug-09	37 years	100,779.49	188,830.24	144,804.86
ES	Structures Technician	16.31-30.56	26-Jun-09	30 years	81,713.10	153,105.60	117,409.35
AA	Structures Technician	16.31-30.56	26-Jun-09	28 years	76,265.56	142,898.56	109,582.06
DM	Structures Technician	16.31-30.56	19-Jun-09	22 years	59,922.94	11,277.44	86,100.19
AG	Structures Technician	16.31-30.56	26-Jun-09	21 years	57,199.17	107,173.92	82,186.55
NS	Structures Technician	16.31-30.56	19-Jun-09	21 years	57,199.17	107,173.92	82,186.55
KK	Structures Technician	16.31-30.56	19-Jun-09	20 years	54,475.40	102,070.40	78,272.90
JC	Structures Technician	16.31-30.56	19-Jun-09	20 years	54,475.40	102,070.40	78,272.90
KT	Structures Technician	16.31-30.56	19-Jun-09	21 years	57,199.17	107,173.92	82,186.55
GR	Structures Technician	16.31-30.56	12-Jun-09	21 years	57,199.17	107,173.92	82,186.55
AN	Structures Technician	16.31-30.56	12-Jun-09	21 years	57,199.17	107,173.92	82,186.55
RP	Structures Technician	16.31-30.56	05-Jun-09	20 years	54,475.40	102,070.40	78,272.90
RK	Structures Technician	16.31-30.56	05-Jun-09	20 years	54,475.40	102,070.40	78,272.90
WL	Structures Technician	16.31-30.56	06-Jun-09	20 years	54,475.40	102,070.40	78,272.90
PB	Structures Technician	16.31-30.56	05-Jun-09	20 years	54,475.40	102,070.40	78,272.90
RP	Structures Technician	16.31-30.56	19-Jun-09	19 years	51,751.63	96,966.88	74,359.26
DN	Structures Technician	16.31-30.56	05-Jun-09	19 years	51,751.63	96,966.88	74,359.26
HE	Structures Technician	16.31-30.56	07-Aug-09	19 years	51,751.63	96,966.88	74,359.26
RH	Structures Technician	16.31-30.56	05-Jun-09	19 years	51,751.63	96,966.88	74,359.26
HR	Structures Technician	16.31-30.56	29-May-09	19 years	51,751.63	96,966.88	74,359.26
JP	Structures Technician	16.31-30.56	05-Jun-09	18 years	49,027.86	91,863.36	70,445.61
GH	Structures Technician	16.31-30.56	29-May-09	18 years	49,027.86	91,863.36	70,445.61
KP	Structures Technician	16.31-30.56	29-May-09	18 years	49,027.86	91,863.36	70,445.61
GM	Structures Technician	16.31-30.56	01-May-09	18 years	49,027.86	91,863.36	70,445.61
MM	Structures Technician	16.31-30.56	29-May-09	17 years	46,304.09	86,759.84	66,531.97
RK	Structures Technician	16.31-30.56	22-May-09	17 years	46,304.09	86,759.84	66,531.97
RH	Structures Technician	16.31-30.56	22-May-09	17 years	46,304.09	86,759.84	66,531.97
ML	Structures Technician	16.31-30.56	25-Jun-09	17 years	46,304.09	86,759.84	66,531.97
AP	Structures Technician	15.68-29.38	31-Mar-09	17 years	44,515.52	83,409.82	63,962.67
PO	Structures Technician	16.31-30.56	22-May-09	17 years	46,304.09	86,759.84	66,531.97
MT	Structures Technician	16.31-30.56	22-May-09	16 years	43,580.32	81,656.32	62,618.32
RG	Structures Technician	16.31-30.56	15-May-09	13 years	35,409.01	66,345.76	50,877.39
JT	Structures Technician	16.31-30.56	15-May-09	13 years	35,409.01	66,345.76	50,877.39
MM	Structures Technician	16.31-30.56	15-May-09	10 years	27,237.70	51,035.20	39,136.45

DA	Structures Technician	16.31-30.56	15-May-09	10 years	27,237.70	51,035.20	39,136.45
MS	Structures Technician	16.31-30.56	15-May-09	10 years	27,237.70	51,035.20	39,136.45
MS	Structures Technician	16.31-30.56	15-May-09	9 years	24,513.93	45,931.68	35,222.81
AO	Structures Technician	16.31-30.56	15-May-09	9 years	24,513.93	45,931.68	35,222.81
RM	Structures Technician	15.68-29.38	20-Feb-09	9 years	23,567.04	44,158.14	33,862.59
SH	Structures Technician	15.68-29.38	20-Feb-09	9 years	23,567.04	44,158.14	33,862.59
JL	Structures Technician	15.68-29.38	20-Feb-09	9 years	23,567.04	44,158.14	33,862.59
RA	Structures Technician	16.31-30.56	15-May-09	9 years	24,513.93	45,931.68	35,222.81
MJ	Structures Technician	16.31-30.56	15-May-09	8 years	21,790.16	40,828.16	31,309.16
RH	Structures Technician	15.68-29.38	20-Feb-09	8 years	20,948.48	39,251.68	30,100.08
GB	Structures Technician	15.68-29.38	31-Mar-09	8 years	20,948.48	39,251.68	30,100.08
CL	Structures Technician	16.31-30.56	15-May-09	8 years	21,790.16	40,828.16	31,309.16
JS	Structures Technician	16.31-30.56	15-May-09	8 years	21,790.16	40,828.16	31,309.16
IJ	Structures Technician	16.31-30.56	15-May-09	7 years	19,066.39	35,724.64	27,395.52
AO	Structures Technician	16.31-30.56	15-May-09	7 years	19,066.39	35,724.64	27,395.52
DL	Structures Technician	16.31-30.56	08-May-09	6 years	16,342.62	30,621.12	23,481.87
MK	Structures Technician	15.68-29.38	13-Mar-09	6 years	15,711.36	29,348.76	22,575.06
DC	Structures Technician	15.68-29.38	20-Feb-09	6 years	15,711.36	29,348.76	22,575.06
RW	Structures Technician	15.68-29.38	20-Feb-09	6 years	15,711.36	29,348.76	22,575.06
FR	Structures Technician	15.68-29.38	20-Feb-09	6 years	15,711.36	29,348.76	22,575.06
SF	Structures Technician	15.68-29.38	20-Feb-09	5 years	13,092.80	24,532.30	18,812.55
BS	Structures Technician	15.68-29.38	20-Feb-09	5 years	13,092.80	24,532.30	18,812.55
JM	Structures Technician	15.68-29.38	20-Feb-09	5 years	13,092.80	24,532.30	18,812.55
DF	Structures Technician	15.68-29.38	20-Feb-09	5 years	13,092.80	24,532.30	18,812.55
AP	Structures Technician	15.68-29.38	20-Feb-09	4 years	10,474.24	19,625.84	15,050.04
DS	Structures Technician	15.68-29.38	20-Feb-09	3 years	7,855.68	14,719.38	22,575.06
ML	Tool and Die Maker	16.31-30.56	08-May-09	29 years	78,989.33	148,002.08	113,495.70
HG	Tool and Die Maker	15.68-29.38	31-Mar-09	4 years	10,474.24	19625.84	15,050.04
	Total				**6,651,166.36**	**11,767,930.21**	**9,308,132.91**

1 This Schedule is based on information set out in a seniority document dated June 24, 2009.
2 Initials have been used to identify employees.
3 The hourly rate based on Appendix A of the collective agreement in force from April 1, 2008 to March 31, 2010.
4 Only completed years of service were used for purposes of calculating termination pay.
5 Hourly rate multiplied by 167 hours/month multiplied by completed years of service.
6 The median is a very conservative position. In L/3 Communications / Spar Aerospace Ltd. v. International Association of Machinists, Northgate Lodge 1579, 127 L.A.C. 4th 225, 244 I noted that "[t]here were seventy-three aircraft technicians on the 2002 master seniority list. There were thirteen at job level 1, thirty-four at job level 2, fifteen at job level 3, seven at job level 4 and four at job level 5". I estimate that the Machinists Union's claim is approximately $10.5 million.