

The Assessment of Reasonable Notice by Canadian Appellate Courts from 2000 to 2011

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Canadian employers have a common law obligation to give reasonable notice when terminating an employment relationship without cause. In determining the appropriate length of the notice period, trial judges hearing wrongful dismissal claims must consider a range of factors, including what are known as the Bardal factors. In this paper, the author presents and analyzes the results of his empirical study of appeal court decisions reviewing trial court awards of reasonable notice across Canada from 2000 to 2011, and examines the impact of the Bardal factors (as well as several others) on outcomes at the appellate level. The study finds that appeal courts have not treated all of the Bardal factors equally, but appear to have given the most weight to the employee's age and length of tenure. Other factors found to have significant predictive value on the length of reasonable notice awards were the employee's gender and whether a successful claim for Wallace damages was made. The data also indicate that employee appeals have succeeded relatively more often than employer appeals, and that the length of notice ordered by appellate courts seems to have plateaued over time. In light of his conclusion that only a narrow range of considerations significantly affect notice awards, the author argues that the current system of judicial assessment of reasonable notice could well be replaced by a less expensive and time-consuming statutory scheme that would incorporate a formula for applying the relevant factors and would be administered by employment standards tribunals rather than by the courts.

1. INTRODUCTION

An employee who is working under an indefinite contract of employment, and whose employment is terminated without just cause, is entitled to reasonable notice of termination so that he or she will have “a fair opportunity to obtain re-employment instead

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of being thrown suddenly and unexpectedly upon the world.”¹ If the employer does not give “working notice” of termination by allowing the employee to continue working until the end of the notice period, the employee has been dismissed in breach of the contract of employment (or “wrongfully dismissed”), and can claim damages in the amount he or she would have been paid for working through the notice period (“severance pay in lieu of notice”).

Calculating an employee’s severance pay in lieu of notice requires a judicial determination of what the reasonable period of notice would have been, based on a number of separate considerations. To that end, the employer and employee typically present evidence on what are known as the *Bardal* factors, which date back to 1960: “the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.”² However, judges are rarely given empirical evidence about how much time the particular dismissed employee might actually need to find a new job. Rather than focusing on the former employee’s unique circumstances, judges commonly try to identify

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- 1 *Cronk v Canadian General Insurance* (1995), 25 OR (3d) 505, 128 DLR (4th) at para 36 [*Cronk*]; see also *Honda Canada v Keays*, 2008 SCC 39 at para 50, [2008] 2 SCR 362 [*Honda*]; *Covered Bridge Golf and Country Club v Schurman*, 2009 NBCA 1 at para 28, 340 NBR (2d) 168 [*Covered Bridge Golf*].
 - 2 *Bardal v The Globe and Mail Ltd*, [1960] OWRN 253 at para 21, 24 DLR (2d) 140 (H Ct J) [*Bardal*]. The Supreme Court of Canada has repeatedly endorsed the *Bardal* factors. See e.g. *Machtiger v HOJ Industries Ltd*, [1992] 1 SCR 986 at para 22, 91 DLR (4th) 491; *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701 at para 81, 152 DLR (4th) 1 [*Wallace*]; and *Honda*, *supra* note 1 at para 28. I conducted a search of the Canadian Legal Information Institute database on August 20, 2012 and found that the *Bardal* factors had been applied in 823 other judicial decisions. In an effort to simplify their task (or perhaps as a check on the soundness of their ultimate award), trial judges have sometimes collapsed the *Bardal* factors into a “rule of thumb” whereby one month’s notice is awarded for each year of service. Appellate courts have clearly stated that there is, in fact, no such “rule.” See e.g. *Pelech v Hyundai Auto Canada*, 63 BCLR (2d) 24 at para 10, 40 CCEL 87 (CA); *Minott v O’Shanter Development Co Ltd* (1999), 42 OR (3d) 321 at para 69, 168 DLR (4th) 270 (CA) [*Minott*]. Some trial judges still use it as a starting-point (and sometimes an end-point). See e.g. *Rodrigues v Shendon Enterprises Ltd*, 2010 BCSC 941 at paras 41, 43, [2010] BCWLD 8320; *Nelson v Champion Feed Services*, 2010 ABQB 409 at para 96, 30 Alta LR (5th) 162.

the most comparable decided cases,³ which serve as benchmarks for the assessment of reasonable notice in the case at hand.

Canadian trial judges are generally instructed by higher courts not to defer to the employer's initial decision on how much notice to give.⁴ However, when hearing an appeal from a trial judge's assessment of reasonable notice, appellate courts do give some deference to that assessment, and seemingly review it not on a standard of "correctness" but through the prism of a more deferential "reasonableness" test (to borrow the terms used to describe the standards of review in administrative law).⁵ For example, in *Minott v. O'Shanter Development Co. Ltd.*, the Ontario Court of Appeal said:

Determining the period of reasonable notice is an art not a science . . . and, ordinarily, there is no one "right" figure for reasonable notice. Instead, most cases yield a range of reasonableness. Therefore, a trial judge's determination of the period of reasonable notice is entitled to deference from an appellate court. An appeal court is not justified in interfering unless the figure arrived at by the trial judge is outside an acceptable range or unless, in arriving at the figure, the trial judge erred in principle or made an unreasonable finding of fact.⁶

In 1997, in *Wallace v. United Grain Growers*,⁷ the Supreme Court of Canada opened up a new head of damages in wrongful dismissal cases, but only where there was evidence of employer bad faith

3 *Bagby v Gustavson Int'l Drilling Ltd*, 1980 ABCA 227 at para 20, 24 AR 181.

4 *Covered Bridge Golf*, *supra* note 1 at para 28.

5 The judicial assessment of reasonable notice is a question of mixed fact and law. See *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 (the judge must apply "a legal standard to a set of facts": at para 26; "matters of mixed fact and law lie along a spectrum": at para 36). If the appellate court can extract a discrete legal error (for example, the trial judge's failure to account for mitigation), then the decision should be reviewed under the correctness standard; otherwise, where a discrete legal error "is not readily extricable," the appropriate standard of review is "palpable and overriding error." *Ibid* at para 36. This latter standard also applies to discrete errors concerning findings of fact (for example, where a trial judge has erred in determining the employee's period of continuous service). *Ibid* at para 25.

6 *Supra* note 2 at para 62. See also *Saalfeld v Absolute Software Corp*, 2009 BCCA 18 at para 18, 88 BCLR (4th) 244 ("In the absence of an error in principle, the test on appeal is not whether I would have made the same award had I been the trial judge, it is whether the trial judge's award was beyond the range of reasonableness in all the circumstances").

7 *Supra* note 2.

or unfair dealing. Although the Court did not direct that “*Wallace* damages” were to be separately assessed,⁸ a practice soon developed whereby trial judges invariably did just that,⁹ by lengthening what would otherwise have been the reasonable notice period. In 2008 the Supreme Court of Canada, in *Honda Canada v. Keays*,¹⁰ revisited *Wallace* and concluded that while damages for employer bad faith in the manner of dismissal remained recoverable as a matter of law, the appropriate remedy for such employer conduct was not to extend the notice period but to add a lump sum of damages based on proof of actual injury to the employee¹¹ (which *Wallace* did not require).

Several empirical studies,¹² summarized in Table 1 in the next part of this paper, have examined the assessment of reasonable notice

8 See *Barakett v Lévesque Beaubien Geoffrion*, 2001 NSCA 157 at para 51, 198 NSR (2d) 135.

9 See *Downham v Lennox & Addington (County of)* (2005), 56 CCEL (3d) 112 at para 247 (Ont Sup Ct J); see also Fisher, *infra* note 12 at 14.

10 *Supra* note 1 at para 50.

11 *Ibid* at para 59.

12 See Steven L McShane, “Reasonable Notice Criteria in Common Law Wrongful Dismissal Cases” (1983) 38:3 *Relations Industrielles* 618 [McShane]; Steven L McShane & David C McPhillips, “Predicting Reasonable Notice in Canadian Wrongful Dismissal Cases” (1987) 41:1 *Indus & Lab Rel Rev* 108 [McShane & McPhillips]; T P Liznick, “A Statistical Analysis of the Determinants in the Calculation of Reasonable Notice Awards in Ontario” (M.I.R. thesis, Queen’s University 1987), summarized in Tim Liznick, “Wrongful Dismissal: Determining Reasonable Notice” (1987) 5:4 *The Worklife Report* 1 [Liznick]; Terry H Wagar & Kathy A Jourdain, “The Determination of Reasonable Notice in Canadian Wrongful Dismissal Cases” (1992) 43:1 *Lab LJ* 58 [Wagar & Jourdain]; Terry H Wagar, “Wrongful Dismissal in Small and Medium-Sized Firms: Some Empirical Evidence” (1995) 12:2 *Journal of Small Business & Entrepreneurship* 94 [Wagar, “Wrongful Dismissal”]; Terry H Wagar, “Determinants of Just Cause and Reasonable Notice in the Dismissal of Nonunion Employees” (1996) 4:2 *Canadian Business Economics* 36 [Wagar, “Determinants of Just Cause”]; Helen Lam & Kay Devine, “Reasonable Notice for Wrongful Dismissal: Court versus Human Resource Decisions” (2001) 56:2 *Relations Industrielles* 365 [Lam & Devine]; Sandra Rollings-Magnusson, “Gender Implications of Wrongful Dismissal Judgments in Canada, 1994-2002” (2004) 41:1 *Canadian Review of Sociology and Anthropology* 27; Barry Fisher, *Revisiting Reasonable Notice Periods in Wrongful Dismissal Cases – 2006 Edition*, online: Barry Fisher Arbitration & Mediation <<http://barryfisher.ca>> [Fisher].

by trial judges. Some studies have found that awards vary by jurisdiction.¹³ Several have also examined whether there is any gender effect in the assessment of reasonable notice. Due to the overwhelming preponderance of male plaintiffs in such studies, gender has not yet been proven to be a statistically significant factor,¹⁴ although the studies found a negative correlation between female plaintiffs and the reasonable notice award.

In this paper, through a statistical analysis of all reasonable notice decisions by appeal courts across Canada from 2000 to 2011 (as reported in the Canadian Legal Information Institute database), I analyze how appellate courts have reviewed trial judges' reasonable notice assessments. To my knowledge, this is the very first Canadian study that has examined the assessment of reasonable notice by appellate courts rather than trial courts. In addition to the fact that appellate decisions typically reflect the collective judgment of at least three judges rather than only one, they have greater precedential value and set the parameters within which trial judges must operate.

I inquire into the following questions: the circumstances in which appeal courts have overturned trial judges' reasonable notice awards; the relative significance of each of the *Bardal* factors in the assessment of reasonable notice; and the impact of other (non-*Bardal*) factors on that assessment. I consider the impact of three non-*Bardal* factors: employee performance, an award of *Wallace* damages, and gender. While in theory, employee performance is not supposed to be taken into account in assessing reasonable notice,¹⁵ at least two studies found that an employee's poor work performance resulted in relatively lower awards.¹⁶ To date, no study has examined the impact of

13 See McShane, *supra* note 12; Wagar & Jourdain, *supra* note 12; Wagar, "Wrongful Dismissal," *supra* note 12; Wagar, "Determinants of Just Cause," *supra* note 12.

14 McShane, *supra* note 12 at 632; McShane & McPhillips, *supra* note 12 at 114; Liznick, *supra* note 12 at 2; Wagar, "Wrongful Dismissal," *supra* note 12 at 101, 103; Wagar, "Determinants of Just Cause," *supra* note 12 at 46.

15 *Dowling v Halifax (City of)*, [1998] 1 SCR 22, rev'g (1996), 136 DLR (4th), 352, 152 NSR (2d) 18 (CA); *Ansari v British Columbia Hydro and Power Authority*, [1986] 4 WWR 123 (BCSC) [*Ansari*].

16 Although these studies were published separately, the two databases largely overlap, with the former being a subset of the latter. See Wagar, "Wrongful Dismissal," *supra* note 12; Wagar, "Determinants of Just Cause," *supra* note 12.

Wallace damages on the assessment of the “base” reasonable notice award. Finally, I examine whether the employee’s gender affects the amount of notice awarded.

In the next part of this study, I provide an overview of existing empirical studies on reasonable notice. In Part 3, I set out my research questions and methodology. In Part 4, I describe the decision database used in my analyses, and in Part 5 I outline the variables that can potentially affect notice awards. In Part 6, I provide a statistical overview of my findings. In Part 7, I consider when and under what circumstances appeal courts overturn reasonable notice assessments. In particular, I address the questions of when appeal courts intervene and whether it matters if the appellant is the employer rather than the employee. I also examine which *Bardal* and non-*Bardal* factors are most significant in determining reasonable notice. Finally, I conclude the analysis by evaluating how certain factors individually affected the size of notice awards and whether the awards have systematically varied over time.¹⁷

2. EXISTING EMPIRICAL RESEARCH ON REASONABLE NOTICE

Several Canadian studies, summarized in Table 1, have empirically examined the assessment of reasonable notice by trial judges, typically by using a statistical method known as multiple regression analysis.¹⁸ Most of these studies are dated, having been published in the 1980s and 1990s. They are also subject to two principal methodological shortcomings. One is sample selection bias: each of the studies

17 For example, we can look for evidence of a systematic increase in notice over time, as noted by judges. See e.g. *Foster v Kockums Cancar Division Hawker Siddeley Canada*, [1993] 8 WWR 477, 83 BCLR (2d) 207 (CA), Southin JA concurring (questioning the reasonableness of notice increases and of the application of the *Bardal* factors, at paras 28-30). Many studies have found a statistically significant increase in reasonable notice awards during the period spanned by the database being analyzed. See generally McShane, *supra* note 12; McShane & McPhillips, *supra* note 12; Wagar & Jourdain, *supra* note 12; Wagar, “Determinants of Just Cause,” *supra* note 12. However, no “year of decision” effect was found in other studies: see Wagar, “Wrongful Dismissal,” *supra* note 12; Lam & Devine, *supra* note 12.

18 *Supra* note 12.

TABLE 1
Empirical Studies on the Determination of Reasonable Notice

<i>Study (Year)</i>	<i>Data Source</i>	<i>Sample Size (N)</i>	<i>Explained Variance (R²)</i>	<i>Statistically Significant Variables (p ≤ .10)</i>
McShane (1983)	Reported Canada-wide trial decisions January 1960 to June 1982	107	.53	Tenure; salary; jurisdiction; year of decision
McShane & McPhillips (1987)	Reported/unreported British Columbia trial decisions January 1980 to April 1986	102	.69	Tenure; occupation; salary; age; poor re-employment prospects; original employment acceptance costs; year of decision
Liznick (1987)	Reported Ontario trial decisions 1965 to 1987	51	.75	Tenure; salary; executive status
Wagar & Jourdain (1992)	Reported/unreported Canada-wide trial decisions January 1985 to February 1990	128	.66	Tenure; job status; poor re-employment prospects; employer size (>500 employees); jurisdiction; year of decision; originally resigned from secure position
Wagar, "Wrongful Dismissal" (1995)	Reported/unreported Canada-wide trial decisions January 1980 to June 1993 (employer ≤ 500 employees)	233	.51	Tenure; salary; occupational status; poor re-employment prospects; manufacturing vs. service sector employer; poor employee work record; jurisdiction

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TABLE 1 (continued)
Empirical Studies on the Determination of Reasonable Notice

<i>Study (Year)</i>	<i>Data Source</i>	<i>Sample Size (N)</i>	<i>Explained Variance (R²)</i>	<i>Statistically Significant Variables (p ≤ .10)</i>
Wagar, "Determinants of Just Cause" (1996)	Reported/unreported Canada-wide trial decisions 1980 to June 1993	214	.50	Tenure; occupational status; poor re-employment prospects; manufacturing vs. service sector employer; poor employee work record; jurisdiction
Lam & Devine (2001)	Reported Alberta trial decisions 1970 to 1996	75	.75 to .79 depending on model specification	Tenure; age; occupational status; poor re-employment prospects; construction industry employer
Rollings-Magnusson (2004)	Reported Canada-wide trial decisions in CCEs 1995 to 2002	252	N/A (cross-tab mean comparisons utilized)	Tenure; age; occupational status; gender
Fisher (2006)	Reported/unreported Canada-wide trial decisions 1995 to May 2006	950	N/A (mean comparisons utilized)	Tenure; occupational status

was primarily based on reported decisions. For reported decisions to be characterized as a random sample, every decision in the entire population must have had an equal probability of being reported, but that is not so: editors of law reports use their discretion in selecting the cases to report, from among all of the decisions issued during a particular period.

The “missing data” problem is also particularly acute in the existing studies. The default protocol in virtually all statistical software is to delete a case from the analysis if the case has no information on one or more of the variables being analyzed, and the remaining cases may not truly represent the original sample. For example, due to missing data, the initial sample was reduced from 199 cases to 107 in McShane (1983), from 138 to 102 in McShane and McPhillips (1987), and from 332 to 214 in Wagar, “Determinants of Just Cause” (1996).

In this study, I have addressed both the issue of sample selection bias and the “missing data” problem. The sample I have analyzed represents something very close to the entire population of reasonable notice decisions issued by Canadian appellate courts during the period in question. Where relevant information was missing from the report of a particular case, I obtained it from secondary sources, including (in some cases) the individual employee or his or her legal counsel.

3. THE RESEARCH QUESTIONS

I examine four broad questions. First, what is the threshold for appellate intervention in trial judges’ reasonable notice determinations? Second, what impact does each of the *Bardal* factors have? Third, are the determinations affected by other institutional and systemic factors? Fourth, did the plaintiff’s gender affect the amount of notice awarded?

First, given that appellate courts do not conduct a *de novo* review in reasonable notice cases, nor pursue a single theoretically correct result, when and under what circumstances will they overturn a trial judge’s assessment of reasonable notice? More generally, is there a clear threshold for appellate intervention, and does it vary with whether the appellant is the employer or the employee?

Second, although a variety of factors may be properly taken into account in assessing reasonable notice (none necessarily being more

critical than any other), do some factors nonetheless have significantly more impact on the result — for example, is length of tenure more or less important than age? Are there break points at which a particular factor becomes more critical — for example, is age more important if the plaintiff is 50 rather than 35, or has short service rather than long service?

Third, and quite apart from the *Bardal* criteria, did other institutional and systemic factors affect notice determination? For example, did reasonable notice awards systematically vary over the twelve-year period of the study (from 2000 to 2011)?¹⁹ Did they vary by jurisdiction,²⁰ or with the level of the employee’s performance at work?²¹ As noted above, *Wallace* damages can be awarded only where there is evidence of employer bad faith or unfair dealing, and since *Honda v. Keays* there must also be proof of actual injury. Did an award of *Wallace* damages create a “spillover effect” by influencing the conventional assessment of reasonable notice?

Fourth, did the plaintiff’s gender affect the amount of notice awarded?

4. THE DATABASE

The database assembled for this study represents almost the entire population of reasonable notice decisions issued by Canadian appellate courts from the beginning of 2000 to the end of 2011.²² In

19 *Supra* note 17.

20 Some studies have found that reasonable notice awards systematically vary by jurisdiction, with Alberta being identified as an “employer-friendly” jurisdiction (*i.e.* lower mean notice awards) relative to British Columbia and Ontario, which tended to be somewhat more “employee-friendly.” See McShane, *supra* note 12; Wagar & Jourdain, *supra* note 12; Wagar, “Wrongful Dismissal,” *supra* note 12; Wagar, “Determinants of Just Cause,” *supra* note 12.

21 Employee performance, whether good or bad, is not supposed to be taken into account in assessing reasonable notice, but at least two studies have found that poor performance — as identified in the trial judge’s reasons for decision — resulted in a lower notice award. See Wagar, “Wrongful Dismissal,” *supra* note 12; Wagar, “Determinants of Just Cause,” *supra* note 12.

22 The database was compiled from appellate decisions reported by the Canadian Legal Information Institute database. CanLII makes an effort to ensure complete coverage, but some decisions might be missing (for example, if an oral decision was never transcribed).

those instances where the case report was incomplete (for example, where the employee's age, salary or tenure was not disclosed) or where relevant information was expressed vaguely (e.g., an "older employee" or a "long-serving employee"), I obtained the requisite missing information directly from the employees or their legal counsel, or from other sources — for example, social media websites such as LinkedIn.

The results reported in this paper are based on an analysis of all appellate court decisions reported in the Canadian Legal Information Institute (CanLII) database from January 1, 2000 to December 31, 2011 where there was an allegation of "wrongful dismissal" resulting in a reassessment or confirmation of the employee's "reasonable notice" entitlement. The CanLII database includes decisions from the appellate courts of all ten provinces as well as the three territorial courts and the federal courts. The database for purposes of this study was constructed using various combinations of search terms such as "reasonable notice," "employee," "employer" and "severance." Decisions involving fixed-term agreements²³ or indefinite contracts where there was an express termination provision in the parties' employment contract²⁴ were excluded from the database, because the "reasonable notice" doctrine does not apply in either situation. I also excluded decisions where the ultimate notice award was "capped" due to the employee's successful mitigation efforts, unless the court otherwise indicated what the notice period would have been in the absence of mitigation.²⁵ I also excluded one decision in which information was missing about the employee's background (age, tenure, etc.), and I could not obtain the missing data from secondary sources.

The search produced a database of 128 individual appellate awards reported in 113 separate appellate decisions. The distribution of the awards was as follows: 51 in Ontario, 32 in British Columbia, 11 in each of Alberta and New Brunswick, 9 in Nova Scotia, 6 in

23 See e.g. *Flieger v New Brunswick*, [1993] 2 SCR 651 at para 52, 104 DLR (4th) 292.

24 See e.g. *Lake Ontario Portland Cement Ltd v Groner*, [1961] SCR 553 at para 10, 28 DLR (2d) 589.

25 See *Evans v Teamsters, Local Union No 31*, 2008 SCC 20 at paras 138-39, [2008] 1 SCR 661.

Manitoba, 3 in each of Saskatchewan and Quebec,²⁶ and one in each of Newfoundland and Yukon Territory. The mean number of appellate awards is 10.67 a year, ranging from a minimum of 6 (in 2007) to a maximum of 21 (in 2004).

Clearly, appellate decisions addressing the assessment of reasonable notice are fairly rare. Of the total of 128 decisions that I found over a twelve-year period, there was a subset of 54 cases in which the trial court's calculation of notice was not challenged on appeal. In this subset, both the employer and the employee probably considered that aspect of the trial court's decision to be acceptable, and the appeal was brought on other issues such as just cause, mitigation of loss, or *Wallace* damages. Because my focus in this study concerns the calculation of reasonable notice independent of any *Wallace* damages award, the amounts of notice reported in my analysis exclude any such supplement, although in cases where a *Wallace* claim was made, I did consider whether that claim influenced the appellate court's assessment of the appropriate period of notice.

5. THE VARIABLES ANALYZED

Based on a content analysis of the trial and appellate decisions, and supplemented by other sources in many of the cases, I was able to obtain information on the following variables:

- *Jurisdiction*: the provincial or territorial court that issued the award.
- *Year*: the date of the decision, and whether it was issued in the first or second half of the twelve-year period covered by the study.
- *Appellant*: whether the appeal was brought by the employer or the employee.
- *Trial court award*: length of notice, in months.
- *Appeal court award*: length of notice, in months.
- Employee's *age* in years, and by category: 34 years or less; 35 to 49 years; 50 years or more.

26 In Quebec, the doctrine of reasonable notice has essentially been codified: see art 2091 CCQ. The small number of Quebec cases is surprising, given the province's large population. I included both English- and French-language decisions, but there may be other Quebec appellate decisions on reasonable notice which have not been included in the CanLII database.

- Employee's job *tenure* (or length of service) with the employer, in years and by category: short-term (less than 5 years); medium-term (5 to 14 years); long-term (15 years or more).
- Employee's *salary*, in thousands of dollars (converted to 2011 dollars)²⁷ and by category:²⁸ lower earners (less than \$70,000);²⁹ medium earners (\$70,000 to \$124,000); and high earners (\$125,000 or more).³⁰
- Employee's *occupation* — a series of dummy variables³¹ reflecting five separate job classifications: clerical/labourer; technical/sales; professional (e.g., lawyers, engineers, accountants employed in their professional capacity); lower/middle management; senior management.
- Employee's *gender*, coded as a dummy variable: 1 = female; 0 = male.
- Employee's *work record*, coded as a dummy variable: 1 = poor record as identified in the court's reasons; 0 = otherwise.
- Whether *Wallace damages were claimed*, coded as a dummy variable: 1 = *Wallace damages claimed*; 0 = otherwise). In addition, I coded a *Wallace win* (1 = yes; 0 = no) and the total amount of *Wallace damages obtained* (in months).

27 Each employee's annual salary was converted to 2011 dollars in order to standardize the database. In the absence of standardization, the salary coefficients estimated by the regression equations would not be unbiased. The conversion used the Statistics Canada "Core CPI" measure as of June of each year (i.e. the mid-point of the year). See Bank of Canada, *Consumer Price Index, 2000 to Present*, online: <<http://www.bankofcanada.ca>>.

28 According to recent Statistics Canada data, these thresholds represent the bottom 85%, the next 10%, and the top 5%, respectively, of all Canadian wage earners. See "Charting the wage gap between Canada's 99% and top 1%," *CBC News* (9 November 2011), online: <<http://www.cbc.ca>> [Wage Gap].

29 One might not characterize a person earning \$69,000 per annum as a "lower-wage" employee. However, 70 of the 128 employees in this study had annual salaries of \$70,000 or more. See Wage Gap, *supra* note 28.

30 Each employee's annual salary figure includes non-discretionary bonuses, but not the value of employment benefits. For employees who were primarily on contingent performance-based pay, the employee's total earnings in the year before dismissal were used.

31 A dichotomous, categorical or dummy variable is simply coded 1 or 0 to indicate the presence or absence of the specified condition, in contrast to continuous variables such as the reasonable notice award.

The *Bardal* factors are captured in the variables of age, tenure, salary and occupation. The other variables capture the institutional and systemic factors referred to earlier in the paper.

In the following sections, I report the variable means (unweighted averages) and other descriptive statistics, as well as the results from a series of multiple linear regression equations³² that mathematically model the judicial assessment of reasonable notice.

6. PROFILE OF THE CLAIMANTS AND THE AWARDS THEY RECEIVED ON APPEAL

Employers were significantly more likely to appeal a trial court decision (67.3% of the cases) than were employees (31.1%), although employees were generally more likely to succeed on appeal (see Table 5, below). The means, standard deviations³³ and ranges of reasonable notice awards, as well as the employees' mean age, tenure and salary (in 2011 dollars), are set out in Table 2. In general, the results indicate that wrongful dismissal claimants are generally older, well paid, and long-serving employees.

Most employees were male (79.7%). On average, male employees were older (47.3 years) and had longer tenure (13.9 years) than female employees (44.4 years of age, with a tenure of 9.3 years). These two factors are reflected in the male employees' higher average salary (\$146,254 versus \$77,458) and higher average notice awards (13.7 months versus 9.6 months).

Table 3 sets out the employees' mean reasonable notice award, salary in 2011 dollars, tenure and age by occupational category. Salary appears to be associated with occupational class — senior executives earned, on average, more than three times as much as any

32 Multiple linear regression, using the Ordinary Least Squares method, is a system of mathematical modelling used to investigate the relationship between one continuous dependent variable (in this case, the reasonable notice award) and a set of independent variables (for example, age and tenure) in order to determine the separate impact of each independent variable on the dependent variable.

33 The standard deviation measures the variability of the data relative to the mean. A low-value standard deviation indicates that the data are more tightly clustered around the mean. In a normal or "bell-curve" distribution, approximately 68% of the observations will lie within one standard deviation of the mean.

TABLE 2
Means, Standard Deviations and Ranges for Employees' Final Notice Award, Age, Tenure and Salary (2011 dollars)

<i>Variable</i>	<i>Mean</i>	<i>Standard Deviation</i>	<i>Range</i>
Final Notice Award	12.9 months	6.6 months	1 week – 28 months
Employee's Age	46.7 years	9.5 years	25 – 67 years
Employee's Tenure	13.0 years	10.5 years	1 week – 42 years
Employee's Salary	\$132,280	\$180,473	\$19,623 – \$1.649 million

other occupational category, and nearly ten times as much as employees in the “clerical/labourer” occupational category. Although the mean notice award was virtually identical for the two “management” classes, this could be explained by the higher mean tenure for the “lower/middle management” category.

In addition to using the employees' age at trial in my analysis, I coded these ages into three categories: 34 years or less (14 employees), 35-49 years (58 employees), and 50 years or more (56

TABLE 3
Mean Notice Award, Salary (2011 dollars), Tenure and Age by Occupational Status

<i>Occupational Class</i>	<i>Notice Award</i>	<i>Salary</i>	<i>Tenure</i>	<i>Age</i>
Clerical/Labourer (n=16)	10.2 months	\$37,543	13.1 years	45.4 years
Technical/Sales (n=41)	11.3 months	\$112,066	12.0 years	45.6 years
Professional (n=9)	10.3 months	\$105,148	9.2 years	48.4 years
Lower/Middle Management (n=46)	15.0 months	\$108,710	14.9 years	47.2 years
Senior Management (n=16)	15.0 months	\$361,838	12.1 years	48.2 years

TABLE 4
Mean Reasonable Notice Awards by Age Category

<i>Age Category</i>	<i>Mean Notice Award</i>	<i>Standard Deviation</i>
34 years or less (n = 14)	6.5 months	4.2 months
35 – 49 years (n = 58)	11.2 months	5.7 months
50 years or more (n = 56)	16.3 months	6.1 months

employees).³⁴ The fact that there are fewer younger employees in the database might reflect several factors. First, younger employees may be less willing to pursue wrongful dismissal litigation because of financial constraints or concerns about compromising their future employment prospects. Second, even if younger employees are equally likely to file wrongful dismissal claims, they may be less likely to pursue an appeal, or more likely to settle their claim before the appeal is heard and decided. Third, they may be better able to secure new employment, thereby effectively mitigating their losses.

I have set out the average reasonable notice awards for each of the three age categories in Table 4. The awards were higher for older employees: the average award for those over 50 was about 2.5 times greater than for those under 35, and nearly 46% higher than for those between 35 and 49. There appears to be about a five-month increase in the average notice award between each age category. These results may be partially explained by the impact of tenure, since older employees usually have longer service. The Pearson correlation coefficient³⁵ between age and tenure is positive ($r = 0.561$), which suggests that while there is an association between those two factors, they each have a separate effect.

Another variable I examined was employee performance. Since I was only able to code an employee's poor work record if the court mentioned it, the effect may be underestimated. Nevertheless, 18.8% of employees were found to have a poor work record. The mean

34 While age is undeniably an important factor in assessing reasonable notice, year-to-year age differences are likely much less significant than the particular "age category" into which an employee might be placed.

35 The Pearson correlation coefficient, "r," measures the strength of the association between two variables. Its value can range from -1 (the two variables are perfectly, inversely correlated) to 1 (the variables are perfectly, positively correlated). A value of 0 indicates there is no relationship whatsoever between the two variables.

notice award for this group was 9.9 months, compared to 13.6 months for other employees. Poor performers had a shorter mean tenure of 7.1 years, compared to 14.4 years for all others. This may explain the lower awards, as poor performers might have had their employment terminated sooner than if their work records had been good, and tenure itself is a significant predictor of higher notice awards.

Finally, I looked at whether *Wallace* damages were claimed, and the consequent impact of *Wallace* awards on notice determinations. A *Wallace* claim was advanced in 49.2% of the cases, with a 41.3% success rate. The average *Wallace* award was 4.5 months, although in two cases no notice extension was ordered, with the issue being addressed by way of a special costs order.

7. FINDINGS AND ANALYSIS

In this part, I examine whether appeals against trial judges' notice decisions are more often brought by employers or by employees, whether there appears to be an appellate intervention threshold, and if there is, whether it varies between employers and employees. I also consider the extent to which *Bardal* factors and other institutional and systemic factors affect the determination of reasonable notice.

The results of the appeals are summarized in Table 5. The success rate refers to the number and percentage of cases where the appeal court overturned the trial judge's notice award and substituted an award more favourable to the appellant. While employers were twice as likely as employees to appeal the trial judge's award, they had a lower success rate on appeal, although the difference was not statistically significant.³⁶ The mean outcome of employer-initiated and employee-initiated appeals was very similar. In three of the

36 I included a dummy variable reflecting whether the appellant was the employer or the employee in a separate set of equations that included the same variables reported in Table 6. The results show that an employer-initiated appeal was generally associated with a statistically significant *increase* in the notice award of about 1.7 to 1.9 months. The estimated coefficients and their associated standard errors for each of the four equations were: 1.86 (.69); 1.93 (.68); 1.75 (.68); and 1.76 (.68). An employer-initiated appeal does not cause an increase in the notice award in the same way that, say, the employee's longer tenure or older age causes a higher notice award, but the results suggest that when employers appeal trial decisions (presumably because they consider the award to be unreasonably high), appellate courts are inclined to let the awards stand.

TABLE 5
“Reasonable Notice” Appeal Results

<i>Appellant</i>	<i>No. of Appeals (%)</i>	<i>Success Rate</i>	<i>Mean Outcome</i>
Employer	51 (68.9%)	12/51 (23.5%)	5.8 month reduction
Employee	23 (31.1%)	7/23 (30.4%)	6.1 month increase

successful employer appeals, the court reduced the trial judge’s award simply because it exceeded the common law “rough upper limit” for reasonable notice (24 months).³⁷

There were only seven successful employee-initiated appeals. One resulted in an increase of 16 months in the notice period — a result that can be characterized as an outlier.³⁸ Omitting that case causes the mean increase to fall to 4.5 months. The lowest reduction in the notice period resulting from a successful employer appeal was two months. In eight of the twelve successful employer appeals, the reduction was six months or more.

These results suggest that appellate courts require a higher error threshold in order to intervene in favour of employer appellants than employee appellants. In fact, if the one outlier is excluded, employee appellants had a 26.2% lower error threshold than employers in terms of the mean variance. It should also be noted that in 21 of the 39 unsuccessful employer appeals, the appeal court specifically observed that the trial judge’s award was generous (at the upper end of an appropriate notice range, or otherwise higher than the court itself might have awarded at trial), but was nonetheless unwilling to set it aside. In only one employee appeal did the court uphold the trial court’s notice award while noting that it was at the “bottom” end of a reasonable range.³⁹

37 *Coutts v Brian Jessel Autosports*, 2005 BCCA 24 at para 19, 40 CCEL (3d) 236; *Lowndes v Summit Ford Sales Ltd* (2006), 206 OAC 55 at para 11, 47 CCEL (3d) 198 (CA); *Aksich v Canadian Pacific Railway*, 2006 QCCA 931 at paras 89-90, 62 CCPB 187.

38 *Noble v Principal Consultants Ltd (Trustee of)*, 2000 ABCA 133 at paras 27-28, 187 DLR (4th) 80 (the appeal court held that the trial judge erred in finding that the employee’s notice entitlement should be reduced due to the employer’s post-discharge bankruptcy).

39 *Kieran v Ingram Micro*, 189 OAC 58 at para 40, 33 CCEL (3d) 157 (CA).

In conclusion, employees appeared to fare better than employers in the appeal courts. One possible explanation may be that employees are more cost-sensitive or risk-averse, and so they appeal only if they are very confident that they will succeed. Another is that appellate courts may simply be more supportive of employees because of their general labour market vulnerability, which has frequently been noted by the Supreme Court of Canada.⁴⁰

Several empirical studies have examined the extent to which the *Bardal* factors (as well as other factors) separately affect the judicial determination of reasonable notice (see Table 1), and those studies indicate that the *Bardal* factors are important, but not the only, predictors of trial judges' notice determinations. The *Bardal* factors include "the character of employment," "the length of service," the employee's age, "the availability of similar employment" and the employee's "experience, training and qualifications." The variables that I have included in this study directly measure the employee's age and service; the various occupational categories (five in number) represent a reasonable proxy for the "character of employment" as well as for the employee's qualifications. The employee's salary also relates to his or her "experience, training and qualifications," as well as to the nature of the job, although it is a somewhat crude proxy. I did not directly measure the "availability of similar employment," as this information was simply not recorded in the decisions. A rough proxy is the provincial unemployment rate. I did include that variable (by age category) in a series of equations, but it had no statistically significant predictive power. Presumably, in favourable labour markets, dismissed employees can more readily find other jobs and may feel less need to bring an action claiming wrongful dismissal.

As in previous studies, I use multiple regression to analyze the data. This statistical method allows one to measure the separate effect of two or more independent variables on a particular dependent variable. I calculated a series of regression equations using the final reasonable notice award as the dependent variable. The results reported here are based on a total of 128 reasonable notice awards issued or confirmed by Canadian appellate courts in the 12-year period from

40 See e.g. *Slaight Communications v Davidson*, [1989] 1 SCR 1038 at para 99, 59 DLR (4th) 416; *Delisle v Canada (Deputy AG)*, [1999] 2 SCR 989 at paras 6 & 67, 176 DLR (4th) 513; *Wallace*, *supra* note 2 at para 95.

2000 to 2011. Due to the nature of the database, sample selection bias and the missing data problem have been largely rectified.⁴¹ Of the numerous equations I calculated, I have reported the results for four of them in Table 6, below.

The first equation simply examines the separate impact of the *Bardal* factors on reasonable notice determinations. I estimated several equations (using, for example, salary versus salary categories, or absolute age versus age categories), but I have reported only the one equation that best fits the data. This equation accounts for slightly more than 73% of the variance in reasonable notice awards.⁴² The most important individual coefficients are those that are statistically significant based on a p-value of 0.10 or less.⁴³ The results for Equation No. 1 show that age is not particularly relevant until the employee reaches the 50-year threshold; relative to all younger categories, employees over 50 recover an additional three months' notice. Tenure is also very important in predicting reasonable notice awards; relative to the mid-tenure category (5 to 14 years), younger employees were awarded about 3.1 months' less notice, and long-serving employees about 7.3 months' more notice. Consistent with previous studies, the employee's occupational status also appears to matter. The estimated coefficients for three of the occupational variables ("clerical/labourer" is the reference category) were statistically significant. Perhaps not surprisingly, employees in the "clerical/labourer" category were clearly disadvantaged relative to every other occupational category,

41 Although this study is based on a nearly complete data set of appellate judgments issued in the period 2000 to 2011, it may be that trial decisions vary systematically from appellate decisions. Some trial decisions that might be "appealable" may not be appealed due to the amount involved or the transaction costs.

42 The coefficient of determination (R^2) provides information regarding how well the estimated regression line fits the actual data. It can range from 0 (no fit whatsoever) to 1 (a perfect fit). The R^2 values reported in Table 6 are very high relative to the range of values that are typical in social science research.

43 The p-value is used in determining statistical significance. Lower p-values suggest greater statistical significance in the estimated correlation coefficients. Social scientists generally do not consider a coefficient with a p-value in excess of 0.10 to be statistically significant.

receiving from 1.4 to 3.6 months' less notice.⁴⁴ The coefficient for salary (and salary may also be a proxy for occupational status⁴⁵) is positive and on the cusp of statistical significance, with a p-value of 0.12. In separate equations using salary categories rather than simply salary (and not reported in Table 6), the two higher salary category variables showed consistently significant results, suggesting about a two-month notice premium for employees in those categories compared to employees in the lowest category (< \$70,000).⁴⁶

On the basis of the coefficients estimated in Equation No. 1, a fifty-year old senior executive with 15 or more years' service and earning about \$200,000 per annum (in 2011) would be expected to

44 The results of this study suggest that occupational status does matter, and that lower-level employees are at a disadvantage in the notice assessment process, although some courts oppose this. See *Di Tomaso v Crown Metal Packaging Canada LP*, 2011 ONCA 469, 337 DLR (4th) 679 (lower-level employees should not be disadvantaged simply by reason of their occupational status, as "the character of the appellant's employment . . . is today a factor of declining relative importance": at para 27); *Bramble v Medis Health and Pharmaceutical Services*, 175 DLR (4th) 385, 214 NBR (2d) 111 (CA) [*Medis Health*]. For an insightful debate on notice awards for clerical employees, see *Cronk*, *supra* note 1 at paras 17-28.

45 The correlation between inflation-corrected salary and senior executive status is 0.48, but is less than 0.08 for all other occupational categories. The correlation between salary and tenure is 0.098 and, similarly, the correlations between tenure and the various occupational categories are quite low (the highest being 0.138 for tenure and lower/middle management). When independent variables are strongly correlated, a problem known as multicollinearity arises leading to difficulties in determining which of, say, two highly correlated variables is most important in terms of influencing the dependent variable.

46 I also specified a series of equations using the natural logarithm of the employee's 2011 salary in place of the 2011 salary or the salary categories. Variables, such as income, are frequently converted to their natural logarithm because it reduces the effect of outliers. Upper-income earners often earn a proportionately greater share of total earned income, and thus salary distributions are typically exponential (just like a log function) rather than linear. Here, seven employees had salaries ranging from \$467,000 to over \$1.6 million, while the next highest salary was about \$388,000. In various equations specified with the natural log salary variable, this variable was consistently statistically significant, although including this variable did not materially affect the sign or the magnitude of the coefficients for any other variables. The estimated coefficient for the natural log of salary indicated that for each one percent increase in salary, the estimated notice award would increase by about 0.013 months.

receive a notice award of about 22.2 months. By contrast, a thirty-year old salesperson with three years' service, and earning \$50,000 per annum, could expect a notice award of about 4.8 months.

I estimated a second set of equations using the same variables as in Equation No. 1 (again in their several configurations), together with two additional employee characteristics: poor work record and gender. Regardless of the specification, and in line with judicial pronouncements, the employee's poor work record was not a significant predictor, but gender was consistently found to be an important factor. The estimated coefficients for the best-fitting equation (including gender but not work record) are reported in Table 6 under Equation No. 2. This equation explained slightly more than 74% of the variance in the reasonable notice awards. It is important to note that based on this equation, and with everything else being equal (comparing male and female employees of the same age, tenure, salary, position, etc.), female employees suffered nearly a 1.6-month notice penalty — a penalty that is solely attributable to gender. This gender penalty increases to slightly more than 1.7 months when variables reflecting *Wallace* damages and year of decision are included (see Equation Nos. 3 and 4). If one accepts that women generally earn less than men for essentially the same work, a double disadvantage is at play: simply by reason of gender, women receive less notice than men, and the calculation of their severance pay will be based on a comparatively lower salary.⁴⁷

In 1997 the Supreme Court of Canada issued its groundbreaking decision in *Wallace v. United Grain Growers*, referred to above, creating a new head of damages for employer bad faith or unfair dealing

47 The mean salary for male employees was \$146,254. The average for female employees was considerably lower — \$77,458. Recent Statistics Canada data show that, while the female-male wage gap has narrowed, it still persists. Marie Drolet, "Why has the gender wage gap narrowed?" Perspectives on Labour and Income (Spring 2011), online: Statistics Canada <<http://www.statcan.gc.ca>>. A recent study involving 17 developed countries conducted for the U.S. Bureau of Labor Statistics also showed that gender-based wage inequality is still a problem, although the wage gap is narrowing as women's educational attainment increases. Paula England, Janet Gornick & Emily Fitzgibbons Shafer, "Women's employment, education, and the gender gap in 17 countries" (2012) 135 Monthly Lab Rev 3 at 9.

in the course of dismissing an employee. The test for such damages remained as set out in *Wallace* until 2008, when the Supreme Court revisited the issue in *Honda v. Keays*. In its original form, therefore, *Wallace* was the law of the land during most of the period covered by this study. I estimated various equations with two principal questions in mind. First, did the mere fact that a *Wallace* claim was advanced affect the notice determination? The answer appears to be a clear “no.” Second, did meritorious *Wallace* claims result in a form of double recovery for employees? Here, the answer appears to be “yes.” Equation No. 3 includes all of the variables used in the first two equations plus a variable reflecting whether or not the court made a separate *Wallace* damages award. This equation produced a modest increase (relative to Equation Nos. 1 and 2) in the R^2 statistic to 0.75. It is important to note that under *Wallace*, the extension of the notice period is supposed to compensate the employee for the employer’s misconduct. However, it appears that employees also recovered an extra 1.5 months’ notice, entirely apart from the *Wallace* extension, in those cases where the employer’s bad faith resulted in a *Wallace* extension.⁴⁸ One possible explanation (perhaps more accurately characterized as speculation) is that judges were reluctant to issue large *Wallace* extensions, and in essence buried part of what was actually a bad faith supplement within the base reasonable notice award.

Finally, I estimated a series of equations including variables designed to uncover any trend in notice awards over time and whether the awards systematically varied by jurisdiction. Several appellate judges have identified a general trend toward higher notice awards in recent decades, and have queried whether that trend can be justified.⁴⁹ Although some previous studies identified both “year of decision”

48 It seems that this pattern has persisted even after the Supreme Court of Canada’s decision in *Honda*, *supra* note 1. I re-estimated Equation Nos. 3 and 4 with an additional dummy variable reflecting whether the court’s decision was issued after *Honda*. This variable was not statistically significant, and the coefficients for “*Wallace* damages awarded” did not materially change (1.44 and 1.54).

49 *Supra* note 17. See also *Woodlock v Novacorp Int’l Consulting* (1990), 72 DLR (4th) 347, 48 BCLR (2d) 28, CarswellBC 166 at paras 13-14, 38 (available on WL Can) (CA); *Wiebe v Central Transport Refrigeration (Man) Ltd*, [1994] 6 WWR 305, 95 Man R (2d) 65 at 62 (CA).

and jurisdictional effects,⁵⁰ I did not uncover any evidence indicating that either effect was at play. I also tested whether there was a decline in average notice awards after *Honda* was decided in 2008. The regression results suggest that average awards declined by about half a month after that point, but these findings were not statistically significant. I also estimated several equations including one or more dummy variables for British Columbia, Alberta and Ontario versus (in each case) the rest of Canada, but found no statistically significant results in any of the equations.

As reported in Equation No. 4 in Table 6, decisions issued after 2005 were (on average, and controlling for other factors) about 0.7 of a month lower than decisions issued in the previous six-year period; however, the result was not statistically significant ($p = 0.32$), so it cannot be confidently stated that a minor retrenchment in reasonable notice awards occurred during the last six years of the period studied. On the other hand, the trend toward higher notice awards, identified by judges and empirical researchers for the period from the 1960s to the 1980s, appears to have ended.⁵¹ By 2011, we seem to have reached a “tipping point,” with awards plateauing at a relatively firm ceiling of 24 months.

8. CONCLUSION: WHAT FACTORS DRIVE APPELLATE COURTS’ REVIEW OF REASONABLE NOTICE AWARDS?

Compared to employees, employers were more likely to appeal a trial court’s reasonable notice award, but less likely to succeed. Appellate courts were also more likely to grant modest notice increases to employees than to order modest decreases in favour of employers. It appears that employers had to more convincingly demonstrate that

50 McShane, *supra* note 12 at 631-632; McShane & McPhillips, *supra* note 12 at 115; Wagar & Jourdain, *supra* note 12 at 62; Wagar, “Wrongful Dismissal,” *supra* note 12 at 102; Wagar, “Determinants of Just Cause,” *supra* note 12.

51 The plaintiff in *Bardal*, *supra* note 2, was an older and well-paid senior executive, as well as a member of the employer’s board of directors, when his employment was terminated. His notice entitlement was fixed at 12 months. Had Mr. Bardal been dismissed in 2011, and based on the results of this study, his likely notice award would have been slightly in excess of 22 months.

TABLE 6
Multiple Regression Results for Reasonable Notice Determinations

<i>Variable</i>	<i>Equation No. 1</i>	<i>Equation No. 2</i>	<i>Equation No. 3</i>	<i>Equation No. 4</i>
Intercept	6.36 (1.28)**	7.11 (1.33)**	7.16 (1.32)**	7.37 (1.33)**
Age (35-49 yrs.)	0.56 (1.10)	0.58 (1.09)	0.38 (1.08)	.55 (1.09)
Age (≥ 50 yrs.)	3.15 (1.17)**	3.25 (1.16)**	3.20 (1.15)**	3.42 (1.17)**
Tenure (< 5 yrs.)	-3.09 (.86)**	-2.93 (.85)**	-3.10 (.85)**	-3.08 (.85)**
Tenure (≥ 15 yrs.)	7.29 (.87)**	7.16 (.86)**	7.06 (.86)**	6.90 (.87)**
Salary (\$000; 2011 dollars)	0.003 (.002)	0.003 (.002)	0.003 (.002)	.004 (.002) [†]
Occupation (tech/sales)	2.05 (1.07)*	1.56 (1.09)	1.35 (1.08)	1.26 (1.09)
Occupation (professional)	1.41 (1.50)	0.75 (1.52)	0.72 (1.51)	.60 (1.51)
Occupation (low/ mid mgmt.)	3.62 (1.08)**	3.14 (1.10)**	3.04 (1.09)**	2.96 (1.09)**
Occupation (sr. mgmt.)	3.36 (1.42)*	2.75 (1.44)*	2.44 (1.44) [†]	2.13 (1.47)
Female Employee		-1.56 (.82) [†]	-1.71 (.82)**	-1.74 (.82)*
Wallace Damages Awarded			1.49 (.78)*	1.59 (.79)*
Decision Issued after 2005				-0.66 (.66)
R ²	.73	.74	.75	.75
R ² Adjusted	.71	.72	.72	.72
F-ratio	35.82**	33.29**	31.28**	28.75**

**p < .01; *p < .05; [†]p < .10; N = 128; standard errors in brackets. The reference categories are: Age (≤ 34 years), Tenure (5-14 years) and Occupation (clerical/labourer).

the trial judge erred before appellate courts would intervene in their favour. This may mean that employee appellants had stronger cases, or it may reflect a subtle judicial bias in their favour.

The *Bardal* factors are powerful predictors of reasonable notice outcomes, and the results of this study show that they continue to drive reasonable notice assessments. However, not all of those factors

are equally influential. Most important among them are tenure and age, especially for employees who are over 50 or who worked for the employer for at least 15 years. Occupational status and salary level are also important factors. Age and tenure are correlated ($r = 0.561$) but the correlation is not so high as to suggest that they are essentially a single factor. The positive correlations between age and tenure ($r = 0.561$), age and salary ($r = 0.149$), and salary and tenure ($r = 0.113$) suggest that these three factors co-vary but are independent considerations in the judicial determination of reasonable notice.

It is not surprising that age and tenure are significant predictors of the amount of notice that the appellate courts will award. Tenure is typically the only factor that is taken into account by Canadian employment standards legislation in fixing statutory minimum notice requirements; the number of employees being terminated also comes into play in the event of a “group termination,” usually triggered at 50 or more employees. The courts have also frequently suggested that long-serving employees have a “moral claim” to a longer notice period.⁵² In addition, long-serving employees are typically older and might face additional barriers in re-entering the labour market, for example, hiring younger workers may allow employers to amortize recruitment and training costs over a longer period.⁵³ Tenure was also the only factor taken into account under the old rule of thumb that judges should award one month’s notice for each year of service.⁵⁴ Even though that rule has been formally rejected, I found a strong correlation between notice awards and tenure. The Pearson correlation coefficient between the final notice award and tenure was 0.816

52 See e.g. *Medis Health*, *supra* note 44 at paras 57, 62; *Starks v Corner Brook Garage Ltd* (2002), 220 Nfld & PEIR 332 at para 43, 21 CCEL (3d) 75 (Nfld SC (TD)); *Lewis v PMC-Sierra Ltd*, 2007 BCSC 1611 at para 26.

53 *Bishop v Carleton Co-operative Ltd* (1996), 176 NBR (2d) 206, 21 CCEL (2d) 1(CA) (“the employee with long service has fewer years left to retrain, fewer years to offer to a new employer, while he will require more from the new employer than a younger employee with the same skills. His re-employment prospects are therefore fewer”: at para 10). Age discrimination may also be a factor: Robert Hiltz, “Canadians believe employers discriminate against older applicants: poll” (23 July 2012), online: <http://www.canada.com/Canadians+believe+employers+discriminate+against+older+applicants+poll/6975266/story.html>.

54 *Supra* note 2 and accompanying text.

(recall that 1 equals a perfect correlation) — a figure which suggests the rule of thumb is far from being dead and buried.⁵⁵

The Supreme Court of Canada has also acknowledged the labour market difficulties faced by older workers. In *Law v. Canada (Minister of Employment and Immigration)*, the Court said that “the increasing difficulty with which one can find and maintain employment as one grows older is a matter of which a court may appropriately take judicial notice.”⁵⁶ In *McKinney v. University of Guelph*, La Forest J., for a majority of the Court, stated that “[b]arring specific skills, it is generally known that persons over 45 have more difficulty finding work than others.”⁵⁷ Judicial sympathy for the labour market difficulties faced by older workers⁵⁸ is reflected in my finding that employees who were 50 or older at the time of dismissal recovered three extra months of notice solely because of their age. Empirical evidence from the United States, which may be generalizable to Canada, suggests that older workers do face discrimination in hiring.⁵⁹ After involuntary job loss, older workers “return to work at lower rates, are less successful at returning to the earnings levels achieved before they lost their jobs, and are less likely to have sustained employment after returning to work” than younger employees.⁶⁰

55 See *supra* note 35.

56 [1999] 1 SCR 497 at para 101, 170 DLR (4th) 1.

57 [1990] 3 SCR 229 at para 92, 76 DLR (4th) 545.

58 2001 BCCA 388 at paras 17-18, 89 BCLR (3d) 14.

59 See generally Joanna N Lahey, “Age Discrimination and Hiring: Evidence from a Labor Market Experiment” in Randall W Eberts & Richard A Hobbie, eds, *Older and Out of Work: Jobs and Social Insurance for a Changing Economy* (Kalamazoo, Mich: W E Upjohn Institute for Employment Research, 2008) 45. The Canadian federal government, undoubtedly in recognition of the labour market challenges faced by workers aged 55 years and older, created the Targeted Initiative for Older Workers, a program that provides re-employment assistance and skills retraining for older workers: Human Resources and Skills Development Canada, *Targeted Initiative for Older Workers*, online: <<http://www.hrsdc.gc.ca>>.

60 Christopher J O’Leary & Randall W Eberts, “Reemployment and Earnings Recovery among Older Unemployment Insurance Claimants” in Randall W Eberts & Richard A Hobbie, eds, *Older and Out of Work: Jobs and Social Insurance for a Changing Economy* (Kalamazoo, Mich: W E Upjohn Institute for Employment Research, 2008) 59 at 80. For more information on the challenges faced by older workers, see Sewin Chan & Ann H Stevens, “Job Loss and Employment Patterns of Older Workers” (2001) 19:2 *Journal of Labor Economics* 484 at 485.

An employee's occupational status is the next most influential factor in the determination of notice awards, with managers being awarded greater notice than employees in the "technical/sales" and "clerical/labourer" categories. Senior managers seemingly do not recover more notice than middle- and lower-level managers simply by reason of their status. Rather, the main factors affecting senior managers' notice awards are age and tenure; those who were awarded 18 months' or more notice were at least in their mid-forties, and most of them had worked for their employer for at least 17 years. Additionally, those employees who obtained awards of at least 18 months were 53.7 years old on average, and their mean tenure was 24.1 years. Employees in the "professional" classification fared worse than those in any other category except the "clerical/labourer" group. Perhaps this reflects the assumptions that professionals will have an easier time finding new jobs and are likelier than other employees to successfully pursue self-employment.

Poor work record (at least insofar as it was identified in the judgments) did not appear to have any impact on reasonable notice awards. This is consistent with the accepted judicial view that an employee's work record is not relevant when assessing reasonable notice.⁶¹ However, a finding of employer misconduct (indicated by a successful *Wallace* damages claim) doubly benefitted employees, as they received both *Wallace* damages and more notice. This "hidden" *Wallace* factor may prove to be more significant in the years ahead if, as many suggest, *Honda v. Keays* will result in fewer and smaller *Wallace* awards. It remains to be seen whether judges will be inclined to set relatively longer notice periods in cases where lump-sum *Wallace* damages are also awarded, or where there is evidence of employer misconduct but not of actual injury to the employee from such misconduct.

Several studies have examined whether there is any gender effect in the assessment of reasonable notice. To date, gender has not proven to be a statistically significant factor, even though those studies found a negative correlation between female gender and size of the award.⁶² It is not surprising that gender had little predictive value

61 See *Ansari*, *supra* note 15 at para 17.

62 See text accompanying *supra* note 14.

in a statistical sense, as most plaintiffs in those studies were male (typically 86% to 90%). Although an employee's gender should not be a relevant factor in assessing reasonable notice, I found a negative correlation between female gender and size of the award. Female plaintiffs constituted slightly more than 20% (26 individuals) of the employees in my study, and the results suggest that female employees received about 1.5 to 1.7 months' less notice than comparable male employees. If there is to be a gender impact, perhaps it should be in *favour* of women, if one accepts that they face a more difficult time than men when seeking new employment.⁶³ Even if there were no direct gender discrimination in the setting of notice awards, women would still be disadvantaged by the fact that their generally lower salaries will mean lower average severance pay awards. Time will tell if this gender bias will disappear, particularly in light of the fact that we are slowly moving toward gender equality in the judicial ranks.⁶⁴

Taking an overall look at the data, it seems that reasonable notice awards have remained relatively stable over the past decade and do not systematically vary by jurisdiction, as Canadian courts tend to be consistent in their reasonable notice determinations. Notice awards can be predicted by a small number of factors, including the employee's age, tenure, occupation and salary.⁶⁵ Given that reasonable notice is generally capped at 24 months, it may be time to consider abandoning individualized notice assessments in favour of a statutory system which could offer greater certainty to both employers and employees. One option would be to amend provincial and federal employment standards statutes to include a duty to give reasonable

63 David W Johnston & Wang-Sheng Lee, "Climbing the Job Ladder: New Evidence of Gender Inequity" (2012) 51:1 *Industrial Relations: A Journal of Economy and Society* 129. See also Alison L Booth, "Gender and Competition" (2009) 16:6 *Labor Economics* 599.

64 According to the Office of the Commissioner for Federal Judicial Affairs, as of October 1, 2012, there were 1,096 federally-appointed judges in office (and 41 vacancies), of whom 360 (about 32.8%) were women. Office of the Commissioner for Federal Judicial Affairs Canada, "Number of Judges on the Bench as of October 1, 2012," online: <<http://www.fja.gc.ca/>>.

65 I calculated an estimated notice award for each employee based on Equation No. 4 and compared these estimates with the actual awards. The estimated award was within ± 1.5 months for 54 employees (42.2%) and within ± 2.5 months for 82 employees (64.1%). The variances were less than 6.8 months in all but one case.

notice of termination that would be separate from (and in addition to) existing statutory minimum termination pay and minimum notice obligations, which are wholly based on length of service. These new provisions would apply only to indefinite employment relationships where the parties had not agreed on a lawful termination clause. They could set out a statutory formula which would take into account the employee's age and length of continuous service, and perhaps such other factors as the employer's size and the employee's salary level,⁶⁶ with calculation disputes being adjudicated by existing employment standards tribunals rather than by the courts. A dispute resolution process of this sort would very likely reduce costs and delays for the parties.

66 I have been advocating such a system for several years. I was heartened to learn that prominent employment lawyer Barry Fisher has a similar view; see *A New & Improved Theory of Reasonable Notice for Wrongful Dismissal after Honda Canada Inc. v. Keays*, online: Barry Fisher Arbitration & Mediation <<http://barryfisher.ca>>. Wrongful dismissal litigation, much of it concerned with the determination of reasonable notice, uses a good deal of scarce judicial resources. A CanLII search of the terms "reasonable notice" and "employee" for the period from 2005 to 2011 produces well over 1000 "hits," and the CanLII database of course does not include the many more claims that were filed but settled before trial.