

**SUPREME COURT OF CANADA**

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| **Citation:** Wilson *v.* Atomic Energy of Canada Ltd., 2016 SCC 29, [2016] 1 S.C.R. 770 | **Appeal heard:** January 19, 2016  **Judgment rendered:** July 14, 2016  **Docket:** 36354 |

Between:

Joseph Wilson

Appellant

and

Atomic Energy of Canada Limited

Respondent

- and –

Canadian Labour Congress, Canadian Association for Non-Organized Employees, Federally Regulated Employers — Transportation and Communications and Canadian Association of Counsel to Employers

Interveners

**Coram:** McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

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| **Reasons for judgment:**  (paras. 1 to 69) | Abella J. |

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| **Joint concurring reasons:**  (para. 70) | McLachlin C.J. and Karakatsanis, Wagner and Gascon JJ. |

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| **Concurring reasons:**  (paras. 71 to 73) | Cromwell J. |

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| **Joint dissenting reasons:**  (paras. 74 to 149) | Côté and Brown JJ. (Moldaver J. concurring) |

Wilson *v.* Atomic Energy of Canada Ltd., 2016 SCC 29, [2016] 1 S.C.R. 770

Joseph Wilson Appellant

v.

Atomic Energy of Canada Limited Respondent

and

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Canadian Association for Non‑Organized Employees,

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Communications and Canadian Association

of Counsel to Employers Interveners

**Indexed as:**Wilson ***v.*** Atomic Energy of Canada Ltd.

2016 SCC 29

File No.: 36354.

2016: January 19; 2016: July 14.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

on appeal from the federal court of appeal

*Employment law ― Unjust dismissal ― Dismissal without cause ― Non‑unionized employees ― Employer terminating non‑unionized employee on a without‑cause basis with severance package ― Employee filing unjust dismissal complaint under Canada Labour Code ― Whether non‑unionized employees can be lawfully dismissed without cause under Code ― Canada Labour Code, R.S.C. 1985, c. L‑2, s. 240.*

*Administrative law — Judicial review — Standard of review — Employer terminating non‑unionized employee on a without‑cause basis with severance package ― Employee filing unjust dismissal complaint under Canada Labour Code ― Adjudicator allowing employee’s complaint ― Whether decision of Adjudicator reasonable ― Streamlining**standard of review framework — Canada Labour Code, R.S.C. 1985, c. L‑2, s. 240.*

W worked as an Administrator for his employer for four and a half years until his dismissal in November 2009. He had a clean disciplinary record. He filed an “Unjust Dismissal” complaint, claiming that his dismissal was in reprisal for having filed a complaint of improper procurement practices on the part of his employer. In response to a request from an inspector for the reasons for W’s dismissal, the employer said he was “terminated on a non‑cause basis and was provided a generous dismissal package”. A labour adjudicator was appointed to hear the complaint. The employer sought a preliminary ruling on whether a dismissal without cause together with a sizeable severance package meant that the dismissal was a just one. The Adjudicator concluded that an employer could not resort to severance payments, however generous, to avoid a determination under the *Code* about whether the dismissal was unjust. Because the employer did not rely on any cause to fire him, W’s complaint was allowed. The Application Judge found this decision to be unreasonable because, in his view, nothing in Part III of the *Code* precluded employers from dismissing non‑unionized employees on a without‑cause basis. The Federal Court of Appeal agreed, but reviewed the issue on a standard of correctness.

Held (Moldaver, Côté and Brown JJ. dissenting): The appeal should be allowed and the decision of the Adjudicator restored.

*Per* Abella J.: At common law, a non‑unionized employee could be dismissed without reasons if he or she was given reasonable notice or pay in lieu. In 1978, Parliament added a series of provisions to Part III of the *Canada Labour Code* under the heading “Unjust Dismissal”, now found at ss. 240 to 246. This Unjust Dismissal scheme consistsof expansive protections like those available to employees covered by a collective agreement and applies to non‑unionized employees who have completed 12 consecutive months of continuous employment. A dismissed employee or an inspector can ask the employer for a written statement setting out the reasons for the dismissal. The employer must thenprovide the statement within 15 days. If an adjudicator determines that the dismissal was unjust, he or she has broad authority to grant an appropriate remedy, including requiring the employer to pay the person compensation or reinstate the person. No complaint can be considered by an adjudicator if the employee was laid off because of lack of work or the discontinuance of a function.

Before this Court, as they had in the prior judicial proceedings, the parties accepted that the standard of review was reasonableness. The decisions of labour adjudicatorsor arbitratorsinterpreting statutes or agreements within their expertise attract a reasonableness standard. Applying that standard, the Adjudicator’s decision was reasonable and consistent with the approach overwhelmingly applied to these Unjust Dismissal provisions since they were enacted in 1978. The fact that a handful of adjudicators have taken a different approach to the interpretation of the *Code* does not justify deviating from a reasonableness standard. The Federal Court of Appeal’s position that even if a reasonableness review applied, the Adjudicatorshould be afforded “only a narrow margin of appreciation” because the statutory interpretation in this case “involves relatively little specialized labour insight”, is improper. The reasonableness standard must be applied in the specific context under review, but to attempt to calibrate reasonableness by applying a potentially indeterminate number of varying degrees of deference within it, unduly complicates an area of law in need of greater simplicity.

Some general comments on the need for greater simplicity may be worth airing. This *obiter* on streamlining the standard of review represents an attempt to start a conversation which will ultimately benefitin future casesfrom submissions from counsel. Collapsing the three standards of review into two has not proven to be the runway to simplicity the Court had hoped it would be in *Dunsmuir*. The terminological battles over which of the three standards of review should apply, have been replaced by those over the application of the remaining two. That leaves the merits waiting in the wings for their chance to be seen and reviewed. This complicated entry into judicial review is hard to justify, and directs us institutionally to think about whether there is a principled way to simplify the path to reviewing the merits. The goal is to build on the theories developed in *Dunsmuir* and apply them in a way that eliminates the need to sort cases into artificial categories.

The explanation in *Dunsmuir* for changing the framework then, remains a valid explanation for why it should be changed now. Most of the confusion in the jurisprudence has been over what to call the category of review in a particular case, reasonableness or correctness. The question is whether there is a way to move forward that respects the underlying principles of judicial review which were explained in *Dunsmuir*, while redesigning their implementation in a way that makes them easier to apply.

The most obvious and frequently proposed reform of the current system is a single reviewing standard of reasonableness. Nothing *Dunsmuir* says about the rule of law suggests that constitutional compliance dictates how many standards of review are required. The only requirement, in fact, is that there *be* judicial review in order to ensure, in particular, that decision‑makers do not exercise authority they do not have. There is nothing in its elaboration of rule of law principles that precludes the adoption of a single standard of review, so long as it accommodates the ability to continue to protect both deference *and* the possibility of a single answer where the rule of law demands it, as in the four categories singled out for correctness review in *Dunsmuir.*

A single standard of reasonableness still invites the approach outlined in *Dunsmuir*, namely, that it is concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Approaching the analysis from the perspective of whether the outcome falls within a range of defensible outcomes has the advantage of being able to embrace comfortably the animating principles of both former categories of judicial review. Courts can apply a wider range for those kinds of issues and decision‑makers traditionally given a measure of deference, and a narrow one of only one “defensible” outcome for those which formerly attracted a correctness review. Most decisions will continue to attract deference, as they did in *Dunsmuir*.

Even if there proves to be little appetite for collapsing the two remaining standards of review, it would still be beneficial if the template developed in *Dunsmuir* were adhered to, including by applying the residual “correctness” standard only in those four circumstances *Dunsmuir* articulated.

Returning tothis case, the issue is whether the Adjudicator’s interpretation of ss. 240 to 246 of the *Code* was reasonable. The text, the context, the statements of the Minister of Labour when the legislation was introduced, and the views of the overwhelming majority of arbitrators and labour law scholars, confirm that the entire purpose of the statutory scheme was to ensure that non‑unionized federal employees would be entitled to protection from being dismissed without cause under Part III of the *Code*. The alternative approach of severance pay in lieu falls outside the range of “possible, acceptable outcomes which are defensible in respect of the facts and law” because it completely undermines this purpose by permitting employers, at their option, to deprive employees of the full remedial package Parliament created for them. The rights of employees should be based on what Parliament intended, not on the idiosyncratic view of the individual employer or adjudicator. The Adjudicator’s decision was, therefore, reasonable.

When the provisions were introduced, the Minister referred to the right of employees to fundamental protection from arbitrary dismissal and to the fact that such protection was already a part of all collective agreements. These statements make it difficult to draw any inference other than that Parliament intended to expand the dismissal rights of non‑unionized federal employees in a way that, if not identically, at least analogously matched those held by unionized employees. This is how the new provisions have been interpreted by labour law scholars and almost all the adjudicators appointed to apply them, namely, that the purpose of the 1978 provisions in ss. 240 to 246 was to offer a statutory alternative to the common law of dismissals and to conceptually align the protections from unjust dismissals for non‑unionized federal employees with those available to unionized employees. The new *Code* regime was also a cost‑effective alternative to the civil court system for dismissed employees to obtain meaningful remedies which are far more expansive than those available at common law.

The most significant arbitral tutor for the new provisions came from the way the jurisprudence defined “Unjust Dismissal”. In the collective bargaining context, “unjust dismissal” has a specific and well understood meaning: that employees covered by collective agreements are protected from unjust dismissals and can only be dismissed for “just cause”. This includes an onus on employers to give reasonsshowing why the dismissal is justified, and carries with it a wide remedial package including reinstatement and progressive discipline. The foundational premise of the common law scheme — that there is a right to dismiss on reasonable notice *without* cause or reasons — has been completely replaced under the *Code* by a regime *requiring* reasons for dismissal. In addition, the galaxy of discretionary remedies, including, most notably, reinstatement, as well as the open‑ended equitable relief available, is also utterly inconsistent with the right to dismiss without cause. If an employer can continue to dismiss without cause under the *Code* simply by providing adequate severance pay, there is virtually no role for the plurality of remedies available to the adjudicator under the Unjust Dismissal scheme. Out of the over 1,740 adjudications and decisions since the Unjust Dismissal scheme was enacted, only 28 decisions have not followed this consensus approach.

The remedies newly available in 1978 to non‑unionized employees reflect those generally available in the collective bargaining context. This is what Parliament intended. To infer instead that Parliament intended to maintain the common law under the *Code* regime, creates an anomalous legal environment in which the protections given to employees by statute — reasons, reinstatement, equitable relief — can be superseded by the common law right of employers to dismiss whomever they want for whatever reason they want so long as they give reasonable notice or pay in lieu. This somersaults the accepted understanding of the relationship between the common law and statutes, especially in dealing with employment protections, by assuming the continuity of a more restrictive common law regime notwithstanding the legislative enactment of benefit‑granting provisions to the contrary.

The argument that employment can be terminated without cause so long as minimum notice or compensation is given, on the other hand, would have the effect of rendering many of the Unjust Dismissal remedies meaningless or redundant. Only by interpreting the Unjust Dismissal scheme as representing a displacement of the employer’s ability at common law to fire an employee without reasons if reasonable notice is given, does the scheme and its remedial package make sense. That is how the 1978 provisions have been almost universally applied. It is an outcome that is anchored in parliamentary intention, statutory language, arbitral jurisprudence, and labour relations practice. To decide otherwise would fundamentally undermine Parliament’s remedial purpose.

*Per* McLachlin C.J. andKarakatsanis,WagnerandGasconJJ.: The standard of review in this case is reasonableness and the Adjudicator’s decision was reasonable and should be restored. Justice Abella’s disposition of the appeal on the merits and her analysis of the two conflicting interpretations of the Unjust Dismissal provisions of the *Code* are agreed with. Although her efforts to stimulate a discussion on how to clarify or simplify the standard of review jurisprudence are appreciated, it is unnecessary to endorse any particular proposal to redraw the current standard of review framework at this time.

*Per* Cromwell J.: The standard of review in this case is reasonableness and the Adjudicator’s decision was reasonable. The appeal should be allowed and the decision of the Adjudicator restored for the reasons given by Abella J. Reasonableness is a single standard and must be assessed in the context of the particular type of decision making involved and all relevant factors. Developing new and apparently unlimited numbers of gradations of reasonableness review ― the margins of appreciation approach created by the Federal Court of Appeal ― is not an appropriate development of the standard of review jurisprudence. However, the standard of review jurisprudence does not need yet another overhaul and the approach developed by Abella J. in *obiter* is disagreed with.

PerMoldaver, Côté and Brown JJ. (dissenting): This case exposes a serious concern for the rule of law posed by presumptively deferential review of a decision‑maker’s interpretation of its home statute. In the specific context of this case, correctness review is justified. To conclude otherwise would abandon rule of law values in favour of indiscriminate deference to the administrative state.

For decades, labour adjudicators across the country have come to conflicting interpretations of the unjust dismissal provisions of Part III of the *Canada Labour Code*. These conflicting interpretations go to the heart of the federal employment law regime, and can in theory, persist indefinitely. The simultaneous existence of these conflicting interpretations undermines the rule of law by compromising the cardinal values of certainty and predictability. This state of affairs creates the risk that the *very same* federally regulated employer might be subjected to conflicting legal interpretations regarding whether it can or cannot dismiss an employee without cause. The existence of lingering disagreements amongst decision‑makers also undermines the very basis for deference. Where there is lingering disagreement on a matter of statutory interpretation between administrative decision‑makers, and where it is clear that the legislature could only have intended the statute to bear one meaning, correctness review is appropriate.

While the constructive spirit in which Abella J.’s revisions to the standard of review are proposed in *obiter dicta* is appreciated, it is preferable to confine any statement regarding what is already the subject of a peripatetic body of jurisprudence to a judicial pronouncement.

Sections 240 to 245 of the *Code* create a mechanism for employees to challenge the lawfulness of their dismissal. Employees who are covered by a collective agreement have a similar procedural option to grieve the lawfulness of their dismissals. This procedure is more efficient than a civil action, since it involves less stringent evidentiary rules, an expert adjudicator who is well versed in the factual nuances of employment relationships, and a stricter timeline than a court action. It is a time‑ and cost‑effective method of resolving employment disputes that provides an alternative to judicial determination. Additional remedies are available to employees who choose to use the unjust dismissal provisions. In this way, the unjust dismissal provisions of the *Code* increase access to justice for federal employees who are dismissed from their employment.

But a procedural mechanism that increases access to justice does not, in and of itself, fundamentally alter the legal basis of the federally regulated employment relationship. This procedural mechanism — access to which is dependent on the discretion of the Minister — is not the exclusive means by which a federal employee may challenge the lawfulness of a dismissal. Parliament has expressly preserved the continuing jurisdiction of the civil courts to decide the lawfulness of the dismissal, though the civil courts apply the common law of wrongful dismissal rather than the unjust dismissal provisions of the *Code*. An employee is always entitled to challenge the lawfulness of a dismissal in the civil courts, irrespective of whether the employee first chooses to resort to the unjust dismissal procedure in the *Code*, though subject to the doctrine of issue estoppel. The unjust dismissal provisions are therefore simply a procedural option for federal employees.

The common law continues to define the federal employment relationship and federally regulated employers are entitled to dismiss employees without cause, but with payment of the appropriate notice and severance pay as prescribed by ss. 230 and 235 of the *Code*, the contract of employment, or the common law (whichever is greater). Adjudicators and courts possess concurrent jurisdiction to determine the adequacy of the notice and severance pay and to order any other remedies that may be warranted in the circumstances. The mere provision of a notice and a severance payment does not allow an employer to escape the scrutiny of an adjudicator any more than it would allow the employer to escape the scrutiny of a court.

Permitting federally regulated employers to dismiss their employees without cause would not have the effect of rendering many of the unjust dismissal remedies meaningless or redundant. The remedy of reinstatement is consistent with a “without cause” regime. It is available in almost every provincial employment law regime irrespective of whether that regime permits an employer to dismiss an employee without cause. Under the *Code*, adjudicators currently order reinstatement based on their expert assessment of whether the employer and employee will be able to continue working together in a healthy and productive employment relationship in the future. If the adjudicator has reason to believe that the employer will simply dismiss the employee again, he or she will not order reinstatement. There is no reason to suppose that this practice would change were the continuing right of federally regulated employers to dismiss their employees without cause to be affirmed, as long as the appropriate notice and severance pay is provided.

A dismissal without cause is not *per se* unjust, so long as adequate notice is provided. Because the Adjudicator’s interpretation of ss. 240 to 246 of the *Code* is inconsistent with the text, context and purpose of these provisions, it ought to be set aside and the appeal dismissed.

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By Abella J.

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By Cromwell J.

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By Côté and Brown JJ. (dissenting)

*Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152; *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Altus Group Ltd. v. Calgary (City)*, 2015 ABCA 86, 599 A.R. 223; *Abdoulrab v. Ontario Labour Relations Board*, 2009 ONCA 491, 95 O.R. (3d) 641; *Taub v. Investment Dealers Assn. of Canada*, 2009 ONCA 628, 98 O.R. (3d) 169; *Pierre v. Roseau River Tribal Council*, [1993] 3 F.C. 756; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Champagne v. Atomic Energy of Canada Ltd.*, 2012 CanLII 97650; *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739; *Sharma v. 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Benson*, 2004 MBQB 210, 188 Man. R. (2d) 218; *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Goodyear Tire and Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157; *Lemieux Bélanger v. Commissaires d’Écoles pour la Municipalité de St‑Gervais*, [1970] S.C.R. 948; *Kelso v. The Queen*, [1981] 1 S.C.R. 199; *Ridley v. Gitxaala Nation*, [2009] C.L.A.D. No. 267 (QL); *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *Poulter v. Gull Bay First Nation*, 2011 CarswellNat 3466 (WL Can.); *Morrisseau v. Tootinaowaziibeeng First Nation* (2004), 39 C.C.E.L. (3d) 134; *Parrish & Heinbecker, Ltd. and Knight, Re*, 2006 CarswellNat 6950 (WL Can.).

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*Act to amend the Canada Labour Code*, S.C. 1977‑78, c. 27, s. 21.

*Canada Labour Code*, R.S.C. 1985, c. L‑2, Part III, ss. 167(3), 168, 230, 235, 240 to 246.

*Civil Code of Québec*, art. 2925.

*Employment Standards Act*, R.S.B.C. 1996, c. 113, ss. 74 to 86.2, 79.

*Employment Standards Act*, R.S.P.E.I. 1988, c. E‑6.2, s. 30.

*Employment Standards Act*, S.N.B. 1982, c. E‑7.2, ss. 61 to 76, 65.

*Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 104.

*Employment Standards Code*, C.C.S.M., c. E110, s. 96.1.

*Employment Standards Code*, R.S.A. 2000, c. E‑9, ss. 82, 89(1).

*Labour Standards Act*, R.S.N.L. 1990, c. L‑2, ss. 62, 68 to 73, 78.

*Labour Standards Code*, R.S.N.S. 1989, c. 246, ss. 6, 21, 23, 71, 72, 78.

*Limitation Act*, S.B.C. 2012, c. 13, s. 6(1).

*Limitation of Actions Act*, C.C.S.M., c. L150, s. 2(1).

*Limitation of Actions Act*, R.S.N.S. 1989, c. 258, s. 2(1).

*Limitation of Actions Act*, R.S.N.W.T. 1988, c. L‑8, s. 2(1).

*Limitation of Actions Act*, R.S.N.W.T. (Nu.) 1988, c. L‑8, s. 2(1).

*Limitation of Actions Act*, R.S.Y. 2002, c. 139, s. 2(1).

*Limitation of Actions Act*, S.N.B. 2009, c. L‑8.5, s. 5(1).

*Limitations Act*, R.S.A. 2000, c. L‑12, s. 3(1).

*Limitations Act*, S.N.L. 1995, c. L‑16.1, s. 9.

*Limitations Act*, S.S. 2004, c. L‑16.1, s. 5.

*Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, s. 4.

*Public Service Labour Relations Act*, R.S.N.B. 1973, c. P‑25, ss. 97(2.1) and 100.1.

*Saskatchewan Employment Act*, S.S. 2013, c. S‑15.1, ss. 2‑97(1), 3‑36(1).

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APPEAL from a judgment of the Federal Court of Appeal (Stratas, Webb and Near JJ.A.), 2015 FCA 17, [2015] 4 F.C.R. 467, 467 N.R. 201, 22 C.C.E.L. (4th) 234, 2015 CLLC ¶210‑023, [2015] F.C.J. No. 44 (QL), 2015 CarswellNat 64 (WL Can.), affirming a decision of O’Reilly J., 2013 FC 733, 435 F.T.R. 300, 9 C.C.E.L. (4th) 208, 2013 CLLC ¶210‑043, [2013] F.C.J. No. 825 (QL), 2013 CarswellNat 2376 (WL Can.). Appeal allowed, Moldaver, Côté and Brown JJ. dissenting.

James A. LeNoury, Avi Sirlin and Reagan Ruslim, for the appellant.

Ronald M. Snyder and *Eugene F. Derényi*, for the respondent.

Steven Barrett and Louis Century, for the intervener the Canadian Labour Congress.

Stacey Reginald Ball and Anne Marie Frauts, for the intervener the Canadian Association for Non‑Organized Employees.

Christopher D. Pigott and Christina E. Hall, for the interveners the Federally Regulated Employers — Transportation and Communications and the Canadian Association of Counsel to Employers.

The judgment was delivered by

1. Abella J. — At common law, a non-unionized employee could be dismissed without reasons if he or she was given reasonable notice or pay in lieu. The issue in this appeal is whether Parliament’s intention behind amendments to the *Canada Labour Code*[[1]](#footnote-1) in 1978 was to offer an alternative statutory scheme consisting of expansive protections much like those available to employees covered by a collective agreement. In my respectful view, like almost all of the hundreds of adjudicators who have interpreted the scheme, I believe that is exactly what Parliament’s intention was.

Background

1. In 1971, Parliament passed amendments to the *Canada Labour Code*[[2]](#footnote-2)setting out the notice requirements for firingnon-unionized employees who had worked for three or more consecutive months.[[3]](#footnote-3) The amendments also stipulated a minimal rate of severance pay for those who had worked for 12 months.[[4]](#footnote-4) Employees dismissed for just cause are not entitled toeither notice or severance pay.
2. More fundamental reforms were enacted in 1978, when the *Code* was again amended by adding a series of provisions to Part III under the heading “Unjust Dismissal”.[[5]](#footnote-5) They are found at ss. 240 to 246.[[6]](#footnote-6) This Unjust Dismissal scheme applies to non-unionized employees who have completed 12 consecutive months of continuous employment. Any such employee who has been dismissed has 90 days to make a complaint in writing to an inspector if the employee considers the dismissal to be unjust (s. 240).
3. A dismissed employee or an inspector can ask the employer for a written statement setting out the reasons for the dismissal. The employer must thenprovide the statement within 15 days (s. 241(1)).
4. An inspector is required to try to immediately settle the complaint (s. 241(2)). If the complaint cannot be settled within a reasonable time, the inspector can, at the request of the dismissed employee, refer the matter to the Minister (s. 241(3)), who may appoint an adjudicator to hear the complaint (s. 242(1)). The report of an inspector acts as a screening mechanism to prevent complaints which are frivolous, vexatious or clearly unmeritorious from proceeding to adjudication: Harry W. Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century* (2006), at pp. 179-80 (Arthurs Report).
5. The mandate of the adjudicator is to determine whether the dismissal was unjust (s. 242(3)). If it was, the adjudicator has broad authority to grant an appropriate remedy (s. 242(4)), including requiring the employer to

**(a)** pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

**(b)** reinstate the person in his employ; and

**(c)** do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

1. No complaint can be considered by an adjudicator if the employee was laid off because of lack of work or the discontinuance of a function (s. 242(3.1)(a)).

Prior Proceedings

1. Joseph Wilson was hired by Atomic Energy Canada Limited (AECL)[[7]](#footnote-7) as a Senior Buyer/Order Administrator in 2005 and was later promoted to Procurement Supervisor. He worked for four and a half years until his dismissal in November 2009. He had a clean disciplinary record.
2. Mr. Wilson filed an “Unjust Dismissal” complaint in December 2009, claiming that he was unjustly dismissed contrary to s. 240(1) of the *Code*. In response to a request from an inspector for the reasons for Mr. Wilson’s dismissal, AECL sent a letter in March 2010 saying that he was “terminated on a non-cause basis and was provided a generous severance package that well exceeded the statutory requirements. We trust you will find the above satisfactory.”
3. Mr. Wilson claimed that his dismissal was in reprisal for having filed a complaint of improper AECL procurement practices.
4. A labour Adjudicator, Prof. Stanley Schiff, was appointed to hear the complaint. AECL sought a preliminary ruling on whether a dismissal without cause together with a sizeable severance package meant that the dismissal was a just one.
5. The parties agreed that regardless of the Adjudicator’s ruling on this preliminary issue, he retained jurisdiction to hear Mr. Wilson’s allegations of reprisal.
6. The Adjudicator concluded that he was bound by *Redlon Agencies Ltd. v. Norgren*, 2005 FC 804, which had held that an employer could not resort to severance payments, however generous, to avoid a determination under the *Code* about whether the dismissal was unjust. Because AECL did not rely on any cause to fire him, Mr. Wilson’s complaint was allowed.
7. The Application Judge found this decision was unreasonable because, in his view, nothing in Part III of the *Code* precluded employers from dismissing non-unionized employees on a without-cause basis. The Federal Court of Appeal agreed, but reviewed the issue on a standard of correctness.

Analysis

1. The parties before this Court, as they had in all the prior judicial proceedings, accepted that the standard of review was reasonableness. I agree. The decisions of labour adjudicators or arbitratorsinterpreting statutes or agreements within their expertise attract a reasonableness standard: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para. 68; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*,[2011] 3 S.C.R. 616, at para. 42.
2. The Federal Court of Appeal itself, including two of the judges who decided the case before us, recently held in *Yue v. Bank of Montreal*, 2016 FCA 107, 483 N.R. 375, that the decisions of adjudicators applying the Unjust Dismissal provisions of the *Code* attract a reasonableness standard:

It is well-settled that the reasonableness standard applies to review of adjudicators’ decisions under Division XIV of Part III of the *Code*, generally, and to their interpretations of what sorts of employer conduct constitute an unjust dismissal: *Payne v. Bank of Montreal*, 2013 FCA 33 at paragraphs 32-33, [443] N.R. 253; *MacFarlane v. Day & Ross*, 2014 FCA 199 at paragraph 3, 466 N.R. 53; *Donaldson v. Western Grain By-Products Storage Ltd.*, 2015 FCA 62 at paragraph 33, 469 N.R. 189. [para. 5]

1. Applying that standard, the Adjudicator’s decision was reasonable and consistent with the approach overwhelmingly applied to these provisions since they were enacted. It is true that a handful of adjudicators have taken a different approach to the interpretation of the *Code*, but as this Court has repeatedly said, this does not justify deviating from a reasonableness standard: *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, at para. 71; *Dunsmuir*, at paras. 55-56; *Smith v. Alliance Pipeline Ltd*., [2011] 1 S.C.R. 160, at para. 38; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd*., [2013] 2 S.C.R. 458, at paras. 7-8.
2. Nor do I accept the position taken in this case by the Federal Court of Appeal that even if a reasonableness review applied, the Adjudicator should be afforded “only a narrow margin of appreciation” because the statutory interpretation in this case “involves relatively little specialized labour insight”. As this Court has said, the reasonableness standard must be applied in the specific context under review. But to attempt to calibrate reasonableness by applying a potentially indeterminate number of varying degrees of deference within it, unduly complicates an area of law in need of greater simplicity.
3. But while it is true that the standard of review in this case falls easily into our jurisprudence, it seems to me that some general comments about standard of review are worth airing, albeit in *obiter*. There are undoubtedly many models that would help simplify the standard of review labyrinth we currently find ourselves in. I offer the following proposal as an option only, for purposes of starting the conversation about the way forward. Because it is only the beginning of the conversation, which will benefit over time from submissions from counsel, this proposal is not intended in any way to be comprehensive, definitive, or binding.
4. A substantial portion of the parties’ factums and the decisions of the lower courts in this case were occupied with what the applicable standard of review should be. This, in my respectful view, is insupportable, and directs us institutionally to think about whether this obstacle course is necessary or whether there is a principled way to simplify the path to reviewing the merits.
5. For a start, it would be useful to go back to the basic principles set out in *Dunsmuir*, under which two approaches were enunciated for reviewing administrative decisions. The first is deferential, and applies when there is a range of reasonable outcomes defensible on the facts and law. This is by far the largest group of cases. Deference is succinctly explained in *Dunsmuir* as follows:

It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view.  Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. [para. 48]

1. The reason for the wide range is, as Justice John M. Evans explained, because “[d]eference . . . assumes that there is no uniquely correct answer to the question”: “Triumph of Reasonableness: But How Much Does It Really Matter?” (2014), 27 *C.J.A.L.P.* 101, at p. 108. The range will necessarily vary. As Chief Justice McLachlin noted, reasonableness “must be assessed in the context of the particular type of decision making involved and all relevant factors” and “takes its colour from the context”: *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5, at paras. 18, citing with approval *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, at para. 59.
2. The other approach, called correctness, was applied when only a single defensible answer is available. As set out in *Dunsmuir*, this applied to constitutional questions regarding the division of powers (para. 58), “true questions of jurisdiction or *vires*” (para. 59), questions of general law that are “both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise” (para. 60), and “[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals” (para. 61).
3. Most of the confusion in our jurisprudence has been over what to call the category of review in a particular case. Perhaps it is worth thinking about whether it is really necessary to engage in rhetorical debates about what to call our conclusions at the end of the review. Are we not saying essentially the same thing when we conclude that there is only a single “reasonable” answer available and when we say it is “correct”? And this leads to whether we need two different names for our approaches to judicial review, or whether both approaches can live comfortably under a more broadly conceived understanding of reasonableness.
4. It may be helpful to review briefly how we got here. In *Dunsmuir*, this Court sought to provide “a principled framework that is more coherent and workable” for the judicial review of administrative decisions (para. 32). As a result, the three existing standards of review were replaced by two. The aim was to simplify judicial review. But collapsing three into two has not proven to be the runway to simplicity the Court had hoped it would be.In fact, the terminological battles over which of the three standards of review should apply have been replaced by those over the application of the remaining two. And so we still find the merits waiting in the wings for their chance to be seen and reviewed.
5. However, where once the confusion was over the difference between patent unreasonableness and reasonableness *simpliciter*, we now find ourselves struggling over the difference between reasonableness and correctness. In my respectful view, this complicated entry into judicial review is hard to justify. Ironically, the explanation in *Dunsmuir* for changing the framework then remains a valid explanation for why it should be changed now, as the following excerpts show:

The recent history of judicial review in Canada has been marked by ebbs and flows of deference, confounding tests and new words for old problems, but no solutions that provide real guidance for litigants, counsel, administrative decision makers or judicial review judges. The time has arrived for a reassessment of the question.

. . .

Despite the clear, stable constitutional foundations of the system of judicial review, the operation of judicial review in Canada has been in a constant state of evolution over the years, as courts have attempted to devise approaches to judicial review that are both theoretically sound and effective in practice. Despite efforts to refine and clarify it, the present system has proven to be difficult to implement. The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.

. . . it has become apparent that the present system must be simplified. [paras. 1 and 32-33]

1. *Dunsmuir* had pointed out that courts were struggling with the “conceptual distinction” between two of the standards — patent unreasonableness and reasonableness *simpliciter* — and were finding that “any actual difference between them in terms of their operation appears to be illusory” (paras. 39-41). An argument can be made, as Prof. David Mullan has, that this Court too has blurred the conceptual distinctions in a number of cases, this time between correctness and reasonableness standards of review, and has sometimes engaged in “disguised correctness” review while ostensibly conducting a reasonableness review.[[8]](#footnote-8) Others too have expressed concerns about inconsistency and confusion in how the standards have been applied.[[9]](#footnote-9) The question then is whether there is a way to move forward that respects the underlying principles of judicial review which were so elegantly and definitively explained in *Dunsmuir*, while redesigning their implementation in a way that makes them easier to apply.
2. The most obvious and frequently proposed reform of the current system is a single reviewing standard of reasonableness. Before accepting it, it is important to remember the rule of law imperatives of judicial review. *Dunsmuir* discussed the relationship between judicial review and the rule of law in the opening paragraphs of its analysis:

As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law.  It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation.  Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution.  Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes. [paras. 27-28]

1. What this means is that “[t]he legislative branch of government cannot remove the judiciary’s power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. . . . In short, judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits” (*Dunsmuir*, at para. 31).
2. Notably, judicial review also “performs an important constitutional function in maintaining legislative supremacy”, which results in “the court-centric conception of the rule of law [being] reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law”: *Dunsmuir*, at para. 30, citing Justice Thomas Cromwell, “Appellate Review: Policy and Pragmatism”, in *2006 Isaac Pitblado Lectures*, at p. V-12.
3. Nothing *Dunsmuir* says about the rule of law suggests that constitutional compliance dictates how many standards of review are required. The only requirement, in fact, is that there *be* judicial review in order to ensure, in particular, that decision-makers do not exercise authority they do not have. I see nothing in its elaboration of rule of law principles that precludes the adoption of a single standard of review, so long as it accommodates the ability to continue to protect both deference *and* the possibility of a single answer where the rule of law demands it, as in the four categories singled out for correctness review in *Dunsmuir.*
4. A single standard of reasonableness still invites the approach outlined in *Dunsmuir*, namely:

. . . reasonableness is concerned . . . with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para. 47]

1. Approaching the analysis from the perspective of whether the outcome falls within a range of defensible outcomes has the advantage of being able to embrace comfortably the animating principles of both former categories of judicial review. Courts can apply a wider range for those kinds of issues and decision-makers traditionally given a measure of deference, and a narrow one of only one “defensible” outcome for those which formerly attracted a correctness review. Most decisions will continue to attract deference, as they did in *Dunsmuir*, which means, as Justice Evans noted

[that] a court may be more likely to conclude that a range of reasonable interpretative choices exists, and that deference is meaningful, when the tribunal’s authority is conferred in broad terms. If, for example, a tribunal is authorized to make a decision on the basis of the public interest, a reviewing court may well decide that the tribunal has a range of choices in selecting the factors it will consider in making its decision. At this point, questions of law shade imperceptibly into questions of discretion. Reasonableness review permits the court to determine whether the factors considered by the tribunal are rationally related to the generally multiple statutory objectives. It is not the court’s role to identify the factors to be considered by the tribunal, let alone to reweigh them. [Footnote omitted; p. 110.]

1. Even in statutory interpretation, the interpretive exercise will usually attract a wide range of reasonable outcomes.This Court in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559, for example, found that the Minister had considerable latitude in interpreting a statutory provision that required decisions be made in the “national interest”.
2. But there may be rare occasions where only one “defensible” outcome exists. In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471, for example, this Court found that the ordinary tools of statutory interpretation made it clear that the administrative body under review did not have the authority to award costs in a specific context. In the particular circumstances of that case, no other result fell within the range of reasonable outcomes. Similarly, this Court has set aside decisions when they fundamentally contradicted the purpose or policy underlying the statutory scheme: *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, [2012] 2 S.C.R. 108.
3. The four categories, however, which were identified as attracting correctness under *Dunsmuir* based on rule of law principles, always yield only one reasonable outcome.
4. I acknowledge that no attempt to simplify the review process will necessarily guarantee consistent outcomes. Even under the current *Dunsmuir* model, there have been cases in this Court where judges applied the same standard, yet came to different conclusions about the decisional effect of applying the standard.[[10]](#footnote-10) But the goal is not to address all possible variables, it is to build on the theories developed in *Dunsmuir* and to apply them in a way that eliminates the need to sort cases into artificial categories.
5. Even if, however, there proves to be little appetite for collapsing the two remaining standards of review, it would, I think, still be beneficial if the template so compellingly developed in *Dunsmuir*, were adhered to, including by applying the residual “correctness” standard only in those four circumstances *Dunsmuir* articulated.
6. But as previously noted, in this case we need not do more than apply our usual approach to reasonableness. The issue here is whether the Adjudicator’s interpretation of ss. 240 to 246 of the *Code* was reasonable. The text, the context, the statements of the Minister when the legislation was introduced, and the views of the overwhelming majority of arbitrators and labour law scholars, confirm that the entire purpose of the statutory scheme was to ensure that non-unionized federal employees would be entitled to protection from being dismissed without cause under Part III of the *Code*. The alternative approach of severance pay in lieu falls outside the range of “possible, acceptable outcomes which are defensible in respect of the facts and law” because it completely undermines this purpose by permitting employers, at their option, to deprive employees of the full remedial package Parliament created for them. The rights of employees should be based on what Parliament intended, not on the idiosyncratic view of the individual employer or adjudicator.
7. Adjudicator Schiff’s decision was, therefore, reasonable.
8. As previously noted, Parliament passed amendments to the *Code* in 1971 which included provisions setting out the minimum remuneration owed to an employee whose employment had been terminated if that employee worked for a threshold number of consecutive months and was not dismissed for just cause. These provisions are now found in ss. 230(1) and 235(1) of the *Code*, both in Part III. The enactment of these provisions neither codified nor extinguished the common law; instead, it offered an alternative to going to court by setting out minimum entitlements for dismissed employees who wanted to avoid the expense and uncertainty of civil litigation: Arthurs Report, at pp. 172-74.
9. In 1978, Parliament further amended the *Code* and established the Unjust Dismissal scheme, currently found in ss. 240 to 246 in Part III of the *Code*. The central question in this case is what effect the 1978 amendments had on the rights of non-unionized employees whose employment had been terminated. When the provisions were introduced, the then Minister of Labour, the Hon. John Munro, said:

It is our hope that [the amendments] will give at least to the unorganized workers *some of the minimum standards* which have been won by the organized workers and which are now embodied in their collective agreements. We are not alleging for one moment that they match the standards set out in collective agreements, but we provide here a minimum standard. [Emphasis added.]

(*House of Commons Debates*, vol. II, 3rd Sess., 30th Parl., December 13, 1977, at p. 1831)

1. He explained the purpose of the new “Unjust Dismissal” provisions to the Standing Committee on Labour, Manpower and Immigration in March 1978 as follows:

The intent of this provision is to provide employees not represented by a union, including managers and professionals, with the right to appeal against arbitrary dismissal — protection the government believes to be a fundamental right of workers and already a part of all collective agreements.

(House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Labour, Manpower and Immigration, Respecting Bill C-8, An Act to amend the Canada Labour Code*, No. 11, 3rd Sess., 30th Parl., March 16, 1978, at p. 46)

1. The references in this statement to the right of employees to “fundamental” protection from arbitrary dismissal and to the fact that such protection was “already a part of all collective agreements”, make it difficult, with respect, to draw any inference other than that Parliament intended to expand the dismissal rights of non-unionized federal employees in a way that, if not identically, then certainly analogously matched those held by unionized employees.
2. Parliament’s intentions were also on display when, the previous August, the Minister acknowledged that while the terminology of “just” and “unjust” was, on its face, ambiguous, the extensive arbitral jurisprudence from organized labour would illuminate the way forward for non-unionized federal employees who were dismissed:

I realize that the terms “just” or “unjust” are sometimes difficult to define. However, we have a vast body of arbitral jurisprudence on dismissals in the organized sector. They contain precedents that will enable arbitrators to determine whether a firing is warranted or not. Each case has to be decided according to its circumstances, but the application of the principles of fairness and common sense have established pretty clearly what constitutes just or unjust dismissal.

(The Hon. John Munro, “A better deal for Canada’s unorganized workers” (1977), 77 *The Labour Gazette* 347, at p. 349)

1. And this, in fact, is how the new provisions have been interpreted by labour law scholars and almost all the adjudicators appointed to apply them, namely, that the purpose of the 1978 provisions in ss. 240 to 246 was to offer a statutory alternative to the common law of dismissals and to conceptually align the protections from unjust dismissals for non-unionized federal employees with those available to unionized employees: Geoffrey England, “Unjust Dismissal in the Federal Jurisdiction: The First Three Years” (1982), 12 *Man. L.J.* 9, at p. 10; Innis Christie, *Employment Law in Canada* (2nd ed. 1993), at p. 669; Arthurs Report, at p. 172.
2. The effect of the 1978 amendments was to limit the applicability of the notice requirements in s. 230(1) and the minimum severance provisions in s. 235(1) to circumstances that fell outside the Unjust Dismissal provisions. The notice and severance pay requirements under ss. 230(1) and 235(1), for example, apply to managers, those who are laid off due to lack of work or discontinuance of a function, and, in the case of s. 230(1), employees who have worked for the employer for more than 3 consecutive months but less than 12 months. In other words, ss. 230(1) and 235(1) are not an alternative to the Unjust Dismissal provisions in ss. 240 to 246, they apply only to those who do not or cannot avail themselves of those provisions: *Redlon Agencies*,at paras. 38-39; *Wolf Lake First Nation v. Young* (1997), 130 F.T.R. 115, at para. 50.
3. The soundness of the consensus among adjudicators interpreting the Unjust Dismissal provisions was confirmed in Prof. Arthurs’ 2006 report on Part III of the *Code*, commissioned by the then Minister of Labour. In preparing his report, Prof. Arthurs established a 16-person Commission Secretariat, consulted two advisory panels (one consisting of impartial experts and the other of labour and management representatives), held two academic round tables engaging 38 participants from almost 20 universities as well as industry groups, and consulted 23 independent research studies conducted by leading Canadian and foreign experts. Nine additional studies were provided by Commission staff on topics such as comparisons between Part III and labour standards legislation across Canada and in other countries. The Commission heard from 171 groups and individuals at public hearings and received over 154 briefs and other submissions. The Commission also met with labour, management and community-based organizations, and labour standards administrators and practitioners.
4. After this extensive review of Part III of the *Code* and its application, Prof. Arthurs confirmed that the goal of the new “Unjust Dismissal” provisions was meant to give “unorganized workers protection against unjust dismissal *somewhat comparable to that enjoyed by unionized workers under collective agreements*” (p. 172 (emphasis added)):

. . . over the years the adjudication system has not only remedied many of the procedural shortcomings of civil litigation, it has significantly modified the old civil and common law doctrines governing wrongful dismissal. . . . Adjudicators, borrowing extensively from the jurisprudence developed over the years by arbitrators in unionized workplaces, have built up their own distinctive doctrines that confer on unorganized federal workers quite extensive substantive and procedural protections. . . . [T]his has coincided with, and arguably hastened, the adoption of progressive attitudes and practices in the field of workplace discipline, many of which were also advocated by human resource and industrial relations professionals as a matter of best practice. [p. 178]

(See also Gilles Trudeau, “Is Reinstatement a Remedy Suitable to At-Will Employees?” (1991), 30 *Indus. Rel.* 302, at pp. 312-13.)

1. The new *Code* regime was also a cost-effective alternative to the civil court system for dismissed employees to obtain meaningful remedies which are far more expansive than those available at common law. As Prof. Arthurs observed:

At common . . . law, employers who wish to reconfigure or reduce their workforce for business reasons are obliged to give “reasonable” notice to employees they intend to dismiss, unless the contract of employment provides otherwise. Of course, as with other protections supposedly enjoyed by workers under the general law, this one has always been difficult to enforce. Nonetheless, it remains the law today, and Part III does nothing to change it. What Part III does do is establish a different, more accessible procedure under which workers confronting discharge for business or economic reasons can claim notice and compensation without having to sue.

. . .

In effect, then, one great merit . . . is that it overcomes the main deficiencies of civil litigation. It provides effective remedies and it removes cost barriers to access to justice. It thereby translates a universally accepted principle — that no one should be dismissed without just cause — into a practical reality. Part III can therefore be understood as an exercise in the reform of civil justice. [pp. 172-73 and 177]

1. The most significant arbitral tutor for the new provisions came from the way the jurisprudence defined “Unjust Dismissal”. It is true, as the Federal Court of Appeal noted, that the word “unjust” is a familiar one in the legal profession’s tool kit and has a generic, even iconic role. In the collective bargaining context, however, it has a specific and well understood — and no less iconic — meaning: that employees covered by collective agreements are protected from Unjust Dismissals and can only be dismissed for “just cause”. This includes an onus on employers to give reasonsshowing why the dismissal is justified, and carries with it a wide remedial package including reinstatement and progressive discipline. As in the 1978 provisions, there is no Unjust Dismissal protection in the case of layoffs or discontinuance of a job.
2. Notably, adjudicators did not interpret their mandate as requiring the *automatic* application of the arbitral jurisprudence or any remedies. Instead, while they “have drawn heavily” from it, they also “modified it in order to reflect the differences at play in the non-unionized environment”: Christie, at p. 688.
3. The decision which continues to be the accepted theoretical template, was the 1979 decision of Prof. George W. Adams in *Roberts v. Bank of Nova Scotia* (1979), 1 L.A.C. (3d) 259 (Can.). It helps illuminate what is generally understood by the terms “just cause” and “Unjust Dismissal”:

I am of the view that when Parliament used the notion of “unjustness” in framing [ss. 240 to 246], it had in mind the right that most organized employees have under collective agreements — the right to be dismissed only for “just cause”. I am of this view because the common law standard is simply “cause” for dismissal whereas “unjust” denotes a much more qualitative approach to dismissal cases. Indeed, in the context of modern labour relations, the term has a well understood content — a common law of the shop if you will: see Cox, “Reflections Upon Labour Arbitration”, 72 Harv. L. Rev. 1482 (1958) at p. 1492. But having said that, I do not deny that the statute is silent on a whole host of important considerations that will, in any particular case, affect the precise meaning to be given to “justness”. [pp. 264-65]

1. He concluded that Parliament must also have had the concept of progressive discipline in mind (*Roberts*, at pp. 265-66). This concept generally requires employers seeking to justify the dismissal to demonstrate that they have made the employee aware of performance problems, worked with the employee to rectify them, and imposed “a graduated repertoire of sanctions before resorting to the ultimate sanction of dismissal”: Arthurs Report, at p. 96; Christie, at pp. 690-91.
2. Prof. Adams explained why he thought progressive discipline was incorporated into the scheme:

Under a collective agreement, arbitrators have adopted the concept of progressive discipline, subject to specific provisions under the collective agreement to the contrary. . . .

. . . Parliament must have had this basic concept in mind when it enacted the instant provision because it is the very essence of “justness” in any labour relations sense . . . . [M]ore fundamentally, it would be my view that on the enactment of [ss. 240 to 246] all employers subject to this new provision were accorded the powers to meet the requirements of progressive discipline. With the greatest of respect, [a] more technical and contrary interpretation . . . would simply frustrate and squander the purpose of this legislation. [Citations omitted.]

(*Roberts*, at pp. 265-66)

1. But he also noted that adjudicators should be mindful of the varying employment contexts under the *Code*, so that the arbitral jurisprudence is not rigidly applied:

However, this does not mean that Adjudicators should import the law of the collective agreement in discipline cases unthinkingly and without modification. They should be extremely sensitive to the varying employment contexts subject to this new provision of the Code, many of which may not fit comfortably within the “industrial” discipline model. In such cases appropriate modifications can be made as required. Thus, I must ask whether the use of suspensions in the banking industry ought not to be required.

(*Roberts*, at p. 266)

1. Ultimately Prof. Adams concluded that while the dismissal in the case before him was unjust, he did not consider reinstatement to be an appropriate remedy in the circumstances. Instead, he awarded Ms. Roberts the equivalent of five months’ wages.
2. What turned out to be the consensus interpretation of the new provisions as reflected in the *Roberts* decision, was also the interpretation accepted by Prof. Gordon Simmons in a report commissioned by Labour Canada to explain the provisions:

For some guidance as to what constitutes just or unjust dismissal we can turn to nearly three decades of dismissal decisions pursuant to collective agreements. There are no hard and fast rules as each situation must be determined according to the particular circumstances of each case. However, the arbitral jurisprudence which has been developed can act as a guide to what have traditionally been regarded as sufficient or insufficient grounds for just dismissal.

(C. Gordon Simmons, *Meaning of Dismissal: The Meaning of Dismissals Under Division V.7 of Part III of the Canada Labour Code* (1979), at p. 1)

1. Until 1994, when Adjudicator T. W. Wakeling broke away in *Knopp v. Westcan Bulk Transport Ltd.*, [1994] C.L.A.D. No. 172 (QL), the adjudicative path was clear that an employee could only be dismissed for just cause as that term was understood in the collective bargaining context. Adjudicator Wakeling’s revisionism led him to conclude that the common law approach applied, and that if the employer has satisfied the requirements in ss. 230(1) and 235(1) of the *Code* or according to the common law, whichever amount is higher, the dismissal would not be unjust. His is the interpretation accepted by the Federal Court of Appeal in this case.
2. Out of the over 1,740 adjudications and decisions since the Unjust Dismissal scheme was enacted, my colleagues have identified only 28 decisions that are said to have followed the Wakeling approach: Reagan Ruslim, “Unjust Dismissal Under the *Canada Labour Code*: New Law, Old Statute” (2014), 5:2 *U.W.O. J. Leg. Stud.* 3 (online), at p. 28. Of these 28 decisions, 10 were rendered after this case was decided at the Federal Court and are therefore not relevant to determining the degree of “discord” amongst adjudicators before this case was heard: *Sharma v. Maple Star Transport Ltd.*, 2015 CanLII 43356; *G & R Contracting Ltd. and Sandhu, Re*, 2015 CarswellNat 7465 (WL Can.); *Pare v. Corus Entertainment Inc.*, [2015] C.L.A.D. No. 103 (QL); *Madill v. Spruce Hollow Heavy Haul Ltd.*, [2015] C.L.A.D. No. 114 (QL); *Swanson and Qualicum First Nation, Re* (2015), 26 C.C.E.L. (4th) 139; *O’Brien v. Mushuau Innu First Nation*, 2015 CanLII 20942; *Newman v. Northern Thunderbird Air Inc.*, [2014] C.L.A.D. No. 248 (QL); *Taypotat v. Muscowpetung First Nation*, [2014] C.L.A.D. No. 53 (QL); *Payne and Bank of Montreal, Re* (2014), 16 C.C.E.L. (4th) 114; and *Sharma and Beacon Transit Lines Inc., Re*, 2013 CarswellNat 4148 (WL Can.).
3. That leaves 18 cases that have applied the Wakeling approach. Three of them were decided by Adjudicator Wakeling himself. In other words, the “disagreement [that] has persisted for at least two decades” referred to by my colleagues consists of, at most, 18 cases out of over 1,700 (para. 74). What we have here is a drop in the bucket which is being elevated to a jurisprudential parting of the waters.
4. Even AECL concedes in its factum that “[t]he majority of adjudicators have held that employees may only be dismissed for just cause.” This consensus is hardly surprising given the unchallenged goals of the Unjust Dismissal scheme and their incompatibility with what is available under the common law.
5. In fact, the foundational premise of the common law scheme — that there is a right to dismiss on reasonable notice without cause or reasons — has been completely replaced under the *Code* by a regime *requiring* reasons for dismissal. In addition, the galaxy of discretionary remedies, including, most notably, reinstatement, as well as the open-ended equitable relief available under s. 242(4)(c), are also utterly inconsistent with the right to dismiss without cause. If an employer can continue to dismiss without cause under the *Code* simply by providing adequate severance pay, there is virtually no role for the plurality of remedies available to the adjudicator under ss. 240 to 245.
6. It is true that under s. 246, dismissed employees may choose to pursue their common law remedy of reasonable notice or pay in lieu in the civil courts instead of availing themselves of the dismissal provisions and remedies in the *Code*. But if they choose to pursue their rights under the Unjust Dismissal provisions of the *Code*, only those provisions apply. As Prof. Arthurs observed in his Report:

. . . the two types of proceedings differ most importantly in other respects.

The first relates to remedies. If successful in a civil action, an employee is entitled to damages equivalent to whatever compensation he or she would have received if the employment contract had been allowed to run its natural course — that is, for whatever period of notice would have been “reasonable.” If an employer has been unfair or high-handed in carrying out the discharge, the employee may be awarded additional damages. *By contrast, if successful before an Adjudicator under Part III, an employee is entitled both to reinstatement and to compensation, not only for the duration of the notice period, but for all losses attributable to the discharge. These are potentially more extensive and expensive remedies than those a court might award*. [Emphasis added; p. 177.]

1. It is worth noting that the *Code*’s scheme, which was enacted in 1978, was preceded by similar Unjust Dismissal protection in Nova Scotia in 1975, and followed by a similar scheme in Quebec in 1979.[[11]](#footnote-11) Unlike other provinces, the Nova Scotia and Quebec schemes display significant structural similarities to the federal statute. They apply only after an employee has completed a certain period of service and do not apply in cases of termination for economic reasons or layoffs. Like the federal scheme, the two provincial ones have been consistently applied as prohibiting dismissals without cause, and grant a wide range of remedies such as reinstatement and compensation.
2. It seems to me to be significant that in *Syndicat de la fonction publique du Québec v. Quebec (Attorney General)*, [2010] 2 S.C.R. 61, interpreting the Unjust Dismissal provision in the Quebec Act, this Court concluded that “[a]lthough procedural in form”, the provision creates “a substantive labour standard” (para. 10). It would be untenable not to apply the same approach to the Unjust Dismissal provision in the federal *Code*, and instead to characterize the provision as a mere procedural mechanism.
3. The remedies newly available in 1978 to non-unionized employees reflect those generally available in the collective bargaining context. And this, as Minister Munro stated, is what Parliament intended. To infer instead that Parliament intended to maintain the common law under the *Code* regime, creates an anomalous legal environment in which the protections given to employees by statute — reasons, reinstatement, equitable relief — can be superseded by the common law right of employers to dismiss whomever they want for whatever reason they want so long as they give reasonable notice or pay in lieu. This somersaults our understanding of the relationship between the common law and statutes, especially in dealing with employment protections, by assuming the continuity of a more restrictive common law regime notwithstanding the legislative enactment of benefit-granting provisions to the contrary: *Machtinger v. HOJ Industries Ltd*., [1992] 1 S.C.R. 986, at p. 1003; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 36.
4. AECL’s argument that employment can be terminated without cause so long as minimum notice or compensation is given, on the other hand, would have the effect of rendering many of the Unjust Dismissal remedies meaningless or redundant. The requirement to provide reasons for dismissal under s. 241(1), for example, would be redundant. And, if an employee were ordered to be reinstated under s. 242(4)(b), it could well turn out to be a meaningless remedy if the employer could simply dismiss that employee again by giving notice and severance pay. These consequences result in statutory incoherence. Only by interpreting ss. 240 to 246 as representing a displacement of the employer’s ability at common law to fire an employee without reasons if reasonable notice is given, does the scheme and its remedial package make sense.
5. That is how the 1978 provisions have been almost universally applied, including — reasonably — by the Adjudicator hearing Mr. Wilson’s complaint. It is an outcome that is anchored in parliamentary intention, statutory language, arbitral jurisprudence, and labour relations practice. To decide otherwise would fundamentally undermine Parliament’s remedial purpose. I would allow the appeal with costs throughout and restore the decision of the Adjudicator.

The following are the reasons delivered by

1. The Chief Justice and Karakatsanis, Wagner and Gascon JJ. — We agree with Justice Abella that, under the current framework, the standard of review is reasonableness. We also agree with her disposition of the appeal on the merits and with her analysis of the two conflicting interpretations of the Unjust Dismissal provisions of the *Canada Labour Code*, R.S.C. 1985, c. L-2, proposed to the Court. Adjudicator Schiff’s decision was reasonable, and it should be restored. We appreciate Justice Abella’s efforts to stimulate a discussion on how to clarify or simplify our standard of review jurisprudence to better promote certainty and predictability. However, as it is unnecessary to do so in order to resolve this case, we are not prepared to endorse any particular proposal to redraw our current standard of review framework at this time.

The following are the reasons delivered by

1. Cromwell J. — I agree with Justice Abella, for the reasons she gives at paras. 15-18 and 38-40, that the standard of review is reasonableness. I also agree, for the reasons she gives at paras. 41-69, that the adjudicator’s decision was reasonable. I therefore agree that the appeal should be allowed with costs throughout and that the decision of the adjudicator should be restored. I write separately only to indicate two things.
2. The first is that, in my respectful view, our standard of review jurisprudence does not need yet another overhaul and that, as a result, I respectfully disagree with the approach that Justice Abella develops in *obiter*. In my view, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, sets out the appropriate framework for addressing the standard of judicial review. No doubt, that framework can and will be refined so that the applicable standard of review may be identified more easily and more consistently. But the basic *Dunsmuir* framework is sound and does not require fundamental re-thinking.
3. The second and related point is to underline my agreement with para. 18 of Justice Abella’s reasons in which she rejects the Federal Court of Appeal’s approach of attempting “to calibrate reasonableness by applying a potentially indeterminate number of varying degrees of deference”. Of course, reasonableness, while “a single standard” nonetheless “takes its colour from the context”: see, e.g., *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 18; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at para. 74. Reasonableness must, therefore, “be assessed in the context of the particular type of decision making involved and all relevant factors”: *Catalyst Paper Corp.*, at para. 18. However, in my opinion, developing new and apparently unlimited numbers of gradations of reasonableness review — the margins of appreciation approach created by the Federal Court of Appeal — is not an appropriate development of the standard of review jurisprudence.

The reasons of Moldaver, Côté and Brown JJ. were delivered by

1. Côté and Brown JJ. (dissenting) — Labour adjudicators have disagreed on the issue of whether it is ever lawful for a federally regulated employer to dismiss a non-unionized employee without cause. This disagreement has persisted for at least two decades. Federally regulated employers and employees are left in a state of uncertainty about the fundamentals of their employment relationship. The adjudicator in this case found that only dismissals for cause are permitted under the *Canada Labour Code*, R.S.C. 1985, c. L-2. On judicial review, the Federal Court and Federal Court of Appeal disagreed: 2013 FC 733, 435 F.T.R. 300; 2015 FCA 17, [2015] 4 F.C.R. 467. Both courts held that dismissals without cause are permitted under the *Code*. The application for judicial review was allowed and the matter was remitted to the adjudicator to determine an appropriate remedy.
2. We agree with the Federal Court and the Federal Court of Appeal. A dismissal without cause is not *per se* unjust, so long as adequate notice is provided. However, such a dismissal does not allow the employer to escape the scrutiny of an adjudicator or the courts if the employee chooses to challenge the lawfulness of the dismissal. The adjudicator in this case adopted the opposite interpretation, holding that dismissal without cause is automatically an unjust dismissal. Because the adjudicator’s interpretation of ss. 240 to 246 of the *Code* is inconsistent with the text, context and purpose of these provisions, it ought to be set aside.
3. Standard of Review
4. For the reasons we set out below, we would apply a correctness review to the narrow and distilled legal issue in this case.
5. The parties before this Court agreed that the standard of review is reasonableness. However, the determination of the standard of review that applies in any case is a question of law, and “agreement between the parties cannot be determinative of the matter”: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152, at para. 6. Our colleague Justice Abella stated this point succinctly in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3, at para. 33, when she observed that “the parties should not be able, by agreement, to *contract out* of the appropriate standard of review” (emphasis in original).
6. We note Abella J.’s proposed revisions to the standard of review, expressly made in *obiter dicta*.  While we appreciate the constructive spirit in which they are proposed, and while we harbour concerns about their merits, we prefer to confine any statement regarding what is already the subject of a peripatetic body of jurisprudence to a judicial pronouncement.

Rule of Law Concerns Justify Correctness Review in This Case

1. In our view, this case exposes a serious concern for the rule of law posed by presumptively deferential review of a decision-maker’s interpretation of its home statute. In the specific context of this case, correctness review is justified. To conclude otherwise would abandon rule of law values in favour of indiscriminate deference to the administrative state.
2. This Court has recognized that, where deference is owed, a decision-maker’s interpretation of the law will be reasonable if it falls within a range of intelligible, defensible outcomes: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47. As a general proposition, we agree.
3. However, deferring in this way on matters of statutory interpretation opens up the possibility that different decision-makers may each reach opposing interpretations of the same provision, thereby creating “needless uncertainty in the law [in the sense that] individuals’ rights [are] dependent on the identity of the decision-maker, not the law”: J. M. Evans, “Triumph of Reasonableness: But How Much Does It Really Matter?” (2014), 27 *C.J.A.L.P.* 101, at p. 105. This concern was raised forcefully by Stratas J.A. at the Federal Court of Appeal in the present case, and has been expressed elsewhere: see, e.g., Altus Group Ltd. v. Calgary (City), 2015 ABCA 86, 599 A.R. 223, at paras. 31-33; *Abdoulrab v. Ontario Labour Relations Board*, 2009 ONCA 491, 95 O.R. (3d) 641, at para. 48; *Taub v.* *Investment Dealers Assn. of Canada*, 2009 ONCA 628, 98 O.R. (3d) 169, at paras. 65-67.
4. In theory, these disagreements can last forever. Administrative decision-makers are not bound by the principle of *stare decisis*, and many decision-makers — like the labour adjudicators in the present case — lack an institutional umbrella under which issues can be debated openly and a consensus position can emerge.
5. This is precisely what has occurred in the present case. For decades, labour adjudicators across the country have come to conflicting interpretations of the unjust dismissal provisions of Part III of the *Code*. These conflicting interpretations go to the heart of the federal employment law regime: Is an employer ever permitted to dismiss a non-unionized employee without cause? Some adjudicators say yes. Some say no. Lower courts have found both interpretations to be reasonable: see, e.g., Federal Court reasons and *Pierre v. Roseau River Tribal Council*, [1993] 3 F.C. 756 (T.D.).
6. The rule of law and the promise of orderly governance suffer as a result. When reasonableness review insulates conflicting interpretations from judicial resolution, the identity of the decision-maker determines the outcome of individual complaints, not the law itself. And when this is the case, we allow the caprice of the administrative state to take precedence over the “general principle of normative order”: *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, at para. 20; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 71; *Reference re* *Manitoba Language* *Rights*,[1985] 1 S.C.R. 721, at pp. 747-52.
7. More troubling still, such a situation calls into question our legal system’s foundational premise that there is “one law for all” (*Reference re Secession of Quebec*, at para. 71), since, realistically, what the law means depends on whether one’s case is decided by one decision-maker or another. It goes without saying that the rule of law, upon which our Constitution is expressly founded, requires something closer to universal application.
8. The cardinal values of certainty and predictability — which are themselves core principles of the rule of law (T. Bingham, *The Rule of Law* (2010), at p. 37) — are also compromised. In the context of the present case, leaving unresolved a divided body of arbitral decisions clouds an essential feature of the federal regime governing employment relationships. Federally regulated employers cannot predictably determine when and how they can dismiss their employees, while employees are left in a state of uncertainty about the extent of their job security.
9. The conflicting adjudicative jurisprudence has done more than just create general uncertainty. It creates the risk that the *very same* federally regulated employer might be subjected to conflicting legal interpretations, such that it may be told in one case that it *can* dismiss an employee without cause, while being told in another case that it *cannot*. As Rothstein J. stated in his concurring opinion in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 90, “[d]ivergent applications of legal rules undermine the integrity of the rule of law.” This is not mere conjecture; it has already happened to Atomic Energy of Canada Limited, the respondent in the matter before us: see Federal Court reasons and *Champagne v. Atomic Energy of Canada Ltd.*, 2012 CanLII 97650. We would echo the statement of McLachlin J. (as she then was) in her concurring opinion in *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739, that judicial intervention may be required to resolve conflicting administrative decisions:

We must not forget that the parties involved in problems of this sort are often providing services of considerable importance to the public. It is the task of the legal system to provide them with clear guidance as to their legal obligations so that they can provide the services that they are required to provide in an efficacious and legal manner. When two different boards have given conflicting definitions of a body’s legal obligations, it is important that the body be afforded means of determining which obligation prevails and which it must obey. The boards themselves cannot determine this. The only body which can do it is the court. [para. 79]

1. Finally, the existence of lingering disagreements amongst decision-makers undermines the very basis for deference. It makes little sense to defer to the interpretation of one decision-maker when it is clear that other similarly situated decision-makers — whose decisions are equally entitled to deference — have reached a different result. To accord deference in these circumstances privileges the expertise of the decision-maker whose decision is currently subject to judicial review over the expertise of other similarly situated decision-makers without any compelling reason for doing so.
2. We believe, therefore, that where there is lingering disagreement on a matter of statutory interpretation between administrative decision-makers, and where it is clear that the legislature could only have intended the statute to bear one meaning, correctness review is appropriate. This lingering disagreement presupposes that both interpretations are reasonable, since, of course, a contradictory but unreasonable decision will be quashed on judicial review and no lingering disagreement can result. But we wish to make one point clear: it does not matter whether one or one hundred decisions have been rendered that conflict with the “consensus” interpretation identified by the majority. As long as there is one conflicting but reasonable decision, its very existence undermines the rule of law: L. J. Wihak, “Wither the correctness standard of review? *Dunsmuir*, six years later” (2014), 27 *C.J.A.L.P.* 173, at p. 197.
3. Such a lingering disagreement exists in this case. While the majority says that “almost all” of the adjudicators have adopted the interpretation of the legislative scheme that was accepted by the adjudicator in this case (para. 46), there is a significant line of cases adopting the opposite interpretation: see, e.g., *Sharma v. Maple Star Transport Ltd.*, 2015 CanLII 43356; *G & R Contracting Ltd. and Sandhu, Re*, 2015 CarswellNat 7465 (WL Can.); *Pare v. Corus Entertainment Inc.*, [2015] C.L.A.D. No. 103 (QL); *Madill v. Spruce Hollow Heavy Haul Ltd.*, [2015] C.L.A.D. No. 114 (QL); *Swanson and Qualicum First Nation, Re* (2015), 26 C.C.E.L. (4th) 139; *O’Brien v. Mushuau Innu First Nation*, 2015 CanLII 20942; *Newman v. Northern Thunderbird Air Inc.*, [2014] C.L.A.D. No. 248 (QL); *Taypotat v. Muscowpetung First Nation*, [2014] C.L.A.D. No. 53 (QL); *Payne and Bank of Montreal, Re* (2014), 16 C.C.E.L. (4th) 114; *Sharma and Beacon Transit Lines Inc., Re*, 2013 CarswellNat 4148 (WL Can.); *Klein v. Royal Canadian Mint*, 2013 CLLC ¶210-013; *Paul v. National Centre for First Nations Governance*, 2012 CanLII 85154; *Palmer v. Dempsey Laird Trucking Ltd.*, 2012 CarswellNat 1620 (WL Can.); *Gouchey v. Sturgeon Lake Cree Nation*, 2011 CarswellNat 3430 (WL Can.); *Stark v. Tl’azt’en Nation*, 2011 CarswellNat 3074 (WL Can.); *Dominic v. Tl’azt’en Nation*, 2011 CarswellNat 3085 (WL Can.); *McCloud v. Samson Cree Nation*, [2011] C.L.A.D. No. 119 (QL); *Prosper v. PPADC Management Co.*, [2010] C.L.A.D. No. 430 (QL); *Perley v. Maliseet First Nation at Tobique*, 2010 CarswellNat 4618 (WL Can.); *Daniels v. Whitecap Dakota First Nation*, [2008] C.L.A.D. No. 135 (QL); *Armsworthy v. L.H. & Co.*, [2005] C.L.A.D. No. 161 (QL); *Indian Resource Council of Canada and Whitecap (Re)*, 2003 CarswellNat 7342 (WL Can.); *Cooper v. Exalta Transport Services Ltd.*, [2002] C.L.A.D. No. 612 (QL); *Chalifoux v. Driftpile First Nation*, [2000] C.L.A.D. No. 368 (QL); *Halkowich v. Fairford First Nation*, [1998] C.L.A.D. No. 486 (QL); *D. McCool Transport Ltd. v. Bosma*, [1998] C.L.A.D. No. 315 (QL), at paras. 12 et seq.; *Jalbert v. Westcan Bulk Transport Ltd.*, [1996] C.L.A.D. No. 631 (QL); *Knopp v. Westcan Bulk Transport Ltd.*, [1994] C.L.A.D. No. 172 (QL).
4. This is not an exhaustive list, but serves merely to illustrate that discord exists in the adjudicative jurisprudence on the issue of whether the *Code* permits an employer to dismiss an employee without cause. It is the existence of this discord that undermines the rule of law and justifies correctness review in this case. Further, this is a matter of general importance, defining the basis of the employment relationship for thousands of Canadians. We would also add that questions regarding the dismissal of federal employees do not fall exclusively within the jurisdiction of labour adjudicators. As we will explain below, civil courts also possess jurisdiction over some of these matters. The narrow and distilled question of law raised by this case goes to the very heart of the federal employment relationship. Consistency in defining the nature of this relationship is therefore required.
5. We turn now to the merits, applying a correctness review for the reasons set out above.
6. Statutory Provisions
7. This case concerns the interrelationship between the provisions of Part III of the *Code* which govern non-unionized federal employees.
8. Section 230 of the *Code* codifies the common law rules on notice periods and wages in lieu of notice when terminating the employment of an employee without cause:

**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 which the employee is employed; or

**(b)** pay to any 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.

1. Section 235 of the *Code* establishes a minimum amount of severance pay that must be paid to certain employees whose employment is terminated without cause:

**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.

1. Sections 240 to 245 of the *Code* set out a procedure whereby an employee who believes that his dismissal was unjust can complain to an inspector, leading to the appointment of an adjudicator who will determine whether the dismissal was unjust and order a remedy that the adjudicator deems appropriate in the circumstances. Of relevance to this appeal are ss. 240 to 242:

**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.

**(2)** Subject to subsection (3), a complaint under subsection (1) shall be made within ninety days from the date on which the person making the complaint was dismissed.

**(3)** The Minister may extend the period of time referred to in subsection (2) where the Minister is satisfied that a complaint was made in that period to a government official who had no authority to deal with the complaint but that the person making the complaint believed the official had that authority.

**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.

**(2)** On receipt of a complaint made under subsection 240(1), an inspector shall endeavour to assist the parties to the complaint to settle the complaint or cause another inspector to do so.

**(3)** Where a complaint is not settled under subsection (2) within such period as the inspector endeavouring to assist the parties pursuant to that subsection considers to be reasonable in the circumstances, the inspector shall, on the written request of the person who made the complaint that the complaint be referred to an adjudicator under subsection 242(1),

**(a)** report to the Minister that the endeavour to assist the parties to settle the complaint has not succeeded; and

**(b)** deliver to the Minister the complaint made under subsection 240(1), any written statement giving the reasons for the dismissal provided pursuant to subsection (1) and any other statements or documents the inspector has that relate to the complaint.

**242 (1)** The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1).

**(2)** An adjudicator to whom a complaint has been referred under subsection (1)

**(a)** shall consider the complaint within such time as the Governor in Council may by regulation prescribe;

**(b)** shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator and shall consider the information relating to that complaint; and

**(c)** has, in relation to any complaint before the adjudicator, the powers conferred on the Canada Industrial Relations Board, in relation to any proceeding before the Board, under paragraphs 16(a), (b) and (c).

**(3)** Subject to subsection (3.1), an adjudicator to whom a complaint has been referred under subsection (1) shall

**(a)** consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and

**(b)** send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.

**(3.1)** No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where

**(a)** that person has been laid off because of lack of work or because of the discontinuance of a function; or

**(b)** a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament.

**(4)** Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to

**(a)** pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

**(b)** reinstate the person in his employ; and

**(c)** do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

1. The unjust dismissal procedure set out in ss. 240 to 245 is not the only mechanism available to federally regulated employees to challenge the lawfulness of a dismissal. Section 246 of the *Code* expressly preserves their right to seek a civil remedy in the courts:

**246 (1)** No civil remedy of an employee against his employer is suspended or affected by sections 240 to 245.

1. One other provision is worth mentioning. Section 168(1) of the *Code* preserves the application of the common law and contracts of employment where those laws confer greater rights or benefits on employees than Part III of the *Code* does:

**168 (1)** This Part 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. Analysis
2. Applying correctness review, we are of the opinion that a federally regulated employer can dismiss an employee without cause, so long as appropriate notice and severance pay are provided. However, such a dismissal does not preclude the employee from availing himself or herself of the unjust dismissal procedure in ss. 240 to 245 of the *Code*. There is “nothing in section 240 or the surrounding sections of the *Canada Labour Code* which guarantees lifelong job tenure to employees of federally regulated businesses, provided such employees do not give their employers just cause for dismissal”: D. Harris, *Wrongful Dismissal* (loose-leaf), at p. 6-14. An employer therefore has the right to “justly terminate an employee by giving notice or compensation under ss. 230(1) and 235(1)”: H. A. Levitt, *The Law of Dismissal in Canada* (3rd ed. (loose-leaf)), at p. 2-126.1.
3. As a preliminary note, ss. 230 and 235 use the term “termination” of employment, while ss. 240 to 245 refer to “dismissal”. Sections 230 and 235 apply to all situations where the employment of an employee is terminated — including managers and those who are laid off due to lack of work or discontinuance of a function — while ss. 240 to 245 only apply to employees who are “dismissed”. Since the interpretive issue in this case centres on the meaning of the term “unjust dismissal”, we will use the term “dismissal” throughout this analysis unless otherwise required.
4. The adjudicator was asked to determine whether a dismissal without cause but with pay in lieu of notice was nevertheless an unjust dismissal. The narrow question we are addressing is this: Is a dismissal without cause *automatically* an unjust dismissal that *always* entitles an employee to a remedy under s. 242(4)? Or, as the Federal Court and Federal Court of Appeal both found in this case, is a dismissal without cause *potentially* an unjust dismissal (depending on the circumstances) that *could* entitle an employee to a remedy under s. 242(4)?
5. This is a distilled question requiring statutory interpretation and, accordingly, we must begin with the modern principle of statutory interpretation articulated in *Rizzo & Rizzo Shoes Ltd.* *(Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The modern principle requires that statutes “be read to give the words their most obvious ordinary meaning which accords with the context and purpose of the enactment in which they occur”: *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14; *Rizzo Shoes*, at para. 41. When a court interprets a statute, it is “seeking not what Parliament meant but the true meaning of what they said”: *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591 (H.L.), at p. 613 (per Lord Reid). In our view, the true meaning of what Parliament said is clear: federally regulated employers can dismiss their employees without cause.

1. The term “unjust dismissal” is not defined anywhere in the *Code*. An employee has the right to complain about any dismissal that the employee “considers” to be unjust: s. 240(1). This right exists only for 90 days following the dismissal, after which the employee has no right to access the procedure in ss. 240 to 245 to challenge the lawfulness of a dismissal: s. 240(2). An employer must give written reasons for the dismissal if requested to do so: s. 241. If an adjudicator finds that a dismissal is unjust, the adjudicator is empowered to award a remedy, including the remedy of reinstatement: s. 242(4). In our view, ss. 240 to 245 create an additional procedural mechanism for complaining about a dismissal (and provide an additional remedy for such complaints). But they do not define what dismissals qualify as unjust.
2. When one looks at the unjust dismissal provisions of the *Code* in isolation, one might infer that Parliament did intend to prohibit all dismissals without cause. As the majority notes, there are two elements of the unjust dismissal provisions that do not exist at common law and that could be interpreted as creating a just cause regime: the requirement that the employer provide reasons for the dismissal where requested (s. 241), and the power of the adjudicator to order reinstatement where appropriate (s. 242(4)(b)). Since neither of these powers or remedies exist at common law, the majority says that Parliament created a “statutory alternative” to the common law, creating a regime where federal employers can only dismiss their employees for just cause (para. 46).
   1. Problems With the Majority’s Reasoning
3. It is well established that a statute must “be read in a way that avoids absurdity and assigns a meaning to all of the words Parliament has used”: *R. v. G. (B.)*, [1999] 2 S.C.R. 475, at para. 69. In our respectful view, interpreting ss. 240 to 245 as prohibiting an employer from dismissing an employee without just cause produces an absurdity, since it leads to two identical classes of persons being treated differently based on an arbitrary or irrational distinction: *Berardinelli v. Ontario Housing Corp.*, [1979] 1 S.C.R. 275, at p. 280.
4. Sections 240 to 245 do not apply where an employee chooses to challenge the lawfulness of his or her dismissal in the civil courts, where the 90-day limitation period expires (s. 240(2)), or where the Minister declines to appoint an adjudicator pursuant to s. 242(1). These provisions also do not apply to employees who are managers (s. 167(3)), or to employees employed for less than 12 consecutive months (s. 240(1)(a)). The common law continues to apply “where the statute is silent or by its terms cannot apply”: *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, at p. 1319. The common law must therefore continue to apply to these employees.
5. At common law, an employer may dismiss an employee without cause because “[a]n employer’s right to terminate the employment relationship with due notice is simply the counterpart to the employee’s right to quit with due notice”: *Dunsmuir*, at para. 105. Courts have consistently applied the common law to the claims of dismissed federal employees who are subject to Part III of the *Code*: see, e.g., *Lum v. Shaw Communications Inc.*, 2004 NBCA 35, 270 N.B.R. (2d) 141; *Cornelson v. Alliance Pipeline Ltd.*, 2014 ABQB 436; *Nelson v. Champion Feed Services Inc.*, 2010 ABQB 409, 30 Alta. L.R. (5th) 162; *Chandran v. National Bank of Canada*, 2011 ONSC 777, 89 C.C.E.L. (3d) 256; *Paquette v. TeraGo Networks Inc.*, 2015 ONSC 4189, 2015 CLLC ¶210-056; *Vist v. Best Theratronics Ltd.*, 2014 ONSC 2867, 2014 CLLC ¶210-038; *Wallace v. Toronto-Dominion Bank* (1983), 41 O.R. (2d) 161 (C.A.); *Ryder v. Carry The Kettle First Nation*, 2002 SKQB 32, 215 Sask. R. 239; *Nardocchio v. Canadian Imperial Bank of Commerce* (1979), 41 N.S.R. (2d) 26 (S.C.T.D.); *Wilson v. Sliammon First Nation*, 2002 BCSC 190; *Chadee v. Norway House First Nation* (1996), 113 Man. R. (2d) 110 (C.A.); *Spilberg v. Total Transportation Solutions Inc.*, [2014] O.J. No. 2903 (QL) (S.C.J.); *Lazarus v. Information Communication Services (ICS) Inc.*, [2015] O.J. No. 5304 (QL) (S.C.J.); *Jackson v. Gitxsan Treaty Society*, 2005 BCSC 1112, 43 C.C.E.L. (3d) 179; *Beatty v. Best Theratronics* *Ltd.*, 2014 ONSC 3376, 18 C.C.E.L. (4th) 64; *Schimanski v. B & D Walter Trucking Ltd.*, 2014 ABPC 288; *Logan v. Progressive Air Service Ltd.*, [1997] B.C.J. No. 129 (QL) (Prov. Ct.); *Rodgers v. Sun Radio Ltd.* (1991), 109 N.S.R. (2d) 415 (S.C.T.D.).
6. Were ss. 240 to 245 to be taken as prohibiting a federal employee from being dismissed without cause, while s. 246 were to be taken as preserving the right of an employee to sue for wrongful dismissal in civil courts, the result would be that (1) a federally regulated employer can dismiss an employee without cause (even with appropriate notice) as long as the employee chooses to challenge the lawfulness of the dismissal in the civil courts, but (2) a federally regulated employer cannot dismiss an identically placed employee without cause (but with appropriate notice) where that employee objects under the unjust dismissal provisions of the *Code*. The legal basis of the employment relationship would then depend on the *ex post facto* choice of mechanism by which the employee challenges the lawfulness of his or her dismissal. Indeed, it would mean that an employer would not know its legal obligations in advance, since those legal obligations would depend upon either the discretion of the Minister or an employee’s *ex post facto* choice of mechanism to challenge the dismissal. This is absurd. Since we must presume that Parliament did not intend to produce absurd results (*Rizzo Shoes*, at para. 27), we cannot agree with the majority’s interpretation.
7. In addition, we note that s. 242(3) requires an adjudicator to “consider” whether or not a dismissal was unjust. Were the majority’s interpretation the only reasonable one (i.e., were it the correct interpretation), it would mean that, where an employer chooses to dismiss an employee without cause but with appropriate notice and severance pay, there would be nothing for the adjudicator to consider. The adjudicator would be obliged, not *to consider*, but *to automatically conclude* that the dismissal was unjust, a result which clearly deviates from the ordinary meaning of the word Parliament chose.
8. The majority says that there is a “consensus interpretation” of the unjust dismissal provisions that supports its interpretation (para. 58). It finds support for such a consensus in “over 1,740 adjudications and decisions [rendered] since the Unjust Dismissal scheme was enacted” (para. 60). In contrast, it identifies a mere “28 decisions that are said to have followed the Wakeling approach” (para. 60). However, this comparison is simply not accurate. The 1,740 decisions to which the majority refers include every decision rendered under ss. 240 to 245 of the *Code*.[[12]](#footnote-12) The vast majority of these decisions have nothing to do with the “consensus interpretation” that the majority identifies, as they deal with issues as diverse as whether the employer is subject to the *Code*; the extent of the adjudicator’s jurisdiction; whether a dismissal occurred; whether a limitation period had expired; whether just cause was alleged; procedural issues; the meaning of “lack of work or the discontinuance of a function”; and, in a small minority of cases, whether an employer may dismiss an employee without cause, but with payment of the appropriate notice and severance pay.[[13]](#footnote-13)
9. In any event, we fail to see why the mere quantity of adjudicator decisions supporting one position or the other is of any relevance whatsoever to the merits of the statutory interpretation issue in this appeal. As this Court has previously held, it is “improper for one to engage in a preliminary tallying of the number of decisions supporting competing interpretations and then apply that which receives the ‘higher score’”: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 30.
   1. The Proper Interpretation
10. The fundamental flaw with the majority’s interpretation of the subject provisions is that it reads them in isolation. The unjust dismissal provisions of the *Code* must be read in their broader context in order to determine their meaning as part of a complete and coherent legal regime: *Rizzo Shoes*, at para. 21. There are two elements of the broader context that are relevant: the continuing concurrent jurisdiction of the civil courts, and Part III of the *Code* as a whole.
    1. Concurrent Jurisdiction of the Civil Courts
11. Sections 240 to 245 of the *Code* create a mechanism for employees to challenge the lawfulness of their dismissal. This mechanism exists alongside the concurrent jurisdiction of the courts to award a civil remedy for wrongful dismissal, though subject to the doctrine of issue estoppel: s. 246(1); *Pereira v. Bank of Nova Scotia* (2007), 60 C.C.E.L. (3d) 267 (Ont. S.C.J.); Levitt, at p. 2-1. An employee is therefore always entitled to challenge the lawfulness of a dismissal in the civil courts, irrespective of whether the employee first chooses to resort to the unjust dismissal procedure in the *Code*: s. 246(1); *Wyllie v. Larche Communications Inc.*, 2015 ONSC 4747, at para. 76 (CanLII).
12. We note that, while the *Code* imposes a 90-day limitation period for complaints about unjust dismissal to be filed (s. 240(2)), the right of an employee to sue for wrongful dismissal in the civil courts is subject to the ordinary limitation period that exists in each province (usually between two to six years): *Ng v. Bank of Montreal*, 2010 ONSC 5692, 87 C.C.E.L. (3d) 86, at paras. 17-18; *Canadian National Railway Co. v. Benson*, 2004 MBQB 210, 188 Man. R. (2d) 218, at para. 51; *Limitation Act*, S.B.C. 2012, c. 13, s. 6(1); *Limitations Act*, R.S.A. 2000, c. L-12, s. 3(1); *The Limitations Act*, S.S. 2004, c. L-16.1, s. 5; *The Limitation of Actions Act*, C.C.S.M., c. L150, s. 2(1); *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, s. 4; *Civil Code of Québec*, art. 2925; *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5, s. 5(1); *Limitation of Actions Act*, R.S.N.S. 1989, c. 258, s. 2(1); *Statute of Limitations*, R.S.P.E.I. 1988, c. S‑7, s. 2(1); *Limitations Act*, S.N.L. 1995, c. L-16.1, s. 9; *Limitation of Actions Act*, R.S.N.W.T. 1988, c. L-8, s. 2(1); *Limitation of Actions Act*, R.S.Y. 2002, c. 139, s. 2(1); *Limitation of Actions Act*, R.S.N.W.T. (Nu.) 1988, c. L-8, s. 2(1).
13. To be clear, however, it is only adjudicators — appointed at the discretion of the Minister — that can apply ss. 240 to 245 of the *Code*, because a complaint about an unjust dismissal can be made only to an inspector and decided by an adjudicator: ss. 240(1) and 242(1). But a complaint about an unjust dismissal is a complaint about the lawfulness of a dismissal. And courts possess equal jurisdiction to determine the lawfulness of a dismissal of a federal employee. Adjudicators cannot claim sole authority over this question. An employee therefore has two options to challenge the lawfulness of a dismissal: by utilizing the unjust dismissal procedure in the *Code*, or by bringing an action for wrongful dismissal in the civil courts.
14. Courts and adjudicators possess concurrent jurisdiction over the basic question of the lawfulness of a dismissal. The lawfulness of a dismissal is defined by reference to the legal basis of the employment relationship: in a “just cause” regime, all dismissals without just cause are unlawful dismissals. In a “without cause” regime, dismissals without just cause are unlawful dismissals unless they are accompanied by appropriate notice and severance pay. It is impossible to determine the lawfulness of a dismissal without first knowing the legal basis of the employment relationship. Since adjudicators and courts possess concurrent jurisdiction to determine the lawfulness of a dismissal, it follows that both must do so with reference to the same legal basis for the employment relationship.
15. We therefore disagree with the majority that the addition of the unjust dismissal procedure to the *Code* altered the legal basis of the federally regulated employment relationship. Parliament has expressly preserved the continuing jurisdiction of the civil courts to decide the lawfulness of the dismissal, while denying these courts the ability to interpret and apply the unjust dismissal provisions of the *Code*. The legal basis of the employment relationship must be the same for adjudicators and for courts tasked with determining the same question at first instance. Parliament therefore could not have intended to alter the legal basis of the employment relationship simply by adding the unjust dismissal procedure to the *Code*.
    1. Sections 230 and 235
16. Our interpretation is supported by the wording of ss. 230 and 235 of the *Code*. Because ss. 230 and 235 of the *Code* do not apply to dismissals for just cause (ss. 230(1) and 235(1)), they must necessarily apply to dismissals without cause. Otherwise they would be substantially redundant. By prescribing minimum notice periods and severance pay that are owed to employees who are terminated (including dismissed) without cause, Parliament clearly intended to permit federally regulated employers to dismiss non-unionized employees without cause.
17. The majority disagrees, saying that ss. 230 and 235 of the *Code* “apply to managers, those who are laid off due to lack of work or discontinuance of a function, and, in the case of s. 230(1), employees who have worked for the employer for more than 3 consecutive months but less than 12 months” (para. 47). But this cannot be true, as it would mean that all other non-unionized federal employees who are dismissed but who choose not to challenge the lawfulness of their dismissal are entitled to nothing from their employer as a matter of law. Further, if these provisions did not apply to federal employees who choose to challenge the lawfulness of their dismissal in the civil courts, then such employees would not be entitled to *any* notice or severance pay unless such notice or severance pay is owed under the common law: *Code*, s. 168.
18. In our view, ss. 230 and 235 provide minimum notice and severance pay requirements to *all* employees covered by Part III of the *Code* irrespective of whether, when, or how they decide to challenge the lawfulness of a dismissal. To conclude otherwise would severely weaken the statutory protections that Parliament intended to provide to all non-unionized workers.
19. Therefore, as a baseline, Part III of the *Code* permits federally regulated employers to dismiss their employees without cause. To conclude otherwise would ignore the text of ss. 230 and 235 of the *Code*. The question, then, is whether the addition of the unjust dismissal provisions in ss. 240 to 245 fundamentally altered the nature of the employment relationship established by the *Code*.

Legislative History

1. When Parliament enacted ss. 240 to 245 in 1978 (S.C. 1977-78, c. 27, s. 21), it was supplementing the pre-existing provisions of Part III of the *Code*. Sections 230 and 235 — enacted in 1971 (R.S.C. 1970, c. 17 (2nd Supp.), s. 16) — used the language of dismissal for “just cause”, stating that they do not apply “where the termination is by way of dismissal for just cause”. Parliament therefore “thought fit to use this test on some occasions”: *Knopp*, at para. 68. Its conscious decision, however, *not* to use the language of “just cause” when enacting ss. 240 to 245 in 1978 lends support to the conclusion that Parliament did not intend to use these amendments to enact a “just cause” regime for non-unionized federal employees: *ibid*.
2. The majority nevertheless relies on a statement made by the Minister of Labour to the Standing Committee on Labour, Manpower and Immigration in 1978 to establish that Parliament’s amendments to the *Code* intended to “expand the dismissal rights of non-unionized federal employees in a way that, if not identically, then certainly analogously matched those held by unionized employees” (para. 44). However, as the majority notes, the Minister also stated:

It is our hope that Parts III and IV will give at least to the unorganized workers some of the minimum standards which have been won by the organized workers and which are now embodied in their collective agreements. We are not alleging for one moment that they match the standards set out in collective agreements, but we provide here a minimum standard. [Emphasis added.]

(*House of Commons Debates*, vol. II, 3rd Sess., 30th Parl., December 13, 1977, at p. 1831)

1. This portion of the Hansard record weakens the majority’s conclusion that Parliament intended to expand the rights of non-unionized employees in a manner that identically matched those held by unionized employees, since the Minister expressly disclaimed any intent to do so in his statements to the House of Commons. Further, in a promotional article disseminated to federal employees at the time of the amendments, the Minister affirmed that the unjust dismissal provisions “will give the unorganized worker a procedure for appealing against a dismissal he believes to be unjust”. He also stated that they intended to confine this right of appeal to “dismissals imposed as a disciplinary measure” in order to “discourage employers from firing people unfairly and arbitrarily”: the Hon. J. Munro, “A better deal for Canada’s unorganized workers” (1977), 77 *The Labour Gazette* 347, at p. 349 (emphasis added). This is therefore a frail basis for concluding that Parliament intended to alter the common law employment relationship by prohibiting all dismissals without cause.
   1. Discretion of the Minister
2. There is another reason to doubt our colleagues’ view that Parliament intended to confer new, substantive rights on federally regulated employees that are equivalent to the rights conferred on unionized employees by a collective agreement. Pursuant to s. 242(1), the Minister, on receipt of a report of an inspector, “may” appoint an adjudicator to hear a complaint of unjust dismissal. The Minister is not bound to do so. Indeed, as Geoffrey England has documented, in the first two years after these provisions were enacted, “Ministerial consent to adjudication was denied in 19% of all cases in which it was requested”: ‟Unjust Dismissal in the Federal Jurisdiction: The First Three Yearsˮ (1982), 12 Man. L.J. 9, at p. 11. We know of no similar substantive rights under collective agreements that rely on such ministerial discretion.
3. If ss. 240 to 245 do indeed confer on employees a right to be free from dismissal without cause by shifting the federal regime to a “just cause” regime, this substantive right to job security would depend on the discretion of the Minister. If the Minister chooses not to appoint an adjudicator, the employee will have no recourse to enforce his or her right not to be dismissed without just cause — the only option would be a common law action for wrongful dismissal in the civil courts. It would, in effect, be up to the Minister to decide in any case whether the employer was entitled to dismiss an employee without cause. The legal basis of the federally regulated employment relationship cannot depend on ministerial discretion. We therefore do not agree that the addition of ss. 240 to 245 to the *Code* created a “just cause” regime.
   1. The Common Law Continues to Apply
4. As discussed above, the common law employment relationship is an individual contractual relationship. No “wrong in law is done by the termination [of the contract] itself”: *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085, at p. 1096, per McIntyre J. Rather, the common law implies a term in every contract of employment that both the employer and employee have the right to terminate it upon reasonable notice, absent just cause for termination without notice: *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 998. This implied term is constrained by employment standards legislation across Canada, as most provinces have enacted minimum amounts of notice or pay in lieu of notice that must be provided when terminating an employment contract.
5. It is a well-established rule of statutory interpretation that “[w]hen there is overlap between legislation and the common law, both are presumed to apply”: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at §17.24. Statutes must therefore be construed as being consistent with the common law unless the legislature clearly and unambiguously expresses otherwise: *Goodyear Tire and Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610, at p. 614; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1077; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157.
6. Section 168 of the *Code* expressly preserves the continued application of the common law to the federally regulated employment relationship. There is therefore an overlap between the legislation and the common law here. Absent clearly and unambiguously expressed legislative intent to change the common law by adding the unjust dismissal provisions in ss. 240 to 245, we must interpret the *Code* consistently with the common law, particularly since Parliament expressly preserved the common law by enacting s. 168. The majority has pointed to no such clear and unambiguous statutory language. We must therefore interpret the *Code* consistently with the common law, meaning that the contractual basis of individual employment continues to apply, and that federal employers are not categorically prohibited from dismissing non-unionized federal employees without cause. More particularly, we must understand Parliament, in adding ss. 240 to 245 as well as s. 246, as having preserved the concurrent jurisdiction of the courts over the question of the lawfulness of the dismissal, and not as having fundamentally altered the nature of the employment relationship. Parliament simply created another procedural mechanism through which employees could challenge the lawfulness of their dismissal, in which the additional remedy of reinstatement is available.
7. We also note that s. 168 states that Part III of the *Code* shall not “be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement” that are more beneficial to the employee than the rights granted to the employee by Part III of the *Code*. This part of the provision would be meaningless had Parliament not intended to preserve the continued application of the common law.
8. We also respectfully observe that the majority’s understanding of the continuing role of the common law in the federal employment relationship is internally inconsistent. Implicit in the majority’s reasons is a belief that Parliament did not intend to oust the common law of wrongful dismissal when it enacted ss. 240 to 245: it states that Parliament’s intention was “to offer an alternative statutory scheme consisting of expansive protections much like those available to employees covered by a collective agreement” (para. 1), while claiming that this scheme has “completely replaced” the “foundational premise of the common law scheme [being] a right to dismiss on reasonable notice without cause or reasons” (para. 63). It also maintains that s. 246 entitles employees to “pursue their common law remedy of reasonable notice or pay in lieu” (para. 64). In other words, the continuing operation of the common law to define the basis of the federal employment relationship where a remedy is pursued under s. 242 of the *Code* is denied; yet, its operation, for the purpose of defining the basis of the federal employment relationship where civil remedies for dismissal are pursued, is accepted. The majority says, for the former purpose, that the common law has been entirely replaced by the statutory regime (para. 63), yet, for the latter purpose, it characterizes this statutory regime as a mere “alternative” (para. 41).
9. With respect, the majority cannot, coherently, have it both ways. It cannot affirm the existence of a statutory “just cause” regime, which displaces the common law, while acknowledging the continued application of the common law rules regarding the termination of a contract of employment. The two legal propositions simply cannot coexist.
10. As we have said, therefore, it is incumbent on the majority to point to a clear and unambiguously expressed legislative intention to oust the common law. In our respectful view, the majority cannot do so. Indeed, the majority states that it is *our* interpretation which “somersaults our understanding of the relationship between the common law and statutes” since we assume “the continuity of a more restrictive common law regime notwithstanding the legislative enactment of benefit-granting provisions to the contrary”: para. 67. But this reasoning is, with respect, circular. It assumes the question to be decided, being whether Parliament intended to oust the common law by enacting more “generous” provisions through statute. The simple fact that the statute confers benefits tells us nothing about whether the common law continues to apply. A legislature can create an alternate procedure for challenging the lawfulness of a dismissal without thereby implicitly ousting the common law basis for all employment relationships. Indeed, this Court recognized in *Dunsmuir* that an adjudicator’s decision was unreasonable precisely because it would have resulted in a “just cause” regime for non-unionized employees where the legislature had created a grievance mechanism for challenging dismissals but had not expressly indicated any intention to oust the common law: see para. 75.

Comparison With Other Regimes

1. Our conclusion is further reinforced by contrasting the federal regime with provincial schemes that have created a regime where only dismissals for just cause are permitted. Where they have done so, they have done so expressly. In Nova Scotia, s. 71(1) of the *Labour Standards Code*, R.S.N.S. 1989, c. 246 (“*LSC*”), expressly prohibits employers from dismissing certain employees without just cause. It states:

**71 (1)** Where the period of employment of an employee with an employer is ten years or more, the employer shall not discharge or suspend that employee without just cause unless that employee is a person within the meaning of person as used in clause (d), (e), (f), (g), (h) or (i) of subsection (3) of Section 72.

**(2)** An employee who is discharged or suspended without just cause may make a complaint to the Director in accordance with Section 21.

**(3)** An employee who has made a complaint under subsection (2) and who is not satisfied with the result may make a complaint to the Board in accordance with Section 23 and such complaint shall be and shall be deemed to be a complaint within the meaning of subsection (1) of Section 23.

Section 72 of the Nova Scotia *LSC* permits employers to dismiss all other employees without cause upon provision of the appropriate notice or payment of the appropriate pay in lieu of notice. The Nova Scotia *LSC* does not preserve concurrent jurisdiction of the courts over the lawfulness of the dismissal of employees covered by ss. 71 and 72. Instead, the Director and Board have exclusive jurisdiction to determine the lawfulness of the dismissal and order a remedy: ss. 21, 23 and 78. Further, an employee always has the right to complain about the lawfulness of a dismissal to the Director and the Board. Therefore unlike the *Canada Labour Code*, the employee’s right to have his or her claim investigated and adjudicated in Nova Scotia does not depend on the discretionary approval of the Minister: ss. 71(2) and 71(3).

1. Similarly, in Quebec, employees who are employed for two years or more may only be dismissed for “good and sufficient cause”: *An Act respecting labour standards*, CQLR, c. N-1.1, s. 124 (“*ALS*”). As in Nova Scotia, once a complaint is made about a dismissal and it is not settled, “the Commission des normes, de l’équité, de la santé et de la sécurité du travail shall, without delay, refer the complaint to the Administrative Labour Tribunal”: s. 126. An employee always has the right to have his or her claim settled or referred for adjudication in Quebec. This right does not depend on the discretion of the Minister.
2. Both the Quebec and Nova Scotia legislatures clearly intended to establish “just cause” regimes in their respective provinces for certain employees by expressly prohibiting dismissals without cause. Despite the similarity in other provisions such as those regarding minimum notice (ss. 82 and 82.1(3) *ALS*; s. 72(1) *LSC*), and those preserving civil remedies (s. 82, para. 4 *ALS*; s. 6 *LSC*), the fact remains the *ALS* only allows dismissals for “good and sufficient cause” (s. 124), while the *LSC* provides that employers shall not discharge or suspend an employee “without just cause” (s. 71). Despite the majority’s statement to the contrary (para. 65), the contrast between these two provincial schemes and the provisions of the *Code* are such that they cannot be claimed to be “similar”. Had Parliament intended to prohibit without cause dismissals, it would have done so by using such clear and unambiguous language. This is all the more apparent since the *LSC* preceded the enactment of ss. 240 to 245 of the *Code*, and yet Parliament refrained from adopting such irresistibly clear language. The Nova Scotia and Quebec regimes therefore do not present a sufficient basis for concluding that all without cause dismissals are automatically unjust under the *Code*. The reason those two provincial schemes have, as our colleagues correctly observe, “been consistently applied as prohibiting dismissals without cause” (para. 65) is that, unlike the *Code*, they clearly *do* prohibit dismissals without cause.
3. Indeed, we note that other provinces have created alternative, non-judicial mechanisms for challenging the lawfulness of a dismissal while maintaining the common law “without cause” regime. See, e.g., *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25, ss. 97(2.1) and 100.1; *Employment Standards Act*, R.S.B.C. 1996, c. 113, ss. 74 to 86.2; *Employment Standards Act*, S.N.B. 1982, c. E-7.2, ss. 61 to 76; *Employment Standards Act*, R.S.P.E.I. 1988, c. E-6.2, s. 30; *Labour Standards Act*, R.S.N.L. 1990, c. L-2, ss. 62 and 68 to 73.
4. Further, almost all “without cause” jurisdictions make the remedy of reinstatement available where an employee is unlawfully dismissed, for example, where an employee is dismissed for unlawful or discriminatory reasons: *Employment Standards Act* (B.C.), s. 79; *Employment Standards Code*, R.S.A. 2000, c. E-9, ss. 82 and 89(1); *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1, ss. 2-97(1) and 3-36(1); *The Employment Standards Code*, C.C.S.M., c. E110, s. 96.1; *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 104; *Employment Standards Act* (N.B.), s. 65; *Labour Standards Act* (N.L.), s. 78.
5. There is no question that without cause dismissals continue to be permitted in all of these jurisdictions, even where a grievance or non-judicial mechanism for complaining about the lawfulness of a dismissal is available: see, e.g., *Dunsmuir*, at para. 75. The mere availability of a non-judicial procedural mechanism to challenge the lawfulness of a dismissal, coupled with the availability of reinstatement in certain circumstances, does not *ipso facto* transform a “without cause” regime into a “just cause” regime. In our view, the federal *Code* is more akin to these “without cause” jurisdictions than it is to the regimes in Nova Scotia and Quebec.
   1. Role of Remedies
6. The majority also says that an interpretation which permits federally regulated employers to dismiss their employees without cause would “have the effect of rendering many of the Unjust Dismissal remedies meaningless or redundant”: para. 68. But for two reasons, this is not so. First, the requirement to provide reasons where requested is simply an evidentiary tool for inspectors and adjudicators, not a wholesale change to the nature of the employment relationship. Second, the remedy of reinstatement is consistent with a “without cause” regime.
7. Section 241 of the *Code* allows a dismissed employee or an inspector to request that the employer “provide a written statement giving the reasons for dismissal”. Section 241 also prescribes the conditions by which an inspector may endeavour to settle the complaint: see ss. 241(2) and 241(3). In our view, the purpose of s. 241 is to enable the employee and the inspector to know the nature of the case alleged by the employer: if the employer is asserting that the employee was dismissed for cause, the employer must make that factual assertion in the written statement providing reasons for dismissal. If the employer has dismissed the employee for lack of work or discontinuance of a function, this will be reflected in the written reasons for dismissal. And if the employer has simply dismissed the employee without cause, it must state this in the reasons for dismissal so that the inspector and, if necessary, the adjudicator can determine the adequacy of the notice and severance pay. The “reasons” requirement also serves the function of identifying dismissals that may be discriminatory or retaliatory, irrespective of whether the dismissal was for just cause or was without cause. It functions similarly to the discovery process in a civil claim. We do not see how interpreting ss. 240 to 245 of the *Code* as a “without cause” regime would affect the operation of this evidentiary provision.
8. Further, affirming that the *Code* permits employers to dismiss employees without cause does not render meaningless the remedy of reinstatement. As we have noted, the remedy of reinstatement is available in almost every provincial employment law regime irrespective of whether that regime permits an employer to dismiss an employee without cause. For example, reinstatement is routinely ordered where “there has been breach of the statutory requirements or protections governing the employee’s employment, or where the termination is in breach of an applicable human rights code”: J. T. Casey, ed., *Remedies In Labour, Employment and Human Rights Law* (loose-leaf), at p. 4-4 (footnotes omitted); see also *Lemieux Bélanger v. Commissaires d’Écoles pour la Municipalité de St-Gervais*, [1970] S.C.R. 948, at p. 952; *Kelso v. The Queen*, [1981] 1 S.C.R. 199, at p. 210. Under the *Code*, adjudicators currently order reinstatement based on their expert assessment of whether the employer and employee will be able to continue working together in a healthy and productive employment relationship in the future. If the adjudicator has reason to believe that the employer will simply dismiss the employee again, he or she will not order reinstatement. In *Ridley v. Gitxaala Nation*, [2009] C.L.A.D. No. 267 (QL), at para. 3, for instance, it was held that reinstatement is not appropriate where it “is highly likely to result in a second dismissal within a short period of time”. There is no reason to suppose that this practice would change were this Court to affirm the continuing right of federally regulated employers to dismiss their employees without cause, as long as the appropriate notice and severance pay is provided.
9. The adjudicator retains significant remedial powers where a federally regulated employer dismisses an employee without cause. This is because the employer must still provide appropriate notice and severance pay. If the employee chooses to complain about that dismissal before an adjudicator, and the adjudicator has jurisdiction to consider the complaint, the adjudicator has the power to determine whether the amount of notice and severance pay reflects “the wages that the employer ought to have paid the employee either over the course of the period of reasonable notice or as pay in lieu of notice”: *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 66. The adjudicator may do so by comparing the amount the employee would be entitled to under common law against the statutory minimum prescribed in ss. 230 and 235, and awarding the greater sum to the employee. The adjudicator’s power to do so is found in s. 168, which preserves the application of the common law where it provides benefits in excess of what is prescribed in the *Code*.
10. Further, if the adjudicator finds something unjust in the *manner* of dismissal, the adjudicator has the power to award whatever remedy that he or she deems appropriate, whether this is compensatory damages, punitive damages, or in appropriate cases, reinstatement. Adjudicators routinely award damages for mental distress or punitive damages where the employer’s conduct in dismissing an employee is egregious or in bad faith: see, e.g., *Poulter v. Gull Bay First Nation*, 2011 CarswellNat 3466 (WL Can.) ($10,000 for bullying, demeaning, and harassing conduct that led to a constructive dismissal); *Morrisseau v. Tootinaowaziibeeng First Nation* (2004), 39 C.C.E.L. (3d) 134 (three extra months of salary and benefits payable due to the employer’s callous behaviour in dismissing the employee); *Parrish & Heinbecker, Ltd. and Knight, Re*, 2006 CarswellNat 6950 (WL Can.) (four months’ salary ordered as punitive damages for the employer’s conduct in dismissing the employee without cause or notice). These remedies are available in the civil courts and they are routinely awarded as remedies for wrongful dismissals. They are equally available to employees who challenge the lawfulness of their dismissal through the adjudicative provisions of the *Code*.
11. An employer may also dismiss an employee for just cause. Where just cause is made out, an employer is not obliged to provide notice or severance pay to an employee. When an employer dismisses an employee and alleges just cause, an adjudicator has the power to determine whether just cause was made out. If it was not, then the adjudicator may award any remedy that he or she deems appropriate, including reinstatement. Reinstatement is only awarded where it is requested by the employee and where there is no significant deterioration in the employment relationship between the employer and the employee: Levitt, at pp. 2-119 to 2-120.
    1. Summary of the Proper Interpretation
12. The purpose of ss. 240 to 245 is to provide a low cost, efficient, and effective procedural mechanism for employees to challenge the lawfulness of their dismissal. Employees who are covered by a collective agreement have a similar procedural option to grieve the lawfulness of their dismissals, as the Minister noted in his statements to the Standing Committee on Labour, Manpower and Immigration and to the House of Commons in 1978.
13. This procedure is more efficient and perhaps more effective than a civil action, since it involves less stringent evidentiary rules, an expert adjudicator who is well versed in the factual nuances of employment relationships, and a stricter timeline than a court action. It is a “time- and cost-effective method of resolving employment disputes [that] provides an alternative to judicial determination”: *Dunsmuir*,at para. 69. Additional remedies are available to employees who choose to use the unjust dismissal provisions. In this way, the unjust dismissal provisions of the *Code* increase access to justice for federal employees who are dismissed from their employment.
14. But a procedural mechanism that increases access to justice does not, in and of itself, fundamentally alter the nature of the employment relationship. This procedural mechanism — access to which is dependent on the discretion of the Minister — is not, therefore, the exclusive means by which a federal employee must challenge the lawfulness of the dismissal. The employee may choose to challenge the dismissal through the courts as well. The unjust dismissal provisions are simply a procedural option for federal employees. The common law continues to apply, and federally regulated employers are entitled to dismiss employees without cause, but with payment of the appropriate notice and severance pay as prescribed by ss. 230 and 235 of the *Code*, the contract of employment, or the common law (whichever is greater). Adjudicators and courts possess concurrent jurisdiction to determine the adequacy of the notice and severance pay and to order any other remedies that may be warranted in the circumstances. The mere provision of a notice and a severance payment does not allow an employer to escape the scrutiny of an adjudicator any more than it would allow the employer to escape the scrutiny of a court.
15. Conclusion
16. We agree with the Federal Court and the Federal Court of Appeal that the *Canada Labour Code* does not prohibit all federally regulated employers from dismissing employees without cause. It follows that the adjudicator’s decision should be set aside. We would therefore dismiss the appeal.

**Appendix**

*Canada Labour Code*, R.S.C. 1985, c. L-2

**PART III**

**Standard Hours, Wages, Vacations and Holidays**

**DIVISION X**

Individual Terminations of Employment

**Notice or wages in lieu of notice**

**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.

**Notice to trade union in certain circumstances**

**(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 which the employee is employed; or

**(b)** pay to any employee whose employment is terminated as a result of the redundancy of the position two weeks wages at his regular rate of wages.

**Where employer deemed to terminate employment**

**(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.

**DIVISION XI**

Severance Pay

**Minimum rate**

**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.

**Circumstances deemed to be termination and deemed not to be termination**

**(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.

**DIVISION XIV**

Unjust Dismissal

**Complaint to inspector for unjust dismissal**

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.

**Time for making complaint**

(2) Subject to subsection (3), a complaint under subsection (1) shall be made within ninety days from the date on which the person making the complaint was dismissed.

**Extension of time**

(3) The Minister may extend the period of time referred to in subsection (2) where the Minister is satisfied that a complaint was made in that period to a government official who had no authority to deal with the complaint but that the person making the complaint believed the official had that authority.

**Reasons for dismissal**

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.

Inspector to assist parties

(2) On receipt of a complaint made under subsection 240(1), an inspector shall endeavour to assist the parties to the complaint to settle the complaint or cause another inspector to do so.

Where complaint not settled within reasonable time

(3) Where a complaint is not settled under subsection (2) within such period as the inspector endeavouring to assist the parties pursuant to that subsection considers to be reasonable in the circumstances, the inspector shall, on the written request of the person who made the complaint that the complaint be referred to an adjudicator under subsection 242(1),

(a) report to the Minister that the endeavour to assist the parties to settle the complaint has not succeeded; and

(b) deliver to the Minister the complaint made under subsection 240(1), any written statement giving the reasons for the dismissal provided pursuant to subsection (1) and any other statements or documents the inspector has that relate to the complaint.

Reference to adjudicator

242 (1) The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1).

Powers of **adjudicator**

(2) An adjudicator to whom a complaint has been referred under subsection (1)

(a) shall consider the complaint within such time as the Governor in Council may by regulation prescribe;

(b) shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator and shall consider the information relating to the complaint; and

(c) has, in relation to any complaint before the adjudicator, the powers conferred on the Canada Industrial Relations Board, in relation to any proceeding before the Board, under paragraphs 16(a), (b) and (c).

Decision **of** **adjudicator**

(3) Subject to subsection (3.1), an adjudicator to whom a complaint has been referred under subsection (1) shall

(a) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and

(b) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.

Limitation on complaints

(3.1) No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where

(a) that person has been laid off because of lack of work or because of the discontinuance of a function; or

(b) a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament.

Where unjust dismissal

(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to

(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

(b) reinstate the person in his employ; and

(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

Decisions not to be reviewed by court

243 (1) Every order of an adjudicator appointed under subsection 242(1) is final and shall not be questioned or reviewed in any court.

No review by *certiorari*, etc.

(2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, certiorari, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain an adjudicator in any proceedings of the adjudicator under section 242.

Enforcement of **orders**

244 (1) Any person affected by an order of an adjudicator under subsection 242(4), or the Minister on the request of any such person, may, after fourteen days from the date on which the order is made, or from the date provided in it for compliance, whichever is the later date, file in the Federal Court a copy of the order, exclusive of the reasons therefor.

Idem

(2) On filing in the Federal Court under subsection (1), an order of an adjudicator shall be registered in the Court and, when registered, has the same force and effect, and all proceedings may be taken thereon, as if the order were a judgment obtained in that Court.

Regulations

245 The Governor in Council may make regulations for the purposes of this Division defining the absences from employment that shall be deemed not to have interrupted continuity of employment.

Civil remedy

246 (1) No civil remedy of an employee against his employer is suspended or affected by sections 240 to 245.

Application of section 189

(2) Section 189 applies for the purposes of this Division.

*Appeal allowed with costs throughout,* Moldaver, Côté *and* Brown JJ. *dissenting.*

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1. R.S.C. 1985, c. L-2 (see Appendix). [↑](#footnote-ref-1)
2. *An Act to amend the Canada Labour Code*, R.S.C. 1970, c. 17 (2nd Supp.), s. 16. [↑](#footnote-ref-2)
3. Currently Part III, Division X — Individual Terminations of Employment. [↑](#footnote-ref-3)
4. Currently Part III, Division XI — Severance Pay. [↑](#footnote-ref-4)
5. *An Act to amend the Canada Labour Code*, S.C. 1977-78, c. 27, s. 21. [↑](#footnote-ref-5)
6. Currently Part III, Division XIV – Unjust Dismissal. [↑](#footnote-ref-6)
7. AECL is a federally regulated Crown corporation. [↑](#footnote-ref-7)
8. David Mullan, “Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action — The Top Fifteen!” (2013), 42 *Adv. Q*. 1, at pp. 76-81. As examples of where this occurred, Prof. Mullan cites *British Columbia (Workers’ Compensation Board) v. Figliola* [2011] 3 S.C.R. 422; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471; *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 S.C.R. 345; and *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, [2012] 2 S.C.R. 108. See also Lauren J. Wihak, “Wither the correctness standard of review? *Dunsmuir*, six years later” (2014), 27 *C.J.A.L.P.* 173, at pp. 174-75 and 183. [↑](#footnote-ref-8)
9. See Lorne Sossin, “The Complexity of Coherence: Justice LeBel’s Administrative Law” (2015), 70 *S.C.L.R.* (2d) 145; Evans; David Phillip Jones, Q.C., “The Year in Review: Recent Developments in Administrative Law” (paper prepared for the Canadian Bar Association’s 2015 National Administrative Law, Labour and Employment Law Conference) (online); Wihak; Matthew Lewans, “Deference and Reasonableness Since *Dunsmuir*” (2012), 38 *Queen’s L.J.* 59; Paul Daly, “*Dunsmuir*’s Flaws Exposed: Recent Decisions on Standard of Review” (2012), 58 *McGill L.J.* 483; the Hon. Justice David Stratas, “The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency”, February 17, 2016 (online). [↑](#footnote-ref-9)
10. See *M.M. v. United States of America*, [2015] 3 S.C.R. 973; *Kanthasamy v. Canada (Citizenship and Immigration)*, [2015] 3 S.C.R. 909; *Tervita Corp. v. Canada (Commissioner of Competition)*, [2015] 1 S.C.R. 161; *Ontario (Energy Board) v. Ontario Power Generation Inc.*, [2015] 3 S.C.R. 147; *Irving Pulp & Paper, Ltd.* [↑](#footnote-ref-10)
11. *An Act to Amend Chapter 10 of the Acts of 1972, the Labour Standards Code,* S.N.S. 1975, c. 50, s. 4;*An* *Act respecting labour standards*, S.Q. 1979, c. 45, s. 124. [↑](#footnote-ref-11)
12. The source the majority relies on for this number states that “[g]iven that ss. 240 to 246 of the *Code* have been in existence for over 35 years, and have been subject to over 1,740 adjudications and decisions before *Wilson*, it is hard to believe that such new and novel law can be created from an old statute”: R. Ruslim, “Unjust Dismissal Under the *Canada Labour Code*: New Law, Old Statute” (2014), 5:2 *U.W.O. J. Leg. Stud.* 3 (online), at p. 28 (footnote omitted). [↑](#footnote-ref-12)
13. For a summary of the wide array of issues that are dealt with in the decisions rendered by adjudicators under ss. 240 to 245 of the *Code*, see Levitt, at pp. 2-1 to 2-172. [↑](#footnote-ref-13)