Court File No.: C64519

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CLAUDETTE WOOD, BRUCE COOK and JOHN FEATHERSTONE

Plaintiffs
(Respondents)

and

CTS OF CANADA CO. and CTS CORPORATION

Defendants
(Appellants)

FACTUM OF THE PLAINTIFFS (RESPONDENTS)

February 12, 2017

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PART I: OVERVIEW

1. Termination of employment causes employees significant financial and emotional distress. The effects of termination are exacerbated when, as here, a plant closure is involved, with employees searching for work at the same time as many in the same location and industry.

2. While the law cannot change economic reality, it can, and does, seek to mitigate the effects of mass termination through common law and statutory measures that recognize that terminated employees are vulnerable and in need of support. These measures are given life by jurisprudence mandating a liberal, purposive, employee-protective interpretation of the central statute, the *Employment Standards Act, 2000*, S.O. 2000, c. 41 [the "*ESA*"]. One of the *ESA*'s core mass termination provisions is at the heart of the appeal, the duty on employers, at the start of a "notice period", to simply notify the Ministry of Labour [the "MOL"] of the closure.

3. On the extensive, unchallenged Record here, the effect of this notice is to ensure that employees such as the class members receive early, publicly funded, outplacement and support services, ones described by the Motion Judge as potentially "life changing". The Respondents contend that the proper reading of the *ESA* is that, where an employer gives notice of termination and starts an *ESA* "notice period", that is when the MOL notice ought to be given. Such an interpretation is consistent with the words of the *ESA* and the purpose of its provisions of giving employees the earliest possible information and support to help them get back on their feet.

4. On CTS's reading of the *ESA*, the obligation in s. 58(2) to give the MOL notice at the start of the "notice period" only arises at the start of the much shorter "statutory notice period" (8 weeks before the employees' last day). In support, CTS asks that the Court pretend that s. 58(2) does not say "notice period" by arguing that one read in the word "statutory" just before "notice period".

CTS offers no reasons to suggest that the *ESA*'s purposes of ensuring the provision of early outplacement services is better served by waiting until the eve of a closure for notice when: (a) CTS could easily have given the MOL notice at the start of the actual "notice period" it gave; and, (b) the employees would have then had earlier access to critical services. In short, CTS asks that its tortured interpretation of the *ESA*'s words to make "notice period" read as "statutory notice period" should take precedence over the liberal, employee-protective interpretation the Supreme Court commands, one that would result in "notice period" meaning exactly what it means.

5. Relatedly, s. 1 of the *ESA* states that, when a longer notice period is given, as occurred here, the longer period is the "notice period" and the last eight weeks of this notice period are the "statutory notice period". Had the Legislature intended that CTS could wait until the last eight weeks of its "notice period" to give the MOL notice, as CTS argues, it could have easily used the defined term "statutory notice period" in s. 58(2) as the trigger date. Indeed, and most damning for CTS, from 1987 to 2000, the previous version of s. 58 only required the MOL notice at the start of the "*statutory* notice period". In 2000, the word "statutory" was removed twice from what became s. 58 of the *ESA*, leaving the longer "notice period" in its place. CTS's argument would have the Court pretend that the *ESA* was not amended in 2000.

6. From there, CTS's arguments that there should be no consequences for its failure to give the critical MOL notice, with the earlier "life changing" consequences that would have ensued, should be rejected. Justice Sproat – the Motion Judge and a leading employment law specialist and author of a seminal text in the area[1] – rightly rejected CTS's arguments. Relying on settled jurisprudence that breaches of *ESA* termination obligations invalidate the illegal action and require

1 J. Sproat, *Employment Law Manual: Wrongful Dismissal, Human Rights and Employment Standards* (Toronto: Carswell, 2010) (looseleaf).

a robust remedy, he correctly held that CTS could not rely on a notice given illegally and in breach of contract to defeat the claim. He correctly held CTS should be given no credit for that portion of the working notice delivered illegally and in breach of contract. He thus correctly held that legal notice began to run on May 12, 2015 when CTS finally notified the MOL of the closure.

7. Finally, CTS's more minor arguments should be rejected: it should not be given credit for any notice given during weeks where employees were illegally forced to work overtime and it should not be given credit for notice when it gave multiple, serial, notices to certain employees. Such notices are not notices when given over and over.

PART II: FACTS[2]

8. While the Respondents accept the Appellant's recitation of the basic chronology, some additional facts are needed to place the issues in context. The additional facts show that the class members were acutely vulnerable to the effects of a mass termination and would have benefitted greatly from the outplacement services they would have received had CTS given earlier notice to the MOL, notice CTS could quite easily have given them.

A. A Profile of the CTS Employees Forming the Class

9. By the closure of CTS's operations in Ontario at the "Streetsville Plant", whereupon the work was moved to Mexico, the Streetsville Plant had been in operation for over 50 years.[3] When the closure was announced on February 28, 2014 and notice of termination given to all employees in writing on April 17, 2014, this plant employed 129 people, of whom 74 are class members.[4]

2 All references to the evidence refer the reader to the *Respondents' Compendium* [***RC***], such as *RC TAB 1*.
3 Wood Affidavit, *RC TAB 6*, at ¶¶21-30.
4 CTS Employee Listing, Ex. 2 to Urban Cross-Examination [***Urban Cross***], *RC TAB 4(b)*.

10. At closure, these employees were either paid salary or at an hourly rate based on a 40 hour work week.[5] Their main job was manufacturing automobile parts.[6] A large majority of the hourly employees earned $17.12 per hour. Notably, more than half of these $17.12/hour employees had been employed for over twenty-five (25) years.[7] Most class members had worked at CTS for at least two decades, with one approaching 50 years' service. It is not disputed that the Class were employed pursuant to unwritten, individual, contracts and were not members of a union.

B. The Significant Benefits the Class Would Have Received had Early Notice Been Given

11. The Respondents proffered significant evidence that, had CTS given the MOL notice of closure in April 2014 and not on May 12, 2015, class members would have benefitted from access to significant information and other publicly funded outplacement services. CTS did not respond to this evidence, opting in their factum to challenge the admissibility of the evidence. At the hearing, CTS abandoned any admissibility argument, asking that the Motion Judge give the only evidence here, the Respondents' evidence, less weight.[8] Not surprisingly, then, Sproat J. reviewed the only evidence available, the Respondents' extensive evidence, and held that the Class was deprived of substantial information and services, ones he correctly described as potentially "life changing" for long-service, low skilled employees being thrown into the job market with over 100 colleagues at the same time.[9] That evidence is reviewed here.

12. Upon learning of a plant closure via receipt of a "Form 1", the MOL would advise the Ministry of Advanced Education and Skills Development ["MAESD"], who then contacts the

5 Lipton Affidavit, *RC TAB 7* at ¶37; Transcript, Cross-examination of Lynne Campbell [**Campbell Cross**], *RC TAB 3*, QQ 314-315.
6 Park Affidavit, *RC TAB 8*, at ¶24-25; Urban Affidavit, *RC TAB 9*, at ¶8.
7 CTS Employee Listing, Ex. 2 to Urban Cross, *RC TAB 4(b)*.
8 Transcript, First day of hearing (July 17, 2017) [**Transcript, Oral Argument**], *RC TAB 2*, pp. 57-75 [*esp. pp. 64-65, 71*]
9 Reasons for Judgment, dated September 26, 2017 [**Reasons**], *RC TAB 1*, at ¶¶21-34, 74, and 88.

employer to confirm whether it is aware of the types of programs and services offered through "Employment Ontario" that could be of assistance.[10] On receiving a positive response, the MAESD works with the employer to facilitate employee access to a multitude of very significant supports and services, including: (a) arranging and coordinating information sessions with federal partners; (b) arranging to have Employment Ontario providers go on-site to provide information on programs and services, including the Second Career program (which assists laid-off workers train for occupations in high demand by providing eligible employees with up to $28,000 to assist with training related costs i.e., tuition, books, transportation, and basic living expenses; and, (c) establishing an action centre which could offer, amongst other things, job search assistance, one-on-one counselling, job development to augment the services available in the community, literacy programs, and referral services to financial and credit counselling.[11]

13. Instead of giving employees access to this throughout the closure, CTS brought in at the very end "Right Management" to offer a smattering of lesser services (for instance, on how to deal with the emotions associated with a termination).[12] The only evidence of the quality of the services offered came from the Respondents' affiants, who described them as disappointing.[13]

14. Ultimately, CTS admitted in the Form 1 it filed with the MOL that nothing like what the MAESD has to offer was provided. In the Form 1, under "Has the employer implemented or proposed any adjustment measures with employees…?", two senior managers simply typed **"<u>None</u>"**.[14] Relatedly, CTS's lead HR employee in Canada admitted that virtually none of the

10 Lindy Affidavit, *RC TAB 10*, at ¶¶14-18.
11 Emails between M. Baria and R. Lindy, Ex. "C" to the Lindy Affidavit, *RC TAB 10*(a); Exhibits "D"-"Q" of the Lindy Affidavit, *RC TAB 10(b)-(o)*.
12 Campbell Affidavit, *RC TAB 11*, at ¶¶9-11; Lipton Affidavit, *RC TAB 7*, at ¶70.
13 For instance, Burns Affidavit, *RC TAB 12*, at ¶¶15-17, Aultman Affidavit, *RC TAB 13*, at ¶¶26-28, and Featherstone Affidavit, *RC TAB 14*, at ¶¶25-27.
14 Form 1, Ex. "FF" to the Wood Affidavit, *RC TAB 6(a)* [Emphasis Added].

MAESD-available services and information were offered by Right Management.[15] All told, CTS was invoiced $14,400 (plus HST) by Right Management for its group sessions for all hourly employees[16] when a key Employment Ontario retraining service not made available, Second Career, can provide *each employee* with up to $28,000 for tuition, books, child care, and other expenses incurred as part of that employee's skills retraining program.[17]

15. Employees were only first told about the Employment Ontario services on June 18-19, 2015.[18] One class plaintiff, Mr. Featherstone, deposed that he then received help to write a resume and to gain access to an online job search tool,[19] two things he did not receive from Right Management.[20] After nearly 40 years with CTS, Mr. Featherstone did not even have a *CV*.

16. Put simply, the post-Form 1 notice information and services the Class would have received would have been significantly beneficial for them, as Sproat J. rightly accepted.

C. CTS Conceded the Class Would Have Received these Potentially "Life Changing" Benefits had Notice Been Given

17. In its factum, CTS fails to mention that its primary affiant, Tony Urban, then a Vice President, General Manager, and the chief architect of the closure, conceded in cross that CTS would have had no objection to MAESD coming in early to make this significant information and services available.[21] Indeed, at information sessions chaired by Mr. Urban, employees asked for retraining services and CTS's contemporaneous documents indicate that CTS was seeking ways to

15 Campbell Cross, *RC TAB 3*, QQ367-397.
16 CTS Undertakings/ Under Advisements, *RC TAB 17*.
17 Email to M. Baria from L. Lindy dated October 26 and 27, 2016, Ex. "C" to the Lindy Affidavit, *RC TAB 10(a)* [*esp. p. 264*]; and MAESD Second Career webpage, Ex. "L" to the Lindy Affidavit, *RC TAB 10(j)*[*esp. p. 324*].
18 Campbell Affidavit, *RC TAB 11* at ¶29.
19 Featherstone Affidavit, *RC TAB 14*, ¶¶29-30.
20 *Ibid*. at ¶¶25-28.
21 Urban Cross, *RC TAB 4*, QQ442-449.

provide these.[22] CTS ultimately never provided any of these, telling the MOL in the Form 1 on May 12, 2015 that "None" had been provided, a fact Sproat J. rightly gave real weight to.[23] All told, Mr. Urban, in cross, did not hide his disappointment with CTS's conduct:

> Q. Your team really let you down …
> A. I would agree.· Somebody let me down.· I completely agree with you.[24]

18. More to the point, the undisputed evidence before Sproat J. was that, had CTS notified the MOL by April 17, 2014 of the plant closure, the Class would have benefited significantly from the potentially "life changing" information and services the Respondents' record summarizes and Sproat J., with no evidence to contradict the Respondents' evidence, accepted as true.

D. CTS Possessed, Early On, the Information the MOL Required in the Form 1

19. In the *ESA* and regulations, an employer must complete a form at the start of the "notice period" [the Form 1] that contains prospective information about the number of expected layoffs, any "proposed adjustment measures", and economic circumstances leading to the closure.[25] The written Record confirms CTS knew all of these things by late 2013 and early 2014.[26] CTS could easily have filed Form 1 on April 17, 2014 when it gave the Class written notice of termination and knew 77 of its employees would be let go effective March 26, 2015.

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22 Baldassare's Notes dated May 12, 2014 and DeVous Email summary dated , Exs. "T" and "V" to the Wood Affidavit, *RC TAB 6(b) and (c)*; Urban Cross, *RC TAB 4*, QQ442-449.
23 Reasons, *RC TAB 1*, at ¶31.
24 Urban Cross, *RC TAB 4*, QQ 297-299.
25 *ESA*, s. 58(3); "Termination and Severance of Employment", O.Reg. 288/01, s. 3(2), BOA Tab 1.
26 Agreement of Purchase and Sale, Ex. "D" to the Lipton Affidavit, *RC TAB 7(a)*; CTS Board Presentation, Ex. "M" to the Wood Affidavit, *RC TAB 6(d)* [*esp. p. 156*]; News Release, Ex. "G" to the Urban Affidavit, *RC TAB 9(a)*; CTS Employee Listing, Ex. "2" to Urban Cross, *RC TAB 4(b)*; CTS Undertakings/ Under Advisements, *RC TAB 17*; Ex. "A" to the Lidstone Affidavit, *RC TAB 16(a)*; Urban Cross, *RC TAB 4*, QQ278-285.

E. A Few Details about the Action and Motion

20. The Respondents sued for wrongful dismissal, arguing that: (a) CTS could not take credit for working notice given between April 17, 2014 and the date it gave the MOL notice on May 12, 2015; and, thus, (b) valid contractual common law notice runs from May 12, 2015 onward.

21. Sproat J. accepted the argument, holding that: (a) notice had to be given to the MOL by April 17, 2014, at the start of the "notice period"; (b) CTS therefore breached its *ESA* (and related contractual) obligation to give that notice; and, (c) as a consequence, the defence of "notice" normally available to CTS was not available because the notice was tainted by a core breach of contract. Had Sproat J. not come to that final conclusion, His Honour observed, in his reasons, that on the class's alternative "illegality" analysis, CTS could not rely on the illegal April 17, 2014 – May 12, 2015 notice period as a defence to the Action.[27]

PART III: ISSUES AND ARGUMENT

22. CTS's appeal raises one primary issue: Did His Honour err in holding that CTS was required by the *ESA*, at the start of the "notice period", to notify the MOL of the closure? Sproat J. correctly held that the "notice period" in s. 58 means what it says: notice must be given at the start of the "notice period" and not the much shorter "statutory notice period". Had the Legislature intended that the shorter "statutory notice period" triggers notice, it could have explicitly said so in the *ESA* (as it had before 2000). Further, and perhaps more importantly given the proper interpretive approach one must apply to the *ESA*, interpreting s. 58 to mean the "notice period" better serves the *ESA*'s purposes of early notification and provision of services and is more protective of employee interests.

27 Reasons, *RC TAB 1*, at ¶93.

23. Once the Court accepts this proposition, the rest of CTS's appeal should be disposed of in the way Sproat J. decided. If CTS had to give the MOL notice on April 17, 2014 and not May 12, 2015 with the result, unassailable on the Record, that the Class was denied important outplacement services for over a year, then the only remedy is to treat CTS's working notice as void. That is the proper result on a contract analysis: that is, CTS breached a core contractual notice obligation by breaching the *ESA* as the *ESA*'s requirements are incorporated into each employee's contracts. Alternatively, the principles of illegality support a finding that the illegal performance of the contractual obligation of giving notice prevents CTS from relying on the notice it gave to defeat the Class's common law notice claim.

STANDARD OF REVIEW

24. While the extricable legal issues raised are reviewed for correctness, as the Action also concerns contractual remedies that flow from a breach and/or illegal contractual performance, the post-*Sattva* jurisprudence suggests that the palpable/overriding test applies.[28] Here, the consequences of CTS's breach – the failure to provide "life changing" services – is an issue heavily enmeshed in the facts. Moreover, as this Court has shown deference to contractual interpretations rendered by expert commercial judges,[29] it should be no different where employment contracts at issue are interpreted, as here, by a leading employment law expert. Finally, deference applies even though the underlying summary judgment motion was argued on a paper record.[30]

28 *Cf* the recent analysis in *Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc.*, 2017 ONCA 293 at ¶¶16-41, Respondents' Book of Authorities ("BOA"), Tab 12. See also *Gettle Bros. Construction Co. Ltd. v. Alwinsal Potash of Canada Ltd.*, 1969 CanLII 659 (Sask. CA), at ¶17, aff'd [1971] S.C.R. 320 [effect of contractual breach a question of fact], BOA Tab 13.
29 *Western Larch Limited v. Di Poce Management Limited*, 2013 ONCA 722, at ¶¶15-16, BOA Tab 14.
30 *Fendelet v. Dohey*, 2007 ONCA 475 at ¶¶3-4, BOA Tab 15 and *FL Receivables Trust 2002-A (Administrator of) v. Cobrand Foods Ltd.*, 2007 ONCA 425 at ¶¶44-47, BOA Tab 16.

THE POINTS NOT IN DISPUTE

25. Before Sproat J., the parties agreed that CTS owed common law reasonable notice to the Class before terminating their employment. More importantly, the parties correctly agreed on a central legal principle that CTS ignores completely in its factum. While CTS, in its factum, goes to lengths to set out the alleged *statutory* consequences of and remedies flowing from an *ESA* breach, CTS properly conceded before Sproat J. that: [1] the *ESA*'s obligations form an integral part of each employee's *contracts* with CTS; and, [2] breach of the *ESA* is thus actionable as a breach of *contract*. This concession and understanding followed from decades-old settled case law.[31] This proper concession will play a central role in our argument, below.

THE FACT APPEAL

26. CTS suggests that because the *ESA* does not overtly mandate the provision of information and services, Sproat J. erred in finding that such services would have been provided.[32] Although CTS couches this as legal error, Sproat J.'s finding was factual and is owed deference. The finding was based on the Respondents' substantial evidence of the services, evidence drawn from primary government sources who ran the programs. Instead of responding to this evidence with evidence of its own, CTS merely argued that the evidence should be disregarded as inadmissible but then withdrew the contention in oral argument.[33] Sproat J. was thus left with the Respondents' evidence and CTS's affiant's admission these would have been provided had notice been given. The resulting findings of fact, that the services were important and would have been provided, naturally followed, and is owed substantial deference.

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31 *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, at ¶¶24-30, BOA Tab 17; *Stewart v. Park Manor Motors Ltd.*, [1967] O.J. No. 1117 (C.A.), at ¶10, BOA Tab 18; *Franklin v. University of Toronto*, [2001] O.J. No. 4321 (S.C.J.), at ¶¶24-26, BOA Tab 19; *Kumar v. Sharp Business Forms Inc.*, 2001 CanLII 28301 (S.C.J.), at ¶¶7-31, BOA Tab 20.
32 CTS's Factum, at ¶68.
33 *Transcript, Oral Argument, RC TAB 2,* pp. 64-65.

27. If the Court accepts that, on the facts, CTS's failure to give the MOL notice by April 17, 2014 deprived the class members of these substantial benefits for well over a year, then frankly, if the Court also agrees that the *ESA* obligated the giving of this notice by April 17, 2014, the remedy Sproat J. ordered is inevitable. This is because of CTS's legally correct concession that such a breach would: (a) also constitute a core breach of contract; and/or (b) would mean that the contract was performed illegally. On any finding, the law leaves no doubt that CTS cannot rely on its serious contractual breaches and illegal conduct to defeat the Class's contract claim.

28. The appeal therefore comes down largely on the interpretive question to which we now turn before dealing with the issue of the consequences of CTS's *ESA* breaches.

FORM 1 NOTICE HAD TO BE GIVEN AT THE START OF THE "NOTICE PERIOD"

29. We submit that the *ESA* required that CTS notify the MOL by April 17, 2014, the first day of the notice period, then post the Form 1 during the notice period. CTS argues that it need only do so as of May 2, 2015, eight weeks before the June 26, 2015 departures.[34] The Respondents' interpretation accords with the *ESA*'s words, the history and purposes of the *ESA*'s termination provisions, and the remedial, employee-protective interpretive approach required. Under this interpretation, the MOL would have been notified early and the Class would have been provided with early much-needed programs. CTS's interpretation would see it free to conduct a shutdown without notifying the MOL until the eve of closing, by which time several employees had resigned and most had been deprived, for 13 months, of potentially life-changing information and assistance. No purpose and no benefit could be served by this interpretation of the *ESA*.

34 Interestingly, as CTS first set March 26, 2015 as the last day for 77 employees before, in late February, pushing that day back to June 26, on CTS's own interpretation, it had to tell the MOL of the closure by January 29, 2015 [8 weeks before Mar. 26] of the closure. CTS did not even do this and was thus 3.5 months late on its own reading of the *ESA*.

A. Terminations and the *ESA* Generally

30. When an employer decides to terminate one or more employees, the *ESA* provides that it must set a single notice period by giving "at least" one week's notice per year of service, up to eight weeks.[35] On a mass termination of 50-200 employees, the *ESA* and regulations require "at least" eight weeks' notice.[36] Notice, when given, sets some ground rules: (a) it alerts the employee of their last day; (b) it requires that an employee give 1-2 weeks' notice before resigning;[37] and, (c) where notice is given for a longer period, the employee can choose to remain to the end or can leave early, within the "statutory notice period" portion of the "notice period", and still collect *ESA* severance.[38] Given the importance to employees of being able to rely on the full notice given so they can prepare and plan, the *ESA* and Regulations also require that: (a) notice be given in writing and served personally;[39] and, (b) while the employer may offer up to 13 weeks of additional temporary work, the previously set termination date does not change.[40] Thus notice, once given, cannot be withdrawn.[41] To reinforce these important obligations, the *ESA* also states that employers cannot contract out of the *ESA*[42] and that the MOL will enforce *ESA* obligations with criminal prosecution[43] or a range of orders to enjoin and ensure compliance.[44]

31. As will be discussed in more detail below, the *ESA* also deals with the common situation of an employer who, on a mass termination, gives the single notice period it must give but where this notice period is longer than the eight week regulatory minimum. In such a situation, s. 1(1) of the

35 *ESA*, ss. 54 and 57, BOA Tab 2.
36 *ESA*, s. 58; "Termination and Severance of Employment", O.Reg. 288/01, s. 3(1)1, BOA Tab 1.
37 *ESA*, s. 58(6), BOA Tab 2.
38 *ESA*, s. 1 (def. of "statutory notice period") and s. 63(1)(e), BOA Tab 2.
39 "Termination and Severance of Employment", O.Reg. 288/01, s. 4(1), BOA Tab 1.
40 *Ibid*, s. 6(2).
41 *Westburne Central Supply, Re*, [1992] O.E.S.A.D. No. 190 at ¶¶5-7, BOA Tab 21; *McCombe International Trucks Limited*, July 22, 1982, (Davis) E.S.C. 1251, at pp. 4-5, BOA Tab 22; July 24, 2015 MOL Reasons in *Gill v. CTS*, Gill Affidavit, Ex. "F", *RC TAB 15(a)*.
42 *ESA*, s. 5(1), BOA Tab 2.
43 *ESA*, s. 132, BOA Tab 2.
44 *ESA*, ss. 108(1) and 108(5)-(6), BOA Tab 2.

ESA expressly defines the longer period as the "notice period" and the eight week period at the end of that "notice period" as the "statutory notice period".[45]

32. These definitions exist to regulate the entire "notice period", telling employees, as noted above, that they can now plan for their last day, including by working and resigning early during the "statutory notice period" portion of the "notice period" while still collecting severance pay.[46] As we will argue below, the critical section here, the mass termination Form 1 notice section [s. 58(2)], provides that employers need to give the MOL the Form 1 notice at the start of the "notice period" and keep it posted during the "notice period", not just the "statutory notice period". However, before interpreting that section, we must start with key interpretive principles.

B. The Correct Interpretive Approach to the ESA

33. Like all legislation, the *ESA's* words must be interpreted "purposively", "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".[47] Further, the *Legislation Act* commands a "fair, large and liberal construction" to ensure that the *ESA*'s objectives are fulfilled.[48] The SCC in *Rizzo Shoes* added that, as the *ESA* is benefits-conferring legislation designed to "protect employees", it must also be interpreted broadly and generously: "[a]ny doubt arising from difficulties of language should be resolved in favour of the claimant".[49]

45 Relatedly, s. 57, headed by "Employer notice period" adds that the "notice period" is "at least" a certain amount. When an employer gives a longer "notice period", s. 5(2) provides that this "greater benefit" will be enforced.
46 *ESA*, ss. 63(1)(e) and 64(1), BOA Tab 2.
47 *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at ¶21[***Rizzo***], BOA Tab 23. See also, *British Columbia Human Rights Tribunal v. Shrenk*, 2017 SCC 62 at ¶103 [***Shrenk***], BOA Tab 24.
48 *Legislation Act, 2006*, c. 21 Sched. F, s. 64(1), BOA Tab 3.
49 *Rizzo*, *supra*, at ¶ 25 & 36; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 SCR 986 at p. 1003 [***Machtinger***], BOA Tab 25.

C. The Words Used Support Sproat J.'s Conclusion

34. In the *ESA*, an employer who terminates 50 or more employees must also notify the MOL, post an approved form "on the first day of the **notice period**",[50] then keep the posting up during the notice period.[51] The trigger is thus the start of the "notice period" and not the "statutory notice period", a term used elsewhere in the *ESA*.[52] As noted earlier, s. 1(1) clearly defines the "notice period" as the full notice period given when an employer terminates employees. "Statutory notice period" is then defined in s. 1(1) as the last eight weeks of that longer "notice period". On a plain reading, CTS had to notify the MOL on April 17, 2014, the start of the "notice period".

35. To avoid this interpretation of the plain words "notice period", CTS turns to various usages of the term "notice" in the statute and its headings to suggest that "statutory" ought to read in before "notice period" in s. 58(2). With respect, pointing to the use of "notice prescribed" elsewhere, for instance, is a red herring designed to avoid the obvious: the case at bar involves an interpretation of s. 58, which provides that MOL notice is given at the start of the "notice period" and then posted throughout the "notice period".[53] The words used unequivocally indicate that the start of the "notice period" is the trigger. Had the Legislature wished otherwise, it could have used "statutory notice period" in s. 58(2) to make plain that the MOL Form 1 notice can wait to the last eight weeks. This is what the *ESA* in fact said before 2000, a point argued in Section D., below.

36. Where a statute uses two different terms, different meanings are ascribed to a section that uses one term vs. a section that uses another,[54] particularly where, as here, the two sets of terms are

50 *ESA*, s. 58(2) [Emphasis Added], BOA Tab 2.
51 *ESA*, s. 58(5), BOA Tab 2.
52 *ESA*, s. 63(1)(e), BOA Tab 2.
53 In any case, Sproat J. rightly rejected CTS's red herring arguments, noting that many other usages of "notice" in the *ESA* indicate that "notice" and "notice period" all mean the longer period of notice where applicable.
54 *Agraira v. Canada*, 2013 SCC 36 at ¶81, BOA Tab 26; *Barreau du Québec v. Quebec (Attorney General)*, 2017 SCC 56 at ¶77, BOA Tab 27; *Godbout v. Pagé*, 2017 SCC 18 at ¶115, BOA Tab 28.

technical, defined ones[55]. Thus, interpreting s. 58(2) as CTS argues, that one first posts at the start of the "statutory notice period", would interpret s. 58(2) as if the word "statutory" had been written when: (a) manifestly it had not; and, (b) "statutory notice period" and "notice period" are used elsewhere in the *ESA* to mean different things. Having chosen "notice period": (a) the longer "notice period" was intended; and, (b) the shorter "statutory notice period" was not.

37. Final clues supporting the earlier timing of MOL notice are found in other parts of s. 58 and the key regulation. These require the giving and posting of information of a *prospective* nature such as information about the economic circumstances leading to the closure.[56] As noted in the Facts, CTS had all of this information by April 17, 2014, at the start of the "notice period".

38. Before moving on, while CTS describes this interpretation as "novel", it cites no case law giving s. 58(2) its interpretation. The only case on point comes from BC, where the Court of Appeal held that similar language in that Province's statute means that the equivalent MOL notice must be given on the first day of the notice period, as the Respondents contend.[57]

D. The 2000 ESA Amendments Definitively Support the Respondents' Reading

39. From 1987 to 2000, the obligation to post the Form 1, keep it posted, and give the MOL notice were spelled out as ones that apply only during the "**statutory** notice period".[58] Thus, from 1987 until the 2000 wholesale replacement of the *ESA*, s. 57(3) required that notice be given at the

55 *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*, [1988] 2 SCR 175 at ¶20, BOA Tab 29.
56 *ESA*, s. 58(3); "Termination and Severance of Employment", O.Reg. 288/01, s. 3(2), BOA Tab 1.
57 *Canadian Assn. of Industrial, Mechanical and Allied Workers v. Wolverine Tube (Canada) Inc.*, 1993 CanLII 801 (B.C.C.A.) at ¶¶34-40 and 50, interpreting the *Employment Standards Act*, R.S.B.C. 1996, c. 113, ss. 64(1)-(2), BOA Tab 30.
58 *An Act to Amend the Employment Standards Act*, S.O. 1987, c. 30, s. 4(2), adding ss. 40(2a) and 40(2b), and s. 1(2) adding s. 1(nb) [def. of "statutory notice period"] [Emphasis Added], BOA Tab 4.

start of the shorter "**statutory** notice period". Section 57(3) was also introduced by weak language: "*[w]here so prescribed*, an employer *may* be required" to give notice.[59]

40. In 2000, the Legislature updated the *ESA*, making many changes. Among them, s. 57 was replaced with the current section [s. 58]. In doing so, the Legislature removed the word "statutory" twice in s. 58, replacing "statutory notice period" with "notice period". With respect to CTS's arguments that it need only post the Form 1 and notify the MOL by the start of the "statutory notice period", the 2000 amendments decisively refute their interpretation. Of note, the Hansard surrounding the 2000 *ESA* restatement is silent about s. 57 (thereafter, s. 58).

41. When a section is amended, then absent external evidence that no change in meaning was intended, the amended wording must be given a different interpretation than the prior wording.[60]

42. The present situation is almost identical to *Ulybel*, where the removal of one term by amendment was held, in the absence of a Hansard comment, to change the meaning of the affected section.[61] Iacobucci J. held that the amendment in such a case meant that a different interpretation emerged as Parliament must be deemed to have acted purposively.[62] *Ulybel* commands the same result in the present appeal: amending the *ESA* to remove "statutory" and to leave a distinctly different term in its place ("notice period") must, coupled with the silence in Hansard, mean an intended change from the shorter "statutory notice period" to the longer "notice period".

43. Consistent with this argument that the 2000 amendments strengthened the notice requirements, these amendments also removed the weaker "Where so prescribed" and "may"

59 *Employment Standards Act*, R.S.O. 1990, c. E.14, s. 57(3), BOA Tab 5.
60 *Bathurst Paper Ltd. v. Minister of Municipal Affairs of New Brunswick*, [1972] S.C.R. 471 at pp. 477-478, BOA Tab 31; *Toronto-Dominion Bank v. Szilagyi Farms Ltd.*, [1988] O.J. No. 1223 at ¶14 (C.A.), BOA Tab 32; *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 at ¶¶33-35 [***Ulybel***], BOA Tab 33; *Shrenk*, *supra* at ¶6.
61 *Ulybel*, *supra* at ¶33.
62 *Ibid.* at ¶¶34-35.

wording formerly in s. 57(3), replacing them simply with "shall" *i.e.* the employer "shall" notify, period. Undoubtedly, someone well versed in the section, limited to the "statutory notice period", found this wording wanting: the old wording suggested modest consequences on a breach[63] and set out unduly short notice periods. The drafter clearly opted to strengthen the provision.

44. CTS responds by pointing to a consultation paper put out at the start of the 2000 amendments to the effect that government did not at the start intend to make changes to the *ESA*'s termination provisions.[64] However, later, during Second Reading of the actual Bill, the sponsoring Minister stated dozens of times that he had listened to concerns and had made changes.[65] And, in addition to changes to s. 58, two other major changes to the *ESA*'s termination part [Part XV] were made: (a) major alterations to the "temporary layoff" rules to increase the number of laid off employees who could collect severance; and, (b) re-drafting the severance service formula.[66]

45. Put simply, the *ESA* that emerged in 2000 contained substantial amendments, including to the termination Part [Part XV], whatever any initial consultation paper may have said. One cannot ignore the fact that, among Part XV's many amendments, s. 57 changed with the removal of "statutory" in multiple sub-sections of s. 57. In these circumstances, *Ulybel* treats this change as purposive, as did Sproat J. and as the Court, we submit, ought to now.

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63 As held by the one *ESA* officer in 1997 in relation to the posting requirements: *St. Laurent v. Kelsey Hayes Canada*, 1997 CarswellOnt 5410 at ¶¶28 and 32-33, BOA Tab 34.
64 CTS's Factum, at ¶53.
65 Ontario, Legislative Assembly, Official Report of Debates (Hansard), 37th Parl, 1st Session, No.107 (24 Nov 2000) at pp. 5760-5761 and 5763-5764, No.112B (4 Dec 2000) at pp.6067-6068, No.113B (5 Dec 2000) at pp. 6117-6138, No.115B (7 Dec 2000) at pp. 6253-6271, No.116A (11 Dec 2000) at pp. 6294-6309 and No.117A (12 Dec 2000) at pp. 6353-6366, BOA Tab 8.
66 Compare *Employment Standards Act*, R.S.O. 1990, c. E.14, ss. 57(17) and 58(1) with *ESA*, s. 56; and, s. 58(4) of the former with s. 65(2) of the latter (added in 2000).

E. The Purposive, Remedial Interpretation Favours the Respondents' Interpretation

46. CTS offers no reasons to suggest that waiting until eight weeks before a closure to give the MOL notice and get employees important information and services better serves the *ESA*'s purposes over a reading that would require notice at the start of the notice period. CTS does not even explain what the *ESA*'s termination provisions' purposes are. This is because those purposes – ensuring earliest possible notices and services and giving employees the best chance at securing employment – all support the Respondents' interpretation. Again, one must interpret the *ESA* purposively and remedially and not, as CTS does, ignore those remedial purposes entirely.

47. The purpose of the *ESA*'s termination provisions is to assist employees in securing new employment by giving them notice and financial security during a difficult time. That purpose has been assiduously cited in legislative debates[67] and case law.[68] The same purpose is, according to the drafters, fulfilled in a mass termination situation by ensuring the earliest possible notice and provision of services.[69] In the United States, from which CTS hails, the equivalent federal mass termination statute (the *WARN Act*) was enacted pursuant to a theory that effective adjustment programs require longer notice alongside the services.[70] Courts in the US have then held that the purpose is the assurance of the most rapid assistance possible to employees.[71] Research into the

67 Ontario, Legislative Assembly, Official Report of Debates (Hansard), 28th Parl, 3rd Sess, No 81 (27 May 1970) at 3236 and (24 June 1970) at 4450-4451 (Minister Bales), BOA Tab 9; Ontario, Legislative Assembly, Official Report of Debates (Hansard), 33rd Parl, 3rd Sess, No 27 (15 June 1987) at 1352-1353 and No 34 (25 June 1987) at 1744-1745 (Minister Wrye), BOA Tab 10.

68 *Rizzo*, *supra*, at ¶25; *Re Telegram Publishing Co.* (1972), 1 L.A.C. (2d) 1 at pp. 20-21; aff'd 1975 CarswellOnt 816 (C.A.), BOA Tab 35; *Re Readyfoods Limited*, 1998 CanLII 19020 (MB LA) at pp. 14-15, BOA Tab 36.

69 *Supra* fn 67; House of Commons Debates, 28th Parl, 3rd Sess, Vol 5 (28 April 1971) at 5320 (Hon. Bryce Mackasey), BOA Tab 11.

70 For the US context, see E. Hudson-Plush, "WARN's Place in the FLSA/Employment Discrimination Dichotomy: Why a Warning Cannot be Waived" (2006), 27 Card. Law Rev. 2929, esp. at pp. 2930-2931 and fn 9 of this article, BOA Tab 37; and, C.P. Yost, "The Worker Adjustment and Retraining Notification Act of 1988: Advance Notice Required?", (1989), 38 Cath. U.L. Rev. 675 at pp. 680-682, BOA Tab 38.

71 *United Paperworkers Int'l Union v. Specialty Paperboard, Inc*., 999 F.2d 51 (2d Cir. 1993), at p. 54, BOA Tab 39; *Local Joint Executive Bd. v. Las Vegas Sands, Inc*., 244 F.3d 1152 (9th Cir. 2001) at p. 1159 [quoting from the 1987 Senate report that formed the basis of the *WARN Act*], BOA Tab 40.

effect of termination laws likewise supports the propositions that employees covered by mass termination laws fare better than others in securing new work.[72]

48. Put simply, the Respondents' interpretation, which would have seen the Class have access to information and services early on, better serves the law's purposes of earlier notice and provision of services. Here, by the time CTS gave the Form 1: (a) 15 of its employees had resigned, having never heard of the services;[73] and, (b) the remaining 114 had been deprived of potentially life-changing information and services for over a year. An interpretation of "notice period" that has that result, as CTS argues, should not be preferred for the one that actually accomplishes the *ESA*'s purposes on a purposive, remedial reading. When in doubt, the more employee-favourable reading, per *Rizzo Shoes*, governs.

F. A Note on CTS's Reliance on the MOL's Policy Manual

49. While the MOL's internal policy manual given to its staff (but not readily available to the public) supports CTS's interpretation of s. 58, the MOL's publicly available, frequently updated interpretation Guide, supports the Respondents' interpretation.[74] That Guide has influenced tribunal interpretations of the *ESA*,[75] just as the policy manual sometimes does. The presence of two interpretive texts that disagree over the meaning of s. 58(2) can hardly be said to overcome the plain meaning of "notice period", one supported by a remedial, purposive reading. Quite apart

72 See notably: J. Friesen, "Mandatory Notice and the Jobless Durations of Displaced Workers", 50 Indus. & Lab. Rel. Rev. 652 at pp. 663-664 (citing several earlier Canadian studies), BOA Tab 41; and, the studies referenced at p. 681 of C.P. Yost, "The Worker Adjustment and Retraining Notification Act of 1988: Advance Notice Required?", *supra.* Friesen's Canadian study, at p. 663, notes that greater workforce attachment, such as in a layoff with an expected return, negatively impacts re-employment. This supports an inference that those receiving early adjustment and retraining services, which de-couples such employees from their old employer, are not as negatively impacted.
73 CTS Undertakings/ Under Advisements, *RC TAB 17*.
74 *Your Guide to the Employment Standards Act, 2000*, "Termination of Employment", MOL, June 2016 version, BOA Tab 42.
75 *Stock Transportation v. Teamster, Local 938*, 2008 CanLII 36511 (ON LA), BOA Tab 43; *Glendale Golf and Country Club, Limited v. Massimo Sanago and Director of Employment Standards*, 2010 CanLII 4265 (ON LRB), BOA Tab 44.

from this, this Court and others have cautioned that the manual CTS relies on is not authoritative, with this Court in *London Machinery* disregarding it altogether.[76] Sproat J. took note of the duelling guides and correctly chose the interpretation that better fits the words and purposes of s. 58(2).[77]

G. Conclusion

50. Based on the text of s. 58, its history, and the purposive/remedial analysis required, CTS had to give the MOL notice on April 17, 2014, when it notified the Class of their terminations.

THE FAILURE TO GIVE THE FORM 1 NOTICE "VOIDS" PART OF THE NOTICE

51. As properly conceded by CTS, if the *ESA* is found to require the delivery of the Form 1 on April 17, 2014, CTS's delivery on May 12, 2015 amounted to a breach of both the *ESA* and contract. What should result from this breach of contract, with the significant repercussions for the Class, is that CTS could not rely on alleged contractual compliance from April 17, 2014 to May 12, 2015.[78] Their "notice", in plain English, was null and void.

52. When CTS first gave notice, it owed its employees a common law and contractual duty to give them reasonable notice of termination. The goal of this notice is the provision of a reasonable opportunity to find work.[79] That is the same goal, as outlined earlier, of the *ESA* termination notice provisions. Basically, CTS sought to achieve this purpose by giving working notice while simultaneously undermining the achievement of the purpose by its own *ESA*/contractual

76 *London Machinery Inc. v. CAW-Canada, Local 27*, [2006] O.J. No. 1087 (C.A.), at ¶54, BOA Tab 45; *Tradium Mechanical Inc. v. Jaidane*, 2016 CarswellOnt 19620 (SCJ), at ¶16, BOA Tab 46.
77 Reasons, *RC TAB 1* at ¶¶40, 52, and 71-72.
78 CTS's main defence was that they had given working notice as of April 17, 2014: CTS's Statement of Defence, Ex. "B" to the Wood Affidavit, *RC TAB 6(e)* at ¶46.
79 *Farber v. Royal Trust Co.*, [1997] 1 SCR 846 at ¶48 [***Farber***], BOA Tab 47; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at ¶¶112, 120, and 128, BOA Tab 48; *Medis Health and Pharmaceutical Services Inc. v. Bramble*, 1999 CanLII 13124 (N.B.C.A.) at ¶¶57 and 78-80 [***Bramble***], BOA Tab 49.

violations, violations that occurred for as much as 93% of the notice period (the situation of the majority, whose last day was June 26, 2015).

53. In these circumstances, as Sproat J. held: (a) CTS should not be permitted to rely on its working notice when it simultaneously breached inextricably linked statutory/contractual obligations; and, (b) the working notice should be deemed void. Declaring the notice void and not permitting CTS to rely on it is consistent with how courts treat other *ESA* breaches at termination and the law and policy of the courts when employee-protecting statutory illegality is involved.[80]

A. CTS Cannot Defend the Claim by Saying "We complied with our contractual obligation to give working notice" while simultaneously breaching the Contractual Obligation to Give Form 1 Notice; The Contract Breach Nullifies Notice

54. As Sproat J. held, following a thorough analysis of the key jurisprudence, Canadian courts treat contractual notice obligations very seriously, holding that breaches of the *ESA* in terminations carry real consequences. On the case law and based on first principles, this was a reasonable and correct result. Put simply, while normally an employer would get credit for working notice given from April 17, 2014 to May 12, 2015, that notice here simultaneously amounted to a breach of an inextricably linked contractual notice obligation serving the same purpose as the purpose of giving the overall notice in the first place. On a simple contractual breach analysis, CTS breached its employment contracts with each Class member and should get no credit for that breach.

55. In a wrongful dismissal Action, the giving of working notice is a defence,[81] and typically the employer's primary defence, as in the present case.[82] While many such Actions turn on the

80 *Wood v. Fred Deeley Imports Ltd*., 2017 ONCA 158 at ¶¶26-28 [***Wood***], BOA Tab 50 and *North v. Metaswitch Networks Corporation*, 2017 ONCA 790 at ¶¶17-19 [***North***], BOA Tab 51.
81 *Cottrill v. Utopia Day Spas and Salons Ltd*., 2017 BCSC 704, at ¶104 [***Cottrill***], BOA Tab 52; *Yeager v. R.J. Hastings Agencies Ltd*., 1984, CanLII 533 (BCSC), at ¶40, BOA Tab 53; *Gregg v. Freightliner Ltd.*, 2004 BCSC 1574 at ¶39, BOA Tab 54; *Humby v University of New Brunswick*, 1998 CanLII 18485 (NBQB.) at p. 6, BOA Tab 55; *R.G.O. Office Products Ltd. v. Knoll North America Corp*.,1996 CanLII 10339 (ABQB), at ¶66, BOA Tab 56; *Bent v.*

question of whether the notice was *quantitatively* deficient, the jurisprudence is settled that where the notice is *qualitatively* deficient, it is treated as entirely void: "[n]otice is a binary concept; either there is notice or there is not".[83] Thus, if something is "close" to notice, it is not notice, and the employer will get no credit for it.[84] In this sense, employment contracts are treated differently than commercial agreements, where breaches may simply give rise to secondary contractual obligations (like damages) and the breaching party may get some credit for part performance.[85] The notion of looking to the contract for the effect of breach is that, in a commercial relationship of equal bargaining power, the parties are expected to have agreed as to what happens on a breach. But, just as the leading commercial cases caution that such an approach does not apply in context of relationships of unequal bargaining power,[86] the SCC has said that the employment relationship is just such a relationship,[87] as has this Court recently: "…courts interpret employment agreements differently from other commercial agreements".[88]

Atlantic Shopping Centres Ltd., 2007 NSSC 231, at ¶23, BOA Tab 57; *Walton's Truck Service Ltd. v. Llewelyn*, [2016] C.L.A.D. No. 94, at p.7, BOA Tab 58; *Starks v. Corner Brook Garage Ltd.*, 2002 CanLII 54056 (NL SCTD), at ¶28, BOA Tab 59.

82 CTS's Statement of Defence, Ex. "B", Wood Affidavit, *RC TAB 6(e)* ¶46.

83 *Kerfoot v. Weyerhaeuser Company Limited*, 2013 BCCA 330, at ¶27, BOA Tab 60; *Michela v. St. Thomas of Villanova Catholic School*, 2015 ONSC 15, at ¶68; all'd, but not on this point, 2015 ONCA 801**[*Michela*]**, BOA Tab 61.

84 See *Michela*, *supra* at ¶¶68-69, citing *Deputat v. Edmonton School District No. 7*, 2008 ABCA 13 at ¶11, BOA Tab 62; *Williams v. McCormick, Rankin & Associates Ltd*., [1987] O.J. No. 1617 (Dist. Ct.), at p. 2 [***Williams***], BOA Tab 63; *Wilson v. Crown Trust Co.*, [1992] O.J. 1765, at p. 4 of 10, BOA Tab 64; *Prinzo v. Baycrest Centre for Geriatric Care*, [2002] O.J. No. 2712 (C.A.), at ¶17, BOA Tab 65. A notice that is unclear is not notice, for example: *Luchuk v Sport BC*, 1984 CanLII 812 (BCSC), at ¶14, BOA Tab 66; *Bader v. Canada Trust Co*, 1980 CarswellBC 1903, at ¶6, BOA Tab 67; *Williams, supra*; *Cottrill*, *supra* at ¶¶104-106.

85 *Photo Production Ltd. v. Securicor Transport Ltd*., [1980] A.C. 827 (H.L.), at pp. 848-849, BOA Tab 68, adopted in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, at pp. 499-500, BOA Tab 69. See S. Waddams, *The Law of Damages*, 2nd ed. (Toronto: Thomson Reuters, 2016), at ¶¶15.670-15.750, BOA Tab 70.

86 In *Photo Production Ltd.*, *supra* at pp. 843 and 849, Wilberforce J. acknowledged that treating breaches as "fundamental" serves important purposes in areas where Parliament has legislated to protected relationships of unequal bargaining power. This is precisely the situation of the *ESA*. Lord Diplock added, at p. 849, that the more drastic "void" result will apply outside the commercial context.

87 *Machtinger*, *supra* at p. 1003.

88 *Wood*, supra at ¶26. *Cf North*, *supra* at ¶19.

56. In short, first principles support the holding in the employment law case law that the effect of a notice that falls short is that the employer gets no credit for the "notice" given. The principle that notice that is deficient, with the result that deficient "notice" vitiates the "notice" given, must apply here where the CTS notice was materially deficient, in breach of no less than an inextricably linked and important *ESA* obligation. This is what Sproat J. reasonably and correctly held.

57. Moreover, closely analogous case law fully supports this conclusion. For instance, CTS's defence mirrors one rejected in *Machtinger*. There, the contract's termination clause itself was void on illegality grounds (the clause was below *ESA* minimums). The employer conceded that but argued that the fact the parties had bargained for this shorter notice should be taken into account in setting the notice period or denying full recovery. Iacobucci J. rejected this:

> In this case we are…faced with…a contract of which one clause is null and void by operation of statute. I would…apply the reasoning of Kerr L.J.: if a term is null and void, then it is null and void for all purposes, and cannot be used as evidence of the parties' intention.[89]

58. By analogy, the fact CTS's notice gave employees time, end dates, and money (albeit in exchange for labour) should not turn this partial, defective form of notice into some sort of "credit", as CTS argues. The notice given here should likewise be void "for all purposes".

59. By further analogy, an *ESA* regulation contains a requirement similar to the Form 1 requirements, in the sense that the breach of which has resulted in courts declaring the inter-related *common law* notice void. In s. 6(1) of the "Termination" regulation, an employer who gives notice is permitted to give "temporary work to the employee without providing a further notice of termination" so long as the final date is no later than 13 weeks following the original termination

89 *Machtinger*, *supra* at p. 1001, citing Kerr L.J., in *Rover International Ltd. v. Cannon Film Sales Ltd.*, [1989] 1 W.L.R. 912 (Eng. C.A.).

date.[90] Despite the fact that this regulatory requirement only regulates how *ESA* notice is to be given, this Court held in *DiTomaso* that, if an employer breaches s. 6(1) by giving more than 13 weeks of temporary work, the employer must also provide fresh *common law* notice. Once s. 6(1) is breached, all prior notices are disregarded, and the employer gets no credit for them.[91]

60. The Form 1 framework shares many similarities with s. 6(1) of the regulation. Just as s. 6(1) regulates the *ESA* notice and says that fresh *ESA* notice must be provided on breach, s. 58(4) itself provides that, until the MOL receives the Form 1, the s. 58(1) notice is deemed "not to have been given". The controlling Court of Appeal *ratio* should thus be dispositive. If an employer gives valid common law notice and breaches the regulation by giving more than 13 weeks of additional work is told that fresh common law notice is required and that the prior notice is void, the similar MOL notice requirement language in the *ESA* should lead to a similar result when that notice is not given. Both the Form 1 and temporary work provisions regulate notice and are inextricably linked to the giving of notice. They are both designed to assist the employee by ensuring that notice is given in a way that promotes the search for employment.[92]

61. The Court of Appeal holding is thus consistent with the principles enunciated earlier: the *ESA* breach converts seeming "notice" into "no notice" ("either there is notice or there is not") and, consistent with *Machtinger*, no credit is given for breaches of *ESA* minimums that regulate important rules around termination. The Court of Appeal jurisprudence should therefore be dispositive here, as Sproat J. felt it should be as well.

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90 "Termination and Severance of Employment", O.Reg. 288/01, s. 6(1), BOA Tab 1.
91 *DiTomaso v. Crown Metal Packaging Canada LP*, 2011 ONCA 469, at ¶20 [***DiTomaso***], BOA Tab 71; *Singh v. Concept Plastics Limited*, 2015 ONSC 6598, at ¶24 and 2015 ONSC 6599, at ¶21; var'd, on a mitigation issue, 2016 ONCA 815 [***Singh***], BOA Tab 72. See also, *Thambapillai v. Labrash Security Services Ltd.*, 2016 ONSC 6068 at ¶24 [***Thambapillai***], BOA Tab 73.
92 See *DiTomaso* for the discussion of how the temporary work provisions promote the goals of notice, similar to those associated with the Form 1 requirements.

B. Alternatively, the Illegal Performance Arguments Achieve the Same Result

62. Alternatively, instead of treating CTS's Form 1 breach as a serious contractual breach, the Respondents argued below that CTS's actions can also be looked at through the lens of the law of illegal contractual performance, with the same results. Where a party performs a contractual duty illegally, the traditional rule is that they do not get credit for performance.[93] Sproat J. accepted this argument without elaboration, having already held that CTS's breach of contract sufficed to grant the Respondents' remedy. We argue the alternative illegality argument here again, if required.

63. The traditional illegality test – *ex dolo malo non oritur actio* – has generally been displaced by a "modern" test. The "modern test" of illegality has emerged to avoid the unjust result of tangential or inconsequential statutory breaches being used to defeat an otherwise valid claim or defence. The formulations of this test show a preference for a multi-factorial balancing test that asks: do the benefits of giving effect to the illegality argument outweigh the negative effects, notably an unjustifiable windfall to the party relying on illegality?[94] The test applies whether it is the plaintiff invoking illegal performance to make out a claim,[95] a defendant invoking it to defend a contract claim,[96] or a plaintiff seeking to counter a defendant's reliance on its contractual performance when its performance is allegedly unlawful.[97]

64. Here, most of those factors favour not permitting CTS to rely on its illegal performance.

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93 John D. McCamus, *The Law of Contracts*, 2d ed. (Toronto: Irwin Law, 2012), at p. 486, BOA Tab 74; *Holman v. Johnson* (1775), 1 Cowp 341 at p. 1121, BOA Tab 75; *Hall v. Hebert*, [1993] 2 S.C.R. 159, at p. 176 (per McLachlin J., later C.J.C.), BOA Tab 76.

94 *Royal Bank of Canada v. Grobman* [1977] O.J. No. 2516 (H.C.J.), at ¶27 [***Grobman***], BOA Tab 77; *Patel v. Mirza*, [2016] UKSC 42, *esp*. at ¶¶107-109 (***Patel***), BOA Tab 78; *Parkingeye Ltd v Somerfield Stores Ltd*., [2013] 1 Q.B. 840 (C.A.), at ¶¶37-39 [***Parkingye***], BOA Tab 79.

95 For ex., *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7 [***Transport North***], BOA Tab 80.

96 *Doherty v. Southgate (Township)*, 2006 CanLII 24231 (Ont. C.A.), BOA Tab 81.

97 *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Limited*, 2004 ABCA 309, esp. at ¶¶44-53, BOA Tab 82; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at ¶¶82 and 115-121 [dissent], and at ¶62 [majority adopts the dissent's analysis], BOA Tab 83. See also *Les Laboratoires Servier v Apotex Inc*, [2014] UKSC 55, BOA Tab 84.

65. *First*, the *ESA* obligation to give MOL notice forms a central part of the Class's contracts and cannot be separated from the contractual, common law, notice obligation. Both serve the same purposes of assisting employees secure new work. Where the statutory duty being breached is serious and central to the contract, as here, this augurs in favour of saying that breach invalidates performance.[98] And, where that law's purposes are better served in voiding illegal performance, the party in breach will not be allowed to rely on such performance.[99] These principles, and the fact that the *ESA*'s goal is the protection of the Class, were relied on in *Machtinger*. The Court there held that a serious consequence for a contract in breach of the *ESA* should be meted out because, if an employer is only made to minimally comply with the *ESA*, there would be too little incentive to comply with important *ESA* obligations.[100] The result should be no different here.

66. *Second*, and related to the first factor, where the innocent party has received "full consideration" or "what they bargained for", they cannot rely on illegality.[101] As noted earlier, for most of the Class, 93% of the notice period went by without the benefit of the MOL-notice induced information and services. Those who had resigned never learned of them. It can hardly be said that the Class received consideration, let alone the "full consideration" they had "bargained for". The Class's real loss, the failure to receive the contractual consideration that would have followed Form 1 notice compliance, should be met with a real remedy.

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98 *Patel*, *supra* at ¶107; *Parkingeye*, *supra* at ¶¶69-71; *St. John Shipping Corp. v. Joseph Rank*, [1957] 1 Q.B. 267 (H.L.) at pp. 289-290, BOA Tab 85.

99 *Sidmay Ltd. v. Wehttam Investments Ltd.*, [1967] O.J. No. 946 (C.A.) at ¶¶57 and 71; aff'd [1968] S.C.R. 828 [***Sidmay***], BOA Tab 86; *Grobman*, *supra* at ¶27; *William E. Thomson Associates Inc. v. Carpenter*, [1989] O.J. No. 1459 (C.A.), at ¶27 [***Carpenter***], BOA Tab 87; *Still v. MNR*, 1997 CarswellNat 2193, at ¶¶37 and 43, BOA Tab 88; *Transport North*, *supra* at ¶¶24 and 42-43; *Love's Realty Services Ltd. v. Coronet Trust*,1989 ABCA 63, at ¶¶15, 29, and 32 [***Love's Realty***], BOA Tab 89.

100 *Machtinger*, *supra*, at p. 988. These principles were recently affirmed in this court in *Wood*, *supra* and *North*, *supra.*

101 *Sidmay*, *supra* at ¶71; *Carpenter*, *supra* at ¶30; *La Foncière, Compagnie d'Assurance de France v. Perras*, [1943] SCR 165 at p. 178, BOA Tab 90.

67. *Third*, this concept of having bargained for an illegal result weighs heavily in commercial cases: the sophisticated, well-resourced party can hardly be heard to complain of an illegal interest rate provision, for instance, that they freely entered into.[102] This is hardly the case at bar where, on the jurisprudence, the Class is regarded as employees in a position of unequal bargaining power who generally do not even know what their statutory and common law rights are.[103] The evidence reviewed in the Facts shows that the Class of low paid, non-unionized employees was vulnerable. By contrast, CTS was a large, international company, reporting earnings of $404 million in 2014.[104] Further, while the Class lacked representation, CTS's evidence is that it had the benefit of two in-house counsel and an "outside" lawyer.[105] It was capable, with two prior, recent shutdowns in Scotland and Illinois, of complying with other closure laws.[106] There can be no question that CTS had the resources and representation to take all due care to ensure that it was complying with the *ESA*. CTS could and should have done better.

68. *Finally*, while some parties behaving illegally are forgiven if they "sincerely" and diligently work toward compliance,[107] CTS did not display such qualities. It did not seek out its HR employee's advice despite her having served a Form 1 during a prior layoff, brushed aside an employee's query questioning *ESA* compliance, and, in an early planning document, a senior CTS manager wrote that CTS would try and "avoid" giving the MOL notice.[108]

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102 *Transport North*, *supra* at ¶¶24 and 45; *Sidmay*, *supra* at ¶51.
103 *Machtinger.*, *supra* at p. 1003.
104 CTS's SEC Filings (New Release), Wood Affidavit, Ex. "F", *RC TAB 6(f)*.
105 Urban Affidavit, *RC TAB 9*, at ¶¶16 and 36.
106 See: Exs. "K" and "M" to the Wood Affidavit, *RC TAB 6(d) and (g)*; *Trade Union and Labour Relations (Consolidation) Act 1992*, 1992 Chap. 52, s. 188, BOA Tab 6, State of Illinois Warn Activity Listing 2013, Ex. "1" to the Urban Cross, *RC TAB 4(a)*, and see Urban Cross, *RC TAB 4*, at QQ76-85 and *Illinois Worker Adjustment and Retraining Notification Act*, 820 ILCS 65, ss. 5 and 10, BOA Tab 7.
107 *Love's Realty*, *supra* at ¶16.
108 Campbell Cross, *RC TAB 3*, QQ420-429; Park Affidavit, *RC TAB 8*, at ¶¶43-44 and 53; Urban Cross, *RC TAB 4*, at QQ367-370; PowerPoint: Canada Announcement document, Ex. "N" to the Wood Affidavit, *RC TAB 6(h)* [*esp. p. 194*].

69. Overall, since CTS's performance breached *ESA* notice conditions that are central to the employment contract, served important purposes (in fact, the same purposes as the working notice CTS says it should be given credit for), had serious consequences for the Class, and resulted from a relationship of real inequality, the Court should not give CTS credit for partial contractual performance performed in breach of contract and/or illegally in these circumstances.

THE REMAINING TWO ISSUES

70. CTS's two final arguments can be dealt with quickly.

71. Here, five class members had their last day extended 30 weeks in a series of "notices", well over the maximum allowable temporary work extension limit of 13 weeks in s. 6(1) of the termination regulation reviewed earlier.[109] As this Court held in *DiTomaso*, once more than 13 weeks' work is given in breach of the regulation, such a breach voids the prior notice, pure and simple.[110] As *DiTomaso* explains, serial notices cannot be "notice" if the last day is constantly changing. *DiTomaso*, in result and reasoning, should be dispositive.

72. CTS does not ask that *DiTomaso* be overruled but argues instead that "all five class members were offered and accepted $500 consideration for agreeing to the extension".[111] First of all, this is an erroneous factual assertion: the Aultman affidavit and exhibits show that she was merely told that her last day was changing and that she would get $500. She signed nothing that could be regarded as an acceptance. Moroever, the $500 was given for the 13 week allowable extension but nothing was given for the weeks of work that went beyond the allowable limit. But more importantly, the prohibition on giving more than 13 weeks does not outline an exception to

109 "Termination and Severance of Employment", O.Reg. 288/01, s. 6(1), BOA-Tab 1. The factual scenario is outlined in full in the Affidavit of Cheryl Aultman, *RC TAB 13*, and Exs. *(a)-(g)*.
110 *DiTomaso*, *supra*. See also, *Singh*, *supra*, and *Thambapillai*, *supra*.
111 CTS's Factum, at ¶80.

enable an employer to contract out by paying something. It is inconceivable that a remedial, employee-protective reading of such a prohibition could be consistent with excusing a breach and converting what is no longer notice into a "notice period" on the payment, post-breach and without a release, of a mere $500. More critically, the *ESA* itself provides the complete answer: s. 5(1) prohibits a waiver or contracting out of its requirements. The so-called "agreement" to pay $500 in exchange for a breach of the regulation is, by operation of section 5(1) of the *ESA*, "void".

73. Finally, Sproat J. correctly held that CTS should be given no credit for working notice during weeks where Class members were "forced" to work overtime and/or simply worked hours in excess of *ESA* weekly hours' maximums. The undisputed facts of forcing such overtime came from Mr. Lipton, CTS's second most senior Canadian employee: he swore that he forced 18 employees into overtime.[112] The undisputed facts of the exact amounts of excessive overtime came from CTS's own records of overtime hours worked.[113]

74. As the purpose of notice is a real opportunity to search for new work,[114] several courts (most notably *Bramble*[115]) have looked at the *quality* of the working notice given and, where materially deficient, have taken that into account in setting the notice period.[116] Where courts give full credit for working notice, they have at times referenced the quality of the opportunity given.[117]

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112 Lipton Affidavit, *RC TAB 7*, at ¶¶59-62; Transcript, Cross-examination of Mitch Lipton, *RC TAB 5* at QQ193-201.

113 CTS Overtime Excel Spreadsheet, Ex. "Q" to the Lipton Affidavit, *RC TAB(b)*; An employer needs a written agreement permitting the working of such hours: *ESA*, ss. 1(3), 17, and 17.1, BOA T-2; and, *Colautti Brothers Tile & Carpet (1985) Inc. v. Cottichio*, 2005 CanLII 43508 (O.L.R.B.), at ¶24, BOA Tab 91. There was none here.

114 Indeed, the SCC describes it as a remunerative opportunity or a qualitative "cushion": *Farber*, *supra*, at ¶48 and *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20 at ¶95, BOA Tab 92,

115 *Bramble*, *supra*.

116 Apart from *Bramble*, see *Cowper v. Atomic Energy of Canada Ltd.*, 1999 CanLII 14853 (S.C.J.), at ¶11, aff'd [2000] O.J. No. 1730 (C.A.), BOA Tab 93; *Norrad v. LaHave Equipment Ltd.* 1995 CarswellNB 267 (Q.B.), at ¶7, BOA Tab 94.

117 See for instance *Loehle v. Purolator Courier Ltd.*, [2008] O.J. No. 2462 (S.C.J.), at ¶¶28-29, BOA Tab 95; *Kontopidis v. Coventry Lane Automobiles Ltd.* 2004 CanLII 16875 (Ont. S.C.J.), at ¶26, BOA Tab 96.

75. For those employees here who were illegally forced into overtime and/or illegally worked in excess of *ESA* hours maximums, this Court should look at substance over form, as did Sproat J.:

> Take the extreme example of an employer … that had employees work 16 hours a day during their notice period in order to attain its corporate objectives. That employer surely could not claim credit for working notice. To do so would be tantamount to saying, "You had 8 hours a day to look for new employment and if you frittered it away sleeping, that was your choice".[118]

76. The Respondents request that this Court endorse *Bramble* and hold that an employer cannot in form give working notice then in substance have its employees work forced and/or excessive hours, all while asking that they be given "credit" for the working notice during those weeks. The Motion Judge was right to say that no such credit be given in the case at bar for those forced to work overtime and/or those who actually worked illegally excessive hours.

PART IV: ORDERS REQUESTED

77. The Respondents respectfully submit that the appeal should be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12TH DAY OF FEBRUARY 2018.

Stephen J. Moreau **Genevieve J. Cantin**

118 Reasons, *RC TAB 1* at para. 111

Court File No.: C64519

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CLAUDETTE WOOD, BRUCE COOK and **JOHN FEATHERSTONE**

Plaintiffs
(Respondents)

and

CTS OF CANADA CO. and **CTS CORPORATION**

Defendants
(Appellants)

CERTIFICATE

I estimate that ninety (90) minutes will be needed for my oral argument of the appeal. An order under subrule 61.09(2) (original record and exhibits) is not required.

DATED AT TORONTO this 12th day of February, 2018.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. Ontario, Legislative Assembly, Official Report of Debates (Hansard), 37th Parl, 1st Session, No. 107 (23 Nov 2000) at 5760-5761 & 5763-5764, No. 112B (4 Dec 2000) at 6067-6068, No. 113B (5 Dec 2000) at 6117-6138, No. 115B (7 Dec 2000) at 6253-6271, No. 116A (11 Dec 2000) at 6294-6309, and No. 117A (12 Dec 2000) at 6353-6366

2. Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 28th Parl, 3rd Sess, No 81 (27 May 1970) at 3236 and (24 June 1970) at 4450-4451(Minister Bales)

3. Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 33rd Parl, 3rd Sess, No 27 (15 June 1987) at 1352-1353 and No.34 (25 June 1987) at 1744-1745 (Minister Wrye)

4. House of Commons Debates, 28th Parl, 3rd Sess, Vol 5 (28 April 1971) at 5320 (Hon. Bryce Mackasey)

5. *Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc*., 2017 ONCA 293

6. *Gettle Bros. Construction Co. Ltd. v. Alwinsal Potash of Canada Ltd*., 1969 CanLII 659 (Sask. CA); aff'd [1971] S.C.R. 320

7. *Western Larch Limited v. Di Poce Management Limited*, 2013 ONCA 722

8. *Fendelet v. Dohey,* 2007 ONCA 475

9. *FL Receivables Trust 2002-A (Administrator of) v. Cobrand Foods Ltd.*, 2007 ONCA 425

10. *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42

11. *Stewart v. Park Manor Motors Ltd*., [1967] O.J. No. 1117 (C.A.)

12. *Franklin v. University of Toronto,* [2001] O.J. No. 4321 (S.C.J.)

13. *Kumar v. Sharp Business Forms Inc*., 2001 CanLII 28301 (S.C.J.)

14. *Westburne Central Supply, Re*, [1992] O.E.S.A.D. No. 190

15. *McCombe International Trucks Limited*, July 22, 1982, (Davis) E.S.C. 1251

16. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27

17. *British Columbia Human Rights Tribunal v. Shrenk*, 2017 SCC 62

18. *Machtinger v. HOJ Industries Ltd.*, [1992] 1 SCR 986

19. *Agraira v. Canada*, 2013 SCC 36

20. *Barreau du Québec v. Quebec (Attorney General)*, 2017 SCC 56

21. *Godbout v. Pagé*, 2017 SCC 18

22. *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*, [1988] 2 SCR 175

23. *Canadian Assn. of Industrial, Mechanical and Allied Workers v. Wolverine Tube (Canada) Inc.*, 1993 CanLII 801 (B.C.C.A.)

24. *Bathurst Paper Ltd. v. Minister of Municipal Affairs of New Brunswick*, [1972] S.C.R. 471

25. *Toronto-Dominion Bank v. Szilagyi Farms Ltd.*, [1988] O.J. No. 1223 (C.A.)

26. *R. v. Ulybel Enterprises Ltd*., 2001 SCC 56

27. *St. Laurent v. Kelsey Hayes Canada*, 1997 CarswellOnt 5410

28. *Re Telegram Publishing Co.* (1972), 1 L.A.C. (2d) 1; aff'd 1975 CarswellOnt 816 (C.A.)

29. *Re Readyfoods Limited*, 1998 CanLII 19020 (MB LA)

30. E. Hudson-Plush, "*WARN's Place in the FLSA/Employment Discrimination Dichotomy: Why a Warning Cannot be Waived*" (2006), 27 Card. Law Rev. 2929, esp. at pp. 2930-2931 and fn 9

31. C.P. Yost, "*The Worker Adjustment and Retraining Notification Act of 1988: Advance Notice Required?*", (1989), 38 Cath. U.L. Rev. 675 pp. 680-682.

32. *United Paperworkers Int'l Union v. Specialty Paperboard, Inc.*, 999 F.2d 51 (2d Cir. 1993)

33. *Local Joint Executive Bd. v. Las Vegas Sands, Inc*., 244 F.3d 1152 (9th Cir. 2001)

34. J. Friesen, "Mandatory Notice and the Jobless Durations of Displaced Workers", 50 Indus. & Lab. Rel. Rev. 652 at pp. 663-664

35. *Your Guide to the Employment Standards Act, 2000*, "Termination of Employment", MOL, June 2016 version.

36. *Stock Transportation v. Teamster, Local 938*, 2008 CanLII 36511 (ON LA);

37. *Glendale Golf and Country Club, Limited v. Massimo Sanago and Director of Employment Standards*, 2010 CanLII 4265 (ON LRB)

38. *London Machinery Inc. v. CAW-Canada, Local 27*, [2006] O.J. No. 1087 (C.A.)

39. *Tradium Mechanical Inc. v. Jaidane*, 2016 CarswellOnt 19620 (SCJ)

40. *Farber v. Royal Trust Co*., [1997] 1 S.C.R. 846

41. *Wallace v. United Grain Growers Ltd*., [1997] 3 S.C.R. 701

42. *Medis Health and Pharmaceutical Services Inc. v. Bramble*, 1999 CanLII 13124 (N.B.C.A.), aff'ing [1998] NBJ No. 174 (Q.B.)

43. *Wood v. Fred Deeley Imports Ltd*., 2017 ONCA 158

44. *North v. Metaswitch Networks Corporation*, 2017 ONCA 790

45. *Cottrill v. Utopia Day Spas and Salons Ltd*., 2017 BCSC 704

46. *Yeager v. R.J. Hastings Agencies Ltd*., 1984, CanLII 533 (BCSC)

47. *Gregg v. Freightliner Ltd.*, 2004 BCSC 1574;

48. *Humby v University of New Brunswick*, 1998 CanLII 18485 (NBQB.)

49. *R.G.O. Office Products Ltd. v. Knoll North America Corp*.,1996 CanLII 10339 (ABQB)

50. *Bent v. Atlantic Shopping Centres Ltd*., 2007 NSSC 231

51. *Walton's Truck Service Ltd. v. Llewelyn*, [2016] C.L.A.D. No. 94

52. *Starks v. Corner Brook Garage Ltd.*, 2002 CanLII 54056 (NL SCTD)

53. *Kerfoot v. Weyerhaeuser Company Limited*, 2013 BCCA 330

54. *Michela v. St. Thomas of Villanova Catholic School*, 2015 ONSC 15; all'd, but not on this point, 2015 ONCA 801

55. *Deputat v. Edmonton School District No. 7*, 2008 ABCA 13

56. *Williams v. McCormick, Rankin & Associates Ltd*., [1987] O.J. No. 1617 (Dist. Ct.)

57. *Wilson v. Crown Trust Co.*, [1992] O.J. 1765

58. *Prinzo v. Baycrest Centre for Geriatric Care*, [2002] O.J. No. 2712 (C.A.)

59. *Luchuk v Sport BC*, 1984 CanLII 812 (BCSC)

60. *Bader v. Canada Trust Co*, 1980 CarswellBC 1903

61. *Photo Production Ltd. v. Securicor Transport Ltd*., [1980] A.C. 827 (H.L.)

62. *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426

63. S. Waddams, *The Law of Damages*, 2nd ed. (Toronto: Thomson Reuters, 2016), at ¶¶15.670-15.750.

64. *DiTomaso v. Crown Metal Packaging Canada LP*, 2011 ONCA 469

65. *Singh v. Concept Plastics Limited*, 2015 ONSC 6598 and 2015 ONSC 6599; var'd, on a mitigation issue, 2016 ONCA 815

66. *Thambapillai v. Labrash Security Services Ltd*., 2016 ONSC 6068

67. John D. McCamus, *The Law of Contracts*, 2d ed. (Toronto: Irwin Law, 2012), at p. 486

68. *Holman v. Johnson* (1775), 1 Cowp 341

69. *Hall v. Hebert*, [1993] 2 S.C.R. 159

70. *Royal Bank of Canada v. Grobman* [1977] O.J. No. 2516 (H.C.J.)

71. *Patel v. Mirza*, [2016] UKSC 42

72. *Parkingeye Ltd v Somerfield Stores Ltd*., [2013] 1 Q.B. 840 (C.A.)

73. *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7

74. *Doherty v. Southgate (Township)*, 2006 CanLII 24231 (Ont. C.A.)

75. *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Limited*, 2004 ABCA 309

76. *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4

77. *Les Laboratoires Servier v Apotex Inc*, [2014] UKSC 55.

78. *St. John Shipping Corp. v. Joseph Rank*, [1957] 1 Q.B. 267 (H.L.)

79. *Sidmay Ltd. v. Wehttam Investments Ltd.*, [1967] O.J. No. 946 (C.A.); aff'd [1968] S.C.R. 828

80. *William E. Thomson Associates Inc. v. Carpenter*, [1989] O.J. No. 1459 (C.A.)

81. *Still v. Minster of National Revenue*, 1997 CarswellNat 2193 (F.C.A.)

82. *Love's Realty Services Ltd. v. Coronet Trust*, 1989 ABCA 63

83. *La Foncière, Compagnie d'Assurance de France v. Perras*, [1943] SCR 165

84. *Colautti Brothers Tile & Carpet (1985) Inc. v. Cottichio*, 2005 CanLII 43508 (O.L.R.B.)

85. *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20

86. *Cowper v. Atomic Energy of Canada Ltd.,* 1999 CanLII 14853 (S.C.J.); aff'd [2000] O.J. No. 1730 (C.A.)

87. *Norrad v. LaHave Equipment Ltd.* 1995 CarswellNB 267 (Q.B.)

88. *Loehle v. Purolator Courier Ltd.,* [2008] O.J. No. 2462 (S.C.J.)

89. *Kontopidis v. Coventry Lane Automobiles Ltd.* 2004 CanLII 16875 (Ont. S.C.J.)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. "Termination and Severance of Employment", O.Reg. 288/01

   See Book of Authorities, Volume 1, Tab 1

2. *Employment Standards Act, 2000,* S.O. 2000, c. 41

   See Book of Authorities, Volume 1, Tab 2

3. *Legislation Act, 2006,* c. 21 Sched. F, s. 64(1)

   See Book of Authorities, Volume 1, Tab 3

4. *An Act to Amend the Employment Standards Act,* S.O. 1987, c. 30, ss. 1(2) and 4(2)

   See Book of Authorities, Volume 1, Tab 4

5. *Employment Standards Act,* R.S.O. 1990, c. E.14, s. 57(3)

   See Book of Authorities, Volume 1, Tab 5

6. *Trade Union and Labour Relations (Consolidation) Act 1992,* 1992 Chap. 52, s. 188

   See Book of Authorities, Volume 1, Tab 6

7. *Illinois Worker Adjustment and Retraining Notification Act,* 820 ILCS 65, ss. 5 and 10

   See Book of Authorities, Volume 1, Tab 7

CLAUDETTE WOOD, et al.
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-and-

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Court File No. : C64519

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
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