Court File No. CV-15-2547-00

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CLAUDETTE WOOD, BRUCE COOK and JOHN FEATHERSTONE
Plaintiffs

and

CTS OF CANADA CO. and CTS CORPORATION
Defendants

FACTUM OF THE PLAINTIFFS, THE MOVING PARTIES

(SUMMARY JUDGMENT MOTION RETURNABLE JULY 17-19, 2017)

CAVALLUZZO SHILTON McINTYRE CORNISH LLP
474 Bathurst Street, Suite 300
Toronto ON M5T 2S6

Stephen J. Moreau, LSUC# 48750Q
Genevieve J. Cantin, LSUC# 69073S
Tel: 416-964-1115
Fax: 416-964-5895

Lawyers for the Plaintiffs,
(Moving Parties)

TO: **CASSELS BROCK & BLACKWELL LLP**
40 King Street West
Toronto ON M5H 3C2

Kristin Taylor
Lara Jackson
Tel: 416-860-2973
Fax: 416-644-9341

Lawyers for the Defendants,
(Responding Parties)

INDEX

INDEX

PART I: OVERVIEW

1. The Defendants [together, "CTS"] operated a manufacturing facility in Streetsville [the "Streetsville Plant"]. CTS notified all 129 employees there, in 2014, that it was closing down in 2015 and moving the work to Mexico. The Plaintiffs are three former Streetsville Plant employees acting for a Class of seventy-six former employees.

2. CTS did not notify the Ministry of Labour [the "MOL"] of the closure until the eve of the shutdown contrary to the *Employment Standards Act, 2000* [the "*ESA*"]. CTS should have notified the MOL in early 2014 when they knew 77 of the 129 employees were being let go effective March 27, 2015. The failure to give notice was a serious breach of a statutory minimum duty: in the absence of MOL notice, the Class was denied the provision of adjustment and retraining information and services normally made available early on during a plant closure. The architect of CTS's shutdown admitted in cross-examination that these employees should have received such benefits, and that CTS had no objection to providing them.

3. Further, CTS conducted the shutdown in a manner that was unfair. It disseminated false, misleading, and incomplete information in termination and other documents, giving employees the false impression that they would need to stay until the shutdown to collect any monies owing. The architect of the shutdown admits that CTS needed the Class to stay in order to build a bank of parts that could be shipped to its Mexico operation for sale to customers. The effect of the problematic communications is that CTS got what it wanted: few resigned.

4. Thus, rather than using the notice period to further the Class's legitimate, legally-recognized, objective of seeking alternative employment, CTS deliberately, and with little regard for the Class's interest, used the notice period for its own ends: to ensure product was made and the employees stayed at their posts to the very end.

5. The Plaintiffs submit that the legal effect of CTS's actions is to nullify the working notice the Class received from April 17, 2014 to the point CTS complied with the *ESA*. As a consequence, CTS owes the Class fresh reasonable notice of termination. The Action is therefore an Action for group wrongful dismissal where the Plaintiffs submit that CTS cannot rely on its illegally proffered working notice as a defence.

6. Once CTS finally notified the MOL of the shutdown, CTS should be given some credit for the working notice that followed. However, while CTS would normally be given credit, as well, for the *ESA* severance payments it made to the Class after their departure, the manner in which severance pay was presented deprives the alleged severance payments of the qualities constituting severance pay such that no credit ought to be given. Put another way, CTS still owes the Class *ESA* severance pay.

7. Alternatively, if the Court determines that CTS ought to be given full credit for the working notice period, the Plaintiffs submit that the working notice, which followed a formula, was insufficient. Additional notice or pay in lieu of such notice is owed.

8. As the Court reads this factum, we cannot stress enough that it will see that the Streetsville Plant closure was entirely mishandled by CTS, start to finish.

9. The shutdown was managed almost exclusively out of CTS's US head office by persons who, among many other errors: (a) started initially by, in their own words, seeking to "avoid" notifying the MOL of the shutdown; (b) cut out the Streetsville Plant's HR manager, who had experience giving the MOL notice on a previous mass layoff occasion; (c) did not even tell the Streetsville Plant's manager or its HR manager that individual notices were coming until the night before; (d) made calculation errors in every notice letter by miscalculating the severance payout; (e) told employees in their notices that they "may" be entitled to *ESA* notice of termination and severance pay, "if applicable", when *ESA* notice was applicable to everyone and where severance pay was applicable to 120 of the 129 affected employees; (f) deliberately removed from the individual notice letters all language stating that employees could take time off to seek new employment; (g) simultaneously emailed all employees who had just received notices an Easter message wishing them "prosperity"; (h) thereafter allowed, and on many occasions compelled, employees to work significant overtime and weekend hours to meet CTS's tight timelines, hours that exceeded *ESA* maximums, all to meet CTS's production timeframes; (i) told departing employees at information sessions that these sessions were very hard on the presenter; (j) did not permit Streetsville Plant managers access to legal advice to deal with closure issues; (k) were asked by employees to provide them with retraining services, said they would look into it,[1] but then never bothered, which is damning when the services were right in front of them if they had just notified the MOL; and, (l) of central importance, were thirteen months late with the MOL notice, the "Form 1".

1 The main architect of the shutdown went much further, in cross, saying that CTS did not oppose giving employees retraining: Transcript, Cross-examination of Tony Urban, QQ442-447.

10. The chief architect of the Streetsville Plant's shutdown and CTS's primary witness, Tony Urban, a Vice President and General Manager who led the shutdown from CTS's head offices in Elkhart, Indiana, sums up perfectly his views that the shutdown was mismanaged and that the whole purpose of the critical Form 1 was something of which he was entirely ignorant:[2]

> Q. Your team really let you down ...
>
> A. I would agree. Somebody let me down. I completely agree with you.
>
> ...
>
> Q. When Mary [the Senior HR Manager] told you that she had let you down regarding the Form 1, I take it you got upset with her, not filing the Form 1 on time.
>
> A. I didn't know what a Form 1 was, Steve, until she brought it up that it was late.

Organization of this Factum

11. The Plaintiffs move to resolve all of the common issues by way of summary judgment. CTS does not oppose the process being employed. Other than Mr. Urban's denial that, during a visit and in private, he called the Streetsville Plant employees "whiners", none of the facts appear to be in dispute.

12. We refer the Court at the outset to TAB 1 of the Plaintiffs' Motion Record: it sets out the seventeen (17) common issues and sets out what the Plaintiffs propose are the answers to these questions. It provides a helpful roadmap to the questions and the Plaintiffs' proposed answers. In saying this, common issue (xiv) (a request for punitive damages) is not being pursued.

2 Transcript, Cross-examination of Tony Urban, QQ 297-299.

PART II: FACTS

13. CTS admits in its Defence that the two Defendants were common employers. Thus, unless otherwise noted, "CTS" is used to refer to the Defendants together.

14. The US defendant, CTS Corporation, operated out of Elkhart, Indiana. It has a worldwide footprint, designing and manufacturing sensors, actuators and electronic components. CTS of Canada owned its Canadian manufacturing business, the Streetsville Plant, formerly at 80 Thomas Street, in Streetsville. The Streetsville Plant had been in operation for over 50 years when it was closed.[3]

A. The Streetsville Plant's Employees and the Class

15. When CTS announced the closure, the Streetsville Plant employed 129 employees. The Plaintiffs are three of those Streetsville Plant employees.

16. The Class comprises 76 of the 129 employees, derived as follows:[4]

(a) 11 of 129 employees were on LTD and were excluded from the Class;

(b) the Streetsville Plant's Plant Manager was excluded from the Class; and,

(c) 41 employees who executed releases in favour of CTS following the closure were excluded.

17. The Plaintiffs have not been provided with copies of the releases executed by employees but, for present purposes, are taking CTS's word that CTS received 41 executed Releases releasing them from liability.[5]

---

3 Wood Affidavit, *Plaintiffs' Record*, TAB 2, at ¶¶21-30 [pp. 16-18].
4 *Supplementary Record*, TAB 2.
5 Certification Order, Wood Affidavit, Ex. "C", *Plaintiffs' Record*, TAB 2 [p. 90].

18. At the time of closure, the non-managerial employees at the Streetsville Plant were either paid salary or at an hourly rate based on a 40 hour work week.[6] At closure, the Plant had three final assembly lines: (a) one that manufactured actuators; (b) one that manufactured sensors; and, (c) the largest line, the pedal line, that manufactured accelerator pedals, predominantly for Toyota.[7] Those lines were supported by a series of employees working in other departments.[8]

19. A large majority of non-managerial hourly employees made $17.12 per hour. There were very few whose hourly rates ranged between $22.94 and $28.61 per hour. Notably, more than half of the employees who made $17.12 per hour were employed by CTS for over twenty-five (25) years.[9]

B. CTS's Global Reorganization

20. By 2012-2013, CTS had begun a global reorganization of its business. In 2013, it consolidated operations at manufacturing facilities in Scotland and Illinois into lower-cost production facilities in Mexico and China.[10] To satisfy its customers' needs during this process, CTS, in both instances, built an inventory bank to support the eventual transfer of operations.[11] CTS's main witness, Mr. Urban, had joined CTS after his Illinois company was purchased, and just before those operations were consolidated.

---

6 Lipton Affidavit, *Plaintiffs' Record*, TAB 9, ¶37 [p. 991]; Transcript, Cross-examination of Lynne Campbell, QQ 314-315

7 Park Affidavit, *Plaintiffs' Record*, TAB 3, ¶24 [p. 726]; Urban Affidavit, *CTS Record*, TAB 1, ¶8

8 Park Affidavit, *Plaintiffs' Record*, TAB 3, ¶25 [p. 726]

9 *Supplementary Record*, TAB 2.

10 Urban Affidavit, *CTS Record*, TAB 1, ¶¶5-7

11 Transcript, Cross-examination of Tony Urban, QQ57-58 and 71-74.

C. The Decision to Close the Streetsville Plant

21. In November 2013, CTS's Board of Directors tentatively decided, as part of its global reorganization, to close down the Streetsville Plant and move the work to Mexico and China. Mr. Urban has graciously acknowledged that this Plant's operations were profitable, and that the closure was not a reflection on employees. Nonetheless, the shutdown was approved to cut down on what CTS says were high production costs.[12]

22. Having so decided, CTS moved quickly to sell the Streetsville Plant's property to a developer, signing an agreement on December 9, 2013.[13] Critically, this agreement committed CTS to a very tight timeframe to shut down the Plant: the developer was to take possession by March 31, 2015, though there was provision to move that date forward by as much as 60 days.[14] Consistent with this, CTS's Board formally approved the closure on February 12, 2014, with the target closure listed in Board materials as "End of 1Q 2015" and "31-Mar-15".[15] In a February 28, 2014 news release, CTS announced the closure to be completed "in the first half of 2015".[16]

D. The Shutdown Plan

23. CTS planned the shutdown starting in late 2013 to early 2014, and the shutdown would proceed well into late 2015. As the Record makes abundantly clear, while the Streetsville Plant's Plant Manager would serve as CTS's point person in Canada, the shutdown was planned and executed entirely from CTS's Elkhart, Indiana head offices. For instance, in cross, the Streetsville Plant's HR Generalist admitted that she ran every

12 Urban Affidavit, *CTS Record*, TAB 1, ¶¶8-11 and 15.
13 Agreement of Purchase and Sale, Lipton Affidavit, Ex. "D", *Plaintiffs' Record*, TAB 9
14 *Ibid.* at Schedule B to the Agreement, Lipton Affidavit, Ex. "D", *Plaintiffs' Record*, TAB 9 [p. 1034].
15 CTS Board Presentation, Wood Affidavit, Ex. "M", *Plaintiffs' Record*, TAB 2 [pp. 246 and 256].
16 News Release, Urban Affidavit, Ex. "G", *CTS Record*, TAB 1 [p. 115].

decision, however mundane, by Mary DeVous, a senior manager in Elkhart (its Vice-President, Human Resources). For instance, when the MOL in April 2015 asked Ms Campbell to complete a simple information form to help the MOL contact CTS, Ms Campbell had to run the response by Ms DeVous.[17]

24. The team of Elkhart employees who planned the shutdown was led by Mr. Urban and was comprised of him, Ms DeVous and one Brian Babin.[18] Some CTS documents show that this team received support from two in-house US lawyers, Robert (Bob) Patton and Elizabeth Ahlemann. In his affidavit, Mr. Urban vaguely references assistance received from "outside legal counsel" with the "plan", but offers no specifics save to say that "external counsel" helped Ms DeVous review the severance letters given to Streetsville Plant employees when serious errors were discovered in the letters.[19] There is no evidence as to: (a) who this phantom counsel is; (b) whether he or she is Canadian; (c) whether he or she is experienced with Ontario labour or employment laws; (d) the advice given and on what topics; and, (e) the instructions given or advice sought and on what topics (save to help with many calculation errors).

25. What is clear is that this team decided to utilize a "bank build" similar to the ones used with the Scotland and Illinois shutdowns and use the bank build period as a means of complying with its obligations to give working notice. To accomplish this, the team simultaneously developed charts of employee data (income, years of service, position, age) and a skeleton plan: build product with existing employees and then shut down manufacturing at the Streetsville Plant by March 31, 2015.

17 Transcript, Cross-examination of Lynne Campbell, QQ179-186.
18 Urban Affidavit, *CTS Record*, TAB 1, ¶15.
19 Urban Affidavit, *CTS Record*, TAB 1, ¶¶16 and 36.

26. The data chart was first created on December 2, 2013 by Mr. Urban.[20] In cross, Mr. Urban states that his team inputted the detailed data found in the chart over the next four months and the chart was meant to coincide with the planned shutdown date as it showed, for each employee, their last day of employment.[21]

27. What is significant about this chart is that, throughout the early planning process, CTS planned on laying off 77 employees on the same day, March 27, 2015, laying off another nine persons on LTD three weeks later, and then laying off another four, four weeks later (90 in total within a four week period). CTS's records show that this carried through right to April 17, 2014, when all Streetsville Plant employees were notified of their termination dates.[22] Under the *ESA*, the obligation to notify the MOL, post the notice in the workplace, and keep it posted, arises when at least 50 employees are terminated in a four week period.[23] CTS did not, of course, notify the MOL and post the notice, the "Form 1", until May 12, 2015, as outlined below.

28. This is where the story gets muddled at CTS's end, as they try and explain why it is that the MOL was not notified. On February 17, 2014, Mr. Urban emailed his team in preparation for a call the next day. Among the agenda items, he included a discussion item of "File Canada Form 1 Notice".[24] The call took place, but Mr. Urban has no recollection of it save that Ms DeVous may have taken notes.[25] Ms DeVous has not

20 The chart is found at the *Supplementary Record*, TAB 2. The chart's property details showing the December 2, 2013 creation by Mr. Urban is found at the Lidstone Affidavit, Ex. "A", *Plaintiffs' Reply Record*, TAB 1 [p. 7].
21 Transcript, Cross-Examination of Tony Urban, QQ278-285.
22 *Supplementary Record*, TAB 2 and TAB 4 [p. 22].
23 *ESA*, s. 58(1).
24 Email, Urban to Others, February 17, 2014, Wood Affidavit, Ex. "L", *Plaintiffs' Record* [p. 228].
25 Transcript, Cross-examination of Tony Urban, QQ210-213.

given evidence even though Mr. Urban admits that she is readily accessible.[26] In any event, what emerged from the call within 1-2 days was an internal working document/plan in the form of a PowerPoint presentation, in which the writer writes:

> Form 1 filing: This is not required on 2/28; filing required only if 50 or more employees terminated in any rolling 4-week period. **Will avoid doing this** with staggered releases.[27]

29. Put simply, CTS's initial goal was to "avoid" the MOL.

30. When asked about this in cross, Mr. Urban admitted that he had no idea what the Form 1 notice was even for, but agreed avoiding the MOL was part of the plan.[28]

31. The puzzling aspect of this story is that, in CTS's notes, the writer explains that the way to "avoid" the MOL notice is to use "staggered releases", presumably by laying off some employees one day, more another day, etc., so that a situation of having 50 or more employees terminated within a four week period never arises. What is baffling about this comment is that CTS's chart assiduously retains the 77 employee terminations for March 27, 2015. Those 77 were then given, on April 17, 2014, their First Severance Letters, all showing the same March 27, 2015 departure date.[29]

32. At best, this Record shows that CTS clearly had in mind a goal of avoiding the MOL, Mr. Urban did not know what the Form 1 was for, and the whole idea of staggering the departures got immediately lost in the planning. What this demonstrates, at its most charitable, is that CTS really gave no thought for the MOL notification process, either as to its purposes or the benefits employees would realize from it.

---

26 *Ibid* at QQ304-307.
27 PowerPoint Plan document, Wood Affidavit, Ex. "N", *Plaintiffs' Record* [p. 279] [Emphasis Added].
28 Transcript, Cross-examination of Tony Urban, QQ245-246 and 299.
29 *Supplementary Record*, TAB 2 and TAB 4 [at p. 22].

Certainly, the evidence is plain that CTS made no effort at complying with the *ESA*. We address later, in argument, the argument that CTS was required, by April 17, 2014 (and not later, as CTS contends), to notify the MOL of the closure.

33. According to Mr. Lipton, one of the most senior employees at the Streetsville Plant, within a week of CTS's decision to "avoid" the MOL by staggering departures, he spoke with Mr. Baldassare, the plant manager at the Streetsville Plant. Mr. Lipton swears that the notion of "staggering" was never discussed: Mr. Baldassare merely stated that the plan was to close the plant by March 2015 and that it was up to them to come up with a plan to make this happen.[30] These two then approached a key engineering employee, Len Park, to ask him for a plan, and "staggering" was not discussed then either: both Messrs. Lipton and Park concur on this point.[31]

34. Of note, Mr. Park's detailed evidence, which CTS has not tried to refute, is that staggering departures "would have been ludicrous" and could only be suggested by someone if "they had no idea how the Streetsville Plant manufactured pedals...".[32]

E. The First Severance Letters

35. While CTS was delegating the shutdown details to Messrs. Baldassare, Lipton, and Park, on February 28, 2014 it announced that it would be closing the Streetsville Plant.[33] The decision was also communicated to the Streetsville Plant employees by

30 Lipton Affidavit, *Plaintiffs' Record*, TAB 9, ¶¶40-42 [pp. 992-993].
31 *Ibid.* at ¶¶43-47; Park Affidavit, *Plaintiffs' Record*, TAB 3, ¶¶5-14 and 21-22 [pp. 721-725].
32 Park Affidavit, *Plaintiffs' Record*, TAB 3, ¶23 *et seq.* [pp. 725-731].
33 Wood Affidavit, *Plaintiffs' Record*, TAB 2, Ex. "I" [p. 219].

Mr. Baldassare and Ms DeVous during a company-wide meeting.[34] The announcement came as a shock to employees. The news upset and angered many of them.[35]

36. For reasons CTS cannot explain, while CTS's goal was to hand each employee a letter of termination by mid-March,[36] it only provided employees with such letters a month later, on April 17, 2014 [the "First Severance Letters"]. The evidence is that Elkhart employees alone drafted the First Severance Letters and kept Mr. Baldassare and Ms. Campbell, the Streetsville Plant's HR point person, entirely out of the loop.[37] It was only late in the day on April 16, 2014 that Ms DeVous first advised Mr. Baldassare and Ms Campbell by email that they should be prepared the next day to hand out the letters.[38] On April 16 and 17, Ms DeVous and Mr. Baldassare exchanged emails where Mr. Baldassare asked questions about them and pointed to numerous problems with the letters: it is clear from the exchanges that CTS was revising the First Severance Letters right up until the very moment of delivery.[39]

37. As we set out in detail in Argument, below, the First Severance Letters that were handed out on April 17, 2014 contain serious defects and were, frankly, false and misleading. For instance, they tell employees that the *ESA* may not apply to the termination when: (a) for 129 of 129 employees, notice of termination was required; and, (b) for 120 of the 129 employees with over five years' service, *ESA* severance had

34 Wood Affidavit, *Plaintiffs' Record*, TAB 2, at ¶¶40 and 43; Urban Affidavit, *Defendants' Record*, TAB 1 at ¶20.
35 Wood Affidavit, *Plaintiffs' Record*, TAB 2 at ¶¶40-42.
36 CTS PowerPoint Plan Document, Wood Affidavit, Ex. "N", *Plaintiffs' Record* [p. 281].
37 Transcript, Cross-examination of Lynne Campbell, QQ69-74.
38 Wood Affidavit, Ex. "R", *Plaintiffs' Record* [pp. 322-327].
39 *Ibid*.

to be paid. The letters give every indication, as we argue below, that the employee must stay to the end to collect anything, contrary to the *ESA*.

38. Sum total, the letters offered working notice of just under or just over a year. In addition, the letters offered, for some employees, a severance payment that was marginally higher than the amount to which the employee was entitled to anyway under the *ESA*. For many, the severance payment offered was *less* than what the *ESA* required.[40] And, for many employees, CTS miscalculated the payments.[41] CTS even miscalculated its own HR Generalist's (Lynne Campbell's) payment.[42]

39. In addition to misleading employees that they would have to stay to collect anything, as we argue more fully below, the First Severance Letters are likewise silent on the question of employees taking time off to seek new employment. This silence was deliberate. In a prior draft of the First Severance Letter, CTS had used language telling employees that they could take time off for job interviews. That language was deliberately removed because (to quote the reason given to the Plant Manager) it "may create more complications for your operation".[43]

40. Around the same time as CTS was delivering the First Severance Letters, Mr. Urban, in an email to CTS employees, offered an Easter greeting, wishing employees

---

40 Mr. Park was offered 6.7 weeks' pay if he stayed when he was entitled to 8.5 weeks' severance: Park Affidavit, *Plaintiffs' Record*, TAB 3, ¶3 [p. 720] and Ex. "C" [p. 764]. Mr. Burns was offered 18.6 weeks when entitled to 20 (Burns Affidavit, *Plaintiffs' Record*, TAB 4, ¶3 [p. 782] and Ex. "A" [p.788]). For Mr. Tam, 12.2 and not 14 weeks was offered (Tam Affidavit, *Plaintiffs' Record*, TAB 5, ¶2 [p. 815] and Ex. "A" [p. 619]. For Mr. Gill, it was 6.2 and not 7.7 weeks (Gill Affidavit, *Plaintiffs' Record*, TAB 8, ¶2 [p. 917] and Ex. "A" [p.928]. Mr. Lipton was offered 7 weeks and not his *ESA* entitlement to 8.5 (Lipton Affidavit, *Plaintiffs' Record*, TAB 9, ¶2 [p. 982] and Ex. "R" [p. 1142]).

41 Transcript, Cross-examination of Tony Urban, Q440. All of the Plaintiffs' affiants' letters contained a miscalculation.

42 Transcript, Cross-examination of Lynne Campbell, QQ143-146.

43 Email, Mary DeVous to Others, Wood Affidavit, Ex "R", *Plaintiffs' Record* [pp. 326-327].

"prosperity".[44] Suffice it to say that the Plaintiffs' affiants generally regarded the timing of the email as, to be polite, somewhat insensitive.

F. The Employee Reaction and the May 12, 2014 Meeting

41. All of the affiants have indicated that Streetsville Plant employees were angry with the First Severance Letters because of the miscalculations and what employees felt was, overall, an inadequate package. A majority of them signed a petition demanding more time to respond.[45]

42. CTS heard this message and quickly dispatched Mr. Urban and Ms DeVous to meet with employees on May 12, 2014 to answer their questions and, ultimately, offer each employee a revised separation package [the "Second Severance Letters"]. They made their presentations five times, to five groups of employees, where the evidence is that tensions were high.[46] Mr. Lipton recalls that, on a break, Mr. Urban called the employees "whiners", which Mr. Urban denies.[47] Mr. Urban admits however, and Ms Campbell confirms, that Mr. Urban told employees at the presentations, somewhat insensitively, that this was a difficult day *for him*.[48]

43. Two key points emerge from the May 12 meetings. First, employees at the meetings expressly asked that CTS offer them retraining services. Mr. Urban and Ms DeVous agreed to look into this but never followed up. Mr. Urban admits, in cross, that

44 Email, T. Urban to Employees, April 17, 2014, Wood Affidavit, Ex. "S", *Plaintiffs' Record* [p. 329].
45 Wood Affidavit, Ex. "U", *Plaintiffs' Record* [pp. 339-343].
46 See for instance, Urban Affidavit, *CTS Record*, ¶39.
47 Lipton Affidavit, *Plaintiffs' Reply Record*, TAB 2, ¶12; Transcript, Cross-examination of Tony Urban, QQ397-399. Mr. Urban accepts that Mr. Lipton is not a dishonest person but suggests that Mr. Lipton is mistaken on this one point, for whatever this is worth.
48 Transcript, Cross-examination of Tony Urban, QQ41-42; Transcript, Cross-examination of Lynne Campbell, Q275.

he does not know why this was not done.[49] Of decided importance, CTS's evidence, through Mr. Urban, is that CTS was not opposed to providing employees with the requested retraining.[50]

44. The second interesting fact is this. Prior to the May 12 meeting, one Streetsville Plant employee, Mr. Park, had read up on plant closures from the MOL's website, and had come across the Form 1 notice obligations.[51] Armed with this information, Mr. Park, at the May 12 presentation he attended, told Mr. Urban and Ms DeVous that CTS had a legal obligation to inform the MOL and appeared not to have done so.[52] The Plaintiffs' affiants corroborate this story,[53] and Mr. Urban admits it.[54] The Plaintiffs' affiants say that Mr. Urban responded abruptly to the effect that CTS was meeting its obligations,[55] while Mr. Urban has no recollection of his response.[56]

45. Despite this warning, CTS did not notify the MOL. And, while Mr. Urban occasionally references "outside" and "external" counsel in his affidavit, there is no evidence from Mr. Urban that the Form 1 issue was put to this supposed lawyer.

46. At the close of the May 12 meetings, CTS handed out revised notices, the Second Severance Letters. These letters were identical in form to the First Severance Letters, differing only in that they provided an increased severance payment if the

49 Baldassare's Notes and DeVous Email summary, Wood Affidavit, Exs. "T" and "V", *Plaintiffs' Record* [pp.331 and 360]; Transcript, Cross-examination of Tony Urban, QQ442-449.
50 Transcript, Cross-examination of Tony Urban, QQ442-447.
51 Park Affidavit, *Plaintiffs' Record*, TAB 3, ¶¶43-44 [pp. 731-732].
52 Park Affidavit, *Plaintiffs' Record*, TAB 3, ¶53 [p. 734].
53 Burns Affidavit, *Plaintiffs' Record*, TAB 4, ¶13 [p. 784]; Tam Affidavit, *Plaintiffs' Record*, TAB 5, ¶10 [p. 817]; Lipton Affidavit, *Plaintiffs' Record*, TAB 9, ¶68 [pp. 1000-1001].
54 Transcript, Cross-examination of Tony Urban, QQ367-370.
55 Burns Affidavit, *Plaintiffs' Record*, TAB 4, ¶14 [p. 784]; Tam Affidavit, *Plaintiffs' Record*, TAB 5, ¶11 [p. 817]; Lipton Affidavit, *Plaintiffs' Record*, TAB 9, ¶69 [p. 1001].
56 Transcript, Cross-examination of Tony Urban, Q371.

employee remained at the Streetsville Plant until their "Separation Date".[57] They also offered, for some employees, an amount in lieu of benefits following the Separation Date.

47. Following delivery of the Second Severance Letters, some employees received further letters identical in form but with other changes to the content.[58] The "Separation Date" for each employee nevertheless remained unchanged: that is, most employees expected their final day to be March 27, 2015.[59]

G. The 2015 Extensions of the Separation Dates

48. The First Severance Letters and each revision contained a provision permitting CTS to extend the Separation Date by as much as 13 weeks. CTS did so in late February, 2015, moving the final date for most employees back from March 27 to June 26, 2015. Other employees with other final dates saw those dates extended as well, to the point where, for a number of employees, CTS gave more than 13 weeks of additional work.[60] Whenever a date was extended, CTS offered in the same notice to pay the employee an additional $500.00.[61]

H. The Gill Complaint

49. Around the same time as his last day was being extended, one employee, Fred Gill, found new employment and gave a notice of resignation. When he asked for *ESA* severance pay, as required by s. 63(1)(e), CTS refused to pay it, prompting a complaint to the MOL. The MOL, while investigating this, questioned whether the Streetsville

57 Wood Affidavit, Exs. "W"-"X", *Plaintiffs' Record*, TAB 2.
58 Wood Affidavit, Exs. "Y" and "AA", *Plaintiffs' Record*, TAB 2.
59 *Ibid.*
60 Wood Affidavit, *Plaintiffs' Record*, TAB 2, ¶¶71-78; *Supplementary Record*, TAB 4 [p. 20].
61 *Ibid.*; Transcript, Cross-examination of Lynne Campbell, QQ112-114.

Plant was actually closing, as they had no Form 1. In a July 24, 2015 decision, the MOL ordered that CTS pay Mr. Gill's severance, supported by reasons to the effect that, once CTS had given the First Severance Letters with the March 27, 2015 Separation Date, it could not reverse the notice and deny Mr. Gill severance.[62]

50. CTS was made aware of this complaint by early April, 2015, as Ms Campbell was instructed by Ms DeVous at that time to complete an information sheet in response.[63]

I. The Form 1 is Finally Filed and Posted

51. CTS finally filed the Form 1 with the MOL on May 12, 2015 and posted it that same day at the Streetsville Plant. CTS offers a laconic explanation for this. Mr. Urban states that it was filed after Ms DeVous discovered that over 50 people were being terminated on the same date "as a result of extensions to a number of the Original Separation Dates".[64] Mr. Urban does not explain, in his affidavit, why it is that this discovery occurred in May 2015 when: (a) the extensions he refers to were provided in *February*, 2015; and, (b) the chart he, Ms DeVous, and CTS's team were operating from in early 20**14** showed that well over 50 people would be let go on the same date.

52. Ms DeVous has not given an affidavit explaining her actions despite, according to Mr. Urban, being completely accessible to CTS as a witness.[65] The most logical inference from the evidence is that the MOL was in touch with Ms DeVous in April over the Gill complaint in order to establish that a plant closure was taking place, learned

62 For a complete description of this story, see the Gill Affidavit, *Plaintiffs' Record*, TAB 8, ¶¶7-17.
63 Letter, MOL to CTS, Gill Affidavit, Ex. "E", *Plaintiffs' Record*, TAB 8; Transcript, Cross-examination of Lynne Campbell, QQ172-196.
64 Urban Affidavit, *CTS Record*, TAB 1, ¶50.
65 Transcript, Cross-examination of Tony Urban, QQ304-307.

from Ms DeVous that it was, and told Ms DeVous to file and post the Form 1, which she did shortly thereafter. The Court is free, on a summary judgment motion, to draw an adverse inference from the failure of a corporation to deliver an affidavit from a pertinent, available, witness absent an explanation for its absence.[66]

53. What is known is that CTS filed and posted the Form 1 on May 12, 2015, the MOL acknowledged receipt, and the MOL then forwarded the Form 1 the next day, on May 13, 2015, to representatives of the Ministry of Training Colleges and Universities ["TCU"] to administer the information and adjustment services described below.[67]

54. The Form 1 process was yet another example of CTS in Elkhart managing the issues alone, only first informing the Streetsville Plant's HR Generalist, Ms Campbell, about it on May 12, 2015. This is somewhat ironic as the Streetsville Plant had seen a previous mass layoff when, with Ms Campbell involved, the Form 1 issues had been dealt with.[68] As Ms Campbell points out in cross, whereas with previous serious employment law issues she would deal directly with experienced and well-regarded labour/employment counsel at Cassels Brock (Kristin Taylor), she had received no direction from Elkhart to deal with her or with any Ontario lawyer and was consigned to dealing solely with in-house counsel from the USA.[69] Mr. Baldassare, the Streetsville Plant's manager, had complained to Mr. Urban in June 2014 that CTS was "getting no legal advice" and that Mr. Urban was not including him in any decision-making.[70]

66 *Kadoke Displays Limited v. Performance Solutions Inc.*, 2011 ONSC 1579 at ¶¶4-9.
67 Wood Affidavit, Exs. "FF"-"HH", *Plaintiffs' Record*, TAB 2.
68 Transcript, Cross-examination of Lynne Campbell, QQ420-429.
69 Transcript, Cross-examination of Lynne Campbell, QQ398-408.
70 Baldassare's Notes, Wood Affidavit, Ex. "T", *Plaintiffs' Record*, TAB 2 [p. 334].

J. The Retraining and Adjustment Services Employees Lost

55. As previously noted, CTS did not object to its Streetsville Plant employees receiving early retraining and related services[71] and had begun exploring, by May 2014, how to go about providing those.[72] In the Lindy Affidavit [Plaintiffs' Record, TAB 11], we set out in detail the evidence of the significant information and services that Ontario ministries/agencies would therefore have provided the Streetsville Plant employees early on had Form 1 notice been given.

56. Upon learning of a plant closure via receipt of a Form 1, the TCU (now the Ministry of Advanced Education and Skills Development ("MAESD")) contacts the employer right away to confirm certain details related to the closure and confirm whether the employer is aware of the types of programs and services offered through "Employment Ontario" that could be of assistance to its employees.[73]

57. On receiving the positive response Mr. Urban says CTS would have given to such an inquiry, the MAESD will work with the employer to facilitate employee access to a multitude of support and services, including:

(a) arranging and coordinating information sessions with federal partners (i.e., Service Canada);

(b) arranging to have Employment Ontario service providers go on-site to provide information on Employment Ontario programs and services, including the Second Career program, which assists unemployed, laid-off workers train for occupations in high demand. Eligible employees are

71 Transcript, Cross-examination of Tony Urban, QQ442-447.
72 Baldassare's Notes and DeVous Email summary, Wood Affidavit, Exs. "T" and "V", *Plaintiffs' Record* [pp.331 and 360].
73 Lindy Affidavit, *Plaintiffs' Record*, TAB 11, ¶¶14-18 [pp. 1192-1194].

provided up to $28,000 to assist with training related costs (i.e., tuition, books, transportation, and basic living expenses). Additional support may also be available to accommodate the needs of people with disabilities, dependants, the costs of living away from home and literacy and basic skills training; 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 through Employment Ontario, and referral services to financial and credit counselling.[74]

58. Instead of giving employees access to this information and these important services throughout the closure, CTS brought in, at the very end, "Right Management", to offer a smattering of group outplacement services (for instance, on how to write a resume, create a LinkedIN profile, and deal with the emotions associated with a termination).[75] The only evidence of the quality of the services offered comes from the Plaintiffs' affiants, most of whom described the services as disappointing.[76]

59. Ultimately, CTS admitted in the Form 1 itself 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...?", Mr. Urban and Ms DeVous simply typed "None".[77]

---

74 Lindy Affidavit, Ex. "C", *Plaintiffs' Record*, TAB 11 [pp. 1207-1212]. Exhibits "D"-"Q" of the Lindy Affidavit reproduces information about Employment Ontario and the many adjustment services available.
75 Campbell Affidavit, *CTS Record*, TAB 2, ¶¶9-11; Lipton Affidavit, *Plaintiffs' Record*, TAB 9, ¶70 [p. 1001].
76 For instance, Burns Affidavit, *Plaintiffs' Record*, TAB 4, ¶¶15-17, Aultman Affidavit, *Plaintiffs' Record*, TAB 6, ¶¶26-28, and Featherstone Affidavit, *Plaintiffs' Record*, TAB 7, ¶¶25-27.
77 Form 1, Wood Affidavit, Ex. "FF", *Plaintiffs' Record* [p. 631].

60. Ms Campbell, in cross, admitted that: (a) virtually none of the MAESD-available services were offered by CTS or by Right Management;[78] and, (b) no brochure or information about those services such as those exhibited in the Lindy affidavit was ever circulated, to her knowledge, at the Streetsville Plant.[79]

61. All told, CTS was invoiced $14,400 (plus HST) in total by Right Management for its group sessions for all of its hourly employees[80] 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.[81]

62. Employees were only first told about the Employment Ontario services available to them on June 18-19, 2015 during a presentation by a Service Canada representative.[82] Mr. Featherstone states that, through Employment Ontario, he received help to write a resume and to gain access to an online job search tool,[83] two things he did not receive from Right Management.[84]

63. Quite apart from being denied information and access to these Employment Ontario services during the closure due to CTS's failure to file the Form 1, as outlined in great detail in argument, below, many CTS employees then found themselves working excessive overtime and weekend hours during the closure. These, alone or together with the language in the First Severance Letters indicating that the employee would

78 Transcript, Cross-examination of Lynne Campbell, QQ373-397.
79 Transcript, Cross-examination of Lynne Campbell, QQ367-372.
80 *Plaintiffs' Supplementary Record*, TAB 4 [p. 21]. Over $3000 per salaried employee was paid too.
81 Lindy Affidavit, Exs. "C" and "L", *Plaintiffs' Record*, TAB 11 [esp. pp. 1212 and 1272].
82 Campbell Affidavit, *CTS Record*, ¶29.
83 Featherstone Affidavit, *CTS Record*, TAB 7, ¶¶29-30 [p. 891].
84 *Ibid.* at ¶¶25-28 [pp. 890-891].

have to stay at CTS until their last day to collect anything, would have eliminated or severely attenuated the employees' opportunity to seek other employment. These facts are reviewed in more detail later.

K. Employee Departures

64. Manufacturing operations at the Streetsville Plant ceased as of June 26, 2015 and all operations ceased by November 6, 2015.[85] Around the time of each employee's departure, CTS re-offered the same severance payment plus the extra $500.00 to those who executed a Release. To those who did not, *ESA* severance was paid.[86]

65. Early in 2016, CTS issued incorrect T4s to many Streetsville Plant employees on account of their 2015 income, causing many no end of difficulties.[87]

L. The Elkhart Closures

66. Consistent with Mr. Urban's evidence that CTS had no objection to providing Streetsville Plant employees with retraining services such as the Employment Ontario ones described above, when CTS shut down manufacturing in Elkhart, Indiana a year later, in 2016, it announced that it was "committed to working diligently with union representatives, elected officials and civic leaders to identify opportunities for **outplacement and retraining** for the affected employees".[88]

85 Campbell Affidavit, *CTS Record*, TAB 2, at ¶¶34-36.
86 Wood Affidavit, *Plaintiffs' Record*, TAB 2, at ¶¶97-99 [p. 37].
87 Wood Affidavit, *Plaintiffs' Record*, TAB 2, at ¶¶100-105 [pp. 37-38]; Mr. Burns and his wife were re-assessed by the CRA and ordered to pay back monies with interest: Burns Affidavit, *Plaintiffs' Record*, TAB 4, ¶¶18-21 [pp. 785-786].
88 June 3, 2016 Press Release, Urban Affidavit, Ex. "A". *CTS Record*, TAB 1 [p. 19] [Emphasis Added].

PART III: ARGUMENT

SUMMARY OF ARGUMENT

67. The arguments support, *inter alia*, the following propositions in answer to the common issues listed at TAB 1 of the Plaintiffs' Motion Record:

(a) to terminate the Class's employment, CTS had to provide reasonable notice of termination and comply with the *ESA*. Compliance with the *ESA* is required by the *ESA* and the employment contracts too;

(b) CTS breached the *ESA* and contracts by not notifying the MOL of the Streetsville Plant's closure until May 12, 2015 and by not posting the notice at the Streetsville Plant. CTS had to notify and post as of April 17, 2014. They were therefore 13 months' late;

(c) the effect of one or more of these failures is to deprive CTS of the right to defend the Action on the basis that it gave working notice. Put another way, the working notice is "void" and fresh notice is required;

(d) as an alternative to proposition (c), the manner in which CTS conducted the closure itself means that CTS should be deprived of the benefit of the working notice defence *i.e.* the same result should flow as in (c);

(e) while normally CTS would be credited, as of the "fresh notice" date, with the severance payments made, these should not be characterized as "*ESA* severance" pay and no credit ought therefore to be given; and,

(f) CTS acted in bad faith in the manner of termination, and general damages should likewise be awarded.

68. CTS should not be permitted to rely on the working notice it gave for any one of two key reasons listed above [propositions (c) or (d)] or for both such reasons. Propositions (b)-(d) have never or rarely been litigated. However, analogous Actions have led courts to declare the common law notice void. General principles also support the conclusion that the working notice is void and fresh notice owed.

69. First, by violating the *ESA* so fundamentally by failing to notify the MOL, CTS's working notice should be declared void. CTS cannot rely on its illegal conduct when that conduct goes to the heart of its obligations to give the Class reasonable notice during a Plant closure. It should not be given credit for working notice.

70. Alternatively, if CTS did not violate the *ESA*, the shutdown was conducted in such a way as to deprive the Class of the very purpose of working notice: a reasonable opportunity to secure new work. This was due to the dissemination by CTS of misinformation that would have the effect of keeping employees employed to the end, CTS's overall failure to address the Class's requests for retraining, and the excessive overtime and weekend hours employees worked, some against their will, during the shutdown. The jurisprudence supports CTS being given little or no credit for working notice given in this fashion.

71. All told, CTS owed the Class fresh notice of termination from May 12, 2015 when it finally notified the MOL, 13 months' late, of the shutdown. Damages from that day forward ought to be awarded.

THE EASIER ISSUES [COMMON ISSUES (I) AND (VII)]

72. CTS admits, in answer to common issue (i), that the two Defendants were common employers.

73. As the Class were employed without written agreements, the answers to the three common issue (vii) questions are easy. Their employment was of indefinite duration requiring, by contract and at common law, reasonable notice prior to their termination.[89] And, CTS was obligated to comply with the *ESA* at all times: the *ESA*'s requirements form an integral part of the employment contract itself.[90]

CTS HAD TO NOTIFY THE MOL BY APRIL 17, 2014 OF THE SHUTDOWN AND FAILED TO DO SO [COMMON ISSUES (II)-(V) AND (VIII)]

74. CTS gave employees written notice of termination on April 17, 2014, telling 77 employees that their employment would end on March 27, 2015. The March 27, 2015 date was extended in 2015 to June 26, 2015. For the remaining employees, different end dates were first used and were also extended in 2015.

75. Despite approving the shutdown in February 2014, announcing it on February 28, 2014, and giving notice of termination on April 17, 2014, CTS waited a full thirteen months after April 17 to notify the MOL of the shutdown and to post the "Form 1" at the Streetsville Plant, on May 12, 2015.

89 *Machtinger v. HOJ Industries Ltd.*, [1992] 1 SCR 986 at pp. 997-998; *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158 at ¶15.

90 *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, at ¶¶24-30; *Stewart v. Park Manor Motors Ltd.*, [1967] O.J. No. 1117 (C.A.), at ¶10; *Franklin v. University of Toronto*, [2001] O.J. No. 4321 (S.C.J.), at ¶¶24-26; *Kumar v. Sharp Business Forms Inc.*, 2001 CanLII 28301 (S.C.J.), at ¶¶7-31.

76. The Plaintiffs submit that the *ESA* required that CTS: (a) notify the MOL by April 17, 2014, the first day of the notice period; and, (b) post the Form 1 during the notice period. CTS argues that it was only obligated to notify and post the Form 1 as of May 2, 2015, eight weeks before the June 26, 2015 departures. CTS thus argues that it was 10 *days* late, while the Plaintiffs argue that CTS was 13 *months* late.

77. The Plaintiffs' interpretation of the *ESA* is correct. It accords with the *ESA*'s words, the history and purposes of the *ESA* and its mass termination provisions, as well as the remedial, employee-protective interpretive approach required. Under the Plaintiffs' interpretation, the MOL would have been notified of a known shutdown early and would have been able, through the MAESD, to provide the Class with early guidance regarding much-needed and helpful adjustment programs.

78. CTS's interpretation would see it free to conduct a shutdown without notifying the MOL until the eve of the closure, by which time some employees had resigned and all employees had been deprived, for 13 months, of the MAESD information and re-employment assistance that could have helped them. No purpose and no benefit could be served by this interpretation of the *ESA*.

79. As between these two interpretations, with the very different effects on the Class, the Plaintiffs' interpretation, the one more beneficial to the Class, should be preferred.

A. Mass Terminations Under the ESA

80. Nobody can contract out of or waive an *ESA* requirement.[91] Where an employer contravenes an *ESA* provision, the MOL is given broad powers to "order what action the person shall take...in order to comply", including by way of injunction proceedings.[92] Consistent with the importance of securing compliance, the *ESA* treats breaches as offences punishable by significant fines and imprisonment.[93]

81. For any termination, employers almost always owe employees *ESA* notice of termination.[94] In addition, if the employee has five or more years' service, larger employers must pay the employee "severance" pay of one week's base salary per year of service (capped at 26 weeks' total).[95]

82. Once an employer gives notice of termination and establishes a "notice period", be it of the minimum duration required by the *ESA* or some longer period, the *ESA* sets out two further obligations. First, the employer must then "freeze" the terms of employment: it cannot reduce wages or benefits, or alter terms.[96] Second, following notice, where an employee gives two or more weeks' notice of resignation that takes effect during the "statutory notice period" (for a closure, the last eight weeks of employment), the employer must pay severance pay despite the resignation.[97]

---

91 *ESA*, s. 5(1)
92 *ESA*, ss. 108(1) and 108(5)-(6)
93 *ESA*, s. 132
94 *ESA*, Part XV, "Termination of Employment" [ss. 54 *et seq.*]
95 *ESA*, ss. 63-65. The employer's annual payroll must exceed $2.5 million/year for severance pay requirements to exist. CTS's payroll exceeded that sum at the Streetsville Plant alone.
96 *ESA*, s. 1 (def. of "statutory notice period") and s. 60. A MOL ESA officer, in 2015, held that, once CTS gave the April 17, 2014 notice, it had to comply with the s. 60 freeze: July 24, 2015 MOL Reasons in *Gill v. CTS*, Gill Affidavit, TAB 8 Ex. "F", *Plaintiffs' Record* [pp. 965-970]
97 *ESA*, s. 1 (def. of "statutory notice period") and s. 63(1)(e)

83. From there, it is helpful to reproduce the key sections of the *ESA* that deal with mass terminations more specifically:

> 1(1) In this Act ... "statutory notice period" means,
>
> > (a) the period of notice of termination required to be given by an employer under Part XV, or
> >
> > (b) where the employer provides a greater amount of notice than is required under Part XV, that part of the notice period ending with the termination date specified in the notice which equals the period of notice required under Part XV;
>
> 58. (1) ... the employer shall give notice of termination in the prescribed manner and for the prescribed period if the employer terminates the employment of 50 or more employees at the employer's establishment in the same four-week period.
>
> (2) An employer who is required to give notice under this section,
>
> > (a) shall provide to the Director the prescribed information in a form approved by the Director; and
> >
> > (b) shall, on the first day of the notice period, post in the employer's establishment the prescribed information in a form approved by the Director.
>
> (3) The information required under subsection (2) may include,
>
> > (a) the economic circumstances surrounding the terminations;
> >
> > (b) any consultations that have been or are proposed to take place with communities in which the terminations will take place or with the affected employees or their agent in connection with the terminations;
> >
> > (c) any proposed adjustment measures and the number of employees expected to benefit from each; and
> >
> > (d) a statistical profile of the affected employees.
>
> (4) The notice required under subsection (1) shall be deemed not to have been given until the Director receives the information required under clause (2) (a).
>
> (5) The employer shall post the information required under clause (2) (b) in at least one conspicuous place in the employer's establishment where it is likely to come to the attention of the

> affected employees and the employer shall keep that information posted throughout the notice period required under this section.

84. Section 58(1) refers the reader to a regulation which, in turn, provides:

> 3. (1) The following periods are prescribed for the purposes of subsection 58 (1) of the Act:
>
> > 1. Notice shall be given at least eight weeks before termination if the number of employees whose employment is terminated is 50 or more but fewer than 200. [...]
>
> (2) The following information is prescribed as the information to be provided to the Director under clause 58 (2) (a) of the Act and to be posted under clause 58 (2) (b) of the Act:
>
> [eight heads of information are then listed to guide the MOL as to the location of and number of employees' affected; the employer's contact details are provided to enable a swift response]
>
> (3) The employer shall provide the information referred to in subsection (2) to the Director by setting it out in the form approved by the Director under clause 58 (2) (a) of the Act and delivering the form to the Employment Practices Branch of the [MOL]....[98]

85. There is no dispute that the trigger for these notice obligations, the termination of "50 or more" employees in a four week period, was activated here: CTS listed, by early 2014, 77 employees with the same planned departure date of March 27, 2015.[99]

86. In s. 58(2), the employer is commanded to provide the MOL with the detailed notice of a pending plant closure (the "Form 1") and then post the Form 1 in the workplace on the first day of the "notice period". Section 58(5) then requires that the Form 1 posting be maintained during this "notice period".

87. The choice of the term "notice period" was no accident. It indicates that, where an employer commences a "notice period" by giving notice in excess of the "statutory

98 "Termination and Severance of Employment", O.Reg. 288/01. The MOL has developed a form to be completed and used to comply with these provisions [the "Form 1"].
99 *Supplementary Record*, TAB 2.

notice period", the start of the longer "notice period" is when the obligations of notice and posting arise. This is because the "notice period" is defined in s. 1 as a period that is longer than the eight week "statutory notice period" required on a closure. Under s. 1, when an employer gives notice that is longer than the "statutory notice period", a "notice period" is created starting on day one, ending the last day, and ending with a period of time defined as the "statutory notice period" (here, eight weeks).

B. The Correct Interpretive Approach to the ESA

88. Like all legislation, the *ESA* must be interpreted "purposively":

> ... 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.[100]

89. Further, an Ontario statute commands a "fair, large and liberal construction" to ensure that the *ESA*'s objectives are fulfilled.[101] The Supreme Court in *Rizzo Shoes* added that, as the *ESA* is benefits-conferring legislation designed to "protect employees",[102] it must also be interpreted broadly and generously: "[a]ny doubt arising from difficulties of language should be resolved in favour of the claimant".[103]

C. The Words of the ESA Support the Plaintiffs' Interpretation

90. Before stepping back and giving the key *ESA* sections a contextual reading, a review of the key sections alone leaves no doubt that: (a) posting the Form 1 was required from the start of the notice period (starting April 17, 2014) and continuously

100 *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at ¶21, citing E.A. Driedger, *Construction of Statutes*, 2nd ed., (Toronto: Butterworths, 1983), at. p. 87.
101 *Legislation Act, 2006*, c. 21 Sched. F, s. 64(1).
102 *Rizzo & Rizzo Shoes Ltd. (Re), supra,* at ¶25.
103 *Rizzo & Rizzo Shoes Ltd. (Re), supra,* at ¶36; *Machtinger v. HOJ Industries Ltd., supra* at p. 1003.

during that notice period; and, (b) the Form 1 had to be given to the Minister at the start (by April 17, 2014) as well.

91. Section 58(2)(b) states that the employer must "on the first day of the **notice period**" post the Form 1 at the workplace. Section 58(5), after referring the reader to s. 58(2), says that the employer must keep the Form 1 posted "throughout the notice period required under this section [s. 58(2)(b)]".

92. The term "notice period" is defined in the *ESA* in relation to the "statutory notice period", which is the minimal notice period required by the *ESA* [at least 8 weeks' notice, in the case of the Streetsville Plant closure, per regulation[104]]. In defining the "statutory notice period", the *ESA* provides that, where the employer gives notice that is greater than the "statutory notice period", the longer period of notice is known as a "notice period". This terminology reflects the fact that an employer can comply with its *ESA* obligations of providing "**at least**" eight weeks' notice by either just providing eight weeks' notice [the statutory notice period] or by providing more than eight weeks.

93. Within a longer "notice period", only the last eight weeks is considered the "statutory notice period".[105] Thus, when CTS gave notice of termination to 77 employees on April 17, 2014 that their employment was to end on March 27, 2015, their *ESA* "notice period" was April 17, 2014 to March 27, 2015, while their "statutory notice period" was January 31, 2015 to March 27, 2015.

104 "Termination and Severance of Employment", O.Reg. 288/01, s. 3(1)1.
105 *ESA*, s. 1, def. of "statutory notice period".

94. The *ESA* distinguishes "statutory notice period" from the "notice period" in order to establish different ground rules on termination. The former term appears again once, in s. 63(1)(e): an employee who resigns on at least two weeks' notice ending "during the statutory notice period" collects severance. However, in s. 60, headed by "Requirements during **notice period**", the employer is told to freeze the wage rates, benefits, and terms of employment during the "notice period". This makes sense: having decided to establish a longer notice period and having locked the employee in, the employer cannot then start lowering wages or benefits, which would compel employees to work for less so as to maintain their severance rights. The freeze language recognizes that employees here are vulnerable: the incentive to collect severance by remaining at work makes them vulnerable to changes in remuneration.

95. With the distinction between "notice period" and "statutory notice period" in mind, the wording of s. 58(2)(b) comes into focus: in choosing the start of the "notice period" as the posting date, the Legislature meant that April 17, 2014 (and not May 2, 2015) was the date on which CTS had to first post the Form 1. Had the Legislature intended otherwise, it could easily have used the term "statutory notice period" instead.

96. Where a statute uses two different terms or sets of words, different meanings are ascribed to a section that uses one form of words vs. a section that uses another,[106] particularly where the same subject is addressed with different terms[107] or where, as here, the two sets of terms are technical, defined ones[108].

106 *Agraira v. Canada,* 2013 SCC 36 at ¶81; *Syndicat de la fonction publique du Québec v. Quebec (Attorney General)*, 2010 SCC 28 at ¶37; *R. v. A.A.*, 2015 ONCA 558 at ¶68.
107 *Peach Hill Management Ltd. v. Canada*, 2000 CarswellNat 1157 (Fed. C.A.), at ¶12.
108 *Mattabi Mines Ltd. V. Ontario (Minister of Revenue)*, [1988] 2 SCR 175 at ¶20.

97. Thus, interpreting s. 58(2)(b) as CTS argues, that one first posts at the start of the "statutory notice period", would interpret s. 58(2)(b) 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.

98. From there, s. 58(2)(a), part of the same section as the posting one [s. 58(2)(b)], should be interpreted as requiring employers to inform the MOL at the same time of the closure, using the same Form 1. Admittedly, s. 58(2)(a) does not come right out, within (a) itself, and say "the employer must inform the MOL at the start of the notice period". Section 58(2)(a) states that the employer "shall provide to the Director the [Form 1]".

99. Since the MOL notice duty in s. 58(2)(a) falls in the middle of a section that requires that the same form be posted at the start of the "notice period", the only realistic reading of s. 58(2)(a) is that the MOL notice is delivered before or at the same time. It would be odd, and would serve no purpose, to require the posting of the Form 1 for a year just to inform employees of something they already know from their termination letters (that their employment is ending) but to withhold that information from the very entity that can assist the employees until near the closure date.

100. Section 58(2)(a) provides that the employer informs the MOL of the intended closure "in a form approved by the Director". This same form then reappears in s. 58(2)(b): the employer posts the notice at the start of the "notice period" using the same "form approved by the Director". This chronology leaves no doubt that the MOL is

notified first and that the same "form approved by the Director" is then posted at the start of the notice period. It is impossible to post the notice at the start of a notice period on a form "approved by the Director" if the MOL has not first been informed. The MOL's own Form 1 indicates that this sequence is the sequence expected by the MOL.[109]

101. The fact that the MOL notice obligation appears in the same section as the posting obligation means that must be interpreted in a way that is consistent with the whole of section 58(2). The "context" through which a part of legislation must be read includes the sections and sub-sections surrounding the interpreted provision.[110] Relatedly, the sequencing in s. 58(2), with the MOL notice paragraph preceding the posting paragraph, suggests the Legislature intended the MOL notice to come first or at the same time: "[i]t is presumed that...the legislature seeks an orderly and economical arrangement" in statutes, with "[r]elated concepts and provisions ... grouped together in a meaningful way".[111]

102. Final clues supporting the early timing of the 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 number of expected layoffs and "proposed adjustment measures" and economic circumstances leading to the closure (such information would be known at the early termination planning stages).[112]

---

109 Form 1 for CTS, Wood Affidavit, Ex. "HH", *Plaintiffs' Record*, TAB 2 [p. 636]

110 *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 SCR 130 at pp. 159-163; *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 at ¶¶28-52; *Martin v. Canada (Attorney General)*, 2013 FCA 15 at ¶67; and, *Gill v. Canada (Attorney General)*, 2010 FCA 182 at ¶¶2, 23, and 36.

111 R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis, 2014) at §8.21, cited approvingly in *Thomas Cavanaugh Construction Ltd. v. City of Ottawa*, 2012 ONSC 3851 (Div. Ct.), at ¶26.

112 ESA s. 58(3); "Termination and Severance of Employment", O.Reg. 288/01, s. 3(2).

103. In the case at bar, CTS knew it was shutting the Streetsville Plant down in late 2013, approved this on February 12, 2014, informed employees in a press release on February 28, 2014, and by April 17, 2014 was fully aware of the economic reasons for the shutdown, the number of affected employees, and the outplacement measures it proposed to offer.[113] There was nothing preventing CTS from notifying the MOL of the information required in the Form 1 by April 17, 2014.

D. The Legislative History Supports the Plaintiffs' Interpretation

104. The legislative history points to the following: (a) the goal of the termination provisions generally is to provide employees with opportunities to secure new work; (b) this goal is accomplished in a mass termination by the earliest possible notice to the MOL to enable early adjustment measures to be put in place; and, (c) employers must give the MOL notice at the same time as they first post the Form 1. These objectives support the idea that CTS gives the MOL the Form 1 earlier (April 17, 2014). Doing so offers a greater benefit to employees whose protection is the *ESA*'s primary goal.

105. Ontario first introduced the mass termination notice provisions in 1970, together in statute and regulation.[114] At First Reading, the Minister outlined that the new provisions were "necessary to protect the worker against the impact [of termination]" and that, with mass terminations, the goal was to "assure full use" of government

113 In its presentation to the Board of Directors on February 12, 2014, CTS employees lay out in full detail the economic rationale for the closure, notably the $4.1 million in estimated annualized savings that would result, and the $11 million CTS would realize from the sale of the property: Wood Affidavit, Ex. "M", *Plaintiffs' Record* [pp. 254-255].

114 *An Act to Amend the Employment Standards Act*, 1968, S.O. 1970, c. 45, s. 4 [adding Part 1A to the law]; and, "Termination of Employment", O.Reg. 251, esp. at ss. 3-6.

adjustment services. The Minister added that this purpose would be achieved by simultaneous notice to both the Minister and to employees.[115]

106. At Second Reading, the Minister was unequivocal that the mass termination provisions were designed for employee "protection" and to help them " find a new job". The Minister expressed concern over a lack of communication from employers, the benefit of longer notice, the benefits of employee retraining and access to adjustment services, and how the best way to achieve the law's goals was to mandate employee and MOL notice as early as possible.[116]

107. Critically, the 1970 statutory amendments and regulation leave no doubt that the intention was to achieve these goals by requiring notice to the MOL at the same time as to employees. After setting out in statute that notice must be given on mass termination pursuant to the regulation,[117] the regulation then provided for "no less than" 8 weeks' notice to employees[118] and concluded that, where such notice is given, "the employer shall **at the same time** notify the Minister in writing".[119]

108. This statutory/regulatory structure, with the obligation to give notice to the MOL "at the same time", continued through numerous changes to and consolidations of the *ESA* and regulation.[120] In 1991, the "at the same time" wording in the regulation was

115 Ontario, Legislative Assembly, Official Report of Debates (Hansard), 28th Parl, 3rd Sess, No 81 (27 May 1970) at 3236 (Minister Bales).
116 Ontario, Legislative Assembly, Official Report of Debates (Hansard), 28th Parl, 3rd Sess, No 81 (24 June 1970) at 4450-4451 (Minister Bales).
117 *An Act to Amend the Employment Standards Act, 1968*, S.O. 1970, c. 45, s. 4, adding s.6b.(2) [later renumbered as s. 13(2) in the *Employment Standards Act*, R.S.O. 1970, c. 147].
118 "Termination of Employment", O.Reg. 251, s. 3(a).
119 "Termination of Employment", O.Reg. 251 at s. 6 [Emphasis Added].
120 *Employment Standards Act*, R.S.O. 1970, c. 147, s. 13(2); *Employment Standards Act*, R.S.O. 1980, c. 137, s. 40(2); "Termination of Employment", R.R.O. 1980, Reg. 286, s. 7.

repealed.[121] The important takeaway from this repeal, when interpreting s. 58 of the *ESA*, is this. Shortly before the regulatory duty to give notice to the MOL "at the same time" was repealed, the detailed obligations on a mass termination to give notice to employees and the MOL were taken out of the regulation and placed together for the first time into the *ESA*, in the same section, in the form used today [then s. 57].[122] Thus, once the structure we have in s. 58 today was introduced, the MOL deemed the "at the same time" wording in regulation to be unnecessary, and repealed it.

109. It is no coincidence that the removal of the "at the same time" words in regulation followed hot on the heels of a consolidation of the dual notice words into the same section of the *ESA*. The repeal of the regulation in these circumstances is strong indication that the *ESA* intended to create the dual, same time, notice obligations that remain to this day. In interpreting laws, there is a presumption against tautology: legislatures avoid superfluous words and don't repeat words unnecessarily.[123] This holds true in interpreting the *ESA* alongside its regulation: one must interpret regulations and their statutes together harmoniously.[124]

110. Finally, when the *ESA* was amended in 1987 to place the dual notice provisions into the same section, the Legislature added the requirements that the notice must include the prospective and circumstantial information still required now (the economic

121 O.Reg. 200/91, s. 1, revoking s, 7 of R.R.O. 1980, Reg. 286.
122 *An Act to Amend the Employment Standards Act,* S.O. 1987, c. 30, s. 4(2), adding s. 40(2a) [consolidated in 1990 into s. 57 – see *Employment Standards Act*, R.S.O. 1990, c. E.14, s. 57].
123 *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, at ¶38; *Canada (National Revenue) v. Thompson,* 2016 SCC 21 at ¶32.
124 R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis, 2014) at §§13.18-13.19; *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66 at ¶38; *Bristol-Myers Squibb Co. v. Canada (Attorney General),* 2005 SCC 26 at ¶36.

circumstances involved, proposed adjustment measures, etc.).[125] In doing so, the Minister repeated that the goal of the mass termination provisions, and the amendments specifically, are "to protect the individual victims of layoffs and business discontinuances" and to help employees secure work by "requir[ing] employers to be more actively involved in helping the workers and their families to adjust". The Minister added that the provisions' goals are to create "an active **early** warning system".[126]

111. This review of the history of s. 58 supports the following: (a) the goal of the mass termination provisions is assistance to employees in finding work; (b) the goal more broadly is employee "protection"; (c) these goals were intended to be achieved by the early involvement of the MOL and the provision of assistance and adjustment programs to employees as early as possible; and, (d) consistent with this, notice to the MOL was to be provided early, and at the same time as the notice to employees. These purposes have been accepted as the purposes of the termination provisions generally, and the mass termination provisions more specifically.[127]

E. The 2000 Amendments Definitively Confirm this Interpretation

112. For reasons not found in Hansard, when the 1987 amendments were introduced – consolidating the key mass termination notice requirements into the statute – the obligation to post the Form 1, keep it posted, and to give the MOL notice were spelled

125 *An Act to Amend the Employment Standards Act*, S.O. 1987, c. 30, s. 4(2), adding s. 40(2c) [consolidated in 1990 into s. 57 – see *Employment Standards Act*, R.S.O. 1990, c. E.14, s. 57].
126 Ontario, Legislative Assembly, Official Report of Debates (Hansard), 33rd Parl, 3rd Sess, No 27 (15 June 1987) at 1352-1353 (Minister Wrye) and Ontario, Legislative Assembly, Official Report of Debates (Hansard), 33rd Parl, 3rd Sess, No 34 (25 June 1987) at 1744-1745 (Minister Wrye).
127 *Rizzo & Rizzo Shoes Ltd. (Re), 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.); *Re Readyfoods Limited*, 1998 CanLII 19020 (MB LA) at pp. 14-15; *Canadian Assn. of Industrial, Mechanical and Allied Workers v. Wolverine Tube (Canada) Inc.*, 1993 CanLII 801 (B.C.C.A.) at ¶50; *Readyfoods (Golden Valley Farms Inc.) v. United Food and Commercial Workers' Union*, Local 832, 1999 CanLII 14313 (Man. Q.B.), at ¶25.

out as one that applies only during the "statutory notice period".[128] Thus, from 1987 until the 2000 wholesale replacement of the statute, s. 57(3) required that notice be given at the start of the "statutory notice period". Section 57(3) was also introduced by weak language: the employer was merely told that "*[w]here so prescribed*, an employer *may* be required" to give notice.[129]

113. 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 from "statutory notice period", leaving behind the term "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 any such interpretation. Of note, while the Hansard surrounding the 2000 *ESA* restatement is full of discussion over other changes, nothing is said about the changes to the notice requirements in s. 57 (thereafter, s. 58).

114. When legislation is amended, then absent some external evidence that no change was intended, the amended wording is to be given a different interpretation than the prior wording.[130] The new words are purposively different.

115. The present situation is very similar to *Ulybel.*[131] There, the issue was whether s. 72(1) of the *Fisheries Act* permitted a court to order forfeiture of the sale of proceeds of a vessel or whether, consistent with s. 70(3) (which outlined a process for the sale of

128 *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"].
129 *Employment Standards Act*, R.S.O. 1990, c. E.14, s. 57(3).
130 *Bathurst Paper Ltd. v. Minister of Mujnicipal Affairs of New Brunswick*, [1972] S.C.R. 471 at pp. 477-478; *Toronto-Dominion Bank v. Szilagyi Farms Ltd.,* [1988] O.J. No. 1223 at ¶14 (C.A.); *R. v. Ulybel Enterprises Ltd.*, *supra* at ¶¶33-35.
131 *R. v. Ulybel Enterprises Ltd.*, *supra.*

"perishables"), a s. 72(1) order could only attach to perishables. Iacobucci J. considered the history of s. 72(1) and noted that, before 1991, s. 72(1) provided that a court could order forfeiture of s. 70(3) sale proceeds (the proceeds of the sale of perishables).[132] He further observed that, in 1991, s. 72(1) was amended to remove the reference to s. 70(3): s. 72(1) orders which once covered "any thing seized pursuant to [s. 70(3)]" now covered the broader "any thing seized under this Act". Thus, like the 2000 removal of the limiting word "statutory" in *ESA* s. 57(3)/58(3), this *Fisheries Act* section saw limiting wording removed. Crucially, Iacobucci J. observed – as with the 2000 amendments to the *ESA* – that Hansard offered no insight into the amendments.[133] Having so concluded, Iacobucci J. held that the amendment alone, in the absence of Hansard explanation, meant that a different interpretation emerged following the amendment: Parliament must be deemed to have acted purposively.[134]

116. *Ulybel* commands the same result here: 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".

117. Consistent with this argument that the 2000 amendments strengthened the notice requirements, the 2000 amendments also removed the weaker "Where so prescribed" and "may" wording formerly found in s. 57(3), replacing it simply with the word "shall" *i.e.* the employer "shall" give the notices, period. Clearly, someone well versed in the jurisprudence and the practical operation of the former "Where so

132 *Ibid.* at ¶¶27 and 33.
133 *Ibid.* at ¶33.
134 *Ibid.* at ¶¶34-35.

prescribed" and "may" obligation, limited to the "statutory notice period", found this wording wanting: the old wording suggested modest consequences for a breach[135] and unduly short notice periods. The drafter clearly opted to strengthen the provision, making it more mandatory ["shall"] and removing "statutory" for what we must now conclude, in the absence of Hansard, was a deliberate reason.

118. The 2000 amendment decisively supports the Plaintiffs' interpretation.

F. The Remedial Interpretation Supports the Plaintiffs

119. As *Rizzo Shoes* observed, the *ESA* must be interpreted remedially, in the way that best protects employees' interests. Where two competing interpretations are offered, the one that best protects those interests is to be adopted.[136]

120. Here, the Plaintiffs' interpretation would result in the MOL getting notice earlier, when earlier notice would have meant earlier provision of adjustment programs and information, all to the employees' benefit. CTS's interpretation would permit it to have employees within a notice period where the goal is to create a period where they can best seek other work, but keep employees away from helpful, important, statutorily-mandated information and programs that would help accomplish that goal. Unquestionably, the Plaintiffs' interpretation works far better results for employees. This supports the Plaintiffs' interpretation of the text.

121. We have reviewed elsewhere in this factum that CTS employees, early in the shutdown, asked CTS for the kinds of retraining and adjustment services that would

135 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.
136 *Rizzo & Rizzo Shoes Ltd. (Re), supra*, at ¶¶22, 25, and 36.

have been provided had the MOL received notice on April 17, 2014. Mr. Urban in cross admitted that he would have been happy to provide these services early.[137] Some affiants expressed that they would have liked to have known about these and might have benefitted from them.[138] Once Mr. Featherstone was told about them, he took advantage of the adjustment services to write his resume.[139] On the facts, requiring earlier MOL notice would have accomplished what CTS employees were asking for and what CTS's affiant says it was willing to give, and could have provided employees with access to significant services denied them for over a year.

122. On CTS's interpretation, where MOL notice is given much later, in addition to depriving all employees of all these benefits for 13 months, as many as fifteen employees who resigned mid-shutdown never once heard of the services.[140]

123. The interpretation that best protects employees is the one that does what the Legislature wanted: it gets information and adjustment services into the employees' hands earlier, gets the MOL involved earlier, while fostering a culture of assisting employees secure new work.

124. That interpretation is the one proffered by the Plaintiffs.

125. Before leaving this topic, we observe that research studies have concluded that employees covered by mass termination laws fare better than others in securing new

137 Transcripts, Cross-examination of Tony Urban, QQ442-447
138 See, for example, the Bhogal Affidavit, *Plaintiffs' Record*, TAB 10, ¶¶20-24 [p. 1159].
139 Featherstone Affidavit, *Plaintiffs' Record,* TAB 7, ¶¶29-30 [p. 891]
140 *Supplementary Record*, TAB 4 [p. 21].

work.[141] In a study of Canadian workers, Friesen found that employees under mass termination provisions fared much better at finding other work than those on layoff who would be expected to have greater attachment to their former workplace as a source of income (and thus not be seeking new work as actively).[142] Friesen's conclusions tell us that the earlier provision of adjustment programs better achieves the re-employment purposes of the *ESA* than an interpretation that keeps the employee more dependent on the terminating employer.

G. The Plaintiffs' Interpretation is Consistent with Other Legislation in Canada; Ontario Employees Should Expect Similar Rights

126. According to the Minister of Labour, describing the mass termination provisions in 1987, these were intended to "put Ontario in front of any other jurisdiction on this continent when it comes to protecting workers...".[143] If CTS's interpretation were accepted, the opposite would come true. Similar provisions across Canada, which mandate early notice to both employees and government, and at the same time, would offer workers elsewhere greater protection.

127. For instance: (a) employers in Nova Scotia must notify the Minister "at the same time" as employees;[144] (b) employers in Newfoundland do so "immediately after the notices are given" to employees;[145] (c) employers in Manitoba are told to notify the Minister and then told in the next subsection that they "shall immediately...give a copy

---

141 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); and, the studies referenced at p. 681 of C.P. Yost, "The Worker Adjustment and Retraining Notification Act of 1988: Advance Notice Required?" (1989), 38 Cath. U.L. Rev. 675.

142 J. Friesen, "Mandatory Notice and the Jobless Durations of Displaced Workers", *supra* at p. 663.

143 Ontario, Legislative Assembly, Official Report of Debates (Hansard), 33rd Parl, 3rd Sess, No 34 (25 June 1987) at 1745 (Minister Wrye).

144 *Labour Standards Code*, RSNS 1989, c. 246, ss. 72(2) and 75(2).

145 *Labour Standards Act*, RSNL 1990, Chap. L-2, s. 57(4).

of the notice to each [employee]";[146] and, (d) federally, the obligation to give notice to employees and the Minister happens early and at the same time, when the employer forms an "intention to so terminate".[147] Like Ontario, the Federal sections were introduced to ensure "meaningful" notice, one that enables "the full service of federal and provincial manpower departments and other agencies...to take effect".[148]

128. The closest provisions to Ontario's, in BC, where the law also puts the employee and Ministerial notices in the same section[149] and specifies that the notice must contain the same prospective information as in the *ESA*,[150] have been interpreted by the Court of Appeal as requiring Ministerial notice: (a) at the same time as employee notice; and, (b) at the start of the notice period *i.e.* at the time when the employer first exercises whichever contractual right/obligation exists and decides to notify the employees.[151]

129. CTS employees should not be told that the *ESA* mandates notice to the MOL far later than what is required federally and in other provinces.

130. Relatedly, it is instructive to see that, in the United States, from which CTS hails, the equivalent federal mass termination statute (the *WARN Act*) was explicitly enacted pursuant to a theory that effective adjustment programs require longer notice alongside

---

146 *The Employment Standards Code*, C.C.S.M. c. E110, s. 67(3).
147 *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 212(1).
148 House of Commons Debates, 28th Parl, 3rd Sess, Vol 5 (28 April 1971) at 5320 (Hon. Bryce Mackasey).
149 *Employment Standards Act*, R.S.B.C. 1996, c. 113, s. 64(1).
150 *Ibid.* at s. 64(2).
151 *Canadian Assn. of Industrial, Mechanical and Allied Workers v. Wolverine Tube (Canada) Inc., supra* at ¶¶34-40.

the adjustment services[152] The purposes of the *WARN Act* have been held to be the assurance of the most rapid assistance possible to terminated employees.[153]

131. Placing the *ESA* within this context of a field of employment laws that seek to protect employees from the effects of closures with the earliest possible assistance through early notice to government agents confirms the Plaintiffs' interpretation: the MOL should, here, have been notified early, at the start of the notice period.

H. Conclusion

132. CTS violated the *ESA* for nearly thirteen months both by failing to post the Form 1 and, worse, by failing to notify the MOL, depriving the employees of early intervention with information about adjustment programs, and the programs themselves. As the *ESA* obligations are contractual too, CTS violated the employment contracts in place with its employees, the Class included. The *ESA* and contracts required the notices by April 17, 2014, the start of the notice period. Common questions (ii)-(v) and (viii) should be answered in the manner proposed in the Notice of Motion.

AS A RESULT OF THESE BREACHES, CTS OWES FRESH REASONABLE NOTICE; THE WORKING NOTICE IS VOID [COMMON ISSUES (VI), (XI), AND (XII)]

133. When CTS delivered the First Severance Letters, on April 17, 2014, it owed its employees a common law and contractual duty to give them reasonable notice before

152 For the US legislative 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; and, C.P. Yost, "The Worker Adjustment and Retraining Notification Act of 1988: Advance Notice Required?", *supra* at pp. 680-682.

153 *United Paperworkers Int'l Union v. Specialty Paperboard, Inc.*, 999 F.2d 51 (2d Cir. 1993), at p. 54; *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].*

terminating their employment. It attempted to discharge that duty in part by giving working notice of 11 or more months (later extended to 14 or more months).

134. For thirteen of those extended months, CTS was in violation of its *ESA* and contractual duties to notify the MOL, post the Form 1, and keep the Form 1 posted throughout the notice period. In short, for as much as 93% of the notice period (the situation of the majority whose last day was June 26, 2015), CTS violated statutory minimum standards in a statute that says that certain violations are "void", that treats violations as criminal offences, and that enjoins compliance.[154]

135. The goal of the First Severance Letters and working notice more generally is the provision of a reasonable opportunity to find work.[155] That is the same goal, as outlined earlier, of the *ESA* mass termination notice provisions. In basic terms, CTS sought to achieve this purpose by giving working notice while simultaneously undermining the achievement of the purpose by its own *ESA* and contractual violations.

136. In these circumstances: (a) CTS should not be permitted to rely on its working notice when it simultaneously breached inextricably linked statutory/contractual obligations; (b) the working notice should be deemed void; and, (c) fresh notice should have been given the day CTS finally gave *ESA* notice (May 13, 2015). Declaring the notice void, not permitting CTS to rely on it (their main defence),[156] and requiring fresh

154 *ESA*, ss. 5(1), 108, and 132.
155 *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846 at ¶48; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at ¶¶112, 120, and 128; *Medis Health and Pharmaceutical Services Inc. v. Bramble*, 1999 CanLII 13124 (N.B.C.A.) at ¶¶57 and 78-80.
156 CTS's Statement of Defence, Ex. "B", Wood Affidavit, *Plaintiffs' Record*, ¶46 [p. 83].

notice, 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.

137. To understand this argument, we first outline that common law notice is an all-or-nothing binary proposition (either there is notice or there isn't) and how courts treat *ESA* breaches at the termination stage as voiding the common law notice and requiring fresh notice. From there, we conclude by relying on broader principles of law concerning the effect of statutory illegality on contract.

A. Reasonable Notice – The "All or Nothing" Proposition

138. Reasonable notice is the lynchpin of wrongful dismissal. While it is the employee who seeks damages for pay in lieu of reasonable notice, several cases hold that the employer has the onus of proving that notice was given.[157]

139. Whatever the onus, the common law has adopted an "all or nothing" approach to reasonable notice: "[n]otice is a binary concept; either there is notice or there is not".[158] Thus, if something is "close" to notice, it is not notice, and the employer will get no credit for it.[159] This concept plays itself out where an alleged notice lacks one or more

157 *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2017 BCSC 704, ¶104; *Yeager v. R.J. Hastings Agencies Ltd.*, 1984, CanLII 533 (BCSC), at ¶40; *Gregg v. Freightliner Ltd.*, 2004 BCSC 1574 at ¶39; *Humby v University of New Brunswick,* 1998 CanLII 18485 (NBQB.) at p. 7; *R.G.O. Office Products Ltd. v. Knoll North America Corp.*,1996 CanLII 10339 (ABQB), at ¶66; *Bent v. Atlantic Shopping Centres Ltd.*, 2007 NSSC 231, at ¶23; *Walton's Truck Service Ltd. v. Llewelyn,* [2016] C.L.A.D. No. 94, at ¶32; *Starks v. Corner Brook Garage Ltd.*, 2002 CanLII 54056 (NL SCTD), at ¶28.

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

159 See *Michela v. St. Thomas of Villanova Catholic School, supra* at ¶¶68-69, citing *Deputat v. Edmonton School District No. 7,* 2008 ABCA 13 at ¶11; *Williams v. McCormick, Rankin & Associates Ltd.*, [1987] O.J. No. 1617 (Dist. Ct.), at p. 2; *Wilson v. Crown Trust Co.*, [1992] O.J. 1765, at p. 4 of 10; *Prinzo v. Baycrest Centre for Geriatric Care*, [2002] O.J. No. 2712 (C.A.), at ¶17.

qualities of notice, usually because it is unclear or is only a warning of a possible end.[160] In short, it is not good enough to comply with the *quantitative* component of notice if, *qualitatively*, the alleged notice lacks a quality that makes it "notice".

140. In this respect, employment law has developed a unique approach. In the commercial context, the presence of a contractual breach does not usually result in this all-or-nothing proposition. There, a breach usually leads to the formation of a "secondary" contract where the breaching party pays damages,[161] albeit where the measure of damages gives the defendant some credit for the benefits conferred on the plaintiff due to the partial performance and/or breach.[162]

141. Giving the defendant credit and not treating a breach as "fundamental" and as voiding the transaction are conclusions based on the equality of bargaining power in a commercial relationship.[163] By contrast, the employment relationship is one of unequal bargaining power.[164] Whether because of this or because the obligation to give notice in employment law is so fundamental that giving partial notice is an example of the kind of breach that justifies giving an employer no credit, the binary "all or nothing" approach that characterizes notice cases is justifiable on first principles.[165]

160 *Luchuk v Sport BC*, 1984 CanLII 812 (BCSC), at ¶14; *Bader v. Canada Trust Co,* 1980 CarswellBC 1903, at ¶6; *Williams, supra*; *Cottrill v. Utopia Day Spas and Salons Ltd., supra* at ¶¶104-106

161 *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827 (H.L.), at p. 849, adopted in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, at pp. 499-500.

162 See S. Waddams, *The Law of Damages*, 2nd ed. (Toronto: Thomson Reuters, 2016), at ¶¶15.670-15.750 and *Photo Production Ltd. v. Securicor Transport Ltd., supra* at pp. 848-849.

163 *Photo Production Ltd. v. Securicor Transport Ltd., supra* at pp. 843 and 849. Interestingly, Wilberforce J. acknowledges that treating breaches as "fundamental" serves important purposes in areas where Parliament has legislated to protected relationships of unequal bargaining power: see p. 843, citing consumer protection legislation. This is precisely the situation of the *ESA*.

164 *Machtinger v. HOJ Industries Ltd.*, *supra* at p. 1003.

165 A contractual breach is fundamental where one party is "'deprived of substantially the whole benefit of the contract": *Hunter Engineering Co. v. Syncrude Canada Ltd., supra* at p. 499. As Lord Diplock

142. We emphasize these points because the contractual context here justifies the Plaintiffs' requested remedy of declaring the notice void. CTS's arguments that they should be given some credit for the working notice when this notice was coupled with the inextricably-linked *ESA* notice breaches fails to account for the fact that the only remedy the Court is given when notice is tainted with illegality and such breaches is to say that no notice was given: "either there is notice or there is not".

143. CTS's defence closely 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 this 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 argument:

> In this case we are not faced with an entirely void contract, but a contract of which one clause is null and void by operation of statute. I would nonetheless 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.[166]

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

145. The treatment in the jurisprudence of analogous *ESA* breaches exemplifies this. This jurisprudence should be dispositive. We turn to that law now.

---

states in *Photo Production Ltd. v. Securicor Transport Ltd., supra* at p. 849, certain kinds of contracts, when breached, do lead to the more drastic "void" result.

166 *Machtinger v. HOJ Industries Ltd., 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.) [emphasis added].

B. The Controlling and Analogous Authorities: ESA Notice Breaches – No Common Law Notice, Notice Void, and Fresh Notice Required

146. While the case at bar is the first of its kind, the *ESA* and its regulations contain requirements similar to the Form 1 requirements the breach of which has resulted in courts declaring the inter-related *common law* notice void.

147. In s. 6(1) of the Termination regulation, an employer who gives *ESA* notice is permitted to give "temporary work to the employee without providing a further notice of termination" so long as the final date of work is no more than 13 weeks following the original termination date.[167] Despite the fact that this regulatory requirement regulates how *ESA* notice is to be given, the Court of Appeal has determined that, if an employer breaches s. 6(1) of this regulation 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 then disregarded, and the employer gets no credit for them.[168]

148. Like the s. 6(1) temporary work restrictions, the Form 1 notice provisions fall with the same *ESA* framework. Similar to s. 6(1), which 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".

149. The controlling Court of Appeal *ratio* should be dispositive. If an employer who has given valid common law notice and who breaches an *ESA* regulatory requirement by giving more than 13 weeks of additional work should be told that fresh common law notice is required and that the prior common law notice is void, the similar language in

---

167 "Termination and Severance of Employment", O.Reg. 288/01, s. 6(1).
168 *DiTomaso v. Crown Metal Packaging Canada LP*, 2011 ONCA 469; *Singh v. Concept Plastics Limited*, 2015 ONSC 6598 and 2015 ONSC 6599; var'd, on a mitigation issue, 2016 ONCA 815. See also, *Thambapillai v. Labrash Security Services Ltd.*, 2016 ONSC 6068 at ¶24.

the *ESA* should lead to a similar result when notice is not given to the MOL. 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.[169]

150. The Court of Appeal holding is 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 the *Machtinger* principles, no credit is given for breaches of *ESA* minimums that regulate important rules around termination.

151. The Court of Appeal jurisprudence should therefore be dispositive here.

C. Illegality and Contract Law Generally – The Breaches Here Should Mean the Working Notice is Void, and Fresh Notice is Required

152. Having said that, if one steps back and applies broader contractual principles concerning the effects of the illegal performance of a contract, these principles point to the same answer. While the law of illegality and its effect on contracts is confusing and unsettled, the varying approaches courts use all point to the fact that CTS's illegal performance should result in the working notice being declared void.

153. This is because the illegality involves breaches of a statute (the *ESA*) expressly designed to regulate the contractual relationship in favour of employee protection. Thus, the illegality is a breach of the very contract whose terms CTS invokes to defend the claim. Further, under a more nuanced, multi-factoral illegality test courts now prefer, the factors all point to the remedies sought by the Plaintiffs.

169 See *DiTomaso v. Crown Metal Packaging Canada LP* for the discussion of how the temporary work provisions promote the goals of notice, similar to those associated with the Form 1 requirements.

154. Traditionally, courts adopted a rigid approach when statutory illegality was involved. Where a contract, in formation or performance, conflicted with a statutory requirement, the contract or performance was deemed void.[170] The basis for this is a 1775 decision providing that *ex dolo malo non oritur action* (no court will aid one whose claim or defence is founded on an illegal or immoral act).[171] While this traditional principle has drawn criticism for giving the other party an unjustifiable windfall, particularly where the breach is minor,[172] even in the "modern" cases set out below, the traditional approach is still referred to as appropriate in certain situations. Moreover, the Supreme Court, in a widely cited decision, reminds us that illegality has a critical role to play in any system of justice that strives for consistency and respect for its laws.[173]

155. The traditional approach still applies where the statute stipulates that the breach results in the contract or performance being declared void.[174] Technically, while the *ESA* in s. 5(1) states that one cannot "contract out" or "waive" an *ESA* minimum and that any attempt to do so is "void", there is nothing in the *ESA* that says that "performance is void". While technically this means that the traditional test does not apply, the fact is that the *ESA* does not just set out performance requirements. It sets out powers to compel performance and it permits punishment for non-performance. The *ESA*'s requirements are also incorporated into the Class's contract with CTS.[175] This is a feature of the *ESA* that distinguishes it from some of the kinds of statutes

170 John D. McCamus, *The Law of Contracts*, 2d ed. (Toronto: Irwin Law, 2012), at p. 486
171 *Holman v. Johnson* (1775), 1 Cowp 341 at p. 1121
172 See, for ex., *Kingshott v. Brunskill*, [1952] O.J. No. 312 (C.A.), where the purchaser of apples that were not graded contrary to statute was able to avoid payment, and see, for a critique: S. Waddams, *The Law of Contracts*, 6th ed. (Aurora: Canada Law Book, 2010), at pp. 419-421.
173 *Hall v. Hebert*, [1993] 2 S.C.R. 159, at p. 176 (per McLachlin J., now C.J.C.).
174 John D. McCamus, *The Law of Contracts, supra* at p. 486; *Still v. Minister of National Revenue*, 1997 CarswellNat 2193 (F.C.A.), at ¶¶17 and 46
175 See the cases listed in footnote 90, above, for this legal proposition.

whose breaches, in the case law in Canada that develop the "modern" approach, do not attract the voiding of the contract itself.

156. Therefore, a breach of the *ESA* Form 1 requirements is one of those breaches that could attract the traditional approach. Indeed, while *Machtinger* did not extensively analyze the law of illegality and say that it was applying the traditional approach (if conduct prohibited by statute, void), the traditional approach is evident, albeit justified in part by resort to some of the variables (employee protection, encouraging *ESA* compliance) discussed below. By analogy, the traditional approach is likewise used where breaches of consumer protection laws are involved, with no "credit" being given to the breaching party for its partial performance of the contract.[176]

157. If this is wrong, the "modern" approach supports the Plaintiffs.

D. Setting Out the "Modern" Test

158. The traditional test has been criticized for providing an unjustifiable windfall in some cases. Whether it is a contracting party who receives delivery of goods but who tries to avoid payment because the shipper violated load limits found in shipping laws[177] or the home purchaser who tries to obtain rescission by pointing to the fact that the vendor, a developer, was technically only registered under a home warranty statute

176 For examples, see *Wainwright (Puddle Duck Trading) v. Jia*, 2009 CanLII 15663 (Ont. Div. Ct.); *407 Auto Collission v. Bounsanga*, 2010 CarswellOnt 9598 (S.C.J.); and, *Bailey v. Jainarine*, 2011 CarswellOnt 1127 (S.C.J.).

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

shortly after the purchase,[178] courts are not enamoured of a party who takes advantage of tangential breaches to avoid obligations to which they freely agreed.

159. So for instance, if the Class here were to:

(a) conjure up a little-known law requiring that auto part manufacturing be overseen by a Canadian corporation;

(b) point to the fact that the US-based parent was the manufacturer;

(c) prove that this Defendant was in violation of this law; and,

(d) ask that the Court declare notice given by such a Defendant "void" on some theory that an employer operating illegally cannot legally give notice,

the court would most likely refuse to make the link from that type of statutory illegality to a conclusion that the working notice is void and fresh notice required.

160. The case at bar is quite different, though, justifying the requested remedy. Here: (a) the *ESA*'s notice provisions are not tangential but are central to the relationship and are designed squarely to protect the Class, to the point where the *ESA* is incorporated into the employment contract; (b) the purposes of the Form 1 requirements CTS breached are the same as the purpose of the common law notice CTS relies on to defend the Action; (c) CTS's breaches were at best reckless, and there certainly was no attempt at compliance; (d) CTS, a large, multi-national, profitable company, with access to significant legal advice, had the resources to do its due diligence, having managed to conduct other contemporaneous shutdowns in accordance with other statutory mass termination requirements; and, (e) the Class were denied important information and

178 *Beer v. Towngate I Ltd.*, [1997] O.J. No. 4276 (C.A.). In *Love's Realty Services Ltd. v. Coronet Trust,* 1989 ABCA 63 a real estate agent was permitted to recover his fee despite not being licensed at the time of transaction.

benefits. If one considers the whole context, as the nuanced illegality test indicates, the application of the test supports the Plaintiffs' requested result/remedies.

161. Courts in the UK and Canada have never been able to settle on a test to be applied to determine the consequences where a contract is performed in a way that violates a statutory prohibition/requirement but language such as the language in s. 5(1) specifying that the contract is "void" is not present. At best, the various formulations of the test indicate a preference for a balancing test, one that considers many factors and 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 the illegality argument?[179]

162. Whatever the test, whether it is the plaintiff invoking illegal performance to substantiate a contractual claim,[180] a defendant invoking it to defend a contract claim,[181] a government respondent on judicial review invoking breach of one statute to invalidate a benefits claim by the applicant based on another,[182] or a plaintiff seeking to counter a defendant's reliance on its contractual performance when its performance is allegedly unlawful or unconscionable,[183] the court under the modern test considers whether the remedy and result is affected by illegal performance, and to what extent.

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

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

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

182 *Still v. Minister of National Revenue, supra* (F.C.A.)

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

163. Applied here, the question for the Court, is: is CTS's illegal conduct such that granting the Class the requested relief (notice void, fresh notice required) a proportionate remedy for the breaches? The Class says "yes". The simple fact is that the Class were denied the benefits that would have followed *ESA* compliance for 13 months. By allowing CTS to rely on its illegal performance, the denial of these benefits is left un-remedied. Giving fresh notice to the Class starting from when the Form 1 requirements were met merely gives effect to the statute, and hardly provides a windfall. Insofar as the Class earns any so-called "windfall" by receiving working notice followed by fresh notice, the "windfall" is attenuated, if not eliminated or overtaken, by the fact that, had early MOL notice been given alongside the working notice, the Class would have had the benefit of both the paid notice but also earlier adjustment services, with improved chances at securing new work sooner. The Class has thus lost that chance of earlier, new work, a real monetary loss that may not be "made up" by giving them the fresh notice CTS will no doubt allege amounts to a windfall. In other words, giving working notice does not or may not "make up" for the loss of prospective employment that did or may follow from having received none of the very adjustment services that, by law, are designed to help employees secure such new, paid, employment.

164. In order to answer the question posed, the "modern" case law points to a number of factors, many inter-related, that the Court should take into account in determining whether to grant or deny the relief claimed. They are:

(a) the seriousness of the illegality and "its centrality to the contract"[184];

184 *Patel v. Mirza, supra* at ¶107; *Parkingeye Ltd v Somerfield Stores Ltd., supra* at ¶¶69-71; *St. John Shipping Corp. v. Joseph Rank, supra* at pp. 289-290.

(b) relatedly, whether the purpose of the law and the breached provisions is the protection of the Class (Where granting the relief serves the statute's or provision's purpose, that favours the requested relief, while if the statute's or provision's purpose is undermined, that favours denying it);[185]

(c) if the Class has received "what they bargained for"[186], that is, if they have received the "**full consideration**" from the contract,[187] the Court should not readily grant them a remedy. This is sometimes expressed in relation to the prior factor *i.e.* where the person relying on the illegality defence has suffered none of the harms the statute is designed to protect them from, relief is more easily denied;[188]

(d) the seriousness of the breach (including the degree of intentionality involved and whether the 'innocent' party was partly to blame);[189]

(e) the relative bargaining positions of the parties,[190] a factor that favours denying the relief claimed where the one relying on the illegality had independent legal advice, was experienced with the contract or issues involved, and/or where the parties were at arm's length;[191] and,

(f) the desirability of avoiding giving the Class a windfall.

185 *Sidmay Ltd. v. Wehttam Investments Ltd.*, [1967] O.J. No. 946 (C.A.) at ¶¶57 and 71; aff'd [1968] S.C.R. 828; *Royal Bank of Canada v. Groberman, supra* at ¶27; *William E. Thomson Associates Inc. v. Carpenter*, [1989] O.J. No. 1459 (C.A.), at ¶27; *Still v. Minister of National Revenue, supra* at ¶¶37 and 43; *Transport North American Express Inc. v. New Solutions Financial Corp., supra* at ¶¶24 and 42-43; *Love's Realty Services Ltd. v. Coronet Trust, supra* at ¶¶15, 29, and 32.

186 *Sidmay Ltd. v. Wehttam Investments Ltd., supra* at ¶71.

187 *William E. Thomson Associates Inc. v. Carpenter, supra* at ¶30; *La Foncière, Compagnie d'Assurance de France v. Perras*, [1943] SCR 165 at p. 178 [emphasis added].

188 *Love's Realty Services Ltd. v. Coronet Trust, supra* at ¶17; *Beer v. Townsgate I Ltd., supra* at ¶17 ["The protection which the Act sought for purchasers was not affected"].

189 *Patel v. Mirza, supra* at ¶107; *Transport North American Express Inc. v. New Solutions Financial Corp., supra* at ¶24; *Love's Realty Services Ltd. v. Coronet Trust, supra* at ¶16; *Parkingeye Ltd v Somerfield Stores Ltd., supra* at ¶¶72-74.

190 *Transport North American Express Inc. v. New Solutions Financial Corp., supra* at ¶24.

191 *Ibid.* at ¶45; *Sidmay Ltd. v. Wehttam Investments Ltd., supra* at ¶51.

165. The avoidance of a windfall factor is never cited as a standalone factor. But, it underpins the other ones. That is, if a sophisticated party receives full consideration but tries to avoid its contractual obligations by relying on a statutory breach that serves unrelated purposes (in the sense that the breach has not caused them harm), the illegality argument will be rejected to avoid giving that party an unjustifiable windfall. Where, conversely, the invoking party has not received the law's protection or has been harmed by the breach and is not the author of their own misfortune, granting the relief on illegality grounds is a proportionate and justifiable response.

E. Applying the Modern Test's Factors

166. All of the factors, when applied here, support the Plaintiffs' requested relief. We group the factors together and apply them here.

Factor 1 The ESA Notice Provisions and their Breach were Central to the Employment Contract; The Purpose of the ESA Provisions was Thwarted by CTS

167. Unlike the many cases cited above where the statutory provision that was breached was tangential, the *ESA* as a whole is so central to the employment relationship that it is incorporated into the employment contract itself.[192] In other words, when CTS breached the Form 1 obligations, it was in direct breach of its contracts with employees, the same ones: (a) from which the obligation to give reasonable notice arose; and, (b) the performance of which CTS relies on to defeat the Action.

168. Further, as previously set out, the purposes of the Form 1 provisions that were breached are the same as the purposes of the common law and contractual obligation

192 See the cases listed in footnote 90, above, for this legal proposition.

of reasonable notice (the reasonable opportunity to secure work). While this obligation is discharged in many cases by only giving reasonable notice, the obligation on a mass termination incorporates the additional Form 1 requirements because of the unique feature of having so many similarly-skilled persons situated in the same community being let go at the same time. The point is, though, that the purposes behind giving both notices are the same. It is not possible to divorce one notice from the other.

169. In employment law, when part of a provision itself is declared void for illegality, the court will not "blue pencil" or notionally sever that part in a way that leaves other features of the clause intact.[193] In a similar vein, it is not possible here to somehow treat the obligation to give "reasonable notice" as so distinct from the obligation to give the Form 1 notice that a breach of the latter would somehow leave intact the former. Absent a written employment agreement, the agreement that must as a matter of law be inferred between CTS and the Class is one that would contain a simple term: "CTS may terminate the Class Member's employment at any time on the provision of reasonable notice, in accordance with the *Employment Standards Act, 2000*". Permitting CTS to breach the latter while treating the former as intact, with CTS getting full credit for the former, would ignore the fact that the two obligations: (a) are inter-related; (b) are found in the same contract of employment; and, (c) serve the same purposes.

170. The fact that CTS's illegal performance goes to the heart of its obligation to give reasonable notice means that a breach of the *ESA* cannot be taken lightly and be treated separately from the performance of "reasonable notice". At every juncture while

193 *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6 at ¶¶29-42.

CTS was giving reasonable notice, from April 17, 2014 until May 12, 2015, it was in breach of the inter-related contractual and *ESA* obligation to give Form 1 notice.

171. Although this reasoning is not expressly articulated in the cases cited above (*Machtinger* and the "13 week" cases) as grounding the remedy of regarding the contract or performance as void, the decisions cited at ¶¶146-158, above, are entirely consistent with the centrality analysis conducted here. Likewise, the notion of treating the Form 1 breach as one that goes to the heart of notice, with the result that the notice is disregarded, fits within the case law that says that notice is a binary concept: when CTS did not give proper, legal notice, then there is simply "no notice" for which CTS ought to be given credit.

172. The only proportionate response to the fundamental breach involved here is to treat the reasonable notice given as void, and to order fresh reasonable notice.

Factor 2 The Class/Employees Received <u>None</u> of the Consideration; They Did Not Receive "Full Consideration"

173. Factor 2 is related to Factor 1. Just as Factor 1 indicates that the obligation to give the Form 1 notice is central to the contract itself, Factor 2 reminds us that the Form 1 obligations were important and, on the facts, that the Class received none of the "consideration" to which it was entitled had Form 1 notice been given. In layman's terms, the Form 1 breaches had real consequences such that requiring fresh, reasonable notice, would hardly amount to giving the Class a windfall.

174. The Form 1 notice obligations were breached for 13 months, for the vast majority of the closure. As outlined in ¶¶55-63, above, during that time, employees received

none of the Employment Ontario information and retraining benefits that would have followed, instead receiving the Right Management services that CTS's own witnesses agree were completely different (and vastly inferior) to Employment Ontario retraining and other services. Indeed, while $14,400 (plus HST) was spent on Right Management group services for all employees, $28,000 *per employee* for "Second Career" retraining would have been available for 13 months but for the breach.

175. In cases where the goals of the legislation one party breached were otherwise met, where the non-breaching party received the full protection of the law, and/or where that party received "full consideration" under the contract, granting that party an additional remedy for the statutory breach is something the court will not do lest it grant that party a windfall. For instance, in *Beer*, the purchaser of property could not rely on the vendor developer's lack of registration, contrary to statute, when: (a) the statute's main purpose was to protect the purchaser from "the added cost and inconvenience of poor workmanship in home construction"; (b) the evidence was that the developer was responsible and competent; and, (c) the purchasers had been "fully protected" (or, put another way, the statutory breach did not leave them less than fully protected).[194]

176. The case at bar is the opposite of a tangential breach of legislation where the party seeking a remedy received full consideration and the full protection the statute was meant to afford them. Here, the Class received **none** of the benefits of the *ESA*. The purposes of the *ESA*'s Form 1 provisions went unfulfilled here. The Class received none of these benefits at a time of acute vulnerability: the laws protecting employees

194 *Beer v. Townsgate I Ltd.*, *supra* at ¶17.

during termination protect an issue that "significantly affects the economic and psychological welfare of employees".[195]

177. While giving the Class fresh notice as of the date CTS complied with the *ESA* means that the Class will get: (a) the first notice; (b) the Form 1 compliance, albeit very late; and, (c) a second notice of termination (and now damages in lieu), this is not a windfall, as CTS will argue. The whole point of early Form 1 notice, as previously articulated, is the early provision of adjustment services from day 1, not from day 390. What these early services are meant to provide the employee is: (a) their reasonable notice; and, (b) the prospects of earlier re-employment. So, while the Class's requested remedy means the payment of damages in lieu of notice starting in May 2015, the fact is that the Class may have, over the short and longer term, lost far more from the absence of the Employment Ontario services than will be "made up" by the provision of damages. The Class do not seek a windfall: reasonable notice may not ever compensate for the *ESA*/contractual notice breaches.

178. Factor 2, together with Factor 1, strongly supports the requested remedy. The remedy seeks to actually compensate for the loss of something of significant value in a situation where the statutory breach falls within the heart of the obligation to give reasonable notice. This is the right case to disregard CTS's notice.

195 *Machtinger v. HOJ Industries Ltd.*, *supra* at pp. 990-991.

Factor 3 The Breach was Serious; CTS Engaged in Risk-Taking Behaviour, was Reckless, and Made Little Attempt at Compliance; CTS Did Not Heed Warnings

179. Briefly, the facts support a finding that CTS, early on, set out to "avoid" the MOL (in their own words) and did not even know what the Form 1 was for. At minimum, what can be said here is that there was no attempt whatsoever at compliance. And, rather than choosing the least-riskiest path by just giving notice early, CTS deliberately chose to engage in risky behaviour by giving no notice.

180. As the next major section outlines, CTS's predominant, if not exclusive focus, was to ensure that employees remained at their posts to the end. CTS's letters were drafted with that purpose. In essence, CTS put most of its energies into planning a shutdown that would serve *its* production purposes (building a bank of products, which required full staff throughout) and adopted a nonchalant attitude toward its most fundamental obligations of MOL notice. In the circumstances, the behaviour was at best reckless or constituted a form of wilful blindness.

181. Further, as noted earlier,[196] Mr. Urban and Ms DeVous were warned at the May 12, 2014 meeting that CTS might be in violation of the *ESA*'s Form 1 requirements, but: (a) they dismissed the concern; (b) they paid no further attention to it; and, (c) despite the evidence that CTS used and had access to external/outside counsel, there is no evidence of an attempt to run the Form 1 issue by a lawyer, including this putative external/outside counsel.

196 See the Facts, ¶¶41-47, above.

182. In *Love's Realty*, the Court held that a "sincere" attempt by the breaching party at compliance meant that voiding an agreement would amount to a disproportionate response. In so finding, the Court added that, in a case where "some evidence of a defiant **or even a casual attitude** is shown", the Court would not be able to ignore a breach and effectively condone it by refusing the non-breaching party its remedy.[197] Consistent with this, *Machtinger* reminds us that an *ESA* breach should not be met by modest consequences but that, consistent with the goal of employee protection, the remedy should be more significant to ensure statutory compliance in future.[198]

183. Here, CTS's approach to the Form 1 was, at best, "casual". There was certainly no "sincere" attempt at compliance, but a casual idea that the MOL could be "avoid[ed]" by staggering employee departures, something CTS never even followed through on. Employers watching this case should – with respect – expect that so casual an attitude towards a matter of fundamental importance to employees at a time of acute vulnerability should be met with a significant remedy. A significant remedy in the circumstances, the one the Plaintiffs seek, is proportionate and proper.

Factor 4 CTS Was Well-Resourced, in a Position of Relative Bargaining Strength, while the Class was Virtually Powerless

184. In some cases where the Court is not prepared to grant a remedy for illegal statutory performance, a critical reason for refusing the remedy is that the party requesting it had freely entered into an agreement at a time when they were well-resourced and/or benefitted from the advice of counsel. Where the relative bargaining strength of the parties is equal, the person seeking to rely on public policy is regarded

197 *Love's Realty Services Ltd. v. Coronet Trust, supra* at ¶16
198 *Machtinger v. HOJ Industries Ltd., supra* at p. 1003

as the author of their own misfortune. Having freely entered into the agreement, granting further relief would amount to giving them an undeserved windfall.[199]

185. Thus, in *Transport North American Express*, two commercial entities were parties to a contract that contained a legal provision (a loan and principal repayment obligation) and a handling fee provision held to be illegal and contrary to the *Criminal Code*. While the Supreme Court agreed that the fee could not be enforced, it was not prepared to let the borrower keep the principal because: (a) "[e]ach party had independent legal advice; and, (b) "[e]ach party was commercially experienced" [simply put, "[the borrowers] knew what they were getting into"]. Allowing one such party to keep the principal was simply a disproportionate outcome from finding the fee to be illegal.[200]

186. The situation of an employee being terminated by an employer is, based on Supreme Court jurisprudence, the opposite of the commercial situation. As we have previously observed, *Machtinger* held that employees are in a position of unequal bargaining power, generally do not even know what their statutory and common law rights are,[201] and so, as a consequence, the law of employment seeks to protect them.[202] Based on controlling legal principles, the Class cannot be treated as having freely understood that CTS was breaching the *ESA*, to the point that they "knew what they were getting into".

199 See for instance *Transport North American Express Inc. v. New Solutions Financial Corp., supra* at ¶24 and *Sidmay Ltd. v. Wehttam Investments Ltd., supra* at ¶71.
200 *Transport North American Express Inc. v. New Solutions Financial Corp., supra* at ¶45.
201 *Machtinger v. HOJ Industries Ltd., supra* at p. 1003.
202 *Ibid.*

187. The facts bear out the fact that the Class was vulnerable and their *ESA* and related contractual rights were being violated in a way that cannot be regarded as a free exchange by equal partners. The facts also confirm that CTS was well-resourced and had access to legal advice: the relative bargaining strength completely favoured CTS.

188. First, CTS was a large, international company during the closure, reporting earnings of $404 million in 2014 and a profit of $26.5 million that same year.[203] Streetsville Plant employees, by contrast, earned modest salaries and hourly rates. There can be no question that CTS had the resources to take all due care to ensure that it was complying with the *ESA*. It should be expected that they would do better than what they did.

189. Second, and relatedly, CTS's own evidence is that, during the planning stages and at other points during the closure, the planning team had the benefit of two in-house counsel and the "external" or "outside" lawyer referenced in Mr. Urban's affidavit. The presence of such representation likewise means CTS could and should have done better. On this point, the Record shows that CTS was capable, with two other recent or contemporaneous shutdowns (in 2013/2014) to comply with UK and Illinois plant closure statutes. For the 2013 Scotland closure, CTS entered into a "collective consultation agreement"[204] as required by UK law,[205] while for the 2013-2014 Illinois closure, notice was given to State authorities[206] as required by Illinois law.[207]

203 CTS's SEC Filings, Wood Affidavit, Ex. "F", *Plaintiffs' Record* TAB 2 [pp. 144 and 148].

204 See: Wood Affidavit, *Plaintiffs' Record* [pp. 226 and 252].
205 *Trade Union and Labour Relations (Consolidation) Act 1992*, 1992 Chap. 52, s. 188.
206 *Supplementary Record*, TAB 1; Transcript, Cross-examination of Tony Urban, QQ76-85.
207 *Illinois Worker Adjustment and Retraining Notification Act*, 820 ILCS 65, ss. 5 and 10.

190. Third, there is no evidence that the Class had similar representation.

191. Finally, while in cases like *Transport North American Express*, the illegality took place at the contract *formation* stage where both sides were experienced and represented by counsel and would have knowingly signed an agreement with an unlawful provision, in the case at bar, there was nothing illegal *per se* in any employment contracts or the letters of termination whereby one could say that the Class "knew what they were getting into". The breach here is a performance breach and, worse, a performance breach involving employees (through a Form 1 posting) and the MOL receiving no notice. These are the kind of breaches of which no employee could be aware unless well versed in the *ESA*. Further, the absence of notice to the MOL itself is not something of which even the most sophisticated of employee would have been aware, as they would not have known what was or was not sent to the MOL.

192. This factor likewise points in favour of giving the Plaintiffs the requested remedy. The absence of notice is not something they agreed to from a position of relative bargaining equality such that one can say, now, that giving the Plaintiffs their remedy would amount to giving them a disproportionate windfall.

F. Conclusion

193. The answer to common issues (vi), (xi), and (xii) are that the working notice is void, fresh reasonable notice ought to have been given as of May 12, 2015, and damages for the failure to give such notice ought to be awarded. The Parties should return to Court to deal with issues of individual adjudication, such as the proper process

and directions on what, substantively, should be included in any individual damages award as pay in lieu of notice.

ALTERNATIVELY, THE WORKING NOTICE SHOULD BE DISREGARDED DUE TO THE MANNER IN WHICH THE SHUTDOWN WAS CONDUCTED [COMMON ISSUE (VIII)]

194. If the Court rejects the Plaintiffs' primary argument that the *ESA* breaches "void" the notice, the Plaintiffs seek the same remedy for an alternative reason.

195. Here, CTS conducted the shutdown in a way that was wholly inimical to reasonable notice's goal of providing employees with an opportunity to seek alternative employment. CTS was concerned with getting its product manufactured within a tight timeframe, the result of which was that many Class members worked excessive overtime and weekend hours, often well above the *ESA* maximums of 8 hours/day, 48 hours/week (without a MOL approved written agreement).

196. Further, the entire manner in which CTS communicated to employees and managed the shutdown was designed with its needs in mind. CTS used false, misleading, and incomplete information about the Class's right to resign and still collect *ESA* severance pay, suggesting employees had to stay to the end to collect anything, with the result that the Class was, in effect, chained to their desks. They became a captive audience because CTS's communications gave the false impression they had to stay. Compounding the problem was the absence of retraining and no communications telling employees they could take time off to seek employment. The end result: almost nobody resigned and many worked excess hours. Worse, one of the Plaintiffs' affiants,

a senior manager, admits that he forced overtime on some employees. Certainly, many worked many such hours, often in breach of *ESA* maximums.

197. Either the misleading communications, the excessive hours worked, or both, are facts which support giving no effect to the working notice or, alternatively, severely cutting down the "credit" CTS should be given for it.

A. The Legal Principles that Support this Argument

198. As noted above, the purpose of reasonable notice is to give employees a reasonable opportunity to seek other employment. Although this purpose is sometimes expressed as the provision of "time",[208] the *quality* of that time matters. Thus, in *Farber*, the Supreme Court emphasized that the goal of reasonable notice is not just "time", but time associated with full remuneration.[209] Notice is not just "time" but has this qualitative component in order to "cushion" the effects of termination.[210]

199. Picking up on this theme, in 1999, the New Brunswick Court of Appeal in *Bramble*, one of the most oft-cited wrongful dismissal decisions in Canada, held that, where working notice is of poor quality in the sense of failing to accomplish the purpose of notice, the employer ought to be given no credit for it.

200. In *Bramble*, employees were given some working notice and sued. The employer responded that it should be given credit for the working notice. Given the evidence of the many hours the plaintiffs worked, the trial judge would not do so

208 For example, *Nielsen v Sheridan Chevrolet Cadillac Ltd.*, 2016 ONSC 1843 at ¶157.
209 *Farber v. Royal Trust Co.*, [1997] 1 SCR 846 at ¶48.
210 *Evans v. Teamsters Local Union No. 31,* 2008 SCC 20 at ¶95

because "the Plaintiffs in this case could not actively seek work during the working notice period because they all continued to work diligently for [the employer]".[211]

201. The employer appealed, arguing that it should be given credit. The Court of Appeal disagreed in a judgment worth quoting:

> ... the appellant urged this Court to give it full credit for the 15 weeks' working notice it gave each respondent. To do so would, in my view, permit formalism to triumph over substance and visit an injustice upon the respondents ...
>
> The trial judge's finding of fact, with respect to the working notice's practical value, is unequivocal and clear: the respondents "could not actively seek work during the working notice period" ... That being so, the portion of the overall notice periods spanning the working notice is, for all intents and purposes, illusory. The law would offend common sense if it dictated that, in such circumstances, a working notice nonetheless carries some weight. Legal results must be reality-based; they cannot rest on mirages.
>
> ... the primary objective of notice is to provide the dismissed employee with a fair opportunity to obtain similar or comparable employment. It follows that the weight to be given to a particular working notice will vary depending on the quality of the opportunity it gives the employee to seek an alternate position. In this particular case, the trial judge's finding of fact that the respondents could not actively seek work during the working notice period deprives the latter of any legal value. As a result, no weight can legitimately be attached to it.[212]

202. While this erudite analysis has never been adopted in Ontario, it has also never been rejected. Consistent with it, whenever Ontario courts have given employers credit for notice, they cite the need to give employees an "opportunity" to find work and show a willingness to consider the quality of this opportunity.[213] In one case, in awarding 27 months' notice, Chadwick J. took into account that the three months of working notice

211 *Bramble v. Medis Health and Pharmaceutical Services Inc.*, [1998] NBJ No. 174 (Q.B.), at p. 22
212 *Medis Health and Pharmaceutical Services Inc. v. Bramble, supra* at ¶¶75-80. See also *Norrad v. LaHave Equipment Ltd.* 1995 CarswellNB 267 (Q.B.), at ¶7.
213 See for instance *Loehle v. Purolator Courier Ltd.*, [2008] O.J. No. 2462 (S.C.J.), esp. at ¶¶28-29; *Kontopidis v. Coventry Lane Automobiles Ltd.* 2004 CanLII 16875 at ¶26.

provided was a period when the employee "had very little time to search for new employment, as he was assigned to complete a project in China".[214]

203. *Bramble* has been cited approvingly across Canada in numerous cases for its overall analysis of reasonable notice.[215] Its deserved status as a leading authority in the area should not be lightly disregarded.

204. The Plaintiffs rely on *Bramble*. It is consistent with the principles of reasonable notice: giving "notice" should not be some mechanical thing when the quality of the time given is poor. An employee who is literally chained to her desk but who has received "notice" can hardly be told that the employer ought to be given credit for it. Why should this be any different where, here, the chains assumed the form of misleading communications that reasonably kept employees at work and where, communications or not, large amounts of overtime and weekend time were worked, such that seeking new employment would have been nearly impossible?

B. The Communications were False, Misleading and Incomplete, Incenting or Compelling Employees to Stay Until the End

205. In the First Severance Letters and in all similar subsequent letters outlining CTS's packages, CTS, through the use of false, misleading, and incomplete language, told the Class that they had to continue working until their last day to collect severance when, legally, they did not if they met the *ESA* statutory notice period resignation conditions.

---

214 *Cowper v. Atomic Energy of Canada Ltd.,* 1999 CanLII 14853 (S.C.J.), at ¶11, aff'd [2000] O.J. No. 1730 (C.A.).

215 *Di Tomaso v. Crown Metal Packaging Canada LP, supra* at ¶27; *Chaudhry v. Canada (Attorney General)*, [2007] F.C.J. No. 550 at ¶33; *Bahrami v. AGS Flexitallic Inc.*, [2015] A.J. No. 922 at ¶¶24-33; *Bellini v. Ausenco Engineering Alberta Inc.*, [2016] N.S.J. No. 338 (S.C.) at ¶52; *Logan v. Numbers Cabaret Ltd. (c.o.b. Hamburger Mary's)*, [2016] B.C.J. No. 1704 (S.C.) at ¶20.

The communications gave the impression that employees were being incented or required to stay. Compounding this problem was the absence of any language to the effect that CTS understood employees would look for work, and would make provision for such searches. In fact, CTS had removed language from a prior draft of these letters telling employees that they could take time off to search for new work.

206. The letters erroneously start by telling employees that the package sets out an amount that the employees "**may** be entitled to under the Ontario *Employment Standards Act, 2000*, including pay in lieu of notice of termination, severance pay **if applicable**".[216] Saying that employees "may" be entitled to *ESA* requirements "if" those requirements were "applicable" was false. All 129 Class Members were entitled to *ESA* notice.[217] And, 120 of the Class Members had enough service to be entitled to *ESA* severance.[218] There was no "may" or "if applicable" about any of these rights.

207. The problem with the wording is that it told the Class that they are not entitled to anything under the *ESA* as of right, with the result that the reader would falsely conclude that the only way to collect the monies outlined is to stay until the "Separation Date" set out in the letter.

208. Such a false interpretation was bolstered by the letters' other statements asserting that, to receive anything, the employee had to remain until their last day: "[t]his separation package is conditional in that for it to be binding upon [CTS] you must...continue to perform your present duties...until the Separation Date". What CTS

216 Wood's First Severance Letter, Wood Affidavit, Ex. "O", *Plaintiffs' Record* [emphasis added]
217 *ESA*, s. 58.
218 *ESA*, s. 61; *Supplementary Record*, TAB 2.

falsely told the reader is that it is not bound to make the payment unless the employee stays "until the Separation Date" when much of the payment was a payment CTS was bound to give whether or not the employee stayed.

209. For Ms Wood, the payment CTS offered was 21.5 weeks' pay when Ms Wood was already entitled, without the offer, to 21 weeks' *ESA* severance. Had Ms Wood been presented with a truthful and non-misleading letter, she would have been told that she can stay to the Separation Date and collect 21.5 weeks' pay or she could leave much earlier, on two weeks' resignation, and collect 21 weeks' severance anyway [staying until the end would only give Ms Wood an extra $447.60][219]. With the ability to leave early with nearly the same payout, truthful language would have confirmed the already-existing incentive built into the *ESA*, making a departure easier. Instead, CTS's language induces or admonishes the employee to stay. Because Ms Wood was told that she may not even get severance pay (a falsehood) and that the *ESA* may not apply (a falsehood), the only conclusion she could be expected to draw was that she had to stay until the end to get anything.

210. The whole Class received the same letters, and the numbers offered for most were close to their *ESA* severance pay entitlements anyway. Many were in fact offered less than their *ESA* severance entitlements.[220]

211. To emphasize the point that CTS expected employees to stay until the last day when they had the right not to, CTS also stated in the letters that: (a) "we look forward to your continuing commitment and cooperation until the Separation Date"; and, (b)

219 See Wood Affidavit, *Plaintiffs' Record*, TAB 2, ¶47(a) [p. 23] for her hourly rate.
220 See fn 40 for the detailed evidence in support of this assertion.

"[w]e look forward to continuing to work with you until the Separation Date". Finally, CTS told employees that, in order to obtain any payment, they had to sign an enclosed release "by no later than the third (3rd) day after the Separation Date, but not earlier than the Separation Date". Such language tells employees that they must stay to collect monies (how else can they sign the release on or right after March 27, 2015 unless they stay until March 27?). Just asking that they execute a release for all monies, alone, sends the message of non-entitlement unless CTS is released. Of note, nearly the exact same type of letter/release (offering just over *ESA* in exchange for a release) was recently held, in *Rubin*, to be "at best, misleading".[221] *Rubin* held that seeking such a release in exchange for the payment of what was owed under the *ESA* anyway plus a small amount more is unconscionable.

212. While it might be tempting for the Court and counsel, well versed in employment law, to infuse the separation letters' false and misleading words with a more charitable or compliant spin, the Supreme Court impels the opposite. In *Machtinger*, the Court held that one should assume that employees are not aware of their common law and statutory rights.[222] By analogy, the Supreme Court recently, in an insurance case, cautioned that one must interpret an insurance policy the way an "average" person would, and that such an "average" person would not be aware of the "distinct tort and statutory context...in understanding the words of the Endorsement".[223]

---

221 *Rubin v. Home Depot Canada Inc.*, 2012 ONSC 3053, at ¶12.
222 *Machtinger v. HOJ Industries Ltd., supra* at p. 1003; *Wood v. Fred Deeley Imports Ltd., supra* at ¶28.
223 *Sabean v. Portage La Prairie Mutual Insurance Co.*, 2017 SCC 7 at ¶29.

213. The Class member is that average person. Not knowing she was entitled to almost all of what CTS offered anyway and could in fact look for work and resign and collect nearly 100% of what CTS was offering, and being told that she must execute a release at the end, and stay to the end, to collect anything, that person could only have read the letters as requiring that they remain at work until the end. Mr. Featherstone's evidence is that he thought he had to stay to collect anything, and accordingly did not start looking for work until after his last day of work.[224]

214. CTS will respond by pointing to the PowerPoint presentation it gave on May 12, 2014 where it told employees, at slide 7 of 9, that they could resign on 2+ weeks' notice ending during the "statutory notice period" and still collect *ESA* severance.[225] While slide 7 of 9 did say that, it did so in highly technical language only a lawyer could understand. More importantly, CTS's witnesses admit that, during the May 12 presentation, they told employees to review updated separation letters carefully, then handed out the Second Severance Letters after the presentation.[226] Those Second Severance Letters repeat all of the false and misleading statements in the First Severance Letters.[227] In short, while slide 7 of 9 came and went in a flash (the PowerPoint presentation was not even handed out)[228], the Second Severance Letters memorialized the falsehoods.

224 Transcript, Cross-examination of John Featherstone, QQ75-86.
225 PowerPoint Slides, Urban Affidavit, Ex. "K", *CTS Record* [p. 145].
226 Transcript, Cross-examination of Lynne Campbell, QQ303-313; Transcript, Cross-examination of Tony Urban, QQ377-383; Featherstone Affidavit, *Plaintiffs' Record*, TAB 7, ¶17 [p. 888].
227 Wood Affidavit, Exs. "W" and "X", *Plaintiffs' Record*, TAB 2 [pp. 362-374].
228 Transcript, Cross-examination of Tony Urban, QQ377-38

215. Finally, CTS's own senior HR official, Ms DeVous, circulated to the Streetsville Plant's manager, around this time, a draft Q&A document that falsely stated that "[t]o be eligible for severance pay...you must remain actively employed until your designated release date".[229] Although this was corrected in a second Q&A document, the corrected version said that the statutory notice period could be seven weeks, not the correct eight.[230] Ms DeVous also told the Plant Manager, by email, that if he is asked by an employee "what if I don't sign?" that he should respond with: "the employee can't receive any of the benefits described [in the separation letters]".[231] In short, the central letters were false, all but one of the other documents were false, and Ms DeVous's advice to the Plant Manager was to tell employees who won't sign the letters that they get nothing when they at least get *ESA* notice and severance.

216. We cannot emphasize this point enough, because false or misleading communications that give the impression that one must stay to the end coloured the entire shutdown. What it meant was that CTS had a captive audience, an employee group that felt it had to stay in order to collect anything. The result of all this was that, of the 118 active employees notified of the closure, only fifteen resigned.[232]

C. The Context Behind the Misleading of Employees: CTS Needed them to Stay to the End

217. There is a reason employees were deceived into staying until the end. In its Record, the Plaintiffs explain at length that CTS's shutdown plans were entirely dependent on having a full, active workforce employed during the entire shutdown, right

229 DRAFT Q&A Document, Wood Affidavit, Ex. "V", *Plaintiffs' Record* [p. 355]
230 Urban Affidavit, Ex. "M". *CTS Record* [p. 153]
231 Email, DeVous to Baldassare, April 17, 2014, Ex. "R", Wood Affidavit, *Plaintiffs' Record* [p. 326].
232 *Supplementary Record*, TAB 4 [p. 21].

to the end, to build a bank of products.[233] CTS has not denied this. In fact, in cross, Mr. Urban conceded this fact and intention:

> Q. Okay. But, again, you did want employees to stay, though?· Whatever -- however the payments were structured, you did want
>
> A. Yes, we did.
>
> Q. And you needed them to stay in large numbers, didn't you?
>
> A. Yes, we did.[234]

218. By the time the shutdown had started, CTS had committed itself to a very tight timeline and production schedule. Its Board of Directors, on February 12, 2014, approved a shutdown by March 31, 2015.[235] CTS then committed publicly, on February 28, 2014, to an early closure.[236] CTS had signed agreements with a developer committing it to deliver possession of the Plant's property by early-to-mid 2015.[237] To ensure high production levels during the coming year, CTS then signed a Retention Agreement with the Streetsville Plant's manager, agreeing to pay him $75,000 if performance and on-time-delivery metrics were met by early 2015.[238]

219. It is in the context of this exceptionally tight timeline that Messrs. Park and Lipton explain that the Streetsville Plant had to run at above full manufacturing capacity from start-to-finish. In the next section, we will outline how "above full" meant lots of overtime and weekend hours were worked. Put simply, CTS's decision to utilize a tight timeframe meant that, as CTS concedes, it needed all or nearly every employee to stay until their

233 Park and Lipton Affidavits, *Plaintiffs Record*, TABS 3 and 9
234 Transcript, Cross-examination of Tony Urban, QQ 509-510
235 *Plaintiffs' Record* [pp. 246 and 256]
236 Press Release, Wood Affidavit, Ex. "I", *Plaintiffs' Record*
237 Various Agreements, Lipton Affidavit, Exs. "D" – "J", *Plaintiffs' Record*, TAB 9
238 Wood Affidavit, Ex. Q", *Plaintiffs' Record*, TAB 2 [p. 312]

last days. CTS therefore crafted its separation letters and communications with that dominant, if not exclusive, goal in mind.

220. Pausing for a moment here, according to *Bramble*, an employer should get no credit for working notice given when its quality is such that, in effect, the opportunity to seek other work is a 'mirage". If the Class were misled into thinking they needed to stay to collect payment, then in effect the Class was not given the opportunity to leave. What they were given instead were incentives to stay and false warnings of no severance if they left to pursue other work. That cannot constitute "notice" at law.

D. What Was Missing

221. Quite apart from the misleading communications, what was missing during the entire shutdown, save with the arrival of Right Management outplacement services at the end, was any positive communication to the Class to the effect that they could or should seek other work, could take time off for interviews, and would be supported in these endeavours. In fact, the opposite happened: CTS deliberately chose not to publicize that employees could or should seek work.

222. The First Severance Letters and all subsequent ones are silent about seeking re-employment. In a prior draft of the First Severance Letter, CTS had used language telling employees that they could take time off for job interviews. That language was deliberately removed because (to quote the reason given to the Plant Manager) it "may create more complications for your operation".[239]

239 Email, Mary DeVous to Others, Wood Affidavit, Ex "R", *Plaintiffs' Record* [pp. 326-327]

223. Of course, this occurred here where the Form 1 was never provided to the MOL, and so the employees never heard about the adjustment services available until the very end of the notice period.

224. Put simply, there was nothing positive, anywhere, about seeking new employment and CTS's support of that. There was nothing to counter the misleading impression given by the communications that employees should stay until the end. CTS was focused on production and keeping employees until the last day.

225. This is squarely the kind of situation addressed by *Bramble*: a "notice" that, if treated as notice, would "permit formalism to triumph over substance and visit an injustice upon the [Class]". *Bramble* says that notices must not be mirages. The "notices" given to the Class here have the illusion of notice, but with respect, in substance they gave the Class no opportunity to seek employment, discouraging it in fact, and all entirely because that is what CTS wanted and needed.

E. Excessive Overtime and Weekend Time was Worked

226. The main reason in *Bramble* for treating the notice as a "mirage" and for giving no credit for it was that the employees had worked so much during the notice period that securing other work was effectively impossible. In the present case, the uncontradicted evidence is that: (1) many in the Class worked significant overtime and weekend hours (many in excess of *ESA* limits without *ESA* required written approval); and, (2) in some cases, Class Members were forced to work overtime. These factors support giving the working notice little or no weight.

227. As the Park and Lipton affidavits explain, to accomplish CTS's "bank build" plan, one that required the almost exclusive use of CTS employees, significant overtime and weekend hours had to be worked. Mr. Park had proposed a Plan B that would have involved less overtime which CTS initially approved, but CTS reverted to the original bank build knowing lots of overtime would be needed.[240] Mr. Urban accepts that this plan required lots of it.[241] In this context, and with the tight deadlines looming, Mr. Lipton, a senior manager, has given uncontradicted evidence that, on numerous occasions, Mr. Urban would demand of him and the Plant Manager that they make employees work more overtime, as CTS needed "everyone out" by the deadline.[242]

228. The result of CTS's demands was that Mr. Lipton says, with regret, that he and the Plant Manager applied "pressure" on employees to work extra hours and, especially for the technicians, he "essentially forced them" to work overtime by telling them that they had no choice but to work it,[243] all contrary of course to the *ESA*. In cross, Mr. Lipton estimates that 18 such employees were compelled to work overtime.[244]

229. Pressure or not, CTS's records show that many employees worked excessive overtime and weekend hours. Mr. Lipton's review of CTS's records[245] for 11 employees shows that, during the shutdown, they worked an average of 13-18.1 hours per week over and above the 40 hour weekly average, depending on how many weeks' vacation

240 CTS's evidence puts the blame for this on Mr. Park. While Mr. Park expressed concerns over his team working significant unpaid overtime and asked that the concerns be addressed, rather than doing so, CTS simply unilaterally went back to the original bank build plan. Regardless of "who is to blame", CTS was the employer and made the decision to go with the bank build plan.
241 Urban Affidavit, *CTS Record*, TAB 1, ¶23; Transcript, Cross-examination of Tony Urban, QQ 466-467.
242 Lipton Affidavit, *Plaintiffs' Record*, TAB 9, ¶¶19-21 [pp. 986-987].
243 Litpon Affidavit, *Plaintiffs' Record*, TAB 9, ¶¶59-62 [pp. 998-999].
244 Transcript, Cross-examination of Mitch Lipton, QQ193-201.
245 CTS Overtime Document, Lipton Affidavit, Ex. "Q", *Plaintiffs' Record*, TAB 9 [pp. 1138-1140]

they took.[246] They thus worked over 53 hours/week on average, more than permitted under the *ESA* absent a written agreement, where none appears to exist.[247] Overtime/weekend hours were extensive for others (61 employees appear on the CTS overtime record produced, representing the majority of hourly employees). Some employees admittedly worked less such hours, some voluntarily worked hours, though tracking the salaried employees' hours does not seem to have taken place.

230. According to *Bramble*, supported by other authorities,[248] the excess hours alone means no credit for the working notice should be given. If this is wrong, the evidence here is that some were compelled to work excessive hours and, for the whole Class, the overtime was being offered to persons who, based on the CTS communications, were effectively stuck at CTS until the last day. In other words, while CTS will argue that some employees wanted overtime, the fact remains that, with the communications in place, these were all employees who were given the impression that CTS was their only source of income (as they would have to stay to collect severance). The choice, if one can use that word, was severely attenuated. These factors should play a role in lowering, to nil, any credit CTS seeks for it is working notice.

231. Before leaving this, it is important to note that there is evidence that these excessive hours meant that employees were too tired to put their energy into seeking alternative work, particularly given the physical nature of the work.[249] And, while CTS

246 Lipton Affidavit, *Plaintiffs' Record*, TAB 9, ¶¶53-58 [pp. 996-998]. Mr. Lipton's calculations from the CTS records for Mr. Gill are verified by Mr. Gill in his review of detailed pay records: Gill Affidavit, *Plaintiffs' Record*, TAB 8, ¶¶18-25 [pp. 921-924].
247 *ESA*, ss. 1(3), 17, and 17.1; *Colautti Brothers Tile & Carpet (1985) Inc. v. Cottichio*, 2005 CanLII 43508 (O.L.R.B.).
248 *Norrad v. LaHave Equipment Ltd., supra; Cowper v. Atomic Energy of Canada Ltd., supra.*
249 Bhogal Affidavit, *Plaintiffs' Record*, TAB 10, ¶9 [p. 1157]

holds up its 11th hour Right Management services as an example of attempts to help employees, the sessions were scheduled at the start and end of shifts.[250] For the many working the kinds of excess hours CTS's records show were worked, attending such sessions would have been impossible. CTS admits it has no evidence as to how many, if any, attended any Right Management session.[251]

F. Conclusion

232. On the authority of *Bramble*, CTS should be given little or no credit for the working notice it gave for any one or combination of the following reasons: (a) the working notice was coupled with the problematic communications; (b) employees worked excessive hours; and, (c) some employees were forced to work those hours.

233. If credit, or not, for working notice depends on the excess time actually worked, individual determinations of time worked may be required. If credit, or not, depends on how the communications are characterized, those communications were made to the Class in common and so orders applicable to the whole Class are possible here.

CTS Gets No Credit for ESA Severance Paid or, Put Another Way, Severance Pay Should be Ordered [common issues (v), (vi), and (xi)

234. For those in the Class who remained employed until their last day and who did not sign a release, CTS paid *ESA* severance pay to them. Normally, employers are credited for the severance paid in calculating damages in lieu of reasonable notice. Here, because of how the severance payment was presented to employees, CTS should get no credit. Fresh severance pay should be ordered.

250 See Ex. "D" to the Campbell Affidavit, *CTS Record*, TAB 2 [pp. 203-204]; Transcript, Cross-examination of Lynne Campbell, QQ314-323

251 Transcript, Cross-examination of Lynne Campbell, QQ342-345.

235. As set out in the previous section, the termination letters gave the false impression that the whole payment, *ESA* severance included, required that the employee remain until the end. So characterized, the lump sums each Class member was offered cannot be regarded as "severance" pay. Where an employer gives notice to an employee, even lengthy notice, and pays them something characterized as something other than "severance pay" following departure, the payment is not severance pay and, accordingly, a further *ESA* severance payment must be paid.[252]

236. Thus, in *Assurant*, an employer who offered lump sum payments not tied to the *ESA* severance pay formula and described as a "stay-bonus" were ordered to make severance payments to each employee.[253] The payments to employees in the case at bar, while not expressly described as a "stay bonus", share those qualities in that the First Severance Letters and all subsequent ones are drafted in a way to give the impression that the employee must stay to the end to get those monies. Compounding this interpretation is the fact that, in February 2015, when CTS extended employees' departure dates, an additional $500.00 was offered on top of the original lump sum.[254] This would give the impression that employees are being paid an incentive to stay as opposed to an amount in lieu of a statutory severance right.

237. As the OLRB cautioned in *Carroll (Re)*, seeking employee consent to pay severance pay as part of a large working notice package, as CTS did here, is fraught with risks for the reason that the severance pay right could be transformed, by seeking

252 *Assurant Group v. Fillion*, 2004 CanLII 5721; aff'd [2006] O.J. No. 843 (Div. Ct.).
253 *Ibid.*
254 Wood Affidavit, *Plaintiffs' Record*, TAB 2, ¶¶71-78; Transcript, Cross-examination of Lynne Campbell, QQ112-114.

consent, into a presentation of the payment that removes from it the quality of severance pay.[255]

238. Given the words used in the First Severance Letters and similar subsequent ones, the effect should be to deprive the payments CTS made (payments representing most of the monies offered employees if they, in effect, stayed) from being called "severance" and from counting against any damages owed from May 12, 2015 onward. Or, put another way, in answer to common issues (v), (vi), and (xi), *ESA* severance pay ought to be ordered for the Class.

CTS Breached its Duty of Good Faith and Owes General Damages [common issues (ix), (x), (xiii), (xv), and (xvi)

239. The Plaintiffs claim that this is an appropriate case for general damages awards for CTS's breach of its obligation of good faith in the manner in which it terminated the Class's employment. We deal with this argument briefly here because many of the key facts and inferences from the Record capable of supporting bad faith findings have already been reviewed at length earlier.

A. The Legal Tests Generally

240. The Plaintiffs allege that CTS did not just breach the *ESA* and contracts but did so recklessly, were unduly insensitive, and disregarded the Class' legitimate contractual interests in reasonable performance. The courts say that that is bad faith.

241. The Supreme Court has expressed the bad faith test in a few different ways, all of which are applicable to the facts here. In *Bhasin*,[256] the Court generally states that

255 *Re Carroll*, [1996] O.E.S.A.D. No. 209 at ¶21.

"good faith" requires "appropriate regard to the legitimate contractual interests of the contracting partner" and reasonable performance. In *Keays*,[257] the Court holds that "bad faith" in the wrongful dismissal context includes undue insensitivity. And, in *Finney*,[258] the Court equates recklessness with bad faith. *Wallace* sets out the good faith standards employers must meet on termination. They must be "candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive".[259]

B. Examples of Bad Faith Here

242. On the Record, a number of examples of bad faith exist. For instance, the misleading communications fall squarely within the kinds of communications *Wallace* says can give rise to bad faith damages.

243. The *ESA* mass termination notice breaches themselves, the result of which was a loss of critical retraining/adjustment services and/or information about these, are an obvious example of bad faith, particularly given the reckless, intentional way they came about. *ESA* breaches can ground general damages for bad faith.[260]

244. CTS's overall approach to termination, that of putting its production needs first to the complete or near complete exclusion of the Class's interests in securing alternative work, are examples of what *Bhasin* calls a failure to have "appropriate regard to the

---

256 *Bhasin v. Hrynew*, 2014 SCC 71 at ¶¶65-66.
257 *Honda Canada Inc. v. Keays*, 2008 SCC 39, at ¶57.
258 *Finney v. Barreau du Québec*, 2004 SCC 36 at ¶¶38-39.
259 *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at ¶98.
260 *Ciszkowski v. Canac Kitchens, a division of Kohler Canada Co.*, [2015] O.J. No. 85 (S.C.J.); *Harris v. Yorkville Sound Ltd.*, 2005 CanLII 46394 (S.C.J.).

legitimate contractual interests of the [Class]". In *Chabot*, a similar lack of regard justified the old *Wallace* "bump".[261]

245. Finally, notifying the Class of termination just before Easter, combined with the email to them wishing them "good health, longevity and prosperity this Easter",[262] is an example of the "unduly insensitive" termination Iacobucci J. warned against in *Wallace*. In one case, a termination shortly before Christmas was cited to justify increasing the notice period on a similar *Wallace* "bump".[263]

C. A Comment on Remedies

246. If the Court accepts that there is a basis for general damages, then if that basis is one common to the Class, consideration should later be given for whether an aggregate award can be made or whether individual assessments will be required.[264] This will likely be a matter for further hearings, if required.

SOME REMAINING ISSUES [COMMON ISSUES (XIV) AND (XVII)]

A. No Punitive Damages

247. Punitive damages are not being pursued. Without meaning to diminish what is a particularly problematic attitude on CTS's part toward its obligations under Canadian law, punitive damages can only be awarded if CTS's actions were also "harsh, vindictive, reprehensible or malicious",[265] an extremely high standard.

261 *Chabot v. William Roper Hull Child & Family Services*, 2003 ABQB 49 at ¶41.
262 Email, T. Urban to CTS employees, Wood Affidavit, Ex. "S", *Plaintiffs' Record* [p. 329]
263 *Laliberté v. Société du Centre Scolaire Communautaire de Calgary*, [2007] A.J. No. 1417 (Q.B.) at ¶61.
264 *Class Proceedings Act, 1992*, S.O. 1992, c. 6, ss. 24-25
265 *Ciszkowski v. Canac Kitchens, a division of Kohler Canada Co., supra* at ¶133.

B. The "13 Week" Employees

248. Five Class Members were given more than thirteen weeks of work past their final date of employment: that is, they were notified of a final date but were later told to work more than 13 weeks past that date.[266] This violates s. 6(1) of the termination regulation.[267] When an employer violates s. 6(1), either by giving one additional period of work multiple periods totalling more than 13 weeks, the Ontario Court of Appeal provides that fresh common law notice of termination must be given.[268]

249. For these five Class Members, an Order that their working notices are void to the date they received the last letter telling them what their final day was is what the Court of Appeal jurisprudence calls for.

C. The Class Members Who Resigned Are Entitled to the Same Remedies

250. Where an employer gives working notice that is less than what is required by the obligation of reasonable notice, the employee is entitled to resign and maintain a wrongful dismissal claim. Courts treat the failure to give reasonable notice as a repudiation by the employer entitling the employee to quit mid-notice while still maintaining an Action.[269]

251. In the case at bar, eleven Class Members, during the notice period, resigned, presumably to take new jobs (two Plaintiffs' affiants, Messrs. Lipton and Gill, certainly resigned for other employment). These resigned Class Members should be permitted

266 *Plaintiffs' Supplementary Record*, TAB 4.
267 Termination and Severance of Employment, O.Reg. 288/01, s. 6(1).
268 *Di Tomaso v. Crown Metal Packaging Canada LP, supra*; *Singh v. Concept Plastics Limited*, 2015 ONSC 6598 and 2015 ONSC 6599; var'd, on a mitigation issue, 2016 ONCA 815.
269 *Sills v. Children's Aid Society of Belleville (City)*, 2001 CanLII 8524 (Ont. C.A.), at ¶¶32-39; *Aasgaard v. Harlequin Enterprises Ltd.*, [1993] O.J. No. 1484 (Gen. Div.), at ¶27, affd, [1997] O.J. No. 1112 (C.A.).

to make a claim on the same repudiation theory that permits other employees, on receipt of inadequate working notice, to treat the notice as repudiation, resign, and claim damages for the balance of notice.

252. The only difference between these Class Members and a more typical case is that, in a more typical case, the employee starts on the day of resignation having received legal, working notice, such that the employer can be given "full credit" to the resignation date.[270] The Class Members who resigned here, on the other hand, started with repudiatory notice which should be regarded as void and of no credit.

253. Naturally, the eleven resigned Class Members, if granted an order permitting them to maintain their Action, will have to account for new income, reducing the damages payable. They should, however, be permitted to advance their claim.

D. The Final, Alternative, Argument – The Working Notice + Severance Pay is Not Sufficient; Common Law Notice Should be Longer

254. If the Court rejects the primary arguments and holds that CTS can rely on the working notice, then the combined effect of working notice and severance was inadequate. That is, on a simple *Bardal* analysis, a few defects arise: (a) for the period after the Class Members' last day of employment, when only severance pay was provided, benefits should have been continued; (b) CTS's use of a notice formula was not reasonable; and, (c) formula or no formula, the resulting total package fell short of reasonable notice.

270 This is the situation in *Sills, supra,* where the employer was given credit for 2.5 months working notice the employee actually worked and not the 14.5 months' work that had been offered.

255. During the reasonable notice period, full employee benefits must be continued.[271] As CTS discontinued all benefits following each Class Member's last day, merely paying *ESA* severance pay thereafter, damages for lost benefits should be ordered. Further, where there is a mass termination, the use of a formula is itself unreasonable:[272] reasonable notice requires an individualized exercise.[273] Finally, the amount of notice given was not sufficient. For most employees who left on June 26, reasonable notice of fourteen months was therefore given. CTS's records show that many employees had very long service and were in their 50s, 60s, and 70s. For those with very long service, the Ontario Court of Appeal has endorsed notice periods exceeding the seeming "cap" of 24 months.[274] In *Abrahim*, Gray J. was critical of a proposed 24 month "cap" default judgment in a group wrongful dismissal case: "I fail to see how a cap of 24 months, or indeed any maximum, is appropriate".[275]

256. If this final argument is reached, the question of what length of notice ought to be awarded, and what the damages are, is one that will have to be adjudicated individually.

271 *Honda Canada Inc. v. Keays*, *supra* at ¶50.
272 *Medis Health and Pharmaceutical Services Inc. v. Bramble*, *supra* at ¶¶40-42.
273 *Arnone v. Best Theratronics Ltd.*, 2015 ONCA 63 at ¶17.
274 *Keenan v. Canac Kitchens*, 2016 ONCA 79; *Maasland v. Toronto (City)*, 2016 ONCA 551; *Cowper v. Atomic Energy of Canada Ltd., supra.*
275 *Abrahim et al v. Sliwin et al*, 2012 ONSC 6295 at ¶25.

PART IV: ORDERS REQUESTED

257. The Plaintiffs request an Order answering the common issues in the manner answered at TAB 1 of the Motion Record.

258. They also request the following Orders:

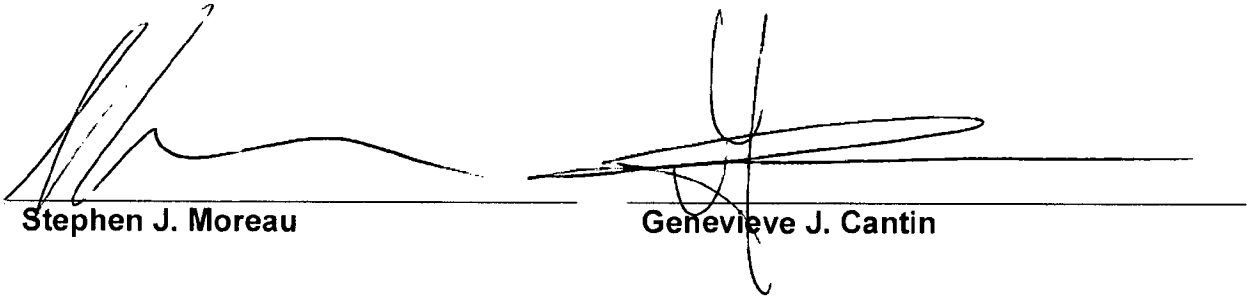
(a) costs of this motion and costs of the Action;

(b) Orders to ensure that the remaining steps to resolve individual issues be put in place; and,

(c) that CTS bear the cost of distributing and administering recovery to the Class.

259. If necessary, a case conference should be scheduled to deal with the individual issues not resolved by the motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12th DAY OF MAY 2017.



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

A

SCHEDULE A

LIST OF AUTHORITIES

1. *Kadoke Displays Limited v. Performance Solutions Inc.*, 2011 ONSC 1579
2. *Machtinger v. HOJ Industries Ltd.*, [1992] 1 SCR 986
3. *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158
4. *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42
5. *Stewart v. Park Manor Motors Ltd.*, [1967] O.J. No. 1117 (C.A.)
6. *Franklin v. University of Toronto*, [2001] O.J. No. 4321 (S.C.J.)
7. *Kumar v. Sharp Business Forms Inc.*, 2001 CanLII 28301 (S.C.J.)
8. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27
9. *Agraira v. Canada*, 2013 SCC 36
10. *Syndicat de la fonction publique du Québec v. Quebec (Attorney General)*, 2010 SCC 28
11. *R. v. A.A.*, 2015 ONCA 558
12. *Peach Hill Management Ltd. v. Canada*, 2000 CarswellNat 1157 (Fed. C.A.)
13. *Mattabi Mines Ltd. V. Ontario (Minister of Revenue)*, [1988] 2 SCR 175
14. *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 SCR 130
15. *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56
16. *Martin v. Canada (Attorney General)*, 2013 FCA 15
17. *Gill v. Canada (Attorney General)*, 2010 FCA 182
18. R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis, 2014) at §8.21
19. *Thomas Cavanaugh Construction Ltd. v. City of Ottawa*, 2012 ONSC 3851 (Div. Ct.)
20. *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53

21. *Canada (National Revenue) v. Thompson*, 2016 SCC 21

22. R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis, 2014) at §§13.18-13.19

23. *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66

24. *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26

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

26. *Readyfoods (Golden Valley Farms Inc.) v. United Food and Commercial Workers' Union, Local 832*, 1998 CanLII 19020 (MB LA), aff'd, 1999 CanLII 14313 (Man. Q.B.)

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

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

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

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

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

32. C.P. Yost, "*The Worker Adjustment and Retraining Notification Act of 1988: Advance Notice Required?*" (1989), 38 Cath. U.L. Rev. 675, p. 681

33. 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

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

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

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

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

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

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

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

41. *Gregg v. Freightliner Ltd.*, 2004 BCSC 1574

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

62. *Holman v. Johnson* (1775), 1 Cowp 341 at p. 1121

63. *Kingshott v. Brunskill*, [1952] O.J. No. 312 (C.A.)

64. S. Waddams, *The Law of Contracts*, 6th ed. (Aurora: Canada Law Book, 2010), at pp. 419-421

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

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

67. *Wainwright (Puddle Duck Trading) v. Jia*, 2009 CanLII 15663 (Ont. Div. Ct.)

68. *407 Auto Collission v. Bounsanga*, 2010 CarswellOnt 9598 (S.C.J.)

69. *Bailey v. Jainarine*, 2011 CarswellOnt 1127 (S.C.J.)

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

71. *Beer v. Towngate I Ltd.*, [1997] O.J. No. 4276 (C.A.)

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

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

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

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

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

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

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

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

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

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

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

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

84. *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6

85. *Nielsen v Sheridan Chevrolet Cadillac Ltd.*, 2016 ONSC 1843

86. *Farber v. Royal Trust Co.*, [1997] 1 SCR 846

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

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

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

90. *Kontopidis v. Coventry Lane Automobiles Ltd.* 2004 CanLII 16875

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

92. *Chaudhry v. Canada (Attorney General)*, [2007] F.C.J. No. 550

93. *Bahrami v. AGS Flexitallic Inc.*, [2015] A.J. No. 922

94. *Bellini v. Ausenco Engineering Alberta Inc.*, [2016] N.S.J. No. 338 (S.C.)

95. *Logan v. Numbers Cabaret Ltd. (c.o.b. Hamburger Mary's)*, [2016] B.C.J. No. 1704 (S.C.)

96. *Rubin v. Home Depot Canada Inc.*, 2012 ONSC 3053

97. *Sabean v. Portage La Prairie Mutual Insurance Co.*, 2017 SCC 7

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

99. *Assurant Group v. Fillion*, 2004 CanLII 5721; aff'd [2006] O.J. No. 843 (Div. Ct.)

100. *Re Carroll*, [1996] O.E.S.A.D. No. 209

101. *Bhasin v. Hrynew*, 2014 SCC 71

102. *Honda Canada Inc. v. Keays*, 2008 SCC 39

103. *Finney v. Barreau du Québec*, 2004 SCC 36

104. *Ciszkowski v. Canac Kitchens, a division of Kohler Canada Co.*, [2015] O.J. No. 85 (S.C.J.)

105. *Harris v. Yorkville Sound Ltd.*, 2005 CanLII 46394 (S.C.J.)

106. *Chabot v. William Roper Hull Child & Family Services*, 2003 ABQB 49

107. *Laliberté v. Société du Centre Scolaire Communautaire de Calgary*, [2007] A.J. No. 1417 (Q.B.)

108. *Sills v. Children's Aid Society of Belleville (City)*, 2001 CanLII 8524 (Ont. C.A.)

109. *Aasgaard v. Harlequin Enterprises Ltd.*, [1993] O.J. No. 1484 (Gen. Div.), affd, [1997] O.J. No. 1112 (C.A.)

110. *Arnone v. Best Theratronics Ltd.*, 2015 ONCA 63

111. *Keenan v. Canac Kitchens*, 2016 ONCA 79

112. *Maasland v. Toronto (City)*, 2016 ONCA 551

113. *Abrahim et al v. Sliwin et al*, 2012 ONSC 6295

B

SCHEDULE B

TEXT OF RELEVANT STATUTORY PROVISIONS

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

   See Book of Authorities, Volume 1, Tab 1

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

   See Book of Authorities, Volume 1, Tab 2

3. *An Act to Amend the Employment Standards Act, 1968*, S.O. 1970, c. 45, s. 4

   See Book of Authorities, Volume 1, Tab 3

4. Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 28th Parl, 3rd Sess, No 81 (27 May 1970) at 3236 (Minister Bales)

   See Book of Authorities, Volume 1, Tab 4

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

   See Book of Authorities, Volume 1, Tab 5

6. *Employment Standards Act*, R.S.O. 1970, c. 147, s. 13(2)

   See Book of Authorities, Volume 1, Tab 6

7. *Employment Standards Act*, R.S.O. 1980, c. 137, s. 40(2)

   See Book of Authorities, Volume 1, Tab 7

8. *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 8

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

   See Book of Authorities, Volume 1, Tab 9

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

    See Book of Authorities, Volume 1, Tab 10

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

See Book of Authorities, Volume 1, Tab 11

12. "Termination of Employment", O.Reg. 251, ss. 3-6

See Book of Authorities, Volume 1, Tab 12

13. "Termination of Employment", R.R.O. 1980, Reg. 286, s. 7

See Book of Authorities, Volume 1, Tab 13

14. O.Reg. 200/91, s. 1, revoking s, 7 of R.R.O. 1980, Reg. 286

See Book of Authorities, Volume 1, Tab 14

15. *Labour Standards Code*, RSNS 1989, c. 246, ss. 72(2) and 75(2)

See Book of Authorities, Volume 1, Tab 15

16. *Labour Standards Act*, RSNL 1990, Chap. L-2, s. 57(4)

See Book of Authorities, Volume 1, Tab 16

17. *Employment Standards Act*, R.S.B.C. 1996, c. 113, s. 64(1) and (2)

See Book of Authorities, Volume 1, Tab 17

18. *The Employment Standards Code*, C.C.S.M. c. E110, s. 67(3)

See Book of Authorities, Volume 1, Tab 18

19. *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 212(1)

See Book of Authorities, Volume 1, Tab 19

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

See Book of Authorities, Volume 1, Tab 20

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

See Book of Authorities, Volume 1, Tab 21

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

See Book of Authorities, Volume 1, Tab 22

23. *Class Proceedings Act, 1992,* S.O. 1992, c. 6, ss. 24-25

See Book of Authorities, Volume 1, Tab 23

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

See Book of Authorities, Volume 1, Tab 24

CLAUDETTE WOOD, et al.
Plaintiffs

-and-

CTS OF CANADA CO., et al.
Defendants

Court File No. CV-15-2547-00

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
BRAMPTON

**FACTUM OF THE PLAINTIFFS,
THE MOVING PARTIES**

**(SUMMARY JUDGMENT MOTION RETURNABLE
JULY 17-19, 2017)**

CAVALLUZZO SHILTON McINTYRE CORNISH LLP
474 Bathurst Street, Suite 300
Toronto ON M5T 2S6

Stephen J. Moreau, LSUC# 48750Q
Genevieve J. Cantin, LSUC# 69073S
Tel: 416-964-1115
Fax: 416-964-5895

Lawyers for the Plaintiffs