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 / Moving Parties

- and -

CTS OF CANADA CO. and CTS CORPORATION
Defendants / Respondents

RESPONDING PARTIES' FACTUM

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

June 28, 2017

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PART I - INTRODUCTION

1. CTS of Canada Co. ("**CTS Canada**") is a Canadian corporation that engaged in the business of designing and manufacturing sensors, actuators and electronic components at a manufacturing facility located in Streetsville, Ontario (the "**Streetsville Plant**"). CTS Canada is a wholly-owned subsidiary of the defendant, CTS Corporation.[1] For the purposes of this action, it is conceded that CTS Corporation and CTS Canada (together "**CTS**") were common employers of the Plaintiffs.

2. In February 2014, CTS announced the Streetsville Plant would be closed. The Streetsville Plant closed permanently in November 2015.

3. The Plaintiffs are 76 former employees of the Streetsville Plant who, unlike 49 of their co-workers, did not execute a full and final release in favour of CTS in connection with the closure, were not dismissed for just cause and were not absent due to disability.[2]

4. The Plaintiffs have brought this wrongful dismissal action under the *Class Proceedings Act*, which has been certified on consent. The Plaintiffs now bring this motion for summary judgment to resolve all of the certified common issues. CTS does not dispute that summary judgment is appropriate for resolving the common issues.

5. This is not a typical wrongful dismissal action. The Plaintiffs allege that the notice of termination provided by CTS in connection with the closure of the Streetsville Plant was inadequate. However, not only do the Plaintiffs seek additional notice, they seek to completely invalidate the notice and severance payments they have already received and

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[1] Affidavit of Anthony Urban, sworn January 13, 2017 ("**Urban Affidavit**"), paras. 1-2 [CTS Compendium, Tab 1]

[2] Certification Order, dated January 19, 2016 [CTS Compendium, Tab 11]

ask to be awarded "fresh" notice and severance pay. The notice and severance pay that the Plaintiffs seek to wipe out is significant. Depending on class member, it ranges from 62 to 81 weeks of working notice of termination and lump sum severance payments of up to 26 weeks' pay.

6. The Plaintiffs concede their position is novel and has never been litigated. Their position is essentially as follows: (1) CTS breached the Ontario *Employment Standards Act, 2000* ("**ESA**") by failing to notify the Ministry of Labour ("**MOL**") of the mass termination by a certain date, thus invalidating the entire working notice period; (2) the working notice period was "unfair" because the Plaintiffs worked overtime, were provided "misleading" termination letters which led to them believe they had to stay until the end of the working notice period, and were not explicitly told they could take time off for job interviews; (3) the severance payments they received were in fact retention bonuses, not severance payments; and (4) CTS breached its duty of good faith in the manner of termination.

7. The Plaintiffs' position is not only novel, it is completely unsupported by legal precedent, basic principles of employment law, and the facts. In particular:

(a) The Plaintiffs' interpretation of the ESA is wrong. CTS was 12 days late notifying the MOL of the closure, not 13 months as the Plaintiffs allege. The late filing was a technical breach of the ESA, had no detrimental effect on the Plaintiffs and does not entitle them to fresh notice.

(b) There is no law to support the proposition that working overtime or not being given time off for interviews invalidates a working notice period. The

Plaintiffs took overtime shifts voluntarily and were paid for those hours. The termination letters were not misleading. Further, the Plaintiffs had legal advice and were expressly advised by CTS of their right to resign within the statutory notice period. They were also expressly advised by CTS that they could, and *should*, seek new employment during the working notice period. There is no evidence that a single employee was denied time off to attend a job interview, and without any obligation to do so, CTS assisted in the Plaintiffs' job search efforts by retaining outplacement career services for them during the working notice period. As a result, a number of the Plaintiffs did use the working notice period to secure new employment.

(c) The severance payments were expressly referred to as severance payments in the termination letters and calculated in accordance with the ESA.

(d) There is no evidence of callous or vindictive conduct on the part of CTS. CTS' technical breach of the ESA in notifying the MOL was a mistake. At all times, CTS conducted the closure of the Streetsville in a respectful manner and in accordance with its legal rights and obligations. In any event, even if any of CTS' conduct could be said to amount to bad faith, there is no evidence of any harm to the Plaintiffs beyond the normal hurt feelings arising from a termination of employment.

8. Invalidating the significant notice already provided by CTS for the reasons put forth by the Plaintiffs would lead to an absurd result. The Plaintiffs seek to make new law on a

set of facts that simply cannot support the extreme relief that is being requested. As a result, CTS asks that the common issues be resolved entirely in its favour.

PART II - SUMMARY OF FACTS

(i) The Decision to Close the Streetsville Plant and Announcement

9. In 2012, CTS Corporation began a global reorganization of its operations which involved a shifting of operations to simplify its business model, reduce its global footprint, and improve its competitive position. As part of this reorganization, in 2013, CTS closed manufacturing facilities in Blantyre, Scotland and Carol Stream, Illinois.[3]

10. Following the decisions to close those facilities, CTS examined the viability of the Streetsville Plant. Although the Canadian plant was profitable, the facility was underutilized and had high production costs. After careful consideration, CTS decided to close the Streetsville Plant and consolidate its operations into lower-cost production facilities in Mexico and China.[4]

11. The decision to close the Streetsville Plant was made by senior management in November 2013. Thereafter, CTS assembled a team, led by Anthony Urban, Vice President and General Manager of the Sensors and Mechatronics business unit, to put in place a plan to ensure an efficient transition of the Streetsville Plant, including by entering into retention agreements with key employees and calculating the costs of the closure, including statutory and common law severance entitlements.[5] Contrary to the improper

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[3] Urban Affidavit, paras. 6-7 [CTS Compendium, Tab 1]
[4] Urban Affidavit, paras. 8-9 [CTS Compendium, Tab 1]
[5] Urban Affidavit, paras. 15-16 [CTS Compendium, Tab 1]

speculation in the Plaintiffs' factum with respect to CTS' "phantom" counsel, CTS worked with external Canadian counsel during this planning process.[6]

12. Following Board approval of the closure on February 12, 2014, arrangements were quickly made to announce the closure to customers, employees and the public.[7]

13. On February 28, 2014, CTS announced the closure to all of the employees at a company-wide meeting held at the Streetsville Plant. Later the same day, CTS issued a press release indicating the closure was expected to be completed in the first half 2015.[8]

(ii) Timing, Transition Plan and Overtime

14. Following the announcement, CTS began to develop a transition plan for the movement of production from Canada to the CTS facility in Mexico. Initially, the closure of the Streetsville Plant was planned for March 31, 2015. Between the announcement and March 31, 2015, CTS planned to build a large bank of inventory at the Streetsville Plant to support the transfer ("**Plan A**"). Under Plan A, overtime would be offered to certain employees in order to build the bank and continue a regular supply of products to CTS customers.[9]

15. Leonard Park, a class member, and Professional Engineer employed at the Streetsville Plant, proposed an alternative to Plan A that involved building a new production line in Mexico instead of moving the existing production equipment from Canada to Mexico ("**Plan B**"). Plan B was attractive to CTS as it reduced the need to build

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[6] Although CTS had no obligation to disclose the identity of their counsel, the documents produced by CTS confirm that they engaged Daniel Wong, a lawyer specializing in employment law and based out of the Toronto office of Osler, Hoskin & Harcourt LLP. [See CTS Compendium, Tab 32]
[7] Urban Affidavit, paras. 17-20 [CTS Compendium, Tab 1]
[8] Urban Affidavit, paras. 20-21 [CTS Compendium, Tab 1]
[9] Urban Affidavit, paras. 22-23 [CTS Compendium, Tab 1]

a large inventory bank and the risk of damaging the existing production lines during the transfer.[10] Plan B also would reduce the need for overtime hours and thereby lower labour costs for CTS. CTS management and key customers approved Plan B.[11]

16. Shortly following the approval of Plan B, the technical team at the Streetsville Plant, led by Mr. Park, refused to move forward with the implementation of Plan B unless all employees at the Streetsville Plant received significantly improved separation packages. The demands of the technical team in this respect were made without consultation with the other employees of the Streetsville Plant. [12]

17. As a result and although Plan A was not CTS' preferred plan, CTS decided to revert back to Plan A and to build the inventory bank. Under Plan A, overtime shifts were offered to certain employees. Although many employees took advantage of the opportunity to work available overtime hours, if employees were unable or unwilling to put in the extra hours, CTS had the option of hiring contract workers on a short term basis to cover available shifts, or to cancel the shift altogether.[13]

(iii) First Severance Letters

18. On April 17, 2014, CTS delivered individual letters to employees at the Streetsville Plant confirming that CTS Canada would cease manufacturing operations by March 31, 2015 and that, as a result, their employment would terminate (the "**First Severance Letters**").

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[10] Urban Affidavit, para. 24 [CTS Compendium, Tab 1]
[11] Cross-examination of Leonard Park, ("**Park Cross**"), q. 86, p. 20 [CTS Compendium, Tab 22]
[12] Park Cross, q. 116-119, p. 26-27; q. 243-246, p. 53-54, q. 253-256, p. 56-57 [CTS Compendium, Tab 22]
[13] Affidavit of Lynne Campbell, sworn January 13, 2017 ("**Campbell Affidavit**"), paras. 21-22; Cross-Examination of Mitch Lipton ("**Lipton Cross**"), 164-176, p. 40-43 [CTS Compendium, Tabs 2, 23]

19. The First Severance Letters set out individual separation packages (the "**Separation Package**") offering:

(a) A period of working notice up until a specified separation date (the "**Original Separation Date**"), which could be adjusted with 2 weeks' notice, as long as the new date was not 13 weeks after the Original Separation Date.

(b) Continued group benefits coverage up to the Original Separation Date;

(c) To assist with obtaining new employment, the outplacement services of Right Management to commence three months prior to the Original Separation Date;

(d) A lump sum separation payment payable at the Original Separation Date equal to severance pay calculated in accordance with the *Employment Standards Act, 2000* ("ESA") (the "**Original Separation Payment**"); and

(e) A Letter of Employment.[14]

20. Under the original Separation Packages, 77 employees were given an Original Separation Date of March 27, 2015. The remaining employees were given Original Separation Dates ranging from March 28, 2015 to August 15, 2015. None of the Plaintiffs received less than 49 weeks' working notice and some received as much as 69 weeks' working notice.[15]

21. To accept the Separation Package, employees were asked to (a) sign and return a copy acknowledging acceptance of the terms of the First Severance Letter within 21 days and (b) sign and return a copy of the Release attached to the Separation Package no

[14] Urban Affidavit, paras. 31-33; First Severance Letter, April 17, 2014 [CTS Compendium, Tabs 1 and 12]
[15] CTS Canada Employee Listing as of April 17, 2014 [CTS Compendium, Tab 28]

earlier than the Original Separation Date. The Plaintiffs were encouraged to seek any legal or other independent advice appropriate in considering the Separation Package.[16]

(iv) Easter Greeting

22. On April 17, 2014, following the delivery of the First Severance Letters, and over six weeks following the announcement of the plant closure, Mr. Urban sent an email to all CTS employees in the Sensors and Mechatronics business unit wishing them and their families "good health, longevity and prosperity" over the upcoming Easter holiday. The email was a well-intentioned holiday greeting that went out to a number of employees around the globe. It was Mr. Urban's practice to send similar holiday messages and he did not intend the greeting to cause any distress.[17]

(v) Reaction to the First Severance Letters

23. Following delivery of the First Severance Letters, a number of employees expressed concerns with the Separation Packages. In response to these concerns, CTS reviewed the First Severance Letters and discovered that some of the calculations of the Original Separation Payment were less than or only equal to the statutory severance pay requirements of the ESA. Despite the Plaintiffs' attempt to point to "serious defects" in the First Severance Letters, the miscalculations in the severance payments were the only error made by CTS in the letters. The errors were inadvertent and was corrected as quickly as possible.[18]

24. The First Severance Letters were replaced with revised letters which (a) increased the Original Separation Payment to satisfy the requirements of the ESA and provide an

[16] First Severance Letter, April 17, 2017 [CTS Compendium, Tab 12]
[17] Urban Affidavit, para. 34 [CTS Compendium, Tab 1]
[18] Urban Affidavit, para. 35-36 [CTS Compendium, Tab 1]

enhanced payment, (the "**Revised Separation Payment**"), and (b) for some employees, provided for a further lump sum payment in lieu of continued benefits coverage after the Original Separation Date (the "**Second Severance Letters**").[19]

25. On May 12, 2014, Mary DeVous, a Vice President of Human Resources, and Mr. Urban travelled to the Streetsville Plant to deliver the Second Severance Letters and to meet with the employees in person. During these meetings, Ms. DeVous and Mr. Urban provided a PowerPoint presentation to all employees outlining the answers to various questions that had been received from employees (the "**PowerPoint**"). The PowerPoint and subsequent discussion addressed a number of questions, including, among other things, how separation payments were calculated, when employees could commence their job search, the effect of not accepting the separation payments and the effect of an employee resigning prior to the separation date.[20]

(vi) Further Enhanced Packages

26. Following delivery of the Second Severance Letters, certain employees expressed concern with the amount of the Revised Separation Payment. In response, on June 9, 2014, for approximately 18 employees, CTS replaced the Second Severance Letters with revised severance letters that (a) increased the Revised Separation Payment, and (b)

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[19] Second Severance Letter, [CTS Compendium, Tab 13]

[20] Urban Affidavit, paras. 37-38 [CTS Compendium, Tab 1]; PowerPoint dated May 12, 2014 [CTS Compendium, Tab 29]. Following preparation of motion materials, CTS discovered that the PowerPoint attached to the Urban Affidavit was an earlier version of the final PowerPoint. On cross-examination, Claudette Wood, confirmed that the PowerPoint included in the CTS Compendium was the presentation delivered at the May 12 meeting. See Cross-Examination of Claudette Wood ("**Wood Cross**") q. 162-163, p. 35-36, [CTS Compendium, Tab 24]

increased the lump sum payment in lieu of benefits coverage after the Original Separation Date (the "**Third Severance Letters**").[21]

27. The Third Severance Letters were a good faith effort by CTS to address a concern expressed by those employees whose Original Separation Date extended beyond the intended cessation of manufacturing operations on March 31, 2015. Specifically, the Third Severance Letters revised the Revised Separation Payment by deducting only 49 weeks of working notice from the total package being offered to those employees, regardless of their Original Separation Date. This further increased the Revised Separation Payment for these 18 employees.[22]

(vii) Extensions of the Original Separation Date

28. By February 2015, it became apparent that CTS required additional time to build customer inventory prior to the Original Separation Date. Accordingly, at the request of customers, the deadline for the cessation of manufacturing operations was extended by 13 weeks to June 26, 2015. All employees were advised that their Original Separation Date would be extended to a revised date, the earliest of which was June 26, 2015 (the "**Revised Separation Date**").[23]

29. As the Revised Separation Date was more than 13 weeks following the Original Separation Date for certain employees, employees were offered $500.00 to accept the Revised Separation Date. In April and September, 2015 further extensions to the Revised

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[21] Urban Affidavit, paras. 43-44 [CTS Compendium, Tab 1]. See also Affidavit of Claudette Wood, sworn October 18, 2016 ("**Wood Affidavit**"), para. 70, Ex. AA; PMR, Vol 1 and 2 for a copy of all 18 letters.
[22] Urban Affidavit, para. 45 [CTS Compendium, Tab 1]
[23] Urban Affidavit, paras. 46-47 [CTS Compendium, Tab 1]

Separation Date were delivered to certain employees.[24] In total, only five employees were extended more than 13 weeks past their Original Separation Date.[25]

(viii) Right Management Services

30. CTS engaged Right Management to provide outplacement services to hourly employees beginning in January, 2015. Five separate workshops were provided on-site at the Streetsville Plant: (a) "Getting Started"; (b) "Career Assessment"; (c) "Resume Development"; (d) "Self-Marketing and Networking"; and (e) "Interviewing Strategies".[26]

31. The outplacement services were scheduled during working hours at times that would be convenient to employees to ensure that they received the full benefit of the sessions in their job search. All hourly employees had access to the Right Management workshops regardless of whether they had accepted their Separation Packages.[27] Salaried employees were offered an introductory on-site workshop, one-on-one coaching and online tools to assist with their job search. Given the increased cost of these services, only salaried employees who had accepted their Separation Package were given access to the online services and one-on-one career management services. [28]

32. In total, CTS held 12 group outplacement sessions for hourly employees and spent over $61,000 on the Right Management services. CTS did not receive a single complaint about the quality of the Right Management Services prior to this litigation.[29]

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[24] Urban Affidavit, paras. 46-47 [CTS Compendium, Tab 1]
[25] CTS Answers to Undertaking: Letter from C. Russell to S. Moreau, April 20, 2017 [CTS Compendium, Tab 30]
[26] Campbell Affidavit, paras. 11-12 [CTS Compendium, Tab 2]
[27] Campbell Affidavit, para. 13 and 15 [CTS Compendium, Tab 2]
[28] Campbell Affidavit, paras. 14-15 [CTS Compendium, Tab 2]
[29] Campbell Affidavit, para. 16; CTS Answers to Undertaking [CTS Compendium, Tabs 2 and 30]

(ix) Form 1 Filing and Service Canada Sessions

33. During the planning stages in 2014, CTS was aware that the Form 1 notification process required by the ESA would be triggered by the termination of 50 or more employees within a four-week period. CTS originally intended to stagger separation dates such that 50 or more employees would not be terminated within any four-week period. [30]

34. In early May 2015, over a year later and after changes to the transition plan and extensions on the closure date, CTS realized that 50 or more employees would have their employment terminated effective June 26, 2015. Accordingly, CTS determined that the filing and posting of the Form 1 was required eight weeks prior to the date, on May 1, 2015. Upon discovering this oversight, CTS immediately submitted and posted the Form 1 on May 12, 2015, 12 days after the deadline required by the ESA. [31]

35. Despite the Plaintiffs' insinuation of malicious intent on the part of CTS to "avoid" the Form 1 process, there is no mystery or hidden agenda with respect to why the Form 1 was filed at this time at not sooner. As set out above and contrary to the Plaintiffs' factum, CTS did receive legal advice during the plant closure. CTS was initially told the Form 1 would not be required due to an original plan to stagger separation dates.[32] The late filing was simply a mistake.

36. We note that the Plaintiffs state in their factum that Mr. Urban admitted on cross-examination that Ms. DeVous was "readily accessible" to give evidence regarding

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[30] Urban Affidavit, paras. 48-49, [CTS Compendium, Tab 1]
[31] Urban Affidavit, paras. 50-51, [CTS Compendium, Tab 1]
[32] Cross-Examination of Anthony Urban ("**Urban Cross**"), q. 243-246, p. 74-76, [CTS Compendium, Tab 25]

the filing of the Form 1.[33] On this basis, they ask the Court to draw an adverse inference against CTS for failing to file an affidavit from her. Plaintiffs' counsel have mischaracterized Mr. Urban's evidence. Mr Urban, whose active employment with CTS ended in July 2015, testified that Ms. DeVous left employment with CTS shortly after him. Mr. Urban and Ms. DeVous communicated twice in the last 18 months on a "personal" level however have not discussed this case. At no point did Mr. Urban admit that Ms. DeVous was "readily accessible".[34]

37. Following the filing of the Form 1 Notice, CTS arranged for Service Canada to deliver information sessions for all employees at the Streetsville Plant on applying for employment insurance and accessing the re-employment services that would be available to them through Employment Ontario.[35]

(x) The Closure and Severance Payments

38. Manufacturing operations at the Streetsville Plant ceased as of June 26, 2015. All operations at the Streetsville Plant ceased as of November 6, 2015.[36]

39. Employees who worked through their Revised Separation Date but did not sign the Release were paid their entitlement, if any, to severance pay under the ESA. Employees who worked into the eight week notice period immediately preceding either their Original Separation Date or Revised Separation Daté, but did not work until the Revised Separation Date were paid their entitlement, if any, to severance pay under the ESA. Employees who worked through their Revised Separation Date and signed the Release

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[33] See Plaintiffs' factum, paras. 28 and 52
[34] Urban Cross, q. 302-307, p. 95-97, [CTS Compendium, Tab 25]
[35] Campbell Affidavit, paras. 28-31 [CTS Compendium, Tab 2]
[36] Campbell Affidavit, paras. 33-34 [CTS Compendium, Tab 2]

were paid their Separation Packages in full.[37] Contrary to the misleading statements in the Plaintiffs' factum, no CTS employee received less than their ESA severance entitlement.[38]

40. Although not at issue on this motion, the Separation Packages offered to and partially received by the Plaintiffs are substantial. The representative plaintiffs, for example, were offered the following:

Plaintiff	Position	Age	Service (years)	Working Notice Provided (weeks)	Severance Pay Provided (weeks)	CTS Offer (weeks)	Total CTS Offer
Claudette Wood	Product Scheduler	58.7	21	62	21.1	22.9 and $825 in lieu of benefits	**84.9 weeks (19.5 months)**
Bruce Cook	Plant Maintenance	59.6	21.2	75	23.7	23.7 and $825 in lieu of benefits	**98.7 weeks (22 months)**
John Featherstone	Plant Maintenance	60.7	38.3	75	26	41 and $2,175 in lieu of benefits	**116 weeks, (26.7 months)**

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

(A) THE ISSUES

41. CTS states the following issues are to be determined on this motion:

(a) Did CTS violate the ESA by failing to notify the MOL of the closure of the Streetsville Plant prior to May 1, 2015, or by failing to post the Form 1 prior to May 1, 2015, such that the working notice period is rendered void? [Common Issues (ii)-(vi), (xi), (xii)]

[37] Campbell Affidavit, paras. 35-36 [CTS Compendium, Tab 1]
[38] See Plaintiffs' factum, para. 210

(b) Did CTS conduct the plant closure in such a way that the working notice period is rendered void as a result of: (i) overtime hours being worked; (ii) misleading, false or incomplete termination letters; or (iii) a lack of communication with respect to the Plaintiffs' seeking new employment. [Common Issues (vii), (viii) and (xi)]

(c) Did CTS violate the ESA by failing to provide severance pay to the Plaintiffs? [Common Issues (v), (vi) and (xi)]

(d) Did CTS breach its duty to act in good faith to the Plaintiffs? [Common Issues (ix), (x), (xiii), (xv), and (xvi)]

42. With the exception of punitive damages (which the Plaintiffs are no longer pursuing), the issues addressed in the Plaintiffs factum under the heading "Some Remaining Issues" are not common issues certified in this action and should not be before this Court.[39] However, in the event that this Court decides to consider these issues, they are addressed summarily below and further oral submissions will be made if necessary.

(B) PRELIMINARY ISSUE

(i) The Lindy Affidavit Should be Disregarded

43. The Plaintiffs rely on an affidavit from Ruben Lindy (the "**Lindy Affidavit**"), an articling student at Cavalluzzo Shilton McIntyre Cornish LLP ("**Cavalluzzo**"), to set out evidence of various government re-employment services the Plaintiffs allege they would have received had CTS filed the Form 1 prior to May 1, 2015.[40]

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[39] See Plaintiffs' factum, paras. 248-256, headings: "The 13 Week Employees"; "Class Members Who Resigned Are Entitled to the Same Remedies"; and "The Final, Alternative Argument – The Working Notice + Severance Pay is Not Sufficient"

[40] Affidavit of Ruben Lindy, sworn October 27, 2016 ("**Lindy Affidavit**") [CTS Compendium, Tab 10]

44. The Lindy Affidavit is relied on extensively in support of two critical issues in this motion. First, the Plaintiffs point to the services outlined in the Lindy Affidavit in support of their interpretation of the mass termination provisions in the ESA. The Plaintiffs argue that the ESA must be interpreted to find that, where an employer provides a longer notice period than the statutory notice period prescribed by the ESA, the Form 1 is due to the Ministry at the beginning of the longer notice period, and not the statutory notice period. A key basis for this requested interpretation is that the legislature intended for employees to be provided access to these "critical" services as soon as possible.[41] Second, the Plaintiffs rely on the Lindy Affidavit in support of their position that CTS breached its duty to act in good faith on the basis that by "recklessly" filing the Form 1 notice in May 2015, CTS deprived employees of these "critical" services over the longer working notice period.[42]

45. The Lindy Affidavit consists primarily of an overview of telephone conversations between Cavalluzzo and two government employees at the MOL and the Ministry of Advanced Education and Skills Development (the "**MAESD**"). As exhibits to his affidavit, Mr. Lindy attaches two emails he sent to the MOL and MAESD employees which include summaries of the information those individuals are alleged to have provided to Cavalluzzo in the telephone conversations (the "**Summaries**"). The emails ask each recipient to confirm their agreement with the Summaries by return email. The Lindy

[41] See for example, Plaintiffs' factum, paras. 57, 61, 77, 78, 120-124, 163, 177
[42] See Plaintiffs' factum, para. 243

Affidavit also attaches printouts of government websites. No direct evidence from either the MOL or MAESD has been provided in this motion.[43]

46. Despite stating that he had personal knowledge of the matters in his affidavit, on cross-examination, Mr. Lindy admitted:

(a) He was not present on the calls between Cavalluzzo and the MOL or MAESD employees. In fact, Mr. Lindy did not even know who at Cavalluzzo had actually spoken to the MOL or MAESD employees. [44]

(b) He did not draft the Summaries attached to his affidavit even though they were included in emails sent by him to the MOL and MAESD employees. [45]

(c) He was not provided with any written notes or recordings of the conversations between Cavalluzzo and the MOL and MAESD employees and thus had no way of knowing whether the Summaries were accurate representations of those conversations. [46]

(d) Genevieve Cantin, counsel for the Plaintiffs, wrote the Summaries and in doing so, used her own notes to draft the Summaries.[47]

(e) Mr. Lindy did not conduct any independent research to support a single statement in his affidavit.[48]

(f) Mr. Lindy has no experience with the Form 1 process, advising on plant closures, or with engaging in any of the services outlined in his affidavit.[49]

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[43] Lindy Affidavit [CTS Compendium, Tab 10]
[44] Cross-examination of Ruben Lindy (the "**Lindy Cross**"), q. 15-17, 21, p. 6-7 [CTS Compendium, Tab 26].
[45] Lindy Cross, q. 24-32, p. 8-9 [CTS Compendium, Tab 26]
[46] Lindy Cross, q. 18-20, p. 6-8; q. 39-40, p. 11 [CTS Compendium, Tab 26]
[47] Lindy Cross, q. 94-96, p. 25, [CTS Compendium, Tab 26]. Relying on litigation privilege, the Plaintiffs have refused to produce Ms. Cantin's notes. Plaintiffs' Answers to Undertaking – Letter from S. Moreau, p. 4 re: Ruben Lindy [CTS Compendium, Tab 31]
[48] Lindy Cross, q. 89-90, p. 23-24 [CTS Compendium, Tab 26]
[49] Lindy Cross, q. 47-54, p. 13-14 [CTS Compendium, Tab 26]

47. Given his complete lack of personal knowledge, Mr. Lindy was unable to answer key questions with respect to the "critical" services the Plaintiffs allege they were deprived of. For example, Mr. Lindy did not know: (a) whether the services were provided only in mass terminations; (b) whether the services were triggered only with a Form 1, or could have been triggered through media reports of a closure; or (c) whether the services were subject to eligibility requirements that would have prevented the Plaintiffs from accessing them prior to their separation dates.[50]

48. The Lindy Affidavit consists entirely of double hearsay that CTS is unable to test. As such, it cannot be relied on in this motion. Although hearsay may be admissible in an affidavit under Rule 39.01(4) of the *Rules of Civil Procedure*,[51] the Ontario Court of Appeal has confirmed that statements of double hearsay are not compliant with that rule and are improper.[52] In any event, even if the Lindy Affidavit did comply with Rule 39.01(4), which it does not, there must still be adequate support for filing hearsay evidence, requiring:

(a) identification of the source of the information, and that the source is the original source of the information or that that person is the person with the personal knowledge or observation of the fact alleged;

(b) an explanation of the reason why the original source of the information has not sworn her/his own affidavit and, therefore, why it is necessary for the court to accept hearsay evidence as opposed to direct evidence;

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[50] Lindy Cross, q. 56-60, p. 15-16; q. 62-78, p. 17-21 [CTS Compendium, Tab 26]
[51] *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, Rule 39.01(4), Defendants' Book of Authorities ("**CTS BOA**") Tab 38
[52] *Airst v. Airst*, [1999] O.J. No. 5866 (C.A.) at para. 6, Defendants' Book of Authorities ("**CTS BOA**") Tab 1

(c) an explanation of the circumstances of how the hearsay evidence was obtained, why the source would have knowledge of the information and the full details of the information and the source so that the court can ascertain the soundness of the information and source, as well as assess some kind of level of reliability to that evidence; and

(d) not only a statement that the deponent believes the evidence from the hearsay source, but reasons why the deponent and the court should believe the source and rely on the untested evidence for each piece of hearsay evidence raised.[53]

49. The above criteria has clearly not been satisfied with respect to the statements in the Lindy Affidavit. There is no explanation provided by the Plaintiffs as to why representatives of the MOL or MAESD could not provide direct evidence of their alleged activities. There is also no explanation as to why Ms. Cantin did not swear this affidavit, why Mr. Lindy could not have been included in the MOL or MAESD calls or, at the very least, why he was not given access to notes or recordings taken during the calls. These omissions are particularly troubling given the apparent importance of this evidence to the Plaintiffs' position. In the circumstances, the Lindy Affidavit cannot be relied on in this motion.

(C) LEGAL PRINCIPLES: NOTICE OF TERMINATION

(i) Reasonable Notice at Common Law

50. CTS acknowledges that the Plaintiffs were employed under contracts of indefinite duration with no contractual limitation on their right to notice of termination. It is trite law that an employee under a contract of indefinite duration, and in the absence of just cause and any express contractual limitation on his or her rights, is entitled to receive

[53] *Children's Aid Society of Huron-Perth v. H(C)*, 2007 ONCJ 744 at paras. 17, 28-30, CTS BOA, Tab 2

reasonable notice of the termination of their employment calculated in accordance with the usual Bardal factors.[54]

51. The requirement to provide reasonable notice is a requirement to provide working notice; not pay in lieu of notice. Where an employer provides adequate working notice, it does not breach the employment contract, and will not be liable for wrongful dismissal. Instead, the employer is complying with its obligation to continue the employment relationship for a reasonable period of time following notification of termination of employment. An employer, at its option, may provide pay in lieu of reasonable notice, however in doing so, an employer is providing compensation for breaching the employment contract.[55]

(ii) The Employment Standards Act, 2000

52. The ESA provides employees in Ontario with minimum entitlements to notice of termination. The following provisions of the ESA are applicable to this motion:

(a) Section 58 of the ESA creates an automatic entitlement for all affected employees to receive a prescribed amount of notice, regardless of their years of service, when the employment of 50 or more employees is terminated within a four week period.[56]

(b) The requirements for notice where a mass termination occurs are found in subsections 58(2)-(5) of the ESA and subsection 3(1) of the *Termination and Severance of Employment* regulation of the ESA (the "**Regulation**"), which prescribed the amount of notice to be at least eight weeks where the

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[54] *Machtinger v. HOJ Industries Ltd.*, [1992] S.C.J. No. 41 (S.C.C.) at para. 19 [***Machtinger***], CTS BOA, Tab 3

[55] *Taylor v. Dyer Brown* (2004), 73 O.R. (3d) 358 (C.A.) at para. 15 [***Taylor***], CTS BOA, Tab 4; *Noble v. Principal Consultants Ltd. (Trustee of)*, 2000 ABCA 133 at para. 14, CTS BOA, Tab 5; *Stelco Inc. Re,* 2005 CarswellOnt 5177 (Ont. S.C.J. [Commercial List]) at paras. 30-31, CTS BOA, Tab 6

[56] *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 58 [***ESA, 2000***], CTS BOA, Tab 39

number of employees whose employment is terminated is 50 or more but fewer than 200. [57]

(c) Subsection 3(2) of the Regulation defines the information that must be provided to the Director of Employment Standards and posted in accordance with subsection 58(2) of the ESA.

(d) Notice of termination under section 58 of the ESA can be provided as either working notice, or pay in lieu of notice. Where working notice is provided, an employer must comply with section 60 of the ESA, which requires an employer to maintain an employee's regular wages and benefits until the end of the notice period.[58]

(e) In addition to notice of termination, section 64 of the ESA provides that employees who have worked for an employer for five or more years and are employed by an employer with an annual Ontario payroll of at least $2.5 million are entitled to severance pay. Severance pay cannot be set off against working notice. [59]

(f) Pursuant to section 63 of the ESA, an employee who resigns during a working notice period is entitled severance pay if the employee gives at least two weeks' notice of resignation and the resignation occurs during the statutory notice period.[60]

(iii) CTS has Satisfied its Common Law and Statutory Obligations

53. CTS has complied with its statutory and common law duties to the Plaintiffs. Each of the Plaintiffs received reasonable notice of the termination of their employment and many received far greater than reasonable notice of the termination of their employment due to the extended length of the working notice period provided. Using the date written

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[57] *Termination and Severance of Employment*, O. Reg. 288/01, s. 3 [***Regulation* 288/01**], CTS BOA, Tab 40
[58] *ESA, 2000, supra* note 56, ss. 60 and 61, CTS BOA, Tab 39
[59] *Ibid*, s. 64, CTS BOA, Tab 39
[60] *ESA, 2000, supra* note 56, s. 63, CTS BOA, Tab 39

notice of termination was provided, not the earlier date the plant closure was announced, the Plaintiffs receive from a minimum of 62 weeks' notice of termination to a maximum of 81 weeks. On top of this, the Plaintiffs have been paid their entitlement, if any, to severance pay under the ESA.[61]

(D) LATE FORM 1 DOES NOT VOID WORKING NOTICE

(i) The Issue in Dispute

54. The provisions of the ESA relevant to this issue in dispute between the parties are the mass termination provisions located at section 58 which, within Part XV, "Termination and Severance of Employment", sets the minimum employer obligations and employee entitlements upon termination of employment. Section 58 provides:

> **Notice, 50 or more employees**
>
> 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.
>
> **Information**
>
> (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.
>
> [...]
>
> **When notice effective**
>
> (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).

[61] Campbell Affidavit, paras. 35-36 [CTS Compendium, Tab 2]

> **Posting**
>
> (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.**[62]

55. With respect to the "prescribed period" referenced in subsection 58(1), section 3 of the Regulation provides in relevant part as follows:

> **Notice, 50 or more employees**
>
> 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.
> >
> > [...][63]

56. Subsection 3(2) sets out the prescribed information to be provided to the Director (in the MOL's Form 1) under subsection 58(2)(a) and posted under subsection 58(2)(b).[64]

57. The fundamental issue in dispute between the parties is simple: does "notice period" in subsection 58(2)(b) of the ESA mean the notice period prescribed by the ESA, or does it mean a greater notice period? The Plaintiffs assert that the reference to the first day of the "notice period" in subsection 58(2)(b) required CTS to provide the MOL with and post the Form 1 at the beginning of the greater working notice period provided to the Plaintiffs by April 17, 2014, even though they were only entitled to eight weeks' notice under subsection 3(1) of the ESA. CTS asserts that the first day of the "notice period" under subsection 58(2)(b) that required CTS to provide the MOL with and post the Form 1

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[62] *ESA, 2000, supra* note 56, s. 58 (emphasis added), CTS BOA, Tab 39
[63] *Regulation* 288/01, *supra* note 57, s. 3, CTS BOA, Tab 40
[64] *Ibid*, CTS BOA, Tab 40

was May 1, 2015, eight weeks prior to the termination of employment of 50 of more employees in a four week period.

(ii) "Notice Period" in 58(2)(b) Refers to the Minimum Notice Period Prescribed by the ESA

(A) Legislative Context and Intent

58. It is well established that the words of an act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the act and the intention of the legislature.[65] CTS submits that a reading of section 58(2)(b) in accordance with the object and intention of the ESA and in the context of the words of the ESA, both outside and within section 58, supports the conclusion that "notice period" in subsection 58(2)(b) refers to the minimum notice period prescribed by the ESA only.

The object and intent of the ESA is to provide uniform minimum standards

59. The historical underpinnings of the ESA are based on the premise that the employment standards created by the statute and its regulations are minimum requirements only. CTS does not dispute that the ESA is remedial legislation designed to protect employees; however, as recognized in *Machtinger*, the ESA is designed to meet that objective by instituting uniform minimum standards.[66] The intent and effect of the ESA is to provide a uniform floor below which employees cannot fall, *not* to regulate or reach into situations where, as here, greater benefits are provided. CTS submits that the words of the ESA must be interpreted with this backdrop in mind.

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[65] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 (S.C.C.) at para. 21, CTS BOA, Tab 7
[66] *Machtinger, supra* note 54 at para. 31, CTS BOA, Tab 3

60. While it remains open to an employer to provide and post the Form 1 earlier than the first day of the prescribed minimum notice period, the ESA does not require it. Subsection 58(2)(b) does not, as the Plaintiffs contend, adjust the time required for the Form 1 to be provided and posted depending on the specific lengthier period of notice an employer may choose to provide. Such an interpretation is inconsistent with the intention of the legislature to provide for uniform minimum standards.

The alternate definitions of "Statutory Notice Period" in subsection 1(1)

61. CTS submits that the definition of "statutory notice period" under subsection 1(1) of the ESA supports its position that "notice period" under subsection 58(2)(b) means the minimum notice period required by the ESA. The definition is:

> "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[67]

62. First, pursuant to clause (a), "statutory notice period" means the period of notice of termination required to be given by an employer under Part XV - the minimum standard. The specific minimum periods of notice required to be given by an employer under Part XV are provided for in subsections 57(1) and 58(1) (and correspondingly section 3 of the Regulation).[68] Therefore, pursuant to clause (a) above, these are the "statutory notice periods". Notably, however, within Part XV these required minimum notice periods are not redundantly labelled as "statutory notice periods." For example, subsection 57(1) is

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[67] *ESA, 2000, supra* note 55, s. 1(1)., CTS BOA, Tab 39
[68] *Ibid,* ss. 57(1) and 58(1), CTS BOA, Tab 39; *Regulation* 288/01, *supra* note 56, s. 3., CTS BOA, Tab 40

preceded by the heading "Employer Notice Period",[69] not "Employer Statutory Notice Period". Similarly, subsection 58(1) and section 3 of the Regulation are preceded by the heading, "Notice, 50 or more employees",[70] not "Statutory Notice Period, 50 or more employees", and subsection 58(1) provides that an employer is required to provide notice of termination for the "prescribed period", not the "prescribed statutory notice period".

63. There are numerous other examples within Part XV where the minimum required notice periods are referenced, yet not explicitly referred to as "statutory notice periods". For example, section 60 states "during a notice period under section 57 or 58" (referencing the prescribed notice periods under those sections), and is preceded by the heading "[r]equirements during notice period".[71] Similarly, subsection 58(4) refers to "the notice required" under subsection 58(1) and is preceded by the heading "[w]hen notice effective".[72]

64. Second, pursuant to clause (b), "statutory notice period" can mean that part of a greater notice period provided by an employer in excess of what is required by the ESA that immediately precedes the termination date specified in the notice that equals the period of notice required under Part XV. In other words, the definition clarifies that for the purposes of the ESA, the required minimum period of notice falls at the end, not the beginning, of any greater period of notice provided.

65. Notably, the only time the defined term "statutory notice period" is used in the ESA is in subsection 63(1)(e), which provides:

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[69] *ESA, 2000, supra* note 56, s. 57(1), CTS BOA, Tab 39
[70] *Ibid,* ss. 57(1) and 58(1), CTS BOA, Tab 39; *Regulation,* 288/01, s. 3, CTS BOA, Tab 40
[71] *ESA,* 2000, *supra* note 56, s. 60, CTS BOA, Tab 39
[72] *Ibid,* s. 58(4), CTS BOA, Tab 39

What constitutes severance

63. (1) An employer severs the employment of an employee if,

[...]

(e) the employer gives the employee notice of termination in accordance with section 57 or 58, the employee gives the employer written notice at least two weeks before resigning and **the employee's notice of resignation is to take effect during the statutory notice period.**[73]

66. This subsection creates an entitlement to severance pay for an employee who, having been provided with a greater notice period than is required by the ESA, delivers notice of resignation within the statutory notice period at the end of that greater notice period. Clause (b) of the statutory notice period definition is specific to create and protect this entitlement in section 63(1)(e); it has no other purpose.

67. Accordingly, CTS submits that all references to "notice period" under Part XV of the ESA, including "notice period" at subsection 58(2)(b), must be read as meaning the minimum period of notice required under the ESA, in accordance with the definition at clause (a) of subsection 1(1).

68. Indeed, in light of the definition at clause (a), it would be redundant to label every reference to the minimum period of notice required under Part XV as a "statutory notice period". The Plaintiffs' contention that only a reference to "statutory notice period" means the required minimum notice period whereas any reference to "notice period" means a period in excess of that minimum, renders the definition under clause (a) meaningless and produces an absurd result given that the specific term "statutory notice period" is only used once outside of subsection 1(1).

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[73] *ESA 2000, supra* note 56, s. 63(1)(e) (emphasis added), CTS BOA, Tab 39

The prescribed remedy for a contravention within section 58

69. As acknowledged in paragraph 101 of the Plaintiffs' factum, the context in which a legislative provision must be read includes the subsections and sections surrounding that provision. CTS submits that when read in the context of subsection 58(4), "notice period" in subsection 58(2) must be interpreted as referring to the "prescribed period" as referenced in subsection 58(1) and provided for in section 3 of the Regulation.

70. As noted and accepted by the Plaintiffs, [74] the requirements to provide the Form 1 to the MOL under 58(2)(a) and to post the Form 1 under 58(2)(b) are both intended to be on "the first day of the notice period".[75] Subsection 58(4) is a remedial provision within section 58 which sets out the consequence of failing to meet the procedural requirements of subsection 58(2)(a). Section 58(4) states that the "notice period required under subsection [58]1" (the "prescribed period") "shall be deemed not to have been given until the Director receives the information required under section 58(2)(a)".[76] Accordingly, subsection 58(4) clearly ties the prescribed notice period (the "notice period required under subsection [58]1") to the procedural requirements under subsection 58(2). It is entirely incongruous to interpret "notice period" in subsection 58(2) as referring to a greater notice period than the minimum prescribed when the remedial provision for a breach of that subsection applies specifically and only to the prescribed notice period. CTS submits that subsection 58(4) means the procedural requirements under section 58(2) only attach to the minimum notice period required under section 58(1) and not any greater notice period an employer may choose to provide.

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[74] See Plaintiffs' factum, paras. 98-99
[75] *ESA, 2000, supra* note 56, s. 58(2), CTS BOA, Tab 39
[76] *Ibid,* s. 58(4), CTS BOA, Tab 39

(B) The Employment Standards Act: Policy and Interpretation Manual

71. The *Employment Standards Act: Policy and Interpretation Manual* (the "**Manual**")[77] published by the MOL further supports CTS' position that subsection 58(2) only required CTS to provide the Form 1 to the MOL and post it on May 1, 2015, the first day of the minimum notice period required by section 58(1). In fact, the Manual explicitly states that this is the case:

> As with individual notice of termination, **nothing precludes an employer from providing a greater right or benefit with respect to mass notice (whether orally or in writing). However, the employer would not thereby be relieved of the obligation to file a Form 1 and post the information by the first day of the statutory portion of the notice period**. In addition, that part of the notice period that would be the statutory notice period – *i.e.*, that part equal to the notice required under Part XV and ending on the termination date (see definition of "statutory notice period" in s. 1 of the Act) would *not* start running until a Form 1 was received by the Director, pursuant to s. 58(4).[78]

72. While the Manual is not binding, it is a useful tool of interpretation, as it reflects the MOL's interpretation and application of the ESA. Pursuant to section 88(2), the Director of Employment Standards may establish policies respecting the interpretation, administration, and enforcement of the ESA,[79] and section 89(2) of the ESA requires employment standards officers to follow any policies established by the Director under subsection 88(2).[80] Notably, with reference to the Manual, the Divisional Court of Ontario has specifically held that although not binding, such administrative guidelines may be

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[77] Ministry of Labour Employment Practices Branch, *Employment Standards Act 2000: Policy and Interpretation Manual,* 2d ed (Scarborough, ON: Carswell, 2001) (ceased publication July 2016) [***Manual***], CTS BOA, Tab 41
[78] *Ibid*, ch. 19.6 at 19-47,CTS BOA, Tab 41
[79] *ESA, 2000, supra* note 56, s. 88(2), CTS BOA, Tab 39
[80] *Ibid,* s. 89(2), CTS BOA, Tab 39

useful in interpreting a statutory scheme.[81] Indeed, the jurisprudence indicates that adjudicators often refer to and rely on the Manual in resolving disputes under the ESA.[82] The Manual is further persuasive support for CTS' position.

(C) The Legislative History

73. The legislative history of the mass termination provisions at section 58 further evidences the legislative intent that the provision and posting of the Form 1 under subsection 58(2) is required only at the beginning of the statutory notice period.

The Introduction of Minimum Notice of Termination

74. The individual and mass notice of termination provisions were first introduced in 1970.[83] The relevant provisions of the *Employment Standards Act* of 1970 (the "**1970 ESA**") then provided:

> 13(2) Notwithstanding subsection 1 [the individual notice requirements], the notice required by an employer to terminate the employment of fifty or more persons in any period of four weeks or less shall be given in the manner and for the period prescribed in the regulations, and until the expiry of such notice the terminations shall not take effect. [84]

75. Section 3 of *Termination of Employment,* Regulation 251 (the "**1970 Regulation**"), set out the prescribed periods of notice that are still in place today, and section 6 of the Regulation stated:

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[81] *Communications v. IKO Industries,* 2012 ONSC 2276 at paras. 15 and 16, CTS BOA, Tab 8
[82] *Ibid,* CTS BOA, Tab 8; *Leys v. Likhanga,* 2012 CarswellOnt 6703 (Ont. L.R.B.) at para. 16, CTS BOA, Tab 9; *Fort Erie Live Racing Consortium and Brewery, General & Professional Workers' Union (SEIU, Local 2), Re,* 2013 CarswellOnt 4491 (Ont. Arb.), at para. 17, CTS BOA, Tab 10; and, *Sysco Food Services of Central Ontario and Teamsters, Local 419,* 2015 CanLII 23833 (Ont. Arb.) at pp 5-6, CTS BOA, Tab 11
[83] *An Act to Amend The Employment Standards Act, 1968,* S.O. 1970, c. 45, s. 4, CTS BOA, Tab 42
[84] *Employment Standards Act,* R.S.O. 1970, c. 147, s. 13(2), CTS BOA, Tab 43

> **Where notice is required to be given by an employer under subsection 2** of section 13 of the Act, **the employer shall at the same time notify the Minister in writing**.[85]

76. CTS submits that section 6 of the Regulation required an employer to notify the Minister at the same time notice was required under subsection 2 (at the beginning of the prescribed periods in section 3 of the 1970 Regulation). There is no basis in the language above to support the Plaintiffs' argument that the words "at the same time" meant that notice to the Minister was required at the beginning of any notice provided in excess of the prescribed minimums. Moreover, the Plaintiffs' position is entirely inconsistent with the intent of the legislature in first providing for mandatory notice of termination: to set minimum and specific periods of time by which an employer is required to provide an employee with notice of termination.

77. The Second Reading of these provisions reflects such an intention:

> These are **the basic protections that we want to see available to all** in the province. [...]
>
> I think it is important that we provide these kinds of protections, and that we **establish a scale or a line of thinking for the industry** of the province as a whole." [...]
>
> **What we want to see is that there is time enough** so that we can assist the individual employees to take advantage of the services that are there; the assistance that can be rendered to him to put him into a new job. [...]
>
> **I think it has to be a graduated length of notice dependent upon the number of employees in the plant**, because the greater number of employees there are, then you have a larger number of people chasing the same jobs perhaps.[86]

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[85] *Termination of Employment*, R.R.O. 1970, O. Reg. 251, s. 6 (emphasis added), CTS BOA, Tab 44
[86] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 28th Parl, 3rd Session, No. 107 (24 June 1970) at 4448 and 4450 (Hon. Minister Bales, Minister of Labour) (emphasis added), CTS BOA, Tab 45

78. While CTS does not dispute that the mass termination provisions were designed to ensure employees were provided with a period of time and assistance to secure a new job, CTS submits that the Plaintiffs' submissions on the First and Second Readings of these provisions ignores the legislative intent to create specific and appropriate minimum periods of notice in order to meet these purposes. There is no basis to conclude from these debates that the legislature even considered the possibility of greater notice being provided and if so, whether earlier notice to the Minister would then be required.

The 1987 Amendments

79. Similar language to that of the 1970 ESA remained in place until 1987, when the legislature introduced severance entitlements (and correspondingly provided a definition of "statutory notice period"),[87] and removed the ministerial notice provision (as set out in section 6 of the 1970 Regulation above),[88] providing as follows:

> 40(2a) Where so prescribed, an employer who is required to give notice by subsection (2) [the same wording as subsection 13(2) of the 1970 Act, above],
>
> (a) **shall provide to the Minister, in the prescribed form, such information as may be prescribed**; and
>
> (b) shall, **on the first day of the statutory notice period**, post in the employer's establishment, in the prescribed form, such information as may be prescribed.[89]

80. The language of the 1987 amendments could not be more clear: notification of the Minister and the posting of the Form 1 were required by the beginning of the statutory notice period only. Moreover, the legislative debates surrounding these amendments confirm the legislature's focus on creating appropriate minimum periods of required

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[87] *Employment Standards Amendment Act, 1987*, S.O. 1987, c. 30 [***ESA Amendment Act, 1987***], s. 1(2), CTS BOA, Tab 46
[88] *Regulation to Amend Regulation 286 of R.R.O. 1980*, O. Reg. 200/91, s. 1, CTS BOA, Tab 47
[89] *ESA Amendment Act, 1987, supra* note 87, s. 4(2) (emphasis added), CTS BOA, Tab 46

notice. In fact, at the Second Reading of these amendments, the government expressed concern at lengthening the notice required for mass terminations:

> There are special provisions under the Employment Standards Act which require longer notice periods of between eight and 16 weeks to employees who lose their jobs in mass layoffs. **A lengthening of these periods could place many Ontario employers in the untenable position of having to serve notice of termination on employees before knowing whether such layoffs will be necessary, with the associated uncertainty for workers**. For this reason, the government has chosen not to lengthen the mass-layoff notice periods.[90]

81. Accordingly, the Plaintiffs' assertion that the legislature intended an employer to provide notice to the Minister "as early as possible" and at the beginning of any greater notice period is inconsistent with the emphasis on appropriate minimum periods of notice and with the clear reference to "statutory notice period" in the statute itself.

The 1990 ESA

82. Subsection 40(2a) above became subsection 57(3) in the 1990 version of the *Employment Standards Act* (the "**1990 ESA**");[91] however, the language cited above remained the same. The requirement for the provision and posting of the Form 1 continued to be the beginning of the statutory notice period. Contrary to the Plaintiffs' contention,[92] subsection 57(3) of the 1990 ESA did not state: "where so prescribed, an employer may be required" to give notice. This is a misrepresentation of the language of the statute.

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[90] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 33rd Parl, 2nd Session, No. 27 (15 June 1987) at 22 (Hon. Mr. Wrye) (emphasis added), CTS BOA, Tab 48
[91] *Employment Standards Act*, R.S.O. 1990, c. E. 14, CTS BOA, Tab 49
[92] See Plaintiffs' factum, para. 112

The ESA 2000

83. In July 2000, the Ontario government released a consultation paper proposing amendments to the 1990 ESA (the "**Consultation Paper**").[93] In respect of termination and severance requirements under the 1990 ESA, the Consultation Paper stated:

> **The government is proposing to make no major changes** to the notice of termination and severance provisions in the act. **A number of minor changes would be made to ensure greater consistency in definitions** and application of the termination and severance provisions.[94]

84. Accordingly, subsection 57(3) became subsection 58(2) and was amended to provide as follows:

> 58(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.[95]

85. Section 58 has not been amended since the ESA 2000 came into force in 2001.

86. CTS submits that the amendments above were minor and administrative in nature. The removal of the reference to "statutory" was simply for the purpose of clarity. "Statutory" was redundant in light of the definition of "statutory notice period" in subsection 1(1) (as discussed in paragraphs 61-68 above). The Consultation Paper and the absence of any legislative debate around the amendments illustrate that there was no

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[93] *Time for Change: Ontario's Employment Standards Legislation: Consultation Paper*, Ministry of Labour, Government of Ontario, July 2000 [***Consultation Paper***], CTS BOA, Tab 50
[94] *Ibid*, at p. 13, CTS BOA, Tab 50
[95] *ESA, 2000, supra* note 56, s. section 58(2), CTS BOA, Tab 39

intention to implement such a major change as requiring Ministerial notice and Form 1 posting requirements to apply to any greater notice period provided.

87. The Plaintiffs rely on *Bathurst Paper Ltd. v. Minister of Municipal Affidavits of New Brunswick*[96] and *R. v. Ulybel Enterprises Ltd.*,[97] in addition to other similar jurisprudence, to argue the opposite: that the removal of the word "statutory" and the absence of any Hansard evidence must mean that the legislature intended 58(2) to apply to a longer notice period than the minimum standard. However, the Plaintiffs have mischaracterized and misapplied this jurisprudence:

(a) First, in *Ulybel*, Iaccobucci J. did not, as the Plaintiffs suggest, rely on the absence of a Hansard explanation to find that the removal of certain words in a provision meant that Parliament acted purposively to indicate a different statutory meaning. In fact, Iaccobucci J. found that while the legislative debates did not make specific reference to the provision at issue, they offered insight that would support a broader interpretation of the legislation.[98] This case does not stand for the proposition that the removal of certain words in a provision, coupled with the absence of any Hansard explanation, means that a different statutory interpretation was intended.

(b) Second, both *Bathurst* and *Ulybel* stand for the proposition that: "legislative changes may reasonably be viewed as purposive, unless there is internal or admissible external evidence to show that only language polishing was intended."[99] CTS submits that the Consultation Paper is clear evidence that only "language polishing" was intended in this case.

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[96] *Bathurst Paper Ltd. v. Minister of Municipal Affidavits of New Brunswick*, [1972] S.C.R. 471 [***Bathurst***], Plaintiffs' Book of Authorities (**"Plaintiffs' BOA"**), Tab 52
[97] *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 [***Ulybel***] Plaintiffs' BOA, Tab 39
[98] *Ibid* at 33-34, Plaintiffs' BOA, Tab 39
[99] *Bathurst, supra* note 96 at 12, Plaintiffs' BOA, Tab 52; *Ulybel, supra* note 97 at 34, Plaintiffs' BOA, Tab 39

88. Accordingly and in light of the above, CTS submits that the legislative history supports its position that the legislature intended the requirements of section 58(2) to apply only to the minimum required statutory notice periods.

(iii) Flaws and Misrepresentations in the Plaintiffs' Position

(A) Inconsistent Interpretations of "Notice Period"

89. In order for the Plaintiffs' position regarding section 58(2) to be supported, one of the following two interpretations of "notice period" in section 58(2) must be accepted by this Honourable Court:

(a) "Notice period" *only* means a greater period of notice in excess of the prescribed minimum; or,

(b) "Notice period" means *either* the prescribed minimum period or a greater notice period than the prescribed minimum, depending on which is actually provided by an employer.

90. While it is unclear which of these interpretations the Plaintiffs are advancing, both interpretations are fundamentally flawed and are entirely at odds with the legislature's intention to provide for uniform minimum standards and appropriate minimum periods of notice for employees in cases of mass termination.

91. We assume the Plaintiffs' do not intend to advance the interpretation under paragraph 89(a) above as section 58(2) would then only apply to a greater notice period, and not to situations where only the prescribed minimum notice was provided.

92. However, the interpretation of "notice period" set out at paragraph 89(b) is also implausible as it is inconsistent with two core arguments relied on by the Plaintiffs to support their position, as follows:

(a) The Plaintiffs emphasize that "no purpose or benefit" is served by providing notice to the MOL at the beginning of the statutory notice period, as it is the "eve of the closure".[100] The upshot of this argument is that where an employer provides only the prescribed notice period under subsection 58(1) (as an employer is explicitly permitted to do) and not some longer notice period, employees derive no benefit from and there is no purpose to the procedural requirements under section 58(2).

(b) Second, the Plaintiffs argue that "notice period" and "statutory notice period" are two separately defined terms.[101] Setting aside the fact that only "statutory notice period", not "notice period", is a defined term, the Plaintiffs repeatedly emphasize that these terms are used purposely to have different meanings. This position is incompatible with "notice period" as meaning both the statutory notice period or a greater notice period depending on which is provided.

93. In light of the foregoing, CTS submits that the Plaintiffs have failed to advance a consistent, coherent, or logical statutory interpretation of "notice period" to support its position that CTS was required to submit the Form 1 to the MOL by April 17, 2014.

(B) Misrepresentations

94. In an attempt to bolster their argument with respect to the definition of "notice period" under subsection 58(2), the Plaintiffs assert that section 60 of the ESA requires an employer to "freeze" wage rates, benefits and terms of employment during any notice period provided by the employer, whether it be the required minimum period of notice, or a longer notice period.[102] In order to support this position, the Plaintiffs rely on July 24,

[100] See Plaintiffs' factum, paras. 78, and 120 – 127
[101] See Plaintiffs' factum, paras. 87, 92-93, and 95-97
[102] See Plaintiffs' factum, paras. 82 and 94

2015 MOL reasons in *Gill v CTS*,[103] and claim that in that decision an MOL employment standards officer held that, once CTS gave the April 17, 2014 notice, it had to comply with the section 60 freeze. This conclusion is nowhere to be found in that decision. In fact, the decision contains no reference to section 60 of the ESA.

95. There is no jurisprudence which supports the position that when a greater notice period than the minimum standard is provided, the section 60 freeze applies throughout the greater notice period. The language of section 60 is clear that the freeze only applies "during a notice period under section 57 or 58".[104] As discussed previously, those sections set out specific required minimum notice periods. There is no basis to conclude that the freeze applies to a notice period provided in excess of those required under sections 57 and 58. The Manual further supports CTS' position in this respect:

> **Section 60(1) sets out the employer's obligations** with respect to maintaining terms and conditions of employment and payment of wages and benefit plan contributions **during the statutory notice period** where notice of termination is given. **The obligations set out in this section apply *only* [emphasis in original] to the statutory notice period. Where an employer gives notice that is greater in length than the statutory notice, these obligations will not apply to the part of the notice period that precedes the statutory notice period.** [...][105]

96. The Plaintiffs further misrepresent Friesen's study of Canadian workers and various provincial notice of termination laws[106] in support of their conclusion 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

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[103] *Gill v CTS* – Reasons for Decision [CTS Compendium, Tab 15]
[104] *ESA, 2000, supra* note 56, s. 60, CTS BOA, Tab 39
[105] *Manual, supra* note 77, ch. 19.8, p. 19-55 (emphasis added), CTS BOA, Tab 41
[106] J. Friesen, "Mandatory Notice and the Jobless Durations of Displaced Workers", 50 Indus. & Lab. Rel. Rev. 652 [***Friesen***], Plaintiffs' BOA, Tab 55

terminating employer.[107] In fact, the Friesen study reviewed the minimum mass termination notice requirements provided for under provincial legislation in those jurisdictions, and only compared employees who received mass termination notice to those who received individual notices of layoff. The study did not compare the effect of an employer's provision of greater periods of notice to an employer's provision of the minimum notice periods required under mass termination provisions, nor did it consider the effect of procedural requirements such as the provision and posting of the Form 1, or the provision of adjustment services. In fact, the study explicitly states that the benefit to workers of notice laws is conferred by the existence of legislation providing for notice, rather than by the amount of notice to which an individual worker is entitled.[108] Accordingly, CTS submits that this study is irrelevant to the issue in dispute and does not support the Plaintiffs' position that "notice period" under subsection 58(2) should be interpreted as referring to a greater period than the minimum required by the ESA.

97. Finally, the Plaintiffs incorrectly assert that CTS' interpretation would mean that the ESA mandates notice to the MOL "far later than what is required federally and in other provinces."[109] While the employment standards legislation in other provinces and the federal jurisdiction is irrelevant to the interpretation of the ESA, the Plaintiffs' assertion misrepresents the requirements of other Canadian provincial and federal employment standards legislation.

98. According to the Plaintiffs, in cases of mass termination where an employer provides greater notice of termination than that required by minimum standards

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[107] See Plaintiffs' factum, para. 125
[108] *Friesen*, *supra* note 106 at p. 664, Plaintiffs' BOA, Tab 55
[109] See Plaintiffs' factum, paras. 126 to 131

legislation, the legislation in Nova Scotia, Newfoundland, Manitoba, British Columbia, and the federal jurisdiction, all mandate that the employer notify the responsible provincial or federal minister at the beginning of the greater notice period provided. The relevant statutory provisions actually do not support this conclusion.

99. Subsection 72(2) of Nova Scotia's *Labour Standards Code*[110] requires a specific minimum period of "notice" in cases of mass terminations, and subsection 75(2) states as follows: "Where an employer is required by subsection (2) of Section 72 to give notice he shall at the same time inform the Minister in writing of any such notices."[111]

100. In Newfoundland's *Labour Standards Act*,[112] section 57 sets out a specific minimum period of "notice of intention to terminate" and subsection 57(4) provides as follows: "[w]here notice of intention to terminate contracts of service are given by an employer under this section, the employer shall, immediately after the notices are given, notify the minister [...]".[113] "Notice" under the Code and "notice of intention to terminate" under this Act are not defined terms. Each respective provision requiring notice to the Minister refers to the section setting out the minimum periods required. There is no basis to conclude that these provisions require notice to the Minister at the beginning of any notice period provided in excess of the minimum standard, nor is there any jurisprudence interpreting them as such.

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[110] *Labour Standards Code*, R.S.N.S. 1989, c. 246, CTS BOA, Tab 51
[111] *Ibid*, s. 75(2), CTS BOA, Tab 51
[112] *Labour Standards Act*, R.S.N.L. 1990, C L-2, CTS BOA, Tab 52
[113] *Ibid* s. 57(4), CTS BOA, Tab 52

101. In Manitoba, subsection 67(1) of *The Employment Standards Code*[114] states that "the employer must give the minister at least the following amount of written notice"[115] and subsequently sets out specific minimum periods depending on the number of employees whose employment will be terminated. Similarly, under the *Canada Labour Code*,[116] subsection 212(1) requires an employer to "give notice to the Minister, in writing, of his intention to so terminate at least sixteen weeks before the date of termination [...]."[117] It is a complete misrepresentation of the legislation to assert, as the Plaintiffs have, that these provisions require notice at the beginning of any greater notice period provided when these provisions explicitly set out specific required minimum periods of notice to the Minister.

102. Lastly, subsection 64(1) of British Columbia's *Employment Standards Act* (the "**BC Act**")[118] requires the employer to give "notice of group termination" to the minister, and subsection 64(3) states: "the notice of group termination must be given as follows: [...]" and proceeds to set out the specific minimum required periods of notice.[119] The Plaintiffs assert that in *CAIMAW, Local 4 v BC (DESB) (Wolverine)*,[120] the BC Court of Appeal held that this section of the BC Act requires ministerial notice at the start of whichever notice period is provided to employees. This is not the case.

103. In *CAIMAW*, employees received notice of termination under a collective agreement. Subsequently, the BC legislature enacted the mass termination provisions

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[114] *The Employment Standards Code*, C.C.S.M. c. E110, CTS BOA, Tab 53
[115] *Ibid*, s. 67(1), CTS BOA, Tab 53
[116] *Canada Labour Code*, R.S.C., 1985, c. L-2, CTS BOA, Tab 54
[117] *Ibid*, s. 212(1), CTS BOA, Tab 54
[118] *Employment Standards Act*, RSBC 1996, c 113, CTS BOA, Tab 55
[119] *Ibid*, s. 64(3), CTS BOA, Tab 55
[120] *CAIMAW, Local 4 v. BC (DESB) (Wolverine)*, 1993 CarswellBC 156 (B.C.C.A.), Plaintiffs' BOA, Tab 51

which are now section 64 of the Act. The union argued that the mass termination provisions should apply retroactively (as they provided for significantly more notice than what was provided for under the collective agreement). The BC Court of Appeal disagreed and held the notices of termination under the collective agreement to be valid. The BC Court of Appeal did not even consider the issue of when ministerial notice should be provided, let alone whether it should be provided at the beginning of a notice period provided in excess of the minimum standard.

(iv) Failure to Provide the Form 1 at the Beginning of the Working Notice Period Does not Invalidate that Notice Period

104. Even if Plaintiffs' interpretation of the Form 1 provisions of the ESA was correct, a breach of the ESA does not void the entire working notice period.

105. To determine the effect of a breach of the Form 1 provisions, it is not necessary to look beyond the ESA. The effect of a breach of section 58(2)(a) is specifically contained within the remedial provision at section 58(4) of the ESA. As set out in paragraphs 69 -70 above, section 58(4) only applies to the prescribed notice required by section 58(1), and not to any longer period of notice.

106. The case law cited by the Plaintiffs in support of their proposition that the entire working notice period must be invalidated does not, in fact, support this proposition.

107. First, in *Machtinger*, the Supreme Court of Canada held that a termination provision that is in breach of the ESA is "null and void" and cannot be used as evidence of the parties' intention to contract for a shorter notice period.[121] *Machtinger* does not stand

[121] *Machtinger*, *supra* note 54 at paras. 33-34, CTS BOA, Tab 3

for the proposition that a breach of the ESA invalidates any period of notice that has already been provided and this proposition is clearly not supported by other case law. For example, in *Carpenter v. Brains II Canada Inc.*, the Ontario Superior Court struck out a termination provision where it was in breach of the ESA but nevertheless credited the employer for eight weeks of working notice already provided in calculating wrongful dismissal damages.[122]

108. Second, the Plaintiffs' reliance on section 6 of the Regulation and the *Di Tomaso v. Crown Metal Packaging Canada LP*[123] is misplaced. Section 6(1) of the Regulation allows an employer to provide employees who have received a notice of termination with up to 13 weeks of temporary work without having to issue further notice of termination. In *Di Tomaso*, the plaintiff received five termination letters, four of which extended the date of the termination of his employment from the original date in November 6, 2009, until February 26, 2010. The court found the extensions breached section 6(1) and ordered fresh notice of termination be provided from the date of the last extension.

109. The *Di Tomaso* case concerns the provision of notice of termination. In ordering fresh notice, the court held that the purpose of section 6 of the Regulation was to ensure that "there would be no uncertainty for an employee as to when his employment would finally end."[124] This purpose is consistent with case law providing that in order to be effective, notice of termination must be specific, unequivocal and clearly communicated

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[122] *Carpenter v. Brains II Canada Inc.*, 2015 ONSC 6224 at para. 29, aff'd 2016 ONSC 3614, CTS BOA, Tab 12
[123] *Di Tomaso v. Crown Metal Packaging Canada LP*, 2011 ONCA 469 at para. 19 [***Di Tomaso***], Plaintiffs' BOA, Tab 82
[124] *Ibid* at para. 19, Plaintiffs' BOA, Tab 82

to the employee.[125] Where an employer breaches section 6(1), the notice of termination no longer achieves the objectives of unequivocal notice. Accordingly, requiring fresh notice of termination is a logical remedy.[126]

110. By contrast, the Form 1 is not intended to replace or act as notice of termination. This point was expressly confirmed in *St. Laurent v. Kelsey Hayes Canada*.[127] In *St. Laurent*, the claimants sought to invalidate the notice of termination provided to them on the basis that the employer had failed to post the Form 1 in the workplace. In denying the claim, the adjudicator noted that the employees had received individual notice of termination and as a result, "[t]he Form 1 would not have added anything of much immediate significance to individual employees in light of the individual notices provided."[128] As a result, the failure to post the Form 1 could not vitiate any individual notices that were provided. The adjudicator went on to note, "...the fact remains that the Form 1 is not on its face a notice of termination but provides certain information with respect to the gross numbers of persons being laid off and any adjustment programs being offered."[129] The adjudicator went on to find that while this information is not "unimportant" it is not central to the purpose of the mass termination provisions in the ESA, which are to ensure employees "are in receipt of the concrete benefit and dignity of timely notice of their termination."[130]

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[125] *Gregg v. Freightliner Ltd.*, 2004 BCSC 1574 at paras. 35-36, CTS BOA, Tab 13
[126] The other cases cited by the Plaintiffs are similarly concerned with "certainty" of notice. See for example: *Thambapillai v. Labrash Security Services Ltd.*, 2016 ONSC 6068 at paras. 26-30, Plaintiffs' BOA, Tab 84
[127] *St. Laurent v. Kelsey Hayes Canada*, 1997 CarswellOnt 5410 (Ont. E.S.B.) [***St. Laurent***], CTS BOA, Tab 14
[128] *Ibid* at para. 8 (emphasis added), CTS BOA, Tab 14
[129] *Ibid* at para. 10 (emphasis added), CTS BOA, Tab 14
[130] *Ibid* at para. 32 (emphasis added), CTS BOA, Tab 14

111. Here, there is no issue of uncertainty with respect to the Plaintiffs' notice of termination. The First Severance Letters unequivocally informed the Plaintiffs of the termination of their employment with CTS. There is no evidence that any of the Plaintiffs were unclear about the fact that their employment was being terminated. In fact, on cross-examination, the affiants confirmed that they knew of the termination of their employment with CTS by, at the latest, April 17, 2014 when the First Severance Letters were delivered.[131] Further the extensions to the Separation Dates in the First Severance Letters were not in breach of section 6(1).[132]

112. The Plaintiffs' comparison of an unclear individual notice of termination with the procedural requirement to notify the MOL of a mass termination is not helpful to the issue to be decided in this motion. CTS' failure to file the Form 1 with the MOL or post the Form 1 in the workplace by May 1, 2015 had no effect on the certainty or quality of the notice of termination provided to the Plaintiffs. As such, the significant working notice periods at issue should not be invalidated.

(E) MANNER OF SHUTDOWN DOES NOT VOID WORKING NOTICE

113. As an alternative to their Form 1 argument, the Plaintiffs seek to completely void their entire working notice periods because:

(a) Plaintiffs were "forced" to work excessive overtime and weekend hours during the working notice period.

(b) CTS gave "false, misleading and incomplete information" about an employee's right to resign and collect ESA severance pay, resulting in

[131] Park Cross, q. 125-127, p. 28; Lipton Cross, q. 63-92, p. 16-23; Wood Cross q. 18-20, p. 6 [CTS Compendium, Tabs 22, 23, 24]
[132] See paragraphs 192-193 of this factum where the Plaintiffs' argument in this respect is briefly addressed

employees being effectively "chained to their desks" under the false impression that they had to stay employed at CTS in order to receive ESA severance pay.

(c) CTS did not communicate to employees they could take time off to seek employment.

114. There is no legal precedent to void a working notice period for any of the reasons cited above. Further, there is no factual basis to support these submissions.

(i) Overtime Does Not Void Working Notice

115. The Plaintiffs cite *Medis Health and Pharmaceutical Services Inc. v. Bramble*[133] for the proposition that where an employee is "literally chained to her desk" and working large amounts of overtime, an employer should not be given credit for any period of working notice provided.[134]

116. *Bramble* is a 1999 decision of the New Brunswick Court of Appeal. Although *Bramble* is often cited for its analysis of the diminishing importance of the "character of employment" factor in determining the length of reasonable notice), it has not once been cited for the proposition that an employer should not be given credit for working notice where an employee was unable to search for work during that period. This proposition is not supported by the finding in *Bramble* and further, has been expressly rejected in Ontario.

117. In *Bramble,* the New Brunswick Court of Appeal considered an employer's appeal from a trial decision finding that six former employees were entitled to notice periods

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[133] *Bramble v. Medis Health & Pharmaceutical Services Inc.* (1999), 214 N.B.R. (2d) 111 (C.A.) [***Bramble***], Plaintiffs' BOA, Tab 62 (For both trial and appeal decision)
[134] See Plaintiffs' factum, paras. 199 to 204

ranging from 13 to 24 months. In setting the notice periods, the lower court rejected the employer's argument that outplacement services provided during a working notice period should be used as a factor to reduce the amount of reasonable notice to which an employee is entitled. The court found that during the 15 week working notice period, the employees "could not actively seek work during...because they all continued to work diligently."[135] Even so, the court deducted the 15 week working notice period from each award of reasonable notice.

118. On appeal, the employer challenged the notice periods set by the trial judge. In dismissing the employer's appeal, the Court of Appeal determined that it was not "at liberty to disregard" the trial judge's finding trial decision that the employees were not able to search for new work during the working notice period. Even so, with one exception, the Court of Appeal did not vary the notice periods awarded by the trial judge which factored in the working notice provided by the employer.[136]

119. In any event, even if *Bramble* stood for the proposition the Plaintiffs' seek to rely on, given the evidence at trial, that proposition would be that requiring an employee to work their regular hours during a working notice period invalidates the notice period.

120. *Norrad v. LaHave Equipment Ltd*[137] is the only other case cited by the Plaintiffs. *Norrad* is a 1995 lower court decision from the New Brunswick Court of Queen's Bench and is the only case cited in the *Bramble* decision in support of its proposition on working notice. In *Norrad*, the court held that an employer should not be credited for a four week

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[135] *Bramble*, *supra* note 133 at paras 21-22, Plaintiffs' BOA, Tab 62 (trial decision)
[136] *Ibid* at para. 77, Plaintiffs' BOA, Tab 62 (appeal decision)
[137] *Norrad v. LaHave Equipment Ltd* [1995] A.N.B. No. 522 (Q.B.) [***Norrad***], Plaintiffs' BOA, Tab 112

working notice period where the employee was expected to "report to work to complete the odds and ends" of a transaction.[138] The court provided no analysis or case in support of this finding. Aside from *Bramble*, the *Norrad* case has not once been cited with approval.

121. To extend the suggested proposition from *Bramble* and *Norrad* would be inconsistent with the basic principles of reasonable notice of termination applied by courts everywhere else in Canada.

122. Ontario courts have confirmed that there is nothing wrong or unfair about requiring employees to actually perform work during a working notice period, even if that work makes it more difficult for an employee to find new employment. This point is confirmed by the Ontario Court of Appeal in *Taylor v. Dyer Brown*, as follows:

> While the purpose of the notice period is to provide time for employees to find alternate employment, a task made more difficult while the employee undertakes to fulfill the terms of working notice, we are of the view that there is no functional difference at law between working notice and payment in lieu of notice.[139]

123. The case law in Ontario also confirms that employers are entitled to expect full attendance during the working notice period and remain entitled to determine how their business is to be conducted. In *Rombis. v. Zeppieri & Associates,* the Ontario Superior Court of Justice held as follows:

> The court follows the decision in *Kontopidis v. Coventry Lane Automobiles Ltd.* (2004), 33 C.C.E.L. (3d) 131 (Ont. S.C.J.), in which the Ontario Superior Court of Justice acknowledged that a period of working notice is difficult on both parties and stated that "... the employer is entitled to require full attendance...". and an employer is entitled "... to determine how his

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[138] *Ibid* at para. 7, Plaintiffs' BOA, Tab 112
[139] *Taylor, supra* note 55 at para. 14, CTS BOA, Tab 4

> business shall be conducted." During a period of working notice, an employer is entitled to have the employee continue to honestly and faithfully work in accordance with the interests of the employer and to fully attend work as scheduled.[140]

124. Consistent with this basic principle, in *Deputat v. Edmonton School District No. 7*, the Alberta Court of Appeal confirmed that the duty to mitigate by searching for alternative employment is the same regardless of whether an employee is provided working notice, and therefore has less time to look for a job, or is provided with pay in lieu of notice.[141]

125. Not only is *Bramble* inconsistent with basic principles of working notice, the proposition the Plaintiffs seek to rely on it for has been expressly rejected. For example, in *Waterman v. IBM Canada Ltd.*,[142] the plaintiff relied on *Bramble* in support of his position that his employer should not be credited for one month of working notice where the plaintiff was on a pre-planned vacation and unable to look for a new job during that time. The Court rejected the plaintiff's position, finding that a period of time during which an employee is unable to look for new work does not invalidate a working notice period.[143]

126. Other than *Bramble* and *Norrad*, there is not a single legal authority for the proposition that a working notice period is invalidated where employees work their regular hours during the notice period, where employees work overtime during the working notice period, or where employees are unable to look for a new job during the working notice period for any other reason.

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[140] *Rombis v. Zeppieri & Associates*, [2007] O.J. No. 2291 (Ont. S.C.J.) at para. 21 (emphasis added), CTS BOA, Tab 15. See also *Kontopidis v. Coventry Lane Automobiles Ltd.*, [2004] O.J. No. 1979 (Ont. S.C.J.) [***Kontopidis***] at para. 33, CTS BOA, Tab 16.
[141] *Deputat v. Edmonton School District No. 7*, 2008 ABCA 13 at para. 27, CTS BOA, Tab 17
[142] *Waterman v. IBM Canada Ltd.*, 2010 BCSC 376 [***Waterman***], CTS BOA, Tab 18
[143] *Ibid* at paras. 25-27, CTS BOA, Tab 18

127. The Plaintiffs concede in their factum that this issue has been rarely, if ever, litigated. Given the clear principles of working notice, the reason for this is clear. To invalidate working notice simply because employees were required to report to work or, at their option chose to work additional shifts, would turn the concept of working notice completely on its head.

128. The Plaintiffs cite three additional cases for a related proposition that "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".[144] None of the cases the Plaintiffs cite, in fact, stand for this proposition.

129. In *Loehle v. Purolator Courier Ltd.*,[145] the issue was whether the plaintiff had been constructively dismissed after receiving a demotion, and if so, whether the plaintiff was required to work in the demoted position to mitigate his damages. The court found that the plaintiff had been constructively dismissed but rejected the plaintiff's argument that the stress from his prior position was a valid reason for rejecting the new position in mitigation of his damages.[146] The decision is in no way supportive of the proposition that Ontario courts consider an employee's "opportunity" to find work during a working notice period.

130. In *Kontopidis v. Coventry Lane Automobiles,*[147] the court considered the fact that the employer had given the plaintiff an "opportunity to search for employment during the notice period" in support of its finding that the case did not warrant bad faith or punitive

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[144] See Plaintiffs' factum, para. 202, and *Loehle v. Purolator Courier Ltd.* [2008] O.J. No. 2462 (Ont. S.C.J) [***Loehle***], Plaintiffs' BOA, Tab 113; *Kontopidis, supra* note 140, CTS BOA, Tab 16; and *Cowper v. Atomic Energy of Canada Ltd.*, 1999 CanLii 14853 (S.C.J), affirmed [2000] O.J. No. 1730 (C.A.) [***Cowper***], Plaintiffs' BOA, Tab 115

[145] *Loehle, supra* note 145, Plaintiffs' BOA, Tab 113

[146] *Ibid* at paras. 60-62, Plaintiffs' BOA, Tab 113

[147] *Kontopidis, supra* note 140, CTS BOA, Tab 16

damages.[148] The court gave no consideration to whether a failure to provide these opportunities would invalidate the working notice period.

131. In *Cowper v. Atomic Energy of Canada Ltd.*,[149] the court considered the reasonable notice period for a long service employee and held that 27 months was appropriate. In coming to this decision, the court held that the employer should be credited for 3 months of working notice even though the plaintiff had little time to search for new employment during that period thus expressly rejecting the Plaintiffs' proposition.[150]

(ii) There is No Evidence of "Forced" Overtime

132. Even if the Plaintiffs' proposition was legally supported, there is no evidence to support their exaggerated submissions of having been "forced" to work overtime or "literally chained" to their desks during the working notice period. Further, there is no evidence that any overtime worked had any effect on the Plaintiffs' ability to look for new work during the working notice period.

133. Both Mr. Urban and Ms. Campbell, the Human Resources Generalist at the Streetsville Plant, confirmed that working overtime at CTS was not mandatory. Overtime shifts during the closure of the Streetsville Plant were offered to production employees only based on seniority. Where CTS could not obtain volunteers to work the needed

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[148] *Ibid* at para. 26, CTS BOA, Tab 16
[149] *Cowper, supra* note 144, Plaintiffs' BOA, Tab 115
[150] *Ibid* at paras. 34-35, Plaintiffs' BOA, Tab 115

overtime, CTS had the option to use contract workers who had already been trained at the CTS facility.[151]

134. There was no need to "force" employees to work overtime as Ms. Campbell confirmed that, during the plant closure, contract workers were not often required as a number of CTS employees were more than willing to work the overtime hours available to them.[152] Similarly, Mr. Urban confirmed on cross-examination that no one at CTS ever raised a concern with him that finding people to work overtime was going to be an issue.[153] In fact, Mr. Lipton, the Operations and Technical Service Manager at the Streetsville Plant, and one of the Plaintiffs' affiants, admitted that he even received complaints that Plaintiffs were not getting enough overtime.[154]

135. Further, none of the Plaintiffs' affiants has sworn that they were "forced" to work overtime. Of the nine affidavits sworn by Plaintiffs, only three - Cheryl Aultman, Fred Gill, and Manmohan Bhogal - indicate that they worked any overtime at all.[155]

136. The only evidence the Plaintiffs rely on in support of this position are statements in Mr. Lipton's affidavit alleging that on two occasions, Mr. Urban demanded that employees work overtime because they needed "everyone out" by a certain deadline.[156] Mr. Lipton stated that as a result of these statements, he pressured employees "really really hard" to

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[151] Campbell Affidavit, paras. 18-21; Urban Affidavit, paras. 27-28 [CTS Compendium, Tabs 1 and 2]
[152] Campbell Affidavit, paras 18-22 [CTS Compendium, Tab 2]
[153] Urban Cross, q. 460-464, p. 145-146 [CTS Compendium, Tab 25]
[154] Lipton Cross q. 202-205, p. 49-50 [CTS Compendium, Tab 23]
[155] Affidavit of Cheryl Aultman, sworn October 14, 2016 ("**Aultman Affidavit**"), para. 20-21; Affidavit of Fred Gill, sworn October 14, 2016 ("**Gill Affidavit**"), paras 19-20; Affidavit of Manmohan Bhogal, sworn October 26, 2016 ("**Bhogal Affidavit**"), para. 9 [CTS Compendium, Tabs 5, 7, 9]
[156] Affidavit of Mitchell Lipton, sworn September 28, 2016 ("**Lipton Affidavit**"), paras. 19-21 [CTS Compendium, Tab 8]

work overtime and told them they had no choice.[157] Mr. Lipton's statements were significantly limited on cross-examination:

(a) Mr. Lipton confirmed that for all hourly employees (which included Ms. Bhogal, Ms. Aultman, and Mr. Gill), overtime was completely voluntary.[158]

(b) Mr. Lipton confirmed Ms. Campbell's evidence that where employees were unable to work overtime, CTS had the option to bring in temporary workers.[159]

(c) Mr. Lipton admitted that a second option, if employees could not take the shifts, would have been to cancel the shift altogether.[160]

(d) Mr. Lipton admitted that for the majority of employees at CTS, he did not have to apply any pressure at all to fill overtime shifts because they "needed the money" and therefore chose to take overtime shifts.[161]

(e) Mr. Lipton admitted that the statements in his affidavit with respect to pressuring employees were actually limited to only 18 employees at CTS in the technical department, most of whom were engineers and team leaders and may have been exempt from overtime pay under the ESA.[162]

(f) Despite the "demands" from Mr. Urban, Mr. Lipton admitted he never issued any sort of written warning or suspension letter to any employee for refusing to work overtime, and was never instructed to do so.[163]

137. Further, and contrary to the Plaintiffs' statements in the factum that CTS was under an "exceptionally tight timeline" to close the Streetsville Plant as a result of its sale of the

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[157] Lipton Affidavit, paras. 60-62 [CTS Compendium, Tab 8]
[158] Lipton Cross, q.193-196, p. 48; Hourly Employees Overtime [CTS Compendium, Tabs 23 and 16].
[159] Lipton Cross, q. 164-172, p. 40-43 [CTS Compendium, Tab 23]
[160] Lipton Cross, q. 174-176, p. 40-43 [CTS Compendium, Tab 23]
[161] Lipton Cross, q. 183-191, p. 45-47 [CTS Compendium, Tab 23]
[162] Lipton Cross, q. 188-191, p. 47; q. 198-200, p. 49 [CTS Compendium, Tab 23]
[163] Lipton Cross, q. 284-286, p. 64-65 [CTS Compendium, Tab 23]

Streetsville Plant,[164] Mr. Urban's evidence is that by May 2014, early in the closure process, the deadline for CTS to vacate the Streetsville Plant had already been pushed from March 31, 2015 until December 15, 2015. Mr. Lipton's evidence that Mr. Urban demanded "everyone out" by a certain date is inconsistent with this timeline.[165]

138. In any event, the evidence in this motion is completely insufficient to support the Plaintiffs' submission that as a result of overtime hours, Plaintiffs were too tired to look for new work after their shifts, thereby undermining the purpose of working notice. In fact, the evidence of Mr. Gill demonstrates the opposite. Mr. Gill, one of the three affiants who worked overtime, did in fact find new employment during the working notice period and resigned from his employment at CTS in March 2015.[166]

139. The only evidence the Plaintiffs have to rely on is a single statement from Ms. Bhogal, who, as an hourly employee, voluntarily accepted her overtime shifts. Ms. Bhogal states that when she finished a long shift, it was difficult for her look for new work.[167] This statement, given the voluntary nature of Ms. Bhogal's overtime, is insufficient to invalidate the entire working notice period for all the Plaintiffs.

140. Similarly, there is no evidence to support the Plaintiffs' assertion that as a result of overtime hours, certain Plaintiffs were unable to attend the outplacement sessions held by Right Management. To the contrary, with the exception of Mr. Park, Mr. Lipton and Mr. Tam – none of whom worked any overtime hours – all of the affiants confirmed that they

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[164] See Plaintiffs' factum, paras. 22 and 219
[165] Urban Affidavit, paras. 11-14 [CTS Compendium, Tab 1]
[166] Gill Affidavit, para. 27 [CTS Compendium, Tab 7]
[167] Bhogal Affidavit, para. 9 [CTS Compendium, Tab 9]

attended Right Management sessions.[168] Further, although there is no record of attendance at the sessions, CTS has produced documents indicating that 93 employees were scheduled to attend the first round of Right Management sessions.[169] Not a single affiant has indicated they were unable to attend their scheduled session due to work demands or overtime hours.

141. CTS submits that there is no legal precedent or evidence to support the Plaintiff's position and, accordingly, there is no basis to void the significant working notice period on account of hours worked by the Plaintiffs.

(iii) The Termination Letters Were Not Misleading and Do Not Void Working Notice

142. The Plaintiffs assert that the termination letters delivered by CTS were "false, misleading and incomplete" such that the Plaintiffs were under a false impression that they had to continue working until the end of the working notice period to collect severance pay. On this basis, the Plaintiffs' allege that CTS should be given no credit for any period of working notice provided. The Plaintiffs' position is again unsupported by both legal precedent and the evidence.

143. The relevant portions of the termination letters provided as follows:

> You agree that the payments during the working notice and as outlined in this separation package...include all amounts to which you may be entitled under the Ontario *Employment Standards Act, 2000*, including pay in lieu of notice of termination and severance pay, if applicable.

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[168] Affidavit of Ken Burns, sworn October 14, 2016, para. 15; Aultman Affidavit, para. 26; Affidavit of John Featherstone, sworn October 14, 2016 ("**Featherstone Affidavit**") para. 25; Gill Affidavit, para. 26; Bhogal Affidavit, para.14 [CTS Compendium, Tabs 4,5,6,7,9]

[169] Email from Lynne Campbell re: Outplacement Training [CTS Compendium, Tab 17]

> This separation package is conditional in that for it to be binding upon the Company you must:
>
> > continue to perform your present duties and responsibilities and as further directed by the Company in a diligent and co-operative manner until the Separation Date; and ...
> >
> > sign and return a witnessed copy of the Release...by no later than the third (3rd) day after the Separation Date, but by no earlier than the Separation Date.
>
> We look forward to your continuing commitment and cooperation until the separation date" and "We look forward to continuing to work with you until the separation date.

144. The Plaintiffs rely on *Rubin v. Home Depot Canada Inc.*[170] in support of their position. In *Rubin*, the employee was provided with a termination letter offering 28 weeks' pay in lieu of notice which was said to exceed the employer's obligations under the ESA. In fact, the offer exceeded the employee's entitlement by only 1 week. To secure the offer, the employee was required to sign a release. The employee signed the release on the day of his termination without legal advice. On summary judgment, the employee sought to set aside the release on the basis of unconscionability. In allowing the motion, the court found the employee was under the false impression that if he did not sign the release, he would not receive even his minimum ESA entitlements. The court noted that in accepting the release, the employer took advantage of the plaintiff's lack of legal advice.[171]

145. *Rubin* does not support the proposition that a "misleading" termination letter can invalidate a period of working notice. Instead, it considers whether a release can be set aside when an employee signs it under a false impression about their legal rights. In any event, the facts of *Rubin* can be distinguished as follows:

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[170] *Rubin v. Home Depot Canada Inc.*, 2012 ONSC 3053 [***Rubin***], Plaintiffs' BOA, Tab 120
[171] *Ibid* at paras. 21-23, Plaintiffs' BOA, Tab 120

(a) **The Plaintiffs received legal advice**. The First Severance Letters allowed 21 days to review and obtain legal advice. On cross-examination, the affiants confirmed that they did in fact receive legal advice within 21 days or had no difficulty doing so.[172] Despite having already received legal advice, the Plaintiffs requested additional time to review the Second Severance Letters. CTS also granted this request for an extension to June 13, 2014.[173]

(b) **The Plaintiffs were given opportunities to ask questions**. All of the Severance Letters encouraged employees to speak to Ms. Campbell if they had any questions. There is no evidence that any of the Plaintiffs approached Ms. Campbell to determine what would happen if they did not accept the Separation Package. In fact, on cross-examination, both Ms. Wood and Mr. Park confirmed they never spoke with Ms. Campbell about the Severance Letters.[174]

(c) **The Plaintiffs were advised of their legal rights by CTS**. CTS expressly advised all of the Streetsville Plant employees at a companywide meeting in May 2014 that if they did not accept the Separation Package, their employment would continue until the end of the working notice period, at which point they would receive their statutory entitlement to severance pay, if applicable. An entire slide of the PowerPoint was dedicated to this point.[175] Similarly, an entire slide of the PowerPoint was dedicated to informing employees that if they resigned prior to their last day of employment, they would still receive statutory severance pay provided they resigned during their statutory notice period.[176] The suggestion that the PowerPoint was written in "highly technical language only a lawyer could understand" is false. In fact, on cross-examination, Mr. Lipton, who

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[172] Park Cross, q. 133-136, p. 29-30; Wood Cross, q. 27-29, p. 7-8 [CTS Compendium, Tabs 22 and 24]
[173] Wood Cross q. 82-85, p. 19 [CTS Compendium, Tab 24]
[174] Park Cross, q. 137-139, p. 30; Wood Cross, q. 30—33, p. 8-9 [CTS Compendium, Tabs 22 and 24]
[175] PowerPoint, Slide 7: *What happens if I don't accept the separation package offered to me?* [CTS Compendium, Tab 29]
[176] Powerpoint, Slide 10: *What happens if I leave before the separation date in my letter?* [CTS Compendium, Tab 29]

attended the meeting and did in fact resign during his statutory notice period, confirmed that he understood he could resign within his statutory notice period and still receive severance pay.[177] There is no evidence that any of the Plaintiffs wanted to resign but were unaware of their right to do so and still receive their statutory severance pay.

(d) **With full knowledge of their rights, the Plaintiffs did not accept the Separation Packages.** Unlike in *Rubin*, there is no agreement or release to set aside. The Plaintiffs received working notice of termination and their statutory severance pay.

(e) **The Separation Packages were generous.** In *Rubin*, the court considered the fairness of the offer, which included only one additional week of notice of termination over ESA minimums. In contract, the Separation Packages offered to the Plaintiffs included a significant working notice period and payments in excess of the Plaintiffs' minimum ESA entitlements. As such, even if the Plaintiffs had signed away any rights in accepting the Separation Package – which they did not – they would have done so for a package that was substantially better than the one in *Rubin*.

(f) **The language was not misleading.** Specifically, with respect to the use of the words "may" or "if applicable", there is no evidence that any of the Plaintiffs were confused by the use of either word.

146. The Plaintiffs have not cited a single case considering whether a "false, misleading or incomplete" termination letter can invalidate a working notice period. Further, and as outlined above, there is no evidence that the termination letters were false, misleading or incomplete. As a result, there is no basis to invalidate the lengthy working notice provided to the Plaintiffs.

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[177] Lipton Cross, q. 93-94, p. 23-24 [CTS Compendium, Tab 23]

(iv) Lack of Communication Regarding Job Search Does Not Void Working Notice

147. The Plaintiffs submit that the working notice period should be invalidated on the basis that CTS did not communicate to employees they could take time off to seek employment. In support of this position, the Plaintiffs have not cited a single legal authority. Further, their position is again unsupported by the evidence.

148. It is well established that there is no legal obligation imposed on employers to provide reference letters, outplacement services, employment counselling or other assistance for employees to find new employment during a working notice period.[178] In fact, in *Mattiassi v. Hathro Management Partnership,* the Ontario Superior Court of Justice described an employer allowing an employee time off to attend job interviews as "generous", stating as follows:

> I realize that in this case the defendants were very generous and offered the plaintiff the opportunity to seek other employment while she was still working without any loss of pay. However, generally speaking, while an employee is working during the working notice, the employee would be expected to continue to carry out his employment duties to earn his salary and the employer would at the same time expect that the employee would fulfill his duties while he is being paid for working.[179]

149. No Canadian court has imposed a requirement on an employer to expressly advise employees in a termination letter that they can take time off to attend interviews in a working notice period. Accordingly, the fact that CTS removed this language from the First Severance Letters does not attract any liability.

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[178] *Beatty v. Canadian Mill Services Assn.*, 2003 BCSC 1053 at paras. 85-87, CTS BOA, Tab 19. See also *Shinn v. TBC Teletheatre B.C., A Partnership*, 2001 BCCA 83 at paras. 11-12, CTS BOA, Tab 20; and *McNevan v. AmeriCredit Corp.*, 2008 ONCA 846 at para. 57 [***McNevan***], CTS BOA, Tab 21

[179] *Mattiassi v. Hathro Management Partnership,* [2011] O.J. No. 4774 (Ont. S.C.J.) at para. 50 (emphasis added), CTS BOA, Tab 22

150. In any event, the evidence contradicts the Plaintiffs' position that they were not supported in their job search efforts by CTS. Specifically,

(a) The First and Second Severance Letters offered employees a Letter of Employment to assist with securing new employment.[180]

(b) Employees were expressly advised at the May 12, 2014 meeting that they could start career transition activity during the working notice period. Again, an entire slide of the PowerPoint was dedicated to this point.[181]

(c) Without legal obligation to do so, CTS spent over $61,000 on outplacement services and held 12 group outplacement sessions for hourly employees during the working notice period, totalling eight hours of counselling per hourly employee.[182]

(d) Despite the repeated mischaracterizations in the Plaintiffs' factum that outplacement services were provided at the "11th hour" and "at the very end" of the working notice period, at the request of the Plaintiffs, the Right Management sessions began in January 2015 – over five months prior to the first separation date.[183]

(e) The Right Management services were provided to all hourly employees, even those who had not accepted their separation package.[184] The services were provided during working hours and employees who attended were paid for attending the sessions.[185] On cross-examination, the affiants confirmed that the Right Management sessions were helpful to their job

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[180] Wood Cross, q. 205-209, p. 46-47 [CTS Compendium, Tab 24]
[181] PowerPoint, Slide 5: *Can I start my career transition activity prior to my separation date?* [CTS Compendium, Tab 29]
[182] CTS Answers to Undertaking; Cross- Examination of John Featherstone ("**Featherstone Cross**") q. 64-65, p. 13-14. [CTS Compendium, Tabs 30 and 27]
[183] Urban Affidavit, para. 40; Campbell Affidavit, para. 12 [CTS Compendium, Tabs 1 and 2].
[184] Campbell Affidavit, para. 15 [CTS Compendium, Tab 1]
[185] Wood Cross, q. 121-123, p. 26-27; Featherstone Cross, q. 62-63, p. 13 [CTS Compendium, Tabs 24, 27]

search.[186] They also confirmed that they never raised any complaints about the quality of the services during their employment.[187]

(f) In addition to the Right Management services, prior to their separation date, all CTS employees were invited to sessions delivered by the MOL providing information on applying for employment insurance, and on other services available through Employment Ontario.[188]

151. As evidence of the assistance outlined above, a number of the affiants confirmed that they did in fact commence their job search during the working notice period, contradicting the Plaintiffs' position that they were not aware of their right to do so. For example:

(a) When asked whether he commenced his job search efforts while still employed at CTS, Mr. Lipton advised that he "absolutely" did and he was told that "that was what [he] *should* be doing."[189]

(b) In addition to Mr. Lipton, (i) Mr. Gill started his job search during the working notice period and in fact secured new employment prior to his end date; [190] (ii) Mr. Park started his job search during as early as February 2014, when the closure was first announced, applied for a "considerable" amount of positions and attended two interviews;[191] and (iii) Ms. Wood started her job search during the working notice period, including by signing up to job search engines and applying for a "few" positions. Ms. Wood also was able to maintain a part-time job through the working notice period.[192]

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[186] Wood Cross, q. 128-132, p 28-29; Featherstone Cross, q. 66-70, p. 14-15 [CTS Compendium, Tabs 24, 27]
[187] Wood Cross, q. 137-143, p. 30-31; Featherstone Cross, q. 72-73, p. 15 [CTS Compendium, Tabs 24, 27
[188] Campbell Affidavit, para. 29-30 [CTS Compendium, Tab 2]
[189] Lipton Cross, q. 275-276, p. 62-63 [CTS Compendium, Tab 23] (emphasis added)
[190] Gill Affidavit, para. 27 [CTS Compendium, Tab 7]
[191] Park Cross, q. 222-227, p. 49-50 [CTS Compendium, Tab 22]
[192] Wood Cross, q. 156-159, p. 34-35; q. 167-170, p. 37-38 [CTS Compendium, Tab 24]

(c) There is no evidence that any employees were ever denied requests for time off to attend interviews.[193] In fact, although none of the affiants requested time off, Mr. Lipton confirmed that he did not think any request for time off for interviews during working hours would have been denied.[194]

152. On cross-examination, the only affiant who confirmed he did not commence his job search during the working notice period was John Featherstone, one of the representative plaintiffs. Mr. Featherstone attended the May 12, 2014 meeting where employees were expressly told they could commence their job search during the working notice period and Mr. Featherstone worked no overtime hours.[195] Despite this, Mr. Featherstone's job search efforts did not commence until September 25, 2015, over three months after his separation date. Since September 2015, and until his cross-examination in March 2017, Mr. Featherstone had not applied for a single job.[196] Any suggestion that Mr. Featherstone would have started his job search earlier had he received different information from CTS is simply untenable.

153. The Plaintiffs again have not cited a single case invaliding a working notice period for a failure to assist with job search efforts. Further, and as outlined above, there is no evidence to support their submissions in this respect.

(F) CTS MUST BE GIVEN CREDIT FOR SEVERANCE PAY

154. In addition to invalidating the entire working notice period, the Plaintiffs assert that CTS should be given "no credit" for the severance payments made to the Plaintiffs on the basis that the severance payments were a form of "stay" or "retention" bonus. Consistent

[193] Park Cross-Examination, q. 228-229, p. 50; Wood Cross, q. 160-161, p. 35 [CTS Compendium, Tabs 22, 24]
[194] Lipton Cross, q. 276-279, p. 63 [CTS Compendium, Tab 23]
[195] Featherstone Affidavit, para. 15; Featherstone Cross, q. 78-80. p. 16. [CTS Compendium, Tabs 6, 27]
[196] Featherstone Cross, q. 82-96, p. 17-19 [CTS Compendium, Tab 27]

with their other positions in this motion, the Plaintiffs' position is not supported by legal precedent or the evidence.

155. The two cases relied on by the Plaintiffs come from the Ontario Labour Relations Board (the "**Board**") and are easily distinguished. In *Assurant Group v. Fillion*[197] the employee received six months' notice of the company's intention to move its operations from Toronto to Kingston. Employees who chose to stay with the company received a bonus calculated as 25% of their base salary. The communication to the employees expressly referred to the payment as a stay-bonus, not severance pay. The employee agreed to the transfer however later changed her mind. Her employment was terminated at the end of the six month notice period. The employer took the position that the employee was not entitled to severance pay on the basis that the notice provided, along with the 25% bonus, constituted a greater right or benefit under section 5(2) of the ESA and satisfied her entitlement to both notice and severance.

156. In ordering severance pay to be paid, the Board relied on the fact that, in the letters communicating the change of location, there was no indication that the stay-bonus was intended to satisfy the severance pay requirement under the ESA. Instead, the express stated purpose of the bonus was to retain employees. Further, the Board noted the stay-bonus was not calculated using the ESA severance pay formula.[198]

157. Unlike the *Assurant Group* case, the severance payments made by CTS to the Plaintiffs were made in satisfaction of their legal entitlement to severance pay and not as

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[197] *Assurant Group v. Fillion*, 2004 CanLII 5721, aff'd [2006] O.J. No. 843 Plaintiff's BOA, Tab 123
[198] *Ibid* at para. 18, Plaintiffs' BOA, Tab 123

a reward for staying until the end of the working notice period. The following evidence demonstrates this clearly:

(a) Employees who were offered bonuses similar to the bonus in *Assurant Group* entered into separate retention agreements with CTS which specifically provided for "retention bonuses."[199]

(b) The First and Second Severance Letters specifically state that the Separation Payments included the Plaintiffs' entitlement to severance pay under the ESA.[200] Further, on cross-examination, Mr. Park confirmed his understanding that the Separation Payments outlined in the First and Second Severance Letters were intended to be in satisfaction of his entitlement to severance pay under the ESA.[201]

(c) Mr. Urban confirmed on cross-examination that the Separation Payments were intended to comply with the Plaintiffs' legal entitlements, and were not intended as incentive payments, as follows:

> Q: 508: So the April 17 letter, for example, there are monies that are paid if you stay until the end. You saw those monies as an incentive to stay because you wanted those employees to stay?
>
> A:. Yeah. We wanted the employees to stay, but I don't – I don't – I didn't think of it as an incentive or otherwise. I looked at it as being their obligation to Canadian law that we were advised to complete and then exceeding it.[202]

(d) Employees were expressly advised at the May 12, 2014 meeting that if they resigned prior to their last day of employment, they would still receive

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[199] Urban Affidavit, para. 16. See also: CTS Answers to Undertaking [CTS Compendium, Tabs 1 and 30]
[200] First and Second Severance Letters [CTS Compendium, Tabs 12 and 13]
[201] Park Cross, q. 247-252, p. 54-55 [CTS Compendium, Tab 22]
[202] Urban Cross, q. 508, p. 159-160 [CTS Compendium, Tab 25]

statutory severance pay provided they resigned during their statutory notice period.[203]

(e) The payments actually made to the Plaintiffs at the end of the working notice period were calculated using the ESA severance pay formula. Two affiants confirmed on cross-examination that the payments they received were in satisfaction of their severance pay entitlement under the ESA.[204]

158. The Plaintiffs also rely on *Carroll (Re)*[205] for the proposition that by seeking the Plaintiffs' "consent" to pay severance pay as part of a larger working notice package, CTS somehow "transformed" the severance payment such that it was no longer severance pay. In fact, the analysis in *Carroll* in limited only to situations where severance pay is paid as part of a salary continuance and does not stand for the proposition cited by the Plaintiffs.

159. In *Carroll,* the employer offered a choice of two separation packages: a lump sum of 12 months' salary or 14 month salary continuation, both in exchange for a release. Similar to the First and Second Severance Letters, the offer clearly indicated in writing that both packages were inclusive of the employees' right to termination and severance pay under the ESA. The employee did not accept either package. In response, the employer elected to pay out the more generous 14 month salary continuation. Under the ESA, an employer must pay severance as a lump sum unless the employee agrees to receive it or the Director of Employment Standards approves its payment in

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[203] PowerPoint Slide 10: *What happens if I leave before the separation date in my letter?* (emphasis added) [CTS Compendium, Tab 29]
[204] Park Cross, q. 214, p. 47-48; q. 263-276, p.59-61; Lipton Cross, q. 98, p. 25 [CTS Compendium, Tabs 23, 23]
[205] *Re Carroll,* [1996] O.E.S.A.D. No. 209 [***Carroll***], Plaintiffs' BOA, Tab 124

instalments.[206] Accordingly, at issue for the Board was whether the employee's failure to consent to the salary continuance meant that severance had not been paid.

160. The Board found in favour of the employer and expressly rejected the Plaintiffs' position with respect to severance pay as follows:

> I also find that the Employer intended that the options offered would include severance and termination entitlements under the Act. Frankly, I do not know how there could be any question of it; a paragraph in the termination letter expressly address the issue.[207]

161. With respect to the "consent" issue, the Board found that consent was not required following case law indicating that a breach of the lump sum provisions in the ESA were a technical breach only and did not entitle an employee to additional severance pay:

> In my view, a salary continuation plan as a means to meet the employer's statutory obligations to pay termination pay and severance pay does have some risks. It is a breach of section 7(5) and if it is contingent on mitigation, it may not meet the requirements of the Act. However, I am not prepared to conclude that an employee must consent to the plan before it can be considered a payment of entitlements under the Act.[208]

(G) CTS DID NOT ACT IN BAD FAITH

162. The Plaintiffs allege that CTS has breached its obligation in the manner of termination and seek general damages. The Plaintiffs offer the following specific "facts and inferences" in support of their claim for bad faith damages:[209]

(a) CTS breached the mass termination Form 1 Notice procedure, resulting in a loss of critical retraining and adjustment services.

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[206] *ESA, 2000, supra* note 56, s. 66(1), CTS BOA, Tab 39
[207] *Carroll, supra* note 205 at para. 18, Plaintiffs' BOA, Tab 124
[208] *Ibid,* Plaintiffs' BOA, Tab 124
[209] Also referred to as "aggravated", "general", "moral", or "mental distress" damages

(b) CTS' overall approach of putting its "production needs first to the complete or near exclusion" of the Plaintiffs' job search efforts showed a failure to have appropriate regard to the interest of the Plaintiffs; and

(c) CTS sent an Easter greeting after delivering the First Severance Letters.

163. There is no evidence of conduct justifying bad faith damages in this case. Further, the Plaintiffs have entirely failed to adduce any evidence that the Plaintiffs have suffered any actual harm or basis for damages as a result of the alleged bad faith.

(i) Legal Principles of Bad Faith Damages

164. The Supreme Court of Canada's decision in *Keays v. Honda Canada Inc.*[210] set out the current state of the law in respect of damages for breach of an employer's duty of good faith in the manner of dismissal. The decision provides that an employer has an obligation of good faith and fair dealing in the manner of dismissal. Damages for breach of this duty are compensatory and not punitive in nature.[211] To justify an entitlement to bad faith damages, the onus is on the employee to establish:

(a) The employer breached its obligation of good faith and fair dealings in the manner of dismissal; and

(b) The breach resulted in mental distress, beyond the normal hurt feelings and distress arising from a termination.[212]

165. With respect to the first step of the *Keays* test, it has long been accepted that a dismissed employee is not entitled to compensation for injuries flowing from the fact of the

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[210] *Keays v. Honda Canada Inc.* 2008 SCC 39 [***Keays***], CTS BOA, Tab 23
[211] *Ibid* at para. 62, CTS BOA, Tab 23; *Merrill Lynch Canada Inc. v. Soost*, 2010 ABCA 251 [***Merrill Lynch***], CTS BOA, Tab 24
[212] *Keays*, *supra* note 210 at paras. 56-60, CTS BOA, Tab 23; *Mulvihill v. Ottawa (City)*, 2008 ONCA 201 at para. 45 [***Mulvihill***], CTS BOA, Tab 25

dismissal itself. The normal distress and hurt feelings resulting from dismissal are to be expected and are not compensable.[213]

166. In *Gismondi v. Toronto (City),*[214] the Ontario Court of Appeal held that conduct justifying bad faith damages must be "something akin to intent, malice or blatant disregard for the employee", or conduct that can be characterized as "callous and insensitive treatment."[215] Similarly in *Desforge v E-D Roofing Ltd.,*[216] the Ontario Superior Court described the type of conduct necessary to justify bad faith damages as "egregious, hard-hearted or vindictive conduct on the part of the employer."[217]

167. In *Mulvihill v. Ottawa (City),*[218] the Ontario Court of Appeal held that a mistake is not conduct that can be said to be unfair or bad faith.[219] Further, actions that are "not malevolent", "probably well-intentioned", demonstrate "some lack of care" or those that amount to "sloppy conduct" are not conduct that can be said to be bad faith.[220]

168. Examples of bad faith conduct that have been found to be worthy of compensation include: dismissing an employee for cause following the employee's commencement of cancer treatment,[221] threatening or undertaking baseless criminal investigations into an

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[213] *Keays, supra* note 210 at para. 56, CTS BOA, Tab 23
[214] *Gismondi v. Toronto (City),* [2003] O.J. No. 1490 (C.A.) at para. 32 (emphasis added) [***Gismondi***], CTS BOA, Tab 26
[215] *Ibid*, CTS BOA, Tab 26
[216] *Desforge v. E-D Roofing Ltd.,* [2008] O.J. No. 3720 (Ont. S.C.J.) [***Desforge***], CTS BOA, Tab 27
[217] *Ibid* at para. 74, CTS BOA, Tab 27. See also *Evans v. Complex Services*, 2012 ONSC 6508 at paras. 18-20, CTS BOA, Tab 28; and *Merrill Lynch, supra* note 211 at para. 17, CTS BOA, Tab 24
[218] *Mulvihill, supra* note 212, CTS BOA, Tab 25
[219] *Ibid* at para. 65, CTS BOA, Tab 25
[220] *Gismondi, supra* note 214 at para. 32, CTS BOA, Tab 26. See also: *Desforge, supra* note 216 at para. 82, CTS BOA, Tab 27; *Merrill Lynch, supra* note 211 at para. 17, CTS BOA, Tab 24; and, *McNevan, supra* note 178 at paras. 58-59, CTS BOA, Tab 21
[221] *Altman v. Steve's Music Store Inc.,* 2011 ONSC 1480, CTS BOA, Tab 29

employee's misconduct,[222] failing to investigate complaints of sexual harassment,[223] and belittling, harassing or bullying an employee in hopes they employee will quit. [224]

169. With respect to the second step of the test, even if bad faith conduct can be established, an employee must adduce evidence of actual harm in order to obtain bad faith damages. The evidence required must demonstrate a causal connection to the employer's breach of its duty of good faith in the manner of dismissal.[225]

170. For example, in *Brien v. Niagara Motors*, the Ontario Court of Appeal reversed a trial decision awarding mental distress damages on the basis of insufficient medical or expert evidence. The court held that while the employer's conduct could have led to an award of damages, the mental distress suffered was not of the nature required to qualify for compensatory damages as "the respondent did not seek any medical attention, professional assistance or undergo any therapy..."[226]

(ii) Late Filing of the Form 1 is Not Bad Faith

171. There is no case law considering specifically whether an employer's late filing of the Form 1 notice amounts to bad faith. However, the case law is clear that a breach of the ESA alone does not support awards of bad faith damages.

172. For example, in *McNevan v. AmeriCredit Corp.*,[227] the Ontario Court of Appeal held that failing to offer assistance to an employee in finding new employment, failing to

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[222] *Pate v. Galway-Cavendish & Harvey (Township)*, 2013 ONCA 669, CTS BOA, Tab 30
[223] *Doyle v. Zochem Inc.*, 2017 ONCA 130, CTS BOA, Tab 31
[224] *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419, CTS BOA, Tab 32
[225] *Keays*, *supra* note 211 at para. 59; *Mulvihill, supra* note 212 at para. 95, CTS BOA, Tab 23
[226] *Brien v. Niagara Motors,* 2009 ONCA 887, CTS BOA, Tab 33. See also *Sweeting v. Mok,* 2015 CarswellOnt 18913, 27 C.C.E.L. (4th) 161 (Ont. S.C.J.), aff'd 2017 ONCA 203, 2017, CTS BOA, Tab 34
[227] *McNevan*, *supra* note 178, CTS BOA, Tab 21

provide a letter of reference and mishandling an employee's vacation pay, T4s and Record of Employment, were not sufficient to support a finding of bad faith by the employer. In overturning the trial judge's finding of bad faith, the Court of Appeal held that, although there may have been some "lack of care" and "expediency" in relation to the employee's termination entitlements, "it would be erroneous to characterize the company's post-termination actions as high-handed or in bad faith."[228]

173. The two cases cited by the Plaintiffs for the proposition that an ESA breach can form the basis of a claim for bad faith damages do not support this proposition.

174. In *Ciszkowski v. Canac Kitchens*[229] the plaintiff relied on the fact that his employer breached the ESA by failing to pay his ESA termination entitlements for six years following the termination of his employment as a basis for additional damages. The only portion of the decision considering an ESA breach is with respect to punitive damages. In considering the ESA breach, the court found that the breach was not sufficient to ground an award of punitive damages.[230]

175. In *Harris v. Yorkville Sound Ltd.*[231], the court found the employer had acted in bad faith in dismissing the employee however did not give any consideration to any alleged ESA breach in making this finding. Rather, the court relied on the fact that the employer maintained allegations of cause and fired the employee knowing she was pregnant. Similar to *Ciszkowski* , the only portion of the analysis considering an ESA breach was

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[228] *Ibid* at paras. 58-59, CTS BOA, Tab 21
[229] *Ciszkowski v. Canac Kitchens*, [2015] O.J. No. 85 (S.C.J.), Plaintiffs' BOA, Tab 128
[230] *Ibid* at para. 133, Plaintiffs' BOA, Tab 128
[231] *Harris v. Yorkville Sound Ltd.*, [2005] O.J. No. 5360, Plaintiffs' BOA, Tab 129

with respect to punitive damages. Again, the court found that the ESA breach at issue was not sufficient to justify punitive damages.[232]

176. In any event, even if a breach of the ESA could support a claim for bad faith, the evidence is that the late filing of Form 1 was a mistake and far from the "callous or insensitive" treatment required to award bad faith damages. CTS initially did not believe the Form 1 would be required due to a plan to stagger release dates. When they discovered they had missed the eight week deadline, the Form 1 was filed immediately, 12 days late.[233] There is no evidence that CTS intended to deprive the Plaintiffs of any services arising from the Form 1 process.

177. The fact that Mr. Park brought the Form 1 to the attention of CTS in May 12, 2014 is irrelevant. As the Plaintiffs concede in their factum, their interpretation of the ESA provisions with respect to the Form 1 is novel and has never been litigated. Accordingly, any suggestion that the Form 1 was due to be filed in May, 2014 (ten months prior to the Original Separation Date) would have been news to both CTS and its outside counsel.

178. In any event, there is no evidence that CTS' failure to file the Form 1 deprived the Plaintiffs of any "critical services". The only evidence of these alleged services is outlined in the Lindy Affidavit. As set out above, the Lindy Affidavit contains inadmissible double hearsay and is not admissible. However, in the event the Court considers the contents of the Lindy Affidavit, a review of the exhibits attached to that affidavit confirms that a number of the services allegedly triggered by a Form 1 are either (a) not limited to mass termination situations; or (b) not limited to employees who have lost their job at all. For

[232] *Ibid* at para. 70, Plaintiffs' BOA, Tab 129
[233] Urban Affidavit, para. 50-51 [CTS Compendium, Tab 1]

example, information about both the Ontario apprenticeship and adult learning services indicate that individuals must only be residents of Ontario and meet certain educational requirements to participate. Similarly, the Government of Canada Job Bank is a public job bank that anyone can use. [234]

179. Further, a number of the services that are allegedly triggered by a Form 1 may not have even been available to the Plaintiffs during the working notice period. For example, the Second Career service, which provides funding for re-training, is only available to individuals who are not working, or who have been laid off and are working a temporary job. The service is also restricted in eligibility depending on how long the individual has been unemployed, evidence of positions they've applied to, their level of education and information showing the skills sought are actually in demand. In any event, there is no evidence that any of the Plaintiffs applied for the Second Career service following the termination of their employment or would have been eligible for the service. [235]

(iii) The Overall Approach to the Closure is Not Bad Faith

180. The Plaintiffs allege that CTS' overall approach of putting its "production needs first" to the exclusion of the Plaintiffs' job search efforts showed a failure to have appropriate regard to the interest of the Plaintiffs and attracts bad faith damages. This position is again unsupported by legal precedent and the evidence.

181. Contracting parties are entitled to perform a contract in their own best interests. The duty of good faith does not require a contracting party to forego contractual advantages such that CTS had some obligation to consider the interest of the Plaintiffs

[234] Government Websites and Lindy Cross, q. 75-81, p. 20-21 [CTS Compendium, Tabs 18-21 and 26]
[235] Government Websites and Lindy Cross, q. 71-73, p. 19 [CTS Compendium, Tabs 18-21 and 26]

above or even equally to CTS. Simply requiring a party to perform a contract in accordance with its terms is neither dishonest nor in bad faith.[236] As such, expecting the Plaintiffs to work their regular hours, or overtime hours where they have agreed to do so, cannot constitute bad faith where the Plaintiffs are compensated for their labour.

182. Further, and as set out above, CTS has no legal obligation to assist with the Plaintiffs' job search efforts during the working notice period. The duty of good faith does not create any such obligation. As stated by the Ontario Superior Court in *Addison Chevrolet Buick GMC Ltd. v. General Motors of Canada Ltd.*:

> The duty of good faith performance of contractual obligations recently affirmed by the Supreme Court of Canada in *Bhasin* [is not a licence] to invent obligations out of whole cloth divorced from the actual terms of the contract between the parties.[237]

183. The Plaintiffs have cited one case in support of their proposition that CTS acting in its own self interest justifies bad faith damages, which is easily distinguishable. In *Chabot v. William Roper Hull Child & Family Services*,[238] the plaintiff was dismissed four days after raising a complaint of harassment. The employer did not conduct an investigation into the allegations, but dismissed the plaintiff and then issued a letter to customers advising that the termination was based on "philosophical differences" and that further employment of the plaintiff "would only continue to have a negative impact on the Agency". The court found that this conduct likely made it more difficult for the plaintiff to find a new position and justified bad faith damages.

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[236] *Bhasin v. Hrynew*, 2014 SCC 71 at paras. 70, 73, 86, CTS BOA, Tab 35; *Styles v. Alberta Investment Management Corp.*, 2017 ABCA 1 at paras. 45, 47, 52, CTS BOA, Tab 36
[237] *Addison Chevrolet Buick GMC Ltd. v. General Motors of Canada Ltd.*, 2015 ONSC 3404 at para. 119, reversed on other grounds, 2016 ONCA 324, CTS BOA, Tab 37
[238] *Chabot v. William Roper Hull Child & Family Service*, 2003 ABQB 49, Plaintiffs' BOA, Tab 130

184. There is no similar conduct attributed to CTS in this motion. CTS did not take any steps to undermine the Plaintiffs' attempts to obtain new employment. In fact, the evidence is clear that CTS did just the opposite by expressly notifying employees of their right to find new employment during the working notice period, offering significant outplacement services and providing letters of employment to assist with their job search.

185. Further, the uncontradicted evidence of Mr. Urban is that in announcing the closure over one year prior to the intended closure date, CTS intended to: (1) provide for an efficient transition of the Streetsville Plant's operations in order to ensure that CTS customers would not be negatively affected; and (2) allow employees sufficient time to adjust to the impact of the closure on their livelihoods and to plan for their future. [239]

(iv) The Easter Greeting is Not Bad Faith

186. The Plaintiffs assert in their factum that "...notifying the Class of termination just before Easter, combined with the email to them wishing them 'good health, longevity and prosperity this Easter'" justifies an award of bad faith damages.

187. This statement is inaccurate. The Plaintiffs were notified of the plant closure on February 28, 2014, at a company-wide meeting, approximately six weeks before receiving the First Severance Letters. As a result, the Plaintiffs were not surprised to receive the First Severance Letter on April 17, 2014.[240] In any event, Mr. Urban's evidence is uncontradicted that the holiday greeting was well-intentioned and that he did not anticipate it would cause any harm. At worst, it may have been careless timing on his

[239] Urban Affidavit, para 21 [CTS Compendium, Tab 1]
[240] Wood Cross, q. 37-44, p. 9-10 [CTS Compendium, Tab 24]

part; however, the case law is clear that well-intentioned, careless conduct is not bad faith conduct worthy of compensation.

188. The Plaintiffs have cited *Laliberté c. Société du Centre Scolaire Communautaire de Calgary*[241] in support of their position on the Easter greeting. In *Laliberté* the Alberta Provincial Court considered the fact that the employee was dismissed shortly before Christmas from a small francophone community. The timing of the dismissal close to Christmas was relevant only to the court's determination of the notice period as it may have affected the employee's ability to find a new job. The court did not analyze bad faith damages in this decision. *Laliberté* has no application to this motion.

(v) There is No Evidence of Harm

189. Even if any of CTS' conduct in the closure amounted to malicious, callous or insensitive treatment worthy of compensation, which it clearly does not, the Plaintiffs have failed to satisfy the second half of the *Keays* test which requires them to adduce evidence of actual harm caused by CTS' breach of its duty of good faith.

190. In particular, with respect to conduct that allegedly made the Plaintiffs' job search efforts more difficult or resulted in the Plaintiffs being "chained" to their desks and unable to search for a new job, the Plaintiffs have refused to provide evidence of the job search efforts of its class members.[242] This information is clearly relevant to a determination of any actual harm resulting from the alleged bad faith of CTS.

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[241] *Laliberté c. Société du Centre Scolaire Communautaire de Calgary*, 2007 ABPC 324, Plaintiffs' BOA, Tab 131

[242] Plaintiffs Answers to Undertaking – Letter from S. Moreau, dated April 26, 2017 re: Mitch Lipton [CTS Compendium, Tab 31]

191. Further, from the evidence that is in the record, it is clear that, with the exception of Mr. Featherstone, all of the affiants cross-examined by CTS commenced their job search during the working notice period. Further, both Mr. Lipton and Mr. Gill secured new employment during the working notice period. As outlined above, Mr. Featherstone had made no attempt to mitigate his damages as of March 29, 2017, nearly two years after termination. Any difficulty he had had finding a new job cannot be attributed to CTS.

192. Lastly, there is no evidence that any of the Plaintiffs sought any sort of medical attention or counselling in relation to the plant closure. [243] The evidence that has been advanced by the Plaintiffs is insufficient to ground a claim for bad faith damages. For example, statements in the Plaintiffs' affidavits that the closure of the Streetsville Plant felt like a "slap in the face", that employees had "tears in their eyes" at the farewell barbeque, or that the closure felt like the "break-up" of a family,[244] while understandable, are precisely the type of normal distress and hurt feelings resulting from the termination of one's employment that are to be expected and are not compensable.[245]

(H) THE UNCERTIFIED ISSUES

(i) The 13 Week Extension Does Not Void Working Notice

193. Five of the Plaintiffs had their separation dates extended more than 13 weeks from their Original Separation Dates. The Plaintiffs allege that this amounts to a breach of section 6(1) of the Regulation and entitles these Plaintiffs to fresh notice and severance. The Plaintiffs rely on the *Di Tomaso* case for this proposition.[246]

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[243] Park Cross q. 142, p. 31; Wood Cross; q. 47, p. 11 [CTS Compendium, Tabs 22 and 24].
[244] Wood Affidavit, para. 41-42, 94, 96 [CTS Compendium, Tab 3]
[245] *Keays*, *supra* note 210 at para. 56, CTS BOA, Tab 23
[246] *Di Tomaso*, *supra* note 123, Plaintiffs BOA, Tab 82

194. This issue was not certified as a common issue and should not be decided on this motion. In any event, the facts in *Di Tomaso* are readily distinguished. Unlike *Di Tomaso,* all five Plaintiffs were provided with a choice to accept the extension over 13 weeks. If they did not accept, their separation date was not extended beyond 13 weeks and all other terms of their Separation Package remained in place. As a result, there was never any uncertainty about their termination date. Further, unlike *Di Tomaso,* all five Plaintiffs were provided with additional consideration for the extension, which amounts to a greater right or benefit under section 5(2) of the ESA, such that section 6(1) of the Regulation no longer applies.[247]

(ii) Plaintiffs Who Resigned Are Not Entitled to Any Damages

195. The Plaintiffs allege that 11 of the Plaintiffs who resigned during the working notice period are entitled to the same remedies. This issue was not certified as a common issue and cannot be decided on this motion. In any event, the Plaintiffs' position has no merit. The working notice provided to these resigned Plaintiffs was valid working notice and constituted reasonable notice of termination, as is demonstrated by their ability to search for and obtain new employment during this time The case relied on by the Plaintiffs in support of this position considered whether an employer can be given credit for a period of working notice where the employee was on disability and was not paid. The case did not consider whether an employee who resigns during the working notice period for new employment can maintain an action for wrongful dismissal.

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[247] *ESA, 2000, supra* note 56, s. 5(2). Urban Affidavit, para. 46 [CTS Compendium, Tab 1]. See all extension letters at Wood Affidavit, Ex. CC, PMR, Vol. 2, Tab CC, p. 534

PART IV - ORDER REQUESTED

196. CTS asks that the Plaintiffs' motion be dismissed with costs to CTS, and that the common issues be resolved entirely in favour of CTS.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of June, 2017.

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Schedule "A"

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Airst v. Airst*, [1999] O.J. No. 5866 (C.A.).
2. *Children's Aid Society of Huron-Perth v. H(C)*, 2007 ONCJ 744.
3. *Machtinger v. HOJ Industries Ltd.*, [1992] S.C.J. No. 41 (S.C.C.).
4. *Taylor v. Dyer Brown* (2004), 73 O.R. (3d) 358 (C.A.).
5. *Noble v. Principal Consultants Ltd. (Trustee of)*, 2000 ABCA 133.
6. *Stelco Inc. Re*, 2005 CarswellOnt 5177 (Ont. S.C.J. [Commercial List]).
7. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 (S.C.C.).
8. *Communications v. IKO Industries*, 2012 ONSC 2276.
9. *Leys v. Likhanga*, 2012 CarswellOnt 6703 (Ont. L.R.B.).
10. *Fort Erie Live Racing Consortium and Brewery, General & Professional Workers' Union (SEIU, Local 2), Re*, 2013 CarswellOnt 4491 (Ont. Arb.).
11. *Sysco Food Services of Central Ontario and Teamsters, Local 419*, 2015 CanLII 23833 (Ont. Arb.).
12. *Carpenter v. Brains II Canada Inc.*, 2015 ONSC 6224 at para. 29, aff'd 2016 ONSC 3614.
13. *Gregg v. Freightliner Ltd.*, 2004 BCSC 1574.
14. *St. Laurent v. Kelsey Hayes Canada*, 1997 CarswellOnt 5410 (Ont. E.S.B.).
15. *Rombis v. Zeppieri & Associates*, [2007] O.J. No. 2291 (Ont. S.C.J.).
16. *Kontopidis v. Coventry Lane Automobiles Ltd.*, [2004] O.J. No. 1979 (Ont. S.C.J.).
17. *Deputat v. Edmonton School District No. 7*, 2008 ABCA 13.
18. *Waterman v. IBM Canada Ltd.*, 2010 BCSC 376.
19. *Beatty v. Canadian Mill Services Assn.*, 2003 BCSC 1053.
20. *Shinn v. TBC Teletheatre B.C., A Partnership*, 2001 BCCA 83.
21. *McNevan v. AmeriCredit Corp.*, 2008 ONCA 846.

22. *Mattiassi v. Hathro Management Partnership,* [2011] O.J. No. 4774 (Ont. S.C.J.).

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

24. *Merrill Lynch Canada Inc. v. Soost,* 2010 ABCA 251.

25. *Mulvihill v. Ottawa (City)*, 2008 ONCA 201.

26. *Gismondi v. Toronto (City),* [2003] O.J. No. 1490 (C.A.).

27. *Desforge v. E-D Roofing Ltd.,* [2008] O.J. No. 3720 (Ont. S.C.J.).

28. *Evans v. Complex Services*, 2012 ONSC 6508.

29. *Altman v. Steve's Music Store Inc.,* 2011 ONSC 1480.

30. *Pate v. Galway-Cavendish & Harvey (Township)*, 2013 ONCA 669.

31. *Doyle v. Zochem Inc.,* 2017 ONCA 130.

32. *Boucher v. Wal-Mart Canada Corp.* 2014 ONCA 419.

33. *Brien v. Niagara Motors,* 2009 ONCA 887.

34. *Sweeting v. Mok,* 2015 CarswellOnt 18913, 27 C.C.E.L. (4th) 161 (Ont. S.C.J.), aff'd 2017 ONCA 203, 2017.

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

36. *Styles v. Alberta Investment Management Corp.*, 2017 ABCA 1.

37. *Addison Chevrolet Buick GMC Ltd. v. General Motors of Canada Ltd.,* 2015 ONSC 3404, reversed on other grounds, 2016 ONCA 324.

Schedule "B"

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194.

   See Book of Authorities, Volume II, Tab 38

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

   See Book of Authorities, Volume II, Tab 39

3. *Termination and Severance of Employment*, O. Reg. 288/01.

   See Book of Authorities, Volume II, Tab 40

4. Ministry of Labour Employment Practices Branch, *Employment Standards Act 2000: Policy and Interpretation Manual,* 2d ed (Scarborough, ON: Carswell, 2001) (ceased publication July 2016).

   See Book of Authorities, Volume II, Tab 41

5. *An Act to Amend The Employment Standards Act, 1968,* S.O. 1970, c. 45.

   See Book of Authorities, Volume II, Tab 42

6. *Employment Standards Act*, R.S.O. 1970, c. 147.

   See Book of Authorities, Volume II, Tab 43

7. *Termination of Employment,* R.R.O. 1970, O. Reg. 251.

   See Book of Authorities, Volume II, Tab 44

8. Ontario, Legislative Assembly, *Official Report of Debates (Hansard),* 28th Parl, 3rd Session, No. 107 (24 June 1970) (Hon. Minister Bales, Minister of Labour).

   See Book of Authorities, Volume II, Tab 45

9. *Employment Standards Amendment Act, 1987*, S.O. 1987, c. 30.

   See Book of Authorities, Volume II, Tab 46

10. *Regulation to Amend Regulation 286 of R.R.O. 1980*, O. Reg. 200/91, s. 1.

    See Book of Authorities, Volume II, Tab 47

11. Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 33rd Parl, 2nd Session, No. 27 (15 June 1987) at 22 (Hon. Mr. Wrye, Minister of Labour).

See Book of Authorities, Volume II, Tab 48

12. *Employment Standards Act,* R.S.O. 1990, c. E. 14.

See Book of Authorities, Volume II, Tab 49

13. *Time for Change: Ontario's Employment Standards Legislation: Consultation Paper*, Ministry of Labour, Government of Ontario, July 2000.

See Book of Authorities, Volume II, Tab 50

14. *Labour Standards Code*, R.S.N.S. 1989, c. 246.

See Book of Authorities, Volume II, Tab 51

15. *Labour Standards Act*, R.S.N.L. 1990, C L-2

See Book of Authorities, Volume II, Tab 52

16. *The Employment Standards Code,* C.C.S.M. c. E110.

See Book of Authorities, Volume II, Tab 53

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

See Book of Authorities, Volume II, Tab 54

18. *Employment Standards Act*, RSBC 1996, c 113.

See Book of Authorities, Volume II, Tab 55

CLAUDETTE WOOD et al.
Plaintiffs / Moving Parties

and

CTS OF CANADA CO. et al.
Defendants / Respondents

Court File No. CV-15-2547-00

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
BRAMPTON

RESPONDING PARTIES' FACTUM
(SUMMARY JUDGMENT MOTION
RETURNABLE JULY 17-19, 2017)

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