

TERMINATION CLAUSES UPDATE: YOUR "FOR CAUSE" PROVISION MIGHT NOW INVALIDATE YOUR "WITHOUT CAUSE" PROVISION

By [Andrea M. Marsland](#)

A recent case from the Ontario Court of Appeal likely invalidates thousands of termination clauses across Ontario. If you are an employer using template employment agreements, you should have your templates reviewed right away. Your termination clauses may no longer be enforceable.

What's the Case?

In *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391 (CanLII), the Court considered a relatively standard summary judgment motion dealing with allegations of wrongful dismissal. The main issue on the motion was the legal effect of a written employment agreement between the parties. The employee took the position that the termination clause in his employment agreement was void because it attempted to contract out of the minimum standards set out in the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "ESA"). The employer conceded that the "Termination for Cause" provision in the agreement was void because it violated the ESA. However, it argued that the "Termination of Employment with Notice" provision in the agreement was valid and, because the employer was not alleging cause, it could rely on it.

Notably, the two clauses were stand-alone clauses in the employment agreement. The employer argued that where there are two discrete termination provisions that by their terms apply to different situations, the Courts should consider whether one provision impacts upon the other and whether the provisions are "entangled" in any way. If they are not, the employer argued that there is no reason why the invalidity of one should impact on the enforceability of the other. The employer also argued, in the alternative, that the severability clause applied in this case.

What's the issue?

The discrete question before the Court was whether an invalid "for cause" provision rendered an otherwise enforceable "without cause" provision unenforceable. The Court of Appeal said yes thereby likely invalidating thousands of clauses across the province.

In its decision, the Court held that: "*An employment agreement must be interpreted as a whole and not on a piecemeal basis. The correct analytical approach is to determine whether the termination provisions in an employment agreement read as a whole violate the ESA.*"

On the issue of severability, the Court held that: "*We decline to apply this clause to termination provisions that purport to contract out of the provisions of the ESA. A severability clause cannot have any effect on clauses of a contract that have been made void by statute: North v. Metaswitch Networks Corporation, 2017 ONCA 790, 417 D.L.R. (4th) 429, at para. 44.*"

What does this mean for employers?

Employers should have their employment agreements reviewed as soon as possible. Employers may now be relying on unenforceable termination provisions.



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