

# Is it Time For Employers to Review Your Employment Contracts? The Supreme Court of Canada Says Yes

January 18, 2021

By Daniel Wong, Sean Foran, Megan Mah

On January 14, 2021, the Supreme Court of Canada denied Swegon North America Inc.'s application for leave to appeal the Ontario Court of Appeal's decision in *Waksdale v Swegon North America Inc.*<sup>[1]</sup> As a result, one of the most notable and controversial employment law decisions of 2020 is now settled law.

As we noted in our [previous commentary on the Court of Appeal's decision](#), *Waksdale* swung the pendulum further in favour of employees by introducing another barrier to the enforceability of termination provisions that attempt to limit or replace the employee's common law reasonable notice entitlements following a without cause termination.

The plaintiff employee in *Waksdale* was terminated without cause. The employee's employment agreement included separate "without cause" and "for cause" termination provisions. The employment agreement also included a severability clause, which stated that any illegal provision was severable from and would not affect the legality of the remainder of the agreement. The parties agreed that, on its own, the "without cause" termination clause was enforceable. They also agreed that, on its own, the "for cause" termination provision was unenforceable because it contravened the ESA. The parties disagreed on the effect of the unenforceable "with cause" clause on the enforceability of the separate "without cause" termination provision.

The Ontario Court of Appeal determined that the employment agreement must be interpreted as a whole, and should not be read on a piecemeal basis. As a result, the unenforceable "for cause" termination provision rendered the entire termination provision unenforceable. The Court of Appeal further held that the termination clause was unable to be saved by a severability clause, which cannot have any effect on provisions that have already been made void by statute.

Because the Supreme Court has denied the defendant employer leave to appeal the decision, it will now be more challenging for employers to argue that their termination clauses are enforceable. As a result, employers should consider reviewing the enforceability of the termination clauses included in their existing employment agreements (and employment agreement templates) on a periodic basis. In particular, they should consider whether a "for cause" termination clause is really necessary; more often than not, these clauses do not confer rights that are any different than those that already exist at common law. More generally, termination clauses should be reviewed prior to an employer hiring new employees or terminating existing employees.

For more information on how to mitigate risk with respect to your employment agreements, please contact Daniel, Sean or Megan.

<sup>[1]</sup> 2020 ONCA 391 (*Waksdale*)

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

For more information or inquiries:



## Daniel Wong

Toronto  
416.947.5042

Email:  
dwong@weirfoulds.com

Daniel Wong is Chair of the Firm's Employment & Labour Practice Group with a practice that is focused on employment and labour relations.



## Sean Foran

Toronto  
416.947.5019

Email:  
sforan@weirfoulds.com

Sean Foran is a leading expropriation lawyer, with extensive experience as counsel in large-scale infrastructure projects. Sean also practises real-estate, employment, business and government litigation.



## Megan Mah

Toronto  
416.947.5098

Email:  
mmah@weirfoulds.com

Megan Mah has a diverse practice that focuses on human rights, employment, civil litigation, administrative and constitutional law.

**WeirFoulds**<sup>LLP</sup>

[www.weirfoulds.com](http://www.weirfoulds.com)

### Toronto Office

4100 – 66 Wellington Street West  
PO Box 35, TD Bank Tower  
Toronto, ON M5K 1B7

Tel: 416.365.1110  
Fax: 416.365.1876

### Oakville Office

1320 Cornwall Rd., Suite 201  
Oakville, ON L6J 7W5

Tel: 416.365.1110  
Fax: 905.829.2035