



# What's New in HR Law

## Crystal Ball Termination Clauses: Potential Future Breach of ESA Renders Provision Void

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### Bottom Line

In [\*Rutledge v Canaan Construction Inc.\*](#), the Ontario Superior Court of Justice determined that even if an employee is exempt from certain minimum standards under the *Employment Standards Act, 2000* (“ESA”) a termination clause may be deemed void if there is even the *possibility* that it may violate the ESA in the future. This recent decision joins a growing body of case law from the Ontario courts which makes clear that even hypothetical deviations from the required statutory minimums are likely to be fatal to a contractual termination provision’s enforceability and will expose an employer to liability for common law reasonable notice.

### Background

Mr. Rutledge was employed by Canaan Construction Inc. as an apprentice working in the construction industry. His last continuous period of employment commenced in November 2015 at which time he signed an employment agreement with the following termination clause:

This update is for general discussion purposes and does not constitute legal advice or an opinion.

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The Employee may be terminated at any time without cause upon being given the minimum periods of notice as set out in the *Employment Standards Act*, or by being paid salary in lieu of such notice or as may otherwise be required by applicable legislation. The Employee acknowledges that pursuant to the *Employment Standards Act* they are not entitled to any notice or time in lieu thereof due to the nature of their job and as such they are entitled to absolutely no notice or pay and benefits in lieu thereof upon termination.

The termination provisions set forth above, represent all severance pay entitlement, notice of termination or termination in lieu thereof, salary, bonuses, vacation pay and other remuneration and benefits payable or otherwise provided to the Employee in relation to the termination of the Employee regardless of cause or circumstances.

On October 10, 2017, Mr. Rutledge was laid off due to a shortage of work and/or the end of the season. He was not recalled, and was not provided with any notice of termination or pay in lieu of notice.

Following a trial before the Small Claims Court, Mr. Rutledge's employment contract was found to be unenforceable for contracting out of section 60(1)(c) of the ESA. As a result, Mr. Rutledge was awarded 9.5 weeks of salary.

Canaan Construction Inc. appealed the Small Claims Court decision arguing that Mr. Rutledge was employed as a construction employee, and that construction employees are explicitly disentitled to notice of termination or pay in lieu thereof under the ESA. In essence, Mr. Rutledge's entitlements under the ESA were precisely those spelled out in the employment agreement and, as such, the termination provision should be upheld.

### **Appeal Dismissed: Superior Court Finds Potential Violations of the ESA**

On appeal, the Ontario Superior Court of Justice (the "Court") acknowledged that under section 2(1) of Regulation 288/01 of the ESA (the "Regulation") construction employees are not entitled to notice or pay in lieu of notice upon termination. However, the court noted the Regulation does not flatly disentitle construction employees to the other protections under the ESA.

On this basis the Court found the termination clause in Mr. Rutledge's employment agreement unenforceable. In particular, while the contractual termination clause did – at the actual time of Mr. Rutledge's dismissal – accurately capture the total of his entitlements under the ESA, the termination clause purported to contract out of the ESA in two hypothetical future scenarios:

1. In the event Mr. Rutledge was no longer working as a construction employee at the time of his dismissal, he would have been entitled to notice of termination and benefit continuation throughout the notice period; and
2. In the event Canaan Construction Inc. had grown in size at the time of Mr. Rutledge's dismissal, he may have been entitled to severance pay.

The Court found the termination clause was unenforceable as it purported to contract out of the ESA in at least the above two ways.

## Check the Box

This case, and others that have been similarly decided, highlight that even a potential violation of the ESA – no matter how remote – will render a contractual termination provision unenforceable. Now more than ever, careful and thoughtful drafting is critical to ensure that employment agreements achieve their desired purpose and effectively limit termination liabilities.

## Need more information?

For more information about drafting enforceable employment contracts, or employment issues relating specifically to the construction industry, please contact [Natalie Garvin](#) at 416-408-5512 or your regular lawyer at the firm.



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