

## ***Mind Your Provisions***

As discussed in previous e2r Alerts, the courts in Ontario are examining termination clauses in employment agreements with a microscope. Cases have consistently demonstrated that in order for a termination provision to be enforceable, the provision must meet minimum entitlements upon termination provided for in the employment standards legislation, including specific reference to notice entitlements, benefit continuance, and statutory severance pay. Moreover, the termination provision must explicitly state that the employee is not entitled to common law reasonable notice upon termination.

However, there is a glimmer of hope for termination provisions that may have previously been held to be invalid for the reasons set out above. The Ontario Court of Appeal recently released a decision which found that a termination provision which did not explicitly reference an employee's entitlement to statutory severance pay and which made no reference to the employee's common law entitlements was enforceable.

In *Nameth v. Hatch Ltd.*, the employee signed an employment agreement containing the following termination provision:

*The Company's policy with respect to termination is that employment may be terminated by either party with notice in writing. The notice period shall amount to one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation.*

The Court of Appeal found that the above noted provision's silence with respect to statutory severance pay was not an indication that the parties did not intend to abide by their obligations in accordance with the employment standards legislation. Moreover, the Court found that specific language contracting out of common law reasonable notice is not necessary if it can be easily inferred from the language agreed to by the parties. Therefore, the termination provision was found to be enforceable.

While this decision represents a positive development in favour of employers, employers nevertheless should err on the side of ensuring termination provisions include all of the elements noted in the prior case law to guarantee the enforceability of the termination provision.



Moreover, employers operating in multiple jurisdictions should ensure that the employment agreement used in each province has been tailored to that specific province to not only reflect differences in employment standards legislation but also judicial rulings of the particular province. For example, the Alberta Court of Appeal in *Holm v. AGAT Laboratories Ltd.*, recently found that a termination which did not explicitly exclude the employee's entitlement to common law reasonable notice permitted the employee to pursue his common law right to reasonable notice upon termination.

Given the fluctuating state of the law, we highly recommend using a recently updated employment agreement whenever issuing a new employment agreement. If you have not recently updated your employment agreements, we urge you contact e2r® to have your employment agreements reviewed by an Advisor.

