# Ten Simple Words Keep the Termination Clause Debate Alive: SCC Denies Leave to Appeal in Oudin v. Centre Francophone de Toronto

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Readers of our blog will recall that termination provisions have, in recent years, come under technical scrutiny by the courts. Where a contractual termination provision has failed to state that minimum statutory requirements will be provided, the courts have shown willingness to invalidate a contractual provision and award an employee damages in lieu of his or her "common law reasonable notice" (which almost always exceeds the applicable statutory minimums).

Despite having an opportunity to bring clarity to the matter, the Supreme Court of Canada has instead kept the debate alive with ten simple words: "The application for leave to appeal is dismissed with costs".

In recent years, the court's decisions in ***Wright v. The Young and Rubicam Group of Companies (Wunderman)***(*Wright*) and ***Stevens v. Sifton Properties Ltd.*** (*Stevens*) struck down termination clauses in employment agreements because they failed to explicitly reference benefits continuation throughout the statutory notice period. These decisions left many employers scrambling to put in place revised employment agreements (which, in and of itself, is no easy task) and employment counsel generally understood this to be the "new norm".

However, in 2015, the Superior Court of Justice's decision in ***Oudin v Le Centre Francophone de Toronto*** (*Oudin*) questioned this "new norm".

As readers of our **blog** will recall, in *Oudin* the court upheld a termination provision which made no mention of statutory benefits or statutory severance.

The court's decision in *Oudin* appeared difficult to reconcile with its previous decisions including in *Wright* and *Stevens*. As such, it was not surprising that it was appealed to the Ontario Court of Appeal. The Court of Appeal's brief decision noted that the motion judge, who was entitled to deference, considered the circumstances of the parties, the words of the written agreement as a whole, and the legal obligations of the parties.

Leave to appeal to the Supreme Court of Canada (**SCC**) was sought. However, despite having an opportunity to bring clarity to this issue, the SCC has chosen to let the discussion continue, to hopefully be resolved on another day.

## Our Views

The SCC's decision not to grant leave to appeal, when taken in tandem with other recent cases, including ***Riskie v Sony of Canada Ltd.*** (*Riskie*), has helped to strengthen an employer's chance of enforcing a termination clause that does not specifically reference every statutory termination entitlement. As Justice Dunphy fittingly noted in *Riskie*:

The ESA provides minimum standards which the parties are required to comply with. A contract that fails to list all such requirements – as few indeed do – is guilty only of preserving trees from unnecessary destruction. A provision which seeks to contract out of the law is unenforceable; a provision which merely promises to obey it is superfluous.