News

Recent Decisions from Courts of Appeal Provide Guidance on Restrictive Covenants

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In a time where employees are unlikely to remain with one employer throughout their working lives, employers often seek to put in place restrictive covenants to limit departing employees from competing with them, soliciting their clients/customers or using confidential information obtained in the course of their employment.

The scope of restrictive covenants has recently been considered by two Canadian Courts of Appeal. In the first case, *Martin v. ConCreate*, the Court of Appeal for Ontario found that a restrictive covenant did not have a fixed duration, and was therefore unenforceable. The Court was also clear that the fact a covenant had been entered into with advice from independent counsel would not entirely shield that covenant from judicial scrutiny. A discussion of this case is found in our *FTR Now* of February 6, 2013, "Important Direction on Restrictive Covenants from the Court of Appeal for Ontario."

The Alberta Court of Appeal also recently considered the restrictive covenant of a departing employee who left his employer and set up a competing operation. The Court found that the non-solicitation clause was unenforceable because it was ambiguous. However, despite the fact the former employee was not a director, officer or shareholder of his former employer, the Court concluded that he owed his former employer certain fiduciary obligations, which he had breached. A discussion of this case is found in our Case in Point blog post of February 20, 2013, "Alberta Court of Appeal Considers Restrictive Covenants and Fiduciary Duties."

These cases underscore the need for restrictive covenants to be clear, reasonable and without ambiguity in order to protect an employer's interests when key employees leave the company.