

RT

Rubin  
Thomlinson LLP

# **The Employment Law Roundup: Restrictive Covenants Update**

**Christine Thomlinson  
January 16, 2012**

*Restrictive Covenants Update by Christine Thomlinson*

*Globex Foreign Exchange Corporation v. Kelcher 2011 ABCA 240 (Alta. C.A.)*

Three employees of the foreign currency exchange business, Globex Foreign Exchange Corp (“Globex”), left in 2005 to join a competitor. All three had signed contracts containing non-competition and non-solicitation covenants and the primary issue at trial was the enforceability of these covenants. The trial judge concluded that the restrictive covenants were not enforceable against one of the employees who had been wrongfully dismissed. With respect to the two remaining employees, because their contracts were signed some 2.5 years after they began working for Globex, the trial judge found their restrictions to be void for lack of consideration. In the alternative, the trial judge said that the non-competition clauses were broader than needed and therefore would have been unenforceable in any event, as would certain of the non-solicitation clauses as well. Globex appealed.

The majority of the Alberta Court of Appeal upheld the findings regarding the unenforceability of the restrictive covenants, based on their overly broad nature. They also agreed with the trial judge’s finding that the two restrictive covenants entered into during the course of employment were void for lack of legal consideration. However, the majority went on to comment on the principle that an employer will not be entitled to rely upon a restrictive covenant contained in an employment agreement when the employee has been wrongfully dismissed. It was noted that there is long-standing legal authority for the proposition that restrictive covenants do not bind an employee once the employer has repudiated the employment contract and the repudiation is accepted (as it is when an employee accepts other employment). The fact that the employee chooses not to sue for wrongful dismissal is irrelevant because there is no legal obligation to do so.

Justice Slattery did not agree with this unqualified finding or with the majority of the Court, and wrote in a dissenting opinion that it would be problematic to say that a restrictive covenant could never be enforceable against an employee who is wrongfully dismissed. Examples of situations where this might be appropriate were reviewed, such as where an employer provides reasonable notice but it is found not to be enough, or in a case where an employer has a legitimate reason to believe that there exists just cause to terminate an employee but a trial judge does not agree. Although these reasons make some sense, the fact is that the majority of the Alberta Court of Appeal in this case upheld the principle that a wrongful dismissal will invalidate an otherwise enforceable restrictive covenant.

*What does this mean for employers?*

1. This case is reminder that employers must proceed with caution when terminating employees who are subject to a contract with a restrictive covenant.
2. Similarly, employers should never be overly confident that any restrictive covenant is entirely reliable.