# FTR QUARTERLY

SUMMER 2015

Hicks Morley

HUMAN RESOURCES
LAW AND ADVOCACY

In this issue:

# BEYOND WRONGFUL DISMISSAL

As a society, we've seen the blurring of traditional lines of thinking in many areas – from technology's merging of work and home life to the mass media's blending of advertising and content.

Lines are blurring in law as well. In a litigation context, the lines between traditional employment-related litigation – such as wrongful dismissal claims – and the broader spectrum of commercial litigation are disappearing as employers see a rapid expansion in the nature and variety of claims they have to deal with.

"Client needs are evolving, and they're leveraging our deep experience in different kinds of litigation that complement our labour and employment practice," says Frank Cesario, chair of the Litigation group in the Hicks Morley Toronto office. "The range is significant – from data breach, to pensions, to defamation, to minority shareholder rights."

## TECHNOLOGY DRIVES CHANGE

Not surprisingly, changes in the creation and use of new technology lie behind many of the changes taking place in the litigation arena, particularly in the area of wrongful competition, where departing employees leave with information deemed proprietary.

"With the increased use of technology in the workplace, there's an electronic trail that didn't exist before, making it difficult for

employees to disguise their competitive activities – particularly those that occur on the employer's time and before the employment relationship ends," says Richelle Pollard, a lawyer in the Toronto office. "As a result, we've seen increased litigation about the limits and parameters placed on an individual at the end of employment, often involving rights to a book of business by individuals in sales or advisory roles."

This type of litigation is also prevalent in the technology industry itself, as firms look to protect their proprietary interests when an employee leaves.

While litigation is linked to the courtroom, much of the work by Hicks Morley litigators happens before a case ever gets to trial. The approach is truly one of "litigation if necessary, but not necessarily litigation."

"While there are a few litigation trends I could point to, one type we're seeing more of is wrongful competition litigation relating to employees in the software industry," says Ian Dick, a Toronto office lawyer. "There's a lot of litigation focused on protecting employers from key employees going to competitors with confidential information about software development. The stakes can be high, and litigation often plays a role in ensuring employer information stays with the employer – and isn't used against them by the competition."

## A FOCUS ON RESULTS

While litigation is linked to the courtroom, much of the work by Hicks Morley litigators happens before a case ever gets to trial. The approach is truly one of "litigation if necessary, but not necessarily litigation."

"I'm a big believer in the use of mediation to resolve matters," says Jeff Goodman, a Hicks Morley Toronto office lawyer. "We all treat mediation as a very serious step in the process – and use it to convince the other side of the limitations of their case and ultimately compromise on their claims and settle."

Even informal discussions with opposing counsel can pay dividends – as many don't have experience in the employment arena.

"A large part of my practice is centred on disputes about short- and long-term disability claims," says Amy Tibble, a lawyer in the firm's Toronto office. "In those cases, it's critical to engage

opposing counsel in discussions as early as possible, as many of them are personal injury lawyers who have little experience with employment law. With a little education, they often adjust their expectations and we're able to achieve a resolution more quickly."

There are few lawyers who practise in employment or the corporate/commercial area of wrongful competition or executive compensation who have done more trials than our team.

When mediation and discussions don't lead to a quick resolution, trial experience can be the ace in the hole.

"Too many lawyers have never done a trial – or if they have, maybe one or two small trials. That plays to our advantage, as the other side knows we have the skill and resolve to litigate," says Stephen Gleave, a lawyer in the firm's Toronto office. "There are few lawyers who practise in employment or the corporate/commercial area of wrongful competition or executive compensation who have done more trials than our team. The other side knows this and it influences settlements."

## LITIGATION EXCELLENCE – FIRST

While Hicks Morley litigators have deep subject matter expertise in the labour and employment context, it's their foundational expertise as litigators that clients rely on when issues arise.

"We're fortunate to have longstanding relationships with our clients – and they've seen the depth of our litigation experience," says Cesario. "To put it simply, great litigators are great litigators – and we combine this expertise with an approach that's practical, lean and cost-effective. As our clients face a broader range of claims, we've become a litigation destination they can count on."

# COMMON PITFALLS: USE OF EXPERT WITNESSES

Expert evidence is an important, and sometimes controversial, element of modern civil litigation. A well-chosen expert can demystify complex issues and decipher convoluted evidence. However, using expert evidence also presents certain pitfalls: specifically, that expert evidence will be misused and will distort the fact-finding process. To guard against these pitfalls, the courts have progressively tightened the rules of admissibility and enhanced the trial judge's gatekeeping role.

BY: FRANK CESARIO AND SIOBHAN M. O'BRIEN

The use of experts is a key strategic issue in litigation, and the following three legal and practical aspects of this issue are discussed below: (1) the legal test for admission of expert testimony, (2) the common pitfalls when selecting an expert witness, and (3) practical tips in the selection of expert witnesses.

## THE LEGAL TEST

Determining the admissibility of expert opinion evidence involves two steps. First, the party seeking to submit the expert evidence must meet the legal test set out in the Supreme Court of Canada's leading decision on expert evidence, *R. v. Mohan,* which requires that the following four threshold criteria are met:

1. **The evidence must be relevant.** Relevance is a threshold requirement for the admission of expert evidence and is a matter to be decided by the adjudicator as a question of law.
2. **The evidence must be necessary to assist the trier of fact.** Necessity is the consideration of whether the evidence is likely to be outside the experience and

knowledge of a judge or jury; in other words, an expert witness cannot usurp the functions of the trier of fact.

3. **The evidence must not be subject to an exclusionary rule.** Exclusionary evidentiary rules may render expert evidence inadmissible notwithstanding that it meets the other criteria of the four-part test.

4. **The expert must be properly qualified.** A properly qualified expert must have special or peculiar knowledge through study or experience regarding the matters about which he or she will testify.

If this four-part test is met, the second stage of the analysis for the admission of expert evidence is a gatekeeping function. Notwithstanding admissibility, an adjudicator must decide whether the potential benefits of admitting the evidence justify the risks or costs. "Cost" in this context refers to the risks that the evidence could pose to the trial process (i.e. time, prejudice and confusion). "Benefit" refers to the probative value and reliability of the evidence.

In the recent decision *Westerhof v. Gee Estate,* the Court of Appeal for Ontario confirmed that in exercising its gatekeeper function, a court could exclude all or part of the opinion evidence of the participant or non-party if the evidence did not meet the test for admissibility.

## COMMON PITFALLS

An examination of the case law reveals a number of common pitfalls to avoid.

**1. Partiality**

A common complaint by triers of fact is that too many experts are no more than "hired guns" who tailor their reports and evidence to suit clients' needs. In the recently released *White Burgess Langille Inman v. Abbott and Haliburton Co.*, the Supreme Court of Canada stated that an expert witness has a duty to the court to be independent, impartial and unbiased.

Avoid experts with a direct interest in the outcome of litigation, such as a financial interest or close familial relationship to a party.

**2. Expert as Advocate**

An expert is not permitted to argue the facts and advocate one side's position. A proposed expert's lack of independence may affect not only the weight given to the expert's evidence, but also whether that evidence is admissible.

**3. Direct Interest**

Avoid experts with a direct interest in the outcome of litigation, such as a financial interest or close familial relationship to a party. An expert who is not neutral and objective is less reliable.

## PRACTICAL TIPS

Once you avoid these pitfalls, there are several practical tips you can follow to maximize the impact and reliability of expert evidence.

First, ensure your expert is reliable and is qualified to testify about the issues you want him or her to address. This means that before hiring the expert, do your research. For example, consider taking steps to ascertain or review:

a. The expert's *curriculum vitae*;

b. Prior reports the expert has written;

c. Prior testimony – do transcripts from prior cases reveal that the expert was a strong communicator?

d. Internet presence – is the expert's online personal or professional brand consistent with the engagement?

e. Reputation – is the expert's professional reputation consistent with the engagement?

f. Publications; and,

g. The outcome of other cases in which the expert has appeared – how the expert has been received by courts.

Second, you should gain a general understanding of the method your proposed expert will use. Does it appeal to common sense? Is the evidence likely to assist the fact-finder in their mission?

Third, interview the expert to make sure he or she understands the issues in the case and the specific issue that it is intended he or she will address.

Finally, make sure the expert understands the process and deadlines applicable in the relevant jurisdiction.

The proper expert witness approach and strategy can be critical in litigation. Hicks Morley is experienced in navigating the issues that arise when relying on or responding to expert evidence, and we look forward to working with you on your next case (or your current one!).

***Frank Cesario*** is a lawyer in Hicks Morley's Toronto office. He is the Practice Group Leader for the firm's Litigation group. He has significant courtroom experience representing clients in civil litigation and regulatory proceedings. Frank has particular expertise in administrative law and judicial review, appeals, employment litigation, pension litigation, shareholder litigation, restrictive covenant litigation, class actions and injunctions. Frank has represented clients in trials, commercial arbitrations, hearings and appeals.

Tel: 416.864.7355
Email: frank-cesario@hicksmorley.com

***Siobhan O'Brien*** is a lawyer in Hicks Morley's Ottawa office. Her practice involves advising and representing a wide variety of public and private sector clients on all issues related to labour and employment matters in both unionized and non-unionized settings. Her practice includes arbitration advocacy, employment litigation, human rights proceedings and the entire spectrum of collective bargaining, including interest arbitrations and strike management.

Tel: 613.369.2111
Email: siobhan-obrien@hicksmorley.com

# CLASS ACTIONS BEYOND CERTIFICATION – THE CASE FOR DEFENCE THROUGH TRIAL

BY: JOHN C. FIELD

As we approach the quarter-century mark since the *Class Proceedings Act, 1992* ("*CPA*") came into force in Ontario, employers should recognize the need to defend their decisions and policies, not only by resistance to certification of a proposed class action under the *CPA*, but also by defending the merits of a class action, where certified, through a common issues trial.

## STEP ONE – THE CERTIFICATION BATTLE

Resistance to certification of a proposed class action remains a critical first step, where the claim advanced is not appropriate for class action treatment. In that regard, lack of commonality remains the key fighting ground under the five-part certification test under the *CPA*. The *CPA* contains a five-part test for certification as follows:

5.(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

a. the pleadings or the notice of application discloses a cause of action;

b. there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

c. the claims or defences of the class members raise common issues;

d. a class proceeding would be the preferable procedure for the resolution of the common issues; and

e. there is a representative plaintiff or defendant who,

i. would fairly and adequately represent the interests of the class;

ii. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and

iii. does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

With respect to the test for certification, the Supreme Court of Canada has decided several cases in the last several years that have clarified the evidentiary burden on the plaintiff. The Court has confirmed that the plaintiff must support the last four parts of the test under the *CPA* with "some evidence"; however, with respect to commonality, the "some evidence" test is based on the Court's consideration of whether a common issue once decided at a common issues trial will move the litigation forward, even if there are individual issues which remain to be determined after the resolution of the common issues.

With respect to the fourth part of the test on preferability on the resolution of the common issues, the Supreme Court of Canada also has clarified that a plaintiff can still proceed with a class action, even where there already has been a regulatory process pursued under a statutory regime.

At the certification stage, the motions judge must decide the issue based on the procedural provisions with respect to the test for certification, as opposed to a decision on the merits of the claim.

## STEP TWO – THE POST-CERTIFICATION DEFENCE

Given the history of certification proceedings in Ontario in the last decade, including the increasing number of class actions against employers, where a class action is certified, employers now more than ever need to consider resistance to potential pressure by plaintiff counsel to negotiate or mediate an early settlement, where the merits of the claim can be strongly defended at a common issues trial. Employers in those circumstances should be prepared to pursue their defence through documentary and oral discovery, pre-trial and trial.

> It is fundamentally important to remember that certification merely involves a procedural gate opening. It does not determine liability on the part of the employer.

Plaintiff counsel seek to use the procedural mechanism of a certification order as a tool to press an employer into early resolution. This approach maximizes plaintiff counsel's return, while minimizing their efforts to prove the case at a common issues trial. It is fundamentally important to remember that certification merely involves a procedural gate opening. It does not determine liability on the part of the employer. As a result, employers should be prepared to defend actions and policies that have been undertaken in the course of their management of the workplace.

## CLASS ACTIONS – HERE TO STAY

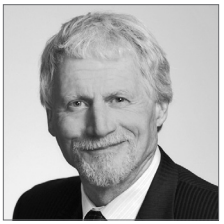
There is no doubt that plaintiff counsel have targeted employers, particularly large employers, as significant sources for class action claims. These types of claims have their roots in our neighbour to the south, but clearly the use of the class action vehicle in Canada is here to stay. Employers should continue to focus on ensuring that minimum statutory thresholds are met in the workplace and should also consider the communications that are made to their employees.

In recent years, a variety of proposed class actions have been pursued against employers, including wage and hour claims, employee and retiree benefit claims,

pension claims and employee health claims. Frequently, these claims have been based on an allegation of a systemic practice on the part of the employer. An alleged common issue therefore is pursued at a common issues trial. Employers need to recognize that where they defend such unfounded systemic claims through trial, they are able to do so based on a full evidentiary record in order to assist them in establishing that the plaintiff has failed to prove such a systemic claim based on a balance of probabilities.

Assessment of the risk will continue to be the essential factor for employers to consider and this assessment should include reputational, as well as economic considerations.

The more class action claims are pursued against employers, the more there is a corresponding need for employers to recognize the importance of fully defending their actions at a common issues trial. Successful resistance at trial can bolster an employer's future ability to resist additional unfounded systemic claims as well.



***John Field*** is a lawyer in Hicks Morley's Toronto office. He has acted as lead defence counsel in a significant number of class actions on behalf of employers since 1998. These include class action proceedings involving wrongful dismissal claims, overtime claims, pension benefits and pension surplus claims, retiree benefit claims, employee retention bonus claims and employee health claims. He has acted as counsel at all levels of court, including the Court of Appeal for Ontario and the Supreme Court of Canada.

Tel: 416.864.7301
Email: john-field@hicksmorley.com

# CONGRATULATIONS

## We're pleased to congratulate Liz Kosmidis on her appointment as Vice-Chair at the Workplace Safety and Insurance Appeals Tribunal.

Liz graduated from Osgoode Hall Law School and was called to the Bar in 1983. During her time at Hicks Morley, she quickly made her mark as an expert in workers' compensation matters and as a trusted advisor to many of the firm's clients on workers' compensation, disability management and other labour and employment law issues. Prior to joining the firm, Liz was senior legal counsel at the Legal Services Division of the Workplace Safety and Insurance Board.

# THANK YOU

## Brenda J. Bowlby and Barry J. Brown Retire.

### BRENDA J. BOWLBY

Brenda Bowlby retired from the partnership at the end of March 2015, after more than 33 distinguished years of practice with the firm. Over the course of her career, Brenda gained recognition as a leading contributor to the development of education, administrative and human rights law in Canada, consistently ranking as a leading practitioner in the area of Labour and Employment Law by Best Lawyers® in Canada and acting as counsel in many of the leading cases in special education law. Brenda authored a number of books, chapters and articles on special education and human rights, including *An Educator's Guide to Special Education Law*, 2nd ed (Toronto: Canada Law Book, 2010). She developed the firm's acclaimed Workplace Investigation Training program, a reflection of Brenda's commitment to the provision of superior customer service, and was a member of the firm's Executive Committee for a number of years.

Brenda played a key role in the development of the firm's education law and human rights practices, and her commitment to client service in these challenging areas is a legacy that continues.

### BARRY J. BROWN

On December 31st, 2014, Barry Brown retired from the partnership after 30 years of practice. Barry joined Hicks Morley in 1984 and has been an integral leader in the area of employment and labour relations law – as well as education law, in which he regularly acted for school boards, community colleges and universities.

Barry's expertise and extensive knowledge in a wide variety of practice areas is inspiring.

We thank both Brenda and Barry for their contributions to their practice and the firm and trust that they will thoroughly enjoy a well-earned retirement.

Hicks Morley is pleased to announce that a contribution of $5,000.00 is being made to the Bob Hicks Scholarship at the Ivey Business School at Western University on behalf of our retiring partners.

# A LITIGATOR AT HEART

From high school moots to precedent-setting class action lawsuits, Elisha Jamieson-Davies has always enjoyed the courtroom. And as a member of the firm's Litigation Practice Group, she continues to represent our clients on a broad range of litigation matters.

We talked to Elisha about how her interest in litigation developed, and where it has taken her career.

**You practise out of the Toronto office. Has Toronto always been home?**

It has since articling. I grew up in London, Ontario, but moved to Kingston for law school and then to Toronto at the start of my career.

**Where did the interest in law come from?**

In high school, we did a criminal moot and I loved the experience. I also got encouraging feedback from my teacher, so criminal law was always in the back of my mind. In university, I completed a psychology degree at Western but realized that I didn't want to be in academia for the long term – I wanted to be on my feet in the

working world. So I decided to pursue what I loved – and I went to Queen's for law school because they had an intensive criminal law section.

**But you eventually switched into labour and employment?**

I did. I volunteered at the Kingston Penitentiary throughout law school – and working with the inmates really opened my eyes to the problems in the criminal law system. I knew I wouldn't be happy doing it. I participated in the Hicks Morley moot in my second year, and really enjoyed the experience, so I began to shift my focus to labour and employment. I articled at Hicks Morley and I've been here ever since.

We're fortunate to have longstanding relationships with our clients – so they know us and trust us, and see our advocacy skills in action. So when it comes to a litigation issue, we're their go-to firm.

**Was litigation always your primary interest?**

My first couple of years were broadly based, with a general labour and employment practice. But I got involved in a large class action lawsuit in my second year of practice – and I found it fascinating. I really began to focus on litigation from that point onward. It's now about 80% of my practice.

**What are your main areas of litigation?**

I have cases involving standard employment issues – such as wrongful dismissals and short- and long-term disability insurance disputes – but also in a number of other areas, from sexual assault cases where the employer has been named as a party, to general commercial litigation.

We're fortunate to have longstanding relationships with our clients – so they know us and trust us, and see our advocacy skills in action. So when it comes to a litigation issue, we're their go-to firm.

**What is the greatest challenge for a litigator today?**

I think one of the greatest challenges is actually getting to the courtroom for a full trial. There is a much greater expense associated with litigation today. A lot of it is driven by technology: there are documents today – emails, texts, blogs, for example – that didn't even exist a generation ago. So the massive electronic

document trail involved in many cases, combined with severely backlogged courts, results in fewer cases getting to the courtroom door for trial, even ones that are very strong.

> For those cases that need to be fought at trial, we make sure that our clients have fierce, well-trained and strategic advocates.

Our clients are definitely picking and choosing their battles – and we help them weigh the time, dollar cost and value in terms of pursuing litigation. For those cases that need to be fought at trial, we make sure that our clients have fierce, well-trained and strategic advocates. However, for those cases that may not need a full trial, we help clients through negotiation, mediation or by using litigation tools, such as motions, to resolve the matter.

### Any litigation trends?

The U.S. was way ahead of us in terms of class action litigation, but we're catching up and there's more in Canada now than ever before. I think this type of litigation will continue to grow here.

And basic wrongful dismissal claims – dealing solely with notice period issues – are much less prevalent. These claims now are often bundled with other causes of action, from breaches of duty of good faith to human rights complaints.

### How about your life outside of law – what are your main interests?

My husband and I bought a house a year ago, and a backyard for my gardening was a key feature. So that's been a real focus lately. I also danced for 25 years – ballet, jazz, hip hop – so the performing arts remain a strong interest. We try to get out to shows as much as possible, whether it's ballet, plays or classical music. And I really enjoy food and watching the cooking shows on the Food Network. I wish I was a better cook, but I'm working on it – and I'm having a lot of fun along the way.


# PROFESSIONAL DEVELOPMENT SESSIONS AND WORKSHOPS

This professional development program for in-house counsel and human resources professionals is designed to keep you informed about the latest legal developments and best practices.

| | |
|---|---|
| September 16 | Collective Bargaining & Communications CPD Breakfast |
| September 30 | *ESA*: Back to Basics CPD Breakfast |
| October 21 | The Aging Workforce: What You Need to Know CPD Breakfast |
| October 28 | Litigation Update CPD Breakfast |
| November 9 | Workplace Accommodation Training |
| November 18 | Social Media and Off-Duty Conduct CPD Breakfast |
| November 24 | School Board Management Conference |
| November 25 | Developing and Administering an Effective Attendance Management Policy CPD Breakfast |
| November 26 | Workplace Investigation Training |

VISIT HICKSMORLEY.COM/ADVANTAGE FOR MORE DETAILS

## *FTR QUARTERLY*'S NEXT CHAPTER

In our 2014 Hicks Morley client communications survey, we asked *FTR Quarterly* readers whether they would prefer to receive Hicks Morley updates and publications in print, or electronically.

**The verdict is in.** We will be transitioning all of the timely, insightful content you rely on into new user- and mobile-friendly electronic formats at the end of this year. Hicks Morley will continue to publish a number of electronic updates on issue-specific and sector-specific topics, keeping you informed about the latest developments and best practices in the field of human resources law.

Visit **hicksmorley.com/subscribe.htm** to subscribe to our electronic communications and manage your preferences.

**TORONTO**
77 King St. W.
39th Floor, Box 371
TD Centre
Toronto, ON M5K 1K8
Tel: 416.362.1011
Fax: 416.362.9680

**WATERLOO**
100 Regina St. S.
Suite 200
Waterloo, ON N2J 4P9
Tel: 519.746.0411
Fax: 519.746.4037

**LONDON**
148 Fullarton St.
Suite 1608
London, ON N6A 5P3
Tel: 519.433.7515
Fax: 519.433.8827

**KINGSTON**
366 King St. E.
Suite 310
Kingston, ON K7K 6Y3
Tel: 613.549.6353
Fax: 613.549.4068

**OTTAWA**
150 rue Metcalfe St.
Suite 2000
Ottawa, ON K2P 1P1
Tel/Tél: 613.234.0386
Fax/Téléc: 613.234.0418

hicksmorley.com

Hicks Morley

HUMAN RESOURCES
LAW AND ADVOCACY

*FTR Quarterly* is published four times per year by Hicks Morley Hamilton Stewart Storie LLP. The articles and other items in *FTR Quarterly* provide general information only, and readers should not rely on them for legal advice or opinion. Readers who need advice or assistance with a matter should contact a lawyer directly.