



# FTR

## QUARTERLY

WINTER 2015

**In this issue:**

**FOCUS ON KNOWLEDGE  
MANAGEMENT**

Inside knowledge management:  
how it benefits you

**LEGAL DEVELOPMENTS**

Top ten legal developments of 2014  
The 2015 compliance challenge

**PROFILE**

From northern frontier to  
eastern shores



**HUMAN RESOURCES  
LAW AND ADVOCACY**

# INSIDE KNOWLEDGE MANAGEMENT: HOW IT BENEFITS YOU



If you work in human resources, and remember the simpler days of the “Personnel Department,” you’ll understand the shift at Hicks Morley from what used to be known as “research” to today’s Knowledge Management group.

Just as the human resources profession has evolved far beyond paying, hiring and promoting, Hicks Morley continues to redefine its Knowledge Management group in response to the needs of both lawyers and clients.

“There’s truly been an evolution in the area over the past ten years,” says Heather Ritchie, Hicks Morley’s Chief Knowledge Officer and head of the Knowledge Management group.

“We’re moving from capturing and storing knowledge to actually embedding that knowledge right in the workflow – providing a ‘just in time’ delivery of information that our lawyers and their clients need.”

## FOCUS ON COST-EFFECTIVENESS

The focus of the group has also broadened, with a much greater emphasis on cost-effective service delivery – and on driving innovation to come up with new ways to serve clients better. This includes a re-examination of work processes to maximize efficiencies.

For example, the group has documented all of the steps required for an injunction, providing practical information and precedent material at every stage so that lawyers can respond quickly and efficiently in this time-sensitive situation. And the benefits to clients go well beyond just faster service.

“By defining a process and developing an extensive repository of ‘best practices’ precedents, our lawyers reduce the time they spend creating documents – and that means more cost-effective service for our clients,” says Pamela Hillen, one of the firm’s Knowledge Management lawyers.

“While every document has to be tailored to a client’s needs and situation, an efficient process and precedent system means lawyers don’t have to reinvent the wheel each time – something that’s particularly useful when urgent matters arise and time is at a premium.”

“By defining a process and developing an extensive repository of ‘best practices’ precedents, our lawyers reduce the time they spend creating documents – and that means more cost-effective service for our clients.”

## IT TAKES A VILLAGE

As the scope and responsibilities of the Knowledge Management group have increased, so has the makeup of the team responsible for the work. The group now consists of:

- a Chief Knowledge Officer who heads the Knowledge Management group and is responsible for developing and enhancing the firm’s knowledge management practices and direction;
- two full-time Knowledge Management lawyers;
- a full-time librarian, responsible for overseeing the firm’s extensive library collection, which includes thousands of unreported decisions; and
- a full-time Knowledge Management coordinator, who works with the group to manage and execute its initiatives.

And while the focus of Knowledge Management has broadened to include process improvement and innovation, knowledge sharing remains an essential core service that the group provides.

“We continue to support a number of client awareness publications, such as *FTR Quarterly*, *FTR Now*, our *Human Resources Legislative Update* blog and our *Case In Point* blog,” says Tierney Read Grieve, one of the firm’s Knowledge Management lawyers. “We know from the feedback we receive that our clients and the industry at large are relying upon these to stay up-to-date.”

And it’s not only a “firm-to-client” transfer of knowledge that the group provides. It is also responsible for identifying opportunities to transfer knowledge between senior and junior lawyers – a key step in enhancing associate productivity to meet the cost expectations of clients.

## THE EVOLUTION CONTINUES

Paul Broad, a partner in Hicks Morley’s London office, has been involved in the firm’s research and knowledge management areas since his start at the firm in 2000. While he’s no longer formally part of the group, he continues to provide support to its members and has seen the changes that have occurred first-hand.

“The role of a modern Knowledge Management lawyer is evolving and is quite challenging,” says Broad. “It requires a good understanding of information management principles, coupled with a sound professional judgment that our lawyers rely on to serve our clients well.”

As Chief Knowledge Officer, Heather Ritchie is the one responsible for meeting this challenge head-on.

“We spend a lot of time thinking about how we can do things better and deliver more value,” says Ritchie. “It’s a continuous process of enhancing existing practices, identifying and evaluating new ideas and showing the value in new approaches. The legal world doesn’t stand still – and our job is making sure our lawyers and clients stay a step ahead.”



# TOP TEN DEVELOPMENTS IN HUMAN RESOURCES LAW OF 2014

Legislative developments and rulings from decision-makers brought change to the fore in 2014. We have highlighted below ten of the key developments employers and human resources professionals need to know about in 2015 and beyond.

BY: CRAIG R. LAWRENCE

## 1. FAMILY STATUS ACCOMMODATION

The Federal Court of Appeal's decision in *Canada (Attorney General) v. Johnstone* introduced a four-part test for determining whether an employee has established a *prima facie* case of discrimination on the basis of family status where the issue is accommodation of childcare needs. The decision affirms that family status protections extend only to a parent's legal obligations, not to personal choices, and that family status accommodation obligations will only arise after the employee has made reasonable efforts to self-accommodate.

## 2. THREE NEW LEAVES OF ABSENCE UNDER THE ONTARIO *ESA*

Effective October 29, 2014, three new unpaid leaves of absence were added to the *Employment Standards Act, 2000* ("*ESA*"): Family Caregiver Leave (up to 8 weeks), Critically Ill Child Care Leave (up to 37 weeks) and Crime-Related Child Death or Disappearance Leave (up to 52 or 104 weeks), in prescribed circumstances to eligible employees. These new leaves can be used in conjunction with other *ESA* leaves if the circumstances of the leave qualify for more than one type.

### 3. THE NEW DUTY OF HONESTY

In *Bhasin v. Hrynew*, the Supreme Court of Canada created a new common law duty of honesty that requires parties not to lie or otherwise knowingly mislead each other about matters directly linked to the performance of a contract. This does not impose a duty of loyalty or of disclosure, and it is separate and distinct from any fiduciary duties that might otherwise exist. A failure to act honestly may give rise to damages.

### 4. CANADA'S ANTI-SPAM LEGISLATION ("CASL")

Effective July 1, 2014, CASL prohibits the sending of commercial electronic messages ("CEMs") without the express or implied consent of the recipient. The majority of CEMs require the express consent of the receiving party, which typically requires an affirmative action by the receiver. CEMs must also clearly and prominently provide an unsubscribe mechanism for recipients.

### 5. MENTAL STRESS UNDER THE WSIA

Prior to April 2014, the *Workplace Safety and Insurance Act, 1997* ("WSIA") and Workplace Safety and Insurance Board policy provided entitlement for work-related mental stress: psychotraumatic disability and traumatic mental stress. At that time, traumatic mental stress would only be recognized where it arose as an acute reaction to a sudden and unexpected traumatic event that occurred in the course of employment. However, the Ontario Workplace Safety and Insurance Appeals Tribunal held that these limitations were unconstitutional. While the long-term implications of this decision are currently unclear, one development may be a rise in claims for chronic mental stress that

accumulates over time and does not arise from an acute and unexpected event.

### 6. CONFIDENTIALITY OF SETTLEMENT AGREEMENTS

The Ontario Divisional Court upheld an arbitral decision ordering the repayment of settlement monies following a breach of confidentiality by the grievor, Jan Wong. The settlement agreement stipulated that a breach would result in the repayment of settlement funds paid to Ms. Wong by her employer, The Globe and Mail. The Court concluded that the repayment provision contained in the settlement was enforceable, and that upholding the settlement as agreed by the parties was not unconscionable. This helpful decision confirms that where parties agree that settlements must be kept confidential, failure to do so can carry significant consequences.

### 7. PENSION REFORM

Significant pension reforms were introduced in Alberta in 2014 and multiple pension reform bills have been introduced in Ontario. Alberta's *Employment Pension Plans Act* is a sweeping overhaul of the province's pension legislation, and impacts all areas of pension plan design, funding and administration. In Ontario, the *Pooled Registered Pension Plans Act, 2014* and the *Ontario Retirement Pension Plan Act, 2014* have been introduced to address the establishment of pooled plans and retirement undersavings, respectively.

### 8. DETERMINING INDEPENDENT CONTRACTOR STATUS

The Supreme Court of Canada created a new two-part test for determining whether an individual is an employee or an independent contractor in *McCormick v. Fasken Martineau DuMoulin LLP*. The test focuses on control

and dependency to determine whether an employment relationship exists. The more control exercised over an individual's workplace life, the greater the individual's dependency and the more vulnerable the individual will be in the workplace – all of which supports the existence of an employment relationship. The Court's test is a simple articulation of what is often a very fact-specific issue.

## 9. "COMMONALITY" IN CLASS ACTIONS

In October 2014, the Ontario Court of Appeal dismissed an appeal by certain current and former employees of CIBC World Markets Inc. for certification of a class action for overtime pay. In its decision, the Court of Appeal held that the job functions and duties of the proposed class members relevant to their eligibility for overtime pay could not be addressed without having regard to the individual circumstances of the class members. In short, the variation in job functions and responsibilities among the class members were such that the Court would not be able to determine overtime eligibility on a class-wide basis.

This lack of commonality was fatal to the class action certification.

## 10. ENFORCEABILITY OF TERMINATION PROVISIONS

Employers have been alerted yet again that termination clauses in employment agreements must be carefully drafted in order to ensure their enforceability. The Ontario Superior Court's decision in *Miller v. A.B.M. Canada Inc.* addressed a termination provision that ostensibly limited the employee's termination entitlements to the minimum period of notice or *salary* in lieu of such notice prescribed by legislation. The Court determined that the provision was void and unenforceable as it did not comply with the *ESA*. By limiting the pay in lieu of notice to simply salary, the employer excluded both a car allowance and pension contributions that were otherwise owed under the termination provisions of the *ESA*. As the provision was null and void, a period of reasonable notice was calculated that significantly exceeded the employee's *ESA* entitlements.



*Craig Lawrence is an associate in the Toronto office. He practises in all areas of labour and employment law out of the firm's Toronto office and has appeared before the Superior Court of Justice, the Ontario Labour Relations Board, the Human Rights Tribunal of Ontario and numerous labour arbitrators and mediators.*

Tel: 416.864.7532

Email: [craig-lawrence@hicksmorley.com](mailto:craig-lawrence@hicksmorley.com)



# THE 2015 COMPLIANCE CHALLENGE

Those of us who work in the area of human resources and human resources law know that nothing stays the same for long. Employment legislation, workplace policies and procedures, and staffing are just some areas where change is constant.

BY: THOMAS W. AGNEW

With all this transformation, it is critical for employers to monitor compliance with their legal obligations on an ongoing basis. We discuss below some key areas of compliance worth revisiting in 2015. Ask yourself whether your organization has achieved and maintained compliance in each one. If the answer is “no,” make compliance the number one resolution for your organization in 2015.

## **NEW OBLIGATIONS UNDER THE ACCESSIBILITY FOR ONTARIANS WITH DISABILITIES ACT**

The Ontario government enacted the *Accessibility for Ontarians with Disabilities*

*Act* (“AODA”) in 2005 with the goal of making Ontario accessible to persons with disabilities by 2025. As part of their AODA compliance obligations, affected organizations should have already developed policies, conducted training and developed accessibility plans in accordance with established deadlines – the most recent being January 1, 2015.

For large organizations (50+ employees) in the private or not-for-profit sectors, 2015 is the year in which you will need to review your employment policies and practices related to recruitment, accommodation, return-to-work and redeployment and advancement to ensure that you are



compliant with new accessibility standards that take effect on January 1, 2016.

The Ministry of Economic Development, Trade and Employment is responsible for enforcing compliance, and has the power to conduct audits and issue monetary penalties for non-compliance. Accordingly, every employer should check to see if it is AODA compliant – and take steps to ensure compliance in 2015 and beyond.

## SEXUAL HARASSMENT AND WORKPLACE VIOLENCE

In 2010, Bill 168 amended the *Occupational Health and Safety Act* to require worker protection from violence and harassment. Bill 168 specifically defines workplace violence and workplace harassment, and imposes several obligations on employers to protect workers from both violence and harassment in the workplace. This includes an employer obligation to create and post policies dealing with workplace harassment and violence, to create programs to implement those policies, and to conduct a risk assessment with respect to workplace violence addressing the unique circumstances of its workplace.

With the recent release of the Ontario Human Rights Commission’s statement entitled “Sexual Harassment and the Ontario *Human Rights Code*” and the Ontario government’s commitment to initiatives against violence and sexual harassment, renewed focus should be placed on issues of workplace sexual harassment. Employers large and small are well-advised to ensure robust policies and programs are in place to deal with complaints – and that appropriate training is provided to all employees about their rights and responsibilities.

## EMPLOYMENT CONTRACTS

Many organizations require their employees to sign written employment contracts. These contracts can bring clarity and certainty regarding the terms and conditions of employment, both during the employment relationship and when the employment relationship ends. It is important to review contract precedents on a regular basis, particularly where template documents are used, to ensure those contracts continue to reflect the goals of the organization.

Developments in the case law provide another good reason to review template employment contracts on a periodic basis. For example, several decisions released in the last few years have found termination provisions in employment contracts, which were meant to limit an employee’s entitlements upon termination to his or her minimum entitlements under the *Employment Standards Act, 2000*, were unenforceable because they did not appropriately address benefits continuation

Employers large and small are well-advised to ensure robust policies and programs are in place to deal with complaints – and that appropriate training is provided to all employees about their rights and responsibilities.

upon termination. Rather than having to pay out the minimum entitlements negotiated in the contract, the employers were required to provide common law reasonable notice.

In light of these decisions, employers should review their organization’s employment contract precedents and minimize potential risks in future termination situations.

## CANADA'S ANTI-SPAM LEGISLATION

On July 1, 2014, Canada's anti-spam legislation (commonly referred to as "CASL"), came into force. CASL regulates unwanted electronic messages that frequently target customers and businesses as well as other Internet threats, such as the installation of spyware and other malicious code. CASL restricts the sending of commercial electronic messages, which are messages sent by any means of telecommunication that are intended (even in part) to encourage participation in commercial activity. Any employer that sends electronic messages as part of its marketing and communications strategy should be aware of CASL because of its potential impact on legitimate business-related electronic communications.

Those who fail to be compliant with CASL can face substantial financial penalties that can be levied against both individuals and corporations. 2015 will be the first full year with CASL in effect, so there is no better time than now for organizations to ensure they are compliant.

## PAY EQUITY

Many are familiar with the term "pay equity," but not everyone is familiar with

whether their organization is pay equity compliant. The *Pay Equity Act* came into force in 1989. Since that time, employers covered by this legislation have been required to develop pay equity plans to achieve the legislation's purpose, which is to "redress systemic gender discrimination in compensation for work performed by employees in female job classes."

Achieving pay equity isn't enough, however, as the *Act* also requires organizations to maintain pay equity on an ongoing basis. Without regular maintenance, pay equity plans can become outdated and an organization that was once compliant might find that some aspects of its plan(s) no longer comply with the legislation. Because liability under the *Act* is not capped or time-limited, all employers are encouraged to take some time in 2015 to assess whether they are pay equity compliant.

## KEEP PACE WITH CHANGE

The workplace is a dynamic environment – and employers must ensure that their policies and procedures keep pace with this constant change. Now is the time to check all areas within your organization – not just those listed here – to ensure the policies and procedures currently in place are compliant with legislation, and continue to serve your organization's unique needs.



*Thomas Agnew is an associate lawyer at Hicks Morley's Toronto Office who practises in all areas of labour and employment law. Thomas advises employers on a wide range of issues, including grievance arbitrations, wrongful dismissals, human rights and employment standards. Thomas also provides training to employers and employer organizations on these issues.*

*Tel: 416.864.7227*

*Email: [thomas-agnew@hicksmorley.com](mailto:thomas-agnew@hicksmorley.com)*

# ADVANTAGE

## 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.

January 21	2015 Pension, Benefits and Executive Compensation Update Breakfast CPD Session
February 25	Using the Discovery Process to Achieve Your Strategic Litigation Goals Breakfast CPD Session
March 11	Psychological Disabilities and the Workplace: WSIB and Human Rights Implications Breakfast CPD Session
March 25	Responding to Data Breaches in the Retail and Hospitality Sectors Breakfast CPD Session
April 15	Labour Relations Breakfast CPD Session
April 28	Workplace Investigation Training
May 6	Human Rights Update 2015 Breakfast CPD Session
May 13	Communications and Collective Bargaining Breakfast CPD Session



HR QUICK HITS

### Reforms to Federal Certification and Decertification Processes under *Canada Labour Code*

Effective June 16, 2015, two key amendments to the *Canada Labour Code* enacted by Bill C-525, *Employees' Voting Rights Act*, come into force:

**1. No More “Card Check” Certification.** The automatic “card check” certification process will be eliminated. The amendments will require a secret ballot certification vote in all cases, which is what occurs presently in other jurisdictions such as Ontario. The union will be required to demonstrate membership evidence of support by 40% of the bargaining unit employees to trigger the secret ballot vote.

**2. Reduced Threshold for Decertification.** The threshold of evidence required to trigger a secret ballot decertification vote will be reduced from a 50% +1 majority, to 40% of employees in the bargaining unit no longer wishing to have the union represent them.

In both instances, a majority of votes cast in the secret ballot vote will be required to either certify or decertify the union as bargaining agent.

## FROM NORTHERN FRONTIER TO EASTERN SHORES



From her childhood in Kapuskasing, Sophia Duguay knew she wanted to become a lawyer. Now a partner in the Hicks Morley Kingston office, Sophia has most certainly achieved that early life goal. We spoke to her about her life and work – and the changes she’s seen in human resources law.

### **Tell us a bit about your background.**

I was born and raised in Kapuskasing and lived there right through the end of high school. It was a great community to grow up in. I left home for university, splitting my undergrad years between Western and Ottawa University and completing a political science degree.

### **How did your interest in law develop?**

As a child, I really enjoyed watching the courtroom dramas on TV. I knew from an early age that being a lawyer was what I wanted to do, and I took every step I could in that direction. I took a law course in high school, and even did a co-op placement

at a local law firm in Kapuskasing. After my undergrad, I went straight to law school at Queen’s. I definitely stayed the course.

### **What brought you to Hicks Morley?**

My husband and I both enjoyed Kingston and wanted to stay after I completed law school, so I articulated at a general practice law firm in the area and I was hired back in the labour and employment law group. It was during my first year that the group was invited to make the move to Hicks Morley and open the Kingston office in 1999. Even back then, the firm was a leader in the use of technology, so it was an easy integration with the other Hicks Morley offices.

### Any areas of focus in your practice?

I have several private sector clients but do a lot of work in the broader public sector, including a number of municipalities. My work really ranges across the whole labour and employment spectrum – from negotiations, to interest arbitrations, to workplace human rights concerns. And the advantage of being part of a large human resources law firm is that we have access to a tremendous depth of expertise in specialized areas. If one of our clients needs help in a specific area – pay equity or pensions, for example – we can easily access this expertise within the firm.

### You are fluent in French and English – how is your practice split between the two?

The amount of work I do in French is fairly small – our Ottawa office has more of an opportunity to work in that language. But I enjoy having the ability to work in either.

### Any changes for Eastern Ontario clients over the past few years?

The broader labour work – such as grievances and arbitrations – has remained consistent. But the change that's impacting employers everywhere is the need to do more with less. I do a lot of work advising clients on the labour and employment implications of change, from shared services arrangements, to restructuring, to other organizational moves.

There's also a renewed emphasis on issues relating to personal harassment that impacts just about every workplace. There's a growing spotlight on these issues, and it's more important than ever for employers to get the workplace investigation of any complaint right.

### Any other trends of note?

Accommodation issues in particular are an evolving area of the law – and it's something that clients constantly have to work with and assess. I think one of the most significant trends relates to family status accommodation, and conflicts between family obligations such as child care and work. These are thorny issues – and a lot of employers are struggling to find the right answer. There are few hard and fast rules in the area, and each request has to be assessed on its own facts.

Accommodation issues in particular are an evolving area of the law – and it's something that clients constantly have to work with and assess.

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

We're fortunate because we experience the best of the city and best of the country. I love working in downtown Kingston, but we live on a lake just north of the city, about 25 minutes from the office. We have two children, our son is 11 and our daughter is 5, and activities are a major focus with our son's spring football and rep hockey and our daughter's dance lessons. And the lake is always a focus. We boat and fish in the summer and we build a rink on the lake in the winter – the true Canadian life on ice.

# NEW PARTNERS

Hicks Morley is pleased to announce the addition of Elisha Jamieson-Davies and Gregory J. Power as partners in the firm.



## ELISHA JAMIESON-DAVIES

Elisha is a member of the firm's Litigation practice group and has represented clients in trials, hearings, motions, judicial reviews, appeals and mediations. She has appeared before the Superior Court of Justice, Divisional Court, Court of Appeal for Ontario and the Federal Court. Elisha brings a practical view to litigation and works with her clients to develop the best strategy for the particular issue at hand. Although she has developed a niche in financial services litigation, judicial reviews and class action litigation, Elisha works on a variety of litigation matters for the firm's clients, in both the public and private sectors. Elisha is also a co-editor of the firm's litigation publication, *Raising the Bar*.

Elisha can be reached at 416.864.7344  
or [elisha-jamieson-davies@hicksmorley.com](mailto:elisha-jamieson-davies@hicksmorley.com)



## GREGORY J. POWER

Gregory Power practises in all areas of labour and employment law. He represents a broad base of federally and provincially regulated employers in both the public and private sectors. Gregory provides advice in many different areas, including employment law litigation, human rights issues, corporate transactions and union-management issues. He also serves as the chief spokesperson for a number of employers who are engaged in the collective bargaining process. His practice involves appearances before the courts as well as a variety of federal and provincial administrative bodies, including human rights tribunals, labour boards and arbitration panels.

Gregory can be reached at 416.864.7240  
or [gregory-power@hicksmorley.com](mailto:gregory-power@hicksmorley.com)



## CONGRATULATIONS

**We congratulate the Honourable Mr. Justice William LeMay on his appointment as a judge of the Ontario Superior Court of Justice.**

Will graduated from the University of Toronto with a Bachelor of Laws degree in 1996 and was called to the Ontario Bar in 1998. Will has practised his entire career as a labour and employment lawyer with Hicks Morley where he has also built and led the firm's workplace safety and insurance practice. We are grateful to Will for his many contributions and wish him well as he enters his new profession as a jurist.

**Find out more at [hicksmorley.com](http://hicksmorley.com)**

**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/Télé: 613.234.0418

[hicksmorley.com](http://hicksmorley.com)



**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.

© Copyright 2015 Hicks Morley Hamilton Stewart Storie LLP