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Hicks Morley

HUMAN RESOURCES
LAW AND ADVOCACY

THE GROWING NEED FOR U.S. CROSS-BORDER EXPERTISE

While Canada and the United States share much in common as democratic, market-based societies, the similarities usually end at the border when it comes to labour and employment law issues.

With Canada having vastly different legislation, jurisprudence and legal requirements than our American neighbours, U.S.-based companies buying, selling or operating a business in Canada need Canadian-based expertise to navigate the labour, employment, pension and other human resources issues that are sure to arise.

VANISHING BUSINESS BORDERS

While businesses are benefiting from the many new cross-border opportunities that are emerging, one of the key challenges they face concerns the very different laws that govern the human resources function in each jurisdiction.

"On the labour side, U.S. clients are surprised by our certification process and how short the open window is between the actual application and the vote," says Stephen Shamie, Hicks Morley's Managing Partner. "And for individual employees, the whole concept of reasonable notice and termination of employment is very different. U.S. clients are always shocked at what is required – especially in situations involving the termination of senior executives."

With individuals in Canada receiving far greater protection in the eyes of the law than in the United States, a great deal of planning needs to go into human resources decisions to avoid serious liability.

"We understand that clients want solutions to their business problems, not legalistic answers that explain what they can't do," says Michael Kennedy, a partner in Hicks Morley's Toronto office. "That's why we work with them on ways to comply while still addressing their business needs. It's a very practical approach that our clients appreciate."

BEYOND EMPLOYMENT LAW

The need for cross-border legal advice isn't limited to labour and employment law issues. One of the other key areas that many clients must address is pension and benefit plan issues.

"We have a solid understanding of the pension and benefits landscape in the United States, so we leverage that knowledge to implement solutions here for American clients – and also help Canadian companies expand into the U.S.," says Elizabeth Brown, Chair of the Hicks Morley Pension and Benefits group.

It's a role that often goes beyond providing just legal advice.

"In highly regulated areas like pensions and labour relations, our American clients rely on us to deal with the regulators and use our understanding of the laws and the political landscape to put practical solutions in place," says Brown. "Even when decisions are being driven out of the United States, our knowledge of the Canadian landscape enables us to become an integral part of their team."

There are a number of pension and benefits issues that American clients want or need to address that require experienced Canadian counsel – including fundamental changes to their plans.

"American clients who have recently acquired Canadian businesses are often eager to replace their costly defined benefit pension plans with defined contribution arrangements," says Susan Nickerson, a partner in Hicks Morley's Pension and Benefits group. "Many of our clients have been successful in implementing, and when required, negotiating a transition to defined contribution benefits, but it's a delicate situation that requires effective management, communication and education. We can play a key role in making that happen."

And because of the links between different facets of the human resources function, American clients also need the lateral thinking that ensures that changes in one program area don't put them offside in another.

We have a solid understanding of the pension and benefits landscape in the United States, so we leverage that knowledge to implement solutions here for American clients.

"One of the most significant ways we add value is helping our U.S. clients understand how a narrow question or minor change in one area might have implications in another," says Rachel Arbour, an associate in the Pension and Benefits group. "Our work touches on the entire human resources spectrum, so we can identify if a small change to a pension or benefits plan has broader implications in areas such as collective bargaining, employment contracts and payroll practices."

THE ADVANTAGES OF INDUSTRY DEPTH

"One of the significant issues that U.S. clients face when crossing the border is the need to maintain parity and equality in their human resources operations while dealing with a completely different set of legislative requirements. This often requires a balance between the need to 'Canadianize' a company's operations while maintaining the spirit and intent of the U.S. parent's mission statement and core values," says Donna D'Andrea, a partner in the firm's Toronto office.

According to D'Andrea, "a key benefit we offer U.S. clients is our depth of knowledge in specific industries. For example, we act for a number of major hotel companies. Our knowledge of the hospitality industry and trends in Canada allows us the opportunity to advise a U.S. parent company on whether the strategies employed in the United States require modification before implementation in Canada."

For industries with operations across various provinces, it also means navigating the common law across the country in conjunction with provincial legislation.

"When it comes to obtaining Canadian legal advice, U.S. clients want to work with one service provider. We work with clients within their Canada-wide operations, not just those in Ontario," says D'Andrea. "We create and manage the legal team to provide cross-Canada advice and place the advice in context. It's a coordinated approach that's much simpler for the client."

EXPERIENCE COUNTS

For U.S. companies that have limited familiarity with the Canadian landscape, an experienced Canadian legal advisor can provide enormous benefits in terms of identifying issues before they become problematic.

"No other firm in Canada has the breadth of expertise and experience in the human resources law area," says Amanda Hunter, a partner in the Hicks Morley Toronto office. "And with our extensive experience in working with U.S. clients, we know the kinds of issues that might surprise them and can work to proactively avoid compliance issues before they arise."

From a legal and human resources perspective, our job is to make the border disappear for our clients, whether it's between provinces, between the U.S. and Canada, or internationally.

With trade agreements, technology and many other factors continuing to break down borders for business, it's the kind of advice and service that is needed more than ever.

"From a legal and human resources perspective, our job is to make the border disappear for our clients, whether it's between provinces, between the U.S. and Canada, or internationally," says Elizabeth Brown. "Our experience lets us take a broader view of things, based on a client's larger operations. So it's advice that truly fits into the bigger picture. That's the kind of perspective our clients are looking for, and we work hard to provide it."

ePROBLEMS WITH eDISCOVERY

When eDiscovery started gaining widespread acceptance many years ago, people hoped that the advent of electronic record keeping and the new "paperless" society would simplify the production and discovery process. Most people have been sadly disappointed. Canadian jurisdictions are now dealing with many of the issues that U.S. litigants have previously wrestled with – and Ontario is at the forefront of the struggle to resolve these problems.

BY: IAN R. DICK

In Ontario, the process of litigation – including wrongful dismissal actions and departing employee actions – is governed by the *Rules of Civil Procedure* ("*Rules*"). As of January 1, 2010, a number of significant changes have been made to those *Rules*, including many relating to discovery and production obligations.

DISCOVERY AND PRODUCTION OBLIGATIONS

The *Rules* in Ontario provide that "every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed..." "Document" is defined broadly as including "a sound recording, videotape, film, photograph,

chart, graph, map, plan, survey, book of account, and data and information in electronic form." The amended *Rules* now require the parties to consider what issues are likely to arise concerning documents, and in particular electronic documents, and to develop a discovery plan for dealing with those issues at the outset of the case.

One of the significant problems faced by parties involved in litigation today is navigating through the dangerous waters where technology meets production obligations.

In short, the question of how documentary production is to be undertaken must now be specifically addressed at the outset of each case and a case-specific plan devised. The amended *Rules* adopt the principle of "proportionality" – meaning that the time, expense, delay and potential prejudice involved must be considered. The concept is of particular importance when dealing with electronic documents where the scope of the records being searched and possibly produced can be extremely broad and voluminous.

ELECTRONIC DOCUMENTS: UNIQUE FORMS, UNIQUE PROBLEMS

Electronic data and information take many forms. These include electronic drafts of word processing documents, PDF files, voicemail messages, email messages and personal digital assistant or "PDA" (e.g. BlackBerry) data, including calendar entries, PIN messages and text messages. This information can also take less obvious forms, such as metadata, which is information about a particular data set or document describing how, when and by whom that data or document was collected, created, accessed, modified and formatted. Metadata can be essential to establishing key facts about the timing of when certain electronic documents were created and who had access to those documents, yet even the creator of the documents will often be unaware that this metadata even exists let alone how to access it.

The wide variety of types of electronic records is matched by the wide variety of methods for storing these records. Electronic records can be stored on all manner of devices, including computer hard drives, on- and off-site servers, floppy discs, electromagnetic tape, CDs, DVDs, memory sticks and PDAs. Often, only the IT specialists can identify what information and data might exist, let alone where it might be stored and how it might be accessed.

One of the significant problems faced by parties involved in litigation today is navigating through the dangerous waters where technology meets production obligations.

The recently published *Annotated E-Discovery Checklist*, developed by the Ontario E-Discovery Implementation Committee of the Ontario Bar Association to simplify the process of electronic discovery, is 24 pages long. While the *Checklist* doesn't resolve all of the issues that a party is likely to come across in preparing for discovery, it does identify many of the issues that are likely to arise. These include:

- preservation of documents;
- explaining the documentary discovery process;
- identifying concerns regarding possible "spoliation" – a common law principle that allows the court to presume that where relevant evidence has been

destroyed, the evidence destroyed would have been unfavourable to the party who destroyed it;

- establishing an IT liaison;
- implementing a "litigation hold policy";
- conferring with opposing counsel;
- collection and review of records;
- dealing with issues of privilege and confidentiality;
- producing relevant records to opposing parties; and
- preparing for examinations for discovery.

STRATEGIES FOR eSUCCESS

In order to deal with the new reality of documentary production, there are several simple steps that you might wish to take.

- Keep records long enough to allow for potential litigation.
- Establish a retention and destruction policy (so that there are fewer irrelevant records that have to be sorted through).
- Make provision to implement a "litigation hold" (a process to insure relevant records are not destroyed under the standard policy when litigation is pending).
- Establish systems and practices in consultation with your IT people that will facilitate the preservation and collection of documents.
- Inventory your records so you know where they are stored in order to facilitate quicker and more efficient searches if and when necessary.
- Establish a system for identifying and segregating documents that are likely to be subject to privilege to minimize the risk that these documents are accidentally produced when the pressure is on.
- Designate an individual to act as a "co-ordinator" for production issues, who can be notified if there is a reasonable likelihood of litigation, can implement appropriate measures to preserve and collect documents, and can co-ordinate with IT people and act as a liaison with legal counsel.

PUT PROCEDURES IN PLACE TODAY

The prospect of dealing with production of electronic records in the course of litigation can be daunting; however, it is essential to achieving ultimate success in court. Documents provide the foundation upon which a case is built. A case can be built on the documents that are not produced as well as on the documents that are produced. Electronic document handling procedures such as the ones described above can go a long way to helping your case and ensuring the best possible outcome should litigation take place.

***Ian Dick** is Chair of the firm's Litigation group. He is a litigator with extensive trial experience, having acted as lead counsel on a number of lengthy and complex civil trials. Ian is a frequent speaker on a wide variety of litigation topics including eDiscovery, civil procedure, expert evidence and judicial review. Ian works out of Hicks Morley's Toronto office.*

HR QUICK HITS

Unmasking Anonymous Internet Users

Recently, the Ontario Divisional Court addressed the procedural rules surrounding the "unmasking" of anonymous Internet users by the courts, and the circumstances in which interests such as privacy may be raised as a basis for restricting the production of relevant records in the process of litigation.

In *Warman v. Fournier*, the Court held that a motions judge erred in requiring the owner/operator of a right-wing Internet message board to disclose the identities of eight John Doe defendants who had posted commentary about lawyer Richard Warman.

The issue in this case was whether, and when, civil procedural rules could be used to obtain the identities of anonymous Internet users without restrictions that are based on countervailing *Charter*-protected interests, such as privacy and freedom of expression. The need to balance interests has been recognized in the test for production of identifying information from non-parties. In this case, the party in custody of the identifying records was a named defendant and subject to a routine duty to produce "all documents relevant to any matter in issue in the action."

The Court held that the routine production duty did not preclude a balancing of interests and that the motions judge ought to have considered the following four issues before ordering production:

1. whether the unknown alleged wrongdoers had a reasonable expectation of anonymity in the particular circumstances;
2. whether the plaintiff had established a *prima facie* case and was acting in good faith;
3. whether the plaintiff had taken reasonable steps to identify the unknown alleged wrongdoers and attempted to do so; and
4. whether the public interests favouring disclosure outweighed the legitimate interests of freedom of expression and right to privacy of the unknown alleged wrongdoers.

The Court held that the *prima facie* standard of proof is appropriate when the order threatens an individual's ability to speak anonymously. It also held that notice to unnamed alleged wrongdoers may be required, but that generally little would be added by such a step in defamation proceedings, given what is required to prove a *prima facie* case of defamation. In the result, the Divisional Court remitted the matter to be re-heard by a different motions court judge.

THE ART OF THE DEAL

Craig Rix was called to the Bar in 1995 but took a leave from law soon after to work with the provincial government as a senior political policy advisor. It was a time of great change on the labour front, and gave Craig a first-hand experience of the regulatory and public policy-making process that he continues to draw on today in his private practice.

Craig spoke with *FTR Quarterly* in October about his career and what his years in government taught him about finding common ground and forging practical solutions to complex issues.

Tell us about your background.

I'm from Hamilton originally, so I grew up in a highly unionized town where labour relations was part of the community culture. I completed a Bachelor of Arts in Political Science at McMaster, then carried on with graduate work in Public Administration and Public Policy. My main interest was in public/private partnerships and how you could bring successful private sector practices to operations in the public sector.

How did your interest in law develop?

A law career was always part of the equation for me. I never shied away from a good argument and labour law presented the best place to put that interest into practice. Besides, to this day, labour law continues to deal with the really interesting and often competing legal interests of employers and organized labour. With my background in public policy, I thought a career in law would bring all of these discrete interests together.

So I enrolled at the University of Windsor in 1990 and participated in the joint American law degree program at the University of Detroit/Mercy. That Detroit experience has proven to be very helpful as more of my private sector client contacts are now based out of U.S. headquarters.

After law school I articled at Hicks Morley but took a leave from law soon after my practice started to become a senior political policy advisor with the Ontario government.

What inspired you to go work in government?

It was early in my career, so it was still easy to change roles, and an opportunity came along to bring my legal experience and my academic training to bear on the development of public policy in labour relations. It was an opportunity I didn't want to miss.

How did you enjoy it?

I loved it, but it was a blinding pace and an unbelievable learning experience. I gained great insight into the complexities of the legislation making process.

It also helped me define what it takes to be a good advocate and lawyer. In government, I was often the client of legal services from internal and external counsel, so I got to appreciate what good legal advice was – and wasn't. The best lawyers were down-to-earth problem solvers and pragmatic, and not at all legalistic. It really informed my perspective on the profession and what I would and wouldn't do when I returned to practice.

The pragmatic part of law was knowing how to find a solution to the problem, not simply articulate the issues and the obstacles that stood in the way of any outcome. In the labour arena, there's always going to be a balancing of

interests of multiple stakeholders. So the question often was, how can you move legislation forward that will work for all parties?

What was it like coming back to legal practice?

My time at Queen's Park was a great experience – but it wasn't a career. So after three years I knew it was time to get back. I returned to Hicks Morley, I think as a better lawyer and a better problem solver. I also returned to the role of advocate with my rights and interest arbitration work – so I'm able to carry on an advocacy role that I enjoy very much as well.

How has your practice evolved over the years?

I think if you were to sum up the change in my practice it's that I relish the opportunity to be both a trusted advisor and an advocate. I love getting in on a file or project at the early development or strategic planning stage. Adding value by problem solving before the conflict arises is very rewarding to me. I also like the challenge of trying to advocate or negotiate in an environment where there are complex issues to be resolved.

Any situations in particular that employers should watch out for?

I think there are a couple on the horizon. The first is that we can't ignore that both the federal and provincial governments are carrying significant operating deficits – and this will inevitably be a large challenge for employers who are dependent on government funding. These deficits will be a drag on economic development. They will put significant pressure on broader public sector employers – who will continue to confront the demands of staff, but who will have limited resources to respond.

Compounding this challenge is the aging demographic of the Canadian workforce. It's a longer-term issue, but there will eventually be skills shortages. Proactive employers are looking beyond their 5 and 10 year plans and taking steps now to ensure they are well positioned to attract and retain the people they need to succeed.

What do you enjoy doing in your downtime?

My downtime is centred on family time. I live in Port Credit with my wife and our two daughters. They're both active at school, in dance and gymnastics, which means travelling a fair bit around Southwestern Ontario. So we're a busy family but we both love being involved in our kids' lives.

In terms of a solo passion, I really enjoy cycling. This past June I rode in the 200 km Ride to Conquer Cancer and with the help of friends and family managed to raise $10,000 for a great cause. It was a blast – and a very satisfying experience raising that much money while doing something I love.

HR QUICK HITS

Termination for Innocent Absenteeism

Two recent cases of the Ontario Superior Court illustrate that the doctrine of frustration continues to apply to situations of innocent absenteeism. However, the doctrine will only apply where the termination is done properly and with regard to all the circumstances.

In the first case, *Duong v. Linamar Corporation*, the Court dismissed a wrongful dismissal claim on the basis of a finding of frustration of contract due to disability. The plaintiff had been off work because of a disability for over three years, and had recently had his long-term disability benefits discontinued for non-cooperation with a treatment plan. The Court found the traditional tests for frustration applied.

In the second case, *Naccarato v. Costco*, the Court found that the employer had wrongfully dismissed the plaintiff when it terminated his employment for frustration arising out of his long and continuing absence (approximately five years) due to illness. The Court noted that this was not a situation where there was no evidence regarding the possibility of improved attendance. Rather, the doctor had provided no opinion with respect to the possibility of attendance in the foreseeable future. The Court found the employer therefore failed to meet the test of the Supreme Court of Canada in *Hydro-Québec* that its obligation to the employee ends when he "can no longer fulfill the basic obligation for the foreseeable future."

It is settled in law that an employer does not have to continue indefinitely to employ an employee who has an ongoing absence from the workplace due to disability and who can no longer fulfill his or her duties of the employment contract. However, prior to terminating an employee on this basis, the employer must be diligent in assessing the circumstances surrounding the absence. The employer should ensure that there is no reasonable prospect of the employee's return to the workplace and that accommodation to the point of undue hardship has been fully explored.

HICKS MORLEY WELCOMES EIGHT NEW ASSOCIATES

Hicks Morley is pleased to announce that the following lawyers joined the firm in September.

THOMAS AGNEW

Thomas Agnew is an associate lawyer at our Toronto office. He practises in all areas of labour and employment law, representing employers on a wide range of employment and labour matters, and provides training to employers and employer organizations. Thomas received his Juris Doctor from Queen's University, where he received the R.W. Leonard Prize in Collective Agreements and Arbitration and competed in the 2008 Hicks Morley Moot. Thomas both summered and articled with the firm before returning in 2010 as an associate.

JOSEPH COHEN-LYONS

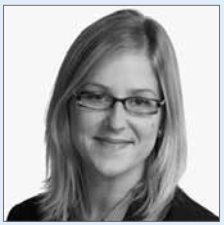
Joseph Cohen-Lyons is an associate lawyer at our Toronto office. Joseph practises in all areas of labour and employment law, providing advice and representation to employers on a wide range of labour and employment issues, with a particular interest in litigation and privacy law. Joseph received his Juris Doctor degree from Queen's University. Prior to joining Hicks Morley, Joseph worked in a legal clinic where he represented federal inmates in administrative matters, including disciplinary court hearings and hearings before the National Parole Board of Canada. Joseph articled with Hicks Morley before being called to the Bar in 2010.

MIKE HAMILTON

Mike Hamilton is an associate lawyer at our Waterloo office and practises in all areas of labour and employment law. Mike received his Juris Doctor from the University of Toronto. While attending law school, Mike sat as an executive member of the University's legal aid clinic where he represented clients in a variety of court and tribunal hearings. Mike articled with Hicks Morley before being called to the Bar in 2010.

HILARY JARVIS

Hilary Jarvis is an associate lawyer at our Toronto office and practises in all areas of labour and employment law. She received her Juris Doctor degree and her Masters in International Relations from the University of Toronto. In 2007 and 2008 Hilary worked as a summer law student at a Toronto firm specializing in immigration law. Hilary articled with Hicks Morley before being called to the Bar in 2010.



REBECCA LEE

Rebecca Lee is an associate lawyer in the Hicks Morley Pension and Benefits group and is based in our Toronto office. Rebecca advises employers on various aspects of pension and employee benefit plans, including plan design, administration and governance, as well as legal issues relating to plan mergers, wind-ups, surplus and corporate transactions. Rebecca obtained her Juris Doctor from Queen's University, where she received the 2007 Lang Michener prize in Contract Law. Prior to law school, she attended McMaster University where she graduated with a B.A. in Labour Studies and an M.A. in Work and Society. Before joining Hicks Morley, Rebecca articled with another Toronto area labour and employment boutique firm.

ERIN MILLER

Erin Miller is an associate lawyer in our Toronto office, and currently practises in all areas of labour and employment law. Erin received her Juris Doctor degree from Osgoode Hall. Prior to law school, Erin completed an Honours Bachelor of Arts with distinction from the University of Windsor and received the Board of Governor's medal for her program. Erin both summered and articled with Hicks Morley before being called to the Bar in 2010.

RICHELLE POLLARD

Richelle Pollard is an associate lawyer in our Toronto office, and currently practises in all areas of labour and employment law, with a particular interest in litigation. Richelle received her Bachelor of Laws degree from the University of Windsor where she was awarded the 2009 Labour Arbitration Award. Prior to law school, Richelle attended Wilfrid Laurier University where she obtained an Honours Bachelor of Arts degree with distinction. She both summered and articled with Hicks Morley before being called to the Bar in 2010.

CHERYL WARAM

Cheryl Waram is an associate lawyer in our Ottawa office. Her practice involves advising and representing unionized and non-unionized clients on a wide variety of human resources matters. Cheryl particularly enjoys serving the needs of small business. Prior to being called to the Bar, Cheryl worked in the labour and employment law area, in both private and public settings. Cheryl articled with Hicks Morley before being called to the Bar in 2010.

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