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Hicks Morley

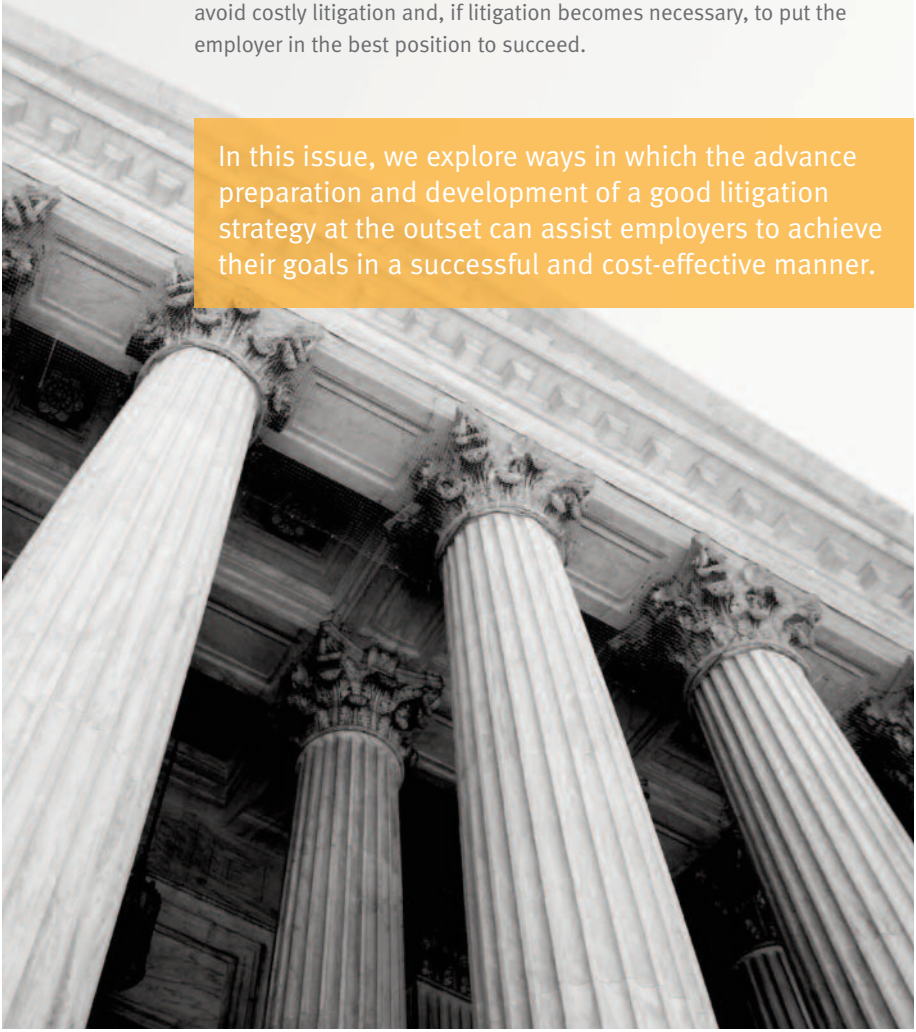
HUMAN RESOURCES
LAW AND ADVOCACY

In this issue:

Employers face significant risks from employees who engage in wrongful conduct, whether it is departing employees misappropriating clients and confidential information or employees acting in ways that threaten the positive image of the employer. In times of economic difficulties, employers also encounter significant problems in managing their workforce, as the termination of employees is costly and creates challenges of retaining cash to run the business.

Hicks Morley specializes in providing cross-organizational strategic advice to the leading private and public sector employers in Canada to respond to these risks and challenges. This advice is designed to avoid costly litigation and, if litigation becomes necessary, to put the employer in the best position to succeed.

In this issue, we explore ways in which the advance preparation and development of a good litigation strategy at the outset can assist employers to achieve their goals in a successful and cost-effective manner.



PROTECTING YOUR COMPANY AGAINST WRONGFUL COMPETITION

Confidential business and client information is the lifeblood of an organization. A strategy to protect this information and enforce your rights is critical.

BY: **FRANK CESARIO**

Competition can be fierce during times of economic distress – and increasing employee mobility makes it imperative to develop a proactive strategy to protect your business from departing employees who steal confidential business information and use it to compete unfairly and solicit your clients.

Although departing employees have certain legal obligations even in the absence of a written contract, step one is usually ensuring that restrictive covenant language is included in employment contracts. But rights and contracts are meaningless without a strategy to enforce them.

A corporate strategy to respond to unfair competition must deter departing employees – and the companies that hire them – from raiding your client base. This involves three objectives:

(1) protecting your company's clients and assets;

(2) reinforcing the integrity and enforceability of any restrictive covenants in your employees' contracts; and

(3) sending a clear message that action will be taken to hold departed employees and their new employers accountable for their conduct.

Hicks Morley has extensive experience in providing strategic advice and litigating these disputes, including a recent success in *H. L. Staebler Company Limited v. Allan* (a leading decision of the Ontario Court of Appeal successfully argued by Stephen Gleave of our Toronto office).

Based on our experience, here are some key strategic steps that you should consider.

REVIEW EXISTING COVENANTS

The law continually evolves, and the language in your employment contracts must keep pace with these changes to ensure the terms remain enforceable. That's why it's important to review any non-competition, non-solicitation (of clients

or other employees) and confidentiality clauses in your existing contracts.

To be enforceable, these covenants must pass three tests:

(1) They must go no further than reasonably necessary to protect your legitimate business interests, client base, confidential information and trade secrets.

(2) They must be reasonable in scope (i.e. in terms of geography, duration and fields of business).

(3) In most cases, they cannot prohibit competition generally. A non-competition clause (i.e. the prohibition of doing business altogether) is traditionally viewed with suspicion by courts in the employment context and is much harder to enforce than a non-solicitation clause. However, courts have enforced non-competition clauses in exceptional cases, such as with the sale of a book of business, or if an employee is knowledgeable and equal in bargaining power when the covenant is signed.

You should review your past practices to determine whether you have consistently applied and enforced your covenants (if not, the chances of enforcement decrease).

You may want to consider some additional, creative contract terms that can help protect your business interests. For example, some employers have clauses relating to stock options, supplemental retirement plans or other contingent payments allowing them to cut off or claw back the payment if the employee goes to work for a competitor or solicits clients within a reasonable, defined period of time after receiving the payment. Courts have shown a willingness to enforce these arrangements on the basis that requiring a former employee to forgo a benefit if she chooses to compete is not a restraint of trade and does not prevent the employee from pursuing her livelihood.

HR QUICK HIT

SURVEY COMING YOUR WAY – WE NEED YOUR FEEDBACK!

Over the past two years, we've undertaken a number of enhancements to keep you informed of legal developments in Human Resources law and advocacy:

- Our news magazine, *FTR Quarterly*, delivers in-depth coverage of key legal developments and insights into legal trends.
- Our e-newsletter, *FTR Now*, keeps you informed of the latest news and legal developments that impact human resources.
- *Legislative Update* provides a monthly review of new and proposed Ontario and Federal legislation that impacts a broad spectrum of employers and other organizations.
- In addition to these publications, we regularly post news updates on our website.
- Our RSS feeds provide commentary to you as we post it.

Now we need your feedback to make our client communications even better. Please look for our communications survey in the next few weeks – e-mailed to your inbox. We'd greatly appreciate your participation and feedback.

REINFORCE THE OBLIGATION OF EMPLOYEES TO PROVIDE NOTICE AND ACT IN GOOD FAITH

If a key employee leaves, your company will need time to transition clients from this employee to others in your organization. Employees are legally required to give notice of their departure and it is good practice to include a reasonable notice period in their employment contracts.

During the notice period, employees cannot solicit or take steps to transition clients to a new employer. Employees also have an implied duty of good faith to their employer, which can include cooperating in the transfer of clients. Key employees and senior executives may also have a fiduciary duty of confidence, loyalty, good faith and avoidance of conflict of interest.

If an employee breaches these obligations, put them on notice that the company will take the necessary action to recover damages for any losses caused by the breach.

PROTECT CONFIDENTIAL INFORMATION AND RELEVANT EVIDENCE

When an employee leaves, you should confirm that no physical or electronic confidential information has been taken by him or her. If you suspect that information has been taken, create an inventory of the physical property that you believe is in the employee's possession and demand its return.

Computerized data should be analyzed to determine if documents are missing. This is a rich source of potential evidence of wrongful solicitation or misuse of confidential information. We have successful experience using expert forensic computer analysts to review emails and the hard drives of departing employees' work computers, and any BlackBerrys or USB devices. Experts can resurrect deleted files and messages.

This evidence creates significant risks to the former employee and new employer from a legal, regulatory and reputation perspective. It also creates potential liability based on the tort of spoliation – the intentional destruction of relevant evidence. We have settled cases favourably for our clients once this improper conduct is shared with the other side.

Computerized data is a rich source of potential evidence of wrongful solicitation or misuse of confidential information.

If confidential information is taken, consider a "deleting agreement" involving the use of an independent third-party computer expert to verify in writing that the device(s) have been "scrubbed clean" of all confidential information and that none is stored elsewhere.

USE PRINCIPLED LETTERS AND OFFERS TO SETTLE IF A BREACH OCCURS

When you learn that a departed employee is in breach of her obligations, a principled and well-reasoned letter should be sent to her and to her new employer immediately.

This letter should describe the relevant facts, the breach, the consequences of breach, the relevant law and the liability of the employee and new employer, and state that the company is reviewing its options regarding legal action and an injunction. The letter should also highlight that the company expects to recover its legal costs. This letter helps to characterize the case according to your view.

The letter is usually sent under a lawyer's signature. The employee and new employer will share it with their lawyer, who will inform them of the significant risks and legal costs if they continue in their wrongful conduct.

A separate letter should include an offer to settle based on the employee and new employer complying with contractual covenants and legal obligations. The consequences of the offer should be explained: if the employee and her new employer fail at trial, the company may be entitled to recover full legal costs. The heavy burden of legal costs is often an effective deterrent and creates a significant barrier to the breach of covenants and legal duties. In a recent wrongful competition case, we recovered a significant amount of legal costs for one of our clients.

If you proceed with a lawsuit, you'll need to consider whether to add the new employer as a defendant in a court action. You'll want to consider whether the new employer induced breach of the covenant, profited from the breach or received confidential information. You'll also want to consider the strategic impact of adding the employer as defendant (increased legal costs for you, the potential for the hiring of a better legal team to oppose you and the solidarity it provides for your departed employee).

The cost and time of parallel procedures – a lawsuit and an injunction motion – can cause the employee and his new employer to settle favourably.

CONSIDER AN INJUNCTION TO STOP BREACHES

Bringing an injunction motion can be a valuable tool for deterring breaches. An injunction can be obtained within one or two weeks and can prevent the employee and new employer from soliciting or accepting business from clients until the case is decided at trial. It can be an even more powerful tool if it's coupled with an aggressive trial schedule. The cost and time of parallel procedures – a lawsuit and an injunction motion – can cause the employee and his new employer to settle favourably.

In preparing for an injunction, it is essential to be in a position to move quickly. This includes getting an early start on drafting affidavits describing the company's business, the employee's role, the employee's departure and details of the breaches and how they caused harm (e.g. lost profits, market share, goodwill or reputation). Helpful facts include solicitation of clients and misuse of confidential information, as well as any conduct prior to departure that gave the employee a head start in competing.

But there are significant risks to seeking an injunction, especially if the employer loses the motion. The employee and new employer may be encouraged to step up efforts to take your clients because they believe they will not be liable for their conduct. The court may hold that your covenant is not *prima facie* enforceable, which sends a message to the marketplace that your clients and assets are unprotected by the law.

Unfortunately, courts are reluctant to grant injunctions in employment cases and have a tradition of protecting free competition and employee mobility. The traditional test for injunctions is problematic for employers because it requires the company to show irreparable harm that outweighs the harm suffered by the employee if forced to comply with the covenant. To succeed, the company must characterize the employee's conduct as being clearly and egregiously in breach of reasonable contractual or legal obligations.

New developments in the law may help, however, as some Ontario courts have found that irreparable harm is not required if there is a clear breach of a restrictive covenant.

There are also risks to winning an injunction. The company must promise the employee and new employer that it will pay any damages they suffer if the court later

determines that the injunction should not have been granted. This can lead to a further proceeding to determine liability flowing from the improper injunction.

In the end, the facts of each case should determine whether an injunction will succeed or whether the risks are simply too high.

When it comes to safeguarding your confidential business and client information, the key always is to be prepared. Deterrence of any breach is always your desired goal.

BE READY TO GO TO TRIAL

While the risks of a trial cannot be ignored, it can sometimes be the only avenue to enforcing covenants, recovering damages and reimbursing as much of your legal costs as possible. The cumulative effect of damages and legal costs sends a powerful message to employees and future employers that breaches of your company's rights are not worthwhile.

The downside to trials is that they are time-consuming and costly, and unfortunately, it is common for employees in breach of their covenants to raise embarrassing claims against their former employer or individuals at their former firm in an attempt to involve clients in the proceedings.

To increase your chances of success at trial and minimize any risks, an effective litigation strategy will involve the following:

- ensuring that no unfounded claims of unethical or bad faith conduct are made against the employee or new employer, or you risk paying their legal costs (even if you otherwise win);
- making an early written offer to settle, as this allows the court to grant your company increased costs if you succeed at trial;
- collecting the evidence to prove wrongdoing by the employee and new employer; and
- determining a credible method of calculating losses (we recently achieved an award of lost profits for five years as a result of the breach of a non-competition covenant).

A STRATEGY IN PLACE IS THE BEST DEFENCE

When it comes to safeguarding your confidential business and client information, the key always is to be prepared. Deterrence of any breach is always your desired goal. By adopting a sound legal strategy to put the proper safeguards in place, investigate potential breaches and defend your company's rights should a breach occur, you'll be in a much better position to successfully protect your business from unfair competition by a departed employee – and deter others from attempting the same.

Frank Cesario *practises in the firm's Litigation Group. He has broad experience representing clients in civil litigation and regulatory proceedings, and has particular expertise in administrative law and judicial review proceedings, corporate/commercial and securities litigation, wrongful competition/breach of fiduciary duty litigation, employment litigation, class actions and injunction proceedings.*

PROTECTING AN EMPLOYER'S REPUTATION IN THE COMMUNITY

Putting the right corporate policies and practices in place today can go a long way to protecting your reputation should a future incident occur.

BY: STEPHEN GLEAVE

An employer faces many challenges in protecting its reputation in the community, challenges that are magnified in today's climate of instant and pervasive information dissemination. The challenges can arise in a wide variety of contexts:

- wrongful or criminal behaviour by employees;
- improper corporate or board governance;
- whistle-blowing; or
- regulatory non-compliance, to name but a few.

Should an incident occur or an impropriety come to light, an employer must be able to take the necessary action to ensure that any damage is minimized and that its reputation is restored.

Hicks Morley is involved in providing strategic litigation advice to employers to protect their positive image in the community. This advice includes the development of corporate policies and practices to allow an employer to respond to such risks in an efficient and cost-effective manner. It also includes a strategy to win at trial should an employee bring an action for wrongful dismissal.

Based on our experience in this area and the successes that we've helped clients achieve, there are a number of useful guidelines that we can share to help you protect your organization's image in the community.

CODE OF CONDUCT IS KEY

A key first step is adopting a code of conduct that clearly sets out the employer's expectations of its employees and emphasizes the importance of maintaining the employer's image in the community. The code should also inform employees of the potential consequences for behaviour that could harm the employer's reputation.

In addition, you should have clear policies and guidelines that establish a process for investigating allegations of misconduct or impropriety, and should apply those in a fair manner in each individual case. Where serious allegations are involved, you should consider conducting interviews in which notes of the questions and answers are transcribed.

Where criminal charges have been laid and the alleged conduct hurts your organization's reputation, you would be wise to place the employee on an administrative leave as the employee may not be able to explain his or her position until the criminal charges have been resolved. The question of whether the leave must be paid is rather complex, and you should seek legal advice before placing any employee on a leave without pay.

PROVING YOUR CASE

In any wrongful dismissal or related action, you will have to prove the misconduct on a balance of probabilities (the civil standard of proof), and not beyond a reasonable doubt (the criminal standard of proof).

When assessing whether just cause exists, a court should take into account the particular image that you are attempting to protect. It is not always necessary to prove actual damage to your organization's reputation; it may be sufficient to show that the misconduct in question has caused potential harm to your image in the community and to positive employee morale.

You can rely on your written code of conduct in defending your decisions provided that the code of conduct has been communicated to employees. This can be done by distributing the code to employees on a regular basis and having them read its contents. You should maintain records that can establish that this has occurred.

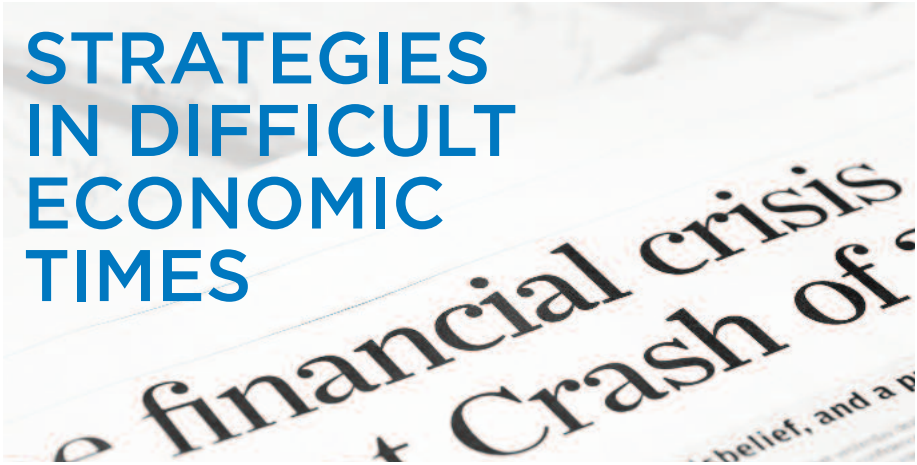
It may be sufficient to show that the misconduct in question has caused potential harm to your image in the community and to positive employee morale.

TAKE PREVENTATIVE STEPS NOW

The best way to manage the risk to your organization's reputation should any future incident occur is to engage in careful strategic planning ahead of time. This will allow you to respond quickly and appropriately and take all the steps necessary to protect your organization's image in the community.

Stephen Gleave *practises primarily as a litigator. Stephen's focus is on managing complex civil actions to bring them to a successful and cost-effective solution, either through settlement or litigation. Recently, he has worked on some complex wrongful competition cases, including the issues of ownership of books of business, and the use of fiduciary duties and the duty of good faith to restrain wrongful competition.*

STRATEGIES IN DIFFICULT ECONOMIC TIMES



As a follow-up to the "Responding to Difficult Economic Times" article that appeared in the Winter 2009 edition of *FTR Quarterly*, we revisit the issues that employers face during economic slowdowns – but this time from a litigation strategy perspective.

BY: ALLYSON FISCHER

As the global economy continues to contract, many companies are being forced to downsize their workforces and cut costs. Developing an effective litigation strategy from the outset can help minimize termination costs. Here are strategies you may want to consider in a downsizing situation.

PAYOUTS AT THE TIME OF TERMINATION

In the past, many companies have approached terminations by paying employees higher amounts at the outset in an effort to save legal fees. This approach does not work in today's economy because of the extraordinary number of employees who are losing their jobs. Rather, this approach tends to establish higher notice periods that become the new standard for settlement. Without an effective litigation strategy, you could end up paying higher notice periods than you had planned – resulting in significantly higher restructuring costs. This risk is heightened in economic circumstances where job losses are higher than usual, as is the case right now.

DEVELOP A MATRIX

Before terminating a large number of employees, consider developing a matrix with notice periods at the lower end of the reasonable notice range based on job classifications, age, years of service and other relevant factors.

These "reduced" notice periods should be offered to employees at the time of termination as salary continuance, subject to a clawback or mitigation provision, together with outplacement counselling services. Not only does this approach provide a greater opportunity to employees to find a new job, it gives you the ability to monitor whether your former employees find another job. If so, your liability can be significantly reduced.

USE OF MATRIX IF LITIGATION THREATENED

When negotiating a settlement of a potential claim, you'll be well positioned to press for a discount in the matrix notice periods based on a variety of possible concessions that you could offer:

- Waive the employee's responsibility to mitigate: Amounts offered or paid to employees would not be clawed back if the employee finds alternative employment during the notice period. With the clawback removed, an employee who finds a new job within the notice period gains a more lucrative result.
- Pay the amount as a lump sum rather than as salary continuance: Paying employees a lump sum is often worth more to an employee than salary continuance. Lump sum settlements immediately put money into employees' hands and can be transferred directly into an RRSP, resulting in tax savings.
- Provide outplacement counselling: Offering employees outplacement counselling at the time of termination helps employees find a job more quickly. Also, if declined, it allows the employer to establish that the employee has failed to mitigate his or her damages by taking all reasonable steps to look for alternative employment.
- Allocate a portion of the settlement as general damages: Depending on the circumstances of the case, a portion of the settlement may be allocated toward non-taxable general damages, putting more money in the employee's pocket without you incurring further costs.

These factors will tend to drive settlements downward rather than increasing them, and they then can become the new settlement standard.

LOWER NOTICE PERIODS JUSTIFIED IN TOUGH ECONOMIC TIMES?

There is some judicial support for the approach of offering "reduced" notice periods in poor economic times. In a decision that arose during a previous period of recession in the early 1980s, *Bohemier v. Storwal International Inc.*, the trial judge noted that companies should not be forced to bear the entire burden of a poor economic environment and that there must be some limit to notice periods even if employees are unable to find alternative work.

The trial judge also noted that courts must preserve an employer's ability to function in unfavourable economic conditions and ensure that companies can reduce their workforce at a reasonable cost, if necessary. If not, companies will face receivership or bankruptcy. The result was upheld by the Ontario Court of Appeal.

STRATEGY IS KEY TO SUCCESS

By developing a litigation strategy prior to implementing cost savings initiatives such as reducing your workforce, your company can minimize its costs and risks. This should result in significant cost savings, particularly where a large number of employees are affected.

Allyson Fischer *practises in all areas of labour and employment law with an emphasis on employment-related litigation. Her litigation practice focuses on resolving claims through cost-effective litigation or settlement. Allyson is routinely involved in complex wrongful dismissal litigation involving executive level employees, and regularly represents clients in wrongful competition actions.*

A CAPITAL CAREER

Andrew McCreary was called to the Bar in 1998 and began his career in Toronto as an employment law litigator before making his way east – helping to establish Hicks Morley's Ottawa office in 2001. He talked to *FTR Quarterly* about the development of his interest in human resources law and advocacy and the trends that he sees in employment litigation.

Are you originally from the Ottawa area?

Not quite as far east as Ottawa, but I grew up in Kingston and then did my law degree at Queen's, so this part of the world is very familiar to me.

But your law career began in Toronto?

That's right. By the time law school ended I had spent a fair amount of time in Kingston and I wanted to test the waters in Toronto, so I articled at one of the downtown full-service firms. They asked me to join the labour group there and I accepted. I'd done my Bachelor's degree in Social Organization and Human Relations and always had an interest in the relationship between people and work, so it seemed like a great fit.

It was during those first couple of years that I started gravitating towards civil and employment litigation as opposed to labour negotiations and arbitrations. I really liked tackling the process and strategies related to court work. It is very structured, but I really enjoy the challenges and competitive aspects of working within that framework.

How did the move to Ottawa come about?

As much as I liked the excitement of living in Toronto, I missed living and working in a smaller centre. I understood that a labour and employment firm in Ottawa was looking for help and I decided to make the move to Ottawa to join Chuck Hofley at his firm. That was in 2000. Not long after that, Chuck and I joined Lynn Thomson, George Vuicic and Leanne Fisher in starting up the Ottawa office of Hicks Morley. It was an exciting time for me and has been a great opportunity to work closely with a group of top-notch lawyers.

What's the litigation practice like in Ottawa?

It's very diverse because the employers we deal with are so varied. Ottawa is obviously a government town, but also has a dynamic hi-tech industry. All of the service and other industries that are needed to support the City and these operations provide a different flavour. One of the things I love about what I do is the chance to see first-hand the operations and cultures of so many different employers. And it's all within a fairly intimate business and legal community where you know and have dealt with many of the lawyers and judges. For me, it's the best of both worlds and offers a view of business that not many have an opportunity to experience. I really feel privileged to be part of it.

One of the things I love about what I do is the chance to see first-hand the operations and cultures of so many different employers.

How has your practice evolved over the years?

I think my practice has really mirrored many of the trends that are occurring in employment litigation. The classic employment law case is a wrongful dismissal suit, and I've done many of those starting very early in my career, but they've evolved into a much more complex beast. Issues related to human rights and mental distress, among other things, are becoming far more commonplace, and questions of damages are more complicated because of the many kinds of bonus, incentive, stock option and other compensation plans.

What does that mean for employers?

I think the stakes are higher now and employers need to undertake greater planning when a termination decision has to be made. While no employer can reduce its litigation risk to zero, they can greatly reduce the risk of a lawsuit by getting the legal advice they need upfront – before a termination occurs.

There are times when the lifeblood of an organization is at stake if an employer doesn't take steps to protect its interests.

I also think in these times that employers shouldn't be afraid to consider options short of termination if workforce or cost reductions are needed due to business conditions. There are a lot of ways to cut costs, from Employment Insurance work sharing, to a shorter work week, to compensation and benefit reductions. There's a perception that you can't do those types of things, but they can be very effective in many situations if they're done the right way. And they can offer huge longer-term benefits for employee job security and business viability and profitability.

Any other trends of note?

I think wrongful competition lawsuits are increasing – where one or more employees leave a business to join a competitor. It's an area employers need to be aware of as the stakes can be huge. Competition is fierce in many industries, and employees can be both highly valuable and highly mobile, so there are times when the lifeblood of an organization is at stake if an employer doesn't take steps to protect its interests. That means getting the appropriate non-competition, non-solicitation and confidentiality agreements in place. It also means carefully assessing situations where employees are being brought on who are subject to confidentiality, non-solicitation and non-competition obligations that may or may not be enforceable. About one-third of my practice is devoted to providing proactive advice and litigating on issues like this.

Any situations in particular that employers should watch out for?

Competition and wrongful dismissal issues often surface when a company starts to acquire other smaller companies – something

we're seeing a lot of these days. Every time there's an acquisition, one company is buying the goodwill of a smaller business. The owner/operator is often still part of the business, and if the marriage isn't a happy one, then competition issues often arise when the former owner decides to ramp up and start a separate, competing business all over again. This can be very complicated litigation with big potential consequences. It always helps if acquiring businesses do their due diligence on the target company and clearly document the responsibilities and restrictions relating to the former owner.

Do you get much of a chance to enjoy the non-working side of Ottawa?

I do, although it's a busy stage of life. I'm Vice President of the Board of Directors of the Ottawa branch of the Canadian Mental Health Association, and that's volunteer work that I really believe in and enjoy. On the personal side, my wife works as a lawyer at Agriculture Canada through the Department of Justice, and we have a five-year-old son and a three-year-old daughter – so that keeps us pretty active. Luckily, cottage life isn't far away in Ottawa, so we head to the lake as much as we can to recharge and to bike, kayak and hike. Ottawa is really a great community to be part of. Neither of us could imagine being anywhere else.

HICKS MORLEY WELCOMES BACK AMY TIBBLE AS AN ASSOCIATE IN TORONTO

AMY TIBBLE

Amy Tibble was an associate with the firm from 2004-2007, during which time she developed a practice focused on litigation, labour, and information and privacy law. In 2007, Amy moved to work as in-house counsel with a municipality located in southern Ontario. From this experience, Amy gained valuable insight into the full range of issues that employers face in managing human resources matters. Amy rejoined Hicks Morley in March 2009, and has resumed her practice where she left off. Amy's practice will primarily focus on litigation, but will also include human rights and labour matters for public and private sector employers, whether under federal or provincial jurisdiction.

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HUMAN RESOURCES
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