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Hicks Morley

HUMAN RESOURCES
LAW AND ADVOCACY

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ON THE EASTERN FRONT

The "go local" mantra has been a popular one in the past few years when it comes to sourcing food. But what many don't realize is that "go local" is old news when it comes to sourcing legal services – at least for human resources-related work.

When Hicks Morley considered its expansion plans over 20 years ago, regional offices were high on the priority list. The firm now has four – Kitchener-Waterloo, London, Kingston and Ottawa. Last fall, the firm celebrated the 10th anniversary of its Kingston office, the location responsible for serving the firm's Kingston-area clients as well as many others in eastern Ontario.

KINGSTON TRIO

The Kingston office was established as the firm's third regional office when Kees Kort, Vince Panetta and Sophia Duguay left their previous firm and relocated under the Hicks Morley name. They were joined by Colin Youngman in 2006 to form the current group of four lawyers.

"I've been here from the beginning and the goal of the Kingston office – and all of the regional offices – is to give clients full services within their own community, but with all the resources and expertise that a large firm like Hicks Morley can bring," says Kort.

"The firm's existing clients like the convenience of dealing locally, and we've been fortunate to attract many new clients who now benefit from the local expertise of a larger firm."

PERSONAL TOUCH IS KEY

While it is easy to think that advances in technology – with tools such as email and Web/video conferencing – might have lessened the need for regional offices, the Kingston lawyers have found that it is actually quite the opposite.

"In terms of our clients, face-to-face meetings are still an essential part of what we do, so being close geographically is a huge advantage," says Panetta. "It also gives us a much better understanding of local business conditions and the local players. We're just more in tune with what's happening."

And that also means being more in tune with the business challenges of each client.

"In terms of our clients, face-to-face meetings are still an essential part of what we do, so being close geographically is a huge advantage," says Panetta.

"Our knowledge of the law is an essential, of course, but the knowledge has to be applied practically to mesh with the business realities of each client," says Youngman. "That's where a local presence really helps. We get to know our clients' businesses and operations so that any strategies and action plans are tailored to their specific workplace needs."

BAY STREET ON MAIN STREET

Where technology has helped in recent years is by connecting the firm's resources more easily. Back in 1989, when the first regional office was established in Kitchener-Waterloo, there was no Internet to link offices. Lawyers often had to come into the firm's library in Toronto to do legal research before a hearing or arbitration. By the time the Kingston office was established in 1999, those issues were a thing of the past – and with the advances in mobile technology, Hicks Morley lawyers are more connected than ever.

"We're really able to bring the resources of Bay Street to eastern Ontario and beyond," says Panetta. "Our central Knowledge Management Group ensures we're up-to-date on the law and we can draw on expertise as needed firm-wide. When we combine that knowledge base with our local insights, it's a powerful combination."

The firm also has more formalized information-sharing processes in place, with the establishment of industry groups within the firm that monitor developments within specific sectors of the economy.

Sophia Duguay, who is a member of the firm's Healthcare and Social Services Industry Groups with an emphasis on the long-term care sector, notes that each sector has unique issues that must be taken into account when helping clients. And that is the advantage of an "industry group" approach to the firm's knowledge sharing.

"Healthcare unions all have provincial agendas," says Duguay, one of the firm's bilingual lawyers. "As a member of the firm's Healthcare Group, I'm able to keep up with what's going on provincially. I then can combine this information with our local knowledge of what's happening in the sector to fashion homegrown strategies and solutions."

"We pride ourselves on taking a proactive approach with our clients – to address potential issues before they become real ones," says Kort.

ADVANTAGE LOCAL

The Kingston office's blend of local knowledge and province-wide expertise brings a unique service to the area's employers at a time when human resources issues are front and centre.

"Eastern Ontario is facing the same issues as the rest of the province, arising out of the economic downturn," says Kort.

"So this is a particularly challenging time for employers, from issues relating to downsizings to demands of the collective bargaining process."

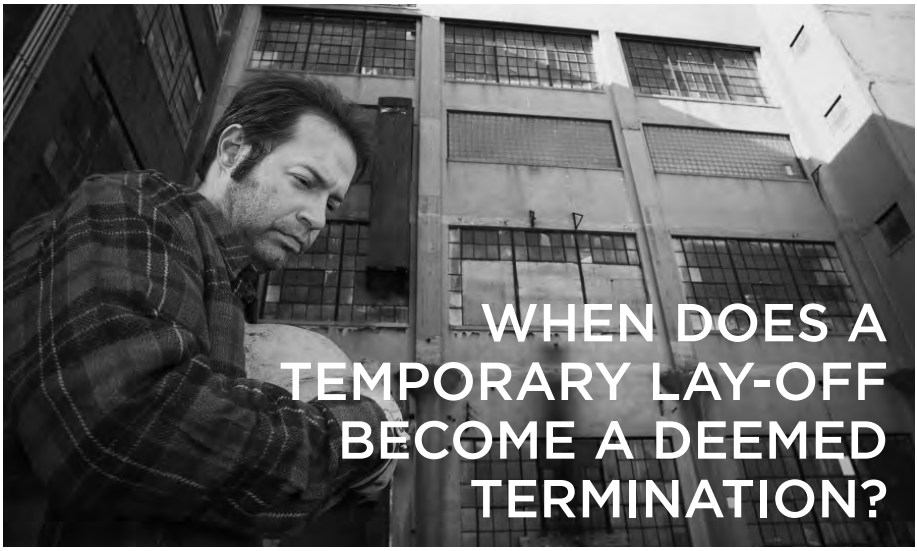
One of the innovative solutions that the Kingston office has provided is the introduction of scheduled "legal clinics" at some client locations. One of the firm's lawyers visits for a half or full day and is available for consultation on legal issues as determined by the client. It has proven to be a cost-effective way of providing "storefront legal services" right at a client's premises.

"We pride ourselves on taking a proactive approach with our clients – to address potential issues before they become real ones," says Kort. "To make that happen, there really is no substitute for being in the region and assessing the issues first-hand. It's a huge advantage for us and our clients. We've enjoyed the first 10 years immensely. We're looking forward to what the next 10 years will bring."

HR QUICK HITS

WSIB Changes its Practice on the Payment of Loss of Earnings Benefits

The Ontario Workplace Safety and Insurance Board recently changed its operational practice of paying loss of earnings ("LOE") benefits even when a worker is no longer in the workforce and has no loss of earnings. The change follows several successful challenges brought by Hicks Morley lawyers on behalf of employers. In several decisions, the Appeals Tribunal concluded that the WSIB was incorrectly interpreting section 43 of the *Workplace Safety and Insurance Act, 1997*, and lacked the statutory authority to award LOE benefits where the worker had no loss of earnings (e.g. following retirement). The new change means that in order to be entitled to LOE benefits, a worker must now actually have a loss of earnings. See our *FTR Now* of April 21, 2010 for details.



WHEN DOES A TEMPORARY LAY-OFF BECOME A DEEMED TERMINATION?

From time to time, employers find themselves in the position of having to lay off employees on a temporary basis. A major concern is the impact of the temporary lay-off and deemed termination provisions of the *Employment Standards Act, 2000* (the "*ESA*"), and the possible liability for termination pay should the lay-offs exceed the deemed termination threshold.

BY: BOB ATKINSON AND PAUL BROAD

Unfortunately for employers, the temporary lay-off and deemed termination provisions of the *ESA* are notoriously complex and difficult to interpret, making a difficult decision even more challenging. In a recent decision involving Johnson Controls Inc. and the CAW (successfully argued by Bob Atkinson and Paul Broad of the firm's London office), the Court of Appeal upheld as reasonable an arbitrator's helpful interpretation of these provisions.

THE *ESA* PROVISIONS

Section 56 of the *ESA* provides that a temporary lay-off is not a termination of employment until it exceeds one of three possible thresholds:

(a) a lay-off of 13 weeks in a period of 20 consecutive weeks;

(b) a lay-off of 35 weeks in a period of 52 consecutive

weeks, provided that the employer complies with one of six additional requirements (including continuing group benefits, providing supplementary unemployment benefits, getting the approval of the Director or entering into certain recall agreements with non-union employees); or

(c) a lay-off longer than the one described in point (b) above, provided that the employer recalls the employee within the time frame set out in an agreement between the employer and the union representing the employees.

THE ARBITRATION DECISION

In a 2006 decision involving the CAW and London Machinery Inc., the Ontario Court of Appeal had provided an interpretation of section 56 of the *ESA*, including a finding that a basic recall rights provision in a collective agreement, which provides for recall rights in excess of 35 weeks, could be a s. 56(2)(c) agreement under the *ESA*.

The issue before Arbitrator Brian McLean in the Johnson Controls matter was the interrelationship between clauses 56(2)(a), (b) and (c). The Union tried to argue that even if a collective agreement recall rights provision is a s. 56(2)(c) agreement, an employer must still comply with the substantive requirements of s. 56(2)(b) – i.e. must provide one of the financial benefits in (b) – in order to extend the temporary lay-off beyond 13 weeks in 20.

Arbitrator McLean rejected this argument, relying both upon the language of the *ESA* provision, which does not speak of compliance with the substantive requirements of s. 56(2)(b), and upon the *London Machinery* decision, which he determined was binding upon him. Rather, he found that where there is a s. 56(2)(c) agreement, there will not be a deemed termination until the temporary lay-off reaches the 35-weeks-in-52 threshold.

THE COURT DECISIONS

The CAW sought a judicial review of the Arbitrator's decision, first in the Divisional Court and subsequently at the Court of Appeal. In each instance, the Court upheld the Arbitrator's decision on the basis that it was a reasonable interpretation of section 56 of the *ESA*. The Divisional Court provided a more detailed analysis of the section, and found that the Arbitrator's interpretation was supported by the language and grammatical

structure of the provisions. The Court also found that the CAW's policy arguments did not support its alternative interpretation.

At the Court of Appeal, the Court dismissed the CAW's application from the bench, having not been convinced that the Arbitrator's interpretation was unreasonable. However, the Court suggested that the CAW's interpretation also could be a reasonable interpretation. While the comments of the Court in this regard are not binding on future decision-makers, they maintain a degree of uncertainty in this important area of the law.

GOING FORWARD

Despite the non-binding comments of the Court of Appeal, there yet may be some degree of certainty developing in the law. In at least one other case (*Re TI Automotive Canada Inc.*), the CAW's argument again was rejected, this time by Arbitrator Surdykowski. Thus, while there is some lingering doubt and the possibility remains that some decision-makers may decide otherwise, employers generally should be able to rely on a collective agreement recall rights provision – assuming that it provides for recall rights longer than 35 weeks – to extend a temporary lay-off out to a period of 35 weeks of lay-off in a period of 52 consecutive weeks.

***Bob Atkinson** is a partner in the firm's London office. His practice involves the full range of labour and employment law matters with an emphasis on grievance arbitration, Labour Relations Board matters, WSIB, human rights and civil litigation.*

***Paul Broad** is a partner in the firm's London office and is chair of the firm's Knowledge Management Group. Paul advises clients in a variety of labour and employment areas, with a particular emphasis on employment standards, privacy and freedom of information, accessibility for persons with disabilities and restructuring issues.*

LA LOI 168 ET LE DÉFI DU DEVOIR DE DIVULGATION

Le projet de loi 168, la *Loi modifiant la Loi sur la santé et la sécurité au travail en ce qui concerne la violence et le harcèlement au travail et d'autres questions*, vient rajouter aux obligations des employeurs. Notamment, la Loi 168 impose des nouvelles exigences considérables visant à éliminer la violence et le harcèlement au travail. Ces obligations seront imposées à tous les lieux de travail présentement visés par la *Loi sur la santé et la sécurité du travail.*

PAR: GEORGE VUICIC ET
MARIE-FRANCE CHARTRAND

DIVULGATION DE RENSEIGNEMENTS PERSONNELS

La Loi 168 impose en outre un devoir de fournir des renseignements aux travailleurs, y compris des renseignements personnels, relatifs au risque de violence au travail de la part d'une personne qui a des « antécédents de comportement violent », si selon toute attente : (a) le travailleur rencontrera cette personne dans le cadre de son travail, et (b) le risque de violence au travail est susceptible d'exposer le travailleur à un préjudice corporel.

Il s'agit d'une importante obligation de divulgation; les employeurs se verront aux prises avec, d'une part, le devoir de divulguer des renseignements personnels intimes, et d'autre part, le devoir de protéger la confidentialité de tels renseignements. Tous les employeurs en Ontario doivent avoir égard à la *Loi de 2004 sur la protection des renseignements personnels sur la santé*, qui régit la divulgation et l'utilisation de renseignements médicaux concernant des particuliers. Certains employeurs d'ordre public sont également assujettis aux lois en matière d'accès à l'information et la protection de la vie privée, qui régissent l'utilisation et la divulgation des renseignements personnels. Afin de concilier ces obligations divergentes, la Loi 168 limite la divulgation à ce qui est « raisonnablement nécessaire » pour

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BILL 168 DISCLOSURE OBLIGATIONS MAY LEAD TO DIFFICULT DECISIONS FOR EMPLOYERS

Bill 168, the *Occupational Health and Safety Amendment Act* (*Violence and Harassment in the Workplace*), *2009* amends the *Occupational Health and Safety Act* and imposes a range of new obligations on employers aimed at preventing and addressing workplace harassment and workplace violence. All workplaces currently affected by the *Occupational Health and Safety Act* will be subject to these new obligations.

These new obligations are aimed at preventing and addressing workplace harassment and workplace violence.

One controversial aspect of Bill 168 is the new requirement on employers to provide information, including personal information, to a worker related to a risk of workplace violence from a person with a history of violent behaviour if (a) the worker can be expected to encounter that person in the course of his or her work, and (b) the risk of workplace violence is likely to expose the worker to physical injury. Despite this new obligation, Bill 168 is silent about the type and amount of personal information that must be provided and strictly limits this information to what is "reasonably necessary" to protect the worker from physical injury.

Employers may face challenges in complying with their new obligation to disclose information that is reasonably necessary to protect the worker from physical injury while maintaining their obligation of protecting the confidentiality of such information.

These challenges may be particularly acute for employers who are required to comply with other laws governing the privacy or confidentiality of information in their possession. School boards, for example, must maintain certain information about each student, in a file known as the Ontario Student Record ("OSR"). The *Education Act* strictly limits when OSR information may be disclosed, so school boards must be cautious in balancing their conflicting obligations to maintain the confidentiality of the OSR while also satisfying their new duty under Bill 168 to disclose to workers – in certain circumstances – information about persons (including students) with a history of violent behaviour. School boards should develop a protocol to guide the process for determining when information about students may be disclosed. All employers subject to privacy or confidentiality requirements should consider how to reconcile those obligations with the requirements of Bill 168.

protéger le travailleur d'un préjudice corporel. Or, la Loi 168 n'offre pas de balises quant à savoir quels renseignements pourraient être raisonnablement nécessaires.

Les conseils scolaires peuvent ils—ou doivent-ils—divulguer les renseignements contenusdans un DSO, afin de satisfaire à l'obligation prévue par la Loi 168 de fournir à leurs employés des renseignements sur les élèves ayant des antécédents de comportement violent?

LE MILIEU SCOLAIRE

Le défi est d'autant plus prononcé pour certains organismes particuliers, en raison de leur environnement unique. À titre d'exemple, les conseils scolaires accueillent des élèves ayant des besoins particuliers, qui sont parfois incapables de contrôler leur comportement, ou qui ne comprennent pas nécessairement que leur comportement puisse causer un préjudice à autrui. Ces élèves ont parfois des tendances de comportement violent.

Afin de répondre aux besoins exceptionnels de ces élèves et soutenir leur réussite scolaire, les conseils scolaires doivent préparer un Plan d'enseignement individualisé ou un Plan de gestion de comportement, lesquels identifient les besoins particuliers des élèves. Ces plans sont consignés au dossier scolaire de l'Ontario de l'élève (« DSO »).

Les conseils scolaires peuvent-ils—ou doivent-ils—divulguer les renseignements contenus dans un DSO, afin de satisfaire à l'obligation prévue par la Loi 168 de fournir à leurs employés des renseignements sur les élèves ayant des antécédents de comportement violent?

L'article 266 de la *Loi sur l'éducation* limite strictement l'accès au DSO, et stipule que « l'examen des renseignements figurant dans le dossier est réservé, sous le sceau du secret, aux agents de supervision et au directeur d'école et aux enseignants de l'école en vue d'améliorer l'enseignement donné à l'élève ».

De plus, la loi en matière de l'accès à l'information et de la protection de la vie privée défend la divulgation des renseignements personnels à toute personne autre que celle qui est visée par les renseignements, sauf dans certaines circonstances.

Malgré que la *Loi sur la santé et la sécurité au travail* stipule que ses dispositions l'emportent sur les dispositions d'autres lois générales ou spéciales, la conciliation des devoirs divergents de divulgation et de protection de la vie privée n'est pas évidente.

Premièrement, la responsabilité d'un conseil scolaire par rapport à la collecte d'information est plus onéreuse par rapport à d'autres lieux de travail. Deuxièmement, la confidentialité imposée en vertu de la *Loi sur l'éducation* relativement au DSO est sujette à des exceptions limitées, qui ne concordent pas avec les obligations d'un employeur en vertu du projet de Loi 168. Finalement, la Loi 168 ne définit pas le terme « antécédents de comportement violent », lequel déclenche l'obligation de divulgation de renseignements.

Afin de satisfaire aux exigences de confidentialité du DSO prévues par la *Loi sur l'éducation* et, en même temps, aux obligations de divulgation prévues par la Loi 168, les conseils scolaires devraient préparer un protocole sur la divulgation des antécédents de comportement violent. Les objectifs du protocole sont : d'établir une marche

à suivre lorsqu'un élève en difficulté ayant des antécédents de comportement violent est identifié; de déterminer si des renseignements suffisants sur les antécédents de l'élève peuvent se trouver dans des sources autres que le DSO; d'énumérer les acteurs pédagogiques et scolaires qui doivent être impliqués dans une telle prise de décision; de cibler les travailleurs qui pourraient rencontrer l'élève en question, et qui risquent donc de subir un préjudice corporel; et déterminer les paramètres des renseignements nécessaires qui doivent être divulgués pour protéger le travailleur d'un préjudice corporel. L'établissement d'un protocole, avec l'appui des acteurs clés du conseil scolaire, permettra aux conseils de satisfaire à leurs obligations découlant de la *Loi sur l'éducation* tout en respectant les nouvelles exigences fixées par la Loi 168.

***George Vuicic** est associé au sein de notre bureau d'Ottawa, où il maintient une pratique entièrement bilingue. Il représente nos clients dans les deux langues officielles par rapport à toute une gamme de différents dossiers en droit du travail et de l'emploi, y compris le litige civil, l'arbitrage et les instances auprès des commissions des relations de travail et autres tribunaux administratifs. Il assiste notamment les conseils scolaires, tant avec les dossiers de relations de travail qu'avec les dossiers de droit scolaire, y compris l'enfance en difficulté.*

***George Vuicic** is a partner in the firm's Ottawa office, where he maintains a bilingual practice, advising and representing clients in both official languages in a broad range of labour and employment issues, including litigation, regulatory prosecutions, arbitration and labour board proceedings. He also advises school boards, both on labour relations and education law, including special education issues.*

***Marie-France Chartrand** a plaidé devant la Cour supérieure de justice de l'Ontario ainsi que la Cour d'appel de l'Ontario. Marie-France concentre une partie de sa pratique sur le contentieux civil. Elle fait également valoir les intérêts des employeurs dans plusieurs contextes, tels que la négociation collective, l'arbitrage, les procédures devant les commissions des relations de travail, les plaintes découlant des droits de la personne et des normes du travail.*

***Marie-France Chartrand** is an associate in the firm's Ottawa office. Prior to joining Hicks Morley in 2008, she worked at a national firm in Ottawa where she was involved in a number of high-profile litigation matters. In her practice, she advises clients in both official languages in a broad range of labour and employment issues.*

TACKLING THE ISSUES

Vince Panetta had five stellar seasons playing football for the Queen's Golden Gaels – and a career in football was always a consideration. But law was ultimately his calling and Vince became one of the founding members of the Hicks Morley Kingston office when it opened in 1999. He spoke with *FTR Quarterly* in March about his love of sport, his ties to the Kingston area and some of the trends he sees in the labour and human resources area.

Have you always lived in eastern Ontario?

I have – other than a couple of years, when I was working in Toronto. Ottawa is my hometown and I was there right through high school. That's really where my interest in labour issues developed. My dad was a pipefitter and my mother was a nurse so I come from a heavily unionized background. It was often a hot topic of conversation at the dinner table. Of course, now that I represent management my parents always joke that I'll be cut out of the will – at least I think it's a joke.

Did your labour interest carry on in university?

It did, but my interest in any academic subject really took a back seat to football when I started university. I loved playing and was being recruited by a number of schools for their football programs. It looked like my best opportunity was at Queen's, and that's where I went in 1984.

So academics and sport really competed for your attention?

They did, but I really enjoyed both. I did my undergrad degree in commerce and then stayed on for an extra year and did a Masters in Industrial Relations. I played for the football team during that time – three years at tight end,

one year at offensive guard and my final year as a fullback. I was captain during my final two years. I was fortunate to have some success. I was a conference all-star at three different positions and was inducted into the Queen's Football Hall of Fame in 2000. It was a really nice honour.

Any possibility of football as a career?

I came to the conclusion partway through undergrad that a football career was going to be a stretch. I was drafted by the Hamilton Tiger-Cats after my fourth year but when I didn't make the team in that first camp I was ready to move on.

We worked closely with a number of lawyers and I realized that law offered more of the stuff that I was really interested in – like bargaining and arbitrations.

Where did you move to?

That's when I did the Masters in Industrial Relations. It was a 12-month program and when I graduated I started work in the summer of 1989 at the Toronto Construction Association as a Labour Relations Officer. It was a great learning experience. The TCA was the authorized bargaining agent for contractors so I got to participate in the bargaining of several collective agreements.

We worked closely with a number of lawyers and I realized that law offered more of the stuff that I was really interested in – like bargaining and arbitrations. So I decided to go back to school for a law degree, first at Osgoode and then at Queen's for my final two years as I'd gotten married and my wife had begun her teaching career in Belleville.

How did you end up at Hicks Morley?

During law school I was introduced to Kees Kort by one of his law partners at the time. Kees is a senior partner at Hicks now but was working at a different firm then. I talked to him about working at the firm and he was interested, so I started working there as a summer student in 1994 and then articled and joined as an associate. The entire labour and employment department made the move to Hicks in 1999 and I've been here ever since.

Any concerns about moving to a larger, Toronto-based firm?

I was a little worried that I would have a lesser role at a larger firm, but it worked out really well. I ended up having the same responsibilities and the same close relationships with clients but suddenly had access to all the resources that a larger firm brings.

It's still a huge advantage, being able to call any of 100 or so lawyers in different regions of the province with different specialties to pick their brains when the need arises.

How would you describe your current practice?

It's always been fairly varied. I probably spend 30% of my time on collective bargaining, another 30% doing arbitrations, and the rest on general advice across the human resources spectrum. And I work with a wide range of clients, so I really enjoy the variety.

Any interesting trends in the areas you practise in?

I think that one particular growth area will be in human rights with the new tribunal. Individual knowledge of human rights has been around for a while and it's only going to increase further with the more "direct access" model that's now in place. It likely will mean an increase in human rights applications that employers will have to deal with.

I think the other big area will be in pension and benefits litigation as the boomers approach retirement. It also will be an increasingly larger issue in bargaining and will play a bigger role in terms of an employer attracting and retaining employees.

Any situations in particular that employers should watch out for?

I think that violence in the workplace issues are going to have a growing impact on employers – and with the new legislation it's certainly going to touch every workplace. Employers will be taking steps to both protect employees and do some due diligence in terms of risk assessments of employees and whether they pose a risk of violence. Of course, there are lots of grey areas and I think there

will be some litigation to determine how parts of the statute will apply.

You have a long history in the Kingston-Belleville area. What do you enjoy about your life and practice here?

We live in Belleville, which is where my wife is from and where her teaching career is. We have four kids – from ages 8 to 14 – and it's a great community to raise a family in. And professionally, I do a lot of travelling, so being in Belleville is also pretty central – I have clients both east and west of here.

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Your days are busy ones. How do you unwind?

With a family of six I have to say it's a pretty active life. Our three boys all play competitive hockey and I'm usually at the rink most nights during hockey season. I'm also involved in the minor hockey association and do some coaching. I really love watching my kids play sports and seeing them joke around in the dressing room and develop some really great friendships. Once summer hits, we pretty much leave the sports behind. We have a cottage on a small lake in Prince Edward County that's only 20 minutes away, so we move out there for July and August and the kids are able to fish and swim and water-ski and we can hang out as a family. It's a wonderful benefit to living in this part of Ontario.

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