FTR QUARTERLY

SUMMER 2009

In this issue:

Hicks Morley

HUMAN RESOURCES
LAW AND ADVOCACY

THE SUSTAINABILITY CRUNCH

COLLECTIVE BARGAINING IN HARD ECONOMIC TIMES

Collective bargaining takes on a whole new meaning when companies lose money and government tax revenues shrink. Concessions are on the table, but not all employee groups are prepared to dine.

It is no secret that Canada is in the midst of the worst recession in 50 years and that our major trading partner, the United States, is suffering even harder. The impact of the recession is being felt in the public and private sectors in different ways.

First, unemployment has increased dramatically, as the manufacturing and natural resources sectors in particular grapple with declining demand. As a result, the increases in unemployment are not spread equally across the country. According to Statistics Canada, Ontario accounts for 39% of the total working-age population of the country, but has experienced 64% of the overall employment losses since the start of the labour market downturn. The result? As of May 2009, Ontario had an unemployment rate of 9.4% – its highest level in 15 years. This has obviously made job security a huge issue.

Second, there has been a dramatic impact on the finances of private and public sector employers. The economic slowdown has resulted in reduced sales and prices for the private sector and revenue shortfalls for the public sector.

This has often been compounded by the drop in the stock market requiring employers to address pension plan shortfalls. Nor are there many signs that the world will return to its old ways. As a result, employers are having to adapt to that changed world.

"Employers are the first to recognize that times have changed and that jobs, money and security are all in short supply – especially in Ontario," says Simon Mortimer, a partner in Hicks Morley's Toronto office. "For many employers – both public and private sector – there is a sustainability crisis and that's what is shaping collective bargaining as organizations begin to fully feel the impact of a bad economy."

PRIVATE SECTOR FASTER TO RESPOND

While employers have recognized the tough road ahead for some time now, unionized employees have had varying responses to the crisis based on their industry and the nature of the employer relationship. In general, the private sector unions by necessity have been faster to respond to the crisis than those in the public sector.

"I don't think you can exaggerate the significance of this economic crisis when it comes to the private sector in this province," says Wallace Kenny, a partner in Hicks Morley's Toronto office. "The manufacturing and retail sectors have been decimated – and they're trying to find ways to keep employees and reach settlements. As a result, many unions have made concessions that have helped employers respond to the crisis."

In general, the private sector unions by necessity have been faster to respond to the crisis than those in the public sector.

The concessions take many forms, and vary in scale depending on how hard hit the particular industry has been. For a sector like the auto industry, the Canadian Auto Workers union has made major pay concessions, and the auto parts industry is engaging in similar discussions, with massive lay-offs already in effect due to the slump in auto sales.

A significant issue for many employers is the under-funded status of their defined benefit pension plans. As a result, employers are seeking changes to their pension plans that will reduce liabilities going forward, such as a change in plan design from defined benefit to defined contribution.

"As far as non-pension benefits are concerned, there are a number of concessions that can have a significant impact on an employer's ability to survive the current downturn," says Terra Klinck, a partner in the Hicks Morley Pension and Benefits Practice Group. "For example, many employers are attempting to put caps on retiree benefits, either by reducing the package available to future retirees, or having retirees absorb the true cost of these benefits through premium rates that reflect the retiree demographic alone, not blended with the workforce as a whole."

Where the relationship between employer and union is a reasonable one, there can be concessions made on both sides.

Other areas of concessions include reduced hours of work, pay freezes and the elimination of certain employee benefits, such as out-of-province emergency medical coverage. The concessions to be bargained depend on a number of factors in each case: the state of the employer-union relationship, the areas of cost concern for the employer and how strong the need for cost reduction is in terms of an employer's survival.

DISCONNECT BETWEEN PUBLIC AND PRIVATE SECTORS

One of the key issues facing labour relations in Ontario today is what may seem to be the disconnect between the public and private sectors in terms of their ability to react to the revenue shortfalls that are arising out of this economic crisis. To a degree, this can be explained by the enormity of the challenges confronting the manufacturing sector, which has required fundamental changes to avoid the prospect of failure.

In contrast, Craig Rix, a partner in Hicks Morley's Toronto office, notes that "with governments willing to run short-term budget deficits for now, the decline in revenues for the public sector is not yet as dramatic as in the private sector." So wage increases in the public sector have not declined to the same degree that they have in the private sector. For example, the May 2009 Ministry of Labour *Collective Bargaining Highlights* provides that the average wage increase in the public sector was 2.5% and the private sector was 0.5%. "This," Rix observes, "will have to give when the inevitable government funding belt-tightening begins."

"When you look at a lot of recent public sector bargaining, it's clear that many public sector unions are not willing to acknowledge the impact of the recession on governments," says Will LeMay, a partner in Hicks Morley's Toronto office. "In 2008, there were a lot of settlements (teachers, police, fire, municipalities) in the 3% range that went for a number of years. So when municipalities sit down with their unions now, unions have a 'me too' mindset based on settlements that were really done in different economic conditions."

With the recession now in full swing, and government revenues shrinking, it is not surprising that for many municipalities negotiations are very much focused on the ability to pay. "The strikes in Windsor and Toronto have all been about affordability," says Hicks Morley partner Michael Kennedy. "And for critical services – like hospitals and firefighters – where there is interest arbitration, it will be very interesting to see if arbitrators factor in the fragile financial state of municipalities."

Still, not all public sector negotiations have ended with high wage increases or prolonged strikes. Recent settlements by the province with OPSEU and the City of London with its workers have been at much lower wage increase levels that reflect the financial hit that governments are taking. And that is good news for the long-term sustainability of the services offered by publicly funded institutions.

CONCESSIONS ON BOTH SIDES

Every bargaining situation is unique, and there are no hard rules when it comes to negotiated outcomes. In some situations, there is a spirit of partnership – in others poor relations make it difficult to resolve things in a reasonable way. Where the relationship between employer and union is a reasonable one, there can be concessions made on both sides.

"A number of employers have gone to their unions early and asked to negotiate early, and a lot of unions have been receptive to that," says Ted Kovacs, a partner in Hicks Morley's Waterloo office. "On the flip side, I'm seeing a greater interest in employers trying to preserve jobs – through reduced work weeks, temporary lay-offs and other measures that avoid termination. It can be administratively more cumbersome, but it's positive for labour relations and employee morale and ensures staff will be in place when demand picks up."

The challenge for employers is finding that unique win-win agreement for their organization that gets them through the bad times while positioning their organization for success when the economy eventually recovers.

BARGAINING PENSIONS:

EMPLOYER STAMPEDE TO DC PLANS?

The year 2008 will go down in history as the year of the worst equity market since 1929, with markets around the world reacting to the meltdown of the housing market in the United States and the near collapse of some of the world's leading financial institutions.

BY: SUSAN NICKERSON

Pension plans, private and public, suffered unprecedented losses from the meltdown in the latter part of 2008. Defined benefit (DB) pension plan funding ratios of assets-to-liabilities dropped a reported 20-30%, spreading fear among federal and provincial governments and pension plan sponsors, many of whom were already struggling to meet their contribution obligations.

For many employers sponsoring Ontario DB pension plans, the year-end 2008 valuations will require enormous contribution increases over the next five years to fund the solvency deficiencies that have developed. The result could mean impending bankruptcy for these employers unless they can make significant design changes to their plans.

The design change many DB plan sponsors are contemplating is the transition from DB to defined contribution (DC) plans. The industry trend to DC plans is already well-established. Many employers in recent years have switched to DC plans, or to some combination of DC and DB, to reduce the risk of having to cover a significant funding shortfall. Until now, the trend to DC plans has been steady, but the 2008 market meltdown may result in a stampede of employers seeking to implement DC plan arrangements.

DC PLANS AT THE BARGAINING TABLE

Not surprisingly, for employers with unionized workforces entitled to collectively bargained DB pension benefits, the implementation of DC plan arrangements is the central issue on the bargaining table in 2009. However, employers generally encounter significant opposition to such proposals as many unions strongly prefer DB pension plans for their members and are prepared to fight for them. In recent months, several high profile negotiations have broken down over a union's refusal to accept a proposal to introduce a DC plan, even in cases where the DC provisions would only apply to new employees hired after the effective date of the collective agreement.

The 2008 market meltdown may result in a stampede of employers seeking to implement DC plan arrangements.

That said, some employers have been successful in negotiating a transition to DC benefits. And as with many aspects of workplace management, effective communication, education and explanations of the logic and reasoning behind the employer's DC proposal were all key to a successful conclusion of the negotiations.

COLLECTIVELY BARGAINING A DC PENSION PROPOSAL

While each employer-union relationship is unique, there are a number of strategies an employer should consider when tabling a new DC arrangement as part of its bargaining proposal:

- **Nail down design details before communicating.** When an employer first communicates with the union about a DC arrangement, it is essential that it have all design details in place. For example, unions will want to know whether DB benefits will be "frozen" and DC benefits offered for future service, or whether employees will be given the option to convert their DB benefit to lump-sum values deposited into their DC accounts. If the DB plan is a final average earnings plan, they will also want to know whether final average earnings will be frozen or whether their future earnings will be taken into account for purposes of calculating their DB benefit.
- **Clearly explain reasons for the change.** Provide enough information to the union to support the case for the change to DC and for the union to understand what is at stake at the bargaining table. Faced with the possibility of future lay-offs, terminations or the total collapse of the employer's business, the union may be more open to accepting the change to DC benefits.
- **Make education a priority.** Educate the union during collective bargaining about both the cost of maintaining DB benefits and what benefits DC plans can provide. With the assistance of an actuary, develop and disclose clear examples of the impact

of the change to DC benefits on the employees' future benefits. Depending on the demographics of the particular workforce and the designs of the DB plan and new DC arrangement, for some employees a change to DC benefits for future (and possibly past) service may produce a higher pension than the current DB plan. Educating the union about the pros and cons of DB versus DC benefits will be key to the success of the DC proposal. In this regard, it is typical for the union to engage its own actuary.

- **Ensure all communications are clear, true and accurate.** Be careful not to make any misrepresentations, especially about the risks associated with DC as opposed to DB plans and what the DC arrangement may provide at retirement. Failure to do so exposes the employer to claims for negligent misrepresentation and breach of its fiduciary duty as the administrator of its pension plan.

Whether more employers will be successful in 2009 in implementing DC arrangements for their unionized workforces remains to be seen. Certainly the enormous pension contributions now required by many employers as a result of the 2008 market meltdown makes a stronger case for DC benefits than ever before. Indeed, the survival of their businesses may depend on it.

Susan Nickerson *is a partner in the firm's Pensions and Benefits Group. Her practice is primarily focused on advising employers and financial institutions on pension surplus and contribution, holiday issues, on-going regulatory compliance, as well as pension, trust and benefit issues arising in the context of business transactions and insolvencies.*

Tel: 416.864.7257
Email: susan-nickerson@hicksmorley.com

HR QUICK HITS

Legislative update

In the most recent session of the Ontario Legislature, the government passed a number of pieces of legislation that will have a direct impact on employers. The key legislative changes and related regulatory initiatives touch on a variety of subjects, ranging from the use of hand-held devices by individuals operating motor vehicles (which will apply to employees driving cars or trucks during the course of their employment) and a new job-protected organ donor leave of up to 13 weeks, to the elimination of "elect-to-work" exemptions from public holiday pay, termination pay and severance pay under the *Employment Standards Act, 2000.* A detailed description of these changes and other developments of interest to your organization can be found in our firm's Legislative Update, located on the Resources Centre page of our website: **www.hicksmorley.com**

LABOUR RELATIONS
FROM THE INSIDE OUT

Simon Mortimer got his first taste of labour relations during his year as President of UWO's University Students' Council following his undergraduate degree. And he's never looked back. From his position as a unionized employer, to his work in government, to his private practice in both Waterloo and Toronto, Simon has participated in the labour relations process from a number of different vantage points. Simon spoke with *FTR Quarterly* in June about his background and some of the trends that are emerging in the labour relations area.

We understand you did a fair bit of travel at a young age.

I did. I'm from Toronto, but I went to boarding school at Lakefield College, and did a six-month exchange at a school in India about 300 kilometres from Delhi. Then after Lakefield, I spent a year as a junior teacher at Gordonstoun School in Scotland. So I got to see some interesting places early on.

What was your path to law?

It was a bit of a winding one. I got my BA in English from Western in 1988, but I stayed on for a year as President of the University Students' Council. That was really my first exposure to labour relations, as we had a unionized staff of about 30 people. So I got some experience as a unionized employer and I really enjoyed dealing with the labour relations part of the job.

After Western, I went to work for a couple of years with a corporate research company, but I knew I'd eventually be going back to school for either industrial relations or law. Law school won out and I went to Windsor, which had a strong labour program. I knew that was going to be my focus, and I really pursued opportunities. I got a summer job at Hicks Morley, then articled here and was hired back as a lawyer.

And you started off in Waterloo?

The firm was looking for an associate in the Waterloo office, and it was a great opportunity for me to take on a lot of responsibility quite quickly. Brent Labord was a great model and mentor for me. I was there from 1996 through 1998.

How did you end up back in Toronto?

I was offered the role of head policy advisor to Jim Flaherty, who at that time was the Ontario Minister of Labour. I had an amazing year learning about the stakeholders in the labour relations process and the balancing of interests in the *Labour Relations Act*. It also gave me a great understanding of the intentions of government versus the interpretation given by boards, as well as a very close-up view of what goes on behind the scenes. It's been very helpful in my practice to have seen things in a different context.

When did you return to the firm?

I was in government for a year, and applied to come back in the Toronto office. I maintained my focus on labour relations, and it was very much a Fred Hamilton and Tom Storie traditional labour practice – I still feel very indebted to both of them.

How has your practice changed over the years?

I think the biggest change for me is staying a step ahead of the growing level of sophistication in the issues our clients are dealing with.

As an example, where clients used to ask straightforward questions about pay or discipline, now in bargaining we're dealing with incentive pay systems, complex work schedules and cafeteria benefits. Employers want to really target compensation strategically. It used to be about hours and pay. Now it's about realizing value for money.

Another change is in how employers handle union campaigns. Years ago, employers would terminate union organizers. Now there's a tremendous focus on communication and disclosure during an organizing drive. Employers are much better prepared and are committed to teaching employees about self-representation so that they can make an educated decision.

The biggest change for me is staying a step ahead of the growing level of sophistication in the issues our clients are dealing with.

The *Labour Relations Act* sets limits on what employers can say or do during an organizing drive, and employers know that they have to operate in the sphere of full and honest disclosure. So we've developed ways of communicating that work within these limits, everything from Q&A blogs to websites.

There's a similar focus on disclosure during strikes as well. During a lengthy one last year, we used the internet to post every communication back and forth between the union and the employer as well as every offer on the table. It took a real commitment to full transparency, because not every communication is flattering to the employer, but it was a very effective approach.

Any other trends that employers should take note of?

There are a few that are noteworthy. First, there's been a shift in power towards employers caused by the current recession. However, while it's important to negotiate concessions that are needed to stay viable, the initial shock of the recession is over – and economic improvement may be on the horizon – so employers have to prove their case and do the necessary work on the rationale for any concessions.

I think the second trend is with union structure. Unions are merging, cooperating, sharing information and really breaking down barriers and there's a lot more information being passed from union to union. Employers need to understand that unions are much more savvy and have much greater access to information than they used to have.

One final change to watch for is the 2005 amendment to the *Labour Relations Act* that allows unions to apply for interim reinstatement if an organizer is terminated during a campaign. Through the Labour Board there's a two-day

turnaround to justify the termination and many people are being reinstated. This makes it vitally important for employers who have campaigns underway to carefully review any decisions they make and ensure they're aware of the risk.

What do you enjoy doing outside of work?

Our kids are a real focus, so that takes up a lot of our after-work time. We have a ten-year-old boy and a seven-year-old girl, so we keep pretty busy with things like soccer, figure skating and skiing. But we escape to the country as much as we can. We have a farm in Shelburne Ontario – it used to be my parents' land so the connection goes back a long way – and that's where my wife and I and our two kids go to escape. We lend the land to others for farming, but there's a lot for us to do up there year-round, with a trout pond and swimming and just being outdoors. It really is a great place for all of us to unwind.

HICKS MORLEY WELCOMES A NEW ASSOCIATE TO THE LITIGATION GROUP

LAILA KARIMI

Hicks Morley is pleased to announce that Laila Karimi joined the firm's Litigation Practice Group in our Toronto office in July. Laila received her law degree from Queen's University, where she received the David Sabbath Prize for Constitutional Law and the Community Commitment Award. She was a finalist at the William C. Vis International Commercial Arbitration Moot held in Vienna, Austria. After law school, Laila spent at year in Geneva, Switzerland where she first interned and later worked as the Associate Project Officer in the Asia-Pacific Regional Programme at the International Commission of Jurists, a non-governmental organization that works to promote and protect human rights through the rule of law. Prior to joining the firm, Laila worked as a litigator at a large Toronto firm. Laila has experience in employment, corporate/commercial, broker/dealer, defamation and class action litigation, and has appeared as counsel before the Ontario Superior Court of Justice.

Laila can be reached at 416.864.7282
or laila-karimi@hicksmorley.com

DRUG AND ALCOHOL TESTING

LEGAL PRINCIPLES BEGIN TO CRYSTALLIZE

The Ontario Court of Appeal recently issued its decision in the *Imperial Oil* drug testing case, confirming that there is now a maturing, critical mass of case law dealing with drug and alcohol testing issues.

BY: JOHN BRUCE

In our Spring 2008 edition of *FTR Quarterly,* we discussed the *Imperial Oil* arbitration award and lower court ruling, and the evolving area of Canadian drug testing law. The *Imperial Oil* case was notable because the arbitrator based his decision upon a collective agreement provision protecting employees' dignity, as well as upon employees' general privacy interests. The Court of Appeal has now found that the arbitrator's decision was a reasonable one.

Although the area is still evolving, this case signals that the legal principles related to testing in the workplace have largely crystallized – especially in the unionized setting. When a drug and alcohol policy is challenged, a decision-maker is likely to apply these principles to determine whether the policy fits safely within accepted norms. Employers need to review their policies and testing programs in this context because policies that were developed when the jurisprudence was still nascent may need to be updated to reflect the current state of the law.

LEGAL PRINCIPLES

Testing can be discriminatory on the basis of disability or perceived disability (i.e. drug or alcohol dependency). Employers need to be able to demonstrate that their testing programs advance a *bona fide* occupational requirement and that any disabilities discovered in the course of testing will be accommodated to the point of undue hardship.

The Supreme Court of Canada has described testing as "highly intrusive". Improved technologies may reduce the *physical* invasiveness of testing, but are unlikely to change the perception that the testing encroaches upon the employee's dignity, privacy and, in some cases, human rights.

An employer certainly has a right to take steps to ensure a safe workplace that is free from alcohol and drug impairment. However, this legitimate objective has to be balanced against what are now accepted as the rights of employees subject to testing.

This means there needs to be a justifiable reason for the testing. Such justifications limit an employee's reasonable expectation of privacy. Further, the potentially traumatic impact of the testing is lessened by the fact that the employee can understand that there are good rationales for the testing.

It is important to emphasize that the employer should start with a drug and alcohol policy that clearly sets out its testing program.

CLEAR COMMUNICATION AND FLEXIBILITY ARE KEY

It is important to emphasize that the employer should start with a drug and alcohol policy that clearly sets out its testing program. A clear policy communication adjusts the reasonable expectations of employees. Even better, a written agreement between the union and the employer demonstrates that there is agreement that the testing is reasonable. Increasingly, unions are willing to agree to drug and alcohol policies with limited testing because they see such testing as an important tool for creating safe workplaces.

Employers should be cautious about using "zero-tolerance" language when drafting this type of policy. Whether a zero-tolerance approach enhances deterrence has been called into question. Rather, deterrence is often achieved simply by the fact that the employer is testing. Automatic testing and test responses do not demonstrate reasonableness and can be unnecessarily intrusive, affecting employees' dignity and privacy. The policy should emphasize flexibility and that an individualized investigation and assessment will occur by management in each circumstance, with accommodation of disabilities as required. Policy language that builds in such flexibility is better insulated from legal attack and bolsters the employer's position that its testing is not unreasonably intruding on employee rights.

JUSTIFIABLE REASONS REQUIRED

For a testing program or an individual test to be upheld, an employer must also demonstrate that there are justifiable reasons for it. Furthermore, testing is more likely to be justified in the context of a broader investigation based on other evidence of potential impairment.

So, what are justifiable reasons for testing?

- Reasonable cause testing typically is justified, especially in safety-sensitive workplaces.
- Similarly, return to work testing also typically is justified where an employee previously has tested positive or been identified as having a substance dependency. Often such testing can be a key part of the dependant employee's treatment and the employer's accommodation efforts. It is the "stick" component of the "carrot and stick" approach that can be effective when accommodating a substance dependency disability.

- Post-accident and near miss testing should be approached as a variation on reasonable cause testing. A serious accident or near miss obviously justifies an investigation. However, decisions like Alberta's *Suncor* case make clear that testing likely will not be justified unless: (1) there are reasonable grounds for the testing beyond the mere fact that an accident has occurred; or (2) in the absence of such reasonable grounds, the employer's investigation demonstrates that there is no other credible explanation for the accident.
- Pre-employment and random testing typically will not be justified except in very limited circumstances (e.g. truck drivers crossing into the United States where testing is mandatory). Such testing may be justified in the context of extremely safety-sensitive positions, where there is low supervision and impairment could have catastrophic consequences. Or, as the arbitrator stated in the *Imperial Oil* decision, random testing may be reasonable where there is concrete evidence that *"an out of control drug culture has taken hold in a safety-sensitive workplace"*.

NEXT STEPS

When litigating drug and alcohol testing cases, an employer's position is greatly enhanced where the policy is well-drafted and thus insulated from direct legal attack. By averting an attack on the policy itself, the employer focuses the case on the employee-specific application of the policy, which will provide the employer with more strategic options to resolve the matter in a way favourable to the employer's goals.

An employer's position is greatly enhanced where the policy is well-drafted and thus insulated from direct legal attack.

Therefore, employers should be reviewing their own drug and alcohol policies and testing programs to ensure that they are carefully drafted and fit within what are the increasingly accepted guiding legal principles and norms. There may be occasions when an employer chooses, for any of a variety of reasons, to push the boundaries of these norms – one of the more common being consistency with policies applied in other jurisdictions in which the employer operates. Should an employer decide to push the boundaries in this fashion, the employer should endeavour to ensure that it can justify its decision based on the circumstances at its workplace, that it understands the associated risks and that it implements measures to optimize its legal position.

John Bruce *is a partner in the Toronto office. He represents private and public sector clients in all aspects of labour and employment law, and he regularly provides clients with strategic advice respecting employment and labour issues for executing large business initiatives and transactions.*

Tel: 416.864.7285
Email: john-bruce@hicksmorley.com

TORONTO
Toronto Dominion Tower
66 Wellington St. W.
30th Floor, Box 371
Toronto, ON M5K 1K8
Tel: 416.362.1011
Fax: 416.362.9680

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

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

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

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

www.hicksmorley.com

Hicks Morley

HUMAN RESOURCES
LAW AND ADVOCACY

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