FTR QUARTERLY

SUMMER 2011

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Hicks Morley

HUMAN RESOURCES
LAW AND ADVOCACY

FEDERAL EXPERTISE

The Canadian Constitution can be a quirky beast – and its distinction between provincially and federally regulated employers from a human resources law perspective is no exception.

Federally regulated employers – such as banks, railway and transportation companies, and telecommunications and broadcasting organizations – are governed by federal human resources laws. All other organizations are governed provincially. But it's not always as clear as it sounds.

"A significant component of my federal work relates to constitutional law, where there's an argument as to whether a matter is properly before a federal tribunal," says John-Paul Alexandrowicz, a partner in the Hicks Morley Toronto office.

"This involves assessing whether the business is federally or provincially regulated. We've had many cases, especially involving union certifications, where an application is brought under more labour-friendly federal laws and we've successfully argued that provincial laws apply."

A DIFFERENT REGIME

Of course, when matters do fall squarely in the federal sector, clients require in-depth knowledge and advice on an entirely different set of rules that govern human resources matters.

Under the *Canada Labour Code*, a terminated employee has a choice to bring a claim for wrongful dismissal, or the employee can make a complaint of unjust dismissal, which is similar to an arbitration.

"The main federal statute – the *Canada Labour Code* – is a single piece of legislation that incorporates the equivalent of Ontario's *Employment Standards Act*, *Occupational Health and Safety Act* and *Labour Relations Act*," says Simon Mortimer, a partner in the Hicks Morley Toronto office. "While some provisions are similar to provincial laws, many of the rules are quite different. The federal *Code* is also noteworthy, as the manner of its application differs greatly from what one might expect from a straightforward reading of the provisions."

In recent years, the federal government has commissioned studies relating to minimum standards and labour issues under the *Canada Labour Code* to identify areas of potential legislative reform. With a new majority government now in place, employers may see some of those reform measures implemented.

One of the key differences from an employment law perspective for non-union, federally regulated employers is the termination process for non-management employees.

"Under the *Canada Labour Code*, a terminated employee has a choice to bring a claim for wrongful dismissal, or the employee can make a complaint of unjust dismissal, which is similar to an arbitration," says Toronto office partner Catherine Peters.

"The key difference is that under the unjust dismissal process, the employee can claim reinstatement if the dismissal is found to be unjust," says Peters. "The challenge for federal sector clients is that whenever an employer is contemplating a termination, they must think not only of common law, but also the other set of rights that employees have, as it's the employee who decides which set of rights to trigger."

In many cases, this can be a considerable advantage to the terminated employee.

"One trend that's growing is an increase in the number of unjust dismissal complaints from non-union employees who are seeking reinstatement," says Gregory Power, an associate in the Hicks Morley Toronto office. "In most cases, employees have no interest in returning to the employer. They use it as a means of leveraging higher settlement amounts because they assume the employer is opposed to taking them back."

UNIQUE LAWS ACROSS ALL AREAS

Labour and employment aren't the only two human resources areas where federal laws can differ significantly.

For example, human rights are governed by the *Canadian Human Rights Act*, where a traditional process model is used, and the Canadian Human Rights Commission investigates complaints and decides whether a hearing will be held. And while many of the rights are similar across

jurisdictions in Canada, some issues – such as that of mandatory retirement – are only now being resolved at the federal level.

Even when dealing with similar rights, there can be different approaches to these rights at the federal and provincial level. Federal employers – and especially those who have both federally and provincially regulated employees – need to be aware of these differences, as situations with similar facts could be decided differently based on which regime they fall under.

Whenever an employer is contemplating a termination, they must think not only of common law, but also the other set of rights that employees have, as it's the employee who decides which set of rights to trigger.

An example of a subtle difference between federal and provincial rights is in respect of childcare in family status discrimination cases.

"Compared to provincial tribunals, the Canadian Human Rights Tribunal has generally been much more open to arguments about an employer's duty to accommodate when various childcare issues are involved," says Peters. "This means that there's more pressure on federal employers to accommodate a broader range of childcare issues than at the provincial level. However, these federal/provincial differences may converge over time."

Employer pension plans is another area that has its own set of federal rules.

"There have been sweeping changes to the federal pension rules recently," says Terra Klinck, a partner in the firm's Toronto office. "Most federal employers who maintain registered pension plans will be taking steps now to bring their plans into compliance with these changes."

Another complication on the pension side – and indeed across many human resources areas – is that many large employers operate in both the federal and provincial arenas, with employees in both regimes. This means that they must comply with federal legislation for federally regulated employees, and provincial legislation (across multiple provinces) for their provincial enterprises.

"To add an even greater level of complexity, many of my federal clients also have operations outside of Canada," says Klinck. "So trying to maintain comparable pension and benefit programs within Canada and then across borders can be an enormous challenge. That's one of the key areas in which we can help."

EXPERIENCE COUNTS

For federal sector employers grappling with human resources issues, experienced legal counsel can provide concrete benefits in terms of both resolving issues and identifying them before they become problematic.

"We have a long history of representing employers in the federal sector – in some cases dating back decades," says Peters. "That's the kind of experience and perspective our clients are looking for, and we are well-situated to provide it."

HR QUICK HITS

Court of Appeal Clarifies Key Notice of Termination Principles

The Ontario Court of Appeal has issued a decision that provides clarification on two key notice of termination principles:

- the extent to which an employer is permitted to extend a notice of termination; and
- whether unskilled employees should be awarded lower periods of reasonable notice.

The plaintiff in *Di Tomaso v. Crown Metal Packaging Canada LP* was a 62-year-old, 33-year unskilled labourer. His employment was terminated when Crown Metal closed its business, and he was provided with 8.5 weeks of working notice. However, prior to his termination date, the notice period was extended for 6 weeks. This happened several times until the plaintiff's employment was finally terminated approximately 5 months later, at which time he received 26 weeks of severance pay.

With respect to the extensions of the notice period, Crown Metal attempted to rely on an *Employment Standards Act, 2000* ("*ESA*") regulation that permits employers to provide temporary employment of up to 13 weeks following the originally scheduled termination date, but without the need to provide a new notice of termination. This provision is of importance in closure and other restructuring situations where it is not always possible to predict the final termination date with accuracy.

The trial judge found that, even though each extension was less than 13 weeks in duration, the cumulative effect was to keep the plaintiff employed for more than 13 weeks beyond the original termination date; therefore, the *ESA* regulation did not apply. The Court of Appeal agreed with this finding, and held that the regulation "contemplates a single period of temporary work that is not to exceed 13 weeks. If the temporary work exceeds that duration, fresh notice is required."

With respect to the reasonable notice period, the trial judge rejected Crown Metal's argument that the law in Ontario restricted unskilled employees to a maximum reasonable notice period of 12 months. Rather, the trial judge found that the traditional *Bardal* factors (age, length of service, employee's position and availability of comparable employment) supported a reasonable notice period of 22 months.

The Court of Appeal upheld this finding as well and expressly rejected the submission that there was an upper limit on reasonable notice periods for unskilled employees. Moreover, the Court cautioned against giving too much weight to any one *Bardal* factor, and suggested that "character of employment" is "a factor of declining relative importance."

PENSION REFORM – HR OPPORTUNITIES AND CHALLENGES

For many years pension stakeholders have been calling for an overhaul of pension legislation in Canada, but, politically, pension reform had been just "too hot to handle."

BY: JORDAN FREMONT

However, the environment changed dramatically over the past decade. Governments were confronted with the perfect storm of poor economic conditions, shifting demographics, onerous solvency funding obligations, widely publicized bankruptcies and loss of benefit security. After a generation without significant change, there was a need to modernize.

The resulting legislative response has been swift and sweeping, with reforms across Canada now in full swing. These changes touch on many aspects of an employer's corporate operations, beginning in the pension department and extending beyond to encompass human resources and finance. Here is an overview of some of the more significant changes, and their related opportunities and challenges.

CHANGES THAT PRESENT POTENTIAL OPPORTUNITIES

Phased Retirement

Federally, and in Ontario and a number of other provinces, governments have introduced legislative changes to facilitate "phased retirement," whereby an employee is able to begin his or her pension while continuing to work, albeit on a reduced basis. Phased retirement may appeal to employees who wish (or are prepared) to continue working, but only in a reduced capacity. This may better enable employers to retain skilled and experienced employees for longer than those employees might otherwise be prepared to continue their employment. It remains to be seen whether these changes will have their intended effect, but phased retirement may well become an important human resources tool as Canada's workforce continues to age.

Innovative Plan Designs

A number of changes will facilitate greater flexibility and make available certain new types of pension plan designs that can help employers address particular workplace needs or concerns. For example, Ontario changes will permit the following:

- Ontario registered plans will be able to make available optional benefits that can be purchased by way of optional contributions made entirely by plan members.
- A new kind of "target benefit" will allow plans to be designated to fix pension contributions at specified levels by way of collective agreement, while also targeting particular benefit levels. The benefits will only be "targets" since they will be subject to reduction if plan funding levels are not sufficient to provide for them.
- For defined contribution pension plans, there will be the ability to make pension payments directly, meaning that pension benefits will not necessarily need to be transferred to another vehicle for a plan member to receive pension payments.

Funding Relief

Many jurisdictions in Canada have also provided temporary relief from solvency funding requirements, and a handful of jurisdictions have provided greater funding flexibility, by allowing a limited use of letters of credit. For plan sponsors that have been (or will be) able to take advantage of them, these funding-related changes should provide nearer-term assistance by freeing up available cash for other plan sponsor priorities.

Phased retirement may appeal to employees who wish (or are prepared) to continue working, but only in a reduced capacity.

Elimination of Partial Wind-ups

Other specific reforms are anticipated to have both positive and negative implications, at least from a sponsor perspective. For example, partial wind-ups are to be eliminated in Ontario, and on the plus side, this change will ease administration and remove any uncertainty that presently exists in terms of knowing whether a partial wind-up will be required. However, there are other related changes that mitigate the positive implications of this particular reform. For instance, the elimination of partial wind-ups will mean that employers will be deprived of a tool that is presently available and can be helpful in settling benefits for groups of employees whose benefits are "frozen" in a particular plan.

CHANGES THAT PRESENT POTENTIAL CHALLENGES

Certain additional administrative duties and obligations have also been introduced that are designed to improve plan governance, transparency and accountability, as well as mitigate the potential increased benefit-related risk associated with solvency funding relief and enhanced funding flexibility. While largely positive from a member or employee perspective, these changes will nonetheless impose additional burdens on plan administrators.

Expanded "Grow-in" Rights

The introduction of immediate vesting and "grow-in" enhancements for Ontario employees who are terminated on an involuntary basis means that many of the costs associated with partial wind-ups will remain. In fact, for defined benefit plans that provide early retirement subsidies, the extension of grow-in rights to individual terminations may actually increase plan liabilities unless the plans are amended to reduce or remove these benefits. Amendments to remove or reduce early retirement subsidies might be possible in some cases, but employment and collective bargaining implications might well impose legal or practical challenges in other cases.

Member Protections

Certain restrictions have been (or will be) imposed to manage the extent to which benefit security can be put at risk. Federally, for example, regulations now prescribe that a solvency ratio of 85 percent must be maintained when making plan improvements. Also, federally regulated plans are now generally required to be fully funded in the event of plan termination. These and other restrictions will act to limit options that were previously available to plan sponsors.

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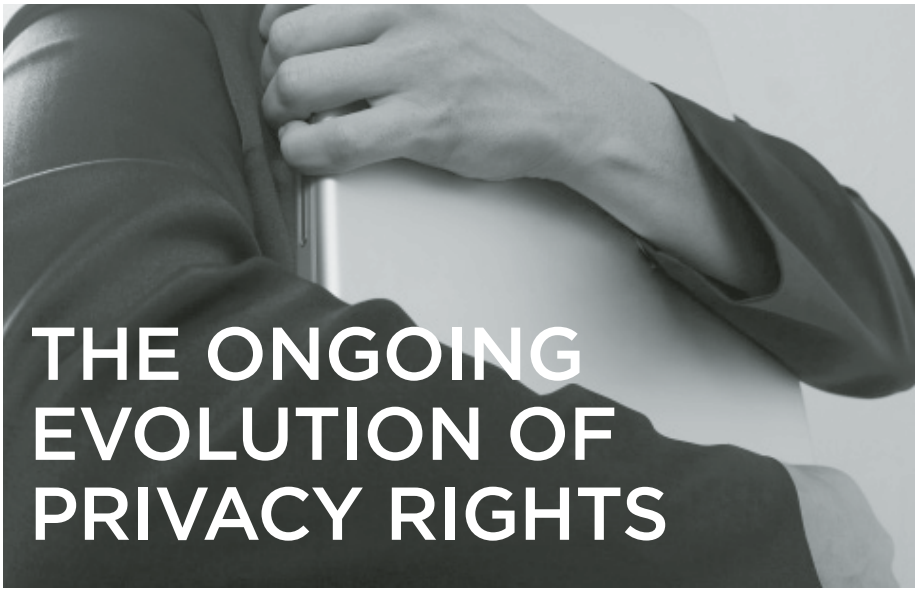
CONCLUSION

The road to pension reform across Canada has been long and winding, but reform is here and employers, sponsors and administrators must keep abreast of these changes and give consideration to some of the administrative as well as strategic opportunities and challenges that pension reform presents. At a minimum, pension plans require amendment and processes need to be reviewed to ensure that these continue to be compliant with changes to legislation.

***Jordan Fremont** is a partner in the Pension and Benefits Group at Hicks Morley. He practices exclusively in the areas of pensions, benefits and compensation, providing strategic advice to a broad range of private and public sector clients on matters involving plan design, compliance, governance and administration. Jordan also advises clients on issues relating to plan expenses, surplus entitlement, wind-ups and transactions.*



THE ONGOING EVOLUTION OF PRIVACY RIGHTS

Traditionally, the common law in Canada has not recognized a free-standing right to privacy. Rather, parties seeking to enforce privacy rights at common law have been required to raise privacy claims through other privacy-related torts, such as trespass, nuisance and harassment.

BY: MIREILLE KHORAYCH

Increasingly, courts in Ontario have been called upon to formally recognize a tort of invasion of privacy, though the issue has yet to be determined with finality. However, courts do recognize privacy rights in a variety of contexts, and where employers create reasonable expectations of privacy, they will often be given protection. Two recent decisions by Ontario courts highlight the tension that currently exists regarding the scope of privacy rights in Ontario.

JONES AND THE COMMON LAW

The traditional view of the common law was upheld in the recent case of *Jones v. Tsige* The plaintiff sued a bank co-worker for accessing her personal banking information through the employer's computer system.

The Ontario Superior Court of Justice found that there is no right to privacy at common law and dismissed the plaintiff's case. In so finding, Justice Whitaker reviewed the divergent case law on the issue and ultimately relied on the decision in *Euteneier v. Lee*, where the Court of Appeal articulated the principle that there is "no 'free-standing' right to dignity or privacy at common law."

The Ontario Superior Court of Justice found that there is no right to privacy at common law and dismissed the plaintiff's case.

The Court did not conclude that *no* privacy rights were violated when the plaintiff's personal information was accessed; rather,

the Court found that the common law does not recognize a tort of invasion of privacy, which was the basis of the plaintiff's action. Having concluded that no such cause of action existed, the Court did not comment on whether there was a reasonable expectation of privacy in the circumstances.

However, Justice Whitaker also appears to have relied to some degree on the existence of a comprehensive statutory privacy scheme, which he felt did not necessitate judicial intervention to ensure that privacy rights were protected. The existence of the *Personal Information Protection and Electronic Documents Act* ensured that the plaintiff had recourse for the alleged privacy violation through administrative channels. It is unclear how much weight the Court placed on this factor.

COLE AND THE *CHARTER*

While the common law does not currently recognize a tort of invasion of privacy nor a "free-standing" right to privacy, it remains possible for employers to create reasonable expectations of privacy that will be enforceable even in non-union environments (labour arbitrators traditionally protect privacy interests of unionized employees).

In *R. v. Cole*, the Ontario Court of Appeal considered the question of whether a teacher had a reasonable expectation of privacy in material stored on a laptop computer provided to him by his employer school board, and on which pictures of a nude, Grade 10 student were found during a systems maintenance check.

The Court found that the teacher had a reasonable expectation of privacy based on a number of factors, including his ability to use the laptop for personal purposes, take it home over the summer holidays and restrict access to it by use of a password.

Notably, the board did not have a clear and unambiguous policy to monitor, search or otherwise police the teacher's use of his laptop, which it could have used to limit the expectation of privacy created by the other factors.

While the common law does not currently recognize a tort of invasion of privacy nor a "free-standing" right to privacy, it remains possible for employers to create reasonable expectations of privacy that will be enforceable.

Cole was a criminal case and therefore triggered *Charter* rights that would otherwise not normally arise within the context of a private employment relationship. The considerations surrounding the reasonable expectation of privacy were grounded in section 8 of the *Charter,* the right to be free from unreasonable search and seizure, and not from a common law right to privacy, the existence of which the Court did not comment on. The Court ultimately determined that the school board did not breach the teacher's *Charter* rights (although a subsequent warrantless search by the police did so), but the case is significant for its finding that the teacher enjoyed a reasonable expectation of privacy in his use of the employer's laptop.

WHAT DOES THIS MEAN FOR EMPLOYERS?

Notwithstanding the traditional view of the common law, whether there is a common law right to privacy or a tort of invasion of privacy remains a contentious issue. At the time of writing, the *Jones* decision is under appeal, and if the appeal is heard, it will provide a chance for the Ontario Court of Appeal to directly address the issue in a case in which it is squarely raised.

However, even in the absence of a free-standing right to privacy at common law, the *Cole* decision signals to employers that where an expectation of privacy is created by the employer, it will be enforced. This tension is perhaps most apparent in the use of an employer's computer systems, where the employer usually owns and manages the systems, but very often permits reasonable personal use of the devices and systems by its employees. However, the *Cole* decision also strongly suggests that employers can shape and limit any reasonable expectation of privacy through the articulation and enforcement of a computer use policy and procedure that provides a clear right to monitor and control employee personal content and places clear limits on the privacy interests of the employees.

Mireille Khoraych *is an associate in Hicks Morley's Toronto Office. Her practice encompasses all areas of employment law, with a particular emphasis on employee privacy and statutory compliance. Mireille provides strategic human resources advice to clients in the public and private sectors, who are both federally and provincially regulated.*

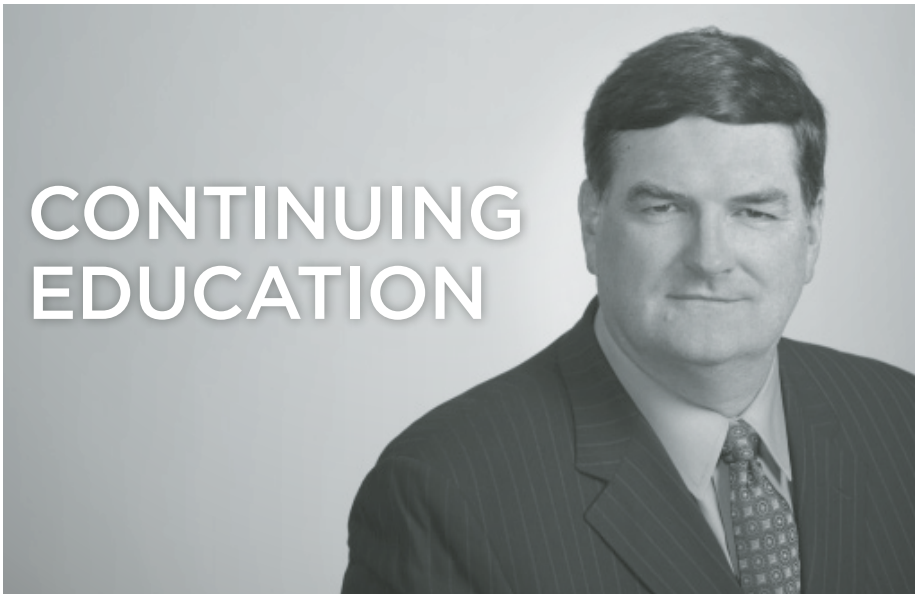
HR QUICK HITS

Employer Ordered to Pay Terminated Employee Disability Benefits to Age 65

In *Brito v. Canac Kitchens*, the employer dismissed a 55-year-old employee with 24 years' service without cause, and provided the employee with his minimum entitlements under the *Employment Standards Act, 2000* ("*ESA*"). The employer continued the employee's LTD coverage during the 8-week *ESA* notice period only. Unfortunately, the employee was diagnosed with cancer about 16 months after his termination, and became unable to work.

The Court ruled that the employee's reasonable notice entitlement was 22 months, and awarded damages accordingly. In addition, Canac was found to be liable for the employee's disability benefits to age 65 (an amount of approximately $200,000) because his disability had occurred within the reasonable notice period. The Court also awarded damages of $15,000 for the employer's harsh treatment of the plaintiff, as evidenced by its "hardball" approach to notice of termination and its preference for litigation.

This decision is a stark reminder that employers may become liable for significant amounts of disability benefits should an employee become disabled during the reasonable notice period and coverage is not continued for the entire period. Therefore, when terminating an employee, employers must carefully consider how to address the benefits continuation issue during the termination process.



CONTINUING EDUCATION

It's fitting that an individual who pursued a law degree more for education than career would end up with educational institutions as a significant part of his client base. And while Hicks Morley partner John Brooks graduated many years ago, it's clear that he never really left the world of education behind.

While John has significant experience advising both private and public sector clients on a broad array of issues, it's his expertise in the education sector – and with universities in particular – that has solidified his reputation as one of the top lawyers in his field.

John spoke to *FTR Quarterly* in July about his life and career.

Where are you from originally?

I'm the oldest of seven kids, born and raised in Toronto. So I've stayed pretty close to home over the years.

What drew you to law school?

I was doing my undergrad at Queen's and was looking for a way to extend my education. I wrote the LSAT exam for law school to see if it was an option and I did well. It really was as much an education choice as a career choice.

When did your interest in labour and employment begin?

I articled at Cassels Brock and discovered that advocacy work was what I really enjoyed. At the end of my year, a group of lawyers left the firm to start one of the first boutique litigation and labour firms, Genest Murray. They asked if I wanted to join them. Two of the key people were labour lawyers with whom I had worked a lot during articling, and it seemed like a great fit.

And it was. I practiced there for over ten years. At that time, most of the firm, including me, decided to join Heenan Blaikie, and I stayed on for four or five years there. But it was time for a change and Hicks Morley was the obvious choice for labour law. That was seven years ago and I haven't looked back.

A large part of your practice is in the education sector industry. How did that interest develop?

I worked a lot with John Murray, who represented a variety of universities in labour and employment matters including the University of Toronto, York University and Trent University. Hicks Morley was a great fit because they also represented many universities in labour, employment and pension matters. Our universities group does more of this work than any firm in the country, let alone Ontario.

What do you like about it?

Human resources work in the university sector is very rich from an issues perspective. Institutions like the University of Toronto and York University, for example, have tens of thousands of faculty and students so there is no shortage of variety. And universities are generally highly unionized with multiple academic and non-academic collective agreements in place, so there's a great deal of work there. I also have the opportunity to do quite a bit of collective bargaining as either chief spokesperson or as an advisor, which I really enjoy.

One other area that I find fascinating is the hearing work that I'm involved in, such as tenure appeals. The issues they involve lie at the heart of what these institutions are all about in terms of teaching, research and service, and are obviously of significant importance to the institution, its faculty and the individual faculty member involved. It's challenging and interesting work.

Overall, staff and faculty at all universities are dedicated, smart people to work with – and that really adds to my enjoyment of the work. Universities are also very involved in planning for the future, and being involved in up front planning processes can be very rewarding.

Any trends of note in the sector?

Universities have been and continue to be subject to funding pressures, academic workforce issues and, for many universities, significant pension issues. They are also subject to the Ontario government's compensation restraint legislation and other government cost-cutting initiatives that put pressure on staff and faculty to continue to deliver the high-quality post-secondary education that students expect and deserve.

There are a few other ongoing issues that are gaining a higher profile these days. Student well-being and health continues to be a concern, as students grapple with a more intense academic environment and new life experiences. Universities are in a difficult position in some cases, having to balance a student's right to privacy with the desire to ensure the student gets all the help he or she needs.

Public safety issues are also at the forefront, with concerns about adequate policing and student safety. Many universities are the size of small cities, so it's not surprising that public safety issues arise. And that means assessing policing and security levels and procedures on an ongoing basis.

What are your interests/passions outside of the office?

I have five kids – ages 3 to 20 – so I think you can guess where much of my time outside of the office is spent. We do a lot of skiing in the winter and a lot of cottaging in the summer and the day-to-day busyness of life takes care of the rest. I listen to a broad range of music and I like to read as much as I can for pleasure. I'm also an avid poker player and play in a number of regular games with friends and colleagues and have a lot of fun at the card table.

GREAT MOVES

New Associate

MEAGHEN RUSSELL

Meaghen Russell recently joined the firm as an associate lawyer with Hicks Morley in Toronto. She represents both private and public sector employers in areas of employment, labour, human rights and education law. Meaghen was admitted to both the Ontario Bar and the Illinois Bar in 2006. For the past five years, she worked in Chicago for a boutique civil litigation firm where she gained invaluable experience litigating cases in federal and state court, and before the various administrative tribunals at the municipal, state and federal levels. She was recently selected by *Super Lawyer Magazine* as a 2011 Illinois Rising Star.

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HUMAN RESOURCES
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