FTR QUARTERLY

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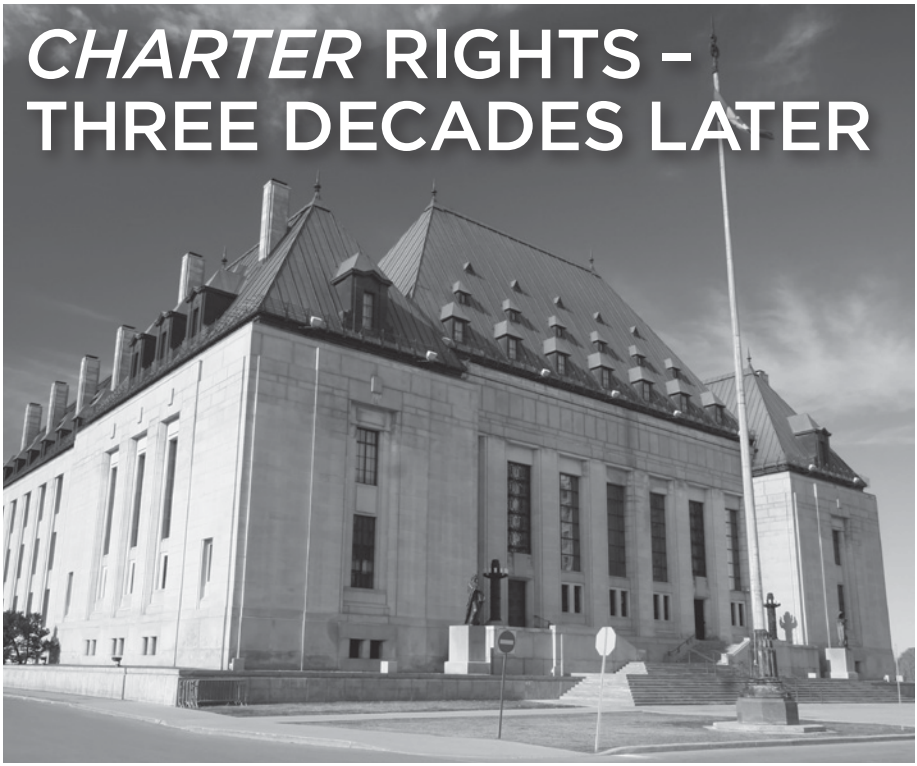
Hicks Morley

HUMAN RESOURCES
LAW AND ADVOCACY

In this issue:

CHARTER RIGHTS – THREE DECADES LATER



Anniversaries can dovetail in interesting ways, and 2012 marks a couple of note – the 30th anniversary of the *Canadian Charter of Rights and Freedoms* and the 40th anniversary of Hicks Morley's founding.

While the Firm pre-dates the *Charter* by ten years – with a practice that extends far beyond rights-based advice and litigation – the labour and employment area has been a significant focus of *Charter* litigation from the beginning, and Hicks Morley has been active in the area since day one.

The passing of *Charter* knowledge from one generation of lawyers to another over time has been a key reason for the Firm's continued expertise in the area.

"I had a great opportunity to work with Chris Riggs in the mandatory retirement case that went to the Supreme Court of Canada in 1990," says Michael Hines, a partner in the Toronto office.

"One of my responsibilities was to gather expert evidence to establish that, at least back then, significant cognitive decline began to appear at or shortly after age 65," says Hines. "It was a bit awkward putting that evidence before Justice Gibson Gray, the trial judge, who had already turned 70, but he received it graciously and with good humour."

SIGNIFICANT CASES

Other senior members of the firm have also been instrumental in blazing the trail through their *Charter* expertise.

"Doug Gray – who came to the Firm in 1978 and is now a Superior Court Justice – was involved in lengthy litigation on section 11 rights in the context of contempt proceedings and the right not to be compelled to be a witness in proceedings," recalls Christopher Riggs, a partner in the Toronto office.

Another key case, which focused on special education law, was argued at the Supreme Court of Canada by Riggs and Brenda Bowlby, also a partner in the Toronto office.

"*Eaton v. Brant County Board of Education* is the most memorable *Charter* case I've dealt with," says Riggs. "It involved the appropriate placement of a 12-year-old girl with cerebral palsy. Brenda Bowlby successfully represented the school board before the Special Education Tribunal, which found that a special education class was in the child's best interests. The parents then made an application for judicial review of this decision."

At the Supreme Court of Canada hearing, Riggs represented the school board and Bowlby represented the Ontario Public School Boards' Association in support of the school board. The Court agreed with the school board, making it clear that educational decision-makers must make decisions based on a child-centred perspective, not on what parents wish. It established a principle of great significance and the case remains the leading case in the special education area.

"The Supreme Court rejected the concept that there is a presumption favouring integration in education and recognized that where a school board focuses on the needs of a child with a disability and, based on the best interests of the child, places the child outside of the regular class, this is not discrimination based on stereotype but is providing the child with an equal opportunity in education," says Bowlby.

> In terms of future trends, one of the fastest-growing areas of *Charter* litigation is the provision of pensions and benefits.

"It was a groundbreaking case," says Riggs. "Our highest court recognized that disability as a prohibited ground under the *Charter* differed from other grounds – like race or sex – in that it meant vastly different things depending on the individual and the context."

CONTINUED CHANGE

From a human resources standpoint, the most profound impact of the *Charter* is how it has shaped the policies and processes that employers must follow to avoid rights violations in certain situations, such as strikes or protests.

"The *Charter* has changed the law on how employers can obtain labour injunctions and other forms of relief, including orders for contempt, to control large-scale organized protests," says Stephen Gleave, a partner in the Toronto office. "This also applies to social activist movements that have the potential to inflict harm on a business or reputation. Employers and their counsel must be versed in the *Charter* to move quickly in the courts to protect the employer's interests."

In terms of future trends, one of the fastest-growing areas of *Charter* litigation is the provision of pensions and benefits.

From a human resources standpoint, the most profound impact of the *Charter* is how it has shaped the policies and processes that employers must follow to avoid rights violations in certain situations, such as strikes or protests.

"*Charter* claims are being raised in a number of cases involving pension and benefit entitlements," says Sean Sells, an associate in the Toronto office. "It is not uncommon for plan members to allege that provisions of the plan that limit certain entitlements discriminate on the basis of age, sex or marital status/family status, contrary to section 15 of the *Charter*."

One such recent case – *Ontario Nurses' Association and Municipality of Chatham-Kent* – was argued on behalf of the municipality by Barry Brown, a partner in the London office. The case dealt with a claim that reduced group benefit entitlements under the collective agreement for employees age 65 and over were discriminatory. While the arbitrator found that the provisions were discriminatory, he determined that this discrimination was justified as a reasonable limit on protection against discrimination as permitted by section 1 of the *Charter*.

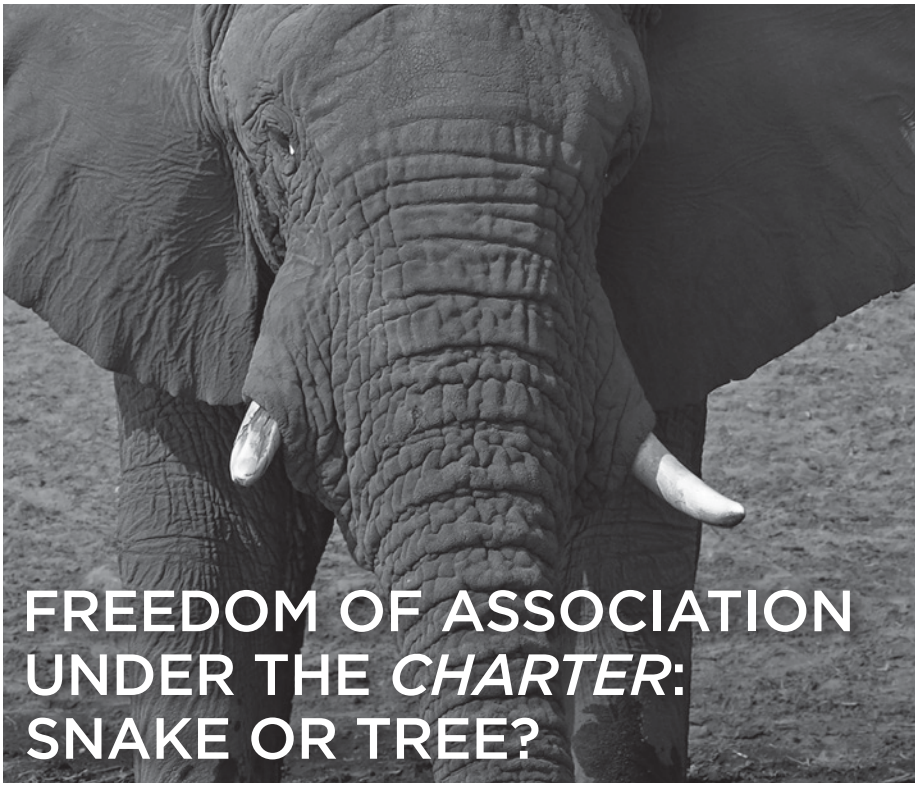
"The case highlights a common element of labour disputes: the intersection between the practical – in that case, the results of collective bargaining and the cost and availability of insurance – and the theoretical – there, the equality provisions of the *Charter*," says Brown.

It's the type of balancing act that has gone on for 30 years, and while the nature of *Charter* cases continues to evolve, the Firm's expertise and experience ensures that employers are well represented in meeting these new challenges.

HR QUICK HITS

SIN cards to be phased out

The federal government has signalled its intention to eliminate the social insurance number ("SIN") plastic cards over time, resulting in modest cost savings and reflecting the fact that the "card" is not actually required to deliver services and does not have security mechanisms on it. Social insurance numbers will continue to be assigned and numbers already issued will not be changed. The phasing-out of the SIN cards is authorized through recent amendments made by the 2012 federal budget bill, Bill C-38, which provides that SIN cards will now be issued on a discretionary, and no longer a mandatory, basis.



FREEDOM OF ASSOCIATION UNDER THE *CHARTER*: SNAKE OR TREE?

The ancient parable of the six blind men and the elephant is a lesson in perspective. Each blind man was asked to describe "what an elephant is like" by touching one part of the animal. One, touching the trunk, proclaimed elephants to be like snakes. Another, touching a leg, declared elephants to be like trees. And so on.

BY: MICHAEL A. HINES

This lesson, combined with the ability of courts to see what they want in earlier precedent, provides an insight into two recent decisions from Saskatchewan and Ontario on the so-called *Charter* "right to collective bargaining."

The "elephant" in question is the recent Supreme Court of Canada case law on section 2(d) of the *Charter*, most particularly its unanimous 2007 decision in *B.C. Health Services* and its 2011 decision in *Ontario (Attorney General) v. Fraser* ("*Fraser*").

Section 2(d) guarantees to everyone the fundamental "freedom of association." The legal question here concerns the extent to which unions can use section 2(d) to challenge legislation adverse to their

interests. *B.C. Health Services* was hailed as the case that reversed a series of 1987 Supreme Court decisions, making labour legislation and "collective bargaining" finally subject to *Charter* rights – a case that would, for the first time, force governments to exercise legal caution when enacting wage restraint legislation, back-to-work legislation and so on. Significantly, *B.C. Health Services* emphasized that section 2(d) does not prescribe any particular model of labour relations, so long as a process of "good faith collective bargaining" is statutorily protected.

The Court's fragile "unanimity" in *B.C. Health Services* was soon revealed by *Fraser*, which yielded four sets of reasons among its nine members. It should therefore come as no surprise that these cases are now generating divergent interpretations. What is striking is the extent of the disparity. Indeed, accepting a basic shared parameter (the applicability of section 2(d) to labour law), the two most recent cases could not be more different.

On February 6, 2012, Justice Ball of the Saskatchewan Court of Queen's Bench released his decision in *Saskatchewan v. Saskatchewan Federation of Labour* ("*SFL*"). At issue was the constitutionality of *The Public Service Essential Services Act* ("*PSES*"), which guaranteed the continuous provision of public services necessary to ensure safety, health and order. Employees engaged in providing such services were prohibited from striking at any time.

PSES was unusual in two important respects. First, employers covered by *PSES* could determine, without appeal, which services were to be regarded as essential. Second, *PSES* contained no third-party dispute resolution mechanism to resolve outstanding bargaining issues. The collective bargaining concerns of "essential services workers" could remain unresolved indefinitely.

The Court's fragile "unanimity" in *B.C. Health Services* was soon revealed by *Fraser*, which yielded four sets of reasons among its nine members.

Although Justice Ball could have focused on the absence of any dispute resolution mechanism to support a conclusion that section 2(d) had been violated, his decision was much more specific. He held that section 2(d) constitutionally guarantees a *right to strike*. The denial within *PSES* of a *right to strike* was sufficient on its own to constitute a section 2(d) violation, forcing the government to justify this omission under section 1 of the *Charter*. The implications for police, hospital and other similar "no strike" labour regimes are obvious.

Justice Ball placed extensive reliance on the dissenting judgment of Chief Justice Dickson in the three 1987 decisions that *B.C. Health Services* had overturned. He also relied heavily on an analysis of Canada's international treaty obligations regarding labour laws and collective bargaining, many of which advert to a "right to strike." He regarded the majority decision in *Fraser* as an unqualified endorsement of *B.C. Health Services*. He mentioned only in passing the Court's important observation that section 2(d) does not compel any specific model of collective bargaining.

On June 1, 2012, the Ontario Court of Appeal released its decision in *Mounted Police Association of Ontario v. Canada* concerning the labour law regime applicable to members of the RCMP. The issue was more fundamental and less extreme than the "right to strike" affirmation in *SFL*. The challenged provisions did not require the employer to recognize any employee association selected by the affected employees. Rather, the legislation provided a structure that allowed the employees to elect a number of Staff Relations Representatives ("SRRs") who would discuss, in good faith, matters of concern with representatives of the employer. There was, of course, no right to strike. The only "dispute resolution mechanism" concerned salary, where a panel of two SRRs, two employer representatives and a neutral chair would do no more than make recommendations to the Treasury Board concerning compensation issues.

The analysis in *SFL* would have found a violation of section 2(d) simply based on the absence of a "*Charter*-guaranteed right to strike." Yet in its unanimous decision, the Ontario Court of Appeal found the legislation to be consistent with section 2(d). *SFL* was not mentioned. *Fraser* was regarded as having tempered *B.C. Health Services* and was interpreted as being based largely on its unusual facts – a consideration of the *Charter* rights of migrant, politically disenfranchised agricultural workers that had little to say about well-organized police unions. The revered "*Charter* right to collective bargaining" was held to be merely a "derivative right" arising *in certain cases only* as an adjunct to the freedom of association. International treaties were not mentioned. Rather, the Court pointed out that many successful labour relations systems in other countries were modelled on "representative" systems like the SRR structure at issue.

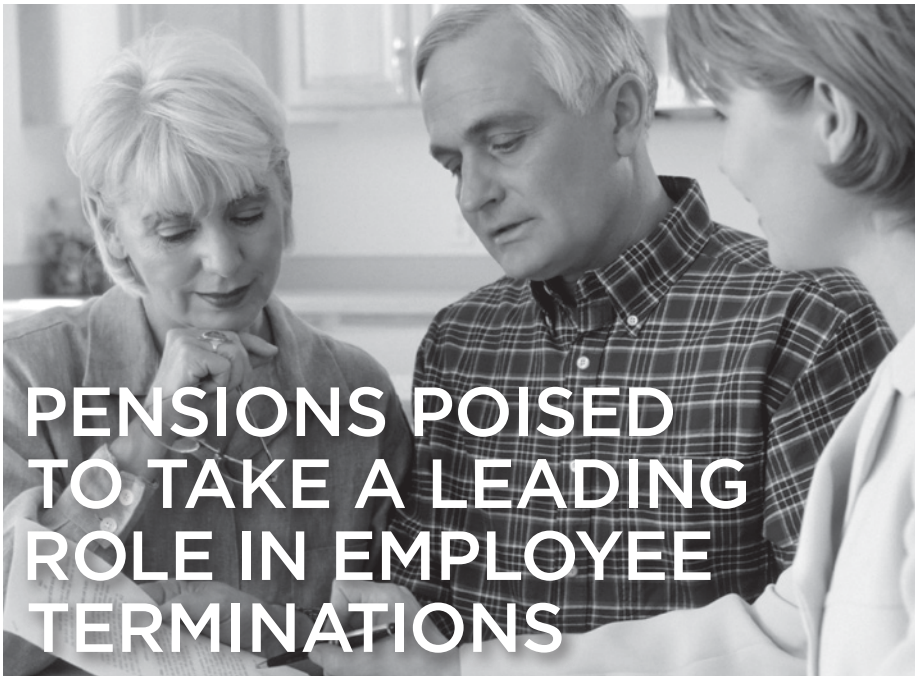
The revered "*Charter* right to collective bargaining" was held to be merely a "derivative right" arising *in certain cases only* as an adjunct to the freedom of association. International treaties were not mentioned.

This observation, combined with the statement in *B.C. Health Services* regarding "no single prescribed model," allowed the Court to find that the model before it was sufficient to guarantee the associative freedoms protected by section 2(d).

So is "the *Charter* right to collective bargaining" a snake, a tree, or something else? The answers at this stage are anything but clear.

Michael Hines *is a partner in Hicks Morley's Toronto office. He practises in all areas of employment law, with a particular focus on the school board and police sectors, as well as human rights and appellate litigation. In 2009, Michael received his Master of Laws Degree in Constitutional Law from Osgoode Hall Law School.*

Tel: 416.864.7248
Email: michael-hines@hicksmorley.com



PENSIONS POISED TO TAKE A LEADING ROLE IN EMPLOYEE TERMINATIONS

40

As we celebrate our 40th anniversary this year, we thank you for your continued support.

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1988 Hicks Morley Toronto office relocates to 66 Wellington

1972 Bob Hicks named Firm's first managing partner

1999

1972 Hicks Morley office opens with 8 lawyers at 77 King Street West

1993 Hicks Morley opens

1989 Hicks Morley opens Waterloo office

1991 Hicks Morley moves from

BY: LISA J. MILLS

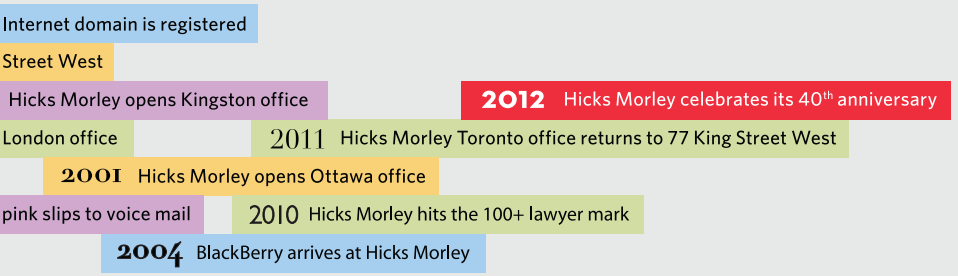
A number of changes to Ontario's *Pension Benefits Act* became effective July 1, 2012. The most significant change is the application of "grow-in" rights to individual terminations from employment with provincially regulated employers. Before July 1, 2012, grow-in rights only applied on the full or partial wind up of a defined benefit pension plan.

WHAT ARE "GROW-IN" RIGHTS?

Grow-in rights give eligible employees an entitlement to early retirement or bridging benefits (as set out in the terms of the pension plan) to which they would not otherwise be entitled at the time of their termination from employment.

Not all pension plans are created equal. The value of grow-in rights can range from nil to several multiples of the terminating employee's annual salary, depending on the design of the plan. If your pension plan design uses an age and/or service milestone to determine the value of early retirement pensions, it will tend to provide more significant grow-in benefits to terminating employees.

For example, suppose your pension plan imposes higher early retirement reductions if an employee terminates employment before age 55 than if an employee terminates after attaining age 55. Under the grow-in regime, an eligible employee will be deemed to continue in employment until age 55 for the



purpose of calculating the early retirement reduction. This translates into a more generous early retirement pension benefit than provided under the terms of your pension plan.

Jointly sponsored pension plans, such as OMERS and the Ontario Teachers' Pension Plan, and multi-employer pension plans may opt out of providing grow-in rights to their plan members, and may later rescind such an election. If your organization participates in these types of pension plans, you should consult the pension plan administrator to determine whether grow-in rights apply. Single-employer pension plans do not have the option of opting out of the grow-in regime.

ELIGIBILITY CRITERIA

Under the new regime, to be eligible for grow-in rights on termination of employment, the terminating employee must have been employed in Ontario and have at least 55 age and service "points" on his or her last day of pension plan membership.

The application of grow-in rights to situations that do not fall neatly into these categories will inevitably give rise to disputes.

Grow-in rights apply to most employer-initiated terminations of employment. Even certain "cause" terminations are caught. Grow-in rights will be inapplicable to a particular termination of employment only if the employee's wilful misconduct, disobedience or wilful neglect of duty is not trivial and has not been condoned by you as the employer.

At the other end of the scale, *bona fide* employee-initiated resignations from employment do not give rise to grow-in rights. Further, an employee who has received working notice of termination may resign and end the employment relationship early without forfeiting grow-in rights. The termination of a "construction employee," as defined under the *Employment Standards Act, 2000* ("*ESA*"), does not attract grow-in rights.

A temporary lay-off (as defined under the *ESA*) will not trigger grow-in rights. Once a lay-off becomes permanent, grow-in rights are triggered if the employee ceases pension plan membership.

The application of grow-in rights to situations that do not fall neatly into these categories will inevitably give rise to disputes. We expect a body of cases to develop that will help you identify the types of terminations to which grow-in rights apply.

IMPACT ON TERMINATION PRACTICES

Although consideration of pension loss as a component of a wrongful dismissal damages claim is not new, the statutory nature of grow-in rights raises a fresh set of considerations and challenges.

The true cost of a termination from employment to which grow-in rights apply includes not only the cost of the statutory minimum and applicable common law notice payments payable directly by the employer, but also the indirect cost to your organization of the grow-in enhancements payable from the pension fund. For every extra dollar paid out of the pension fund to a terminating employee, another dollar must be contributed to the pension fund to maintain its funding.

The application of grow-in rights to employer-initiated terminations will raise the profile of pension issues in wrongful dismissal litigation. By extension, the pension consequences of a termination of employment will also become more critical in designing termination offers and negotiating settlements.

We anticipate that disputes will arise in situations where the characterization of a termination from employment falls somewhere between an employer-initiated termination and an employee resignation. In these situations, the language used by the parties to characterize the nature of the termination and to address the application of grow-in rights will be key. The opportunity for an employee to obtain independent legal advice and the releases that protect your organization from future claims have enhanced importance in the new "grow-in" world.

NEXT STEPS

We encourage you to review your pension plan design to determine whether and how grow-in applies.

The individuals in your organization who are tasked with processing terminations need to understand the new grow-in regime and be mindful of the rules when structuring and settling terminations. These individuals will need access to the grow-in cost for each termination so that information can be taken into account in designing an appropriate settlement offer and release. You should also be prepared to answer queries from departing employees as to their eligibility for and the impact of grow-in on the value of their pension benefits.

The language used by the parties to characterize the nature of a termination and to address the application of grow-in rights will be key.

Finally, you may wish to consider whether changes to the pension plan design may be appropriate to reduce the cost of grow-in as well as any restrictions on making such amendments.

Lisa Mills *is a partner in Hicks Morley's Ottawa office, and a member of our Pension and Benefits Practice Group. Lisa advises employers on issues relating to pensions, benefits, executive compensation and related income tax matters. Lisa teaches a pension law course at Queen's University. In 2009, Lisa was selected by Lexpert as one of Canada's Leading Lawyers under 40.*

Tel: 613.369.2112
Email: lisa-mills@hicksmorley.com

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November 8	**The WSIB's Duty to Cooperate:** Accommodation by Another Name
November 21	**The Impact of the *Charter* and Concepts of Privacy and Accommodation on Our Ever-Changing World of Labour Relations**

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ON YOUR MARK

We were delighted to recently host close to 2,000 clients at our biennial, complimentary client conferences in Waterloo, Kingston, Ottawa, Toronto and London. We hope you found the information valuable and the experience meaningful. Thanks for joining us.

For more information on Hicks Morley's fall educational programs, please visit hicksmorley.com

THE SPICE OF LIFE

While Ted Kovacs has chosen a career with one firm only – he's been with Hicks Morley since his articling year in 1991 – his practice in the Firm's Waterloo office is as varied and vibrant as it gets. Leveraging the deep expertise that comes from 20 years of practice, Ted still cites the variety of clients and wide scope of legal issues as two of the most enjoyable aspects of his work.

Ted spoke to *FTR Quarterly* in June about his life and career.

Tell us about your background.

I grew up in Welland, Ontario, and lived in Aurora just north of Toronto for a time too while attending St. Andrew's College on a hockey and academic scholarship. I did a Bachelor of Commerce degree at Queen's University and went to law school there as well.

How did your interest in law develop?

I was truly surrounded by it. My dad was a Superior Court Justice and my older brother is a labour and employment lawyer, so law was a big part of our lives. I think I'd always had an interest in it. I met my wife at Queen's while she was completing a Masters of Industrial Relations.

Did your labour and employment law focus come from family as well?

In part it did, but it also came from my summer work at General Motors in St. Catharines, working on the line and as a student supervisor. And from the labour and employment studies that were part of my commerce degree. In fact, our managing partner, Steve Shamie, taught the labour and employment course I took while doing my commerce degree.

As my law studies progressed, I knew this was the area I wanted to practise and Hicks Morley was the best of its kind. I applied to work in the Toronto office and was hired as an articling student – and I've been here ever since.

Why the switch to Waterloo?

My first three years were in the Toronto office, from 1993 to 1996, and I really enjoyed the work. But the Waterloo region was growing quickly, and the business side of me found the opportunity to grow the Firm's practice in that region very appealing. There were four lawyers in the office when I joined, and we'll soon be ten. There's a wonderful mix of private and public sector employers here – and we've been very involved in the region.

We're definitely seeing more and more human rights applications, with issues such as requests for accommodation and family status claims cutting across both private and public sectors.

We really wanted to grow the Waterloo office the way the Firm's founding partners grew the Toronto office – that was our inspiration. We're very happy with the way it's worked out.

How has your practice evolved over the years?

I've always thrived on a wide variety of work – from manufacturing to public services – and that's really continued throughout my career. Every day and every week is different – and the clients I work with are talented, smart, interesting people, which is a huge factor in my enjoyment of the practice.

In terms of what's changing, we're definitely seeing more and more human rights applications, with issues such as requests for accommodation and family status claims cutting across both private and public sectors. Some of this relates to the new direct access model where employees can make applications directly to the Tribunal, but I also think the volume of information that's now available online has resulted in a far greater knowledge and awareness of rights.

Any trends or situations in particular that employers should watch out for?

On the human rights side, I think employers need to focus on having a solid process in place to handle complaints. It's tough – because it takes resources – but responding to each complaint through a step-by-step process goes a long way to resolving issues effectively.

I think another emerging challenge for employers – especially in the automobile and manufacturing sectors – is the issue of cross-border competition. Unions south of the border have made concessions to keep operations going, and employers here are asking unions to be creative in terms of newly negotiated pay and benefits arrangements. But unions so far have been less willing to change, and I see this as a big challenge over the next few years.

What do you enjoy doing in your downtime?

We live in Cambridge and we've really been drawn to the historic side of old Cambridge. People here are very active in the arts. My wife and I have a 14-year-old daughter and an 11-year-old son. We are constantly entertained by their activities during the school year – whether it's our son's Cambridge Centaurs basketball, or our daughter's involvement in local theatre group productions from Waterloo to Ancaster – and enjoy hanging out at the cottage in the summer. It's a wonderful community, and with the universities in the region it's also very diverse. We really love it here.

HR QUICK HITS

No duty to mitigate where contract provides a fixed notice period and is silent on mitigation

BY: CAROLYN CORNFORD GREAVES

A recent decision by the Ontario Court of Appeal clarifies an employee's duty to mitigate where he or she is employed pursuant to an employment contract with a fixed notice period that is silent on the obligation to mitigate. In *Bowes v. Goss Power Products Ltd.*, Mr. Bowes' employment contract included a fixed notice period of six months if his employment was terminated within four years. The contract did not mention mitigation. Mr. Bowes' employment was terminated within that period, and he obtained a new job earning the same salary two weeks later. Goss Power paid Mr. Bowes his statutory entitlement (three weeks) but not the full six months. He brought an application for the full amount. The application judge determined that an employment agreement is subject to a duty to mitigate unless the agreement states otherwise. Mr. Bowes had fully mitigated and was not entitled to six months' pay in lieu of notice. He appealed the decision to the Court of Appeal.

The Court of Appeal granted his appeal. Applying principles of contract law and damages, the Court held that when parties contract for a fixed notice period, they are fixing an amount of "liquidated" damages or a contractual sum owed to an employee upon termination, rather than fixing a common law reasonable notice period, and that there is no duty to mitigate with respect to such damages. The Court did allow that an employer could *explicitly* require an employee to mitigate fixed or liquidated damages. Thus, if a contract does not specifically require an employee to mitigate, the employer must pay the full amount fixed in the contract.

The Court of Appeal's clarification regarding mitigation has significant implications for employers that have contracts with employees containing fixed notice periods. Here are some practical tips for employers in light of this decision:

- when entering into new employment agreements containing a fixed notice period, include a requirement that the fixed notice period is subject to mitigation; and
- if your current employment contracts do not address the question of mitigation, contact your Hicks Morley lawyer to determine the legal steps that should be taken to minimize your potential liability.

Carolyn Cornford Greaves *is an associate at the Hicks Morley Toronto office and practises in all areas of labour and employment law. She provides practical solutions and strategic advice to employers and management on a wide range of issues, including wrongful dismissals, employment standards and contracts of employment.*

Tel: 416.864.7460
Email: carolyn-cornfordgreaves@hicksmorley.com

TORONTO
77 King St. W.
39th Floor, Box 371
TD Centre
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

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HUMAN RESOURCES
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