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JUNE 2013 | LEXPERT.CA | $16.95

THE BUSINESS MAGAZINE FOR LAWYERS

TOMORROW'S WORKPLACE

The new labour and employment practice and the future of work

PM# 40065782

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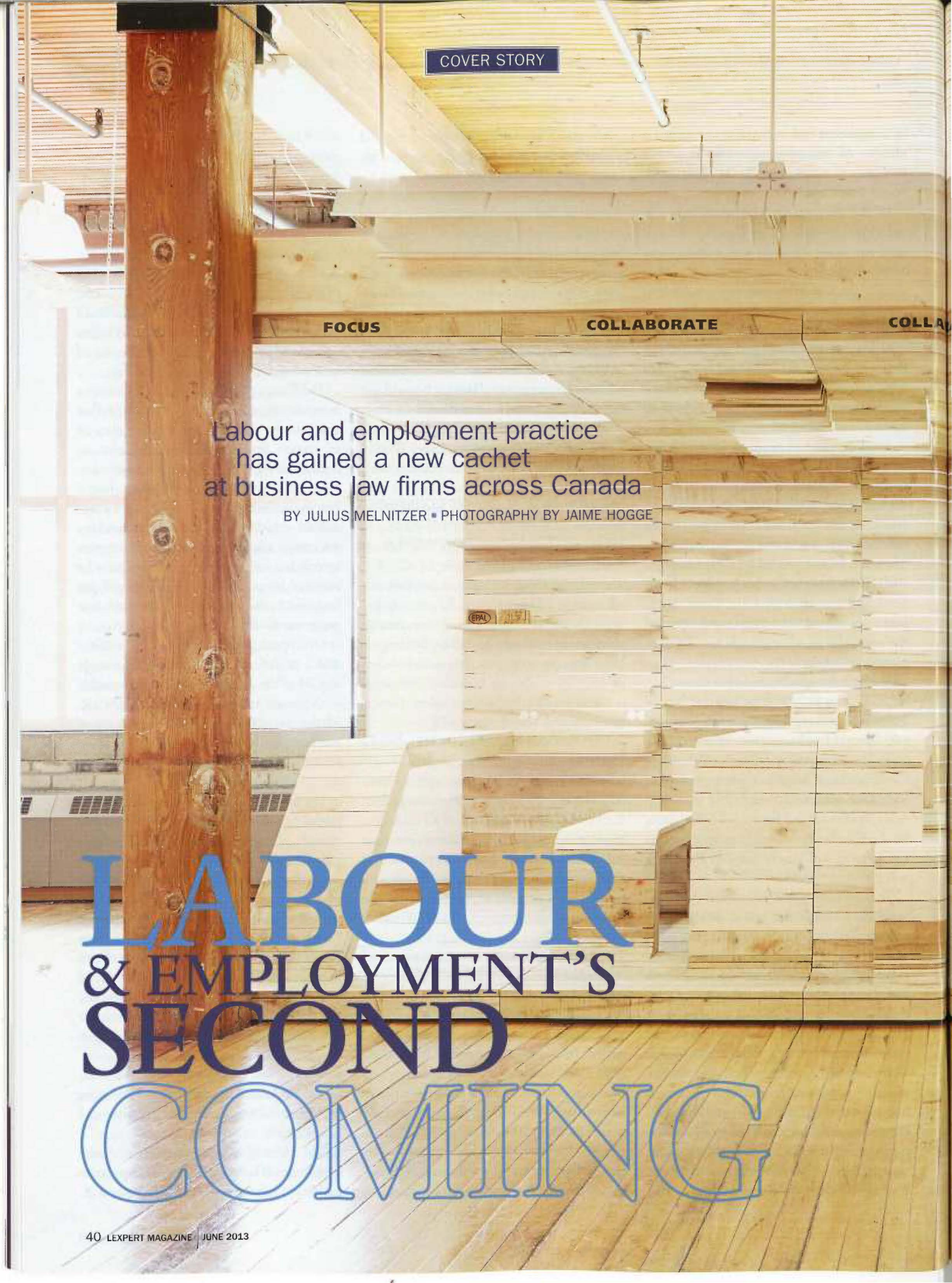
Richard Chaykowski, Norton Rose Fulbright;
Jeffrey Goodman, Hicks Morley Hamilton Stewart Storie LLP;
Fan Kuzz, Sherrard Kuzz LLP



Labour and employment practice has gained a new cachet at business law firms across Canada

BY JULIUS MELNITZER ▪ PHOTOGRAPHY BY JAIME HOGGE

LABOUR & EMPLOYMENT'S SECOND COMING

> The POP-UP Office (designed by DUBBELDAM Architecture + Design) is a concept for a modular office easily reconfigured for adaptability and flexibility.

YOU'D BE HARD-PRESSED TO FIND "WORKPLACE LAW" listed among the areas of expertise on the websites of Canada's management-side major law firms or boutiques. Even Hicks Morley Hamilton Stewart Storie LLP, the country's largest management-side labour and employment law boutique, bills itself as a "Human Resources Law and Advocacy" firm.

But then, it would be equally difficult to find "business law" listed among these firms' areas of expertise. Which is not to say that, where appropriate, firms don't describe themselves as "business law" firms; arguably, that's the fallback description for any firm interested in conveying the message that it provides a range of business-related legal services.

In other words, business law isn't an area of expertise so much as it is an attempt to strike the balance between establishing a discrete identity or brand for a law firm without unduly limiting the message about the type and range of services its professionals provide. "Full-service," on the one hand, may be a little too vague because it could embrace a range of consumer-oriented legal services; describing a firm as a "corporate-commercial" firm, on the other hand, may not put sufficient emphasis on areas of practice, such as litigation, not intuitively associated with the phrase.

It is not that, as the success of Hicks Morley evidences, "human-resources law" is in any way an inadequate or inappropriate description. It's just that in today's market, legal services associated with the workplace have moved beyond the aegis of any particular department, such as human resources, into the realm of strategic

MORT MITCHNICK
> BORDEN LADNER GERVAIS LLP

> "BECAUSE LABOUR and employment law is cutting edge in so many areas, it has become an important stand-alone practice for many firms, and there's a growing emphasis on building these practices."

advice. How else other than strategic can you describe the counsel Target required when it was deciding whether to take over Canadian retail leases at a host of Zellers' unionized locations? What about advising a public company on the appropriate compensation package for a new CEO in light of the brouhaha surrounding executive compensation in the past few years? Advocating the company's right to surplus in a pension case in the Supreme Court of Canada? Or arguing a certification motion in a multi-million-dollar overtime class action that attacks the very heart of a financial institution's organizational and compensation structure?

And that's not all. "Labour and employment considerations have become increasingly significant in the context of M&A as well," says Morton Mitchnick of Toronto, who is counsel at Borden Ladner Gervais LLP, a national firm with a strong workplace law presence.

REMEMBER that "human-resources law" used to be "labour and employment law." To be sure, "labour relations" and "employment law" are still the first two practice areas listed on Hicks' website. But they are only two of the 10 to 15 practice areas listed, including "human rights" and "information and privacy" — by way of mentioning just two areas of workplace law that have emerged from the shadows of what was regarded as arcane if not marginal not so long ago.

"There are more legal issues impacting the workplace than anyone anticipated even as recently as five years ago," says Erin Kuzz of Toronto-based workplace law boutique Sherrard Kuzz LLP. "Our human-rights practice, for example, has exploded since the changes to the Ontario regime."

Vancouver's Harris & Company, Western Canada's largest workplace law boutique, used to bill itself as providing advice on labour and employment law, but today uses the tagline "Workplace Law."

"We now have extensive pension, business immigration, human-rights and freedom-of-information practices alongside the traditional areas of expertise," says the firm's founder, Eric Harris. "The focus has shifted to dealing with people in business and advising them on whatever needs they have that arise from the workplace."

To that end, Mathews, Dinsdale & Clark LLP, the Toronto boutique that recently opened a Vancouver office, also emphasizes workplace law with its "Workplace Law Spoken Here" website tagline. By contrast, Filion Wakely Thorup Angeletti LLP, another major Toronto management-side boutique, has stuck with the "management labour and employment law" designation. So has Sherrard Kuzz. The phrase "workplace law" as a practice descriptor also failed to turn up on the sites of any of the national law firms engaged in labour and employment practices.

Regardless, however, of the terminology they use to describe themselves, this much is clear: whatever you call them, lawyers dealing with workplace-related matters are working in a much more diverse market than they did in the past.

"We're even competing with the criminal lawyers in the occupational health and safety field," notes Roy Filion of Filion Wakely Thorup Angeletti LLP.

SO WHY THE focus on semantics? In today's branding and marketing-oriented world, phraseology is often the harbinger of evolution. It not only traces developments but in many instances promotes them. So the mere fact that "workplace law" is finding its way into the lexicon of labour and employment lawyers, especially the highly specialized boutiques, tells us a good bit about what's really going on in the market.

And what's really going on is that labour and employment law has truly become workplace law in its broadest sense, much as corporate-commercial law has become the broader business law. Like business law, workplace law now embraces a host of associated specialties. So pension and benefits, business immigration and human-rights expertise are to workplace law what the likes of competition, securities and tax are to business law.

The reason that major firms are less inclined than boutiques to embrace "workplace law" as the umbrella for their labour- and employment-related practices is because some elements of workplace law, like privacy law, extend beyond the workplace to other stakeholders in the business arena, with consumers being the most prominent example.

But make no mistake about it: whatever you may call it, workplace law embraces some very lucrative and high-stakes financial and reputational mandates involving

matters ranging from the defence of class actions, pension disputes and systemic human-rights abuses to navigating the vagaries of provincial successorship legislation attendant on a merger or acquisition. "Because labour and employment law is cutting edge in so many areas, it has become an important stand-alone practice for many firms, and there's a growing emphasis on building these practices," Mitchnick says.

In other words, workplace law expertise has become an important arrow in the client-development quiver. "We like to think that we have about 100 lawyers doing full-time human-rights, labour law, employment law, and pension law work," says Brian Smeenk in Fasken Martineau DuMoulin LLP's Toronto office.

Indeed, some major firms have come to see the field's ever expanding tentacles as a causeway to relationships that will attract the M&A and transactional prizes they so cherish. "Law firms are starting to realize that an employment and labour practice is a great entry point to the firm for new clients," says Richard Nixon in Davis LLP's Toronto office. "The first contact with offshore clients, for example, is frequently with regard to an employment matter."

As well, firms that have a strong workplace practice don't have to concentrate solely on luring transactional clients away from established business law firm relationships: in some cases, it may be easier to establish an initial connection by attracting the workplace law business that a large corporate client has placed with a boutique.

The reality of the marketplace, however, is that most large firms don't have the strength and depth to lure day-to-day workplace law retainers of the boutiques. "We make a point of building mutually beneficial relationships with people at large firms because referrals have always been an important part of our business," says Kuzz.

FOR BOUTIQUES, though, expanding the parameters of workplace law into new areas, and particularly employment law, has been a mandatory strategy to succeed. "Labour law is not growing as a business because the level of unionization has fallen and many new kinds of business are populated by self-employed small entrepreneurs," Eric Harris says. "High-tech companies may have a lot of legal issues, but they're not trade-union issues."

One surprising exception, however, are the oil sands, where unions are a going and growing concern. "There's a lot of construction in Northern Alberta, and construction is heavily unionized," says Tom Ross in the Calgary office of McLennan Ross LLP, an Alberta-based regional firm with over 20 lawyers who make up the firm's management-side workplace law practice. "This gives rise not only to traditional labour-relations work, but to such things as business immigration law, because the demand for people here outstrips the supply."

JOHN CRAIG
> HEENAN BLAIKIE LLP

"There's a mindset change in the Bar, which has recognized that employment law has become lucrative and many firms want to be more involved."

Generally speaking, however, while labour-relations practices may be awash with many of the new modern-day issues that characterize employment law, the number of labour-relations, management-side clients, apart from those in the public sector, is at best stagnant for many firms. On the employment side, however, the non-unionized workforce keeps growing, and developments like the explosive growth of human-rights claims and class actions make the issues far more significant and lawyer-friendly than ever. "There's a mindset change in the Bar, which has recognized that employment law has become lucrative and many firms want to be more involved," says John Craig in Heenan Blaikie's Toronto office.

The difficulty is that, with some exceptions, workplace law matters aren't a good fit for many larger firms. "Generally speaking, the files aren't worth a huge amount of money, and in many cases you're giving a lot of general advice," Kuzz says. "That doesn't work because the large firms have a higher rate structure and sophisticated in-house counsel will not send the work there, especially if they're comfortable with the boutique team."

Indeed, it wasn't so long ago that being a business law firm meant cutting back on stand-alone workplace law practices. Around the turn of the century, which is when Canada's major firms decided they were going to embrace the business law message, they encouraged their labour and employment lawyers to devote their energies to the firm's transactional work. "At that time, the large firms did not regard labour and employment stand-alone practices as of very much value," says Nixon. "So a lot of lawyers left these firms."

Perhaps no more so than at McCarthy Tétrault LLP's Toronto office, where Nixon, Smeenk and Lorenzo Lisi, now at Toronto's Aird & Berlis LLP, found that the time had come to part ways. "McCarthy still has a significant workplace law practice, but it's nowhere near as significant as it was 10 years ago," Nixon says.

After the financial crisis, however, employment law became attractive because it was largely recession proof and its ambit included lucrative niche areas. "You need to do hard-core labour and employment work if you want to get the bet-the-company labour and employment work," says Paul Boniferro, a partner in McCarthy's national labour and employment group. "And you still need to earn your stripes in the marketplace in the traditional way."

Boniferro, who concedes that the firm's national contingent of 30 labour and employment lawyers "has been larger in the past," nonetheless says that less than 10 per cent of the practice is transactionally oriented. "At any given time, one of us certainly has a transactional file on his or her desk," he says. "My personal practice focuses heavily on collective bargaining, wrongful-dismissal litigation, human rights, griev-

ance arbitration and what I would call 'day-to-day operational advice.'"

Still, while McCarthys certainly does not eschew stand-alone workplace law clients, the main source of business for Boniferro and his colleagues are the firm's corporate clients. "We wouldn't want to see a 100-lawyer department because our client base doesn't justify it," he says. "What we want to do is to develop and maintain a strong presence in the marketplace without growing too big."

By contrast, Norton Rose has roughly 75 lawyers dedicated to labour and employment law. The firm's Eastern Canadian component, formerly known as Ogilvy Renault, featured the practice area as one of its "four pillars" (which also includes business law, intellectual property and litigation), and the firm has always had one of the strongest labour and employment practices in the country. The firm is also strong in Ottawa, where its primary competition is Emond Harnden LLP, Gowling Lafleur Henderson LLP, Nelligan O'Brien Payne LLP and Perley-Robertson, Hill & McDougall LLP.

What is interesting, however, is that workplace law is not one of the "six headlights" of Norton Rose Fulbright's international strategy. "Labour law starts locally, regionally or provincially, and nationally for federal works and undertakings," says Richard Charney, the Toronto-based global practice leader of the firm's employment and labour group, who points to the firm's recent absorption of Calgary-based boutique Armstrong Mitchell Lawyers as evidence that workplace law remains a priority for the firm's Canadian operations. "Norton Rose Fulbright continues to view the four pillars as ever present in the Canadian context."

Which is not to say that workplace law is not important to the firm from an international perspective. Indeed, Norton Rose has a significant workplace law practice in Australia that is even slightly larger than the Canadian contingent, more than 30 dedicated practitioners in the US, about a dozen labour and employment lawyers in South Africa, and practitioners in the UK, Germany, the Middle East and Central Asia. Linking these practices is the firm's newly launched *Global Workplace Insider* blog that provides ongoing commentary regarding workplace law issues arising around the world.

THE FACT REMAINS, however, that, among the major Canadian firms, only Norton Rose and Heenan Blaikie appear to regard workplace law as a core practice. A more accurate way of describing the position of many of the other majors is to say that they now see workplace law as a source of or conduit to new, profitable mandates by which they can expand and strengthen their relationship with corporate clients, old and new. Their interest in bread-and-butter labour-relations and employment law as stand-alone growth areas is therefore somewhat limited.

ERIC HARRIS
> HARRIS & COMPANY LLP

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Fasken Martineau is an interesting case in point. The firm is stronger in workplace law in the Toronto area than it once was, a sign perhaps of the practice's growing importance to the corporate community. By contrast, Fasken is not the dominating labour and employment force that it was in BC in the years after it merged with Vancouver's Russell & DuMoulin in 2000 — although its workplace law practice still remains deep.

"We see our most significant competitors in workplace law as the two big boutiques, Harris and Roper Grayell," says Robert Sider of Vancouver's Lawson Lundell LLP, a regional firm that boasts 12 workplace law lawyers, including four pension law lawyers. "Heenan Blaikie and Fasken Martineau are the chief competitors among the large firms."

According to Sider, however, Fasken's labour law department in BC is "not half of what is was five years ago" due to a series of personnel reductions. "But that's not inconsistent with what we've seen among the nationals, except for Heenan Blaikie," he says. "In fact, some of the big Toronto firms that don't have a Vancouver office tend to call us rather than sending out their own people."

However that may be, it's not as if the nationals have gone away. In addition to the firms already mentioned, Davis, Dentons Canada LLP and McCarthys also have BC practices that merit mention.

There's no doubting, however, that boutiques and regional firms, including Farris, Vaughan, Willis & Murphy LLP, Taylor Jordan Chafetz, and TevlinGleadle, in addition to the firms already mentioned, are a stellar force in the BC workplace law market. Their continuing prominence may be explained partly by the failure of the Toronto boutiques to expand outside Ontario; alternatively, the strength of the BC boutiques and regionals, buttressed by Harris's exclusive alliance with Hicks Morley and Roper Greyell's strategic alliance with Sherrard Kuzz, may explain the Ontario boutiques' reluctance to go national, much as it may explain the relative lack of growth among nationals in the province's workplace law arena. Mathews Dinsdale's recent move into Vancouver, however, may be the beginning of a trend or the end of a very brief one: it's not clear how many other Ontario boutiques have enough national clients or prospects to merit expansion outside Ontario.

On the other hand, small boutique firms and sole practitioners that specialize

in the local workplace market proliferate in Ontario. But they tend to act for both employers and employees and cannot as individual entities be regarded as competitive with the exclusively management-side major firms and boutiques.

IN ALBERTA, McLennan Ross continues to cast a considerable shadow over the market, although that dynamic has been altered somewhat by Norton Rose's absorption of Armstrong Mitchell. Gowling Lafleur Henderson LLP, Bennett Jones LLP and Dentons are McLennan and Norton Rose's main competitors in Calgary. In Edmonton, Field Law, Dentons, McLennan Leslie & Tyerman LLP, and Neuman Thompson challenge McLennan.

Quebec, of course, is the birthplace of Ogilvy Renault, one of Norton Rose Canada's forerunners, and Heenan Blaikie. Lavery, de Billy, L.L.P., which has offices in Montreal, Quebec City and Ottawa, has fortified its presence through a strong but informal relationship with Hicks Morley. Among the nationals, McCarthys, Borden Ladner and Fasken Martineau also show strength. Workplace law boutiques Loranger Marcoux s.e.n.c.; Schneider & Gaggino; Melançon Marceau, Grenier et Sciortino; and Trudel Nadeau Avocats s.e.n.c.r.l. figure prominently as well.

Aikins, MacAulay & Thorvaldson LLP, Thompson Dorfman Sweatman LLP, and Taylor McCaffrey LLP lead in Manitoba, with McDougall Gauley LLP, MacPherson Leslie, and Bainbridge Jodouin Cheecham at the forefront in Saskatchewan. Atlantic Canada features Stewart McKelvey, McInnes Cooper, Forbes Roth Basque, Ritch Dunford and Pink Larkin.

THE UPSHOT IS that – the specific dynamics of the marketplace and individual firm strategies aside – there's a great deal of competition for employment-law-related mandates. By contrast, the playing field in traditional management-side labour-relations practices has not changed much. Heenan Blaikie and Norton Rose continue to be very high on the list of the national firms with the strongest labour-relations practices, even as boutiques of varying sizes throughout the country compete with these firms and amongst themselves to capture as much of the shrinking market as they can.

"Labour-relations lawyers are under intense pressure to decrease their rates and have been for some time, which is why most of the major firms are not focused on growing these practices," Craig says. "But because niche practices like pension law and employment class actions are not subject to the same pressures and are becoming more significant for business, just about everyone – including ourselves, other national firms and the boutiques – are working to expand that type of business."

PAUL BONIFERRO
> MCCARTHY TÉTRAULT LLP

> "WE WOULDN'T want to see a 100-lawyer department because our client base doesn't justify it. What we want to do is to develop and maintain a strong presence in the marketplace without growing too big."

It's not hard to discern their motivation. Consider that *Indalex*, perhaps the most closely watched pension-related case ever, featured counsel from traditional blue-chip firms like Goodmans LLP, Osler, Hoskin & Harcourt LLP, and Stikeman Elliott LLP on the pro-business side of the argument against the pensioners. Although Goodmans and Stikeman do not have high-profile pension departments and their presence in *Indalex* is primarily attributable to their considerable expertise in insolvency proceedings, it's likely no accident that Goodman's Joe Conforti, one of three labour and employment lawyers at the firm, is highly regarded, and that the intervening Canadian Bankers Association chose Osler – which, with Blake, Cassels & Graydon, ranks as having among the most outstanding pension departments in the country – to be its counsel.

Otherwise, there are the coffer-filling (for law firms) overtime class actions, which have proliferated in the US and threaten to do so in Canada in the wake of the Supreme Court of Canada's refusal to grant leave against Ontario Court of Appeal rulings upholding the class certifications in *Fresco v. Canadian Imperial Bank of Commerce* and *Fulawka* (CIBC) *v. The Bank of Nova Scotia* (BNS).

BNS opted for a Borden Ladner team composed of members of its litigation group and its deep workplace law group; CIBC had Torys LLP team up with workplace law specialists Hicks Morley. What's interesting in the latter case is that Torys has a relatively small workplace law department in Toronto of no more than six dedicated practitioners, and the emphasis there is clearly on pensions: the group calls itself the "Pension & Employment" practice, and the only sub-category it lists is "Pension & Employment Litigation." The chair of the practice, Mitch Frazer, is best known for his pension expertise, although his practice, and that of his colleagues, extends to a wide

range of human-resource-related issues.

Frazer has a very definite philosophy regarding the growth of his department, which has grown at the conservative rate of about one lawyer annually in recent years. "You have to look at where you are in the market and at what's profitable," he says. "What I'm looking for are people who are knowledgeable in all the HR areas, because the main thing I want our department to be is strategic advisors for a strong firm-client base."

As Torys demonstrates, however, there's no doubting that firms with smaller workplace law departments can succeed in the niche areas that provide lucrative workplace law mandates. Clearly, that was Torys' intention in segregating a pension and employment litigation group. And snaring the prized *CIBC* retainer in the overtime class action proves the strategy can be successful, especially in a partnership with a workplace law boutique.

But there are a few firms, like Davies Ward Phillips Vineberg LLP, who are investing little internally in the workplace law phenomenon. "We don't have a labour and employment practice group, although we do have a partner who provides what I call 'first-level coverage' on transactions," says Davies' managing partner Shawn McReynolds. "If we're going to have a bigger department, it needs to make its own way, and if we do need more help on a transaction or a lawsuit, we can rent the expertise by calling the managing partners at Hicks Morley or Mathews Dinsdale."

WHILE IT REMAINS to be seen who will benefit most from them, retainers of similar magnitude to *CIBC* and *BNS* are likely on the horizon. The fact that accounting giant KPMG quickly and effectively settled an analogous case bears some witness to the potential numbers of defendants seated in the bleachers waiting for the outcome of what are surely test runs in *Fresco* and *Fulawka*.

"There is significant risk out there because many employers are not in full compliance with provincial labour standards," says Jeffrey Goodman of Hicks Morley's Toronto office. "Now that *Fresco* and *Fulawka* have been certified, you're going to see a lot of voluntary settlements and also a lot of litigation. The bank cases are only the low-hanging fruit because the defendants are large federal employers whose employees are governed by a single statute, the *Canada Labour Code*, and subject to a national class."

As Goodman sees it, certification of *CIBC* and *BNS* will be the catalyst not only for cases against other national employers, but for regionalized class actions against companies or divisions of companies governed by provincial law. To be sure, BC courts have held that overtime claimants are limited to bringing statutory claims before provincial regulators, but the BC rulings were based on very specific privative statutory language. "Ontario, by contrast, specifically authorizes overtime actions in court," Goodman says.

MITCH FRAZER
> TORYS LLP

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WORKPLACE LAW IS also trenching on what has traditionally been regarded as commercial litigation. Significant cases involving restrictive covenants, for example, are increasingly requiring an understanding of local and regional employment and business markets. Stock options have become mainstays of many wrongful dismissal disputes. Shareholder disputes in private companies can be complicated by the fact that departing shareholders are also employees. "There is a growing willingness at our firm to practise what I call 'commercial employment law,'" Goodman says.

Nor, as it turns out, is the spread of workplace law confined to barristers. "With the growing awareness of human rights, it takes a lot of solicitors to keep business people out of workplace-related trouble," says Aird & Berlis's Lisi.

Keith Mitchell, Farris Vaughan's Vancouver-based managing partner, is of similar mind about the activities of his firm's 10-lawyer workplace law contingent. "Our labour and employment lawyers spend quite a bit of time on planning and structuring how a business is going to be carried on as well as day-to-day administration," he says.

WITH ALL THAT potential for workplace law, many lawyers believe Canada is a promising destination for a global workplace law firm. "It's amazing when you consider that there is no national labour boutique in Canada that is akin to a firm like Littler Mendelson in the US," John Craig observes.

Query, then, whether Canada could be fallow territory for a specialty workplace law firm. "I think that the biggest challenge for boutiques is the need to develop a national and international footprint, because it allows them to compete for international RFPs," says Filion, whose firm is a member of L&E Global, which was established in 2012 and describes itself as "an integrated alliance of premier employment law boutique firms advising on all worklaw related matters that international employers may have to deal with."

Indeed, L&E's very existence, and its focus on the growing multi-jurisdictional aspects of workplace law, is perhaps the most forceful testament to the coming of the practice's new age.

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