FTR QUARTERLY

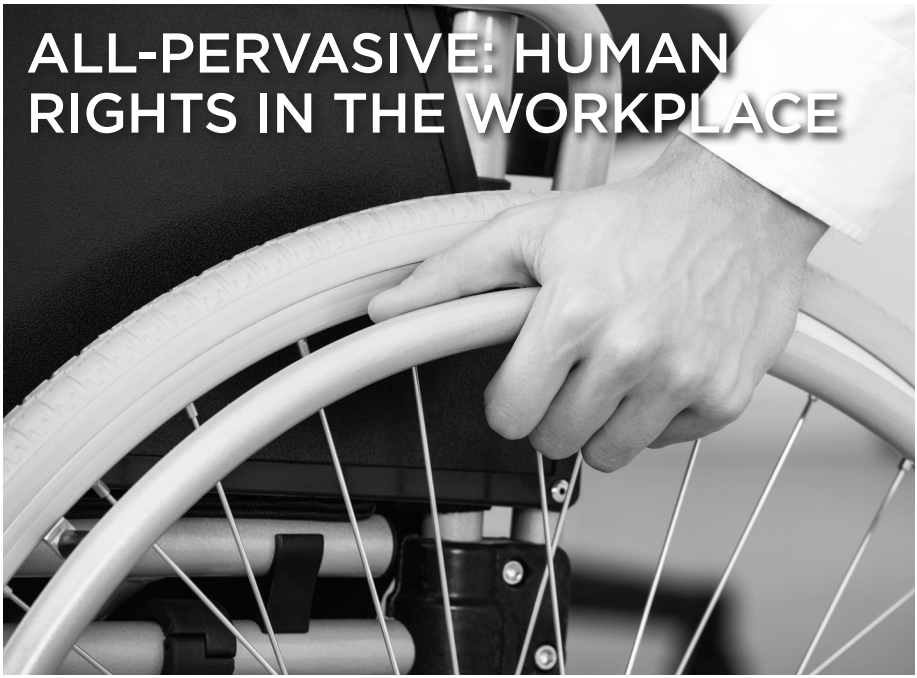
SPRING 2015

In this issue:

Hicks Morley

HUMAN RESOURCES
LAW AND ADVOCACY

ALL-PERVASIVE: HUMAN RIGHTS IN THE WORKPLACE



With so many different relationships in a workplace – employer/employee, worker/co-worker, customer/service provider – it's not surprising that human rights issues arise so frequently in the work environment.

"Human rights issues can arise in virtually every workplace, every day," says Donna D'Andrea, a partner in Hicks Morley's Toronto office. "Awareness is critical, which is why manager and supervisor training is so important. It can mean training on what protections exist under the *Human Rights Code*, how to respond to potential issues before they are raised by an employee, considering accommodation options, and training front-line employees to ensure the services they offer don't discriminate against or harass members of the public."

EMPLOYMENT-RELATED VERSUS SERVICE-RELATED COMPLAINTS

While the protected grounds under the *Human Rights Code* are numerous, there are two main categories that can arise in a workplace: employment-related complaints, involving employees and their employer (such as the accommodation of disabilities), and service-related complaints, between the organization and a member of the public it serves (from gaming and hospitality,

to retailers, schools and police). Each type of complaint presents its own unique challenges.

"Service-based complaints raise unique considerations. For example, the organization may also need to consider the relationship between the organization and the public and maintaining that positive (and sometimes ongoing) relationship, while still vigorously defending the allegations and maintaining trust in the public eye," says Lauri Reesor, a partner and Chair of the Hicks Morley Human Rights group.

For both employer-related and service-based complaints, there are emerging challenges that are impacting employers. One of the key ones for service-based complaints is the increased reputation risk due to the role of social media.

"On the employment side, similar considerations may arise if the applicant remains employed. In those cases, the employer must not only vigorously defend the application but also manage the employee on an ongoing basis. It can be a delicate balance to keep the two separate, recognizing that even legitimate management actions at work may be alleged to be retaliation later for bringing the human rights application."

RISING CHALLENGES

For both employer-related and service-based complaints, there are emerging challenges that are impacting employers. One of the key ones for service-based complaints is the increased reputational risk due to the role of social media.

"It's a significant consideration in our strategic response to an application," says D'Andrea. "It's more difficult to manage social media in a service-related complaint because there are no workplace policies that can be enforced to stop the applicant from engaging the media in the application. So it's critical that we factor reputational risk into our plan of action."

For employment-related complaints, one of the biggest changes has been the increase in awareness and associated complaints related to family status.

"We continue to see an increase in requests for advice on employee family status-related accommodation issues – as well as advice and information on how employers can reduce their liability

through proactive measures," says Kathryn Meehan, an associate in the firm's Waterloo office. "These issues are often related to child care and elder care responsibilities."

As a society, our views on issues evolve continually – from car seatbelts, to Sunday shopping, to same-sex marriage, to drug decriminalization. Not surprisingly, human rights law continues to evolve as well.

The good news is that many of these issues can be resolved before the complaint is formalized outside of the organization.

"While the duty to accommodate is a significant ongoing challenge with family status applications, there's a high success rate in having these issues resolved – often before a formal complaint is even launched," says Patty Murray, a partner in the Hicks Morley Toronto office. "And according to Human Rights Tribunal statistics, even when a complaint is launched, 60% to 70% of applications are resolved before a hearing. With our knowledge of the area, we're able to play a key role in seeing these resolutions through. It can take a creative approach at times, but the end result can be satisfaction for both sides."

CHANGE – IT'S A CONSTANT

As a society, our views on issues evolve continually – from car seatbelts, to Sunday shopping, to same-sex marriage, to drug decriminalization. Not surprisingly, human rights law continues to evolve as well.

"One of the recent changes to the *Code* is the inclusion of gender identity and gender expression as grounds for protection," says Andrew Zabrovsky, an associate in the firm's Toronto office. "It's a significant development, and it's posed unique challenges for service providers in particular as they attempt to address issues like providing gender-neutral change areas and restrooms – and training their employees to be sensitive and aware of gender issues in general."

With societal change a constant, the organizations with the greatest success in managing human rights issues – and related costs – will be the ones that are able to stay on top of evolving trends, and develop new best practices to suit a changing world.

MEDICAL MARIJUANA AND THE WORKPLACE: WHAT'S YOUR LEGAL OBLIGATION?

With the increasing prevalence of medical marijuana use, employers are becoming concerned with their legal obligations towards employees who have prescriptions for medical marijuana and, in particular, with their accommodation requirements. Here are some factors to keep in mind should such an accommodation request arise in your workplace.

BY: JACQUELINE J. LUKSHA

WITH A DISABILITY COMES LEGAL PROTECTION

The obligation to accommodate the use of medical marijuana arises under the Ontario *Human Rights Code* ("*Code*"), which protects individuals in the workplace from discrimination on the basis of disability. Employers are required to accommodate an individual's disability to the point of undue hardship. In the case of medical marijuana, this accommodation may include allowing individuals to smoke or use marijuana in situations where such use would otherwise be prohibited.

The Human Rights Tribunal of Ontario ("Tribunal") has dealt with these issues in the context of restaurant patrons and pre-employment screening. To date, what is clear from these cases is that determining accommodation obligations will require a balancing of competing interests.

THE WEIGHING OF INTERESTS

The case law demonstrates that the Tribunal will weigh different interests in determining whether a rule is reasonable and *bona fide*. This means that accommodation issues

arising from the use or possession of medical marijuana must be met with careful analysis.

In *Gibson v. Ridgeview Restaurant Limited*, the Tribunal found that an applicant was not discriminated against because he was told not to smoke in close proximity to a restaurant's entrance and was then told not to return to the restaurant when he did so. The applicant failed to establish a disability-related need to smoke marijuana near to the restaurant's entrance or that being denied that option created any disability-related disadvantage. Moreover, the restaurant's requirement that he not smoke marijuana within six feet of the entrance was reasonable and *bona fide* and had been adopted in good faith in light of legitimate concerns for patrons, including health-related concerns, that are "rationally connected" to running a licensed bar/restaurant. Permitting the applicant to smoke in close proximity to the restaurant would have given rise to undue hardship.

To date, what is clear from these cases is that determining accommodation obligations will require a balancing of competing interests.

Similarly, in *Ivancicevic v. Ontario* (*Consumer Services*), an applicant who had an "Authorization to Possess" marijuana, pursuant to federal regulations, argued that a regulation under the *Liquor Licence Act* discriminated against him on the basis of disability because he was not allowed to consume medical marijuana while on a licensed premises (in an area sanctioned for tobacco smokers). That regulation also prohibited a licence holder from permitting a person to "hold" marijuana while on its premises.

On a proactive basis, workplace policies and procedures should take into account the potential for accommodation of medical marijuana use or possession in the workplace.

The Tribunal found that the applicant had a disability-related need to smoke marijuana and to use it through the day; the regulation was therefore *prima facie* discriminatory. However, the *Code* defence of undue hardship was met because the regulation was adopted in good faith for health and safety reasons to protect against an established risk from marijuana smoke, and was therefore reasonably necessary to accomplish a legitimate legislative purpose.

The adjudicator held that the regulation was unenforceable to the extent it prohibited the applicant to "hold" (as opposed to consume) marijuana, as this prohibition was discriminatory and there was no evidence that this prohibition was reasonably necessary.

In *Pelham v. Rain for Rent Canada ULC*, a case of marijuana use and pre-employment screening, the Tribunal found that there must be evidence of a disability to trigger scrutiny under the *Code*. The applicant had not indicated a concern that a pre-employment drug test or reference check would reveal a disability, nor had he pointed to any evidence that would indicate that the employer perceived him to have a disability. The Tribunal concluded that the application had no reasonable prospect of success.

EMPLOYER CHECKLIST – FACTORS TO CONSIDER

The Tribunal has yet to consider the specific issue of use of medical marijuana in the workplace. It is likely that, as in the cases above, employers will be required to weigh competing interests and obligations to ensure that any rule prohibiting the use or possession of marijuana in the workplace does not discriminate against those with disabilities.

When faced with a request to use or possess marijuana in the workplace, at a minimum employers should consider the following factors:

- does the employee have a disability-related need to consume medical marijuana?
- would a refusal to allow the employee to use or possess marijuana have the effect of creating a substantive disadvantage for the employee by effectively prohibiting him or her from consuming medically sanctioned marijuana?
- does the employer have an explicit policy prohibiting the use or possession of marijuana in the workplace?
- is that prohibition based on health and safety considerations, or other considerations that are rationally connected to the workplace?
- was the prohibition adopted in good faith, as opposed to being motivated by discriminatory animus?
- is the prohibition no broader than necessary to accomplish its purpose?
- is there a location available at the workplace where the grievor can discreetly consume the medical marijuana?

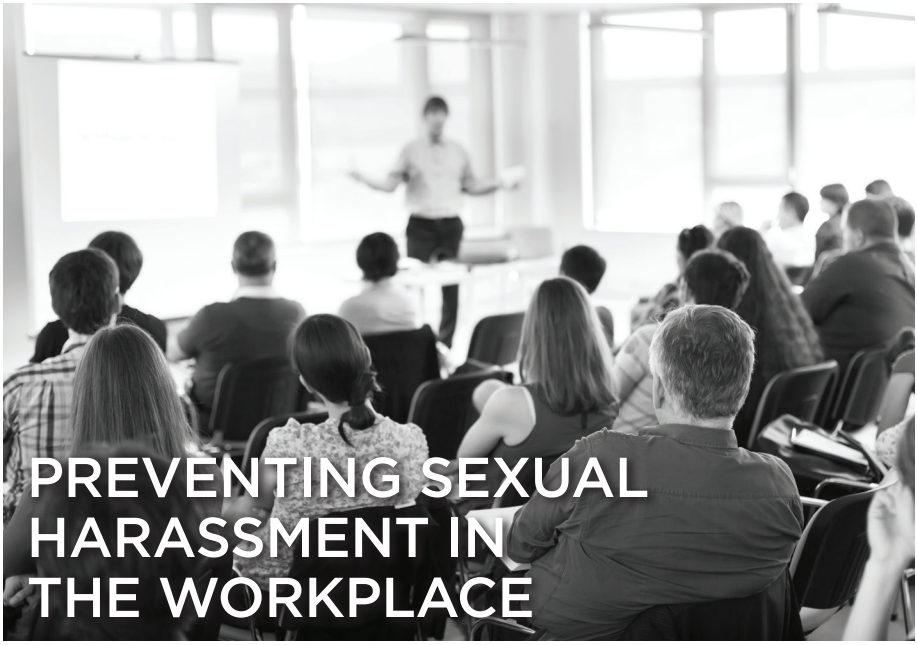
BE PROACTIVE ON POLICIES

It will not be sufficient for employers to simply state that accommodation of an employee's disability-related need to use or possess medical marijuana through his or her working hours will constitute undue hardship. Each case will require an individual analysis of the competing interests and workplace requirements involved. On a proactive basis, workplace policies and procedures should take into account the potential for accommodation of medical marijuana use or possession in the workplace.

We would be pleased to help you formulate policies or deal with requests as they arise in your workplace.

Jacqueline Luksha has appeared as counsel at the Human Rights Tribunal of Ontario, the Pay Equity Tribunal, the Ontario Labour Relations Board and in labour arbitrations. She has also appeared in the Ontario Superior Court of Justice (Divisional Court) and the Federal Court of Appeal. Jacqueline has represented clients at discovery and in mediation in the course of her civil litigation practice. In addition to her advocacy work on behalf of clients, Jacqueline frequently provides advice and training to clients and publishes client updates on human resources issues.

Tel: 416.864.7531
Email: jacqueline-luksha@hicksmorley.com



PREVENTING SEXUAL HARASSMENT IN THE WORKPLACE

The issue of sexual harassment in the workplace continues to receive widespread media attention, spurring lively (and occasionally heated) discussion.

BY: LAUREN I. COWL

Late last year, the Ontario Human Rights Commission responded to recent high-profile events by issuing a Policy Statement, *Sexual Harassment and the Ontario Human Rights Code*. Sexual harassment is also top of mind for the Ontario government, which released *It's Never Okay: An Action Plan to Stop Sexual Violence and Harassment* on March 6, 2015 ("Action Plan"). Although the government's Action Plan is still in its preliminary stages, it contemplates various educational initiatives and legislative reforms to change the way Ontarians understand and approach the issues of sexual harassment and violence.

Employers have a legal duty to provide a workplace free of sexual harassment and respond promptly and appropriately to allegations of sexual harassment. Here are five practical measures for preventing sexual harassment in the workplace and minimizing the risk of employer liability.

1. KNOW THE LEGISLATIVE FRAMEWORK

Ontario's *Human Rights Code* ("*Code*") and the *Occupational Health and Safety Act* ("*OHSA*") are the primary legislation governing an employer's duty to maintain a harassment-free workplace. Under the *Code*, harassment on the basis of a prohibited ground – including sex, sexual orientation, gender identity and gender expression – is unlawful. The *Code* also affirms that employees have the right to be free from all forms of discriminatory harassment in the workplace. The *OHSA*'s definition of

workplace harassment does not require that harassment be tied to a prohibited ground of discrimination to be unlawful. Both the *Code* and the *OHSA* state that harassment includes engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.

Under the *OHSA*, employers are required to prepare, post and review on an annual basis their policies and programs regarding workplace violence and harassment. The *OHSA* also contains training obligations and requires employers to conduct risk assessments with respect to workplace violence.

Effective training does not take a one-size-fits-all approach, but is tailored to include meaningful examples that are relevant to the particular workplace and employees in question.

2. DEVELOP COMPREHENSIVE POLICIES AND PROGRAMS

The likelihood of compliance with any workplace policy is increased when employees are given clear expectations regarding their conduct. Employers are therefore well-advised to utilize a comprehensive workplace harassment policy that addresses, at minimum:

- a *Code*- and *OHSA*-compliant definition of harassment that identifies appropriate/inappropriate behaviour;
- to whom the policy applies and where, addressing conduct on social media, conduct that occurs off-site, as well as off-duty conduct that may relate to the workplace and therefore be captured by the policy;
- the complete complaint resolution process, including: to whom employees should report, how confidentiality will be addressed in the process, how complaints will be investigated, what corrective action will be taken and how conclusions will be reported to the complainant and others;
- employee obligations to report workplace harassment, with an explanation that good faith complaints are protected from acts of reprisal;
- employee rights to pursue other complaints under other processes available to them (e.g. under the *Code* or the *OHSA*); and
- employer obligations to investigate potential workplace harassment, even if a formal complaint has not been made.

3. PROVIDE THOROUGH, REGULAR TRAINING

Thorough training will allow employees to ask questions, obtain clarity about their obligations and apply the policy in practical workplace situations. Employees should be informed of and trained on the policy at the outset of their employment. Training should be revisited at regular intervals to address changes in the workplace (including an incident of workplace harassment) and to remind employees of their rights, roles and responsibilities under the policy.

Effective training does not take a one-size-fits-all approach, but is tailored to include meaningful examples that are relevant to the particular workplace and employees in question. Remember to document and retain copies of the training programs used, as well as employees' acknowledgements of the policy and their participation in training.

4. ADHERE TO THE COMPLAINT RESOLUTION PROCESS

Employers are required to investigate complaints promptly and to treat each complaint as genuine. Adequate resources should be assigned to properly investigate a complaint. As adherence to a comprehensive complaint resolution process may take time to complete – from "intake," to investigation, to final determination – consider whether interim measures are appropriate in order to address immediate concerns of the complainant, the respondent or the workplace.

It is useful to remind the parties of the relevant timelines for next steps, the extent to which confidentiality will be protected and their obligations to co-operate in the investigation. Parties should also understand what information will be provided to them upon the completion of the process (e.g. a decision with reasons, but not the complete investigation record).

> Consider whether interim measures are appropriate in order to address immediate concerns of the complainant, the respondent or the workplace.

5. FOSTER AN ENVIRONMENT OF RESPECT

When assessing whether an employer has met its obligation to provide a harassment-free workplace, an important factor relevant to employer liability is whether the employer provided a healthy environment for a complainant to come forward. The human rights jurisprudence is clear that even when employers take timely action to address individual instances of harassment, they may still be liable if the work environment has been poisoned or if a workplace culture that condones sexual harassment has been tolerated.

Training and education about workplace harassment and human rights issues, as well as a zero-tolerance approach to workplace harassment, will help foster a climate of respect in the workplace. Individuals in manager, director and supervisory roles should receive specialized training that addresses their additional responsibilities under the *Code* and the *OHSA* so that they are equipped to handle harassment issues appropriately.

As the government rolls out its Action Plan, remaining informed about legal developments and sharing them with employees is good practice and makes good business sense.

Lauren Cowl is an associate lawyer at Hicks Morley's Toronto office and currently practises in all areas of labour and employment law. Lauren provides advice and representation to both private and public sector employers and management on a wide range of labour and employment issues including labour disputes, grievance arbitrations, wrongful dismissals, employment standards, employment contracts, and human rights and accommodation.

Tel: 416.864.7025
Email: lauren-cowl@hicksmorley.com

PROFESSIONAL DEVELOPMENT SESSIONS AND WORKSHOPS

This professional development program for in-house counsel and human resources professionals is designed to keep you informed about the latest legal developments and best practices. Visit hicksmorley.com/advantage.

May 25	Workplace Investigation Training
June 3	The Proposed Overhaul of the WSIB Classification and Rate Framework: What You Need to Know Breakfast CPD Session
June 10	Changes to the *Employment Standards Act:* What You Need to Know Breakfast CPD Session
June 11	Workplace Investigation Training – London

HR QUICK HITS

Administrative penalties issued for non-compliance with the *AODA*

Recent Licence Appeal Tribunal ("Tribunal") decisions provide useful guidance regarding the assessment of administrative penalties against private sector employers that fail to comply with their self-reporting obligations under the *Accessibility for Ontarians with Disabilities Act, 2005* ("*AODA*").

In *Echoworx*, *Metaris Inc.*, *Lafleur Restaurants* and *J&A Creative Services*, the employers failed to comply with final notice letters from the Accessibility Directorate of Ontario ("ADO") regarding their obligation to file an accessibility report. While the Tribunal ultimately rejected the ADO's characterization of the contraventions and reduced the penalty in each case, the Tribunal affirmed that self-reporting and administrative penalties are "key components" of ensuring AODA compliance. Among other things, it noted that:

- An employer's obligation to self-report in a timely manner is not excused by staffing or management changes, corporate restructuring, or an employee's failure to follow instructions or draw management's attention to a final notice delivered by registered mail.
- The fact that a business is Internet-based or closed to the public does not minimize the importance of self-reporting requirements, or mitigate an employer's failure to comply.
- While a corporation's apparent acceptance of responsibility for not filing a report in a timely manner may be "commended," an administrative penalty may still be assessed in these cases.

DIVERSITY FIRST

Catherine Peters has been with Hicks Morley for more than 20 years – with much of her career and current practice focused in the human rights area. Catherine is also Chair of the firm's Diversity Committee – and is responsible for putting Hicks Morley's commitment to diversity into action within its own workplace.

Catherine spoke with *FTR Quarterly* about her career, her current roles and her life outside of law.

Where are you from originally?

I was born in Winnipeg, but lived in many locations across Canada in my early childhood because of my father's civil engineering work. We settled in Calgary when I was 9, and I lived there until I went to university. I did a four-year degree in psychology at Queen's, then went to law school at U of T.

How did your interest in law develop?

My mother got accepted to law school in her 40s and practised for several years. That was certainly a significant influence.

What brought you to Hicks Morley?

I was always intrigued by the "people" aspect of the employment relationship, and I knew there were a lot of interesting advocacy opportunities in the field. Every social issue in Canadian life plays out in the workplace somehow.

So I applied to article at Hicks Morley, and I was really taken with the people and the congeniality in the firm. It's been a great fit – I've been here for more than 20 years.

As our clients' workforces become more and more diverse, they not only look to us for advice in managing that diversity, but also expect us to reflect that diversity in the services we provide, and to bring different perspectives to bear on the work we do.

You do a lot of human rights work. Has that always been a large focus of your practice?

It has. When I first started with the firm after articling, I was hired into a role that was 50% research and 50% as a practising lawyer. The research role really opened doors for me to get involved in some interesting and complex work – and human rights was a big part of that, as novel and complex issues were constantly emerging.

I became the head of research in 2001, but began transitioning out of that role around 2007. I headed the firm's human rights practice group for two years and human rights work is a large part of my practice.

You're head of the firm's Diversity Committee. What is that and how did that come about?

Enhancing diversity and inclusion is an important goal within the profession right now. There are a lot of really important initiatives ongoing that are focused on dismantling barriers that prevent diverse groups from flourishing in the legal profession. It is a challenging process but one that is long overdue.

Diversity is also very important to our clients. As our clients' workforces become more and more diverse, they not only look to us for advice in managing that diversity, but also expect us to reflect that diversity in the services we provide, and to bring different perspectives to bear on the work we do. We've made great strides in the last few years – for example, we have a very

high proportion of female associates and partners relative to most firms – but, of course, it's a process, and there is still much work to be done.

The Diversity Committee is a committee of two partners, two associates and a member of our support staff. We work together to support the firm in developing initiatives to carry out its commitment to diversity and inclusion.

What are some of the emerging issues you're dealing with today that weren't on the radar 10 years ago?

Workplace human rights law is constantly changing, and there is no lack of interesting legal developments. However, I think one of the most interesting trends in the human rights field right now is less about the substantive issues that arise, and more about the greater awareness that exists out there. Individuals are much more aware of their rights today than they were a decade ago – and they're also more likely than in the past to reach out to the Human Rights Tribunal if they think a violation of their rights has taken place.

From an organizational standpoint, the stakes have never been higher, particularly for the senior leadership. The public expects a much higher level of social responsibility from senior leaders than they did 5 or 10 years ago. They expect senior leaders to foster a climate that promotes the health, safety and human dignity of their workforce and the people they serve. When the public learns that a serious issue has occurred, which is increasingly common in the age of social media, the reputational impact can be devastating, and the consequences for all those accountable – up to the CEO – can be very serious.

How about your life outside of law – what are your main interests?

I've lived in Toronto for over 25 years, and I'm very happy living here. But travel is my passion – and hiking trips in particular are a focus. I really enjoy seeing the world on foot – and challenging myself in the process. So I try to get away once or twice a year when I can. Last year I went hiking in Patagonia at the southern tip of South America, and I've also completed a 250-kilometre section of the Camino de Santiago in Portugal and Spain.

NEW ASSOCIATE

Hicks Morley is pleased to announce that Allison MacIsaac has joined Hicks Morley in our Toronto office.

ALLISON E. MACISAAC

Allison currently practises in all areas of labour and employment law. She provides advice and representation to both private and public sector employers and management on a wide range of labour and employment issues including human rights and accommodation, labour disputes, grievance arbitrations, wrongful dismissals, employment standards and employment contracts.

Allison can be reached at 416.864.7326
or allison-macisaac@hicksmorley.com

GREAT MOVES

Hicks Morley's Southwestern Ontario team is growing – Jodi Gallagher Healy transfers to the firm's London office.

JODI GALLAGHER HEALY

Jodi Gallagher Healy has transferred from Hicks Morley's Toronto office to our London office to join our growing Southwestern Ontario team. Jodi will continue to advise employers throughout Ontario, with a particular interest in developing the firm's London area-based practice. Jodi has more than a decade of experience providing advice and representation to employers on a wide spectrum of human resources law, including grievance arbitrations, labour relations strategy, human rights and accommodation, wrongful dismissal litigation, employment standards compliance and litigation and WSIB issues.

Jodi can be reached at 519.931.5605
or jodi-gallagherhealy@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

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.