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In this issue:



Hicks Morley

HUMAN RESOURCES
LAW AND ADVOCACY

# HUMAN RIGHTS ISSUES: EXPANDING ACROSS THE LABOUR AND EMPLOYMENT SPECTRUM

Twenty years ago, human rights claims were typically focused on age, race and sex issues. Today, employers must manage human rights issues that extend far beyond those traditional boundaries.

Most employers are sensitive to well-established human rights concerns that can arise in the workplace – from discrimination at the time of hiring, to harassment, to accommodation for religious holidays.

But many employers may not be attuned to the widening scope of human rights issues that could impact them.

"The norms in our society are constantly evolving, and human rights issues are evolving along with them," says Patty Murray, Chair of the Hicks Morley Human Rights Practice Group. "As employees make discrimination complaints that touch on new areas, tribunals and courts are making their assessments and slowly expanding the boundaries of what rights are protected."

For employers, this requires an ongoing awareness of the types of issues that could lead to a human rights complaint, and where possible, taking proactive steps to address issues before they arise.

## TAKING PROACTIVE ACTION

While advocacy in the courts, at arbitration and before human rights tribunals is an essential strategy when complaints can't be resolved, taking proactive steps to address human rights issues, and to resolve them when they do arise, can play a key role in risk management.

"By and large, our clients aim to be leaders in the field of human rights," says Catherine Peters, a partner in the firm's Toronto office. "They often don't measure success simply in terms of a 'win' in human rights litigation."

There are a number of steps that employers can take to address human rights issues, such as reviewing, amending or implementing policies, providing education and training for employees, or improving the accessibility of premises or services.

"A significant part of my practice involves helping clients proactively address and resolve human rights challenges short of litigation," says Peters. "It's really a question of balancing interests so that clients are able to build and cement their reputation as leaders in the human rights field without compromising the operational needs and objectives of the organization."

## ARBITRATIONS

Labour arbitrations have long been a forum for human rights complaints, but there are a couple of emerging trends of note.

"One of the most significant trends is that the efforts of employers to manage attendance are frequently being met with grievances alleging harassment and discrimination on the basis of disability," says Brenda Bowlby, a partner in Hicks Morley's Toronto office. "Supervisors need to make contact with absent workers at home to see how they are doing, to help the employee maintain a connection with the workplace and to request medical information to determine the nature of the employee's restrictions. But these steps are often challenged by grievances alleging harassment."

Another trend is the increase in grievances alleging age discrimination since the elimination of the upper limit on "age" in the Ontario *Human Rights Code*, while grievances alleging a failure to accommodate a disability remain quite high.

There are several strategies that employers can use to help manage any complaints that arise.

"If a complaint has already been made, we frequently retain experts – usually medical experts in the context of a disability – to provide greater effectiveness in cross-examining the union's witnesses," says Bowlby. "And it's critical for the employer to ensure that good notes are kept when workplace disputes emerge so that our evidence at arbitration is solid and complete."

But the most important piece of advice might be to get timely advice. As Bowlby notes, negotiating can be very effective, and the best time to involve your legal counsel is at the point you think a dispute might arise rather than after a grievance comes in.

## WRONGFUL DISMISSAL ACTIONS

The changes to the *Human Rights Code* that took effect in June 2008 specifically sanction the use of civil proceedings to advance claims regarding alleged infringements of the *Code*. And this will undoubtedly bring change.

"We'll not only see human rights issues arise more frequently in wrongful dismissal litigation, but there may also be an expansion in the types of claims, extending past mere dismissal into matters such as promotion, compensation and performance management," says Kim Pepper, a partner in the firm's Toronto office.

The question that could attract the most attention, though, is the type of remedies that will be awarded by the courts when human rights issues are raised in civil proceedings.

"The new provisions of the *Human Rights Code* give the courts the ability to order restitution other than monetary

compensation," says Pepper. "We don't yet know whether the courts will start awarding the types of remedies that have historically been rejected in the past, such as reinstatement, apologies or the requirement to provide references. If they do, it will add even greater complexity to this area of litigation."

## PENSION AND BENEFITS

You might think that human rights would be far removed from pension and benefits plans, but even these programs – ones that provide tangible and often generous benefits to employees – can spark a human rights complaint.

"The most common discrimination allegations that arise in pension plans are gender and age discrimination," says Elizabeth Brown, head of the firm's Pension and Benefits Practice Group.

"For example, some plans have historical two-tiered eligibility provisions – such as men joining the plan at age 21 and women not permitted to join until a later date. While these are grandparented under human rights legislation, they are still challenged as discriminatory by employee groups."

The same type of challenge can arise with benefits plans that stop group benefits at age 65, even if a person continues working past that age. While such policies are generally permitted under the *Code* by exemptions tied to the *Employment Standards Act, 2000* and its regulations, they may still face a constitutional challenge.

"In the end, many of these claims are defensible, but the litigation can become quite complex. So when an employer is structuring a pension plan buy-back or any kind of special program, it's important to be aware of the effect such a program will have on different groups of plan members – especially between men and women if the plan contains historical differences in eligibility."

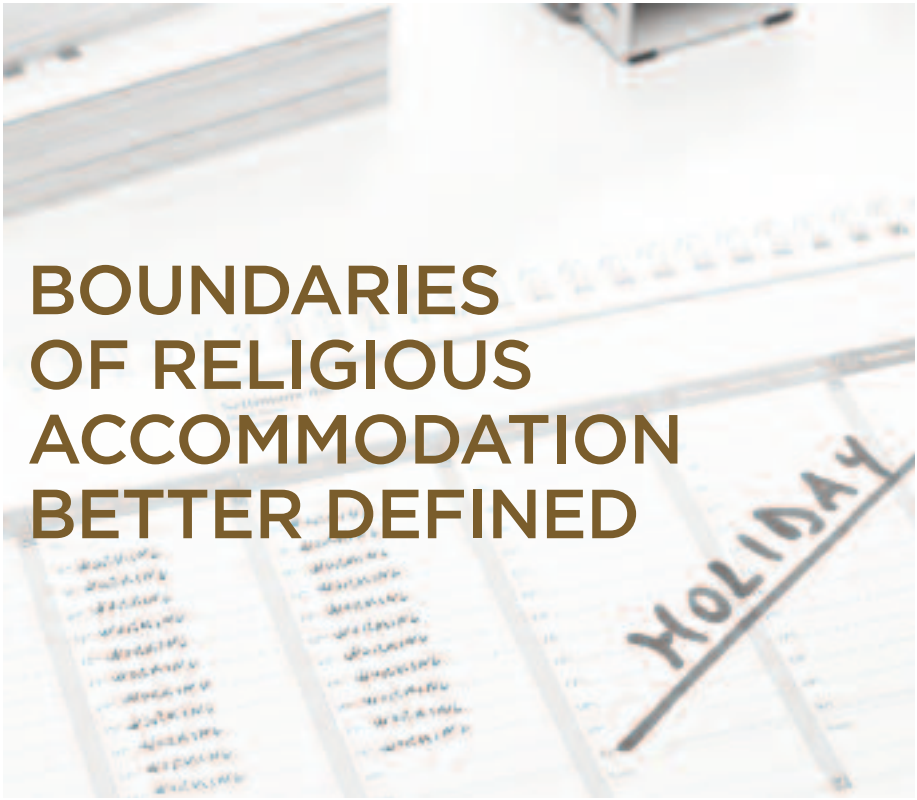
## WORKERS' COMPENSATION

Workers' compensation cases necessarily involve the intersection between the requirements of the *Workplace Safety and Insurance Act, 1997* and the requirements of the *Human Rights Code*. Not surprisingly, these situations can escalate into human rights issues.

"We typically see human rights issues in return to work and re-employment obligation cases," says Will LeMay, Chair of the firm's Workplace Health, Safety, and Attendance Management Group. "The employer has an obligation to consider suitable available work for the employee for a period of up to two years after the accident. Furthermore, the Workplace Safety & Insurance Board is considering new cooperation policies that would potentially extend the duration of employers' obligations."

Problems occur when the employee challenges the suitability of the work or the assertion by the employer that no suitable work is available. The consequences of a breach can be considerable. While the WSIB can't reinstate the worker, it can levy a fine of up to one year of benefits and pay the employee a similar amount and charge it to the employer.

"That's why it's important to properly document each case," notes LeMay. "Make sure you have clear notations on the employee's restrictions and have documented your search for suitable, available work."




# BOUNDARIES OF RELIGIOUS ACCOMMODATION BETTER DEFINED

The need to accommodate religious leaves in the workplace is hardly a new issue, but it continues to be a challenging one. Two recent cases in which Hicks Morley lawyers have been involved have led to some helpful legal developments for employers.

BY: CATHERINE L. PETERS

## NEED FOR LEAVE MUST BE PROVEN

When an employer receives a request for religious leave, there is often no reason to doubt the legitimacy of the need to be absent from work. However, if you do have questions about the legitimacy of a request, you may be unclear about how far you can go in questioning employees about their religious needs. A recent arbitration case argued by Hicks Morley's Brenda Bowlby – *Re York Region District School Board and OSSTF, District 16* (11 August 2008, Tacon) – provides some useful guidance for such a situation.

In her decision, Arbitrator Tacon adopted the reasoning of a recent Supreme Court of Canada decision called *Amselem*, and found that if an employee has a sincerely held belief that has a connection to religion, and honestly believes it is obligatory or customary to observe a religious holiday, then the employee

should be considered entitled to religious leave. The employee's belief need not be consistent with official religious dogma or the position of religious officials in order for the request for leave to be legitimate.

However, at the same time, Arbitrator Tacon emphasized that an employer is not required to "blindly accept" requests for religious leave for days on which members of the employee's faith are not generally required to refrain from working. She noted that, "[w]hile the religious beliefs of individuals may well be personal and private, in each instance, the claimant has … to prove his/her claim". The Arbitrator endorsed the school board's practice of treating leave requests for certain "significant faith days" as presumptively legitimate and requesting further information from the employee in other cases to verify the legitimacy of the leave request.

## NO REQUIREMENT FOR "TWO PAID DAYS"

Another issue that has come up in several workplaces recently concerns the entitlement to two paid days off in lieu of statutory holidays.

Since 1996, the Ontario Human Rights Commission's *Policy on Creed and the Accommodation of Religious Observances* has stated that employees who are members of religious faiths, other than Western Christian faiths, are entitled to two paid days of religious leave to parallel the statutory holidays on Christmas Day and Good Friday, unless the employer can establish that providing two paid days of leave would cause undue hardship.

The Commission did not update or change its *Policy* after the Ontario Court of Appeal's decision in *Tratnyek* in 2000, in which the Court endorsed the "menu of options" approach to religious accommodation – that is, the approach of providing a range of options (including scheduling options) that would allow an employee to take religious leave without loss of pay.

The *Tratnyek* decision made it clear that an employer can fulfil its duty to accommodate religious needs by using a menu of options approach – without first establishing that providing paid leave would cause undue hardship. Nevertheless, despite this decision, the Commission continued to advise members of the public that there was a blanket entitlement to two days of paid religious leave.

In *Markovic v. Autocom Manufacturing Ltd.*, 2008 HRTO 64 (argued by Hicks Morley's Christopher Riggs and Catherine Peters), the Human Rights Tribunal of Ontario held that, contrary to the Commission's *Policy*, there is no blanket requirement to provide two days – or any number of days – of paid religious leave.

Vice-Chair Sherry Liang accepted the argument that an employer's obligation under human rights legislation is to design its workplace standards or policies in a way that recognizes and accommodates religious differences between employees. This can be done by providing scheduling options that allow employees to avoid loss of pay. In her words, "where available, adjustments to work schedules provide an appropriate accommodation at least partly because they do not require an alteration of the essential employment bargain" (that is, "the exchange of services for pay").

To date, at least two arbitrators, and now the Tribunal, have found that no such "two paid days" requirement exists. Furthermore, at the time of this writing, Brenda Bowlby of Hicks Morley is awaiting a decision concerning the "two paid days" requirement articulated in the Commission's *Policy*, and

it is hoped that the trend established in the earlier cases will be continued.

## CONCLUDING COMMENTS

The guidance provided by these recent decisions will no doubt prove helpful to many employers in addressing religious accommodation issues. Nevertheless, this remains a very sensitive and complex area. For this reason, you should consider seeking legal counsel both at the stage of policy formulation and at the stage of dealing with individual requests for religious accommodation.

***Catherine Peters** is a partner in the firm's Toronto office. Catherine provides strategic advice to clients on a wide variety of areas of practice, with a special emphasis on human rights law, and represents clients before arbitration and human rights tribunals.*

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HR QUICK HITS

## Arbitrator Declines to Apply Commission's Duty to Accommodate Policy

In a recent decision argued by Hicks Morley's Paul Jarvis, a labour arbitrator considered whether the Ontario Human Rights Commission's *Policy and Guidelines on the Duty to Accommodate* had any persuasive value with respect to the issue of "undue hardship". Arbitrator Herman concluded that it did not.

The union had argued that in laying off disabled employees, the employer had not reached the threshold of undue hardship set out in the Commission's *Policy* since the employer had not demonstrated that the costs related to keeping the individuals employed "were so substantial they would alter the essential nature of the enterprise or so significant that they would substantially alter its viability".

Arbitrator Herman noted that the Commission's *Policy* did not have the force of law, nor was it consistent with any court decision, including decisions of the Supreme Court of Canada. Arbitrator Herman also noted that setting that high a standard as a threshold was largely meaningless, as large organizations would never be able to lay off employees unless their very existence was at risk. Accordingly, he found the Commission's view as expressed in the *Policy* to be of no persuasive value, and he declined to apply it.

While the Commission's *Policy* on human rights issues is often touted as persuasive, this case shows that adjudicators and other decision-makers often take a more reasoned and common sense approach to issues of "undue hardship" in considering whether an employer has satisfied its duty to accommodate.

# LITTLE CAR, BIG FEAR: WHEN IS A DISABILITY A DISABILITY?

Despite recent case law relaxing the "undue hardship" standard (an example being the 2007 Supreme Court decision in *McGill Health Sciences Centre*), a claim of undue hardship remains an exacting and unpredictable defence to claims of discrimination on the grounds of disability.

Because of this, we have long emphasized the wisdom in challenging such claims at an earlier, more fundamental level. Often this has involved questioning whether an asserted difference in treatment amounts to "discrimination" in the first place. The recent arbitration decision in *Re City of Brampton and CUPE, Local 831 (Brand)* (15 June 2008, MacDowell) shows the possible benefit of raising an even more fundamental question – is there a disability at all?

## THE SMART CAR, THE "PHOBIA", THE ARBITRATION

For many years, the City of Brampton had permitted its By-Law Enforcement Officers to use their own personal cars to perform their work in monitoring compliance with a multitude of city by-laws. The employees were fond of this arrangement, in part because of the mileage allowance they received and in part due to the anonymity it provided them during the working day.

However, in May 2006, the City introduced a "green" approach to its fleet of vehicles. As part of the new approach, By-Law Enforcement Officers were required

to drive Smart Cars that had been newly purchased by the City and which bore City colours and the City logo.

Immediately upon the introduction of the new vehicles, an officer named David Brand claimed that he had a phobia relating to driving such a small car. This was not based on claustrophobia (Brand flew small planes and lived on a houseboat). Rather, he claimed it was due to a traffic accident he had experienced in France in 1985, when he and his wife were rear-ended while touring on his motorcycle. He asked to be permitted to continue to use his own car (a compact Elantra) or one of the City's new Honda Hybrids by way of accommodation.

The City was sceptical. It did not want to invite similar claims from others and it did not wish to engage in the "undue hardship" debate. So Brand's particular requests for accommodation were refused. However, the City respected Brand's assertions at least to the point of taking him off the road and giving him desk duties (at no loss of pay), while the issue of his asserted phobia could be explored.

This case reminds employers not to jump unnecessarily into the accommodation process, and highlights the obligation of employees to take all reasonable steps to minimize the degree of accommodation required where a disability does exist.

Initially, the City received a few cryptic notes from Brand's family physician. Brand subsequently provided a letter from a psychologist, but again, this was equivocal. As was its right, the City insisted upon clarification from the specialist. At the same time, it was proposing to Brand and to CUPE that Brand be sent for an independent medical evaluation (IME). This proposal was rejected – Brand insisted on dealing with his own practitioners. The parties were deadlocked and so the matter proceeded to arbitration before Richard MacDowell.

## NO PHOBIA, NO DISABILITY

At arbitration, the City (represented by Hicks Morley's Michael Hines) established that the psychologist's support for Brand's refusal to drive a Smart Car was based upon the psychologist's own doubts about the safety

of the Smart Car. Brand's fears did not, in his opinion, reflect an irrational, maladaptive phobia (such as a fear of teddy bears). Rather, it reflected a rational level of caution (such as a fear of grizzly bears). This revelation led to a further discovery. The psychologist did not offer Brand any treatment for two reasons – first, he did not want to persuade Brand that he should try driving Smart Cars and second, Brand did not wish to be treated.

The City argued successfully that the psychologist's opinions about the safety of the Smart Car were misplaced (given its certification by Canada's Highway Transport Authority) and irrelevant (being outside the psychologist's area of expertise). It noted that CUPE had never challenged the vehicle's safety under Ontario's *Occupational Health and Safety Act*.

More fundamentally, the City persuaded Arbitrator MacDowell that there was no need to engage in the whole discrimination/accommodation/undue hardship debate, since no one was actually claiming that Brand suffered from a medical condition. Arbitrator MacDowell held that while Brand's asserted caution might justify him in seeking a job other than By-Law Enforcement Officer, it could not require "accommodation" on the City's part. Finally, he held that Brand's evident lack of desire to overcome his fears through offered acclimatization and training should act against his claim.

Brand's case was not helped by Arbitrator MacDowell's express findings that Brand had manipulated the truth and had misled his health care practitioners, his employer and the arbitrator in describing the history of his "condition" and its effects upon him. The grievance was dismissed, as was CUPE's belated request that the Arbitrator at least require the City to pursue the original proposal of an independent medical examination. Brand was effectively required to drive the Smart Car or find another job (if one was available).

The Brampton Smart Car case reminds employers not to jump unnecessarily into the accommodation process, and highlights the obligation of employees to take all reasonable steps to minimize the degree of accommodation required where a disability does exist.

# THE RIGHTS STUFF

Patty Murray is Chair of the Hicks Morley Human Rights Practice Group and has practised law at Hicks Morley for her entire career. She has seen first hand the sweeping changes that have occurred in the human rights area over the course of the past two decades. Patty spoke with *FTR Quarterly* about her move into the human rights practice area and the trends in human rights advocacy that continue to emerge.

**Human rights is a fairly unique specialty area. How much of your practice is devoted to it?**

It's about 50% of my practice, with the other 50% covering the labour and employment law spectrum. However, many of the labour arbitration matters I deal with have a human rights component to them. So the overall percentage is probably higher. These types of issues arise in my practice on a daily basis.

### Has human rights always been part of your practice?

Not to this extent – it's grown pretty substantially over the years. I began my career here in 1988 as an articling student and back then the issues involving human rights were not as well-developed as today. I spent my first couple of years of practice gaining general experience in the employment and labour areas. There were always human rights issues to deal with, but they were focused on the more traditional avenue of a complaint to the Human Rights Commission and hearings before the Tribunal rather than across the breadth of our practice. So it was only a small part of my work when I first started out.

### Why the focus on it now?

I think it's a couple of factors. First, the area has really exploded in its scope, so there is simply more human rights work to do. It now touches just about every practice area in the firm. Secondly, I think the area was a naturally good fit for me personally. I always wanted to be an advocate, whether on my feet arguing cases or finding an alternative way to solve an issue, and the fact that human rights involves real people grappling with real issues always makes for extremely interesting work.

### What's behind the growth in human rights work specifically?

I think it really comes down to a greater awareness. Both employees and the public at large have become far more sophisticated in both identifying and pursuing their legal rights – and the case law has evolved and expanded to provide even greater protection of these rights.

For example, 20 years ago the issue of how an employer had to accommodate a disabled employee wasn't really even on the radar screen. Now it's not a question of whether they have to accommodate, it's a question of how broad are the employee's rights, and how far the employer has to go to accommodate.

### What are the real hot spots that your clients should be aware of when it comes to guarding against human rights complaints?

What we're seeing right now is a growth in service-based complaints – human rights cases filed by members of the public who access services. The issues can range from closed captioning at entertainment facilities to accommodating learning disabilities in schools, colleges and universities, or claims of racial profiling by law enforcement agencies.

The challenge here is that potential claims can appear to come out of nowhere. Our job as advocates is not only to help clients with any outstanding complaints but also to help them identify and address the areas in which they may be vulnerable for future complaints.

### Do you think the recent change to the human rights regime in Ontario is a good thing?

I'm cautiously optimistic that this is a good move for everyone. As of June 30th this year, all new human rights complaints are being made directly to the Human Rights Tribunal of Ontario, and not the Commission. It's condensed the process considerably, so clients will need to defend their decisions much more quickly and vigorously, but I think ultimately this will lead to faster resolutions.

In the past, someone could file a complaint and have it descend into a black hole for three years. Those days are gone. I don't think it's in anyone's interest to have systemic delays, so a process in which everyone turns their minds to the key issues quickly is better for all of the parties.

Our job as advocates is not only to help clients with any outstanding complaints but also to help them identify and address the areas in which they may be vulnerable for future complaints.

And I think the new tribunal will be more rigorous in screening out non-meritorious claims. There is a more complete application form for complainants to fill out – and if it's not complete, they send it back, with just 20 days to amend it. I think this will act as an important deterrent to frivolous claims.

**Has your work in this area changed your perspectives on life in any way?**

I've dealt with a lot of different human rights issues over the years, and I think that you gain a better appreciation for the situations that people can find themselves in. So I'm definitely more aware of the human rights issues that are out there. Ultimately, I think that makes me a better lawyer and advocate for our clients. They want to be good corporate citizens in terms of how they treat their employees. I can help with that by spotting the potential issues before they arise and, when there is a complaint, determining how a case can most effectively be dealt with.

**You've got an active family life as well as a professional life. What keeps you busy outside of the office?**

I think "active" sums it up nicely. We have two young boys who are 5 and 7. And I think if they practised human rights, it would be focused on banning homework. But other than that ongoing issue, and the shuttling of kids here and there, we ski as much as we can in the winter, and we try to get up north in the summer, which is all about swimming, fishing and campfires. As long as I'm not the one taking the fish off the hooks, I'm happy!

HR QUICK HITS

## Ontario Introduces *Apology Act*

On October 7th, the Ontario Government introduced Bill 108, the *Apology Act, 2008*. The purpose of the Bill is to ensure that an apology made by or on behalf of any person in relation to any matter would not be considered an admission of liability or fault, and would not affect any insurance coverage available to a person in relation to the matter. However, this would not apply to proceedings under the *Provincial Offences Act*. The Bill would also make the apology inadmissible in civil, administrative or arbitration proceedings as evidence of fault or liability. The rule against inadmissibility would not apply to criminal or *Provincial Offences Act* proceedings. Finally, the Bill would not affect the use that may be made of convictions for criminal or provincial offences in any proceeding.

# NEW ASSOCIATES

Hicks Morley is pleased to introduce six new associates who joined our Toronto office at the beginning of September. Each of the new associates articled with Hicks Morley, and will be providing services across the labour and employment spectrum.

## MICHELLE A. ALTON

Michelle Alton received her LL.B. from the University of Western Ontario and has a B.Sc. from Queen's University, as well as a M.Sc. (Biology) from McGill University. Michelle was the recipient of numerous advocacy awards throughout law school, including the Justice C.D. Stewart Trophy.

## KATHRYN J. BIRD

Kathryn Bird received her law degree from the University of Toronto and her undergraduate degree in Honours Anthropology from the University of Alberta. In the summer of 2006, Kathryn worked for a civil litigation boutique. Kathryn was awarded the Gordon Cressy Student Leadership Award in law school and received a number of other scholarships.

## MIREILLE KHORAYCH

Mireille Khoraych received both her B.Sc. (Honours) and J.D. from the University of Toronto. Mireille brings with her experience as an advocate with the Family Law Project in Toronto and legal advisor at the Arab and Middle East Refugee Assistance in Cairo. While in law school, Mireille was a research assistant at the Ontario Human Rights Commission and a case worker at Downtown Legal Services.

## CRAIG R. LAWRENCE

Craig received his LL.B. from the University of Western Ontario, where he served as an employment law advisor at the Business Law Clinic and as vice-president of the University's Labour Society. Prior to attending law school, Craig received the Gold Medal and a B.A. (English) from Western and an M.A. (English) from the University of Guelph.

### BUSHRA REHMAN

Bushra Rehman received her J.D. from the University of Toronto. Prior to her law career, Bushra worked for several years as a software engineer in the biotechnology and financial services fields. During law school, Bushra was actively involved with Pro Bono Students Canada, and served as an intern for Human Rights Watch, where she was engaged in advocacy and enforcement of international human rights standards.

### ANDREW N. ZABROVSKY

Andrew Zabrovsky received his LL.B. from Queen's University, where he was granted an entrance scholarship. Prior to law school, Andrew attended Duke University where he earned a B.A. in Political Science, with a minor in History. Andrew was an active member of the Queen's Law community, representing his class as Men's Athletic Representative for two years, sitting on both the Admissions and Academic Ad Hoc committees, and working as an Associate Editor with the *Queen's Law Journal*.

## NEW KNOWLEDGE MANAGEMENT LAWYER

### PAMELA HILLEN

In addition to our new associates, we're also pleased to announce that Pamela Hillen has joined the firm as a Knowledge Management Lawyer in our Toronto office. Pam was previously a Senior Legal Counsel with the Workplace Safety & Insurance Board, where she provided human resources advice to the Board. As a Knowledge Management Lawyer, Pam will provide support to other lawyers in the firm to enable us to better serve the needs of our clients.

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