FTR QUARTERLY

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Hicks Morley

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LAW AND ADVOCACY

THE HEALTHCARE TIGHTROPE

The healthcare industry has always had to balance the interests of different stakeholders. But demands are rising on all fronts – with little control over the revenue needed to get the job done.

Healthcare costs in the province of Ontario have escalated over the last few decades and currently comprise almost 50% of the government's annual budget. As the boomer generation approaches retirement, these costs will only rise. But as these costs increase, so do the checks and balances on healthcare spending. In the next few pages, members of Hicks Morley's Healthcare Group discuss some of the unique challenges the sector is facing today.

THE HEALTHCARE CHALLENGE

The hospital sector provides an illustration of the challenges faced by healthcare sector institutions as a whole. Hospitals are faced with fixed budgets, a limited ability to generate additional revenue, a zero tolerance for deficits – and a mandate to continue to provide their services, and provide them to more people.

"It's extremely challenging for hospitals to provide all the services they're required to provide within the budgets that they've been given," says Carolyn Kay, chair of the Hicks Morley Healthcare Practice Group. "And when you factor in the additional burdens that hospitals have to contend with – from pay equity to occupational health and safety requirements – it's not surprising that so many are struggling to stay on track financially."

BUDGET CRUNCH LEADS TO CHANGES

Many recent hospital restructurings have been precipitated by new budgetary constraints. The Ministry of Health funds each of the 14 Local Health Integration Networks that in turn set hospital budgets. Deficits are not permitted, so when costs mount, hospitals are required to find efficiencies, or risk having hospital operations taken over by an appointed supervisor.

"The issue with finding efficiencies through restructuring is that you can't take action in a vacuum," says Sarah Eves, a Healthcare Group partner in the Hicks Morley Toronto

office. "There are many collective agreement provisions that have to be taken into account, as well as the requirements imposed by legislation such as the *Local Health System Integration Act* and the *Public Sector Labour Relations Transition Act*."

This can create a strategic challenge. On the one hand, the hospital must continue to provide services, though it doesn't have enough cash to do it. On the other hand, it has changes in mind that could create cost efficiencies, but it can't execute them due to contract or legislative requirements.

"Much of what we do is to provide strategic advice on how to deal with these issues and what is actually possible," says Eves. "Even smaller scale restructurings – like a transfer of programs between hospitals or the outsourcing of services – can have unexpected consequences. Our job is to ensure our clients know about these before they act."

THE ISSUES GO BEYOND BUDGETS

Budgets are not the only concern that hospitals and other healthcare institutions face. The Ministry of Labour has taken a very tough stand with healthcare institutions with respect to a number of requirements found in the *Occupational Health and Safety Act* (the "*OHSA*").

"One issue that's currently being contested is the Ministry's insistence that hospitals do a physical inspection of their entire premises at least once each month," says Veronica Kenny, an associate in the Hicks Morley Waterloo office. "The work hours and personnel needed to perform this task are astronomical – it's simply not practical."

The *OHSA* states that where the requirement isn't practical, a partial inspection each month that covers the entire premises in a year is satisfactory. But the Ministry disputes the lack of practicality and has insisted on full inspections each month.

"Hospitals believe their current inspections are more than adequate – and they simply don't have the money or resources to perform complete monthly inspections," says Kenny. "But the Ministry hasn't been open to negotiation, especially with the threat of the H1N1 virus looming. It's still a live issue though, and hospitals are contesting it."

Another concern facing hospitals is the reporting of injuries or illnesses in the workplace under the *OHSA*.

> In light of recent cases, the reporting of critical injuries of non-workers and occupational illnesses has been a focus of the Ministry of Labour.

"This really poses a challenge to hospitals and other healthcare facilities that deal with critical injuries and fatalities every day," says Meghan Ferguson, an associate in the Hicks Morley Toronto office. "Hospitals need to be aware that the Ministry of Labour is taking a very hard stand on reporting requirements. At least two hospitals and a Chief Operating Officer of a hospital have been charged under the *OHSA* for failing to report an occupational illness."

The renewed vigilance under the *OHSA* doesn't end there.

"One of the areas the Ministry of Labour has become very active in is dealing with workplace violence issues," says Rob Little, a partner in the Hicks Morley Toronto office. "For years, the Ministry of Labour largely ignored the hospital sector, but that's really changed in the past few years."

There are a number of reasons for the increased attention – for example, a recent high profile case involving a fatality at a hospital and proposed new workplace violence legislation (Bill 168) – and some effective lobbying by the Ontario Nurses' Association.

"To mitigate their risks, hospitals need to have workplace violence policies in place and be able to demonstrate they've done risk assessments in critical areas," says Little. "They should also have security procedures in place to be able to provide an effective response if a situation occurs, and may want to consider additional measures, such as staff training on how to deal with aggressive patients."

CHANGES COMING TO LONG-TERM CARE AS WELL

Hospitals aren't the only healthcare institutions experiencing change, as long-term care facilities await the proclamation and coming into force of the *Long-Term Care Homes Act* (the "*LTCHA*"), which received Royal Assent in June 2007.

Once regulations are finalized, the *LTCHA* will replace the *Nursing Homes Act*, the *Charitable Institutions Act* and the *Homes for the Aged and Rest Homes Act*, which currently govern long-term care facilities in Ontario.

The new statutory framework will provide for enhanced standards, requirements and accountability that will significantly impact all aspects of the sector, including labour relations and human resources.

"In many respects, the *LTCHA* will micro-manage the employment relationship between long-term care facilities and their employees," says Sophia Duguay, a partner in the Hicks Morley Kingston office.

"As an example, it dictates minimum qualifications for employment, minimum hours of work per week for key positions, minimum staffing hours and ongoing training requirements."

In promoting a zero tolerance policy, the *LTCHA* also imposes a duty to protect residents from abuse and neglect, as well as strict obligations to report, investigate and document complaints, together with whistle-blowing protections.

"All of this will inevitably impose additional costs on long-term care facilities, which are under ongoing financial pressures," says Duguay. "It's also sure to impact collective bargaining and the interpretation of collective agreements in the long-term care sector."

AWARENESS IS KEY TO RISK MANAGEMENT

In the healthcare sector, the only constant is change. While funding issues can only be resolved in the political arena, those healthcare organizations that stay on top of evolving compliance standards and best practices will ensure their risks are properly mitigated and the health of their institutions is maintained.

OPENING THE DOOR TO A BARRIER-FREE WORKPLACE:
Preparing for the *AODA*

Ontario employers have extensive experience with the accommodation of persons with disabilities under the *Human Rights Code*. However, many employers remain unaware of the important developments under the *Accessibility for Ontarians with Disabilities Act, 2005* that will begin to apply to virtually all Ontario organizations in the near future.

BY: LEOLA W. PON AND PAUL E. BROAD

In a significant shift of approach, the *Accessibility for Ontarians with Disabilities Act, 2005* (the "*AODA*") will require employers to take actual steps towards breaking down the barriers that prevent persons with disabilities from access and inclusion in the workplace and in society more generally. In this article, we explore how employers can begin to prepare now for the *AODA*.

THE OBJECTIVES OF THE *AODA*

The fundamental purpose of the *AODA* is to make Ontario accessible for persons with disabilities by 2025 through the gradual establishment and implementation of accessibility standards in relation to the following five areas: customer service; transportation; information and communications; the built environment; and employment.

The *AODA* seeks to break down the barriers to inclusion not only in the workplace, but in all aspects of life in Ontario for all members of the public. These standards are not merely best practices; rather, they will have the force of law and are supplemented by various enforcement mechanisms such as annual reports, inspections, compliance orders and fines.

DEVELOPMENT OF THE STANDARDS

At present, the only standard that has been passed as law is the Customer Service Standard. It has compliance deadlines of January 1, 2010 for designated public

sector organizations and January 1, 2012 for all other organizations and persons that provide goods or services to members of the public or other third parties and that have at least one employee in Ontario. The Customer Service Standard includes a variety of compliance requirements, including:

- establishing policies, practices and procedures;
- training staff, volunteers, contractors and others; and
- meeting specific requirements in relation to assistive devices, guide dogs and other service animals, support persons, notices of temporary disruption of facilities or services, establishing feedback processes and complaint procedures.

The Ministry of Community and Social Services has prepared a number of helpful resources on this Customer Service Standard, which are available online at:

http://www.mcss.gov.on.ca/mcss/english/pillars/accessibilityOntario/accesson/compliance/customer/

The remaining four standards are at various stages of development, which we reviewed in our September 14, 2009 *FTR Now*: Recent Developments under the *AODA*. The Final Proposed Employment Accessibility Standard was released in late October, 2009. At press time, Hicks Morley was in the process of preparing an *FTR Now* on the subject. As with the Customer Service Standard, the Ministry of Community and Social Services maintains up-to-date information on the development of the standards on its website.

GETTING READY FOR THE *AODA*

Preparing for the *AODA* is going to take a significant amount of time, effort and commitment, and employers should consider now how to develop and implement their compliance initiatives. Here are some practical tips your organization may wish to consider.

1. UNDERSTAND THE CONTENT AND SCOPE OF THE STANDARDS

Most employers to date have focused their attention primarily on the Customer Service Standard, for understandable reasons. However, employers need to recognize that there will be five standards in all, any one of which could apply to their organization. Many stakeholders have already expressed concerns that the current and proposed standards are difficult to understand, and overlap in unnecessary and confusing ways – for example, several standards each contain their own requirements for policy development and training, each with different content, reporting and timeline requirements.

Perhaps in recognition of the concerns, the Ministry has created an online resource for organizations called the AODA Compliance Assistance Centre at:

http://www.mcss.gov.on.ca/mcss/english/pillars/accessibilityOntario/accesson/compliance/index.htm

This website has links to an array of information such as summaries, guidelines, FAQs and other resource materials. In addition, a number of public and private sector employer organizations and industry associations have developed, or are in the process of developing, toolkits to assist their members to meet the *AODA* requirements, some of which have been posted on the internet. Of course, in working

with generic materials produced by the Ministry or other organizations, employers should take the time to review those materials carefully and to tailor them so that they properly meet the organization's specific needs and circumstances.

Finally, organizations should consider consulting with legal and technical experts to ensure the legal requirements are being complied with and to obtain technical advice on, for example, communication tools and other assistive devices.

2. PLAN WELL AHEAD

For the designated public sector, the initial phase of *AODA* compliance is only a few months away. For the private and not-for-profit sectors, January 1, 2012 is not as far away as it may seem at first blush, especially given other requirements and pending timelines.

Organizations should carefully review the most recent version of each proposed standard to gain an advance understanding of what those standards may require when they become law. This will help identify in advance the existing resources and the potential new resources and costs that will need to be allocated to compliance efforts.

Some organizations have found it helpful to establish a committee with broad representation from various departments within the organization.

Furthermore, many of the standards are quite technical in nature (e.g. the information and communication standard and the built environment standard), so organizations will need to involve the appropriate individuals in the planning process.

It is also important for organizations to start identifying different sources of possible funding to facilitate those requirements that have a direct cost component.

3. IMPLEMENT, COMMUNICATE AND ASSESS

Organizations should consider starting their implementation efforts early with the Customer Service Standard so that they can manage the multiple and competing demands on limited human and financial resources as the other standards come into effect.

Employers should also periodically assess the effectiveness of those measures to help ensure compliance is being achieved and the measures in place are actually effective. These assessments could include encouraging feedback, informal reviews and internal reporting and accountability measures.

In addition, it may be helpful to develop a communications or public relations plan to communicate with employees, clients and customers and members of the public about the organization's efforts and commitment to the objectives of the *AODA*.

4. ASSIGN ACCOUNTABILITY

Given the compliance requirements and the potential penalties for non-compliance – $100,000 per day for organizations and $50,000 per day for individuals – organizations should consider assigning accountability for *AODA* compliance to a senior member of management to ensure that the initiatives are properly implemented, tracked and reported.

5. GET STARTED WITH BEST PRACTICES

The transportation, information and communications, built environment and employment standards have not

yet been finalized, and may not require full compliance for several years. However, organizations should consider implementing best practices now to relieve the future impact of those standards when they do become law, and to begin the process of changing the organizational culture to make accessibility an integral component of decision-making.

The Ministry has developed a number of "how to" guidelines with best practices for making buildings and spaces, workplaces, meetings and information accessible. These are available online at:

http://www.mcss.gov.on.ca/mcss/english/how/?pillar=accessibilityOntario&program=mcss

With these strategies in place, organizations can ensure they are well prepared to comply with the *AODA*'s accessibility standards as they come into force over the next several years.

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Paul E. Broad *is a partner in the firm's London office and is chair of the firm's Knowledge Management Group. Paul has been following the development of the AODA and its standards since it was passed into law in 2005, and has provided training and advice to numerous employers on AODA compliance.*

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HR QUICK HITS

Hicks Morley's Kingston office celebrates 10 years.

October 12th was the ten-year anniversary of the opening of our Kingston office. Kees Kort, Vince Panetta, Sophia Duguay and Colin Youngman maintain their practice at our location in the Limestone City, assisted by Catherine Bridgen, Jessica Byrne and Vicki Mence. This regional office, like all others, is fully integrated into Hicks Morley's knowledge management, technology and information systems. Our Kingston lawyers are readily available to address your human resources issues.

TO YOUR HEALTH

Carolyn Kay joined Hicks Morley as an articling student in 1985 and has practised at the firm ever since. In addition to her extensive involvement in labour relations and pay equity over the past 25 years, she has been at the forefront of the healthcare field – a specialty area that has grown significantly with the increasing demand for services and the many structural changes that have occurred recently within the healthcare system.

Carolyn is chair of the Hicks Morley Healthcare Practice Group. She spoke with *FTR Quarterly* in October about her career path – and some of the challenges that the healthcare sector faces today.

Tell us a bit about your background.

I was born and raised in Whitby and returned there to raise my three children after completing my post-secondary education. While it doesn't have the same small town appeal that it had when I was growing up, it's still where I call home.

You took a degree in business before going to law school. Was business a primary interest of yours?

My undergrad degree is a Bachelor of Business from York, but business was never really my career focus. Ever since high school I had planned on being a lawyer. I think the idea first came to me when my older brother talked about pursuing that as a career.

I went into the business program, therefore, knowing that it was really a stepping stone to law school. As a result, I tried to focus on the organizational behaviour and human resources courses in my studies, rather than accounting and marketing. I draw upon that background routinely in terms of what I do now.

You had a bit of an unusual start to your legal education, balancing more than a few balls.

It was a pretty busy time. I continued on at York for law at Osgoode Hall, but I also had to find a way to pay for my education. I found a job working at the Shell Refinery across the street from the campus where I worked after classes from about 4 p.m. to midnight – although I had to cut a couple of classes on occasion.

I also had my first son between my second and third years of law school, so third year was a bit of a blur as I was still working at Shell, had a baby boy and a full course load.

What led you to Hicks Morley?

When I was growing up I had worked on the line at GM, as did my dad until his retirement, so I had a good sense of labour relations from the union side, and labour had always been my primary area of interest in law school.

I interviewed for articling positions at both labour and management-side firms, but I found I really wasn't attracted to the labour side. Looking at it from a career standpoint, it was more of a reactive environment and I really felt that the management side had much greater variety and more of an opportunity to be proactive.

How were you introduced to the healthcare practice?

At Hicks you weren't slotted into particular practice areas, so I was able to dabble in a lot of things. Tom Storie was the partner who got me interested in the healthcare sector. He had been working in the hospital sector and with the Ontario Hospital Association for years since the development of central bargaining in 1974.

Janice Baker, who surprised us all by retiring so young, was also a big influence. In addition to healthcare work, Janice was the firm's expert in pay equity from the inception of the legislation and she roped me in on several files. As a result, pay equity is now one of my prime specialty areas. Pay equity continues to be a significant issue within the healthcare sector, given not only the amalgamations of hospitals that occurred in 1998 but also the obligation to maintain pay equity on an ongoing basis.

Has your own experience as a unionized worker influenced how you practice today?

I think it's helped my practice immensely because I have a good appreciation of the union side of an issue. And when you have a blue-collar background as I do, it sometimes makes it a little easier to gain acceptance with some clients who are sceptical about "Bay Street lawyers".

My background provided me with some valuable experiences that clients could relate to and a real understanding of both sides of the coin.

Any emerging issues your clients should be aware of?

I don't think there's any one single issue, but certainly for hospitals it is the balancing act to satisfy all stakeholders that has become the biggest challenge. There's huge pressure to do everything – balance budgets, improve services and at the same time balance the interests of employees and their respective unions. Protection of staff from workplace violence and other health and safety issues, including pandemic planning, are at the forefront.

While institutions look for ways to restructure to gain efficiencies, the labour relations considerations can be highly complex. I think the role we play is much more strategic in terms of helping organizations navigate their way through the legislative and collective agreement maze to find solutions that work from a legal perspective as well as helping them achieve their ultimate operational objectives.

What keeps you busy outside of the office?

I've been a single mom for years now so the intensity of organizing and attending to my kids' various activities left me with little time for extracurricular activities for myself. Now that they are grown, however, I've found myself with more free time.

And this winter, for the first time in many years, I've actually booked a vacation down south with my fiancé. I just have to make sure the kids don't decide to throw a New Year's Eve party at the house in my absence!

NEGLIGENCE CLAIMS AGAINST GOVERNMENT RELATING TO SARS FAIL

Earlier this year, the Ontario Court of Appeal considered the issue of whether the Ontario government could be held liable for damages suffered by front-line healthcare workers who contracted SARS during the outbreak in 2003. In two decisions that dispose of five cases involving similar claims, the Court provides interesting insight into the application of traditional legal standards to government actions during times of disease outbreak.

BY: TIERNEY READ GRIEVE

The first case, *Abarquez v. Ontario*, involved plaintiffs who were registered nurses employed in hospitals during the SARS outbreak. They alleged that they contracted SARS as a result of negligent actions by the Ontario government, including:

- a failure to provide front-line workers with timely information about the disease and outbreak;
- issuing inadequate Directives to hospitals; and
- the Ministry of Labour's failure to properly enforce either the Directives or health and safety standards under the *Occupational Health and Safety Act*.

In addition, the plaintiffs alleged that the government breached their rights to life, liberty and security of the person as guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*.

The Court of Appeal unanimously struck the entire statement of claim, concluding that no private duty of care was owed, and that there was no *Charter* breach. It found that the Directives were promulgated by the Chief Medical Officer of Health pursuant to the powers conferred by the *Health Protection and Promotion Act*, and were matters of public policy aimed at protecting the Ontario public as a whole from the spread of SARS by establishing standards to be applied by hospitals, heathcare

facilities and healthcare professionals. The government's actions involved a weighing and balancing of different, and sometimes competing, interests – including the plaintiffs' individual interests.

The second decision, *Williams v. Ontario*, is notable because the Court found that while there was no general duty of care owed by the government, a plaintiff could seek a remedy if he or she could show that the harm suffered resulted from negligence at the *operational* level on the part of those responsible for the application and enforcement of the Directives, including healthcare facilities and heathcare professionals.

The Court dismissed all five of these actions. Motions seeking leave to appeal *Abarquez* and *Williams* to the Supreme Court of Canada have been filed and the final outcome is unknown at press time; however, these cases illustrate that courts recognize that the exercise of statutory powers by government involves weighing and balancing a myriad of competing interests and endeavouring to arrive at a position that best satisfies the interests of the public at large. The courts are not willing to lightly interfere with difficult public policy decisions made by government in circumstances like these, where it attempts to contain the spread of communicable diseases.

Tierney Read Grieve *is a Knowledge Management lawyer in the firm's Toronto office. In her role, she assists with the collection and distribution of legal expertise within the firm, and provides firm lawyers and clients with timely updates on current legal developments.*

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HR QUICK HITS

Employers Beware: Inappropriate communications to other employees regarding a termination may result in higher damages.

An employer sent the following message to its employees: "[w]e are sorry to inform you that [employee] has been terminated from our team for non-production and refusal to accept the new contract terms". The trial judge found that this communication was unfounded and damaging to the employee's reputation, and awarded *Wallace* damages in an amount equal to two months' pay. In *Slepenkova v. Ivanov*, 2009 ONCA 526 (CanLII), the Ontario Court of Appeal upheld this decision.

HICKS MORLEY WELCOMES FIVE NEW ASSOCIATES

Hicks Morley is pleased to announce that the following lawyers joined the firm in September.

ALICE CROWE

Alice Crowe has returned as an associate lawyer in Hicks Morley's Toronto office. She obtained her LL.B. from Osgoode Hall Law School, where she was Vice-President of Communications for the Labour and Employment Law Society and worked as a Research Assistant for Professor Alan Young. Alice practises in all areas of employment and labour law, with a particular interest in litigation and education law. Alice summered and articled with Hicks Morley before being called to the Bar in 2009.

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MARK FIRMAN

Mark Firman joined the firm's Pension and Benefits Practice Group in our Toronto office in September. He practises broadly in all areas of pension and benefits law and advises clients on a range of matters. Mark has widespread experience with pension issues arising in mergers and acquisitions, including pension plan mergers, splits and successor liability. Mark obtained his J.D. (with honours) from the University of Toronto in 2008 and both summered and articled with a major business law firm before joining Hicks Morley.

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DAVID ROSS

David Ross has returned as an associate lawyer in the firm's Toronto office and currently practises in all areas of labour and employment law. In addition to advising clients and advocating on their behalf, David provides training to employers and employer organizations on employment-related issues. David obtained his LL.B.

from the University of Ottawa, graduating *cum laude*, where he won the 2008 Employment and Labour Moot for both the regional Ottawa and provincial Toronto competitions. David articled with Hicks Morley before being called to the Bar in 2009.

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NADINE ZACKS

Nadine Zacks has returned as an associate lawyer in Hicks Morley's Toronto office. She received her J.D. (with honours) from the University of Toronto. In the summer of 2006, Nadine co-authored an annotated bibliography on *Comparative and International Law relating to Forced Marriage*, which was published by the Department of Justice Canada. Nadine received the Law Society of Upper Canada Award for Outstanding Achievement in Legal Studies and received the Ori Fidani Prize in Real Estate Law. Nadine summered and articled with Hicks Morley before being called to the Bar in 2009.

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SIOBHAN O'BRIEN

Siobhan O'Brien has returned to Hicks Morley's Ottawa office as an associate. She obtained her J.D. (with honours) from Queen's University, where she was co-President of the Labour and Employment Club. Upon graduation she received the Sack Goldblatt Mitchell Award in Labour Law, Employment Law and Human Rights. Siobhan has work experience with the Department of Foreign Affairs, where she was actively involved in the corporate social responsibility initiative as well as the DFAIT Space Security publication. Siobhan articled with Hicks Morley before being called to the Bar in 2009.

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