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FTR QUARTERLY

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Hicks Morley

HUMAN RESOURCES
LAW AND ADVOCACY

In this issue:

A "CLIENT FIRST" CULTURE – 40 YEARS OF HICKS MORLEY EXCELLENCE

Hicks Morley is celebrating its 40th year in 2012 – and while a lot has changed since 1972, recent discussions with many of the founding lawyers reveal how deeply the firm's original principles and values remain embedded in Hicks Morley today.

IN THE BEGINNING

In 1971, the original partners of Hicks Morley – Bob Hicks, Colin Morley, Fred Hamilton, Bruce Stewart and Tom Storie – were practising labour law as partners at the Toronto-based law firm of Miller Thomson.

The five, along with associates (at that time) Harvey Beresford and Christopher Riggs, decided in the fall of that year to leave and start their own firm. With the required six months' notice to Miller Thomson, the new law firm of Hicks Morley Hamilton Stewart Storie began operations the following spring.

"We wanted to work in a smaller environment – one that was focused solely on labour law," says Colin Morley. "The view of labour law at the time was that it was a second-tier practice and a bit rough – with many firms choosing to avoid the area altogether."

Fred Hamilton agrees. "We felt we could make more of an impression in the field if we had our own firm. Labour law wasn't the dominant sphere of law that it is today, but we thought there was potential."

THE HICKS FACTOR

That potential was soon realized, with each of the five founding partners bringing his particular strength to the table. But there was an acknowledged first among equals, and that was Bob Hicks.

“Bob had established himself as the premier labour lawyer in Canada – he was head and shoulders above the rest of us,” says Bruce Stewart. “He was also extremely gifted with client relationships – all relationships actually. He left everyone who met him feeling better – and reassured that he or she had come to the right person.”

Hicks also set much of the tone for the firm’s culture, with a relentless devotion to client service and a true belief in the necessity of delegating and sharing work in order to maintain that level of service.

“With Bob, there was a 110 percent commitment to clients, that was the expectation,” says Morley. Everything else came second, even our own families. And almost everything flowed from Bob in some way. He made it clear that clients were clients of the firm, not any individual lawyer, and that they should be confident that anyone here could look after them. It was a major contributing factor to the success of the firm.”

ONE FOR ALL

While Bob Hicks was an instrumental contributor to the firm’s success, one person does not a firm make.

Hicks set much of the tone for the firm’s culture, with a relentless devotion to client service.

“Colin Morley was tenacious. He would win any case on a preliminary objection that he could – and he was exceptional in arbitration hearings,” says Harvey Beresford. “And I learned a tremendous amount about people relations and the law from Bruce Stewart, who was instrumental in developing the public sector part of the practice.”

Christopher Riggs also saw the contributions made by the founding partners during his long career with them.

"Fred Hamilton was a great lawyer and a great negotiator – and he oversaw the firm's first significant wave of growth as managing partner," says Riggs. "And Tom Storie was a tremendous mentor to younger lawyers – and partnership-wise, he was the glue that every firm needs to stay together. He played that role exceptionally well."

LOVE OF LAW

If there is a single theme that unites all the firm's founding partners and associates, it's the love of the work that they did and continue to do.

"The issues we were dealing with were cutting-edge social issues, and it's not difficult to work hard when you're passionate about it," says Bruce Stewart.

Passionate indeed. The two original associates of the firm – Christopher Riggs and Harvey Beresford – continue their exceptional careers as partners at the firm. Beresford was instrumental in evolving the practice to offer more strategic business advice – moving beyond pure legal advocacy to act as a true business partner. And he counts the landmark agreement negotiated with Ontario's doctors in 1997 as his most satisfying success.

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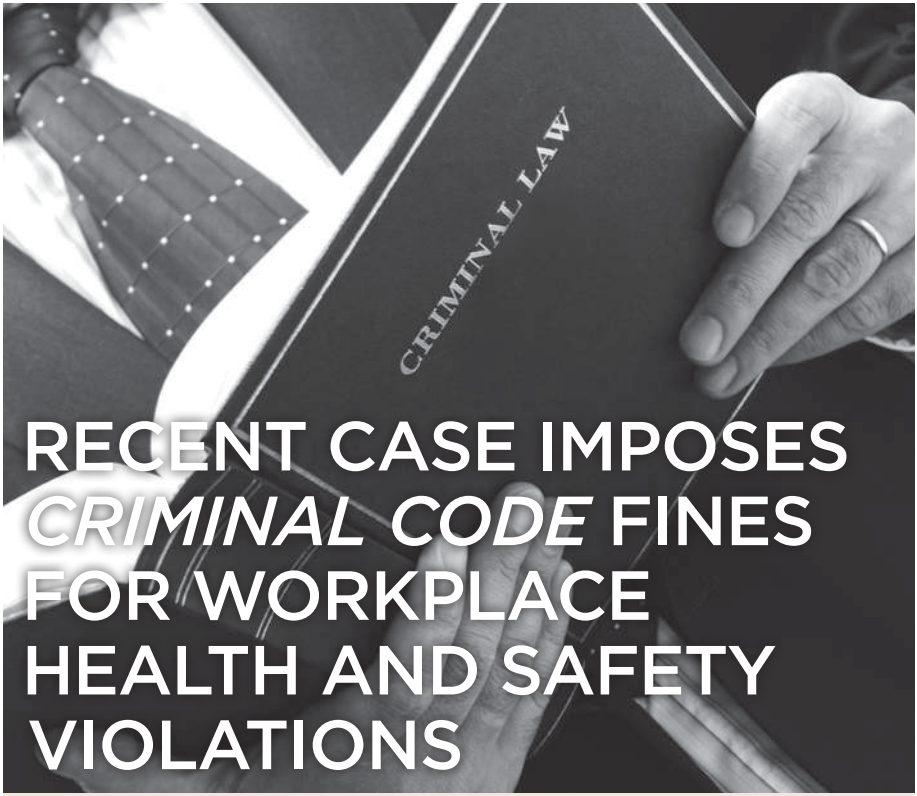
Christopher Riggs succeeded Fred Hamilton as managing partner in 1993 and oversaw a significant period of growth in the ten years that followed, more than doubling the firm's size. He also acted as litigation counsel in a number of landmark *Charter* decisions that continue as precedents to this day.

While the baton continues to be passed to new generations of Hicks Morley lawyers, the tradition of excellence and service continues. At 40, the firm has earned a right to celebrate and build on its past – with all eyes looking forward to a promising future.



RECENT CASE IMPOSES *CRIMINAL CODE* FINES FOR WORKPLACE HEALTH AND SAFETY VIOLATIONS

In a recent case, *R. v. Metron Construction Corporation*, the Ontario Court of Justice imposed one of the first sentences rendered under the Bill C-45 amendments to the *Criminal Code* of Canada.

BY: ROBERT W. LITTLE AND NADINE S. ZACKS

Those amendments impose criminal liability on organizations (including companies) for the actions of their "representatives" or "senior officers" and require that anyone who undertakes or has the authority to direct how another person does work or performs a task must take reasonable steps to prevent bodily harm to any person arising from the work.

The *Metron* case confirms the real risk to employers of criminal liability resulting from health and safety incidents. Below, we discuss the significant implications of this decision and its companion decision in *R. v. Swartz*, and what employers need to know about their obligations and potential liabilities.

BACKGROUND

On Christmas Eve in 2009, six workers were repairing concrete balconies on the 14th storey of a high-rise building.

When they were descending, four workers were killed and one was seriously injured when their swing stage collapsed and fell to the ground. The sixth worker had been properly attached to a safety line and suffered no injuries.

A subsequent investigation determined that the swing stage was improperly constructed and that it would not have been safe for two workers to descend on it, let alone six. Moreover, it only had two lifelines available on it. The swing stage, which had been rented, had also arrived with no manual, instructions or other production information, as required by the *Occupational Health and Safety Act* ("OHSA"). Toxicology reports indicated that three of the four deceased, including the site supervisor, had recently ingested marijuana.

Metron Construction, the company overseeing the restoration, was charged under the *Criminal Code* and entered a guilty plea. The company pleaded guilty based on the actions of the site supervisor, who all agreed was a "senior officer" of the company as defined in the *Criminal Code*.

On sentencing, the Court considered the general principles of sentencing under the *Criminal Code*: denunciation, deterrence, rehabilitation and proportionality. In the absence of criminal cases on point, the Court referred to the body of jurisprudence for sentencing under the OHSA in addition to the factors to be taken into account under the *Criminal Code* in imposing a sentence on a corporation.

The Court noted that, unlike the OHSA, the *Criminal Code* does not provide for a maximum fine. However, the *Criminal Code* does require the Court to consider the impact of the fine on the financial viability of the organization. Metron only had two permanent employees and had been operating at a loss for the past two years. The Court imposed a fine of $200,000 plus the 25 percent victim fine surcharge.

The *Criminal Code* requires the Court to consider the impact of the fine on the financial viability of the organization.

In the companion sentencing case under OHSA, *R. v. Swartz*, Mr. Swartz, the president and sole director of Metron, entered guilty pleas to four charges of failing to take all reasonable care to ensure the corporation complied with the applicable provisions of the OHSA and its regulations, including failing to provide adequate training and instruction on fall protection systems (in particular, to non-English-speaking workers in a language they understand).

Mr. Swartz also failed to ensure that training and instruction records were maintained, failed to ensure that the swing stage was not used while it was defective or hazardous, and failed to ensure that, at the time of the accident, the swing stage was not loaded in excess of the load it was designed to bear.

The maximum fine permitted by the OHSA for an individual is $25,000 per count. A fine of $22,500 for each of four counts was imposed, for a total of $90,000 plus the 25 percent victim fine surcharge, or 90 percent of the maximum. The Court noted it was well above Mr. Swartz's total income for the last year.

The total financial penalty to Mr. Swartz and Metron was more than three times the net earnings of the business in its last profitable year.

APPEAL OF SENTENCE UNDERWAY

Following the release of the decision on sentencing in *Metron*, the Crown applied to the Ontario Court of Appeal for leave to appeal the $200,000 sentence on the basis that the sentence imposed was "manifestly unfit". The Crown submitted that the trial judge erred in his assessment of the appropriate sentencing range and imposed a sentence that did not reflect the high level of culpability required for a criminal conviction. Notably, the Crown had sought a much steeper penalty, arguing that a fine of $1,000,000 was appropriate.

WHAT DOES THIS MEAN?

Given the financial status of the corporate and individual defendants, the fines imposed in these cases were substantial. The fine imposed in *Metron* may still increase if the appeal is successful. These cases underscore the fact that directors and other managers have very real obligations under both the OHSA and the *Criminal Code* and demonstrate the significant liabilities (including imprisonment) that may result from a breach of the OHSA and these relatively new *Criminal Code* provisions.

Metron is also important in its reminder of the broad definition of "senior officer" under the *Criminal Code*. In small companies, even mid-level managers such as site supervisors can attract significant liability for the organization.

Finally, the cases are a clear call to all employers to ensure that adequate training and supervision is provided to workers, and particularly in a way that workers can understand. This can be a challenge if English is not a worker's first language, but it's a challenge that must be met.

It remains to be seen whether the *Metron* decision will encourage the laying of *Criminal Code* charges in other serious workplace accidents. At the very least, as the Court said, the decision is intended to "send a clear message to all businesses of the overwhelming importance of ensuring the safety of workers whom they employ."

Robert Little *is a partner in Hicks Morley's Toronto office and works extensively in the occupational health and safety field. He routinely defends employers charged under the Occupational Health and Safety Act. He often speaks on health and safety matters and has provided training to justices of the peace on health and safety prosecutions.*

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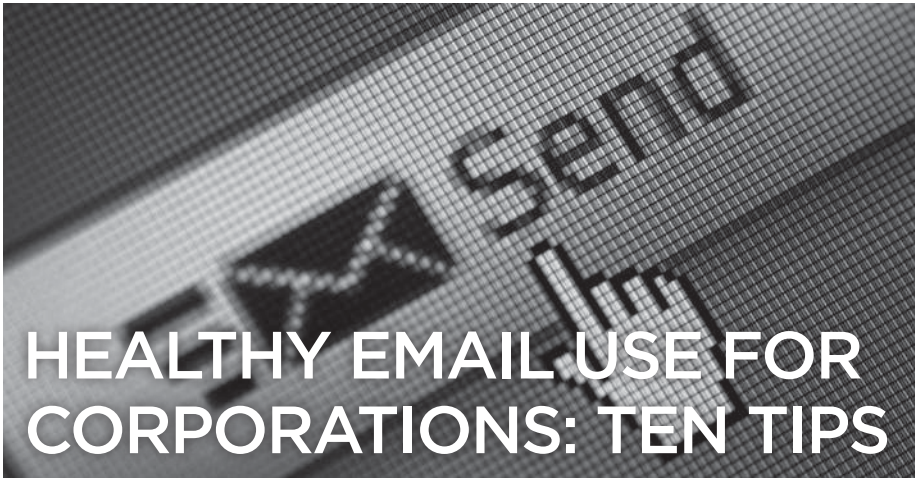

HEALTHY EMAIL USE FOR CORPORATIONS: TEN TIPS

Although few cases turn on a single "smoking gun" email, many an employer's defence has been burdened by email communications that require explanation. A good management-side advocate can reconcile "awkward" emails with the theory of an employer's case, but the burden of explaining email after email can significantly harm a defence despite the most heroic efforts of counsel.

BY: DANIEL J. MICHALUK

This is a call to address that risk and proactively manage poor corporate email use. We are not suggesting employers work to limit communication or hide questionable conduct. Our point is that employees will create a more complete, clear and consistent record of their activity if they treat email as a slightly more formal means of communication than is typical. Here is a list of ten practices for you to consider for use in a "healthy email use" program.

1. **Pick up the phone.** For many subjects, a telephone discussion can quickly generate a level of understanding that might take numerous emails to achieve. Even simple subjects can generate significant back-and-forth.
2. **Have a meeting.** Don't use email to think aloud. Deliberations can be very sensitive because they often lead to decisions that do not reflect initial thoughts. Email is an extremely poor medium through which to deliberate. Deliberation is best suited to meetings.
3. **Write meaningful subject lines.** Your recipient should be able to understand what your email is about by reading the subject line. For example, "Project Alpha report attached for your review." If action is required, indicate so in the subject line. Don't leave the subject line blank. Don't use "important," or "hi" or the like.

4. **Keep to one subject per email.** By sending business email you are creating a record of correspondence that likely has some value to the business. That record is difficult to manage when it has more than one subject. It may seem strange, but send two emails in sequence rather than one. Similarly, don't (lazily) reply to an old email to start a new subject.

> Never email when you are upset or angry. If it is appropriate to respond in writing at all, wait until you have calmed down.

5. **Ask, "Does this person really need to be copied?"** Routine use of the CC field can annoy and burden recipients. Use it for a purpose and be critical about your purpose. Ask yourself if copying someone is really a necessary courtesy. In other words, if they won't complain, don't copy them.

6. **Be concise.** Start with your point or request. Provide a brief rationale or explanation. End with an invitation to action (either yours or the recipient's). If your email requires much more than this, email might not be an appropriate means of communication.

7. **Pause. Pause again. Send.** Never email when you are upset or angry. If it is appropriate to respond in writing at all, wait until you have calmed down. Remember that your response will be permanently recorded. Even in less intense circumstances, you'll benefit by reflecting on your emails rather than responding immediately.

8. **Don't forward an email that will provoke a harmful response.** If you receive an email that is alarming or obnoxious, resist the urge to forward it to your colleagues. Yes, you'll need to talk it through, but if you forward the provocative email to four others, you'll cause at least one to react without thought, in writing.

9. **Check your spelling and grammar.** It may seem unimportant, but if the substance of your email is later scrutinized, poor spelling and grammar might cause people to perceive you as sloppy or uncaring and discount your substantive position.

10. **Check the clarity of your message.** Have I been too loose in conveying a complicated idea? Have I used humour that is too risky? Ask these questions and, remember, your email will create a permanent record.

Dan Michaluk *is a partner in the Hicks Morley Toronto office and Chair of the firm's Information and Privacy Practice Group. He acts exclusively on behalf of management in a full range of matters related to information management and privacy, regulatory defence and employment and has experience as lead counsel in matters heard before labour arbitrators, human rights tribunals and all levels of court.*

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CONTINUING PROFESSIONAL DEVELOPMENT SESSIONS

This professional development program* focused on in-house counsel is designed to keep you informed about the latest legal developments and best practices, and is complimentary for clients and friends.

January 30	Diary of a Pension & Benefits Lawyer: 2012 Case Law Update and More
February 13	Workplace Harassment: Navigating the Minefields
February 27	To Be Determined
March 6	The Duty of Good Faith: Getting More (or Less) Than You Bargained For
April 3	Pay Equity: The Ongoing Challenges
April 17	Protecting Management From *Criminal Code*, OHSA Liability Arising From Workplace Accidents
May 1	Expert Evidence: What You Need to Know to Win the Battle of the Experts
May 15	Information and Privacy Roundtable for In-House Counsel

**Accreditation pending, visit hicksmorley.com/advantage for details*

HR QUICK HITS

New Mandatory OHSA Workplace Poster

Effective October 1, 2012, employers must display a new Ministry of Labour ("MOL") poster entitled "Health and Safety at Work: Prevention Starts Here" in English and the majority language of the workplace. The poster summarizes key rights and responsibilities under the *Occupational Health and Safety Act* and explains how to obtain additional health and safety information and how to contact an MOL inspector. It is available in multiple languages on the MOL website.

COVERING ALL THE BASES

Amanda Hunter has worked her entire career at Hicks Morley, and as a self-professed "people person," it's the client service aspect of her work that she treasures the most. And with a practice that covers almost all labour, employment and human rights concerns, she's proven to be a valuable resource to clients on a wide range of issues.

Amanda spoke with *FTR Quarterly* in September about her practice and some of the legal trends that she sees emerging in her work.

We just caught up with you after a mediation hearing. Is that something you do a lot of?

I do a fair amount of wrongful dismissal work, and mediations are mandatory for all legal actions in Toronto. So I do a fair number. About 90 percent of court files end up settling, and we got a settlement this morning, so it's been a good day.

Tell us a bit about your background.

I came to Canada at age nine from England, and we lived in Terra Cotta, a small community near Georgetown. I went to high school in Brampton, then went to U of T to study sociology. I also took a number of labour management and industrial relations courses along the way – and those really captured my interest.

How did your interest in law develop?

I was torn between doing a Masters in Industrial Relations and going to law school. Law school seemed to be a good lead to a solid profession, so that's what I chose. I went to the University of Manitoba.

How was your time out west?

I loved Manitoba and the people there, and I did some general litigation work for

a Winnipeg law firm while I was in school. But it was really my interest in labour and employment law that drove my desire to move back to Toronto. So I applied to Hicks Morley to article in 1997, was accepted and I've been here ever since. I can't imagine being anywhere else.

How has your practice evolved over the years?

My practice has always been very broadly based – I never specialized in one area to the exclusion of others. The part about the job that I love is the people – and the client relationships in particular. I'm fortunate to work with some truly wonderful clients, and when I have a relationship with a client, I want to answer as many questions as I can and be a resource he or she can count on. So it encourages me to work across a wide range of areas. And if clients have deeper questions in areas I don't work in, such as workplace safety and insurance or pensions, I have wonderful colleagues down the hall who can take care of them.

The one area I have particular expertise in is the *Employment Standards Act*. The legislation has many complexities and impacts a lot of the work we do, from negotiating collective agreements, to putting employment policies in place, to structuring employment contracts. So I'm one of the "go to" people for that.

Is there a particular area that captures your interest that you'd like to do more work in?

I really like the international practice, representing multinational corporations, dealing with conflict of laws issues, and structuring arrangements that work across borders. It's intellectually very interesting.

And one of the most rewarding things I do at the firm internally is mentoring articling students and associates. I really enjoy it – helping them navigate the unwritten rules, trying to teach them things about law, or process, or client service.

Any trends in particular that employers should note?

Employment law is always evolving, which is why it is such an exciting area to practise in. In the current economic climate, there is a lot of pressure to find efficiencies and savings. In the private sector our clients are often faced with challenges to reduce costs, including restructuring and even, in some cases, reducing compensation. Changing terms and conditions of employment for non-union and union employers is complicated. Add to that the recent statutory compensation restraint measures introduced by the government in the public sector and you have a lot of clients needing our assistance. We have a great team at Hicks Morley to help us get up to speed quickly on any new trends so we are ready to answer questions quickly, efficiently and, therefore, cost effectively.

What do you enjoy doing in your downtime?

I live in downtown Toronto but I spend a lot of my free time in the country. I have a horse named Arrakis that I keep near Schomberg, and I compete in eventing, which involves the three disciplines of dressage, show jumping and cross country. Horses are a true passion of mine. I also run, and I've been in training for a half marathon, although work sometimes gets in the way of the training. At home, I have an adorable English Bull Terrier, who's quite a character. It all keeps me pretty busy!

HR QUICK HITS

Termination not appropriate sanction for one act of misconduct

BY: ALAN S. FREEDMAN

In a recent decision, *Barton v. Rona*, the Ontario Superior Court found that discipline of a managerial employee would have been a more effective sanction than termination for a single incident of misconduct.

The plaintiff was an assistant store manager. KM, a wheelchair-bound employee, wished to attend a training session held on the worksite's second floor to which there was no wheelchair access. The plaintiff was approached by other employees suggesting KM be hoisted to the second floor on an order picker truck (the "lift scheme"). The plaintiff advised them he was uncomfortable with the suggestion but despite his authority to do so, he failed to order them not to do it. They proceeded with the lift scheme.

Consequently, the employer determined that numerous employees were in clear violation of its Employee Handbook health and safety policies. The local human resources manager initially recommended no one be terminated for this incident, but ultimately both the plaintiff and another employee were terminated.

The Court found that by failing to prevent the lift scheme, the plaintiff breached his obligations under the Employee Handbook, which formed a part of his employment contract. It held that the plaintiff's misconduct was serious, but noted, among other things, his good prior work record and that he did not give permission for the actual lift scheme. The Court found that this act of misconduct was not severe enough to warrant termination; some other form of discipline might have been appropriate. It awarded reasonable notice.

This case is a reminder that before terminating for cause, employers should ask themselves whether the employee will "learn his lesson" with a sanction short of termination. If the answer is "yes," discipline other than termination should be considered. The Court was also no doubt influenced by the HR manager's recommendation not to terminate. If there are conflicting opinions within management on whether termination is really necessary, this is a good indication that discipline short of termination may be the right approach.

***Alan Freedman** is a partner in the Toronto office of Hicks Morley. He advises and represents employers in labour board and arbitration proceedings, collective bargaining, employment standards and human rights proceedings, occupational health and safety appeals and prosecutions, judicial review proceedings and employment-related litigation.*

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NEW ASSOCIATES

Hicks Morley is pleased to welcome back the following new associates, following the successful completion of their articles at the firm and their call to the Bar in 2012.

SAMANTHA CRUMB

Samantha Crumb practises in all areas of labour and employment law. Samantha received her Juris Doctor degree from Queen's University. Throughout law school, she was a research assistant, providing legal research and writing in the areas of constitutional law and labour law. She also volunteered for the *Queen's Law Journal*, and acted as the Articles Editor in her final year.

JULIA NANOS

Julia Nanos practises in all areas of labour and employment law. Julia received her Juris Doctor degree from the University of Western Ontario, where she volunteered at the community legal clinic and in Pro Bono Students Canada's Family Law Program. In 2010, Julia interned with the International Labour Organization in Geneva, Switzerland, where she assisted with the researching and drafting of the Organization's 2011 Global Report on discrimination in employment, entitled *Equality at Work: The Continuing Challenge.*

MITCHELL SMITH

Mitchell Smith practises in all areas of labour and employment law. Mitchell obtained his Juris Doctor degree from Bond University, where he graduated with First Class Honours and was placed on the Vice-Chancellor's List for academic excellence. Upon graduating from Bond University, Mitchell worked as a Judge's Associate in the Supreme Court of Queensland, Australia, and conducted legal research for a national project on employment law.

MELISSA ROTH

Melissa Roth is an associate at the Hicks Morley Waterloo office and practises in all areas of labour and employment law. Melissa received her Juris Doctor degree from the University of Western Ontario, where she worked as a Student Editor in *The Canadian Journal of Law and Jurisprudence* and served as a volunteer caseworker at Western's Community Legal Services. In law school, she received the Miller Thomson LLP entrance scholarship for Academic Excellence.

JACQUELINE LUKSHA

Jacqueline Luksha practises in all areas of labour and employment law, with a particular interest in grievance arbitration, litigation, human rights, and labour disputes. Jacqueline received her joint Masters of Industrial Relations and Juris Doctor degree from Queen's University, where she participated in the Hicks Morley Moot, ProBono Students Canada and the Canadian Labour Arbitration Competition, and was awarded the Fasken Martineau DuMoulin prize in Civil Procedure.

Hicks Morley is also pleased to welcome the following new associate to the firm.

ANDREA YAU

Andrea Yau is an associate in Hicks Morley's Pension and Benefits Practice Group where she assists public and private sector clients on pension and employee benefit issues. Andrea received her Juris Doctor degree from the University of Western Ontario where she won the 2009 Borden Ladner Gervais Client Counselling Competition, and was selected as the Canadian law student intern for the Great Lakes and St. Lawrence Cities Initiative. While at law school, Andrea served as a Student Editor of *The Canadian Journal of Law and Jurisprudence* and was an investment law research assistant.

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