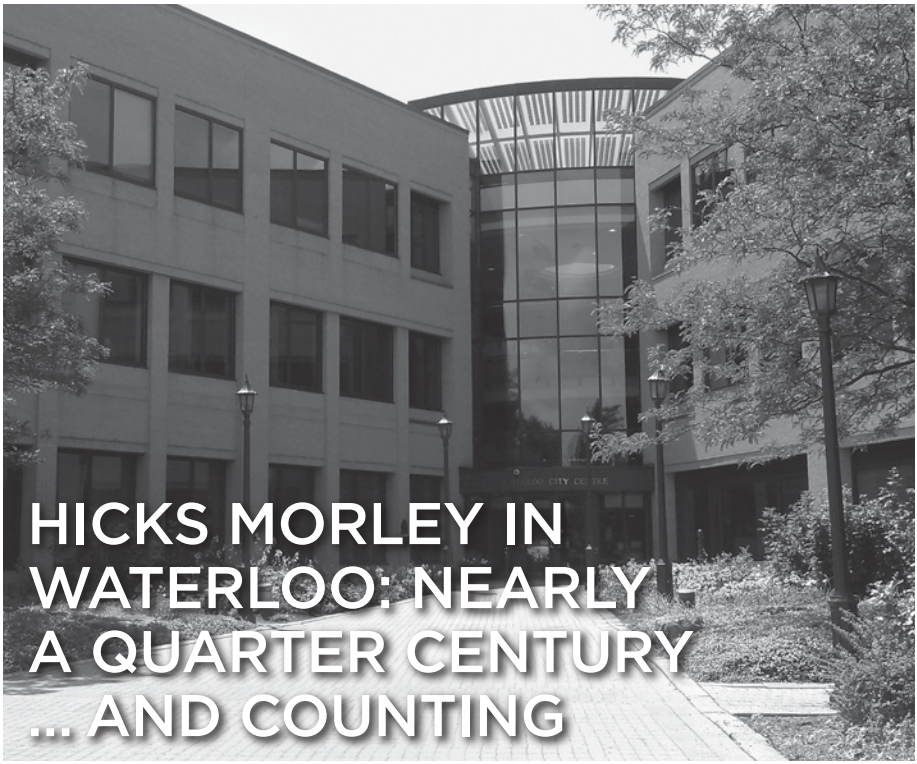
FTR QUARTERLY

SUMMER 2013

Hicks Morley

HUMAN RESOURCES
LAW AND ADVOCACY

In this issue:



HICKS MORLEY IN WATERLOO: NEARLY A QUARTER CENTURY ... AND COUNTING

As with any business expansion, the Hicks Morley Waterloo office opening in 1989 – the firm's first move out of Toronto – was a calculated risk, with a goal of serving many existing clients locally and attracting new clients looking for access to a full-service human resources law firm.

Fast-forward nearly 25 years, and it's safe to say that the risk has paid off – with huge benefits for both the firm and its clients.

"The region has grown in size and industry diversity like few others in the country – hi-tech, automotive, financial services, and education to name a few," says Brent Labord, the lawyer who founded the Waterloo office in his third year of practice in 1989. "It didn't take long to realize that we had to grow our office and the range of our practice to meet the need."

From a one-lawyer operation in 1989, the office has expanded to ten lawyers and is the largest human resources law firm in the region. It was this growth potential that attracted many of the firm's lawyers to the Waterloo office.

"The business side of me found the opportunity to grow the firm's practice in the region very appealing," says Ted Kovacs, a Hicks Morley partner who joined the Waterloo office as lawyer number five in 1996. "We really wanted to grow the Waterloo office the way the firm's founding partners grew the Toronto office – that was our inspiration. And we're very happy with the way it's worked out."

A GROWTH IN EXPERTISE

In Toronto, the firm's growth resulted in part from the expanded expertise that lawyers developed as human resources law issues began to spread to an increasing number of areas – from pay equity, to human rights, to occupational health and safety.

Much the same has occurred in Waterloo. In addition to the labour and employment work at the heart of the firm's expertise, lawyers in the office have developed diverse practices over many years that span the range of human resources law issues.

From a one-lawyer operation in 1989, the office has expanded to ten lawyers and is the largest human resources law firm in the region.

"One of the key areas of my practice over the past 20 years has been defending employers charged with offences under the *Occupational Health and Safety Act* ["OHSA"]," says Hicks Morley partner Ian Campbell.

"While the growth in my OHSA practice is due in part to increasing government regulation and enforcement over the years, it's also been influenced by the strong manufacturing base that exists in the Kitchener-Waterloo, Cambridge and Guelph areas. With such a large employee base in the region, the need for OHSA expertise is significant."

Another practice area that extends beyond the Waterloo region is the office's work in the police services sector, with firm partners Seann McAleese and Glenn Christie providing expertise in this area.

"My police work focus stems from having 13 years of experience as a civilian in policing before I became a lawyer," says Christie. "I'm able to combine my MBA business education, my policing experience and my legal background to provide advice and strategies on both the legal and non-legal aspects of police labour relations, discipline and civilian oversight. It's a unique role that clients recognize goes far beyond that of most lawyers."

A PROACTIVE APPROACH

Development of expertise within the context of the broader labour and employment field allows the firm to provide in-depth proactive advice that can prevent issues or situations from arising.

In the OHSA area, for example, the firm provides training sessions for the supervisors and managers of clients – and advice on their safety programs and other related initiatives. And for clients where unionization is a concern, the firm has helped many clients take the proactive steps necessary to ensure they remain union free.

"In general, our work is defence, not offence," says firm partner Stephen Goodwin. "Ideally, we'll work closely with our clients to take steps to avoid problems before they become big issues. If an issue does become a matter for litigation, we work out the best strategy to defend the employer's interests."

CLOSE TIES TO THE COMMUNITY

While the lawyers in the Waterloo office serve clients with operations across the country, they each work to maintain close ties to their community and the organizations they serve.

Ideally, we'll work closely with our clients to take steps to avoid problems before they become big issues.

"All of us understand the importance of sharing knowledge and contributing to the broader human resources community," says Kathryn Meehan, an associate in the Waterloo office. "I worked as a human resources manager before becoming a lawyer and litigator, so I understand the perspective of our clients and their information needs. It makes me a more effective advocate and it's a true motivator in terms of getting more involved."

Involved indeed. The Grand Valley Chapter of the Human Resources Professionals Association – an organization many of the lawyers play key roles in – has grown to become the largest human resources association in the province outside of Toronto. And the firm's community contributions extend to teaching at universities and colleges as well as other charitable and community volunteer work.

After nearly 25 years, the Hicks Morley roots in the Waterloo region run deep. And as the size and diversity of the region continue to grow, the firm is committed to growing right along with it.

AN UPDATE ON BILL 168 – WHAT WE'VE SEEN TO DATE

In June 2010, the Bill 168 amendments to Ontario's *Occupational Health and Safety Act* ("OHSA") imposed new obligations on employers to develop and implement policies, programs and training regarding workplace violence and workplace harassment, to conduct risk assessments, and to convey certain information to employees.

BY: MATTHEW MIHAILOVICH

Here is an update on our experience to date with Bill 168 issues that have commonly arisen since that time.

A CHANGING DISCIPLINARY LANDSCAPE

As expected, Bill 168 has had a significant impact on the way workplace violence claims are adjudicated – and there have been several labour arbitration awards in which the Bill 168 amendments have influenced decision making.

For example, in *The Corporation of the City of Kingston and CUPE, Local 109 (Hudson)*, the arbitrator identified four ways that Bill 168 has impacted the process of analyzing workplace violence cases:

i) The way in which workplace parties must think about incidents involving inappropriate language has been clarified; threats are no longer just words, but now, by definition, constitute violence.

ii) The manner in which an employer must react to an allegation of a threat has changed; threats have to be immediately reported and investigated, and an assessment must be completed regarding the existence of a real danger.

iii) The manner in which an arbitrator might assess the reasonableness of termination as an appropriate disciplinary response has been affected. Although termination for cause is not automatic, the seriousness of the offence may be given greater weight over other factors, such as provocation, remorse and length of service.

iv) Workplace safety must now be assessed as a factor in the reasonableness and proportionality of the penalty.

Arbitrators have shown a willingness to uphold severe discipline for threats in light of the Bill 168 amendments, and have also upheld dismissals where bullying and harassment have occurred in the workplace. In *Metro Ontario and UFCW*, the grievor's discharge for uttering racial slurs and throwing a meat slicer padlock against a wall while bullying a co-worker was upheld. In *Jamieson Laboratories and CAW*, the grievor was dismissed for wrapping a plastic bag around a co-worker and making inappropriate gestures in front of other employees. In each case the arbitrators were concerned with the grievor's lack of remorse and appreciation of the severity of the misconduct.

Nevertheless, cases have recognized that provocation may justify the reduction of an imposed penalty, although there must still be some reasonable proportion between the provocation and the actions of the employee.

Violence or harassment does not only occur within the physical workplace. Threats of violence and harassing behaviour can occur online, and decisions have addressed these issues. Where the online conduct has a reasonable connection to the workplace, and subject to privacy considerations, employers have been justified in taking appropriate disciplinary action.

With respect to harassment, post-Bill 168 employees often complain of being "harassed" by a supervisor or member of management in relation to work directions or performance expectations. There remains a recognized distinction between appropriate management directions and communications, and conduct that transcends into the realm of harassment; Bill 168 has *not* taken away an employer's right to manage its workplace.

Violence or harassment does not only occur within the physical workplace. Threats of violence and harassing behaviour can occur online, and decisions have addressed these issues.

To date, decision-makers have recognized the heightened awareness of workplace violence and harassment brought forth by Bill 168. Employers are expected to comply with the requirements of the OHSA, and to take matters of workplace violence and harassment seriously, with immediate action to address the situation. Likewise, employees are obligated to avoid engaging in violent or harassing behaviour and to appreciate the nature of their conduct.

THE MINISTRY OF LABOUR'S ROLE AND RECENT ACTIVITY

The Ministry of Labour has the ability to order employers to comply with the Bill 168 amendments, and can issue monetary fines or jail time for breaches of the OHSA.

The Ministry of Labour recently completed a blitz in the health care sector focused on enforcing requirements to protect workers

from violence. During the blitz, 285 visits were conducted, resulting in 307 orders. The three most frequent failures were with respect to the requirements to conduct workplace risk assessments, to ensure workplace violence and harassment policies were in writing and posted in the workplace, and to review measures and procedures for the health and safety of workers, including from the risk of violence, at least once a year.

Further compliance checks can be expected in other sectors throughout the Ministry of Labour's remaining blitz schedule for 2013-2014.

REPRISAL AND ENFORCEMENT ISSUES

Importantly, the Bill 168 amendments do not provide a stand-alone enforcement mechanism for employees to complain directly to the Ontario Labour Relations Board ("OLRB") alleging that they have been subjected to workplace violence or harassment.

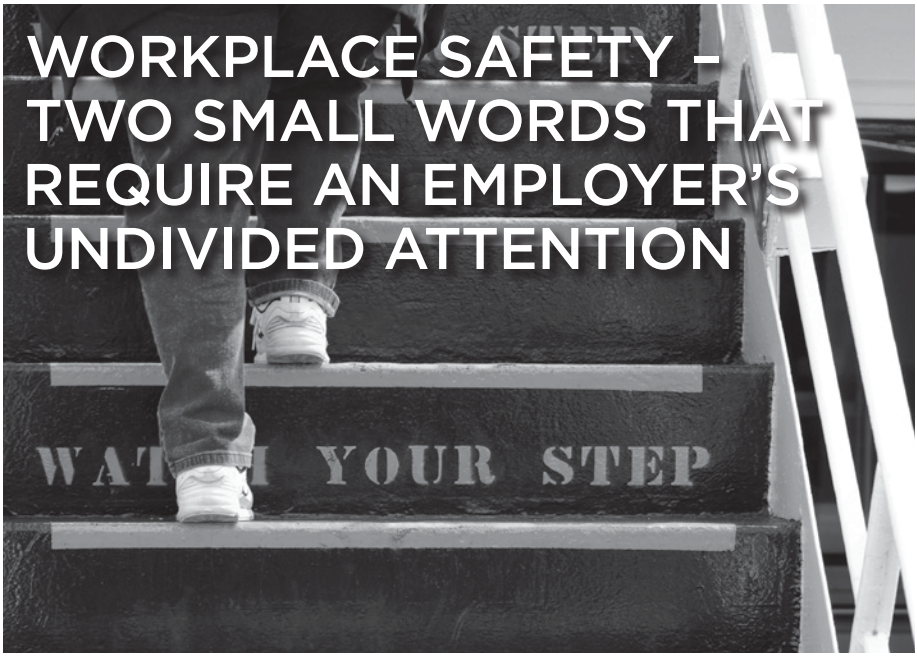
Employers often inquire about an employee's ability to make a claim to the OLRB regarding a workplace harassment issue. In *Conforti v. Investia Financial Services*, the OLRB determined that its authority is very limited, in that OHSA does not confer jurisdiction over a complaint alleging an employer failed to comply with its workplace harassment policy or that the employee was subject to a reprisal after filing a workplace harassment complaint. In other words, it does not adjudicate on whether an employer provided a harassment-free workplace, and it does not have jurisdiction over discipline in response to the initiation of a harassment complaint. From the OLRB's perspective, an employer's obligation regarding workplace harassment is limited to the creation and posting of a policy and program, and to providing information to employees.

That said, Bill 168 has clearly changed the landscape in relation to the prevention of workplace violence and harassment. All workplace parties have a role and responsibilities in the process – and are expected to work together to ensure a healthy and safe work environment.

Matthew Mihailovich *is an associate lawyer at Hicks Morley's Waterloo office. He practises in all areas of labour and employment law, advising a wide variety of public and private sector clients and appearing before courts, arbitrators and administrative tribunals. He works with numerous employer groups, appearing as a frequent speaker and providing strategic and proactive human resources advice. Matthew is the Director of Finance of the Grand Valley Chapter of the HRPA, and was the Membership Director of the Hamilton Chapter of the HRPA for four years.*

Tel: 519.883.3112
Email: matthew-mihailovich@hicksmorley.com

WORKPLACE SAFETY – TWO SMALL WORDS THAT REQUIRE AN EMPLOYER'S UNDIVIDED ATTENTION



Ontario's *Occupational Health and Safety Act* ("OHSA") sets out a litany of safety requirements that an employer must apply and enforce – or face threat of prosecution and potentially significant penalties. Ontario employers are held to a rigorous standard when it comes to creating and maintaining a safe workplace, but are Ontario *employees* held to a high standard? When employees breach an employer's safety-related policies and procedures, what disciplinary options are available to Ontario employers?

BY: MAUREEN M. QUINLAN AND JODI GALLAGHER HEALY

The appropriate disciplinary response to a safety violation depends upon a number of factors. Here are four key ones to consider.

1. DID THE EMPLOYEE UNDERSTAND THE SAFETY RULES AND REQUIREMENTS?

Safety rules must be clear and posted in the workplace. Where appropriate, employees should receive safety-related training. Training can be provided using internal resources, such as supervisors or human resources personnel, or through specialized

external resources. In either case, attendance at training sessions should be documented and acknowledged by the employee in writing. Employers should also retain any safety-related training materials for future reference.

Short tests and quizzes completed by the employee following the training sessions can help demonstrate that employees fully understand the substance of the training programs and the related safety requirements.

Updated training should be implemented as necessary when there are changes to the safety requirements or for the purposes of refreshing an employee's memory. Again, these retraining or refresher sessions should be documented and acknowledged by the employee in writing.

2. WHAT IS THE NATURE OF THE EMPLOYEE'S POSITION?

The Court of Appeal for Ontario recently confirmed in *Plester v. PolyOne Canada Inc.* ("*Plester*") that supervisors are held to a higher standard than those without supervisory responsibilities in circumstances where safety rules and requirements have been breached. A safety infraction by a supervisor, particularly one with safety-related responsibilities, will generally be viewed as much more serious than infractions by those without supervisory responsibilities.

3. HOW SERIOUS WAS THE INFRACTION?

Safety infractions that result in injuries or expose others to serious risk of injury are generally considered to be the most serious of workplace safety incidents.

But even serious safety infractions may not justify an employee's for cause termination if the safety violation is an isolated incident. For example, in *Barton v. Rona Ontario Inc.* an assistant store manager was terminated for cause after employees under his supervision used a forklift to lift a wheelchair-bound employee to the store's second floor to attend a training session. The lift clearly breached the company's safety protocols and could have resulted in serious injury both to the employee on the forklift as well as those looking on from below.

The Court recognized that the assistant store manager's misconduct was serious, but took care to note that he did not give explicit permission for the lift nor did he perform the lift himself. After considering these circumstances and other contextual factors,

the Court determined that the circumstances did not justify termination for cause and, instead, found that a suspension would have been a more appropriate disciplinary penalty.

4. WHAT ARE THE CONTEXTUAL FACTORS?

Since the Supreme Court of Canada's decision in *McKinley v. BC Tel*, employers have been required to consider the surrounding circumstances when determining whether an employee's dishonest conduct will amount to cause for termination. This same obligation applies when imposing discipline following safety-related infractions.

An employer must consider the contextual circumstances, such as the employee's length of service and disciplinary record, including the nature and number of prior offences and any other relevant factors, before imposing a disciplinary penalty.

> Employers must take care to deal with, and document, each individual safety infraction.

An employee's disciplinary record will come under close scrutiny in this context. Severe disciplinary penalties will be the most difficult to impose when an employee has a clean disciplinary record or has not received any prior warnings or discipline for safety-related misconduct. In *Plester*, for example, the Court found that termination for cause was not justified after determining that the supervisor's prior disciplinary record involved only minor incidents that were stale and not safety-related.

ENSURE A CONSIDERED RESPONSE TO SAFETY VIOLATIONS

An employer has a range of disciplinary tools at its disposal to respond to safety infractions, including:

- verbal warnings;
- written warnings;
- suspensions (where permitted in the contract of employment); and
- termination for the most serious of infractions.

Employers must take care to deal with, and document, each individual safety infraction, even those that are minor safety violations, as employees who engage in safety violations should be made aware of their misconduct and correct their behaviour. The documentation should clearly outline the safety requirements

that were breached, any related training provided to the employee and the seriousness of the offence. Where applicable, the documentation should include the disciplinary penalty imposed and the remedial steps that will be taken if further infractions occur. These warnings and lesser disciplinary penalties will help to justify future disciplinary penalties and, ultimately, termination for cause if the employee repeatedly violates workplace safety protocols.

These steps help to emphasize the paramount importance of safety within the workplace and put an employee on notice that significant disciplinary consequences will follow a breach of workplace safety protocols.

While potentially painstaking, the careful management of employees' workplace safety violations will not only assist in justifying progressive discipline, it will also help to demonstrate an employer's commitment to safety in the workplace and adherence to the requirements of the OHSA.

Maureen Quinlan *is an associate in Hicks Morley's Toronto office and has been practising labour and employment law for more than ten years. She advises employers and litigates on their behalf on a wide range of labour and employment-related issues, including labour disputes, wrongful dismissal, employment standards, employment contracts, human rights, privacy, workplace safety and insurance and disability benefit-related claims. Maureen has been involved in matters before all levels of court in Ontario and the Federal Court of Canada and has appeared before various arbitrators and administrative tribunals, at both the federal and provincial levels.*

Tel: 416.864.7036
Email: maureen-quinlan@hicksmorley.com

Jodi Gallagher Healy *is an associate in Hicks Morley's Toronto office. Jodi advises on a wide range of labour and employment law issues, including labour relations, human rights, wrongful dismissal, employment standards and workplace privacy issues. She has appeared before a variety of arbitrators, mediators, administrative boards and courts. Jodi has served on the Executive of the Ontario Bar Association's Labour and Employment Section since 2009.*

Tel: 416.864.7035
Email: jodi-gallagherhealy@hicksmorley.com

POLICE AND BEYOND

Seann McAleese has been with Hicks Morley from the start of his legal career in 1999. In 2004, he relocated to our Waterloo office where he provides a full range of labour relations and employment law advice to both public and private sector clients.

We spoke to Seann in June about his career, his move to the Waterloo office and the changes he has seen in the practice of labour and employment law.

Tell us where you're from originally?

I grew up near Simcoe, Ontario, and lived in the area through high school. I went to York University to do a history degree, but I took an organizational development course in second year that included a section on collective bargaining.

As part of that course, we reviewed a National Film Board film called "Final Offer" about the historic bargaining session between General Motors and the CAW in 1984. I was fascinated by the film, the course and the negotiating process, and decided to pair my history degree with a labour relations major.

When did law enter the picture?

For my work term placement, I worked at the CAW for a winter term and then for the summer after doing research into collective agreements. I really enjoyed it – and it confirmed that labour relations was a key area of interest for me.

A professor I worked for as a research assistant mentioned that if I wanted to do the employer-side, law school was the route to take. That intrigued me and led me to Osgoode, which had the largest selection of labour and employment courses.

What brought you to Hicks Morley?

I was looking for a summer job after my second year – and wanted to work at a boutique firm that had a labour and employment focus. Hicks was an obvious choice and it accepted me for a summer position. It went well and I came back to article with the firm in 1999 and then joined the firm as an associate in 2001 after my call to the Bar.

What prompted your move to the Waterloo office?

My roots remain very much in small town southwestern Ontario, growing up in a home situated on 75 acres of land where neighbours were miles down the road. Toronto was a great place for education and to ground my career, but by 2004 I was starting a family and the commute on either end of the day was taking time away from both work and family.

Waterloo was a busy, growing office in a great community closer to my extended family but still close to Toronto where I had developed some great client relationships.

Waterloo was a busy, growing office in a great community closer to my extended family but still close to Toronto where I had developed some great client relationships. I raised the idea of making the move with the firm executive and the partners at the Waterloo office – who really had the ultimate say. They agreed to the move and I never really missed a beat. Most of the clients I served were happy to continue working with me and my practice and career have continued to grow.

When did the police services expertise begin to develop?

My father was an OPP officer, so I've always had an interest in policing. When I first came to the firm, I didn't fully appreciate that we practised in the area. But I got some exposure to the sector early on, and I took every opportunity to develop my expertise. Many police services board client officials know that I come from a police family and that I understand and respect the profession. I think that goes a long way, and I've got some great client relationships in the sector.

How about your other work?

I'm a true generalist, with my practice split fairly evenly between labour issues such as collective bargaining and rights arbitrations and employment issues for non-union employers such as wrongful dismissal, wrongful competition and other strategic advice. Areas such as human rights cut across both. I am fortunate to represent a diverse group of employers in a variety of industries across the public and private sector, from small to large enterprises. I also do a fair amount of work for insurance companies, so I know that industry particularly well.

Has the practice changed much over the years?

I think it has. Many of our clients truly don't have the time or resources that they used to for devotion to legal matters. So they want us to come armed with background information on their business and industry – and want advice that's tailored to this knowledge.

We still advise on the legal risks, but much of our advice is now centred on business solutions. It's less about opinion letters and more about bottom-line advice that matches a client's organizational style. This cuts across both private and public sectors. There's a real push to deliver legal services more effectively and efficiently, and our firm excels at that.

How about your spare time – what keeps you busy?

We live in New Hamburg, just outside of Waterloo. It's a great community and our place backs onto a forest, so the country is really at my back door. It's a great place to raise three kids, ages ten, six and one. A lot of our spare time is centred around things like hockey, swim lessons and music classes. The one escape I do have is my motorcycle, which I got back into in 2008. I can ride it into work on many days, and it's a great way to decompress and collect my thoughts at the end of a day.

> I am fortunate to represent a diverse group of employers in a variety of industries across the public and private sector, from small to large enterprises.

HR QUICK HITS

Federal Court clarifies dismissal regime under *Canada Labour Code*

In a recent decision (*AECL v. Wilson*), the Federal Court considered the meaning of the unjust dismissal provision of the *Canada Labour Code* ("CLC"), finding that the CLC does not require employers to show just cause for all dismissals. The applicant, who had been dismissed without cause and paid six months severance, claimed unjust dismissal under section 240 of the CLC. The adjudicator upheld the applicant's claim on the basis that other than dismissal for lack of work or discontinuance of a function, the unjust dismissal provision meant that the CLC only permits dismissals for cause. This finding added to the line of cases holding that the CLC provides federally regulated employees with just cause protection similar to what is provided under a collective agreement.

On judicial review, the Federal Court overturned the adjudicator's finding as being unreasonable in light of earlier case law and the CLC provisions. The Court found that sections 230 and 235 of the CLC permit an employer to dismiss an employee without cause where it provides appropriate notice and severance pay. However, a "without cause" dismissal may be challenged under section 240 if the employee feels that the dismissal was "unjust," which may mean, for example, that the reasons given for the dismissal were unjustified or the dismissal was discriminatory or a reprisal. Given the conflicting case law at the adjudicator level about the nature of protection created by section 240, this decision sets out a narrow interpretation and is an important ruling in employers' favour.

CONTINUING PROFESSIONAL DEVELOPMENT SESSIONS

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.

September 11	Risk Management Breakfast CPD Session
October 9	Bargaining & Negotiations Breakfast CPD Session
October 23	Disability & Employment Breakfast CPD Session
October 30	Discrimination in the Provision of Services – Is Your Organization Vulnerable
November 13	Human Rights Breakfast CPD Session
November 15	School Board Management Conference
November 20	Breakfast CPD Session
November 21	Workplace Investigation Training Workshop for Colleges
November 28	Workplace Investigation Training Workshop

**Accreditation pending on Breakfast CPD Sessions; visit hicksmorley.com/advantage for details.*

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