



# AMO 2019

## Annual Human Resources Update

Presented by Hicks Morley LLP

August 19, 2019

# Human Resources Law Update

A professional headshot of Craig Rix, a man with short dark hair, wearing a dark blue suit jacket, a light blue shirt, and a patterned tie. He is smiling. In the top left corner of the image is a red square with the text "Hicks Morley" in white.

Hicks  
Morley

Craig Rix | Partner, Toronto

A professional headshot of Leanne Fisher, a woman with blonde hair styled in a braid, wearing a black blazer over a light-colored top. She is smiling. In the top left corner of the image is a red square with the text "Hicks Morley" in white.

Hicks  
Morley

Leanne Fisher | Partner, Ottawa

A professional headshot of Nadine Zacks, a woman with long brown hair, wearing a dark blue blazer over a white top. She is smiling. In the top left corner of the image is a red square with the text "Hicks Morley" in white.

Hicks  
Morley

Nadine Zacks | Partner, Toronto

# AGENDA

1. Bargaining and Legislative Update
2. OHSA – Good governance is good compliance
3. Case Law Update
4. OMERS NRA 60 for Paramedics

# Bargaining and Legislative Update

# Police Bargaining Update

# City of Toronto

- New 3% specialty pay for front line priority response officers with more than 5 years experience
- Introduction of part-time retiree pilot program – PT retirees employed for fixed period and not subject to terms and conditions of collective agreement
- Variety of benefit improvements, language changes

# Ontario Provincial Police

- OPP Award (Kaplan):
  - 2019 - \$100,469 (Jan 1 - 2.15%)
  - 2020 - \$102,629 (Jan 1 - 2.15%)
  - 2021 - \$103,655 / \$104,660 (Jan 1 - 1.0%, July 1 – 0.97%)
  - 2022 - \$106,597 (Jan 1 - 1.85%)

# Fire Bargaining Trends



# Comparability With Police

- It used to be that police settled first and fire followed the police
- The Fire Association wanted fire-policy parity
- The municipalities wanted to pay fire less than police
- Current situation – murky!

# 2019 End Rates

	Fire End Rate	Police End Rate
Mississauga	\$101,327	\$100,420
Barrie	\$101,270	
Thorold	\$101,216	\$100,311
Oakville	\$101,131	TBN
Brampton	\$101,047	\$100,420
Niagara Falls	\$101,040	TBN
Kitchener, Cambridge, Guelph, Waterloo	\$101,017	\$100,426
Vaughan, Markham, Richmond Hill	\$100,983	\$100,421
Toronto	\$100,925	\$100,925
Halton Hills	\$100,698	\$100,420
Kingston	\$100,614	\$100,395
London	\$100,599	\$100,599

# What Else is Being Negotiated/Awarded?

- Physiotherapy benefits - \$600-\$1,000 or unlimited?
- Psychological, Psychiatrist, Registered Counsellor - \$1,000 (Sudbury) up to \$3,500 (Toronto)
- Dental major restorative (\$2,500-\$3,000) and orthodontics (\$3,000-\$3,500)
- Massage and other paramedicals (\$500 - \$1,000)
- Vision, hearing, speech and orthotics – all up!

# Paramedic Bargaining

# Summary of Settlements/Awards @ May 2018

Municipality	2016	2017	2018	2019	2020
Cochrane DSSAB		1.6%	1.65%	1.7%	
Haliburton County		2.0%	1.75%	1.75%	
Halton Region		1.5%	1.5%	1.75%	2.0%
City of Hamilton	1.5%	2.0%	2.0%	2.0%	2.0%
Lanark County		1.75%	2.0%		
Middlesex-London		1.0%/1.0%	1.5%	1.5%	1.75%
Waterloo Region	1.75%	1.5%	1.5%	1.75%	

# Summary of Settlements/Awards @ May 2018

Municipality	2016	2017	2018	2019	2020
Peterborough Cty	1.75%	1.75%	1.75%		
Oxford County		1.5%	1.5%	1.5%	
York Region	1.65%	1.74%	1.74%	1.74%	
Rainy River DSSAB			1.75%	1.75%	1.75%
Timiskaming DSSAB		1.75%	1.75%	1.75%	
Guelph	1.75%	1.5%	1.5%		
Norfolk	1.75%	1.55%	1.5%	1.5%	

# Trends of the Average Base Wage Increase for the Public Sector

Sector	2016	2017	2018
Provincial	1.3	1.9	1.6
Municipal	1.6	1.9	1.8
Federal	1.4	1.5	1.6
Private	1.9	2.1	1.9



# Legislative Update: Bill 47



## Bill 47: An Overview

- The Bill amends:



*Employment Standards Act, 2000*



*Labour Relations Act, 1995*

# Changes to the *Employment Standards Act, 2000*

## Bill 47 - Quick Changes

- **Minimum Wage**
  - Will remain at **\$14.00** for **2019**
  - To be tied to CPI (again) starting in **2020**
- **Public Holiday Pay**
  - Goes back to pre-Bill 148 (which has been in place since **July 1, 2018** anyway)

## Many Leaves Remain Unchanged

- The following leave related provisions introduced in Bill 148 remain unchanged with Bill 47:

- ✓ Increased vacation after 5 years of service
- ✓ Possibility of extended parental leave
- ✓ Increased pregnancy leave for still-birth or miscarriage
- ✓ Increased family medical leave
- ✓ Changes to critical illness leave
- ✓ Changes to crime-related child disappearance and child death leaves
- ✓ Domestic or sexual violence leave

## Repealed Provisions

- Equal pay for equal work (employment status)
- Request for changes to schedule or work location
- Minimum on-call pay
- Minimum cancellation pay
- Right to refuse work without 96 hours notice
- Reverse onus on employers to prove an independent contractor is not an employee

# Personal Emergency Leave Overhaul



## Previous Scheme

- 10 days (2 paid + 8 unpaid)
- Illness or injury of employee
- Death, illness, injury or urgent matter of certain family members



## In force January 1, 2019

- Sick leave (3 unpaid days/year)
- Family responsibility leave (3 unpaid days/year)
- Bereavement leave (2 unpaid days/year)

# Changes to the *Labour Relations Act, 1995*

## Repealed Provisions

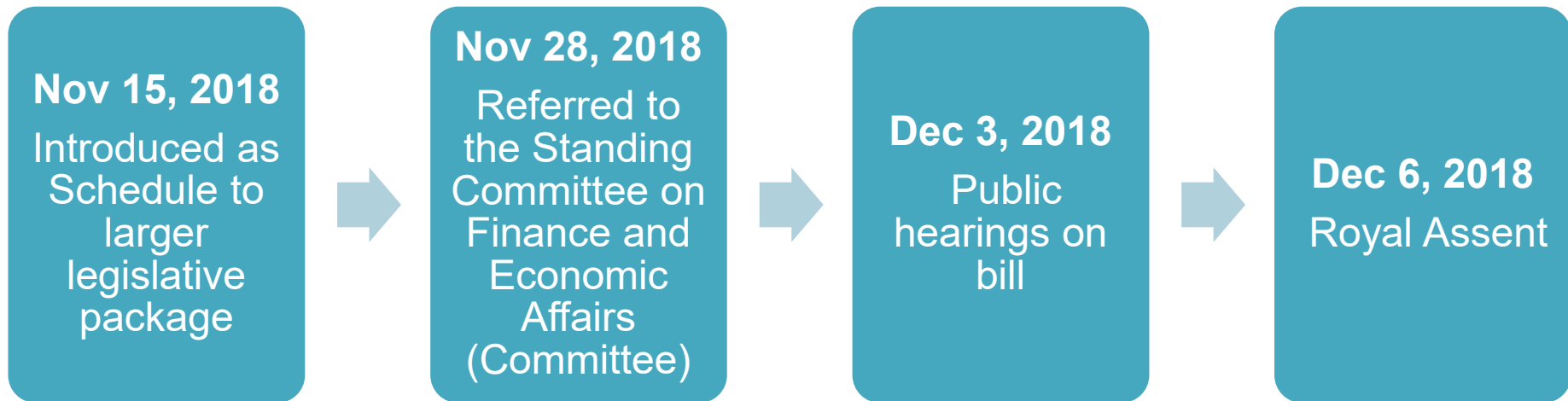
- Employee lists with 20% support
- Changes to bargaining unit consolidation
- Card-based certification for certain industries
- Increased fines

**REPEAL**



# **Bill 57: Changes to Fire Interest Arbitration**

## ***Bill 57 - Restoring Trust, Transparency and Accountability Act, 2018***



## Changes to Interest Arbitration

- Single arbitrator instead of Boards of Arbitration
  - Similar to police
- Written submissions exchanged in advance of the hearing date
- Arbitrator required to provide written reasons **demonstrating their consideration of the statutory criteria** under the legislation
  - Granted upon request of either party

## New Criteria at Interest Arbitration

- Arbitrator shall take into consideration...
- Comparison between employees and “**other employees in the public and private sectors**” of terms and conditions of employment

## New Criteria at Interest Arbitration

- Arbitrator shall take into consideration...
- Comparison of:
  - “**collective bargaining settlements reached in the same municipality**” and
  - in “**comparable municipalities**, including those reached by employees in bargaining units to which the LRA applies”
  - having regard to the “**relative economic health of the municipalities**”

## New Criteria at Interest Arbitration

- Arbitrator shall take into consideration...
- Economic health of Ontario and the municipality, including but **not limited to:**
  - Changes to labour market characteristics
  - Changes to property tax characteristics
  - Changes to socio-economic characteristics

## Bill 66 Restoring Ontario Competitiveness Act, 2018

Dec 6, 2018  
First Reading



Omnibus Bill



Apr 3, 2019  
Royal Assent

## Excess Weekly Hours of Work Agreements

- Employers are still required to obtain the written agreement of employees or their bargaining agent to work weekly hours in excess of 48 hours per week
- No need to obtain the approval of the Director of Employment Standards for any such agreement, regardless of the number of hours contemplated in the agreement



## Overtime Averaging Agreements

- Employers would be permitted to enter into written agreements with employees or their bargaining agent to average hours of work for the purposes of determining entitlement to overtime pay for periods of up to **four weeks** without requiring the approval of the Director
- As with the existing ESA provisions, the averaging periods must be “separate, non-overlapping [and] contiguous”
- Government is currently consulting to discuss whether 4 week cap is the right number

# Bill 124

- New wage restraint legislation.
- Introduced on eve of summer break.
- Not applicable but relevant to Municipalities.

# OCCUPATIONAL HEALTH & SAFETY

# OHSA Changes in Fines

- On December 14, 2017, Bill 177, *Stronger, Fairer Ontario Act*, received Royal Assent
- Bill 177 amended fines under OHSA from:

\$25,000

to \$100,000 for  
individuals

\$500,000

to \$1,500,000 for  
corporations

# Ontario (Labour) v. New Mex Canada Inc., 2019 ONCA 30 (CanLII)

## Overview

- Worker suffered seizure while working on an elevated machine
- Worker fell 12 feet to the floor and died
- Company and two directors plead guilty to OHSA charges
- Company fined \$250,000 and directors each received 25 day jail sentence
- On appeal, fine reduced to \$50,000 and jail sentence set aside in lieu of fine

# Key Takeaways



**Possibility of jail sentence for OSHA violations increasing**



**Risk of large fines**

# Ontario (Labour) v. Quinton Steel (Wellington) Limited, 2017 ONCA 1006 (CanLII)

## Overview

- Worker fell from temporary welding platform that was less than 3 metres high and died
- Platform wasn't protected by guardrails and worker wasn't wearing fall arrest equipment
- Employer had met all listed requirements in regulation
- Employer charged with failing to take all reasonable precautions to protect the worker

# Key Takeaways



Employers may be legally required to take additional precautions even where not required by Regulation



General duty clause is interpreted broadly



# How do you defend OHS/A Charges?

- Must be duly diligent - accused exercised “all reasonable care in the circumstances” to prevent the alleged offence
- In order to successfully defend OHS/A prosecutions, the concept of due diligence must form part of a workplace’s health and safety program **before** the accident occurs

# OHSA Due Diligence Essentials



Ongoing Assessment of Workplace Risks and Hazards



Health and Safety Policies and Procedures



Training and Instruction



Communication and Reminders

# OHSA Due Diligence Essentials



Supervisory Monitoring



Enforcement of Health and Safety Policies and Procedures



Documentation



# CASELAW UPDATE

# *International Brotherhood of Electrical Workers, Local 1620 v. Lower Churchill Transmission Construction Employers' Association Inc., 2019 NLSC 48 (CanLII)*

## Facts

- Grievor suffered from osteoarthritis and Crohn's Disease
- Authorized to use medical cannabis
  - utilized medical cannabis at night (not while on duty)
- Applied for but not offered (safety-sensitive) positions

# *International Brotherhood of Electrical Workers, Local 1620 v. Lower Churchill Transmission Construction Employers' Association Inc., 2019 NLSC 48 (CanLII)*

## Issue

- Was there a failure to accommodate and individually assess grievor?

## Decision

- Employer was not required to place the grievor, who used medical cannabis, in a safety-sensitive position
- Employer was unable to reliably measure impairment from cannabis use, based on current technology and resources.
- Upheld on judicial review

# Key Takeaways



**Safety still first!**



**Individualized impact assessment?  
(to extent possible)**

# *Bombardier Transportation (Thunder Bay Plant) v Unifor , Local 1075, 2018 CanLII 25604*

## Facts

- Manager believes he has observed grievor consuming cannabis at break
- Grievor tests positive for cannabis
- Grievor discharged for on-site usage
- Grievor alleges positive test is due to off-duty use (for medical reasons)



# *Bombardier Transportation (Thunder Bay Plant) v Unifor , Local 1075, 2018 CanLII 25604*

## Issue

- Was the discharge appropriate?

## Decision

- Grievor reinstated
- No direct evidence of usage in the workplace
- Positive test does not prove Employer's case (does not demonstrate current impairment)
- If onus was not on employer to prove impairment may have been different result

# Key Takeaways



**Conduct a thorough investigation**



**Importance of proof of impairment**

## *Rivard v. Essex (County)*, 2018 HRTO 1535 (CanLII)

### Facts

- Employee seeks reimbursement of costs of medical cannabis under insurance company
  - non-work related illness
- Insurer denies claim
- Employee brings Application to HRTO alleging discrimination on the basis of disability

## *Rivard v. Essex (County)*, 2018 HRTO 1535 (CanLII)

### Issue

- Was it discriminatory for insurer to deny reimbursement for medical cannabis?

### Decision

- Precondition to reimbursement (for any drug) under policy was existence of a Drug Identification Number [DIN] from Health Canada
- Medical cannabis does not have a DIN
- Denial based on fact of no DIN , not on nature of disability
- Not discriminatory

# Ontario – Decision No. 72/18, 2018 ONWSIAT 179 (CanLII)

## Facts

- A fire fighter sought entitlement to be compensated for costs of medical cannabis used to relieve pain from serious workplace injury
- Workplace Safety and Insurance Board declined to cover the cost of medical cannabis
- The fire fighter appealed



# Ontario – Decision No. 72/18, 2018 ONWSIAT 179 (CanLII)

## Issue

- Was the fire fighter entitled to coverage for his medical cannabis?

## Decision

- The WSIAT allowed the appeal
- Prior Tribunal decisions outlined the requirements that must be met when authorizing reimbursement for medical cannabis
  - The fire fighter met all of these requirements

# Ontario – Decision No. 72/18, 2018 ONWSIAT 179 (CanLII)

## Decision

- 1) Evidence of constant and debilitating pain of worker due to compensable injury/illness;
- 2) Evidence that other pain treatments have not been ineffective;
- 3) Evidence from physician that cannabis has been effective;
- 4) No contraindications regarding cannabis use (i.e. overuse, abuse, etc.)
- 5) Authorization to use and possess medical cannabis from Health Canada.

## *Merrifield v. Canada (Attorney General)* 2019 ONCA 205

### Facts

- RCMP officer (in civil action) alleges that managers bullied and harassed him throughout the period of 2005-2012
- Trial judge recognized a new cause of action “tort of harassment”
- Trial judge found that managers repeatedly and intentionally harassed the RCMP officer



# *Merrifield v. Canada (Attorney General)* 2019 ONCA 205

## Issue

- Should the court recognize a new ‘tort’ of harassment?

## Decision

- Court of Appeal recognized ‘evolutionary’ nature of change in law
- No foreign jurisdiction authority, no academic authority or compelling policy rational to recognize new tort of harassment
- Not a case where the facts cried out for the creation of a new tort
- Other remedies available: Ex. intentional infliction of mental suffering

# Key Takeaways



No new tort of “Harassment



Intentional infliction of mental suffering and other torts sufficient, for now, to address these concerns

## *Ruston v. Keddco MFG. (2011) Ltd., 2019 ONCA 125 (CanLII)*

### Facts

- Employer terminates Ruston for alleged 'fraud'.
- Ruston indicates he will be seeking legal counsel
- Employer states if he did so, they would counter-claim against him and it would be “very expensive” for him
- Ruston sues, Employer countersues for \$1.7 million for unjust enrichment, breach of fiduciary duty and fraud and \$50,000. punitive damages

## *Ruston v Keddco MFG (2011) ONCA 125 (CanLII)*

### Issue

- Was there cause for dismissal?
- What about the Employer's counterclaim (and other statements)?

### Decision

- Lower Court: No cause for dismissal, bad faith tactics utilized by Employer
  - Award of: Generous Notice Period + \$100,000 (punitive damages), \$25,000. (moral damages) + 546,684.73 (costs)
- Court of Appeal: Agreed

# Key Takeaways



**Importance of good faith and fair dealing**



**Avoid 'tactics'**

# *City of Toronto and CUPE, Local 79, 2018 CanLII 76445 (ON LA)*

## Facts

- Unionized city employee had been suffering from mental health issues resulting from stress
- Employee had received appropriate workplace accommodations since 1999 (fewer hours, fewer work days per week, etc.) and had been considered a “full-time” employee under the Collective Agreement
- Employer changed employee’s status from full-time to part-time
- Union grieved employer’s unilateral change of employee status

# City of Toronto and CUPE, Local 79, 2018 CanLII 76445 (ON LA)

## Issue

- Is it permissible for the employer to make this change?

## Decision

- Arbitrator allows the grievance and restores the employee's full-time status, ordering compensation for losses
- Arbitrator: employer would normally have the ability to make this reclassification; however, due to the length of the accommodation at full-time status, onus shifts to employer to demonstrate reasonable grounds for change or undue hardship to continue to accommodate

## Key Takeaways



**Duty to accommodate is important, but be mindful of the effects of long-term accommodation**



**Employer must have reasonable grounds for making changes to a long-term accommodation or demonstrate that continuation of the accommodation would amount to undue hardship**



## *Envirocon Environmental Services, ULC v. Suen* 2019 BCCA 46

### Facts

- Employee told he would have to take an out-of-province assignment that required him to be away from home for eight to ten weeks and employer would not pay for him to return home during that period.
- Employee had a four-month old infant at home and preferred to stay nearby to help his wife take care of their newborn.
- He refused the assignment and his employment was terminated for cause.

# *Envirocon Environmental Services, ULC v. Suen* 2019 BCCA 46 (CanLII)

## Issue

- Was the employee discriminated against on the basis of family status?

## Decision

- Confirmed the test:
  - (i) there had been a change in a term or condition of his employment; and
  - (ii) such a change resulted in “a serious interference with a substantial parental or other family duty of obligation”.
- The facts did not satisfy the second part of the test.
- Desire to remain close to home to care for newborn child was “no different than the vast majority of parents.” There was nothing in the complaint that suggested child would not be cared for in his absence.

# Key Takeaways



**Parental preferences do not need to be accommodated**



**Only need to accommodate substantial parental obligations**

# *Carter v. Human Rights Tribunal of Ontario*, 2019 ONSC 142

## Facts

- Applicant with non-work-related injury
- Alleged NEER program led employers to preferentially accommodate those injured in the workplace
- Tribunal Decision:
  - differential treatment of those injured in the workplace not discriminatory under the Code
  - failure to accommodate because employer only looked at permanent jobs

# *Carter v. Human Rights Tribunal of Ontario*, 2019 ONSC 142

## Issue

- Is it discriminatory to preferentially accommodate WSIB injuries?

## Decision

- Tribunal's decision upheld
- Preferential treatment of workers due to the WSIB rating program  $\neq$  discrimination

- Seniority rights remain relevant

# Humber River Hospital and Ontario Nurses' Association, 2018

## CanLII 115718 (ON LA)

### Facts

- Grievor worked for hospital for 3 years until terminated for stealing narcotics and other medications from the hospital
- Evidence established that the grievor was addicted to drugs and often under the influence of drugs at work
- Hospital conducted investigation, met with grievor, terminated employment
- Union argued *prima facie* discrimination on the basis of disability
- Hospital argued just cause because the grievor stole narcotics and other drugs from the hospital, worked under the influence thereby risking patient safety and was repeatedly dishonest about her drug use
- Employer argued it “neither knew nor ought to have known” that the grievor was an addict at the time employment was terminated

# Humber River Hospital and Ontario Nurses' Association, 2018

## CanLII 115718 (ON LA)

### Issue

- Did the employer breach its duty to accommodate under the *Human Rights Code* and collective agreement by terminating nurse who was stealing as a result of her drug addiction?

### Decision

- Arbitrator was satisfied the theft was caused by her addiction disability
- “Failure to disclose explicitly the disability in advance of termination cannot alone preclude the duty to accommodate, when the inability to disclose may be a feature of the disease itself”
- Hospital had “ample information” prior to the termination to identify the disability issue and it chose to ignore the issue and proceed to termination
- Hospital breached procedural duty to accommodate under the *Code*

# Key Takeaways



The procedural aspect of the duty to accommodate is important, including the obligation to recognize undisclosed disabilities potentially



Addiction cases are difficult as the grievor's ability to explicitly disclose the disability in advance of termination can be directly related to the disability itself



Reinstatement might still be inappropriate (award damages) in such cases where the grievor is not forthcoming and there is a warranted lack of trust established



# Peel (Regional Municipality) and OPSEU, Local 277 (Reed), 2019 CarswellOnt 4115

## Facts

- Grievor was paramedic with 30 years of service who went off for a workplace injury
- Grievor was absent from work for almost 2.5 years after injury
- Municipality discharged him because it believed the employee would not return to work in the foreseeable future
- The collective agreement had a deemed termination clause after 24 months

# Peel (Regional Municipality) and OPSEU, Local 277 (Reed), 2019 CarswellOnt 4115

## Issue

- Did the employer breach its duty to accommodate?

## Decision

- The municipality fell short in its duty to accommodate the grievor
- The municipality failed to conduct an independent assessment of whether he could return in the reasonably foreseeable future
- The municipality also failed to warn the employee that his employment was at risk

# *Peel (Regional Municipality) and OPSEU, Local 277 (Reed), 2019 CarswellOnt 4115*

## Decision

- In order to fulfill the duty to accommodate, the employer must make its own inquiry and determination
- Employers have a duty to warn employees of their intention to terminate their employment – notice to the union is insufficient
- Compliance with the collective agreements deemed termination clause does not automatically fulfill the duty to accommodate

# Key Takeaways



**Initiate a thorough inquiry when assessing accommodation**



**Warn an employee on leave when their employment is at risk**



# OMERS NRA 60 for Paramedics

# OMERS NRA 60 for Paramedics

- As of January 1, 2021, paramedics will be able to participate in NRA 60
- Requires employer decision to apply NRA 60 status to paramedics (subject to negotiation)
- To make effective, a by-law must be filed confirming NRA 60 status

# NRA 65 to 60 Conversions

- Know that prior NRA 65 service will be converted, resulting in reductions to credited service
- Reduced service will be available to be purchased by each member (at a member's own cost)
- Employee groups might seek to have employer “contribute” to cost of purchasing adjusted service
- But not all employees will benefit from conversion to NRA 60, or from purchasing service

# NRA 60 - Employer Considerations

- Employers should consider the potential implications that NRA 60 status might have on
  - Absenteeism rates and sick leave expenses
  - Salary and benefits (including any retiree benefits) costs, and
  - Ability to recruit/replace retiring workers, and consequences for training/training expenses





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Presented by Hicks Morley LLP

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