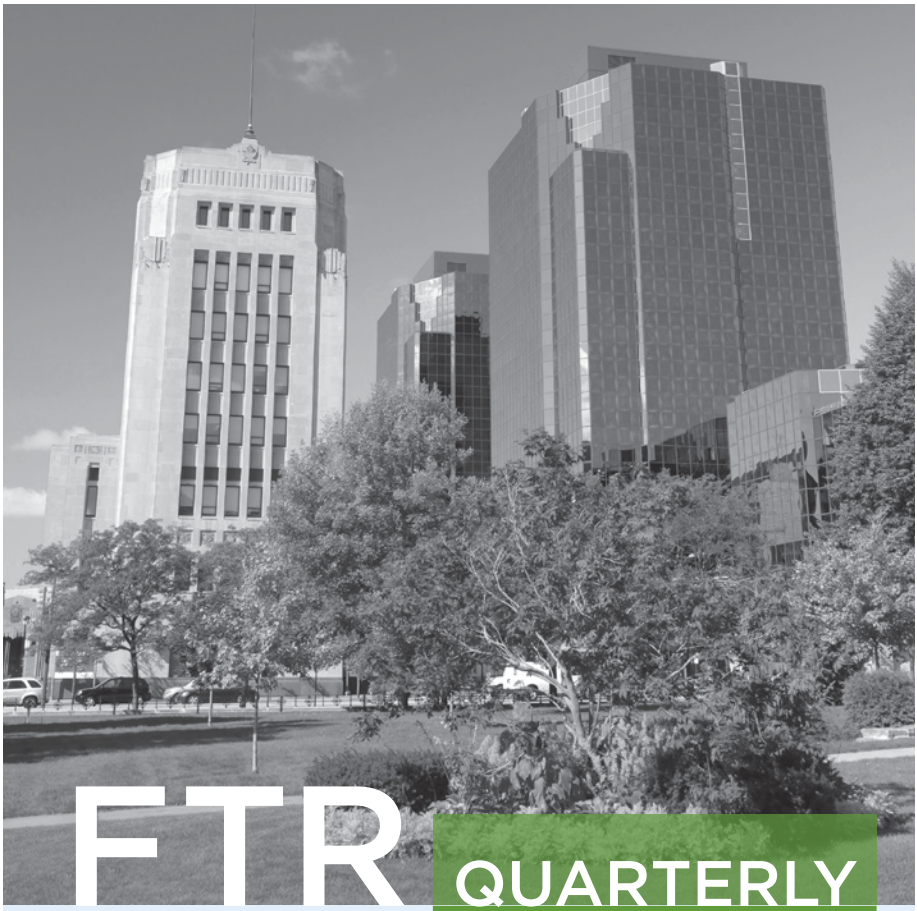

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HICKS MORLEY LONDON: 20 YEARS AND COUNTING

No one could accuse Hicks Morley of irrational exuberance when it opened its London, Ontario office in 1993. The economy was still reeling from the effects of the recession, unemployment was more than 11 percent and government deficits were at record levels and climbing.

But beyond these economic storm clouds, the firm – and founding London office partners Bob Atkinson and Barry Brown – saw a growing need for human resources law expertise and a large market in southwestern Ontario that could be better served by establishing a presence in the area.

"The firm had opened an office in Waterloo by that stage, so we knew that we could provide the same level of service in a smaller office," says Brown. "London seemed the obvious next step."

Atkinson and Brown also had a familiarity with the region that went beyond their travels to clients in the area.

"Both Barry and I went to law school in London – and our spouses were also from the area – so the move made sense on both a personal and professional level," says Atkinson. "We could hit the ground running, working from a city that had already been home at an earlier stage of our legal careers."

SERVICE FIRST

The key reason for the London office's creation was a simple one – better service through faster, easier access to clients at their places of work. And that reason holds true 20 years later.

"Generally speaking, we go to the client rather than the client coming to us," says Atkinson. "Our work involves helping clients with labour, employment and other workplace issues, so experiencing the workplace first-hand is a huge advantage."

Brown agrees."You can do a certain amount electronically, but you really can't prepare a case over the phone. And in the labour and employment area, things can happen quickly, so being here makes it a lot easier to respond."

There is also the unquantifiable benefit of having first-hand knowledge of the many communities the London office serves – from Windsor, to Woodstock, to Owen Sound.

"Many of our clients view their work as extremely personal – they live in the same communities as their employees and have a personal connection to these individuals," says Lisa Kwasek, a Hicks Morley associate. "These relationships drive how we deal with a file and the outcomes we achieve."

A BROADER PERSPECTIVE

While local knowledge has many benefits, so too does knowledge of the bigger picture. As part of Canada's leading human resources law firm, London lawyers also bring experience and knowledge that extends province-wide.

"Our public sector clients in particular appreciate that we bring both the local and the provincial perspective to issues, says firm partner Margaret Szilassy. "And that broader perspective helps us be proactive in our advice – and tackle issues before they become problems or lead to litigation."

And there is no shortage of issues. Like many areas of the province, southwestern Ontario was hit hard by the recent recession, with a sharp decline in the manufacturing sector.

"Many of our clients view their work as extremely personal – they live in the same communities as their employees and have a personal connection to these individuals."

"We've seen a lot of downsizing, reorganizations, and some plant closures as well in the manufacturing sector," says Paul Broad, a Hicks Morley partner. "And in the public sector, compensation restraint in all forms has been an ongoing issue for clients for several years now. But there have also been areas of both recovery and new development in the region – and it's exciting for us to be part of these changes."

THE NEXT 20

After two decades in London, the "novelty" of a regional office presence has long passed. The firm – and the five lawyers who work out of the London office – have become firmly entrenched in the region. Whether through teaching at colleges and universities, supporting and working for local charities, or simply raising their families, the lawyers have found that their roots in the community run deep.

"It was a great move 20 years ago – and we've never looked back," says Brown. "We're fortunate to enjoy some very close and longstanding client relationships, which we'll work hard to maintain for many years to come."

UPDATE ON UNIVERSAL RANDOM DRUG AND ALCOHOL TESTING IN CANADA

On June 14, 2013, the Supreme Court of Canada released its much anticipated decision in *Communications, Energy and Paperworkers of Canada, Local 30 v. Irving Pulp & Paper Ltd.* ("*Irving*"). The decision, which addresses certain aspects of the employer's unilaterally implemented alcohol testing policy, is significant because it confirms that unionized employers are not automatically permitted to impose universal random drug and alcohol testing even in safety-sensitive or dangerous workplaces.

BY: KATHRYN J. BIRD

The decision reiterated that the appropriate analysis to be used when reviewing any policy implemented by management is the "balancing of interests" approach. This analysis requires decision-makers to balance the employer's safety concerns against the employees' right to privacy.

The majority in *Irving* emphasized that this balancing of interests is crucial and operates to prevent an employer from unilaterally imposing universal random drug and alcohol testing solely on the basis that a workplace is inherently dangerous. Notably, this finding is in accordance with statements made by the Alberta Court of Appeal in *Communications, Energy and Paperworkers Union, Local 707 v. Suncor Energy Inc.* ("*Suncor*"), which emphasized that the existence of a safety-sensitive work environment does not provide a blanket justification for the employer to conduct alcohol and drug testing of any nature for all employees on the worksite.

Echoing that sentiment, the majority in *Irving* held that decision-makers, and therefore employers, should regard the decision of Arbitrator Michel Picher in *Re Imperial Oil Ltd. and C.E.P., Local 900* ("*Nanticoke*") as the "blueprint" for considering the validity of drug and alcohol policies. Accordingly, the majority endorsed the following principles from *Nanticoke*:

- No employee can be subject to random, unannounced alcohol or drug testing, except as part of an agreed rehabilitative program.
- An employer may require alcohol and drug testing of an individual where the circumstances give the employer reasonable cause to do so.
- Employers may require alcohol or drug testing following a significant incident, accident or near miss where it may be important to determine the root cause of what occurred.
- Drug and alcohol testing is a legitimate part of continuing contracts of employment for individuals found to have a substance abuse problem. As part of an employee's rehabilitation and return to work, workplace parties may agree that the employee undergo random, unannounced drug or alcohol testing for a period of time.

In terms of the practical impact of *Irving* on safety-sensitive unionized workplaces, employers should regard this decision as establishing a significant bar to the implementation of a universal random drug and alcohol testing policy. Unless an employer can demonstrate that it operates a safety-sensitive unionized workplace that is afflicted with "enhanced safety risks," such as a general substance abuse problem at the workplace, it will likely be unable to justify universal random drug and alcohol testing.

THE NON-UNIONIZED CONTEXT

While *Irving* clarified the law with respect to universal random drug and alcohol testing in a safety-sensitive unionized workplace, it left open the question of what standards apply to alcohol and drug testing in a non-unionized workplace. At present, the analysis of the Ontario Court of Appeal in *Entrop v. Imperial Oil Ltd.* ("*Entrop*") remains the leading authority on the issue of drug and alcohol testing in non-unionized workplaces in Ontario.

> This analysis requires decision-makers to balance the employer's safety concerns against the employees' right to privacy.

As detailed in *Entrop*, the pre-eminent concern for employers in the non-unionized context is whether a drug and alcohol testing policy is compliant with the Ontario *Human Rights Code* (the "*Code*"). Under that analysis, in order to avoid a finding that a policy is in breach of the *Code*, employers must be able to demonstrate that their testing programs advance a *bona fide* occupational requirement and that employees with a drug or alcohol addiction will be accommodated to the point of undue hardship. Drug and alcohol testing will be found to constitute a *bona fide* occupational requirement where the employer can demonstrate a justifiable reason for the testing. Interestingly, the most common justifications, including reasonable cause, a significant accident or as part of a rehabilitation program, are

the same as those identified above as reasonable justification for a testing policy in a unionized environment.

At this time, it remains to be seen how the issue of universal random testing will develop in non-unionized workplaces, and factors point in different directions.

Despite the similarities with regard to plausible justifications for drug and alcohol testing, there is one critical distinguishing element between unionized and non-unionized workplaces. While the majority in *Irving* equated drug and alcohol testing and treated their permissibility in the same manner, the Court of Appeal in *Entrop* distinguished between an employer's ability to implement random alcohol testing as opposed to random drug testing. In fact, the Court held that random alcohol testing for employees in safety-sensitive situations is permissible, provided that the duty to accommodate has been factored in, while random drug testing in the same situation is not permissible because the technology used does not measure current impairment.

At this time, it remains to be seen how the issue of universal random testing will develop in non-unionized workplaces, and factors point in different directions. For example, in the ten years since *Entrop* was decided, there have been significant technological advances in the field of drug testing, which might alleviate some of the concerns raised by the Court in *Entrop*. On the other hand, while the *Irving* decision focused on unionized workplaces only, some of the language used by the majority could suggest that the "balancing of interests" approach applied in the context of a unionized workplace may also have some application to the non-unionized environment.

For now, *Entrop* will continue to be the binding authority on the matter until the Ontario Court of Appeal or Supreme Court is given cause to re-examine the issue of universal random drug and alcohol testing in the non-unionized context. In the meantime, employers must continue to implement only those policies for which they can demonstrate a *bona fide* occupational requirement, while perhaps also pausing to consider how the policy might be regarded if balanced against an employee's right to privacy.

***Kathryn Bird** is an associate lawyer at Hicks Morley's Toronto office. Kathryn regularly advises public and private sector employers, both unionized and non-unionized, on litigation, human rights and labour-related issues. In addition, Kathryn advises public and private entities about their employment and service-related accessibility and accommodation obligations. Kathryn regularly appears before Superior and Appellate Courts, the Human Rights Tribunal of Ontario, labour arbitrators and the Ontario Labour Relations Board.*

Tel: 416.864.7353
Email: kathryn-bird@hicksmorley.com

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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.

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November 15	School Board Management Conference
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November 28	Workplace Investigation Training Workshop

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

CLIENT CONFERENCES 2014
ON YOUR MARK

Our biennial, complimentary client conferences reflect our commitment to keeping you informed about the latest developments and best practices, including strategies that can help your organization's human resource management.

Please mark the following dates in your calendar, and join us this coming spring at a location near you.

Ottawa: **May 9**
Kingston: **May 13**
London: **May 28**
Waterloo: **June 4**
Toronto: **Details to follow**

Visit hicksmorley.com for details.

BEST PRACTICES ON TERMINATION

The law governing individual employment relationships is always evolving. If your practices as an employer do not evolve in step with the law – especially concerning the manner in which terminations occur – your organization may be exposed to a myriad of legal claims. With this in mind, here are ten best practices for conducting terminations fairly and prudently – and limiting your organization's exposure to potential legal claims.

BY: CHERYL A. WARAM

1. CHECK THE ORIGINAL EMPLOYMENT CONTRACT

Check to see whether the employee had entered into a written employment contract or had signed an offer letter. Employment contracts often limit entitlements to the minimums in the *Employment Standards Act, 2000* ("*ESA*") or some other formula. If you are relying on such language, ensure that the language is clear and unambiguous.

Before termination, investigate the circumstances at the time of hiring to determine whether other factors exist that could impact an appropriate severance package. Was the employee lured away from previous, stable employment? Did he or she relocate? Were any promises or representations made? Is the employee bound to any restrictive covenants?

2. CONSIDER ANY POLICIES AND PROCEDURES IN PLACE

Determine if any policies or procedures exist within your organization regarding the termination process. If they do exist, these

should be carefully followed before, during and after termination.

3. ASSESS REASONABLE NOTICE INDIVIDUALLY

Unless there is a termination clause in the original employment contract, determining "reasonable" notice is not an exact science, and you must consider factors that are unique to each employee. Beware of focusing on the employee's age and years of service. The "one month per year of service" approach has been consistently rejected by the courts, as has offering a lower-value severance package to unskilled or lower-level employees.

4. DON'T FORGET BENEFITS AND OTHER PERKS

Pay in lieu of notice must compensate the employee as though he or she remained employed throughout the notice period. Accordingly, be sure to factor in whether the employee receives allowances or whether a bonus would have been paid during the period. Of particular importance is ensuring the employee has access to benefits coverage: failing to account for benefits can have devastating results if the employee becomes disabled during the reasonable notice period.

5. AT THE TERMINATION MEETING, BE CANDID, DISCREET AND COMMUNICATE CLEARLY

The termination meeting with the employee should be in person and in private. For non-cause terminations, you must provide a written termination notice identifying the termination date and clearly setting out the notice package.

Whether or not emotions are inflamed, you must avoid unfair or callous conduct at this meeting, such as being untruthful, misleading or unduly insensitive. Where appropriate, you can give reasons for the termination and answer questions candidly. The employee should be given time to compose himself or herself and, unless there are security concerns, he or she should be permitted to leave the workplace discreetly. After that, you should be circumspect when communicating about the employee's departure. Failing to act in good faith can, in itself, attract additional (and sometimes significant) damages.

For non-cause terminations, you must provide a written termination notice identifying the termination date and clearly setting out the notice package.

6. OPTIONS TO BE OFFERED UPON TERMINATION

If the employee launches a wrongful dismissal claim, you may be able to limit your liability by proving that the employee failed to diligently seek reasonable employment to offset the alleged losses. Offering alternate employment is one way to accomplish this, if such an offer is reasonable and does not subject the employee to hostility or embarrassment. If re-employment is not practical, consider paying for outplacement, relocation, moving or other allowances. Doing so helps terminated employees land on their feet, while building a legal defence if they fail to participate.

7. GIVE TIME TO CONSIDER A RELEASE

It is prudent to have the employee sign a release when the termination package exceeds his or her minimum *ESA* entitlements. Employees should

be given a reasonable amount of time to consider the release and seek whatever legal or professional advice they consider necessary. If the employee requests an extension of time, it is normally best to grant it. Undue pressure to accept an offer, or misrepresentation as to an employee's entitlements, can not only vitiate the release but also lead to damages for bad faith conduct.

8. PROVIDE THE LEGAL ENTITLEMENTS PROMPTLY

Upon termination, the employee has certain entitlements for which no release is required, and these must be provided by you. For example, there is a five-day time limit for issuing a Record of Employment. In addition, the minimum notice, severance and benefit entitlement, as may be applicable under the *ESA*, must be paid. This requirement is subject to certain exceptions, such as where wilful misconduct has given rise to the termination. Finally, you must pay any outstanding wages, gratuities or vacation pay entitlement to the employee within seven days of termination (or the next scheduled payday).

9. DOES CAUSE EXIST? CONSIDER THE CONTEXT FIRST

"Cause" can be considered a fundamental breach of the employment relationship, but it cannot be determined in a vacuum. The context and surrounding circumstances are critical to the severity of the misconduct. It is always prudent for you to have allegations of cause investigated thoroughly and neutrally before termination. A shoddy investigation may lead to large damages awards, particularly where false accusations cause harm to the employee.

10. THE TERMINATION MEETING WHERE CAUSE IS ALLEGED

The termination meeting with the employee should be in person and in private. At the meeting, you must give the employee written notice of the termination and the reasons for the termination. As with non-cause terminations, you must take every step to avoid being callous or unfair in your actions. Before the meeting, you should make an assessment as to whether there are security concerns with the employee leaving the premises, and if so, how to best deal with those concerns.

Conducting a termination is never easy. Each one engages different considerations and strategies. Utilizing these ten best practices can go a long way towards protecting your organization from liability and, perhaps ideally, ending the employment on a more positive note.

Cheryl Waram *is an associate lawyer in Hicks Morley's Ottawa office. She advises public and private sector clients on a wide variety of human resources matters in both the unionized and non-unionized settings, including collective agreement interpretation, union certification, workforce restructuring, information and privacy issues, policy and contract drafting, and disability accommodation. Cheryl has appeared at various levels of court and has advocated on behalf of her clients before labour boards, employment standards officers, grievance arbitrators and human rights tribunals.*

Tel: 613.369.2120
Email: cheryl-waram@hicksmorley.com

LONDON OFFICE ORIGINAL

Bob Atkinson began his career at Hicks Morley's Toronto office in 1984 – but the opportunity and challenge of starting up a new office in a new city brought him to London in 1993. Bob has practised from the firm's London office ever since, serving both the public and private sectors on a range of labour and employment matters.

We spoke to Bob in September about his move to the London office and the growth of his practice over the years.

Is southwestern Ontario where it all began for you?

I actually didn't get to London until I went to Western Law. I was born in Toronto and went to high school there. I started my career there as well.

How did your interest in law develop?

I completed a degree in political studies at Queen's, and my interest in law really developed from my constitutional and political theory courses in that program.

My interest in a litigation career developed in my third year of law school at Western, when I worked for a term at the student legal clinic in London. That gave me exposure to minor criminal matters, landlord and tenant litigation, *Highway Traffic Act* cases – different forms of advocacy work. I really liked "being on my feet" and advocating for clients.

How did that play out after law school?

I articled at the Federal Department of Justice in Toronto, which was a fantastic litigation experience, and then accepted a clerkship at what was then known as the High Court of Justice, assisting five judges with their work at Osgoode Hall.

When did labour law enter the picture?

I decided to do a Masters in Law at Monash University in Melbourne, Australia – and a course in comparative labour law really caught my interest. Don Carter, a former Chair of the Ontario Labour Relations Board

and Queen's Law School professor who was visiting the university at the time, was the one who actually marked my thesis. I passed! He also highly recommended Hicks Morley as a place to work, so I applied to the firm when I got back to Toronto and was hired as an associate.

How were your early years there?

It was still a relatively small firm – I think I was the 19th lawyer – and mentorship was then, and still is, a key element of the firm's success. It was really a combination of watching the senior partners in action and being given my own work very early on. Within a few months of starting, I was arguing my own cases. I knew I had found my calling.

That was in 1984, and it was still a fairly traditional labour law practice – Labour Board matters, collective bargaining and grievance arbitration. But the explosion of work in other areas – like human rights, occupational health and safety, pay equity, and workers' compensation – happened soon after, so my areas of practice have broadened considerably over the years.

How did the idea of a London office come to pass?

Another firm partner, Barry Brown, and I had clients in southwestern Ontario, as did a number of other lawyers in the firm. We saw a good opportunity to serve a number of existing clients closer to their workplaces. And there was plenty of new business opportunity too. With more than a half-million people in the region, London was an obvious choice of location, being a major centre that's centrally located.

It's really given us much easier access to our clients. In the type of work that we do there's a huge advantage to actually meeting on-site to experience the workplace first-hand.

And even back in 1993, we were connected to Toronto and Waterloo office colleagues as if they were just down the hall – with a four-digit phone number that could reach any lawyer. And of course, the Internet and other technologies have made this even easier today.

Within a few months of starting, I was arguing my own cases. I knew I had found my calling.

How have issues changed for your clients over the years, from an HR law perspective?

Given the most recent recession and government restraint measures, I think that the universal issue that both public and private sector clients are dealing with is trying to find ways to do things better and more efficiently with their existing resources. This can involve any number of initiatives, from staffing changes to attendance management programs.

Another big change is the use and abuse of social networks at work. It's really changed the types of things employers have to deal with in the workplace – and raises interesting legal issues for employers as well.

How about your spare time – what do you enjoy doing?

We're new cottage-owners, so we've been spending a lot of our spare time there. And I enjoy golfing in the summer and skiing in the winter. Our three girls are now in their 20s and are all independent. But we're still very closely connected to their lives – and I know they will always be a welcome focus for us.

HICKS MORLEY WELCOMES FOUR NEW ASSOCIATES

Hicks Morley is pleased to welcome back four new associates to the Toronto office, following the successful completion of their articles at the firm and call to the Bar in 2013.

JOSHUA F. CONCESSAO

Joshua currently practises in all areas of labour and employment law. He provides advice and representation to employers and management on a wide range of labour and employment issues including labour disputes, grievance arbitrations, wrongful dismissals, employment standards, employment contracts, human rights and accommodation, and occupational health and safety. Joshua received his Juris Doctor degree from the Faculty of Law at Queen's University. While attending Queen's, Joshua was a volunteer caseworker at the Queen's Legal Aid Clinic and participated as an oralist in the Wilson Moot. Joshua articled at the firm before returning in 2013 as an associate.

Joshua can be reached at 416.864.7027
or joshua-concessao@hicksmorley.com

MICHELLE C. FOLLIOTT

Michelle currently practises in all areas of labour and employment law, and provides advice and representation to employers and management on a wide range of labour and employment issues including human rights and accommodation, collective bargaining, labour disputes, grievance arbitrations, wrongful dismissals and employment contracts. Michelle is also active in providing training seminars for clients. Michelle received her Juris Doctor degree from the University of Toronto, where she worked in the criminal division of the school's community legal clinic and was awarded Best Written Submissions for her involvement with the University of Oxford International Intellectual Property Moot. Michelle summered and articled with the firm before returning as an associate in 2013.

Michelle can be reached at 416.864.7028
or michelle-folliott@hicksmorley.com

DIANNE E. JOZEFACKI

Dianne currently practises in all areas of labour and employment law. She provides advice and representation to employers and management in both the public and private sectors on a wide range of labour and employment issues including labour disputes, grievance arbitrations, wrongful dismissals, employment standards, employment contracts, human rights and accommodation, and related court litigation. Dianne received her Juris Doctor degree from the University of Ottawa, graduating *cum laude* on the Dean's Honour List. During law school, she competed in the 2011 Hicks Morley Moot. Dianne was both a summer student and then an articling student with the firm before returning in 2013 as an associate. Dianne speaks fluently in French.

Dianne can be reached at 416.864.7029
or dianne-jozefacki@hicksmorley.com

AMANDA E. LAWRENCE

Amanda currently practises in all areas of labour and employment law, providing strategic advice and representation to employers and management on a wide range of labour and employment issues, including labour disputes, grievance arbitrations, wrongful dismissals, employment standards, employment contracts, accommodation and human rights applications. Amanda received her Juris Doctor degree from the University of Toronto and has a Bachelor of Arts (Honours) in Political Science from Acadia University. While attending law school, she volunteered as a participant in the Family Law Project. Amanda articled with Hicks Morley before returning as an associate in 2013.

Amanda can be reached at 416.864.7030
or amanda-lawrence@hicksmorley.com

HR QUICK HITS

Recent cases of note

The Ontario Court of Appeal recently released two decisions that together establish a complete prohibition against holding a cell phone while driving in Ontario. Both decisions specifically dealt with the interpretation of section 78.1(1) of the *Highway Traffic Act*, which prohibits driving while "holding or using a hand-held wireless communication device [e.g. a cell phone] or other prescribed device that is capable of receiving or transmitting telephone communications, electronic data, mail or text messages."

In the first case, *R. v. Kazemi*, the accused was observed holding a cell phone at a stoplight. She alleged that the cell phone had been on the seat and dropped to the floor when she braked, and that she had merely picked it up. While she admitted that the cell phone was in her hand, she denied that she was "holding" the cell phone within the meaning of section 78.1(1). The Court rejected this argument, and ruled that while not expressly defined in the legislation, the ordinary meaning and dictionary definitions of "holding" a cell phone – "having it in one's hand," and "to have a grip on" or "to support in or with the hands" respectively – best achieve the Legislature's purpose in enacting the section. It stated:

> [14] Road safety is best ensured by a complete prohibition on having a cell phone in one's hand at all while driving. A complete prohibition also best focuses a driver's undivided attention on driving. It eliminates any risk of the driver being distracted by the information on the cell phone. It removes any temptation to use the cell phone while driving. And it prevents any possibility of the cell phone physically interfering with the driver's ability to drive. In short, it removes the various ways that road safety and driver attention can be harmed if a driver has a cell phone in his or her hand while driving.

Moreover, the Court ruled that no minimum period of sustained "holding" is required to trigger the provision. Ultimately, the Court upheld the conviction.

In the second case, *R. v. Pizzurro*, the accused did not dispute that he had been "holding" a cell phone while driving. Instead, he argued that the Crown had failed to establish that the cell phone he was holding was "capable of receiving or transmitting telephone communications, electronic data, mail or text messages." In the absence of evidence demonstrating that the cell phone was operational at the material time, the Crown, he alleged, had failed to discharge its burden. Here, the Court clarified that the cell phone being held need not be proven to have been operational at the material time: it is sufficient for a driver to be caught "holding" a cell phone, whether that phone is receiving or transmitting data, since cell phones are well known to have such capability. The receiving or transmitting capability requirement applies only to any other devices that may be prescribed by regulation in the future.

The Court's approach in these cases reinforces the government's stated intention of countering distracted driving by restricting the use of cell phones to a truly "hands-free" mode.

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

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