

(Almost) Everything  
your need to know about  
**Canadian vs U.S.**  
**Labour Law**



# Introductions



**Laurie M. Robson**

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Ms. Robson advises employers on the interpretation and application of collective agreements, unfair labour practices, and acts as employer spokesperson and a strategist in the negotiation of collective agreements in the private sector.

She appears as employer counsel in grievance arbitrations, and before the courts and administrative tribunals including the Alberta Labour Relations Board.

She also advises employers on the development and implementation of human resources policies and procedures, employment contracts and termination proposals.



**Brian D. Portas**

Partner | Labour and Employment,  
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Brian Portas is a partner in our Labour and Employment Group. He has been selected for inclusion in the *Best Lawyers™ in Canada* for Immigration Law since 2014. Brian is also a Chartered Professional in Human Resources (CPHR) (previously Certified Human Resources Professional (CHRP)).

In his business immigration practice, Brian has assisted clients with obtaining Canadian work permits (including applications that require Labour Market Impact Assessments/Labour Market Opinions from Service Canada), preparing permanent residence applications, citizenship applications, and dealing with other immigration issues such as temporary entry into Canada as a business visitor.

## Julie Merten

Senior Counsel, BP America Inc.

Julie Merten is a Senior Counsel in BP's Labor Employment and Employee Benefits practice group. She is responsible for managing the labor & employment issues for a wide variety of clients within BP in both the US and Canada.

Julie's clients include oil/gas upstream and refining operations, centralized human resource functions and BP's supply and trading business.

Julie's practice includes employment litigation in both the US and Canada, collective bargaining and labor law issues, advising on non-compete and non-solicitation issues, the development and implementation of human resource policies, and counseling on a wide range of labor & employment issues for both the US and Canada.

She has been the Vice President, President and is now the Treasurer of the American Petroleum Labor Lawyer Association (APLLA).

Julie graduated from the University of Texas School of Law.

## Kimberley Pilcher



**Kimberly D. Pilcher**

Executive Counsel  
Labor & Employment Law  
Exxon Mobil Corporation

Kim first chairs cases in labor arbitration and handles a wide variety of labor and employment matters involving the: National Labor Relations Act, Fair Labor Standards Act, Family Medical Leave Act, Americans with Disability Act, Equal Employment Opportunity Commission matters, harassment policy investigations and international projects – essentially anything employee related.

- Executive Counsel at Exxon Mobil Corporation in the Labor & Employment Law group for 20 years
- BBA – University of Texas at San Antonio
- MBA – Our Lady of the Lake University
- JD - Southern Methodist University

- 1. Some “foundational” differences**
- 2. Unionization rates and processes**
- 3. The Legalization of Cannabis**
- 4. Drug & Alcohol testing**
- 5. Wage and Hour Class Actions**
- 6. Immigration**

# Canadian L&E Laws are not National in Scope

- Provincial legislation governs all aspects of the workplace unless employees are employed “on or in connection with the operation of any **federal** work, undertaking or business...”
  - Business itself is a **federal** work/undertaking; or
  - Business is integral to, dependant on or a vital part of the federal
    - *Feds = approximately 10% of the Canadian workforce (airlines, shipping, inter-provincial trucking, rail....)*
- Result?
  - Subtle to major differences in labour, employment standards, health and safety, workers' compensation and human rights laws, regulations, procedures and practices
  - Single jurisdiction litigation

# No “at will” Employment

The concept doesn't exist!

- All employees in Canada work under employment contracts – whether verbal, written or implied
- In the absence of just cause, and without enforceable termination provisions in an employment agreement, employees are entitled to statutory notice of termination, statutory severance pay (in some provinces) AND “reasonable notice at common law”
  - Factors include age, length of service, nature of position, circumstances of hire
  - Notice can be upwards of 4 – 6 weeks per year of service
  - Benefits and other perks (i.e. bonuses) payable as well

# Category of Dependent Contractors

- 3 of the 10 provincial labour relations statutes (Ontario, Alberta, and British Columbia) and the *Canada Labour Code* (federal employees) refer to “dependent contractors”
  - Workers who are in a situation of economic dependence on a party that provides the bulk of their work
  - Deemed to be an employee and entitled to organize/collectively bargain
- Important, but still unanswered question, is how this applies to those in the “Gig” economy
  - Taxi drivers vs Uber/Lyft drivers?

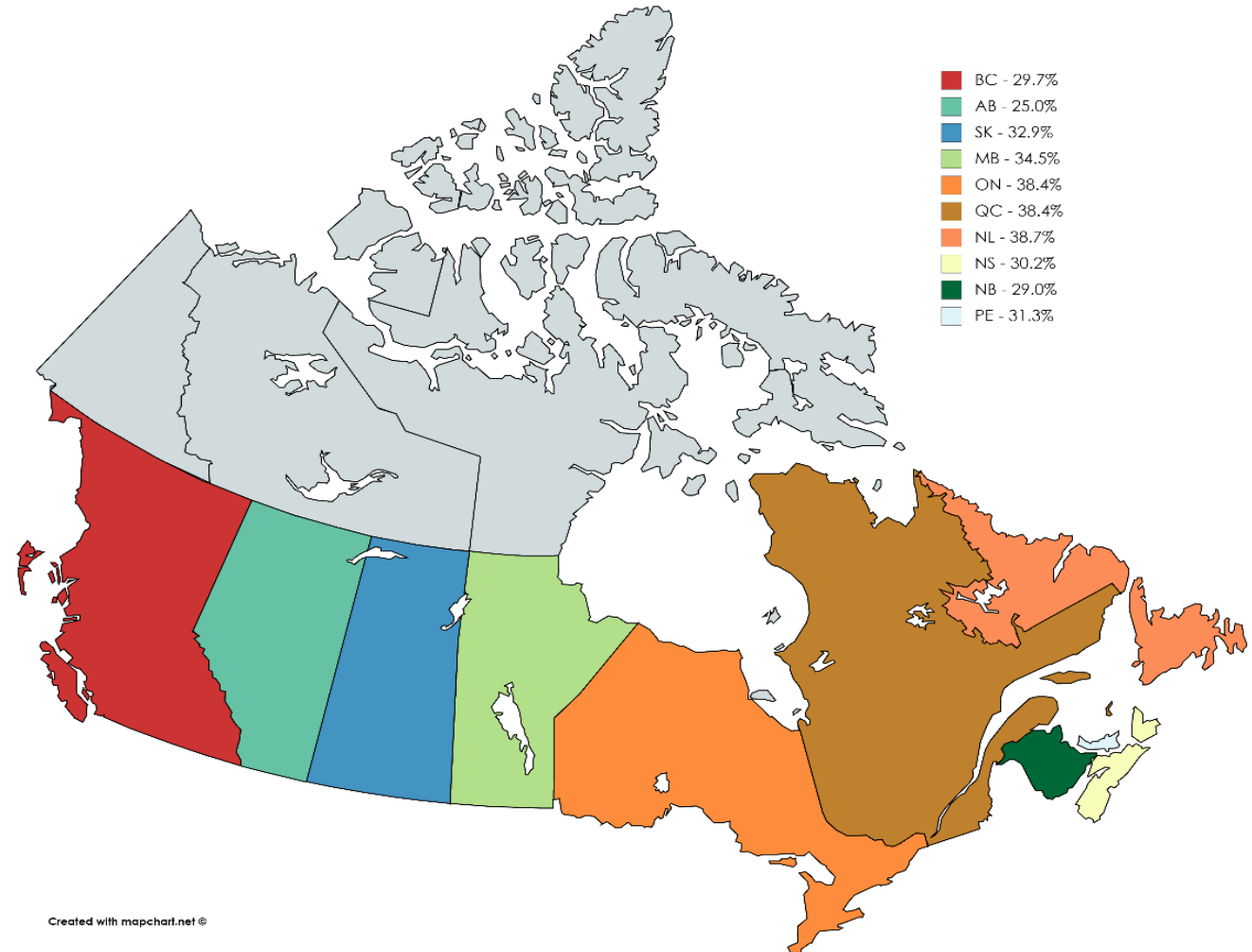
# No Right to “Right-to-Work”

- Canada operates under the “Rand-formula”
  - The payment of union dues is mandatory regardless of the worker’s union status
    - *Minimal exceptions (i.e. religious)*
  - Model is designed to ensure that no employee will opt out of a union simply to avoid dues, yet reap the benefits of collective bargaining
  - Generally imposed by the relevant statute



# Unionization in Canada Rates (2017)

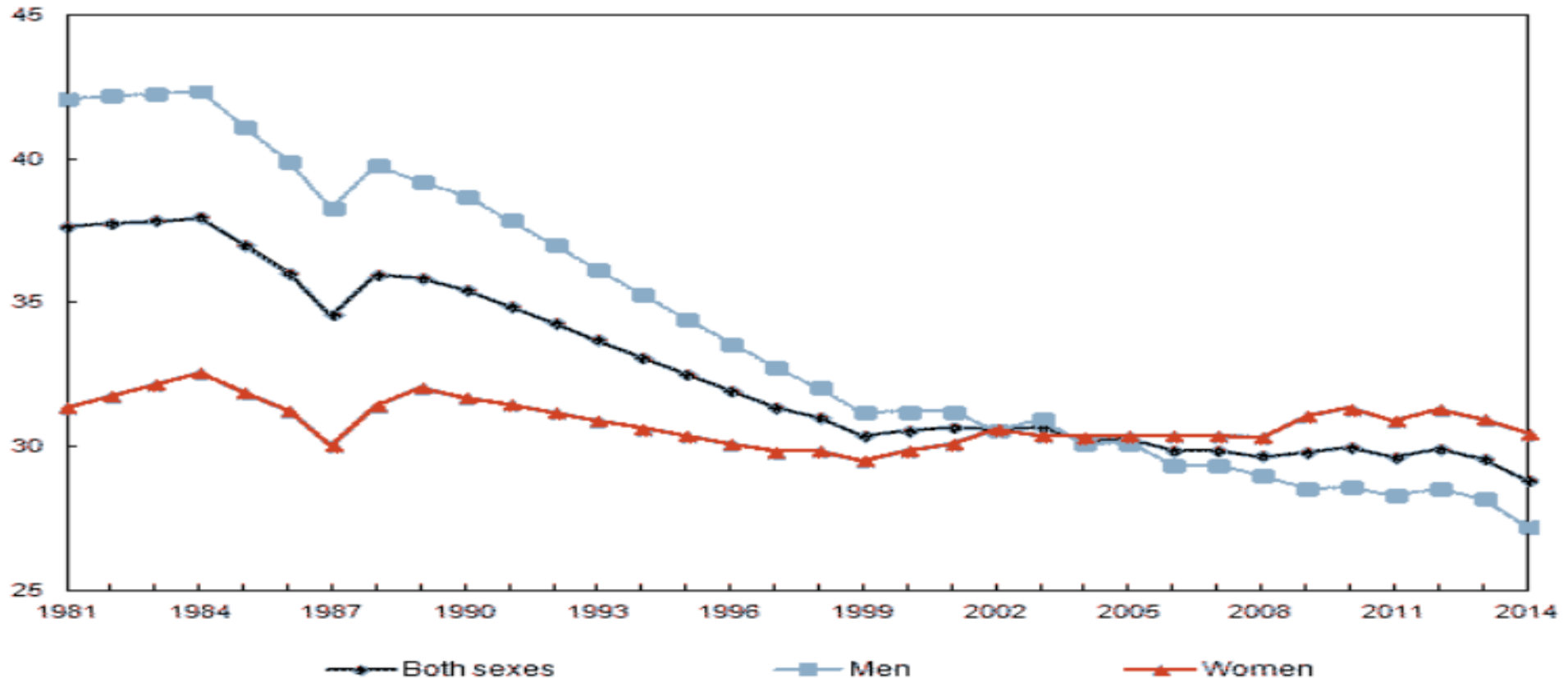
- Canada
  - Public Sector – 75.5%
  - Private Sector – 17.5%
  - Combined – 30.4%
- USA
  - 10.7%
- Provincial (combined)
  - Newfoundland and Labrador - 38.7%
  - Quebec - 38.4%
  - Manitoba - 34.5%
  - Saskatchewan - 32.9%
  - Nova Scotia - 30.2%
  - Prince Edward Island- 31.3%
  - British Columbia - 29.7%
  - New Brunswick – 29.0%
  - Ontario - 26.8%
  - Alberta – 25.0%



# Historic Trends: Rates are Falling

**Chart 1**  
**Unionization rates of employed individuals aged 17 to 64, 1981 to 2014**

percentage



**Sources:** Statistics Canada, Labour Force Survey, 1997 to 2014; Labour Market Activity Survey, 1986 to 1990; Survey of Union Membership, 1984; Survey of Work History, 1981.

# Reasons for the Trend?

- Loss of manufacturing (i.e. Ontario & Michigan)
- Demographics
  - Younger workers tend to choose flexibility over *perceived* stability
    - *50% of Uber's drivers are between 18-39 years old (Bloomberg, January 2018)*
- Easier access to knowledge and litigation
- Legislation that addresses traditional union demands
  - Increases to minimum wage
  - Pay equity
  - Leaves of absence (paid and unpaid)
  - Scheduling and time off

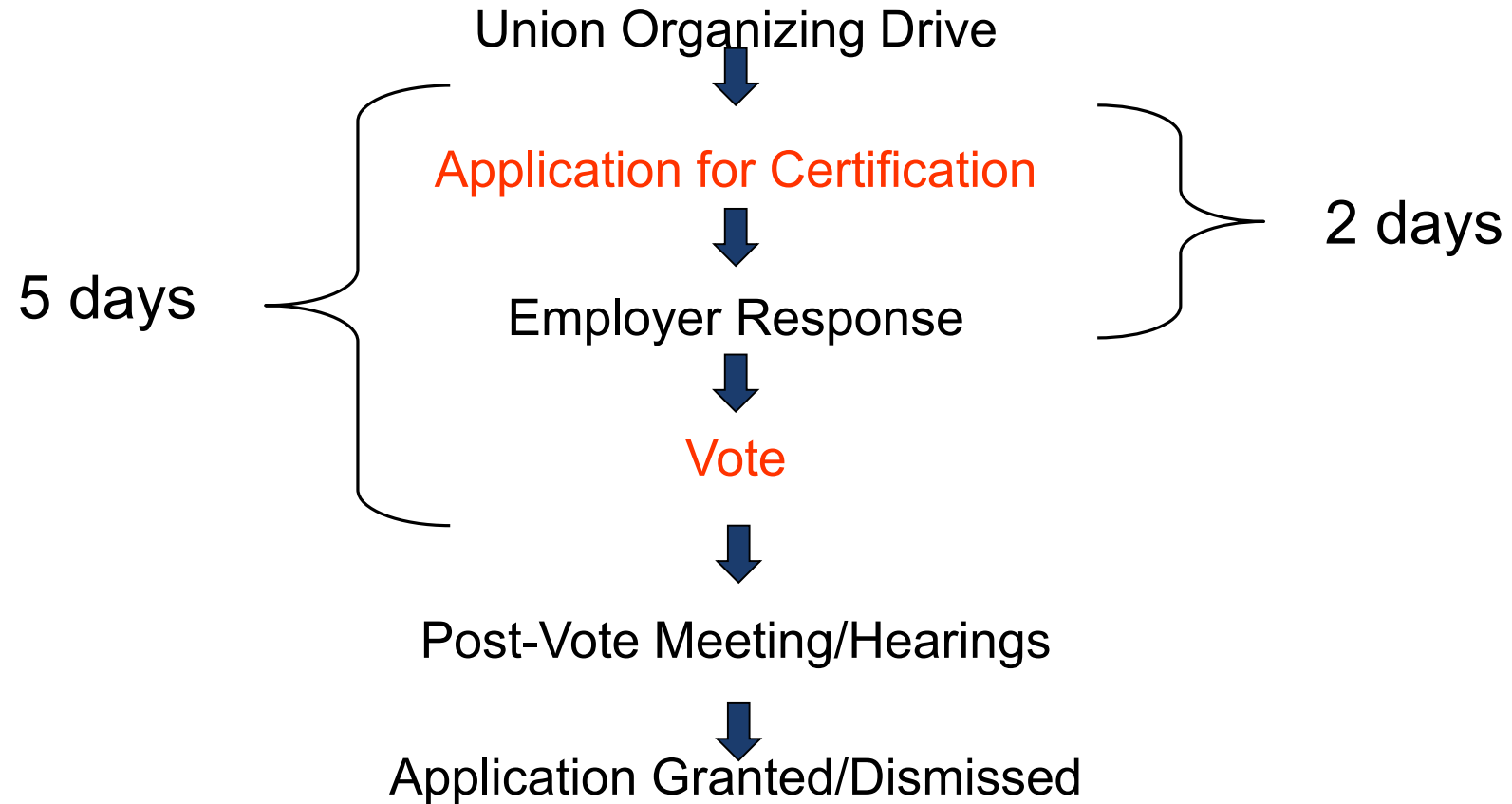
# How Unions Obtain Bargaining Rights

- Voluntary recognition
  - The “dance with the devil you know” approach - employer agrees to recognize the union as the bargaining agent
  - Available in every Canadian jurisdiction except Quebec
- Application (petition)
  - The most common approach
  - Scope and extent of employer’s counter-campaign differs between provinces
- Remedial certification by a labour board
  - Following really bad employer behaviour!
  - Available in all provinces except Saskatchewan

# Card vs. Vote-Based Certification

	Card Check Unionization	Support Required to Obtain Ballot Vote	Vote Timing
<b>New Brunswick</b>	60% (Mandatory), 50% (Discretionary)	40%	Not defined
<b>P.E.I.</b>	50% + 1	50% + 1	Not defined
<b>Quebec</b>	50% + 1	35-50%	Not defined
<b>Saskatchewan</b>	N/A	45%	3+ days
<b>Nova Scotia</b>	N/A 50% + 1 (Construction)	40%	3-5 days
<b>Newfoundland &amp; Labrador</b>	N/A	50% + 1	5 days
<b>Ontario</b>	N/A 55% + 1 (Construction)	40%	5 days
<b>Manitoba</b>	N/A	40%	Within 7 days
<b>British Columbia</b>	N/A	45%	Within 10 days
<b>Alberta</b>	N/A	40%	Within 20 Board days
<b>Federal</b>	50% + 1	35-50%	Within 30 calendar days

# Example: The Ontario Model (talk about quickie elections!)



# Strikes & Picketing

- Generally, to be in a lawful strike or lockout position, any existing collective agreement must have expired *and* the provincial conciliation or mediation process must first be exhausted.
  - Can't judge a CBA by its cover
- If strike is legal, picketing (primary or secondary) is legal if conducted in a lawful manner
  - Peaceful picketing is protected by the *Charter of Rights and Freedoms* (SCC, *Pepsi*, 2002)
  - Unlawful picketing includes:
    - Tortious or criminal activity
    - Trespass to property
    - Significant delays (*very fact-specific*)
- To restrain picketing, need to show irreparable harm
- Right to use “replacement workers” generally exists

# The New World – Legalization of Cannabis in Canada

- Canada's regulated commercial cannabis industry began in 2013
- Prior to October 17, 2018, legal access to cannabis was for medical purposes only and was regulated entirely federally
- Cannabis in Canada is regulated federally, provincially and municipally



# Bill C-45: Legalization of Recreational Cannabis

Bill C-45: *An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts*, (the “**Cannabis Act**”)

- Cannabis removed from Item 1 of Schedule II of the *Controlled Drugs and Substances Act* (the “**CDSA**”)
- Bill C-45 permits adults to legally possess and use cannabis without a prescription
  - Permits public possession of up to 30 grams of dried legal cannabis or equivalent
  - Allows cultivation of up to 4 plants per household
- Creates the criminal offence of selling cannabis to minors, and imposes significant penalties on those who engage young Canadians in cannabis-related offences
- Offences also relate to “illicit cannabis”

# Detecting Impairment

- Effect of cannabis depends on THC content, frequency of use, whether combined consumption with alcohol or other drugs
- No scientific consensus on the definition of cannabis “impairment” or safe limit for consumption
- Bill C-46 authorized the Federal government to approve “oral fluid drug screeners” for roadside stops – criticized for lack of connection to current impairment
  - Current practices are to use Drug Recognition Experts or Standardized Field Sobriety Tests
  - Blood or urine samples may also be requested by police
- Federal government committee currently reviewing issue of workplace cannabis testing – employers want rules for random drug testing in “safety-sensitive jobs”

# Some issues arising from Bill C-45/C-46

- Age – 18, or as determined by provinces
- Retail Sales – as determined by provinces
- No regulations re: edibles (expected in 2019)
- Impairment testing by police and in workplaces – major unresolved issue, expected to bring challenges in criminal courts and in workplaces
- Federal government has opted for “*per se*” THC limits – no scientific proof of link between limits and impairment
- Bill C-46 will enable screening of drivers without reasonable suspicion

# Issues for Employers - Cannabis

## Human Rights

- Potential addiction issues
  - *Addiction is considered a disability, which is a protected ground under Human Rights legislation*
- Underlying disability?
  - *Why is the employee using medical cannabis? Likely there is a duty to accommodate.*

## Impaired employees

- Occupational Health and Safety legislation
- Ability to perform job duties
- Currently no accepted test for impairment from cannabis

## Drug testing – what is permitted?

- Privacy versus safety

# Issues for Employers - Cannabis

- No generally recognized test for impairment, nor any consensus on how long after use impairment can last
- Health Canada:
  - “Impairment can last for more than 24 hours after cannabis use, well after other effects may have faded”
- The time it takes for the effects of cannabis to wear off depends on:
  - How much and how often person has consumed it
  - The concentration of the cannabis that is taken
  - Whether it was smoked or ingested through other means
- There is no standard waiting time to drive after using cannabis

# Drug & Alcohol Testing

- In a word - **Restrictive!**
- While greater rights for post-incident or reasonable cause testing, random testing is currently limited to:
  - Dangerous workplaces (not easy to prove)
  - Proof of a general problem with substance abuse in the workplace
- *Unifor v. Suncor* (2018)
  - Suncor implemented random drug and alcohol testing at one of its oil sands in Alberta, and Unifor, the union, challenged the legality of that policy
  - An arbitration tribunal concluded that the testing policy was unreasonable, however, the ABQB and the ABCA quashed that decision and sent the matter back to a fresh arbitration panel
  - Union and Suncor have agreed on a program of random testing – March 2019

## Ontario Human Rights Commission 2016 Policy says:

- Pre-employment testing is a violation of the *Human Rights Code*
- Testing after a conditional offer for a safety-sensitive position not recommended
- Positive tests should not lead to automatic negative consequence – accommodation required
- Reasonable grounds and post-incident testing may be acceptable where there is a link between impairment
- Reasonable grounds: seeing alcohol or drug use, acting in a way consistent with impairment, substances or paraphernalia near employee or his/her work area (e.g. empty bottles)
- Other methods such as interviewing the person about their behaviour, changing duties, offering accommodation are suggested.

# Pre-Employment Testing

## BC Hydro and Power Authority and IBEW, Local 258 (Alcohol & Drug Testing), Re, 2018 CarswellBC 1549

- Pre-employment testing for all individuals applying for safety sensitive positions is a bona fide occupational requirement and reasonable exercise of management rights
- A general problem with substance abuse *in the workplace* is not threshold for pre-employment testing
- Tests not intended to determine impairment, but to serve as a “red flag”
- Risk assessment and management is a legitimate objective for safety sensitive positions
- Unlike internal applicants, external candidates are not typically known to the hiring employer, and have a reduced expectation of privacy

## Mechanical Contractors Assn. Sarnia and UA, Local 663 (Alcohol and Drug Testing), Re, 2013 CarswellOnt 18985

- Mandatory pre-access alcohol and drug testing in respect of Suncor jobsites is discriminatory and an unreasonable exercise of management rights
- No evidence does not establish that there is a health and safety workplace problem due to alcohol or drug use
- Pre-access testing not a predictor of future use, current impairment or performance deficiency; only indicate past use, without indicating when or how much of the drug was used
- No thought given to personal privacy consideration



# Random Drug Testing

- Generally not permitted at the workplace
- Safety concerns at the workplace must be balanced against employees' privacy interests
- Following a Supreme Court decision in 2013 (*Irving*), employers have to lead evidence of:
  1. A dangerous workplace;
  2. A general workplace drug or alcohol problem; and
  3. The employer has exhausted other alternatives for addressing the problem
- This may be different where a universal random testing policy is negotiated as part of a collective agreement
- Random testing for a particular employee may be permitted where the position is safety-sensitive and:
  1. The employee returns to work following rehabilitation for an addiction issue
  2. The employer has reasonable cause to believe the employee is impaired at the workplace
  3. The employee is involved in a workplace accident or near-miss

# Post-Incident Drug Testing

*Canadian Energy Workers' Association v ATCO Electric Ltd.*, 2018 ABQB 258

- Grievors were involved in a minor accident at a remote worksite at Fort McMurray
- Mandatory post-incident drug testing based on the value of damage done
- Shortly after the incident, the employees were tested, and one test returned positive for cannabis
- The testing was upheld by an arbitrator and the court due to the risk of serious harm involved
- The employer was entitled to test to “rule out” the possibility of impairment where impairment was a possibility
- Grievance was dismissed as a result

# Dismissal for Recreational Use at Work?

## *Bombardier Transportation and Unifor, Local 1075 (2018)*

- Grievor dismissed because caught smoking cannabis at work
- Employer policy – consumption at work was grounds for just cause dismissal
- Grievor tested positive for THC but claimed to be a medical user
- Employer did not meet the burden of proof that the grievor was smoking at work
- Lack of impairment tests means employers require other evidence – as presence of THC does not demonstrate impairment or recent consumption

# Wage and Hour Class Actions

- Canada is experiencing an increase in wage/hour/overtime/misclassification class actions
- Wage and hour settlements in the U.S. resulted in a combined value of \$1.2 billion during 2016 and 2017.<sup>1</sup>
- Seeing an increase in the role of unions in connection with class claims
  - Backing the class claim and organizing at the same time
  - Referring to the class claim in support of campaign

# Canadian Business Immigration

- Business Visitors
  - Misrepresentation and Customs Searches
- Work Permit vs. Visa vs. Electronic Travel Authorization (eTA)
- Criminal Inadmissibility (DUI?) – Temporary Resident Permit (TRP)
- Temporary Foreign Worker Program (TFWP) – Labour Market Impact Assessment (LMIA)  
  
vs.
- International Mobility Program (IMP) – LMIA exemption categories

# Canadian Business Immigration

- NAFTA Professional (similar to TN visa)
  - CUSMA / USMCA / T-MEC
  - Provide professional level services in the field of qualification
- Intra-Company Transferee (similar to L1 visa)
  - Employed with the company outside Canada continuously for at least 1 year
  - Senior Manager / Executive or Specialized Knowledge Worker (not like H-1B visa)
- Global Skills Strategy effective June 12, 2017
  - Short-term work permit exemption (15 or 30 days) (NOC 0 and A only)
  - Global Talent Stream