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Respecting the Expertise of Administrative Tribunals: SCC

The Alberta Labour Relations Board's decision that Driver Iron was an employer under the *Labour Relations Code* and bound by collective agreements between an employers' association and the union was restored by the Supreme Court of Canada in [*Construction Labour Relations v. Driver Iron Inc.*](#), 2012 SCC 65. The decision reinforces the strong position the Supreme Court has taken on respecting the decisions of specialized administrative tribunals dealing with complex statutory regimes, as noted in the InHouse article [SCC says labour board was right all along](#).

Identifying a Gap not Necessarily Modifying an Offer to Settle: MBCA

The Human Rights Commission's decision to deem an offer to settle reasonable on condition that the release be limited to the complaint was reasonable and did not unilaterally amend the substance of the offer to settle according to the Court of Appeal in [*Korsch v. Human Rights Commission \(Man.\) et al.*](#), 2012 MBCA 108. The court did not go so far as to say that the Commission has the power under s.29 (2)(b) of *The Human Rights Code* to modify offers, however, saying that issue will have to be left for another day when the Commission provides reasons explaining its interpretation of s.29.

Claiming Unpaid Overtime in Court: MBQB

The master dismissed an employer's motion to strike a statement of claim for unpaid overtime in [*Hutlet v 4093887 Canada Ltd.*](#), 2012 MBQB 342, finding that the law in Manitoba is unsettled on whether an employee's right to overtime wages provided by *The Employment Standards Code* can be enforced in an action and that the issue could not be fully argued and considered on a motion. After examining conflicting appellate authority on the issue and noting the limitations of the statutory remedy the court concluded there was "merit to the plaintiff's position that there is a cause of action on the basis of breach of the statutory provisions for overtime, whether based on the breach of statute *simpliciter* or breach of contract." (para.85)

Professional Discipline and Disability: ABCA

The Alberta Court of Appeal addresses the topical issue of disability as a defence to professional discipline charges in [*Wright v College and Association of Registered Nurses of Alberta \(Appeals Committee\)*](#), 2012 ABCA 267. A majority of the court dismissed the appeals of two nurses who had been disciplined by their regulatory body for stealing hospital narcotics and falsifying records. The nurses argued their addictions were a disability which should have been accommodated under the *Alberta Human Rights Act* and that punishing them amounted to discrimination based on disability. As noted in this [ABlawg article](#) the Supreme Court may choose to weigh in on the issue given the split court.

Random Drug Testing: ABCA

The latest word on random drug testing comes from the Alberta Court of Appeal in [*Communications, Energy and Paperworkers Union, Local 707 v. Suncor Energy Inc.*](#), 2012 ABCA 373. The decision to uphold an injunction preventing the oil sands energy company Suncor from imposing random drug and alcohol testing on certain employees split the court. "The non-consensual taking of bodily fluids is a substantial affront to an individual's privacy rights," said the majority, and the immediate implementation of such intrusive testing could not be supported in the absence of immediate peril or significant risk of loss by job site accidents. This [post](#) on ABlawg discusses both ABCA decisions in the case.

The Supreme Court of Canada will rule on this issue when it gives its decision in [*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Limited*](#), heard December 7, 2012 and available on [webcast](#).

New and Proposed Legislation

Federal Update

- The senate passed [Bill C-45](#) (the second omnibus budget implementation bill introduced October 2012) on December 14, 2012 and the *Jobs and Growth Act, 2012* c.31 received royal assent the same day. Labour and employment law lawyers should be aware that ss. 219 to 232 of the bill (not yet in force) propose amendments to Part III of the *Canada Labour Code* which will affect employers (particularly those who are federally regulated) and employees. These include changes to the calculation of holiday and vacation pay, to the time limits for unpaid wages and other *Code* violations, and to the way in which the complaints process works. The bill also implements measures from the last budget, including tax changes regarding employer contributions to sickness or accident insurance plans, federal public service pension reform and amendments to the *Employment Insurance Act* affecting small business employer premiums. For a more extensive discussion of the changes see the [legislative summary](#) and these articles: [Federal Government Introduces Second Budget Implementation Bill](#) (Hicks Morley) and [Canada's Second Budget Implementation Bill's Impact](#) (Employment Professionals Canada blog).
- Several changes to the *Employment Insurance Act* (arising from the enactment of the *Jobs, Growth and Long-term Prosperity Act*) came into force January 6, 2013. Sections 605 and 607 of the Act were proclaimed in force by [SI/2012-98](#), providing for a new 36 month limitation period applicable to the repayment of certain employment insurance benefits (see new subsection 46.01 of the *Employment Insurance Act*). In addition, the [Employment Insurance Regulations](#) have been amended as noted in [SOR/2012-261](#) and [SOR /2012-297](#), creating three new categories of claimants and adding new definitions for "reasonable job search" and "suitable employment." All changes are part of Economic Action Plan 2012's goal to support Canadians returning to work according to this [government announcement](#). This [post](#) from The Stream provides further detail on the regulatory changes.
- [Bill C-44](#), the *Helping Families in Need Act*, received royal assent December 14, 2012. Parts of the Act came into force on royal assent and the remainder of the Act will come into force by order in council. The Act provides for income support for parents who take a leave from work due to the death or disappearance of their child as a result of a suspected *Criminal Code* offence. The Act also provides employment insurance benefits to parents caring for a child with a critical illness.

Manitoba Update

- [Bill 3](#) is Manitoba's response to Bill C-44, described above. It amends *The Employment Standards Code* to give Manitoba parents the right to take an unpaid leave from their employment and to be reinstated at the end of the leave in the situations described in the federal act. The bill received royal assent on December 6, 2012 and will come into force at the same time as the federal legislation.

- The Manitoba government introduced [Bill 15](#) on December 3, 2012. The bill repeals the provision of *The Employment Standards Code* that allows certain employers, by permit, to pay less than minimum wage to people with mental or physical disabilities. Existing permits will not be affected by the repeal and the change won't impact special employment programs for the disabled that are exempt from *The Employment Standards Code*. For more info see this Free Press article: ['Relic' lower wage for disabled to be repealed](#).

Recommended Reading

- [Perspectives](#) - the most recent CBA National Labour and Employment Law section newsletter contains articles on the attempt to have the NHL lockout declared illegal, on conditional certification, and on deference for arbitral awards.
- [Possibility of Temporary Layoffs Must Be Included in Employment Contract](#) - this Slaw post discusses an [Ontario case](#) in which the court found that in the absence of an express or implied contractual provision allowing temporary layoff, a temporary layoff constitutes termination of employment.
- [Rogue Ontario Employer Sentenced to Jail for ESA Violations](#) and [Jail Time for Employment Standards Violations in Ontario!](#) - these two posts discuss an Ontario decision in which an employer was sentenced to 90 days in jail for ignoring *Employment Standards Act* orders to pay \$125,000 worth of unpaid wages.
- [Don't Get Snowed Under by Overtime Claims: Six Ways to Reduce Risk - Labour + Employment Newsletter](#) - this Bull Houser article contains practical tips for employers on how to manage overtime claims.
- [Federal Government Cuts Employment Insurance Benefits to Temporary Foreign Workers](#) - this Workplace Wire article addresses the federal government's [controversial](#) decision to cut certain EI benefits to foreign workers which came into effect December 9, 2012.

Winter CPD: LSM

- [Writing to Persuade](#) - this advocacy writing workshop with instructor Stephen Armstrong is designed to teach litigators to write persuasive factums. Participants can register for a half or a full day program, with the afternoon session focussing on skills building using editing exercises. The program takes place February 21, 2013 at the Law Society classroom.
- [Powerful Witness Preparation](#) - spend a day immersing in the methods and procedure that will help you prepare witnesses to be powerful and persuasive communicators. Join presenter Dan Small at this highly acclaimed seminar to be held March 8, 2013 at the Law Society classroom. [Register](#) by February 1, 2013 to receive the early bird rate.

For those who prefer a webinar format, consider registering for the following programs:

- [Avoid Hating the Law 10 Years From Now: An Ethical Lesson From the Trenches](#) (February 12, 2013); [The Fear Factor: How Good Lawyers Get Into Bad Ethical Trouble](#) (February 26, 2013); and [It's Not "Time" Management, It's LIFEtime Management](#) (March 12, 2013) are all presentations by Stuart Teicher, a professional legal educator who focuses on ethics law. [Register](#) for 2 or more programs and save or get a discount if you register as a group.

Honouring Chief Justice Richard Scott on His Retirement

Manitoba's legal community is invited to participate in two events honouring Chief Justice Richard Scott on his retirement. An educational forum [Courting Change: The Changing Role of Courts](#) will be held February 8, 2013 and a [gala dinner](#) is planned for February 9, 2013. See www.scottretirement.org for more information.

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