

# Client Advisory

## Developments in executive compensation and governance, workforce rewards and pay equity, and inclusion and diversity – Fall 2023

December 21, 2023

### Summary

#### Executive compensation and governance

- Say-on-pay vote results
- Employee ownership trusts, other ITA and ITR amendments
- Corporate law developments
- Securities developments
- Bonus and DPSP taxation changes in Québec

#### Work, rewards and careers

- Employment equity, pay equity and pay transparency developments
- Minimum wage and public holiday developments
- Use of French by federally regulated private businesses
- Employment standards developments
- Competition developments
- Accessibility developments
- International credentialing
- Four-day workweek trial

#### Inclusion and diversity

- Women on boards of directors and in executive officer positions
- Wage gaps: Gender and disability
- Retaining older workers

- Continuing workforce impacts of COVID-19
- Federal initiatives
- Provincial initiatives

#### Case law

- Pay equity developments
- Employment standards considerations
- Constructive dismissal, condonation and factors affecting reasonable notice
- Class action developments
- Special damages and costs considerations
- Options and restricted stock units
- Restrictive covenants
- Corporate powers

## Executive compensation and governance

### Say-on-pay vote results

The 2023 proxy season marked the 14th year of voluntary say-on-pay in Canada. Overall, results were similar to past years, with average shareholder support remaining strong at 91%.

Five companies in 2023 received less than 50% shareholder support (versus four in 2022 and six in 2021), with pay-for-performance misalignment and problematic pay practices likely factors in the voting results. The vast majority of issuers received support above 80%, generally indicating alignment between disclosed executive compensation levels and overall company performance.

Highlights of the 2023 proxy season, according to a WTW analysis as at October 6, 2023, include:

- 261 companies adopted say-on-pay (compared to 250 in 2022), including 52 constituents of the S&P/TSX 60 Index and 174 constituents of the S&P/TSX Composite Index
- Among the total sample, 244 companies held a vote this year (compared to 225 in 2022)

| 2022      |  | 2023      |
|-----------|--|-----------|
| 250 / 225 | Number of companies / number of votes held       | 261 / 244 |
| 91%       | Average shareholder support                      | 91%       |
| 5% (11)   | ISS say-on-pay “against” vote recommendation     | 3% (7)    |
| 2% (4)    | Failure rate (less than 50% shareholder support) | 2% (5)    |

## Employee ownership trusts, other ITA and ITR amendments

The Department of Finance has proposed amendments to the income tax legislation, including: [Legislative Proposals Relating to the Income Tax Act and the Income Tax Regulations](#) and related [Explanatory Notes](#); as well as [Legislative Proposals Relating to the \*Income Tax Act\* and the \*Income Tax Regulations \(Technical Amendments\)\*](#) and related [Explanatory Notes](#).

### Employee ownership trusts

Employee ownership trusts were announced in [Budget 2023](#) to facilitate the transition of privately owned businesses to employees. Effective January 1, 2024, ITA amendments will permit certain private corporations controlled by a trust that meets various conditions and that satisfy certain control requirements (a “qualifying business”) to transfer the business to an irrevocable employee ownership trust (EOT). Subject to a probationary period of up to 12 months, beneficiaries must be employees or former employees of the qualifying business (excluding shareholders above specified thresholds).

The interest of each class of beneficiary (i.e., current or former employees) must be determined in the same manner. Beneficiary distributions must be determined by a reasonable and equitable combination of hours, remuneration (paid or payable), and period of employment. Different combinations could apply for different purposes or for current versus former employees. However, “excessive distributions” for higher-earning employees should be avoided.

Trustees must be either a Canadian corporation or individual, at least one-third of whom must also be current employees of the qualifying business. Qualifying transfers would benefit from a new 10-year capital gain reserve, a new 15-year exception to the shareholder loan rule, and a new 15-year exception to the deemed interest benefit rule (currently, a borrower must include any shareholder loan in income if not repaid by the end of the following calendar year, while a shareholder receives a deemed benefit if the interest rate charged on a corporate loan is below the prescribed interest rate).

Finally, in the 2023 [Fall Economic Statement](#), the government announced that it will exempt from taxation in 2024, 2025 and 2026 the first \$10 million in capital gains realized on the sale of a qualifying business to an Employee Ownership Trust, subject to certain conditions.

### Alternative minimum tax (AMT) for high-income individuals

To ensure a more equitable sharing of the tax burden among all Canadians by increasing the amount of taxes paid by high-income individuals and trusts, the formula for calculating their alternative minimum tax will be adjusted, effective for taxation years beginning after 2023. The current formula of “ $A \times (B - C) - D$ ” will change so that:

- “A” (the AMT rate) increases to 20.5% (from 15%)
- “C” changes from an individual’s basic exemption for the year (currently \$40,000) to the lower bound for the fourth income tax bracket (currently \$173,000) and subsequently indexed to CPI
- “D” decreases from 100% of an individual’s basic tax credit for the year to 50%

“B” represents adjusted taxable income determined in accordance with the minimum tax rules and will not change. Several individual exemptions, deductions and credits are also eliminated.

According to the [Parliamentary Budget Office](#), the number of AMT payers is expected to significantly decrease by 2028, while the number of payers with incomes over \$400,000 and the amounts paid by such individuals will both increase. Total AMT revenue will be higher by \$2.6 billion. However, some high-income individuals may realize more capital gains in 2023 than previously intended to avoid AMT obligations in subsequent years, thus blunting the impact of these changes.

#### Retirement compensation arrangements (RCAs)

Retroactive to March 28, 2023, amounts paid for letters of credit or surety bonds will no longer be subject to the 50% refundable tax, and certain refundable tax payments made before March 28, 2023 could be refunded. Refunds cannot exceed the RCA’s “specified refundable tax” balance at the end of the taxation year, and will reduce its refundable tax balance. Refund amounts must also be included in computing the employer’s income for the taxation year in which it was received, and could be paid directly to employers or the RCA custodian. The purpose of this policy change is to encourage employers to establish or maintain RCAs for high-income earners by facilitating different funding vehicles and reducing their associated costs.

#### Labour requirements for green investment tax credits

To qualify for new investment tax credits for carbon capture utilization and storage, or for clean technology, clean hydrogen or clean electricity, companies or entities must ensure workers at applicable worksites are covered by an “eligible collective agreement” or receive comparable compensation (including benefits) as unionized workers, and that at least 10% of the labour performed by workers in the Red Seal trades is performed by registered apprentices. The purpose of this policy change is to help Canada meet its climate commitments in a way that supports desired job creation. [Amendments](#) to the *Income Tax Act* and *Income Tax Regulations* were introduced on November 27, 2023. Taxpayers who do not meet these requirements, which will apply in respect of property prepared or installed after September 30, 2023, could still claim reduced investment tax credits.

#### Tax on repurchases of equity

Effective after 2023, a 2% tax will be imposed on the net value of equity repurchased by certain listed entities (i.e., share buy-backs). Equity issuances to an employee as part of their employment would be considered a reorganization or acquisition, and could not be deducted when determining the net value of repurchased equity. There is also a new anti-avoidance rule, subject to an exception for employee benefit plans, employee profit sharing plans, and deferred profit sharing plans.

#### Technical amendments

The no-cost averaging rule will be expanded to include securities acquired on the surrender of an employee stock option, and will provide greater flexibility under the ITR for the exercise or settlement of options before an acquisition or reorganization (effective January 1, 2023).

Employers would also be limited to a single subsidy under the Temporary Wage Subsidy or the Canada Emergency Wage Subsidy for overlapping pay periods (retroactively to March 18, 2020).

### Employee Life and Health Trusts (ELHTs)

The ITA has been [amended](#), retroactively to February 27, 2018, to clarify the application of the relaxed restrictions under which key employees can participate in an ELHT (see our [Client Advisory](#) dated November 14, 2022). Québec will [harmonize](#) its taxation legislation to reflect this change.

## **Corporate law developments**

### Federal

*Canada Business Corporations Act* amendments requiring certain corporations to provide the regulator with information on individuals with significant control, and permitting it to be forwarded to an investigative body, FINTRAC or other prescribed entity, have been proclaimed into force [effective January 22, 2024](#). Reporting obligations will apply on or after incorporation, amalgamation or continuance, and when a change in information occurs, and is designed to counteract money laundering and tax evasion. For related developments, see our [Client Advisory](#) dated June 12, 2023.

### New Brunswick

Various [amendments](#) to New Brunswick's *Business Corporations Act* have received Royal Assent, including changes to the requirements for directors' elections, and terms of office and removal. Directors could also appoint one or more additional directors (subject to restrictions). Another corporation that holds voting shares of a corporation could serve as a director of the corporation, with the directors of that other corporation remaining jointly and severally liable for the obligations and liabilities arising from the other corporation's position as a director. A corporation could even operate without a board of directors, pursuant to a unanimous shareholders agreement the requirements for which are set out (new Part XVII.1).

Two or more shareholders could agree in writing how they will exercise their voting rights, and a meeting of shareholders could be held entirely electronically. Notices of a meeting of shareholders and any related documents could also be provided by website posting. Any document (i.e., financial statements, resolutions, proxies) could be signed, any notice or document could be filed, and any corporate record could be inspected electronically as well. Finally, new "unlimited liability corporations" would be permitted, whose shareholders are jointly and severally liable to satisfy its debts and liabilities (British Columbia, Alberta and Nova Scotia also allow such corporations).

All amendments took effect on June 16, 2023, except for those dealing with unlimited liability corporations, and corporations without a board of directors. For further details, see FCNB's [Proposal to Modernize the Business Corporations Act](#).

## **Securities developments**

The Canadian Securities Administrators (CSA) and Canadian Investment Regulatory Organization (CIRO) have released [Regulatory Organization Staff Notice 31-363](#) providing updated guidance on their Client Focused Reforms (adopted in 2021) which impose on registrants an ongoing obligation to

identify and address or avoid reasonably foreseeable material conflicts of interest in the best interests of clients. A revised [Frequently Asked Questions](#) document is also available. Ten examples are provided related to compensation (internal, third-party and supervisory), as well as client fees and other areas, together with best practices for firms and individual registrants to consider. Firms, however, must lead in addressing conflicts of interest, including through appropriate policies, practices and employee training. Firms must also provide affected clients with disclosure before account opening or in a timely manner. Effective controls, including pre-trade screening and post-trade reviews, should be implemented and proper documentation maintained. According to a recent survey summary, only 37 of 172 registrant reviews found no compliance issues. A significant minority of firms failed to identify one or more material conflicts of interest (34%) or lacked adequate controls (28%), while a majority either failed properly to disclose material conflicts of interest (53%) or had inadequate policies and procedures in place (66%).

The CSA have also [proposed](#) a framework under which all registered dealers and advisers (outside Québec) must take reasonable steps to make the Ombudsman for Banking Services and Investments available to their clients as a binding dispute resolution service, and will [consult](#) on adopting, with necessary modifications for the Canadian context, IFRS S1 (which requires disclosures about sustainability-related risks and opportunities companies face over the short-, medium- and long-term), and IFRS S2 (which sets out specific climate-related disclosures for use with IFRS S1). Both Standards were recently released by the [International Sustainability Standards Board](#) (ISSB) and require that all sustainability-related information and financial statements be provided in the same reporting package.

Key priorities for the [Ontario Securities Commission](#) during 2024-2025 include:

- Updating climate-related disclosures based on the ISSB Standards
- Considering broader diversity on boards and in executive roles at reporting issuers, while taking account of approaches in other jurisdictions to minimize market fragmentation
- Strengthening the dispute resolution framework of the Ombudsman for Banking Services and Investments and modernizing the Commission's Disgorgement Framework
- Modernizing delivery options for regulatory and continuous disclosure filings, with paper delivery remaining optional
- Advancing cooperation with Indigenous Peoples, and integrating their perspectives and interests

The Toronto Stock Exchange has posted a [Filer's Aid](#) for collecting personal information from new officers, directors or trustees using [Form 3](#), which is filed within 10 days after any relevant change.

The US Securities and Exchange Commission (SEC) has adopted rule amendments governing [beneficial ownership reporting](#) (applicable to foreign private issuers) that will shorten the deadline for initial Schedule 13D filings (covering investors with control intent) from 10 days to five business days, and require Schedule 13D amendments to be filed within two business days. Filing deadlines are also accelerated for Schedule 13G beneficial ownership reports (covering Exempt Investors and those without control intent). Compliance will be fully required by December 18, 2024. As noted in

the Final Rule, the acquisition of shares as a result of certain corporate actions or off-market transactions (such as compensatory equity grants to executives) are less likely to be characterized as activist campaign announcements. In addition, filings that report only one or two off-market transfers could be associated with beneficial ownership acquired through compensation awards.

The SEC has also adopted [amendments](#) to modernize the disclosure requirements for repurchases of an issuer's equity. Disclosures include the number of shares repurchased daily and the average price paid, as well as information (provided quarterly) about the adoption and termination of insider trading arrangements under Rule 10b5-1 ([adopted](#) in December 2022, for further details see our [Client Advisory](#) dated May 16, 2022). Issuers must also disclose the objectives or rationales for repurchases by officers and directors, how they are calculated, any related policies and procedures, and whether certain officers and directors traded securities in the four business days before or after the repurchase plan was announced. Foreign private issuers will disclose quantitative data in new Form F-SR, commencing with the first full fiscal quarter beginning on or after April 1, 2024. Subsequently, the SEC [levied a \\$25 million fine](#) against an issuer for violating internal accounting controls requirements relating to its stock buybacks. According to the Commission, companies that authorize buybacks must have controls to ensure their Rule 10b5-1 trading plans meet all applicable conditions, including the requirement that "traders have to relinquish their ability to influence the amount or timing of trades after their trading plans go into effect".

In a recent [enforcement initiative](#), the SEC charged six officers, directors and major shareholders of five public companies for failing to report in a timely fashion information about their holdings and transactions in company stock (exceeding \$90 million in aggregate). The companies were also charged for contributing to, or failing to report, these failures. Data analytics was used to identify insiders who filed late Forms 4, 13D or 13G.

## **Bonus and DPSP taxation changes in Québec**

Revenu Québec has summarized [tax changes](#) that took effect on July 1, 2023. The tax rate for bonuses or retroactive payments to an employee whose estimated annual remuneration (including a bonus or retroactive payment) does not exceed \$17,183 for 2023 was decreased from 8% to 7%. The tax rate for a single payment from a deferred profit-sharing plan also decreased, from 15% to 14% if the payment does not exceed \$5,000, and from 20% to 19% for payments above \$5,000.

## **Work, rewards and careers**

### **Employment equity, pay equity and pay transparency developments**

#### Federal

The federal government will [amend](#) the *Employment Equity Act* (EEA) to:

- Create two new designated groups: Black people, and 2SLGBTQI+ people
- Expand the definitions of:
  - "Aboriginal Peoples" to include First Nations, Métis, and Inuit

- “members of visible minorities” to include other racialized people
- “persons with disabilities” through alignment with the *Accessible Canada Act*

The government will also consult with affected communities, unions and employers on how to implement these changes. For details of these and other recommendations for reform, see the [Final Report](#) of the Employment Equity Act Review Task Force. For details of previous EEA amendments, see our [Client Advisory](#) dated November 10, 2021.

The federal government has released [draft amendments](#) to the *Pay Equity Regulations* which will:

- Require employers to follow the same three-step process used to establish an initial pay equity plan in workplaces with no predominantly male job classes (collect workplace data, analyze workplace information, and compare compensation)
- Ensure alignment with the federal minimum wage requirements under the *Canada Labour Code* (payment of the higher of either the applicable provincial minimum wage or the new federal minimum wage)
- Require employers to include additional information in their annual pay equity statements concerning compensation increases for female job classes
- Operationalize the system for administrative monetary penalties by:
  - designating violations that will attract penalties
  - setting out how to determine penalty amounts – the penalty range for a violation would be determined by the role of the party who committed the violation, the size of workplace, the classification of the violation (minor, serious, or very serious) and the party’s compliance history (first, second, and third or subsequent violations)
  - listing aggravating and mitigating criteria the Pay Equity Commissioner will use to set actual penalty amounts

The *Pay Equity Act* and Regulations have been in force since August 31, 2021. Private sector employers must develop and post their first pay equity plan by September 3, 2024, and update their plans every five years (for further details, see our [Client Advisory](#) dated November 10, 2021).

### British Columbia

British Columbia’s [Pay Transparency Regulation](#) sets out the requirements for an organization’s annual pay transparency reports, which must be prepared by private sector employers starting between 2024 and 2026, depending on the size of the organization (for details of these and other requirements under the *Pay Transparency Act*, see our [Client Advisory](#) dated June 12, 2023).

Under the Regulation, an employer will be able to choose to have its report cover a 12-month period based either on its most recently completed financial year, or the immediately preceding calendar year. The Regulation defines four “gender categories” (Man, Woman, Non-binary and Unknown) based on self-identification, and sets out how an organization will determine its gender “reference



category” (Man, Non-binary, or Unknown), as well as gender differences between hourly rates of pay, and mean and median overtime pay, overtime hours, and bonus pay. A detailed list of required information is set out based primarily on these determinations, with exceptions if a gender category contains fewer than 10 employees.

## Ontario

Ontario has introduced [amendments](#) to the *Employment Standards Act, 2000* (ESA) to require that employers include in a publicly advertised job posting information about the expected compensation (or range of compensation) for the position, and a statement (if applicable) that artificial intelligence is used to screen, assess or select applicants. Copies of job postings and associated application forms must be retained for three years after public access to the posting is removed.

## **Minimum wage and public holiday developments**

Effective October 1, 2023, the hourly minimum wage increased in the following provinces:

- [Saskatchewan](#), to \$14.00
- [Manitoba](#), to \$15.30
- [Ontario](#), to \$16.55
- [Nova Scotia](#), to \$15.00
- [Prince Edward Island](#), to \$15.00
- [Newfoundland and Labrador](#), to \$15.00

Effective September 1, 2023, the Northwest Territories’ [hourly minimum wage](#) increased to \$16.05, and will be adjusted annually based on CPI.

Manitoba’s *Employment Standards Code* has been [amended](#) to establish National Day for Truth and Reconciliation a paid public holiday, to be observed each September 30th.

## **Use of French by federally regulated private businesses**

The *Use of French in Federally Regulated Private Businesses Act* contained in [Bill C-13](#) will, once in effect, require [federally regulated](#) businesses (other than those in the broadcasting sector or with fewer than a prescribed number of employees) to ensure their employees in Québec can perform their work, be supervised, and use regularly and widely used work instruments and computer systems in French. Employees must also receive all employment and post-employment communications and documents in French including applications, offers, contracts, employment conditions, training materials, termination notices, collective agreements and related materials. Businesses will have to inform employees of their rights and remedies under the Act and create a committee to help foster and generalize their use of French. Alternatively, a business could choose to apply Québec’s *Charter of the French Language* (see our [Client Advisory](#) date June 27, 2022). Two years after its effective date, the new Act will be expanded to cover federally regulated private businesses in prescribed regions outside Québec with a “strong francophone presence”.

According to [Statistics Canada](#), in 2021 4.6% of Ontario workers used French regularly at work, including those who used French predominantly (1.2%) or equally with other languages (0.6.%). The comparable percentage in New Brunswick were 32.0%, 20.1%, and 3.9%. Meanwhile, in Québec 35.4% of workers used English regularly at work, including those who used English predominantly (13.9%) or equally with other languages (5.6).

Federal and provincial/territorial ministers responsible for immigration have also agreed, in coordination with the Ministers' Council on the Canadian Francophonie, to promote the selection by French-speaking immigrants of [francophone minority communities](#) outside Québec, and their long-term retention within such communities.

## **Employment standards developments**

### Federal

*Canada Labour Code* amendments, passed in 2018, establishing graduated notice requirements for federally regulated employees on individual termination, and requiring federally regulated employers to provide a statement of benefits to terminated employees, have been proclaimed into force [effective February 1, 2024](#). For up to three years of employment, the current notice entitlement of two weeks for employees with at least three months of service remains unchanged. Thereafter, the notice period will increase by one week for each additional year of completed service, up to a maximum of eight weeks. These changes will help harmonize employment standards across the country, and recognize difficulties faced by some long-serving employees in securing new work.

New [regulations](#) will also exempt (or modify for) certain federally regulated sectors Code requirements for 30-minute breaks, eight-hour rest periods, 96 hours' notice of a schedule, and 24 hours' notice of shift change. The new regulations will apply to the banking, telecommunications and broadcasting, rail, and air transportation sectors (earlier regulations made similar changes for [other sectors](#)). The exemptions or modifications will vary by sector and job classification, and are effective beginning next year (depending on the sector). They will assist employers with continuous operations and unique scheduling practices, while 513,000 employees are expected to benefit from greater job security due to increased business viability (though offset by reduced work-life balance).

Finally, the federal government has [introduced](#) additional Code amendments to restrict the use of replacement workers (i.e., subsequently hired employees and managers as well as contractors) during a strike or lockout, and require that employers and unions agree on activities that must be maintained during a work stoppage before issuing a notice of strike or lockout. Employers could be subject to a maximum daily fine of \$100,000 or administrative penalties for breaching these new requirements. The amendments will take effect 18 months after Royal Assent. A [Backgrounder](#) is available, as well as a [summary of feedback](#) on the reforms as originally proposed.

### Ontario

Effective October 26, 2023, the ESA was [amended](#) to require employees who work solely from home to receive enhanced notice of a [mass termination](#), and be counted when determining whether the

employment of 50 or more individuals is terminated in a four-week period at “a location at which an employer carries on business”. Supporting [regulations](#) have also been released.

## Competition developments

*Competition Act* [amendments](#) have been introduced permitting the Competition Tribunal to make orders affecting non-competitors, and repealing an exception involving merger efficiencies. The Competition Bureau has also finalized its [Enforcement Guidelines on wage-fixing and no-poaching agreements](#) (see our [Client Advisory](#) dated June 12, 2023). Despite its recent criminalization, the federal government is considering re-introducing prohibitions against buy-side collusion, reviewable on a civil standard. However, according to a [summary of stakeholder feedback](#), this proposal was not widely supported due to perceived negative implications for small and medium sized enterprises.

Subsequent *Competition Act* [amendments](#) were also introduced to improve the focus on worker impacts in competition analysis.

## Accessibility developments

Accessibility Standards Canada, a departmental corporation within Employment and Social Development Canada created under the *Accessible Canada Act*, has released a draft [Standard on Employment](#). Requirements for all aspects of the employment relationship are set out, including recruitment, hiring, onboarding, retention, promotion, career development, performance management, and termination. Work includes paid and unpaid employment or employment-like activities – temporary, casual, part-time, contract or gig – in the federally regulated private and broader public sectors. The work environment includes physical as well as remote, online and hybrid settings. A key objective is to ensure that compensation is based on merit. The draft Standard also sets out the requirements for an accessibility strategy with measurable objectives, supporting policies (including how to integrate accessibility within existing policies), communication and education requirements, proactive removal of barriers, and clear responsibilities for key workplace parties (including senior management, managers and supervisors).

*The Accessible Saskatchewan Act* was proclaimed into force [effective December 3, 2023](#), mandating accessibility standards for persons with disabilities in several areas, including employment.

Application of a particular standard could depend on factors such as the number of an organization’s employees. Public sector bodies listed in *The Accessible Saskatchewan Regulations* have until December 3, 2025 to establish their accessibility plans. Private sector entities could also be required to develop, communicate and update accessibility plans, though no such requirement is yet in place. Administrative penalties could be assessed for contraventions. Further details are provided in this [government news release](#).

## International credentialing

### British Columbia

British Columbia [Bill 38 – 2023](#), the *International Credentials Recognition Act*, has received Royal Assent. A [Backgrounder](#) is also available. Once in effect, it will establish a new government office to advance fair, efficient and transparent international credential assessment processes. Regulatory

authorities would, in general, be prohibited from requiring Canadian work experience or certain proofs of language proficiency. The Act also prohibits requiring Canadian work experience, and applies to 18 regulatory authorities (listed in one of three Schedules) including veterinarians, architects, engineers, teachers, lawyers, social workers, and chartered professional accountants.

### Saskatchewan

Saskatchewan has introduced [expanded options](#) under its Immigrant Nominee Program. The Existing Work Permit stream is now available to permit holders working in an additional 279 intermediate and lower-skilled occupations to apply for permanent residency (in addition to high-skilled occupations and designated trades). All other Program criteria must still be met, including language requirements and having a permanent, full-time job offer. There are currently more than 16,000 job vacancies in the province, with a total of 112,260 forecasted over the next five years.

### Ontario

[Amendments](#) to Ontario's *Fair Access to Regulated Professions and Compulsory Trades Act, 2006*, banning 30 regulated professions from imposing a requirement to demonstrate Canadian work experience, are now in effect. [Supporting regulations](#) have also been filed that will only permit a regulated profession to accept Canadian experience in satisfaction of a qualification for registration if it also accepts specified alternatives to Canadian experience. Individual assessments must be available to applicants with work experience obtained in a foreign jurisdiction; and a description of the alternative, the competencies to be acquired, and any individual assessment required must be published on the regulated profession's publicly accessible website.

Separate amendments will also, if passed, provide that prescribed requirements must be met to determine whether a regulated profession assesses qualifications in a way that is transparent, objective, impartial and fair; and, if a third party makes such assessments, whether the regulated profession has taken reasonable measures to ensure they are so made. Ontario has also introduced [ESA amendments](#) that will, if passed, prohibit employers from including requirements related to Canadian experience in any publicly advertised job posting.

### All jurisdictions

The [Provincial Nominee Program](#) (PNP) brought 68,000 or 35% of all new economic immigrants to Canada in 2019, many of whom work in the trades or technical fields. It also increasingly attracts younger individuals more fluent in English or French or with more pre-immigration Canadian work experience. Meanwhile, [disparities](#) in employment income, economic status and wealth distribution across racialized groups can be attributed in part to the imperfect transferability of foreign education and work experience, and are compounded by deficiencies in English/French literacy. Finally, only 13.7% of [economic principal applicants](#) in 2010 had completed a Canadian post-secondary qualification within 10 years of arrival, partly due to difficulties securing recognition of their foreign credentials. However, those who did had higher median employment incomes and reduced rates of low income.

Meanwhile, the percentage of economic PNP immigrants in 2019 who [remained in their intended province or territory](#) at the end of their landing year was 89%, with the highest percentage of 97% recorded in Ontario. Percentages remained relatively high even after five years. However, after accounting for several factors, there remained large provincial differences in retention rates.

Federal and provincial/territorial ministers responsible for immigration have committed to reduce barriers and streamline foreign [credential recognition \(FCR\) processes](#), particularly in regulated occupations such as the skilled trades and health care. They will also further align FCR with newcomer selection through the PNP, making it easier for professionals to work upon arrival.

## Four-day workweek trial

Working hours fell for companies participating in a trial conducted by [4 Day Week Global](#), from a baseline of 38 hours to 32.97 hours, with no corresponding increase in work intensity. Instead, workers became more efficient and improved their capabilities. Job satisfaction scores, work-life balance scores, and self-rated physical and mental health measures all improved, helping increase retention from 70% to 90%. Although burnout increased slightly six months after the trial, most improvements are considered sustainable. A subset of 41 North American participants observed a 15% average increase in revenue, with none planning to reinstate a five-day work week.

Supporting these findings is new research from [Statistics Canada](#) that, in April 2023, 4.1 million people or 21.2% of all employed Canadians reported high or very high levels of work-related stress due to heavy workloads and balancing work and personal life. While 19.7% of men were likely to experience high or very high levels of stress, this percentage increased to 22.7% for women.

## Inclusion and diversity

### Women on boards of directors and in executive officer positions

The Canadian Securities Administrators have released [Multilateral Staff Notice 58-316: Review of Disclosure Regarding Women on Boards and in Executive Officer Positions – Year 9 Report](#). Based on a review of 602 issuers with year-ends between December 31, 2022 and March 31, 2023, and that filed information circulars or annual information forms by July 31, 2023:

- Women filled 43% of vacated board seats, occupied 27% of all board seats, and represented 8% of all board chairs
- 64% of issuers adopted a policy on women's board representation, and 43% adopted targets
- 59% of issuers adopted either director term limits or alternative methods of board renewal
- Women held 5% of all CEO positions, 17% of all CFO positions, and at least one executive officer position at 71% of all issuers
- 5% of issuers adopted targets for representation of women in executive officer positions

According to [Statistics Canada](#), in 2020 women held 20.5% of 17,996 Canadian directorships, up 0.3% since 2019. However, 59.7% of boards did not have any women directors. Government

business entities continued to have the highest share of women on their boards (34.8% of all positions). While women comprised 31.4% of the 14,807 officers across all corporations conducting business in Canada, up 0.8%, women were still less likely (at 23.7%) to be represented among top officers (i.e., executive vice-presidents, or chairpersons).

### **Wage gaps: Gender and disability**

According to Statistics Canada, the overall [gender wage gap](#) narrowed from 16% in 2007 to 12% in 2022 among workers aged 20 to 54, due to improved labour market qualifications and changes in the types of position held. Gaps were largest for certain immigrant and Indigenous women, and smallest for immigrant women who landed as children and Canadian-born women. Higher paid women faced larger wage gaps than lower paid women, while rising employment across diverse groups of women has slowed the narrowing of the gender wage gap.

Wage-employed university graduates were more likely to be [gig workers or sole proprietors](#) in 2016 than less educated individuals. Temporary work status and part-time employment were also strongly associated with gig employment, whose prevalence was 9.6% among temporarily employed part-time wage employees versus 4.3% among their full-time counterparts.

Also according to Statistics Canada, although the rate of disability in Canada increased from 22% to 27% between 2017 and 2022, [persons with disabilities were more likely to be employed](#) (62% of working age adults versus 59%) narrowing the gap between employment rates of people with and without disabilities by 5%. However, in 2019 persons with disabilities aged 16 and older had an average annual income of \$43,400, while persons without disabilities earned \$55,200, a 21.4% [disability pay gap](#). A slightly wider pay gap for men was likely due to women earning less, regardless of disability status. Gaps also persist, regardless of gender, among permanently employed persons with a disability.

### **Retaining older workers**

According to Statistics Canada, [retaining older workers](#) can help alleviate labour market constraints. In June 2023, 21.8% of Canadians aged 55 to 59 were fully or partially retired, versus over 90% for those 70 or older. The main drivers of retirement are financial preparedness and state of health. Motivations to continue working include the availability of part-time or less stressful or physically demanding work, the ability to perform more interesting work, and increased remuneration.

According to the [World Economic Forum](#), those aged 55 and older will exceed 25% of the workforce in G7 countries by 2031, up 10% since 2011. In part because older workers tend to exhibit greater loyalty and job satisfaction, “age-diverse” firms exhibit lower turnover and higher productivity than benchmarks. After age 60, interesting work overtakes compensation as the primary motivation, followed by autonomy and flexibility (often around working hours). Companies should also design programs and training that appeal to older workers, such as mentoring younger colleagues.

According to [Toronto Metropolitan University](#), highlighting the value of skills training for mature workers and combating associated stereotypes could help address labour shortages in Canada.

## Continuing workforce impacts of COVID-19

[Median after-tax family income](#) decreased by 2.8% to \$59,300 in 2021, due largely to the end of federal pandemic benefits, which was only partially offset by higher employment income. The most severely impacted groups were seniors and lower-income families, especially in Toronto, Windsor and Winnipeg. As a result, the low-income rate increased to 15.5%, and income inequality as measured by the Gini coefficient increased to 0.353. While [real income growth](#) outpaced real GDP growth in recent years, the [wealth gap](#) widened in the second quarter of 2023, though it remained lower than before the pandemic, with households aged 35 to 44 experiencing greater strain. Middle income workers benefited from strong labour market conditions and higher wages, leading to a 6.9% increase in disposable income (versus 3.3% across all households). Enhanced future GDP growth could therefore depend in part on organizational and workplace culture shifts promoting remote work.

The pandemic also negatively [impacted newly certified journeypersons](#), who could not work virtually, while the closure of worksites and educational institutions reduced timely apprenticeship completions within 25 Red Seal trades (excluding construction) from 21.8% in 2019 to 18.4% in 2021. Higher concentrations of women in certain trades (e.g., hairstylists or cooks), also resulted in lower overall certification rates for female apprentices. Although tight labour markets in 2021 and 2022 helped reverse these trends, [new apprenticeship registrations](#) remain below pre-pandemic levels.

According to the [TMU Diversity Institute](#), female employment increased by 2% or 178,000 jobs in February 2022, compared with 2020, versus 1.9% for men. The percentage of employed women between 25 and 54 reached 81% (an all-time high) primarily due to a rise in full-time employment. Social-emotional or “soft” skills such teamwork, communication and customer service were in high demand. While these trends are expected to continue within industries most affected by the pandemic, such as retail and hospitality, demand for workers overall has decreased so far in 2023.

## Federal initiatives

The federal government has introduced Bill C-50, the [Canadian Sustainable Jobs Act](#), which includes several measures contained in an [Interim Sustainable Jobs Plan](#). A [Backgrounder](#) is also available. The legislation will establish a Sustainable Jobs Partnership Council and an independent Secretariat to provide advice on encouraging sustainable job creation, support workers and communities, and foster policy and program alignment across federal entities. Considerations will include equity, fairness and inclusion. Plans will be published every five years, beginning in 2025, with a focus on net-zero emissions and required future skills. The federal government has also committed to consulting with provinces and territories, Indigenous Peoples, labour and industry.

The [Canada Disability Benefit Act](#) has received Royal Assent and will come into force by June 22, 2024. It sets out high-level requirements for the implementation of the Canada Disability Benefit, which will support working-age persons with disabilities. Regulations will address eligibility and conditions, how to determine benefit amounts, indexation and payment periods. The government will [engage](#) with provinces and territories to minimize potentially negative effects on other benefits.

Effective January 1, 2024, employers must annually review and update temporary foreign workers' wages to ensure they reflect increases to [prevailing wage rates](#) for their occupation and region of

work. The federal government will also extend certain changes to the Temporary Foreign Worker Program to help employers fill job vacancies in tight labour markets, until August 30, 2024.

The [Express Entry Program](#) will be updated to encourage candidates with work experience in high-demand trades or with French language proficiency to apply for permanent residence. The requirement to secure a [Labour Market Impact Assessment \(LMIA\)](#) before applying to hire a temporary foreign worker will be eliminated, provided employers have three positive assessments over the past five years. Employers could also benefit from longer validity periods of up to 36 months and from simplified hiring processes. A LMIA confirms no Canadian citizen or permanent resident is available to perform the required work and verifies compliance with previous undertakings.

A new [Youth Employment and Skills Strategy](#) will fund projects to improve labour market outcomes for persons under 30. Supports could include mentoring, skills development and training, paid work experiences, dependent care, or mental health counselling. Priority groups include youth with disabilities, those from official language minority communities, or who are facing multiple and compounding barriers, as well as Indigenous, 2SLGBTQI+, Black and other racialized youth.

The federal government has created the [Disability Inclusion Business Council](#) to recommend how it can support business to improve workplace inclusivity. An employer led independent disability business network will also be established. In addition, the [Opportunities Fund for Persons with Disabilities](#) will provide disability supports for employers and employees, including skills and job search training, pre-employment services, wage subsidies, and work placements.

According to the federal government, Canada's early learning and child care system has contributed to a record high [labour force participation rate](#) for women in their prime working years of 85.7%. This is supported by research from the [TMU Diversity Institute](#) that most of these gains were in full-time employment.

## Provincial initiatives

British Columbia's [Skills for Success Program](#) will offer flexible work placements to individuals experiencing or at risk of homelessness.

Alberta will increase funding for projects providing [targeted employment services](#) for persons living with disabilities. Recipient organizations will partner with employers across the province to recruit and retain workers with disabilities and promote inclusive hiring practices.

Manitoba will provide additional support to [Employment and Income Assistance \(EIA\) participants](#) through pre-employment services, and financial management, mentorship and cultural programs.

Ontario's [Skills Development Fund](#) will help train 100,000 workers in a variety of sectors, with a focus on social assistance recipients and people with criminal records. Ontario is also increasing the number of [Investing in Women's Futures program](#) locations, from 23 to 33, to help women facing social and economic barriers connect to employment readiness and wraparound supports.

Nova Scotia's [Equity and Anti-Racism Strategy](#) includes an engagement plan focused on psychological health and safety in the workplace (public consultations are planned). It has also



launched [public consultations](#) on how to prevent and address workplace harassment. Finally, [amendments](#) to Nova Scotia's *Workers' Compensation Act*, effective September 1, 2024, will allow for compensation of gradual onset or traumatic mental stress caused by significant work-related stressors, including ongoing harassment or bullying resulting in psychological injury, but excluding stress related to performance evaluations, a change in job description or interpersonal conflicts.

## Case law

### Pay equity developments

In [2023 PEC 001](#) the Treasury Board's request to establish three pay equity plans for employees in the core public administration instead of the default single plan required under the *Pay Equity Act*, was denied. Although there were enough male comparators in each plan, the required process would not have been faster or more accurate. The three proposed plans would also cut across departments and divide employees working in similar job classes, reinforcing gender segregation and impacting collective bargaining. However, the Commission did indicate that an employer was not required to attempt to establish a single pay equity plan before applying for multiple plans.

In [Essex County Library Board v. Canadian Union of Public Employees, Local 2318](#), the employer proposed using the job-to-job comparison method for some female job classes and the proportional value method for others, arguing that there were no comparable male job classes. This resulted in a pay equity adjustment (increase) of 54 cents per hour for one female job class only, with no adjustments for any other female job classes. The union disputed this outcome. According to the Arbitrator, the employer's decision with respect to the proportional value method was unreasonable. While there is no set process for how parties should perform a proportional valuation, it must involve comparing jobs within the same bargaining unit (unless it contains no representative male jobs). There was no evidence that the two bargaining unit positions were unrepresentative or outliers, and so the employer could not add the third (non-bargaining unit) comparator. Finally, the employer's decision to use band numbers rather than point scores to plot its wage line was also unreasonable. To convert point scores into numbers between one and seven skewed the ratio between job value and compensation, and unreasonably distorted the ratio of work value to compensation.

### Employment standards considerations

In [Director of Employment Standards v. Sleep Country Canada](#), the Ontario Divisional Court confirmed that "regular rate" of pay under the *Employment Standards Act, 2000* for employees whose entire salary is composed of commissions includes only regular (non-overtime) hours worked in a given week. However, the employer could not reconcile weeks where it had underpaid or overpaid overtime (thus potentially limiting an employee's recovery). The matter was returned to the Board for redetermination on the basis that weeks for which more than the minimum was paid did not constitute overpayments.

In [Marchetta c. Petros](#), the Québec Court of Appeal agreed to hear the employee's appeal from a lower court decision that she had not been wrongfully dismissed, because the employer did not have an "undertaking" or office in Québec as required by section 2 of the *Act respecting legal standards*.

According to the Court, establishing the “scope of application of the Act to the increasingly common phenomenon of strictly online employment” was a new question of law that merited appellate review.

### **Constructive dismissal, condonation and factors affecting reasonable notice**

In *Pham v. Qualified Metal Fabricators*, the Ontario Court of Appeal held that an employee who was temporarily laid off at the beginning of the COVID-19 pandemic, and whose layoff was repeatedly extended, could sue for constructive dismissal. Silence or failure to object does not equal condonation, which must be established by positive actions (often by remaining at work, which is not possible in lay-off cases). There is no requirement for a laid-off employee to ask when they might be called back, while the fact that other employees had been laid off did not constitute an implied term permitting layoffs. For an Alberta Court of Appeal decision on employee condonation of a unilateral reduction of compensation during COVID-19, see our [Client Advisory](#) dated November 10, 2021.

In *Blomme v. Princeton Standard Pellet Corporation*, the British Columbia Supreme Court dismissed a wrongful dismissal claim by a worker whose employment had been terminated by operation of law after a temporary COVID-19 layoff for lack of mitigation. Generally, an employee must mitigate by returning to work for the same employer, unless conditions exist that would objectively render doing so unreasonable. A reasonable person in the employee’s position would have accepted the employer’s offer to return to the same position, salary and benefits (which had been continued). Neither was there evidence of any hostility, embarrassment or humiliation. Alternatively, she should have accepted the employer’s in-lieu offer of eight weeks’ pay in lieu of reasonable notice.

In *Plotnikoff v. Associated Engineering Alberta Ltd.*, the Alberta Court of Justice awarded a 33-year old engineering technologist with almost 10 years of service 10 months reasonable notice on termination without cause. Although applying for seven positions in 10 months constituted failure to mitigate, no deduction was ordered because, relying on the Ontario Court of Appeal decision in *Lake v. La Presse* (see our [Client Advisory](#) dated June 12, 2023) the employer failed to establish that any comparable positions were available. Damages were calculated based on a 30-hour workweek (i.e., the difference between 35 hours worked per week over the final four months of employment, and the 25 hours per week set out in the parties’ reduced working hours agreement).

The Ontario Court of Appeal dismissed the employer’s appeal in *Milwid v. IBM Canada Ltd.*, agreeing that the following factors justified an award of 26 months reasonable notice (two more than the 24-month upper limit, barring exceptional circumstances): the employee’s age, length of service, managerial status, compensation level, and the “technical ... nature of his skills geared towards the defendant’s business”. An additional month of notice, bringing the total to 27 months, was also appropriate because Milwid had lost his employment at the beginning of the COVID-19 pandemic, which was “a truly exceptional circumstance”. He was also entitled to Restricted Share Units because an ambiguous exclusion in IBM’s standard form Equity Award Agreement left open “a reasonable interpretation that eligibility was not extinguished until the end of the notice period at common law”. For further details of the trial decision, see our [Client Advisory](#) dated June 12, 2023.

In *Lynch v. Avaya Canada Corporation*, the Ontario Court of Appeal upheld a terminated professional employee’s award of 30 months reasonable notice on termination without cause. The

exceptional circumstances in this case included his age (approaching 64) and over 38 years of service performing unique and specialized work for Avaya. As such, his skills were tailored to and limited by his very specific workplace experience. Although comparable positions would be available in other Ontario cities, Lynch was not required to expand his job search beyond Belleville, where he had lived throughout his employment. As such, there was no failure to mitigate.

## **Class action developments**

The Ontario Superior Court of Justice has approved (without reasons) a \$153 million settlement in *Fresco v. Canadian Imperial Bank of Commerce*, a national class proceeding brought under Ontario's *Class Proceedings Act, 1992* relating to unpaid overtime under Part III of the *Canada Labour Code*. Earlier decisions, [upheld](#) last year by the Ontario Court of Appeal, found that the Bank's organization-wide overtime policies, together with "deficient" record keeping systems, breached the Code because they did not always result in payment for permitted (though unapproved), even if many employees did receive overtime pay. As well, aggregate damages (i.e., one large amount to compensate the entire class of plaintiffs) were theoretically possible as a reasonable method for determining individual amounts. Fees were also [approved](#) in the amount of \$25 million (instead of the \$44 million requested by class counsel) which, after necessary deductions, left a net recovery for current and former employees of \$86 million. The Court also declined to award an honorarium for Fresco, the representative plaintiff.

In *Le Feuvre v. Enterprise Rent-A-Car Canada Company*, the Ontario Divisional Court denied certification in a proposed employee misclassification action involving 10 years' unpaid overtime for approximately 2,500 current and former employees working in seven provinces. Certification was not appropriate because there were no common issues involving the duties of employees across different types of offices. As a result, some of the proposed class members may have been misclassified, while others may not have been, thus necessitating individual actions. Neither was there evidence suggesting how aggregate damages could be calculated on a class-wide basis.

## **Special damages and costs considerations**

In *Rutledge v. Markhaven Inc.*, the Ontario Superior Court of Justice awarded a 43-year old executive with 21 years of service 22 months reasonable notice. This did not include short- and long-term disability benefits during the notice period, because premiums were paid by the employer. The employee was also awarded \$50,000 in bad faith/moral damages for the insensitive manner of her termination, which included a non-arm's length investigation. Punitive damages were not awarded.

In *Teljeur v. Aurora Hotel Group*, the Ontario Superior Court of Justice awarded a 56-year old senior manager with 3.5 years of service five months reasonable notice, relying on the Ontario Court of Appeal decision in *Lake v. La Presse* (see our [Client Advisory](#) dated June 12, 2023). An additional \$15,000 in moral damages were awarded because the employer had surreptitiously recorded the termination meeting, failed to provide a notice of termination, delayed providing the statutory minimum entitlement, and reneged on a promise to pay enhanced notice.

In [additional reasons](#), the Ontario Superior Court of Justice denied costs to the successful plaintiff in *Chin v. Beauty Express Canada Inc.* (see our [Client Advisory](#) dated June 12, 2023) because her claim, which should have been brought in small claims court, constituted “overreach”.

## Options and restricted stock units

DeFi’s Board awarded the respondents 750,000 share options. However, when they attempted to exercise the options, the respondents were told their grants had been withdrawn because they were not “consultants” within the meaning of DeFi’s Stock Option Plan. They sued for damages for breach of option agreement, and under the OBCA oppression remedy. In [Justein v. DeFi Technologies Inc.](#), the Ontario Court of Appeal confirmed that the options grant could not be rendered unenforceable without a Board resolution cancelling them. While it was unclear how much work the respondents actually did for the company, both remained in an advisory role. As a result, the appropriate remedy was to put them in the position they would have been where they permitted to exercise the options. Damages were calculated based on the mean option price determined according to the highest and lowest stock price between when the respondents attempted to exercise the options and their expiry date (which was one of several methods jointly suggested by the parties to calculate damages).

In [Maynard v. Johnson Controls Canada LP](#), the Ontario Court of Appeal confirmed an award of 14 months reasonable notice, calculated on the basis of Maynard’s total compensation, including unvested Restricted Stock Units worth \$188,335. Although the employer’s Share and Incentive Plan disentitled participants to any unvested Units at termination, Maynard was never provided a copy of this document and no equivalent provisions were included in his contract of employment.

## Restrictive covenants

In [EF Institute for Cultural Exchange Limited v. WorldStrides Canada, Inc.](#), the parties were direct competitors. Conklin was the former President of EF. His severance agreement included a restrictive covenant and confidentiality clause. He was subsequently hired by WorldStrides, but only started work after the one-year restrictions had expired. EF sued WorldStrides and Conklin for various heads of damages, including return of Conklin’s \$225,000 severance payment, all of which were dismissed. The Court of Appeal confirmed that “simply meeting with a prospective future employer that is a competitor is not, on its own, a breach of fiduciary duties” and that no sensitive information was communicated during the interview process, or after Conklin’s hiring but before starting work.

## Corporate powers

In [Mann v. Mann](#), the Saskatchewan Court of Appeal held that the broad power of directors under [The Business Corporations Act, 2021](#) to appoint officers and delegate to them powers necessary to “manage the business and affairs of the corporation” includes the right to delegate management of that corporation’s rights, as a shareholder in another (related) company, despite the absence of a directors’ resolution specifically authorizing the delegation. In a [related decision](#), the Court further held that there is no authority for the proposition that a corporation can only retain and instruct counsel if there is a board consensus, or that all directors must have a say where the corporation’s by-laws have delegated the relevant power to a specific officer. In fact, the by-laws in this case

clearly allowed the corporation's president to unilaterally engage counsel for the corporation, a responsibility that falls within the general supervision of a corporation's business and affairs.

In *Fraser c. Canadian National Railway Company*, the Québec Court of Appeal confirmed that a corporation need not obtain leave to refuse a shareholder's request to include a proposal in its circular, and that CN was not required to include Fraser's proposals in its 2022 management proxy circular, because they were substantially the same as previous failed submissions, their primary purpose was seemingly to redress a personal claim or grievance, and they constituted an attempt to secure publicity. A corporation can refuse to include a proposal without obtaining leave from a court. As a result, CN's only obligation was to notify Fraser in writing within the prescribed period of its intention, with supporting reasons, not to include her proposals.

### **For more information**

This Advisory is not intended as a substitute for legal, accounting, actuarial or other professional advice. For further information on these developments, please contact your WTW consultant, or:

Stephen Burke, +1 604 691 1040

[stephen.burke@wtwco.com](mailto:stephen.burke@wtwco.com)

Glenda Oldenburg, +1 416 960 7654

[glenda.oldenburg@wtwco.com](mailto:glenda.oldenburg@wtwco.com)

Evan Shapiro, +1 416 960 2846

[evan.shapiro@wtwco.com](mailto:evan.shapiro@wtwco.com)

Ming Young, +1 416 960 7125

[ming.young@wtwco.com](mailto:ming.young@wtwco.com)

### **About WTW**

At WTW (NASDAQ: WTW), we provide data-driven, insight-led solutions in the areas of people, risk and capital. Leveraging the global view and local expertise of colleagues serving 140 countries and markets, we help you sharpen your strategy, enhance organizational resilience, motivate your workforce and maximize performance.

Working shoulder to shoulder with you, we uncover opportunities for sustainable success—and provide perspective that moves you. Learn more at [wtwco.com](https://www.wtwco.com).