

## Trends in executive compensation, workforce rewards, and DEI – Spring 2024

June 3, 2024

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## **Executive compensation and governance**

### **Income tax developments**

#### Employee stock options

In [Budget 2024](#), the federal government announced that it will amend the *Income Tax Act* (ITA) to increase the capital gains inclusion rate, for individuals, from one-half to two-thirds on the portion of capital gains realized annually that exceed a threshold of \$250,000 (below which the inclusion rate would remain one-half). Note, however, that the necessary amendments were not in the 2024 Budget Bill (discussed below). When in force, they will apply to all capital gains realized on or after June 25, 2024. The proposed annual \$250,000 threshold would apply in full in 2024 (i.e., not prorated). Claimants of the employee stock option deduction (see our [Client Advisory](#) dated November 10, 2021) would receive a one-third deduction of the taxable benefit to reflect the new capital gains inclusion rate, but would be entitled to a deduction of one-half the taxable benefit up to a combined limit of \$250,000 for both employee stock options and capital gains. Net capital losses of prior years would continue to be deductible against taxable capital gains in the current year by adjusting their value to reflect the inclusion rate of any offset capital gains. As a result, capital losses realized prior to the rate change would offset capital gains realized after the change. Further transitional rules are still required to separately identify capital gains and losses realized before and after the effective date. Additional design details are still to be released.

#### Investment tax credits: Prevailing wage and apprenticeship requirements

In [Budget 2024](#), the government announced a 30% EV supply chain investment tax credit, applicable to property acquired and available for use on or after January 1, 2024. As well, [Bill C-69](#) (the 2024 Budget Bill) sets out details of the refundable investment tax credit for investments in certain clean hydrogen projects and clean technology manufacturing property. All proposed credits include requirements to pay prevailing union wages and create new apprenticeship opportunities.

The federal government also established a [Sustainable Jobs Training Fund](#) to help workers develop in-demand skills. [Eligible projects](#) must focus on reducing carbon emissions, green building and retrofits, electric vehicle maintenance, and charging infrastructure.

## Other amendments

Other ITA amendments in Bill C-69 would introduce a \$10-million capital gains exemption on the sale of a business to an employee ownership trust (EOT) and adjust the alternative minimum tax (AMT) (see our [Client Advisory](#) dated December 21, 2023). Also, EOTs will now be exempt from AMT.

## **Securities law developments**

### Canadian Securities Administrators (CSA)

CSA updated its [guidance on virtual shareholders meetings](#), according to which issuers should disclose in management information circulars and proxy-related materials the logistics for accessing, participating in, and voting at virtual meetings. Registration and authentication procedures should be simplified, and shareholders permitted to raise questions and provide direct feedback. Similarly, issuers should coordinate with the proponents of any proposals in advance, and ensure they can speak to them and answer questions. The virtual platform to be used must have adequate functionality, and the Chair must understand how to operate within it. Finally, issuers are urged to consider holding hybrid meetings.

CSA also [published](#) new research on the impact of amendments to [National Instrument 31-103 - Registration Requirements, Exemptions and Ongoing Registrant Obligations](#) which were implemented in 2016 to ensure investors receive clear and complete annual performance and fee disclosures, including registrant compensation (known as Client Relationship Model Phase 2, or CRM2). Between 2013-2020, average mutual fund and ETF fees declined, as did investment fund manager fees, while improvements were realized in risk-adjusted, gross investment performance. Distribution of investment assets shifted toward funds with lower fees, but not those exempt from CRM2 requirements. For details of other Client Focused Reforms adopted by CSA and the Canadian Investment Regulatory Organization, see our [Client Advisory](#) dated December 21, 2023.

CSA also noted the launch of consultations on [Canadian Sustainability Disclosure Standards 1 and 2](#) and anticipates adopting only those provisions needed to support climate-related disclosures.

### Ontario Securities Commission (OSC)

The OSC has [extended](#), by 18 months until January 31, 2026, the CSA blanket relief for *Canada Business Corporations Act* (CBCA) incorporated reporting issuers from the requirement to specify that securities be voted or withheld from voting in respect of the election of directors where they comply with the CBCA's majority voting amendments (for further details, see our [Client Advisory](#) dated November 10, 2021). The OSC and CSA are also reviewing options for "a more permanent solution". Until then, however, affected issuers will remain exempt from the director election form of proxy requirement in [National Instrument 51-102 - Continuous Disclosure Obligations](#) in respect of uncontested director elections.

The OSC also released its [2023 Corporate Finance Branch Annual Report](#). It addresses:

- Common record amendments following a continuous disclosure review, including late filing of executive compensation disclosure

- Non-compliance identified in MD&A reviews, including with respect to executive compensation (issuers not required to send an information circular must still comply with certain disclosures in section 11.6 of NI 51-102 within 140 days after their most recently completed financial year) and ESG (material climate-related risks should be disclosed in a factual and balanced manner, with supporting data and reports; issuers should also avoid misleading promotional language)
- Option repricing: Issuers should report a disposition for the cancellation of options (code 38) and an acquisition for the grant of options with the new exercise price (code 50)

### US Securities and Exchange Commission (SEC)

The SEC adopted [final rules to enhance and standardize climate-related disclosures](#) in public offerings and SEC filings, but has [paused implementation](#) amid court challenges. When in force, the final rules will apply to all registrants, including foreign issuers. Timing of compliance will depend on a registrant's filer status. Specifically, the final rules require disclosure of:

- Material climate-related risks, and mitigation/adaptation strategies
- Management's associated role, and related Board oversight
- Information about a registrant's climate-related targets or goals and, for certain filers, information about material Scope 1 and/or Scope 2 emissions, including an assurance report (foreign private issuers can disclose their Scope 1 and/or Scope 2 emissions on a delayed basis – i.e., in an amendment to their annual report on Form 20F, no later than when such disclosure would be due for a domestic registrant)
- Costs, expenditures, charges and losses in various areas

According to the SEC's [Office of Minority and Women Inclusion](#), a majority of the 58 voluntary self-assessments (7% of all regulated entities) indicated organizational commitment to diversity and inclusion, to related employment practices, and to publicizing workforce diversity progress. However, only a minority of firms monitored their diversity progress or publicized self-assessment results. As well, 75 of 162 SEC senior officers were women, and 50 were minority (up 31.6% and 13.6% respectively from 2022), while approximately one-third of all SEC staff identified as a minority.

### **Individuals with significant control**

CBCA amendments took effect on January 22, 2024 (see Orders [SI/2023-62](#) and [SI/2023-79](#)) requiring corporations to collect and provide to the Director (Regulator) information on individuals with significant control (ISC). Reporting is required on or after incorporation, amalgamation or continuance, or when a change in information occurs, and is designed to counteract money laundering and tax evasion. The Regulator can now also impose fines of up to \$100,000, issue a certificate of dissolution, or refuse to issue a certificate of compliance. Individuals or corporations can request that information not be made public in certain situations. Wholly owned subsidiaries and Crown corporations must still file to confirm their [exemption](#).

[Bill C-69](#) would also amend the CBCA to harmonize all fine amounts (by increasing some from \$5,000 to \$100,000) for offences related to collecting or sending information (to the Regulator or

investigative bodies) regarding individuals with significant control; and to set separate fines and imprisonment terms for a director, officer or shareholder guilty of various offences if convicted on indictment (instead of summarily).

The federal government also created a [webpage](#) for CBCA corporations to file certain ISC data through a [searchable database](#), which will be scalable to include information held by provinces and territories that choose to participate. Provinces with similar requirements include British Columbia, Ontario, Québec and Nova Scotia (see our [Client Advisory](#) dated June 12, 2023).

## **Corporate governance (OSFI and CCGG)**

### OSFI Guideline B-15

The Office of the Superintendent of Financial Institutions (OSFI) [updated its Guideline B-15: Climate Risk Management](#) to align expectations for federally regulated financial institutions (FRFIs) with [international disclosure standards](#), and final [Climate Risk Returns](#) for collecting standardized data on emissions and exposures. FRFIs must have an “appropriate governance and accountability structure in place to manage climate-related risks”, while Senior Management must assume “overall accountability for the FRFI’s climate risk management” and consider how compensation policies and related practices incorporate related considerations. Disclosure of cross-industry metrics, under Annex 2-2, includes “the percentage of Senior Management and other material risk-takers’ remuneration recognized in the current period that is linked to climate-related considerations”.

Guideline B-15 and the Climate Risk Returns are effective fiscal year-end 2024 for domestic systemically important banks and internationally active insurance groups headquartered in Canada (with filing required within 180 days after fiscal year-end, or by mid-2025). For all other in-scope FRFIs, they will become effective fiscal year-end 2025 (with filing required by mid-2026).

### OSFI Integrity and Security Guideline

OSFI released its [Integrity and Security Guideline](#) requiring FRFIs to maintain policies and procedures against threats to their integrity or security, and a related [FAQ](#) document. The Guideline will be [phased in](#) between January 31, 2024 and July 31, 2025, and should be applied on a proportional risk basis with directors and “responsible persons” demonstrating integrity through actions, behaviours and decisions that are validated through an enterprise-wide framework. Expectations should also be contained in codes of conduct and conflict of interest policies and procedures, communicated to all employees and contractors, and reinforced through regular training (as applicable). Employees must be able to raise concerns through internal and external channels.

By July 31, 2025, FRFIs must also ensure that responsible persons, employees, job applicants and contractors are subject to risk-based background checks, including verification of identity and background, criminal record checks, and credit checks. OSFI may require that specific individuals obtain a higher level of security clearance, depending on their roles and responsibilities.

## CCGG Proxy Best Practices

The Canadian Coalition for Good Governance (CCGG) released its [2023 Best Practices for Proxy Circular Disclosure](#) which provides examples of model disclosure in various areas, including executive compensation. Issuers should disclose:

- Details of executive compensation structure, and identify mechanisms to mitigate risk-inducing behaviours, including clawback and anti-hedging policies
- Whether the Board targets a specific range or percentile level for compensation relative to a chosen peer group, companies that comprise the peer group, and the rationale for inclusion
- The company's positioning relative to peers
- Target and actual values of CEO compensation, using year-end stock prices to show how effective the program was in aligning the interests of management and shareholders
- Detailed information on all aspects of compensation, including pensions and supplemental retirement benefits for named executive officers; named executive officers should also be encouraged to build meaningful shareholdings over the course of their tenures
- Detailed information on share ownership requirements (e.g., levels of ownership, what long term incentives can count toward those requirements, current share holdings, and whether shareholdings are determined based on market value or acquisition price)

## CCGG Board Engagement Program

According to its [2023 Board Engagement Program Annual Report](#), CCGG remains focused on structural elements of executive compensation, performance measures, and executive share ownership requirements (with a preference for full-value awards such as RSUs and PSUs). Companies should provide sufficient disclosure on climate-related transition risks, improve gender diversity in key roles, and consider moving from virtual-only to hybrid shareholder meetings.

## **Work, rewards and careers**

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

#### Federal

The [Employment Equity Regulations](#) have been [amended](#) to implement a new National Occupational Classification (NOC) system for reporting purposes. Unit Groups now reflect the revised 2021 NOC, aligning all 516 Unit Groups (up from 500 in 2016) with the 14 legislated Occupational Groups. Private sector employers must re-categorize employees before reporting for calendar year 2024.

Recommendations for [Employment Equity Act](#) (EEA) reform were provided by an expert [Task Force](#) (the first three of which noted below have been [accepted](#) by the government):

- Creating two new designated groups, for Black people and for 2SLGBTQI+ people
- Updating the definition “persons with disabilities” by aligning it with the Accessible Canada Act

- Introducing new defined terms for “Aboriginal Peoples” (replacing “Indigenous Peoples”) and “members of visible minorities” (replacing “racialized people”)
- Requiring completion of self-identification surveys on employee hire, annually and on termination
- Requiring employers with at least 100 workers to establish Joint Employment Equity Committees
- Extending the application of the EEA to federally regulated private sector employers with 10 or more employees, and its protections to religious minorities and Canadians and permanent residents working abroad
- Requiring workplace benefit packages to be considered in an employment systems review
- Expanding the employment equity obligations of federal contractors

The federal government also launched consultations on further EEA amendments. A [discussion paper](#) tracks closely many of the Task Force’s earlier recommendations. Of note is the government’s consideration, among other proposals, to:

- Move the various defined groups that experience disadvantages in employment from the EEA to the Regulations, thus providing more flexibility for making future updates but at the possible expense of perceived instability and diminished legal protection
- Require employers to establish accountability mechanisms for senior executives (through performance evaluations) to ensure implementation of their employment equity plan and that reasonable progress is made to achieve and sustain employment equity

Finally, the government [launched](#) a new [employment equity tool](#) that provides anonymized data on workforce representation and pay gaps experienced by women, Aboriginal Peoples, persons with disabilities, and visible minorities.

### British Columbia

As announced in [Budget 2024](#) the government plans to reduce its median gender pay gap over the fiscal planning period from 17% in 2023 to below the national average of 15%.

### Ontario

Ontario [amended](#) the *Employment Standards Act, 2000* (ESA) to require that employers include expected compensation (or a range of compensation) for all positions in publicly advertised job postings, and a statement (if applicable) that artificial intelligence is used to screen, assess or select applicants. Copies of job postings and application forms must be retained for three years after the public posting is removed. These ESA amendments are not yet in force.

On May 6, 2024 Ontario [introduced](#) further ESA amendments that would require a publicly advertised job posting to disclose whether it is for an existing vacancy, and the employer to provide applicants with prescribed information (which must also be retained for three years). Employers would also be required to respond to applicants they have interviewed. However, Ontario will first [consult](#) with stakeholders to develop an “education-first approach” for implementing these changes.

## Minimum wage developments

Effective April 1, 2024, the hourly minimum wage increased for:

- [Federally regulated employees](#) (including interns) to \$17.30 from \$16.65 (subject to any higher provincial or territorial minimum wage), and in
- [Nova Scotia](#) to \$15.20, from \$15.00 (this is the first annual increase based on CPI for Nova Scotia plus 1%)
- [New Brunswick](#) to \$15.30, from \$14.75
- [Newfoundland and Labrador](#) to \$15.60, from \$15.00

Effective May 1, 2024, the hourly minimum wage in [Québec](#) increased to \$15.75, from \$15.25.

Effective June 1, 2024, the hourly minimum wage in [British Columbia](#) increased to \$17.40, from \$16.75. Starting next year it will [increase](#) based on annual changes in CPI for British Columbia.

Effective October 1, 2024, the hourly minimum wage in [Ontario](#) will increase to \$17.20, from \$16.55, reflecting the annual increase in Ontario CPI.

## Employment standards developments

### Federal

[Bill C-69](#) would amend the *Canada Labour Code* (Code) to prohibit employee misclassifications, through a new presumption that any person who receives remuneration is an employee (and not a contractor); and to clarify an employer's obligation to provide notice on termination or wages in lieu thereof, and (if applicable) severance pay.

A new "right to disconnect" for [federally regulated](#) workers would also be introduced. When in force, employers will have one year to establish a policy setting out their general rule respecting work-related communication outside scheduled work hours, including employer expectations and employee safeguards. Policies must be developed and updated with input from affected employees, and provided to them through various means. For details of similar requirements in Ontario, see our [Client Advisory](#) dated May 16, 2022.

### Ontario

[Amendments](#) to the ESA would increase fines for general offences against individuals, from \$50,000 to \$100,000 (thus harmonizing with the maximum amounts that can be imposed against corporations). Also, effective May 6, 2024, certain fines related to a third or subsequent contravention of the ESA in a three-year period have [increased](#), from \$1,000 to \$5,000 (multiplied by the number of employees affected, if applicable).

## CRA guidance

The Canada Revenue Agency (CRA) posted new guidance which explains that a taxable benefit is received if an employee, their spouse or a partnership receives a loan because of the employee's



current, previous or intended employment. A benefit can also arise from an overpayment of salary repaid by the employee over time. Reporting instructions are included.

CRA also released a draft Income Tax Folio Chapter on [Provincial Income Allocation](#) (S4-F3-C2). A new formula is provided for allocating taxable income to a province when a corporation has multiple permanent establishments. Variables include total salaries and wages paid in the year to employees of a permanent establishment in a province, which in turn includes all remuneration under subdivision A of Division B of Part I of the ITA and, in certain situations, amounts (excluding commissions) under an agreement with a third-party service provider. Available deductions are not taken into account. Special rules for partnerships and joint ventures are also set out.

## Measures to address labour shortages

### General

According to its [blueprint](#) aligning immigration with Canada's labour market needs, the federal government will create the new role of Chief International Talent Officer, work with partners to improve foreign credentials recognition, and focus on attracting students with high-demand skills. It will also link sectoral strategies, such as agriculture or health human resources, taking into account needs within regions and Francophone minority communities. The government will also implement an open work permit for H-1B visa holders and develop additional options for talented technology workers. Finally, it will prioritize Start-Up Visa Program applications supported by venture capital, angel investor groups, and business incubators.

In [Budget 2024](#), the federal government announced new multi-year funding to streamline the Foreign Credential Recognition Program, with a focus on the construction and health sectors. It is also calling on provinces and territories to remove barriers to foreign credentials recognition.

According to the [Parliamentary Budget Officer](#), productivity growth in Canada would increase if the income gap between new immigrants and the Canadian median (which is especially high outside Ontario) were eliminated.

According to Statistics Canada, in 2022 the most significant [skills shortages](#) were in the skilled trades (28%), management (15%) and business (11.4%). The construction sector experienced the most shortages. Remedial measures included staff training (53.3%), retention strategies (50.8) and targeted recruitment (49.4%). For every dollar invested in [apprenticeship training](#), employers could receive average returns of 36 cents and better retention of internally trained journeypersons.

### Alberta

The *Alberta Personal Income Tax Act* has been [amended](#) to implement and establish qualification criteria for an [Alberta is Calling Attraction Bonus](#), a one-time \$5,000 refundable tax credit aimed at attracting 2,000 out-of-province workers in the skilled trades over [three Phases](#). Applicants must move to Alberta this year and file a 2024 Alberta tax return.

## Saskatchewan

Saskatchewan will [streamline](#) its pathways for credentials recognition (including accelerated assessments, training and licensure pathways, and settlement programming). It will also settle 8,000 internationally trained workers in 2024, and add 250 new apprentice training seats.

## Manitoba

Manitoba released draft regulations permitting self-regulated professional bodies to request an [extension of time](#) to process domestic labour mobility applications, and to [ensure](#) they do not impose unduly burdensome language testing requirements on out-of-province or international applicants.

## Ontario

Ontario will [prohibit requiring prior Canadian experience](#) as a pre-screening mechanism, thus supporting related ESA amendments in Bill 149 (see our [Client Advisory](#) dated December 21, 2023), which received Royal Assent on March 21, 2024 but must still be proclaimed into force. Related amendments will require regulated professions to assess qualifications in a transparent, objective, impartial and fair manner.

Subsequently, [Bill 190](#) was introduced to require that regulated professions have policies respecting alternatives to normally required documentation of qualifications, and plans addressing how they will enable parallel processing of concurrent registration processes.

## New Brunswick

New Brunswick will [reduce](#) certification barriers for internationally trained workers in regulated professions, with a focus on health-care professionals.

## **Continuing workforce impacts of COVID-19**

According to Statistics Canada, the recent pandemic accelerated [working from home](#) and saw 40% of Canadians working most hours virtually in 2020, with 90% of new teleworkers reporting no productivity declines. The effects of working from home will likely vary across firms, sectors and types of work arrangement (hybrid versus exclusively virtual). Employers could encounter difficulties accommodating diverse teleworking preferences, with possibly negative impacts on retention.

## **Inclusion and diversity**

### **Women and minorities on non-profit boards**

[Bill C-69](#) would amend several federal statutes to require annual disclosure of diversity on boards and in senior management by FRFIs (already required for CBCA corporations, see our [Client Advisory](#) dated October 15, 2019) simultaneous with the notice of annual meeting sent to shareholders or (where applicable) members or policy holders.

According to Statistics Canada, 47.3% of all [board of director positions in non-profit organizations](#) were filled by women last year, and 9.8% by members of racialized groups. In 2022, 92.6% of non-

profit organizations were governed by a board of directors, representing 8.2% of Canada's GDP. For similar for-profit corporation statistics in 2020, see our [Client Advisory](#) dated December 21, 2023.

## Parental leave and childcare

In 2019, 91% of mothers who resumed work within 18 months of their [parental leave](#) returned to the same employer, and 80.3% expected their hours and other work features to remain the same. Meanwhile, 50.5% of mothers planned to use childcare centres, up from 42% in 2009, with the highest percentage in Québec (61%). Two years later, before introduction of the [Canada-wide early learning and child care system](#), 68% of couples with young children had two employed parents, compared with 84% for couples without children. As a result, fewer two-parent families feel obliged to have one parent not working or working part-time to care for a child.

According to Statistic Canada, by December 2023, 56% of children below age six were in [child care](#), up from 52% in 2022 but still below the 60% pre-pandemic level. While the average monthly cost for full-time arrangements decreased to \$544, from \$649, parents are finding it more difficult to secure placements, with one-quarter of children on a waiting list.

## Employment and wage gap trends

Also according to Statistics Canada, a more balanced share of [parental leave](#) could also help reduce gender gaps in both employment and earnings, which are influenced by persisting inequalities in caring responsibilities between men and women.

Meanwhile, between 2017 and 2022 the [employment rate for disabled Canadians](#) increased to 62% (versus 78% for persons without disabilities). Employment and Social Development Canada has also made available information, tools and resources to help [smaller and medium-sized employers](#) hire disabled persons and create inclusive workplaces.

Finally, in 2021 there were few [gender differences](#) in terms of over-qualification (15.8% versus 15.2%). However, the rates for non-immigrants were between 11.7% (for men) and 9.8% (for women), whereas the corresponding rates for immigrants were much higher at 19.9% (for men) and 22.3% (for women). As well, despite superior educational outcomes, 18.4% of [2SLGBTQ+ people](#) were in the bottom personal income quintile, versus 13.5% for non-2SLGBTQ+ people.

## Federal and provincial initiatives

### General

On January 30, 2024, Canada ratified the International Labour Organization's [Violence and Harassment Convention](#), and must now implement laws, policies and collective bargaining agreements that prohibit, prevent and address violence and harassment at work.

According to Statistics Canada, in 2020 47% of women and 31% of men reported experiencing some form of [harassment or sexual assault at work](#). Data are also available for people with disabilities, Indigenous People, racialized people, immigrants, and LGB people.

The federal government has established a [Union-Led Advisory Table](#) to recommend supports for workers affected by economic change, with a focus on mid-career workers in at-risk sectors.

### British Columbia

The [Anti-Racism Act](#) has received Royal Assent and requires the government to establish a provincial action plan by June 1, 2026, with a focus on systemic racism against Indigenous peoples, as well as Islamophobia and antisemitism. New requirements are imposed on all public bodies to establish and regularly review targets to recruit, retain and advance racialized individuals within their general workforce and senior management. For details of the complementary [Anti-Racism Data Act](#), see our [Client Advisory](#) dated November 14, 2022.

### Saskatchewan

Saskatchewan has set out the required provisions that every provincially regulated employer must include in its [violence prevention plan](#), effective May 17, 2024. Recent amendments to *The Saskatchewan Employment Act* now also protect contract workers, students and volunteers from violence at work (for further details, see our [Client Advisory](#) dated June 12, 2023).

### Ontario

[Bill 190](#) would amend the definitions of “workplace harassment” and “workplace sexual harassment” in the *Occupational Health and Safety Act* (OHSA) to include virtual activities. The scope of the OHSA would also be expanded to cover telework. Finally, Ontario will [consult](#) on creating a new employer duty to act where investigations identify that workplace harassment has occurred.

### Québec

[Bill 42](#) has received Assent and will amend, on or by September 27, 2024, the:

- *Act respecting industrial accidents and occupational diseases* to presume certain employment injuries result from sexual violence, extend the time limit for filing a claim, and impute the cost of benefits relating to such claims to the employer and any related corporate entities
- *Act respecting labour standards* to expand an employer’s obligation to prevent psychological harassment in the workplace, and prohibit reprisals against employees who report harassment; seven minimum content requirements for the employer policy on psychological harassment are set out for how to identify and eliminate risks, provide training, handle complaint, and ensure confidentiality; previous disciplinary measures for physical or psychological harassment committed by the same employee must be taken into account when investigating and addressing new complaints; fines will increase, with punitive damages allowed for psychological harassment

Québec will also provide [new funding](#) to finance support services for employees during the filing and handling of a complaint for psychological harassment of a sexual nature in the workplace.

## Newfoundland and Labrador

**Consultations** were launched on replacing the *Status of Women Advisory Council Act* with new legislation that is inclusive of gender-diverse people. The Council's mandate will also be expanded to include issues of concern for 2SLGBTQQA+ people.

## **Case law**

### **For cause termination**

In *Graceffa c. Otéra Capital Holdings Inc.*, a former senior executive who was a Board member or Chair of several Caisse subsidiaries (Otéra, Ivanhoé Cambridge, and MCAP) was terminated for cause following an internal investigation. The Québec Superior Court confirmed that under the *Civil Code* senior executives and “employees holding positions of hierarchical importance” are held to “exacting standards of probity and loyalty”, and that the doctrine of progressive discipline does not apply to senior executives. Nevertheless, an employer must still establish cause founded on a serious breakdown of trust. The defendants met this burden, as Graceffa had admitted accepting \$15,000 in cash from an individual with a criminal record for drug trafficking. Other instances of misconduct, including failure to disclose his roles with three external corporations or to fully disclose the extent of outside business relationships, though not on their own capable of justifying termination for cause, were aggravating factors. Although Graceffa was not entitled to compensation in lieu of reasonable notice, Ivanhoé Cambridge could not unilaterally withhold any agreed remuneration payable in April 2019 (one month before termination). He was therefore entitled to a special bonus of \$400,000 and his 2018 annual bonus representing 80% of base remuneration.

Pending appeal, the Québec Court of Appeal refused to seal the parties' employment contracts, non-disclosure agreements and other documents, in part because Graceffa's former employers could not demonstrate how disclosure would be detrimental to other executives.

### **Reasonable notice and components of damages**

In *Ratz-Cheung v. BMO Nesbitt Burns Inc.*, the Ontario Superior Court of Justice (SCJ) awarded a 59-old investment advisor with 24 years' service, 24 months reasonable notice, the upper limit barring exceptional circumstances. No damages for lost opportunity to sell her book of business were awarded, as Ratz-Cheung had not seriously contemplated retirement during the two-year reasonable notice period. Neither had she demonstrated a basis for bad faith damages in the manner of her termination – although the reasons provided (job elimination and restructuring) were inaccurate, this was done in good faith to facilitate her re-employment.

In *Kopyl v. Losani Homes (1998) Ltd.*, the Ontario Court of Appeal clarified that an invalid termination clause cannot convert a fixed-term contract of employment into a contract terminable on reasonable notice. The employer therefore had to pay Kopyl the balance under her one-year fixed-term contract (six months) instead of only four weeks (as it alleged was owing at common law).

In *Challis v. Maverick Oilfields Services Ltd.*, the Alberta Court of King's Bench awarded a former senior executive the unpaid deferred portion of his bonus, noting that section 8(2) of the *Employment Standards Code* requires payment of earnings within 10 days of the end of the pay period in which

termination occurs, or 31 days after the employee's last day at work. Despite any "residual discretion" as to when the deferred portion would be paid, the bonus was declared, had accrued, and was no longer discretionary, as alleged by Maverick.

In *Gazier v. Ciena Canada ULC*, the Ontario SCJ awarded a 58-year old non-managerial employee with 22 years' service, damages representing 24 months reasonable notice following termination without cause, again the upper limit. In calculating a bonus component, the Court declined to average Gazier's previous four bonus payments, instead applying the actual payments provided in the two years following termination (the first of which resulted in low payouts due to the pandemic's negative effect on Ciena's business). Awarding more would have resulted in a windfall to Gazier.

In *Boyer v. Callidus*, the Ontario SCJ awarded a retired senior executive damages for unpaid and deferred options awarded for 2014 and 2015 (\$525,000) plus 3% quarterly interest. Although Callidus' policies required that any eligible person remain employed to receive deferred compensation, Boyer was not aware of this provision, and his supervisor confirmed the options could be exercised after retirement. As a result, this became a term of the parties' oral contract of employment, despite contrary provisions in Callidus' Stock Incentive Plan. Damages representing the lost opportunity to exercise the options within the 24 months following termination, calculated by the difference in value between grant price and market price on the first trading day after Boyer's retirement. Since Callidus went private before trial, specific performance was not possible, and Boyer received equivalent monetary compensation instead. For details of a previous decision permitting Boyer to amend his pleadings to claim damages for his unpaid options, see our [Client Advisory](#) dated June 12, 2023.

In *Zheng v. China Southern Airlines Company Limited*, the British Columbia Supreme Court awarded a 57-year old former employee with nine years' service, 20 months reasonable notice. Her work experience was in a niche area with limited availability, especially following the Covid-19 pandemic (Zheng was terminated in 2020). She was also entitled to aggravated damages in the amount of \$35,000 for the bad faith manner of termination, as well as \$75,000 in punitive damages for CSA's "highly blameworthy ... abusive, planned and deliberate" conduct. The Court awarded these additional amounts because CSA had: placed Zheng on immediate administrative leave (without reasons); ordered her to leave the office following "a callous and humiliating" search, and not to speak with other employees; made unfounded allegations that she had breached confidentiality; conducted a biased and inadequate investigation, followed by threats of legal proceedings; and damaged Zheng's reputation by notifying others in the industry of her termination.

## **Successor employment**

In *Manthadi v. ASCO Manufacturing*, the employee was 69 at trial, with 36 years of service for a predecessor employer. After ACSO purchased the predecessor's business, Manthadi continued working for five more weeks at the same hourly rate of pay. Previously, she had signed a release and accepted \$5,900 in severance from the predecessor. According to the Ontario SCJ, reasonable notice in situations involving successor employment is not determined by "stitching together the employee's terms of service with the vendor and purchaser of the business and considering it as one continuous period of employment". Rather, the Court should consider some or all of the prior service

to arrive at a fair result, which in this case was 12 months reasonable notice, or \$39,844, with no deduction for the \$5,900 severance she had already received.

## Mitigation

In *Giduturi v. LG Electronics Canada Inc.*, the Ontario SCJ awarded a 49-year old warehouse worker with 13.5 years' service, 12 months reasonable notice. When LG decided to outsource portions of its business, it arranged for all affected employees, including Giduturi, to be offered comparable employment with the third-party purchaser. Giduturi rejected his offer, and so his employment was terminated by LG. On these facts, his duty to mitigate was not engaged by the third party's offer, because it was made and withdrawn before his actual termination. Nothing was therefore deducted from his award of damages for failure to mitigate.

## Managerial employees

In *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, the Supreme Court of Canada overturned a Québec Court of Appeal decision and held that excluding managers from the definition of "employee" in section 1 of Québec's *Labour Code* did not infringe the right to freedom of association under section 2(d) of the *Canadian Charter of Rights and Freedoms* or section 3 of the *Quebec Charter of human rights and freedoms*. As a result, the Association's members cannot join a union or bargain collectively. More broadly, the decision confirms that other restrictions, in Québec or other provinces and territories, applicable to managerial employees, such as restrictions on entitlement to overtime pay, etc. are also valid.

## For more information

This Advisory is not intended to constitute or serve as a substitute for legal, accounting, actuarial or other professional advice. For information on how this issue may affect your organization, please contact your WTW consultant, or:

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