Client Advisory

Trends in executive compensation, workforce rewards and DEI – Fall 2024

November 21, 2024

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Executive compensation and governance

Say-on-pay vote results

The 2024 proxy season marked the 15th year of voluntary say-on-pay in Canada. Overall, results saw a slight improvement over 2023, with average shareholder support at 92% (up from 90%).

Four companies received less than 50% shareholder support (down from five), with pay-for-performance misalignment and problematic pay practices the driving 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 2024 proxy season, according to a WTW analysis as at September 25, 2024, include:

- 258 companies adopted say-on-pay (down from 260) with the decline due to some issuers being delisted, including 52 constituents of the S&P/TSX 60 Index and 175 constituents of the S&P/TSX Composite Index
- In total, 239 companies held a vote this year up to September 25th (down from 249)

2023		2024
260 / 249	Number of companies / number of votes held	258 / 239
90%	Average shareholder support	92%
3% (7)	ISS say-on-pay “against” vote recommendation	3% (6)
2% (5)	Failure rate (less than 50% shareholder support)	2% (4)

Income tax developments

Employee stock options

The federal government released draft *Income Tax Act* amendments (and Explanatory Notes) to implement capital gains and stock option tax changes announced in the 2024 federal budget. Claimants would receive a lower one-third deduction of the option gain for employee stock options

exercised on or after June 25, 2024, reflecting the new basic inclusion rate of two-thirds. The higher inclusion applies to combined stock option exercise gains and realized capital gains from all sources in excess of the annual limit of $250,000. Gains below this annual limit may still be eligible for the current one-half deduction on exercise gains (subject to the employer designating the stock options as qualifying for preferential tax treatment at the time of grant). This will preserve the longstanding treatment of employee stock option benefits as generally equivalent to that for capital gains. The rules for deeming when a benefit is received upon option exercise by an employee of a privately held company would depend on whether it is a Canadian-controlled Private Corporation ("CCPC"). Other proposed amendments relate to the charitable donation of unexercised employee stock options.

According to the CD Howe Institute, these changes will generate $3.3 billion in additional tax revenue over five years, versus up to $8.8 billion as estimated in various government sources, in part due to their interaction with recent alternative minimum tax (AMT) changes.

For details of the capital gains and AMT changes, see our Client Advisory dated June 3, 2024.

Employee ownership trusts (EOTs)

The federal government proposed expanding the temporary $10 million capital gains exemption and 10-year capital gains reserve for qualifying business transfers under the EOT rules to qualifying sales of shares to certain worker cooperative corporations.

Provincial harmonization

Québec announced that it will harmonize its tax system to accommodate EOTs and incorporate the federal government's recent AMT changes.

Securities developments

Proxy changes

The federal *Form of Proxy (Banks and Bank Holding Companies) Regulations* under the *Bank Act* have been amended to better align with the revised *Canada Business Corporations Regulations*, which now incorporate by reference National Instrument 51-102 (Continuous Disclosure Obligations). There are no changes from the consultation draft (see our Client Advisory dated June 12, 2023).

The Canadian Securities Administrators (CSA) published a Notice and Request for Comment on proposed amendments to various National Instruments and Policies to address several matters, including codifying temporary blanket orders issued by provincial securities regulators to accommodate recent *Canada Business Corporations Act* majority voting amendments (see our Client Advisory dated May 16, 2022) by requiring the form of proxy to provide shareholders the option to specify whether their votes are cast "for" or "against" each director nominee.

Principles for Responsible Investment (PRI) documented impediments in the voting chain, including proxy advisory firms' perceived influence over voting decisions and a lack of advisor choice. PRI also notes that investors often use research and voting recommendations from multiple proxy advisors, customized voting policies, and/or other data sources to inform their voting decisions. Challenges noted include:

- Tight timeframes between AGM materials sent to shareholders and investors submitting votes
- Lack of geographical and sector-specific information in advisory research and recommendations
- Insufficient consideration of systemic risk (i.e., climate change or rising inequality)
- Limited transparency of proxy advisory services and the different actors involved in the voting chain (i.e., investors may not know that some proxy advisors adhere to local stewardship codes)
- Challenges in vote processing and a lack of integration between different systems

To address these challenges, asset owners should evaluate their external manager's voting records and, with investment managers, ensure robust due diligence when appointing proxy advisors.

Executive compensation disclosure

The CSA released their Investment Fund Continuous Disclosure Modernization Final Report, according to which the data presentation format (table versus formula) of investment fund executive compensation disclosures can affect retail investor approval ratings and investment-related judgements. For example, a compensation scheme was viewed more positively overall if the CEO bonus component had been presented using an equation (which appears more scientific) rather than a table (which participants found easier to understand).

The CSA also released Staff Notice 51-365 Continuous Disclosure Review Program Activities for the Fiscal Years Ended March 31, 2024 and March 31, 2023, which states that issuers must explain in sufficient detail how the company will satisfy short- and long-term liquidity demands, including if applicable by reducing discretionary operating expenditures such as employee wages and bonuses.

US Securities and Exchange Commission (SEC) enforcement

The SEC settled charges against 15 entities and 10 individuals for failures to report information in a timely manner about their holdings and transactions in company stock. Two public companies were also charged for contributing to filing failures by their officers and directors, and failing to report their insiders' filing delinquencies. All of the entities and individuals also agreed to cease and desist from committing or causing similar violations, and to pay civil penalties totaling over $3.8 million. Data analytics were used to identify insiders who filed late Forms 4, 13D or 13G. For details of similar settlements, see our Client Advisory dated December 21, 2023.

Canadian Investment Regulatory Organization (CIRO)

According to CIRO's 2024 Investor Survey:

- 59% of investors received an explanation of their investment advisor's compensation, 35% did not, and 6% were unsure whether they received an explanation
- Younger investors (18-34) and those with investable assets under $10,000 were least likely to receive an explanation, while those with over $1 million in assets were most likely
- 49% of investors did not think filing a complaint was worthwhile, while 25% did not know how to do so or worried about its impact on their relationship with the advisor

CIRO also released its 2023-2024 Enforcement Report. Enforcement cases involved two groups: investment dealers and mutual fund dealers (both firms and individuals); and addressed the need to protect investors, foster fair and efficient capital markets, and promote market integrity.

For details of CIRO's recent Client Focused Reforms, including advisor compensation disclosure, see our Client Advisory dated December 21, 2023.

Corporate governance

To strengthen Canada's financial sector, the federal government has proposed:

- Prohibiting or restricting interlocking directorates (i.e., when a director of one firm is an employee, executive, partner, owner or board member at another firm), which can raise competition concerns or undermine decision-making at federally regulated financial institutions (FRFIs); limiting interlocking directorates could also encourage a broader range of individuals to serve as directors and enhance governance.
- Authorizing the Office of the Superintendent of Financial Institutions (OSFI) to require that FRFIs adhere to policies and procedures that protect against threats to their integrity or security (such as foreign interference) with a focus on governance

OSFI also noted that the changing risk landscape requires "a careful redesign of incentive structures and accountability measures to align with a more comprehensive view of good performance", while a "senior managers regime" deserves ongoing consideration. For details of OSFI's draft Culture and Behaviour Risk Guideline, see our Client Advisory dated June 12, 2023.

Work, rewards and careers

Employment equity, pay equity and pay transparency

British Columbia

By November 1, 2024, all employers with 1,000 or more employees in British Columbia were required to post gender pay gap reports, and all employers were required to include salary or wage information on publicly accessible job postings (see our Client Advisory dated June 12, 2023). The province has also released its first Pay Transparency Report (see our Client Advisory dated December 21, 2023), which includes provincial-level information on the gender pay gap in part- and full-time employment, in various industry sectors, and for employees with different identities. In 2023:

- Although BC's median gender pay gap fell by 1% to 17%, it was still wider than the 14% national gender pay gap
- Women working full-time were overrepresented in lower-paying sectors (such as retail, education, and healthcare and social assistance)
- Newcomer, disabled, Indigenous, other racialized women and gender diverse people had among the lowest personal median incomes

- To address non-compliance during the initial implementation phase, the Director of pay transparency adopted a collaborative and educational approach with employers

British Columbia also created an online pay transparency reporting tool for employers to upload unidentifiable data on employees' gender and pay, which will then generate an automated report.

Ontario

Ontario released a regulatory proposal to support amendments to the *Employment Standards Act, 2000* contained in Bill 190, which received Royal Assent on October 28, 2023 and will (once proclaimed into force) require employers to disclose in publicly advertised job postings whether a job vacancy exists, and to provide prescribed information to interviewees within a prescribed period (see our Client Advisory dated June 3, 2024). A Consultation Paper sought input on whether:

- Higher compensation postings (i.e., $200,000) should be exempt from the requirement to include an expected compensation or range of compensation
- A limit of $40,000 is reasonable on the expected range of compensation
- Exceptions should be permitted to the prohibition against requiring Canadian job experience, or to the requirement to disclose the use of artificial intelligence
- Employers should be required to disclose approximately when a vacancy is expected
- 30 calendar days is reasonable for an employer to disclose the results of the recruitment process to interviewees, and whether any potential methods of communication should be prescribed
- Employers with fewer than 25 employees should be exempt from the requirements to disclose whether a vacancy exists, and to respond to interviewees
- An employer should be required to provide information in writing to employees prior to their start date, such as the work location, salary/wage and expected hours of work

In *Trumble v. Pay Equity Hearings Tribunal*, the Ontario Divisional Court upheld a Tribunal ruling that the employer's pay equity plan was lawful after assessing various non-monetary benefits, such as extra sick days and vacation entitlements granted to male persons holding various positions. The Court also confirmed the reasonableness of not separating out the complainant's duties into two separate job classes for comparison purposes, as well as its use of a plan template (developed by its consultants) in formulating a pay equity plan. While it is generally preferable not to use different processes for collecting pay equity information as between genders (questionnaires for women versus interviews for men), the Tribunal's findings on this point were reasonable as the small number of people involved allowed for a customized solution. Costs of $7,000 were ordered against the complainant, despite assertions that the legal process created barriers when seeking pay equity.

Minimum wage developments

On October 1, 2024, the hourly minimum wage will increase in:

- Saskatchewan to $15.00 from $14.00

- Manitoba to $15.80 from $15.30
- Prince Edward Island to $16.00 from $15.40

For recent increases in other jurisdictions, see our Client Advisory dated June 3, 2024.

Artificial intelligence (AI) in the workplace

Statistics Canada released an analysis of AI occupational exposure. In May 2021, 29% of workers held jobs highly exposed to and highly correlated with AI, while 31% were in high exposure and low correlation jobs. A "high correlation" means that relatively more tasks could be replaced by AI. The remaining 40% were in less exposed jobs. Unlike prior technological innovations, AI could transform the jobs of highly educated workers, with 86% of individuals holding at least a bachelor's degree in jobs that were highly exposed to AI, compared with 38% of their less educated counterparts. More recently, 6.1% of businesses used AI in the second quarter of 2024. However, only 6.3% of those businesses reported a decrease in total employment.

According to the World Economic Forum, unchecked use of AI and associated algorithms can result in biased and discriminatory hiring outcomes, perpetuate inequities, and dampen progress in workforce diversity. Data privacy and breaches are another concern, easily occurring through the non-anonymization and collection of employee data.

Employment standards developments

British Columbia

British Columbia amended the *Employment Standards Regulation* and developed a new *Online Platform Workers Regulation* to provide protection for gig workers, both effective September 3, 2024. A Backgrounder is also available. New protections require:

- Payment of a minimum wage and certain expenses, as well as tip protection
- Pay and destination transparency
- Notice of suspension, and compensation on termination based on length of service
- Workers' compensation coverage

Saskatchewan

Effective January 1, 2025, the definition of "worker" in Saskatchewan's *Workers' Compensation Act, 2013* will be amended to exclude executive officers on an employer's payroll, and include students.

Competition Act developments

The Competition Bureau and Public Prosecution Service have expanded the application of their Immunity and Leniency Program Guidelines to cover the *Competition Act*'s new wage-fixing and no-poaching provisions, which prohibit companies from agreeing to: fix, maintain, decrease or control wages or other terms of employment; or refrain from soliciting or hiring each other's employees (see our Client Advisory dated December 21, 2023). Meanwhile, a Guide to the June 2024 amendments to the Competition Act clarifies that the Competition Tribunal can consider competitive harm in labour

markets, as well as the risk of coordination between competitors, when deciding whether a merger should be allowed. It also explains that the amendments provide greater protection for complainants, whistleblowers and industry participants.

The Competition Bureau will also amend its merger enforcement guidelines to reflect recent amendments to the *Competition Act* and *Competition Tribunal Act* to improve the focus on worker impacts when reviewing transactions. A consultation paper notes that mergers may lessen competition between employers and harm workers through wage decreases (or wages remaining stagnant), inferior employment terms, lower non-wage benefits. In addition, while the level of concentration at which competition concerns arise may be lower in labour markets than product markets, relevant data is limited. Certain non-wage aspects of compensation may also be difficult to measure, such as pension or vacation entitlements. As a result, in some situations remuneration could decrease while employment or output is not affected. Finally, different considerations may apply for a merger's impact on employees versus contractors, or for other types of employment relationships.

In a recent address, the Commissioner of Competition stated that as a result of these reforms, stakeholders should expect "more aggressive and active enforcement", which will "recognize the importance of competition to workers through the new wage-fixing and no-poaching offences" and provide "enhanced protections" for whistleblowers and others.

Apprenticeship certification and international credentialing

General

According to Statistics Canada, by the end of 2022 apprenticeship certification rates were gradually recovering from the pandemic for some trades, and were highest in Québec. However, female apprentices experienced lower growth in certification rates (0.3%) than men (0.6%). Meanwhile, the Provincial Nominee Program and the Canadian Experience Class had become the main immigration pathways for work permit holders, supplanting the Federal Skilled Worker Program, due to a substantial expansion of the Post-Graduation Work Permit Program and the arrival of spouses or common-law partners of skilled workers and students.

Employment and Social Development Canada has concluded an online engagement on how to drive a modern, inclusive and productive labour market. To address skills gaps, an aging workforce and employment challenges facing women and disabled Canadians, a discussion paper recommends greater employer investment in training new workers, upskilling existing workers and facilitating employment opportunities for under-represented groups. Meanwhile, governments should focus on streamlining foreign credentials recognition and inter-provincial/territorial labour mobility, and creating new immigration pathways to meet labour demands.

Federal

The federal government's Immigration Levels Plan (2025 through 2027) sets out an overall decrease of 105,000 admissions in 2025, as compared to projected levels. Adjustments, however, will be

made to economic immigration streams to prioritize transition of workers already in Canada to permanent residency, and to attract workers in health care and trades occupations.

The federal government also outlined various actions to reduce use of the Temporary Foreign Worker Program (TFWP). These include consistently applying the 20% cap for workers who intend to seek permanent residency, and applying the Refusal to Process policy to all Census Metropolitan Areas with an unemployment rate over 6%, subject to an exception for employers in certain sectors. The application of most Labour Market Impact Assessments (LMIAs) approved for Low-wage Stream positions has been limited to a maximum work duration of one year, and work permit eligibility for spouses of foreign workers in certain occupations and sectors has also been restricted. As well, the hourly wage criteria for the high-wage stream is raised to 20% above the median hourly wage (between $5 and $8 per hour) depending on the province or territory (as a result, more jobs will be subject to the stricter rules of the low-wage stream). Finally, new data verification processes will be implemented to ensure only legitimate job offers are approved.

The government will monitor employer demand for the TFWP and the employment rate, and could take further tightening measures such as increasing LMIA fees, imposing new employer eligibility criteria, or excluding employers in certain sectors. In 2023, $2.1 million in Administrative Monetary Penalties were issued to non-compliant employers, who are also listed on a public-facing website.

Bill C-58 (amending the *Canada Labour Code* and the *Industrial Relations Board Regulations*) has received Royal Assent and will permit employers to use replacement workers to prevent serious damage to property, and threats to public health or safety. However, bargaining unit members must be offered the opportunity to perform the work. Employers could be subject to fines of up to $100,000 per day. For details of earlier consultations, see our Client Advisory dated December 21, 2023.

British Columbia

The *International Credentials Recognition Act* (see our Client Advisory dated December 21, 2023) took effect on July 1, 2024, assisting foreign trained professionals in 29 sectors. Supporting regulations set out when and how the Superintendent may grant an exemption to a professional regulator which has a valid reason for requiring Canadian work experience. The maximum administrative penalty amount has been set at $100,000.

Alberta

Alberta Regulation 95/2024 (see page 271 of the Alberta Gazette) setting out 62 prescribed occupations that are eligible for the Alberta Attraction Bonus has been published. For details of the Bonus, see our Client Advisory dated June 3, 2024.

Saskatchewan

Saskatchewan introduced the Health Talent Pathway immigration stream to consolidate all health care recruitment through its Immigrant Nominee Program. A second stream was established for agricultural workers. The province has also introduced new protections for workers and eligibility requirements (including a code of conduct) for employers recruiting internationally. Administrative penalties of up to $200,000 for individuals and $400,000 for corporations could be imposed.

Saskatchewan also advised that some graduates who received their post-secondary education in another province and international students can qualify under the Graduate Retention Program, which has provided $801 million in tuition tax credits to more than 85,000 graduates since 2009.

Manitoba

Effective October 30, 2024, *The Apprenticeship and Certification - General Regulation* was amended to restore the 1:1 apprentice-to-journeyperson ratio, subject to certain exceptions, and consolidate graduated minimum wage rates for apprentices in 37 designated trades, set either as a percentage in excess of the provincial minimum wage or as a percentage of the reference wage rate for the trade in question. As a result, various regulations were also repealed.

Effective March 27, 2025, *The Language Proficiency Testing Regulation* will ease language testing requirements for out-of-province and international applicants within various regulated professions.

Ontario

Ontario has opened a fifth Skills Development Fund (SDF) Training Stream to address challenges recruiting, training and upskilling workers for various in-demand sectors. A Skilled Trades Special Advisor has also been appointed who will focus on the manufacturing and automotive industries. For details of previous SDF streams, see our Client Advisory dated December 21, 2023.

Ontario will reform its foreign credentials system by requiring regulated professions to have a policy to accept alternatives where standard registration-related documents cannot be obtained for reasons beyond an applicant's control, such as war or natural disasters. The government will also increase access to skills training and apprenticeships for individuals who do not meet academic entry requirements through a new Experienced Apprenticeship Pathway. Applicants must be at least 21 years old and out of formal education for at least three years.

Inclusion and diversity

Women on boards and in executive officer positions

The CSA released a Review of Disclosure Regarding Women on Boards and in Executive Officer Positions (Year 10 Report) which summarizes the corporate governance disclosures of 574 non-venture issuers and includes underlying data for year 10 and data for 113 additional non-venture issuers not included in the Year 9 review sample. Highlights include the following:

- 29% of board seats were held by women this year, up from 27% in 2023 and 11% in year one
- 90% of issuers had at least one woman on their board, up from 89% in 2023 and 49% in year one
- 72% of issuers had at least one woman in an executive officer position, up from 71% in 2023 and 60% in year one
- 37% of board vacancies were filled by women, down from 43% in 2023

Wage gap trends

The federal government will provide $100 million to improve economic and leadership opportunities for women in Canada, and address systemic barriers to their economic participation and success, including harassment, discrimination, limited access to mentors and networks, and lack of flexible work arrangements. Although women's labour force participation reached a record high of 85.7% in July 2023, women are still concentrated in low-wage occupations, with 28.2% of women working in the five lowest paid occupations.

The Word Economic Forum released its Global Gender Gap 2024 Insight Report, according to which Canada ranked 36th out of 146 countries with a score of 0.761, with high parity scores in labour force participation (88.4%) and technical and professional workers (ranking 1st). However, Canada ranked 44th in terms of gender parity for estimated earned income, and 48th for wage equality. Canada's share of women in senior roles was only 35.5%, approximately half that of men.

According to Statistics Canada, under 25% of executive positions were occupied by women in 2021, with occupation titles closely tied to base pay. For example, only 6.7% of women executives occupied the President or CEO positions of a firm, which attract the highest compensation, versus 19.1% for men. As a result, between 2016 and 2020, women executives earned, on average, 40.6% less than men when not controlling for other factors, while the average gender pay gap, after accounting for socioeconomic and firm characteristics, was 32.1% for total compensation and 29.5% for base pay. These findings were partly attributable to occupational segregation, with a higher proportion of women executives in lower-paying roles that in turn negatively impacted their base.

According to new research from the Rotman School of Management, the class pay gap (where people from lower-class families earn less than those from upper-class families, even after accounting for similar levels of education and occupation) is durable despite educational attainment and exists across low- to high-skilled occupations.

Accessibility developments

General

According to Statistics Canada, the employment rate of Canadians with a disability held steady in 2023 at 47.1%, whereas for persons without disabilities it decreased from 67.7% to 66.9%. Disability also had a greater impact on the employment rates of men, and among racialized Canadians and those without a university degree. Disabled persons were more likely to work in sectors such as health care and social assistance, or public administration. Meanwhile, 42% of disabled Canadians could be classified as having work potential if provided appropriate accommodations.

Federal

The federal government launched its Employment Strategy for Canadians with Disabilities, which aims to close their employment gap by 2040, in part by helping employers create inclusive and accessible workplaces. Next steps will include:

- Continuing to embed employment supports for persons with disabilities across federal programs, and to make all government policies and programs more inclusive

- Working with provincial, territorial and Indigenous governments to share knowledge and better support persons with disabilities in the labour market
- Developing progress indicators in collaboration with stakeholders

Manitoba

Manitoba launched a review of the Accessible Employment Standard under *The Accessibility for Manitobans Act*. The Standard was enacted in 2019 and applies to paid employees who are full-time, part-time, apprentices or seasonal. It addresses practices relating to various aspects of employment including recruitment, hiring and retention.

Ontario

Ontario is expanding its integrated employment services to Toronto, Northeast Ontario and Northwest Ontario to help jobseekers, including those on social assistance and people with disabilities, secure rewarding careers. In May 2024, there were close to 195,000 jobs going unfilled across the province, down 49% since April 2022.

New Brunswick

Bill 47, the *Accessibility Act*, received Royal Assent and will require that accessibility standards be established in various areas, including employment, and that entities adopt accessibility plans that identify, remove and prevent barriers. The government aims to achieve a more accessible New Brunswick by 2040, with public sector accessibility plans established by the end of 2025.

Case law

For cause termination

After its main customer, Bell Canada, implemented a mandatory vaccination policy providing that failure to comply by VuPoint employees would constitute a material breach of its services agreement with Bell, VuPoint adopted its own vaccination policy on parallel terms. When an employee refused to disclose his vaccination status, he became ineligible to continue providing technician services for Bell customers. VuPoint therefore terminated his employment. In *Croke v. VuPoint System Ltd.*, the Ontario Court of Appeal upheld a lower court decision that dismissed the employee's wrongful dismissal action, as the parties' employment contract had been frustrated by implementation of the Bell Policy. According to the Court, his claim failed because the Policy constituted an unforeseen "supervening event" beyond VuPoint's control which constituted a "radical alteration of its employment contract with the appellant". Bell therefore could terminate his employment without first taking other non-disciplinary measures.

In *Morton v. Royal Bank of Canada*, the Federal Court confirmed that RBC had cause to terminate an Investment Retirement Planner with 18 years' experience who had completed numerous transactions with clients' money that contravened its various guidelines and Code of Conduct (all of which she had confirmed annually having read and understood). Specifically, Morton performed numerous rebalancing transactions by manually switching the automatic default category in the Bank's payroll system from "non-compensable" to "compensable" without advising the payroll

department as required. As a result, she received unauthorized fees, bonuses and commissions totaling almost $100,000. Her employment was terminated after RBC conducted two internal audits and provided a warning of possible termination. In addition, Morton had been untruthful in advising that her manual rebalancing was infrequent, when it had occurred 76 times over a six-month period (as disclosed in a third, post-termination audit). Under the circumstances, progressive discipline was not necessary.

Reasonable notice and components of damages

In *Krmpotik v. Thunder Bay Electronics Limited*, the Ontario Court of Appeal upheld a damages award of 24 months, the common law maximum barring exceptional circumstances, in favour of a 59-year old former employee with 29 years of service. An additional $50,000 in moral or aggravated damages were also upheld based on the employer's insensitive manner of dismissal, which occurred on the same day Krmpotik returned to work following back surgery.

In *Farrow v. RLG International Inc.*, the British Columbia Court of Appeal denied an application for leave to appeal by Farrow, RLG's former CEO and managing director, from an arbitration award that settled a dispute over the terms of RLG's purchase of his shares on retirement in a single transaction, rather than in tranches spread over three years, which worked to his financial disadvantage because the share value at retirement in 2021 was negatively impacted by the COVID-19 pandemic. The Court rejected Farrow's allegations that RLG had led him to believe his shares would be purchased in tranches, or did not correct his misapprehension to this effect, which in turn influenced the timing of his retirement. The shareholders' resolution setting the share price for 2021 was not tainted by material omissions in the information circular, and was therefore valid.

In *Leblanc c. Lightspeed POS Inc.*, a former Senior Vice President of Products and Technology was terminated without cause after 2.75 years of service, and provided nine months reasonable notice, including amounts representing bonus and other entitlements. Leblanc's request for additional amounts representing the value of stock options and restricted share units (RSUs) that would have vested during the notice period was rejected, and his resulting action was unsuccessful. The parties' employment contract did not provide compensation for incentives granted under Lightspeed's long-term incentive plans on termination without cause. In addition, Leblanc had accepted several grant agreements which provided that all unvested options and RSUs as of the date of termination were automatically cancelled. According to the Court, a discretionary benefit, provided in addition to regular remuneration, need not be included in damages for wrongful termination. Holding otherwise could discourage or limit the granting of options or RSUs, thus depriving employers of a legitimate tool to encourage employee loyalty and retention over the long-term. Finally, even if options agreements were contracts of adhesion under the *Civil Code* (i.e., unilaterally imposed by the employer), provisions that stipulate the immediate termination of unvested options on termination of employment are neither abusive nor contrary to public policy, and should be enforced.

Termination clauses

In *Wilds v. 1959612 Ontario Inc.*, the Ontario Superior Court of Justice awarded a 52-year old employee wrongful termination damages representing two months reasonable notice, after he had

completed 4.5 months of service for the employer. The termination provisions in the parties' employment contract violated the *Employment Standards Act, 2000* (ESA) and were therefore void. This was because the termination without cause provision provided that Wilds would receive her base salary and certain benefits only, thus excluding her bonus entitlement and other benefits. As such the employer had inappropriately attempted to reduce her wages or alter a term or condition of employment. In addition, the termination for cause provision purported to make the employer's compliance with the Act dependent on the employee signing a release, thus also violating the ESA.

In *Egan v. Harbour Air Seaplanes LLP*, the British Columbia Court of Appeal, noting conflicting approaches in different jurisdictions, held that a termination clause that referentially incorporates statutory notice provisions without expressly limiting entitlement to the statutory minimum (i.e., does not convert the statutory floor to a contractual ceiling) will be enforceable in British Columbia. Neither will failure to comply with a contractual notice requirement render a termination clause unenforceable (thereby entitling the employee to enhanced common law notice). Instead, it is a breach of contract that could lead to additional damages. Although the termination clause in this case was silent on the employer's obligations in respect of executive bonus payments and other benefits, Egan was effectively guaranteed all that was statutorily required, and the clause could not be construed as permitting the employer to contract out of any statutory obligations.

Special damages

In *Giacomodonato v. PearTree Securities Inc.*, the Ontario Court of Appeal upheld a lower court decision awarding a former investment banker with two years' service, wrongful dismissal damages of $830,761 based on the terms of the parties' second employment contract. Although fresh consideration must be provided to alter employment terms, the courts are not concerned with the adequacy of such consideration. In this case, PearTree provided fresh consideration in the form of a $40,000 payment to cover the employee's costs of severing his previous employment, and an additional two weeks paid vacation. The Court of Appeal also upheld the lower court's award of $10,000 in punitive damages based on PearTree's decision to suspend salary continuation and attempts to evade further payments. Costs of over $830,000 awarded at trial in favour of Giacomodonato were also upheld, in light of PearTree's "unforgiving, scorched earth, and bare-knuckle" approach to litigation, including an "obviously meritless" counterclaim.

In *Teljeur v. Aurora Hotel Group*, the Ontario Court of Appeal upheld a lower court ruling awarding a 57-year old general manager wrongful termination damages representing seven months reasonable notice, after he had completed three years of service. An additional $15,000 was awarded in moral damages, also upheld on appeal, because the employer failed to provide the minimum severance required under the *Employment Standards Act, 2000*, and tried to encourage the employee to resign.

Collective bargaining

In *KDM Constructors LP v. The International Union of Operating Engineers Local 870*, the Saskatchewan Court of Appeal held that corporate employers do not have a protected right to freedom of association under section 2(d) of the *Canadian Charter of Rights and Freedoms*, and therefore cannot opt out of the collective bargaining process under *The Saskatchewan Employment*

Act. Relying on the recent decision of the Supreme Court of Canada in *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec* (see our Client Advisory dated June 3, 2024), the Court of Appeal confirmed that the section 2(d) right exists to empower employees through collective association to address their power imbalance with employers.

Directors and officers liability insurance

In *Furtado v. Underwriter*, the Ontario Court of Appeal upheld a lower court decision denying the insured coverage under a directors and officers insurance policy, because he did not provide notice of a potential claim as required under the policy. Although it contained a suspension clause that relieved Furtado of providing notice if legally prevented from doing so, that clause became spent once the *Securities Act* was amended in 2019, while the policy was in effect, to allow the subject of an OSC investigation to notify their insurer. However, despite being informed of this change by the OSC in 2021, Furtado did not provide notice under the policy until 2022 by which time it had expired. According to the Court of Appeal, once the law changed to permit Furtado to inform the insurer, but certainly after he was specifically advised of this fact, notice had to be given to trigger coverage.

Application of the Wage Earner Protection Program Act

In *Arrangement relatif à Former Gestion Inc.*, the Québec Court of Appeal confirmed a lower court ruling that the federal *Wage Earner Protection Program Act* (WEPPA) (see our Client Advisory dated November 10, 2021) applies to former employees of insolvent corporations that are restructuring pursuant to a reverse vesting order under the *Companies' Creditors Arrangement Act*, despite the fact that they had not wound down their operations (instead, their assets and obligations were assigned to various shell companies incorporated to facilitate the transaction). The Court noted that reverse vesting orders have become "increasingly common" in insolvencies where a debtor cannot easily transfer intangible property or other rights under a traditional asset sale. However, "in the case of both an asset sale and a reverse vesting order, employees who have lost their jobs have no solvent employer from whom they can claim lost wages", thus engaging WEPPA.

Mitigation

In *Oakley v. Bounty Print Limited*, an employee with 41 years of service was invited to return to work, at the same rate of pay and with no change in terms or conditions of employment, four months after termination without cause. He declined. According to the Supreme Court of Nova Scotia, the fact that litigation existed between the parties did not automatically negate the duty to mitigate by returning to work; if that were the case, every wrongfully dismissed employee could avoid their obligations simply by commencing an action. While the employee had lost trust in his employer, a reasonable person in his position would have accepted the offer of renewed employment.

In *Lopez v. Bank of Nova Scotia*, the Federal Court of Canada confirmed that the test for reasonableness when rejecting an offer by a dismissed employee is the same, whether it is an offer of employment from a new employer or an offer of reinstatement from the dismissing employer. The Court therefore upheld an adjudicator's decision that the employee had failed to mitigate her damages by waiting 32 months before returning to a substantially similar position. Reinstatement

with the entirety of her service recognized for future severance purposes, following receipt of an initial severance, would have provided double recovery.

Distributions from an employee benefit plan

In *Black v. The King*, the Tax Court of Canada held that an employer had not allocated a particular number of shares to each employee participating in a trust arrangement, as required under sections 7(1) and 7(2) of the *Income Tax Act*, simply by agreeing to issue over 1.3 million shares to a trust for the benefit of all eligible employees. As a result, although the trust qualified as an employee benefit plan, distributions were taxable when received by the employees within the meaning of section 248(1) of the Act.

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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