Willis Towers Watson

Client Advisory

Developments in executive compensation and governance, workforce rewards and pay equity, and inclusion and diversity – Fall 2021

November 10, 2021

Summary

Various workforce rewards and executive compensation developments have occurred since the publication of our last Client Advisory. Key items of interest include:

Executive compensation and governance:

- Taxation of employee stock options
- Say-on-pay voting results
- Draft Ontario Capital Markets Act released for public consultation
- CSA executive compensation disclosure
- Proposed CSA climate-related disclosures
- New requirements for electing directors under the CBCA
- New business corporations statute in Saskatchewan
- Corporate meeting rules in various provinces
- OSFI ends compensation restrictions at federally regulated deposit taking institutions and insurers
- Canada Emergency Wage Subsidy and new support programs
- SEC rule changes on shareholder approval of executive compensation arrangements
- SEC initiatives on ESG
- Representation of women on corporate boards

Workforce Rewards and Pay Equity:

- Federal pay equity legislation in force

- Federal employment equity amendments
- Wage Earner Protection Act changes, effective November 20, 2021
- Working on Sundays in Manitoba
- Minimum wage and statutory holidays in various jurisdictions

Case law:

- Majority voting policies
- Bonus entitlement
- Impact of COVID-19 on reasonable notice
- Vacation and holiday pay class action
- Pay equity

Inclusion and diversity:

- US and international corporate diversity
- International gender pay gap studies
- Teleworking and hybrid arrangements

Taxation of employee stock options

The *Income Tax Act* and Regulations have been amended to set the annual maximum benefit of the employee stock option deduction for employees of certain employers at $200,000 (previously unlimited), which applies to options granted on or after July 1, 2021. Gains on option grants above the $200,000 limit (based on face value at time of grant) are taxed as regular employment income, with no cap on the annual maximum deduction for Canadian-controlled private corporations (CCPCs) or for non-CCPCs with annual gross revenue of $500 million or less.

Québec has also introduced similar tax changes, effective July 1, 2021. Employers must submit to provincial tax authorities a copy of the notice filed with CRA confirming that granted options are subject to the new tax treatment, and can only designate a security as non-qualified for provincial application if it has been so designated under the federal *Income Tax Act*.

Say-on-pay vote results

The 2021 proxy season marked the 12th year of voluntary say-on-pay in Canada. Overall, results were similar to past years, with average shareholder support remaining strong at 91%.

Six companies in 2021 received less than 50% shareholder support (versus one in 2020 and two in 2019), 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 2021 proxy season, according to a Willis Towers Watson analysis as at August 27, 2021, include:

- 241 companies adopted say-on-pay (compared to 260 in 2020 – the decline is attributable to certain companies being delisted), including 51 constituents of the S&P/TSX 60 Index and 164 constituents of the S&P/TSX Composite Index
- Among the total sample, 223 companies held a vote this year (compared to 240 in 2020)

2020		2021
260 / 240	Number of companies / number of votes held	241 / 223
93%	Average shareholder support	91%
0% (0)	ISS say-on-pay "against" vote recommendation	7% (13)
0% (1)	Failure rate (less than 50% shareholder support)	3% (6)

Draft Ontario Capital Markets Act released for public consultation

Ontario has released a draft *Capital Markets Act* for public consultation, until January 21, 2022. If introduced and passed, the new Act would replace the current *Securities Act* and *Commodities Futures Act*. A related Consultation Commentary discusses "new tools" for continuous disclosure and exemption compliance, the proxy system and corporate governance.

The proposed legislation provides rule making authority that could require all publicly listed issuers to implement say-on-pay by having an annual advisory shareholders' vote on the board's approach to executive compensation, and also to provide additional requirements and guidance on the role of independent directors in conflict of interest transactions.

For details of recent consultations on proposed regulations to implement say-on-pay requirements under the *Canada Business Corporations Act*, see our Client Advisory dated March 31, 2021.

CSA executive compensation disclosure

The Canadian Securities Administrators (CSA) published National Instrument 52-112 Non-GAAP and Other Financial Measures Disclosure, Companion Policy 52-112 Non-GAAP and Other Financial Measures Disclosure and Related Consequential Amendments and Changes to regulate disclosures in the Statement of Executive Compensation relating to non-GAAP financial measures and ratios. No specific limitations or industry-specific requirements are mandated for calculating these measures and ratios. However, disclosures should be improved through greater clarity and consistency. National Instrument 52-112 replaces SN 52-306, and generally applies to all reporting issuers for disclosures for a financial year ending on or after October 15, 2021.

The CSA also released for comment Proposed Amendments to National Instrument 51-102 Continuous Disclosure Obligations and Other Amendments and Changes Relating to Annual and Interim Filings of Non-Investment Fund Reporting Issuers and Seeking Feedback on a Proposed Framework for Semi-Annual Reporting – Venture Issuers on a Voluntary Basis. The comment deadline was September 17, 2021. Among other changes, the CSA are proposing to remove the duplicative requirement to disclose executive compensation under Item 8 of Form 51-102F5 Information Circular, and to eliminate other requirements in the MD&A and AIF with respect to

disclosure of cash dividends or distributions declared, any restrictions on the payment of dividends or distributions, and additional disclosures for reporting issuers with significant equity investees.

Proposed CSA climate-related disclosures

The CSA published for public comment, until January 17, 2022, Proposed National Instrument 51-107 Disclosure of Climate-related Matters. It will be phased in over one year for non-venture issuers and over three years for venture issuers, starting after December 31, 2022, and contemplates disclosures relating to: governance; strategy around short-, medium- and long-term climate-related risks and opportunities (excluding "scenario analysis"); risk management; and metrics and targets.

An issuer would have to disclose its Scope 1 (all direct greenhouse gas (GHG) emissions), Scope 2 (all indirect GHG emissions arising from an issuer's consumption of purchased electricity, heat or steam) and Scope 3 (all other indirect GHG emissions, other than those described in Scope 2) and their related risks, or the issuer's reasons for not doing so. The CSA is also considering an alternative approach that would require disclosure of Scope 1 GHG emissions only (with Scope 2 and Scope 3 GHG disclosures being optional).

New requirements for electing directors under the CBCA

Draft amendments under the *Canada Business Corporations Regulations, 2001* were released earlier this year to, among other reforms:

- Require distributing corporations (generally, a reporting issuer under provincial securities legislation) to elect directors on an individual basis only (rather than by a slate system in which all directors are either elected or defeated in a single vote)
- Set out exceptions for a person's appointment as a director when they fail to be elected under the majority voting rules
- Set new or amended time periods for providing notices and other regulatory requirements
- Amend the prescribed proxy form

Although expected by July 1, 2021, implementation of these reforms has not yet occurred.

New business corporations statute in Saskatchewan

Bill 5, *The Business Corporations Act, 2020*, has received Royal Assent and will, once implemented, introduce major reforms to Saskatchewan's corporate law framework. Key reforms include:

- At every annual meeting, directors of certain corporations must provide shareholders information about diversity among directors and members of senior management. As well, when acting with a view to the best interests of the corporation, directors and officers may consider various factors, including matters respecting diversity and the interests of stakeholders, including employees, retirees and pensioners (see our Client Advisory dated October 15, 2019 for similar reforms under the *Canada Business Corporations Act*).

- Directors can fix the "reasonable" remuneration of directors, officers and employees; further details will be provided in supporting regulations which must be released before the Act takes effect (currently, there is no requirement that such remuneration be reasonable)
- Electronic signatures and delivery of various documents, are permitted – specifically, for resolutions, proxies, financial statements, notices, and statutory declarations and affidavits. Government regulations under the new Act could also be made with respect to holding, attending and voting at shareholder meetings electronically

Various statutes currently in force will also be repealed, including *The Business Corporations Act*, *The Business Statutes Act*, *The Companies Act*, and *The Companies Winding Up Act*.

Corporate meeting rules in various provinces

Effective May 20, 2021, British Columbia's *Business Corporations Act* was amended to allow corporations to permanently host fully or partially electronic meetings, including those requisitioned by shareholders. Notice requirements are also set out, and companies must facilitate shareholder participation by telephone or other communications media. However, directors may not participate in person at fully electronic meetings of directors.

Alberta's *Business Corporations Act* has also been amended, effective retroactively to August 15, 2020, so that, unless a corporation's bylaws expressly provide otherwise, board and shareholder meetings can be held virtually, provided all attendees are able to hear and communicate with each other instantaneously and, where applicable, vote at the meeting.

Manitoba's temporary orders under the *Public Health Act*, effective since March 31, 2020, permitting virtual meetings and delivery of notices, documents and other information by electronic means (even if not allowed under a corporation's by-laws) have been lifted, effective October 21, 2021.

Finally, temporary amendments to Ontario's *Business Corporations Act* extending deadlines for holding annual shareholders meetings and directors meetings, and permitting electronic attendance and voting, have been extended until September 30, 2022.

OSFI ends compensation restrictions at federally regulated deposit taking institutions and insurers

Effective November 4, 2021, OSFI ended its COVID-era prohibitions on bank and insurance company share buybacks, and on increases to regular dividends and executive compensation (see our Client Advisory dated October 26, 2020). However, OSFI expects that management and boards of directors will act responsibly, and employ robust risk management practices and sensitivity analysis that uses conservative and prudent assumptions to guide decisions pertaining to capital distributions.

Canada Emergency Wage Subsidy and new support programs

The Canada Emergency Wage Subsidy (CEWS) ended on October 23, 2021 (previously, the federal government had extended the CEWS by adding new claim periods 14 through 21, and new flexibility

for determining an eligible entity's revenue decline for periods 14 through 17). See SOR/2021-206 and the latest Canada Emergency Wage Subsidy (CEWS) FAQs.

Executive pay clawback rules were also introduced and apply to public corporation employerw that received CEWS payments in any claim period beginning on or after June 6, 2021. A group of connected employers can allocate among themselves the group's total executive compensation repayment amount, using a form under the *Income Tax Regulations* and filed with the Canada Revenue Agency. No employer can be assigned a percentage repayment obligation that exceeds the total of its CEWS amount for the relevant period. Repayments must be made in the order of the last CEWS amount first, until the total of all excess refunds equals the eligible employer's executive compensation repayment amount.

A public corporation is one listed or traded on a stock exchange or public market. If the employer's total executive compensation is greater in 2021 than it was in 2019 (prorated for employers that do not have a calendar year-end), then the employer must repay some or all of the CEWS received. Total executive compensation depends on whether Canadian or foreign securities laws apply:

- If Canadian securities laws apply, the total disclosed under the Statement of Executive Compensation for Named Executive Officers under CSA National Instrument 51-102, Continuous Disclosure Obligations (generally the CEO, CFO and three other most highly compensated executives)
- If a foreign securities law applies, the total for the five highest compensated executives, as reported under a similar required disclosure
- In all other cases, the total an employer would have to report if it was required to make shareholder disclosures under Canadian securities laws

The Finance Committee has recommended that the government table a report on the recovery of wage subsidy amounts from publicly traded companies and their subsidiaries that paid dividends or repurchased shares while receiving the CEWS. According to Statistics Canada, between April and October 2020, 36% of active businesses received support, while the replacement rate (percentage of pre-pandemic employment among CEWS recipients) was 75% on average across all industries. Uptake was highest among businesses with 10 to 49 employees, while those receiving support were generally larger before the pandemic and experienced a greater employment decline than active non-recipient businesses. At least one employee was rehired by 23% of recipients.

The government has also established the Canada Recovery Hiring Program, which can provide until May 7, 2022 a 50% wage subsidy to help employers with current revenue losses above 10% to hire more workers, or increase their hours or wages. Further details are provided in a Backgrounder.

Finally, another new wage subsidy is available until May 7, 2022 for businesses still facing significant pandemic-related challenges. The Tourism and Hospitality Recovery Program is for tour operators, travel agencies and restaurants, with a subsidy rate of up to 75% (reduced to 37.5% between March 13 and May 7, 2022); and the Hardest-Hit Business Recovery Program is for severely impacted businesses in other sectors, with a subsidy rate of up to 50% (reduced to 25% between March 13

and May 7, 2022). Applicants must demonstrate significant revenue losses over 12 months of the pandemic, as well as revenue losses in the current month. However, during any new temporary local lockdown businesses will be eligible, if applicable, for up to the maximum wage subsidy, regardless of losses over the course of the pandemic. See Backgrounder for further details.

SEC rule changes on shareholder approval of executive compensation arrangements

The US Securities and Exchange Commission may amend or rescind various rules to minimize the significant economic impact on small entities, including a 2011 rule to implement provisions of the *Dodd-Frank Act* relating to shareholder approval of executive compensation (including frequency), and also to provide disclosure to shareholders concerning certain "golden parachute" compensation arrangements in relation to merger or acquisition transactions (and in certain circumstances to conduct a separate shareholder advisory vote to approve such arrangements).

SEC initiatives on ESG

The US Securities and Exchange Commission (SEC) is seeking public input on climate change disclosure, with a focus on how (if at all) registrants should disclose their internal governance and oversight of climate-related issues, and on the advantages and disadvantages of requiring disclosure concerning the link between executive or employee compensation and climate change risks and impacts (see Question 8). In addition, the SEC has outlined more broadly various issues that policymakers should consider with respect to ESG disclosures, and has released the text of a Commissioner's speech on the possible content of future ESG Rules.

Meanwhile, in an ESG Risk Alert, the SEC noted inconsistencies between public ESG-related proxy voting claims of investment firms and internal proxy voting policies and practices, in areas including independent assessment of proposals, and client voting processes. Therefore, the SEC will examine a firm's policies, procedures, and practices related to ESG; its use of ESG-related terminology; its due diligence and other processes for selecting, investing in, and monitoring investments; and whether proxy voting decision making processes are consistent with ESG disclosures and marketing materials. Additional information is provided in a related Public Statement.

Finally, the recent proxy season provided a reminder of the significance of ESG, with climate proposals receiving record support among shareholders at many companies across various industries – including the energy industry, which saw climate activists win three seats on Exxon's board at the most recent annual meeting. Related board obligations are discussed in the SEC's proposals, as well as the need to focus properly on ESG through board diversification.

Representation of women on corporate boards

Corporations Canada has released Diversity of Boards of Directors and Senior Management of Federal Distributing Corporations, which identifies 669 distributing corporations required to disclose diversity information, reviews 469 proxy circulars filed in 2020, and presents findings which will establish a baseline to measure future progress:

- 50% of corporations had at least one woman on the board of directors, 16% had at least one member of a visible minority, 1.7% had at least one Indigenous person, and 1.7% had at least one person with disabilities
- Women held 17% of board seats, members of visible minorities held 4%, and persons with disabilities and Indigenous persons held 0.3% each
- Women held 25% of all senior management positions, members of visible minorities held 9%, persons with disabilities held 0.6%, and Indigenous persons held 0.2%
- 14% of corporations that disclosed diversity information set targets for women's representation on boards, and 1% set targets for at least one of the other designated groups
- 32% of corporations that disclosed diversity information adopted written policies relating to identification and nomination of women board members, and 26% adopted similar policies relating to Indigenous peoples, members of visible minorities and persons with disabilities

Statistics Canada has released Representation of women on boards of directors, 2018, a related data table, and updated data. Women were slightly more likely to hold board seats in 2018 than in 2017, with larger corporations displaying higher representation. Government business entities had the most women board members, followed by the utilities and finance sectors. In terms of geographic representation, based on the jurisdiction in which the corporation is incorporated:

- 47% of women directors were located in Ontario, followed by Québec with 19.6%
- Québec and Saskatchewan had the highest proportion of women directors, both at 19.4% (Saskatchewan also recorded the highest annual increase (at 1.4%)
- British Columbia (-0.1%) and the northern territories region (-0.8%) were the only areas that posted year-over-year declines in the representation of women on corporate boards
- Provinces with the highest proportions of women directors differed by sector (see analysis of the utilities, finance, management of companies and enterprises, and energy sectors)

Federal pay equity legislation in force

Effective August 31, 2021, most provisions of the *Pay Equity Act*, its supporting regulations, and related amendments to the *Canadian Human Rights Act* took effect for federally regulated employers. A Backgrounder has also been released.

The Act was passed in 2018 and replaces the previous complaint-based pay equity process with a proactive regime that requires employers to identify and correct any pay differences between jobs mainly done by women and those mainly done by men, if the work is of equal value. The new regime's key objectives are to ensure pay equity is achieved and maintained, help address systemic gender discrimination in compensation practices and pay systems, and reduce the gender wage gap. However, an employer cannot achieve pay equity by decreasing the pay of any other job class.

Federally regulated employers have three years to implement a pay equity plan. Employers will then have three to five years (depending on the employer's size and the amount of the wage adjustment)

to eliminate compensation differences due to gender. Employers will also have to update their pay equity plans at least once every five years. The Regulations set out requirements for:

- Mathematical factors for comparing compensation, including under the "equal line" and "equal average" methods (the two most common methods for comparing male and female compensation under the Act) and under the "proxy" and "typical job classes" methods
- Methods for developing a pay equity plan if there are no predominantly male job classes under various methods
- Process for updating pay equity plans, including data collection, analysis of workplace information, compensation comparisons, and phasing-in pay adjustments
- Posting documents in the workplace, and setting various time limits

Employers in the federally regulated private sector are expected to incur total quantified costs of almost $2 billion for the 10-year period 2020-2029 because of compensation increases representing pay equity payouts. Expected benefits of the new regime include:

- Greater transparency
- Improved productivity, workplace morale, and employee mental health
- Reduced legal costs to resolve pay equity disputes

Federal employment equity amendments

Effective January 1, 2021, amendments took effect under the *Employment Equity Act* and its supporting Regulations to extend transparency reporting to include Aboriginal peoples, persons with disabilities, and members of visible minorities working in the federally regulated private sector. A Backgrounder was also released.

Reporting must now include new data on hourly rates of pay, bonus pay, overtime pay and overtime hours. The definition of "salary" was also amended to exclude various benefits, reimbursements and other perquisites. The first report using enhanced data is required by June 1, 2022. In the interim, the government will use the current annual submission process and online engagement tools to guide federally regulated employers. It will also verify final submissions. All wage gap information will be publicly available on an aggregated basis only, with the first release expected in the winter of 2023.

The government believes these reforms will support the objectives of its new pay equity legislation (see above) by enabling federally regulated employers to identify and address workforce wage gaps. The data will also inform federal policies for creating equal and inclusive workplaces.

Finally, a federal Task Force has been established to conduct the most extensive review of the Act since it was introduced in 1986. Following public consultations, the Task Force will recommend reforms to advance equity, diversity and inclusion in federally regulated workplaces. This will include improving "retention and leadership of under-represented groups at some of Canada's largest corporations." It will also study how to: redefine and expand equity groups; better

support equity-related groups; and improve accountability, compliance, enforcement and public reporting of employment equity.

Wage Earner Protection Act changes, effective November 20, 2021

The Wage Earner Protection Program provides payments to cover outstanding eligible wages (wages, vacation pay, certain disbursements, termination pay, and severance pay) to individuals whose employers are bankrupt or subject to receivership. The maximum payment under the Program is equivalent to seven weeks insurable earnings ($7,578.83 for 2021) under the *Employment Insurance Act*. The following amendments to the *Wage Earner Protection Program Act*, passed in 2018, providing payments for wages owed to employees of insolvent employers, have been proclaimed into force effective November 20, 2021, and will:

- Increase the maximum amount an individual can receive
- Expand the definition of "eligible wages"
- Add more conditions under which a payment can be made
- Add new requirements for the government to claim subrogation in respect of payments made under the Act (i.e., the government can, after making payments to workers, seek the amount of those payments from the persons or entities who should have made them)

Supporting amendments to the *Wage Earner Protection Program Regulations* also take effect on November 20, 2021 and will:

- Allow earlier WEPP payments when employers are liquidated
- Extend WEPP coverage for employers subject to foreign insolvency proceedings
- Remove the mandatory reduction of 6.82% applied to all WEPP payments
- Update the payment scheme for trustees' fees and expenses when very few assets remain in an insolvent estate (including higher maximum payments and indexing)
- Require an applicant to explain why they were late in applying or missed other deadlines
- Repeal provisions relating to the administration of appeals

Working on Sundays in Manitoba

Manitoba is proposing amendments to regulations under the *Employment Standards Code* to limit the ability of certain employees to refuse to work on a Sunday, including employees who had agreed in writing when hired to work on Sundays, or are covered by a collective agreement preventing them from refusing to work on Sundays.

Minimum wage and statutory holidays in various jurisdictions

The *Canada Labour Code* has been amended to introduce a new $15.00 minimum wage, effective December 29, 2021, for federally regulated workers. It will increase with inflation and cannot be lower than the minimum wage in effect in the employee's province of employment. The Code was

also amended to introduce a new paid general holiday for federally regulated employees, called National Day for Truth and Reconciliation and celebrated each September 30th.

On June 1, 2021, the regular hourly minimum wage in British Columbia increased from $14.60 to $15.20, and the liquor server minimum wage (set at $13.95 per hour) was eliminated (meaning all liquor servers, 80% of whom are women, will earn the higher general minimum wage). Beginning next year, minimum wage increases in British Columbia will be based on the rate of inflation. Finally, the government will work with Indigenous leaders, organizations and communities on how to mark Truth and Reconciliation Day (for this year, provincial public sector employers, including Crown corporations, were advised to honour this day by closing or operating at reduced levels).

On October 1, 2021, the hourly minimum wage in Ontario increased from $14.25 to $14.35. Subsequently, the government announced a further increase, to $15.00 effective January 1, 2022. In addition, on the same date the special minimum wage for liquor servers, currently set at $12.55 per hour, will be eliminated, entitling those workers also to the general hourly minimum wage.

The hourly minimum wage also increased on October 1, 2022 in Saskatchewan (from $11.45 to $11.81), Manitoba (from $11.90 to $11.95), and Newfoundland and Labrador (from $12.50 to $12.75).

Case law update: Majority voting policies

The Supreme Court of Canada has dismissed an application for leave to appeal in *Baylin Technologies Inc. v. Gelerman*, thus upholding a decision of the Ontario Court of Appeal that Baylin's majority voting policy complied with TSX Company Manual majority voting requirements, and that Gelerman, a director who failed to secure the necessary votes at a meeting of shareholders, was required to resign from its board. For further details, see our Client Advisory dated March 31, 2021.

Case law update: Bonus entitlements

Two lower court decisions have applied last year's Supreme Court of Canada decision in *Matthews v. Ocean Nutrition Canada Ltd.* (see our Client Advisory dated October 26, 2020):

- In *Manastersky v. Royal Bank of Canada*, the Ontario Court of Appeal reduced a portfolio manager's total damages from over $1.1 million to $191,000 by excluding payments under RBC's incentive plan during the 18-month reasonable notice period. Neither was Manastersky awarded additional damages representing a pro rata share of investment proceeds already received from a carried interest plan. According to the Court, such an approach would, "in effect, recast his common law, fund-specific entitlement to incentive compensation … into a notional 'annual or annualized' entitlement".
- In *Koski v. Terago Networks Inc.* the British Columbia Supreme Court held that an employment contract is not considered terminated until after the reasonable notice period expires and, because it did not clearly and unambiguously eliminate or limit the senior executive's common law right to bonus payments during the reasonable notice period, Terago's bonus policy was unenforceable.

Case law update: Impact of COVID-19 on reasonable notice

Courts in Ontario, Alberta and British Columbia have considered the effect of COVID-19 on of the reasonable notice period and related damages owed on wrongful termination:

- In *Lamontagne v. JL Richards and Associates Limited*, a 36-year old accountant with 6.25 years of service, was terminated just before the COVID-19 pandemic and awarded 10 months reasonable notice. Citing *Yee v. Hudson's Bay Company* (see our Client Advisory dated March 31, 2021) the Ontario Superior Court of Justice took judicial notice that, by February 2020, the threat of a global pandemic had created economic uncertainty, leading to a longer notice period than would have resulted absent the COVID-19. Although a bonus component was included in Lamontagne's damages, the Court refused to average her previous three bonus payments, because payouts for 2020 were expected to be significantly reduced as compared to previous years, if not altogether eliminated due to COVID-19". The bonus entitlement was therefore set at $13,500 (her 2019 bonus amount) instead of $27,500 (her bonus amounts in both 2018 and 2017).
- In *Herreros v. Glencore Canada* and *Marazzato v. Dell Canada Inc.*, the Ontario Superior Court of Justice awarded long serving employees damages of 16 months and 15 months, respectively, but without an extension for COVID-19. Also, in *Herrerors*, as all Senior Business Analysts received a 15% bonus in 2019 and 2020, that percentage was used to calculate the employee's damages, instead of her average bonus amounts during the three years preceding termination (which would have resulted in a higher percentage).
- In *Kosteckyj v. Paramount Resources Ltd.*, the Alberta Court of Queen's Bench awarded a professional employee with 6.5 years of service nine months reasonable notice following termination without cause. Her damages included a bonus component, which was payable in respect of Restricted Share Units (RSUs) only due to the impact of COVID-19 on Paramount's business. Previously, she had received bonuses that included RSUs and cash.
- In *Hogan v. 1187938 B.C. Ltd.*, the British Columbia Supreme Court held that when a temporary lay-off in March 2020 due to COVID-19 became a permanent termination five months later, the 53-year old managerial level employee with 22 years of service had been constructively dismissed. He was awarded 22 months reasonable notice, but no bonus was included as none had been paid in 2019 and it was unlikely any would be paid in 2020. The Court also deducted from the employee's damages $14,000 received in Canada Emergency Response Benefit (CERB) payments. The CERB was not private insurance, and did not represent delayed compensation or a part of the employee's earnings. The general rule therefore applied that contract damages should place the employee in the same economic position he would have been in, but for the unlawful termination; not deducting the CERB, however, would have improved the employee's economic position.

Case law update: Vacation and holiday pay class action

Following employee inquiries, Medcan determined that it had been incorrectly calculating vacation pay and public holiday pay for "variable pay" employees by basing such payments on base salary

only without factoring in commissions or bonuses, contrary to the *Employment Standards Act, 2000*. Although the mistake had persisted for at least 15 years, Medcan only paid affected current and former employees unpaid amounts for 2018 and 2019, arguing that any claim for deficiencies in earlier years was statute barred under the ESA and the *Limitations Act, 2002*. A proposed class action was launched for unpaid vacation pay and public holiday pay dating back to 2005. In *Curtis v. Medcan Health Management Inc.*, the Ontario Superior Court of Justice held that the plaintiffs had established certifiable causes of action alleging breaches of their employment contracts and unjust enrichment, and that other procedural requirements under the *Class Proceedings Act, 1992* were met. However, it refused to certify a class action because individual questions of fact relating to Medcan's potential liability could not be determined without proof by individual class members. The Court noted there was no statistical sampling that would assist in determining what individual class members were owed in the aggregate, and that Medcan's limitation arguments and the impact of releases signed by certain class members would need to be addressed individually.

Case law update: Pay equity

In *Ontario Nurses' Association v. 10 Community Care Access Centres, 2021*, the Ontario Divisional Court upheld a decision of the Pay Equity Hearings Tribunal that only the initial establishment of a pay equity plan is subject to collective bargaining, not its subsequent maintenance. The Court also held that no rights were engaged under the *Canadian Charter of Rights and Freedoms*, such as freedom of association.

In *Southlake Regional Health Centre v. Service Employees International Union, Local 1 Canada*, the parties had been negotiating and maintaining pay equity since 1990. Most recently (in January 2021) an Ontario Labour Arbitrator ruled on outstanding issues between the employer and Union by implementing hourly rate adjustments for certain female dominated job classifications. The employer consented in the hopes of furthering settlement, but nevertheless maintained its right to assert the Arbitrator lacked jurisdiction, because pay equity disputes could not be addressed under the parties' collective agreement. Earlier, however, the employer had rejected all of the parties' joint recommendations, instead relying on its own ratings to implement certain pay equity adjustments.

US and international corporate diversity

The US Securities and Exchange Commission has approved Nasdaq rule changes requiring listed companies to disclose, subject to certain exceptions, aggregated information about the self-identified gender and racial characteristics and LGBTQ+ status of their boards. If applicable, companies must also explain why they do not have at least two Diverse board members, including at least one who self-identifies as female and one who identifies as an Underrepresented Minority or LGBTQ+. Failure to comply could lead to delisting. These changes are designed to help investors better understand companies' approaches to board diversity, while ensuring they have the flexibility to best serve shareholders. In a separate Public Statement, two Commissioners stated that more work still needs to be done in this area; for example, disability may be another relevant characteristic, as well as diversity among senior management and the workforce more broadly.

In 2021, the number of female CEOs women running businesses on the Fortune 500 hit an all-time record, at 41, and a women is running a top-four corporation (Karen Lynch at CVS Health). This is also the first year that two Black women are running Fortune 500 businesses: Roz Brewer (No. 16) at Wallgreens Boots Alliance, and Thasunda Brown Duckett (No. 79) at TIAA.

International gender pay gap studies

According to the Pew Research Center, the US gender pay gap has remained stable over the past 15 years, with women earning 84% of what men earned in 2020. However, the gap is smaller for younger workers aged 25 to 34, due primarily to narrowing gaps in other areas such as educational attainment, occupational segregation and work experience. Meanwhile, sizeable pay gaps also exist within STEM careers including by gender, race and ethnicity. Wages were highest for Asian men, and lowest for Black and Hispanic women.

The World Economic Forum's Global Gender Gap Report 2021 analyzes four different gaps and benchmarks in 156 countries. Among the most gender-equal country in the world, Canada ranks 24th (Iceland maintained its first place ranking). Priorities identified for Canada include adding more women senior managers, and reducing gaps in wages and income where approximately 30% of gaps have yet to close. Preliminary evidence suggests that the COVID-19 economic downturn impacted women more severely than men and partially re-opened gaps that had previously closed. Women were also more likely than men to exit the labour market due to COVID-19.

According to the Proceedings of the National Academy of Sciences' report on Rising between-workplace inequalities in high-income countries, the share of inequality between workplaces is growing in 12 of 14 countries (including Canada), and in no country has it fallen. However, Canada (and Japan) were the only countries where wage inequality remained relatively stable.

Teleworking and hybrid arrangements

According to Statistics Canada, in February 2021 90% of new teleworkers were at least as productive at home as they were at their usual place of work, while close to 50% accomplished more work per hour and/or worked longer hours per day. Once the pandemic is over, 80% of new teleworkers would like to work at least half their hours from home. In a separate study, Statistics Canada reports that 39% of all workers would like to work most or all of their hours at home.

However, the World Economic Forum has expressed concern that hybrid working may be detrimental to inclusivity. While promoting diversity through recruitment from rural areas and other countries, hybrid structures can also exclude parents, women, neurodiverse individuals, and employees in remote locations who are less available to work in the office.

For more information

This Advisory does not 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 Willis Towers Watson consultant, or:

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About Willis Towers Watson

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