LEGAL ALERT

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Current Legal Developments Critical to Corporate Management

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Justice consists in doing no injury to men; decency in giving them no offence.

~ Marcus Tullius Cicero (106 BCE – 43 BCE)

PENSIONS AND BENEFITS

Ontario pension plan members may form advisory committees

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Ontario registered pension plan members have significant new rights to information about their plans.

New Ontario legal requirements that came into force at the beginning of 2017 give significant rights to members of Ontario registered pension plans to form advisory committees. These new committees, if formed, will have the right to monitor all aspects of the administration and investment of their pension plans.

The requirements impose serious (and, potentially, costly) obligations on administrators of pension plans to assist with the establishment and ongoing support of member advisory committees.

Employer requirements

Employers and other administrators of Ontario registered pension plans should become familiar with the new requirements for two reasons. First, the timelines are tight. Plan administrators who receive a request to form an advisory committee will have to act quickly.

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CHARTER ISSUES

Supreme Court rejects damages claim against Alberta regulator

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The Supreme Court's recent refusal to award *Charter* damages against a regulator leaves unresolved the question of whether (and, if so, when) *Charter* damages can be awarded against a regulator.

Section 24(1) of the *Canadian Charter of Rights and Freedoms* provides (in broad terms) for remedies for breach of *Charter* rights and freedoms. It states that

> [a]nyone whose rights or freedoms, as guaranteed by [the] *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court

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Second, the new requirements could require administrators to provide far more extensive information about their pension plans than they have been used to providing.

Administrators who fail to take note of the new requirements are exposing themselves to risks of non-compliance with fiduciary obligations and inadvertent disclosure of information that was not intended to be disclosed to plan members.

Application

The new requirements apply to defined benefit and defined contribution pension plans registered in Ontario. They do not apply to Group RRSPs (registered retirement savings plans), nor other non-registered employee savings plans. Pension plans with fewer than 50 members (including retirees) are exempt from the requirements. Certain types of multi-employer and jointly-sponsored plans are also exempt.

Process

The new requirements come into play if there is a request from at least ten members of a plan (including retirees) or a union that represents plan members. If the members or union request that an advisory committee be formed, the plan administrator must follow a prescribed process to communicate the request with all plan members, distribute materials and conduct a vote.

There are no prescribed requirements as to exactly *how* the vote must be conducted. It may be conducted in person, electronically or by mail. There are strict timelines as to when the administrator must act. Within 30 days of receiving a request, the administrator must communicate with the members or union who request the committee.

And, within 90 days of receiving a request, the administrator must communicate with all plan members and conduct a vote. Note that it is the plan administrator's legal obligation, not the obligation of the members or union, to ensure that member communications are distributed and the vote is conducted.

Specific requirements

An advisory committee is established if a majority of the votes cast are in favour of forming such a committee. In that case, the pension plan administrator is required to do several things, including:

- facilitate appointments to the advisory committee and hold the initial meeting of the advisory committee,
- give the committee or its representative information about the pension plan that the committee requests;
- make the plan actuary available to meet with the committee at least annually (if the plan provides defined benefits),
- ensure that the committee has access to an individual who can report on the investments of the pension fund at least annually, and
- provide administrative assistance to the committee.

Monitoring function

An advisory committee does not have any legal authority to dictate how the plan should be administered. The new rules say simply that,

> [T]he purposes of an advisory committee are (a) to monitor the administration of the pension plan; (b) to make recommendations to the administrator respecting the administration of the pension plan; and (c) to promote awareness and understanding of the pension plan.

Significance

Although the concept of enhanced disclosure to plan members is laudable, senior management and legal counsel to employers and other pension plan administrators should be

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informed and cautious about these new requirements. An immediate issue of concern is the question of who pays for the costs of establishing and running the advisory committee.

The new rules say that reasonable costs related to the establishment and operations of the committee are payable out of the pension fund. For a defined contribution pension plan, this could be problematic since it would require individual member accounts to be debited.

Disclosure

A more serious issue relates to disclosure. Prior to 2017, Ontario pension legislation set out a very clear, limited list of documents that unions and members were entitled to receive on request. The disclosure obligations of administrators are now far less clear, and potentially far more extensive.

The new rules say that the administrator is required to give to the advisory committee, on request, "such information as is under the administrator's control and is required by the committee or its representative for the purposes of the committee." There is no guidance as to how far this vague disclosure obligation could extend.

A prudent manager (or other company stakeholder involved with the management of an employer's pension plan) should pause in the preparation of minutes of management meetings, legal opinions, consultants' advice and all other materials that address the pension plan.

It is possible that these new rules will require disclosure of such materials to advisory committees that were previously not required to be disclosed to plan members and unions.

Governance processes

There are governance documentation approaches that can be used by employers who sponsor pension plans to reduce the risks of inadvertent disclosure of material that should be kept confidential from plan members and unions. The new rules regarding advisory committees should prompt employers to consider whether their governance processes are appropriate.

REFERENCES: *Pension Benefits Act*, R.S.O. 1990, c. P.8, section 24, and O. Reg. 351/16 which amended section 65 of Reg. 909 of R.R.O. 1990.

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considers appropriate and just in the circumstances.

Purposes of damages award

In its 2010 decision in *Ward v. Vancouver (City)* ("Ward"), the Supreme Court of Canada confirmed that an award of damages against the government — "to require the state (or society writ large) to compensate an individual for breaches of the individual's constitutional rights" — may be an appropriate and just remedy.

The Court observed that damages may serve three interrelated purposes that further the objects of the *Charter*:

(1) compensation of the claimant for a breach of rights that causes personal loss;
(2) vindication of the *Charter* right by emphasizing its importance and the gravity of the breach; and
(3) deterrence of future breaches.

Exceptions

However, the Court also recognized that there may be countervailing factors that make a damages award inappropriate and unjust, even where it serves one or more of these three purposes. It identified two of these factors in particular: the availability of adequate alternative remedies and concerns for good governance.

The latter factor, it stated, would apply where "s. 24(1) damages would deter state agents from doing what is required for effective governance."

Criminal context

Since the Ward decision, there have been many cases in which *Charter* damages have been awarded. The vast majority of these awards have been made in the criminal law context — for example, for wrongful non-disclosure by the Crown or for unlawful searches, detentions or arrests.

Regulatory context

In its recent decision in *Ernst v. Alberta Energy Regulator* ("Ernst"), the Supreme Court had an opportunity to consider whether *Charter* damages could be an appropriate and just remedy in a different context — the regulatory context. While the Court discussed a number of the issues that a damages award in this context would raise, the division among the judges resulted in there being no majority decision on this question.

At a minimum, however, the Court's decision serves to highlight the issues that will have to be addressed when *Charter* damages are again sought against a regulator.

Facts

The circumstances of the *Ernst* case were unusual. Ms. Ernst is an Alberta landowner who actively opposed fracking and drilling in the vicinity

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