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BY: PAUL E. BROAD

BPS ACCOUNTABILITY LEGISLATION PASSES WITH SIGNIFICANT AMENDMENTS

On December 9, 2014, the Ontario government passed Bill 8, the *Public Sector and MPP Accountability and Transparency Act, 2014*, which gives the government the authority to create comprehensive compensation frameworks for certain employers in the broader public sector (“BPS”), and implements a number of measures to enhance “accountability and transparency” in the government and the public sector. The Bill received Royal Assent on December 11th.

In our July 14, 2014 *FTR Now* – “Ontario Re-introduces BPS Accountability, Transparency Legislation (Formerly Bill 179)” – we reviewed the provisions of Bill 8 in some detail. However, during the Standing Committee hearings into the Bill, the government passed a number of amendments, some of which will have a significant impact on the BPS.

In this *FTR Now*, we will review the changes that will be brought about by Bill 8, and will highlight the Committee amendments.

A. COMPENSATION RESTRAINT – A NEW STATUTE

Bill 8 will significantly change the compensation restraint landscape in Ontario. It enacts a new statute called the *Broader Public Sector Executive Compensation Act, 2014* (“BPSECA”), which will complement, and in some cases, replace the compensation restraint measures contained in Part II.1 of the *Broader Public Sector Accountability Act, 2010* (“BPSAA”).

One key Committee amendment was to change the scope of application of the new BPSECA.

As previously reported, the BPSECA will apply to the same BPS organizations that are currently subject to Part II.1 of the BPSAA – hospitals, school boards, universities and colleges, Hydro One, the Independent Electricity System Operator, the Ontario Power Authority and Ontario Power Generation. In addition, Bill 8 originally added community care access corporations to the list, which are currently not subject to Part II.1 of the BPSAA.

In the Committee hearings, the government amended Bill 8 so that the BPSECA will now also apply to Ornge (Ontario's air ambulance service), and to any organization designated as a public body under the *Public Service of Ontario Act, 2006* (except for those that are also designated as "Commission public bodies"). This latter category includes such organizations as the AGCO, the LCBO, OLG and the WSIB.

Collectively, the organizations subject to the BPSECA are called "designated employers".

As with Part II.1 of the BPSAA, the BPSECA will apply only to "designated executives". This term includes any of the following individuals who make at least \$100,000 in compensation on an annualized basis:

- the head of the organization (whatever his or her title);
- a vice president, chief administrative officer, chief operating officer, chief financial officer, chief information officer or other executive; or
- a director of education or supervisory officer of a school board.

NEW GOVERNMENT POWERS

The BPSECA does not itself establish restraints on compensation; rather, it provides the government with the authority to do so in the future by directive and regulation.

The Management Board of Cabinet will have the authority to issue directives to designated employers requiring them to provide detailed information related to compensation and other payments made to designated executives, including information of specific individuals. Presumably, this power would be exercised to gather the information necessary for the development of compensation frameworks.

The Lieutenant Governor in Council (i.e. Cabinet) will have the authority to establish regulations creating "compensation frameworks" that could apply to

all designated employers and designated executives, or could apply on a more limited class or specific individual basis.

Any compensation framework created will govern the compensation that could be paid by a designated employer to a designated executive. Moreover, the framework could establish limits on any element of a compensation plan, including salary, benefits, perquisites, bonuses, incentives, etc.

Compliance with a compensation framework will be mandatory, and could be enforced through a number of measures.

COMPENSATION

There are several key points to note regarding compensation frameworks.

When Bill 8 was first introduced, it provided that any limits established by compensation frameworks would not apply to reduce the compensation plans of current designated executives who remain in their existing positions (though they could apply to prevent future increases). At the Committee stage, the government amended this “grandparenting” provision so that it will only apply for a 3-year period. Any element of a compensation plan that exceeds what can be paid out under an applicable compensation framework will cease to be payable 3 years after the framework comes into force. This could require designated employers to reduce compensation paid to designated executives at that time.

With respect to persons who become designated executives after any compensation frameworks established under the BPSECA come into effect, or who accept a new designated executive position after that date, the compensation framework will apply immediately to that individual.

If a compensation framework begins to apply to a designated employer that is currently subject to Part II.1 of the BPSAA, that organization will no longer be subject to Part II.1 of the BPSAA as of that date (though the organization would remain subject to other parts of that statute). In other words, the existing compensation restraints would cease to apply to the organization and any of its employees. This will have several important effects:

- for designated employers made subject to a compensation framework, they will cease to be subject to the “performance pay envelope rules” of the BPSAA;

- in addition, for designated employers made subject to a compensation framework, the members of their boards will cease to be subject to any compensation restraints (due to the narrower definition of “designated executive” in the BPSECA); and
- for colleges or universities made subject to a compensation framework, most deans would likely cease to be subject to compensation restraints, while provosts would remain subject if they hold a designated executive position made subject to a compensation framework.

Of final note, the BPSECA will have significantly strengthened enforcement mechanisms. For example, the government will have the power to appoint a public accountant to confirm whether an organization was complying with any applicable compensation frameworks. In addition, overpayments of compensation to a designated executive would be deemed to be debts owed to the Crown by the designated employer, and could be deducted from future financing. The BPSECA also confirms that overpayments will be deemed as debts owed by the designated executive to the employer. The BPSECA also contains a limited offence provision.

BPSAA AMENDMENTS

In addition to introducing the new BPSECA, Bill 8 amends the BPSAA to add a new Part V.1. Under the new part, Management Board of Cabinet can issue directives requiring designated BPS organizations to prepare and publish business plans as well as any other business or financial documents specified in the directives. For publicly funded organizations under the BPSAA, the government could also publish guidelines for the preparation and publication of business plans and other business and financial documents.

WHAT DOES ALL THIS MEAN RIGHT NOW?

It is important to stress that, in terms of compensation restraint, the BPSECA will only have an impact on an organization if a compensation framework is passed that applies to that organization. Absent such a framework being passed, the status quo applies – BPS organizations currently governed by Part II.1 of the BPSAA will remain subject to that Part, while organizations not subject to compensation restraints will remain unregulated.

Thus, it will be important for all potential BPSECA designated employers to monitor the development of any compensation frameworks in the future. Hicks Morley will be actively monitoring all developments in this area as well.

B. FREEDOM OF INFORMATION

Bill 8 amends the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*. In particular, the statutes will both be amended to require institutions to put in place reasonable measures for the preservation of records within the custody and control of the institution, in accordance with any record-keeping or records retention requirements that apply to the institution.

In addition, the statutes will be amended to create a new offence where a person altered, concealed or destroyed (or caused another person to do so) a record with the purpose of denying a right to access the record or the information in it.

C. EXPANDED OMBUDSMAN POWERS

Bill 8 will also increase accountability through expanded ombudsman powers.

First, Bill 8 grants authority to the provincial Ombudsman to investigate matters related to:

- school boards;
- universities; and
- “municipal sector entities” – including municipalities, local boards and municipally-controlled corporations.

At the Committee stage, the government amended Bill 8 in some significant ways with respect to municipal sector entities.

As a general rule, Bill 8 was amended to provide that the provincial Ombudsman does not have the authority to investigate a complaint respecting any decision, recommendation, act or omission that is within the authority of a municipal Ombudsman, subject to several key exceptions:

- for municipalities other than the City of Toronto, the provincial Ombudsman would have jurisdiction over complaints where the municipal Ombudsman had refused to investigate a matter, or had conducted and concluded an investigation;
- again for municipalities other than the City of Toronto, the provincial Ombudsman would have jurisdiction where any applicable time limits

for bringing complaints to the municipal Ombudsman had expired; and

- for all municipalities, the provincial Ombudsman would retain the existing authority to investigate matters on his or her own motion.

Bill 8 was also amended at the Committee stage to confirm that the new rules, summarized immediately above, also apply to municipal integrity commissioners, registrars and auditors general.

Second, Bill 8 amends the *Excellent Care for All Act, 2010* to create a new position of “patient ombudsman”, which would operate with respect to hospitals, community care access centres and long-term care homes. The functions of the new position would include:

- receiving and responding to complaints from patients and former patients or their caregivers (an amendment made at Committee, with the term to be defined in future regulations);
- facilitating the resolution of complaints;
- undertaking investigations of health sector organizations, either in response to a complaint or on the patient ombudsman's own initiative; and
- making recommendations following investigations.

D. MISCELLANEOUS PROVISIONS

In addition to the measures discussed above, Bill 8 also enacts a variety of other changes, including:

- amending the *Ambulance Act* to allow for the designation of “air ambulance service providers” and increased provincial oversight mechanisms, including the appointment of special investigators and whistle-blower protections;
- amending the *Lobbyists Registration Act, 1998* to create greater oversight of the activities of lobbyists;
- requiring public disclosure of the expenses of MPPs and (in some cases) their staff; and
- making amendments to the powers of the Integrity Commissioner under the *Public Sector Expenses Review Act, 2009*.

E. CONCLUSION

Bill 8 will have a significant impact on employers in the broader public sector, and will subject them to a broad array of new oversight powers. As noted at the outset, the Bill has received Royal Assent as of December 11, 2014, although most of the Schedules in the Bill (which enact the various changes) will come into force only upon proclamation.

Hicks Morley will continue to monitor the Bill as its provisions are proclaimed into force. We also recommend that all BPS employers carefully review the new Bill to better ascertain how it will impact your organization.

If you would like to discuss with us how Bill 8 might affect your organization, please contact your regular Hicks Morley lawyer.

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Hicks Morley Hamilton Stewart Storie LLP
www.hicksmorley.com

TORONTO
77 King St. W.
39th Floor, Box 371
TD Centre
Toronto, ON M5K 1K8
Tel: 416.362.1011
Fax: 416.362.9680

WATERLOO
100 Regina St. S.
Suite 200
Waterloo, ON N2J 4P9
Tel: 519.746.0411
Fax: 519.746.4037

LONDON
148 Fullarton St.
Suite 1608
London, ON N6A 5P3
Tel: 519.433.7515
Fax: 519.433.8827

KINGSTON
366 King St. E.
Suite 310
Kingston, ON K7K 6Y3
Tel: 613.549.6353
Fax: 613.549.4068

OTTAWA
150 rue Metcalfe St.
Suite 2000
Ottawa, ON K2P 1P1
Tel/Tél: 613.234.0386
Fax/Télé: 613.234.0418