

Overview of the Wage Earner Protection Program

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The Wage Earner Protection Program Act ("WEPPIA") was enacted in 2005 as part of an effort by Parliament to provide protections to Canadian employees from losses resulting from employer insolvencies. Those protections, which came into force in July 2008, involved two components: (i) amendments to the *Bankruptcy and Insolvency Act*² (the "BIA") and the *Companies' Creditors Arrangement Act*³ ("CCAA") to establish and give effect to a priority secured claim on the current assets of an employer (the "Employee Wage Security") in favor of employees who are owed wages when the employer becomes bankrupt or subject to a receivership; and (ii) the establishment of a fund to compensate employees for wages and related amounts lost as a result of the bankruptcy or receivership of their employer. This compensation fund program is administered by the Federal Minister of Labour and is called the Wage Earner Protection Program.

The Employee Wage Security

Sections 81.3 and 81.4 of the BIA establish a secured claim in favor of employees where their employer becomes bankrupt or subject to a receivership, respectively. The secured claim in each case ranks above all other claims, rights, charges and security interests (with limited enumerated exceptions) and attaches to all of the current assets of the employer as at the date of bankruptcy, or in the case of a receivership those current assets that are in the possession or under the control of the receiver.

The Employee Wage Security secures "wages, salaries, commissions or compensation" owed to employees by an employer in bankruptcy or receivership for services rendered during the six-month period prior to bankruptcy⁴ or the appointment of a receiver, subject to a cap of \$2000 per employee less all such amounts paid to the employee by a trustee in bankruptcy or a receiver⁵.

Officers and directors of the employer and persons not dealing at arm's length with the employer are not entitled to the benefit of the Employee Wage Security (see BIA subsections 81.3(6) and (7) and 81.4(6) and (7)).

The phrase "wages, salaries, commissions or compensation" has been interpreted broadly to include vacation and overtime pay and all other benefits and entitlements earned by the

¹ S.C. 2005, c. 47 s.1, as am.

² R.S.C. 1985, c. B-3, as am.

³ R.S.C. 1985, c. C-36, as am.

⁴ In bankruptcy the relevant period can extend more than six months as the time period begins six months prior to the "date of the initial bankruptcy event" and ends on the date of bankruptcy. The date of the initial bankruptcy event may pre-date the date of bankruptcy by weeks or months in cases where the employer is deemed bankrupt as a result of failed BIA proposal proceedings or where a bankruptcy order is made against the employer.

⁵ The Employee Wage Security also covers up to \$1000 per traveling salesperson employee for disbursements properly incurred in the course of the employer's business during the same six month (or longer) period.

⁶ *Ted LeRoy Trucking Ltd., Re*, 2010 CarswellBC 1109 (CA), affirming 2009 CarswellBC 98 (S.C.).
⁷ As presently prescribed by regulation (see s. 3 of the Wage Earner Protection Program Regulations, SOR/2008-222).

- (b) severance pay and termination pay that relate to employment that ended during the period referred to in paragraph (a).
- (ii) the period beginning on the day that is six months before the day on which a proposal under Division I of Part III of the Bankruptcy and Insolvency Act is filed by or in respect of the employer or the day on which proceedings under the Companies' Creditors Arrangement Act are commenced and ending on the date of the bankruptcy or the first day on which there was a receiver in relation to the former employer; and
- (i) the six-month period ending on the date of the bankruptcy or the first day on which there was a receiver in relation to the former employer; and
- (a) wages other than severance pay and termination pay that were earned during the longer of the following periods:
- "eligible wages" means

The term "eligible wages" is defined in section 2(1) of the WBPPA as follows:

An individual employee is eligible to receive payments under the Wage Earner Protection Program if (a) his or her employment ended as a result of certain prescribed factors - presently resignation or retirement, termination or expiry, (b) the former employer is bankrupt or subject to a receivership; and (c) the individual is owed eligible wages by the former employer.

The preamble to the WBPPA states the full name of the legislation as "an act to establish a program for making payments to individuals in respect of wages owed to them by employers who are bankrupt or subject to a receivership." It achieves this objective by establishing a fund administered by the Federal Minister of Labour to compensate employees who do not receive eligible wages and severance and termination pay as a result of a bankruptcy or receivership.

The Wage Earner Protection Program

While the Employee Wage Security does not exist as such in restructuring proceedings under the proposal provisions of the BIA or under the CCAA, the priority is given effect by requiring, as a condition to court approval of a sale out of the ordinary course of business or a proposal or plan of reorganization, that the court be satisfied that all amounts that would have the benefit of the Employee Wage Security can and will be paid (see BIA subsections 60(1.3) and 65.13(8) and CCAA subsections 6(5) and 36(7)).

employee, regardless of whether they are payable to the employee or to a third-party (e.g., a union or benefits provider) on the employee's direction⁶. The Employee Wage Security does not, however, include severance pay or termination pay (see BIA subsections 81.3(9) and 81.4(9)).

and "wages" is defined as follows:

"wages" includes salaries, commissions, compensation for services rendered, vacation pay, severance pay, termination pay and any other amounts prescribed by regulation⁸.

In the *Ted LeRoy Trucking* case referred to above, the British Columbia Court of Appeal applied a broad interpretation to the WEPFA definitions and determined that the term "wages" in the WEPFA includes amounts earned by the employee but payable to a third-party (e.g., a union or benefits provider) on the employee's direction.

The Wage Earner Protection Program covers eligible wages owing to an individual up to a maximum of the greater of (a) \$3000, and (b) four times the maximum weekly insurable earnings under the *Employment Insurance Act* (the "EIA"); less amounts prescribed by regulation. The amounts prescribed by s. 6 of the Wage Earner Protection Program Regulations, SOR/2008-222 are as follows:

- (a) any amount of the individual has received after the date of the bankruptcy or the first day on which there was a receiver in relation to the former employer by virtue of his or her rights in respect of the eligible wages; and
- (b) an amount equal to 6.82% of the amount determined under subsection 7(1) of the WEPFA.

The present weekly maximum insurable earnings under the EIA is \$882.70 so the maximum amount that can be claimed by an employee in respect of eligible earnings under the Wage Earner Protection Program is presently \$3,531, less the amounts prescribed by regulation.

Those former employees who were officers and directors of the employer, those with a controlling interest in the employer, those who occupied a managerial position with the employer and those not dealing at arm's length with the foregoing are not eligible to receive payments under the Wage Earner Protection Program (see section 6 of the WEPFA).

Trustees in bankruptcy and receivers of employers are required by the WEPFA to undertake certain duties including identifying each individual who is owed eligible wages, determining the amount of eligible wages owing, informing each individual who may be eligible to receive payments from the Wage Earner Protection Program of the existence of that program and the conditions under which payment may be made, and providing certain relevant information to the Minister of Labour (see sections 21 and 22 of the WEPFA for the duties of the trustee and receiver).

To receive payments under the Wage Earner Protection Program, eligible former employees must make application to the Minister of Labour in the manner prescribed in the Wage Earner

⁸ The items presently prescribed by regulation are as follows: gratuities accounted for by the employer, disbursements of a travelling salesperson properly incurred in and about the business of a bankrupt or the business of a person subject to a receivership, and production bonuses and shift premiums (see s. 2 of the Wage Earner Protection Program Regulations, SOR/2008-222).

Interaction Between the Wage Earner Protection Program and the Employee Wage Security

Protection Program regulations. Those regulations presently contemplate, at sections 9 and 10, that an application for payment be made in writing using the form provided by the minister (available at www.serviccanada.gc.ca) and must be made within 56 days after the latest of (a) the day of the bankruptcy or receivership, (b) the day on which the applicant's employment ends for an enumerated reason, and (c) the day on which the receiver terminated the applicant's employment.

Section 36 of the WBPPA states that Her Majesty in Right of Canada is, to the extent of payments made to an individual, subrogated to any rights that the individual may have in respect of unpaid wages against the bankrupt or insolvent employer and, if the former employer is a Corporation, a director of the Corporation. The effect of this provision, among other rights that may be available to Her Majesty as subrogee, is the federal government can assert the Employee Wage Security in insolvency proceedings of the former employer and pursue directors with respect to unpaid wages to the extent the directors would otherwise be liable for such amounts. In that regard it is worth noting that directors are liable under the corporate legislation and employment standards legislation in many provinces and territories for unpaid wages and vacation pay but not, in most cases, for termination and severance pay.

It is also relevant to point out the differences between the scope of the Employee Wage Security and the scope of the Wage Earner Protection Program, which are as follows:

1. the maximum entitlement of an individual employee under the Wage Earner Protection Program exceeds the maximum amount of the Employee Wage Security; and
2. the Employee Wage Security does not secure amounts owing in respect of termination and severance pay, whereas the Wage Earner Protection Program compensates individuals for those amounts.

The result of these differences is that the federal government will often have paid more under the Wage Earner Protection Program than it can or will collect as subrogee of the individual employee's rights under the Employee Wage Security.

The Wage Earner Protection Program regulations address the difference in coverage by directing, at section 8, that payments under the Wage Earner Protection Program be allocated in the following order:

- (a) first, to wages other than those referred to in paragraphs (b) through (e);
- (b) second, to traveling salesperson disbursements;
- (c) third, to vacation pay;
- (d) fourth, to termination pay; and
- (e) last, to severance pay.

By directing the allocation of payments in this way, the Minister of Labour ensures that she can recoup Wage Earner Protection Program payments to the greatest extent possible and avoid the possibility that a creditor or corporate director might seek to have Wage Earner Protection Program payments allocated first to termination and severance pay such that the Minister's recourse to the Employee Wage Security or to the corporate director is minimized.

Case Law under the WEPFA

There has been little case law under the WEPFA.

The *Ted LeRoy Trucking* case, discussed above, considered the scope of the wages and other amounts covered by the Employee Wage Security and the WEPFA.

In *G.F. Canada Equipment Financing G.P. v. Northern Sawmills Inc.*⁹ the Ontario Superior Court of Justice considered whether certain unionized employees were terminated within the six months prior to the appointment of a receiver such that they were entitled to WEPFA benefits. The facts were somewhat involved but were, in essence, as follows:

- In 2004 the employer and the union had negotiated recall rights for certain laid-off employees on terms, including that upon expiry of the recall period the employees' employment would be terminated;

- On July 6, 2010 the employer and union entered into a Memorandum of Settlement that the court interpreted as recognizing that the employees - save those who had signed waiver forms forfeiting their recall rights and electing instead to receive termination payments - had recall rights until the date of the Memorandum of Settlement; and

- On January 6, 2011 a receiver was appointed by the court in respect of the employer.

The Court concluded that the employment of those employees who had not signed waivers forfeiting their recall rights terminated on July 6, 2010 and, since this date fell within the six month period preceding the appointment of the receiver (by just 2 days), those employees were entitled to WEPFA rights and could claim compensation from the Wage Earner Protection Program in respect of their termination and severance amounts.

With respect to employees who had signed waivers, the Court found that as they had not received the termination payments bargained for, there was a total failure of consideration and so the waivers of recall rights were null and void. As a result, these employees were treated in the same manner as the employees who had not signed waivers and were therefore entitled to WEPFA rights on the basis that their employment was terminated on July 6, 2010.