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Dec 9, 2024

COURT FILE NUMBER	2401-02664
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF THE COMPROMISE OF ARRANGEMENT OF LYNX AIR HOLDINGS CORPORATION and 1263343 ALBERTA INC. dba LYNX AIR

DOCUMENT **BOOK OF AUTHORITIES TO THE REPLY BENCH BRIEF OF THE APPLICANT, CANADIAN UNION OF PUBLIC EMPLOYEES**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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Counsel for Canadian Union of Public Employees

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Clerk's Stamp

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended

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Counsel for Canadian Union of Public Employees

TABLE OF AUTHORITIES

TAB 1

CHAPTER 28

An Act to correct certain anomalies, inconsistencies, archaisms, errors and other matters of a non-controversial and uncomplicated nature in the Revised Statutes of Canada, 1970 and other Acts subsequent to 1970

[*Assented to 29th June, 1977*]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE

Short title

1. This Act may be cited as the *Miscellaneous Statute Law Amendment Act, 1977.*

R.S., c. A-3

AERONAUTICS ACT

2. Subsection 6(6) of the *Aeronautics Act* is repealed and the following substituted therefor:

Jurisdiction where offences committed outside Canada

"(6) Where a person has violated a provision of a regulation or an order or direction of the Minister made under a regulation with respect to the operation over the high seas or any territory not within Canada of an aircraft registered in Canada the violation of which is an offence by virtue of subsection (4) or (5), the offence is within the competence of and may be charged, tried and punished by the court having jurisdiction in respect of similar offences in the judicial division of Canada where that person is found in the same manner as if the offence had been committed in that judicial division."

CHAPITRE 28

Loi visant à corriger certaines anomalies et incompatibilités, certains archaïsmes et certaines erreurs mineures et évidentes des Statuts revisés du Canada de 1970 et de certaines lois postérieures

[*Sanctionnée le 29 juin 1977*]

Sa Majesté, sur l'avis et du consentement du Sénat et de la Chambre des communes du Canada, décrète:

TITRE ABRÉGÉ

Titre abrégé

1. La présente loi peut être citée sous le titre: *Loi corrective de 1977.*

S.R., c. A-3

LOI SUR L'AÉRONAUTIQUE

2. Le paragraphe 6(6) à la *Loi sur l'aéronautique* est abrogé et remplacé par ce qui suit:

Juridiction en cas d'infractions commises hors du Canada

«(6) Lorsqu'une personne a enfreint une disposition d'un règlement ou d'une ordonnance ou directive du Ministre, établies sous le régime d'un règlement concernant l'utilisation, au-dessus de la haute mer ou de tout territoire non compris dans les limites du Canada, d'un aéronef enregistré au Canada, dont la violation constitue une infraction prévue par le paragraphe (4) ou (5), une telle infraction est du ressort de la cour compétente pour connaître des infractions semblables dans la division judiciaire du Canada où cette personne se trouve et une accusation visant une infraction de ce genre peut être portée devant cette cour, qui peut juger et punir l'inculpé, comme si l'infraction avait été commise dans cette division judiciaire.»

further information respecting the financial position of the company placed or to be placed before the annual meeting of shareholders following its last completed fiscal year and, if the financial statement is in consolidated form, a copy of the financial statement in non-consolidated form and the report of the auditor thereon."

gnements concernant la situation financière de la société présentés ou qui seront présentés à l'assemblée annuelle des actionnaires qui suit sa dernière année financière terminée, ainsi qu'une copie de l'état financier non consolidé et du rapport du vérificateur s'y rapportant, si l'état financier est consolidé.»

R.S., c. L-1

CANADA LABOUR CODE

CODE CANADIEN DU TRAVAIL

S.R., c. L-1

21. (1) The definition "Director" in section 3 of the *Canada Labour Code* is repealed and the following substituted therefor:

21. (1) La définition de «Directeur» à l'article 3 du *Code canadien du travail* est abrogée et remplacée par ce qui suit:

"Director" «*Directeur*»

" "Director" means an officer of the Department of Labour designated by the Minister to receive and deal with complaints under this Part;"

« «Directeur» désigne les fonctionnaires du ministère du Travail que le Ministre désigne pour recevoir et examiner les plaintes formulées en vertu de la présente Partie;»

«Directeur» "*Director*"

c. 17 (2nd Supp.), s. 16

(2) All that portion of subsection 60(1) of the said Act preceding paragraph (*a*) thereof is repealed and the following substituted therefor:

(2) La partie du paragraphe 60(1) de ladite loi qui précède l'alinéa *a*) est abrogée et remplacée par ce qui suit:

c. 17 (2e Supp.), art. 16

Notice to be given of group terminations

"**60.** (1) Any employer who terminates, either simultaneously or within any period not exceeding four weeks, the employment of a group of fifty or more employees employed by him within a particular industrial establishment, or of such lesser number of employees as is prescribed by a regulation made under paragraph 60.2(*b*) that is applicable to the employer, shall, in addition to any notice required to be given by him under section 60.4, give notice to the Minister, in writing, of his intention to do so at least"

«**60.** (1) Tout employeur qui met fin, soit simultanément, soit au cours d'une période de quatre semaines ou moins, à l'emploi d'un groupe de cinquante employés ou plus qui sont à son service dans un établissement industriel particulier, ou d'un nombre inférieur d'employés prescrit par un règlement établi en vertu de l'alinéa 60.2*b*) et applicable à l'employeur, doit en sus de toute notification qu'il doit fournir en vertu de l'article 60.4, donner au Ministre un avis écrit de son intention de ce faire au moins»

Avis des cessations d'emploi collectives doit être donné

1972, c. 18, s. 1

(3) Subsection 198(5) of the said Act is repealed and the following substituted therefor:

(3) Le paragraphe 198(5) de ladite loi est abrogé et remplacé par ce qui suit:

1972, c. 18, art. 1

Powers of Commission

"(5) An Industrial Inquiry Commission has and may exercise all of the powers of a person appointed as a Commissioner under Part I of the *Inquiries Act*."

«(5) Une commission d'enquête industrielle détient et peut exercer tous les pouvoirs des commissaires nommés en application de la Partie I de la *Loi sur les enquêtes*.»

Pouvoirs de la Commission

R.S., c. L-4

LAND TITLES ACT

LOI SUR LES TITRES DE BIENS-FONDS

S.R., c. L-4

22. Section 34 of the *Land Titles Act* is repealed and the following substituted therefor:

22. L'article 34 de la *Loi sur les titres de biens-fonds* est abrogé et remplacé par ce qui suit:

TAB 2

SUPERIOR COURT
COMMERCIAL DIVISION

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-11-063779-249

DATE : AUGUST 27, 2024

BY THE HONOURABLE DAVID R. COLLIER, J.S.C.

IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF:

FORMER GESTION INC.
and
THE OTHER APPLICANTS LISTED IN SCHEDULE A HERETO
Applicants/Debtors

PRICEWATERHOUSECOOPERS INC.
Monitor

EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA
Impleaded Party

JUDGMENT
(APPLICATION FOR DECARATORY RELIEF AND A WAGE EARNER PROTECTION PROGRAM ORDER)

I. OVERVIEW

[1] The central question raised by this application is whether the *Wage Earner Protection Program Act*[1] (WEPPA) applies to the former employees of insolvent corporations that are restructured under a reverse vesting order issued pursuant to the *Companies' Creditors Arrangement Act* [2] (CCAA).

[2] WEPPA is federal legislation which provides for the payment of outstanding wages by the government to individuals whose employment is terminated as a result of their employer's insolvency.

[3] Until recently, the *Juste Pour Rire* (*Just For Laughs*) group of companies (the "JPR Group") were engaged in the production and distribution of comedy festivals, shows and media content.

[4] On March 5, 2024, six entities forming part of the JPR Group filed a Notice of Intention to make a proposal to creditors under the *Bankruptcy and Insolvency Act*[3] (BIA). Ten days later, the Court authorized these entities, as well as 11 other entities in the JPR Group, to either continue or commence insolvency proceedings under the CCAA.

[5] Following a sale and solicitation process, in May 2024, certain entities in the JPR Group agreed to sell a substantial part of their assets or their shares to a Québec-based comedy production company, ComediHa! 24 Inc. (ComediHa).

[6] The transaction with ComediHa was approved by the Court on June 7, 2024. Under the terms of the transaction three entities (the "AVO Entities")[4] sold the bulk of their assets to ComediHa under an asset vesting order and ceased their operations. One of the AVO Entities, Former Gestion Inc., terminated all its employees prior to the transaction. Twelve other entities (the "RVO Entities")[5] sold their shares to ComediHa and transferred certain of their liabilities to a newly incorporated company ("ResidualCo") pursuant to a reverse vesting order. Five of the RVO Entities[6] terminated their employees and transferred their employment liabilities to ResidualCo.

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1 S.C. 2005, c. 47, s.1.
2 R.S.C. 1985, c. C-36.
3 R.S.C. 1985, c. B-3.
4 The AVO Entities are: Former Gestion Inc., Former Groupe Inc. and Former Management SC Inc.
5 The RVO Entities (including the "NPO Entities", as applicable, and as described in the amended application dated July 16, 2024) are: Distributions Juste Pour Rire Inc., Juste Pour Rire TV Alberta Inc., Juste Pour Rire Audio Inc., Juste Pour Rire Les Gags Inc., 9135-7988 Québec Inc., Les Productions Juste Pour Rire II Inc., Juste Pour Rire TV Inc., 2789018 Ontario Inc., 277692 Ontario Inc., Just For Laughs Toronto Festival, Festival Zoo-Fest and Festival Juste Pour Rire.
6 Festival Juste Pour Rire, Festival Zoo-Fest, Distributions Juste Pour Rire Inc., Les Productions Juste Pour Rire II Inc. and Juste Pour Rire TV Inc.

[7] In all, some 100 employees were terminated on June 4, 2024, just prior to the transaction: 45 by Former Gestion Inc. and 55 by the five RVO Entities. ComediHa did not assume any obligations towards the terminated employees, although it did subsequently hire 13 of them.

[8] When the employees were terminated on June 4, they had been paid all salary and vacation pay owing to them. However, they were given no prior notice of termination and, according to the Monitor, they may have a claim under WEPPA for termination pay (*indemnité de préavis*).[7]

[9] On May 26, 2024, the JPR Group applied to the Court for an order approving the sale to ComediHa and for a declaration that their former employees were covered by WEPPA and would be paid outstanding wages. Their WEPPA application was postponed, however, and in July the Applicants presented an amended application. In the amended proceeding the Applicants express a concern that Employment and Social Development Canada (ESDC), the body that administers WEPPA, may refuse to pay outstanding wages to the former employees of the RVO Entities.

[10] There appears to be no concern that ESDC will consider applications for the payment of wages by the former employees of the AVO Entity, Former Gestion Inc.

[11] Seeking to avoid an unequal treatment of the JPR Group's former employees, the Applicants ask the Court to exercise its discretionary power under s. 11 of the CCAA and to declare, for the purpose of WEPPA, that all JPR Group's former employees were employed by Former Gestion Inc. when they were terminated.

[12] Subsidiarily, the Applicants seek a declaration that, at the date of termination of the JPR Group's former employees, their respective employer was a former employer that met the criteria prescribed by section 3.2 of the WEPP Regulations[8] and that all their former employees in Canada who were terminated are individuals to whom WEPPA applies.

[13] On behalf of ESDC the Attorney General of Canada (AGC) opposes the amended WEPPA application on three grounds, arguing that: (i) the request for retroactive relief is an unwarranted attempt to rewrite the facts; (ii) the Court cannot render the declaratory relief without infringing upon the Minister's jurisdiction to decide eligibility for payments under WEPPA; and (iii) since the RVO Entities have not wound down their operations, WEPPA does not apply to their former employees.

[14] For the following reasons the Court concludes that Former Gestion Inc. and the RVO Entities meet the prescribed criteria of s. 3.2 of the WEPP Regulations and that WEPPA applies to their former employees. It is therefore unnecessary to rule upon the

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7 *Cinquième rapport du Contrôleur*, July 19, 2024, paras. 50, 55.

8 *Wage Earner Protection Program Regulations*, SOR/2008-222.

Applicants' request to have Former Gestion Inc. retroactively declared the employer of the JPR Group's employees.

II. ANALYSIS

i. the ComediHa transaction

[15] Under the purchase and sale agreement approved by the Court on June 7, 2024, ComediHa purchased substantially all the assets, property and business undertaking of the three AVO Entities and the shares and certain assets of the twelve RVO Entities. The transaction provided for the transfer of certain assets and liabilities by the RVO Entities to a newly incorporated entity, 9517-3258 Québec Inc. (ResidualCo).

[16] Through its purchase of shares ComediHa acquired the rights to thousands of distribution agreements between the RVO Entities and third parties, as well as title to thousands of video recordings in the catalogues of the RVO Entities. In authorizing the reverse vesting order, the Court acknowledged that it would have been virtually impossible to transfer all the distribution rights to ComediHa under a traditional asset sale, or to prove the vendors' title to such a vast quantity of intellectual property.

[17] Just as importantly, the reverse vesting order allowed ComediHa to benefit from tax credits and government grants which were important assets of the RVO Entities, but which could not be transferred to ComediHa through an asset sale.

[18] The mixed AVO/RVO transaction structure was approved by the Court because it added significant value to the debtors' assets and maximized the recovery for creditors.

ii. WEPPA

[19] *WEPPA*'s purpose is stated at s. 4 of the statute:

> 4. The Wage Earner Protection Program is established to provide for payments to individuals in respect of wages owed to them by employers who are insolvent.

[20] "Wages" are broadly defined under the statute to include "salary, commissions, compensation for services rendered, vacation pay, termination pay, severance pay and any other amounts prescribed by regulation." [9]

[21] Broadly speaking, under WEPPA an individual may be entitled to receive the payment of wages for a period up to six months preceding a bankruptcy, a receivership

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[9] WEPPA, s. 2 "wages".

or a proposal under the BIA or the commencement of proceedings under the CCAA.[10] The Court was informed that current payments can amount to $8,300 per individual.

[22] An individual's eligibility for payment is set out at s. 5 of WEPPA. For present purposes, an individual is eligible to receive the payment of wages if, (i) their employment has terminated,[11] (ii) the former employer is the subject of proceedings under the CCAA and a court has determined, upon application, that all the employees of the former employer, other than those required to wind down the employer's business operations, have been terminated,[12] and (iii) the individual is owed wages by the former employer.[13]

[23] An individual applies for payment to the designated Minister, who determines whether the individual is eligible to receive a payment.[14] An individual may request the Minister to review its decision respecting eligibility and the Minister's review decision may be appealed, on a question of law or jurisdiction, to the Canada Industrial Relations Board. The Board's decision is final.[15]

iii. does WEPPA apply to the RVO Entities?

[24] To date, no application has been made for WEPPA compensation and the Minister has not considered the eligibility of JPR Group's employees under s. 5 of the Act. Nevertheless, given the AGC's position that the RVO Entities do not meet the criteria prescribed by s. 3.2 of the WEPP Regulations it is not premature to rule upon the applicability of WEPPA to these former employees.

[25] The question of whether WEPPA applies to the former employees of the RVO Entities is also of general interest. Although reverse vesting orders are exceptional restructuring tools,[16] they have become increasingly common features of insolvencies where a debtor cannot easily transfer intangible property or rights under a traditional asset sale.

[26] The question of whether WEPPA applies in the case of reverse vesting orders is one of statutory interpretation and is not simply a question of eligibility reserved to the Minister under s. 9 of WEPPA. The Minister's power to decide whether an individual is eligible to receive a payment does not prevent the Court, in the face of a judicial dispute, from determining the proper scope and meaning of the Act.

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10 WEPPA, s. 2 "eligible wages".
11 WEPPA, s. 5(1)(a); WEPP Regulations, s. 3(b).
12 WEPPA, ss. 5(1)(b)(iv) and 5(5); WEPP Regulations, s. 3.2.
13 WEPPA, s. 5(1)(c).
14 WEPPA, ss. 8, 9.
15 WEPPA, ss. 11 to 20.
16 *Harte Gold Corp. (Re)*, 2022 ONSC 653 (CanLII).

[27] WEPPA is clearly remedial legislation intended to provide protection to workers who suffer lost wages as a result of a bankruptcy or restructuring.[17] As such, the Act should "be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objectives".[18]

[28] According to the modern principle of statutory interpretation the meaning of the Act is to be resolved through an analysis that has regard to its text, context and purpose.[19]

[29] The AGC cites section 3.2 of the WEPP Regulations to argue that WEPPA only applies when an employer is liquidating or winding down its activities.[20] The AGC argues that since the RVO Entities have not wound down their operations WEPPA does not apply to them or their former employees.

[30] Section 3.2 reads as follows:

> 3.2 For the purposes of subsection 5(5) of the Act, a court may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations.

[31] In the Court's opinion, the AGC's argument is based on an incorrect reading of section 3.2. The section does not require an employer to be winding down its operations for its former employees to apply for compensation. Rather, the provision is permissive. It allows terminated employees to apply for back wages notwithstanding that some individuals may still be engaged in winding down the employer's operations. In this manner, WEPPA provides compensation to employees as soon as it becomes clear that all of them have been or will be terminated due to a bankruptcy or restructuring. Section 3.2 of the WEPP Regulations favours the attainment of WEPPA's objective to provide timely compensation and does not limit the Act's protection for workers, as the AGC contends.

[32] The problem or "mischief" sought to be cured by WEPPA is the absence of a solvent employer who can pay wages owing to former employees. Seen in this context, the cessation of the employer's business operations, or the transfer of its liabilities to an insolvent third party, are irrelevant to the application of the Act. 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.

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17 WEPPA, s. 4; House of Commons Debates, Volume 140, Number 128, 1st Session, 38th Parliament, Thursday, September 29, 2005, Hansard, p. 8186.

18 *Interpretation Act*, R.S.C., 1985, c. I-21, s. 12.

19 Ruth Sullivan, *The Construction of Statutes*, 7th ed., Toronto, 2022, LexisNexis Canada Inc.; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 6, paras. 118-120, cited in Sullivan at § 2.01[1].

20 Impleaded Party's Plan of Argument, paras. 18 and 33.

[33] In this regard one should note that WEPPA applies to receiverships and proposals under the BIA – instances where an insolvent company may not necessarily cease to operate despite that all its employees have been terminated.

[34] The Court agrees with the Applicants that the relevant time for determining when WEPPA applies is the moment at which all an insolvent entity's employees are terminated due to a bankruptcy or restructuring. That is when the employee's entitlement to compensation arises and neither the Act nor the regulations indicate that circumstances arising after the termination are relevant. Consequently, in the event an employee is owed eligible wages by a former employer at the moment the former employer terminates all its employees, s. 5(1)(c) of WEPPA ("the individual is owed eligible wages by the former employer") is satisfied.

[35] It would be contrary to the object of the Act to deny compensation to a terminated employee simply because the former employer transfers its liability to a third party under a reverse vesting order. If the assignee is insolvent, as is most often the case, such an assignment does not improve the employee's prospect of being paid. If the assignee has assets, however, the government is subrogated in the rights of the former employee up to the amount of the WEPPA payment. The government's right of subrogation indicates that the assignment of the employer's liability post termination is irrelevant to the operation of the Act.

FOR THESE REASONS, THE COURT :

[36] **GRANTS** the amended application for a WEPPA Order;

[37] **DECLARES** that pursuant to section 5(5) of WEPPA, Former Gestion Inc. and the RVO Entities as defined herein are former employers that meet the criteria prescribed by section 3.2 of the WEPP Regulations, and all their former employees in Canada who have been terminated are individuals to whom WEPPA applies;

[38] **DECLARES** that this Order and all other orders in these proceedings shall have full force and effect in all provinces and territories in Canada;

[39] **THE WHOLE**, without costs.

_____

DAVID R. COLLIER, J.S.C.

Mtre Ilia Kravtsov
Mtre Sandra Abitan
Mtre Jack Little
OSLER, HOSKIN & HARCOURT LLP
Counsel for Applicants/Debtors

Mtre Denis Ferland
DAVIES WARD PHILLIPS & VINEBERG
Counsel for the Monitor

Mtre Andrew Hatnay
Mtre Abir Shamim
Mtre James Hamum
KOSKIE MINSKY
Mtre Nicolas Brochu
FISHMAN FLANZ MELAND PAQUIN
Counsel for Mr Oz Weaver and other terminated employees

Mtre Kim Sheppard
Mtre Jonathan Bachir-Legault
ATTORNEY GENERAL OF CANADA
Counsel for Employment and Social Development Canada

Mtre Daniel Cantin
Counsel for Revenu Quebec

Hearing date : July 22, 2024[21]

[21] Vu la nature urgente de l'affaire, le Tribunal estime que de retarder la signature du présent jugement dans l'attente de la version traduite entraînerait un retard préjudiciable à l'intérêt public ou causerait une injustice ou un inconvénient grave à une des parties au litige. Une traduction suivra.

SCHEDULE A – LIST OF APPLICANT ENTITIES

1. **9379-3834 QUÉBEC INC**. a legal person having its registered office at 2101 Saint-Laurent boulevard, Montreal, Québec, H2X 2T5, Canada.

2. **FORMER GROUPE INC.** a legal person having its registered office at 2101 Saint-Laurent boulevard, Montreal, Québec, H2X 2T5, Canada.

3. **FORMER MANAGEMENT SC INC.** a legal person having its registered office at 2101 Saint-Laurent boulevard, Montreal, Québec, H2X 2T5, Canada.

4. **BOUFFONS MONTRÉAL INC.** a legal person having its registered office at 2101 Saint-Laurent boulevard, Montreal, Québec, H2X 2T5, Canada.

5. **BOUFFONS MTL ARTS DE LA TABLE** a legal person having its registered office at 2101 Saint-Laurent boulevard, Montreal, Québec, H2X 2T5, Canada.

6. **9517-3258 QUÉBEC INC**. a legal person having its registered office at 2101 Saint-Laurent boulevard, Montreal, Québec, H2X 2T5, Canada.

TAB 3

2020 ONSC 61
Ontario Superior Court of Justice [Commercial List]

Imperial Tobacco Canada Ltd., Re

2020 CarswellOnt 12826, 2020 ONSC 61, 323 A.C.W.S. (3d) 474, 82 C.B.R. (6th) 306

In The Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, As Amended

In The Matter of a Plan of Compromise or Arrangement of JTI-Macdonald Corp.

In The Matter of a Plan of Compromise or Arrangement of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited

In The Matter of a Plan of Compromise or Arrangement of Rothmans, Benson & Hedges Inc.

McEwen J.

Heard: December 6, 2019
Judgment: January 3, 2020
Docket: CV-19-615862-00CL, CV-19-616077-00CL, CV-19-616779-00CL

Proceedings: reasons in full to *JTI-MacDonald Corp., Re* (2019), 2019 CarswellOnt 24243, McEwen J. (Ont. S.C.J. [Commercial List])

Counsel: Robert I. Thornton, John Finnigan, Leanne M. Williams, for Applicant, JTI-Macdonald Corp.
Deborah Glendinning, Craig Lockwood, for Applicant, Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited
Paul Steep, James Gage, Heather Meredith, for Applicant, Rothmans, Benson & Hedges Inc.
Avram Fishman, Mark E. Meland, Andre Lesperance, Bruce Johnston, Harvey Chaiton, for Quebec Class Action Plaintiffs
Jacqueline Wall, for Her Majesty The Queen In Right of Ontario
Lily Harmer, for Her Majesty The Queen In Right of Alberta and Newfoundland & Labrador
Michael Eizenga, for Consortium
Nicholas Kluse, for Philip Morris International Inc.
Natasha MacParland, for FTI Consulting Canada Inc., Monitor of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited, Tobacco Canada Limited and Imperial Tobacco Company Limited
Linc Rogers, for Deloitte Restructuring Inc., Monitor of JTI-MacDonald Inc.
Jane Dietrich, for Ernst & Young Inc., Monitor of Rothmans, Benson & Hedges Inc.
Adam Slavens, for Receiver of JTI-Macdonald Corp. and JTIM Canada LCC
Douglas Lennox, for Certified British Columbia Class Action
Robert Cunningham, for Canadian Cancer Society
Joel Rochon, Peter Jervis, for Moving Counsel
Nadia Campion, for Court-Appointed Mediator

Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
  XVII.6 Miscellaneous
Civil practice and procedure
V Class and representative proceedings
  V.2 Representative or class proceedings under class proceedings legislation

V.2.c Conduct of class proceeding

V.2.c.v Applications or motions

Headnote

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Conduct of class proceeding — Applications or motions

Applicant tobacco companies filed for protection under Companies' Creditors Arrangement Act (CCAA) — Companies sought resolution of multiple litigation claims against them — CCAA proceedings included claims already brought against companies, as well as others that had not been made yet — Monitors of companies sought for representative counsel to represent claimants against all three companies — Monitors claimed this relief would allow for pan-Canadian global settlement — Monitors brought joint motion for this relief — At motion hearing, two other firms sought permission to appear as co-counsel — Firms claimed their participation was necessary to advance interests of claimants in uncertified actions started by one firm — Firms moved for this relief — Motion was heard along with joint motion — Joint motion granted; firms' motion dismissed — Moving firm had not taken steps to advance actions which it had started — Second moving firm had potential conflict of interest — Single point of contact was needed for class members — Stakeholders did not oppose appointment of representative counsel — There was no reason to believe representative counsel would not provide proper representation, to all class members.

Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous

Monitors successfully moved to have representative counsel represent claimants, in class action against tobacco companies.

Table of Authorities

Cases considered by *McEwen J.*:

Adams v. Canadian Tobacco Manufacturers' Council (2009), 2009 SKQB 387, 2009 CarswellSask 648, 344 Sask. R. 37 (Sask. Q.B.) — referred to

Canwest Publishing Inc. / Publications Canwest Inc., Re (2010), 2010 ONSC 1328, 2010 CarswellOnt 1344, 65 C.B.R. (5th) 152 (Ont. S.C.J. [Commercial List]) — followed

Cash Store Financial Services, Re (2014), 2014 ONSC 4326, 2014 CarswellOnt 10776, 16 C.B.R. (6th) 261, 31 B.L.R. (5th) 313 (Ont. S.C.J.) — referred to

Montreal, Maine & Atlantic Canada Co., Re (April 4, 2014), Doc. 45041-000167-134 (C.S. Que.) — referred to

Pearson v. Inco Ltd. (2001), 2001 CarswellOnt 4340, 57 O.R. (3d) 278, 16 C.P.C. (5th) 357, [2001] O.T.C. 892 (Ont. S.C.J.) — followed

Pearson v. Inco Ltd. (May 13, 2002), Epstein J. (Ont. S.C.J.) — referred to

Sears Canada Inc., Re (January 25, 2018), Doc. No. CV-17-11846-00CL (Ont. S.C.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 10.01 — considered

R. 10.01(1)(f) — considered

***McEwen J.*:**

OVERVIEW

1 JTI-Macdonald Corp. ("JTIM"), Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited ("Imperial"), and Rothmans, Benson & Hedges Inc. ("RBH") (collectively "the Applicants") have filed for protection pursuant to the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") seeking a resolution of the multiple, significant litigation claims.

2 These *CCAA* proceedings are complex in nature and involve a number of significant tobacco-related actions that have been brought against the Applicants as well as a number of potential tobacco-related claims which are currently unasserted or unascertained.

3 On December 6, 2019 the three Monitors (Deloitte Restructuring Inc. in its capacity as court-appointed Monitor of JTIM, FTI Consulting Canada Inc. in its capacity as court-appointed Monitor of Imperial and Ernst & Young Inc. in its capacity as court-appointed Monitor of RBH) (collectively the "Tobacco Monitors") brought a joint motion in all three Applications seeking advice and directions with respect to orders appointing Representative Counsel regarding the unasserted and unascertained claims. The Tobacco Monitors proposed that Representative Counsel — The Law Practice of Wagner & Associates, Inc. ("Wagners") — would advance claims on behalf of individuals (the "TRW Claimants"), with some limited exceptions described below, who have asserted claims or may be entitled to certain claims for a Tobacco-Related Wrong (the "TRW Claims").

4 The thrust of the joint motion is that the multiplicity of actions against the Applicants across Canada do not provide comprehensive representation for all individuals in these *CCAA* proceedings.

5 It is therefore necessary to have representation for all of the TRW Claimants so that they may be properly represented with respect to me primary goal of these *CCAA* proceedings — a pan-Canadian global settlement. This will benefit the TRW Claimants, the Applicants and all stakeholders.

6 The proposed Representative Counsel, Wagners, would represent all individuals outside of those claims that are currently the subject of a previously certified class action. There are currently three certified class actions. Two by the Quebec Class Action Plaintiffs ("QCAP") and one in British Columbia (the "Knight Class Action") (collectively the "Certified Class Actions").

7 At the hearing of the joint motion, Rochon Genova LLP and The Merchant Law Group (collectively "Moving Counsel") sought permission to appear as co-counsel with Wagners. Moving Counsel seek to become involved in these Applications since The Merchant Law Group issued eight tobacco-related statements of claim, all of which are uncertified (the "Uncertified Actions"), as follows:

- *Suzanne Jacklin v. Canadian Tobacco Manufacturers' Council et al.*, No. 53974/12 (Ontario)
- *Barbara Bourassa on behalf of the estate of Mitchell David Bourassa v. Imperial Tobacco Canada Limited et al.*, No. 10-2780 (British Columbia)
- *Roderick Dennis McDermid v. Imperial Tobacco Canada Limited et al.*, No. 10-2769 (British Columbia)
- *Linda Dorion v. Canadian Tobacco Manufacturers' Council et al.*, No. 0901-08964 (Alberta)
- *Thelma Adams v. Canadian Tobacco Manufacturers' Council et al.*, No. 916 (Saskatchewan)
- *Adams v. Canadian Tobacco Manufacturers' Council* [2009 CarswellSask 648 (Sask. Q.B.)], No. 1036
- *Ben Semple v. Canadian Tobacco Manufacturers' Council et al.*, No. 312869 (Nova Scotia)
- *Deborah Kunta v. Canadian Tobacco Manufacturers' Council et al.*, No. CI09-01- 61479 (Manitoba)

8 Moving Counsel seek to represent the interests of the proposed class members in the Uncertified Actions. In essence, Moving Counsel would partner together, with Rochon Genova LLP acting as lead counsel within their team. Moving Counsel would then act on behalf of individuals who could be included in the Uncertified Actions, while Wagners would act for the remaining individuals in Canada (outside of the Certified Class Actions above).

9 On December 9, 2019 I granted the Tobacco Monitors' motion and denied the request of Moving Counsel to act as co-counsel with Wagners, with Reasons to follow.

10 I am now taking the opportunity to provide those Reasons.

THE ADJOURNMENT REQUEST

11 At the commencement of the motion, Moving Counsel sought an adjournment It was opposed by the Tobacco Monitors, the Applicants, Quebec, the provinces of British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan (collectively "the Consortium"), QCAP and the Knight Class Action. No stakeholder supported the adjournment request.

12 The basis for the adjournment request was as follows:

- Rochon Genova LLP had just been retained by The Merchant Law Group on December 4, 2019.
- Moving Counsel wanted to file additional materials to support the position that they be allowed to act.
- Moving Counsel had an important role to play in the ongoing *CCAA* proceedings.
- It was important that the individuals in the Uncertified Actions have their own representation.
- Only a short adjournment was required and there would be no prejudice to the other stakeholders.

13 After hearing submissions I denied the adjournment request subject to the caveat that if something arose during argument with respect to the appointment of Representative Counsel that, in my view, required an adjournment, I would reconsider the issue. No such issue arose.

14 In denying the request for an adjournment I accepted the submissions of the Tobacco Monitors and supporting stakeholders as follows:

- The Merchant Law Group had been advised verbally of the motion on November 21, 2019.
- The motion materials were served on both The Merchant Law Group and Rochon Genova LLP on November 25, 2019, with supporting reports being delivered on November 26, 2019, all within the timelines required by the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
- The Initial Orders in both the JTIM and RBH proceedings provided timelines for service of motions which were met by the Tobacco Monitors' counsel.
- Neither The Merchant Law Group, nor Rochon Genova LLP, complied with the portions of the Initial Orders with respect to the required timelines to file responding materials to a motion.
- A short adjournment would be next to impossible given the number of counsel involved and the pending holiday season.
- There would be prejudice if the motion was adjourned. Significant progress has been made in the court-ordered mediation before the Honourable Warren Winkler, Q.C. This mediation was at a critical stage and any delays would upset significant milestones, some of which have occurred between the date of the hearing and the release of these Reasons.

15 Moving Counsel did not file any materials to support the request for an adjournment although, in my view, they had a reasonable amount of time to do so. They were, however, able to provide fulsome affidavit evidence in support of their position that they ought to be retained to represent individuals in the Uncertified Actions commenced by The Merchant Law Group.

16 In these circumstances, an adjournment was not warranted or necessary given the affidavit filed by Moving Counsel and the well-informed submissions they were able to make after the adjournment request was denied.

THE TOBACCO MONITORS' MOTION TO APPOINT REPRESENTATIVE COUNSEL

17 I will first deal with whether Representative Counsel ought to be appointed and then whether Moving Counsel ought to be able to represent those individuals potentially able to claim in the Uncertified Actions.

18 At the outset it bears noting that no stakeholder opposes the Tobacco Monitors' motion to appoint Wagners as Representative Counsel to represent all TRW Claimants. The Applicants and significant stakeholders such as the Consortium, QCAP and the Knight Class Action consent. Other significant stakeholders, being Ontario, Quebec, Alberta and Newfoundland & Labrador, expressly do not oppose.

Jurisdiction

19 I accept the Tobacco Monitors' submission that Canadian courts have jurisdiction to appoint Representative Counsel in insolvency proceedings pursuant to both s. 11 of the *CCAA* and r. 10.01 of the *Rules of Civil Procedure*. Section 11 of the *CCAA* affords this court broad discretion to make "any order that it considers appropriate in the circumstances" while r. 10.01(f) permits this court to "appoint one or more persons to represent any person or class of persons who are ... unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served."

20 On a number of occasions courts have used the aforementioned provisions to appoint counsel to represent a broad range of litigants in complicated *CCAA* proceedings: see *Cash Store Financial Services, Re*, 2014 ONSC 4326 (Ont. S.C.J.); *Montreal, Maine & Atlantic Canada Co., Re* (April 4, 2014), Doc. 45041-000167-134 (C.S. Que.); and *Sears Canada Inc., Re* (January 25, 2018), Doc. No. CV-17-11846-00CL (Ont. S.C.).

21 Based on the above, I am satisfied that I have the jurisdiction to appoint Representative Counsel to represent the TRW Claimants in these proceedings. No one took issue with this court having jurisdiction.

The TRW Claims

22 The Tobacco Monitors, as noted, propose that Representative Counsel will represent individuals with TRW Claims in all provinces and territories to the extent that they are not currently represented in the Certified Class Actions. These would include various residual tobacco-related disease claims that fall outside the certified class definitions in the Certified Class Actions, claims that are currently the subject of the Uncertified Actions and the tobacco-related claims for which no individual or class proceedings have been commenced. Of course, it would not include the provinces' health cost recovery claims nor the existing, uncertified commercial class actions in Ontario which have been commenced by the tobacco growers and producers.

23 In order to achieve a pan-Canadian global settlement, the Tobacco Monitors submit it is necessary to appoint Representative Counsel to ensure that the TRW Claims, as defined, are addressed in an efficient, timely and consistent manner. The TRW Claimants are scattered across the country. Most do not have any representation and likely do not have the ability or resources to advance their claims in these complex *CCAA* proceedings.

24 As mentioned, The Merchant Law Group has commenced Uncertified Actions in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and Nova Scotia. No class proceedings or individual proceedings have been commenced in New Brunswick, Newfoundland & Labrador, Prince Edward Island or any of the Territories.

25 Overall, the TRW Claimants, as defined in the draft order, are individuals who assert or may be entitled to assert claims with respect to a broad range of alleged wrongs generally relating to tobacco-related personal injury. I accept that the broad definition of the TRW Claimants is satisfactory and it can be refined at a later period.

It is Appropriate to Appoint Representative Counsel

26 In determining whether it is appropriate to appoint Representative Counsel, I agree with the Tobacco Monitors' submission that the relevant factors are set out in *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 1328 (Ont. S.C.J. [Commercial List]), at para. 21, as follows:

- The vulnerability and resources of the group sought to be represented.
- Any benefit to the companies under *CCAA* protection.
- The facilitation of the administration of the proceedings and efficiency.
- Any social benefit to be derived from representation of the group.
- The avoidance of a multiplicity of legal retainers.
- Whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and is prepared to act for the group seeking the order.
- The balance of convenience and fairness.
- The position of other stakeholders and the monitors.

27 In this case I accept that all of the factors have been met.

28 The TRW Claimants, as noted, are vulnerable individuals in complex proceedings where they are unorganized and likely lack resources. The Applicants and indeed all stakeholders will benefit from a pan-Canadian settlement.

29 Without Representative Counsel the administration of these proceedings would be cumbersome and perhaps undoable. The appointment of Representative Counsel will facilitate efficiency and make the proceedings more cost effective by providing a clear mechanism for communicating with the TRW Claimants.

30 The social benefits of access to justice, in the facilitating of a complex restructuring, are met. At this time many of the TRW Claims are unascertained and unasserted. As such, many of the TRW Claimants are likely unaware of these *CCAA* proceedings. The Representation Order sought would further promote access to justice by giving the TRW Claimants a powerful, single voice in the process.

31 A multiplicity of legal retainers between several counsel is also obviated which will save time and money. The TRW Claimants would also be assisted by Representative Counsel acting as a single point of contact among all of the other stakeholders, the Applicants and the Tobacco Monitors.

32 The balance of convenience and fairness favour the retainer of Representative Counsel as no firm is currently advancing a certified class action and is prepared to act for the TRW Claimants. None of the other stakeholders object and significant stakeholders consent to the orders sought.

33 Wagners has the necessary expertise. Once again, no one opposes the appointment of Wagners as Representative Counsel. This includes Moving Counsel, notwithstanding their position that they be appointed as co-counsel with Wagners.

34 Wagners, which is based in Halifax, is recognized as a leading class action law firm. I am satisfied that, as a result of their experience in the area, they have demonstrated the necessary expertise in class action matters to represent the TRW Claimants. Additionally, I am satisfied that the method proposed by the Tobacco Monitors infuses the necessary degree of independence in Wagners so that they can vigorously represent the TRW Claimants.

35 Last, Wagners is not conflicted in this matter and will take the necessary steps to ensure that no conflicts arise.

MOVING COUNSEL SHOULD NOT BE APPOINTED AS CO-COUNSEL

Position of Moving Counsel

36 While Moving Counsel do not oppose Wagners being appointed as Representative Counsel, they submit that they ought to be appointed as co-counsel for the following reasons:

- The court should be hesitant to displace The Merchant Law Group who is counsel of record in the eight Uncertified Actions.

- Rochon Genova LLP, who would be lead counsel, is well qualified to assist.

- Involving Moving Counsel would provide "additional firepower" on behalf of the TRW Claimants, which would be of benefit to them.

- Moving Counsel should not be denied the right to represent the plaintiffs in the Uncertified Actions simply because the actions have not been certified. Rochon Genova LLP has represented plaintiffs in similar circumstances, such as the proposed class members in the well-known *Lac-Mégantic* matter.

- In circumstances where Wagners' appointment is unopposed, Moving Counsel would enjoy greater independence and be in a better position to advocate on behalf of the proposed class members in the Uncertified Actions.

Position of the Tobacco Monitors

37 The Tobacco Monitors primarily submit as follows:

- The Merchant Law Group is not in a solicitor-client relationship with individuals outside of the eight individuals named in the Uncertified Actions.

- Wagners would represent all TRW Claimants equally and impartially.

- It is important to have a single point of contact. This will ensure efficiency and clarity, and control costs.

- The within motion is not a carriage motion. Therefore, only the *Canwest* factors ought to apply.

- Wagners, pursuant to the terms of the proposed order, can retain additional counsel of its choosing to assist, if need-be.

- Rochon Genova LLP would be acting in a conflict of interest since it already represents plaintiffs bringing claims against Imperial.

- Adding Moving Counsel as co-counsel will only complicate matters, add delay and is contrary to the wishes of the Applicants and significant stakeholders in a scenario where no stakeholder supports the position taken by Moving Counsel.

Analysis

38 I accept the position of the Tobacco Monitors and the supporting submissions of the Consortium and QCAP.

39 First, I accept that based on the authority set out in *Pearson v. Inco Ltd.* (2001), 57 O.R. (3d) 278 (Ont. S.C.J.), leave to appeal to Div. Ct. refused [2002] O.J. No. 2134 (Ont. S.C.J.) (at paras. 13 and 18), The Merchant Law Group is not in a solicitor-client relationship with the proposed class members in the Uncertified Actions. In fact, The Merchant Law Group, on its own website, states that potential class members who provide contact information are not creating a solicitor-client relationship.

40 We are therefore left with the situation where The Merchant Law Group, and ultimately Moving Counsel, represent eight individual clients at this point in time.

41 Further, it cannot be ignored that The Merchant Law Group has taken no steps to advance the Uncertified Actions it has commenced. All eight of them have remained dormant since they were issued between 2009 to 2012. Moving Counsel has

filed no materials to suggest otherwise. In these circumstances it can hardly be said that any meaningful steps have been taken to the benefit of proposed class members.

42 I agree with the Tobacco Monitors that a single point of contact is critical in these proceedings. As I have previously indicated, these restructurings are amongst the most complex in *CCAA* history for a number of reasons, which include the vast number and size of the complicated tobacco-related actions that have been, or could be, commenced against the Applicants.

43 I further agree with the Tobacco Monitors that the most efficient and cost-effective way to deal with the TRW Claimants is to appoint a single law firm which can deal with all of the claims in an even-handed manner throughout Canada. To add Moving Counsel at this stage would unduly complicate matters and add expense and delay. This is particularly true where The Merchant Law Group has taken no steps over several years and now Moving Counsel would have to quickly prepare and become involved as co-counsel representing a discrete group different from the TRW Claimants that would be represented by Wagners. The legal team proposed by Moving Counsel in its filed affidavit has already changed and one of the counsel proposed is no longer prepared to act.

44 Additionally, Moving Counsel submits that they be paid in the discretion of the Court-Appointed Mediator at the end of the proceedings, which adds an element of uncertainty and added expense in a situation where Wagners has agreed to work for an hourly rate.

45 These matters are far different from the *Lac-Mégantic* case due to their national scope and number of significant and varied claims. Further, in *Lac-Mégantic*, there was no proposal similar to the one being made by the Tobacco Monitors.

46 In this regard, it is also important to repeat that this is a purely procedural motion to provide representation for the TRW Claimants to promote a pan-Canadian settlement. It is not a carriage motion.

47 Rochon Genova LLP would also have to deal with its current conflict, for which it provides no clear path.

48 Overall, I am of the view that when all significant stakeholders support, or do not oppose, the appointment of Wagners, and based on the above analysis and submissions by the Tobacco Monitors, the far preferable path is to have Wagners represent all of the TRW Claimants. To add Moving Counsel would unduly complicate matters and would not provide any benefit to the TRW Claimants. Indeed, Moving Counsel propose that they would represent only those individuals potentially within the Uncertified Actions which could lead to division, complication and expense. It could also cause delay if Moving Counsel and Wagners could not agree on important matters. All of these risks are unnecessary and remedied by Wagners acting on behalf of all TRW Claimants.

49 Taking into consideration all of the factors in appointing Representative Counsel and the very complicated nature of these proceedings, I am of the view that Wagners, an experienced class action litigation firm, is well qualified to be appointed as Representative Counsel. It is preferable that Wagners alone be appointed and be given the discretion, as set out in the draft order, to retain others to assist if necessary.

50 In this regard, I conclude by stating that there is no reason to believe that Wagners would be any less vigorous in its representation of the TRW Claimants as would Moving Counsel or any other law firm. There is no basis for this submission. The Tobacco Monitors, as court officers, have made a very reasonable recommendation after a long consultation process with the Applicants and all of the stakeholders.

DISPOSITION

51 Based on the foregoing, as per my December 9, 2019 Endorsement, the Tobacco Monitors' joint motion appointing Representative Counsel in these proceedings was granted. The request of Moving Counsel to appear as co-counsel was denied. The Orders were therefore signed as per the drafts filed in all three Applications.

Monitors' motion granted; firms' motion dismissed.

TAB 4

In the Matter of an Arbitration pursuant to Division IX, Part III
of the *Canada Labour Code*, R.S.C. 1985, c. L-2 As Amended ("the *Code*")

BETWEEN:

WestJet, an Alberta Partnership

("WestJet" or the Employer)

and

Employees in the service of WestJet, an Alberta Partnership, who are subject to a group termination dated October 14, 2020, pursuant to the *Code*

(the "Calgary Corporate Employees")

DECISION

Arbitrator:	Mark L. Asbell, Q.C.
For the Employer:	Courtenay Mercier (In-House Counsel)
For the Employees:	Robert Trumper
Location of Hearing:	By Written Submissions
Date of Decision:	September 8, 2021

DECISION

I. Introduction

[1] This Decision addresses two questions or clarifications raised by the Calgary Corporate Employees flowing out of my Decision dated June 1, 2021 (2021 CanLII 58975 (CA LA)) (the Decision) deciding the appropriate severance package and recall rights (the Adjustment Program Award) of a group termination under Part III, Division IX, section 224 of the *Canada Labour Code* (the *Code*).

[2] As part of the Decision and Adjustment Program Award, I found, amongst other considerations, that the Calgary Corporate Employees were entitled to a severance package under the *Code*. I also found that severance should be calculated based on completed years of employment.

[3] The Calgary Corporate Employees seek clarification on two issues:

A. Should vacation pay be paid on the 16-week back pay of wages?
B. Should partial years of service count towards the severance calculation?

[4] I will address each in turn.

A. Should Vacation Pay Be Paid on the 16-Week Back Pay of Wages?

[5] Paragraph 2 of the Adjustment Program Award attached as Schedule C to the Decision provided additional notice over and above the severance amounts set out elsewhere. This paragraph states:

> **Top-up of Differential of Notice of Termination Period**
>
> 2. WestJet shall pay to each Calgary Corporate Employee their regular rate of wages and hours of work in a week for the 16-week notice period (October 14, 2020 – February 3, 2021), less amounts already received. Such amount shall be paid at the same time as the balance of the severance which follows.

[6] The Calgary Corporate Employees argue they should be entitled to vacation pay from October 14, 2020 until February 3, 2021 in addition to their entitlement to remuneration under this paragraph.

[7] The employees state this remuneration meets the definition of “wages” under section 166 of the *Code*. The Code defines “wages” as including “every form of remuneration for work performed …”. Pursuant to section 184.01 of the *Code*, vacation

pay is equal a percentage of “wages”. As such, argue the employees, they are also entitled to vacation pay on the 16-week back pay of wages.

[8] WestJet counters by arguing the payments made during a notice period are not considered “wages” for the purposes of the payment of vacation pay. Therefore, vacation pay in not owing on the 16-week notice period.

[9] WestJet, correctly, notes that the Decision expressly and interchangeably describes the 16-week period as a “notice period,” “notice of termination period,” “notice,” “statutory notice period,” and “statutory group notice period.” WestJet contends the language used in the Decision and the Adjustment Program Award demonstrates that the 16-week period during which supplemental wages were payable is a “notice period” similar to that as contemplated under the section 230 notice period. Payments pursuant to section 230 fall under the category “other amounts” and are not classified as wages as per federal guidelines on vacation pay. As such, argues WestJet, vacation pay is not payable on the 16-week notice period.

[10] The requirement to pay remuneration for the 16-week notice period was discussed starting at paragraph 48 of the Decision:

> [48] There is no doubt the employees received less than their normal wage from April 16, 2020 onwards when the first lay-offs in the Calgary Corporate Employees group occurred. All of the employees received only a percentage of their salaries through the federal government’s CEWS program during their notice period from October 14, 2020 to the date of their termination, February 3, 2021.
>
> [49] As discussed later, a key consideration in WestJet’s offer of two weeks severance per year of employment, and my acceptance of its position, is that employees also received 16 weeks notice of their termination as required by section 212 of the Code. WestJet relied on this provision to describe and justify the generosity of its offer. By example, WestJet indicated a 5-year employee would receive a very generous 26 weeks notice under its offer, comprised of the 16 weeks notice already provided as required under section 212, plus an additional 10 weeks as per its offer. WestJet argued that a severance of 26 weeks or approximately six months for a 5-year employee is well in excess of what an employee with such tenure would normally receive.
>
> [50] I am satisfied my jurisdiction includes consideration of section 212 and the 16-week statutory notice period. WestJet used the 16-week statutory notice period as part of its consideration for its separation package offer and an indication of the generosity of its offer. Thus, WestJet itself considered it to be inclusive within the separation package.

> The "contents of a separation package" are not limited; to the contrary, the wording provides a non-exhaustive list of considerations.
>
> [51] Although section 212 sets out the 16-week notice, unlike section 230 (which it refers to), section 212 does not specifically set out that employees are entitled to their regular rate of wages for the notice period. Despite the fact the section does not reference payment to employees of their regular rate of wages, this is the logical presumption.
>
> [52] I am of the view that WestJet can only equitably rely on the provision of the 16-week notice as evidence of its "fair and reasonable offer" if the employees received full salary for that period. They did not and the employees are entitled to receive an appropriate top up to make them whole for this 16-week period.

[11] As noted in paragraph 48 of the Decision, employees received some funding under the Canadian Emergency Wage Subsidy (CEWS) from the federal government during the 16-week notice period. At paragraph 52, the Decision found the Calgary Corporate Employees were entitled to receive an appropriate top up to make them whole for the notice period.

[12] I agree with WestJet that payments made under section 212, like those payments required under section 230, are not "wages" within the definition of section 166 of the *Code*. Rather, these payments fall within the category of termination pay and severance pay and are not considered "wages" under the *Code*; they are "other amounts" as contemplated within the Labour Program Guideline "Vacation Pay - Canada Labour Code - Part III - Division IV - 805-1-IPG-012". This Guideline sets out that vacation pay is not payable on termination and severance pay as this pay is not deemed to be wages under the *Code.* The Guideline states:

> … termination pay and severance pay are not remuneration for work performed and so are not deemed to be wages by the Code. In this regard, termination pay and severance pay fall under the category "other amounts" and are not classified as wages.

[13] The Guideline goes on to expressly provide that "monies owed to an employee upon termination" or "pay in lieu of notice of termination" are not considered wages for the purposes of calculating vacation pay.

[14] The payments ordered and received under paragraph 2 of the Adjustment Program Award were not compensation for work performed. Rather, they are payments as required under section 212 for payment in lieu of notice of termination. These monies are not wages, but, rather, constitute "other amounts" within the Vacation Pay

Guideline. Therefore, no vacation pay is due and payable for the top up of the 16-week notice period ordered pursuant to paragraph 2 of the Adjustment Program Award.

B. Should partial years of service count towards the severance calculation?

[15] The Calgary Corporate Employees contend it is inequitable for employees who have come close to completing an additional year of service from losing out on a full two weeks of service. They submit WestJet should prorate severance pay for partial years of service as opposed to requiring a completed year of service.

[16] The Adjustment Program Award adopted by the Decision expressly provides at sections 7(b)(i), (ii), (iii); 7(c)(i), (ii), (iii); 7(d)(i), (ii), (iii); 7(e)(i), (ii), (iii); 7(f); and 7(g) that severance is paid for "*each completed year of continuous employment* the Corporate Employee has with the Company as of their Termination Date." [Emphasis added].

[17] The Decision and the Adjustment Program Award is unambiguous in this regard. The express language mirrors the language used in section 235 of the *Code* respecting severance pay:

> 235 (1) An employer who terminates the employment of an employee who has completed twelve consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, pay to the employee the greater of
>
> (a) two days wages at the employee's regular rate of wages for his regular hours of work in respect of *each completed year of employment* that is within the term of the employee's continuous employment by the employer, and
>
> (b) five days wages at the employee's regular rate of wages for his regular hours of work. [Emphasis added]

[18] I agree with WestJet that pro-rating severance for partial years of service is not contemplated by the Decision, the Adjustment Program Award, or the *Code*. Rather, such a concept is expressly contradicted: service is calculated using each completed year of continuous service.

[19] Further, and in any event, as indicated above, the Calgary Corporate Employees are not seeking clarification of a perceived ambiguity or uncertainty of the award in relation to proration of service. Rather, they are arguing that the award is inequitable for those nearing the end of a year of employment and they should have had their service prorated. I note the employees had full opportunity to present this argument at the original hearing before me and, in fact, referenced that many employees had extensive

years and partial years of experience during the hearing. I was well aware that employees had varying start dates, but expressly found that service was to be calculated on each completed year of employment. By claiming my award is inequitable in this part, the employees are, in essence, seeking to re-litigate a portion of the argument that was before me. I have already ruled in this regard and seeking "clarification" on this portion of the award is an inappropriate mechanism and method to seek a different outcome. Other forums exist for appeals and/or judicial reviews.

[20] To confirm, service is to be calculated based on complete years of service for each employee and partial years of service do not count towards the severance calculation.

Dated this 8th day of September, 2021.

Mark L. Asbell, Q.C.
Arbitrator

TAB 5

CANADA

House of Commons Debates

VOLUME 140 • NUMBER 127 • 1st SESSION • 38th PARLIAMENT

OFFICIAL REPORT
(HANSARD)

Wednesday, September 28, 2005

Speaker: The Honourable Peter Milliken

(Motion agreed to and bill referred to a committee)

* * *

● (1725)

WAGE EARNER PROTECTION PROGRAM ACT

Hon. Joe Fontana (for the Minister of Industry) moved that Bill C-55, An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, be read the second time and referred to a committee.

He said: Madam Speaker, in the time that is left today, I am pleased to speak to a very important bill, Bill C-55, which is a balanced and comprehensive reform package for insolvency legislation tabled by my hon. colleague, the Minister of Industry. The proposed changes will modernize our insolvency legislation, ensuring that the system better responds to the needs of the marketplace.

Just as important, I want to talk about how the reforms will improve the protection of workers whose employers undergo restructuring or become bankrupt. I am very passionate about this topic. Under our current system, too many workers are vulnerable when their employers enter into a restructuring or file for bankruptcy. Canadian workers suffer lost wages, reduced pension benefits and uncertainty that their collective agreements may be unilaterally changed by a court.

The government has heard from Canadian workers about the need to ensure that they are more fairly treated when their employers suffer economic hardship. The reforms introduced by my colleague will do just that.

For example, we are proposing new measures, including the wage earner protection program, for the first time in our history which will provide workers with a guaranteed payment for unpaid wages up to $3,000. An estimated 10,000 to 15,000 workers in every workplace across the country in both federal and provincial jurisdictions are left with unpaid wages or reduced pensions due to employer bankruptcies in Canada. These workers did not agree to become lenders to their employers when they were hired. They cannot afford to bear the risk of coming up empty-handed after they have done their hard work each and every day. They need to have their paycheques to buy groceries, to pay their mortgages and to pay their car payments.

Let me explain what the program will really mean for these workers. Under the current system three-quarters of unpaid workers in a bankruptcy receive nothing for their work, zero. The average payout overall is only 13¢ on the dollar. In Canada, existing federal and provincial labour laws protect the workers who perform work but are not paid by their employers. However, these labour laws cease to be in effect when a bankruptcy or receivership occurs, because currently, bankruptcy law supersedes labour laws in these cases.

The situation facing unpaid workers in Canada exposes a clear gap in our system. Clearly, changes are needed. That is why the government is acting on behalf of the workers of Canada. The wage earner protection program will apply when an employer goes bankrupt, or is put into receivership under the Bankruptcy and Insolvency Act. These are the employees who are unpaid. The employees can apply to the program to have their wages paid, up to $3,000, immediately upon that occurrence.

The wage earner protection program will operate efficiently. It will be delivered seamlessly, building on the existing relationships between trustees and receivers and the employment insurance system.

This type of program is not radical or new, but it is for our country. Many countries already have a similar program to protect their workers, such as the United Kingdom and Australia. The cost of the program is only going to be $30 million a year. In the event of a dramatic increase in the number of bankruptcies, it could go as high as $50 million. That is not a big investment from the Canadian government to protect the working men and women of this country.

The government expects to recover up to half of the program payouts as a creditor to the employer. Under the wage earner protection program, the government will assume the workers' claims against their bankrupt employer's estate. This means that the government will recover a portion of its costs by making claims against the employer's estate and therefore, the employee does not have to do it.

The reforms will also amend the Bankruptcy and Insolvency Act to establish a limited superpriority for unpaid wage claims up to $2,000. Under the new limited superpriority an unpaid worker will be one of the first to be paid from the current assets of the bankrupt employer.

● (1730)

The limited superpriority for unpaid wages balances the risk of bankruptcy between the employees and other creditors of the bankrupt company. Right now the burden weighs too heavily on the employees. It will assist the government in recouping its costs for the wage earner protection program by making more assets of bankrupt companies available for the employees and wage claims. That is putting the employees first.

I will have more to say about this tomorrow morning.

The Acting Speaker (Hon. Jean Augustine): The minister has 14 minutes and 46 seconds left for the continuation of this debate.

PRIVATE MEMBERS' BUSINESS

[*English*]

CRIMINAL CODE

The House resumed from June 22 consideration of the motion that Bill C-293, An Act to amend the Criminal Code (theft of a motor vehicle), be read the second time and referred to a committee.

The Acting Speaker (Hon. Jean Augustine): It being 5:30 p.m., the House will now proceed to the taking of the deferred recorded division on the motion at second reading of Bill C-293.

Call in the members.

TAB 6

HOUSE OF COMMONS

Tuesday, April 27, 1971

The House met at 2 p.m.

HOUSE OF COMMONS

PRESENCE IN SPEAKER'S GALLERY OF REPRESENTATIVES OF PEOPLE'S CONSULTATIVE CONGRESS OF INDONESIA

Mr. Speaker: This House has the honour and pleasure of welcoming today a most distinguished parliamentary figure and a national hero in his own country, General Abdul Haris Nasution, Chairman of the People's Consultative Congress of Indonesia.

Some hon. Members: Hear, hear!

Mr. Speaker: General Nasution is concluding a nine-day visit to Canada, accompanied by his beautiful and charming wife, Madame Sunarti Nasution, as well as by Mr. Mustamin Matutu, a Member of the Congress, and Lieutenant Colonel Supolo, Secretary to the Congress. They are in the Speaker's Gallery today with His Excellency the Ambassador of Indonesia and Madame Bandoro.

Some hon. Members: Hear, hear!

Mr. Speaker: These honoured guests have visited a number of Canadian cities before coming to the capital city. It is the hope of this House that their tour has been enjoyable, that their many contacts with Canadians from all walks of life have proven useful, and that they take away with them many pleasant memories of their visit. We want to assure them of our own personal and enduring friendship.

Some hon. Members: Hear, hear!

* * *

• (2:10 p.m.)

[*Translation*]

PRIVILEGE

MR. FORTIN—CONVERSION OF COQUALEETZA HOSPITAL INTO COMMUNITY CENTRE

Mr. André Fortin (Lotbinière): Mr. Speaker, on March 24 last, I asked the Minister of Indian Affairs and Northern Development (Mr. Chrétien) a number of questions concerning the conversion of the Coqualeetza Hospital into a community centre and the related family and social problems. The minister's answers to these questions are recorded on page 4566 of *Hansard*.

On March 24, the minister replied that no decision had been made as to the conversion of this property, further indicating that three proposals had been made by the Indians, that his department was studying each of these proposals and that the government would make a decision later. May I quote the minister's words:

—We are not, however, in a position to give an answer at this time.

Now, the same day, Mr. Wilbur T. Campbell, president of the North American Indian Brotherhood of British Columbia and of the Coqualeetza Community Centre received a letter from Mr. Bergevin, Assistant Deputy Minister of Indian Affairs and Northern Development, stating quite clearly that a decision had already been taken and would stand.

Mr. Speaker, I contend that the House has been misinformed, as I have been myself, and that this prevents us from making the representations that should be made at this level.

I, therefore, move, seconded by the hon. member for Abitibi (Mr. Laprise):

That any decision be withheld until the conclusion of a thorough investigation regarding the conversion of the Coqualeetza Hospital into a community centre.

Mr. Speaker: The hon. member can only move this motion to the extent that the Chair recognizes that this is a question of privilege. I suggest to the hon. member that this is not a matter of privilege, at least, not a prima facie case. It seems to me that the hon. member could obtain the information that he is seeking in some way other than through a question of privilege.

In any case, I suggest to him that the motion that he is moving is a substantive one, and not one of privilege, and that, in these circumstances, it cannot be put before the House.

ROUTINE PROCEEDINGS

MISCELLANEOUS PRIVATE BILLS AND STANDING ORDERS

First report of Standing Committee on Miscellaneous Private Bills and Standing Orders—Mr. Forget (Saint-Michel).

[*Editor's Note: For text of above report, see today's Votes and Proceedings.*]

* * *

TRADE

TABLING OF AGREEMENT WITH FEDERAL REPUBLIC OF GERMANY ON SCIENTIFIC AND TECHNOLOGICAL CO-OPERATION—STATEMENT BY MINISTER

Hon. Jean-Luc Pepin (Minister of Industry, Trade and Commerce): Mr. Speaker, pursuant to Standing Order 41 (2), I should like to table, in the two official lan-

other jurisdictions as much as on the degree of assistance given to the limited number of employees presently working under federal jurisdiction.

• (8:30 p.m.)

In 1965, the first federal code established the minimum wage at $1.25 an hour. In July, 1970, this was changed to $1.65, and in these proposals it is suggested this figure be amended to $1.75. I support this proposed change, but more importantly I endorse the fact that under this legislation the Governor in Council, upon the recommendation of the Minister of Labour, can increase the figure from time to time without specific legislation being required. The power given to the minister and to the Governor in Council will, I hope, eliminate the long delays in making changes and, hopefully, will result in an annual review of the minimum wage for people working within federal jurisdiction. I hope the committee will give consideration to recommending that the Minister of Labour review this minimum standards annually.

This bill is of particular importance since we have an obligation to protect the unorganized labour forces in Canada which come within federal jurisdiction. Hopefully, as I said before, this legislation should set an example to other jurisdictions and encourage them to take the same action within their areas of responsibility. Most of the members of this House realize that approximately 60 per cent of the labour force of Canada is without the protection of a labour union. On the federal level there is a 50-50 split between organized and unorganized labour. In view of the large numbers of people concerned, these amendments assume particular importance.

The minimum wage standards set in this legislation do not apply to employees under 17 years of age. In 1965 specific regulations were established to set the rate for such people at $1 per hour. In July last year, this rate was raised to $1.40 per hour. It is my understanding that the minister will recommend to cabinet, following passage of this bill, that the regulation be changed to establish the rate at $1.50 per hour. I hope that the minister will review the minimum wage for those under 17 years of age in our work force at the same time as he reviews the over-all minimum wage for those over the age of 17, and that this will be done annually in both instances.

In clause 17, at page 13 of the bill, there is a provision dealing with the individual termination of employment whereby two weeks' notice, or pay in lieu of notice, must be given to an employee with three months' service or more. This provision will apply to all regular employees but not to those performing managerial functions or in professional categories. Frankly, I fail to see why this distinction must be made between ordinary employees and management or professional employees and I trust that the standing committee will look carefully at this question and satisfy itself that there are compelling reasons for making this exception. If there are not compelling reasons, I hope the committee will recommend the elimination of this distinction.

Still on clause 17, I want to talk for a few moments about severance pay and to support the provision where-

[Mr. Cafik.]

by an employee with five or more years' service receives two days per year severance pay, to a maximum of 40 days. Obviously, this does not apply to an employee whose employment has been terminated for just cause, or who is entitled to pension whether it be the Canada pension or the like. I hope the committee will give consideration to reviewing these provisions with the thought of establishing a two-day benefit for every year of service without the five-year minimum requirement.

I make this suggestion because it seems to me that if it is valid to give a person 10 days' severance pay after five years' service, then it is unfair to cut any benefit for a person with only four years and 11 months' service. If we were to establish benefits on the basis of two days for every one year of service, then after one year a person would receive two days' pay; after four years he would receive eight days' pay, and so on. I think that is a reasonable suggestion to make. Although the minister may well have some valid reason why it cannot be implemented, I hope the committee will carefully review this suggestion. Excluded from the severance pay provisions are those in a managerial or professional category. Once more, I fail to see why the distinction has to be made between them and ordinary employees.

The bill also covers group termination of employment. This proposed new part provides that an employer contemplating the termination of employment of 50 or more workers within a four-week period must give the Minister of Labour notice in writing. A copy of the notice must be sent to the nearest Canada Manpower centre and to the trade unions concerned. This part will apply to all employees, including persons performing managerial functions and professional people, but will exclude those who are seasonally or irregularly employed. I suggest that the committee give careful consideration to this proposal, because those employees who are not covered by labour union contracts—in other words, those who have an individual relationship with their employer—are not really given specific notice under this legislation.

I should like to read the provision on page 11 of the bill. The section deals with the notice that must be given to the Minister of Labour and to the labour union. As far as the person not covered by labour union agreement is concerned, the bill provides:

> —and where any employee in such group is not represented by a trade union, a copy of such notice shall be given to him or posted forthwith by the employer in a conspicuous place—

I suggest that when the committee reviews the bill, it should give consideration to deleting the word "or" and substituting therefor the word "and", so that the bill would then provide that there is an obligation on the employer to give notice to the individual not covered by labour contract as well as to post that notice in a conspicuous place. I do not think that this proposal would be difficult to implement. Generally speaking, I am 100 per cent in favour of the provisions dealing with group termination of employment. I think they are long overdue. Under these provisions, an employer who wants to lay off between 50 and 100 workers within a four-week period would have to give eight weeks' notice; if he wanted to lay off between 100 and 300 workers he would have to

give 12 weeks' notice; and to lay off more than 300 workers would require 16 weeks' notice.

Clause 17 of the bill also makes provision for dismissal for garnishment. I think it is high time the government implemented this kind of legislation and I hope that other jurisdictions will follow suit. I think this legislation is an example for them and, as I said before, it is high time we ended discrimination against those who find themselves in financial difficulties, who have their pay cheques garnisheed and who prior to now were very often, if not in the vast majority of cases, fired because the employer did not like the inconvenience of having to go through the garnishee formalities.

• (8:40 p.m.)

I should like also to comment on the maternity leave provision of this bill. I listened with great interest to the hon. member for Vancouver-Kingsway (Mrs. MacInnis). I know the interest she has in the rights of women and I share much of her concern in this regard. The hon. member has made two or three suggestions that are worthy of careful consideration by the committee. I agree with her when she said I hope I quote her correctly that the maternity leave provision and the equal pay benefits are real advances for the women workers of Canada.

I do not believe, however, that any piece of legislation is perfect, and I am sure there is room for improvement in this bill. Under the proposal, an employee who has completed 12 months' employment with her employer would be entitled to maternity leave of up to 11 weeks before delivery of the child and six weeks after. I think the hon. member for Vancouver-Kingsway suggested that the 12 months ought to be reconsidered and I agree with that. I also agree that perhaps there should be a degree of flexibility as to whether a person should be entitled to the leave prior to the birth of the child or after. In my experience, being the father of five children, often the real crisis is after the birth of the child and not before. This varies a great deal, depending on individual conditions including the temperament of the woman involved. There is good reason for the committee to consider this suggestion very carefully.

I am heartily in favour of the equal pay provisions. As a matter of fact, at a convention in Ottawa about a year ago, in the Chateau Laurier, I remember putting forward a resolution which was passed, changing the approach from equal pay for equal work to equal pay for similar work. It is much easier to say that someone is performing a similar function than to say it is an equal function. "Equal" implies that it is equal in every detail. I believe that if it is similar work, that is enough.

I believe that the provision for equal pay for similar work with similar responsibilities is a considerable improvement in terms of terminology and I think it will have a practical effect in terms of the relationship between employers and employees. I hope the employers will look upon this as a meaningful change and will be much more careful in the way they apply salaries to men and women in order to ensure that they are in fact equal if the work is similar.

In closing, may I say I strongly support this bill to amend the Canada Labour (Standards) Code. It is a major step forward in the protection of workers in Canada under federal jurisdiction. Even more important, I think it is a great step forward by way of example for other jurisdictions to follow. I sincerely hope that the provinces will follow the lead we have given so that people all across Canada will be able to work under some kind of universal labour code which would be in their interest and the interest of the country as a whole.

[*Translation*]

Mr. André Fortin (Lotbinière): Mr. Speaker, speaking of the lay-off of 500 employees by Canadian Vickers Limited, the Minister of Labour (Mr. Mackasey) said this to the House on May 26, 1969, as reported on page 9040 of *Hansard:*

> Last fall I undertook to bring this kind of legislation forward and... all parties supported me. I said on that occasion, however, that I could not visualize such legislation being before the House until late fall or early spring, and I see no reason which would enable me to advance that date.

At that time, the minister recognized that present legislation is inadequate and obsolete in many respects. Today, as we study Bill C-228 amending the Canada Labour (Standards) Code and setting up new labour standards, it would seem that the minister has at last found the spring he spoke of then, and I congratulate him.

Although the amendments introduced by Bill C-228 have long been overdue—a practice which, by the way, seems to suit this government—I am in agreement generally as to the principles involved.

None the less, as our group usually does when we find errors in a bill introduced by the government, we make whatever criticisms and suggestions that seem appropriate.

It has been a long time since the government first promised such a bill, and more specifically since the 1968 general election, and we would have expected this bill to be the result of thorough consideration. Unfortunately, in spite of this long wait, this bill is definitely inadequate. At the most, it is but the pretence of a bill dealing among other things with termination of employment and I will endeavour to limit my comments to this matter even though there are other less important issues discussed in this bill.

I will give an example in order to prove how superficial and confusing this bill is. As regards group or individual terminations of employment, clause 17 of the bill provides for the addition of several Parts, and I should like to quote subclause (4) of clause 341 of new Part IVC. It reads as follows:

> Except where otherwise prescribed by regulation, an employer shall, for the purposes of this Part, be deemed to have terminated the employment of an employee where he lays off this employee.

First of all, it will be noted, Mr. Speaker, that the beginning of this clause is drafted in this way:

> Except where otherwise prescribed by regulation...

TAB 7

Employment and Social Development Canada
Emploi et Développement social Canada

Fair, safe and productive workplaces

Labour



Five-Year Statutory Review of the *Wage Earner Protection Program Act*

Helping Canadian Workers during Bankruptcy and Receivership

Report to Parliament

Canada

Five-Year Statutory Review of the *Wage Earner Protection Program Act*

Helping Canadian Workers during Bankruptcy and Receivership

Report to Parliament

Tabled by the Honourable Dr. K. Kellie Leitch, P.C., O.Ont., M.P.
Minister of Labour and Minister of Status of Women

Spring 2015

Five-Year Statutory Review of the *Wage Earner Protection Program Act*
Helping Canadian Workers during Bankruptcy and Receivership

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Foreword

Message from the Minister of Labour

It is always unfortunate when businesses declare bankruptcy, leaving Canadian workers and their families facing uncertain financial circumstances. Protecting the rights of Canadian workers is especially important in these difficult times.

This is why the Government of Canada established the Wage Earner Protection Program (WEPP) in 2008. WEPP ensures that workers are provided with wages and compensation owed to them when their employer experiences bankruptcy or receivership.

The Five-Year Statutory Review Report of the *Wage Earner Protection Program Act* demonstrates the program's success in helping workers when they need it most – between bankruptcy and finding a new job. This includes the expanded coverage over the years to a broader range of layoff situations and compensation, such as severance and termination pay.

Our efforts are making a difference. Since 2008, WEPP has assisted over 71,000 Canadians by recovering almost all of the wages, vacation pay, and disbursements owed to them. Processing times have also improved steadily so that earned wages are paid within six weeks. In fact, in 2013-14, almost 50 per cent of payments were made within two weeks and 87 per cent within 28 days.

Through measures such as cutting income tax rates and supporting entrepreneurs and innovation, our Government is taking action so businesses can thrive, innovate, and expand their markets. We are also committed to safeguarding the rights of Canadian workers and supporting them through the transition when a business declares bankruptcy.

Our Government will continue to ensure that the Wage Earner Protection Program responds to the needs of displaced workers. It is our duty to keep Canadian workplaces fair, safe and productive.

The Honourable Dr. K. Kellie Leitch, P.C., O.Ont., M.P.
Minister of Labour and
Minister of Status of Women

Executive Summary

In 2008, the Wage Earner Protection Program (WEPP) came into effect to help protect the financial security of Canadian workers who lose their job and are owed wages, disbursements, vacation pay, termination pay and severance pay when their employer declares bankruptcy or becomes subject to a receivership. The Program was made possible through the *Wage Earner Protection Program Act* (WEPPA), an important piece of insolvency legislation in Canada which complements the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*.

The WEPPA requires the completion of a one-time, five-year review of the Act and the administration and operation of the Wage Earner Protection Program. The review is presented in four parts:

Part one covers the history of the legislation, including amendments made to the WEPPA since it entered into force to better protect workers affected by insolvencies. This section also explains how the WEPP functions, and the roles and responsibilities of the Labour Program and its partners in delivering the Program.

Part two summarizes an internal evaluation of the performance and relevance of the WEPP over its first three years in operation, and an analysis of service delivery data since the Program began in July 2008 and through its five full fiscal years of existence (2009-10 to 2013-14).

Part three explores aspects of the legislation and the Program which stakeholders have suggested could be amended to better protect vulnerable workers affected by insolvency. The activities considered by the Labour Program, as listed in part four, reflect how some of these stakeholder issues may be addressed.

Part four also presents the conclusion of the five-year review of the *Wage Earner Protection Program Act* and the Wage Earner Protection Program; namely, that the WEPP is well administered and operated, and that the Act is effectively meeting its authorized mandate. The review also concludes that there is an ongoing need for the type of benefits offered through the Program.

Overall, the review of the WEPPA demonstrates that putting workers first in insolvency proceedings and helping them get paid for their owed wages is an ongoing commitment for the Government of Canada.

Part one:
The *Wage Earner Protection Program Act*

The *Wage Earner Protection Program Act* (WEPPA) and its Regulations protect workers in Canada who lose their job and are owed earned wages when their employer goes bankrupt or becomes subject to a receivership under the *Bankruptcy and Insolvency Act*. The WEPPA came into effect on July 7, 2008.

The WEPPA created the Wage Earner Protection Program (WEPP), which advances to workers payment for "eligible wages[1]" before insolvency proceedings are completed. Once a worker is paid, the Government assumes the worker's place as a creditor in the bankruptcy, as well as the risk of recovering the amounts paid.

Before the Program began, unpaid wage claims of workers ranked after secured creditors, which meant that many employees had to wait one to three years to get a small portion of earned wages. On average, this amount was 13 cents for every dollar earned, and only five per cent of workers were successful in recovering this money.

The maximum WEPP payment amount is set at four times the maximum weekly Employment Insurance earnings, and it is indexed yearly for inflation. The introduction of the WEPP has increased the amount of unpaid wages that a worker may recover in an insolvency, with the average payment of 64 cents for every dollar earned.

WEPPA Timeline

2005 Bill C-55 tabled to establish the *Wage Earner Protection Program Act* as part of a number of reforms to Canada's insolvency legislation.

2007 Bill C-12 amended the Act before it entered into force to address technical issues.

2008 WEPPA entered into force

2009 The definition of "eligible wages" under WEPPA was expanded to include termination pay and severance pay.

2011 WEPPA was expanded to include workers who lose their jobs after their employer's attempt to restructure takes longer than six months and subsequently fails.

The introduction of the WEPP has also significantly reduced the time it takes for workers to receive a payment for owed earned wages. Compared to the two to three year wait before the Program began, in 2013-14, 95 per cent of WEPP payments were made within the 42-day standard, 85 per cent within 28 days, 57 per cent within 21 days, and 47 per cent within 14 days.

[1] The term "eligible wages" is defined in the WEPPA and, at the inception of the Program, it covered any wages, vacation pay, and disbursements owed to an individual by their insolvent employer.

Expanding the Protection of Workers

The WEPPA is about protecting the financial security of workers who are owed earned wages after their employer has filed for bankruptcy or is subject to a receivership. Over time, the Government has taken steps to improve the legislation in order to expand the protection of wage earners and increase the amount of money workers can receive through the Program.[2]

Budget 2009 expanded the definition of eligible wages to include termination pay and severance pay owed to workers whose jobs ended in the period beginning six months before the date of bankruptcy or receivership. The timeframe for trustees and receivers to provide information to the Minister and potential WEPP applicants was also increased from 35 to 45 days, or longer where justified.

Budget 2011 further expanded the WEPP to include workers who lose their jobs when their employer's attempt at restructuring takes longer than six months and is subsequently unsuccessful.[3] This provided an additional $4.5 million annually to the Program to support workers affected by insolvency.

The 2012 Economic Action Plan increased the WEPP's annual operating budget by $1.4 million to ensure applicants received payments more quickly. As a result, more than 95 per cent of applications are now processed within the 42-day service standard.

Increased WEPP Payments

Including termination pay and severance pay as eligible wages significantly increased the WEPP payment to workers affected by insolvent employers. Prior to the amendment, the average WEPP payment was $1,192. Following the amendment, the average payment was almost twice that amount at $2,318.

The Program

The Wage Earner Protection Program delivers several services.[4] First and foremost, it provides timely payments to workers for unpaid eligible wages. Second, in certain circumstances, it pays trustees and receivers for their role in performing their WEPP related duties. Third, it offers a review process for applicants who are dissatisfied with their eligibility decision, as well as a process for those who wish to appeal the results of a review.

Eligibility

WEPP applies to all workers in Canada[5] who meet these four criteria: their employment has ended; their former employer is bankrupt or subject to a receivership; they are owed eligible wages; and these wages were earned within six months preceding the bankruptcy or receivership.[6]

Directors, officers, certain managers, and individuals who have a controlling interest in the business of the former employer or who are not dealing at arm's length with any of these above-noted persons are not eligible for the WEPP.

[2] Appendix B details all of the amendments made to the WEPPA after the legislation came into force.

[3] This amendment became effective on December 15, 2011 and was retroactive to bankruptcies and assignments into receiverships that occurred after June 5, 2011.

[4] Refer to Appendix D for the main WEPP service delivery processes.

[5] With a social insurance number.

[6] Unpaid eligible wages include those earned during the six months preceding a restructuring event.

Ghesquière: WEPP Service Delivery Excellence

Ghesquière Plant Farms Ltd. declared bankruptcy on November 30, 2010. Among the employees who had earned wages were 105 temporary foreign workers from Trinidad and Tobago, Jamaica, Barbados, and Mexico.

Foreign workers in Canada are eligible to apply to the WEPP if they have a valid Canadian 900-series social insurance number. This was the case for the foreign workers employed by Ghesquière.

The Labour Program worked closely with government liaison offices associated with the Ministries of Labour in Trinidad and Tobago, Jamaica, Barbados, and Mexico to ensure that every involved worker was informed about the WEPP. As a result, 102 of 105 received a WEPP payment.

Payment Formula

The maximum WEPP payment is capped at four weeks insurable earnings under the Employment Insurance Program, which changes annually to reflect inflation. In 2015, this amount is $3,807.68. The WEPP Regulations also provide for a 6.82 per cent offset which is deducted from the payment amount to reflect deductions an employee would have if they received the payment from an employer.

Payment Recovery

Where possible, the Government recovers the WEPP payment advanced to workers from the employer's estate assets. An initial claim up to $2,000 for wages and vacation pay, and $1,000 for disbursements, are secured on the estate assets. The remaining amounts (for termination and severance pay) are unsecured and less likely to be recovered.

Program Budget

Initially, $28.7 million for payments to workers and $2.5 million for the fees of trustees and receivers were allocated from the Consolidated Revenue Fund for the WEPP. Budget 2009 increased the WEPP fund by $25 million to cover the inclusion of termination pay and severance pay as "eligible wages." In 2013-14, the WEPP reserve was set to $49.25 million based on the Program's demonstrated and anticipated requirements. Annual average payouts range between $32 and $35 million.

When the WEPP was first introduced, its operating budget was set at $3.2 million. Budget 2012 increased this budget by $1.4 million to improve the capacity of the Labour Program and Service Canada to deliver the WEPP and ensure applicants received payments more quickly. Today, the operational budget of the WEPP remains at $4.6 million.

Program Roles and Responsibilities

The Minister of Labour is responsible for the Wage Earner Protection Program. Federal partners and external stakeholders also have key roles in administering and delivering the Program.

Administration

The Labour Program provides administrative guidance and oversight to the WEPP by developing policies on the application of the legislation and any regulatory or legislative changes, in consultation with Industry Canada and the Office of the Superintendent of Bankruptcy. The Labour Program is also responsible for administering and delivering the WEPP appeal process, monitoring and reporting on WEPP service delivery, and leading communications activities.

Operation

Service Canada delivers the WEPP on behalf of the Labour Program by processing applications to assess the eligibility of applicants, issuing payments, administering the review process when a worker disagrees with the decision, and identifying any overpayments. Service Canada delivers these services to clients in-person, by telephone, and online.

The Canada Revenue Agency recovers overpayments made to a recipient, trustee or receiver. The Agency also plays a role in the steps taken by the Government to recover WEPP payments from the bankrupt estate.

Insolvency Administrators

Trustees and receivers support the administration of the WEPP by submitting the information that is used by Service Canada to help determine the eligibility of applicants for the Program. Insolvency administrators are also required to inform workers about the WEPP and how they may apply for this benefit. In addition, trustees and receivers must inform the Minister when the trustee is discharged or the receiver completes their duties.

"The Wage Earner Protection Program is worthwhile and accomplishes much in protecting the rights of employees."

Canadian Association of Insolvency and Restructuring Professionals' submission on the WEPPA Five-Year Review, Jean-Daniel Breton, CPA, CA, FCIRP

Part two:
Track Record and Key Successes

The Minister of Labour launched a review of the *Wage Earner Protection Program Act*, and the administration and operation of the WEPP, in May 2013. An evaluation of the Program's performance in its first three years formed the basis of this review. Analysis of program delivery data since the WEPP began in 2008 and through its five full fiscal years of existence (2009-10 to 2013-14) also provided insight and conclusions about the Program's track record and successes.

Program Evaluation

The evaluation of the Wage Earner Protection Program [7] concluded that there is an ongoing need for the type of benefits offered under the WEPP and that the Program aligns with federal government priorities. The evaluation also had specific observations about the performance of the WEPP as follows:

Program Awareness, Communication and Access to Information

The target population of the WEPP is aware of the Program and participation by eligible workers is high. A large majority of applicants found it easy or very easy to obtain the information they needed from Service Canada, and almost all applicants indicated that the quality of the information was good or very good. Trustees and receivers were also generally satisfied with the quality of information provided to them, although some indicated the need for improvement.

For example, some indicated that the *Trustee/ Receiver Information Form* could be improved because it was inefficient and challenging to complete.

Program Delivery and Outcomes

Nine out of ten applicants received a WEPP payment, averaging approximately 64 cents on the dollar of the amounts they had earned, during the period under evaluation. Where possible, the Program also recovered these amounts from the estate of the former employer. The majority of applicants did not attempt to recover money owed by their former employer and few (five per cent) were successful in recovering money using other methods. The evaluation thus concluded that without the WEPP, most workers would receive very little (if any) of their earned money.

Application processing time improved as the Program matured. As set out in the WEPP Regulations, the majority of trustees and receivers provided required information to Service Canada within two months of the bankruptcy or receivership and 91 per cent of applicants applied within 56 days. An initial decision on the majority of applications was reached within 30 days of receipt and the average time to process them was 36 days. The average date of payment was within 54 days of the application date. Requests for a review of an initial decision and requests for an appeal of a review decision took about 90 days to complete. Appeals were very uncommon, about 0.2 per cent of all cases.

[7] Posted in August 2014 at http://www.esdc.gc.ca/eng/publications/evaluations/labour/2013/august/wepp.shtml.

An unintended outcome of the WEPP related to the costs incurred by trustees and receivers in administering the Program. Some stakeholders indicated that these costs caused some reluctance amongst insolvency professionals to take on no- or low-asset bankruptcies and receiverships. One in five of trustees and receivers interviewed also expressed concerns with the process for claiming their fees or the payment scheme in the Regulations.

Evaluation Recommendations

Based on its findings, the evaluation recommended that the Labour Program make five main improvements to the Program, each of which has since been addressed.

1. Find ways to streamline administration, including the *Trustee/Receiver Information Form*.

The process of submitting the *Trustee/Receiver Information Form* electronically was improved so that trustee and estate information only needs to be submitted once and specific information for each worker thereafter.

2. Address the information needs of trustees and receivers.

WEPP messaging on the Service Canada website was improved. The Labour Program and Service Canada are improving templates and tools for trustees and receivers; expanding the *Trustee/Receiver Information Form* to include all information required to submit a claim under the BIA; and streamlining the process to upload required information for many employees.

3. Examine Employment Insurance overpayments resulting from the WEPP.

A review of the data found that only 0.03 per cent of WEPP recipients are in an employment insurance overpayment situation.

4. Find ways to improve access to the WEPP in no- or low-asset estates.

The Labour Program and Service Canada have been working with insolvency experts to ensure the administrative duties of trustee and receivers in low-asset bankruptcies are appropriately remunerated in order to encourage insolvency professionals to take on more of these cases, which would provide more workers with access to the WEPP.

5. Continue monitoring application processing times and find ways to reduce the processing and completion of reviews and appeals.

In partnership with Service Canada, the Labour Program has monitored application processing timelines since the WEPP began in 2008. These timelines have improved to the point where currently more than 95 per cent of applications are processed within the 42-day service standard. Of these, 85 per cent are processed within 28 days, 67 per cent within 21 days, and 47 per cent (almost half of all applications received) within 14 days.

Data Analysis

From the date on which the Program began in July 2008 to the end of March 2014 (which covers five full fiscal years since WEPP's introduction),[8] 71,483 workers or 87 per cent of applicants received a WEPP payment, while the remaining applicants did not meet the eligibility criteria. The recipients of a WEPP payment received nearly all of the wages, vacation pay, and disbursements owed to them by their insolvent employers. More than 50 per cent of WEPP recipients were also paid the full amount of owed termination pay and severance pay. In total, the WEPP payments amounted to $165.7 million.

[8] The data analyzed for this section are available in tables in Appendix E.

WEPP Statistics Snapshot: July 7, 2008 – March 31, 2014

Number of Estates Processed: 3,980

Number of Applicants: 82,126

Number of Payment Recipients: 71,483

Number of Recipients who received the Maximum Payment: 35,116

Number of Recipients who received Full Payment for Amounts Owed: 36,367

Average Payment: $2,464[9]

Total Payments: $165,719,213

- **For Wages:** $43,257,356
- **For Vacation:** $26,178,983
- **For Disbursements:** $201,017
- **For Termination:** $78,563,605
- **For Severance:** $17,518,252

Number of Reviews: 2,446 requested, 2,389 completed, 58% resulting in a payment

Number of Appeals: 144 requested, 120 completed, 20% resulting in a payment

Application and Payment Activity Year-Over-Year

WEPP application and payment activity are relatively consistent from year to year, with a lower than average uptake in 2012-13 due to lower numbers of insolvencies. The average payment has also remained largely consistent, while the number of review and appeal requests has fluctuated.

[9] Prior to 2009, the average payment was $1,192. In 2009, the definition of "eligible wages" was expanded to include termination pay and severance pay, following which the average payment significantly increased.

Payments by Province and Territory

WEPP payment distribution across the provinces and territories has remained fairly constant, with the majority of payments issued in Ontario and Quebec because most bankruptcies and receiverships occurred in these provinces. In all jurisdictions, severance amounts may be accumulated based on individual employment contracts or collective agreements. Only Ontario and the federal jurisdiction[10] include severance pay under their employment standards legislation.

Payments to Trustees and Receivers

The WEPP process to pay the fees and expenses of trustees and receivers began in December 2010. Between that date and March 31, 2014, 56 applications for payment were received[11] and, of these, 27 were found eligible to receive a payment. The total amount of payments made was $64,636 and the average payment was $2,394.

Service Delivery

In 2013-14, more than 95 per cent of completed applications were processed within the 42-day service standard. This result greatly exceeded the service standard goal of processing 80 per cent of applications within this timeframe and marked the highest application processing standard achieved since the WEPP began. Similarly, in 2013-14, 95 per cent of review decisions were made within the newly established 35-day service standard, which represented a significant improvement compared to previous years. The target of processing 80 per cent of appeal requests within 180 days was also met in 2013-14.

[10] Labour jurisdiction is divided between federal and provincial and territorial governments, depending on the industry in which the work is performed. Federal laws apply to interprovincial and international transportation, chartered banks, telecommunications, the grain industry, most Crown corporations and certain activities undertaken by First Nations. All other industrial activities, which represent over 90 per cent of the Canadian work force, fall under provincial or territorial jurisdiction.

[11] Monthly data unavailable prior to December 2012.

When a review overturns the original decision to reject an applicant, the applicant receives a WEPP payment. This typically occurs when new information (not included in the initial application for a WEPP claim) is provided by either the trustee, receiver, or directly from the applicant. The proportion of reviews that were decided in favour of making a payment to applicants has fluctuated over the life of the WEPP, averaging 58 per cent.

An accepted appeal may result when a question of eligibility, employment status, or conflict between the *Wage Earner Protection Program Act* and the *Bankruptcy and Insolvency Act* is resolved. While appeals of a review decision are less likely to lead to a WEPP payment (on average 20 per cent), the proportion of accepted appeals has increased in the last two fiscal years.

Recovery of Debts

Where possible, the Government attempts to recover from the employer's estate the amounts it advanced to workers through the WEPP. Up to $2,000 per employee for wages and vacation pay, and up to $1,000 for disbursements, are secured as a super-priority claim from the current assets of the insolvent estate. If additional funds are available, the Government may also be able to recover a portion, or all, of the remaining amounts (unsecured) that it paid out to employees. Since the Program began, almost 15 per cent of WEPP payments have been recovered from insolvent estates, totaling over $24 million.

ITQ Solutions: WEPP Payments made possible with help from Province

In July 2011, more than 1,000 employees of ITQ Solutions found themselves out of a job without notice when the company suddenly shut down its three locations in Quebec and Ontario. While the Superior Court of Quebec declared ITQ Laval Ltée bankrupt, employees of ITQ in Trois-Rivières and Oshawa were employees of a different corporation, ITQ Ltée, and thus were ineligible for the WEPP.

IQT Ltee was finally declared bankrupt following a petition filed by la *Commission des normes du travail* and *Revenu Québec*, and all remaining ITQ Solutions employees were then eligible for the WEPP. As a result, a total of $2.87 million in WEPP payments were made to these employees for earned wages.

Part three: Identifying and Resolving Issues

The Labour Program works collaboratively with federal partners and insolvency experts to identify and resolve concerns with the Wage Earner Protection Program. In preparation for this review, the Department analyzed the issues raised by stakeholders since the WEPP began, including those presented in research papers and those mentioned during workshops and recent consultations. As a result, the Labour Program has been considering potential solutions to these issues, which may lead to future amendments to the WEPP. Ongoing consultation and analysis of new and outstanding issues will continue to be undertaken by the Department.

Key Issues

Improving the Payments of Trustee and Receiver Fees and Expenses

Trustees and receivers are entitled to receive payment for the WEPP duties they undertake and the overall cost of administering the WEPP. However, when there are few or no assets left in the estate, trustees and receivers would like the process used to calculate their fees and expenses to be improved because they feel the payments do not cover their costs. Some have indicated that they are reluctant to take on bankruptcies or receiverships involving wage claims in low- or no-asset cases because they think the payment formula is insufficient.

The Labour Program is reviewing potential regulatory amendments to improve this payment scheme.

Addressing the Liability of Trustees and Receivers

While there have been no prosecutions against trustees and receivers related to their WEPP duties, stakeholders have expressed concern about the potential for liability when an insolvent business did not keep proper records on employees' earned wages. Receivers who have ended the employment of workers at the time of receivership and re-hired employees to help wind-down the business have also questioned whether this practice may leave them vulnerable to liability.

The Labour Program has discussed using various means to certify the amounts owed to eligible workers in the absence of payroll records as one option to reduce that liability risk. It is also considering the suggestion to develop standards outlining the efforts required of trustees and receivers to find books and records, and to ask employees for information, to help determine earned wages.

Administering the "Most Beneficial Payment"

The *Wage Earner Protection Program Act* requires that workers receive the "most beneficial payment" (greater amount) when their former employer is subject to both receivership and bankruptcy proceeding. To determine this payment, both the trustee and receiver must independently calculate wages owing and submit a *Trustee/Receiver Information Form*

for each employee. The trustee community considers this process as duplicative, time-consuming and burdensome. Trustees and receivers also believe that it may make it difficult to put the Crown's subrogate claim to the correct estate.

The Labour Program and Service Canada are working to improve the processing of the most beneficial payment requirement, including by: exploring ways to split the work between a trustee and receiver; developing uniform practices; or creating a time-saving version of the *Trustee/Receiver Information Form* filing system for these cases.

Clarifying the Crown's Subrogation Right

In exchange for receiving a timely payment from the WEPP, applicants assign their wage claim to the Government who then takes the place of the applicant when dividends from the estate are distributed. This is referred to as the Crown's subrogated right. There have been concerns raised by stakeholders over legal attempts to use the WEPP to absolve former directors of their liabilities. Specifically, a few directors have sought to have their liability reduced by the amount of WEPP payments that were given to former employees. This is not the intent of the Program. Some stakeholders have also expressed concern that the ordering of priorities under the WEPP Regulations eliminates the only way employees may recover other unpaid wages from directors, such as outstanding vacation pay. In particular, they claim that directors are able to argue that the wages have already been paid through the WEPP.

The Labour Program is exploring ways to improve the recovery of WEPP debt.

Other Issues

Stakeholders have also raised other issues that are beyond the scope of the five-year review. For example, there is support for the WEPP to be expanded to cover employees who lose their jobs during a restructuring which does not lead to a bankruptcy or when companies close down without filing an official bankruptcy (known as "walkaways"). Some stakeholders would like an increased WEPP payment cap or the same, lump-sum payment given to all impacted employees. Still others have recommended an extension of the WEPP coverage period or an expansion of the WEPP payment to cover benefits, such as pension payments or international insolvency events.

Industry Canada's Review of Canada's Insolvency Laws

The *Wage Earner Protection Program Act* complements other federal insolvency legislation; namely, the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*. In 2014, Industry Canada held consultations on these legislations. Stakeholders, including those interested in enhancing the protection of employees affected by insolvency, were invited to make submissions.

Thirteen of the 65 submissions included recommendations directly related to the WEPP. The views were diverse, ranging from those who would like the maximum payment increased and/or for employees to be compensated for all unpaid wages, to those who believe any further Program enhancement would be detrimental and further reduce credit availability for borrowers. These views are detailed in *Fresh Start: A Review of Canada's Insolvency Laws*.[12]

[12] Publicly available at www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00882.html

Part four:
Conclusion and The Path Forward

This review clearly demonstrates that the *Wage Earner Protection Program Act* and the administration and operation of the Wage Earner Protection Program are successful.

In particular, the Department's performance evaluation shows that the WEPPA is effectively meeting its mandate to help pay the wages earned by workers who lose their jobs after their employer filed for bankruptcy or became subject to a receivership. The target population is aware of the Program and participation by eligible workers is high. The evaluation also concludes that there is an ongoing need for the type of benefits offered by the WEPP because, without the Program, workers impacted by insolvency are not likely to recover monies for earned wages.

WEPP's track record reinforces the successful administration and operation of the Program. The WEPP has significantly improved the ability of employees to successfully recover amounts owed to them by their insolvent employers and has also ensured that these amounts are paid to them in timely fashion.

More than 71,000 Canadians received a payment between July 2008 and March 31, 2014 which covered nearly all of the wages, vacation pay, and disbursements they were owed totalling more than $167 million. As well, more than 50 per cent of these recipients were paid in full for owed termination pay and severance pay. This is a significant improvement from the amounts many employees were able to recover prior to the introduction of the WEPP (13 cents on every dollar earned).

Service standards are also being met and, in recent years, significantly exceeded. For example, in 2013-14, more than 95 per cent of applications were processed within the 42-day service standard (of which 85 per cent were processed within 28 days, 67 per cent within 21 days, and 47 per cent within 14 days). In addition, in 2013-14, 95 per cent of reviews were determined within the 35-day service standard, and 80 per cent of appeals were processed within the 180-day service standard.

Next Steps

This review highlights areas where the WEPPA and its Program may be enhanced in the future to better protect vulnerable workers affected by insolvency. The Labour Program is considering the views of stakeholders and potential solutions to these issues to improve both service delivery and program operations. For example, to reduce a number of overpayments, the Labour Program and Service Canada will take steps to improve application processing where both a bankruptcy and a receivership occur. In addition, the Labour Program and Service Canada will work on modernizing and streamlining information and tools for trustees and receivers to assist them in performing their duties and providing information to potential WEPP applicants.

Conclusion

The Wage Earner Protection Program provides certain and timely payments to individuals who find themselves in a difficult financial situation following their employer's bankruptcy or receivership. The Program has proven to be an effective way to lessen the burden of bankruptcy and receivership on employees. Most importantly, it has been a key source of timely financial support to workers in Canada who have lost their job because of a bankruptcy or receivership.

Putting workers first in insolvency proceedings and paying them owed wages in a timely fashion remains an ongoing commitment for the Government of Canada. These workers deserve to receive equitable, fair, and timely payment for the wages that they have earned. The WEPP is meeting this objective.

Appendices

Appendix A: Bill C-12 Amendments

Stakeholders Comments	Legislative Changes
Clarify when a person is not eligible to make a claim for wages earned under the WEPP; especially, the meaning of "arm's length".	2007, c. 36, s. 83 Paragraph 2(5)(a) defines when an individual is considered to deal at arm's length with a related person.
Ensure that individuals who are employed for three months or less are eligible to receive a payment under the WEPP.	2007, c. 36, s. 85 Removes the requirement for an applicant to have worked for their employer at least three months prior to the date of bankruptcy or receivership.
Revisit the payment amount for wages under the WEPP and for super-priority wages under the BIA to avoid unintended consequences.	2007, c. 36, s. 86 Paragraph 7(2): If the former employer is both bankrupt and subject to a receivership, the amount that may be paid for wages owed to an applicant is the greater of the amount determined by the bankruptcy and the amount determined by the receivership.
Clarify all of the WEPP processes, including the process to review an application eligibility decision and the process to appeal the resulting review decision.	2007, c. 36, s. 87 Paragraphs 8-10 inform the process in which a person must apply to receive a payment under the WEPP and how that person will be informed of their eligibility or ineligibility for the payment after the Minister has assessed the application.
	2007, c. 36, s. 87 Paragraph 11 allows an applicant to request a review of their eligibility or ineligibility for payment under the WEPP. Paragraph 12 outlines the authority of the Minister to conduct such a review and Paragraph 13 reflects the finality of the Minister's review decision (subject to the right of appeal).
	2007, c. 36, s. 87 Paragraph 14 allows an applicant to appeal the eligibility decision made by the Minister on a question of law or jurisdiction.

	2007, c. 36, s. 88 Paragraph 16 explains that an appeal to an adjudicator will be on the record and that no new evidence is admissible. Paragraph 17 outlines the authority of the adjudicator and the resulting outcome of their ruling.
	2007, c. 36, s. 89 Paragraphs 19 and 20 stipulate that an appeal by an adjudicator is final and may not be reviewed or questioned in any way.
	2007, c. 36, s. 91 Paragraphs 32 and 33 inform the process for the Minister of Labour to determine whether an overpayment was made under the WEPPA and the process for the Minister of National Revenue to collect it.
Ensure that the trustee or receiver is entitled to claim reasonable costs from the federal government for helping to administer the WEPP and bankruptcy. This includes the costs to determine the amount of wages owing to each individual when the debtor's books and records are either non-existent or out-of-date.	2007, c. 36, s. 89 Paragraph 21(4) outlines the duties of a person who is dealing at arm's length with, and providing payroll services to, a bankrupt or insolvent person, such as the cost of providing information to which they have access.
	2007, c. 36, s. 89 Paragraph 22 obliges the Minister to pay the fees and expenses incurred by trustees or receivers as prescribed by WEPPA Regulations.
Provide assurance of the protection of personal information, such as a social insurance number.	2007, c. 36, s. 90 Paragraph 29 assures an applicant that their social insurance number shall not be used in any way other than the administration of the WEPPA or the *Income Tax Act*.
Amend the anti-abuse measures for various offences related to the work of trustees and receivers, which seem unduly harsh.	Paragraphs 38(4) and 39(2) provide that a person may not be convicted of an offence if the person establishes that they exercised due diligence to prevent the commission of the offence. These provisions also reduce to two years (from six) the time limit for instituting a prosecution for an offence.

Appendices

Appendix B: Bill C-10 Amendments

Stakeholders Comments	Legislative Changes
Define the types of wages which are eligible for a WEPP payment and clarify the meaning of termination of employment.	2009, c. 2, s. 342 Paragraph 2(1) defines "eligible wages" as (a) wages other than severance pay and termination pay that were earned during 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 (b) severance pay and termination pay that relate to employment that ended during the period referred to in paragraph (a). A marginal note was also added to clarify that "eligible wages" include salaries, commissions, compensation for services rendered, vacation pay, severance pay, termination pay, and any other amounts prescribed by regulation.
	2009, c. 2, s. 343 Paragraph 5(a) clarified that an individual was eligible for a WEPP payment if their employment had ended for a reason prescribed by regulation. The prescribed reasons include resignation or retirement, termination of the individual's employment, and expiration of an individual's term of employment
	2009, c. 2, s. 347 Paragraph 41 (b) clarifies that the Governor in Council may make regulations prescribing reasons for the purposes of paragraph 5(a).

Revisit date for calculating the six-month period to determine the extent of unpaid wages by including the phrase "date of initial bankruptcy event."	2009, c. 2, s. 342 Paragraph 2(1) makes clear that eligible wages (including severance and termination pay) must be earned during 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.
	2009, c. 2, s. 343, s. 345 and s. 346 Paragraph 5(d) was repealed because it was redundant to paragraph 2(1). Similarly, Paragraphs 7(1-2) and 21(1)(a) were revised to remove the redundant six-month period information.

Appendices

Appendix C: Glossary of Terms[13]

Arm's length: Describes dealings between two parties who are free and independent of each other and who do not share a special relationship, such as being related or where one party has control over the other. An "arm's length" relationship is required between an applicant and an officer, director, person with a controlling interest, or manager in order to be eligible to receive a WEPP payment.

Bankruptcy: A legal process governed by the *Bankruptcy and Insolvency Act* for a person who can no longer pay their debts as they become due. The person who owes the debt assigns all assets (with some exceptions) to a trustee in bankruptcy who sells or uses the assets to help pay the debt to the creditors.

Creditor: A person who is owed money, goods or services. An unsecured creditor does not have any security for the debt owed them. A preferred creditor is an unsecured creditor who has a first claim to any funds that are available. A secured creditor is one who takes collateral for the extension of credit, such as when a car or house is purchased.

Insolvency: The inability of a debtor to pay off debt as it becomes due.

Priority: The order in which creditors are ranked for payment of claims provable under the *Bankruptcy and Insolvency Act*. Following payment of a WEPP claim, the Crown assumes the position of the applicant as a creditor to the extent of the payment.

Receiver: A person appointed by a creditor or by the Court to take possession or control of the assets of a debtor within the meaning of subsection 243(2) of the *Bankruptcy and Insolvency Act*.

Receivership: A proceeding in which a debtor's assets are in the possession or control of a receiver within the meaning of the *Bankruptcy and Insolvency Act*.

Super-priority: In 2008, the *Bankruptcy and Insolvency Act* created a limited super-priority in a bankruptcy or a receivership in favour of employees for unpaid wage claims. The priority is limited because the charge applies only to current assets up to $2,000. While this does not impact the amount paid by the WEPP, it is relevant for the amount the Crown may recover from the estate in the place of the wage earner.

Trustee in bankruptcy: A person licensed by the Office of the Superintendent of Bankruptcy to administer bankruptcies and proposals.

[13] Adapted, in part, using the definitions on the Office of the Superintendent of Bankruptcy Canada website at www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01467.html.

WEPP eligibility period: This begins six months before a restructuring event and ends on the date of bankruptcy or receivership.

WEPP eligible wages: These include: 1) salaries, commissions, compensation for services rendered, vacation pay, gratuities accounted for by the former employer, disbursements of a travelling salesperson properly incurred in and about the business of the former employer, production bonuses, and shift premiums earned during the eligibility period; and 2) termination pay and severance pay for employment that ended during the eligibility period.

Appendices

Appendix D: Program Process

Delivery Process

1. The trustee and/or the receiver identifies each worker that is owed wages by an employer who has declared bankruptcy or is subject to receivership.

2. The trustee and/or the receiver determines the amount of eligible earned wages which are owed to each worker.

3. The trustee or the receiver provides Service Canada with the information required on each worker using the *Trustee/Receiver Information Form*. The form is submitted:

    - 45 days from the date of bankruptcy or from the first day on which there was a receiver in relation to the former employer OR
    - 15 days after the trustee or receiver has been given the information from another person, such as a person providing payroll services to a bankrupt or insolvent person.[14]

4. The trustee or the receiver informs each worker about the Wage Earner Protection Program and the conditions under which payments may be made under the WEPPA. The trustee or receiver also provides each worker with the following information within 45 days of the date of bankruptcy or receivership:

    - the date of bankruptcy or receivership;
    - the date the employment ended;
    - the requirement of individuals to submit a proof of claim for eligible wages owing;
    - a copy of the *Trustee/Receiver Information Form* submitted to Service Canada; and
    - either the WEPP application form or directions on where an individual may obtain this form.

5. Each worker may submit a WEPP application form to Service Canada within 56 days of the bankruptcy or receivership. If there is a delay in submitting the form, a reason for the delay must also be provided.

[14] The WEPPA provides a longer period of time if circumstances beyond the control of the trustee or receiver necessitates it.

6. Upon submission of their application, the applicant agrees to allow the Government of Canada to take their place as a creditor in bankruptcy or receivership.

7. Service Canada assesses the eligibility of each applicant to receive a WEPP payment based on the information contained in the *Trustee/Receiver Information Form* and on the worker's application. This includes:
    - whether the employment has ended;
    - whether the former employer is bankrupt or subject to a receivership; and
    - whether the applicant is owed eligible wages (as defined in the WEPPA) by the former employer.

8. Service Canada makes an initial decision and gives notice of this decision to eligible and non-eligible applicants. If the applicant is eligible, Service Canada also notifies the trustee or receiver of the amount that the applicant will receive.

9. The Government may then pursue the recovery of the amount of the WEPP payment (up to $2,000 on a super-priority basis and the remainder on a regular-priority basis).

Review Process

1. An applicant may request a review by the Minister of their eligibility.

2. A request for review must be made in writing within 30 days of being notified of the eligibility decision, unless circumstances beyond the control of the applicant necessitate a longer period. The applicant may provide information to support the request for review.

3. Service Canada, on behalf of the Minister, conducts the review and may also contact the trustee or receiver for original documentation, information or clarification.

4. The result of the review may vary, confirm or rescind the original decision and Service Canada notifies the applicant of the review decision in writing. Also, the trustee is notified if the original decision is changed and the applicant is found eligible for the WEPP, or if the payment amount is changed.

Appeal Process

1. If the applicant is not satisfied with the outcome of the review, they may appeal the decision, but only on a question of law or jurisdiction.

2. An appeal may be filed within 60 days of being notified of the review decision. The applicant may not add any new facts or evidence to the file because the appeal is "on the record" only.

3. To file an appeal, an applicant must provide a written submission containing their social insurance number, current address and telephone number, and detailed grounds for the appeal. This information may be provided through the Notice of Appeal to Adjudicator form, which is available on the Labour Program website.
4. The Labour Program will assess the appeal request and may recommend that the Minister appoint an adjudicator to hear the appeal. If an adjudicator is appointed, the applicant will be notified in writing.
5. As outlined in section 17 of the *Wage Earner Protection Program Act*, the adjudicator may confirm, vary or rescind the review decision, which will be provided to the applicant in writing, including the reasons for the decision. The adjudicator's decision is final.

Overpayment Process

1. If Service Canada or the Labour Program determines that an applicant received a WEPP payment greater than the amount which the applicant was eligible to receive, the applicant will receive a notice in writing explaining the determination and specifying the amount that they were not eligible to receive.
2. The applicant will have 30 days from the receipt of the notification in which to pay the overpaid amount.
3. If the overpayment has not been repaid within 30 days, interest begins to accrue.

Appendices

Appendix E: Data Tables

Application and Payment Activity Year-Over-Year

WEPP Administrative and Operational Activities by Fiscal Year							
Activity Type	FY08/09[15]	FY09/10	FY10/11	FY11/12	FY12/13	FY13/14	Totals
Estates Processed	450	810	684	688	674	674	3,980
Applicants	5,751	17,957	14,974	17,132	11,072	15,240	82,126
Payment Recipients	2,733	16,264	14,305	13,848	11,064	13,269	71,483
Recipients of Maximum Payment	145	8,390	6,611	7,984	5,189	6,250	34,569
Recipients Paid in Full	2,588	7,874	7,694	5,864	5,875	7,019	36,914
Reviews							
Requested	183	243	550	541	423	506	2,446
Completed	107	250	508	438	546	540	2,389
Appeals							
Requested	5	37	34	35	20	13	144
Completed	1	13	30	42	16	18	120

[15] July 8, 2008 to March 31, 2009.

WEPP Payments by Fiscal Year and By Type ($)							
	FY08/09	FY09/10	FY10/11	FY11/12	FY12/13	FY13/14	Program Totals
Wages	2,150,302	8,576,850	7,793,607	7,415,057	5,324,286	11,997,543	43,257,645
Vacation	1,469,793	5,693,500	5,089,594	4,532,059	4,726,195	4,666,940	26,178,081
Termination	n/a	16,407,579	16,203,289	18,242,857	14,310,273	13,398,700	78,562,698
Severance	n/a	5,221,918	4,412,075	3,264,538	2,051,721	2,568,000	17,518,252
Disbursements	13,680	41,844	25,498	24,220	31,267	64,508	201,017
Total	**3,633,769**	**35,941,690**	**33,524,062**	**33,478,731**	**26,443,742**	**32,695,691**	**165,717,685**
Average Payment	**1,323**	**2,210**	**2,344**	**2,418**	**2,390**	**2,464**	**n/a**

Payments by Province and Territory

WEPP Payments by Province and Territory and by Type in Fiscal Year 2013-14 ($)						
	Wages	Disbursements	Vacation	Termination	Severance	Total Payments
Quebec	4,583,519.90	24,722.11	2,497,161.70	4,555,360.03	1,018,572.74	12,679,336.47
Ontario	3,464,503.60	27,207.05	1,203,795.23	6,920,087.29	536,598.27	12,152,191.44
British Columbia	1,504,085.20	4,107.13	480,138.85	466,230.19	587,637.24	3,042,198.61
Alberta	1,673,302.93	5,657.23	275,167.39	726,371.94	41,343.88	2,721,843.37
Manitoba	468,671.31	0.00	50,145.02	103,045.98	309,806.57	931,668.88
Nova Scotia	41,746.91	2,448.49	60,323.98	352,602.17	15,826.28	472,947.83
New Brunswick	102,264.41	0.00	52,366.27	221,799.82	17,572.53	394,003.03
Saskatchewan	52,132.27	366.35	19,078.25	32,142.47	12,165.24	115,884.58
Newfoundland and Labrador	39,816.16	0.00	6,970.67	6,168.35	17,939.29	70,894.47
Other[16]	10,255.41	0.00	13,152.78	11,617.22	3,794.98	38,820.39
Prince Edward Island	31,745.07	0.00	1,789.30	3,113.43	255.97	36,903.77

[16] "Other" comprises unreported province of residence or jurisdiction of residence outside of Canada.

Northwest Territories	17,912.72	0.00	267.66	0.00	4,661.03	22,841.41
Yukon	7,586.98	0.00	6,582.60	161.56	372.49	14,703.63
Nunavut	0.00	0.00	0.00	0.00	1,453.61	1,453.61
Total	**11,997,542.86**	**64,508.36**	**4,666,939.69**	**13,398,700.45**	**2,568,000.12**	**32,695,691.48**

WEPP Payment Recipients by Province and Territory in Fiscal Year 2013-14	
Quebec	5,286
Ontario	4,595
British Columbia	1,288
Alberta	1,192
Manitoba	400
Nova Scotia	211
New Brunswick	157
Saskatchewan	62
Newfoundland and Labrador	34
Other[17]	18
Prince Edward Island	12
Northwest Territories	7
Yukon	5
Nunavut	2
Total	**13,269**

[17] Ibid.

Payments to Trustees and Receivers

WEPP Payments by Fiscal Year to Trustees and Receivers for Fees and Expenses ($)					
Type	FY11/12	FY12/13	FY13/14	Average per FY	Program Totals
Applications	24	17	15	n/a	56
Payments	12	7	8	9	27
Total Paid	12,065.00	14,420.00	38,150.63	21,205	64,636

Recovery of Debts

Recovery of Subrogated Debt and Overpayments ($) by Fiscal Year						
Fiscal Year	Class 1 – Labour Program				Class 2 – Canada Revenue Agency	
	Super priority		Unsecured		Overpayments	
	Established	Recovered	Established	Recovered	Established	Recovered
2008-09	2,907,808.43	-2,000.00	708,248.26	0.00	9,630.35	0.00
2009-10	11,483,285.62	-2,869,620.14	24,492,213.69	-932,610.88	56,450.65	-33,273.46
2010-11	10,173,359.57	-3,502,018.14	21,540,285.96	-270,143.59	261,791.69	-161,445.62
2011-12	10,212,960.71	-5,067,099.37	24,172,797.58	-1,080,977.61	387,741.52	-227,743.61
2012-13	7,594,069.76	-5,612,507.80	18,908,827.06	-517,794.97	45,572.19	-92,199.20
2013-14	13,432,491.39	-3,710,364.85	20,358,231.71	-702,132.29	59,026.83	-68,426.55
Total	55,803,975.48	-20,763,610.30	110,180,604.26	-3,503,659.34	820,213.23	-583,088.44

Service Delivery

WEPP Client Contact with Service Canada by Fiscal Year								
Type	FY08/09	FY09/10	FY10/11	FY11/12	FY12/13	FY13/14	Average per FY	Program Totals
Calls	12,049	31,527	30,319	34,089	29,717	26,480	27,364	164,181
In-person Visits	6,803	12,126	10,661	9,075	5,943	5,751	8,393	50,359
Website Hits	97,884	173,752	140,095	136,879	112,098	102,038	127,124	762,746
Total Contact	116,736	217,405	181,075	180,043	147,758	134,269	162,881	977,286

WEPP Service Delivery Standards (# and %) by Fiscal Year									
	Service Delivery	FY10/11[18]		FY11/12		FY12/13		FY13/14	
Initial decision Service Standard: 80% within 42 days	Days	Applications	Per cent	Applications	Per cent	Applications	Per cent	Applications	Per cent
	0 - 7	1,481	13%	558	4%	922	9%	2,251	20%
	8 - 14	2,749	25%	904	7%	1,543	15%	3,071	27%
	15 - 21	2,264	21%	1,908	14%	694	7%	2,289	20%
	22 - 28	1,816	16%	2,169	16%	475	5%	1,985	18%
	29 - 35	1,548	14%	2,688	20%	483	5%	1,084	10%
	35 - 42	592	5%	2495	19%	828	8%	267	2%
	43+	588	5%	2,472	19%	5,397	52%	250	2%
	On Target	10,450	95%	10,722	81%	4,945	48%	10,947	98%
	Total	11,038	99%	13,194	99%	10,342	101%	11,197	99%
Reviews Service Standard: 90% within 35 days	0 - 7	12	2%	3	1%	65	15%	278	55%
	8 - 14	2	0%	7	1%	58	14%	136	27%
	15 - 21	6	1%	10	2%	51	12%	36	7%
	22 - 28	2	0%	10	2%	48	11%	22	4%
	29 - 35	8	1%	17	3%	23	5%	11	2%
	36+	518	95%	495	91%	180	42%	23	5%
	On Target	30	5%	47	9%	245	58%	483	95%
	Total	548	99%	542	100%	425	99%	506	100%
Appeals Service Standard: 80% within 180 days	0 - 60	16	46%	23	66%	0	0%	2	33%
	61 - 120	14	40%	7	20%	3	16%	2	33%
	121 - 180	3	9%	4	11%	7	37%	1	17%
	181+	2	6%	1	3%	9	47%	1	17%
	On Target	33	94%	34	97%	10	53%	5	83%[19]
	Total	35	101%	35	100%	19	100%	6	100%

[18] The 42-day service standard was established for fiscal year 2010-11. For fiscal year 2009-10, 58 per cent of applications were processed within a 28-day service standard, which was applicable at the time.

[19] This result is not final as more than 50 per cent of the appeals have yet to be completed.

WEPP Reviews and Appeals Service Delivery Standards (# and %)													
	FY08/09		FY09/10		FY10/11		FY11/12		FY12/13		FY13/14		Average
	Number	Per cent	Number	Per cent	Number	Per cent	Number	Per cent	Number	Per cent	Number	Per cent	Per cent
Reviews Accepted	80	44	150	60	305	56	203	37	319	74	386	76	58
Reviews Rejected	102	56	102	40	243	44	343	63	111	26	122	24	42
Appeals Accepted	0	0	19	50	1	3	2	6	5	26	2	33	20
Appeals Rejected	5	100	19	50	34	97	34	94	14	74	4	67	80

TAB 8

Commercial Insolvency in Canada

FOURTH EDITION

Kevin P. McElcheran

LexisNexis

(e)

Collective Agreements

¶5.192

Collective agreements remain in force despite the commencement of CCAA proceedings and may not be disclaimed under section 32.[198] Collective bargaining is a statutory right under federal and provincial labour relations laws that permit the recognition of unions to bargain the terms of their members' employment with employers on a collective basis. Labour relations law protects the collective bargaining rights as an exclusive power of the union, once it has been certified, to represent its members.

Footnotes — ¶5.192:

[198] CCAA, s. 32(9).