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WEPPA Amendments in Force: Some Welcome Changes

January 24, 2022

By Philip Cho and Craig Harasymchuk, Student-at-Law

On November 20, 2021, long-awaited amendments to the *Wage Earner Protection Program* ("**WEPP**") came into force. The amendments are a welcome change to WEPP and will close some of the remaining gaps in the program designed to protect some of the most vulnerable stakeholders in an insolvency proceeding – employees.

The Wage Earner Protection Program

WEPP is a federal program, enacted under the *Wage Earner Protection Program Act*, SC 2005, c 47, as amended ("**WEPPA**"), designed to protect the wages of employees by making payments to employees when their employer enters certain insolvency proceedings. While the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**") provides for a priority to employees under s. 136(1)(d), this priority is limited to the first $2,000 of unpaid wages only, and the priority does not apply to statutory termination or severance pay, or to common law pay in lieu of notice.

However, in many instances, a terminated employee may find the employer has insufficient assets to provide meaningful distributions, or any at all, on account of an employee's priority claim for unpaid wages, let alone for any termination pay, severance pay, or other various types of remuneration. When WEPPA was introduced in 2005, the Government of Canada estimated that 10,000 to 15,000 workers annually had unpaid wage claims caused by their employers' bankruptcy.

WEPP helps protect these employees by providing a government-backed program that employees can access to receive payments, and which is not dependent on the assets of the insolvent employer, or the status of the insolvency proceeding (some of which may take months and years before creditors receive distributions, if at all). To date, WEPP has paid approximately $473 million in wages to 161,000 Canadian workers. For 2021, the maximum amount an individual can claim is $7,579.

The Amendments are a Welcome Change

On November 20, 2021, certain amendments made as part of *Bill C-86, Budget Implementation Act, 2018, No. 2*, as well as the *Wage Earner Protection Program Act Regulations*, SOR/2008-222 (the "**Regulations**"), came into force (the "**Amendments**"). Of note, section 5 of WEPPA, setting out the eligibility requirements for an employee, now includes circumstances where the insolvent employer is the subject of proceedings under Division 1, Part III of the BIA (Proposal proceedings) or under the *Companies' Creditors Arrangement Act* (the "**CCAA**"), **AND** a court determines, essentially, that the employer is winding down its business operations (sub. 5(5) of WEPPA and s. 3.2 of the Regulations).

Prior to these amendments, only those whose employment were terminated in, or as part of, a bankruptcy or receivership proceeding were eligible to participate in WEPP. However, employment terminations often occur in other insolvency restructuring proceedings where there is no bankruptcy or receivership, such as a BIA Proposal or CCAA proceeding ("**Restructuring Proceedings**"). In Restructuring Proceedings, while often seen as an effort to avoid the ending of a business operation (i.e. a restructuring of the

business so that it may continue), modern insolvency practice recognizes the value to stakeholders to permit the use of Restructuring Proceedings to effect orderly liquidations and wind-downs of business operations in a manner that will result in better recoveries than would occur in a traditional bankruptcy or receivership.

Some of these "liquidating" Restructuring Proceedings could take months, if not years, before the insolvent company is ultimately wound-down and assigned into bankruptcy as a final administrative step. In such cases, an employee would be required to wait until the end of the process before accessing entitlements under WEPP. In some circumstances, insolvency professionals have found "work arounds" by appointing a receiver solely for the purpose of triggering the requirements under WEPPA for the benefit of employees. However, "work arounds" are never ideal and are not always available.

The Amendments now formally provide for any person to apply to the court in a Restructuring Proceeding for a determination that the insolvent employer meets the criteria set out in s. 3.2 of the Regulations. At this time, the criteria in the Regulations is limited to an employer, "all of whose employees in Canada have been terminated other than any retained to wind down its business operations." In other words, the availability of WEPP is limited to those Restructuring Proceedings where there is an orderly liquidation and wind-down of the business operations.

The Amendments also make similar changes to permit employees to access WEPP in the case of a foreign insolvency proceeding that is recognized by the Canadian courts. The Amendments also removed an offset designed to approximate statutory deductions be deducted from payments made to qualifying workers. In practice, this offset created economically inefficient administrative issues for licensed insolvency trustees administering WEPP payments and penalized those employees who had already maximized their CPP and EI contributions.

More Changes to Come?

The Amendments are welcomed by many insolvency professionals and worker protection advocates and closes inconsistencies in WEPP that prevented WEPP from achieving its purpose. WEPP now aims to provide timely payments to *more workers* negatively impacted by insolvency proceedings, which will provide relief to those most vulnerable to sudden and unexpected interruptions in remuneration.

However, the Amendments do not make WEPP available to employees who have been terminated by an employer engaged in a traditional Restructuring Proceeding and is attempting to avoid bankruptcy. Presumably this is because in a traditional Restructuring Proceeding, the company should present a proposal or plan of arrangement that all creditors and employees will have an opportunity to vote on, which should provide some form of recovery better than in a bankruptcy. Explanatory notes to the Regulations Amending the Wage Earner Protection Program Regulations, SOR/2021-196 simply state that expanding WEPP to non-liquidating Restructuring Proceedings was not pursued because WEPP is designed to cover only bankruptcy or receivership scenario, and not to cover all forms of business restructurings.

Unfortunately, given the length of time a Restructuring Proceeding and performance of a proposal or plan of arrangement can take, the unavailability of WEPP in these circumstances may disincentivize employees from supporting a restructuring proposal or plan in order to force a bankruptcy so that they may have more timely access to funds under WEPP. Also, while there is an automatic bankruptcy in the event a Division 1 proposal is not approved by creditors, the same is not true for CCAA plans of arrangement. While unlikely, it remains a possibility that after a failed CCAA restructuring proceeding, the company does not become bankrupt or put into receivership.

It remains to be seen if WEPP will be expanded to cover these other Restructuring Proceedings or not. Until then, in the appropriate circumstances, insolvency professionals may have to continue to resort to "work arounds", such as appointing a receiver for the purpose of WEPPA.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

For more information or inquiries:

Philip Cho

Toronto
416.619.6296

Email:
pcho@weirfoulds.com

Philip Cho is a partner at WeirFoulds LLP and Chair of the Insolvency & Restructuring Practice Group.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035

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