Changes to the Wage Earners Protection Program Act

Allan Nackan, Partner at GlassRatner and co-leader of the firm's Restructuring practice, sheds light on the recent changes to the *Wage Earners Protection Program Act* ('WEPPA')—including how it addresses certain criticisms as well as what it means for Canadian employees impacted by a business failure.

Introduced in July of 2008, the *Wage Earner Protection Program Act* ("WEPPA") provides a basic security net for employees who lose their job when their employer becomes bankrupt or subject to a receivership. Protection under the WEPPA is provided to employees for outstanding wages, vacation pay, termination pay, or severance pay up to a cap of a certain number of weeks of the maximum insurable earnings (in 2018, prior to the changes discussed below, this equates to approximately $3,980).

The WEPPA excludes certain employees including those who served as an officer or director, had a controlling interest in the employer, were not dealing at arm's length with the employer, or held certain managerial positions.

How do the WEPPA and Bankruptcy and Insolvency Interact?

Sections 81.3 and 81.4 of the *Bankruptcy and Insolvency Act* ("BIA") provide a priority for employee wages and vacation pay only—up to a cap of only $2,000. An employee can't double dip any amount payable under the BIA section 81.3 or 81.4 charge, reducing the amount of WEPPA that employees would otherwise receive. It's the normal practice of Licensed Insolvency Trustees ("LIT") and receivers to claim the full WEPPA entitlement for employees and forward any BIA section 81.3 or 81.4 amounts directly to Service Canada. In practice, the WEPPA amount is guaranteed money to employees from the federal government and any recovery under sections 81.3 or 81.4 by the LIT or receiver provides some recovery to Service Canada.

Is the WEPPA Changing?

Bill C-86, *Budget Implementation Act, 2018, No. 2* proposed certain amendments to the WEPPA. These changes received Royal Assent on December 13, 2018 meaning that *Bill C-86* has, or will soon become, law. *Bill C-86* provides for changes to apply retroactively to bankruptcies or receiverships dated after February 26, 2018.

Key changes to the WEPPA

Arguably the most significant change to the WEPPA is the increase in the maximum payment, which increases from four times the maximum insurable earnings (approximately $3,980 in 2018) to seven times (approximately $6,960 in 2018).

However, there are other significant changes which clear up certain anomalies in the legislation. For example, it is common after a bankruptcy or receivership for the LIT or receiver to employ certain employees in order to wind down the business. It was previously unclear if employees who worked for the LIT or receiver were considered not to have been terminated as at the date of bankruptcy or receivership, meaning that such employees may have forfeited their claims for termination or severance pay. The changes make it clear that employees who work for the LIT or receiver can still collect termination or severance pay under WEPPA.

The WEPPA previously protected employees who lost their jobs in a bankruptcy or receivership up to six months prior to the filing of a previous *Companies' Creditors Arrangement Act* ("CCAA") plan or a BIA Proposal. This is inconsistent since it is generally the filing of a Notice of Intent ("NOI") which starts a Proposal proceeding and not the filing of a Proposal itself. As a result, where there was an eventual bankruptcy or receivership, an employee terminated six months before a CCAA would be eligible, but an employee terminated six months before a BIA NOI would not. The new legislation corrects this anomaly and references the filing of a NOI date as a reference date for the six-month look-back period.

The new changes also open the door to the applicability of WEPPA where there is no bankruptcy or receivership. Where a former employer is not bankrupt or subject to a receivership, but subject to a foreign insolvency proceeding recognized by the Court under the BIA, the Court may order that a LIT be appointed pursuant to the WEPPA and that the WEPPA applies. However, the regulations which the Court is to use when making this determination have not yet been drafted. The changes also state that any person may apply to Court for an order that the WEPPA applies in a BIA Proposal or CCAA; again, the criteria the Court is to use are to be outlined in regulations yet to be drafted.

A Practitioner's Perspective

The WEPPA provides an important safety net for vulnerable Canadians who are terminated in a bankruptcy or receivership. For the reasons noted above, the new changes fix some of the criticisms from a practitioner's perspective. Many large liquidations are done via a CCAA plan without a bankruptcy or receivership. In others, a bankruptcy or receivership is

triggered for the sole purpose of ensuring that WEPPA protection applies. For example, a limited receivership order was granted in the Sears CCAA for the expressed purpose of providing WEPPA coverage to employees. It's likely that the regulations to be drafted will allow employees who lose their jobs in a liquidating CCAA or BIA proposal to ask the court to order the WEPPA applies to them.

People who are culled from the workforce as part of a successful CCAA or BIA Proposal may not enjoy the same protection as those terminated in a liquidation; in particular, such employees may find that they receive pennies on the dollar for termination and severance claims while employees terminated in a liquidation receive payment of up to approximately $6,960 of their claims. This could create an undesirable situation where a terminated employee in a CCAA plan or BIA proposal chooses to vote against the plan or proposal since he or she has a vested interest in a liquidation where a much higher payment would be received.

In summary, the amendments to WEPPA address a number of anomalies previously experienced—giving much needed clarity around certain areas of the legislation. More importantly, however, the changes create some welcomed relief to Canadians and their families who are impacted by a business failure.

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