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Via email: [alex.duff@labour-travail.gc.ca](mailto:alex.duff@labour-travail.gc.ca)

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Dear Mr. Duff:

**Re: Enhancing the Wage Earner Protection Program**

I write on behalf of the Canadian Bar Association's Labour and Employment Law Section (CBA Section) to offer feedback on Employment and Social Development Canada's discussion paper, *Enhancing the Wage Earner Protection Program*,<sup>1</sup> looking at regulations to support the recent legislative changes to the *Wage Earner Protection Program Act* (WEPP Act).

The CBA is a national association of 36,000 lawyers, law students, notaries and law teachers. Among our primary objectives are improvements in the law and the administration of justice, and promoting the rule of law. The CBA Section includes lawyers who act both for unions and for employers. The CBA Section addresses issues related to law and practice affecting labour-management relations and employment standards.

For ease of reference, our comments respond to the questions in the discussion paper.

**Business Restructuring**

- 1) *What are the key factors that should be taken into account when determining whether a restructuring proceeding should trigger WEPP eligibility for employees?*

The CBA Section recommends that eligibility for the Wage Earner Protection Program (WEPP) be triggered by restructuring steps brought under the *Bankruptcy and Insolvency Act* (BIA) or *Companies' Creditor Arrangement Act* (CCAA) that result in a material impact on the employment of employees. Business restructurings under the BIA or CCAA can take many forms, and a WEPP claim system may not be necessary in all circumstances. For instance, a WEPP claims process does not need to be triggered in a balance sheet restructuring, which involves minimal or no operational restructuring. However, there could be a material impact on employees in a liquidating

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<sup>1</sup> Employment and Social Development Canada, [Enhancing the Wage Earner Protection Program](#) (2019).

restructuring (i.e. all or substantially all the assets of the business being sold) or an operational restructuring (i.e. closing parts of the business). Since there is no definition in the restructuring legislation of a balance sheet restructuring, operational restructuring or liquidating restructuring, we recommend that triggers for WEPP eligibility be clearly set out in the regulations.

We also recommend that the regulations include a safety valve mechanism allowing the business debtor to apply to a court to suspend the operation of WEPP if: (i) implementation of WEPP coverage would cause material hardship or delay to the company's restructuring efforts; and (ii) delaying implementation of WEPP coverage would not cause undue prejudice to the business debtor's employees.

- 2) *Do you see any potential problems with requiring a court to make a determination of WEPP eligibility in these cases?*

There is currently no requirement for a court to make an initial determination about WEPP eligibility in bankruptcy or receivership proceedings, and we see no reason to make this a requirement. We recommend that applicable legislation set out the criteria for WEPP eligibility in a business restructuring and allow access to the courts for any disputes about individual eligibility. Given that business restructurings require the appointment of a monitor (for CCAA proceedings) or proposal trustee (for BIA proposal proceedings), each of which have a duty to report material developments in the restructuring to the court, the government could also consider requiring the monitor or proposal trustee to report any WEPP eligibility disputes to the court.

- 3) *What type of guidance or information materials would be most useful to employees, employee representatives and insolvency professionals to ensure that this new eligibility is understood and correctly applied?*

We recommend that information or guidance documents be written in plain language and posted on the existing website. These materials should include a clear explanation of what constitutes restructuring for the purpose of WEPP eligibility. As widely as possible, notice should also be given directly to employer organizations and unions.

## **Foreign Proceedings**

- 4) *How can we design WEPP regulations to ensure that employees working in Canada for a company which begins insolvency proceedings in a foreign jurisdiction can access to the WEPP based on eligibility criteria that are fair, easy to understand, and administratively simple to implement?*

Foreign corporations that operate in Canada are subject to federal, and provincial or territorial labour and employment legislation. There are two potential WEPP triggers to a foreign insolvency proceeding: (i) commencing the foreign proceeding in the foreign jurisdiction such as commencing a Chapter 11 proceeding in the United States (foreign proceeding); and (ii) issuing a recognition order for the foreign proceeding under either the BIA or the CCAA (recognition proceeding).

In the case of a foreign proceeding without a recognition proceeding, it may be difficult to implement WEPP coverage and to enforce WEPP requirements (ie. the preparation of necessary reporting and claims calculations) given that any disputes would have to be heard by a foreign court. It would be more administratively efficient to implement WEPP coverage and enforce WEPP requirements in the context of a recognition proceeding since these proceedings are governed by a Canadian court, which grants the recognition order, and is empowered to "make any order that it considers appropriate" (BIA, section 272(1)). The

subrogated claim of the Canadian government for amounts paid under WEPP may not be recognized in the foreign proceeding, but under legislation, it could be expressly recognized as a valid claim in a recognition proceeding.

As we stated in our response to Question 1, we recommend that the legislation set out clear eligibility criteria for the application of WEPP coverage since foreign insolvency proceedings can also take many forms, including balance sheet restructurings, operational restructurings, and liquidating restructurings.

- 5) *Are there any risks associated with extending WEPP coverage to foreign insolvency proceedings? If so, what measures could mitigate such risks?*

There are risks associated with enforcing a subrogated claim for amounts paid under WEPP in a foreign insolvency proceeding, as noted in our response to question 4. It is unlikely that Canadian statutory prioritization of employees' claims will be recognized in a foreign proceeding and there is a risk that subrogated claims asserted by a government entity will be treated as subordinated claims in a foreign proceeding (under the doctrine of the extraterritorial enforcement of foreign tax claims). To mitigate these risks in recognition proceedings, we recommend that legislation require that priorities and rights of subrogation be maintained as a condition of obtaining recognition of the foreign proceeding.

There is also a substantial risk that mandatory WEPP reporting and claim calculation requirements will not be enforced in a foreign proceeding if the required activities are stayed by a foreign insolvency order. In the case of a recognition order, these risks could be mitigated by the jurisdiction of a Canadian court to make an order that requires compliance with WEPP requirements.

- 6) *What type of guidance or information materials would be most useful to employees, employee representatives and insolvency professional to ensure that the new eligibility criteria is understood, and correctly applied?*

We recommend that information or guidance documents be written in plain language and posted on the existing website. We also suggest including a clear explanation of what constitutes a foreign insolvency proceeding for the purpose of WEPP eligibility. As widely as possible, notice should also be given directly to employer organizations and unions.

- 7) *What would be the best way to inform the insolvency community and workers of the new WEPP eligibility criteria?*

We recommend that public notice and information be included on the existing website.

### **Insolvencies with Few Assets**

- 8) *In what circumstances do you think it is reasonable for the Government of Canada to pay the fees and expenses of trustees and receivers?*

We believe it would be reasonable for the government to pay the fees and expenses of trustees and receivers where non-payment would put employees' access to the WEPP in jeopardy.

- 9) *What documentation should a trustee or receiver be required to provide to demonstrate that they meet the conditions to seek Government payment of fees and expenses?*

A proposed trustee or receiver should submit financial records showing that but for payment of a portion of fees by the federal government, they would be unlikely to act.

10) *What criteria should be used to determine:*

- *Eligibility to receive payment of fees and expenses of the administration of an insolvent employer estate?*
- *Amount of payment that would be fair and reasonable?*

The CBA Section has no comment.

11) *Could revising the existing trustee and receiver payment formula have unintended effects? If so, what measures could minimize such concerns?*

The CBA Section has no comment.

### **Offsets**

12) *How do we ensure that non-WEPP payments received by individuals during insolvency proceedings are treated in an equitable manner?*

The CBA Section has no comment.

### **Excluded Managers**

13) *Do you recommend revising the current definition of “excluded manager” to improve clarity? If so, what criteria should be considered in developing a revised definition?*

For greater ease and clarity, we recommend that the definition of “excluded manager” be in the WEPP Act rather than the regulations. It is not clear whether the intent is to include only those who can unilaterally or autonomously make binding decisions, or whether it is sufficient for the purposes of exclusion to be included in the decision-making process on matters falling under s. 5(a) or (b) of the regulations.

14) *What type of guidance or information materials would be most useful to employees, employee representatives and insolvency professionals to ensure that any potential new eligibility definition is well understood and properly applied?*

The CBA Section believes that a clear eligibility definition in the WEPP Act would offer the necessary guidance.

We trust that our comments are helpful and would be pleased to provide any needed clarification.

Yours truly,

*(original letter signed by Nadia Sayed for Robyn Trask)*

Robyn Trask  
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