THE CANADIAN BAR ASSOCIATION
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Via email: ourania.moschopoulos@labour-travail.gc.ca

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Wage Earner Protection Program
165 Hotel-de-Ville Street
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Dear Ms. Moschopoulos:

Re: *Wage Earner Protection Program Act* – Five-year Review

I am writing on behalf of the Canadian Bar Association's National Bankruptcy, Insolvency and Restructuring Law Section (CBA Section) in response to the five year review of the *Wage Earner Protection Program Act* (WEPPA).

The CBA is a national association of 37,500 lawyers, Quebec notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. The CBA Section represents insolvency lawyers from across Canada and has a long history of contributions to government reform initiatives on insolvency law.

I. Coverage in Reorganization Proceedings

The WEPPA is intended to provide coverage for remuneration, termination and severance pay where reorganization proceedings are commenced by an employer. It is unclear why the WEPPA references the coverage period in proceedings under Part III, Division I of the *Bankruptcy and Insolvency Act* (BIA) to filing a Proposal by the debtor, but not to commencement of proceedings under the *Companies' Creditors Arrangements Act (*CCAA). While proceedings under Part III, Division I of the BIA can be commenced by filing a Proposal, they are typically commenced by filing a Notice of Intention to Make a Proposal.

It is possible that a debtor may never file a Proposal in a BIA proposal proceeding. In those circumstances, when the debtor becomes bankrupt, coverage under the WEPPA relates to the six month period prior to the bankruptcy rather than the commencement of the proposal proceedings. We recommend amending paragraph 2(1)(a)(ii) of the WEPPA to reflect the relevant period for proceedings under Part III, Division I of the BIA to ensure it begins six months before a Proposal or Notice of Intention to make a Proposal is filed.

In CCAA proceedings, it is possible that no bankruptcy will occur and no receiver be appointed. Consideration should be given to:

- amending s. 2(1)(a)(ii) of the CCAA so the relevant period for CCAA proceedings ends when the proceedings under the CCAA are terminated; and
- amending s. 5 to reflect that CCAA proceedings may terminate without a bankruptcy or a receiver being appointed. If these changes are made, monitors will need to be assigned the same functions as bankruptcy trustees and receivers *vis-à-vis* the WEPPA.

II. Coverage in a Receivership

There is a gap in the coverage provided by the WEPPA where an employee's employment is continued in a receivership.

Under the WEPPA, the terms in an order appointing a receiver state that the debtor's employees remain employed until they are terminated by the receiver on behalf of the debtor. Similarly, where a receiver is appointed by a secured creditor, the employees generally remain employed by the debtor until they are terminated by the receiver acting as agent of the debtor. Where the receiver does not terminate the debtor's employees on appointment, the employees will not have WEPPA coverage for termination and severance pay if they are later terminated by the receiver on behalf of the company. The WEPPA should be amended to provide coverage for employees who are terminated on the appointment of the receiver or by the receiver subsequent to appointment.

III. Coverage Where Interim Receiver is Appointed

Section 81.3 of the BIA provides coverage where an interim receiver is appointed. The WEPPA only provides coverage where a receiver in the meaning of s. 243(2) of the BIA is appointed. An interim receiver does not generally take control of a debtor's business and is there primarily to preserve and protect the debtor's property. It is, however, possible for an interim receiver to be appointed to operate a debtor's business. We believe the WEPPA should provide coverage where an employee is terminated on the appointment of an interim receiver or by the interim receiver.

IV. Compliance Costs

Under the Wage Earner Protection Program (WEPP), insolvency administrators incur fees and expenses that are borne by the debtor's estate. The WEPP requires an insolvency administrator to determine remuneration, termination and severance pay based on the applicable federal, provincial or territorial employment standards legislation. Where employees are located in various provinces or territories, the cost to determine the amount owing can be significant. Secured creditors must often bear the costs of administering the WEPP. Insolvency administrators will not take on an assignment unless the secured creditors agree to indemnify them for the cost of administering the WEPP. This masks the actual cost of administering the WEPP as costs absorbed by creditors are not reflected. The WEPP should be responsible for its own administration costs.

The WEPP Regulations provide compensation to insolvency administrators for fees and expenses where there are no assets in the debtor's estate and no indemnity from a creditor. The Regulations should be amended to permit insolvency administrators to recover the costs of administering the WEPP notwithstanding what assets are in the estate or what indemnities they have from creditors.

The administrative costs of the WEPP can be reduced by requiring the insolvency administrator to determine whether an employee's entitlement is within the maximum under the WEPP and BIA. Where the employee's entitlement exceeds the maximum, the insolvency administrator should not be required to calculate the precise amount owing to the employee unless there will be a distribution to the employee's unsecured claim in the bankruptcy. The administration costs of the

WEPP could also be reduced by giving all employees whose employment is terminated as a result of the employer's bankruptcy or insolvency a lump-sum payment of $3,000. Some, however, question whether the lump-sum model would result in a windfall for some employees. Research should be undertaken to determine the number of employees whose entitlement is less than the maximum and the total administrative costs in order to ascertain the amount owing to employees and whether the WEPP should provide for a lump-sum payment of $3,000 per employee.

V. Exercise of Subrogation Rights

The key sources of recovery in the WEPP for exercising the rights of the employees are the priority charges arising under the BIA and the employees' rights against the directors arising under employment standards and corporate legislation. The extent to which the Crown takes active steps to exercise the rights of the employees against the debtor's property is unclear. It is also unclear whether the Crown takes steps to conduct investigations to determine what recoveries may be available in a bankruptcy, receivership or reorganization. There should be a clear process to ensure that recoveries by the WEPP through the exercise of the subrogated rights are maximized.

We appreciate the opportunity to comment on the five-year review of the WEPPA and would be pleased to further assist the government in any way possible.

Yours truly,

(original signed by Noah Arshinoff for David Jackson)

David Jackson
Chair, Bankruptcy, Insolvency and Restructuring Section