Westlaw Delivery Summary Report for BRETON,JEAN-DANI

Date/Time of Request:	Sunday, July 13, 2014 15:51 Eastern
Client Identifier:	JEAN-DANIEL
Database:	ANNREVINSOLV
Citation Text:	2012 ANNREVINSOLV 11
Lines:	1015
Documents:	1
Images:	0

2012 ANNREVINSOLV 11

Annual Review of Insolvency Law

Editor: Janis P. Sarra

Annual Review of Insolvency Law 2012
11 — WEPPA — What ails it and can it be fixed?

11 — WEPPA — What ails it and can it be fixed?

Jean-Daniel Breton[FN*]

I. — Introduction

I have been practising in the insolvency field for a long time, and never before have I seen a piece of legislation that is this well intentioned be so badly received or so widely criticized. While I have no empirical data on the number of complaints made, it feels as if all discussions about insolvency eventually turn to the topic of employee protection in general and the *Wage Earner Protection Program Act* ("*WEPPA*") in particular, with criticism expressed by the professionals charged with administering the legislation, the creditors who must bear the cost of administering it, and even the employees who benefit from the program.

I wrote an article, published in the 2010 edition of the *Annual Review of Insolvency Law*,[FN2] examining the changes made in 2005 and 2007[FN3] (implemented in 2008 and 2009) to enhance employee protection in insolvency situations, and this article addressed in part the *WEPPA*. With regards to the issue of employee protection as a whole, I concluded the article by stating that while some problems had been encountered, they did not appear to represent a fundamental flaw; the legislation seemed to accomplish its stated objective, and the professionals charged with administering the provisions were working through the kinks.

The present text builds on the previous article, by focusing specifically on the *WEPPA*. To provide context, this article starts with a discussion of the general principles that underlie the legislation, the significant changes made since its inception, and the more relevant jurisprudence that has evolved to date. In the next section, I discuss the implementation issues that have surfaced since the legislation was implemented, and that are as yet not fully resolved. The last section contains suggestions for changes that could be implemented in the short term and in the longer term to improve the program.

The title of this text is "*WEPPA* — What ails it and can it be fixed?" In view of the breadth of the definition of the word "fix", meaning anything from a repair, a quandary, a cheat or rendering infertile, there is no doubt that the legislation can be "fixed". The better question, which I will try to address, is can it be improved?

II. — The Legislation

A. — Background of WEPPA

The *WEPPA* is not the government's first attempt at drafting legislation to protect employees against the possible loss of wages and income in the event of the insolvency or bankruptcy of their employer. At the time of the in-depth reform that came into effect in November 1992, when the *Bankruptcy Act* was renamed the *Bankruptcy and Insolvency Act* ("*BIA*"),[FN4] the government had suggested the creation of a fund to indemnify employees for unpaid wages in the event of bankruptcy of an employer. The provisions were never implemented, because the stakeholders could not agree on how the indemnity fund would be financed, and by whom.

One interesting feature that was introduced as part of the in depth reform of November 1992 was the obligation to perform a review of the legislation within a five-year period after its implementation. This feature was introduced to monitor the changes to ensure corrective action could be taken if they had a detrimental effect, as insolvency legislation had previously been left relatively unchanged since time immemorial. This five-year review principle was retained in the changes that were made in 1997, which affected both the *BIA* and the *Companies' Creditors Arrangement Act*, ("CCAA")[FN5] and now seems to have been adopted as a permanent feature.[FN6]

The issue of the protection of employees' rights came back on the agenda in the revision process that was undertaken by the Standing Senate Committee on Banking, Trade and Commerce in 2002. In its report to Parliament, [FN7] the Standing Senate Committee on Banking, Trade and Commerce recommended changes aimed at enhancing the protection for employees' unpaid wages, but did not bring back the concept of an indemnity fund.

Notwithstanding the lack of recommendation to that effect, the government introduced a panoply of new provisions aimed at protecting the employees, including *inter alia* the creation of the Wage Earner Protection Program ("WEPP") through *WEPPA*.[FN8]

The new legislation was introduced in June 2005. That period was a difficult one for the government of the time, as it was minority government facing the prospect of defeat. In the last few days of the 38th Parliament, despite representations from several parties that the legislation was flawed, the review process was cut short and the legislation was adopted. The rumour at the time was that the legislation was put to a vote in Parliament by the governing party to goad the opposition into defeating it, since the draft legislation contained important social policy features that were expected to be perceived favourably by the electorate, and a vote against the legislation by the opposition parties or a delay in approving same by the Senate could be used as political capital. If indeed that was the plan, it backfired as the legislation received support from all parties, and was approved by the Senate and enacted just before the government was defeated.

While the legislation was enacted in 2005, it was not immediately implemented, as the Senate's approval was subject to a commitment that the legislation would be reviewed to correct its flaws, prior to its implementation. The revision process focused on the provisions of the *BIA* and *CCAA* as the *WEPPA* was brand new legislation, which was eventually implemented on July 8, 2008 without any changes.[FN9]

The *WEPPA* has undergone two significant changes since its inception. The first change was made through the *Budget Implementation Act, 2009*[FN10] and was made effective January 26, 2009. Essentially, this change extends the program to cover severance and termination payments in addition to unpaid wages and remuneration. The second change was made through the *Keeping Canada's Economy and Jobs Growing Act*[FN11] and was made effective June 5, 2011. Essentially, this change is intended to extend the time frame in which a claim may be made, to cover situations where a restructuring proceeding under the *BIA* or *CCAA* is put in motion by an insolvent debtor before a bankruptcy or receivership occurs.

As we will see later in this text, neither of these changes completely fulfills its intended purpose.

B. — General Principles

The legislation has a very limited scope, made obvious by its formal name: *An Act to establish a program for making payments to individuals in respect of wages owed to them by employers who are bankrupt or subject to a receivership*. As discussed above, an attempt was made in 2009 at expanding the scope, although the legislation remains applicable only in respect of employers who are bankrupt or in receivership.

The general principles behind the legislation are fairly simple:

1. *It is intended to coexist with and complement the protections afforded to employees under sections 81.3 and 81.4 of the BIA*. These particular sections of the *BIA* are the provisions that create a statutory security in favour of workers, encumbering the current assets of the employer, to secure certain unpaid remuneration of employees and disbursements of travelling salespersons.

2. *It creates a structure to inform potential beneficiaries of the existence of the program and the manner in which benefits can be claimed, and to report information to the Minister of Labour who is charged with the administration of the WEPPA*.[FN12] Under the program, receivers and trustees are given responsibility to collect information about what claims may exist, inform potential claimants and transmit information to the Minister on the potential claims.[FN13] To assist the trustee or receiver in fulfilling its responsibilities, the legislation states that persons who have access to the information necessary to establish the claims have a duty to provide this information to the trustee or receiver on request, and if the information is held by a third party payroll service, on payment of the reasonable costs of preparing the necessary information.[FN14]

3. *It is intended to enable an advanced payment to employees in respect of their claims that may subsequently be recovered (at least in part) by the program*. The program was structured essentially as a means to provide a more rapid payment to employees, as it was acknowledged that distributions in a bankruptcy or receivership process take some time. The benefit of the legislation was reserved for employees only, as the legislation states that the benefits thereunder may not be assigned.[FN15] To ensure that the program would work strictly as a means to advance funds to employees temporarily, the legislation provides that the government is subrogated in the beneficiary's right to recover its claim from the distributions made in the context of the bankruptcy or receivership on account of the claim, and is subrogated to the beneficiary's right to recover its claim from the directors of the employer, where the employer is a corporation.[FN16]

When the program was first implemented, the indemnity covered essentially unpaid wages and remuneration, which in theory should have been largely recoverable by the program, in view of the (then) newly created statutory security under sections 81.3 and 81.4 of the *BIA*.

However, in view of the misalignment between the maximum amount available as an indemnity under the *WEPPA* and the maximum claim amount secured under the *BIA*,[FN17] and in view of the change that was made shortly after the implementation to allow an indemnity for termination and severance payments, [FN18] the amounts recoverable under the program are much lower than what would have been the expectation when the program was designed. As such, the program effectively morphed from a means to accelerate payments into a government benefit package.

Human Resources and Skills Development Canada ("HRSDC"), who manages the program for the Minister, reports that in the three year period from April 1, 2009 to March 31, 2012, 44,417 payment applications were processed out of 50,063 applications received; the indemnity paid totalled approximately $103 million; over 50% of the applicants received the maximum amount available under the program; and 38.0% of the amounts paid were for unpaid wages and vacation, 0.1% was for disbursements, and 61.9% was for termination and severance.[FN19]

4. *Costs of the program should be borne, to the extent possible, by the estate*. The objective to have the estate of the employer (or more bluntly, the creditors of the employer) bear the cost of collecting information and providing it to the Minister is made obvious by the limitations placed on the circumstances under which the fees and disbursements of the trustee or receiver may be paid by the Minister. Even where the fees and disbursements are directly related to work performed to fulfill the obligations under *WEPPA*, these fees and disbursements will not be reimbursed by the Minister if the fees represent less than 10% of all of the work performed by the trustee or receiver, or if there are sufficient funds in the estate to pay these fees, or if some third party has guaranteed the fees and disbursements of the trustee or receiver. [FN20]

5. *Measures should be in place to limit "orphan estates"*, i.e., estates where there can be no receivership or bankruptcy (and therefore no benefit to employees) as a result of a lack of financial resources to pay the costs of administration of the estate. Trustees and receivers are typically paid out of assets that come under their control and administration. Since the newly created statutory security referred to in section 81.3 and 81.4 of the *BIA* could encroach on the assets available to pay costs of administration, a concern was expressed that trustees or receivers may not agree to act in respect of certain files where recovery of the fees and disbursements could be uncertain. This could effectively render the program moot in circumstances where it is most required. To avoid this occurrence, the legislation provides for a possibility that the fees and disbursements of a trustee or receiver relating to the general administration of the estate could be paid by the Minister, in certain limited circumstances. These limited circumstances are the situations where there are not sufficient funds in the estate to pay the costs of administration, the only assets of the employer are current assets (and therefore subject to the statutory security in favour of employees under sections 81.3 and 81.4 of the *BIA*), and there would have been sufficient assets to pay the costs of administration of the estate but for the claims made under sections 81.3 and 81.4 of the *BIA*.[FN21]

C. — Jurisprudence

The most significant jurisprudence that has evolved to interpret the provisions of *WEPPA* is the case of *Re Ted Leroy Trucking Ltd.* The case actually examines two separate (but related) questions dealing with employee rights.[FN22]

The first question examined by the court[FN23] had to do with the definition of "wages" for the purposes of the *BIA* and *WEPPA*. In this litigation, the union representing the employees sought a declaration that all amounts provided to be paid under the collective agreements could be considered as wages for purposes of the *WEPPA* and *BIA*, whether payable to the employee directly, or payable to a third party on behalf of the employee, such as a payment to an insurance company for group insurance, or a payment to a health and welfare fund, or a payment to the union. The court found that amounts payable to a third party on behalf of the employee could constitute remuneration of an employee, and thus could meet the definition of "wages" for the purposes of *WEPPA* and enjoy the priority given to unpaid wages under the *BIA*.[FN24]

The decision of the Court of Appeal leaves an uncertainty regarding whether the amount claimed by a third party that could be considered as "wages" under the *WEPPA* could give rise to a claim for benefits under *WEPPA*, as the court states:

> It is not at all clear that payments under WEPPA can ever be made to anyone other than the employee who applies for them. The legislation provides a limited priority to compensation owed to employees. That compensation might be in respect of a payment directly or indirectly remitted to a third-party. The payment and the priority are for the benefit of the employee, not the third-party. The legislation does not prefer third-party benefit providers over secured creditors.[FN25]

Strangely, the Crown did not intervene in these particular proceedings, even though their outcome could have far reaching implications on the administration of the *WEPPA* itself, or on the rights of the Crown to claim an amount against the bankrupt estate in view of the right of subrogation when a payment is made to an employee.[FN26] These consequences are discussed in the previous article I wrote on this topic, and are not discussed again here.[FN27]

The second question examined by the court[FN28] has to do with the allocation of the priority rights under the *BIA*, when claims have been made by (and paid to) employees under *WEPPA*. In this case, the Crown applied to expunge the claim of a creditor. Consistent with the decision referred to above, third party service providers filed claims against the bankrupt estate, in connection with amounts that should have been paid to it in connection with employee benefits, and claimed to be entitled to the statutory security referred to in section 81.3 and 81.4 of the *BIA*. The Crown asked the court to expunge the claims, in view of the fact that the Crown had paid benefits to employees under *WEPPA*, and was thus entitled to be subrogated to the rights of employees under sections 81.3 and 81.4 of the *BIA*. The reason for the Crown's request was that if third party service providers were allowed to benefit from the statutory security referred to in sections 81.3 and 81.4 of the *BIA*, this would erode the priority rights to which the Crown would be entitled by subrogation. Unsurprisingly in view of the previous decision, the court denied the motion to expunge the claims, thereby allowing these third party providers' claims to share in the statutory security created by sections 81.3 and 81.4 of the *BIA* encumbering the current assets.

The jurisprudence to date would thus suggest that "wages" have to be interpreted widely, for both purposes of the WEPP and the *BIA*; that claims can be made by a third party for amounts that would be considered as the employee's remuneration; that these claims could benefit from the statutory security under sections 81.3 and 81.4 of the *BIA*; that to the extent that the claim is made in respect of an employee, the statutory security may have to be apportioned between the claim of the employee for unpaid wages and the claim of the third party; and that as a result the Crown may have to share with third parties if it is subrogated to the rights of the employees.

What is still not certain in view of the decision of the Court of Appeal, is whether the claim of a third party for "wages" could give rise to a payment of a benefit to the third party, or to the employee for the account of the third party, under *WEPPA*.

III. — Implementation Issues

Having gained some understanding of the objectives of the legislation, the changes made to it and the jurisprudence that evolved since its implementation, we can discuss the issues that have been identified to date, and that could affect the program's efficiency and acceptance by the stakeholders.

I have segregated the implementation issues in three broad categories, namely fundamental/structural issues, concurrent proceedings and administrative issues. The list of issues should not be regarded as a comprehensive census of all the problems that have surfaced or that can be identified with the WEPP, but merely represents the issues that are most often the source of complaints, or that can affect the objectives of the program. These are addressed in greater detail below.

A. — Fundamental/Structural Issues

i. — Lack of protection for terminated employees

The most significant fundamental flaw of the legislation, from my perspective, comes from its very limited scope, of providing protection only to those employees whose employer is bankrupt or in receivership. That limitation in scope might have been acceptable when the legislation's purpose was to advance payment to employees for the amounts that they should ultimately be entitled to recover in a distribution in the context of a bankruptcy or receivership, through the statutory security created by sections 81.3 and 81.4 of the *BIA*, but is inconsistent with the changes made in 2009 to allow a benefit relating to unpaid termination or severance pay.

In the context of a restructuring proceeding, the employees' current wages are usually paid on an on-going basis, to limit the hardship for employees as their continued cooperation and efforts will undoubtedly be an integral part of any restructuring plan. The vacation pay that is accrued and unpaid is usually not a factor early on in the proceedings, unless the restructuring proceedings commence at a time when employees are scheduled to take their annual vacation. Both the *BIA* and *CCAA* contain provisions to protect the amounts due to the employees that could be considered as preferred claims if the employer were bankrupt. If the restructuring is not successful and the employer becomes bankrupt or in receivership, the protections afforded to employees under the *BIA* come into play. If the restructuring is successful, the issue of amounts due to employees is oftentimes moot, as employees will be allowed to take their vacations in due course, over time.

As a result of the particular dynamics of the restructuring work as outlined above, there was therefore no need to extend the benefits of *WEPPA* to restructuring engagements, inasmuch as the *WEPPA* benefits covered only unpaid wages.

When a policy decision was made to extend the benefits to include severance and termination pay, the requirement that the employer be bankrupt or in receivership should have been removed. A large number of job losses occur in restructuring files, and if the restructuring is successful, the displaced employees do not have access to the relief provided under the *WEPPA*. There is no public policy reason I can think of that justifies allowing a severance or termination pay benefit to an employee who has lost his employment as a result of the bankruptcy of his employer, while denying such a benefit to an employee who has lost his employment because of his employer's insolvency.

I have heard an argument made that a plant closure in the context of a restructuring is not substantially different than a plant closure by any employer who just decides that the plant is not profitable and shuts it down permanently. However, there is a substantial difference. While in both cases it can be said that the job was lost because of an operational restructuring, in one case the solvent employer may have to participate in a process to help employees find alternative employment, and will have to provide working notice or make a payment to employees in lieu of notice, and may have to pay severance pay. In the other case, the insolvent employer will have the same obligations but will not be able to make payments because of its insolvency.

In fact, because of the lack of protection for employees whose employment is terminated in the context of a restructuring proceeding, if the restructuring is successful, there is an incentive for displaced employees to vote against the restructuring plan to try and cause the employer to become bankrupt, which is counterproductive to the restructuring objectives of Canadian insolvency legislation.

ii. — Misalignment of provisions

Aside from the fact that employees that lose their employment in the context of a restructuring proceeding that is successful are denied a right to benefit, there could be a difference in treatment of the claims of employees in the context of a restructuring that is not successful, depending on the type of proceeding that was undertaken.

This comes from a misalignment of the provisions between the *BIA* and *WEPPA*, as to the reference periods. Under *WEPPA*, the time frame is made in reference to the bankruptcy or receivership, while the time frames in the *BIA* are made in reference to the earliest of the proceeding that triggers the application of the *BIA*. Because of the misalignment in the provisions, it would conceivably be possible for an employee who would otherwise be entitled to the relief provided by the *WEPPA* to become disentitled just because of the passage of time if a restructuring proceeding is protracted.

In the last round of modifications to the *WEPPA*, the government tried to correct this misalignment, but the changes made do not accomplish the objective. Firstly, a mistake was made in processing the changes to the legislation, such that the French and English versions of the *WEPPA* did not contain the same definition for the term "eligible wages". This mistake has since been corrected.[FN29]

Then, the change made to correct the misalignment allows for a reference period of up to six months before the making of an initial order, if the bankruptcy or receivership is preceded by a failed restructuring under the *CCAA* , or up to six months before the filing of a proposal, if the bankruptcy or receivership is preceded by a failed proposal. There is no mention of a reference period relating to the making of a notice of intention to make a proposal under the *BIA*, such that if an employee was terminated immediately before the filing of a notice of intention to make a proposal, and the debtor avails itself of all possible extensions of the delay to make a proposal, this employee would be denied the benefit of *WEPPA* because of the passage of time, even if the proposal fails.

There is no public policy reason I can think of that justifies allowing a severance or termination pay benefit to an employee who has lost his employment just before an initial order was made, while denying such a benefit to an employee who has lost his employment just before a notice of intention to make a proposal was filed.

iii. — Necessity for a termination of employment

Section 2 of *WEPPA* states that the term "eligible wages" includes severance and termination pay that relate to an employment that ended during the period referred to in paragraph 2(1)(a). Paragraph 2(1)(a) is the section that sets out the reference period for a claim, as either the six months period preceding the bankruptcy or receivership, or the period that commences six months before the making of an initial order under the *CCAA* or the filing of a proposal under the *BIA* and ends with the bankruptcy or receivership. Under any combination or permutation of the definition in paragraph 2(1)(a), the ending date is either the date of the receivership or the bankruptcy.

In interpreting the provisions of *WEPPA*, HRSDC has decided that the bankruptcy of an employer automatically terminates the employment contract, while receivership does not. At this point, I am not sure whether the inter-

pretation of HRSDC regarding the effect of bankruptcy on employment contracts is correct. In the common law provinces, it has long been considered that bankruptcy terminates the employer-employee relationship between the bankrupt and the employee,[FN30] although it seems the employment does not always terminate.[FN31] In Québec the situation is even more uncertain, as the provincial law specifically states that a sale or alienation of an enterprise, or a change in its legal structure does not terminate an employment contract.[FN32] A past change to the Québec *Labour Code* removing a reference to a sale by a trustee in bankruptcy as an exception to the rule where an employment agreement would follow the assets into the hands of a subsequent purchaser led insolvency professionals to believe that bankruptcy would not automatically terminate employment agreements.[FN33]

Whether the interpretation of HRSDC is correct, semi correct or incorrect is irrelevant as concerns the effect of bankruptcy on the entitlement to a claim for severance or termination pay, as HRSDC's interpretation achieves the result contemplated by the legislation — if an employee loses his or her employment as a result of the bankruptcy, that employee should be able to access the relief provided by *WEPPA*.

The problem occurs in respect of receiverships, as the situation is essentially the same as with a bankruptcy, although the employees will be denied the benefit pertaining to severance or termination unless the receiver terminates the employment concurrently with the receivership.

Whether the engagement is a receivership or a bankruptcy, the professional charged with the responsibility to make an inventory, wind down the affairs of the insolvent person and sell the assets will require some help from the existing employees. There is no valid reason why the employee retained by the receiver would be denied the benefits of the *WEPPA* in respect of the termination and severance claim, while the employee retained by the trustee would be allowed the benefits in similar circumstances.

The fact that employees who are retained by the receiver may lose their entitlement to benefits relating to termination and severance pay will undoubtedly lead to conflict and dissatisfaction, if employees are denied a claim, or will act as a disincentive to assisting the insolvency professional in winding down the estate. The lack of support from employees in winding down the estate could prevent the optimization of returns for the creditors, or prevent the insolvency professional from pursuing attempts at finding a purchaser for the business as a going concern, which is counterproductive to the objectives of Canadian insolvency legislation.

iv. — Possibility that benefits are paid to employees who have not lost their employment

In certain cases, bankruptcy and receivership can be used as a tool to restructure the business (albeit a very draconian tool), and the employees may be able to remain with the new purchaser. Whether or not the new purchaser is considered a "successor employer", the employees oftentimes retain the same salary and benefit level as they enjoyed before the bankruptcy or receivership, because the continued cooperation of a core group of the employees is key to a successful transfer of the business operation to the new purchaser. While it is true that employees will suffer some level of prejudice as a result of the transfer of the business operations, either through a loss of seniority or an increase in risk and stress, the financial burden relating to the impact of bankruptcy or receivership could vary widely depending on the circumstances, to a point where the transfer could be practically seamless.

In the present system, there is no distinction made as to whether the employee is retained by the new purchaser, or is displaced permanently as a result of the bankruptcy or receivership. If the employer is bankrupt, the trustee will have to advise the employees of the existence of the program, and the employees may file a claim for ter-

mination and severance which may be paid through *WEPPA*, even though there was, in fact, no loss of employment.

v. — Basis of calculation of claim

The *WEPPA* is a federal law that allows a claim for unpaid wages, severance and termination pay, which are amounts calculated with reference to provincial employment legislation. With respect to unpaid wages, this does not cause problems, as the entitlement to wages is a matter that is privately negotiated between the employer and the employee. If the employee is dissatisfied with the compensation levels offered by the employer, the employee will simply leave as soon as he or she finds suitable employment with better conditions. With respect to severance and termination, however, the employee rarely gets to negotiate the terms of the severance entitlement, and these will depend primarily on the province of residence of the employee.

As a result of this dynamic, two employees who are essentially in the same situation could have widely different entitlements to benefits, just because they reside in different provinces. Since one of the objectives of the legislation appears to be to assist workers displaced as a result of the bankruptcy or receivership of their employer to have some reasonable income while they search for a new job, it would seem appropriate to ensure some consistency in the levels of claims to which similarly situated employees would be entitled under the statute, rather than calculating it strictly based on provincial legislation.

To give an example of the difference in situation that could prevail, the maximum notice or pay in lieu of notice to which an employee could be entitled (without taking into consideration additional entitlements that could arise as a result of group termination provisions) could vary from two weeks[FN34] to eight weeks.[FN35] The differences can be even more pronounced if the group termination and severance provisions are taken into account.

This problem is not easily resolved, as it may require cooperation in all jurisdictions, or setting a standard that corresponds to the lowest provincial amount, to avoid a situation where employees terminated as a result of a bankruptcy or a receivership receive a treatment that is superior to that received by other employees in a province. Setting a standard that corresponds to the lowest provincial amount is not ideal as this may curtail entitlement to benefits that may already be insufficient (this is addressed later in this text). As such, achieving a common scale across Canada to calculate benefit entitlement would necessarily be difficult to accomplish.

vi. — Quantum of benefits

The benefits available under *WEPPA* are automatically indexed, as one of the limits applicable to a claim is calculated based on a multiple of the maximum weekly insurable earnings[FN36] as defined in the *Employment Insurance Act*,[FN37] which amount is adjusted yearly to take into consideration changes in the Consumer Price Index.

However, the amount of the maximum benefit appears woefully inadequate, at a little more than $3,000 in total for unpaid wages, severance and termination, and would not seem sufficient to provide meaningful support to the employee so that he or she can look for alternative sources of employment without the stress of wondering how the household expenses will get paid in the short term. That the maximum benefit level is inadequate would appear to be supported by the fact that the majority of the indemnity claims paid by HRSDC since the program was modified in 2009 are for the maximum amount of benefit available.[FN38]

vii. — Integration or flow through issues

A problem of integration or a flow through issue refers to a situation where similarly situated creditors could be treated differently, without any rationale arising from the fact pattern or circumstances.

This problem can be identified in the provisions of the *WEPPA*. Suppose for example, that a worker is paid $2,000 per week, one week in arrears, and could be entitled to four weeks of notice, pay in lieu of notice, severance or termination pay (collectively, in this example "severance") if his or her employment were terminated (let us ignore vacation pay for the purposes of this example). In the context of a bankruptcy, the claim of this employee could be treated in many different ways, all with the same economic result.

From the perspective of a director of the insolvent employer, the preference would be to pay the employee immediately before the insolvent employer becomes a bankrupt. This choice would be based on the director's propensity to control the risk of engaging his or her director's liability for wages under corporate law.[FN39] In this situation, the secured creditor who has security over the current assets will have a higher debt (because of the payment), but the current assets will not be encumbered by the statutory security under section 81.3 of the *BIA*, the director will not have a personal liability for wages, and the employee will be receiving a little over $3,000 from *WEPPA*,[FN40] less an amount equal to 6.82% of his or her claim.[FN41] Between the amount paid by *WEPPA* and the amount paid immediately before the bankruptcy, the employee will have recovered $5,290[FN42] of his/her $6,000 claim.

The second situation that could occur would be that the employer becomes bankrupt, and the trustee pays the salary of the employee in order to obtain the employee's cooperation in winding down the estate. The employee's claim under *WEPPA* would have to be based on eligible wages owed to the employee, i.e. $4,000 in severance, and as a result, the employee will also have recovered $5,290 of his/her $6,000 claim.

The third situation that could occur would be that the employer becomes bankrupt or in receivership, and that the trustee or receiver requires the employee to file a claim, which is paid in due course. In this circumstance, the employee would have recovered either $3,190 or $3,290 of his/her $6,000 claim.[FN43]

In each of the above three situations, the secured creditor's position is equivalent, and so is the position of the director of the insolvent corporation. The only difference in outcome occurs in respect of the employee, who may recover (in this example) from 53.2% to 88.2% of his or her claim, depending on when the payment is made, or how it is characterized.

My experience to date suggests that the secured creditors prefer a payment of the wages immediately after the bankruptcy or the receivership, by "purchasing" the employee's claims to minimize the impact of the erosion of the security through the provisions of sections 81.3 and 81.4 of the *BIA*. As demonstrated above, this tends to decrease the employees' overall outcome from proceeds received from *WEPPA* and from the estate, all things being otherwise equal.

B. — Concurrent proceedings issues

i. — Allocation of responsibility for work amongst professionals

If an employee's wages are unpaid, they are unpaid only once. They are not more or less unpaid because there are concurrent bankruptcy and receivership proceedings. The *WEPPA* addresses both a claim resulting from a

receivership, and a claim resulting from a bankruptcy, and the *WEPPA* makes both the receiver and the trustee equally responsible for notifying employees and providing information to the Minister.

Since the employees have but a single claim, the responsibility attributed to professionals to notify employees and provide information to the Minister cannot possibly be anything other than a joint obligation, out of an abundance of caution, to ensure that someone will indeed fulfill the obligations under the *WEPPA*.

There could be a difference in outcome for the employees in view of the fact that the right to claim a benefit under *WEPPA* is a right that expires day by day. For example, if a receivership occurs and a bankruptcy follows one week later, the six month reference period may yield a different result for the same employee. The *WEPPA* acknowledges that dynamic, and provides that the calculation of a claim that must be used for purposes of *WEPPA* is that which gives rise to the best outcome for the employee.[FN44]

That does not mean there are two claims possible under *WEPPA*, but a single one calculated to yield the best outcome for the employee, if there is a concurrent bankruptcy and receivership.

While the *WEPPA* allocates responsibility to both the trustee and the receiver to fulfill the obligations under the legislation, it does not address who amongst the professionals (where they are a different person) has the prime responsibility.

Human nature, lack of resources, the possibility to obtain a payment of the fees from the WEPP and the interest of the secured creditor in limiting costs may trigger conflicting views as to whom should perform the work, which are not easily resolved.

ii. — Possibility of duplication of claims

This issue is essentially a subset of the issue discussed above, regarding coordination of responsibilities amongst professionals. If a bankruptcy and receivership are contemporaneous, the claims of employees should be identical and there would be no need to provide information to the employees and to the Minister twice. The problem would thus be limited to one of coordination amongst professionals as to whom will assume the responsibility to fulfill the requirements of *WEPPA*.

If however the bankruptcy and receivership are separated in time, or if the bankruptcy is preceded by a proposal or a plan of arrangement under the *CCAA*, the claims may be for different amounts. As well, the interpretation given by HRSDC regarding the effect of bankruptcy and receivership on the employment contract and the resulting impact on the employees' claim for severance and termination has at times led to a need to re-commence the process of providing information to the Minister in respect of the entitlements under *WEPPA*.

In such a case it is likely that an employee will in all good faith follow the information provided by both the trustee and the receiver, and thus will file a claim with the trustee, another claim with the receiver, and two claims with *WEPPA*. The obvious risk in such a situation is that the claims will be processed separately and will both be paid, resulting in a duplicate payment of the employee's claim. This risk is not a theoretical risk as this situation has occurred.

C. — Administrative issues

i. — Poor record keeping by insolvent employers

The trustee or receiver has a limited amount of time in which to inform itself of who may have a claim; advise potential claimants of the existence of the WEPP; compile information on what is owed; and communicate the information to the Minister.[FN45]

Since the record keeping of insolvent persons is rarely impeccable, fulfilling the information requirements of the legislation may be difficult if not impossible, even with the provisions built in the legislation to compel third parties to provide information to the trustee or receiver.[FN46]

This is particularly the case in dealing with situations where employees could have been terminated in the six months before proceedings commence, as the records may not indicate that anything is owed to these former employees. It may be possible to assess the quantum of a claim that is known to exist but it is much more difficult to assess the existence of a claim from an unknown claimant.

ii. — Remuneration of professionals

The topic of the remuneration of professionals was outlined in the first section of this text. Essentially, the underlying philosophy is that the costs of the WEPP should be paid out of the estate, that costs may be paid for work directly related to the WEPP in exceptional circumstances, and that the Minister may authorize the payment of the trustee's or receiver's administrative costs (i.e., unrelated to the work specifically pertaining to the WEPP) to avoid the possibility of having "orphan estates".

The problem is that the conditions to access the relief afforded by the legislation for costs are so stringent that the costs are almost always borne exclusively by the creditors.

This leads to a potentially unfair result, as creditors must both bear the cost of the program and suffer an encroachment to the value that is otherwise available to pay their claims, as a result of the statutory security created by sections 81.3 and 81.4 of the *BIA*. The objective of preserving the employees' rights by giving them a statutory security over current assets is reasonable (although affected secured creditors could argue otherwise). The straw that breaks the camel's back is a requirement that after having been deprived of the value otherwise available to it, the creditor is asked to pay additional costs directly attributable to the asset which was given in priority to the employees, so that they may collect their amounts faster.

Furthermore, the provisions of the *WEPPA* and *WEPPR* as drafted do not achieve the stated objective of preventing the occurrence of "orphan estates", as the fees that may be available to pay costs of administration of an estate are limited by the value of the rights that may exist under sections 81.3 and 81.4 of the *BIA*. Essentially, this means that if an insolvent person has employees but does not have current assets, there would be no possibility to access the relief for the costs of administration. As a result, the designated professional may not accept the mandate as trustee or receiver, and as a consequence the employees would be denied the benefit of *WEPPA*.

iii. — Communication of information

The exchange of information between the professionals (trustees, receivers) and HRSDC is done through a web based entry system, where information is entered one record at a time. While the web based entry system has been greatly improved since the inception of the program, the processing of information by individual records is still cumbersome, time consuming, and the source of many complaints by the users of the system.

The process would be greatly enhanced if the system allowed for the upload/download of information in batches,

from existing software (Excel worksheets, Access Databases, Word tables) or directly from the employers' payroll systems, and if the user (trustee or receiver) could access the employee's file and make amendments without having to re-enter the data that has not changed.

IV. — Suggested Changes

Based on the preceding long list of issues and complaints, it would be possible to believe that the legislation is fatally flawed. That would be incorrect. While difficulties exist, the legislation has one strong redeeming factor, [FN47] which is its important social policy objective of lessening the hardship for employees of the loss of employment relating to the insolvency of their employer. This social policy objective needs to be addressed, in order to allow displaced employees the opportunity to look for alternative employment without the stress that would be caused by the employees having to face their own insolvency.

The WEPP is a good program that attempts to achieve this policy objective. The program does not need to be eliminated, it needs to be improved and corrected, so that it can truly work in conjunction with the insolvency laws, the labour laws, the labour training or retraining programs and the employment insurance legislation, to effect a smooth transfer of the work force from areas of non-productivity, towards areas of productivity and economic progress.

My thoughts on the possible areas for improvement are set out below, segregated between changes that could be made in the immediate future, and changes that could be made in the longer term.

A. — Changes that could be implemented in the very short term

i. — Extending the program to all situations where an employer becomes subject to insolvency legislation

Ideally, I would suggest extending the program to all situations of insolvency, but I acknowledge that it may be overly difficult to extend protection to employees of firms that do not become subject to some formal insolvency process. At least in the short term, I consider it may be sufficient to rely on the provincial labour standards systems to protect those employees of smaller firms who simply close down their doors without undertaking a formal insolvency process. That is mostly a matter of being practical rather than idealistic, as the smaller firms that simply close down and stop operations typically have very few employees, and it would be difficult if not impossible, absent a formal insolvency proceeding, to manage the informational needs and assess whether the shut-down is really an insolvency situation or an opportunistic event.

However, the program should not be limited only to bankruptcy situations, as the bigger job loss problem likely occurs in restructuring engagements, where it is unfortunately necessary to terminate some jobs in order to save the remaining ones.

While extending the program would undoubtedly lead to an increase in the spending of the budget allocated to the WEPP, I believe that the change is essential in order to achieve the social policy objective of the legislation and remove the inequity that presently prevails, in allowing unequal treatment between employees that lose their jobs as a result of insolvency of the employer. Obviously, to be effective the timing of the application for benefits should be adjusted, so that it no longer becomes necessary to await the outcome of the restructuring proceeding for an employee to be entitled to draw the benefit, but the benefit should be available as soon as possible after the job loss.

ii. — Changing the criterion for admissibility to a claim for severance or termination

The current interpretation of HRSDC regarding the impact of receivership and bankruptcy on employment contracts may deny benefits to employees who lose their job as a result of the receivership of their employer unless the receiver terminates the employment immediately upon its appointment. This is counterproductive to the objective of optimizing returns for the creditors, and attempting to save jobs by investigating the possibility of a sale of the business as a going concern. The requirement that the loss of employment be concurrent with the bankruptcy or the receivership is overly stringent and works against the objective of the legislation. The rules could be relaxed through an interpretation in the *WEPPA*, to ensure that the entitlement to the benefits is not lost if the continued employment by the receiver or the trustee is merely temporary to wind down the estate.

iii. — Changing the criteria for the remuneration of professionals

As mentioned earlier in this text, one area of complaints by the creditors is the fact that in addition to being deprived of a value that would otherwise be available to them, they must pay the cost of the professionals to prepare the information for the Minister, so that employees can receive their payments faster. This leads to an inequitable result that should be changed.

The formula to remunerate professionals should allow funds to be paid from the budget allocated to the WEPP, to cover the fees of the professionals in fulfilling the obligations specifically related to the *WEPPA*. The requirement that the fees be paid by the estate, or that no fee be paid if the remuneration of the trustee or receiver was guaranteed by a third party, should be removed. The calculation should remain simple, based on the volume of claims to be treated.

From my perspective, there would be no need to modify the fundamental principles regarding the payment of the administration costs of the trustee or receiver to avoid "orphan estates", although the formulas restricting the payment to the value of rights under sections 81.3 and 81.4 of the *BIA* should be revisited.

iv. — Correcting the integration / flow through problem

The integration or flow through problem could be alleviated by modifying the WEPP so that it covers only claims of employees that cannot benefit from the statutory security that exists through sections 81.3 or 81.4 of the *BIA*. This would avoid employees losing benefits because of strategic decisions by secured creditors to limit the extent of the statutory security. The employees' recourses could be separated into two different modes of protection, the first one being the statutory security under section 81.3 and 81.4 of the *BIA*, which would cover unpaid wages and vacation pay up to a maximum of $2,000 per employee, and the other being the WEPP which would cover salaries and vacation pay in excess of the $2,000 limit, and termination and severance claims.

This would limit the problem of allocation of the statutory security amongst people who may be entitled to it, between the employee, the WEPP and third party claimants for employee benefits provided to the workforce or for amounts due on behalf of an employee, a problem that became painfully obvious in the *Re Ted Leroy Trucking Ltd* case.[FN48]

v. — Ensuring consistency in the time frames

The presently existing inconsistency in the reference dates, between a restructuring proceeding undertaken under Part III of the *BIA* and a restructuring proceeding undertaken pursuant to the *CCAA*, has no reason to exist and

should be corrected. The reference date for a termination of employment[FN49] should be the filing of a notice of intention to make a proposal, or in the absence of such a notice, the filing of the proposal.

B. — Changes that could be implemented over a longer period

i. — Increasing the amount of the benefit available to the displaced employees

The current amount of slightly over $3,000 appears insufficient to allow displaced employees to find alternative employment opportunities with a serene frame of mind. This seems evidenced by the fact that since the program was expanded in 2009, the majority of the payments made pursuant to the WEPP have been at the maximum available amount of benefits.

It would seem that an increase in the benefit would be desirable, to compensate the employee for the disruption that undoubtedly results from the loss of employment. This disruption includes (without limitation) a need to re-train/relearn, financial stress, family and peer pressure, and possibly a need to relocate.

The program is currently funded out of Canada's consolidated revenue fund. An increase in the benefit level, coupled with the recommendation that the program be limited to covering amounts that are not subject to the statutory security under section 81.3 and 81.4 of the *BIA*, as suggested above, would undoubtedly raise the cost of the program. Perhaps the government could investigate the possibility of setting up a levy on the payment of wages to all employees in Canada, to cover the cost of the WEPP.

ii. — Providing a common formula to calculate severance and termination entitlements

The benefits are based on the severance and termination pay entitlements as they are established by the provinces' or the federal labour laws. These entitlements can vary significantly from province to province. To achieve a more equitable result, the *WEPPA* could provide for a common base to calculate the benefit entitlement. As mentioned earlier in this text, this may be difficult to accomplish.

iii. — Limiting access to the benefits to persons who have actually lost their employment

At present, some employees may be claiming a benefit from *WEPPA* even though a new employer acquires the business as a going concern and hires all (or most) of the existing employees. This is due to the fact that as an abundance of caution, purchasers ask that all employees be dismissed before the business is acquired, in an attempt to avoid a characterization of the purchaser as a "successor employer". The fact that the employees have been formally terminated may entitle them to make a claim from *WEPPA*, just because they must be informed of the existence of the program and they are informed of the fact that their claim against the estate may include pay in lieu of notice, severance or termination. This may be true even though the employee continues to perform his or her regular work seamlessly, without any substantial change in employment conditions.

To be equitable, the benefit of the WEPP should be limited to those situations where an actual loss of employment or at least a substantial change in employment conditions has occurred. This suggestion is made as part of the "longer term" suggested changes, only because of the inherent difficulty I can perceive in identifying specifically the situations where a "real" loss of employment has occurred.

V. — Conclusion

The preceding section sets out a series of suggestions of changes I believe could be made in the short term or in

the longer term, to improve the program.

I do not pretend that making all of these changes would make the program ideal or would make it work flawlessly, as I do not pretend that these are the only changes that need to be made to the program to stop the complaints that have been formulated so far. The program is too young for anyone to pretend to know how to work out all of the kinks in the system. The suggestions in the preceding section are merely my personal views of what could be changed to make the program better aligned with what I perceive its objective and societal role to be, and they are offered in the hope of fostering some discussion on the manner in which we could take a good product and make it great.

FN*. Jean-Daniel Breton, CA, FCIRP is a senior vice president of Ernst & Young Inc., practicing in the Montréal office. The views expressed in this article are mine and do not necessarily reflect the opinion of the firm I work for nor those of my professional colleagues involved in insolvency and restructuring practices. I wish to acknowledge and express my gratitude to Isabelle Gévry who assisted in reviewing this paper.

FN2. Jean-Daniel Breton, "Employee Protection in Insolvency Proceedings — Reviewing the Performance and Setting the Objectives" in Janis P Sarra, ed, *Annual Review of Insolvency Law 2010* (Toronto: Carswell, 2011) 359.

FN3. 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*, SC 2005, c 47 as amended by *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, SC 2007, c 36 [*2005 Amendment Act*].

FN4. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*].

FN5. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*].

FN6. See *BIA*, *supra* note 4, s 285; *CCAA*, *supra* note 5, s 63; *WEPPA*, *supra* note 1, s 42.

FN7. Canada, Senate, Standing Senate Committee on Banking Trade and Commerce, *Debtors and Creditors Sharing the Burden: A review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (November 2003) (Chair: The Honourable Richard H. Kroft).

FN8. See Breton, *supra* note 2.

FN9. The *BIA* and *CCAA* provisions were modified through the *2005 Amendment Act*, *supra* note 3.

FN10. *Budget Implementation Act, 2009*, SC 2009, c 2 [*Budget Implementation Act*].

FN11. *Keeping Canada's Economy and Jobs Growing Act*, SC 2011, c 24.

FN12. *Wage Earner Protection Program Regulations*, SOR/2008-222, s 1 [*WEPPR*].

FN13. *WEPPA*, *supra* note 1, s 21; *WEPPR*, *supra* note 12, ss 15 and 16.

FN14. *WEPPA*, *supra* note 1, s 21; *WEPPR*, *supra* note 12, s 17.

FN15. *WEPPA*, *supra* note 1, s 37.

FN16. *Ibid*, s 36.

FN17. Compare *WEPPA*, *supra* note 1, s 7 and *BIA*, *supra* note 4, ss 81.3 and 81.4. The maximum benefit under *WEPPA* for 2012 is $3,531, while the maximum amount for the claim secured under sections 81.3 and 81.4 of the *BIA* is $2,000 (for an employee who is not a travelling salesperson). The misalignment is further complicated by the use of a different reference period in the definition of "eligible wages", at *WEPPA*, *supra* note 1, s 2, and in the amount of a claim for purposes of *BIA*, *supra* note 4, ss 81.3 and 81.4.

FN18. *Budget Implementation Act*, *supra*, note 10.

FN19. This data was extracted from information provided by HRSDC in the context of a presentation given at the annual general meeting of the Canadian Association of Insolvency and Restructuring Professionals ("CAIRP"), in August 2012 [HRSDC].

FN20. *WEPPA*, *supra* note 1, s 22; *WEPPR*, *supra* note 12, s 18.

FN21. *WEPPA*, *supra* note 1, s 22; *WEPPR*, *supra* note 12, s 19.

FN22. The file of *Re Ted Leroy Trucking Ltd* also led to very interesting and groundbreaking jurisprudence in the area of the Crown's recourses relating to a deemed trust claim for unremitted commodity taxes in the context of insolvency proceedings under the *CCAA*, reported at 2010 SCC 60, 72 CBR (5th) 170, but that is not the topic of the present article.

FN23. *Re Ted Leroy Trucking Ltd*, 2010 BCCA 223, 68 CBR (5th) 210; aff'g 2009 BCSC 41, 52 CBR (5th) 225; leave to appeal to SCC ref'd 2010 CarswellBC 3393 (SCC).

FN24. *Ibid* at paras 10, 33-36.

FN25. *Ibid* at para 29.

FN26. *WEPPA*, *supra* note 1, s 36.

FN27. Breton, *supra* note 2, at section III, subsection D "Subrogation of Claims — Who May Formulate a Claim on Behalf of an Employee" 369.

FN28. *Re Ted Leroy Trucking Ltd*, 2012 BCSC 178, 86 CBR (5th) 149 [*Re Ted Leroy*].

FN29. *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19, s 697.

FN30. See *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27, ¶7, 14-17, 39, 40, 50 CBR (3d) 163, 1998 CarswellOnt 1. See also *Associated Freezers of Canada (Trustee of) v. Retail, Wholesale Canada, Local 1015 (Division of United Steelworkers of America)*, 149 NSR (2d) 385, ¶28, 1995 CarswellNS 219 (SC); *Re St Mary's Paper*, 19 OR (3d) 163, ¶58 and 63, 1994 CarswellOnt 285, Abella JA, dissenting (CA).

FN31. See *Re Royal Crest Lifecare Group*, 46 CBR (4th) 126, ¶29, 2004 CarswellOnt 190 (CA); *Saan Stores Ltd v. Nova Scotia (Labour Relations Board)*, 173 NSR (2d) 222, ¶52-54 and 64, 1999 CarswellNS 473 (CA).

FN32. *Labour Code*, RSQ, c C-27, art 45; *Civil Code of Québec*, LRQ, c C-27, art 2097; *An Act Respecting Labour Standards*, RSQ, c N-1.1, art 96.

FN33. Philippe Bélanger, "La faillite, la convention collective et les contrats d'emploi : Quelles sont les obligations transmises à l'acquéreur d'une entreprise faillite?" in Janis P Sarra, ed, *Annual Review of Insolvency Law 2004* (Toronto: Carswell, 2005).

FN34. *Canada Labour Code*, RSC 1985, c L-2, s 230.

FN35. *Employment Standards Act, 2000*, SO 2000, c 41, s 57 [*ESA*].

FN36. *WEPPA*, *supra* note 1, s 7.

FN37. *Employment Insurance Act*, SC 1996, c 23.

FN38. HRSDC, *supra* note 19.

FN39. See e.g. *Canada Business Corporations Act*, RSC 1985, c C-44, s 119.

FN40. As of September 30, 2012, the maximum amount was $3,531.

FN41. *WEPPR*, *supra* note 12, s 6.

FN42. $3,531, less 6.82%, plus $2,000.

FN43. The employee would receive $3,531, less 6.82% less $2,000 as a benefit from *WEPPA*, and would receive $2,000 less a 5% levy under *BIA* section 147 from the trustee, or would receive $2,000 from a receiver, for a total of either $3,190 or $3,290.

FN44. *WEPPA*, *supra* note 1, s 7(2).

FN45. *WEPPR*, *supra* note 12, ss 15 and 16.

FN46. *WEPPA*, *supra* note 1, s 21.

FN47. After all, the program has distributed approximately $103 million to 44,417 employees over the three year period ended March 31, 2012. HRSDC, *supra* note 19.

FN48. *Re Ted Leroy*, *supra* note 28.

FN49. or for unpaid wages, although this would be moot if my suggestion regarding removing benefits for unpaid wages is retained.

END OF DOCUMENT