

**EMPLOYEE SUPER-PRIORITY UNDER THE WEPPA AND THE BIA:
Comments on *Ted LeRoy Trucking Ltd.* and *383838 B.C. Ltd. (Re)***

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The *Wage Earner Protection Program Act*, S.C. 2005, c. 47 (the “WEPPA”), came into force on July 7, 2008. This paper will set out the implications of the WEPPA on insolvency practice and provide a brief analysis of *Ted LeRoy Trucking Ltd. and 383838 B.C. Ltd. (Re)*, 2009 BCSC 41 (“*LeRoy Trucking*”), the only reported decision regarding the WEPPA (as at the date of this paper) since the legislation came into force.

I. Introduction to the WEPPA

According to the preamble of the *WEPPA*, it is “[a]n 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.” The *WEPPA* established the Wage Earner Protection Program (the “WEPP”) to make payments to eligible individuals for unpaid wages earned six months prior to their employer’s bankruptcy or receivership¹ subject to certain exceptions. Pursuant to section 6 of the *WEPPA*, an individual is not eligible for WEPP payments in respect of wages earned during the period in which he/she was an officer or director of the employer; held a managerial position with the employer; exercised a controlling interest in the employer; or dealt at non-arm’s length with an officer, director, manager or person who exercised a controlling interest in the employer.

A. Trustee’s Duties under the WEPPA

Pursuant to section 21 of the *WEPPA*, the trustee or receiver is required, among other things, to identify eligible individuals, determine the amount of wages owing to each eligible individual, provide information to eligible individuals regarding the WEPP and report certain information to the Minister of Labour and Housing (Service Canada). After an eligible person files a proof of claim in the bankruptcy or receivership and receives a copy of the information provided to Service Canada by the trustee or receiver, the eligible person may apply for his/her WEPP payment.²

B. Employee Super-Priority under the WEPPA and the BIA

Pursuant to section 36 of the *WEPPA*, if the Crown makes a WEPP payment to an eligible individual in respect of unpaid wages, the Crown is subrogated to the claims enjoyed by that employee under the *Bankruptcy and Insolvency Act*, R.S. 1985 c. B-3 (the “BIA”).

Unpaid employees enjoy a super-priority against the current assets of the employer in an amount up to \$2,000 under sections 81.3 and 81.4 of the BIA. Section 81.3 of the BIA deals with the super-priority for certain employees in the context of a bankrupt employer, while section 81.4 deals with the same issue in the context of an employer in receivership. Since sections 81.3 and 81.4 of the *BIA* are otherwise identical, only the relevant portion of section 81.3 is reproduced below:

¹ *WEPPA*, s. 4 and 5

² <http://www.servicecanada.gc.ca/eng/sc/wepp/apply/how.shtml>

Security for unpaid wages, etc. — bankruptcy

81.3(1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a bankrupt for services rendered during the period beginning on the day that is six months before the date of the initial bankruptcy event and ending on the date of the bankruptcy is secured, as of the date of the bankruptcy, to the extent of \$2,000 — less any amount paid for those services by the trustee or by a receiver — by security on the bankrupt's current assets on the date of the bankruptcy.

Commissions

(2) For the purposes of subsection (1), commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for during the period referred to in that subsection, are deemed to have been earned in that period.

Security for disbursements

(3) The claim of a travelling salesperson who is owed money by a bankrupt for disbursements properly incurred in and about the bankrupt's business during the period referred to in subsection (1) is secured, as of the date of the bankruptcy, to the extent of \$1,000 — less any amount paid for those disbursements by the trustee or by a receiver — by security on the bankrupt's current assets on that date.

Rank of security

(4) A security under this section ranks above every other claim, right, charge or security against the bankrupt's current assets — regardless of when that other claim, right, charge or security arose — except rights under sections 81.1 and 81.2 and amounts referred to in subsection 67(3) that have been deemed to be held in trust.

... ..

Definitions

(9) The following definitions apply in this section.

"compensation" includes vacation pay but does not include termination or severance pay.

C. WEPP Payments

Section 7 of the *WEPPA* sets out the amounts that may be paid to an eligible individual. Effective March 12, 2009, section 7 of the *WEPPA* was amended to reflect, among other things, corresponding amendments to section 2(1) described below. The current version of section 7 of the *WEPPA* provides as follows:

Amount of payment

7(1) The amount that may be paid under this Act to an individual is the amount of eligible wages owing to the individual up to a maximum of the greater of the following amounts, less any amount prescribed by regulation:

- (a) \$3,000; and
- (b) an amount equal to four times the maximum weekly insurable earnings under the Employment Insurance Act.

Bankruptcy and receivership

- (2) If the former employer is both bankrupt and subject to a receivership, the amount that may be paid is the greater of the amount determined in respect of the bankruptcy and the amount determined in respect of the receivership.

Since maximum weekly insurable earnings under the *Employment Insurance Act*, S.C. 1996, c. 23 (the “*EI Act*”) are an indexed amount, the maximum WEPP payment available to an eligible individual as at the date of this paper is approximately \$3,253, less any amounts prescribed by regulation.³

D. Definition of “wages”

The term “eligible wages”, used in section 7(1) of the *WEPPA*, is defined in the current version of section 2(1) of the *WEPPA*. Previously, the term “wages” excluded termination and severance pay under section 2(1) of the *WEPPA*. However, effective March 12, 2009, the definition of “wages” in section 2(1) was amended to include both these amounts. The current version of section 2(1) of the *WEPPA* reads as follows:

Definitions

2(1) The following definitions apply in this Act.

"eligible wages" means

- (a) wages other than severance pay and termination pay that were earned during the six-month period ending on the date of the bankruptcy or the first day on which there was a receiver in relation to the former employer; and
- (b) severance pay and termination pay that relate to employment that ended during the period referred to in paragraph (a).

"wages" includes salaries, commissions, compensation for services rendered, vacation pay, severance pay, termination pay and any other amounts prescribed by regulation.

The definition of “wages” is set out in further detail in section 2 of the *Wage Earner Protection Program Regulations*, SOR/2008-222 (the “*WEPP Regs*”):

Wages

³ <http://www.servicecanada.gc.ca/eng/sc/wepp/payment/howmuch.shtml>; *Wage Earner Protection Program Regulations*, SOR/2008-222, s. 6

2. The following amounts are prescribed for the purposes of subsection 2(1) of the Act:
 - (a) gratuities accounted for by the employer;
 - (b) disbursements of a travelling salesperson properly incurred in and about the business of a bankrupt or the business of a person subject to a receivership; and
 - (c) production bonuses and shift premiums.

The definition of “wages” under the *WEPPA* is an important issue to insolvency practice and the administration of the *WEPPA* because, under the *WEPPA*, unpaid wage claims have priority over all other creditors. Accordingly, the interests of other creditors, including secured creditors, are subordinated in a bankruptcy or receivership to the extent of the unpaid wage claims permitted under the *WEPPA* and the proper interpretation of “wages” will ensure that those interests are compromised only to the degree intended by Parliament.

II. Background to *Ted LeRoy Trucking*

The interpretation of the term “wages” in the *WEPPA* was at issue in *LeRoy Trucking*, heard December 17, 2008 before the Honourable Chief Justice Brenner. *LeRoy Trucking* remains the only reported decision to-date on this issue.

In *LeRoy Trucking*, Ted LeRoy Trucking Ltd. (“TLT”) obtained a stay of proceedings under the *Companies’ Creditors Arrangement Act* and PricewaterhouseCoopers Inc. (“PWC”) was appointed as the Monitor. TLT attempted but ultimately failed to restructure its business. Subsequently, TLT was assigned into bankruptcy and PWC was appointed as its Receiver.

During the course of the Receivership, a disagreement as to the definition of “wages” arose between PWC and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Locals 1-80, 1-2171 and 1-363 (the “Union”) which represents certain employees of TLT pursuant to a collective agreement.

The Union’s position was that all liabilities arising from the collective agreement between the Union and TLT ought to be included in the calculation of “wages” as defined under the *WEPPA* and given statutory priority thereunder, regardless of whether any amount is payable directly to the employee or on the employee’s behalf to a third party such as the Union, a health or welfare trust, or a third party service provider. However, PWC rejected the Union’s view and took the position that the definition of “wages” in *WEPPA* and the *BIA* did not include such third party payments. Century Services Inc. (“Century”), TLT’s largest and highest ranking secured creditor, supported PWC’s view of “wages”.

As the parties could not agree on the issue, the Union brought an application before the Honourable Chief Justice for directions as to the amounts properly covered by “wages” as defined by the *WEPPA* and the *BIA*. One of the authors of this paper, Mary Buttery, was counsel for Century at that application.

A. The Union’s Position on *LeRoy Trucking*

The Union took the position that all liabilities arising from its collective agreement with TLT ought to be included in the calculation of “wages” under the *WEPPA*. In particular, the Union argued that the meaning of “wages” in the *WEPPA* and sections 81.3 and 81.4 of the *BIA* are sufficiently expansive to include union dues and monies remitted to third parties for the purpose of providing benefits, entitlements or programs for or on behalf of the TLT employees.

Both the Union and Century agreed that the *WEPPA* ought to be interpreted in accordance with the modern approach, such that the words of the *WEPPA* “are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”⁴ However, the Union and Century disagreed as to the conclusion to be reached using the modern approach.

Citing certain case authorities, legal commentary and extrinsic aids such as the Hansard, the Union argued that the provisions of the *WEPPA* and the *BIA* at issue in *LeRoy Trucking* were remedial legislation intended to provide very broad protection to workers and that the definition of “wages” should be liberally interpreted for that reason. In particular, the Union argued that excluding third party payments would reduce the degree of return and protection to workers that, in their view, was intended by Parliament and create an unfair distinction between employees who receive most of their remuneration through direct payments and those who receive substantial parts of their compensation through benefits conferred by third party payments.

The definition of “wages” in section 2(1) of the *WEPPA* includes “compensation for services rendered” and the super-priority described in sections 81.3 and 81.4 of the *BIA* refer to the claim of a person who is owed “compensation by a bankrupt for services rendered” and the claim of a person who is owed “compensation by a person who is subject to a receivership for services rendered” respectively. The Union argued that third party payments were included in “compensation” and relied in particular on *Re Canadian Display Exhibit Co.*, [1968] O.J. No. 696 (Ont. S.C.). (“*Canadian Display*”).

In *Canadian Display*, the trustee disallowed the portion of the union’s claim relating to monies which were required, under the collective agreement, to be paid into a benefit trust for the purpose of providing life insurance, accident insurance and other such benefits to employees. Pursuant to the collective agreement, the employer was required to remit 9 cents into the benefit trust for each hour worked by an employee, of which 4 cents per hour was to be deducted from the employee’s wages and 5 cents per hour was to be paid directly by the employer. In *Canadian Display*, the trustee allowed the union’s claim on a preferred basis to the extent of the 4 cents per hour deducted from the employee’s wages but disallowed the union’s claim to the extent of the 5 cents per hour paid directly by the employer. In the trustee’s view, the 5 cents per hour paid by the employer to the benefit trust could only be the basis of an ordinary claim and not a preferred claim because these amounts were paid to a third party and were therefore not compensation to employees. The trustee in *Canadian Display* further pointed out that the employee had no vested interest in the benefits yielded by the trust or any assurance that benefits would accrue to him and that termination of employment might result in the loss of benefits or the right to share in amounts to be distributed upon the winding-up of the benefit fund. Ultimately, Registrar McCubbin decided that, regardless of whether the 5 cents per hour paid by the employer to the benefit trust was “wages”, those

⁴ *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21, citing *Elmer Driedger on the Construction of Statutes* (2nd ed. 1983) at p. 87

amounts were “compensation” for the purposes of the distribution scheme set out in section 95 of the *Bankruptcy Act* (now s. 136 of the *BIA*):

In the absence of authority by way of a specific statutory definition or otherwise, I would regard the word "compensation" as including any return given by an employer to, or for the benefit of, an employee for services given by the employee as such. In this context the total of the contributions at the rate of 5[cents] per hour to be made by Canadian Display and Exhibit Company Limited would amount to compensation for the employees involved whether or not the ultimate or potential benefit to a particular employee may take a form other than a delivery to him of the amounts so accumulated on his account.⁵

An abridged version of the above statement by Registrar McCubbin was ultimately adopted by the Honourable Chief Justice in *LeRoy Trucking* as the correct view of the definition of “compensation”, which is defined in the *BIA* but not in the *WEPPA*.

B. Century’s position on *LeRoy Trucking*

Although Century agreed that the modern approach should be used to interpret the definition of “wages” in the *WEPPA* and sections 81.3 and 81.4 of the *BIA*, it did not agree with the Union’s views as to Parliament’s intent or the purpose of the legislation. Contrary to the Union, Century argued that the intention and purpose of the *WEPPA* was to balance the competing interests of employees and other creditors by protecting only core wages and that this intention was evident in extrinsic sources, administrative interpretations and the explicit wording of the provisions.

With respect to the wording of section 7 of the *WEPPA* as it was at that time, Century pointed out Parliament’s repeated references in that section to amounts payable or owing specifically “to an individual”, “to the individual” and “to the eligible individual”. As discussed above, since *LeRoy Trucking* was decided, section 7 of the *WEPPA* has been shortened and otherwise amended. However, the current version of section 7 still refers to “[t]he amount that may be paid under this Act to an individual” and “the amount of eligible wages owing to the individual”. In Century’s view, this language is indicative of Parliament’s intent to limit “wages” in the *WEPPA* to only those monies payable directly for employees in connection with their employment.

With respect to the underlying purpose of the legislation, Century argued that Parliament intended to strike a balance between the interests of workers and other creditors in order to ensure the effective functioning of the Canadian credit system. Century argued that the *WEPPA* and sections 81.3 and 81.4 of the *BIA* serve this purpose by creating a security interest for unpaid wages but only within the limits stipulated under the legislation and only for those amounts payable directly to the employee. In support of its position, Century cited certain extrinsic aids such as the Hansard and the Briefing Book for Bill C-55 which enacted the *WEPPA* and sections 81.3 and 81.4 of the *BIA*, and administrative interpretations published electronically by Service Canada.

C. Chief Justice Brenner’s Decision in *LeRoy Trucking* regarding the definition of “wages”

⁵ *Canadian Display*, para. 11

Ultimately, the Honourable Chief Justice decided the issue in favour of the Union and interpreted “wages” to include the third party payments rejected by PWC. As explained above, the Honourable Chief Justice relied heavily on the definition of “compensation” set out in *Canadian Display* and stated his conclusion as follows:

Century says that Parliament's reference "to the individual" in s. 7 of the *WEPPA* indicates a clear intention that payments are to be made under the *WEPPA* for amounts payable directly to the individual employee and not to third parties. It contends that the fact that this reference is repeated throughout the section demonstrates that its inclusion was intended to have legal meaning and effect and that third party payments are therefore to be excluded from the definition.

But s. 7(1) also speaks of the "amount of wages owing to the individual that were earned". So are the amounts under *WEPPA* that are required to be paid only those amounts that were due to be paid directly to the employee as contended by Century or do they also include additional amounts that were to be paid from the employee's earnings to third parties for the employee's benefit?

To answer this question one must consider the definition of "wages" in s. 2(1) of the *WEPPA*. It is relatively expansive; it defines wages as including "compensation for services rendered". In my view any reasonable definition of "compensation for services rendered" must mean all compensation earned by the employee. It cannot be limited to only that portion of the compensation earned by the employee and due to be paid directly to him, as opposed to being paid to third parties at the direction of and for the benefit of the employee.

The term "compensation" in the context of bankruptcy legislation was considered in *Re Canadian Display Exhibit Co.* [1968] O.J. No. 696 (S.C.), 12 C.B.R. (N.S.) 180. In *Canadian Display*, the collective agreement obliged the employer to pay nine cents an hour into a benefit trust, four cents to be deducted from the employees' hourly wage and five to be paid directly by the employer. The trustee said the five cent employer contributions were not wages, based on the ground that the contributions were paid to a third party and any employees terminated during a probationary period would never be entitled to receive a payment from the fund. The Court disagreed, saying at para. 11, "[i]n the absence of authority by way of a specific statutory definition or otherwise ... the word 'compensation' ... includ[es] any return given by an employer to, or for the benefit of, an employee for services given by the employee as such."

In my view the definition of wages is broad enough to include holiday and overtime pay and all employee benefits and entitlements (except for the specifically excluded severance and termination pay). Regardless of whether each of these items may be considered "wages" in the ordinary sense of the word, they are clearly "returns given by an employer to or for the benefit of the employee for services given by the employee". Thus, they are properly viewed as compensation and should be considered "wages" under *WEPPA*.

So, I conclude that the term "wages" in the *WEPPA* includes not only amounts due to be paid directly to the employee but also other amounts that were earned by the employee and which were directed to be paid to a third party by the

employee directly or pursuant to a contract such as a collective agreement covering the employee.⁶

The authors of this paper admit that our views may be biased in favour of Century. That being said, we both respectfully disagree with the analysis and definition of “wages” set out in the Honourable Chief Justice’s Reasons in *LeRoy Trucking*. On April 23, 2009, Century brought its application for leave to appeal from the decision in *LeRoy Trucking* and the authors of this paper were counsel for Century at that application.

III. The Leave to Appeal Application

On its leave to appeal application before Mr. Justice Groberman, Century took the position that the Honourable Chief Justice had erred in law by failing to give due weight to the explicit wording of the legislation and accepted rules of statutory interpretation. Century further argued that the Honourable Chief Justice’s definition of “wages” was inconsistent with the purpose of the legislation as revealed in the extrinsic sources and administrative interpretations presented by Century.

Both Century and the Union agreed that the interpretation of “wages” under the *WEPPA* and the *BIA* is important to insolvency practice. However, Century and the Union disagreed on a number of other issues such as the admissibility of and weight to be given to extrinsic sources and administrative interpretations as evidence of legislative intent.

Among other things, Century and the Union disagreed as to whether the Honourable Chief Justice was correct in his reliance on *Canadian Display*. The Union argued that since the term “compensation” is not defined in the *WEPPA* and only defined in section 81.3 and 81.4 of the *BIA* to include vacation pay and exclude severance pay, it was necessary for the Honourable Chief Justice to make a judicial interpretation of the term “compensation” and that it was correct for him to do so in reliance on *Canadian Display*. The Union further pointed out that *Canadian Display* was cited with approval in *Re James et al.*, 2000 BCSC 1127 (“*James*”).

Century, on the other hand, argued that *Canadian Display* had been misinterpreted by the Honourable Chief Justice. According to Century, Registrar McCuddy’s view of the term “compensation”, adopted by the Honourable Chief Justice in *LeRoy Trucking*, was expressly qualified by the words, “[i]n the absence of authority by way of a specific statutory definition”. Century argued that, in this case, there was a specific statutory definition of “compensation” under the *BIA* and that definition did not reference any third party payments. Further, although this point was not canvassed at the application, the authors are also of the view that *Canadian Display* does not apply to sections 81.3 and 81.4 of the *BIA* because it was decided under what was then section 95(d) of the *Bankruptcy Act* which dealt with a preferred claim in favour of employees whereas the *WEPPA* and sections 81.3 and 81.4 of the *BIA* deal with a super-priority in favour of employees. Likewise, *James* was also decided in the context of a preferred claim in favour of employees. Needless to say, the interests of other creditors are subordinated to a greater degree by a super-priority than a preferred priority in favour of employees thus, in the authors’ view, it is not at all clear that the same considerations should apply to the definition of “compensation” in this case.

⁶ *LeRoy Trucking*, para. 17-22

At the leave to appeal application, Century also argued that, under section 7 of the *WEPPA*, WEPP payments are limited to the greater of \$3,000 or four times the maximum weekly insurable earnings (“EI insurable earnings”) under the *EI Act*, thus the definition of “insurable earnings” under the *EI Act* is instructive. Section 2(1) of the *EI Act* defines “insurable earnings” as “the total amount of the earnings, as determined in accordance with Part IV, that an insured person has from insurable employment”. In addition, section 2(1) of the *Insurable Earnings and Collection of Premiums Regulations*, S.O.R./97-33⁷ specifies that EI insurable earnings under section 2(1) of the *EI Act* is “the total of all amounts, whether wholly or partly pecuniary, received or enjoyed by the insured person that are paid to the person by the person’s employer in respect of that employment” and the amount of any gratuities which must be declared under provincial legislation but section 2(3.1) says that “earnings” does not include any amount excluded as income under section 6(1)(a) of the *Income Tax Act*. In turn, section 6(1)(a) of the *Income Tax Act*, excludes third party payments such as “any benefit... derived from the contributions of the taxpayer’s employer to or under a registered pension plan, group sickness or accident insurance plan, private health services plan, supplementary employment benefit plan, deferred profit sharing plan or group term life insurance policy”.⁸ That being the case, Century argued that EI insurable earnings include amounts payable directly to an individual and exclude third party payments.

In the authors’ view, by pegging the maximum amount payable for “wages” under the *WEPPA* to EI insurable earnings for a four week period, Parliament intentionally avoided the uncertainty that would result in cases where statutory protection provided under the *WEPPA* was insufficient to cover all third party payments. The authors note that neither the *WEPPA* nor the *BIA* provide any guidance as to how the insolvency officer should pay funds and allocate shortfalls to competing third parties in those circumstances.

The authors of this paper also note that, based on our discussions with representatives of Service Canada, the system established to administer the WEPP was never designed to process third party payments and indeed, that it is not capable of doing so. Although this information is anecdotal and was not presented at Century’s leave to appeal application, it is, in our view, further indication that the federal government never intended to protect third party payments under the *WEPPA*.

IV. LeRoy Trucking: Looking Forward

As in the normal course, Mr. Justice Groberman did not make any finding as to the merit of the arguments advanced by Century and the Union, other than to determine that Century met the threshold test for leave to appeal, including the presentation of an arguable case in law. At the time of this paper, Century’s appeal remains pending. The outcome of the appeal will have important consequences for the insolvency practice as it may result in secured creditors being subordinated to an extent that insolvency practitioner’s never envisioned.

⁷ *Insurable Earnings and Collection of Premiums Regulations*, SOR/97-33, (“*IECPR Regs*”), s. 2

⁸ *Income Tax Act*, 1985, c. 1 (5th Supp.), s. 6