2023 01G 3233
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF the *Bankruptcy and Insolvency Act* R.S.C. 1985 c. B-3 as Amended (the "**BIA**");

AND IN THE MATTER OF the *Companies Creditors Arrangement Act* R.S.C., 1985 c. C-36 as Amended (the "**CCAA**"); and

AND IN THE MATTER OF an application of Big Erics Inc. and Terra Nova Old Port Foods Inc.

MEMORANDUM OF FACT AND LAW OF THE APPLICANTS

Court File Number(s):	24543 (Terra Nova Old Port Foods Inc.) 24544 (Big Erics Inc.)
Estate File Numbers.	51-2962147 (Terra Nova Old Port Foods Inc.) 51-2962148 (Big Erics Inc.)
Date of Filing of Document:	September 18, 2023
Name of Party Filing or Person:	Terra Nova Old Port Foods Inc. and Big Erics Inc.
Application to which Document being filed relates:	Motion for an extension of the stay period under the CCAA
Statement of Purpose in filing:	Memorandum of Fact and Law in respect of the relief sought in the Motion
Court Sub-File Number, if any	N/A

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To the Service List attached hereto as Schedule "A"

FACTS:

1. Big Erics Inc. ("**BEI**") and Terra Nova Old Port Foods Inc. ("**TNOPFI**") (collectively, the "**Companies**") operate a 78-year-old business in Atlantic Canada. BEI's business relates to the purchase and sale of commercial and residential kitchen, food service (including restaurant), and sanitation and janitorial equipment and supplies.

2. Prior to ceasing operations in August 2023, TNOPFI manufactured and sold beef, pork and other protein food products that it processed in Newfoundland and also bought and sold finished food products from other producers.

3. On 03 July 2023, the Company made an application pursuant to s.11 of the CCAA and accordingly an order was issued by the Court on 18 July 2023, and subsequently amended and restated by the Court on 28 July 2023 (hereinafter, the "**ARIO**"). The ARIO, among other things:

   (a) grant a stay of proceedings up to and including September 30, 2023 (the "**Stay Period**"); and

   (b) approve payment of the amounts in respect of a key employee retention plan ("**KERP**") as described in the First Report of the Monitor dated July 17, 2023 (the "**First Report**").

4. The Companies bring the within motion seeking to:

   (a) extend the Stay Period up to and including December 31, 2023; and

   (b) amend the approved KERP to include one additional party and their retention payment of $1,500.

5. The Monitor consents to the relief being sought.

ISSUES:

1. Whether the requested amendment to the Stay Period as defined in the ARIO should be granted; and

2. Whether WEPPA applies to the former employees of the Company.

Extension of the Stay Period

6. The current Stay Period expires on September 30, 2023. Pursuant to section 11.02(2) of the CCAA, the Court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor has acted, and is acting, in good faith and with due diligence.

7. Section 11.02(2) of the CCAA provides that a court may grant a requested stay of proceedings, other than on the initial application, under the following circumstances;

> 11.02 (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Reference: CCAA, section 11.02(2) – (3).
[TAB 1]

8. When granting an extension, Courts have routinely extended the stay of proceeding where there is evidence that the extension of the proceedings will advance the purpose of the CCAA. When CCAA proceedings are in their early stages, it is appropriate for courts to

give deference when considering extensions of the stay, provided the requirements of s. 11.02(3) have been met.

Reference: *North American Tungsten Corporation Ltd. (Re)*, 2015 BCSC 1376 at paras 26-28
[TAB 2]

9. Since the Initial Order, the Companies have acted in good faith and with due diligence to:

(a) liquidate TNOPFI at the request of Bank of Montreal ("**BMO**"), a secured lender of the Companies, and

(b) stabilize and maintain the going concern operations of BEI through the peak hospitality and tourism summer months to maximize revenue.

10. The extended Stay Period is necessary to provide BEI sufficient breathing room and stability to continue the going concern business to ensure BEI's primary value – its business, inventory, receivables, and goodwill – is preserved and available to maximize realization for creditors and stakeholder.

11. The extended Stay Period is also necessary to allow TNOPFI to finalize the wind down of its operations, including pursuing outstanding accounts receivables, in order to maximize realization for its creditors and stakeholders.

12. The Companies also intend to return to Court to seek approval of a Sale and Investment Process ("**SISP**") that builds upon the marketing efforts to date. BEI has already circulated a draft SISP to BMO and the mezzanine lenders on the hope that the anticipated application for approval of the SISP will be brought on consent. The Companies are seeking an extension of the Stay Period to facilitate this process.

13. The cash flow forecast indicates that the Companies will have sufficient liquidity to meet its post-filing obligations through the end of the proposed extended Stay Period.

14. Since the granting of the Initial Order, the Companies have acted and continue to act in good faith and with due diligence to complete a going concern restructuring under the CCAA, while maintaining ordinary course business operations.

15. The Monitor supports the requested extension of the Stay Period.

Amendment of the KERP

16. To incentivize employees to remain engaged, the Companies sought and obtained approval of a the KERP to pay certain retention payments to key employees.

17. The Companies seek to amend the approved KERP to include an additional party who was inadvertently omitted and their retention payment of $1,500.

18. Courts have relied on the broad jurisdiction afforded by section 11 of the CCAA to approve and amend key employee retention plans.

Reference: *U.S. Steel Canada Inc (Re)*, 2014 ONSC 6145 at para 27.
[TAB 3]

19. In *Aralez*, the Court distilled the factors to be considered in granting a KERP into three criteria:

(a) Arm's length safeguards: whether there has been arm's length input into the design, scope and implementation of the program;

(b) Necessity: whether the employee interests are such that a KERP is necessary to maintain engagement; and

(c) Reasonableness of Design: whether the targets and incentives of the program are aligned with the goals of the restructuring.

Reference: *Aralez Pharmaceuticals Inc. (Re)*, 2018 ONSC 6980 at para 30. **[TAB 4]**

See also *Just Energy Group Inc. et al (Re)*, 2021 ONSC 7630 at para 7. **[TAB 5]**

20. The Companies submit that the amendment of the KERP is warranted, necessary, and appropriate in the present circumstances. In particular, the following factors support the amendment of the KERP:

(a) Approval of the Monitor: the KERP was designed by the Companies under the oversight of the Monitor. The Monitor supports the addition of the employee and the modest increase of $1,500.00 to the KERP payments.

(b) Employee is Critical to a Successful Restructuring: The employee is critical to the financial administration of TNOPFI and is actively assisting with the post-wind down administration. The employee is irreplaceable at this stage of winding down TNOPFI, given their significant institutional knowledge gained through their employment with TNOPFI for over 17 years. Therefore, it is critical that this employee remain employed with TNOPFI to enhance the prospects of a successful restructuring for the benefit of all stakeholders.

(c) Reasonable of Design: The targets and incentives of the approved KERP are not changed by the addition of the one employee.

Application of WEPPA

17. Prior to the CCAA proceedings, TNOPFI employed over forty (40) employees. As required by BMO, TNOPFI ceased operations by 31 August 2023 and permanently laid off over forty (40) employees. The lay offs are considered final.

18. Section 5(1) of *Wage Earner Protection Program Act,* S.C. 2005, c. 47 s. 1 sets out

the conditions of eligibility;

> 5 (1) An individual is eligible to receive a payment if:
>
> (a) the individual's employment ended for a reason prescribed by regulation;
>
> (b) one of the following applies:
>
> (i) the former employer is bankrupt,
>
> (ii) the former employer is subject to a receivership,
>
> (iii) the former employer is the subject of a foreign proceeding that is recognized by a court under subsection 270(1) of the Bankruptcy and Insolvency Act and
>
> (A) the court determines under subsection (2) that the foreign proceeding meets the criteria prescribed by regulation, and
>
> (B) a trustee is appointed, or
>
> (iv) the former employer is the subject of proceedings under Division I of Part III of the Bankruptcy and Insolvency Act or under the Companies' Creditors Arrangement Act and a court determines under subsection (5) that the criteria prescribed by regulation are met; and
>
> (c) the individual is owed eligible wages by the former employer.

Reference: s.5(1) *Wage Earners Protection Plan Act,* S.C. 2005, c. 47.
[TAB 6]

19. Section 5(5) of WEPPA states that a court, on an application, can determine that a former employer meets the criteria prescribed by the regulations.

> 5(5) On application by any person, a court may, in proceedings under Division I of Part III of the Bankruptcy and Insolvency Act or under the *Companies' Creditors Arrangement Act*, determine that the former employer meets the criteria prescribed by regulation.

Reference: s.5(5) *Wage Earners Protection Plan Act,* S.C. 2005, c. 47.
[TAB 7]

20. As a result the Applicant, submits that this Honourable Court, on application of the Monitor, can make a determination that regulations apply.

21. Section 3.2 of The *Wage Earner Protection Program Regulations,* SOR/2008-222 outlines the prescribed eligibility criteria to be met;

> 3.2 For the purposes of subsection 5(5) of the Act, a court may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations.

Reference: s.3.2. *Wage Earner Protection Program Regulations,* SOR/2008-222 **[TAB 8]**

22. Substantially all of the employees of the Company were terminated between 01 August and 31 August 2023. The only employees that have been retained were necessary to wind up the affairs of TNOPFI and collect on its accounts receivable for the benefit of its creditors. The terminations are final.

23. Therefore, the Applicant submits that the Company meets the criteria outlined in WEPPR and WEPPA should apply to the former employees of the Company.

Relief Sought

21. Based on the above, the Companies therefore request an order:

    (a) extending the Stay Period up to and including December 31, 2023; and

    (b) amending the approved KERP to include one additional party and their retention payment of $1,500.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at St. John's, Newfoundland and Labrador, this 18th day of September 2023.

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LIST OF AUTHORITIES

1. *Companies Creditors Arrangement Act*, RSC 1985 s.11(1)
2. *North American Tungsten Corporation Ltd. (Re)*, 2015 BCSC 1376
3. *U.S. Steel Canada Inc (Re)*, 2014 ONSC 6145
4. *Aralez Pharmaceuticals Inc (Re)*, 2018 ONSC 6980
5. *Just Energy Group Inc. et al.*, 2021 ONSC 7630
6. s.5(1) *Wage Earners Protection Plan Act,* S.C. 2005, c. 47.
7. s.5(5) *Wage Earners Protection Plan Act,* S.C. 2005, c. 47.
8. s.3.2. *Wage Earner Protection Program Regulations,* SOR/2008-222

SCHEDULE 'A'

2023 01G 3233
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AND IN THE MATTER OF an application of Big Erics Inc. and Terra Nova Old Port Foods Inc.

Estate Nos. 51-2962147 (Terra Nova Old Port Foods Inc.)
51-2962148 (Big Erics Inc.)

Court Nos. 24543 (Terra Nova Old Port Foods Inc.)
24544 (Big Erics Inc.)

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TAB 1

CANADA

CONSOLIDATION

Companies' Creditors Arrangement Act

R.S.C., 1985, c. C-36

Current to September 13, 2023

Last amended on April 27, 2023

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

CODIFICATION

Loi sur les arrangements avec les créanciers des compagnies

L.R.C. (1985), ch. C-36

À jour au 13 septembre 2023

Dernière modification le 27 avril 2023

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Documents that must accompany initial application

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be

Forme des demandes

10 (1) Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;

b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;

c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Interdiction de mettre l'état à la disposition du public

(3) Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Redressements normalement nécessaires

11.001 L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

Droits des fournisseurs

11.01 L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;

b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Suspension : demande initiale

11.02 (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Suspension : demandes autres qu'initiales

(2) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F); 2019, c. 29, s. 137.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

2005, c. 47, s. 128.

Persons obligated under letter of credit or guarantee

11.04 No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made,

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Preuve

(3) Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

Restriction

(4) L'ordonnance qui prévoit l'une des mesures visées aux paragraphes (1) ou (2) ne peut être rendue qu'en vertu du présent article.

2005, ch. 47, art. 128, 2007, ch. 36, art. 62(F); 2019, ch. 29, art. 137.

Suspension — administrateurs

11.03 (1) L'ordonnance prévue à l'article 11.02 peut interdire l'introduction ou la continuation de toute action contre les administrateurs de la compagnie relativement aux réclamations qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de la compagnie dont ils peuvent être, ès qualités, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.

Exclusion

(2) La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la compagnie ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

Présomption : administrateurs

(3) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie est réputé un administrateur pour l'application du présent article.

2005, ch. 47, art. 128.

Suspension — lettres de crédit ou garanties

11.04 L'ordonnance prévue à l'article 11.02 est sans effet sur toute action, poursuite ou autre procédure contre la who is obligated under a letter of credit or guarantee in relation to the company.

2005, c. 47, s. 128.

11.05 [Repealed, 2007, c. 29, s. 105]

Member of the Canadian Payments Association

11.06 No order may be made under this Act that has the effect of preventing a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the *Canadian Payments Act* or the by-laws or rules of that Association.

2005, c. 47, s. 128, 2007, c. 36, s. 64.

11.07 [Repealed, 2012, c. 31, s. 420]

Restriction — certain powers, duties and functions

11.08 No order may be made under section 11.02 that affects

(a) the exercise or performance by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*;

(b) the exercise or performance by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the *Canada Deposit Insurance Corporation Act*; or

(c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the *Winding-up and Restructuring Act*.

2005, c. 47, s. 128.

Stay — Her Majesty

11.09 (1) An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor

personne — autre que la compagnie visée par l'ordonnance — qui a des obligations au titre de lettres de crédit ou de garanties se rapportant à la compagnie.

2005, ch. 47, art. 128.

11.05 [Abrogé, 2007, ch. 29, art. 105]

Membre de l'Association canadienne des paiements

11.06 Aucune ordonnance prévue par la présente loi ne peut avoir pour effet d'empêcher un membre de l'Association canadienne des paiements de cesser d'agir, pour une compagnie, à titre d'agent de compensation ou d'adhérent correspondant de groupe conformément à la *Loi canadienne sur les paiements* et aux règles et règlements administratifs de l'Association.

2005, ch. 47, art. 128; 2007, ch. 36, art. 64.

11.07 [Abrogé, 2012, ch. 31, art. 420]

Restrictions : exercice de certaines attributions

11.08 L'ordonnance prévue à l'article 11.02 ne peut avoir d'effet sur :

a) l'exercice par le ministre des Finances ou par le surintendant des institutions financières des attributions qui leur sont conférées par la *Loi sur les banques*, la *Loi sur les associations coopératives de crédit*, la *Loi sur les sociétés d'assurances* ou la *Loi sur les sociétés de fiducie et de prêt*;

b) l'exercice par le gouverneur en conseil, le ministre des Finances ou la Société d'assurance-dépôts du Canada des attributions qui leur sont conférées par la *Loi sur la Société d'assurance-dépôts du Canada*;

c) l'exercice par le procureur général du Canada des pouvoirs qui lui sont conférés par la *Loi sur les liquidations et les restructurations*.

2005, ch. 47, art. 128.

Suspension des procédures : Sa Majesté

11.09 (1) L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

a) l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi ainsi que des intérêts, pénalités et autres charges afférents, à l'égard d'une compagnie under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a *provincial pension plan* as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) that may apply.

When order ceases to be in effect

(2) The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

qui est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour la période se terminant au plus tard :

(i) à l'expiration de l'ordonnance,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) l'exercice par Sa Majesté du chef d'une province, pour la période que le tribunal estime indiquée et se terminant au plus tard au moment visé à celui des sous-alinéas a)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition législative de cette province à l'égard d'une compagnie qui est un débiteur visé par la loi provinciale, s'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Cessation d'effet

(2) Les passages de l'ordonnance qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)a) ou b) cessent d'avoir effet dans les cas suivants :

a) la compagnie manque à ses obligations de paiement à l'égard de toute somme qui devient due à Sa Majesté après le prononcé de l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a *provincial pension plan* as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2)

TAB 2

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *North American Tungsten Corporation Ltd. (Re),* 2015 BCSC 1376

Date: 20150709
Docket: S154746
Registry: Vancouver

In the Matter of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended

And

In the Matter of the *Canada Business Corporations Act,* R.S.C. 1985, c. C-44, as amended

And

In the Matter of North American Tungsten Corporation Ltd.

Petitioner

Before: The Honourable Mr. Justice Butler

Oral Reasons for Judgment
In Chambers

Counsel for the Petitioner:	John R. Sandrelli Jordan D. Schultz
Counsel for the Monitor, Alvarex & Marsal Canada Inc.:	Kibben M. Jackson
Counsel for Callidus Capital Corporation:	William E.J. Skelly
Counsel for Government of Northwest Territories:	Mary Buttery H. Lance Williams
Counsel for Wolfram Bergbau and Hütten AG:	Jonathan McLean Angela L. Crimeni
Agent for Counsel for Global Tungsten & Powders Corp.:	Jonathan McLean Angela L. Crimeni
Place and Date of Hearing:	Vancouver, B.C. July 8, 2015
Place and Date of Judgment:	Vancouver, B.C. July 9, 2015

[1] **THE COURT:** This is my ruling on the applications I heard yesterday. The petitioner, North American Tungsten Corporation Ltd. (the "Company"), applies for an extension of the stay of proceedings which was granted in the initial order in this matter on June 9, 2015 (the "Initial Order"), and seeks approval for interim financing pursuant to s. 11.2 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

[2] I will set out the background to this matter and the parties' positions. For the reasons that follow, I am approving the Company's application to extend the stay and approving the interim financing facility on the terms proposed as those were modified during the course of argument yesterday. As always, if a transcript of this ruling is ordered, I reserve the right to amend it, but only as to form, not substance.

Background

[3] The Company is involved in the exploration, development, mining and processing of tungsten and other minerals. The main capital assets of the Company are the Cantung Mine located in the Northwest Territories and the Mactung property, an undeveloped exploration property located on the border of the Yukon Territory and the Northwest Territories. The Mactung property is one of the largest deposits of tungsten in the world. It has received approvals from the federal and Yukon governments to proceed to the next stage of development, but a very large capital investment will be required to construct a mine.

[4] The Company sought protection under the *CCAA* as a result of circumstances mostly beyond its control, including a severely depressed world market for tungsten. At the reduced price the Company has been receiving for its tungsten, the Cantung Mine was generating sufficient cash flow to pay the majority of its operational and administrative costs but was unable to meet its financing costs. At the time of the Initial Order, the Company was experiencing significant cash flow problems.

[5] Alvarez & Marsal Canada Inc. was appointed Monitor under the Initial Order. A summary of the amounts claimed as owing by secured creditors and their respective security interests as at July 7, 2015 is set out in the Monitor's Fourth

report. I will refer to that summary because an understanding of the security interests held by the principal creditors is necessary to consider the issues raised on this application.

[6] Callidus Capital Corporation is owed approximately $13.33 million. This is secured by all present and after-acquired property not related to Mactung. That includes more than 200 pieces of mining equipment used at the Cantung Mine. The Monitor has opined that there is sufficient value in the equipment to satisfy that debt.

[7] The Government of Northwest Territories ("GNWT") is owed $24.67 million. This is secured by all present and after-acquired property related to Mactung. While there is some issue and ongoing negotiation about the actual amount of debt which arises from the Company's reclamation obligations, it is significant.

[8] Global Tungsten & Powders Corp. ("GTP") and Wolfram Bergbau and Hütten AG ("WBH") are the Company's only two customers for all of the tungsten produced from the Cantung Mine. The total indebtedness to the customers is approximately $8.16 million. They also hold security over all present and after-acquired property related to Mactung.

[9] Debenture holders are owed $13.58 million, which is secured by all present and after-acquired property of the Company.

[10] Queenwood Capital Partners II LLC ("Queenwood II") is owed approximately $18.51 million, secured by all present and after-acquired property of the Company. The principals of Queenwood II are related to Company insiders.

[11] The total amount of the secured debt is in the range of $80 million. There is also approximately $14 million in unsecured liabilities. The reported book value of the assets at the time of the Initial Order was approximately $64 million, which included a value of $20 million for the Mactung property. The fair market value or realizable value has not been determined by the Monitor.

[12] The somewhat unique situation here is that Callidus does not have security over the Mactung property and the GNWT and the customers do not have security over the Cantung property.

[13] The stay granted by the Initial Order expired yesterday, but I extended it until July 10, 2015 to allow me to consider the arguments advanced on this application. Since the Initial Order, management of the Company has been working in good faith to develop a plan of arrangement. Management has developed an operating plan to manage cash flow through the next several months. I will not refer to the projected cash flow except to say that it anticipates receipt of the interim financing and continued revenues of more than $22 million from operations.

[14] The Company has been involved in extensive discussions with the Monitor and stakeholders to put in place a potential Sale and Investment Solicitation Process ("SISP"). To date the plan has involved re-focusing on surface mining and milling ore stockpiles rather than underground mining. Employees have been terminated. If the interim financing is obtained, the Company plans to continue operations at the mine until the end of October 2015, including management of environmental care. It plans to conduct an orderly wind down of underground mining activities, including a staged sale of equipment used in the underground work. It plans to reconfigure the mill facilities to facilitate tailings reprocessing so that it can use existing tailings stores as well as the surface extraction as a revenue source. It also plans to undertake limited expenditures on Cantung reclamation and Mactung environmental work with a view to increasing asset values. It hopes to seek court approval of a SISP in the next couple of weeks.

[15] As a result of difficulties arising from timing of receipt of payments from GTP, one of the customers, the cash flow problems for the Company became critical within the last ten days. The Company sought interim financing and received an offer from a third party. Callidus was opposed to that offer of financing and the Company eventually obtained a $500,000 loan from Callidus on June 29, 2015 on a short-term basis (the "Gap Advance"). They continued to negotiate and arrived at an agreement

for interim financing (the "Interim Facility") and a forbearance agreement (the "Forbearance Agreement"). These form the basis for the application before this court. Terms of these agreements which are relevant to the application include:

a) the $500,000 Gap Advance would be deemed to be an advance under the Interim Facility;

b) Callidus will advance an additional $2.5 million, which along with the Gap Advance would be secured over all of the property of the Company and have priority over the secured creditors; and

c) the Company will have to make repayments to Callidus by certain dates and those payments include payments of interest and principal on the existing loan facility (the "Post-Filing Payments").

[16] At the hearing of the application, one of the more contentious issues was the Company's request that the court make the order in relation to the Gap Advance *nunc pro tunc*. This term was sought because s. 11.2(1) of the *CCAA* allows a court to make an order for interim financing but "The security or charge may not secure an obligation that exists before the order is made."

[17] Of course the Gap Advance was an obligation which existed before the making of any order for interim financing. During the course of argument yesterday, the Company withdrew the application for a *nunc pro tunc* order in relation to the Gap Advance. This occurred because Callidus agreed to modify the terms of the Interim Facility such that the Gap Advance will be treated as an advance under its existing facility. In other words, the proposed Interim Facility is now for a $2.5 million loan facility and not $3.0 million, as set out in the application.

Position of the Company

[18] The Company says that in all of the circumstances, proceeding with the Forbearance Agreement and the Interim Facility is better for the petitioner's restructuring efforts and necessary given the urgent need for funding. It stresses that

without access to the interim financing, it will be unable to meet its ongoing payroll obligations or its negotiated payment terms for the post-filing obligations. It will be unable to continue restructuring and will likely face liquidation by its secured creditors. It also says there is greater value for all stakeholders if the Company is permitted to continue operating as a going concern. It says there would likely be no recovery for creditors other than the senior secured creditors without access to the Interim Facility. The local community of Watson Lake and local businesses would suffer significantly, as 100 employees would be out of work. Further, the Company says there is little prejudice to the secured creditors. In addition, it says if the mine site is abandoned, there would be a larger reclamation obligation, which would be to the detriment of the GNWT and other creditors with claims against an interest in the Mactung property.

Position of the Customers

[19] The customers oppose the Interim Facility and the extension of the stay. They argue that the financing of $2.5 million at interest rates of 21% will not help the Company emerge from this process with a workable plan. They argue that putting the Cantung Mine into care and maintenance as of November and hoping that tungsten prices rise in the future is not a workable plan.

[20] The customers say the result of approval of the Interim Facility is that the security interests of WBH and GTP would be prejudiced because those interests would be subordinated to Callidus as well as the GNWT. Finally, they argue that the bankruptcy of the Company and sale of its assets is inevitable no matter what happens.

Position of the GNWT

[21] The GNWT does not oppose the extension of the stay nor the granting of the Interim Facility. However, it opposes the Forbearance Agreement which would grant the Interim Facility priority over the GNWT Mactung security, which it holds to secure the environmental and reclamation obligations of the Company. It says that it would be prejudiced as a result of the granting of that priority and that in the circumstances

here there is no reason to do so. It says that Callidus would effectively receive approximately $1.5 million in Post-Filing Payments in very short order, which essentially allows it an unfair priority.

The Monitor

[22] The Monitor provided detailed comments supporting the Company's application for interim financing as well as the stay. In doing so it made the following observations:

- Without the interim financing, the Company would have no choice but to immediately cease operations. This would negatively impact the progress of reclamation of the mine and tailings ponds and may have a negative impact on the near term market value of the Mactung property.
- The key senior management of the Company remain in place and are committed to pursuing restructuring solutions or transactions that will see an orderly transition of ownership and stewardship of the assets.
- The Interim Facility is supported by Queenwood II and the debenture holders, the creditors who potentially have the most to lose.
- Based on the confidential appraisal, it appears that the equipment values in aggregate exceed the amounts due to Callidus, which may eliminate or at least mitigate the potential prejudice to creditors having security over Mactung.
- The terms of the Interim Facility including interest rates and fees are consistent with market terms for interim financings in the context of distressed companies and are commercially reasonable in these circumstances when compared to the terms of other court approved interim financing facilities.

[23] The Monitor concludes its comments in its Fourth Report by stating that "the interim financing contemplated by the Interim Lending Facility and the Forbearance Agreement will enhance the prospects of a viable restructuring and/or a future SISP

being undertaken by the Company. Overall... the Monitor is of the view that, balancing the relative prejudices to the stakeholders, the terms of the Forbearance Agreement and Interim Lending Facility are reasonable in the circumstances and the Monitor supports the Company's application..."

Extension of the Stay

[24] I turn now to the reasons for granting the extension of the stay. Subsection 11.02(2) of the *CCAA* provides that the Company may apply for an extension of the stay of proceedings for a period that the court considers necessary on any terms that the court may impose. Subsection 11.02(3) provides:

> (3) The court shall not make the order unless
>
> (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
>
> (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

[25] A number of decisions have considered whether "circumstances exist that make the order appropriate". In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, the Court emphasized that the underlying purpose of the legislation must be considered when construing the provisions in the *CCAA*. Justice Deschamps stated at para. 70:

> ... Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs.

[26] When granting an extension, it is a prerequisite for the petitioner to provide evidence of what it intends to do in order to demonstrate to the court and stakeholders that extending the proceedings will advance the purpose of the *CCAA*. The debtor company must show that it has at least "a kernel of a plan": *Azure Dynamics Corporation (Re)*, 2012 BCSC 781.

[27] It is also appropriate for the company to use the *CCAA* to effect the sale of the company's business as a going concern. While the main focus of the legislation is the reorganization of insolvent companies, a sales and investment solicitation process (SISP) may be the most efficient way to maximize the value of stakeholders' interests and minimize the harm which stems from liquidation: *Anvil Range Mining Corp.* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J.).

[28] When *CCAA* proceedings are in their early stages, it is appropriate for courts to give deference when considering extensions of the stay, provided the requirements of s. 11.02(3) have been met. See, for example, *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775.

[29] The good faith and due diligence requirement of s. 11.02(3) includes observance of reasonable commercial standards of fair dealings in the proceedings, the absence of an intent to defraud and a duty of honesty to the court and to the stakeholders directly affected by the *CCAA* process.

[30] I am satisfied that it is appropriate to grant the extension of the stay as sought by the Company. I reject the position of the customers that the Company has failed to put forward any kind of plan. The operating plan which the Company has begun to put in place responds to the existing cash flow problems and is intended to put the Company in a position to enhance the prospects of a viable restructuring and/or a future SISP.

[31] It is more than a kernel of a plan. It is a strategy to move forward in an orderly way which may provide benefits to all stakeholders. It takes into account the remedial purpose of the legislation and attempts to minimize the potential social and economic losses of liquidation of the Company. None of the parties suggested that the Company is acting with an absence of either good faith or due diligence, and I am satisfied from the evidence of Mr. Lindahl and the comments of the Monitor that the Company is indeed proceeding in a fashion which fulfills its obligations of good faith and due diligence.

The Interim Facility

[32] I turn to my reasons for approving the interim financing. Subsection 11.2(4) of the *CCAA* sets out factors which the court must consider in determining whether to grant a priority charge to an interim lender. The factors in that section which are most relevant to this application are:

> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> ...
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report... if any.

[33] While the factors listed in that section should be considered, the court may also consider additional factors, which may include the following as set out in *Timminco Limited (Re)*, 2012 ONCA 552 at para. 6, and I am paraphrasing:

a) without interim financing would the petitioner be forced to stop operating;

b) whether bankruptcy would be in the interests of the stakeholders; and

c) would the interim lender have provided financing without a super priority charge...

[34] In *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 at paras. 58 and 59, the Court approved of the following factors which had been considered by the chambers judge:

a) the applicants needed additional financing to support operations during the period of the going concern restructuring;

b) there was no other alternative available and in particular no suggestion that the interim financing would have been available without the super priority charge;

c) the balancing of prejudice weighed in favour of approval of the interim loan facility.

[35] When I consider all of these factors, I am satisfied that it is appropriate to approve the Interim Facility. My reasons for doing so include the following:

- The cash flow projections show that the $2.5 million from the Interim Facility will be sufficient to allow the Company to satisfy obligations along with its ongoing revenues from operations through to November 2015. By that time the SISP should be well underway and perhaps concluded.

- I accept the Monitor's comments regarding the Interim Facility and Forbearance Agreement. In other words, I accept that the Company would not be able to find other interim financing on more favourable terms and that without such financing, the Company would have no choice but to immediately cease operations.

- I further accept the Monitor's comment that cessation of the operations would negatively impact the reclamation of the Cantung Mine and tailings ponds and may have a negative impact on the market value of the Mactung property.

- The Interim Facility enhances the Company's prospects of carrying out a successful SISP and presenting a viable plan to its creditors. If it is forced to shut down its operations, the Company will likely not be able to continue these proceedings and could not continue with the SISP.

- Bankruptcy and a forced liquidation of the assets is not in the best interests of any stakeholder.

- It is unlikely that any creditor will be materially prejudiced by the priority financing. There are two significant reasons for this. First, I accept the Monitor's view that the equipment security is likely to be sufficient to satisfy the existing debt to Callidus. Second, to the extent that the payments to Callidus under the Interim Facility cover Post-Filing Payments, those will likely be offset by the fact that the ongoing operations will result in the conversion of substantial inventories of unprocessed ore. That ore is Cantung property and so it is currently subject to the existing Callidus security. Under the operating plan, revenue from that asset will be used for ongoing operations.

- I further accept the comments of the Monitor and the submissions of the Company that keeping the Cantung Mine operating will likely assist the Company in managing its environmental obligations and thus limit the risk that the GNWT will be faced with a significant reclamation project. As counsel for the Monitor indicated, abandonment of the mine is likely to result in greater costs. The situation would undoubtedly be somewhat chaotic.

- Finally, I conclude that the Interim Facility will further the policy objectives underlying the *CCAA* by mitigating the effects of an immediate cessation of the mining operations which would result in the loss of employment for the Cantung Mine workers and negatively impact the surrounding community.

[36] Before concluding, I will make one final comment regarding the requirements of the Forbearance Agreement that the Company make the Post-Filing Payments to Callidus. The Initial Order permits such payments to Callidus. Further, there is nothing in the *CCAA* which prohibits these payments. In the circumstances I have already outlined above, the use of the inventories of unprocessed ore to fund ongoing operations would only be possible with the approval of the Interim Facility. In other words the Post-Filing Payments may be offset by the revenues earned from that asset, which would be a benefit to all creditors.

[37] In summary, I am granting the extension of the stay. I believe the request was to July 17, 2015. I will hear from counsel on that issue if there is some other date that is preferred. Further, I approve the Forbearance Agreement and the Interim Facility in the amount of $2.5 million, and as previously indicated, the Gap Advance is not included in that.

[38] What about the date for an extension of the stay?

[39] MR. SCHULTZ: Yes, My Lord. So that'll turn a little bit on your availability actually, as was indicated by Mr. Sandrelli, the Company anticipates bringing an application to coincide with the end of the stay for a further extension and approval of a SISP. The Company is also hopeful that an application to approve as was alluded to some further financing from Callidus in respect to the GTP receivable. So I guess I am in your hands a little bit as to whether you might be available on the 17th for an hour to hear those.

[40] THE COURT: I can be available, but it would have to be by telephone. I am in Williams Lake next week.

[41] MR. SCHULTZ: Okay.

[42] THE COURT: So I think that we should proceed with that because the next couple weeks after that I am probably not available.

[43] MR. SCHULTZ: Okay. In that case then the 17th is probably the best day, and that would be the day we will be seeking the extension to for now.

[44] THE COURT: All right. The stay is extended to July 17, 2015.

"Butler J."

TAB 3

CITATION: U.S. Steel Canada Inc. (Re), 2014 ONSC 6145
COURT FILE NO.: CV-14-10695-00CL
DATE: 20141022

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36 AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.

BEFORE: Mr. Justice H. Wilton-Siegel

COUNSEL: *R. Paul Steep, Jamey Gage and Heather Meredith*, for the Applicant

Kevin Zych, for the Monitor

Michael Barrack, Robert Thornton and Grant Moffat, for United States Steel Corporation and the proposed DIP Lender

Gale Rubenstein, Robert J. Chadwick and Logan Willis, for Her Majesty the Queen in Right of Ontario and the Superintendent of Financial Services (Ontario)

Ken Rosenberg and Lily Harmer, for the United Steelworkers International Union and the United Steelworkers Union, Local 8782

Sharon L.C. White, for the United Steelworkers Union, Local 1005

Shayne Kukulowicz and Larry Ellis, for the City of Hamilton

Steve Weisz and Arjo Shalviri, for Caterpillar Financial Services Limited

S. Michael Citak, for various trade creditors

Kathryn Esaw and Patrick Corney, for the Independent Electricity System Operator

Andrew Hatnay, for certain retirees and for the proposed representative counsel

HEARD AND ENDORSED: October 8, 2014
RELEASED: October 22, 2014

ENDORSEMENT

[1] U.S. Steel Canada Inc. (the "Applicant") brought an application for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") on September 16, 2014, and was granted the requested relief pursuant to an initial order of Morawetz R.S.J. dated

September 16, 2014 (the "Initial Order"). The Initial Order contemplated that any interested party, including the Applicant and the Monitor, could apply to this court to vary or amend the Initial Order at a comeback motion scheduled for October 6, 2014 (the "Comeback Motion").

[2] The Comeback Motion was adjourned from October 6, 2014 to October 7, 2014, and further adjourned on that date to October 8, 2014. On October 8, 2014, the Court heard various motions of the Applicant and addressed certain other additional scheduling matters, indicating that written reasons would follow with respect to the substantive matters addressed at the hearing. This endorsement constitutes the Court's reasons with respect to the five substantive matters addressed in two orders issued at the hearing.

[3] In this endorsement, capitalized terms that are not defined herein have the meanings ascribed to them in the Initial Order.

DIP Loan

[4] The Applicant seeks approval of a debtor-in-possession loan facility (the "DIP Loan"), the terms of which are set out in an amended and restated DIP facility term sheet dated as of September 16, 2014 (the "Term Sheet") between the Applicant and a subsidiary of USS (the "DIP Lender").

[5] The Term Sheet contemplates a DIP Loan in the maximum amount of $185 million, to be guaranteed by each of the present and future, direct or indirect, wholly-owned subsidiaries of the Applicant. The Term Sheet provides for a maximum availability under the DIP Loan that varies on a monthly basis to reflect the Applicant's cash flow requirements as contemplated in the cash flow projections attached thereto. Advances bear interest at 5% per annum, 7% upon an event of default, and are prepayable at any time upon payment of an exit fee of $5.5 million together with the lender's fees and costs described below. The Term Sheet provides for a commitment fee in the amount of $3.7 million payable out of the first advance. The Applicant is also obligated to pay the lender's legal fees and any costs of realization or disbursement pertaining to the DIP Loan and these CCAA proceedings.

[6] The Term Sheet contains a number of affirmative covenants, including compliance with a timetable for the CCAA proceedings. The DIP Loan terminates on the earliest to occur of certain events, including: (1) the implementation of a compromise or plan of arrangement; (2) the sale of all or substantially all of the Applicant's assets; (3) the conversion of the CCAA proceedings into a proceeding under the *Bankruptcy and Insolvency Act*; (4) December 31, 2015, being the end of the proposed restructuring period according to the timetable; and (5) the occurrence of an event of default, at the discretion of the DIP lender.

[7] A condition precedent to funding under the DIP Loan is an order of this Court granting a charge in favour of the DIP lender (the "DIP Lender's Charge") having priority over all security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (herein, collectively "Encumbrances") other than the Administration Charge (Part I), the Director's Charge and certain permitted liens set out in the Term Sheet, which include existing and future purchase money security interests and certain equipment financing security registrations listed in a schedule to the Term Sheet (the "Permitted Priority Liens").

[8] The terms and conditions of the DIP Loan, as set out in the Term Sheet, have been the subject of extensive negotiation in the period prior to the hearing of this motion. The DIP Loan is supported by the monitor and USS, and is not opposed by any of the other major stakeholders of the Applicant, including the Province of Ontario and the United Steelworkers International Union and the United Steelworkers Union, Locals 1005 and 8782 (collectively, the "USW").

[9] The existence of a financing facility is of critical importance to the Applicant at this time in order to ensure stable continuing operations during the CCAA proceedings and thereby to provide reassurance to the Applicant's various stakeholders that the Applicant will continue to have the financial resources to pay its suppliers and employees, and to carry on its business in the ordinary course. As such, debtor-in-possession financing is a pre-condition to a successful restructuring of the Applicant. In particular, the Applicant requires additional financing to build up its raw materials inventories prior to the Seaway freeze to avoid the risk of operating disruptions and/or sizeable cost increases during the winter months.

[10] The Monitor, who was present during the negotiations regarding the terms of the DIL Loan, the Chief Restructuring Officer (the "CRO") and the Financial Advisor to the Applicant have each advised the Court that in their opinion the terms of the DIP Loan are reasonable, are consistent with the terms of other debtor-in-possession financing facilities in respect of comparable borrowers, and meet the financial requirements of the Applicant. The Monitor has advised in its First Report that it does not believe it likely that a superior DIP proposal would have been forthcoming.

[11] The Court has the authority to approve the DIP Loan under s. 11 of the CCAA. I am satisfied that, for the foregoing reasons, it is appropriate to do so in the present circumstances.

[12] The Court also has the authority under s. 11.2 of the CCAA to grant the requested priority of the DIP Lender's Charge to secure the DIP Loan. In this regard, s. 11.2(4) of the CCAA sets out a non-exhaustive list of factors to be considered by a court in addressing such a motion. In addition, Pepall J. (as she then was) stressed the importance of three particular criteria in *Canwest Global Communications Corp. (Re)*, 2009 CarswellOnt 6184 at paras. 32-34 (S.C.), [2009] O.J. No. 4286 [*Canwest*]. In my view, the DIP Lender's Charge sought by the Applicant is appropriate based on those factors for the reasons that follow.

[13] First, notice has been given to all of the secured parties likely to be affected, including USS as the only secured creditor having a general security interest over all the assets of the Applicant. Notice has also been given broadly to all PPSA registrants, various governmental agencies, including environmental agencies and taxing authorities, and to all pension and retirement plan beneficiaries pursuant to the process contemplated by the Notice Procedure Order.

[14] Second, the maximum amount of the DIP Loan is appropriate based on the anticipated cash flow requirements of the Applicant, as reflected in its cash flow projections for the entire restructuring period, in order to continue to carry on its business during the restructuring period. The cash flows to January 30, 2015 are the subject of a favourable report of the Monitor in its First Report.

[15] Third, the Applicant's business will continue to be managed by the Applicant's management with the assistance of the CRO during the restructuring period. The Applicant's board of directors will continue in place, a majority of whom are independent individuals with significant restructuring and steel-industry experience. The Applicant's parent and largest creditor, USS, is providing support to the Applicant by providing the DIP Loan through a subsidiary. Equally important, the existing operational relationships between the Applicant and USS will continue.

[16] Fourth, for the reasons set out above, the DIP Loan will assist in, and enhance, the restructuring process.

[17] Fifth, the DIP Lender's Charge does not secure any unsecured pre-filing obligations owed to the DIP lender or its affiliates. It will not prejudice any of the other parties having security interests in property of the Applicant. In particular, the DIP Charge will rank behind the Permitted Priority Liens. Although it will rank ahead of any deemed trust contemplated by the *Pension Benefits Act*, R.S.O. 1990, c. P.8, the DIP Loan contemplates continued payment of the pension contributions required under the Pension Agreement dated as of March 31, 2006, as amended by the Amendment to Pension Agreement dated October 31, 2007 (collectively, the "Stelco Pension Agreement") and Ontario Regulation 99/06 under the *Pension Benefits Act* (the "Stelco Regulation").

[18] Based on the foregoing, it is appropriate to grant the DIP Charge having the priority contemplated above. As was the case in *Timminco Ltd. (Re)*, 2012 ONSC 948 at paras. 46-47, [2012] O.J. No. 596 [*Timminco*], it is not realistic to conceive of the DIP Loan proceeding in the absence of the DIP Lender's Charge receiving the priority being requested on this motion, nor is it realistic to investigate the possibility of third-party debtor-in-possession financing without a similar priority. The proposed DIP Loan, subject to the benefit of the proposed DIP Lender's Charge, is a necessary pre-condition to continuation of these restructuring proceedings under the CCAA and avoidance of a bankruptcy proceeding. I am satisfied that, in order to further these objectives, it is both necessary and appropriate to invoke the doctrine of paramountcy, as contemplated in *Sun Indalex Finance, LLC v. United Steel Workers*, 2013 SCC 6, [2013] 1 S.C.R. 271 [*Sun Indalex*] such that the provisions of the CCAA will override the provisions of the *Pension Benefits Act* in respect of the priority of the DIP Lender's Charge.

Administration Charge and Director's Charge

[19] The Initial Order provides for an Administration Charge (Part I) to the maximum amount of \$6.5 million, a Director's Charge to a maximum amount of \$39 million, and an Administration Charge (Part II) to a maximum amount of \$5.5 million plus \$1 million. On this motion, the Applicant seeks to amend the Initial Order, which was granted on an *ex parte* basis, to provide that the Administration Charge (Part I) and the Director's Charge rank ahead of all other Encumbrances in that order, and the Administration Charge (Part II) ranks ahead of all Encumbrances except the prior-ranking court-ordered charges and the Permitted Priority Liens.

[20] The Court's authority to grant a super-priority in respect of the fees and expenses to be covered by the Administration Charge (Part I) and the Administration Charge (Part II) is found in s. 11.52 of the CCAA. Similarly, s. 11.51 of the CCAA provides the authority to grant a

similar charge in respect of the fees and expenses of the directors to be secured by the Director's Charge.

[21] As discussed above, the Applicant has fulfilled the notice requirements in respect of those provisions by serving the motion materials for this Comeback Motion to the parties on the service list and by complying with the requirements of the Notice Procedure Order.

[22] It is both commonplace and essential to order a super-priority in respect of charges securing professional fees and disbursements and directors' fees and disbursements in restructurings under the CCAA. I concur in the expression of the necessity of such security as a pre-condition to the success of any possible restructuring, as articulated by Morawetz R.S.J. in *Timminco* at para. 66.

[23] In *Canwest*, at para. 54, Pepall J. (as she then was) set out a non-exhaustive list of factors to be considered in approving an administration charge. Morawetz R.S.J. addressed those factors in his endorsement respecting the granting of the Initial Order approving the Administration Charge (Part I) and the Administration Charge (Part II). Similarly, Morawetz R.S.J. also addressed the necessity for, and appropriateness of, approving the Director's Charge in such endorsement.

[24] In my opinion, the same factors support the super-priority sought by the Applicant for the Administration Charge (Part I), the Director's Charge and the Administration Charge (Part II). Further, I am satisfied that the requested priority of these charges is necessary to further the objectives of these CCAA proceedings and that it is also necessary and appropriate to invoke the doctrine of paramountcy, as contemplated in *Sun Indalex*, such that the provisions of the CCAA will override the provisions of the *Pension Benefits Act* in respect of the priority of these Charges. I am satisfied that the beneficiaries of the Administration Charge (Part I) and the Administration Charge (Part II) will not likely provide services to the Applicant in these CCAA proceedings without the proposed security for their fees and disbursements. I am also satisfied that their participation in the CCAA proceedings is critical to the Applicant's ability to restructure. Similarly, I accept that the Applicant requires the continued involvement of its directors to pursue its restructuring and that such persons, particularly its independent directors, would not likely continue in this role without the benefit of the proposed security due to the personal exposure associated with the Applicant's financial position.

The KERP

[25] The Applicant has identified 28 employees in management and operational roles who it considers critical to the success of its restructuring efforts and continued operations as a going concern. It has developed a key employee retention programme (the "KERP") to retain such employees. The KERP provides for a cash retention payment equal to a percentage of each such employee's annual salary, to be paid upon implementation of a plan of arrangement or completion of a sale, upon an outside date, or upon earlier termination of employment without cause.

[26] The maximum amount payable under the KERP is $2,570,378. The Applicant proposes to pay such amount to the Monitor to be held in trust pending payment.

[27] The Court's jurisdiction to authorize the KERP is found in its general power under s. 11 of the CCAA to make such order as it sees fit in a proceeding under the CCAA. The following factors identified in case law support approval of the KERP in the present circumstances.

[28] First, the evidence supports the conclusion that the continued employment of the employees to whom the KERP applies is important for the stability of the business and to assist in the marketing process. The evidence is that these employees perform important roles in the business and cannot easily be replaced. In addition, certain of the employees have performed a central role in the proceedings under the CCAA and the restructuring process to date.

[29] Second, the Applicant advises that the employees identified for the KERP have lengthy histories of employment with the Applicant and specialized knowledge that cannot be replaced by the Applicant given the degree of integration between the Applicant and USS. The evidence strongly suggests that, if the employees were to depart the Applicant, it would be very difficult, if not impossible, to have adequate replacements in view of the Applicant's current circumstances.

[30] Third, there is little doubt that, in the present circumstances and, in particular, given the uncertainty surrounding a significant portion of the Applicant's operations, the employees to be covered by the KERP would likely consider other employment options if the KERP were not approved

[31] Fourth, the KERP was developed through a consultative process involving the Applicant's management, the Applicant's board of directors, USS, the Monitor and the CRO. The Applicant's board of directors, including the independent directors, supports the KERP. The business judgment of the board of directors is an important consideration in approving a proposed KERP: see *Timminco Ltd. (Re)*, 2012 ONSC 506 at para.73, [2012] O.J. No. 472. In addition, USS, the only secured creditor of the Applicant, supports the KERP.

[32] Fifth, both the Monitor and the CRO support the KERP. In particular, the Monitor's judgment in this matter is an important consideration. The Monitor has advised in its First Report that it is satisfied that each of the employees covered by the KERP is critical to the Applicant's strategic direction and day-to-day operations and management. It has also advised that the amount and terms of the proposed KERP are reasonable and appropriate in the circumstances and in the Monitor's experience in other CCAA proceedings.

[33] Sixth, the terms of the KERP, as described above, are effectively payable upon completion of the restructuring process.

Appointment of Representative Counsel for the Non-USW Active and Retiree Beneficiaries

[34] The beneficiaries entitled to benefits under the Hamilton Salaried Pension Plan, the LEW Salaried Pension Plan, the LEW Pickling Facility Plan who are not represented by the USW, the Legacy Pension Plan, the Steinman Plan, the Opportunity GRRSP, RBC's and RA's who are not represented by the USW and beneficiaries entitled to OEPB's who are not represented by the USW (collectively, the "Non-USW Active and Retiree Beneficiaries") do not currently have representation in these proceedings. The defined terms in this section have the meanings ascribed thereto in the affidavit of Michael A. McQuade referred to in the Initial Order.

[35] The Applicant proposes the appointment of six representatives and representative counsel to represent the interests of the Non-USW Active and Retiree Beneficiaries. The Court has authority to make such an order under the general authority in section 11 of the CCAA and pursuant to Rules 10.01 and 12.07 of the *Rules of Civil Procedure*. I am satisfied that such an order should be granted in the circumstances.

[36] In reaching this conclusion, I have considered the factors addressed in *Canwest Publishing (Re),* 2010 ONSC 1328, [2010] O.J. No. 943. In this regard, the following considerations are relevant.

[37] The Non-USW Active and Retiree Beneficiaries are an important stakeholder group in these proceedings under the CCAA and deserve meaningful representation relating to matters of recovery, compromise of rights and entitlement to benefits under the plans of which they are beneficiaries or changes to other compensation. Current and former employees of a company in proceedings under the CCAA are vulnerable generally on their own. In the present case, there is added concern due to the existence of a solvency deficiency in the Applicant's pension plans and the unfunded nature of the OPEB's.

[38] Second, the contemplated representation will enhance the efficiency of the proceedings under the CCAA in a number of ways. It will assist in the communication of the rights of this stakeholder group on an on-going basis during the restructuring process. It will also provide an efficient and cost-effective means of ensuring that the interests of this stakeholder group are brought to the attention of the Court. In addition, it will establish a leadership group who will be able to organize a process for obtaining the advice and directions of this group on specific issues in the restructuring as required.

[39] Third, the contemplated representation will avoid a multiplicity of retainers to the extent separate representation is not required. In this regard, I note tha,t at the present time, there is a commonality of interest among all the non-USW Active and Retiree Beneficiaries in accordance with the principles referred to in *Nortel Networks Corp. (Re)*, 2009 CarswellOnt 3028 at para. 62 (S.C.), [2009] O.J. No. 3280 [*Nortel*]. In particular, at the present time, none of the CRO, the proposed representative counsel and the proposed representatives see any material conflict of interest between the current and former employees. In these circumstances, as in *Nortel*, I am satisfied that representation of the employees' interests can be accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims. If the interests of such parties do in fact diverge in the future, the Court will be able to address the need for separate counsel at such time. In this regard, the proposed representative counsel has advised the Court that it and the proposed representatives are alert to the possibility of such conflicts potentially arising and will bring any issues of this nature to the Court's attention.

[40] Fourth, the balance of convenience favours the proposed order insofar as it provides for notice and an opt-out process. The proposed representation order thereby provides the flexibility to members of this stakeholder group who do not wish to be represented by the proposed representatives or the proposed representative counsel to opt-out in favour of their own choice of representative and of counsel.

[41] Fifth, the proposed representative counsel, Koskie Minsky LLP, have considerable experience representing employee groups in other restructurings under the CCAA. Similarly, the proposed representatives have considerable experience in respect of the matters likely to be addressed in the proceedings, either in connection with the earlier restructuring of the Applicant or in former roles as employees of the Applicant.

[42] Sixth, the proposed order is supported by the Monitor and a number of the principal stakeholders of the Applicant and is not opposed by any of the other stakeholders appearing on this motion.

Extension of the Stay

[43] Lastly, the Applicant seeks an order extending the provisions of the Initial Order, including the stay provisions thereof, until January 23, 2015. Section 11.02(2) of the CCAA gives the Court the discretionary authority to extend a stay of proceedings subject to satisfaction of the conditions set out in s. 11.02(3). I am satisfied that these requirements have been met in the present case, and that the requested relief should be granted, for the following reasons.

[44] First, the stay is necessary to provide the stability required to allow the Applicant an opportunity to work towards a plan of arrangement. Since the Initial Order, the Applicant has continued its operations without major disruption. In the absence of a stay, however, the evidence indicates the Applicant will have a cash flow deficiency that will render the objective of a successful restructuring unattainable. As mentioned, the Monitor has advised that, based on its review, the Applicant should have adequate financial resources to continue to operate in the ordinary course and in accordance with the terms of the Initial Order during the stay period.

[45] Second, I am satisfied that the Applicant is acting in good faith and with due diligence to facilitate the restructuring process. In this regard, the Applicant has had extensive discussions with its principal stakeholders to address significant objections to the initial draft of the Term Sheet that were raised by such stakeholders.

[46] Third, the Monitor and the CRO support the extension.

[47] Lastly, while it is not anticipated that the restructuring will have proceeded to the point of identification of a plan of arrangement by the end of the proposed stay period, the Applicant should be able to make significant steps toward that goal during this period. In particular, the Applicant intends to commence a process of discussions with its stakeholders as well as to explore restructuring options through a sales or restructuring recapitalization process (the "SARP") contemplated by the Term Sheet. An extension of the stay will ensure stability and continuity of the applicant's operations while these discussions are conducted, without which the Applicant's restructuring options will be seriously limited if not excluded altogether. In addition, the Applicant should be able to take steps to provide continuing assurance to its stakeholders that it will be able to continue to operate in the ordinary course during the anticipated restructuring period, without interruption, notwithstanding the current proceedings under the CCAA.

[48] Accordingly, I am satisfied that an extension of the Initial Order will further the purposes of the Act and the requested extension should be granted.

Wilton-Siegel J.

Date: October 22, 2014

TAB 4

CITATION: Aralez Pharmaceuticals Inc. (Re), 2018 ONSC 6980
COURT FILE NO.: CV-18-603054-00CL
DATE: 20181121

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c.c-36, AS AMENDED

RE: IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ARALEZ PHARMACEUTICALS INC. AND ARALEZ PHARMACEUTICALS CANADA INC., Applicants

BEFORE: S.F. Dunphy J.

COUNSEL: *Maria Konyukhova and Kathryn Esaw* for Applicants

Jeffrey Levine, for the Official Committee of Unsecured Creditors

David Bish, for Richter Advisory Group, Monitor

Danish Afroz, for Deerfield Management Company, L.P.

HEARD at Toronto: November 16, 2018

REASONS FOR DECISION

[1] This case raises for determination the always-troubling question of Key Employee Retention Plans (or "KERPs") and Key Employee Incentive Plans (or "KEIPs"). At the conclusion of the hearing. I indicated that I would be approving the proposed KERP involving three employees with reasons to follow and would take under reserve the matter of the proposed KEIP.

[2] For the reasons that follow, I have determined to approve the KEIP as well. My reasons that follow apply to both programs.

Background facts

[3] The applicants Aralez Pharmaceuticals Inc. and Aralez Pharmaceuticals Canada Inc. brought this application under the *Companies' Creditors Arrangement Act*, R.S.C. 1990, c. C.-36 and an initial order was granted by me on August 10, 2018 with Richter Advisory Group Inc. appointed as Monitor. A number of affiliated entities in the

same corporate group sought relief pursuant to Chapter 11 of the United States Bankruptcy Code on the same day. The Chapter 11 case is being managed by Justice Glenn in the United States Bankruptcy Court for the Southern District of New York. Both courts have adopted a cross-border protocol.

[4] As their names suggest, the Aralez group of companies are in the pharmaceutical industry. The debtor companies have operated in an integrated manner and have 41 employees at the Canadian entities and 23 in the Chapter 11 entities.

[5] In addition to being operationally integrated, Aralez has an integrated capital structure as well. The secured credit facility is secured by substantially all of the assets of the debtor companies on both sides of the border. The secured creditors – Deerfield Partners L.P. and Deerfield Private Design Fund III, L.P. – possess security on substantially all of the assets of the debtor companies on both sides of the border. The security in Canada has been subjected to independent review by the Monitor and its counsel and no issues have arisen nor have any creditors objected to their claims.

[6] These cases have been targeting a managed liquidation from the start. On September 18, 2018, the Canadian and US entities entered into three stalking horse agreements and, pursuant to a court-ordered sales process order, are in the process of completing a bid process in the coming days. The three stalking horse bids place a "floor" under sale proceeds of approximately $240 million subject to possible adjustments. This compares to the secured claim of Deerfield that is approximately $275 million.

[7] I understand that a motion may be brought in the United States to challenge some aspects of Deerfield's security in that jurisdiction (no such motion has been suggested in Canada to date). However, as things currently stand, the bid process underway would have to yield a fairly significant improvement from the existing stalking horse offers in order to result in surplus being available for junior creditor groups. The point of this analysis is merely to establish that Deerfield's input into the process of design of the KEIP and KERP programs before me is a material factor. Any funds diverted to KEIP or KERP programs have a substantial likelihood of coming out of Deerfield's pocket in the final analysis and any improvements or de-risking to either cash flow or sales proceeds will enure very substantially to Deerfield's benefit.

[8] Stated differently – Deerfield has significant "skin in the game" when it comes to a KERP or KEIP.

[9] Deerfield's interest acquires somewhat greater weight when one considers that one of the stalking horse bids (in the United States) is a credit bid whereas the Canadian stalking horse bid involves a sale of the assets of Aralez Pharmaceuticals Inc., resulting in the unsecured creditors of subsidiary Aralez Pharmaceuticals Canada Inc. being granted effective priority over Deerfield despite Deerfield's secured claims.

Deerfield is thus very likely to be one of the only Canadian creditors substantially impacted by the KEIP or KERP.

[10] This does not imply that the Court is a rubber stamp as to whatever Deerfield may have approved nor does it imply that other voices have no weight. It does imply that some comfort can be taken that this process has been subject to arm's length market discipline. Deerfield has an interest in getting as much as possible in the way of value-added effort out of the employee group and they have an interest in getting that effort at as low a cost as they can bargain for.

[11] The KERP program involved only three employees, was reported upon extensively by the Monitor and was not opposed by any stakeholder. I approved it at the hearing with reasons to follow (these are those reasons). The KEIP program affects nine senior management employees whose services are provided to both the Canadian and United States debtors and was accordingly presented to both courts for approval. I am advised that Justice Glenn approved the KEIP program for purposes of the United States debtors on November 19, 2018.

[12] While the KERP and KEIP programs were presented to me separately, they have many features in common. Were this not a transnational proceeding, it is quite likely that I should have had but a single combined KERP-KEIP program before me since these are not commonly differentiated in this jurisdiction. Different considerations obtain in the United States where KERP programs for some categories of employees are not allowed and KEIP programs are subject to specific rules one of which is that the predominant purpose of a KEIP must be *incentive* and not *retention*. Both are appropriate criteria in our process. In approving the KEIP program for the United States debtors, Justice Glenn indicated that he was satisfied that the KEIP program was designed primarily to incent the beneficiaries of the program.

[13] The Canadian KERP impacts three employee of Aralez Pharmaceuticals Canada Inc. The KERP would provide these three with a retention bonuses of between 25% and 50% of salary. The total amount payable under the proposed program would be $256,710 and payment is to be made on the earlier of termination without cause, death or permanent disability and the closing of a sale of the Canadian assets.

[14] The KEIP impacts nine senior management employees of the Canadian debtors who provide services (in all but one case) that benefit both estates. None of the KEIP participants are expected to have on-going roles once the bankruptcy sales process is completed. The program is designed to incent participants to assist in achieving the highest possible cash flow during the bankruptcy process (thereby reducing the need to rely upon DIP financing) and to achieve the highest level of sales proceeds. Cash flow is measured relative to the DIP budget and nothing is payable until sales are completed.

[15] The affected individuals are members of the senior management team that can be expected to be in a position to achieve a positive impact upon both criteria (cash flow and sales proceeds), but their roles are such that the level and value of the contributions of each towards those targets are difficult to measure with precision. Total payouts under the "super-stretch" targets could rise to as much as $4,058,360. This figure may be compared to the stalking horse bids that establish a floor price of $240 million.

[16] Since all but one of the participants in the KEIP program are providing services for the benefit of both United States and Canadian debtors, the KEIP program has been designed such that costs will be shared by the two estates regardless of residence.

[17] The design of the two programs was supervised by Alvarez & Marsal Inc, the financial advisor to the United States and Canadian debtors. The Compensation Committee of the parent company's Board was involved as was the debtor's counsel. The Monitor was consulted at every step in the process and provided significant input that was taken into account. The Board of Directors of each affected entity has approved the plans.

[18] The programs were disclosed to the proposed beneficiaries at or near the outset of the bankruptcy process. At the request of the DIP Lender, court approval of these programs was not sought at that time as is relatively common. The stalking horse bids were several weeks away from being finalized and significant effort from the affected employees would be needed to but those transactions to bed. The sales process that followed also needed to be put on the rails and the all hands were needed to ensure that the business passed through the initial stages of the bankruptcy filing without undue adversity. In short, the affected employees were asked to acquiesce in the deferral of approval of these programs with the understanding that the employer would pursue their approval in good faith.

[19] With only a few weeks remaining until the expected end of the sales process, it is fair to observe the employees have more than delivered on their end of the bargain. Cash flow has held up very well and the stalking horse bids have been firmed up at a favourable level.

[20] The motion for approval of the KEIP (not the KERP) was opposed by the Official Committee of the Unsecured Creditors appointed pursuant to the United States Chapter 11 process. I shall not review here the nature of their standing claim – and the dispute of that claim. Their intervention has been focused, their arguments precise and the prospect of harm in the form of unnecessary delay or expense is minimal. Without prejudice to the position of everyone on the status of this committee in other contexts, I agreed to hear them and receive their written arguments. The cross-border protocol that both courts have approved affords me discretion to allow the Official Committee standing on a case-specific or *ad hoc* basis.

[21] In the view of the Official Committee, the KEIP program bonuses are too high and too easily earned. I shall address both of these arguments below.

Issues to be determined

[22] Ought this court to exercise its discretion to approve the KERP or KEIP programs as proposed by the applicants?

Analysis and discussion

[23] KERP/KEIP programs throw up a number of thorny issues that must be grappled with because there are a number of potentially conflicting policy considerations to balance.

[24] The early stages of an insolvency filing are chaotic enough without having added pressures of trying stem the hemorrhage of key employees. "Key" is of course an elastic concept. Everyone is key to someone. Employees are not hired to amuse management but to perform necessary functions. Sorting out "key" in the context of the organized chaos that is the early days of an insolvency filing requires a weathered eye to be cast in multiple directions at once:

- restructuring businesses often have inefficiencies that need identifying and resolving that may impact some otherwise "key" employees;
- with the levers of traditional shareholder oversight blunted in insolvency, the risks of management resolving conflicts in favour of self-interest are acute;
- it is easy to overstate the risk of loss of key employees if a "bunker mentality" causes management to take counsel of their fears rather than objective evidence, such evidence to be informed by a recognition that *some* degree of instability is inevitable; and
- "business as usual" is a goal, but never a perfectly achievable one and small amounts of stability acquired at high cost may be a bad investment.

[25] While the risks of abuse or wasted effort are easily conjured, the legitimate use of an appropriately-calibrated incentive plan are equally obvious:

- Employees in newly-insecure positions are easy prey to competitors able to offer the prospect of more stable employment, sometimes even at lower salary levels, to people whose natural first priority is looking after their families;

- There is a risk that the most employable and valuable employees will be cherry-picked while the debtor company may find itself substantially handicapped in trying to compete for replacement employees;

- Whether by reason of internal restructuring or a court-supervised sales process, employees may often find themselves being asked to bring all of their skills and devotion to the task of putting themselves out of work; and

- Since many employers use a mix of base salary and profit-based incentives, employees of an insolvent business in restructuring may find themselves being asked to do more – sometimes covering for colleagues who have being laid off or who have left for greener pastures - while earning a fraction of their former income.

[26] What is wanting to sort out these competing interests is one thing that the court – on its own at least – is singularly ill-equipped to provide. It is here that the essential role of the Monitor as the proverbial "eyes and ears of the court" comes to the fore. The court cannot shed its robe and wade into the debate in a substantive way. The Monitor on the other hand can shape the manner in which the debate is conducted and in which the decisions presented to the court for approval are made.

[27] What the court is unable to supply on its own can be summed up in the phrase "business judgment". Outside of bankruptcy, the debtor company is entitled to exercise its own business judgment in designing such programs subject to the oversight of shareholders and the directors they appoint. Inside bankruptcy, the oversight of the court is required to assess the reasonableness of the exercise of the debtor company's business judgment. In my view, the court's role in assessing a request to approve a KERP or KEIP program is to assess the totality of circumstances to determine whether the process has provided a reasonable means for *objective* business judgment to be brought to bear and whether the end result is objectively reasonable.

[28] Perfect objectivity, like the Holy Grail, is unattainable. However, where business judgment is applied in a process that has taken appropriate account of as many of the opposing interests as can reasonably be brought into the equation, the result will adhere most closely to that unattainable ideal.

[29] My review of the limited case law on the subject of KERP (or KEIP) approvals suggests that there are no hard and fast rules that can be applied in undertaking this task. However the principles to be applied do emerge. Morawetz J. suggested a number of considerations in *Cinram International Inc. (Re)*, 2012 ONSC 3767 (CanLII),

relying on the earlier decision of Newbould J. in *Grant Forest Products Inc. (Re)*, 2009 CanLII 42046 (ON SC)[1]. I reproduce here the synthesis of Morawetz J. (*Cinram*, para. 91):

> a. whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);
> b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;
> c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;
> d. the employees' history with and knowledge of the debtor;
> e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;
> f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;
> g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and
> h. whether the payments under the KERP are payable upon the completion of the restructuring process.

[30] I have conducted my examination of the facts of this case having regard to the following three criteria which I think sweep in all of the considerations underlying *Grant* and *Cinram* and which provide a framework to consider the degree to which appropriately objective business judgment underlies the proposal:

(a) Arm's length safeguards: The court can justifiably repose significant confidence in the objectivity of the business judgment of parties with a legitimate interest in the matter who are independent of or at arm's length from the beneficiaries of the program. The greater the arm's length input to the design, scope and implementation, the better. Given the obvious conflicts management find themselves in, it is important that the Monitor be actively involved in all phases of the process – from assessing the need and scope to designing the targets and metrics and the rewards. Creditors who may fairly be considered to be the ones indirectly

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[1] See also Pepall J. (as she then was) in *Canwest Global Communications Corp. (Re)*, 2009 CanLII 55114 (ON SC) at para. 49-52.

benefitting from the proposed program and indirectly paying for it also provide valuable arm's length vetting input.

(b) Necessity: Incentive programs, be they in the form of KERP or KEIP or some variant are by no means an automatic or matter of course evolution in an insolvency file. They need to be justified on a case-by-case basis on the basis of necessity. Necessity itself must be examined critically. Employees working to help protect their own long-term job security are already well-aligned with creditor interests and might generally be considered as being near one end of the necessity spectrum while those upon whom great responsibility lies but with little realistic chance of having an on-going role in the business are the least aligned with stakeholder interests and thus may generally be viewed as being near the other end of the necessity spectrum when it comes to incentive programs. Employees in a sector that is in demand pose a greater retention risk while employees with relatively easily replaced skills in a well-supplied market pose a lesser degree of risk and thus necessity. Overbroad programs are prone to the criticism of overreaching.

(c) Reasonableness of Design: Incentive programs are meant to align the interests of the beneficiaries with those of the stakeholders and not to reward counter-productive behavior nor provide an incentive to insiders to disrupt the process at the least opportune moment. The targets and incentives created must be reasonably related to the goals pursued and those goals must be of demonstrable benefit to the objects of the restructuring process. Payments made before the desired results are achieved are generally less defensible.

(a) Arm's length safeguards

[31] In my view, there is substantial evidence that the process of negotiating and designing both programs has benefitted from significant arm's length and objective oversight in the negotiation, design and implementation phases of these two programs.

[32] The process leading to both programs began prior to the insolvency filings on August 10, 2018. Aralez had engaged A&M as its financial advisor for the restructuring process and asked A&M to help formulate both the key employee incentive and retention programs. A&M worked on program design in consultation with the debtor's legal counsel and with input from the compensation committee of the Aralez Pharmaceuticals Inc. Board of Directors, none of whom are beneficiaries of either program.

[33] The Monitor has been consulted extensively. The Monitor has inquired into the design and objects of the proposed plans and has verified the levels of the proposed

incentives relative to the objectives of the programs and other historical data. The Monitor's input has resulted in a number of alterations to the proposals as these have evolved. As the programs have emerged from the process, the Monitor's conclusion is that the KERP is comparable to other KERP plans this court has approved and is reasonable in the circumstances. The Monitor has concluded that the KEIP addresses the concerns raised by the Monitor, protects the interest of Canadian stakeholders and these would not be materially prejudiced by approval of the KEIP. Both recommendations are entitled to very significant weight from this court.

[34] The U.S. Trustee raised a number of concerns with the proposed KEIP which have also resulted in revisions.

[35] Finally, Deerfield has been consulted and has indicated that they take no objection to either program as they have emerged from this process. For the reasons discussed above, Deerfield's *imprimatur* carries a particularly significant degree of weight in these circumstances in terms of establishing the arm's length and market-tested nature of the two programs before me.

[36] The business judgment of Deerfield and the Board of Directors of API are entitled to significant weight. The independent and very significant input of the Monitor, A&M and the U.S. Trustee afford significant comfort that objective viewpoints have played a significant role in designing and vetting the proposals. Finally, the recommendation of the Monitor is entitled to significant weight given the unique role the Monitor plays in the Canadian restructuring process.

[37] In summary, the process followed provides a high degree of comfort that a reasonable level of objective business judgment has been brought to bear. Circumstances will not allow every case the luxury of such a thorough process. However, this process was professionally designed thoroughly run. It has appropriately generated a high level of confidence in the integrity of the outcome

(b) Necessity

[38] The design of the two programs demonstrates an appropriate regard for the criterion of necessity. They are not over-broad.

[39] Any analysis of whether a program is over-broad must take into account the nature of the business. In some respects, Aralez may be likened to a virtual pharmaceutical company in that it out-sources many functions of a traditional pharmaceutical company such as manufacturing. It thus has relatively few employees compared to its size.

[40] In designing the programs and assessing which employees to be included, an assessment was undertaken of each prospective beneficiary in terms of the ease with which they might be replaced, the degree to which they are critical to daily operations of

the debtor companies or completion of the sales process and – for the KERP program at least – the perceived level of retention risk. The Monitor's input was sought at each level of the design and finalization of the programs.

[41] The KERP program involves three employees in Canada and I am advised that their inclusion in the KERP is a condition of the purchaser under the stalking-horse bid. The loss of these three employees – critical to the Canadian business being sold – would endanger the stalking horse bid process at worst and disrupt the business being sold by requiring the debtor companies to deal with recruiting, transition and similar matters at a juncture where they are least able to deal with them at best. Their departure at this juncture would entail significant additional expenditures in terms of professional time at least if that event did not endanger the stalking horse bid.

[42] The KEIP program involves nine members of senior management. They are employees the nature of whose function defies precise description or measurement. They are employees who act in concert with each other as part of a team for whom neither the clock nor the calendar play more than a subsidiary role in dictating their hours of labour. These employees are essential to ensuring the business remains stable and performs well during the restructuring process. They play a key role in helping ensure the sales process achieves the highest level of return. They are also employees most of whom are laboring under the near certainty that the more efficient and successful they are in their efforts, the sooner they will be out of a job.

[43] At such a high level, personal reputation and professional pride remain as significant motivators to be sure. While a job well done may be its own reward, appropriate financial incentives are not without their place. This is a classic case for a well-designed incentive program.

[44] I am satisfied that the design of these programs satisfies the criterion of necessity.

(c) Reasonableness of design

[45] The KERP program provides for retention bonuses ranging from 25% to 50% of annual salary. The aggregate compensation available is $256,710, a figure that may be contrasted to the stalking horse bid for the Canadian assets of $62.5 million. Payment is made on the earlier of termination without cause by the company, death or permanent disability and the completion of the sales transaction.

[46] The timing of payments and the amount of the payments provided for, relative both to the salary of the individuals and to the value of the company, are both well in-line with precedent.

[47] The KEIP program provides for incentive payments to participants based on the debtors' performance relative to target established for cash flow targets during the

bankruptcy proceedings and relative to the achieved asset sale proceeds. Failure to reach targets results in no bonus, while four levels of bonus are possible (Threshold[2], Target, Stretch and Super Stretch).

[48] The real controversy on the motion was in respect of the KEIP.

[49] It is true that the cash flow performance of the debtors to date plus the projections of cash flow over the coming weeks put the KEIP participants well on track to achieving the highest "super-stretch" level of incentive. It is also true that if *no* bids are received in the sales process now underway and only the stalking horse bids are completed, the participants will be comfortably within the "target" level of incentive for asset sales. Combined, this means that that total incentives of approximately 81.25% of salary appears to be all but assured to KEIP participants. In the circumstances, the Official Committee objects that these incentives are simply too easily earned.

[50] They also object to the level of incentives relative to salary as being unacceptably high.

[51] The answer to both of these objections lies in the peculiar facts of this case.

[52] The KERP and KEIP programs were both conceived of and designed primarily in the period leading up to the initial filings made in August 2018, although alterations have been made following the input of, among others, the United States trustee. The employees selected for inclusion in both programs have been operating in the expectation that the employer would proceed in good faith to seek court approval as soon as practicable. At the request of the DIP Lender, the process of seeking court approval was deferred to put priority on the process of securing and finalizing the stalking horse bids and getting the sales process underway. At the time these plans were first offered to employees, forecasting cash flow in bankruptcy and sales proceeds was looking through a glass darkly. It is only hindsight – and the past efforts of the employees – that has made the targets appear to be such an easy goal.

[53] Of course, the employer could not promise and the employee could not expect that court approval of these plans would be a rubber stamp. That does not mean that this court should not take into account the circumstances prevailing when the plans were first offered to employees and the good faith of the employees in continuing to apply their shoulders to the wheel without causing disruption to the process when it could least afford it. It would be fundamentally unfair to penalize the affected employees for their good faith and constructive behavior in this case. It would also be counter-productive as such a precedent would not fail to alter behavior in future cases.

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[2] The threshold incentive based on cash flow was removed after discussions with the United States Trustee.

[54] I am satisfied that the targets were realistic and appropriate at the time they were set and served to align the interests of employees with stakeholders in an appropriate manner.

[55] The level of incentive is also less than meets the eye when the facts are examined more closely. While the combined cash flow plus asset sale incentives could result in incentives of up to 125% of salary, that figure is premised on base salary. In the case of the employees within the proposed KEIP program, base salary has been but one portion of their total compensation. When historical compensation is taken into account, the incentive payments recede to levels significantly below the 80% level calculated by the Official Committee to something closer to 50%.

[56] I am satisfied that the incentive amounts are reasonable in all of the circumstances.

Disposition

[57] In the result, I confirmed the KERP program at the hearing of the motion on December 16, 2018 and am granting the motion in respect of the KEIP program at this time. My approval extends to the requested priority charges securing the KEIP payments.

[58] Order accordingly.

S.F. Dunphy J.

Date: November 21, 2018

TAB 5

CITATION: *Just Energy Group Inc. et al.,* 2021 ONSC 7630
COURT FILE NO.: CV-21-00658423-00CL
DATE: 2021-11-18

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERICAL LIST)

RE: IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND:

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.

BEFORE: Koehnen J.

COUNSEL: *Jeremy Dacks, Marc Wasserman, Michael De Lellis, Shawn Irving and Emily Paplawski*, for the Just Energy Group

Neil Herman and Allyson Smith, U.S. Counsel to the Just Energy Group

Jonah Davids and Michael Carter, for the Just Energy Group

Ryan Jacobs, Jane Dietrich and Alan Merskey, Canadian Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, and OC II LVS XIV LP in their capacity as the DIP Lenders

David Botter, Sarah Schultz and Anthony Loring, U.S. Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, and OC II LVS XIV LP in their capacity as the DIP Lenders

Heather Meredith and James D. Gage, Canadian Counsel to the Agent and the Credit Facility Lenders

Howard Gorman, Ryan Manns and Travis Torrence, for Shell Energy North America (Canada) Inc. and Shell Energy North America (US)

Robert Kennedy and David Mann, Canadian Counsel to BP Canada Energy Marketing Corp., for BP Energy Company, BP Corporation North America Inc., and BP Canada Energy Group ULC

Tyler Planeta, for the Plaintiff, Stephen Gilchrist (in proposed securities class proceeding in SCJ at Toronto, File No. CV-19-627174-00CP)

Steven Wittels and Susan Russell, U.S. Counsel for Fira Donin and Inna Golovan, in their capacity as proposed class representatives in Donin et al. v. Just Energy Group Inc. et al.

Bevan Brooksbank, for Chubb Insurance Company of Canada and Zurich Insurance Company of Canada

Robert Thornton, Rebecca Kennedy, Rachel Bengino and Puya Fesharaki, for FTI Consulting Canada Inc., as Monitor

Paul Bishop and Jim Robinson, for FTI Consulting Canada Inc., as Monitor

John F. Higgins, U.S. Counsel to FTI Consulting Canada Inc., as Monitor

HEARD: November 10, 2021

ENDORSEMENT

[1] The applicants Just Energy Group Inc. and its affiliates bring two motions. The first is for an order extending the stay under the *Companies' Creditors Arrangement Act*,[1] amending its Debtor in Possession Financing Term Sheet, approving a transaction for the wind up of Just Energy Finance into Just Energy and approving a second key employee retention plan (the "Second KERP"). On the second motion, Just Energy and its relevant affiliates seek leave to sell shares in a private company. As part of that transaction one of the Just Energy affiliates would be wound up and dissolved. Doing so would allow Just Energy to capture over $6 million in tax benefits. Strictly speaking, however, the affiliate does not meet the solvency requirements that corporate law imposes before a corporation can be wound up.

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

At the end of the hearing I approved orders granting the relief requested in respect of both motions with reasons to follow. These are those reasons.

The First Motion

I. The Second KERP

[2] The only contentious element of the first motion is Just Energy's proposal for a second KERP in the amount of $4,381,934.

(a) The Request for an Adjournment

[3] Ian Wittels appeared as US counsel for a group of class action plaintiffs who have commenced a complaint in the United States. The complaint alleges that one or more of the applicants has fraudulently overcharged American consumers for their energy needs. He sought an adjournment to consider his position on the KERP and indicated that he may be objecting to it because it removes assets from the CCAA estate which could otherwise be used for the benefit of his clients. I declined the adjournment.

[4] The class action claim was filed in the US courts approximately 2 ½ years ago. This was long before the CCAA proceeding began in early March 2021. The class-action plaintiffs have therefore had the possibility to investigate matters and seek Canadian legal advice for some time. They did not object to the first KERP that was approved in March 2021 and which provided for total payments of $6,679,625.

[5] The motion materials for the second KERP were served seven days before the hearing. The class action plaintiffs raised no objections until the hearing before me on November 10. This is a large CCAA proceeding with a significant number of stakeholders who have appeared throughout, including at the hearing on November 10.

[6] I was not given any satisfactory reason for which the class action plaintiffs were unable to raise concerns with the applicants or the Monitor before the hearing on November 10. After declining the adjournment, I invited Mr. Wittels to make submissions opposing the Second KERP.

(b) Objections to the Second KERP

[7] The factors to consider in determining whether to approve a KERP include (i) the approval of the Monitor; (ii) whether the beneficiaries of the KERP are likely to consider other employment opportunities if the KERP is not approved; (iii) whether the beneficiaries of the KERP are crucial to the successful restructuring of the debtor company; (iv) whether a replacement could be found in a timely manner should the beneficiary elect to terminate his or her employment with the debtor company; and (v) the business judgment of the board

of directors of the debtor. These factors were found to support the first KERP. They are equally relevant in determining whether to approve the second KERP.

(i) Approval of the Monitor:

[8] The Monitor supports the Second KERP. Indeed, it was developed with input and feedback from the Monitor.

(ii) Likelihood of Employee Departures

[9] The class action plaintiffs submit that the applicants have introduced no evidence that employees would actually leave without a Second KERP, and that any evidence in that regard is speculative.

[10] The applicants have described the increased hardship that key employees have suffered since the commencement of the CCAA proceeding. In addition to carrying on their regular duties as Just Energy employees, key employees have assumed the considerable burden of administering the CCAA proceedings and advancing the prospects of a plan. This has been no easy task. Just Energy is a highly regulated business. The company is subject to separate regulatory regimes in each state or province in which it operates. It has complex commercial arrangements with suppliers and a number of secured and unsecured lenders. The integrity of those arrangements in turn depends on Just Energy's compliance with regulatory requirements. Developing a plan in these circumstances involves complex, detailed discussions with regulators, suppliers, and creditors. These discussions have become even more cumbersome and time-consuming than they would ordinarily be because of the Covid 19 pandemic. This has led Just Energy management to have serious concerns about employee burnout.

[11] As a practical matter, it would be extremely difficult, if not impossible, to introduce hard evidence that employees will leave without a KERP. As an equally practical matter, however, CCAA proceedings put employees into a highly vulnerable position. They have no idea what will become of their employment at the end of the CCAA proceeding. They do not know whether they will retain their positions or whether the enterprise will be merged with another entity which will rationalize its human resources requirements resulting in the termination of a significant number of key employees. They do not know whether the Just Energy entity that emerges from the plan will have the same manpower needs as it currently has or whether it will also materially reassess its human resources requirements. In those circumstances, it is very tempting for an employee to accept a position with another employer that seems to offer more job stability than an entity in CCAA proceedings can. That creates a material risk of employee departures.

(iii) Are Beneficiaries of KERP Critical to a Successful Restructuring

[12] Both the applicants and the Monitor believe the beneficiaries of the KERP are critical to the success of the restructuring.

[13] The first KERP was approved in March. Since then no one has taken issue with the identity of the beneficiaries or their importance to a successful restructuring.

(iv) Ease of Replacing Departing Employees

[14] While employees can always be replaced, finding a replacement with equal skill and knowledge of Just Energy's business and operations is very difficult in the time pressured atmosphere of a CCAA proceeding.

[15] This is particularly so with Just Energy. As noted in paragraph 10 above, it is a complex, highly regulated business. That makes bringing new employees up to speed a more time-consuming process. Time in a CCAA proceeding translates into cost and potential prejudice to a plan.

(v) Business Judgment of the Board

[16] The Board of Just Energy has concluded that the Second KERP is required to promote a plan. The KERP extends well beyond senior management. This is not a situation of the Board keeping its friends in management happy. Rather, the KERP appears to be a considered plan to identify employees throughout the enterprise whose retention is important for the plan.

[17] In addition to the business judgment of the Board, I would add the business judgment of the creditors. The principal lenders and suppliers to Just Energy are highly sophisticated entities. They have no interest in having Just Energy dissipate its assets on wasteful employee bonus schemes. They do have an interest in recovering on their debt. They have concluded that the best way to do that at the moment is to proceed with the Second KERP. This includes unsecured lenders with loans of approximately (US) $300 million. Those are creditors with hard claims for monies already advanced. The class action plaintiffs, on the other hand have an unliquidated claim for damages in a class action that has not yet been certified, let alone tried.

[18] Mr. Wittels submits that there are millions of American consumers who have been disadvantaged by the allegedly fraudulent conduct of the applicants. In those circumstances, he submits that the court "should be putting the brakes" on payments to employees. He further submits that the plaintiffs' ability to recover on their $2 billion claim will be reduced if corporate funds are siphoned off by payments to employees under the Second KERP.

[19] The principle behind the KERP is not to deprive creditors of recovery but to improve creditor recovery by maintaining the applicant's ongoing business by retaining key employees.

[20] A KERP can be seen as an investment in the ongoing enterprise. If the investment is successful, there will be much more to distribute to creditors as a result of a plan than there would be without the KERP. Whether a plan might have been possible without a KERP can only be assessed after the fact. Entities in CCAA protection do not, however, have that

luxury. They may equally find out after the fact that employees have fled leaving them incapable of advancing a plan. At that point it is too late to implement a KERP.

[21] Like any other investment, KERPs have risk. There is a risk that the KERP will not result in larger creditor recovery at the end of the day. The applicants served their motion on 400 parties including secured and unsecured creditors. All but the class action plaintiffs appear to agree that the best way forward is to continue the CCAA proceeding with a Second KERP.

[22] The First KERP was developed based on the expectation that the restructuring would be largely concluded but for regulatory approvals by the end of 2021. It was therefore structured to provide employees with payments in September and December 2021. The size and complexity of the proceeding have not allowed the plan to advance as much as Just Energy would have liked to. Approximately 80% of the payments on the first KERP have already been paid out. The balance will be paid out in December 2021 and March 2022.

[23] Just Energy estimates that it requires employees to remain until at least June 2022. There is significant concern that the balance of the First KERP does not provide sufficient incentive for key employees to remain until June 2022.

[24] The Second KERP is designed to incentivize employees to remain. It envisages paying retention bonuses to nonexecutive employees in March and September 2022. If a successful restructuring occurs before September, the final KERP would be paid at that time. Executive KERP recipients will receive one instalment in March 2022 and a second success-based payment on completion of a successful restructuring.

[25] In light of the foregoing considerations, I am satisfied that the Second KERP should be approved.

(c) The Sealing Order

[26] As part of the approval of the Second KERP, the applicants also seek an order sealing details of the amounts paid to individual employees.

[27] In *Sherman Estate v. Donovan*,[2] the Supreme Court of Canada held at para. 38 that an applicant for a sealing order must establish that:

(i) court openness poses a serious risk to an important public interest;

(ii) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

[2] 2021 SCC 25

(iii) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[28] All 3 factors are satisfied here. The documents the applicants seek to seal contain the names of the KERP recipients and the amounts each will receive. Publicly disclosing employee compensation violates the privacy interest of those employees. The employees themselves have not initiated any court proceeding that would require production of that information. Broad publication of confidential income data could create risks for employee retention in this and other CCAA proceedings.

[29] In *Ontario Securities Commission v. Bridging Finance Inc.*[3] Chief Justice Morawetz recently granted a sealing order over the details of a KERP in similar circumstances. I am satisfied that it is equally appropriate to make that order here. The limitation on the open courts principle is minimal. The order is proportional. It benefits in protecting privacy interests of non-party employees outweigh the very limited impact on the open courts principle.

II. The Stay Extension

[30] There is no opposition to the request to extend the CCAA stay from December 17, 2021 to February 17, 2022. The court has discretion to extend the stay if circumstances exist that make doing so appropriate and if the applicant continues to act in good faith and with due diligence towards a plan.[4] I am satisfied from my review of the Fourth Report of the Monitor that the applicant is doing so. In addition, the Just Energy cash flows produced on the motion demonstrate that the applicants have sufficient funds to continue operations until February 17, 2022. As a result, I extend the stay until February 17, 2022.

III. The Amended DIP Term Sheet

[31] The applicants seek to extend the term of their DIP loan from December 31, 2021 to September 30, 2022. They do not seek to increase the amount of the loan. The extension involves payment of a 1% financing fee which amounts to a payment of approximately (US) $1,250,000.

[32] No one opposed the DIP extension. That said, the payment of the extension fee raises the same issues about potentially reducing the size of the estate available to the class action plaintiffs as does the Second KERP. I will therefore proceed on the basis that the class action plaintiffs oppose the DIP extension even though Mr. Wittels did not expressly raise that argument. I take this approach because it struck me that the class action plaintiffs may have become alive to the issues that the CCAA poses for them fairly late in the day.

[33] To the extent that a CCAA proceeding ultimately fails, there is always the risk that the cost of the financing fee associated with the extension will further diminish the pool of assets available for creditors. As with the KERP, however, the ultimate goal is to have more

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[3] 2021 ONSC 4347 at paras. 25-27.
[4] CCAA, ss. 11.02(2) -11.02(3)

money available for creditors in a CCAA proceeding than would be available in a bankruptcy.

[34] Section 11.2 (4) provides that the court should consider, among other things, the following factors when considering interim financing:

> (a) the period during which the company is expected to be subject to proceedings under the CCAA;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the view of the monitor.

[35] Those factors are also appropriate to consider when considering amendments to DIP financing.[5]

[36] Applying those factors here, I am satisfied that the DIP extension should be approved.

[37] The applicants expect to finalize a plan some time between June and September of 2022. The applicants have the support of their creditors. To date, no creditor has spoken against the DIP extension or any other issue involving management of the Just Energy group. The expiry of the DIP facility on December 31, 2021 would put an end to Just Energy's ability to arrive at a plan. The extension of the DIP facility would considerably enhance the prospects of a viable plan. The monitor supports the extension of the DIP facility. The monitor specifically references the extension fee in its report and believes it to be reasonable. Just Energy continues to be a significant enterprise with hundreds of employees. The company has been moving in good faith towards a plan, but the business is of such a complexity that it has taken longer than initially anticipated. This is not surprising. The company is subject to a myriad of regulatory regimes across the United States and Canada. It has complex commercial arrangements with suppliers and a number

[5] *Re Laurentian University of Sudbury*, 2021 ONSC 3545, at para. 39

of secured and unsecured lenders, the integrity of which in turn depends on Just Energy's compliance with regulatory requirements.

[38] In the foregoing circumstances, I am satisfied that the DIP loan should be extended.

IV. The Just Energy Finance Transaction

[39] The applicants seek court approval to undertake a transaction that would wind up JE Finance into Just Energy and subsequently file articles of dissolution in respect of JE Finance. The applicants seek approval of the transaction because JE Finance and Just Energy are applicants in this proceeding and because paragraph 13 (c) of the Second Amended and Restated Initial Order dated May 26, 2021 prevents the applicants from reorganizing a material portion of their business without court approval.

[40] The ultimate objective of the Finance dissolution is to realize tax losses in Just Energy Hungary (a wholly owned subsidiary of JE Finance). As part of the proposed transaction certain intercompany loans will be set off against each other and all remaining assets and liabilities of JE Finance will be rolled into Just Energy. No creditors will be prejudiced by that transaction and no creditors oppose it. The Monitor supports the transaction.

[41] The transaction is consistent with the objectives of the CCAA, principally because it maximizes the value of the debtor's assets for the benefit of all stakeholders. In those circumstances, I am satisfied that the JE Finance transaction and its subsequent dissolution should be approved.

The Second Motion: The ecobee Transaction

[42] Just Management Corp. ("JMC") is a wholly owned subsidiary of Just Energy. JMC owns shares in ecobee Limited ("ecobee"). ecobee has entered into a proposed transaction with Generac Power Systems Inc. which it proposes to conclude by way of a plan of arrangement. JMC would like to support that transaction and seeks an order authorizing it to enter into a Support Agreement pursuant to which it would agree to be bound by the arrangement and would dispose of its ecobee shares pursuant to the arrangement.

[43] The notice of motion seeking approval of the ecobee transaction was delivered only the day before the hearing. The relief it seeks was, however, set out in an affidavit that was served a week earlier. Given the nature of the transaction which is described below and the description of it in the earlier affidavit, I was prepared to consider it on November 10 despite the short notice.

[44] Court approval is required because the Initial and subsequent Orders require court approval for any refinancing, restructuring, sale, or reorganization of the Just Energy entities' businesses. A further issue arises because the *Canada Business Corporations Act*[6] (the

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[6] *Canada Business Corporations Act*, RSC 1985, c C-44

"CBCA"), pursuant to which JMC is incorporated, makes dissolution available only to solvent corporations. Given that JMC is an applicant in this proceeding and given that it will have transferred its only valuable asset, the ecobee shares, to Just Energy before dissolution, it fails to meet the solvency requirement for a dissolution.

[45] In deciding whether to grant authorization under subsection 36(1) of the CCAA for a sale of assets outside the ordinary course of business, the CCAA court will consider the following non- exhaustive factors:

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in its opinion, the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.[45]

[46] I am satisfied that those factors have been met.

[47] Just Energy acquired the ecobee shares in 2012 for approximately $6.4 million. Just Energy has been trying to sell its ecobee shares for several years without success. As a result of the arrangement, Just Energy anticipates receiving approximately $61,000,000. Of that, approximately $18,000,000 will be received in cash on completion of the Arrangement. The remaining $43,000,000 will be received in publicly traded shares of Generac. Just Energy will be free to dispose of those shares immediately. They are not subject to any hold provision. In addition, if certain performance targets are met, Just Energy has the potential to receive an additional $10,000,000 of Generac shares in 2022 and 2023.

[48] Ecobee has also been looking for a strategic transaction for quite some time. The Generac transaction is the best opportunity that has presented itself.

[49] The Monitor approves the sale of the shares and has filed a report stating that, in its view, the sale of the shares would be more beneficial to creditors than any other transaction. No creditors oppose the transaction. The effect of the proposed sale is highly beneficial to creditors because it will inject significant amounts of cash into the CCAA estate.

[50] Moreover, to some extent the question of approval of the sale of the shares is academic because they are subject to a drag along right which would compel Just Energy to sell the ecobee shares pursuant to any transaction that is approved by the ecobee board and a majority of the votes cast by each class of ecobee shareholders. The majority of each class has already committed to support the proposed Arrangement.

[51] This brings me to the proposed wind up and dissolution transaction that is proposed as part of the sale of the ecobee shares.

[52] The court has jurisdiction to approve the wind up and dissolution transactions pursuant to its general power to make appropriate orders under section 11 of the CCAA. As noted, however, certain aspects of the wind up and dissolution transaction raise further complications. Those include the following:

(i) The stated capital of JMC will be reduced to zero. Although permitted by corporate law, it is potentially subject to a solvency test under section 38 (3) of the CBCA.

(ii) JMC will purchase for cancellation preferred shares that Just Energy Ontario LP holds in JMC. Share repurchases are also subject to corporate solvency tests in subsection 34 (2) of the CBCA. In light of the fact that JMC is a co-guarantor of certain Just Energy indebtedness and is an applicant in this proceeding, the solvency test is most likely not satisfied.

(iii)JMC will be voluntarily dissolved. Section 208 (1) of the CBCA prohibits a corporation that is insolvent from dissolving.

[53] Counsel have not been able to direct me to any caselaw or commentary about the policy rationale behind the CBCA's restrictions on insolvent corporations engaging in certain transactions. It would appear that the purpose of those restrictions is to protect creditors or other stakeholders from transactions that would deprive them of assets or other rights that would ordinarily be available to them under insolvency legislation.

[54] Those concerns do not arise here. The purpose of the winding up and dissolution transaction is to achieve approximately $6.6 million of tax savings that would otherwise not be available. The only assets of JMC are the ecobee shares and an interest in a dormant partnership that has no value. Those assets will be wound up into Just Energy. At the same time, Just Energy will assume any liabilities owed by JMC.

[55] In this case, blind application of the CBCA's solvency requirements would in fact undermine the purpose of those requirements. Oversight by the Monitor and the Court provides additional assurance that the interests of creditors in the dissolution will be protected.

[56] In that context, any solvency requirements contained in the CBCA are breached only if they are viewed in isolation and are divorced from the transactions as a whole. The end

result generates a net benefit to the Just Energy estate by making more assets available than would otherwise be the case.

[57] Gascon J. (as he then was) came to a similar conclusion in *AbitibiBowater*[7] albeit without discussing the point. In that case, the Monitor's 22nd report dated November 19, 2009, noted that certain aspects of the proposed transaction violated the solvency provisions of the CBCA and the Quebec Company's Act. Gascon J. nevertheless issued an order which allowed the transaction to proceed "notwithstanding the provisions of any federal or provincial statute."[8]

[58] Section 11 of the CCAA provides the court with broad remedial jurisdiction. It provides:

> **Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act**, if an application is made under this Act in respect of a debtor company, **the court**, on the application of any person interested in the matter, **may**, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, **make any order that it considers appropriate in the circumstances.**

[59] The section gives the court express power to override the *Bankruptcy and Insolvency Act*[9] and the *Winding up and Restructuring Act*.[10] That power was also used to override the priority schemes in provincial statutes by according super priority to DIP lenders before super priority was enshrined in the CCAA.[11]

[60] In *Century Services Inc. v. Canada (Attorney General)*[12] the Supreme Court of Canada observed that that judicial discretion has allowed the CCAA to adapt and evolve to meet contemporary business and social needs and that it has called on courts to innovate as restructurings become increasingly complex.

[61] In *Rescue! The Companies' Creditors Arrangement Act*[13] Professor Janis Sarra noted that in determining whether and how to exercise its discretion the court should ask itself whether the order will

> "usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs."[14]

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[7] Order in *(Re) AbitibiBowater Inc.* (23 November 2009), Montreal, 500-11-036133-094 (Que. S.C.).
[8] *Ibid.* at para 12.
[9] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3
[10] *Winding-up and Restructuring Act,* RSC 1985, c W-11
[11] *Skydome Corp., Re*, 1998 CarswellOnt 5922; 16 C.B.R. (4th) 118 at paras. 8-9, 13-14.
[12] 2010 SCC 60, [2010] 3 S.C.R. 379 at para 58, 61.
[13] 2d edition, Toronto: Carswell, 2013. The
[14] *Rescue!* at page 120

[62] That exercise requires the court to balance the interests of and prejudice to various stakeholders. Here, the only stakeholder who is potentially prejudiced is the CRA. It did not appear on the motion. It also has other means of protecting its interests by way of tax reassessments.

[63] In circumstances where the proposed transaction would add value to the estate, would not prejudice any stakeholder of the CCAA and does not offend the interests that the CBCA seeks to protect by imposing insolvency requirements, I am satisfied that the winding up and dissolution transaction furthers the effort to avoid social and economic losses that would result from liquidation and should be allowed to proceed.

Disposition

[64] For the reasons set out above I signed orders on November 10, 2021 extending the stay under the CCAA, extending the DIP facility, approving the wind up of Just Energy Finance, approving the Second KERP, approving the sale of ecobee shares in proposed plan of arrangement and permitting the ancillary transactions set out in paragraph 52 above to occur, notwithstanding the insolvency of the corporations involved.

Koehnen J.

Date: 2021-11-18

TAB 6

Wage Earner Protection Program Act, SC 2005, c 47, s 1

Current version: in force since Nov 20, 2021

Link to the latest version :	https://canlii.ca/t/7w0b
Stable link to this version :	https://canlii.ca/t/556xs
Citation to this version:	Wage Earner Protection Program Act, SC 2005, c 47, s 1, <https://canlii.ca/t/556xs> retrieved on 2023-09-18
Currency:	This statute is current to 2023-08-21 according to the Justice Laws Web Site

Wage Earner Protection Program Act

S.C. 2005, c. 47, s. 1

Assented to 2005-11-25

An Act to establish a program to provide for payments to individuals in respect of wages owed to them by employers who are insolvent

[Enacted by section 1 of chapter 47 of the Statutes of Canada, 2005, in force July 7, 2008, see SI/2008-78.]

Short Title

Short title

1 This Act may be cited as the *Wage Earner Protection Program Act*.

Interpretation

Definitions

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

Board means the Canada Industrial Relations Board established by section 9 of the *Canada Labour Code*. (*Conseil*)

eligible wages means

(a) wages other than termination pay and severance pay that were earned during the longer of the following periods:

(i) 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,

(ii) the period beginning on the day that is six months before one of the following days and ending on the date of the bankruptcy or the first day on which there was a receiver in relation to the former employer:

(A) the day on which a proposal is filed by or in respect of the employer under Division I of Part III of the *Bankruptcy and Insolvency Act* or, if a notice of intention to make a proposal is filed by or in respect of the employer under that Division, the day on which the notice of intention is filed,

(B) the day on which the most recent proceedings under the *Companies' Creditors Arrangement Act* are commenced, and

(iii) the period beginning on the day that is six months before one of the following days and ending on the day on which a court makes a determination under subsection 5(5):

(A) the day on which a proposal is filed by or in respect of the employer under Division I of Part III of the *Bankruptcy and Insolvency Act* or, if a notice of intention to make a proposal is filed by or in respect of the employer under that Division, the day on which the notice of intention is filed,

(B) the day on which the most recent proceedings under the *Companies' Creditors Arrangement Act* are commenced; and

(b) termination pay and severance pay that relate to employment that ended

(i) during the period referred to in paragraph (a), or

(ii) during the period beginning on the day after the day on which the period referred to in paragraph (a) ends and ending on the day on which the trustee is discharged or the receiver completes their duties, as the case may be. (*salaire admissible*)

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

Precision

(1.1) For the purpose of the definition eligible wages, a proposal does not include a proposal for which a certificate is given under section 65.3 of the *Bankruptcy and Insolvency Act* and a notice of intention to make a proposal does not include a notice of intention in respect of a proposal for which such a certificate is given.

Meaning of trustee

(1.2) In this Act, **trustee** includes a monitor as defined in subsection 2(1) of the *Companies' Creditors Arrangement Act*.

Employers subject to a receivership

(2) For the purposes of this Act, an employer is subject to a receivership when any property of the employer is under the possession or control of a receiver.

Meaning of receiver

(3) In this Act, **receiver** means a receiver within the meaning of subsection 243(2) of the *Bankruptcy and Insolvency Act*.

Words and expressions

(4) Unless otherwise provided, words and expressions used in this Act have the same meaning as in the *Bankruptcy and Insolvency Act*.

Related persons

(5) Despite subsection 4(5) of the *Bankruptcy and Insolvency Act*,

- **(a)** for the purposes of paragraph 6(d), an individual is considered to deal at arm's length with a related person if the Minister is satisfied that, having regard to the circumstances — including the terms and conditions of the individual's employment with the former employer, their remuneration and the duration, nature and importance of the work performed for the former employer — it is reasonable to conclude that the individual would have entered into a substantially similar contract of employment with the former employer if they had been dealing with each other at arm's length; and
- **(b)** for the purposes of subsection 21(4), individuals who are related to each other are, in the absence of evidence to the contrary, deemed not to deal with each other at arm's length while so related.

2005, c. 47, s. 1 "2"; 2007, c. 36, s. 83; 2009, c. 2, s. 342; 2011, c. 24, s. 163; 2012, c. 19, s. 697(E); 2017, c. 20, s. 378, c. 26, s. 52; 2018, c. 27, s. 627.

Designation of Minister

Power of Governor in Council

3 The Governor in Council may designate a member of the Queen's Privy Council for Canada to be the Minister for the purposes of this Act.

Program Established

Establishment

4 The Wage Earner Protection Program is established to provide for payments to individuals in respect of wages owed to them by employers who are insolvent.

2005, c. 47, s. 1 "4"; 2018, c. 27, s. 628.

Eligibility for Payments

Conditions of eligibility

5 (1) An individual is eligible to receive a payment if

(a) the individual's employment ended for a reason prescribed by regulation;

(b) one of the following applies:

(i) the former employer is bankrupt,

(ii) the former employer is subject to a receivership,

(iii) the former employer is the subject of a foreign proceeding that is recognized by a court under subsection 270(1) of the *Bankruptcy and Insolvency Act* and

(A) the court determines under subsection (2) that the foreign proceeding meets the criteria prescribed by regulation, and

(B) a trustee is appointed, or

(iv) the former employer is the subject of proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies' Creditors Arrangement Act* and a court determines under subsection (5) that the criteria prescribed by regulation are met; and

(c) the individual is owed eligible wages by the former employer.

(d) [Repealed, 2009, c. 2, s. 343]

Prescribed criteria — foreign proceeding

(2) On application by any person, a court may, in a proceeding under Part XIII of the *Bankruptcy and Insolvency Act*, determine that the foreign proceeding meets the criteria prescribed by regulation. If the court determines that the foreign proceeding meets the prescribed criteria, the court may appoint a trustee for the purposes of this Act.

Employment in Canada

(3) An individual who is eligible to receive a payment because of subparagraph (1)(b)(iii) is only eligible to receive a payment in respect of eligible wages earned for employment in Canada and termination pay and severance pay that relate to that employment.

Deemed bankruptcy

(4) For the purposes of this Act, if all of the conditions set out in subparagraph (1)(b)(iii) are met, the former employer is deemed to be bankrupt and the date of the bankruptcy is deemed to be the day on which all of those conditions are met.

Prescribed criteria — other proceedings

(5) On application by any person, a court may, in proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies' Creditors Arrangement Act*, determine that the former employer meets the criteria prescribed by regulation.
2005, c. 47, s. 1 "5"; 2007, c. 36, s. 84; 2009, c. 2, s. 343; 2018, c. 27, s. 629.

Exceptions

6 An individual is not eligible to receive a payment in respect of any wages earned during, or that otherwise relate to, a period in which the individual

(a) was an officer or director of the former employer;

(b) had a controlling interest within the meaning of the regulations in the business of the former employer;

(c) occupied a managerial position within the meaning of the regulations with the former employer; or

(d) was not dealing at arm's length with

(i) an officer or director of the former employer,

(ii) a person who had a controlling interest within the meaning of the regulations in the business of the former employer, or

(iii) an individual who occupied a managerial position within the meaning of the regulations with the former employer.

2005, c. 47, s. 1 "6"; 2007, c. 36, s. 85; 2009, c. 2, s. 344; 2018, c. 27, s. 630(F).

Amounts Covered by Program

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 an amount equal to seven times the maximum weekly insurable earnings under the *Employment Insurance Act*.

Reduction

(1.1) Except in the circumstances prescribed by regulation, the amount that may be paid under this Act to an individual is to be reduced by any amounts provided for by regulation.

Greatest amount

(2) If more than one situation that is described in paragraph 5(1)(b) applies to the former employer, the amount that may be paid is the greatest of the amounts determined in respect of each of those situations.

2005, c. 47, s. 1 "7"; 2007, c. 36, s. 86; 2009, c. 2, s. 345; 2017, c. 26, s. 53; 2018, c. 27, s. 631.

Application for Payment

Application

8 To receive a payment, an individual is to apply to the Minister in the manner and during the period provided for in the regulations.

2005, c. 47, s. 1 "8"; 2007, c. 36, s. 87; 2018, c. 27, s. 632(F).

Minister's determination of eligibility

9 If the Minister determines that the applicant is eligible to receive a payment, the Minister shall make the payment.

2005, c. 47, s. 1 "9"; 2007, c. 36, s. 87.

Notification

10 (1) The Minister is to inform the applicant of their eligibility or ineligibility to receive a payment.

Notification to trustee or receiver

(2) The Minister is to inform the trustee or receiver of the applicant's eligibility or ineligibility to receive a payment.
2005, c. 47, s. 1 "10"; 2007, c. 36, s. 87; 2018, c. 27, s. 633.

Review by Minister

Request for review

11 An applicant who is informed under section 10 may request a review of their eligibility or ineligibility, as the case may be.

2005, c. 47, s. 1 "11"; 2007, c. 36, s. 87.

Review

12 The Minister may confirm, vary or rescind a determination of eligibility made under section 9. If the Minister varies the determination, the Minister shall make any payment resulting from the variation.

2005, c. 47, s. 1 "12"; 2007, c. 36, s. 87.

Notification

12.1 The Minister is to inform the applicant and the trustee or receiver of a decision made under section 12.

2018, c. 27, s. 634.

Review is final

13 Subject to the right of appeal under section 14, the Minister's confirmation, variation or rescission, as the case may be, is final and may not be questioned or reviewed in any court.

2005, c. 47, s. 1 "13"; 2007, c. 36, s. 87.

Appeal to Board

Board

13.1 For the purposes of sections 14 to 20, the Board is considered to be composed of only the Chairperson and Vice-Chairpersons as its members.

2017, c. 20, s. 379.

Appeal on question of law or jurisdiction

14 (1) The applicant may appeal the decision made by the Minister under section 12 to the Board only on a question of law or jurisdiction.

Regulations

(2) The Board may make regulations respecting the period during which and the manner in which an appeal may be made.

2005, c. 47, s. 1 "14"; 2007, c. 36, s. 87; 2017, c. 20, s. 379.

Assignment or appointment

14.1 (1) The Chairperson of the Board may assign a member of the Board or appoint an external adjudicator to determine an appeal that comes before the Board.

Powers, duties and functions

(2) A member of the Board and an external adjudicator have all the powers, duties and functions that are conferred on the Board by any of sections 14 to 18 with respect to any matter that has been assigned to them or for which they have been appointed, as the case may be, other than the power referred to in subsection 14(2).

Decision of member or external adjudicator

(3) A decision made by a member of the Board or an external adjudicator under any of sections 14 to 18 is deemed to be a decision made by the Board.

Limitation of liability

(4) A member of the Board and an external adjudicator are not personally liable, either civilly or criminally, for anything done or omitted to be done by them in good faith in the exercise or purported exercise of any power, or in the performance or purported performance of any duty or function, conferred on them under any of sections 14 to 18.

Remuneration and expenses — external adjudicator

(5) An external adjudicator shall be paid the remuneration and the fees that may be fixed by the Chairperson of the Board and is entitled to be paid reasonable travel and living expenses incurred by them in the course of their duties while absent from their ordinary place of residence.

2017, c. 20, s. 379; 2018, c. 27, s. 652.

Minister informed of appeal

15 (1) The Board shall inform the Minister in writing when an appeal is brought and provide him or her with a copy of the request for appeal.

Documents provided to Board

(2) The Minister shall, on request of the Board, provide to the Board a copy of any document that the Minister relied on for the purpose of making the decision being appealed.

Documents provided to Minister

(3) The Board shall, on request of the Minister, provide to the Minister a copy of any document that is filed with the Board in the appeal.

Power of Minister

(4) The Minister may, in an appeal, make representations to the Board in writing.

2005, c. 47, s. 1 "15"; 2017, c. 20, s. 379.

Appeal on the record

16 The appeal is to be an appeal on the record and no new evidence is admissible.

2005, c. 47, s. 1 "16"; 2007, c. 36, s. 88.

Board's decision

17 The Board may confirm, vary or rescind the decision made by the Minister under section 12. If the Board varies the decision, the Minister shall make any payment resulting from the variation.

2005, c. 47, s. 1 "17"; 2007, c. 36, s. 88; 2017, c. 20, s. 380.

Copies of decision

18 The Board shall send a copy of its decision, and the reasons for it, to each party to the appeal, to the Minister and to the trustee or receiver.

2005, c. 47, s. 1 "18"; 2017, c. 20, s. 380; 2018, c. 27, s. 635; 2018, c. 27, s. 652.

No review by *certiorari*, etc.

19 No order may be made to review, prohibit or restrain and no process entered or proceeding taken to question, review, prohibit or restrain in any court — whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise — an action of the Board under any of sections 14 to 18.

2005, c. 47, s. 1 "19"; 2007, c. 36, s. 89; 2017, c. 20, s. 380; 2018, c. 27, s. 636; 2018, c. 27, s. 652.

Decision is final

20 The Board's decision is final and shall not be questioned or reviewed in any court.

2005, c. 47, s. 1 "20"; 2007, c. 36, s. 89; 2017, c. 20, s. 380.

Administration

Duties of Trustees and Receivers

General duties

21 (1) For the purposes of this Act, a trustee or a receiver, as the case may be, shall

(a) identify each individual who is owed eligible wages;

(b) determine the amount of eligible wages owing to each individual;

(c) inform each individual other than one who is in a class prescribed by regulation of the existence of the program established by section 4 and of the conditions under which payments may be made under this Act;

(d) provide the Minister and each individual other than one who is in a class prescribed by regulation with the amount of eligible wages owing to the individual and any other information prescribed by regulation;

(e) inform the Minister of when the trustee is discharged or the receiver completes their duties, as the case may be.

Compliance with directions

(2) A trustee or receiver shall comply with any directions of the Minister relating to the administration of this Act.

Duty to assist

(3) A person, other than one described in subsection (4), who has or has access to information described in paragraph (1)(d) shall, on request, provide it to the trustee or the receiver, as the case may be.

Duty to assist — payroll contractors

(4) A person who is dealing at arm's length with and providing payroll services to a bankrupt or insolvent person and who has or has access to information described in paragraph (1)(d) shall,

(a) if requested by the trustee or receiver, provide the trustee or receiver with a description of the information described in paragraph (1)(d) that they have or have access to and an estimate of the cost of providing the information; and

(b) if requested by the trustee or receiver, provide the trustee or receiver with the information described in paragraph (1)(d) that they have or have access to.

2005, c. 47, s. 1 "21"; 2007, c. 36, s. 89; 2009, c. 2, s. 346; 2018, c. 27, s. 637.

Fees and expenses

22 Subject to section 22.1, the trustee's or receiver's fees and expenses, in relation to the performance of their duties under this Act, are to be paid out of the estate of the bankrupt employer or the property of the insolvent employer or by the insolvent employer.

2005, c. 47, s. 1 "22"; 2007, c. 36, s. 89; 2018, c. 27, s. 638; 2018, c. 27, s. 639.

Minister to pay fees and expenses

22.1 The Minister shall, in the circumstances prescribed by regulation, pay any fees or expenses of the trustee or receiver that are prescribed by regulation in relation to the performance of their duties under this Act or the performance of their duties and functions or the exercise of their powers under the *Bankruptcy and Insolvency Act* or the *Companies' Creditors Arrangement Act*.

2018, c. 27, s. 638; 2018, c. 27, s. 639.

Powers of Minister

Directions to trustees and receivers

23 (1) The Minister may give directions to trustees and receivers in respect of the performance of their duties under this Act.

Directions not statutory instruments

(2) A direction given by the Minister is not a statutory instrument within the meaning of the *Statutory Instruments Act*.

Power to summon, etc.

24 (1) For the purposes of the administration of this Act, the Minister may

(a) summon any person before him or her and require the person to give evidence, orally or in writing, and on oath or, if the person is entitled to affirm in civil matters, on solemn affirmation;

(b) require any person to provide the Minister with any information or document that the Minister considers necessary; and

(c) require any person to provide an affidavit or a statutory declaration attesting to the truth of any information provided by the person.

Taking oaths, etc.

(2) Any person, if designated by the Minister for the purpose, may administer oaths and take and receive affidavits, statutory declarations and solemn affirmations for the purpose of or incidental to the administration of this Act. Every person so designated has, with respect to any such oath, affidavit, declaration or affirmation, all the powers of a commissioner for administering oaths or taking affidavits.

Acceptance of oaths, etc.

(3) The Minister may, for the purposes of administering this Act, accept any oath administered or any affidavit, statutory declaration or solemn affirmation taken or received by any person who has the powers of a commissioner for taking affidavits and who is an officer or employee of

(a) a department or other portion of the federal public administration specified in any of Schedules I, IV and V to the *Financial Administration Act*; or

(b) a department of the government of a province.

Inspections

25 (1) A person designated by the Minister for the purpose may, at any reasonable time, enter any place in which he or she reasonably believes there is any information or document relevant to the administration of this Act and may, in that place,

(a) inspect any books, records, electronic data or other documents that he or she reasonably believes may contain information that is relevant to the administration of this Act;

(b) use or cause to be used any computer system to examine any data contained in or available to the computer system;

(c) reproduce or cause to be reproduced any record from the data in the form of a print-out or other intelligible output;

(d) take any document or other thing from the place for examination or, in the case of a document, for copying; and

(e) use or cause to be used any copying equipment to make copies of any documents.

Prior authorization

(2) If any place referred to in subsection (1) is a dwelling-house, the designated person may not enter the dwelling-house without the consent of the occupant, except under the authority of a warrant issued under subsection (3).

Warrant to enter dwelling-house

(3) A judge may issue a warrant authorizing the designated person to enter a dwelling-house subject to the conditions specified in the warrant if, on *ex parte* application, the judge is satisfied by information on oath that

(a) there are reasonable grounds to believe that the dwelling-house is a place referred to in subsection (1);

(b) entry into the dwelling-house is necessary for any purpose related to the administration of this Act; and

(c) entry into the dwelling-house has been, or there are reasonable grounds to believe that entry will be, refused.

Orders if entry not authorized

(4) If the judge is not satisfied that entry into the dwelling-house is necessary for any purpose related to the administration of this Act, the judge may, to the extent that access was or may be expected to be refused and that information or documents are or may be expected to be kept in the dwelling-house,

(a) order the occupant of the dwelling-house to provide the Minister, or a person designated by the Minister for the purpose, with reasonable access to any information or document that is or should be kept in the dwelling-house; and

(b) make any other order that is appropriate in the circumstances to carry out the purposes of this Act.

Duty to assist

26 The owner or person in charge of a place that is entered by the designated person and every person found there must

(a) give the designated person all reasonable assistance to enable him or her to exercise his or her powers and perform his or her duties; and

(b) provide the designated person with any information relevant to the administration of this Act that he or she requires.

Information must be made available to Minister

27 Personal information relating to an applicant that is collected or obtained by the Canada Employment Insurance Commission must, if requested by the Minister, be made available to the Minister to determine the applicant's eligibility to receive a payment under this Act.

2005, c. 47, ss. 1 "27", 140; 2012, c. 19, s. 312.

28 [Repealed, 2005, c. 47, s. 140]

Social Insurance Number

29 No person may knowingly use, communicate or allow to be communicated a Social Insurance Number that was obtained for a purpose related to an application for a payment under this Act except for the purpose of the administration or enforcement of this Act or the *Income Tax Act*.

2005, c. 47, s. 1 "29"; 2007, c. 36, s. 90; 2018, c. 27, s. 640(F).

Delegation

30 The Minister may delegate to any person the exercise of any power or the performance of any duty or function that may be exercised or performed by the Minister under this Act.

Audit of applications

31 (1) Subject to subsections (2) to (4), the Minister may, on his or her initiative, conduct an audit of any application for payment under this Act.

Applications with payment

(2) An audit of an application in respect of which a payment was made may be conducted at any time within three years after the day on which the payment was made.

Exception

(3) If the Minister has reasonable grounds to believe that a payment was made on the basis of any false or misleading information, an audit of the application in respect of which the payment was made may be conducted at any time within six years after the payment was made.

Other applications

(4) An audit of an application in respect of which no payment was made may be conducted at any time within three years after the day on which the applicant was sent a notice informing the applicant that he or she was not eligible to receive a payment.

No payment or partial payment

31.1 If the Minister determines that an individual did not receive all or part of a payment that they were eligible to receive, the Minister shall make a payment to them in an amount equal to the amount that they did not receive.

2018, c. 27, s. 641.

Overpayments

Determination of overpayment

32 (1) If the Minister determines that an individual received a payment in an amount greater than the amount that they were eligible to receive, the Minister shall send them a notice

(a) informing them of the determination; and

(b) specifying the amount that they were not eligible to receive.

Notification

(2) The Minister shall also inform the trustee or receiver of the determination and the amount that the individual was not eligible to receive.

(3) [Repealed, 2018, c. 27, s. 642]

2005, c. 47, s. 1 "32"; 2007, c. 36, s. 91; 2018, c. 27, s. 642.

Request for review

32.1 An individual who is informed of the Minister's determination under subsection 32(1), other than a determination made as a result of a review under section 12, may request a review of the determination.

2018, c. 27, s. 643.

Review

32.2 The Minister may confirm, vary or rescind a determination made under subsection 32(1).

2018, c. 27, s. 643.

Notification

32.3 The Minister shall inform the individual and the trustee or receiver of a decision made under section 32.2.

2018, c. 27, s. 643.

Review is final

32.4 Subject to the right of appeal under section 32.5, the Minister's confirmation, variation or rescission, as the case may be, is final and may not be questioned or reviewed in any court.

2018, c. 27, s. 643.

Board

32.41 For the purposes of sections 32.5 to 32.92, the Board is considered to be composed of only the Chairperson and Vice-Chairpersons as its members.

2018, c. 27, s. 644.

Appeal on question of law or jurisdiction

32.5 (1) The individual may appeal the decision made by the Minister under section 32.2 to the Board only on a question of law or jurisdiction.

Regulations

(2) The Board may make regulations respecting the period during which and the manner in which an appeal may be made.

2018, c. 27, s. 643; 2018, c. 27, s. 644.

Assignment or appointment

32.51 (1) The Chairperson of the Board may assign a member of the Board or appoint an external adjudicator to determine an appeal that comes before the Board.

Powers, duties and functions

(2) A member of the Board and an external adjudicator have all the powers, duties and functions that are conferred on the Board by any of sections 32.5 to 32.9 with respect to any matter that has been assigned to them or for which they have been appointed, as the case may be, other than the power referred to in subsection 32.5(2).

Decision of member or external adjudicator

(3) A decision made by a member of the Board or an external adjudicator under any of sections 32.5 to 32.9 is deemed to be a decision made by the Board.

Limitation of liability

(4) A member of the Board and an external adjudicator are not personally liable, either civilly or criminally, for anything done or omitted to be done by them in good faith in the exercise or purported exercise of any power, or in the performance or purported performance of any duty or function, conferred on them under any of sections 32.5 to 32.9.

Remuneration and expenses — external adjudicator

(5) An external adjudicator shall be paid the remuneration and the fees that may be fixed by the Chairperson of the Board and is entitled to be paid reasonable travel and living expenses incurred by them in the course of their duties while absent from their ordinary place of residence.
2018, c. 27, s. 644.

Minister informed of appeal

32.6 (1) The Board shall inform the Minister in writing when an appeal is brought and provide him or her with a copy of the request for appeal.

Board provided with documents

(2) The Minister shall, on request of the Board, provide the Board with a copy of any document that the Minister relied on for the purpose of making the decision being appealed.

Minister provided with documents

(3) The Board shall, on request of the Minister, provide the Minister with a copy of any document that is filed with the Board in the appeal.

Power of Minister

(4) The Minister may, in an appeal, make representations to the Board in writing.

2018, c. 27, s. 643; 2018, c. 27, s. 644.

Appeal on the record

32.7 The appeal is to be an appeal on the record and no new evidence is admissible.

2018, c. 27, s. 643.

Board's decision

32.8 The Board may confirm, vary or rescind the decision made by the Minister under section 32.2.

2018, c. 27, s. 643; 2018, c. 27, s. 645.

Copies of decision

32.9 The Board shall send a copy of its decision, and the reasons for it, to each party to the appeal, to the Minister and to the trustee or receiver.

2018, c. 27, s. 643; 2018, c. 27, s. 645.

No review by *certiorari*, etc.

32.91 No order may be made to review, prohibit or restrain and no process entered or proceeding taken to question, review, prohibit or restrain in any court — whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise — an action of the Board under any of sections 32.5 to 32.9.

2018, c. 27, s. 643; 2018, c. 27, s. 645.

Decision is final

32.92 The Board's decision is final and shall not be questioned or reviewed in any court.

2018, c. 27, s. 643; 2018, c. 27, s. 645.

Debt due to Her Majesty

32.93 (1) An amount determined to be owing under section 32, 32.2 or 32.8 constitutes a debt due to Her Majesty in right of Canada and the debt may be recovered by the Minister of National Revenue.

Certificate of default

(2) The amount of any debt referred to in subsection (1) may be certified by the Minister, and registration of the certificate in the Federal Court has the same effect as a judgment of that Court for the amount specified in the certificate and all related registration costs.

2018, c. 27, s. 643.

Garnishment

33 If the Minister is of the opinion that a person is or is about to become liable to pay an amount to an individual who is indebted to Her Majesty under subsection 32.93(1), the Minister may, by written notice, order the person to pay to the Receiver General on account of the individual's liability all or part of the amount otherwise payable to the individual.

2005, c. 47, s. 1 "33"; 2007, c. 36, s. 91; 2018, c. 27, s. 643.

When debt may be recovered

34 Any action to recover a debt under subsection 32.93(2) or section 33 may be taken only after the end of the period within which an individual may request a review under section 32.1 or, if the individual requests a review within that period, after final disposition of the review and any appeals.

2005, c. 47, s. 1 "34"; 2007, c. 36, s. 92(E); 2018, c. 27, s. 643.

Financial Provisions

Payments out of C.R.F.

35 There may be paid out of the Consolidated Revenue Fund all payments authorized to be made under this Act.

Subrogation

36 (1) If a payment is made under this Act to an individual in respect of eligible wages, Her Majesty in right of Canada is, to the extent of the amount of the payment, subrogated to any rights the individual may have in respect of the eligible wages against

(a) the bankrupt or insolvent employer; and

(b) if the bankrupt or insolvent employer is a corporation, a director of the corporation.

Notice to Minister

(1.1) Unless the Minister directs otherwise, an individual who received a payment under this Act shall notify the Minister, in writing, of any action or other proceeding, other than the one in respect of which the individual received the payment, to recover eligible wages, including an action or other proceeding that is commenced by another person or organization and of which the individual is aware. The notice shall contain any information prescribed by regulation.

Notice to Minister — decision or order

(1.2) Unless the Minister directs otherwise, an individual who received a payment under this Act shall also notify the Minister, in writing, of any final decision or order, of which they are aware, respecting the recovery of eligible wages. The notice shall contain any information prescribed by regulation.

Maintaining an action

(2) For the purposes of subsection (1), Her Majesty in right of Canada may maintain an action in the name of the individual or Her Majesty in right of Canada.

2005, c. 47, s. 1 “36”; 2007, c. 36, s. 93; 2018, c. 27, s. 646.

Payment to Her Majesty in right of Canada

36.1 (1) If, under a court judgment or for any other reason, a trustee, receiver or any other person is required to pay eligible wages to an individual who the trustee, receiver or other person has reason to believe has received a payment under this Act, the trustee, receiver or other person shall

(a) ascertain whether Her Majesty in right of Canada is subrogated to any rights the individual may have in respect of the eligible wages; and

(b) if Her Majesty in right of Canada is subrogated, pay to Her Majesty the amount in respect of which Her Majesty is subrogated before making any payment to the individual in respect of eligible wages.

Components of wages

(2) A trustee, receiver or other person who makes a payment under paragraph (1)(b) shall provide the Minister with information respecting the components of wages to which the payment relates.

2018, c. 27, s. 647.

Amount not assignable

37 An amount that is payable under this Act is not capable of being assigned, charged, attached, anticipated or given as security and any transaction appearing to do so is void or, in Quebec, null.

2005, c. 47, s. 1 “37”; 2007, c. 36, s. 93.

Offences and Penalties

Offences

38 (1) Every person commits an offence who

(a) makes a false or misleading entry, or omits to enter a material particular, in any record or book of account that contains information that supports an application under this Act;

(b) in relation to an application under this Act, makes a representation that the person knows to be false or misleading;

(c) in relation to an application under this Act, makes a declaration that the person knows to be false or misleading because of the nondisclosure of facts;

(d) being required under this Act to provide information, does not provide it or makes a representation that the person knows to be false or misleading;

(e) obtains a payment under this Act by false pretence;

(f) being the payee of any cheque issued as a payment under this Act, knowingly negotiates or attempts to negotiate it knowing that the person is not entitled to the payment or any part of the payment; or

(g) participates in, consents to or acquiesces in an act or omission mentioned in any of paragraphs (a) to (f).

Trustees and receivers

(2) Every person who fails to comply with any of the requirements of subsection 21(1), (3) or (4) commits an offence.

Limitation of prosecutions

(3) A prosecution for an offence under subsection (1) or (2) may be commenced at any time within six years after the day on which the subject matter of the prosecution arose.

Due diligence

(4) No person may be convicted of an offence under subsection (2) if the person establishes that they exercised due diligence to prevent the commission of the offence. 2005, c. 47, s. 1 "38"; 2007, c. 36, s. 93.

Obstruction

39 (1) Every person commits an offence who delays or obstructs a person in the exercise of their powers or the performance of their duties under this Act.

Limitation of prosecutions

(2) A prosecution for an offence under subsection (1) may be commenced at any time within two years after the day on which the subject matter of the prosecution arose.

2005, c. 47, s. 1 "39"; 2007, c. 36, s. 93.

Punishment

40 Every person who is guilty of an offence under section 38 or 39 is liable on summary conviction to a fine of not more than $5,000 or to imprisonment for a term of not more than six months, or to both.

Regulations

Regulations

41 The Governor in Council may make regulations generally for carrying out the purposes of this Act, including regulations

(a) prescribing amounts for the purposes of subsection 2(1);

(b) prescribing reasons for the purposes of paragraph 5(1)(a);

(b.1) prescribing criteria for the purposes of subsections 5(2) and (5);

(c) defining controlling interest and managerial position for the purposes of section 6;

(d) prescribing circumstances and providing for amounts for the purposes of subsection 7(1.1);

(e) respecting the allocation of payments to the different components of wages;

(f) respecting the period during which and the manner in which applications for payments are to be made under section 8;

(g) respecting the period during which and the manner in which a review may be requested under section 11 or 32.1;

(h) prescribing the classes of individuals that the trustee or receiver is not required to inform under paragraph 21(1)(c) or to whom they are not required to provide information under paragraph 21(1)(d);

(i) respecting the information that is to be provided by trustees and receivers to the Minister and to individuals for the purposes of paragraph 21(1)(d) and respecting the period during which and the manner in which that information is to be provided;

(j) respecting the period during which and the manner in which the information referred to in paragraph 21(1)(c) and subsections 21(3) and (4) is to be provided;

(k) prescribing fees and expenses for the purposes of section 22.1 and the circumstances in which they are to be paid; and

(l) prescribing the period during which and the manner in which the Minister must be notified under subsection 36(1.1) or (1.2) and the information that must be contained in the notice.

2005, c. 47, s. 1 "41"; 2007, c. 36, s. 94; 2009, c. 2, s. 347; 2017, c. 20, s. 381; 2018, c. 27, s. 648; 2018, c. 27, s. 652.

Review of Act

Review

42 Within five years after the day on which this section comes into force, the Minister must cause a review of this Act and its administration and operation to be conducted, and cause a report on the review to be laid before each House of Parliament on any of the first 15 days on which that House is sitting after the review is completed.

TAB 7

Wage Earner Protection Program Act, SC 2005, c 47, s 1

Current version: in force since Nov 20, 2021

Link to the latest version :	https://canlii.ca/t/7w0b
Stable link to this version :	https://canlii.ca/t/556xs
Citation to this version:	Wage Earner Protection Program Act, SC 2005, c 47, s 1, <https://canlii.ca/t/556xs> retrieved on 2023-09-18
Currency:	This statute is current to 2023-08-21 according to the Justice Laws Web Site

Wage Earner Protection Program Act

S.C. 2005, c. 47, s. 1

Assented to 2005-11-25

An Act to establish a program to provide for payments to individuals in respect of wages owed to them by employers who are insolvent

[Enacted by section 1 of chapter 47 of the Statutes of Canada, 2005, in force July 7, 2008, see SI/2008-78.]

Short Title

Short title

1 This Act may be cited as the *Wage Earner Protection Program Act*.

Interpretation

Definitions

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

Board means the Canada Industrial Relations Board established by section 9 of the *Canada Labour Code*. (*Conseil*)

eligible wages means

(a) wages other than termination pay and severance pay that were earned during the longer of the following periods:

(i) 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,

(ii) the period beginning on the day that is six months before one of the following days and ending on the date of the bankruptcy or the first day on which there was a receiver in relation to the former employer:

(A) the day on which a proposal is filed by or in respect of the employer under Division I of Part III of the *Bankruptcy and Insolvency Act* or, if a notice of intention to make a proposal is filed by or in respect of the employer under that Division, the day on which the notice of intention is filed,

(B) the day on which the most recent proceedings under the *Companies' Creditors Arrangement Act* are commenced, and

(iii) the period beginning on the day that is six months before one of the following days and ending on the day on which a court makes a determination under subsection 5(5):

(A) the day on which a proposal is filed by or in respect of the employer under Division I of Part III of the *Bankruptcy and Insolvency Act* or, if a notice of intention to make a proposal is filed by or in respect of the employer under that Division, the day on which the notice of intention is filed,

(B) the day on which the most recent proceedings under the *Companies' Creditors Arrangement Act* are commenced; and

(b) termination pay and severance pay that relate to employment that ended

(i) during the period referred to in paragraph (a), or

(ii) during the period beginning on the day after the day on which the period referred to in paragraph (a) ends and ending on the day on which the trustee is discharged or the receiver completes their duties, as the case may be. (*salaire admissible*)

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

Precision

(1.1) For the purpose of the definition eligible wages, a proposal does not include a proposal for which a certificate is given under section 65.3 of the *Bankruptcy and Insolvency Act* and a notice of intention to make a proposal does not include a notice of intention in respect of a proposal for which such a certificate is given.

Meaning of trustee

(1.2) In this Act, **trustee** includes a monitor as defined in subsection 2(1) of the *Companies' Creditors Arrangement Act*.

Employers subject to a receivership

(2) For the purposes of this Act, an employer is subject to a receivership when any property of the employer is under the possession or control of a receiver.

Meaning of receiver

(3) In this Act, **receiver** means a receiver within the meaning of subsection 243(2) of the *Bankruptcy and Insolvency Act*.

Words and expressions

(4) Unless otherwise provided, words and expressions used in this Act have the same meaning as in the *Bankruptcy and Insolvency Act*.

Related persons

(5) Despite subsection 4(5) of the *Bankruptcy and Insolvency Act*,

> **(a)** for the purposes of paragraph 6(d), an individual is considered to deal at arm's length with a related person if the Minister is satisfied that, having regard to the circumstances — including the terms and conditions of the individual's employment with the former employer, their remuneration and the duration, nature and importance of the work performed for the former employer — it is reasonable to conclude that the individual would have entered into a substantially similar contract of employment with the former employer if they had been dealing with each other at arm's length; and
>
> **(b)** for the purposes of subsection 21(4), individuals who are related to each other are, in the absence of evidence to the contrary, deemed not to deal with each other at arm's length while so related.

2005, c. 47, s. 1 "2"; 2007, c. 36, s. 83; 2009, c. 2, s. 342; 2011, c. 24, s. 163; 2012, c. 19, s. 697(E); 2017, c. 20, s. 378, c. 26, s. 52; 2018, c. 27, s. 627.

Designation of Minister

Power of Governor in Council

3 The Governor in Council may designate a member of the Queen's Privy Council for Canada to be the Minister for the purposes of this Act.

Program Established

Establishment

4 The Wage Earner Protection Program is established to provide for payments to individuals in respect of wages owed to them by employers who are insolvent.

2005, c. 47, s. 1 "4"; 2018, c. 27, s. 628.

Eligibility for Payments

Conditions of eligibility

5 (1) An individual is eligible to receive a payment if

(a) the individual's employment ended for a reason prescribed by regulation;

(b) one of the following applies:

(i) the former employer is bankrupt,

(ii) the former employer is subject to a receivership,

(iii) the former employer is the subject of a foreign proceeding that is recognized by a court under subsection 270(1) of the *Bankruptcy and Insolvency Act* and

(A) the court determines under subsection (2) that the foreign proceeding meets the criteria prescribed by regulation, and

(B) a trustee is appointed, or

(iv) the former employer is the subject of proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies' Creditors Arrangement Act* and a court determines under subsection (5) that the criteria prescribed by regulation are met; and

(c) the individual is owed eligible wages by the former employer.

(d) [Repealed, 2009, c. 2, s. 343]

Prescribed criteria — foreign proceeding

(2) On application by any person, a court may, in a proceeding under Part XIII of the *Bankruptcy and Insolvency Act*, determine that the foreign proceeding meets the criteria prescribed by regulation. If the court determines that the foreign proceeding meets the prescribed criteria, the court may appoint a trustee for the purposes of this Act.

Employment in Canada

(3) An individual who is eligible to receive a payment because of subparagraph (1)(b)(iii) is only eligible to receive a payment in respect of eligible wages earned for employment in Canada and termination pay and severance pay that relate to that employment.

Deemed bankruptcy

(4) For the purposes of this Act, if all of the conditions set out in subparagraph (1)(b)(iii) are met, the former employer is deemed to be bankrupt and the date of the bankruptcy is deemed to be the day on which all of those conditions are met.

Prescribed criteria — other proceedings

(5) On application by any person, a court may, in proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies' Creditors Arrangement Act*, determine that the former employer meets the criteria prescribed by regulation.
2005, c. 47, s. 1 "5"; 2007, c. 36, s. 84; 2009, c. 2, s. 343; 2018, c. 27, s. 629.

Exceptions

6 An individual is not eligible to receive a payment in respect of any wages earned during, or that otherwise relate to, a period in which the individual

(a) was an officer or director of the former employer;

(b) had a controlling interest within the meaning of the regulations in the business of the former employer;

(c) occupied a managerial position within the meaning of the regulations with the former employer; or

(d) was not dealing at arm's length with

(i) an officer or director of the former employer,

(ii) a person who had a controlling interest within the meaning of the regulations in the business of the former employer, or

(iii) an individual who occupied a managerial position within the meaning of the regulations with the former employer.

2005, c. 47, s. 1 "6"; 2007, c. 36, s. 85; 2009, c. 2, s. 344; 2018, c. 27, s. 630(F).

Amounts Covered by Program

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 an amount equal to seven times the maximum weekly insurable earnings under the *Employment Insurance Act*.

Reduction

(1.1) Except in the circumstances prescribed by regulation, the amount that may be paid under this Act to an individual is to be reduced by any amounts provided for by regulation.

Greatest amount

(2) If more than one situation that is described in paragraph 5(1)(b) applies to the former employer, the amount that may be paid is the greatest of the amounts determined in respect of each of those situations.

2005, c. 47, s. 1 "7"; 2007, c. 36, s. 86; 2009, c. 2, s. 345; 2017, c. 26, s. 53; 2018, c. 27, s. 631.

Application for Payment

Application

8 To receive a payment, an individual is to apply to the Minister in the manner and during the period provided for in the regulations.

2005, c. 47, s. 1 "8"; 2007, c. 36, s. 87; 2018, c. 27, s. 632(F).

Minister's determination of eligibility

9 If the Minister determines that the applicant is eligible to receive a payment, the Minister shall make the payment.

2005, c. 47, s. 1 "9"; 2007, c. 36, s. 87.

Notification

10 (1) The Minister is to inform the applicant of their eligibility or ineligibility to receive a payment.

Notification to trustee or receiver

(2) The Minister is to inform the trustee or receiver of the applicant's eligibility or ineligibility to receive a payment.

2005, c. 47, s. 1 "10"; 2007, c. 36, s. 87; 2018, c. 27, s. 633.

Review by Minister

Request for review

11 An applicant who is informed under section 10 may request a review of their eligibility or ineligibility, as the case may be.

2005, c. 47, s. 1 "11"; 2007, c. 36, s. 87.

Review

12 The Minister may confirm, vary or rescind a determination of eligibility made under section 9. If the Minister varies the determination, the Minister shall make any payment resulting from the variation.

2005, c. 47, s. 1 "12"; 2007, c. 36, s. 87.

Notification

12.1 The Minister is to inform the applicant and the trustee or receiver of a decision made under section 12.

2018, c. 27, s. 634.

Review is final

13 Subject to the right of appeal under section 14, the Minister's confirmation, variation or rescission, as the case may be, is final and may not be questioned or reviewed in any court.

2005, c. 47, s. 1 "13"; 2007, c. 36, s. 87.

Appeal to Board

Board

13.1 For the purposes of sections 14 to 20, the Board is considered to be composed of only the Chairperson and Vice-Chairpersons as its members.

2017, c. 20, s. 379.

Appeal on question of law or jurisdiction

14 (1) The applicant may appeal the decision made by the Minister under section 12 to the Board only on a question of law or jurisdiction.

Regulations

(2) The Board may make regulations respecting the period during which and the manner in which an appeal may be made.

2005, c. 47, s. 1 "14"; 2007, c. 36, s. 87; 2017, c. 20, s. 379.

Assignment or appointment

14.1 (1) The Chairperson of the Board may assign a member of the Board or appoint an external adjudicator to determine an appeal that comes before the Board.

Powers, duties and functions

(2) A member of the Board and an external adjudicator have all the powers, duties and functions that are conferred on the Board by any of sections 14 to 18 with respect to any matter that has been assigned to them or for which they have been appointed, as the case may be, other than the power referred to in subsection 14(2).

Decision of member or external adjudicator

(3) A decision made by a member of the Board or an external adjudicator under any of sections 14 to 18 is deemed to be a decision made by the Board.

Limitation of liability

(4) A member of the Board and an external adjudicator are not personally liable, either civilly or criminally, for anything done or omitted to be done by them in good faith in the exercise or purported exercise of any power, or in the performance or purported performance of any duty or function, conferred on them under any of sections 14 to 18.

Remuneration and expenses — external adjudicator

(5) An external adjudicator shall be paid the remuneration and the fees that may be fixed by the Chairperson of the Board and is entitled to be paid reasonable travel and living expenses incurred by them in the course of their duties while absent from their ordinary place of residence.

2017, c. 20, s. 379; 2018, c. 27, s. 652.

Minister informed of appeal

15 (1) The Board shall inform the Minister in writing when an appeal is brought and provide him or her with a copy of the request for appeal.

Documents provided to Board

(2) The Minister shall, on request of the Board, provide to the Board a copy of any document that the Minister relied on for the purpose of making the decision being appealed.

Documents provided to Minister

(3) The Board shall, on request of the Minister, provide to the Minister a copy of any document that is filed with the Board in the appeal.

Power of Minister

(4) The Minister may, in an appeal, make representations to the Board in writing.

2005, c. 47, s. 1 "15"; 2017, c. 20, s. 379.

Appeal on the record

16 The appeal is to be an appeal on the record and no new evidence is admissible.

2005, c. 47, s. 1 "16"; 2007, c. 36, s. 88.

Board's decision

17 The Board may confirm, vary or rescind the decision made by the Minister under section 12. If the Board varies the decision, the Minister shall make any payment resulting from the variation.

2005, c. 47, s. 1 "17"; 2007, c. 36, s. 88; 2017, c. 20, s. 380.

Copies of decision

18 The Board shall send a copy of its decision, and the reasons for it, to each party to the appeal, to the Minister and to the trustee or receiver.

2005, c. 47, s. 1 "18"; 2017, c. 20, s. 380; 2018, c. 27, s. 635; 2018, c. 27, s. 652.

No review by *certiorari*, etc.

19 No order may be made to review, prohibit or restrain and no process entered or proceeding taken to question, review, prohibit or restrain in any court — whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise — an action of the Board under any of sections 14 to 18.

2005, c. 47, s. 1 "19"; 2007, c. 36, s. 89; 2017, c. 20, s. 380; 2018, c. 27, s. 636; 2018, c. 27, s. 652.

Decision is final

20 The Board's decision is final and shall not be questioned or reviewed in any court.

2005, c. 47, s. 1 "20"; 2007, c. 36, s. 89; 2017, c. 20, s. 380.

Administration

Duties of Trustees and Receivers

General duties

21 (1) For the purposes of this Act, a trustee or a receiver, as the case may be, shall

(a) identify each individual who is owed eligible wages;

(b) determine the amount of eligible wages owing to each individual;

(c) inform each individual other than one who is in a class prescribed by regulation of the existence of the program established by section 4 and of the conditions under which payments may be made under this Act;

(d) provide the Minister and each individual other than one who is in a class prescribed by regulation with the amount of eligible wages owing to the individual and any other information prescribed by regulation;

(e) inform the Minister of when the trustee is discharged or the receiver completes their duties, as the case may be.

Compliance with directions

(2) A trustee or receiver shall comply with any directions of the Minister relating to the administration of this Act.

Duty to assist

(3) A person, other than one described in subsection (4), who has or has access to information described in paragraph (1)(d) shall, on request, provide it to the trustee or the receiver, as the case may be.

Duty to assist — payroll contractors

(4) A person who is dealing at arm's length with and providing payroll services to a bankrupt or insolvent person and who has or has access to information described in paragraph (1)(d) shall,

(a) if requested by the trustee or receiver, provide the trustee or receiver with a description of the information described in paragraph (1)(d) that they have or have access to and an estimate of the cost of providing the information; and

(b) if requested by the trustee or receiver, provide the trustee or receiver with the information described in paragraph (1)(d) that they have or have access to.

2005, c. 47, s. 1 "21"; 2007, c. 36, s. 89; 2009, c. 2, s. 346; 2018, c. 27, s. 637.

Fees and expenses

22 Subject to section 22.1, the trustee's or receiver's fees and expenses, in relation to the performance of their duties under this Act, are to be paid out of the estate of the bankrupt employer or the property of the insolvent employer or by the insolvent employer.

2005, c. 47, s. 1 "22"; 2007, c. 36, s. 89; 2018, c. 27, s. 638; 2018, c. 27, s. 639.

Minister to pay fees and expenses

22.1 The Minister shall, in the circumstances prescribed by regulation, pay any fees or expenses of the trustee or receiver that are prescribed by regulation in relation to the performance of their duties under this Act or the performance of their duties and functions or the exercise of their powers under the *Bankruptcy and Insolvency Act* or the *Companies' Creditors Arrangement Act*.

2018, c. 27, s. 638; 2018, c. 27, s. 639.

Powers of Minister

Directions to trustees and receivers

23 (1) The Minister may give directions to trustees and receivers in respect of the performance of their duties under this Act.

Directions not statutory instruments

(2) A direction given by the Minister is not a statutory instrument within the meaning of the *Statutory Instruments Act*.

Power to summon, etc.

24 (1) For the purposes of the administration of this Act, the Minister may

(a) summon any person before him or her and require the person to give evidence, orally or in writing, and on oath or, if the person is entitled to affirm in civil matters, on solemn affirmation;

(b) require any person to provide the Minister with any information or document that the Minister considers necessary; and

(c) require any person to provide an affidavit or a statutory declaration attesting to the truth of any information provided by the person.

Taking oaths, etc.

(2) Any person, if designated by the Minister for the purpose, may administer oaths and take and receive affidavits, statutory declarations and solemn affirmations for the purpose of or incidental to the administration of this Act. Every person so designated has, with respect to any such oath, affidavit, declaration or affirmation, all the powers of a commissioner for administering oaths or taking affidavits.

Acceptance of oaths, etc.

(3) The Minister may, for the purposes of administering this Act, accept any oath administered or any affidavit, statutory declaration or solemn affirmation taken or received by any person who has the powers of a commissioner for taking affidavits and who is an officer or employee of

(a) a department or other portion of the federal public administration specified in any of Schedules I, IV and V to the *Financial Administration Act*; or

(b) a department of the government of a province.

Inspections

25 (1) A person designated by the Minister for the purpose may, at any reasonable time, enter any place in which he or she reasonably believes there is any information or document relevant to the administration of this Act and may, in that place,

(a) inspect any books, records, electronic data or other documents that he or she reasonably believes may contain information that is relevant to the administration of this Act;

(b) use or cause to be used any computer system to examine any data contained in or available to the computer system;

(c) reproduce or cause to be reproduced any record from the data in the form of a print-out or other intelligible output;

(d) take any document or other thing from the place for examination or, in the case of a document, for copying; and

(e) use or cause to be used any copying equipment to make copies of any documents.

Prior authorization

(2) If any place referred to in subsection (1) is a dwelling-house, the designated person may not enter the dwelling-house without the consent of the occupant, except under the authority of a warrant issued under subsection (3).

Warrant to enter dwelling-house

(3) A judge may issue a warrant authorizing the designated person to enter a dwelling-house subject to the conditions specified in the warrant if, on *ex parte* application, the judge is satisfied by information on oath that

(a) there are reasonable grounds to believe that the dwelling-house is a place referred to in subsection (1);

(b) entry into the dwelling-house is necessary for any purpose related to the administration of this Act; and

(c) entry into the dwelling-house has been, or there are reasonable grounds to believe that entry will be, refused.

Orders if entry not authorized

(4) If the judge is not satisfied that entry into the dwelling-house is necessary for any purpose related to the administration of this Act, the judge may, to the extent that access was or may be expected to be refused and that information or documents are or may be expected to be kept in the dwelling-house,

(a) order the occupant of the dwelling-house to provide the Minister, or a person designated by the Minister for the purpose, with reasonable access to any information or document that is or should be kept in the dwelling-house; and

(b) make any other order that is appropriate in the circumstances to carry out the purposes of this Act.

Duty to assist

26 The owner or person in charge of a place that is entered by the designated person and every person found there must

(a) give the designated person all reasonable assistance to enable him or her to exercise his or her powers and perform his or her duties; and

(b) provide the designated person with any information relevant to the administration of this Act that he or she requires.

Information must be made available to Minister

27 Personal information relating to an applicant that is collected or obtained by the Canada Employment Insurance Commission must, if requested by the Minister, be made available to the Minister to determine the applicant's eligibility to receive a payment under this Act.

2005, c. 47, ss. 1 "27", 140; 2012, c. 19, s. 312.

28 [Repealed, 2005, c. 47, s. 140]

Social Insurance Number

29 No person may knowingly use, communicate or allow to be communicated a Social Insurance Number that was obtained for a purpose related to an application for a payment under this Act except for the purpose of the administration or enforcement of this Act or the *Income Tax Act*.

2005, c. 47, s. 1 "29"; 2007, c. 36, s. 90; 2018, c. 27, s. 640(F).

Delegation

30 The Minister may delegate to any person the exercise of any power or the performance of any duty or function that may be exercised or performed by the Minister under this Act.

Audit of applications

31 (1) Subject to subsections (2) to (4), the Minister may, on his or her initiative, conduct an audit of any application for payment under this Act.

Applications with payment

(2) An audit of an application in respect of which a payment was made may be conducted at any time within three years after the day on which the payment was made.

Exception

(3) If the Minister has reasonable grounds to believe that a payment was made on the basis of any false or misleading information, an audit of the application in respect of which the payment was made may be conducted at any time within six years after the payment was made.

Other applications

(4) An audit of an application in respect of which no payment was made may be conducted at any time within three years after the day on which the applicant was sent a notice informing the applicant that he or she was not eligible to receive a payment.

No payment or partial payment

31.1 If the Minister determines that an individual did not receive all or part of a payment that they were eligible to receive, the Minister shall make a payment to them in an amount equal to the amount that they did not receive.

2018, c. 27, s. 641.

Overpayments

Determination of overpayment

32 (1) If the Minister determines that an individual received a payment in an amount greater than the amount that they were eligible to receive, the Minister shall send them a notice

- **(a)** informing them of the determination; and
- **(b)** specifying the amount that they were not eligible to receive.

Notification

(2) The Minister shall also inform the trustee or receiver of the determination and the amount that the individual was not eligible to receive.

(3) [Repealed, 2018, c. 27, s. 642]

2005, c. 47, s. 1 "32"; 2007, c. 36, s. 91; 2018, c. 27, s. 642.

Request for review

32.1 An individual who is informed of the Minister's determination under subsection 32(1), other than a determination made as a result of a review under section 12, may request a review of the determination.

2018, c. 27, s. 643.

Review

32.2 The Minister may confirm, vary or rescind a determination made under subsection 32(1).

2018, c. 27, s. 643.

Notification

32.3 The Minister shall inform the individual and the trustee or receiver of a decision made under section 32.2.

2018, c. 27, s. 643.

Review is final

32.4 Subject to the right of appeal under section 32.5, the Minister's confirmation, variation or rescission, as the case may be, is final and may not be questioned or reviewed in any court.

2018, c. 27, s. 643.

Board

32.41 For the purposes of sections 32.5 to 32.92, the Board is considered to be composed of only the Chairperson and Vice-Chairpersons as its members.

2018, c. 27, s. 644.

Appeal on question of law or jurisdiction

32.5 (1) The individual may appeal the decision made by the Minister under section 32.2 to the Board only on a question of law or jurisdiction.

Regulations

(2) The Board may make regulations respecting the period during which and the manner in which an appeal may be made.

2018, c. 27, s. 643; 2018, c. 27, s. 644.

Assignment or appointment

32.51 (1) The Chairperson of the Board may assign a member of the Board or appoint an external adjudicator to determine an appeal that comes before the Board.

Powers, duties and functions

(2) A member of the Board and an external adjudicator have all the powers, duties and functions that are conferred on the Board by any of sections 32.5 to 32.9 with respect to any matter that has been assigned to them or for which they have been appointed, as the case may be, other than the power referred to in subsection 32.5(2).

Decision of member or external adjudicator

(3) A decision made by a member of the Board or an external adjudicator under any of sections 32.5 to 32.9 is deemed to be a decision made by the Board.

Limitation of liability

(4) A member of the Board and an external adjudicator are not personally liable, either civilly or criminally, for anything done or omitted to be done by them in good faith in the exercise or purported exercise of any power, or in the performance or purported performance of any duty or function, conferred on them under any of sections 32.5 to 32.9.

Remuneration and expenses — external adjudicator

(5) An external adjudicator shall be paid the remuneration and the fees that may be fixed by the Chairperson of the Board and is entitled to be paid reasonable travel and living expenses incurred by them in the course of their duties while absent from their ordinary place of residence.
2018, c. 27, s. 644.

Minister informed of appeal

32.6 (1) The Board shall inform the Minister in writing when an appeal is brought and provide him or her with a copy of the request for appeal.

Board provided with documents

(2) The Minister shall, on request of the Board, provide the Board with a copy of any document that the Minister relied on for the purpose of making the decision being appealed.

Minister provided with documents

(3) The Board shall, on request of the Minister, provide the Minister with a copy of any document that is filed with the Board in the appeal.

Power of Minister

(4) The Minister may, in an appeal, make representations to the Board in writing.

2018, c. 27, s. 643; 2018, c. 27, s. 644.

Appeal on the record

32.7 The appeal is to be an appeal on the record and no new evidence is admissible.

2018, c. 27, s. 643.

Board's decision

32.8 The Board may confirm, vary or rescind the decision made by the Minister under section 32.2.

2018, c. 27, s. 643; 2018, c. 27, s. 645.

Copies of decision

32.9 The Board shall send a copy of its decision, and the reasons for it, to each party to the appeal, to the Minister and to the trustee or receiver.

2018, c. 27, s. 643; 2018, c. 27, s. 645.

No review by *certiorari*, etc.

32.91 No order may be made to review, prohibit or restrain and no process entered or proceeding taken to question, review, prohibit or restrain in any court — whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise — an action of the Board under any of sections 32.5 to 32.9.

2018, c. 27, s. 643; 2018, c. 27, s. 645.

Decision is final

32.92 The Board's decision is final and shall not be questioned or reviewed in any court.

2018, c. 27, s. 643; 2018, c. 27, s. 645.

Debt due to Her Majesty

32.93 (1) An amount determined to be owing under section 32, 32.2 or 32.8 constitutes a debt due to Her Majesty in right of Canada and the debt may be recovered by the Minister of National Revenue.

Certificate of default

(2) The amount of any debt referred to in subsection (1) may be certified by the Minister, and registration of the certificate in the Federal Court has the same effect as a judgment of that Court for the amount specified in the certificate and all related registration costs.

2018, c. 27, s. 643.

Garnishment

33 If the Minister is of the opinion that a person is or is about to become liable to pay an amount to an individual who is indebted to Her Majesty under subsection 32.93(1), the Minister may, by written notice, order the person to pay to the Receiver General on account of the individual's liability all or part of the amount otherwise payable to the individual.

2005, c. 47, s. 1 "33"; 2007, c. 36, s. 91; 2018, c. 27, s. 643.

When debt may be recovered

34 Any action to recover a debt under subsection 32.93(2) or section 33 may be taken only after the end of the period within which an individual may request a review under section 32.1 or, if the individual requests a review within that period, after final disposition of the review and any appeals.

2005, c. 47, s. 1 “34”; 2007, c. 36, s. 92(E); 2018, c. 27, s. 643.

Financial Provisions

Payments out of C.R.F.

35 There may be paid out of the Consolidated Revenue Fund all payments authorized to be made under this Act.

Subrogation

36 (1) If a payment is made under this Act to an individual in respect of eligible wages, Her Majesty in right of Canada is, to the extent of the amount of the payment, subrogated to any rights the individual may have in respect of the eligible wages against

(a) the bankrupt or insolvent employer; and

(b) if the bankrupt or insolvent employer is a corporation, a director of the corporation.

Notice to Minister

(1.1) Unless the Minister directs otherwise, an individual who received a payment under this Act shall notify the Minister, in writing, of any action or other proceeding, other than the one in respect of which the individual received the payment, to recover eligible wages, including an action or other proceeding that is commenced by another person or organization and of which the individual is aware. The notice shall contain any information prescribed by regulation.

Notice to Minister — decision or order

(1.2) Unless the Minister directs otherwise, an individual who received a payment under this Act shall also notify the Minister, in writing, of any final decision or order, of which they are aware, respecting the recovery of eligible wages. The notice shall contain any information prescribed by regulation.

Maintaining an action

(2) For the purposes of subsection (1), Her Majesty in right of Canada may maintain an action in the name of the individual or Her Majesty in right of Canada.

2005, c. 47, s. 1 "36"; 2007, c. 36, s. 93; 2018, c. 27, s. 646.

Payment to Her Majesty in right of Canada

36.1 (1) If, under a court judgment or for any other reason, a trustee, receiver or any other person is required to pay eligible wages to an individual who the trustee, receiver or other person has reason to believe has received a payment under this Act, the trustee, receiver or other person shall

(a) ascertain whether Her Majesty in right of Canada is subrogated to any rights the individual may have in respect of the eligible wages; and

(b) if Her Majesty in right of Canada is subrogated, pay to Her Majesty the amount in respect of which Her Majesty is subrogated before making any payment to the individual in respect of eligible wages.

Components of wages

(2) A trustee, receiver or other person who makes a payment under paragraph (1)(b) shall provide the Minister with information respecting the components of wages to which the payment relates.

2018, c. 27, s. 647.

Amount not assignable

37 An amount that is payable under this Act is not capable of being assigned, charged, attached, anticipated or given as security and any transaction appearing to do so is void or, in Quebec, null.

2005, c. 47, s. 1 "37"; 2007, c. 36, s. 93.

Offences and Penalties

Offences

38 (1) Every person commits an offence who

(a) makes a false or misleading entry, or omits to enter a material particular, in any record or book of account that contains information that supports an application under this Act;

(b) in relation to an application under this Act, makes a representation that the person knows to be false or misleading;

(c) in relation to an application under this Act, makes a declaration that the person knows to be false or misleading because of the nondisclosure of facts;

(d) being required under this Act to provide information, does not provide it or makes a representation that the person knows to be false or misleading;

(e) obtains a payment under this Act by false pretence;

(f) being the payee of any cheque issued as a payment under this Act, knowingly negotiates or attempts to negotiate it knowing that the person is not entitled to the payment or any part of the payment; or

(g) participates in, consents to or acquiesces in an act or omission mentioned in any of paragraphs (a) to (f).

Trustees and receivers

(2) Every person who fails to comply with any of the requirements of subsection 21(1), (3) or (4) commits an offence.

Limitation of prosecutions

(3) A prosecution for an offence under subsection (1) or (2) may be commenced at any time within six years after the day on which the subject matter of the prosecution arose.

Due diligence

(4) No person may be convicted of an offence under subsection (2) if the person establishes that they exercised due diligence to prevent the commission of the offence. 2005, c. 47, s. 1 "38"; 2007, c. 36, s. 93.

Obstruction

39 (1) Every person commits an offence who delays or obstructs a person in the exercise of their powers or the performance of their duties under this Act.

Limitation of prosecutions

(2) A prosecution for an offence under subsection (1) may be commenced at any time within two years after the day on which the subject matter of the prosecution arose.

2005, c. 47, s. 1 "39"; 2007, c. 36, s. 93.

Punishment

40 Every person who is guilty of an offence under section 38 or 39 is liable on summary conviction to a fine of not more than $5,000 or to imprisonment for a term of not more than six months, or to both.

Regulations

Regulations

41 The Governor in Council may make regulations generally for carrying out the purposes of this Act, including regulations

(a) prescribing amounts for the purposes of subsection 2(1);

(b) prescribing reasons for the purposes of paragraph 5(1)(a);

(b.1) prescribing criteria for the purposes of subsections 5(2) and (5);

(c) defining controlling interest and managerial position for the purposes of section 6;

(d) prescribing circumstances and providing for amounts for the purposes of subsection 7(1.1);

(e) respecting the allocation of payments to the different components of wages;

(f) respecting the period during which and the manner in which applications for payments are to be made under section 8;

(g) respecting the period during which and the manner in which a review may be requested under section 11 or 32.1;

(h) prescribing the classes of individuals that the trustee or receiver is not required to inform under paragraph 21(1)(c) or to whom they are not required to provide information under paragraph 21(1)(d);

(i) respecting the information that is to be provided by trustees and receivers to the Minister and to individuals for the purposes of paragraph 21(1)(d) and respecting the period during which and the manner in which that information is to be provided;

(j) respecting the period during which and the manner in which the information referred to in paragraph 21(1)(c) and subsections 21(3) and (4) is to be provided;

(k) prescribing fees and expenses for the purposes of section 22.1 and the circumstances in which they are to be paid; and

(l) prescribing the period during which and the manner in which the Minister must be notified under subsection 36(1.1) or (1.2) and the information that must be contained in the notice.

2005, c. 47, s. 1 "41"; 2007, c. 36, s. 94; 2009, c. 2, s. 347; 2017, c. 20, s. 381; 2018, c. 27, s. 648; 2018, c. 27, s. 652.

Review of Act

Review

42 Within five years after the day on which this section comes into force, the Minister must cause a review of this Act and its administration and operation to be conducted, and cause a report on the review to be laid before each House of Parliament on any of the first 15 days on which that House is sitting after the review is completed.

TAB 8

Wage Earner Protection Program Regulations, SOR/2008-222

Current version: in force since Nov 20, 2021

Link to the latest version :	https://canlii.ca/t/8100
Stable link to this version :	https://canlii.ca/t/5572t
Citation to this version:	Wage Earner Protection Program Regulations, SOR/2008-222, <https://canlii.ca/t/5572t> retrieved on 2023-09-18
Currency:	This regulation is current to 2023-08-21 according to the Justice Laws Web Site

Wage Earner Protection Program Regulations

SOR/2008-222

WAGE EARNER PROTECTION PROGRAM ACT

Registration 2008-07-04

Wage Earner Protection Program Regulations

P.C. 2008-1317 2008-07-04

Her Excellency the Governor General in Council, on the recommendation of the Minister of Labour, pursuant to section 41 of the *Wage Earner Protection Program Act*[a], hereby makes the annexed *Wage Earner Protection Program Regulations*.

[a]S.C. 2005, c. 47, s. 1

Interpretation

1 The following definitions apply in these Regulations.

Act means the *Wage Earner Protection Program Act*. (*Loi*)

Minister means the Minister of Labour. (*ministre*)

Wages

2 The following amounts are prescribed for the purposes of the definition **wages** in 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.

SOR/2016-258, s. 1.

Termination of Employment

3 An individual's employment has ended for the purposes of paragraph 5(a) of the Act if it has ended for any of the following reasons:

(a) the individual resigned or retired;

(b) the individual's employment has terminated; or

(c) the term of the individual's employment has expired.

2009, c. 2, s. 348.

Foreign Proceedings

3.1 For the purposes of subsection 5(2) of the Act, a court may determine whether the foreign proceeding is in respect of a former employer that has terminated all of its employees in Canada other than any retained to wind down its business operations.

SOR/2021-196, s. 1.

Proceedings Under Bankruptcy and Insolvency Act or Companies' Creditors Arrangement Act

3.2 For the purposes of subsection 5(5) of the Act, a court may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations.

SOR/2021-196, s. 1.

Controlling Interest

4 For the purpose of paragraph 6(b) of the Act, an individual had a controlling interest in the business of their former employer if the individual owned

(a) more than 40% of the voting shares in the business;

(b) a block of voting shares that is large enough such that no one shareholder or coalition of shareholders can block a motion; or

(c) enough shares in the business to control the business's policy.

Excluded Managers

5 For the purpose of paragraph 6(c) of the Act, an individual occupied a managerial position with their former employer if the responsibilities of the individual included making binding

(a) financial decisions affecting the business of the former employer; or

(b) decisions with respect to the payment or the non-payment of wages by the former employer.

Offsets

6 Any amount that an individual has received in respect of eligible wages or in respect of the termination of employment that is paid by the former employer or from any other source, excluding any amounts received through other federal or provincial programs, after the date of the bankruptcy or receivership, or the day on which a court determines that the former employer meets the criteria set out in section 3.1 or 3.2, as the case may be, is the amount for the purposes of subsection 7(1.1) of the Act.

2009, c. 2, s. 349; SOR/2021-196, s. 2.

7 [Repealed, 2009, c. 2, s. 350]

Allocation of Payments

8 Payments to an individual under the Act are to be allocated in the following order:

(a) firstly, to wages other than those referred to in paragraphs (b) to (e);

(b) secondly, to 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 to the extent referred to in subsections 81.3(3) and 81.4(3) of the *Bankruptcy and Insolvency Act*;

(c) thirdly, to vacation pay;

(d) fourthly, to termination pay; and

(e) lastly, to severance pay.

2009, c. 2, s. 351.

Applications

9 (1) An application for payment shall be made within 56 days after the latest of the following days:

(a) the date of the bankruptcy or receivership of the applicant's former employer,

(b) the day on which the applicant's employment ends for any of the reasons referred to in section 3, and

(c) the day on which a court determines that the former employer meets the criteria set out in section 3.1 or 3.2, as the case may be.

(2) The application may be submitted after the expiry of the 56-day period if circumstances beyond the control of the applicant prevented them from submitting the application during that period.

2009, c. 2, s. 352; SOR/2016-258, s. 2(E); SOR/2021-196, s. 3.

10 An application shall be made in writing using the form provided by the Minister.

Review

11 (1) An applicant shall request a review under section 11 or 32.1 of the Act in writing within 30 days after the day on which the applicant is informed under subsection 10(1) or 32(1) of the Act, as the case may be, of the Minister's determination.

(2) The request may be submitted after the expiry of the 30-day period if circumstances beyond the control of the applicant prevented them from submitting the request during that period.

SOR/2016-258, s. 3(E); SOR/2021-196, s. 4.

12 The Minister shall notify the applicant in writing of the Minister's decision.

13 [Repealed, SOR/2021-196, s. 5]

14 [Repealed, SOR/2021-196, s. 5]

Information to Be Provided to the Minister

15 (1) For the purpose of paragraph 21(1)(d) of the Act, the trustee or receiver shall provide the Minister with the following information in the form provided by the Minister:

(a) the date of bankruptcy or receivership, or the day on which a court determines that the former employer meets the criteria set out in section 3.1 or 3.2, as the case may be;

(b) the name, address, telephone number, social insurance number, employee number and job title of the individual;

(c) the dates on which wages, other than severance pay or termination pay, were earned and the basis upon which they were calculated;

(c.1) the date on which any employment in respect of which severance pay or termination pay is owing ended;

(d) a statement as to whether or not the individual delivered a proof of claim for wages owing under section 124 of the *Bankruptcy and Insolvency Act*; and

(e) the names of the employer's officers, directors and owners and of the person responsible for the employer's payroll.

(2) The trustee or receiver shall provide the information within

(a) 45 days after the date of bankruptcy or after the first day on which there was a receiver in relation to the former employer, as the case may be, unless circumstances beyond the control of the trustee or receiver justify a longer period; or

(b) if the trustee or receiver requests the information under subsection 21(3) or (4) of the Act, 15 days after receiving the information.

2009, c. 2, s. 353; SOR/2016-258, s. 5(E); SOR/2021-196, s. 6.

Information to Be Provided to an Individual

16 (1) For the purpose of paragraph 21(1)(d) of the Act, the trustee or receiver shall provide each individual with the following information:

(a) the date of bankruptcy or receivership, or the day on which a court determines that the former employer meets the criteria set out in section 3.1 or 3.2, as the case may be;

(b) a statement informing the individual of their requirement under section 124 of the *Bankruptcy and Insolvency Act* to deliver a proof of claim for wages owing;

(c) a copy of the information and documents that they provided to the Minister with respect to the individual; and

(d) an application form for the Wage Earner Protection Program.

(2) The trustee or receiver shall provide the information within 45 days after the date of bankruptcy or after the first day on which there was a receiver in relation to the former employer, as the case may be, unless circumstances beyond the control of the trustee or receiver justify a longer period.

2009, c. 2, s. 354; SOR/2016-258, s. 6; SOR/2021-196, s. 7.

Duty to Assist — Deadlines

17 (1) A person shall provide information under subsection 21(3) or (4) of the Act within 10 days after the day on which they receive the request unless circumstances beyond the control of the person justify a longer period and the person makes a written request to the Minister for an extension before the 10 days have elapsed.

(2) A copy of the request for extension shall also be provided to the trustee or receiver, as the case may be.

SOR/2016-258, s. 7.

Fees and Expenses

18 (1) For the purposes of section 22.1 of the Act, the Minister shall, on application by the trustee, pay the fees and expenses if

(a) the trustee has submitted a claim in the form approved by the Minister;

(b) the claim indicates a deficit; and

(c) the amount of any third-party deposits and guarantees in respect of the fees and expenses is less than the deficit.

(2) The amount payable is equal to the lesser of

(a) the amount by which the deficit exceeds the amount of any third-party deposits and guarantees; and

(b) the amount determined by the formula

$$\mathbf{A + B}$$

where

A is the amount obtained by adding $1,000, as adjusted, to

(i) $150, as adjusted, for each of the first 10 claims, and

(ii) $100, as adjusted, for each additional claim; and

B is, the total of the fees and expenses to a maximum of $6,000, as adjusted, not including applicable sales taxes, incurred

(i) for taking possession of the property, making an inventory and securing and insuring the property,

(ii) for mail-outs to creditors to advise them of the meeting of creditors and the discharge hearing of the trustee,

(iii) for publishing a newspaper notice of the bankruptcy,

(iv) for the official receiver and the registrar, and

(v) for all of the other items that may be allowed by the court on the taxation of the statement of receipts and disbursements, to a maximum of $1,000, as adjusted.

(3) Despite subsection (2), the amount determined for B in paragraph (2)(b) is equal to 0 if the amount determined in accordance with the following formula is more than $10,000, as adjusted:

$$X - Y$$

where

X is equal to the total value of the former employer's assets; and
Y is the total value of the claims that have priority over the fees and expenses of the trustee.

(4) The Minister may request that the trustee provide a copy of the final statement of receipts and disbursements.
SOR/2021-196, s. 8.

19 (1) The amounts, as indicated in subsections 18(2) and (3), that are to be adjusted are to be done so on January 1 of each year in accordance with the percentage increase to the consumer price index for the year ending on September 30 of the previous year.

(2) The consumer price index is the annual average all-items consumer price index for Canada (not seasonally adjusted) published by Statistics Canada.

(3) The adjusted amounts are to be rounded

(a) in the case of those set out in the description of A in paragraph 18(2)(b), to the nearest dollar;

(b) subject to paragraph (c), in the case of those set out in the description of B in paragraph 18(2)(b) and in subsection 18(3), to the nearest $500 increment; and

(c) in the case of those set out in subparagraph (v) of the description of B in paragraph 18(2)(b), to the nearest $100 increment.

(4) If, as a result of rounding, an amount set out in the description of B in subsection (2) remains the same as it was for the previous year, the unrounded adjusted amount is to be used for the purposes of the adjustment for the following year.

SOR/2021-196, s. 8.

20 The notice referred to in subsections 36(1.1) and (1.2) of the Act is to be provided to the Minister within 30 days after the day on which the individual becomes aware of the action, proceeding, decision or order, as the case may be, and include

(a) the name, address, telephone number and social insurance number of the individual;

(b) in the case of a notice referred to in subsection 36(1.1),

(i) the date the action or proceeding was commenced,

(ii) the nature of the action or proceeding,

(iii) the name of the person who commenced the action or proceeding and their contact information; and

(c) in the case of a notice referred to in subsection 36(1.2), the date the decision or order was made and, if a payment has been received as a result of the decision or order,

(i) the amount of the payment broken down by the components of wages to which it relates and by recipient,

(ii) the contact information of the recipients,

(iii) the time period for which the payment relates, and

(iv) the source of the payment.

SOR/2021-196, s. 8.