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The WEPPA, Purposive Interpretation and Vulnerable Creditors

Contents

INSOL International
6-7 Queen Street, London, EC4N 1SP
Tel: +44 (0) 20 7248 3333 Fax: +44 (0) 20 7248 3384

Acknowledgement

INSOL International is pleased to present the 21st technical paper titled "The WEPPA, Purposive Interpretation and Vulnerable Creditors" written by Jassmine Girgis, Assistant Professor, Faculty of Law, University of Calgary, Canada. Prof. Girgis was also the INSOL International Scholar for the Americas Region in 2010 - 2011.

The Wage Earner Protection Program Act (WEPPA) is part of a comprehensive package of insolvency reforms that were introduced to the Canadian Bankruptcy and Insolvency Act (BIA) and it came into force in July 2008.

After the reforms were introduced to the BIA, employees with wage claims enjoy a super priority status over secured and unsecured creditors up to a maximum of $ 2000. These super-priority rights of employees may, in the short term protect the employees' rights but, in the long term may have adverse effects if secured lenders are not able to recover the full amount of the debts owed to them.

This paper considers the wage earner provisions that are in force in Canada and also the decision given by the appellate court in the case of *Ted Leroy Trucking Ltd. v. Century Services Inc*. This is the only case so far to consider the new amendments and, in particular, the broad interpretation given by the court when defining the term "wages".

INSOL International sincerely thanks Professor Jassmine Girgis for writing this very interesting paper.

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The WEPPA, Purposive Interpretation and Vulnerable Creditors

Jassmine Girgis[*±]
Assistant Professor, Faculty of Law, University of Calgary
INSOL Scholar for the Americas - 2010 / 2011

Introduction

When a debtor does not have enough money to repay its obligations as they become due, the debtor may choose to declare bankruptcy, or one of its creditors may apply for a bankruptcy order. Bankruptcy, as a collective debt - collection device, provides "creditors with a compulsory and collective forum to sort out their relative entitlements to the debtor's assets".[1]

When the state creates special priority rights in bankruptcy (rights in bankruptcy that are not enjoyed outside of bankruptcy), it brings about the problem articulated by Professor Jackson, namely the creation of incentives for some creditors to trigger the bankruptcy process at a time when it might not be in the creditors' best interests as a whole.[2] In spite of these concerns, the state nonetheless carves out exceptions in the form of a special protection for groups of unsecured creditors. This paper will consider one type of unsecured creditors which have been given a special protection in bankruptcy, wage earners.

Canada has recently introduced the *Wage Earner Protection Program Act*.[3] The WEPPA established the Wage Earner Protection Program (the "WEPP") to make payments to eligible individuals for unpaid wages earned six months prior to their employer's bankruptcy or receivership[4] subject to certain exceptions. Under the WEPPA, if the Crown makes a WEPP payment to an eligible individual in respect of unpaid wages, the Crown is subrogated to the claims enjoyed by that employee under the *Bankruptcy and Insolvency Act*.[5] Under the BIA, unpaid employees have a limited super - priority against the current assets[6] of the employer in an amount up to $2000.[7]

This paper will consider the wage earner provisions and *Ted Leroy Trucking Ltd. v. Century Services Inc*.[8] the only appellate case to consider the new amendments, and, in particular, the definition of "wages". In *Leroy Trucking*, Ted Leroy Trucking Ltd. ("TLT") made an assignment into bankruptcy when it failed to restructure its business. At issue in this case was the extent of the definition of "wages" in WEPPA and the BIA. The secured creditor argued that the definition was restricted to encompass amounts owing directly to the employee. The union representing the employees, however, took the position that the definition encompassed all liabilities arising from the collective agreement between the union and the TLT, "irrespective of whether the amount is payable directly to the employee or, on the employee's behalf, to a third party such as the union, a health and welfare trust, or a third party service provider".[9] Both the trial and appellate courts found that "the term 'wages' in the WEPPA includes not only amounts due to be paid directly to the employee but also other amounts that were earned by the employee and which were directed to be paid to a third party by the employee directly or pursuant to a contract such as a collective agreement covering the employee".[10]

The paper will also consider the position of employees before and after their employers' bankruptcies and examine how "wages" has been interpreted in the past and how that influenced the *Leroy Trucking* decision. The broad interpretation the Court gave to the term "wages" in *Leroy Trucking* can

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[*] The views expressed in this article are the views of the authors and not of INSOL International, London.

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[1] Thomas Jackson, *The Logic and Limits of Bankruptcy Law* (Cambridge, Mass, Harvard University Press, 1986), p. 4 [Jackson, *Limits of Bankruptcy Law*].

[2] *Ibid*., at p. 85.

[3] Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1, as amended by S.C. 2007, c. 36 [WEPPA]. This came into force in July 2008.

[4] *Ibid*., at ss. 4-5.

[5] Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 81.3-81.4 [BIA]. Section 81.3 of the BIA deals with the super-priority for certain employees in the context of a bankrupt employer, while section 81.4 of the BIA deals with the same issue in the context of an employer in receivership.

[6] *Ibid*.

[7] The priority is limited because the charge only applies to "current assets", which are defined in the BIA as "mean[ing] cash, cash equivalents — including negotiable instruments and demand deposits — inventory or accounts receivable, or the proceeds from any dealing with those assets" (*ibid*., at s. 2).

[8] *Ted Leroy Trucking Ltd. v Century Services Inc*, 2009 B.C.S.C. 41, aff'd 2010 B.C.C.A. 223, leave to appeal to S.C.C. refused, 2010 CarswellBC 3393 [*Leroy Trucking*].

[9] *Leroy Trucking* (B.C.S.C.), *ibid*. at para. 4

[10] *Ibid*., at para. 22.

be given one of two interpretations, either that the amounts payable to a third party would go directly to that third party upon an employer's bankruptcy, or that the amounts payable would be included in the payments that go to the employees, thereby expanding "wages" for the benefit of the employees. Each interpretation has its advantages and drawbacks but the latter is more in tune with the purpose of the legislation and it avoids practical application problems that would arise on the former interpretation, since the legislation, on its face, does not appear to make allowances to payments for parties other than employees.

I. Creating New Bankruptcy Entitlements?

Two distinct camps have formed in the debate over the role of bankruptcy law. While academics agree that bankruptcy law serves as a debt collection device, the disagreement revolves around the extent to which bankruptcy law should interfere in pre - bankruptcy entitlements. On one side, it is argued that bankruptcy law should be largely procedural, serving as a device to distribute creditors' entitlements in accordance with the pre - bankruptcy entitlements that had been negotiated by the debtors and their creditors. On the other hand, others maintain that bankruptcy law should contain a substantive element in that it should be able to alter pre - bankruptcy entitlements in order to protect certain interests that are not given the opportunity, prior to bankruptcy, to negotiate for a privileged priority position.

Bankruptcy law serves as a collective debt - collection device.[11] As a collective and compulsory regime, bankruptcy serves to prevent what would otherwise happen in its absence: individual creditors, concerned about not being paid by a debtor, rush to line up and 'grab' the debtor's assets when the debtor defaults, otherwise widely known as the "common pool" problem.[12] By definition, bankruptcy occurs when a debtor is unable to pay its debts as they become due. During that time period, if individual creditors are rushing to ensure they each get paid, they may otherwise be unaware that pursuing the debtor at that time may not be in the group of creditors' best interests as a whole. Rather, the best thing for the creditors as a group may be, instead, to keep the debtor's assets together rather than splitting them up. That incentive to be the 'first to the finish line'[13] is thereby removed by the imposition of the bankruptcy scheme on all creditors, under which creditors are paid on a pro rata basis, in large part according to a priority scheme determined pre-bankruptcy.[14]

Inherent in its role as a debt - collection device, this argument has also maintained that bankruptcy must maintain the bargain each creditor struck with the debtor at the time they initially contracted for the creditor's investment in the debtor's business.[15] Bankruptcy law should protect the priority scheme agreed to by the creditors and debtor in times of financial well being and the scheme is then "used in the event that such a day of reckoning should come about".[16] Put another way, bankruptcy law should not create rights, nor should it change the pre - bankruptcy priority scheme, but rather, it should implement the rights that were agreed to prior to the debtor's bankruptcy.[17] Specifically, it should be "seen as an attempt to implement the type of collective and compulsory system that rational creditors would agree to if they could bargain together before the fact".[18]

To that end, that creation of rights within the bankruptcy scheme specifically works against bankruptcy's fundamental goal, namely to solve the 'common pool' problem. If rights are created within bankruptcy through alteration of the priority scheme that exists outside bankruptcy, creditors whose positions would be improved within bankruptcy have an incentive to trigger the bankruptcy scheme.[19] And a collective scheme fulfills its purpose only if it is activated when it is in the group's collective interest to do so, which is more likely if pre and post - bankruptcy positions are not altered.

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[11] Jackson, *Limits of Bankruptcy Law*, *supra*, footnote 1, at p. 7; Douglas G. Baird, "The Uneasy Case for Corporate Reorganizations" (1986), 15 J Legal Stud 127 at p. 131.
[12] See Jackson's widely-recognized example involving rights to fishing in a lake. Jackson, *Limits of Bankruptcy Law*, *supra*, footnote 1, at pp. 11-12.
[13] Thomas H. Jackson, "Of Liquidation, Continuation and Delay: An Analysis of Bankruptcy Policy and Nonbankruptcy Rules" (1986), 60 Am Bankr LJ 399 at p. 401; Douglas G. Baird and Thomas H. Jackson, "Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy" (1984), 51 U Chicago L Rev 97 at p. 103.
[14] Sometimes the priority sequence changes upon the imposition of bankruptcy proceedings, resulting in the creation of rights upon bankruptcy.
[15] Jackson, *Limits of Bankruptcy Law*, *supra*, footnote 1, at p. 25.
[16] Baird, *supra*, footnote 11, at p. 131.
[17] Jackson, *Limits of Bankruptcy Law*, *supra*, footnote 1, at p. 25.
[18] Thomas H. Jackson, "Avoiding Powers in Bankruptcy" (1984), 36 Stan L Rev 725 at p. 728.
[19] Jackson, *Limits of Bankruptcy Law*, *supra*, footnote 1, at p. 27.

The Jackson / Baird view has been met with opposition. On the other side, the debate is led by Elizabeth Warren, who sees the purpose of state debt collection law as different than that for bankruptcy law. State collection law exists to collect one unpaid debt when a debtor is solvent.[20] But state law cannot respond to situations in which the debtor is unable to pay all its creditors.[21] For that, we must turn to bankruptcy law, which exists to deal with situations involving complete debtor collapse. It aims to allocate the debtor's assets when they are insufficient to satisfy all creditor claims, and it also terminates the rights of unpaid creditors,[22] which state law does not do.[23]

A straight forward application of the Jackson / Baird model is unlikely to be the most effective policy choice, since vulnerable creditors, as in involuntary creditors and / or those who are unable to bargain for priority prior to bankruptcy, would have little protection in the event of bankruptcy. Creating protection through legislation adheres to the Warren model, and the state does create certain protection for groups of unsecured creditors, including employees. In Canada, employees have protection both before and within bankruptcy, which is a combination of both the Jackson / Baird and Warren models. Although the state is creating rights for employees within bankruptcy, the protection of employees before bankruptcy and subsequent similar priority position after, removes incentives for them to trigger the bankruptcy process.

II. Protection of Employees: Historical and Current

Historically, the issue of wages and how employees should be compensated in their employers' bankruptcies has been frequently debated in discussions on amending bankruptcy legislation. Employees do not enter into contracts with their employer for the extension of credit,[24] making them non - consensual creditors and therefore in need of more protection against the bankruptcy of their employers.[25] It is on this basis that employees have been afforded preferred status. The 1949 *Bankruptcy Act* gave unpaid wage claims a preferred status over the claims of general creditors (but behind secured creditors), up to a maximum of $500. That legislation remained unchanged until 1992, but in the interim, several attempts were made to prioritize wage claims.

In 1970, the Tassé Report recommended that wage claims take priority over all other claims, including secured claims, in what has come to be known as "super - priority".[26] But secured creditors objected when the recommendations in the Tassé Report were included in Bill C-60 in 1975. The Tassé Report proposals had included super priority wage claims of up to $2000, but the objections led instead to the Senate Committee's idea of a government-administered fund, consisting of contributions from employers and employees.[27] In 1986, the Colter Report found that employees were commonly left without available funds due to prioritizing wage claims behind the claims of secured creditors[28] and it declared the state of law to be unsatisfactory.[29] The Colter Report also found that, although some provincial legislation dealt with employee wage claims, the legislation was subject to inconsistent treatment in the courts, which created uncertainty and spurred litigation.[30] Its recommendation was to create a "wage earner protection fund", to be financed by both employers and employees in order to avoid affecting any one lender.[31]

In 1991, Bill C-22 proposed a wage protection plan through enactment of a separate *Wage Claim Payment Act* but the proposed program was removed from the Bill when the Mulroney

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[20] Elizabeth Warren, "Bankruptcy Policy" (1987), 54 U Chicago L Rev 775 at p. 782.
[21] *Ibid*., at p. 783.
[22] *Ibid*., at p. 785.
[23] *Ibid*., at p. 784.
[24] More specifically, "because the employee does not anticipate non-payment the employee's wages are unlikely to include a risk premium to offset the risk of the employer failing to pay wages because of insolvency. Even if the employee appreciated the risk of non-payment it is unlikely that the typical employee, especially at a non-executive level, would bother to bargain for a risk premium or some other form of protection against the risk of the employer becoming insolvent." See Kevin Davis and Jacob Ziegel, "Assessing the Economic Impact of a New Priority Scheme for Unpaid Wage Earners and Suppliers of Goods and Services" (prepared for Industry Canada, Corporate Law Policy Directorate, 30 April, 1998) at pp. 13-15 (footnote omitted) [Davis and Ziegel Report].
[25] Stephanie Ben-Ishai and Anthony Duggan, *Canadian Bankruptcy & Insolvency Law* (Markham, LexisNexis Canada, 2007), at p. 69.
[26] *Report of the Study Committee on Bankruptcy and Insolvency Legislation* (Ottawa, Information Canada, 1970) (Chair: Roger Tassé) [Tassé Report].
[27] Senate, Standing Senate Committee on Banking, Trade and Commerce , *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (November 2003) (Chair: Richard H. Kroft), online: Parliament <http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/bank-e/rep-e/bankruptcy-e.pdf> [Senate Report].
[28] Canada, Advisory Committee on Bankruptcy and Insolvency, *Proposed Bankruptcy Act Amendments: Reports of the Advisory Committee on Bankruptcy and Insolvency* (Hull, Qc., Supply and Services Canada, 1986) (Chair: Gary F. Colter) [Colter Report].
[29] *Ibid*., at p. 21.
[30] *Ibid*.
[31] *Ibid*., at p. 32.

government faced too much opposition from its own caucus.[32] Instead, the matter was referred to a Special Joint Committee of the Senate and the House of Commons for reconsideration, but it was never established.[33] In 1992, the BIA finally was amended to increase unpaid wage claims, but they continued as preferred claims, up to a maximum of $2,000 from the previous $500 maximum. The problem flagged by the Colter Report in 1986 remained unchanged, however, because preferred creditors continued to rank above claims of general unsecured creditors but below claims of secured creditors.[34]

Therefore, the recommendations and reports put forth the idea of a fund and the creation of a super priority claim, but in the end, the only change that occurred was an increase to the amount of the employee preferred claim. However, in 2005, both ideas were implemented through the passing of the WEPPA to create a fund for employees, and the amending of the BIA to create a super priority claim.

a. Current Wage Protection Within Bankruptcy

As the Colter Report had pointed out in 1986, even with an increase to the maximum amount to which an employee would be entitled to as a preferred claim, the reality is that there is rarely much left over for remaining creditors after secured creditors enforce their claims against the debtor's assets. As a result, the preferred status for employees was never effective protection.[35] As a result of the inadequate protection for employees in the legislation, the recent legislative amendments made a significant change. The government - sponsored fund under WEPPA was an idea that had been put forward in the past but had never been adopted in Canada. Parliament has recently introduced the WEPPA and created a BIA limited super - priority charge[36] in favour of employees,[37] two protections that are different in scope and coverage.[38] The WEPPA established the WEPP to make payments to eligible individuals for unpaid wages earned six months prior to their employer's bankruptcy or receivership[39] subject to certain exceptions whereas the BIA creates a charge in favour of employees.

The preamble to WEPPA specifies that it is "[a]n Act to establish a program for making payments to individuals in respect of wages owed to them by employers who are bankrupt or subject to a receivership." Under WEPPA, "wages" and "eligible wages" are defined as:

> "wages" includes salaries, commissions, compensation for services rendered, vacation pay, severance pay, termination pay and any other amounts prescribed by regulation.[40]
>
> "eligible wages" means:-
>
> *(a)* wages other than severance pay and termination pay that were earned during the six - month period ending on the date of the bankruptcy or the first day on which there was a receiver in relation to the former employer; and
>
> (*b*) severance pay and termination pay that relate to employment that ended during the period referred to in paragraph (*a*).[41]

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[32] Anthony J. Duggan *et al*., *Canadian Bankruptcy and Insolvency Law, Cases, Text and Materials*, 2d ed. (Toronto, Emond Montgomery, 2009), pp. 19, 406.
[33] Senate Report, *supra*, footnote 27, at p. 89.
[34] These claims are found in s. 136(1) of the BIA, *supra*, footnote 5.
[35] Roderick J. Wood, *Bankruptcy & Insolvency Law* (Toronto, Irwin Law, 2009), p. 268.
[36] The priority is limited because the charge only applies to "current assets", which are defined in the BIA as "mean[ing] cash, cash equivalents - including negotiable instruments and demand deposits - inventory or accounts receivable, or the proceeds from any dealing with those assets" (BIA, *supra*, footnote 5, at s. 2).
[37] Sections 81.3 and 81.4 of the BIA, *supra*, footnote 5. Section 81.3 deals with the super-priority for certain employees in the context of a bankrupt employer, while section 81.4 deals with the same issue in the context of an employer in receivership.
[38] E. Patrick Shea, *BIA, CCAA & WEPPA, A Guide to the New Bankruptcy & Insolvency Regime* (Markham, LexisNexis Canada, 2009), pp. 8-9 [Shea, *BIA*, *CCAA* &*WEPPA*].
[39] WEPPA, *supra*, footnote 3, at ss. 2(1) ("eligible wages"), 4, 5.
[40] WEPPA, *Ibid*., at s. 2(1). As noted above, as WEPPA was originally enacted, the definition of "wages" excluded severance pay and termination pay. The definition was amended, however by Bill C-10, in force March 12, 2009 (but retroactive to January 29, 2009), to include severance pay and termination pay. See Lloyd W. Houlden, Geoffrey B. Morawetz and Janis P. Sarra, *The 2010 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell, 2009), p. 1273. The *Leroy Trial* judgment refers to the original definition of "wages" (excluding severance pay and termination pay) but the *Leroy CA* decision refers to the amended definition(*Leroy Trucking*, *supra*, footnote 8).
[41] WEPPA, *supra*, footnote 3, at s. 2(1).

The definition is expanded in the Regulations:

> The following amounts are prescribed for the purposes of subsection 2(1) of the Act:
>
> (*a*) gratuities accounted for by the employer;
>
> (*b*) disbursements of a travelling salesperson properly incurred in and about the business of a bankrupt or the business of a person subject to a receivership; and
>
> (*c*) production bonuses and shift premiums.[42]

The link between the two statutes comes under section 36 of the WEPPA, which provides that if the Crown makes a WEPP payment to an eligible individual in respect of unpaid wages, the Crown is subrogated to the claims enjoyed by that employee under the BIA. Under the BIA, unpaid employees have a super - priority against the "current assets"[43] of the employer in an amount up to $2000.[44] The BIA charge has priority to all other claims, including secured claims, with a few exceptions.[45] To the extent that there are insufficient assets to satisfy the amount secured by the employee charge, an employee may claim as a preferred creditor.[46] And if a secured creditor's claim is eroded as a result of the super-priority afforded to an employee, that secured creditor can prove a claim as a preferred creditor with regard to the amount lost due to the super - priority.[47]

Under WEPPA, workers are limited to claiming a maximum of $3000 or an amount that is four times the maximum weekly insurable earnings under the *Employment Insurance Act*,[48] whichever is greater.[49] The funds come from general revenues of the federal government and the program subrogates the Crown to any right by the employee. After the Crown makes payment to the employee, the Crown can sue the employer or director in the name of the federal Crown or the employee.

The amount of wages paid out to an eligible individual under the WEPPA is governed by section 7. This section is as follows:

> 7 (1) The amount that may be paid under this Act to an individual is the amount of eligible wages owing to the individual up to a maximum of the greater of the following amounts, less any amount prescribed by regulation:
>
> (*a*) $3,000; and
>
> (*b*) an amount equal to four times the maximum weekly insurable earnings under the *Employment Insurance Act*.
>
> (2) If the former employer is both bankrupt and subject to a receivership, the amount that may be paid is the greater of the amount determined in respect of the bankruptcy and the amount determined in respect of the receivership.[50]

As between the WEPPA and the BIA, the coverage between the two statutory regimes intersects but there are some differences. For example, the WEPPA covers termination and severance pay and employee remuneration, and covers claims of up to $3000. The statutory charge only covers claims of up to $2000 for employee remuneration but it does not include severance and termination pay. The effect of this difference will become

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[42] Wage Earner Protection Program Regulations, SOR/2008-222, s. 2.
[43] "Current assets" are defined in s. 2(1) BIA, *supra*, footnote 5, as meaning "cash, cash equivalents — including negotiable instruments and demand deposits — inventory or accounts receivable, or the proceeds from any dealing with those assets".
[44] *Ibid.,* at ss. 81.3-81.4.
[45] BIA, *Ibid*., at s. 81.3(4). The charge is subject to the rights of unpaid suppliers to repossess their goods, the rights of unpaid fishers, farmers and aquaculturists to a secured charge over the consideration received by the debtor for their goods, and deemed trusts.
[46] *Ibid*., at s. 136(1)(d).
[47] *Ibid*., at ss. 136(1)(d.01) -(d.02).
[48] *Employment Insurance Act*, S.C. 1996, c. 23.
[49] WEPPA, *supra*, footnote 3, at s. 7(2).
[50] WEPPA, *Ibid*., at s. 7. Both the *Leroy Trucking* (B.C.S.C.), and *Leroy Trucking* (B.C.C.A.) judgments refer to the original version of s. 7, which stated that the "amount that may be paid to an eligible individual is the amount of wages that were earned in the six months immediately before the date of bankruptcy…" The amended version removed the time period for the wages earned and instead, placed it in the definition of "eligible wages". The maximum amount paid to an individual is the same under the original version and the amended version, only the original version states that the amount is "less any deductions applicable under a federal or provincial law" *(Leroy Trucking*, *supra*, footnote 8).

significant when the government compensates employees under the WEPP for termination and severance pay, but is unable to include those payments in the BIA priority charge for wages.[51]

In the next section, the scope of the legislative provisions that govern unpaid wages outside bankruptcy will be examined. The definition of "wages" in the WEPPA is the issue in *Leroy Trucking* but an examination of how "wages" has been defined in different contexts provides an indication of the type of approach Parliament may have intended.

b. Employee Wage Legislation Outside of Bankruptcy

Outside bankruptcy, recovery of employee wage claims is governed by a provincial legislation, which gives employees an administrative system through which they can go after their employers for unpaid wages. As wage claims have garnered protection within bankruptcy, they have also received favoured treatment outside bankruptcy. Most provinces have created a type of non - consensual security interest in the debtor's assets in favour of employees, which provides employees with a preference or priority to the payment, instead of being grouped with the ordinary unsecured creditors in the event of the employer's insolvency.[52] The security interests are used to secure the payment or performance of an obligation and are classified as "non - consensual" because they arise through operation of law.[53] The provinces use various devices to create security including statutory liens, charges, secured debts, security interests or mortgages.[54] In some instances, a deemed trust is created by the legislation but since a trust needs many elements to arise, most of which are absent if deemed to be created by statute, the transaction ends up functioning as a secured transaction.[55] Neither provincial security interests nor statutory deemed trusts operate in a bankruptcy, as provincial legislation typically gives way to the federal BIA under the principle of paramountcy.

In some provinces, the employee wage claim is limited by a monetary amount[56] while in other provinces, there is no such limitation. The security interests created by employee standards legislation are excluded from the scope of the provincial *Personal Property Security Acts* ("PPSA") because they are non - consensual,[57] which means the enforcement remedies articulated in the PPSAs are not applicable to them.[58] If a statutory enforcement method is not provided, common law methods may be utilized[59] and in the absence of either, the employees may have to rely on a court - ordered sale.[60]

The provisions creating the non - consensual security interests usually establish a priority status in relation to both subsequent and prior security interests. It has been determined that

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[51] See Shea, *BIA*, *CCAA* & *WEPPA*, *supra*, footnote 38, at pp. 262-63, where he also discusses the differences between the WEPPA and the statutory charge in terms of the period covered and eligibility for coverage. See also Craig A. Mills, "Balancing Interest: An Overview of the Wage Earner Protection Program" online: Miller Thomson LLP <http://www.millerthomson.com/assets/files/article_attachments/Balancing_Interests_An_Overview_of_the_Wage_Earner_Protection_Program.pdf>.

[52] In Ontario (*Employment Standards Act*, S.O. 2000, c. 41, s. 14) and Newfoundland (*Labour Standards Act*, R.S.N.L. 1990, c. L-2, s. 37), employment standards legislation provides a statutory preference for unpaid wages, not a security interest. Alberta (*Employment Standards Code*, R.S.A. 2000, c. E-9, s. 109(3)), British Columbia (*Employment Standards Act*, R.S.B.C. 1996, c. 113, s. 87(1)), Manitoba (*Employment Standards Code*, C.C.S.M. c. E110, s. 94(2)), New Brunswick (*Employment Standards Act*, S.N.B. 1982, c. E-7.2, s. 38.1(1) [amended SNB 1988, c. 59, s. 15; SNB 1994, c. 50, s. 2]), Nova Scotia (*Labour Standards Code*, R.S.N.S. 1989, c. 246, s. 88), Prince Edward Island (*Employment Standards Act*, R.S.P.E.I. 1988, c. E-6.2, s. 31(1)), Saskatchewan (*Labour Standards Act*, S.S. 1978, c. L01, s. 56(1.2) [amended S.S. 1980-81, c. 63, s. 5; S.S. 1993, c. P-6.2), Northwest Territories (*Labour Standards Act*, R.S.N.W.T. 1988, c. L-1, s. 54(1)), the Yukon (*Employment Standards Act*, R.S.Y. 2002, c. 72, s. 91(2)) create statutory security interests. Nova Scotia (s. 36), Ontario (s. 40) and Prince Edward Island (s. 12) create a deemed trust for vacation pay, but not for unpaid wages. Alberta (s. 109(2)), Manitoba (s. 100), Saskatchewan (s. 56(1.1)) and the Yukon (s. 91(1)) create a deemed trust for unpaid wages, in addition to a deemed security interest.

[53] Peter Barnacle *et al*., *Employment Law in Canada*, 4th ed., vol. 2 (Markham, LexisNexis Canada 2005) at §19.168.

[54] In this paper, only the security devices arising under employment standards legislation will be considered. It should be noted, though, that in addition to this, employees can get relief for unpaid wages by employing relief found in execution legislation in most jurisdictions. See Barnacle, *Ibid*., at §19.154, n 1.

[55] Barnacle *et al*., *Ibid*., at §19.169.

[56] In Alberta, the limit to the deemed security interest is $7,500. See *Employment Standards Code*, R.S.A. 2000, c. E-9, s. 109(3). In Manitoba, there is a $2500 limit in the extent to which the deemed security interest enjoys priority over prior security interests, but the amount of unpaid wages secured is not limited. See Employment Standards Code, C.C.S.M. c. E110, s. 101. In New Brunswick, a sliding scale is created. See *Employment Standards Act*, S.N.B. 1982, c. E-7.2, s. 38.1(1) [amended S.N.B. 1988, c. 59, s. 15; S.N.B. 1994, c. 50, s. 2].

[57] Non-consensual security interests are expressly excluded from PPSAs. See, for example, *Personal Property Security Act*, R.S.O. 1990, c. P-10, s. 4; *Personal Property Security Act*, R.S.A. 2000, c. P-7, s. 4.

[58] There is one exception in Manitoba. The Manitoba *Employment Standards Code*, *supra* footnote 53, states that when a financing statement is registered in the Personal Property Registry, the director obtains a lien and charge of the employer's assets, which are deemed to be a security interest under the *Personal Property Security Act* (*Employment Standards Code*, C.C.S.M. c. E110, s. 94(4)), and that the remedies provided in the *Employment Standards Code* and the *Personal Property Security Act* are cumulative (*Employment Standards Code*, C.C.S.M. c. E110, s. 94(6)). The security interest has to be registered to be effective under the PPSA. The effect of these provisions is that the enforcement remedies in the PPSA would be applicable. See Barnacle, *supra*, footnote 53, at §19.184, 211.

[59] Barnacle *et al*., *Ibid*., at §19.180; *Re Clemenshaw* (1962), 36 DLR (2d) 245 (B.C.C.A.).

[60] Barnacle *et al*., *supra*, footnote 53, at §19.183.

simply stating in the legislation that the security interest obtains priority is not enough; rather, unless a statute employed clear wording, the provision "should not be construed in a manner that could deprive third parties of their pre - existing property rights".[61] Bernacale and others have determined that the legislation in Nova Scotia and New Brunswick is likely to be ineffective at establishing priority over pre - existing security interests while the provisions in Alberta, British Columbia, Manitoba, the Northwest Territories, Prince Edward Island, Saskatchewan and the Yukon Territories are probably effective at establishing priority.[62] Therefore, for the most part, the provincial legislation that provides protection for employees outside bankruptcy is effective at creating a preference or priority for them, for payment, in the event they are not paid the wages owing to them.

III. Historical Analysis of "Wages"

One of the issues prevalent in provisions aimed at protecting employees within bankruptcy is the placement of the boundary for the protection, which in part, depends on the definition of "wages". In the context of bankruptcy, the considerations that have been inherent in the interpretations are primarily about ensuring even treatment of bankrupts across the different provinces, and protecting families by making sure a bankrupt has enough income available during the process of bankruptcy to sustain himself and his family.

The public policy considerations related to protecting the individual or the family have, in many instances, caused "wages" to be interpreted broadly.[63] In *Wallace v United Grain Growers Ltd*.[64] the Supreme Court of Canada determined that damages for wrongful dismissal were classified as "wages" thereby giving an undischarged bankrupt the ability to maintain an action against a former employer and deal with the property. Specifically, it found that "the underlying nature of the damages awarded in a wrongful dismissal action is clearly akin to the 'wages'" that are referred to in the BIA".[65] To support that position, the court mentioned cases in which "wages" had been interpreted broadly, to include disability benefits,[66] severance pay[67] and income tax refunds.[68] In *Re Giroux*, where the issue was whether severance pay was exempt property as a result of being "salary, wages or other remuneration" under the *Bankruptcy Act*, or whether it constituted after-acquired property and was therefore divisible among the bankrupt's creditors, Smith J. gave a broad interpretation by finding it included "virtually all benefits accruing to employees". Specifically,

> Speaking generally, one should experience no difficulty including in the definition of salary, wages and other remuneration virtually all benefits accruing to employees. Unless the context requires a restricted meaning, any reward should normally qualify, if not as "salary, wages", at least as "remuneration", whether the reward takes the form of sick pay allowance, bonuses, vacation with pay or pay in lieu of notice.[69]

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[61] *Homeplan Realty Ltd. v Avco Financial Realty Services Ltd*., [1979] 2 S.C.R. 699 [*Homeplan*].

[62] Barnacle *et al*., *supra*, footnote 53, at §19.201-202.

[63] Historically, those entitled to a preference are those who are "servants" or "waged employees", or those who fall within certain classifications in the legislation that have commonly been understood as "employees" (the current legislation speaks of "clerk, servant, traveling salesman, labourer or workman". See s. 136(1)(d) BIA, *supra*, footnote 5. These same classifications have historically denoted classes of employees. See Paul G.Kauper, "Insolvency Statutes Preferring Wages Due Employees" (1931-32), 30 Mich L Rev 504 at p. 510, rather than "independent contractor" (*Guillot v Lefaivre*, [1946] S.C.R. 335; Kauper, *Ibid*., at p. 525) and one assumption on which the court's interpretation is dependent in *Leroy Trucking* is that the legislation only applies to employees and not to independent contractors. Typically, the difference between the two has centred on the amount of control an individual has over his employment and the terms on which the task is accomplished, with an employee being subject to the control of the employer (Guy Mitchell Jr., "Recent Important Decisions" (1933-34), 6 Miss LJ 294 at p. 294; *Kisner v Jackson* (1930), 159 Miss 424). An independent contractor has been defined as "a person employed to perform work on the terms that he is to be free from the control of the employer as respects the manner in which the details of the work are to be executed" (Mitchell, *Ibid*., at p. 294) or by the Mississippi Supreme Court as "one who renders service in the course of an occupation, representing the will of his employer only as to the result of the work, and not as to the means by which it is accomplished" (*Callahan v Rayburn* (1915), 110 Miss 108, 69 So. 669). It is a question of fact to determine the applicable category (*Re Gordean Furniture Co*. (1923), 4 C.B.R. 237 (Alta. (TD)). As a result, the issue with legislation dealing with protections for employees often revolved around determining who was entitled to employee status (Kauper, *Ibid.*, at p. 514). Historically, the protection was aimed at a labourer, for the same reasons employees now have protection; they were seen as having no power to demand security for their wages (Kauper, *Ibid*., at pp. 507-08). And the assumption that the WEPPA applies only to employees is not explicitly stated. However, the term "wages" seems to be inherently understood as referring only to employees, as "employee" is mentioned once in the legislation, but the title does refer to "wage earner".
One question that arises from the court's interpretation is whether the result may have been different if one were not tied to the underlying assumption that those entitled to a preference need to be employees (one consideration is that WEPPA does not mention an independent contractor or describe the position in the section listing the individuals who are not eligible to receive a payment in respect of wages. See WEPPA, *supra*, footnote 3, at s. 6). If it could be argued that "compensation for services rendered" could refer to any service performed for the employer, whether by employee or independent contractor then the court's interpretation in *Leroy Trucking* of the phrase could be subject to question since it would open the phrase up to an interpretation that would not necessarily encompass all compensation, including third party benefits. This is simply a question to be considered (See *Leroy Trucking*, *supra*, footnote 8).

[64] *Wallace v United Grain Growers Ltd.*, [1997] 152 D.L.R. (4th) 1 (S.C.C.) [*Wallace*].

[65] *Ibid*., at paras. 59, 65.

[66] *Re Ali* (1987), 62 C.B.R. (N.S.) 64 (Ont. S.C.).

[67] *Re Giroux* (1983), 45 C.B.R. (N.S.) 245 (Ont. S.C.) [*Re Giroux]*; *Re Greening* (1989), 73 C.B.R. (N.S.) 24 (N.B. Q.B.).

[68] *Marzetti v Marzetti*, [1994] 2 S.C.R. 765 (S.C.C.) [*Marzetti*].

[69] *Re Giroux*, *supra*, footnote 67, at para. 5.

Similarly, in *Marzetti*, the issue was whether a post-bankruptcy income refund was property of the bankrupt and therefore, divisible among his creditors, or whether it would be classified as deferred wages. *Marzetti* established that property falling under what became section 68, the "salary, wages and other remuneration" which the court described as an "important form of property", deserving of "special treatment", would not vest automatically in the trustee through the simple operation of law, to become divisible among the bankrupt's creditors; rather the trustee could only access it by making a court application.[70] The court gave "wages" a broad interpretation by focusing on the policy considerations inherent in the bankruptcy provisions on wages, namely to have regard to the "family responsibilities and personal situation of the bankrupt",[71] which caused the court to "err on the side of caution".[72]

Underlying these provisions is the rehabilitative purpose of bankruptcy legislation. As *Marzetti* indicated, the process involved, such as the requirement for the trustee to apply to the court for a debtor's wages, and for a court to order the direct payment to the trustee only after having had regard to the family responsibilities and personal considerations of the bankrupt, provide "measures designed to give [the bankrupt] the minimum needed for subsistence".[73] The court determined that the provision requires a consideration of the fact that a bankrupt's reasonable living expenses need to be covered before any excess wages can be distributed among his creditors[74] even though the legislation weighed in favour of the trustee.[75] Therefore, although the court could have found in favour of the trustee after finding the statutory language weighs in the trustee's favour, the policy considerations inherent in the provision caused the court to go the other direction.[76] In *Marzetti*, the bankrupt's post - bankruptcy income tax refund was classified as wages and the trustee could only access it through a section 68 application. Similarly, in *Re Giroux*, the benefit that was defined as "wages" was the bankrupt's severance pay, for which the trustee also had to make an application (under then section 48). In both *Marzetti* and *Re Giroux*, the expansive definition of wages adopted by the courts directly benefited the bankrupts.

In *Marzetti*, the court's interpretation of section 68 was also influenced by a consideration of provincial law and the problems that would arise if its interpretation allowed for the treatment of "wages" to vary between provinces.[77] Similar considerations influenced Parliament's most recent attempt to wrestle with where to draw the boundaries on the definition of "wages". When Bill C-55 was enacted, the definition of wages was narrow and severance and termination pay were excluded. According to the Clause - by - Clause analysis released by Industry Canada, the reason for the exclusion was to protect the core wage of workers. There, it was maintained that the amount of severance and termination could potentially vary greatly, depending on the seniority of workers, the province and the workplace, respectively, could set statutory minimal amounts or enhanced minimal amounts of termination or severance pay.[78] And specifically, the inclusion of termination and severance pay would greatly increase the amounts paid out by WEPP.[79] The definition was amended, however, by Bill C-10, that came into force on 12 March 2009 (but retroactive to January 29, 2009), to include severance pay and termination pay.[80]

The definition of "wages" continues to be discussed, and was the issue in the most recent decision about the extent of its boundaries, *Leroy Trucking*. Much in keeping with the historical development of the term, the Court in *Leroy Trucking* gave "wages" a broad definition. The question that remains is whether the term was interpreted broadly to protect employees, and thereby to adhere to the purpose of the legislation, namely the protection of employees as vulnerable creditors, or to distribute the funds to third parties to whom payments had been owed prior to the employers' bankruptcies.

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[70] *Marzetti*, *supra*, footnote 68, at paras. 43-60.
[71] In *Re Giroux*, *Bankruptcy Act*, R.S.C. 1970, c. B-3, s. 48, in *Marzetti*, BIA, *supra*, footnote 5, at s. 68(1).
[72] *Marzetti*, *supra*, footnote 68, at para. 85.
[73] *Ibid*., citing *Vachon v. Canada Employment and Immigration Commission*, [1985] 2 S.C.R. 417, at para. 66.
[74] Houlden, L. W. and C. H. Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf (consulted on 10 July 2010), 3d ed., vol. 1 (Toronto, Carswell, 1992), pp. F-66 – F-69.
[75] *Marzetti*, *supra*, footnote 68, at para. 85.
[76] *Ibid*.
[77] *Ibid*., at paras. 62-63.
[78] Bill C-55, *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insovency Act and the Companies Creditors Arrangement Act and to make consequential amendments to other Acts*, 1st sess, 38th Parl, 2005, online: Industry Canada <http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00791.html>.
[79] *Ibid*.
[80] In 1986, the Colter Report recommended that severance pay be kept as an unsecured claim, "since granting such status would increase the contributions to the wage earner protection fund, and reduce the assets available for distribution to other creditors" (Colter Report, *supra*, footnote 28, at p. 34). In the 2003 Senate report representatives of organized labour supported including termination and severance pay. The Senate recommendation, however, was to amend the BIA to provide that "unpaid claims for wages and vacation pay arising as a result of an employer's bankruptcy be payable to an amount not to exceed the lesser of $2000 or one pay period per employee claim" (Senate Report, *supra*, footnote 27, at p. 96).

IV. Legislation: Protects Employees and Removes Incentives to Trigger the Bankruptcy Process

As indicated above, employees are vulnerable creditors. They have limited power to bargain for their own protection in the event of their employer's bankruptcy and rarely have access to information that would allow them to assess the risk of potential bankruptcy[81] and to properly co - ordinate their affairs. Arguably, even if they did come to possess certain information on the eve of an employer's bankruptcy, they still have limited recourse available to protect themselves. An employee is not typically diversified in employment and does not usually hold more than one job nor can the employee easily obtain another job in the event of a company's failure to pay wages due to its insolvency. The court noted this vulnerability as early as 1904 in *Fee v Turner*[82] when it determined that directors should be personally liable for arrears of wages.

> For lack of any other reason it occurs to me that what must have been had in view, was to protect to a limited extent those who were employed by such companies in positions which do not enable them to judge with any special intelligence what is the company's real financial position. The directors have personally this knowledge or should have it, and if, aware of the company's embarrassed affairs, and specially of the danger of a speedy collapse and insolvency, they continue to utilize the services of employees who have no means of securing this knowledge and who give their time and labour upon their sole reliance, often, on the good faith and respectability of the company's directors, it is not inequitable that such directors should be personally liable, within reasonable limits, for arrears of wages, thus given to their service.[83]

More recently, the matter was addressed by Kevin Davis and Jacob Ziegel in their report, "Assessing the Economic Impact of a New Priority Scheme for Unpaid Wage Earners and Suppliers of Goods and Services" in a comment about the status of employees prior to the WEPPA, when employees only had a preferred claim in their employers' bankruptcies.

> [I]t may be true to say that because the employee does not anticipate non-payment the employee's wages are unlikely to include a risk premium to offset the risk of the employer failing to pay wages because of insolvency. Even if the employee appreciated the risk of non-payment it is unlikely that the typical employee, especially at a non executive level, would bother to bargain for a risk premium or some other form of protection against the risk of the employer becoming insolvent. Some analysts have also noted that even if employees addressed their minds to the risk of non-payment, because of cognitive and volitional deficiencies they are likely to underestimate the risks of non-payment or discount the risks because of the satisfactions and fulfilment provided by the employment or simply because of the overriding need to find a job in an environment of high unemployment.[84]

Davis and Ziegel go on to note that the fact that employees do not bargain for a risk premium is not simply a disadvantage to employees; it also benefits both employers and secured creditors, and allocates the risk of bankruptcy to non-secured creditors, such as wage earners, or anyone whose claim ranks lower than secured creditors.[85] This benefits secured creditors, who achieve a higher priority position, and employers, who may get credit on advantageous terms in return for granting a security interest.[86] Those who do not benefit, the employees, are those who take the risk and are not compensated for it.[87]

As a result of the vulnerability, employees have always enjoyed some protection in a corporation's bankruptcy or insolvency, and have also been distinguished from the corporation's other creditors. The protection of employees can take various forms, including:

> Giving priority to a wage claim against the debtor's assets or against immovable property the value of which was increased by the employee's work, up to the amount

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[81] Report on the Operation and Administration of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*, Marketplace Framework Policy Branch (Corporate and Insolvency Law Policy Directorate, September 2002) at p. 27; *Ibid*.
[82] *Fee v Turner* (1904), 13 Que. K.B. 435 at p. 446.
[83] *Ibid*.
[84] Davis and Ziegel Report, *supra*, footnote 24, at pp. 13-15. See also Kauper, *supra*, footnote 63, at p. 507.
[85] Davis and Ziegel Report, *Ibid*. See also Kauper, *ibid*.
[86] Davis and Ziegel Report, *Ibid*. See also Kauper, *ibid*.
[87] Davis and Ziegel Report, *Ibid*. See also Kauper, *ibid*.

of the value added. It can also take the form of providing a preferred claim in the debtor's bankruptcy or in the liquidation of the company.[88]

The consequence of having protection both before and after bankruptcy is that any incentive for wage earners to trigger bankruptcy proceedings, is removed. Outside of bankruptcy, unpaid employees get protection through provincial employee wage provisions, and any civil remedies that may be available to employees. As indicated above, if bankruptcy has not been commenced, employees with claims have the right to pursue the employer and they have priority over secured creditors if they live in a province with effective employment standards provisions. Once bankruptcy occurs, however, all creditors' claims and enforcement proceedings, including those of employees, are stayed and bankruptcy legislation governs. Prior to the WEPPA, once bankruptcy proceedings were instituted, employee claims were governed by the previous section 136 of the BIA, which gave employees a preferred claim up to a maximum of $2000 and as preferred claimants, employees ranked below secured creditors in a bankruptcy, which means the institution of bankruptcy proceedings caused a reversal of priorities if the parties were situated in a province that had effective employment standards legislation. Accordingly, secured creditors had an incentive to trigger bankruptcy proceedings. Rather than having employers pay out wage claims in priority to secured creditors outside of bankruptcy, especially if the proceeding was taking place in a province without legislative limits to the claims, secured creditors may have chosen instead to commence bankruptcy proceedings to have employees' claims converted to preferred under the BIA. That way, they took in priority to employees.

The introduction of the WEPPA gave employees an advantage, in that it allowed them to continue to enjoy super priority within and outside bankruptcy. As noted above, WEPPA gives employees super priority for wage claims up to a maximum of $3000 or an amount that is four times the maximum weekly insurable earnings under the *Employment Insurance Act*,[89] whichever is greater.[90] Employees now have entitlements in bankruptcy similar to those given to them outside bankruptcy, in terms of priority, due to the fund created by WEPPA, and the super priority charge in the BIA, which removes the incentive for secured creditors to trigger bankruptcy proceedings that may have existed before the amendments.[91]

However, although employees can now maintain their positions within bankruptcy, some issues remain unresolved with the amendments, and they were brought to the forefront in *Leroy Trucking*. The *Leroy Trucking* decision dealt with the definition of "wages". The decision can be interpreted in one of two ways and depending on the interpretation given to the decision, it may be in accordance with the purpose of the provisions, the protection of employees, or it may serve to create practical application issues that are not addressed by the legislation.

V. *Leroy Trucking*

The issue in *Leroy Trucking* was whether payments paid or payable to a third party on an employee's behalf under an agreement such as a collective agreement, as in money that is not payable directly to the employee, could be paid under the legislation, out of the WEPPA fund. Both the trial and appellate court levels determined that part of the definition of "wages", "compensation for services rendered", was broad enough to include "all compensation earned by the employee" and was not limited to the portion payable directly to the employee.

In this case, Ted Leroy Trucking Ltd. ("TLT") made an assignment in bankruptcy on 3 September 2008, and PricewaterhouseCoopers Inc. ("PWC") was appointed Receiver pursuant

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[88] A. Bohémier and A.-M. Poliquin, "Réflexionsur la protection des salariésdans le cadre de la failliteou de l'insolvabilité" (1988), 48 R. du B. 75 at p. 81, translated and cited in *Barrette v Crabtree Estate*, [1993] 1 S.C.R. 1027.

[89] *Employment Insurance Act*, *supra*, footnote 48.

[90] WEPPA, *supra*, footnote 3, at s. 7(2).

[91] Therefore, while the argument about compromising secured creditors' claims is correct in some circumstances, it may nonetheless cease to be an issue if their claims are compromised to a lesser degree under WEPPA than they are under provincial employment standards legislation. And in some provinces, that will be the case. These are the provinces with effective super priority provisions, provisions that give employee wages super priority over the types of security interests detailed in the provision. See Barnacle *et al*., *supra*, footnote 53, at §19.204. But in other provinces, provinces that do not have effective protection for employees outside of bankruptcy (in Nova Scotia (Labour Standards Code, R.S.N.S. 1989, c. 246, s. 88(2)) and New Brunswick (Employment Standards Act, S.N.B. 1982, c. E-7.2, s. 38.1(1) [amended S.N.B. 1988, c. 59, s. 15; S.N.B. 1994, c. 50, s. 2], the provisions are likely ineffective at creating a super priority over pre-existing property interests. the provisions are similar to those in *Homeplan, supra*, footnote 61, in which the Supreme Court determined the provisions did not create super priority due to the lack of clear wording. See Barnacle *et al*., *supra*, footnote 53, at §19.195-201), there may well be an issue of compromising secured creditors' claims if "wages" is interpreted too broadly. It is for these situations that it is important to determine the meaning of the legislation. And it will be argued that the legislation, if interpreted according to its purpose and the balance it tries to achieve, should be given a narrower interpretation than it was given in *Leroy Trucking*, *supra*, footnote 8.

to a General Security Agreement. Century Services Inc. ("Century Services") was the highest-ranking secured creditor of TLT. The employees of TLT were represented by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the "Union").

Under the WEPPA, an individual employee can recover up to $3000 of wages ($3154 after adjusting for inflation) earned during the six months prior to bankruptcy or receivership of the employer. The Union argued that the all liabilities arising under the collective agreement between the Union and the TLT employees should be included in the claims asserted by the individual employees under WEPPA, regardless of whether the amount is payable to the employee or to a third party on the employee's behalf. Third parties can include a union, a health and welfare trust, or a third party service provider. Century Services argued that the security interest created for unpaid wages only encompassed the amounts payable directly to an individual employee.

The PWC Receiver rejected the Union's claim, deciding that the priority protection granted to wages under the WEPPA and the BIA went to those directly payable to an employee and did not include benefit payments to third parties on behalf of their employees, or union dues. The court had to decide how "wages" should be interpreted.

At trial, it was determined that the definition of "wages" in subsection 2(1) of the WEPPA was relatively expansive, since "wages" includes "compensation for services rendered", which, in the view of the court, "must mean all compensation earned by the employee" and not limited to "only that portion of the compensation earned by the employee and due to be paid directly to him".[92] The court relied on *Canadian Display & Exhibit Co., Re*[93] to define "compensation" in the context of bankruptcy legislation. In *Canadian Display*, it was decided that in the absence of a specific statutory definition, "compensation" would "include any return given by an employer to, or for the benefit of, an employee for services given by the employee as such".[94] The trial court found "wages" included "holiday and overtime pay and all employee benefits and entitlements (except for the specifically excluded severance and termination pay)".[95] Since each of those elements were "returns given by an employer to or for the benefit of the employee for services given by the employee", then they should be viewed as compensation and should therefore be considered "wages" under WEPPA.[96] The court concluded that "wages" under WEPPA was not limited to payments made directly to the employee but included those paid to a third party by the employee or under a contract such as a collective agreement.[97]

The decision was upheld on appeal, with the Court of Appeal making several findings. First, the Court found that Parliament's intention in introducing the legislation was to create a balance between the interests of employees and those of secured creditors. To do so, employees would be given a benefit over secured creditors through the immediate payment of unpaid wages and the secured creditors whose security is compromised would have a limited super - priority through a preferred claim.[98] The Court of Appeal found that there is no basis for finding that employee benefits, whether contained in a collective agreement or employment contract, are not part of employees' compensation.[99] Payments to third parties are made for the benefit of the employee and not the third party[100] and these benefits are part of the employees' compensation.[101] Application for leave to appeal to the Supreme Court of Canada was dismissed.

VI. *Leroy Trucking*: Two Possible Interpretations

According to the principles of statutory interpretation, "wages" should be interpreted in the context of the purpose of the legislation, which, according to the interpretation one gives to the

[92] *Leroy Trucking* (B.C.S.C.), *supra*, footnote 8, at para. 19.
[93] *Canadian Display & Exhibit Co., Re,* [1968] OJno. 696, 12 C.B.R. (N.S.) 180 (Ont. S.C.) [*Canadian Display*].
[94] *Ibid*., at para. 11.
[95] *Leroy Trucking* (B.C.S.C.), *supra*, footnote 8, at para. 21. As WEPPA was originally enacted, the definition of "wages" excluded severance pay and termination pay. The definition was amended, however by Bill C-10, in force March 12, 2009 (but retroactive to January 29, 2009), to include severance pay and termination pay. See Lloyd W. Houlden, Geoffrey B. Morawetz and Janis P. Sarra, *The 2010 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell, 2009), p. 1273. The case refers to the original definition of "wages" (excluding severance pay and termination pay).
[96] *Leroy Trucking* (B.C.S.C.), *supra*, footnote 8, at para. 21.
[97] *Ibid*., at para. 22.
[98] *Leroy Trucking* (B.C.C.A.), *supra*, footnote 8, at para. 25.
[99] *Ibid*., at para. 33.
[100] *Ibid*.
[101] *Ibid*., at para. 35.

Leroy Trucking decision, may or may not have been considered by the Court. There are two possible interpretations to the Court's decision, one that upholds the purpose of the legislation but is more difficult to justify with each creditor, and one that may be more reasonable to more parties but is not entirely supportable under the legislation. Either interpretation has advantages and disadvantages for the parties who may have an interest in the WEPPA fund. Practically, however, if the *Leroy Trucking* decision has identified different parties as potential recipients of the fund, the decision has created a gap in the legislation because the legislation is silent on the priority of allocation.

In *Leroy Trucking*, the trial and appellate court levels determined that "compensation for services rendered", part of the definition of "wages" in WEPPA, was broad enough to include "all compensation earned by the employee" and was not limited to the portion payable directly to the employee. This phrase, "compensation for services rendered", has been interpreted before in bankruptcy legislation and the question was whether it should be interpreted any differently under the WEPPA than it has been previously interpreted. The Court of Appeal approached the issue by referencing other provisions in bankruptcy legislation and it relied on a case concerning previous, unrelated provisions of the BIA.[102] As a result, the Court's interpretation of "wages" in *Leroy Trucking* is not novel; it is similar to interpretations given to the term in the past and to recommendations made by committees. Over the decades, reports on employee priority have typically included a discussion on the definition of "wages". The Colter Report gave "wages" a broad interpretation and recommended that the term include "arrears of all amounts withheld from the employee such as pension benefits and union dues" but not severance pay, which should remain an unsecured claim.[103] In preparing its 2003 Report, the Senate heard from representatives of organized labour, who supported a broad definition of wages, to include vacation, severance and termination entitlements, as well as pension contributions and benefits. But the recommendation in the Senate Report only extended to including "unpaid wage claims and vacation pay".[104] Also, the trial judge in *Leroy Trucking* relied on *Canadian Display*[105] to find that "compensation", which is included in the definition of "wages", includes "any return given by an employer to, or for the benefit of, an employee for services given by the employee as such".[106] On appeal in *Leroy Trucking*, although the appellant argued the trial judge had erred in relying on *Canadian Display* since the case concerned "previous, inapplicable provisions of the *BIA*", the appellate court found that the trial judge did not rely on *Canadian Display* to provide the definition of wages, but rather, merely to illustrate an approach to statutory interpretation. It is arguable that the trial judge did, in fact, rely on *Canadian Display* to provide the definition of wages and assuming he did, or that it strongly influenced his decision, it makes sense. The wheel is not reinvented when interpreting new legislation if the legislation is the latest attempt at remedying an issue that has been the subject of discussions, reports and legislative provisions over the past several decades.

The phrases and wording used in the WEPPA to articulate the amounts owing to employees in the event of an employer's bankruptcy, are similar and in parts, identical, to the language used in prior legislation dealing with the same issue. Regardless of the type or amount of preference for "wages" created by the legislation, the ultimate goal has always been the protection of employees. Therefore, if an issue has persisted, and the same policy considerations and ideas behind the legislative provisions have persisted, and the only difference between the amendments is primarily the boundary being drawn on the amount or priority of the claim, then the same or similar interpretations will apply to the provisions. Therefore, the same interpretation that has been reached by courts and debates over the years will generally apply to the legislation to define the same words and phrases or to provide an approach to the interpretation. In *Leroy Trucking*, the court found that "compensation for services rendered" was broad enough to include "all compensation earned by the employee" and was not limited to the portion payable directly to the employee. For that reason, it was found to include a third party benefit.[107]

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[102] *Ibid*., at paras. 14-15, 20. In the BIA, section 136 sets out the priority of claims and gives "the amount of any wages, salaries, commissions, compensation or disbursements referred to in sections 81.3 and 81.4 that was not paid" (BIA, *supra*, footnote 5, at s. 136(1)(d)) fourth priority in the proceeds realized from the property of a bankrupt (See *Ibid*. for an explanation on sections 81.3 and 81.4.).

[103] Colter Report, *supra*, footnote 28, at pp. 32, 34.

[104] Senate Report, *supra*, footnote 27, at p. 96.

[105] *Canadian Display*, *supra*, footnote 93.

[106] *Leroy Trucking* (B.C.S.C.), at para. 20.

[107] However, one argument that has been made against using the interpretation in *Canadian Display* is provided by the counsel to Century Services, the secured party in *Leroy Trucking* that argued against the inclusion of third party benefits in the definition of "wages". As noted above, in *Canadian Display*, it was decided that in the absence of a specific statutory definition, "compensation" would "include any return given by an employer to, or for the benefit of, an employee for services given by the employee as such" (*Canadian Display*, *supra*, footnote 93, at para. 11). Century Services' counsel argued that *Canadian Display* was decided under a previous provision of the Bankruptcy Act, which dealt with a preferred claim in favour of employees, unlike WEPPA and sections 81.3 and 81.4 of the BIA, which deal with a super priority claim in favour of employees. Counsel argued that the different priority positions given to employees under the provisions mean the same

The determination in the decision, that "compensation for services rendered" was broad enough to include "all compensation earned by the employee" and was not limited to the portion payable directly to the employee could be interpreted in one of two ways. It could mean that payments from the WEPPA fund would be made directly to third parties, since they would be receiving the compensation that was not payable directly to the employee. Or it could mean that employees would get payments that were, before bankruptcy, payable to third parties but upon the employer's bankruptcy, would become payable to the employees. There is ambiguity in the decision so either interpretation might be possible. But the parties that have had to use the decision to deal with the application of WEPPA have chosen to adopt the former interpretation.

In support of the latter interpretation, however, the *Leroy Trucking* decision discusses wages as being compensation earned by the employee but not necessarily "payable" directly to the employee. Importantly, the court does not direct the wages *to be paid* to the third party after bankruptcy. If this interpretation is the one meant by the Court, it would be expanding the definition of "wages" for the benefit of the employees, since employees would be receiving the entire amount falling under the definition of "wages". By employing the language in this way, we would be interpreting the legislation according to its purpose. In addition, this interpretation makes the application of WEPPA simpler; it does not require the WEPPA fund to be allocated between employees and third parties,[108] an option that is, notably, not provided for in the legislation.

If, however, the decision is taken to mean that third parties do, upon the employer's bankruptcy, get the payments that were payable to them prior to bankruptcy, then the purpose of the legislation would not have been the driving force behind the decision. If the purpose of the legislation is to address the vulnerability of wage earners, then the court's broad interpretation, which results in the payment of the benefits that are part of the definition of "wages" to third parties, does not address that problem. In addition to the purpose argument, this position also creates practical problems in its application, which is a problem less about the purpose of the legislation and more about an interpretive gap that would have been created by *Leroy Trucking*. If *Leroy Trucking* has identified different parties as potential recipients of the WEPPA fund, the decision has created a gap in the legislation, because the legislation is silent on priority of allocation. If legislation on employee wages was meant to be interpreted as applying to more than one party, the legislation or associated regulations would also specify how to allocate the fund, which is absent. This alone may indicate that Parliament did not intend for the legislation to be interpreted as having the fund allocated to more than one party, the wage earners. The gap does not arise if the money owed to the employees and their unions or other third parties does not exceed the most current figure in the WEPPA since, with the *Leroy Trucking* decision, the fund will simply pay out to all entitled parties. Rather, this issue is likely to surface if the employee is owed more than the legislated amount. As a result, by interpreting the legislation as applicable to third parties without a discussion of the payment priority, a gap was created and it needs to be addressed. The Receiver, PWC, supports this interpretation in its letter to the former employees of TLT,[109] as does counsel for Century Services.[110] PWC also maintains that the allocation between employees and third parties would be done on a pro rata basis[111] but that is a difficult argument to make, given the silence of the WEPPA on the issue, and the specific direction in the BIA for a rateable distribution between unsecured creditors, when Parliament intends it to be so.[112]

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considerations should not apply to the definition of "compensation" (See Mary I.A. Buttery and Cindy Cheuk, "Employee Super-Priority Under the WEPPA and the BIA: Comments on *Ted Leroy Trucking Ltd.* and *383838 B.C. Ltd. (Re)*" (Presented to: CLE Bankruptcy and Insolvency 2009, May 29, 2009), online: Fraser Milner Casgrain <http://www.fmc-law.com/upload/en/publications/2009/Employee_SuperPriority_Under_the_WEPPA_and_BIA.pdf> at p. 9).

[108] It's interesting to note that the government may not have originally contemplated the inclusion of third party benefits in "wages", since the government's website, Service Canada, used to advise that benefits were not covered by WEPP (See Shea, *BIA*, *CCAA* & *WEPPA*, *supra*, footnote 38, at p. 256. See also Buttery and Cheuk, *ibid.*, in which anecdotal evidence is provided about a discussion the authors had with Service Canada. Service Canada indicated that "the system established to administer the WEPP was never designed to process third party payments and indeed, that it was not capable of doing so"). Therefore, it may never have been contemplated that benefits be included in "wages". Since the court has decided they are, the question we are now left with is whether, upon bankruptcy, those benefits then go to the employee or to the third party. Changes have recently been made and now the website advises only that "WEPP does not cover non-wage benefits such as dental insurance" ("Wage Earner Protection Program", online: Service Canada http://www.servicecanada.gc.ca/eng/sc/wepp/index.shtml), most likely to reflect the *Leroy Trucking* decision.

[109] In the Letter to Former Employees of Ted Leroy Trucking Ltd. ["Letter to Former Employees"], the employees are instructed that the Court's decision in Leroy Trucking "will likely have the effect of reducing the amount paid directly to [the employees] by the amounts found to be payable to the third parties", online: PriceWaterhouseCoopers < http://www.pwc.com/ca/en/car/tedleroy/assets/tedleroy-41_012909.pdf> at p.2.

[110] Buttery and Cheuk discuss Parliament's intention of avoiding uncertainty that would result from third party payments, and also, representations made during discussions with Service Canada that the WEPP system was never designed to make third party payments. See Buttery and Cheuk, *supra*, footnote 107.

[111] Letter to Former Employees, *supra*, footnote 109, at p.2.

[112] BIA, *supra*, footnote 5 at s.141.

Of course, there are many considerations to support a broader interpretation, the one that has benefits being paid out to third parties. Employees who are party to a collective agreement would not be able to collect wages unless third party benefits were paid, as according to the collective agreements. Wages are not simply paid to employees but rather, employees take jobs because of benefits that may have been bargained for by these third parties. And in the case of a collective agreement, an employee would be collectively bound to provide payments to that third party for the benefits given to that employee, or the benefits would be part of the employee's compensation,[113] and therefore, regardless of whether the payments are made by way of assignment, or jointly between the employer and employee, or solely by the employee, they are being made for the benefit of the employee.[114] Without these agreements, employees may not take jobs, since they would not be entitled to the benefits that would be included as part of their employment. On the question as to whether the payment to a third party should fall under a creditor claim by that third party when an employer becomes bankrupt, or whether the fund set up to protect employees should be used to compensate these third parties as well, third parties without whom employees would not be entitled to certain benefits, there are arguments to be made on either side.

The influence of these arguments on secured creditors is important to consider. The appellant argued that the inclusion of third party benefits as wages distorts the balance between them and wage earners.[115] Within this argument lies the idea that wage earners are vulnerable but also that special protection for them requires a balancing of interests because it is also a burden on secured creditors. The argument, namely the concern about secured creditors' interests being compromised with an overly broad reading of super priority employee claims, can be a problem since, generally, an overly broad interpretation of a super priority claim does compromise secured creditors. It is important to remember, however, that employee claims have priority outside of bankruptcy as well, so the imposition of bankruptcy does not impose a significant change. As long as secured creditors know of the claims that will take priority, they can factor the claim into the bargain they strike with the debtor. Secured creditors are prepared to allow for $2000 per employee upon a bankruptcy, the amount to which the super priority charge applies in the BIA, so the court's interpretation of "wages" under the WEPPA does not affect secured creditors. It will affect secured creditors to the extent that, if the Crown asserts the wage claim in priority over secured creditors, then as the definition of "wages" becomes more expansive, the more the Crown will recover against the secured creditors. A broad reading of "wages" in WEPPA will therefore affect the amount going to the employees but the amount to which secured creditors' interests will be compromised is limited to the prescribed $2000 in the BIA. Therefore, depending on the size of the claim, secured creditors may also be affected.

VI. Conclusion

The Court's interpretation, to include benefits in "wages", can be supported by legislation and by precedent. The question that arises from the decision, however, is whether third party benefit providers can make a claim under WEPPA upon an employer's bankruptcy, and recover the amount they were owed, or whether the expansion of the definition of "wages" to include benefits was done for the benefit of employees. Those dealing with the application of the decision have chosen to interpret it in the former way.[116] If the former, the decision may be more fair to third parties but that protection may not have been intended by the legislation, and may therefore not accord with its purpose. While there is an argument to be made for either side, the stronger one is the one that adheres to the purpose of the legislation and allows for the application of the legislation without creating legislative gaps.

[113] The court noted that "it is usual for benefits to be considered by an employee as part of his or her compensation and for employers to consider the payment of benefits to be part of the labour costs of doing business (*Leroy Trucking* (B.C.C.A.), *supra*, footnote 8 at para. 19). It later noted that benefits can take different forms, whereby sometimes employees authorize the employer to deduct payments, sometimes the cost of the benefit is shared between employer and employee and sometimes the employer pays the costs of the benefit. *Ibid*., at para. 32.

[114] *Ibid.,* at para. 33.

[115] *Ibid.*, at para. 25.

[116] Even though PWC's interpretation has payments being made to the third parties, as of August 29th, 2011, the third party unions involved in the *Leroy Trucking* case had not made a claim under WEPPA.