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MINDEN GROSS GRAFSTEIN & GREENSTEIN LLP BARRISTERS & SOLICITORS

UNPAID WAGES & COLLECTIVE AGREEMENTS UNDER BILL C-55



Photos Courtesy Getty Images

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The last significant amendments to the *Bankruptcy and Insolvency Act (Canada)* (“BIA”) and the *Companies’ Creditors Arrangement Act (Canada)* (“CCAA”) were made in 1997 and contemplated a formal review of both statutes after five years. Accordingly, between 2001 and 2003, a consultation process was undertaken and various reports were produced.

Bill C-55, “An Act to establish the *Wage Earner Protection Program Act*, to amend the *Bankruptcy and Insolvency Act* and the *Companies’ Creditors Arrangement Act* and to make consequential amendments to other Acts” (“Bill C-55”) is the product of this review process and is certain to alter insolvency practice in Canada. Bill C-55 will also introduce a series of less dramatic changes such as establishing statutory authority for court powers that had previously been exercised under the auspices of the Court’s inherent jurisdiction.

The proposed legislation has received Royal Assent and, although it has not yet been proclaimed into force, many of the changes under Bill C-55, including the

enactment of the *Wage Earners Protection Program Act* (the “WEPP”) and changes that affect the rights of unpaid suppliers, warrant advance scrutiny.

WEPP

In broad terms, WEPP allows an employee that has been terminated to apply to the Minister for payment of the amount of wages, including salary and vacation pay, for the six month period prior to the date of bankruptcy or receivership. The maximum amount that an employee will receive is the greater of \$3,000 and an amount equal to four times the maximum weekly insurable earnings under the *Employment Insurance Act*, less any deductions applicable under federal or provincial law.

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Not all employees will be permitted to apply to the Minister under WEPP. Officers, directors, individuals who hold a controlling interest in the debtor employer and those occupying managerial positions are specifically excluded from protection. Additionally, employees that have been employed for a period of three months or less are expressly disqualified under WEPP. These excluded employees are, for the most part, readily identifiable although the full scope of the phrase “managerial position” remains unclear at this point.

The introduction of WEPP is accompanied by corresponding amendments to both the BIA and the CCAA. As it concerns WEPP claims, the Minister is granted security, to the extent of \$2,000, over all the current assets of the bankrupt. The phrase “current assets” is defined as unrestricted cash, or any other asset that, in the normal course of operations, is expected to be converted into cash or consumed in the production of income within one year or within the normal operating cycle when it is longer than a year (i.e.: accounts receivable and inventory). These claims will be subordinate to unpaid supplier claims.

Subsection 6(4) of the CCAA provides that the Court may only sanction a plan of compromise and arrangement if the plan provides for the payment to employees of amounts equal to at least what the employees would have been paid under subsection 136(1)(d) of the BIA.

The duties associated with administering WEPP and, more particularly, employee applications for protection, rest with the trustee or receiver who may charge reasonable fees and disbursements for the performance of these tasks.

Union – Collective Agreements

Bill C-55 and, in particular, proposed section 65.12 of the BIA and subsection 33(1) of the CCAA provide that a debtor company may apply to Court, on five days notice to the bargaining agent representing the employees, for an order authorizing it to serve a notice to bargain. The court may issue the order only if it is satisfied that (a) a viable compromise or arrangement could not be made in respect of the company, taking into account the terms of the collective agreement; (b) the company has made good faith efforts to renegotiate the provisions of the collective agreement; and (c) the failure to issue the order would result in irreparable damage to the company. Where the collective agreement is revised as a result of the renegotiation, the bargaining agent is deemed to have a claim, as an unsecured creditor, for an amount equal to the value of the concessions.

Critically, subsection 65.12(6) of the BIA and section 33 of the CCAA make clear that any collective agreement that the company and the bargaining agent have not agreed to revise will remain in force. In short, the existing collective agreement stays in place unless the parties agree to make amendments.

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BANKRUPTCY AND INSOLVENCY

The Insolvency Practice Group has extensive experience in security enforcement, financial reorganizations, debt restructurings, debtor and creditor rights, forbearance/standstill arrangements, receivership and related matters for financial institutions, court and privately appointed receivers, interim receivers and liquidators, landlords, suppliers, trustees in bankruptcy, corporate and individual borrowers and other interested parties.

Jules N. Berman, Q.C.
(416) 369-4122
jberman@mindengross.com

Kenneth L. Kallish
(416) 369-4124
kkallish@mindengross.com

Catherine Francis
(416) 369-4137
cfrancis@mindengross.com

Raymond M. Slattery
(416) 369-4149
rslattery@mindengross.com

Timothy R. Dunn
(416) 369-4335
tdunn@mindengross.com

David T. Ullmann
(416) 369-4148
dullmann@mindengross.com

Rachel Moses
(416) 369-4115
rmoses@mindengross.com

Glen O. Lewis
(416) 369-4133
glewis@mindengross.com

David J.N. Rainsberry
(416) 369-4140
drainsberry@mindengross.com

Critical Suppliers

One of the proposed changes that will affect the rights of a supplier is the proposed new section 11.4 of the CCAA which would allow a restructuring company to apply to the Court for a declaration that one of its suppliers is a “critical supplier” of goods and services to the company and give the Court the express statutory authority to compel the “critical supplier” to supply goods or services to the company on any terms that are consistent with the pre-existing supply relationship between the restructuring company and the supplier, or on any other terms that the Court considers appropriate. Practically, this section would give a restructuring company the ability to force a supplier to continue to supply goods and services during a CCAA restructuring under terms that are more onerous for the supplier than the terms that governed the pre-existing supply relationship between the restructuring company and the supplier.

In order for a supplier to be declared “critical”, the Court will have to be satisfied that the goods or services supplied by that entity are critical to the restructuring company’s continued operations.

It is unclear whether suppliers will be able to object to such a finding on the basis of financial hardship; however, in the event of such finding, the Court must grant the “critical supplier” a charge against any assets of the restructuring company, equal to the amount of the value of goods or services supplied pursuant to the terms of the Order, which will be capable of ranking ahead of the claims of any secured creditors of the company. It should be noted that the charge would not be available for pre-filing arrears.



It is also interesting to note that the proposed amendments to the proposal sections of the BIA do not include any similar provision, and it is not clear why Parliament has chosen to draw this distinction between the debtor in possession restructuring process under the BIA and the debtor in possession restructuring process under the CCAA.

Section 81.1 of the Bankruptcy and Insolvency Act (Canada) – Unpaid Suppliers

Section 81.1 of the BIA provides suppliers with the qualified right to recover goods supplied to a debtor


for use in the debtor’s business by delivering a demand (in a prescribed form) to a receiver or trustee within 30 days of the delivery of the goods for which payment has not been made in priority to recovery by the company’s other creditors (secured and unsecured). In order for the goods to qualify under s.81.1 the trustee or receiver must

be appointed at the time of the demand for repossession and the goods: (a) must be in the possession of the debtor, trustee or receiver; (b) must be identifiable as goods delivered to the debtor company by the supplier and not fully paid for; (c) must be in the same state as they were on delivery; and (d) cannot be resold or subject to any agreement for sale at arm’s length.

As a result of the above noted criteria, it is indeed rare for a supplier to be able to successfully assert a claim pursuant to s.81.1. Perhaps in response to this reality, the Minister of Industry has opted to modify the provisions of s.81.1 slightly with the intention of expanding its scope by giving unpaid suppliers up to 15 days following the date of the bankruptcy, the commencement of

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a section 243 receivership or the filing of a notice of intention or a proposal, to claim their rights in respect of goods delivered within the thirty (30) days preceding such events. However, each of the above noted criteria would continue to apply, hence it is not likely that the proposed amendments will in fact increase the instances where unpaid supplier's successfully rely on s.81.1.

As noted above, Bill C-55 has not yet been proclaimed into force and given the current political climate, the future of Bill C-55 is uncertain. 

Timothy R. Dunn
partner
Direct: 416-369-4335
tdunn@mindengross.com



Glen O. Lewis
associate
Direct: (416) 369-4133
glewis@mindengross.com



David J.N. Rainsberry
associate
Direct: 416-369-4140
drainsberry@mindengross.com



CPA Issues New Cheque Specifications in Preparation for Cheque Imaging

**Updated: November 2005
("Specifications for Imageable
Cheques: A Quick Reference" link
added)**

The Canadian Payments Association (CPA) has published new specifications for Canadian cheques in preparation for the transition to image-based clearing. Under the new specifications, all cheques used by customers of financial institutions operating in Canada will require some changes. The new specifications, as outlined in CPA Standard 006, Part A, are necessary to ensure that high-quality cheque images can be captured, both for clearing purposes and for delivery to clients, and to enhance processing efficiency.

Prior to finalizing the specifications, the CPA invited comments from stakeholders on proposed changes and took into account input received. Most organizations that participated in the consultation process indicated they could make the transition to the new cheque specifications within one year. However, with a view to minimizing impact on stakeholders, the CPA and its member financial institutions have established a two-year transition period to ensure cheque printers, software providers and businesses that produce their own cheques have ample time to make the necessary changes. Thus, **all Canadian business cheques should conform with the new specifications as outlined in CPA Standard 006, Part A by December 31, 2006.**

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Since most consumers order their personal cheques through their financial institutions, these already follow a more standard format than business cheques. Consequently, it will likely be possible in most cases to continue to process “old-format” personal cheques on an interim basis until consumers have used up their current cheque supply, as long as suitable images can be captured from them. As of April 2005 all cheque orders made through financial institutions or their supplier are being fulfilled with “new-format” cheques. This approach will contribute to a smooth transition for consumers.



Key changes to the cheque specifications include:

- ◆ adoption of a numeric date field in one of three specified formats (YYYYMMDD, MMDDYYYY or DDMMYYYY). Field indicators must be printed below the date field to indicate which format is being used. Bilingual date field indicators are accommodated for cheques using the ISO date format (YYYYMMDD);
- ◆ a mandatory serial number in the MICR line encoded on the bottom of the cheque (until now the serial number has been optional);
- ◆ an increase in the minimum length of a cheque from 6” to 6 ¼”, or 15.88 cm, to ensure there is sufficient space to accommodate the mandatory serial number in the MICR line; Family law and creditor protection considerations should be addressed.
- ◆ standardized positions for key fields on the cheque, such as the date field and the amount in figures;
- ◆ disallowance of elements that may hinder the capture of images or data from the cheques (e.g. inverse printing, italics or slanted fonts, a bottom border

printed below the MICR line and the use of black carbon on the reverse of cheques will not be permitted);

- ◆ a provision to ensure that security features do not interfere with key data, or “areas of interest” as defined in Standard 006, Part A, either prior to imaging or post imaging.
- ◆ new printing requirements on the reverse of the cheque so that image capture can be verified;
- ◆ some revisions to technical specifications (e.g. maximum Print Contrast Signal) to ensure high-quality images can be captured.

Cheque printers, software providers and organizations that print their own cheques are strongly encouraged to provide pre-production samples of their new cheques to their financial institution’s Quality Assurance Division to verify that they meet the new specifications. These organizations should contact their financial institutions for more information about the testing process and timelines. [MG](#)

Source: http://www.canpay.ca/news/new_cheque_specs.asp

Professional Notes

Howard S. Black was the speaker with host, Patricia Lovett-Reid of Report on Business Television, Television's Money Talk show, in a program entitled "Your Lasting Legacy" sponsored by the Financial Forum in Calgary in November. Howard will be speaking on the same topic for programs planned in Toronto in January and in Vancouver in February.

Joan Jung presented a seminar to the Ottawa branch of the Society of Estate and Trust Practitioners on "Post Mortem Issues - a primer and case study" on January 18, 2006. She also presented a paper at the 2005 Ontario Tax Conference of the Canadian Tax Foundation entitled "Shareholders Agreements: Selected Tax Issues".

Daniel Sandler discussed the Supreme Court of Canada's recent decisions in *Canada Trustco and Mathew* (on the general anti-avoidance rule in section 245 of the Income Tax Act) at two conferences, one at the University of Toronto GAAR Symposium in November 2005 and the second at the LexisNexis Tax Summit in December 2005. His article, "The Minister's Burden Under GAAR" will be published in the Canadian Tax Journal (2006) vol. 53, no. 1. In January 2006, he presented "Reducing the Adventure in Venture Capital — Sharpening the Divide between Capital Gains and Ordinary Income" at the Australasian Tax Teachers Association

2006 Conference in Melbourne, Australia. In February 2006, he was the key-note speaker at a venture capital Symposium on "Tax and Expenditure Subsidies for Commercialising Innovation" hosted by the Intellectual Property Research Institute of Australia (IPRIA) in Melbourne, Australia.

David Louis the author of *Implementing Estate Freezes*, second edition which provides expert, yet highly practical, guidance on implementing estate freezes has just been released and published by CCH Canadian Limited.

Firm News

David T. Ullmann has become a director and board member of Anaphylaxis Canada a non profit organization dedicated to raising awareness about Anaphylaxis. Anaphylaxis is the medical condition that results from a severe allergic reaction.

Howard S. Black has been appointed a member of the Standing Committee on Teaching and Learning at Osgoode Hall Law School.