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BARRISTERS AND SOLICITORS

Employee Claims in Bankruptcy and the Wage Earner Protection Program Act

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Bankruptcy. Since the beginning of the economic downturn, it is a word that we hear almost daily in the news media. An event that significantly changes employer/employee relationships and raises several questions regarding employee claims.

Generally speaking, employee claims for wage arrears and accrued vacation were considered preferred claims in bankruptcy ranking behind existing secured creditors but ahead of the bankrupt employer's unsecured creditors. This all changed with amendments to the *Bankruptcy and Insolvency Act*, effective July 7, 2008, which grant a so called "super-priority" for certain employee claims.

Under this super-priority, unpaid wages including vacation pay arrears and unpaid pension contributions will rank ahead of secured creditors with very minor exceptions. This super-priority creates a statutory secured claim on the bankrupt's "current assets". If employee claims cannot be satisfied from the pool of current assets, any deficiency will then rank behind the existing secured creditors, but ahead of the unsecured creditors as a preferred claim.

The super-priority covers employee claims for unpaid wages, salaries, commissions or compensation for services performed during the six month period immediately preceding the date of the initial bankruptcy event, up to a maximum of \$2,000.00 per employee. An additional super-priority has also been established in respect of unpaid pension contributions and unremitted employee pension deductions to an unlimited amount. While there are exceptions to the super-priority they are beyond the scope of this bulletin.

In addition to amendments under the BIA, employee claims gain further protection under the *Wage Earner Protection Program Act* (the "WEPP") which came into force July 7, 2008. The WEPP guarantees payment of qualifying employee claims less applicable deductions (ie. income tax). Once these payments are made to the employee, the WEPP is subrogated to the employee's claim and therefore becomes entitled the super-priority.

In an economic climate where bankruptcy is becoming a more common occurrence, employees will surely benefit from the added protections that have been put into place. Conversely, lenders and other secured creditors have lost a certain degree of protection that will require the implementation of new strategies to supplement their security.

The term "compensation" is defined to include vacation pay but it explicitly excludes termination and severance pay.

**The foregoing information is provided to you for information purposes only.
We caution you to obtain legal advice specific to your situation in all circumstances**

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