Submission of the Ontario Association of Insolvency and Restructuring Professionals ("OAIRP") on the draft Wage Earner Protection Plan Act ("WEPPA") Regulations ("the Regulations")

June 20, 2008

OAIRP has over 400 members representing the vast majority of Licensed Trustees in Bankruptcy in Ontario. All of our members are also members of the Canadian Association of Insolvency and Restructuring Professionals ("CAIRP") with whom we work closely.

The Regulations were posted in the Canada Gazette on June 7, 2008. Interested parties were required to provide comments on the Regulations within 15 days of that date. We find this time deadline to be too short to allow us to consider the Regulations as fully as we would have wished. This submission has been prepared under the above time constraints and it may be that some important aspects of the WEPPA and the Regulations have not been fully understood or considered.

In the time available we have not been able to fully integrate our submission into the submission being prepared by CAIRP.

In the spirit of wishing to constructively assist in helping make the WEPPA achieve its objectives we are providing the following comments:

1. One objective of the WEPPA seems to us to be to encourage secured creditors and other parties to see that wage arrears are paid in receiverships and bankruptcies. In almost all receiverships and bankruptcies where there are employees there will be wage arrears. In the past these have often been paid by or through the Receiver/Trustee ("the Professional"). It is not abundantly clear from our reading of the WEPPA and Regulations whether the

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Professional is still obliged to perform all of the reporting required under the WEPPA to the Minister and to employees even if all wage arrears are paid shortly after the commencement of the receivership/bankruptcy. We understand that this was the intent of the drafters. We therefore recommend that, for greater clarity, the Regulations be amended to state that no reporting (to either the Minister or to Employees) is required if all wage and vacation pay arrears have been paid prior to the date by which the Professional would otherwise be required to make the reporting. The unambiguous lifting of this administrative burden should be an additional encouragement for secured creditors and others to see that those arrears are paid.

2. The provisions in the Regulations for the payment of the fees and expenses of the Professional are hard to understand. They seem complex and subjective. As currently drafted they seem to envisage the payment of a part of the Professional's fees and expenses but only in a situation where that Professional has unpaid fees and expenses. It seems to us that no Professional will willingly take on an assignment where ending up with unpaid fees and expenses is the anticipated outcome. In our opinion this will lead to Professionals refusing to take on the administration of corporate bankruptcies and receiverships where it is not clear, at the outset, that there will be sufficient assets realized to cover the CRA unremitted source deduction deemed trust claim and any Bankruptcy and Insolvency Act ("BIA") Section 81.1, 81.2, 81.3 and 81.4 claims ("the Super Priority Claims") together with the Professional's fees and expenses for realizing upon assets, administering the estate and fulfilling its obligations under the WEPPA. The result will be, in the right set of circumstances, an increase in situations where companies close their doors and no-one is available to administer the WEPPA and, by so doing, ensure that employees' wage arrears are paid. As well as wage arrears not being paid through the WEPPA, any unrealized assets, often called "Orphan Assets", will be lost to the formal economy, perhaps being just abandoned or, if a receivable, never collected.

   It should be understood that, at the commencement of a bankruptcy or receivership, the ultimate outcome, both in terms of the dollar realization but also in terms of the work the Professional is required to perform, is not at all clear. The Professional has to bring order to chaos in what are often very difficult situations. The more uncertainties, the greater the risk and therefore the larger the likely realization before a Professional will take a file. In a bankruptcy, once a Trustee accepts a file, the Trustee is obliged under the BIA to complete the file, even if it is discovered that there are insufficient assets to pay all Super Priority Claims and its fees and expenses.

In situations where there might be insufficient assets to pay all Super Priority Claims and the Professional's fees and expenses we recommend that the commitment by the Minister to pay the Professional's reasonable fees and expenses be much clearer, simpler and certain.

3. The exclusion, or apparent exclusion, from eligibility for any payment of a Professional's fees and expenses by the Minister if the Professional has a fee guarantee from a creditor will be another factor that, in certain circumstances, will lead creditors to walk away from a bad debt, rather than take control and try and enhance recoveries for the benefit of all stakeholders. This is because a creditor giving a fee guarantee would have to see sufficient recoveries to pay the Super Priority Claims and the Professional's fees and expenses before they saw any recovery. However, if recoveries were low, they would have to pay the Professional's fees and expenses in full while others benefited from the Professional's work in realizing upon assets.

   We recommend that the payment by the Minister of Professional's fees and expenses should not be conditional upon whether the Professional has a fee guarantee.

4. A few regulation specific points:

   a. Excluded Managers – Reg s.5. The definition is vague.
   b. Reg s. 17 – As drafted this suggests a Professional cannot make a request for information after the first 10 days of an appointment. This limitation makes no sense. In the chaos that accompanies the commencement of a file it may be that the Professional has been unable to determine who has payroll information until after that date. There should be no such limitation.
   c. Reg s 19(1)(b) – The reference to a "deficit" on a Statement of Receipts and Disbursements ("SRD") is confusing. Not all SRDs are done on the same basis, however many Professionals take the view that an SRD cannot show a deficit as Receipts must equal Disbursements. Also, presumably, any anticipated payment of fees by the Minister should be shown as a Receipt in the same way that an unpaid fee guarantee would.
   d. Reg s 19(1)(d) Limiting fees to only those situations where WEPPA administration is a large part of the file (ie over 10%) further complicates matters and reduces certainty.
   e. Reg s 19(2)(b) Words like disorganized, incomplete, impossible and cooperative are subjective and will cause confusion and lack of efficient certainty.

f. Reg s 20 The fee calculation is incomprehensible. In fact Reg s 20 (2) seems to suggest that the amount payable is equal to the least of a number of amounts including (b) the value of a guarantee. Does this mean that if there is no guarantee (ie the guarantee is zero) then the amount payable is automatically zero?

5. The Regulations also do not address who is responsible for what in a situation where there is a Trustee and a Receiver and, in particular, where they are not the same Professional.

We also recommend that the practical effectiveness of the WEPPA and Regulations be reviewed within a year of being declared in force to assess whether refinements might be required based on real world experiences.

We would be pleased to discuss our comments further and to work to find a better, more practical way of achieving the objectives of the WEPPA.

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