

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
1001270243 ONTARIO INC.**

**REPLY BOOK OF AUTHORITIES
OF RICHARD GOLDGLASS AND OTHER TERMINATED EMPLOYEES**

June 2, 2026

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TO: THE SERVICE LIST

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TAB 1



Reasons for decision

In the matter of an appeal of the Minister's decision under section 14 of the *Wage Earner Protection Program Act*

Ms. Tania Fagnoli,

applicant.

Board File: 33268-C

Neutral Citation: 2020 CIRB 932

July 10, 2020

The panel of the Canada Industrial Relations Board (the Board) was composed of Ms. Ginette Brazeau, Chairperson, assigned to this matter pursuant to section 14.1 of the *Wage Earner Protection Program Act* (the *WEPP Act*).

I. Nature of the Application

[1] On September 19, 2019, the Board received an application to appeal filed by Ms. Tania Fagnoli (the applicant) pursuant to section 14(1) of the *WEPP Act*.

[2] The dispute concerns the Minister's review decision which found that Ms. Fagnoli was not dealing at arm's length with her former employer, 8978611 Canada Inc.

[3] Having reviewed the application, the Board considers it to be untimely. However, even if it had been timely, the Board would have confirmed the Minister's review decision.

II. Background and the Minister's Decision

[4] On January 22, 2019, Ms. Fagnoli filed an application to receive a payment under the Wage Earner Protection Program (WEPP). In her application, she indicated that she was related to her former employer. Under the *WEPP Act*, wages earned while an individual was related to a person who is a director, officer or manager of the former employer or who has a controlling interest in the former employer are not eligible for payment unless an applicant can show that their contract of employment is substantially similar to that of an employee who is not related to

their employer. Such applicants are invited to answer follow-up questions on the nature of their contract of employment. In Ms. Fagnoli's responses, she indicated that her terms and conditions of employment were similar to those of the other employees but that she had invested or lent money to her former employer.

[5] On March 6, 2019, Service Canada, who administers the WEPP on behalf of the Minister of Labour, issued a decision denying payment under the *WEPP Act* on the basis that Ms. Fagnoli was "not dealing at arm's length with a person who held an excluded position: an officer, a director, a manager or a person with a controlling interest."

[6] Ms. Fagnoli requested a review of the decision. She stated that following litigation between the shareholders of the former employer, a judgement was issued by the Superior Court of Quebec determining that her father, the person to whom she is related and who held an excluded position, only owned 26 percent of the shares. She argued that 26 percent does not constitute control. She appended an excerpt of the judgement to her request for review.

[7] Furthermore, Ms. Fagnoli stated that her involvement with the business was as an ordinary employee with no special or particular benefits. She stated that she was hired because she had the necessary qualifications, worked standard hours and received the same benefits as other employees.

[8] On May 7, 2019, Service Canada issued its review decision on behalf of the Minister confirming the initial decision. It stated the following:

Pursuant to section 6 of the Wage Earner Protection Program Act (WEPPA), an individual is not eligible for a WEPP payment where the individual was not dealing at arm's length with related persons who occupy excluded management positions.

After an evaluation of the circumstances of employment, it was determined that you were not dealing at arm's length with your former employer.

Consequently, you are not eligible to receive a WEPP Payment.

[9] It is this decision that Ms. Fagnoli seeks to have changed on appeal. She filed her application to appeal with the Board on September 19, 2019. It appears that she also attempted to file her application with Service Canada in July or August 2019.

III. Positions of the Parties

A. Position of the Applicant

[10] The applicant bases her appeal on a question of law. She states that the shareholding structure of her former employer was the subject of litigation and that the Superior Court of Quebec determined that her father owned 26 percent of the shares.

[11] She states that the review decision does not take that court ruling into consideration. She argues that in order to establish that a person is dealing with a party who is not at arm's length, that party must have a controlling interest in the company. She indicates that there were four shareholders and no controlling party. She states that she was neither a decision-maker nor a director of the company but only an employee with specific tasks and functions. She also indicates that even though she was related to one shareholder, there was no controlling interest and that the decision to liquidate the company was made by the Court. She states that all the shareholders agreed to have her work at the company, that she worked the same hours as the other employees and that she was paid similarly to the other employees. She submits that she should not be penalized because the other employees were not.

[12] She asks that the review decision be reversed.

B. Position of the Minister

[13] Although the Minister has the right to make representations to the Board pursuant to section 15(4) of the *WEPP Act*, the Minister declined to do so in this matter.

IV. The Board's Role on Appeal

[14] A person who is unsatisfied with the Minister's review decision may appeal it to the Board but only on a question of law or jurisdiction (section 14(1) of the *WEPP Act*). The appeal is limited to a review of the information that is contained on the Minister's file:

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

[15] Accordingly, the Board is provided with a copy of the file containing all the documents and information that were before the Minister's delegate when the review decision was issued. The Board is prohibited from obtaining additional evidence or documents that would assist it in clarifying the disputed facts. Its only role is to consider the review decision and the information

that was before the Minister's delegate to determine what facts were considered and how the legal questions were analyzed.

[16] The Board may then confirm, vary or rescind the Minister's review decision (section 17 of the *WEPP Act*).

[17] In this case, the applicant is basing her application to appeal on a question of law.

[18] As explained in a recent decision of the Board in *Au*, 2020 CIRB 931, a question of law is a question about the legal test. In the context of an appeal pursuant to section 14(1) of the *WEPP Act*, the Board will have to consider the following:

1. Whether the Minister's delegate applied the correct legal test and asked the right questions in coming to the decision;
2. Whether all aspects of the legal test were applied to the facts;
3. Whether the Minister's delegate took into account all the key facts and the evidence that the law requires the delegate to take into account in the application of a test.

[19] The Board will therefore, review the record and assess the review decision with these principles in mind.

V. The Record

[20] The record that was provided to the Board for this appeal consists of the Review File Summary (the Summary) and the various documents that Service Canada obtained from the trustee and from the applicant.

A. The Summary

[21] The Summary is a document prepared by the Minister's delegate that contains the summary of the facts considered as well as the reasoning behind the Minister's delegate review decision.

[22] The Summary makes it clear that Ms. Fagnoli's wages were not excluded because of a position that she held herself but because she indicated being related to her former employer through her father, Mr. Carlos Fagnoli.

[23] The Minister's delegate then examined the arm's length assessment starting with sections 2(5)(a) and 2(5)(b) of the *WEPP Act* which provide the test to apply to determine whether wages earned by an individual who was not dealing at arm's length with an excluded individual can still qualify for a payment under the *WEPP Act*.

[24] In the Summary, it is indicated that Ms. Fagnoli's father was one of the four company owners and that he was also the only director/officer of the company. The Minister's delegate reported that Ms. Fagnoli had confirmed that her father owned 26 percent of the shares and had a non-controlling interest. The Minister's delegate also indicated that Ms. Fagnoli maintained that she was dealing at arm's length and that she had not received any special treatment. Ms. Fagnoli also confirmed that she had lent \$72,000 of her own money in 2017 in order to keep the company afloat and allow it to continue to pay the employees.

[25] In the "Decision Outcome—Confirm" section of the Summary, the Minister's delegate stated that even though Ms. Fagnoli did not receive preferential treatment and had similar earnings to other employees, she had paid other employees' wages out of her pocket and had invested her own money in the company in order to keep it afloat. It is also stated that her father was one of four shareholders.

[26] In her fact-finding efforts, the Minister's delegate contacted Ms. Fagnoli in order to obtain further information about her relationship with the former employer and confirmed the information provided in the arm's length supplementary questionnaire. This information was used to assess whether Ms. Fagnoli would have entered into a substantially similar contract of employment with her former employer. The trustee was also contacted and confirmed that Ms. Fagnoli's father was registered as an officer/director on the Quebec corporate registry ("Registraire des entreprises Québec") and that he was also the first shareholder ("Premier actionnaire").

[27] The Minister's delegate concluded that Ms. Fagnoli was not dealing at arm's length with her former employer:

Pursuant to the Wage Earner Protections Program Act (WEPPA) .6(d), an individual is not eligible for a WEPP payment where the individual was not dealing at arm's length with related persons who i) are an officer or director, ii) possess controlling interest, or iii) occupied an excluded management position.

Based on an evaluation of the circumstances of employment as stated through applicant statements and answers to the supplementary questions, it was determined that the individual was not dealing at arm's length with the former employer.

B. Other Documents

[28] In addition to the Summary, the record contains a “Supplementary Record of Review” and a number of documents which are reflected in the Summary.

[29] The information statement from the Registraire des entreprises Québec, the province’s corporate registry confirms that Ms. Fagnoli’s father was the former employer’s first shareholder but that he was not a majority shareholder. It also names Mr. Fagnoli as the only director (“administrateur”) of the corporation.

[30] The record also contains a request for appeal that was received by Service Canada on August 20, 2019. Appended to the request is a note signed by the applicant and dated July 17, 2019, stating that it was her second attempt at sending her request for appeal as “[t]he initial appeal was sent 30+ days ago but was returned to sender.” There is also an envelope addressed to the WEPP Processing Centre stamped August 1, 2019, by Canada Post.

VI. Analysis and Decision

A. Timeliness

[31] The present application to appeal was filed with the Board on September 19, 2019. In her application to appeal, Ms. Fagnoli states that she was notified of the Minister’s review decision on May 9, 2019. In other words, the Board received the application to appeal more than five months after Ms. Fagnoli was notified of the Minister’s review decision. She did not provide any reason for the delay in filing her appeal and did not request an extension of time to file from the Board.

[32] The Board’s Rules of Procedure for eligibility appeals provide the following with regard to the filing of an application to appeal:

The Board has determined that an appeal pursuant to section 14(1) of the *WEPP Act* shall, unless circumstances beyond the control of the appellant justify a longer period, be made within 60 days after the day on which the appellant is notified of the Minister’s decision.

If the appellant is unable to file their appeal within the 60-day period, they must provide the reasons for the delay. An extension **may** be granted if the appellant can demonstrate that there were circumstances beyond their control that prevented them from filing within the prescribed time period.

[33] The Board notes that the appeal form prompts applicants to request an extension of time if they are filing their appeal more than 60 days after having been notified of the Minister's decision. In those cases, applicants are invited to explain and demonstrate that there were circumstances beyond their control that prevented them from filing within the prescribed period. The form also invites such applicants to provide supporting documentation.

[34] In her application to appeal filed using the Board's form, Ms. Fagnoli acknowledged that she was filing her appeal beyond the deadline but did not provide any explanation for the delay and did not request an extension from the Board.

[35] The Board is cognizant of the fact that at the time the review decision was issued, it did not have jurisdiction over WEPP eligibility appeals. The Board only acquired such jurisdiction on July 29, 2019, when certain provisions of the *Budget Implementation Act, 2017, No. 1*, (S.C. 2017, c. 20) came into force. Prior to that date, appeals were made to ad hoc adjudicators through Service Canada. The Board is sensitive to the fact that this legislative change may have been a source of confusion for some applicants.

[36] Prior to July 29, 2019, the time limit for filing an appeal was provided in the *Wage Earner Protection Program Regulations*:

13 An appeal to an adjudicator under section 14 of the Act shall, unless circumstances beyond the control of the applicant justify a longer period, be made within 60 days after the day on which the applicant is notified of the Minister's decision.

[37] Therefore, the applicant had 60 days after she was notified of the Minister's decision to file her appeal. That period ended on July 8, 2019, and her appeal request was recorded as received by Service Canada on August 20, 2019, more than a month beyond the time limit. The date stamp on the envelope indicates that it was mailed on August 1, 2019. In her correspondence to Service Canada signed and dated July 17, 2019, she stated that her initial appeal was sent more than 30 days before but that it was returned to her. However, she did not provide any evidence in support of that statement.

[38] The Board finds that the application to appeal is untimely. The applicant may have provided an explanation for her late filing to Service Canada but she did not provide any explanation or any supporting evidence in her application to appeal filed with the Board. It may have been considered differently had Ms. Fagnoli provided a detailed explanation accompanied by a copy of her original correspondence and the envelope that was returned to her with the Canada Post "return to sender" stamp. Her correspondence sent to Service Canada is dated July 17, 2019,

passed the 60-day time limit. It appears from the date stamp on the envelope that it was mailed two weeks later on August 1, 2019. Applicants are expected to act diligently with respect to their rights. Barring circumstances beyond the control of the applicant, the time limits are meant to be firm in order to provide finality and certainty of process. The Board has no basis in this case on which it can grant Ms. Fagnoli an extension and accordingly, dismisses the application on the basis that it is untimely.

[39] However, even if the Board had found the application to appeal to be timely, it would have confirmed the Minister's review decision.

B. Dealing at Arm's Length from the Employer

[40] The Minister's delegate determined that Ms. Fagnoli's wages were not eligible as they were earned while she was not dealing at arm's length with her former employer.

[41] The *WEPP Act* excludes certain wages from eligibility for payment:

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

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

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

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

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

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

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

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

[42] Wages earned while an individual was not dealing at arm's length with their former employer may still be eligible for payment if the individual meets the requirements of section 2(5)(a) of the *WEPP Act*.

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

(a) for the purposes of paragraph 6(d), an individual is considered to deal at arm's length with a related person if the Minister is satisfied that, having regard to the circumstances — including the terms and conditions of the individual's employment with the former employer, their remuneration and the duration, nature and importance of the work performed for the former employer — it is reasonable to conclude that the individual would have entered into a substantially similar contract of employment with the former employer if they had been dealing with each other at arm's length; and

(b) for the purposes of subsection 21(4), individuals who are related to each other are, in the absence of evidence to the contrary, deemed not to deal with each other at arm's length while so related.

[43] In other words, an individual's wages may still be eligible for payment if the Minister's delegate is satisfied that the individual worked under a contract of employment that is comparable to what would be place for other employees doing similar work even if that individual was dealing at arm's length with the employer. In order to make that determination, the Minister looks at the general circumstances of the individual's employment such as the terms and conditions of their employment, their remuneration, the duration of their employment as well as the nature and the importance of the work they performed for the former employer.

[44] The Board notes that the list of circumstances enumerated at section 2(5)(a) is introduced by the term "including." Such language indicates that the list is not intended to be limitative and therefore, the Minister's delegate can take into account other relevant circumstances in order to make a determination.

[45] The Board will now look at whether the Minister's delegate applied the tests provided in sections 2(5)(a) and 6(d) of the *WEPP Act*, and did so in an unaltered manner, taking into account the appropriate evidence.

[46] Ms. Fagnoli's argument on appeal is that she was related to a shareholder who had a non-controlling interest in the company and that therefore, she qualifies for a payment pursuant to the *WEPP*. She further explains that she worked like the other employees. In other words, she argues that the individual to whom she was related did not have a controlling interest in the former employer and that in any case, she entered into a contract of employment that was substantially similar to that of other employees of the former employer.

[47] It is noted in the Summary that Ms. Fagnoli's father was a shareholder of the former employer. However, it does not appear that this formed the basis of the Minister's determination.

[48] In any event, being related to someone who had a controlling interest in the former employer is not the only basis for exclusion pursuant to section 6(d). The *WEPP Act* also excludes wages earned by a person who was not dealing at arm's length with a director or officer of the former employer or with an excluded manager.

[49] In this case, it appears from the Summary that the Minister's delegate considered that Ms. Fagnoli's father was a director of the former employer and that Ms. Fagnoli was thus not dealing at arm's length with a director of the corporation. Even though it is not clearly stated in the Summary or in the letter communicating the review decision, it can be elicited from the record that the Minister's delegate effectively applied the exclusion provided at section 6(d)(i) of the *WEPP Act* which excludes wages earned by an individual while they were related to a corporate director of the former employer. It is clear from the corporate registry documents that Ms. Fagnoli's father was listed as the sole director and officer of the corporation. The Board sees no error in the application of exclusion provided at section 6(d) of the *WEPP Act*.

[50] The Minister's delegate then turned her mind to whether Ms. Fagnoli's wages could still be eligible for payment pursuant to section 2(5)(a). In doing so, the Minister's delegate applied the substantially similar contract of employment test. The Summary shows that the Minister's delegate took into account the entire circumstances of Ms. Fagnoli's employment to make that determination. While she accepted that Ms. Fagnoli's terms and conditions of employment were similar to those of other employees, the Minister's delegate also found that Ms. Fagnoli lent a substantial amount of money to her former employer in order to pay the salaries of the other employees when the business experienced financial difficulties. For the Minister's delegate, this indicated that Ms. Fagnoli's contract of employment or employment relationship was not substantially similar to that of arm's length employees.

[51] Such a fact is one that the Minister is entitled to take into account when assessing the general circumstances of employment of an individual in order to determine whether an individual entered into a substantially similar contract of employment. The Board sees no error of law in the Minister's application of the test and would dismiss Ms. Fagnoli's appeal.

VII. Conclusion

[52] The Board finds that the application to appeal was filed beyond the time limit and sees no reason to extend it. Therefore, the Board dismisses this appeal on the basis that it is untimely.

[53] Had the application been timely, the Board would have confirmed the Minister's review decision as the Board considers that there is no error of law in the Minister's delegate conclusion on the eligibility of Ms. Fagnoli's wages.

Ginette Brazeau
Chairperson

TAB 2



Reasons for decision

In the matter of an appeal of the Minister's decision under section 14 of the *Wage Earner Protection Program Act*,

Wes Au,

applicant.

Board File: 33310-C

Neutral Citation: 2020 CIRB 931

July 8, 2020

The panel of the Canada Industrial Relations Board (the Board) was composed of Ms. Ginette Brazeau, Chairperson, assigned to this matter pursuant to section 14.1 of the *Wage Earner Protection Program Act (WEPP Act)*.

I. Introduction

On July 29, 2019, the provisions of the *WEPP Act* were amended through the enactment of the *Budget Implementation Act, 2017, No. 1*. These amendments transferred the responsibility for adjudicating appeals filed under the *WEPP Act* to the Board. As this is the first decision of the Board under this Act, we will take the opportunity to review and consider in detail the applicable legislative framework.

II. Nature of the Application

[1] On October 15, 2019, the Board received an application to appeal filed by Mr. Wes Au (the applicant) pursuant to section 14(1) of the *WEPP Act*.

[2] Mr. Au appeals the Minister's review decision which found that he was not eligible to receive a payment under the *WEPP Act* on the basis that his wages were earned while he was a director of his former employer, Innova Global Ltd.

[3] Having reviewed the application, the Board has decided to rescind the Minister's review decision.

III. Background and the Minister's Decision

[4] Mr. Au was employed by Innova Global Ltd. and held the title of Director of International Operations until his former employer became bankrupt. At the time of the bankruptcy, Mr. Au was owed wages within the meaning of section 2 of the *WEPP Act* by his former employer. The trustee in bankruptcy, PricewaterhouseCoopers Inc., sent a letter to Mr. Au to inform him of the Wage Earner Protection Program (WEPP) and to invite him to apply for a payment under the *WEPP Act* for his unpaid wages.

[5] Mr. Au filed an application for payment on July 17, 2019, with Service Canada, who is tasked with administering the WEPP on behalf of the Minister of Labour. In accordance with the process established in the *WEPP Act*, the trustee filed a Trustee Information Form (TIF) with Service Canada. In the TIF, the trustee indicated that Mr. Au was an officer or director of his former employer.

[6] Wages earned while an individual exercised certain functions, including those of director or officer of a former employer, are excluded from payment pursuant to section 6 of the *WEPP Act*.

[7] On July 26, 2019, Service Canada, on behalf of the Minister, issued a decision denying Mr. Au's application for payment because the trustee had indicated that he was registered as an officer or director of his former employer.

[8] On August 19, 2019, Service Canada received Mr. Au's request for a review of that decision. He referred Service Canada to a "Summary of Questions and Answers" filed by the trustee, in which it had indicated that he was not registered as a director or officer of his former employer. He also included corporate records of his former employer including the Registration Statement, which showed that he was not listed as a registered director. Service Canada then proceeded to obtain further information from the trustee and from Mr. Au to determine whether Mr. Au's wages were excluded from payment.

[9] On August 29, 2019, Service Canada issued the review decision and confirmed its initial decision. It stated the following:

Pursuant to Section 6(a) of the *Wage Earner Protection Program Act* (WEPPA), an individual is not eligible to receive a WEPP payment in respect of any wages earned during a period in which he or she was an officer or director of the former employer.

After an evaluation of your file, it was determined that you were an officer or director with your former employer, *Innova Global Ltd.* The Receiver indicated that according to your resignation letter and your job functions you worked as an officer or director of the former employer.

[10] It is this decision that Mr. Au asks the Board to rescind on appeal.

IV. Positions of the Parties

A. Position of the Applicant

[11] The applicant states that he submitted documents and also spoke to Service Canada in order to explain who had the authority to make binding decisions with his former employer. He argues that the review decision was based on information that was not fully understood, incomplete in analysis or misinterpreted. He states that he would have appreciated a phone call to confirm facts and address additional questions before the issuance of the review decision.

[12] He indicates that he submitted a letter of resignation, resigning as officer or director even though he was not an officer or director. He states that the directors of the employer were confirmed in the corporate documents that were provided to Service Canada and that there was no description of any job functions in the resignation letter. He submits that the purpose of the resignation letter was to be a blanket form letter he signed in order to avoid any personal liabilities to employees, as was recommended by the legal counsel. He states that other employees who were not directors or officers also signed the resignation letter.

[13] He provides a summary of the facts that he states he submitted and discussed with Service Canada.

B. Position of the Minister

[14] Although the Minister has the right to make representations to the Board pursuant to section 15(4) of the *WEPP Act*, the Minister declined to do so in this matter.

V. The Board's Role on Appeal

[15] An individual who is unsatisfied with the Minister's review decision may appeal it to the Board, but only on a question of law or jurisdiction (section 14(1) of the *WEPP Act*). The appeal is limited to a review of the information that is contained on the Minister's file:

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

[16] Accordingly, the Board is provided with a copy of the file containing all the information and documents that were before the Minister's delegate when the review decision was issued. The Board is prohibited from obtaining additional evidence or documents that would assist it in

clarifying the disputed facts. Its only role is to consider the review decision and the information that was before the Minister's delegate to determine what facts were considered and how the legal questions were analyzed.

[17] In this case, the applicant is basing his appeal on a question of law.

[18] The *WEPP Act* does not provide a definition for a "question of law." It is therefore useful for the Board to review how questions of law have been defined in cases relating to statutory appeals.

[19] In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, the Supreme Court of Canada (the Court) stated that questions of law are "about what the correct legal test is":

Section 12(1) of the *Competition Tribunal Act* contemplates a tripartite classification of questions before the Tribunal into questions of law, questions of fact, and questions of mixed law and fact. Briefly stated, **questions of law are questions about what the correct legal test is**; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or *vice versa*.

(pages 766–767; emphasis added)

[20] In the same case, the Court added that it is an error of law to ignore an item of evidence that the law requires a decision-maker to consider. However, it also stated that considering the proper evidence but reaching a wrong conclusion does not amount to an error of law, but rather amounts to an error of mixed law and fact:

... If the Tribunal did ignore items of evidence that the law requires it to consider, then the Tribunal erred in law. Similarly, if the Tribunal considered all the mandatory kinds of evidence but still reached the wrong conclusion, then its error was one of mixed law and fact. ...

(page 769)

[21] In *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32; [2017] 1 S.C.R. 688, the Court explained that a question of law can arise when in the course of applying a legal test to the facts, the legal test is altered:

[44] That said, while the application of a legal test to a set of facts is a mixed question, if, in the course of that application, the underlying legal test may have been altered, then a legal question arises. For example, if a party alleges that a judge (or arbitrator) while applying a legal test failed to consider a required element of that test, that party alleges that the judge (or arbitrator), in effect, deleted that element from the test and thus altered the legal test. ...

...

Such an allegation ultimately challenges whether the judge (or arbitrator) relied on the correct legal test, thus raising a question of law (*Sattva*, at para. 53; *Housen*, at paras. 31 and 34–35). ...

[22] In summary, a question of law is a question about a legal test. In the context of an application to appeal pursuant to section 14(1) of the *WEPP Act*, the Board will have to consider:

1. whether the Minister's delegate applied the correct legal test and asked the right questions in coming to the decision;
2. whether all aspects of the legal test were applied to the facts; and
3. whether the Minister's delegate took into account all the key facts and the evidence that the law requires the delegate to take into account in the application of a test.

[23] The Board is limited to reviewing the information that was provided to the Minister's delegate when the review decision was made and cannot obtain new or additional evidence. It is the Minister's delegate who has the authority to gather all relevant facts through the various powers that are conferred on the Minister in the *WEPP Act* (see sections 21 and 23 to 27 of the *WEPP Act*). In other words, the scheme of the *WEPP Act* is such that the Minister's delegate creates the full evidentiary record on which to base the decision. It is not up to the Board to make findings of fact or to review questions of fact in the context of an application to appeal.

[24] Pursuant to section 17 of the *WEPP Act*, the Board has the power to confirm, vary or rescind the Minister's review decision. In other words, the *WEPP Act* empowers the Board not only to confirm or rescind the Minister's decision but also to substitute its decision for that of the Minister in appropriate circumstances.

[25] It is with these principles in mind that the Board will undertake an assessment of the Minister's review decision.

VI. The Record

[26] The record consists of the Review File Summary (the Summary) and the various documents that Service Canada obtained from the trustee and from Mr. Au.

A. The Summary

[27] The Summary is a document prepared by the Minister's delegate that contains a summary of the facts considered as well as the reasoning behind the Minister's review decision.

[28] It appears from the Summary that the Minister's delegate considered the following facts:

- Mr. Au signed a resignation letter in which he resigned from all positions held as an officer or director of the former employer;
- Mr. Au was not a registered officer or director;
- Mr. Au's position title was "Director of International Operations," and he was the only individual in this position;
- Mr. Au's duties consisted of setting up subsidiaries of the company in other jurisdictions, and he described that his job was "to talk to government staff and lawyers to establish office set up and follow through on all of the necessary paperwork in order to accomplish this";
- The trustee indicated in the TIF that Mr. Au was an officer/director.

[29] In her fact-finding efforts, the Minister's delegate contacted the trustee in order to determine whether Mr. Au was an officer or director and/or whether he had the ability to make binding financial decisions at the time of receivership. The Minister's delegate stated that the trustee had been unable to confirm details but had confirmed that Mr. Au did not appear on the Corporate Registry as an officer or director. The Minister's delegate noted that the Officer/Director questionnaire had been emailed to the trustee for completion. There is no indication that the trustee completed the questionnaire; however, it did send an email containing Mr. Au's resignation letter, in which he resigned from all positions he held as an officer or director of his former employer.

[30] The Minister's delegate also stated that Mr. Au had been contacted in order to provide "more detailed information regarding his role as officer/director of the former company" and to complete a fact-finding questionnaire. The applicant had indicated that he was the "*Director of International Operations*" and that he had been in this role for three years. He had previously worked as an accountant for his former employer.

[31] In the Summary, the Minister's delegate described "officers and directors" as follows:

The job title is not always an indication of eligibility the situation is different for Officers and Directors of a company. Officers and Directors of a company discuss the economic situation of the company as a whole, and are in a position to make binding decisions in respect of the economic viability of the company as part of their job. As a rule, the officers/directors of a company would be excluded from the WEPP.

An officer, by definition is an individual appointed by the director(s) of a corporation to manage the day-to-day business of a corporation, such as president, vice-president, secretary, treasurer, etc. The position of officer is distinct from that of director, although in a small corporation one individual very often occupies both positions.

A Director, by definition is an individual elected by the shareholder(s) to supervise the management of a corporation.

[sic]

[32] The Minister's delegate concluded, after having evaluated the file and specifically the discussions with Mr. Au and the trustee as well as the information contained in the questionnaire, that Mr. Au was an officer or director of the former employer. The Minister's delegate noted that both the trustee and Mr. Au had "confirmed he was a Director of the former business" and that further fact-finding with the applicant had confirmed that he was the only employee who worked as the "Director of International Operations."

B. Other Documents

[33] The record includes various documents that the Minister's delegate relied upon to create the Summary.

[34] The record includes a questionnaire entitled "WEPPR Officer/Director Assessment" which appears to have been completed by the Minister's delegate. It contains questions aimed at determining whether an individual was an officer or director. On the questionnaire, "officer" is defined as follows:

An individual appointed by the director(s) of a corporation to manage the day-to-day business of a corporation, such as president, vice-president, secretary, treasurer, etc. The position of officer is distinct from that of director, although in a small corporation one individual very often occupies both positions.

[35] The "no" box next to that definition is checked off.

[36] On that same questionnaire, "director" is defined as "[a]n individual elected by the shareholder(s) to supervise the management of a corporation." Next to that definition, the "yes" box is checked off.

[37] There are then four follow-up questions on the questionnaire. The first is whether the applicant had the power to make binding decisions in regard to the economic viability of the company. The “no” box is checked off, with the explanation that Mr. Au was able to set up new divisions in other jurisdictions; he would set up the legal structures and then the finance department would take over. The second follow-up question is whether Mr. Au had the authority to sign cheques on behalf of the company, and the third is whether Mr. Au managed the day-to-day operations of the business. For both questions, the “no” box is checked off. It is explained that management went to the “Operations people” once Mr. Au had played his part. The last question, which pertains to whether Mr. Au had the power to hire and fire staff, was left unanswered.

[38] In the questionnaire, it is also noted that Mr. Au had the ability to use the company credit card when he needed to make purchases, such as service fees, since company cheques were not accepted internationally. Purchases were rarely over \$500.

[39] The “Supplementary Record of Review” contains the details of the information gathered from the applicant and trustee and the date on which the information was obtained. The Minister’s delegate spoke to Mr. Au on August 23, 2019, and stated the following in this document:

Spoke with the client who confirms his title as “Director of International Operations”. Claims his duty was to set up subsidiaries of the company in other provinces, states or countries. Claims he did not have any staff reporting to him. His job was to talk to government staff and lawyers to establish office set up and follow through on all of the necessary paperwork in order to accomplish this.

As far as his Title, the applicant states that alot of the Salesman were “Directors” in title so he wanted to clarify that the term was used quite loosely and because they are an International Company, it’s easier getting in the door with more descriptive titles as opposed to generic ones. Another example the applicant used was when they would be making cold calls, it was much easier to say they were “Directors” and futher explained that in engineering world it means your’re not right out of school and you have some real work experience.

[sic]

[40] The Minister’s delegate also spoke with the trustee on August 26, 2019, and stated the following in the document:

... [The trustee] confirmed that the title of **Director** for Mr. Au was confirmed as far as they were concerned. It was his title and he resigned in that capacity and the company council administered he was that. Furthermore, he was listed on the company records as such; he was known as a "Director."

[sic]

VII. Analysis and Decision

[41] The applicant challenges the Minister's delegate's decision that he was a director of his former employer. It appears that the Minister's delegate came to this conclusion because the trustee had indicated that based on Mr. Au's resignation letter and his job functions, he worked as a director.

[42] The Board must therefore look at whether the Minister's delegate committed an error of law when she determined that Mr. Au was a director of his former employer.

[43] Wages earned while an individual occupied certain positions are not eligible for payment according to the *WEPP Act*, including wages earned while an individual was an officer or director of the former employer:

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

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

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

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

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

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

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

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

[44] Neither the *WEPP Act* nor the *Wage Earner Protection Program Regulations* define the words "officer" or "director."

[45] Pursuant to section 2(4) of the *WEPP Act*, when no definition is provided in the Act, words and expressions have the same meaning as in the *Bankruptcy and Insolvency Act* (the BIA).

[46] The BIA does not define the term “officer” but defines “director” as follows:

2 In this Act,

...

director in respect of a corporation other than an income trust, means a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever name called.

[47] The Board understands from this definition that it is an individual’s functions as opposed to their title that make them a director pursuant to the BIA. However, the BIA does not indicate what the functions of a director are.

[48] Before delving further, a clarification is in order. The term “director” is common in organizations and often designates a senior manager. However, this is not the case in the *WEPP Act*, because wages earned by individuals who hold certain managerial positions are already excluded by virtue of section 6(c) of the *WEPP Act*. Furthermore, in section 6(a), the term “director” is used in connection with the term “officer,” and the BIA as well as the *WEPP Act* both translate the term “director” to “administrateur” in their respective French versions. This leads the Board to conclude that “director” is used at section 6(a) of the *WEPP Act* in the sense commonly understood in corporate law and refers to individuals who act as the directing mind of a business and effectively oversee the activities of the corporation.

[49] As a general proposition, directors of a corporation are individuals selected by shareholders to manage the business and affairs of the corporation (see *Halsbury’s Law of Canada—Business Corporations (2018 Reissue) (McGuinness, Hole) VII. The Board of Directors, 1. Nature of Directorship, (2) “Director” Defined, HBC-83 (QL)*):

... In the context of corporate law, the term “director” is used to designate the class of persons given the primary (and in some cases exclusive) responsibility for the management of a corporation. In this respect, s. 102(1) of the *Canada Business Corporations Act* provides that subject to any unanimous shareholder agreement, the directors shall manage or supervise the management of the business and affairs of a corporation. Thus the Act begins with the initial presumption that responsibility for management is normally vested with the directors of a corporation. In managing the corporation, the directors do not act as the delegates or agents of the shareholders who elected or appointed them.

[50] Normally, provincial and federal legislations require businesses to be registered and to register the names of their directors and officers. However, information provided to corporate registrars is not always up to date. Furthermore, an individual who has not been properly appointed or elected as a director can still be considered a director if they act in that capacity (see *Halsbury's Law of Canada—Business Corporations (2018 Reissue) (McGuiness, Hole), VII. The Board of Directors, 2. Appointment or Election, (1) General, HBC-86 (QL)*):

... A director *de jure* is a director who has been formally and legally appointed or elected as a director in accordance with the corporate constitution and applicable statute. A *de facto* director is a person who is not a director (or has ceased to be a director) but who nevertheless purports to act in the capacity of a director; the term includes a person who was ostensibly duly elected but who may lack some qualification under the relevant corporate law, a person who simply assumes the role of director without any pretence of legal qualification, and former directors whose term of office have expired but who have continued to act as directors of the corporation after the expiration of their term of office.

[sic]

[51] Therefore, there is no hard-and-fast rule for determining who is a director. However, some key elements will have to be examined to provide an indication that an individual acts as a director, including whether the individual was appointed by shareholders, whether the individual manages the business and the level of responsibility and supervision that the individual has over the affairs of the corporation.

[52] In the Summary, the Minister's delegate made the following statements with regard to directors:

The job title is not always an indication of eligibility the situation is different for Officers and Directors of a company. Officers and Directors of a company discuss the economic situation of the company as a whole, and are in a position to make binding decisions in respect of the economic viability of the company as part of their job. As a rule, the officers/directors of a company would be excluded from the WEPP.

...

A Director, by definition is an individual elected by the shareholder(s) to supervise the management of a corporation.

[sic]

[53] This description of "director" found in the Summary is broadly consistent with the Board's understanding of the exclusion provided at section 6(a) of the *WEPP Act*. However, it is not clear in the review decision or in the Summary whether the Minister's delegate relied on that

description or took into consideration those key elements that are necessary to determine whether an individual is a director for the purpose of the *WEPP Act*.

[54] The review decision itself indicates that according to the receiver (although in this case, it was a trustee), Mr. Au worked as a director of his former employer based on his resignation letter and his job functions.

[55] However, the Summary states that Mr. Au was not a registered director of his former employer. There is no indication as to whether Mr. Au was selected by the shareholders of the corporation to be a director, and no information was sought regarding the corporate leadership and structure. The Summary lists the job duties that Mr. Au provided to the Minister's delegate, which included setting up subsidiaries of the company in foreign jurisdictions, but then states that according to the trustee, Mr. Au performed the duties of a director. The trustee provided no details or any indication of Mr. Au's actual functions within the company. The Minister's delegate relied on the trustee's opinion that Mr. Au performed the duties of a director without conducting her own analysis and assessment of the actual duties and functions performed by Mr. Au to determine whether they were actually those of a director.

[56] It appears to the Board that the Minister's delegate neither asked herself whether Mr. Au had been appointed by the shareholders to be a director nor asked herself whether his duties amounted to the actual management of the business and affairs of the corporation.

[57] Rather, the Summary emphasizes the fact that Mr. Au's title was that of "Director" without regard to his actual ability to direct the affairs of the corporation. There are several instances in the Summary where it is not clear whether the word "director" is used pursuant to its meaning at section 6(a) of the *WEPP Act*. As explained above, having the title of "director" is not enough to be considered a "director" pursuant to section 6(a) of the *WEPP Act*, as this title can apply to a myriad of positions. A further assessment was therefore necessary. The Board is of the view that the Minister's delegate did not undertake a proper analysis of the relevant facts and the applicable test when she determined that Mr. Au was a director of the former employer.

[58] For all of these reasons, the Board finds that the Minister's delegate committed an error of law when she determined that Mr. Au was a director within the meaning of section 6(a) of the *WEPP Act*.

VIII. Conclusion

[59] Having found that the Minister's delegate made an error of law, the Board may vary or rescind the Minister's review decision.

[60] In this case, the Board does not consider that it would be appropriate for it to vary the decision. Doing so would require it to make further inquiries to determine whether Mr. Au was selected by the shareholders of the corporation and possibly analyze whether Mr. Au's duties amounted to the management of the business and affairs of the former employer. As explained above, it is not the Board's role on appeal to conduct further fact-finding and to draw conclusions of fact. The Board is of the view that the Minister is in a better position to conduct additional fact-finding if necessary and to assess the information in a manner that is consistent with the legal test for determining whether the applicant was a director.

[61] For these reasons, the Board rescinds the Minister's review decision and remits it back to the Minister so that she may review her review decision in accordance with this decision.

Ginette Brazeau
Chairperson

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

Court File No.: CV-25-00739279-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
1001270243 ONTARIO INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at **TORONTO**

**REPLY BOOK OF AUTHORITIES OF
RICHARD GOLDGLASS AND OTHER
TERMINATED EMPLOYEES**

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