

**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 LOYALTONE, CO.

(the “**Applicant**”)

**FACTUM OF THE APPLICANT  
(Stay Extension Order)**

June 12, 2024

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## PART I - INTRODUCTION

1. This factum is filed in support of the motion by the Applicant for an order that:
  - (a) extends the stay of proceedings for approximately 12 months to provide the Applicant with time to complete the realization of its remaining assets, including prosecution of its contingent claims, and pursue other remaining wind-up activities for the benefit of the Applicant's creditors;
  - (b) declares that the Applicant meets the criteria prescribed by section 3.2 of the *Wage Earner Protection Program Regulations*, SOR/2008-222 (the "**WEPP Regulations**") so certain of the Applicant's former employees may potentially be eligible for benefits under the *Wage Earner Protection Program Act (Canada)*, SC 2005, c 47, s 1 (the "**WEPPA**"); and
  - (c) approves the fees and activities of KSV Restructuring Inc. in its capacity as Monitor (the "**Monitor**") and its legal counsel, since they were last approved in the Stay Extension and Distribution Order (as defined below).<sup>1</sup>

## PART II - SUMMARY OF FACTS

### A. BACKGROUND

2. The background regarding this motion is set out in more detail in the Seventh Report of the Monitor dated June 10, 2024 (the "**Seventh Report**").
3. Capitalized terms used and not otherwise defined in this Factum have the meaning given to them in the Seventh Report.
4. The Applicant historically operated the AIR MILES® Reward Program.

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<sup>1</sup> Seventh Report at para. 1.1(1)(f).

5. The Applicant commenced this proceeding under the *Companies' Creditors Arrangement Act* (this "**CCAA Proceeding**") in March of 2023 and at the comeback hearing, sought and obtained approval of a sale and investment solicitation process (the "**SISP**"). The SISP was supported by an asset purchase agreement (the "**BMO APA**") with Bank of Montreal ("**BMO**") – the Applicant's most significant partner in the AIR MILES® Reward Program – as buyer, which was designated as a stalking horse bid.<sup>2</sup>

6. Following completion of the SISP, no competing qualified bids were received at the bid deadline, and the BMO APA, as amended, was selected as the successful bid. The Court granted an approval and vesting order in respect of the BMO APA on May 12, 2023.<sup>3</sup> On June 1, 2023, the transaction contemplated by the BMO APA closed and accordingly the Applicant sold substantially all of its operating assets to two affiliates of BMO (the "**Transaction**").<sup>4</sup>

7. Pursuant to an additional Order (the Ancillary Relief Order) granted on May 12, 2023, upon closing of the Transaction, the Applicant's directors and officers were deemed to resign (other than certain officers who remained employed by the Applicant upon closing for a short period of time) and the Monitor was authorized and empowered to exercise any powers which may be properly exercised by a board of directors or any officers of the Applicant.<sup>5</sup>

8. On July 5, 2023, the Court issued a further Order (the "**Stay Extension and Distribution Order**") that, among other things, (i) approved one or more distributions of the proceeds from the Transaction and other cash held by the Applicant (or held by the Monitor on behalf of the

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<sup>2</sup> *LoyaltyOne Co. (Re)*, (March 10, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Initial Order](#)); *LoyaltyOne Co. (Re)*, (March 20, 2023), ONSC (Commercial List), Court File No. CV-23-00696017-00CL ([SISP Approval Order](#)) [SISP Approval Order]. *LoyaltyOne Co. (Re)*, (March 20, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Endorsement](#)) [March 20 Endorsement].

<sup>3</sup> *LoyaltyOne Co. (Re)*, (May 12, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Approval and Vesting Order](#)).

<sup>4</sup> Seventh Report of the Monitor dated June 10, 2024 at para. 2.2(1) [Seventh Report].

<sup>5</sup> *LoyaltyOne Co. (Re)*, (May 12, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Ancillary Relief Order](#)).

Applicant) to the Applicant's secured lenders, and (ii) extended the stay of proceedings to June 28, 2024.

9. Following the closing of the sale and certain initial distributions being made, the Applicant continues to hold certain cash on hand and net proceeds of the Transaction and certain additional assets – primarily contingent claims – which were excluded from the sale.<sup>6</sup>

## **B. STAY EXTENSION AND REMAINING ACTIVITIES**

10. The stay of proceedings currently expires on June 28, 2024. The Applicant is requesting an extension of the stay of proceedings to June 12, 2025.

11. The extension of the stay period will provide the Applicant, under the direction of the Monitor, further time to

- (a) conclude the Bread Litigation;
- (b) advance and conclude the CRA Litigation;
- (c) advance the Breach of Fiduciary Duty Claim;
- (d) if the WEPPA relief is granted, coordinate with ESDC (as defined below) to assist in advancing the WEPPA process for the benefit of terminated employees; and
- (e) pursue other remaining wind-up activities for the benefit of the Applicant's creditors including distributing its remaining assets (subject to the outcome of the other remaining activities in the CCAA proceeding) (collectively, the "**Remaining Activities**").<sup>7</sup>

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<sup>6</sup> Seventh Report at para 1.0(9).

<sup>7</sup> Seventh Report at para 1.0(1)(g).

**C. WEPPA**

12. There were a total of approximately 27 employees either (i) not offered employment with BMO pursuant to the Transaction and whose employment was terminated by the Applicant; or (ii) on long term disability prior to the commencement of the CCAA proceeding, not offered employment with BMO pursuant to the Transaction and whose employment was terminated by the Applicant. All terminated employees were paid their full wages and vacation pay, but not severance or termination pay.<sup>8</sup>

13. The Applicant is seeking a declaration that the Applicant meets the criteria prescribed by section 3.2 of the WEPP Regulations.<sup>9</sup>

14. This relief would potentially enable the Applicant's former employees terminated in the six months prior to, or during the CCAA proceeding, to receive benefits under the WEPPA.<sup>10</sup>

**D. MONITOR'S FEES AND ACTIVITIES**

15. The Seventh Report attaches affidavits from representatives of the Monitor and its legal counsel that provide, among other things, each account (in certain limited instances redacted for matters of confidentiality and privilege) and summary tables identifying the individual professionals who have worked on this matter, their hourly billing rates and the total number of hours worked.<sup>11</sup> The activities of the Monitor and its legal counsel relating to those accounts have also been described in the other recent reports filed in this CCAA Proceeding.<sup>12</sup>

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<sup>8</sup> Seventh Report at para. 6.0(2).

<sup>9</sup> Seventh Report at para. 1.1(1)(c).

<sup>10</sup> Seventh Report at para. 1.1(1)(c).

<sup>11</sup> Seventh Report at Appendices "A" and "B".

<sup>12</sup> Fifth Report of the Monitor dated November 23, 2023; Supplement to the Fifth Report of the Monitor dated March 13, 2024; and the Sixth Report of the Monitor dated April 19, 2024.

16. The fees (excluding disbursements and HST) of the Monitor from June 1, 2023 to May 31, 2024 total \$1,626,018.50. The fees (excluding disbursements and HST) of the Monitor's legal counsel from June 7, 2023 to May 31, 2024 total \$1,686,482.00.<sup>13</sup>

17. The Monitor and its legal counsel billed amounts at hourly rates consistent with the market and the circumstances of this CCAA Proceeding.<sup>14</sup>

### **PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

18. The issues to be determined on this Motion are whether the Court should:

- (a) extend the stay to June 12, 2025;
- (b) declare that the Applicant meets the criteria prescribed by section 3.2 of the WEPP Regulations; and
- (c) approve the Reports and the activities of the Monitor and the fees and disbursements of the Monitor and its counsel.

#### **E. STAY EXTENSION**

19. Section 11.02 of the CCAA provides that this Court may grant an extension of the stay of proceedings for any period it deems necessary, provided that the Applicant has satisfied this Court that: (i) the extension is appropriate; and (ii) it has acted, and is acting, in good faith and with due diligence.<sup>15</sup>

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<sup>13</sup> Seventh Report at para. 9.0(2).

<sup>14</sup> Seventh Report at para. 9.0(5).

<sup>15</sup> CCAA, s. 11.02.

20. There is no “standard” length of time for which the stay of proceedings should or must be extended. Rather, the length of a stay extension depends on this Court’s view of what is most appropriate in the circumstances, and is therefore, highly fact specific.<sup>16</sup>

21. The current stay of proceedings (which was for a period of one year) expires on June 28, 2024. The requested stay extension up to and including July 12, 2025 is anticipated to be required to complete the Remaining Activities. In particular, if the CRA Litigation proceeds to trial, the trial will not occur until the fall of 2024. Similarly, the Breach of Fiduciary Duty Claim will take significant time to fully litigate. The Applicant may return to Court to seek a further extension, if necessary. In the interim period, the Monitor will report to the Court and stakeholders no less frequently than every 6 months.<sup>17</sup>

22. The Applicant has acted, and continues to act, with due diligence and in good faith in this CCAA Proceeding to achieve the best available outcome for its stakeholders and anticipates that it will have sufficient resources to fund the Remaining Activities for the benefit of its creditors.<sup>18</sup> The Monitor supports the Stay Extension.<sup>19</sup> The Stay Extension sought is, therefore, appropriate in the circumstances.

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<sup>16</sup> *U.S. Steel Canada Inc., Re*, [2016 ONSC 3106](#) at para. 15; *Crystallex International Corporation (Re)*, (November 18, 2021), ONSC (Commercial List), CV-11-9532-00CL ([Endorsement](#)) at para. 9 (Conway, J) (“if this stay extension motion is any indication, these motions are battlefields for all sorts of issues that are time consuming and costly. Three months intervals will only consume additional resources and detract from the company’s main focus, which is to secure recovery for stakeholders through the US enforcement proceeding.”); *Crystallex International Corporation (Re)*, (December 12, 2022), ONSC (Commercial List), CV-11-9532-00CL ([Order](#)).

<sup>17</sup> This Court has granted similar relief in recent decisions: see, for example, *LoyaltyOne Co. (Re)*, (July 5, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Stay Extension and Distribution Order](#)) at para 3. *Crystallex International Corporation (Re)*, (December 12, 2022), ONSC (Commercial List), Court File No. CV-11-9532-00CL ([Order](#)) at para. 4; *Crystallex International Corporation (Re)*, (December 12, 2022), ONSC (Commercial List), CV-11-9532-00CL ([Endorsement](#)); *Tricon Films and Television, Re*, (April 11, 2017), ONSC (Commercial List), CV16-11634-00CL ([Approval Order – Distribution Agreement](#)) at para. 4.

<sup>18</sup> Seventh Report at para. 5.0(1).

<sup>19</sup> Seventh Report at para. 7.0(1).

## F. THE WEPPA IS APPLICABLE

23. The WEPPA provides that an individual is eligible to receive payment thereunder if (among other criteria) the former employer is subject to CCAA proceedings and a court determines that the former employer meets the criteria prescribed by section 3.2 of the WEPP Regulations.<sup>20</sup> Section 3.2 of the WEPP Regulations provides that the court “may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations.” Courts have declared that the criteria prescribed by section 3.2 of the WEPP Regulations was met and the WEPPA applied when a debtor has terminated (or is in the process of terminating) the employment of substantially all of their employees.

24. The employment of all of the Applicant’s remaining employees was terminated following closing of the Transaction with BMO.<sup>21</sup> As such, the Applicant meets the criteria prescribed by section 3.2 of the WEPP Regulations, and the Court should make the requested declaration such that the Applicant’s employees can access the benefits available under the WEPPA following the termination of their employment.<sup>22</sup>

25. Representatives from Labour Program Employment and Social Development Canada (“ESDC”), the Government of Canada agency responsible for administering programs under the WEPPA, were served with the Motion Record and the Seventh Report. A representative of the Department of Justice (which represents ESDC) corresponded with the Applicant’s legal counsel and the Monitor in respect of the relief being sought in connection with the WEPPA. Subject to

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<sup>20</sup> *Wage Earner Protection Program Act (Canada)*, [SC 2005, c 47, s1](#), s. 5(5); *Wage Earner Protection Program Regulations*, [SOR/2008-222](#), s. 3.2.

<sup>21</sup> Seventh Report at paras. 2.2(2) and 6.0(2).

<sup>22</sup> *Greenspace Brands Inc., Re*, (June 15, 2023), ONSC (Commercial List), Court File No. CV-23-00697516-00CL ([Ancillary Relief Order](#)) at para. 5; *Arrangement relative a Xebec Adsorption Inc.*, (March 16, 2023), ONSC (Commercial List), Court File No. 500-11-061483-224 ([WEPP Order](#)) at para. 7; *FIGR Brands Inc., Re*, (February 2, 2022), ONSC (Commercial List), Court File No. CV-21-00655373-00CL ([Stay Extension, Distribution WEPPA and Fee Approval Order](#)) at para. 4.

slightly revised language, which has been agreed to by the Applicant and the Monitor, the Department of Justice has advised they consent to the requested relief.

**G. MONITOR'S REPORTS, ACTIVITIES AND FEES**

**(i) *Monitor's reports and activities should be approved***

26. This Court has held that there are good policy and practical reasons for approving a CCAA monitor's report and activities, including that such court approval:

- (a) allows the court officer to move forward with next steps in the proceeding;
- (b) bring the court-officer's activities before the court;
- (c) allows an opportunity for concerns of the stakeholders to be addressed, and any problems to be rectified;
- (d) enables the Court to satisfy itself that the court officer's activities have been conducted in prudent and diligent manners;
- (e) provides protection for the court-officer not otherwise provided by the CCAA; and
- (f) protects the creditors from the delay and distribution that would be caused by (i) re-litigation of steps taken to date and (ii) potential indemnity claims by the court-officer.<sup>23</sup>

27. Approval of the Monitor's Reports and activities is appropriate in the circumstances. The Monitor's Reports outline the specific activities taken by the Monitor over the past year and for which approval is sought. The approval sought is not a general approval of the Monitor's activities but approval of the specific activities taken by the Monitor, all of which are detailed in the Reports.

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<sup>23</sup> *Target Canada Co. Re*, [2015 ONSC 7574](#) at para. 23; *Laurentian University of Sudbury*, [2022 ONSC 2927](#) at paras. 13-14.

No adverse comment has been received on the Monitor's activities described in the Seventh Report or the other reports for which approval is sought. Accordingly, the Reports and the activities set out in therein should be approved.

**(ii) Fees of the Monitor and its legal counsel should be approved**

28. The jurisdiction of this Court to pass the accounts of the Monitor and its counsel is confirmed in the ARIO, which provides that "the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice."<sup>24</sup>

29. The overarching test for assessing the fees and disbursements of the Monitor and its counsel in a CCAA proceeding is whether they are "fair and reasonable" in all of the circumstances and are appropriate.<sup>25</sup> The factors to be considered include: (i) the nature, extent, and value of the assets being handled; (ii) the complications and difficulties encountered; (iii) the time spent; (iv) the court officer's knowledge, experience, and skill; (v) the diligence and thoroughness displayed; (vi) the responsibilities assumed; and (vii) the results of the court officer's efforts.<sup>26</sup>

30. Consideration of each of these factors supports approval of the Monitor's and its counsel's fees and expenses. Among other things, the Monitor and its counsel have been integral in assisting the Applicant and its advisors through a CCAA process to date that has led to the successful closing of the Transaction for the benefit of a wide array of stakeholders, including the Credit Agreement Lenders, employees, suppliers and AIR MILES<sup>®</sup> collectors. The Monitor also agreed to the expansion of its powers, which has led to a greater scope of work and enabled the continuation of the Applicant's restructuring initiatives, including monetization of its remaining

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<sup>24</sup> *LoyaltyOne Co. (Re)*, (March 20, 2023), ONSC (Commercial List), Court File No. CV-23-00696017-00CL ([ARIO](#)) at para. 34.

<sup>25</sup> *Triple-I Capital Partners Limited v. 12411300 Canada Inc*, [2023 ONSC 3400](#) at para. 26.

<sup>26</sup> *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#) at paras. 33-36, quoting *Belyea v Federal Business Development Bank* (1983), 44 N.B.R. (2d) 248 at para. 9 (CA), see Schedule "C"; *Nortel Networks Corp., Re*, [2017 ONSC 673](#) at para. 13-14 (noting that the same factors apply to review of a Monitor's accounts).

assets and overseeing and prosecuting significant litigation claims for the benefit of all of the Applicant's stakeholders following the closing of the Transaction.

**PART IV - ORDER REQUESTED**

31. For all of the reasons above, the Applicant requests that this Court grant the requested Stay Extension Order in the form proposed.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 12<sup>th</sup> day of June, 2024.

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**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. *Arrangement relative a Xebec Adsorption Inc.*, (March 16, 2023), ONSC (Commercial List), Court File No. 500-11-061483-224 ([WEPP Order](#))
2. *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#)
3. *Belyea v Federal Business Development Bank* (1983), 44 N.B.R. (2d) 248
4. *Crystallex International Corporation (Re)*, (November 18, 2021), ONSC (Commercial List), CV-11-9532-00CL ([Endorsement](#))
5. *Crystallex International Corporation (Re)*, (December 12, 2022), ONSC (Commercial List), Court File No. CV-11-9532-00CL ([Order](#))
6. *Crystallex International Corporation (Re)*, (December 12, 2022), ONSC (Commercial List), CV-11-9532-00CL ([Endorsement](#))
7. *FIGR Brands Inc., Re*, (February 2, 2022), ONSC (Commercial List), Court File No. CV-21-00655373-00CL ([Stay Extension, Distribution WEPPA and Fee Approval Order](#))
8. *Greenspace Brands Inc., Re* (June 15, 2023) ONSC (Commercial List), Court File No. CV-23-00697516-00CL ([Ancillary Relief Order](#))
9. *Laurentian University of Sudbury*, [2022 ONSC 2927](#)
10. *LoyaltyOne Co. (Re)*, (March 10, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Initial Order](#))
11. *LoyaltyOne Co. (Re)*, (March 20, 2023), ONSC (Commercial List), Court File No. CV-23-00696017-00CL ([SISP Approval Order](#))
12. *LoyaltyOne Co. (Re)*, (March 20, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Endorsement](#))
13. *LoyaltyOne Co. (Re)*, (March 20, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([ARIO](#))
14. *LoyaltyOne Co. (Re)*, (May 12, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Approval and Vesting Order](#))
15. *LoyaltyOne Co. (Re)*, (May 12, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Ancillary Relief Order](#))
16. *LoyaltyOne Co. (Re)*, (July 5, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Stay Extension and Distribution Order](#))
17. *Nortel Networks Corp., Re*, [2017 ONSC 673](#)
18. *Target Canada Co (Re)*, [2015 ONSC 7574](#)

19. *Tricon Films and Television, Re*, (April 11, 2017), ONSC (Commercial List), CV16-11634-00CL ([Approval Order – Distribution Agreement](#))
20. *Triple-I Capital Partners Limited v. 12411300 Canada Inc*, [2023 ONSC 3400](#)
21. *U.S. Steel Canada Inc., Re*, [2016 ONSC 3106](#)

**SCHEDULE “B”**  
**TEXT OF STATUTES, REGULATIONS & BY - LAWS**

**Companies’ Creditors Arrangement Act, R.S.C. 1985, c C-36**

**General Power of Court**

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

**Stays, etc. — initial application**

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

**Stays, etc. — other than initial application**

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

**Burden of proof on application**

(3) The court shall not make the order unless

- (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
- (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

**Wage Earner Protection Program Act (S.C. 2005, c.47, s. 1)**

**eligible wages** means

- (a) wages other than termination pay and severance pay that were earned during the longer of the following periods:

...

- (ii) the period beginning on the day that is six months before one of the following days and ending on the date of the bankruptcy or the first day on which there was a receiver in relation to the former employer:

- (A) the day on which a proposal is filed by or in respect of the employer under Division I of Part III of the *Bankruptcy and Insolvency Act* or, if a notice of intention to make a proposal is filed by or in respect of the employer under that Division, the day on which the notice of intention is filed,

- (B) the day on which the most recent proceedings under the *Companies' Creditors Arrangement Act* are commenced, and

...

**Conditions of eligibility**

5 (1) An individual is eligible to receive a payment if

- (a) the individual's employment ended for a reason prescribed by regulation;
- (b) one of the following applies:
  - (i) the former employer is bankrupt,
  - (ii) the former employer is subject to a receivership,
  - (iii) the former employer is the subject of a foreign proceeding that is recognized by a court under subsection 270(1) of the *Bankruptcy and Insolvency Act* and
    - (A) the court determines under subsection (2) that the foreign proceeding meets the criteria prescribed by regulation, and
    - (B) a trustee is appointed, or
  - (iv) the former employer is the subject of proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies' Creditors Arrangement Act* and a court determines under subsection (5) that the criteria prescribed by regulation are met; and
- (c) the individual is owed eligible wages by the former employer.

**Prescribed criteria — other proceedings**

(5) On application by any person, a court may, in proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies' Creditors Arrangement Act*, determine that the former employer meets the criteria prescribed by regulation.

**Wage Earner Protection Program Regulations, SOR/2008-222**

**Proceedings Under Bankruptcy and Insolvency Act or Companies' Creditors Arrangement Act**

**3.2** For the purposes of subsection 5(5) of the Act, a court may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations.

**SCHEDULE "C"**  
***Belyea v Federal Business Development Bank*** (1983), 44 N.B.R. (2d) 248

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** [Genoa Bay Lumber Co. v. Genoa Bay Marina Ltd.](#) | 2001 BCSC 1325, 2001 CarswellBC 2157, 108 A.C.W.S. (3d) 827 | (B.C. S.C., Sep 21, 2001)

1983 CarswellNB 27  
New Brunswick Court of Appeal

Belyea v. Federal Business Development Bank

1983 CarswellNB 27, [1983] N.B.J. No. 41, 116 A.P.R. 248, 18 A.C.W.S. (2d) 19, 44 N.B.R. (2d) 248, 46 C.B.R. (N.S.) 244

## **BELYEA and FOWLER v. FEDERAL BUSINESS DEVELOPMENT BANK**

Hughes C.J.N.B., Ryan and Stratton JJ.A

Judgment: January 18, 1983

Docket: No. 31/82/CA

Subject: Corporate and Commercial; Insolvency

### **Related Abridgment Classifications**

Debtors and creditors

#### **VII Receivers**

##### **VII.3 Appointment**

##### **VII.3.b Application for appointment**

##### **VII.3.b.ii Person entitled to make application**

##### **VII.3.b.ii.A General principles**

Debtors and creditors

#### **VII Receivers**

##### **VII.8 Remuneration of receiver**

##### **VII.8.b Remuneration**

##### **VII.8.b.iii Miscellaneous**

### **Headnote**

Receivers --- Appointment — Application for appointment — Person entitled to make application — General

Receivers --- Remuneration of receiver — Remuneration

Secured creditors — Receiver appointed by document — Remuneration — Factors to be considered.

There is no fixed rate or settled scale for determining the amount of compensation to be paid a receiver. He is usually allowed either a percentage upon his receipts or a lump sum based upon the time, trouble and degree of responsibility involved. The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and, while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous. The considerations applicable in determining the reasonable remuneration to be paid to a receiver should include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts and the costs of comparable services when performed in a prudent and economical manner. Whether an account for services is fair and reasonable is a matter of some difficulty. In many cases, attempts have been made to establish this fact by calling as witnesses persons who engage in the same profession or calling to testify that the charges made are the usual and normal charges for similar services made by members of that particular profession or calling in their locality. Even though a professional is entitled to a fair, just and reasonable compensation measured by the reasonable value of the services rendered, the fees charged must

bear some reasonable proportion to the amount of the value affected by the controversy or involved in the employment. Thus, in cases where a professional is aware of the amount at issue, the courts will impose an underlying or implied limit or maximum on the professional fees it will allow, based on what is reasonable in relation to the dollar amount involved in the particular case. Generally speaking, courts have been reluctant to award remuneration based solely upon the time spent by the appointee in performing his duties. They have preferred to award either a lump sum or a commission upon the amount collected or realized by the receiver. However, whether the commission or lump sum method is used in computing the compensation to be paid to a receiver, the compensation awarded must be fair and reasonable having regard to all of the material facts and circumstances of the particular case.

**Table of Authorities**

**Cases considered:**

*Considered by majority:*

*Amalg. Syndicates, Re*, [1901] 2 Ch. 181, 17 T.L.R. 486 — referred to

*Campbell v. Arndt* (1915), 8 Sask. L.R. 320, 9 W.W.R. 57, 24 D.L.R. 699 (S.C.) — referred to

*Cowie (J.W.) Enrg. Ltd. v. Allen* (1982), 26 C.P.C. 241, 52 N.S.R. (2d) 321 (C.A.) — referred to

*Eastern Trust Co. v. N.S. Steel & Coal Co. Ltd.* (1938), 13 M.P.R. 237 (N.S.C.A.) — referred to

*Hall v. Slipp* (1894), 1 N.B. Eq. 37 — referred to

*Ibar Devs. Ltd. v. Mount Citadel Ltd.* (1978), 26 C.B.R. (N.S.) 17 (Ont. S.C.) — referred to

*Indust. Dev. Bank v. Garden Tractor & Equipment Co. Ltd.*, [1951] O.W.N. 47 (H.C.) — referred to

*Considered in dissent:*

*Lister (Ronald Elwyn) Ltd. v. Dunlop Can. Ltd.*, [1982] 1 S.C.R. 726, 41 C.B.R. (N.S.) 272, 18 B.L.R. 1, 135 D.L.R. (3d) 1, 65 C.P.R. (2d) 1, 42 N.R. 181 — referred to

**Statutes considered:**

Evidence Act, R.S.N.B. 1973, c. E-11, s. 49.

**Authorities considered:**

75 C.J.S. 1067.

Williston on Contracts, 3rd ed. (1967), vol. 10, pp. 928-29.

Action by secured creditors against debtor for deficiency owing under guarantee; claim that receiver's remuneration excessive.

**Stratton J.A. (Hughes C.J.N.B. concurring):**

1 I have had the benefit of reading the judgment prepared by my brother Ryan and regret that I am unable to agree in all respects with his proposed disposition of this appeal [from 40 C.B.R. (N.S.) 157, 38 N.B.R. (2d) 162, 100 A.P.R. 162 ].

2 In his factum counsel for Messrs. Belyea and Fowler raises two grounds of appeal, namely, the reasonableness of the refusal by the Federal Business Development Bank to accept an offer made by Mr. Sam Gamblin to purchase the inventory of Chase Camera & Supply Limited for \$40,000, and the reasonableness of the receiver's account of \$11,730. I agree with Ryan J.A. that the refusal by the bank to accept the Gamblin offer was not, in the circumstances, unreasonable. However, I do not agree that the receiver satisfactorily established that its account for services was fair and reasonable.

3 There is no fixed rate or settled scale for determining the amount of compensation to be paid a receiver. He is usually allowed either a percentage upon his receipts or a lump sum based upon the time, trouble and degree of responsibility involved. The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous.

4 The principles applicable in fixing the remuneration to be allowed a receiver have been discussed in a number of decisions. In the frequently quoted case of *Campbell v. Arndt* (1915), 8 Sask. L.R. 320, 9 W.W.R. 57, 24 D.L.R. 699 (S.C.) , it was pointed

out that a receiver is generally paid by a commission on the gross amount of his receipts, the rate of which varies from 2 to 5 per cent in proportion to the care and trouble involved. The court in that case concluded that, although the receiver must have spent considerable time and experienced a good deal of trouble, there did not appear to have been any very exceptional difficulties entitling him to exceptionally larger fees and, accordingly, he was awarded as a fair remuneration a commission of 5 per cent of the funds coming into his hands.

5 A lump sum was awarded to receivers by the Nova Scotia Court of Appeal in *Eastern Trust Co. v. N.S. Steel & Coal Co. Ltd.* (1938), 13 M.P.R. 237 . In making their award, the court said at p. 240:

As we view it, we are entitled, in order to fix the remuneration of both receivers and liquidators, to survey the entire operations under their charge since their appointment, to take into consideration the time each of them gave to the work and the responsibilities resting on them as receivers and liquidators, and to determine what the work necessarily done should cost, if conducted prudently and economically.

6 A lump sum was also awarded a receiver as fair compensation for his services in *Indust. Dev. Bank v. Garden Tractor & Equipment Co. Ltd.*, [1951] O.W.N. 47 (H.C.) . In that case, Marriott, Master, said at p. 48:

In fixing the compensation of a receiver, the Court always has had complete jurisdiction to allow what is fair and reasonable under all the circumstances, but a receiver has no *prima facie* right to any fixed rate as a trustee in bankruptcy has under The Bankruptcy Act. In *Kerr on Receivers*, 11th ed. 1946, at p. 279, it is stated: "In the case of receivers and managers there is no fixed scale. They are sometimes allowed 5 per cent on the receipts: in other cases their remuneration is fixed at a lump sum or regulated by the time employed by the receiver, his partners and clerks." In *Re Fleming* (1886), 11 P.R. 426 , Chancellor Boyd stated: "Five per cent commission may be a reasonable allowance in many cases, but where the estate is large and the services rendered are of short duration and involving no very serious responsibility, such a rate may be excessive."

7 In fixing a lump sum rather than a percentage fee for a receiver's compensation in *Ibar Devs. Ltd. v. Mount Citadel Ltd.* (1978), 26 C.B.R. (N.S.) 17 (Ont. S.C.) , Saunders, Master, concluded that remuneration on a 5 per cent basis was just too high. He held that the receiver was entitled to a fair fee on the basis of a quantum meruit according to the time, trouble and degree of responsibility involved.

8 It should perhaps be noted that there is American authority for the proposition that where the duties of the receiver consist in liquidating assets, a commission on the fund is a more appropriate method of compensation than that based on a fair price for the labour and time employed, and is the one commonly used. Where the compensation is so computed, 5 per cent is the usual and customary rate in ordinary cases. However, the rate varies according to the degree of difficulty or facility in the collection of different receipts: see 75 C.J.S. 1067.

9 The considerations applicable in determining the reasonable remuneration to be paid to a receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

10 Experienced counsel know that it can be a matter of some difficulty to prove that an account for services is fair and reasonable. In many cases, counsel attempt to establish this fact by calling as witnesses persons who are engaged in the same profession or calling to testify that the charges made by the plaintiff are the usual and normal charges for similar services made by members of that particular profession or calling in their locality. In the present case, where the receiver was a chartered accountant, no evidence was tendered by any member of the accounting profession as to the usual and normal charges made for services similar to those performed by the receiver nor, indeed, was any evidence called other than that of the receiver, to establish the reasonableness of the charges which he unilaterally made for his services.

11 One of the compelling factors referred to in *Williston on Contracts*, 3rd ed. (1967), vol. 10, pp. 928-29 as a determinant of the reasonable value of services performed by lawyers is the amount involved. To state this proposition another way, even

though a professional is entitled to a fair, just and reasonable compensation measured by the reasonable value of the services rendered, the fees charged must bear some reasonable proportion to the amount of money or the value affected by the controversy or involved in the employment. Thus, in cases where a professional is aware of the amount at issue, courts will impose an underlying or implied limit or maximum on the professional fees it will allow based on what is reasonable in relation to the dollar amount involved in the particular case: see *J.W. Cowie Enrg. Ltd. v. Allen* (1982), 26 C.P.C. 241, 52 N.S.R. (2d) 321 (C.A.) .

12 Generally speaking, courts have been reluctant to award remuneration based solely upon the time spent by the appointee in performing his duties: see *Re Amalg. Syndicates*, [1901] 2 Ch. 181, 17 T.L.R. 486 . They have preferred to award either a lump sum or a commission upon the amount collected or realized by the receiver. However, whether the commission or lump sum method is used in computing the compensation to be paid to a receiver, the compensation awarded must be fair and reasonable having regard to all of the material facts and circumstances of the particular case. In determining the fairness and reasonableness of a receiver's remuneration it is, I think, well to keep in mind what was said by Barker J. on this subject as long ago as 1894 in *Hall v. Slipp*, 1 N.B. Eq. 37 -39:

... while it is important that a remuneration consistent with the responsibility of the position should be allowed, it is of equal importance that the position should not be made a means simply of absorbing the moneys of creditors and others whose interests it is the duty of this Court to protect.

... while, as a general rule, a commission of five per cent. on receipts is allowable, exceptions are made in special cases, both in the way of increasing the amount where unusual work is required, or diminishing it where the amounts are large or the trouble is insignificant.

... It is evident, if the necessary expenses of administering estates in this Court bear so large a proportion to the amount involved as this, the practical result is simply to enrich the Court's officers at the expense of the suitors. In my opinion, however, the practice of the Court warrants no such result; and I think it only right to point out that it is a mistake to support that those who act as receivers are entitled to charge, or will be allowed, a remuneration made up on a scale of fees applicable to leading counsel.

13 In the present case, there was no evidence tendered of any express agreement regarding the remuneration to be paid to the receiver. Nor do I think that this is an appropriate case in which to limit the compensation payable to the receiver to a reasonable percentage of the assets handled. On the other hand, were I to uphold the finding of the trial judge, I would in effect be allowing the receiver a fee equivalent to 35 per cent of the amount realized on the sale of the assets.

14 The record discloses that the receiver sold the inventory of Chase Camera & Supply Limited for \$30,075 and that the total receipts from all sources were \$36,566. The receiver charged a fee for its services of \$11,730 which it deducted from the funds in its hands, remitting the balance to the bank. There was no evidence that this receivership was in any way complex. Indeed, the evidence was that the officers of Chase Camera & Supply Limited provided a good deal of assistance to the receiver in the disposition of the assets. In all of the circumstances, it is my opinion that the fee deducted by the receiver, categorized by one of the employees of the bank as "high", was unreasonable in relation to the dollar amount realized on the sale of the inventory and ought to have been reduced. In failing to make that reduction, I think the trial judge erred in principle.

15 Counsel for the Federal Business Development Bank did not call as witnesses the persons who actually performed the work in this receivership, other than Mr. Fowler who supervised it, nor did he tender in evidence any "record or entry of an act, condition or event made in the regular course of" the business of the receiver. In the absence of such evidence, it is difficult to see how s. 49 of the Evidence Act, R.S.N.B. 1973, c. E-11, can be of any assistance to the receiver in establishing its account. Moreover, the only evidence, other than that of Mr. Fowler, as to the reasonableness of the receiver's account was that of the in-house solicitor for the bank who testified that in a case such as this present one he "would have expected a receiver's bill of approximately \$5,000.00, say in the range of \$4,000.00 to \$6,000.00, which would be something which we would reasonably anticipate". In view of this evidence, it is my opinion that a reasonable remuneration to the receiver in this case would be \$6,000.

16 As my brother Ryan points out, the reasonableness of a demand for payment given on the same day that the bank was informed of a potential sale of the company's inventory was not in issue before us nor, for that matter, was it made clear what act of default by the company was relied upon by the bank as entitling it to crystallize its debenture. Therefore, these matters were not considered on this appeal.

17 I would allow the appeal and reduce the judgment at trial to \$4,591.03. The defendants are entitled to the costs of this appeal which I would fix at the sum of \$750.

**Ryan J.A. (dissenting):**

18 This is an appeal by the defendants from a decision of a judge of the Court of Queen's Bench, wherein he directed judgment for the plaintiff against the defendants, jointly and severally, in the sum of \$10,249.03 together with costs. In its action the plaintiff claimed against the defendants for a deficiency which it alleged was owing to it under a guarantee given by the defendants to secure a loan of \$40,000 advanced by the plaintiff to Chase Camera & Supply Ltd.

19 The following facts are set out in the decision of the trial judge reported in (1982), 40 C.B.R. (N.S.) 157, 38 N.B.R. (2d) 162 at 163 -64, 100 A.P.R. 162 :

In the summer of 1978 the plaintiff lent \$40,000.00 to the company. To secure the loan the plaintiff took a debenture which gave it the right to appoint a receiver. The defendants guaranteed the loan. Both the debenture and guarantee were received in evidence.

Relations between the company and the plaintiff were uneventful until August 27, 1979 when events started happening quickly. That morning Mr. Belyea visited Donald O'Leary, a senior credit officer of the plaintiff, and informed him that the company was in poor financial shape and that Mr. Sam Gamblin, of Gem Photo, was accompanied Mr. Belyea to the meeting, was prepared to pay \$40,000.00 for the company's inventory. Mr. Belyea pointed out that this amount would more than satisfy the company's indebtedness to the plaintiff which then stood at approximately \$34,000.00. Mr. Belyea requested the plaintiff's permission for this transaction.

By the afternoon of the same day the plaintiff had concluded that it could not consent to the transaction and instead appointed H.R. Doane Ltd. as receiver and requested them to take steps to liquidate the inventory. A partner of the Doane firm, Mr. Bev Fowler, was the Doane representative responsible for this task.

Mr. Fowler described the various options open to him at that time and described his efforts in arranging a sale, which took place after tender, to a Bridgewater, N.S. company for \$30,000.00. In addition the plaintiff realized \$4,925.24 apart from the receiver's efforts. A balance of \$7,749.03 remained owing on the \$34,231.85 due at the date of demand. Mr. O'Leary made mention of a balance of \$8,279.30 as of November 10, 1981 but gave no details of this higher figure.

20 At a pre-trial conference the parties agreed that the issues to be determined by the trial judge were:

- a) Did the plaintiff act reasonably in its refusal to accept the Gamblin offer? and
- b) Was the receiver's fee of \$11,730 reasonable?

The same issues were raised on this appeal.

21 As to the first issue the trial judge held the plaintiff was justified in refusing to accept the Gamblin offer of \$40,000 for the inventory of Chase Camera & Supply Ltd. because a substantial amount was owing to the plaintiff, the value of the inventory on which it held its security was unknown to it and because the defendant Belyea disclosed to the plaintiff the company's poor financial situation. These factors no doubt appeared to the plaintiff to jeopardize its position as a creditor. In my opinion, the refusal to accept the Gamblin offer was a business judgment which I cannot say was unreasonable.

22 In his submission counsel for the defendants contended that, not only was the receiver's account unreasonable, but that the receiver had failed to prove that the work charged for was in fact performed. Mr. Fowler, a chartered accountant and licensed trustee, was an audit partner with H.R. Doane Limited specializing in insolvency work. He explained that each of Doane's employees is required to keep a time card upon which the employee enters the hours which he had spent each day on whatever accounts he works on. Mr. Fowler stated that at the end of each week the cards are "extended" and the information thereon is entered in each client's ledger account. He produced photocopies of all time cards and ledger sheets of the Chase Camera account which, by agreement of counsel, were used to establish the time spent by each employee who worked on the account.

23 In seeking to prove the reasonableness of the receiver's account, counsel for the plaintiff did not enter in evidence the employees' time cards or the client's ledger sheets, nor did he avail himself of [s. 49 of the Evidence Act, R.S.N.B. 1973, c. E-11](#), which provides that:

A record or entry of an act, condition or event made in the regular course of a business is, insofar as relevant, admissible as evidence of the matters stated therein if the court is satisfied as to its identity and that it was made at or near the time of the act, condition or event.

24 Notwithstanding the fact the photocopies of the time cards and the client's ledger sheets were not entered in evidence, counsel for the defendants cross-examined Mr. Fowler at length on their contents as though they had been entered in evidence. For this reason and because counsel for the parties agreed at a pre-trial conference that the issue to be decided by the trial judge with respect to the account was whether or not it was reasonable and fair, I am satisfied that the trial judge was entitled to rely on the entries made in the cards as well as the viva voce testimony of Mr. Fowler in determining whether the account was reasonable and fair. The trial judge's finding that the receiver's account was fair and reasonable is a finding of fact supported by the evidence. Moreover, no evidence was tendered by the defendants to prove that the charges were unreasonable, or that the work was not actually performed. As there was no palpable or overriding error in his finding this court will not interfere with it.

25 This appeal did not raise the issue of the requirement of reasonable notice to which a debtor is entitled when a debt is payable on demand. This requirement was illustrated by the decision of the Supreme Court of Canada in *Ronald Elwyn Lister Ltd. v. Dunlop Can. Ltd.*, [1982] 1 S.C.R. 726, 41 C.B.R. (N.S.) 272, 18 B.L.R. 1, 135 D.L.R. (3d) 1, 65 C.P.R. (2d) 1, 42 N.R. 181 delivered 31st May 1982 after the present appeal had been argued. The question whether or not the circumstances of the instant case give rise to a cause of action against the plaintiff is one which we need not consider on this appeal.

26 In the result, I would dismiss the appeal with costs to be taxed in accordance with the schedule of costs in force at the time the action was commenced.

*Directions given.*

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 LOYALTYONE, CO.

Court File No. CV-23-00696017-00CL

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

PROCEEDING COMMENCED AT  
TORONTO

**FACTUM OF THE APPLICANT  
(Stay Extension Order)**

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