Court of Appeal File No.: COA-24-OM-0248
Court File No.: CV-2300696017-00CL

COURT OF APPEAL FOR ONTARIO

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.

Applicant

FACTUM OF THE MOVING PARTIES LOYALTYONE, CO. AND THE MONITOR (MOTION FOR LEAVE TO APPEAL)

September 9, 2024

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PART I - MOVING PARTIES, PRIOR COURT & RESULT

1. LoyaltyOne, Co. ("**LoyaltyOne**") and KSV Restructuring Inc. in its capacity as monitor of LoyaltyOne (the "**Monitor**") bring this motion for an order granting leave to appeal to the Court of Appeal from the order of the Honourable Justice Conway (the "**Motion Judge**") of the Superior Court of Justice (Commercial List) at Toronto dated July 10, 2024 (the "**Order**").

2. The Order relates to a potential $96 million tax refund (the "**Tax Refund**") that may become payable following the resolution of a tax dispute (the "**Tax Dispute**") between LoyaltyOne and the Canada Revenue Agency ("**CRA**") before the Tax Court of Canada. The respondent Alliance Data Systems Corporation (now known as Bread Financial Holdings, Inc.) ("**Bread**") claims to be entitled to the entirety of the Tax Refund pursuant to a Tax Matters Agreement with Loyalty Ventures Inc. ("**LVI**"), dated November 5, 2021 (the "**TMA**").

3. LoyaltyOne sought to disclaim the TMA under section 32 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**"). The Monitor sought to have the TMA set aside as a transfer at undervalue ("**TUV**") under section 96(1)(b)(ii) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("**BIA**"), as incorporated into section 36.1(1) of the CCAA. The Motion Judge denied both.

4. This is one of those clear cases that requires appellate intervention. The errors made by the Motion Judge do not involve the exercise of supervisory discretion in CCAA proceedings that attracts deference from an appellate court. Rather, the errors upend well-settled principles of insolvency law, fundamentally constrict the remedial objectives of the BIA and the CCAA, and materially affect the assets available for distribution to LoyaltyOne's creditors. It is in the interests of justice to grant leave to appeal.

PART II - SUMMARY OF THE FACTS

A. Overview

5. The proposed appeal satisfies the well-established test for leave to appeal. The proposed appeal is (i) of significance to the practice, (ii) of significance to the proceeding, (iii) *prima facie* meritorious, and (iv) will not hinder the progress of the proceeding.

6. First, the proposed appeal is of great significance to insolvency law and practice. The disclaimer of agreements under section 32 of the CCAA is a key tool in an insolvency proceeding, permitting a CCAA debtor, whether in a restructuring or liquidating CCAA, to disclaim otherwise binding agreements to maximize the

value of its assets for the benefit of all creditors. The case law confirms that section 32 can be used when it is beneficial to the CCAA proceeding.

7. However, the Motion Judge's decision upends settled law concerning disclaimer, eliminating its potential use within liquidating CCAAs and drastically narrowing a debtor's ability to exercise this important statutory right. The whole point of disclaiming an agreement in a CCAA proceeding is to benefit all creditors by preserving the debtor's estate and relative entitlements, not to protect an individual creditor simply because that creditor has an agreement that is otherwise enforceable and was intended to be fully performed (a feature of all agreements). The approach to disclaimer taken by the Motion Judge would put at risk a debtor's ability to preserve and maximize the value of its assets and introduce significant uncertainty into CCAA practice, encouraging contractual counterparties to the debtor to litigate the disclaimer of their agreements. This is a critical error that requires correction.

8. The decision also unduly constrains the availability of TUV relief under the CCAA (and BIA) that is designed to protect creditors from transactions that have the effect of diminishing the value of the debtor's estate. The TUV provision depends on, among other things, a finding that the debtor company is insolvent. By restrictively interpreting the definition of "insolvent person" in the BIA, the Motion Judge incorrectly narrowed the applicability of the TUV provision – and more broadly the "insolvent person" definition as a whole – contrary to both the express wording of the statute and the remedial purpose of the TUV regime. Thus,

one creditor benefits to the detriment of the creditors as a whole – an unfair result and one contrary to the principles of insolvency law.

9. Second, the proposed appeal is of great significance to this proceeding. The up-to $96 million Tax Refund is a highly valuable remaining asset of the CCAA debtor's estate in a circumstance where creditors will suffer a significant shortfall on their claims. If the TMA were disclaimed, the Tax Refund would be available to all creditors, including, potentially, Bread. If the purported transfer to Bread is a TUV, Bread would not be entitled to a share of it except to the extent it has other provable claims. The Motion Judge's decision not to approve the disclaimer of the TMA and to narrow the definition of "insolvent person" and not undertake a full TUV analysis could result in a scenario where a single creditor – Bread – reaps the benefit of any Tax Refund recovered by LoyaltyOne at the expense of all other creditors. Bread argued on the motions that it alone is entitled to the Tax Refund through a remedial constructive trust. The Motion Judge deferred for future determination the question of whether such a trust could apply. If it does, no other creditors will share in the Tax Refund.

10. Third, the proposed appeal meets the low bar of being *prima facie* meritorious. Regarding disclaimer, the Motion Judge erred in law based on an incorrect interpretation and application of section 32 of the CCAA which directly conflicts with well established authority. Disclaimer is not the very limited tool reflected in the Motion Judge's reasons. Regarding the definition of "insolvent person" for the purposes of the TUV, the Motion Judge (i) erred in law by incorrectly interpreting and applying that definition, and (ii) made a palpable and overriding

error by ignoring material evidence that LoyaltyOne was in fact an "insolvent person" on a balance sheet basis. The Motion Judge focused only on the evidence concerning the cash flow test for insolvency, ruling that test was not met, but failed to consider the expert and contemporaneous evidence that the balance sheet test for insolvency was met. ***Either*** test being met means LoyaltyOne was an "insolvent person", so it is an error of law for the Motion Judge not to properly address the balance sheet test.

11. Finally, the proposed appeal will not unduly hinder the progress of this proceeding. LoyaltyOne has already sold substantially all of its operating assets and the Tax Refund is not expected to become immediately available. The only remaining step in this proceeding is to distribute LoyaltyOne's remaining assets, including the Tax Refund (if and when it becomes available), to creditors. There are no "real time" issues outstanding in this CCAA proceeding that would make an appeal undesirable.

B. Background

12. For three decades, LoyaltyOne operated one of Canada's first and leading loyalty programs, known as AIR MILES.[1]

13. By 2018, LoyaltyOne was a subsidiary of Bread,[2] a U.S. company which operated various lines of business. At that time, Bread decided to divest itself of its marketing services and customer loyalty programs (operated by LoyaltyOne

[1] Affidavit of Cynthia Hageman affirmed November 9, 2023 ("Hageman 1") para. 20, Moving Parties Motion Record for Leave to Appeal ("MPMR") Tab 4.
[2] Known as "Alliance Data Systems" at that time.

and another Bread subsidiary, BrandLoyalty) to focus on its private label credit card and banking business.[3] Bread retained Morgan Stanley in 2019 to run a sale process ("**Project Angus**") in connection with its planned divestiture of LoyaltyOne.[4] Project Angus resulted in limited market interest in, and indications of value for, LoyaltyOne. This was due in part to "[s]ponsor concentration concerns."[5]

14. Ultimately, by December 2020, only two highly conditional, non-binding bids were made for LoyaltyOne. Following Project Angus, Bread determined that the divestiture of its loyalty business should be structured through a spin-out "with no counterparty" (*i.e.* purchaser) so that Bread "would control" the terms and structure for its own benefit.[6]

15. Bread announced the spin-out of LoyaltyOne and BrandLoyalty in May 2021 (the "**Spin Transaction**"). It implemented the Spin Transaction six months later, on November 5, 2021 (the "**Spin Date**").[7] The Spin Transaction was implemented through a series of agreements, including the TMA – which provided Bread with a

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[3] Hageman 1 para. 22, MPMR Tab 4; Affidavit of Jeffrey Fair affirmed November 9, 2023 ("Fair") paras. 12-13, Exhibit A (p. 17), MPMR Tab 5.
[4] Project Angus did not include BrandLoyalty. Affidavit of Andrew Harington affirmed May 1, 2024, Exhibit A ("Harington Report 1") para. 205, MPMR Tab 9; Affidavit of Joseph L. Motes affirmed February 9, 2024 ("Motes 1") para. 26, MPMR Tab 12; Examination of Blair Cameron Qs. 20-21, Joint Transcript and Exhibit Brief ("JTEB"), MPMR Tab 22.
[5] Cross-examination of Joseph Motes ("Motes Cross") Q. 51, JTEB, MPMR Tab 22. Cross-examination of Scott Davidson ("Davidson Cross") Exhibit 23 (p. 3), JTEB, MPMR Tab 22; Harington Report 1 paras. 207-209, MPMR Tab 9; Hageman 1 para. 25, MPMR Tab 4; Fresh as Amended Affidavit of Cynthia Hageman affirmed April 17, 2024 ("Hageman 2") paras. 29-34, MPMR Tab 6.
[6] Hageman 2 paras. 33-34, Exhibit D (p. 2), MPMR Tab 6; Motes Cross UA No. 6, Tab 1 (p. 4), JTEB, MPMR Tab 22.
[7] Hageman 1 paras. 30, 50, MPMR Tab 4.

right to claim payment of an amount equal to the Tax Refund if and when received by LoyaltyOne.[8] The Spin Transaction resulted in:

(a) the spin-out of LVI, a newly incorporated U.S. holding company, as an independent public company that would own certain of Bread's subsidiaries, including LoyaltyOne;

(b) LVI entering into a loan agreement to borrow USD$675 million in term loans, together with a revolving facility in the amount of an additional USD$150 million;

(c) the requirement that LVI transfer substantially all of the term loan proceeds to Bread at closing – to improve Bread's financial position;

(d) LoyaltyOne guaranteeing the loan to LVI, as "primary obligor and not as surety"; and

(e) the distribution of approximately 80% of LVI's shares to Bread's shareholders, with Bread retaining approximately 20%.[9]

16. Since LoyaltyOne guaranteed LVI's significant indebtedness as the primary obligor, and not as a surety, it was responsible for the prompt payment of the obligations under the Credit Agreement in full when due.[10] The Credit Agreement provides that:

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[8] TMA section 8(c), Motes 1 Exhibit T, MPMR Tab 12.
[9] Hageman 1 paras. 9, 48-49, MPMR Tab 4; Credit Agreement, Article XI, section 11.01, Hageman 1 Exhibit P, MPMR Tab 4.
[10] Credit Agreement, Article XI, section 11.01, Hageman 1 Exhibit P, MPMR Tab 4; Cross Examination of Andrew Harington ("Harington Cross") Qs. 141-144, JTEB, MPMR Tab 22.

> Each Guarantor hereby jointly and severally guarantees to each Secured Party and each other holder of Obligations as hereinafter provided, as primary obligor and not as surety, the prompt payment of the Obligations in full when due (whether at stated maturity, as a mandatory repayment, by acceleration, as a mandatory cash collateralization or otherwise) strictly in accordance with the terms thereof. Each Guarantor hereby further agrees that if any of the Obligations are not paid in full when due (whether at stated maturity, as a mandatory prepayment, by acceleration, as a mandatory cash collateralization or otherwise), such Guarantors will, jointly and severally, promptly pay the same, without any demand or notice whatsoever, and that in the case of any extension of time of payment or renewal of any of the Obligations, the same will be promptly paid in full when due (whether at extended maturity, as a mandatory prepayment, by acceleration, as a mandatory cash collateralization or otherwise) in accordance with the terms of such extension or renewal.[11]

17. Although LoyaltyOne was jointly and severally liable with the other obligors under the Credit Agreement, none of them had the ability to service the debt. LoyaltyOne was the main operating business and LVI's only other operating subsidiary, BrandLoyalty, had essentially no cash flow from operations.[12] As a result, LoyaltyOne was expected to, and did, service the debt owed by LVI.[13]

18. LoyaltyOne's financial circumstances deteriorated significantly following the Spin Transaction.[14] Nevertheless, LoyaltyOne was still obliged to service LVI's significant debt and corporate costs because neither LVI nor BrandLoyalty could fund those payments.[15]

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[11] Credit Agreement, Article XI, section 11.01, Hageman 1 Exhibit P, MPMR Tab 4. [emphasis added]
[12] Affidavit of Cynthia Hageman affirmed May 1, 2024 ("Hageman 3") para. 14, MPMR Tab 10; Hageman 1 para. 44, MPMR Tab 4.
[13] Hageman 2 para. 23, MPMR Tab 6; Harington Cross Qs. 141-144, 405-421, JTEB, MPMR Tab 22; Davidson Cross Qs. 615-618, JTEB, MPMR Tab 22.
[14] Hageman 1 paras. 54-57, MPMR Tab 4.
[15] Hageman 1 para. 44, MPMR Tab 4; Hageman 2 para. 23, MPMR Tab 6; Hageman 3 para. 14, MPMR Tab 10; Harington Cross Qs. 141-144, 405-421, JTEB, MPMR Tab 22; Davidson Cross Qs. 615-618, JTEB, MPMR Tab 22.

19. Less than 18 months after the Spin Date, on March 10, 2023, LoyaltyOne commenced CCAA proceedings.[16]

20. On October 27, 2023, LoyaltyOne, with the approval of the Monitor, provided Bread with a notice of disclaimer of the TMA under section 32 of the CCAA.[17]

C. LoyaltyOne Attempts to Maximize Creditor Recoveries

21. While in CCAA, LoyaltyOne sold substantially all of its operating assets, including the AIR MILES rewards program, to affiliates of Bank of Montreal ("**BMO**"). Its remaining assets consist of (i) the undistributed remaining net proceeds from the sale of its assets and cash on hand, all of which is subject to a security interest in favour of its secured creditors, and (ii) the amount of the Tax Refund, if and when received. These remaining assets are insufficient to repay LoyaltyOne's creditors in full.[18]

22. LoyaltyOne has creditors other than Bread and the lenders under the Credit Agreement, including the CRA. Approximately $6 million remains owing to trade creditors in respect of pre-filing claims and restructuring claims and, as a result of LoyaltyOne disclaiming almost 60 contracts and its off-balance sheet obligations, there may be claims by unsecured creditors that have not yet been quantified.[19]

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[16] Hageman 1 para. 57, MPMR Tab 4.
[17] Hageman 1 Exhibit S, MPMR Tab 4; Hageman 1 para. 63, MPMR Tab 4; Fifth Report of the Monitor dated November 23, 2023 ("Monitor's Fifth Report"), section 1.1, para. 5, MPMR Tab 18.
[18] Hageman 1 paras. 61-62, MPMR Tab 4.
[19] Monitor's Fifth Report, section 2.3, para. 4, MPMR Tab 18.

23. During this CCAA proceeding, Bread asserted an entitlement to the Tax Refund for its own benefit to the exclusion of all other creditors, notwithstanding that LoyaltyOne was subject to this CCAA proceeding and was advancing the Tax Dispute with the CRA regarding the Tax Refund using funds that would otherwise have been available to LoyaltyOne's creditors.

D. The Motion Judge's Decision

24. On June 13 and 14, 2024, the Motion Judge heard a motion by Bread and a joint motion by LoyaltyOne and the Monitor for certain relief relating to the TMA.[20]

25. Bread moved for an order that the disclaimer not be approved and the Monitor moved for a declaration that the payment provisions under the TMA relating to the Tax Refund were a TUV pursuant to section 96(1)(b)(ii) of the BIA, as incorporated into section 36.1(1) of the CCAA. The Motion Judge (i) prohibited LoyaltyOne from using section 32 of the CCAA to disclaim the TMA and (ii) held that payment provisions under the TMA relating to the Tax Refund were not a TUV.

PART III - THE PROPOSED APPEAL

26. If leave is granted, this Court will be asked to answer four questions:

With respect to the disclaimer:

(1) Did the Motion Judge err in law by eliminating or restricting the statutory tool of disclaimer in a liquidating CCAA, contrary to

[20] *LoyaltyOne, Co. (Re),* 2024 ONSC 3866 ("*LoyaltyOne*").

Parliament's intention concerning section 32 of the CCAA and binding case law?

(2) Did the Motion Judge err in law by failing to consider the interests of creditors of LoyaltyOne (who would benefit substantially from the disclaimer), other than Bread and the lenders under the Credit Agreement?

With respect to determining whether the payment provisions in the TMA regarding the Tax Refund were a TUV:

(3) Did the Motion Judge err in law by incorrectly interpreting and applying the definition of "insolvent person" in section 2 of the BIA, thereby narrowing the applicable grounds for finding that a debtor company is insolvent, contrary to the intention and express definition contained in the BIA?

(4) Did the Motion Judge make a palpable and overriding error in finding "[t]here is no analysis of how the debt was allocated among the three companies and whether the portion allocated to LoyaltyOne exceeded its fair market value"?

PART IV - ISSUES & LAW

27. The only issue is whether leave to appeal should be granted.[21] This Court has stated that it will grant leave to appeal in CCAA proceedings where there are

[21] CCAA, section 13.

"serious and arguable grounds that are of real and significant interest to the parties."[22] This motion for leave to appeal clears that threshold. In particular:

(a) the proposed appeal is of significance to the practice;

(b) the proposed appeal is of significance to this CCAA proceeding;

(c) the proposed appeal is *prima facie* meritorious; and

(d) the proposed appeal will not hinder the progress of the CCAA proceeding.[23]

A. The Disclaimer Issue Satisfies the Test for Leave

(i) The Point on Appeal Is of Significance to the Practice

28. The correct interpretation, application, and indeed, availability of section 32 of the CCAA is of significance to insolvency practice because the ability of a debtor company to disclaim an agreement under that section has a critical impact on CCAA proceedings generally and on the recovery available to a debtor company's creditors specifically.[24]

29. Disclaimers are a fundamental and oft-exercised tool in CCAA proceedings since they allow a debtor to not perform uneconomic contracts – which themselves often contribute to the debtor company's insolvency in the first place – and address the resulting claims in the context of the CCAA proceeding.

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[22] *Bellatrix Exploration Ltd. v. BP Canada Energy Group ULC*, 2020 ABCA 178 ("*Bellatrix 2020*"), para. 16.
[23] *Bellatrix 2020*, para. 16.
[24] *T. Eaton Co*., *Re*, 1999 CanLII 15024 (ON SC) ("*Eaton*"), para. 7.

30. Section 32 of the CCAA came into force in 2009.[25] It provides debtors with a statutory right to disclaim any agreement that the debtor is a party to (subject to limited exceptions inapplicable here) and the requirements expressly provided for in that provision. Section 32 was introduced along with several other amendments to bankruptcy and insolvency legislation, all of which were designed to ensure that "Canada's insolvency system is […] fair […] predictable as far as being able to assess risk […] transparent so creditors can defend their interests, and […] efficient, ensuring that there are appropriate incentives while deterring abuse."[26]

31. Section 32, in particular, codified the inherent jurisdiction of CCAA courts to permit debtors to unilaterally terminate contracts, "without regard to the terms"[27] of those contracts:

> It is clear that under CCAA proceedings debtor companies are permitted to unilaterally terminate in the sense of repudiate leases and contracts without regard to the terms of those leases and contracts including any restrictions conferred therein that might ordinarily (i.e. outside CCAA proceedings) prevent the debtor company from so repudiating the agreement. To generally restrict debtor companies would constitute an insurmountable obstacle for most debtor companies attempting to effect compromises and reorganizations under the CCAA. Such a restriction would be contrary to the purposive approach to CCAA proceedings followed by the courts to this date.[28]

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[25] Office of the Superintendent of Bankruptcy, "Summary of Key Legislative Changes", *Section B. A Summary of Key Legislative Changes in Force as of September 18, 2009: Disclaimer and Assignment of Agreements*.

[26] "Bill C-12, An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005", 2nd reading, *Debates of the Senate*, 39-2, Vol. 144, No. 12 (15 November 2007), page 230 (Hon. Michael A. Meighen).

[27] *Eaton*, para. 7.

[28] *Eaton*, para. 7. [emphasis added]

32. The very purpose of amending the CCAA to codify the practice of allowing disclaimers was to "facilitate restructurings by granting debtors the ability to repudiate agreements that would threaten [their] viability if they continued to be bound by them."[29]

33. The availability of disclaimer has never previously been constrained by the nature of a CCAA proceeding – whether the proceeding results in a sale, a liquidation or an approved plan of compromise or arrangement has no impact on a debtor company's reliance on disclaimer as a critical restructuring tool. Indeed, parties have tried, and repeatedly been unsuccessful, in arguing the opposite.

34. For example, in one case, the contractual counterparty explicitly argued that section 32 was not available in a circumstance where the debtor company had "ceased to carry on business, is being liquidated, and as such will not propose an arrangement to its creditors."[30] The court squarely rejected that argument:

> It is accepted by the case law that the disclaimer need not be essential but merely advantageous to a plan. There need not be any certainty that there will be a plan of arrangement but just that cancellation of the contract in question would be beneficial to the making of a plan. Section 32 C.C.A.A. applies even where there is a sales process in place as is the situation with Aveos. Prior to Section 36 C.C.A.A. coming into force in 2009, it was broadly accepted that liquidating while under C.C.A.A. protection was not contrary to the Act. Now, Section 36 C.C.A.A. explicitly provides for sales out of the ordinary course of business, with Court approval.[31]

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[29] Government of Canada, Bill C-12: Clause by Clause Analysis, "Rationale".
[30] *Aveos Fleet Performance Inc./Aveos Fleet performance aéronautique inc. (Arrangement relatif à)*, 2012 QCCS 6796 *("Aveos*"), para. 31.
[31] *Aveos*, paras. 49-50 [emphasis added]; *Target Canada Co. (Re)*, 2015 ONSC 1028 ("*Target*"), paras. 23-25.

35. More recently, the Supreme Court of Canada has recognized that CCAA proceedings have evolved to permit liquidating CCAAs, which are now commonplace "in the CCAA landscape":

> [U]nder the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.[32]

36. The Motion Judge erroneously prohibited disclaimer of the TMA because:

(a) it would "reverse the bargain" and allow LoyaltyOne to "get out of the deal", which the Motion Judge found are "not the intended purpose of a disclaimer under s. 32(4) of the CCAA";[33]

(b) it was "an attempt [by LoyaltyOne] to secure funds for itself that it was never entitled to retain", despite its effect being to maximize the value of its estate for the benefit of creditors as a whole and to ensure the equitable treatment of creditors;[34] and

(c) it would be unfair to Bread, solely because Bread would not receive the payment it expected.[35]

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[32] *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 ("*Callidus*"), paras. 42-43, 46. [emphasis added]
[33] *LoyaltyOne*, paras. 59-60.
[34] *LoyaltyOne*, para. 54.
[35] *LoyaltyOne*, para. 59.

37. The Motion Judge's reasons for prohibiting the disclaimer do not make sense in the context of the objective of disclaimers as they are the very reasons a disclaimer is upheld, not denied, in settled CCAA case law. For example:

(a) in *Target*, the debtor company disclaimed various franchise agreements with pharmacists in the context of a liquidation. The disclaimers notified the pharmacists that the debtor was seeking to shut down the pharmacies within thirty days. The pharmacists argued that insolvency and/or bankruptcy awaited many of them if the disclaimers were upheld. The Court found that "the [p]harmacists want to postpone the effect of the disclaimer in the hope of obtaining a continuation of support payments from Target Canada for an unspecified time."[36] The Court held that "setting aside the disclaimer might provide limited assistance to the [p]harmacists, but it would come at the expense of other creditors";[37]

(b) in *Aveos*, the debtor company sought to disclaim a global master services agreement. The counterparty claimed that it was owed fees for unpaid services as well as an indemnity payment pursuant to the agreement. The Monitor supported the disclaimer on the basis that the agreement was expensive for the debtor company and undesirable. The Court approved the disclaimer;[38]

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[36] *Target*, para. 6.
[37] *Target*, para. 24.
[38] *Aveos*, paras. 44, 47-50, 62-63.

(c) in *Timminco*, the debtor companies stopped making payments with respect to many of their pre-filing obligations – including in connection with the disclaimed contract – in order to preserve their ability to continue operating and to implement a successful sale of their assets. The debtor company successfully emphasized that the disclaimer of the contract at issue, and the cessation of payments in connection with that contract, led to various benefits for the debtor company all in service of "maximiz[ing] the benefits to [the debtors'] stakeholders" and ensuring that "creditors in the same classification are treated equitably" having regarded to the expanded scope of the CCAA to facilitate sales and liquidations;[39] and

(d) in *Laurentian*, the debtor company disclaimed various agreements with various universities and argued that doing so would save approximately $7.1M to $7.3M annually.[40] The Court approved the disclaimer, emphasizing that the Monitor had approved the disclaimer and in doing so, had "[properly balanced the] competing interests of Laurentian and all stakeholders" including the counterparties to the agreements.[41]

38. In these cases, the disclaimer was upheld even though it resulted in the debtor "revers[ing] the bargain"[42] and even though the debtor had partially

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[39] *Timminco Limited (Re)*, 2012 ONSC 4471 ("*Timminco*"), paras. 53, 55-56.
[40] *Laurentian University of Sudbury*, 2021 ONSC 3272 ("*Laurentian*"), para. 37.
[41] *Laurentian*, para. 45.
[42] *LoyaltyOne*, para. 59.

performed the agreement at issue. That is precisely because the clear and unequivocal purpose of disclaimer under the CCAA is to allow the debtor to "get out of the deal" in an attempt to "[secure funds] that it was never entitled to retain"[43] to maximize the value of its estate for the benefit of all creditors.[44] The alternative, allowing a single creditor to continue to benefit at the expense of all others, is contrary to the *pari passu* principle that this Court has previously emphasized lies at the heart of Canadian insolvency law.[45]

39. Subsection 32(4) was specifically drafted to ensure that "the court will consider the effect [of a disclaimer] on all parties."[46] This is consistent with the CCAA overall, which has a remedial objective and requires the court to focus on all stakeholders, not just a select few.[47] Subsection 32(4) contains a non-exhaustive list of factors that the court must consider when deciding whether to make an order that an agreement not be disclaimed:

(a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

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[43] *LoyaltyOne*, para. 60.
[44] Bill C-12, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and Chapter 47 of the Statutes of Canada 2005*, 2nd Sess., 39th Parl., cl 76 (as assented to 14 December 2007); Government of Canada, Bill C-12: Clause by Clause Analysis, "Rationale"; *Timminco*, para. 62; *Laurentian*, para. 46; *Target*, paras. 24-25; *Callidus*, para. 42.
[45] *Nortel Networks Corporation (Re)*, 2015 ONCA 681, paras. 23-24.
[46] Government of Canada, Bill C-12: Clause by Clause Analysis, "Rationale".
[47] *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60 ("*Century Services*"), paras. 59-60.

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.[48]

40. The court is required to consider those factors for the purpose of ensuring that its decision to approve or prohibit disclaimer is equitable and consistent with the guiding principles of the CCAA, including maximizing available recoveries for stakeholders.[49]

41. The Motion Judge's decision focused on the impact of the disclaimer on Bread (on the one hand) and the lenders under the Credit Agreement (on the other). In so doing the Motion Judge erred in law and considered an improper factor – the relative size of the remaining creditor pool beyond Bread and the lenders under the Credit Agreement. This consideration is not articulated in legislation or well-established case law and is not justifiable under the general principles of the CCAA. The interest of all creditors of the debtor must be considered when assessing a contested disclaimer.

42. In the circumstances, the Motion Judge's decision reflects a myopic view of section 32 that is contrary to the history, purpose, and objectives of section 32. If the Motion Judge's decision is left undisturbed, it will fundamentally alter insolvency practice by depriving debtors of their statutory right to disclaim contracts in liquidating CCAAs – a critical tool needed to maximize creditor recoveries and preserve their relative entitlements.

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[48] CCAA, section 32(4).
[49] CCAA, section 32; *Target*, para. 24; *Timminco,* para. 62; *Laurentian*, para. 46.

(ii) The Point Raised Is of Significance to the Proceeding

43. Overturning the Motion Judge's decision to prohibit disclaimer of the TMA would have a material effect on the outcome of this proceeding: disclaimer of the TMA will result in the Tax Proceeds received by LoyaltyOne becoming available to maximize recovery for all of LoyaltyOne's creditors.[50]

(iii) The Appeal Is Prima Facie Meritorious

44. The moving parties are not required to prove that the appeal is more likely to succeed than fail. It cannot be said of this proposed appeal that "the likelihood it will succeed is extremely low."[51]

45. The Motion Judge's errors were not exercises of discretion and, if leave is granted, this Court will not be asked to review any discretionary decision made by the Motion Judge. Rather, the Motion Judge's decision disallowing disclaimer resulted from an interpretation of section 32 that is contrary to Parliament's intention and wrong, in law, for the reasons described above.

46. In addition, section 32 must be interpreted consistently with the larger insolvency scheme that spans several pieces of legislation, and "in light of the objectives, context, intent and policies of Parliament,"[52] which include:

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[50] After the notice of motion for leave to appeal in this proceeding was served, LoyaltyOne and the CRA signed a consent to judgment with respect to the Tax Dispute which allowed LoyaltyOne's appeal and referred the matter back to the Minister of National Revenue for reconsideration and reassessment on the basis that LoyaltyOne was entitled to the further reserve originally claimed in its income tax return for the December 31, 2013 taxation year. The CRA may now assert set-off claims. In that event, those claims may be disputed and, if so, would need to be resolved.

[51] *DGDP-BC Holdings v. Third Eye Capital Corp., PricewaterhouseCoopers,* 2021 ABCA 33 ("*DGDP*"), paras. 22-26; *Bellatrix 2020*, paras. 28-29.

[52] *Bellatrix Exploration Ltd. (Re)*, 2021 ABCA 85 ("*Bellatrix 2021*"), paras. 63-64.

> [P]roviding for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company.[53]

47. Rather than "serving the objectives of the CCAA",[54] the Motion Judge's decision defeats the very purpose of section 32, and would have the effect of incentivizing creditors to pursue bankruptcy or receivership proceedings instead of attempted CCAA restructurings as there is no question that a trustee or receiver does not have to perform an uneconomic contract of a debtor. That is an absurd consequence that could not have been intended by Parliament and runs directly contrary to the Supreme Court's warning in *Century Services* of giving creditors skewed incentives that would lead them to prefer bankruptcy over attempted CCAA restructurings, in turn undermining the remedial objectives of the CCAA.[55]

48. Not only does the Motion Judge's interpretation of section 32 encourage statute shopping in favour of the BIA, which is contrary to public policy objectives of insolvency legislation, the Motion Judge also "deviated from the legislative purpose" of section 32. In doing so, the Motion Judge made a clear error of law, reviewable on a standard of correctness.[56]

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[53] *Callidus*, para. 40.
[54] *Bellatrix 2021*, para. 66.
[55] *Century Services*, paras. 24, 47.
[56] *Wong v. Lui*, 2023 ONCA 272 ("*Wong*"), paras. 16-17, 28, 35-36.

(iv) The Appeal Will Not Unduly Hinder the Progress of the Proceeding

49. The proposed appeal will not unduly hinder the progress of this proceeding because LoyaltyOne has already sold substantially all of its operating assets. The only remaining step is to recover and distribute the remaining assets (which may be done through a plan, if appropriate), including any Tax Refund received from the CRA, and the Tax Refund is not expected to become immediately available.

50. This Court should take the time needed to carefully consider the Motion Judge's decision given its significant impact on the practice and the proceeding, and can do so without creating the risk of negative consequence for LoyaltyOne's stakeholders or distracting from any real-time restructuring efforts.

51. In contrast, allowing the Motion Judge's decision to stand will frustrate the remedial objectives of the CCAA because it restricts the availability of disclaimer as a critical restructuring tool for the benefit of the debtor company's stakeholders.

B. The TUV "Insolvent Person" Issue Satisfies the Test for Leave

(i) The Point on Appeal is of Significance to the Practice

52. The Motion Judge found that LoyaltyOne was not an insolvent person at the time of the TUV and, therefore, did not engage in the balance of the statutory TUV analysis. The Motion Judge erred in law with respect to the scope of the definition of "insolvent person" under section 2 of the BIA, a foundational term in bankruptcy and insolvency law.

53. The definition of "insolvent person" is a key component of the TUV provision in section 96(1)(b)(ii)(A) of the BIA (as incorporated by reference in section 36.1(1) of the CCAA):

> On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if […]
>
> (b) the party was not dealing at arm's length with the debtor and … (ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and
>
> (A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it […][57]

54. Section 2 of the BIA defines "insolvent person" as follows:

> a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.[58]

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[57] BIA, section 96 [emphasis added]; CCAA, section 36.1(1).
[58] BIA, section 2.

55. The Motion Judge focused predominantly on the first type of insolvency – whether a debtor is unable to meet its obligations as they generally become due (also known as the "cash flow solvency test").[59] However, once the Motion Judge rejected LoyaltyOne's expert evidence that LoyaltyOne was insolvent on the basis of its five-year cashflow projections, the Motion Judge stopped the analysis. The Motion Judge did not consider the other available definitions of "insolvent person" and did not consider the remainder of the TUV analysis pursuant to section 96.

56. The Motion Judge should have considered the other definitions of insolvency and erred in law by failing to do so. In particular, the Motion Judge should have considered whether LoyaltyOne was an "insolvent person" in accordance with subsection (c) of the definition, otherwise known as the "balance sheet test", which was expressly argued in the parties' written and oral submissions:

> a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and [...]
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

57. Importantly, the three definitions of "insolvent person" contained in section 2 of the BIA are disjunctive – a debtor is an insolvent person if it meets the balance sheet test even if it is not insolvent under the cash flow test.[60] The Motion Judge

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[59] Harington Report 1 para. 101, MPMR Tab 9.
[60] *Stelco Inc., Re*, 2004 CanLII 24933 (ON SC), para. 28; *Laurentian University of Sudbury*, 2021 ONSC 659, para. 31.

did not grapple with the balance sheet test, making only a cursory reference to the term “fair market value”. That is an error of law based on the plain meaning of the definition of “insolvent person” in the BIA and inconsistent with the remedial nature of the BIA (and CCAA) generally, and specifically having regard to the purpose of section 96.[61]

58. That error of law was compounded by the Motion Judge’s conclusion that “[t]here is no analysis of how the debt was allocated among the three companies and whether the portion allocated to LoyaltyOne exceeded its fair market value.”[62] As described in greater detail below, the Motion Judge’s failure to consider that evidence (which was that LoyaltyOne was contractually liable for the entire debt under the Credit Agreement, had historically serviced the debt and that there was no other entity in the group capable of funding the debt) is a palpable and overriding error that warrants appellate attention.

59. Moreover, the definition of “insolvent person” contained in section 2 of the BIA is a key component of the statute and affects multiple provisions of the BIA (and the CCAA). If the Motion Judge’s incorrect interpretation of “insolvent person” is not reversed, it will significantly constrain how the term “insolvent person” is interpreted throughout the BIA (and CCAA) as a whole – not just how it is interpreted for the purpose of the TUV provision. This is also of significance to the practice.

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[61] *Ernst & Young Inc. v. Aquino*, 2022 ONCA 202, paras. 22-24.
[62] *LoyaltyOne*, para. 43.

(ii) The Point Raised Is of Significance to the Proceeding

60. The point raised is of significance to this proceeding because the Motion Judge's incorrect interpretation and application of the definition of "insolvent person" led the Motion Judge to stop the TUV analysis prematurely.

(iii) The Appeal Is Prima Facie Meritorious

61. The appeal satisfies the low threshold of being *prima facie* meritorious. The Motion Judge erred in law by incorrectly interpreting and applying the definition of "insolvent person" in section 2 of the BIA. The Motion Judge failed to consider the disjunctive nature of the definition, contrary to the express and plain meaning of that section. The failure to properly interpret a statutory provision is an error of law reviewable on a correctness standard.[63]

62. The Motion Judge also made a palpable and overriding error by concluding that "[t]here is no analysis of how the debt was allocated among the three companies and whether the portion allocated to LoyaltyOne exceeded its fair market value."[64]

63. It is uncontroversial that a failure to consider material evidence is a palpable and overriding error that warrants appellate intervention:

> A misapprehension of evidence may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence […] most errors that constitute a misapprehension of evidence will not be regarded as involving a question of law. However, appellate intervention is warranted where the misapprehension of evidence is

[63] *Wong*, paras. 16-17, 19.
[64] *LoyaltyOne*, para. 43.

> palpable and overriding, such that it is plain to see or obvious and goes to the very core of the outcome of the case.[65]

64. As described above in paragraphs 55 to 57, the Motion Judge used the phrase "fair market value" but did not assess the available evidence regarding that value or otherwise grapple with the balance sheet test. Instead, the Motion Judge went on to find that, because the record did not allow for a determination about the foreseeability of the departure of a major sponsor – Sobeys Inc. – ("**Sobeys**"), the Motion Judge could not accept LoyaltyOne and the Monitor's expert evidence that, under the cash flow test, LoyaltyOne was insolvent on the Spin Date.

65. However, the motion records included material evidence regarding the balance sheet test, including (i) the liabilities of LoyaltyOne (including LoyaltyOne's contractual liability for the entire debt owing under the Credit Agreement and how much of that debt had to be paid by LoyaltyOne – *i.e.*, its allocation of the debt) and (ii) whether those liabilities exceeded LoyaltyOne's fair market value.

66. First, LoyaltyOne's main affiant, Cynthia Hageman, gave evidence that (i) LoyaltyOne was the main operating business and provided all of the cash flow to service the debt under the Credit Agreement, (ii) BrandLoyalty had almost no cash flow from operations, and (iii) LVI had no operations from which to fund the debt. None of that evidence was contested and none of that evidence was related to the foreseeability of Sobeys' departure.[66]

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[65] *Bayford v. Boese*, 2021 ONCA 442*,* paras. 28, 40-42. [emphasis added]
[66] Hageman 1 para. 44, MPMR Tab 4; Hageman 2 para. 23, MPMR Tab 6; Hageman 3 para. 14, MPMR Tab 10.

67. Bread on the one hand, and LoyaltyOne and the Monitor on the other, each provided expert evidence regarding how the debt under the Credit Agreement should be allocated for the purpose of assessing LoyaltyOne's solvency. Bread's expert argued that the debt ought to be allocated entirely to LVI (a holding company with no independent business), whereas LoyaltyOne and the Monitor's expert argued that the debt ought to be allocated to LoyaltyOne.[67] Thus, there was evidence and argument addressing the liability aspect of the balance sheet test, in particular that the entirety of the $675 million debt was legally and factually borne by LoyaltyOne, none of which was analyzed by the Motion Judge.

68. On the asset side of the balance sheet test, LoyaltyOne and the Monitor's expert provided evidence concerning bids that had been provided for the LoyaltyOne business in connection with Project Angus. In assessing the bids as a reflection of LoyaltyOne's fair market value, LoyaltyOne's expert stated:

> Before considering (i) the impact that the Sobeys conditions not being met would have on the enterprise value which either Bidder #2 or #3 would be willing to pay, or (ii) that the major sponsor-agreement condition on Bidder #2's offer over-prices the LoyaltyOne business without the major sponsor safety net, it is worth noting that even the simple average of these two offers would indicate that LoyaltyOne is insolvent on a balance sheet test, i.e., the offer average of $672.5 million is below the $675 million of term loan debt under the Credit Agreement alone.[68]

69. Bread's expert agreed that the bids submitted in connection with Project Angus were submitted by "sophisticated investors", within one year of the Spin

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[67] Harington Report 1 paras. 48-49, MPMR Tab 9; Affidavit of A. Scott Davidson affirmed April 15, 2024, Exhibit A, paras. 7.9-7.10 (p. 12), MPMR Tab 16; Harington Cross Qs. 141-144, 405-421, JTEB, MPMR Tab 22; Davidson Cross Qs. 615-618, JTEB, MPMR Tab 22.
[68] Harington Report 1 para. 217, MPMR Tab 9. [emphasis added]

Date and "are a corroborative indicator of the value of the Air Miles business as of the Spin Date."[69] Although Bread's expert concluded that the EBITDA multiples in those bids demonstrated that LoyaltyOne was not insolvent, the conflicting evidence of both experts was available for the Motion Judge to review and consider. The Motion Judge instead ignored that evidence, and the actual LoyaltyOne balance sheet in evidence (which showed that the value of LoyaltyOne's liabilities significantly exceeded the value of its assets if the $675 million debt under the Credit Agreement were considered),[70] and concluded that there was no evidence of LoyaltyOne's fair market value as at the Spin Date.

70. The balance sheet analysis did not depend on, and was not connected to, the foreseeability of Sobeys' departure. The Motion Judge's failure to consider material evidence regarding the allocation of debt and the impact of that allocation on the solvency of LoyaltyOne "goes to the very core" of the outcome of the motion – the determination that the TMA could not be set aside as a TUV. Had the Motion Judge properly apprehended the evidence, the Motion Judge may have determined that the payment provisions in respect of the Tax Refund under the TMA were a TUV and that the TMA was void and unenforceable as a result, ensuring that up to approximately $96 million was available to maximize recoveries for all of LoyaltyOne's creditors.

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[69] Affidavit of A. Scott Davidson affirmed February 14, 2024, Exhibit A, para. 8.53 (p. 53), MPMR Tab 14; Davidson Cross Qs. 114-115, JTEB, MPMR Tab 22.
[70] Monitor's Fifth Report, Appendix G1, MPMR Tab 18.

(iv) The Appeal Will Not Unduly Hinder the Progress of the Proceeding

71. For the same reasons described above at paragraphs 49 to 51, the proposed appeal will not unduly hinder the progress of this proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of September, 2024.

Kiyan Jamal

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Meghan De Snoo

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Lawyers for the Monitor

SCHEDULE "A"

LIST OF AUTHORITIES

Caselaw

1. *9354-9186 Québec inc. v. Callidus Capital Corp.,* 2020 SCC 10
2. *Aveos Fleet Performance Inc./Aveos Fleet performance aéronautique inc. (Arrangement relatif à)*, 2012 QCCS 6796
3. *Bayford v. Boese*, 2021 ONCA 442
4. *Bellatrix Exploration Ltd. (Re)*, 2021 ABCA 85
5. *Bellatrix Exploration Ltd. v. BP Canada Energy Group ULC*, 2020 ABCA 178
6. *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60
7. *DGDP-BC Holdings v. Third Eye Capital Corp., PricewaterhouseCoopers,* 2021 ABCA 33
8. *Ernst & Young Inc. v. Aquino*, 2022 ONCA 202
9. *Laurentian University of Sudbury*, 2021 ONSC 3272
10. *Laurentian University of Sudbury*, 2021 ONSC 659
11. *LoyaltyOne, Co. (Re),* 2024 ONSC 3866
12. *Nortel Networks Corporation (Re)*, 2015 ONCA 681
13. *Stelco Inc., Re*, 2004 CanLII 24933 (ON SC)
14. *T. Eaton Co*., *Re*, 1999 CanLII 15024 (ON SC)
15. *Target Canada Co. (Re)*, 2015 ONSC 1028
16. *Timminco Limited (Re)*, 2012 ONSC 4471
17. *Wong v. Lui*, 2023 ONCA 272

Authorities

1. "Bill C-12, An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005", 2nd reading, *Debates of the Senate*, 39-2, Vol. 144, No. 12 (15 November 2007)

2. Bill C-12, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and Chapter 47 of the Statutes of Canada 2005*, 2nd Sess., 39th Parl. (as assented to 14 December 2007)

3. Government of Canada, Bill C-12: Clause by Clause Analysis

4. Office of the Superintendent of Bankruptcy, "Summary of Key Legislative Changes", *Section B. A Summary of Key Legislative Changes in Force as of September 18, 2009: Disclaimer and Assignment of Agreements*

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

Leave to appeal

13 Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

Disclaimer or resiliation of agreements

32 (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

Court may prohibit disclaimer or resiliation

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

Court-ordered disclaimer or resiliation

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

Factors to be considered

(4) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

Date of disclaimer or resiliation

(5) An agreement is disclaimed or resiliated

(a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);

(b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or

(c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

Intellectual property

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Loss related to disclaimer or resiliation

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

Reasons for disclaimer or resiliation

(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

Exceptions

(9) This section does not apply in respect of

(a) an eligible financial contract;

(b) a collective agreement;

(c) a financing agreement if the company is the borrower; or

(d) a lease of real property or of an immovable if the company is the lessor.

Preferences and Transfers at Undervalue

Application of sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

Interpretation

(2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

> **(a)** to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";
>
> **(b)** to "trustee" is to be read as a reference to "monitor"; and
>
> **(c)** to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor company".

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Definitions

2 In this Act,

[…]

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

> **(a)** who is for any reason unable to meet his obligations as they generally become due,
>
> **(b)** who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> **(c)** the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

Transfer at undervalue

96 (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value

of the consideration received by the debtor and the value of the consideration given by the debtor — if

(a) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; or

(b) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

Establishing values

(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

Meaning of person who is privy

(3) In this section, a person who is privy means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

Court of Appeal File No. COA-24-OM-0248
Court File No. CV-23-00696017-00CL

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 OF APPEAL FOR ONTARIO
PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE MOVING PARTIES
(MOTION FOR LEAVE TO APPEAL)

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