Court File No. CV-23-00696017-CL

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LOYALTYONE, CO.

Applicant

FACTUM OF THE MONITOR

(Motion Returnable June 13 and 14, 2024)

May 28, 2024

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TABLE OF CONTENTS

SCHEDULES

I. OVERVIEW

1. The Monitor adopts the submissions and facts set out by LoyaltyOne in its factum. The Monitor organizes its arguments according to what it submits is the correct outcome, then its proposed alternative outcome if the court does not accept that primary outcome, and then Bread's untenable proposed outcome.[1]

2. The Correct Outcome – Bread has no claim at all relating to the Tax Proceeds. The TMA is not binding on LoyaltyOne for the reasons submitted by LoyaltyOne in its factum. On that basis alone, Bread[2] has no claim whatsoever to the Tax Proceeds addressed in the TMA, and LoyaltyOne's motion should be granted. No further analysis is required by the Court.

3. Another reason Bread has no right to any of the Tax Proceeds is that if the Court finds the TMA binds LoyaltyOne, the disposition of Tax Proceeds is void and unenforceable as a transfer at undervalue ("**TUV**") contrary to section 36.1 of the *Companies' Creditors Arrangement Act ("**CCAA**")*. The reality is that even if Bread wins on its agency and trust positions, refuted below by the Monitor, Bread still loses overall as any transfer is a voidable TUV. This is so for two key reasons: (i) LoyaltyOne's insolvency at the time of the TMA and (ii) the disparity between the value transferred to Bread under the TMA relative to the value, if any, LoyaltyOne received.

4. Legally and practically, LoyaltyOne bore the burden to make payments on the US$675 million debt borrowed as part of the Spin Transaction. In that context, and taking into account the massive hit to LoyaltyOne's business caused by Sobeys' decision to exit the Air Miles program, LoyaltyOne was insolvent when the TMA was made. Moreover, LoyaltyOne received no or

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[1] The Monitor also adopts the defined terms set out in the factum of LoyaltyOne.

[2] Until March 2022 Bread was known as Alliance Data Systems Corporation. For the purpose of this factum, Bread and ADS are referred to as "Bread" throughout. (Affidavit of Cynthia Hageman affirmed May 1, 2024 ("**Hageman May Affidavit**"), para. 1, LoyaltyOne/Monitor Supplementary Motion Record dated May 1, 2024 ("**L1 Supp. MR**"), Tab 1, p. 5.)

conspicuously less value than the fair market value of the potential CA$96 million tax refund right that Bread alleges was transferred to it pursuant to the TMA. As a result, any disposition to Bread of the Tax Proceeds is void as a TUV and Bread has no provable unsecured claim against LoyaltyOne related to the Tax Proceeds.

5. The Alternative Outcome – Bread has an unsecured claim relating to the Tax Proceeds. If the Court finds that the TMA is binding and not void as a TUV, LoyaltyOne has disclaimed the TMA so, at most, Bread has a provable pre-filing unsecured claim against LoyaltyOne in the amount of the Tax Proceeds. Submissions demonstrating LoyaltyOne met the test for disclaimer are found in the factum of LoyaltyOne and are relied upon by the Monitor.

6. This same economic outcome would result even if the Court orders that the TMA not be disclaimed. If LoyaltyOne receives the Tax Proceeds, Bread will have, at best, a provable pre-filing unsecured claim for an amount equal to the Tax Proceeds. Thus, disclaimed or not, Bread's economic interest in the Tax Proceeds is the same.

7. Bread's Meritless Proposed Outcome – Bread has a right to 100% of any Tax Proceeds. To obtain this outcome, Bread must establish ***all*** of the following elements:

(a) the TMA is binding on LoyaltyOne and not void as a TUV;

(b) the TMA should not be disclaimed, even with the approval of the Monitor; and

(c) the TMA gives Bread a right to all of the Tax Proceeds because:

(i) as a matter of contract interpretation under the applicable Delaware law, the TMA requires that any Tax Proceeds be paid by LoyaltyOne as ***agent*** to Bread; and

(ii) any Tax Proceeds received by LoyaltyOne are subject to a ***trust*** in favour of Bread such that they are not property of LoyaltyOne available to LoyaltyOne's creditors.

8. Bread cannot establish any of these elements. Based on a straightforward reading of the TMA, the chose in action against the Crown to seek a refund of tax previously paid by LoyaltyOne remains LoyaltyOne's property. Under the TMA, interpreted correctly under Delaware law, LoyaltyOne is not as Bread's agent in respect of any Tax Proceeds and, under the applicable stringent Canadian law, any Tax Proceeds are not subject to a trust.

II. FACTS

9. The Monitor relies on the statement of relevant facts put forward by LoyaltyOne in its factum. In March 2023, KSV Restructuring Inc. was appointed as the Monitor of LoyaltyOne.[3]

10. The Monitor underlines one set of crucial facts, described at length in LoyaltyOne's factum. In summary:

(a) ***Before*** the Spin Transaction and the TMA, and before the Lenders provided US$675 million of debt financing, Sobeys (one of LoyaltyOne's most important partners) advised Bread that it would be terminating its participation in the Air Miles program.

(b) ***Before*** the Spin Transaction and the TMA, Sobeys' contract was amended so it could provide notice of termination between July 2022 (only eight months after the Spin Transaction) and February 1, 2023, so there was certainty Sobeys was exiting.

[3] Order of Justice Conway on March 10, 2023, paras. 21-22. Ancillary Relief Order of Justice Conway on May 12, 2023, para. 5.

(c) There is no evidence that ***before*** the Spin Transaction and the TMA, Bread disclosed these facts to potential lenders, debt rating agencies, and even its own financial advisor, EY, that asked for information about partner exits.[4]

11. This omission eviscerates Bread's argument that everyone knew what they were getting into. The Court does not have to determine at this time if that non-disclosure was a breach of Bread's obligations to its shareholders and others. But this massive pre-Spin Transaction undisclosed risk to LoyaltyOne is important in assessing Bread's position in these motions.

III. ISSUES

12. The Monitor addresses the following issues:

(a) Is the TMA binding on LoyaltyOne? The Monitor submits that it is not.

(b) If the TMA is binding on LoyaltyOne, is it void as a TUV? The Monitor submits that it is.

(c) If the TMA is binding on LoyaltyOne and not void, did LoyaltyOne correctly disclaim the TMA? The Monitor submits that it did.

(d) If the TMA is binding on LoyaltyOne and effective, does Bread have the right to 100% of any Tax Proceeds because:

(i) under the TMA, as agent, LoyaltyOne must pay the amount of the Tax Proceeds to Bread; and

[4] Amended Expert Report of Andy Harington dated April 16, 2024 ("**Brattle First Report**"), para. 67, LoyaltyOne/Monitor Amended Reply Record dated May 3, 2024 ("**L1 RMR**"), Tab 4A, p. 314; Exhibit 23 to the Cross-Examination of Scott Davidson held May 14, 2024 ("**Davidson Cross**"); Cross-Examination of Joseph Motes on May 17, 2024, Q. 111-119 ("**Motes Cross**"); Exhibit 15 to the Rule 39.03 Examination of Blair Cameron held May 13, 2024 ("**Cameron Exam**"); Affidavit of Cynthia Hageman affirmed March 8, 2024 and April 17, 2024 ("**Hageman April Affidavit**"), paras. 42, 45, and 53, L1 RMR, Tab 1, pp. 17-18 and 20.

(ii) any Tax Proceeds received by LoyaltyOne are subject to a trust in favour of Bread? The Monitor submits that the answer to this question is no.

IV. LAW AND ARGUMENT

A. The TMA is not binding on LoyaltyOne

13. The Monitor fully supports and adopts the arguments set out in the factum of LoyaltyOne with respect to the TMA not binding LoyaltyOne. Those arguments are not repeated here.

B. In any event, any disposition to Bread was a transfer at undervalue and void

14. Even if this Court were to find that the TMA is binding on LoyaltyOne, it would be void as a TUV because (a) the transfer occurred less than five years before the *CCAA* filing; (b) the transfer was made to a related party; (c) LoyaltyOne was insolvent when the TMA was made; and (d) LoyaltyOne received no value, or conspicuously less than the fair market value for that disposition.

15. A great deal of evidence has been adduced about sub-issues (c) and (d). However, the Monitor's position at its core is straightforward:

(a) no matter how reasonably measured, taking into account that Sobeys told Bread and LoyaltyOne it was exiting the Air Miles program before the Spin Transaction, LoyaltyOne was insolvent when the TMA was made; and

(b) Bread claims that LoyaltyOne gave Bread the entire economic value of its tax refund claim of up to CAD$96 million. LoyaltyOne received nothing of any real value from Bread in exchange for this alleged disposition. Even Bread does not point to anything of value that ***LoyaltyOne received***, erroneously arguing instead

that the Court should look to the debt-laden value that LoyaltyOne's parent, ***LVI, received*** from the Spin Transaction.

(i) Transfers at undervalue contrary to the CCAA

16. A TUV is a disposition of property for which, at most, the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor.[5] The TUV regime applies if the Court finds the TMA disposed of property to Bread.[6] Here, that is the alleged obligation for LoyaltyOne to pay money to Bread. Courts have given an expansive interpretation of what constitutes a "transfer" in order to give effect to the remedial purposes of fraudulent conveyance laws, like the TUV regime.[7] Accordingly, if the TMA is found to bind LoyaltyOne, the Court should determine that LoyaltyOne's payment obligation relating to the Tax Proceeds constitutes a disposition for purposes of TUV protection. Alternatively, if the Court accepts Bread's argument that there is a trust in respect of the Tax Proceeds (which argument the Monitor rejects), that disposition is a TUV.

17. Section 36.1 of the *CCAA* provides that the provisions of the *BIA* remedying a TUV are applicable under the *CCAA*, subject to certain modifications that do not have a substantive impact on the analysis.[8] Section 96(1)(b) of the *BIA* – "Transfer at Undervalue" – states:

> 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

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[5] *Bankruptcy and Insolvency Act*, RSC, 1985, c. B-3 ("***BIA***"), s. 2.
[6] "Property" is defined very broadly in section 2 of the *BIA* to include "money,…things in action,… as well as obligations… present or future, vested or contingent, in, arising out of or incident to property". See also *Saulnier v. Royal Bank*, 2008 SCC 58, paras. 16, 44.
[7] Roderick J. Wood, *Bankruptcy & Insolvency Law*, 2d ed (Toronto: Irwin Law, 2015) pp. 21-22, L1/Monitor Book of Authorities ("**BOA**") Tab 4; Roderick J. Wood, *Transfers at Undervalue: New Wine in Old Wineskins?*, p. 5, BOA Tab 5; *City Peel Taxi v Victory Hanna*, 2012 ONSC 2450, para. 129; *Royal Bank of Canada v North American Life Assurance Co.*, [1996] 1 SCR 325, para. 59.
[8] Section 36.1(2) of the *CCAA* provides the modifications to section 96 of the *BIA*.

> ...
>
> (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…

18. All of these elements are present.

(ii) Bread and LoyaltyOne were non-arm's length parties

19. Section 4(5) of the *BIA* provides that persons who are related to each other are deemed not to deal at arm's length while so related. At the time the TMA was made, Bread and LoyaltyOne were related to each other, within the meaning of section 4 of the *BIA*, because Bread owned LoyaltyOne through its wholly-owned subsidiary, LVI;[9] Bread's general counsel, Joseph Motes III, was the sole director of both LoyaltyOne and LVI;[10] and Bread controlled LoyaltyOne through Mr. Motes.[11]

(iii) LoyaltyOne was insolvent within five years of the TMA being made

20. Under section 96(1)(b) of the *BIA*, the insolvency look back period is five years for a non-arm's length transaction. LoyaltyOne's "initial bankruptcy event" was March 10, 2023 (the date LoyaltyOne was granted protection under the *CCAA*) and the Spin Date (when the TMA was entered into) is November 5, 2021, within the five year look back period.

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[9] Affidavit of Cynthia Hageman dated November 9, 2023 ("**Hageman November Affidavit**"), para. 9, LoyaltyOne/Monitor Motion Record dated November 9, 2023 ("**L1 MR**"), Tab 2, p. 23.
[10] Hageman November Affidavit, paras. 27, 33, 50, L1 MR, Tab 2, p. 28, 30, 34.
[11] Hageman November Affidavit, para. 50, L1 MR, Tab 2, p. 34; Affidavit of Jeffrey Fair dated November 9, 2023, para. 23, L1 MR, Tab 3, p. 870-871.

21. The *BIA* defines an "insolvent person" in section 2 as 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.

22. A determination of whether an entity is insolvent pursuant to subsection (c) is known as the "balance sheet test". Contingent liabilities, including guarantees, can be factored into the balance sheet test. In this regard, Professor Roderick Wood's observation about the balance sheet test, adopted by the Saskatchewan Court of Queen's Bench, is a pithy summary:

> In principle, the balance sheet test should include all future liabilities. A failure to include these into the calculation unfairly prejudices long-term creditors. The insolvency test must be met before a payment or transfer of property can be impugned as a preference. A failure to include all liabilities would permit short-term creditors to be paid despite the fact that this will result in insufficient assets to satisfy the claims of long-term creditors. Courts that have refused to include all obligations have expressed a concern that this may result in too many businesses falling within the definition. This concern is misplaced. The excess of liabilities over assets is not an act of bankruptcy, and therefore involuntary bankruptcy proceedings cannot be forced upon a debtor even if the debtor is insolvent under the balance sheet test.

> The statutory language associated with the balance sheet test refers to obligations rather than debts. Contingent claims and unliquidated claims are therefore included.[12]

23. Moreover, the balance sheet test requires a review of the "the evidence relating to the fair value of the assets and what they might realize if disposed of at a fairly conducted sale under legal process".[13] The parties' financial experts have provided such evidence. But their expert reports are like ships passing in the night because Bread's expert assessed the solvency of LVI, LoyaltyOne's parent following the Spin Transaction, and the Monitor's expert assessed the solvency of LoyaltyOne. Legally, Bread's expert assessed the wrong company. Without doubt, the legal test for a TUV includes determining if "the ***debtor*** was insolvent at the time of the transfer or was rendered insolvent by it" [emphasis added].[14] LoyaltyOne is the *CCAA* debtor, not LVI. LoyaltyOne claims to be owed the Tax Proceeds, not LVI. Bread is seeking to take the Tax Proceeds from LoyaltyOne, not LVI.

24. However, on cross-examination, Bread's financial expert, Scott Davidson of Kroll, did address LoyaltyOne's solvency and greatly simplified the TUV analysis. Mr. Davidson conceded that, with ***LoyaltyOne*** bearing a debt of US$675 million, and holding all of his assumptions stable, but assuming that as of the Spin Date Sobeys was going to give formal notice of termination within eight months of the Spin Date, this "certainly would result in the insolvency of ***LoyaltyOne***" as of

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[12] *Bank of Montreal v. Halliday Estate (Trustee of)*, 2021 SKQB 276, paras. 35, citing with approval Roderick J. Wood, *Bankruptcy & Insolvency Law*, 2d ed (Toronto: Irwin Law, 2015), pp. 21-22, BOA Tab 4, citing *Challmie, Re* (1976), 22 C.B.R. (N.S.) 78 (B.C. S.C.), BOA Tab 1. Houlden and Morawetz state, "it is quite permissible in preparing a balance sheet for the purposed of para (c) to show a long term debt even though it is not presently due" (*Bankruptcy and Insolvency Law of Canada*, 4th Edition, Chapter 5, Part IV Property of the Bankrupt, § 5:500. Insolvency of Debtor—Assets Insufficient to Pay Obligations, BOA Tab 2). See also *Anderson, Re,* 2012 BCSC 956 (B.C. S.C.) at para. 10, which concluded that "contingent liabilities on guarantees are to be included as debts accruing due". The Supreme Court of Canada has held that "the broad definition of 'claim' in the *BIA* includes contingent and future claims that would be unenforceable at common law or in the civil law." It is reasonable to conclude that the same logic would apply to "obligations" in the context of a balance sheet analysis; *AbitibiBowater Inc., Re*, 2012 SCC 67, para. 34.

[13] *King Petroleum Ltd.*, (1978) Re, 29 C.B.R. (N.S.) 76 (OSC) at para. 11, BOA Tab 3.

[14] *BIA,* s. 96.1(b)((ii)(A).

the Spin Date.[15] Thus, while there are other factors concerning solvency about which the experts disagree, there is no dispute that if LoyaltyOne owed a US$675 million debt and "for sure" Sobeys was exiting the Air Miles program, LoyaltyOne was insolvent as of the date the TMA was made.[16]

25. As a result, there are only two questions for the Court to determine in order to make a finding of insolvency: (i) did LoyaltyOne legally and/or practically owe the US$675 million debt; and (ii) at the Spin Date, was Sobeys soon going to give formal notice of termination? If the answers to both of those questions is "yes", which it is, then LoyaltyOne was insolvent as of the Spin Date.

(a) The US$675 million debt.

26. The evidence is that both financial experts in this proceeding included the US$675 million of debt (described in LoyaltyOne's factum) in their analysis of whether LoyaltyOne was insolvent under the balance sheet test as of the date the TMA was made in November 2021, although they disagree on the details of that inclusion.[17] However, because Bread's expert only considered the solvency of LVI and not LoyaltyOne, his analysis is entirely unhelpful. In any event, his opinion that the US$675 million of debt belongs to LVI is both legally and practically inaccurate.

27. LoyaltyOne and the Monitor's expert, Andrew Harington of Brattle, properly assessed the solvency of LoyaltyOne and concluded that the entire US$675 million was a debt of LoyaltyOne,

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[15] Davidson Cross, Q. 36-44.
[16] Second Expert Report of Andy Harington dated May 1, 2024 ("**Brattle Second Report**"), paras. 15, 16, L1 Supp. MR, Tab 2A, p. 24.
[17] In other words, both of the experts' reports evidence that the debt under the Credit Agreement is properly considered under the balance sheet test. Brattle First Report, paras. 29, 202, 285-287, L1 RMR, Tab 4A, pp. 301, 368, 394; Expert Report of A. Scott Davidson and Kathryn Gosnell, Exhibit A to Affidavit of A. Scott Davidson affirmed February 14, 2024 ("**Kroll First Report**"), paras. 9.13, 9.37-9.38, 10.6, Bread Motion Record dated February 14, 2024 ("**Bread MR**") pp. 1025, 1028-1030.

based both on a plain reading of the Credit Agreement and the business reality that payment on the debt is "all falling to LoyaltyOne in substance".[18]

28. His opinion is amply supported. As part of the Spin Transaction, LVI borrowed US$675 million pursuant to the Credit Agreement.[19] LoyaltyOne was responsible for the US$675 million debt as "primary obligor and not a surety" under the Credit Agreement, which required it to make "prompt payment ... in full when due".[20] While that obligation is labelled a guarantee by the Credit Agreement, it is, in substance, a primary obligation for LoyaltyOne (meaning that LoyaltyOne's obligation to pay is ***not*** contingent on LVI's default under the debt).[21]

29. The business evidence that LoyaltyOne practically owed the debt is also compelling. Ms. Hageman's uncontested evidence is that LoyaltyOne was the main operating business and LVI's only other operating subsidiary, Brand Loyalty, had little free cash flow from operations.[22] LoyaltyOne would have been expected to and did provide all the cash flow to support payments due under the Credit Agreement in 2022 as well as the expenses incurred by the US-based corporate infrastructure of LVI.[23] LoyaltyOne was also responsible for supplying funds to allow for LVI to make interest and principal payments on the debt in the ordinary course, which it did by way of dividends.[24] On its facts, there is not a case for apportioning the debt among LoyaltyOne and the other obligors that had no practical way to satisfy the debt without LoyaltyOne.

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[18] Harington Cross, Q. 142-144; Brattle First Report, paras. 48-50, L1 RMR, Tab 4A, p. 308, 309; Hagerman November Affidavit, para. 44, L1 MR, Tab 2, p. 32-33. See also Harington Cross, Q. 196-202, Hageman May Affidavit, para. 14, L1 Supp. MR, Tab 1, p. 9; Brattle Second Report, para. 111, L1 Supp. MR, Tab 2A, p. 599.
[19] Hageman November Affidavit, para. 48 and Exhibit "P" (Credit Agreement dated November 3, 2021), L1 MR, Tab 2 and 2P, pp. 33, 386, 391; Brattle First Report, Table 2, L1 RMR, Tab 4, p. 303.
[20] Hageman November Affidavit, para. 49 and Exhibit "P" (Credit Agreement dated November 3, 2021), L1 MR, Tab 2 and 2P, pp. 34 and 534; Brattle First Report, para. 49, L1 RMR, Tab 4, p. 309.
[21] Harington Cross, Q. 142-144, 196-202; *Can-Win Leasing (Toronto) Ltd. v. Moncayo*, 2014 ONCA 689, para. 35; *Canadian General Insurance Co. v. Dube Ready-Mix Ltd.*, [1984] A.N.B. No. 50, paras. 8, 9.
[22] Hageman May Affidavit, para. 14, L1 Supp. MR, Tab 1, p. 9; Hageman November Affidavit, para. 44, L1 MR, Tab 2, p.32-33.
[23] Hageman November Affidavit, para. 54, L1 MR, Tab 2, p. 35.
[24] Hageman May Affidavit, para. 14, L1 Supp. MR, Tab 1, p. 9.

(b) Sobeys stated it was exiting Air Miles months before the Spin Date.

30. Sobeys grocery store was the second largest Air Miles sponsor and was effectively LoyaltyOne's "anchor tenant".[25] It played a critical role for LoyaltyOne, acting as both a place where customers could collect and redeem Air Miles and carrying with it a "network effect" on the value of the entire Air Miles program for remaining sponsors and collectors.[26] Bread knew that by impacting Air Miles collectors (as a loss of a key redemption location) and other sponsor participants (by reduced program appeal, loss of negotiation strength and a demand for contractual concessions by other sponsors), the loss of Sobeys would have – and did have – a "dramatic downward" financial effect on LoyaltyOne.[27]

31. By January 2021, well before the Spin Date, Sobeys had communicated to Bread its intention to withdraw from the Air Miles program by 2022, which information was then shared internally with Bread executives.[28] This was confirmed on cross-examination, when Mr. Motes stated that by January 2021, Sobeys had indicated a present intention to leave the Air Miles program and that this information had been disclosed to the attendees of a Bread Audit Committee Meeting in January 2021.[29] The knowledge of Sobeys' impending departure was also set out in an internal Bread slide deck related to the Spin Transaction dated January 8, 2021, which stated that "Sobey's relayed its intention to terminate by the end of 2022".[30] Eight months before the Spin

[25] Hageman April Affidavit, para. 40, L1 RMR, Tab 1, p. 17.
[26] Hageman April Affidavit, paras. 40, 53-55, L1 RMR, Tab 1, p. 17, 20-21; Brattle First Report, paras. 67, 68, 70-72, L1 RMR, Tab 4A, pp. 314-318.
[27] Davidson Cross, Q. 38-43; Brattle Second Report, para. 90, L1 Supp. MR, Tab 2A, p. 50-51; Harington Cross, Q. 139-144, 154-168, 204-207, 222. There is no analysis of any such debt apportionment in Mr. Davidson's reports.
[28] Hageman April Affidavit, para. 49, L1 RMR, Tab 1, p. 19; Exhibit 8 to the Cameron Exam. See also, for example, Brattle Second Report, paras. 86-88, L1 Supp. MR, Tab 2A, p. 47-49; Hageman April Affidavit, paras. 39-52, L1 RMR, Tab 1, p. 16-20; Cameron Examination, Q. 57, 62-67, 85-87; Motes Cross, Q. 65-67, 84, 93-104. See also, para. 10 above.
[29] Motes Cross, Q. 65-67, 93-104.
[30] Hageman April Affidavit, para. 50 and Exhibit "D", p. 2, L1 RMR, Tabs 1 and 1D, pp. 19, 74.

Date, Sobeys amended its contract with LoyaltyOne to state that the contract "shall be terminated […] no earlier than July 1, 2022 and no later than February 1, 2023".[31]

32. Despite LoyaltyOne making efforts to keep Sobeys as a sponsor in the time leading up to the Spin Transaction, it was clear to those internal to Bread that those efforts were simply a "Hail Mary" and that Sobeys' departure was a foregone conclusion.[32]

(c) Conclusion on insolvency.

33. The two conditions that Bread's expert conceded would result in LoyaltyOne being insolvent at the Spin Date were fulfilled. As LoyaltyOne and the Monitor's expert concluded concerning LoyaltyOne's solvency (an analysis not done by Bread's expert), "the [US$675 million of] debt exceeds the fair market value of LoyaltyOne…" and accordingly, the debtor, LoyaltyOne, was insolvent under the balance sheet test when the TMA was made.[33]

(iv) The alleged tax refund disposition had a value higher than what LoyaltyOne received

34. An assessment of the value exchanged under the TMA must be considered at the LoyaltyOne level, and not the LVI level, because section 96(1) requires an assessment of "the difference between the value of the consideration received by the ***debtor*** and the value of the consideration given by the ***debtor***" [emphasis added].[34] The debtor, LoyaltyOne, received no value or conspicuously less value in return for the CA$96 million potential Tax Proceeds disposition with LoyaltyOne receiving only administrative and tax reconciliation obligations from Bread.[35]

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[31] Hageman April Affidavit, paras. 42 and 45, L1 RMR, Tab 1, pp. 17-18.
[32] Cameron Exam, Q. 290.
[33] Brattle First Report, para. 202, L1 RMR, Tab 4A p. 368. Mr. Harington also concluded that LoyaltyOne was insolvent under the cash flow test (Brattle First Report, paras. 103-196, L1 RMR, Tab 4A pp. 331-366).
[34] Brattle First Report, para. 18, L1 RMR, Tab 4A, p. 299.
[35] Brattle First Report, para. 19(b), L1 RMR, Tab 4A, p. 299. ***Importantly***, Bread's financial expert, Mr. Davidson, conducted no analysis on the consideration or transfer (or "give"/"get") at the LoyaltyOne level or in the context of the TMA alone. Mr. Davidson solely conducted an analysis at the LVI level, which is how he concluded that LVI's "get" was the LoyaltyOne and Brand Loyalty operating business. No such "get" analysis applies to LoyaltyOne

As a result, the consideration LoyaltyOne received from Bread was nil or conspicuously less than the fair market value of the potential Tax Proceeds.

35. In summary, Bread attempted to take up the Tax Proceeds from LoyaltyOne at a time when LoyaltyOne was insolvent, as a result of the hundreds of millions of dollars in debt that Bread imposed on LoyaltyOne and the loss of LoyaltyOne's second largest sponsor which Bread knew about months earlier. This meets the requirements of a TUV and is void.

C. LoyaltyOne correctly disclaimed the TMA

36. The Monitor relies on the submissions of LoyaltyOne concerning this issue. In brief, by disclaiming the TMA (on a without prejudice basis to LoyaltyOne's primary position that the TMA is not binding or is void). LoyaltyOne acted fairly and reasonably by providing notice to Bread that it would not be performing its obligations under the TMA, including not paying over to Bread any Tax Proceeds. The disclaimer appropriately maximizes realizations for the benefit of LoyaltyOne's creditors (which includes the Lenders, the Crown and unpaid contractors and vendors)[36] in accordance with their relative priorities and entitlements.[37]

D. LoyaltyOne is not Bread's agent and the Tax Proceeds are not subject to a trust

37. Bread's position is that under the TMA, LoyaltyOne holds any Tax Proceeds received as agent for Bread, subject to a trust, and must pay those funds entirely over to Bread.[38] Bread relies

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because it already owned its operating business and received nothing material from the Spin Transaction. See Expert Report of Scott Davidson dated February 14, 2024, para. 2.5, Bread MR, Tab 4, p. 972.

[36] Monitor's Supplemental Fifth Report dated March 13, 2024, para. 2.0.1, available at: https://www.ksvadvisory.com/docs/default-source/insolvency-case-documents/loyaltyone/ccaa-proceedings/reports/l1---supplement-to-the-fifth-report-of-the-monitor---final.pdf?sfvrsn=839699fe_3.

[37] LoyaltyOne preliminary list of creditors as at March 9, 2023, available at: https://www.ksvadvisory.com/experience/case/loyaltyone.

[38] Bread Notice of Motion, paras. 8, 22 and 38, Bread MR, Tab 1, pp. 3, 6 and 10.

on section 12(b) of the TMA, which must be interpreted together with other interlocking contractual provisions.

38. It is unnecessary for the Court to address this argument if it finds, as it should, that the TMA is not binding on LoyaltyOne or that the alleged disposition of the Tax Proceeds is a TUV. However, if the Court finds otherwise, Bread's best-case scenario is a provable unsecured claim – not Bread's attempt to scoop 100% of the Tax Proceeds away from other creditors of LoyaltyOne.

(i) Delaware law requires that the TMA be interpreted based only on the ordinary and usual meaning of the contractual language and not factual matrix evidence

39. The TMA is expressly governed by and must be construed in accordance with the laws of the State of Delaware.[39] The relevant Delaware interpretation principles are below.

40. The contractual interpretation law of Delaware is that the intent of the parties to a contract is to be determined from the language of the contract,[40] on an objective standard.[41] Delaware Courts "will read a contract as a whole and … give each provision and term effect, so as not to render any part of the contract mere surplusage", and will seek to reconcile all provisions when read as a whole.[42]

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[39] TMA, section 22, Exhibit "A" to the Hageman November Affidavit, L1 MR, Tab 2A, p. 70. This provision is enforceable under both Delaware law and Ontario law; Expert Report of Matthew O'Toole dated March 8, 2024 ("**O'Toole Report**"), paras. 8, citing to Restatement (Second) of Conflict of Laws, § 187 (1988), L1/Monitor US Book of Authorities ("**US BOA**") Tab 25, B*eautyCon Media ABC Tr. Through Saccullo Bus. Consulting*, LLC, 2023 WL 5164148, at *11, US BOA Tab 1 and *Sycamore Partners Mgmt., L.P. v. Endurance Am. Ins. Co.*, 2021 WL 761639, at *9-10 (Del. Super. Ct. Feb. 26, 2021), US BOA Tab 21, RMR, Tab 2A, pp. 229-232. Choice of forum clauses are enforceable absent unconscionability: *Douez v. Facebook, Inc.*, 2017 SCC 33.

[40] O'Toole Report, para. 12, citing to *Twin City Fire Ins. Co. v. Delaware Racing Ass'n*, 840 A.2d 624, 628 (Del. 2003), US BOA Tab 22 and *Lorillard Tobacco Co. v. Am. Legacy Found*., 903 A.2d 728, 739 (Del. 2006), US BOA Tab 16, L1 RMR, Tab 2A, p. 232.

[41] O'Toole Report, para. 12, citing to *Cantera v. Marriott Senior Living Servs.,* Inc., 1999 WL 118823, at *4 (Del. Ch. Feb. 18, 1999), US BOA Tab 4, *NBC Universal v. Paxson Commc'ns Corp*., 2005 WL 1038997, at *5 (Del. Ch. Apr. 29, 2005), US BOA Tab 17, *Zimmerman v. Crothall,* 62 A.3d 676, 690 (Del. Ch. 2013), US BOA Tab 24 and *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co*., 616 A.2d 1192, 1196 (Del. 1992), US BOA Tab 19, L1 RMR, Tab 2A, p. 232.

[42] O'Toole Report, paras. 12 and 13, L1 RMR, Tab 2A, p. 232-233.

41. Unless there is ambiguity in the contract, Delaware Courts will interpret contractual terms in accordance with their ***ordinary and usual meaning***.[43] A provision in a contract is only ambiguous if it would fairly or reasonably be susceptible to different interpretations or have multiple meanings; a contract is not ambiguous simply because parties disagree on its meaning.[44]

42. Where a court determines that a contract is ***not ambiguous***, the court's interpretation will be ***confined to the document's "four corners"***, and ***extrinsic evidence will not be considered***.[45] Quite importantly, this approach is different than under Ontario law: under Delaware law, what in Ontario is called ***factual matrix or surrounding circumstances evidence cannot be used to interpret an unambiguous contract***. The TMA is not ambiguous and, therefore, the surfeit of evidence about its surrounding circumstances is not relevant.

(ii) The key provisions of the TMA in their ordinary and usual meaning

43. Bread's position rests on section 12(b) of the TMA:

> *Treatment of Payments*. To the extent permitted by Applicable Tax Law, ***any payment made*** by… Loyalty Ventures or any member of the Loyalty Ventures Group to ADS…, pursuant to this Agreement, the Separation Agreement… that relates to Taxable periods (or portions thereof) ending on or before the Distribution Date ***shall be treated by the parties hereto for all Tax purposes as a distribution*** by Loyalty Ventures to ADS…; ***provided***, however, that notwithstanding anything to the contrary in this Section 12(b), ***any payment made pursuant to Section 2.08(c) of the Separation Agreement shall instead be treated as if*** the party required to make a payment of received amounts had ***received such amounts as agent*** for the other party… [emphasis added]

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[43] O'Toole Report, para. 15, L1 RMR, Tab 2A, p. 233.
[44] O'Toole Report, para. 12, citing to *Rhone-Poulenc Basic Chems. Co.*, 616 A.2d at 1196, US BOA Tab 19 and *Williams Field Services Group, LLC*, 2019 WL 4668350, at *16, US BOA Tab 23, L1 RMR, Tab 2A, p. 232.
[45] O'Toole Report, paras. 16, 17, citing to *Interim Healthcare, Inc. v. Spherion Corp*., 884 A.2d 513, 547 (Del. Super. 2005), US BOA Tab 14, *Cornell Glasgow, LLC v. LaGrange Properties*, LLC, 2012 WL 6840625, at *11 (Del. Super. Ct. Dec. 7, 2012), US BOA Tab 5 and *Eagle Indus., Inc.*, 702 A.2d at 1232, US BOA Tab 7, L1 RMR, Tab 2A, pp. 233-234.

44. Thus, the general rule for any payments by LoyaltyOne to Bread under the TMA is that they be treated as a "distribution" for tax purposes. However, the TMA provides that a payment would not be treated as a distribution if it was "made pursuant to Section 2.08(c) of the Separation Agreement". In ***only*** that situation, the payment is to be treated as if that party had received such an amount as an agent for the other party. Thus, to the extent section 12(b) of the TMA creates an agency relationship, it is ***only*** for a payment made under section 2.08(c) of the Separation Agreement.

45. Section 2.08(c) of the Separation Agreement provides what is appropriately construed as a misdirected payments provision to deal with post-Spin Date payments to LoyaltyOne that should have been paid to Bread, and *vice versa* (and with respect to their corporate groups).

> As between ADS and Loyalty Ventures (and the members of their respective Groups) ***all payments received*** after the Distribution Date by either party (or member of its Group) ***that relate to a business, asset or Liability of the other party*** (or member of its Group), shall be held by such party for the use and benefit and at the expense of the party entitled thereto. ***Each party shall maintain an accounting of any such payments, and the parties shall have a monthly reconciliation***, whereby all such payments received by each party are calculated and the net amount owed to ADS or Loyalty Ventures, as applicable, shall be paid over with a mutual right of set-off. If at any time the net amount owed to either party exceeds $500,000, an interim payment of such net amount owed shall be made to the party entitled thereto within five (5) Business Days of such amount exceeding $500,000. Notwithstanding the foregoing, neither ADS nor Loyalty Ventures shall act as collection agent for the other party, nor shall either party act as surety or endorser with respect to non-sufficient funds, checks or funds to be returned in a bankruptcy or fraudulent conveyance action. ***Further notwithstanding the foregoing, treatment of Tax assets shall be governed by the Tax Matters Agreement and shall not be considered in this reconciliation process.*** [emphasis added]

46. Not characterizing misdirected payments as tax-implicated "distributions" makes sense. Characterizing a payment as being from agent to principal avoids that tax inefficiency.[46]

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[46] *Stubart Investments Ltd. v. R.*, [1984] 1 S.C.R. 536 at pp. 580-581, 1984 CarswellNat 222 at paras. 66-67.

47. Section 2.08(c) of the Separation Agreement only deals with misdirected payments received by one party that "relate to a business, asset or Liability of the other party". The payment of the Tax Proceeds does not fit within the ambit section 2.08(c). The Tax Proceeds relate to a disputed pre-Spin tax payment made by LoyaltyOne to the CRA, not by Bread to the CRA, arising from the tax treatment of Air Miles, which was operated by LoyaltyOne and not Bread, all of which is now the subject of the Tax Dispute that LoyaltyOne, not Bread, is litigating.[47] Thus, the Tax Proceeds that may be received by LoyaltyOne "relate to a business, asset or Liability" ***of LoyaltyOne***, not Bread. There is no misdirected payment involved.

48. Bread argues that if LoyaltyOne is successful in its Tax Proceeds litigation, then under section 8 of the TMA, Bread "shall be entitled" to the Tax Proceeds, which must be paid to Bread net of any reasonable costs incurred to obtain the Tax Proceeds:

> (a) ADS Tax Refunds. Except as provided by Section 8(b), ***ADS shall be entitled to all Tax Refunds*** received by any member of the ADS Group or any member of the Loyalty Ventures Group, including but not limited to Tax Refunds resulting from the matters set forth on Schedule C. Loyalty Ventures shall not be entitled to any Tax Refunds received by any member of the ADS Group or the Loyalty Ventures Group, except as set forth in Section 8(b).
>
> …
>
> (c) A Company (a "**Tax Refund Recipient**") receiving (or realizing) a Tax Refund to which another Company is entitled hereunder ***shall pay over the amount of such Tax Refund*** (including interest received from the relevant Taxing Authority, but ***net of*** any Taxes imposed with respect to such Tax Refund or the payment of such Tax Refund and ***any other reasonable costs associated therewith*** incurred after the Distribution Time, including third-party expenses incurred after the Distribution Time in connection with the application for or any Tax Proceeding with respect to such Tax Refund) within thirty (30) days of receipt thereof (or from the due date for payment of any Tax reduced thereby)… [emphasis added]

49. The Tax Proceeds are clearly captured by the TMA's definition of "Tax Refund":

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[47] Tax Matters Agreement dated November 5, 2021, s. 8(b) and Schedule C, Hageman November Affidavit, Exhibit "A", L1 MR, Tab 2A, p. 55; Affidavit of Joseph L. Motes III affirmed February 9, 2024, Bread MR, Tab 2T, p. 850.

> "**Tax Refund**" means any refund, reimbursement, offset, credit, or other similar benefit in respect of Taxes (including any overpayment of Taxes that can be refunded or, alternatively, applied against other Taxes payable), including any interest paid on or with respect to such refund of Taxes.

50. Reading section 8(a) and (c) together as a whole, these provisions create a contractual payment obligation owed to Bread, in an amount equal to the Tax Proceeds, if the Tax Proceeds are received by LoyaltyOne – nothing more.

51. Notably, the TMA does not provide for the ***assignment*** of anything related to the Tax Proceeds. Section 8(a) merely uses the word "entitled" and only with respect to an actual tax refund received (not the chose in action for a tax refund), in the context of a section of the TMA about "payments". This language is in contrast to the wording in the Separation Agreement that the parties used when they intended to transfer the ownership of an asset from LoyaltyOne to Bread:[48]

> … to ***assign, contribute, convey, transfer and deliver*** (or shall have assigned, contributed, conveyed, transferred and delivered) to Loyalty Ventures or any member of the Loyalty Ventures Group as of the Distribution Time designated by Loyalty Ventures (a "Loyalty Ventures Designee") ***all of the right, title and interest*** of ADS or such member of the ADS Group in and to all of the Loyalty Ventures Assets, if any, held by any member of the ADS Group, and ADS... [emphasis added][49]

52. The parties' intention to merely create a contractual obligation—not assignment—for LoyaltyOne to make payments makes sense in the context of the special nature of a claim for a tax refund. Section 67 of the *Financial Administration Act* ("**FAA**")[50] provides:

> Except as provided in this Act or any other Act of Parliament,
>
> (a) a Crown debt is ***not assignable***; and

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[48] The TMA repeatedly cross-references the Separation Agreement, so they clearly must be read as a whole, as required under Delaware law.
[49] Separation Agreement dated November 3, 2021, s. 2.03, Hageman November Affidavit, Exhibit "O", L1 MR, Tab 2O, p. 122-340.
[50] *Financial Administration Act*, R.S.C., 1985, c. F-11.

> (b) no transaction purporting to be an assignment of a Crown debt is effective so as to confer on any person any rights or remedies in respect of that debt. [emphasis added]

53. Under the *FAA*, a "Crown debt" is defined:

> "Crown debt" means any existing or future debt due or becoming due by the Crown, and ***any other chose in action in respect of which there is a right of recovery enforceable by action against the Crown*** [emphasis added]

54. The Court of Appeal for Ontario has concluded that a claim for a tax refund is a chose in action and, therefore, is a "Crown debt":

> Any overpayment by a taxpayer results in money owed by the government to the taxpayer. As the taxpayer has a right to a refund of the money, if that right is not discharged by payment, the taxpayer may enforce the right by an action against the government. ***The right to reimbursement is therefore a chose in action within the definition of "Crown debt"*** in section 66 of the Act. [emphasis added][51]

55. Section 220(6) of the *Income Tax Act*[52] provides an exception to the prohibition against assignment of a Crown debt, but under section 220(7) that assignment does not bind the Crown:

> An assignment referred to in subsection (6) ***is not binding on Her Majesty in right of Canada*** and, without limiting the generality of the foregoing,
>
> (a) the ***Minister is not required to pay to the assignee*** the assigned amount;
>
> (b) the ***assignment does not create any liability of Her Majesty in right of Canada to the assignee***;… [emphasis added]

56. In other words, if the tax refund chose in action, or a receivable for the tax refund, had been assigned by LoyaltyOne to Bread, the Crown would not have been bound to pay Tax Proceeds to Bread. In the TMA, Bread avoided the risk of such an outcome by inserting a contractual payment

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[51] *Profitt v. A.D. Productions Ltd. (Trustee of),* 2002 CanLII 44914 (ON CA) at paras. 20 and 22.

[52] "Notwithstanding section 67 of the *Financial Administration Act* and any other provision of a law of Canada or a province, a corporation may assign any amount payable to it under this Act"; *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

obligation for LoyaltyOne to promptly pay an amount equal to the Tax Proceeds – which can now only give Bread, at most, a provable unsecured claim for that amount.

57. Bread's expert witness on Delaware law, Mr. Solomon, argues that section 12(b) of the TMA creates an agency relationship for this payment.[53] His approach is problematic, however, because he did not confine himself to providing the Delaware legal principles he viewed as being relevant to the interpretation of the TMA and the Separation Agreement. Instead, without relying on any authority or legal explanation, he opined that the plain words contained in some of the relevant provisions of these agreements reflect the requisite "manifestation of consent by one person to another that the other shall act on his behalf and subject to his control".[54] This Court can read the words of the relevant provisions for itself and determine their ordinary and usual meaning, without taking into account Mr. Solomon's view. Importantly, Mr. Solomon did not address the misdirected-payment interpretation discussed above or the applicable Canadian income tax law.

58. Also, Mr. Solomon appears to have overlooked a key aspect of section 12(b). The provision does not identify LoyaltyOne as an agent; instead it states that LoyaltyOne should be "treated as if" it were acting as an agent, in the context of the tax treatment of the payment. He bootstraps a tax treatment into the creation of an actual agency relationship, with no additional contractual wording that parallels the sophisticated language used in the rest of the TMA and Separation Agreement.

59. LoyaltyOne is not an agent for Bread with respect to the Tax Proceeds and there is no basis to find that Bread could be entitled to equitable relief, through a trust or otherwise, to compel LoyaltyOne to turn over 100% of the Tax Proceeds to Bread.

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[53] Solomon February Report, paras. 56-58, Bread MR, Tab 3A, pp. 935-936.
[54] Solomon February Report, para. 59, Bread MR, Tab 3A, p. 936.

(iii) There is no trust under Delaware law

60. To the extent that Bread argues that the TMA creates a trust, there is no basis in the TMA for that argument. Under Delaware law, the parties must have intended that a trust relationship be created. While "[n]o particular form of words or conduct are necessary", there must be evidence of "definite, explicit and unequivocal words" or "circumstances so revealing and compelling as to manifest the intention with all reasonable certainty" to create a trust.[55] An express trust is not created simply by the existence of a fiduciary relationship, such as an agency relationship,[56] rather, it is the settlor's intent that determines whether a trust has been created,[57] and a court will look "objectively at the result" to determine whether an agreement does, in fact, create a trust.[58] There is no such evidence in the case at hand – the TMA merely states that in the context of misdirected payments, inapplicable here, such payments were to be treated "as if" made by an agent. There is nothing more indicating that fig leaf was supposed to intend the creation of a trust.

61. Also, the circumstances are not such for the imposition of a constructive trust by the U.S. Courts.[59] Under Delaware law, a constructive trust may only be imposed "[w]hen one party, by virtue of fraudulent, unfair or unconscionable conduct, is enriched at the expense of another to whom he or she owes some duty."[60] Further, the Delaware Bankruptcy Court has recognized the

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[55] O'Toole Report, para. 20, citing *Fulweiler v. Spruance*, 222 A.2d 555, 560 (Del. 1966), US BOA Tab 8, *Cravero, v. Holleger*, 566 A.2d 8, 13, US BOA Tab 6 and *Bodley v. Jones*, 32 A.2d 436, 438 (Del. 1943), US BOA Tab 2, L1 RMR, Tab 2A, pp. 236-237.

[56] O'Toole Report, para. 20, citing *New Enterprise Associates 14, L.P. v. Rich*, 295 A.3d 520, 529 (Del. Ch. 2023), US BOA Tab 18 and *Bovay v. H.M. Byllesby & Co*., 29 A.2d 801, 804 (Del. Ch. 1943), US BOA Tab 3, L1 RMR, Tab 2A, pp. 236-237; Expert Report of Christopher Samis affirmed March 8, 2024 ("**Samis Report**"), para. 6, citing *In re AE Liquidation, Inc.*, 426 B.R.. 511, 517 (Bankr. D. Del. 2010), US BOA Tab 11, *In re Holmes Envt'l,. Inc.*, 287 B.R. 363, 375 (Bankr. E.D. Va. 2002), US BOA Tab 13 and *Soles v. Stevenson*, 53 Misc.2d 402, 278 N.Y.S.2d 922, 927 (N.Y.S up. Ct. 1967), US BOA Tab 20, L1 RMR, Tab 4A, p. 261.

[57] O'Toole Report, para. 20, citing *Cravero*, 566 A.2d at 13, US BOA Tab 6 and *Hanson v. Wilmington Trust Company*, 119 A.2d 901, 909 (Del. Ch. 1955), US BOA Tab 9, L1 RMR, Tab 2A, pp. 236-237.

[58] O'Toole Report, para. 20, citing *Cravero*, 566 A.2d at 13, US BOA Tab 6, L1 RMR, Tab 2A, pp. 236-237.

[59] Samis Report, para. 6, L1 RMR, Tab 3A, p. 261.

[60] Samis Report, para. 6, citing to *Hogg v. Walker*, 622 A.2d 648, 652 (Del. 1993), US BOA Tab 10, L1 RMR, Tab 3A, p. 261.

imposition of a constructive trust to be a "drastic equitable remedy", requiring a "clear and convincing standard".[61] There are no facts here supporting such a remedy.

62. Accordingly, even if Delaware law were to apply, it would not yield a trust. But the Monitor submits that the trust issue raised by Bread is a matter only of Ontario and Canadian law, which is addressed below.

(iv) Canadian law is the governing law about whether there is a trust for tax refund proceeds and there is no such basis for a trust

63. Mr. Solomon opined that "the application of a particular law in a bankruptcy proceeding is the purview of the applicable (bankruptcy) court applying their own choice of law rules".[62] The Monitor agrees. Whether the Court should impose a constructive trust is a matter of priorities between creditors, and priorities are determined by the *lex fori* (here the *lex fori* is the law of Ontario).[63] The applicable Ontario law, the *International Recognition of Trusts Act,*[64]provides that a constructive trust shall be governed by the law with which it is most closely connected having regard to the situs of the assets of the trust, the place of residence or business of the trustee and the objects of the trust and the places where they are to be fulfilled, in a situation where the settler did not designate a place for administration of the trust. In the case at hand, all three applicable factors points to the place and law of the trust being Ontario.

64. In Ontario, a constructive trust is a remedy that is primarily awarded to prevent unjust enrichment and deter wrongdoing. In the insolvency context, a constructive trust is analogous to a

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[61] Samis Report, para. 7, citing to *In re Green Field Energy Servs., Inc*., 2018 WL 6191949, at *78 (Bankr. D. Del. Nov. 28, 2018), US BOA Tab 12 and *Interlake Mat. Handling, Inc*., 441 B.R. 437, 441 (Bankr. D. Del. 2011), US BOA Tab 15, L1 RMR, Tab 3A, p. 261.
[62] Reply Expert Report of Steven Solomon dated March 22, 2024, para. 17.
[63] *Sefel Geophysical Ltd., Re*, (1988) 92 A.R. 51 at para. 19, relying on *Todd Shipyards Corp. v. Altema Compania Maritima S.A.*, [1974] S.C.R. 1248 at pp. 574-75.
[64] *International Recognition of Trusts Act*, 2017, S.O. 2017, c. 2, Sched. 7, s. 3(1) and Schedule 1, Article 7.

security interest as it allows the plaintiff to take the disputed asset out of debtor's estate, which consequently diminishes the assets left to pay the estate's other creditors.[65]

65. The Supreme Court of Canada has set out four conditions to be satisfied before a constructive trust will be imposed:

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
>
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
>
> (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.[66]

66. The last condition is given "significant weight" in the insolvency context:

> If a constructive trust is ordered in respect of a bankrupt, there is an obvious impact on the other creditors of the bankrupt's estate. Accordingly, ***the use of a constructive trust as a remedy in insolvency proceedings is used "only in the most extraordinary cases"*** and **"the test to show that there is a "constructive trust in a bankruptcy setting is high**:" *Creditfinance*, at paras. 32 and 33. In the instant case, there will likely not be enough funds for the secured creditors. Accordingly, any remedial constructive trust awarded by this court would upset the priority scheme under the BIA and ***effectively take funds from the secured creditors to pay certain unsecured creditors***.[67]

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[65] Anthony Duggan, Constructive Trusts in Insolvency: A Canadian Perspective, 2016 94-1, Canadian Bar Review 86, 2016 CanLIIDocs 140.
[66] *Soulos v. Korkontzilas,* 1997 CanLII 346 (SCC), para. 45*; Kingsett Mortgages Corp et. al. v. Stateview Homes et. al*., 2023 ONSC 2636 ("***Kingsett***"), para. 70.
[67] *Kingsett*, paras. 71-72 [emphasis added]; *Hollinger Inc. Re*, 2013 ONSC 5431, paras. 40-42.

67. In light of the absence of words or deeds giving rise to a trust, and the negative impact on other creditors of recognizing a trust, Bread does not meet the high test in the insolvency context to impose a trust giving Bread 100% of the Tax Proceeds, leaving other creditors with nothing.

V. ORDER REQUESTED

68. The Monitor respectfully requests that this Court grant the relief set out in the factum of LoyaltyOne.

May 28, 2024

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Meghan de Snoo

GOODMANS LLP
Lawyers for the Monitor, KSV Restructuring Inc.

SCHEDULE "A"

LIST OF AUTHORITIES

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1.	*AbitibiBowater Inc.*, Re, 2012 SCC 67
2.	*Anderson, Re*, 2012 BCSC 956
3.	*Bank of Montreal v. Halliday Estate (Trustee of)*, 2021 SKQB 276
4.	*Canadian General Insurance Co. v. Dube Ready-Mix Ltd.*, [1984] A.N.B. No. 50
5.	*Can-Win Leasing (Toronto) Ltd. v. Moncayo*, 2014 ONCA 689
6.	*Challmie, Re (1976)*, 22 C.B.R. (N.S.) 78 (B.C. S.C.)
7.	*Douez v. Facebook, Inc.*, 2017 SCC 33
8.	*Hollinger Inc. Re*, 2013 ONSC 5431
9.	*King Petroleum Ltd., (1978) Re,* 29 C.B.R. (N.S.) 76 (OSC)
10.	*Kingsett Mortgages Corp et. al. v. Stateview Homes et. al.*, 2023 ONSC 2636
11.	*Profitt v. A.D. Productions Ltd. (Trustee of)*, 2002 CanLII 44914 (ONCA)
12.	*Saulnier v. Royal Bank*, 2008 SCC 58
13.	*Sefel Geophysical Ltd., Re*, (1988) 92 A.R. 51
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15.	*BeautyCon Media ABC Tr. Through Saccullo Bus. Consulting*, LLC, 2023 WL 5164148
16.	*Bodley v. Jones*, 32 A.2d 436 (Del. 1943)
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18.	*Cantera v. Marriott Senior Living Servs.,* Inc., 1999 WL 118823 (Del. Ch. Feb. 18, 1999)
19.	*Cornell Glasgow, LLC v. LaGrange Properties*, LLC, 2012 WL 6840625 (Del. Super. Ct. Dec. 7, 2012)

20.	*Cravero, v. Holleger*, 566 A.2d 8 (1989)
21.	*Eagle Industries, Inc. v. DeVilbiss Health Care, Inc.,* 702 A.2d 1228 (1997)
22.	*Fulweiler v. Spruance*, 222 A.2d 555 (Del. 1966)
23.	*Hanson v. Wilmington Trust Company*, 119 A.2d 901 (Del. Ch. 1955)
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31.	*NBC Universal v. Paxson Commc'ns Corp*., 2005 WL 1038997 (Del. Ch. Apr. 29, 2005)
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33.	*Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co*., 616 A.2d 1192 (Del. 1992)
34.	*Soles v. Stevenson*, 278 N.Y.S.2d 922 (N.Y.S up. Ct. 1967)
35.	*Sycamore Partners Mgmt., L.P. v. Endurance Am. Ins. Co.*, 2021 WL 761639 (Del. Super. Ct. Feb. 26, 2021)
36.	*Twin City Fire Ins. Co. v. Delaware Racing Ass'n*, 840 A.2d 624 (Del. 2003)
37.	*Williams Field Services Group, LLC*, 2019 WL 4668350
38.	*Zimmerman v. Crothall,* 62 A.3d 676 (Del. Ch. 2013)
Secondary Sources	
39.	American Law Institute, *Restatement of the Law (2d) of Conflict of Laws* (1988)

40.	Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th Edition, Chapter 5. Part IV Property of the Bankrupt § 5:50 Insolvency of Debtor—Assets Insufficient to Pay Obligation
41.	Roderick J. Wood, *Bankruptcy & Insolvency Law*, 2d ed (Toronto: Irwin Law, 2015)
42.	Roderick J. Wood*, Transfers at Undervalue: New Wine in Old Wineskins?* (August 28, 2017)

SCHEDULE "B"

LIST OF RELEVANT STATUTES, REGULATIONS, BY-LAWS, ETC.

1.	*Bankruptcy and Insolvency Act*, RSC, 1985, c. B-3
2.	*Companies' Creditors Arrangement Act*, RSC 1985, c C-36
3.	*Financial Administration Act*, R.S.C., 1985, c. F-11
4.	*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)
5.	*International Recognition of Trusts Act*, 2017, S.O. 2017, c. 2, Sched. 7

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

Court File No: CV-23-00696017-CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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