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

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

RESPONDING FACTUM OF BREAD FINANCIAL HOLDINGS, INC.
(MOTION FOR LEAVE TO APPEAL)

October 4, 2024

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PART I - OVERVIEW

1. LoyaltyOne and the Monitor[1] each seek leave to appeal from the order dated July 10, 2024, of the Honourable Justice Conway (the "**Order**"). The Order, amongst other things, disallows LoyaltyOne's disclaimer of a tax matters agreement with Bread Financial Holdings, Inc. ("**Bread**") dated November 5, 2021 (the "**TMA**") and concludes that the TMA does not constitute a transfer at undervalue.

2. Justice Conway, the supervising judge for LoyaltyOne's *CCAA* [2] proceedings, made her decision after careful consideration of the correct legal principles as applied to the specific facts of this case. In respect of the disclaimer, Her Honour analyzed the factors statutorily prescribed by Parliament and then considered the overall fairness of the proposed disclaimer in the context of the evidentiary record before her. In respect of the alleged transfer at undervalue, Her Honour considered the balance sheet test as set out by LoyaltyOne and the Monitor's own expert and found that, on the record before her, the Monitor did not prove LoyaltyOne's insolvency at the time of the impugned transfer — an element of the test for finding a transfer at undervalue. The purported legal errors raised by LoyaltyOne and the Monitor in their factum for leave to appeal (the "**Leave Factum**") are without merit and, in reality, are nothing more than complaints about Her Honour's factual findings.

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[1] "**LoyaltyOne**" is LoyaltyOne, Co. and the "**Monitor**" is KSV Restructuring Inc. in its capacity as court-appointed monitor of LoyaltyOne.

[2] *Companies' Creditors Arrangement Act* RSC, 1985 c C-36 ("***CCAA***").

3. LoyaltyOne and the Monitor do not meet the high bar set for obtaining leave to appeal a *CCAA* decision made by the supervising judge who is steeped in the intricacies of the debtor company's insolvency. Indeed, Conway J.'s decision was a highly discretionary one based on the specific facts of this case and her reasons are owed considerable deference.

4. None of the four factors considered in granting leave weigh in favour of the applicants and their motion for leave to appeal should be dismissed with costs.

PART II - CONCISE STATEMENT OF FACTS

A. Bread divested LoyaltyOne

5. LoyaltyOne is a Nova Scotia company that, until June 2023, operated the AIR MILES reward program. AIR MILES is a Canadian loyalty rewards program that encourages consumers to shop with certain businesses by providing consumers with "reward miles" when they make eligible purchases.[3] Prior to November 2021, LoyaltyOne was an indirect subsidiary of Bread (then-named "Alliance Data Systems Corporation"), a publicly traded entity existing under the laws of Delaware. Bread primarily operates in the credit card and banking services space but, prior to November 2021, also operated a loyalty rewards division composed of LoyaltyOne and a European-based business, BrandLoyalty.

6. On November 5, 2021 (the "**Spin Date**"), Bread spun-off its loyalty rewards division to a new company, Loyalty Ventures Inc. ("**LVI**"), as part of a divestment

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[3] Affidavit of Joseph L Motes III affirmed February 9, 2024 ("**Motes Affidavit #1**") at para 13, Motion Record of LoyaltyOne and the Monitor for Leave to Appeal ("**Leave MR**"), Tab 12.

transaction (the "**Spin Transaction**"). The Spin Transaction was completed with the intention to create two successful businesses and both Bread and LVI executives were optimistic at the time of the Spin Transaction about LVI's prospects.[4] Almost all of the Bread management team that coordinated the Spin Transaction chose to move to LVI, and the new CEO of LVI (a longtime Bread executive) elected to purchase over US$400,000 in LVI shares in the month following the Spin Transaction.[5] Bread retained a 19% interest in LVI and had a material interest in the new company's success.[6]

7. As part of the Spin Transaction — and after thorough consideration by Bread and its professional advisors of the appropriate allocation of debt between Bread and LVI — LVI entered into a credit agreement with a consortium of secured lenders (the "**Lenders**") which provided $675 million in debt financing (the "**Credit Agreement**").[7] LoyaltyOne and BrandLoyalty, now subsidiaries of LVI via the Spin Transaction, each guaranteed LVI's debt under the Credit Agreement. LVI used the debt financing and a US$100 million dividend to pay Bread, who then used the funds to pay down its long-term debt. The result was the distribution of the former conglomerate's debt between the two now-independent businesses.[8]

8. Also as part of the Spin Transaction, the parties entered into the TMA. The TMA provides that Bread is required to pay all pre-Spin Date tax payables and tax

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[4] Motes Affidavit #1 at paras 37-68, Leave MR, Tab 12.
[5] Affidavit of Joseph L Motes III affirmed March 25, 2024 ("**Motes Affidavit #2**") at paras 14-17, Leave MR, Tab 15; Motes Affidavit #1 at para 88, Leave MR, Tab 12.
[6] Motes Affidavit #1 at paras 29 and 70(f), Leave MR, Tab 12.
[7] Motes Affidavit #1 at para 70(d), Leave MR, Tab 12.
[8] Motes Affidavit #1 at para 70(d), Leave MR, Tab 12.

reserves of LVI and its subsidiaries (including LoyaltyOne) and is correspondingly entitled to any pre-Spin Date tax receivables, including tax refunds, of its former subsidiaries.[9] The TMA allowed LVI to emerge from the Spin Transaction with a "blank slate" from a tax perspective.

9. A substantially final form of the TMA was made available to the Lenders ahead of entering into the Credit Agreement and, in fact, the Lenders *required* that LVI enter into the TMA as a condition of receiving financing.[10] "Tax refunds" were explicitly excluded from the Lender's security package under the Credit Agreement.[11]

10. The LVI group's most significant pre-Spin Date tax receivable has been a potential refund from the Canada Revenue Agency ("**CRA**") of CA$96 million (the "**Tax Refund**"). The Tax Refund is connected to a 2019 reassessment of LoyaltyOne's 2013 corporate tax return, which resulted in the CRA disallowing a reserve taken by LoyaltyOne.[12] LoyaltyOne appealed the reassessment to the Tax Court of Canada in July 2020 and a trial was scheduled for September 2024. Subsequent to Conway J. issuing the Order, LoyaltyOne and the CRA signed a consent to judgment that allowed LoyaltyOne's appeal and referred LoyaltyOne's 2013 tax return back to the Minister of National Revenue for reassessment.[13]

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[9] Motes Affidavit #1, Exhibit T at ss. 3, 8, and 11, Leave MR, Tab 12T.
[10] Motes Affidavit #1 at paras 78-79, Leave MR, Tab 12.
[11] Motes Affidavit #1 at paras 78-79, Leave MR, Tab 12.
[12] Motes Affidavit #1 at para 82, Leave MR, Tab 12.
[13] The reassessment remains ongoing. The CRA may assert set-off claims for taxes outstanding by LoyaltyOne.

11. The trial of the Tax Refund could have resulted in the return of the Tax Refund (if LoyaltyOne was successful) or in further taxes and penalties being owed by LoyaltyOne (if the CRA was successful). Under the TMA, Bread is entitled to the Tax Refund, less legal costs, but would have been responsible for indemnifying LoyaltyOne for any further taxes and penalties owing had the CRA been successful.[14]

12. LoyaltyOne and the Monitor misleadingly characterize LoyaltyOne's pursuit of the Tax Refund as being at the expense of LoyaltyOne's creditors.[15] This is misleading as Bread has indemnity obligations under the TMA and will ultimately be responsible for legal costs associated with the Tax Refund dispute.

B. LoyaltyOne Sought Relief Under the *CCAA* in March 2023

13. LVI operated as a standalone business following the Spin Transaction and LoyaltyOne made regular dividend payments to LVI until September 2022.[16] In March 2023, 16 months after the Spin Transaction, LVI and LoyaltyOne sought creditor protection in the U.S. and Canada, respectively. This was triggered by, amongst other things, the almost-complete collapse of earnings of BrandLoyalty in 2022.[17]

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[14] Motes Affidavit #1, Exhibit T at ss. 3, 8, and 11, Leave MR, Tab 12T.
[15] Leave Factum at para 23.
[16] Cross-Examination Transcript of Cynthia Hageman ("**Hageman Transcript**"), Q382-Q386, Joint Transcript & Exhibits Brief, Leave MR, Tab 22.
[17] Expert Report of A. Scott Davidson & Kathryn Gosnell of Kroll Canada Limited dated February 14, 2024 ("**Davidson Report #1**") at paras 10.21-10.25, Leave MR, Tab 14A.

14. In public disclosures from the relevant time period, LVI attributed BrandLoyalty's earnings collapse to Russia's invasion of Ukraine — BrandLoyalty was based in Europe and was significantly impacted by the invasion — along with increased supply and logistics costs.[18] Macroeconomic factors, including interest rate hikes and foreign exchange fluctuations, along with the loss of Sobeys as an AIR MILES program sponsor, further contributed to LVI's inability to make payment to the Lenders.[19]

15. In June 2023, LoyaltyOne sold substantially all of its operating assets to the Bank of Montreal as part of a *CCAA* sale process. The TMA was not sold as part of that transaction; LoyaltyOne retained the rights and obligations thereunder, including the obligation to remit the Tax Refund to Bread if and when received. LoyaltyOne's principal creditors (accounting for substantially all of its secured creditors and approximately 90% of the creditors generally) are the Lenders to the Credit Agreement.[20]

16. During their insolvency proceedings, LoyaltyOne and LVI each commenced multiple proceedings in Canada and the U.S. against Bread and other parties for matters related to the Spin Transaction (excluding the motion subject to the present proposed appeal). In Ontario, LoyaltyOne commenced an action against Bread and Joseph L. Motes III (an executive at Bread) seeking damages in the

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[18] Davidson Report #1 at para 10.23-10.24, Leave MR, Tab 14A; Davidson Report #1 at para 10.26, Leave MR, Tab 14A.

[19] Davidson Report #1 at para 10.19, Leave MR, Tab 14A.

[20] The preliminary list of creditors available on the Monitor's website indicates that as of March 9, 2023 the Lenders represented approximately 96% of LoyaltyOne's debt (See: www.ksvadvisory.com/experience/case/loyaltyone). Bread understands the Lenders' share is now estimated at approximately 90%.

amount of US$775 million in relation to the Spin Transaction.[21] In the U.S., the LVI trustee has commenced two separate actions against Bread in courts in Delaware and Texas alleging, amongst other things, fraudulent transfer and seeking recovery of US$750 million and the Tax Refund.[22] The Lenders hold the vast majority of LVI's debt and are the driving force behind these ongoing proceedings. A U.S. securities class action has also been commenced against Bread.

C. The TMA Motions

17. On October 27, 2023 — months after the sale of substantially all of its operating assets to the Bank of Montreal — LoyaltyOne delivered to Bread a "Notice of Disclaimer or Resiliation" under section 32(1) of the *CCAA* with respect to the TMA (the "**TMA Disclaimer**"). On November 9, 2023, as an alternative to the TMA Disclaimer, LoyaltyOne and the Monitor brought a motion that, amongst other things, sought a declaration that the TMA constituted a transfer at undervalue. On November 13, 2023, Bread served its motion opposing the TMA Disclaimer.

18. Justice Conway heard the two motions together on June 13 and 14, 2024. An extensive evidentiary record was put before Her Honour by LoyaltyOne and Bread. An ad hoc group of the Lenders also filed a factum and made oral submissions before Conway J. but elected not to file any evidence.

[21] Motes Affidavit #1 at para 95, Exhibit AA, Leave MR, Tab 12 and 12AA.
[22] Hageman Transcript, Q81-90, Exhibit 27 and J, Joint Transcript & Exhibits Brief, Leave MR, Tab 22.

19. In reasons for her decision dated July 10, 2024, Her Honour disallowed the TMA Disclaimer holding that the TMA remains in full force and effect (the "**TMA Disclaimer Decision**") and does not constitute a transfer at undervalue (the "**Transfer at Undervalue Decision**").[23]

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

20. The sole issue on this motion is whether LoyaltyOne and the Monitor should be granted leave to appeal the Order with respect to the TMA Disclaimer Decision and the Transfer at Undervalue Decision.

A. The Framework for Granting Leave to Appeal

21. Any person dissatisfied with an order or decision made under the *CCAA* is to obtain leave to appeal to the Court of Appeal.[24] It is a well-established principle that leave to appeal in *CCAA* proceedings is to be granted sparingly and only where "there are serious and arguable grounds that are of real and significant interest to the parties."[25]

22. As this Court held in *Laurentian University of Sudbury (Re)*, the cautious approach to granting leave to appeal in the context of *CCAA* proceedings reflects the fact that a high-degree of deference is owed to the discretionary decisions of judges supervising such proceedings as they are "steeped in the intricacies of the

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[23] *LoyaltyOne, Co. (Re)*, 2024 ONSC 3866 at paras 51-55 [LoyaltyOne], Tab 9 of Book of Authorities [BoA].
[24] *CCAA*, ss. 13-14.
[25] *Urbancorp Inc. v. 994697 Ontario Inc.*, 2023 ONCA 126 at para 25, Tab 13 of BoA.

CCAA proceedings they oversee" and are seeking to balance various interests.[26] As adopted by Wagner C.J. and Moldaver J. in *9354-9186 Québec inc. v. Callidus Capital Corp.:*

> ...one of the principal functions of the judge supervising the CCAA proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests.[27]

23. The factors that this Court considers in granting leave to appeal are well-established and include whether:

(a) the proposed appeal is *prima facie* meritorious or frivolous;

(b) the points on the proposed appeal are of significance to the practice;

(c) the points on the proposed appeal are of significance to the action; and

(d) whether the proposed appeal will unduly hinder the progress of the action.[28]

24. For the reasons set out below, Bread submits that LoyaltyOne and the Monitor do not satisfy the high bar for obtaining leave to appeal. This factum will first respond to LoyaltyOne's motion for leave to appeal regarding the TMA

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[26] *Laurentian University of Sudbury (Re)*, 2021 ONCA 199 at para 20 [Laurentian Leave Appeal #1], Tab 6 of BoA, citing *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521 at para 54 [Callidus], Tab 1 of BoA.
[27] Callidus, *supra* note 26 at para 54, Tab 1 of BoA, citing *Edgewater Casino Inc. (Re)*, 2009 BCCA 40 at para 20, Tab 4 of BoA.
[28] Laurentian Leave Appeal #1, *supra* note 26 at para 23, Tab 6 of BoA.

Disclaimer Decision and will then respond to the Monitor's motion for leave to appeal regarding the Transfer at Undervalue Decision.

B. The Proposed Appeal of the TMA Disclaimer Decision Does Not Satisfy the Test for Leave

i. The Proposed Appeal is Not *Prima Facie* Meritorious

25. In its Leave Factum, LoyaltyOne asserts that Conway J's reasons erroneously eliminate or restrict the use of the disclaimer provisions in "liquidating *CCAA*s" and inappropriately consider the Lenders as a factor in making the TMA Disclaimer Decision. Neither alleged error has merit.

(a) Justice Conway Did Not Eliminate or Restrict the Statutory Tool of Disclaimer

26. Section 32(1) of the *CCAA* permits a debtor company to disclaim or resiliate any agreement to which the company is a party to as of its filing date. This right of the debtor company is not absolute; counterparties may challenge the disclaimer under section 32(2) and seek an order from the court that the agreement not be disclaimed or resiliated.[29] Section 32(4) lists three non-exhaustive factors a court is to consider when determining whether to uphold a disclaimer:

(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

[29] *CCAA*, s. 32(2).

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.[30]

27. The decision to uphold a disclaimer is ultimately a discretionary one rooted in what is fair, appropriate and reasonable in the circumstances. As held by Morawetz C.J. (leave to appeal to this Honourable Court denied):

> A consideration of the s. 32(4) factors requires a balancing of interests. The subsection is silent with respect to the relative importance of any one of the factors to be considered and is not restricted to the listed factors. … **The disclaimer of a contract must be fair, appropriate and reasonable in all the circumstances. Ultimately, it is a discretionary decision to determine whether the disclaimer should be upheld.** This discretion is exercised by weighing the competing interests and prejudice to the parties and assessing whether the disclaimer or resiliation is fair and reasonable.[31] [emphasis added]

28. LoyaltyOne correctly notes in its Leave Factum that Parliament's purpose in enacting the disclaimer regime under the *CCAA* was to facilitate restructurings.[32] Indeed when introducing a draft of the disclaimer provisions to the House of Commons in September 2005, a Member of Parliament explained that the proposed amendments would "allow a restructuring company to terminate certain agreements **where it is necessary for the viability of its restructuring process** and would not be overly injurious to the other party to the agreement" [emphasis added].[33]

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[30] *CCAA*, s. 32(4)
[31] *Laurentian University of Sudbury*, 2021 ONSC 3272 at para 44 [Laurentian (ONSC)], Tab 8 of BoA, leave to appeal denied *Laurentian University of Sudbury (Re)*, 2021 ONCA 448, Tab 7 of BoA.
[32] Leave Factum at para 32.
[33] Canada, Parliament, *House of Commons Debates*, 38th Parl, 1st Sess, Vol 128 (29 September 2005) at 1345 (Hon Don Boudria) online:

29. Courts have interpreted restructuring liberally and permitted the use of the disclaimer provisions in liquidating *CCAA*s where it has been necessary for (or at least facilitated) a wind-down or liquidation of the business.[34] In seeking leave to appeal, LoyaltyOne argues that Conway J. upends settled law by eliminating or restricting the ability of debtor companies to invoke the disclaimer provisions in instances of liquidating *CCAA*.[35] This is not true. To the contrary, Conway J. explicitly recognizes that disclaimers can be used in liquidating *CCAA*s:

> It is clear from the cases that the purpose of the disclaimer is to relieve the debtor from the burden of performing a contract where it would prevent or delay a successful restructuring (*Laurentian*), **a sale of the business** (*Timminco Ltd. (Re)*, 2012 ONSC 4471, 93 C.B.R. (5th) 326), **or an orderly winddown and distribution of assets to creditors** (*Target Canada Co. (Re)*, 2015 ONSC 1028, 23 C.B.R. (6th) 303).[36] [emphasis added]

30. Justice Conway disallowed the TMA Disclaimer, not because LoyaltyOne was a liquidating CCAA but because the disclaimer was not necessary for the viability of, or even advantageous to, achieving a liquidation.

31. LoyaltyOne's argument that it was an "error" for Conway J. to disallow the TMA Disclaimer when the effect of it was "to maximize the value of the estate for the benefit of creditors as a whole"[37] is a novel interpretation of disclaimer law. Nothing in the language of section 32 of the *CCAA*, Parliament's intention in

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https://www.ourcommons.ca/documentviewer/en/38-1/house/sitting-128/hansard, Tab 14 of BoA.

[34] See e.g., the cases raised by LoyaltyOne and addressed in section B(i)(c) of this Factum.

[35] Leave Factum at para 7.

[36] LoyaltyOne, *supra* note 23 at para 53, Tab 9 of BoA.

[37] Leave Factum at para. 36(b).

enacting the section, or the case law suggests that the purpose of the disclaimer provisions is to maximize the value of the estate to the exclusion of other considerations. Such a singular focus would be misguided because almost every disclaimer maximizes value for a debtor. While a judge can consider value maximization as a factor in their analysis, it is *not* the determinative factor and is not the purpose of section 32.

32. In deciding whether to uphold the TMA Disclaimer, Conway J. was required to consider the three factors set out in section 32(4).[38] And Her Honour did exactly that. Justice Conway carefully considered each factor and her analysis of each is set out in paragraphs 51 to 55 of her decision.[39] In assessing the second factor, Conway J. determined that the TMA Disclaimer would not help facilitate a restructuring, compromise, arrangement, sale, or wind-down of the business since LoyaltyOne had already sold its operating assets and "there is no plan to be filed", "no restructuring in process" and "no suggestion of a plan to be put to creditors".[40]

33. The only mention of a plan in the present case appears at paragraph 49 the Leave Factum, which states that the "only remaining step [in the *CCAA*] 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 […]" [emphasis added].[41] This is a red herring. It is the first time that LoyaltyOne and the Monitor have raised the prospect of a plan. It was not mentioned in their earlier motion

[38] CCAA, s. 32(4).
[39] LoyaltyOne, *supra* note 23 at paras 51-55, Tab 9 of BoA.
[40] LoyaltyOne, *supra* note 23 at paras 52, 54, Tab 9 of BoA.
[41] Leave Factum at para 49.

materials, nor was it relied on in oral submissions before Conway J. It is hard to imagine why a plan is necessary in the present case.

34. It is clear from her reasons that Conway J. found the second factor to be persuasive in the case of the TMA Disclaimer. This was entirely appropriate, and her weighing of factors is to be afforded deference.

(b) Justice Conway Appropriately Balanced the Interests of all Parties

35. After assessing the section 32(4) factors, Conway J. then considered whether the TMA Disclaimer was fair, appropriate and reasonable.[42] Her Honour found that it would be entirely unfair, inappropriate and unreasonable to uphold the TMA Disclaimer in the specific circumstances of this case:

> [58] The Lenders accepted the terms of the TMA when they advanced funds to LVI in the Spin Transaction. It was a condition of the Credit Agreement that the TMA be entered into. The TMA explicitly states that the Tax Refund was payable to Bread. The Tax Refund was specifically excluded from the Lenders' security in the Credit Agreement.
>
> [59] It would be entirely unfair, inappropriate, and unreasonable for LoyaltyOne to disclaim the TMA. The effect of the Disclaimer would be to reverse the bargain that LoyaltyOne made when it entered into the Spin Transaction and that the Lenders made when they entered into the Credit Agreement as part of the transaction. This is even more unfair when I consider that LoyaltyOne has already paid tax refunds to ADS under the provisions of the TMA and has sought indemnity for its costs of pursuing the Tax Refund.
>
> [60] I find that the Disclaimer is being used to get out of the deal that was made in the Spin Transaction, secure the funds for LoyaltyOne that it was never entitled to retain, and assist the Lenders in recovering the losses that they sustained on

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[42] LoyaltyOne, *supra* note 23 at paras 56-60, Tab 9 of BoA.

> the transaction. That is not the intended purpose of a disclaimer under s. 32(4) of the CCAA.

36. LoyaltyOne and the Monitor have tried to recast Conway J.'s assessment of the fairness of the TMA Disclaimer as one that improperly focuses on "the impact of the disclaimer on Bread (on the one hand) and the lenders under the Credit Agreement (on the other)" and ignores "the interest of all creditors."[43] These arguments ignore the reality of the relationship between LoyaltyOne, Bread and the Lenders. Rather uniquely amongst *CCAA* proceedings, and as Conway J. noted in her reasons, the Lenders represent approximately 90% of LoyaltyOne's creditors.[44] This means, in practical terms, that if Bread does not receive the Tax Refund, the Lenders will. Justice Conway appropriately recognized that the TMA Disclaimer is, at its core, an inter-creditor dispute between the Lenders and Bread.

37. LoyaltyOne complains that Conway J. disallowed the TMA Disclaimer on the basis that it would "reverse the bargain" and allow LoyaltyOne to "get out of the deal" which, LoyaltyOne asserts, is the entire point of the *CCAA* disclaimer provisions.[45] This is a misreading of Conway J.'s reasons. Justice Conway based her decision to disallow the TMA Disclaimer, in part, on the fact that disclaiming the TMA would result in reversing the pre-filing bargain entered into between the debtor company (LoyaltyOne), a counterparty (Bread), and a *third party to the disclaimer* (the Lenders).

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[43] Leave Factum at para 41.
[44] LoyaltyOne, *supra* note 23 at para 56 and footnote 6, Tab 9 of BoA.
[45] Leave Factum at para. 36(a).

38. The TMA Disclaimer, if approved, would result in the Lenders receiving a benefit that is the exact opposite of what they bargained for when they negotiated the Credit Agreement. This is clear on reading the full text of Conway J.'s decision rather than just the excerpt that LoyaltyOne and the Monitor cherry-picked. The relevant portions of Justice Conway's reasons read: "The effect of the Disclaimer would be to reverse the bargain that LoyaltyOne made when it entered into the Spin Transaction and that **the Lenders made when they entered into the Credit Agreement as part of the transaction**" [emphasis added].[46] An express term of the TMA was that LoyaltyOne was not entitled to the Tax Refund. The Lenders required LoyaltyOne to enter into the TMA as a condition of the Credit Agreement and the Credit Agreement expressly excluded the Tax Refund from the Lenders' security.

39. Because the Lenders are the *de facto* beneficiaries of the TMA Disclaimer, it was entirely appropriate for Conway J. to consider the Lenders in assessing the TMA Disclaimer. Contrary to LoyaltyOne's Leave Factum, such consideration does not constitute a legal error.[47]

40. Justice Conway's analysis of the overarching fairness of the TMA Disclaimer indicates that Her Honour was alive to the specific context of the TMA as a component of the Spin Transaction. Her Honour's thorough understanding of the unique fact pattern raised by the Spin Transaction led her to the view that disclaimer was an inappropriate tool for the TMA. This is exactly the type of finding

[46] LoyaltyOne, *supra* note 23 at paras 54, 59, Tab 9 of BoA.
[47] Leave Factum at para 41.

that this Honourable Court and the Supreme Court of Canada have held are owed deference, as it involves the balancing of interests of different parties within the *CCAA* process.[48] Justice Conway's consideration of the Lenders when assessing the fairness, appropriateness and reasonableness of the TMA Disclaimer has no merit as a ground of appeal.

(c) The Cases Cited by LoyaltyOne Do Not Support Their Position

41. LoyaltyOne cites *Target Canada Co. (Re)*,[49] *Laurentian University of Sudbury,*[50] *Aveos Fleet Performance Inc.*[51] and *Timminco Ltd. (Re)*[52] to support the argument that Conway J. erred in disallowing the TMA Disclaimer. LoyaltyOne does not sufficiently explain how these cases, which were all before Conway J., show any alleged legal errors, but in any event these cases are either distinguishable from the present case or are incorrectly summarized by LoyaltyOne, as set out below:

(a) ***Target Canada Co. (Re)***: The debtor company sought to close all of its Canadian stores. Many of the stores contained pharmacies operated under franchise agreements, which the debtor sought to disclaim. Regional Senior Justice Morawetz (as he then was) approved the disclaimers. His analysis weighed the benefits of the

[48] Callidus, *supra* note 26 at para 54, Tab 1 of BoA; Laurentian Leave Appeal #1, *supra* note 26 at para 21, Tab 6 of BoA.
[49] *Target Canada Co. (Re)*, 2015 ONSC 1028 [Target], Tab 11 of BoA.
[50] Laurentian (ONSC), *supra* note 31, Tab 8 of BoA.
[51] *Aveos Fleet Performance Inc./Aveos Fleet performance aéronautique inc. (Arrangement relatif à)*, 2012 QCCS 6796 [Aveos], Tab 2 of BoA.
[52] *Timminco Limited (Re)*, 2012 ONSC 4471 [Timminco], Tab 12 of BoA.

disclaimers to the debtor (an orderly wind-down, asset realization and return maximization) against the harm to the pharmacists (business closure).[53] His Honour found that Target would need to incur "significant ongoing administrative costs" if the franchise agreements were not disclaimed, yet it would do little to help the pharmacists who would operate in vacated premises and "inevitably close in the very near future."[54] The present situation is unlike *Target* because Bread would be in a substantially worse position if the TMA Disclaimer were approved, while LoyaltyOne will not suffer any material operational costs from complying with the TMA and will only "lose" the Tax Refund, in which it forfeited its beneficial interest on the Spin Date.

(b) ***Laurentian University of Sudbury***: The debtor university sought to disclaim federation agreements with affiliated universities. Chief Justice Morawetz approved the disclaimers on the basis it would result in millions of dollars of cost savings and enable the debtor to put forward a plan acceptable to its stakeholders. His Honour recognized that disclaiming the agreements would result in financial hardship to the counterparties, but disclaiming gave the debtor a chance to restructure. Not disclaiming the agreements meant that the debtor would likely cease operations, which would in turn force

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[53] Target, *supra* note 49 at paras 22-25, 27, Tab 11 of BoA.
[54] Target, *supra* note 49 at para 23 and 27, Tab 11 of BoA.

the counterparties to cease operations.[55] Like the pharmacists in *Target*, the counterparties would be in the exact same position regardless of whether the disclaimer was approved, but the debtor's restructuring prospects would be much improved. This is not the case in the present situation.

(c) ***Aveos Fleet Performance Inc.***: The debtor company sought to disclaim a service agreement that the Monitor considered too expensive and ill-suited to the debtor, as LoyaltyOne points out in its Leave Factum.[56] But Justice Schrager's (as he then was) approval of the disclaimer went beyond these considerations. The Leave Factum omits a crucial paragraph from His Honour's reasons: "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."[57] Here, there is no plan and no restructuring to speak of. All that remains to be done is a distribution to creditors before terminating the *CCAA*.

(d) ***Timminco Ltd. (Re)***: The chief executive officer of the debtor company sought an order compelling the company to comply with a consulting agreement. Justice Morawetz (as he then was) dismissed

[55] Laurentian (ONSC), *supra* note 31 at paras 75-76, Tab 8 of BoA.
[56] Aveos, *supra* note 51 at paras 43, 47-48, Tab 2 of BoA; Leave Factum at para 37(b).
[57] Aveos, *supra* note 51 at para 49, Tab 2 of BoA.

the motion on the basis that the agreement constituted a pre-filing obligation that was stayed.[58] It was only in non-binding *obiter*, when considering an alternative argument, that Morawetz J. addressed disclaiming the agreement. His Honour found that the debtor company had (prior to the initial order) already stopped making payments under the consulting agreement (along with other agreements) to preserve its ability to continue operating and implement a successful liquidation. Re-starting payments under the agreement would strain the "already severely constrained cash flows" and the ability to implement a sales process.[59] On this basis, it was "fair, reasonable, advantageous and beneficial" to the restructuring process to approve the disclaimer.[60] *Timminco* is wholly distinguishable from the present case, where there are no continuing operations to preserve and the sale of operating assets is already complete.

42. As Conway J. notes in her reasons, the above cases have material differences in fact from the TMA Disclaimer.[61] Her Honour did not break precedent in disallowing the TMA Disclaimer but rather applied precedent to a different set of circumstances.

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[58] Timminco, *supra* note 52 at paras 41-47, Tab 12 of BoA.
[59] Timminco, *supra* note 52 at para 56, Tab 12 of BoA.
[60] Timminco, *supra* note 52 at para 57, Tab 12 of BoA.
[61] LoyaltyOne, *supra* note 23 at paras 53-54, Tab 9 of BoA.

ii. The Proposed Appeal is not of Significance to the Practice

43. Justice Conway's decision was highly fact-specific and discretionary. As such, it is of limited, if any, significance or precedential value to other proceedings.

44. LoyaltyOne and the Monitor try to frame the proposed appeal as being of significance to the practice because "the ability of a debtor company to disclaim an agreement under [section 32 of the *CCAA*] has a critical impact on *CCAA* proceedings generally and on the recovery available to a debtor company's creditors specifically".[62] This may be true as an abstract maxim but Conway J.'s decision does not alter the ability of a debtor company to disclaim agreements under section 32 of the *CCAA*.

45. As set out in paragraphs 28 to 34 of this Factum, Justice Conway's reasons do not eliminate or restrict the ability of a debtor company to disclaim contracts in liquidating *CCAA*s. Rather, in the specific and unique circumstances of this case, Conway J. found that a disclaimer was not an appropriate tool. Nothing in her decision is contrary to the statutory provisions of the *CCAA* nor any *CCAA* precedent. The significance of the decision to the practice, if any, is that courts do not "rubberstamp" challenged disclaimers but meaningfully engage with the factors set out at section 32(4) and the overarching fairness, appropriateness and reasonableness of the disclaimer in the specific context before the Court.

[62] Leave Factum at para 28.

iii. The Proposed Appeal is Not of Significance to this *CCAA* Proceeding

46. The proposed appeal is not of significance to this *CCAA* proceeding. LoyaltyOne's business has been sold and all that remains to be done is make distributions to creditors. The remedial functions of the *CCAA* process, including saving jobs and mitigating the social and economic consequences of bankruptcy, have already been achieved.

47. The proposed appeal is not of significance to anyone other than the Lenders who are the only creditors that actively participated in the TMA Disclaimer motion. As stated above, the Lenders represent substantially all of LoyaltyOne's secured creditors and approximately 90% of its creditors generally. If Bread does not receive the Tax Refund, then the Lenders will be the beneficiaries. The TMA Disclaimer is, at its core, an inter-creditor dispute.

48. Furthermore, the significance of the proposed appeal even to the Lenders is limited as the Lenders continue to support actions against Bread in Ontario, Texas and Delaware. If LoyaltyOne and/or LVI succeed in proving their allegations against Bread in any of those other actions, the Lenders will be made whole for losses arising from the Spin Transaction.

iv. Whether the Proposed Appeal Will Unduly Hinder the Progress of the Action is a Neutral Factor

49. This Honourable Court has held that whether a proposed appeal will unduly hinder an action is a neutral factor in a *CCAA* proceeding where the principal

remaining task is to distribute the funds to creditors.[63] Leave to appeal has been denied where this factor is neutral or weighs in favour of the moving party, but the other factors weigh against the granting of leave.[64]

C. The Proposed Appeal of the Transfer at Undervalue Decision Does Not Satisfy the Test for Leave

i. The Proposed Appeal is Not *Prima Facie* Meritorious

50. Section 36.1 of the *CCAA* applies the transfer at undervalue provision (section 96) of the *Bankruptcy and Insolvency Act* ("***BIA***") to *CCAA* proceedings.[65] Through its motion, the Monitor sought to establish that the TMA was a transfer at undervalue pursuant to section 96(b)(ii)(A) of the *BIA*, which required Conway J. to find that LoyaltyOne was insolvent at the time the TMA was executed (i.e., the Spin Date).[66]

51. After reviewing the evidence, Justice Conway held that the Monitor failed to establish LoyaltyOne was insolvent on the Spin Date and that, accordingly, the TMA did not constitute a transfer at undervalue.[67] Justice Conway's decision adhered to the methodology of LoyaltyOne's and the Monitor's own expert and adjusted the calculation only for fact-dependent findings that are to be afforded a high-degree of deference. This ground of appeal does not have merit.

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[63] *DEL Equipment Inc. (Re)*, 2020 ONCA 555 at para 21, Tab 3 of BoA.
[64] *DEL Equipment Inc. (Re)*, *supra* note 63 at paras 21-22, Tab 3 of BoA; *Essar Steel Algoma Inc. (Re)*, 2017 ONCA 478 at para 32, Tab 5 of BoA; *Ontario Wealth Management Corporation v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500 at paras 43-46, Tab 10 of BoA.
[65] *CCAA,* s. 36.1.
[66] *BIA*, RSC 1985, c B-3, s 96(b)(ii)(A).
[67] LoyaltyOne, *supra* note 23 at para 47, Tab 9 of BoA. The Monitor sought to establish a transfer at undervalue under s. 96 of the *BIA*.

(a) Justice Conway Properly Considered the Balance Sheet Test

52. The definition of "insolvent person" in section 2 of the *BIA* includes three disjunctive tests for determining whether a person is insolvent:

> **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; (personne insolvable)[68]

53. In seeking leave to appeal this part of the Order, the Monitor argues that Conway J. failed to consider subdefinition (c), commonly referred to as the balance sheet test. This is untrue. In fact, the first solvency test that Conway J. considers is the balance sheet test:

> First, LoyaltyOne's expert, Mr. Harrington, gave various ranges of the fair market value of LoyaltyOne as at the Spin Date. These values range from a low of $452 million (comparable companies approach) to $656 million (discounted cash flow approach). He then added the full amount of LoyaltyOne's $675 million liability under the Credit Agreement to conclude that the company was insolvent.[69]

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[68] *BIA*, RSC 1985, c B-3, s 2.
[69] LoyaltyOne, *supra* note 23 at paras 41-42, Tab 9 of BoA.

54. The range of values that Conway J. is discussing are the different approaches to the balance sheet solvency test put forward by LoyaltyOne's and the Monitor's expert, Andrew Harington. In Mr. Harington's first report, he notes that the definition at subsection (c) of "insolvent person" in the *BIA* does not define the phrase "at a fair valuation" and that, accordingly, there are different accepted approaches to completing the balance sheet test.[70] His report then distinguishes between going-concern approaches (which include earnings-based methods such as discounted cashflow) and liquidation approaches (which assume the business is being liquidated). Mr. Harington then opined as follows:

> In view of the profitability of LoyaltyOne [on the Spin Date], even with adjustment for the loss of Sobeys as discussed herein, I consider a going-concern approach, rather than a liquidation approach, to be applicable to the question of assessing whether LoyaltyOne was solvent [on the Spin Date] under the balance sheet solvency test.[71]

55. Having determined the appropriate method in the circumstances, Mr. Harington proceeded to use going-concern approaches (which incorporate the company's earnings and cashflows) to the balance sheet test in both of his reports and it is these calculations that Conway J. engages with in her reasons. Mr. Harington opines in his second report that LoyaltyOne's fair market value was as high as $656 million, but that because LVI's debt under the Credit Agreement was $675 million, LoyaltyOne was insolvent.[72] In her reasons, Conway J. accepts the methodology and approaches employed by Mr. Harington for the balance sheet

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[70] Amended Reply Expert Report of Andrew Harington amended April 16, 2024 ("**Harington Report #1**"), pp. 27-28, Leave MR, Tab 9A.
[71] Harington Report #1, pp. 27-28, Tab 9A.
[72] Second Reply Expert Report of Andrew Harington dated May 1, 2024, Table 43, p. 6, Tab 11A.

test but after a review of the evidence she made two factual findings that affect the end calculations and conclusion regarding insolvency.

56. First, Conway J. held that on the record before her she was not prepared to find that Sobeys' departure from the AIR MILES program in June 2022 was foreseeable at the Spin Date.[73] Accordingly, Mr. Harington's fair value estimates (which assumed that Sobeys' departure was foreseeable at the Spin Date and therefore employed significant deductions for Sobeys' departure) were underestimates. Justice Conway specifically notes in her decision that Mr. Harington acknowledged on cross-examination that he did not know what the fair value of LoyaltyOne would have been if he had not deducted for Sobeys' departure.[74]

57. Second, Conway J. was not willing to attribute all of LVI's $675 million debt under the Credit Agreement to LoyaltyOne given that there was a second subsidiary business (BrandLoyalty) that was expected to contribute towards the debt.[75] This was a factual finding that Her Honour made based on the evidentiary record.

58. Justice Conway's findings led her to conclude that the Monitor's expert had underestimated LoyaltyOne's assets and overestimated LoyaltyOne's liabilities. Accordingly, Her Honour was not persuaded that LoyaltyOne was insolvent on the Spin Date under the balance sheet test.[76] In reaching this holding, Conway J. also

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[73] LoyaltyOne, *supra* note 23 at para 30 and 46, Tab 9 of BoA.
[74] LoyaltyOne, *supra* note 23 at para 44, Tab 9 of BoA.
[75] LoyaltyOne, *supra* note 23 at paras 43-44, Tab 9 of BoA.
[76] LoyaltyOne, *supra* note 23 at para 47, Tab 9 of BoA.

had the evidence of Bread's expert who opined that LoyaltyOne was solvent under various probabilities of Sobeys' departure, using the same approaches to the balance sheet solvency test recommended by Mr. Harington.[77] In her decision, Conway J. notes that given Mr. Harington's deductions for Sobeys she preferred the analysis of Bread's expert.[78]

59. In seeking leave to appeal, the Monitor appears to misunderstand its own expert's evidence and asserts that Conway J. only focused on the cashflow solvency test.[79] This is not true. The Monitor then contradicts its own expert by asserting that the foreseeability of Sobeys' departure (and its impact on cashflows) is not connected to the balance sheet test.[80] This is incorrect for the reasons Mr. Harington set out in his first report. Justice Conway employed the balance sheet test as presented to her by the Monitor's expert. That Conway J.'s factual findings related to the balance sheet test do not accord with LoyaltyOne's and the Monitor's desired outcome does not constitute a legal error.

(b) Justice Conway Did Not Fail to Consider Material Evidence

60. The Monitor further argues that Conway J. made a palpable and overriding error by writing that "[t]here is no analysis of how the [Credit Agreement] debt was allocated" among LVI, LoyaltyOne, and BrandLoyalty.[81] The Monitor argues there was in fact "material evidence" in the motion records regarding the liabilities of

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[77] Reply Expert Report of A. Scott Davidson & Kathryn Gosnell of Kroll Canada Limited dated April 15, 2024 at para 2.
[78] LoyaltyOne, *supra* note 23 at para 46, Tab 9 of BoA.
[79] Leave Factum at paras 10 and 64.
[80] Leave Factum at para 70.
[81] Leave Factum at 62; LoyaltyOne, *supra* note 23 at para 43, Tab 9 of BoA.

LoyaltyOne, including the allocation of the Credit Agreement debt.[82] This argument fundamentally misinterprets Conway J.'s decision and the evidence in the record on this issue.

61. In written argument and at the hearing, the Monitor advanced the position that the structure of LoyaltyOne's guarantee and the poor performance of BrandLoyalty meant that all the Credit Agreement debt should be considered a liability of LoyaltyOne. The Monitor's evidence on BrandLoyalty's expected performance came predominantly from the affidavit of Cynthia Hageman, who admitted on cross-examination that she was not involved in the financial modelling related to the Spin Transaction.[83]

62. Conversely, Bread led evidence that at the time of the Spin Transaction the parties were optimistic about BrandLoyalty's growth.[84] Bread also tendered an LVI slide deck from two months after the Spin Transaction that suggested that LVI believed BrandLoyalty's revenue would be able to service at least $160 million of the Credit Agreement debt.[85]

63. Justice Conway was aware of and considered the evidence from both sides. Her reasons make clear that she accepted Bread's evidence that both LoyaltyOne and BrandLoyalty were expected to contribute to LVI's debt but she notes that neither side tendered evidence that constituted a definitive analysis of how LVI,

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[82] Leave Factum at paras 65-67.
[83] Hageman Transcript, Q206-210, Joint Transcript & Exhibits Brief, Leave MR, Tab 22.
[84] Motes Affidavit #2 at paras 18-19, Leave MR, Tab 15.
[85] Examination of Andrew Harington, slide 3 of Exhibit 48, Joint Transcript & Exhibits Brief, Leave MR, Tab 22.

LoyaltyOne, and BrandLoyalty allocated the Credit Agreement debt. This is true and her statement that there is “no analysis” should not be interpreted to mean that there is “no evidence”, as LoyaltyOne and the Monitor now argue.

64. Ultimately, Conway J. held that to allocate 100% of LVI’s debt to LoyaltyOne when there was a second operating business that was expected to contribute revenues to pay down the group debt required more and better evidence and analysis than the scant mention of it made by LoyaltyOne and the Monitor in the record, particularly where it was the Monitor’s burden to establish insolvency at the time of the Spin Transaction. This was a reasonable holding made after considering the evidence. It is not a failure to consider material evidence.

65. Regardless, any alleged error on debt allocation does not change the outcome of Conway J.’s decision. Justice Conway held the Monitor had failed to establish insolvency on the Spin Date because (a) the impact of Sobeys’ departure should not be factored into the fair value of LoyaltyOne’s assets; and (b) the entirety of LVI’s debt should not be allocated to LoyaltyOne. Neither LoyaltyOne nor the Monitor take issue with Conway J.’s finding regarding Sobeys’ departure and accordingly her debt allocation finding is not dispositive.

66. Proving insolvency under the balance sheet test or any other relevant test was the Monitor’s burden in advancing a transfer at undervalue claim. After a thorough review of the evidentiary record, Justice Conway held that the Monitor had failed to meet its burden. Justice Conway’s factual findings are to be afforded deference and there is no merit to the Monitor’s attempt to appeal the Transfer at Undervalue Decision.

ii. The Proposed Appeal is not of Significance to the Practice

67. Justice Conway's Transfer at Undervalue Decision was also highly fact-specific and discretionary. It was based on a set of facts that are unique to this case and the expert evidence that was before her, making it very unlikely that the proposed appeal will be of significance or precedential value in other proceedings.

68. LoyaltyOne and the Monitor argue that Conway J.'s "incorrect interpretation of 'insolvent person' [….] will significantly constrain how the term 'insolvent person' is interpreted throughout the *BIA* (and *CCAA*) as a whole […]".[86] This is untrue. Justice Conway does not apply a novel interpretation to "insolvent person": she applied the statutory definition to the facts at hand using the methodology of LoyaltyOne's own expert.

69. LoyaltyOne and the Monitor further argue that Conway J.'s interpretation of "insolvent person" resulted in her stopping "the TUV analysis prematurely."[87] This is not the case. Justice Conway decided on the facts that LoyaltyOne was not insolvent on the Spin Date. There was no need for her to continue her analysis when the Monitor failed to establish the first part of the test.

iii. The Proposed Appeal is Not of Significance to this *CCAA* Proceeding

70. For the reasons set out in the disclaimer section of this Factum, the proposed appeal is not of significance to this *CCAA* proceeding.

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[86] Leave Factum at para 59.
[87] Leave Factum at para 60.

iv. Whether the Proposed Appeal Will Unduly Hinder the Progress of the Action is a Neutral Factor

71. For the reasons set out in the disclaimer section of this Factum, whether the proposed appeal will unduly hinder the progress of this action is in this case a neutral factor that is not determinative of whether leave should be granted.

PART IV - ORDER REQUESTED

72. LoyaltyOne and the Monitor have not satisfied the test for leave to appeal from a discretionary decision of a *CCAA* supervising judge. Accordingly, their motion should be dismissed. Bread requests that the motion of LoyaltyOne and the Monitor seeking leave to appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of October 2024.

STIKEMAN ELLIOTT LLP
Lawyers for Bread Financial Holdings, Inc.

SCHEDULE "A"

LIST OF AUTHORITIES

Caselaw	
1	*9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521
2	*Aveos Fleet Performance Inc./Aveos Fleet performance aéronautique inc. (Arrangement relatif à)*, 2012 QCCS 6796
3	*DEL Equipment Inc. (Re)*, 2020 ONCA 555
4	*Edgewater Casino Inc. (Re)*, 2009 BCCA 40
5	*Essar Steel Algoma Inc. (Re)*, 2017 ONCA 478
6	*Laurentian University of Sudbury (Re)*, 2021 ONCA 199
7	*Laurentian University of Sudbury (Re)*, 2021 ONCA 448
8	*Laurentian University of Sudbury*, 2021 ONSC 3272
9	*LoyaltyOne, Co. (Re)*, 2024 ONSC 3866
10	*Ontario Wealth Management Corporation v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500
11	*Target Canada Co. (Re)*, 2015 ONSC 1028
12	*Timminco Limited (Re)*, 2012 ONSC 4471
13	*Urbancorp Inc. v. 994697 Ontario Inc.*, 2023 ONCA 126
Authorities	
14	Canada, Parliament, *House of Commons Debates*, 38th Parl, 1st Sess, Vol 128 (29 September 2005).

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Companies' Creditors Arrangement Act, RSC 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.

Court of appeal

14 (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

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.

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, RSC 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; (*personne insolvable*)

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.

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 File No. COA-24-OM-0248
Court File No. CV-23-00707017-0000

ONTARIO
COURT OF APPEAL FOR ONTARIO
Proceeding Commenced at Toronto

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