

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

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

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

(the “**Applicant**”)

**FACTUM OF THE APPLICANT
(Stay Extension and Distribution Order & Approval and Vesting Order)**

June 30, 2023

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PART I - INTRODUCTION

1. The Applicant's CCAA Proceeding¹ has progressed to a point where substantially all of its operating assets have been sold, and the Applicant is seeking authority to make distributions to its secured lenders. The Applicant also seeks an extension of the stay of proceedings to facilitate the Applicant's ongoing efforts to realize on its remaining assets, which are primarily litigation claims. In relation to the remaining assets, the Applicant is also seeking an approval and vesting order for the sale of certain surplus office furniture.

2. For over three decades, the Applicant operated the AIR MILES[®] Reward Program. In that time, the AIR MILES[®] Reward Program built strong relationships between Canadian consumers enrolled in the program, known as "Collectors" and the Applicant's customers, known as "Partners".² At the filing date, there were over 10 million active Collector accounts and hundreds of brands that participated in the AIR MILES[®] Reward Program. The Applicant's most significant Partner (the largest participant in the program) was Bank of Montreal ("**BMO**").³

3. Facing substantial financial and operational challenges as a result of actions by its former parent, the Applicant commenced this proceeding under the *Companies' Creditors Arrangement Act* (this "**CCAA Proceeding**") in March of 2023 and at the comeback hearing, sought and obtained approval of a sale and investment solicitation process (the "**SISP**"). The SISP was supported by an asset purchase agreement (the "**BMO APA**") with BMO as buyer, which was designed as a stalking horse bid.⁴

¹ Unless otherwise defined, capitalized terms have the meaning given to them in the the Fourth Report of the Monitor dated June 27, 2023 [Fourth Report].

² Third Report of the Monitor dated May 8, 2023 at 2.3 [Third Report]; Pre-Filing Report of the Proposed Monitor dated March 10, 2023 (Exhibit A to the Third Report) at 2.3 [Pre-Filing Report].

³ Third Report at 2.3.

⁴ *LoyaltyOne Co. (Re)*, (March 10, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Initial Order](#)); *LoyaltyOne Co. (Re)*, (March 20, 2023), ONSC (Commercial List), Court File No. CV-23-

4. Following completion of the SISP, where no competing qualified bids were received at the bid deadline, the BMO APA, as amended, was selected as the successful bid. The Court granted an approval and vesting order in respect of the BMO APA on May 12, 2023. On June 1, 2023, the transaction contemplated by the BMO APA closed and accordingly the Applicant sold substantially all of its operating assets to two affiliates of BMO.⁵

5. Following the closing of the sale, the Applicant holds certain cash on hand and the net proceeds of the transaction (collectively, the “**Cash and Proceeds**”) and certain additional assets which were excluded from the sale.⁶

6. Pursuant to an additional Order granted on May 12, 2023 (the “**Ancillary Relief Order**”), upon closing of the sale transaction, the Applicant’s directors and officers were deemed to have resigned (subject to certain limited exceptions) and the Monitor was authorized and empowered, but not required, to exercise any powers which may be properly exercised by a board of directors or any officers of the Applicant to cause the Applicant, through the Applicant’s Assistants (as defined in the ARIO) (then engaged, if any), to take the actions described in the Ancillary Relief Order.⁷

7. To facilitate the next steps in this CCAA Proceeding, the Applicant is seeking two orders: (i) the Stay Extension and Distribution Order, that among other things, (A) authorizes one or more distributions of the Cash and Proceeds on the terms set out therein, (B) reduces or eliminates certain of the Court-ordered charges in respect of amounts that have been satisfied, (C) extends the Stay Period (as defined in the Third Report) for approximately 12 months in order to provide the Applicant with time to make distributions, complete various post-closing matters and to

00696017-00CL ([SISP Approval Order](#)) [SISP Approval Order]. *LoyaltyOne Co. (Re)*, (March 20, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Endorsement](#)) [March 20 Endorsement].

⁵ Fourth Report at 1.0(6)-(7); 2.2(3).

⁶ Fourth Report at 1.0(8).

⁷ *LoyaltyOne Co. (Re)*, (May 12, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Ancillary Relief Order](#)).

advance the realization of its remaining assets, including litigation claims, and (D) approves the fees and activities of the Monitor and its counsel to date; and (ii) the Approval and Vesting Order (FF&E), that approves a sale of certain furniture, fixtures and equipment remaining at the Applicant's former Toronto headquarters to the landlord.⁸

PART II - SUMMARY OF FACTS

A. BACKGROUND

8. The Applicant is an indirect subsidiary of Loyalty Ventures Inc. ("**LVI**"), a Delaware corporation. LVI is a holding company that was formed as part of a transaction (the "**Spinoff Transaction**") completed in November 2021 by Bread Financial Holdings, Inc. (formerly known as Alliance Data Systems Corporation) ("**Bread**").⁹

9. Pursuant to the Spinoff Transaction, Bread: (i) required LVI to borrow and the Applicant, among others, to guarantee US\$675 million of senior secured debt pursuant to the Credit Agreement and to transfer the proceeds thereof, after payment of transaction costs, to Bread; and (ii) extracted US\$100 million of cash from the balance sheets of LVI's subsidiaries, including the Applicant. As part of the Spinoff Transaction, Bread also caused LVI to enter into a series of agreements, including a transition services agreement through which Bread would continue to provide operational services to LVI and its subsidiaries.¹⁰

10. In light of these challenges, the Applicant considered various restructuring options and, prior to the commencement of this CCAA Proceeding, the Applicant and BMO entered into the initial version of the BMO APA, which provided for a purchase price of US\$160 million, subject to

⁸ Fourth Report at 1.1(1).

⁹ Third Report at 2.2.

¹⁰ Third Report at 2.2.

certain adjustments, plus the assumption of certain liabilities, to be used as a “stalking horse” bid in the SISP.¹¹

B. THE CCAA PROCEEDING AND THE CHAPTER 11 PROCEEDING

(i) The Initial Filings

11. On March 10, 2023: (i) the Applicant was granted protection under the CCAA; (ii) LVI and three of its affiliates (collectively, the “**U.S. Debtors**”) commenced the U.S. Proceedings; and (iii) LVI and certain of its subsidiaries, including the Applicant, entered into the Transaction Support Agreement with the Credit Facility Agent and certain Credit Agreement Lenders (collectively, with the other Credit Agreement Lenders that later entered into the Transaction Support Agreement, the “**Consenting Stakeholders**”). The Transaction Support Agreement outlined the terms on which the parties thereto agreed to implement, support, and/or consent to, among other things, the Transaction.¹²

12. At the Comeback Hearing on March 20, 2023, this Court granted two orders:

- (a) the ARIO that, among other things (i) extended the Stay Period until and including May 18, 2023; (ii) authorized the Applicant to borrow funds under the DIP Facility to finance the Applicant’s working capital requirements and make the Intercompany DIP Loan (as defined in the Third Report) to LVI consistent with the budget and granted the DIP Lender’s Charge to the maximum amount of US\$70 million to secure amounts advanced under the DIP Facility; (iii) authorized the Applicant to enter into the Transaction Support Agreement, and directed the Applicant to comply with its obligations thereunder; (iv) approved two Employee Retention Plans and granted the Employee Retention Plans Charge (each as

¹¹ Fourth Report at 1.0(3).

¹² Fourth Report at 1.0; 2.3.2(2).

defined in the ARIO) to the maximum amount of \$5.35 million; and (v) approved the retention of PJT Partners LP (the “**Financial Advisor**”), and granted the Financial Advisor Charge to the maximum amount of US\$6 million;¹³ and

- (b) an order (the “**SISP Approval Order**”) that, among other things: (i) approved the SISP in respect of the Applicant’s business and assets; (ii) authorized the Applicant’s entry, *nunc pro tunc*, into the initial version of the BMO APA, solely for use as a “stalking horse bid” in connection with the SISP; (iii) approved the Bid Protections and granted the Bid Protections Charge to the maximum amount of US\$4 million; and (iv) authorized the Applicant to implement the SISP pursuant to its terms and authorized and directed the Applicant, the Financial Advisor, and the Monitor to perform their respective obligations and to do all things reasonably necessary to perform their obligations under the SISP.¹⁴

13. By May 1, 2023, the Applicant had drawn the full principal amount of the DIP Facility (US\$70 million) to fund its ongoing business operations, its restructuring, including financing the Intercompany DIP Loan in support of the U.S. Proceedings.¹⁵

(ii) The U.S. Plan

14. On a parallel path, and consistent with the Transaction Support Agreement, the U.S. Debtors pursued a plan of liquidation in the U.S. Proceedings (the “**U.S. Plan**”). On April 27, 2023, the U.S. Bankruptcy Court granted an order approving the U.S. Plan.¹⁶

15. On May 1, 2023, this Court granted an Order (the “**U.S. Plan Performance Approval Order**”) (a) approving the compromise of claims, grant of releases, and payments by the Applicant

¹³ *LoyaltyOne Co. (Re)*, (March 20, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([ARIO](#)) [ARIO].

¹⁴ [SISP Approval Order](#); Third Report at 1(3).

¹⁵ Third Report at 3.1.

¹⁶ Third Report at 1(5).

set out in the U.S. Plan; and (b) partially lifting the stay of proceedings to allow the Applicant to comply with and give effect to the U.S. Plan.¹⁷

16. The U.S. Plan was implemented in accordance with its terms and the orders of the U.S. Court on June 2, 2023. Upon implementation, a liquidating trust was formed to pursue claims against Bread and certain other parties for the benefit of the U.S. Debtors' stakeholders, including the Credit Agreement Lenders. The claims held by the liquidating trust are the only material remaining assets that may be available for distributions to creditors of LVI.¹⁸

C. THE TRANSACTION

17. No competing bids having been submitted, the transaction contemplated by the BMO APA was the only viable option that emerged from the SISP. On May 12, 2023, the Court granted the following three orders:

- (a) the AVO, among other things, approving the Transaction and, upon closing, vesting the Purchased Assets in BMO's designees (the "**Buyers**") and requiring the Applicant to: (i) repay all indebtedness owing under the DIP Facility secured by the DIP Lender's Charge; and (ii) pay all obligations owing to the Financial Advisor secured by the Financial Advisor Charge;¹⁹
- (b) an order assigning the Assigned Contracts to the Buyers upon closing; and
- (c) the Ancillary Relief Order.²⁰

¹⁷ *LoyaltyOne Co. (Re)*, (May 1, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Endorsement](#)) at para. 7; *LoyaltyOne Co. (Re)*, (May 1, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([U.S. Plan Performance Approval Order](#)).

¹⁸ Third Report at 2.2.

¹⁹ *LoyaltyOne Co. (Re)*, (May 12, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Approval and Vesting Order](#)).

²⁰ [Ancillary Relief Order](#); *LoyaltyOne Co. (Re)*, (May 12, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Endorsement](#)) at paras. 2, 3; Third Report at 1.1.

18. The Transaction closed on June 1, 2023, and in accordance with the BMO APA, BMO paid the cash purchase price of US\$160,259,861 as follows: (i) US\$77,175,584 to the Applicant; (ii) US\$73,084,277 to the DIP Lender to fully repay the DIP Facility and discharge the DIP Lender's Charge; and (iii) US\$10 million into an escrow account maintained by the Monitor as escrow agent, to be held pending the calculation of the purchase price adjustments (the "**Adjustment Escrow Amount**").²¹

19. The process for determination of the final purchase price is set out in the BMO APA and provides for BMO to deliver a draft closing statement setting out BMO's calculation of certain purchase price adjustment components not later than 90 calendar days after the closing, being August 30, 2023. To the extent the parties are unable to resolve any disputes relating to the proposed purchase price adjustments, the BMO APA provides for the resolution of disputes by the Monitor or, in certain circumstances, by an arbitrator. Under the terms of the BMO APA, the maximum amount of potential purchase price adjustments is the Adjustment Escrow Amount (US\$10 million). The Applicant and the Buyers are continuing to work through the post-closing steps at this time.²²

20. In connection with the Transaction, the Applicant's employees were provided with offers of employment from BMO and commenced their employment with BMO effective on June 1, 2023. Two employees of the Applicant did not accept their offer of employment from BMO and were terminated effective on May 31, 2023. In addition, 20 employees of the Applicant continued to work for the Applicant until June 18, 2023 (the "**Transition Employees**") to provide certain month end accounting services. After June 18, 2023, each of the Transition Employees commenced employment with BMO. Each former employee has been paid all amounts owing in respect of

²¹ Fourth Report at para 2.2(3).

²² Fourth Report at 2.2(3)-(5).

wages and vacation pay according to the Applicant's books and records, including all amounts secured under the Employee Retention Plans Charge.²³

21. The Applicant has also made the payments required in the AVO.²⁴

D. THE REMAINING ASSETS

22. Along with the post-closing matters related to the Transaction, the Applicant, under the direction of the Monitor, has been working to disclaim any unnecessary agreements, liquidate any remaining physical assets and to determine the best path forward to realize on the remaining assets. Among the remaining assets are litigation claims, including the Applicant's dispute of a tax reassessment in connection with the Applicant's 2013 income tax return pursuant to which the CRA reassessed the Applicant's liability for that year as \$110 million (the "**CRA Litigation**"). Under certain scenarios, if the Applicant is successful in the CRA Litigation, it may be entitled to a return of the approximately \$97 million in value it has already provided to CRA in order to pursue the CRA Litigation in accordance with applicable regulation. A trial of the CRA Litigation is scheduled for the fall of 2024.²⁵

23. With respect to the remaining physical assets in the Applicant's former Toronto headquarters (the "**FF&E**"), the Applicant, with the assistance of the Monitor, engaged an experienced liquidator to develop a liquidation strategy. The liquidator's proposal provided for the conduct of an online auction and the removal of the FF&E from the leased space within 45 days. Both the Monitor and the liquidator had concerns regarding the ability to sell and remove all of the FF&E within the proposed timeline.²⁶

²³ Fourth Report at 3.2.

²⁴ Fourth Report at 3.2.

²⁵ Fourth Report at 3.4(2) and 6.0.

²⁶ Fourth Report at 4.0(3).

24. In connection with the Applicant's issuance of a disclaimer to First Gulf KEC Development Limited, the landlord under the Toronto office lease (the "**Landlord**") and the Applicant entered into discussions regarding the FF&E. The Applicant and the Landlord ultimately entered into a bill of sale (the "**Bill of Sale**") for the sale of the Applicant's right, title and interest in and to any remaining FF&E as listed on the schedule to the Bill of Sale to the Landlord for \$360,000 plus HST (the "**FF&E Sale**"). The Bill of Sale contains no representations or warranties but provides that the Applicant will seek a vesting order from this Court. The Applicant has agreed to pay a fee to the liquidator to compensate it for the costs incurred and lost commissions. Notwithstanding this fee, the Monitor believes that the expected recovery is similar to what could have been achieved through an auction. In addition, the FF&E Sale relieves the Applicant of the administrative burdens of an auction and the costs removal of any remaining FF&E from the leased premises prior to the effective date of the disclaimer, while also providing certainty with respect to realization on the FF&E and limiting further professional costs.²⁷

E. MONITOR'S FEES AND ACTIVITIES

25. The Fourth Report attaches affidavits from representatives of the Monitor and its counsel that provide, among other things, each account (redacted for matters of privilege) and summary tables identifying the individual professionals who have worked on this matter, their hourly billing rates and the total number of hours worked.²⁸ The activities of the Monitor and its counsel have also been described in the other reports filed in this CCAA Proceeding.²⁹

26. The fees (excluding disbursements and HST) of the Monitor from the commencement of this CCAA Proceeding to May 31, 2023 total \$807,966.50. The fees (excluding disbursements

²⁷ Fourth Report at 4.0.

²⁸ Fourth Report at Appendices B and C.

²⁹ Pre-filing Report of the Proposed Monitor dated March 10, 2023; First Report of the Monitor dated March 16, 2023; Second Report of the Monitor dated April 27, 2023; Third Report, and Fourth Report.

and HST) of Goodmans from the commencement of this CCAA Proceeding to June 6, 2023 total \$702,414.50.³⁰

27. The Monitor and its counsel billed amounts at hourly rates consistent with the market and the circumstances of this CCAA Proceeding.³¹

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

28. The issues to be determined on this Motion are whether

- (a) the distribution to the Credit Facility Agent should be approved on the terms set out in the Stay Extension and Distribution Order;
- (b) the stay should be extended to June 28, 2024;
- (c) the Directors' Charge should be reduced to \$2 million and the Employee Retention Plans Charge should be released;
- (d) the FF&E Sale should be approved; and
- (e) the activities of the Monitor and the fees and disbursements of the Monitor and its counsel should be approved.

A. DISTRIBUTION

29. Section 11 of the CCAA provides that a court may make any order it considers appropriate in the circumstances and grants this Court the authority to approve distributions to creditors, during the pendency of CCAA proceedings even where such distributions occur outside of a plan of compromise or arrangement.³² As this Court held in *Re Nortel Networks Corporation et al.*

³⁰ Fourth Report at 7(1).

³¹ Fourth Report at 7(4).

³² *AbitibiBowater Inc.*, [2009 QCCS 6461](#) at para. 71; *Nortel Networks Corp.*, *Re*, [2014 ONSC 4777](#) at paras. 54 and 55 [*Nortel*].

[58] I see no difference between an interim distribution, as in the case of *AbitibiBowater*, or a final distribution, as in the case of *Timminco*, or a distribution to an unsecured or secured creditor, so far as a jurisdiction to make the order is concerned without any plan of arrangement.³³

30. This Court has exercised its discretion to grant similar distribution orders in recent cases, including in *Harte Gold*, *Greenspace Brands*, and *Fresh Food Group*.³⁴

31. The Stay Extension and Distribution Order sought authorizes the Applicant only to distribute the Cash and Proceeds and to retain sufficient funds to satisfy the Priority Amounts, which include not only the remaining Charges, but also the amounts required to continue the administration of this CCAA Proceeding (as determined by the Applicant in consultation with the secured creditors or further Order of the Court). Other than the beneficiaries of the Charges, the Credit Facility Agent, as agent for the Credit Agreement Lenders, is the only remaining secured creditor of the Applicant. Distribution of additional recoveries other than the Cash and Proceeds of the Transaction, if any, will be subject to further Court Order.

32. The Monitor's counsel, Goodmans, has provided an Ontario law opinion to the Monitor that, subject to customary assumptions and qualifications, the security relating to the Credit Agreement creates a validly perfected security interest in favour of the Credit Facility Agent in the Credit Agreement Collateral).³⁵

33. The expected distribution is less than the amount of the obligations outstanding under the Credit Agreement and it is anticipated that the Credit Facility Agent will suffer a significant shortfall.

³³ *Nortel* at para. 58.

³⁴ *Harte Gold Corp., Re*, (February 15, 2022) ONSC (Commercial List), Court File No. CV-21-00673304-00CL ([CCAA Distribution and Termination Order](#)) (Penny, J); *Greenspace Brands Inc., Re* (June 15, 2023) ONSC (Commercial List), Court File No. CV-23-00697516-00CL ([Ancillary Relief Order](#)) (McEwen, J); *TGF Acquisition Parent Ltd., Re*, (April 13, 2021) ONSC (Commercial List), Court File No. CV-21-00657098-00CL ([Distribution Order](#)) (Hailey, J) [*Fresh Food*].

³⁵ Fourth Report at 2.3.2(5).

As such, there is no prejudice to any party in permitting a distribution to the Credit Facility Agent at this time.

34. Notice of this motion has been given to the service list in this CCAA Proceeding (which includes relevant taxing authorities) and the Applicant is not aware of any party opposing the proposed distribution being sought in the Stay Extension and Distribution Order.

35. The Applicant has now also received a Comfort Letter from CRA in relation to the proposed distributions, which is being held in escrow pending the outcome of this motion that, subject to the issuance of the proposed Stay Extension and Distribution Order, will permit the Applicant to effect the proposed distribution expeditiously, for the benefit of the parties in interest, being the Credit Agreement Lenders.³⁶ The Applicant has also discussed the form of proposed Stay Extension and Distribution Order with counsel for CRA and understands that CRA does not intend to oppose the order.

36. The proposed Stay Extension and Distribution Order provides that the Applicant shall make all distributions to the Credit Facility Agent for application by the Credit Facility Agent (i) in accordance with the provisions of the Credit Agreement (including the payment of all fees, expenses, charges, and all other amounts payable to the Credit Facility Agent in its capacity as such) and applicable law; and (ii) following authorization and direction from the Required Lenders (as defined in the Credit Agreement), in order to enable the Credit Facility Agent to provide the necessary funding to fund the LVI Chapter 11 Litigation Trust as is contemplated by, and in accordance with, the LVI Chapter 11 Plan. As such, the Credit Facility Agent may, as contemplated under the LVI Chapter 11 Plan, fund the LVI Chapter 11 Litigation Trust with a

³⁶ Fourth Report at 3.3.

portion of any distributions made pursuant to the proposed Stay Extension and Distribution Order.³⁷

37. The distribution framework set forth in the proposed Stay Extension and Distribution Order is appropriate in the circumstances and provides an efficient means for the Applicant to distribute Cash and Proceeds while retaining sufficient amounts to satisfy the Priority Amounts and such other amounts as the Applicant, with the consent of the Requisite Consenting Lenders (as defined in the Transaction Support Agreement) or further Order of this Court, determines necessary, including to facilitate the ongoing administration of this CCAA Proceeding and the activities of the Applicant. The Consenting Stakeholders are supportive of the requested order, including the language which confirms the Credit Facility Agent's authority to apply the proceeds in accordance with the Credit Agreement and applicable law.

B. STAY EXTENSION

38. Section 11.02 of the CCAA provides that this Court may grant an extension of the Stay Period for any period it deems necessary, provided that the Applicant has satisfied this Court that: (i) the extension is appropriate; and (ii) it has acted, and is acting, in good faith and with due diligence.³⁸

39. There is no "standard" length of time for which the Stay Period should or must be extended. Rather, the length of a stay extension depends on this Honourable Court's view of what is most appropriate in the circumstances, and is therefore, highly fact specific.³⁹

³⁷ Fourth Report at 3.1.

³⁸ CCAA, s. 11.02.

³⁹ *U.S. Steel Canada Inc., Re*, [2016 ONSC 3106](#) at para. 15; *Crystallex International Corporation (Re)*, (November 18, 2021), ONSC (Commercial List), CV-11-9532-00CL ([Endorsement](#)) at para. 9 (Conway, J) ("if this stay extension motion is any indication, these motions are battlefields for all sorts of issues that are time consuming and costly. Three months intervals will only consume additional resources and detract from the company's main focus, which is to secure recovery for stakeholders through the US enforcement proceeding."); *Crystallex International Corporation (Re)*, (December 12, 2022), ONSC (Commercial List), CV-11-9532-00CL ([Order](#)).

40. Following the proposed distribution, the remaining activities of the Applicant will include, among other things: (i) prosecuting any remaining litigation claims for the benefit of stakeholders; (ii) liquidating the remaining assets; and (iii) attending to remaining post-closing matters (the “**Remaining Activities**”).⁴⁰

41. The current Stay Period expires on July 14, 2023. The requested Stay Extension up to and including June 28, 2024 is required to complete the Remaining Activities. In particular, if the CRA Litigation proceeds to trial, the trial will not occur until the fall of 2024. Similarly, the other potential claims held by the Applicant will take significant time to assess and, if appropriate, fully litigate. As a result, the Applicant is seeking an extension of the Stay Period to June 28, 2024, at which point it will return to Court to seek a further extension, if necessary. In the interim period, the Monitor will report to the Court and stakeholders no less frequently than every 6 months.⁴¹

42. The Applicant has acted, and continues to act, with due diligence and in good faith in this CCAA Proceeding to achieve the best available outcome for its stakeholders and will have sufficient funds to pay its post-filing obligations as they come due pursuant to the Holdbacks (as defined in the Fourth Report). The Monitor supports the Stay Extension.⁴² The Stay Extension sought is, therefore, appropriate in the circumstances.

C. CHARGES

43. The Directors’ Charge was approved to protect the Directors and Officers from any liabilities they may incur in their capacity as such following the commencement of this CCAA Proceeding, including unpaid wages, source deductions, vacation pay, and sales taxes. At this

⁴⁰ Fourth Report at 6.0.

⁴¹ This Court has granted similar relief in recent decisions: see, for example, *Crystallex International Corporation (Re)*, (December 12, 2022), ONSC (Commercial List), Court File No. CV-11-9532-00CL ([Order](#)) at para. 4; *Crystallex International Corporation (Re)*, (December 12, 2022), ONSC (Commercial List), CV-11-9532-00CL ([Endorsement](#)); *Tricon Films and Television, Re*, (April 11, 2017), ONSC (Commercial List), CV16-11634-00CL ([Approval Order – Distribution Agreement](#)) at para. 4.

⁴² Fourth Report at 6.0.

point, the Applicant is no longer conducting any business operations and does not have any employees. In addition, each former employee of the Applicant has been paid all amounts owing in respect of wages and vacation pay according to the Applicant's books and records, all source deductions have been remitted and all HST has been remitted for the period ending May 31, 2023. Therefore, the known obligations secured under the Directors' Charge have been paid in full. However, out of an abundance of caution, the Applicant is requesting that this Court not discharge the Directors' Charge, but reduce it from \$15.409 million to \$2 million, with the balance to be released on a future motion. The Monitor approves this reduction to the Directors' Charge.⁴³ The former Directors and Officers who are beneficiaries of the Directors' Charge were served with notice of this motion.

44. In addition, all payments required under the Employee Retention Plans have been made and the Applicant has no remaining employees. Therefore, there is no further need for the Employee Retention Plans Charge.⁴⁴

45. This Court has granted similar relief, releasing or reducing charges upon satisfaction of the obligations secured thereunder in recent cases such as *Greenspace* and *Old CLHC Company* (f/k/a *Clover Leaf Seafoods Company*).⁴⁵

D. THE FF&E SALE

46. Under section 36 of the CCAA, this Court may authorize the Applicant to sell or otherwise dispose of its assets outside of the ordinary course of business free and clear of any security, charge or other restriction.⁴⁶ While the ARIO permits a single sale of up to \$250,000 or multiple

⁴³ Fourth Report at 3.2(2).

⁴⁴ Fourth Report at 3.2(4).

⁴⁵ *Greenspace Brands Inc., Re* (June 15, 2023) ONSC (Commercial List), Court File No. CV-23-00697516-00CL ([Ancillary Relief Order](#)) at paras 23-25; *Old CLHC Company, Re*, (January 29, 2021) ONSC (Commercial List), Court File No. CV-19-631523-00CL ([Distribution, Discharge and Termination Order](#)) at para 9.

⁴⁶ CCAA, s. 36; *PCAS Patient Care Automation Services Inc. (Re)*, [2012 ONSC 3367](#) at para. 54.

sales up to \$1 million, the proposed FF&E Sale contemplates consideration of \$360,000 plus HST, therefore requiring a separate approval from this Court.⁴⁷

47. In deciding whether to exercise its discretion to approve the FF&E Sale, this Court must review the FF&E Sale as a whole and decide whether it is appropriate, fair, and reasonable.⁴⁸

Section 36(3) of the CCAA provides a non-exhaustive list of factors to be considered:⁴⁹

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances. The Applicant, with the assistance of the Monitor, engaged an experienced liquidator to evaluate the value of the FF&E and assist the Applicant in their realization. The Applicant also entered into discussions with the Landlord, pursuant to which the Applicant and the Landlord entered into a Bill of Sale for the FF&E, with a purchase price similar to the expected proceeds of an auction through the liquidator;⁵⁰
- (b) whether the Monitor approved the process leading to the proposed sale or disposition. The Monitor approved the process leading to the FF&E Sale and has opined that further time marketing the Remaining FF&E may result in professional costs exceeding any incremental sale proceeds;⁵¹
- (c) whether the Monitor filed a report with the court stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy. In the Fourth Report, the Monitor supports the FF&E Sale;⁵²

⁴⁷ [ARIO](#) at para 12.

⁴⁸ *PCAS Patient Care Automation Services Inc. (Re)*, [2012 ONSC 3367](#) at para. [54](#); *Veris Gold Corp. (Re)*, [2015 BCSC 1204](#) at para. [23](#) [*Veris Gold*], citing *White Birch Paper Holding Co., Re*, [2010 QCCS 4915](#) at para. [49](#) [*White Birch*].

⁴⁹ CCAA, s. 36(3); *White Birch* at para. [48](#).

⁵⁰ Fourth Report at 4.0.

⁵¹ Fourth Report at 4.0.

⁵² Fourth Report at 4.0.

- (d) the extent to which the creditors were consulted. The Applicant has consulted with, among others, the Consenting Stakeholders with respect to the FF&E Sale;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties. The FF&E Sale relieves the Applicant from paying for the removal of the assets from the Toronto premises before the effective disclaimer of the Toronto lease on July 10, 2023 and from other disposition costs;⁵³ and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value. The purchase price in the FF&E Sale is comparable to the proceeds expected to be obtained at an auction of those assets and is, accordingly, fair and reasonable.⁵⁴

48. The section 36(3) factors are not intended to be exhaustive and the principles established in *Royal Bank v. Soundair Corp.* for the approval of a sale in an insolvency proceeding remain relevant.⁵⁵ Applying these principles, courts examine: (i) whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently; (ii) the interests of all parties; (iii) the efficacy and integrity of the process by which offers were obtained; and (iv) whether there has been unfairness in the working out of the process.⁵⁶ As set out above, each of these principles support approval of the FF&E Sale.

⁵³ Fourth Report at 4.0.

⁵⁴ Fourth Report at 4.0.

⁵⁵ *Veris Gold* at paras. [22 – 25](#); *LoyaltyOne Co. (Re)*, (May 12, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Endorsement](#)) at para 7.

⁵⁶ *Royal Bank v. Soundair Corp.* (1991), 83 DLR (4th) 76, [1991 CarswellOnt 205](#) at para. 16 (CA), BOA, Tab 20.

E. MONITOR'S ACTIVITIES AND FEES

(i) Monitor's activities should be approved

49. The Monitor's reports to this Court outline the specific activities taken by the Monitor to-date and for which approval is sought. Approval of the Monitor's activities is appropriate in the circumstances.⁵⁷ The approval sought is not a general approval of the Monitor's activities but approval of the specific activities taken by the Monitor to-date, all of which are detailed in the Monitor's reports. Accordingly, the activities set out in the Monitor's reports should be approved.

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

50. The jurisdiction of this Court to pass the accounts of the Monitor and its counsel is confirmed in the ARIO, which provides that "the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice."⁵⁸

51. The overarching test for assessing the fees and disbursements of the Monitor and its counsel in a CCAA proceeding is whether they are "fair and reasonable" in all of the circumstances and are appropriate.⁵⁹ The factors to be considered include: (i) the nature, extent, and value of the assets being handled; (ii) the complications and difficulties encountered; (iii) the time spent; (iii) the court officer's knowledge, experience, and skill; (iv) the diligence and thoroughness displayed; (v) the responsibilities assumed; and (vi) the results of the court officer's efforts.⁶⁰ All of these factors are satisfied here. Among other things, the Monitor and its counsel have been integral in assisting the Applicant and its advisors through a CCAA process to date that has led

⁵⁷ *Target Canada Co (Re)*, [2015 ONSC 7574](#) at paras. 21-23.

⁵⁸ [ARIO](#) at para. 34.

⁵⁹ *Triple-I Capital Partners Limited v. 12411300 Canada Inc.*, [2023 ONSC 3400](#) at para. 26.

⁶⁰ *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#) at paras 33-36, quoting *Belyea v Federal Business Development Bank* (1983), 44 N.B.R. (2d) 248 at para. 9 (CA), BOA, Tab 2; *Nortel Networks Corp., Re*, [2017 ONSC 673](#) at para. 13-14 (noting that the same factors apply to review of a Monitor's accounts).

to the successful closing of the Transaction for the benefit of a wide array of stakeholders, including the Credit Agreement Lenders, employees, suppliers and AIR MILES® collectors. The Monitor also agreed to the expansion of its powers, which has led to a greater scope of work and enabled the continuation of the Applicant's restructuring initiatives for the benefit of stakeholders following the closing of the Transaction.

PART IV - ORDER REQUESTED

52. For all of the reasons above, the Applicant requests that this Court grant the requested Stay Extension and Distribution Order, and the requested Approval Vesting Order (FF&E) in the forms proposed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of June, 2023.



Per Ryan Jacobs/Jane Dietrich/Timothy
Pinos/Natalie E. Levine
Cassels Brock & Blackwell LLP
Lawyers for the Applicant

SCHEDULE "A"

LIST OF AUTHORITIES

1. *AbitibiBowater Inc.*, [2009 QCCS 6461](#)
2. *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#)
3. *Belyea v Federal Business Development Bank* (1983), 44 N.B.R. (2d) 248
4. *Crystallex International Corporation (Re)*, (November 18, 2021), ONSC (Commercial List), CV-11-9532-00CL ([Endorsement](#))
5. *Crystallex International Corporation (Re)*, (December 12, 2022), ONSC (Commercial List), Court File No. CV-11-9532-00CL ([Order](#))
6. *Crystallex International Corporation (Re)*, (December 12, 2022), ONSC (Commercial List), CV-11-9532-00CL ([Endorsement](#))
7. *Greenspace Brands Inc., Re* (June 15, 2023) ONSC (Commercial List), Court File No. CV-23-00697516-00CL ([Ancillary Relief Order](#))
8. *Harte Gold Corp., Re*, (February 15, 2023) ONSC (Commercial List), Court File No. CV-21-00673304-00CL ([CCAA Distribution and Termination Order](#))
9. *LoyaltyOne Co. (Re)*, (March 10, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Initial Order](#))
10. *LoyaltyOne Co. (Re)*, (March 20, 2023), ONSC (Commercial List), Court File No. CV-23-00696017-00CL ([SISP Approval Order](#))
11. *LoyaltyOne Co. (Re)*, (March 20, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Endorsement](#))
12. *LoyaltyOne Co. (Re)*, (March 20, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([ARIO](#))
13. *LoyaltyOne Co. (Re)*, (May 1, 2023), ONSC (Commercial List), Court File No. CV-23-00696017-00CL ([Endorsement](#))
14. *LoyaltyOne Co. (Re)*, (May 1, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([U.S. Plan Performance Approval Order](#))
15. *LoyaltyOne Co. (Re)*, (May 12, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Approval and Vesting Order](#))
16. *LoyaltyOne Co. (Re)*, (May 12, 2023), ONSC (Commercial List), Court File No. CV-23-0069017-00CL ([Ancillary Relief Order](#))
17. *Nortel Networks Corp., Re*, [2014 ONSC 4777](#)

18. *Nortel Networks Corp.*, Re, [2017 ONSC 673](#)
19. *PCAS Patient Care Automation Services Inc. (Re)*, [2012 ONSC 3367](#)
20. *Royal Bank v. Soundair Corp.* (1991), 83 DLR (4th) 76, [1991 CarswellOnt 205](#)
21. *Target Canada Co (Re)*, [2015 ONSC 7574](#)
22. *TGF Acquisition Parent Ltd.*, Re, (April 13, 2021) ONSC (Commercial List), Court File No. CV-21-00657098-00CL ([Distribution Order](#))
23. *Tricon Films and Television*, Re, (April 11, 2017), ONSC (Commercial List), CV16-11634-00CL ([Approval Order – Distribution Agreement](#))
24. *Triple-I Capital Partners Limited v. 12411300 Canada Inc.*, [2023 ONSC 3400](#)
25. *U.S. Steel Canada Inc.*, Re, [2016 ONSC 3106](#)
26. *Veris Gold Corp. (Re)*, [2015 BCSC 1204](#)
27. *White Birch Paper Holding Co.*, Re, [2010 QCCS 4915](#)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

General Power of Court

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

Stays, etc. — initial application

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

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

Stays, etc. — other than initial application

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

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

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

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

...

Duties and functions

23(1) The monitor shall

...

(k) carry out any other functions in relation to the company that the court may direct.

...

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

...

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

...

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Income Tax Act (Canada) R.S.C., 1985, c. 1 (5th Supp.)

Person acting for another

159 (1) For the purposes of this Act, where a person is a legal representative of a taxpayer at any time,

(a) the legal representative is jointly and severally, or solidarily, liable with the taxpayer

(i) to pay each amount payable under this Act by the taxpayer at or before that time and that remains unpaid, to the extent that the legal representative is at that time in possession or control, in the capacity of legal representative, of property that belongs or belonged to, or that is or was held for the benefit of, the taxpayer or the taxpayer's estate, and

(ii) to perform any obligation or duty imposed under this Act on the taxpayer at or before that time and that remains outstanding, to the extent that the obligation or duty can reasonably be considered to relate to the responsibilities of the legal representative acting in that capacity; and

(b) any action or proceeding in respect of the taxpayer taken under this Act at or after that time by the Minister may be so taken in the name of the legal representative acting in that capacity and, when so taken, has the same effect as if it had been taken directly against the taxpayer and, if the taxpayer no longer exists, as if the taxpayer continued to exist.

Certificate before distribution

(2) Every legal representative (other than a trustee in bankruptcy) of a taxpayer shall, before distributing to one or more persons any property in the possession or control of the legal representative acting in that capacity, obtain a certificate from the Minister, by applying for one in prescribed form, certifying that all amounts

(a) for which the taxpayer is or can reasonably be expected to become liable under this Act at or before the time the distribution is made, and

(b) for the payment of which the legal representative is or can reasonably be expected to become liable in that capacity have been paid or that security for the payment thereof has been accepted by the Minister.

Personal liability

(3) If a legal representative (other than a trustee in bankruptcy) of a taxpayer distributes to one or more persons property in the possession or control of the legal representative, acting in that capacity, without obtaining a certificate under subsection (2) in respect of the amounts referred to in that subsection,

(a) the legal representative is personally liable for the payment of those amounts to the extent of the value of the property distributed;

(b) the Minister may at any time assess the legal representative in respect of any amount payable because of this subsection; and

(c) the provisions of this Division (including, for greater certainty, the provisions in respect of interest payable) apply, with any modifications that the circumstances require, to an assessment made under this subsection as though it had been made under section 152 in respect of taxes payable under this Part.

Appropriation of property

(3.1) For the purposes of subsections 159(2) and 159(3), an appropriation by a legal representative of a taxpayer of property in the possession or control of the legal representative acting in that capacity is deemed to be a distribution of the property to a person.

(4) and (4.1) [Repealed, 2001, c. 17, s. 154(1)]

Election where certain provisions applicable

(5) Where subsection 70(2), 70(5) or 70(5.2) of this Act or subsection 70(9.4) of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, is applicable in respect of a taxpayer who has died, and the taxpayer's legal representative so elects and furnishes the Minister with security acceptable to the Minister for payment of any tax the payment of which is deferred by the election, notwithstanding any provision of this Part or the *Income Tax Application Rules* respecting the time within which payment shall be made of the tax payable under this Part by the taxpayer for the taxation year in which the taxpayer died, all or any portion of such part of that tax as is equal to the amount, if any, by which that tax exceeds the amount that that tax would be, if this Act were read without reference to subsections 70(2), (5) and (5.2) and the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, were read without reference to subsections 70(2), (5), (5.2) and (9.4) of that Act, may be paid in such number (not exceeding 10) of equal consecutive annual instalments as is specified by the legal representative in the election, the first instalment of which shall be paid on or before the day on or before which payment of that tax would, but for the election, have been required to be made and each subsequent instalment of which shall be paid on or before the next following anniversary of that day.

(5.1) Where, in the taxation year in which a taxpayer dies, an amount is included in computing the taxpayer's income by virtue of paragraph 23(3)(c) of the *Income Tax Application Rules*, the provisions of subsection 159(5) apply, with such modifications as the circumstances require, as though the amount were an amount included in computing the taxpayer's income for the year by virtue of subsection 70(2) or an amount deemed to have been received by the taxpayer by virtue of subsection 70(5).

(6) For the purposes of subsection 159(5), the **tax payable under this Part** by a taxpayer for the taxation year in which the taxpayer died includes any tax payable under this Part by virtue of an election in respect of the taxpayer's death made by the taxpayer's legal representative under

subsection 70(2) or under the provisions of that subsection as they are required to be read by virtue of the *Income Tax Application Rules*.

Election where subsection 104(4) applicable

(6.1) Where a time determined under paragraph 104(4)(a), (a.1), (a.2), (a.3), (a.4), (b) or (c) in respect of a trust occurs in a taxation year of the trust and the trust so elects and furnishes to the Minister security acceptable to the Minister for payment of any tax the payment of which is deferred by the election, notwithstanding any other provision of this Part respecting the time within which payment shall be made of the tax payable under this Part by the trust for the year, all or any portion of the part of that tax that is equal to the amount, if any, by which that tax exceeds the amount that that tax would be if this Act were read without reference to paragraph 104(4)(a), (a.1), (a.2), (a.3), (a.4), (b) or (c), as the case may be, may be paid in the number (not exceeding 10) of equal consecutive annual instalments that is specified by the trust in the election, the first instalment of which shall be paid on or before the day on or before which payment of that tax would, but for the election, have been required to be made and each subsequent instalment of which shall be paid on or before the next following anniversary of that day.

Form and manner of election and interest

(7) Every election made by a taxpayer under subsection 159(4) or 159(6.1) or by the legal representative of a taxpayer under subsection 159(5) shall be made in prescribed form and on condition that, at the time of payment of any amount payment of which is deferred by the election, the taxpayer shall pay to the Receiver General interest on the amount at the prescribed rate in effect at the time the election was made, computed from the day on or before which the amount would, but for the election, have been required to be paid to the day of payment.

Taxation Act, 2007, SO 2007, c 11, SO 2007, Sch A

Returns, payments and interest

117 (1) Subsections 70 (2) and 104 (2), paragraphs 104 (23) (d) and (e), sections 158 and 159, subsections 160.1 (1), (3) and (4), 161 (1), (2), (2.2), (4), (4.01), (4.1), (5), (6), (6.1), (6.2), (7) and (11) and sections 161.2 and 161.3 of the Federal Act apply for the purposes of this Act. 2007, c. 11, Sched. A, s. 117 (1).

Application of s. 161.1 of Federal Act

(2) If a collection agreement is in effect, section 161.1 of the Federal Act applies to a corporation in respect of interest determined with regard to tax payable under each of Divisions B, C, D and E of Part III. 2007, c. 11, Sched. A, s. 117 (2).

Taxpayers owing \$2 or less

(3) If the Ontario Minister determines, at any time, that the total of all amounts owing by a person to the Crown in right of Ontario under this Act does not exceed \$2, the Ontario Minister may cancel the amounts owing. 2007, c. 11, Sched. A, s. 117 (3).

Refunds of \$2 or less

(4) If, at any time, the total of all amounts payable by the Ontario Minister to a person under this Act does not exceed \$2, the Ontario Minister may apply all or part of those amounts against any amount owing, at that time, by the person to the Crown in right of Ontario. However, if the person, at that time, does not owe any amount to the Crown in right of Ontario, those amounts are deemed to be nil. 2007, c. 11, Sched. A, s. 117 (4).

Excise Tax Act (Canada) R.S.C, 1985, c. E-15

Definitions

270 (1) In this section,

receiver means a person who is a receiver within the meaning assigned by subsection 266(1); (*séquestre*)

representative means

- **(a)** a person, other than a trustee in bankruptcy or a receiver, who is administering, winding up, controlling or otherwise dealing with any property, business, commercial activity or estate of a registrant, and
- **(b)** a trustee of a trust that is a registrant. (*représentant*)

(2) Every receiver shall, before distributing to any person any property or money under the control of the receiver in the receiver's capacity as receiver, obtain a certificate from the Minister certifying that all amounts that are, or can reasonably be expected to become, payable or remittable under this Part by the receiver in that capacity in respect of the reporting period during which the distribution is made, or any previous reporting period, have been paid or that security for the payment or remittance of the amounts has, in accordance with this Part, been accepted by the Minister.

(3) Every representative of a registrant shall, before distributing to any person any property or money under the control of the representative in the representative's capacity as the representative, obtain a certificate from the Minister certifying that

(a) all amounts that are payable or remittable by the registrant under this Part in respect of the reporting period during which the distribution is made, or any previous reporting period, and

(b) all amounts that are, or can reasonably be expected to become, payable or remittable under this Part by the representative in that capacity in respect of the reporting period during which the distribution is made, or any previous reporting period,

have been paid or that security for the payment or remittance of the amounts has, in accordance with this Part, been accepted by the Minister.

(4) Any

(a) receiver who distributes property or money without obtaining a certificate as required by subsection (2) in respect of the amounts referred to in that subsection, or

(b) representative who distributes property or money without obtaining a certificate as required by subsection (3) in respect of the amounts referred to

in that subsection is personally liable for the payment or remittance of those amounts to the extent of the value of the property or money so distributed.

Employment Insurance Act (S.C. 1996, c. 23)

Return of benefits by employer or other person

46 (1) If under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in bankruptcy or any other person becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to a claimant for a period and has reason to believe that benefits have been paid to the claimant for that period, the employer or other person shall ascertain whether an amount would be repayable under section 45 if the earnings were paid to the claimant and if so shall deduct the amount from the earnings payable to the claimant and remit it to the Receiver General as repayment of an overpayment of benefits.

Return of benefits by employer

(2) If a claimant receives benefits for a period and under a labour arbitration award or court judgment, or for any other reason, the liability of an employer to pay the claimant earnings, including damages for wrongful dismissal, for the same period is or was reduced by the amount of the benefits or by a portion of them, the employer shall remit the amount or portion to the Receiver General as repayment of an overpayment of benefits.

Defence of due diligence

(3) A director is not liable if the director exercised the degree of care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances to prevent the act or omission for which the penalty is imposed.

Limitation period

(4) No action or proceedings to recover any amount payable by a director shall be commenced more than six years after the occurrence of the act or omission for which the penalty is imposed.

Amount recoverable

(5) If execution referred to in paragraph (2)(a) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

Preference

(6) If a director pays an amount in respect of a corporation's liability that is proved in liquidation, dissolution or bankruptcy proceedings,

(a) the director is entitled to any preference that Her Majesty in right of Canada would have been entitled to if that amount had not been paid; and

(b) if a certificate that relates to that amount has been registered, the director is entitled to an assignment of the certificate to the extent of the director's payment and the Commission shall make the assignment.

Contribution from other directors

(7) A director who has satisfied a claim under this section is entitled to contribution from the other directors who are liable for the claim.

Recovery

86 (1) All premiums, interest, penalties and other amounts payable by an employer under this Act are debts due to Her Majesty and are recoverable in the Federal Court or any other court of competent jurisdiction or in any other manner provided for by this Act.

Amounts deducted and not remitted

(2) Where an employer has deducted an amount from the remuneration of an insured person as or on account of any employee's premium required to be paid by the insured person but has not remitted the amount to the Receiver General, the employer is deemed, notwithstanding any security interest (as defined in subsection 224(1.3) of the *Income Tax Act*) in the amount so deducted, to hold the amount separate and apart from the property of the employer and from property held by any secured creditor (as defined in subsection 224(1.3) of the *Income Tax Act*) of that employer that but for the security interest would be property of the employer, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

Extension of trust

(2.1) Notwithstanding the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection (2) to be held by an employer in trust for Her Majesty in the manner and at the time provided under this Act, property of the employer and property held by any secured creditor (as defined in subsection 224(1.3) of the *Income Tax Act*) of that employer that but for a security interest (as defined in subsection 224(1.3) of the *Income Tax Act*) would be property of the employer, equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted by the employer, separate and apart from the property of the employer, in trust for Her Majesty whether or not the property is subject to such a security interest, and

(b) to form no part of the estate or property of the employer from the time the amount was so deducted, whether or not the property has in fact been kept separate and apart from the estate or property of the employer and whether or not the property is subject to such a security interest and is property beneficially owned by Her Majesty notwithstanding any security interest in such property or in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

Meaning of security interest

(2.2) For the purposes of subsections (2) and (2.1), a security interest does not include a prescribed security interest.

Certificate before distribution

(3) Before distributing any property over which a responsible representative has control in that capacity, the responsible representative shall obtain a certificate from the Minister certifying the payment, or acceptance by the Minister of security for payment, of all amounts

- (a) for which an employer is liable under this Act up to and including the date of distribution; and
- (b) for the payment of which the responsible representative is or can reasonably be expected to become liable in that capacity.

Personal liability

(4) If the responsible representative distributes to one or more persons property over which the responsible representative has control in that capacity, without obtaining the certificate, the responsible representative is personally liable for the payment of the amounts to the extent of the value of the property distributed and the Minister may assess the responsible representative for the amounts in the same manner and with the same effect as an assessment made under section 85.

Security

(5) If the Minister considers it advisable in a particular case, the Minister may accept security for payment of premiums by way of mortgage, hypothec or other charge of any kind whatever on property of the employer or any other person or by way of guarantee from other persons.

Trustee in bankruptcy

(6) If an employer has become bankrupt, the trustee in bankruptcy is deemed to be the agent of the bankrupt for the purposes of this Act.

Definition of *responsible representative*

(7) For the purposes of this section, ***responsible representative*** means a person, other than a trustee in bankruptcy, who is an assignee, liquidator, receiver, receiver-manager, administrator, executor, liquidator of the succession or any other like person administering, winding up, controlling or otherwise dealing with a property, business or estate of another person.

Retail Sales Tax Act, RSO 1990, c R. 31

Trust for money collected

22 (1) Any amount collected or collectable as or on account of tax under this Act by a vendor shall be deemed, despite any security interest in the amount so collected or collectable, to be held in trust for Her Majesty in right of Ontario and separate and apart from the vendor's property and from property held by any secured creditor that but for the security interest would be the vendor's property and shall be paid over by the vendor in the manner and at the time provided under this Act and the regulations. 1997, c. 43, Sched. D, s. 6.

Extension of trust

(2) Despite any provision of this or any other Act, where at any time an amount deemed by subsection (1) to be held in trust is not paid as required under this Act, property of the vendor and property held by any secured creditor of the vendor that but for a security interest would be property of the vendor, equal in value to the amount so deemed to be held in trust shall be deemed,

- (a) to be held, from the time the amount was collected or collectable by the vendor, separate and apart from the property of the vendor in trust for Her Majesty in right of Ontario whether or not the property is subject to a security interest; and
- (b) to form no part of the estate or property of the vendor from the time the amount was so collected or collectable whether or not the property has in fact been kept separate and apart from the estate or property of the vendor and whether or not the property is subject to such security interest. 1997, c. 43, Sched. D, s. 6.

Same

(3) The property described in subsection (2) shall be deemed to be beneficially owned by Her Majesty in right of Ontario despite any security interest in such property or in the proceeds of such property, and the proceeds of such property shall be paid to the Minister in priority to all such security interests. 1997, c. 43, Sched. D, s. 6.

(4) Repealed: 2012, c. 8, Sched. 54, s. 2.

Minister's certificate

(5) Every person who, as assignee, liquidator, administrator, receiver, receiver-manager, secured or unsecured creditor or agent of the creditor, trustee or other like person, other than a trustee appointed under the *Bankruptcy and Insolvency Act* (Canada), takes control or possession of the property of any vendor shall, before distributing such property or the proceeds from the realization thereof under that person's control, obtain from the Minister a certificate that the amount deemed by subsection (1) to be held in trust, including any interest and penalties payable by the vendor, has been paid or that security acceptable to the Minister has been given. 1997, c. 43, Sched. D, s. 6.

No distribution without Minister's certificate

(6) Any person described in subsection (5) who distributes any property described in that subsection or the proceeds of the realization thereof without having obtained the certificate required by that subsection is personally liable to Her Majesty in right of Ontario for an amount equal to the amount deemed by subsection (1) to be held in trust, including any interest and penalties payable by the vendor. 1997, c. 43, Sched. D, s. 6.

Notice to be given

(7) The person described in subsection (5) shall, within 30 days from the date of that person's assumption of possession or control, give written notice thereof to the Minister. 1997, c. 43, Sched. D, s. 6.

Minister to advise of indebtedness

(8) As soon as practicable after receiving such notice, the Minister shall advise the person described in subsection (5) of the amount deemed by subsection (1) to be held in trust, including any interest and penalties thereon. 1997, c. 43, Sched. D, s. 6.

Definitions

(9) In this section and in subsection 36 (2.1),

“secured creditor” means a person who has a security interest in the property of another person or who acts for or on behalf of that person with respect to the security interest, and includes a trustee appointed under a trust deed relating to a security interest, a receiver or receiver-manager appointed by a secured creditor or by a court on the application of a secured creditor and any other person performing a similar function; (“créancier garanti”)

“security interest” means any interest in property that secures payment or performance of an obligation, and includes an interest created by or arising out of a debenture, mortgage, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatsoever or whenever arising, created or deemed to arise or otherwise provided for, but does not include a security interest prescribed by the Minister as one to which this section does not apply. (“sûreté”) 1997, c. 43, Sched. D, s. 6.

Application

(10) This section and clause 43 (2) (b) apply in respect of any tax collected or collectable by a vendor on or after January 1, 1998, whether or not the security interest was acquired before that date. 1997, c. 43, Sched. D, s. 6.

Corporations Tax Act (Ontario), RSO 1990, c C.40

Payment of tax by receivers

107 (1) Every person required under subsection 75 (7) to deliver a return for a corporation for a taxation year shall, immediately on receipt of a notice of assessment or reassessment in respect of the taxation year, pay all taxes, interest, penalties and other amounts payable under this Act by or in respect of the corporation to the extent that the person has or had in the person's possession or control property belonging to the corporation or its estate, at any time since the taxation year, and the person shall thereupon be deemed to have made the payment on behalf of the corporation. 1994, c. 14, s. 50 (1); 2004, c. 16, s. 2 (2).

Certificate of tax paid

(2) Every assignee, liquidator, receiver, receiver-manager, and other agent, other than a trustee in bankruptcy, before distributing any property of the corporation under their control, shall obtain a certificate from the Minister certifying that all taxes, interest, penalties and other amounts payable by the corporation under this Act have been paid or that security for the payment thereof in a form acceptable to the Minister has been given under section 103. 1994, c. 14, s. 50 (1); 2004, c. 16, s. 2 (2).

Personal liability of receivers

(3) Any person referred to in subsection (2) who fails to obtain the certificate referred to therein shall be personally liable to Her Majesty in right of Ontario for an amount equal to the taxes, interest, penalties and other amounts payable under subsection (1) and such debt shall be deemed to be tax owing by such person under this Act and may be enforced in accordance with

the provisions of this Act. R.S.O. 1990, c. C.40, s. 107 (3); 1994, c. 14, s. 50 (2); 2004, c. 16, s. 2 (2).

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT* ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LOYALTYONE, CO.

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

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

PROCEEDING COMMENCED AT
TORONTO

**FACTUM OF THE APPLICANT
(Stay Extension and Distribution Order & Approval and
Vesting Order)**

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