

**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
(Approval and Vesting Order, Assignment Order and Ancillary Relief Order)**

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PART I - NATURE OF THIS MOTION

1. Pursuant to the SISP approved at the Comeback Hearing, the Transaction set out in the Asset Purchase Agreement with BMO has been determined to be the Successful Bid.¹
2. The Applicant now seeks three orders: (i) an order (the "**Approval and Vesting Order**") approving the Transaction and vesting the Purchased Assets in, and assigning the Assumed Liabilities to, the Buyers (affiliates of BMO); (ii) an order (the "**Assignment Order**") upon closing of the Transaction assigning certain contracts to one of the Buyers pursuant to s. 11.3 of the CCAA; and (iii) an order (the "**Ancillary Relief Order**") upon closing of the Transaction, deeming all current directors and (subject to certain limited exceptions) officers of the Applicant to have resigned and authorizing the Monitor to exercise any powers of the board of directors or any officer of the Applicant to cause the Applicant to, among other things, realize on any of the Applicant's remaining assets (the "**Remaining Property**") and attend to any post-closing matters.

¹ Affidavit of Shawn Stewart sworn May 3, 2023 (the "**Stewart Affidavit**") at para. 12. Terms not otherwise defined herein have the meaning given in the Stewart Affidavit, including the Exhibits thereto, or the ARIO, as applicable.

3. The Transaction is the only viable option for the continuation of the AIR MILES[®] Reward Program and the preservation of the Applicant's business as a going concern. The Transaction provides tangible benefits to the Applicant and its stakeholders, including offers of employment to all of the Applicant's employees on terms substantially similar to their current employment. If the Transaction is approved and closes, the Buyers will continue to operate the AIR MILES[®] Reward Program, benefiting, among others, the Applicant's approximately 700 employees, the approximately 10 million active Collectors, the Applicant's Partners, Reward Suppliers, and Vendors. The proceeds of the Transaction are expected to be sufficient to pay the amounts secured by the Charges and the Employee Payables (defined below) and to provide a partial recovery to the Credit Agreement Lenders. The Applicant anticipates returning to Court after the closing of the Transaction to seek authority to distribute a portion of the proceeds to the Credit Facility Agent for the benefit of the Credit Agreement Lenders.

4. While approval of the Transaction itself is being sought for the first time, the Asset Purchase Agreement was previously approved by this Court "to provide a floor for an acquisition transaction while the Applicant [conducted] the SISP".² The relief in the Approval and Vesting Order (including approval of the Transaction and the related relief) is supported by the Consenting Stakeholders (who represent approximately 72% of the Credit Agreement Lenders by value and the Credit Facility Agent), the Monitor and the Applicant's largest partner (being BMO).³

5. The Assignment Order and the Ancillary Relief Order are necessary to implement the Transaction and to enable the Applicant to pursue recovery of the Remaining Property in an efficient manner. The Assignment Order is required by the Asset Purchase Agreement and authorizes the assignment of certain contracts that require counterparty consent to assignment and for which the Applicant has been unable to obtain such consent. The Applicant commenced

² *LoyaltyOne Co. (Re)*, (March 20, 2023), ONSC (Commercial List), Court File No. CV-23-00696017-00CL ([Endorsement](#)) at para. 13 [March 20 Endorsement].

³ Stewart Affidavit at paras. 17, 41.

the process of seeking consents from these counterparties approximately one month ago, and has provided each of them with notice of this motion and the Assignment Order.⁴ Similarly, the Ancillary Relief Order is necessary because the Applicant's current Directors and Officers, with a few exceptions, intend to cease acting as directors and officers of the Applicant upon the completion of the Transaction. The deemed resignation of those Directors and Officers and the authorization of the Monitor to exercise the powers of the board will permit the Applicant to pursue the monetization of the Remaining Property and conduct post closing activities efficiently.

PART II - SUMMARY OF FACTS

A. HISTORY OF THIS CCAA PROCEEDING

6. The LoyaltyOne Entities operate the marketing program known as the AIR MILES[®] Reward Program or AIR MILES[®]. For over three decades, the AIR MILES[®] Reward Program has influenced customer behaviour, driven profitability, and built long-term relationships with Partners and Canadian consumers. There are currently over 10 million active Collector accounts and hundreds of brands that participate in the AIR MILES[®] Reward Program.⁵

7. This CCAA Proceeding was precipitated by a combination of increased market challenges and the imposition of substantial burdens on the Applicant by the Applicant's former U.S. parent company (Bread), in connection with the Spinoff Transaction. 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,

⁴ Stewart Affidavit, paras 54; Affidavit of Service of Alec Hoy sworn May 5, 2023; Affidavit of Service of Alec Hoy sworn May 10, 2023. The addresses in the affidavits of service were initially compiled from the Applicant's books and records, including the provisions of the applicable contracts. If it became apparent that the relevant address was no longer active, materials were also sent to alternative addresses obtained from publicly available information.

⁵ Stewart Affidavit at para. 7.

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 in exchange for a monthly fee.⁶

8. In light of these challenges, and prior to the commencement of this CCAA Proceeding, the Applicant and BMO entered into the initial version of the Asset Purchase Agreement, to be used as a “stalking horse bid” in connection with the SISP, pursuant to which BMO agreed to: (i) purchase all or substantially all of the operating assets of the Applicant; and (ii) assume certain liabilities associated with the operations of the AIR MILES[®] business on the terms set out therein, including the Applicant’s obligations to Collectors under the AIR MILES[®] Reward Program and in respect of the Reserve Account established for the benefit of Collectors.⁷

9. 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 Chapter 11 Cases;⁸ 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 outlines the terms on which the parties thereto have agreed to implement, support, and/or consent to five transactions: (i) the Transaction; (ii) the Intercompany DIP Loan; (iii) the DIP Financing Facility; (iv) the U.S. Plan; and (v) the sale of the “BrandLoyalty” business. Each of these transactions represents a critical piece of the negotiated settlement among the parties.⁹

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

⁶ Stewart Affidavit at para. 9.

⁷ Stewart Affidavit at para. 10.

⁸ Stewart Affidavit at paras. 13, 14.

⁹ Stewart Affidavit at paras. 15, 16 and Exhibit “B”.

- (a) an Amended and Restated Initial Order (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 Financing Facility to finance the Applicant’s working capital requirements and make the Intercompany DIP Loan to LVI in an amount up to US\$30 million and granted the DIP Lender’s Charge to the maximum amount of US\$70 million to secure amounts advanced under the DIP Financing 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 to the maximum amount of \$5.35 million; and
 - (v) approved the retention of the Financial Advisor and the Transaction Fee and granted the Financial Advisor Charge to the maximum amount of US\$6 million; 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 Asset Purchase Agreement, 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.¹⁰

B. THE APPLICANT'S ACTIVITIES SINCE THE COMEBACK HEARING

11. Since the granting of the SISP Approval Order and the ARIO on March 20, 2023, the Applicant has been working in good faith and with due diligence to:

- (a) respond to creditor and stakeholder inquiries regarding this CCAA Proceeding, including requests related to Corporate Vendor obligations and Collector redemptions, and inquiries on the SISP and the Asset Purchase Agreement;
- (b) conduct its duties and obligations under the Court-approved SISP with a view to ultimately facilitating a value-maximizing sale transaction, including working with the Financial Advisor to conduct the SISP and undertaking a detailed process to identify the contracts, employees, resources, and assets necessary for a purchaser to operate the Business on a go-forward basis;
- (c) engage with BMO to advance various matters relating to the Asset Purchase Agreement—including the negotiation and execution of the APA Amendment, described below—so that the transaction contemplated thereby could be implemented in a timely and efficient manner if the Asset Purchase Agreement was determined to be the Successful Bid (which has now occurred);

¹⁰ Stewart Affidavit at para. 18; *LoyaltyOne Co. (Re)*, (March 20, 2023), ONSC (Commercial List), Court File No. CV-23-00696017-00CL ([ARIO](#)) [ARIO]; *LoyaltyOne Co. (Re)*, (March 20, 2023), ONSC (Commercial List), Court File No. CV-23-00696017-00CL ([SISP Approval Order](#)).

- (d) comply with its obligations in respect of the DIP Financing Facility and the Intercompany DIP Loan;
- (e) continue to stabilize its business and operations, including maintaining Partner, Corporate Vendor, Reward Supplier, and Collector relationships; and
- (f) continue its business development, including its efforts to launch its expanded travel service business that will improve the Applicant's travel offerings and provide Partners additional opportunities to engage with Collectors.¹¹

12. To fund its ongoing business operations and restructuring efforts, as of May 1, 2023, the full principal amount of the DIP Financing Facility (US\$70 million) has been advanced by the DIP Lender to the Applicant. The Applicant has loaned the principal amount of US\$23.3 million to LVI under the Intercompany DIP Loan as contemplated by the ARIO.¹²

13. In anticipation of the Transaction (or an alternative transaction identified by the SISP), the Applicant has made substantial efforts to prepare its business accordingly, including with respect to the transition of its workforce. In addition, the Applicant has obtained an advance ruling certificate under the *Competition Act*, R.S.C., 1985, c. C-34.¹³

14. The Applicant also reviewed the Assumed Contracts (as defined below) and has determined that 231¹⁴ of the Assumed Contracts require the consent of the counterparties (the **"Consent Right Counterparties"**) to assign the contracts. Beginning on April 12, 2023, the Applicant sent letters to the Consent Right Counterparties seeking their consent to the assignment

¹¹ Stewart Affidavit at para. 19.

¹² Stewart Affidavit at para. 20.

¹³ Stewart Affidavit at paras. 40, 53 – 55.

¹⁴ This is the number of contracts identified to date which require consent to assign and are not "Excluded Contracts".

of the applicable Assumed Contracts and identifying any pre-filing monetary defaults according to the Applicant's books and records.¹⁵

15. Since that time, the Applicant, with the assistance of the Restructuring Advisor, has worked with the Consent Right Counterparties to identify and address any of their concerns with respect to the applicable Assumed Contracts, including with respect to the Cure Costs. As at May 3, 2023, 90 Consent Right Counterparties had provided consent for the assignment of their applicable Assumed Contracts. However, 138 consents remained outstanding. Since May 3, 2023, another 18 consents have been received, but an additional 2 contracts have been designated as Excluded Contracts. The Applicant continues efforts to consensually obtain the consents in advance of the hearing. The Applicant is seeking the Assignment Order to effect the assignment of the contracts for consents that are not received prior to the hearing.¹⁶

16. On a parallel path, and consistent with the Transaction Support Agreement, the U.S. Debtors have pursued a plan of liquidation in the Chapter 11 Cases (the "**U.S. Plan**"). On April 27, 2023, the U.S. Bankruptcy Court granted an order approving the U.S. Plan. On May 1, 2023, this Court granted an Order: (i) approving the compromise of claims, grant of releases, and payments by the Applicant set out in the U.S. Plan; and (ii) lifting the Stay of Proceedings to allow the Applicant to comply with and give effect to the U.S. Plan.¹⁷ Following implementation of the U.S. Plan and the completion of the sale of the "BrandLoyalty" business, the Credit Agreement Lenders and the Credit Facility Agent will release their liens against the remaining obligors under the Credit Agreement, other than the Applicant.¹⁸

¹⁵ Stewart Affidavit at paras. 53, 54 and Exhibit "D".

¹⁶ Stewart Affidavit at paras. 55 – 57 and Exhibit "E".

¹⁷ *LoyaltyOne Co. (Re)*, (May 1, 2023), ONSC (Commercial List), Court File No. CV-23-00696017-00CL ([Endorsement](#)) at para. 7; *LoyaltyOne Co. (Re)*, (May 1, 2023), ONSC (Commercial List), Court File No. CV-23-00696017-00CL ([U.S. Plan Performance Approval Order](#)).

¹⁸ Stewart Affidavit at para. 22.

17. Under the U.S. Plan, upon implementation, a liquidating trust will be formed to pursue claims against Bread and certain other parties for the benefit of the U.S. Debtors' stakeholders, which, for certainty, includes the Credit Agreement Lenders. Other than any recoveries from the liquidating trust and the sale of BrandLoyalty, the only substantial recoveries to the Credit Agreement Lenders will be the proceeds of the Transaction (after payment of the amounts secured by the Charges and the Employee Payables), if approved and closed, and the proceeds from the realization of any of the Remaining Property in Canada.¹⁹

C. CONDUCT AND OUTCOME OF THE SISP

18. The SISP, supported by the Asset Purchase Agreement as a stalking horse bid, was developed in consultation with BMO and the Consenting Stakeholders, as well as with the Monitor and the Financial Advisor. The SISP was "anchored" by the Asset Purchase Agreement, "which provide[d] certainty to the Applicant and its stakeholders of a going-concern transaction, while also enabling the Applicant, with the assistance of [the Financial Advisor] and under the oversight of the Monitor, to test the market and pursue the possibility of a superior transaction".²⁰ The SISP was designed to provide a fair and reasonable process to canvass the market to confirm whether the Transaction delivered the best possible result for all stakeholders.²¹

19. The SISP provided for a 35-day period to solicit interest, ending on the Qualified Bid Deadline of 5:00 p.m. (ET) on April 27, 2023. Under the SISP, if one or more Qualified Bids (other than the Asset Purchase Agreement as the "stalking horse bid") was received on or before the Qualified Bid Deadline, the Applicant would proceed with an Auction.²²

20. Since the granting of the SISP Approval Order, the Applicant has conducted the SISP in accordance with the SISP Approval Order with the assistance of the Financial Advisor and under

¹⁹ Stewart Affidavit at para. 23.

²⁰ First Report at 4.1.1.

²¹ Stewart Affidavit at para. 24.

²² Stewart Affidavit at para. 25 and Exhibit "A" at para. 154.

the supervision of the Monitor. As contemplated by the SISP and the Transaction Support Agreement, the Applicant and the Financial Advisor have consulted with the advisors to the Consenting Stakeholders throughout the process.²³

21. The Financial Advisor contacted approximately 48 parties, including parties identified by the Consenting Stakeholders as potentially interested parties. The Financial Advisor also established a data room and facilitated diligence calls with prospective bidders.²⁴ Notwithstanding the Applicant and the Financial Advisor's efforts, no Qualified Bids other than the Asset Purchase Agreement were received on or before the Qualified Bid Deadline. Accordingly, on April 28, 2023, the Applicant notified BMO by letter that the Asset Purchase Agreement was the Successful Bid.²⁵

D. THE TRANSACTION

22. The Transaction is the only viable option that has emerged in the SISP and therefore represents the highest and best available value to the Applicant and its stakeholders. The only alternative to the Transaction that is available is a liquidation, which would result in the termination of employment for all of the employees, a disruption or termination of the AIR MILES® Reward Program with unknown impacts to Collectors, further impaired recoveries for the Credit Agreement Lenders, potential litigation regarding the distribution of the proceeds of liquidation of the Remaining Property, and potential non-payment of the DIP.²⁶

23. The Transaction contemplates that the Buyers will: (i) purchase all or substantially all of the operating assets of the Applicant, including the shares of Travel Services (the "**Travel Services Shares**"); and (ii) assume substantially all contracts relating to the Applicant's Business and the Purchased Assets, including the Reserve Agreement and the Reserve Security (collectively, the "**Assumed Contracts**"). As consideration for the above, the Buyers will pay

²³ Stewart Affidavit at para. 26.

²⁴ Stewart Affidavit at para. 27.

²⁵ Stewart Affidavit at para. 28.

²⁶ Stewart Affidavit at paras. 29, 30.

US\$160,259,861.40 (inclusive of the US\$10 million to be paid to the Monitor as the Adjustment Escrow Amount) in cash, less certain purchase price adjustments, and will assume the Assumed Liabilities and pay certain transfer taxes (together, the “**Purchase Price**”).²⁷

24. The Purchase Price is subject to adjustments for: (i) amounts required to ensure the Reserve Account is funded in accordance with the governing documents and past practice; (ii) certain amounts required to pay post-filing payables above expected levels; and (iii) the amount, if any that Cure Costs (as defined in the Asset Purchase Agreement) exceed US\$10 million in the aggregate. The process for determining the final Purchase Price and entitlement to the Adjustment Escrow Amount post closing is set out in the Asset Purchase Agreement.²⁸

25. On May 3, 2023, the Applicant and the Buyers executed the APA Amendment to: (i) clean up certain immaterial drafting inconsistencies and defined terms; (ii) attach a revised list of Excluded Contracts (as defined in the Asset Purchase Agreement); (iii) provide for a revised process for the identification of additional Excluded Contracts; and (iv) include certain provisions relating to transitioning employees, being certain existing employees (including officers) of the Applicant that will remain employed by the Applicant for a short period of time after closing to complete certain corporate and winddown matters and thereafter join BMO.²⁹ The APA Amendment provides for a slight increase to the consideration provided under the Asset Purchase Agreement from US\$160 million in cash to US\$160,259,861.40. Pursuant to section 12.4(b) of the Asset Purchase Agreement, the APA Amendment designates two affiliates of BMO as the Buyers: 14970179 Canada Inc. to acquire the Travel Services Shares and 14970144 Canada Inc. to acquire all of the Purchased Assets other than the Travel Services Shares and to assume all

²⁷ Stewart Affidavit at para. 37.

²⁸ Third Report at 5.0.

²⁹ Stewart Affidavit at para. 37.

of the Assumed Liabilities.³⁰ Prior to executing the APA Amendment, the Applicant consulted with the Consenting Stakeholders and the APA Amendment was approved by the Monitor.³¹

26. Certain conditions in the Asset Purchase Agreement remain outstanding, including the: (i) granting of the Approval and Vesting Order; (ii) delivery of the Cure Costs Schedule no later than two Business Days prior to Closing; and (iii) delivery of consents to assignment in respect of certain Assumed Contracts or the granting of the Assignment Order.³²

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

27. The issues to be determined on this Motion are whether the Transaction should be approved and whether the Approval and Vesting Order, the Assignment Order and the Ancillary Relief Order should be granted to effect the related relief.

A. THE APPROVAL AND VESTING ORDER

(a) THE TRANSACTION SHOULD BE APPROVED

28. Under s. 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. A sale to preserve the business as a going-concern is consistent with the objectives of the CCAA.³³

29. In deciding whether to exercise its discretion to approve the Transaction, this Court must review the Transaction as a whole and decide whether it is appropriate, fair, and reasonable. This determination is made in the context of the primary objectives of the CCAA, which include avoiding

³⁰ Stewart Affidavit at Exhibit "C". Pursuant to section 12.4(b) of the Asset Purchase Agreement, this designation does not limit, relieve or affect the obligations of BMO to pay the Estimated Purchase Price at Closing, and/or any other obligations of BMO under the Asset Purchase Agreement to the extent not performed by the Buyers at Closing.

³¹ Third Report at 5.3.

³² Stewart Affidavit at para. 40.

³³ *Consumers Packaging Inc., Re* (2001), 27 C.B.R. (4th) 197, [2001 CanLII 6708](#) at paras. 5, 9 (CA); *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229, [2009 CarswellOnt 4467](#) at paras. 35 – 40, 48 (SC) [*Nortel*]; *PCAS Patient Care Automation Services Inc. (Re)*, [2012 ONSC 3367](#) at para. 35 [*PCAS*].

the devastating social and economic costs of liquidation of a debtor company's assets.³⁴ Section 36(3) of the CCAA provides a non-exhaustive list of factors to be considered:³⁵

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances. The SISP was developed by the Applicant in consultation with the Financial Advisor, the Monitor, BMO, and certain of the Credit Agreement Lenders to provide a fair and reasonable process to canvass the market.³⁶ The SISP, which was approved by this Court,³⁷ was followed and conducted in an open and transparent manner and the Applicant has, throughout the course of the SISP, met its obligations thereunder;³⁸
- (b) whether the Monitor approved the process leading to the proposed sale or disposition. The SISP was developed with the input of, among others, the Monitor. The Monitor supported and recommended that this Court approve the SISP and has confirmed the SISP was carried out in accordance with its terms;³⁹
- (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. The Monitor has confirmed that the Transaction is more beneficial to the Applicant's creditors than a bankruptcy liquidation;⁴⁰
- (d) the extent to which the creditors were consulted. The Applicant has consulted with its creditors, including the Consenting Stakeholders and BMO, as its largest

³⁴ PCAS 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*]; *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586 at paras. 156, 157.

³⁵ Section 36(3) of the CCAA; and see *White Birch* at para. 48.

³⁶ First Report at 4.1.3, 4.8.1.

³⁷ [March 20 Endorsement](#) at para. 14.

³⁸ Stewart Affidavit at para. 26; Third Report at 5.3.

³⁹ First Report at 4.1.3, 4.8.1.; Third Report at 4.1.

⁴⁰ Third Report at 5.3.

Partner under the AIR MILES[®] Reward Program, both before and during this CCAA Proceeding with respect to the sale of the AIR MILES[®] business and the development of the SISP.⁴¹ The Consenting Stakeholders and their advisors were also provided certain information and consultation rights throughout the SISP in accordance with and as set out in the Transaction Support Agreement,⁴²

- (e) the effects of the proposed sale or disposition on the creditors and other interested parties. The Transaction is the only viable option for the AIR MILES[®] Reward Program to continue as a going concern and represents the highest and best value to the Applicant and its stakeholders.⁴³ The Purchase Price will satisfy the amounts secured by the Charges and the Employee Payables, which will facilitate a distribution to the Credit Agreement Lenders at a future date as a partial recovery on their secured claims.⁴⁴ While the Transaction itself will result in no recovery for the Applicant's unsecured creditors, this is a function of the market value of the AIR MILES[®] business, as determined by the SISP. The Transaction will result in numerous tangible benefits, including: (i) preserving the Business as a going-concern; (ii) maintaining commercial relationships with the Collectors, Partners, Reward Suppliers and Corporate Vendors; (iii) preserving the arrangements in respect of the Reserve Account, including the approximately US\$566 million of assets (as at March 2, 2023) set aside thereunder to ensure that obligations can be met for redeemed Reward Miles; (iv) avoiding disruption in the Collector experience; and (v) offers of employment to all of the Applicant's employees,⁴⁵ and

⁴¹ Stewart Affidavit at paras. 17, 19.

⁴² Stewart Affidavit at Exhibit "A" at para. 157, Exhibit "B".;

⁴³ Stewart Affidavit at paras. 29, 30; Third Report at para 5.3.

⁴⁴ Stewart Affidavit at paras. 36, 42, 43.

⁴⁵ Stewart Affidavit at paras. 31, 45.

- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value. The SISP was developed to provide a reasonable market test in the circumstances. No other offers were received notwithstanding the extensive efforts of the Applicant and the Financial Advisor.⁴⁶

30. The s. 36(3) factors are not intended to be exhaustive and the principles established in *Royal Bank v. Soundair Corp.* for approval of a sale in an insolvency proceeding remain relevant.⁴⁷ 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.⁴⁸ As set out above, each of these principles support approval of the Transaction.

31. In addition, the Transaction complies with s. 36(7) of the CCAA, which requires that for this Court to grant an authorization to sell the Applicant's assets free and clear of charges and other restrictions, it must be satisfied that the Applicant can and will make the employee payments and pension contribution amounts set out in ss. 6(5)(a) and 6(6)(a) of the CCAA (the "**Employee Payables**").⁴⁹ The Purchase Price will provide sufficient funds to satisfy, among other things, the Employee Payables and the Applicant has advised that it intends to pay the Employee Payables upon Closing of the Transaction.⁵⁰

32. Accordingly, the Transaction viewed as a whole is appropriate, fair, and reasonable in the circumstances and should be approved by this Court.

⁴⁶ Stewart Affidavit at paras. 25, 28 and Exhibit "A" at paras. 148, 160 – 161.

⁴⁷ *Veris Gold* at paras. [22 – 25](#). *Arrangement relative à Black Rock Metals Inc.*, [2022 QCCS 2828](#) at para. [95](#) [*Black Rock*], citing *Harte Gold (Re)*, [2022 ONSC 653](#) [*Harte Gold*]; see also *Clearbeach and Forbes (Re)*, [2021 ONSC 5564](#) at para. [24, 25](#).

⁴⁸ *Royal Bank v. Soundair Corp.* (1991), 83 DLR (4th) 76, [1991 CarswellOnt 205](#) para. 16 (CA).

⁴⁹ CCAA, s. [36\(7\)](#).

⁵⁰ Stewart Affidavit at para. 36.

(b) DIP REPAYMENT

33. The Approval and Vesting Order provides for the repayment by the Applicant of all obligations owing under the DIP Term Sheet (the “**DIP Repayment**”) upon Closing, following which, the DIP Lender’s Charge will be automatically released and terminated.

34. The DIP Repayment is a condition to the Asset Purchase Agreement and no person will be prejudiced by such repayment as the remaining amount of the cash component of the Purchase Price is sufficient to repay all amounts in priority to the DIP Lender’s Charge.⁵¹ Upon repayment, the DIP Lender’s Charge will be released and terminated without any further action.

(c) PAYMENT OF THE TRANSACTION FEE

35. The Approval and Vesting Order sought also authorizes the payment of the Transaction Fee upon Closing. The Transaction Fee is secured by the Financial Advisor Charge (ranking fourth behind the Administration Charge, the Directors’ Charge, and the Employee Retention Plans Charge).⁵²

36. By the ARIO, this Court approved the engagement of the Financial Advisor on the terms set out in the Financial Advisor Agreement. This included the Transaction Fee up to the maximum amount of US\$6 million. The ARIO also granted the Financial Advisor Charge as security for the Transaction Fee. This Court found that this relief was appropriate “in light of the complexity of the restructuring”.⁵³

37. The Transaction Fee will have been properly earned by the Financial Advisor upon the closing of the Transaction. Since the remaining portion of the cash component of the Purchase Price is sufficient to satisfy amounts that rank ahead of the Financial Advisor Charge, no person

⁵¹ Stewart Affidavit at para. 42.

⁵² [ARIO](#) at para. 46.

⁵³ [ARIO](#) at paras. 36, 37; [March 20 Endorsement](#) at para. 12.

will be prejudiced by the payment of the Transaction Fee.⁵⁴ The Consenting Stakeholders and the Monitor all support the payment of the Transaction Fee.⁵⁵

(d) RELEASES

38. The Approval and Vesting Order contains broad releases (the “**Releases**”) in favour of, among others: (i) the current and former directors, officers, employees, legal counsel, agents and advisors of the LoyaltyOne Entities (subject to certain limitations); (ii) the Monitor and its legal counsel and advisors; (iii) BMO, in its capacity as the original buyer under the Asset Purchase Agreement and the DIP Lender and its legal counsel and advisors; and (iv) the Consenting Stakeholders and their legal counsel and advisors (each as further qualified and defined in the Approval and Vesting Order, the “**Released Parties**”), from claims relating to the Applicant, Travel Services, the business, operations, assets, Property and affairs of the Applicant or Travel Services, the administration and/or management of the Applicant or Travel Services, or this CCAA proceeding, or the Asset Purchase Agreement (and closing documents related thereto), the Transaction Support Agreement, any agreement, document, instrument, matter or transaction involving the Applicant or Travel Services arising in connection with or pursuant to any of the foregoing, and/or the consummation of the Transaction. The Released Parties do not include the Applicant and its current and former affiliates.⁵⁶

39. The Releases do not release or discharge: (i) any claim that is not permitted to be released under s. 5.1(2) of the CCAA or any claim with respect to any act or omission that is finally determined by a court of competent jurisdiction to have constituted actual fraud, wilful misconduct, or gross negligence; (ii) any obligations of any of the Released Parties under or in connection with

⁵⁴ Stewart Affidavit at para. 36.

⁵⁵ Stewart Affidavit at para. 41; Third Report at 5.3.

⁵⁶ Stewart Affidavit at para. 46. The term “Releasing Parties” under the proposed Approval and Vesting Order includes all Persons other than the Applicant, Travel Services and their current and former affiliates. The Applicant and Travel Services separately provide releases in the draft Approval and Vesting Order.

the Asset Purchase Agreement, the documents related to the closing of the Transaction, the Transaction Support Agreement, the Definitive Documents and/or any agreement, document, instrument, matter or transaction involving the Applicant or Travel Services arising in connection with or pursuant to any of the foregoing; or (iii) any claim against or in respect of Joseph L. Motes III, Bread or other parties associated with Bread (collectively, the “**Excluded Parties**” and each, an “**Excluded Party**”). They also do not limit any claim against an Excluded Party to the proceeds of any insurance policies. Importantly, the Releases do not release the Applicant from any obligations, including the obligations under the Credit Agreement, which will remain outstanding and will be addressed at a future date.⁵⁷

40. Any claim that is not permitted to be released pursuant to s. 5.1(2) of the CCAA or a claim with respect to any act or omission that is determined by a court of competent jurisdiction to have constituted actual fraud, willful misconduct, or gross negligence, will be limited solely to recovery from the proceeds of any applicable insurance policies for the Directors and Officers. Notice has been provided to the insurers and similar provisions have been approved in other CCAA proceedings.⁵⁸

41. Under s. 11 of the CCAA, and subject to certain restrictions, this Court may make any order that it considers appropriate in the circumstances. The CCAA also expressly contemplates that claims against the directors and officers of a debtor company can be compromised and released in a plan, subject to certain exceptions.⁵⁹ On this authority, courts have routinely approved releases in favour of parties to a restructuring or sale transaction, their professional

⁵⁷ Stewart Affidavit at para. 47.

⁵⁸ *Just Energy Group Inc., et al*, ONSC (Commercial List), Court File No. CV-21-00658423-00CL ([Approval and Vesting Order](#)) at para. 27 (Nov 3, 2022).

⁵⁹ CCAA, s. 5.

advisors, as well as their directors, officers and others outside of a plan in the context of a transaction.⁶⁰

42. In deciding whether to approve the Releases in connection with the Transaction, this Court must consider whether: (i) the Released Parties were necessary to the Transaction; (ii) the claims to be released are rationally connected to the purpose of the Transaction and necessary for it; (iii) the Transaction could succeed without the Releases; (iv) the Released Parties contributed to the Transaction; and (v) the Releases benefit the Applicant as well as the Applicant's creditors generally.⁶¹ It is not necessary for each of these factors to apply in order for the Releases to be granted.⁶²

43. The Releases are rationally connected to the Transaction and essential to its success. The Released Parties have made significant and often critical contributions to the development and implementation of the Applicant's exit from this CCAA Proceeding and the continued viability of the AIR MILES[®] Reward Program as a going-concern. If the Approval and Vesting Order is granted and the Transaction is consummated, the AIR MILES[®] Reward Program will continue under new ownership, and various stakeholders will have the benefit of: (i) an ongoing relationship with the Business; or (ii) the proceeds of the Transaction.⁶³

(e) Retail Sales Tax Act

44. The Approval and Vesting Order also includes a provision exempting the Transaction from s. 6 of the *Retail Sales Tax Act* (Ontario) or equivalent provisions of other applicable tax legislation. Under that provision, certain unpaid taxes will flow to a purchaser of assets unless the

⁶⁰ *Black Rock* at para. [128](#), citing *Green Relief Inc., Re*, [2020 ONSC 6837](#) at paras. [23 – 25](#) [*Green Relief*]; *8640025 Canada Inc.*, [2021 BCSC 1826](#) at para. [43](#). See also *Harte Gold* at paras. [81 – 86](#); *Just Energy Group Inc. et al. v. Morgan Stanley Capital Group Inc. et al.*, [2022 ONSC 6354](#) at para. [67](#) [*Just Energy*].

⁶¹ *Black Rock* at para. [130](#), citing *Harte Gold* at paras. [78 – 86](#) and the test established in *Lydian International Limited (Re)*, [2020 ONSC 4006](#) at para. [54](#). See also *Green Relief* at para. [27](#).

⁶² *Green Relief* at para. [28](#).

⁶³ Stewart Affidavit at para. 48.

sale is completed under s. 8 of the *Bulk Sales Act* (Ontario). Accordingly, notwithstanding the repeal of the *Bulk Sales Act* (Ontario),⁶⁴ the Applicant and the Buyers are seeking this relief to confirm that no liability will flow to the Buyers under *the Retail Sales Tax Act* (Ontario) or any similar legislation. Similar orders have been made by this Court in other CCAA proceedings.⁶⁵

B. ASSIGNMENT ORDER

45. The Asset Purchase Agreement contemplates that, subject to its terms, including the payment of any Cure Costs, Newco is to assume the Assumed Contracts. Notwithstanding the Applicant's efforts, certain consents required in connection with the assignment to certain of the Assumed Contracts remain outstanding at this time. The Applicant is seeking the Assignment Order solely with respect to those contracts identified on Schedule "A" to the proposed order.⁶⁶ The specified contracts are contracts where: (i) consent to assignment is required under the terms of the contract; and (ii) no consent has been returned at this time.

46. Section 11.3 of the CCAA provides that this Court may grant an order assigning the rights and obligations of the Applicant to "any person who is specified by the court and agrees to the assignment", with certain limited exceptions.⁶⁷ In deciding whether to exercise its discretion under s. 11.3, this Court must consider, among other things, three statutory factors:

- (a) whether the Monitor approved the proposed assignment. The Monitor supports the assignment of the Assumed Contracts;⁶⁸

⁶⁴ Pursuant to section 59(3)(a) of the *Legislation Act* (Ontario), where a statute refers to a provision in another statute which has been repealed or revoked without being replaced: (i) the repealed or revoked provision continues to have effect, but only to the extent that is necessary to give effect to the Act or regulation that contains the reference; and (ii) the reference is to the provisions as it read immediately before the repeal or revocation. Section 6 of the *Retail Sales Tax Act* (Ontario) refers to the *Bulk Sales Act* "as it read immediately before it was repealed".

⁶⁵ *Target Canada Co., Re*, [2015 CarswellOnt 4745](#) (SC) at para. 14; *Hartford Computer Hardware, Inc., Re*, [2012 CarswellOnt 21271](#) (SC) at para. 8; and *Canwest Publishing Inc., Re*, [2010 CarswellOnt 18866](#) at para. 20.

⁶⁶ As additional consents are received, the Applicant will update the Schedule "A" to remove such contacts.

⁶⁷ CCAA, s. [11.3](#).

⁶⁸ Third Report at 5.1.

- (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations. The Buyers are affiliates of BMO, a diversified financial services provider. BMO is responsible for the payment of the Purchase Price and for the performance of the obligations under the Asset Purchase Agreement up to Closing. BMO is the 8th largest bank in North America and is listed on the Toronto and New York Stock Exchanges with a market capitalization of over \$95 billion.⁶⁹ Where the assignee is a sophisticated financial entity, courts have found comfort in the viability and likely success of the proposed assignment;⁷⁰ and
- (c) whether it would be appropriate to assign the rights and obligations to that person. Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA, which are “avoiding the social and economic losses resulting from liquidation of an insolvent company”.⁷¹ Thus, where an assignment is necessary for the business to continue as a going-concern, Courts have found the assignment to be appropriate.⁷² In this case, the Assumed Contracts are necessary for the continued operation of the Business by the Buyers and for the protection of the confidential data exchanged under the applicable non-disclosure agreements. The assignment of the Assumed Contracts will benefit the Applicant’s stakeholders by providing for the continuation of the Business, including ongoing trade and employment relationships, and by allowing Collectors an opportunity to continue to earn and redeem Reward Miles.⁷³

⁶⁹ Stewart Affidavit at Exhibit “A” at para. 138.

⁷⁰ See, for example, *UrtheCast Corp., Re*, [2021 BCSC 1819](#) at para. 50.

⁷¹ *Century Services Inc. v. Canada (Attorney General)*, [2010 SCC 60](#) at para. 70.

⁷² *Veris Gold* at paras. 49, 50. See also *TBS Acquireco Inc. (Re)*, [2013 ONSC 4663](#) at para. 25, in which this Court considered the assignment appropriate as a result of, among other things, the fact that it “would result in the continuation of business in the greatest number of stores and the continued employment of the greatest number of people”.

⁷³ Stewart Affidavit at Exhibit “A” at paras. 41, 113.

47. The Applicant has provided notice to each counterparty, which notice included copies of the Applicant's Notice of Motion and a draft of the Assignment Order.⁷⁴

48. This Court may not make an order under s. 11.3 of the CCAA unless it is satisfied that all monetary defaults in relation to the assigned contracts, with certain exceptions, will be remedied on or before the day fixed by this Court.⁷⁵ To satisfy this requirement, the Assignment Order expressly provides that such assignment is subject to, among other things, the payment of any amounts required to be paid under s. 11.3 of the CCAA.

49. The Applicant sent letters to the Consent Right Counterparties and worked with those who responded and the Restructuring Advisor to determine, among other things, the applicable Cure Costs.⁷⁶

50. The Assumed Contracts include agreements with Partners, key service providers, marketing agencies, suppliers, and other contract counterparties who are integral to the operation of the Applicant's day to day business. The Assumed Contracts also include non-disclosure agreements. Given the sensitive nature of the information shared by each party, it is essential that the agreements be assigned so that the business remains able to enforce any privacy or other rights related to the information covered by the non-disclosure agreement.⁷⁷

C. ANCILLARY RELIEF ORDER

51. The Applicant seeks the Ancillary Relief Order to, among other things: (i) deem the resignation of the Directors and (subject to certain limitations) Officers concurrent with the delivery of the Monitor's Certificate; (ii) authorize the Monitor to exercise any powers which may be properly exercised by a board of directors or any officers of the Applicant to cause the Applicant,

⁷⁴ Affidavit of Service of Alec Hoy sworn May 5, 2023; Affidavit of Service of Alec Hoy sworn May 10, 2023.

⁷⁵ CCAA, s. [11.3\(4\)](#).

⁷⁶ Stewart Affidavit at paras. 53 – 55.

⁷⁷ Stewart Affidavit at para. 58.

through the Applicant's Assistants, to, among other things, complete the Remaining Activities; and (iii) extend the Stay Period up to and including July 14, 2023 (the "**Stay Extension**").

52. Following the Closing, the Remaining Activities of the Applicant will include, among other things: (i) overseeing the transitioning employees that will remain with the Applicant and the remaining business and activities of the Applicant; (ii) prosecuting any remaining litigation claims for the benefit of stakeholders; (iii) liquidating the Remaining Property; and (iv) attending to any post-closing matters. The Applicant's current Directors and Officers (excluding transitioning employees who are currently officers) have advised that they intend to resign, effective upon Closing. To ensure efficiency and transparency in timing, the proposed Ancillary Relief Order deems the directors and applicable officers to have resigned upon filing of the Monitors' Certificate contemplated by the Approval and Vesting Order and thereafter empowers the Monitor 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, to complete the Remaining Activities.⁷⁸ The Monitor's use of the Applicant's Assistants will allow the Monitor to preserve and leverage significant institutional knowledge and serve to maximize cost efficiencies in completing the Remaining Activities for the benefit of the Applicant's creditors.

53. Pursuant to ss. 11 and 23(1)(k) of the CCAA, this Court has the authority to expand the powers of the Monitor.⁷⁹ The expansion of a Monitor's powers is not uncommon in CCAA proceedings and has been granted in previous cases, including by this Court.⁸⁰ The proposed expanded powers for the Monitor are reasonable and necessary in the circumstances and will

⁷⁸ Stewart Affidavit at para. 61.

⁷⁹ CCAA, ss. [11](#), [23\(1\)\(k\)](#); *Ernst & Young Inc. v. Essar Global Fund Limited*, [2017 ONCA 1014](#) at paras. [106](#), [117](#), [118](#) [*Essar Global*]; *Harte Gold* at para. [91](#).

⁸⁰ *Just Energy* at paras. [2](#), [3](#), [68](#), [69](#); *Clover Leaf Holdings Company et al. (Re)*, (January 28, 2020) ONSC (Commercial List), Court File No. CV-19-00631523-00CL ([Monitor's Expansion of Powers and Stay Extension Order](#)) at para. 5; *Harte Gold* at paras. [91 – 93](#); *Mountain Equipment Co-Operative (Re)*, [2020 BCSC 2037](#) at paras. [9](#), [10](#).

best ensure a timely and efficient conclusion to this CCAA Proceeding for the benefit of the Applicant's stakeholders.

54. In furtherance of the Remaining Activities, the proposed Ancillary Relief Order provides that the Applicant and its respective advisors and its current and former officers, directors, employees, agents and representatives shall co-operate with the Monitor in the exercise of its powers. Importantly, the proposed Ancillary Relief Order provides that to the extent such persons are employees of the Buyers, such requests will not interfere with their day-to-day responsibilities or cause liability to the Buyers and shall be at the Applicant's sole expense. This limitation provides additional protection to the Buyers when compared with recent precedent.⁸¹

55. The proposed Ancillary Relief Order will also contain provisions to ensure that any privileged information or documents accessed by the Monitor with its expanded powers will only be subject to a limited waiver in favour of the Monitor and for no other purpose. Given that the Remaining Property includes certain litigation claims, it is important that applicable legal privileges are preserved and maintained.⁸²

56. The requested Stay Extension up to and including July 14, 2023 is required to allow the Transaction to close. Section 11.02 of the CCAA provides that this Court may grant an extension to 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.⁸³

⁸¹ See *Clover Leaf Holdings Company et al. (Re)*, (January 28, 2020) ONSC (Commercial List), Court File No. CV-19-00631523-00CL ([Monitor's Expansion of Powers and Stay Extension Order](#)) at para. 13.

⁸² *Re Crystallex International Corporation* (May 7, 2019) ONSC (Commercial List) Court File No. CV-11-9532-00CL ([Endorsement](#)); *Re Crystallex International Corporation* (May 5, 2019) ONSC (Commercial List) Court File No. CV-11-9532-00CL ([Order](#)).

⁸³ CCAA, s. [11.02](#).

57. The current stay of proceedings expires on May 18, 2023. Assuming the Transaction is approved by this Court, the Applicant requires the Stay Extension to close the Transaction, to begin undertaking the Remaining Activities, and to return to Court under the direction of the Monitor to seek other and further relief related to the Remaining Activities including the authority to make distributions to its secured creditors.⁸⁴

58. The Applicant has acted, and continues to act, with due diligence and in good faith in this CCAA Proceeding to achieve a going-concern transaction for the AIR MILES® Reward Program and the best available outcome for its stakeholders.⁸⁵ The Monitor supports the Ancillary Relief Order, including the provisions granting it expanded powers.⁸⁶

PART IV - ORDER REQUESTED

59. For all of the reasons above, the Applicant requests that this Court grant the requested Approval and Vesting Order, Assignment Order and Ancillary Relief Order, each in the forms proposed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of May, 2023.



Cassels Brock & Blackwell LLP
Lawyers for the Applicant

⁸⁴ Stewart Affidavit at para. 63.

⁸⁵ Stewart Affidavit at para. 64; Third Report at 9.0.

⁸⁶ Third Report at 7.0.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *8640025 Canada Inc.*, [2021 BCSC 1826](#)
2. *Arrangement relative à Black Rock Metals Inc.*, [2022 QCCS 2828](#)
3. *Canwest Publishing Inc., Re*, [2010 CarswellOnt 18866](#) (ONSC)
4. *Century Services Inc. v. Canada (Attorney General)*, [2010 SCC 60](#)
5. *Clearbeach and Forbes (Re)*, [2021 ONSC 5564](#)
6. *Clover Leaf Holdings Company et al. (Re)*, (January 28, 2020) ONSC (Commercial List), Court File No. CV-19-00631523-00CL ([Monitor's Expansion of Powers and Stay Extension Order](#))
7. *Consumers Packaging Inc., Re* (2001), 27 C.B.R. (4th) 197, [2001 CanLII 6708](#) (ONCA)
8. *Crystallex International Corporation (Re)*, (May 7, 2019), ONSC (Commercial List) Court File No. CV-11-9532-00CL ([Endorsement](#))
9. *Crystallex International Corporation (Re)*, (May 5, 2019), ONSC (Commercial List) Court File No. CV-11-9532-00CL ([Order](#)).
10. *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014
11. *Green Relief Inc., Re*, [2020 ONSC 6837](#)
12. *Harte Gold (Re)*, [2022 ONSC 653](#)
13. *Hartford Computer Hardware, Inc., Re*, [2012 CarswellOnt 21271](#) (ONSC)
14. *Just Energy Group Inc., et al.*, (November 3, 2022), ONSC (Commercial List), Court File No. CV-21-00658423-00CL ([Approval and Vesting Order](#))
15. *Just Energy Group Inc. et al. v. Morgan Stanley Capital Group Inc. et al.*, [2022 ONSC 6354](#)
16. *LoyaltyOne Co. (Re)*, (March 20, 2023), ONSC (Commercial List), Court File No. CV-23-00696017-00CL ([ARIO](#))
17. *LoyaltyOne Co. (Re)*, (March 20, 2023), ONSC (Commercial List), Court File No. CV-23-00696017-00CL ([Endorsement](#))
18. *LoyaltyOne Co. (Re)*, (March 20, 2023), ONSC (Commercial List), Court File No. CV-23-00696017-00CL ([SISP Approval Order](#))
19. *LoyaltyOne Co. (Re)*, (May 1, 2023), ONSC (Commercial List), Court File No. CV-23-00696017-00CL ([Endorsement](#))

20. *LoyaltyOne Co. (Re)*, (May 1, 2023), ONSC (Commercial List), Court File No. CV-23-00696017-00CL ([U.S. Plan Performance Approval Order](#))
21. *Lydian International Limited (Re)*, [2020 ONSC 4006](#)
22. *Mountain Equipment Co-Operative (Re)*, [2020 BCSC 1586](#)
23. *Mountain Equipment Co-Operative (Re)*, [2020 BCSC 2037](#)
24. *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229, [2009 CarswellOnt 4467](#) (ONSC)
25. *PCAS Patient Care Automation Services Inc. (Re)*, [2012 ONSC 3367](#)
26. *Royal Bank v. Soundair Corp.* (1991), 83 DLR (4th) 76, [1991 CarswellOnt 205](#) (ONCA)
27. *Target Canada Co., Re*, [2015 CarswellOnt 4745](#) (ONSC)
28. *TBS Acquireco Inc. (Re)*, [2013 ONSC 4663](#)
29. *UrtheCast Corp., Re*, [2021 BCSC 1819](#)
30. *Veris Gold Corp. (Re)*, [2015 BCSC 1204](#)
31. *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

Compromise with secured creditors

5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

Claims against directors – compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

...

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.

...

Assignment of agreements

11.3(1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

- (a) an agreement entered into on or after the day on which proceedings commence under this Act;
- (b) an eligible financial contract; or
- (c) a collective agreement.

Factors to be considered

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

- (a) whether the monitor approved the proposed assignment;
- (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
- (c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement – other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation – will be remedied on or before the day fixed by the court.

Copy of order

(5) the applicant is to send a copy of the order to every party to the agreement.

...

Duties and functions

23(1) The monitor shall

...

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

...

Right of access

24 For the purposes of monitoring the company's business and financial affairs, the monitor shall have access to the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company, to the extent that is necessary to adequately assess the company's business and financial affairs.

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.

Retail Sales Tax Act, R.S.O. 1990, c. R.31

Sales in bulk

6 (1) This section applies with respect to a sale in bulk that is not completed under section 8 of the *Bulk Sales Act* before July 1, 2011, but it does not apply with respect to a sale in bulk made pursuant to a written agreement entered into on or before March 29, 2011.

Application re sellers

(2) This section applies with respect to a person who, on or before June 30, 2010, held or was required to hold a permit under section 5 and with respect to a person who, after June 30, 2010, holds or is required to hold a permit under section 5.

Seller's duty to obtain certificate

(3) No person described in subsection (2) shall dispose of the person's stock through a sale in bulk to which the *Bulk Sales Act*, as it read immediately before it was repealed, would have applied had it not been repealed without first obtaining a certificate in duplicate from the Minister indicating that all taxes, penalties and interest collectable or payable by the person under any of the following statutes have been paid or indicating that the person has entered into an arrangement satisfactory to the Minister for the payment of such taxes, penalties and interest or for securing their payment:

1. *Liquor Tax Act, 1996.*
2. *Fuel Tax Act.*
3. *Gasoline Tax Act.*
4. *Race Tracks Tax Act.*
5. *Retail Sales Tax Act.*
6. *Tobacco Tax Act.*

Liability of seller

(4) The issuance of a certificate under subsection (3) by the Minister does not affect any liability under the statutes listed in subsection (3) of the person in respect of whom the certificate is issued.

Liability of a purchaser

(5) Every person ("purchaser") purchasing stock through a sale in bulk to which the *Bulk Sales Act*, as it read immediately before it was repealed, would have applied had it not been repealed from a person ("seller") described in subsection (2) shall obtain from the seller the duplicate copy of the certificate furnished under subsection (3) and, if the purchaser fails to do so, the purchaser is responsible to the Minister for payment to the Minister of all taxes, penalties and interest imposed under the statutes listed in subsection (3) that are collectable or payable by the seller.

Transition

(6) This section as it reads on June 30, 2011 continues to apply with respect to a sale in bulk made pursuant to a written agreement entered into on or before March 29, 2011 or with respect to a sale in bulk completed under section 8 of the *Bulk Sales Act* before July 1, 2011.

...

Bulk Sales Act, R.S.O. 1990, c. B.14

Judicial exemption

3 (1) A seller may apply to a judge for an order exempting a sale in bulk from the application of this Act, and the judge, if satisfied, on the affidavit of the seller and any other evidence, that the sale is advantageous to the seller and will not impair the seller's ability to pay creditors in full, may make the order, and thereafter this Act, except section 7, does not apply to the sale.

Notice, terms and directions

(2) The judge may require notice of the application for the order to be given to the creditors of the seller or such of them as he or she directs, and may in the order impose such terms and give such directions with respect to the disposition of the proceeds of the sale or otherwise as he or she considers appropriate.

...

Completion of sale

8 (1) Where the buyer has received the statement mentioned in section 4, the buyer may pay or deliver the proceeds of the sale to the seller and thereupon acquire the property of the seller in the stock in bulk,

(a) if the statement mentioned in section 4 discloses that the claims of the unsecured trade creditors of the seller do not exceed a total of \$2,500 and that the claims of the secured trade creditors of the seller do not exceed a total of \$2,500 and the buyer has no notice that the claims of the unsecured trade creditors of the seller exceed a total of \$2,500 and that the claims of the secured trade creditors of the seller exceed a total of \$2,500; or

(b) if the seller delivers a statement verified by the seller's affidavit showing that the claims of all unsecured trade creditors and all secured trade creditors of the seller of which the buyer has notice have been paid in full; or

(c) if adequate provision has been made for the immediate payment in full of all claims of the unsecured trade creditors of the seller of which the buyer has notice and of all claims of secured trade creditors of the seller that are or become due and payable upon completion of the sale of which the buyer has notice, so long as their claims are paid in full forthwith after completion of the sale, but where any such creditor has delivered a waiver in Form 2 no provision need be made for the immediate payment of the creditor's claim.

Idem

(2) Where the buyer has received the statement mentioned in section 4, the buyer may pay or deliver the proceeds of the sale to the trustee and thereupon acquire the property of the seller in the stock in bulk, if the seller delivers to the buyer,

(a) the consent to the sale in Form 3 of unsecured trade creditors of the seller representing not less than 60 per cent in number and amount of the claims that exceed \$50 of all the unsecured trade creditors of the seller of whose claims the buyer has notice; and

(b) an affidavit of the seller deposing that the seller delivered or caused to be delivered to all of the seller's unsecured trade creditors and secured trade creditors personally or by registered mail addressed to them at their last known addresses at least fourteen days before the date fixed for the completion of the sale copies of the contract of the sale in bulk, the statement mentioned in subsection 4 (1), and the statement of affairs in Form 4, and deposing that the affairs of the seller as disclosed in the statement of affairs have not materially changed since it was made.

Legislation Act, SO 2006, c 21, Sch F

Rolling incorporation of Ontario legislation

59 (1) A reference in an Act or regulation to a provision of another Act or regulation is a reference to the provision,

- (a) as amended, re-enacted or remade; or
- (b) as changed under Part V (Change Powers).

Same

(2) Subsection (1) applies whether the provision is amended, re-enacted, remade or changed under Part V before or after the commencement of the provision containing the reference.

Reference to repealed and unreplaced provision

(3) If the provision referred to is repealed or revoked, without being replaced,

- (a) the repealed or revoked provision continues to have effect, but only to the extent that is necessary to give effect to the Act or regulation that contains the reference; and
- (b) the reference is to the provision as it read immediately before the repeal or revocation.

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
(Approval and Vesting Order, Assignment Order and
Ancillary Relief Order)**

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