

AGREEMENT FOR PRESTO RETAIL DISTRIBUTION

THIS AGREEMENT (“**Agreement**”) is made as of [], 2017 (the “**Effective Date**”),

BETWEEN: **METROLINX**, a corporation incorporated under the laws of Ontario, having its head office at 97 Front Street West, Toronto, Ontario, M5J 1E6 (“**Metrolinx**”);

AND: **THE CORPORATION OF THE CITY OF BURLINGTON**, a corporation incorporated under the laws of Ontario, having its head office at 426 Brant Street, Burlington, Ontario, L7R 3Z6 (“**Transit Agency**”)

WHEREAS:

- A. Metrolinx is an agency of the Government of Ontario established pursuant to the *Metrolinx Act, 2006*;
- B. Metrolinx owns and operates the PRESTO electronic payment system, and transit agencies (including Transit Agency) use such system pursuant to a Greater Toronto Area Fare System Operating Agreement (the “**Core PRESTO Agreement**”);
- C. Metrolinx has established a relationship with Loblaws Inc. (“**Loblaw**”) to be the primary distributor for PRESTO Media through its affiliate’s Shoppers Drug Mart banner pursuant to an agreement made as of April 11, 2017 (the “**Loblaw Agreement**”);
- D. The Loblaw Agreement requires that Transit Agency accept certain exclusivity requirements before Loblaw can be required to Distribute and Load PRESTO Media in Transit Agency’s jurisdiction; and
- E. This Agreement sets out the terms of such exclusivity.

NOW, THEREFORE in consideration of the mutual obligations contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

SECTION 1
INTERPRETATION, TERM AND TERMINATION

1.1 Definitions

- (a) “**Concession**” means, in relation to PRESTO Media, a status that is eligible for a reduced fare or promotional status on certain transit systems.
- (b) “**Distribute and Load PRESTO Media**” means any and all of the sale, distribution, activation, card-querying, balance-checking, loading and reloading of PRESTO Media, including e-purse transactions (which refers to the loading and debiting of stored value, which is used to pay for transit), adding monthly, weekly, or period passes, and any other transit fare passes as Metrolinx determines may be offered to the public through PRESTO, and the setting of Concessions on PRESTO Media.
- (c) “**Distribution Zone**” means the following area cumulatively:
 - (i) areas in Zone 1 and within a 1.2 km radius of any Loblaw PRESTO Point;
 - (ii) areas in Zone 2 and within a 3.5 km radius of any Loblaw PRESTO Point; and
 - (iii) areas in Zone 3 and within a 7.0 km radius of any Loblaw PRESTO Point.
- (d) “**FIPPA**” means the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31;
- (e) “**Loblaw PRESTO Point**” means a Loblaw Retail Store which Distributes and Loads PRESTO Media.
- (f) “**Loblaw Retail Store**” means a retail store which is operated by Loblaw or one of its affiliates, or a franchisee to Loblaw or one of its affiliates.
- (g) “**LUM**” means limited-use media that is compatible with the PRESTO system.
- (h) “**MPOS Device**” means mobile point of sale device that is used to Distribute and Load PRESTO Media.

- (i) “**Next Natural Break**” means, in relation to an agreement of a person, the earlier of: (A) an agreement’s next renewal without monetary penalties for non-renewal under that agreement; (B) an agreement’s expiry; and (C) where an agreement has no defined term, the date that that agreement may be terminated without monetary penalty related to such termination.
- (j) “**PRESTO Media**” means PRESTO cards, LUMs, and any non-digital fare media that operates using the PRESTO technology system, or any future iteration thereof, but not any future digital version of PRESTO that may be available online.
- (k) “**TA Exclusivity Requirements**” means the exclusivity obligations set out in Section 2.2 and Section 2.3.
- (l) “**Transit Station**” means the interior of any enclosed transit station and any exterior waiting area designated for passengers at a rail station, subway station, bus terminal or transfer hub, but does not include bus stops or streetcar stops, unless such bus stops or streetcar stops are part of a rail station, subway station, bus terminal or transfer hub.
- (m) “**Zone 1**” means Toronto, East York, Etobicoke, North York, Scarborough, or York or in the geographical area defined by municipal wards 12 and 14 in the City of Ottawa as of April 11, 2017.
- (n) “**Zone 2**” means Ajax, Aurora, Barrie, Brantford, Bradford West Gwillimbury, Brampton, Burlington, Cambridge, Clarington, East Gwillimbury, Guelph, Halton Hills, Hamilton, Innisfil, King, Kitchener Waterloo, Markham, Milton, Mississauga, Newmarket, Niagara Falls, Oakville, Oshawa, Peterborough, Pickering, Richmond Hill, St. Catherines, Stoney Creek, Vaughan, Whitby, and Whitchurch-Stouffville or the geographical area defined by municipal wards 7, 8, 9, 10, 11, 13, 15, 16, 17, and 18 in the City of Ottawa as of April 11, 2017.
- (o) “**Zone 3**” means any area in Ontario that is not Zone 1 or Zone 2.

1.2 Term and Termination

This Agreement shall commence on the Effective Date and continue (the “**Term**”) until the earlier of: (i) the date on which the Loblaw Agreement ceases to be effective (after all renewals); and (ii) the date on which the Core PRESTO Agreement expires or is terminated without a successor or replacement agreement being effective.

SECTION 2 PRESTO DISTRIBUTION

2.1 PRESTO Media Distribution

- (a) Loblaw will Distribute and Load PRESTO Media at Loblaw PRESTO Points pursuant to the Loblaw Agreement.
- (b) Metrolinx shall take commercially reasonable efforts to ensure that at least fifty-five percent (55%) of Shoppers Drug Mart locations in each municipality that uses the PRESTO system for which Transit Agency, or its transit agency operator, is the primary provider of local public transit (each such municipality, a “**PRESTO Municipality**”) will Distribute and Load PRESTO Media at the conclusion of Loblaw’s roll-out of Loblaw PRESTO Points.
- (c) Metrolinx shall provide the devices which Loblaw needs to Distribute and Load PRESTO Media at Loblaw PRESTO Points.

2.2 Standard Loblaw Exclusivity

- (a) Except as expressly set out below in this Section 2.2, Transit Agency will not engage any entity other than Loblaw or Metrolinx to Distribute and Load PRESTO Media.
- (b) Transit Agency may not rely on Section 2.2(c)(ii)(Y) to solicit the roll-out of Loblaw PRESTO Points in a municipality until after Loblaw has completed the roll-out of Loblaw PRESTO Points within that municipality.
- (c) Notwithstanding Section 2.2(a), Transit Agency may engage a third-party to Distribute and Load PRESTO Media only in the following circumstances:
 - (i) in a Transit Station;

- (ii) outside of the Distribution Zone, but only where Transit Agency has provided written notice to Metrolinx that it requires Distribution and Loading of PRESTO Media to a certain area outside of the Distribution Zone and Metrolinx has passed such notice on to Loblaw (Metrolinx’s notice to Loblaw, a “**Distribution Request**”) and Metrolinx informs Transit Agency that Loblaw has either: (X) advised that there is no Loblaw Retail Store that could extend the Distribution Zone to cover such area if it were converted to a Loblaw PRESTO Point, or (Y) declined the opportunity in writing. If Loblaw indicates that there is one or more potential Loblaw Retail Stores to cover such area, it shall have thirty (30) days from the Distribution Request to indicate whether it will convert any such Loblaw Retail Stores to Loblaw PRESTO Points. If Loblaw does not respond within thirty (30) days of the Distribution Request, or if it responds in the affirmative but does not create a Loblaw PRESTO Point, within ninety (90) days of the Distribution Request, Loblaw will be deemed to have declined; or
- (iii) where such a third-party is:
 - (A) one of a limited group of persons which Metrolinx has specified in writing to Transit Agency are available to assist with distribution, provided that such persons do not Distribute and Load PRESTO Media in collaboration with, or from locations operated from within, any Loblaw Direct Competitors (as of the date hereof, there are no such persons);
 - (B) a temporary contractor or a contractor to whom Transit Agency has contracted a customer-facing role (such as, if Transit Agency were Metrolinx, Metrolinx’s Bombardier Guest Service Representatives, or the agency engaged by Metrolinx to provide regional tours (where the contractor operated a travelling information booth which appeared to be staffed by Metrolinx employees)), and which is used by Transit Agency to Distribute and Load PRESTO Media directly to consumers; or
 - (C) a group that acts as a pass-through to the members of that group, and not the general public, where Transit Agency’s sales of PRESTO Media to that group are direct or via any transit-agency intermediaries, and not via any non-transit intermediary.
- (d) **Termination of Third-Party PRESTO Agreements.** If Loblaw creates a Loblaw PRESTO Point that expands the Distribution Zone to include an area that contains a third-party retailer that Distributes and Loads PRESTO Media then Metrolinx may provide Transit Agency written notice and Transit Agency must terminate any agreement with that third-party retailer at the Next Natural Break. Notwithstanding the forgoing, if Transit Agency contracts with a third-party to Distribute and Load PRESTO Media pursuant to Section 2.2(c)(ii)(Y), then Transit Agency shall not be required to terminate its contract with that third-party as otherwise described in this Section 2.2(d).
- (e) **Distribution by Direct Competitors.** Transit Agency will not contract with a Loblaw Direct Competitor to Distribute and Load PRESTO Media without prior written approval of Metrolinx, which may be withheld in Metrolinx’s sole discretion.
- (f) **Distribution outside Transit Stations.** Where Transit Agency Distributes and Loads PRESTO Media outside of a Transit Station in a retail environment, such Distribution and Loading of PRESTO Media must take place in a space exclusively operated by Transit Agency and must not exceed three (3) months per distribution location in any twelve (12) month period.
- (g) **PRESTO Machines.** The Parties agree that self-serve PRESTO devices, including add-value machines and ticket-vending machines, may be installed by Transit Agency: (i) outside of retail environments; or (ii) within a retail environment only if it is in a mall, not within a specific retailer, and there is no Loblaw PRESTO Point in that mall.

2.3 Loblaw Exclusivity as Tailored to Third Party Transit Agencies

The TA Exclusivity Requirements are subject to the terms below:

- (a) *Roll-out plan requirements.* Loblaw’s proposed roll-out plan shall seek to equitably distribute Loblaw PRESTO Points with an emphasis on transit corridors. Transit Agency acknowledges that Metrolinx cannot compel Loblaw to roll-out in any particular location.

- (b) *Exclusivity is breached.* If there is a breach by Transit Agency and/or a PRESTO Municipality of the TA Exclusivity Requirements and Loblaw withdraws Loblaw PRESTO Points from such PRESTO Municipality/coverage zone then, in addition to any other remedies hereunder available to Metrolinx, Transit Agency agrees to bear the direct cost and expense of the withdrawal of such Loblaw PRESTO Points which will be four thousand dollars (\$4,000) per Loblaw PRESTO Point.
- (c) *Transit agency property out of scope.* All properties operated and owned, licensed or leased by Transit Agency as a provider of Burlington Transit are out of scope of the TA Exclusivity Requirements and Transit Agency is free to Distribute and Load PRESTO Media directly or indirectly via third parties in those locations, but not through any Loblaw Direct Competitor.
- (d) *Municipality property out of scope.* All properties operated and owned, licensed or leased by a PRESTO Municipality are out of scope of the TA Exclusivity Requirements and Transit Agency is free to Distribute and Load PRESTO Media on such properties but not through any retailer.
- (e) *Legacy fare media.* The TA Exclusivity Requirements shall not restrict Transit Agency from selling its own fare media (i.e. not PRESTO).
- (f) *Limited grandfathering of current arrangements.* Any existing retail distribution points of Transit Agency that Distribute and Load PRESTO Media as of April 11, 2017 (of which all such distribution points are listed in Schedule A – Authorized PRESTO Media Distributors) may continue except if such distribution point would otherwise breach the TA Exclusivity Requirements in which case the third-party transit agency must terminate such agreement at its Next Natural Break, and such agreement may not be amended in any way to increase the scope of PRESTO Media distribution or to increase its term or renewal provisions.
- (g) *Possible limited right to add new locations.* Transit Agency may not create any new retail distribution points for PRESTO Media (whether by creating a new retail distribution point or adding PRESTO Media to an existing retail distribution point) after April 11, 2017 except in very limited circumstances with Metrolinx’s prior written consent which Metrolinx may withhold in its sole discretion.

SECTION 3 **LOBLAW DIRECT COMPETITOR**

3.1 **Competing Entities**

- (a) “**Loblaw Direct Competitor**” means the following competing banners and the following entities:

Entity	Competing Banners
Empire Company	Chalo FreshCo, FreshCo, Foodland, Price Chopper, Sobeys, Sobeys Express, Sobeys Extra, Sobeys Urban Fresh, Food Town, IGA, IGA Express, IGA Extra, Lawtons, Les Marchés Tradition, Marché Bonichoix, Needs Convenience, Rachele Béry, Safeway, Thrifty Foods
METRO Incorporated	Adonis, Foods Basics, Metro, Brunet, Les 5 Saisons, Marché Ami, Marché Richelieu, Metro Plus, Super C
Longo’s	Grocery Gateway, Longo’s, The Market by Longo’s
Walmart	Walmart
Costco	Costco
Whole Foods	Whole Foods
Farm Boy	Farm Boy
Pharmasave	Pharmasave
Urbery	Urbery
Sephora	Sephora
McKesson	Guardian, I.D.A., Medicine Shoppe, Remedy’s Rx, Rexall, Rexall Pharmaplus, Proxim
Amazon	Amazon

Penguin Fresh	Penguin Fresh
Mama Earth Organics	Mama Earth Organics
InstaBuggy	InstaBuggy
Grocerymarket.ca	Grocerymarket.ca
Pusateri's	Pusateri's
Fiesta Farms	Fiesta Farms
Rabba	Rabba
Jean Coutu	Jean Coutu

- (b) The list of competing banners in Section 3.1(a) may be updated on a quarterly basis. The list of entities in Section 3.1(a) may be updated on an annual basis. In each case, Metrolinx shall promptly provide such updated list to Transit Agency.

3.2 Transition

- (a) If a new competing banner is added to Section 3.1(a) (whether through the addition of a new entity or a new competing banner) and Transit Agency is negotiating with such competing banner at time of such addition for an arrangement that would result in a breach of this Agreement, Transit Agency will be entitled to conclude its negotiations with such competing banner within six (6) months of the date which Loblaw notified Metrolinx of such competing banner's addition to the list.
- (b) If Transit Agency is a party to an agreement with a Loblaw Direct Competitor that places Transit Agency in breach of this Agreement due to Transit Agency entering into such agreement pursuant to Section 3.2(a) or due to Transit Agency already being a party to that agreement prior to such competing banner's addition to the list in Section 3.1(a), then Transit Agency must terminate such agreement at such agreement's Next Natural Break.

SECTION 4 GENERAL

4.1 Injunctive Relief

Each Party acknowledges that the benefits to be obtained by the other Party under this Agreement are significant and may not be adequately compensated by an award of damages in the event of a default or impending default by such Party. Accordingly, each Party shall be entitled to the remedy of injunctive relief or specific performance without having to establish the inadequacy of any other remedy available by law.

4.2 Indemnity

Transit Agency shall defend, indemnify and hold harmless Metrolinx, and its respective directors, officers, employees, representatives, and agents from and against all losses, liabilities, fines, penalties, costs and expenses (including reasonable legal fees) ("**Losses**") where such Losses arise from, relate to or are incurred in connection with a claim that relates to or alleges a breach by Transit Agency of the TA Exclusivity Requirements.

4.3 Confidentiality

Transit Agency agrees that the terms of this Agreement are confidential in nature and subject to Article 16 of the Core PRESTO Agreement and the confidentiality provision of any successor or replacement agreement.

4.4 General

- (a) Notices. Notices shall be given under the Core PRESTO Agreement.
- (b) Amendments. No amendment or modification to this Agreement will be valid unless set forth in writing and signed by authorized representatives of both Parties.
- (c) Severability. Any provision of this Agreement which is held to be invalid or unenforceable under present or future laws shall be ineffective to the extent of such invalidity or unenforceability and shall be severed from the balance of this Agreement, all without affecting the remaining provisions of this Agreement and appropriate amendments shall be made to this Agreement to put the Party who is disadvantaged by such

invalidity or unenforceability in the same financial position as if no provision hereof were invalid or unenforceable. The Parties agree to immediately negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties as closely as possible in an acceptable manner to the end that transactions contemplated hereby are fulfilled to the extent permitted by law.

- (d) Entire Agreement. This Agreement constitutes the entire Agreement between the Parties with respect to the subject matter hereof and supersedes all prior agreements, understandings, negotiations and representations, whether oral and written, with respect thereto.
- (e) Binding Effect. This Agreement shall enure to the benefit of and be binding upon the Parties hereto and their respective successors and permitted assigns.
- (f) Waiver. No waiver of any term or condition is valid unless in writing and signed by an authorized representative of both Parties, and will be limited to the specific situation for which it is given. No waiver shall be inferred from or implied by any failure to act or delay in acting by a Party in respect of any default, breach, non-observance or by anything done or omitted to be done by another Party. The waiver by a Party of any default, breach or non-compliance under this Agreement shall not operate as a waiver of that Party's rights under this Agreement in respect of any continuing or subsequent default, breach or non-compliance (whether of the same or any other nature).
- (g) Governing Law. This Agreement shall be exclusively governed by the laws of the Province of Ontario and the federal laws of Canada applicable therein.
- (h) Further Assurances. The Parties shall execute, acknowledge and deliver all such further assurances, instruments and documents and do all such other acts as may be necessary or appropriate in order to carry out the intent and purposes of this Agreement.
- (i) Remedies Cumulative. Except as may be otherwise provided in this Agreement, the rights or remedies of the Parties hereunder are not exclusive, and either Party is entitled alternatively or cumulatively, subject to the other provisions of this Agreement, to damages for breach, to apply for an order from an appropriate court requiring specific performance, or to any other remedy available at law or in equity.
- (j) English Language. The Parties have requested that this Agreement and all documents contemplated by this Agreement be drawn up in English. *Les Parties aux présentes ont exigé que cette entente et tous autres documents envisagés par les présentes soient rédigés en anglais.*

IN WITNESS WHEREOF the Parties have caused this Agreement to be executed as of the date first above written.

METROLINX

THE CORPORATION OF THE CITY OF BURLINGTON

Per: _____
Name: _____
Title: _____

Per: _____
Name: _____
Title: _____

Per: _____
Name: _____
Title: _____

Per: _____
Name: _____
Title: _____

We have authority to bind the company.

We have authority to bind the company.

SCHEDULE A
Authorized PRESTO Media Distributors

Burlington			
Transit Agency	Location name	Address	City
Burlington	Burlington Transit Bus Terminal	430 John St, Burlington L7R 2K5	Burlington
Burlington	Hamilton Street Railway	36 Hunter St E, Hamilton L8N 3W8	Hamilton