T-_____-2021

FEDERAL COURT OF CANADA

BETWEEN:

ONEX CORPORATION
ONEX CARESTREAM FINANCE LP
1727655 ONTARIO INC.

Applicants

AND:

THE ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPLICATION FOR JUDICIAL REVIEW
(Sections 18 and 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7)

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TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Applicants. The relief claimed by the Applicants appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the Applicants. The Applicants request that this application be heard in Toronto.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it

on the Applicants' solicitor, or where the Applicant is self-represented, on the Appellant, **WITHIN 10 DAYS** of being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: January 14, 2022

Issued by: _____

Registry
Federal Court of Canada
180 Queen Street West
Toronto, Ontario
M5V 1Z4

TO: The Minister of National Revenue
7th Floor
555 Mackenzie Avenue
Ottawa, Ontario K1A 0L5

(Service is effected by filing the original and two paper copies at the Registry in accordance with Rule 133 of the *Federal Court Rules* and with article 48 of the *Federal Courts Act*)

APPLICATION

1. **THIS IS AN APPLICATION FOR JUDICIAL REVIEW IN THE FEDERAL COURT IN RESPECT OF** (i) a decision (the "**Decision**") of the Canada Revenue Agency ("**CRA**"), acting on behalf of the Minister of National Revenue (the "**Minister**"), concluding that she has no discretion to accept an election under subsection 21(15) of the *Economic Action Plan 2014 Act*, No. 2, SC 2014, c. 39 ("**Bill C-43**") by Applicant Onex Carestream Finance LP for the purposes of having subsections 93.1(5) and (6) of the *Income Tax Act*, RSC, 1985, c. 1 (5th Supp.) (the "**ITA**") deemed to have come into force on January 1, 2010, and, therefore, apply to the 2012 and 2013 taxation years of all its foreign affiliates; and (ii) the Minister's restrictive interpretation of the ITA underlying the Decision (the "**Interpretation**").

2. The Decision is dated December 16, 2021 and was received by the Applicants on that same day.

3. **THE APPLICANTS MAKE APPLICATION TO**:

   (a) **QUASH** the Minister's Decision;

   (b) **DECLARE** that the Minister's Decision and Interpretation are incorrect and unreasonable;

   (c) **DECLARE** that the Minister refused to exercise the discretion conferred on her by the ITA;

   (d) **DECLARE** that the Minister has, pursuant to subsections 220(2.1) and (3) ITA, discretion to accept an election by Applicant Onex Carestream Finance LP under subsection 21(15) of Bill C-43 for the purposes of having subsections 93.1(5) and (6) ITA deemed to have come into force on January 1, 2010, and,

therefore, apply to the 2012 and 2013 taxation years of all its foreign affiliates (the "**Election**");

(e) **REFER** the matter back to the Minister for reconsideration and adjudication in accordance with this Application and this Court's instructions;

(f) **GRANT** the Applicants all reasonable and proper costs that this Court deems just and equitable in the circumstances; and

(g) **GRANT** such further and other relief as counsel may advise and this Court may permit.

THE GROUNDS FOR THE APPLICATION are as follows:

I. INTRODUCTION

4. The Applicants reported their income for 2012 and 2013 based on a reasonable interpretation of the ITA that was supported by public statements of both the CRA and the Department of Finance.

5. In 2014, legislative amendments to the ITA were enacted. These amendments provided a different path leading to the same tax result. In this context, and for the reasons described below, including the stated position of the CRA and the Department of Finance, the Applicants decided that an election deeming these amendments to come into force at an earlier date and therefore apply to 2012 and 2013 was not necessary and would not be filed.

6. In 2020, more than four years after the normal due date to file the Election, the Minister notified the Applicants that she was abandoning her and the Department of Finance's longstanding interpretation of the relevant provisions of the ITA and proposed adjustments to the Applicants' 2012 and 2013 returns. While the Applicants maintain that the proposed adjustments are incorrect, they separately requested that

the Minister exercise her discretion under the ITA to accept the Election to achieve a fair and just result.

7. On December 16, 2021, the Minister notified the Applicants of her "*final*" Decision and of her underlying general and restrictive Interpretation, namely that she considered the ITA did not give her authority to exercise discretion to accept the Election.

8. This Application seeks *inter alia* to set aside the Minister's Decision and Interpretation and declare that the ITA, reasonably and correctly interpreted, confers discretion on the Minister to accept the Election.

II. AT A GLANCE: FOREIGN AFFILIATE AND PARTNERSHIP RULES

A. FOREIGN AFFILIATE RULES

9. The foreign affiliate rules in the ITA[1] generally provide for two mutually exclusive categories of income earned by a controlled foreign affiliate: (a) income from an active business; and (b) foreign accrual property income ("**FAPI**").

10. Income from an active business of a controlled foreign affiliate will only be included in the controlling entity's income when it receives a dividend. A Canadian corporation typically can deduct the amount of dividends it receives out of active business income in computing its taxable income.

11. By contrast, the ITA requires shareholders who are resident in Canada to include their share of any FAPI of a controlled foreign affiliate in their income on a current basis irrespective of whether it is actually paid to them.[2] When a dividend is received out of FAPI of a controlled foreign

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1 Sections 90 to 95 ITA.

2 Subsection 91(1) ITA.

affiliate, the ITA provides a deduction in computing income to reflect the taxes previously paid (the "**FAPI Dividend Deduction**").

12. Paragraph 95(2)(a) ITA provides that income earned by a controlled foreign affiliate that would otherwise be FAPI will generally be deemed to be active business income where it relates to an active business carried on by another controlled foreign affiliate of the taxpayer (the "**Deemed Active Business Income Rule**"). For instance, if a Canadian taxpayer holds shares of a controlled foreign affiliate (CFA#1), directly or through other corporations, and the latter earns interest income from another controlled foreign affiliate (CFA#2) of the Canadian taxpayer in respect of funds lent by CFA#1 to CFA#2 and used in CFA#2's active business, the interest income will not constitute FAPI and will be taxable when a dividend is paid to the Canadian taxpayer.

B. PARTNERSHIP RULES

13. The ITA does not tax partnerships.

14. Rather, subsection 96(1) ITA requires a partnership to compute its income as if it were a separate person, and each partner to include its share of the partnership's income in its own income. Subsection 229(1) of the *Income Tax Regulations* (C.R.C., c. 945) (the "**Regulations**") requires every member of a partnership to file for each fiscal period an information return (T5013) containing the income or loss of the partnership and the share of each member of the income or loss.

15. As detailed below, prior to the coming into force of subsections 93.1(5) and (6) ITA in 2014, there were no rules in the ITA that would make or deem a partnership to be related to a corporation other than a corporation that it directly controlled for purposes of applying the Deemed Active Business Income Rule to controlled foreign affiliates of the partnership (the "**Pre-2014 Legislation**"). Accordingly, in the example in paragraph 12 above, if the Canadian taxpayer held shares

in CFA#1 through a partnership rather than directly or through a corporation, the interest received by CFA#1 from CFA#2 constituted FAPI which had to be included in the Canadian taxpayer's income from the partnership, subject to the FAPI Dividend Deductions where dividends have been paid.

III. OVERVIEW OF THE FACTUAL BACKGROUND

A. THE APPLICANTS AND THE RELEVANT STRUCTURE

16. The facts are stated as they were for the period relevant for this Application and the amounts have been rounded for ease of reference.

17. The applicant Onex Corporation ("**Onex Canada**") is a corporation resident in Canada.

18. Together with related entities, Onex Canada invests capital on behalf of its shareholders, institutional investors and high net worth clients from around the world. As such, the Onex group invests in operating companies generally taking controlling ownership positions.

19. One of these operating companies, Carestream Health, Inc., is a US resident corporation providing X-ray imaging systems worldwide ("**USOpco**").

20. USOpco is a controlled foreign affiliate of Onex Canada for purposes of the ITA.[3]

21. In parallel:

    (a) Onex Canada is the limited partner of applicant Onex Carestream Finance LP ("**Onex USP**") and holds a 99.99% partnership interest; and

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[3] Section 95(1) *ITA*

(b) Applicant 1727655 Ontario Inc. ("**GP**") is the general partner of Onex USP and holds the remaining 0.01% partnership interest therein.

22. In February 2011, a widely-used form of structure for Canadian multinationals to finance foreign active business operations was implemented:

(a) Onex USP borrowed approximately USD$1,850M from arm's length parties;

(b) Onex USP used the borrowed funds to subscribe for, and acquire all of the common shares of Onex Carestream Finance II LLC ("**LLC2**"), a US resident corporation and controlled foreign affiliate of Onex USP for purposes of the ITA; and

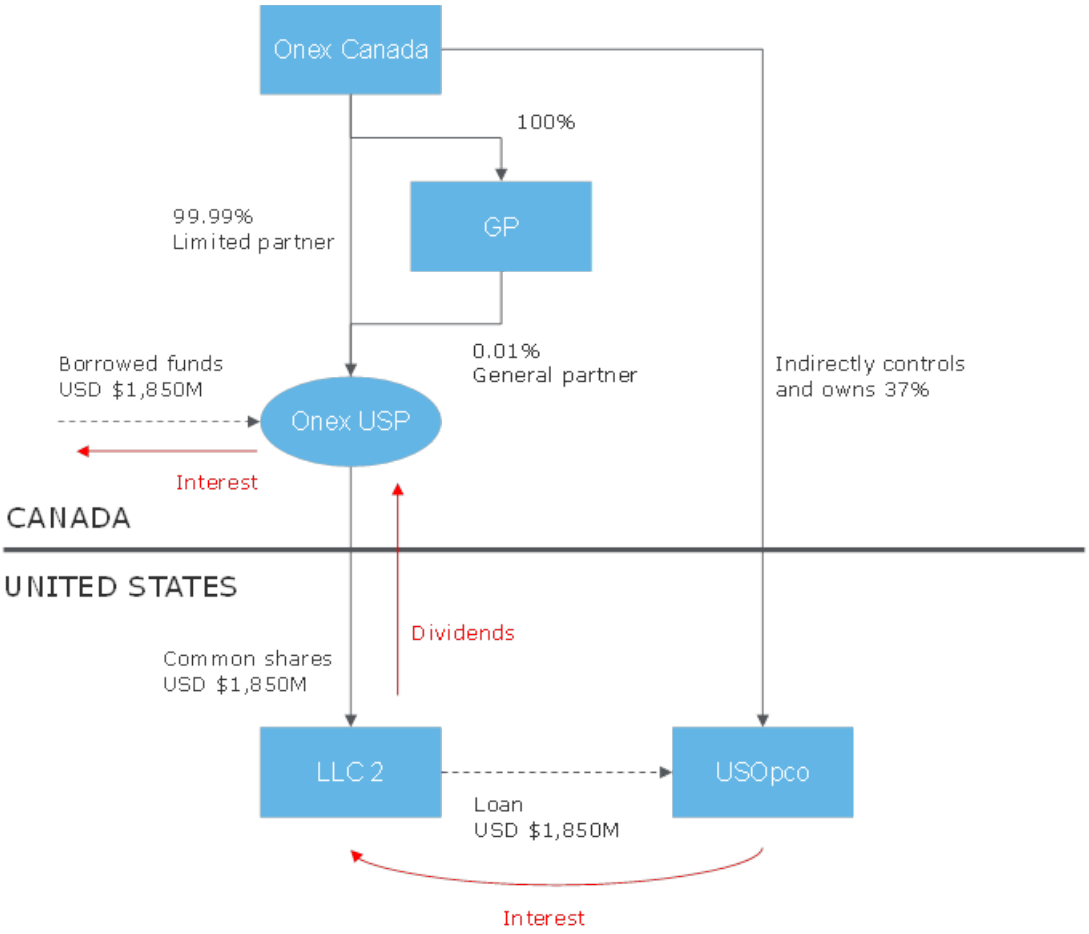
(c) LLC2 used the share proceeds to make an interest-bearing loan to USOpco.

23. The borrowed funds were used by USOpco in its active business.

24. USOpco paid LLC2 interest and related fees on the loan ("**Interest**").

25. LLC2 paid dividends to Onex USP.

26. The following chart is a simplified illustration of the relationships between the relevant entities and the flow of funds:



B. TAX REPORTING

27. At the time Onex USP was required to compute its income for 2012 and 2013, the ITA was affected by the Pre-2014 Legislation and the Deemed Active Business Income Rule did not apply.

28. Accordingly, in computing its income, Onex USP included the Interest, $101M in 2012 and $92M in 2013, as FAPI.

29. As for Onex Canada and GP, they included in their income their shares of Onex USP's income. Under the FAPI Dividend Deduction, they also claimed a deduction in respect of the dividends paid by LLC2 in the same amounts as the FAPI income, that is, $101M in 2012 and $92M in 2013.

30. These computations were based on a reasonable interpretation of the ITA. This interpretation was in line with the CRA's interpretation reflected in a published administrative practice that extended back to January 1979 as well as public statements of the Department of Finance on how the relevant provisions are intended to operate to achieve a result that is consistent with the scheme of the ITA (the "**Administrative Practice**").

C. THE ENACTMENT OF BILL C-43

i. The New Provisions

31. On December 16, 2014, Bill C-43 came into force and introduced, *inter alia*, new subsections 93.1(5) and (6) ITA (the "**New Provisions**") to address complexities – including the Pre-2014 Legislation – arising from the application of the foreign affiliate rules to structures involving partnerships. In particular, the New Provisions are technical tax provisions relating to the use of partnerships to hold the foreign affiliates shares.

32. The New Provisions deem USOpco to have the same foreign affiliate and qualifying interest status in respect of Onex USP that it has in respect of Onex Canada.

33. Therefore, under the New Provisions, USOpco is deemed to be a foreign affiliate of Onex USP with the consequence that any payment of interest or related amounts by USOpco to LLC2 is included in LLC2's active business income in accordance with the Deemed Active Business Income Rule.

ii. The "Coming Into Force" Provision

34. Subsection 21(15) of Bill C-43 ("**CIF Provision**") provides that the New Provisions apply in respect of taxation years ended after July 12, 2013, unless a taxpayer elects for an earlier application that would deem the

New Provisions to come into force on January 1, 2010 (above-defined as "**Election**"):

> (15) Subsections 93.1(5) and (6) of the Act, as enacted by subsection (8), apply in respect of taxation years of foreign affiliates of a taxpayer that end after July 12, 2013. However, if the taxpayer elects in writing under this subsection in respect of all its foreign affiliates and files the election with the Minister of National Revenue on or before the day that is the later of the day that an information return referred to in subsection 229(1) of the Income Tax Regulations is required (or would be required if the taxpayer were a Canadian partnership), pursuant to subsections 229(5) and (6) of the Income Tax Regulations, to be filed in respect of the fiscal period of the taxpayer that includes the day on which this Act receives royal assent and the day that is one year after the day on which this Act receives royal assent, then subsections 93.1(5) and (6) of the Act, as enacted by subsection (8), are deemed to have come into force on January 1, 2010. (our emphasis)

35. In the case of Onex USP, the CIF Provision required an Election to be filed by December 16, 2015 as:

(a) subsection 229(5) of the Regulations required that Onex USP's T5013 be filed within 5 months after the end of the fiscal periods in issue, namely (i) June 30, 2012 for the 2012 taxation year and (ii) June 30, 2013 for the 2013 taxation year; and

(b) Bill C-43 received royal assent on December 16, 2014 and its anniversary is December 16, 2015.

D. ONEX USP'S DECISION NOT TO ELECT UNDER THE CIF PROVISION

36. When the New Provisions were introduced, the Applicants considered whether Onex USP should file an Election to have these New Provisions apply to its 2012 and 2013 taxation years.

37. After analysis and consultation with their tax advisors, the Applicants decided an Election was not necessary, essentially for the following reasons.

38. First, Onex USP's T5013 returns and Onex Canada's income tax returns had already been filed.

39. Second, the tax positions taken by the Applicants in these returns were consistent with the Administrative Practice and supported by a proper interpretation of the ITA.

40. Third, the Election would only have resulted in unnecessary compliance and administrative burden to the Applicants and the CRA without a different outcome. Simply stated, under the New Provisions, Onex USP's income for 2012 and 2013 would remain the same as its income reported in accordance with the Administrative Practice and so would the income reported by Onex Canada and GP.

E. THE CRA'S JUNE 10, 2020 LETTER

41. In a letter dated June 10, 2020, the CRA proposed to artificially and substantially inflate Onex Canada's and GP's income by refusing the FAPI Dividend Deduction referred to in paragraph 29 above.

42. The CRA's proposal was based on an interpretation of the ITA contrary to the interpretation reflected in the Administrative Practice

F. THE JULY 9, 2020 SUBMISSIONS

43. In a letter dated July 9, 2020, Onex Canada provided detailed submissions as to why the Applicants' computation of income and reporting were supported by:

(a) a proper interpretation of the ITA; and

(b) the Administrative Practice.

44. Alternatively, should the CRA not agree to withdraw its proposed adjustments, Onex Canada requested that the Minister exercise her discretion to accept an Election to have the New Provisions apply to Onex USP's 2012 and 2013 taxation years, pursuant to subsections 220(2.1) or (3.2) ITA.

45. To that end, Onex Canada's submissions highlighted that making a change in a longstanding administrative practice at a time at which taxpayers can no longer elect to avoid undue tax consequences undermines the efficient and effective functioning of the tax system, especially when the tax results reported by the taxpayers are the appropriate and intended results as confirmed by the New Provisions.

G. THE MINISTER'S DECISION AND INTERPRETATION AT ISSUE

46. The Decision maintained the CRA's intention to artificially and substantially inflate Onex Canada's income.

47. Further, the Decision, stated to be "*final*",[4] denied the discretionary relief sought by Onex Canada on the basis that "*the Income Tax Act does not allow the Minister to exercise discretion to accept the late filing of the election under the CIF [P]rovision for subsections 93.1(5) and (6).*"[5]

48. Given the Minister's broad and definitive conclusion regarding the absence of any form of discretion under the ITA that would allow the Election, the Applicants have no choice but to apply to this Court to challenge the Decision and seek a declaratory relief regarding the underlying restrictive Interpretation in order to settle the live controversy.

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4 Decision, page 7.

5 Decision page 4. See also, page 7.

IV. STATEMENT OF THE GROUNDS INTENDED TO BE ARGUED

49. This Court should grant the orders sought by the Applicants *inter alia* for the following reasons.

50. The Minister refused to exercise the discretion conferred on her by the ITA.

51. The Minister's conclusion that she has no discretion under the ITA to accept a late-filed Election under the CIF Provision is incorrect and unreasonable. In this regard:

(a) Subsection 220(2.1) ITA allows the Minister to exercise discretion to waive the requirement for the Election to be filed and, then, to require the filing of the Election at her request; and

(b) Another provision of the ITA – subsection 220(3) – grants the Minister discretion to accept Onex USP's Election under the CIF Provision.

A. THE MINISTER'S DISCRETION UNDER 220(2.1) ITA

52. 220(2.1) ITA reads:

> (2.1) **Waiver of filing of documents** Where any provision of this Act or a regulation requires a person to file a prescribed form, receipt or other document, or to provide prescribed information, the Minister may waive the requirement, but the person shall provide the document or information at the Minister's request. (our emphasis)

53. In her Decision, the Minister indicated "*subsection 220(2.1) does not grant [her] discretion […] to assist the taxpayer in this situation*" essentially because:

(a) the CIF Provision is not part of the ITA;

(b) allowing subsection 220(2.1) ITA to waive a requirement to file an Election – which is not listed in section 600 of the Regulations – would run counter to Parliament's intention to limit late elections to those listed in section 600 of the Regulations; and

(c) the nature of subsection 220(2.1) ITA is different from subsection 220(3.2) ITA and only the latter grants her discretion to accept a late filed election.

54. This interpretation of the ITA is incorrect and unreasonable.

i. <u>The CIF Provision Must Be Construed as Part of the *ITA*</u>

55. Subsection 42(3) of the *Interpretation Act*, R.S.C., 1985, c. I-21, provides that an amending enactment, as far as consistent with the tenor thereof, shall be construed as part of the enactment it amends.

56. It follows that the New Provisions and the CIF Provision of Bill C-43, the purpose of which is to address complexities – including the Pre-2014 Legislation – arising from the application of the foreign affiliate rules to structures involving partnerships, shall be construed as part of the ITA they amend.

ii. <u>Waiving the Requirement to File the Election Does Not Run Counter to Parliament's Intention</u>

57. The Minister's conclusion that allowing subsection 220(2.1) ITA to waive a requirement to file an Election – which is not listed in section 600 of the Regulations – would run counter to Parliament's intention to limit late elections to those listed in section 600 of the Regulations is contrary to the wording of section 220(2.1) ITA.

58. Subsection 220(2.1) ITA provides that the Minister has the authority to waive the filing of "*other document*".

59. The word "*document*" has a broad meaning and a proper interpretation includes an election in writing such as the Election under the CIF provision.

iii. Subsection 220(2.1) ITA is Different from Subsection 220(3.2) ITA and Allows the Late Filing of the Election

60. Subsections 220(2.1) and 220(3.2) ITA provide distinct mechanisms:

(a) subsection 220(3.2) ITA grants the Minister discretion to "*extend the time for making an election or grant permission to amend or revoke an election […] that is required to be made […] under a prescribed provision*".

(b) subsection 220 (2.1) ITA grants the Minister discretion (i) to waive the requirement to file a document such as an election and (ii) to subsequently require, despite the waiver, the person to provide the document or information.

61. The Minister interprets subsection 220 (2.1) ITA as limiting her discretion to waiving the requirement to file an election. In so doing, she disregards the remainder of the provision, namely her discretion to subsequently require the filing of the election.

62. Properly interpreted and fully read, subsection 220(2.1) ITA allows the Minister to exercise discretion to waive the requirement for the Election to be filed and, then, to require the filing of the Election at her request.

B. THE MINISTER'S DISCRETION UNDER SUBSECTION 220(3) ITA

63. Another provision of the ITA – subsection 220(3) – grants the Minister discretion to accept Onex USP's Election under the CIF Provision:

> 220 (3) **Extensions for returns** The Minister may at any time extend the time for making a return under this Act. (our emphasis)

64. As mentioned above, the CIF Provision provides that the Election must be filed "*on or before the day that is the later of*":

    (a) "*the day that an information return referred to in subsection 229(1) of the [Regulations] is required (…) pursuant to subsections 229(5) and (6) of the [Regulations] to be filed (…)*"; and

    (b) *"the day that is one year after the day on which [Bill C-43] receives royal assent*".

65. The filing of the "*information return referred to in subsection 229(1)*" ITA – the T5013 return – is governed, *inter alia,* by the combination of paragraph 221(1)(d) ITA, section 229 of the Regulations and subsection 152(1.4) ITA.

66. It follows that the filing of a T5013 return is a requirement "*under this Act* [ITA]" for which the Minister has, under 220 (3) ITA, discretion to extend the time for making such return.

67. By exercising her discretion to extend the time for Onex USP to file a T5013 return under paragraph 221(1)(d) ITA and section 229 of the Regulations, the Minister automatically extends the time within which the Election can be filed by Onex USP under the CIF Provision.

68. Subsection 220(3) ITA must receive a broad interpretation, one that provides relief from strict filing requirements, remedies injustices, and covers new return filing requirements. Indeed, to reflect Parliament's intent, subsection 220(3) ITA must be given full effect.

THE APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

69. Affidavit of David Copeland;

70. Copy of the letters from:

    (a) The CRA to Onex Canada dated June 10, 2020;

    (b) Onex Canada to the CRA dated July 9, 2020;

    (c) The CRA to Onex Canada dated December 16, 2021; and

71. Such further and other material, affidavit or other evidence as may be deemed necessary.

MATERIAL IN THE POSSESSION OF THE MINISTER AND THE CRA:

72. The Applicants intend to ask the Minister and the CRA to send a certified copy of material that is not in the possession of the Applicants but is in the possession of the Minister and the CRA, after taking the necessary steps with the Minister and the CRA and the Registry to ensure that any documents sent to the Registry in accordance with 317, 318 and 350 of the *Federal Court Rules* will be kept under seal and not made public.

73. The Applicants reserve their right to amend this Application including in light of the material to be transmitted.

DATED AT MONTRÉAL, this 14th day of January 2022.

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