T-_____-22

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: October 7, 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** a decision (the "**2022 Decision**") dated September 9, 2022 of the Canada Revenue Agency ("**CRA**"), as delegate of the Minister of National Revenue (the "**Minister**"), concluding that:

   (a) "[t]here is no discretion provided by Parliament to the Minister in the *Economic Action Plan,* the *[Income Tax] Act* or elsewhere to extend the time to make the Election" that would result in subsections 93.1(5) and (6) of the *Income Tax Act*, RSC, 1985, c. 1 (5th Supp.) (the "**ITA**") being deemed to have come into force on January 1, 2010 in respect of all the foreign affiliates of the taxpayer filing that election (the "**Threshold Decision**"); and

   (b) "[i]n any event, even if subsection 220(3) of the [*Income Tax*] *Act* did apply to the Election, the Minister of National Revenue would not have exercised discretion to extend the time for USP [Onex Carestream Finance LP] to file that election" (the "**Merits Decision**").

2. The Decision is dated September 9, 2022, and was received by the Applicants on that same day.

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

   (a) **CONSOLIDATE** this Application for Judicial Review with the one at issue in Docket No. T-85-22;

   (b) **QUASH** the 2022 Decision;

   (c) **DECLARE** that the Threshold Decision is incorrect and/or unreasonable;

(d) **DECLARE** that the Merits Decision is unreasonable;

(e) **DECLARE** that the Minister has, pursuant to subsection 220(3) ITA, discretion to extend the time for the filing of an information return under paragraph 221(1)(d) ITA and section 229 of the *Income Tax Regulations* (C.R.C., c. 945) (the "**Regulations**") (the "**T5013 return**") and consequently accept an election by Applicant Onex Carestream Finance LP ("**Onex USP**") under subsection 21(15) of the *Economic Action Plan 2014 Act*, No. 2, SC 2014, c. 39 ("**Bill C-43**") (the "**Election**") 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;

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

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

(h) **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 for the Applicants. In this context, the Applicants decided that the 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, on July 9, 2020, they separately requested that the Minister exercise her discretion under subsections 220(2.1) and/or (3.2) ITA to accept the Election to achieve a fair and just result (the **"First Request**").

7. On December 16, 2021, the Minister notified the Applicants of her "final decision" to the First Request to the effect that "the *Income Tax Act* does not allow the Minister to exercise discretion to accept the late filing of the [E]lection*"* (the "**2021 Decision**").

8. On January 14, 2022, the Applicants filed an application for judicial review in this Court against the 2021 Decision (Docket No. T-85-22). This application remains pending.

9. On March 1, 2022, the Applicants requested that the Minister exercise her discretion under subsection 220(3) ITA to extend the time for the filing of a T5013 return as this would extend the time within which the Election could be filed (the **"Second Request**").

10. On September 9, 2022, the Minister notified the Applicants of her "final decision" to the Second Request being the Threshold Decision and the Merits Decision.

11. This Application seeks:

(a) to set aside the Threshold Decision on the grounds that it is incorrect and/or unreasonable, and declare that subsection 220(3) ITA, reasonably and correctly interpreted, confers discretion on the Minister to extend the time for the filing of a T5013 return and consequently accept the Election; and

(b) to set aside the Merits Decision on the grounds that it is unreasonable as it is untenable in light of the factual and legal constraints that bear on it.

II. AT A GLANCE: FOREIGN AFFILIATE AND PARTNERSHIP RULES

A. FOREIGN AFFILIATE RULES

12. The foreign affiliate rules found at sections 90-95 ITA 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**").

13. Income from an active business of a controlled foreign affiliate will only be included in the controlling entity's income when it is paid out as a dividend. Such dividends will generally be tax free because of section 113, which usually allows a Canadian corporation to deduct the amount of dividends it receives out of active business income of a controlled foreign affiliate in computing its taxable income (the "**Interco Dividend Deduction**").

14. By contrast, FAPI income of a controlled foreign affiliate must be included in the controlling entity's income on a current basis irrespective of whether it is actually paid to them.[1] To avoid double taxation, when a

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[1] Subsection 91(1) ITA.

controlled foreign affiliate pays out a dividend on amounts included as FAPI, subsection 91(5) ITA provides a deduction in computing income to reflect the FAPI (the "**FAPI Dividend Deduction**").

15. 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, will be taxable when a dividend is paid to the Canadian taxpayer, and will be treated as described in paragraph 13.

B. PARTNERSHIP RULES

16. The ITA does not tax partnerships. 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 Regulations requires every member of a partnership to file for each fiscal period an information return (the T5013 return) containing the income or loss of the partnership and the share of each member of the income or loss.

17. As detailed below, prior to the coming into force of subsections 93.1(5) and (6) ITA in 2014 (the "**New Provisions**"), the Deemed Active Business Income Rule did not apply when a partnership was interposed between a Canadian taxpayer and its controlled foreign affiliate (the "**Pre-2014 Legislation**"). Accordingly, in the example in paragraph 15 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

18. The facts are stated as they were for the period relevant for this Application and the amounts have been rounded for ease of reference.[2]

19. The Applicant Onex Corporation ("**Onex Canada**") is a corporation resident in Canada.

20. The Onex group invests capital on behalf of its shareholders and 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.

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

22. USOpco is a "controlled foreign affiliate" of Onex Canada, as defined at subsection 95(1) ITA.

23. In parallel:

    (a) Onex Canada is the limited partner of Onex USP and holds a 99.99% partnership interest;

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[2] Unless otherwise stated, all dollar amounts are to United States Dollar ("**US$**" or "**USD**"), which is the functional currency of the Applicants for tax purposes.

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

(c) Onex USP is the sole owner of Onex Carestream Finance II LLC ("**LLC2**"), a US resident corporation and controlled foreign affiliate of Onex USP for purposes of the ITA.

24. In February 2011, the Applicants and USOpco refinanced USOpco's outstanding indebtedness by way of the following steps, which was a widely-used form of financing for Canadian multinationals to invest in foreign active business operations:

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

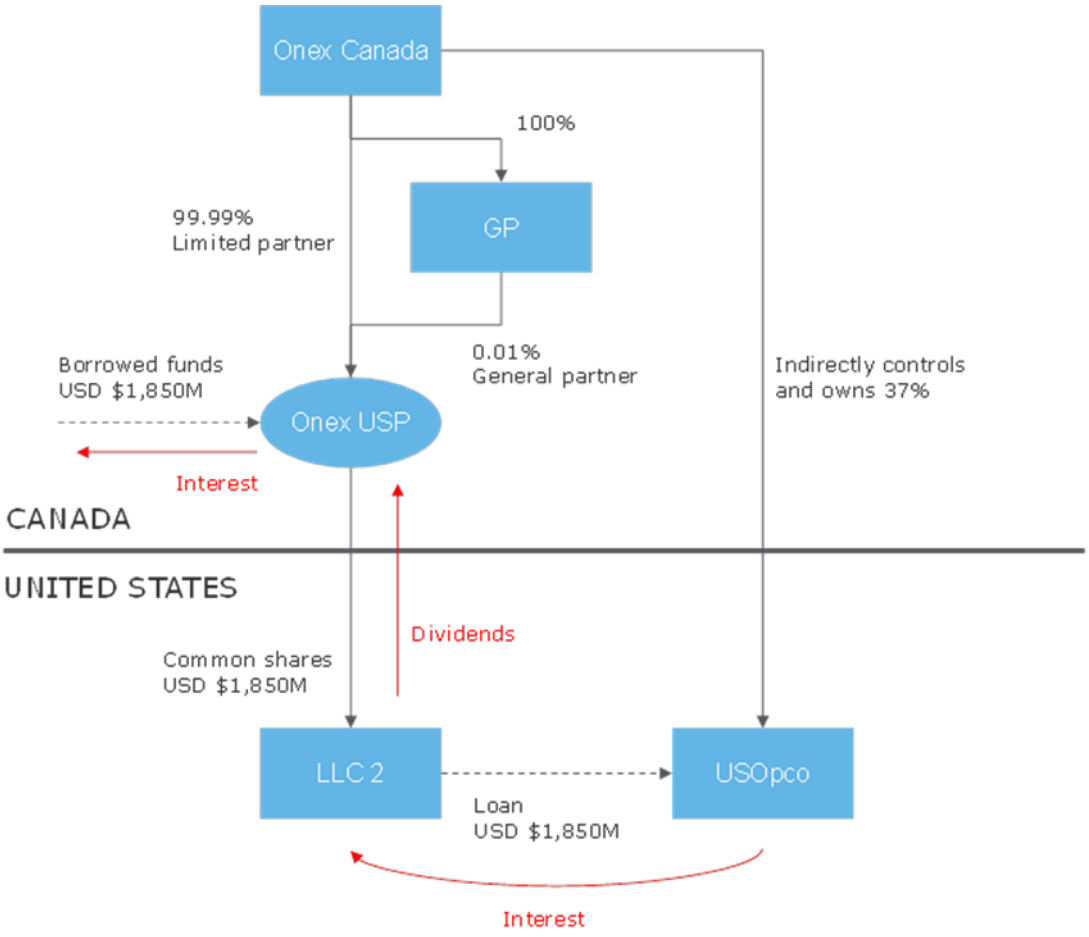
(b) Onex USP used the borrowed funds to subscribe for, and acquire all of the common shares of LLC2; and

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

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

26. USOpco paid LLC2, among other amounts, interest on the borrowed funds, namely: $101 million in 2012 and $92 million in 2013 (the "**Interest**").

27. Interest and repayments of a portion of the Loan principal received from USOpco allowed LLC2 to pay dividends to Onex USP, namely: $179.5 million in 2012 and $109.5 million in 2013 (the "**Dividends**"). The following chart is a simplified illustration of the relationships between the relevant entities and the flow of funds:



B. TAX REPORTING

28. At the time Onex USP was required to compute its income for 2012 and 2013, the Deemed Active Business Income Rule did not apply to the Interest paid by USOpco to LLC2. Accordingly, in computing its income, Onex USP included the Interest as FAPI. It also claimed an offsetting deduction pursuant to subsection 91(5) ITA, as the Dividends from LLC2 were paid out of previously taxed FAPI. Onex USP also included in its income the dividends paid to it by LLC2. More precisely, in accordance with sections 90, 91 and 96 ITA, Onex USP computed its income as follows:

Onex USP Computation

	2012	2013
Income (loss)	($94.5M)	($95.5M)
FAPI - Interest of LLC2 ss. 91(1)	$101M	$92M
FAPI Dividend Deduction pursuant to ss. 91(5)	($101M)	($92M)
Partnership income (loss) excluding Dividends from LLC2 and other dividends	($94.5M)	$(95.5M)
Dividends from LLC2 ss. 90(1)	$179.5M	$109.5M
Other Dividends	$5M	-
Net Partnership Income (Loss)	$90M	$14M

29. As illustrated in the chart in the following paragraph, Onex USP's net partnership income was allocated 99.99% Onex Canada and 0.01% to GP pursuant to subsection 96(1) ITA.

30. Under sections 93.1 and 113 ITA, Onex Canada was deemed to own 99.99% of the shares of LLC2 and to have received the Dividends. As such Onex Canada was entitled to the InterCo Dividend Deduction. Accordingly, pursuant to sections 90, 93.1, 96 and 113 ITA, Onex Canada reported its taxable income for 2012 and 2013 in respect of its participation in Onex USP as follows:

Onex Canada's Computation

	2012	2013
99.99% of the Net Partnership Income (Loss)	$89.99M	$13.99M
Interco Dividend Deduction pursuant to s. 113	($179.49M)	($109.49M)
Net Taxable Income	**($89.5M)**	**($95.5M)**

31. These computations were based on the relevant provisions of the ITA and the Applicants' understanding of CRA's interpretation reflected in a published administrative practice that extended back to January 1979 and was observed until 2017, 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. MAKING AN ELECTION

i. The New Provisions

32. On December 16, 2014, Bill C-43 came into force and introduced, *inter alia*, 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.

33. 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 and no longer constitutes FAPI. The New Provisions simplify the calculation of the Applicants' income in respect of the investment in LLC2,

by eliminating the need to compute the FAPI inclusion and FAPI Dividend Deduction, but it did not change the net income (or loss) of the Applicants' in any taxation year as these amounts fully offset each other.

ii. The "Coming Into Force" Provision

34. The coming into force provision, section 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.	(15) Les paragraphes 93.1(5) et (6) de la même loi, édictés par le paragraphe (8), s'appliquent relativement aux années d'imposition des sociétés étrangères affiliées d'un contribuable qui se terminent après le 12 juillet 2013. Toutefois, si le contribuable en fait le choix en vertu du présent paragraphe relativement à l'ensemble de ses sociétés étrangères affiliées, dans un document qu'il présente au ministre du Revenu national au plus tard soit à la date d'échéance de production d'une déclaration de renseignements visée au paragraphe 229(1) du *Règlement de l'impôt sur le revenu* qui s'applique à lui (ou qui s'appliquerait à lui s'il était une société de personnes canadienne), en vertu des paragraphes 229(5) et (6) du *Règlement de l'impôt sur le revenu*, pour son exercice qui comprend la date de sanction de la présente loi, soit, si elle est postérieure, à la date qui suit d'un an la date de sanction de la présente loi, les paragraphes 93.1(5) et (6) de la même loi, édictés par le paragraphe (8), sont réputés être entrés en vigueur le 1er janvier 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 period (January 31, 2015) that includes the day on which Bill C-43 receives royal assent (December 16, 2014), that is, June 30, 2015; and

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

iii. <u>Onex USP's Decision Not to Elect Under the CIF Provision</u>

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 that it was unnecessary to file an Election essentially for the following reasons.

38. First, based on the Applicants' understanding of the relevant provisions of the ITA and the Administrative Practice, the Election would only change how Onex USP computed its income by eliminating the FAPI inclusion and the corresponding FAPI Dividend Deduction, but it would not change the net income allocated to Onex Canada, nor would it change Onex Canada's taxable loss in respect of the investment.

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

40. Third, 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, and were entirely consistent with the underlying policy of the ITA.

41. Fourth, 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 was reported in accordance with the ITA and Administrative Practice and so would the income reported by Onex Canada and GP.

D. THE DISPUTE WITH THE CRA

42. In a letter dated June 10, 2020 (the "**CRA Proposal**"), the CRA proposed to artificially and substantially inflate Onex Canada's income[3] by reducing the Interco Dividend Deduction by the amount of the FAPI Dividend Deduction claimed by Onex USP: $101M for 2012 and $92M for 2013. The CRA relies on subparagraph 93.1(2)(d)(i) ITA, which states that:

Where dividends received by a partnership	**Dividendes reçus par une société de personnes**
(i) where the corporation resident in Canada is a member of the partnership, the amount deductible by it under section 113 in respect of the dividend referred to in paragraph (a) shall not exceed the portion of the amount of the dividend included in its income pursuant to subsection 96(1), and	(i) lorsque la société résidant au Canada est un associé de la société de personnes, le montant qu'elle peut déduire, en application de l'article 113, au titre du dividende visé à l'alinéa a) ne peut dépasser la partie du dividende qui est incluse dans son revenu en application du paragraphe 96(1),

[emphasis added]

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3 The same treatment would apply to GP to the extent of its interest in Onex USP.

43. In other words, the CRA is proposing to reduce Onex Canada's Interco Dividend Deduction on the basis that Onex Canada was not allocated the full amount of the Dividends under subsection 96(1) ITA, but rather the amount of the Dividends net of the FAPI Dividend Deduction.

44. This is incorrect. As illustrated in the charts included in paragraphs 28 and 30, the full amount of the Dividends, $179.49M in 2012 and $109.49M in 2013, was included in the income allocated to Onex Canada pursuant to subsection 96(1) ITA.

45. In addition, the Administrative Practice from 1979 until 2017 was to the effect that the deductions, including the Interco Dividend Deductions, for dividends received through a partnership are based on the gross amounts of the dividends. Indeed, in 2000, when section 93.1 was added to the ITA, the Department of Finance stated that the "limitation in subparagraph 93.1(2)(d)(i) is the gross amount of dividends included for the purposes of determining the partner's income"[4] and the CRA confirmed that it "will interpret the subparagraph in a manner consistent with the view of the Department of Finance noted above".[5]

i. <u>The First Request</u>

46. In the First Request, Onex Canada provided detailed submissions as to why the CRA Proposal was unfounded in fact and law.

47. In the alternative, Onex Canada asked 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

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4 "Table ronde fédérale" in Congrès 2000, (Montreal : Association de planification fiscale et financière, 2001) answer to question 6.2.

5 CRA document 2001-0111675 "Gross amount of dividend" dated September 6, 2002.

220(2.1) or (3.2) ITA. Should Onex USP be permitted to make an Election, the CRA Proposal would necessarily be withdrawn.

48. 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.

ii. <u>The 2021 Decision</u>

49. On December 16, 2021, the CRA advised the Applicants by letter (defined above as the 2021 Decision) that it was maintaining its position set out in the Proposal and rejecting the Applicants' request to file an Election 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) [the New Provisions]*" (pages 4 and 7).

50. On January 14, 2022, the Applicants filed an application for judicial review in this Court against the 2021 Decision (Docket No. T-85-22). This application remains pending.

iii. <u>The Second Request</u>

51. In the Second Request, Onex USP asked that the Minister exercise her discretion under subsection 220(3) ITA to extend the time for the filing of T5013 return in respect of its 2012 and 2013 taxation years. Such an extension would have the effect of extending the time period to file an Election set out in the CIF Provision.

E. THE 2022 DECISION

52. On September 9, 2022, the CRA communicated the 2022 Decision, presenting the CRA's conclusion that:

(a) "the Minister of National Revenue does not have any discretion to extend the time to make the Election. There is no discretion provided by Parliament to the Minister in the *Economic Action Plan*, the *Act* or elsewhere to extend the time to make the Election" (defined above as the "Threshold Decision"); and

(b) "even if subsection 220(3) of the *Act* did apply to the Election, the Minister of National Revenue would not have exercised discretion to extend the time for [Onex] USP to file that election" (defined above as the "Merits Decision").

IV. STATEMENT OF THE GROUNDS INTENDED TO BE ARGUED

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

A. THE THRESHOLD DECISION

54. The Minister's conclusion that she "does not have any discretion to extend the time to make the Election" does not respond to the request that was made to her, that is, to exercise her discretion in subsection 220(3) ITA to extend the time for the filing of the T5013 return. In itself, the Minister's conflation of the issues should be sufficient to lead to a finding of incorrectness and unreasonableness.

55. The Minister's conflation contaminated and distorted her analysis of the applicable law: instead of applying the modern rule of interpretation to determine whether subsection 220(3) ITA allows to extend the date to file a return, she applied the rule to determine whether subsection 220(3) ITA allows for a late Election.

56. As mentioned above, the CIF Provision permits the filing of an Election by "the day that an information return referred to in subsection 229(1) of the Income Tax Regulations is required […] pursuant to subsections 229(5) and (6) of the Income Tax Regulations, to be filed in respect of the fiscal period of the taxpayer […]".

57. The filing of the "*information return referred to in subsection 229(1)*"—namely, 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.

58. Subsection 220(3) ITA states that:

Extensions for returns	**Prorogations de délais pour les déclarations**
(3) The Minister may at any time extend the time for making a return under this Act.	(3) Le ministre peut en tout temps proroger le délai fixé pour faire une déclaration en vertu de la présente loi.

[emphasis added]

59. It follows that the Minister is authorised, at any time, to extend the time during which "an information return referred to in subsection 229(1) of the Income Tax Regulations is required […] pursuant to subsections 229(5) and (6) of the Income Tax Regulations, to be filed". Such an extension would necessarily have the effect of extending the time set out in the CIF Provision to file the Election.

60. This interpretation of subsection 220(3) ITA is consistent with the text, context and purpose of both this provision and the CIF Provision.

61. Moreover, section 12 of the *Interpretation Act*, RSC, 1985, c. I-21 states:

Enactments deemed remedial	**Principe et interprétation**
12 Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.	12 Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

62. The Federal Court of Appeal has endorsed applying a large and liberal approach to subsection 220(3) ITA in *Bonnybrook Park Industrial Development Co. Ltd. v. Canada (National Revenue),* 2018 FCA 136, where the Court held that this provision allowed a Minister to extend the time to file a tax return, and thereby extend the statutory time period in subsection 129(1) ITA during which a taxpayer may apply for a dividend refund.

63. Consistent with *Bonnybrook*, subsection 220(3) ITA should be afforded a "broad application" to allow it "to blunt the harsh effects of strict filing requirements" – including in this case the requirement set out in the CIF Provision. This is entirely appropriate from a standpoint of fiscal policy.

B. THE MERITS DECISION

64. The Minister's conclusion that "even if subsection 220(3) of the *Act* did apply to the Election, the Minister of National Revenue would not have exercised discretion to extend the time for [Onex] USP to file that election" (defined above as the "Merits Decision") is unreasonable.

65. First, it is based on the erroneous premise that the Applicants requested an extension of time to file the Election. As mentioned, this is not what the Applicants requested.

66. Second, the 2022 Decision lists the following justifications for the Merits Decision:

> - the decision not to file the Election was made deliberately and after consultation with tax advisors;
> - filing the Election on time was not onerous;
> - filing the Election on time would not have resulted in an unnecessary compliance and administrative burden to USP, Onex Corporation, or the Canada Revenue Agency ("CRA");
> - filing the Election on time was not redundant;
> - the CRA did not mislead Onex Corporation or USP as to its administrative policy or the proper interpretation of the relevant provisions of the *Act*; and
> - there is no compelling reason why USP did not file the Election on time.

67. Inexplicably absent from the CRA's list is the fact that the Applicants did not file the Election because they believed in good faith that their filing position in the 2012 and 2013 taxation years was correct such that the filing of the Election would have served no purpose in their particular situation as it would have resulted in the same amount of tax.

68. Similarly, in an appendix to the 2022 Decision, the CRA suggests that "It is reasonable to expect sophisticated taxpayers such as Onex and USP that engage sophisticated tax advisors would have taken the necessary steps to minimize tax compliance risk by filing the Election on time". However, this statement presupposes that the Applicants were aware of any "tax compliance risk". Again, there was no reason for the Applicants to perceive any such risk given the application of the ITA to their situations which was supported by the Administrative Practice.

69. Finally, the CRA's claim that the Administrative Practice "did not mislead Onex [Canada] or [Onex] USP" relies on a statement made by the CRA in a technical interpretation; Document No. 2007-0247551E5 (the "**2007 Statement**"). More precisely, the CRA claims that the change in the Administrative Practice should have been intuited from the 2007 Statement. However, there was nothing in this statement that suggests a change from the Administrative Practice. In fact, the endnote to that document clearly states that the 2007 Statement was limited to its particular facts and in no way changed the Administrative Practice vis-

à-vis dividends paid by foreign affiliates to partnerships with Canadian corporations as partners.

70. It follows that the CRA was unreasonable in reaching the Merits Decision as it failed to acknowledge:

(a) the fact, as illustrated in the charts included in paragraphs 28 and 30, that the full amount of the Dividends, $179.49M in 2012 and $109.49M in 2013, was included in the income allocated to Onex Canada pursuant to subsection 96(1) ITA;

(b) the fact that the Applicants were justified in taking the position that their filling was in accordance with the ITA and that the Election would have served no purpose in their case;

(c) the Administrative Practice that led to Onex USP's decision not to file the Election. In particular, CRA's reliance on the 2007 Statement being a change of its position fails to consider the clear statement in the endnote that the 2007 Statement did not change the Administrative Practice as it applied to the Applicants, rather it expressly confirms that that Administrative Practice was intended to apply to Onex Canada to provide a full Interco Dividend Deduction without any reduction; and

(d) the time, cost and complexity of reaching a decision to file any election nor does it consider the cost required to refile the tax returns of Onex USP even though there would be no overall change to the final net income of Onex USP.

71. As such, the Merits Decision is untenable in light of the factual and legal constraints that bear on it.

V. CONSOLIDATION

72. This Application for Judicial Review, and the Applicants' Application for Judicial Review in Docket No. T-85-22, arise from the same underlying dispute and ultimately seek the same outcome (namely, the filing of an Election), such that the outcome of one will necessarily impact on the other. It is appropriate that the two Applications for Judicial Review be consolidated, pursuant to Rule 105 of the *Federal Courts Rules*.

THE APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

73. Materials Filed in Docket No. T-85-22;

74. Copy of the letters from:

    (a) Onex Canada to the CRA dated March 1, 2022;

    (b) The CRA to Onex Canada dated September 9, 2022; and

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

MATERIAL IN THE POSSESSION OF THE MINISTER AND THE CRA:

76. 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.

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

DATED AT MONTRÉAL, this 7th day of October 2022.

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