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**COURT OF APPEAL OF ALBERTA**

COURT OF APPEAL FILE NUMBER: 1703-237AC

TRIAL COURT FILE NUMBER: 1703 12327

REGISTRY OFFICE: EDMONTON

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 ARRANGEMENT OF CANADA NORTH GROUP INC., CANADA NORTH CAMPS INC., CAMPCORP STRUCTURES LTD., D.J. CATERING LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD. and 1919209 ALBERTA LTD.

DOCUMENT: **~~APPLICATION FOR LEAVE TO APPEAL -~~ MEMORANDUM OF ARGUMENT ON BEHALF OF CANADA NORTH GROUP INC., CANADA NORTH CAMPS INC., CAMPCORP STRUCTURES LTD., D.J. CATERING LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD. and 1919209 ALBERTA LTD.**


ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:

Stephanie A. Wanke and Spencer Norris
DLA Piper (Canada) LLP
1201 Scotia Tower 2,
10060 Jasper Avenue
Edmonton, AB T5J 4E5
T: 780.429.6822
F: 780.702.4379
E: stephanie.wanke@dlapiper.com

**For the Applicant,**
**Department of Justice Canada**
George F. Bódy
10423 – 101 Street N.W.
Edmonton Alberta T5H 0E7
T: 780.495.7595
F: 780.495.3319
E: George.body@justice.gc.ca

**For the Respondent,**
**Ernst & Young Inc., Monitor**
Darren R. Bieganek, Q.C.
Duncan Craig LLP
Suite 2800, 10060 Jasper Ave.
Edmonton, Alberta T5J 3V9
T: 780.441.4386
F: 780.428.9683
E: dbieganek@dcllp.com

**For the Respondent – Business Development Bank of Canada**
Jeffrey Oliver & Mary I. A. Buttery
Cassels Brock & Blackwell LLP
Suite 1250 Millennium Tower,
440 – 2nd Avenue SW,
Calgary, Alberta T2P 5E9
T: 403.351.2921
F: 403.648.1151
E: joliver@casselsbrock.com

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# I. STATEMENT OF FACTS

## A. Introduction

1. There can be no reasonable dispute in this matter that the assets of Canada North Camps Inc. ("**CNC**") and Campcorp Structures Ltd. ("**Campcorp**") vastly exceed the amounts required to satisfy both the deemed trust claims made by the CRA pursuant to the *Canada Pension Plan* (*"**CPP**"*), *Employment Insurance Act* ("***EIA***"), and *Income Tax Act ("**ITA**")* as well as the Directors' Charge, the Administration Charge and the Interim Lender's Charge (the "***CCAA* Charges**") granted in these proceedings.

2. Nevertheless, Her Majesty the Queen in Right of Canada as represented by the Minister of National Revenue (the "**CRA**") seeks leave to appeal the Decision of The Honourable Madam Justice J.E. Topolniski issued September 11, 2017 (the "**Decision**").

3. In doing so, the CRA puts a tremendous financial burden on the responding companies in the subject proceedings under the *Companies' Creditors Arrangement Act* , RSC 1985 c C-36, as amended ("***CCAA***"), being CNC, Campcorp, Canada North Group Inc., D.J. Catering Ltd., 816956 Alberta Ltd., and 1371047 Alberta Ltd. (the "**CCAA Companies**").

4. The CCAA Companies are responsible for their own costs as well as the costs of Ernst & Young Inc., the Monitor (the "**Monitor**") and Business Development Bank of Canada ("**BDC**") in these proceedings, as well as the legal costs of certain secured lenders.

5. The CCAA Companies - at a time of financial insolvency - are therefore required to expend significant amounts of money on professional fees for a leave application that has no actual impact on the recovery of the CRA.

6. Further the CRA is now seeking to vary the Initial Order granted in these proceedings by

The Honourable Mr. Justice K.G. Nielsen on July 5, 2017 (the "**Initial Order**") as a result of the CRA's delay in failing to participate in the initial application.

7. The CRA's application for leave to appeal does not meet the test or satisfy the criteria necessary for leave to appeal the Decision under the *CCAA*.

8. The CCAA Companies respectfully submit that the CRA's leave to appeal should be dismissed, with costs.

9. In the alternative, should this Honourable Court grant leave, the *CCAA* Companies submit that an order for interim costs is appropriate and the CRA should bear the costs of the *CCAA* Companies, the Monitor, and BDC, regardless of outcome.

**B. Factual Background**

10. A relevant chronology of proceedings is provided in **Appendix A** attached hereto.

11. The CRA asserts deemed trust claims against CNC of $652,916.43 and against Campcorp of $32,626.50.[1]

12. Throughout these proceedings the CCAA Companies have provided information to the CRA to demonstrate that it is not at risk in recovering is deemed trust claims.

13. In keeping with standard insolvency practice, the Affidavits containing appraisals have been sealed by the Court of Queen's Bench as to not compromise these proceedings by allowing potential purchasers to have access to the valuations.

14. The relevant excerpts of the Confidential Supplement of the Affidavit of Shayne McCracken sworn June 28, 2017[2] (the "**First Confidential Affidavit**") and Confidential

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[1] Affidavit of Albert LaRoque sworn September 26, 2017 at para 8.
[2] Tab 1, Joint Extract of Confidential Evidence on Behalf of the Respondents [**Confidential Evidence**].

Supplement of the Sixth Affidavit of Shayne McCracken sworn October 24, 2017[3] (the "**Confidential Appraisal Affidavit**") have been provided in the Joint Confidential Compendium of Evidence, provided unfiled to the Court of Appeal, herewith.

15. In order to avoid breaching the confidentiality of the appraisals, specific values for conditional materials are not being referenced in this Memorandum. The evidence provided by the CCAA Companies is as follows:

a) At paragraph 5 of the First Confidential Affidavit, a cash value of the equipment held by the CCAA Companies is provided.[4]

b) Further appraisals of operations of the CCAA Companies are provided in paragraphs 7-12 of the First Confidential Affidavit, as well as appraisals of real estate in paragraphs 13-22.[5]

c) In Schedule "E" of the Monitor's First Report filed July 24, 2017, the Monitor provided adjusted accounts receivable for CNC and Campcorp at July 15, 2017 of $1,221,125.20 and $3,360,691.31, respectively.[6]

d) In Schedule "F" of the Monitor's Second Report filed September 18, 2017, the Monitor provided adjusted accounts receivable for CNC and Campcorp. at September 2, 2017 of $2,155,820 and $2,963,399.[7]

e) In the Confidential Appraisal Affidavit, a summary of the current

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[3] Tab 2, Confidential Evidence.
[4] Tab 1, Confidential Evidence.
[5] *Ibid.*
[6] Tab 16, Joint Extract of Evidence on Behalf of the Respondents [**Extract of Evidence**].
[7] Tab 12, Extract of Evidence.

equipment appraisals of CNC and Campcorp is provided at paras. 6-8.[8]

16. The above evidence has not been challenged by the CRA.

## II. ISSUES

17. Should leave to appeal be granted to the CRA in respect of the Decision?

18. If leave to appeal is granted, should the CRA bear the costs of what can be described as an academic appeal?

## III. LEAVE TO APPEAL

19. Pursuant to section 13 of the *CCAA*, leave to appeal is required for any order or decision made in these *CCAA* proceedings. Madam Justice Paperny summarizes the test for leave to appeal in *CCAA* proceedings in *Wells Fargo Securities Canada Ltd v Sanjel Corporation*:

> The test is whether there are serious and arguable grounds of appeal. This involves assessment of several factors: whether the point on appeal is of significance to the practice; whether the point raised is of significance to the parties and the action; whether the appeal is *prima facie* meritorious (or conversely frivolous); and whether the appeal will unduly hinder the progress of the *CCAA* proceedings.[9]

20. Each factor strongly militates against granting leave.

### A. Not of Significance to the Practice

21. The point of law raised by the CRA in its request for leave to appeal is not a novel point of law and has been well surveyed by the Courts.

22. Justice Topolniski succinctly summarizes the jurisprudence with respect deemed trusts and their priority *vis-à-vis* other security interest in paras. 25-36 of her Decision.

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[8] Tab 2, Confidential Evidence.

[9] *Wells Fargo Securities Ltd v Sanjel Corporation,* 2017 ABCA 120, **Tab 11**, Joint Book of Authorities on Behalf of the Respondents [**Book of Authorities**].

23. Following *Royal Bank v Sparrow Electric*[10], the Supreme Court of Canada considered the deemed trust created by s. 227(4.1) of the *ITA* in *First Vancouver Finance v MNR*.[11] Honourable Supreme Court Justice Iacobucci confirmed that the deemed trust created by the *ITA*, *CPP*, and *EI* had not been materially disturbed by succeeding jurisprudence.

24. *First Vancouver* was considered in the context of the *CCAA* in *Temple City Housing Inc.* where The Honourable Madam Justice Romaine expressly addressed the question of law CRA seeks leave to appeal. Justice Romaine concludes:

> "It is clear that a court in a CCAA proceeding is able to grant a super-priority over existing security interest for DIP financing. If it were otherwise, and if super-priority could not be granted without the consent of secured creditors, "the protection of the CCAA effectively would be denied a debtor company in many cases"…"[12]

25. Justice Romaine granted Temple City Housing Inc. its application for protection under the *CCAA* and the debtor-in-financing charge in priority of the CRA's claim.

26. The Court's inherent jurisdiction and jurisdiction pursuant to the *CCAA* were further reiterated by Deschamps J. in *Century Services* where she states:

> "…I note that Parliament has in recent amendments changed the wording contained in s. 11(1) [of the *CCAA*] making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act,…make any order that it considers appropriate in the circumstances" (S.C. 2005, c 47, s.128). Parliament appears to have endorsed this broad reading of *CCAA* authority developed by the jurisprudence."[13]

27. Justice Topolniski correctly resolved the CRA's application in accordance with the

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[10] *Royal Bank of Canada v Sparrow Electric Corp*, [1997] 1 SCR 411, 193 AR 321, **TAB 7,** Book of Authorities.
[11] *First Vancouver Finance v MNR*, 2002 SCC 49 [*First Vancouver*], **TAB 8,** Book of Authorities.
[12] *Temple City Housing Inc.*, 2007 ABQB 786 at para 14. [*Temple City*] **TAB 9,** Book of Authorities.
[13] *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 at para 68, **TAB 3,** Book of Authorities.

prevailing jurisprudence and any further consideration of such jurisprudence will not have a significant impact on practice under the *CCAA*.

**B. No Significance in this Action**

28. The issue that the CRA is seeking leave to appeal is of no practical or real significance to these proceedings.

29. The entirety of the CRA's claim for unremitted source deduction from CNC and Campcorp is, respectively, $652,916.43 and $32,626.50.

30. The total amount primed by the *CCAA* Charges is $3,150,000.

31. This argument is academic as the assets of CNC and Campcorp significantly exceed the *CCAA* Charges and the amounts claimed by the CRA.

32. There is no conceivable outcome in these *CCAA* proceedings in which the CRA's claim of unremitted source deductions are not satisfied in whole.

33. The CRA in fact, admits as much in its Memorandum at paragraph 46:

> The fact that there is enough money to satisfy both the deemed trust and the Priming Charges is significant - it means that proceeding with an appeal on the points of law described herein should not impair or hinder the progress of the *CCAA* proceedings.

34. Further, in order to affect the priority of the *CCAA* Charges, not only does the CRA need to succeed on the question it is seeking leave for, it also needs to succeed in having such an appeal vary the Initial Order retroactively - despite, as set out the Chronology at Appendix A, the CRA being served notice of and taking no position at the initial application or the first extension application.

35. As Justice Topolniski held in the Decision at paras 70 and 72:

> CRA's dawdling put BDC, the Monitor and perhaps the directors at risk of significant prejudice, and it is unfair for it to now ask that the priority be reversed before it gave meaningful notice to all affected parties.
>
> ...
>
> Accordingly, irrespective of whether CRA prevails at the end of the day, all of the Prioirty Charges should be unaffected until August 11, 2017.[14]

36. The CRA has put forward no argument in its Memorandum for leave to appeal to show why retroactively varying the Initial Order would be appropriate in the face of the CRA's "dawdling".

## C. The Appeal is not *prima facie* meritorious

37. With respect to this third criterion, The Honourable Justice Wakeling stated in *Mudrick Capital Management LP v Lightstream Resources Ltd.*:

> "...Third, is the likelihood that the question presented by the potential appellant will be answered in the manner favourable to potential appellant high enough to justify a second hearing putting the ultimate disposition into doubt and requiring the attention of a panel of judges and counsel for the disputants? Appeals are expense and introduce delay. Is the answer to the question that the potential appellant presents for consideration so obvious that it can be said the appeal is frivolous? In answering this question, one must bear in mind that an appeal court will only set aside a decision of the supervising judge, if he or she committed an error of law, clearly misapprehended an important fact or made a decision that is obviously wrong..."[15]

38. The issue that the CRA seeks leave to appeal does not meet the high threshold Justice Wakeling sets in considering whether the appeal is *prima facie* meritorious. It is unlikely the CRA would receive a favourable result on appeal.

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[14] *Canada North Camps (Companies' Creditors Arrangement Act)* 2017 ABQB 550, at paras 70 and 72, **TAB 6,** Book of Authorities.

[15] *Mudrick Capital Management LP v Lightstream Resources Ltd.* 2016 ABCA 401 at para 11, **TAB 12,** Book of Authorities.

39. Further, the CRA's argument that deemed trusts should enjoy priority over the *CCAA* Charges runs counter to the remedial nature and policy objectives of the *CCAA*.

**D. The Appeal will unduly hinder the progress of the *CCAA* proceedings**

40. Pursuant to the terms of the Initial Order, the *CCAA* Companies bear the legal costs of the Monitor and BDC. Both the Monitor and BDC are entitled to oppose the CRA's application, but it comes with a significant cost to the *CCAA* Companies. Further, a number of secured creditors have participated in the CRA's application to date on a "watching brief" and those costs are also arguably borne by the *CCAA* Companies pursuant to the terms of its security.

41. The professional fee burden on the *CCAA* Companies to respond to the CRA is tremendous - and such fees may, in of themselves, prejudice the ability of the *CCAA* Companies to survive a restructuring.

42. Continuing with an appeal will take valuable time and financial resources from the *CCAA* Companies when that time and money would be better spent on the actual restructuring.

43. Further, any effort to vary the priorities retroactively to the Initial Order will cause disruption and uncertainty in these proceedings.

44. As iterated in *Temple City Appeal*, judges in *CCAA* proceedings make discretionary decisions in a constantly changing situation and are owed a high degree of deference.[16] Further, as put by Justice Rowbotham, it is impossible to "unscramble the egg".[17] BDC advanced interim financing to the *CCAA* Companies on the express condition of a first-

[16] *Temple City Appeal*, para 14, **TAB 10,** Book of Authorities.
[17] *Ibid*.

priority charge sanctioned by the Court over the assets of the *CCAA* Companies. The Monitor, counsel for the Monitor, the Chief Restructuring Officer, and counsel for the *CCAA* Companies have all have provided services to the *CCAA* Companies under the security of a super-priority charge behind BDC.

## IV. INTERIM COSTS

45. Should the CRA be granted leave to appeal the Decision, it is appropriate in these circumstances to order that the CRA bear the full costs of the Respondents, the *CCAA* Companies, the Monitor, and BDC, regardless of outcome.

46. The power to order interim and advance costs is inherent in the Court's equitable jurisdiction, as set out by Justice Lebel in granting interim costs in *British Columbia (Minister of Forests) v Okanagan Indian Band*.[18]

47. The CRA is seeking to use these proceedings as a test case, notwithstanding that the CRA is at no actual risk of not recovering its full deemed trust claims.

48. It is inequitable that these costs be borne by the *CCAA* Companies. It is also inappropriate to allow the CRA to advance its application without opposition, which makes this case an appropriate case to make any leave order conditional on the CRA bearing the costs.

49. Justice Côté crafted a solution in *PricewaterhouseCoopers Inc. v. Canada (Superintendent of Bankruptcy)*[19] similar to the solution now sought by the CCAA Parties. In that matter, the Superintendent of Bankruptcy sought leave to appeal a decision

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[18] *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at para 40, **TAB 13,** Book of Authorities..

[19] *PricewaterhouseCoopers Inc. v Canada* (Superintendent of Bankruptcy) 2008 ABCA 412, [2009] AWLD 140 [*PricewaterhouseCoopers*], **TAB 16,** Book of Authorities.

involving the interpretation of s. 128(3) of the *Bankruptcy and Insolvency Act.*

50. The question involved the application of levy to certain transactions[20] concluded by the trustee. The amount in question was nominal and the Superintendent's decision was similarly focused on establishing precedent, not on actual recovery of funds.

51. Justice Côté granted leave to appeal on the condition that the Superintendent of Bankruptcy acknowledged responsibility for certain costs of the appeal. Alternately, "if the Superintendent of Bankruptcy thinks that the litigation is too expensive, then he can just abandon his leave motion, and there will be no leave to appeal."[21]

52. The *CCAA* Companies are insolvent. The cost of the CRA's application will ultimately be borne by the creditors of the *CCAA* Companies. These creditors already are required to stay their claims and are at risk of less than full recovery - they should also not need to bear the cost of the CRA's policy litigation.

53. The *CCAA* Companies therefore submit that if leave is granted, it be conditional on the CRA bearing the costs, regardless of outcome.

ESTIMATED TIME FOR ARGUMENT: ~~45 MINUTES~~ 30 minutes

All of which is respectfully submitted this 27 day of October, 2017.

DLA PIPER (CANADA) LLP

Per: ______________________

Stephanie A. Wanke and Spencer Norris

[20] *Climenhaga v Alberta*, 2008 ABQB 340, **TAB 17,** Book of Authorities.
[21] *PricewaterhouseCoopers*, para 2.

TAB

A

## APPENDIX A

1. On June 26, 2017, Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd. and D.J. Catering Ltd. (collectively, the "**Canada North**") filed with the Official Receiver Notice of Intention to file a proposal pursuant to subsection 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

2. On June 28, 2017, Canada North, along with 816956 Alberta Ltd. and 1371047 Alberta Ltd. filed an originating application returnable July 5, 2017 (the "**Originating Application**"), to commence proceedings pursuant to the *Companies' Creditors Arrangement Act* , RSC 1985 c C-36 (the "***CCAA***").[1]

3. The Originating Application at subparagraphs 2(e) to (h), states that the Applicants are seeking an Administration Charge (to a maximum of $1,000,000), Directors' Charge (to a maximum of $150,000), and Interim Lender's Charge (to a maximum of $1,000,000) (collectively, the "***CCAA* Charges**") and a charge over their respective properties protecting the same as relief from the Court.

4. In support of the Originating Application, the Applicants filed a Bench Brief on June 28, 2017 (the "**Brief**"), which explained why the CCAA Charges were appropriate in the circumstances.

5. On Wednesday June 28, 2017, the Canada Revenue Agency ("**CRA**") was served at its Edmonton Office at 9700 Jasper Avenue, Edmonton, Alberta T5J 3C8 with:

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[1] Originating Application filed June 28, 2017, **Tab 1**, Joint Extract of Evidence on Behalf of the Respondents [Extract of Evidence].

a. the Originating Application,

b. a draft initial order that set out the *CCAA* Charges being sought by the Applicants (the "**Draft Initial Order**");[2]

c. The affidavit of Shayne McCracken sworn June 28, 2017 attesting to a $1,140,000 debt to the CRA for source deductions and GST;[3]

d. A letter directing the CRA to contact the Applicants' counsel should they want a copy of the brief.[4]

6. On June 30, 2017, in response to the Originating Application, Canadian Western Bank filed three applications to appoint a receiver (one in respect to each Canada North Camps Inc., D. J. Catering, and Camcorp Structures Ltd.) and materials in support of the applications.

7. On July 4, 2017, Canadian Western Bank served the three applications and supporting materials on the CRA by courier to 9700 Jasper Avenue, Edmonton, Alberta T5J 3C8.

8. On Wednesday July 5, 2017, the hearing of the Originating Application was held. The CRA did not attend the initial hearing.

9. Justice Nielson granted the Initial Order on July 5, 2017 (the "**Initial Order**"). By agreement of the parties, the requested Administration Charge was reduced to a

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[2] Schedule A of Originating Application, Draft Initial Order filed June 28, 2017, **Tab 2**, Extract of Evidence.
[3] Affidavit of Shayne McCracken sworn June 28, 2017 without exhibits, **Tab 3**, Extract of Evidence.
[4] Excerpt of Affidavit of Service of Lynnette Goodwin sworn July 5, 2017, **Tab 4**, Extract of Evidence.

maximum of $500,000; otherwise, the Initial Order with respect to the CCAA Charges was granted as per the Draft Initial Order.[5]

10. The provisions of the Initial Order with respect to the priority of the CCAA Charges were consistent with the Alberta Template CCAA Initial Order.

11. The Initial Order was mailed to the Canada Revenue Agency on Thursday July 6, 2017.

12. In the Monitor's First Report, at paragraph 7, the Monitor advises that the notice of the CCAA proceedings ran in the Edmonton Journal and the National Post on July 12, 2016 and that all required notices were sent to the Companies' creditors within 5 days of the Initial Order.[6]

13. On July 11, 2017, Canadian Western Bank served an Order granted in these proceedings and additional material on the Canada Revenue Agency by email to George Body at george.body@justice.gc.ca.

14. On July 20, 2017, the Applicants subsequently served their application for the first extension of the CCAA proceedings (the "**First Extension Application**") on the Canada Revenue Agency by sending the same by mail to 9700 Jasper Avenue, Edmonton, Alberta T5J 3C8. A letter accompanying the First Extension Application directed the

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[5] CCAA Initial Order granted July 6, 2017, **Tab 5**, Extract of Evidence.
[6] The Monitor's First Report filed July 24, 2017, **Tab 16**, Extract of Evidence.

Canada Revenue Agency to the Monitor's website for digital copies of the supporting materials of the First Extension Application.[7]

15. On July 21, 2017, the Canadian Western Bank served its application to appoint a receiver over Canada North Camps Inc., Campcorp Structures Ltd. and D.J. Catering Ltd. on the Canada Revenue Agency by email to George Body at george.body@justice.gc.ca.

16. On July 24 and 26, 2017 Canadian Western Bank served supporting materials to its application to appoint a receiver on the Canada Revenue Agency by email to George Body at george.body@justice.gc.ca.

17. On July 25, 2017, the Applicants served an application to increase interim financing (the "**Additional DIP Financing Application**") on the Canada Revenue Agency by sending the application by mail to 9700 Jasper Avenue, Edmonton, Alberta T5J 3C8. A letter accompanying the Additional DIP Financing Application directed the Canada Revenue Agency to the Monitor's website for digital copies of the supporting materials of the Additional DIP Financing Application.[8]

18. On July 26, 2017, counsel for Canada Revenue Agency, by way of email from George Body, provided the Applicants and unfiled application to vary the Initial Order granted July 5, 2017 with respect to the CCAA Charges (the "**CRA Application**"). This was the

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[7] Second Affidavit of Service of Lynnette Goodwin sworn July 27, 2017, **Tab 6**, Extract of Evidence.
[8] Excerpt of Third Affidavit of Service of Lynnette Goodwin sworn July 27, 2017, **Tab 7**, Extract of Evidence.

first indication to the Companies that the CRA had retained counsel in this matter and the first time that the CRA had provided an address for email service.

19. The CRA attended the First Extension Application and the Additional DIP Financing Application on July 27, 2017.

20. On July 27, 2017, Justice Hillier granted the first extension as well as an Order increasing the DIP Financing to a maximum of $2,500,000, with a corresponding increase in the Interim Lender's Charge (the "**Extension Order**").

21. At the July 27, 2017 application, the CRA advised the Court of the present application set for August 11, 2017 but did not oppose the First Extension Application or the Additional DIP Financing Application.

22. On August 3, 2017, the CRA subsequently served on the service list a filed copy of the CRA Application.9

23. The CRA Application was heard August 11, 2017 before The Honourable Justice Topolniski who dismissed the CRA Application in her September 11, 2017 decision.10

24. The Court of Queen's Bench subsequently sealed the Confidential Supplement to the Sixth Affidavit of Shayne McCracken sworn October 24, 2017 by Sealing Order granted October 25, 2017.[11]

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[9] CRA's Notice of Application filed July 31, 2017, **Tab 10**, Extract of Evidence.
[10] Order of Justice Topolniski granted September 11, 2017, **Tab 11**, Extract of Evidence.
[11] Sealing Order granted by Justice Nielsen on October 25, 2017, **Tab 15**, Extract of Evidence.