



ONTARIO SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-23-00693758-00CL HEARING DATE: October 12, 2023

NO. ON LIST: \_\_\_\_\_

TITLE OF PROCEEDING: IN THE MATTER OF A PLAN OF COMPROMISE OR  
ARRANGEMENT OF ORIGINAL TRADERS ENERGY LTD. AND  
2496750 ONTARIO INC.

BEFORE JUSTICE: KIMMEL

PARTICIPANT INFORMATION : SEE PARTICIPANT SHEET ATTACHED

For Plaintiff, Applicant, Moving Party, Crown:

| Name of Person Appearing | Name of Party | Contact Info |
|--------------------------|---------------|--------------|
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|                          |               |              |

For Defendant, Respondent, Responding Party, Defence:

| Name of Person Appearing | Name of Party | Contact Info |
|--------------------------|---------------|--------------|
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For Other, Self-Represented:

| Name of Person Appearing | Name of Party | Contact Info |
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## **ENDORSEMENT OF JUSTICE KIMMEL:**

### The Motions

1. The OTE Group (which includes the Applicants and two related and operationally integral non-applicant limited partnerships, OTE Logistics and Original Traders Energy LP, who have had relief extended to them through these CCAA proceedings) seeks an Order (the "Extended Stay and Amended Claims Procedure Order"):
  - a. Extending the Stay Period, as defined in the Initial Order, to April 26, 2024;
  - b. Amending the claims procedure approved pursuant to the Claims Procedure Order dated April 27, 2023 (the "Claims Procedure Order") pursuant to which the OTE Group, with the assistance of the Monitor, will seek to identify, quantify and resolve certain claims by former employees; and
  - c. Approving the Fifth Report of the Monitor dated September 28, 2023 (the "Fifth Report"), the Supplement to the Fifth Report of the Monitor dated October 6, 2023 (the "Supplemental Report"), and the activities and conduct of the Monitor in relation to the OTE Group and the CCAA Proceedings as described in these reports.
2. The Monitor is seeking an Order (the "Monitor's Enhanced Powers and Amended Bid Process Approval Order"), among other things:
  - a. providing the Monitor with enhanced powers in connection with the business and property of Original Traders Energy Ltd., 2496750 Ontario Inc., OTE Logistics LP, and Original Traders Energy LP (together, the "OTE Group"); and
  - b. approving an amended bid process (the "Amended Bid Process") for the sale of the assets of the OTE Group to be carried out by the Monitor.
3. These motions, together with a motion brought by Glenn Page ("Page") and 2658658 Ontario Inc. ("265") for, among other things, the appointment of a Chief Restructuring Officer (a "CRO Appointment Motion"), were originally returnable last week and were adjourned to allow the OTE Group, the Monitor and the stakeholders time to come to a consensual resolution, which they have now done. The court was advised today that the CRO Appointment Motion is being withdrawn, without prejudice. No one is opposing either the Monitor's Enhanced Powers and Amended Bid Process Approval Order or the Extended Stay and Amended Claims Procedure Order.
4. The court was advised that all known stakeholders were served with the original motions returnable last week and that the Monitor has engaged with any who have raised any concerns regarding the orders now sought. No one appearing at the hearing raised any concerns or objections to the orders sought.
5. The employees and former employees have not been formally consulted or given notice of the proposed Amended Claims Procedure, but it has been designed to favour them and they retain all of their rights in respect of their claims.

### Recent Developments

6. Following the date of the Initial Order made on January 30, 2023, the OTE Group has continued to work with the Monitor in managing the business of the OTE Group. Subsequent to the Fourth Report, the OTE Group became aware of the departure of certain key customers. As a result, the OTE Group does not anticipate being able to replace the lost sales volumes attributable to these customers in the current circumstances of its restructuring. As a result, operations at certain locations have been discontinued and some employees have been terminated. It is expected that there will be further employee terminations.

7. With the assistance of the Monitor, the OTE Group has prepared a plan to reduce the operations of the OTE Group (the "Reduced Operations Plan") to limit operating costs and conserve cash due to the circumstances stated above.

#### Amended Claims Procedure

8. The Monitor was previously authorized to carry out a Claims Procedure which had a claims bar date of June 27, 2023. The OTE Group and the Monitor propose to amend the Claims Procedure to include claims of terminated employees and to streamline and simplify the Claims Procedure for any employees terminated during the CCAA process (the "Terminated Employees"). This Amended Claims Procedure is targeted to Terminated Employee's claims and is designed to foster a user-friendly process for the Terminated Employees to have their claims recognized and resolved quickly and cost-effectively. The Employee Restructuring Claim mechanism provided for functions as a simplified "negative notice" employee claims process.
9. This approach to employee termination claims, including a negative notice claims process, has been adopted in other CCAA proceedings. See for example, *Just Energy Group Inc.*, (September 15, 2021) CV-21-00658423-00CL (Order), at para. 22; and *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 2037, at paras. 12, 60 and 68.
10. Under this amended Claims Procedure, the OTE Group will prepare, in consultation with the Monitor and based on the OTE Group's books and records, a notice of Employee Restructuring Claim for each Terminated Employee terminated during the CCAA Proceedings that sets out accrued and unpaid vacation pay, termination and/or severance pay among other amounts. From that point forward, the negative notice process built into this amendment mirrors the claims procedures in *Just Energy Group Inc.* and *Payless Shoesource Canada GP Inc.*, (April 24, 2019) CV-19-00614629- 00CL (Order), where Terminated Employees will be provided with their determined claim amount, after which a dispute process can be run if necessary.
11. The court's authority to amend the Claims Procedure is found in ss. 11 and 12 of the CCAA. The court requested a change to paragraph 3 to the proposed form of order, which was made, to make it clear that the court has not endorsed or approved the basis on which the Employee Restructuring Claims will be calculated at first instance and that the employees' rights with respect to the determination of their claims are preserved.
12. With that change, and for the above and the other reasons outlined, *inter alia*, in paragraph 35 of the OTE Group's factum on this motion, it is appropriate to exercise the court's discretion to approve the Amended Claims Procedure.

#### Enhancement of Monitor's Powers and Amended Bid Process

13. The expanded powers of the Monitor are consistent with what is typically provided for when the Monitor takes over for the board of directors, in a situation such as this where the last remaining director has agreed to resign. These expanded powers address governance and conflict issues that have been raised while allowing the Monitor to continue to manage the business and conduct the Amended Bid Process, among other things.
14. The Monitor believes the relief sought in the Monitor's Enhanced Powers and Amended Bid Process Approval Order is fair and reasonable and is in the best interests of the OTE Group's creditors and will not prejudice any stakeholders.
15. Pursuant to ss. 11 and 23(1)(k) of the CCAA, this Court has the authority to expand the powers of the Monitor. Section 11 of the CCAA provides the Court with a broad discretion that should be exercised in furtherance of the remedial objectives of the CCAA, and where it has been demonstrated that (a) the

order sought is appropriate in the circumstances, (b) the applicant has been acting in good faith and with due diligence. See *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at paras. 47-49.

16. Section 23(1)(k) of the CCAA specifically provides that the monitor shall carry out any other functions in relation to the debtor company that the court may direct.
17. It has become accepted that a monitor's powers may be enhanced to allow it to function as a "super monitor" under the CCAA, including to provide super monitor powers to allow a monitor to exercise the powers of the board of directors of an entity after its board and management have resigned. See *Re Nortel Networks Corporation et al*, 2014 ONSC 6973, at para. 31. The Monitor's counsel advises that the proposed enhanced powers in this case are consistent with those that have been approved in previous cases.
18. The Monitor's enhanced powers requested at this motion would also ensure that the Monitor's investigation is not impeded and will provide the required independent oversight and governance to allow the Monitor to continue its investigations for the benefit of the stakeholders of the OTE Group and address the governance concerns that have been raised by Page and 265.
19. Among the enhanced powers would be the authority to run the Amended Bid Process. The remedial nature of the CCAA confers broad powers to facilitate restructurings, including the power to approve a sale process in relation to a CCAA debtor's business and assets, prior to or in the absence of a plan of compromise and arrangement. See *Nortel Networks Corporation (Re)*, 2009 CanLII 39492 (ON SC), at para. 48.
20. The Monitor's Fifth Report described a detailed proposed bid process that has been revised based upon input and consultation with stakeholders. The Amended Bid Process narrows the assets for sale to the right, title and interests of the OTE Group in the chattels identified at Schedule 1 to the Amended Bid Process due to uncertainty surrounding the ownership of fuel blending equipment, including claims that have been or may be asserted by landlords in respect thereof. The Amended Bid Process also provides for consultation rights to the Royal Bank of Canada ("RBC"), in its capacity as the secured lender to the OTE Group.
21. The Amended Bid Process has been timed to conclude before the end of the year when certain licences are expiring.
22. The Monitor's factum outlines at paragraphs 25-27 the factors to be considered and the justification for approving the Amended Bid Process in this case. The Monitor is of the view that the Amended Bid Process provides an appropriate framework that will fairly canvass the market to obtain the best offer for the assets of the OTE Group which will maximize value for the stakeholders.
23. The court approves the enhancement of the Monitor's powers and the Amended Bid Process for all of these reasons.

#### The Stay Extension

24. The court's authority to grant the requested stay extension to April 26, 2024 is found in s. 11.01(2) and (3) of the CCAA. I am satisfied that the stay extension is appropriate in the circumstances to, among other things, allow the Monitor to advance the Reduced Operations Plan and Amended Bid Process and to continue to work with the OTE Group, as it has done, in good faith and with due diligence to operate the remaining business as a going concern pending the completion of a potential transaction. It will also allow the Monitor to continue its investigation and tracing of OTE Group funds alleged to have been misappropriated.
25. Further, the Fifth Report also states that, based on the Third Extended Cash Flow Forecast, as defined therein, the Monitor believes the OTE Group will have sufficient liquidity to fund both operating costs and the costs of the CCAA Proceedings through to April 28, 2024, if granted.
26. The Monitor is of the view that the extension of the Stay Period is fair and reasonable in the circumstances.

### Approval of the Monitor's Activities and Reports

27. The requested approval of the Monitor's Fifth Report and Supplemental Report contains the standard restrictive language regarding reliance and is consistent with the approach adopted in *Target Canada Co. (Re)*, 2015 ONSC 7574, at para. 2 that endorses approval of the Monitor's activities and reports at regular intervals. The requested approval of the Monitor's Fifth and Supplemental Reports and activities described therein is granted.

### Orders

28. The Extended Stay and Amended Claims Procedure Order and the Monitor's Enhanced Powers and Amended Bid Process Approval Order are both granted and shall issue in the forms as signed by me today, with immediate effect and without the necessity of formal issuance and entry.

A handwritten signature in cursive script that reads "Kimmel J.".

KIMMEL J.



# [1] Participant Information Form

This form is to be used:

- in place of previous ‘counsel slips’, and
- for all hearings using the CaseLines document sharing platform. For these hearings, parties of their representatives are to complete the form and upload it into the CaseLines event folder/bundle.

Where possible, the moving party for the event should coordinate with other parties to complete one form for the hearing. In criminal matters, each party may prepare their own form.

This form must be saved using the court’s document name convention (e.g. Participant Information – All Parties – 01-JUN-2021 or Participant Information – Defendant Smith – 01-JUN-2021).

## CASE AND EVENT INFORMATION

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|---------------------------------------|---|
| <b>Court File Number</b>              | CV-23-00693758-00CL   |
| <b>Court Location (e.g. Hamilton)</b> | Toronto   |
| <b>Case Name</b>                      | In the Matter of the Compromise or Arrangement of Original Traders Energy Ltd. and 2496750 Ontario Inc. |
| <b>Type of Hearing</b>                | Motion for certain relief under the CCAA  |
| <b>Date of Hearing</b>                | October 12, 2023  |

## PARTICIPANT INFORMATION

**For Plaintiff, Applicant, Moving Party, Crown:**

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<sup>1</sup> Please provide a phone number where you can be reached during the virtual/hybrid hearing, if necessary.

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