



SUPERIOR COURT OF JUSTICE

COMMERCIAL ENDORSEMENT FORM

COURT FILE NO.: CV-23-00693758-00CL DATE: September 9, 2024

NO. ON LIST: 2

TITLE OF PROCEEDING: **ORIGINAL TRADERS ENERGY LTD. et al v. HIS MAJESTY THE KING IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF FINANCE et al**

BEFORE JUSTICE: **Kimmel**

**PARTICIPANT INFORMATION**

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

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
Duncan Lau Broderick Lomax	KPMG – Court Appointed Monitor	<a href="mailto:duncanlau@kpmg.ca">duncanlau@kpmg.ca</a> <a href="mailto:blomax@kpmg.ca">blomax@kpmg.ca</a>

**ENDORSEMENT OF JUSTICE KIMMEL:**

- [1] KPMG Inc. ("KPMG") is the court-appointed monitor of the OTE Group in these proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.
- [2] This motion by the Monitor is unopposed. It seeks a Lease Termination Approval Order relating to its agreement with two landlords regarding the termination of their leases with the OTE Group, their acquisition of certain immovable blending equipment that was used by the OTE Group when it operated from their premises, and certain ancillary relief including vesting and partial sealing orders.
- [3] The relief sought is supported by the Tenth Report of the Monitor dated September 4, 2024 (the "Tenth Report"). Capitalized terms used but not otherwise defined herein have the meanings ascribed to such terms in the Tenth Report.
- [4] On October 12, 2023 an Order was made (the "Monitor's Enhanced Powers and Amended Bid Process Approval Order") that, among other things, provided the Monitor with enhanced powers in connection the with the business and property of the OTE Group, and approved an amended bid process for the sale of the assets of the OTE Group to be carried out by the Monitor (the "Bid Process").
- [5] When its business was still operational, the OTE Group used immovable fuel blending equipment (the "Blending Equipment") located underground beneath three leased blending locations on First Nations reserve lands in Tyendinaga, Whitefish, and Six Nations (the "Fuel Blending Locations"). The landlords of the Fuel Blending Locations (the "Fuel Blending Landlords") have asserted to the Monitor that the Blending Equipment constitute fixtures on the land, and not property of the OTE Group. Although the Monitor did not wholly accept this position, as a practical matter, the Blending Equipment could not be sold separately without a party agreeing to also assume the leases for the respective Fuel Blending Locations.
- [6] While not listed among the chattels for sale under the Bid Process, the Monitor received four expressions of interest in the Blending Equipment and related leasehold interests, and thereafter facilitated conversations between the interested parties and the Fuel Blending Landlords. The landlords of the Tyendinaga Fuel Blending Location (the "Tyendinaga Landlord", and the leased premises, the "Tyendinaga Premises") and the Whitefish Fuel Blending Location (the "Whitefish Landlord", and the leased premises, the "Whitefish Premises") were ultimately not agreeable to leasing their premises or selling the Blending Equipment on the terms proffered. As such, finding a resolution directly with such landlords was the only way to obtain value for the OTE Group and its stakeholders.
- [7] Fuel blending operations at the Tyendinaga Premises and Whitefish Premises were discontinued in August and September 2023, respectively, and the fuel and gas licenses for both premises expired on December 31, 2023, making a "going concern" sale of the OTE Group's interests in either premises impossible. Notwithstanding this, the OTE Group has continued to pay rent in respect of the Tyendinaga Premises and Whitefish Premises while attempting to find a commercial resolution.
- [8] The Monitor determined that it was in the best interests of the OTE Group and its stakeholders to pursue a cost-effective termination of the lease agreements in respect of the Fuel Blending Locations

and to settle all disputes with the Blending Location Landlords regarding the lease agreements and the Blending Equipment. The Monitor believes that the agreements reached with the Tyendinaga Landlord and the Whitefish Landlord are necessary and appropriate and in the best interests of the OTE Group and its stakeholders in the circumstances.

[9] By way of summary, the Monitor states as follows at paragraph 36 of its Tenth Report:

The Monitor is of the view that both the Tyendinaga Lease Termination Agreement and the Whitefish Lease Termination Agreement are appropriate in the circumstances. As noted above, despite soliciting expressions of interest in respect of the Blending Equipment and related leases and engaging in discussions with the landlords and potential purchasers in respect of same, no agreement was ultimately reached with a third party for the purchase of such equipment or the assumption of the leases (given, among other things, the uncertainty as to the ownership of such equipment). The settlement agreements represent the only opportunity for the OTE Group to achieve a fair and reasonable value for the Blending Equipment, ensure that rent is no longer paid in respect of non-operational premises, and provide finality by ensuring that the landlords cannot pursue any claims against the OTE Group in respect of the leases or such equipment. The Monitor does not believe any stakeholders are prejudiced by the approval of the Lease Termination Agreements, or the vesting of the OTE Group's interests in the Blending Equipment in the respective landlords free and clear of claims or encumbrances - the only remaining secured lender of the OTE Group, RBC, has security over the funds invested in the GIC, which are sufficient to satisfy the amounts owing thereto. The Monitor therefore believes that agreements are in the best interests of the OTE Group and their stakeholders.

[10] These lease termination agreements, entered into on July 19 and August 29, 2024 respectively are conditional upon court approval.


[11] The court has the jurisdiction to approve settlement agreements in CCAA proceedings if satisfied that the settlement is (a) fair and reasonable; (b) beneficial to the debtor and its stakeholders generally; and (c) consistent with the purpose and spirit of the CCAA. See *Nortel Networks Corporation (Re)*, 2018 ONSC 6257, at para. 24, and *Laborers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2013 ONSC, 1078, at para 49.

[12] I am satisfied that the Tyendinaga Lease Termination Agreement and the Whitefish Lease Termination Agreement meet these requirements, for all of the detailed reasons outlined in the Monitor's Tenth Report and the factum filed in support of this motion. The service list has received notice of this motion and no one appeared to indicate any opposition to it. The only secured creditor, RBC, has expressly advised that it does not oppose the orders sought by this motion, while others have simply not responded.

[13] The vesting order language that has been included in respect of the Blending Equipment follows the vesting language contained in the Commercial List model AVO,

- [14] A partial sealing order is sought in respect of Confidential Appendix 1 and Confidential Appendix 2 to the Tenth Report that contain the unredacted copies of the Tyendinaga Lease Termination Agreement and the Whitefish Lease Termination Agreement, respectively. The only redaction applied in each case is the amount to be paid by the respective landlords pursuant to the settlement and for the Blending Equipment. The Monitor is of the view that the disclosure of the price to be paid for the Blending Equipment under each agreement could prejudice the Monitor's ability to maximize value for stakeholders should it become necessary to pursue an alternate transaction in respect of the Blending Equipment and related leases if the Lease Termination Agreements or the transactions contemplated thereby fail to close.
- [15] The Lease Termination Approval Order provides that, after the closing of the sales of the Blending Equipment, the Monitor shall publish a revised version of the Tenth Report on its website including the Confidential Appendices, and shall file that revised version of the Tenth Report on its website. This Court granted a sealing order on a similar basis in connection with an earlier transaction arising out of the Bid Process that was approved (the Vehicle Transaction) where the information sought to be sealed was "discrete, proportional and limited", as it is here. See *In the Matter of the Companies' Creditors Arrangement Act and In the Matter of a Plan of Compromise or Arrangement of Original Traders Energy Ltd. and 2496750 Ontario Inc.*, 2023 ONSC 753, at paras. 59 to 65.
- [16] I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC requirements, as modified by the reformulation of the test in *Sherman Estate v. Donovan*, 2021 SCC 25, at para 38. Preservation of the confidentiality of information inherent in a commercial sale transaction pending closing is recognized as meeting the requirements of the test for sealing court documents when limited to only that material that contains the confidential and sensitive information and only for as long as may be necessary, as has been proposed in this case. See *Sherman Estate*, at para. 85.
- [17] Counsel for the Monitor is directed to ensure that the sealed confidential appendices are provided to the court clerk at the filing office in an envelope with a copy of this endorsement and the signed order with the relevant provisions highlighted so that they can be physically sealed.
- [18] For the above reasons, the requested Lease Termination Approval Order in respect of the Tyendinaga and Whitefish leases, including all ancillary relief such as the vesting and partial sealing orders contained therein, are granted. The order may issue in the revised form signed by me today.
- [19] The revisions made today reflect the subsequent agreement between the Monitor and the Whitefish Landlord authorizing the transfer of the Blending Equipment to a party related to the Whitefish Landlord, and vesting the Blending Equipment in that party rather than the Whitefish Landlord.

[20] There is no agreement with the third Fuel Blending Landlord. No relief is sought in respect of that lease or the associated Blending Equipment at this time.



KIMMEL, J.

**DATE: 9 SEPTEMBER, 2024**