SUPERIOR COURT OF JUSTICE

COUNSEL SLIP / ENDORSEMENT

COURT FILE NO.: CV-23-00693758-00CL **DATE:** 30 January 2023

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TITLE OF PROCEEDING: **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.

BEFORE JUSTICE: **Osborne**

PARTICIPANT INFORMATION

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Name of Person Appearing	Name of Party	Contact Info
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ENDORSEMENT OF JUSTICE OSBORNE:

[1] This is an application for relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36. It is made by Original Traders Energy Ltd. ("OTE GP") and 2496750 Ontario Ltd. ("249"), (collectively

the "Applicants" or the "Companies"). Together with Original Traders Energy LP ("OTE LP") and OTE Logistics LP ("OTE Logistics"), the Applicants comprise the "OTE Group".

[2] Following the hearing, I granted the initial order with reasons to follow. These are those reasons. Defined terms have the meaning given to them in the Application materials unless otherwise indicated.

[3] The OTE Group is a wholesale fuel supplier which services mainly First Nations petroleum stations and communities across Ontario. It has been in this business since 2018. It services over 30 gas stations, the majority of which are situated on nine different First Nations reserves in southern Ontario.

[4] The OTE Group purchases bulk or blended fuel, blends fuel where required and with and without local sourcing and then supplies and distributes gasoline diesel and other fuel products. It has four Operating Locations and the fifth location, the Couchiching Location, is only partially constructed. Its head office and one blending centre are in the Six Nations of the Grand River Territory of Scotland, Ontario. It has additional blending centres in Tyendinaga Mohawks of Bay of Quinte of Shannonville, Ontario and Atikameksheng Anishnawbek Territory of Naughton, Ontario as well as the partially constructed blending centre in Couchiching First Nation Territory of Fort Frances, Ontario.

[5] I observe, however, that the partially constructed Couchiching blending centre is, according to the materials of the Applicants, neither an asset nor a property of the OTE Group, but is said to be effectively a trespass on reserve lands that was constructed to partial completion, and which is apparently the subject of ongoing disputes.

[6] The OTE Group has 58 full-time employees and one part-time employee and holds five fuel and gas licenses which it requires to conduct business.

[7] The Applicants are insolvent. Absent protection under the CCAA, the Applicants lack sufficient cash to meet their obligations as they come due, and their liabilities exceed the value of their assets.

[8] The Applicants seek protection from their creditors while they continue as a going concern to allow time to explore various restructuring options for the benefit of stakeholders.

[9] The relief sought by the Applicants today is fully supported and recommended by the Proposed Monitor as well as by RBC, the senior secured creditor.

[10] As against this background, the issues on this Application are:

a. Does the Court have jurisdiction to grant the relief requested under the CCAA and should a stay of proceedings be granted, including the requested stay of rights and remedies of the relevant regulators?

b. Should the protections of the initial order, if granted, apply to the OTE Group, including the Limited Partnerships?

c. Should the Court grant the Charges sought?

d. Should KPMG be appointed as Monitor with the additional investigatory powers?

e. Should payments to critical suppliers be authorized for pre-filing expenses? and

f. Should the second affidavit of Scott Hill sworn January 27, 2023 (the "Confidential Affidavit") be sealed as requested?

Jurisdiction

[11] The Applicants rely on the Affidavit of Scott Hill sworn January 27, 2023 together with the exhibits thereto, the Confidential Affidavit and the pre-filing report of the Proposed Monitor together with exhibits thereto. Defined terms have the meaning given to them in the Application materials and pre-filing report of the Proposed Monitor unless otherwise indicated.

[12] OTE GP is the general partner of OTE LP and was incorporated under the OBCA.

[13] OTE LP was created under the *Limited Partnership Act* (Ontario).

[14] OTE Logistics is also an Ontario Limited partnership originally established under the name Gen 7 Fuel Management Services LP.

[15] 249 is also an OBCA corporation.

[16] As stated above, these entities together comprise the OTE Group. The group, including for greater certainty OTE LP and OTE Logistics, are highly integrated in operations and management.

[17] The OTE Group is balance sheet insolvent and is facing a looming liquidity crisis as it is unable to meet liabilities anticipated to come due during the first quarter of this year. It is anticipated that the OTE Group will have sufficient cash to sustain operations throughout the proposed CCAA proceeding, but will lack sufficient funds to cover outstanding liabilities. These are further described below.

[18] The challenges are compounded by the fact that the liabilities faced by the OTE Group were precipitated by alleged executive misconduct related primarily to the actions of the former president of OTE GP, Mr. Glenn Page ("Page"), said to have been acting together with associates and other entities. The OTE Group is missing material portions of its books and records with the result that, among other things, financial information and records for the period January 2021 through August 2022 inclusive, are unreliable and incomplete. There are no completed financial statements subsequent to fiscal 2020, and even those statements are questionable as to their accuracy and completeness.

[19] It is anticipated that the role of the Proposed Monitor will include recovering and then analysing to the extent possible the financial records.

[20] Litigation against Page and associates is pending in Ontario and in another jurisdiction. Allegations made in that litigation include the allegations that the defendants used company funds to the extent of several million dollars to pay for inappropriate expenses, including the purchase of a large yacht (and caused the OTE Group or entities within it to guarantee a chattel mortgage secured by the vessel) and that the defendants gave preferred pricing for fuel and gasoline to certain retail gas station businesses on First Nations reserves controlled by them. Additional litigation and demands for payment against the OTE Group are anticipated. At the same time, the OTE Group is also subject to litigation by former executives and their associates.

[21] The OTE Group owes material amounts to provincial and federal regulators and tax authorities with the result that the required licences, if it is to continue to operate, are in jeopardy. Revocation of those licences would jeopardize if not defeat entirely, the proposed restructuring efforts.

[22] As of November 1, 2022, OTE LP was in default of fuel and gas filings due in July, August and September, 2022. It had prior amounts outstanding to the Ministry of Finance ("MOF") inclusive of penalties and interest in the following amounts: gas licences - $27,856,055.71; and fuel licences - $6,885,045.70.

[23] The OTE Group received a security cancellation notice from the MOF on or about December 6, 2022 advising that the MOF, had in turn received on December 2, 2022, a 60-day cancellation notice from Zürich Insurance Company Ltd. in respect of a surety bond issued as security for the amounts owing to the MOF in connection with the gas and fuel licenses. That notice required replacement security to be put in place by January 30, 2023.

[24] Notwithstanding that the MOF was provided with a copy of a reinstatement email confirmation from Zürich to the effect that a standard reinstatement notice would be provided by Zürich to the MOF, the MOF called on and redeemed the Zürich surety bond on January 24, 2023.

[25] As of January 26, 2023, the MOF confirmed that the gas licences and fuel licences would be extended until March 31, 2023. The OTE Group seeks a stay of the revocation of those licences during the CCAA proceedings. Absent that, the Applicants submit, there would be a functional halt to the entire operations of the OTE Group and jeopardize any restructuring efforts.

[26] The secured debt of the OTE Group consists primarily of debt owed to the Royal Bank of Canada ("RBC"), and various equipment lessors.

[27] OTE LP and OTE Logistics are parties to loan agreements with RBC that are in default for a total amount of $4,558,280.88 as at January 19, 2023. Those obligations are secured pursuant to GSAs, assignments, lease arrangements and guarantees.

[28] Those obligations are also secured by an account performance security guarantee certificate of cover executed by Export Development Canada ("EDC") to secure petroleum product purchases. EDC has received a claim application from RBC due to a call on the standby letter of credit in respect of which the performance guarantee was issued. The OTE Group take the position that the letter of credit may have been obtained under false pretenses and is the subject of the ongoing litigation referred to above.

[29] OTE LP and OTE Logistics have entered into a forbearance agreement with RBC pursuant to the terms of which, in exchange for RBC refraining from exercising its rights pursuant to its security during this CCAA proceeding, no charge granted by way of an initial order or otherwise during these proceedings shall prime the RBC security without its consent, the stay will not apply to RBC, and RBC will be an unaffected creditor in any plan of arrangement. The Proposed Monitor supports the forbearance agreement, without which RBC is likely to demand on its security which would hinder the restructuring prospects of the OTE Group.

[30] None of the equipment leases are in default although if the initial order is not granted, they may become subject to acceleration and default which would further hinder the restructuring projects of the OTE Group.

[31] Beyond that, the Applicants are not certain as to the financial state of affairs of the OTE Group due to the alleged misconduct of past executives and the missing books and records. Whether and the extent to which additional liabilities exist is as yet unknown. This includes liabilities to regulatory and taxing authorities.

[32] The OTE Group has pursued a number of strategic initiatives to stabilize financial functions and operations, obtain, update and analyze books and records, and impose appropriate controls. At this point, however, it seeks protection pursuant to this proceeding to explore potential restructuring options for the benefit of stakeholders while preserving the value of the business.

[33] The evidence satisfies me that relief under the CCAA is required to stabilize the integrated enterprise and preserve the value of the business for the benefit of the stakeholders of the OTE Group. Most fundamentally, absent protection being granted today, the operations of the Applicants and the OTE Group, and therefore the uninterrupted supply of fuel to First Nations communities throughout Ontario and during the winter months, is at risk.

[34] The Applicants are corporations that collectively owe over $5 million in outstanding liabilities. They have delivered the documents and financial statements required under s. 10(2) of the CCAA. The CCAA applies to a "debtor company" or an "affiliated debtor company". The CCAA defines a "debtor company" as, among other things, any company that is insolvent or has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* ("BIA").

[35] This Court considered the circumstances in which a debtor company was insolvent in *Stelco Inc. Re*, [2004] 48 C.B.R. (4th) 299 ("*Stelco*"), and held that in order to give effect to the CCAA objectives of allowing a debtor company breathing room to restructure, a debtor is insolvent if there is a looming liquidity crisis such that it is reasonably foreseeable that the debtor will run out of cash unless its business is restructured.

[36] As noted, and while the Applicants presently have sufficient cash for the CCAA proceedings and to fund future obligations, their cash flow is not sufficient to provide for the payment of all due and owing obligations.

[37] Moreover, they are balance sheet insolvent. As confirmed by the Applicants and the Proposed Monitor, total assets are estimated to be $67,523,927 as against total liabilities of $95,392,669.

[38] The Applicants therefore meet the test under the BIA and as contemplated by the Court in *Stelco*, discussed above.

[39] The terms "insolvency" or "insolvent" are not defined in the CCAA, but "insolvent person" is defined in the BIA (s.2.1). In the BIA definition, it includes a person whose liability to creditors provable as claims under [the BIA] amount to $1000, and who is for any reason unable to meet his obligations as they generally become due, who has ceased paying his current obligations in the ordinary course of business as they generally become due, or the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all of his obligations, due and accruing due.

[40] I observe, as did Farley, J. In *Stelco,* that the BIA tests are disjunctive so that at debtor company meeting any one of the tests is determined to be insolvent (*Stelco*, at para. 28, quoting with authority from *Re Optical Recording Laboratories Inc.,* (1990) 1990 CanLII 6672 (ONCA), 75 D.L.R. (4th) 747 at pg. 756). Moreover, and also as observed by Farley, J., the phrase "accruing due" has been interpreted by the courts as broadly identifying all obligations that will "become due" at some point in the future (*Stelco*, at para. 59).

[41] In *Stelco*, Farley, J. considered the test set out in s.2.1 of the BIA as informed by what he described as "the expanded CCAA test" such as was necessary to give effect to the intention of Parliament in enacting the CCAA to achieve its stated objectives. Since the term "insolvent" is not defined in that statute, it should be given the meaning that the overall context of the CCAA requires. Farley, J. referenced with approval what he called "the modern rule of statutory interpretation which directs the court to take a contextual and purposive approach to the language of the provision at issue as illustrated by *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII) [2002] S.C.R. 559 at 580: "today, there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."" (*Stelco*, para. 23).

[42] It is the position of the Applicants that the present financial structure is sustainable only if they can negotiate pricing changes for OTE GP with certain suppliers, restructure operations and implement cost-cutting, and determine the quantum in nature of outstanding liabilities to creditors including regulatory and taxation authorities, all for the purpose of developing a plan to satisfy those obligations.

[43] Having considered the evidence in the record, I am satisfied that the Applicants meet the test for protection under the CCAA, in addition to which I note that a number of creditors of the OTE Group have demanded payment and have threatened to or have already commence proceedings.

[44] Moreover, and while the CCAA applies by its express terms to debtor companies, it is well-established that this Court has the jurisdiction to extend the protection of the stay of proceedings to partnerships, where the operations of that partnership or those partnerships are integral and closely related to the operations of the Applicant, all to ensure that the purposes of the CCAA can be achieved (*See Lehndorff General Partner Ltd., Re*, [1993] 17 CBR (3d) 24, 9 BLR (2d) 275 (Ont Gen Div [Commercial List]) at para 21; *Target Canada Co., Re*, 2015 ONSC 303 at paras 42–43 [Target]; and *4519922 Canada Inc. Re*, 2015 ONSC 124 at para 37).

Stay

[45] Section 11.02(1) of the CCAA provides that the Court may order a stay of proceedings on an initial CCAA application for a period of not more than 10 days. Section 11.001 of the CCAA provides that relief granted on an initial CCAA application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that initial 10-day period.

[46] A stay of proceedings is clearly necessary here if any form of restructuring process is to be successful. The relief sought today is limited to what is reasonably necessary, and the stay is granted.

[47] The issue is then whether, as requested, that stay should extend to relevant regulatory authorities in respect of any rights and remedies they may have. Specifically, the Applicants seek an order that all rights and remedies of provincial and federal regulators and/or border authorities that have authority with respect to the importation and exportation of fuel, petroleum, diesel and/or gasoline in respect of the OTE Group or their respective employees and representatives, or affecting the Business Or property, our state except with the written consent of the OTE Group and the Monitor, or leave of this Court sought on notice to the Service List.

[48] Section 11.1 of the CCAA provides that if such relief is sought on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) [i.e., the stay] not apply in respect of one or more of the actions, suits or proceedings taken bio before the regulatory body if in the court's opinion a viable compromise or arrangement could not be made in respect of the [Applicant] if that subsection were to apply; and it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

[49] The Applicants submit that the MOF and/or other regulatory bodies or taxation authorities, may seek to enforce certain of their rights and remedies, including to revoke the gas and fuel licences and today, there is no certainty they will not act to do so. Any such enforcement particularly by the MOF with respect to the fuel licences would have material adverse consequences for the OTE Group likely shutting down existing operations which in turn will materially impair the ability of the OTE group to continue as a going concern and likely impair any restructuring efforts. The MOF was on notice of today's hearing.

[50] The Proposed Monitor supports the relief sought and observes in the pre-filing report that notwithstanding ongoing constructive discussions with the MOF, the unique circumstances here are such that it should be temporarily stayed from exercising rights and remedies, provided the MOF is paid amounts owing to it in the ordinary course post-filing all with a view to providing the OTE Group with a stable environment in which it can seek to restructure.

Appointment of KPMG as Monitor

[51] The Applicants propose to have KPMG appointed as the Monitor. KPMG is a "trustee" within the meaning of subsection 2(1) of the BIA, is established and qualified, and has consented to act as Monitor. The involvement of KPMG as the court-appointed Monitor will lend stability and assurance to the Applicants' stakeholders. KPMG is not subject to any of the restrictions set out in s. 11.7(2) of the CCAA, has consented to act as Monitor and has prepared a 13-week cash flow forecast.

[52] I am satisfied that KPMG should be appointed as Monitor in these CCAA Proceedings.

[53] Moreover, I am satisfied in the circumstances that, as requested, the Monitor should have additional investigatory powers including the power to compel production of books and records relating to the OTE Group and conduct investigations including examinations under oath of any person reasonably thought to have knowledge relating to the information requested, as set out in the draft initial order sought.

[54] One of the material factors leading to the circumstances that bring the Applicants to this Court today seeking protection is the fact that they are unable to locate all books and records, said to be as a result of the alleged misconduct of certain former executives, with the result that they cannot discern with certainty, for example the precise extent of all liabilities as to the identity of creditors or quantum.

[55] I am satisfied that it is to the benefit of all stakeholders that these investigative powers be granted and that they be granted to the Court-appointed Monitor. As set out in the draft initial order, those investigative powers are generally consistent with such powers given to Court-appointed Monitors in situations where the books and records of an applicant are deficient, the historical financial information is unreliable and there are matters requiring further investigation, as I am satisfied is the case here.

Sealing Order

[56] The Applicants seek a sealing order with respect to the Confidential Affidavit and exhibits thereto. It is sought on the basis that it is necessary to honour and give effect to an existing sealing order made by a court in another jurisdiction.

[57] Subsection 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.42, provides for the Court's authority to grant a sealing order. It provides that the Court may order that any document filed in a civil proceeding be treated as confidential, sealed and not part of the public record.

[58] The Supreme Court of Canada in *Sherman Estate v Donovan,* 2021 SCC 25, at para. 38, recast the test from *Sierra Club of Canada v. Canada (Minister of Finance)* 2002 SCC 41 (CanLII):

> The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core principles that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking the court to exercise discretion in a way that limits the open court presumption must establish that:
>
> a. court openness poses a serious risk to an important public interest;
>
> b. the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
>
> c. as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> Only where all of these prerequisites have been met can a discretionary limit on openness - for example, a sealing order, a publication ban, an order excluding the public from the hearing, or a redaction order - properly be ordered. This test applies

to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188 at paras. 7 and 22).

[59] Under the first branch of the three-part test, an "important commercial interest" is one that can be expressed in terms of the public interest in confidentiality. The Supreme Court was clear that the interest in question cannot merely be specific to the party requesting the order and must be one which can be expressed in terms of a public interest in confidentiality.

[60] The Supreme Court recognized the potential need for a sealing order where the parties have agreed to a confidentiality provision (see *Bombardier Inc. v. Union Carbide Canada Inc.,* 2014 SCC 35 at para. 49). Here, the parties present today do not oppose the sealing order. Moreover, it is supported and recommended by the Proposed Monitor.

[61] More fundamental, however, is the fact that the material over which the sealing order is sought is already the subject of a sealing order issued by a court in another jurisdiction. That order, which requires that the contents of the case in that jurisdiction remain sealed until further order of that court, was made in a proceeding commenced by a verified Complaint itself filed under seal. I am satisfied that an important public interest includes comity and cooperation between courts in different jurisdictions.

[62] With respect to the second requirement, there are no reasonably alternative measures to address the risk. To decline to grant the sealing order here would be to immediately render moot and ineffective the order already made in the foreign proceeding. Moreover, I am satisfied that to decline to grant the proposed sealing order here would materially impair the maximization of asset value for the benefit of stakeholders.

[63] The third requirement is also met. While the Confidential Affidavit would be sealed, the balance of the materials in the Application (which constitute the overwhelming proportion of the information before the Court today) would not be sealed, and available to the public. The information over which confidentiality is sought to be maintained is discrete, proportional and limited. It is also consistent with the scope of the sealing order made by the foreign court.

[64] Again, I observe that the order sought is supported by the recommendation of the Proposed Monitor.

[65] I am satisfied that the benefits of the proposed sealing order outweigh its negative effects with the result that it should be granted, pending further order of the Court.

[66] In addition to the general comeback provisions applicable for a first day CCAA order, I have required that the sealing order is effective only until the earlier of the vacating of the sealing order of the foreign court appended to the Confidential Affidavit without being replaced by another sealing order of a foreign court, the vacating of any other sealing order granted by a foreign court to replace the existing order, or further order of this Court. It may be varied by the Court on motion of any party brought on notice at any time.

[67] Counsel for the Applicants are directed to file a physical copy of the unredacted Confidential Affidavit with exhibits with the Commercial List Office in a sealed envelope marked: "Confidential and sealed by Court order; not to form part of the public record until further order of the Court".

The Charges

Administration Charge

[68] The Court has jurisdiction to grant an administration charge under s. 11.52 of the CCAA. It is to consider: the size and complexity of the business being restructured, the proposed role of the beneficiaries of the charge, whether there is an unwarranted duplication of roles, whether the quantum of the proposed charge appears to be fair and reasonable, the position of the secured creditors likely to be affected by the charge,

and the position of the Monitor. (See *CanWest Publishing Inc., Re*, 2010 ONSC 222 ("*CanWest*"), at para. 54).

[69] The administration charge sought for $500,000, subordinate to the security held by RBC discussed above, meets this test and is appropriate. It is supported by the Proposed Monitor and RBC. The amount is limited to the amount reasonably necessary for the initial 10-day stay.

The Directors' and Officers' Charge

[70] The Court has jurisdiction to grant a directors' and officers' (D&O) charge under section 11.51 of the CCAA, provided notice is given to the secured creditors who are likely to be affected by it. To ensure the stability of the business during the restructuring period, the Applicants need the ongoing assistance of their directors and officers, who have considerable institutional knowledge and specialized expertise. They seek a priority D&O charge in favour of the current and future directors and officers in the amount of $200,000, ranking subordinate to the administration charge.

[71] The Monitor supports the Applicants' request for the D&O charge, also subordinate to the security of RBC, who also supports it. I am satisfied it is appropriate here. It is approved in the amount of $250,000.

Payment of Pre-filing Amounts

[72] The Applicants seek authority to pay, with the consent of the Monitor and the OTE Group, amounts owing for goods or services supplied by third parties to any of the OTE Group prior to filing, up to a maximum aggregate amount of $6,375,000, if such third parties are critical to the Business and the ongoing operations of the OTE Group. The Applicants also seek authority to pay amounts owing to the Ministry of Finance pursuant to an agreement reached with the MOF on January 26, 2023 regarding the extension of certain fuel and gas tax licences.

[73] There is no question here that both the ability to continue the supply of fuel and the continuation of the requisite fuel licences are critical to the restructuring efforts of the Applicants and the continued fuel supply to First Nations communities in Ontario through the winter months.

[74] The payment of prefiling amounts are authorized.

Initial Order and Comeback Hearing

[75] The comeback hearing shall take place on Thursday, February 9, 2023 commencing at 9:30 AM via Zoom before me.

[76] The order I have signed is effective immediately and without the necessity of issuing and entering.

Osborne, J.