

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

BETWEEN:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C.  
1985, c. C-36, AS AMENDED

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF **ORIGINAL  
TRADERS ENERGY LTD. and 2496750 ONTARIO INC.**

Applicants

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**FACTUM OF THE APPLICANTS  
(Returnable October 4, 2023)**

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September 28, 2023

**AIRD & BERLIS LLP**

Brookfield Place  
181 Bay Street, Suite 1800  
Toronto, Ontario M5J 2T9

**Steven Graff** (LSO# 31871V)

Tel: 416-865-7726

Email: [sgraff@airdberlis.com](mailto:sgraff@airdberlis.com)

**Martin Henderson** (LSO# 24986L)

Tel: 416-865-7725

Email: [mhenderson@airdberlis.com](mailto:mhenderson@airdberlis.com)

**Tamie Dolny** (LSO# 77958U)

Tel: 647-426-2306

Email: [tdolny@airdberlis.com](mailto:tdolny@airdberlis.com)

**Cristian Delfino** (LSO# 87202N)

Tel: 416-865-7748

Email: [cdelfino@airdberlis.com](mailto:cdelfino@airdberlis.com)

*Lawyers for the OTE Group*

## **PART I – INTRODUCTION**

1. On or about January 30, 2023, Original Traders Energy Ltd. (“**OTE GP**”) and 2496750 Ontario Inc. (“**249**” and with OTE GP, the “**Applicants**”) obtained an initial order (the “**Initial Order**”) before the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) granting the Applicants protection under the CCAA and other related relief, with a view to allowing the Applicants an opportunity to restructure its business and affairs. The Applicants’ CCAA proceedings are referred to herein as the “**CCAA Proceedings**”.

2. While OTE Logistics LP (“**OTE Logistics**”) and Original Traders Energy LP (“**OTE LP**”) are not Applicants in this proceeding, relief was extended to both OTE Logistics and OTE LP (together, the “**Limited Partnerships**”), which are related to and carry on operations that are integral to the business of the Applicants. The terms “**OTE Group**” and “**Applicants**” throughout this factum refer to the Applicants and Limited Partnerships collectively. The Initial Order also appointed KPMG Inc. as the CCAA monitor in these CCAA Proceedings (in such capacity, the “**Monitor**”).

3. On or about February 9, 2023, the Court issued an amended and restated initial order (the “**ARIO**”) under the CCAA which, *inter alia*, expanded certain charges and extended the Stay Period (as defined in the Initial Order) to April 28, 2023. Terms used below but undefined are as capitalized later within this factum.

4. This factum is submitted to this Honourable Court on behalf of the OTE Group, who is requesting the following ancillary relief:

- (a) An order (the “**Third Stay Extension Order**”), substantially in the form included in the Motion Record of the OTE Group, *inter alia*, which:
  - (i) Extends the Stay Period, as defined in the Initial Order, to April 26, 2024;
  - (ii) Amends the claim procedure approved pursuant to the Claims Procedure Order (term as defined below, the “**Claims Procedure**”) pursuant to which amendment the OTE Group, with the assistance of the Monitor,

will seek to identify, quantify and resolve certain claims by former employees;

- (iii) Approves a sales process (the “**Bid Process**”) for the business and property of the OTE Group, to be carried out by the Monitor, as detailed in the fifth report of the Monitor (the “**Fifth Report**”), excluding certain assets identified at schedule “A” to the Injunctive Order (term as defined herein);
- (iv) Approves the Fifth Report and the activities and conduct of the Monitor in relation to the OTE Group and the CCAA Proceedings; and
- (v) Such further and other relief as this Court may find just.

## **PART II – THE FACTS**

### **A. Background**

5. The OTE Group functions as a wholesale fuel supplier which services mainly First Nations’ petroleum stations and First Nations’ communities across Ontario.

6. The OTE Group services a total of over 30 gas stations throughout Southern Ontario, with a majority of these gas stations situated on 9 different First Nations reserves in Southern Ontario.

7. The liabilities faced by the OTE Group were triggered by alarming executive misconduct which threatens the survival of the OTE Group, arising from the actions of the former president of OTE GP, Glenn Page (“**Page**”), and other of his associates and entities, including Mandy Cox (“**Cox**”).

8. The OTE Group is missing significant portions of their books and records due to Page’s and others’ alleged misconduct. Financial information and records of the OTE Group for the entire period from January of 2021 to August of 2022 are unreliable and incomplete.

9. While the OTE Group's investigation is still ongoing, and the full magnitude of their losses are unknown, millions of dollars effectively disappeared from the OTE Group's control under Page's watch, which triggered the OTE Group's ongoing insolvency. The Italian Yacht (as defined herein) was further inexplicably diverted from the OTE Group's control through 265 (as defined herein).

10. The following orders have been granted since the ARIO:

- (a) On March 15, 2023, this Court issued an injunctive order (the "**Injunctive Order**") which, *inter alia*, restrained Page, Cox and 26586558 Ontario Inc. ("**265**", a corporation that Page controls with Cox, his spouse, who is also a former employee of the OTE Group, and collectively, the "**Mareva Respondents**") from selling, removing, dissipating, alienating, transferring, assigning, encumbering or similarly dealing with a seventy-foot yacht from the Italian ship builder Azimut Benetti, named "Cuz We Can", more particularly described at Schedule "A" to the Injunctive Order (the "**Italian Yacht**").
- (b) On April 28, the Honourable Justice Osborne granted an Order extending the stay of proceedings to August 4, 2023 and an Order authorizing and directing the Monitor to carry out the claims process as described therein (separately, the "**Stay Extension Order**" and the "**Claims Procedure Order**").
- (c) An Information Order was also granted on April 28, 2023 (the "**Information Order**"), by which AirSprint Inc. was directed to provide to the Monitor or its counsel any requested information in connection with the ARIO issued by this Court on February 9, 2023 and any other Order of the Court, related to the OTE Group, the OTE Group Affiliates (as defined in the Information Order) or any third party owned, controlled by, or otherwise related to the OTE Group Affiliates.
- (d) Chapter 15 proceedings under the US Bankruptcy Code, 11 U.S.C. §§ 101-1532 (the "**US Bankruptcy Code**") were also commenced by US counsel to the Monitor. As a result:
  - (i) On May 15, 2023, the United States Bankruptcy Court Southern District of Florida (Fort Lauderdale Division) granted a motion for provisional relief under s. 1519 and 1520 of the US Bankruptcy Code which entered an order for provisional relief to protect assets of the OTE Group and to impose an automatic stay of proceedings in the United States in accordance with the ongoing Canadian proceedings; and
  - (ii) On May 31, 2023, the United States Bankruptcy Court Southern District of Florida (West Palm Beach Division) granted an order recognizing the Canadian proceedings as a "foreign main proceeding" within the

meaning of 11 U.S.C. § 1502 of the US Bankruptcy Code, *inter alia* certain other relief.

- (e) On July 11, 2023, counsel to the Mareva Respondents served a motion record seeking relief for: (i) an Order setting aside the Injunctive Order; or, (ii) in the alternative, an extension of the deadline to file sworn statements in accordance with the Injunctive Order.
- (f) On July 17, 2023, this Court granted various relief sought by the OTE Group in the form of the following orders:
  - (i) An order (the “**Second Stay Extension Order**”) which:
    - (1) Extended the Stay Period (as defined in the Initial Order) to November 3, 2023;
    - (2) Approved the fourth report of the Monitor (the “**Fourth Report**”); and
    - (3) Authorized and directed the addition of the OTE GP to the Italian Yacht’s insurance policy.
  - (ii) An order authorizing and directing the Monitor to conduct a sales process as soon as practicable for the Italian Yacht and directing AirSprint to remit to the Monitor any funds, proceeds of sale or use of any aircraft or fractional ownership or other interests therein in which the OTE Group has claimed an interest.

11. The OTE Group continues to work extensively to recover and track down all of the millions misappropriated by the Mareva Respondents.

## **B. Recent Developments**

12. Following the date of the Initial Order, the OTE Group has continued its business operations in the ordinary course.<sup>1</sup> Subsequent to the Fourth Report however, the OTE Group became aware of the departure of certain key customers. Accordingly, 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. With the assistance of the Monitor, the OTE Group

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<sup>1</sup> Affidavit of Scott Hill sworn on September 25, 2023 at [para 23](#) [“**Seventh Hill Affidavit**”].

has prepared a plan to reduce the operations of the OTE Group (the “**Reduced Operations Plan**”) to limit operating costs and conserve cash as a result of the circumstances stated above.<sup>2</sup>

13. When the CCAA Proceedings commenced, the OTE Group had three blending locations: Tyendinaga, Whitefish and Six Nations (as defined in the First Hill Affidavit sworn January 27, 2023). As of the date of the Fifth Report, the Reduced Operations Plan has commenced and operations at both the Tyendinaga and Whitefish blending locations (collectively, the “**Discontinued Locations**”) have ceased and all employees employed at the Discontinued Locations have been terminated (all employees who are terminated during the CCAA Proceedings are referred to herein as the “**Terminated Employees**”). Additionally, all movable assets and equipment have been transferred from the Discontinued Locations to the Six Nations blending location.<sup>3</sup>

### C. Proposed Bid Process Post-Terminations

14. To date, no active marketing of the OTE Group and/or its assets have been undertaken.<sup>4</sup> In an attempt to locate one or more potential buyers for the business and/or assets of the OTE Group, the Monitor, in conjunction with the OTE Group, has developed the Bid Process. The Bid Process will serve as a means of gauging interest in the OTE Group’s assets to help determine whether a possible transaction would result in greater than liquidation value for the property, assets and undertakings of the OTE Group (collectively, the “**Property**”), excluding assets identified at Schedule “A” to the Injunctive Order, which are being marketed separately. Given the need to reduce operations generally, as well as the recent loss of key customers as noted above, the OTE Group believes the Bid Process to be the most reasonable and prudent path forward for itself and its stakeholders.<sup>5</sup>

15. Key aspects of the Bid Process are as follows:

- (a) On October 5, 2023 an initial offer summary will be sent by the Monitor to a list of potential interested parties (the “**Interested Parties**”);

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<sup>2</sup> Fifth Report of the Monitor dated September 28, 2023 at [para 24](#) [“**Fifth Report**”].

<sup>3</sup> *Ibid* at [paras 25-26](#).

<sup>4</sup> *Ibid* at [para 34](#).

<sup>5</sup> Seventh Hill Affidavit, *supra* note 1 at [para 36](#).

- (b) The Monitor will cause a notice of the Bid Process to be published in The Globe and Mail (National Edition) and such other publications as the Monitor, in consultation with the OTE Group, deems appropriate;
- (c) The Monitor will establish a data room and provide Interested Parties who have signed a non-disclosure agreement access to such;
- (d) Interested Parties will be required to submit binding offers (“**Binding Offers**”) to the Monitor by no later than November 10, 2023 at 5:00 p.m. EST; and
- (e) Binding Offers that are deemed acceptable to both the Monitor and the OTE Group will be presented to the Court for final approval.<sup>6</sup>

16. These key dates are further summarized below:<sup>7</sup>

<b>Milestone</b>	<b>Date</b>
Commence solicitation of interest from parties	No later than October 5, 2023
Binding offer deadline	November 10, 2023 at 5:00 p.m. EST
Deadline to notify qualified bidders of successful bid	November 16, 2023 at 5:00 p.m. EST

17. As indicated in the Bid Process Letter attached at Appendix “A” to the Fifth Report (the “**Bid Process Letter**”), Binding Offers must, *inter alia*:

- (a) be submitted on or before the Bid Deadline by a Qualified Bidder (terms as defined in the Bid Process Letter);
- (b) be made by way of binding, definitive transaction document(s) that is/are executed by the Qualified Bidder;
- (c) include an acknowledgement by the Qualified Bidder: (i) that it has had an opportunity to conduct any and all due diligence prior to making the Binding Offer; (ii) that it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Property in making its Binding Offer; and (iii) that it did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever, whether express, implied, statutory or otherwise, regarding the Property or the completeness of any information provided in connection therewith, other than as expressly set forth in the Binding Offer or other transaction document submitted with the Binding Offer;

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<sup>6</sup> Fifth Report, *supra* note 2 at [para 38](#).

<sup>7</sup> *Ibid* at [Appendix “A”](#).

- (d) not provide for any break or termination fee, expense reimbursement or similar type of payment, it being understood and agreed that no bidder will be entitled to any bid protections;
- (e) contain a clear indication of whether the Qualified Bidder is offering to: (i) acquire all, substantially all or a portion of the Property; or (ii) make an investment in, restructure, reorganize or refinance the Property and/or one or more of the OTE Group, on terms and conditions reasonably acceptable to the Monitor and to the OTE Group;
- (f) provide proof of funds acceptable to the Monitor, in consultation with the OTE Group;
- (g) provide for a deposit of 10% of the total purchase price of the Property to be purchased; and
- (h) include such other information as reasonably requested or identified as being necessary or required by the Monitor, upon consultation with the OTE Group.

18. The Monitor, at its reasonable discretion and upon consultation with the OTE Group may, at any time: (a) pause, terminate, amend or modify the Bid Process in accordance with the terms set out therein; (b) remove any portion of the Property from the Bid Process; and/or (c) establish further or other procedures for the Bid Process.

#### **D. Proposed Amendment to Claims Procedure Post-Bid Process**

19. In the event that the Bid Process fails to produce an acceptable bid to the OTE Group and the Monitor and a wind-up of the OTE Group becomes necessary, the OTE Group and the Monitor propose an amendment to the Claims Procedure Order. As mentioned, the Monitor was authorized by the Court to carry out a claims process pursuant to the Claims Procedure Order (the “**Claims Process**”). As such, the Claims Process was carried out in accordance with the Claims Procedure order by the Monitor with the assistance of the OTE Group. The claims bar date was June 27, 2023.<sup>8</sup>

20. To simplify the administration of the Claims Procedure, Terminated Employees would not be required to file proofs of claim forms with respect to their individual claims (the

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<sup>8</sup> *Ibid* at [para 42](#).



“**Employee Restructuring Claims**”).<sup>9</sup> Instead, based on the OTE Groups’ books and records, the OTE Group, in consultation with the Monitor, will prepare a notice of Employee Restructuring Claims. This notice sets out the classification, nature and amount of the Employee Restructuring Claim.<sup>10</sup> The Monitor will deliver, along with a claims package, this notice to each Terminated Employee with such a claim as soon as reasonably practicable and no later than 10 business days following the date on which such Employee Restructuring Claims arise.<sup>11</sup>

21. These claims are then either accepted by the Terminated Employee or may be disputed based on classification, nature and/or amount of the claim by completing a notice of dispute or of disallowance (the “**Notice of Dispute of Employee Restructuring Claim**”).<sup>12</sup> This notice must be sent within a given time period further described below. Any Terminated Employee who does not deliver such a Notice of Dispute of Employee Restructuring Claim within the given timeframe will forever be barred from disputing the classification, nature and/or amount of the claim.<sup>13</sup>

22. Importantly, and to make the process as simple and user-friendly as possible, the Terminated Employees do not have to submit any notice to the Monitor to accept their Employee Restructuring Claims. In other words, the claims prepared by the OTE Group will be automatically accepted by the Monitor should a notice of dispute not be received.<sup>14</sup> This process mirrors a “negative notice” employee claims regime for a claims process, which is granted regularly by this Court in other CCAA filings, and further allows for an expeditious and streamlined process to resolving multiple claims.<sup>15</sup>

23. The OTE Group has continued to work with the Monitor in good faith to respond to numerous creditor and stakeholder inquiries on a daily basis.<sup>16</sup>

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<sup>9</sup> *Ibid* at [para 44](#).

<sup>10</sup> *Ibid*.

<sup>11</sup> *Ibid*.

<sup>12</sup> *Ibid* at [para 45](#).

<sup>13</sup> *Ibid* at [para 46](#).

<sup>14</sup> *Ibid*.

<sup>15</sup> *Ibid* at [para 48](#).

<sup>16</sup> Seventh Hill Affidavit, *supra* note 1 at [para 11](#).

24. Further information with respect to the OTE Group's business, operations, products and causes of insolvency are contained within the various affidavits of Scott Hill and Miles Hill which are available on the Monitor's website.

### **PART III – ISSUES AND THE LAW**

25. The substantive issues to be adjudicated by the Court on the OTE Group's motion are as follows:

- (a) Should the extension to the Stay Period be granted?
- (b) Should the Monitor's Fifth Report and past activities be approved?
- (c) Should the Claims Procedure be amended?
- (d) Should the Bid Process be approved?

#### **A. Should the Extension to the Stay Period Be Granted?**

26. The CCAA empowers a court to extend the stay of proceedings granted to a debtor company by way of section 11.02(2). In considering whether to grant a stay extension, the Court must consider (i) whether the order sought is appropriate in the circumstances; and (ii) whether the applicant has been acting in good faith and with due diligence.<sup>17</sup>

27. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA."<sup>18</sup> The OTE Group respectfully submits that extending the Stay Period would be appropriate as it would allow the Monitor to, among other things, advance the Reduced Operations Plan as well as the Bid Process, in cooperation with the OTE Group.<sup>19</sup>

28. The OTE Group, with the supervision and assistance of the Monitor, has also been operating as a going-concern in good faith and with due diligence.<sup>20</sup> Since the Initial Order on January 30, 2023, the OTE Group has been working diligently with the Monitor and various stakeholders to piece together their books and records and best understand their financial

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<sup>17</sup> *Companies' Creditors Arrangement Act*, [RSC 1985, c C-36](#), ss 11.02(2)–(3) [CCAA]; *9354-9186 Québec Inc v Callidus Capital Corp*, [2020 SCC 10](#) at [para 49](#) [*Callidus*].

<sup>18</sup> *Callidus*, *ibid* at [para 50](#).

<sup>19</sup> Fifth Report, *supra* note 2 at [para 49](#).

<sup>20</sup> *Ibid* at [para 52](#).

position. The OTE Group has also been working with the Monitor in an effort to trace the various allegations of Page's misappropriation of the OTE Group's funds.<sup>21</sup>

29. In this case, the Third Stay Extension Order is requested in order to afford the OTE Group time to, among other things:

- (a) Continue to manage the business of the OTE Group in the ordinary course;
- (b) Continue to maintain relations and communications with key stakeholders;
- (c) Continue to work with the Monitor to investigate missing books and records;
- (d) Assess the claims that are submitted or may be submitted as part of the amended Claims Procedure Order; and
- (e) Develop and advance the next steps for a Reduced Operations Plan and Bid Process with the assistance of the Monitor.

30. The Monitor is of the view that the extension of the Stay Period is appropriate in the circumstances.<sup>22</sup> 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.<sup>23</sup>

31. This Honourable Court has routinely approved stay extensions of similar or longer time periods than the proposed stay extension,<sup>24</sup> and the OTE Group submits that the test to extend a stay of proceedings under section 11.02(2) and 11.02(3) of the CCAA, as requested, is met.

#### **B. Should the Monitor's Fifth Report and past activities be approved?**

32. The approval of reports of a monitor and corresponding activities as set out therein is a standard, ordinary course request in insolvency proceedings.<sup>25</sup>

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<sup>21</sup> Seventh Hill Affidavit, *supra* note 1 at [para 40](#).

<sup>22</sup> Fifth Report, *supra* note 2 at [para 52](#).

<sup>23</sup> *Ibid.*

<sup>24</sup> See generally *Lydian International Limited*, [2020 ONSC 7979](#); *US Steel Canada Inc (Re)*, [2017 ONSC 1967](#); *Cline Mining Corp (Re)*, [2015 ONSC 622](#).

<sup>25</sup> *Target Canada Co. (Re)*, [2015 ONSC 7574](#) at [para 2](#) [*Target Canada*]; see also *Laurentian University of Sudbury*, [2022 ONSC 5850](#) at [para 17](#) [*Laurentian University of Sudbury*].

33. In *Target Canada Co. (Re)* (“**Target Canada**”), this Honourable Court noted that there are good policy and practical reasons to grant the approval of a Monitor’s reports and activities, including (a) allowing a Monitor to bring its activities before the Court; (b) allowing an opportunity for stakeholders’ concerns to be addressed; (c) enabling the Court to satisfy itself that a Monitor’s activities have been conducted in prudent and diligent manners; (d) providing protection for a Monitor not otherwise provided by the CCAA; and (e) protecting creditors from delay that may be caused by re-litigation of steps or potential indemnity claims by a Monitor.<sup>26</sup> The principles set out in *Target Canada* were more recently reaffirmed by Morawetz CJ in *Laurentian University of Sudbury*, as well as in an endorsement by the court.<sup>27</sup>

34. If a Monitor has met the objective test of demonstrating that it has acted reasonably, prudently and not arbitrarily, this Honourable Court should approve its past activities and reports. The OTE Group continues to work with the Monitor during these CCAA Proceedings and understands that the Monitor’s activities were carried out in accordance with the orders appointing them, were consistent with their respective mandates, and were done in furtherance of the objective of developing a potential restructuring strategy for the OTE Group, including the Bid Process and amendment to the Claims Procedure Order regarding Employee Restructuring Claims. The OTE Group submits that relief approving the activities of the Monitor to date should be granted.

### **C. Should the Claims Procedure be amended?**

35. Though there is no express statutory authority for the approval of a claims procedure, sections 11 and 12 of the CCAA provide this Court with the power to make any order it considers appropriate in the circumstances and fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.<sup>28</sup> This Court regularly grants approvals for claims procedures in connection with the CCAA restructuring process.<sup>29</sup>

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<sup>26</sup> *Target Canada*, supra note 25 at [paras 2, 22–23](#).

<sup>27</sup> *Laurentian University of Sudbury*, supra note 25 at [para 17](#); see also *Laurentian University of Sudbury* (May 18, 2022) [CV-21-656040-00CL](#) (Endorsement) at paras 13–14.

<sup>28</sup> CCAA, supra note 17, ss [11](#) and [12](#).

<sup>29</sup> *Re Toys “R” US (Canada) Ltd.*, [2018 ONSC 609](#) at [para 9](#); see also *Timminco Limited (Re)*, [2014 ONSC 3393](#) at [para 40](#).

36. The amendment to the Claims Procedure, as described above, is designed to foster a user-friendly process for the Terminated Employees to have their claims recognized and resolved quickly. The Employee Restructuring Claim mechanism functions as a simplified “negative notice” employee claims process, and was drafted to expeditiously address Employee Restructuring Claims in an efficient and cost-effective manner.

37. Courts have found that negative notice claims processes are especially effective in handling employee claims. Recently, the British Columbia Supreme Court granted a claims process order that approved a negative notice claims process that dealt with employee claims.<sup>30</sup> In that scenario, a negative notice claims process functioned in such a way whereby impacted employees were only required to file materials if they disputed the debtor’s proposed assessment of their claim.<sup>31</sup> This negative process was positively remarked on to be “as streamlined a process as possible for the former employees”<sup>32</sup> and “designed to specifically address their unique interests.”<sup>33</sup>

38. Similar negative notice claims process have also been approved in Ontario by this Honourable Court. For instance, in *Just Energy Group Inc.*, all negative notice claimants were sent claim packages by the debtor, in conjunction with the monitor, detailing their claim amount based on the debtors books and records. As seen in the proposed amendment to the Claims Procedure, in *Just Energy Group Inc.*, the negative notice claimants were able to dispute the assessment via a notice of dispute claim.<sup>34</sup> A similar negative notice claims process with respect to employee claimants was also granted during the *Payless Shoesource Canada Inc. et al CCAA* proceeding.<sup>35</sup>

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<sup>30</sup> *Mountain Equipment Co-Operative and 1314625 Ontario Limited* (November 27, 2020) [No. S209201](#) (Order) at paras 23–25.

<sup>31</sup> *Mountain Equipment Co-Operative (Re)*, [2020 BCSC 2037](#) at [para 12](#).

<sup>32</sup> *Ibid* at [para 60](#).

<sup>33</sup> *Ibid* at [para 38](#).

<sup>34</sup> *Just Energy Group Inc.*, (September 15, 2021) [CV-21-00658423-00CL](#) (Order) at para 22.

<sup>35</sup> *Payless Shoesource Canada Inc. and Payless Shoesource Canada GP Inc.*, (April 24, 2019) [CV-19-00614629-00CL](#) (Order) at paras 18-23; see also *Metro 360 General Partnership*, (September 16, 2020) [CV-20-00642783-00CL](#) (Order) at paras 15-25.

### **The Function of Negative Notice Amendment to the Claims Procedure Order**

39. The integration of a negative notice claims process for the Employee Restructuring Claims is designed to be methodical and efficient. Here, 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 proceeding that which sets out accrued and unpaid vacation pay, termination and/or severance pay among other amounts.<sup>36</sup> From that point forward, the negative notice process built into this amendment mirrors the *Just Energy Group Inc.* and *Payless Shoesource Canada Inc. et al.* claims procedures, where Terminated Employees will be provided with their determined claim amount, after which a dispute process (as detailed above), can be ran if necessary.

40. In light of the above, the amended Claims Procedure should be approved. The following factors support this Court's exercise of discretion to approve the amendment to the Claims Procedure Order:

- (a) The amendment to the Claims Procedure allows the Terminated Employees to resolve their respective claims in a streamlined and simplified manner;<sup>37</sup>
- (b) The OTE Group developed the amendment to the Claims Procedure following close consultation with the Monitor;<sup>38</sup>
- (c) The amendment to the Claims Procedure is designed to be fair and flexible in resolving claims against the OTE Group;
- (d) The OTE Group and the Monitor believe that the amendment to the Claims Procedure Order and its prescribed timelines are reasonable and allow for sufficient time for Terminated Employees to accept or dispute an Employee Restructuring Claim;<sup>39</sup>
- (e) The amendment to the Claims Procedure is designed to assist the OTE Group in assessing the universe of claims against it and the potential distribution to creditors to continue to make informed decisions regarding its options within this proceeding; and

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<sup>36</sup> Fifth Report, *supra* note 2 at [para 43](#).

<sup>37</sup> Seventh Hill Affidavit, *supra* note 1 at [para 34](#).

<sup>38</sup> *Ibid* at [para 35](#).

<sup>39</sup> Fifth Report, *supra* note 2 at [para 47](#).

- (f) The Monitor is supportive and recommends that this relief be granted.<sup>40</sup>

**D. Should the Bid Process be approved?**

41. It is well recognized that a CCAA court has jurisdiction to approve a sale process in relation to a CCAA's debtor's business and assets, as the CCAA is intended to be flexible and is afforded a liberal interpretation to achieve its overall objectives.<sup>41</sup> Prior to or in the absence of a plan of compromise or arrangement, this Court in *Nortel* has held that the approval of a sale by a CCAA debtor to preserve its business is consistent with these objectives and is within the jurisdiction of this Court.<sup>42</sup>

42. In determining whether it is appropriate to authorize a sales process, Morawetz CJ in *Nortel* flags the following factors a court ought to consider:

- (a) Is a sale transaction warranted at this time?
- (b) Will the sale benefit the whole "economic community"?
- (c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
- (d) Is there a better viable alternative?<sup>43</sup>

43. Subsequent to Morawetz CJ's *Nortel* decision, the CCAA was amended in 2009 which clarified this Court's jurisdiction to authorize a sale of a debtor's assets outside a plan of arrangement upon the consideration of non-exhaustive factors enumerated in s. 36 of the CCAA. These factors are as follows:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

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<sup>40</sup> Seventh Hill Affidavit, *supra* note 1 at [para 35](#).

<sup>41</sup> *Nortel Networks Corporation (Re)*, [55 CBR \(5th\) 229](#) at [para 47](#) [*Nortel*]; CCAA, *supra* note 17, ss. [11](#) and [36](#).

<sup>42</sup> *Ibid*.

<sup>43</sup> *Ibid* at [para 49](#).

- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.<sup>44</sup>

44. Though these factors apply to the approval of an actual sale rather than a sale process, this Court has long since held that s. 36 factors should also be considered indirectly when applying the *Nortel* criteria.<sup>45</sup> These criteria have been applied recently by this Court in *Green Growth Brands, (Re)*, *Just Energy*, *Aleafia Health Inc. et al.* and *Fire & Flower Holdings Corp. et al.* to support the approval of sale processes.<sup>46</sup>

45. Though applicable to the test for approving a transaction following a sales process, the following factors are also often considered in the context of approval of a sales process itself:<sup>47</sup>

- (a) Whether the party made a sufficient effort to obtain the best price and to not act improvidently;
- (b) The interests of all the parties;
- (c) The efficacy and integrity of the process by which the party obtained offers; and
- (d) Whether the working out of the process was fair.

46. In consideration of the above, relief approving the Bid Process should be granted, as:

- (a) **Warranted Sales Process:** The Bid Process is designed to provide the best return for its stakeholders given the streamlined process for the sale of all or part of the Property, especially in light of the recent loss of anticipated revenue and the current industry conditions,<sup>48</sup>

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<sup>44</sup> CCAA, *supra* note 17, s [36](#).

<sup>45</sup> *Brainhunter Inc. (Re)*, [2009 CanLII 72333](#) at [paras 16-17](#).

<sup>46</sup> *Green Growth Brands, (Re)*, [2020 ONSC 3565](#) at [para 61](#); *Fire & Flower Holdings Corp. et al.*, (June 21, 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00700581-00CL ([Endorsement](#)); *Just Energy Group Inc. et al.*, (August 18, 2022) Toronto, Ont Sup Ct [Commercial List] CV-21-00658423-00CL ([Endorsement](#)); *Aleafia Health Inc. et al.*, (August 22, 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00703350-00CL ([Endorsement](#)).

<sup>47</sup> *DCL Corporation (Re)*, [2023 ONSC 3686](#) at [para 19](#).

<sup>48</sup> *Seventh Hill Affidavit*, *supra* note 1 at [para 39](#).



- (b) **Efficiency:** The Bid Process offers an efficient and effective means of gauging interest in the Property.<sup>49</sup> Though condensed, the timeline of the Bid Process will assist in a timely sale of the Property should such a transaction be identified;<sup>50</sup>
- (c) **Monitor's Support:** The OTE Group has developed the Bid Process with the assistance of the Monitor to best maximize value for the OTE Group's creditors and to provide a flexible structure for canvassing the market.<sup>51</sup> The Monitor has advised that the Bid Process, via its milestones, will provide sufficient time to systematically engage the market in a comprehensive, fair and transparent manner.<sup>52</sup> The Monitor is supportive of the Bid Process and believes it balances the search for a prospective purchaser with the costs associated with such a search;<sup>53</sup>
- (d) **Benefits the Economic Community and No *Bona Fide* Reason to Object:** The Bid Process will commence promptly, ensuring it can be conducted in a timely, yet reasonable, manner for the benefit of all stakeholders.<sup>54</sup> The Bid Process is the best option in the circumstances in light of the challenges facing the OTE Group, and the OTE Group does not believe that any creditor has a reasonable basis to oppose the Bid Process and no objection has been received; and
- (e) **No Better Alternative:** There has been no identification of any other viable alternative to the Bid Process.

#### **PART IV – RELIEF SOUGHT**

47. The OTE Group respectfully requests the granting of relief substantially in the form contained in its Motion Record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** as of the date first written above.

*Tamie Dolny on behalf of Steven Graff*

**S. Graff / M. Henderson / T. Dolny / C. Delfino**

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<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> Fifth Report, *supra* note 2 at [para 41](#).

<sup>53</sup> Seventh Hill Affidavit, *supra* note 1 at [para 39](#).

<sup>54</sup> *Ibid.*

**SCHEDULE “A”  
LIST OF AUTHORITIES**

1	<i>9354-9186 Québec Inc. v. Callidus Capital Corp.</i> , <a href="#">2020 SCC 10</a>
2	<i>Lydian International Limited</i> , <a href="#">2020 ONSC 7979</a>
3	<i>U.S. Steel Canada Inc. (Re)</i> , <a href="#">2017 ONSC 1967</a>
4	<i>Cline Mining Corp. (Re)</i> , <a href="#">2015 ONSC 622</a>
5	<i>Target Canada Co. (Re)</i> , <a href="#">2015 ONSC 7574</a>
6	<i>Laurentian University of Sudbury</i> , 2022 ONSC 2927 (May 18, 2022) CV-21-656040-00CL ( <a href="#">Endorsement</a> )
7	<i>Laurentian University of Sudbury</i> , <a href="#">2022 ONSC 5850</a>
8	<i>Re Toys “R” US (Canada) Ltd.</i> , <a href="#">2018 ONSC 609</a>
9	<i>Timminco Limited (Re)</i> , <a href="#">2014 ONSC 3393</a>
10	<i>Fire &amp; Flower Holdings Corp. et al.</i> , (June 21, 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00700581-00CL ( <a href="#">Endorsement</a> )
11	<i>Aleafia Health Inc. et al.</i> , (August 22, 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00703350-00CL ( <a href="#">Endorsement</a> )
12	<i>Mountain Equipment Co-Operative and 1314625 Ontario Limited</i> (November 27, 2020) <a href="#">No. S209201</a> (Order)
13	<i>Mountain Equipment Co-Operative (Re)</i> , <a href="#">2020 BCSC 2037</a>
14	<i>Just Energy Group Inc. et al.</i> , (September 15, 2021) <a href="#">CV-21-00658423-00CL</a> (Order)
15	<i>Just Energy Group Inc. et al.</i> , (August 18, 2022) Toronto, Ont Sup Ct [Commercial List] CV-21-00658423-00CL ( <a href="#">Endorsement</a> )
16	<i>Payless Shoesource Canada Inc. and Payless Shoesource Canada GP Inc.</i> , (April 24, 2019) <a href="#">CV-19-00614629-00CL</a> (Order)
17	<i>Metro 360 General Partnership</i> , (September 16, 2020) <a href="#">CV-20-00642783-00CL</a> (Order)
18	<i>Nortel Networks Corporation (Re)</i> , <a href="#">55 C.B.R. (5th) 229</a>

19	<i>Brainhunter Inc. (Re)</i> , <a href="#">2009 CanLII 72333</a>
20	<i>Green Growth Brands, (Re)</i> , <a href="#">2020 ONSC 3565</a>
21	<i>DCL Corporation (Re)</i> , <a href="#">2023 ONSC 3686</a>

**SCHEDULE “B”  
RELEVANT STATUTES**

**Companies’ Creditors Arrangement Act R.S.C., 1985, c. C-36**

**General power of court**

**11** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

**Stays, etc. — other than initial application**

**(2)** A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

**(a)** staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

**(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

**(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

**Burden of proof on application**

**(3)** The court shall not make the order unless

**(a)** the applicant satisfies the court that circumstances exist that make the order appropriate; and

**(b)** in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

**Stays, etc. — other than initial application**

**11.02(2)** A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

**(a)** staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

### **Burden of proof on application**

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

### **Fixing deadlines**

**12** The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

...

### **Restriction on disposition of business assets**

**36 (1)** A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

### **Notice to creditors**

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36, AS AMENDED  
AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF ORIGINAL TRADERS ENERGY LTD. and 2496750 ONTARIO  
INC.

Court File No. CV-23-00693758-00CL

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**Proceedings commenced at Toronto**

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**FACTUM OF THE APPLICANTS  
(Returnable October 4, 2023)**

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**AIRD & BERLIS LLP**

Barristers and Solicitors  
Brookfield Place  
181 Bay Street, Suite 1800  
Toronto, ON M5J 2T9

**Steven Graff (LSO#: 31871V)**  
**Martin Henderson (LSO#24986L)**  
**Tamie Dolny (LSO#: 77958U)**  
**Cristian Delfino (LSO#: 87202N)**

Tel: 416.863.1500  
Fax: 416.863.1515

*Lawyers for the OTE Group*