

Court File No.

**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

**FACTUM OF THE OTE GROUP
(Returnable January 30, 2023)**

January 29, 2023

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PART I – INTRODUCTION

1. Original Traders Energy Ltd. (“**OTE GP**”) and 2496750 Ontario Inc. (“**249**” and with OTE GP, the “**Applicants**”) have made an application (the “**CCAA Application**”) before the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) returnable on January 30, 2023 (the “**Proposed Filing Date**”), seeking an initial order (the “**Initial Order**”) 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 OTE Group 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, the Applicants seek to have relief sought within the proposed Initial Order extend 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 Applicants also seek to appoint KPMG Inc. (“**KPMG**” or the “**Proposed Monitor**”) as the CCAA monitor in these CCAA Proceedings (in such capacity, the “**Monitor**”).

3. The OTE Group is a wholesale fuel supplier which services primarily First Nations’ petroleum stations and First Nations’ communities across Ontario, and began operating in the First Nations fuel supply industry (the “**Fuel Industry**”) in 2018. The OTE Group services more than 30 gas stations throughout Ontario. The majority of these gas stations are situated on First Nations reserves.

4. The OTE Group’s total assets are estimated by the Proposed Monitor to be \$67,523,927 with total liabilities of \$91,392,669.¹ As detailed further herein, the OTE Group is missing significant amounts of their books and records due to a former executive’s alleged misconduct,

¹ Initial Affidavit of Scott Hill sworn January 27, 2023 (the “**Hill Affidavit**”), at para 96; Application Record dated January 27, 2023 at Tab 4.

along with certain of his associates. Financial information and records of the OTE Group from the period of January 2021 to August 2022 are largely unreliable and incomplete.

5. The principal purpose of the CCAA Proceedings is to provide the Applicants with the opportunity to restructure their debt obligations in a stable environment with the breathing space afforded by filing for protection under the CCAA. The proceedings will provide a forum to allow the OTE Group to develop a plan of compromise or arrangement (the “**Plan**”) that is intended to provide creditors with a better outcome than an immediate liquidation of the Applicants’ assets and business. The Applicants intend to move through the CCAA Proceedings as expeditiously as possible, with the goal of emerging as a going-concern business at the earliest possible opportunity.

6. In short, the primary objectives of the CCAA Proceedings are to:

- (a) stabilize the OTE Group’s business;
- (b) create a forum to understand the quantum of liabilities and claims; and
- (c) provide the OTE Group with the opportunity to explore a potential Plan.

7. The relief sought in the Initial Order is limited to what is reasonably necessary to allow the Applicants to maintain the status quo and continue operations in the ordinary course during the initial 10-day stay of proceedings (the “**Initial Stay**”). The Applicants intend to return to the Court for additional relief necessary to advance the CCAA Proceedings at a hearing to be scheduled prior to the expiration of the Initial Stay (the “**Comeback Hearing**”).

PART II – FACTS

8. Detailed information with respect to the Applicants’ business, operations, products and causes of insolvency is contained within the Affidavit of Scott Hill, sworn January 27, 2023 (the “**Hill Affidavit**”). All capitalized terms used but not defined herein have the meanings ascribed to them in the Hill Affidavit or the pre-filing report of the Proposed Monitor served on January 27, 2023 (the “**Pre-Filing Report**”), where appropriate.

Background

9. OTE GP is a corporation incorporated under the *Business Corporations Act* (Ontario), on July 5, 2017.² OTE GP is the general partner of OTE LP.³

10. OTE LP is a limited partnership formed under the *Limited Partnership Act* (Ontario) and is primarily in the business of purchasing and blending fuel products, when required, in order to supply to petroleum stations and First Nations communities across Ontario.⁴

11. OTE Logistics is a limited partnership formed under the *Limited Partnership Act* (Ontario), and is in the business of providing fuel transportation services and logistics support to OTE LP. Except for OTE LP, OTE Logistics has no other customers. The general partner of OTE Logistics is 249.⁵

12. The OTE Group's premises include a head office site, as well as three blending facilities. A further related site is under construction and is the subject of litigation. Across all locations, the OTE Group has approximately 59 employees. All the employees are residents of the First Nations communities they work in.⁶

Misconduct Litigation

13. As detailed further in the Hill Affidavit, alarming circumstances created by prior executives of the OTE Group, including the OTE Group's past president, Glenn Page, have threatened the survival of the Applicants' business. Among other misconduct, Glenn Page and certain of his associates are alleged to have: (i) misappropriated millions of dollars of OTE LP's funds and misused its credit; (ii) falsified and destroyed the OTE Group's books and financial records; and (iii) failed to pay or remit provincial gasoline and fuel taxes to the Ontario Ministry of Finance (the "MOF").⁷ The OTE Group's current management has commenced an action

² *Ibid* at para 26.

³ *Ibid* at para 28.

⁴ *Ibid* at paras 23–25.

⁵ *Ibid* at paras 29–32.

⁶ Pre-Filing Report at paras 19–20.

⁷ Hill Affidavit at para 10.

against Glenn Page and other defendants⁸ on the basis of their breaches of duty and other misconduct in connection with the business and affairs of the Applicants (the “**Page Claim**”).⁹

The Page Claim includes the following allegations, among others:

- (a) In 2021, Glenn Page and his spouse, defendant Mandy Cox, purchased, through a corporate entity, a seventy foot yacht from the Italian shipbuilder Azimut Benetti, named "Cuz We Can" (the “**Italian Yacht**”), using funds wire transferred from OTE LP’s account, and caused OTE Logistics LP to guarantee a chattel mortgage secured by the vessel;
- (b) Another defendant, Glenn Page’s brother, Brian Page, posed as a director and officer of OTE LP and OTE Logistics to facilitate concealed dealings with third parties;
- (c) Glenn Page and Brian Page provided a fraudulent directors' resolution of OTE Logistics authorizing its guarantee of debts in respect of the purchase of the Italian Yacht;
- (d) Glenn Page used more than \$15 million of OTE LP’s funds and credit to finance the construction and operation of certain gas stations (the “**Gen 7 Stations**”), which Glenn Page controlled; and
- (e) Glenn Page did not charge appropriate fuel tax on fuel purchases made by the Gen 7 Stations, to give the Gen 7 Stations a competitive advantage, for which the OTE Group may now face regulatory and taxation liability.

Licensing Concerns

14. The OTE Group relies on certain licenses from the MOF to conduct its business in Ontario. Pursuant to the *Fuel Tax Act*, R.S.O. 1990, c. F. 35 (the “**Fuel Tax Act**”), OTE LP holds the following licenses (the “**Fuel Licenses**”), which permit OTE LP to conduct business as an exporter, importer and interjurisdictional transporter of fuel products within and out of Ontario:¹⁰

- (a) an exporter license (the “**Exporter License**”);
- (b) an importer license (the “**Importer License**”);
- and (c) an interjurisdictional transporter license (the “**IT License**”);

⁸ OTE USA LLC (“**OTE USA**”) and OT Energy Inc. (“**OT Michigan**”) are non-Applicant entities that are controlled by Glenn Page. OT Michigan is the majority shareholder of OTE USA. Both OTE USA and OTE Michigan are named as defendants in ongoing litigation in Ontario.

⁹ Hill Affidavit at paras 70–76.

¹⁰ *Ibid* at para 60.

15. Pursuant to the *Gasoline Tax Act*, R.S.O. 1990, c. G. 5 (the “**Gas Tax Act**”), OTE LP holds the following licenses (the “**Gas Licenses**”), which permit OTE LP to conduct business as an importer and interjurisdictional transporter of gasoline products for the purpose of moving gasoline products in bulk within and out of Ontario:¹¹ (a) an importer license (the “**Gas Importer License**”); and (b) an interjurisdictional transporter license (the “**Gas IT License**”).

16. As of November 1, 2022, OTE was in default of its July, August and September 2022 fuel and gas filings, and owed the following amounts to the MOF (inclusive of penalties and interest):¹² (a) Gas Licenses of \$27,856,055.71; and (b) Fuel Licenses of \$6,885,045.70.

17. OTE LP has since filed and remitted gas and fuel taxes for the months of October to December of 2022. Returns for July, August and September of 2022 were filed without payment, with the acknowledgement (but not waiver) of the MOF. OTE LP has begun paying taxes for October 2022, and December 2022 taxes have also been paid to date.¹³

18. The following timeline has since unfolded regarding the Gas Licenses and Fuel Licenses:¹⁴

- (a) **Security Cancellation by Zurich:** On or about December 6, 2022, OTE received a security cancellation notice from the MOF advising that, on December 2, 2022, the MOF had received a 60 day cancellation notice (the “**Security Cancellation Notice**”) from Zurich Insurance Company Ltd. (“**Zurich**”) in respect of Surety Bond No. 6350832 worth \$2,000,000 (the “**Zurich Bond**”). Zurich had originally issued the Zurich Bond to serve as security for the amounts owing to the MOF in connection with the Gas Licenses and Fuel Licenses. The Security Cancellation Notice stated that replacement security must be put in place by January 30, 2023 (the “**Security Deadline**”). Despite the Security Cancellation Notice, the Applicants continued to work extensively to ensure that the Zurich Bond would be reinstated. On or about January 24, 2023, Zurich confirmed via email to the Applicants that a standard reinstatement notice would be provided to the MOF to satisfy the Security Deadline.
- (b) **Calling on the Zurich Bond by the MOF:** Despite providing the MOF with a copy of the reinstated email confirmation from Zurich, later on January 24, 2023,

¹¹ *Ibid* at para 62.

¹² *Ibid* at para 77.

¹³ *Ibid* at para 82.

¹⁴ *Ibid* at paras 77–88.

the MOF called on and redeemed the Zurich Bond and provided the Applicants with confirmation via email for the amount of \$2,000,000.

- (c) **Reinstatement of Licenses, Pending Cash Security Provision, with Discretionary Ability to Rescind by the MOF:** After multiple extensions and extensive negotiations with the MOF, the MOF advised the Proposed Monitor and the Applicants that the Gas Licenses and the Fuel Licenses could be potentially extended to March 31, 2023, pending payment of \$2,000,000 in cash security. However, the MOF retains their ability to suspend or cancel the Gas Licenses and the Fuel Licenses at any time.

19. The OTE Group has made arrangements to post the \$2,000,000 in cash security requested by the MOF. However, absent relief sought through the proposed Initial Order, the MOF could terminate the Gas Licenses and the Fuel Licenses at any time, or alternatively, impose other conditions upon OTE for renewal, which may result in the OTE Group losing its ability to conduct business with its customers in Ontario. Without the Gas Licenses and the Fuel Licenses, the Applicants are likely to lose their vital revenue streams, which would functionally halt the OTE Group's entire business operations.¹⁵

Assets and Liabilities

20. The OTE Group's secured debt relates primarily to: (a) liability to the Royal Bank of Canada ("**RBC**") of approximately \$4.5 million; and (b) liability to secured lessors for various real property and equipment leases.¹⁶

21. On or about January 26, 2023, OTE LP and OTE Logistics entered into a forbearance agreement with RBC (the "**RBC Forbearance Agreement**"). Under the RBC Forbearance Agreement, both OTE LP and OTE Logistics have covenanted with RBC that, in exchange for RBC refraining from exercising its rights under certain security that RBC holds during the CCAA proceedings (or the occurrence of an Intervening Event, as defined within the RBC Forbearance Agreement):¹⁷

- (a) RBC shall enjoy the benefit of its security during the Borrowers' anticipated CCAA Proceedings such that no charge shall be granted in priority to RBC's

¹⁵ *Ibid* at para 83.

¹⁶ *Ibid* at para 95.

¹⁷ *Ibid* at para 109.

security within the Initial Order or during the pendency of these CCAA proceedings, without the written consent of RBC;

- (b) the stay period contemplated by the Initial Order or during the pendency of the CCAA Proceedings shall not apply to RBC; and
- (c) RBC shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA.

22. The Proposed Monitor supports the agreement negotiated with RBC.¹⁸ The RBC Forbearance Agreement enables and allows a restructuring to occur for the OTE Group. Without the indulgences contemplated in the RBC Forbearance Agreement, RBC is likely to demand on its security, which would hinder the OTE Group's restructuring prospects.

23. In addition to the above, and as further detailed in the Hill Affidavit, certain issues have arisen or are likely to arise regarding:

- (a) an account performance security guarantee certificate of cover executed by the Export Development Canada ("EDC") to RBC. RBC submitted a claim application to EDC after it issued demands to the OTE Group, which requires further investigation due to Glenn Page's and others' misconduct;
- (b) a number of equipment leases held by the OTE Group are subject to acceleration payments which are triggered as a result of defaults on payment terms, which may trigger multi-million dollar liabilities without protection under the Initial Order;
- (c) a notice of outstanding payments to the Canada Border Services Agency (the "CBSA") in the amount of \$19,376,774 was received by OTE LP on December 6, 2022, which requires further investigation; and
- (d) various litigation claims that the OTE Group is subject to, ranging from contractual disputes to employee matters.

24. In light of these issues, based on the Cash Flow Forecast completed by KPMG,¹⁹ while the Applicants presently have enough cash for the CCAA proceedings, they are functionally balance sheet insolvent, as their cash-flow is insufficient to provide for the payment of all due and owing obligations. The Applicants further believe that the present financial structure is only sustainable if they can (a) negotiate pricing changes for OTE GP, which negotiations have

¹⁸ Pre-Filing Report at para 55.

¹⁹ *Ibid* at para 76 and at Appendix "B".

occurred and are ongoing with certain suppliers, (b) restructure operations, including cost cutting and renegotiation of certain existing contracts, and (c) determine the quantum and nature of outstanding liabilities to creditors, including regulatory and taxation authorities, for the purpose of developing a plan to satisfy those obligations.

PART III – ISSUES

25. The issues on this Application are whether:

- (a) the Applicants meet the criteria to obtain relief under the CCAA, including OTE LP and OTE Logistics;
- (b) this Court should grant the Stay, including the specialized relief sought regarding the Regulatory Stay;
- (c) this Court should grant KPMG additional investigatory powers as Monitor;
- (d) this Court should authorize the payment of certain pre-filing amounts to critical suppliers;
- (e) this Court should grant the Administration Charge and the D&O Charge; and
- (f) this Court should issue a sealing order over the Second Affidavit of Scott Hill sworn January 27, 2023 (the “**Second Hill Affidavit**”).

PART IV- LAW & LEGAL AUTHORITIES

(A) THE APPLICANTS MEET THE CRITERIA TO OBTAIN RELIEF UNDER THE CCAA, INCLUDING OTE LP AND OTE LOGISTICS

26. The CCAA applies to a “debtor company” or affiliated debtor companies where the total claims against the debtor or its affiliates exceeds five million dollars.²⁰ The total claims against the Applicants exceed this amount.

27. Pursuant to section 2 of the CCAA, a “debtor company” means, *inter alia*, a company that is insolvent. Whether a company is insolvent for the purposes of the definition of “debtor

²⁰ *Companies’ Creditors Arrangement Act*, R.S.C. 1985, C. C-36, as amended (the “CCAA”), s. 2(1) and s. 3(1).

company” is evaluated by reference to the definition of “insolvent person” in the *Bankruptcy and Insolvency Act* and to the expanded concept of insolvency accepted by this Court in *Stelco*.²¹

28. In order to give effect to the CCAA objectives of allowing the debtor company breathing room to restructure, a debtor is insolvent under the *Stelco* approach 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. The insolvency of a debtor company is determined as of the time of filing the CCAA application.²²

29. The OTE Group is balance sheet insolvent.²³ Both the test under the BIA and the expanded *Stelco* test are satisfied. It faces an inability to pay upcoming liabilities, in part due to alleged misconduct by past executives and missing access to key books and records required to understand the operations of its business.

30. The OTE Group is therefore insolvent as it cannot meet these liabilities as they come due. The OTE Group meets the test for protection under the CCAA. In addition, a number of the OTE Group’s creditors have demanded payment, threatened to sue or commenced litigation.

31. Furthermore, the CCAA expressly applies, by its terms, to debtor companies, but not partnerships.²⁴ However, where the operations of partnerships are integral and closely related to the operations of the Applicant, it is well-established that a CCAA court has the jurisdiction to extend the protection of the stay of proceedings to those partnerships in order to ensure that the purposes of the CCAA can be achieved. Such relief has been granted on multiple occasions.²⁵

32. At hand, the business and operations of all of the Applicants, including the limited partnerships of OTE LP and OTE Logistics, are heavily intertwined with the business of the other debtors. The limited partners hold the regulatory licenses which are necessary for the OTE Group to conduct business throughout Ontario’s First Nations communities.

²¹ *Stelco Inc. Re.*, [2004] 48 CBR (4th) 299, 129 ACWS (3d) 1065 (Ont Sup Ct [Commercial List]).

²² *Ibid* at para 4.

²³ Pre-Filing Report at para 109.

²⁴ CCAA, s. 2.

²⁵ See e.g., *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*]; *4519922 Canada Inc., Re.*, 2015 ONSC 124 at para 37.

33. In light of these specific facts, OTE LP and OTE Logistics meet the test to be included in this CCAA Application. The inclusion of OTE LP and OTE Logistics is required in order to restructure the OTE Group and promote the OTE Group's ability to emerge as a going concern after these restructuring proceedings.

(B) PURPOSE AND SCOPE OF THE STAY AND EXTENSION OF RELIEF TO INCLUDE REGULATORY STAY

(i) Initial Stay Should Be Granted

34. Pursuant to section 11.02 of the CCAA, this Court has the discretion to grant the stay of proceedings being sought by the OTE Group at the initial application for a period of no more than 10 days, provided that the court is satisfied that circumstances exist to make the order appropriate.²⁶ The flexibility of the CCAA is thus particularly well-suited to complex restructurings involving more than one entity, and a stay of proceedings is appropriate to provide the debtor with breathing room while it seeks to restore solvency and emerge from the CCAA on a going concern basis.²⁷

35. Without the benefit of a stay of proceedings, the OTE Group will not be able to respond to and address the various stakeholder issues raised in the Hill Affidavit, including ongoing litigation and creditor concerns.

36. The initial stay of proceedings should be granted as it is reasonably necessary in these circumstances to maintain the *status quo* and to give the Applicants the breathing space they require to develop a potential Plan.

(ii) Regulatory Stay Should Be Granted

37. The most immediate threat to the OTE Group's business is the MOF's discretionary ability to cancel its Gas Licenses and Fuel Licenses. Without the Gas Licences and Fuel Licences, the OTE Group will be unable to market, sell, import and export its products to consumers in First Nations communities across Ontario.

38. The Regulatory Stay is required because regulators are exempt from the application of the Initial Stay in relation to investigations, actions and other proceedings, except where the proceeding relates to the enforcement of a payment ordered by the regulatory body or the court.²⁸

39. Pursuant to subsection 11.1(3) of the CCAA, the debtor company may apply to the CCAA court for an order requiring the stay to apply to all proceedings or steps that may be taken by a regulatory body, on notice to the regulatory body and the persons likely to be affected by the order. The two-part statutory test is as follows:

Exception

(3) On application by the company and 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) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

40. This Honourable Court has previously granted regulatory stay language in two CCAA cases: *Just Energy* and *Abbey Resources*. The facts of both scenarios are analogous to the OTE Group's situation at hand, as:

(a) ***Just Energy***: In *Just Energy*, five different provincial regulators issued licenses to 16 different Just Energy entities allowing them to sell gas and electricity; without a regulatory stay, various regulators were likely to trigger suspension or cancellation of their licenses upon the Just Energy entities entering CCAA proceedings. This Court held that the imposition of a regulatory stay against all regulators was: "consistent with the remedial purpose of the CCAA which is to avoid social and economic losses resulting from the liquidation of an insolvent company. To permit the immediate termination of Just Energy's licenses would not avoid social and economic losses but amplify them."²⁹ The regulatory stay provisions were further allowed even though the relief sought under s. 11.1(3) of the CCAA was without notice to regulators; in part, this lack of notice was given

²⁶ CCAA, s. 11.02; *Lydian International Limited (Re)*, 2019 ONSC 7473 at para 22 [*Lydian*].

²⁷ *Target*, at para 8.

²⁸ CCAA, s. 11.1(1) and s. 11.1(2).

²⁹ *Re Just Energy Corp.*, 2021 ONSC 1793 at para 87.

as surety bonds for \$46.3 million could have been otherwise demanded on by regulators.

- (b) ***Abbey Resources***: The debtor held licenses granted by the Ministry of Energy and Resources (the “MOER”), which opposed the CCAA proceedings.³⁰ The MOER required an additional security deposit from the debtor of over \$13 million to maintain its licenses,³¹ and threatened that non-payment of the security would cancel the licenses at-hand. The MOER further confirmed that, if not paid the substantial security deposit from the debtor, it intended to wield its authority to take regulatory action that would inhibit the debtor from carrying on business.³² The MOER further held discretionary statutory power to cancel a license if “the security required [...] has not been provided in the amount and within the time required” by the *Oil & Gas Conservation Act*.³³ While decisions were not delivered by this Court, the Court granted the Initial Order which granted a regulatory stay against the MOER to prohibit the MOER from cancelling or suspending the debtor’s license due to non-payment of the security owing to the MOER.

41. As was further stated by this Court in *Just Energy*:

- (a) More plainly put, the CCAA automatically stays enforcement of any payments of money ordered by the regulator. It does not, however, automatically stay other steps that a regulator may take against a regulated entity. The court may nevertheless stay such other steps if it is of the view that the failure to stay those other steps means that a viable compromise or arrangement could not be made, provided that the additional stay is not contrary to the public interest.

42. In determining whether to impose a stay pursuant to section 11.1(3) of the CCAA, the courts must remain mindful of the remedial purposes of the CCAA. Here, the two criteria in section 11.1(3) are readily made out, and the imposition of the Regulatory Stay is consistent with both these remedial purposes and with the prior-established case law of *Just Energy* and *Abbey Resources*, as follows.

³⁰ *Abbey Resources Corp., Re*, (29 July 2021) Saskatoon Q.B. No. 733 of 2021 (SKQB) ([Supplemental Brief of Law, Abbey Resources Corp.](#))

³¹ *Abbey Resources Corp., Re*, (4 August 2021) Saskatoon Q.B. No. 733 of 2021 (SKQB) ([Second Supplemental Brief of Law](#)) at para 3.

³² *Ibid* at paras 12–15.

³³ RSS 1978, c. O-2, s. 12(2)(c).

(a) A Regulatory Stay is necessary for a viable compromise or arrangement

43. OTE LP requires the Gas Licenses and Fuel Licenses to operate the business of the OTE Group. If these licenses are cancelled or suspended, it will be unable to deliver or transport its products within Ontario to the First Nations communities to which the OTE Group provides services. The MOF is also aware of the Applicants' proposed CCAA proceedings and has been provided with appropriate notice of the relief sought before this Court.³⁴

44. While security is required under the *Fuel Tax Act* and the *Gas Tax Act* to cover liability regarding the importing/exporting of fuel/gasoline in and out of Ontario, the MOF holds the discretionary ability to "accept security for the payment of taxes in any manner the Minister considers appropriate" under s. 17(2) of the *Fuel Tax Act* and s. 19(2) of the *Gas Tax Act* (mirror provisions). Acceptable forms of security can range from irrevocable letters of credit to surety bonds to cash.³⁵

45. In *Just Energy*, notice of the initial CCAA application was not given to regulators so that surety bonds would not be cancelled and triggered. In *Abbey Resources*, a regulatory stay was granted even where security wasn't available to satisfy the MOER's discretionary statutory requirements for financing, and despite significant opposition from the MOER.

46. The cancellation of the Gas Licenses and the Fuel Licenses would effectively terminate the OTE Group's ability to transport or sell its products to its existing customers, including its customers in First Nations communities. Without the stable of customer contracts and relationships that the OTE Group has developed, the Applicants will instantly lose their vital revenue streams and threaten their viability. Moreover, the MOF could then take steps against the OTE Group to penalize it through the punitive provisions of the *Fuel Tax Act* and the *Gas Tax Act*. As an example, unregistered interjurisdictional carriers under the *Fuel Tax Act* per s. 4.16(1) are guilty of offences and upon conviction, are liable to monetary fines which include the amount equal to the amount of the tax that should have been paid or remitted to the MOF.

³⁴ Hill Affidavit at para 78.

³⁵ Ontario, Ministry of Finance, *Gasoline Tax* <www.ontario.ca/document/gasoline-tax> and Ontario, Ministry of Finance, *Fuel Tax* <www.ontario.ca/document/fuel-tax>.

47. The Regulatory Stay, if granted, will mitigate the material, pressing and significant risk that steps taken by the MOF could destroy the business and any possibility of a viable compromise or arrangement along with it. As a result, this branch of the statutory test is satisfied.

(b) A Regulatory Stay is not contrary to the public interest

48. As described herein, by way of this CCAA proceeding the OTE Group is seeking breathing room to allow it to stabilize its business and reconstruct its records following Glenn Page's misconduct and subsequent exit from the business. This is an extraordinary situation.

49. As part of the OTE Group's efforts moving forward, the OTE Group intends to implement appropriate systems to ensure that fuel and gas tax are properly collected, remitted and reported going forward. In this respect, the Regulatory Stay promotes the public interest, insofar as it will create an environment in which the MOF will be able to realize on the OTE Group's outstanding indebtedness. Should the Gas and Fuel Licences be canceled, such that the OTE Group is unable to operate, the MOF will almost certainly be left with a significant shortfall.

50. The Regulatory Stay merely maintains the status quo, by permitting the OTE Group to continue to serve its customers in the ordinary course, in accordance with existing contracts, with no risk of price fluctuation or interruptions to the reliable supply of gas or fuel to the First Nations communities in question.

51. Indeed, the MOF has already granted licence extensions to the OTE Group, in recognition that the expiry of the licences will effectively terminate the OTE Group's business. The proposed Regulatory Stay simply provides the OTE Group with greater certainty that the licences will not be revoked in the near term, and allows the OTE Group to focus its efforts on its restructuring, instead of repeated negotiations with the MOF regarding further extensions.

52. Further, over the period of the Regulatory Stay, the OTE Group will operate under the supervision of the Court and the Monitor. The MOF can therefore have comfort that the events that led to the OTE Group's current difficulties – mismanagement by a rogue executive – will not be repeated.

53. In these circumstances, there is no increased risk to the MOF, or other factor, that would reflect a public policy rationale for refusing to grant the Regulatory Stay.

54. By contrast, allowing the suspension or cancellation of the Gas Licenses and the Fuel Licenses, would result in significant and unnecessary disruption to customers, market participants, and the retail fuel/gas industry generally by removing a major player from the Ontario marketplace.

55. Under the protection of the Regulatory Stay, the OTE Group will be able to ensure that the MOF's requirements are satisfied, and that there is a viable path moving forward. If any circumstances change, the MOF is able to return to this Court and seek a lift of the Regulatory Stay as applicable.

56. The relief requested by the Applicants regarding a Regulatory Stay is critical to respond to the extraordinary circumstances in which the Applicants find themselves, the unique urgency created by those circumstances and the fundamentally interconnected nature of the Applicants' business. The Regulatory Stay consists of exactly the type of essential "keep the lights on" measures that are contemplated by section 11.001 of the CCAA, and ought to be granted.

(C) THE MONITOR REQUIRES ADDITIONAL INVESTIGATORY POWERS

57. Pursuant to section 11 and paragraph 23(1)(k) of the CCAA, this Court has the authority to expand the powers of a monitor and grant additional powers as considered appropriate in furtherance of the purpose of the CCAA proceeding. Authorizing expanded monitor's powers, sometimes referred to as a "super monitor", has become increasingly common in CCAA proceedings.³⁶

58. The Proposed Monitor's investigative provisions in the Initial Order mirror provisions authorized by the CCAA courts in the case law cited herein. The Proposed Monitor requires the

³⁶ [Arrangement relatif à Bloom Lake General](#), 2021 QCCS 2946 at paras 124–129; [Ernst & Young Inc. v Essar Global Fund Limited](#), 2017 ONCA 1014 at paras 106, 117–118. See also: [9227-1584 Québec Inc. & 9336-9262 Québec Inc.](#) (2 December 2019), Montreal, Que CA 500-11-057549-194 ([Amended and Restated Initial Order](#)) at paras 39–40; [Le Groupe SMI Inc. et al](#) (21 September 2018), Montreal, Que CA 500-11-055122-184 ([Amended and Restated Initial Order](#)) at paras 50.1–50.2.

investigative powers set out in the Initial Order in order to understand the value of any assets that were dissipated from the OTE Group, and to potentially recover such assets for the benefit of all stakeholders.

59. As the Supreme Court of Canada set out in *9354-9186 Québec inc. v Callidus Capital Corp.*,³⁷ the broad discretion granted to the Court pursuant to section 11 of the CCAA is one of “the principal means through which the CCAA achieves its objectives ... by carving out a unique supervisory role for judges”. The Supreme Court of Canada ruled that this authority may be exercised in furtherance of the remedial objectives of the CCAA, and where the applicants demonstrate that: (a) the order sought is appropriate in the circumstances, and (b) the applicant has been acting in good faith and with due diligence.³⁸

60. As held by this Court in *Boreal Capital Partners Ltd (Re)*,³⁹ a Monitor should be granted investigative powers, even in the face of opposition from an impacted third party, where court-appointed supervising officers advise the Court that “there are *prima facie* indications of questionable transactions which, in their professional opinion, ought to be investigated”⁴⁰ and the negative impacts of not granting the investigative powers could lead to there being “no restructuring”.⁴¹ KPMG has indicated that significant investigations need to occur to understand the OTE Group’s liabilities and assets in light of the misconduct detailed in the Hill Affidavit. Without recovery of the OTE Group’s books and records, a restructuring may be impossible.

61. As a result, investigating and potentially recovering on assets that may have been improperly dissipated, for the benefit of the OTE Group’s stakeholders furthers the remedial objectives of the CCAA and is appropriate in the circumstances. Furthermore, the Applicants have been acting in good faith and with due diligence as described in the Hill Affidavit.

62. At the present time, the Applicants are only seeking investigative powers for the Monitor. It is intended that the Monitor will later report the results of their analysis of the OTE Group’s liabilities and claims to the Court, prior to the Monitor or anyone else taking any recovery steps

³⁷ [2020 SCC 10](#) at para 47.

³⁸ *Ibid* at para 49.

³⁹ [2021 ONSC 7997](#).

⁴⁰ *Ibid* at para 9.

in respect of any potential dissipated assets. As a result, the Court will have the opportunity to review and authorize any proposed steps that may impact or prejudice any other party.

(D) THE PAYMENT OF PRE-FILING AMOUNTS TO CRITICAL SUPPLIERS SHOULD BE APPROVED

63. The Applicants seek authorization, with the consent of the Monitor, to make certain payments, including pre-filing amounts owing in arrears, to certain third parties that provide services that are integral to the Applicants' ability to operate. This is a further measure designed to protect the Applicants' essential supplies and services during the post-filing period. Such authorization is typically granted on the basis of this Court's jurisdiction to make orders that it thinks appropriate under section 11 of the CCAA. Language used in the proposed Initial Order mirrors provisions that have been previously granted by this Honourable Court.⁴²

64. Case law demonstrates that a supplier is viewed as critical to a debtor company's post-filing operations where the particular goods or services are sufficiently integrated into the debtor company's operations that it would be materially disruptive to the debtor's operations and restructuring for the particular supplier to cease providing such services and/or it would be difficult or impossible to secure an alternate supplier.⁴³

65. The Court has frequently authorized an applicant to pay pre-filing suppliers where continued supply is integral to the business of the applicants,⁴⁴ even in the case of non-critical suppliers.⁴⁵ The Court's jurisdiction is not impaired by section 11.4 of the CCAA, which codifies the Court's authority to declare a person to be a critical supplier and to grant a charge on the debtor's property in favor of such critical supplier. The relief here is necessary to maintain ordinary course operations. The OTE Group believes that the authority to make certain pre-filing payments pursuant to the proposed Initial Order is appropriate in the circumstances, as it requires

⁴¹ *Ibid* at para 8.

⁴² *Roberts Company Canada Limited* (8 July 2020), Toronto, Ont CA CV-20-00643158-00CL ([Amended and Restated Initial Order](#)) at para 7(c).

⁴³ See e.g., *Target*, at paras 62–65; *Re Clover Leaf Holdings Company*, 2019 ONSC 6966 at paras 24–27.

⁴⁴ *Index Energy Mills Road Corporation (Re)*, 2017 ONSC 4944 at paras 26–32; *Canwest Global Communications Corp., Re*, [2009] 59 CBR (5th) 72, 181 ACWS (3d) 853 (Ont Sup Ct [Commercial List]) at para 41 [*Canwest Global*]; *Cinram International Inc., Re*, 2012 ONSC 3767 at para 37, and at paras 66–71 of Schedule C [*Cinram*].

⁴⁵ *Futura Loyalty Group Inc., Re*, 2012 ONSC 6403 at para 10.

the continued supply of goods and services from its key vendors and service providers during these CCAA proceedings.

66. In authorizing the payment of pre-filing obligations, courts have considered the following factors:⁴⁶

- (a) Whether goods and services were integral to the debtors' business;
- (b) The debtors' dependency on the uninterrupted supply of the goods or services;
- (c) The fact that no payment would be made without the consent of the Monitor;
- (d) The Monitor's support and willingness to work with the debtors to ensure payments to suppliers in respect of pre-filing liabilities are minimized;
- (e) Whether the debtors had sufficient inventory of the goods on hand to meet their needs; and
- (f) The effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to critical suppliers.

67. The relief here is necessary to maintain ordinary course operations. The Applicants believe that the authority to make certain pre-filing payments pursuant to the proposed Initial Order is appropriate in the circumstances, as it requires the continued supply of goods and services from its key vendors and service providers during these CCAA proceedings.

68. The Applicants' ability to operate the business of the OTE Group in the normal course is dependent on maintaining these supplier relationships on commercially reasonable terms. The Applicants will require the consent of the Proposed Monitor in connection with anticipated payments, and the Proposed Monitor is supportive of this relief sought.

(E) THE ADMINISTRATION CHARGE AND THE D&O CHARGE SHOULD BE GRANTED

(i) *Administration Charge*

⁴⁶ *Cinram*, at para 68 of Schedule C.

69. The Applicants seek a Court-ordered charge in the amount of \$500,000 over the Applicants' Property (as defined in the Initial Order) in favour of the Monitor, counsel to the Monitor and counsel to the Applicants to secure payment of their professional fees and disbursements, whether incurred before or after the date of the Initial Order (the "**Administration Charge**".)

70. Pursuant to section 11.52 of the CCAA, the Court may grant an administration charge.⁴⁷ In deciding whether to grant an administration charge, Courts have considered a number of factors including: (a) the size and complexity of the businesses being restructured; (b) the proposed role of the beneficiaries of the charge; (c) whether there is an unwarranted duplication of roles; (d) whether the quantum of the proposed charge appears to be fair and reasonable; (e) the position of the secured creditors likely to be affected by the charge; and (f) the position of the Monitor.⁴⁸

71. At hand, the Administration Charge should be granted as its beneficiaries will continue to contribute to these CCAA proceedings and assist the Applicants with achieving their objectives. Each of the proposed beneficiaries is performing unique functions without duplication of roles, the quantum of the proposed charge is fair and reasonable, and the Proposed Monitor is supportive of the Administration Charge.

(ii) D&O Charge

72. The Applicants are seeking a charge in the amount of \$250,000 to indemnify their directors and officers for liabilities that may be incurred in their capacity as directors and officers of the Applicants (the "**D&O Charge**"). This Court has the jurisdiction to grant the D&O Charge under s. 11.51 of the CCAA.

73. When determining whether the D&O Charge is warranted, a Court must be satisfied "with the amount of the charge, that insurance is not otherwise available (s. 11.51(3)) and that

⁴⁷ CCAA, s. 11.52

⁴⁸ [Canwest Publishing Inc./Publications Canwest Inc., Re](#), 2010 ONSC 222 at para 54 [*Canwest Publishing*]; see also *Lydian* at para 46.

the charge will not provide coverage for wilful misconduct or gross negligence (s. 11.51(4)).⁴⁹ As has been stated by this Court, “[t]he purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protections against liabilities they could incur during the restructuring”.⁵⁰

74. The Applicants’ ordinary course operations may give rise to potential director liability. While the Proposed Monitor understands that the Applicants maintain insurance, KPMG believes that the amount and priority ranking “is required and reasonable in the circumstances”⁵¹ and was calculated taking into consideration employee payroll and related expenses and other employment-related liabilities.

75. The Applicants are of the view that the quantum of the D&O Charge is reasonably necessary at this time to address circumstances that could lead to potential directors’ liability prior to the Comeback Hearing. The quantum of the D&O Charge was developed with the assistance and support of the Proposed Monitor. The D&O Charge does not indemnify directors for wilful misconduct or gross negligence, and the D&O Charge is crucial to the continued involvement of the officers and directors during the CCAA proceeding to provide them with certainty regarding their personal liability.

(F) THE SEALING ORDER SHOULD BE GRANTED

76. A Court may order that any document filed in a civil proceeding be treated as confidential, sealed and that it not form part of the public record. The test for determining whether a sealing request ought to be granted in a commercial context was set out by the Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)*, namely:⁵²

- (a) when such a request is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

⁴⁹ *Miniso International Hong Kong Limited v Migu Investments Inc.*, 2019 BCSC 1234 at para 98, referencing *Canwest Publishing* at paras 56–57.

⁵⁰ *Canwest Global* at paras 46–48.

⁵¹ Pre-Filing Report at paras 101-104.

⁵² [\[2002\] 2 SCR 522, 211 DLR \(4th\) 193 \(SCC\)](#) at para 53.

- (b) when the salutary effects of the confidentiality request, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which, in this context, includes the public interest in open and accessible court proceedings.

77. In *Sherman Estate v Donovan*,⁵³ the Supreme Court held that a person asking a court to exercise discretion in limiting the ‘open court’ presumption must establish that: (i) openness poses a risk to an important interest of the public; (ii) the request sought is necessary to prevent the risk to the identified interest as reasonable alternative measures will not prevent said risk; and (iii) the benefits of the request outweigh the negatives as a matter of proportionality.

78. The Second Hill Affidavit contains material that has been sealed by court order in another jurisdiction. The requested sealing relief is the least restrictive means available to protect the legal process of this external jurisdiction, and is necessary and appropriate in light of the legal requirements of this other court of law.

PART V – RELIEF SOUGHT

79. In light of the foregoing, it is respectfully requested that this Court grant the relief set out in the draft order appended as Tab 2 to the Application Record.

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

Tamie Dolny on behalf of Steven Graff

S. Graff / M. Spence / T. Dolny / S. Hans

⁵³ [2021 SCC 25](#) at para 3.

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. [*Stelco Inc. Re*](#), [2004] 48 CBR (4th) 299, 129 ACWS (3d) 1065 (Ont Sup Ct [Commercial List])
2. [*Lehndorff General Partner Ltd., Re*](#), [1993] 17 CBR (3d) 24, 9 BLR (2d) 275 (Ont Gen Div [Commercial List])
3. [*Target Canada Co., Re*](#), 2015 ONSC 303
4. [*4519922 Canada Inc., Re*](#), 2015 ONSC 124
5. [*Lydian International Limited \(Re\)*](#), 2019 ONSC 7473
6. [*Re Just Energy Corp.*](#), 2021 ONSC 1793
7. [*Arrangement relatif à Bloom Lake General*](#), 2021 QCCS 2946
8. [*Ernst & Young Inc. v Essar Global Fund Limited*](#), 2017 ONCA 1014
9. [*9227-1584 Québec Inc. & 9336-9262 Québec Inc.*](#) (2 December 2019), Montreal, Que CA 500-11-057549-194 (Amended and Restated Initial Order)
10. [*Le Groupe SMI Inc. et al*](#) (21 September 2018), Montreal, Que CA 500-11-055122-184 (Amended and Restated Initial Order)
11. [*9354-9186 Québec inc. v Callidus Capital Corp.*](#), 2020 SCC 10
12. [*Boreal Capital Partners Ltd \(Re\)*](#), 2021 ONSC 7997
13. [*Roberts Company Canada Limited*](#) (8 July 2020), Toronto, Ont CA CV-20-00643158-00CL (Amended and Restated Initial Order)
14. [*Clover Leaf Holdings Company, Re*](#), 2019 ONSC 6966
15. [*Index Energy Mills Road Corporation \(Re\)*](#), 2017 ONSC 4944
16. [*Canwest Global Communications Corp., Re*](#), [2009] 59 CBR (5th) 72, 181 ACWS (3d) 853 (Ont Sup Ct [Commercial List])
17. [*Cinram International Inc., Re*](#), 2012 ONSC 3767
18. [*Futura Loyalty Group Inc., Re*](#), 2012 ONSC 6403
19. [*Canwest Publishing Inc./Publications Canwest Inc., Re*](#), 2010 ONSC 222
20. [*Miniso International Hong Kong Limited v Migu Investments Inc.*](#), 2019 BCSC 1234

21. [*Sierra Club of Canada v Canada \(Minister of Finance\)*](#), [2002] 2 SCR 522, 211 DLR (4th) 193 (SCC)
22. [*Sherman Estate v Donovan*](#), 2021 SCC 25

**SCHEDULE “B”
RELEVANT STATUTES**

Companies’ Creditors Arrangement Act, R.S.C. 1985, C. C-36, as amended

Definitions

2 (1) In this Act,
[...]

debtor company means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent; (*compagnie débitrice*)

Application

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(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.

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.

Meaning of *regulatory body*

11.1 (1) In this section, *regulatory body* means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

Regulatory bodies — order under section 11.02

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Oil & Gas Conservation Act RSS 1978, c. O-2, as amended

Amendment, suspension, cancellation of licences

12 (2) The minister may amend, suspend or cancel a licence if:
[...]

(c) the security required pursuant to section 15 has not been provided in the amount and within the time required.

Fuel Tax Act, R.S.O. 1990, c. F.35

Security for tax

17 (2) Where the Minister considers it advisable to do so, the Minister may accept security for the payment of taxes in any manner the Minister considers appropriate.

Gasoline Tax Act, R.S.O. 1990, c. G.5

Security for tax

19 (2) Where the Minister considers it advisable to do so, the Minister may accept security for the payment of taxes in any form the Minister considers appropriate.

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.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceedings commenced at Toronto

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