



NO. S-209201
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED
AND
IN THE MATTER OF MOUNTAIN EQUIPMENT CO-OPERATIVE
AND 1314625 ONTARIO LIMITED

PETITIONERS

APPLICATION RESPONSE

Application response of: Alvarez & Marsal Inc, in its capacity as the court-appointed monitor (in such capacity, the "**Monitor**") of Mountain Equipment Cooperative and 1314625 Ontario Limited (the "**Petitioners**").

THIS IS A RESPONSE TO the Notice of Application of Lorne Hoover on his own behalf and on behalf of former MEC employees that have a claim against MEC (the "**Applicant**") dated **November 12, 2020**, and returnable on **November 24, 2020** (the "**Representative Counsel Application**").

Part 1: ORDERS CONSENTED TO

The Monitor consents to the granting of the following orders set out in Part 1 of the Notice of Application: **NONE**.

Part 2: ORDERS OPPOSED

The Monitor opposes the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application: **Paragraphs 1 and 2**.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Monitor takes no position on the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application: **NONE**.

Part 4: FACTUAL BASIS

A. Background

1. On September 14, 2020, the Petitioners were granted an initial order (the "**Initial Order**") by the Supreme Court of British Columbia to commence proceedings (these "**CCAA Proceedings**") under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA**").

2. The Initial Order afforded the Petitioners, *inter alia*, an initial stay of proceedings up to and including September 24, 2020 (the “**Stay Period**”) and appointed the Monitor as the court-appointed monitor in these CCAA Proceedings.
3. On September 22, 2020, the Petitioners brought an application (the “**Comeback Application**”) to seek approval of an amended and restated initial order (the “**ARIO**”) amending and restating the Initial Order to, *inter alia*:
 - (a) seek an extension of the Stay Period through to October 31, 2020;
 - (b) authorize an increased maximum amount of borrowing under the Interim Financing Facility (as defined in the Monitor’s First Report to Court) to \$100,000,000;
 - (c) grant a key employee retention plan charge against the assets of the Petitioners in an amount not to exceed \$778,000 (the “**KERP Charge**”); and
 - (d) seek approval of the sale approval and vesting order (the “**SAVO**”) to approve the sale transaction (the “**Transaction**”) contemplated by the asset purchase and sale agreement between the Petitioners and 1264686 BC Ltd dated September 11, 2020 (the “**APA**”) for the sale of the Purchased Assets and the vesting of all of the Purchased Assets in the Purchaser free and clear of any Encumbrances other than Permitted Encumbrances, as such capitalized terms are defined in the APA.
4. On September 24, 2020, this Court granted an extension of the Stay Period from September 24, 2020 to September 28, 2020 to allow for the Comeback Application to be heard on September 28, 2020.
5. During the period from September 28, 2020 through to October 1, 2020, in addition to hearing the Comeback Application of the Petitioners, the Court heard several applications, including, *inter alia*, by Plateau Village Properties Inc and Midtown Plaza Inc (together, the “**Landlords’ Application**”), Kevin Harding and Save MEC (together, the “**Members’ Application**”), and the BC Co-op Association and Mutuals Canada (the “**Public Intervenors’ Application**”).
6. On October 2, 2020, this Court dismissed the Landlords’ Application, the Members’ Application and the Public Intervenors’ Application and granted the ARIO, which included, *inter alia*, an extension of the Stay Period to November 3, 2020, and the SAVO sought by the Petitioners.
7. On October 21, 2020, this Court granted an assignment order to assign all of the rights and obligations of the Petitioners under certain remaining contracts to 1266524 BC Ltd (recently renamed MEC Canada Inc. and referred to herein as the “**Purchaser**”).
8. On October 28, 2020, this Court granted a further extension of the Stay Period to January 20, 2021 to, *inter alia*, provide the Petitioners with sufficient time to complete post-closing matters related to the Transaction and seek an order to expand the powers of the Monitor provided for in the ARIO.

9. On October 30, 2020, the parties closed the Transaction and the great majority of the Petitioners' assets were conveyed to the Purchaser pursuant to the terms of the SAVO. Consequently, the major remaining stakeholders of the Petitioners with outstanding claims (the "**Outstanding Claims**") are the former employees of the Petitioners (the "**Former Employees**") and the Petitioner's landlords.
10. The Petitioners have been working diligently and in good faith with the Monitor to develop a proposed claims process to evaluate and resolve the Outstanding Claims (the "**Claims Process**").

B. The Representative Counsel Application

11. The Applicant is a former employee and a member of an alleged Facebook group of approximately 85 former employees of the Petitioners (the "**Employee Group**").
12. In the Representative Counsel Application, the Applicant seeks an order that:
 - (a) Victory Square Law Office ("**VSLO**") be appointed as representative counsel for the Former Employees who have claims against the Petitioners in these CCAA Proceedings;
 - (b) VSLO will have the ability to retain outside counsel assistance;
 - (c) VSLO be granted a charge in the amount of \$85,000 over the Property of the Petitioners in respect of its anticipated fees (the "**VSLO Charge**"), to allow for the effective participation of the Former Employees in these CCAA Proceedings; and
 - (d) The VSLO Charge will rank in priority over all other security interests, trusts, liens, charges, encumbrances, or other secured claims in favour of any person or entity other than the:
 - (i) administrative charge (to a maximum amount of \$1,000,000);
 - (ii) directors and officers' charge (to a maximum amount of \$4,500,000); and
 - (iii) the KERP Charge.

Part 5: LEGAL BASIS

A. This Court has discretion to appoint representative counsel

1. Section 11 of the CCAA grants this Court the discretion to appoint a representative counsel:

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.

CCAA, s 11

League Assets Corp, Re, 2013 BCSC 2043 at para 70

1057863 BC Ltd (Re), 2020 BCSC 1359 at para 124

B. The test for the appointment of representative counsel

2. In deciding whether to exercise its discretion to appoint a representative counsel, courts evaluate the following two considerations: (i) whether the persons to be represented by the representative counsel have a commonality of interest, and (ii) whether it is fair and reasonable in the circumstances to appoint the representative counsel.

3. Commonality of interest is evaluated with regard to the following six considerations:

- (a) commonality of interest is assessed based on the non-fragmentation test, not on an identity of interest test;
- (b) the interests to be considered are the legal interests that a creditor holds *qua* creditor in relationship to the debtor company prior to and under the plan as well as on liquidation;
- (c) the commonality of interests is to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible;
- (d) in placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable plans;
- (e) absent bad faith, the motivations of creditors to approve or disapprove of a plan are irrelevant; and
- (f) the requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.

Nortel Networks Corp, Re (2009), 53 CBR (5th) 196 at para 62, 2009 CanLII 26603 (ONSC)

Stelco Inc, Re (2005), 78 OR (3d) 241 (CA) at para 23

4. Where the parties to be represented by the representative counsel have a commonality of interest in consideration of the factors outlined above, this Court has considered the following in deciding whether it is fair and reasonable to exercise its discretion to appoint a representative counsel:

- (a) the vulnerability and resources of the group to be represented;
- (b) any benefit to the companies under CCAA protection;
- (c) any social benefit to be derived from representation of the group;

- (d) the facilitation of the administration of the proceedings and efficiency;
- (e) the avoidance of a multiplicity of legal retainers;
- (f) the balance of convenience and whether it is fair and just including to the creditors of the estate;
- (g) whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
- (h) the position of other stakeholders and the Monitor.

1057863 at paras 125 – 129

League Assets at paras 71 - 75

Application

5. It is unclear to the Monitor whether the Applicant, the Employee Group, and the other members of the Former Employees have a commonality of interest such that the relief sought in the Representative Counsel Application would assist in these CCAA Proceedings. In fact, the Monitor notes that it is possible that the determination of certain severance claims alleged in the Representative Counsel Application may prejudice, or otherwise have a deleterious effect on, the recovery of other members of the Former Employees.
6. In certain circumstances employees have been found to be vulnerable so as to warrant the appointment of representative counsel. However, in this case it is unclear to the Monitor that the Applicant, the Employee Group, or the Former Employees more broadly are vulnerable or otherwise lack the resources to retain counsel themselves in these CCAA Proceedings.
7. It is also unclear whether the Former Employees, including the 85 members of the Employee Group, support the relief sought in the Representative Counsel Application. The Monitor specifically notes that the Applicant merely states that no party from the Employee Group has “expressed concern”. It is, therefore, unclear to the Monitor that the relief sought in the Representative Counsel Application will, in fact, avoid a multiplicity of legal retainers.
8. Furthermore, the Applicant has not established that the relief sought in the Representative Counsel Application would lead to any meaningful benefit to the Petitioners, or a social benefit more generally.
9. Finally, in considering the balance of convenience, the Monitor notes that it has reviewed the books and records of the Petitioners and that the Petitioners are bringing an application to enhance the powers of the Monitor, including to allow the Monitor to conduct the Claims Process. In the Monitor’s view, the books and records of the Petitioners do not indicate that the Applicant, the Employee Group, or the Former Employees in general will be prejudiced by participating in, and having their claims evaluated and resolved through, the Claims Process. Consequently, the Monitor is of

the view that the balance of convenience falls against the relief sought in the Representative Counsel Application at this time.

10. For these reasons, the Monitor is not supportive of the relief sought in the Representative Counsel Application.

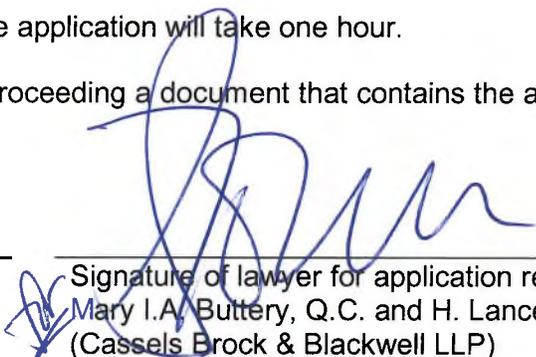
Part 6: MATERIAL TO BE RELIED ON

1. In further support of its position herein, the Monitor relies on:
 - (a) the Third Report of the Monitor to Court, dated October 27, 2020;
 - (b) the Fourth Report of the Monitor to Court, dated November 23, 2020; and
 - (c) such further and other materials as counsel may advise and this Honourable Court may permit.

The application respondent estimates that the application will take one hour.

The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

Date: November 23, 2020



Signature of lawyer for application respondent
Mary I.A. Buttery, Q.C. and H. Lance Williams
(Cassels Brock & Blackwell LLP)

THIS APPLICATION RESPONSE was prepared by Mary I.A. Buttery, Q.C. and H. Lance Williams, of the firm of Cassels Brock & Blackwell LLP, Lawyers, whose place of business and address for delivery is 2200 - 885 West Georgia Street, Vancouver, BC, V6E 3C8, Telephone: 604.691.6100; Fax: 604.691.6120.