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

NOTICE OF APPLICATION

Name of applicant: Lorne Hoover on his own behalf and on behalf of former MEC employees that have a claim against MEC

To: The Service List

TAKE NOTICE that an application will be made by the applicant, Lorne Hoover, before Madam Justice Fitzpatrick at the courthouse at 800 Smithe Street, Vancouver, British Columbia, on the 24th day of November, 2020, at 2:00 p.m., for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. The applicant is seeking the following Orders:

    a. Victory Square Law Office ("**VSLO**") be appointed as representative counsel for the former employees of Mountain Equipment Co-op who have claims against MEC in the present proceedings (the "**Former Employees**");

    b. Representative counsel 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 Petitioner in respect of its anticipated fees (the "**Employee Charge**"), to allow for the effective participation of the Former Employees in the proceedings; and

    d. The Employee Charge shall 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. D & O Charge (to a maximum amount of $4,500,000);

iii. Key Employee Charge (to a maximum amount of $778,000); and

2. Such further and other relief as this Honourable Court deems just.

Part 2: FACTUAL BASIS

1. The applicant is a former employee and a member of a Facebook group of approximately 85 Former Employees ("**Employee Group**").

2. MEC is subject to proceedings under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c.-36, as amended, that were commenced on September 14, 2020 (the "**CCAA Proceedings**").

3. Alvarez & Marsal Canada Inc. has been appointed as monitor in the CCAA Proceedings (the "**Monitor**").

4. The CCAA Proceedings have been initiated for the main purpose of approving a sale of MEC's assets. Other non-secured creditors, and in particular the Former Employees, will have to prove their claims in a claims process yet to be approved by the Court.

5. The financial statements produced to date indicate that the unsecured creditors will see approximately 30% to 50% return on their claims.

The Former Employees

6. The Former Employees are a financially vulnerable group of approximately 300 individuals who have a significant financial interest in the CCAA Proceedings. This financial interest includes substantial contractual and statutory severance entitlement.

7. As set out in the first affidavit of Lorne Hoover, the Employee Group has emerged as the only collection of employees who have organized for the purpose of discussing and promoting the interests of Former Employees (1st affidavit of Lorne Hoover, para. 9).

8. The Employee Group has been informed of this application and none of the 85 members of the group have objected (1st affidavit of Lorne Hoover, para. 12).

Diversity and Complexity of Severance Claims

9. In VSLO's communication with 30 Former Employees it is clear that there are a complex array of legal issues which may require interpretation or determination by the Court. The factual and legal questions related to VSLO's involvement will relate to statutory severance, or severance under common law or a written contract. There are

at least two provisions which discuss the concept of severance. We are not sure what MEC's position would be on the severance provisions, but if MEC is relying on them to limit common law severance, we will dispute this position if granted representative plaintiff status. Additionally, and aside from the immediate question of interpretation, there are also various individual considerations which would limit or prevent the application of any contractual provision purporting to limit severance.

Employment Standards

10. Employment standards legislation will obviously apply to individuals who have been terminated. In addition, however, group termination provisions may be applicable. It is our understanding that at least 50 individuals have been let go from the head office location in Vancouver. Pursuant to section 64(3)(a) of the *Employment Standards Act*, RSBC 1996 c. 113, the employees affected at the head office location ought to be provided an additional 8 weeks' severance. Alberta has a similar provision in its *Employment Standards Code*, RSA 2000, c. E-9, and the ministerial order of March suspending the group termination provision expired on June 17, 2020.

Common Law Severance

11. In VSLO's review it was clear that there are Former Employees with claims for common law severance. These severance claims are not formulaic and require a determination of "reasonable notice". The test most frequently cited by the courts in determining whether a period of notice is "reasonable" is set forth by McRuer, C.J.H.C. in *Bardal -and- Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 at 145:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided on with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servants.
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> See, *British Columbia Court of Appeal in Landry -and- Canadian Forest Products Ltd.* (1992), 14 B.C.A.C. 15, 67 B.C.L.R. (2d) 165 (B.C.C.A.) At para. 11.

12. The application of these non-exhaustive factors requires an individualized assessment of the employee, their work history and the general labour market for the specific classification. Furthermore, what constitutes "reasonable notice" in any given circumstance is highly influenced by precedents with similar employment circumstances.

Contractual Severance Provisions

13. There are two basic severance provisions in the contracts we have reviewed. The first of those predate the most recent contracts and read as follows:

> TERMINATION: MEC may terminate your employment at any time for just cause without notice or any payment in lieu of notice. This employment contract may be terminated at any time without just cause by either party. In the event of termination by MEC without cause, you agree that the appropriate and reasonable notice of termination and/ or severance pay is as set out in the Employment Standards legislation of your province of employment. You shall give MEC a minimum of fourteen (14) days notice if you terminate this contract without cause. Refer to MEC Policy B.7 Termination.
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> (1st affidavit of Kelly Ma, para. 6, exhibit "A").

14. The more recent contractual provision that was incorporated into the contracts involved in the restructuring is set out as follows:

> Termination Without Cause: MEC may terminate your employment at any time upon providing you with only such minimum notice of termination, or pay in lieu thereof, and severance pay (if applicable) as may be required by the applicable employment standards legislation in your province. You will also be paid any outstanding wages and any vacation pay owing to you as of the date of termination and as required by the applicable employment standards legislation in your province. Where required by such employment standards legislation, MEC will continue to make its employer contributions to the benefit plans in which you participate at the time of the termination of your employment for the minimum period required by law.
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> (1st affidavit of Kelly Ma, para. 7, exhibit "B").

15. We are unsure what MEC's position is on these contractual provisions. If MEC is of the view that this contractual provision simply reiterates its obligations under the relevant employment standards legislation, then we agree. If however, MEC takes the position that this provision somehow waives the employees' right to common law notice, then there is a conflict between our view and that of MEC, which ought to require resolution before claims can be processed.

16. Finally, the most recent iteration of severance language began to appear in late 2018 and early 2019. While the different notice periods may differ, an example of such a contractual provision is as follows:

> ii. You will receive such minimum notice of termination, or pay in lieu thereof, continuation of benefits, continuation of vacation pay accrual and statutory severance pay (if applicable), as required by the employment standards legislation in the province in which you work, as amended from time to time. For greater certainty, on termination of your employment without cause, you will receive any and all entitlements for which you are eligible and are required by the employment standards legislation in the province where you work. Also, in the provinces where it is required by applicable employment standards legislation, and only for the duration required by such legislation, MEC will continue to make its premium

contributions on your behalf so as to provide for your participation in the ME C's benefit program in which you participate at the time of the termination of your employment.

iii. Subject to your termination and return of a Release, MEC will pay you an additional Separation Payment equal to the sum of (A) one (1) week of base salary for each year worked up to five (5) years of continuous service; plus (B) two (2) weeks' base salary for each year worked without interruption after five (5) years of continuous service. Partial years of service will be pro-rated by the completed month of service. The maximum Separation Payment to which you will be entitled based on the service calculation above will be forty-four (44) weeks' base salary.

(1st affidavit of Kelly Ma, para. 9, exhibit "D").

17. As with the other contractual provisions, it is our view that this language does not waive an employee's right to pursue damages at common law. Rather, the language merely sets agreement on the severance entitlement should the employee not elect to pursue a civil claim for common law notice.

18. These contractual provisions demonstrate the likely need for adjudication of these issues to properly and fairly advance the claims process.

Application of Written Contracts

19. There are two other factors which may also become relevant to a claims process. The first is the requirement for consideration to give contractual force to an offer, and the second is the changed substratum document doctrine. Both of these concepts relate to individual circumstances and would require an analysis of individual factual circumstances.

20. Dealing with the former, it is our view that a number of employees were not offered consideration when they signed a contract mid employment. In our communication with some of the Former Employees we were informed of numerous examples where employees were offered the same or substantially similar employment to their previous position during the restructuring. Even though they were placed in the same, or similar job, they were also required to sign a new employment contract. It is our position that contracts signed during an ongoing employment relationship without consideration are unenforceable.

21. Secondly, we also communicated with a number of individuals who had a very old contract on file. The employment contract was initially signed during an early phase of their career with MEC. However, since signing many of the employees' jobs had changed a great deal, which might engage the "changed substratum doctrine". That doctrine was adopted from Ball, Canadian Employment Law at paragraph 41 of *Rasanen v. Lisle-Metrix Ltd.* (2001), 2002 CanLII 49611 (ON SC), 17 C.C.E.L. (3d) 134 (S.C.J.), aff'd (2204), which states as follows:

> Canadian jurists have recognized that contractual terms that are fair in the early part of the employment relationship may be unfair when the employee has developed new skills, has acquired a new position, receives greater remuneration or has additional responsibilities. When these circumstances exist, the Court may hold that the "substratum" of a written contract of employment has disappeared or eroded sufficiently so that, inter alia, terms purporting to limit the amount of notice required for termination of employment no longer have contractual force.

22. In our view there are a number of longer-term employees who would be affected by this doctrine.

Part 3: LEGAL BASIS

Representation Order

1. Section 11 of the CCAA provides:

> 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.

2. The Court can make an order under section 11 of the *CCAA* to make a representation order under Rule 20-3 of the *Supreme Court Civil Rules.*

Nortel Networks Corp. (Re), [2009] O.J. No. 2166, at paras. 10-16

3. The factors that have been considered by the courts in granting the appointment of representatives in CCAA cases are the following:

   a. the vulnerability and resources of the group sought 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 theorder; and

h. the position of other stakeholders and the Monitor.

Canwest Publishing Inc., 2010 ONSC 1328, at para. 21

Urbancorp Inc. (Re), 2016 ONSC 5426, at para. 11

Target Canada Co. (Re), 2015 ONSC 303 at para. 61

1057863 BC Ltd (Re), 2020 BCJ No 1441 at para. 125

4. The issue of whether to appoint a representative counsel is one of equity; there can be no definitive rules governing any particular case, but the above factors require consideration.

Urbancorp Inc. (Re), 2016 ONSC 5426, at para. 12

5. Vulnerability is a subjective factor that is relevant to a representation and payment order and cannot be reduced to a consideration of impecuniosity.

Arrangement relatif a Les lnvestissements Hexagone inc., 2016 QCCS 6792

Funding for Representative Counsel and its Related Charge

6. Section 11.52(1)(c) of the *CCAA* allows the court to place a charge on the petitioner's assets to secure payment of the legal fees and disbursements required to ensure the effective participation by the Former Employees in these proceedings.

7. Section 11.52 of the *CCAA* provides:

> 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
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> (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.

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

8. The necessity of such a charge in a restructuring is warranted to ensure the involvement of professionals and achieve the best possible outcome for the stakeholders.

U.S. Steel Canada Inc. (Re), 2014 ONSC 6145, at para. 22

9. Factors to consider in approving an administrative charge include:

   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 unwanted 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.

Canwest Publishing Inc., 2010 ONSC 222, at para. 54

Walter Energy Canada Holdings, Inc. (Re), 2016 BCSC 107, at para. 42

10. Before incurring, or continuing to incur fees and expenses to be claimed from a debtor in a *CCAA* restructuring, the interested person must first take appropriate steps to set up with the monitor and the debtor the rules applicable to the "effective participation" of its experts, subject to the Court's approval. Such rules must take into consideration the following factors:

    a. a court officer is already involved, namely the court appointed monitor and, as such, he is the "eyes and ears" of the Court, and he must, at all times, remain independent and act impartially for the benefit of all stakeholders;

    b. therefore, services already rendered or to be rendered by the monitor must not be duplicated by the interested person's financial, legal or other experts, at least, not for the debtor's account;

    c. an "effective participation" has to be pro-active and constructive, never losing sight of the global picture of the restructuring and the interests of all stakeholders;

d. an "effective participation" shall not include challenging the merits per se of the restructuring proceedings; the debtor need not fund the opponent of its restructuring;

e. "time is of the essence": the monitor must be in a position to assess appropriately, and budget for, the fees and expenses to be incurred in a restructuring; therefore, interested persons claiming the right to be indemnified or secured for their financial, legal or other experts' "effective participation" must act quickly to obtain confirmation of said right and set up the applicable rules;

f. once the rules are established by the claimant, the monitor and the debtor, they must be authorized by the Court, including whether or not fees and expenses already incurred ought to be included; and

g. as authorizing the payment of fees and expenses before any distribution to a debtor's stakeholders is tantamount to granting prior ranking security, the Court has endorsed Judge Gascon's comments on the principles governing the granting of a CCAA administration charge.

Homburg Invest Inc. (Arrangement relatif à), 2014 QCCS 980, para. 100

Representation Order

Vulnerability and resources of the group sought to be represented

11. The Former Employees are a financially vulnerable group of approximately 300 individuals dispersed throughout, Canada but concentrated in western Canada. Each Former Employee has a claim for severance, only a portion of which are expected to be returned.

12. Former Employees are disproportionately affected by the present insolvency proceedings. They have not only suffered immediate losses but from loss of income going forward.

13. Individually, the Former Employees have little financial resources available to fund any sophisticated defense of their interests. The present insolvency proceedings coincide with one of the most economically vulnerable periods of their lives.

14. Moreover, many employees are or may be unaware of significant legal interests they have without representation. Some employees may not be aware of common law severance rights, which could increase their claim by several times the amount. The information asymmetries between workers without counsel and other major creditors with counsel would lead to obvious and manifest unfairness.

Benefit to the companies under CCAA protection

15. It is in MEC's interest to ensure their employees' rights are adequately protected and advocated. The present CCAA Proceedings involved a member owned cooperative. The Former Employees are the heart and soul of MEC. MEC has been a top employer in Canada, and the fair treatment of its employees is no doubt an important priority for MEC.

16. Furthermore, VSLO possesses specialized expertise in labour and employment law matters and can work with MEC counsel to sharply consolidate issues and streamline dispute resolution processes before any claims officer.

Social benefit to be derived from representation of the group

17. The courts have said that assisting a group of vulnerable employees through complex legal issues and complex CCAA Proceedings is a social benefit.

Nortel Networks Corporation, 2009 CanLII 26603 (Ont. S.C.J.), para. 13

Facilitation of the administration of the proceedings and efficiency

18. To date, the Former Employees have not been involved (with legal counsel) in these proceedings. Furthermore, they have not been provided with timely advice about the proceedings which relate directly to their interests. The Court has found value in appointing representative counsel where it would facilitate the dissemination of accurate and timely advice among a broad group of stakeholders.

Quadriga Fintech Solutions Corp. (Re), 2019 NSSC 65 (CanLII), para 16

19. The Former Employees are entitled to both statutory and contractual or common law notice periods. Many of the written contracts have similar legal issues which could apply to all participants. Given the similarities, legal concepts could be more efficiently grouped and adjudicated in a manner most efficient to the resolution of all issues. However, this would require coordination which is best placed and organized by one representative client.

20. Conversely, allowing claims to proceed at random, with possibly unrepresented individuals would impede any streamlining of claims and could lead to mischaracterization of issues, duplication and inequity associated with conflicting rulings on similar claims.

Avoidance of a multiplicity of legal retainers

21. If a representative is not appointed, then either Former Employees will not be represented, or there will likely be a mixture of multiple legal counsel and unrepresented litigants. With approximately 300 Former Employees with claims, this could be unmanageable. Alternatively, the Former Employees would have to self-organize and enter into a complex and impractical joint retainer arrangement. Although better, it could not be

guaranteed and would further be administratively difficult for all parties involved especially given the distances and possibility of under inclusion. It is neither practically feasible nor just and equitable to require an arrangement other than representative counsel.

Balance of convenience and whether it is fair and just

22. It is fair and just that the Former Employees be provided adequate representation in these proceedings. Each of the approximately 300 Former Employees has a direct interest at stake. Granting a representative counsel is the only way in which to ensure the Former Employees' claims are determined in the most fair, consistent and efficient manner possible.

23. With numerous overlapping issues, it is essential that the legal claims are advanced by an officer of the court with a view to process, efficiency and the best interests of the Former Employees. The alternative would invite a cumbersome piecemeal and unfocused adjudication of the outstanding legal and factual issues.

No similar representative counsel has been appointed

24. No other representative counsel has been appointed in this matter.

Position of other stakeholders and theMonitor

25. Counsel has given notice to both MEC and the Monitor of this application, although we are unaware of either's position.

Funding

Size and complexity of the businesses being restructure

26. MEC's financial and business arrangements are complex. All parties noted this during the preceding hearings related to approval of the APA. Additionally, the legal claims related to severance are also large and complex, especially when they require resolution in a short period of time.

The proposed role of the beneficiaries of the charge

27. The primary proposed role of the beneficiaries of the charge is to represent the Former Employees in a manner that ensures each of their claims is fully accounted for. Additionally, VSLO will be able to provide accurate and timely advice on the process.

28. Perhaps most importantly to the application for a charge, VSLO will be able to properly define the outstanding issues, consolidate the issues, come to agreement on certain claims and facilitate a claims process that will orderly and efficiently resolve any disputes between MEC and rep counsel.

No unwanted duplication of roles

29. While the Monitor is a representative of the Court and has an obligation to all stakeholders, it does not have the time or resources to properly advise the Former Employees.

30. Similarly, while MEC no doubt has a moral and ethical interest in the well being of the Former Employees, it is a direct counterparty to the specific legal interests at stake in the claims process.

31. The proposed role of representative counsel is to specifically advocate for the statutory and contractual rights of the Former Employees. No party is presently attending to these interests.

Quantum of the proposed charge is fair and reasonable

32. Given the number of Former Employees involved, the communication and coordination to understand the underlying facts and the time it will take to resolve each claim, we submit that an $85,000 charge is fair and reasonable.

33. The present assets available are approximately 20 million, which may be altered by the closing adjustments.

34. Furthermore, the cash flow statement produced on behalf of MEC anticipate significant professional fees not to exceed $1,000,000. The anticipated fees of the Former Employees are an insignificant amount in that context.

Section 8.2 Report of the Proposed Monitor

Position of the secured creditors likely to be affected by the charge

35. The secured creditors will be unaffected by the charge.

Position of the Monitor

36. We provided advanced notice to the monitor and requested its position, but have not heard.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Lorne Hoover, made on November 12, 2020; and,
2. Affidavit #1 of Kelly Ma, made on November 12, 2020.

The applicant estimates that the application will take 75 minutes.

[] This matter is within the jurisdiction of a master.

[X] This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application:

(a) file an application response in Form 33;

(b) file the original of every affidavit, and of every other document, that:

  (i) you intend to refer to at the hearing of this application, and

  (ii) has not already been filed in the proceeding, and

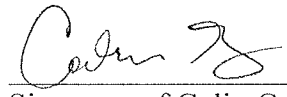
(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

  (i) a copy of the filed application response;

  (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

  (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date: November 12, 2020



Signature of Colin Gusikoski
Counsel for the applicant

To be completed by the court only:

Order made
[ ] in the terms requested in paragraphs _____. of Part 1 of this notice of application

[ ] with the following variations and additional terms:

_____
_____
_____
_____

Date: _____ _____
Signature of [ ] Judge [ ] Master

APPENDIX

[*The following information is provided for data collection purposes only and is of no legal effect.*]

THIS APPLICATION INVOLVES THE FOLLOWING:

[*Check the box(es) below for the application type(s) included in this application.*]

[ ] discovery: comply with demand for documents
[ ] discovery: production of additional documents
[ ] extend oral discovery
[ ] other matter concerning oral discovery
[ ] amend pleadings
[ ] add/change parties
[ ] summary judgment
[ ] summary trial
[ ] service
[ ] mediation
[ ] adjournments
[ ] proceedings at trial
[ ] case plan orders: amend
[ ] case plan orders: other
[ ] experts