



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:** Kevin Harding on his own behalf and on behalf of Save MEC

THIS IS A RESPONSE TO the application of the Petitioners, Mountain Equipment Co-operative ("MEC") (now named 1077 Holdings Co-operative ("1077") and 1314625 Ontario Limited ("131 Limited"), (together with MEC, the "**Petitioners**") set to be heard before the Honourable Madam Justice Fitzpatrick by MS Teams videoconference on 27/Nov/2020 at 10:00 am.

**Part 1: ORDERS CONSENTED TO**

The application respondents consent to the Court directing MEC to fulfill the "**membership information disclosure**" request made by Eugene Kuhn of Save MEC, within a reasonable timeframe and in a reasonably manageable electronic format, in full, or at least in part.

**Part 2: ORDERS OPPOSED**

The application respondents oppose the Court directing, permitting, or advising MEC to withhold membership information disclosure to Mr. Kuhn or Save MEC, or to withhold such access to any other MEC members exercising a legal right to participate in democratic governance of MEC as a co-operative.

**Part 3: ORDERS ON WHICH NO POSITION IS TAKEN**

The application respondents take no position on the orders sought in paras 1 and 3 of the Petitioner's Notice of Application filed on Nov. 23, 2020 (the "**Application**").

## Part 4: FACTUAL BASIS

### The Membership Information Disclosure

1. The application respondents primarily rely on the contents of Kevin Harding's Affidavits #1 and #3, the facts previously established in these proceedings, and in particular, *Mountain Equipment Co-operative (Re)*, 2020 BCSC 1586 (the "**SAVO Decision**"). Defined terms set out therein are adopted below unless otherwise indicated.
2. The Petitioners' Application seeks "advice and directions" from the Court on whether to disclose MEC member information to members. In para. 4 of the Application, the Petitioners seek an order with respect to "membership information disclosure":

An Order providing the advice and directions of this Honourable Court regarding requests for disclosure of membership lists including personal information of the members of Mountain Equipment Co-operative (the "**Member Information Requests**"), and specifically the guidance of this Honourable Court on the following issues:

(a) Is it appropriate for the Petitioner MEC to respond to the Member Information Requests in the circumstances?

(b) If yes, to what extent and in what manner should members' personal information be disclosed?

3. In support of the Petitioners' Application, a second affidavit of Robert Wallis was filed on November 23, 2020 ("**Wallis Aff#2**"), which documents the name change of MEC to 1077 Holdings Co-operative ("**1077**") at para. 31.
4. Eugene Kuhn, a representative of Save MEC and member of 1077, formally requested a copy of MEC's membership registry which is a list of all members and their contact information, on September 22, 2020. (Harding Aff#3, paras. 5-6), as acknowledged in the Application at paras. 31-33.
5. Mr. Kuhn provided an affidavit stating his commitment to comply with the permitted "corporate purposes". (Harding Aff#3, para. 7).
6. After a long delay, counsel for the Petitioner informed Mr. Kuhn that direction would be sought from this Court before 1077 would provide Mr. Kuhn with a "formal response". (Harding Aff#3, para. 8).
7. Despite the SAVO, the remaining co-operative still has approximately 5,700,000 members each of whom paid a \$5 membership fee for rights to participate in the cooperative. (Affidavit #1 of Phillippe Arrata, para. 16)
8. The Save MEC steering committee ("**Steering Committee**") continues work on advancing and protecting the residual interests of the 1077 members. Kevin Harding

remains the spokesperson for the Steering Committee (Affidavit #3 of Kevin Harding, paras 2-3).

9. The current AGM is scheduled for December 10, 2020 (Application, para. 81). The Petitioner asserts that the board will resign at the end of November 2020 (Application, para. 62). This further necessitates the election of a new Board.
10. The Petitioners, at paras. 40-41 of the Application seem to suggest, without proof, that the membership registry will be used for nefarious or inappropriate purposes. These paragraphs are selective and highly speculative.
11. The Petitioners have not introduced any evidence regarding why the cost of assembling would be significant, or whether there already exists an electronic list that encompasses some or all of the membership information.

### **Proposed Ongoing Operations Of MEC**

12. In the third affidavit of Kevin Harding, he has outlined Save MEC's plans to save the outdoor enthusiast co-operative now known as 1077. The related activities immediately set out below and taken from paragraph 11 of the affidavit, clearly require the membership registry:
  - a. A potential restructuring of the co-op and amendment to its corporate purposes;
  - b. Election of a new board of directors;
  - c. Encouraging members to exercise their voting rights to elect Board that would provide stewardship for what remains of 1077 as a co-operative;
  - d. Informing members of their right to participate in the ongoing governance of 1077 as a co-operative and communicating about future meetings; and,
  - e. To democratically determine the future direction of the co-op and how best to meet members outdoor exploration and adventure needs, including:
    - i. Collectively developing proposals to be voted upon at the AGM, such as how and whether to continue the historic non-retail activities of the co-operative; and,
    - ii. Restructuring the organization or combining with other co-operatives that have similar purposes.
13. The previous operations of the 1077 co-operative have historically engaged far more interests beyond the "retail business" and included other more social and cultural activities. Some of those related activities, including but not limited to:
  - a. Gear exchanges, where members could swap gear with one another, knowing that the social and associative link between members increased the value and reliability of the gear;
  - b. Races and social events, where members were able to meet and interact with each other, learn from one another (such as bicycle repairs, hiking safety, etc.);

- c. Contributions to environmental activities, which saw the co-op previously donate 1% of its revenues, at a minimum, to environmental causes, but also directly sponsor the development and maintenance of outdoor trails and activities throughout the country. There is no guarantee that a for-profit, private corporation will continue to make these contributions to the community, and this has evolved, over time, to be an essential corporate purpose of the co-op; and,
  - d. Support and development of new co-operatives, for example by providing mentoring, advising, provision of office space, and similar support.
14. None of these additional corporate purposes necessarily require retail stores to operate out of, and in fact, many of them can be provided by the members in co-operation with each other.
  15. In selectively quoting from communications to the Save MEC group, counsel ignores that one project organized by the members – Project Redemption – is entirely aimed at taking back the co-operative.
  16. A non-democratic winding-down executed by the Monitor of the non-economic aspects of the co-operative is in direct odds with the legitimate purposes that Save MEC is seeking to exercise.

## **Part 5: LEGAL BASIS**

### *General Outline*

17. It is submitted that there is no reason in law to withhold the membership registry. The cooperative association still exists, there is an active group attempting to ensure its continued existence and they require the registry to effectuate that effort.
18. There are no provisions of the CCAA which conflict with the request for the List, nor would providing the List frustrate any purpose of the CCAA. Accordingly, the *Co-op Act* governs this application.
19. There are only two arguments advanced in support of the Petitioners' withholding of the List.
20. First, the Petitioners assert that the Save MEC group may utilize the List for a purpose other than that permitted under the *Co-op Act*. We point out that by virtue of section 134 of the *Co-op Act*, doing so would be illegal. The Petitioners are therefore, asserting that the Court ought to infer that the Save MEC group will break the law at some point in the future and on this speculative assertion, deny the application.
21. Aside from the fact that such an argument directly casts aspersions on the personal and professional reputations of the Save MEC group, it is clearly unreasonable.
22. Second, the Petitioners rely on privacy concerns. However, this concern has been

fully canvassed and dismissed in *Pearson v Peninsula Consumer Services Cooperative*, 2012 BCSC 1725 (*Pearson*).

23. Accordingly, the Court should advise the Petitioners to disclose the List, as requested and as quickly as reasonably possible.

*Cooperative Association Act in Context of Personal Information Protection Act*

24. In *Mountain Equipment Co-operative (Re)*, 2020 BCSC 1586, Madam Justice Fitzpatrick stated that despite divesting 1077 of “substantially all of its assets in the short term,” (para. 171)

[...] the Kingswood sale does not mean that MEC will cease to exist as a co-operative. It may be that MEC’s members can still consider whether any options remain for them in that respect, particularly if a plan is approved and successfully executed to leave the co-operative intact in a legal sense but without the burden of any debt and, of course, with few assets. (para. 172).

25. In light of 1077’s present existence and given the active efforts by at least one well organized group to ensure its survival, members of 1077 have a legitimate corporate purpose, and legal right, to access a list of members and their contact information.
26. Justice Gaul in *Pearson*, thoroughly reviewed the various provisions within the *Cooperative Association Act*, S.B.C. 1999, c. 28 (*Co-op Act*) that require a membership registry be maintained and provided to members:

7 [...] an association must have a Register of Members that consists of, amongst other things, the names and addresses of the association's members (*Co-op Act*, s. 124(1)(a)).

8 The Register of Members must be kept at the association's registered office and it may be inspected by any person during normal business hours (*Co-op Act*, s. 128(1)(d)).

9 Every member of an association may examine and take extracts of the association's records, including its Register of Members (*Co-op Act*, s. 130(2)).

10 Members of an association are also entitled to require the association to provide them with copies of the association's Register of Members (*Co-op Act*, s. 132).

11 Section 133 of the *Co-op Act*, allows a person, be they a member of the association or not, to obtain information regarding the association, including the association's membership list. The section reads in part:

Subject to fulfillment of the conditions in subsection (2), a person may obtain one or more of the following lists:

(a) a membership list, setting out the names and addresses of the association's members and the number of membership shares held by each;

.....

(2) The following are the conditions for the purpose of subsection (1):

(a) that the person delivers a written application to the association or its agent, requesting the list or lists the person wishes to obtain and an affidavit of the person, or if the person is a corporation, an affidavit of a director or officer of the corporation ... stating in the affidavit

(i) the name and address of the person making the application,

.....

(iii) that the list is required and will be used only for corporate purposes pertaining to that association;

(b) that the person pays a reasonable fee to the association or its agent.

12 The duty of the association to comply with its statutorily imposed disclosure obligations is reinforced in s. 135 of the *Co-op Act* which reads, in part:

In accordance with sections 128 to 133 an association must

(a) permit a person to examine or take extracts from any record to which the person has access under sections 128 to 132, or

(b) provide a person who complies with the conditions under section 133 with a membership list ...

13 Moreover, section 135(2) provides:

If an association contravenes subsection (1), a court may order that an examination or extract be permitted or a copy provided within a time the court considers appropriate.

*Pearson, supra.*, paras 7-13

27. Interpreting this requirement in light of the *Personal Information Protection Act*, S.B.C. 2003, c. 63 (*PIPA*), Justice Gaul dismissed an argument that *PIPA* had quasi-constitutional status and found that if the membership registry information is being used for the purposes under the *Co-op Act*, it is not a violation of *PIPA* to provide the membership lists.

59 In my view, a reasonable person would consider it proper and appropriate

for members of an association like a co-op to have access to its members' registry or membership list and the contact information of their fellow members, as long as that information is to be used for purposes allowed under the *Co-op Act*. Improper use of such personal information brings with it the risk of consequences such as prosecution.

60 Notwithstanding the able submissions of counsel for the respondent, I am unpersuaded that any provision of the *PIPA* or, for that matter, the general spirit of the *PIPA*, prohibits the disclosure of the information being sought by the petitioner.

(emphasis added)

28. Accordingly, Justice Gaul declared that any member of the respondent co-op in good standing may obtain a copy of its 50,000 person membership list within a reasonable time frame. To reach this conclusion, the learned judge drew from principles found in *EnCana Corp. v. Douglas*, 2005 ABCA 439 (Alta. C.A.), and a decision by Judge Bracken in *Fawcett v. TLC The Land Conservancy of British Columbia*, an unreported decision dated 3 July 2009, Victoria Registry No. 09-2153 ("Fawcett"). In the latter decision, Judge Bracken found that the disclosure must be made under the *Societies Act* to members of a society.
29. The facts in *Fawcett*, as quoted in *Pearson*, are almost identical to the present circumstances at are outlined at the following paragraph as the applicants were seeking contact information to save the future of the relevant organization:

48 At paragraph 10 of his reasons, Mr. Justice Bracken explained the facts of the application before him:

The petitioner wants to access the membership register to obtain the contact information for all members of The Land Conservancy so that Save TLC can communicate with the members and present the views of Save TLC on matters of concern to The Land Conservancy and to have access to the members respecting the election of directors at the extraordinary meeting in August. The petitioner says that Save TLC requires the information so that it can determine who the members are, where they can be contacted, when they became members, and if their memberships are in good standing. It also says that Save TLC needs to know how to contact members to arrange for any proxy votes for the meeting.

30. These legitimate purposes parallel those authorized in the *Co-op Act* and asserted in Harding's Affidavit #3. Use of a co-operative membership registry is limited to "corporate purposes pertaining to that association" under s.134 of the *Co-op Act*. As defined in s.1 of the *Co-op Act*, (emphases added)

"corporate purposes" means, in relation to an association, any effort to

(a) influence the voting of members, investment shareholders or debenture-holders of the association at any meeting,

(b) acquire or sell shares or debentures of the association, or

(c) effect an amalgamation involving, or a reorganization of, the association;

31. The Steering Committee and its representatives are legally bound to limit use of the List for activities that directly support corporate purposes such as communicating with 1077 members with respect to influencing their voting at the AGM or taking action to reorganize or amalgamate the association. Save MEC is committed to keeping its use of the List within these purposes (Harding Aff#3 at paras. 7, 9-10).
32. In response to the Petitioner's concerns expressed in para. 27 about Mr. Harding's and Tamara Paton's goals are irrelevant. Save MEC is an organized group that can pursue any legitimate or legal activities they deem appropriate for the group and its goals.
33. It is wild speculation and offensive to suggest that they would engage those efforts with the illegal use of the List.
34. If any member is granted access to the List, applied for with the requisite affidavit, that member has legally undertaken to use it for "corporate purposes." It is not this Court's role to police or interfere with this based upon overwrought speculative theories that the membership list would be misused. The Steering Committee is composed of sophisticated and educated individuals, such as former directors of MEC, who are cognizant of their legal and ethical obligations (Harding Aff#1 at para. 39)
35. The application respondents submit there is an urgent and exceptional need for Save MEC to communicate with all members because the Board has consistently taken steps to prevent members from participating in the governance of 1077 in the events leading up to and during these proceedings.

#### *Form of Disclosure*

36. It is submitted that the List should include all contact information provided to 1077. The contact information would have been given with the intent of informing members of relevant cooperative related issues. Thus, there is at least implied consent for all contact information provided. This was the conclusion drawn by the Court in *Pearson*. There the Court reviewed both the circumstances and privacy legislation to conclude there was implied consent for the information:

20 Subject to s. 18 of the PIPA, an organization is prohibited from collecting, using or disclosing personal information about an individual



without the individual's consent. An individual may consent or be deemed to have consented to the collection, use, and disclosure of personal information under ss. 7 and 8 of the PIPA.

21 Sections 17 and 18 of the PIPA establish the criteria that must be met before an organization may disclose personal information. Section 17 reads:

Subject to this Act, an organization may disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances and that

(a) fulfill the purposes that the organization discloses under section 10 (1)  
...

22 Section 18 of the PIPA reads in part:

An organization may only disclose personal information about an individual without the consent of the individual, if [...] (o) the disclosure is required or authorized by law ...

[...]

28 The petitioner maintains that both the Co-Op Act and the PIPA can live harmoniously, and that the latter does not trump the former. In particular, the petitioner asserts there is no reason or need to have recourse to the paramountcy clause of the PIPA.

29 The petitioner points to the fact that both the Co-op Act and the PIPA permit the disclosure of personal information. The Co-op Act specifically authorizes the disclosure of membership lists. The PIPA permits the disclosure of personal information without the consent of the person if the disclosure is authorized by law. Alternatively, the petitioner argues that members of the co-op are deemed to have consented to disclosure of their personal information.

37. After this general review, the Court considered what if any information was disclosable under implied consent. The judge stated at paragraph 56 that the implied consent provisions of *PIPA* were engaged:

I accept the petitioner's submissions in this regard and find that individuals who join the respondent must reasonably expect that the respondent's membership list and the personal contact information contained in that list will be available to all members, and in particular candidates for election to positions within the respondent. (Emphasis added.)

38. Therefore, all contact information available, including emails and telephones, ought to be disclosed and disclosed in its most usable form, which in our view is electronically.

*Authorized Consent*

39. Furthermore, the respondents understand that members have provided their authorized consent on membership application forms (affidavit #3 of Kevin Harding, para. 24). That consent is believed to include the address, telephone number and email address.

40. The provision for express consent in PIPA is as follows:

Provision of consent

- 7 (1)An individual has not given consent under this Act to an organization unless

(a)the organization has provided the individual with the information required under section 10 (1), and

(b)the individual's consent is provided in accordance with this Act.

41. The provision of that consent has in our understanding also been met by the requirement at paragraph 10(1) which reads as follows:

Required notification for collection of personal information

- 10 (1)On or before collecting personal information about an individual from the individual, an organization must disclose to the individual verbally or in writing

(a)the purposes for the collection of the information, and

(b)on request by the individual, the position name or title and the contact information for an officer or employee of the organization who is able to answer the individual's questions about the collection.

42. Therefore, it is our view that the members have provided their express consent for use of the personal information requested.

*Implied Consent*

43. PIPA also allows for disclosure of personal information where there exists implied consent:

Implicit consent

- 8 (1)An individual is deemed to consent to the collection, use or disclosure of personal information by an organization for a purpose if

(a)at the time the consent is deemed to be given, the purpose would be considered to be obvious to a reasonable person, and

(b)the individual voluntarily provides the personal information to the organization for that purpose.

44. In our view, it so notorious that MEC or “Mountain Equipment Coop” is a cooperative, that anyone providing their name, address, email address and telephone number must know that such information was being provided for the purpose of running the cooperative.
45. Furthermore, MEC had a policy directly applicable to the collection and use of personal information. A copy of that policy is attached as exhibit “E”. That policy clearly outlines 1) the opposite position that MEC is taking in this application; and 2) the use of personal information for corporate purposes:

As a co-operative, MEC requires your assistance in providing us with your personal information to fulfil our regulatory obligations. If you become a member, you must provide certain information which is added to our internal membership database, which co-operatives must maintain by law. The information maintained in the database includes:

- member number;
- the name, address, and telephone number of the member;
- the number of patronage bonus shares held by the member;
- the date on which the name of the member was entered in the register as a member with the co-operative;
- the date on which any person ceased to be a member of the co-operative.

The information contained in the database can only be used for corporate purposes pertaining to Mountain Equipment Co-operative, such as Board election information and other correspondence. MEC does not sell, rent, or loan our membership lists to anyone.

46. Lastly, the membership withdrawal application, attached as exhibit F to the 3<sup>rd</sup> affidavit of Kevin Harding does indicate that emails are collected and stored in MEC’s database.
47. In our submission, these features collectively demonstrate that the use of personal information requested for corporate purposes would be plain and obvious.

*Refusing Disclosure Constitutes Substantial Interference with Charter Protection*

48. It has further been established that exercise of collective rights through a co-operative

is protected under s.2(d) of the *Canadian Charter of Rights and Freedoms*. In the *SAVO Decision* Madam Justice Fitzpatrick states:

I accept Mr. Harding's submissions that co-operatives provide important social and community benefits and that the right to join a co-operative and exercise collective rights through that means goes to the root of the protection offered by s. 2(d): *Mounted Police Assn. of Ontario / Assoc. de la Police Montée de l'Ontario v. Canada (Attorney General)*, 2015 SCC 1 (S.C.C.) at para. 54, citing *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 (S.C.C.). MEC is clearly an example of the exercise of that right, leading to it being, as Mr. Harding asserts, the largest co-operative in Canada.

49. Findings made in *Pearson*, while not made in the context of the *Charter*, nevertheless illustrate how the collective purpose of co-operatives is served by providing access to member lists:

58 A cooperative is made up of members joining together for their mutual benefit in cooperation towards a common goal. It is practically impossible to have the necessary cooperation amongst members if the members do not have access to some means of contacting each other. [...]

50. Although not directly a *Charter* analysis, this logic applies to such an analysis, and underscores a *Charter* infringement. Freedom of association under section 2(d) of the *Charter*, is intended to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of their ends (*Mounted Police Association of Ontario v. Canada*, 2015 SCC 1 (“MPAO”) at para. 54). The Save MEC group intends to pursue this freedom, but to do so requires the production of the List. Withholding this list renders the associational activities “practically impossible”. Therefore, if the Court refused to provide such list in these proceedings, it would engage the *Charter* as such a decision meets the “substantial interference” test (*MPAO, supra*, at paras. 74-77).
51. Once the fundamental freedom is engaged the Court is required to undertake an inquiry as to the whether the infringement is a reasonable limit “prescribed by law as can be demonstrably justified in a free and democratic society” (section 1, *Charter*). This is accomplished through the application of the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103 (“*Oakes*”). There are two branches to the test, with the second consisting of two parts. The test is as follows:
- a. Is the legislative goal pressing and substantial? i.e., is the objective sufficiently important to justify limiting a *Charter* right?
  - b. Is there proportionality between the objective and the means used to achieve it? This requires:
    - i. A rational connection with the object or purpose of the law;

- ii. The limit can only impair the freedom no more than is reasonably necessary; and,
  - iii. Proportionality between the effects of the law limiting rights and the law's objective.
52. It is submitted that the limit proposed by the Petitioners fails both branches of the *Oakes* test. We have not given credence to the argument which suggests the Save MEC group will knowingly break the law. We are certain that such accusatory implications will not be given any serious consideration by this Court. Rather, we have limited the analysis on the privacy concerns. As we understand it, the Petitioners seek to have additional privacy protections in a CCAA proceeding
53. On the first branch, there would be no basis to provide greater protections under any CCAA proceeding than are available to the general public, and therefore, the Petitioners' application must fail on the first branch.
54. The second branch leads to a similar conclusion. First, the case law states that any standard that is "arbitrary, unfair or based on irrational considerations" can not meet this first factor of the second branch. The standard requested by the Petitioner is clearly arbitrary and therefore must fail. On the second factor, there is no basis to conclude the standards under *PIPA* are not sufficient to protect privacy interests. Lastly, the legislature has already set out an appropriate balance and requiring additional arbitrary protections cannot justify the infringement, on balance.
55. For all the above reasons, the List should be disclosed.

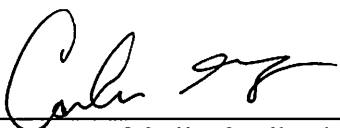
#### **Part 6: MATERIAL TO BE RELIED ON**

- 1. Affidavit #1 of Kevin Harding, made September 25, 2020;
- 2. Affidavit #3 of Kevin Harding, made November 26, 2020;
- 3. Affidavit #1 of Phillippe Arrata, made September 13, 2020;
- 4. Affidavit #2 of Robert Wallis, made on November 23, 2020;
- 5. The pleadings and proceedings cited herein; and,

The application respondents estimate that the application will take 60 minutes.

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

Date: November 26, 2020

  
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 Signature of Colin Gusikoski  
 Counsel for the application respondents