



No. S209201
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: Mountain Equipment Co-operative and 1314625 Ontario Limited (the
"application respondents")

THIS IS A RESPONSE TO the notice of application of Kevin Harding on his own behalf and on
behalf of "Save Mec" filed 25/Sep/2020.

Part 1: ORDER CONSENTED TO

The application respondents consent to the granting of the orders set out in the following
paragraphs of Part 1 of the notice of application on the following terms: NIL.

Part 2: ORDERS OPPOSED

The application respondents oppose the granting of the orders set out in paragraphs 1-4 of
Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondents take no position on the granting of the orders set out in paragraphs
NIL of Part 1 of the notice of application.

Part 4: FACTUAL BASIS

1. The Petitioners rely on the contents of their Petition filed in this proceeding on
September 14, 2020 and their Notice of Application filed in this proceeding on
September 22, 2020. Defined terms set out therein are adopted below unless otherwise
indicated.

Adjournment

2. The Petitioners submit that the balance of prejudice does not warrant an adjournment of the sale approval application hearing in the circumstances.
3. As discussed in the First Arrata Affidavit, the First Wallis Affidavit, the First Report of the Monitor, and the Notice of Application filed by the Petitioners on September 22, 2020, there is significant urgency in approving the Sale Agreement so that the Transaction can close in a timely manner.
4. The steering committee led by the applicant Mr. Harding (the “**Steering Committee**”) says it has interest to explore opportunities to address MEC’s liquidity issues in the short term, but has not yet determined a path forward.

Notice of Application filed September 25, 2020, para. 12

5. None of the proposed sources of potential funding described by the Steering Committee in its application materials involve concrete commitments or realistic options to raise the large amount of funds MEC would need to repay the Credit Facility, address its significant ongoing operating losses, and invest in the capital expenditures necessary to allow it to proceed as a profitable enterprise.
6. For example, the applicant says the Canadian Co-operative Investment Fund (“**CCIF**”) has provided a letter of support to the Steering Committee to support a viable alternative to the Transaction. However, the CCIF’s website confirms that its loans only range from \$50,000 to \$1,250,000,

Affidavit #1 of Kevin Harding, made 25/Sep/2020 (the “**Harding Affidavit**”), para. 45

Affidavit #2 of Krystal Shayler, made 28/Sep/2020, Ex. B

7. At paragraph 56 of his affidavit, Mr. Harding refers to a letter from the Co-operators Group Limited, which he suggests outlines the efforts to seek alternative arrangements to the Transaction, and quotes from part of that letter in the body of his affidavit. However, in the next paragraph of that letter, the writer confirms that any financial review carried out by the Co-operators does not imply a commitment to enter into any agreements.

Harding Affidavit, Ex. F

8. The other proposed sources of funding largely consist of anonymous potential investors, and discussions without specific or concrete proposals or term sheets.
9. In respect of funding from members, the Steering Committee has apparently received over \$100,000 for its legal fees from approximately 2,500 individuals, for an average of approximately \$40 per person. The applicant’s suggestion that 25-40% of MEC’s members would provide \$10 (which would have to happen immediately) to raise between \$13.5 million and \$21.6 million for a refinancing is mere speculation, and in any

event would be far short of the amounts required to resolve MEC's ongoing and immediate financial difficulties.

10. In the Petitioners' submission, nothing raised by the Steering Committee on its application suggests there is any realistic likelihood of raising the amount of funds required by MEC to repay the Lenders and move forward as a viable enterprise in the very short period of time available. The Special Committee, with the assistance of the Financial Advisor, thoroughly canvassed traditional and alternative refinancing options, as discussed in the First Wallis Affidavit, the First Arrata Affidavit and the First Report of the Monitor.
11. The adjournment sought by the Steering Committee would put the closing of the Transaction at risk, given the number of items (including negotiations with landlords and contractors and/or applications for assignment orders) that has to occur prior to closing. MEC's other stakeholders, including its employees, landlords, suppliers and other unsecured creditors, would be unfairly prejudiced by the proposed adjournment.

Representative Counsel

12. The Steering Committee seeks an order appointing Victory Square Law Office as representative counsel, including an order granting a fifth-ranking charge to the maximum amount of \$100,000 over the property of the Petitioners (the "**Proposed Counsel Charge**").
13. The Petitioners take the position that a representative counsel order is not necessary or warranted in the circumstances, and if this Court is inclined to make the representative counsel order sought, the Proposed Counsel Charge is not appropriate and is unfairly prejudicial to other stakeholders of the Petitioners.
14. The Steering Committee is able to represent its own interests effectively through counsel without a representative counsel order, and has retained experience local counsel for that purpose.
15. The Steering Committee has raised approximately \$100,000 for its legal fees in this proceeding, and therefore does not require the Proposed Counsel Charge. The Steering Committee is not vulnerable, and there would be limited if any benefits in terms of social benefits, or benefits for the facilitation of the administration of the proceedings and efficiency.
16. In particular, the Proposed Counsel Charge would prejudice more vulnerable groups of stakeholders such as MEC's employees.

Part 5: LEGAL BASIS

Adjournment

1. As discussed above and in the Petitioners' Notice of Application filed on September 22, 2020, the approval of the Sale Agreement is urgent in order for the closing of the

Transaction to occur before MEC experiences significant weekly cash flow losses, which losses may increase as a result of rising COVID-19 transmission rates. There is a real risk that delay will cause the Petitioners to breach the covenants in the Interim Financing Credit Agreement with the Lenders, leading to the cessation of MEC's operations.

2. Further, in order to maximize recovery for MEC's stakeholders, many of which are economically vulnerable, the Transaction has to close in a timely manner before MEC's forecasted losses escalate and in order for the Purchaser to take advantage of the upcoming holiday sales periods.
3. Given the fact that the Special Committee already thoroughly canvassed the options for refinancing from February 2020 onwards, and the lack of viable options put forth by the Steering Committee, the balance of prejudice favours proceeding with the application for approval of the Sale Agreement without delay.

Representative Counsel

4. Orders appointing representative counsel generally have two purposes: (1) to ensure stakeholders receive effective communication and have their interests represented in the CCAA court; and (2) to ensure there is increased efficiency and cost-effectiveness in the proceedings.

Re Quadriga Fintech Solutions Corp. 2019 NSSC 65 at para. 9

5. In *Re League Assets Corp.* this Court set out the non-exhaustive list of factors to be considered in granting representative counsel orders, which include:
 - (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 the order; and
 - (h) the position of other stakeholders and the Monitor.

Re League Assets Corp., 2013 BCSC 2043 at para. 72

6. With respect to the vulnerability of stakeholders, courts have found that large groups of employees or individual investors may require representative counsel.

Re Target Canada Co., 2015 ONSC 303, para. 61
Re League Assets, *supra* at para. 73

7. In the case at bar, the factors to be considered in granting a representative counsel order do not weigh in favour of making such an order.
- (a) the Steering Committee and its supporters have not, as was the case in *League Assets*, invested a significant portion of their net worth in the debtor;
 - (b) MEC has roughly 5,700,000 members who have paid a \$5 membership fee for rights to shop at MEC and participate as a co-operative member. They are not as “keenly affected” as other stakeholders who are at significant financial risk including employees, landlords, trade suppliers and other creditors;
 - (c) MEC’s capital structure is not “exceedingly complex” as was the case in *League Assets*. As for timing considerations, here the members have obtained counsel in advance of the comeback hearing and counsel has been served with all materials for the comeback hearing;
 - (d) further, this particular group of MEC members have the resources to ensure they will be represented during these CCAA proceedings. MEC members have raised over \$100,000 for the express purpose of covering this group’s legal fees;
 - (e) the Steering Committee has also organized in a cohesive group that has retained experienced local counsel. This means:
 - (i) any benefit to MEC from having the members represented during these restructuring proceedings will be obtained;
 - (ii) similarly, any social benefit to be derived from the representation of the group will be obtained;
 - (iii) efficient administration of the proceedings will be facilitated without requiring a representative counsel order; and
 - (iv) the risk of a multiplicity of legal retainers is low.
8. Given the facts above, the balance of convenience does not weigh in favour of appointing representative counsel.

Proposed Counsel Charge

9. As noted above, the Steering Committee seeks the Proposed Counsel Charge in the amount of \$100,000.

10. Should the Court make an order appointing representative counsel for the Steering Committee, the Petitioners submit that the Proposed Counsel Charge is unnecessary and would adversely affect MEC's stakeholders, including its employees, landlords, suppliers and vendors, and other unsecured creditors.
11. In *Re Urbancorp Toronto Management Inc.*, Newbould J. declined to order that fees for representative counsel be secured by a charge, noting that estate funds should be spent for the benefit of the estate as a whole, not for the benefit of one group whose interests are contrary to the interests of the estate as a whole.

Re Urbancorp Toronto Management Inc., 2016 ONSC 5426, para. 24

12. In that case, Newbould J. accepted the argument that funding has to be fair to all stakeholders, it would be wrong to have funding that would be solely in the interest of one group of stakeholders.

Re Urbancorp, *supra*, at para. 18

13. The non-exhaustive factors for the Court to consider in deciding whether to grant a representative counsel charge are as follows:
 - (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.

Re Urbancorp, *supra*, at para. 14

14. Here, funds have already been raised to allow the Steering Committee to effectively participate in the proceedings.
15. With an economic stake that, under the CCAA, falls below that of creditors such as employees, the proposed role of the beneficiaries of the charge would be primarily to enable an attempt to find alternate sources of financing, which for the reasons discussed above, is not a realistic option, nor one that requires significant involvement of local counsel.
16. The Petitioners understand the Lenders and the Monitor take the position that the Proposed Counsel Charge is not warranted in the circumstances.
17. Further, the Proposed Counsel Charge is not fair to other stakeholders. For example, a vulnerable group that is often granted representative counsel orders, being employees,

would be adversely affected by the Proposed Counsel Charge, as it will reduce the amounts available for employee and other creditor claims in the CCAA proceeding.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Philippe Arrata, made 13/Sep/2020;
2. Affidavit #1 of Robert Wallis, made 22/Sep/2020;
3. Affidavit #2 of Krystal Shayler, made 28/Sep/2020;
4. The pleadings and proceedings herein; and
5. Such further materials that this Honourable Court may accept.

The application respondents estimate that the application will take 10 minutes.

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

Norton Rose Fulbright Canada LLP

Date: 28/Sep/2020

per: 

Signature of ☐ application respondent

☒ lawyer for application respondents

Howard A. Gorman, Q.C.

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APPLICATION RESPONSE

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