SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

District of: Nova Scotia
Division No.: 01-Halifax
Estate No.: 51-2939212
Court No.: HFX 525172

IN THE MATTER OF: A NOTICE OF INTENTION TO MAKE A PROPOSAL FILED BY **ATLANTIC SEA CUCUMBER LTD.** PURSUANT TO SECTION 50.4 OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, B-3; AND

IN THE MATTER OF: AN APPLICATION BY **ATLANTIC SEA CUCUMBER LTD.** FOR RELIEF UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985 C C-36 AS AMENDED.

MEMORANDUM OF FACT AND LAW

TO:
Supreme Court of Nova Scotia
Law Courts
1815 Upper Water Street,
Halifax, NS B3J 1S7

FROM:
Darren O'Keefe, Caitlin Fell, Shaun Parsons
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O'KEEFE & SULLIVAN
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AND TO:
Boyne Clarke LLP
Counsel for the Proposed Monitor
99 Wyse Rd Unit 600,
Dartmouth, NS B3A 4S5
Attn: Joshua Santimaw
JSantimaw@boyneclarke.ca

AND TO:

The Service List attached hereto as Schedule "A"

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

District of: Nova Scotia
Division No.: 01-Halifax
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MEMORANDUM OF FACT AND LAW

To: The parties listed in Schedule "A" via electronic mail.

1. We are counsel to Atlantic Sea Cucumbers Limited (the "**Company**" or "**ASCL**") in connection with the proposal proceedings under the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "**BIA**") arising from the Notice of Intention to Make a Proposal (the "**NOI**") filed by the Company on May 1, 2023.

2. The Company has scheduled a Notice of Application in Chambers scheduled to be heard before your lordship in General Chambers in Halifax on Thursday, July 13, 2023 at 2 p.m. At the Application, ASCL is seeking an Order, among other things:

    a. abridging notice periods and service requirements pursuant to section 11 of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended ("**CCAA**");

b. directing that service on the service list set out in Schedule "A" hereto is sufficient for the purposes of this Application pursuant to section 11 of the CCAA;

c. declaring that the Company is a company to which the CCAA applies;

d. authorizing the continuation under the CCAA of the Company's proposal proceedings commenced under the BIA, pursuant to the NOI;

e. appointing msi Spergel Inc. (the "**Proposed Monitor**") as an officer of this Honourable Court to monitor the business and financial affairs of the Company;

f. staying, for a period not to exceed 10 days or until otherwise ordered by the court, all proceedings and enforcement processes taken or that might be taken in respect of the Company, the Proposed Monitor, or their respective employees and representatives;

g. prohibiting, for a period not to exceed 10 days, or until otherwise ordered by the court, the commencement of any action, suit or proceeding against the Company;

h. granting an administration charge of up to the maximum amount of $300,000 over the property of the Company (the "**Administration Charge**");

i. approving the DIP Loan and granting a charge in favour of the DIP Lender up to the maximum amount of $250,000.00 over the property of the Company, subordinate to the Administration Charge (each as defined below); and

j. such further and other relief as may be requested and this Honorable Court deems just.

(the "**Initial Order**")

3. The Affidavits of Songwen Gao dated July 7, 2023 (the "**Gao Affidavit**") and July 11, 2023 (the "**Gao DIP Affidavit**") are filed in support of this Motion. MSI Spergel, in its

capacity as proposal trustee (the "**Proposal Trustee**") is also filing a report (the "**Second Report**") in advance of the Application to assist the Court.

4. This memorandum provides the factual matrix giving rise to the present Application, describes the relief being sought, identifies the issues to be considered by the Court, and sets out the arguments in favour of granting the Initial Order.

5. Capitalized terms not defined in this prehearing memorandum have the meaning ascribed to them in the Gao Affidavit and the Gao DIP Affidavit.

A. FACTS:

6. The facts are as set out in the Gao Affidavit, Gao DIP Affidavit, and the Second Report.

7. The Company filed the NOI on May 1, 2023. Effective on the same date, the Company received the benefit of a stay of proceedings (the "**Stay**") for an initial 30-day period in accordance with the provisions of the BIA. On May 31, 2023, Registrar Balmanoukian granted an Order extending the time for the Company to make a proposal under the BIA. The Stay is currently set to expire at the close of business on July 15, 2023.

8. The Company operates an end-to-end supply of dried sea cucumbers, including the processing, exporting and direct sales of product. In doing so, ASCL processes wild Canadian sea cucumber caught fresh from the coastal waters of Nova Scotia, Canada. Frozen sea cucumbers are purchased primarily from harvesters in Nova Scotia and Newfoundland and Labrador. ASCL sells its products to both domestic and international customers.

9. Between 2018 and 2020, ASCL experienced significant growth in revenue, however, the Covid-19 pandemic caused a sharp drop in demand from customers resulting in ASCL's annual revenue dropping back below pre-pandemic levels. Sea cucumbers are a specialty niche product in which customer demand is highly dependent on changes in customer income and economic sentiment. Additionally, the COVID-19 pandemic increased the operating costs of ASCL, diminishing its profit margins.

10. ASCL is a subsidiary of Atlantic Golden Age Holdings Inc. ("**AGAH**") that holds all of the shares of ACSL. Historically, AGAH provided funding to ASCL to offset the dwindling demand for sea cucumbers. As this pattern continued, ASCL became reliant on the advances by its parent company to continue operations. However, the cash infusions were an interim measure that could not be indefinitely sustained.

11. ASCL has obtained a DIP financing commitment from AGAH (in such capacity, the "DIP Lender") to fund the Company during the restructuring period subject to various terms and conditions as described in the term sheet dated July 11, 2023 (the "DIP Term Sheet").

12. ASCL is looking to transition the NOI proceeding to, among other things, afford the Company with the benefit of the flexibility of the CCAA, including by potentially implementing a reverse vesting structure on conclusion of a Court-ordered sale process. The Company believes that continuing these proceedings under the CCAA will maximize value for its stakeholders.

B. ISSUES:

13. The issues at this motion are whether this Court should:
    a. convert the NOI proceedings into CCAA proceedings;
    b. appoint msi Spergel Inc. as monitor;
    c. extend the Stay;
    d. grant the Administration Charge; and
    e. grant the DIP Lender's Charge and Approve the DIP Loan.

C. LAW AND ARGUMENT

(a) The NOI Proceedings should be converted to the CCAA

14. In *Re Clothing for Modern Times Ltd*, the Ontario Superior Court of Justice (Commercial List) set out the requirements to transfer an ongoing NOI proceeding to the CCAA:[1]

[1] *(Re) Clothing for Modern Times Ltd*, 2011 ONSC 7522 **(Tab 1)**

9 It strikes me that on a motion to continue under the CCAA an applicant company should place before the court evidence dealing with three issues:

(i) The company has satisfied the sole statutory condition set out in section 11.6(a) of the CCAA that it has not filed a proposal under the BIA;

(ii) The proposed continuation would be consistent with the purposes of the CCAA; and,

(iii) Evidence which serves as a reasonable surrogate for the information which section 10(2) of the CCAA requires accompany any initial application under the Act...

15. As noted in paragraph 54 of the Gao Affidavit, the Company has not filed a proposal under the BIA. It is further submitted that the Second Report being filed herein contains "the information which section 10(2) of the CCAA requires accompany any initial application under the Act", or a "reasonable surrogate" thereof.

16. The Company is insolvent. Under the CCAA, a debtor is insolvent if it meets the definition of "insolvent person" under the BIA, which states that a person is insolvent if: (i) they are unable to meet their obligations as they become due; (ii) they have ceased paying their current obligations in the ordinary course of business; or (iii) the aggregate of their property is not sufficient to enable payment of all obligations due and accruing due.

17. The Company collectively owes over $5 million in outstanding liabilities. It has delivered the documents and financial statements required under section 10(2) of the CCAA.[2]

18. The continuation of this proceeding under the CCAA will further the purposes of the CCAA by, among other things:

a) permitting ASCL to continue operations and to solicit going concern sale offers through a sale process. The Company intends to utilize the breathing room afforded by the stay of proceedings to formulate the terms of a sale process to be conducted pursuant to a Court order;

[2] See: Section VI of the Second Report and Exhibits "B" and "C" to the Gao Affidavit.

b) preserving costs by avoiding the need to return to Court every 45 days for approval of the Stay;

c) allowing the Company the benefit of the flexibility of the CCAA, including by potentially implementing a reverse vesting structure in order to preserve the value of certain key contracts and import licenses;

d) avoiding the devastating effects of bankruptcy and liquidation, which would destroy significant value for stakeholders; and

e) preserving the status quo while attempts are made to maximize value for stakeholders and resolve outstanding disputes.

(b) MSI should be Appointed as the Monitor

19. Should the Initial Order be granted, section 11.7 of the CCAA requires the Court to appoint a licensed insolvency trustee (as defined under the BIA) to monitor the affairs of the subject debtor.

20. In the present case, it is appropriate for MSI to be appointed as Monitor. MSI has consented to the appointment and is a "trustee" within the meaning of section 2(1) of the BIA, without being subject to the restrictions set out under section 11.7(2) of the CCAA.

21. Neither MSI nor any of its representatives or affiliates has been at any time in the past two years: (a) a director, officer or employee of any member of the Company; (b) related to any member of the Company, or to any director or officer of any member of the Company; or (c) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of any member of the Company.

(c) The Stay should be Continued

22. Section 11.02(1) of the CCAA provides that the court may order a stay of proceedings on an initial CCAA application for a period of not more than 10 days. Section 11.001 of the CCAA provides that relief granted on an initial CCAA application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that initial 10-day period.

23. While section 11.001 is intended to prevent initial orders from taking on unnecessary breadth and scope, it does not prevent the court from granting the relief necessary to preserve the *status quo*. Since the enactment of section 11.001, courts have regularly granted, as part of "first day motions", stays of proceedings, limited interim financing charges, administration charges, and directors' and officers' charges, as well as orders relative to the payment of critical pre-filing obligations, all of which is necessary to protect the Company's business as a going concern.[3]

(d) The Administration Charge should be Granted

24. The Company is seeking an Administration Charge (as defined in the Initial Order).

25. Section 11.52 of the CCAA grants this court jurisdiction to order the proposed Administration Charge.

26. The Administration Charge is warranted, given that:

    (a) these proceedings will require the extensive involvement of professional advisors subject to the Administration Charge;

    (b) the professionals subject to the Administration Charge have contributed, and will continue to contribute, to the restructuring of the Company;

    (c) there is no unwarranted duplication of roles, therefore the fees incurred by these proceedings will be minimized;

    (d) the proposed Administration Charge ranks in priority to the interests of the secured creditors, who have been given notice of this requested relief; and

    (e) the Proposed Monitor is supportive of the proposed Administration Charge.

[3] See: *Clover Leaf Holdings Company, Re.*, 2019 ONSC 6966 (Tab 2); *Mountain Equipment Co Operative (Re)*, 2020 BCSC 1586 (Tab 3).

(e) The DIP Lender's Charge should be Granted, and the DIP Loan should be Approved

27. Section 11.2(1) of the CCAA provides that a debtor can receive interim financing, subject to the requirement that the security or charge may not secure an obligation that exists before the order is made:

> 11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

28. ASCL secured a financing commitment from the DIP Lender pursuant to the DIP Term Sheet. It was a condition of the DIP Lender's support under the DIP Term Sheet that they obtain a court-ordered charge over all of the Company's assets.

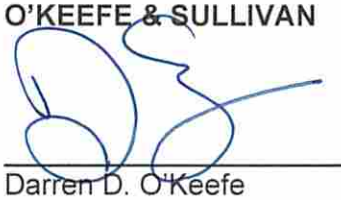
29. It is necessary under the Cash Flow Forecast that ASCL receive DIP financing to maintain operations as a going concern during the pendency of these proceedings. The terms of the financing are limited to those reasonably necessary for the Company's continued operations in the ordinary course of business during the Stay. Further, the terms of DIP Term Sheet are consistent with ordinary commercial transactions of this nature, as also confirmed by the Proposed Monitor. If the Initial Order is granted and DIP financing is given, the Company intends to return to the Court and seek a Court-ordered sale process for the property of ASCL.

C. RELIEF REQUESTED:

30. It is respectfully submitted that this is an appropriate case in which to grant the relief set out within in the Initial Order.

Signed July 11, 2023

O'KEEFE & SULLIVAN



Darren D. O'Keefe
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To the Service List attached hereto as Schedule "A".

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

District of Nova Scotia
Division No. 01 – Halifax
Court No. 45461
Estate No. 51-2939212

IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, RSC 1985, c B-3, AS AMENDED

IN THE MATTER OF: THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF ATLANTIC SEA CUCUMBER LTD. OF THE COMMUNITY OF HACKETTS COVE, IN THE PROVINCE OF NOVA SCOTIA

SCHEDULE "A"

SERVICE LIST
Updated May 25, 2023

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Index of Authorities

1.	*(Re) Clothing for Modern Times Ltd*, 2011 ONSC 7522
2.	*Clover Leaf Holdings Company, Re.*, 2019 ONSC 6966
3.	*Mountain Equipment Co Operative (Re)*, 2020 BCSC 1586

CITATION: (Re) Clothing for Modern Times Ltd., 2011 ONSC 7522
COURT FILE NO.: 31-1513595
DATE: 20111216

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: IN THE MATTER OF THE Notice of Intention to make a Proposal of Clothing for Modern Times Ltd.

BEFORE: D. M. Brown J.

COUNSEL: M. Poliak and H. Chaiton, for the Applicant

M. Forte, for A. Farber & Partners Inc., the Proposal Trustee and Proposed Monitor

I. Aversa, for Roynat Asset Finance

D. Bish, for Cadillac Fairview

L. Galessiere, for Ivanhoe Cambridge Inc., Oxford Properties Group Inc., Primaris Retail Estate Investment Trust, Morguard Investment Limited and 20 VIC Management Inc.

M. Weinczuk, for 7951388 Canada Inc.

HEARD: December 16, 2011

REASONS FOR DECISION

I. Motion to continue *BIA* Part III proposal proceedings under the *CCAA*

[1] Clothing for Modern Times Ltd. ("CMT"), a retailer of fashion apparel, filed a Notice of Intention to Make a Proposal pursuant to section 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, on June 27, 2011. A. Farber & Partners Inc. was appointed CMT's proposal trustee. At the time of the filing of the NOI CMT operated 116 retail stores from leased locations across Canada. CMT sold fashion apparel under the trade names Urban Behavior, Costa Blanca and Costa Blanca X.

[2] CMT has obtained from this Court several extensions of time to file a proposal. That time will expire on December 22, 2011. Under section 50.4(9) of the *BIA*, no further extensions are possible.

[3] Accordingly, CMT moves under section 11.6(a) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 for an order, effective December 22, 2011, continuing CMT's restructuring proceeding under the *CCAA* and granting an Initial Order, as well as approving a sale process as a going concern for part of CMT's business.

II. Key background events

[4] Following the filing of the NOI, pursuant to orders of this Court, CMT conducted a self-liquidation of underperforming stores across Canada and, as well, a going-concern sale of its Urban Behavior business. The latter transaction is scheduled to close on January 16, 2012.

[5] At the time of the filing of the NOI there were three major secured creditors of CMT: Roynat Asset Finance, CIC Asset Management Inc., and CMT Sourcing. The company's indebtedness to those creditors totaled approximately $28.3 million. CMT anticipates that the proceeds from the Urban Behavior transaction and the liquidation of under-performing stores will prove sufficient to repay its loan obligations to Roynat in full before the expiration of a forbearance period on January 16, 2012.

[6] When CMT was last in court on November 7, 2011 it stated it intended to make a proposal to its unsecured creditors, an intention supported by the two remaining secured creditors, CIC and CMT Sourcing. Subsequently CMT met with representatives of certain landlords and commenced discussions about its proposed restructuring plan. As a result of those discussions CMT lacks the confidence that its proposal would be approved by the requisite majority of its unsecured creditors, and it does not believe that it can make a viable proposal to its creditors. Instead, CMT thinks that a going-concern sale of its Costa Blanca business would be in the best interests of stakeholders and would preserve employment for about 500 remaining employees, both full-time and hourly retail staff.

[7] In its Sixth Report dated December 14, 2011 Farber agrees that a going concern sale of the Costa Blanca business would be in the best interests of CMT's stakeholders, maximize recoveries to the two secured creditors, CIC and CMT Sourcing, and preserve employment for CMT's remaining employees. Farber supports CMT's request to continue its restructuring under the *CCAA*. Farber consents to act as the Monitor under *CCAA* proceedings and to administer the proposed sale process.

III. Continuation under the *CCAA*

A. Principles governing motions to continue *BIA* Part III proposal proceedings under the *CCAA*

[8] Continuations of *BIA* Part III proposal proceedings under the *CCAA* are governed by section 11.6(a) of that Act which provides:

11.6 Notwithstanding the *Bankruptcy and Insolvency Act*,

(*a*) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part.

[9] It strikes me that on a motion to continue under the *CCAA* an applicant company should place before the court evidence dealing with three issues:

(i) The company has satisfied the sole statutory condition set out in section 11.6(a) of the *CCAA* that it has not filed a proposal under the *BIA*;

(ii) The proposed continuation would be consistent with the purposes of the *CCAA*; and,

(iii)Evidence which serves as a reasonable surrogate for the information which section 10(2) of the *CCAA* requires accompany any initial application under the Act.

Let me deal with each in turn

B. The applicant has not filed a proposal under the *BIA*

[10] The evidence shows that CMT has satisfied this statutory condition.

C. The continuation would be consistent with the purposes of the *CCAA*

[11] In *Century Services Inc. v. Canada (Attorney General)*,[1] the Supreme Court of Canada articulated the purpose of the *CCAA* in several ways:

(i) To permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets;[2]

(ii) To provide a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made;[3]

(iii)To avoid the social and economic losses resulting from liquidation of an insolvent company;[4]

---

[1] 2010 SCC 60.
[2] *Century Services*, para. 15.
[3] *Ibid.*, para. 59.
[4] *Ibid.*, para. 70.

(iv)To create conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all.[5]

As the Supreme Court noted in *Century Services*, proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved "through a rules-based mechanism that offers less flexibility."[6] In the present case CMT bumped up against one of those less flexible rules – the inability of a court to extend the time to file a proposal beyond six months after the filing of the NOI.

[12] The jurisprudence under the *CCAA* accepts that in appropriate circumstances the purposes of the *CCAA* will be met even though the re-organization involves the sale of the company as a going concern, with the consequence that the debtor no longer would continue to carry on the business, as is contemplated in the present case. In *Re Stelco Inc.* Farley J. observed that if a restructuring of a company is not feasible, "then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part".[7] It also is well-established in the jurisprudence that a court may approve a sale of assets in the course of a *CCAA* proceeding before a plan of arrangement has been approved by creditors.[8] In *Re Nortel Networks Inc.* Morawetz J. set out the rationale for this judicial approach:

> The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.[9]

[13] The evidence filed by CMT and Farber supports a finding that a continuation under the *CCAA* to enable a going-concern sale of the Costa Blanca business and assets would be consistent with the purposes of the *CCAA*. Such a sale likely would maximize the recovery for the two remaining secured creditors, CIC and CMT Sourcing, preserve employment for many of the 500 remaining employees, and provide a tenant to the landlords of the 35 remaining Costa Blanca stores. Avoidance of the social and economic losses which would result from a liquidation and the maximization of value would best be achieved outside of a bankruptcy.

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[5] *Ibid.*, para. 77.
[6] *Ibid.*, para. 15.
[7] (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J.), para. 1. In *Consumers Packaging Inc., Re*, 2001 CarswellOnt 3482 the Court of Appeal held that a sale of a business as a going concern during a *CCAA* proceeding is consistent with the purposes of that Act.
[8] See the cases collected by Morawetz J. in *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.), paras. 35 to 39. See also section 36 of the *CCAA*.
[9] *Ibid.*, para. 40.

D. Evidence which serves as a reasonable surrogate for *CCAA* s. 10(2) information

[14] As the Supreme Court of Canada observed in *Century Services*, "the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority."[10] On an initial application under the *CCAA* a court will have before it the information specified in section 10(2) which assists it in considering the appropriateness, good faith and due diligence of the application. Section 10(2) of the *CCAA* provides:

> 10. (2) An initial application must be accompanied by
>
> (*a*) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;
>
> (*b*) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and
>
> (*c*) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

[15] Section 11.6 of the *CCAA* does not stipulate the information which must be filed in support of a continuation motion, but a court should have before it sufficient financial and operating information to assess the viability of a continuation under the *CCAA*. In the present case CMT has filed, on a confidential basis,[11] cash flows for the period ending January 31, 2012, which show a net positive cash flow for the period and that CMT has sufficient resources to continue operating in the *CCAA* proceeding, as well as to conduct a sale process without the need for additional financing.

[16] In addition, the Proposal Trustee filed on this motion its Sixth Report in which it reported on its review of the cash flow statements. Although its opinion was expressed in the language of a double negative, I take from its report that it regards the cash flow statements as reasonable.

[17] Finally, the previous extension orders made by this Court under section 50.4(9) of the *BIA* indicate that CMT satisfied the Court that it has been acting in good faith and with due diligence.

---

[10] *Century Services*, para. 70.

[11] CMT has filed evidence explaining that disclosure of the cash flows prior to the closing of the Urban Behavior transaction would make public the proceeds expected from that transaction. I agree that such information should not be made public until the deal has closed. CMT has satisfied the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 and a sealing order should issue.

E. Conclusion

[18] No interested person opposes CMT's motion to continue under the *CCAA*. Its two remaining secured creditors, CIC and CMT Sourcing, support the motion. From the evidence filed I am satisfied that CMT has satisfied the statutory condition contained in section 16(a) of the *CCAA* and that a continuation of its re-structuring under the *CCAA* would be consistent with the purposes of that Act.

IV. Sale Process

[19] In *Re Nortel Networks Corp.* Morawetz J. identified the factors which a court should consider when reviewing a proposed sale process under the *CCAA* in the absence of a plan:

> (a) is a sale transaction warranted at this time?
>
> (b) will the sale benefit the whole "economic community"?
>
> (c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
>
> (d) is there a better viable alternative?[12]

[20] No objection has been taken to CMT's proposed sale of its Costa Blanca business or the proposed sale process under the direction of Farber as Monitor. Chris Johnson, CMT's CFO, deposed that CMT is not in a position to make a viable proposal to its creditors and has concluded that a going-concern sale of the Costa Blanca business would be the most appropriate course of action. The Proposal Trustee concurs with that assessment. In light of those opinions, an immediate sale of the Costa Blanca business would be warranted in order to attract the best bids for that business on a going-concern basis. Such a sale, according to the evidence, stands the best chance of maximizing recovery by the remaining secured creditors and preserving the employment of a large number of people. No better viable alternative has been put forward.

[21] Accordingly, I approve the proposed sale process as described in paragraph 37 of the affidavit of Chris Johnson.

V. Administration Charges

[22] CMT seeks approval under section 11.52 of the *CCAA* of an Administration Charge over the assets of CMT to secure the professional fees and disbursements of Farber as Monitor and its counsel, as well as the fees of Ernst & Young Orenda Corporate Finance Inc. ("E&Y"), who has been acting as CMT's financial advisor, together with its counsel. The order sought reflects, in

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[12] *Nortel Networks, supra.*, para. 49. See also *Re Brainhunter Inc.* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J.), para. 13.

large part, the priorities of various charges approved during the *BIA* Part III proposal process. CMT proposes that the Professionals Charge approved under the *BIA* orders and the CCAA Administration Charge rank *pari passu*, and that whereas the *BIA* orders treated as ranking fourth "the balance of any indebtedness under the Professionals Charge", the *CCAA* order would place a cap of $250,000 on such portions of the Professionals and CCAA Administration Charges.

[23] No interested person opposes the charges sought.

[24] I am satisfied that the charge requested is appropriate given the importance of the professional advice to the completion of the Urban Behavior transaction and the sale process for the Costa Blanca business.

VI. Order granted

[25] I have reviewed the draft Initial Order submitted by CMT and am satisfied that an order should issue in that form.

[26] CMT also seeks a variation of paragraph 3 of the Approval and Vesting Order of Morawetz J. made November 7, 2011 in respect of the Urban Behavior transaction to include, in the released claims, the Professionals Charge and the CCAA Administration Charge. None of the secured creditors objects to the variation sought and it is consistent with the intent of the existing language of that order. I therefore grant the variation sought and I have signed the order.

(original signed by)
D. M. Brown J.

Date: December 16, 2011

CITATION: Clover Leaf Holdings Company, Re., 2019 ONSC 6966
COURT FILE NO.: CV-19-631523-00CL
DATE: 20191204

SUPERIOR COURT OF JUSTICE – ONTARIO

- COMMERCIAL LIST

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CLOVER LEAF HOLDINGS COMPANY, CONNORS BROS. CLOVER LEAF SEAFOODS COMPANY, K.C.R. FISHERIES LTD., 6162410 CANADA LIMITED, CONNORS BROS. HOLDINGS COMPANY AND CONNORS BROS. SEAFOODS COMPANY

BEFORE: HAINEY J.

COUNSEL: *Kevin Zych, Sean Zweig* and *Mike Shakra* for the Applicants

Marc Wasserman and *Martino Calvaruso* for the Monitor

Natasha MacParland for FCF Co. Ltd.

Peter Rubin for Wells Forgo

Jeremy Opolsky for Lion Capital

Robert Chadwick and *Christopher Armstrong* for Terms Lenders

HEARD: November 25, 2019

ENDORSEMENT

Overview

[1] On November 22, 2019, the applicants ("Clover Leaf"), obtained an initial order pursuant to the *Companies Creditors Arrangement Act* R.S.C. 1985, c. C-36 as amended ("*CCAA*") which appointed Alvarez & Marsal Canada Inc. as Monitor and stayed all proceedings against the applicants, their officers, directors and the Monitor until December 2, 2019.

[2] On November 25, 2019 the applicants sought an amended and restated order to supplement the limited relief obtained pursuant to the initial order. I granted the order and indicated that I would provide a more detailed endorsement. This is my endorsement.

Facts

[3] The applicants are the Canadian affiliates of Bumble Bee Foods, an international seafood supplier based in the United States ("Bumble Bee").

[4] The applicants operate the Clover Leaf business in Ontario, New Brunswick and Nova Scotia. They have approximately 650 employees in Canada. The Clover Leaf business has long been associated with well-known brands of canned seafood products in Canada.

[5] While the Clover Leaf business in Canada is cash flow positive and profitable, the balance sheet of the Bumble Bee group, including the applicants, has suffered extreme financial pressures primarily due to extensive litigation against Bumble Bee in the United States.

[6] As a result, the Bumble Bee group has filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code ("Chapter 11 proceedings") and the U.S. Bankruptcy Court has granted certain First Day Orders in those proceedings.

[7] The applicants are seeking similar relief in these proceedings to stabilize and protect their business in order to complete a comprehensive and coordinated restructuring of Clover Leaf in Canada and Bumble Bee in the United States. This will include an asset sale of each of their respective businesses ("Sale Transaction"). This outcome is the result of extensive consideration of various options and consultations with Bumble Bee's secured lenders in an attempt to restructure the business.

Applicants' Position

[8] The applicants submit that this *CCAA* proceeding is in the best interests of their stakeholders and will result in their business being conveyed on a going concern basis with minimal disruption. The breathing room afforded by the *CCAA* and Chapter 11 proceedings, and the other relief sought, will allow the applicants to continue operations in the ordinary course, maintaining the stability of their business and operations, and preserving the value of their business while the Sale Transaction is implemented.

[9] Although the applicants are party to a stalking horse asset purchase agreement, they are not seeking any relief in connection with it or the Sale Transaction at this stage. The applicants will return to court for that relief at a later date. They are, instead, only seeking the limited relief required at this time.

Issues

[10] I must determine the following issues:

a) Is the relief sought on this application consistent with the amendments to the *CCAA* which came into effect on November 1, 2019?

b) Should I extend the stay of proceedings to December 31, 2019?

c) Should I approve the proposed DIP financing and grant the DIP charge?

d) Should I grant the administration charge and the directors' charge?

e) Should I approve the KEIP and the KEIP charge, and grant a sealing order?

f) Should I authorize the applicants to pay their ordinary course pre-filing debts? and

g) Should I grant the intercompany charge?

Analysis

The New CCAA Amendments

[11] In determining this application I must consider the amendments made to the *CCAA* that came into force on November 1, 2019.

[12] Section 11.001 of the *CCAA* provides as follows:

> An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[13] The purpose of this new section of the *CCAA* is to make the insolvency process fairer, more transparent and more accessible by limiting the decisions made at the outset of the proceedings to measures that are reasonably necessary to avoid the immediate liquidation of an insolvent company and to allow for broader participation in the restructuring process.

[14] The applicants submit that the relief sought on this application is limited to what is reasonably necessary in the circumstances for the continued operation of their business. Further relief, including approval of the Sale Transactions and related bidding procedures, will not be sought until a later date on reasonable notice to a broader group of stakeholders.

[15] I am satisfied that the relief sought on this motion is reasonably necessary for the continued operation of the applicants for the period covered by the order sought to allow them to take the next steps toward a smooth transition of their business to a new owner for the following reasons:

(a) Prior to initiating insolvency proceedings here and in the United States the applicants conducted a thorough assessment of their options and consulted with all their major creditors before arriving at the proposed Sale Transaction;

(b) The applicants' stakeholder such as employees, customers and suppliers who have not yet been consulted about these *CCAA* proceedings will not be prejudiced by the order sought. In fact, in my view, they will suffer prejudice if the order is not granted;

(c) The applicants have the support of their secured creditors who are expected to suffer a shortfall if the Sale Transaction closes;

(d) The applicants are not the cause of these insolvency proceedings; and

(e) The applicants are only seeking relief that is reasonably necessary to take the next steps toward a smooth transition to a new owner.

[16] For these reasons, I have concluded that the relief sought is consistent with the new amendments to the *CCAA*.

[17] I will now consider whether it is appropriate to grant certain of the specific terms of the amended and restated initial order.

Stay of Proceedings

[18] The applicants seek to extend the stay of proceedings to December 31, 2019.

[19] I am satisfied that the stay of proceedings should be extended as requested for the following reasons:

(a) The applicants have acted and are acting in good faith with due diligence;

(b) The stay of proceedings requested is appropriate to provide the applicants with breathing room while they seek to restore their solvency and emerge from these *CCAA* proceedings on a going-concern basis;

(c) Without continued protection under the *CCAA* and the support of their lenders the stability and value of the applicants' business will quickly deteriorate and will be unable to continue to operate as a going-concern;

(d) If existing or new proceedings are permitted to continue against the applicants, they will be destructive to the overall value of their business and jeopardize the proposed Sale Transaction; and

(e) The Monitor supports the requested extension of the stay of proceedings.

DIP Financing

[20] The applicants submit that the proposed DIP financing should be approved for the following reasons:

(a) The proposed DIP financing is reasonably necessary for the continued operation of Clover Leaf in the ordinary course of business during the period covered by the order sought within the meaning of s. 11.2(5) of the *CCAA*. It is also consistent with the existing jurisprudence that DIP financing should be granted "to keep the lights on" and should be limited to terms that are reasonably necessary for the continued operation of the company; and

(b) The proposed DIP financing is reasonably necessary to allow the applicants to maintain liquidity and preserve the enterprise value of their business while the Sale Transaction is being pursued. The proposed DIP financing will be used to honour commitments to employees, customers and trade creditors.

[21] I am satisfied for these reasons that the requirements of s. 11.2(5) of the *CCAA* are satisfied.

[22] In this case, the applicants are not borrowers under the proposed DIP financing but they are proposed to be guarantors. The applicable jurisprudence has established the following factors which should be considered to determine the appropriateness of authorizing a Canadian debtor to guarantee a foreign affiliate's DIP financing:

(a) The need for additional financing by the Canadian debtor to support a going concern restructuring;

(b) The benefit of the breathing space afforded by *CCAA* protection;

(c) The lack of any financing alternatives to those proposed by the DIP lender;

(d) The practicality of establishing a stand-alone solution for the Canadian debtor;

(e) The contingent nature of the liability of the proposed guarantee and the likelihood that it will be called upon;

(f) Any potential prejudice to the creditors of the Canadian entity if the request is approved; and

(g) The benefits that may accrue to the stakeholders if the request is approved and the prejudice to those stakeholders if the request is denied.

[23] I have concluded that I should approve the proposed DIP financing and the proposed DIP charge for the following reasons:

(a) Because of its current financial circumstances, the Bumble Bee Group cannot obtain alternative financing outside of the Chapter 11 and *CCAA* proceedings;

(b) The applicants' liquidity is dependent on the secured lenders providing the proposed DIP financing;

(c) The proposed DIP financing is necessary to maintain the ongoing business and operations of the Bumble Bee Group, including the applicants;

(d) While the proposed DIP financing is being provided by the applicants' existing secured lenders rather than new third-party lenders, eleven third-party lenders were solicited with no viable proposal being received. In my view, this demonstrates that the proposed DIP financing represents the best available DIP financing option in the circumstances;

(e) The proposed DIP financing will preserve the value and going concern operations of the applicant's business, which is in the best interests of the applicants and their stakeholders;

(f) Because the DIP lenders are the existing secured lenders, they are familiar with the applicants' business and operations which will reduce administrative costs that would otherwise arise with a new-third party DIP lender;

(g) Protections have been included in the amended and restated initial order to minimize any prejudice to the applicants and their stakeholders;

(h) The amount of the proposed DIP Financing is appropriate having regard to the applicants' cash-flow statement; and

(i) The Monitor supports the proposed DIP financing and its report confirms that the applicants will have sufficient liquidity to operate their business in the ordinary course.

Payment of Pre-Filing Obligations

[24] To preserve normal course business operations, the applicants seek authorization to continue to pay their suppliers of goods and services, honour rebate, discount and refund programs with their customers and pay employees in the ordinary course consistent with existing compensation arrangements.

[25] The court has broad jurisdiction to permit the payment of pre-filing obligations in a *CCAA* proceeding. In granting authority to pay certain pre-filing obligations, courts have considered the following factors:

(a) Whether the goods and services are integral to the applicants' business;

(b) The applicants' need for the uninterrupted supply of the goods or services;

(c) The fact that no payments will be made without the consent of the Monitor;

(d) The Monitors' support and willingness to work with the applicants to ensure that payments in respect of pre-filing liabilities are appropriate;

(e) Whether the applicants have 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 are unable to make pre-filing payments.

[26] I am satisfied that it is critical to the operation of their business that the applicants preserve key relationships. Any disruption in the services proposed to be paid could jeopardize the value of their business and the viability of the Sale Transaction. The authority in the proposed amended and restated initial order to pay pre-filing obligations is appropriately tailored and responsive to the needs of the applicants and is specifically provided for in the applicants' cash flows and in the DIP budget. In particular, the payments are limited to those necessary to preserve critical relationships with employees, suppliers, and customers, to ensure the stability and continued operation of the applicants' business and will only be made with the consent of the Monitor. The relief sought is consistent with orders in other *CCAA* cases.

[27] Further, in keeping with the requirements in s. 11.001 of the *CCAA* the contemplated payments are all reasonably necessary to the continued operation of the applicants' business so that there will be no disruption in services provided to the applicants and no deterioration in their relationships with their suppliers, customers and employees.

KEIP and KEIP Charge

[28] I have also concluded that the KEIP and KEIP charge should be approved because of the following:

(a) The KEIP was developed in consultation with AlixPartners, Bennett Jones LLP and with the involvement of the Monitor. The Monitor is supportive of the KEIP. The secured creditors also support the KEIP charge;

(b) The KEIP is reasonably necessary to retain key employees who are necessary to guide the applicants through the *CCAA* proceedings and the Sale Transaction;

(c) The KEIP is incentive-based and will only be earned if certain conditions are met; and

(d) The amount of the KEIP, and corresponding KEIP charge, is reasonable in the circumstance.

[29] In approving the KEIP and KEIP charge pursuant to s. 11 of the *CCAA* I have determined that the terms and scope of the KEIP have been limited to what is reasonably necessary at this time in accordance with s. 11.001 of the *CCAA*.

[30] As the KEIP contains personal confidential information about the applicants' employees, including their salaries, I am granting a sealing order pursuant to s. 137(2) of the *Courts of Justice Act*, RSO 1990, c. C. 43. This will prevent the risk of disclosure of this personal and confidential information.

Intercompany Charge

[31] I am also granting the requested Intercompany Charge to preserve the status quo between all entities within the Bumble Bee group to protect the interest of creditors against individual entities within the group. The Monitor supports the charge which ranks behind all the other court-ordered charges.

Administrative Charge

[32] I am also granting an administration charge in the amount of $1.25 million to secure the professional fees and disbursements of the Monitor, its counsel and the applicants' counsel for the following reasons:

(a) The beneficiaries of the administration charge have, and will continue to, contribute to these *CCAA* proceedings and assist the applicants with their business;

(b) Each beneficiary of the administration charge is performing distinct functions and there is no duplication of roles;

(c) The quantum of the proposed charge is reasonable having regard to administration charges granted in other similar *CCAA* proceedings;

(d) The secured creditors support the administrative charge; and

(e) The Monitor supports the administrative charge.

Directors' Charge

[33] Finally, I am granting a directors' charge in the amount of $2.3 million to secure the indemnity of the applicants' directors and officers for liabilities they may incur during these *CCAA* proceedings for the following reasons:

(a) The directors and officers may be subject to potential liabilities in connection with the *CCAA* proceedings and have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;

(b) The applicants' liability insurance policies provide insufficient coverage for their officers and directors;

(c) The directors' charge applies only to the extent that the directors and officers do not have coverage under another directors and officers' insurance policy;

(d) The directors' charge would only cover obligations and liabilities that the directors and officers may incur after the commencement of the *CCAA* proceedings and does not cover willful misconduct or gross negligence;

(e) The applicants will require the active and committed involvement of its directors and officers, and their continued participation is necessary to complete the Sale Transaction;

(f) The amount of the directors' charge has been calculated based on the estimated potential exposure of the directors and officers and is appropriate given the size, nature and employment levels of the applicants; and

(g) The calculation of the directors' charge has been reviewed with the Monitor and the Monitor supports it.

Conclusion

[34] For these reasons the amended and restated initial order is granted.

[35] I thank counsel for their helpful submissions.

HAINEY J.

Date: December 4, 2019

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586

Date: 20201028
Docket: S209201
Registry: Vancouver

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

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners, Mountain Equipment Co-Operative and 1314625 Ontario Limited:	H. Gorman, Q.C. S. Boucher
Counsel for the Monitor, Alvarez & Marsal Canada Inc.:	H.L. Williams J. Enns
Counsel for Royal Bank of Canada, as Administrative Agent and Collateral Agent under Credit Agreement:	J. Sandrelli V. Cross
Counsel for Kingswood Capital Management LP, Kingswood Capital Opportunities Fund I, LP, Kingswood Capital Opportunities Fund I-A, LP and 1264686 B.C. Ltd.:	D. Chochla K. Jackson

Counsel for Plateau Village Properties Inc.:	C. Ramsay K. Mak P. Cho N. Carlson
Counsel for Midtown Plaza Inc.:	K. McEwan, Q.C. C. Smith R. Atkins W. Stransky
Counsel for RioCan Real Estate Investment Trust Company:	L. Galessiere
Counsel for Crestpoint Real Estate Investments Ltd., as authorized asset manager of 0965311 B.C. Ltd.:	B. Wiffen
Counsel for Les Galeries de la Capitale Holdings Inc. and manager Oxford Properties Group:	F. Viau
Counsel for First Capital Holdings (Alta) Corp. and First Capital (Ontario) Corp.:	K. Hashmi
Counsel for Concert Properties Limited:	H. Meredith
Counsel for Kevin Harding, spokesperson for steering committee for "SaveMEC" campaign:	C. Gusikowski P. Reardon
Counsel for BC Co-op Association and Co-operatives and Mutuals Canada:	E. Bridgewater
Place and Date of Hearing:	Vancouver, B.C. September 28-30 and October 1, 2020
Place and Date of Decision with Written Reasons to Follow:	Vancouver, B.C. October 2, 2020
Place and Date of Written Reasons:	Vancouver, B.C. October 28, 2020

INTRODUCTION

[1] On September 14, 2020, the petitioners, Mountain Equipment Co-operative and its wholly owned subsidiary, 1314625 Ontario Limited ("131"), sought and obtained relief pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). I will refer to the petitioners jointly by the first petitioner's well-known acronym, "MEC".

[2] On September 14, 2020, I granted an Initial Order in favour of MEC that included a stay until September 24, 2020, although that was later extended to the time of this comeback hearing. I also approved an interim financing facility to a total of $100 million (the "Interim Financing"), although draws were then limited to $15 million, consistent with the test set out in s. 11.2(5) of the *CCAA*. I appointed Alvarez & Marsal Canada Inc. ("A&M") as the Monitor. Finally, I approved charges usually granted in these proceedings: an Administration Charge ($1 million), a D&O Charge ($4.5 million) and an Interim Financing Charge ($102 million).

[3] At this comeback hearing, MEC seeks an Amended and Restated Initial Order (ARIO) to continue the relief granted in the Initial Order, with approval to access the entire amount under the Interim Financing. In addition, MEC seeks approval of a Key Employee Retention Program (KERP) and a related charge. Finally, MEC seeks an order approving a sale of substantially all of its assets, pursuant to a Sale Approval and Vesting Order (SAVO).

[4] Since September 14, 2020, formidable opposition has formed in response to MEC's application for approval to sell its assets under the SAVO.

[5] Many parties now seek an adjournment of MEC's application for the SAVO, objecting to any sale at this time for various reasons. Those parties include two landlords, Plateau Village Properties Inc. ("Plateau") and Midtown Plaza Inc. ("Midtown"), and Kevin Harding, spokesperson for the steering committee for the "SaveMEC" campaign. Mr. Harding also seeks an order appointing his law firm as representative counsel for certain members of MEC, with an accompanying charge for their expenses.

[6] MEC contends that it is critical that the sale occur without delay. MEC opposes all of the relief sought by the objecting parties.

[7] On October 1, 2020, I concluded the comeback hearing. On October 2, 2020, I granted the orders sought by MEC, including the SAVO, and dismissed the relief sought by the objecting parties, with reasons to follow. These are my reasons.

BACKGROUND

[8] MEC is a co-operative association incorporated under the *Cooperative Association Act,* S.B.C. 1999, c. 28 (the "*Co-op Act*").

[9] In 1971, almost 50 years ago, MEC was formed from the passion of many Vancouverites who loved to spend time outdoors and appreciated having the right equipment and gear to do so. Since then, MEC has become an iconic retailer of outdoor activity equipment and clothing, serving the needs of the public who share that passion for the outdoors. MEC sells many well-known brands and also has its own very successful private label for many products.

[10] MEC's ownership is unique. MEC currently has approximately 5.8 million members, each having paid a $5 lifetime membership fee for the right to shop at MEC and participate in its governance as a co-operative member. Counsel advises that the breadth of MEC's membership in Canada is significant, representing some 22% of the Canadian working population.

[11] 131 owns a parcel of land that comprises the parking lot at the site of MEC's Ottawa Store. 131's assets are not significant in the overall circumstances. Similarly, MEC also owns an interest in a limited partnership which has nominal value.

[12] MEC has a significant history of community involvement. Since 1987, MEC has contributed approximately $44 million to organizations focused on conservation and outdoor recreation.

[13] MEC's head office is located at leased premises in Vancouver, BC. MEC operates online and also, operates 22 retail locations across Canada in BC, Alberta,

Manitoba, Ontario, Quebec and Nova Scotia. MEC leases its eastern distribution centre in Brampton, Ontario and most (16) of its store operations. MEC owns six store locations and its western distribution centre in Surrey, BC.

[14] As of September 7, 2020, MEC has approximately 1,516 employees: 1,143 active employees, 176 laid off employees, 118 employees on the Canada Emergency Wage Subsidy program and 79 employees on unpaid leave.

[15] MEC's board of directors (the "Board") has eight directors. As of September 10, 2020, MEC's senior management consists of seven officers. Philippe Arrata is MEC's Chief Executive Officer who has provided most of the sworn evidence on behalf of MEC in this proceeding.

[16] In 2015, MEC embarked on a significant growth plan. That plan resulted in six new stores and two new relocated stores in Vancouver and Toronto, a new head office, a new eastern distribution centre as well as significant investments in online retail resources. MEC has commitments for two additional new stores (Calgary North West and Saskatoon) that have not yet opened, which is a point of controversy on this application. Over the ensuing years, this growth plan was successful from a market expansion and sales perspective, but it also resulted in a higher fixed cost structure and increased debt levels.

[17] In August 2017, MEC, as borrower, and 131, as guarantor, entered into a credit agreement with the Royal Bank of Canada (RBC), as agent, and RBC, Canadian Imperial Bank of Commerce and the Toronto-Dominion Bank (collectively, the Lenders") for a senior secured asset-based revolving credit facility (the "Credit Facility").

[18] The Credit Facility initially allowed MEC to borrow up to a maximum of $130 million with a maturity date of August 3, 2020. Through various amendments implemented over 2020, that borrowing maximum was reduced to its present level, $100 million. The Lenders hold first priority security over all of MEC's assets.

[19] The results of MEC's growth strategy led to challenging fiscal circumstances. Since 2015, MEC's operating losses were approximately $80 million, offset to some extent by real estate transactions that realized capital gains. Even so, the net loss for the year ending February 23, 2020 was approximately $22.7 million, largely arising from increased costs, certain under-performing stores and liquidity strains.

[20] MEC's assets consist primarily of: owned and leased real property; equipment; inventory; accounts receivable; and intangible assets including certain trademarks on trade names, membership lists and goodwill. As of February 2020, MEC's recorded a book value of approximately $389 million in current and long-term assets.

[21] MEC's liabilities are comprised primarily of: amounts owed to suppliers; governments and employees; amounts owed to the Lenders under the Credit Facility; gift cards and provision for sales returns; lease obligations; and deferred lease liabilities. MEC's current and long-term liabilities, as reported in its February 2020 Financial Statements, totalled approximately $229.6 million.

EVENTS LEADING TO *CCAA* PROCEEDINGS

[22] In early 2020, MEC took steps to address its financial difficulties. MEC's Board brought in a new management team to focus on cost reduction and a return to profitability.

[23] On February 10, 2020, MEC engaged Alvarez and Marsal Canada Securities ULC ("A&M Securities") as a financial advisor to assist in a review of strategic alternatives, provide assistance to obtain and negotiate new financing. A&M Securities is an entity affiliated with A&M, the Monitor.

[24] In March 2020, the Board struck a special committee, comprised of three Board members (the "Special Committee"). The mandate of the Special Committee was to make recommendations to MEC's Board on strategic alternatives, including (a) transactions with a view to sell all or substantially all or any portion of MEC's assets (or a merger, amalgamation or some other strategic alliance involving MEC);

(b) pursuit of organic growth; (c) recapitalization, restructuring or reorganization; or (d) any other strategic alternative in the best interests of MEC.

[25] The efforts of the new management team, the Special Committee and A&M Securities led eventually to the implementation of a Sales and Investment Solicitation Process (SISP) that resulted in the proposed sale that MEC now seeks to have court approved.

[26] Under its initial mandate, A&M Securities made efforts toward identifying a satisfactory refinancing, including: establishing a data room; contacting a number of lenders; and, entering into a number of Non-Disclosure Agreements (NDAs) with lenders. However, MEC and A&M Securities' efforts to find a solution to MEC's very difficult financial difficulties were hampered by the COVID-19 pandemic that hit Canada in March 2020. As one might expect, the pandemic had a significant and negative impact on the retail sector generally and on MEC's already struggling operations. All of MECs stores closed as of March 18, 2020.

[27] As the Monitor notes, MEC's insolvency arose from an unsustainable 25 "bricks and mortar" store operating model, the "disastrous" impact from the pandemic on sales and cash flow and inadequate financing capacity to sustain ongoing losses and provide working capital.

[28] Although A&M Securities received a number of term sheets for a refinancing, none of them provided for a complete refinancing of MEC's debt that solved its serious financial challenges.

[29] On June 1, 2020, as permitted by the BC Registrar for all cooperative associations, MEC announced that its Annual General Meeting (AGM) (originally scheduled for June 23, 2020) would be postponed by up to six months due to the impact of COVID-19 and to allow MEC to focus on the urgent financial challenges impacting its business. The AGM is scheduled for December 10, 2020.

[30] On June 10, 2020, with the support of the Lenders, MEC expanded A&M Securities' engagement to explore whether there were other potential viable

refinancing options and to initiate a SISP. The Special Committee established guiding commercial principles in the design of the SISP to: provide maximum value to the broad stakeholder group; preserve the maximum number of store locations and jobs; and ensure that, if possible, the buyer preserved MEC's purpose, values and outreach programs.

[31] Again, A&M Securities followed the usual path in this effort, including establishing a data room, identifying potential interested purchasers, distributing an initial "teaser" letter to 158 parties and entering into confidentiality agreements with 39 interested parties. A&M Securities requested non-binding Letters of Intent (LOIs).

[32] By July 15, 2020, A&M Securities had received nine LOIs and reviewed and conducted due diligence on each of them. On July 16, 2020, A&M Securities presented the LOIs to the Special Committee for its consideration and later provided its recommendations with respect to having bidders move into "Phase 2" of the SISP process. On July 24, 2020, MEC's Board considered the Special Committee's recommendation with respect to the LOIs.

[33] On August 6, 2020, Phase 2 of the SISP process began with five recommended bidders who had submitted LOIs. The Phase 2 process established a final bid deadline of August 28, 2020. Four bids were received by that deadline, as were later reviewed by A&M Securities and the Special Committee.

[34] On September 4, 2020, MEC's Board, with the input of their advisors, identified Kingswood Capital Management LP ("Kingswood"), a US based private investment firm, as the successful bidder and negotiations began to finalize a purchase and sale agreement.

[35] As with many retailers, by mid-September 2020, the impact of the pandemic, which only exacerbated MEC's pre-existing difficulties, remained very relevant. In the months leading to September 2020, MEC realized a considerable increase in online sales, however, it still experienced a substantial reduction in sales compared to last year for that period ($98 million). By mid-September 2020, MEC has re-

opened many of its stores, however, five remain closed because of the pandemic. The stores that had re-opened were operating at a reduced sales volume.

[36] As of September 4, 2020, and primarily due to the pandemic, MEC owed approximately $4.6 million in rent deferrals or arrears in respect of its leases, and MEC had agreed to rent deferral plans with some of its landlords to repay these arrears by late 2021. Further, MEC had significant past due amounts owed to merchandise suppliers and other vendors.

[37] As of September 11, 2020, MEC owed approximately $74 million under the Credit Facility, leaving approximately $19 million available under the borrowing base. At that time, MEC was unable to repay the Credit Facility by the maturity date of September 30, 2020.

[38] All of these factors, together with MEC's ongoing lease, contractual and trade creditor obligations, led MEC to decide that it had no alternative but to seek a formal restructuring of its affairs in court proceedings and seek to conclude the Kingswood sale in those proceedings.

[39] On September 11, 2020, MEC and Kingswood entered into an asset purchase and sale agreement (the "Sale Agreement"). Under the Sale Agreement, Kingswood, through a Canadian-based subsidiary, agreed to purchase substantially all of MEC's assets. The Sale Agreement is conditional on MEC obtaining court approval through this *CCAA* proceeding.

[40] By the date of the filing (September 14, 2020), RBC had formally notified MEC of defaults under the Credit Facility. Despite MEC's challenging financial affairs, the Lenders confirmed their support for MEC in this *CCAA* proceeding and they continue to support MEC in terms of the relief presently sought.

GERM OF THE PLAN

[41] When I granted the Initial Order, MEC had outlined a restructuring plan. During the course of these proceedings, MEC indicated its intention to:

a) Immediately stabilize its cash flows and operations;

b) Develop a strategy that would address its liquidity issues and generate sufficient revenue to sustain operations through the *CCAA* process, including by streamlining operations;

c) Apply for the SAVO to approve the transaction with Kingswood, which would allow repayment to the Lenders and also allow MEC's business to emerge as a better capitalized operation with as little disruption as practicable; and

d) Establish and complete a claims process toward formulating a plan of compromise and arrangement for presentation to its creditors. The intention is to fund a plan from the proceeds arising from the Kingswood sale.

FUTHER *CCAA* RELIEF SOUGHT

[42] As stated above, MEC seeks to continue the relief sought in the Initial Order, with additional relief relating to: full approval of draws under the Interim Financing, approval of a KERP, extending the stay to November 3, 2020 and granting the SAVO.

[43] MEC's application is supported by the Monitor's First Report dated September 24, 2020 (the "First Report").

Interim Financing

[44] At the commencement of these proceedings, MEC indicated that it required the Interim Financing to support its operations and restructuring efforts. It was and is very apparent that MEC needs the Interim Financing for those purposes.

[45] MEC secured a financing commitment from the Lenders pursuant to a restructuring support agreement dated September 11, 2020 (the "Restructuring Support Agreement"). It was a condition of the Lenders' support under the Restructuring Support Agreement that they obtain a court-ordered security interest,

lien and charge over all of MEC's assets. One of the key financial terms of the Interim Financing was that it was subject to a calculation of borrowing availability, with a maximum principal amount of $100 million under the combined Credit Facility and the Interim Financing, funded in progressive advances on an as-needed basis.

[46] Pursuant to the Initial Order, I approved the Interim Financing, with draws limited to $15 million to the time of the comeback hearing, and approved the Interim Financing Charge. During the course of this hearing, I increased the draw limit to $23 million.

[47] Firstly, I was satisfied that the Interim Financing Charge complied with s. 11.2(1) of the *CCAA* in that it did not secure any of MEC's pre-filing obligations to the Lenders, as prohibited by that provision.

[48] The Interim Financing agreements are amendments to the Credit Facility, pursuant to which the Lenders will provide further liquidity to MEC despite any defaults under the Credit Facility. It is an express term of the Interim Financing that advances made under the Interim Financing cannot be used to satisfy pre-filing obligations under the Credit Facility or any other pre-filing debt. In addition, the Interim Financing Charge does not secure any of MEC's pre-filing obligations and includes a "carve out" to ensure that other secured creditors (such as those with Purchase Money Security Interests (PMSIs)) are not primed by the Charge.

[49] While the terms of the Interim Financing provide that post-filing receipts collected by MEC will be applied to pay down MEC's pre-filing debt under the Credit Facility, I agreed with MEC that mechanisms in interim financing agreements by which pre-filing obligations are paid from proceeds derived by post-filing operations do not contravene s. 11.2(1) of the *CCAA*.

[50] In *Performance Sports Group Ltd. (Re)*, 2016 ONSC 6800, Justice Newbould concluded that a similarly crafted interim lending facility did not offend s. 11.2(1):

> [22] Section 11.2(1) of the *CCAA* provides that security for a DIP facility may not secure an obligation that existed before the order authorizing the security was made. The effect of this provision is that advances under a DIP

> facility may not be used to repay pre-filing obligations. In this case, the ABL DIP Facility is a revolving facility. Under its terms, receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility. The applicants submit that in this case, the ABL DIP Facility preserves the pre-filing status quo by upholding the relative pre-stay priority position of each secured creditor. By requiring that the PSG Entities only use post-filing cash receipts to pay down the accrued balance under the revolving credit facility, the ABL DIP Lenders are in no better position with respect to the priority of their pre-filing debt relative to other creditors. I accept that no advances under the ABL DIP Facility will be used to pay pre-filing obligations and there has been inserted in the Initial Order a provision that expressly prevents that. The provision that receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility is approved.

[51] Similar conclusions were reached in *Comark Inc. (Re)*, 2015 ONSC 2010 at paras. 17-29. Regional Senior Justice Morawetz (as he then was) accepted that the proposed interim financing facility would not result in a greater level of secured debt than was contemplated under the pre-filing facilities and would not prime PMSIs. Effectively, the court found that, since the proposed charge would increase while the pre-filing facility would be paid down by the use of the debtor's cash generated from its business, the proposed charge only secured post-filing advances made under the interim facility in compliance with s. 11.2(1) of the *CCAA*.

[52] In May 2020, Justice Romaine reached the same conclusion in a recent *CCAA* proceeding involving ENTREC Corporation (Alta QB, Calgary Judicial Centre; File No. 2001 06423).

[53] Secondly, I was satisfied that a consideration of the factors set out in s. 11.2(4) of the *CCAA* supported that the Interim Financing (then with limited draws) was appropriate. Those factors are:

a) the period during which the company is expected to be subject to proceedings under this Act;

b) how the company's business and financial affairs are to be managed during the proceedings;

c) whether the company's management has the confidence of its major creditors;

d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

e) the nature and value of the company's property;

f) whether any creditor would be materially prejudiced as a result of the security or charge; and

g) the monitor's report referred to in paragraph 23(1)(b), if any.

[54] The governing factors at the time of the granting of the Initial Order were:

a) MEC anticipated that it would seek an extension of the stay of proceedings at the comeback hearing for a further amount of time to allow it to complete the sale process without having to seek a further extension;

b) MEC's business and financial affairs were to be managed by MEC's Board and key management employees in consultation with the (then) proposed Monitor;

c) MEC had the confidence of the Lenders, its senior secured creditors and the proposed Interim Lenders. The Lenders supported the approval of the Interim Financing and the granting of the Interim Financing Charge;

d) Without the Interim Financing, MEC was not able to fund its operations and continue its restructuring efforts, and the value of its assets would have diminished as a result. In fact, the Credit Facility matured on September 30, 2020;

e) I was satisfied that no secured creditor would be materially prejudiced by the Interim Financing Charge, as the charge includes the carve out and preserved the pre-filing status *quo*; and

f) The proposed Monitor supported the approval of the Interim Financing and granting of the Interim Financing Charge.

[55] Finally, in light of s. 11.2(5) of the *CCAA*, I was satisfied that the terms of the financing were limited to those reasonably necessary for MEC's continued operations in the ordinary course of business during the period to the comeback

hearing. In addition, I was satisfied that the terms of the Interim Financing were consistent with ordinary commercial transactions of this nature, as also confirmed by the proposed Monitor. See *Miniso International Hong Kong Limited v. Migu Investments Inc.*, 2019 BCSC 1234 at paras 79-90.

[56] The Interim Financing provides for a maturity date that is the earlier of a) November 30, 2020; b) the completion of a "Transaction" in relation to all or substantially all of MEC's assets, and sufficient to repay the Lenders in full, and is approved by the Court; and c) at the Lenders' option, the occurrence of any Event of Default (other than the commencement of the *CCAA* proceedings).

[57] MEC now seeks approval of the Interim Financing generally, which would allow it to request subsequent advances up to the $100 million limit until the next extension period on November 3, 2020.

[58] No creditor or stakeholder objects to the Interim Financing sought by MEC.

[59] The Cash Flow Forecast prepared in mid-September 2020 readily supported that MEC is in urgent need of interim funding during the restructuring. In the First Report, the Monitor noted that the Lenders had already advanced $9.4 million under the Interim Facility and confirmed that the full amount of the funding under the Interim Financing was required. No other source of financing was available; the Credit Facility expired on September 30, 2020. No creditor will be prejudiced, let alone materially prejudiced, by this funding.

[60] MEC's financial circumstances continue to be very challenging, even in the short term. Ongoing weekly losses of approximately $1.1-1.6 million are being incurred. In October 2020 alone, MEC projects losses of over $15 million.

[61] Having considered all of the factors in s. 11.2(4) of the *CCAA*, I have no hesitation concluding that approval of the full amount of the Interim Financing is appropriate. Without the Interim Financing, MEC is unable to continue its operations, a result that would have disastrous consequences to the larger stakeholder group, whether or not the SAVO is granted.

The KERP

[62] MEC seeks approval of a KERP. To secure obligations under the proposed KERP, MEC also seeks the granting of a third-priority court-ordered charge on MEC's assets in priority to all other charges, other than the Administration Charge and the D&O Charge (the "KERP Charge").

[63] MEC asserts that the KERP is necessary to allow it to maintain its business operations, complete the restructuring, including completing the sale to Kingswood and preserve asset value. MEC says that, without a KERP, its efforts would be seriously compromised.

[64] In July and September 2020, MEC's Board approved retention agreements (the "Retention Agreements") for eight key senior managers for total compensation of $778,000. The Retention Agreements were filed under seal in these proceedings, as summarized in Appendix E to the First Report.

[65] The Retention Agreements include provision for payment of compensation upon the earlier of certain dates, including a sale of all or substantially all of MEC's assets (or the merger, amalgamation or consolidation of MEC with another entity), the employee's termination without cause or, by certain dates in December 2020, depending on the employee. It is not certain that all executives offered Retention Agreements will remain with MEC through to conclusion of the restructuring.

[66] The Court may exercise its discretion under its general statutory jurisdiction under s. 11 of the *CCAA* to approve a KERP and grant a KERP Charge: *U.S. Steel Canada Inc. (Re)*, 2014 ONSC 6145 at para. 27.

[67] Courts across Canada have approved key employee incentive plans in numerous *CCAA* proceedings: for example, *Nortel Networks Corp. (Re)*, [2009] O.J. No. 1044 (Ont. S.C.J.) and *U.S. Steel Canada*. In *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107, this Court stated:

> [58] Factors to be considered by the court in approving a KERP will vary from case to case, but some factors will generally be present. See for

example, *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); and U.S. Steel Canada at paras. 28-33.

[68] In *Walter Energy* at para. 59, I discussed the *Grant Forest Products* factors, as follows:

a) Is this employee important to the restructuring process?

b) Does the employee have specialized knowledge that cannot be easily replaced?

c) Will the employee consider other employment options if the KERP is not approved?

d) Was the KERP developed through a consultative process involving the Monitor and other professionals?; and

e) Does the Monitor support the KERP and a charge?

[69] In *Aralez Pharmaceuticals Inc. (Re)*, 2018 ONSC 6980 at para. 30, Justice Dunphy stated that three criterion underlie all of the considerations of key employee retention and incentive programs in insolvency proceedings as discussed in the relevant case law: a) arm's length safeguards, b) necessity, and c) reasonableness of design.

[70] The Monitor has reviewed the terms of the Retention Agreements and has concluded that the terms of the proposed KERP Charge are reasonable in the circumstances and customary in similar *CCAA* proceedings. The Monitor has also confirmed that the KERP will provide stability for MEC's business operations, particularly in the critical time period when MEC is attempting to stabilize its operations and, if the SAVO is granted, working to finalize the final negotiations with Kingswood, leading to a closing of that transaction. The Lenders have confirmed they are agreeable to the KERP and the KERP Charge as well.

[71] I accept the Monitor's assessment and conclusions with respect to the KERP. I conclude that the KERP is reasonable and necessary in the circumstances and I exercise my discretion to approve the KERP and grant the KERP Charge.

The Stay

[72] Clearly, an extension of the stay is necessary to allow MEC's restructuring efforts to continue, whether the SAVO is granted or not.

[73] No stakeholder objects to MEC's application for the ARIO, including an extension of the stay of proceedings. The Monitor confirms its view that MEC is acting in good faith and with due diligence.

[74] I am satisfied that an extension of the stay is appropriate until November 3, 2020, in accordance with s. 11.02 of the *CCAA*.

SISP/SAVO

[75] The main focus on this application has been in relation to MEC's application for the granting of the SAVO in favour of Kingswood, pursuant to s. 36(1) of the *CCAA*. Section 36(3) of the *CCAA* lists the relevant non-exhaustive factors to be considered:

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[76] Mr. Harding, Plateau and Midtown all seek an adjournment of MEC's application for the SAVO for "at least" two weeks. Plateau and Midtown also seek orders that would allow them to obtain further document discovery and cross-examine MEC's deponents, including Mr. Arrata and Mr. Robert Wallis. The parties seeking an adjournment are supported by the BC Co-op Association and Cooperatives and Mutuals Canada (the "Co-op Associations").

[77] I address the arguments advanced against MEC's application for the SAVO below. There is considerable overlap and interrelationship between the various categories below, so they should be read as a whole.

i) The Kingswood Sale Agreement

[78] MEC describes the key aims and elements of the Sale Agreement as:

a) Kingswood will continue to operate the business as a going concern under a similar name to MEC and will maintain the goodwill of the retail business;

b) the purchased assets comprise almost all of the assets currently used by MEC for the business;

c) Kingswood will retain at least 75% of the active employees of MEC;

d) Kingswood will acquire, or assume, the leases for at least 17 of MEC's retail locations. For those leases not being acquired or assumed, MEC has already or will provide disclaimers to the landlords;

e) Kingswood will assume liabilities including with respect to warranties, existing gift cards (estimated $13.2 million) and employees who accept offers of employment (estimated $2 million);

f) In order to protect goodwill with existing suppliers and contractors, Kingswood will assume liability for payments to certain inventory and other key vendors and suppliers (estimated $25 million) and will seek assignment of certain contracts; and

g) The Sale Agreement is not conditional on any financing or third-party approvals.

[79] The Court has had the benefit of reviewing certain confidential documents arising from the SISP, including the unredacted Sale Agreement and Confidential Appendix C to the First Report that were both filed under seal in this proceeding.

[80] Significantly, the Sale Agreement provides for a sale price (base amount of $120 million, subject to certain adjustments) that will repay the Lenders in full, maximize the ongoing number of operating stores and retention of a majority number of employees, and leave MEC with additional funds to support a *CCAA* plan that would see a distribution to unsecured creditors. The Board and Special Committee consider that the Kingswood offer was consistent with the guiding principles of the SISP as had been earlier established.

[81] I have reviewed the details of the other three bids received and reviewed by the Special Committee and MEC's Board prior to acceptance of Kingswood's offer. I agree that the Kingswood offer is clearly the most advantageous one, both in terms of price, continuity of business operations, retention of stores, retention of employees and assumed liabilities.

ii) The Monitor Issue

[82] As part of Plateau's objection to the SAVO, it seeks an order replacing A&M as Monitor with Ernst & Young Inc., pursuant to s. 11.7(3) of the *CCAA*.

[83] Plateau argues that, since A&M Securities, A&M's affiliate, was involved in the SISP, A&M is not appropriate to continue as Monitor in these proceedings. Plateau argues that, in the circumstances, the Monitor cannot opine on the adequacy of the SISP as required under s. 36(3)(b) of the *CCAA*.

[84] I will note at the outset that no one on this application, let alone Plateau, questions the professionalism of A&M. Rather, Plateau asserts that there is a perception of bias in respect of the Monitor's views of the SISP, which cannot stand in the face of the clear requirement that a monitor be independent and impartial while exercising its fiduciary obligations to all stakeholders. Plateau cites various authorities including: *United Used Auto & Truck Parts Ltd. (Re)*, [1999] B.C.J. No. 2754 at para. 20 (S.C.); *Winalta Inc. (Re)*, 2011 ABQB 399; *Can-Pacific Farms Inc. (Re)*, 2012 BCSC 760; and *Walter Energy Canada Holdings Inc. (Re)*, 2017 BCSC 53 at paras. 24-25.

[85] I have reviewed the terms of A&M Securities' engagements with MEC. As counsel note, s. 11.7(2) of the *CCAA* provides restrictions on who may be a monitor. A&M clearly did not fall within that restricted list and was able to accept an appointment as Monitor when the Initial Order was granted.

[86] Under the February 10, 2020 engagement, A&M Securities was providing consulting services with respect to identifying potential financing. A&M Securities' compensation was a fixed fee with hourly rates after a certain time period. I am unable to discern any conflict between that engagement and A&M's current one as Monitor that causes any concern.

[87] Similarly, the A&M Securities' June 10, 2020 engagement with MEC also provided for consulting services in respect of the SISP, also on an hourly basis.

[88] It is apparent that, by June 2020, MEC foresaw that it may be necessary to file under the *CCAA* in order to resolve the significant financial difficulties it faced. In the second engagement with A&M Securities, MEC specifically addressed that potential step. Paragraph 4 of the June 10, 2020 engagement agreement provided that MEC could choose to put A&M forward as the Monitor. MEC and A&M expressly agreed that no conflict would arise between the second engagement and that potential appointment. As the Monitor notes, this type of pre-planning for a potential monitor appointment is typically undertaken since it allows a debtor to seamless and efficiently transition into the restructuring process while taking advantage of efforts begun even prior to that time.

[89] Plateau places great emphasis on the reasoning and result found in *Nelson Education Ltd. (Re)*, 2015 ONSC 3580. In that case, Newbould J. considered an application to replace the monitor where the monitor was recommending a sale. The monitor had been a financial advisor to the company for two years prior to its appointment, and it had conducted a SISP prior to the *CCAA* filing that involved dealings with the second lien holders. Almost immediately after the filing, the debtor sought approval to sell the assets to the first lien holders, leaving nothing for the second lien holders.

[90] Justice Newbould found that replacement of the monitor was necessary since firstly, the monitor was in no position to comment independently on the validity of the SISP and, secondly, there was an appearance of a lack of impartiality:

> [30] The problem is that Nelson has proposed a quick court approval of a transaction in which the first lien lenders will acquire the business of Nelson and in which essentially all creditors other than the second lien lenders will be taken care of. Nelson has asserted in its material that the SISP process undertaken by Nelson prior to the *CCAA* proceedings has established that there is no value in the Nelson business that could give rise to any payout to the second lien lenders. The SISP process was taken on the advice of A&M and under their direction. It was put in Nelson's factum that:
>
> > The Applicants, with the assistance of their advisors, conducted a comprehensive SISP which did not result in an executable transaction that would result in proceeds sufficient to repay the obligations under the First Lien Credit Agreement in full or would otherwise be supported by the First Lien Lenders;
>
> [31] Nelson intends to request Court approval of the proposed transaction. An issue that will be front and centre will be whether the SISP process prior to this *CCAA* proceeding can be relied on to establish that there is no value in the security of the second lien lenders and whether other steps could have been taken to obtain financing to assist Nelson in continuing in business other than a credit bid by the first lien lenders. A&M was centrally involved in that process. It is in no position to be providing impartial advice to the Court on the central issue before the Court.

[91] A&M Securities' involvement with MEC was clearly in the context of finding a solution to MEC's financial difficulties in the short term. It is common ground that MEC could most likely have obtained *CCAA* protection in early 2020 and then conducted the search for financing and/or the SISP within those proceedings. MEC states that it had good reason not to obtain court protection at that time, as I will discuss later in these reasons. This is a distinguishing factor from *Nelson Education*, where the monitor had a much more extensive and historical relationship with the debtor and other stakeholders.

[92] Further, I can discern no conflict, whether real or apparent, arising from A&M Securities' previous involvement. Importantly, there is no success fee or compensation built into the second engagement that could possibly stand as an incentive for the Monitor to recommend the Kingswood sale (or any other sale) for

approval. Unlike *Nelson Education*, this is not a case where only one secured creditor is apparently benefitting from the proposed transaction. The Sale Agreement will benefit all the stakeholders generally, although in different degrees given their different priorities. Although clearly hindsight, I note that Newbould J. later approved the proposed transaction (*Nelson Education Ltd. (Re)*, 2015 ONSC 5557), about two-and-a-half months later, at no doubt considerable cost to the estate.

[93] In addition, as I will discuss in more detail below, there would be considerable cost and delay in replacing the Monitor at this time. The monitor engagement for MEC is not a simple affair and any new firm would take some time to fully assume that role and prepare a report – likely not even within "at least" two weeks, the delay sought by the objecting parties. Time is not on MEC's side in these urgent circumstances. See *Can-Pacific Farms* at para. 26.

[94] Finally, the s. 36(3)(b) factor – the monitor's approval of the process – is only one of the relevant factors that the court is to consider, among others. None of the s. 36(3) factors have primacy in respect of the court's consideration as to whether a sale should be approved. The previous involvement of the Monitor with MEC is a consideration, however, not a controlling one.

[95] Every sale approval application will be fact intensive toward ensuring that any proposed sale is fair and reasonable, after an appropriate sales process.

[96] I have no concerns arising from A&M's affiliate acting as MEC's financial advisor in the months leading to this proceeding. I decline to exercise my discretion to replace A&M as Monitor in these proceedings.

iii) The SISP

[97] Plateau and Midtown question the appropriateness of MEC filing for *CCAA* protection after having conducted the SISP. They say that the *CCAA* is being improperly used to approve a "quick slip sale" arising from a process that took place outside of the Court's supervision, without the Court's approval and without consultation with MEC's stakeholders.

[98] MEC began taking steps toward finding a solution to its financial difficulties many months before the *CCAA* filing. MEC asserts that, while the Court did not pre-approve the SISP, the SISP was extensive and properly canvassed the market to identify the best and highest value for its business.

[99] As the parties note, this is a classic "pre-packaged" proceeding, or "pre-pack", as it is colloquially known. As in many previous *CCAA* proceedings, most of MEC's restructuring efforts have taken place before the filing of the court proceeding, and the most obvious restructuring path presented now by MEC is the sale to Kingswood arising from the SISP.

[100] There is nothing inherently flawed in a "pre-pack" approach. There are often good reasons why a debtor company may choose such a course of action, more often than not arising from the real or perceived threats or disruptions to a business by pursuing options within a proceeding. The Monitor confirms its own experience and views in that respect, particularly relating to retail operations where it is critical to preserve going concern value.

[101] Here, MEC contends it ran the SISP prior to any *CCAA* proceedings to maintain stability in its business and to promote a going concern solution, all as supported by the Lenders, who were increasingly concerned about their credit exposure in light of the financial crisis faced by MEC. I readily accept that running a retail operation within *CCAA* proceedings, particularly with the uncertainty in the marketplace, both from a general economic view and by reason of the pandemic, would give rise to risk and potential disruption to future operations. I also accept that MEC had good reason to seek to avoid further risks and disruptions to its operations, given its already fragile economic state.

[102] Similar circumstances were considered in *Sanjel Corp. (Re)*, 2016 ABQB 257, where a SISP conducted outside of the proceedings was challenged. In that case, the SISP was conducted by a financial advisor for about four months prior to the *CCAA* filing. At that time, the accounting firm was identified as the potential monitor

and, when later appointed as monitor, recommended court approval of the sale that arose through the SISP.

[103] Justice Romaine discussed the concerns that arise where a court is presented with a "pre-pack" where court approval of a sale that arose from a pre-filing SISP is sought. Her comments are apt here and I would adopt them:

> [70] A pre-filing SISP is not of itself abusive of the *CCAA*. Nothing in the statute precludes it. Of course, a pre-filing SISP must meet the principles and requirements of section 36 of the *CCAA* and must be considered against the *Soundair* principles. The Trustee submits that such a SISP should be subject to heightened scrutiny. It may well be correct that a pre-filing SISP will be subject to greater challenges from stakeholders, and that it may be more difficult for the debtor company to establish that it was conducted in a fair and effective manner, given the lack of supervision by the Court and the Monitor, who as a court officer has statutory duties.
>
> [71] Without prior court approval of the process, conducting a SISP outside of the *CCAA* means that both the procedure and the execution of the SISP are open to attack by aggrieved stakeholders and bitter bidders, as has been the case here. Any evidence or reasonable allegations of impropriety would have to be investigated carefully, whereas in a court-approved process, comfort can be obtained through the Monitor's review and the Court's approval of the process in advance. However, in the end, it is the specific details of the SISP as conducted that will be scrutinized.

[104] Justice Romaine's reasoning was followed by this Court in *Feronia Inc. (Re)*, 2020 BCSC 1372 where Justice Milman accepted the proposal trustee's recommendation in support of a sale achieved through a pre-filing sales process (paras. 50-57). The proposal trustee's affiliate firm had been engaged to assist with that sales process.

[105] The court's comments in *Sanjel* about a pre-filing SISP being more open to attack is certainly evident here.

[106] I will now address the actual financing and SISP process in more detail. Evidence of MEC and A&M Securities' efforts is found in Mr. Arrata's evidence as was supplemented by Mr. Wallis' evidence. Mr. Wallis is a MEC director and Chair of the Special Committee. The Monitor also addresses the financing and SISP process in its First Report.

[107] A&M Securities was engaged to secure new financing in February 2020, principally to replace the Credit Facility which was approaching maturity. Unfortunately, the pandemic wrought havoc with those efforts and MEC quickly moved to form a committee to address those issues. That informal committee was formally constituted as the Special Committee on March 27, 2020 with its mandate to pursue a broad range of strategic alternatives.

[108] Although the financing options being pursued were not successful, it was not for want of effort. The steps that A&M Securities designed to seek the financing, as listed above, can only be described as typical. Government aid programs were considered. Approximately 66 lenders were contacted; the listing of those lenders indicates a broad range of lending institutions, including two co-operatives. A May 12, 2020 term sheet provided to RBC by one lender was considerably below what the Lenders were owed and required first priority security that was not a realistic request from the Lenders' point of view given the financing amount.

[109] Mr. Harding, supported by the Co-op Associations, asserts that MEC could have asked its members for the necessary funding. Mr. Wallis addresses that matter, stating that the Special Committee considered but then rejected that option as impractical. In my view, his reasons are amply supportable and are reasonable in the circumstances: a public plea for such funding was unlikely to garner the very substantial amounts needed to repay the Lenders, even if it could be achieved, which was questionable, while creating negative impacts on MEC's business in the meantime.

[110] Finally, the Special Committee considered that the Lenders were very unlikely to grant an extension of the Credit Facility, without significant improvement in MEC's financial performance that, in the teeth of the pandemic, appeared also very unlikely.

[111] Having exhausted refinancing efforts, the Special Committee and the Board had no choice but to then consider a sale. After interviewing other financial advisors, the Special Committee decided that it was in MEC's best interests to continue with A&M Securities under the SISP, given its expertise and experience with MEC.

[112] Again, the Special Committee and the Board expressly considered whether the SISP should be conducted prior to any *CCAA* proceeding. They decided to do so in order to avoid the likelihood of a distressed-assets sale situation and to preserve MEC's relationships with vendors, customers and service providers with respect to its ongoing business operations in order to preserve going concern value.

[113] As with the refinancing efforts, A&M Securities' design of the SISP included the usual features (as listed above), in that it was structured and implemented in the same or similar manner as is typically done in a SISP in the course of *CCAA* proceedings. No party appearing on this application contended that the SISP steps were inappropriate or lacking, resting on the contention only that they weren't consulted in its implementation.

[114] The list of persons contacted was extensive, including Canadian and US private investment firms, retail conglomerates and even REI, a US co-operative that was in fact the inspiration for MEC in the first place. As stated above, Kingswood's bid was clearly the best bid of the four that MEC received.

[115] The Lenders' support, including under the Interim Financing, is premised on MEC seeking approval of the Kingswood transaction. I note this as a factor, although the Lenders' support is not surprising since the proposed transaction will generate sufficient funds to pay the Lenders in full. The Monitor's liquidation analysis would also suggest that the Lenders would be paid in full under that scenario.

[116] Another relevant factor in the Court's consideration of the adequacy of the SISP is the level of oversight throughout the process.

[117] The Special Committee and MEC's Board, both comprised of well-qualified and experienced business professionals, oversaw A&M Securities' efforts. Both Mr. Arrata and Mr. Wallis fully endorse those efforts as having produced the very best alternative for MEC in the circumstances. I have no reason to question their commercial and business judgment: *AbitibiBowater Inc.*, 2010 QCCS 1742 at para. 71. Mr. Wallis confirms that, despite rumours in the community, no MEC Board

members are receiving any incentives or compensation in respect of the Kingswood transaction. Further, the process was reviewed by the Lenders and their experienced professional advisors, again without objection.

[118] In my view, it is not surprising in the circumstances that the Monitor supports the SISP efforts as being sufficiently robust in the circumstances, particularly with its usual features and oversight. The Monitor states that the SISP is likely consistent with what the Monitor would have recommended in a court-supervised process, with which I agree. It is also worth emphasizing that the entire SISP process from June-September 2020 ran over a 100 day period, hardly a rushed process (i.e., even well beyond the "aggressive timelines" approved in *Sanjel* at paras. 75-77).

[119] I conclude that the SISP was a competitive process, was conducted in a fair and reasonable manner and adequately canvassed the market for options available to MEC.

iv) Harding / Co-Operative Association Issues

[120] Mr. Harding is the spokesperson for the steering committee of the "SaveMEC" campaign, involving who he describes as a "highly motivated, well organized group of Members, seeking to preserve MEC's status as a cooperative association with an operating business". They have been assisted through various online efforts, suggesting support from some 140,000 individuals, and contributions from 2,500 persons toward a legal fund of over $100,000. As I noted on October 2, 2020, the passion of the "SaveMEC" group members is evident, as it was with MEC's original founders.

[121] Like Plateau and Midtown, Mr. Harding seeks an adjournment of "at least" two weeks. He suggests that his group would like to explore opportunities to address MEC's liquidity crisis in the short term. He says that the very short notice given to MEC members in respect of these proceedings is challenging in terms of identifying alternatives; MEC gave notice to its members of this proceeding on September 14, 2020. Mr. Harding is supported in his submissions by the Co-op Associations' counsel.

[122] Mr. Harding indicates some "definitive" sources of funding have already been identified by his group. Unfortunately, none even come close to resolving the very significant financial issues faced by MEC, particularly given the amounts owing to the ever increasingly concerned Lenders who are owed in excess of $80 million in a very uncertain retail environment, MEC's ongoing losses and MEC's required working capital.

[123] Mr. Harding's most significant complaint against the SAVO is that the members will "lose" their substantial financial interest in MEC through their membership. He points to MEC's February 2020 balance sheet that indicated the book value of members' shares was in excess of $192 million.

[124] In my view, this argument has little merit. Each MEC member only stands to "lose" their $5 investment, although I appreciate that collectively, the investment is significant. Based on the evidence presented on this application, the best bid which was received from Kingswood is not sufficient to repay the unsecured creditors in full, let alone provide for any return to MEC's members. Accordingly, assuming the SISP has produced the best financial result in the circumstances, which I accept, MEC members have no real financial interest at this time.

[125] I appreciate that Mr. Harding only seeks a short period of time to confirm whether other more advantageous options are available. This argument also is not persuasive. I consider that the chances of SaveMEC coming up with an option within two weeks to stave off the Lenders, secure funding the cover the losses and necessary working capital and pay the unpaid creditors to be an extremely outside one, however sincere that intention and those efforts may be.

[126] I completely disagree with Mr. Harding that there is no prejudice to MEC, Kingswood or the Lenders if the sale is delayed until his group has a chance to investigate other options. As Mr. Wallis states in his Affidavit, set out below, there is significant prejudice to MEC and its stakeholders in terms of delay, cost, ongoing losses and deal risk. Mr. Harding's group is risking nothing at this point; to the contrary, other broad stakeholder interests are very much "in the money" under the

Kingswood transaction in the sense of it providing recovery to creditors and preserving jobs and business relationships.

[127] I note that the broad stakeholder group who Mr. Harding seeks to represent includes many MEC members who stand to preserve their jobs and redeem the significant value in gift certificates, all by reason of the Kingswood sale.

[128] Mr. Harding also asserts that these *CCAA* proceedings must be conducted in a manner that respects the fundamental freedom of MEC members, namely the "freedom of association", that arises under s. 2(d) of the *Charter of Rights and Freedoms* (the "*Charter*").

[129] It is unusual to face *Charter* arguments in commercial matters or even *CCAA* proceedings. That said, 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 Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 at para. 54, citing *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313. 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.

[130] I cannot see, however, that MEC seeking court protection in its present circumstances offends any rights arising under s. 2(d) of the *Charter*. As MEC's counsel states, the *Charter* does not protect against an organization incurring losses and finding itself in insolvent circumstances, even if the organization is a co-operative.

[131] No one, including Mr. Harding, disputes that MEC qualified to seek court protection under the *CCAA*. Rather, he asserts that MEC members must be able to exercise their democratic right to shape the future of MEC, and particularly, he argues that any decision to sell MEC's assets cannot be made without the approval of MEC's members. The *Co-op Act*, s. 71(2), and MEC's Rules of Co-operation

(8.11) both provide that a sale of the whole or substantially the whole of the co-operative's undertaking requires a special resolution of the members.

[132] Mr. Harding's complaint that the members have been unfairly and oppressively denied participation in this important decision to sell MEC's assets is understandable; however, it but does not change the fact that such participation is a very unwieldly step, particularly with the pandemic, it would delay matters where urgency is required, and its relevance is questionable in any event given that the best evidence is that the members have no financial interest in MEC.

[133] I disagree with counsel for the Co-op Associations that the application of the *CCAA* in the face of the *Co-op Act* is an "unsettled area of law". Cooperatives are able to avail themselves of the *CCAA* if they are insolvent and they otherwise meet the statutory requirements.

[134] The *CCAA* expressly recognizes that participation by corporate shareholders (the equivalent of MEC's members here) toward approving a sale of the assets, is not a requirement before the court can exercise its jurisdiction under s. 36(1):

> 36(1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> [Emphasis added.]

[135] Mr. Harding suggests that MEC's affairs are being conducted in an oppressive manner by this attempt to sell MEC's assets without member approval. I see no utility in embarking upon an analysis of the oppression remedy under s. 156 of the *Co-op Act* in the present circumstances, although I would hasten to add that no such court ordered relief has been formally sought. Mr. Harding refers to the comments of this Court in *Radford v. MacMillan*, 2017 BCSC 1168, aff'd 2018 BCCA 335, concerning the assessment of reasonable expectations in the oppression analysis. In this Court in *Radford*, Justice Masuhara stated that expectations must be "realistic": para. 119.

[136] I hardly think the MEC members could conceivably realistically consider that they, and they alone, would dictate whether a sale would occur, when the co-operative is insolvent and their memberships presently have no value.

[137] It is unfortunate that Mr. Harding appears to be singularly focussed on preserving MEC as a co-operative entity to continue its business. Given the co-operative principle of "concern for community" embraced by MEC as part of its DNA, the "SaveMEC" campaign group and the Co-op Associations might have given some consideration to the fact that the Kingswood sale will benefit many persons in the community. The sale will ensure ongoing employment to most MEC employees, the maintenance of business relationships which support other jobs and repayment of at least some portion of the debt that MEC owes to its many unsecured creditors.

[138] Mr. Harding's application for an adjournment is dismissed.

v) Disclaimed Lease Issues

[139] Plateau and Midtown both seek an adjournment of MEC's application for the SAVO for "at least" two weeks. In addition, both seek an order that MEC produce substantial further documents in relation to the refinancing and sale efforts. Finally, they seek to cross-examine Mr. Arrata and Mr. Wallis on their affidavits.

[140] Plateau and Midtown's objection to the SAVO derives from the extremely unfortunate circumstances that arise from MEC's disclaimer of their store leases (in Calgary North West and Saskatoon respectively).

[141] In its petition materials, MEC has earlier identified that the Sale Agreement with Kingswood did not include an assignment of three leases, including those for the Saskatoon and Calgary North West stores. The Saint-Denis store had already been permanently closed; the Saskatoon and Calgary North West stores had not yet opened.

[142] In Mr. Arrata's Affidavit #1 sworn September 13, 2020, he stated that MEC expected to be disclaiming those leases, with the approval of the Monitor, in accordance with s. 32(1) of the *CCAA*.

[143] As forecast, after the Initial Order was granted, on September 15, 2020, MEC issued notices of intention to disclaim or resiliate all three leases. The Monitor approved these disclaimers in order to "reduce costs and downsize redundant operations". On September 22, 2020, MEC provided its reason for the disclaimer of Plateau's lease, citing its liquidity crisis, that Kingswood had decided not to acquire the leases and that the disclaimer was necessary to enhance the prospects of a viable compromise. The same considerations apply to Midtown's lease.

[144] In the First Report, the Monitor stated that it is also of the view that the disclaimers will enhance the prospect of a viable arrangement and further the restructuring of MEC, as contemplated by the Kingswood Sale Agreement.

[145] On September 30, 2020, Plateau filed a Notice of Application to prohibit the disclaimer of its lease by the deadline, and I assume that Midtown has done likewise.

[146] I agree that both Plateau and Midtown face challenging economic circumstances themselves by reason of the disclaimers. Both landlords have expended substantial sums of money in outfitting their developments for MEC, who was to have been the anchor tenant. Both landlords will suffer significant losses in respect of lost rental revenue and any indirect benefits that might have been derived by MEC's presence in their developments.

[147] Based on my conclusions that the SISP was fair and reasonable in the circumstances, I reject these landlords' request for any delay in approving the Kingswood sale and decline to exercise my discretion to do so. I see no reasonable prospect that these landlords will be in any better position after a delay of two weeks. I also see no need for further document production beyond the

documentation that MEC provided on September 26, 2020 in response to Plateau and Midtown's applications.

[148] Kingswood's decision not to take up these leases was made independently of MEC and, on the face of things, aligns with what Kingswood envisions by way of its future operations. The Sale Agreement provides for a *contraction* of MEC's operating stores to at least 17 locations; in that event, it hardly makes business sense that, at the same time, Kingswood would also agree to incur the considerable expense of fixturing, outfitting, staffing and supplying one or two *new* locations. None of the other three bidders expressed any interest in these locations either.

[149] As with Mr. Harding's argument, I also reject Plateau and Midtown's assertions that little or no prejudice arises from any adjournment. To the contrary, the unsecured creditor pool will be enhanced by an expeditious sale which obviates any further weekly losses being incurred by MEC. These landlords stand to gain by that enhanced pool of money in respect of their claims that will no doubt be filed, claims that will not increase whether or not the SAVO is granted. Plateau and Midtown have solely focussed on process issues, to the exclusion of other interests at play. They have failed to justify their position.

[150] Plateau and Midtown's arguments appear to conflate MEC's application for the SAVO with their right to contest the disclaimers. They suggest that, effectively, no sale can be considered by the court until the disclaimer issue is determined. No authority was cited in support for this proposition. Indeed, the sale application might just as easily have been considered and the Kingswood sale approved even before any disclaimer notice was issued.

[151] As MEC's counsel notes, MEC decided to be forthright from the outset in signalling this very bad news to these landlords.

[152] I appreciate that granting the SAVO to allow a sale of substantially all of MEC's assets to Kingswood can be interpreted as effectively determining the disclaimer issue. It will be difficult for the landlords to argue that the disclaimer

should be prohibited so as to allow MEC, which no longer operates its business, to take up the lease.

[153] However, this ignores the simple reality of the situation. MEC cannot force a buyer to take up these leases. In addition, MEC's dire financial circumstances, as revealed on this application, would hardly have supported a business decision to start up these stores even if the SAVO is not granted. There is no realistic chance that the Lenders would support such an endeavour under the Credit Agreement. Further, I see no basis upon which this Court would effectively require MEC to spend millions of dollars on these new stores under its *CCAA* jurisdiction. It is difficult to imagine that this Court would, in balancing the various interests at play in relation to the benefits of the Kingswood sale, require such a result to the detriment of the many stakeholders other than these two landlords.

[154] I would add that five other MEC landlords also appeared on this application. They indicated that they were not opposed to the granting of the SAVO or were not taking any position. I suspect that they are all hoping that their store locations will be viewed favourably by Kingswood when the at least 17 store "winners" are chosen to continue operations. If any of them are not in the "winner" category, any losses will be added to the unsecured creditor group to share in the net recovery under the Kingswood sale.

[155] Plateau and Midtown's applications for an adjournment, document discovery and cross-examination of Mr. Arrata and Mr. Wallis are dismissed.

vi) Should the Kingswood Transaction be Approved?

[156] The Court's approach in considering a proposed sale under s. 36 of the *CCAA* is informed by the *CCAA*'s statutory objectives, as was discussed in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60.

[157] The main objective is to avoid, if possible, the devastating social and economic costs of a liquidation of a debtor's assets: *Century Services* at para. 15. In achieving these remedial goals, the court must be cognizant of the various interests

at stake, including the debtor, the creditors, employees, counterparties, directors and shareholders: *Century Services* at paras. 59-60. As evident from my discussion above, many of those stakeholder interests were represented on this application and expressed their views. However, the court must also recognize and give effect to, to the extent possible, all stakeholder interests whether present on this application or not.

[158] As with many applications for relief under the *CCAA*, the Court must strive to balance what are often competing interests and objectives. That exercise is often within the rubric of the need to conclude that the relief is "appropriate". Appropriateness is assessed by inquiring whether the purpose of the order sought and the means it employs advances the statutory objectives or remedial purpose of the *CCAA*. As Justice Deschamps stated in *Century Services* at para. 70, the chance of achieving that goal is enhanced when "all stakeholders are treated as advantageously and fairly as the circumstances permit" [Emphasis added.]

[159] The relevant factors to be balanced and considered under s. 36(3) are reflective of a consideration of what can be, and is on this application, a broad range of interests.

[160] I have concluded that the refinancing efforts and the SISP were conducted in a fair and reasonable manner. There is no basis upon which to second guess the adequacy of the substantial efforts that were made by the Board, the Special Committee and A&M Securities in that respect.

[161] The Kingswood transaction that arose from that competitive process was clearly the best from the few bids that were received. All other bids paled in comparison, particularly in relation to the purchase price and commitments to ongoing store operations and employee retention. As noted in the Monitor's First Report, the consideration that MEC will receive is substantial. While the base purchase price is $120 million, the total indicative purchase price is actually $150 million, after accounting for the substantial liabilities that Kingswood will

assume in respect of vendor trade payables, employee obligations and gift card obligations.

[162] The process conducted outside of this *CCAA* proceeding was not a rushed affair. I accept that many of the stakeholders on this application consider that they have been ignored or disadvantaged by reason of the lack of prior consultation and the short notice given to them to respond to this application. In my view, MEC has provided reasonable and understandable explanations for proceeding in that manner. The Monitor provides further support in the First Report in stating that to proceed otherwise would have created significant uncertainty and disruption in MEC's day to day business and put MEC's business operations and a potential going concern sale at unnecessary risk.

[163] As the Monitor notes, the perfect financial storm faced by MEC, still exacerbated by the risks posed by the ongoing pandemic, does not give MEC the luxury of time here. What is needed is a timely solution, after, of course, the Court has fully reviewed the evidence and is satisfied that the requested relief is appropriate. There is no evidence to suggest that MEC's Board or Kingswood have manufactured the need for what is described as urgent relief by approval of the SAVO.

[164] I have also concluded that, although some minor delay could be accommodated with the time limits under the Restructuring Agreement and the Sale Agreement, the perceived benefits do not outweigh the risks that follow. I accept the evidence of Mr. Wallis as to why it is urgent to approve the Sale Agreement as soon as possible. He states:

> 45. [MEC] believe[s] that the approval of the Sale Agreement is a matter of urgency. Any extension or delay in obtaining Court approval and Closing may have serious and detrimental consequences for its business and stakeholders, including, but not limited to, its employees, members and suppliers. This is particularly the case given the extent of [MEC's] ongoing weekly operating losses, as shown in [MEC's] Cash Flow Forecast, and the importance that any potential purchaser of the Business would have to close this transaction in sufficient time to take advantage of the coming holiday sales period.

> 46. The projections reflect an erosion of the borrowing base under the Interim Financing Facility and cash availability becomes very tight under the borrowing base calculation towards the end of October. It is therefore imperative that matters progress as quickly as possible so that MEC's customers, suppliers, landlords and employees have confidence that MEC will continue as a successful going concern.
>
> 47. Given the recent rise in COVID-19 transmissions across Canada, there is also a real and unpredictable risk that increased COVID-19 rates and/or restrictions would result in further deterioration in sales below those set out in the Updated Cash Flow Forecast provided by the Monitor, which would in turn jeopardize the availability of the Interim Financing Facility or ability to meet the closing condition of requiring repayment of the Credit Facility. The Lenders have confirmed they require a timely completion of the Transaction.

[165] The work to be done to conclude all matters under the Sale Agreement and move toward a closing of the transaction will no doubt be complex and take some time. Many contractual matters need to be concluded by Kingswood with stakeholders, such as employees, landlords and suppliers, in advance of the closing. As noted by MEC and the Monitor, it is critical to the success of the ongoing business that the transaction close as soon as possible so that Kingswood can order additional inventory in advance of the "Black Friday" and holiday shopping season. Kingswood is able to close the transaction by mid-late October 2020.

[166] The Monitor has also conducted a liquidation analysis to compare the results of the Kingswood sale to that which might be achieved by an orderly liquidation of MEC's assets through a bankruptcy and/or receivership. Under the Kingswood sale, estimated recovery to unsecured creditors is between $0.30-50 on the dollar; in a liquidation, estimated recovery to unsecured creditors is between $0.30-60 on the dollar. What is significant as between these two scenarios, however, is that in a liquidation, there would be far greater creditor claims.

[167] The Kingswood sale avoids the devastating impact of a liquidation on employee's jobs, preserves many of the leases, trade supply agreements and service agreements, and provides value to many unsecured creditors by Kingswood's full assumption of liabilities. These latter considerations figure greatly in the Court's decision as to whether a sale should be approved. That decision is made

toward achieving the main statutory objectives under the *CCAA* which are to allow the business to continue, with all the economic, societal and community benefits that that option affords. Many of the indirect benefits are unquantifiable.

[168] I agree with the Monitor that, in all the circumstances, the Kingswood sale is commercially reasonable and, on balance, is more beneficial to MEC's stakeholders, and particularly its creditors, than any other alternative. I grant the SAVO on the terms sought.

Representative Counsel

[169] Mr. Harding also sought an order under s. 11 of the *CCAA* that Victory Square Law Office be appointed as representative counsel for MEC's members. He also sought a charge of $100,000 under s. 11.52 of the *CCAA* to secure anticipated fees in respect of participation, ranking behind the four court-ordered charges but ahead of the Lenders' security.

[170] I conclude that this relief might have been more seriously considered if there was any indicative value held by the MEC members and, if these proceedings had taken a different path where the members' interests were in play.

[171] Having concluded that the Kingswood sale should be approved, which will divest MEC of substantially all of its assets in the short term, I see little utility in granting this relief. As I discuss above, this sale will garner some net proceeds for the unsecured creditors, leaving no recovery for MEC's members.

[172] I would add that 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.

[173] Mr. Harding is, of course, welcome to continue to participate in these proceedings on behalf of the "SaveMEC" group, as he wishes, which I assume can be done with counsel given the funds already raised.

[174] Mr. Harding's application for appointment of representative counsel and a related charge is dismissed.

FINAL THOUGHTS

[175] I accept that this decision is a disappointing conclusion to the fate of what was an iconic Canadian retailer who has inspired the passion and commitment of many Canadians for outdoor activity. Like many Canadian retailers, MEC has fallen victim to economic forces, and perhaps questionable business judgments made years ago, all exacerbated by the cataclysmic and unprecedented impact of the COVID-19 pandemic throughout most of 2020.

[176] This result, however, will ensure the continuation of MEC's business, albeit in another organization. While this sale transaction is not wrapped in the Canadian flag, the best evidence is that Kingswood will continue to support MEC's core values and principles, being community engagement and promotion of a healthy outdoor lifestyle. More importantly, the ongoing operations will support Canadian individuals and their families and also businesses where jobs are disappearing quickly given ongoing economic disruptions. Creditors will be paid, or paid a substantial portion of what they are owed, no doubt to the relief of many.

[177] This is the core objective under a *CCAA* proceeding, and while that objective was not achieved here in a perfect manner, it was still achieved in a reasonable manner. That is all that anyone can ask.

"Fitzpatrick J."