

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

**IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*,  
R.S.C. 1985, c. B-3, AS AMENDED**

**AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL  
OF THE BODY SHOP CANADA LIMITED, IN THE CITY OF TORONTO, OF THE  
PROVINCE OF ONTARIO**

**AIDE-MÉMOIRE**

(For scheduling of motion for Representative Counsel for Terminated Canadian Employees)

April 24, 2024

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Counsel to Stephanie Hood and other employees  
and the Proposed Representative Counsel for  
Terminated Canadian Employees

1. Koskie Minsky LLP ("**KM**"), counsel to approximately 40 terminated employees of The Body Shop Canada Ltd. ("**TBS Canada**" or the "**Company**"), files this Aide-Mémoire in response to the Aide-Mémoire served by the Company yesterday evening and in support of its position that the motion to appoint Representative Counsel (the "**Representative Counsel Motion**") should be heard on May 20, 2024 or otherwise as soon as practically possible.

2. While KM is willing to reasonably accommodate opposing lawyer vacations and other availability issues, the parties are far apart on the hearing date: May 20, 2024 by KM versus July 9 or 10, 2024 by the opposing parties.

3. KM makes three submissions:

- (a) the arguments and positions for the motion are already well-developed and in an advanced state;
- (b) caselaw from the Commercial List holds that the appointment of Representative Counsel should occur early in a proceeding, not later; and
- (c) the schedule proposed by KM is fair and reasonable, and the motion should not be delayed.

**a) This motion is already essentially briefed – there is no justification for an expansive schedule**

4. The appointment of Representative Counsel in this case is not a new issue. TBS Canada filed its NOI on March 1, 2024 and immediately began to close 33 stores and terminate 220 employees. After being consulted by some of the terminated employees, on March 11, 2024, KM

had a phone discussion with counsel to TBS Canada and the Proposal Trustee and proposed a consent arrangement for the appointment of Representative Counsel. Counsel for the Company and the Proposal Trustee said they would oppose the appointment of Representative Counsel.

5. On March 14, 2024, Counsel for the Company sent a lengthy letter to KM outlining their opposing arguments. KM responded to the Company's lawyer's letter by its letter of April 10, 2024. KM served its motion record for the appointment of Representative Counsel on the Service List on April 12, 2024

6. The issue on the motion for a Representation Order is discrete, and the arguments have essentially already been set out in KM's motion materials, KM's correspondence of April 10, 2024, and the opposing arguments are in the lengthy letter from Davies dated March 14, 2024. There is minimal additional work to do to complete the Court materials for either side and no justification for the extended schedule.

**b) Case law from this Court holds that the appointment of a representative counsel should occur earlier in a proceeding, not later**

7. As held by Justice Pepall in *Canwest Publishing Inc.*, 2010 ONSC 1328 ("**CanWest**"), "it is a false economy to watch and wait" for the appointment of a Representative Counsel and it is "unhelpful to the needs" of employees:

[24] **In my view, this watch and wait suggestion is unhelpful to the needs of the Salaried Employees and Retirees and to the interests of the Applicants. I accept that the individuals in issue may be unsecured creditors whose recovery expectation may prove to be non-existent and that ultimately there may be no claims process for them.** I also accept that some of them were in the executive ranks of the LP Entities and continue to benefit from payment of some pension benefits. ***That said, these are all individuals who find themselves in uncertain times facing legal proceedings of significant complexity. The evidence is also to the effect that members of the group have little means to pursue representation***

*and are unable to afford proper legal representation at this time. The Monitor already has very extensive responsibilities as reflected in paragraph 30 and following the Initial Order and the CCAA itself and it is unrealistic to expect that it can be fully responsive to the needs and demands of all of these many individuals and do so in an efficient and timely manner.* .... It would be a considerable benefit to both the Applicants and the Salaried Employees and Retirees to have Representatives and representative counsel who could interact with the Applicants and represent the interests of the Salaried Employees and Retirees. In that regard, I accept their evidence that they are a vulnerable group and there is no other counsel available to represent their interests. Furthermore, a multiplicity of legal retainers is to be discouraged. *In my view, it is a false economy to watch and wait. Indeed the time taken by counsel preparing for and arguing this motion is just one example. The appointment of the Representatives and representative counsel would facilitate the administration of the proceedings and information flow and provide for efficiency.* [emphasis added]

8. Further, this principle was emphasized in *Muscletech Research and Development Inc. (Re)*, (2006), 2006 CarswellOnt 4929 (S.C.), where the Court was critical of parties who failed seek a representation order early in insolvency proceeding.

*c) The schedule proposed by KM is fair and reasonable, and the motion should not be delayed.*

9. KM proposed a schedule with a motion hearing for May 20, 2024. KM's schedule with its proposed dates in the middle column:

Event	Moving Party Proposed Date	Company's Proposed Date
Moving Party Motion Record served	April 12, 2024	
Moving Party Supplemental Motion Record served	April 23, 2024	No change
Scheduling Case Conference	April 24, 2024	Date subject to request for extension based on contents of Supplemental Motion Record
Responding/ Company Motion Record due	April 29, 2024	May 10, 2024
Proposal Trustee's Report due		May 15, 2024

Reply Motion Record due (if any)	May 1, 2024	May 22, 2024
Company Stay Extension Motion		May 30 or 31, 2024
Cross Examinations on filed affidavits	May 6-7, 2024	May 27-31, 2024
Proposal Trustee's Supplemental Report due		June 5, 2024
Moving Party Factum due	May 9, 2024	June 14, 2024
Responding Factum due	May 14, 2024	June 28, 2024
Reply Factum due (if any)	May 16, 2024	July 5, 2024
Motion Hearing	May 20, 2024	July 9 or 10, 2024

10. On April 23, 2024, the Proposal Trustee proposed a significantly more extended schedule in the far right column for a hearing on July 9 or 10, 2024 citing a couple of reasons, including to accommodate opposing lawyer vacations.

**The Terminated Canadian Employees need representation in this proceeding**

11. The TBS Canada workforce is comprised of mostly female retail workers who were paid modest incomes. They are especially vulnerable. Unlike other insolvency cases where a representation order is prearranged with a law firm to coincide with an insolvency filing and the mass termination of employees, in this case, 220 employees were left unorganized by the Company and left on their own to try and figure out the amount and composition of their claims, issues pertaining to the Wage Earner Protection Program, and the complex matters in the TBS Canada insolvency proceeding as chronicled in the first Endorsement of this Court, dated March 4, 2024.

12. Over the weeks following the mass termination of their employment, about 40 employees retained KM requesting representation and advice in the TBS Canada Proposal proceedings. Many of those employees told KM they felt "helpless" in the insolvency proceeding, and also requested

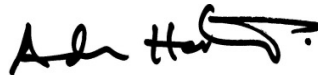
KM to bring forward a representation motion as soon as possible so that all other terminated employees could be represented.

13. The Terminated Canadian Employees are a significant creditor group who all need representation in this complex proceeding so that their rights and claims are protected and advanced, and not prejudiced or undermined. KM has calculated the claims of 30 employees to be \$862,000. The claims of all 220 employees will be approximately \$2M to \$2.5M. *Inter alia*, all these employees need advice on sale of business proposals by the Company that it says it is pursuing, recoveries for creditors, any vote on a Proposal and negotiations relating thereto, or for a liquidation in case of a bankruptcy. The rest of the employees need their claims calculated by their own counsel, and all this work needs to proceed now and not be delayed.

14. If the main issue is costs of the Representative Counsel, then the appointment can be made now and a motion scheduled to determine the issue of costs later.

15. In accordance with the caselaw of this Court and the advanced state of the submissions for this motion, KM requests that the Court schedule the Representative Counsel motion in accordance with the timetable proposed by KM above or as soon as reasonably possible.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 24<sup>th</sup> day of April, 2024.



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**Andrew Hatnay**



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**James Harnum**



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**Abir Shamim**

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Proceeding commenced at **TORONTO**

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