SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

ENDORSEMENT

COURT FILE NO.: BK-24-03050418-0031 **DATE:** July 4, 2024

NO. ON LIST: 2

TITLE OF PROCEEDING:

In the Matter of The Body Shop Canada Limited

BEFORE: Justice Osborne

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
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For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info
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For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Jane Dietrich	Proposal Trustee Counsel	jdietrich@cassels.com
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ENDORSEMENT OF JUSTICE OSBORNE:

Representative and Representative Counsel for Terminated Employees: Relief Sought and Positions of the Parties

[1] Ms. Stephanie Hood seeks an order appointing her as Representative of all terminated employees of The Body Shop Canada Limited ("TBS Canada" or "the Company") who were employed by TBS Canada and terminated on or about March 1, 2024 and afterward (the "Terminated Canadian Employees") and who are owed and have claims in respect of termination and severance pay, health benefits, and/or other amounts (the "Claims"). She asks to be made the Representative in this *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), proceeding or in any other insolvency proceeding in relation to TBS Canada.

[2] Ms. Hood also seeks an order appointing Koskie Minsky LLP as Representative Counsel to the Terminated Canadian Employees and directing that the mandate of Representative Counsel be as set out in the Notice of Motion. This mandate includes pursuing the application of *Wage Earner Protection Program Act* ("*WEPPA*") claims on behalf of the Terminated Canadian Employees, representing the Terminated Canadian Employees in the Proceedings, and advancing their Claims for voting and distribution purposes in this or any other insolvency proceeding involving TBS Canada.

[3] Finally, Ms. Hood seeks as terms of the proposed order specific terms providing that:

a. all Terminated Canadian Employees will be represented by Representative Counsel unless they opt out of representation by that firm within a fixed period of time; and

b. neither the Representative nor the Representative Counsel shall have any liability in relation to the fulfilment of their proposed respective duties in carrying out the provisions of the proposed order, except for claims of gross negligence or wilful misconduct.

[4] The motion materials as filed provided that the opt out period within which Terminated Canadian Employees were required to opt out of representation by Representative Counsel was seven days. They also provided that the fees and disbursements of Representative Counsel were to be paid by the Company.

[5] The Motion was opposed by TBS Canada, various stakeholders, including landlords, and by the Proposal Trustee.

[6] Given the objections of various stakeholders to the relief sought, and in particular to the terms of the proposed order set out above (among others), proposed Representative Counsel advised the Court at the hearing of this motion that the relief sought was being amended to provide that the opt out period would be extended to 30 days, and that fees and disbursements of Representative Counsel were no longer sought to be paid by the Company or the estate. Proposed Representative Counsel advised that, if appointed, Representative Counsel may in the future seek court approval of fees to be paid from amounts otherwise payable to Terminated Canadian Employees, but that in no event would such fees be sought from the Company or the estate.

[7] With those two amendments to the relief sought, TBS Canada and the Proposal Trustee advised that they took no position on whether the Court ought to exercise its discretion to appoint the Representative and Representative Counsel, subject to two caveats. First, they maintained their position that the relief sought was unnecessary in this proceeding and would lead to unnecessary expense, even if that expense was borne by the employees themselves, such that the balance of convenience did not favour the relief sought. Second, if the relief was granted, they maintained their objections to the immunity from liability sought by proposed Representative Counsel.

[8] For the reasons that follow, the motion is dismissed.

The Test

[9] This Court has the authority to appoint representatives and representative counsel to terminated employees in insolvency proceedings: subsection 183(1) of the *BIA*. Subsection 126(2) of the *BIA* expressly contemplates the appointment of a "court-appointed representative" for "workers and others employed by the bankrupt" with respect to preparing a group Proof of Claim for all employees.

[10] Rule 10.01 of the *Rules of Civil Procedure* describes the proceedings and circumstances in which a representation order may be made.

[11] Justice (now Chief Justice) Morawetz of this Court has held that Representative Counsel should be appointed to enable vulnerable stakeholders (in that case, employees and retirees) to meaningfully participate in CCAA proceedings that directly affect them: *Nortel Networks Corporation (Re)* (2009), 55 C.B.R. (5th) 114 (Ont. S.C.) ("*Nortel*"), at paras. 13-16.

[12] That approach was followed by this Court in *CanWest Publishing Inc. (Re),* 2010 ONSC 1328, 65 C.B.R. (5th) 152 ("*CanWest*"), at paras. 23-24 (and this approach has been followed in other *CCAA* cases[1]).

[13] It is preferable that a representation order be issued early in the proceedings for the benefit not only of the directly affected employees and retirees, but indeed for all stakeholders. Such orders are appropriate even where there is a possibility that the individuals in issue may be unsecured creditors whose recovery may prove to be nonexistent and that, ultimately, there may be no claims process for them: *CanWest* at paras. 23 – 24.

[14] Similar representation orders have been made under the *BIA*: see *Foodora Inc.,* (8 July 8 2020), Toronto, No. BK-31-2641224 (Ont. S.C.); *The RedPin.com Realty Inc.* (11 September 2008), Toronto, No. CV-18-59964400CL (Ont. S.C.); and *Roman Catholic Episcopal Corporation of St. John's* (21 February 2022), No. 24092 (N.L. S.C.).

[15] Justice Pepall (as she then was) summarized in *CanWest*, at para. 21, the appropriate factors to be considered in a determination of whether a representation order is appropriate:

a. the vulnerability and resources of the group sought to be represented;

b. any benefit to the companies under CCAA protection;

c. any social benefit to be derived from representation of the group;

[1] See, for example, *Target Canada Co. (Re),* 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 60-61*; U.S. Steel Canada Inc. (Re),* 2014 ONSC 6145, 20 C.B.R. (6th) 116, at paras. 34-42; *Catalyst Paper Corporation (Re)*, 2012 BCSC 451, 89 C.B.R. (5th) 292; *Fraser Papers Inc. (Re)*, 2009 CanLII 55115 (ON SC); *Hollinger Canadian Publishing Holdings Co. (Re)*, 2010 ONSC 4269, at para. 5; and *In the Matter of the Proposal of Metroland Media Group Ltd*., 2023 ONSC 5805 ("*Metroland*").

d. the facilitation of the administration of the proceeding and efficiency;

e. the avoidance of multiplicity of legal retainers;

f. the balance of convenience and whether it is fair and just including to the creditors of the estate;

g. whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and

h. the position of other stakeholders and the Monitor.[2]

Analysis of Factors as applied to this Case

[16] The background for, and context of, this bankruptcy proceeding are set out in my earlier endorsements in this matter. Defined terms in this Endorsement have the meaning given to them in those earlier endorsements and/or the motion materials, unless otherwise stated.

[17] TBS Canada filed a Notice of Intention to make a Proposal following on unforeseen steps taken by its UK parent to complete a cash sweep of the accounts of TBS Canada, thereby eliminating instantly all of its liquidity while at the same time failing to remit payment for amounts owing to the vendors, suppliers, and landlords of TBS Canada. The effect on TBS Canada of those steps was immediate and profound: it could not continue to carry on business in the circumstances, closed 33 retail stores (approximately one third of the total stores), and suspended online sales.

[18] One of the unfortunate results of all of this was that approximately 220 Canadian employees were terminated. Of those, approximately one quarter were head office salaried employees and approximately three quarters were store level employees paid on an hourly basis.

[19] Of the Terminated Canadian Employees, 38 (including the proposed Representative Ms. Hood), have already retained the firm of proposed Representative Counsel.

[20] Collectively, the Terminated Canadian Employees have claims in respect of severance pay, vacation pay and other benefits, in the approximate amount of $2.1 million.

[21] Despite the able submissions of proposed Representative Counsel, who is amply qualified to perform that role in an appropriate case, I am not persuaded that the *CanWest* factors are satisfied here.

[22] In my view, this case is distinguishable on its facts from those on which the proposed Representative relies. In particular, and while I readily acknowledge the very real impact of the terminations on those employees and their families, this proceeding, and the claims or potential claims of the Terminated Canadian Employees, are at present, and are anticipated to continue to be, relatively straightforward. This is so even if TBS Canada is granted continuing creditor protection pursuant to the *CCAA* rather than in this NOI Proceeding.[3]

[23] I am not persuaded that on the particular facts of this case, there will be any material savings of cost or time or that the process will be simplified or streamlined. Importantly, I am not persuaded that any of the Terminated Canadian Employees will be prejudiced by the absence of a Representative or Representative Counsel

[2] *CanWest*, at para 21. See also *Nortel*, at paras. 7, and 13-15.

[3] That anticipated motion for protection under the *CCAA* is the reason the moving parties seek the representation order in this proceeding, "or in any other insolvency proceeding involving the Company".

or that an analysis of the CanWest factors, considered holistically and in the aggregate, favours the appointment of a Representative or Representative Counsel.

[24] I pause to observe what in my view is obvious from *CanWest* itself and the numerous subsequent cases that have considered that decision and the issue: the factors enumerated by Pepall J. (as she then was) are neither exhaustive nor mandatory. Factors not enumerated in *CanWest* may be relevant to the analysis in a particular case, and each and every one of the CanWest factors need not be satisfied before the court can conclude that the appointment of Representative Counsel may be appropriate. Rather, as Pepall J. stated, the factors enumerated are considerations in what is to be a holistic analysis informed by the particular circumstances of each case.

[25] Moreover, in this case, counsel for the moving parties made vigourous submissions with respect to the two terms of the proposed order challenged by the company, the Proposal Trustee and the other stakeholders as being inappropriate, even if the representation order were made: expansive immunity from liability for the Representative and Representative Counsel, and a mandatory opt-out mechanic for the Terminated Canadian Employees, rather than an opt-in structure. Counsel for the moving parties submitted that each of these terms was critical to the relief sought, such that if this Court were not inclined to grant the proposed order with both of those terms included, the terms of representation would be ineffective and unworkable, such that that Court should dismiss the motion altogether.

[26] While I do not agree that a representation order can be or is ineffective and unworkable without these terms in an appropriate case, I would not be prepared to grant them in this particular case, even if I were otherwise persuaded that a representation order was appropriate.

[27] The proposed order would require Terminated Canadian Employees to proactively opt out of joint representation (now within 30 days), failing which they would be deemed to be represented by the Representative and Representative Counsel and, effectively, be "bound as part of the class". The company, the Proposal Trustee and other stakeholders such as the landlords, submit that the opposite mechanism should be imposed: Terminated Canadian Employees should have the ability to opt in if they elect to do so, but should not be compelled to do so.

[28] I recognize that there are many insolvency cases (both NOI and *CCAA* proceedings) in which Representative Counsel has been appointed, and in which proposed class or group members have been required to opt out, failing which, by default, they were included in the group or class. I also recognize and agree with the submission made by counsel for the moving parties to the effect that in many cases, this makes good sense, ensuring that the class or group can be bound by positions taken and determinations made in the proceeding so that the efficiencies and benefits that are said to be the rationale for such an order in the first place can actually be realized.

[29] An opt-out mechanic may also be appropriate in circumstances where the fees of representative counsel are being borne by the company: in exchange for incurring that cost, the company wants the benefit of the default of inclusion in the class or group. That factor falls away where the company is not bearing those costs.

[30] However, that is not this particular case. Here, the universe of potential class members is relatively small (approximately 220), of which approximately one seventh have already "opted in" by choosing individually to retain the proposed Representative Counsel. The others have not elected to do so. Interestingly, the evidence is that very few of them have even made inquiries about their claims or potential claims to the company or to the Proposal Trustee, notwithstanding the ability to do so through promoted websites, contact telephone numbers and other means.

[31] Moreover, the evidence on this record suggests that the claims or potential claims of the Terminated Canadian Employees are and will be relatively straightforward. The company is not currently anticipating further

headcount reductions, nor has it proposed or implemented any changes to the terms and conditions of employment of the current employees, other than making retention payments to certain key employees.

[32] Most of the Terminated Canadian Employees did not have claims for accrued vacation pay and other benefits. The claims they do have have been identified and calculated. Upon receiving the motion materials, counsel for TBS Canada delivered to proposed Representative Counsel a series of inquiries, including a request to identify the Former Employees who had already retained that firm, in order that TBS Canada could address their respective employment claim values. Proposed Representative Counsel did so, and also provided to the company a list of the employment claim calculations prepared by counsel and an accountant, whom they had retained.

[33] There are only two groups within the Terminated Canadian Employees: those paid hourly and those paid by salary. All were paid their wages or salary in accrued and unused vacation pay as at the date of their termination of employment. There are no unionized employees, no retirement or pension plans, and no defined-benefit plans. There are not, unlike in a number of the cases on which the Moving Parties rely, complex pension issues involving actuarial evidence or the calculation of present value pension obligations.

[34] Accordingly, the claims and potential claims relate to statutory termination and severance pay, pay in lieu of health benefits coverage, group RRSP contributions, vacation pay, bonuses, and, with respect to some employees, pay in lieu of reasonable notice at common law.

[35] TBS Canada, together with the Proposal Trustee, has performed its own calculations of those claims which, as noted above, are estimated to total approximately $2.1 million. In so doing, the company and the Proposal Trustee applied uniformly the rules and principles for retail employment claims established in the recent *Nordstrom Canada Retail Inc. (Re)*, Toronto, CV-23-00695619-00CL (Ont. S.C.), insolvency proceeding (which was managed by the Chief Justice of this Court) to assess the employee claims here.

[36] Perhaps ironically, the calculations performed by the company and the Proposal Trustee yield higher claims than those performed by proposed Representative Counsel in respect of 26 of the 38 former employees already represented. In the aggregate, and while recognizing that the assessments are provisional and preliminary on both sides, the delta between the two calculations is approximately $460,000, with the calculations performed by the company and the Proposal Trustee yielding the higher result. That delta represents almost 25% of the estimated aggregate claims in their entirety.

[37] Proposed Representative Counsel submits that it can provide assistance in this case in a number of ways. In my view, however, much of that work has already been done or is being done.

[38] As noted above, the preliminary assessment of the relevant claims has already been completed. The company held a town hall meeting on the Filing Date, provided termination letters to all former employees that gave them a single point of contact for any inquiries, and issued a press release with directions to source additional information concerning this proceeding, and information regarding claims. The Proposal Trustee has also created a dedicated webpage with information for former employees.

[39] Once the company makes final determinations about the claims of Terminated Canadian Employees, it intends to send to each such individual an employee claims package that includes a single, omnibus proof of claim reflecting the aggregate claim of all Former Employees; a letter explaining the single claim and advising recipients that they may (but are not required to) submit their own proof of claim; a summary of the Former Employee's individual entitlement and how it was calculated; and contact information for the Proposal Trustee to address any questions that the Former Employee may have in respect of the single claim or individual entitlement. The Proposal Trustee is committed to assisting the company in this process.

[40] In the result, and for these reasons, I am not satisfied that the process will be streamlined or simplified if the relief is granted (such as might be the case in a situation involving thousands of employees, or any large number of employees with unique and complex claims). I am also not persuaded that any Terminated Canadian Employees will be prejudiced if the relief is not granted. The company and the Proposal Trustee are able (and willing) to field inquiries from former employees, of which there have been very few to date. In any event, the company and the Proposal Trustee have put in place mechanics to deal with future inquiries and issues if they arise. They have also engaged with Service Canada in respect of possible *WEPPA* claims notwithstanding the position taken by Service Canada that such benefits are not available in the circumstances of this case.

[41] In addition, there is no evidence of significant diverging interests between or among different employee groups, such as was present in many of the cases relied upon by the moving parties in which Representative Counsel was appointed. In those cases, diverging interests included, for example, groups of unionized versus non-unionized employees, as well as complex pension value issues and obligations. In unionized environments, the issuance of representation orders can operate so as to equalize the playing field between unionized employees (who already have the benefit of group representation through their union by default) and nonunionized employees who might otherwise be unrepresented. See, for example: *CanWest*, *Nortel*, and *Metroland.*

[42] Finally, with respect to the proposed fees of Representative Counsel, the moving parties have been clear as noted above, that they will not seek to have any fees or disbursements borne by the Company or the estate. However, and not surprisingly, they advised that they may in the future seek Court approval for fees and disbursements from amounts otherwise payable to the Terminated Canadian Employees. It is expected that there will be distributions in the future.

[43] Proposed Representative Counsel has declined to reveal in the public record, or to disclose to the company and the Proposal Trustee, its proposed fee arrangements with respect to Terminated Canadian Employees it would represent if the proposed relief is granted.

[44] I accept the submission of the responding parties that where the claims of the individual Terminated Canadian Employees are expected to be relatively modest, the fact that they will likely be subjected to what is in effect a mandatory discount to the amounts they would otherwise recover (albeit undisclosed as to quantum) - which is the practical effect of the proposed opt-out mechanic - is another factor favouring an opt-in mechanic rather than an opt-out.

[45] Since the amounts at issue are modest, and particularly since the preliminary calculations from the Company are higher than those of the accountant retained by proposed Representative Counsel, and further that in any event, the claims are relatively straightforward, it is reasonable to expect that some employees may elect to receive the gross amount of their claim as offered by the company. Moreover, those who do not so elect are not prejudiced: they are free to opt-in to the representative group if they wish, or retain their own counsel, and in either event have the benefit of that advice.

[46] For all of these reasons, I am not persuaded that it would be appropriate to include as a term of the proposed order the opt out mechanic, even if it were granted. As noted above, the moving parties submit that there is no point in granting the motion without that term since, in their submission, many employees would not proactively opt in, and the benefits of having Representative Counsel would not be achieved.

[47] Finally, I accept the submission of the responding parties that the proposed scope of immunity from liability is too broad in this case. It would seek to immunize the Representative and Representative Counsel from any liability related to “its duties in carrying out the provisions of [the order sought]”.

[48] The moving parties submit that such immunity, or limitation on liability, is routinely granted in representation orders made in insolvency or bankruptcy proceedings, as well as in class proceedings. They further

submit that this term is also essential and they do not pursue the representation order at all if this is not a term included.

[49] They submit that such immunity is appropriate for Court officers, such as monitors, receivers, proposal trustees or representative counsel. Such immunity is common and well-founded for court officers such as monitors, receivers, and proposal trustees. Those officers of the Court have a mandate from, and report to, the Court. Monitors, for example, are often referred to as the "eyes and ears of the Court". While representative counsel clearly have duties to the Court (as indeed do all counsel), they are not Court officers in the same class as the other examples given. Their mandate flows, quite properly, from their retainer by their client group, and their principal fiduciary duty is owed to that group and includes acting in the best interests of its members.

[50] That is fundamentally different from the role of a Court officer, the duties of whom are owed to the Court, the process, and all of the stakeholders, to fulfil their mandate in a manner that is fair, reasonable and transparent. It is also fundamentally different from the role of *amicus curiae*, and I do not accept the submission of the moving parties that the role of Representative Counsel is the same. It is not. *Amicus curiae* may have a mandate to represent a particular interest or perspective, but they are appointed by the Court and owe their duty to the Court and its process.

[51] Moreover, such immunity as is proposed here may well be appropriate in cases (examples in this Court and other courts are many) where the class or group being represented includes a large number of individuals who, as contemplated in Rule 10, are not ascertained or identified, and whom Representative Counsel is compelled to represent. Even if I were persuaded to grant some immunity in the particular circumstances of this case, I would accept the submission of the responding parties that such immunity should extend only to employee claims of those Terminated Canadian Employees who are compelled into representation by proposed Representative Counsel.

[52] The scope of the term, as sought by the moving parties, would immunize counsel from any liability associated with claims of its current clients - those who have voluntarily and individually elected to retain the firm. I do not see any basis to impose such a limitation on liability here, and thereby impose a term amending the bargain freely and voluntarily entered into by private parties.

[53] As noted above, the moving parties submit that without the Court-ordered immunity, they do not pursue the principal relief in any event.

[54] I also observe that Rule 10.01(1) on which the moving parties rely, provides that a representation order *may* be made by a judge (it is discretionary) appointing "one or more persons to represent any person or class of persons …who have a present, future, contingent or on ascertained interest in or may be affected by the proceeding and *who cannot be readily ascertained, found or served*." [Emphasis added].

[55] On its face, I am far from certain the Rule has any application to the particular circumstances of this case. Here, of the approximately 220 Terminated Canadian Employees, 38 have already retained the firm proposed as Representative Counsel. The balance cannot be described as persons or a class of persons who cannot be readily ascertained, found or served.

[56] Indeed, they are the opposite: they are an entirely known, discrete, and relatively small class of approximately 180 employees. The fact that they are known and can readily be found is illustrated by the fact that TBS Canada naturally has Human Resources records for each of its own employees, and also by the fact that the relief sought by the moving parties includes production from the company of this very contact information for each individual. The identity and contact information for every single member of the proposed group or class is readily available.

[57] In my view, Rule 10 does not assist the moving parties here.

Result and Disposition

[58] For all of these reasons, and having considered all of the *CanWest* factors as against the particular circumstances of this case, I am not persuaded that the proposed Representative or Representative Counsel should be appointed to fulfil those respective roles.

[59] Even if I were persuaded that such relief were appropriate, I am not persuaded that an opt-out mechanic or the proposed limitation on liability of the Representative and Representative Counsel would be appropriate terms of such an order, and the moving parties submit that such terms are integral to the relief sought, to which there is no point if they are not included.

[60] Accordingly, the motion is dismissed. No costs were sought, and none are awarded.

[61] Order to go to give effect to these reasons.