

Court File No. BK-24-03050418-0031
Estate / Court File No. BK-31-3050418

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
IN BANKRUPTCY AND INSOLVENCY**

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

**RESPONDING FACTUM OF
THE BODY SHOP CANADA LIMITED
(MOTION RETURNABLE JULY 4, 2024)**

June 24, 2024

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto ON M5V 3J7

Natasha MacParland (LSO# 42383G)
Tel: 416.863.5567
Email: nmacparland@dwpv.com

Natalie Renner (LSO# 55954A)
Tel: 416.367.7489
Email: nrenner@dwpv.com

Chenyang Li (LSO# 73249C)
Tel: 416.367.7623
Email: cli@dwpv.com

Lawyers for The Body Shop Canada
Limited

TO: THE SERVICE LIST

TABLE OF CONTENTS

| | |
|--|-----------|
| PART I - OVERVIEW | 1 |
| PART II - SUMMARY OF FACTS | 2 |
| A. BACKGROUND TO THE NOI PROCEEDING | 3 |
| B. STORE CLOSURES AND EMPLOYEE MATTERS | 5 |
| C. THE REPRESENTATIVE COUNSEL MOTION | 6 |
| (A) THE FORMER EMPLOYEE CLAIMS | 8 |
| PART III - ISSUES | 10 |
| PART IV - LAW & ARGUMENT..... | 10 |
| A. CONCERNS WITH THE PROPOSED ORDER IN THE EVENT NO FEES, COSTS, OR DISBURSEMENTS ARE SOUGHT FROM TBS CANADA..... | 10 |
| (A) THE SCOPE OF IMMUNITY FROM LIABILITY IS TOO BROAD | 11 |
| (B) FORMER EMPLOYEES SHOULD NOT BE COMPELLED TO BE REPRESENTED BY KOSKIE MINSKY UNLESS THEY CHOOSE TO OPT-IN | 11 |
| B. IN THE EVENT THAT KOSKIE MINSKY SEEKS FEES, COSTS, OR DISBURSEMENTS FROM TBS CANADA, THE REPRESENTATIVE COUNSEL MOTION SHOULD BE DISMISSED | 13 |
| (A) NEITHER THE PROPOSAL TRUSTEE NOR THE COMPANY SUPPORT THE APPOINTMENT OF REPRESENTATIVE COUNSEL..... | 15 |
| (B) THIS PROCEEDING IS NOT COMPLEX..... | 17 |
| (C) THERE IS LITTLE ADMINISTRATIVE EFFICIENCY TO BE GAINED | 21 |
| (D) SOCIAL BENEFIT OF A REPRESENTATION ORDER DOES NOT OUTWEIGH THE PREJUDICE TO OTHER STAKEHOLDERS..... | 23 |
| PART V - ORDER REQUESTED..... | 25 |

PART I - OVERVIEW

1. On March 1, 2024 (the “**Filing Date**”), The Body Shop Canada Limited (“**TBS Canada**” or the “**Company**”) filed a notice of intention (the “**NOI**”) to make a proposal under the *Bankruptcy and Insolvency Act*¹ (“**BIA**”). Alvarez & Marsal Canada Inc. was appointed to act as the proposal trustee (the “**Proposal Trustee**”). On April 15, 2024 and May 30, 2024, this Court issued orders granting the Company extensions of time to file a proposal to July 12, 2024, along with other related relief.

2. On April 12, 2024, a former employee of the Company whose employment was terminated in connection with the filing of the NOI, Stephanie Hood, brought a motion seeking an order, among other things, to appoint Koskie Minsky LLP (“**KM**”) as representative counsel (the “**Representative Counsel Motion**”) for all former employees of the Company who were terminated on or after the Filing Date (“**Former Employees**”).

3. In the original iteration of the Representative Counsel Motion, KM sought an order from this Court requiring the Company to pay KM’s costs to represent the Former Employees in this proceeding. That demand apparently no longer forms part of this Motion.² Although the Company has requested clarification concerning this change in position by KM, it remains unclear whether KM still seeks an order that would require the Company to pay other fees and disbursements, including third party consulting fees, incurred and to be incurred by KM as part of its representation of the Former Employees. Indeed, KM has not filed an amended notice of motion to specify with precision the revised scope of relief sought on this Representative Counsel Motion.

¹ [Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3.](#)

² Factum of the Moving Party dated June 14, 2024 (“**KM Factum**”), at para. 4.

4. Provided that KM does not seek an order that requires the Company to pay any of KM's or its "Agents'" fees, costs, or disbursements, TBS Canada does not take a position on whether or not KM is appointed as representative counsel. However, the Company remains opposed to two specific aspects of the representation order sought by KM: (i) the request of KM for this Court to prophylactically immunize KM and its "Agents" of liability;³ and (ii) the request of KM for this Court to impose an opt-out procedure for Former Employees who are not currently clients of KM.⁴

5. In the event that KM does seek an order requiring the Company to pay its or its Agents' fees, costs, or disbursements, TBS Canada opposes the Representative Counsel Motion in its entirety.

PART II - SUMMARY OF FACTS

6. The facts in support of this motion are more fully set out in the Affidavit of Jordan Searle, sworn March 1, 2024 (the "**First Affidavit**"), the Affidavit of Jordan Searle, sworn April 8, 2024 (the "**Second Affidavit**"), the Affidavit of Jordan Searle, sworn May 10, 2024 (the "**Third Affidavit**"), and the Affidavit of Jordan Searle, sworn May 23, 2024 (the "**Fourth Affidavit**").⁵

³ Notice of Motion dated April 12, 2024, at para. 14 [Motion Record ("**MR**"), Tab 1, p. 5].

⁴ Notice of Motion dated April 12, 2024, at para. 9 [MR, Tab 1, p. 4].

⁵ Affidavit of Jordan Searle dated March 1, 2024 ("**First Searle Affidavit**") [Responding Record ("**RR**"), Tab 1(A), pp. 22-49]; Affidavit of Jordan Searle dated April 8, 2024 ("**Second Searle Affidavit**") [RR, Tab 1(B), pp. 50-82]; Affidavit of Jordan Seale dated May 10, 2024 ("**Third Searle Affidavit**") [RR, Tab 1, pp. 1-21]; and Affidavit of Jordan Searle dated May 23, 2024 ("**Fourth Searle Affidavit**") [Supplemental Responding Record ("**Supp. RR**"), Tab 1(A), pp. 10-38].

A. BACKGROUND TO THE NOI PROCEEDING

7. TBS Canada is a federally incorporated corporation specializing in the sale of skincare, haircare, bath and body products with 72 stores⁶ across Canada.⁷ The Company and its U.S. affiliate, Buth-Na-Bodhaige Inc. ("**TBS US**") are wholly owned subsidiaries of The Body Shop International Limited ("**TBS International**" or the "**UK Parent**"), which is indirectly owned by Aurelius IV UK Acquico Eight Limited (the "**Aurelius Purchaser**").⁸

8. The UK Parent historically provided several accounting and cash management services for the Company and TBS US. These services were provided pursuant to a cash management system and cash pooling arrangement.⁹ As described in the First Affidavit, TBS Canada and TBS US found themselves in a liquidity crisis when TBS International unexpectedly filed for administration (the "**UK Administration**") on February 13, 2024.¹⁰

9. In the weeks before the UK Administration, the UK Parent swept cash from TBS Canada's bank accounts held at HSBC Bank Canada (which has now been acquired by the Royal Bank of Canada) but failed to remit payment for amounts owing to the Company's vendors/suppliers and landlords.¹¹ When the UK Parent filed the UK Administration, all funding, other than payroll and certain other limited payables, for the Company was cut off with no advance notice. This left the Company with significant overdue payables that it could not pay.¹²

⁶ At the Filing Date, the Company operated 105 stores but 33 of the stores were identified as underperforming and closed.

⁷ Fourth Searle Affidavit, at para. 5 [Supp. RR, Tab 1(A), p. 12].⁸ First Searle Affidavit, at para. 12 [RR, Tab 1(A), pp. 28-29].

⁸ First Searle Affidavit, at para. 12 [RR, Tab 1(A), pp. 28-29].

⁹ Fourth Searle Affidavit, at para. 9 [Supp. RR, Tab 1(A), p. 13].

¹⁰ First Searle Affidavit, at paras. 5-7 [RR, Tab 1(A), pp. 25-27].

¹¹ Fourth Searle Affidavit, at para. 10 [Supp. RR, Tab 1(A), pp. 13-14].

¹² First Searle Affidavit, at para. 6 [RR, Tab 1(A), p. 26].

10. Accordingly, TBS Canada filed the NOI to provide it with the breathing room and expanded protections necessary to organize its financial affairs and develop a plan for the continuation of the business as a going concern.¹³

11. On May 30, 2024, this Court issued an order granting, among other things, an extension of time for TBS Canada to file a proposal to July 12, 2024.¹⁴

12. Since the Filing Date, TBS Canada has acted in good faith and made diligent efforts to improve its liquidity position, stabilize its operations, and pursue a going-concern solution for the continuation of “The Body Shop” business in Canada. These efforts have included, among others: (a) closing and liquidating 33 underperforming stores (the “**Closing Stores**”); (b) terminating the employment of 197 store-level employees related to the Closing Stores and approximately 20 head-office employees (*i.e.*, the “Former Employees”); (c) operating its remaining 72 stores on a going-concern basis (the “**Going-Concern Stores**”); and (d) engaging with its key stakeholders.¹⁵

13. TBS Canada is pursuing alternatives to keep the business in Canada operating as a going concern. To that end, the Company is in active discussions with the UK Parent, the UK Administrator and the Aurelius Purchaser, since the structure of any transaction is inextricably tied to the outcome of the UK Administration.¹⁶

14. On May 17, 2024, the Company became aware that it would not be possible to reach the necessary agreements with existing stakeholders in the UK for a restructuring of the UK Parent. As such, the UK Administration now seeks a sale of the business and assets of TBS International. Although parties have expressed interest in the Canadian

¹³ Fourth Searle Affidavit, at para. 11 [Supp. RR, Tab 1(A), p. 14].

¹⁴ Order of Justice Cavanagh dated May 30, 2024 [Supp. RR, Tab 1(B), pp. 40-42].

¹⁵ Fourth Searle Affidavit, at paras. 15-16 [Supp. RR, Tab 1(A), pp. 15-16].

¹⁶ Second Searle Affidavit, at para. 56 [RR, Tab 1(B), p. 76].

business, it is unclear whether TBS International will preserve the current organizational structure with TBS Canada as its subsidiary, or whether it would support a sale to a third-party or related franchise buyer.¹⁷

15. Because of the length of time that the sale process in the UK Administration will likely take, TBS Canada has advised that Court that it intends to convert this NOI proceeding to a proceeding under the *Companies' Creditors Arrangement Act*¹⁸ ("**CCAA**"). A CCAA conversion motion has been scheduled to be heard before this Court on July 5, 2024.¹⁹

B. STORE CLOSURES AND EMPLOYEE MATTERS

16. With the assistance of the Proposal Trustee, TBS Canada coordinated the closure of the Closing Stores that it identified as underperforming. The leases for the Closing Stores were disclaimed effective March 31, 2024 and all of the inventory at the Closing Stores has been liquidated.²⁰

17. TBS Canada also undertook a regional realignment, reducing the number of regions of its operations from seven to five and a re-allocation of stores among the remaining regions, resulting in further headcount reductions. All headcount reductions associated with these efforts were undertaken to save costs and keep the business operational while minimally impacting its employees.²¹

18. TBS Canada has terminated less than one-third of its workforce (or approximately 220 individuals), most of whom did not have claims for accrued vacation pay and other

¹⁷ Fourth Searle Affidavit, at paras. 28-32 [Supp. RR, Tab 1(A), pp. 20-21].

¹⁸ [*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.](#)

¹⁹ Request for Continuing Matter re July 5, 2024 Motion [Supp. RR, Tab 1(C), pp. 44-46].

²⁰ Second Searle Affidavit, at para. 24 [RR, Tab 1(B), pp. 60-61].

²¹ Second Searle Affidavit, at para. 25 [RR, Tab 1(B), p. 61].

benefits. Out of a workforce of 780 individuals on March 1, 2024, 70 of the terminated employees were salaried — 20 of whom were head office employees — and approximately 150 of the terminated employees were paid hourly.²² The Company continues to employ approximately 570 people and has continued to satisfy its payroll obligations in the ordinary course. The Company is not currently anticipating any further headcount reductions.²³

19. The Company has not proposed or implemented any changes to the terms and conditions of employment of its current employees, other than making retention payments to certain key employees. Moreover, the Company has not sought to compromise or reduce the claims of its Former Employees.²⁴

C. THE REPRESENTATIVE COUNSEL MOTION

20. On April 12, 2024, TBS Canada was served with the Representative Counsel Motion. The salient aspects of the representation order sought by KM originally included the following:

- (a) an order appointing Ms. Hood as representative for all Former Employees;²⁵
- (b) an order appointing KM as representative counsel for all Former Employees;²⁶
- (c) an order that any given Former Employee shall be represented by KM unless the Former Employee ***opts out*** of representation by KM within seven business days of the issuance of the representation order;²⁷

²² Second Searle Affidavit, at para. 26 [RR, Tab 1(B), p. 61].

²³ Second Searle Affidavit, at para. 27 [RR, Tab (B), p. 62].

²⁴ Third Searle Affidavit, at paras. 17-18 [RR, Tab 1, p. 7].

²⁵ Notice of Motion dated April 12, 2024, at para. 2 [MR, Tab 1, p. 2].

²⁶ Notice of Motion dated April 12, 2024, at para. 3 [MR, Tab 1, p. 2].

²⁷ Notice of Motion dated April 12, 2024, at para. 9 [MR, Tab 1, p. 4].

- (d) an order that KM may retain third party consultants to assist KM in this proceeding;²⁸
- (e) an order that ***TBS Canada shall pay for the “professional costs”*** incurred and to be incurred by KM and its third party consultants in respect of this proceeding;²⁹ and
- (f) an order that KM and third party consultants retained by KM have ***no liability*** in this proceeding.³⁰

21. On May 15, 2024, counsel for TBS Canada delivered to KM a series of questions concerning statements made in Ms. Hood’s affidavits filed in respect of the Representative Counsel Motion. The questions sent to KM included a request to identify the Former Employees who had already retained KM so that TBS Canada could address the employment claim values calculated by KM for those Former Employees.³¹

22. On June 13, 2024, KM delivered its response to the questions set out in the May 15, 2024 letter. KM advised that it has been retained to act for 38 Former Employees of the approximately 220 total Former Employees (the “**KM Clients**”).³² KM also provided to TBS Canada a list of the employment claim calculations prepared by KM and an accountant retained by KM.³³

23. On June 19, 2024, counsel for TBS Canada delivered a letter to KM requesting clarifications concerning KM’s representation that it would no longer be asking that its

²⁸ Notice of Motion dated April 12, 2024, at para. 12 [MR, Tab 1, p. 4].

²⁹ Notice of Motion dated April 12, 2024, at para. 13 [MR, Tab 1, p. 4].

³⁰ Notice of Motion dated April 12, 2024, at para. 14 [MR, Tab 1, p. 5].

³¹ Letter dated May 15, 2024, at question 1 [Supp. RR, Tab 1(D), p. 49].

³² Letter dated June 13, 2024, at response 1 [Supp. RR, Tab 1(E), p. 53-54].

³³ Letter dated June 13, 2024, at Schedule “A” [Supp. RR, Tab 1(E), p. 59].

costs be paid by the Company.³⁴ As of the date of this factum, no clarifications have been provided by KM to TBS Canada.

(a) The Former Employee Claims

24. There are only two groups of Former Employees: those paid hourly and those paid by salary. The Former Employees were paid their wages and accrued and unused vacation pay as of the date of their termination of employment. There are no unionized employees, no retirement or pension plans, and no defined benefit plans.³⁵

25. The Former Employees have claims against TBS Canada for: statutory termination and severance pay, pay in lieu of health benefits coverage, group RRSP contributions, vacation pay, bonuses, and in some circumstances, pay in lieu of reasonable notice at common law (which are inclusive of the other identified categories of claims) (the **"Employee Claims"**).³⁶

26. Since before the Filing Date, TBS Canada has worked closely with its counsel and the Proposal Trustee to calculate the Employee Claims. The Company has diligently collected and assembled the facts and documents necessary to determine the Employee Claims and has provisionally assessed each Employee Claim. In aggregate, the Company estimates that the Employee Claims total approximately \$2.1 million.³⁷ TBS Canada, with the assistance of counsel and the Proposal Trustee, applied uniformly the rules and principles established for retail employment claims arising from the recent *Nordstrom* insolvency matter to assess Employee Claims.³⁸

³⁴ Letter dated June 19, 2024, at pp. 1-2 [Supp. RR, Tab 1(F), pp. 61-62].

³⁵ Third Searle Affidavit, at para. 24 [RR, Tab 1, p. 9].

³⁶ Third Searle Affidavit, at para. 19 [RR, Tab 1, p. 7].

³⁷ Third Searle Affidavit, at paras. 20 and 23 [RR, Tab 1, pp. 7-9].

³⁸ Letter dated June 19, 2024, at p. 2 [Supp. RR, Tab 1(F), p. 62].

(i) The Calculation of Claims for Clients of Koskie Minsky

27. KM states that it applied a uniform methodology and formula to calculate all of the claims of the KM Clients.³⁹ However, the Employee Claim calculation for KM Clients prepared by KM and its accountant is significantly lower than TBS Canada's provisional assessment of those claims.

28. TBS Canada's provisional assessment of the value of Employee Claims for KM Clients is greater than the calculation prepared by KM in respect of 26 of the 38 KM Clients. As an example, TBS Canada's provisional assessment of Ms. Hood's (the proposed representative for Former Employees) Employee Claim is approximately \$98,668.00⁴⁰ whereas KM's calculation of her Employee Claim has shifted between \$46,095.97⁴¹ and \$62,698.33.⁴² With regard to the aggregate of claims for KM Clients, TBS Canada's provisional assessment is more than \$460,000 greater than KM's calculation of approximately \$940,000.⁴³

29. To be clear, however, TBS Canada's provisional assessment remains subject to change based on currently unknown variables such as each Former Employee's mitigation efforts which can only be assessed on an individual basis.

(b) The Wage Earner Protection Program Act

30. In addition to conducting an independent valuation of Employee Claims, TBS Canada has also engaged Service Canada to explore potential avenues to enable *Wage*

³⁹ Supplemental Affidavit of Stephanie Hood dated April 23, 2024 ("**Second Hood Affidavit**"), at paras. 5-14 [Supplemental Motion Record ("**Supp. MR**"), Tab 1, pp. 2-4].

⁴⁰ Letter dated June 19, 2024, at p. 3 [Supp. RR, Tab 1(F), p. 62].

⁴¹ Affidavit of Stephanie Hood dated April 12, 2024 ("**First Hood Affidavit**"), at para. 13 [MR, Tab 2, p. 20].

⁴² Letter dated June 13, 2024, at response 3 [Supp. RR, Tab 1(E), p. 54].

⁴³ Letter dated June 19, 2024, at Appendix "A" [Supp. RR, Tab 1(F), p. 65].

*Earner Protection Program Act*⁴⁴ (“**WEPPA**”) payments for the Former Employees even though the strict statutory requirements that trigger payment under WEPPA have not been met in this proceeding.⁴⁵ Unfortunately, on May 22, 2024, the Federal Crown advised that no WEPPA payments are currently available for the Former Employees and that attempts to artificially trigger WEPPA payments would be inconsistent with the legislation.⁴⁶

PART III - ISSUES

31. The sole question for this Court to determine on this Representative Counsel Motion is ***whether a representation order should be made in this proceeding.***

32. As alluded to above, TBS Canada does not take a position on whether or not KM should be appointed as representative counsel ***provided that*** KM does not seek an order that would require the Company to pay any amount of KM's, or KM's Agents', fees, costs, or disbursements. TBS Canada does, however, oppose certain terms in the form of order requested in the Representative Counsel Motion, as outlined below.

33. In the event that KM does seek payment from the Company of any portion of its or its Agents' fees, costs, or disbursements, TBS Canada submits that this Representative Counsel Motion should be dismissed in its entirety.

PART IV - LAW & ARGUMENT

A. CONCERNS WITH THE PROPOSED ORDER IN THE EVENT NO FEES, COSTS, OR DISBURSEMENTS ARE SOUGHT FROM TBS CANADA

⁴⁴ [Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1.](#)

⁴⁵ Third Searle Affidavit, at para. 41 [RR, Tab 1, p. 15].

⁴⁶ Supplement to the Third Report of the Proposal Trustee dated June 5, 2024 (“**Supp. Third Report**”), at paras. 2.1 and 2.2 [Supp. RR, Tab 1(H), pp. 96-97].

(a) The Scope of Immunity from Liability is Too Broad

34. In paragraph 14 of its notice of motion, KM asks this Court to immunize it from “liability in relation to KM’s appointment as representative counsel or the fulfilment of its duties in carrying out the provisions of [the order sought]”.⁴⁷ TBS Canada objects to the scope of the immunity requested.

35. In the event that this Court is persuaded to grant KM immunity, KM’s immunity should extend only to the Employee Claims of the Former Employees who are compelled into representation by KM. KM’s current demand for immunity, as currently drafted, would immunize it from liability associated with claims of KM Clients under KM’s current retainer with those Clients. KM has not provided a cogent rationale as to why it would be appropriate to extinguish those claims under the representation order sought by KM.

36. As drafted, it appears to TBS Canada that KM seeks blanket immunity, which the Company submits is inappropriate.

(b) Former Employees Should Not Be Compelled to Be Represented by Koskie Minsky Unless They Choose to Opt-In

37. In paragraph 9 of its notice of motion, KM asks this Court to impose a seven-day opt-out period for Former Employees.⁴⁸ The Company notes that the factum filed by KM on this Representative Counsel Motion does not explain why an opt-out procedure is necessary or in the interests of the Former Employees in this proceeding. There are at least three important features of this proceeding that militate against imposing an opt-out procedure upon Former Employees.

⁴⁷ Notice of Motion dated April 12, 2024, at para. 14 [MR, Tab 1, p. 5].

⁴⁸ Notice of Motion dated April 12, 2024, at para. 9 [MR, Tab 1, p. 4].

38. **First**, as of the date of this factum, KM has not disclosed its proposed fee arrangements in respect of the *de facto* class. Assuming that the fees, costs, and disbursements of KM are not paid by the Company, the fees incurred by KM will presumably be paid by the Former Employees as class members on a contingency fee basis. It would be inequitable to bind Former Employees to representation by KM on a truncated opt-out timeline in circumstances where those Former Employees do not have the information necessary to make an informed decision as to whether their own interests are better served by participating as a member of KM's class.

39. **Second**, the proposed seven day opt-out deadline that commences as soon as a representation order is issued is a highly truncated time period. There is a serious risk that Former Employees may not even receive or have a chance to consider the opt-out notice before the proposed opt-out deadline expires.

40. **Third**, the benefits that Former Employees may receive through representation by KM appear to be unclear in this case. As detailed above, the Company's provisional assessment of the quantum of Employee Claims for KM Clients is generally far higher than the calculation advanced by KM.

41. Setting aside differences in individual Employee Claim calculation results, the aggregate Employee Claim valuation is consistent between the Company (at \$2.1 million)⁴⁹ and KM (at \$2.0 million to \$2.5 million).⁵⁰ This proceeding is therefore distinguishable from the cases relied upon by KM in which KM claims credit for obtaining better outcomes for employees.⁵¹ Indeed, the majority of KM Clients in this case would

⁴⁹ Third Searle Affidavit, at para. 23 [RR, Tab 1, p. 9].

⁵⁰ Second Hood Affidavit, at para. 7 [Supp. MR, Tab 1, p. 3].

⁵¹ See, e.g., KM Factum, at para. 37.

appear to benefit more from filing a proof of claim prepared by the Company and the Proposal Trustee rather than a proof of claim prepared by KM.⁵²

42. The benefits of the opt-out procedure proposed by KM therefore do not outweigh the costs, including the potential prejudice to Former Employees, in the particular circumstances of this proceeding. TBS Canada submits that Former Employees deserve the chance to make an informed decision as to whether they believe they stand to gain more through representation by KM rather than being forced into that position and having any potential distribution to them reduced on account of counsel fee deductions. In the Company's submission, the interests of a vulnerable creditor group are not advanced through the implementation of an opt-out process in this case.

43. The way to ensure that Former Employees are provided with clear information to make an informed decision is to provide for an **opt-in** process in any representation order, and to require KM to disclose to Former Employees the fee arrangement that would apply if they choose to be represented by KM.

B. IN THE EVENT THAT KOSKIE MINSKY SEEKS FEES, COSTS, OR DISBURSEMENTS FROM TBS CANADA, THE REPRESENTATIVE COUNSEL MOTION SHOULD BE DISMISSED

44. TBS Canada agrees that this Court has the jurisdiction to issue a representation order and that the Former Employees are a vulnerable creditor group. However, as a general observation, this Court should resist the inclination to convert ordinary course commercial insolvencies into *de facto* class actions. In most commercial insolvencies, there will likely be a group of terminated employees affected by the proceedings.

⁵² Letter dated June 19, 2024, at Appendix "A" [Supp. RR, Tab 1(F), p. 65].

However, this fact alone, absent compelling additional factors, should not be the basis for a representation order.

45. This Court has held that representation orders are an equitable remedy, the issuance of which depends highly on the facts of each case.⁵³ Distilled to their core, the case law regarding representation orders in the insolvency domain indicates that the compelling additional factors that might justify such an equitable order fall into four non-exhaustive buckets:

- (a) the position of the trustee or monitor, the debtor, or other stakeholders on whether representative counsel should be appointed;
- (b) the complexity of the proceeding including in terms of creditor dynamics, legal issues, or the number of vulnerable creditors that comprise the class; and
- (c) administrative efficiency, which may include avoiding a multiplicity of legal retainers and duplication of representative counsel; and
- (d) the social benefit to be derived from the representation order balanced against fairness to other stakeholders.⁵⁴

46. None of these compelling additional factors exist in any meaningful measure in this case. There is thin support for a representation order in the case law in the circumstances of this case.

⁵³ [*Urbancorp Toronto Management Inc. \(Re\)*, 2016 ONSC 5426](#), at para. 12 [[Urbancorp](#)] [Responding Party Book of Authorities (“**RBOA**”), Tab 14].

⁵⁴ [*Canwest Publishing Inc. \(Re\)*, 2010 ONSC 1328](#), at para. 21 [[Canwest](#)] [RBOA, Tab 4].

(a) Neither the Proposal Trustee Nor the Company Support the Appointment of Representative Counsel

47. As *Canwest* makes clear, “the position of other stakeholders and the [m]onitor”⁵⁵ is a factor to be considered in assessing whether a representation order should issue. Here, of course, neither the Company nor Proposal Trustee supports the representation order.⁵⁶ All of the insolvency cases cited by KM in which representative counsel was appointed are fundamentally distinguishable because, with one exception, the appointment of representative counsel was made with the consent or at least non-opposition of the trustee or monitor (as applicable) and the debtor.

48. The one exception to this rule was *Canwest* itself. However, as explained below, this case needs to be read in the proper context of the broader downfall of the *Canwest* organization that gave rise to parallel insolvency proceedings (media and publishing), *Canwest* is the proverbial exception that proves the rule.

(i) The Exception in *Canwest* is Distinguishable and Does Not Apply in the Instant Proceeding

49. The *Canwest* case relied upon by KM flows from the insolvency of *Canwest*’s publishing business (the “**CW Publishing Proceeding**”).⁵⁷ Months before its publishing business filed under the CCAA, *Canwest*’s media business already filed for insolvency protection under the CCAA (the “**CW Media Proceeding**”).⁵⁸ The same monitor was

⁵⁵ [*Canwest*](#), *supra* note 54 at para. 21 [RBOA, Tab 4].

⁵⁶ See, e.g., Supp. Third Report, at paras. 3.1-3.2 [Supp. RR, Tab 1(H), p. 101].

⁵⁷ [*Canwest*](#), *supra* note 54 at para. 1 [RBOA, Tab 4]; and Excerpt of Pre-Filing Report of the Monitor in the CW Publishing Proceeding dated January 7, 2010, at para. 11 [Supp. RR, Tab 1(I), p. 115].

⁵⁸ Excerpt of Pre-Filing Report of the Monitor in the CW Publishing Proceeding dated January 7, 2010, at paras. 18-19 [Supp. RR, Tab 1(I), pp. 117-118].

appointed to oversee both Proceedings.⁵⁹ Justice Pepall case managed both Proceedings as well.⁶⁰

50. Importantly, on October 27, 2009 – well before the release of the *Canwest* decision on March 4, 2010 – Justice Pepall issued a representation order in the CW Media Proceeding.⁶¹ That representation order was **sought by the debtors** and the **debtor consented to the payment of the fees** of the representative counsel appointed. The representation order issued in the CW Media Proceeding covered former employees of the debtors **who were not represented by the union**.⁶²

51. Given the proactive seeking of a representation order by the debtors in the CW Media Proceeding, it is unsurprising that Justice Pepall granted a mirror order concerning former employees of Canwest's publishing business who were not represented by the union in the CW Publishing Proceeding even though the debtors in the CW Publishing Proceeding objected.⁶³

52. In addition, it is important to recognize that the monitor in *Canwest* did not oppose the appointment of representative counsel. The monitor only opposed the request that the debtors fund the fees of representative counsel as a result of a restrictive covenant in a financing agreement particular to the CW Publishing Proceeding.⁶⁴

⁵⁹ Excerpt of Pre-Filing Report of the Monitor in the CW Media Proceeding dated October 5, 2009 [Supp. RR, Tab 1(J), pp. 120-122].

⁶⁰ See, e.g., *Canwest Global Communications Corp. (Re)*, CV-09-8241-00CL (unreported) dated October 13, 2009 [RBOA, Tab 1]; and [Canwest Publishing Inc. \(Re\), 2010 ONSC 222](#) [RBOA, Tab 3].

⁶¹ *Canwest Global Communications Corp. (Re)*, CV-09-8396-00CL (unreported) dated October 27, 2009 [*Canwest Global*] [RBOA, Tab 2].

⁶² *Canwest Global*, *supra* note 61 at para. 1 [RBOA, Tab 2].

⁶³ [Canwest](#), *supra* note 54 at paras. 2 and 15-18 [RBOA, Tab 4].

⁶⁴ [Canwest](#), *supra* note 54 at para. 19 [RBOA, Tab 4].

53. The factual basis and the positions of the debtor and Proposal Trustee in this case are fundamentally different from *Canwest*. There is no compelling reason why a representation order should be issued over the objections of TBS Canada and the Proposal Trustee in this case.

(ii) Case Law Militates Against Issuing a Representation Order When the Relief is Opposed by the Trustee or Monitor and the Debtor

54. Excluding *Canwest*, representation orders were rejected in all of the other cases cited by KM where the trustee or monitor and the debtor opposed the appointment of representative counsel (*i.e.*, *TBS Acquireco Inc. (Re)*⁶⁵ and *Mountain Equipment Co-Operative (Re)*⁶⁶).

(b) This Proceeding is Not Complex

55. This proceeding is straightforward and does not call for the appointment of representative counsel:

- (a) there are three clearly defined unsecured creditor groups (the Former Employees, landlords, and trade creditors);⁶⁷
- (b) there are no meaningful secured creditors. One nominal secured creditor, Aurelius IV UK Acquico Seven Limited ("**Aurelius Seven**"), advised that it is releasing its security. A second nominal secured creditor, the Royal Bank of Canada, has no claim for any amount in this proceeding. And the third nominal secured creditor, Enterprise, holds security over only corporate vehicles for which there are no payments arrears;⁶⁸

⁶⁵ [*TBS Acquireco Inc. \(Re\)*, 2013 ONSC 4663 \[TBS\]](#) [RBOA, Tab 12].

⁶⁶ [*Mountain Equipment Co-Operative \(Re\)*, 2020 BCSC 2037 \[MEC\]](#) [RBOA, Tab 9].

⁶⁷ Third Searle Affidavit, at para. 30 [RR, Tab 1, p. 12].

⁶⁸ Third Searle Affidavit, at para. 31 [RR, Tab 1, p. 12]; and Supp. Third Report, at para. 2.3 [Supp. RR, Tab 1(H), p. 97].

- (c) none of the secured creditors have filed any claim against the Company;⁶⁹
and
- (d) as noted above, the Company (with the assistance of counsel and the Proposal Trustee) has already assessed the Employee Claims for each Former Employee.

56. By contrast, all of the cases relied upon by KM where representation orders for employee groups in insolvency proceeds have been issued concerned: (i) a mixture of complications arising from union dynamics, the presence of pension issues, or (ii) an unwieldy number of individual claimants.

(i) Cases Involving Union Dynamics and Pension Issues are Not Analogous

57. The representation orders in the key cases relied upon by KM – including *Canwest*,⁷⁰ *Nortel*,⁷¹ and *Metroland*⁷² – all involved potentially diverging interests between unionized versus non-unionized employee groups as well as complex pension valuation issues and obligations. Because certain former or current employees in those proceedings appeared to have group representation through their union by default,⁷³ the issuance of representation orders in those cases essentially equalized the playing field between unionized versus non-unionized employees to ensure that the interests of the unrepresented employees would not be prejudiced in favour of the union-represented employees.

⁶⁹ Third Searle Affidavit, at para. 32 [RR, Tab 1, p. 12].

⁷⁰ [Canwest](#), *supra* note 54 at para. 4 [RBOA, Tab 4].

⁷¹ [Nortel Networks Corporation \(Re\), 2009 CanLII 26603](#) (Ont. S.C.), at paras. 3 and 18 [[Nortel](#)] [RBOA, Tab 10].

⁷² [Metroland Media Group Ltd. \(Re\), 2023 ONSC 5805](#), at paras. 8-9 [[Metroland](#)] [RBOA, Tab 8].

⁷³ See, e.g., [U.S. Steel Canada Inc. \(Re\), 2014 ONSC 6145](#), at para. 34 [[U.S. Steel](#)] [RBOA, Tab 13].

58. In this proceeding, however, there are no such union dynamics or associated pension complexities. No employee group benefits from group representation to the disadvantage of another employee group. And there are no pension obligations that may give rise to disparate treatments between employee groups. Instead, TBS Canada has applied a uniform methodology to provisionally assess all of the claims of Former Employees. For these reasons, TBS Canada submits that none of the representative counsel cases that concern union or pension complexities are analogous to the instant case.

(ii) This Case Does Not Concern an Unwieldy Number of Former Employees

59. In almost all of the cases relied upon by KM involving the appointment of representative counsel for employees in insolvency proceedings, the number of employees with claims far exceeded the approximately 220 individuals that KM seeks to represent in this proceeding. For example:

- (a) in *Nortel*, representative counsel was appointed to represent several thousands of former employees and pensioners, including unionized former employees;⁷⁴
- (b) in *Metroland*, representative counsel was appointed to represent 501 non-unionized former employees in circumstances where the union was already representing 104 unionized former employees;⁷⁵
- (c) in *Foodora*, representative counsel was appointed to represent approximately 1,200 non-unionized food delivery couriers in circumstances

⁷⁴ *Supra* note 71.

⁷⁵ *Supra* note 72.

where the union represented approximately 1,200 unionized food delivery couriers;⁷⁶

- (d) in *U.S. Steel Canada*, representative counsel was appointed to represent approximately 5,200 non-unionized active and retired beneficiaries of various pension plans⁷⁷ in circumstances where the union represented on thousands more unionized beneficiaries of those pension plans;
- (e) in *Fraser Papers Inc.*, representative counsel was appointed to represent more than 700 non-unionized employees⁷⁸ in circumstances where two unions represented hundreds or thousands more unionized current and former employees;
- (f) in *Hollinger Canadian Publishing Holdings Co.*, representative counsel was appointed to represent approximately 3,000 pensioners;⁷⁹ and
- (g) in *Target Canada Co.*, representative counsel was appointed to represent approximately 17,600 employees.⁸⁰

60. The sole case cited by KM where representative counsel was appointed for an employee group of less than 200 individuals is *Canwest*.⁸¹ However, for the reasons

⁷⁶ Compare Excerpt of Motion Record of Koskie Minsky in Foodora Inc. Proceeding dated July 6, 2020, Affidavit of James Harnum, at para. 1 [Supp. RR, Tab 1(K), pp. 125-126] with Letter of Cavalluzzo LLP dated May 29, 2020, at p. 1 [Supp. RR, Tab 1(K), p. 128].

⁷⁷ Letter from Koskie Minsky in U.S. Steel Proceeding dated December 23, 2014, at p. 2 [Supp. RR, Tab 1(L), p. 133].

⁷⁸ [*Fraser Papers Inc. \(Re\)*, 2009 CanLII 55155](#) (Ont. S.C.), at para. 15 [RBOA, Tab 6].

⁷⁹ Notice of Application in Re Hollinger Canadian Publishing Holdings Co. dated December 9, 2009, at para. 2(d) [Supp. RR, Tab 1(M), p. 140].

⁸⁰ [*Target Canada Co. \(Re\)*, 2015 ONSC 303](#), at para. 6 [RBOA, Tab 11]; and [*Urbancorp*](#), *supra* note 53 at para. 21 [RBOA, Tab 14].

⁸¹ No reference is made in [*Catalyst Paper Corp. \(Re\)*, 2012 BCSC 451](#) [RBOA, Tab 5] to the number of former or current employees represented by representative counsel. Court materials for this proceeding also do not appear to be online on the Monitor's website any longer. With regard to the *Eaton's* and *Confederation Life Insurance Co.* cases described in paragraphs 32(i) and 32(j) of the KM Factum, KM does not provide any citation to the applicable court files or a decision that would permit an examination of the facts of those cases.

above, *Canwest* is easily distinguished from this case. In *Canwest*, the union was appointed to represent thousands of unionized individuals across both the CW Publishing and CW Media Proceeding. Moreover, representative counsel appointed with the consent of the debtors in the CW Media Proceeding represented several hundred individuals.⁸² In these circumstances, it is understandable that the Court strove to avoid a situation whereby thousands of employees benefitted from group representation, but a select few did not.

(c) *There is Little Administrative Efficiency to be Gained*

61. In this Representative Counsel Motion, KM represents that it can provide assistance by: (i) facilitating the filing of a single proof of claim for all Former Employees using consistent methodology; and (ii) pursuing the application of WEPPA payments for Former Employees.⁸³ But all of this substantive work has already been done.

62. As described above, TBS Canada has already assessed the Employee Claims. Once those determinations are final, the Company intends to send to each Former Employee an employee claims package that includes: (a) a single, omnibus proof of claim (the “**Single Claim**”) reflecting the aggregate claim of all of the Former Employees; (b) a letter explaining the Single Claim and advising the Former Employees that they may (but are not required to) submit their own proof of claim; (c) the Former Employee’s individual entitlement and how it was calculated; and (d) contact information for the Proposal Trustee to address any questions that the Former Employee may have in respect of the

⁸² Read together the Excerpt of Factum of the Union in CW Publishing Proceeding, at para. 9 [Supp. RR, Tab 1(O), p. 145] and the Excerpt of Factum of the Retirees in CW Media Proceeding, at para. 7 [Supp. RR, Tab 1(N), p. 150].

⁸³ KM Factum, at para. 34(b).

Single Claim or individual entitlement.⁸⁴ The Proposal Trustee is also committed to assisting the Company in this process.⁸⁵

63. With regard to WEPPA, as described above, Service Canada has already taken the position that the Former Employees are not eligible for payments under that statute in the current circumstances. It is therefore unclear what additional assistance KM could provide to Former Employees in this regard.

64. This is not a case like *League Assets Corp. (Re)*, where the Monitor sought the appointment of representative counsel to relieve itself of the obligation to respond to hundreds of inquiries from thousands of investors with claims.⁸⁶ Here, the Proposal Trustee and the Company are fully capable of fielding questions from the Former Employees and keeping Former Employees updated on developments.⁸⁷

65. Indeed, the Company has taken important steps to keep Former Employees updated, including by:

- (a) holding a town hall meeting on the Filing Date;
- (b) providing termination letters to Former Employees that provided them with a single point of contact for any questions; and
- (c) issuing a press release with directions to additional information concerning the proceeding.⁸⁸

⁸⁴ Third Searle Affidavit, at para. 37 [Responding Record, Tab 1, p. 14]. If this proceeding is converted to a CCAA proceeding, then the Company's proposed actions would be subject to the discretion of the CCAA court.

⁸⁵ Third Report of the Proposal Trustee dated May 14, 2024 ("**Third Report**"), at paras. 8.2-8.6 [Supp. RR, Tab1(G), pp. 85-86].

⁸⁶ [*League Assets Corp. \(Re\)*, 2013 BCSC 2043](#), at para. 66 [RBOA, Tab 7].

⁸⁷ Third Report, at paras. 8.1-8.3 [Supp. RR, Tab 1(G), pp. 84-85].

⁸⁸ Third Searle Affidavit, at paras. 44-45 [Responding Record, Tab 1, pp. 16-18].

66. The Proposal Trustee has also created a dedicated webpage to share information with Former Employees.⁸⁹

67. ***Efficiency is reduced rather than improved*** by the appointment of representative counsel in this case. The dominant tide of the case law demonstrates that representation orders are not issued in circumstances similar to this case.

(d) Social Benefit of a Representation Order Does Not Outweigh the Prejudice to Other Stakeholders

68. Finally, the appointment of KM as representative counsel, with a requirement that the Company pay KM's fees, costs, and disbursements (including third party consultants retained by KM) causes prejudice to other stakeholders in this proceeding with no corresponding social benefit.

69. The prejudice to other stakeholders, including the Company, are immediate and significant. If KM persists in seeking the payment of its fees, costs, and disbursements from the Company, it will place an already insolvent enterprise under greater financial strain. Increasing the financial strain on the Company acts to the detriment of the approximately 570 individuals who continue to be employed by TBS Canada.

70. Requiring the Company to pay KM's fees, costs, and disbursements would also be unfair to other creditor groups. It constitutes a direct transfer of value from the amount available to all creditors into the hands of a single creditor group. There is a real possibility that requiring the Company to pay KM's fees, costs, and disbursements will reduce the recoveries of other creditors.

71. Contrary to the position of KM, there is little social benefit to be derived from a representation order in this case. Although KM raises the spectre of nefarious

⁸⁹ Third Searle Affidavit, at para. 47 [Responding Record, Tab 1, p. 18].

interventions by “Aurelius”,⁹⁰ there are no such concerns in reality. As explained above, the Aurelius Seven has confirmed it will release its security interest. There are also no complex pension issues involving actuarial evidence or present value claims of pension obligations that the Former Employees need to navigate.

72. Instead, this case involves a straightforward application of statutory termination and severance and common law reasonable notice principles for Former Employees who are not unionized and have no pension entitlements.

73. As recognized in *MEC*, the balance of convenience does not tilt in favour of representative counsel in circumstances where the monitor and debtor are alive to the interests of employee creditors and the calculation of employment claims is a simple function of common law reasonable notice.⁹¹ As this Court observed in *TBS Acquireco*, it is unclear what “value-add[]” is brought to the table by representative counsel in these types of insolvencies.⁹²

74. Moreover, as recognized in *Urbancorp*, in circumstances where the appointment of representative counsel is opposed by the trustee or monitor and will not address any particularly complex issue in a proceeding, it will usually be inappropriate to issue a representation order that would require the debtor to pay the fees of representative counsel, or force creditors into group representation through an opt-out process.⁹³

75. In every insolvency, there will be vulnerable parties. And in every case, it would be preferable to have fewer, rather than more, lawyers involved. But a general claim asserting the vulnerability of a creditor group and their inability to retain counsel should

⁹⁰ KM Factum, at para. 34(c).

⁹¹ [MEC](#), *supra* note 66 at paras. 31, 38, and 49-53 [RBOA, Tab 9].

⁹² [TBS](#), *supra* note 65 at para. 37 [RBOA, Tab 12].

⁹³ [Urbancorp](#), *supra* note 53 at paras. 27-28 [RBOA, Tab 14].

not – and cannot be – the standard for assessing whether a representation order should issue. Yet distilled to its essence, these are reasons underpinning KM's pitch on this Motion.

76. If KM's request for a representation order is accepted in this proceeding, it is hard to imagine a circumstance where a commercial insolvency would not call qualify for a representation order.

77. For these reasons as well, the Representative Counsel Motion should be dismissed if KM seeks to recoup any portion of its fees, costs, or disbursements from TBS Canada.

PART V - ORDER REQUESTED

78. In the event that KM abandons its demand to be paid any fees, costs, or disbursements from TBS Canada in connection with its representation of Former Employees, TBS Canada takes no position on whether or not KM should be appointed as representative counsel. Rather, TBS Canada opposes the inclusion of blanket immunity and opt-out procedure clauses in the form of representation order requested. In all other circumstances, the Company requests an order dismissing the Representative Counsel Motion and an order requiring all parties to bear their own costs of the Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of June, 2024.



DAVIES WARD PHILLIPS & VINEBERG LLP

155 Wellington Street West
Toronto ON M5V 3J7

Natasha MacParland (LSO# 42383G)

Tel: 416.863.5567

Email: nmacparland@dwpv.com

Natalie Renner (LSO# 55954A)

Tel: 416.367.7489

Email: nrenner@dwpv.com

Chenyang Li (LSO# 73249C)

Tel: 416.367.7623

Email: cli@dwpv.com

Lawyers for the

The Body Shop Canada Limited

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Canwest Global Communications Corp. (Re)*, CV-09-8241-00CL (unreported) dated October 13, 2009
2. *Canwest Global Communications Corp. (Re)*, CV-09-8396-00CL (unreported) dated October 27, 2009
3. *Canwest Publishing Inc. (Re)*, [2010 ONSC 222](#)
4. *Canwest Publishing Inc. (Re)*, [2010 ONSC 1328](#)
5. *Catalyst Paper Corp. (Re)*, [2012 BCSC 451](#)
6. *Fraser Papers Inc. (Re)*, [2009 CanLII 55155](#)
7. *League Assets Corp. (Re)*, [2013 BCSC 2043](#)
8. *Metroland Media Group Ltd. (Re)*, [2023 ONSC 5805](#)
9. *Mountain Equipment Co-Operative (Re)*, [2020 BCSC 2037](#)
10. *Nortel Networks Corporation (Re)*, [2009 CanLII 26603](#)
11. *Target Canada Co. (Re)*, [2015 ONSC 303](#)
12. *TBS Acquireco Inc. (Re)*, [2013 ONSC 4663](#)
13. *U.S. Steel Canada Inc. (Re)*, [2014 ONSC 6145](#)
14. *Urbancorp Toronto Management Inc. (Re)*, [2016 ONSC 5426](#)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

Court File No. BK-24-03050418-0031
Estate / Court File No. BK-31-3050418

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
IN BANKRUPTCY AND INSOLVENCY**

PROCEEDING COMMENCED AT
TORONTO

**RESPONDING FACTUM OF
THE BODY SHOP CANADA LIMITED**

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto ON M5V 3J7

Natasha MacParland (LSO# 42383G)
Email: nmacparland@dwpv.com
Tel: 416.863.5567

Natalie Renner (LSO# 55954A)
Email: nrenner@dwpv.com
Tel: 416.367.7489

Chenyang Li (LSO# 73249C)
Email: cli@dwpv.com
Tel: 416.367.7623

Tel: 416.863.0900

Lawyers for The Body Shop Canada Limited