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July 26, 2024

Representative Counsel Not Needed for The Body Shop Employees

In March 2024, The Body Shop Canada ("TBS Canada") filed a Notice of Intention to make a Proposal under the *Bankruptcy and Insolvency Act* after its UK parent company completed a cash sweep of TBS Canada. The cash sweep instantly eliminated TBS Canada's liquidity, forcing it to suspend online orders and close 33 retail stores.

As a result, 220 TBS Canada employees were terminated, three quarters of whom were store level employees paid on an hourly basis (the "Terminated Canadian Employees").

In the Matter of The Body Shop Canada Limited, one of those employees, Stephanie Hood, sought an order appointing her as Representative of all terminated employees of TBS Canada and sought the appointment of Koskie Minsky LLP as Representative Counsel to the Terminated Canadian Employees ("Proposed Representative Counsel").

Within her proposed order, Ms. Hood sought relief that:

1. All Terminated Canadian Employees would be represented by Representative Counsel unless they expressly opted out within a fixed period of time; and
2. Both she and the Representative Counsel would have no liability in relation to the fulfillment of their respective duties, except for claims of gross negligence or wilful misconduct.

The motion was heard before the Honourable Justice Peter J. Osborne on July 4, 2024, and in his endorsement dated July 5, 2024, Justice Osborne dismissed the motion, finding on the facts before him, it was not appropriate to grant the relief sought.

The Law

Pursuant to subsections 183(1) and 126(2) of the *BIA*, the Court has the authority to appoint representatives and Representative Counsel to terminated employees in insolvency proceedings. The purpose of doing so is to allow for the preparation of a group Proof of Claim for all affected employees. The intention is to enable employees and retirees

the opportunity to meaningfully, collectively and affordably participate in CCAA proceedings that affect them.

Rule 10.01 of the *Rules of Civil Procedure* sets out when a judge may appoint such representatives, and the factors to consider in determining whether a representative order is appropriate are set out in *CanWest Publishing Inc. (Re),* 2010 ONSC 1328. These factors include:

> a. the vulnerability and resources of the group sought to be represented;
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> b. any benefit to the companies under CCAA protection;
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> c. any social benefit to be derived from representation of the group;
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> d. the facilitation of the administration of the proceeding and efficiency;
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> e. the avoidance of multiplicity of legal retainers;
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> f. the balance of convenience and whether it is fair and just including to the creditors of the estate;
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> 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
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> h. the position of other stakeholders and the Monitor.

The Decision

In applying the *CanWest* factors, Justice Osborne found that the facts before him did not warrant the appointment of a representative or Representative Counsel. It was also found that the specific relief of a mandatory opt-out mechanism and immunity from liability for the Terminated Canadian Employees were not appropriate in the circumstances, even if the order had been made.

Justice Osborne found that a representative or Representative Counsel was not needed in this case. The expected claims of the each of the employees were anticipated to be relatively straightforward: there were no unionized employees or pension plans. The claims and potential claims of the Terminated Canadian Employees related only to statutory termination and severance pay, pay in lieu of health benefits coverage, group RRSP contributions, vacation pay, bonuses and for some of the employees, pay in lieu of reasonable notice at common law.

Given the straightforward nature of the claims, the relatively

small group of employees and that the preliminary assessment of the claims had already been completed, Justice Osborne questioned what assistance Representative Counsel could provide.

Furthermore, much of the work proposed by the Proposed Representative Counsel had already been completed by TBS Canada: a town hall meeting had been held, TBS Canada had provided termination letters with a single point of contract and advised that once final determinations were made, the Terminated Canadian Employees would be provided with a single omnibus proof of claim and a summary of individual entitlement. TBS Canada had also conducted an initial estimate of the claims, which was almost 25% higher than the estimate calculated by the Proposed Representative Counsel.

Regarding the mandatory opt-in relief, Justice Osborne found that such relief was not appropriate in circumstances where the amounts at issue were modest, the preliminary calculations of TBS Canada were higher than the Proposed Representative Counsel, and the claims were relatively straightforward. Justice Osborne found that in those circumstances, it would be reasonable to expect that some employees may elect to proceed without counsel.

In addition, there would be costs associated with the appointment of Representative Counsel, the costs of which would be deducted from individual claim amounts. Justice Osborne found that, in those circumstances, many employees likely would not opt in, and the benefits of having Representative Counsel would not be achieved.

Finally, on the issue of the scope of immunity, Justice Osborne found that the role of Representative Counsel is fundamentally different from the role of a Court officer or *amicus curiae* who owe their duty to the Court and its process. Also, should such immunity be granted, it would immunize counsel from any liability associated with claims of the current 38 members of the Terminated Canadian Employees who had already retained the firm independently. The Court saw no basis to impose such a term, which would have the effect of amending the agreement voluntarily entered into by those private parties.

Takeaways

This decision highlights that representative counsel (and the associated court sanctioned legal fees) are not appropriate in every case. It is evident that the Court will be hesitant to appoint counsel (unless parties expressly opt out) in situations where the claims are straightforward and readily calculatable: it

is only when counsel will add value that the Court will consider the appointment.

The decision also provides an example of the application of the *CanWest* factors, and confirms that those factors are neither exhaustive nor mandatory.

Finally, Justice Osborne has provided guidance on when limitations of liability are appropriate in court-appointed counsel, recognizing the difference between court officers and private counsel whose duties remain with their clients and not the Court.