

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE BANKRUPTCY OF DANIER LEATHER INC.

FACTUM

**(re: appointment of Representative Counsel for terminated employees,
returnable May 18, 2016)**

May 16, 2016

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Proposed Representative Counsel to the
terminated employees of Danier Leather
Inc.

TO: THE SERVICE LIST

PART I - OVERVIEW

1. This factum is filed in respect of a motion by Koskie Minsky LLP for the appointment of Representative Counsel for all former employees (the “**Employees**”) of Danier Leather Inc. (“**Danier**”) who were terminated on or before the bankruptcy of Danier (the “**Bankruptcy**”) on March 21, 2016 without being paid termination pay, severance pay, and other amounts owing to them by Danier. There are approximately 1,000 terminated employees affected by the bankruptcy of Danier. Danier’s workforce is not unionized and it does not maintain a pension plan.

2. The appointment of Representative Counsel in this case is appropriate to ensure that all the Employees are represented, their claims are consistently calculated, and that their rights and interests are protected and advanced in the bankruptcy proceedings. The test for the appointment of Representative Counsel in insolvency cases is readily met.

3. The trustee in bankruptcy of Danier supports the appointment of Representative Counsel. In its Second Report to the Court dated May 12, 2015, the trustee states:

7. The Trustee supports the appointment of Koskie as Representative Counsel for the following reasons:

- Koskie specializes in representing employees in insolvency proceedings. Determining employee claims may require legal and financial resources. Koskie has expertise to efficiently coordinate such assistance;
- The arrangement will assist to streamline the claims process which will reduce the fees and costs of the Trustee and its legal counsel and facilitate a more expeditious distribution to all creditors as the Trustee and its counsel will spend less time reviewing the claims and will only be dealing with one law firm (versus several if several employees are individually represented);

- The Trustee is of the view that the Fee Structure is appropriate and that Koskie's hourly rates are lower than its own and those of its counsel;
- Koskie will be a single point of contact for employees, which will allow for consistent information to be provided to all employees; and
- The Trustee may be required to have certain employee claims determined by the Court, in which case it will be preferable to have the claims determined in one hearing as opposed to multiple hearings in the event that several employees retain separate counsel.¹

PART II - THE FACTS

4. On March 21, 2016, Danier made an assignment in bankruptcy and the firm of KSV Kofman Inc. ("KSV") was appointed as Trustee in Bankruptcy. A court-ordered receivership is proceeding concurrently with the Bankruptcy, with KSV also serving as receiver.

5. Danier's merchandise was predominantly marketed under the "Danier" brand and was sold at 76 leased retail locations across Canada. On March 1, 2016, Danier entered into an agency agreement with a contractual joint venture of third-party firms (the "Agent") to liquidate the inventory, furniture, fixtures and equipment in 76 of its store locations. The Agent completed the liquidation of the Danier stores on May 9, 2016.

6. Pursuant to the terms of the receivership order issued on March 21, 2016, the Receiver engaged approximately 900 of Danier's former employees on a temporary and day-to-day basis to assist with the wind-down of Danier's business.

¹ Second Report to the Court of KSV Kofman Inc. as Trustee in bankruptcy of Danier Leather Inc. dated May 12, 2016, at para. 7

7. As a result of the Bankruptcy on March 21, 2016, all of Danier's employees were terminated without being paid termination pay, severance pay, and other amounts owing to them by Danier.

8. Danier owes amounts to the Employees in respect of their termination pay and/or severance pay entitlements under employment standards legislation, contracts of employment, and the common law. The Employees may also have claims for other employment-related matters and other unsecured claims against Danier.

9. The proposed Representative Counsel, Koskie Minsky LLP, has extensive experience representing employees and retirees in insolvency proceedings across Canada.²

PART III - THE ISSUES

1. Should Representative Counsel be appointed for the employees in this case?

Answer: Yes. Appointing Representative Counsel meets the test in *Canwest* and is appropriate, just, and fair in this case.

PART IV - THE LAW

10. This Court's authority to appoint Representative Counsel in bankruptcy proceedings derives from a number of sources:

- (a) Rules 10.01 and 12.07 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194;

² Hatnay Affidavit, paragraph 15, 16, and 17.

- (b) section 131(1) of the *Courts of Justice Act* (Ontario), R.S.O. 1990, c. C.43; and
- (c) sections 183(1) and 197(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“**BIA**”).

11. In *Nortel Networks Corporation (Re)*, Mr. Justice Morawetz (as he then was) held that representative counsel should be appointed to allow vulnerable employees and retirees to participate in insolvency proceedings (in that case, the CCAA proceedings of *Nortel Networks*; a liquidating CCAA):

[13] [I]t is submitted that employees and retirees are a vulnerable group of creditors in an insolvency because they have little means to pursue a claim in complex CCAA proceedings or other related insolvency proceedings. It was further submitted that the former employees of Nortel have little means to pursue their claims in respect of pension, termination, severance, retirement payments and other benefit claims and that the former employees would benefit from an order appointing representative counsel. In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a reliable resource for former employees for information about the process. The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel’s insolvency

[14] I am in agreement with these general submissions.³

12. In *Canwest Publishing Inc.*, Madam Justice Pepall (as she then was) summarized the factors considered by Canadian courts when issuing representative counsel orders in insolvency proceedings (the “**Canwest Factors**”):

- (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;

³ *Nortel Networks Corporation (Re)* (2009), 2009 CarswellOnt 3028 (Ont. S.C.) (“*Nortel*”) at paras. 11, 13-14 and 16.

- (d) the facilitation of the administration of the proceedings and efficiency;
- (e) the avoidance of a 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.⁴

13. Further, the courts have issued representation orders for a variety of creditor groups so that they can have meaningful representation in insolvency proceedings:

- *Metcalfe & Mansfield Alternative Investments II Corp.*: The court appointed representative counsel for certain holders of asset-backed commercial paper;
- *Rousseau Resort Developments Inc.*: The court appointed representative counsel on behalf of condominium unit owners in the receivership of the resort;
- *MF Global*: The court appointed representative counsel to represent all customers of MF Global.⁵

A representation order for the terminated Danier employees readily meets the Canwest Factors and should be ordered

⁴ *CanWest Publishing Inc. (Re)*, 2010 ONSC 1328 (Ont. S.C.) (“*CanWest*”) at para. 21

⁵ *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* Order of Campbell J. dated March 17, 2008; *WestLB AG, Toronto Branch v. Rousseau Resort Developments Inc.* (“*Rousseau Resort*”) Order of Pepall J. dated August 20, 2009; *MF Global Canada Co.* Order of Campbell J. dated November 14, 2011

a) *The Danier employees are a vulnerable group and without a representation order will not have representation in the bankruptcy proceedings*

14. Employees are a vulnerable group of creditors in any insolvency proceeding, whether a bankruptcy proceeding or a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. The vulnerability of employees who are terminated in connection with an insolvency has been articulated as follows:

Employees comprise the largest segment of those creditors of business organizations who have little capacity to protect themselves from the effects of their debtors. This is due in large part to the fact that the circumstances surrounding the formation of employment contracts do not facilitate the use of protective measures. A prospective employee rarely has the bargaining power to demand some form of security interests in the property of a prospective employer to protect against the possibility that amounts owing under an employment contract are not paid...Further, employees do not have the capacity to spread the loss resulting from non-payment over a large number of transactions. Nor can an employee "write-off" a loss from nonpayment of wages against other income.⁶

15. The above rationale applies to the Employees of Danier. The vast majority of the Employees have little means or expertise to pursue their claims for unpaid termination pay, severance pay, and other amounts in the bankruptcy proceedings, and as a group, require Representative Counsel in these proceedings.

b) *A Representation Order provides a benefit to the Danier estate*

16. Representative Counsel will benefit the estate by removing the need for the Estate to deal with individual employees advancing individual claims. Representative Counsel can promote

⁶ R.C.C. Cuming, *Enhanced Enforcement of Wage Claims under Canadian Bankruptcy and Receivership Law*, prepared for the Corporate Law Policy Directorate of Industry Canada by Robert C.C. Cuming, College of Law — University of Saskatchewan, April 1998, p. 1.

finality of the claims against the Estate in a consistent, efficient, and streamlined manner collectively for the Danier employees, thereby providing an overall benefit to the Estate.

c) *A Representation Order provides a social benefit*

17. Granting a Representation Order will provide a social benefit by assisting the Employees, the vast majority of whom have no means to protect their rights and would have little or no assistance in advancing their claims for payment. Representative Counsel will prepare an Omnibus Proof of Claim, inform the Employees of their rights and of the progress of the bankruptcy proceedings, provide the advice needed by the Employees to protect their interests, and represent them for the purpose of all decisions which might affect their claims and rights in the course of the bankruptcy proceedings and, if necessary, bring matters before the Court as may be required.

d) *A Representation Order facilitates the administration of the insolvency proceeding and enhances its efficiency*

18. Representative Counsel will function as one focused point of contact for all Employees and help facilitate the administration of the company's reorganization in an efficient manner. It avoids the need for the Estate to deal with a potentially large number of individual, unrepresented Employees advancing single and inconsistent claims. As Morawetz, R.S.J. stated in *Re Cash Store*:

[20] I am also satisfied that a representation order will facilitate the administration of the CCAA proceeding and enhance its efficiency. The appointment of representative counsel will avoid the need for the Applicants to deal with a potentially large number of individual

unrepresented borrowers advancing individual and possibly inconsistent claims.⁷

e) The avoidance of a multiplicity of legal retainers

19. A multiplicity of individual legal retainers for each Employee with claims based on similar facts can lead to inconsistent positions being taken by similarly situated claimants and contribute to increased delay and cost for the Estate. One Representative Counsel for all Employees will prevent the multiplicity of legal retainers and avoid the conflicts that can arise from such multiple retainers.

f) The balance of convenience favours the appointment of Representative Counsel

20. In *Dugal v. Research in Motion*, Mr. Justice Campbell issued a representation order and referred to the “balance of convenience” factor described in *Police Retirees of Ontario v. Ontario Municipal Employees’ Retirement Board*, a leading case on representation orders:

...the test to be applied in considering a request for a representation order is not whether the individual members of the group can be ascertained or found, but rather whether the balance of convenience favours granting of a representation order instead of individual service upon each member of the group and individual participation in the proceedings. Such an interpretation is consistent with the legislative purpose behind this provision, which is designed to encourage an expeditious means of resolving contentious issues without the cost and expense associated with a Rule 12 order. In analyzing the balance of convenience test, I must consider the inconvenience that would be experienced by each party of the representation order were or were not granted.⁸

21. The balance of convenience strongly favours granting a representation order in this case. No stakeholder in the bankruptcy proceedings will be prejudiced by the issuance of a

⁷ *Cash Store Financial Services (Re)*, 2014 ONSC 4567, para. 20

⁸ *Dugal v. Research in Motion*, (2007), 87 O.R. (3d) 721 (S.C.), para. 21; *Police Retirees of Ontario Inc. v. Ontario Municipal Employees’ Retirement Board* (1997), 35 O.R. (3d) 177 (Ont. Gen. Div.), para. 18.

representation order. On the other hand, if the representation order is not granted, substantial prejudice will likely result to the Danier Employees who will not have representation in the bankruptcy proceedings and are at considerable risk that their claims may not be calculated accurately and/or paid in full, or may not be paid at all.

g) No other Representative Counsel has been appointed in this case

22. No other representation order has been made in these proceedings in respect of the Danier employees.

h) The Trustee supports the appointment of Representative Counsel, and no other party opposes

23. The trustee in bankruptcy of Danier supports the appointment of Representative Counsel. To date, no other party has indicated an objection to the appointment of Representative Counsel.

Orders appointing representative counsel have been granted without concurrent appointment of representative employees

24. The courts have appointed a law firm as Representative Counsel without appointing individuals as Representatives at the same time. In the CCAA proceedings of Target Canada Inc., the initial order appointed Koskie Minsky LLP as Representative Counsel to the Employees, and directed a process by which Koskie Minsky would then select up to seven employees of Target to serve as representatives.⁹ A similar process is envisioned in this case.

⁹ *Target Canada Co., et al*, Order of Morawetz R.S.J. dated January 15, 2015.

25. In the CCAA proceedings of Hollinger Canadian Publishing Holdings, Koskie Minsky LLP was appointed as Representative Counsel to all employees and retirees of the company, without the appointment of individual representatives by the court.¹⁰

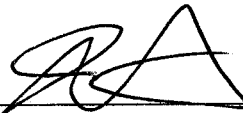
PART V - ORDER REQUESTED

26. The Moving Party respectfully requests an order appointing Koskie Minsky LLP as Representative Counsel to the Employees of Danier.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 16th day of May, 2016.



ANDREW J. HATNAY



JAMES HARNUM

¹⁰ *Hollinger Canadian Publishing Holdings*, Order of Campbell J. dated December 10, 2009.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Nortel Networks Corporation (Re)*, 2009 CarswellOnt 3028
2. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (March 17, 2008)
3. *Canwest Publishing (Re)*, 2010 ONSC 1328 (S.C.J. Commercial List)
4. *Cash Store Financial Services (Re)*, 2014 ONSC 4567
5. *Dugal v. Research in Motion* (2007), 87 O.R. (3d) 721 (S.C.J. Commercial List)
6. *Hollinger Canadian Publishing Holdings*, Order of Campbell J. dated December 10, 2009.
7. *MF Global Canada Co. (Re)*, 2011 ONSC 7100 (S.C.J.)
8. *Police Retirees of Ontario Inc. v. Ontario Municipal Employees' Retirement Board* (1997), 35 O.R. (3d) 177 (Ont. Gen. Div.)
9. R.C.C. Cuming, *Enhanced Enforcement of Wage Claims under Canadian Bankruptcy and Receivership Law*, prepared for the Corporate Law Policy Directorate of Industry Canada by Robert C.C. Cuming, College of Law — University of Saskatchewan, April 1998
10. *Rousseau Resort Developments Inc.* (20 August 2009), Ontario S.C.J. (Commercial List) CV-09-8201-00CL (endorsement)
11. *Target Canada Co., et al*, Order of Morawetz R.S.J. dated January 15, 2015

SCHEDULE "B"

RELEVANT STATUTES

Rules of Civil Procedure, R.R.O. 1990, Regulation 194

10.01 (1) In a proceeding concerning,

- (a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
- (b) the determination of a question arising in the administration of an estate or trust;
- (c) the approval of a sale, purchase, settlement or other transaction;
- (d) the approval of an arrangement under the Variation of Trusts Act,
- (e) the administration of the estate of a deceased person; or
- (f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served.

12.07 Where numerous persons have the same interest, one or more of them may defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so.

Courts of Justice Act, R.S.O. 1990 c. C.43

131. (1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

Bankruptcy and Insolvency Act, R.S.C. 1985, c B-3

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

- (a) in the Province of Ontario, the Superior Court of Justice;
- (b) [Repealed, 2001, c. 4, s. 33]
- (c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;
- (d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;
- (e) in the Province of Prince Edward Island, the Supreme Court of the Province;
- (f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;
- (g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and
- (h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

197 (1) Subject to this Act and to the General Rules, the costs of and incidental to any proceedings in court under this Act are in the discretion of the court.

**ONTARIO
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Proceeding commenced at Toronto

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**(re: appointment of Representative Counsel for
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