

**CITATION:** Trillium v. Cassels Brock & Blackwell et al, 2013 ONSC 1789  
**COURT FILE NO.:** CV-10- 397096CP  
**DATE:** 20130405

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Trillium Motor World Ltd., Plaintiff

**AND:**

Cassels Brock & Blackwell LLP and General Motors of Canada Limited,  
Defendants

Proceeding under the *Class Action Proceedings Act, 1992*, S.O. 1992, c. 6

**BEFORE:** Justice E. P. Belobaba

**COUNSEL:** *For Trillium Motor World:* Bryan Finlay, David Sterns, Allan Dick, Marie-Andree Vermette and Michael Statham

*For Cassels Brock & Blackwell:* Peter Griffin and Rebecca Jones

*For non-party Canadian Automobile Dealers Association:* Paul Morrison and Eric Block

**HEARD:** October 16, 2012 and March 12, 2013

**RULE 30 PRODUCTION MOTION (PRIVILEGED DOCUMENTS)**

[1] This is the third of three Rule 30 production motions that were heard by me as the successor case management judge in this class action proceeding. The first two, brought by the defendants General Motors of Canada Limited (“GMCL”) and Cassels Brock & Blackwell (“CBB”), were dismissed in reasons released on November 16, 2012.<sup>1</sup> The

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<sup>1</sup> *Trillium Motor World Ltd. v. General Motors of Canada Limited and Cassels, Brock & Blackwell LLP*, 2012 ONSC 5960 (Sup. Ct.)

third motion, brought by the plaintiff Trillium against CBB, and heard at the same time as the other two, was put “on hold” pending settlement discussions. However, no settlement was achieved, some new evidence was discovered and the matter has returned to me for a further hearing.

## Background

[2] This matter was certified as a class action by Justice Strathy in 2011<sup>2</sup> and is now proceeding to a common issues trial. The factual background was set out in detail in the certification decision<sup>3</sup>. Put simply, this class action was commenced on behalf of some 207 GM Canada dealers whose dealerships were terminated by GMCL as a result of the financial crisis and “auto bailout” in the summer of 2009. The terminated dealers say that GMCL compelled them to sign Wind-Down Agreements (“WDAs”) in breach of provincial franchise law and that CBB, the dealers’ legal counsel, was negligent and breached fiduciary and contractual obligations in failing to provide appropriate advice. GMCL denies that it breached provincial franchise law and CBB denies that it was ever retained by the dealers. The latter dispute—whether CBB was retained by the dealers or by the dealers’ association, the Canadian Automobile Dealers Association (“CADA”), or by both—is the focus of this third motion.<sup>4</sup>

[3] The retainer question is also the focus of several of the common issues relating to CBB that are the subject of the upcoming common issues trial. Not surprisingly, counsel agreed at the October 16, 2012 hearing that my decision on this question - whether CBB was retained by the dealers, by CADA or both – would not be *res judicata* and would not bind the common issues trial judge.

[4] During the course of the hearing I asked CADA why they were refusing to produce the documents in dispute because I was, frankly, puzzled by CADA’s position. Why wouldn’t the automobile dealers’ association want to help these former dealers in

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<sup>2</sup> *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2011 ONSC 1300, [2011] O.J. No. 889 [“Certification Reasons”], aff’d 2012 ONSC 463, 2012 O.J. No. 1578 (Div. Ct.) [“GMCL Appeal”]; 2012 ONSC 1443, 2012 O.J. No. 1579 (Div. Ct.) [“Cassels Brock Appeal”]. GMCL did not seek leave to appeal. Cassels Brock’s motion for leave to appeal was dismissed on August 24, 2012 by the Court of Appeal.

<sup>3</sup> Certification Reasons, *supra*, note 1.

<sup>4</sup> Trillium’s motion for the admission of new evidence, namely the recently obtained partial recordings of the May 24, 2009 conference call, is easily granted. Neither CADA nor CBB opposed the motion and, as I advised counsel at the hearing, the tapes and transcripts of the May 24<sup>th</sup> conference call would help clarify the issues for me and would likely influence the outcome.

their litigation with GMCL? Why wouldn't it want to help CBB who need the documents to defend themselves in this lawsuit? Counsel for CADA acknowledged that his client's position was unusual but was unable to provide an explanation.

[5] In any event, it became increasingly obvious to me as the hearing progressed on March 12, 2013 that the most sensible resolution of this productions motion would be for me to review the documents and determine whether or not they are privileged. I decided to review the documents for three reasons: one, Trillium's claim that CBB was providing legal advice to the dealers on the May 24, 2009 conference call was not completely unreasonable; two, given the document descriptions that were provided by CADA, I had doubts that privilege was being properly claimed for some of the documents;<sup>5</sup> and three, a judicial review of the documents in dispute would resolve the productions motion without in any way tainting the retainer question that, in my view, should more properly be determined at the common issues trial.

### **The documents in dispute**

[6] The dispute initially involved 234 documents that CBB was prevented from producing because CADA asserted solicitor-client privilege. This number was reduced to 211 when counsel agreed that the 23 Saturn documents in CBB's possession could be released with the written consent of one or more of the former Saturn dealers.<sup>6</sup>

[7] I asked CADA to divide the remaining 211 documents into two groups: (1) documents that are clearly privileged because CADA was seeking or receiving legal advice; and (2) all the others. I suspected that some of the documents in question were of the "legal information" variety – that is, CADA asking for and receiving general legal information about what might happen to the dealers if GMCL filed for bankruptcy and sought protection under the CCAA.

[8] In response to my request, counsel for CADA divided the 211 documents into the following two groups:

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<sup>5</sup> For example, Part II of Schedule D included documents that were sent by or to third parties such as GMCL, with no explanation why privilege was being claimed. Also, no documents were produced that were partially redacted and, as Trillium asserts, it is highly unlikely that all of the communications between CBB and CADA are protected by solicitor-client privilege in their entirety.

<sup>6</sup> Counsel advised me this week that the required consent has been provided and the 23 Saturn documents have been produced.

- (1) the first category (one volume) contained 69 documents that CADA was prepared to have released, subject to several redactions;
- (2) the second category (two volumes) contained 142 documents that CADA objected to producing on the ground that they were created “in the continuum of communications and meetings between CADA and CBB in furtherance of CADA seeking and/or receiving legal advice from CBB.”

[9] I proceeded to review each of the documents.

### **Analysis**

[10] As a conscientious automobile dealers association, CADA was understandably concerned about what would happen to its dealer-members if GMCL filed for bankruptcy protection under the CCAA. It was also understandably involved in the organization and education of its membership to prepare them for a possible CCAA filing. In drafting the numerous memos that CADA sent to its dealer-members over the time period in question, CADA no doubt sought and received general information about the CCAA and the federal bankruptcy process from its counsel. I also have no doubt that CADA asked CBB to review the proposed drafts to ensure accuracy and to make sure that nothing said in these memos would expose CADA to any legal liability.

[11] How do I decide whether documents relating to CADA’s communications to and from its legal counsel are privileged? I can do no better than to adopt the approach that was put forward by both CADA and CBB. One must differentiate between legal information and legal advice. Legal information consists of providing answers regarding the law generally, the options available, and the relevant legal procedures that might pertain.<sup>7</sup> For example, information provided by CBB to CADA about the federal bankruptcy process and the CCAA and how it would affect the dealers is legal information, not legal advice.

[12] Legal advice, on the other hand, is advice that is given with respect to the client’s legal rights and duties and is given on the understanding that it may well be followed.<sup>8</sup> It depends on the individual circumstances of the recipient<sup>9</sup> and consists of a much more

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<sup>7</sup> *Charlebois v. Barreau du Quebec*, [2012] QCCA 788 at para. 32.

<sup>8</sup> *R.v. Baker*, [1990] O.J. No. 1617 at 5.

<sup>9</sup> *Sherriff v. Apps*, [2012] O.J. No. 790 at para. 28.

personalized opinion on the way the law would apply in a particular case or about the particular decision that should be made in the circumstances.<sup>10</sup> Legal advice involves the interpretation of legal principles “to guide future conduct or to assess past conduct.”<sup>11</sup> In short, legal advice is particularized advice that is directed to the client’s legal rights or duties and in essence says “here is what I think you should do” as opposed to “here is some information about the CCAA and the federal bankruptcy process.”

[13] Thus, if CADA sought and received advice from its counsel at CBB about its role and responsibility as a national dealer organization and its rights and duties given its mandate and jurisdiction, or sought and received advice with respect to the content of the memos it proposed to send out to its membership (to ensure they were legally accurate and did not expose CADA to legal liability), that would certainly amount to “legal advice” as described above. However, if CADA was simply asking its counsel for information about the federal bankruptcy process or the CCAA in order to better understand the situation and thus better assist its dealer-members, that would not be legal advice as defined in the case law.

[14] Using this definition (which, to repeat, was advanced by both CADA and CBB) I reviewed the 211 documents and concluded as follows:

- None of the 69 documents in CADA’s “first category” relate in any way to the seeking or receiving of legal advice. I note that CADA neither objects nor consents to their production. I therefore order that these 69 documents be produced forthwith, without redactions.<sup>12</sup> At CADA’s request I will add that the release of these 69 documents is without prejudice to CADA’s position on the second category of documents.
- Only 60 of the remaining 142 documents in the “second category” pertain to the seeking or receiving of legal advice. The 60 documents that are privileged are identified by Tab Number and Document Number as set out in the Appendix. The remaining 82 documents shall be produced forthwith.

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<sup>10</sup> *Ibid.*

<sup>11</sup> *In re County of Erie*, an unreported decision of the U.S. Court of Appeal for the Second Circuit (January 3, 2007), as cited and relied on by CADA in its Supplementary Factum at para. 63.

<sup>12</sup> The small number of redactions suggested by CADA are on documents or communications that do not fall within the definition of “legal advice” as applied herein and are not needed to protect solicitor-client privilege.

[15] I note that the 60 privileged documents fall into the following five categories:<sup>13</sup>

- 44 documents relate to the review of draft memos that CADA was proposing to circulate to the dealers (there are numerous duplicates in this category);
- 8 documents relate to CBB pre-bills and invoices;
- 5 documents relate to media inquiries;
- 2 documents relate to a specific legal opinion;
- 1 document relates to advice regarding a possible conflict issue.

[16] I am satisfied that these 60 documents fall within the definition of “legal advice” being sought by or provided to CADA and relate to CADA’s own legal rights and duties as a dealers’ association and/or its related liability concerns. The remaining 82 documents are not privileged and should be produced.

[17] In sum, of the 211 documents reviewed, 60 are privileged and 151 shall be produced forthwith, as detailed above. *Order to go accordingly.*

[18] If the parties are unable to resolve the question of costs of both the motion to admit new evidence and the productions motion, I would be pleased to receive brief written submissions from Trillium within 14 days and from Cassels Brock & Blackwell within 10 days thereafter.

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Belobaba J.

**Date:** April 5, 2013

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<sup>13</sup> I am satisfied that in identifying these five categories I am not compromising solicitor-client privilege. They were either mentioned during the course of the hearing or they are self-evident.

**APPENDIX**

**THE FOLLOWING 60 OF 142 DOCUMENTS ARE PRIVILEGED**

1.	Tab 4, Doc. 896	21.	Tab 81, Doc. 897	41.	Tab 111, Doc. 270
2.	Tab 20, Doc. 348	22.	Tab 82, Doc. 117	42.	Tab 112, Doc. 274
3.	Tab 43, Doc. 637	23.	Tab 83, Doc. 440	43.	Tab 114, Doc. 1052
4.	Tab 45, Doc. 544	24.	Tab 84, Doc. 443	44.	Tab 115, Doc. 999
5.	Tab 46, Doc. 545	25.	Tab 87, Doc. 001	45.	Tab 116, Doc. 1153
6.	Tab 47, Doc. 553	26.	Tab 90, Doc. 1009	46.	Tab 118, Doc. 850
7.	Tab 48, Doc. 554	27.	Tab 93, Doc. 582	47.	Tab 119, Doc. 854
8.	Tab 49, Doc. 643	28.	Tab 94, Doc. 583	48.	Tab 120, Doc. 1036
9.	Tab 61, Doc. 496	29.	Tab 95, Doc. 587	49.	Tab 121, Doc. 1040
10.	Tab 63, Doc. 551	30.	Tab 96, Doc. 738	50.	Tab 123, Doc. 939
11.	Tab 68, Doc. 209	31.	Tab 97, Doc. 748	51.	Tab 125, Doc. 873
12.	Tab 69, Doc. 210	32.	Tab 98, Doc. 758	52.	Tab 127, Doc. 945
13.	Tab 70, Doc. 462	33.	Tab 99, Doc. 770	53.	Tab 134, Doc. 862
14.	Tab 71, Doc. 631	34.	Tab 100, Doc. 776	54.	Tab 135, Doc. 1006
15.	Tab 73, Doc. 206	35.	Tab 102, Doc. 786	55.	Tab 136, Doc. 1147
16.	Tab 74, Doc. 121	36.	Tab 104, Doc. 798	56.	Tab 139, Doc. 1144
17.	Tab 76, Doc. 456	37.	Tab 105, Doc. 808	57.	Tab 140, Doc. 1146
18.	Tab 78, Doc. 447	38.	Tab 106, Doc. 1056	58.	Tab 141, Doc. 819
19.	Tab 79, Doc. 451	39.	Tab 107, Doc. 1060	59.	Tab 142, Doc. 1033

20.	Tab 80, Doc. 834	40.	Tab 108, Doc. 1068	60.	Tab 143, Doc. 1015
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