CITATION: Trillium Motor World Ltd. v. General Motors of Canada Limited, 2015 ONSC 3824
COURT FILE NO.: CV-10-397096CP
DATE: 20150708

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
Trillium Motor World Ltd. Plaintiff	Alan D.J. Dick, David Sterns, Andy Seretis, Bryan Finlay, Q.C., Marie-Andrée Vermette, Michael Statham for the Plaintiffs, Defendants to the Counterclaim
– and –	
General Motors of Canada Limited and Cassels Brock & Blackwell LLP Defendants	David S. Morritt, Evan Thomas, Geoff Hunnisett, Karin Sachar, Kent E. Thomson, Sean Campbell, Sarah Weingarten, Dina Milivojevic, for the Defendant/Plaintiff by Counterclaim, General Motors of Canada Peter H. Griffin, Rebecca Jones, Jon Laxer for the Defendant Cassels Brock & Blackwell LLP
AND BETWEEN:	
General Motors of Canada Limited Defendant, Plaintiff by Counterclaim	**HEARD:** September 9, 10, 11, 12, 15, 16, 17, 22, 23, 24, 25, 26, 29, 30; 2014 October 1, 2, 3, 6, 7, 8, 9, 10, 14, 15, 16, 17, 20, 21, 22, 23, 29, 30, 31; 2014 November 3, 4, 5, 6, 10; 2014 December 17, 18, 19; 2014
– and –	
Trillium Motor World Ltd. and Thomas L. Hurdman Plaintiff, Defendants to the Counterclaim	

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T. McEWEN J.

REASONS FOR JUDGMENT

PART I – INTRODUCTION

[1] This action was certified as a class proceeding by Strathy J. (as he then was) on March 1, 2011. At the height of the global financial crisis, an imperilled General Motors of Canada Limited ("GMCL") executed a plan devised to reduce its large dealership network. Dangerously close to the edge of insolvency, GMCL hoped that the plan, together with other measures, would satisfy the demands of the Federal and Provincial Governments (the "Canadian Governments"), secure long-term government funding, and allow the company to avoid seeking creditor protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

[2] On May 20, 2009, GMCL delivered Notices of Non-Renewal and Wind-Down Agreements ("WDAs") to 240 dealers, which, if accepted, would terminate their relationships with GMCL over a period of time. The dealers were given six days to accept or decline the offers. Two-hundred-and-two of the 240 dealers accepted the offers, executing and returning the WDAs to GMCL.

[3] The plaintiff, Trillium Motor World Ltd. ("Trillium"), represents 181 Class Members who accepted the offers and signed WDAs. Trillium claims that GMCL breached both its common law obligations to the Class Members and its statutory obligations under provincial franchise legislation across the country, such as Ontario's *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (the "*Wishart Act*").

[4] Trillium also claims that the defendant law firm, Cassels Brock & Blackwell LLP ("Cassels"), which was retained by some or all of the Class Members before the receipt of the WDAs, breached its contractual and fiduciary duties to the dealers and was negligent in the provision of its legal services. The number and nature of the Cassels retainers, which is a disputed issue, will be reviewed later in these Reasons.

[5] For the reasons below, I find that GMCL did not breach any common law or statutory obligations toward the Class Members. Trillium's claim against GMCL is therefore dismissed. Also, for the reasons below, GMCL's counterclaim against Trillium and the Class Members is dismissed.

[6] For the reasons below, I find that Cassels was retained by the Class Members including Trillium to protect their interests in any complex restructuring of the dealer network and to represent them in any GMCL *CCAA* proceedings. I further find that Cassels breached its contractual and fiduciary duties by accepting the retainer despite having already agreed to act for the Federal Government (through Industry Canada) in relation to any GMCL *CCAA* proceedings. Cassels knew about this conflict from the outset; yet, rather than declining to act for the GMCL

dealers and referring the dealers to an unconflicted law firm, or even telling the dealers about the retainer with the Federal Government, Cassels continued to act for both the Federal Government and the dealers.

[7] Further still, I find that Cassels was negligent and breached its contractual duties to the Class Members by acting for both the affected dealers (those who had signed and executed WDAs) and the dealers who were continuing with GMCL when it knew or ought to have known that the two groups of dealers had divergent and adverse interests. Finally, I find that Cassels was negligent and breached its contractual duties to the Class Members by maintaining a "Wait-and-See Approach" long past its appropriateness.

[8] As a result of these breaches, the Class Members, who were offered compensation which represented a fraction of the value of their dealerships, lost the opportunity to negotiate with GMCL for increased wind-down payments.

[9] Trillium's claim against Cassels is therefore allowed. For the reasons set out below, I award the Class Members aggregate damages in the amount of $45,000,000.00 for this lost opportunity.

The trial

[10] The trial, including three days of closing argument, took 41 days to complete. The parties called 25 witnesses, including eight experts. The 96 exhibits introduced into evidence contained hundreds of individual documents. In closing argument the parties filed approximately 1,500 pages of written submissions.

[11] All of the parties called expert evidence at the trial. Expert reports were filed as numbered exhibits. I have had regard to both the written and oral testimony of the experts as evidence in this trial.

The certification order

[12] The certification order defines the Class as all corporations in Canada that signed a WDA with GMCL in or after May 2009.

[13] I have attached as Appendix "A" to this judgment a complete list of the common issues that were certified by Strathy J. These include the common issues certified against GMCL and Cassels as well as the counterclaim commenced by GMCL against Trillium.

Witnesses and key players

[14] For further ease of reference I have attached as Appendix "B" a list of the lay witnesses, expert witnesses and key players along with the roles they played to provide some context.

PART II – BACKGROUND

GMCL and GM

[15] GMCL was a wholly-owned subsidiary of General Motors Corporation ("GM"). As of 2008, GMCL was selling vehicles under eight brands: Chevrolet, Buick, Pontiac, GMC, Cadillac, Saturn, Saab and Hummer. Each brand contained a variety of nameplates, e.g. Chevrolet "Silverado" or Pontiac "G-5". GMCL and GM were closely integrated. GM supplied to GMCL more than 80 percent of vehicle types sold by its dealers in Canada, and more than 80 percent of vehicles manufactured by GMCL in Canada were supplied to GM in the United States. As its parent, GM controlled significant aspects of GMCL's business, such as deciding which brands and nameplates would be manufactured for sale in the U.S. and in Canada.

GMCL and the dealers

The relationship

[16] GMCL does not sell vehicles directly to the public, but rather through a network of dealers. The dealers then sell vehicles through different product distribution channels. In 2009 GMCL had three separate channels. One channel was dedicated to Chevrolet products; another to Pontiac, Buick and GMC products; and a third to dealers selling Saturn vehicles. The Cadillac brand could be sold through both of the first two channels and the Saab brand only through the Saturn channel; the Hummer brand could be sold through any of the three channels.

[17] For reasons of clarity and convenience, and due to the class definition issues involving the Saturn dealers, I will generally distinguish among five groups of dealers:

(a) Saturn dealers (all of whom signed WDAs);

(b) GMCL dealers (i.e. all Chevrolet, Pontiac, Buick and GMC dealers including the dealers who never were offered WDAs);

(c) all the dealers who were offered WDAs (including GMCL and Saturn dealers);

(d) the GMCL dealers who were offered WDAs.[1]; and

(e) the "call dealers", who communicated with Cassels by telephone on one occasion on

[1] The dealers who were terminated by GMCL were commonly referred to as the "non-retained dealers". In light of the fact that there is an issue as to whether Cassels was "retained" by GMCL dealers, including those whose franchises were terminated, it may be confusing to continue to use this terminology. I therefore variously refer to the non-retained dealers as "Class Members", "affected dealers" or just "dealers" as the case may be.

May 24, 2009.[2]

[18] The relationship between GMCL and the dealers was governed by a standard form Dealer Sales and Service Agreement (the "DSSA"). Each Class Member was a party to a DSSA. GMCL did not negotiate the terms of the DSSAs; every dealer entered into the same standard form agreement.

[19] The DSSA consisted of the following documentation:

- a one-page "Tip in Sheet" setting out, among other things, the dealer and dealer principal respectively, e.g. the plaintiff Trillium and its principal Thomas Hurdman ("Hurdman");
- addenda containing specific terms, for example, what vehicles the dealer was permitted to sell; and
- Standard Provisions.

[20] GMCL characterizes the DSSA as a personal services contract. While that wording is used in the DSSA, the Trillium DSSA was executed by Trillium and GMCL and not by Hurdman personally. This appears to be the common practice.

[21] As will be discussed further in my analysis of Common Issue (c)(iii), a certain interpretative tension existed within the DSSA. On the one hand, the Tip in Sheet stipulated that a dealer was assured the opportunity to enter into a new Dealer Agreement with GMCL at the expiration date if GMCL determined that the dealer had fulfilled its obligations under the Agreement. On the other hand, Article 4.1 of the Standard Provisions of the DSSA stated that GMCL could take appropriate action to ensure, among other things, that the number of dealers in its dealer network was appropriate. Presumably, this included declining to renew dealer agreements if necessary.

[22] Trillium submits that the Tip in Sheet gave dealers a right of renewal provided they did not breach any contractual requirements of the DSSA – in other words, the DSSA was "evergreen". GMCL submits that Article 4.1 of the Standard Provisions takes precedence, and hence GMCL could terminate dealers under appropriate circumstances.

Communication between GMCL and the dealers

[23] Because the dealers were dispersed throughout Canada, they interacted with GMCL in a number of ways. The GMCL Dealer Communications Team ("DCT"), for example, functioned as a consultative board comprised of GMCL representatives and dealers from across Canada. The General Motors Dealers' Association ("GMDA") provided a voice for GMCL dealers.

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[2] Discussed primarily at paras. 365-371.

Many GMCL and Saturn dealers were also members of the Canadian Automobile Dealers Association ("CADA"), a not-for-profit organization representing over 3,000 dealers from a variety of manufacturers across Canada. There were other dealer associations too, but for the most part, this litigation concerns the DCT, the GMDA and CADA. GMCL also communicated with the dealers fairly regularly through televised Highly Interactive Distance Learning Broadcasts ("HIDL broadcasts"). During these broadcasts, representatives of GMCL would speak to dealers via video link.

[24] In 2008 and 2009, Marc Comeau ("Comeau") was GMCL's Vice President of Sales, Service and Marketing. He was responsible for GMCL's sales activities, dealer network activities and marketing activities. He was the most senior person at GMCL responsible for dealer relations and communicated frequently with the dealers, often via HIDL broadcast.

Trillium

[25] Trillium was a GMCL dealership authorized to sell Pontiac, Buick and GMCL products. Trillium was granted the dealership in 1989 and opened for business in 1991. It was located in Scarborough, Ontario. At first, Hurdman shared ownership of Trillium with GMCL; by 2005, he had bought out GMCL's interest.

[26] Trillium generally performed below average compared to other GMCL dealers. The evidence at trial disclosed that Trillium's location was problematic and sales were below average. Internal GMCL ratings disclosed as much. Hurdman and GMCL met on numerous occasions to discuss this problem and possible solutions. Between 2003 and 2008, Trillium's sales declined by approximately 25 percent. On its financial records, Trillium suffered net operating losses. Hurdman testified that for practical purposes, Trillium broke even, paying down debt and providing a comfortable lifestyle for Hurdman and his family – all of whom were employed by the dealership. Trillium's problems were not unique. They were, in part, connected to GMCL's declining market share and the number of GMCL dealers in the Toronto region. As will be discussed below, GMCL had been grappling with these problems for some time.

A declining market share & the over-dealering problem

Pre-2008: the spectre of a crisis

[27] GMCL's dealer network is long established: GMCL began its operations in Canada over 100 years ago. For decades GMCL was one of the three major automotive companies in Canada. At one time, GMCL's market share exceeded 40 percent of all vehicles sold in Canada. This began to change in the early 1970s as foreign competitors began selling, and later manufacturing, vehicles in Canada. By 2008, GMCL's market share had dropped to less than 22 percent.

[28] It was in the 1990s that GMCL first felt the effects of having too many dealers servicing its reduced market share. Having too many dealers in a single market – or "over-dealering" – is a serious problem for automotive companies. GMCL was concerned about over-dealering, in part, because it reduces dealers' profitability, which in turn makes dealers reluctant to invest in facilities, hire suitable employees, and purchase new service equipment. At trial, Trillium

acknowledged that over-dealering was a problem for GMCL in Toronto, but took the position that there was no evidence that over-dealering was a significant problem in other urban markets or even a minor problem in smaller markets. I disagree. While over-dealering was a particularly critical problem in Toronto, the evidence revealed that the problem existed to some extent throughout Canada. This evidence included:

- testimony from both Comeau and Paul Risebrough ("Risebrough"), GMCL's Director of Dealer Network Planning, Dealer Organization and Business Management, that dealers in different markets were complaining about over-dealering;

- a letter introduced into evidence by Tom Donnelly, an Ottawa dealer, disclosing that both he and other dealers had complained of too many dealers in Ottawa;

- in August 2007, the GMDA expressed concerns of over-dealering to Comeau and others. It complained about the viability of the Toronto dealer network advising that "it is facing a crisis."; and

- Minutes of a September 26, 2008 DCT meeting disclosed that Dale Downie, a GMC dealer in London, Ontario, raised concerns about over-dealering, calling Ontario "a bloody mess." He added that the problem was not just in Toronto and that action had to be taken in all of the major markets.

[29] That over-dealering was a legitimate problem is further supported by GMCL's attempts to identify difficulties within the dealer network and reduce its size.

[30] One such attempt was "Project 2000". During the late 1990s, GMCL held meetings with almost all of its dealers across Canada, as well as dealers from other manufacturers. Project 2000 was intended to help GMCL compare its own dealer network to those of its competitors, and to assist GMCL with dealership rationalization.

[31] GMCL also conducted a "Ring Analysis" of its dealers in the Toronto area in 2007. This involved a detailed calculation of the percentage of consumers who would buy a particular product in a certain area. The goal was to determine how far consumers will travel from their homes to purchase a vehicle. This analysis helped GMCL understand how many dealerships it required; where the best dealerships were located; and which dealerships were underperforming.

[32] The results of Project 2000 and the Ring Analysis were shared with the dealers. Partially due to these studies, the dealer network was reduced by about 15 percent between 2000 and 2008 to approximately 705 dealers.

[33] Notwithstanding this modest reduction, however, GMCL made no drastic or continuing efforts to rationalize its dealer network. In my view, this was largely because up until 2008, even underperforming dealers such as Trillium were surviving and affording their principals comfortable lifestyles. As a result, GMCL did not view over-dealering as an urgent problem, and hence rationalization and reduction were generally approached on a voluntary basis.

2008: calamity strikes

[34] Trillium does not dispute that from 2005 to 2008, GMCL was facing significant financial challenges. In 2008, when the global economic crisis hit, its problems went from bad to desperate. The laissez-faire attitude that GMCL and its dealers had taken toward dealer network rationalization proved to be a mistake. By mid-2008 both GM and GMCL were suffering from increasingly reduced sales. Notably, GMCL's sales shrunk in the summer of that year when GMAC, a major provider of vehicle financing in both Canada and U.S. (and a GM subsidiary facing financial difficulties of its own), stopped leasing GM vehicles in Canada. Sales continued to slump in the latter part of 2008 as credit became harder to obtain for GM, GMCL and its customers alike. To make matters worse, oil prices rose, and the asset-backed security markets in the United States and Canada collapsed.

[35] Plummeting car sales were exacerbated by the global economic downturn that began in the fall of 2008. This was a tumultuous time for the economy at large. Many American financial institutions failed; the sub-prime crisis decimated the housing market in the U.S.; unemployment surged; and credit markets became even harder to access. These times were especially perilous for GM and GMCL, both of which were rapidly running out of cash. In 2007, GMCL lost $2.7 billion. By the end of 2008, GMCL had lost $4.3 billion. GM, GMCL and the dealers were all surprised by the extraordinary pace and painful depth of the financial crisis.

[36] GM and GMCL began to consider insolvency proceedings. Lawrence Buonomo ("Buonomo"), the Global Chief Litigation Counsel at GM, testified that GM began considering an insolvency filing in the United States. John Stapleton ("Stapleton"), the Chief Financial Officer of General Motors North America, testified that GMCL also began planning for a possible *CCAA* filing. Both companies desperately needed funding that could not be obtained through private markets.

[37] By December 2008, essentially out of cash and unable to borrow from the private markets, GM submitted a restructuring plan to the U.S. Government seeking $18 billion USD in financing and proposing drastic business restructuring measures to qualify for further support. The measures included reducing its brands, nameplates and dealers. Significantly, GM proposed to reduce the Pontiac brand to a "niche" brand with limited nameplates. In Canada, this proposal was a significant adverse blow to GMCL and its dealers: unlike in the U.S. where Pontiac made up around six percent of sales, the brand accounted for over 26 percent of GMCL sales in Canada. The proposal was especially bad for Pontiac-heavy dealerships such as Trillium, which relied on Pontiac for over 50 percent of its sales. At trial, no one disputed that Pontiac was a critical brand for GMCL dealers in Canada.

[38] At the same time as GM was approaching the U.S. Government, GMCL approached the Canadian Governments. The Canadian Governments asked GMCL to provide a restructuring plan that would ensure GMCL was a viable operation. Throughout December, both GMCL and GM worked on proposals to satisfy the demands of their respective governments.

[39] In late December 2008, the Canadian Governments agreed to give temporary financial support to GMCL provided that it was proportionate to Ontario's market share of GM's North American manufacturing. In the United States, GM received interim financial support from the

U.S. Government of up to approximately $13 billion USD, subject to the receipt of a detailed restructuring plan.

[40] While the government negotiations continued, Comeau delivered a HIDL broadcast to the dealers on December 19, 2008. He told the dealers that there was "no need to panic" and that Pontiac would take on a more focussed role. He added that the dealers in the Pontiac, Buick and GMC distribution channel would remain fully competitive. In my opinion, this was a reasonable position for GMCL to take given the circumstances. GMCL had secured interim funding from the Canadian Governments and Pontiac, though reduced to niche status, was expected to continue as a viable brand.

[41] Trillium criticizes GMCL's communications with the dealers in 2008 concerning the looming financial crisis. The evidence does not support this submission. In my view, while GMCL did not always address each and every development, it communicated adequately with its dealers regarding the crisis they were collectively facing.

At the edge of insolvency

February 2009

[42] The financial situation deteriorated even more in 2009, as sales forecasts in the U.S. continued to drop. Although GMCL and many of its dealers remained optimistic about the future of Pontiac as a niche brand, by February, GMCL and some of the dealers had grown concerned about worsening sales. That month, four members of the GMDA wrote to Comeau to express their concern that the situation was "totally different from anything we have experienced before." Their letter addressed over-dealering in Toronto and urged GMCL to "play a more active and decisive role" in bringing discussions about over-dealering in Toronto to a resolution. The letter emphasized that "things that may have been viable six months ago may not work today."

[43] Throughout February, the DCT held meetings about the state of the economy and its effect on GMCL and the dealers. GMCL continued to review the dealer network. Both GM and GMCL continued to prepare viable restructuring plans for their respective governments.

[44] On February 17, 2009, GM submitted its plan to the U.S. Government. The plan confirmed that things had worsened since December 2008. GM proposed reducing its U.S. dealer network from approximately 6,200 dealers to approximately 4,700 dealers over four years. GM still proposed that Pontiac would continue as a niche brand. But, while GM projected that Chevrolet, Cadillac and Buick and GMC would be continued, it proposed that Saturn, Saab and Hummer would be either sold or discontinued. Nameplates were also to be reduced. Not surprisingly, this revised proposal had negative implications for GMCL. The GM plan forecast a 22 percent decrease in vehicle sales in Canada during 2009. The restructuring plan also emphasized the potential for a GM bankruptcy, as well as the uncertainty of GMCL's continued viability if the Canadian Governments did not provide financial assistance.

[45] GMCL provided its own plan to the Canadian Governments on February 20, 2009. Comeau and Stapleton were both involved in this proposal. Comeau testified that GMCL had no

choice but to reduce its dealer network, given the reduction in brands and nameplates announced by GM. As a result, GMCL's restructuring plan accelerated the reduction of GMCL dealers. Before GM's proposal was released, GMCL had contemplated a reduction of 15 percent over five years; now, GMCL proposed reducing its network of 705 dealers to somewhere between 450 and 500 dealers by 2014 – a significant reduction of 30 to 36 percent over five years. But GMCL remained optimistic, hoping to achieve reductions through retirements, facilitated consolidations and private capital acquisitions. In February 2009, no involuntary reductions were proposed.

[46] It bears emphasizing that, at this time, there was uncertainty surrounding the Pontiac brand. Neither GMCL, nor the dealers, knew the exact implications of Pontiac becoming a niche brand in Canada, as this had not yet been clarified by GM. In any event the new, rather drastic, dealer reduction proposed by GMCL was significant and without precedent. GMCL was prepared to implement this plan, but required approval from the Canadian Governments.

[47] I find that GMCL adequately communicated the contents of the plan, including the dealer reduction proposal, to its dealers through a variety of means, including a HIDL broadcast delivered by Comeau on February 18. While the tone of the HIDL that day was upbeat and positive, there is no indication that Comeau was disingenuous. He told the dealers that meetings would be conducted with dealers to discuss the problems that GMCL and the dealers were facing, and meetings did, in fact, commence very shortly thereafter.

[48] Moreover, the overall message from Comeau was a measured and accurate one. I do not accept Trillium's submission, through the evidence of Hurdman and Fern Turpin Jr. ("Turpin"), a Dealer Principal of a GMCL dealership in Ottawa (whose family also owned a Saturn dealership), that Comeau's message, particularly in the February 18 HIDL, was that the dealers had no cause for immediate concern. This is not a reasonable interpretation of the message from that HIDL broadcast, or of the proposed restructuring plan. Nor was it a reasonable understanding given all of the surrounding circumstances. The situation was very serious, both for GMCL and the dealers. The dealers knew it and were not misled by Comeau's message.

[49] On February 27, 2009, GMCL sent a letter to its Saturn dealers. GMCL advised them that it would discontinue the Saturn brand at the end of the 2011 model year, but it was hopeful that Saturn could be sold to a third party. Around this time, a Saturn dealer action group (the "Saturn Group") was formed, of which Turpin was a member. CADA also became involved in assisting Saturn dealers at this time. As will be seen, Cassels was retained by the Saturn Group in March 2009 to provide legal advice with respect to, among other issues, GMCL's legal ability to terminate the Saturn dealerships.

March 2009

[50] The DCT meetings continued into March, and more HIDL broadcasts took place. As Comeau had done with the Saturn Dealers in 2008, he and other executives travelled across Canada conducting roadshow meetings with GMCL dealers – but this time, to discuss imminent dealer network rationalization. At these meetings, which occurred between February 23 and March 11, dealers were reminded that over-dealering was a problem and that reducing Pontiac to a niche brand would likely impact dealers in the Pontiac, Buick and GMC distribution channel.

The written presentation used at the roadshow meetings, which was reviewed at trial, clearly communicates that this planned reduction was significant. Other issues were discussed too, such as GMCL's difficulties with certain bond holders, the union and retirees.

[51] Also during March 2009, GMCL was negotiating with the Canadian Auto Workers ("CAW") to obtain concessions from the union. GMCL was attempting to restructure legacy costs with retirees and also began negotiating with suppliers, who were facing liquidity problems of their own. By the end of March it was clear that without government assistance neither GM nor GMCL would survive.

[52] A new financial storm front arrived in March. A group of U.S. hedge funds (the "Bond Holders") brought an oppression claim against GM, GMCL, Stapleton and Neil Macdonald ("Macdonald"), the Vice President of Corporate Affairs, General Counsel and Secretary of GMCL, among others, in Nova Scotia (the "Nova Scotia Action"). The Bond Holders claimed that in May 2008, more than $570 million had been wrongly transferred between GM and its affiliates including GMCL. This development added another layer of complexity to finding solutions for the problems faced by GM and GMCL.

[53] In light of its growing problems, GMCL hired Ernst & Young to take steps to prepare for a potential *CCAA* filing. In 2009, there were both positive and negative features to a possible *CCAA* filing. In my view, as will be discussed, the cons outweighed the pros. There would have been serious financial consequences for GMCL, and many others associated or dependent upon it, if GMCL pursued a *CCAA* filing. It is therefore unsurprising that during this time, GM, GMCL, the U.S. Government and the Canadian Governments all wanted the resolution of GMCL's financial woes to take place outside a *CCAA* proceeding. The predicament was the same for the dealers: they had much to lose if the company was to file under the *CCAA*. A GMCL *CCAA* filing would have left the dealers as unsecured creditors with the prospect of recovering very little or no money from the restructuring or bankruptcy.

[54] On March 27, the U.S. Government and the Canadian Governments rejected GM and GMCL's respective restructuring plans. A public announcement was made three days later on March 30. According to the U.S. Government, GM's proposal was inadequate, and tougher measures were required. The Canadian Governments' press release on March 30 also called for further reductions, stating that GMCL and all its stakeholders, including the dealers, had to make sacrifices:

> While the restructuring plans represent progress, they do not go far enough to ensure the long-term viability of these companies. Therefore, we are not certifying the proposals. … Together with our U.S. counterparts we believe that further fundamental changes are needed.
>
> …
>
> The companies must examine their assumptions about overall auto sales and their assumptions about market share corresponding to their current product mix and their long-term product plans. …. As with the U.S. Government's request,

> **Canada is requesting that both companies and their stakeholders – management, labour, retirees, dealers, and suppliers – contribute appropriately to improve overall cost structures in their long-term restructuring plans.**
>
> Both the U.S. and Canadian governments are extending the deadlines for certification of the restructuring plans by an additional 30 days for Chrysler and an additional 60 days for General Motors.
>
> [Emphasis added]

[55] As far as the Canadian dealers were concerned, this was very unwelcome news. The Canadian Governments had now indicated their agreement with the U.S. Government that the circumstances warranted a more aggressive rationalization of the dealer network, which, presumably, included the reduction of brands and nameplates.

[56] The U.S. and Canadian Governments granted GM and GMCL respectively, 60 days to submit better restructuring plans, making June 1, 2009 the new deadline. Failure to meet the deadline, or delivery of an unacceptable proposal, would lead to a refusal of financial assistance and possibly the liquidation of GM and GMCL. Comeau, Stapleton and Buonomo all testified about this prospect and I accept their testimony.

[57] GMCL worked at a feverish pace to develop a new proposal. Significant discussions and negotiations had to be undertaken with the dealers, the CAW, the Bond Holders and the retirees. Work on the potential *CCAA* filing also continued in case GMCL failed to create a proposal in time or the Canadian Governments refused its proposal.

[58] GMCL had some early success with the retirees concerning legacy costs. This left the CAW, the dealers and the Bond Holders. Stapleton referred to these three groups as the "three-legged stool". GMCL had to successfully address all three in order to avoid a *CCAA* filing.

[59] In a March 30, 2009 HIDL broadcast, Comeau advised the dealers that the U.S. and Canadian Governments had rejected the original restructuring plan. Comeau described the changes that had to be made as "deeper and faster". This phrase was used by Comeau and other GMCL officials frequently thereafter. It is unclear who exactly coined the phrase, but it was undoubtedly the mantra of GMCL during the weeks that followed.

April 2009

[60] In April 2009, GMCL obtained bridge financing from the Canadian Governments that it had requested in March, to keep it afloat while it worked on its new proposal.

[61] On April 14, Comeau delivered a significant HIDL broadcast to the dealers. As usual, Comeau came across as upbeat and optimistic as he explained that GMCL would be accelerating its network restructuring while the plan to eliminate approximately 200 to 250 dealers by 2014 remained in place. Comeau told the dealers of the June 1, 2009 deadline set by the Canadian

Governments.

[62] In an April 21 HIDL broadcast Comeau repeated to the dealers that GM had not yet released any new information with respect to the new product portfolio. Because GM continued to work on its own restructuring plan during this time, GMCL remained unsure as to what its redeveloped product portfolio would look like.

[63] On April 23, GMCL learned that GM would likely be discontinuing Pontiac completely by the end of 2010. Comeau testified that this information could not be immediately disseminated to the dealers given the fact that it was not yet official. As a result, he did not advise the dealers right away.

[64] Instead, the discontinuation of Pontiac was officially announced four days later by GM on April 27. This turn of events had a profound effect on GMCL and its dealers given the fact, as noted, that 26 percent of GMCL vehicles sold in Canada bore the Pontiac brand. Evidence provided by Comeau, Stapleton and Risebrough all reflected the significance of GM's announcement. Risebrough testified that the discontinuance of Pontiac had significant repercussions for GMCL and its dealers since GMCL had been planning on continued (though reduced) Pontiac sales to support the development of a low-priced Buick car which would have filled the void created by Pontiac's shift to a niche brand. This transitional plan was now off the table.

[65] That same day, on April 27, GMCL issued a press release setting out its own restructuring plans. Significantly, GMCL announced that the dealer network would be reduced on an expedited basis. GMCL was now seeking to reduce its dealers from 705 in 2009 to between 395 and 425 by the end of 2010 – a reduction of approximately 42 percent. After GMCL's announcement, it would have been obvious to all involved that a large percentage of the dealers would find themselves on the chopping block within 20 months at most.

[66] When Comeau delivered his April 27 HIDL broadcast, however, he did not convey any sense of dread to the dealers. As usual, Comeau's tone was positive and his delivery smooth and comforting. That said, Comeau did provide the dealers with accurate information concerning the drastic new dealer reduction. He advised that GMCL would work "closely" with the dealers and that GMCL hoped to achieve dealer reductions through normal attrition and consolidation. He stated that GMCL was still putting its plans together and it was unclear whether consolidation could be achieved through private capital, central funding or other alternatives. Among other things, he noted that the Canadian Governments had asked GMCL to implement this network consolidation on a much faster timetable. He added that the goal was to accomplish it in an orderly, cost effective and consumer-friendly way. He repeated that GMCL would work closely with the dealers; that the plan had not yet been developed; and that GMCL would continue its dialogue with the DCT.

[67] The optimistic tone of Comeau's broadcast suggested that viable alternatives would likely emerge for the dealers affected by the reduction process. That said, the new timeline and the percentage of dealers set to be shut down were obviously alarming. Further, GM and GMCL were now just over a month away from the June 1 deadline. As previously stated, there was a very real chance that one or both companies would fail without government support.

[68] While the evidence at trial disclosed that GMCL had not yet begun to formulate the wind-down plan that it ultimately put into place, in my opinion GMCL could have been more frank with its dealers concerning the impact of the loss of Pontiac and the fact that it might explore options other than rationalization through attrition and consolidation. Tellingly, this omission of candour forms the basis for many of Trillium's complaints in the action. Nevertheless, GMCL's communications cannot be viewed in a vacuum without regard to the other issues GMCL and the dealers faced. GMCL's optimism was not disingenuous. GMCL was performing a delicate commercial balancing act. Negotiations with the Bond Holders and the CAW – not to mention preparation for *CCAA* proceedings – were front and centre during this time. This was the fourth time since the beginning of 2008 that GMCL had sought concessions from the CAW. Not surprisingly, the negotiations were difficult, but GMCL was hopeful of a resolution that would save the company and the attendant jobs.

[69] Also on April 27, GM launched a bond exchange offer to holders of notes or bonds issued by GM or its affiliates whereby the notes or bonds could be exchanged for stock ("the Exchange Offer"). The value of the Exchange Offer was approximately $27 billion USD. It included the claims of the Bond Holders in the Nova Scotia action. The Exchange Offer remained outstanding to May 26, during which time U.S. securities laws prohibited GM from negotiating with any of the holders of the bonds, including the Bond Holders. The documentation filed by GM with the U.S. Securities and Exchange Commission ("the S-4") stated that GM might file for bankruptcy relief if the Exchange Offer was unsuccessful.

[70] After April 27, Comeau and his team began to identify the dealers that would not be retained by GMCL. It should be noted that Trillium does not dispute the selection itself (i.e. which dealers were chosen). Trillium's complaint is essentially about how the plan was carried out and that the dealers were ultimately "ambushed" by GMCL. I agree that no fault can be placed upon GMCL with respect to the dealers that were chosen. While one could certainly argue that some dealers should have been retained and others let go, it cannot be doubted that the process was extensive, thorough and conducted on a dispassionate basis. Comeau and his team worked hard to properly identify the dealers to be offered WDAs. Large amounts of data were compiled, reviewed and re-reviewed. GMCL, for example, developed an exhaustive spreadsheet, which became known as "the Matrix", to compare dealers. It synthesized a huge amount of complex information.

[71] As noted, in March 2009 the Saturn dealers had retained Cassels. This was facilitated by CADA and Timothy Ryan ("Ryan"), the Director of Industry Relations and General Counsel of CADA. On or around April 15, Ryan again approached Cassels – this time, regarding the representation of GMCL dealers in relation to a potential GMCL *CCAA* proceeding. At this point, the GMCL dealers had not yet asked CADA to facilitate legal representation but it appears that Ryan, at least, foresaw trouble on the horizon and wanted to have something in place for the GMCL dealers, (as well as the Chrysler dealers).

[72] The dealers would indeed require legal assistance. Four days later, on April 19, unaware that Ryan had reached out to Cassels, Michael Croxon ("Croxon"), a dealer, approached CADA to advise that a group of GMCL dealers had agreed to form a steering committee to represent all GMCL dealers in Canada should GMCL file for bankruptcy protection (the "Steering

Committee"). He asked for CADA's assistance in securing legal representation. The nature of the retainer that resulted – and crucially, whether there ever was a retainer between Cassels and the GMCL dealers – was hotly contested at trial. The events of April and May 2009 surrounding the purported retainer are discussed in greater detail below.

[73] At this point, however, it is necessary to identify the four retainers and purported retainers involving Cassels:

- Ryan and CADA had a longstanding retainer with Peter Harris ("Harris"), a partner at Cassels. A new file matter (a subfile) was opened under this retainer in April 2009 with respect to providing CADA with legal assistance concerning the problems that GMCL and Chrysler were facing;

- there was the retainer between Cassels and the Saturn dealers, which was facilitated by CADA in March 2009;

- Cassels was retained by Industry Canada in March 2009 to advise it with respect to a potential commercial financing transaction concerning GMCL and Chrysler; and

- there was the alleged retainer between Cassels and the GMCL dealers, which arose in May 2009, and which was also allegedly facilitated by CADA. The Cassels lawyers allegedly acting under this retainer were Harris, Glenn Zakaib ("Zakaib"), Larry Weinberg ("Weinberg"), and David Ward ("Ward"). Cassels denies that this retainer ever existed and I will have more to say about this controversy below.

May 2009

[74] By early May 2009, GMCL was contemplating offering some form of WDA to a number of the dealers. GMCL contemplated making the offers either inside or outside a *CCAA* filing. Ultimately, GMCL attempted to restructure the dealer network outside a *CCAA* filing. During this time, GMCL used the Matrix to identify which dealers would be offered WDAs. This development was not communicated to any of the dealers or dealer organizations. GMCL also began analyzing its exposure to claims from dealers and the overall financial impact of a potential *CCAA* filing.

[75] On May 5, Comeau and Macdonald met with the Steering Committee. They did not tell the members of the Steering Committee that GMCL was developing a wind-down plan and had begun identifying possible dealers to receive WDAs. Rather, they told the Steering Committee that GMCL's plans were not yet formalized and that it was impossible for GMCL to comment one way or another.

[76] On May 12, Comeau sought approval from Troy Clarke ("Clarke"), the President of GM North America and second-in-command to the CEO of GM, Fritz Henderson ("Henderson"), regarding a proposal to give pre-filing wind-down payments to some dealers. The approval sought was for a budget of up to $218 million for an anticipated 290 dealers. In seeking approval, Comeau told Clarke that GMCL estimated its potential exposure to claims from dealers resulting from this restructuring to be between $300 and $500 million. The proposed budget and

the wind-down offers were designed to eliminate this exposure while giving the dealers what GMCL considered fair treatment in the circumstances.

[77] GMCL's plan also provided that these dealers would be allowed to operate for a further six to nine months, during which time they would receive payments to help offset costs of shutting down their dealerships. Further, GMCL hoped to facilitate the profitable disposal of inventory to the benefit of both itself and the dealers.

[78] On May 14 there was an important meeting in Washington, D.C. (the "Washington Meeting"). Buonomo, Macdonald and Stapleton (by telephone) all attended the meeting, along with Joe Peter ("Peter"), CFO of GM North America, Arturo Elias ("Elias"), President of GMCL, Ray Young, the CFO of GM and a few of the lawyers who were assisting GM and GMCL with the restructuring. Also in attendance were representatives from the U.S. and Canadian Governments. One of the topics discussed at the Washington Meeting was whether GMCL would file for *CCAA* protection.

[79] At the Washington Meeting, the participants identified three requirements that had to be met in order to avoid a *CCAA* filing: resolutions with the CAW, the dealers, and the Bond Holders. The Canadian Governments would only provide funding outside a *CCAA* filing if GMCL reached satisfactory resolutions with each of these stakeholders. The primary focus of the Washington Meeting was the Bond Holder issue. Buonomo testified that GMCL dealers were not discussed in any detail during the meeting, other than a brief exchange in which the Canadian and U.S. Governments approved GMCL's proposal to attempt to resolve its dealer network by making some form of pre-filing wind-down offer to still unidentified dealers. The dealers were not viewed as being on the same plane as the Bond Holders in a number of important respects. Notably, the participants felt that the Bond Holders had considerably more leverage, either outside or within a *CCAA* filing. Altogether, the U.S. and Canadian Governments expressed the view that it would be desirable to avoid a GMCL *CCAA* filing, but it was clear that this had to be accomplished at a reasonable cost.

[80] On the same day as the Washington Meeting, GM sent a letter to approximately 1,100 of its U.S. dealers advising them that their agreements would not be renewed. GM offered these dealers until the end of May to provide input. The dealers that received the letter were generally very small or underperforming dealers.

[81] On May 15 Comeau, who did not attend the Washington Meeting, received approval from Clarke and Peter to send pre-*CCAA* wind-down offers to a group of dealers. GMCL was given a budget of up to $218 million for this purpose. This was comprised of $182 million for GMCL dealers; $30 million for Saturn dealers: $4 million for Hummer dealers; and $2 million for Saab dealers. According to Comeau, he was instructed that any offer would be conditional on GMCL avoiding filing for *CCAA* protection. This, of course, was a significant development. At this time, GMCL also determined that it would attempt to formulate and deliver the wind-down offers by May 20, with a required response date from the dealers of May 26. Stapleton and Comeau both testified that Clarke's approval of $218 million for the wind-down offers was expressly tied to the number of dealers GMCL proposed to let go (i.e., 290 dealers).

[82] Shortly after receiving this approval, Comeau emailed his team and others at GMCL to

update them on this development. In my view, Comeau's email reflects the fact that GMCL had not been given authority to exceed the budget limits established by Clarke at the time he granted approval. Comeau confirmed in his testimony that he had no authority to exceed those budget limits. In other words, GMCL took its marching orders from GM and any decision to go beyond the allocated $218 million would have to come from GM. Buonomo confirmed that GMCL could not have exceeded the budget limits established by Clarke without the approval of GM and the U.S. and Canadian Governments.

[83] Comeau delivered another HIDL broadcast on May 15. Comeau told the dealers that over the next few weeks,

- GMCL would work to achieve solutions that would best serve its current and future customers while also recognizing some of the unique aspects of the Canadian network;
- in the event that GMCL's restructuring plans were not approved by the Canadian Governments or GMCL could not reach agreement with all key stakeholders, it was possible that the company would be required to pursue its restructuring under a court-supervised process pursuant to the *CCAA*;
- GMCL would be identifying dealers with whom its relationship would come to an end; and
- GMCL would proceed in a fair and consistent manner.

[84] Comeau did not share with the dealers the details of the Washington Meeting or the WDA proposal. He testified that he did not do so because GMCL was uncertain as to whether it could complete all the necessary steps, prepare the necessary documents and have the documents delivered by May 20. But Comeau did advise the dealers that GMCL was hopeful that it would roll out its dealer restructuring plan by the end of May or in the very first part of June. In my view, the dealers listening to the broadcast should and likely did understand that a 42 percent reduction could not be achieved through normal attrition and consolidation.

[85] That same day, Comeau called Rick Gauthier ("Gauthier"), the president of CADA, to advise CADA and the Steering Committee generally of what was potentially to occur with the WDAs. CADA told Comeau that neither CADA nor the Steering Committee would get involved at this stage. The Steering Committee was of the view that dealing with WDAs did not fall within its mandate. The Steering Committee felt that its current mandate was to deal with issues flowing from a possible GM bankruptcy or GMCL *CCAA* filing. It took the position that it had no role to play with respect to any proposal being developed for the dealers whose dealerships would be discontinued, which in any event, had not yet been identified. At this point in time the Steering Committee's own members did not know whether they would receive WDAs. As it turned out, none did.

[86] By May 15, considerable work remained to be done. Between May 15 and May 19, including the Victoria Day Weekend, Comeau and his team undertook the enormous task of identifying the dealers who would be offered WDAs and drafting the necessary documentation,

including the Notice of Non-Renewal and WDA. Both Comeau and Risebrough testified that GMCL was not yet certain that it could make the WDA offers in the manner approved by Clarke. They also testified that the WDAs had not yet been drafted or vetted by the necessary stakeholders at GMCL, including GMCL's legal department. In other words, GMCL was under a tight deadline to come up with an appropriate formula that would be acceptable to the U.S. and Canadian Governments and that would fit within the parameters put in place by GM.

[87] By Saturday morning on May 16 GMCL had taken the Canadian Governments through the proposed dealership plan. The following day, Sunday May 17, GMCL sent a network briefing presentation to officials in the Canadian Governments. This presentation contained information concerning GMCL's brand strategy and network; the over-dealering problems that GMCL was attempting to address; the basic methodology for dealer selection; and a draft list of zones, cities and number of employees (though not the names of dealerships) for the "work-in-progress" list of dealers who would be offered WDAs.

[88] The wind-down formula was completed late in the day on May 18. The formula was based on the size of each dealer's market and the number of retail Pontiac sales that the dealer had made in 2008, plus various allowances. GMCL's wind-down formula was consistent with the basis upon which GMCL sought approval from GM to make pre-filing wind-down offers. The principles underlying GMCL's approach to its wind-down offers – business continuation, mitigation of severance costs and partial compensation for liquidation – dictated that larger dealers carrying on business in larger markets should receive larger wind-down payments.

[89] The WDAs and other documentation were completed on May 19. In cross-examination, it was put to Comeau that GMCL's plan was already well established and could have been communicated to dealers over the Victoria Day Weekend. I accept Comeau's testimony that GMCL was not in a position to send out the WDAs over that weekend, or otherwise to meaningfully communicate with the dealers, because it had not yet selected the dealers to whom offers would be made and it had not yet finalized the WDA formula. Indeed on the evening of May 19, Comeau and his team at GMCL were still finalizing the list of dealers and completing the notification letters for those dealers. The ultimate list of dealers totalled 240 dealers – 50 fewer than originally contemplated. Comeau testified that, as a result, the $218 million originally allotted for 290 dealers was reduced on a *pro rata* basis to $143.5 million to be allotted among the 240 dealers.

[90] On May 19, Comeau conducted a critical HIDL broadcast. He advised the dealers that the next day some of them would receive WDAs. He recommended that those dealers review the WDAs with their legal, tax and other advisors. He noted that the deadline for responses was May 26. This left the dealers receiving WDAs only four business days, given the intervening weekend. The dealers were understandably shocked and surprised to receive this news.

[91] As noted, GMCL had previously come to terms with its retirees. A deal was tentatively reached with the CAW on May 21. It was ratified on May 25. Given the terms of the Exchange Offer to the Bond Holders, negotiations with them could not commence until May 27. GMCL decided that it was important to know promptly whether it had agreements with the dealers offered WDAs so that it could determine whether it should proceed with negotiations with the

Bond Holders.

[92] Cassels, CADA and the Steering Committee met on May 20. The Steering Committee confirmed, once again, that it would not play a role with respect to the delivery of the WDAs but rather only with respect to issues flowing from a possible GM bankruptcy or GMCL *CCAA* filing.

[93] On May 20 GMCL delivered Notices of Non-Renewal and WDAs to 240 dealers. The Notices of Non-Renewal informed the dealers that GMCL would not renew their respective DSSAs when they expired on October 31, 2010. The Notice of Non-Renewal summarized the terms of the WDA and encouraged each dealer, if interested in accepting the offer, to "review the WDA with legal, tax and any other advisors of your choosing." The WDA included, among other things, an offer by GMCL to make a series of payments to each dealer, in exchange for which the dealer would voluntarily terminate its DSSA and release all claims against GMCL.

[94] Multiple different versions of the WDAs were prepared, including different forms for domestic dealers (selling Pontiac, Buick, GMC, Chevrolet and/or Cadillac) with a single operator; domestic dealers with dual operators; Saturn/Saab dealers with a single operator; and Saturn/Saab dealers with dual operators. The Saturn and Saturn/Saab dealers received a different form of WDA that gave them an option: accept the offer and end their relationship with GMCL (by winding down), or elect to wait for the outcome of discussions regarding a potential sale of the Saturn brand and then move forward with Saturn under its new ownership if a deal was reached.

[95] Also on May 20, CADA advised the GMCL dealers that it wanted to hold a conference call to provide information to the dealers who had been offered WDAs but that it could not identify them because it did not have a list. GMCL refused to disclose the information, claiming it would prejudice the individual dealers. The dealers who had been offered WDAs were invited to contact CADA instead. A conference call was held on May 24. Ryan was on the call, as were Gauthier and Mike Gallardo ("Gallardo"), CADA's Industry Relations and Communications Officer. Two lawyers from Cassels, Harris and Zakaib, and Chuck Seguin ("Seguin"), a consultant retained by CADA, were also present. It is not known how many dealers participated in the call, although it is generally thought by the parties that the number was somewhere in the range of 110. Dealers from across the country participated. Questions were asked of and statements made by Zakaib, Ryan and Gauthier. It was a gloomy conversation. The dealers were told by CADA and Cassels that the lawyers would not make any recommendations. CADA was of the view that this was a "take it or leave it" offer.

[96] On May 22, GMCL sent all of the dealers offered a WDA a memorandum setting out "Questions and Answers" concerning issues that had been raised by these dealers on the conference call. GMCL was also in contact with CADA and the DCT with respect to the offer that had been made. Also on May 22, the DCT sent a letter to all GMCL dealers recommending that those dealers who had been offered WDAs accept them.

[97] The WDA was accompanied by a certificate of independent legal advice (the "ILA Certificate") that the dealers were required to sign. The Notices of Non-Renewal and the WDAs also indicated that while the wind-down offer was conditional on all of the dealers accepting the

offer (the "Acceptance Threshold Condition"), GMCL reserved its right to waive this condition. Hurdman signed and returned his WDA on May 26. By May 29, 202 of the 240 dealers who had been offered WDAs had accepted the offer by executing and returning the WDA. On May 30, GMCL waived the Acceptance Threshold Condition.

[98] This left only the Bond Holders to deal with. Frenetic negotiations began between GM and the Bond Holders on May 27. After virtually non-stop negotiations and with the approval of the U.S. Government, GM lent $450 million USD to GMCL to fund a settlement. A settlement was reached at approximately 7:00 a.m. on June 1, 2009 in the amount of $369 million USD or $400 million CAD (using June 2, 2009 exchange rates). The Canadian Governments' approval was obtained minutes thereafter. Although GMCL had prepared the necessary documents for a potential *CCAA* filing scheduled for June 1 in the Commercial List in Toronto, GMCL decided that the filing was now unnecessary because it had resolved the outstanding issues, obtained government approval, and could now restructure outside a *CCAA* filing. Conversely, in the U.S., on June 1, GM was forced to file for protection under Chapter 11 of the United States Bankruptcy Code.

Developments after June 1, 2009

[99] On June 1, 2009, Trillium sold all its remaining new vehicle and parts inventories to the Gus Brown Dealership at cost, and completed the inventory transfer by June 4, 2009. Trillium ceased operating as a GMCL dealer on June 26, 2009, having requested an early termination date of September 30, 2009. Trillium's DSSA was terminated effective July 2, 2009.

[100] Trillium, along with the other Class Members, received wind-down payments as per the terms of the WDAs. In total, GMCL paid $126 million (including payments for sign removal) to the 202 dealers who had accepted the WDAs. The average payment was approximately $600,000, and payments ranged as high as $2.274 million. GMCL made all payments to Trillium in accordance with the WDA – a sign removal payment amount of $6,051.20 and a wind-down payment amount of $642,000. The last payment to Trillium under the WDA was made in December 2009.

[101] Trillium started this action against GMCL and Cassels on February 10, 2010 on behalf of all of the dealers who had signed the WDAs.

The Saturn dealers

[102] Fifty-one Saturn dealers received WDAs. Nine Saturn dealers opted out of the Class. Hence, the Class of 181 dealers includes 42 Saturn dealers. A preliminary issue regarding the nature of the Class must be addressed before dealing with the common issues.

[103] As noted above, the Saturn dealers were told in February 2009 that the Saturn brand would be discontinued by the end of 2011. GMCL advised that it would look for a third party purchaser, failing which the brand would simply come to an end. In response, the Saturn dealers formed an action group in March 2009 and this group retained Cassels shortly thereafter.

[104] Although GMCL was in the midst of negotiations with the Penske Automotive Group at

the time, the Saturn dealers received WDAs on May 20, the same day as the other GMCL dealers who were offered WDAs. As noted, the Saturn WDAs differed in that they contained two options. The Saturn dealers could accept the wind-down payments ("Option One") or continue pending the sale to a third party ("Option Two"). Under Option Two, if the negotiations came to naught, the Saturn dealers could re-elect Option One and receive wind-down payments.

[105] By May 26, 20 of the 51 Saturn dealers had chosen Option One. When the Penske deal fell through, the rest of the 51 Saturn dealers (save one) re-elected Option One, and accepted the WDA. The last Saturn dealer re-elected later in 2009.

Are the Saturn dealers part of the Class?

[106] Trillium takes the position that the Saturn dealers are members of the Class.

[107] Trillium argues that the Saturn dealers share the same cause of action with the GMCL dealers – namely, that they entered into a WDA with GMCL. The fact that the Saturn WDA included two options, reflecting their unique situation, does not remove them from the Class. Further, Trillium submits that the Saturn dealers had the same interest or objective as the GMCL dealers: to obtain the best possible deal in the circumstances. Therefore, they are proper members of the Class. Trillium concedes that there may be some contextual differences between the GMCL dealers and the Saturn dealers, but maintains that these should not bar the Saturn dealers from participating in these proceedings.

[108] Cassels argues that the Saturn dealers are not members of the Class as against Cassels. It takes the position that its handling of the Saturn retainer is not even an issue in this action. Cassels submits that the Amended Amended Statement of Claim makes no specific allegations by the Saturn dealers against Cassels and that there are only passing references to the Saturn retainer in the pleading. Cassels also notes that when the Saturn dealers who chose Option Two re-elected for Option One, there was no retainer with Cassels in place.

[109] GMCL takes a slightly different tack from Cassels. GMCL submits that while there is a cause of action pleaded against it by the Saturn dealers, the Saturn dealers are, substantively, in a different position than the GMCL dealers. According to GMCL, the Saturn dealers knew from very early on – i.e., February 2009 – that their dealerships were ending and therefore they were not affected by the later HIDL broadcasts or the potential *CCAA* filing. GMCL relies on the evidence of Turpin, who testified that he was not surprised that his family's Saturn dealership got a WDA because he knew that all Saturn dealers were going to be discontinued. GMCL submits that the common issues addressing fair dealing and the right to associate will be affected by the fact that every Saturn dealer accepted the offer, choosing either Option One or Option Two, and that the Saturn dealers were able to organize and had retained counsel.

[110] In my view, the Saturn dealers are party to these proceedings (despite some minor noted differences) and Trillium is a proper representative plaintiff for this group of dealers.

[111] As regards the claim against Cassels, it is true that the Saturn retainer was different from the alleged retainer that the GMCL dealers had with Cassels. The Saturn dealer group retained Cassels in March 2009, and the Saturn brand was not the subject matter of the May 4

memorandum circulated by CADA and the Steering Committee. Also, as stated, the Saturn WDAs had more options than those given to the other GMCL dealers.

[112] Nevertheless, there are a number of problems with Cassels' submission. First and foremost, Cassels failed to raise this issue with Strathy J. at the certification stage. Justice Strathy took note of the "slight variation" in the WDAs but certified the entire Class nonetheless. Second, the claim has proceeded for years on the basis that the Saturn dealers were members of the Class. Again, Cassels made no objection until closing argument. Finally, the Class was certified on the basis that Trillium would be the representative plaintiff for all dealers who executed a WDA. All of the Saturn dealers executed a WDA. Hence, Trillium is a proper representative plaintiff for all of the Saturn dealers.

[113] However, I recognize that there are differences between the GMCL dealers and the Saturn dealers as regards the claims against both Cassels and GMCL. In my reasons below, I will address those differences.

PART III – THE CLAIM AGAINST GMCL

[114] I will now turn to the common issues certified against GMCL. I will first deal with Trillium's claim against GMCL, followed by the counterclaim by GMCL against the Class Members.

Background

[115] Both Trillium and GMCL agree that GMCL was in the throes of financial crisis during the spring of 2009. GMCL was insolvent during this time and reliant upon the Canadian Governments for short term funding. One must not lose sight of these unprecedented economic pressures bearing down on GMCL when it formulated and executed its plan to reduce the dealer network. This is not a case about a franchisor taking advantage of its franchisees simply to squeeze a little more profit from the margins. On the other hand, despite these exceptional circumstances, one must also not lose sight of the fact that the dealers were vulnerable, and as franchisees, were dependent upon GMCL for products and information.

[116] While the exceptional circumstances of this case involve a challenging, fast moving and dire economic situation, they do not negate the legal duties owed by GMCL to the dealers; rather, those duties must take their colour from that context.

Common Issue (a):

> **Is GMCL a franchisor within the meaning of the *Arthur Wishart Act (Franchise Disclosure), 2000,* S.O. 2000, c. 3 (the "*Wishart Act*"), the *Franchises Act,* R.S.A. 2000, c. F-23 (the "*Alberta Act*") and the *Franchises Act,* R.S.P.E.I. 1988, c. F-14.1 (the "*PEI Act*"), or any of them?**

[117] The answer to this common issue is "yes".

[118] GMCL has admitted that it is a franchisor within the meaning of s. 1(1) of the *Wishart Act*, as well as the corresponding provisions of the *Alberta Act* and the *PEI Act.*

Common Issue (b):

> **Are all Class Members entitled to the benefit of the statutory duty of fair dealing under s. 3 of the *Wishart Act* and the right of association under s. 4 of the *Wishart Act* (or similar provisions under such franchise legislation otherwise governing any such Class member) by virtue of the choice of law provisions in the standard General Motors Dealer Sales and Service Agreement and the Wind-Down Agreement?**

[119] The answer to this common issue is "yes".

[120] The Class consists of dealers who operated dealerships all across Canada, including some outside Ontario: (a) in provinces where there was no franchise legislation in May 2009, and (b) in two provinces, Alberta and PEI, that had their own franchise statutes at the time. Trillium's claims in this proceeding have been advanced on the basis that all Class Members, regardless of the province in which they operated, are equally entitled to the statutory protections accorded to Ontario franchisees under ss. 3 and 4 of the *Wishart Act*.

The choice of law clause

[121] All Canadian dealers had the same DSSA with GMCL. That DSSA contained a choice of law provision at s. 17.12 in favour of Ontario:

> This Agreement is governed by the laws of the Province of Ontario. However, if performance under this Agreement is illegal under a valid law of any jurisdiction where such performance is to take place, performance will be modified to the minimum extent necessary to comply with such law.

Covenant C-13 of the WDA also contained a choice of law provision, again in favour of Ontario.

[122] Trillium's position is straightforward. The Class Members operating in provinces other than Ontario are entitled to the rights afforded by ss. 3 and 4 of the *Wishart Act* because, in signing the DSSAs and WDAs, they agreed with GMCL to be bound by the laws of Ontario, including Ontario's franchise legislation, the *Wishart Act*. Trillium cites the Court of Appeal's decision in *405431 Ontario Ltd. v. Midas Canada Inc.*, 2010 ONCA 478, 322 D.L.R. (4th) 177 [*Midas* (2010)], in which it affirmed Cullity J.'s conclusion in *405431 Ontario Ltd. v. Midas Canada Inc.* (2009), 64 B.L.R. (4th) 251 (Ont. S.C.) [*Midas* (2009)], that the Ontario choice of law clause in the franchise agreement demonstrated that the parties intended for their rights and obligations to be the same as if the franchisee operated in Ontario.

[123] GMCL recognizes the validity of the choice of law clauses contained in the DSSA and WDA but submits that non-Ontario Class Members are not entitled to benefit from all of the

provisions of the *Wishart Act*. GMCL makes two basic arguments. First, the parties could not have intended to subject the DSSA and the WDA to the *Wishart Act* in light of the "clear territorial limits" set out in s. 2(1) of that statute. Second, whether or not the *Wishart Act* applies generally, s. 4 in particular is an extra-contractual statutory right that has nothing to do with the contract itself and therefore was not incorporated by the proper law of the contract.

"Clear territorial limits"

[124] Section 2(1) of the *Wishart Act* states that the act applies to franchise agreements entered into by franchisees operating partly or wholly in Ontario:

> **Application**
>
> **2(1)** This Act applies with respect to a franchise agreement entered into on or after the coming into force of this section, with respect to a renewal or extension of a franchise agreement entered into before or after the coming into force of this section and with respect to a business operated under such an agreement, renewal or extension if the business operated by the franchisee under the franchise agreement or its renewal or extension is to be operated partly or wholly in Ontario.

[125] According to GMCL, s. 2(1) places clear territorial limits on the applicability of the *Wishart Act* such that the court cannot presume that the parties intended, by means of a general selection of Ontario law as the proper law of their franchise agreement, to subject that franchise agreement to the franchise legislation of Ontario.

[126] I do not accept this argument.

[127] First, in my view, the *Midas* decisions resolve this issue. As in this case, some of the class members in *Midas* carried on business outside of Ontario but the franchise agreement in question contained a choice of law clause in favour of Ontario:

> 10.11. Controlling Law. This Agreement, including all matters relating to the validity, construction, performance and enforcement thereof, shall be governed by the laws of the Province of Ontario.

[128] In *Midas* (2009), Cullity J. found (at para. 35) that by virtue of the choice of law clause, the franchise agreements were governed by the *Wishart Act*, irrespective of the location of the franchisees:

> I believe the most reasonable inference is that, by agreeing that the laws of Ontario are to govern the validity, construction, performance and enforcement of a franchise agreement applicable to franchises operating in another province, the intention of the parties was that their rights and obligations – including the reciprocal and inviolable rights and duties of fair dealing – are to be the same as

> if the business of the franchise was operated in Ontario. The territorial limitations in section 2 of the [*Wishart Act*] have, in my opinion, no more effect for this purpose than that of the general presumption that statutes are not "intended to apply extraterritorially to persons, things or events outside the boundaries of the enacting jurisdiction" (*Sullivan on the Construction of Statutes*, (5th edition), page 731).

[129] The Court of Appeal upheld Cullity J.'s finding that the *Wishart Act* applied to the franchises operating outside Ontario, stating at para. 45:

> I agree with the motion judge and would give no effect to this ground of appeal. Many commercial contracts today contain choice of law clauses. That choice often bears no relationship to where the contract is to be carried out. As the respondent notes in its factum:
>
> > As Peter W. Hogg states "[a]s a general proposition, it is plain that a province may not regulate extraprovincial activity" [Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Carswell, 2007) at s. 13.3(d)]. It is equally plain, however, that this inherent territorial limitation does not prevent parties from adopting the law of one province to regulate contracts which have a connection to other provinces, or in the case of franchise agreements, which can span multiple jurisdictions. The law selected by the parties will ordinarily govern the dispute subject to public policy exceptions:
> >
> > > Where the parties have expressly selected a governing law, there is no difficulty in identifying the "law intended by the parties." The law will govern the contract provided the choice is *bona fide* and legal, and there is no reason for avoiding the choice on the ground of public policy. [Janet Walker, *Castel & Walker: Canadian Conflict of Laws*, 6th ed., looseleaf (Markham, Ont: LexisNexis Butterworths, 2005) at s. 31.2a.].

[130] GMCL challenges the reasoning in the *Midas* decisions and submits that they were both wrongly decided. I disagree with this submission and, in any event, I am bound by them.

[131] Second, irrespective of *Midas* (2010), I cannot accept GMCL's argument because it depends on an unreasonable interpretation of s. 2 of the *Wishart Act*, and has an effect beyond its purpose of regulating Ontario businesses. The drafters of the *Wishart Act* could not have intended to prevent franchisees and franchisors in other provinces from opting in to the statutory protections of the *Wishart Act*. That is a matter of contracting, not a matter of legislating. Rather, in my view, the purpose of s. 2(1) is to relieve Ontario businesses of the need to explicitly adopt the legislative scheme of the *Wishart Act*. In other words, the *Wishart Act*

applies to those businesses operating partly or wholly in Ontario. Finally, I agree with Cullity J. in *Midas* (2009) that, at the most, s. 2(1) reflects the standard presumption that statutes are not intended to apply extraterritorially. That alone cannot be enough to preclude the effect of a choice of law clause. Were it otherwise, choice of law clauses would be of little use to anyone.

[132] GMCL submits that even if *Midas* (2010) was correctly decided and binding, the decision did not address the effect of "competing statutes" that exist in other provinces. GMCL points to the application provisions in the *Alberta Act* and the *PEI Act* that correspond to s. 2(1) of the *Wishart Act*. For example, s. 3(1) of the *Alberta Act* states:

> **Application of Act**
>
> **3(1)** This Act applies to the sale of a franchise made on or after November 1, 1995
>
> (a) if the franchised business is to be operated either partly or wholly in Alberta, and
>
> (b) if the purchaser of the franchise is an Alberta resident or has a permanent establishment in Alberta for the purposes of the *Alberta Corporate Tax Act*

[133] And s. 2(1) of the *PEI Act* states:

> **Application**
>
> **2(1)** This Act applies with respect to,
>
> (a) a franchise agreement entered into on or after the coming into force of this section;
>
> (b) a renewal or extension of a franchise agreement described in clause (a) entered into on or after the coming into force of this section; and
>
> (c) a business operated under an agreement, renewal or extension described in clause (a) or (b), if the business operated by the franchisee under the franchise agreement or its renewal or extension is to be operated partly or wholly in Prince Edward Island.

[134] In my view, the application provisions under both statutes must be interpreted in the same manner as s. 2(1) of the *Wishart Act*. Their purpose is neither to preclude out-of-province businesses from adopting the Alberta or PEI law to govern their franchise agreements, nor to prevent businesses operating in Alberta or PEI from opting into a statutory framework for franchises that provides equal or greater protections for the parties. Thus, I do not accept GMCL's submission that Class Members who carried on business in Alberta or PEI are not entitled to the benefits provided by the *Wishart Act*.

[135] In this regard, I should comment on s. 17 of the *Alberta Act* and s. 11 of the *PEI Act*. Section 17 of the *Alberta Act* states as follows:

> **Limit on jurisdictional choice**
>
> **17** Any provision in a franchise agreement restricting the application of the law of Alberta or restricting jurisdiction or venue to any forum outside Alberta is void with respect to a claim otherwise enforceable under this Act in Alberta.

And s. 11 of the *PEI Act* states:

> **Attempt to affect jurisdiction void**
>
> **11** Any provision in a franchise agreement purporting to restrict the application of the law of Prince Edward Island or to restrict jurisdiction or venue to a forum outside Prince Edward Island is void with respect to a claim otherwise enforceable under this Act in Prince Edward Island.

In my view, these provisions do not oust the application of the *Wishart Act* either.

[136] In *578115 Ontario Inc. (c.o.b. McKee's Carpet Zone) v. Sears Canada Inc.*, 2010 ONSC 4571, 325 D.L.R. (4th) 343 [*Sears*], Strathy J. interpreted a choice of law provision choosing Ontario law in the context of franchisees operating their businesses in Alberta and the agreements being subject to the s. 17 limit on jurisdictional choice in the *Alberta Act*.

[137] At para. 28 of the certification motion in *Sears*, Strathy J. stated:

> These [limit on jurisdictional choice] provisions would not preclude the plaintiff from bringing an action in Ontario on behalf of a class that includes Alberta and New Brunswick franchisees, but they may well require the Ontario court to apply the law of the province in which the franchisee was located.

[138] One could argue that s. 17 of the *Alberta Act* and s. 11 of the *PEI Act* are problematic for franchisees in those provinces in the face of a choice of law provision which selects Ontario law. However, it is my view that, when read in context, the words "void with respect to a claim otherwise enforceable under this Act in Alberta" and "void with respect to a claim otherwise enforceable under this Act in Prince Edward Island" allow for a choice of law provision selecting provincial laws other than those of Alberta or PEI. A claim otherwise enforceable in Alberta or PEI would have to be a claim that could be brought in Alberta or PEI. This class proceeding was certified in Ontario and proceeded under the jurisdiction of this court. It could not have been brought in Alberta or PEI. Neither GMCL nor Cassels argued that the class proceeding for Alberta or PEI dealers could have been brought in Alberta or PEI (or for that matter, that any other out-of-province dealers should have brought actions in their province of residence).

[139] More importantly, the jurisdiction-limiting provisions in question must be interpreted in

light of the remedial purposes of the *Alberta Act* and the *PEI Act*. They were designed to prevent parties from contracting out of the remedial legislative scheme rather than to prevent franchisees from participating in national class actions brought in provinces that have similar franchise disclosure legislation. The Class Members located in Alberta and PEI had substantially similar rights and protections under the *Wishart Act* as they would have had under their provincial legislation. There were no submissions that their rights were compromised in any way. I would not, therefore, give effect to GMCL's submission that they must be dealt with separately.

"Provisions applicable to persons"

[140] GMCL's second argument regarding Common Issue (b) is, that even if the out-of-province Class Members are entitled to the benefits of the *Wishart Act* generally, the choice of law clause cannot cause statutory provisions that purport to govern persons, rather than the franchise agreement itself, to apply to the non-Ontario Class Members. According to GMCL, s. 4 of the *Wishart Act*, in large part, applies to persons and not to the validity or interpretation of the franchise agreement itself. Simply put, Ontario statutory provisions that confer non-contractual rights, such as s. 4 of the *Wishart Act*, cannot be incorporated by a choice of law clause in favour of Ontario.

[141] GMCL also puts this argument another way. Because the choice of law clause states that the laws of Ontario govern the DSSA, any applicable statutory provision must be relevant to the contract itself and not just the contractual relationship. According to GMCL, the "proper law" of the contract determines its material or essential validity, its interpretation and effect, its discharge (i.e. for breach) or its effect on third parties. Thus, if the particular statutory provision has nothing to do with these aspects of the contract, then the "proper law" of the contract does not cause that particular provision to apply to the parties.

[142] I do not accept this argument in either variation. The choice of law provision governs the DSSA, not just its interpretation. What is at issue here is the contractual relationship between the franchisor (GMCL) and the franchisees (the dealers). The dealers are not seeking to obtain the benefit of rights provided for by some unrelated Ontario statute. The *Wishart Act* creates a framework of rights and obligations that govern the specific type of contractual relationship that the parties entered into. Further, GMCL's proposed distinction between rights "applicable to persons" and contractual rights is untenable. Section 4 provides rights to a specific kind of person, namely, a contracting party to a franchise agreement. Thus, I would not give effect to GMCL's attempt to limit the applicability of the *Wishart Act*.

Common Issue (c): the Duty of Fair Dealing

Introduction

[143] In general terms, Common Issue (c) asks whether, if GMCL owed a duty of fair dealing to the Class Members, it breached that duty of fair dealing. Given GMCL's admission that it is, indeed, a franchisor, and given my finding on Common Issue (b), there is no need to ask whether GMCL owed the Class Members a duty of fair dealing. That much is clear. The critical issue is whether GMCL breached that duty.

[144] To avoid offending the principle that common issues should not be stated in overly broad terms, Strathy J. certified Common Issue (c) as sub-issues, having regard to the specific allegations of breaches of the duty of fair dealing that Trillium makes against GMCL. The sub-issues certified are as follows:

> **(c) If GMCL owed a duty of fair dealing to the Class Members, did GMCL breach this duty by:**
>
> **(i) delivering the Wind-Down Agreements to the Class Members on or after May 20, 2009 and requiring acceptance of the Wind-Down Agreements by 6 p.m. EST on May 26, 2009;**
>
> **(ii) not disclosing to the Class Members the identities of dealers offered a Wind-Down Agreement;**
>
> **(iii) stating in the Notice of Non-Renewal and Wind-Down Agreement that GMCL "will not be renewing the Dealer Sales and Service Agreement" between GMCL and each of the Class Members at the expiry of its current term on October 31, 2010;**
>
> **(iv) stating in the Wind-Down Agreement that "it has always been and continues to be [GMCL's] position that the Acts are not applicable to the Dealer Agreement or the relations between GM and Dealer and/or Dealer Operator";**
>
> **(v) stating in the Notice of Non-Renewal, the Wind-Down Agreement and the May 19, 2009 HIDL broadcasts that GMCL's offer of the Wind-Down Agreement was conditional upon all of the Non-Retained Dealers accepting the offer on or before May 26, 2009; or**
>
> **(vi) breaching any terms of the Wind-Down Agreement.**

[145] Before addressing these sub-issues individually, it is necessary to make some preliminary comments on the scope and content of the statutory duty of fair dealing in s. 3 of the *Wishart Act.*

Fair dealing and good faith

[146] Section 3 of the *Wishart Act* reads as follows:

> **Fair dealing**
>
> **3(1)** Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement.

> **Right of action**
>
> **3(2)** A party to a franchise agreement has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing in the performance or enforcement of the franchise agreement.
>
> **Interpretation**
>
> **3(3)** For the purpose of this section, the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards.

[147] The statutory duty of fair dealing in s. 3 codifies the common law duty of good faith: *Spina v. Shoppers Drug Mart Inc.*, 2012 ONSC 5563, [2012] O.J. No. 4659 at para. 146 [*Spina*]; *Landsbridge Auto Corp. v. Midas Canada Inc.* (2009), 73 C.P.C. (6th) 10 at para. 24 (Ont. S.C.); *Machias v. Mr. Submarine Ltd.* (2002), 24 B.L.R. (3d) 228 at para. 114 (Ont. S.C.) [*Machias*]; *1117304 Ontario Inc. (c.o.b. Harvey's Restaurant) v. Cara Operations Ltd.* (2008), 54 B.L.R. (4th) 244 at para. 66 (Ont. S.C.) [*Cara*]; *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252, [2012] O.J. No. 834 at para. 495 [*TDL*].

[148] For most purposes, the terms "good faith" and "fair dealing" can be used interchangeably. In some cases, courts have even referred to a "duty of good faith and fair dealing" arising under s. 3 of the *Wishart Act*: see e.g. *Spina* at para. 149 and *Cara* at para. 62. That said, given the language in s. 3(3), it could be argued that because the duty of fair dealing "includes" the duty to act in good faith, the duty of fair dealing is necessarily broader – it requires something more than mere good faith. In fact, this is a key component of Trillium's position on Common Issue (c). According to Trillium, the scope of the statutory duty of fair dealing in s. 3 of the *Wishart Act* is much broader than the common law duty of good faith.

[149] There are, however, two problems with Trillium's submission. Addressing them will help illuminate the scope and content of the duty of fair dealing.

[150] First, Trillium does not explain what that broader scope consists of. It merely asserts that fair dealing is broader than good faith. No doubt, on Trillium's view, GMCL must do more than simply act in good faith, but how much more? What counts as more? In other words, Trillium has failed to distinguish fair dealing from good faith to any practical extent.

[151] Second, in light of the Supreme Court's landmark decision in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 [*Bhasin*], this distinction between the concepts of good faith and fair dealing is somewhat of a red herring. In *Bhasin*, the Supreme Court explained, at para. 63, that there is "an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance." Because the underlying principle of good faith manifests in a wide variety of contexts, the Supreme Court held at para. 69 that courts should adopt "a highly context-specific understanding of what honesty and reasonableness in performance require."

[152] In my view, the manner in which the principle of good faith manifests as a specific duty renders moot the argument about whether the principle of good faith in the franchise context is narrower than the duty of fair dealing in s. 3 of the *Wishart Act*. The principle of good faith, as it manifests in the franchise context, will reflect the circumstances of that context, including the power dynamics of the unique relationship between franchisor and franchisee. For all practical purposes, the two duties – if they are, in fact, two conceptually distinct duties – will give rise to the same obligations in the franchise context.

[153] Thus, contrary to Trillium's submission, I believe that judicial resources are better spent analyzing the scope and content of a single, encompassing "duty of good faith and fair dealing" than engaging in a philosophical exercise to differentiate between good faith in the franchise context and fair dealing in the franchise context.

The content of the duty of good faith and fair dealing

[154] At a minimum, the duty of good faith requires the honest performance of contractual obligations. That is, it requires that parties not lie or knowingly mislead each other about matters directly linked to the performance of the contract. And it is clear that the duty of good faith has an upper limit – namely, it does not require the contracting parties to act as fiduciaries to one another. But in between those two extremes lies a wide, context-sensitive range of obligations, rights and responsibilities.

[155] When determining what honesty and reasonableness require in a particular context, *Bhasin*, at para. 66, counsels lower courts to look first to "existing doctrines" of good faith before employing the organizing principle where the existing law is found wanting. A quick survey of the franchise jurisprudence reveals a considerable amount of discussion of what the duty of good faith and fair dealing in s. 3 of the *Wishart Act* requires of franchisors and franchisees.

[156] In *TDL*, for example, Strathy J. reviewed the franchise jurisprudence and summarized the content of the duty of good faith and fair dealing as follows at para. 502:

> The content of the duty of good faith and fair dealing has been expressed to include the following:
>
> - to require the franchisor to exercise its powers under the franchise agreement in good faith and with due regard to the interests of the franchisee: *Shelanu*, at paras. 66 and 69;
>
> - to require the franchisor to observe standards of honesty, fairness and reasonableness and to give consideration to the interests of the franchisees: *Landsbridge* at para. 15*; Shelanu* at paras. 5, 68-71;
>
> - to ensure that the parties do not act in such a way that "eviscerates or defeats the objectives of the agreement that they have entered into": *Transamerica Life Inc. v. ING Canada Inc*. (2003), 68 O.R. (3d) 457

at para. 53 (C.A.); or "destroy the rights of the franchisees to enjoy the fruits of the contract.": *Landsbridge,* at para. 17;

- to ensure that neither party substantially nullifies the bargained objective or benefit contracted for by the other, or causes significant harm to the other, contrary to the original purpose and expectation of the parties: *Katotikidis v. Mr. Submarine Ltd.*, [2002] O.J. No. 1959 at para. 72 (S.C.J.); *TDL Group Ltd. v. Zabco Holdings Inc.*, [2008] M.J. No. 316 at para. 272 (Q.B.); and

- where the franchisor is given a discretion under the franchise agreement, the discretion must be exercised "reasonably and with proper motive, and may not do so arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.": *Landsbridge,* at para. 17, citing *Carvel Corporation v. Baker*, 79 F. Supp. 2d 53 (D. Conn 1997) at para. 69; *CivicLife.com Inc. v. Canada (Attorney General)* [2006] O.J. No. 2474, 215 O.A.C. 43 (C.A.), at para. 50; *Shelanu* at para. 96.

[157] Justice Strathy's analysis of the duty of fair dealing and good faith was upheld on appeal: *Fairview Donut Inc. v. TDL Group Corp.*, 2012 ONCA 867, [2012] O.J. No. 5775.

[158] More recently, in *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2015 ONSC 29, [2015] O.J. No. 23 [*Pet Valu*], Belobaba J. considered the content of the duty of good faith and fair dealing under s. 3. He held that the franchisor in that case had breached its duty of good faith and fair dealing in failing to disclose certain material facts to the franchisees. According to Belobaba J. at para. 58:

> … the franchisor's duty to disclose important and material facts that relate to the ongoing performance of the franchise agreement under s. 3 of the *Arthur Wishart Act* is not precluded by the existence of the comprehensive disclosure regime set out in s. 5 of the Act. As this court concluded in the *Salah*, *Country Style*, and *Cuts Fitness* line of cases, there can indeed be situations where fair dealing requires that the franchisor tell the franchisee the truth about an important and material fact – particularly if the opposite was stated in the disclosure document and franchise agreement.

[159] Trillium and GMCL disagree on the applicability of *Pet Valu* to the present case.[3] Trillium submits that *Pet Valu* confirms their position that, as a franchisor, GMCL had an obligation under s. 3 to disclose material facts regarding the WDAs. GMCL submits that *Pet Valu* should be distinguished and provides no assistance to Trillium's argument. In fact, GMCL

[3] I received written submissions on the applicability of *Pet Valu* from both parties after the trial.

goes so far as to say that in light of *Bhasin*, Belobaba J.'s reasoning in *Pet Valu* is flawed and should not be relied upon to find that the duty of good faith and fair dealing in s. 3 of the *Wishart Act* places a positive disclosure obligation on GMCL regarding the WDAs.

[160] I agree with Belobaba J.'s proposition that s. 3 of the *Wishart Act* may give rise to an obligation to disclose important and material facts in some circumstances, and that the disclosure regime set out in s. 5 of the *Wishart Act* does not preclude the existence of such a duty.

[161] I do not accept GMCL's submission that the reasoning in *Pet Valu* is inconsistent with *Bhasin*. It is true that the Supreme Court in *Bhasin* held that the common law contractual duty of good faith does not give rise to a positive duty to disclose. The Supreme Court was not, however, purporting to address the franchise context or the "existing doctrine" developed in franchise cases such as *Salah v. Timothy's Coffees of the World Inc.* (2009), 65 B.L.R. (4th) 235 (Ont. S.C.), aff'd 2010 ONCA 673, 74 B.L.R. (4th) 161. In my view, there is nothing inconsistent with the court in *Bhasin* limiting the scope of the duty of good faith in the context of ordinary contractual relationships, but not in the unique context of franchise relationships.

[162] *Bhasin* aside, GMCL's arguments distinguishing *Pet Valu* generally address the issue of whether GMCL failed to disclose any important or material information. The egregiousness of the franchisor's non-disclosure in *Pet Valu*, for example, has no bearing on whether, in the context of its contractual relationship with Trillium, GMCL should have disclosed important and material facts relating to the WDAs.

[163] Lastly, as I have previously stated, the duty of fair dealing is context-specific. I accept that the duty of good faith and fair dealing would have required GMCL to treat the affected dealers with honesty and fairness; give due regard to the interests of the affected dealers; refrain from undermining or defeating the objectives of the DSSA; exercise any discretion under the DSSA reasonably and with proper motive; and, disclose important and material facts relating to the performance of the DSSA. The specific context of GMCL's conduct was that it was making crucial business decisions very quickly during a time of instability and flux for both GMCL and its dealers. When considering each of the sub-issues below I will review the statutory duty of fair dealing through the lens of commercial reality – that is, GMCL's conduct in that context.

Common Issue (c)(i):

> **If GMCL owed a duty of fair dealing to the Class Members, did GMCL breach this duty by delivering the Wind-Down Agreements to the Class Members on or after May 20, 2009 and requiring acceptance of the Wind-Down Agreements by 6 p.m. EST on May 26, 2009?**

[164] The answer to this common issue is "no".

[165] Trillium argues that the timeframe for deciding whether to sign the WDA was unreasonably short. In Trillium's submission, common sense dictates that people have great difficulty making important, life-changing decisions under intense time pressure and with limited information. This is particularly so, Trillium submits, when people are in a state of emotional

shock. Trillium further submits that the six-day deadline did not take the Class Members' interests into account; that the information was received in a piecemeal and unverified way; and, that the WDAs were unique and complex. Lastly, Trillium suggests that GMCL deliberately timed events to "jam" the dealers by giving them a short window for acceptance.

[166] Before addressing each of these claims individually, I must again draw attention to the context, described above, in which GMCL formulated its wind-down plan, drafted the WDAs, selected the dealerships to be eliminated and delivered the Notices of Non-Renewal and WDAs. Contrary to the picture painted by Trillium, GMCL had not been developing the WDA plan for some time and waiting until the last minute in order to catch the dealers off-guard.

[167] Before March 30, 2009, GMCL had planned to rationalize its dealer network over the course of five years, through retirements, private capital acquisitions and facilitated consolidations. The Canadian Governments rejected this plan, calling for "deeper and faster" rationalization. I appreciate that the Canadian Governments did not request deeper and faster cuts to the dealer network *specifically*, but I accept Comeau's evidence that GMCL understood it needed a more aggressive plan to qualify for long-term government funding. Further, I also accept that some degree of dealer rationalization had to take place. GMCL had too many dealers and everyone knew this. This is why the rationalization of its dealer network was a significant component of GMCL's first plan. It is entirely reasonable to interpret the Canadian Governments' request for deeper and faster restructuring as including a deeper and faster rationalization – the dealers were explicitly identified as a group of stakeholders who had to contribute to the rationalization.

[168] Throughout April 2009, GMCL still planned to achieve rationalization through retirements, attrition and consolidation. GMCL also planned to reorganize its brand objectives to satisfy the Canadian Government's request. For example, Comeau testified that there was a proposal to develop Pontiac into a niche brand targeting Generation Y drivers with European-inspired small and compact vehicles. But things changed yet again toward the end of April when GM announced the termination of Pontiac. As Comeau testified, GM's decision had serious consequences for GMCL and its approach to rationalization.

[169] I accept Comeau's evidence that GMCL was taken by surprise by GM's announcement to discontinue the Pontiac brand altogether and that this had a significant effect upon GMCL's business model and its restructuring, particularly with respect to the dealers. Thus, not only was GMCL facing pressure from the Canadian Governments for deeper and faster restructuring, it was being forced by GM to accomplish this task despite the loss of a major brand.

[170] I will now turn to the individual arguments put forth by Trillium.

Minimum reasonable benchmark

[171] Trillium submits that the clearest indication of a minimum commercially reasonable time required to review and consider an important business decision is the 14-day cooling-off period required by s. 5 of the *Wishart Act*. I disagree with the reasoning behind this submission. There is no such requirement in s. 3 of the Act and there is no legal precedent to import the 14-day requirement from s. 5 into s. 3. Therefore, the analysis should not be considered within the

context of a 14-day time period.

The timing of the delivery of the WDAs

[172] The first question is whether GMCL unreasonably delayed informing the dealers of its plan by waiting until May 19, 2009. Comeau met with Clarke on May 12 to discuss a more definitive wind-down process involving 290 dealers and to obtain a budget of $218 million. The plan received the go-ahead from GM at the Washington Meeting on May 14. It took GMCL five days to inform the dealers of its plan.

[173] In the best-case scenario, GMCL would have informed the dealers on May 15 that it was planning to prepare and deliver a WDA on or around May 20 with an acceptance date no later than May 26. Thereafter, GMCL could have advised the dealers to consider their positions and obtain professional advice given the possibility of some sort of WDA being offered. The difficulty I have with this theory is that GMCL would not have been able to give the dealers anything more than a general picture of what was to come. As of May 15, the number and identity of the dealers to be wound down had not yet been finalized. As of May 15, the documents had yet to be drafted. As of May 15, it was not even known for certain whether the plan could be executed.

[174] In these circumstances, there is scant evidence, if any, that, had the dealers been informed on May 15 of the general picture of what was to come, they would have been in any better position. Hurdman, Turpin, and another dealer principal in Kingston, Ontario, Brian Condie ("Condie") all testified that they did not expect to be wound down. It is also difficult to envision what, if any, constructive steps they would have taken during this four-day period, i.e. up until the announcement on May 19.

[175] At the trial I had the benefit of watching all of the HIDL broadcasts that Trillium submits are significant, particularly those of May 15 and May 19. Trillium specifically takes issue with the fact that, despite GMCL receiving its marching orders from GM on May 15, Comeau disclosed nothing of the restructuring plan during the May 15 HIDL broadcast. Comeau's explanation at trial was, as noted above, that the work had not been completed. Trillium submits that even if this was true (and I accept it as being true), GMCL still should not have waited until May 19. Trillium argues that GMCL could have forewarned the dealers about what was to come, but instead delivered a message intended to assure the dealers that nothing was imminent.

[176] During the May 15 HIDL broadcast, Comeau disclosed that GM had told the U.S. dealers that 1,100 under-performing and very small sales volume dealers were not part of the long-term dealer network and would not be renewed through October 2010.

[177] With respect to the Canadian operation, Comeau advised as follows:

> Many have asked how we will proceed in selecting dealers. Now the purpose of today's broadcast is not to cover this detail. However, I will say that we will proceed in a fair and consistent manner. As I shared with essentially every dealer back in February and March, as we made our way across the country, we

> have carefully assessed our future product portfolio along with the most recent announcement concerning Pontiac. We must ensure that our dealerships have the requisite product to ensure their long-term viability. Well-differentiated, combined Chevy and Buick GMC facilities will become a little more pervasive in certain metro and urban markets. In other markets, simple dealer count reductions will be required. We are hopeful to roll out our plan potentially by the end of May or in the very first part of June.

[178] Comeau did not advise the dealers of the May 15 plan to offer some dealers WDAs by May 26. Also, Comeau's message in that May 15 HIDL broadcast was delivered in an oddly upbeat fashion, considering the dire situation faced by GMCL and its dealers – particularly in light of the fact that GMCL knew that WDAs would be delivered within four days. When one reviews the excerpt above and the remainder of the May 15 HIDL broadcast, Comeau does not tell the dealers anything inaccurate or untrue, with one exception. Comeau notes that the plan to reduce dealers may be rolled out as late as early June, which was unlikely to be the case given the June 1 deadline for a *CCAA* filing – a deadline which, having been announced by the Federal Government on March 30, had been explicitly communicated to the dealers in Comeau's April 14 HIDL broadcast.

[179] Given the uncertainty surrounding the events of May 15, I am not prepared to find that this misstatement in and of itself constitutes a breach of GMCL's good faith obligation towards the dealers. Overall, the message of the May 15 HIDL broadcast is that a plan GMCL considers to be "fair and consistent" will be delivered to the dealers over the course of the following weeks. As noted, no argument is being made by Trillium that the selection process was anything to the contrary.

[180] Comeau's message to the dealers was pointedly non-specific in light of the instructions he had received from GM. However, in circumstances where the offer had not yet been formulated, and the dealers not yet selected, I cannot conclude that GMCL had an obligation to advise the dealers on May 15 of anything more than that which was communicated in the HIDL broadcast. In any event, given my comments above, any additional information would likely not have made a material difference to the dealers' situations.

[181] In summary, not disclosing the dealer restructuring process did not breach GMCL's obligation of fair dealing. First, it was not dishonest. Second, it was reasonable in the circumstances because the restructuring process had not yet crystallized. Given the frenetic pace of events, all of the challenges GMCL was facing, and the dealers' awareness that a great number of them would be eliminated by the end of 2010, it was not unreasonable for GMCL to determine whether the wind-down plan could be effected before making any formal announcements.

[182] Furthermore, on May 15 GMCL did inform CADA that it would attempt to develop a wind-down process. CADA passed on the information to the Steering Committee. GMCL communicated this information to allow CADA and the Steering Committee to prepare for what was ultimately to come and to disseminate information to the dealers. Neither CADA nor the Steering Committee decided to act on that information or take a leadership role. CADA took the

position that it would simply respond once the final message was delivered, and the Steering Committee maintained its position that it would only deal with issues surrounding a potential *CCAA* filing.

[183] While some criticism may be leveled against GMCL for reaching out to CADA and the Steering Committee without advising individual dealers, in my view this does not constitute a breach of GMCL's obligation of fair dealing. If anything, it shows an honest and reasonable level of disclosure. It also undermines any argument that GMCL was attempting to keep its plan a secret. Either CADA or the Steering Committee could have shared this information with the dealers.

[184] Trillium takes the position, however, that GMCL was not disseminating the information for the benefit of the dealers, but rather so that CADA would support the wind-down initiative. In support of this position, Trillium refers to a number of inter-company emails where GMCL spoke both of enlisting CADA's assistance to help meet the May 26 deadline and of how CADA's support was important. In his notes of the May 15 conference call with CADA and the Steering Committee, Zakaib noted that CADA had been asked by GMCL to help "sell this package."

[185] With respect to Trillium's submission, I agree that GMCL clearly wanted the wind-down plan to succeed since it was important to obtain agreements with the dealers as well as the CAW and the Bond Holders. GMCL's very survival, in its current form, was at stake with a June 1 deadline looming. It was not, however, in my view, a breach of the duty of good faith for GMCL to contact the Steering Committee and CADA and express their intentions and preferences. There is no evidence that any undue influence or pressure was placed upon CADA or the Steering Committee. I find that GMCL acted in a fair and reasonable manner in contacting the Steering Committee and CADA.

[186] That being said, I do not accept Comeau's explanation that GMCL simply wanted to provide information to CADA or the Steering Committee. GMCL's true intent was to explain why in its view the WDA was an attractive and viable solution both for GMCL and for the dealers who could and likely would receive nothing in a *CCAA* proceeding. But in the circumstances of GMCL having to make difficult and swift decisions against the backdrop of a looming *CCAA* filing, providing CADA and the Steering Committee with information about the restructuring was fair and reasonable.

The May 26 deadline

[187] On May 19 Comeau delivered the bad news to the dealers via a HIDL broadcast. He set out the terms and conditions of the WDAs that were to be delivered the next day, acknowledging that the timing was "very tight." Trillium submits that the May 26 deadline was artificially short and designed to "jam" the dealers. Trillium further argues that there was no reason why the deadline could not have been extended to a later date in May, albeit prior to the June 1 *CCAA* deadline.

[188] Internal documentation produced at trial indicated that a May 28 or 29 deadline had been contemplated by GMCL. GMCL ultimately decided on the May 26 deadline. This dovetailed

with the May 27 date upon which GMCL could commence negotiating with the Bond Holders.

[189] I do not find that failing to extend the deadline by a few days constituted a breach of fair dealing. It was a decision taken by GMCL that was fair and reasonable given the commercial reality of the circumstances. In any event, I question whether it would have made any material difference to the dealers. This is especially true for the Saturn dealers, who knew their dealerships would be closed and who had been given an option. I accept the evidence of Hurdman that he felt rushed. Turpin and Condie's testimony supported Hurdman's evidence. None of them, however, testified that more time was required to make a decision or that a few extra days would have mattered. The GMCL dealers would not specifically have known of their plight until May 20 when the dealer list was finalized and announced. At best they would have had an extra few days to decide what to do in a fluid and risky situation. Moreover, a number of dealers executed the WDAs in advance of the May 26 deadline. Further, within the six-day timeframe the dealers were able to organize and participate in a conference call on May 24 with CADA and lawyers from Cassels to discuss whether they ought to sign the WDAs.

[190] Trillium also criticizes GMCL's position that the May 26 deadline was influenced by the timeline for negotiations with the Bond Holders. According to Trillium, even if the May 26 deadline was necessary because GMCL needed to know how many dealers would accept the WDA before deciding whether to bargain with the Bond Holders, this approach breaches the duty of fair dealing. Specifically, the desire to avoid a round of negotiations with third-party stakeholders was a matter of "pure convenience" which "cannot trump the legitimate interests of the dealers in having sufficient time to consider and respond to the WDA." Compressing the dealers' time in order to spare itself the inconvenience of delaying negotiations with third parties, it was submitted, is inconsistent with GMCL's obligation of fair dealing.

[191] Furthermore, Trillium submits that GM gave the instructions to commence negotiations with the Bond Holders before the May 26 deadline and before the results were known and confirmed in writing. There was no evidence that GM or Buonomo were waiting to learn of the dealer acceptance rate before reaching out to the Bond Holders. Buonomo himself admitted on cross-examination that the dealers could have been given until as late as May 29 to respond to the WDA without affecting the negotiation with the Bond Holders. Trillium points out that GMCL did not decide until May 29 that the 84 percent take-up of the WDA by the dealers was sufficient, and this was two days after the negotiations with the Bond Holders had begun.

[192] While there is some merit in the above assertions, I am not persuaded that GMCL had a legal duty to proceed differently, or that linking various risks together to come up with a strategy to reach settlements with its stakeholders, in this case particularly the affected dealers, constitutes a breach of the duty of fair dealing. Very tough decisions had to be made in an extremely short time period. Considered in this context, GMCL's actions were reasonable.

[193] In hindsight, it is arguable that it may have been better for GMCL to give the dealers a few more days to make a decision but, as noted, the timeline was short and there is no evidence that it would have affected the ability of the dealers to protect themselves. In my view, such an argument requires too much of GMCL given the time pressures it was facing, the threat to its continued existence as a business enterprise, and the fact that, for the most part, it was reacting to

a worsening economic landscape, GM's instructions, and the Canadian and U.S. Governments' decisions.

[194] Additionally, the dealers' best interests were unknown at that time. It was open to the dealers to either sign the WDA or to take their chances that GMCL would not file under the *CCAA*. Thirty-eight dealers did exactly that and refused to sign the WDA. The dealers who executed the WDAs knew that it was possible, if not probable, that, as unsecured creditors, they would have received nothing or virtually nothing in an insolvency distribution. That Class Members were looking at "nothing or cents on the dollar" in a *CCAA* proceeding was generally accepted by the insolvency expert witnesses called at trial, including Trillium's own experts, Gerald Kandestin ("Kandestin"), a partner with the law firm of Kugler Kandestin LLP, and Sandra Rosch ("Rosch"), a principal of Stonecrest Capital Inc.

[195] Relying on para. 86 of *Bhasin*, Trillium also submits that the dealers were denied a fair opportunity to protect their interests and that GMCL's failure to ensure this opportunity amounts to a breach of its duty of honest performance. In my view, though it may not have been ideal, given the exceptional beggars-of-government-cannot-be-choosers circumstances facing GMCL and the dealers, the opportunity they had to make a decision was fair enough.

[196] Taking into account all of the circumstances as described above, I find that GMCL did not breach its duty of fair dealing by delivering the WDAs to the Class Members on or after May 20 and requiring acceptance by 6:00 p.m. EST on May 26.

Common Issue (c)(ii):

> **If GMCL owed a duty of fair dealing to the Class Members, did GMCL breach this duty by not disclosing to the Class Members the identities of dealers offered a Wind-Down Agreement?**

[197] The answer to this common issue is "no".

[198] Common Issue (c)(ii) is distinct from Common Issue (e), which considers the same facts under the right of association pursuant to s. 4 of the *Wishart Act*. Trillium submits that the ability of the dealers to exchange thoughts and information with each other would have assisted them in coming to a more reasoned and informed decision regarding the WDAs. The failure to facilitate the dealers' ability to do this hampered the dealers' decision-making process. GMCL wanted to control the situation. It wanted to prevent the dealers from mounting an effective response. By withholding the identities of the dealers who had received WDAs, GMCL breached its duty of good faith and fair dealing. I disagree.

[199] GMCL did not breach its duty of fair dealing by refusing to disclose to the Class Members the identities of dealers offered a WDA. In my view, GMCL acted fairly and reasonably in refusing to distribute the information. GMCL had concluded that releasing this information to the dealers, CADA or the Canadian Governments would be unfair to the affected dealers because it would negatively affect their ability to wind-down their businesses in an orderly fashion. In GMCL's opinion, disclosing this information would have caused panic;

made customers and employees leave the dealerships immediately; adversely affected the dealers' position with creditors, including banks; and would have generally placed the dealers in a worse situation.

[200] The first difficulty with Trillium's submission is that there was no credible and reliable evidence at trial that GMCL was trying to control the dealers or prevent them from mounting an effective response to the predicament. Trillium's position ignores the fact that the dealers, through CADA, could, and to some degree did, organize by the time of the May 24 conference call. This is especially true for the Saturn dealers, all of whom knew each other and knew they were to be shut down. When CADA reached out to the dealers with WDAs asking them to identify themselves, it noted the fact that this issue was a sensitive one. According to Gauthier, by May 24, only 110 of the 202 dealers who received WDAs identified themselves to CADA.

[201] There was also little evidence at trial that any of the affected dealers requested the identities of the other such dealers. Hurdman had made only a general request that GMCL provide him with information as to which other Toronto dealers had received WDAs. Further, there was no evidence that the dealers' decision-making was prejudiced by not knowing the identity of the other dealers who had received WDAs. They all knew that more than a few dealers would have been selected. That being said, while I accept that the dealers would have benefited from receiving the list to assist them in collectively organizing, at the same time it would have been reasonable for GMCL to think that disclosure of individual dealers' identities could have prejudiced their individual positions. In fact, Hurdman acted quickly after receiving and executing the WDA. He immediately began discussions with the Gus Brown Dealership about buying his parts and inventory. He also immediately began to provide his employees with notice of termination to reduce his severance obligations. By June 4, 2009 Hurdman had sold the parts and inventories. Had his identity been disclosed, for example, it might have impeded his ability to obtain a fair price.

[202] Viewing these circumstances objectively, it was reasonable for GMCL not to disclose the list of affected dealers. It may well also explain why there was no overall demand by dealers to obtain a copy of the list and why only about 110 ultimately identified themselves to CADA. Of course, this is not to say that these dealers would not have banded together and negotiated collectively had they been represented by unconflicted legal counsel acting in their best interests. That issue will be addressed below in the section dealing with the claims against Cassels.

[203] I also reject Trillium's argument that the privacy claims of GMCL "ring hollow when part of GMCL's wind-down plan was to send letters to customers to inform them of the affected dealers' status and directing them to the nearest retained dealership." As submitted by GMCL, this mischaracterizes the evidence. Letters were sent to Trillium's customers *at the end of July 2009* advising that Trillium was no longer an authorized General Motors dealer. By the time the letter was sent, the operations of Trillium had already been wound down.

[204] Lastly, I do not accept Trillium's argument that in the circumstances ss. 15 and 16 of the *Wishart Act* required GMCL to list in its disclosure document the names, business addresses and telephone numbers of all of the Class Member dealers. The wording of those sections does not support such an argument.

Common Issue (c)(iii):

> **If GMCL owed a duty of fair dealing to the Class Members, did GMCL breach this duty by stating in the Notice of Non-Renewal and Wind-Down Agreement that GMCL "will not be renewing the Dealer Sales and Service Agreement" between GMCL and each of the Class Members at the expiry of its current term on October 31, 2010?**

[205] The answer to this common issue is "no".

[206] Trillium submits that GMCL was fully aware that the DSSA was an evergreen agreement, but nevertheless told the dealers that it would not renew their DSSAs. It thereby breached its duty of good faith and fair dealing. GMCL did this even though it knew that it did not have a unilateral right of non-renewal. Its statement in the Notice of Non-Renewal and the DSSA was "high handed, opportunistic, unfair and dishonest." I disagree.

[207] This issue highlights the interplay between the TERM provision of the DSSA and Article 4.1 of the Standard Provisions. These sections read as follows:

> FIRST: TERM
>
> This Agreement will expire without any action by either Dealer or GM on October 31, 2010 or in accordance with the terms of the Agreement. **Dealer is assured the opportunity to enter into a new Dealer Agreement with GM at the expiration date if GM determines Dealer has fulfilled its obligations under this Agreement.**
>
> …
>
> Article 4.1 "Dealer Network Planning"
>
> Because GM distributes its Products through a Network of authorized dealers operating from approved locations, **those dealers must be appropriate in number, located properly and have properly sized facilities** to ensure that GM Products are competitively represented and serviced in the marketplace and permit each dealer the opportunity to achieve a reasonable return on investment if it fulfills its obligations under the Dealer Agreement. Through such a dealer network, Dealer and GM can provide for the convenience of customers in purchasing Products and having them serviced. As a result, customers, dealers and GM all benefit.
>
> **To maintain an effective dealer network, GM agrees that it will monitor marketing conditions and take appropriate action to ensure that, to the degree possible, the number, size and location of its dealers is appropriate to achieve the objectives stated above. Such marketing conditions include GM sales and registration results, demographic considerations, competitive**

> **dealer networks, industry changes, the ability of GM existing dealers to achieve the objectives stated above, the opportunities available to existing dealers and other appropriate circumstances.**
>
> **Nothing in this Agreement shall require GM to limit competition or to prefer one dealer over another to act contrary to the interests of the dealer Network as a whole.**
>
> **Nothing in this Agreement shall require GM to effectuate or complete any dealer networking plan or strategy that has been or may be published to Dealer. Except as expressly provided otherwise in this Agreement, all dealer network decisions will be made solely by GM pursuant to its business judgment.**
>
> [Emphasis added.]

[208] While the TERM provision assured a dealer the opportunity to enter into a new Dealer Agreement if it had fulfilled its obligations under the Agreement, it is my view that this provision was subject to Section 4.1 of the DSSA. Section 4.1 provides GMCL with the authority "to maintain an effective dealer network". This allows GMCL, among other things, to maintain control of the number, size and location of its dealers. Tellingly, it further provides that nothing in the Agreement shall require GMCL to act contrary to the interests of the dealer network as a whole. This would include the TERM provision.

[209] It makes sense that Article 4.1, when read together with the TERM provision, should take precedence when one considers the commercial realities of running a large dealer network. It would not make commercial sense, in my view, for the sections to be read in such a way that GMCL would lose control over the size of the dealer network once the DSSAs are entered into. Article 4.1 simply provides GMCL with the reasonable flexibility to opt out of certain dealer agreements in order to oversee the continued prosperity of the business. This is to the benefit of both GMCL and the dealer network as a whole.

[210] That being said, nothing in the DSSA gave GMCL *carte blanche* to enact whatever restructuring or rationalization it saw fit. Article 4.1 incorporates an element of reasonableness by stipulating that appropriate action can only be taken to maintain an effective dealer network. In my view, this protects dealers from arbitrary decision-making and reinforces the duty of fair dealing.

[211] Further, in my view, the statement made by GMCL to which Trillium takes exception was a simple statement of fact – namely, that GMCL would not be renewing the DSSAs of certain dealers and that those dealers could decide, after obtaining legal advice, whether or not to accept the WDA. While Trillium argues that this put the dealers "between a rock and a hard place," again, one cannot ignore the context in which the statement was being made. GMCL was in a position where dealers had to be cut as part of the restructuring required to obtain government funding so that the company could survive. GMCL was advising the dealers that their DSSAs would not be renewed at the expiry date of October 31, 2010. Trillium knew that it

could either accept the offer, or reject it, and take its chances in or outside of a *CCAA* proceeding as a non-accepting dealer.

[212] Additionally, Trillium's argument that GMCL's statement was "high handed, opportunistic, unfair and dishonest" is untenable. There was no evidence adduced at trial that would support Trillium's allegation. The closest Trillium comes to relevant evidence for this allegation was elicited from Macdonald of GMCL, who testified that he told the Canadian Governments that the dealers could argue that the DSSA was "evergreen".

[213] Finally, Trillium takes issue with the fact that GMCL never articulated, even in the WDA, that it was relying upon Article 4.1. In my view nothing turns on this fact, because I do not find that it was incumbent upon GMCL to disclose every single detail to the dealers with respect to this common issue.

[214] In light of the above circumstances, I do not find that GMCL breached its duty of fair dealing to the Class Members by stating that it would not be renewing the DSSA in the Notice of Non-Renewal and WDA.

Common Issue (c)(iv):

> **If GMCL owed a duty of fair dealing to the Class Members, did GMCL breach this duty by stating in the Wind-Down Agreement that "it has always been and continues to be [GMCL's] position that the Acts are not applicable to the Dealer Agreement or the relations between GM and Dealer and/or Dealer Operator"?**

[215] The answer to this common issue is "no".

[216] GMCL now concedes that the *Wishart Act* applies to the DSSA. When it delivered the WDAs, however, it advised the dealers that GMCL's position was that the provincial franchise acts, which would include the *Wishart Act,* did not apply and stated:

> Dealer and Dealer Operator acknowledge that it has always been and continues to be GM's position that the [Provincial Franchise] Acts are not applicable to the Dealer Agreement or the relations between GM and Dealer and/or Dealer Operator. However, if a Court were to conclude otherwise, Dealer and Dealer Operator [waive and release all rights under the Acts].

[217] Trillium alleges that GMCL always knew that the *Wishart Act* applied to the DSSA and that this statement was made dishonestly and in bad faith.

[218] Trillium's submission has some merit insofar as GMCL later conceded that the *Wishart Act* is applicable. As I shall explain, however, GMCL's stated position at the time does not amount to a breach of its duty of good faith and fair dealing, and GMCL honestly believed that it was not bound by the provincial franchise acts with respect to the dealers. Furthermore, on the chance that it was wrong, GMCL alerted the dealers to the relevant provisions in the *Wishart Act*,

which is some signal that it was not acting in bad faith.

GMCL honestly believed that the *Wishart Act* did not apply

[219] Trillium challenges the proposition that GMCL honestly believed the *Wishart Act* did not apply with four arguments, all of which I reject. First, Trillium submits that it is not credible that GMCL believed it was not bound by the *Wishart Act*. Trillium points to Macdonald's testimony that it was GMCL's position it was not bound by the *Wishart Act* because the DSSA did not require the payment of any royalty or upfront franchise fees. Trillium notes that the definition of "franchise" in the *Wishart Act* does not even refer to royalties or franchise fees. It refers to direct or indirect payments, which can include payments for products and supplies. In any event, Trillium asserts, Macdonald admitted in cross-examination that the price of vehicles purchased by the dealers included a royalty of seven percent payable to GM for intellectual property. Thus, Trillium submits, GMCL should have known that it was a franchisor.

[220] A review of the transcript, however, discloses that this was not the exact nature of Macdonald's evidence. Rather, the evidence is that there is a royalty payable by GMCL to GM as per their agreement, calculated on the basis of GMCL's total sales of automobiles to dealers. This is a subtle but important distinction. Besides, in my view, the fact that Macdonald may have been wrong in his understanding is not fatal to GMCL's position.

[221] Second, in challenging the *bona fides* of GMCL's belief, Trillium relies upon the fact that in 2002 GMCL was part of the Canadian Vehicle Manufacturer's Association ("CVMA"), which lobbied for an industry-wide exemption from the *Wishart Act*. This exemption was refused. Further, after the *Wishart Act* was passed, GMCL applied for and obtained an exemption from the s. 5 requirement to include its financial statements in a disclosure document to be given to prospective franchisees. In that application GMCL described itself as a franchisor. Macdonald knew of this.

[222] I accept Macdonald's evidence that with respect to seeking exemptions, GMCL was simply taking "a belt and suspenders approach" in making certain decisions to manage its business. This did not preclude GMCL from taking the position, such as it did with the dealers, that it was not a franchisor. Even if this view was incorrect, open to doubt, or later changed (as it was in this action), it was a position that GMCL was entitled to take if it honestly believed that this was the case. I am not prepared to conclude, based on the above, that Macdonald and GMCL misrepresented their belief to the dealers. Macdonald's evidence, in my view, was not successfully challenged in cross-examination.

[223] Third, Trillium points to the fact that GMCL had legal advice from Osler Hoskin & Harcourt LLP and refused to produce the legal opinion it had obtained as to whether it was a franchisor on the basis of solicitor-client privilege. I do not find the fact that GMCL had competent lawyers who would provide it with an opinion in this matter is conclusory since they obviously would not be bound by the opinion if they disagreed with it on a reasonable basis.

[224] Fourth, Trillium introduced a number of documents at trial to show that GMCL had historically referred to dealers as franchisees and that the terms "franchise network" and "franchise system" were also used. While this is true, I do not believe that much turns on it.

Thousands of documents flowed between the dealers and GMCL during the course of the relationship. In my view, it is not helpful to locate a relatively small number of documents and hold them up as being indicative of a party's belief as to its legal position. Often, words are loosely chosen. Macdonald was clear in his evidence that GMCL did not consider itself to be a franchisor. I accept this evidence. Comeau also testified in this regard, although in my view, he was not qualified to express an opinion on this issue: unlike Macdonald, Comeau was not involved in these matters on an ongoing basis but rather primarily in charge of the dealer network.

[225] I accept GMCL's position that there was no case law or legal authority in 2009 that clearly resolved the issue as to whether the definition of franchisor captured GMCL. In any event, as noted, I accept that the statement made by GMCL that it was not a franchisor was not made on a deceitful or dishonest basis but rather to fully and frankly put their position to the dealers who could accept or reject it with the benefit of independent legal advice.

[226] Finally on this point, if I am incorrect and GMCL did indeed breach its duty of fair dealing by stating that the provincial acts were not applicable to the dealers, I do not find that any damage was caused. The statement was simply GMCL's legal position on this issue. GMCL urged and required that the dealers obtain independent legal advice; accordingly, the dealers could have agreed or disagreed with the position.

Common Issue (c)(v):

> **If GMCL owed a duty of fair dealing to the Class Members, did GMCL breach this duty by stating in the Notice of Non-Renewal, the Wind-Down Agreement and the May 19, 2009 HIDL broadcasts that GMCL's offer of the Wind-Down Agreement was conditional upon all of the Non-Retained Dealers accepting the offer on or before May 26, 2009?**

[227] The answer to this common issue is "no".

[228] Trillium has two complaints with respect to this common issue. First, GMCL stated that the offer of the WDA was conditional on all of the affected dealers accepting it on or before May 26, i.e. the Acceptance Threshold Condition. Second, GMCL failed to turn its mind to defining a satisfactory acceptance rate before the deadline for signing on May 26, 2009.

The Acceptance Threshold Condition

[229] Trillium's first complaint is that GMCL's statement to the dealers that it required a 100 percent acceptance rate was "untrue, unfair and intended to amplify pressure on the dealers to accept the WDA." The evidence does not support the underlying presumption of Trillium's argument that GMCL unequivocally told dealers that 100 percent take-up was required:

- During the May 19 HIDL broadcast, Comeau noted that the WDA was conditional upon all of the dealers accepting the offer. He did, however, specifically indicate that this acceptance level could be waived by GMCL. This ought to have been understood by the

dealers.

- Both the Notice of Non-Renewal and the WDA clearly indicated that an acceptance rate of less than 100 percent might be acceptable to GMCL and that GMCL reserved the right to waive the Acceptance Threshold Condition.

- In response to a question that had been posed by a dealer, GMCL stated in the May 22 "Questions and Answers" document provided to dealers that 100 percent acceptance was not required.

[230] Although Hurdman, Turpin, Condie, Robert Johnston ("Johnston") a former GMCL dealer principal in Brampton and member of the DCT, and John Carroll ("Carroll") a former GMCL principal in Nova Scotia and also a member of the DCT, generally testified that they understood that 100 percent acceptance was required, Condie also testified that he did not consider whether his rejection of the WDA would result in the WDAs being inoperative for everyone else. Similarly, in cross-examination, Turpin conceded that the dealers, in essence, had individual decisions to make.

[231] In light of Comeau's comments made during the May 19 HIDL and the express wording of the Notice of Non-Renewal and the WDA, even if the above dealers honestly believed that 100 percent acceptance was required, this was not the message transmitted to them. The message was clear in the May 19 HIDL, the Notice of Non-Renewal and the WDA: GMCL could waive the Acceptance Threshold Condition.

Failing to perform an analysis

[232] In response to Trillium's second complaint, i.e., that GMCL had not determined an appropriate required acceptance rate before May 26, I do not believe that anything turns on this. At times, GMCL noted in its internal documentation that it required more than 90 percent take-up and it expressed this to the Canadian Governments. However, these preliminary internal discussions must be considered in light of the evidence as a whole. The evidence at trial disclosed that GMCL was not entirely sure what an acceptable rate would be in order to waive the Acceptance Threshold Condition. The evidence was that GMCL first had to look at the number and relative size of the dealers who accepted the WDAs in order to determine whether there would be enough of an economic benefit to waive the Acceptance Threshold Condition. It was reasonable for them to do so in order to determine the economic viability of the wind-down plan.

[233] Failing to perform an analysis as to the appropriate required acceptance rate before May 26 does not, in my view, support Trillium's argument that GMCL breached its duty of fair dealing. Read in context, it simply means that GMCL had achieved its goal and therefore had taken another step to avoid a *CCAA* filing.

Common Issue (c)(vi):

> **If GMCL owed a duty of fair dealing to the Class Members, did GMCL breach this duty by breaching any terms of the Wind-Down Agreement?**

[234] The answer to this common issue is "no".

[235] Trillium concedes that GMCL did not breach any of its obligations under the WDA.

Common Issue (d):

> **Did GMCL have a duty to disclose material facts concerning its restructuring to franchisees at the time of soliciting the Wind-Down Agreement? If so, did it fail to disclose material facts and did it breach such duties?**

[236] The answer to this common issue is "no".

[237] GMCL did not breach its duty to disclose important and material facts concerning its restructuring to the franchisees at the time of soliciting the WDAs.

Overview of the allegation

[238] Trillium submits that GMCL had a duty to provide complete, fair and accurate information regarding the WDAs, including any facts which might have led the dealers to reject the WDA offers. In Common Issue (g), I consider whether s. 5(1) of the *Wishart Act* imposes an ongoing positive duty to disclose – that is, whether or not the obligation in that section is limited to the beginning of the franchise relationship. In Common Issue (d), I am concerned primarily with the duty of good faith and fair dealing under s. 3 of the *Wishart Act*.

[239] According to Trillium, GMCL misled the dealers and was dishonest in a number of ways. First, GMCL failed to act honestly and fairly by concealing its plan to offer WDAs from April 27 to May 19. This concealment affected the dealers' ability to associate and take collective action. Second, it is submitted that GMCL actively misled the dealers by stating that the Canadian Governments directed GMCL to reduce its dealer network through the WDAs. In particular, it is submitted that Comeau's HIDL Broadcast on April 27 was a deception intended to perpetuate the notion that the Canadian Governments were driving the WDA plan. Third, according to Trillium, GMCL withheld key information regarding the 100 percent Acceptance Threshold Condition, including the fact that it *wanted* 100 percent but did not require it; that it had not considered what take-up level it actually needed; and that the Canadian Governments did not impose any minimum take-up level on GMCL. Fourth, it is submitted that GMCL did not disclose and in fact withheld the Canadian Governments' preference to avoid a GMCL *CCAA* filing. Finally, it is submitted that GMCL misled the dealers by implying that if the dealers did not sign, they would likely get nothing in a *CCAA* proceeding.

[240] For the reasons that follow, in my opinion, none of these instances amounted to a breach

of GMCL's duty to disclose as it pertains to the duty of good faith and fair dealing.

Concealment of the plan

[241] Trillium submits that GMCL breached its duty of good faith and fair dealing by failing to advise the dealers before May 19 of its intention to offer WDAs to certain dealers.

[242] As I have indicated already, I do not accept Trillium's contention that a definite plan existed before May 12 to offer WDAs. The circumstances I reviewed in Common Issue (c) apply equally here. Further, it was not until May 15, 2009 that Comeau received the green light to move forward with the wind-down offers. Following that, the wind-down formula was finalized on May 18; the Notice of Non-Renewal and the WDA on May 19; and the list of affected dealers on the morning of May 20. Thereafter, the WDAs were forwarded electronically to the dealers.

[243] The duty to disclose important and material facts under s. 3 of the *Wishart Act* does not extend so far as to require GMCL to keep the dealers abreast of every development or share the details of its restructuring plan on an ongoing basis. The duty is contextual and governed by the boundaries of reasonable conduct. GMCL acted honestly and reasonably by informing the dealers of the plan on May 19 once those details had been finalized.

GMCL did not mislead dealers by stating that the governments mandated the cuts

[244] Hurdman testified to his belief that the Canadian Governments forced GMCL to eliminate their dealer network through the WDAs. This belief was based on what he had been told by GMCL. Turpin, Condie, Johnston and Carroll all testified to a similar understanding. A close review of their evidence, however, does not support Trillium's submission that GMCL misled the dealers by stating that the governments mandated the cuts. Hurdman, Turpin, Condie, Johnston and Carroll testified that they were advised by GMCL that the Canadian Governments required an overall restructuring that involved a reduction of the dealer network. However, there is no evidence that GMCL told the dealers that the Canadian Governments specified that WDAs should be used or that any other specific process should be followed to restructure the dealer network.

[245] I do not propose to recite all of the evidence adduced at trial concerning government preferences about how the restructuring should be fashioned. Certainly when one reviews the government-generated press releases, the HIDL broadcasts, and the evidence of Comeau, Stapleton and Buonomo, it is clear that dealer reduction was contemplated, by the Canadian Governments, in their demand for GMCL to restructure. I accept GMCL's submission that, although the Canadian Governments did not tell GMCL how or when this should take place, they did expect a reduction of dealers that would correspond with the reduction in brands and nameplates. Read fairly, this was the message that was transmitted by GMCL to the dealers.

[246] It is important at this juncture to recall the circumstances: GMCL's survival depended upon the Canadian Governments being satisfied with the restructuring proposal GMCL provided, which necessarily included sacrifices by the dealers, and ultimately dealer reduction. That sacrifices were being called for was specifically canvassed at the Washington Meeting which the

Canadian and U.S. Governments attended. In this context, I cannot accept Trillium's submission that the words "deeper and faster" in the March 30 rejection delivered by the governments did not apply to the dealers. I also do not accept Trillium's submission that GMCL's announcement that 42 percent of the dealers be cut by the end of 2010 was phrased to make it appear as though the Canadian Governments had demanded that GMCL take this specific action.

[247] Trillium points to the April 27 HIDL broadcast, in which Comeau stated:

> We will see similar contraction in Canada from 705 dealers and retailers in 2008 to somewhere between 395 and 425 by 2010. This is consistent with the plan and message we shared with you during our cross-country tour. **Obviously, we've been asked by governments to implement *this* network consolidation on a much faster timetable.** The goal is to accomplish this reduction in an orderly, cost-effective and consumer friendly way, to allow for a more competitive dealer network and higher throughput in all markets.
>
> [Emphasis added]

[248] Trillium also places considerable emphasis on the following excerpts from the May 19 HIDL broadcast:

> The key stakeholders and outstanding issues in this country have been well publicized over the past several weeks and months. Agreements with the CAW, sustaining suppliers, obtaining support from governments, reducing debt, addressing pension issues and restructuring our dealer network remain the key components of our restructuring efforts.
>
> …
>
> For governments to continue their support of our restructuring efforts, they fully expect shared sacrifices across the spectrum. Prime Minister Harper, Premier McGuinty and Industry Minister Clement have all been very clear on this matter.

[249] I view Trillium's submission as being an exercise in picking and choosing non-specific language to try to make a point unsupported by the evidence and devoid of necessary context. At worst, these statements are slightly ambiguous. They are far from deceitful. I do not believe that any portion of the May 19 HIDL broadcast can be construed as GMCL representing that the Canadian Governments demanded specific dealer reductions in the form of a delivery of a WDA. What was generally communicated to the dealers was that the Canadian Governments were demanding more sacrifices by GMCL, the CAW retirees, dealers as well as other stakeholders, and that this meant a reduction in dealers.

The 100 percent take-up condition was not misleading

[250] I have already dealt with and rejected this claim in Common Issue (c)(v). My findings apply with equal force to this point.

Canadian governments' preference to avoid a *CCAA* filing

[251] The complaint Trillium makes in this regard is that Comeau, in his May 19 HIDL broadcast, made no mention of the fact that the Canadian Governments wanted restructuring to take place outside a *CCAA* filing, if possible.

[252] Trillium relies on the following messages from the May 19 HIDL broadcast:

> The wind-down agreement is conditional upon all the non-retained dealers accepting the offer and executing it and delivering their respective wind-down agreements to General Motors of Canada on or before May 26, 2009 at 6 p.m. Eastern Standard Time.
>
> …
>
> Said in another way, unless we are able to achieve a number of non-dealer related objectives and we gain acceptance of this offer by all non-retained dealers, there is a strong possibility that GM Canada will file for reorganization under the provisions of the *CCAA*.
>
> I must reiterate that the acceptance level of this Canadian wind-down offer will weigh heavily on whether or not there is a filing in Canada. Obviously every effort must be expended to avoid such an outcome.
>
> …
>
> We're a big family. We've gotten to know each other professionally and in many cases on a personal basis. We've been through ribbon-cutting ceremonies, we've been to weddings and we've been together for a long time. Bringing any relationship to an end is extremely difficult; however the survival of General Motors depends on these decisions.
>
> …
>
> With everyone's collaboration, we expect GM to emerge as a viable, vibrant entity, capable of achieving much success. I'm asking every dealer who will receive the wind-down agreement to treat it in the spirit in which it is being offered, and that is with the utmost respect. These decisions are painful; however, without them, we will potentially see no alternative but to seek the supervision of the court with all the intended consequences.

[253] Trillium submits that Comeau had an obligation to advise the dealers of the Canadian Governments' preference to avoid a *CCAA* filing. Trillium faults GMCL for instead delivering a message which led the dealers to believe that "the government made us do this." Trillium also relies upon inter-office GMCL documentation prepared by Comeau that suggests that the Canadian Governments were behind the introduction of the WDAs. GMCL concedes that the

Canadian Governments did prefer a restructuring outside a *CCAA* filing. GMCL submits, however, that this preference was on the condition that any such restructuring could be done at an acceptable cost.

[254] In my view, there was no misleading language used during the May 19 HIDL broadcast. Further, I do not believe that much turns on this alleged concealment. GMCL told the dealers that it wished to avoid a *CCAA* filing and this was specifically referred to in Comeau's May 19 HIDL broadcast. The Canadian and U.S. Governments' and GMCL's preference to avoid a *CCAA* filing was also made obvious by the presentation of the WDAs as a settlement outside a *CCAA* filing.

[255] Further, despite the preference of GMCL and the Canadian Governments, a *CCAA* filing was a live possibility throughout April and May 2009. GMCL was insolvent and reliant upon short term loans from the Canadian Governments. Unless it could resolve the financial challenges it faced, GMCL was ready, willing and able to make a *CCAA* filing on June 1. It was clear from the testimony of Comeau and Buonomo that such a filing was actually considered to be probable in the days leading up to June 1. In my view, it is not reasonable to criticize GMCL for describing the Canadian Governments' preference to avoid a *CCAA* filing in these circumstances, particularly where the Canadian Governments made it known that it would have to be done in a cost-effective way.

GMCL did not mislead the dealers by stating they would get nothing in a *CCAA* filing if they did not sign the WDAs

[256] Trillium makes a number of assertions in this regard and I will deal with each one in turn.

a) Was this message untrue?

[257] Trillium submits that at least from May 16 to May 29, GMCL was planning to allow any dealer that did not accept a WDA the opportunity to accept a WDA within a *CCAA* filing. Accordingly, Trillium argues that it was untrue for GMCL to tell the dealers that not signing the WDA meant getting nothing in a *CCAA* filing.

[258] In support of this submission, Trillium relies on the draft affidavits prepared by GMCL to be filed in the event of a *CCAA* filing. Trillium argues that the draft affidavits of Stapleton dated May 16, May 26, May 29 and May 30 show that GMCL would have offered dealers a second chance to enter into a WDA after a *CCAA* filing.

[259] The problem with Trillium's submission is that Stapleton, who was to execute the final affidavit, testified that he did not prepare the draft affidavits. He was not consulted with respect to this particular issue, and the affidavits did not reflect the view of GMCL as to whether it would offer a WDA to the dealers if a *CCAA* filing was made. In fact, the ultimate affidavit that was prepared on May 31 did not state that such an offer would be made in a *CCAA* filing. I found Stapleton's evidence to be credible on this point, and he did not waver despite prolonged cross-examination. I accept his evidence that the ultimate affidavit on May 31 honestly sets out the view of GMCL.

[260] I am cognizant of the fact that the May 29 affidavit was sent to the Commercial List in advance of the proposed June 1 filing date. Noted specifically on these written materials was that they were in draft form and that numerous changes could be forthcoming. It is not surprising to me that in light of the frenetic activities that were transpiring in April and May 2009 some details might be overlooked and later corrected. This is particularly so considering that GMCL did not decide that it would honour the WDAs that were entered into by Class Members until May 29, 2009, when it waived the Acceptance Threshold Condition.

b) Did GMCL pressure the dealers?

[261] Trillium argues that GMCL improperly pressured the dealers with misleading information to get them to accept the WDAs. Trillium specifically relies upon Comeau's interactions with the DCT and CADA.

[262] At trial, a great deal of time was spent on the DCT letter delivered to the dealers on May 22. That letter was authored by Gaetan Boily ("Boily"), who was a dealer principal in Montreal, and reviewed by Johnston and Carroll. The DCT letter recommended acceptance of the WDA and specifically stated that non-continuing dealers who did not accept the WDA would likely receive no compensation in a *CCAA* filing.

[263] Trillium alleges that Comeau encouraged the DCT to make the above statement and that the statement is misleading. Trillium called Johnston and Carroll as witnesses. Both generally testified that they had been told this by Comeau. Trillium also alleges that Comeau was instrumental in drafting the letter. Both Johnston and Carroll testified in-chief that they believed this was the case. Comeau testified that he was not involved in the drafting of the letter. Boily, who was called by GMCL, testified that he alone drafted the letter.

[264] In my view, little turns on this letter. Unfortunately, an inordinate amount of time was spent at trial on this issue, particularly attacking the credibility of the witnesses who testified in this regard. It is not surprising that the witnesses might have had different recollections as to what happened with respect to a letter that was drafted almost five years ago. First, I accept Boily's testimony that he drafted the letter. He provided his testimony in a straightforward and believable manner. He is no longer a GMCL dealer. In these circumstances I see no reason why he would not provide truthful testimony. With respect to the drafting of the letter, both Johnston and Carroll had some difficulty with recollection. While I believe that both of them gave their testimony as best they could, it was sometimes unreliable, in my view, given the passage of time. Johnston conceded that if Boily was prepared to swear that he wrote the letter then Johnston was prepared to accept this fact.

[265] Comeau could not recall conversations that he had with these dealers but he testified that he would not have pressured or misled them. In my view little turns on this. Both Johnston and Carroll agreed in cross-examination that they had also been told by CADA that dealers would likely receive nothing in a *CCAA* filing. When all of the evidence is considered, I do not find that GMCL exerted undue pressure on the dealers through the DCT.

[266] Trillium also submitted that Comeau exerted pressure on CADA to convince the dealers to accept the WDA or risk receiving nothing in a *CCAA* filing. Comeau had several

communications with CADA, including telephone conversations with Gauthier and Ryan on May 15. Comeau also sent an email to Gauthier, stating that CADA "had an obligation toward their members to be in a ready position on May 19, 2009."

[267] Trillium also pointed to inter-office emails between Comeau, Elias and Macdonald which noted that the information flow in support of CADA and DCT had fallen into place.

[268] In considering the evidence given at trial, I do not find that it supports Trillium's position that GMCL inappropriately applied pressure to the affected dealers. I accept that overall, Comeau preferred that the dealers accept the WDAs so that a *CCAA* filing could be avoided. This was no secret. Read properly in context, Comeau's remarks cannot be construed as exerting inappropriate pressure on them. In my view, Comeau was entitled to encourage the dealers to accept the WDA as he did in discussions with CADA, and for that matter, the DCT. It is acceptable that he provided CADA with GMCL's views about take-up of the WDAs.

[269] Lastly, with respect to this issue, GMCL created a document of "talking points" for Regional Managers who would be speaking with dealers. It specifically directed them not to pressure the dealers. The reality at the time, without the benefit of hindsight, is that there was tremendous risk to all involved and the affected dealers were put in a very difficult position as to whether they would accept the WDA or risk losing everything in a *CCAA* filing. Viewing the issue through this lens, I would not categorize the communications by Comeau to the DCT and CADA as misleading or made in breach of good faith or fair dealing.

Common Issue (e): The Statutory Right to Associate

> **If all Class Members had a statutory right to associate, did GMCL interfere with, prohibit, restrict, penalize, attempt to penalize or threaten to penalize the Class Members' exercise of this right?**

[270] The answer to this common issue is "no".

[271] Like Common Issue (c), Common Issue (e) was certified as a number of sub-issues. Each of these sub-issues will be addressed separately. Each concerns the dealers' right to associate found in s. 4 of the *Wishart Act*, which reads as follows:

> **Right to associate**
>
> **4(1)** A franchisee may associate with other franchisees and may form or join an organization of franchisees.
>
> **Franchisor may not prohibit association**
>
> **4(2)** A franchisor and a franchisor's associate shall not interfere with, prohibit or restrict, by contract or otherwise, a franchisee from forming or joining an organization of franchisees or from associating with other franchisees.

Same

4(3) A franchisor and franchisor's associate shall not, directly or indirectly, penalize, attempt to penalize or threaten to penalize a franchisee for exercising any right under this section.

Provisions void

4(4) Any provision in a franchise agreement or other agreement relating to a franchise which purports to interfere with, prohibit or restrict a franchisee from exercising any right under this section is void.

Right of action

4(5) If a franchisor or franchisor's associate contravenes this section, the franchisee has a right of action for damages against the franchisor or franchisor's associate, as the case may be.

[272] Justice Cullity in *Midas* (2009) at para. 17 described the purpose of s. 4 as follows:

> Although defendant's counsel were critical of the plaintiff's reliance on cases under section 2(d) of the *Canadian Charter of Rights and Freedoms* for this purpose, I am of the opinion that, when read in its context in the [*Wishart Act*], the right of association in section 4 does encompass the right of franchisees to participate in a class action for the purpose of enforcing their rights against the franchisor under the statute or otherwise. Section 4 is not concerned with the right to associate socially or recreationally. **Its inclusion in the statute would be inexplicable if it was not intended to permit franchisees to associate for the purpose of protecting their interests and enforcing their rights through collective action.**
>
> [Emphasis added]

The scope and content of the right to associate

[273] The parties disagree on the scope of the right to associate. Trillium interprets the provisions of the Act generously. In its written closing argument, Trillium asserts that s. 4 guarantees franchisees the right to associate "in whatever forum and whatever lawful manner they choose." On the facts of this case, that required GMCL to provide a list identifying dealers who had received WDAs to one another so that the dealers could organize effectively. In other words, Trillium proposes that the right to associate in s. 4 requires positive action on the part of GMCL to facilitate association.

[274] Further, according to Trillium, s. 4 is a "strict liability offence" – the court need not consider the reasons GMCL had for not disclosing the list of dealers, because the very fact that the list was withheld amounts to a breach. In its submission, there is no room for considering the

reasonableness of GMCL's decision or whether it acted in good faith. To construe the section otherwise, according to Trillium, is to permit franchisors to interfere with its franchisees' right of association based on what the franchisor thinks is in the best interest of the franchise system. Trillium does not provide any case law to support this generous analysis of the right to associate in s. 4 of the *Wishart Act*.

[275] GMCL takes the position that there is no positive obligation on the part of the franchisor to facilitate association. In other words, s. 4 establishes a negative right rather than a positive duty. GMCL submits that s. 4 is intended only to limit the actions of the franchisor that are aimed at precluding franchisees from acting collectively. On this view, the suggestion that s. 4 is a "strict liability offence" is untenable. GMCL submits that it intentionally allowed the dealers to determine whether they wanted to disclose their identities to each other. Further, GMCL submits that it could have faced serious repercussions had it unilaterally disclosed their identities.

[276] The purpose of s. 4 is to permit franchisees to associate. Underlying this objective is the overarching purpose of the *Wishart Act* itself, which is to "mitigate and alleviate the power imbalance that exists between franchisors and franchisees": *Midas* (2009) at para. 21; see also *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.), at paras 58 and 66; *Personal Service Coffee Corp. v. Beer (c.o.b. Elite Coffee Newcastle)* (2005), D.L.R. (4th) 466 (Ont. C.A.), at para 28; *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada* (2002), 62 O.R. (3d) 535 (S.C.), at paras 41-42, aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.).

[277] In my view, s. 4 does not impose positive obligations on the franchisor. Even when one considers the remedial nature of the *Wishart Act*, the plain and ordinary meaning of the language in s. 4 does not support Trillium's position. Section 4 prevents franchisors from restricting, prohibiting and interfering with franchisees who exercise their right to associate. It also prevents franchisors from penalizing or threatening to penalize those who do. Section 4 does not require franchisors like GMCL to facilitate or encourage association or to do anything beyond refraining from activities that inhibit association. It is a negative duty in the fullest sense.

[278] Provided that GMCL did not meddle with or interpose in the dealers' attempts to organize, did not prevent the dealers from exercising their right to associate, and did not punish or threaten to punish the dealers for doing so, it acted in compliance with the negative duty created by s. 4.

[279] This interpretation of s. 4 is supported by the case law and by scholarly commentary: see *Spina* and Peter Dillon, *Franchise Legislation in Canada*, loose-leaf, (Aurora: Canada Law Book, 2010) at FDA-159, 4:10 [Dillon]. I am not prepared to develop an exception to this interpretation for the Class Members.

[280] In any event, I cannot accept that s. 4 creates a "strict liability offence" as Trillium puts it. The context is crucial. Understanding the conduct of a franchisor in the context in which they are acting necessarily imports an inquiry into the reasonableness of the franchisor's actions. Of course, I agree with Trillium's submission that a subjective element cannot be introduced into s. 4(2). The starting point for the analysis should not be whether the franchisor *thought* it was acting reasonably. Instead, the inquiry must focus on whether the franchisor's actions amounted to interfering, restricting, prohibiting or penalizing *in the circumstances of the case*. But at the

same time, what amounts to "interference" (for example) will take colour from the context.

Overlap with Common Issue (c)

[281] Common Issue (e) addresses the same allegations as Common Issue (c), but from the perspective of the right to associate. Accordingly, there is significant overlap between these two common issues. Neither Trillium nor GMCL makes full and separate submissions on Common Issue (e). GMCL makes no new submissions and incorporates all of its arguments from Common Issue (c) into Common Issue (e). Trillium makes separate submissions only with respect to Common Issue (e)(vi).

[282] Having reviewed their submissions, I am of the view that no further analysis is required with respect to Common Issues (e)(i), (e)(iii), (e)(iv) and e(v). Common Issues (e)(ii) and (e)(vi), however, require further analysis.

Common Issue (e)(ii)

> **If all Class Members had a statutory right to associate, did GMCL interfere with, prohibit, restrict, penalize, attempt to penalize or threaten to penalize the Class Members' exercise of this right by not disclosing to the Class Members the identities of the dealers offered a Wind-Down Agreement?**

[283] The answer to this common issue is "no".

[284] Based on the foregoing analysis of s. 4 of the *Wishart Act*, it is my view that GMCL was not obligated to provide the names of the dealers who had received WDAs to other such dealers or to CADA. Characterizing the refusal to provide the names of the dealers as a breach of s. 4 would in essence place a positive obligation upon GMCL. In my view, the Act does not provide for such a positive obligation. The refusal cannot be characterized as interfering with, restricting or prohibiting the dealers' right to associate, but rather a refusal to entertain a request that GMCL legitimately felt was unreasonable. As I have noted in Common Issue (c)(ii), GMCL took the reasonable position to treat the list as confidential in order to protect the privacy and business interests of the affected dealers.

[285] Furthermore, the dealers were not prevented from self-identifying and forming a collective. Their collective action was not prevented or made impossible by GMCL's actions. I note again that this is especially true for the Saturn dealers. The dealers who had received WDAs could have disclosed their identities either to the DCT or to CADA or among themselves. GMCL, in fact, tried to convince the Steering Committee, CADA and the DCT to play a role in assisting the dealers. Though this, of course, would benefit GMCL in its desire to determine whether a sufficient number of dealers would accept the WDAs, it shows overall that efforts were made that were reasonable and that went beyond the requirements of s. 4 of the *Wishart Act*.

[286] Trillium alleges that GMCL knew that Cassels had a conflict of interest and that GMCL forced the dealers to rely on CADA and Cassels by not providing the list to the dealers. I

disagree. Macdonald gave evidence that he had identified a *potential* conflict of interest, but there is no evidence that GMCL had knowledge of an *actual* conflict of interest. It is far too remote to suggest that GMCL could have anticipated that a potential conflict might prevent Cassels from assisting the dealers, thus constituting interference with the dealers' right to associate.

[287] As for GMCL telling Hurdman that it would not release the information due to privacy laws, I accept that this was a mistake. There is no evidence that this mistake amounted to dishonesty. Furthermore, there was no evidence at trial that GMCL somehow preyed upon "conflicting interests and loyalties" as alleged by Trillium.

Common Issue (e)(vi)

> **If all Class Members had a statutory right to associate, did GMCL interfere with, prohibit, restrict, penalize, attempt to penalize or threaten to penalize the Class Members' exercise of this right by any terms of the Wind-Down Agreement?**

[288] The answer to this common issue is "no".

[289] Trillium alleges that the confidentiality provision in s. 8 of the WDA interfered with the Class Members' statutory right to associate. Section 8 states:

> Confidentiality. Dealer and Dealer Operator hereby agree that, without the prior written consent of GM, they shall not disclose to any person (other than (a) its or their agents or employees having a need to know such information in the conduct of their duties for Dealer or Dealer Operator, or (b) its or their legal, tax or other professional advisors, or (c) representatives of the Canadian Automobile Dealers Association, in each case provided such individuals shall be bound by a similar undertaking of confidentiality) the terms or conditions of this Agreement or any facts relating hereto or to the underlying transactions, except where the disclosure is required pursuant to an order of a court, arbitrator or arbitration panel, administrative tribunal or other body having the power to compel the production of such information. Such disclosure shall be made only to the extent so ordered and provided that Dealer and/or Dealer Operator receiving such an order promptly notifies GM so that it may intervene in response to such order, or if timely notice cannot be given, seeks to obtain a protective order from the court or government for such information.

[290] Trillium submits that this provision prevented dealers from discussing the "terms or conditions of this Agreement or any facts relating hereto or to the underlying transactions" with other dealers. Therefore, Trillium argues, it is a violation of s. 4.

[291] I agree with GMCL that Trillium's position ignores basic principles of contract law. The provisions in the WDA would not have been in force until the agreement had been executed. Up

until the time of execution, the dealers contemplating signing the WDAs were not subject to the confidentiality provision because there was no contract. I further agree with GMCL that the relevant period for Trillium's claims under this common issue is the time leading up to the execution of the WDAs. Up until signature, the dealers with offers were not subject to any legal impediments that would have precluded them from communicating with anyone else. The evidence establishes that the dealers did not believe that they were subject to such a restriction of non-disclosure. Hurdman and Condie spoke with a number of other dealers. Furthermore, on May 24 during the CADA phone call, multiple dealers spoke about the proposed WDA. Hurdman, Condie and Turpin all participated in that phone call.

[292] For these reasons, I find that the confidentiality clause, referred to above, did not interfere with, prohibit, restrict, penalize, attempt to penalize, or threaten to penalize the Class Members' statutory right to associate.

Common Issue (f):

> **Are the waiver and release contained in s. 5 of the Wind-Down Agreement null, void and unenforceable in respect of the Class Members' rights under ss. 4 and 11 of the Wishart Act (or similar provisions under such franchise legislation otherwise governing any such Class member);?**

[293] The answer to this common issue is "no".

[294] The waiver and release (the "Release") in s. 5 of the WDA does not contravene ss. 4 and 11 of the *Wishart Act*. It is therefore enforceable as against the Class Members' claims.

[295] GMCL rightly identifies Common Issue (f) as a threshold question in this case. If the Release is valid and enforceable, Trillium's claims against GMCL must be dismissed regardless of the answers to Common Issues (c), (d), (e) and (g). That is because the Release expressly bars Trillium from pursuing claims against GMCL for breaches of the duty of fair dealing, breaches of the right of association, and breaches of the disclosure obligation. I have already answered "no" to Common Issues (c), (d) and (e); but in the event that I am incorrect, for the following reasons, I conclude that GMCL has established that the Release is valid and enforceable, does not contravene the *Wishart Act*, and therefore bars Trillium's claims for breach of the duty of fair dealing, breach of the right of association, and breach of the duty of disclosure.

Relevant statutory provisions

[296] Section 4 of the *Wishart Act* deals with the right to associate. Section 4(4) states that:

> Any provision in a franchise agreement or other agreement relating to a franchise which purports to interfere with, prohibit or restrict a franchisee from exercising any right under this section is void.

[297] Section 11 of the *Wishart Act* provides:

> Any purported waiver or release by a franchisee of a right given under this Act or of an obligation or requirement imposed on a franchisor or franchisor's associate by or under this Act is void.

The Release

[298] The Release is found at section 5 of the WDA. Section 5, along with the Notice of Non-Renewal and WDA, is reproduced in its entirety in Appendix C. Trillium primarily takes issue with the following portions of the Release:

> 5. Release; Covenant Not to Sue; Indemnity.
>
> (a) Each of Dealer and Dealer Operator on their own behalf and on behalf of any of their respective Affiliates, members, partners, venturers, shareholders, Dealer Owners, officers, directors, employees, agents, spouses, legal representatives, heirs, administrators, executors, successors, and assigns (collectively, the "Dealer Parties"), hereby absolutely and irrevocably, subject to the conditions set forth in the concluding paragraph of this Section 5(a), releases, settles, cancels, discharges, and acknowledges to be fully satisfied any and all claims, demands, complaints, damages, debts, liabilities, obligations, costs, expenses, liens, actions, and causes of action of every kind and nature whatsoever (including without limiting the generality of the foregoing, negligence), whether known or unknown, foreseen or unforeseen, suspected or unsuspected, in law or in equity ("Claims"), which any of the Dealer Parties may have as of the Effective Date or may thereafter have or acquire at any time against GM, its Affiliates, or any of its or their members, partners, venturers, shareholders, officers, directors, employees, agents, spouses, legal representatives, heirs, administrators, executors, successors, or assigns (collectively, the "GM Entities"), arising out of or relating to:
>
> (v) or any and all applicable statute, regulation, or other law, including Ontario's Arthur Wishart Act (Franchise Disclosure), 2000, Alberta's Franchises Act, Prince Edward Island's Franchises Act and/or any other similar franchise legislation which may be enacted or proclaimed in force in the future (collectively, the "Acts"). Dealer and Dealer Operator acknowledge that it has always been and continues to be GM's position that the Acts are not applicable to the Dealer Agreement or the relations between GM and Dealer and/or Dealer Operator. However, if a court were to conclude otherwise, Dealer and Dealer Operator specifically acknowledge that it and they are hereby waiving any and all rights given to it or them under the Acts and are hereby releasing GM and the other GM Entities from any obligation or requirement imposed on GM and/or any of the other GM Entities by the Acts and further

> acknowledge that they are doing so with full awareness of such rights, obligations and requirements, and intend to waive its and their rights to: **(1) any Claim for breach of the duty of fair dealing in the performance or enforcement of or exercise of any right under the Dealer Agreement; (2) any Claim for GM and/or any of the other GM Entities penalizing, attempting to penalize or threatening to penalize the Dealer and/or the Dealer Operator for associating with other GM dealers or retailers; (3) any Claim for damages for a misrepresentation contained in a disclosure document or a statement of material change; (4) any Claim for rescission for failure to provide a disclosure document or a statement of material change as required by the** Acts**; (5) any Claim for rescission for providing a deficient disclosure document or a statement of material change as required by the Acts; and (g) any other Claims arising under one or more or all of the Acts; or** …
>
> [Emphasis added]

[299] The words of a release must be read in their ordinary sense and in light of the surrounding factual matrix, which includes, but is not limited to, the purpose of the agreement and facts that were known or reasonably capable of being known by the parties when they entered into the agreement. In determining what was in the contemplation of the parties at the time when the Release was given, I have considered the language of the whole document, the circumstances leading up to its execution, and evidence as to the intention of the parties.

The case law

[300] The interplay between the *Wishart Act* and the common law of releases has been carefully considered over the past decade. Two decisions are particularly relevant to the resolution of Common Issue (f) – the decision of Cullity J. in *Midas* (2009) (discussed above) and the decision of Cumming J. in *1518628 Ontario Inc. v. Tutor Time Learning Centres, LLC*, 2006 CanLII 25276 (Ont. S.C.) [*Tutor Time*]. Both decisions were approved by the Court of Appeal in *Midas* (2010). *Midas* (2009) articulates the rule and *Tutor Time* identifies an exception to the rule. The central question underlying Common Issue (f) is whether this case falls within the rule or the exception.

Tutor Time – the exception

[301] *Tutor Time* was decided before *Midas* (2009). In *Tutor Time*, the franchisee plaintiff, exercising its rights under the *Wishart Act*, sought rescission of a franchise agreement entered into with Tutor Time Learning Centres through a share purchase agreement. The franchisee's business had suffered considerably, and the franchisee blamed its lack of success on the franchisor's failure to meet its disclosure obligations under the *Wishart Act*. Before commencement of the action, however, negotiations took place and a settlement was reached that included a release in favour of the franchisor. Later, the franchisee took the position that the

release was void pursuant to s. 11 of the *Wishart Act*. Justice Cumming disagreed stating at para. 108:

> In my view, s. 11 does not have application to a release given (with the advice of counsel) by a franchisee in the settlement of a dispute for existing, known breaches of the *Act* by the franchiser in respect of its disclosure obligations, which would otherwise entitle the franchisee to a statutory rescission.

Midas (2009) – the rule

[302] In *Midas* (2009), the franchisee plaintiff initiated class proceedings against Midas Canada. The causes of action relied upon included breaches of the duty of fair dealing set out in s. 3 of the *Wishart Act*. The standard-form franchise agreement used by Midas Canada, however, required its franchisees to sign a general release upon the renewal of the franchise relationship. Following certification, questions arose as to whether Midas Canada could force the franchisee, whose franchise agreement had expired, to execute a release as a condition of renewal. The larger issue became whether any provision requiring franchisees to release a franchisor from liability as a condition of renewal or transfer of their rights was unenforceable.

[303] Justice Cullity held that the provision in the franchise agreement was void and unenforceable. First, he found that the right of association granted to franchisees pursuant to s. 4(1) of the *Wishart Act* encompasses the right of the franchisees to join in class proceedings for the purpose of enforcing their rights against the franchisor. As a result, he found that the release required by the franchise agreement amounted to a release of the franchisees' rights under s. 4(1). Justice Cullity concluded that this release was *prima facie* void, noting, however, that there were exceptions and it was necessary to leave open the possibility of cases such as *Tutor Time* or other circumstances where it would be inequitable to permit a franchisee to rely on the provisions of s. 11 to vitiate a release.

[304] Justice Cullity at paras. 20-21 explicitly rejected the franchisor's argument that ss. 4(1) and 11 could not have been intended to apply to agreements and releases in situations where the franchisees voluntarily decided to seek renewals. As Cullity J. stated at para. 22:

> It is unquestionable that the provisions and the intentions reflected in such agreements are subject to the overriding provisions of the [*Wishart Act*]. In consequence, the fact that Midas is seeking compliance with the agreements is beside the point. If the agreements interfere with the right of association conferred by section 4(1), they will be void to that extent. If they require releases of rights under the statute, the releases would be void and the relevant provisions of the agreement will be unenforceable.

[305] It should be noted that the franchisee in *Midas* (2009) was not trying to settle its claims; rather, it had brought the motion because it wished to continue to assert its claims as a member of the class proceedings. Unlike *Tutor Time*, there was no existing settlement agreement. Justice Cullity stated at para. 27:

> There may be cases in which the distinction is difficult to draw, but I decline to find that the prerequisite of a settlement has been satisfied here where the question is whether the franchisor can enforce the provisions of the franchise agreements dealing with renewals and assignments by insisting on the execution of a release by an unwilling franchisee.

[306] The Court of Appeal agreed. It adopted the reasoning of Cullity J., upholding his finding that the release was void and unenforceable. The court did not overrule *Tutor Time*; rather, according to the Court of Appeal in *Midas* (2010) at para. 24,

> *Tutor Time* simply has no application to the facts of this case. In *Tutor Time*, the motion judge concluded that s. 11 did not apply to a release given by a franchisee, with the advice of counsel, in settlement of a dispute for existing and fully known breaches of the Act that would otherwise have entitled the franchisee to a claim.

[307] Given the remedial purpose of the *Wishart Act* and the plain wording of s. 11, generally, a purported waiver or release by a franchisee of a right under the *Wishart Act* will be void and unenforceable. Equally, however, it is clear that a narrow exception must exist for those cases where it would be inequitable for a franchisee to avail itself of s. 11. For the policy reasons outlined in *Tutor Time*, a release given by a franchisee with the advice of counsel in settlement of a dispute for existing and fully known breaches of the *Wishart Act* that would otherwise entitle the franchisee to claims, will not be caught by s. 11.

The Release was a settlement

[308] The factual matrix surrounding the WDA and the Release demonstrates the intention and understanding of the parties: that the WDA was to be a full and final settlement of any claims the dealers might have had from the non-renewal of their DSSAs, including any claims, statutory or otherwise, in connection with the Notice of Non-Renewal or the WDA.

[309] As noted above, Trillium rejects the notion that the WDA was a settlement of anything, insisting instead that the WDA was an amendment to the DSSA. At paragraph 295 of its closing submissions, Trillium explains its position as follows:

> Soliciting the WDA from the [Class Members] was performance of the DSSA. The WDA irrevocably changed the franchise relationship as reflected in the DSSA. It constituted an amendment to the DSSA. Moreover, it brought that relationship to a premature end. Until the WDA was signed, the DSSA was the

only governing agreement between the parties.[4]

[310] As this passage reveals, Trillium misses the point. First, there is no dispute that the WDA brought the DSSA to a premature end; but that just begs the question of its legal nature. Second, characterizing the WDA as an amendment does not change the analysis. Although I do not think it was an amendment, to the extent that the DSSA continued in force until non-renewal, it might appear that the WDA did, in some sense, amend the DSSA – the WDA did change the nature of the relationship between the dealers and GMCL. But an amendment can give rise to legal claims, and those legal claims can be adjudicated or settled. In this sense, the WDA did not give rise to any new rights. Rather it ended any claim for rescission. As GMCL argues a "settlement" is a voluntary arrangement that brings a dispute or potential dispute to an end without a final adjudication of the issues between the parties on the merits: *City of Toronto Economic Development Corp. v. Olco Petroleum Group Inc.*, [2008] O.J. No. 2413, paras. 7 and 12 (Master) (S.C.). Lastly, in any event, I am not convinced that there is a legal basis for describing the WDA as an amendment to the DSSA. In my view it was a settlement document.

[311] I reject Trillium's submission that the WDA and Release cannot be viewed as a settlement of claims because GMCL, in its communications with the dealers, did not *describe* the WDA as a settlement agreement. At para. 541 of its closing submissions, Trillium emphasized that the WDA "…did not say, 'we are breaching the *Wishart Art* and this is our settlement: take it or leave it.'" But, more to the point, why must a settlement agreement identify itself as such? In my view, provided that the parties understood the nature and the purpose of the WDA, it does not matter whether the word "settlement" was used in the document. In this regard, it is worth recalling that the unabbreviated title of the WDAs is, "Notices of Non-Renewal and Wind-Down Agreements", which very clearly indicates that the parties were ending their contractual relationship.

[312] Given the factual matrix leading up to the signing of the WDAs – notably, the looming *CCAA* filing and the known restructuring of GMCL's dealer network – the parties must have understood that the central purpose of the WDA was a full and final settlement of any legal claims arising from non-renewal of the DSSA and the WDA itself. Indeed, Hurdman and Turpin, both dealers who received WDAs, testified that they were aware that GMCL intended to rely on their acceptance of the WDA to determine whether a *CCAA* filing could be avoided. Anything less than a full settlement would have undermined the purpose of this out-of-court restructuring. Additionally, whether or not the WDA was called a "settlement agreement," the plain language of the Release leaves no doubt that the parties intended the WDA to be a full and final settlement. Paragraph 5(a) of the Release clearly states that "[e]ach of Dealer and Dealer Operator…hereby absolutely and irrevocably…releases, settles, cancels, discharges, and acknowledges to be fully satisfied any and all liens, demands, complaints, damages, debts, liabilities, obligations, costs, expenses, liens, actions, and causes of action of every kind and

[4] Trillium made this submission in the context of Common Issue (c). The statement applies equally to Common Issue (f). It is a fuller description of the plaintiff's position found at paragraph 543 of its closing submissions.

nature whatsoever…".

The Release was a settlement of existing and fully known claims

[313] As noted above, Trillium submits that there is no evidence its claims existed and were fully known when the Release was signed. Trillium submits that (1) the ILA Certificate is the only evidence that GMCL can point to and it does not expressly acknowledge any claims; (2) because GMCL declined to ask the dealer witnesses whether they had full knowledge of the claims, the court should infer that they did not know of any claims; (3) nothing in the Notice of Non-Renewal or the WDA acknowledges that GMCL committed any breach; (4) GMCL took the position at the time that it was not bound by the *Wishart Act*; and (5) no claim could be considered "existing" before the parties signed the WDA.

[314] I reject Trillium's submissions for reasons that follow.

The ILA Certificate

[315] First, the ILA Certificate is not the only indication that the dealers knew about their potential claims. An inference can be drawn, from the abundance of clear facts facing the dealers at the time, that they had a variety of contractual and statutory claims. Upon entering into the WDAs, the dealers knew everything they needed to know to assert the claims they now bring. They knew that they only had six days to consider the WDA, obtain independent legal advice, and make their decision. They also knew they had not received, and would not be receiving, a disclosure document in relation to the WDA.

[316] Little turns on the form of the ILA Certificate. I note that Trillium has provided no authority for its contention that the ILA Certificate ought to have contained words to the effect of: "I have explained to Dealer and Dealer Operator that GMCL is breaching the *Wishart Act* and they have claims under the *Wishart Act*. These claims are under sections 3, 4, 6, and 7 of the *Wishart Act*. Dealer and Dealer Operator acknowledge that they have these *Wishart Act* claims against GMCL, but voluntarily choose to release them in the WDA."

[317] Regardless of what the ILA Certificate could have said, it clearly stated that the advising lawyer (1) had read the WDA; (2) had explained the nature and effect of the WDA, including the dealer's waivers, releases and indemnification obligations; and (3) had verified that the dealer had carefully read the WDA and was fully advised and informed with regard to all of the foregoing matters. Simply put, the ILA Certificate, as drafted, adequately supports an inference that the dealers who signed the WDAs knew they were giving up any legal claims they might have against GMCL.

[318] In support of its submissions Trillium cites the family law case of *Slipak v. Slipak*, [2004] O.J. No. 25 (S.C.) [*Slipak*] in which Tucker J. found that a separation agreement was invalid notwithstanding the fact that the wife received independent legal advice before signing the separation agreement. I agree that independent legal advice will not necessarily bar setting aside a release; but competent, genuinely independent legal advice goes some distance in rebutting some of the possible grounds for setting aside a contract. *Slipak* is entirely distinguishable in that the independent legal advice in that case was manifestly inadequate – the wife spoke with a

lawyer for ten minutes, and was told both before and after the meeting that she "had to sign the Agreement or get nothing." The quality of the independent legal advice the wife received was at issue in that case. Trillium expressly agreed that no challenge would be made to the accuracy or sufficiency of the legal advice that it and other Class Members received from their lawyers. It also should not be forgotten that generally speaking the dealers, including Trillium, were sophisticated and experienced business persons managing large business enterprises and not unfamiliar with legal language and contracts.

Examination of dealer witnesses

[319] Trillium asserts that GMCL failed to examine Hurdman and Turpin on the legal advice they received regarding any claims against GMCL arising out of the Notice of Non-Renewal. I agree with GMCL that nothing can be inferred from this. Trillium expressly agreed that no challenge has been or would have been made to the accuracy or sufficiency of the legal advice that it and other Class Members received from their lawyers. Each lawyer for each Class Member expressly confirmed, in writing, that he or she explained "the nature and effect of the Wind-Down Agreement, including the Dealer's and the Dealer Operator's waivers, releases and obligations contained therein."

[320] Moreover, it must be remembered that when Hurdman was cross-examined, he testified that in May of 2009 he believed that GMCL had no right not to renew his DSSA. Specifically, he testified that in May 2009, he thought he was entitled to a renewal of his dealer agreement so long as he was not in breach of the agreement. Similarly, Turpin testified that he always thought he had an automatic right of renewal; he was never under the impression that GMCL had the power to take a dealership out of the network; and he knew he was giving up his right of renewal by signing the WDA. Likewise, Condie testified that his understanding at the time was that he had an automatic right of renewal and he did not believe that GMCL could reduce the dealer network without a dealer's consent. Thus, in my view, the dealer witnesses' knowledge of their claims was explored at trial.

Content of the Notice of Non-Renewal and the WDA

[321] Trillium submits that because nothing in the Notice of Non-Renewal or the WDA acknowledged that GMCL committed any breach, its claims could not have been in existence or fully known at the time and therefore could not be released. I do not accept this submission.

[322] First, it was unnecessary for the Notice of Non-Renewal or the WDA to expressly state that GMCL had breached the DSSA or state that the dealers had full knowledge of such a breach. There was a known dispute between the parties – namely, whether GMCL was entitled under the DSSA to decline to renew Trillium's franchise agreement. It was no mystery to the dealers what the Release was drafted to address. For example, in addition to the testimony of the dealer witnesses that they believed in May 2009 that GMCL did not have a right to non-renewal, the dealers were specifically told by CADA that they had the option to sue GMCL. In the May 22 memorandum, CADA advised the dealers of the following:

> A dealer might decide not to sign the Wind-Down Agreement and instead

> consider that he or she would launch a legal action against GM alleging a breach of his or her Dealer Sales and Service Agreement for non-renewal and/or breach of contract.

[323] Second, the Release contains a high degree of specificity. It was not a standard form release. It specifies that the Release pertains to claims arising out of the DSSA as well as rights under the *Wishart Act*.

GMCL's position on the *Wishart Act*

[324] The fact that GMCL asserted that it was not bound by the *Wishart Act* is not contrary to the existence of claims that it violated the Act. Section 5(c)(v) of the WDA states GMCL's position (from which it has since retreated), that the *Wishart Act* does not govern its relationship with the dealers. The section also states, however, that were a court to hold otherwise, the dealer and dealer operator waive any claims that could arise under the Act:

> Dealer and Dealer Operator acknowledge that it has always been and continues to be GM's position that the Acts are not applicable to the Dealer Agreement or the relations between GM and Dealer and/or Dealer Operator. **However, if a court were to conclude otherwise, Dealer and Dealer Operator specifically acknowledge that it and they are hereby waiving any and all rights given to it or them under the Acts and are hereby releasing GM and the other GM Entities from any obligation or requirement imposed on GM and/or any of the other GM Entities by the Acts and further acknowledge that they are doing so with full awareness of such rights, obligations and requirements…**
>
> [Emphasis added]

[325] This passage clearly shows that it was within the contemplation of the parties at the time the Release was executed that GMCL may be bound by the Act. But more importantly, just as it could not decide whether the dealers had any claims against it arising from the WDA and the Act, GMCL had no responsibility to advise the dealers of any such claims. Simply put, in this case, GMCL's initial denial is not relevant to whether the dealers' statutory claims existed and were fully known when the Release was executed.

[326] Further, 32 of the dealers, having reviewed the Notice of Non-Renewal and the WDA chose not to sign the WDA. They commenced legal proceedings against GMCL, running the risk that there might be a *CCAA* filing or a bankruptcy. Thus, a considerable number of the dealers who did not sign the WDA understood that they could take their chances, not execute the WDA, and see whether GMCL would make a *CCAA* filing or whether a better deal could be had.

Claims crystallized and were released immediately

[327] I reject Trillium's submission that the Release cannot be effective because Trillium would have only gained a rescission claim after the Release was executed. First, in my view, the Notice of Non-Renewal gave rise to any potential rescission claim by Trillium against GMCL.

The Notice of Non-Renewal was GMCL's way of telling Trillium that the franchise agreement would be coming to an end, *regardless* of whether this violated the DSSA or the *Wishart Act*. It did not say that the DSSA would not be renewed *only if* Trillium signed the WDA. Second, more generally, any claims against GMCL crystallized when Trillium received the Notice of Non-Renewal and the WDA, and were immediately released when the Release was signed. In my view, given the factual matrix in this case – including the fact that Trillium received independent legal advice regarding the Release – there is nothing inherently wrong with a Release "fixing" breaches relating to its own procurement. Trillium and the other dealers were sophisticated commercial actors, with experience of entering into contracts, and signed the WDA with the benefit of independent legal advice.

Conclusion

[328] The WDA and Release were designed to bring the franchise relationship to an end. Thus, for the reasons above, this case falls within the *Tutor Time* exception. The dealers reviewed the WDA and Release, received legal advice, and decided whether or not to sign the agreement. In short, the Release was clearly entered into with legal advice and in settlement of existing and fully known claims. Notwithstanding its important remedial purpose, the *Wishart Act* does not permit franchisees to resile from their settlement agreements in the circumstances of this case. Unlike *Midas* (2009), the claims that the franchisees seek to bring against the franchisor were fully known when the Release was given. The, not unsophisticated, franchisees received independent legal advice regarding the Release which was carefully drafted to address the specific dispute in question – namely, any breach of the DSSA and any breach relating to the *Wishart Act*. In this case, the importance of ensuring that full and final settlements are indeed, full and final, requires the court to answer "no" to Common Issue (f).

Common Issue (g):

> **Was GMCL required to deliver to each Class Member a disclosure document within the meaning of the *Wishart Act*, the Alberta Act and the PEI Act, as the case may be, at least fourteen days before the Class Member signed the Wind-Down Agreement?**

[329] The answer to this common issue is "no".

[330] Having found under Common Issue (b) that the *Wishart Act* applies to all Class Members irrespective of the province in which their dealership operates, it is unnecessary to address Common Issue (g) in the context of the *Alberta Act* or the *PEI Act*. Under Common Issue (c)(i), I addressed Trillium's submission that the duty of good faith and fair dealing in s. 3 imports a similar disclosure obligation to that found under s. 5 of the *Wishart Act*. I held that it did not. I will now consider whether that disclosure obligation required GMCL to give the dealers who received WDAs a disclosure document fourteen days before the WDAs were delivered.

Statutory disclosure under the *Wishart Act*

[331] The franchisor's statutory obligation to disclose arises under ss. 5(1) and 5(5) of the

Wishart Act. These provisions are as follows:

> **5(1)** A franchisor shall provide a prospective franchisee with a disclosure document and the prospective franchisee shall receive the disclosure document not less than 14 days before the earlier of,
>
> (a) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise; and
>
> (b) the payment of any consideration by or on behalf of the prospective franchisee to the franchisor or franchisor's associate relating to the franchise.
>
> …
>
> **5(5)** The franchisor shall provide the prospective franchisee with a written statement of any material change, and the franchisee must receive such statement, as soon as practicable after the change has occurred and before the earlier of,
>
> (a) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise; and
>
> (b) the payment of any consideration by or on behalf of the prospective franchisee to the franchisor or franchisor's associate relating to the franchise.

[332] The following definitions in s. 1(1) of the *Wishart Act* are of importance:

> "prospective franchisee" means a person who has indicated, directly or indirectly, to a franchisor or a franchisor's associate, agent or broker an interest in entering into a franchise agreement, and a person whom a franchisor or a franchisor's associate, agent or broker, directly or indirectly, invites to enter into a franchise agreement.
>
> "franchise agreement" means any agreement that relates to a franchise between,
>
> (a) a franchisor or franchisor's associate, and
>
> (b) a franchisee.
>
> "material change" means a change in the business, operations, capital or control of the franchisor or franchisor's associate, a change in the franchise system or a prescribed change, that would reasonably be expected to have a significant adverse effect on the value or price of the franchise to be granted or on the decision to acquire the franchise and includes a decision to implement such a change made by the board of directors of the franchisor or franchisor's associate or by senior management of the franchisor or franchisor's associate who believe that confirmation of the decision by the board of directors is probable.

> "material fact" includes any information about the business, operations, capital or control of the franchisor or franchisor's associate, or about the franchise system, that would reasonably be expected to have a significant effect on the value or price of the franchise to be granted or the decision to acquire the franchise.

[333] Determining whether the statutory duty of disclosure under s. 5 is triggered requires deciding whether the WDA could be classified as a "franchise agreement" and whether the dealers could be characterized as "prospective franchisees."

Was the WDA a franchise agreement or an agreement relating to the franchise?

[334] In my view, there was no duty to provide a disclosure document to the dealers because the WDA is not a franchise agreement or any other agreement relating to a franchise within the meaning of s. 1(1) of the *Wishart Act*. Section 5(1) only pertains to the grant of a franchise and related documents that are entered into at that time.

[335] This view is supported by the comments made by D.M. Brown J. (as he then was) in *3574423 Canada Inc. v. Baton Rouge Restaurants Inc.*, 2011 ONSC 6697, [2011] O.J. No. 5018, [*Baton Rouge*] aff'd 2013 ONCA 39, [2013] O.J. No. 297, where he stated at paras. 282-283:

> Section 5 disclosure requirements are linked to very specific acts – the signing of a franchise agreement 'or any other agreement relating to the franchise' and the payment of consideration.
>
> … a franchisor's conduct in failing to provide prescribed disclosure does not attract legal liability unless a very specific, concrete step has occurred – 'the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise.' If a prospective franchisee changes its legal position by signing such documents and becomes a 'franchisee,' then the *AWA* offers up remedies if it turns out that it has been the victim of commercial misconduct by the franchisor.

[336] The phrase "any other agreement relating to the franchise" refers to ancillary documents signed by a franchisee in connection with entering into a franchise agreement. Although in *6862829 Canada Ltd. v. Dollar It Ltd.*, 2010 ONCA 34, [2010] O.J. No. 214, the Court of Appeal was not asked to consider the meaning of the phrase "any other agreement," it described the type of ancillary and related agreements which were entered into by the franchisee in that case: an indemnity agreement, general security agreement and sublease.

[337] In *Baton Rouge* at para. 289 D.M. Brown J. also identified what amounts to a franchise agreement:

> … the phrase 'franchise agreement or any other agreement relating to the franchise' in section 5(1)(a) of the *AWA* refers to an agreement signed by a person who becomes an actual franchisee.

[338] Employing D.M. Brown J.'s method of determining whether a disclosure obligation is triggered – namely, asking whether the signing of the agreement changed the dealers' legal position by becoming a franchisee – leads to the conclusion that the WDA is not a franchise agreement within the meaning of s. 5. The dealers' legal position was not changed so that they became franchisees. In fact, just the opposite occurred: the dealers' legal position was changed in that they were winding down and would no longer be GMCL franchisees. Extending the meaning of D.M. Brown J.'s interpretation to include the position in which the dealers found themselves would undermine the meaning of the section. It is clear on this interpretation that the signing of a WDA does not attract the disclosure requirements of s. 5 of the *Wishart Act*. This was also fully canvassed in Common Issue (f). As per *Tutor Time*, the dealers were settling and releasing all existing and known claims.

Were the dealers "prospective franchisees"?

[339] In several Ontario cases, a "prospective franchisee" has been described as a party who needed adequate information to make an "economically and financially sound" decision of whether to invest in a franchise opportunity: *1490664 Ontario Ltd. v. Dig This Garden Retailers Ltd.* (2005), 256 D.L.R. (4th) 451 at paras. 16 and 18 (Ont. C.A.); *MDG Kingston Inc. v. MDG Computers Canada Inc.*, 2008 ONCA 656, 92 O.R. (3d) 4 at para. 1; *6862829 Canada Ltd. v. Dollar It Ltd.*, [2008] O.J. No. 4687 (S.C.) at para. 59; *779975 Ontario Ltd. v. Mmmuffins Canada Corp.* (2009), 62 B.L.R. (4th) 137 (Ont. S.C.) at para. 30; and *Machias v. Mr. Submarine Ltd.*, 24 B.L.R. (3d) 228 (Ont. S.C.)

[340] A review of the *Wishart Act* also discloses a distinction between "franchisees" and "prospective franchisees". In my view, prospective franchisees are those who have not yet entered into a franchise agreement. Once they do so, they become franchisees and obtain rights and duties under the Act, for example, the duty of fair dealing and the right to associate. In this regard it makes sense that the disclosure protocol set out for prospective franchisees is robust; it is in place to protect those persons who have not yet become franchisees. Thereafter, having become franchisees, their rights and interests are protected by the obligation of fair dealing, the statutory right to associate and other provisions of the *Wishart Act*.

[341] I agree with GMCL's submission that Trillium's characterization of the dealers as prospective franchisees prior to the execution of the WDA is unfounded. I find it illogical that an existing franchisee entering into a WDA could also be considered a prospective franchisee.

[342] It is important that the meaning of "prospective franchisee" and "franchise agreement" be harmoniously read together, because what makes the franchisee "prospective" is their subsequent act of signing a franchise agreement. This status triggers the disclosure obligation in s. 5. It is not enough that the WDA be classified as a franchise agreement. The dealers, in signing such an agreement, would have to be characterized as "prospective franchisees" in order to trigger GMCL's disclosure obligations and obtain the benefit of s. 5.

Common Issue (h):

By virtue of GMCL's failure to deliver any disclosure document:

(i) is each Class Member entitled to rescind the Wind-Down Agreement within two years of signing the Wind-Down Agreement; and
(ii) is each Class Member carrying on business in Alberta entitled to cancel the Wind-Down Agreement, within two years of signing the Wind-Down Agreement?

[343] The answer to this common issue is "no."

[344] Having found that the answer to Common Issue (g) was "no," it follows that the answer to this question is also "no". The Class Members are not entitled to rescind the WDA within two years of signing the WDA.

[345] Having found that the Ontario franchise legislation applies to all Class Members, and in light of my finding on Common Issue (g), each Class Member carrying on business in Alberta is not entitled to cancel the WDA within two years of signing it.

Common Issue (i)

Is each Class Member which delivers to GMCL a notice of rescission or notice of cancellation, as the case may be, in respect of the Wind-Down Agreement within two years of signing the Wind-Down Agreement entitled to compensation under ss. 6(6) of the *Wishart Act* or the PEI Act or under s. 14(2) of the Alberta Act, as the case may be?

[346] The answer to this common issue is "no."

[347] Having found that the answers to Common Issue (g) and Common Issue (h) were "no," it follows that the answer to this question is also "no". A Class Member who is not entitled to rescind the agreement is also not entitled to compensation under s. 6(6) of the *Wishart Act*.

[348] Because Ontario franchise legislation applies to all Class Members, and due to my findings on Common Issues (g) and (h), none of the Class Members carrying on business in PEI or Alberta is entitled to compensation under s. 6(6) of the *PEI Act* or under s. 14(2) of the *Alberta Act*.

PART IV – THE COUNTERCLAIM

[349] GMCL has counterclaimed against the Class Members on the basis that:

(a) if the release is enforceable, the [Class Members] have breached their obligations under the WDA by bringing this action; or

(b) in the alternative, if the release is not enforceable, GMCL is entitled to restitution of the amounts paid out as wind-down payments in consideration for obtaining the release.

[350] In this regard, Strathy J. certified three common issues concerning GMCL's counterclaim. I will deal with each of the common issues in turn.

Counterclaim Common Issue (a)

Did each member of the Dealer Subclass breach section 5(c) of their respective Wind Down Agreements by commencing the Class Action and/or failing to opt out of the Class Action?

[351] The answer to this counterclaim common issue is "no".

[352] Although I found in Common Issue (f) that the Release is generally enforceable, I accept Trillium's submission that s. 5(c) of the WDA offends the right of association under section 4 of the *Wishart Act*. Section 5(c) reads as follows:

> (c) Dealer and Dealer Operator on their own behalf and on behalf of the other Dealer Parties, hereby agree not to, at any time, sue, protest, institute or assist in instituting any proceeding in any court, arbitration, or administrative proceeding, or otherwise assert any Claim that is covered by the release provision in subparagraph (a) above. For greater certainty, Dealer and Dealer Operator on their own behalf and on behalf of the other Dealer Parties, expressly acknowledge that the release provision in subparagraph (a) above includes, without limitation, a complete, full and final release of any Claims of any nature or kind which Dealer, Dealer Operator and/or any of the other Dealer Parties may have for equitable relief, the recovery of damages or an accounting of profits in any representative action or class proceeding commenced by any other past, present or future dealer or retailer of GM or any of the other GM Entities, and Dealer and Dealer Operator on their own behalf and on behalf of the other Dealer Parties, hereby irrevocably agree to take whatever affirmative steps may be necessary to opt out of or disclaim any interest in any such action or proceeding. Dealer and Dealer Operator on their own behalf and on behalf of the other Dealer Parties, hereby agree not to make or pursue any Claim against any person which might claim contribution or indemnity from GM or any of the other GM Entities. Notwithstanding anything to the contrary, Dealer and Dealer Operator on their own behalf and on behalf of the other Dealer Parties, acknowledge and agree that GM will suffer irreparable harm from the breach by any Dealer Party of this covenant not to sue or participate in any action and therefore agrees that GM shall be entitled to any equitable remedies available to GM, including, D-7 without limitation, injunctive relief, upon the breach of such covenant not to sue or participate in any action by any Dealer Party.

[353] GMCL did not violate Trillium's right of association with respect to the issues considered

in Common Issue (e), but the provisions of s. 5(c) do violate Trillium's right to bring a class action against GMCL and as such, offend the right of association under section 4.

[354] As I noted above, Cullity J. in *Midas* (2009) expressly stated that including s. 4 in the *Wishart Act* would be inexplicable if the legislators did not intend to permit franchisees to associate for the purpose of protecting their legal interests and protecting their rights through collective action. I agree.

[355] Further, I believe that s. 5(c) is void for public policy reasons. The class action lawsuit plays an important role in Canadian society and has fundamental advantages over a multiplicity of individualized suits. In my view, the public policy principles articulated by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 render s. 5(c) of the WDA void to the extent that it denies the affected dealers the right to bring an action against GMCL collectively. I do not believe this to be inconsistent with my finding that the Release bars Trillium's claims against GMCL. The result is that the WDAs cannot preclude a class action, but the Release provides GMCL with a defence to that class action.

Counterclaim Common Issue (b)

> **If the answer to Issue (a) is yes, is each member of the Defendant Class liable to indemnify GMCL against all claims, losses, damages, the amount of the Wind Down Payment and expenses which may be imposed upon or incurred by GMCL arising from, relating to or caused by the Defendant Class Members' breaches of the Wind Down Agreements?**

[356] The answer to this counterclaim common issue is "no".

[357] As a result of my analysis in Counterclaim Common Issue (a), the issue of costs will be dealt with separately by way of further submissions if the parties are unable to resolve the issue. Further, given my finding in Counterclaim Common Issue (a), GMCL is not entitled to a refund or any other indemnity.

Counterclaim Common Issue (c)

> **In the event that the release contained in section 5 of the Wind Down Agreement is void, which is denied by GMCL, have the Defendant Class Members been unjustly enriched at the expense of GMCL and therefore liable to make restitution to GMCL for all or some of the Wind Down Payment to each of them?**

[358] I have found that the Release in the WDA is not void and therefore it is unnecessary to answer this question. In any event, the answer to this counterclaim common issue is "no".

[359] In my view, the Class Members have not been unjustly enriched at the expense of GMCL. While GMCL's claim for restitutionary relief was not explored in great depth during

closing submissions, there was a juristic reason for GMCL's enrichment of the Class Members – namely, securing agreement to the WDAs which allowed GMCL to avoid a *CCAA* filing. Moreover, if the Release were set aside, the dealers' claim for compensation for the closing of their dealerships would be revived. The WDA, as a contract for much more than the covenant in 5(c), provides a juristic reason for enrichment. Because this common issue was not pursued in any depth by GMCL in its closing submissions, I find it unnecessary to delve into a more nuanced unjust enrichment analysis.

PART V – DAMAGES AGAINST GMCL

[360] Because Trillium has failed to establish that GMCL is liable for damages, it is unnecessary to assess quantum, particularly when the basis for the assessments could differ depending on the alleged breaches made by GMCL.

PART VI – THE CLAIM AGAINST CASSELS

The Common Issues

[361] The following common issues were certified by Strathy J. against Cassels:

> **(j) Did Cassels Brock & Blackwell LLP ("Cassels") owe contractual duties to some or all of the Class Members and, if so, did Cassels breach those duties?**
>
> **(k) Did Cassels owe fiduciary duties as lawyers to some or all of the Class Members and, if so, did Cassels breach those duties?**
>
> **(l) Did Cassels owe duties of care to some or all of the Class Members and, if so, did Cassels breach those duties?**

[362] For the reasons that follow, my answer to all three common issues is "yes".

Introduction

[363] In March 2009 the Saturn group retained Cassels to represent its interests against GMCL with respect to the closing or sale of the Saturn dealerships. In the same month Industry Canada retained Cassels concerning the financing of GMCL and Chrysler. CADA, which had a longstanding relationship with Cassels and whose membership included the Class Members, also retained Cassels to provide it with legal assistance concerning the problems that GMCL and Chrysler were facing. Ryan also approached Cassels regarding representation for the GMCL dealers in relation to the potential GMCL *CCAA* proceedings. Some GMCL dealers sent money to CADA with respect to the retaining of Cassels, and a Steering Committee was formed to represent the GMCL dealers.

[364] The issues to be considered with respect to the claim against Cassels include the following:

(i) whether Cassels was retained by the GMCL dealers, including the Class Members;

(ii) if there was a retainer that involved the Class Members, the nature of its scope;

(iii) whether Cassels was in conflict because of its pre-existing retainer to represent the Government of Canada;

(iv) whether Cassels was negligent or in breach of fiduciary duties with respect to its representation of dealers who had not received WDAs;

(v) whether Cassels owed the "call dealers" (the dealers with whom it had spoken to directly but who had not sent money to CADA) a duty of care; and

(vi) the calculation of damages, if any.

The nature of the class and the call dealers

[365] A preliminary issue arose during closing submissions regarding the nature of the class. The class definition that was certified by Strathy J. in 2011, consists of "all corporations in Canada that signed the WDA."

[366] Trillium takes the position that the class certified in the claim against Cassels includes dealers who did not send money to CADA to retain Cassels, but who were present during the May 24, 2009 conference call (see above at para. 95) and who signed WDAs (the "call dealers"). According to Trillium, Cassels knew or ought to have known that the dealers participating in the May 24 call "were looking to it for legal and strategic advice and that the dealers could reasonably expect that everything possible would be done by Cassels to ensure that their interests would be furthered."

[367] Cassels, however, takes the position that Trillium was attempting to create a new "call dealer" category of Class Members by asserting that those on the conference call signed the WDA because they were told, or "felt" from the call, that they had no alternatives. According to Cassels, this "moves into the world of negligence or negligent misrepresentation based on reliance, a claim not pleaded, not certified and incapable of certification." Further, according to Cassels, there is no representative plaintiff capable of giving the court evidence about the call dealers, and what the group thought and expected leading up to, and as a result of, the May 24 conference call. This is because Hurdman, the representative plaintiff, was a member of the GMCL dealer group that forwarded funds to CADA to retain Cassels and testified about his expectations which, from his evidence, were clearly tied to his belief that he had retained Cassels through the GMCL dealer group.

[368] In reply, Trillium denied that it was raising anything new. According to Trillium, there is no merit to Cassels' position that the claim advanced on behalf of the call dealers had not been pleaded and was never certified. First, Common Issue (l) asks whether Cassels owed duties of care "to some or all of the Class Members." The call dealers, being Class Members, are encompassed in this common issue. Second, Trillium's Amended Amended Statement of Claim

pleads that "independent of the contractual retainer, Cassels owed a duty of care to all Class Members due to the unique circumstances of their involvement" (emphasis in original). Therefore, whether dealers who were not members of the client group that had sent monies to CADA were nevertheless owed a duty of care was an issue encompassed by Common Issue (1). Third, Trillium points to following excerpt from Strathy J.'s certification decision:

> In this case, it is at least arguable that in participating of [sic] the drafting of the May 22, 2009 memo (as it is alleged) and in participating in the May 24, 2009 conference call, Cassels brought itself into a relationship of sufficient proximity to the terminated dealers to owe them a duty of care – a duty, in light of its alleged conflict, to refer them to counsel who could protect and advance their collective interests.

[369] During the certification hearing before Strathy J., Cassels argued that Trillium had failed to plead the necessary elements of its negligence claim, including reliance. As the above passage indicates, Strathy J. rejected Cassels' position, certifying Common Issue (l) and acknowledging that it would be an issue to be decided at trial whether such a relationship (between Cassels and the call dealers) would support a duty of care.

[370] I agree with Trillium's submissions and I shall determine whether or not the call dealers were owed a duty of care. Justice Strathy heard and rejected Cassels' submissions regarding the nature of the negligence claim available to dealers who participated on the call but did not retain Cassels in the sense that they had not sent monies to CADA. There is no need to revisit this matter. With the exception of the actual term "call dealer," there was nothing new about the call dealers' category identified by Trillium in its closing submissions. Further, insofar as the defining characteristic of that group of Class Members is participation in the May 24 conference call, Hurdman (as the representative plaintiff) was capable of providing evidence as to the expectations and impressions of those dealers, which were identical to the rest of the Class Members.

[371] Of course, the fact that the call dealers are Class Members and encompassed by Common Issue (l) does not determine whether they have a viable negligence claim. Justice Strathy did not have a full evidentiary record before him when he held that Cassels may have brought itself into a relationship of sufficient proximity to these terminated dealers to owe them a duty of care. In my view, as I will now explain, the claim that Cassels owed a duty of care to the call dealers is not supported by the evidence.

Cassels did not owe the call dealers a duty of care

[372] Trillium submits that the evidence establishes sufficient foreseeability and proximity between Cassels and the call dealers to support a *prima facie* duty of care under the first part of

the *Anns/Cooper* test.[5] It further submits that there are no residual policy concerns. I do not accept this submission. Although they are members of the Class, I find that Cassels did not owe the call dealers a duty of care.

[373] According to Trillium, mere participation in the May 24 conference call supports a finding of sufficient proximity between Cassels and the call dealers. Trillium provided no support for this assertion during closing submissions, making it difficult to ascertain the reason why participation in the conference call triggers a duty of care. In effect, Trillium is asking the court to extend the duty of care Cassels owed to its clients to non-clients who *chose not to retain* Cassels. Trillium did not point to a single Canadian legal decision that has recognized a duty of care owed by a lawyer to a non-client in analogous circumstances.

[374] Gauthier's description of Harris and Zakaib as the dealers' lawyers must be interpreted in the context of the GMCL client group retainer. The dealers who were offered WDAs and participated in the conference call would have been well aware of the GMCL dealer group retainer and would have understood that Harris and Zakaib were the client group's legal team. The proximate relationship was between the lawyers and their clients. The call dealers were on-lookers.

[375] In any event, the legal information provided during the May 24 conference call to the dealer group – and due to the nature of the conference call, to any dealer who phoned in – is not sufficient to establish a duty of care for Cassels towards the non-client call dealers.

[376] Due to this lack of proximity, the call dealers do not satisfy the *Anns/Cooper* test for the establishment of a duty of care. A duty of care must be grounded in a relationship of sufficient closeness or proximity to make it just and reasonable to impose an obligation upon Cassels to take reasonable care not to injure the call dealers.

The retainer and its scope

[377] Common Issues (j) and (k) require the court to determine whether Cassels was retained by the GMCL dealers; and if such a retainer existed, whether it was limited to providing dealers with legal advice on the *CCAA* proceedings or whether the retainer also included advice about how the dealers, including the Class Members, should respond to a non-*CCAA* restructuring.

[378] There are three retainers and one alleged retainer to keep track of when considering the claim against Cassels. First, there is the Cassels retainer by the Saturn dealers, which was facilitated by CADA. This retainer is undisputed. Second, there is the longstanding Cassels retainer by CADA. Likewise, this retainer is undisputed. Third, there is the Cassels retainer by Industry Canada. The existence of this retainer is indisputable. And finally, there is the alleged Cassels retainer by the GMCL dealers, including Class Members, that allegedly arose by the

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[5] *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Anns v. Merton London Borough Council*, [1978] A.C. 728

Class Members funding the retainer with Cassels for the purpose of dealing with the business crisis at GMCL. I have already concluded that although the call dealers are Class Members, they are not participants in this alleged retainer.

[379] Cassels denies having ever been in a solicitor-client relationship with the GMCL dealers, taking the position that its client was CADA – not the individual dealers who sent funds to CADA to hold in trust for the GMCL dealer group. Again, there is no dispute that the Saturn dealer group had a retainer with Cassels as of March 2009, or that specific retainer agreements were executed by individual Saturn dealers.

[380] For the most part, Common Issue (l) overlaps with Common Issue (j). As Justice Cromwell noted in *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 34 [*Galambos*], "[t]he claim that the solicitor-client contract was breached is essentially a differently labeled repetition of the claim in negligence, and this contractual claim falls with it." In other words, with one notable exception, Common Issues (j) and (l) stand and fall together. The exception, of course, pertains to Trillium's claim, discussed above, that Cassels breached a duty of care that it owed to dealers who participated in the May 24 conference call, whether or not they had directly or indirectly retained Cassels.

[381] As I will detail below, Cassels breached its fiduciary duties and contractual duties, and was negligent by accepting both the Industry Canada retainer and the GMCL dealer retainer. Cassels acted irresponsibly and unprofessionally by failing to have an effective conflicts checking system in place – that is, one which actually leads to lawyers discussing and resolving potential conflicts. Cassels is liable for its failure to heed the alarm bells that were audible, despite the deficiencies of its conflicts checking system. It is also liable for how it responded to the readily apparent conflicts amongst the dealers. Further, Cassels breached its contractual duties to the Class Members and was negligent in maintaining a Wait-and-See Approach and failing to address the Steering Committee's compromised position.

The Cassels timeline

[382] CADA had a longstanding relationship with Harris and Cassels. Ryan and Harris had dealt with a number of matters together over the years.

[383] In March Cassels was retained by the Saturn dealers to provide advice regarding their rights and options with respect to the discontinuance of the Saturn brand. Harris was one of the Cassels lawyers working on this matter.

[384] In March Cassels was also retained by Industry Canada ("the Canada retainer") to advise it on a potential commercial financing transaction to support GMCL and Chrysler. From Cassels, Bruce Leonard ("Leonard"), a senior insolvency lawyer at Cassels, Michael Weinczok ("Weinczok"), and Arthur Hamilton ("Hamilton") were all involved in this retainer.

[385] On or around April 15 Ryan approached Harris about Cassels opening a file for the GMCL dealers regarding a potential GMCL *CCAA* filing.

[386] Coincidentally, on April 19, Croxon, a member of the Steering Committee, emailed Ryan

seeking assistance in organizing legal representation. The email read:

> As you have likely heard a group of General Motors Dealers from across the country participated in a conference call on Friday afternoon. During the call it was agreed that this group would form a committee to represent all GM Dealers in Canada should GM file for bankruptcy protection…The first task for the group is to contact all GM Dealers in Canada requesting monies to build a fund for appropriate legal representation.
> …
> Secondly, we will obviously need to retain Council [sic] to act on behalf of the Dealers. I am sure you know many who could take this on. I have placed one call myself to a leading law firm in this field (Goodmans) and asked them to explore if any conflicts exist. I will make myself available should we need to interview any potential firms.
>
> I am leaving for Korea this evening but anticipate having access to email for the week that I am scheduled to be there. Could you please acknowledge this email and suggest how CADA might assist going forward? Also, I understand that you will be seeing Doug this Tuesday. He can fill you in on any other particulars.[6]

[387] In a meeting on April 21 Harris, Weinczok, Hamilton and Cassels' managing partner, Mark Young ("Young"), discussed whether Cassels could accept the GMCL dealer group retainer. They concluded that although there was no legal conflict between the GMCL dealer group and Canada retainers, a precautionary ethical wall should be erected and each client should be advised about the other retainer.

[388] Harris testified that at the meeting they discussed the retainer request, the Saturn dealers, and the Canada retainer. According to Harris, the issue boiled down to whether, at this moment, they could accept this retainer and continue to act for the Saturn dealers, and whether there was a conflict.

[389] According to Young's testimony, the Cassels lawyers concluded that accepting the GMCL dealer retainer would not create a conflict with the Canada retainer. According to Young, they did not discuss specific details at the meeting, but rather, in general terms, the roles that each would be playing. Young stated that they did not discuss whether Canada's position after a *CCAA* filing might be adverse to that of the dealers.

[390] Later that day, on April 21, Harris emailed Ryan of CADA stating that there was "one proviso which should not be problematic but which I want to discuss with you." In the conversation that followed, Harris informed Ryan that Cassels had the Canada retainer and

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[6] Although "bankruptcy protection" is referred to, for ease of reference, I will generally refer to *CCAA* proceedings throughout these reasons as it quickly became apparent that this was the plan being considered by GMCL.

"could not take on the government, if such a circumstance arose, in any *CCAA* proceeding."

[391] Harris testified that in his discussion with Ryan that day, he also advised that Cassels had the Canada retainer and that "[o]nce we got in the *CCAA*, if an adverse interest arose with respect to that retainer, it's conceivable that we could not act for the dealers at that time." Ryan and Harris agreed in their evidence that this "proviso" – namely, Cassels dropping the GMCL dealers – was acceptable to Ryan and CADA. Harris offered to send Ryan a letter to this effect, but they ultimately concluded that no letter was necessary at that point since no conflict existed. Neither Ryan nor Harris communicated this "proviso" to the Steering Committee or to the GMCL dealers.

[392] Under cross-examination, Harris stated that it had not occurred to him to advise the Steering Committee that there was an adversity of interest between Canada and the dealers regarding a *CCAA* proceeding.

[393] In answering undertakings during the litigation, a letter sent from Lenczner Slaght LLP to WeirFoulds LLP dated September 5, 2014 stated that Harris had no memory of the discussion regarding the potential conflict. Notwithstanding this lack of memory, Harris had no difficulty testifying at trial about his discussion with Ryan and confirming the facts set forth in the Lenczner Slaght letter as true.

[394] It appears from Young's testimony that he considered only CADA's position with respect to the conflict as distinct from the dealers. In my view, he either failed to turn his mind to the possibility of a conflict with CADA's membership or he simply ignored the fact that the dealers were also involved with respect to the retainer they were paying for. I find it remarkable that no one at Cassels or CADA – especially, Harris and Ryan – ever thought to raise the issue of conflicts with the Steering Committee. Hurdman testified that he would not have approved of Cassels acting in these circumstances. I accept his testimony because it reflects how a reasonable client would react. Turpin and Condie testified to the same effect.

[395] Cassels' GMCL dealer group file was opened on May 4, 2009. After seeing this matter on the daily file opening report circulated throughout the firm on May 5, Leonard, who had not been involved in the earlier meetings, emailed Weinczok and Hamilton expressing concern:

> I can see some points of conflict that may develop between IC [Industry Canada] and the GM dealers. As in who owns the inventory on hand, collection of A/R from dealers, appeals from disclaimers of contracts, dealers who operate from leased (company) premises and the like. There may be ways to handle this (passing these issues off to Citi as the primary secured creditor) but there is a distinct possibility that we would end up in Court on opposite sides. We could use conflict counsel as a device but at some point IC would be alarmed to see the firm acting in a way that depreciates a successful sale of GMCL and the continuance of a GM business in Canada. As far as I know, the GM side of this has not been disclosed to IC.
>
> We said in our Saturn disclosure that the Saturn dealers would amount to a

> negligible part of any restructuring. I believe the GM dealers would be a much larger issue. I am open to suggestions but I think that if we are going to proceed with the dealer representation, our contact with IC requires at least disclosure if not consent. Arthur, is this something you could delicately craft?
>
> Mike could then raise/discuss/assure IC when he is in Ottawa on Monday that all is well? Thanks for all your help.

[396] At trial, Leonard explained that he wrote the email because he wanted to alert Hamilton and Weinczok that they should not lose sight of their obligations to the Government of Canada. He believed that if there was going to be a conflict, they should at least get consent from the government to take on the retainer with the GMCL dealers.

[397] Although Leonard suggested to Weinczok that Harris should be informed of the possibility that they would have to "back off" the dealers if the Industry Canada position became threatened, Leonard's concerns were not shared with Harris. Leonard testified at trial that he had no communication with Harris or anyone else involved in the CADA retainers about this matter. Not surprisingly, due to this unexplained reticence to discuss potential conflicts among the partners, a full discussion concerning multiple retainers did not take place. Although there was sensitivity for unconflicted loyalty to Industry Canada, there appears to have been no similar sentiment for the GMCL dealers' interests.

[398] Young and Leonard did not feel that an actual, immediate conflict had arisen at this time. Even the limited information available about the retainer with GMCL dealers ought to have prompted further discussions, but there were no discussions with Harris after April 21. This speaks to the paucity of communication between partners at Cassels regarding potential conflicts during this time. As a result, not much turns on the firm's views as to whether or not a conflict existed. Whether by oversight or by design, no one seemed to have an understanding of the whole picture – that is, of the retainers and their interaction with each other. Because of this, the conflict was never properly addressed.

[399] On May 4 the Steering Committee sent a memorandum on CADA letterhead to all the GMCL dealers advising them of the Steering Committee's formation and seeking to have the dealers sign a GMCL dealer group participation form and make a payment to the dealer group legal fund.

[400] On May 7 Harris distributed an Ethical Wall memorandum to the entire firm. Also on May 7, Harris and Zakaib participated in a conference call for GMCL dealers. Harris described the purpose of the call as "[providing] legal information with respect to what occurs in a bankruptcy or insolvency filing and how it impacts claimants thereunder." As an example of what the Cassels lawyers discussed, they commented on whether GM could unilaterally cancel contracts under the *CCAA*, whether and how GM could set off assets, as well as the likelihood of GM filing for Chapter 11 bankruptcy protection or GMCL filing for *CCAA* protection. They also urged the GMCL dealer group to organize themselves for a potential *CCAA* filing.

[401] As noted above in discussing the claim against GMCL, on May 15, Comeau informed

CADA that GMCL would be sending WDAs to a group of dealers. CADA organized a call with the Steering Committee to discuss Comeau's request that the Steering Committee play a role with respect to the pending offers. Zakaib listened in on the Steering Committee call. At least from this juncture, Cassels knew or ought to have known that the dealers who are now Class Members, i.e. those who received WDAs, would be relying on the firm for legal advice and legal assistance. Zakaib thought that a formal new retainer was necessary.

[402] In a subsequent email forwarded to Zakaib, Ryan explained that the Steering Committee advised GMCL that the Steering Committee had no role to play in GMCL's proposed offer to dealers outside of a *CCAA* filing. In his responding email, Zakaib stated:

> Tim, I was able to stay on for the entire call. I agree with the committee's decision here not to be the negotiators and facilitators for GM's planned dealer terminations. I also agree that dealings with terminated dealers will require a new retainer and a new committee. At the same time, it would be helpful to get the details of their plan and the list of dealers so the existing committee knows what is being proposed and whether this might lead in any event to a bankruptcy of GM. I also believe that some government lobby efforts might be considered if it is in fact the case that this is all government controlled. I will want to consult with Peter about what other steps might be considered and whether we could assist individual dealers who do get notice.

[403] As of May 20, approximately 400 GMCL dealers had returned the participation form attached to the May 4 memorandum. The amount of money raised by then was close to $1 million. The funds were sent to CADA and held in trust.

[404] On May 20, when GMCL sent the WDAs to 240 of its dealers, CADA advised the GMCL dealers that it wanted to hold a conference call to assist all of the dealers who had received WDAs, but that it could not do so since it did not have a list of the dealerships that were to be terminated.

[405] On May 22 CADA sent a memorandum to the dealers stating the following:

> Given the very short time lines that Dealers have to consider this important agreement it is critical that you review these documents with your legal and business advisors immediately and ensure that you respond before the deadline of May 26, 2009, should you determine to sign the Wind Down Agreement.

[406] Between May 21 and 23 Cassels received emails from CADA. Zakaib participated in a call with Gauthier and Ryan to prepare for the May 24 conference call organized for the dealers who had received WDAs.

[407] The conference call took place as scheduled. No roll call was taken and there is no way of determining how many of the dealers on the call had received WDAs but undoubtedly some of the affected dealers were listening. On the call, Gauthier repeated what had been stated in the

May 23 memo, namely that the GMCL client group funds would only be used in the event of *CCAA* proceedings:

> I would urge you to send in your cheque immediately, otherwise you will not be considered as part of the representative class as we go forward and make our case to the courts should General Motors file for *CCAA* come June 1 […] At the end of the day, if none of these monies are needed, they will be returned to you. The monies are held in trust by CADA and can only be used for the purpose of representing you in front of the courts on the *CCAA* matter.

[408] At this juncture, the individual dealers were again told to obtain independent legal advice.

[409] On May 28, 2009, CADA sent a memorandum by email announcing that it had arranged for two law firms to represent the contributing GMCL dealers in the event of a GMCL bankruptcy: Cassels would act for the dealers who had received WDAs and Lax O'Sullivan Scott LLP would act for the continuing dealers.

[410] On June 3, 2009, CADA advised the contributing GMCL dealers that GMCL had announced that it would not be filing for bankruptcy. On June 24, 2009, the money from the CADA trust fund was refunded to the contributing GMCL dealers, including funds contributed by Class Members.

Was there a retainer?

[411] The solicitor-client relationship is based on general concepts of contract and the specific contract of a retainer: *Filipovic v. Upshall* (2000), 133 O.A.C. 151 at para. 5 (C.A.). Whether a solicitor-client relationship exists is a question of fact. There is no need for a person to formally retain a lawyer by way of letter or other document. Nor is it necessary that an account be rendered or a bill paid. Rather, a court must look to a number of factors to ascertain whether such a relationship exists.

[412] Justice Hawco helpfully identified twelve relevant indicia in *Jeffers v. Calico Compression Systems*, 2002 ABQB 72, 314 A.R. 294 [*Jeffers*]. Both parties agree that these indicia are accurate and apply to this case. They are as follows:

(i) a contract or retainer;
(ii) a file opened by the lawyer;
(iii) meetings between the lawyer and the party;
(iv) correspondence between the lawyer and the party;
(v) a bill rendered by the lawyer to the party;
(vi) a bill paid by the party;
(vii) instructions given by the party to the lawyer;
(viii) the lawyer acting on the instructions given;
(ix) statements made by the lawyer that the lawyer is acting for the party;
(x) a reasonable expectation by the party about the lawyer's role;
(xi) legal advice given; and

(xii) any legal documents created for the party.

[413] Not all indicia need to be present. Rather, as Hawco J. explains at para. 8,

> …the question appears to be whether a reasonable person in the position of a party with knowledge of all the facts would reasonably form the belief that the lawyer was acting for a particular party.

Further, the twelve indicia are not exhaustive. Depending on the facts of the case, other indicia may be relevant.

[414] Cassels submits that Trillium has failed to establish any of the twelve *Jeffers* indicia. Trillium concedes that there is no evidence of direct correspondence between Cassels and the GMCL dealers; no bills were rendered by Cassels or paid by the GMCL dealers; no instructions were given by the GMCL dealers or acted upon by Cassels; and no legal documents were created by Cassels for the GMCL dealers.

[415] According to Trillium, the following six indicia were present:

(i) a contract or retainer;
(ii) a file opened by the lawyer;
(iii) meetings between the lawyer and the party;
(iv) statements made by the lawyer that the lawyer is acting for the party;
(v) reasonable expectations by the party about the lawyer's role; and
(vi) legal advice given.

[416] For the reasons below, I find that Cassels was in fact retained to represent the GMCL dealers and that a retainer existed as of May 4, 2009. I agree with Trillium that, at least, the above six indicia were present and support the existence of a retainer between Cassels and the GMCL dealers.

Analysis

[417] The existence of a solicitor-client relationship is a fact-driven and multifaceted analysis. Sometimes, it will be readily apparent that a retainer exists. Other times, a careful examination of the facts must be undertaken. The court must take a holistic approach to the question at hand, considering the evidence in its totality. The following facts are not in dispute:

(i) CADA was Cassels' client and had been for some time. There was a longstanding relationship between Ryan and Harris. Trillium does not dispute that Cassels was retained by CADA and had its own separate retainer during the time in question.

(ii) Cassels does not dispute that, *had* a *CCAA* filing taken place, a solicitor-client relationship between Cassels and the GMCL dealers would have crystallized. Cassels argues that its retainer with the GMCL dealers was conditional on a *CCAA* filing by

> GMCL. Cassels therefore says that the question is not whether a retainer *could* have materialized, but rather, *when* it would have materialized.

[418] The parties focus on evidence from six key dates during April and May 2009: (1) the April 29 Memorandum; (2) the May 4 Memorandum; (3) the May 4 Opening Emails; (4) the May 7 Ethical Wall Memorandum; (5) the May 7 Conference Call; and (6) the May 24 Conference Call. According to Trillium, the documents, emails, and conference calls on these dates are indicia of a solicitor-client relationship. According to Cassels, they signify nothing. I disagree: they signify that Cassels had a solicitor-client relationship with the dealers. I will address each of the key events in turn, referring to other evidence where necessary to fill in the gaps.

[419] There are four distinct players involved in the retainer issue: the Steering Committee, the GMCL dealers, CADA and Cassels. In my view, Ryan and Harris misidentified CADA's role. As noted, CADA had an ongoing retainer with Cassels. Ryan and Harris conflated that retainer and the retainer for representation for all the GMCL dealers. Ryan and Harris somehow came to the conclusion that CADA was in fact the exclusive and discrete client of the subsequent retainer and not the GMCL dealers themselves. As I discuss below, this view is untenable.

The documentation

The April 29 Memorandum

[420] On April 29, at Ryan's request, Harris sent CADA a memorandum outlining Cassels' legal experience. The memorandum was directed to the GMCL dealers and consisted primarily of assurances from Cassels as to its legal expertise and its commitment to providing quality legal services that included the following:

> *Our Commitment to the GM Dealers' Group*
>
> **First-tier, value added legal advice**
>
> …we are thoughtful in assigning lawyers during the file intake process and careful in monitoring team activity throughout the life of the file.
>
> **Experienced counsel**
>
> This direct experience coupled with years of representing companies in many other areas of the auto industry makes us keenly aware of the issues the GM Dealers' Group could face in the coming months.
>
> **No surprises**
>
> We believe that it is our obligation to inform you immediately of any developments or obstacles that may affect the cost, timeline or direction of your file, and to discuss openly the options available to you as well as the potential short and long-term impact of each option.

> **A single point of contact**
>
> Peter [Harris], with Larry [Weinberg] as back-up, will take general responsibility for all day to day activities and ongoing communication with the GM Dealers' Group management.
>
> The entire team will keep up-to-date on company, industry and legislative issues that will affect your group and we will share relevant information with you to ensure prompt and proactive client service.
>
> *Our Service Guarantee*
>
> **Responsive, Practical Advice**
>
> We commit to you that the advice you receive from us will be timely and presented in a manner that is useful and actionable to your steering committee and other advisors at CADA
>
> **Communication Plan**
>
> Peter Harris and Larry Weinberg … will work proactively with your Management to ensure the most effective and efficient delivery of legal services.
>
> **Service Level Feedback Program**
>
> This feedback [about the level of Cassels' service delivery] will be elicited through informed discussions with the appropriate individuals on your steering committee.
>
> [Emphasis in original]

[421] The wording of the memorandum raises the obvious question: why would Cassels send an impressive brochure to its longstanding client, CADA? Cassels seeks to avoid this question, emphasizing that the GMCL dealers never saw the memorandum and that, therefore, it cannot be relevant to any of the indicia of a solicitor-client relationship.

[422] In my view, Trillium's explanation makes more sense. The memorandum entitled "Provision of Legal Services to the GM Dealers' Group," was sent to CADA to be passed along to the Steering Committee. As noted, the Steering Committee had approached CADA with the idea of retaining counsel to represent the GMCL dealers should a *CCAA* filing take place. Further, Harris testified that Ryan asked him to provide "a brief summary of [Cassels] and in particular its bankruptcy expertise" and that he presumed that Ryan provided the memorandum to the Steering Committee. Based on this exchange, and Harris' impression that Ryan would pass along the memorandum to the Steering Committee, and because there was no reason to send such a document only to CADA, I find that the "Provision of Legal Services" memorandum was created and intended for the benefit of the Steering Committee. To summarize, the uncontradicted evidence is that Ryan sought the memorandum from Cassels in order to deliver it

to the Steering Committee and that Harris sent it to Ryan as requested. Although Trillium did not cross-examine Boily or the other Steering Committee witnesses as to whether their understanding of the memorandum was different from Harris', I am comfortable inferring that the Steering Committee received and reviewed the memorandum. In any event, the fact that Cassels created the memorandum for such a purpose is sufficient to qualify as one indicium that there was a retainer with the GMCL dealers.

The May 4 Memorandum

[423] On May 4 Ryan emailed a memorandum, using CADA letterhead, to the GMCL dealers. Given the structure of the memorandum it is somewhat ambiguous as to who was in charge, but a plain reading of the memorandum discloses that it was sent from the Steering Committee and that the Steering Committee was created to work "with" CADA to organize the GMCL dealers. It does not state that the Steering Committee was created "by" CADA or suggest that the memorandum was from CADA as opposed to the Steering Committee.

[424] The memorandum reads, in part:

> To: General Motors Canada Dealers
>
> From: **National General Motors Dealer Steering Committee** (Michael Croxon, Doug Leggat, Tom Donnelly, Pierre Cloutier, Gaetan Boily, Harry Mertin, Jim Gauthier, John Carroll, Linder Armitage, Ross Ulmer, Neil Kalawsky, Bob Johnston, Pat Healy, Al MacPhee, ("the Steering Committee:")
>
> The purpose of this memo is to provide you with information about the formation of a national General Motors Steering Committee which has been created to work with the Canadian Automobile Dealers Association ("CADA") to organize Canadian General Motors dealers into a national General Motors dealer group to ensure that Canadian General Motors dealer interests are represented should General Motors of Canada Ltd. file for bankruptcy protection in Canada in the near future.
>
> The role of the Steering Committee (the members of which are noted below) is to provide policy direction and instructions to legal counsel who will represent the Canadian General Motors dealers in any bankruptcy filing. We have retained the Toronto law firm of Cassels Brock & Blackwell to handle our interests. On April 30, 2009 our Steering Committee met via conference call with CADA and legal counsel to discuss our going forward strategy…
>
> [Emphasis in original]

[425] On May 13 another email was sent by Ryan containing a virtually identical memorandum to the dealers.

[426] Trillium points to six key statements in the memorandum as evidence of a contract or retainer between Cassels and the GMCL dealers. The memorandum states that (1) Cassels had been retained by the "National General Motors Dealer Steering Committee" for the national GM dealer group; (2) the role of the Steering Committee was to provide policy direction and instruction to Cassels; (3) the Steering Committee had already met via a conference call with CADA and legal counsel to discuss "our going forward strategy" and certain matters had already been agreed upon; (4) preparation by the lawyers for the bankruptcy may have been necessary and funds were available for this; (5) if the dealer wished to participate and be represented by Cassels, then the attached form had to be completed and sent in; and (6) the Steering Committee would be meeting regularly and holding a conference call on May 7, 2009.

[427] Cassels argues that the memorandum provides no evidence of a contract or retainer between it and the GMCL dealers. First and foremost, the memorandum was sent to the GMCL dealers by CADA, not by Cassels. Second, Cassels submits that the sentence that Trillium points to as evidence that the Steering Committee retained Cassels is taken out of context. As Ryan explained during cross-examination, this was simply CADA telling the GMCL dealers that *it* had retained Cassels, and that CADA was organizing representation for the GMCL dealers only in the event of a *CCAA* filing by GMCL.

[428] Cassels' interpretation stretches the plain and ordinary language of the memorandum and all but ignores the context in which it was created. Cassels' submission that CADA authored the memorandum simply does not stand up to scrutiny. Not only does the memorandum clearly state that it is from the Steering Committee, but the April 23, 2009 email chain between a member of the Steering Committee and Ryan indicates that the Steering Committee asked CADA to email the GMCL dealers on its behalf – presumably, the Steering Committee wanted to take advantage of CADA's communications infrastructure and established reputation. In short, I find that CADA was simply a conduit through which the Steering Committee could communicate with all of the GMCL dealers.

[429] In this context I do not accept the evidence of Ryan and Harris that the client was exclusively CADA and not the GMCL dealer group. Further, Harris' evidence at trial on this point was, at times, equivocal. He vacillated between recognizing the GMCL dealers as clients and insisting that Cassels' only client was CADA.

[430] For example, during his examination in-chief Harris testified that CADA was always the client:

> Q. Who was the client as this file was opened?
>
> A. Canadian Automobile Dealers Association.
>
> Q. Why was that?
>
> A. That was traditionally the way we opened the files on different matters. The matter would be the General Motors dealers…

[431] But elsewhere, he acknowledged that GMCL dealers would have been clients of Cassels:

> Q. And coming back to tab 45, which is the memo of May 4, 2009, at the time that that memorandum was prepared and distributed, upon whom did you understand – on whose behalf did you understand you would be acting in the event of a filing by General Motors?
>
> A. At that time in the event of a filing we would be acting on behalf of the steering committee.
>
> Q. And if I can come back to one further question. Would it include acting solely for Non-Retained Dealers?
>
> A. On that date it wouldn't. It would be retained by all GM dealers in the event of a filing for bankruptcy or insolvency.
>
> […]
>
> Q. All right. Let's just then draw a line under this and identify and tie down the point that you have made, that nowhere in this material that we've looked at is there any advice to the dealers that you were not acting for them at this point?
>
> A. That's correct. There isn't, but as I said, and I said before, we were representing them in the event of a bankruptcy/insolvency proceeding. The steering committee understood that and they are the voice of the dealers. That's why we're dealing with the steering committee.
>
> […]
>
> Q. But even accepting what you say, if there was a risk of this, how could Cassels Brock act for the dealers?
>
> A. I think at the time of the meeting, Cassels Brock made the decision they would inform the Government of Canada side, would inform the Government of Canada as I have informed Mr. Ryan, and it was decided to proceed and I never heard any other word from Mark Young or from any of the Government of Canada side with respect to that being problematic from the context of the Government of Canada.
>
> Q. But your clients were the dealers?
>
> A. Yes, absolutely.

[432] This was also conceded, in essence, by Zakaib in his cross-examination wherein he admitted that the May 4 memorandum was from the Steering Committee and it was the Steering

Committee that was providing policy direction and instructions to Cassels.

[433] A process such as this may not satisfy the retainer requirement in all cases. However, the GMCL dealer group was a large body of independent dealers, and the parties must be given some leeway to execute a retainer in a manner that accords with the realities of coordinating such an amorphous group of joint clients. Large, multi-person joint retainers, or committee retainers, are not uncommon in the *CCAA* landscape or in other contexts such as shareholder claims, unsecured creditor claims in bankruptcy proceedings, class action claims, claims by tenant associations, and claims by public interest litigants. Group retainers play an important role in facilitating access to justice and making the real time *CCAA* litigation more efficient for all those involved. In this case, the Steering Committee, with the help of CADA, engaged Cassels to act on behalf of the yet-to-be-established GMCL dealer group. With Cassels on board, the Steering Committee, again with the help of CADA, organized individual dealers by encouraging them to join the client group and send in money for a trust fund. Cassels knew or ought to have known that it was not acting just for the spokesperson of the dealers (the Steering Committee) but for the dealers as well.

The May 4 Opening Emails

[434] Trillium also relies on a series of internal Cassels emails beginning on April 30, 2009 and continuing to May 4, 2009, which it submits provides evidence that a file was opened by Cassels for the GMCL dealers. I agree.

[435] On April 30 an assistant at Cassels filled out a New Matter Form on behalf of Harris and performed a conflict inquiry for "General Motors Dealers".

[436] On May 4 Jim Wilson ("Wilson"), the General Manager of Cassels, sought clarification from Harris and advised the file opening clerk to delay opening the file, stating:

> I have placed a call to Peter Harris, just to seek clarification.
> I will advise, once I have spoken with him. Please Hold-off opening until I can further advise.
>
> Thanks,
>
> Jim

[437] Later that day Wilson emailed the file opening clerk again, stating:

> I have just spoken with Mr. Harris and understand that this is an expansion of the earlier file, opened on behalf on [sic] Saturn Dealers. I further understand that there will also be a similar precautionary ethical wall established. Subject to any comment from Mr. Weinczok, please proceed to open the file.
>
> Thanks,
> Jim

[438] Cassels maintains that these emails have little or no significance to the issue at hand. It submits that: (1) no file was opened by Cassels, and (2) because these emails were internal and never seen by CADA or the GMCL dealers, they cannot be indicia of a solicitor-client relationship. According to Cassels, to the extent that these emails are evidence that Cassels understood it was acting for the GMCL dealers, this is answered by "all the documents in April and May 2009 which consistently reflect that the representation of the dealers would only occur on a filing by GMCL."

[439] The submission that Cassels did not open a file is contradicted by the documentary evidence. The conflict search for GMCL dealers and the request made to the file opening clerk support an inference that Cassels opened a file for the GMCL dealers. Cassels' suggestion that these emails simply reflect the firm acting on the instructions of another client makes little sense. Even if a lawyer opened a file for a new client on the instructions of another client, the fact remains that the file was opened for the new client.

[440] Cassels' second submission requires the court to consider the nature of the legal test for finding a solicitor-client relationship. The underlying suggestion is that only facts which are known to the putative client (or possibly, to both parties) qualify as indicia of a solicitor-client relationship. I disagree. While a putative client's knowledge is important, the existence of a retainer cannot be totally dependent on what the putative client thought or knew about the existence of the solicitor-client relationship. Equally important is what the lawyer knew or ought to have known about the reasonable expectations of the persons with whom he or she is dealing directly or indirectly. The court must be able to consider objective facts about the parties' conduct that suggest such a relationship. The opening of a file is a good example. A client need not be present in the office or privy to an email chain when the lawyer opens the file, in order for that to count as an indicium.

The May 7 Ethical Wall Memorandum

[441] On May 7 Harris sent a firm-wide Ethical Wall email stating the following:

> Please review carefully and acknowledge that you have read and understood the following:
>
> Cassels Brock & Blackwell LLP ("CBB") has accepted a retainer from the GM Dealers Action Group ("GM Group") through the Canadian Automobile Dealers Association regarding potential claims against General Motors of Canada Limited with respect to the potential bankruptcy of GM and the potential restructuring of the GM dealer network.

[442] Trillium submits that this confirms that Cassels had accepted a retainer from the GMCL Dealer Group – i.e., those dealers who had sent in money and/or completed the form attached to the May 4 memorandum. Trillium also notes that Harris did not phrase the retainer as a "conditional retainer" or "anticipated retainer".

[443] Again, Cassels submits that little should be taken from this internal memorandum. First,

the text of the memorandum is consistent with the firm "getting into position" to represent the dealers in the event of a filing. Further, the memorandum was never seen by CADA or by the dealers. Once again, when considering whether there was a retainer, it would be unduly restrictive, in my view, to exclude facts only within the knowledge of the solicitor. Further, the plain wording of the email clearly states that the retainer was with the "GM Dealers Action Group" and that Cassels had accepted it.

The May 7 Conference Call

[444] The May 4 memorandum invited the GMCL dealers to participate in a "listen only" conference call on May 7. CADA organized the conference call. Trillium places considerable emphasis on the conference call, and in particular, on what was said by the Cassels lawyers. According to Trillium, Harris and Ward provided legal advice to the GMCL dealers who called in. Trillium points to notes made by Peter Andrews ("Andrews"), a GMCL dealer who listened in during the conference call:

> These bankruptcy lawyers think that GM will file for Chapter 11 bankruptcy protection in the U.S. and also for *CCAA* protection in Canada
>
> - They feel that the GM situation is larger and more complex than the Chrysler situation
> - They also feel that there will be more economic fall-out because there are more debts and more contacts [sic] likely to be broken
> - Also it is less predictable and less likely to succeed. Therefore they feel that it is important that those affected organize themselves
> - *CCAA* is meant to encourage parties to participate and minimize the pain
>
> Therefore you need a seat at the table to argue for your rights. Organizing now can result in significant benefits for dealers.
>
> - This means active participation to protect Sales and Service Agreements
> - GM will have powers and dealers will have a chance to participate, therefore dealers must be together and have a seat at the table
> - Dealers will become creditors as receivables (incentives etc.) will become frozen
> - There will be thousands of creditors

[445] The notes were entered into evidence without objection. I am satisfied that the notes likely reflect what was said by the Cassels' lawyers on the call.

[446] According to Cassels, the conference call was organized by CADA pursuant to its mandate to provide information to the dealers. Thus, Cassels was not providing "legal advice" to the dealers, but rather legal information at the request of its client, CADA. According to Cassels, at most, it only gave generic legal information to the dealers. Further, according to Cassels, the structure of the conference call confirms that CADA was the client of Cassels, not the dealers. For example, the call was open to all members of CADA, not just those who contributed to the CADA trust fund. Moreover, the dealers could not speak or give instructions on the call. With respect, Cassels makes meaningless distinctions.

[447] In my view, legal advice was provided on the call and it was provided for the benefit of the dealers. Cassels advised that the GMCL dealers needed a seat at the table and they should now organize for potential *CCAA* proceedings; what the *CCAA* proceeding would likely involve; and, the fact that a *CCAA* filing was likely to take place. But, in any event, it is unnecessary to parse the distinction between legal information and legal advice in order to find that there was a retainer between Cassels and the GMCL dealers. The conference call was a meeting between lawyers and their clients, and therefore another indicium of a solicitor-client relationship.

[448] Further, contrary to Cassels' submissions, the structure of the conference call does not indicate that CADA was Cassels' client. The fact that dealers, other than those who contributed to the CADA trust fund, attended the conference call must be understood in context. At this time, the Steering Committee, with the help of CADA, was soliciting dealers to join the GMCL dealer group. As evidenced by the May 4 memorandum, the Steering Committee had been created to work with CADA to organize the GMCL dealers. This is consistent with Harris' description of the relationship between CADA and the Steering Committee in the May 7 Ethical Wall email, where he stated that Cassels "has accepted a retainer from the GM Dealers Action Group ("GM Group") through the Canadian Automobile Dealers Association."

[449] There is no doubt that CADA facilitated the retainer between Cassels and the GMCL dealer group by providing contacts and resources. At this point in time, the GMCL dealer group and the trust fund were still growing as GMCL dealers joined and sent in money. Thus, at best, the structure of the conference call is equivocal in its support for Cassels' position that CADA was its client and not the GMCL dealers.

The May 24 Conference Call

[450] A second conference call took place on May 24, during which CADA and Cassels lawyers addressed the delivery of the WDAs. Gauthier made the following introductory statement:

> Also representing the Canadian GM dealers legal team are, um, the two lawyers from the Toronto firm of Cassels Brock, Peter Harris and Glenn Zakaib, both are here with me today.

[451] Trillium argues that this is further evidence of a retainer. Cassels emphasizes that the conference call was again organized by CADA and not the Steering Committee; that there was no expectation of confidentiality on the call since anyone could have dialed in to listen; and, that

the parties have no record of how many dealers were on the call or how many participants on the call had contributed to the CADA trust fund. Cassels also points to the fact that during the call, Ryan tells the dealers to speak with their legal advisors regarding the decision to sign the WDA, and confirmed that CADA would not be making a recommendation about whether or not to sign.

[452] Once again, the fact that CADA organized the conference call has little bearing on the issue at hand – namely, whether Cassels had a retainer with the GMCL dealers. The Steering Committee was designed to use CADA infrastructure as the May 4 memorandum on CADA letterhead demonstrates. At the very least, the May 24 conference call constitutes a second meeting between lawyer and client, and the statement by Gauthier supports the inference that Cassels had been retained by the GMCL dealers. There certainly is no evidence that Cassels corrected Gauthier's implication that Harris and Zakaib were there to represent the dealers. Neither Harris nor Zakaib said anything to the contrary. In response to Cassels' first point, I think it is better dealt with as an issue going to the scope of the retainer between the GMCL dealers and Cassels.

[453] With respect to the introduction made by Gauthier above, Harris conceded in cross-examination that Gauthier was indicating that one of Cassels' retainers was representing the GMCL dealers.

[454] Lastly, in advance of the May 24 conference call, the Steering Committee did provide instructions to Cassels. Specifically, the Steering Committee instructed Cassels not to become involved in the WDAs but rather to continue to focus on a potential *CCAA* filing. This was not raised by Trillium because, as discussed below, Trillium disputes the ability of the Steering Committee to instruct Cassels not to get involved with the WDA. Despite arguing that the Steering Committee did instruct Cassels not to get involved with the WDAs, Cassels emphasizes that no instructions were given *by Trillium itself* to Cassels and, therefore, this cannot count as an indicium. Due to the nature of the joint retainer and the role of the Steering Committee as the voice for the GMCL dealer group, Cassels' submission carries little weight. Further, to the extent that Cassels did not get involved with the WDAs, it was acting on the instructions of the Steering Committee.

Evidence at trial

[455] Cassels relies heavily on the evidence of Hurdman, as well as Turpin and Condie, with respect to the retainer issue. It submits that Hurdman and Turpin gave evidence to support Cassels' position while Condie's testimony was not credible. First, I do not accept that Condie's testimony lacked credibility. It merely reflected his honest belief that the retainer occurred at an earlier date. As far as Hurdman and Turpin are concerned, I agree that their evidence, at times, supported the position of Cassels but, overall, they both testified that they also expected preparation work to have been done if necessary for a potential *CCAA* filing. I found their testimony generally credible and reliable given the circumstances – namely, the rather confused nature of the scope of the retainer, the blame for which lies at the feet of CADA and Cassels, and the very little communication that took place thereafter between Cassels and the dealers. In particular, Hurdman's testimony accords with what a reasonable person would have expected of Cassels in the circumstances of this case.

[456] The fact that Hurdman himself had no direct contact with Cassels is irrelevant in my view. The retainer with Cassels was set up through the Steering Committee which represented the GMCL dealers, including Trillium. Hurdman sent in money on behalf of Trillium as requested. Trillium was one of the dealers represented by Cassels through the Steering Committee. Further, the fact that none of the GMCL dealers asked Cassels to represent them with respect to the WDAs is not germane to this issue. The retainer dealt with steps that should have been taken before or at a *CCAA* filing. At that time the issue of WDAs was not contemplated.

[457] Of interest is the fact that Carroll, Johnston and Boily, who were members of the Steering Committee, were also called as witnesses at trial but neither Trillium nor Cassels asked them any questions about the nature of the retainer. Trillium submits that it did not need to ask given the clarity of the documentation supporting its position. Cassels maintains that it was Trillium's obligation to ask and it failed to do so. Although the onus is on Trillium to establish that there was a retainer, I am surprised that neither party elicited this information which would have been critical to the issue since the Steering Committee represented the dealers. In any event, the remaining evidence is sufficient to determine this issue.

[458] With respect to Ryan, I do not put much weight on his evidence concerning the issue of the retainer. Given the rather clumsy manner in which the retainer was created and its scope defined, I am of the view that his testimony reflected an overzealous effort on his part to establish a clear, unequivocal retainer between Cassels and CADA as opposed to Cassels and the dealers. Harris and Zakaib made concessions that Ryan would not. I found that Ryan's reluctance to acknowledge obvious facts was unreasonable in the circumstances. In my view, it is easy for Ryan to take the position he now does, given CADA's continued relationship with GMCL and Cassels, while its relationship with the affected dealers ended in May 2009. I am concerned that, either consciously or subconsciously, these relationship dynamics coloured his evidence.

[459] With regard to Harris, while I generally found him to be a credible witness, I was struck by how little consideration he had given to the GMCL dealers and the nature of their relationship with Cassels. Harris apparently did not think much about possible retainers, but as noted, conceded at one point that he considered the dealers to be his clients. His evidence was therefore not reliable.

[460] As regards Zakaib, I found him to be a credible and reliable witness. However, his role at Cassels in relation to the GMCL dealers was a limited one. He was brought on to work the file but did not take a leading position. Thus, while some of his evidence is helpful, he did not always have a useful vantage point from which to understand the nature of Cassels' relationship with the GMCL dealers and its responsibility to Class Members.

Sufficient indicia are present

[461] In my view, based on the totality of the evidence, Trillium has established on a balance of probabilities that there was a solicitor-client relationship between Cassels and the GMCL dealers, including the Class Members. The underlying question is whether a reasonable person in the position of a party with knowledge of all the facts would reasonably form the belief that

the lawyer was acting for a particular party. In this case, that question must be answered in the affirmative.

What was the scope of the retainer?

[462] Whether Cassels breached its contractual and fiduciary obligations under the retainer depends on the scope of the legal services that Cassels was retained to provide. Trillium takes the position that there were two facets to the retainer: (1) representation in any insolvency proceedings under the *CCAA*; and (2) representation in any restructuring that took place outside the *CCAA*. Thus, the question as to scope, is whether outside restructuring events – such as the WDAs – were captured by the retainer.

[463] In support of its position, Trillium points to the language of the Steering Committee's May 4 memorandum, which it submits envisioned a restructuring "carried out in the shadow of a filing." Under the heading "Reasons to Participate," the May 4 memorandum states:

> **General Motors Dealers Have Many Issues in Common:** All GM Canada dealers share many of the same concerns that will arise out of a GM Canada restructuring. These include issues such as potential termination of the existing dealership agreements, changes to your relationship with General Motors Canada, responsibility for and payment of warranty claims, holdbacks and incentive payments, and floor plan financing. It is more effective and efficient to have these common issues addressed by one counsel representing the voice of all GM Canada dealers.

[464] Further, under the heading "Economies of Scale," the May 4 memorandum states:

> **Economies of Scale:** Legal representation in a complex restructuring or insolvency proceeding is expensive. The costs of retaining qualified counsel are considerably lower when you share a single, unified retainer rather than retaining counsel on your own or in a small, regional group.
>
> [Emphasis added]

[465] Trillium submits that the above must be interpreted as distinguishing between a "complex restructuring" and an "insolvency proceeding". In cross-examination, Harris agreed that the two concepts were separate. Zakaib simply stated that this passage "says what it says." Trillium also points to other documentary evidence such as the April 29 memorandum and the May 7 Ethical Wall memorandum. The latter, for example, distinguished between restructuring of the dealer network and insolvency proceedings, and suggested that Cassels would be assisting the GMCL dealers with both:

> [Cassels] has accepted a retainer from the GM Dealers Action Group ("GM Group") through the [CADA] regarding potential claims against [GMCL] with respect to the potential bankruptcy of GM and the potential restructuring of the

> GM dealer network…
>
> [Emphasis added]

[466] Trillium further submits that even if the retainer was limited to *CCAA* proceedings, representation in *CCAA* proceedings does not start at the point of the filing itself; it includes a range of inextricable pre-filing events. The WDAs, according to Trillium, were a pre-filing event that must be viewed as "part and parcel" of acting for a client in a potential *CCAA* filing.

[467] Cassels submits that the retainer, if active in May 2009, was simply a retainer to act in the event of a *CCAA* proceeding. Cassels submits that there is "extensive, repeated written support for that position," by which Cassels appears to mean the May 4 and May 22 memoranda. Cassels also relies on the evidence of Hurdman and Turpin, submitting that they understood that the retainer was limited to *CCAA* proceedings. Cassels points to the fact that Kandestin described the retainer as follows: "[b]y early May, the law firm's retainer was broadened to include the other GM dealers in the event of a GMCL *CCAA* filing."

[468] Finally, while Cassels concedes that if there was an active retainer, its scope was dictated by the terms of the May 4 memorandum, it emphasizes that the memo clearly states that the Steering Committee was to provide policy direction and instructions to counsel. On May 15 the Steering Committee told Cassels that its mandate was limited to potential *CCAA* proceedings and that Cassels should not get involved with the WDAs. If any ambiguity existed as to the scope of the retainer, it was resolved on May 15.

Analysis

[469] Where a retainer clearly limits the scope of legal services to be provided, a client generally cannot, at a later stage, criticize the lawyer for failing to perform services that fall outside the scope of the retainer.

[470] On the other hand, where a retainer has not been reduced to writing, a heavy onus is on the lawyer to show that its version of the scope of the retainer is correct: *Griffiths v. Evans*, [1953] 2 All E.R. 1364, [1953] 1 W.L.R. 1424 (C.A.); *Rye and Partners v. 1041977 Ontario Inc.*, [2002] O.J. No. 4518 (S.C.). This is especially true in cases involving ambiguity as to the scope of the retainer. As Justice Hoilett stated in *Coughlin v. Comery*, [1996] O.J. No. 822 at para. 34 (Gen. Div.), aff'd [1998] O.J. No. 4066 (C.A.), leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 597:

> …the onus is on the solicitor who seeks to limit the scope of his/her retainer and where there is ambiguity or doubt it will, generally, be resolved in favour of the client.

[471] I find that the scope of the retainer was not strictly limited to representation in a possible *CCAA* proceeding. The retainer included pre-filing advice on issues relating to the restructuring of the dealer network. This is evidenced by the notes made by Andrews, who recorded that Cassels recommended that the dealers "organize now" so that they could get "a seat at the table"

to advocate for their rights. Of course, Cassels was not obligated to provide advice on every aspect of the GMCL dealers' affairs. However, the most important matter in question – namely, the WDAs – ultimately fell squarely within the purview of "complex restructuring" of the GMCL dealer network. Further, while Cassels contested whether the retainer included such restructuring activities, it never suggested that the WDAs were not a pre-filing restructuring event. In my opinion, Cassels' retainer included advice about the WDAs.

[472] First, the scope of the retainer was ambiguous. Even if Cassels honestly believed that the retainer excluded major pre-filing events such as the WDA, it woefully failed to delineate the scope of the retainer and document its terms of engagement. Lawyers and law firms who use limited scope retainers must clearly define the scope of the legal services to be provided and candidly explain these limitations to their clients. The fact that the GMCL client group was a large, loose association of individual dealerships organized by CADA and represented by the Steering Committee does not relieve Cassels of this fundamental obligation.

[473] Accordingly, absent compelling considerations to the contrary, the ambiguity in the retainer – e.g., whether it included complex restructuring, or whether certain pre-filing events could trigger the need to provide further legal services – must be resolved against Cassels. The only possible countervailing consideration is the fact that on May 15, the Steering Committee instructed Cassels not to get involved with the WDAs. In my view, however, the Steering Committee's instructions did not limit the scope of the overall retainer. The Steering Committee's view of its mandate on May 15 is not determinative of the scope of the retainer. It is one factor to consider among many – such as the written terms of the retainer contained in the May 4 memoranda and other documents, as well as the testimony from the lawyers on the file and from the client Class Members. That evidence supports the conclusion that Cassels had or would have had a retainer to provide advice to the dealers who had received WDAs. Further, the circumstances of May 15 undermine the weight of the instructions as a consideration for the scope of the retainer. Specifically, as I discuss in greater detail below, upon learning that almost half of the GMCL dealer group would be receiving pre-filing Notices of Non-Renewal and WDAs, the Steering Committee became conflicted.

[474] As of May 15, the Steering Committee was speaking for two groups with divergent interests: (1) the dealers who would not receive WDAs, who would have had little interest in paying for Cassels to advise those dealers with regard to the WDAs, especially if *CCAA* proceedings could be avoided by having these dealers simply accept GMCL's offers; and (2) the dealers who were on the chopping block and who had every interest in receiving comprehensive advice and support from a leading law firm that, being well-acquainted with their file, could hit the ground running. Due to the compromised position of the Steering Committee, of which Cassels would have been well aware, the Steering Committee's view of its mandate and its instructions to Cassels cannot be given much weight in determining the scope of the retainer between Cassels and the GMCL dealer group.

[475] Second, even with this ambiguity, it is clear that, at the least, the scope of the retainer included pre-filing restructuring of the nature of the WDAs. The documentary evidence – notably the April 29 provision of services memorandum, the May 4 retainer memorandum, and the May 7 Ethical Wall memorandum – all support Trillium's submission that the retainer was

not limited to steps in commenced *CCAA* proceedings. Cassels' assertion that there is "extensive, repeated written support" for its position simply cannot be made out on the evidence. Only an unreasonable, micro-dissection of the language of the May 4 memorandum could support its contention that the scope of the retainer excluded anything beyond representation in commenced *CCAA* proceedings. Moreover, during examination, Harris and Zakaib were open to the possibility that their retainer with the GMCL dealers involved more than just representation in a *CCAA* proceeding. Harris agreed that "complex restructuring" and "insolvency" referred to distinct concepts. And with regard to the "potential claims" mentioned in the Ethical Wall memorandum, Zakaib testified that other claims, in addition to the potential bankruptcy, could arise and that the retainer would have generally covered these.

[476] Finally, I do not accept Cassels' submission that the evidence of Hurdman and Turpin as to their understanding of the retainer supports Cassels' version of the scope of the retainer. Cassels selectively highlights passages from the cross-examination of Hurdman and Turpin to suggest that they believed the scope of the retainer was limited to *CCAA* proceedings. At best, for Cassels, the evidence of Hurdman and Turpin during cross-examination was equivocal with regard to their understanding of the exact scope of the retainer. Only taken out of context does it suggest that they viewed the retainer as strictly limited to a *CCAA* proceeding.

[477] In examination-in-chief, Turpin testified that he understood that in sending his cheque in response to the Steering Committee's May 4 memorandum, his GMCL dealership:

> …had retained Cassels Brock from that moment on to deal with whatever interests the dealership and the group had with whatever General Motors and the issues that were arising with GM.

[478] This supports the testimony of Hurdman, who stated that his understanding and expectations were similar. In cross-examination, Turpin agreed with counsel that Cassels' retainer "was conditional and directed to a filing by General Motors." However, in addition to his evidence in examination-in-chief, Turpin also testified in cross-examination that he expected Cassels to provide advice during the call held on May 24 because "we had retained them a few weeks prior for the restructuring."

[479] Likewise, while Hurdman accepted the suggestion of counsel that the May 4 memorandum contained the words "should General Motors of Canada Ltd. file for bankruptcy protection in Canada in the near future," he also testified in-chief that he was not sure how things would play out and wanted his dealership to have the benefit of the group legal representation that the Steering Committee had arranged for. Thus, while the evidence of Hurdman and Turpin was not always consistent with regard to this issue (and accordingly, I have placed limited weight upon it), Cassels overstates the point when it submits that their evidence was that the retainer was limited to *CCAA* proceedings. Lastly, in any event, neither Hurdman nor Turpin was a member of the Steering Committee and involved in creating the retainer.

[480] For these reasons, I find that there was a retainer between Cassels and the GMCL dealers and that its scope was not limited to representation related exclusively to a *CCAA* proceeding. Given the nature of the common issues certified against Cassels, it is unnecessary to specify the

precise scope of the retainer. Nevertheless, it is clear that to the extent that the retainer included "complex restructuring" of the dealer network, Cassels was obligated to provide legal services to the dealers – be it advice or representation – with respect to the Notices of Non-Renewal and the WDAs.

Cassels' alleged failures

[481] Trillium submits that Cassels failed the GMCL dealer group in three material ways. First, Cassels was in a conflict from day one due to its pre-existing retainer with Industry Canada (the "Canada Conflict"). Second, Cassels failed to ensure that a non-conflicted Steering Committee was in place to instruct counsel, and when the Steering Committee became conflicted, Cassels (a) failed to advise the Steering Committee of its conflict and (b) failed to advise the affected dealers in respect of the WDAs (the "Steering Committee Conflict"). Third, Cassels did nothing to prepare for a *CCAA* filing or restructuring of the dealership network, but instead decided to "wait and see" (the "Wait-and-See Approach").

[482] According to Trillium, each of these failures should lead the court to answer "yes" to Common Issues (j) and (l). The Canada Conflict, the Steering Committee Conflict and the Wait-and-See Approach all amounted to breaches of Cassels' contractual obligations to the GMCL dealer group and likewise support a finding that Cassels acted negligently. Further, according to Trillium, the Canada Conflict in particular should also lead the court to answer "yes" to Common Issue (k) insofar as the Canada Conflict supports a finding that Cassels breached its fiduciary duties to the GMCL dealer group. I agree with Trillium.

The Canada Conflict

[483] Cassels was in a solicitor-client relationship with the GMCL dealers and owed them contractual duties as well as the fiduciary duties associated with such a relationship. According to Trillium, Cassels breached these duties by accepting a retainer to act for the GMCL dealers despite having already accepted the Canada retainer. Specifically, Cassels breached its contractual and fiduciary duty of loyalty, its duty to avoid conflicts, its duty to provide candid advice and disclosure, and its duty to act in the client's best interest.

[484] The conflict with the Canada retainer, Trillium urges, was not hypothetical – it was real. Had a *CCAA* filing taken place – one of the very events for which Cassels had been retained by the GMCL dealers – the interests of Industry Canada would have been aligned with those of GMCL and adverse to those of the GMCL dealers. Moreover, from the very outset, there were limits to what Cassels would have done for the GMCL dealers in any restructuring of the dealer network undertaken by GMCL in order to receive funding from the Canadian Governments. The Cassels lawyers retained by the GMCL dealer group did not vigorously advocate on behalf of the GMCL dealers.

[485] Trillium further asserts that Cassels should have declined the retainer for the GMCL dealers. Instead, it accepted the retainer based on (1) an insufficient analysis of the conflicts issue; and (2) the incorrect notion that the conflict had not yet materialized. Further, according to Trillium, the ethical wall put in place by Cassels did not resolve the conflict or ameliorate the impact of the Canada retainer. The problem here was not the preservation of confidentiality

between different clients, but rather the fact that Cassels was acting for two clients with adverse interests in the same matter. A lawyer cannot agree to act for parties on opposite sides of a contentious issue simultaneously. Such a conflict strikes at the heart of the duties that a lawyer owes to a client. No ethical wall could resolve such a flagrant breach of Cassels' duty of loyalty.

[486] The same analysis, Trillium submits, applies to the Saturn dealers. They were essentially in the same position as the GMCL dealers with respect to the conflict with the Canada retainer.

[487] Cassels submits that it was not conflicted on account of the Canada retainer. According to Cassels, even if there was a retainer to act for the GMCL dealers, the existence of the Canada retainer only created a *potential conflict* for the GMCL dealers. Further, the ethical wall was sufficient to address any potential conflict. Cassels notes that both of its insolvency experts, Ken Rosenberg ("Rosenberg"), a partner with Paliare, Roland, Rosenberg, Rothstein LLP and John Levin ("Levin"), a partner with Fasken, Martineau, Du Moulin LLP, agreed that Cassels' approach to this potential conflict was in keeping with the standard of care in Ontario. Finally, Cassels submits that, in any event, nothing flows from the alleged conflict. Cassels submits that the lawyers working on the file were in no way impacted by the Canada retainer. Further, because GMCL never filed for *CCAA* protection, the court does not need to decide how Cassels and CADA would have responded to any potential conflict.

Analysis

[488] What can be said about Cassels' retainer with the GMCL dealers applies equally to its retainer with the Saturn dealers. For the sake of brevity, however, I will generally refer to the "GMCL dealer group" throughout.

[489] The relationship between solicitor and client is categorically fiduciary. However, as Cromwell J. held in *Galambos* at paras. 36 and 37*:*

> [N]ot every legal claim arising out of a *per se* fiduciary relationship, such as that between a solicitor and client, will give rise to a claim for breach of fiduciary duty.
>
> A claim for breach of fiduciary duty may only be founded on breaches of the specific obligations imposed because the relationship is one characterized as fiduciary.
>
> [Citations omitted]

[490] Cassels had a specific obligation to represent the interests of the GMCL dealers in the restructuring and the *CCAA* proceedings. Trillium depended on Cassels for legal advice and representation. There can be no doubt that Cassels and Trillium were in a fiduciary relationship that gave rise to specific obligations relating to restructuring involving the GMCL dealers and in any potential *CCAA* proceedings. The question is whether Cassels breached its fiduciary duties.

[491] Likewise, Cassels owed Trillium contractual obligations arising out of the GMCL dealer

group retainer, including, but not limited to, a duty of loyalty, a duty to avoid conflicts, a duty to provide candid advice and disclosure, and a duty to act in the client's best interest. Again, the question is whether Cassels breached its contractual obligations.

[492] These two questions turn on whether there was a conflict, as opposed to the mere potential for a conflict, arising from the two retainers. After all, the thrust of Cassels' argument is that what Trillium calls a conflict was, in fact, just the possibility of a future conflict.

[493] The Supreme Court of Canada in *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, [2013] 2 S.C.R. 649 [*McKercher*], clarified that there are two types of conflicts of interest that may disqualify a law firm from acting on a given matter. First, there are cases that fall into the "bright line" rule articulated by Binnie J. in *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, at para. 29 [*Neil*], where the direct legal and immediate interests for the two parties are adverse. Second, when a situation falls outside the scope of the bright line rule, the question becomes whether there is a "substantial risk" that the lawyer's representation of the client would be materially and adversely affected by the dual representation: *McKercher*, at para. 8.

[494] I find that this case falls within the bright line rule because the direct legal and immediate interests of the GMCL dealers and Industry Canada were adverse. However, even if I am wrong in that regard, at the time that Cassels entered into the retainer with the GMCL dealers, there was a substantial risk that Cassels' representation of the GMCL dealers would be materially and adversely affected due to its pre-existing and ongoing retainer with Industry Canada. Further, the ethical wall put in place by Cassels was not sufficient to ameliorate this conflict of interest.

The bright line rule

[495] In *Neil*, the Supreme Court established the bright line test for cases where a lawyer is not permitted to act for adverse clients unless both parties provide their informed consent. Justice Binnie, writing for the court, articulated the rule as follows at para. 29:

> The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client – even if the two mandates are unrelated – unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.

[496] The key terms under the bright line rule are "directly adverse" and "immediate interests". Trillium has proved on a balance of probabilities that its interests were directly adverse to the immediate interests of Industry Canada during the relevant period. Trillium relies primarily on the evidence of Harris to support its assertion that an irreconcilable conflict between the two retainers was manifest on April 21, 2009. Trillium relies on the following admissions by Harris:

- he generally understood in April that Canada and Ontario were setting the pace with respect to the various Viability Plans that GMCL was developing;

- he understood that if GMCL could avoid liquidation Canada, along with Ontario and the U.S. Treasury, would be the bailout party;

- he agreed that in any *CCAA* filing, Canada and GMCL would have an identity of interests;

- he agreed that if he were acting for the dealers and was trying to upset the *CCAA* proceeding (i.e. by contesting a sale of assets or the disclaimer of DSSAs) in order to get leverage for the dealers, these steps would necessarily engage Canada's interests depending on what view Canada took of such a move;

- he agreed that Canada would have an interest in avoiding any upset or delay to a GMCL *CCAA* proceeding;

- he agreed that Canada was going to be the DIP financer and was providing the funds for the purchase of the assets; and

- he agreed that Cassels representing the dealers would involve Cassels' client Canada on one side and Cassels' client the GMCL Dealer Group on the other.

[497] Industry Canada's immediate interests were adverse to the interests of the GMCL dealers, which were to obtain the best possible non-*CCAA* restructuring deal, if such an offer was made by GMCL. For example, it would have been directly against the interests of Industry Canada for the GMCL dealers to take a tough stance on the WDAs because this could have jeopardized the restructuring that the Canadian Governments wanted to succeed. Had the retainer been limited to *CCAA* proceedings, this would not have been the case because Cassels would not yet have been acting for the GMCL dealers. But having found that the retainer included complex restructuring, and given the fact that Industry Canada's interests were substantially aligned with those of GMCL, which was executing the restructuring, I must conclude that there was a bright line conflict.

The residual category of conflicts

[498] If I am wrong that the immediate interests of Industry Canada and the GMCL dealers were adverse, or that the retainer included representation and advice during pre-*CCAA* restructuring, I am nevertheless satisfied that there was a conflict. In *McKercher*, at para. 38, the Supreme Court clarified that conflicts of interests may arise despite the inapplicability of the bright line rule:

> When a situation falls outside the scope of the bright line rule for any of the reasons discussed above, the question becomes whether the concurrent representation of the clients creates a substantial risk that the lawyer's representation of the client would be materially and adversely affected. The determination of whether there exists a conflict becomes more contextual, and looks to whether the situation is "liable to create conflicting pressures on judgment" as a result of "the presence of factors which may reasonably be

> perceived as affecting judgment": Waters, Gillen and Smith, at p. 968. In addition, the onus falls upon the client to establish, on a balance of probabilities, the existence of a conflict – there is only a deemed conflict if the bright line rule applies.

[499] Cassels takes the position that there was only ever the *potential* for a conflict to arise on account of the two retainers. In other words, Cassels accepts that there was indeed a risk that immediate legal interests of Industry Canada and the GMCL dealers would be directly adverse. Insofar as Harris' testimony suggests that Cassels would have dropped the GMCL dealers if the risk became reality ("if an adverse interest arose with respect to that retainer, it's conceivable that we could not act for the dealers at that time"), there can be little doubt that there was a risk that Cassels' representation of the GMCL dealers would have been materially affected.

[500] Thus, the issue is really whether this risk was a substantial one. In my view, the evidence supports a finding that it was. At the time of the retainer, the following facts were known:

- GMCL was essentially insolvent and relying upon government money to survive;
- the current plan in place was to reduce the dealer network by 29 to 36 percent by the end of 2014, later accelerated to 42 percent by the end of 2010;
- Cassels, by virtue of its representation of the Saturn dealers, was aware of the fact that an argument could be raised that GMCL's proposal may be in violation of the DSSA. In fact it advised the Saturn dealers and drafted a letter on their behalf to send to GMCL in this regard. Accordingly, it would have been aware that if the GMCL dealers were cut, it would have to take a position contrary to Canada's desire for a restructuring;
- the retainer was going to be accepted with the proviso that Cassels could not take on the government in a *CCAA* proceeding. The interest of Canada would be aligned with GMCL on a *CCAA* filing. The interest of the GMCL dealers would be either to survive the rationalization or to, on the other hand, obtain as much financial compensation as possible if they were to be non-retained;
- the dealers who had received WDAs would have faced the loss of their businesses; and,
- the proposed *CCAA* filing would be one of, if not the, largest in Canadian history. A *CCAA* filing is "real time litigation" where parties have limited timeframes to act and react to the proceeding.

[501] The evidence given by witnesses at trial, but in particular, by Harris and Leonard, indicates that if a *CCAA* proceeding had taken place, Industry Canada and the GMCL dealer group would have almost certainly been adverse in interest. The fact that the *CCAA* filing never took place informs, but does not determine, the issue of whether there was a substantial risk. By May 2009, for all involved, a *CCAA* filing would have appeared very likely, if not inevitable.

[502] In support of its position, Cassels relies upon the expert reports and evidence of Rosenberg and Levin, both of whom are well-experienced in *CCAA* matters.

[503] Rosenberg generally testified that due to the complexity of *CCAA* proceedings it is appropriate not to address conflicts before they actually arise. Rosenberg quoted from the decision of Morawetz J. (as he then was) in *Nortel Networks Corp. (Re)* (2009), 53 C.B.R. (5th) 196 (Ont. S.C.) [*Nortel*]. In that case, Morawetz J. appointed a law firm as representative counsel for a number of employee groups even though there was a potential for a conflict of interest between various employee groups and the former employees. Morawetz J. found that the appointment of a single representative counsel was the most efficient and cost effective way to ensure that the arguments of the employees were placed before the court. He concluded that they shared a sufficient commonality of interest in that they all had unsecured claims against Nortel for some form of deferred compensation.

[504] Rosenberg, relying upon *Nortel*, testified that conflicts in the *CCAA* context need not be dealt with "until they become ripe and real, my language is don't jump before you get to the fence and the fence is a real conflict."

[505] Levin also considered the Canada retainer in the context of his opinion on the standard of care, testifying that the potential for conflict arises in many major insolvency proceedings. Like Rosenberg, Levin did not appear to view the Canada retainer as creating a conflict, but merely the potential for conflict.

[506] I do not accept these opinions as they relate to the Canada Conflict issue. First, as far as Rosenberg's opinion is concerned, including his reliance upon *Nortel*, it is my view that the *Nortel* case is entirely distinguishable from the facts of this case. The employee groups and the former employees in Nortel would have had a number of common interests, all of which stem from the relationship they had as employees with Nortel. This is well set out in the decision. This is a far cry from the current situation. For the reasons above, there is little or no commonality of interest between Industry Canada and the dealers, particularly those who received Notices of Non-Renewal and WDAs. Apart from each of them having an overarching hope that GMCL would survive, the method by which this would be achieved puts them directly at odds with each other.

[507] In my view, Levin's suggestion that Cassels could accept both retainers and "try to manage around" the potential for conflict is unreasonable and unrealistic. This is particularly so given the fact that the dealers had no idea that the conflict existed from the outset. While in some cases Levin's suggestion of bringing in other counsel if a conflict arose, would make sense, it does not in this case. Here we are not dealing with conflicts that pop up unexpectedly during the *CCAA* process that could not have been identified or adequately assessed if identified. Rather, we are looking at obvious conflicts that existed from the outset, in a very significant potential *CCAA* filing wherein many of the dealers, GMCL and Saturn alike, stood to lose their livelihoods precisely because the Canadian Governments were demanding massive restructuring before they would offer financial support to the imperilled enterprise.

[508] Thus, in my view, Trillium has established on a balance of probabilities that there was a substantial risk that Cassels' representation of the GMCL dealer group would have been

materially and adversely impacted by the conflict. I cannot envision a situation in which Cassels could have discharged its duty to the dealers, particularly the dealers who were being put out of business, while it strove to promote the interests of Industry Canada. As submitted by Trillium, an example of Cassels' conflict and problems with loyalty is evidenced by the fact that Cassels, as counsel for Industry Canada, asked GMCL on May 14 to provide Industry Canada with a "car dealer analysis of potential claims on shut down obligations to dealers." I flatly reject Ryan's evidence that he saw no conflict between the position of the dealers and Industry Canada when he testified as follows:

> It seemed to me that if – if the Federal Government were able to assist GM such that you would have a viable General Motors, ultimately you would have a dealer network, a viable dealer network and that would be a good thing because at this point, as you know we are talking about all dealers.

[509] In my opinion this represents a completely unrealistic view of the vulnerable position the dealers were in and suggests that all dealers had the same interests which was unlikely given GMCL's stated goal for drastic dealer reduction within 20 months. I doubt that Ryan would have taken the same view had he been a GMCL dealer who heavily relied upon Pontiac sales to make a living. I further disagree with Cassels that until the format of a potential GMCL *CCAA* filing and the role, if any, that Canada would play became known, there could be no basis for concluding that a conflict existed. This simply does not accord with the evidence. In addition to the above drastic cuts, it is GMCL's position in this lawsuit, which I accept, that dealer reduction was one of the critical "three legs of the stool" that had to be achieved for GMCL to avoid a *CCAA* filing or, alternatively, one of the critical elements to resolve within a *CCAA* filing. Given the pivotal role of the Canadian Governments in financing the restructuring of GMCL, it is difficult to imagine a situation where the dealers, GMCL and Canada all would have been on the same page in any meaningful way.

[510] Finally, I disagree with Cassels' submission that nothing flows from the Canada retainer (i.e. that the Canada retainer had no effect on the efforts of the Cassels lawyers) and its argument that Trillium's allegation that Cassels was impeded by its Canada retainer violates the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.) pp. 70-71.

[511] In closing submissions, Cassels stated that the allegation of professional misconduct was unfair because of the rule in *Browne v. Dunn*:

> Trillium argues that Cassels Brock's conflict of interest with respect to the Canada retainer was one of "the real reasons why Cassels deserted and did nothing for the dealer client group in May 2009."
>
> This allegation, which is one of professional misconduct, was never put to a single Cassels Brock witness. Each member of the CADA team testified that their conduct with respect to CADA and the putative retainer was in no way impacted by the Canada retainer. They were not even cross-examined on this evidence. To now suggest that the lawyers "deserted" the dealers because of the

> Canada retainer is improper and unfair.
>
> It also violates the rule in *Browne v. Dunn*, as it is presumably argued to ask this Court to reject that evidence.

[512] While it is true that Trillium, for whatever reason, did not cross-examine Cassels' witnesses on the issue of the conflict and how it affected Cassels' representation of the dealers, doing so was unnecessary because this is largely a matter of argument. The Cassels witnesses would have only denied that there was a conflict. In any event, the effect of the rule in *Browne v. Dunn* does not apply. The rule in *Browne v. Dunn* is grounded in the common sense that it is not fair under the adversary system to catch someone unaware of the case being made against them. The rule does not apply here because Cassels knew from the outset that its conflict with Canada was one of the central issues raised by Trillium. It had every opportunity to address the issue and it did so. There is no realistic possibility that the Cassels witnesses would have been caught by surprise by Trillium's closing arguments.

Conclusion on Canada Conflict

[513] By accepting a retainer with the GMCL dealers to act in any restructuring or *CCAA* proceedings, despite knowing or having ought to have known that there was a substantial risk that it would be unable to act for the GMCL dealers because of a pre-existing retainer to act for Industry Canada in the GMCL *CCAA* proceedings, Cassels breached its duty of loyalty and the duty to avoid conflicts. By failing to inform the GMCL dealers of the Canada retainer, either through the Steering Committee or by communicating with the GMCL dealers directly, Cassels breached the duty to provide candid advice and disclosure. Altogether, Cassels' conduct supports a finding that it failed to act in the GMCL dealer group's best interests.

[514] I specifically reject Cassels' submission that the time for disclosure would have been on June 1, or maybe a few days beforehand – in effect, leaving the GMCL dealer group at the altar. Disclosure should have been made from the outset when Cassels recognized that the dealers needed to be organized and needed "a seat at the table."

[515] Alternatively, and at a minimum, I find that Cassels owed a duty to the dealers to advise them at the outset of the Canada retainer and all of the potential problems that could thereafter arise, and not, as Cassels suggests, wait until June 1 to "see what happened."

[516] In this regard, a word must be said about Cassels' dealings with CADA and particularly the dealings between Harris and Ryan. I cannot understand how either of them thought it was acceptable for Cassels to take on this retainer without advising the Steering Committee or the Saturn dealers that it was also acting for Industry Canada. These dealers' very existence and survival were at stake. It was a tumultuous economic time. The evidence demonstrated that it was difficult to predict, at any given time, just how bad things could possibly get for GM, GMCL and the dealers. In fact, things progressively worsened toward the end of 2008 and well into 2009. But such circumstances underscore just how important it was for the dealers to receive direct, independent advice from committed legal counsel. Instead, the dealers got a law firm with an undisclosed limit on its retainer. Hurdman testified that, had he known that Cassels was

retained by Canada, he would have asked the Steering Committee to appoint new counsel. This sentiment is entirely reasonable.

[517] Having engaged Cassels on behalf of the dealers, it was not CADA's right to deal with the conflict of interest. Both Ryan and Harris should have appreciated this fact. CADA had no skin of its own in this contest. It had no risk. It was not paying for legal representation concerning a potential *CCAA* filing, and it stood to lose nothing (or gain anything) depending on the outcome of the proceeding other than the attrition of its current membership. CADA and Harris conflated the two retainers that were presented to Harris. The first was a retainer to advise CADA with respect to advice on the bankruptcy risks of major auto dealers and the second to represent the dealers with respect to a potential *CCAA* filing. While CADA could certainly provide instructions regarding any conflicts or other issues that it saw with respect to *its own* retainer, it had no authority to waive conflicts or potential conflicts on behalf of the dealers. This should have been obvious. It is astonishing that the Cassels' lawyers, acting on behalf of Canada, Saturn and the GMCL dealers, conducted firm meetings to analyze the likelihood and depth of a conflict – and somehow concluded that it was unnecessary to consult or advise the dealers, whom Cassels was apparently prepared to jettison in favour of Industry Canada's retainer.

[518] Finally, regardless of what Harris and Zakaib may have stated at trial, and while I appreciate that they were not cross-examined on whether they would have done anything differently had the Canada retainer not existed, I infer from the fact that Cassels was quite willing to drop the GMCL dealers if necessary that the firm failed to represent the dealers as zealously as they could have. In my view, their representation of the GMCL dealers was hampered by Cassels' overriding loyalty to another party in the same matter.

[519] As stated above, the Saturn dealers were owed the same *per se* fiduciary duties and contractual duties from Cassels as the GMCL dealers, including the duty of loyalty and the duty to avoid conflicts. With regard to both groups, Cassels' conduct amounted to a breach of its fiduciary and contractual duties.

The Steering Committee Conflict

Introduction

[520] Trillium submits that Cassels fell below the standard of care of a reasonably prudent solicitor/law firm by failing to ensure that a non-conflicted Steering Committee was in place to instruct counsel and by failing to act in the interests of the dealers who had received WDAs. As a consequence of this failure, the Steering Committee, itself conflicted because it represented both dealers who had received WDAs and those who were continuing as dealers, was unable to assist the dealers who had received the WDAs. According to Trillium, Cassels compounded this error by squandering all later opportunities to ameliorate the conflict in the Steering Committee when it failed to advise the Steering Committee on May 15 and May 20 that it was conflicted and by failing to advise the dealers who had received the WDAs. It was not until May 28, 2009, two days after GMCL's deadline for the return of the WDAs, that CADA arranged for a second retainer with Lax O'Sullivan Scott LLP to manage the conflict.

[521] Trillium's submission boils down to this: Cassels was negligent and breached its contractual obligations to the GMCL dealer group because (1) the Steering Committee was conflicted from the start; and (2) Cassels failed to address the conflict when it had the chance on May 15 and 20, 2009.

[522] I agree. Cassels did not meet the standard of care of a reasonably prudent solicitor/law firm with respect to the Steering Committee. By May 7, 2009, Cassels ought to have advised the Steering Committee of the fact of the impending schism in the GMCL dealer group between those who would remain GMCL dealers and those who would not. By May 15, the Steering Committee's conflict was borne out by its instructions to Cassels not to assist the GMCL dealers who were to receive WDAs. The warning signs of May 7 should have become alarm bells for Cassels by May 15. Yet Cassels said nothing. By May 20, some dealers received the Notices of Non-Renewal and the WDAs. Seeing that the Steering Committee was conflicted and providing instructions that benefited the surviving dealers only, Cassels should have advised the Steering Committee of its conflict and taken steps to ensure that the dealers who had received WDAs had separate legal counsel.

April 30 conference call

[523] According to Trillium, by the end of April 2009, Cassels knew or ought to have known that there was an irreconcilable conflict within the Steering Committee insofar as the GMCL dealer group would splinter into two groups with adverse interests for the sake of *CCAA* proceedings. Specifically, by April 27, Cassels would have been aware that GMCL was planning to reduce the GMCL dealer network by approximately 42 percent. During the April 30 conference call, CADA, the Steering Committee, Ward and Harris discussed the mandate of the Steering Committee and the logistics of the trust fund set up by CADA. Notably, they discussed the possibility of a conflict arising among the dealers in any *CCAA* proceedings. Various possible "splinters" were contemplated, such as continuing and non-continuing dealers, Pontiac and non-Pontiac dealers, and participating and non-participating dealers.

[524] Cassels submits that it met the standard of care expected of a reasonably prudent solicitor/law firm with regard to the possibility of a Steering Committee Conflict during this time. Cassels emphasizes how little the parties actually knew in late April 2009. In Comeau's April 27 HIDL broadcast, the plan was far from finalized. It was not clear *when* the cuts would take place (before, during or after a *CCAA* proceeding), nor was it clear *how* they would be carried out. Indeed, Hurdman, Turpin and Condie testified that following the April 27 HIDL broadcast, they expected the GMCL dealer reductions to be achieved through attrition and consolidation. They did not expect to receive WDAs in May 2009. Likewise, Ryan, Ward, Harris and Zakaib all testified that they were unaware of how and when GMCL would reduce its dealer network.

[525] I accept Cassels' submission that it met the standard of care of a reasonably prudent solicitor/law firm with regard to the Steering Committee's conflict at this time, toward the end of April. I accept that Cassels needed to "get up to speed" with the file and assess whether the circumstances required a re-configuration of its retainer. Given the uncertainty around the dealer reduction plan, I accept that it was reasonable for Cassels, at the end of April and the beginning

of May, to refrain from advising the Steering Committee that it was probably in a conflict. In large insolvency proceedings, it is normal for counsel taking on a new file to begin with a "non-fragmentation" approach, that is, to accept a broader retainer before determining whether splintering the group into subgroups is necessary. That is not to say the Steering Committee was not in a conflict at the end of April, but rather, that Cassels did not fall below the standard of care by failing to advise the Steering Committee at this particular time. The situation was quickly to change.

The May 7 conference call

[526] By May 7, however, the dust had settled and Cassels should have been alert to the conflict between the two groups of dealers. During the conference call that day, Harris and Zakaib emphasized the importance of organizing and preparing for a *CCAA* proceeding and complex restructuring. In my view, this emphasis on organization and preparation indicates that Cassels had sufficient time to consider the circumstances and should have advised the Steering Committee of the possibility that the interests of the dealers would diverge in the near future. Although it was unclear exactly how and when GMCL would be ending its relationship with the affected dealers, Cassels should have appreciated that 42 percent of the dealers would be in a very different position in any restructuring or *CCAA* proceedings from the 58 percent of dealers who were continuing. Cassels should have advised the Steering Committee that it was speaking on behalf of both groups of dealers and that this constituted a conflict of interest.

The May 15 discussion with GMCL

[527] On May 15, 2009, GMCL told CADA that WDAs would be offered to a group of dealers. This information was also transmitted to Cassels during the conference call organized by CADA that day. Upon learning the details of GMCL's plan to reduce its dealer network, the Steering Committee instructed Cassels not to get involved. Cassels again fell below the standard expected of a reasonably prudent law firm by simply accepting the Steering Committee's instructions without advising it that the Steering Committee had been, effectively, speaking on behalf of both the soon-to-be survivors and the soon-to-be sacrificed dealers.

[528] The Steering Committee on May 15 was faced with the impossible task of representing the interests of both the 42 percent that were losing their dealerships and the 58 percent that were continuing with GMCL. The fact that the GMCL dealers who were members of the Steering Committee did not know whether they would be offered WDAs did not resolve this conflict. Cassels should have recognized that the Steering Committee's instructions were tainted by its compromised position.

The May 20 delivery of the WDAs

[529] On May 20, when GMCL delivered the Notices of Non-Renewal and the WDAs, the members of the Steering Committee, all of whom were remaining with GMCL, did not instruct Cassels to provide any advice or support to the dealers with whom they were now parting company. The conflict that had been waiting in the background since the end of April was now front and centre. Even if I am wrong to find that Cassels should have advised the Steering Committee of its conflict on May 7 or May 15, I am confident that on May 20 Cassels was

obligated to advise the Steering Committee that it could no longer speak on behalf of all of the dealers.

What should Cassels have done?

[530] At trial, the parties spent a considerable amount of time arguing the merits of Kandestin's opinion that Cassels ought to have facilitated the creation of a second, unpopulated Steering Committee for the soon-to-be departing dealers. I believe that there are serious practical problems with Kandestin's position. But it is unnecessary for me to opine on how Cassels could have best managed the Steering Committee Conflict. First, at a minimum, Cassels should have advised the Steering Committee of its conflict and it failed to do so. This amounted to negligence on Cassels' part. What might have transpired after the Steering Committee was advised of its conflict is a hypothetical that I need not explore. Second, I am confident that whatever it would have done, the affected dealers would have been better prepared for GMCL's offer on May 20.

The Wait-and-See Approach

[531] Given the foregoing discussion of the Steering Committee Conflict and the Canada Conflict, it is unnecessary to discuss the Wait-and-See Approach at great length. When Cassels was retained by the dealers, it knew that 42 percent of the dealers would be cut. While one may consider whether Cassels should have known of a conflict from the outset, it certainly had time to identify it by May 7 when it gave advice to the dealers to get a seat at the table. Had Cassels advised the GMCL dealers or the Steering Committee that they needed to rethink how instructions were to be given, the dealers who were to receive WDAs could have had a mechanism in place on May 20 when the WDAs were offered. Moreover, given the Steering Committee's conflict, its instructions not to get involved with the WDAs did not relieve Cassels of this responsibility.

[532] By May 15, the Wait-and-See Approach was not only inappropriate, it was unreasonable and imprudent. Upon learning that 42 percent of the GMCL dealer group would be receiving Notices of Non-Renewal and WDAs, Cassels should have advised the Steering Committee of its conflict and begun preparing for consequences of the Notices of Non-Renewal and WDAs going out to the dealers.

[533] Thus, in addition to breaching its contractual obligations under the retainer and falling below the standard of care regarding the Canada Conflict and the Steering Committee Conflict, Cassels fell below the standard of care expected of a reasonably competent and prudent lawyer/law firm and breached its contractual duties by continuing its Wait-and-See Approach after May 7, and especially after May 15.

Answers to the Common Issues involving Cassels

Common Issue (j):

> **Did Cassels owe fiduciary duties as lawyers to some or all of the Class Members and, if so, did Cassels breach those duties?**

[534] It follows from the discussion above that the answer to this common issue is "yes". Cassels did owe fiduciary duties to some or all of the Class Members. Cassels breached those duties.

Common Issue (k):

> **Did Cassels owe contractual duties to some or all of the Class Members and, if so, did Cassels breach those duties?**

[535] It follows from the discussion above that the answer to this common issue is "yes". Cassels did owe contractual duties to some or all of the Class Members. Cassels breached those duties.

Common Issue (l):

> **Did Cassels owe duties of care to some or all of the Class Members and, if so, did Cassels breach those duties?**

[536] Again the answer to this common issue is "yes". Cassels owed duties of care to some or all of the Class Members. Cassels breached some of those duties.[7]

PART VII – DAMAGES AGAINST CASSELS

Aggregate Damages

[537] Trillium seeks aggregate damages pursuant to s. 24(1) of the *Class Proceedings Act 1992*, S.O. 1992, c. 6. Section 24(1) provides that aggregate damages may be awarded where:

> (a) monetary relief is claimed on behalf of some or all Class Members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount

[7] In answering all these questions "yes", I am referring only to the 181 Class Members and not the call dealers.

of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all Class Members can reasonably be determined without proof by individual Class Members.

[538] The first precondition, s. 24(1)(a), sets a low hurdle. Cassels does not dispute the fact that Trillium claims monetary relief on behalf of some or all of the Class Members.

[539] The second precondition, s. 24(1)(b), poses a larger challenge. Aggregate damages should not be considered if relevant questions of fact and law (other than those relating to the assessment of damages) remain to be determined in order to establish the amount of Cassels' liability. This hurdle, however, has been met by Trillium because I have found liability against Cassels in favour of the Saturn dealers and the Class Members who contributed to the retainer.

[540] The third precondition, s. 24(1)(c), is the most critical. In this regard, I must determine the aggregate or a part of the defendant's liability to the Class Members and give judgment accordingly where the aggregate or part of the defendant's liability to some or all of the Class Members can reasonably be determined without proof by individual Class Members. Justice Belobaba recently analyzed this precondition in *Ramdath v. George Brown College,* 2014 ONSC 3066, 375 D.L.R. (4th) 488 at para. 47, identifying three requirements:

(a) the reliability of the non-individualized evidence that is being presented;

(b) whether the use of this evidence will result in any unfairness or injustice to the defendant (for example, by overstating the defendant's liability); and,

(c) whether the denial of an aggregate approach will result in "a wrong eluding an effective remedy" and thus a denial of access to justice.

[541] In my view, Trillium has satisfied all three requirements. The basis for Trillium's claim in aggregate damages is loss of chance. This chance relates to the affected dealers as a group, and the likelihood that negotiations of the terms of the WDA would have taken place between the group *as a whole* and GMCL. The non-individualized evidence is reliable, the use of the evidence does not result in any unfairness to Cassels, and to deny the Class Members the aggregate approach would amount to the denial of a remedy. Acting collectively in negotiations with GMCL is a critical component of the Class Members' claim against Cassels. An individualized approach to damages would not only be unfair to the individuals who would have banded together, it would be misguided given the nature of their action. Determining how much more money would have been available from GMCL for the Class Members had they had an opportunity to negotiate for it does not cause any injustice to the defendant Cassels by overstating its liability; rather, it simply quantifies that liability.

Loss of chance

[542] The practice of compensating the loss of chance originated in what remains a leading decision from the English Court of Appeal, *Chaplin v. Hicks*, [1911] 2 K.B. 786 (C.A.) [*Chaplin*]. In that case, the defendant newspaper held a beauty contest. Contestants submitted their photographs and the fifty most popular, based on reader responses, were chosen for the next round. Of those fifty, twelve were selected, on the basis of interviews, as the winners of the contest. The plaintiff submitted her photograph and was selected as one of the fifty, and then as one of the twelve. The defendant, however, failed to inform her of the interview. As a result, she was not interviewed and lost her chance to win the beauty contest and gain the attendant rewards. The court in *Chaplin* found that the plaintiff's loss was compensable. Specifically, it rejected the defendant's argument that her damages were remote and speculative, finding that she had lost an almost one-in-four (12 in 50) chance at being chosen winner. The court assessed her damages accordingly.

[543] Since then, loss of chance has become a well-established basis for assessing damages for breach of contract and solicitors' negligence: see *Webb & Knapp (Canada) Ltd. v. Edmonton (City)* (1970), 11 D.L.R. (3d) 544 (S.C.C.) at p. 557 [*Webb & Knapp*]; *Eastwalsh v. Homes Ltd. v. Anatal Developments Limited* (1993), 12 O.R. (3d) 675 (C.A.) at paras. 37-45 [*Eastwalsh*]; *Wong v. 407527 Ontario Ltd.* (1999), 179 D.L.R. (4th) 38 (Ont. C.A.) at paras. 26-35 [*Wong*].

[544] There are two parts to the loss of chance analysis: causation and quantum. See *Eastwalsh* at paras. 44-45; see also, Pitch & Snyder, *Damages for Breach of Contract*, 2d ed, loose-leaf, (Toronto: Thomson Carswell, 2010) at pp. 3-3.

[545] At the first stage, causation, the plaintiff must prove on a balance of probabilities that the defendant's breach or negligence caused the plaintiff to lose a substantially real and significant chance to avoid a loss or obtain a benefit. The loss of chance analysis has been applied in a number of English cases involving solicitors' negligence. These cases provide some guidance as to the plaintiff's burden of proof at the causation stage of a loss of chance claim. In *Allied Maples Group v. Simmons & Simmons*, [1995] 1 W.L.R. 1602 (Eng. C.A.), the trial judge held that the plaintiffs could recover if they could prove, on a balance of probabilities, that if armed with proper advice, they would have sought to negotiate with the third party; and that there was a real chance those negotiations would have been successful: see pp. 1608-09 of the appeal court's decision. Likewise, in *Acton v. Graham Pearce & Co.*, [1997] 3 All E.R. 909 (Eng. Ch. Div.), the trial judge first considered, on a balance of probabilities, whether the plaintiffs would have followed the proper advice, had it been given; and then considered, again on a balance of probabilities, whether there was a real or substantial chance that the prosecution would have been discontinued or the plaintiff acquitted. Thus, while loss of chance alleviates the burden of proof to some degree regarding hypothetical events involving third parties, the plaintiff must still establish on the ordinary civil standard of proof that there was a genuine opportunity and that it would have acted in a way that might capitalize on this opportunity alleged to have been lost.

[546] At the second stage, quantum, a court will evaluate the reasonable probability of the real and significant chance and award damages based on the assessed probability. For example, in *Wong*, after expressing doubts as to whether the defendant Liang would have agreed to provide a

realizable security, Laskin J.A. concluded, nevertheless, that the lost opportunity to negotiate security had *some* value for the plaintiffs. At para. 31 of his judgment, Laskin J.A. valued the likelihood of obtaining the security at 20 percent and calculated damages accordingly.

[547] In *Eastwalsh*, Griffiths J.A. disagreed with the trial judge's conclusion that had the defendant not breached the contract, the plaintiff would have had a 50 percent chance of closing the sale. Justice Griffiths was more pessimistic about the plaintiff's chances. Whereas the trial judge had reduced damages by half, Griffiths J.A. awarded nominal damages, holding at para. 59 that the lost chance was "too insubstantial to justify anything more than nominal damages."

[548] More recently, in *Folland v. Reardon*, (2005), 74 O.R. (3d) 688 (C.A.) at para. 73 [*Folland*], the Court of Appeal identified four criteria that the plaintiff must establish in order to succeed in loss of chance:

> (i) the plaintiff must establish on a balance of probabilities that but for the defendant's wrongful conduct, the plaintiff had a chance to obtain a benefit or avoid a loss;
>
> (ii) the plaintiff must show that the chance lost was sufficiently real and significant to rise above mere speculation;
>
> (iii) the plaintiff must demonstrate that the outcome – that is, whether the plaintiff would have avoided the loss or made the gain – depended on someone or something other than the plaintiff himself or herself; and
>
> (iv) the plaintiff must show that the lost chance had some practical value.

[549] The court in *Folland* explained the four criteria at para. 74 as follows:

> The first criterion is simply an application of the traditional burden of proof. The plaintiff has the burden of demonstrating the "but for" connection between the lost opportunity and the defendant's misconduct. The second criterion is admittedly somewhat nebulous. There is no bright line between a real chance and a speculative chance. An empirical review of the case law suggests that chances assessed at less than 15 per cent are seldom viewed as real chances. The third requirement recognizes that where a plaintiff is faced with the difficulty of establishing what would have happened, a past hypothetical fact, had the defendant not engaged in the wrongful conduct, it is too much to expect the plaintiff to establish that hypothetical fact on the balance of probabilities where what would have happened turns on the actions of a third party. The fourth requirement reflects the inherent nature of a damages award. If the chance lost has no real value, neither the compensatory nor restitutionary rationale for damages would justify an award of more than nominal damages.

[550] Whether one views loss of chance through the four *Folland* criteria or in terms of

causation and quantum, some degree of speculation is unavoidable due to the inherently hypothetical nature of the exercise. As Laskin J.A. stated in *Wong*, "at best, [valuing a lost opportunity] is an uncertain and difficult exercise; at worst, it is an exercise in speculation." This is especially true in cases where the value of the benefit that could have been obtained, or the loss that could have been avoided, is unknown or difficult to quantify. Unlike in *Chaplin*, where the value of the benefit that the plaintiff could have obtained was more or less established,[8] the value of a hypothetical lawsuit or hypothetical negotiation cannot be easily ascertained. Indeed, in this case against Cassels, the monetary value of the benefit that the dealers allegedly lost, i.e. the opportunity to obtain larger termination payments from GMCL, ranges from zero dollars (according to Cassels) to hundreds of millions (according to Trillium.)

[551] As a further complication, some loss of chance cases, this being one of them, will require the court to consider not one, but a sequence of probabilities. For example, in this case, the court must take into account the probability that the affected dealers would have banded together to pursue collective negotiations, the probability that GMCL would have met the dealers at the bargaining table, and the probability that negotiations, if they had taken place, would have been successful in increasing the size of the compensation in any meaningful way.

[552] But complexities notwithstanding, if Trillium can prove on a balance of probabilities that it lost a real chance to obtain a benefit or avoid a loss, the difficulty of assessing the value of that chance will not bar recovery. As the Supreme Court held in *Webb & Knapp* at para. 557, the fact that assessment is difficult is no ground for awarding nominal damages. The court must do its best with the evidence available. Indeed, in *Folland* at para. 88, the court acknowledged that not all successful loss of chance claims will involve lost lottery tickets or missed beauty contests. In some cases, "…perhaps because of the complexity of the variables involved or the unavailability of crucial evidence, it will be impossible to realistically assess what would have happened but for the defendant's misconduct. In those cases, the plaintiff may successfully advance a lost chance claim, if that claim meets the criteria discussed above…".

Stage One – Causation

Has Trillium established, on a balance of probabilities, that but for Cassels' wrongful conduct it had a chance to obtain a benefit or avoid a loss?

[553] The answer to this question is "yes". Trillium has proven that Cassels caused the loss of an opportunity to negotiate collectively with GMCL for increased WDA payments.

[554] I have already found that Cassels was in a solicitor-client relationship with the GMCL dealers and therefore owed them contractual and fiduciary duties. I have also already found that Cassels breached these duties in three ways – namely, the Canada Conflict, the Steering

[8] It was a three year acting engagement for £3, £4 or £5 per week.

Committee Conflict, and the Wait-and-See Approach. Trillium submits that if Cassels had met the standard of care, provided competent advice, and proposed a negotiation with GMCL, the dealers would have sought to negotiate as a collective with GMCL.

[555] In my opinion and based on the evidence: if Cassels' loyalty had not been divided; if Cassels had declined to follow the conflicted Steering Committee's instructions not to get involved with the WDAs; and if Cassels had not maintained a Wait-and-See Approach for longer than it should have, then Cassels would likely have provided advice with regard to the WDAs and would likely have proposed the option of negotiating as a united group as an option to the affected dealers.

[556] I infer from the existence of the conflict and from Cassels' inaction with regard to the dealers that Cassels' divided loyalty caused it to "soft pedal" the representation of the dealers who received WDAs. The fact that Cassels would not confront the government in any *CCAA* proceedings or complex restructuring prevented Cassels from fully committing to the cause of the dealers. In any event, the Canada Conflict is not the only way in which Cassels fell into error. Cassels also breached its contractual duties and acted negligently by failing to advise the Steering Committee of its conflicts, by accepting instructions from the Steering Committee not to get involved with the WDAs, and by maintaining its Wait-and-See Approach. I am satisfied that had Cassels been involved with the WDAs and proactive with regard to the dealers' interests, it would have advised the Class Members about negotiating collectively with GMCL. Alternatively, had Cassels advised the dealers of the Canada Conflict and the Steering Committee Conflict, and had new counsel been retained, I am confident that new counsel would have advised the dealers regarding the WDAs. Thus, the issue is whether Trillium can prove, on a balance of probabilities, that the affected dealers would have banded together and instructed Cassels or another law firm to pursue negotiations with GMCL regarding the WDAs. I conclude that they would have.

[557] Hurdman, Turpin and Condie all testified that, if there had been an initiative by Cassels to negotiate, they would have participated. I accept their evidence, and I infer from the fact that they would have participated that other dealers facing termination would have as well. The Class Members would have gained some leverage from banding together as a cohesive unit. In fact, this is precisely what Cassels urged the GMCL dealers to do in the May 4 and May 13 memoranda, and during the May 7 conference call. After all, it is not unusual in insolvency restructurings or *CCAA* proceeding for stakeholders, united by certain common interests, to form heterogeneous groups in order to gain leverage. This case was no different.

[558] Cassels relies heavily upon the evidence of Risebrough, who testified that a hypothetical negotiation was not realistic given his experience with the dealers. Boily seemed to agree. The problem with their evidence, in my view, is that the dealers had never been confronted by a situation like the one before them in May 2009. As Risebrough conceded, in the past, the dealers' difficulty in building consensus and acting as a unified group related to operational, advertising and marketing issues, not the survival of their dealerships. The dealers had never been confronted by mass termination before. While there certainly could have been areas of discord among the dealers, I do not think this would have prevented them from acting collectively when facing a common foe in such dire circumstances. As an aside, I find it

somewhat ironic for Cassels to make this submission now, when based on Cassels' representations to the GMCL dealer group, it held itself out as entirely capable of assisting the GMCL dealers in complex restructuring of the dealer network, which presumably would have involved negotiations with GMCL and other stakeholders.

[559] I also find that it is more likely than not that a mechanism could have been devised to bind the dealers within the negotiation framework. In any event, consistent with GMCL's ability to waive 100 percent acceptance in the context of the offering of the WDAs, there is no reason to believe that 100 percent take-up would be necessary in a negotiation.

[560] Finally, evidence of Hurdman, as well as that of Turpin and Condie, also leads me to conclude that the dealers would have instructed Cassels to negotiate with GMCL. The monetary offers they received represented a fraction of the value of their dealerships. GMCL's own internal analysis demonstrated that the offers represented about one-third of the value of the dealerships that were being offered WDAs. The dealers had a lot to gain from pursuing collective negotiations with GMCL. While I fully appreciate the fact that the Class Members could have received nothing in a *CCAA* filing, I do not believe that this risk would have discouraged them from approaching GMCL when they were receiving a small fraction of the value of their dealerships.

[561] Thus, Trillium has satisfied me on a balance of probabilities that, with the proper advice and representation from Cassels, the affected dealers would have banded together and sought to negotiate with GMCL. I will now consider whether that chance was real and significant, or as Cassels submits, it was overwhelmed by negative contingencies.

Was the chance that Trillium lost "sufficiently real and significant"?

[562] The answer to this question is "yes". But for Cassels' breaches and negligence, Trillium would have had a sufficiently real and significant chance to achieve higher WDA payments through negotiations with GMCL. In arriving at this conclusion, I have considered and assessed the likelihood of GMCL meeting the dealers at the bargaining table, as well as the likelihood of negotiations leading to a successful result.

Would GMCL have negotiated?

[563] GMCL delivered the WDAs on a "take it or leave it basis". Specifically, on May 22 GMCL told the Class Members that the WDAs were non-negotiable. Cassels therefore takes the position that GMCL meant what it said and certainly would not have negotiated with the Class Members even if they were collectively represented by a competent and unconflicted firm. GMCL took the same position at trial.

[564] Both Trillium and GMCL adduced expert evidence on the issue as to whether GMCL would have negotiated. Trillium relied upon the evidence of Rosch and Margot Schonholtz ("Schonholtz") a lawyer practicing with the U.S. firm of Willkie, Farr, and Gallagher LLP. GMCL relied upon the evidence of John McKenna ("McKenna") a partner with PWC LLP, and Robert Harlang ("Harlang") a Managing Director of Duff & Phelps and John McKenna ("McKenna") a partner with PWC LLP.

[565] The defendants took great issue with the evidence provided by Rosch and Schonholtz. Similarly, Trillium had various criticisms concerning the evidence of McKenna and Harlang.

[566] In my view, the complaints do not raise serious issues of credibility. I thought all of the witnesses were honest in providing their opinion evidence. However, although the expert evidence was helpful in marshalling the evidence and in my deliberations, I have come to the conclusion that I am in a better position than the experts to deal with this issue, having heard the totality of the evidence and reviewed more documentation than was available to them.

[567] GMCL and Cassels also raised a number of arguments to support the position that GMCL would not have negotiated. I do not propose to deal with each and every argument raised by the defendants or conversely by Trillium or every issue raised by the experts, but I will review the ones that I believe to be of significance.

Carroll's negotiation

[568] Although this is admittedly a modest point involving only one dealer, I note that Carroll did contact Comeau after receiving a WDA and negotiated a deal whereby the WDA would be withdrawn with respect to his dealership if he agreed to move to another location. While this was the only instance of a dealer successfully negotiating with GMCL regarding the WDAs, it undermines GMCL's position that it would never have negotiated a WDA.

Other negotiations

[569] GMCL argued that the dealers were the only group with respect to the so-called "three-legged stool" that it would not negotiate with in order to avoid a *CCAA* filing. GMCL did, however, conduct negotiations with the CAW and the Bond Holders (and for that matter, the retirees).

[570] It is true that there was no history of collective negotiations between GMCL and its dealers, either with respect to the DSSAs or with respect to what occurred when the group of Saturn dealers approached GMCL. Given the fact, however, that GMCL needed settlements with all three entities, it seems incongruous and unlikely to me that it would not have negotiated with the dealers if a critical mass of dealers had rejected the WDAs and/or they had been properly organized. As noted throughout this judgment, these were unprecedented times, the likes of which had never been seen before by GMCL or its dealers. Past history is therefore of little value. I do not accept that if a stalemate arose GMCL simply would have filed under the *CCAA.*

The preference of the U.S. and Canadian Governments

[571] Although it is clear that there were limitations on how far the U.S. and Canadian Governments, GM and GMCL would have gone to avoid a filing under the *CCAA*, the evidence clearly shows that all three entities preferred restructuring outside that regime. The preference of the Canadian Governments is particularly important because they were, as Buonomo put it, "driving the bus" insofar as they were the only source of financing for GMCL. In an insolvency-related transaction, the Canadian Governments would have played multiple pivotal roles – they

would have been the financing source, the DIP financers, and the purchasers. I, therefore, regard the expressed preference of the U.S. and Canadian Governments to avoid a *CCAA* filing as a weighty factor that would have encouraged GMCL to back off from its position that the WDAs were not negotiable. I note that there was no evidence adduced at trial that the Canadian Governments would have opposed a negotiation.

Evidence of GMCL's witnesses

[572] GMCL witnesses Comeau, Stapleton, Macdonald, Risebrough and Buonomo all testified that in their view, GMCL would not have negotiated with the dealers. I do not accept this testimony. While I do not believe that they were purposely misstating GMCL's position, I believe that, if push came to shove, negotiations would have been entertained. I therefore do not find their evidence to be reliable. In this regard, I accept the evidence of both Rosenberg and Kandestin that clients (in this case GMCL) often take the position that an offer is non-negotiable only to move off that position on a reasoned basis in order to effect a settlement of an issue.

[573] More importantly, both Comeau and Buonomo testified that any final decision with respect to negotiation, had the dealers proposed a negotiation, would have been left in the hands of GM, not GMCL. Comeau did not have the authority to make the final call and he admitted that he would have had to pass the information along to GM. None of the above GMCL witnesses had the authority to entertain or dismiss negotiations, and no member from GM who had the ultimate authority to approve a negotiation testified at trial. Nor did any person who represented the Canadian Governments in the restructuring testify at trial. I am therefore left with the evidence of Comeau and Buonomo which demonstrates that the decision to negotiate did not end with GMCL.

GMCL did not negotiate with Saturn

[574] While it is true that GMCL did not negotiate with the Saturn dealers at the time the Saturn dealers were told that the brand would be discontinued, the situation involving the GMCL dealers was materially different. The 51 Saturn dealers had limited leverage, given the undoubted discontinuation of the brand and its limited effect on GMCL. But, once the GMCL dealer rationalization plan was announced, GMCL was not only facing the 51 Saturn dealers, but was also now faced with 240 GMCL dealers who had also received WDAs. Now there was a much larger group, which, in my view, would have enjoyed greater leverage in a negotiation.

Time restraints

[575] I do not accept the submission that time restraints prevented GMCL from negotiating. GM and GMCL had time to conduct complicated settlement negotiations with the Bond Holders within a four-day time period. I accept Trillium's submission that there was a real chance that such a negotiation could have been carried out with the affected dealers. Comeau and his team were available to conduct the negotiations after the WDAs were delivered and they would have been the appropriate people to do so given their preparation of the WDA protocol.

Comeau's credibility

[576] I find little merit in the submission that GMCL would not have negotiated because doing so would have undermined Comeau's credibility with the dealers. As set out in my analysis of Trillium's claim against GMCL, the dealers who received WDAs felt betrayed by Comeau; they felt that he ambushed them, misled them and was less than truthful. Given the affected dealers' opinion of Comeau after the WDAs were delivered, it is difficult to imagine that, in their eyes, his credibility would have been further diminished by negotiating higher WDA amounts – and even if this was possible, I doubt this would have mattered much to GMCL.

Canadian dealers vs. U.S. dealers

[577] GMCL takes the position that neither GM nor the United States Treasury would have permitted negotiations because it would have been inconsistent with the approach taken towards the discontinued dealers in the U.S. and this could have set an expensive precedent for GM in its Chapter 11 filing. Buonomo generally testified in this regard. I do not accept this submission.

[578] The submission that a dangerous precedent would have been set is undermined by the fact that GMCL takes a contradictory position concerning the development of the WDAs: that "the dealer networks in Canada and the United States were very different. GMCL recognized that it could not simply follow GM's approach." There, GMCL submitted that the dealer network in Canada was materially different than that in the U.S.; it was structured differently; and GMCL had few, if any, very low volume under-performing dealers. In light of this earlier submission, I do not now accept that a negotiation with the Canadian dealers would have resulted in some sort of negative precedent in the U.S. Buonomo was not involved with any of the Canadian negotiations and in my view, although I found him to be a credible witness, his evidence on this point is simply not convincing.

[579] Further, there was no direct evidence to support this suggestion – just anecdotal evidence based on Buonomo's understanding of the U.S. Treasury's position. In any event, Buonomo testified that the position the U.S. Treasury was going to take would be similar to that in Canada but not identical. In these circumstances, I do not believe it is likely that a negotiation would not have taken place for fear of setting a precedent in the U.S. Buonomo was simply providing his understanding as to what the situation would be, which was largely based on the Washington Meeting. Lastly, in any event, the U.S. Government also wanted to avoid a *CCAA* filing by GMCL.

The GMCL plan was approved by the Canadian Governments

[580] I do not accept the submission that GMCL was not authorized to go beyond the parameters of the WDA offer without approval of the U.S. and Canadian Governments. First, there were no government witnesses called at trial to support this submission. There were also savings with respect to the fact that $218 million was authorized for 290 dealers and ultimately

only 240 WDAs were delivered with 202 acceptances. This reduced the budget to $143.5 million. Ultimately, $126 million was paid.[9] While I accept the position of GMCL and Cassels that the money would not have been spent without restraint, the amount did provide GMCL with some flexibility. The dealers were clearly part of GMCL's identified "three-legged stool" which had to be dealt with if a *CCAA* filing was to be avoided. Whether GMCL would have needed government approval to exceed the $218 million allocated is better considered when looking at how much more GMCL would likely have paid.

Costs and risks associated with the CCAA filing

[581] There were both pros and cons to GMCL making a *CCAA* filing. Cassels submits that the pros of a *CCAA* filing outweighed the cons and that consequently, if approached by the affected dealers to negotiate, GMCL would have simply filed for *CCAA* protection. I disagree.

[582] GMCL committed tremendous time and resources to identify the costs and risks of a *CCAA* filing. Ultimately after conducting their analysis, GMCL, as well as the U.S. and Canadian Governments, preferred a restructuring outside a *CCAA*. I accept that the orderly restructuring in a *CCAA* did have benefits to GMCL; but the risks, in my view, rightly caused GMCL to attempt to avoid a *CCAA* filing since they exceeded the benefits. It is in this context that I allowed expert evidence. As noted, the expert evidence was hotly contested.

[583] In my view, the risks to GMCL would have likely also made the company amenable to considering and, at the very least, having discussions with the dealers by way of a negotiation. The benefits to GMCL to filing for *CCAA* protection included: the fact that DIP financing was in place by the Canadian Governments; GMCL could continue operations; and, likely leave behind creditors with old GMCL by achieving a sale of the assets and the business under a *CCAA*. There were, however, significant costs. These included a substantial amount of net operating losses (the "NOLs") which had a present value in the range of $600 million. There was no guarantee that these could be realized in a *CCAA* filing. There was also a risk that GMCL could not transfer a $1.1 billion tax refund to new GMCL in a *CCAA* filing. There was also a risk that a *CCAA* filing could not be done quickly, which could have impacted GM's bankruptcy filing, and further there would be associated costs during a *CCAA* filing which would be in the several million-dollar range. Furthermore, GMCL identified that failure to reach a deal with the dealers could result in a disorderly transition of inventory which would have caused significant financial setbacks for GMCL. Most significantly, however, it could have caused damage to the GM brand in Canada by deterring customers from purchasing vehicles from a company operating under *CCAA* protection.

[584] Given all of the above, I find that Trillium has proved, on a balance of probabilities, that but for Cassels' conduct, there was a real chance that the dealers would have negotiated productively with GMCL.

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[9] This number is a close approximation.

[585] While I have not relied on the concession in any way, I take comfort from the fact that GMCL conceded, rightfully in my view, in closing submissions that the dealers would not have had the door "slammed in their face" if they had approached GMCL as a group seeking to negotiate a reasonable increase of the WDA payments.

Stage Two – Quantum

[586] Because Trillium has proved, on a balance of probabilities, that the affected dealers suffered the loss of a real chance to negotiate with GMCL for higher WDA payments, I must now consider the value of that lost opportunity. This requires me to quantify the probability that the dealers would have been successful in their negotiations, which involves identifying any negative contingencies and reducing the quantum of damages awarded to the dealers accordingly. In other words, I must value what was likely lost and the likelihood of that value having been captured but for Cassels' misconduct.

[587] In closing argument, Trillium urged me to award damages in the amount of $375 to $425 million; Cassels maintained that no money ought to be paid because the downside risk to productively negotiating with GMCL far outweighed the chance it could occur. Once again, while I have found the evidence of the experts useful in marshalling the documentary evidence of GMCL, I am not persuaded that I ought to rely on it in assessing damages. I am in a much better position than the experts, having heard all of the evidence and having seen all of the documents produced at trial.

[588] I have assessed the value of the dealers' lost opportunity at $50 million, and for the reasons below, award the Class Members $45 million in damages.

The Value of a Successful Negotiation with GMCL

[589] As noted above, unlike in *Chaplin*, the monetary value of the benefit that the dealers lost the chance to obtain ranges from nothing to hundreds of millions of dollars. In my view, where a plaintiff has proven loss of chance, but the value of that chance cannot be determined with any certainty because of the multiple hypotheticals involved, the limits of "sufficiently real and significant" may provide, at the least, a framework within which an assessment can take place. No one would suggest, for example, that the dealers had a sufficiently real and significant chance of negotiating a $1 billion increase in WDA payments from GMCL. On the other hand, the dealers had a near certain chance of obtaining a $1 dollar increase. By defining the upper limit of "real and significant" at the outset, the court may proceed in its assessment on a more principled basis.

[590] This was not the approach adopted by Laskin J.A. in *Wong*, or the trial judge in *Eastwalsh*. However, unlike those cases, which involved losses more or less quantifiable in isolation, the value of the benefit that could have been obtained by the affected dealers is inextricable from the reasonable probability of the chance to obtain that very benefit. Thus, in my view, a slight deviation from those cases – namely, considering the value of the benefit before the probability of obtaining it – is warranted on these facts.

[591] What are the limits of sufficiently real and significant in this case? In my view, but for Cassels' conduct, the dealers had a sufficiently real and significant chance to obtain, at most, $218 million through negotiations with GMCL.

[592] Any chance of negotiating more than $218 million is mere speculation. The total amount approved by GM, for GMCL to offer to the affected dealers was $218 million: $182 million to the GMCL dealers, $30 million to Saturn dealers, $2 million to Saab dealers and $4 million to Hummer dealers. This amount was earmarked for 290 dealers. However, only 240 dealers ultimately received WDAs and a combined wind-down offer was reduced on a principled basis to $143.5 million. Ultimately $126 million was paid by GMCL to the 202 dealers who accepted WDAs. I accept Comeau's evidence that GM and GMCL took a principled approach to the wind-down payments. Comeau was not simply given a pot of money in the amount of $218 million to spend as he wished. I also accept Comeau's evidence that developing the proposal required for GM's approval and translating the approved aggregate amount into a principled wind-down formula was complex and undertaken with care. The earmarked amount of $218 million and the actual amount of $126 million paid to the dealers who accepted WDAs reflected the fact that different dealers required different financial packages depending on the size and location of their dealerships, their severance exposure, and the value of their operating assets.

[593] At the same time, Comeau and his team had flexibility within the parameters of their principled approach. Comeau's email of May 16, 2009 sent to other GMCL employees sheds light on GMCL's thinking at the time:

> I'm forwarding 2 files for your reference, as they summarize what has been shared with governments thus far and the dealer count and wind down estimates submitted and approved by Troy [Clarke]. It is extremely important to underscore that Troy is giving us freedom to navigate within the space he has approved. He is clearly cognizant of the complexities and the potential need to add or delete where appropriate (e.g. Cost or dealer count).

[594] To my mind this email demonstrates that Comeau had room to manoeuvre in trying to negotiate this complex settlement, which was of extreme, if not critical, importance to GM and GMCL. In fact, this flexibility goes hand-in-hand with the principled approach. Comeau and his team developed and implemented a formula precisely because they had been given the discretion to offer more or less money within an approved range.

[595] Without better evidence, it would be unreasonable to peg the amount that the dealers had a real chance of obtaining higher than $218 million. However, in my view, given the fact that after consulting the Canadian Governments, GM gave GMCL approval to spend $218 million it is reasonable to conclude that GMCL, with the approval of GM, had flexibility to complete a deal by paying up to this amount notwithstanding the number of dealers it needed to get on side. Notwithstanding my conclusion, for the sake of completeness, I will briefly review the expert testimony on this issue.

[596] According to Rosch, GMCL would have been prepared to pay in the range of $212 million to $300 million for a number of reasons. Rosch considered a number of factors, including:

- the uncertainty of the total amount the Canadian Governments would have been willing to pay;
- the importance of GMCL to the Canadian Governments;
- the fact that they had negotiated with other stakeholder groups including the Bond Holders;
- the fact that GMCL had conducted its own analysis (the indifference analysis) in which GMCL calculated what it would be worth GMCL to pay to avoid a *CCAA* filing;
- the uncertainty associated with GMCL's ability to utilize the NOLs in a *CCAA* which had a net value of $500 to $600 million;
- the cost of a disorderly distribution of inventory;
- the negative effect a *CCAA* filing would have on GM's brand in Canada;
- the risk that GMCL could lose a $1.1 billion dollar tax refund; and
- the risk that a *CCAA* filing in Ontario could delay and negatively hamper the bankruptcy proceedings of GM in the U.S.

[597] Schonholtz came up with an even higher range of between $330 million and $500 million. Schonholtz relied on a number of factors including many that Rosch had identified. She concluded that GMCL would have paid, at the low end $330 million, which she calculated as being the cost of avoiding a filing under the *CCAA*. She thereafter concluded that GMCL would have paid up to the higher end of $500 million which would have been the cost of rationalizing its dealer network. She identified the following additional factors:

- GMCL was thinking an orderly liquidation would cost up to $1 billion of inventory;
- thirty-three percent of the value of the inventory on the lots would likely have been an acceptable cost to GMCL to avoid a *CCAA;*
- GMCL's documents include ranges of numbers from $300 to $500 million; and
- had the dealers been the last group standing (as the Bold Holders ended up being) they would have had considerable leverage.

[598] With respect to why she came up with a higher range than Rosch, Schonholtz stated:

> I think we looked at the question of the quantum a bit differently. I don't think that she considered the scenario of the last man standing. And I – I weighed certain factors, frankly, very heavily in coming to my opinion that I don't think she necessarily weighed as heavily, the execution risks of the global deal, dealing with a billion dollars of inventory in an orderly way, the transferability of a billion six in cash tax refund.
>
> Those types – I mean, obviously a lot – all these circumstances informed my opinion, but I think I weighed those in particular more heavily than Ms. Rosch did.

[599] Cassels relies upon the evidence of McKenna and Harlang. Harlang testified that when one balanced all of the positive and negative factors they were completely offset and no one could reasonably conclude that GMCL would have been willing or able to negotiate the terms of the WDA with the dealers. He identified a number of negative factors that would have impacted GMCL's willingness to negotiate, including:

- GMCL was insolvent;
- there was no reasonable prospect that unsecured creditors in the contemplated *CCAA* filing would receive any recovery;
- a *CCAA* filing was ready to go with DIP financing in place;
- a *CCAA* process would have helped GMCL achieve its primary objectives of continuing operations and implement its final restructuring plan;
- the workings of the *CCAA* would have likely afforded GMCL the ability to effect its contemplated *CCAA* application on a timely basis;
- GMCL would have been able to effectively deal with litigious creditors; and
- GMCL would most likely have left behind creditors with old GMCL by promptly achieving a sale of the operating assets and business under the *CCAA*. The continuing dealers would have travelled with the business. The non-continuing dealers would have been stranded with no return.

[600] Harlang also identified a number of factors that would have negatively affected the dealers' ability to negotiate, including:

- the non-retained dealers were a disparate group in May of 2009 which did not bargain collectively with GMCL and were unlikely to have organized as a cohesive collective negotiating unit;
- over 300 GMCL dealers failed to contribute to the CADA Trust Fund;

- a significant number of non-retained dealers did not identify themselves to CADA as late as November 24, 2009; on the May 24, 2009 conference call, there were varying reactions as to whether dealers would or would not sign;

- the Saturn dealers had different interests, including the desire to benefit from a sale of the Saturn business to Penske;

- the Pontiac brand discontinuance affected different dealers differently;

- the non-retained dealer group had varying levels of profitability and net worth in May of 2009;

- 23 of the accepting non-retained dealers had continuing relationships with GMCL and other dealerships;

- 49 of the accepting non-retained dealers also owned non-GMCL dealerships;

- certain of the non-retained dealers owned their dealership premises or leased them from related parties;

- lease and rent terms for premises varied widely;

- 38 of the non-retained dealers did not accept the WDA;

- some 30 dealers ultimately opted out of this litigation;

- varying dealers would have had varying degrees of risk tolerance, including the risk of losing the benefit of the wind-down offers and recovering nothing in a *CCAA* proceeding;

- there was no mechanism outside of the *CCAA* itself to bind dealers;

- GMCL could have avoided payments to non-retained dealers by stranding them in a *CCAA* proceeding.

[601] Based on the above, Harlang's evidence, if accepted, leads to a conclusion that there was no loss of opportunity.

[602] McKenna did not provide a range of potential settlement numbers. He concluded that he "did not believe that [he] could have reasonably quantified that range in these circumstances and any conclusions [he] may have formed in that regard would be highly speculative." McKenna did, however, identify seven major factors that would have impacted GMCL's willingness to negotiate or reach an agreeable settlement and opined that a number of those factors would have been quite difficult to satisfy in the time available.

[603] I do not accept that the factors listed by Harlang and McKenna would completely negate the value of the loss of opportunity. I also disagree with Rosch and Schonholtz that the dealers

had a real and significant chance at obtaining between $212 and $300 million, and $330 and $500 million, respectively. While the dealers may have had some chance in this regard, in my view, these amounts are speculative.

[604] Rather, within the limits of real and significant chance, the best possible result that the affected dealers could have obtained would have been a collective increase in their WDA payments of $92 million, that being the difference between the $126 million paid to the 202 dealers and the $218 million limit, the amount approved of and earmarked by GM and available to Comeau for securing the WDAs. In this regard it is worth emphasizing that the factors mentioned by Rosch and Schonholtz were known to GMCL and GM when the cap of $218 million was set.

The Value of the Lost Opportunity to Negotiate

[605] Having established an upper limit as to what the dealers had a chance to obtain, (i.e. the $218 million) I must now consider the reasonable probability of obtaining such a result and discount the damages award proportionally.

[606] As stated by the court in *Eastwalsh* at para. 37, a loss of chance will be reduced where more contingencies exist:

> In determining the worth of the chance the court reasoned that the assessment would depend upon the number of contingencies; the more contingencies, the lower value of the chance and the lower the likelihood of the case being satisfied in the plaintiff's favour. A greater likelihood of success obviously increased the value of the chance and the amount of recover.
>
> In short, in assessing damages the court must discount the value of the chance by the improbability of its occurrence.

[607] There are several additional negative factors identified by Cassels – some of which I have already considered in assessing whether the dealers had a real and significant chance to negotiate with GMCL – which I accept as being realistic and substantial contingencies, namely:

- the dealers, due to their differences, may have been unable to band together;
- notwithstanding GMCL's desire to avoid a *CCAA* filing, it was prepared to do so if a reasonable settlement could not be reached with the dealers and this was supported by the Canadian Governments;
- good faith negotiations could have simply failed;
- the leverage that the dealers would have enjoyed had limits given the fact that they could be cut in a *CCAA* filing and likely receive nothing; and

- the dealers could have asked for significantly less than the $218 million that Comeau had to work with.

[608] None of these contingencies, individually or together, negate the dealers' chance of achieving a higher payment through negotiation. Nor do they push that chance outside the realm of real and significant possibility. They are simply contingencies which lower the reasonable possibility of the chance lost by the dealers.

[609] Unlike in *Martin v. Goldfarb* (1998), 41 O.R. (3d) 161 (C.A.) [*Martin*], the impossibility of precise assessment of damages in this case is not due to the parties' own conduct, but rather due to the nature of the damages and the conduct giving rise to such losses. As Finlayson J.A. held in *Martin*, the general principle is that the plaintiff carries the burden of establishing a breach and the damages, including the quantum of damages, flowing from that breach. In some cases, the impossibility in calculating damages will require the court to do the best it can in the circumstances.

[610] In my view, it is far from certain that the affected dealers would have banded together and instructed Cassels to negotiate; that GMCL would have negotiated rather than file for *CCAA* protection; and that the Class Members would have achieved through negotiation the most that Comeau could offer without going to GM for permission to request more. In light of the contingencies, I find that the dealers had a 55 percent chance at obtaining a successful negotiation with GMCL. Therefore, I assess the value of the real and significant chance the dealers had at obtaining a $92 million dollar increase through negotiations with GMCL at $50.06 million which I have rounded down to $50 million. While I am mindful of the imprecise and imperfect nature of such a determination, having considered the myriad positive and negative contingencies surrounding this hypothetical negotiation, I am satisfied that the figure reflects the value of the opportunity lost by the Class Members on account of Cassels' breach of contract and negligence.

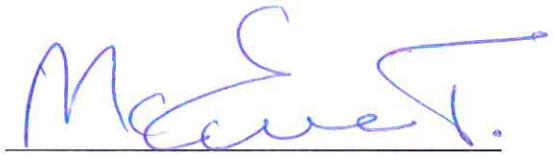
[611] However, only 181 of the affected dealers (or 89.6 percent of the affected dealers, which I have rounded up to 90 percent) chose to participate in this class action against Cassels. In these circumstances, I do not believe it would be just to allow the Class Members to reap the benefit of an aggregate damages award based on the 202 dealers who accepted WDAs. I therefore reduce damages further, awarding the Class Members 90 percent of $50 million, that being $45 million.

[612] This award includes the Saturn dealers. While I accept that the Saturn dealers would have been in a less advantageous position than the GMCL dealers in any negotiation, I find that, as Trillium submits, they would have banded together, as it would have made good sense to increase leverage by increasing their numbers. In these circumstances, I accept Trillium's position that the question of how to divide the damages is properly left to the stage where proceeds are distributed among the Class Members.

DISPOSITION

[613] For the reasons above, Trillium's claim against GMCL and GMCL's counterclaim are dismissed. Trillium is entitled to damages against Cassels for breach of fiduciary duty, breach of contract and professional negligence in the amount of $45,000,000.00.

[614] If Trillium and Cassels cannot agree on the amount of pre-judgment interest and post-judgment interest (Common Issue (m)) I can be spoken to. Similarly, if the parties cannot agree on costs they should make arrangements to appear before me.



Mr. Justice T. McEwen

Released: July 8, 2015

APPENDIX "A"

COMMON ISSUES

The following common issues were certified against GMCL and Cassels:

(a) Is GMCL a franchisor within the meaning of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (the "*Wishart Act*"), the *Franchises Act*, R.S.A. 2000, c-F-23 ("Alberta Act") and the *Franchises Act*, R.S.P.E.I. 1988, c F-14.1 ("PEI Act"), or any of them;

(b) Are all Class Members entitled to the benefit of the statutory duty of fair dealing under s. 3 of the *Wishart Act* and the right of association under s. 4 of the *Wishart Act* (or similar provisions under such franchise legislation otherwise governing any such class member) by virtue of the choice of law provisions in the standard General Motors Dealer Sales and Service Agreement and the Wind-Down Agreement;

(c) If GMCL owed a duty of fair dealing to the Class Members, did GMCL breach this duty by:

(i) delivering the Wind-Down Agreements to the Class Members on or after May 20, 2009 and requiring acceptance of the Wind-Down Agreements by 6 p.m. EST on May 26, 2009;

(ii) not disclosing to the Class Members the identities of dealers offered a Wind-Down Agreement;

(iii) stating in the Notice of Non-Renewal and Wind-Down Agreement that GMCL "will not be renewing the Dealer Sales and Service Agreement" between GMCL and each of the Class Members at the expiry of its current term on October 31, 2010;

(iv) stating in the Wind-Down Agreement that "it has always been and continues to be [GMCL's] position that the Acts are not applicable to the Dealer Agreement or the relations between GM and Dealer and/or Dealer Operator";

(v) stating in the Notice of Non-Renewal, the Wind-Down Agreement and the May 19, 2009 HIDL broadcasts that GMCL's offer of the Wind-Down Agreement was conditional upon all of the Non-Retained Dealers accepting the offer on or before May 26, 2009; or

(vi) breaching any terms of the Wind-Down Agreement;

(d) Did GMCL have a duty to disclose material facts concerning its restructuring to franchisees at the time of soliciting the Wind-Down Agreement? If so, did it fail to disclose material facts and did it breach such duties?

(e) If all Class Members had a statutory right to associate, did GMCL interfere with, prohibit, restrict, penalize, attempt to penalize or threaten to penalize the Class Members' exercise of this right by:

(i) delivering the Wind-Down Agreements to the Class Members on or after May 20, 2009 and requiring acceptance of the Wind-Down Agreements by 6 p.m. EST on May 26, 2009;

(ii) not disclosing to the Class Members the identities of the dealers offered a Wind-Down Agreement;

(iii) stating in the Notice of Non-Renewal and Wind-Down Agreement that GMCL "will not be renewing the Dealer Sales and Service Agreement" between GMCL and each of the Class Members at the expiry of its current term on October 31, 2010;

(iv) stating in the Wind-Down Agreement that "it has always been and continues to be [GMCL's] position that the Acts are not applicable to the Dealer Agreement or the relations between GM and Dealer and/or Dealer Operator";

(v) stating in the Notice of Non-Renewal, the Wind-Down Agreement and the May 19, 2009 HIDL broadcasts that GMCL's offer of the Wind-Down Agreement was conditional upon all of the Non-Retained Dealers accepting the offer on or before May 26, 2009; or

(vi) any terms of the Wind-Down Agreement;

(f) Are the waiver and release contained in s. 5 of the Wind-Down Agreement null, void and unenforceable in respect of the Class Members' rights under ss. 4 and 11 of the *Wishart Act* (or similar provisions under such franchise legislation otherwise governing any such class member);

(g) Was GMCL required to deliver to each Class Member a disclosure document within the meaning of the *Wishart Act*, the *Alberta Act* and the *PEI Act*, as the case may be, at least fourteen days before the Class Member signed the Wind-Down Agreement;

(h) By virtue of GMCL's failure to deliver any disclosure document:

(i) is each Class Member entitled to rescind the Wind-Down Agreement

within two years of signing the Wind-Down Agreement; and

(ii) is each Class Member carrying on business in Alberta entitled to cancel the Wind-Down Agreement, within two years of signing the Wind-Down Agreement;

(i) Is each Class Member which delivers to GMCL a notice of rescission or notice of cancellation, as the case may be, in respect of the Wind-Down Agreement within two years of signing the Wind-Down Agreement entitled to compensation under ss. 6(6) of the *Wishart Act* or the PEI Act or under s. 14(2) of the Alberta Act, as the case may be;

(j) Did Cassels Brock & Blackwell LLP ("Cassels") owe contractual duties to some or all of the Class Members and, if so, did Cassels breach those duties;

(k) Did Cassels owe fiduciary duties as lawyers to some or all of the Class Members and, if so, did Cassels breach those duties;

(l) Did Cassels owe duties of care to some or all of the Class Members and, if so, did Cassels breach those duties;

(m) What is the amount of pre-judgment and post-judgment interest applicable to any damages awarded?

The following common issues were certified in the counterclaim:

(a) Did each member of the Dealer Subclass breach section 5(c) of their respective Wind Down Agreements by commencing the Class Action and/or failing to opt out of the Class Action?

(b) If the answer to issue (a) is yes, is each member of the Defendant Class liable to indemnify GMCL against all claims, losses, damages, the amount of the Wind Down Payment and expenses which may be imposed upon or incurred by GMCL arising from, relating to or caused by the Defendant Class Members' breaches of the Wind Down Agreements?

(c) In the event that the release contained in section 5 of the Wind Down Agreement is void, which is denied by GMCL, have the Defendant Class Members been unjustly enriched at the expense of GMCL and therefore liable to make restitution to GMCL for all or some of the Wind Down Payment to each of them?

APPENDIX "B"

WITNESSES AND KEY PLAYERS

Lay Witnesses

Trillium

Thomas Hurdman ("Hurdman") was the dealer principal of Trillium, which was located in Toronto. Hurdman executed a WDA on behalf of the dealership.

Fern Turpin Jr. ("Turpin") was the dealer principal, along with his father ("Turpin Sr."), of Turpin Pontiac Buick GMC, Ltd., a GMCL dealership located in Ottawa. Turpin also helped operate a Saturn/Saab dealership in Ottawa co-owned by his father with another principal. The Turpins executed WDAs on behalf of both dealerships.

Brian Condie ("Condie") was the dealer principal of Condie Pontiac Buick GMC in Kingston. Condie also executed a WDA.

Robert Johnson ("Johnson") was a former GMCL dealer principal in Brampton. His dealership was retained by GMCL. In 2009 he was a member of the GMCL Dealer Communications Team.

John Carroll ("Carroll") was a GMCL principal owning a number of dealerships in Nova Scotia. Carroll received a WDA, which, following negotiations, was later rescinded by GMCL. He was also a member of the Dealer Communications Team.

GMCL

Marc Comeau ("Comeau") is Vice President of GM Korea. In 2008 and 2009, Comeau was GMCL's Vice President of Sales, Service and Marketing. He was responsible for GMCL's sales activities, dealer network activities and marketing activities. Comeau was the most senior person at GMCL responsible for dealer relations. He was GMCL's point person with the dealers and played a pivotal role in the development and delivery of the WDAs. He reported directly to GMCL's president at the time, Arturo Elias ("Elias"). Comeau was also a member of GMCL's Board of Directors.

John Stapleton ("Stapleton") is the Chief Financial Officer of General Motors North America ("GMNA") which covers Canada, the U.S. and Mexico. In 2008 and 2009, he was the CFO and Vice President of Finance of GMCL. He, too, reported to Elias. During the relevant times, he was closely involved in discussions and negotiations with the Canadian Governments and U.S. Governments to obtain financial assistance, and he took a lead role in negotiating a settlement with the Canadian Auto Workers ("the CAW"). He was also a member of GMCL's Board of Directors.

Neil Macdonald ("Macdonald") is the Vice President of Corporate Affairs, General Counsel and Secretary of GMCL as well as a member of the Board of Directors. He is responsible for the overall legal affairs of GMCL and was involved extensively in preparing GMCL's potential filing under the *CCAA*.

Paul Risebrough ("Risebrough") was GMCL's Director of Dealer Network Planning, Dealer Organization and Business Management during the relevant period. He retired in 2011. He was two rungs below Comeau on the corporate ladder and interacted with GMCL's dealer network. He was intimately involved in GMCL's restructuring of the dealer network.

Lawrence Buonomo ("Buonomo") was the Global Chief Litigation Counsel at GM until June 2014. He is a lawyer. During 2008 and 2009 he was extensively involved in GM's effort to secure financing from the U.S. Government. He also played a role in planning for a GM bankruptcy filing and played an important role in negotiations with Bond Holders in the critical period from May 27 to June 1, 2009.

Gaetan Boily ("Boily") was a former dealer principal of a GMCL dealership in Montreal, Quebec. He was one of the retained dealers. He was also a member of the GMCL Dealer Communications Team.

Cassels

Peter Harris ("Harris") practiced at Cassels between 2006 and 2011. He now operates his own firm and practices commercial and tax law. He has a long standing relationship with the Canadian Automobile Dealers Association ("CADA").

Bruce Leonard ("Leonard") joined Cassels in 1993 and practices in the firm's restructuring and insolvency group with a particular focus on international insolvency.

Glenn Zakaib ("Zakaib") joined Cassels in 1987 and practices mainly in the areas of product liability and class proceedings.

Mark Young ("Young") is the managing partner of Cassels and has been with the firm since 1994. He has been the managing partner since 2000. His practice focused primarily on public offerings, private placement transaction, mergers and acquisitions and corporate reorganizations and financings.

David Ward ("Ward") joined Cassels in 1992 and practices restructuring and insolvency law, and participates in the firm's commercial litigation and construction groups.

Timothy Ryan ("Ryan") is the Director of Industry Relations and General Counsel of the Canadian Automobile Dealers Association (CADA).

Expert Witnesses

Trillium Experts

Sandra Rosch ("Rosch") is a principal of Stonecrest Capital Inc. She has a Bachelor of Commerce and a Masters of Business Administration. She has experience in investment banking and complex restructurings under the *CCAA*. Rosch testified as to whether GMCL would have negotiated with the dealers and if so, how much more GMCL would have been prepared to pay.

Margot Schonholtz ("Schonholtz") is a lawyer practicing with the U.S. firm of Willkie, Farr, and Gallagher LLP, specializing in complex restructuring and insolvency matters. She provided the same expert testimony as Rosch.

Gerald Kandestin ("Kandestin") is a partner with the law firm of Kugler Kandestin LLP, in Montreal. His practice is concentrated in bankruptcy, insolvency and restructuring matters. He opined on what a competent, unconflicted law firm would have done, in the *CCAA* context, to properly represent the affected dealers and whether Cassels had met this standard.

GMCL Experts

Robert Harlang ("Harlang") is a Managing Director of Duff & Phelps. Harlang has experience in insolvency and restructuring matters in a wide variety of industries and has been involved in insolvency and restructuring projects. He opined on the factors that may have impacted the decision of GMCL to proceed with an application under the *CCAA*, the factors that may have impacted upon GMCL's willingness or ability to negotiate with the affected dealers in May 2009, and whether GMCL would have negotiated the WDAs.

John McKenna ("McKenna") is a partner with PWC LLP with experience in the area of corporate restructuring and insolvency in both the United States and Canada. McKenna testified on the same matters as Harlang.

Sharif Farhat ("Farhat") is a Vice President of Expert Analytical Services for Urban Science Applications Inc. in Detroit, Michigan. Farhat testified with respect to the GMCL dealer network, its rationalization and the way in which affected dealers were selected. I did not find it necessary to repeat or rely on his testimony in my Reasons for Decision.

Cassels' Experts

Ken Rosenberg ("Rosenberg") is a partner with the law firm Paliare Roland Rosenberg Rothstein LLP. His practice involves insolvency, business, regulatory and administrative law advocacy. He has experience involving *CCAA* matters and class action litigation. Rosenberg opined as to whether Cassels met the standard of care in relation to the events in April and May 2009.

John Levin ("Levin") is a partner with the law firm Fasken Martineau Du Moulin LLP. Levin

has experience in areas of banking and insolvency law, among other areas. He too has experience in corporate takeover and restructuring transactions. He was asked to opine as to whether it is common in a typical corporate/commercial/insolvency practice in Ontario for a solicitor, acting on the instructions of a client, to provide legal information to non-client parties without purporting to have a solicitor-client relationship.

APPENDIX "C"

TRILLIUM'S NOTICE OF NON-RENEWAL AND WDA

Marc I. Comeau
Vice President
Sales, Service & Marketing

General Motors of Canada Limited
Sales, Service & Marketing
Mail Code: CA1-130-001
1908 Colonel Sam Drive
Oshawa, ON L1H 8P7
marc.comeau@gm.com

VIA E-MAIL
PERSONAL & CONFIDENTIAL

May 20, 2009

Mr. T.L. Hurdman
Trillium Pontiac Buick GMC Ltd.
35 Auto Mall Drive
SCARBOROUGH, ON M1B 5N5

Attention: Lynt

This letter is being delivered to Trillium Pontiac Buick GMC Ltd. further to GM Canada's HIDL Dealer Broadcast on May 19, 2009 concerning our restructuring efforts.

The unprecedented economic conditions in the United States and Canada and in our industry have made it necessary for us to restructure our business and operations significantly. The restructuring plan also includes addressing GM Canada's dealer network in order to maintain GM Canada's long term viability. Part of that restructuring is a planned reduction in the number of GM Canada dealerships. As we have communicated to all dealers, our revised restructuring plan is a result of GM being challenged to move more aggressively and faster in its restructuring efforts.

In our planning, we have identified those attributes that GM dealers must have to be a successful part of the dealer network going forward. We also reviewed historical performance factors such as sales effectiveness, CSI performance, capitalization, profitability, location, facilities, among other market factors. We have also conducted an analysis of Trillium Pontiac Buick GMC Ltd.'s operations and market. We are providing you with our conclusions regarding Trillium Pontiac Buick GMC Ltd. dealership in connection with our dealer network plans now, in the spirit of open and candid communication.

Based on this review, GM Canada has decided, and we are hereby notifying you that we will not be renewing the Dealer Sales and Service Agreement between Trillium Pontiac Buick GMC Ltd. and General Motors of Canada Limited (the "Dealer Agreement") at the expiry of its current term, and accordingly the Dealer Agreement will expire on October 31, 2010. We know this is a difficult situation. However, we feel that it is best to openly communicate our decision to you now. The need for this review, analysis and decision was forced on us by extremely difficult economic conditions both of us face in the industry. Simply put, we must have a viable, competitive dealer network going forward.

Attached for your review is a copy of the Wind-Down Agreement that was discussed during the HIDL Dealer Broadcast earlier this week. This letter and a copy of the Wind-Down Agreement have been delivered today to approximately 240 dealers across Canada (the "Non-Retained Dealers"). The Wind-Down Agreement sets out the terms and conditions upon which GM Canada is prepared to make certain formula-based payments to the Non-Retained Dealers in exchange for the dealers' commitment to continue operating their dealerships until they voluntarily terminate their Dealer Agreements effective December 31, 2009 (or such other date as GM may approve, but in any event on or prior to October 31, 2010) (the "Wind-Down Period"), to waive all termination assistance rights under the Dealer Agreement and to provide a general release in favour of GM Canada and its Affiliates. The payment is intended to assist winding down your operations as a GM dealer, in as orderly a way as possible under the

(ii)

current circumstances. It will also provide financial assistance to remain in business throughout the Wind Down Period, such that the transition of your business can follow an orderly path.

Our offer, as set out in the Wind-Down Agreement, is conditional upon all of the Non-Retained Dealers accepting the offer (the "Acceptance Threshold Condition") and executing and delivering their respective Wind-Down Agreements to GM Canada on or before **May 26, 2009 at 6:00 pm EST** (the "End of the Offer Period"). GM Canada reserves the right, in its discretion, to waive the Acceptance Threshold Condition. Any Wind-Down Agreements signed and returned to GM Canada by the End of the Offer Period will not become effective unless and until GM Canada provides written notice to those dealers that the Acceptance Threshold Condition and any other required conditions have been met or have been waived by GM Canada.

These difficult actions with respect to GM Canada's dealer network restructuring are part of a number of initiatives that GM Canada has undertaken, and must achieve quickly, to avoid the necessity of filing for reorganization. If you are interested in entering into the Wind-Down Agreement, you should review the Wind-Down Agreement with legal, tax and any other advisors of your choosing. To accept, please request your counsel to complete a certificate of independent legal advice (attached as an Exhibit to the Wind-Down Agreement). Please send the signed certificate together with the executed Wind-Down Agreement by the End of the Offer Period by pdf or fax to your Regional Zone Office Manager, as listed below, with two original signed copies of the Agreement, each with an original signed Certificate, to follow by courier.

We look forward to receiving your response.

Very truly yours,

Marc Comeau
Vice President, Sales, Service & Marketing

Western Region
Mr. G.R. Lemmerick - Western Region Manager
General Motors of Canada Limited
4220 Blackfoot Trail S.E.
Calgary, Alberta T2G 4E6
Mail Code: CA3-100-005
E-Mail: glenn.lemmerick@gm.com
Fax Number: 403-243-3377

Central Region
Ms. S. Voitka - Central Region Manager
General Motors of Canada Limited
1908 Colonel Sam Drive
Oshawa, Ontario L1H 8P7
Mail Code: CA1-184-001
E-Mail: sandra.voitka@gm.com
Fax Number: 905-644-2632

Eastern Region
Mr. S.J. O'Reilly - Eastern Region Manager
General Motors of Canada Limited
5000 Route Trans-Canadienne
Pointe-Claire, Quebec H9R 4R2
Mail Code: CA2-200-005
E-Mail: steve.oreilly@gm.com
Fax Number: 514-630-7395

(iii)

THIS WIND DOWN AGREEMENT (this "Agreement") is made and entered into as of the Effective Date (as hereinafter defined), by and between Trillium Pontiac Buick GMC Ltd., ("Dealer"), and Mr. T.L. Hurdman, an individual residing in SCARBOROUGH, ON (the "Dealer Operator") and GENERAL MOTORS OF CANADA LIMITED, a corporation incorporated under the laws of Canada ("GM").

RECITALS

A. Dealer and GM are the parties to a Dealer Sales and Service Agreement and the schedules, exhibits and attachments thereto and all home office letters and policies issued by GM from time to time (collectively, the "Dealer Agreement"). Dealer's Dealership Operations are currently located at 35 Auto Mall Drive in SCARBOROUGH, ON. Capitalized terms not otherwise defined in this Agreement shall have the definitions set forth for such terms in the Dealer Agreement.

B. GM has provided Dealer with written notice (the "Notice of Non-Renewal") that it will not be renewing the Dealer Agreement at the expiry of its current term and the Dealer Agreement will expire on October 31, 2010.

C. GM has provided Notices of Non-Renewal to approximately 240 dealers across Canada, including Dealer (collectively, the "Non-Retained Dealers") and has offered to enter a wind down agreement (the "Wind Down Agreement") with each of the Non-Retained Dealers on terms and conditions substantially the same as those set forth herein.

D. Subject to the terms and conditions set forth herein, Dealer, Dealer Operator and GM desire to enter into this Agreement, providing for, among other things, (i) Dealer Operator's voluntary resignation and Dealer's voluntary termination and cancellation of the Dealer Agreement on December 31, 2009 (or such other date as GM may approve under this Agreement, but in any event on or prior to October 31, 2010), (ii) GM's payment of certain monetary consideration to Dealer, (iii) Dealer's and Dealer Operator's covenants regarding its continuing Dealership Operations under the Dealer Agreement, as supplemented and amended by the terms of this Agreement (the "Subject Dealership Operations" and (iv) Dealer's and Dealer Operator's release of GM and other GM Entities (as defined below) from any and all liability arising out of or connected with the Dealer Agreement, any predecessor agreement(s) thereto, and the relationship between GM, Dealer and Dealer Operator relating to the Dealer Agreement, and any predecessor agreement(s) thereto, all on the terms and conditions set forth herein.

COVENANTS

NOW, THEREFORE, in consideration of the foregoing recitals and the premises and covenants contained herein, Dealer, Dealer Operator and GM hereby agree as follows:

1. Non-Retained Dealers Acceptance Threshold. GM's offer to the Dealer set forth in this Agreement is conditional upon all of the Non-Retained Dealers accepting the offer (the "Acceptance Threshold Condition") and executing and delivering their respective Wind Down Agreements to GM (together with the Certificate of Independent Legal Advice attached as Exhibit "B" hereto) on or before **May 26, 2009 at 6:00 p.m. EST** (the "End of the Offer Period"). The parties acknowledge that the Acceptance Threshold Condition is solely for GM's benefit and GM reserves the right, in its discretion, to waive the Acceptance Threshold Condition for any reason whatsoever. If GM provide written notice (the "Agreement Effectiveness Notice") to the Dealer by May 30, 2009 either that: (a) the Acceptance Threshold Condition is satisfied; or (b) GM waives the Acceptance Threshold Condition, then this Agreement shall become effective as of the date of the Agreement Effectiveness Notice (such date is

referred to herein as the "Effective Date") and GM shall thereafter execute and deliver to Dealer a fully executed copy of this Agreement. In the event that GM does not provide the Dealer with the Agreement Effectiveness Notice by May 30, 2009, then this Agreement shall be considered void and will have no force or effect.

2. Payment to Dealer.

(a) In consideration of Dealer's and Dealer Operator's execution and delivery to GM of this Agreement, and Dealer Operator's voluntary resignation and Dealer's voluntary termination and cancellation of the Dealer Agreement as set forth in Section 3 of this Agreement, and provided Dealer is in compliance with its obligations under this Agreement, including without limitation Sections 2(b), 2(c) and 3(a) below, GM shall pay, or cause to be paid, to Dealer the "Wind Down Payment" (as defined in and calculated pursuant to Exhibit "A"), which Wind Down Payment shall be payable in four instalments (each such payment referred to herein as an "Instalment Payment" and the final such instalment payment referred to herein as the "Final Payment") and in accordance with the payment schedule set forth in Exhibit "A". Each of the four payment dates referred to in Exhibit "A" constitute a "Payment Date" and the final payment date referred to in Exhibit "A" also constitutes the "Final Payment Date" for the purposes of this Agreement, subject to the terms and conditions set forth in this Agreement. The Wind Down Payment is consideration for Dealer Operator's and Dealer's covenants, representations, warranties, releases and waivers set forth herein.

(b) GM shall pay each instalment of the Wind Down Payment to the Dealer by crediting Dealer's open account maintained on the GM dealer payment system (the "Open Account") on the Payment Dates, provided the following have occurred or are true, on each Payment Date:

(i) Dealer shall be in compliance with all applicable bulk transfer, sales tax transfer or similar laws and the expiration of all time periods provided;

(ii) Dealer shall have delivered to GM evidence reasonably satisfactory to GM that GM shall have no liability or obligation to pay any sales, use, goods and services, harmonized sales or other taxes that may be owing by Dealer, including where applicable, certificates of applicable taxing authorities indicating that Dealer has paid such taxes;

(iii) Dealer shall have fully complied with its covenants, obligations and terms set forth in this Agreement;

(iv) Dealer shall be in full compliance with its representations and warranties in this Agreement;

(v) Dealer must not: (1) be wound up, dissolved, or liquidated under any law or otherwise have its existence terminated or pass any resolution or become subject to any order in connection with any of the foregoing; (2) make a general assignment for the benefit of its creditors, acknowledge its insolvency or be declared or become bankrupt or insolvent, or cease to carry on or fail in its business; (3) commit an act of bankruptcy, file a proposal or notice of intention to make a proposal or be issued a notice of intention to enforce security under the *Bankruptcy and Insolvency Act* (Canada) or any similar law of any jurisdiction; (4) file or have a proceeding commenced against it (whether voluntary or involuntary) seeking any stay of proceedings, protection from creditors, moratorium, reorganization, arrangement, composition, re-adjustment, or any other relief under any present or future law of any jurisdiction relative to bankruptcy, insolvency,

reorganization or other relief for debtors or affecting creditors' rights, including the *Companies' Creditors Arrangement Act* (Canada); or (5) be subject to the appointment of any trustee in bankruptcy, interim receiver, receiver, receiver and manager, monitor or liquidator or any other person with similar powers, in respect of the Dealer or any part of its business, property or undertaking;

(vi) Dealer shall have operated the business in accordance with the Dealer Agreement, in the ordinary course consistent with past practice, and with this Agreement, and shall not have liquidated, or commenced liquidation of, any part of the Dealer's property, assets or undertaking; and

(vii) in furtherance of effecting an orderly wind down of Dealer's operations and to encourage Dealer to use commercially reasonably efforts to sell its new Motor Vehicle inventory during the Wind Down Period, with respect to the second Instalment Payment, Dealer shall have sold to *bona fide* arm's length retail or fleet customers or to another GM authorized dealer of GM Products in Canada, for use or distribution in Canada, at least 25% of the existing inventory of new Motor Vehicles of Dealer held on the Effective Date during the period from the Effective Date to and including the second Payment Date, and with respect to the third Instalment Payment, Dealer shall have sold to a *bona fide* arm's length retail or fleet customers or to another GM authorized dealer of GM Products in Canada, for use or distribution in Canada, at least 45% of the existing inventory of new Motor Vehicles held on the Effective Date during the period from the Effective Date to the third Payment Date.

(c) In addition to the conditions set forth in Section 2(b) above which apply to all Instalment Payments, unless expressly set forth therein, GM shall pay the Final Payment, provided the following have occurred or are true:

(i) Dealer shall have sold all of its inventory of new Motor Vehicles either to *bona fide* arm's length retail or fleet customers or to another GM authorized dealer of GM Products, in Canada, for use or distribution in Canada;

(ii) without limiting the generality of Section 2(b)(ii) above, Dealer shall have fully complied with its obligations in Section 4(b) below with respect to permitting and cooperating with the removal from the Premises of all signs (freestanding or not) used in connection with the Subject Dealership Operations; and

(iii) Dealer shall have ceased all business operations of the Subject Dealership Operations and shall have complied with all obligations under the Dealer Agreement, including the post-termination obligations thereunder.

3. Termination of Dealer Agreement.

(a) Dealer hereby covenants and agrees to conduct the Subject Dealership Operations up to and including December 31, 2009 (the "Termination Date") under and in accordance with the terms of the Dealer Agreement, as supplemented or amended by the terms of this Agreement; provided however, (i) that the parties can agree in writing upon an earlier Termination Date; (ii) upon written request from Dealer, GM may, in its discretion, consent to the Termination Date occurring on a later date, but in any event on or prior to October 31, 2010; or (iii) in the event of default or breach of any covenants, obligations or terms under this Agreement or the Dealer Agreement, GM may, at its option, (1) terminate this Agreement and shall have no further

obligations hereunder, or (2) cease making any further payments under this Agreement and shall have no further obligations under this Agreement. Any earlier or later termination date approved pursuant to this Section 3(a) shall constitute the "Termination Date" for the purpose of this Agreement.

(b) Dealer Operator hereby voluntarily resigns, and the Dealer hereby terminates and cancels the Dealer Agreement, as of the Termination Date, such termination and cancellation being hereby accepted by GM, forming the agreement referenced in Article 14.2 thereof. Effective on the Termination Date, the Dealer shall cease operating the Subject Dealership Operations at the Premises.

(c) Payment of all or any part of the Final Payment on the Final Payment Date may, in GM's reasonable discretion, be:

(i) reduced by any amount owed by Dealer to GM, General Motors Acceptance Corporation of Canada, Limited or any of their Affiliates (as defined in Section 5(e) below), and/or

(ii) delayed in the event GM has a reasonable basis to believe that any third party has or claims any interest in the assets or properties of Dealer relating to the Subject Dealership Operations including, but not limited to, all or any part of the Final Payment (each, a "Competing Claim"), in which event GM may delay payment of all or any part of the Final Payment until GM has received evidence in form and substance reasonably acceptable to GM that all Competing Claims have been fully and finally resolved.

4. Complete Waiver of All Termination Assistance Rights.

(a) Dealer and Dealer Operator hereby acknowledge and agree that in consideration of GM's payment of the Wind Down Payment in accordance with the terms and conditions of this Agreement, Dealer and Dealer Operator hereby waive all of Dealer's rights to receive termination assistance, whether under the Dealer Agreement or applicable laws or otherwise. For greater clarification, the Dealer and the Dealer Operator expressly waive the provisions of Article 15 of the Dealer Agreement, including:

(i) any obligation of GM to purchase from Dealer any Motor Vehicles whatsoever; and

(ii) any obligation of GM to purchase from or accept returns from Dealer of any Parts and/or Accessories whatsoever.

(b) Dealer shall permit removal from the Premises of all signs, interior or exterior, (freestanding or not) used in connection with the Subject Dealership Operations by GM, Pattison Sign Group by any of their designees, within ten business days of the Termination Date or such later date designated by GM. Dealer and Dealer Operator shall provide reasonable cooperation in such removal. Dealer and Dealer Operator understand and agree that GM will not purchase any signs used in connection with the Subject Dealership Operations, including those bearing any Marks. Dealer and Dealer Operator hereby waive any rights it or they may have to require GM to purchase any signs used or useful in connection with the Subject Dealership Operations. Dealer and Dealer Operator understand and agree that the "Sign Removal Allowance" (as defined in Exhibit "A"), being part of the Wind Down Payment, was determined by GM based in part on Dealer's agreement that it would permit the removal of signs used in connection with the Subject Dealership Operations as set forth above, Dealer and Dealer Operator's agreement that it or they

will not require or attempt to require GM to purchase any or all of such signs pursuant to the provisions of the Dealer Agreement or any applicable statutes, regulations or other laws.

(c) In consideration of GM's agreement to pay the Wind Down Payment to Dealer, Dealer and Dealer Operator expressly agree that all termination rights of Dealer and/or Dealer Operator are set forth herein and each expressly agrees that any termination assistance otherwise available to Dealer and/or Dealer Operator as set forth in any applicable statute, regulation or other law, or otherwise, shall not apply to the termination of the Dealer Agreement as set forth under this Agreement.

5. Release; Covenant Not to Sue; Indemnity.

(a) Each of Dealer and Dealer Operator on their own behalf and on behalf of any of their respective Affiliates, members, partners, venturers, shareholders, Dealer Owners, officers, directors, employees, agents, spouses, legal representatives, heirs, administrators, executors, successors, and assigns (collectively, the "Dealer Parties"), hereby absolutely and irrevocably, subject to the conditions set forth in the concluding paragraph of this Section 5(a), releases, settles, cancels, discharges, and acknowledges to be fully satisfied any and all claims, demands, complaints, damages, debts, liabilities, obligations, costs, expenses, liens, actions, and causes of action of every kind and nature whatsoever (including without limiting the generality of the foregoing, negligence), whether known or unknown, foreseen or unforeseen, suspected or unsuspected, in law or in equity ("Claims"), which any of the Dealer Parties may have as of the Effective Date or may thereafter have or acquire at any time against GM, its Affiliates, or any of its or their members, partners, venturers, shareholders, officers, directors, employees, agents, spouses, legal representatives, heirs, administrators, executors, successors, or assigns (collectively, the "GM Entities"), arising out of or relating to:

(i) the Dealer Agreement, this Agreement or any predecessor agreement(s);

(ii) the National Automobile Arbitration Program;

(iii) the operation of the Subject Dealership Operations, including without limitation any Dealer's employees' severance Claims against any of the Dealer Parties;

(iv) any facilities agreements in respect of the Subject Dealership Operations, including without limitation, any claims related to or arising out of dealership facilities, locations, requirements, or image stipends, and any representations or warranties regarding motor vehicle sales or profits associated with Subject Dealership Operations under the Dealer Agreement;

(v) or any and all applicable statute, regulation, or other law, including Ontario's Arthur Wishart Act (Franchise Disclosure), 2000, Alberta's Franchises Act, Prince Edward Island's Franchises Act and/or any other similar franchise legislation which may be enacted or proclaimed in force in the future (collectively, the "Acts"). Dealer and Dealer Operator acknowledge that it has always been and continues to be GM's position that the Acts are not applicable to the Dealer Agreement or the relations between GM and Dealer and/or Dealer Operator. However, if a court were to conclude otherwise, Dealer and Dealer Operator specifically acknowledge that it and they are hereby waiving any and all rights given to it or them under the Acts and are hereby releasing GM and the other GM Entities from any obligation or requirement imposed on GM and/or any of the other GM Entities by the Acts and further acknowledge that they are doing so with full awareness of such rights, obligations and requirements, and intend to waive its and their

rights to: (1) any Claim for a breach of the duty of fair dealing in the performance or enforcement of or exercise of any right under the Dealer Agreement; (2) any Claim for GM and/or any of the other GM Entities penalizing, attempting to penalize or threatening to penalize the Dealer and/or the Dealer Operator for associating with other GM dealers or retailers; (3) any Claim for damages for a misrepresentation contained in a disclosure document or a statement of material change; (4) any Claim for rescission for failure to provide a disclosure document or a statement of material change as required by the Acts; (5) any Claim for rescission for failure to provide a disclosure document or a statement of material change within the time required by the Acts; (f) any Claim for rescission for providing a deficient disclosure document or statement of material change as required by the Acts; and (g) any other Claims arising under one or more or all of the Acts; or

(vi) any other events, transactions, claims, discussions or circumstances of any kind,

provided, however, that the foregoing release shall be conditional upon GM making the Wind Down Payment in accordance with and subject to the terms and conditions of this Agreement and shall not extend to (x) reimbursement to Dealer of unpaid warranty claims, (y) the payment to Dealer of any incentives currently owing to Dealer or any amounts currently owing to Dealer in its Open Account, or (z) any claims of Dealer pursuant to Article 17.4 of the Dealer Agreement, all of which amounts described in (x) - (z) above of this sentence shall be subject to setoff by GM of any amounts due or to become due to GM or General Motors Acceptance Corporation of Canada, Limited, or any of their Affiliates. GM shall not charge back to Dealer any GM warranty claims approved and paid by GM prior to the Termination Date, , after the later to occur of (A) the date six (6) months following payment, or (B) the Termination Date, except that GM may make charge-backs for false, fraudulent or unsubstantiated claims within two (2) years of payment.

(b) As set forth above, GM reaffirms the indemnification provisions of Article 17.4 of the Dealer Agreement and specifically agrees that such provisions apply to new Motor Vehicles sold by Dealer prior to the Termination Date.

(c) Dealer and Dealer Operator on their own behalf and on behalf of the other Dealer Parties, hereby agree not to, at any time, sue, protest, institute or assist in instituting any proceeding in any court, arbitration, or administrative proceeding, or otherwise assert any Claim that is covered by the release provision in subparagraph (a) above. For greater certainty, Dealer and Dealer Operator on their own behalf and on behalf of the other Dealer Parties, expressly acknowledge that the release provision in subparagraph (a) above includes, without limitation, a complete, full and final release of any Claims of any nature or kind which Dealer, Dealer Operator and/or any of the other Dealer Parties may have for equitable relief, the recovery of damages or an accounting of profits in any representative action or class proceeding commenced by any other past, present or future dealer or retailer of GM or any of the other GM Entities, and Dealer and Dealer Operator on their own behalf and on behalf of the other Dealer Parties, hereby irrevocably agree to take whatever affirmative steps may be necessary to opt out of or disclaim any interest in any such action or proceeding. Dealer and Dealer Operator on their own behalf and on behalf of the other Dealer Parties, hereby agree not to make or pursue any Claim against any person which might claim contribution or indemnity from GM or any of the other GM Entities. Notwithstanding anything to the contrary, Dealer and Dealer Operator on their own behalf and on behalf of the other Dealer Parties, acknowledge and agree that GM will suffer irreparable harm from the breach by any Dealer Party of this covenant not to sue or participate in any action and therefore agrees that GM shall be entitled to any equitable remedies available to GM, including,

without limitation, injunctive relief, upon the breach of such covenant not to sue or participate in any action by any Dealer Party.

(d) Dealer and Dealer Operator shall, and do hereby, jointly and severally, indemnify, defend and hold GM, its Affiliates and its and their members, partners, venturers, shareholders, officers, directors, employees, agents, spouses, legal representatives, heirs, administrators, executors, successors, and assigns (the "Indemnified Parties") harmless, from and against any and all Claims, demands, fines, penalties, suits, causes of action, liabilities, losses, damages, the amount of the Wind Down Payment received by Dealer, and expenses (including, without limitation, reasonable legal fees on a substantial indemnity or on a solicitor and its own client basis and costs) which may be imposed upon or incurred by the Indemnified Parties, or any of them, arising from, relating to, or caused by Dealer's or Dealer Operator's (or any other Dealer Party's) breach of this Agreement, breach of any representation or warranty contained in this Agreement, or Dealer's or Dealer Operator's execution or delivery of or performance under this Agreement.

(e) For the purposes of this Agreement, "Affiliate" means, with respect to any Person (as defined below), any Person that controls, is controlled by or is under common control with such Person, together with its and their respective partners, venturers, directors, officers, shareholders, agents, employees and spouses; and "Person" means an individual, partnership, association, corporation or other entity. A Person shall be presumed to have control when it possesses the power, directly or indirectly, to direct, or cause the direction of, the management or policies of another Person, whether through ownership of voting securities, by contract, or otherwise.

6. Subject Dealership Operations. From the Effective Date of this Agreement until the Termination Date:

(a) Dealer shall not, and shall have no right to, purchase Motor Vehicles from GM, which rights Dealer hereby waives;

(b) Dealer shall not, and shall have no right to, propose to GM (under Section 12.3 of the Dealer Agreement or otherwise) or consummate a change in Dealer Operator, a change in ownership, or a transfer of the dealership business or its principal assets to any Person; provided, however, that GM shall honour the terms of Section 12.2 of the Dealer Agreement upon the death or incapacity of the Dealer Operator if the successor agrees to be bound by the provisions of this Agreement and the term of any new dealer agreement under Subsection 12.2.5 shall expire on the Termination Date. Accordingly, GM shall have no obligation (under Section 12.3 of the Dealer Agreement or otherwise) to review, process, respond to, or approve any application or proposal to accomplish any such change, except as expressly otherwise provided in the preceding sentence;

(c) the following portions of the Dealer Agreement shall not apply: Sections 6.1 and 6.3.1 (concerning ordering of new Motor Vehicles), Article 8 (Training), Article 9 (Review of Dealer's Performance), Sections 12.3 and 12.4 (Changes in Management and Ownership), Article 15 (Termination Assistance), and Article 16 (Dispute Resolution); and

(d) Dealer shall have the right to purchase service parts from GM to perform warranty service and other normal service operations at the Premises. Notwithstanding anything set out in this Agreement, Dealer shall have no obligation to follow the recommendations of GM's Retail Inventory Management ("RIM") process, which recommendations will be provided for guidance purposes only. Dealer's future orders of service parts of any kind (as well as service parts currently on hand and those acquired in the future from a source other than GM), including but not limited to RIM-recommended orders, shall not be eligible for return to GM.

7. Due Authority. Dealer and Dealer Operator hereby jointly and severally represent and warrant to GM that this Agreement has been duly authorized by Dealer and Dealer Operator, that all necessary corporate action has been taken and all necessary corporate or other approvals have been obtained in connection with the execution and delivery of and performance under this Agreement and that Dealer and/or Dealer Operator has or have all necessary authority to enter into this Agreement on behalf of the Dealer and Dealer Operator, as appropriate.

8. Confidentiality. Dealer and Dealer Operator hereby agree that, without the prior written consent of GM, they shall not disclose to any person (other than (a) its or their agents or employees having a need to know such information in the conduct of their duties for Dealer or Dealer Operator, or (b) its or their legal, tax or other professional advisors, or (c) representatives of the Canadian Automobile Dealers Association, in each case provided such individuals shall be bound by a similar undertaking of confidentiality) the terms or conditions of this Agreement or any facts relating hereto or to the underlying transactions, except where the disclosure is required pursuant to an order of a court, arbitrator or arbitration panel, administrative tribunal or other body having the power to compel the production of such information. Such disclosure shall be made only to the extent so ordered and provided that Dealer and/or Dealer Operator receiving such an order promptly notifies GM so that it may intervene in response to such order, or if timely notice cannot be given, seeks to obtain a protective order from the court or government for such information.

9. Informed and Voluntary Acts. Dealer and Dealer Operator have reviewed this Agreement with its and their respective legal, tax, and any other advisors, and are fully aware of all of its and their rights and alternatives. In executing this Agreement, Dealer and Dealer Operator acknowledge that its and their decisions and actions are entirely voluntary and free from any mental, physical, or economic duress. Dealer and Dealer Operator acknowledge and agree that a Certificate of Independent Legal Advice in the form attached as Exhibit "B" hereof shall be completed and submitted with the execution copy of this Agreement.

10. Binding Effect. This Agreement shall benefit and be binding upon (a) to the extent permitted by this Agreement, any replacement or successor dealer or retailer as referred to in the Dealer Agreement, and any successors or assigns, including without limitation, any trustee in bankruptcy, interim receiver, receiver, receiver and manager, monitor, liquidator, or any other person with similar powers appointed in respect of the Dealer or any part of its business, property or undertaking, and (b) any of GM's successors or assigns.

11. Effectiveness. This Agreement shall be deemed withdrawn and shall be null and void and of no further force or effect unless, subject to Section 1 above, this Agreement is executed fully and properly by Dealer and Dealer Operator and is returned to GM, together with the executed Certificate of Independent Legal Advice referred to in Section 9 above, on or before May 26, 2009 at 6:00 P.M. EST. This Agreement shall constitute an agreement, executed by authorized representatives of the parties, supplementing the Dealer Agreement as contemplated by Section 17.11 thereof.

12. Notices. All notices, demands, requests, and other communications required or permitted under this Agreement shall be in writing and shall only be deemed properly given and received (a) when actually given and received, if delivered in person to a party; or (b) one (1) business day after deposit with a private courier or overnight delivery service for next-business-day delivery. All such notices shall be transmitted by one of the methods described above to the party to receive the notice at, in the case of notices to Dealer, and/or Dealer Operator to the address set forth in Recital A above; in the case of GM, to 1908 Colonel Sam Drive, Oshawa, L1H 8P7, Attention: Vice President – Sales, Service & Marketing or,

in any case, at such other address(es) as Dealer, Dealer Operator or GM may notify the other of according to this Section 12.

13. Governing Law. This Agreement is governed by the laws of the Province of Ontario. However, if performance under this Agreement is illegal under a valid law of any jurisdiction where such performance is to take place, performance will be modified to the minimum extent necessary to comply with such law.

14. Complete Agreement of the Parties. This Agreement and the Dealer Agreement, (i) contain the entire understanding of the parties relating to the subject matter of this Agreement, and (ii) supersede all prior statements, representations, agreements understandings, negotiations and discussions relating to the subject matter of this Agreement. The parties represent and agree that, in entering into this Agreement, they have not relied upon any oral or written agreements, representations, warranties, conditions, statements, or promises, express implied or collateral, not specifically set forth in this Agreement. No supplement, waiver, modification, amendment, addition or expansion to this Agreement is effective unless evidenced by a written instrument signed by an authorized representative of the parties, and each party acknowledges that no individual will be authorized to orally supplement, waive, modify, amend, add to or expand this Agreement. The parties expressly waive application of any statute, regulation, law, or judicial decision allowing oral supplements, waivers, modifications, amendments, additions or expansions to this Agreement notwithstanding this express provision requiring a written instrument signed by the parties.

15. Obligations under the Dealer Agreement. All other terms and conditions of the Dealer Agreement not specifically and expressly modified by this Agreement shall remain in full force and effect until the effective date of the termination and cancellation of the Dealer Agreement, as provided in Section 3(b) above. For greater certainty, the Dealer's post-termination obligations set forth in the Dealer Agreement and those provisions of the Dealer Agreement which expressly or by their nature, survive termination or expiration shall, unless modified by this Agreement, survive the termination of the Dealer Agreement.

16. Validity. The invalidity or unenforceability of any provision of this Agreement or any covenant herein shall not affect the validity or enforceability of any other provision or covenant, and any such invalid or unenforceable provision or covenant shall be deemed to be severable. If any of the provisions of this Agreement are found to be invalid or unenforceable, the remaining provisions of this Agreement will remain in full force and effect.

17. Further Assurances. The Parties shall, with reasonable diligence, do all such things and provide all such reasonable assurances as may be required to consummate the transaction contemplated by this Agreement, and each Party shall provide such further documents or instruments required by any other Party as may be reasonably necessary or desirable to effect the purpose of this Agreement and carry out its provisions, whether before or after the termination or cancellation of the Dealer Agreement.

18. Survival. All obligations of the parties under this Agreement, including all waivers, releases, obligations of indemnity and confidentiality, which expressly or by their nature, survive termination, expiration, or transfer of this Agreement or of the Dealer Agreement, shall survive in full force and effect subsequent to, and notwithstanding, such termination, expiration or transfer.

19. Attornment. The parties consent and agree that the courts of the Province of Ontario have exclusive jurisdiction to hear and determine claims or disputes between the parties hereto pertaining to this Agreement.

20. Counterparts and Facsimile Signatures. This Agreement may be executed in any number of original counterparts, by original or electronic signature, with the same effect as if all the parties had

signed the same document, and will become effective when one or more counterparts have been signed by all of the parties and delivered to each of the other parties. All counterparts will be construed together and evidence only one agreement. This Agreement may be executed by the parties and transmitted by fax or electronically and if so executed and transmitted this Agreement will be for all purposes as effective as if the parties had delivered an executed original Agreement.

IN WITNESS WHEREOF, Dealer, Dealer Operator and GM have executed this Agreement as of the day and year first above written.

Trillium Pontiac Buick GMC Ltd.

By: _____
Name: T.L. Hurdman
Title: President

SIGNED, SEALED & DELIVERED
In the presence of:

Witness: _____
Name: Joan Grandy
Address: 600-135 Queens Plate Drive
Toronto, Ontario M9W 6V7

DEALER OPERATOR

_____
Name: T.L. Hurdman

GENERAL MOTORS OF CANADA LIMITED

By: _____
Vice President – Sales, Service & Marketing

EXHIBIT "A"

WIND DOWN PAYMENT

1. Dealer's Wind Down Payment consists of two parts, as follows:

   a) $642,000, (the "Total Per Unit Payment"), based on Dealer's total new unit sold retail and basic fleet in 2008, being 321; and

   b) the "Sign Removal Allowance" being the Dealer's actual sign lease and removal costs, up to a maximum of $35,000.

2. The Final Payment Date shall be the later of ten business days after the Termination Date and the day upon which all of the conditions set forth in Section 2(b) and (c) of this Agreement have been fulfilled.

3. The Wind Down Payment shall be paid in accordance with the following schedule by crediting the Dealer's Open Account, in accordance with GM's standard policies, practices and procedures, and subject to the terms and condition of this Agreement:

July 10th, 2009	15% of the Total Per Unit Payment
September 10th, 2009	15% of the Total Per Unit Payment
~~November 10th, 2009~~	~~15% of the Total Per Unit Payment~~
Final Payment Date	55% of the Total Per Unit Payment plus the Sign Removal Allowance

For greater certainty, GM's standard policies with regard to Open Accounts of terminated dealers will be modified so that the Open Account of Dealer will be frozen upon the Termination Date and one half of the Final Payment will be credited to Dealer's Open Account on or about 30 days after the Termination Date, and the remaining one half balance will be credited to Dealer's Open Account on or about 90 days after the Termination Date, otherwise all in accordance with Section 17.10 of the Dealer Agreement.

EXHIBIT "B"

CERTIFICATE OF INDEPENDENT LEGAL ADVICE

TO: ~~GENERAL MOTORS OF CANADA LIMITED ("GM")~~

FROM: J. Robert Hall (the "Legal Representative")

AND FROM: Trillium Pontiac Buick GMC Ltd. (the "Dealer")

AND FROM: T.L. Hurdman (the "Dealer Operator")

RE: Wind Down Agreement delivered to Dealer and Dealer Operator by GM on May 20, 2009 (the "Wind Down Agreement")

RECITALS:

A. Dealer and Dealer Operator have executed the Wind Down Agreement, which sets out the terms and conditions upon which GM is prepared to make certain formula-based payments to Dealer in exchange for Dealer's commitment to continue operating its dealership until Dealer Operator's voluntary resignation and Dealer's voluntary termination and cancellation of the Dealer Sales and Service Agreement, effective December 31, 2009 (or other such date as GM may approve under the Wind Down Agreement, but in any event on or prior to October 31, 2010), to waive all termination assistance rights under the Dealer Agreement (as that term is defined in the Wind Down Agreement) and to provide a general release in favour of GM and other GM Entities (as defined in the Wind Down Agreement).

B. GM wishes to ensure that Dealer and Dealer Operator have entered into the Wind Down Agreement voluntarily and with a full understanding of the implications.

C. Accordingly, GM requested Dealer and Dealer Operator obtain independent legal advice from a qualified solicitor concerning its and his/her rights and obligations arising out of or in respect of the Wind Down Agreement.

The undersigned Legal Representative, a solicitor in good standing in the province of Ontario has been consulted by Dealer and Dealer Operator for advice as to the nature of the arrangements to be entered into and the implications of such arrangements.

In this regard, I hereby confirm:

(i) I was retained by Dealer and Dealer Operator and I was and am not acting in any way on behalf of GM or any other GM Entities;

(ii) I have read the Wind Down Agreement;

(iii) I have explained the nature and effect of the Wind Down Agreement, including the Dealer's and Dealer Operator's waivers, releases and indemnification obligations contained therein;

(iv) Dealer and Dealer Operator acknowledged to me that it and he/she has carefully read the Wind Down Agreement;

(v) I believe that upon executing the Wind Down Agreement, Dealer and Dealer Operator were fully advised and informed with regard to all of the foregoing matters.

DATED at Toronto, Ontario, this 26th day of May, 2009.

LEGAL REPRESENTATIVE

Name: J. Robert Hall

Dealer and Dealer Operator acknowledge that it and he/she have read the above Certificate of Independent Legal Advice and that the above-noted statements said to be made by it and by him/her are true. Dealer and Dealer Operator acknowledge that J. Robert Hall in advising it and he/she was consulted by it and by him/her as its and as his/her personal solicitor.

DATED at Toronto, Ontario, this 26th day of May, 2009.

TRILLIUM PONTIAC BUICK GMC LTD.

DEALER

By:
Name: T.L. Hurdman
Title: President

SIGNED, SEALED & DELIVERED
In the presence of:

DEALER OPERATOR

Witness
Name: Joan Grandy
Address: 600-135 Queens Plate Drive
Toronto, Ontario M9W 6V7

Name: T.L. Hurdman

signed the same document, and will become effective when one or more counterparts have been signed by all of the parties and delivered to each of the other parties. All counterparts will be construed together and evidence only one agreement. This Agreement may be executed by the parties and transmitted by fax or electronically and if so executed and transmitted this Agreement will be for all purposes as effective as if the parties had delivered an executed original Agreement.

IN WITNESS WHEREOF, Dealer, Dealer Operator and GM have executed this Agreement as of the day and year first above written.

«Dealership_Legal_Name»

By:_____
Name:_____
Title:_____

SIGNED, SEALED & DELIVERED In the presence of:	**DEALER OPERATOR**
Witness: Name: Address:	Name:

GENERAL MOTORS OF CANADA LIMITED

By:_____
Vice President – Sales, Service & Marketing

CITATION: Trillium Motor World Ltd. v. General Motors of Canada Limited et al., 2015 ONSC 3824
COURT FILE NO.: CV-10-397096CP
DATE: 20150708

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Trillium Motor World Ltd.

Plaintiff

– and –

General Motors of Canada Limited
and Cassels Brock & Blackwell LLP

Defendants

AND BETWEEN:

General Motors of Canada Limited

Defendant, Plaintiff by Counterclaim

– and –

Trillium Motor World Ltd.
and Thomas L. Hurdman

Plaintiff, Defendants to the Counterclaim

REASONS FOR JUDGMENT

Mr. Justice T. McEwen

Released: July 8, 2015