

**COURT OF APPEAL FOR ONTARIO**

BETWEEN:

TRILLIUM MOTOR WORLD LTD.

Plaintiff  
(Appellant /  
Respondent by  
Cross-Appeal)

- and -

GENERAL MOTORS OF CANADA LIMITED and  
CASSELS BROCK & BLACKWELL LLP

Defendants  
(Respondent /  
Appellant by  
Cross-Appeal)

AND BETWEEN:

GENERAL MOTORS OF CANADA LIMITED

Plaintiff by Counterclaim  
(Appellant by Cross-Appeal)

and

TRILLIUM MOTOR WORLD LTD. and THOMAS L. HURDMAN

Defendants by Counterclaim  
(Respondents by Cross-Appeal)

**NOTICE OF CROSS-APPEAL**

**THE RESPONDENT, GENERAL MOTORS OF CANADA LIMITED ("GMCL"),**  
**CROSS-APPEALS** from the Judgment of the Honourable Justice Thomas McEwen  
dated July 8, 2015, made at Toronto, Ontario (the "Judgment").

**GMCL ASKS** that:

1. This cross-appeal be allowed and the portion of the Judgment dismissing the Counterclaim of GMCL be set aside;

2. The Judgment be varied to:

- (a) grant judgment in favour of GMCL in respect of its Counterclaim;
- (b) find in favour of GMCL on common issues (a) and (b) certified in respect of GMCL's Counterclaim; and
- (c) order each member of the Defendant Class to indemnify GMCL from and against all claims, losses, damages, costs and expenses that have been or will be imposed upon or incurred by GMCL arising from, relating to or caused by this proceeding both at trial and on appeal, and reimburse GMCL for any and all wind-down payments paid to members of the Defendant Class pursuant to Wind-Down Agreements entered into by them with GMCL in May 2009 (the "Wind-Down Payments");

In this regard, a list of the common issues certified in respect of GMCL's Counterclaim is attached hereto as Schedule "A".

3. Alternatively, the Judgment be varied to:

- (a) find in favour of GMCL on common issues (a) and (b) certified in respect of GMCL's Counterclaim with respect to Class Members that operated dealerships other than in Ontario, Alberta, or Prince Edward Island;

- (b) allow GMCL's Counterclaim in respect of the Class Members referred to immediately above; and
- (c) order each member of the Defendant Class that operated a dealership other than in Ontario, Alberta, or Prince Edward Island to indemnify GMCL from and against all claims, losses, damages, costs and expenses that have been or will be imposed upon or incurred by GMCL arising from, relating to or caused by this proceeding both at trial and on appeal, and reimburse GMCL for the Wind-Down Payments;

4. If the appeal of the Appellant Trillium Motor World Ltd. ("Trillium") with respect to common issues (c) or (d) certified in respect of Trillium's claims is allowed in whole or in part, the Judgment be varied to limit the benefit of the statutory duty of fair dealing provided for under section 3 of the *Arthur Wishart Act* (or similar provisions under franchise legislation in Alberta and Prince Edward Island) to Class Members that operated dealerships in Ontario, Alberta or Prince Edward Island;

5. If Trillium's appeal with respect to common issue (e) certified in respect of Trillium's claims is allowed in whole or in part, the Judgment be varied:

- (a) to limit the benefit of the statutory right to associate provided for under section 4 of the *Arthur Wishart Act* (or similar provisions under franchise legislation in Alberta and Prince Edward Island) to Class Members that operated dealerships in Ontario, Alberta or Prince Edward Island; and

- (b) in any event, to assess no aggregate damages, or alternatively nominal aggregate damages, as against GMCL in respect of any breach this Court may find of GMCL's obligations pursuant to section 4 of the *Arthur Wishart Act* (or similar provisions under franchise legislation in Alberta and Prince Edward Island).

6. If Trillium's appeal with respect to common issue (f) certified in respect of Trillium's claims is allowed in whole or in part, the Judgment be varied:

- (a) to limit the application of section 11 of the *Arthur Wishart Act* (or similar provisions under franchise legislation in Alberta and Prince Edward Island) to Class Members that operated dealerships in Ontario, Alberta or Prince Edward Island; and
- (b) to find that Class Members were unjustly enriched at the expense of GMCL and therefore are liable to make restitution to GMCL for some or all of the Wind-Down Payments;

7. If Trillium's appeal with respect to common issue (d) certified in respect of Trillium's claims is allowed in whole or in part, the Judgment be varied to find that GMCL did not have a duty to disclose material facts concerning its restructuring to GMCL's Dealers at the time Wind-Down Agreements were offered to and entered into by GMCL's Dealers in May 2009;

8. If Trillium's appeal with respect to common issues (g), (h) and (i) certified in respect of Trillium's claims is allowed in whole or in part, the Judgment be varied to limit



any relief granted in respect of those issues to Class Members that operated dealerships in Ontario, Alberta or Prince Edward Island;

9. An Order compelling Trillium and its principal Thomas L. Hurdman ("Hurdman") to pay to GMCL its costs of this cross-appeal on a basis and in an amount to be determined by the Court; and

10. Such further and other relief be granted as this Honourable Court may deem just.

**THE GROUNDS OF CROSS-APPEAL** are as follows:

**GMCL's Counterclaim**

11. The trial judge erred in dismissing GMCL's Counterclaim.

12. The trial judge erred in concluding that section 5(c) of the Wind-Down Agreements offends the right of association provided for in section 4 of the *Arthur Wishart Act*.

13. The trial judge erred in concluding that section 5(c) of the Wind-Down Agreements is void for public policy reasons, including purported public policy considerations in favour of class proceedings.

14. The trial judge erred by failing to recognize that, as a matter of law, a class action is simply a procedural mechanism for asserting claims, rather than a source of substantive rights.

15. The trial judge erred by failing to take into account the overriding public policy considerations concerning the need for commercial certainty, the sanctity of contracts and the encouragement of settlements.

16. The trial judge erred by failing to find that Class Members breached their Wind-Down Agreements by bringing or participating in this class proceeding and that Class Members are liable to indemnify GMCL under section 5(d) of the Wind-Down Agreements for all resulting claims, losses, damages, costs and expenses incurred by GMCL in defending the claims asserted against it, and to reimburse GMCL for all Wind-Down Payments made to them.

17. Alternatively, the trial judge erred in concluding that section 5(c) of the Wind-Down Agreements was unenforceable with respect to Class Members that operated dealerships other than in Ontario, Alberta and Prince Edward Island.

18. Alternatively, if the Release contained in section 5 of the Wind-Down Agreements is found to be invalid or unenforceable, the trial judge erred in failing to find that Class Members were unjustly enriched by receiving and retaining the Wind-Down Payments, and Trillium, Hurdman and other Class Members should be required to make restitution to GMCL for some or all of these Payments.

19. The trial judge erred in concluding that the Wind-Down Agreements cannot preclude the commencement of or prosecution against GMCL of the class proceeding at issue in this cross-appeal.

**No Duty to Disclose Material Facts**

20. The trial judge correctly found that GMCL acted honestly and reasonably in providing information to the Class Members during its restructuring and therefore did not breach any purported duty to disclose material facts, but erred in concluding that the

duty of fair dealing may give rise to a positive obligation to disclose material facts in some circumstances.

21. In concluding that the duty of fair dealing may give rise to a positive obligation to disclose material facts in some circumstances, the trial judge failed to recognize that the duty of fair dealing does not give rise to unbargained-for rights and must be anchored in the performance and enforcement of existing contractual rights and obligations.

22. The judge erred in concluding that the duty of good faith and fair dealing imposed under the *Arthur Wishart Act* exceeds the duty of good faith at common law.

#### **Choice of Law**

23. The trial judge erred in concluding that Class Members that operated dealerships outside Ontario were entitled to the benefit of the *Arthur Wishart Act* (S.O. 2000, c. 3), including sections 3, 4, 5, 6, 7 and 11.

24. The trial judge erred in failing to give effect to the clear territorial limits set out in section 2(1) of the *Arthur Wishart Act*.

25. The trial judge erred in failing to give effect to provisions of the *Franchises Act* (R.S.A. 2000, c.F-23) and *Franchises Act*, (R.S.P.E.I. 1988, c. F-14.1) that contain territorial limits and expressly exclude the application of laws other than the laws of Alberta and Prince Edward Island, respectively.

26. The trial judge erred in concluding that the choice of law clause in the agreements between the Class Members and GMCL imported rights and obligations under the *Arthur Wishart Act* into the relationship between GMCL and the Class



Members, including rights conferred under sections 3, 4, 5, 6, 7 and 11 of the *Arthur Wishart Act*.

27. The trial judge erred in concluding that the choice of law clause in the agreements between the Class Members and GMCL incorporates provisions of the *Arthur Wishart Act* that apply to persons, not contractual agreements, such as sections 4 and 5 of the *Arthur Wishart Act*.

28. The trial judge erred in failing to recognize that before the Wind-Down Agreement was executed, its governing clause was not yet in force and therefore, as a matter of law, could not and did not confer rights under Ontario law on Class Members that operated dealerships outside Ontario.

**No Negotiation with Non-Retained Dealers**

29. To the extent necessary, GMCL seeks an Order vacating or reversing the Judgment of the trial judge concerning the hypothetical "collective negotiation" posited in the Judgment.

30. In this regard, the trial judge erred in concluding that GMCL would have negotiated with some or all of the non-retained Dealers and would have reached a concluded bargain in any such negotiations, in the face of:

- (a) uncontradicted evidence from GMCL's witnesses, including Marc Comeau, Paul Risebrough, John Stapleton and Larry Buonomo, that GMCL would not have negotiated with these Dealers; and



- (b) an absence of, or alternatively insufficient, evidence answering critical and unresolved questions underlying the Plaintiffs' theory of a hypothetical negotiation between GMCL and non-retained Dealers.

31. The trial judge also erred in his assessment of damages in respect of the posited hypothetical "collective negotiation."

**Other Grounds**

32. Such further and other grounds as may arise from the resolution of additional issues that the trial judge has yet to address, including costs, or from the settlement of the Judgment.

33. Such further and other grounds as counsel may advise and this Honourable Court may permit.

August 20, 2015

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## **SCHEDULE "A" – COMMON ISSUES ON GMCL'S 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?
- (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?

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Plaintiff by Counterclaim (Appellant by Cross-  
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Court of Appeal File No.: C60828

## COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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