Court of Appeal File No. C60828
Court File No. CV-10-397096CP

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

TRILLIUM MOTOR WORLD LTD.

Plaintiff
(Appellant)

- and -

GENERAL MOTORS OF CANADA LIMITED and CASSELS BROCK & BLACKWELL LLP

Defendants
(Respondent)

A N D B E T W E E N:

GENERAL MOTORS OF CANADA LIMITED

Plaintiff by Counterclaim

- and –

TRILLIUM MOTOR WORLD LTD. and THOMAS L. HURDMAN

Defendants to the Counterclaim

Proceeding under the *Class Proceedings Act, 1992*

NOTICE OF APPEAL

THE APPELLANT, TRILLIUM MOTOR WORLD LTD., APPEALS to the Court of Appeal from the Judgment of Justice T. McEwen dated July 8, 2015 made at Toronto, Ontario.

THE APPELLANT ASKS that:

1. The appeal be allowed and the Judgment dismissing the Appellant's claims as against the defendant, General Motors of Canada Limited ("**GMCL**"), be set aside.

2. Judgment be granted in favour of the Appellant answering common issues (c)(i) and (iii), (d), (e)(vi), (f), (g), (h) and (i) (set forth fully in the attached Schedule "A") in the affirmative.

3. An Order directing individual hearings in accordance with section 25 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("**CPA**") to assess damages under section 3(2) of the *Arthur Wishart Act (Franchise Disclosure), 2000,* S.O. 2000, c. 3 ("**AWA**") in respect of common issues (c)(i), (c)(iii) and (d) and, further, or in the alternative, an award of damages under section 3(2) of the AWA in accordance with the principle set out by this Court in *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673 (*"**Salah**"*) in respect of these common issues.

4. An Order awarding damages under section 4(5) of the AWA in respect of common issue e(vi) in accordance with the principle set out by this Court in *Salah* to be assessed in the aggregate.

5. An Order directing individual hearings in accordance with section 25 of the CPA to determine compensation under section 6(6) of the AWA and damages under section 7 of the AWA in respect of common issues (g), (h) and (i).

6. In the alternative, an Order directing that a new trial be held with respect to the common issues identified in paragraph 2 above.

7. Costs of this appeal and the underlying action be granted as against GMCL in favour of the Appellant.

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

THE GROUNDS OF APPEAL are as follows:

Overarching Error in Principle in the Analysis of the Statutory Duty of Fair Dealing

1. The trial judge made an overriding error in principle that tainted his analysis of the AWA and his determination of the duties that GMCL owed to the class members thereunder. He interpreted the AWA through the "lens of commercial reality" and by reference to the subjective business context in which GMCL was operating in May, 2009 and found, as a result, that the duties GMCL owed to its dealers were diminished. In so doing, the trial judge failed to give consideration to this Court's well-established jurisprudence adopting a purposive approach to a franchisor's duties under the AWA which gives effect to the statute's fundamental purposes of: (i) addressing the power imbalance between franchisors and franchisees; and (ii) protecting franchisees.

2. Further, the trial judge misinterpreted and misapplied *Bhasin v. Hrynew*, 2014 SCC 71 ("***Bhasin***"). *Bhasin* held that a context-specific understanding of a contractual relationship is required to determine whether to "invoke" the duty of good faith. *Bhasin* does not stand for the proposition, adopted by the trial judge, that the scope and content of the duty of good faith are determined by the degree of solvency of one of the parties to the relationship (in this case, GMCL's financial challenges in May, 2009), or by one party's desire to access third-party funding (in this case, GMCL's desire to access billions of dollars of government funding).

Duty of Fair Dealing – Common Issues (c)(i) and (iii)

3. The trial judge's overarching error in principle infected the analysis and disposition of common issue (c)(i). Applying a "fair enough" in the circumstances standard, the trial judge erred in concluding that:

(a) GMCL's giving the class members six days to decide whether or not to sign the Wind-Down Agreement (**"WDA"**) met the "commercially reasonable" standard required of GMCL under section 3 of the AWA;

(b) GMCL's waiting until May 19, 2009 to disclose any information about the wind-down process it was working on (including the information that it disclosed to the Canadian Automobile Dealers Association four days earlier) met the "commercially reasonable" standard required of GMCL under section 3 of the WDA; and

(c) GMCL's refusal to extend the May 26, 2009 deadline for returning the WDAs met the "commercially reasonable" standard required of GMCL under section 3 of the WDA.

4. The overarching error in principle also infected the trial judge's analysis and disposition of common issue (c)(iii). In particular, the trial judge erred in holding that GMCL did not breach the statutory duty of fair dealing by stating in the Notice of Non-Renewal and WDA 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. Specifically, the trial judge:

(a) erred in his interpretation of each class member's renewal rights under their respective Dealer Sales & Service Agreement ("**DSSA**");

(b) erred in his interpretation of the interplay between the TERM provision of the DSSA and Article 4.1 of the DSSA; and

(c) erred in finding that GMCL met the "commercially reasonable" standard required of it under section 3 of the AWA.

Duty to Disclose Material Facts Concerning GMCL's Restructuring – Common Issue (d)

5. Guided by the above error in principle, the trial judge erred in holding that GMCL did not breach the statutory duty of fair dealing by failing to disclose material facts concerning its restructuring to franchisees at the time of soliciting the WDA.

Right of Association – Common Issue (e)(vi)

6. Common issue (e)(vi) asked whether GMCL interfered with the class members' statutory right to associate (section 4 of the AWA) by any terms of the WDA. The trial judge held that the confidentiality provision in section 8 of the WDA did not breach section 4 of the AWA because no breach could have occurred until the WDA was signed, and that "the relevant period for Trillium's claims under this common issue is the time leading up to the execution of the WDAs." In so finding, the trial judge made a palpable and overriding error. There was no evidence adduced at trial capable of supporting the trial judge's finding on this issue.

7. Moreover, the trial judge's holding is inconsistent with his finding (at paragraph 353 of his Reasons) on common issue (a) in GMCL's counterclaim that section 5(c) of

the WDA violates the Appellant's right to bring a class action against GMCL and, as such, offends the right of association in section 4 of the AWA. The trial judge's disposition of this common issue in the counterclaim ought to have yielded a "yes" answer to common issue (e)(vi).

Waiver and Release – Common Issue (f)

8. The trial judge erred in holding that the waiver and release contained in section 5 of the WDA was not null, void and unenforceable in respect of the class members' rights under sections 4 and 11 of the AWA. In particular, the trial judge:

(a) erred in finding that the WDA and the release contained therein falls within the "*Tutor Time* exception";

(b) erred in finding that the released claims, including the claims advanced in this action, were existing and fully known to the class members prior to the signing of the WDA;

(c) erred by failing to consider whether the releases would be void if GMCL had breached section 3 of the AWA in procuring the release. In short, if the WDA was procured in breach of the statutory duty of fair dealing, the release contained therein must be declared void pursuant to sections 4 and 11 of the AWA; and

(d) erred in principle by rewriting the release to delete the provision which he found to be void while allowing the remaining provisions of the release to stand. This exercise in "blue-penciling" was in direct contrast to this Court's decision in *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152.

Disclosure and Rescission – Common Issues (g), (h) and (i)

9. The trial judge erred in answering "no" to common issue (g) and finding that GMCL was not required to deliver to each class member a disclosure document pursuant to the AWA at least fourteen days before the class member signed the WDA.

10. The trial judge misinterpreted the AWA by finding that the WDA was not a "franchise agreement" for the purposes of section 5 of the AWA. The effect of this error was to create a different definition for "franchise agreement" for the purposes of section 5 of the AWA than for remaining sections of the Act.

11. In addition, the trial judge erred in his statutory interpretation by finding that the class members were not "prospective franchisees" with respect to the WDA within the meaning of the AWA.

12. As a direct consequence of his errors in the disposition of common issue (g), the trial judge also erred in answering "no" to common issues (h) and (i). These common issues must be answered in the affirmative if common issue (g) is answered in the affirmative.

Damages

13. The trial judge erred in not assessing damages against GMCL.

14. If any one or more of common issues (c)(i), (c)(iii) or (d) are answered in the affirmative by this Court, the appellant requests an order directing individual hearings to assess damages under section 3(2) of the AWA for each of the class members in accordance with section 25 of the CPA and, further, or in the alternative, an award of

damages under section 3(2) of the AWA in accordance with the principle set out by this Court in *Salah*.

15. If common issue (e)(vi) is answered in the affirmative by this Court, the appellant requests an aggregate assessment of damages under section 4(5) of the AWA in accordance with the principle set out by this Court in *Salah*.

16. If any one or more of common issues (g), (h) or (i) are answered in the affirmative by this Court, the appellant requests an order directing individual hearings for each of the class members in accordance with section 25 of the CPA to determine compensation under section 6(6) of the AWA and damages under section 7 of the AWA.

17. Such further and other grounds as counsel may submit and this Honourable Court may receive.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. Section 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

2. Section 30(3) of the CPA.

3. Leave to appeal is not required.

4. The Judgment being appealed from is a final order.

August 7, 2015

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SCEHDULE “A” – COMMON ISSUES UNDER APPEAL

SCHEDULE "A" – COMMON ISSUES UNDER APPEAL

	Common Issue	Answer of Trial Judge	Under Appeal (yes/no)	Requested Answer to Common Issue
(a)	Is GMCL a franchisor within the meaning of the *Arthur Wishart Act (Franchise Disclosure), 2000,* S.O. 2000, c. 3 (the "*WishartAct*"), 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;	YES	NO	-
(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;	YES	NO	-
(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;	NO	YES	YES
	(ii) not disclosing to the Class Members the identities of dealers offered a Wind-Down Agreement;	NO	NO	-
	(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;	NO	YES	YES

	(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";	NO	NO	-
	(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	NO	NO	-
	(vi) breaching any terms of the Wind-Down Agreement;	NO	NO	-
(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?	NO	YES	YES
(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;	NO	NO	-
	(ii) not disclosing to the Class Members the identities of the dealers offered a Wind-Down Agreement;	NO	NO	-
	(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;	NO	NO	-

	(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";	NO	NO	-
	(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	NO	NO	-
	(vi) any terms of the Wind-Down Agreement;	NO	YES	YES
(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);	NO	YES	YES
(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;	NO	YES	YES
(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	NO	YES	YES
	(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;	NO	YES	YES

(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;	NO	YES	YES

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Plaintiff
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PROCEEDING COMMENCED AT TORONTO

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