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

# COURT OF APPEAL FOR ONTARIO

B E T W E E N:

TRILLIUM MOTOR WORLD LTD.

Plaintiff
(Respondent and Appellant by Cross-Appeal)

- and -

GENERAL MOTORS OF CANADA LIMITED and
CASSELS BROCK & BLACKWELL LLP

Defendants
(Appellant and Respondent by Cross-Appeal)

# FACTUM OF THE APPELLANT, CASSELS BROCK & BLACKWELL LLP

June 6, 2016

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# FACTUM OF THE APPELLANT, CASSELS BROCK & BLACKWELL LLP

## PART I: OVERVIEW

### *a) The Appeal*

1. Cassels Brock & Blackwell LLP ("Cassels") appeals the Judgment of McEwen J. dated July 8, 2015 and March 22, 2016 against it for a yet unascertained amount of up to $45 million.

### *b) Background*

2. An appreciation of the trial judge's errors requires some backdrop.

3. In April 2009, at the height of the global economic crisis, Cassels was approached by an existing client, the Canadian Automobile Dealers Association ("CADA"), to provide advice concerning possible filings by General Motors of Canada Limited ("GMCL") and Chrysler under the *Companies' Creditors Arrangement Act* ("*CCAA*").

4. Cassels was also asked by CADA if it would act for GMCL dealers should GMCL file for bankruptcy protection in Canada in the near future. On May 4, 2009, CADA sent the GMCL dealers a memorandum asking them to confirm whether they wished to participate in such a group retainer in the event of a GMCL bankruptcy filing, and announcing the formation of a Steering Committee "to provide policy direction and instructions to legal counsel who will represent the Canadian General Motors dealers in any bankruptcy filing" (the "May 4 Memorandum").

5. Meanwhile GMCL, while preparing for a possible *CCAA* filing, was taking extraordinary steps to avoid one. One of these steps was GMCL's unexpected decision on May 14, 2009 to deliver Wind-Down Agreements ("WDAs") to 240 of its dealers (the "non-continuing dealers") as part of a last-ditch effort to avoid a *CCAA* proceeding.

6. When the Steering Committee first learned on May 15 of the imminent delivery of WDAs, it specifically directed Cassels that the WDAs were outside its mandate of representing the dealers who chose to retain them within any *CCAA* proceeding.

7. GMCL sent WDAs to the non-continuing dealers on May 20, 2009. The WDAs provided for the voluntary termination of the dealer's Dealer Sales and Services Agreement ("DSSA") and a release in favour of GMCL, in exchange for formula-based payments. GMCL's offer under the WDA was conditional upon all of the non- continuing dealers accepting the offer (the "Acceptance Threshold Condition") by May 26, 2009, though GMCL reserved the right to waive the Acceptance Threshold Condition.

8. GMCL advised the dealers that the WDA was non-negotiable, and that unless they all accepted it, the company may file under the *CCAA*.

9. The dealers were given six days to review and, with written certification of independent legal advice, accept the WDAs. By end of day on May 26, 2009, 202 (84%) of the non-continuing dealers had executed and returned a WDA to GMCL, having obtained independent legal advice and attached a comprehensive Certificate of Independent Legal Advice to their signed WDAs.

10. On June 1, 2009, General Motors Corporation ("GM") began Chapter 11 bankruptcy proceedings in the United States. A *CCAA* filing was averted in Canada at the eleventh hour, after GMCL reached agreements with its bondholders and the Canadian Automobile Workers, and waived the Acceptance Threshold Condition on executed WDAs from its dealers.

11. After *CCAA* proceedings had been averted, and the dealers had received the last of their $126 million payments under the WDAs, the representative plaintiff, Trillium Motor World Ltd. ("Trillium") began this class proceeding on behalf of the 202 dealers who accepted a WDA after obtaining legal advice from their own lawyers (the "Class").

12. The Class alleged that GMCL had breached its common law and statutory duties by notifying 240 of its dealers that their DSSAs would not be renewed, and by giving those dealers six days to agree to a non-negotiable WDA failing which GMCL would likely commence *CCAA* proceedings.

13. The trial judge disagreed. He held that GMCL had met its obligations, and was released by the terms of the WDAs. He nevertheless found that Cassels was retained by and liable to those dealers who had both responded to the May 4 Memorandum and had received a WDA. The trial judge found that Cassels was obliged to provide these dealers (the identity of whom Cassels still

does not know to this day) with legal advice about the WDAs, contrary to the Steering Committee's direction. The trial judge found that Cassels was liable for failing to advise these dealers to engage in a high-stakes showdown with GMCL, which would undoubtedly have driven GMCL into *CCAA* proceedings in which the non-continuing dealers would have received little or nothing.

14. To begin to understand where the trial judge fell into error, it is important to understand the nature of the dealer group, and its intersection with the Class:

(a) The May 4 Memorandum was sent by CADA to 705 GMCL dealers;

(b) Approximately 400 of the 705 dealers responded to the May 4 Memorandum (the "Participation Form Dealers"). This is an estimate, as only CADA knows the actual number and identities of the Participation Form Dealers. The trial judge found that the Participation Form Dealers were Cassels's clients;

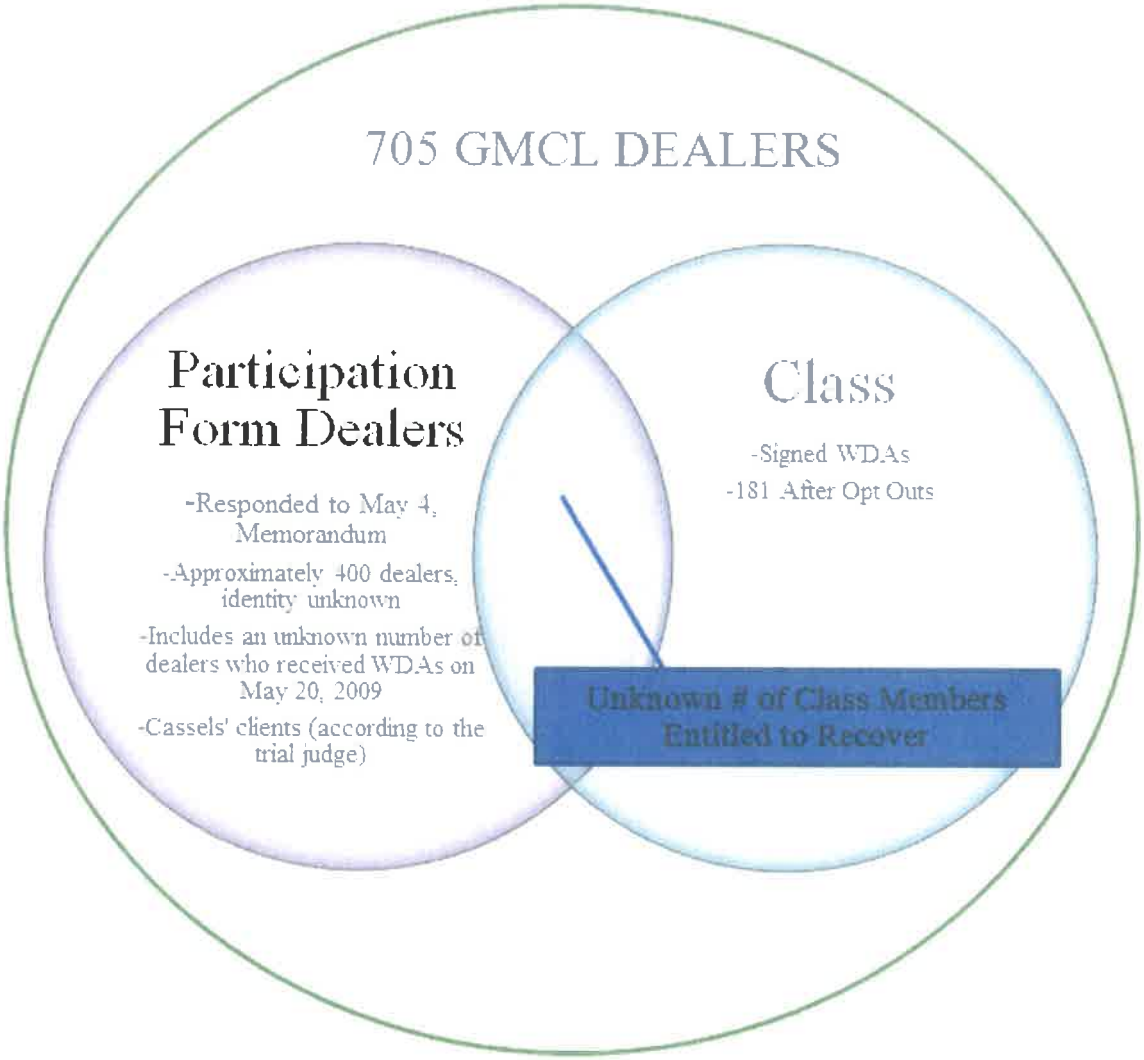
(c) On May 20, GMCL sent WDAs to 240 of the 705 dealers. 202 of the 240 dealers signed and returned the WDAs to GMCL after obtaining independent legal advice from law firms other than Cassels. This group constitutes the Class;

(d) After opt-outs, there are 181 Class members;

(e) The trial judge held that Cassels was liable to those Class members who were Participation Form Dealers, but not to those Class members who did not submit a Participation Form and who only called in to a May 24, 2009 call (the "Call dealers"). The call will be described below; and,

(f) There was no evidence at trial about how many Class members were also Participation Form Dealers.

15. This breakdown of the dealer group can be visualized as follows:




### *c) The Trial Judge's Errors*

16. The first fatal flaw in the trial judge's decision is his interpretation of the "retainer." His errors continue through his consideration of Cassels's duties, causation and aggregate damages, each error by itself justifying the relief sought in this appeal and each undermining his findings in the others.

17. The trial judge:

(a) Erred in finding that Cassels was retained by the dealers who responded to the May 4 Memorandum (the "Participation Form Dealers"), and that the retainer included providing advice on the WDAs, by:

(i) Failing to apply established principles of contractual interpretation;

(ii) Failing to define the scope of the retainer he found;

(iii) Misinterpreting the language of the May 4 Memorandum;

(iv) Incorrectly applying the law of "limited retainers" and reversing the onus of proof; and,

(v) Failing to properly approach the application of context, both before and after May 4, 2009. The context demonstrates that any retainer by dealers was limited to group representation in the event of any insolvency filing by GMCL;

(b) Erred in finding that Cassels breached its duties to the Participation Form Dealers, without making a finding about what the standard of care required in the circumstances, and by finding a breach in the absence of expert evidence to support his finding;

(c) Erred in inferring causation:

(i) Where causation was not certified as a common issue;

(ii) In the face of his fundamental misunderstanding of the composition of the Class;

(iii) Without establishing what was required by the standard of care;

(iv) On a finding, contrary to the only evidence, that Cassels did not recommend a collective negotiation due to its representation of the Government of Canada; and

(v) In the absence of evidence, and in reliance on an unavailable inference about how the Class members would have behaved based on the evidence of three Class members hand-picked by the plaintiff;

(d) Made the same errors in addressing the 42 Saturn dealers who form part of the Class, a group who had retained Cassels in an entirely separate retainer in March 2009 in relation to the discontinuance of the Saturn automobile (the "Saturn retainer"), by failing to:

(i) Determine the nature and scope of the Saturn retainer;

(ii) Define any standard of care or its breach; and,

(iii) Approach any analysis of causation in respect to the Saturn dealers;

(e) Erred in making an aggregate damages finding that was not available to him, and which:

(i) Mistakenly calculated damages as though all 181 Class members were Participation Form Dealers, instead of subgroup of dealers of unknown size, a mistake the trial judge has subsequently acknowledged; and,

(ii) Mistakenly over-calculated by 20% the difference between the amount offered by GMCL to the dealers in the WDAs, and the amount he found GMCL had available to offer to the dealers.

18. Most of the trial judge's errors are errors of law, or are errors of mixed fact and law containing extricable issues of law, and therefore attract a standard of review of correctness. A chart setting out the trial judge's errors and the applicable standards of review is attached at Schedule C.

19. The appeal should be allowed and the plaintiff's claim dismissed.

**ISSUE ONE: CASSELS WAS NOT RETAINED TO PROVIDE ADVICE ON THE WDA**

20. The trial judge erred in finding that Cassels was retained by the dealers who responded to the May 4 Memorandum by either submitting a participation form or sending CADA the requested monies (the "Participation Form Dealers"), and that the scope of this retainer included providing advice on the WDAs.

21. Cassels was not retained to act for the Participation Form Dealers in relation to the WDAs.

22. Cassels was retained by CADA, a long-standing client of Peter Harris, a lawyer at Cassels, to provide advice concerning possible *CCAA* filings by GMCL and Chrysler. In April and May 2009, Cassels had also agreed that in the event that GMCL commenced *CCAA* proceedings, the firm would act for the dealers who wished to retain them.

23. The trial judge's error in failing to properly define the retainer is sufficient to set aside the Judgment and dismiss the action.

24. The following background facts provide the context for consideration of the May 4 Memorandum.

### *a) Lead-up to the May 4 Memorandum*

25. These events took place during the global economic meltdown of 2008 and 2009.

26. In 2008, GMCL was in dire economic straits. By the end of the year, GMCL had lost approximately $4.3 billion.

**Reference:** Reasons for Judgment of Justice McEwan dated July 8, 2015 ("Trial Decision") at paras. 34-35, Joint Appeal Book and Compendium ("JABC"), Tab 6, p. 75

27. GMCL began to consider insolvency proceedings. In December 2008, its parent company, General Motors Company ("GM"), submitted its first restructuring plan to the US government seeking $18 billion USD in financing and proposing "drastic business restructuring measures." GM proposed to reduce the Pontiac brand, which accounted for over 26% of GMCL's sales, to a "niche" brand.

**Reference:** Trial Decision at paras. 34-37, JABC, Tab 6, p. 75

28. At the same time, GMCL approached the Federal and Ontario governments (the "Canadian Governments") for financing. The Canadian Governments asked GMCL to provide a restructuring plan that would ensure that it could continue as a "viable operation."

**Reference:** Trial Decision at para. 38, JABC, Tab 6, p. 75

29. On February 20, 2009, GMCL submitted a revised proposal to the Canadian Governments. It proposed to reduce the number of dealers in its network from 705 dealers to 450-500 dealers by

2014. This was a reduction of approximately 29-36% over five years. Crucially, as found by the trial judge, "no involuntary reductions were proposed."

**Reference:** Trial Decision at para. 45, JABC, Tab 6, pp. 76-77

30. On February 27, 2009, GMCL sent a letter to its Saturn dealers advising them that the Saturn line would be discontinued. All Saturn dealerships would have to close by the end of 2011, unless the brand could be sold to a third party.

**Reference:** Trial Decision at para. 49, JABC, Tab 6, p. 77

31. As the economic situation worsened, GMCL prepared for a *CCAA* filing. GMCL retained Ernst & Young as financial advisor to begin the necessary steps to initiate a filing.

**Reference:** Trial Decision at para. 53, JABC, Tab 6, pp. 78

32. CADA was monitoring the threat of a *CCAA* filing. CADA retained Cassels to provide CADA with advice about "the problems that GMCL and Chrysler were facing."

**Reference:** Trial Decision at paras. 73, 363, JABC, Tab 6, pp. 82, 141

33. On March 4, 2009, CADA's general counsel, Tim Ryan, sent a memo to GMCL dealers to signal issues that may arise in the event of a filing. In that memorandum, CADA wrote that "it would be crucial that dealers were organized and properly represented, in order to be able to make representations to the court overseeing the proceedings." Tim Ryan repeated this statement in an e-mail to dealers on April 8.

**Reference:** March 4, 2009 memorandum, p. 9, TMW000000422, Exhibit 75, Tab 6, Cassels's Appeal Book and Compendium ("Cassels's Compendium"), Vol. I, Tab 1, pp. 9

Email from CADA dated April 8, 2014, TMW000000292, Exhibit 75, Tab 20, Cassels's Compendium, Vol. I, Tab 2, pp. 11-12

34. That same month, CADA facilitated the retainer of Cassels by those Saturn dealers who chose to retain the firm in relation to the announced discontinuance of the Saturn automobile.

**Reference:** Trial Decision at paras. 49, 363, JABC, Tab 6, pp. 77, 141

35. On March 27, 2009, both the US government and the Canadian governments rejected GM and GMCL's restructuring proposals of the previous month. Both GM and GMCL were given 60 days to submit revised restructuring plans. A failure to submit a satisfactory proposal within 60 days would result in a refusal by the governments to extend credit, necessarily leading to bankruptcy proceedings in the United States and *CCAA* proceedings in Canada, by June 1, 2009.

**Reference:** Trial Decision at paras. 54, 56, JABC, Tab 6, pp. 78-79

36. By e-mail dated April 15, 2009, Tim Ryan asked Cassels if it would act for the GMCL or Chrysler dealers in the event of proceedings under the *CCAA* by either manufacturer.

**Reference:** E-mail from Tim Ryan to Peter Harris, dated April 15, 2009, CBB002293, Exhibit 75, Tab 25, Cassels's Compendium, Vol. I, Tab 3, p. 13

Trial Decision at para. 71, JABC, Tab 6, pp. 81

37. On April 19, a dealer named Michael Croxon approached CADA to advise that a group of GMCL dealers had agreed to form a committee to represent all GMCL dealers in Canada should GMCL file for bankruptcy protection. This group, which asked for CADA's assistance, became a CADA working group, and was to provide instructions in any *CCAA* filing.

**Reference:** E-mail from Tim Ryan Peter Harris, dated April 19, 2009, CBB000732, Exhibit 75, Tab 27, Cassels's Compendium, Vol. I, Tab 4, pp. 14-17

Cross-Examination of Tim Ryan ("Ryan Cross"), November 3, 2014, pp. 6931-6936, Cassels's Compendium, Vol. I, Tab 5, pp. 19-24

Trial Decision at para. 72, JABC, Tab 6, pp. 81-82

38. On April 21, 2009, lawyers at Cassels, including the managing partner Mark Young, met to determine whether Cassels could act for the dealers in the event of any *CCAA* proceeding, given that the firm had been retained, in March 2009, by Industry Canada to advise on a potential commercial financing transaction to support GMCL and Chrysler (the "Canada retainer").

**Reference:** Trial Decision at paras. 384, 387-389, JABC, Tab 6, pp. 145-146

39. Cassels concluded that no conflict existed at that time between the retainers, but that a precautionary ethical wall should be erected. Mr. Harris informed Mr. Ryan that, as had been reported in the *Globe and Mail*, Cassels was acting for Canada. Mr. Harris advised Mr. Ryan that Cassels could act for the dealers in any *CCAA* proceeding, but that if an adverse interest arose in those proceedings between the dealers and Canada, it was conceivable that Cassels might not be able to act for the dealers.

**Reference:** Globe and Mail Article, dated May 1, 2009, *Law Firms to Reap Millions,* CBB002100, Exhibit 75, Tab 44, Cassels's Compendium, Vol. I, Tab 6, p. 25

Trial Decision at paras. 387-391, 400, JABC, Tab 6, pp. 146-148

Examination-in-Chief of Mark Young, October 30, 2014, pp. 6651-6654, Cassels's Compendium, Vol. I, Tab 7, pp. 27-30

40. Throughout this period, GMCL delivered numerous video messages, called HIDL broadcasts, to the dealer network. In the April 27 HIDL broadcast, GMCL indicated that it expected to make reductions in the dealer network by the end of 2010, but reassured dealers that it planned to make these reductions through "normal attrition and consolidation." GMCL also announced the discontinuance of the Pontiac brand.

**Reference:** Trial Decision at paras. 23 and 66, JABC, Tab 6, pp. 72, 80

41. On April 30, 2009, the Steering Committee, CADA, and two lawyers from Cassels (David Ward and Peter Harris) participated in a telephone call to discuss the mandate of the Steering Committee, the logistics of creating a CADA trust fund to pay for legal services in any *CCAA* proceeding, and the *CCAA* process. The participants discussed the possibility of conflicts arising among dealers in a *CCAA* proceeding. Various possible "splinters" were contemplated, such as Pontiac and non-Pontiac dealers, and continuing and non-continuing dealers (if GMCL terminated dealers within a *CCAA* proceeding).

**Reference:** Meeting Minutes of the April 30 conference call, CBB000645, Exhibit 75, Tab 39, Cassels's Compendium, Vol. I, Tab 8, pp. 31-32

Trial Decision at para. 523, JABC, Tab 6, p. 176

Handwritten Notes from April 30, 2009 Call, CBB000725, Exhibit 75, Tab 40, Cassels's Compendium, Vol. I, Tab 9, pp. 33-34

42. As of April 30, 2009, and indeed as of the date of the May 4 Memorandum, the dealers had no reason to expect that any dealer terminations might occur in advance of any *CCAA* filing. This is not surprising, as GMCL had not yet begun to formulate its plan to deliver WDAs to certain dealers.

**Reference:** Trial Decision at para. 68, JABC, Tab 6, p. 81

### *b) The Language of the May 4 Memorandum*

43. On May 4, 2009, Tim Ryan at CADA sent the May 4 Memorandum to all GMCL dealers. The May 4, 2009 Memorandum is attached as Schedule D.

44. The May 4 Memorandum was sent under cover of an email from Tim Ryan to all GMCL dealers. The May 4 Memorandum announced the formation of the Steering Committee. The covering e-mail stated in all caps:

> THIS EMAIL CONTAINS A LINK TO A GENERAL MOTORS DEALER MEMO WHICH PROVIDES YOU WITH INFORMATION ABOUT THE FORMATION OF A NATIONAL GENERAL MOTORS DEALER 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 CANADA FILE FOR BANKRUPTCY PROTECTION IN CANADA IN THE NEAR FUTURE.
>
> **Reference:** E-mail from Tim Ryan to CADA GM Dealer members, dated May 4, 2009, TMW000000307, Exhibit 1, Tab 24, Cassels's Compendium, Vol. I, Tab 10, pp. 35-36 [underlined emphasis added]

45. The first sentence of the May 4 Memorandum (which was repeated in a virtually identical memorandum on May 13) stated that CADA and the Steering Committee will work:

> … to ensure that Canadian General Motor dealer interests are represented should General Motors of Canada Ltd. file for bankruptcy protection in Canada in the near future.

46. The second sentence reads:

> 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.
>
> **Reference:** May 4 Memorandum, CBB000177, Exhibit 75, Tab 45, Cassels's Compendium, Vol. I, Tab 11, pp. 37-41
>
> May 13 Memorandum and Cover Email, TMW000000333/TMW000000335, Exhibit 18, Tab 16, Cassels's Compendium, Vol. I, Tab 12, pp. 42-47

47. Dealers were asked to sign and submit an attached participation form (the "Participation Form"), and to contribute funds to a trust fund to be maintained by CADA (the "CADA Trust fund"), in order to identify their interest in being members of the group that would be represented in insolvency filing.

> **Reference:** May 4 Memorandum, CBB000177, Exhibit 75, Tab 45, Cassels's Compendium, Vol. I, Tab 11, pp. 37-41

Trial Decision at paras. 399, 403, JABC, Tab 6, pp. 148-149

48. The May 4 Memorandum goes on to state that CADA will use its own monies to assist with logistical and administrative support and "the initial legal and other professional services that may be necessary in preparation for a bankruptcy filing", and that the funds sent in by the dealers would be "treated as a trust fund" and that "no monies will be disbursed without the authorization and approval of your Steering Committee."

49. Cassels never saw or played any part in gathering the completed Participation Forms or trust funds. Only CADA saw these documents and handled these funds.

**Reference:** Examination-in-Chief of Tim Ryan ("Ryan Chief"), November 3, 2014, pp. 6854-6855, Cassels's Compendium, Vol. I, Tab 13, pp. 49-50

Examination-in-Chief of Peter Harris ("Harris Chief"), October 21, 2014, p. 5965, Cassels's Compendium, Vol. I, Tab 14, p. 52

50. The May 4 Memorandum was not a retainer. It was a proposal for representing interested dealers in the event of a *CCAA* proceeding.

### *c) The Trial Judge Failed to Define the Scope of the Retainer and to apply Principles of Contractual Interpretation*

51. In spite of the language of the May 4 Memorandum, the trial judge found that it was a retainer. He found that "it is unnecessary to specify the precise scope of the retainer", but that it included the provision of advice on the WDA.

52. The trial judge erred. A retainer is a contract, and ordinary principles of contractual interpretation apply. The trial judge was obliged to interpret the language of the May 4 Memorandum to determine if it was a contract and if so, to determine its scope. The first question

that must be asked in any claim against a professional advisor is what exactly the advisor was being retained to do. As the Supreme Court of Canada has noted:

> When a lawyer is retained by a client, the scope of the retainer is governed by contract. It is for the parties to determine how many, or how few, services the lawyer is to perform, and other contractual terms of the engagement.
>
> **Reference:** *Strother v. 3464920 Canada Inc.*, 2007 SCC 24 ("*Strother*") at para. 34, Cassels's BOA, Vol. I, Tab 1

53. A lawyer only acts for a client in so far as he or she has been retained on a specific matter. In *Midland Bank Trust Co. Ltd. and another v. Hett, Stubbs & Kemp*, Justice Oliver rejected the suggestion that there can be such a thing as "general retainer", independent of the subject matter of the retainer:

> There is no such thing as a general retainer in that sense. The expression "my solicitor" is as meaningless as the expression "my tailor" or "my bookmaker" as establishing any general duty apart from that arising out of a particular matter in which his services are retained. The extent of his duties depends on the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do.
>
> **Reference:** *Midland Bank Trust Co. Ltd. and another v. Hett, Stubbs & Kemp* [1978], 3 All ER 571 at 583, Cassels's BOA, Vol. I, Tab 2

54. It is artificial to determine that there is a binding contract between two parties without addressing the subject matter of the alleged contract, as done by the trial judge here. As held by this Court in *Lee v. 1435375 Ontario Ltd.*:

> The formation of a legally binding contract requires a meeting of the minds -- *consensus ad idem.*
>
> **Reference:** *Lee v. 1435375 Ontario Ltd.*, 2013 ONCA 516 at para. 37 (internal citation omitted), Cassels's BOA, Vol. I, Tab 3

55. After finding that he was not obliged to define the scope of the retainer, the trial judge then failed to perform a careful analysis of the language of the May 4 Memorandum, or to even advert

to its covering email (as quoted at paragraph 43) clearly delineating the scope of the contemplated retainer as being in the event of a bankruptcy proceeding. Instead, he concluded that:

> 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.
>
> **Reference:** Trial Decision at paras. 408, 475, JABC, Tab 6, pp. 150, 165-166

56. This paragraph reveals the trial judge's fundamental misunderstanding of the task before him. The trial judge reviewed the May 4 Memorandum for the purpose of determining what it "excluded", instead of properly defining the scope of what it included.

57. In failing to define the scope of the retainer, and in directing himself instead to what the May 4 Memorandum "excluded", the trial judge found that the retainer was "not limited to a *CCAA* proceeding" and that "to the extent that the retainer included 'complex restructuring'" Cassels was obliged to provide the dealers with advice on the WDAs:

> 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.
>
> **Reference:** Trial Decision at para. 480, JABC, Tab 6, pp. 166-167

58. The language "complex restructuring" appears in a section of the May 4 Memorandum entitled "Reasons to Participate", and reads "Legal representation in a complex restructuring or insolvency proceeding is expensive." This language is not found in the operative language of what counsel was being retained to do. The sentence cannot support the trial judge's finding that Cassels was being retained to provide advice on the WDAs:

(a) The sentence is descriptive of a well-known and entirely uncontroversial fact – it is not a term of a retainer;

(b) The word "restructuring" is qualified by the word "proceeding";

(c) The trial judge's leap between "complex restructuring" and "a complex restructuring of the dealer network" is unwarranted and unexplained;

(d) The use of the word "restructuring" is not evidence that the parties were contracting for Cassels to provide legal advice on a document, the WDA, that was not yet in anyone's contemplation; and,

(e) The trial judge fails to interpret the full May 4 Memorandum.

59. The trial judge extracted descriptive words from the May 4 Memorandum, to the exclusion of its language as a whole. A reading of the entire document demonstrates that the contemplated retainer was with respect to an insolvency proceeding only.

***d) The Trial Judge Failed to consider the pre-May 4 Surrounding Circumstances***

60. The trial judge was not only required to interpret the language of the May 4 Memorandum, he was required to do so in a manner "consistent with the surrounding circumstances known to the parties at the time of formation of the contract." He failed to do so.

**Reference:** *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47 (emphasis added), Cassels's BOA, Vol. I, Tab 4

61. The surrounding circumstances known to CADA, the Steering Committee, the dealers and Cassels by May 4, 2009 were that:

(a) GMCL was going to reduce the dealer network "through normal attrition and consolidation" by the end of 2010;

(b) GMCL was facing a possible *CCAA* proceeding. The trial judge found that by May 2009, "for all involved, a *CCAA* filing would have appeared likely, if not inevitable"; and,

(c) CADA was attempting to organize the dealers for representation in a possible *CCAA* proceeding.

**Reference:** Trial Decision at paras. 66, 71, 501, JABC, Tab 6, pp. 80-81, 171

62. The contemporaneous documents leading up to the May 4 Memorandum overwhelmingly demonstrate that CADA, the Steering Committee, Cassels and the dealers were considering a group retainer on behalf of all GMCL dealers in the event of *CCAA* proceedings:

(a) The March 4, 2009 CADA memorandum providing legal information regarding bankruptcy and insolvency issues to the dealers, and advising them that "it would be crucial that dealers were organized and properly represented, in order to be able to make representations to the court overseeing the proceedings." (emphasis added) The trial judge made no reference to this document.

**Reference:** March 4, 2009 memorandum, TMW000000422, Exhibit 75, Tab 6, Cassels's Compendium, Vol. I, Tab 1, pp. 1-10

(b) CADA repeats this in an e-mail to dealers on April 8. The trial judge made no reference to it.

**Reference:** Email from CADA dated April 8, 2014, TMW000000292, Exhibit 75, Tab 20, Cassels's Compendium, Vol. I, Tab 2, pp. 11-12

(c) On April 15, Tim Ryan at CADA sent an e-mail to Cassels entitled "Determination of any Potential Conflict by CBB in acting for GM or Chrysler Dealers if either Manufacturer files for bankruptcy protection" (emphasis added). The trial judge mentioned this email in the chronology, but did not address it when considering the retainer.

**Reference:** E-mail from Tim Ryan to Peter Harris, dated April 15, 2009, CBB002293, Exhibit 75, Tab 25, Cassels's Compendium, Vol. I, Tab 3, pp. 13

Trial Decision at para. 385, JABC, Tab 6, p. 145

(d) Michael Croxon (later co-chair of the Steering Committee), in an April 19, 2009 e-mail to Tim Ryan, forwarded to Mr. Harris the following day, writes of discussions "that this group would form a committee to represent all GM Dealers in Canada should GM file for bankruptcy protection" (emphasis added). The trial judge quoted this passage when laying out the chronology, but did not address this or any other Steering Committee communication when determining that there was an active retainer on behalf of the dealers.

**Reference:** E-mail from Tim Ryan to Peter Harris, dated April 20, 2009, CBB000732, Exhibit 75, Tab 27, Cassels's Compendium, Vol. I, Tab 4, pp. 14-17

Trial Decision at para. 386, JABC, Tab 6, pp. 145-146

(e) On April 28, CADA sent a memorandum to its General Motors Canada Dealer Members in which it stated that "As you know, CADA is busy putting in place a contingency plan in order to assist its General Motor dealer members in the event that General Motors Canada seek (sic) creditor protection under Canada's *'Companies Creditors Arrangement Act'*

('*CCAA*')" (emphasis added). The trial judge did not refer to this email in his Reasons, as he was obliged to do, which led to an incorrect interpretation of the May 4 Memorandum.

**Reference:** April 28, 2009 memorandum, CBB000165, Exhibit 75, Tab 33, Cassels's Compendium, Vol. I, Tab 15, p. 53

(f) The minutes of the April 30 conference call with CADA, the Steering Committee and Cassels record that "Tim advised the Steering Committee that the national General Motors Canada dealer conference call was scheduled for May 7, 2009 at 4pm EST and that it would be a listen only call for participants in English and French to inform Canadian General Motors dealers about the formation of a national General Motors dealer group to ensure that Canadian General Motors dealer interests are represented should General Motors Canada file for bankruptcy protection in Canada in the near future" (emphasis added). The trial judge referred to the April 30 call, but did not advert to the fundamental purpose and content of the discussion in interpreting the May 4 Memorandum. Considering that this was the first call between the Steering Committee and Cassels, this omission is startling.

**Reference:** Minutes of the April 30, 2009 Conference Call, CBB000645, Exhibit 75, Tab 39, Cassels's Compendium, Vol. I, Tab 8, pp. 31-32

(g) No one outside of GMCL anticipated the delivery of a WDA. As found by the trial judge, "[t]hroughout April 2009, GMCL still planned to achieve rationalization through retirements, attrition and consolidation" so that by April 27 "GMCL had not yet begun to formulate the wind-down plan that was ultimately put into place." In early May, when GMCL did begin formulating

its WDA plan, it "was not communicated to any of the dealers or dealer organizations."

**Reference:** Trial Decision at paras. 68, 74, 168, JABC, Tab 6, pp. 81-82, 101

63. The trial judge found that at the time of the retainer, "the issue of WDAs was not contemplated" and that the dealers were "shocked and surprised" when they eventually learned of the WDAs weeks after the May 4 Memorandum.

**Reference:** Trial Decision at paras. 90, 456, JABC, Tab 6, pp. 85, 162

64. A WDA was simply not part of what the Supreme Court of Canada refers to in *Sattva* as the "surrounding circumstances known to the parties at the time of formation of the contract." None of the pre-May 4 communications were directed at organizing a retainer for any purpose other than possible insolvency proceedings.

65. The only pre-May 4 documents relied on by the trial judge in interpreting the retainer are an April 29 Memorandum, and conflict search emails within Cassels. Neither the April 29 Memorandum nor the conflict search emails were seen by the dealers and neither support a finding that the retainer included the WDAs:

(a) The April 29 Memorandum was in the nature of a marketing brochure prepared by Cassels and sent to Tim Ryan at his request. The trial judge found the following:

> 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

**Reference:** Trial Decision at para. 422, JABC, Tab 6, pp. 153-154

This memorandum is evidence only of a potential future retainer being considered for the "GM Dealers Group" in a *CCAA* proceeding, and there was no evidence that the Steering Committee even saw the document. As the plaintiff called two Steering Committee witnesses and did not ask them if they saw the document, an inference ought to have been drawn that they did not.

**Reference:** Trial Decision at para. 422, JABC, Tab 6, pp. 153-154

(b) Internal e-mails at Cassels by staff conducting a conflict search demonstrated that a conflict search was conducted for "General Motors Dealers." No one outside of Cassels saw these administrative documents. These emails provide no evidence as to the timing or scope of any retainer.

**Reference:** Trial Decision at paras. 435, 438 JABC, Tab 6, pp. 157-158

66. The trial judge erred in failing to properly consider this evidence.

### *e) The Trial Judge Erred in Applying the Law of "Limited Retainers" and in Reversing the Onus of Proof*

67. The trial judge, after finding that he was not obliged to define the precise scope of the retainer, found that the retainer was ambiguous. He held, however, that the retainer was "not strictly limited to representation in a possible *CCAA* proceeding" and "included advice about the WDA."[1]

**Reference:** Trial Decision at para. 471, JABC, Tab 6, pp. 164-165

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[1] At paragraph 517 of the Trial Decision, the trial judge described the retainer as being "to represent the dealers with respect to a potential *CCAA* filing" (JACB, Tab 6, p.175). This is correct with respect to the scope of the contemplated retainer. It is, however, inconsistent with the trial judge's finding elsewhere in his Reasons that the retainer was also with respect to "a 'complex restructuring' of the GMCL dealer network" including the WDAs (see, for example, Trial Decision at para. 471, JACB, Tab 6, pp. 164-165).

68. The trial judge's chain of reasoning was as follows:

> 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.
>
> **Reference:** Trial Decision at para. 472, JABC, Tab 6, p. 165
>
> Lawyers and law firms who use limited scope retainers must clearly define the scope of the legal series to be provided…
>
> **Reference:** Trial Decision at para. 472, JABC, Tab 6, p. 165
>
> …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; and,
>
> **Reference:** Trial Decision at para. 473, JABC, Tab 6, p. 165
>
> …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 obliged to provide legal services to the dealers – be it advice or representation – with respect to the Notice of Non-Renewal and the WDAs.
>
> **Reference:** Trial Decision at para. 480, JABC, Tab 6, pp. 166-167

69. In reversing the onus, the trial judge relied on authorities on "limited retainers" for the proposition that "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."

> **Reference:** Trial Decision at para. 470 citing *Coughlin v. Comery,* [1996] O.J. No. 822 at para. 31 (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, Cassels's BOA, Vol. I, Tab 5

70. This line of cases has no application. The term "limited retainer" is a term of art. It cannot and does not apply to any situation where a lawyer is asked to handle a defined matter. A limited retainer is one where the scope of the retainer requires of the lawyer a standard of conduct "less than that required of a reasonably competent and diligent solicitor." As Justice Mackinnon

explained in *Broesky v. Lust*, these include "a real estate transaction without search of title, or providing advice on a separation agreement without obtaining financial disclosure."

**Reference:** *Broesky v. Lust,* 2011 ONSC 167 at para. 56, Cassels's BOA, Vol. I, Tab 6

*ABN Amro Bank Canada v. Gowling, Strathy and Henderson,* [1994] O.J. No. 2617 (Gen. Div.) at para. 18, Cassels's BOA, Vol. I, Tab 7

71. The May 4 Memorandum does not contemplate a "limited retainer." It contemplates a retainer on behalf of all dealers in a *CCAA* filing. It could not specify that the retainer does not include advice on an agreement that did not exist at the time that would later be sent to some and not all of the dealers.

72. The plaintiff bore the burden of proving that Cassels was retained to provide advice on the WDAs.[2] The trial judge cannot avoid his obligation to "specify the precise scope of the retainer" by framing the retainer as "ambiguous" or a "limited" and placing the onus on Cassels to prove what the retainer did not include.

**Reference:** Trial Decision at paras. 472, 480, JABC, Tab 6, pp. 165-167

73. This is not a case where there is a dispute between the lawyer and the client as to what was communicated between them. This is a case about the legal significance of largely admitted facts. There is no principled reason to place the onus on Cassels to displace the plaintiff's legal submission as to the significance of undisputed facts.

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[2] Meeting this burden required the plaintiff to account for the fact that advice concerning the WDAs and the individual dealers' circumstances was always going to be provided by separate counsel for each dealer. Where there is a division of responsibilities between different professionals, this can limit the responsibilities of each in such a way as not to require them to preoccupy themselves with whether the other had discharged its duty (See *Oblates of Mary Immaculate, St. Peter's Province v. 3220605 Canada Inc. (c.o.b. Life Lease Associates of Canada)* [2009] O.J. No. 6362 at para. 104 affirmed 2011 ONCA 481 at paras. 6-7, Cassels's BOA, Vo. I, Tab 8; *Woodglen & Co. v Owens*, [1996] O.J. No. 4082 (Gen. Div.) at paras. 87-89, affirmed (1999), 27 RPR (3d) 237 (Ont. C.A.), Cassels's BOA, Vol. I, Tab 9. This principle should be decisive where one lawyer is specifically instructed not to deal with an issue entrusted to other lawyers.

74. The trial judge created a Catch-22: He held that the retainer contemplated in the May 4 Memorandum includes representation on the WDAs because the May 4 Memorandum fails to specifically exclude the WDAs, in circumstances where neither its authors nor the recipients knew about the WDAs.

**Reference:** Trial Decision at paras. 472, 480, JABC, Tab 6, pp. 165-167

75. The trial judge`s interpretation would require the dealers to have not only contemplated the WDAs, but to have intended that Cassels would act for a subgroup of dealers on receipt of the WDAs, in circumstances where such representation might not be to the benefit of the group as a whole, and indeed might be directly contrary to the interests of those who "retained" Cassels and did not receive a WDA.

76. This interpretation is unreasonable.

### *f) The Trial Judge Failed to Properly Consider Evidence of Subsequent Events*

77. The May 4 Memorandum is not ambiguous, but in any event, the trial judge erred in failing to properly consider the events subsequent to the May 4 Memorandum in interpreting its "terms."

78. If there is ambiguity in a contract, events which occur subsequent to its formation can be used to interpret the contract, because "it may be helpful in showing what meaning the parties attached to the document after its execution, and this in turn may suggest that they took the same view at the earlier date."

**Reference:** *Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.*, 1995 ONCA 438 at p. 12, Cassels's BOA, Vol. I, Tab 10

79. Lambert J.A. discussed the relevance of subsequent conduct in *Canadian National Railways v. Canadian Pacific Ltd*:

> In Canada the rule with respect to subsequent conduct is that, if, after considering the agreement itself, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then certain additional evidence may be both admitted and taken to have legal relevance if that additional evidence will help to determine which of the two reasonable alternative interpretations is the correct one. It certainly makes no difference to the law in this respect if the continuing existence of two reasonable alternative interpretations after an examination of the agreement as a whole is described as doubt or an ambiguity or as uncertainty or as difficulty of construction.
>
> **Reference:** *Canadian National Railways v. Canadian Pacific Ltd.*, [1979] 1 W.W.R. 358 at para. 82, Cassels's BOA, Vol. I, Tab 11

80. The events which occurred between May 4 and May 26 overwhelmingly support Cassels's position that any retainer was only in relation to representation in any *CCAA* proceeding. These events include the following:

(a) In early May, GMCL decided to offer a group of dealers a WDA. The decision was not approved by GM until May 14. The WDA arose after the May 4 Memorandum, and was not anticipated;

**Reference:** Trial Decision at paras. 79-81, JABC, Tab 6, p. 83

(b) On May 15, 2009, Marc Comeau of GMCL advised CADA that GMCL had received approval to approach certain dealers to propose a compensation offer. Mr. Comeau did not disclose the details of the offers or the identities of the proposed recipients. CADA was advised that the compensation offers would be non-negotiable, that even if the dealers accepted the offers a *CCAA* proceeding might still be unavoidable, and that if the dealers did not accept the offers GMCL would commence *CCAA* proceedings and the offers would be off the table.

**Reference:** Glenn Zakaib's Notes of the May 15 Steering Committee Conference Call,[3] CBB002694, Exhibit 75, Tab 75, Cassels's Compendium, Vol. I, Tab 16, pp. 54-57

Examination-in-Chief of Glenn Zakaib ("Zakaib Chief"), October 29, 2014, pp. 6481-6485, 6486, Cassels's Compendium, Vol. I, Tab 17, pp. 59-64

Meeting Minutes of GM Steering Committee Conference Call, dated May 15, 2009, CBB000647, Exhibit 75, Tab 70, Cassels's Compendium, Vol. I, Tab 18, pp. 65-66

Ryan Chief, November 3, 2014, pp. 6869-6871, Cassels's Compendium, Vol. I, Tab 19, pp. 68-70

Examination-in-Chief of Marc Comeau ("Comeau Chief"), October 10, 2014, pp. 4422-4424, Cassels's Compendium, Vol. I, Tab 20, pp. 72-74

(c) On May 15 and again on May 20, the Steering Committee directed Cassels that it was not retained to assist with the WDAs. This evidence is not in dispute. As reflected in the Minutes of the May 15 call, the Steering Committee confirmed to Cassels that "its mandate was to deal with issues flowing from a possible GM Canada bankruptcy filing and that it did not have a role to play in GM's proposed offer to its non-continuing dealers";

**Reference:** Minutes of Steering Committee Conference Call, dated May 15, 2009, CBB000647, Exhibit 75, Tab 70, Cassels's Compendium, Vol. I, Tab 18, pp. 65-66

(d) GMCL did not complete its list of the dealers (ultimately numbering 240) who would receive a WDA until the morning of May 20, 2009, and the WDAs went out that day;

**Reference:** Comeau Chief, October 10, 2014, pp. 4381-4383, 4402, 4435, Cassels's Compendium, Vol. I, Tab 21, pp. 76-80

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[3] Notes were misnamed "CADA re: Saturn Dealers" by Mr. Zakaib. As Mr. Zakaib clarified at trial (p. 6485, Cassels's Compendium, Vol. I, Tab 17), this was a GMCL Steering Committee Call.

Trillium's Wind Down Agreement, GMT000008840, Exhibit 56, Tab 229A, Cassels's Compendium, Vol. I, Tab 22, pp. 81-95

Trial Decision at paras. 2, 93, JABC, Tab 6, pp. 69, 86

(e) On May 20, 2009, CADA sent a note to the dealers about its intention to prepare "a general information memo" about the WDAs, and asked the non-continuing dealers to identify themselves to CADA as GMCL had refused to provide their names due to privacy concerns. No mention was made of Cassels;

**Reference:** CADA memorandum dated May 20, 2009, CBB000187, Exhibit 75, Tab 95, Cassels's Compendium, Vol. I, Tab 23, p. 96

Email from Tim Ryan to Richard Gauthier, Charles Seguin, Peter Harris and Glenn Zakaib, FW: Non-Continuing Dealer List, CBB000497, Exhibit 75, Tab 106, Cassels's Compendium, Vol. I, Tab 24, pp. 97-98

(f) CADA circulated a general information memorandum about the WDAs on May 22, 2009, and advised the dealers that:

> 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.

**Reference:** CADA memorandum dated May 22, 2009, TMW000000342, Exhibit 75, Tab 110, Cassels's Compendium, Vol. I, Tab 25, pp. 99-104

No suggestion was made that CADA, let alone Cassels, would provide the dealers with legal advice on the WDAs. To the contrary, the dealers were specifically told to obtain advice from their own lawyers. The May 22 memorandum stated:

> Please note that this memo is not meant as legal advice (and should not be construed as such) rather, it is intended to provide some general information to assist Dealers when considering the Wind-Down Agreement with their individual legal and business advisors. While every attempt has been made to ensure the contents of this memo are accurate, ultimately Dealers must discuss their own individual situation with their own legal and business advisors in order to understand and address particular circumstances.

**Reference:** CADA memorandum dated May 22, 2009, TMW000000342, Exhibit 75, Tab 110, Cassels's Compendium, Vol. I, Tab 25, pp. 99-104

Cross-Examination of Thomas L. Hurdman ("Hurdman Cross"), September 16, 2014, pp. 1202-1205, Cassels's Compendium, Vol. I, Tab 26, pp. 106-109

(g) On May 24, 2009, CADA held a conference call for any non-continuing dealer who wished to participate. By this date, only 110 of the non-continuing dealers had identified themselves to CADA. In relation to this call:

(i) None of the correspondence setting up the call signalled to dealers that Cassels would be on the call. Indeed, Cassels's attendance on the call was only confirmed on May 22 and was not communicated to the dealers. Mr. Ryan asked Cassels to be on the call as counsel to CADA in order to help it in its role to provide legal information to dealers.

**Reference:** Ryan Chief, November 3, 2014, pp. 6885, Cassels's Compendium, Vol. I, Tab 27, p. 111

Transcript of CADA conference call, dated May 24, 2009, TMW000005974, Exhibit 75, Tab 117, pp. 92-95, Cassels's Compendium, Vol. I, Tab 28, pp. 113-116

(ii) CADA addressed the status of the CADA Trust Fund, making clear that the funds would only be used in the event of a GMCL *CCAA* filing:

> I'd like to make one final comment on the status of the GM dealer legal defence fund. That fund is building up very nicely as we speak and I want to thank all of you who have sent in their money, their cheques, thus far. [...] At the end of the day, if none of these monies are needed they will be returned to you. These monies are held in trust by CADA and can only be used for the purposes of representing you in front of the courts on the *CCAA* matter

**Reference:** Transcript of CADA conference call, dated May 24, 2009, TMW000005974, Exhibit 75, Tab 117, pp. 73-74, Cassels's Compendium, Vol. I, Tab 29, pp. 118-119

(iii) No dealer could have reasonably have believed that Cassels was nevertheless on the call as their counsel, to provide them with legal advice. As noted by an expert called by Cassels, Jonathan Levin, "I think the dealers would have expected that they would have had to pay if that was the role of Cassels Brock";

**Reference:** Examination-in-Chief of Jonathan Levin ("Levin Chief"), October 30, 2014, p. 6726, Cassels's Compendium, Vol. I, Tab 30, p. 121

(iv) CADA instructed the dealers to speak with their legal advisors regarding the decision to sign the WDA:

> I counsel you to sit down with your tax advisors, your business advisors, and your lawyer to look at that in terms of how your existing dealership operations are structured, what companies hold what, and just to get a sense of how that may play out in your individual circumstances.

**Reference:** Transcript of CADA conference call, dated May 24, 2009, TMW000005974, Exhibit 75, Tab 117, p. 87, Cassels's Compendium, Vol. I, Tab 31, p. 123

(v) CADA also informed the dealers that they would not provide a recommendation on whether to sign the WDAs:

> All right. The lawyer's here [sic]. We're not going to make a recommendation. We can only give you the facts, and the facts are

> you can roll the dice that – and roll the dice and potentially get what the agreement represents for, you know, in terms of dollars and cents and you've got to do that calculation.

**Reference:** Transcript of CADA conference call, dated May 24, 2009, TMW000005974, Exhibit 75, Tab 117, p. 165, Cassels's Compendium, Vol. I, Tab 32, pp. 125

(vi) During the call, none of the dealers asked Cassels to take any steps on their behalf;

**Reference:** Transcript of CADA conference call, dated May 24, 2009, TMW000005974, Exhibit 75, Tab 117, pp. 98-180, Cassels's Compendium, Vol. I, Tab 33, pp. 127-212

(vii) The trial judge found that legal information provided by Cassels during the May 24 conference call was not legal advice and was not sufficient to ground any duty of care to any dealers who had not responded to the May 4 Memorandum (the "Call dealers");

**Reference:** Trial Decision at para. 375, JABC, Tab 6, p. 144

(h) On May 28, 2009, CADA sent an e-mail to the dealers who had responded to the May 4 Memorandum. It announced that it had arranged for two law firms to represent the dealers in the event of a *CCAA* proceeding: Cassels would act for the non-continuing dealers and Lax O'Sullivan Scott LLP would act for the retained dealers. The e-mail further advised the dealers that no monies from the CADA Trust Fund had been used to date since those funds had been collected:

> ...to represent Canadian General Motors dealer interests should GM Canada file for bankruptcy protection. Since as of the date of this email no filing has yet occurred by GM Canada no monies have been disbursed, rather CADA has shouldered the cost of arranging for and briefing legal counsel up to this point in time.

**Reference:** CADA memorandum dated May 28, 2009, GMT000012297, Exhibit 75, Tab 123, Cassels's Compendium, Tab 34, pp. 213-216

Ryan Cross, November 3, 2014, pp. 6999-7000, Cassels's Compendium, Vol. I, Tab 35, pp. 218-219

(i) After June 1, 2009, the Steering Committee was disbanded, and all monies were returned to the dealers, because there was no *CCAA* proceeding. No complaint of any kind was made by any dealer;

**Reference:** CADA E-mail dated June 3, 2009, TMW000000288, Exhibit 75, Tab 130, Cassels's Compendium, Vol. I, Tab 36, pp. 220-222

Hurdman Cross, September 16, 2014, p. 1157, Cassels's Compendium, Vol. I, Tab 37, p. 224

Cross-Examination of Fern Turpin Jr. ("Turpin Cross"), September 24, 2014, p. 1921, Cassels's Compendium, Vol. I, Tab 38, p. 226

Ryan Chief, November 3, 2014, p. 6915, Cassels's Compendium, Vol. I, Tab 39, p. 228

CADA memorandum dated July 24, 2009, TWM000000291, Exhibit 1, Tab 54, Cassels's Compendium, Vol. I, Tab 40, p. 229

81. The effect of the direction from the Steering Committee will be explored below. That direction and the other events subsequent to May 4 provide overwhelming evidence that Cassels was not retained in relation to the WDAs.

82. The trial judge's interpretation of the subsequent events is flawed and in any event does not support his finding that Cassels was retained to provide advice with respect to the WDAs. Instead of the evidence cited above, the trial judge relied upon:

(a) **May 7 ethical wall memo**: The trial judge considered an internal ethical wall memo circulated at Cassels on May 7, which provided that Cassels "has accepted a retainer from the GM Dealers Action Group through the Canadian

Automobile Dealers Association regarding potential claims again General Motors of Canada Limited with respect to the potential bankruptcy of GM and the potential restructuring of the GM dealer network." An internal ethical wall memo cannot define the terms of a retainer. In any event, the trial judge said nothing about what the ethical wall memo demonstrates as to the terms of any retainer, only that it supports a retainer's existence. The most logical interpretation of the ethical wall memorandum in the circumstances is that it is referring to a potential bankruptcy proceeding in which there may be a restructuring of the dealer network;

**Reference:** Trial Decision at paras. 441-443, JABC, Tab 6, pp. 158-159

(b) **May 7 listen-only call**: The trial judge described Cassels's role on the call as follows: "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." The trial judge found that this constituted legal advice, but then found that it is unnecessary to "parse" the distinction between legal information and legal advice[4] and concluded that "the structure of the conference call is equivocal in its support for Cassels's position that CADA was its client and not the GMCL dealers." Through all this, the trial judge did not find that the call supported a finding that the retainer included the WDAs; and,

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[4] This finding is inconsistent with the trial judge's finding that similar generic statements provided on a May 24, 2009 CADA call constituted "legal information", not "legal advice." General legal statements do not constitute legal advice. See *Trillium Motor World Ltd. v. Cassels Brock & Blackwell LLP.*, 2013 ONSC 1789 at paras. 11-12, Cassels's BOA, Vol. II, Tab 12

**Reference:** Trial Decision at paras. 375, 446-449, 452, JABC, Tab 6, pp. 144, 160-161

(c) **May 24 call:** The trial judge appears to have relied on Cassels's participation in the May 24 call to support a finding that Cassels was retained by the Participation Form Dealers, despite the call being open to all non-continuing dealers, but did not link this finding to the terms of the retainer and found that no legal advice was given by Cassels during this call.

**Reference:** Trial Decision at paras. 375, 450-454, JABC, Tab 6, pp. 144, 160-161

83. The events subsequent to May 4, 2009 confirm that CADA and the dealers were organizing to retain Cassels in the event of a *CCAA* proceeding, and that Cassels was not retained to provide advice on the WDAs.

### *g) The Trial Judge Erred in his Treatment of Witnesses' Evidence as to the Retainer*

84. The trial judge erred in fact and in law in relying on out-of-context portions of the evidence of Cassels's lawyers Peter Harris and Glenn Zakaib to support his finding that the "retainer" included the provision of advice on the WDA.

85. The trial judge held that Mr. Harris and Mr. Zakaib were "open to the possibility that their retainer with the GMCL dealers involved more than just representation in a *CCAA* proceeding", based on answers they gave on cross-examination. This evidence:

(a) Was divorced from the overall context of their evidence, which was clearly and repeatedly that the retainer was in relation to a possible *CCAA* proceeding only; and,

(b) Does not assist in determining whether the retainer included the WDAs in particular.

**Reference:** Trial Decision at para. 475, JABC, Tab 6, pp. 165-166

Harris Chief, October 21, 2014, pp. 5945-5946, 6035-6036, 6068-6069, Cassels's Compendium, Vol. I, Tab 41, pp. 231-236

Zakaib Chief, October 29, 2014, pp 6472-6473, 6478-6480, 6493-6494, Cassels's Compendium, Vol. I, Tab 42, pp. 238-244

86. The plaintiff, one of the two additional class member witnesses, two members of the Steering Committee, Tim Ryan, and the Cassels lawyers all testified that the retainer contemplated by the May 4 Memorandum was to represent all GMCL dealers in the event of a *CCAA* filing.

**Reference:** Trial Decision at paras. 470, 471, 473, Cassels's ABC, Tab 6, pp. 164-165

Ryan Chief, November 3, 2014, pp. 6843, 6850-6855, Cassels's Compendium, Vol. I, Tab 43, pp. 246-252

Cross-Examination of Robert Johnston ("Johnston Cross"), October 3, 2014, pp. 3401-3403, Cassels's Compendium, Vol. I, Tab 44, pp. 254-256

Cross-Examination of John Carroll ("Carroll Cross"), October 20, 2014, pp. 5783-5788, Cassels's Compendium, Vol. I, Tab 45, pp. 258-263

87. In chief, Mr. Hurdman testified as follows:

> Q. What kind of event did you have in mind at that time for which you might need Cassels Brock?
>
> A. I wasn't sure. The event being a *CCAA* filing, which is what it says, but I wasn't sure how it was going to unfold.

**Reference:** Examination-in-Chief of Thomas L. Hurdman, September 11, 2014, p. 528, Cassels's Compendium, Vol. I, Tab 46, p. 265

88. Mr. Hurdman confirmed in cross-examination that:

Q. These memoranda were the voice that defined your understanding of what the retainer is?

A. What -- that's what initiated me to send in the $5,000 so that CADA would hire a law firm so that, as a group, we would be protected.

Q. In the event of a bankruptcy or CCAA filing?

A. That's where it started.

**Reference:** Hurdman Cross, September 16, 2014, p. 1178, Cassels's Compendium, Vol. I, Tab 47, p. 267

Trial Decision at para. 476, JABC, Tab 6, p. 166

89. Class member Fern Turpin Jr. testified to his understanding that the retainer was conditional on a *CCAA* filing:

Q. And it says that: It has been created to work with 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 file for bankruptcy protection and you read that?

A. Yes, sir

Q. And you understood it?

A. Yes.

Q. And it was conditional and directed to a filing by General Motors?

A. Yes, sir.

Q. And you and I can agree that at this point, May the 4th, and when you reacted to it by sending in your money, no sign of a WDA on the horizon as a creature?

A. Correct.

**Reference:** Turpin Cross, September 24, 2014, pp. 1934-1936, Cassels's Compendium, Vol. I, Tab 48, pp. 269-271

90. The overwhelming weight of the evidence was that Cassels, the Steering Committee and the dealers understood that Cassels was being retained in the event of insolvency proceedings.

91. The trial judge held that 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." That, however, is in respect of a filing, not the WDAs.

**Reference:** Trial Decision at para. 455, JABC, Tab 6, p. 161

92. In any event, a party's evidence as to his or her subjective expectations is inadmissible in interpreting that contract. As held by the Supreme Court of Canada in *Eli Lilly v. Novopharm Ltd.*:

> The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.

**Reference:** *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 at paras. 54 and 59-60, Cassels's BOA, Vol. II, Tab 13

93. In the same way, a party's "admission" as to the scope of a contract is inadmissible. In *MacDonald v. Chicago Title Insurance,* 2015 ONCA 842, this Court recently held:

> To the extent that this paragraph can be understood to mean that Mr. Mineo's personal information and belief was not binding on the motion judge to vary clear contractual terms, it is correct. The motion judge was not obliged to accept Mr. Mineo's understanding of the contract, and indeed, to the extent that Mr. Mineo's evidence described strictly his (and by extension, Chicago Title's) subjective view of what the terms of the Title Policy meant, or Chicago Title's subjective intention in drafting the Title Policy, it was inadmissible for the purposes of contractual interpretation: see Hall, at p. 30.

**Reference:** *Chicago Title Insurance,*2015 ONCA 842 ("*Chicago Title*") at para. 44, Cassels's BOA, Vol. II, Tab 14

94. The trial judge erred in fact in his interpretation of the witnesses' evidence as to the retainer, and he erred in law in relying on this evidence at all.

## ISSUE TWO: CASSELS DID NOT BREACH DUTIES TO THE DEALERS

95. The trial judge erred in finding that Cassels breached its contractual and fiduciary duties, and/or breached the standard of care by:

(a) Acting for the dealers despite the Canada retainer;

(b) Failing to advise the Steering Committee that it was in a conflict, and taking the Steering Committee's direction not to be involved in the WDAs; and

(c) Employing a "wait-and-see" approach.

**Reference:** Trial Decision at paras. 481-482, JABC, Tab 6, p. 167

96. The trial judge's finding that Cassels breached its duties to the Participation Form Dealers necessarily flows from his finding that Cassels was retained by those dealers in relation to the WDA. If this Court overturns the trial judge's findings with respect to the dealer retainer, the trial judge's finding that Cassels's breached its obligations cannot stand. If this Honourable Court upholds the trial judge's finding as to the retainer, Cassels nevertheless met its obligations and the appeal should be allowed.

### *a) No Breach in Relation to the Canada Retainer*

97. In March 2009, Cassels had been retained by Industry Canada to advise on a potential commercial financing transaction to support GMCL and Chrysler (the "Canada retainer").

**Reference:** Trial Decision at para. 384, JABC, Tab 6, p. 145

98. The trial judge held that there was a bright line conflict between the Canada retainer and a retainer on behalf of the dealers in respect of the WDAs. Because of the retainer that he found, the

trial judge held that Cassels was negligent[5] and breached its contractual and fiduciary obligations by accepting the retainer while it was retained by Canada.

**Reference:** Trial Decision at paras. 381, 494, JABC, Tab 6, pp. 145, 169

99. However, the trial judge held that if Cassels had only been retained to act for the dealers in the event of a *CCAA* proceeding, there would have been no conflict with the Canada retainer:

> 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.
>
> **Reference:** Trial Decision at para. 497, JABC, Tab 6, p. 170 (emphasis added)

100. If this Court allows Cassels's appeal with respect to the scope of the retainer, the finding of a bright line conflict with the Canada retainer falls.

101. The trial judge made additional errors:

(a) The trial judge erred in finding that the Canada retainer created a conflict in the "residual category of conflicts", and failed to take into account evidence of both standard of care experts called by Cassels that the firm's approach to the potential conflict with the Canada retainer met the standard of care. The plaintiff led no evidence on this from its standard of care expert;

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[5] While at para. 381 (JABC, Tab 6, p. 145) the trial judge found that Cassels was "negligent" and breached its contractual and fiduciary duties in relation to the Canada retainer, at para. 6 he found that Cassels breached its contractual and fiduciary duties in this regard, without referencing negligence.

**Reference:** Examination-in-Chief of Kenneth Rosenberg ("Rosenberg Chief"), October 29, 2014, pp. 6397-6401, Cassels's Compendium, Vol. I, Tab 49, pp. 273-277

Levin Chief, October 30, 2014, pp. 6727-6728, Cassels's Compendium, Vol. II, Tab 50, pp. 279-280

Trial Decision at para. 508, JABC, Tab 6, pp. 172-173

(b) The trial judge erred in finding that the obvious lack of alignment between the interests of the dealers and the interests of GMCL demonstrated a conflict with the Canada retainer. In rejecting Mr. Ryan's evidence that the interests of the dealers and Canada were aligned (the trial judge made the opposite finding elsewhere), the trial judge noted "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." This is perplexing. There is no evidence that General Motors' decision in the United States to terminate the Pontiac line of cars (which the trial judge found was "a significant adverse blow to GMCL and its dealers") was in dispute in any legal setting, much less in Canada. There could be no finding that the Government of Canada supported the termination of Pontiac, much less that Cassels's retainer included fighting for the reinstatement of Pontiac.

**Reference:** Trial Decision at paras. 37, 63, 509, JABC, Tab 6, pp. 75, 80, 173

102. The trial judge erred in confusing the conflict between the dealers and GMCL with a misalignment of interests between the dealers and Canada. In any event, as discussed in Causation below, any conflict with the Canada retainer led to no consequences and caused no damage whatsoever.

### *b) No Breach in Relation to the Steering Committee*

103. Cassels met its obligations by complying with the direction of the Steering Committee on May 15 that its mandate did not include the WDAs.

104. The May 4 Memorandum provided that:

> 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.
>
> **Reference:** May 4 Memorandum, CBB000177, Exhibit 75, Tab 45, Cassels's Compendium, Vol. I, Tab 11, pp. 37-41

105. The Steering Committee first learned of GMCL's intention to deliver a "settlement offer" to a group of dealers on May 15. When, on that day and again on May 20, 2009, the Steering Committee told Cassels that its mandate did not include the WDAs, the Steering Committee was either:

(a) Providing "direction" and confirmation to legal counsel as to the scope of the contemplated *CCAA* retainer, as submitted by the appellant; or,

(b) Providing "instructions", within the context of an ongoing retainer, not to become involved in the WDAs, as found by the trial judge.

106. Either way, Cassels met its obligations. If the May 4 Memorandum was a retainer, a term of that retainer was that the Steering Committee would provide instructions to Cassels.

107. To avoid the necessary implications of the Steering Committee's directions on May 15 and 20, the trial judge said that the Steering Committee was conflicted and that Cassels should not have taken its instructions. The trial judge failed to find, however, what Cassels ought to have done

instead. The Supreme Court of Canada has held that absent extenuating circumstances, a lawyer is entitled to take instructions from an agent or representative of a group.

**Reference:** *Sinclair v. Smith* (1982), 41 BCLR 374 (BCSC) at paras. 14-22, per McLachlin J, Cassels's BOA, Vol. II, Tab 15

See also *Sykes v. Midland Bank Executor & Trustee Co. Ltd.*, [1971] 1 QB 113 (CA) ("*Sykes*") at p. 124, Cassels's BOA, Vol. II, Tab 16

Trial Decision at paras. 521-522, JABC, Tab 6, p. 176

108. No extenuating circumstances existed here which required or even entitled Cassels to look beyond the direction it was receiving from the Steering Committee. The trial judge was in any event unable to articulate what flowed from his finding that the Steering Committee was in a conflict, holding that is was "unnecessary for me to opine on how Cassels could have best managed the Steering Committee Conflict."

**Reference:** Trial Decision at para. 530, JABC, Tab 6, p. 178

### *i. The Steering Committee was not Conflicted*

109. The trial judge was unable to consistently describe the Steering Committee conflict he found, variously describing it as arising "from the start" or as arising on May 15. At no time were the facts sufficient to establish any conflict on the Steering Committee on either May 4 or May 15.

#### *a. The Steering Committee was not Conflicted "from the start"*

110. At paragraph 521-522 of his Reasons, the trial judge found that the Steering Committee was "conflicted from the start." He found that "[w]hen Cassels was retained by the dealers, it knew that 42 percent of the dealers would be cut."[6]

---

[6] Ultimately, 34% received WDAs.

111. This is a palpable and overriding error, and is contrary to the trial judge's finding that, at the time of the formation of the Steering Committee and the May 4 Memorandum, GMCL had not decided, let alone announced, that dealers would be "cut", let alone "cut" prior to any *CCAA* proceeding. On April 27, GMCL had announced that it was intending to make dealer reductions through consolidations and normal attrition by the end of 2010.

**Reference:** Trial Decision at paras. 64, 68, 523, 531, JABC, Tab 6, pp. 80-81, 176, 178

112. While finding that the Steering Committee was "conflicted from the start", the trial judge found that before May 7, Cassels was not obliged to advise the Committee that "it was probably in a conflict", because:

> 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.

**Reference:** Trial Decision at paras. 521-525, JABC, Tab 6, pp. 176-177

113. The "non-fragmentation" approach will be discussed below. The appellant agrees that it represents the standard of care in Ontario. However, the trial judge then found that by May 7 "the dust had settled and Cassels should have been alert to the conflict between the two groups of dealers."

**Reference:** Trial Decision at para. 526, JABC, Tab 6, p. 177

114. This finding is in error:

(a) There were not "two groups of dealers" by May 7, nor was there any reason to believe that there would be prior to any *CCAA* proceeding. There was a single group of dealers organizing in the event of a *CCAA* proceeding;

(b) Nothing had occurred by May 7 that could ground the trial judge's finding that Cassels was obliged, on that date, and after the May 4 Memorandum had been sent, to advise the Steering Committee that it was in a conflict. The fact that Cassels's lawyers participated in a conference call on that date about bankruptcy issues cannot reasonably ground this finding; and,

(c) The trial judge, after recognizing the non-fragmentation approach, provided no analysis as to why, on May 7, it was no longer appropriate.

115. If the conflict arose "from the start", the trial judge's decision would render any attempt to organize group representation in advance of a *CCAA* proceeding impossible. In early May 2009, it was anticipated that GMCL would commence *CCAA* proceedings on June 1, 2009 (without any suggestion of a WDA), and that the dealers would be represented as a single group unless or until "splinters" developed within the group. This was the standard of practice, as confirmed by the standard of care experts called by Cassels. On the trial judge's finding, such a retainer could never occur, as the mere fact of a possible future difference in interest between unknown members of the group would be enough to compromise a group from the outset.

116. The Steering Committee was not conflicted "from the start."

*b. The Steering Committee was not Conflicted on May 15*

117. In another portion of his Reasons, the trial judge reached a different conclusion as to conflict. At paragraph 473, the trial judge found that the conflict within the Steering Committee arose on May 15:

> 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.

**Reference:** Trial Decision at para. 473, JABC, Tab 6, p. 165

118. The trial judge erred in finding that when the Steering Committee learned about the upcoming "settlement offers" on May 15, the Steering Committee became conflicted.

119. On learning of the upcoming offers, CADA organized a call with the Steering Committee on May 15. Cassels lawyer Glenn Zakaib dialled into the call. No one on the call knew which dealers would be receiving a WDA. The Steering Committee confirmed that GMCL's plan to deliver WDAs did not change the Committee's mandate to act for GMCL dealers as a group in any *CCAA* proceedings. Mr. Zakaib's handwritten note of May 15 confirms the following discussion:

- Comeau wants CADA's direction on best way to proceed
- knows mandate of committee = to deal with CCAA situation

[...]

- need to remind ourselves of SC mandate: solely to rep dealers in case GM files CCAA
- to negotiate on behalf of dealers = outside mandate

[...]

- Committee's mandate was only to deal with CCAA
- danger = getting drawn into deal with GM
- no way 8-9 guys can make decisions for dealers

[...]

- every dealer unique with different staff etc. and laws.
- do the dealers form their own committee
- mandate was to create creditor class

[...]

- no guarantee that complexity won't bubble up
- GM knows package but not telling us

[...]

- if to be a group acting for non-continuing dealers, retainer would set out terms
- we have to stay in place pending June 1/09
- not our mandate to be a conduit for GM
- best for GM to go to dealers

**Reference:** Notes of Glenn Zakaib from the May 15 Call, CBB002694, Exhibit 75, Tab 75, Cassels's Compendium, Vol. I, Tab 16, pp. 54-57

Ryan Cross, November 3, 2014, pp. 6987-6988, Cassels's Compendium, Vol. II, Tab 51, pp. 282-283

Zakaib Chief, October 29, 2014, p. 6486, Cassels's Compendium, Vol. II, Tab 52, p. 285

120. The Steering Committee unanimously determined that GMCL's proposed offers did not fall within its mandate, which was to instruct counsel on behalf of all GMCL dealers in the event of a *CCAA* filing. As stated in the Minutes from the May 15 call:

> After being apprised of the situation, the Steering Committee discussed the issue fully and unanimously concluded that its mandate was to deal with issues flowing from a possible GM Canada bankruptcy filing and that it did not have a role to play in GM's proposed offer to its non-continuing dealers.

**Reference:** Minutes of Steering Committee Conference Call, dated May 15, 2009, CBB000647, Exhibit 75, Tab 70, Cassels's Compendium, Vol. I, Tab 18, pp. 65-66

Email from Arturo Elias to Ray Young and Troy Clarke dated May 16, 2009, GMT000027713, Exhibit 61, Tab 112, Cassels's Compendium, Vol. II, Tab 53, pp. 286-287

Trial Decision at para. 85, JABC, Tab 6, p. 84

Carroll Cross, October 20, 2014, pp. 5784-5785, Cassels's Compendium, Vol. II, Tab 54, pp. 289-290

121. The plaintiff called two Steering Committee witnesses at trial. These witnesses confirmed that the Committee's mandate did not include acting for a subgroup of dealers in relation to the unanticipated WDAs, and that this was confirmed to Cassels on May 15.

**Reference:** Johnston Cross, October 3, 2014, pp. 3401-3403, Cassels's Compendium, Vol. I, Tab 44, pp. 254-256

Carroll Cross, October 20, 2014, pp. 5783-5788, Cassels's Compendium, Vol. I, Tab 45, pp. 258-263

122. When the Steering Committee provided this direction to Cassels on May 15, there was no basis to reject this direction based on any conflict:

(a) The Steering Committee's direction was entirely consistent with its understanding of its mandate from early May onward. There was no reason to believe that its members were being influenced by any conflict. For example:

(i) On May 4, Michael Croxon, Co-Chair of the Steering Committee, sent an email to his fellow Co-Chair and to the CADA, stating:

> I had a conversation with Marc [Comeau] this afternoon. He was inquiring about the mandate of the Steering Committee. I told him that, at this point, its' only purpose was to gather funds from every GM Dealer across Canada in order to represent them as a whole should GM Canada file for bankruptcy protection.

**Reference:** Email from Tim Ryan to Peter Harris dated May 5, 2009, CBB000536, Exhibit 76, Tab 68, Cassels's Compendium, Vol. II, Tab 55, pp. 291-293

(ii) The May 4 Memorandum states that the Steering Committee's mandate is to organize the dealers into a national dealer group to ensure that "dealer interests are represented should General Motors of Canada Ltd. file for bankruptcy protection in Canada in the near future";

(iii) On May 5, GMCL met with the Steering Committee. Marc Comeau recorded how the Committee described its mandate:

> [the] Steering committee has been formed to represent dealers with the purpose of forming a single voice in the event GMCL files for bankruptcy protection in Canada. The committee has no objective other than representing its members should the need arise in a potential filing.

**Reference:** Email from Marc Comeau to Neil MacDonald, Arturo Elias, John Stapleton dated May 8, 2009, GMT000037277, Exhibit 60, Tab 84, Cassels's Compendium, Vol. II, Tab 56, pp. 294-295

Trial Decision at para. 75, JABC, Tab 6, p. 82

(b) None of the members of the Committee knew whether they would themselves be receiving a WDA. They were therefore in the ideal position to confirm, in the best interest of the group, their mandate, and they did so unanimously.

123. On May 20, the Steering Committee re-affirmed the direction given to Cassels on May 15.

**Reference:** Glenn Zakaib's Notes of the May 20, 2009 Conference Call, CBB002109, Exhibit 75, Tab 93, Cassels's Compendium, Vol. II, Tab 57, pp. 296-297

Peter Harris' Notes of the May 20, 2009 Conference Call, CBB000635, Exhibit 75, Tab 92, Cassels's Compendium, Vol. II, Tab 58, pp. 298-299

Ryan Chief, November 3, 2014, pp. 6874-6875, Cassels's Compendium, Vol. II, Tab 59, pp. 301-302

124. The trial judge acknowledged that the members of the Steering Committee did not know whether they would receive WDAs on May 15, but suggested that they were acting only in the interest of the continuing dealers:

> 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.
>
> [...]
>
> 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.

**Reference:** Trial Decision at paras. 85, 522, JABC, Tab 6, pp. 84, 176

125. This is a palpable and overriding error. Both of the co-chairs of the Steering Committee (Michael Croxon and Doug Leggat) subsequently received WDAs and had dealerships that are members of the Class. Another Steering Committee member, Paul Cloutier, also received a WDA but opted out of the Class. There is no basis to find that they were acting "only in the interest of the continuing dealers."

**Reference:** List of Class Members, Cassels's Compendium, Vol. II, Tab 60, pp. 303-309

126. The trial judge erred by finding that the Steering Committee was in a conflict when it provided direction to Cassels on May 15.

### *ii. The Trial Judge Failed to Determine what the Standard of Care Required*

127. Despite finding that the Steering Committee was conflicted, the trial judge failed to make a finding about what the standard of care required Cassels to do in the circumstances:

> 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's 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.

**Reference:** Trial Decision at para. 530, JABC, Tab 6, p. 178

128. As to the trial judge's finding that "Cassels should have advised the Steering Committee of its conflict", the possibility of future conflicts was specifically discussed during the Steering Committee's April 30 call in the context of a possible *CCAA* proceeding. It cannot reasonably be found that the Steering Committee was unaware of the possibility of future conflict.

**Reference:** Trial Decision at para. 530, JABC, Tab 6, p. 178

129. It is an error to fail to make a specific finding about what the standard of care required in a particular circumstance. Standards of care must always balance the benefits of requiring a specific standard of conduct against the general consequences of requiring it in all cases. As Asquith LJ observed in *Daborn v. Bath Tramways Motor Co Ltd.*:

> In determining whether a party is negligent, the standard of reasonable care is that which is reasonably to be demanded in the

> circumstances. A relevant circumstance to take into account may be the importance of the end to be served by behaving in this way or in that. As has often been pointed out, if all the trains in this country were restricted to a speed of 5 miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down.

**Reference:** *Daborn v. Bath Tramways Motor Co Ltd.* [1946] 2 All ER 333 at 336 (CA), Cassels's BOA, Vol. II, Tab 17

130. The Supreme Court held in *Fullowka v. Pinkerton's of Canada Ltd.*, and this Court held in *Krawchuk v. Scherbak*, that the failure to state the standard of care is a reversible error.

**Reference:** *Fullowka v. Pinkerton's of Canada Ltd.*, [2010] 1 S.C.R. 132, at para. 80, Cassels's BOA, Vol. II, Tab 18

*Krawchuk v. Scherbak*, 2011 ONCA 352 ("*Krawchuk*") at para. 123, Cassels's BOA, Vol. II, Tab 19

131. By failing to define the standard of care, the trial judge could not find that it was breached.

### *iii. Cassels met the Standard of Care*

132. The plaintiff called one expert, Gerald Kandestin, to testify as to the standard of care. In reaching his conclusion that Cassels breached the standard of care, the trial judge relied on no part of Mr. Kandestin's evidence, and specifically rejected his evidence as to how to manage the Steering Committee.

#### *a. The Evidence of Gerald Kandestin*

133. Gerald Kandestin is a Quebec lawyer who has never practiced in this Province. Mr. Kandestin agreed that he could not give an opinion as an Ontario lawyer, since he was not licensed to practice in Ontario and has never even sought an occasional call in this Province.

**Reference:** Cross-examination of Gerald Kandestin ("Kandestin Cross"), October 2, 2014, p. 3216, Cassels's Compendium, Vol. II, Tab 61, p. 311

134. Mr. Kandestin testified that Cassels failed to take what he said was the single course of action that any reasonable law firm would have taken, namely:

(a) As early as April 27, Cassels should have known that dealers would be terminated in the immediate future, and should have arranged to act for all 705 GMCL dealers;

(b) Cassels should have gathered information from all 705 dealers, but on the understanding that the firm would then only represent the interests of the non-continuing dealers;

**Reference:** Examination-in-Chief of Gerald Kandestin ("Kandestin Chief"), October 2, 2014, pp. 3231-3232, Cassels's Compendium, Vol. II, Tab 62, pp. 313-314

(c) Cassels should have formed a Steering Committee to represent only the interests of the yet-to-be non-continuing dealers, populated by Saturn dealers and "volunteers" who would agree to represent the interests of the non-continuing dealers, whether or not they ultimately fell within this category;

**Reference:** Kandestin Chief, October 2, 2014, pp. 3232-3234, Cassels's Compendium, Vol. II, Tab 63, pp. 316-318

(d) Cassels should have drafted "extensive memoranda of law" on the legal interests of the non-retained dealers in a *CCAA* filing - despite not having seen the later-delivered WDA, not knowing the form that GMCL's *CCAA* filing would take, and not knowing who the non-retained dealers would be;

**Reference:** Kandestin Chief, October 3, 2014, p. 3272-3273, 3280-3281 Cassels's Compendium, Vol. II, Tab 64, pp. 320-323

(e) Cassels should then have shared its strategies with all 705 GMCL dealers – without considering how this would fit with a lawyer's obligation of confidentiality, and how this sits with Mr. Kandestin's opinion that there was a clear conflict at that time between the continuing and non-continuing dealers;

**Reference:** Kandestin Cross, October 6, 2014, pp. 3508-3509, Cassels's Compendium, Vol. II, Tab 65, pp. 325-326

(f) Before the WDAs were delivered, Cassels should have sought to negotiate the WDAs with GMCL on behalf of clients that did not yet exist;

**Reference:** Kandestin Chief, October 3, 2014, pp. 3283-3284, Cassels's Compendium, Vol. II, Tab 66, pp. 328-329

(g) Once the WDAs were delivered, Cassels should have told all the non-continuing dealers that, regardless of their individual circumstances, they should reject the offer; and,

**Reference:** Kandestin Chief, October 3, 2014, pp. 3309-3310, Cassels's Compendium, Tab 67, pp. 331-332, Kadestin Cross, October 2, 2014, pp. 3662-3668, Cassels's Compendium, Vol. II, Tab 68, pp. 334-340

(h) Cassels should have been prepared to argue that GMCL could not disclaim the existing dealer agreements in a *CCAA* filing because of s. 32(6) of the *CCAA*, which, even if it were possible to read the provision in the unlikely manner that Mr. Kandestin suggests, was not in force at the time.

**Reference:** Kandestin Cross, October 6, 2014, pp. 3480-3490, 3612-3614, Cassels's Compendium, Vol. II, Tab 69, pp. 342-355

135. The trial judge found that there were "serious practical problems with Kandestin's position" about how to address a conflict in the Steering Committee, and did not accept it. This is an understatement. The plaintiff called no other standard of care evidence at trial.

**Reference:** Trial Decision at para. 530, JABC, Tab 6, p. 178

*b. The Evidence of Kenneth Rosenberg and Jonathan Levin*

136. Cassels called two experts on the standard of care of lawyers in Ontario: Kenneth Rosenberg and Jonathan Levin. The experts called by Cassels were the only standard of care experts with Ontario group retainer and *CCAA* experience called at trial. These experts testified that Cassels met the standard of care in taking direction from the Steering Committee in May 2009.

137. Kenneth Rosenberg is a partner at Paliare, Roland, Rosenberg, Rothstein LLP. He is an expert in insolvency, business, regulatory and administrative law litigation. He has extensive group representation experience in *CCAA* matters and in class actions.

138. Mr. Rosenberg testified that it was reasonable for Cassels to have agreed, at the end of April 2009, to act for all GMCL dealers in any *CCAA* filing, rather than requiring the splintering of the group at that time. He described this as the "*Nortel* approach":

> ...
>
> And then I asked myself, if that was the retainer, and that's a very important fact, it wasn't a subgroup of the dealers, it was all of them. And I believe that approach, and I can get into it more, is consistent with the Nortel approach, the non-fragmentation or non-starburst approach. At that time it could make sense that all of them were, all the dealers, continuing and potential non-continuing dealers in that camp.
>
> [...]
>
> What Justice Morawetz relies on, and these are policy issues, I'm not here debating the law, the policy direction on standard of care issues is found in Justice Farley's list which Justice Morawetz adopts. The first is:
>
> "Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test."

> The policy is to encourage large groups of creditors to band together, not because they have precisely the same interests but because they have a common interest. And that's very important. You don't want, in a CCAA case, and let's take Stelco or Air Canada, you could have 10 to 20,000 individuals affected and you don't want them getting individual counsel. You want them to come forward on a class basis as far as possible.
>
> And you don't want them to fragment into different groups until there is a real reason to fragment. Justice Farley goes on to say:
>
> "The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation."
>
> So in this case the dealers signed a dealer agreement and that would be a common interest. The Wind-Down Agreement was common, that would be a common interest. But on May the 4th, the only agreement they knew about was a dealer agreement and the potential that dealers would be cut.
>
> And number 3:
>
> "The commonality of interests are to be viewed purposefully, bearing in mind the object of the CCAA, namely to facilitate reorganization if possible."
>
> And it talks about resisting approaches that would jeopardize viable plans, et cetera. And why this is important and why Justice Morawetz I believe from a standard of care perspective is addressing the end point of a CCAA, which is classifying creditors long before any plan was put forward, is because you're setting these creditor committees in place at the outset to try and get to a point where Justice Farley says in number 4 that will do the least harm to potentially jeopardizing viable plans.
>
> And why this is important is because if you have a different class of creditors, they get a vote and they might get a veto in any plan, and you want to give as few people -- the policy issue is to give as few people or few creditor groups as possible a separate class so they could theoretically kibosh or veto a plan.
>
> **Reference:** Rosenberg Chief, October 29, 2014, pp. 6344, 6359-6361, Cassels's Compendium, Vol. II, Tab 70, pp. 357-360
>
> *Re Nortel Networks Corp., (In the Matter of the Compromise or Arrangement of)*, [2009] O.J. No. 2166 (S.C.) (QL)("*Re Nortel*"), Cassels's Book of Authorities ("Cassels's BOA"), Vol. II, Tab 20
>
> Trial Decision at paras. 503-504, JABC, Tab 6, p. 172

139. Mr. Rosenberg testified that Cassels met the standard of care when it took the direction of the Steering Committee on May 15 that its mandate did not include providing advice to the dealers

with respect to the WDA. Mr. Rosenberg testified that Cassels met the standard of care regardless of whether or not the May 4 Memorandum constituted a "retainer" of the firm:

(a) If a retainer was created by the May 4 Memorandum, a term of that "retainer" was that the Steering Committee would provide direction and instructions to Cassels. Cassels therefore met the standard of care by following the Steering Committee's instructions not to provide advice on the WDAs:

> And I can tell you this is a living, breathing, daily issue when you act for committees. We are creatures of instruction. You cannot go forward unless your client group wants you to go forward, and if you can't do it on a committee basis, often parties send individual lawyers to represent their interests.

**Reference**: Rosenberg Chief, October 29, 2014, p. 6377, Cassels's Compendium, Vol. II, Tab 71, p. 362

(b) If no retainer was created by the May 4 Memorandum, and if the Steering Committee was not authorized to give instructions, the dealers would have had to be unanimous in instructing Cassels as to any course of action to be taken, which would have been impossible:

> I would assume within the non-continuing dealer group there would be a range of responses to the Wind-Down Agreement; some would accept, others would reject, others would want to negotiate different terms.
>
> I don't know how class counsel could do that when you have some dealers -- let's assume hypothetically that some dealers thought this was a good idea, it was a way to get out of the business and get something because they thought GM was going to file. So it's some way to secure a position. And others -- and therefore didn't want to touch it and didn't want to engage in GM. Others may have wanted to engage aggressively with GM. How do you do that?
>
> If unanimity was the governance rule, you couldn't get unanimity, and therefore you'd then have to go and find other counsel for these people.

**Reference:** Rosenberg Chief, October 29, 2014, pp. 6377, 6395-6396, Cassels's Compendium, Vol. II, Tab 72, pp. 364-366

140. Mr. Rosenberg concluded that it was reasonable for Cassels not to provide individual advice to each of the dealers, given the weight of individual issues facing each dealership:

> A. I conclude that it was reasonable for Cassels not to provide individual advice to each of the dealers, and if they were mandated to do so, in the timeline it would have been, I believe on a hypothetical basis, practically impossible to do so, or they could have only given very limited advice because you would have to understand all the business, legal, technical, tax, succession planning issues with respect to each dealer.
>
> And as somebody familiar with these committee structures, it would have been very difficult if you had a few months to do it, but if you had four days to do it, for the reasons I set out in my report, I don't know how you would deal with it.
>
> From a committee perspective, this is like -- this is not a rep order situation. There is no court order dealing with disclosure of information. When you act for multiple clients, two or more, your duty is under one retainer to share all the information you have collected from one client with another.
>
> ***
>
> I understand the average payout was $600,000 so it's an over and under business question. Should I take the 600,000 and run? Is the 600,000 generous? Is it too little? What are my options?
>
> You would have to go through that with each client, know your own client. I don't understand how they could have done that practically from a standard of care perspective.
>
> **Reference:** Rosenberg Chief, October 29, 2014, pp. 6393-6395, Cassels's Compendium, Vol. II, Tab 73, pp. 368-370

141. In any event, not a single dealer asked Cassels to provide individual advice.

142. Cassels also called lawyer Jonathan Levin. Mr. Levin is a partner with the law firm Fasken Martineau Du Moulin LLP. Mr. Levin is an expert in banking and insolvency law, and has extensive experience in restructuring transactions and in acting in group retainers.

143. Mr. Levin, like Mr. Rosenberg, testified that the standard in Ontario insolvency practice is to try to reduce the number of committees involved in a restructuring. The dealers would have had many common interests in any *CCAA* proceedings, and that it is appropriate and not uncommon to

create a committee that may become conflicted down the road, and to address any conflicts as they arise.

**Reference:** Levin Chief, October 30, 2014, pp. 6720-6721, 6733-6736, Cassels's Compendium, Vol. II, Tab 74, pp. 372-373D

144. Mr. Levin testified that Cassels acted within the standard of care by following the Steering Committee's instruction not to get involved in the WDA:

> A. The paragraph states that the mandate of the committee was to deal with issues flowing from a possible GM Canada bankruptcy filing and that they were not going to play any role in the proposed offer to non-continuing dealers and therefore they instructed that General Motors be advised accordingly.[7]
>
> Q. And would it be consistent or inconsistent with the practice of lawyers as you understood it in those circumstances in 2009 to follow the direction of the steering committee?
>
> A. It would be entirely consistent in my experience to follow the direction of the steering committee.
>
> Q. And to the extent that that direction was repeated on May the 20th, would your answer be the same?
>
> A. Yes.

**Reference:** Levin Chief, October 30, 2014, pp. 6709-6710, Cassels's Compendium, Vol. II, Tab 75, pp. 375-376

*c. The Standard of Care*

145. Without relying on Mr. Kandestin's evidence, the trial judge nevertheless found that Cassels breached its obligations in an undefined way.

146. This case involved the need to organize a disparate group of dealers to ensure that they had someone to speak for their collective interest in the event of a contemplated *CCAA* proceeding. The implications of the trial judge's finding that Cassels failed to deal, in an unspecified way, with

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[7] Referring to Meeting Minutes of General Motors Dealer Group Steering Committee's Conference Call on May 15, 2009 at 2:30 pm, CBB000522, Exhibit 75, Tab 70, Cassels's Compendium, Vol. I, Tab 18, pp. 65-66

the Steering Committee conflict must be considered against all cases where collective representation is needed.

147. In large-scale insolvencies, disparate groups of stakeholders often need representation through real time events. The evidence of Messrs. Rosenberg and Levin is supported by the decision of Morawetz J. in *Re Nortel Networks Corp.* In *Nortel,* Morawetz J. held that despite the frequent risk of potential future conflict within a group, the need to ensure prompt and effective representation in fast-moving *CCAA* proceedings supports a non-fragmentation approach to organizing retainers. The non-fragmentation approach recognizes that groups should not be split up unless a conflict is ripe and real.

**Reference**: Rosenberg Chief, October 29, 2014, pp. 6356-6362, 6409-6410, Cassels's Compendium, Vol. II, Tab 77, pp. 380-388

Levin Chief, October 30, 2014, p. 6727-6728, Cassels's Compendium, Vol. II, Tab 50, pp. 279-280

*Re Nortel, supra*, Cassels's BOA, Vol. II, Tab 20

148. The trial judge found that the non-fragmentation approach represented the standard of care, but then failed to apply it.

149. By finding that Cassels breached the standard of care in not dealing with a conflict in the Steering Committee, the trial judge imposed the *CCAA* equivalent of a 5-mile-an-hour speed limit without ever explaining what Cassels, or future law firms facing Cassels's situation, should have done – on either May 7 or on May 15, the conflicting dates when the trial judge found that Cassels should have communicated to the Steering Committee that it was in a conflict.

150. On the trial judge's approach to committee conflicts, a firm retained to act for a group could not take instructions until it was actually known which members of the group would be falling into which category upon the occurrence of a future event.

151. The Steering Committee's confirmation that the WDA was not part of Cassels's mandate was in any event the only decision the Steering Committee could have made without creating the very conflict the trial judge was concerned about. If the trial judge is correct that Cassels was retained by the Participation Form Dealers as of May 4, that group included both dealers who were about to be terminated, and dealers who would be continuing with GMCL. The *Rules of Professional Conduct of the Law Society for Upper Canada* provide that:

> if a contentious issue arises between clients who have consented to a joint retainer, the lawyer shall not advise either of them on the contentious issue and the following rules apply:
>
> (a) The lawyer shall
>
> (i) refer the clients to other lawyers for that purpose; or
>
> (ii) if no legal advice is required and the clients are sophisticated, advise them that they have the option to settle the contentious issue by direct negotiation in which the lawyer does not participate.
>
> (b) If the contentious issue is not resolved, the lawyer shall withdraw from the joint representation.
>
> **Reference:** *Rules of Professional Conduct of the Law Society for Upper Canada*, r. 3.4-8 (emphasis added), Cassels's BOA, Vol. II, Tab 21

152. The Steering Committee's actions were consistent with this professional rule and were thus on their face reasonable. The Committee adopted the only reasonable approach in the face of GMCL's May 15 announcement, based on its mandate and the possibility of future conflict: it directed Cassels that the WDA was outside its mandate. The Steering Committee was fully able to give this direction.

**Reference:** Trial Decision at paras. 85, 468, JABC, Tab 6, pp. 84, 164

153. All of the dealers who signed WDAs retained separate legal counsel, as was entirely appropriate. Trillium conceded that all of the class members were fully and accurately advised about the WDA:

> 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.

**Reference:** Trial Decision at para. 318, JABC, Tab 6, p. 131

154. There was no evidence supporting any "altogether extraordinary circumstance" requiring Cassels to ignore the direction of the Steering Committee. Cassels had no basis to question the disinterestedness of any member of the Steering Committee.

155. Kenneth Rosenberg and Jonathan Levin's evidence properly defined the applicable standard of care in this case.

### *iv. The Trial Judge Made a Finding in the Absence of Expert Evidence*

156. The trial judge failed to articulate the standard of care breached by Cassels because he had no expert evidence upon which he could rely in making that finding.

157. The trial judge rejected the plaintiff's expert evidence that Cassels should have created a mock Steering Committee populated by dealers instructed to act as if they were going to receive WDAs. The trial judge found that "there are serious practical problems with Kandestin's position."

**Reference:** Trial Decision at para. 530, JABC, Tab 6, p. 178

158. Having rejected Mr. Kandestin's evidence, the trial judge had no evidence upon which to find that Cassels's conduct fell outside an acceptable standard. The need for expert guidance in this case was especially acute, where the parties found themselves, as acknowledged by the trial judge, in "a challenging, fast moving and dire economic situation."

**Reference:** Trial Decision at para. 116, JABC, Tab 6, p. 89

159. It was an error of law for the trial judge to find that Cassels breached the standard of care without grounding that finding in any expert evidence. As this Court held in *Krawchuk*:

> The jurisprudence indicates that, in general, it is inappropriate for a trial court to determine the standard of care in a professional negligence case in the absence of expert evidence.

**Reference:** *Krawchuk, supra* at para. 130, Cassels's BOA, Vol. II, Tab 19

160. The failure to make a finding about what a reasonable lawyer was required to do under the circumstances compromises any assessment of causation. In view of the trial judge's refusal to engage in that essential exercise, this Court should not defer to the conclusory finding that the trial judge is "confident that whatever it would have done, the affected dealers would have been better prepared for GMCL's offer on May 20." A finding of fact about so crucial a point cannot be made in the absence of both evidence and reasoning.

**Reference:** Trial Decision at para. 530, JABC, Tab 6, p. 178

### *c) No Breach in Relation to the Wait and See Approach*

161. The trial judge erred in finding that Cassels breached the standard of care by employing a "wait and see approach." He found that:

> 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.
>
> **Reference:** Trial Decision at paras. 531-532, JABC, Tab 6, p. 178

162. The evidence given at trial about the wait and see approach related to the decision not to prepare draft documents in advance of a *CCAA* proceeding. Cassels lawyer David Ward testified that Cassels adopted a wait and see approach because there was little to be gained from preparing materials before the nature of GMCL's filing was known.

> **Reference:** Cross-examination of David Ward ("Ward Cross"), October 31, 2014, pp. 6788, 6792-6793, Cassels's Compendium, Vol. II, Tab 78, Vol. II, pp. 390-392
>
> Re-Examination of David Ward, October 31, 2014, pp. 6804-6805, Cassels's Compendium, Vol. II, Tab 79, pp. 394-395

163. Expert Kenneth Rosenberg explained that the wait and see approach taken by Cassels was reasonable, as *CCAA* materials can only be efficiently drafted once the nature of a filing is known:

> Q. All right. And I suppose that's one other facet I wanted to ask you about in the context of your opinion. You talked a little bit about archaeological litigation versus real time litigation very early on in your evidence, and I suppose we're doing a bit of archaeology here.
>
> But to dial oneself back to a point in advance of a filing, especially with a matter which had the public profile that this did, can one reasonably anticipate exactly what's going to happen?
>
> A. Well, you do, lawyers do and clients do, and more often than not we're wrong. So, many experienced institutional clients say we'll get -- they don't jump before they get to the fence, they hire you when there is a filing. And in my experience, I have acted for banks, bondholders, court intermediaries, unions, pensioners, unsecured creditors, and more often than not the experienced ones say let's not spend the money, we'll spend enough after we file, let's wait and see what happens.
>
> Others do get involved earlier; it depends on the nature of the case. So a wait and see approach is in my view within the range of potential outcomes for a retainer if and when a CCAA filing occurs.
>
> **Reference:** Rosenberg Chief, October 29, 2014, pp. 6402-6403, Cassels's Compendium, Vol. II, Tab 80, pp. 397-398

164. Because there was no *CCAA* filing, the appropriateness of the wait and see approach is not relevant. However, the trial judge conflated his criticisms of the wait and see approach with his criticisms relating to Cassels's handling of the conflicts he found. These criticisms have been addressed above, and are not an independent breach in the standard of care.

**Reference:** Trial Decision at paras. 532-533, JABC, Tab 6, p. 178

165. The trial judge also found that as a result of the wait and see approach, Cassels failed to "begin preparing for consequences of the Notices of Non-Renewal and WDAs going out to the dealers."

**Reference:** Trial Decision at paras. 531-533, JABC, Tab 6, p. 178

166. The trial judge failed to make any findings about who would have given Cassels instructions to "prepare" for the WDAs (it could not have been the Steering Committee), and what the standard of care required that preparation to involve, in circumstances where:

(a) The Steering Committee directed Cassels that its mandate did not include the WDAs;

**Reference:** Trial Decision at paras. 468, JABC, Tab 6, p. 164

(b) The trial judge found:

> 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. 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.

**Reference:** Trial Decision at paras. 173-174, JABC, Tab 6, p. 102

(c) The trial judge also found that "the dealers' best interests were unknown at that time" as the dealers "knew that it was possible, if not probable" that in a *CCAA* "they would have received nothing or virtually nothing"; and,

**Reference:** Trial Decision at paras. 194, JABC, Tab 6, p. 106

(d) On the trial judge's finding, Cassels was retained by virtue of the May 4 Memorandum for the dealers who received WDAs and dealers who did not. They had different interests.

**Reference:** Trial Decision at paras. 416, JABC, Tab 6, p. 151

167. Cassels was not negligent in employing a wait and see approach to the preparation of *CCAA* materials, or in relation to not "preparing" for the WDAs. In any event, without a finding that such "preparation" necessarily would have resulted in a recommendation that the non-continuing dealers reject the WDAs and negotiate as a collective, nothing flows from this.

## ISSUE 3: NO FINDINGS WERE MADE IN RELATION TO THE SATURN RETAINER

168. The trial judge found that Cassels was liable to both the Participation Form Dealers (those dealers who responded to the May 4 Memorandum) and to an entirely different group of dealers, with a different retainer, the Saturn dealers.[8] The trial judge failed to provide any analysis of the scope of the Saturn retainer or Cassels's obligations under that retainer. The plaintiff led no evidence from a Saturn dealer about that retainer.

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[8] The trial judge stated, in error, that Cassels argued that the Saturn dealers were not part of the Class (Trial Decision at paras. 106-113, JABC, Tab 6, pp. 88-89). No such argument was made. Cassels argued that the plaintiff failed to advance sufficient pleadings or evidence to support any claim by the Saturn portion of the Class. As a result of his misunderstanding of the argument, the trial judge failed to address it.

### *a) The Saturn Retainer*

169. On February 17, 2009, GMCL sent a letter to its Saturn dealers advising them that the Saturn line would be discontinued. All Saturn dealerships would have to close by the end of 2011, unless the brand could be sold to a third party.

**Reference:** Trial Decision at para. 49, JABC, Tab 6, p. 77

Letter from GMCL dated February 17, 2009, GMT000005473, Exhibit 75, Tab 1, Cassels's Compendium, Vol. II, Tab 81, pp. 399-400

170. In March 2009, CADA approached Cassels to request legal advice in respect of the discontinuance of the Saturn automobile. CADA facilitated the retainer of Cassels by those Saturn dealers who chose to do so (the "Saturn retainer").

**Reference:** Trial Decision at para. 49, JABC, Tab 6, p. 77

Memorandum dated March 4, 2009, GMT000012381, Exhibit 76, Tab 2, Cassels's Compendium, Vol. II, Tab 82, pp. 401-402

171. The Saturn dealers were each required to sign a retainer agreement with the firm. A Steering Committee of Saturn dealers provided instructions to Cassels on behalf of the group.

**Reference:** Trial Decision at para. 379, JABC, Tab 6, p. 145

Saturn Dealer Association Application and Retainer, TMW000000375, Exhibit 13, Tab 23, Cassels's Compendium, Vol. II, Tab 83, pp. 403-405

172. Under the Saturn retainer, Cassels was called upon to perform legal work that would apply only to the group, and not to advise on the individual circumstances of Saturn dealers. In March 2009, Cassels prepared a letter that Saturn dealers could review with their own legal counsel if they were considering an earlier wind-down of their franchise. The Saturn dealers were told that Cassels could not provide them with individual advice as to whether or not to send the letter.

**Reference:** Cover Letter from Lawrence Weinberg to Anne Nurse re: Draft Letter for Individual Dealers to Withdraw from Operation as a Saturn and/or Saturn and Saab Dealer under GMCL Dealer Sales and Service Agreement, dated April 16, 2009, TMW000002240, Exhibit 75, Tab 26, Cassels's Compendium, Vol. II, Tab 84, pp. 405-406

Draft Letter for Individual Dealers to Withdraw from Operation as a Saturn and/or Saturn and Saab Dealer under GMCL Dealer Sales and Service Agreement, dated April, 2009, TMW000002242, Exhibit 75, Tab 26, Cassels's Compendium, Vol. II, Tab 85, pp. 407-408

173. The trial judge described the Saturn retainer as being with respect to "the closing or sale of the Saturn dealerships" or "to provide advice regarding their rights and options with respect to the discontinuance of the Saturn brand."

**Reference:** Trial Decision at paras. 363, 383, JABC, Tab 6, pp. 141, 145

### *b) Failure to Determine the Scope of the Saturn Retainer*

174. The trial judge found liability on behalf of the Saturn dealers, without performing any analysis about whether the Saturn retainer included the WDAs, baldly holding only that:

> What can be said about Cassels's 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.

**Reference:** Trial Decision at paras. 111, 363, 383, 488, JABC, Tab 6, pp. 88-89, 141, 145, 168

175. The trial judge, however, had identified early in his Reasons, that the Saturn dealers' circumstances and retainer were different than those of the GMCL dealers, and undertook to "address those differences" in his Reasons:

> 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.

...

> 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.
>
> **Reference:** Trial Decision at paras. 111, 113, JABC, Tab 6, pp. 88-89

176. The trial judge never addressed the differences between the Saturn retainer and the GMCL retainer. He treated the Saturn dealers in the same manner as the GMCL dealers. The trial judge made no findings as to the scope of the Saturn retainer, or whether it included the provision of advice on the WDAs.

### *c) Failure to Assess the Standard of Care Applicable to the Saturn Retainer*

177. The trial judge failed to determine a standard of care applicable to the Saturn dealers in May 2009.

178. The Saturn dealers were sent WDAs on May 20, 2009. These WDAs contained a key difference from those sent to GMCL dealers: the WDAs provided to the Saturn dealers the option to receive the payments at the time, or to defer receipt of the payments and continue in operation in the hope that the Saturn brand would be purchased by another company and continue to operate (the "Saturn Option").

> **Reference:** Trial decision para. 104, JABC, Tab 6, pp. 87-88
>
> Saturn Wind Down Agreement, CBB002631, Exhibit 75, Tab90 Cassels's Compendium, Vol. II, Tab 86, pp. 409-425

179. On May 22, 2009, Cassels participated in a conference call with the Saturn dealers in which the WDAs and the Saturn Option were discussed. The Saturn dealers asked CADA to approach GMCL to negotiate a change to the offer: they wished to secure the right to continue operating in the hopes that a company would buy the Saturn brand, but once they found out the identity of the

buyer, to have the option to continue in operation or accept the wind-down offer made to them at that time.

**Reference:** Agenda for Saturn Dealer Action Group Steering Committee via Conference Call on May 22, 2009, CBB002684, Exhibit 75, Tab 108, Cassels's Compendium, Vol. II, Tab 87, pp. 426-427

180. The attempt to negotiate a change to the Saturn Option was unsuccessful as GMCL would not vary the WDA terms. On May 25, 2009, CADA reported that to the Saturn dealers.

**Reference:** Email from Tim Ryan to Peter Harris and Glenn Zakaib dated May 25, 2009, CBB002619, Exhibit 23, Tab 12, Cassels's Compendium, Vol. II, Tab 88, pp. 428-429

Trial Decision at para. 574, JABC, Tab 6, p. 187

181. The trial judge made no finding grounded in the Saturn retainer that any standard of care required Cassels to take any particular steps for the Saturn dealers that it did not take. The trial judge nevertheless found Cassels liable to the Saturn dealers.

**Reference:** Trial Decision at para. 488, 519, JABC, Tab 6, pp. 168, 175

182. The trial judge's finding that Cassels breached its obligations in relation to the GMCL dealers cannot apply to the Saturn dealers, as:

(a) There could be no conflict between the Saturn retainer and the Canada retainer. The Saturn retainer was in relation to General Motor's decision to discontinue the Saturn automobile. There was no evidence that Canada had any involvement or interest in this decision made by the American parent company. The trial judge engaged in no analysis of this issue, simply finding in a conclusory manner that:

> 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's conduct amounted to a breach of its fiduciary and contractual duties.

**Reference:** Trial Decision at para. 519, JABC, Tab 6, p. 175

(b) There could be no conflict within the Saturn Steering Committee, and the trial judge did not find one. Every Saturn dealer received a WDA. As a result, the trial judge's analysis relating to the GMCL Steering Committee conflict does not apply to the Saturn retainer and there would be no basis to question instructions given by the Saturn Steering Committee;

(c) The "wait and see" approach did not apply to the Saturn retainer. The trial judge did not refer to the Saturn retainer in his criticism of the "wait and see" approach.

183. The trial judge found that "this award includes the Saturn dealers." He did not provide the basis for this conclusion, beyond finding that while the Saturn dealers in the Class were in a "less advantageous" position than the other GMCL dealers, they still would have banded together and negotiated with GMCL. No findings were made about the Saturn dealers' unique retainer or Cassels's obligations under that retainer, and no expert evidence was led by the plaintiff in this regard.

**Reference:** Trial Decision at para. 612, JABC, Tab 6, p. 197

184. The trial judge's failure to properly deal with the Saturn dealers is significant to both liability and causation as discussed below. There are forty-two Saturn dealers in the class. Approximately $10 million dollars of the damages awarded by the trial judge were awarded in relation to those dealers.

## ISSUE 4: CAUSATION WAS NEITHER CERTIFIED NOR ESTABLISHED

### *a) Causation was not Certified as a Common Issue*

185. Causation was not certified as a common issue and should not have been the subject of any finding or conclusion by the trial judge.

186. Establishing causation requires individual inquiries into what each dealer would have done. It is not amenable to being determined on a class basis, and was not certified as a common issue.

**Reference:** Trial Decision Appendix "A", Common Issues, JABC, Tab 6, pp. 198-200

187. The plaintiff relied on the fact that causation was not a common issue to resist producing documents central to causation, namely the independent legal advice received by each of the dealers on the WDAs. The plaintiff successfully resisted a production motion brought by Cassels for disclosure of the independent legal advice (the "production motion"), on the grounds that causation was not a certified as a common issue. As Justice Belobaba held:

> Had this been an ordinary action rather than a class proceeding, I would have had no difficulty agreeing with GMCL and CBB that the legal advice that each dealer received about the WDA was relevant to such key issues as causation and damages, and given that solicitor-client privilege was explicitly waived, that all relevant documentation should now be produced. However, this is a class action. The next phase of the litigation is the common issues trial. Justice Strathy has carefully and deliberately certified thirteen issues. It is not my place as the successor case management judge to alter the common issues that were just certified. My choices are clear. If the individual legal advice received by each dealer is relevant to the common issues, then the motions will be granted. If not, then the motions must be dismissed, at least at this stage.
>
> [...]
>
> The legal advice received by Trillium and the other class members from their respective lawyers is not relevant to common issues (j), (k) and (l). I agree with Trillium that CBB will be the focus of the legal and factual inquiries that will have to be made at the common issues trial, not the class members and not their individual lawyers.

**Reference:** *Trillium v. General Motors of Canada et al*, 2012 ONSC 5960 ("*Trillium Production Motion*") at para. 14 [emphasis added], Cassels's BOA, Vol. II, Tab 22

188. A finding of causation on a class basis was not available to the trial judge. The evidence necessary to determine causation was not before the court.

### *a) The Trial Judge's Mistaken Understanding of the Class*

189. The Class is defined as "all corporations in Canada that signed a WDA with GMCL in or after May 2009." GMCL offered WDAs to 240 dealers, and 202 of those dealers signed. After opt-outs, the Class consists of 181 non-continuing dealers.

**Reference:** Trial Decision at para. 12, JABC, Tab 6, p. 70

190. The trial judge's understanding of the Class, upon which he built his causation and damages findings, was that all 181 Class members were also Participation Form Dealers.[9] This is incorrect. There was no evidence at trial about how many of the Class members were Participation Form Dealers. The trial judge acknowledged his error after a motion to settle the terms of the Judgment and held that the Judgment should reflect the possibility that the damages awarded will have to be reduced as a result. [10] He did not address the fact that his causation findings were made based on a misunderstanding of the size of the client group he identified.

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[9] In finding that Cassels owed duties to the Class, the trial judge held that "I am referring only to the 181 Class Members and not the call dealers" (at footnote 7 of the Trial Decision). This is perplexing, as the trial judge explicitly found that the Call dealers were part of the Class elsewhere in his Reasons, when he addressed what he mistakenly believed was Cassels's argument that the Call dealers were not part of the Class. Cassels never made this argument.

[10] In the Reasons on the Motion to Settle the Terms of the Judgment, the trial judge continued to demonstrate a misunderstanding about the nature of the Class and counsel's submissions. The trial judge incorrectly stated that "Cassels therefore submitted that the call dealers' claim had not been certified", and "Cassels submits that the Class only includes those members who returned the Participation Form and/or funds to CADA prior to executing a WDA" whereas Trillium "submits that the Class" includes those dealers who responded to the May 4 Memorandum at any time before May 30. No such arguments about the composition of the Class were advanced by Cassels – the argument related solely to what portion of the Class was entitled to recover from Cassels (*Trillium Motor World Ltd. v. General Motors of Canada Ltd.,* 2016 ONSC 666 (Ont. Sup. Ct.), JABC, Tab 7, pp. 223-228)

**Reference:** Transcript from the Motion to Settle the Terms of the Judgment, January 13, 2016, Cassels's Compendium, Vol. II, Tab 89, pp. 430-469

Transcript from the Motion to Settle the Terms of the Judgment, January 25, 2016, Cassels's Compendium, Vol. II, Tab 90, pp. 470-504

191. Approximately 705 GMCL dealers were asked in the May 4 Memorandum to contribute either $2,500 or $5,000 (depending on their level of sales) to the CADA trust fund for use in any *CCAA* proceedings. The evidence was that CADA raised approximately $1 million in trust funds by May 20, 2009. As noted by expert Robert Harlang, we can therefore infer that "over 300 GMCL dealers failed to contribute to the CADA Trust Fund."

**Reference:** Trial Decision at paras. 403, 600, JABC, Tab 6, pp. 149, 193-194

192. The trial judge's failure to appreciate the size of the client group he found renders his causation and damages analyses unsupportable, as reviewed below.

### *b) The Trial Judge's Causation Findings*

193. The trial judge concluded that the breaches he found caused a loss to the dealers who retained Cassels. He reasoned as follows:

(a) Absent the conflict with the Canada retainer or within the Steering Committee, "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." He did not find that the standard of care required such a recommendation;

**Reference:** Trial Decision at para. 555, JABC, Tab 6, p. 184

(b) Cassels "soft-pedalled" its representation of the dealers' interests as a result of the Canada retainer. The trial judge noted that the plaintiff never put this proposition to any of Cassels's witnesses in cross-examination, but concluded:

> While it is true that Trillium, for whatever reason, did not cross-examine Cassels's witnesses on the issue of the conflict and how it affected Cassels's 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.

**Reference:** Trial Decision at para. 512, JABC, Tab 6, p. 174

(c) The dealers would have instructed Cassels to enter into negotiations with GMCL, despite the risk that doing so would have resulted in a withdrawal of the offer and *CCAA* proceedings;

**Reference:** Trial Decision at para. 560, JABC, Tab 6, p. 185

(d) A mechanism could have been devised to bind the unidentified non-continuing dealers to any negotiation and settlement, although he declined to identify what it would be;

**Reference:** Trial Decision at para. 559, JABC, Tab 6, p. 185

(e) GMCL would have negotiated with the dealers, despite the fact that the WDA was explicitly non-negotiable and the 6-day timeline would have rendered any negotiation impossible;

**Reference:** Trial Decision at para. 583, JABC, Tab 6, p. 189

(f) GMCL would have increased the amount offered to the 240 dealers receiving WDAs to $218 million, which was the amount that GM budgeted when GMCL was planning to terminate 290 dealers.

**Reference:** Trial Decision at paras. 591-592, JABC, Tab 6, p. 191

194. The trial judge held that there was a 55% chance that the above would have occurred, and that the dealers would have recovered an additional $92 million:

> 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.

**Reference:** Trial Decision at para. 610, JABC, Tab 6, p. 196

195. The trial judge erred in law in:

(a) Finding causation in the absence of a finding about what the standard of care required;

(b) Finding that Cassels's lawyers "soft pedalled" their assistance to the dealers due to the Canada retainer in the absence of any evidence and in breach of the rule in *Browne v. Dunn*;

(c) Finding that GMCL would have negotiated the WDAs in the absence of evidence and based on a misunderstanding of the Class;

(d) Finding that the class members would have given Cassels instructions to negotiate, based on an unavailable inference grounded in the evidence of

three class members hand-picked by the plaintiff and without accounting for the fact that Cassels had no access to, or production from, any other class member;

(e) Failing to consider causation in relation to the Saturn dealers; and,

(f) Failing to undertake a proper loss of chance analysis, and in particular, failing to reflect the cumulative elements of probability in assessing loss of chance.

### *c) Causation Could not be Found Without Deciding Standard of Care*

196. As a matter of law, the trial judge could not determine causation without finding what the standard of care required in the circumstances of the case. The trial judge declined to undertake the very analysis that was necessary to decide causation:

> 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's 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.
>
> **Reference:** Trial Decision at para. 530, JABC, Tab 6, p. 178

197. A trial judge can only determine causation after articulating the standard of care, since the causation analysis depends on the trial judge's finding about how the defendant should have acted. As this Court held in *Bafaro v. Dowd*:

> [T]he question whether the standard of care was breached should be decided before the question of factual causation. In other words, the issue of factual causation arises after the trier of fact has found that the defendant breached the standard of care. That is evident from [*Snell v. Farrell*, [1990] 2 S.C.R. 311] itself, where Sopinka J.'s entire discussion of causation was predicated on an uncontested finding of negligence against the doctor.

> The distinction between standard of care and causation, and the necessity to determine the former before the latter, is also evident in the recent Supreme Court of Canada judgment on causation, *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333.

**Reference:** *Bafaro v. Dowd*, 2010 ONCA 188 at paras. 35 and 36, Cassels's BOA, Vol. II, Tab 23

198. This Court reiterated in *Randall (Litigation guardian of) v. Lakeridge Health Oshawa*, that "[f]indings of breaches of the standard of care should be made first, and factual causation analyzed later in light of those findings."

**Reference:** *Randall (Litigation guardian of) v. Lakeridge Health Oshawa*, 2010 ONCA 537 at para. 35 (emphasis added), Cassels's BOA, Vol. II, Tab 24

199. The trial judge never found, and could not have found on the evidence, that the standard of care required Cassels to refuse to follow the Steering Committee's direction, to organize one group of its dealer clients contrary to the interests of the other, and to advise the non- continuing dealers, without knowledge of their individual circumstances, to reject GMCL's offer and negotiate as a collective. Nevertheless, the trial judge determined causation on that very basis.

### *d) Cassels did not "Soft Pedal" its Representation of the Dealers*

200. The trial judge found that the "Cassels's divided loyalty caused it to "soft pedal" the representation of the dealers" and not advise them with respect to the WDAs.

**Reference:** Trial Decision at paras. 556, JABC, Tab 6, p. 184

201. This finding:

(a) Contradicts the trial judge's finding that Cassels did not provide advice on the WDAs because it was acting on the instructions of the Steering Committee:

> To the extent that Cassels did not get involved with the WDAs, it was acting on the instructions of the Steering Committee.

**Reference:** Trial Decision at para. 454, JABC, Tab 6, p. 161

(b) Was made in the absence of any evidence whatsoever; it is flatly contrary to the only evidence. Peter Harris, Glenn Zakaib, and David Ward testified that the Canada retainer did not influence their handling of the dealers in any way. They were not cross-examined on this evidence.

**Reference:** Harris Chief, October 21, 2014, p. 5969-5970, Cassels's Compendium, Vol. II, Tab 91, pp. 506-507

Zakaib Chief, October 29, 2014, pp. 6526-6528, Cassels's Compendium, Vol. II, Tab 92, pp. 509-511

Examination-in-Chief of David Ward, October 31, 2014, p. 6776-6778, Cassels's Compendium, Vol. II, Tab 93, pp. 513-515

202. Having elected not to cross-examine Cassels's witnesses on whether they "soft pedalled", the plaintiff nevertheless invited the trial judge, in closing submissions, to make that finding. The trial judge dismissed Cassels's argument that there was no evidence whatsoever to support the plaintiff's argument and that it was being advanced in breach of the rule in *Browne v. Dunn*. The trial judge found:

> While it is true that Trillium, for whatever reason, did not cross-examine Cassels's witnesses on the issue of the conflict and how it affected Cassels's 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 ground in the common sense [sic] that it is not fair under the adversary system [sic] 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.

**Reference:** The Trial Decision at para. 512, JABC, Tab 6, p. 174

*R. v. Lyttle,* 2004 SCC 5, at para. 64, citing *Browne v. Dunn*, (1893), 6 R. 67 (H.L.), at pp. 70-71, Vol. II, Cassels's BOA, Tab 25

203. The trial judge's finding does not capture the issue that was before him. It was not whether there was a conflict with the Canada retainer, but whether the Canada retainer prejudicially impacted the professional services the lawyers were providing to the dealers. This is not "largely a matter of argument": it is a specific and very serious factual allegation about the conduct of a professional, which the trial judge found as a fact in the absence of any evidence to support it and no basis to reject the actual evidence.

**Reference:** Trial Decision at para. 512, JABC, Tab 6, p. 174

204. The finding that Cassels's lawyers "soft pedalled" their representation of the dealers is unsupported and unfair.

### *e) GMCL would not have Negotiated*

205. The trial judge found that there was a chance that GMCL would have negotiated its explicitly non-negotiable offer because the downsides of a *CCAA* filing outweighed the benefits.

**Reference:** Trial Decision at para. 570, 572, 582-583 JABC, Tab 6, pp. 186-187, 189

206. On May 22, 2009, GMCL sent a "Q+A" document to the dealers, confirming that "The terms and conditions outlined in the WDA are not subject to negotiation."

**Reference:** GMCL "Q+A" regarding WDA offer, dated May 22, 2009, TMW000000601, Exhibit 75, Tab 111, Cassels's Compendium, Vol. II, Tab 94, pp. 516-517

207. The finding that GMCL would have negotiated with the non-continuing dealers was made in the absence of evidence, and contrary to the evidence of the parent company GM's Lawrence Buonomo. After finding that Mr. Buonomo was a credible witness, the trial judge dismissed his evidence that GM would not have permitted GMCL to negotiate with the dealers, on the grounds that Mr. Buonomo was "simply providing his understanding as to what the situation would be."

GMCL's witnesses each testified that GMCL would not have negotiated with the dealers. In the absence of any other evidence, the trial judge's finding that GMCL would have negotiated based on his own assessment of GMCL's wish to avoid *CCAA* proceedings is pure speculation and constitutes an overriding and palpable error.

**Reference:** Trial Decision at paras. 572, 579, 584, 610 JABC, Tab 6, pp. 187-189, 196

208. The plaintiff called "experts" to testify that GMCL would have negotiated. This evidence was the subject of a contested admissibility argument. In any event, the trial judge says that he did not rely on the evidence of these experts in finding that GMCL would have negotiated.

**Reference:** Trial Decision at paras. 564-566, JABC, Tab 6, pp. 185-186

Argument and Ruling on Admissibility of Expert Evidence, September 23, 2014, pp. 1641-1644, Cassels's Compendium, Vol. II, Tab 95, pp. 519-522

209. The trial judge relied in part on the fact that GMCL "negotiated" with one dealer, John Carroll, without referencing the fact that this negotiation took place in June 2009, after Mr. Carroll had executed the WDA and GMCL had avoided a *CCAA* proceeding. Mr. Carroll's circumstances are not of assistance on this issue.

**Reference:** Trial Decision at paras. 568, JABC, Tab 6, p. 186

Carroll Cross, October 20, 2014, pp 5788-5791, Cassels's Compendium, Vol. II, Tab 96, pp. 524-527

210. The trial judge's finding that GMCL would have negotiated with the dealers was made in the absence of evidence and was explicitly grounded in his finding that the dealer group would have had significant negotiating power based on its size:

> 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.
>
> **Reference:** Trial Decision at para. 574, JABC, Tab 6, pp. 187

211. As described earlier, there was no evidence at trial as to how many Participation Form Dealers would have formed the negotiating group. The trial judge's finding that GMCL would have negotiated with the dealers, and that these negotiations would have succeeded, was made in the absence of evidence as to how much leverage the dealers would have had in any negotiation with GMCL.

### *f) Unavailable Inference that the Class would have given Instructions to Negotiate*

212. The trial judge found that the dealers would have given Cassels instructions to negotiate the WDAs despite the risk of *CCAA* proceedings, holding that:

> 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.
>
> **Reference:** Trial Decision at para. 560, JABC, Tab 6, p. 185

#### *i. The Evidence*

213. In making this finding, the trial judge relied on the evidence of three class members. The trial judge held that:

> 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.

**Reference:** Trial Decision at para. 557, JABC, Tab 6, p. 185

Ruling on class members' evidence, September 17, 2014, pp. 1385-1387, Cassels's Compendium, Vol. II, Tab 97, pp. 529-531

214. The trial judge erred in inferring, based on the evidence of three hand-picked class members, how each class members would have behaved when faced with a WDA. The trial judge compounded this error by making a causation finding based on that inference.

215. The certification judge found that the common issues he certified could be determined based on the evidence of the defendants, without individual inquiries. As noted by Justice Belobaba on the production motion, "both Justice Strathy and the Divisional Court emphasized that the certified common issues can be determined based on the acts or omissions of the defendants, without inquiry into the particular circumstances of individual class members."

**Reference:** *Trillium Production Motion, supra* at para. 18, Cassels's BOA, Vol. II, Tab 22

216. At trial, Cassels objected to the plaintiff calling class members as witnesses, on the grounds that their individual circumstances were not relevant at the common issues trial. The trial judge allowed the class members to testify, but held that their evidence went only to the common issues.

**Reference:** Ruling on class members' evidence, September 17, 2014, pp. 1385-1387, Cassels's Compendium, Vol. II, Tab 97, pp. 529-531

217. The representative plaintiff is the only class member who is a party at the common issues trial. In *Blatt Holdings Ltd. v. Traders General Insurance Co.*, Justice Cumming dismissed a motion by the defendants in a class proceeding for particulars regarding the claims of the prospective class members. Justice Cumming held that the defendants were only permitted to know the representative plaintiff's case.

**Reference:** *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 3622 at para. 7 (CA) (emphasis added), Cassels's BOA, Vol. II, Tab 26

*Blatt Holdings Ltd. v. Traders General Insurance Co.*, [2001] O.J. No. 949 (S.C.J.) at paras. 22, 23, Cassels's BOA, Vol. II, Tab 27

218. The plaintiff made no production from the class members. The defendants were not permitted to contact or communicate with them. Cassels could not gather or lead evidence from dealers who would give a contrary view about how they would have responded to certain legal advice in their particular circumstances.

**Reference:** *Ward-Price v. Mariners Haven Inc.*, [2004] O.J. No. 2308 (Ont. Sup. Ct.) at para. 7, Cassels's BOA, Vol. II, Tab 28

219. Determining how each class member would have behaved based on the evidence of three class members hand-picked by the plaintiff was an error in law.

### *ii. The Differing Dealer Circumstances*

220. The trial judge failed to address what would have occurred if a number of dealers wished to accept the offer and/or were opposed to a negotiation due to the risk of a *CCAA* filing. Most glaringly, he did not address the very strong likelihood that the Saturn dealers would have rejected any recommendation that would have risked their WDAs, given the Saturn Option and the fact that they were facing the closure of their dealerships in any event.

**Reference:** Trial Decision at para. 560, JABC, Tab 6, p. 185

221. The non-continuing dealers each faced unique circumstances when they received the WDA. Some were strong dealers, some were Saturn dealers facing discontinuance in any event, some were heavily reliant on sales of the discontinued Pontiac line, some had other dealerships that had not received a WDA and were therefore continuing their relationship with GMCL (the trial judge's

description of GMCL as a "common foe" is inaccurate) and some were under-performing across the board.

**Reference:** Trial Decision at para. 600, JABC, Tab 6, pp. 193-194

222. Trillium, for example, relied on Pontiac for 50% of its sales and was already underperforming before the Pontiac announcement. How each dealer responded to the WDA would necessarily depend on their individual circumstances.

**Reference:** GMCL Canadian Wind Down Summary, GMT000036165, Exhibit 57, Tab 285, Cassels's Compendium, Vol. II, Tab 98, pp. 532-534

Trial Decision at paras. 25-26, 37, 558, JABC, Tab 6, pp. 73, 75, 184-185

### *g) Failure to Assess Causation in Relation to the Saturn Dealers*

223. The trial judge made the unsupported finding that the Saturn dealers would have decided to band together with the other GMCL dealers to increase their leverage, without having made a finding that Cassels ought to have advised them to do so:

> 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.

**Reference:** Trial Decision at para. 612, JABC, Tab 6, pp. 196

224. The Saturn dealers did attempt to negotiate, but it was in relation to the Saturn Option only. GMCL refused to negotiate even this most modest change to the WDA. The trial judge acknowledged this attempt to negotiate only in so far as he rejected the submission that GMCL's refusal to negotiate with the Saturn dealers was evidence that GMCL would have refused to negotiate with the other dealers:

> 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.
>
> **Reference:** Trial Decision at para. 574, JABC, Tab 6, p. 187

225. The trial judge failed to assess causation in relation to the Saturn dealers. There was no evidence that the Saturn dealers:

(a) Would have given further or different instructions to negotiate with GMCL. They gave instructions to negotiate only in relation to the Saturn Option;

(b) Would have sought to negotiate alongside the GMCL dealers, despite being offered a different WDA which contained the Saturn Option in circumstances where GMCL was already in discussions with Penske Automotive Group to sell the Saturn brand. In the GMCL portion of the Reasons, the trial judge found that a few extra days to consider the WDAs was unlikely to have made a material difference especially "for the Saturn dealers, who knew their dealerships would be closed and who had been given an option";

(c) Would have been welcomed into a negotiating group by the GMCL dealers, given their inferior leverage; and

(d) Would have risked losing the WDA offers, when facing a possible *CCAA* proceeding and the "undoubted discontinuation" of the Saturn brand.

**Reference:** Trial Decision at paras. 104, 189, 193, JABC, Tab 6, pp. 87-88, 105-106

226. There is no support in the evidence for the trial judge's treatment of the Saturn dealers. The deficiencies in his Reasons do not allow this Court to effectively review the reasoning process by which he found against Cassels in relation to the Saturn dealers.

227. Despite GMCL's refusal to negotiate the Saturn Option, every Saturn dealer ultimately executed the WDA. This is not surprising, as the Saturn dealers were otherwise facing either a *CCAA* proceeding or the discontinuance, potentially without payment, of the Saturn brand.

**Reference:** Trial Decision at para.105, JABC, Tab 6, p. 88

228. Deference to the trial judge's bald conclusions relating to the Saturn dealers is not warranted.

### *h) Errors in the Loss of Chance Analysis*

229. The trial judge was required to undertake an analysis of the chance lost by the dealers through each link in the chain of causation. He erred by simply assessing in the aggregate that, absent a breach, the dealers had a 55% chance of a successful negotiation resulting in more funds, without undertaking an analysis of the likelihood of the occurrence of each step in the chain of causation. The trial judge's analysis in respect of this figure was as follows:

> 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.

**Reference:** Trial Decision at para. 610, JABC, Tab 6, p. 196

230. The necessary links in the chain of causation were as follows:

(a) **But for Cassels's identified breaches, the firm would have recommended that the dealers risk a *CCAA* filing by attempting to negotiate with GMCL.** The trial judge never found that such a recommendation was required by the standard of care, he only found that it was "likely" that Cassels would have made it.

**Reference:** Trial Decision at para. 555, JABC, Tab 6, p. 184

(b) **A critical number of dealers would have acted on the recommendation of the firm.** The trial judge "inferred" from the evidence of three hand-picked witnesses that the dealers (which presumably means the Participation Form Dealers who received a WDA) would have given Cassels instructions to negotiate, despite the risk of *CCAA* proceedings, and despite the fact that the dealers were all differently situated, most strikingly in the case of the Saturn dealers;

(c) **The firm would have managed, in less than a week, to put in place a mechanism whereby it could seek and obtain instructions to accept a modified deal from GMCL.** GM's Lawrence Buonomo testified that an approach by Cassels to negotiate on behalf of a group without a binding commitment from the group to abide by the negotiations and authority to enter into a deal "would have been an invitation to file bankruptcy." The trial judge baldly found that "it is more likely than not that a mechanism could have been devised to bind the dealers", without stating what this mechanism would or could possibly have been, and in circumstances where by May 24,

only 110 of the 240 dealers who received WDAs had even identified themselves to CADA;

**Reference:** Trial Decision at paras. 200-201, 559, JABC, Tab 6, pp. 107, 185

Cross-Examination of Lawrence Buonomo, October 17, 2014, pp. 5534-5535, Cassels's Compendium, Vol. II, Tab 99, pp. 536-537

(d) **GMCL would have agreed to negotiate.** The trial judge concluded that there was a chance that GMCL would have agreed to negotiate its explicitly non-negotiable offer because the downsides of a *CCAA* filing outweighed the benefits. This finding cannot stand, as described above;

**Reference:** Trial Decision at para. 570, 572, 582-583, JABC, Tab 6, pp. 186-187, 189

(e) **GMCL would have offered the dealers the entire amount GM had approved when GMCL had decided to terminate 290 dealers, instead of the 240 dealers it ultimately settled on.** The trial judge failed to undertake any assessment of how the negotiations between GMCL and the dealers would have gone, in terms of the quantum. He calculated damages on the basis of the maximum figure he found GMCL could have offered the dealers, which assumed a perfect negotiation in which the dealers insisted on the $218 million amount GMCL had previously budgeted for the termination of 290 dealers (without, of course, having any knowledge of this amount) and no more, which would have triggered a *CCAA* filing on the trial judge's finding.

**Reference:** Trial Decision at paras. 591-592, 595, 604-605, JABC, Tab 6, pp. 191, 195

(f) **The dealers would have accepted a modified offer before the June 1 deadline to avoid a *CCAA* filing.**

**Reference:** Trial Decision at para. 557, JABC, Tab 6, p. 184

231. In *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.*, this Court adopted the law from the English case of *Chaplin v. Hicks*, holding that a loss of chance will be smaller when more contingencies are involved:

> 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 recovery.
>
> In short, in assessing damages the court must discount the value of the chance by the improbability of its occurrence.

**Reference:** *Chaplin v. Hicks*, [1911] 2 K.B. 786, Cassels's BOA, Vol. II, Tab 29

*Eastwalsh Homes Ltd. v. Anatal Developments Ltd.*, [1993] O.J. No. 676 (C.A.), at page 13, Cassels's BOA, Vol. II, Tab 30

232. The trial judge selected a global figure of 55% to capture the likelihood that all of these events would have occurred. This is a matter of cumulative probabilities. If we assume that the trial judge found that each of the above six events was equally probable, he was required to have found that the probability of each occurring was greater than 90%[11]. Given that the trial judge found that "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*

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[11] When there are numerous contingencies that will affect whether a given event happens, the probability of that event happening is based on the product of the percentage chance of each contingency occurring. To reach an overall likelihood of 55% of a successful collective negotiation, the trial judge would have had to have assumed that each of the six contingencies listed above had an approximately 90% chance of occurring (0.90 to the power of 6 = 53.1%). If each contingency had a 55% chance of occurring, there was only a 3% chance that the dealers would have recovered as found by the trial judge.

protection; and that the Class Members would have achieved through negotiation the most that Comeau could offer", it was a palpable and overriding error to find that the dealers had a 55% global chance of obtaining a successful negotiation with GMCL.

**Reference:** Trial Decision at para. 610, JABC, Tab 6, p. 196

233. Where the downside risk is just as likely as a positive result, loss of chance is not available. As the trial judge held, this was "a fluid and risky situation."

**Reference:** Trial Decision at para.189, JABC, Tab 6, p. 105

234. GMCL was on the brink of *CCAA* proceedings. On May 29, 2009, GMCL sent draft *CCAA* materials to Justice Sarah Pepall. The following day, GMCL waived the Acceptance Threshold Condition in the WDA. However, GMCL had not yet reached a resolution with its bondholders and was still facing the very real prospect of a *CCAA* filing.

**Reference:** Letter from Marc Comeau to Thomas L. Hurdman, dated May 30, 2009, TMW000000608, Exhibit 1, Tab 45, Cassels's Compendium, Vol. II, Tab 100, pp. 538

Letter from Lyndon A.J. Barnes to Justice Pepall re General Motors of Canada Limited dated May 29, 2009, GMT000049309, Exhibit 87, Tab 5, Cassels' Compendium, Vol. II, Tab 101, pp. 539

235. On June 1, 2009, with GMCL lawyers ready to proceed with a *CCAA* filing that day, a deal was reached with the bondholders after 7:00 a.m., narrowly avoiding a filing. In the United States, GM did not manage to avert a bankruptcy, and commenced proceedings that day.

**Reference:** Trial Decision at para. 98, JABC, Tab 6, p. 87

236. Any chance lost by the dealers must be balanced against the risk that the dealers would have received nothing if negotiating led to a *CCAA* filing and disclaimer of their DSSAs. The court

must consider all contingencies, including negative contingencies, throughout the chain of causation when determining a loss of chance claim. The trial judge did not do so.

**Reference:** *Eastwalsh Homes*, *supra*, at p. 13, Cassels's BOA, Vol. II, Tab 30

*Ristimaki v. Cooper*, [2004] O. J. No. 2699 (S.C.), at paras 178-179, (reversed on appeal on other grounds [2006] O.J. No. 1559 (C.A.)), Cassels's BOA, Vol. III, Tab 31

*Berry v. Pulley,* [2015] O.J. No. 3298, 2015 ONCA 449, at paras. 68-72, Cassels's BOA, Vol.Vol. III, Tab 32

Trial Decision at para. 189, JABC, Tab 6, p. 105

237. The trial judge's causation findings are fundamentally flawed and cannot stand.

## ISSUE FIVE: PALPABLE AND OVERRIDING ERRORS IN ASSESSING DAMAGES

238. As causation was neither certified nor established, the trial judge erred in assessing aggregate damages. The trial judge also erred in his calculation of damages.

**Reference:** *Class Proceedings Act*, 1992, S.O. 1992, c. 6 s. 24, Aggregate assessment of monetary relief

239. The trial judge calculated damages based on a finding that there was a 55% chance that GMCL would have paid the dealers $218 million after a negotiation, instead of the $126 million paid under the WDAs. Applying 55% to the difference between $218 million and $126 million (i.e. $92 million), the trial judge arrived at a figure of $50 million in damages. He then reduced that number downwards to $45 million, to account for the dealers who opted out of the class.

240. The trial judge made two palpable and overriding errors in his treatment of damages:

(a) He calculated damages on the mistaken belief that all 181 Class members were Participation Form Dealers; and,

(b) He miscalculated the numerical difference between the funds he found were available to GMCL and the amounts that were offered to the dealers.

### *a) Miscalculation Relating to the Call Dealers*

241. The trial judge rejected the plaintiff's argument that the Court should "extend the duty of care Cassels owed to its clients to non-clients who *chose not to retain* Cassels" (emphasis in the original), and found that Cassels owed no duties to the Call dealers.

**Reference:** Trial Decision at paras. 372-376, JABC, Tab 6, pp. 143-144

242. The trial judge's misunderstanding of the nature of the Class, however, resulted in his arriving at the mistaken conclusion that all 181 Class members were Participation Form Dealers. In finding that Cassels breached its obligations, he noted that "I am referring only to the 181 Class Members and not the call dealers."[12]

**Reference:** Trial Decision at para. 536, Footnote 7, JABC, Tab 6, pp. 179,

243. The trial judge's calculation of damages incorporated his error that there were 181 Participation Form Dealers:

> 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.
>
> **Reference:** Trial Decision at para. 611, JABC, Tab 6, p. 196

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[12] Paragraph 202 of the Trial Decision relates to GMCL (JABC, Tab 6, p. 107). The trial judge suggested that the 110 non-continuing dealers who had identified themselves to CADA may have banded together and negotiated. On the trial judge's reasoning, only those 110 dealers who are also Participation Form Dealers should be entitled to any recovery.

244. Each Call dealer in the Class will reduce damages by approximately $250,000.00. The trial judge did not have the evidence required to calculate damages, and ought not to have done so.

***b) Miscalculation Relating to the Additional Funds Available***

245. The trial judge erred in calculating the difference between the amount of money offered to the dealers under the WDAs, and the amount of money that, according to his finding, GMCL had available to offer to the dealers.

246. There are three relevant figures:

(a) The trial judge found that GMCL could have paid up to $218 million to the dealers, based on a previously budgeted amount when GMCL was contemplating terminating 290 instead of 240 dealers;

(b) GMCL offered to pay the 240 dealers who received WDAs a combined total of $143.5 million; and

(c) Since 38 dealers rejected the WDA, GMCL ultimately paid out $126 million.

**Reference:** Trial Decision at para. 592, JABC, Tab 6, p. 191

247. The trial judge erroneously calculated damages based on the difference between the amount he found was available to GMCL ($218 million) and the amount ultimately paid out to the dealers ($126 million), concluding that GMCL had $92 million in additional funds available to offer the dealers.

**Reference:** Trial Decision at paras. 592, 604, JABC, Tab 6, pp. 191, 195

248. GMCL could not have known, in the hypothetical negotiation proposed by the trial judge, that 38 dealers would reject the WDAs. GMCL actually had $74.5 million more "available" than it offered the dealers ($218 million minus $143.5 million), not $92 million. Applying the trial

judge's 55% contingency, and then a 10% reduction for the opt-outs, damages amount to $36.9 million, not $45 million. This is before any adjustment is made to account for the Call dealers.

**Reference:** Trial Decision at paras. 591-592, 595, 604, 611-612, JABC, Tab 6, pp. 191, 195-196

## PART II: ORDER SOUGHT

249. Cassels asks that this Court allow the appeal and

(a) Dismiss the action; and

(b) In any event, set aside the damages award,

with costs throughout.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of June, 2016.

Peter Griffin

Rebecca Jones

Danielle Glatt

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

# COURT OF APPEAL FOR ONTARIO

B E T W E E N:

TRILLIUM MOTOR WORLD LTD.

Plaintiff
(Respondent and Appellant by Cross-Appeal)

and

GENERAL MOTORS OF CANADA LIMITED and
CASSELS BROCK & BLACKWELL LLP

Defendants
(Appellant and Respondent by Cross-Appeal)

## CERTIFICATE RESPECTING TIME

I estimate that 1 day or 1/4 of the total time allotted for the appeals will be needed for Cassels Brock & Blackwell LLP's oral argument, not including reply.

An Order under 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 6th day of June, 2016.

Peter H. Griffin

Rebecca Jones

Danielle Glatt

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Lawyers for the Defendant (Appellant and Respondent by Cross-Appeal), Cassels Brock & Blackwell LLP

# TAB A

**Schedule "A"**

**List of Authorities**

1. *Strother v. 3464920 Canada Inc.*, 2007 SCC 24
2. *Midland Bank Trust Co. Ltd. and another v. Hett, Stubbs & Kemp* [1978], 3 All ER 571
3. *Lee v. 1435375 Ontario Ltd.*, 2013 ONCA 516
4. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53
5. *Coughlin v. Comery*, [1996] O.J. No. 822 (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
6. *Broesky v. Lust,* 2011 ONSC 167
7. *ABN Amro Bank Canada v. Gowling, Strathy and Henderson*, [1994] O.J. No. 2617 (Gen. Div.)
8. *Oblates of Mary Immaculate, St. Peter's Province v. 3220605 Canada Inc. (cob Life Lease Associates of Canada* , [2009] O.J. No. 6362, aff'd 2011 ONCA 481
9. *Woodglen & Co. v. Owens* , [1996] O.J. No. 4082 (Gen. Div.) aff'd (1999), 27 RPR (3d) 237 (*ONCA*)
10. *Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.*, 24 O.R. (3d) 97
11. *Canadian National Railways v. Canadian Pacific Ltd.*, [1978] B.C.J. No. 1298 (BCCA)
12. *Trillium v. Cassels Brock & Blackwell et al.,* 2013 ONSC 1789
13. *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129
14. *MacDonald v Chicago Title Insurance* 2015 ONCA 842
15. *Sinclair v. Smith* (1982), 41 BCLR 374 (BCSC)
16. *Sykes v. Midland Bank Executor & Trustee Co. Ltd.,* [1970] 2 All ER 471 (CA)
17. *Daborn v Bath Tramways Motor Co Ltd.* [1946] 2 All ER 333
18. *Fullowka v. Pinkerton's of Canada Ltd.*, [2010] 1 S.C.R. 132
19. *Krawchuk v. Scherbak*, 2011 ONCA 352
20. *Re Nortel Networks Corp., (In the Matter of the Compromise or Arrangement of)*, [2009] O.J. No. 2166 (S.C.) (QL)

21. The Law Society of Upper Canada's *Rules of Professional Conduct*, Rule 3.4-8

22. *Trillium v. General Motors of Canada et al*, 2012 ONSC 5960

23. *Bafaro v. Dowd*, 2010 ONCA 188

24. *Randall (Litigation guardian of) v. Lakeridge Health Oshawa*, 2010 ONCA 537

25. *R. v. Lyttle,* 2004 SCC 5

26. *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 3622

27. *Blatt Holdings Ltd. v. Traders General Insurance Co.*, [2001] O.J. No. 949 (S.C.J.)

28. *Ward-Price v. Mariners Haven Inc.*, [2004] O.J. No. 2308 (Ont. Sup. Ct.)

29. *Chaplin v. Hicks*, [1911] 2 K.B. 786

30. *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.*, [1993] O.J. No. 676 (C.A.)

31. *Ristimaki v. Cooper*, [2004] O. J. No. 2699 (S.C.)

32. *Berry v. Pulley,* [2015] O.J. No. 3298, 2015 ONCA 449

33. *Housen v. Nikolaisen,* 2002 SCC 33, [2002] 2 S.C.R. 235

34. *Desgagne v. Fabrique de St-Philippe d'Arvida,* 1984 CanLII 129 (SCC), [1984] 1 S.C.R. 19

35. *R. v. J.M.H.,* [2011] 3 SCR 197

36. *H.L. v. Canada (Attorney General)*, 2005 SCC 25 (CanLII), [2005] 1 S.C.R. 401, [2005] S.C.J. No. 24,

# TAB B

## Schedule "B"

1. *Rules of Professional Conduct,* Law Society of Upper Canada, r. 3. 4-8

**3.4-8** Except as provided by rule 3.4-9, if a contentious issue arises between clients who have consented to a joint retainer, the lawyer shall not advise either of them on the contentious issue and the following rules apply:

(a) The lawyer shall

(i) refer the clients to other lawyers for that purpose; or

(ii) if no legal advice is required and the clients are sophisticated, advise them that they have the option to settle the contentious issue by direct negotiation in which the lawyer does not participate.

(b) If the contentious issue is not resolved, the lawyer shall withdraw from the joint representation.

[Amended – October 2014]

2. *Class Proceedings Act,* 1992, S.O. 1992, c. 6 s. 24

**Aggregate assessment of monetary relief**

24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly 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 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. 1992, c. 6, s. 24 (1).

**Average or proportional application**

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis. 1992, c. 6, s. 24 (2).

**Idem**

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members. 1992, c. 6, s. 24 (3).

**Court to determine whether individual claims need to be made**

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order. 1992, c. 6, s. 24 (4).

**Procedures for determining claims**

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims. 1992, c. 6, s. 24 (5).

**Idem**

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

(a) the use of standardized proof of claim forms;

(b) the receipt of affidavit or other documentary evidence; and

(c) the auditing of claims on a sampling or other basis. 1992, c. 6, s. 24 (6).

**Time limits for making claims**

(7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section. 1992, c. 6, s. 24 (7).

**Idem**

(8) A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court. 1992, c. 6, s. 24 (8).

**Extension of time**

(9) The court may give leave under subsection (8) if it is satisfied that,

(a) there are apparent grounds for relief;

(b) the delay was not caused by any fault of the person seeking the relief; and

(c) the defendant would not suffer substantial prejudice if leave were given. 1992, c. 6, s. 24 (9).

**Court may amend subs. (1) judgment**

(10) The court may amend a judgment given under subsection (1) to give effect to a claim made with leave under subsection (8) if the court considers it appropriate to do so. 1992, c. 6, s. 24 (10).

# TAB C

**Schedule "C"**

| **The Retainer** | |
|---|---|
| **Error** | **Standard of Review** |
| *The trial judge erred in finding that Cassels was retained by the dealers who responded to the May 4 Memorandum and that the scope of this retainer included providing advice on the WDAs by:* | |
| 1. Failing to apply established principles of contractual interpretation. | This is an error of law and is reviewable on a standard of correctness.<br><br>*MacDonald v. Chicago Title Insurance Company of Canada,* 2015 ONCA 824 (*Chicago Title*), Cassels's BOA, Tab 14<br><br>*Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53 (*Sattva*), Cassels's BOA, Tab 4<br><br>*Housen v. Nikolaisen,* 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 8-9, Cassels's BOA, Tab 33 |
| 2. Failing to define the scope of the retainer that he found. | This is an error of law and is reviewable on a standard of correctness.<br><br>In general, the interpretation of a retainer is a question of mixed fact and law. Here the trial judge's failure to define the scope of the retainer is entitled to no deference because it is tainted by a clear error in principle.<br><br>Where the error of the first-instance decision-maker can be traced to a clear error in principle, it may be characterized as an error of law and subjected to a standard of correctness.<br><br>*Chicago Title, supra* at para. 17, Cassels's BOA, Tab 14 |
| 3. Misinterpreting the language of the May 4 Memorandum. | This is an error of law and is reviewable on a standard of correctness.<br><br>The legal characterization of the facts must be distinguished from the simple assessment of the facts. An appellate court has the power, in |

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| | exercising its jurisdiction, to reach its own legal characterization of the assessed facts.<br><br>*Desgagne v. Fabrique de St-Philippe d'Arvida,* [1984] 1 S.C.R. 19, Cassels's BOA, Tab 34 |
| 4. Incorrectly applying the law of "limited retainers" and reversing the onus of proof. | This is an error of law and is reviewable on a standard of correctness. |
| 5. Failing to properly approach the application of the context before May 4, 2009. | The trial judge was required to interpret that May 4 Memorandum in a manner "consistent with the surrounding circumstances known to the parties at the time of formation of the contract". He failed to do so. This is an error of law and is reviewable on a standard of correctness.<br><br>*Sattva, supra* at para. 47, Cassels's BOA, Tab 4 |
| 6. Failing to properly consider evidence of subsequent events. | The May 4 Memorandum is not ambiguous. But if it is, the trial judge erred in failing to properly consider the events subsequent to the May 4 Memorandum in interpreting its "terms". This is an error of law and is reviewable on a correctness standard. |
| 7. Relying on out-of-context portions of the evidence of Cassels' lawyers Peter Harris and Glenn Zakaib to support his finding that the "retainer" included the provision of advice on the WDAs. | The question of the inadmissibility of a party's evidence in interpreting a contract is an error in law and is subject to a standard of review of correctness. |
| 8. Relying on the plaintiff's witnesses' subjective expectations to interpret the retainer. | This is an error in law and is reviewable on a standard of correctness. |
| **Cassels' Duties** | |
| **Error** | **Standard of Review** |
| *The trial judge erred in finding that Cassels breached its duties to the Participation Form Dealers by:* | |
| 1. Failing to make a finding about what the | The trial judge's failure to identify an applicable |

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| standard of care required in the circumstances. | standard of care is an extricable issue of law reviewable on a correctness standard. |
| 2. Failing to take into account evidence of both standard of care experts called by Cassels that the firm's approach to the potential conflict with the Canada retainer met the standard of care. The plaintiff led no evidence on this from its standard of care expert. | This is an error of law and is reviewable on a correctness standard. |
| 3. Finding that the Steering Committee was conflicted. | This is an error of law and is reviewable on a standard of correctness.<br><br>The legal characterization of the facts must be distinguished from the simple assessment of the facts. An appellate court has the power, in exercising its jurisdiction, to reach its own legal characterization of the assessed facts.<br><br>*Desgagne*, *supra* Cassels's BOA, Tab 34 |
| 4. Finding a breach in the absence of expert evidence to support his finding. | Finding that Cassels breached the standard of care without grounding that finding in any expert evidence is an error of law and is reviewable on a correctness standard. |
| 5. Finding that Cassels breached the standard of care by employing a "wait and see approach" in the absence of making any findings about who would have given Cassels instructions to "prepare" for the WDAs, and what the standard of care required that preparation to involve. | This is an error of law and is reviewable on a standard of correctness. |
| **The Saturn Dealers** | |
| **Error** | **Standard of Review** |
| *The trial judge made the same errors in addressing the 42 Saturn dealers who form part of the Class, by failing to:* | |
| 1. Determine the nature and scope of the Saturn retainer. | This is an error of law and is reviewable on a standard of correctness. |

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| 2. Define the standard of care. | This is an error of law and is reviewable on a standard of correctness. |
| 3. Define the breach of the standard of care. | This is an error of law and is reviewable on a standard of correctness. |
| 4. Approach any analysis of causation in respect of the Saturn Dealers. | This is an error of law and is reviewable on a standard of correctness. |
| **Causation** | |
| **Error** | **Standard of Review** |
| *The trial judge erred in inferring causation:* | |
| 1. Where causation was not certified as a common issue. | Causation was not certified as a common issue and could not be decided on a class basis. This is an error of law and is reviewable on a standard of correctness. |
| 2. Without establishing what was required by the standard of care. | It is an error of law to determine causation without articulating the standard of care. This finding is reviewable on a standard of correctness. |
| 3. On a finding that Cassels "Soft Pedaled" its representation of the Dealers as a result of the Canada Retainer. | This finding is an error of law. It violates the rule in *Browne v. Dunn*. Having elected not to cross-examine Cassels' witnesses on whether they "soft pedalled", the plaintiff nevertheless invited the trial judge, in closing submissions, to make that finding. The trial judge dismissed Cassels' argument that there was no evidence whatsoever to support the plaintiff's argument and that it was being advanced in breach of the rule in *Browne v. Dunn*. He was wrong to say it was a matter of argument.<br><br>The standard of review is correctness. |
| 4. On a finding, contrary to the only evidence, that Cassels did not recommend a collective negotiation due to its representation of the Government of Canada. | This is a question of fact, however it is an error of law to make a finding of fact for which there is no supporting evidence. Accordingly, the standard of review is correctness.<br><br>*R. v. J.M.H.*, [2011] 3 SCR 197 at para. 25, |

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| | Cassels's BOA, Tab 35 |
| 5. In the face of his fundamental misunderstanding of the composition of the Class. | This is an error of fact. The standard of review is palpable and overriding error. |
| 6. On a finding that GMCL would have negotiated with the non-continuing dealers. | This is an error of fact and is reviewable on a palpable and overriding error standard. |
| 7. On the inference that the Class would have given Cassels instructions to negotiate. | Determining how the class would have behaved based on the evidence of three individual class members hand-picked by the plaintiff is an error in law and is reviewable on a standard of correctness. |
| 8. On an incorrect loss of chance analysis. | The trial judge erred by failing to conduct his loss of chance analysis on a cumulative basis. This is an error in principle and is reviewable on a correctness standard. |
| **Damages** | |
| **Error** | **Standard of Review** |
| *With respect to damages, the trial judge erred by:* | |
| 1. Making an aggregate damages finding that was not available to him. | This error involves a question of legal principle – specifically was an aggregate damages finding available to the trial judge? It is reviewable on a standard of correctness. |
| 2. Mistakenly calculating damages as though all 181 Class members were Participation Form Dealers, instead of a subgroup dealers of unknown size. | The trial judge has acknowledged this error in his Reasons on the Motion to Settle the Terms of the Judgement dated March 22, 2016.<br><br>*Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2016 ONSC 666, JABC, Tab 7 |
| 3. Mistakenly over-calculating by 20% the difference between the amount offered by GMCL to the dealers in the WDA, and the amount he found GMCL had available to offer to the dealers. | The trial judge's errors in his calculations of damages are errors of fact and are reviewable on a palpable and overriding standard.<br><br>Where a trial judge commits a palpable and overriding error or makes a finding of fact that is clearly wrong, unreasonable or unsupported by the evidence, the appellate court may substitute |

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| | its own views of the evidence for the trial judge's views of the evidence.<br><br>*H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, [2005] S.C.J. No. 24, at para. 4, Cassels's BOA, Tab 36 |

# TAB D

# Schedule D

CADA
Canadian Automobile Dealers Association
Corporation des Associations de Détaillants d'Automobiles

**Date:** May 4, 2009

**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 Motor 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 and 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. At that time we agreed on the following:

1) Each General Motors Dealer will be asked to contribute to a General Motors Dealer Group Fund based on the dealer's individual annual new vehicle sales volume. Dealers who sell 200 retail vehicles or less are being asked to contribute **$2500 per GM store** and dealers who sell more than 201 new vehicle sales per year are asked to contribute **$5000 per store**. Please note that monies collected will be held by CADA and treated as a trust fund on behalf of the General Motors dealer group to pay for professional services associated in representing you and for no other purpose. Rest assured no monies will be disbursed without the authorization and approval of your Steering Committee and any monies not used will be returned to you on a pro-rata basis.

2) **Reasons to Participate:**

- **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.

# Schedule D

- **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.

- **Power in Numbers:** By joining together as one large group, you show General Motors Canada and other stakeholders that the Canadian GM dealers are united in their position, which forces those other parties to involve your counsel at the bargaining table and respect your interests.

- **Avoid "Divide and Conquer" Tactics:** If the dealers are splintered into many smaller groups (or even individually), the other stakeholders will be able to reduce their "sacrifice" at your expense.

- **Avoid Getting Left Out:** Cassels Brock and Blackwell can only represent the interests of the General Motors Canada dealers who retain them. If you are not part of the client group, they do not represent you and you will not have a voice.

***(IF YOU WISH TO PARTICIPATE AND BE REPRESENTED PLEASE COMPLETE THE FORM ON PG 5).***

**3)** You should also know that CADA has already contributed $150,000 from its Industry Relations fund to provide administrative and logistical support (such as a dedicated 1-800- General Motors dealer hotline, a dedicated General Motors dealer web-site and additional communications and administrative support). In addition the funds will also be used to assist with the initial legal and other professional services that may be necessary in preparation for a bankruptcy filing by General Motors of Canada. However, CADA monies cannot be used for the benefit of non-members so if you are not a member of your regional or provincial association we ask that you consider joining if you wish to take advantage of these resources and participate in the group (please contact your provincial association immediately). Remember, our collective voice is stronger than your individual one.

## IMPORTANT NOTICE

**4) We will be holding a national General Motors dealer conference call on THURSDAY MAY 7, 2009 at 4:00 pm (EST) to provide you with further details about the General Motors dealer group. *Please note that the call will begin in English followed by French.* The call in number for this call is:**

| | |
|---|---|
| **DATE:** | **THURSDAY, MAY 7, 2009** |
| **TIME:** | **4:00 pm (EST)** |
| **Phone:** | **Canadian Toll Free: 1-866-627-1653** |
| | **U.S. Toll Free: 1-877-366-0713** |
| | **Verbal Passcode (to be given to the operator): VG18327** |

# Schedule D

**Your Steering Committee members urge you be available for the call. The call will be on a listen only basis but will provide all dealers with the crucial information required on a going forward basis.**

**Please make your cheques out to:**

**"CADA" or Canadian Automobile Dealers Association**
**Mailing address: 85 Renfrew Drive, Markham, ON L3R 0N9**
**Attn: Michael Gallardo**

For your information the following are your Steering Committee members (by region). Please direct your calls and questions to your regional representatives:

**General Motors Steering Committee:**

| | | |
|---|---|---|
| **British Columbia:** | | |
| Harry Mertin | Mertin GM | (604) 795-9104 |
| Neil Kalawsky | Kalawsky Pontiac | (250) 365-2155 |
| **Alberta:** | | |
| Linder Armitage | Southgate Chevrolet Ltd. | (403) 256-4960 |
| Pat Healy | Lakewood Chevrolet | (780) 462-5959 |
| **Saskatchewan:** | | |
| Ross Ulmer | Ross Ulmer Chevrolet Cadillac Ltd. | (306) 825-8866 |
| **Manitoba:** | | |
| Jim Gauthier | Gauthier Automotive Group | (204) 697-1400 |
| **Ontario:** | | |
| Michael Croxon (Co-Chair) | NewRoads Automotive Group | (905) 881-5000 |
| Doug Leggat (Co-Chair) | Leggat Automotive Group | (905) 333-3700 |
| Bob Johnston | Frost Pontiac Buick Cadillac | (905) 459-0126 |
| Tom Donnelly | Donnelly Automotive Group | (613) 737-5000 |
| **Quebec:** | | |
| Pierre Cloutier | Plaza Chevrolet | (514) 332-1673 |
| Gaetan Boily | Royal Chevrolet | (514) 595-5666 |
| **Atlantic:** | | |
| John Carroll | Carroll GM | (902) 543-2493 |
| Al MacPhee | MacPhee Pontiac | (902) 434-9431 |

# Schedule D

Thank you for your cooperation. Please be assured that the Steering Committee and the CADA are committed to assisting you during this difficult time. As the Steering Committee will be meeting regularly, we will regularly update you through the dedicated website and CADA General Motors Dealer Assistance 1-800 Hotline noted above. The details with regards to these information technologies will be provided in the next few days. If you have any questions, please contact your regional representative or CADA at industryrelations@cada.ca.

Sincerely,

National General Motors Dealer Steering Committee

# Schedule D

## GENERAL MOTORS DEALER GROUP PARTICIPATION FORM

**PLEASE REPLY ASAP**

For our records, we kindly ask that you please fill out the form below and return to CADA as soon as possible. Fax your response to **CADA: (905) 940-6870** or email your response to michael@cada.ca :

**Please check one:**

☐ Yes, I wish to participate and my cheque is forthcoming

☐ No, I do not wish to participate

Dealer Principal (please print): _____

Dealer Principal Signature: _____

Date: _____

**Contact information (please print):**

General Motors Dealership: _____

Telephone: _____

Email: _____

TRILLIUM MOTOR WORLD LTD.
Plaintiff (Respondent and Appellant by Cross-Appeal)

-and-

CASSELS BROCK & BLACKWELL LLP et al.
Defendants (Appellant and Respondent by Cross-Appeal)

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

**COURT OF APPEAL FOR ONTARIO**

Proceeding commenced at TORONTO

# FACTUM OF THE APPELLANT, CASSELS BROCK & BLACKWELL LLP


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