Court File No. C60838

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

TRILLIUM MOTOR WORLD LTD.

Plaintiff
(Appellant)

- and -

GENERAL MOTORS OF CANADA LIMITED and
CASSELS BROCK & BLACKWELL LLP

Defendants
(Respondent)

Proceeding under the *Class Proceedings Act, 1992*

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PART I - ORDER UNDER APPEAL

1. This is an appeal from the Judgment[1] dated July 8, 2015 and March 22, 2016 of the Honourable Justice T. McEwen dismissing this action as against the defendant General Motors of Canada Limited ("**GMCL**") following a 41-day common issues trial.

PART II - OVERVIEW

2. This action was brought against GMCL under the *Arthur Wishart Act (Franchise Disclosure), 2000*[2] ("**Wishart Act**" or the "**Act**"). The Wishart Act's purpose, as this Court has repeatedly stated, is to protect franchisees, including automotive dealers. The Act does this by prescribing a duty of fair dealing and a duty of disclosure on franchisors and by giving a right of association to franchisees. The common issues in this action concern all three of these rights.

3. The Wishart Act's purpose is "the umbrella under which issues must be addressed."[3] The trial judge was bound by this Court's strong and consistent line of authority in Wishart Act cases but did not apply it. He did not even refer to it.

4. In this manner, the trial judge made an overarching error in his approach to this case. Instead of considering the issues from the perspective of the purpose of the Act, he approached the issues by focusing entirely on the financial difficulties that GMCL faced in 2009.

5. The events at issue culminated in May 2009. Although GMCL was in serious financial difficulties, it had told its dealers for months that restructuring of the dealer network would be

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[1] Judgment of McEwen J. dated July 8, 2015 and March 22, 2016, Joint Appeal Book and Compendium ("**JABC**"), Tab 5, p. 53.
[2] S.O. 2000, c. 3.
[3] *Addison Chevrolet Buick GMC Ltd. v. General Motors of Canada Ltd.*, [2016] O.J. No. 2356 (C.A.) ("***Addison***") at para. 59, Book of Authorities of the Appellant ("**BOA**"), Tab 17.

accomplished through attrition, retirements and facilitated consolidations as GMCL went about securing the government bailout funding that would allow it to put its financial problems behind it. Then, GMCL suddenly presented a large number of dealers with a Wind-Down Agreement (“**WDA**”).

6. GMCL delivered this WDA to 240 of its dealers on May 20, 2009. It gave each of them two stark options: accept the WDA as is and “agree” to the early termination of the Dealer Sales & Service Agreement in exchange for a small fraction of the dealership’s worth, or risk getting nothing in a *Companies’ Creditors Arrangement Act*[4] (“**CCAA**”) filing that GMCL was contemplating. GMCL gave the franchisees only four business days – six days in total – to make their decision. Ultimately, 202 franchisees signed the WDA.

7. On May 15, 2009, five days before delivering the WDAs, GMCL had provided an update to its dealers, but failed to disclose the critical facts that its parent company and the Governments of Canada and Ontario had approved the making of a wind-down offer to 42% of GMCL’s dealers, and that it was proposing to deliver the WDAs by May 20 and impose a May 26 response date. Instead, GMCL communicated a general and “pointedly non-specific” message in an “oddly upbeat fashion,” stating that it was “hopeful” that it would roll out its dealer restructuring plan “potentially by the end of May or the very first part of June.”

8. Against this background, the dealers were “understandably shocked” when they were finally told on May 19 that some of them would be receiving WDAs the next day and that they would have only four business days to respond. The dealerships were businesses that

[4] R.S.C., 1985, c. C-36.

represented the life's work and livelihood of many of their owners and their families. Many of the businesses spanned multiple generations.

9. The trial judge's overarching error of focusing on GMCL's financial difficulties rather than viewing the issues from the perspective of the purpose of the Act informed his findings on each of the common issues against GMCL under appeal, and led to the following errors:

(a) The trial judge's finding that GMCL did not breach the statutory duty of fair dealing in how it procured the WDAs hinged on an overarching error in principle: that GMCL's actions had to be evaluated through the "lens of commercial reality,"[5] being the significant economic and commercial challenges the company was facing in May, 2009, and assessed against a legal standard of "fair enough" in "that context," which is irreconcilable with this Court's well-established jurisprudence on the scope, content and purpose of the statutory duty of fair dealing.

(b) The trial judge's finding that the release contained in the WDA was not in violation of section 11 of the Wishart Act[6] was based on the misapplication of a judicially-created exception to the mandatory provisions of section 11, which should not have applied on the facts of this case.

(c) The trial judge's finding that GMCL was not required to deliver a disclosure document pursuant to section 5 of the Wishart Act rested on a finding that disclosure only applies when a franchisee first becomes a franchisee and that the WDA was not a

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[5] Reasons for Judgment of McEwen J. dated July 8, 2015 ("**Reasons**"), **JABC**, Tab 6, p. 100, para. 163.
[6] Section 11 states that **any** purported waiver or release by a franchisee of a right given under this Act or of an obligation or requirement imposed on a franchisor or franchisor's associate by or under this Act is void.

"franchise agreement" for the purposes of disclosure, even though a plain and purposive reading of the Wishart Act does not restrict disclosure to those circumstances.

10. Each of these errors runs contrary to the purpose of the Wishart Act and this Court's pronouncements of how the Act is to be interpreted and applied.

11. Additionally, the trial judge erred by finding that no term of the WDA violated the right of association under section 4 of the Wishart Act, while at the same time finding, in his disposition of GMCL's counterclaim, that the release included in the WDA did violate the dealers' right of association.

12. The trial judge made many factual findings that the appellant sought. He found that GMCL could have told the dealers on May 15 that it was planning to deliver WDAs on or around May 20, and that GMCL could have given the dealers until May 29 to return the WDAs without affecting GMCL's overall restructuring plan. This would have given the dealers as many as 14 days to prepare for and then consider the WDA, instead of just six days. He found that the dealers were "shocked and surprised" to be receiving WDAs. He found that the information provided by GMCL to the dealers leading up to the WDA was "non- specific," "less than frank" and characterized by an "omission of candour."[7] He accepted the testifying dealers' evidence that they felt "rushed" to make a decision. However, against the background of all of these findings, the trial judge concluded that the dealers' rights under the Wishart Act had to take a back seat to GMCL's "commercial reality."

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[7] Reasons, **JABC**, Tab 6, p. 80-81, 85, 103, para. 66, 67, 68, 90, 180. Costs Endorsement of McEwen J. dated March 22, 2016, **JABC**, Tab 8, p. 239, para. 56.

13. A franchisor's duties to its franchisees cannot be diminished by difficult financial circumstances. On the contrary, these duties become even more important in such circumstances so that all parties, not just the franchisor, may properly order their affairs, and that the purpose of the Wishart Act - the protection of franchisees - be respected and fulfilled.

PART III - FACTS

(1) OVERVIEW OF FACTS SECTION

14. Following the introduction of the parties, this Facts section is divided into three time periods:

(a) Build-up to May 20, 2009;

(b) Six days in May: May 20-26; and

(c) Post-May 26 events.

(2) THE PARTIES

15. The appellant, Trillium Motor World Ltd. (formerly, Trillium Pontiac Buick GMC Ltd.) ("**Trillium**"), was a General Motors dealer in the City of Toronto for approximately 20 years from 1990 to 2009.[8]

16. The defendant, GMCL, is a Canadian corporation that manufactures and distributes automobiles to its dealerships throughout Canada.[9]

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[8] Reasons, **JABC**, Tab 6, p. 201, Appendix "B."
[9] Reasons, **JABC**, Tab 6, p. 71, para. 15.

17. Trillium brought this action on behalf of all corporations in Canada that signed a WDA with GMCL (the "**class members**" or "**non-retained dealers**"). There are 181 members of the class after opt-outs.[10]

18. Trillium and all members of the class operated under a standard Dealer Sales and Service Agreement ("**DSSA**") with GMCL.[11] The DSSA of each dealer was to expire on October 31, 2010, but the "term" provision of the DSSA provided as follows:

> This Agreement will expire without any action by either Dealer or GM on October 31, 2010 or in accordance with the terms of the Agreement. **Dealer is assured the opportunity to enter into a new DSSA at the expiration date if GM determines Dealer has fulfilled its obligations under this Agreement.**[12] (Emphasis added)

(3) BUILD-UP TO MAY 20, 2009

19. From December, 2008 to May 15, 2009, GMCL consistently communicated to the dealers that it would work together with them to restructure the dealer network in the face of its financial problems. As shown in the paragraphs which follow, in each instance where GMCL mentioned dealer restructuring to the dealers, it said that such restructuring would be completed by one of the following three methods: natural dealer attrition, retirements, or facilitated consolidations (whereby GMCL would contribute in one dealer buying out another and consolidating the two). The option of a WDA-type agreement did not exist and was not mentioned. Despite its escalating financial problems leading up to May 20, GMCL's messaging to the dealers, as found by the trial judge, was consistently "upbeat,"[13] "positive,"[14]

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[10] Reasons, **JABC**, Tab 6, p. 69, para. 3.
[11].Reasons, **JABC**, Tab 6, p. 72, para. 18-19.
[12] DSSA, Ex. Book, Tab 77, Appeal Book and Compendium of the Appellant, Trillium Motor World Ltd. ("**TMWABC**"), Tab A1, p. 1.
[13] Reasons, **JABC**, Tab 6, p. 77, 79, 103, para. 47, 61, 178.
[14] Reasons, **JABC**, Tab 6, p. 77, 80, para. 47, 66.

"optimistic"[15] and "smooth and comforting."[16] GMCL told the dealers there was "no need to panic."[17]

20. It is for this reason that the trial judge found that the dealers were "understandably shocked and surprised" to be told on May 19, 2009 that GMCL would be delivering WDAs the next day for return on May 26, 2009.[18]

A. Initial Viability Plans – Dealer Restructuring First Communicated

21. By December, 2008, GMCL was experiencing significant financial problems. Credit markets were tightening and GMCL was burning through cash. With no other options to obtain financing, GMCL sought financial assistance from the Governments of Canada and Ontario.[19] Likewise, GMCL's parent in the U.S., General Motors Corporation ("**GMUS**"), sought financial assistance from the U.S. Government.[20]

22. On December 2, 2008, GMUS made its formal request for funding from the U.S. Government (the "**December US Viability Plan**").[21] The December US Viability Plan set out GMUS's problems and its preliminary plans for restructuring.

23. It was in the December US Viability Plan that GMUS first announced major changes to its "product portfolio," i.e., the brands and nameplates of vehicles. GMUS announced that it would be focusing on four core brands – Chevrolet, GMUS, Buick and Cadillac - and that

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[15] Reasons, **JABC**, Tab 6, p. 79, 80, para. 61, 67.
[16] Reasons, **JABC**, Tab 6, p. 80, para. 66.
[17] Reasons, **JABC**, Tab 6, p. 76, para. 40.
[18] Reasons, **JABC**, Tab 6, p. 85, para. 90.
[19] Reasons, **JABC**, Tab 6, p. 75, para. 38.
[20] Reasons, **JABC**, Tab 6, p. 75, para. 37; Stapleton DE, Day 19, p. 3744:2, **TMWABC**, Tab B1, p. 466.
[21] Reasons, **JABC**, Tab 6, p. 75, para. 37; December US Viability Plan, Ex. Book, Tab 175, **TMWABC**, Tab A2, p. 45.

Pontiac would be reduced to a niche brand with a reduced product offering. GMUS also announced that it was placing the Saturn/Saab brands under "strategic review," with an intended sale or spin-off of these brands.[22]

24. On December 5, 2008, GMCL made its own submission (the "**December Viability Plan**")[23] to Industry Canada and the Ontario Ministry of Economic Development & Trade (collectively, the "**Governments**"). With respect to the dealer network, and in light of the news that Pontiac would be reduced to a niche brand, GMCL stated in the December Viability Plan:[24]

> Since the Canadian network is already aligned as described, the reduction in the number of Canadian dealers will be more moderate, as there is no necessity to eliminate single-branded dealership operations, as in the US. In addition, GMCL has been focusing on reducing its dealer network in metropolitan centres over the past few years. Currently, there are over 700 GMCL dealers in Canada, which is a reduction of approximately 15% since 2000. **GMCL plans to continue to work closely with its Canadian dealers on further consolidation and rationalization, with a focus on Canadian metropolitan centres. GMCL expects that the reduction in the number of dealerships will continue over the next five years at a similar rate.** (Emphasis added)

25. On December 19, 2008, GMCL reported to the dealers on the December Viability Plan in a televised Highly Interactive Distance Learning ("**HIDL**") broadcast aired for the dealers.[25] In this HIDL, GMCL's Vice-President of Sales, Service and Marketing and the most senior person at GMCL overseeing the dealer network, Marc Comeau ("**Comeau**"), assured the dealers that there was "no need to panic."[26] Even though Pontiac was becoming a niche brand, Comeau told the dealers that the product portfolio would protect the Pontiac-Buick-GMC dealerships:[27]

> Now let's talk about Pontiac. In terms of the future for Pontiac, documents submitted to the U.S. Senate clearly state that the Pontiac-GMC channel will remain fully competitive in terms of total entries offered. This means that Pontiac will serve to compliment [sic] the Buick and GMC

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[22] December US Viability Plan, Ex. Book, Tab 175, **TMWABC**, Tab A2, p. 45.
[23] December Viability Plan, Ex. Book, Tab 181, **TMWABC**, Tab A3, p. 83.
[24] December Viability Plan at p. 17, Ex. Book, Tab 181, **TMWABC**, Tab A3, p. 99.
[25] Reasons, **JABC**, Tab 6, p. 76, para. 40; December 19 HIDL, Ex. Book, Tab 185, **TMWABC**, Tab A4, p. 118.
[26] Reasons, **JABC**, Tab 6, p. 76, para. 40.
[27] December 19 HIDL, Ex. Book, Tab 185, **TMWABC**, Tab A4, p. 120.

> models, and reinforce the channel as a whole. Both Pontiac, Buick, GMC and Chevrolet remain cornerstones for the Canadian distribution network and our product portfolio will protect the future viability of both channels moving forward. **There is no need to panic**. Don't expect dramatic changes in the short term because it will take time to strategically evolve the Pontiac portfolio. **As I've just mentioned, Pontiac will take on a more focused role and the Pontiac/Buick/GMC channel will remain fully competitive in terms of total entries offered, and I think that's the key takeaway: competitive in terms of total entries offered.** (Emphasis added)

26. On December 20, 2008, the Governments announced that they would provide conditional financial support in the amount of $4 billion in loans payable to GMCL and Chrysler Canada Inc.[28] The Governments gave GMCL until February 20 to submit a viability plan.

27. On February 12, 2009, GMCL broadcast another HIDL to its dealers.[29] This broadcast advised of the restructuring plans to be submitted by both GMUS and GMCL to their respective governments. There was no mention of dealer restructuring on this HIDL.

B. Second Viability Plans – February, 2009 – Dealer Restructuring Plan Communicated to the Dealers

28. On February 17, GMUS released its updated viability plan (the "**February US Viability Plan**").[30] The February US Viability Plan forecast a 22% decrease in vehicle sales in Canada during 2009.[31] Further, GMUS stated that two key agreements needed to be completed in order for its Canadian subsidiary, GMCL, to be viable: one with the Governments, and the other with the CAW with respect to labour costs.[32]

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[28] Reasons, **JABC**, Tab 6, p. 75, para. 39; December 20, 2008 Press Release, Ex. Book, Tab 186.2, **TMWABC**, Tab A5, p. 123.
[29] February 12 HIDL, Ex. Book, Tab 213, **TMWABC**, Tab A6, p. 125.
[30] Reasons, **JABC**, Tab 6, p. 76, para. 44; February US Viability Plan, Ex. Book, Tab 223, **TMWABC**, Tab A7, p. 128.
[31] Reasons, **JABC**, Tab 6, p. 76, para. 44.
[32] February US Viability Plan at p. 13, Ex. Book, Tab 223, **TMWABC**, Tab A7, p. 140.

29. That same day, GMCL sent out a Leadership Message memo to the dealers.[33] The Leadership Message made no mention of dealer restructuring.

30. Also on February 17, GMCL sent a letter to all Saturn dealers advising them of the discontinuance of the Saturn brand at the end of the 2011 model year, and that GMCL was looking into selling or spinning off the Saturn brand to a third-party purchaser.[34]

31. The day after the release of the February US Viability Plan, Comeau broadcast an HIDL to the dealers.[35] Comeau's tone on the HIDL, as found by the trial judge who watched all of the HIDL broadcasts at trial, was "upbeat and positive."[36] In this HIDL, Comeau informed the dealers about the upcoming GMCL submission to the Governments and that a dealer restructuring would be accomplished through attrition, retirements and facilitated consolidations (ie., GMCL providing funds for one dealer to buy out another dealer):[37]

> Now let's talk about dealer network planning. I know this is a subject that is very sensitive to everyone watching. **First let me make it very clear that dealer restructuring is not because of any problems with dealers.** As I have said many times, we have the best dealer organization in the world. We will be working together here over the next few weeks in roundtable meetings, **at which point we will enter into more discussion on this important subject.** But to be clear, I want to underscore that our objectives are very transparent. We must adjust GM dealer throughput to match world-class competitors. Without the higher throughput, the GM dealer network as a whole will get weaker over time. This has happened to us in many markets and we need to address it now. It's not competitive. We must reverse it and its exactly what we're going to do. **The restructuring of our dealer body will be accomplished through attrition, retirements, the infusion of private capital, and General Motors' facilitated consolidations….** (Emphasis added)

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[33] February 17 Leadership Message, Ex. Book, Tab 226, **TMWABC**, Tab A8, p. 146.
[34] Reasons, **JABC**, Tab 6, p. 77, para. 49; February 17 letter to Saturn retailers, Ex. Book, Tab 21, **TMWABC**, Tab A9, p. 147.
[35] February 18 HIDL, Ex. Book, Tab 231, **TMWABC**, Tab A10, p. 150.
[36] Reasons, **JABC**, Tab 6, p. 77, para. 47.
[37] February 18 HIDL, Ex. Book, Tab 231, **TMWABC**, Tab A10, p. 154.

32. On February 20, GMCL released its viability plan (the "**February Viability Plan**") required by the Governments.[38] In the plan, "GMCL remained optimistic, hoping to achieve reductions through retirements, facilitated consolidations and private capital acquisitions."[39] With respect to the dealer network restructuring, the February Viability Plan stated that GMCL planned to "work closely with the Canadian dealers" to reduce the network:[40]

> Currently, there are over 700 GMCL dealers in Canada, which is a reduction of approximately 15% since 2000. **GMCL plans to continue to work closely with its Canadian dealers on further consolidation and rationalization and expects to have 450-500 dealers in Canada by 2014. These efforts will be particularly focused on achieving a viable network configuration in Canada's key urban markets. GMCL is not targeting any specific dealer group to meet reduction targets, but rather looking at opportunities for retirements, private capital acquisitions and facilitated consolidations**. (Emphasis added)

33. The same day as the release of the February Viability Plan, GMCL sent a Leadership Message memo to the dealers over its internal website, "GlobalConnect," to report on the February Viability Plan. The Leadership Message notified the dealers of the dealer restructuring plan contained in the February Viability Plan and assured the dealers that GMCL's plan "retains GM Canada customers, dealer network and new vehicle line-up as the company's top strength and priority."[41]

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[38] Reasons, **JABC**, Tab 6, p. 76, para. 45; February Viability Plan, Ex. Book, Tab 243, **TMWABC**, Tab A11, p. 155.
[39] Reasons, **JABC**, Tab 6, p. 76, para. 45.
[40] February Viability Plan, Ex. Book, Tab 234, **TMWABC**, Tab A11, p. 182.
[41] February 20 Leadership Message, Ex. Book, Tab 239, **TMWABC**, Tab A12, p. 207; Comeau CE, Day 23, p. 4632:4, **TMWABC**, Tab B2, p. 468.

C. Roadshow Meetings to Reinforce February Viability Plan

34. Following the release of the February Viability Plan, in late February/early March, GMCL conducted a roadshow across Canada (also referred to as roundtable meetings) in order to pitch the February Viability Plan to the dealer body.[42]

35. At each roadshow, GMCL advised the dealers face-to-face that the dealer restructuring would be accomplished through the means of attrition, retirements, and facilitated consolidations.[43] The dealers were told of the three elements which the Governments needed GMCL to address in order to obtain financing: the voluntary employment benefit association ("**VEBA**"), unions and bondholders.[44] Reducing the dealer network was not mentioned as a requirement for GMCL to address in order to obtain government financing.

D. Governments Reject February Viability Plan – GMCL Advises No Changes to Dealer Restructuring Plan

36. On March 27, the Governments informed GMCL that they were rejecting the February Viability Plan.[45] Three days later, the rejection of the February Viability Plan was made public when the Governments issued a joint press release (the "**Rejection Release**").[46] The Rejection Release stated that GMCL's plans set out in the February Viability Plan did not go far enough to ensure GMCL's future viability. The Governments demanded that GMCL go "deeper and faster" in implementing its restructuring.

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[42] Reasons, **JABC**, Tab 6, p. 77, para. 50; February Roadshow Presentation, Ex. Book, Tab 248, **TMWABC**, Tab A13, p. 209.
[43] February Roadshow Presentation, Ex. Book, Tab 248, **TMWABC**, Tab A13, p. 211.
[44] Reasons, **JABC**, Tab 6, p. 77, para. 50. Comeau CE, Day 23, p. 4652:9, **TMWABC**, Tab B3, p. 469.
[45] Reasons, **JABC**, Tab 6, p. 78, para. 54.
[46] Reasons, **JABC**, Tab 6, p. 78, para. 54; March 30 Rejection Release, Ex. Book, Tab 293, **TMWABC**, Tab A14, p. 213.

37. The Rejection Release mentions dealers in the following passage:

> As with the U.S. Government's request, Canada is requesting that both companies and their stakeholders — management, labour, retirees, **dealers** and suppliers — contribute appropriately to improve overall cost structures in their long-term restructuring plans. (Emphasis added)

38. The trial judge found, from the Rejection Release, that the Governments indicated that the circumstances warranted a more aggressive rationalization of the dealer network.[47] Although the Governments did not tell GMCL how or when this should take place, the Governments did expect a reduction of dealers that would correspond with the reduction in brands and nameplates.[48]

39. GMCL broadcast an HIDL on March 30 to the dealers to report on the Rejection Release.[49] Comeau told the dealers that the Rejection Release did **not** impact GMCL's dealer restructuring plans as set out in the February Viability Plan and that GMCL still intended to work closely with the dealers on consolidation and rationalization to achieve a reduction of 450 to 500 dealers by 2014. Comeau highlighted that the three key elements on which GMCL had to move "deeper and faster" to satisfy the Governments were: VEBA obligations, UAW, and bondholders:[50]

> First off, we have too many liabilities or debt on our balance sheet and that should be of no surprise to any of you, especially those that participated in the **executive round table meetings** that were conducted about three or four weeks ago. In those sessions, **we clearly called out that there were three key elements that needed to come to play to rid debt from our balance sheet.** [1] We needed to find a new way to deal with the VEBA obligations that we have… [2] We also needed to work with the UAW to come up with a competitive labour agreement…[3] And the third element fell within the area of bond holders… Those elements have not yet all been satisfied or finalized. Therein lies the principle [sic] reason for both governments in the United States and here in Canada stating that here on March 31st we have not yet achieved what needed to be done to ensure that we were viable. And for those of you that attended the round table meetings, I think

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[47] Reasons, **JABC**, Tab 6, p. 79, para. 55.
[48] Reasons, **JABC**, Tab 6, p. 115, para. 245.
[49] Reasons, **JABC**, Tab 6, p. 79, para. 59, March 30 HIDL, Ex. Book, Tab 295, **TMWABC**, Tab A15, p. 218.
[50] March 30 HIDL, Ex. Book, Tab 295, **TMWABC**, Tab A15, p. 218; Comeau CE, Day 23, p. 4656:21, **TMWABC**, Tab B4, p. 472.

> I made it very clear that all of these elements need to be addressed for the plan to be certified and approved.
>
> ...
>
> **As it relates to you, our dealer and retailer network, GMCL's plan remains on track as outlined in our February 20th restructuring plan submission to the government.** General Motors of Canada has been successfully focusing its efforts on reducing its dealer network in Metropolitan Centres over the past few years.
>
> Currently there are over 700 GM Dealers in Canada which is a reduction of approximately 15% since the year 2000. **GM plans to continue to work closely with its Canadian dealers on further consolidation and rationalization and expects to have 450 to 500 dealers in Canada by 2014**. These efforts will be particularly focused on achieving a viable network configuration in Canada's key urban markets. (Emphasis added)

E. April HIDL Broadcasts Reinforce that the February Viability Plan Is Still in Effect

40. GMCL's next communication to the dealers was on April 14 when Comeau conducted another HIDL broadcast.[51] As the trial judge found, Comeau, "as usual, …, came across as upbeat and optimistic as he explained that GMCL would be accelerating its network restructuring while the plan to eliminate approximately 200 to 250 dealers by 2014 remained in place."[52] Comeau told the dealers the following:[53]

> **Now on the questions of brands and dealer consolidations, the plan hasn't really changed.**
>
> …
>
> **Over the next 45 days or so, we will continue to work around the clock with all parties to meet the aggressive requirements that have been set by the Auto Task Force in the United States, as well as their Canadian counterparts.** Supported by both governments, we will 1) accelerate efforts to find solutions with the bondholders… 2) accelerate efforts with the UAW…With our CAW partners and the Federal Provincial governments, we will investigate ways to deal with our pension funding issues. These are the tasks we face and I can commit to you that we… will do everything in our power to bring all of these issues to rest within the prescribed timeframe. (Emphasis added)

[51] Reasons, **JABC**, Tab 6, p. 79, para. 61; April 14 HIDL, Ex. Book, Tab 339, **TMWABC**, Tab A16, p. 223.
[52] Reasons, **JABC**, Tab 6, p. 79, para. 61.
[53] April 14 HIDL, Ex. Book, Tab 339, **TMWABC**, Tab A16, p. 224.

41. Comeau also told the dealers of the June 1, 2009 deadline set by the Governments.[54]

42. One week later, Comeau conducted another HIDL broadcast for the dealers on April 21.[55] Comeau informed the dealers that, even though the US dealer restructuring plan was being expedited, there was no contemplated change for the Canadian dealer restructuring beyond what was said in the February Viability Plan. Specifically, Comeau stated:

> ...Now you may have heard reports out of the United States regarding dealer closures. Fritz Henderson confirmed that GM is expediting the U.S. dealer consolidation to more quickly get to the target number of dealers stated in the February 17th plan. **I would like to reassure you that our plan for the Canadian dealers remains as outlined in our February 20th restructuring plan submission to the Canadian and Ontario governments...** (Emphasis added)

F. Third and Final Viability Plans – the April Viability Plans

43. On April 23, GMCL, and Comeau specifically, learned that GMUS made the decision that Pontiac would be discontinued entirely as a brand rather than being reduced to a niche brand.[56] GMUS would make the announcement on April 27.

44. With this upcoming announcement in mind, Comeau continued to formulate the network restructuring plans and considered the effect of the loss of Pontiac on the dealer network.

45. On April 27, GMUS released its final viability plan (the "**GMUS April Viability Plan**").[57] The GMUS April Viability Plan confirmed that Pontiac would be discontinued *by the end of 2010* and that Saturn would either be phased out or spun-off by the end of 2009. It also referred to a more aggressive reduction of the U.S. dealer network by 42%. The announced loss

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[54] Reasons, **JABC**, Tab 6, p. 79, para. 61.

[55] Reasons, **JABC**, Tab 6, p. 80, para. 62; April 21 HIDL, Ex. Book, Tab 358, **TMWABC**, Tab A17, p. 226.

[56] Reasons, **JABC**, Tab 6, p. 80, para. 63; Comeau CE, Day 23, p. 4695:15, **TMWABC**, Tab B5, p. 476; Email string among Comeau, Macdonald, G. Velez et al. re: Pontiac Announcement, Ex. Book, Tab 370, **TMWABC**, Tab A18, p. 230.

[57] GMC S-4 dated April 27, 2009, Ex. Book, Tab 377, **TMWABC**, Tab A19, p. 233; GMC Press Release dated April 27, 2009, Ex. Book, Tab 380, **TMWABC**, Tab A20, p. 236.

of Pontiac had greater consequences in Canada than it would in the U.S. In the U.S., Pontiac accounted for about 6% of retail sales, while in Canada, Pontiac accounted for approximately 26% of retail sales.[58]

46. On the same day as the GMUS April Viability Plan was released and four days after learning of the fate of Pontiac, GMCL released its updated viability plan in the form of a press release (the "**April Viability Plan**").[59] The April Viability Plan stated with respect to the dealer network restructuring:

> In accelerating its Restructuring Plan and consistent with the announced changes to Saturn, Saab, HUMMER and Pontiac brands, GM Canada will reduce its dealer network from 705 dealers in 2009 to between 395-425 dealers **at the end of 2010**, a percentage reduction of 42% consistent with that in the US.

47. The trial judge found that after GMCL's announcement of the April Viability Plan, it "would have been obvious to all involved that a large percentage of the dealers would find themselves on the chopping block within 20 months at most."[60]

48. The trial judge also went on to find, however, that in an HIDL broadcast that same day (April 27),[61] Comeau "*did not convey any sense of dread to the dealers. As usual, Comeau's tone was positive and his delivery smooth and comforting*."[62] In this critically important HIDL broadcast, Comeau advised the dealers that GMCL would work "closely" with the dealers and that GMCL still hoped to achieve dealer reductions "through normal attrition and consolidation." He stated that GMCL was still putting its plans together and it was unclear

[58] Reasons, **JABC**, Tab 6, p. 80, para. 64.
[59] Reasons, **JABC**, Tab 6, p. 80, para. 65; GMCL April Viability Plan dated April 27, 2009, Ex. Book, Tab 385, **TMWABC**, Tab A21, p. 241.
[60] Reasons, **JABC**, Tab 6, p. 80, para. 65.
[61] April 27 HIDL, Ex. Book, Tab 387, **TMWABC**, Tab A22, p. 243.
[62] Reasons, **JABC**, Tab 6, p. 80, para. 66.

whether consolidation could be achieved through private capital, central funding or other alternatives. He added that the goal was to accomplish the dealer reduction in an orderly, cost effective and consumer-friendly way. He repeated that GMCL would work closely with the dealers; and that the plan had not yet been developed.[63]

49. Comeau's exact words were:[64]

> Today GM has announced the phase out of Pontiac by the end of 2010. A very difficult decision. I will have more comments on Pontiac, as it relates to Canada, later on in this broadcast... GM's dealer count in the United States will be reduced from 6200 in 2008 to 3600 in 2010 - a 42% reduction. We will see similar contraction in Canada from 705 dealers and retailers in 2008 to somewhere between 395 and 425 by 2010.
>
> …
>
> Please understand, this announcement is not a notice of termination of any dealer agreements…. It is still GM's intent to grow the product offerings of Buick and GMC in an attempt to provide appropriate market coverage, competitive throughput and greater dealer opportunity for profitability as I just mentioned. So more to come on the specifics of our future portfolio.
>
> …
>
> **On the question of dealer consolidation, we hope to achieve dealer reductions through normal attrition and consolidation**. We are still putting our plans together, whether through private capital where one dealer would buy another, or through other funding or other alternatives yet to be determined. **We intend to work closely with our dealers through this process.**
>
> …
>
> I know you all have many questions. We have not yet developed all of the details of our transition process. **We expect to have answers to your questions by the end of May**, when we hope to have completed our restructuring plan with government. (Emphasis added)

50. The trial judge found that "*the optimistic tone of Comeau's broadcast suggested that viable alternatives would likely emerge for the dealers affected by the reduction process*."[65]

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[63] Reasons, **JABC**, Tab 6, p. 80, para. 66.
[64] April 27 HIDL, Ex. Book, Tab 387, **TMWABC**, Tab A22, p. 243.

There was nothing said on that HIDL or in the letter sent to the dealers the same day[66] that could have lead the dealers to believe that notices of non-renewal and WDAs would be forthcoming over the next few weeks.[67]

51. The trial judge found that GMCL lacked candour and could have been "more frank" with the dealers in the April 27 communications:[68]

> [68] While the evidence at trial disclosed that GMCL had not yet begun to formulate the wind-down plan that it ultimately put into place, in my opinion **GMCL could have been more frank** with its dealers concerning the impact of the loss of Pontiac and the fact that it might explore options other than rationalization through attrition and consolidation. Tellingly, **this omission of candour** forms the basis for many of Trillium's complaints in the action. […] (Emphasis added)

G. Behind the Scenes GMCL Plans for WDA Delivery

52. The April 27 HIDL was the last message to the dealers until the next HIDL broadcast which aired on May 15. This was despite Comeau's promise to the dealers to keep them fully informed and be transparent.[69] From April 27 to May 15, there were no broadcast communications, no communications from the Dealer Communications Team (DCT), no Leadership Messages posted on GlobalConnect and no face-to-face meetings.[70] GMCL shut off communications with its dealer body during this critical time period and with its deadline to produce a viable restructuring plan by June 1 fast approaching.

53. During this period of silence, GMCL was feverishly at work planning its restructuring either inside or outside a CCAA filing.

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[65] Reasons, **JABC**, Tab 6, p. 80, para. 67.
[66] Letter from GMCL to dealers dated April 27, 2009, Ex. Book, Tab 389, **TMWABC**, Tab A23, p. 247.
[67] Hurdman DE, Day 3, p. 522:5, **TMWABC**, Tab B6, p. 478; Turpin DE, Day 9, p. 1653:14, **TMWABC**, Tab B6, p. 483; Condie DE, Day 11, p. 2050:17, **TMWABC**, Tab B6, p. 487.
[68] Reasons, **JABC**, Tab 6, p. 81, para. 68.
[69] Comeau CE, Day 22, p. 4553:11, **TMWABC**, Tab B7, p. 490.
[70] Turpin DE, Day 9, p. 1660:23, **TMWABC**, Tab B8, p. 491.

54. After April 27, Comeau and his team began to identify the dealers that would not be retained by GMCL.[71]

55. By early May 2009, GMCL was contemplating offering some form of WDA to a number of the dealers. GMCL contemplated making the offers either inside or outside a CCAA filing. During this time, GMCL used the "Matrix" (a spreadsheet which synthesized a huge amount of complex information) to identify which dealers would be offered WDAs.[72]

56. This "*development was not communicated to any of the dealers or dealer organizations*."[73]

57. At that time, GMCL also began analyzing its exposure to claims from dealers and the overall financial impact of a potential CCAA filing.[74]

H. GMCL Seeks Approval of Wind-Down Plan

58. By early May, GMCL came to the realization that its decision to eliminate 42% of its dealers by 2010 would potentially expose it to significant damages claims by the dealers. These claims were estimated by GMCL to be between $300 and $500 million.[75]

59. GMCL worked on various scenarios and conducted various analyses on how they could extinguish such claims. GMCL was contemplating offering some form of "wind-down agreement" to a number of the dealers, either inside or outside a CCAA filing, whereby the

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[71] Reasons, **JABC**, Tab 6, p. 81, para. 70.
[72] Reasons, **JABC**, Tab 6, p. 81, para. 70, 74; Email re: GMCL Dealer Network 363 Analysis dated May 5, 2009, Ex. Book, Tab 438-438.1, **TMWABC**, Tab A24, p. 249.
[73] Reasons, **JABC**, Tab 6, p. 82, para. 74.
[74] Reasons, **JABC**, Tab 6, p. 82, para. 74.
[75] Reasons, **JABC**, Tab 6, p. 82, para. 76.

dealers would agree to the early termination of their DSSAs and release their claims against GMCL in exchange for a monetary payment.[76]

60. Faced with the potential of large damages claims by the dealers, GMCL sought approval from GMUS of its proposed dealership reduction plan involving the use of a wind-down agreement. Comeau prepared a presentation and sent it to GM North America's President, Troy Clarke ("**Clarke**"), on May 12, which outlined GMCL's proposed dealer restructuring plan.[77] The presentation sought approval for up to $218 million to implement the dealer restructuring using wind-down agreements. The proposed budget and the wind-down offers were designed to eliminate the $300 - $500 million exposure with respect to dealer claims.[78]

I. The Washington Meeting – Plan Put into Place

61. On May 14, there was an important meeting in Washington, D.C. to discuss the GMCL restructuring (the "**Washington meeting**").[79] Attendees at the Washington meeting included representatives from the U.S. Treasury, Canadian and Ontario Governments, GMUS and GMCL, and their respective counsel.[80] The entire meeting was about GMCL.[81]

62. In slides prepared in anticipation of the meeting, GMCL stated that "bankruptcy process will facilitate execution of plan (pressures dealers to more readily accept terms of transition

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[76] Reasons, **JABC**, Tab 6, p. 82, para. 74.
[77] Reasons, **JABC**, Tab 6, p. 82, para. 76; GMCL follow up items authored by Comeau, Ex. Book, Tab 483.1, **TMWABC**, Tab A25, p. 260.
[78] Reasons, **JABC**, Tab 6, p. 82, para. 76.
[79] Reasons, **JABC**, Tab 6, p. 83, para. 78.
[80] Reasons, **JABC**, Tab 6, p. 83, para. 78; Buonomo DE, Day 26, p. 5390:15, **TMWABC**, Tab B9, p.494.
[81] Washington Meeting Agenda, Ex. Book, Tab 489-489.1, **TMWABC**, Tab A26, p. 280.

agreements)."[82] GMCL's CFO testified that "bankruptcy process," as used in this slide, applied to the *threat* of a bankruptcy, not just within a filing itself.[83]

63. At the meeting, the Governments expressed the view that it would be desirable to avoid a GMCL *CCAA* filing if this could be accomplished at a reasonable cost.[84]

64. It was at the Washington meeting on May 14 where it was decided that GMCL would make a wind-down offer to certain non-retained dealers.[85] As described below, the offer was not made until the following week, and it imposed on the non-retained dealers a May 26 response date.[86]

J. GMCL Gets Marching Orders

65. The next day, on May 15 at 8:45 a.m. ET, Clarke gave Comeau approval to spend up to $218 million to fund the dealer restructuring.[87] Subject to adopting a "principled approach," Comeau was given complete freedom to navigate within this space.[88] The evidence of Comeau was that the 'marching orders' and approval from Clarke were official and GMCL had what it needed "to go on to the next phase."[89]

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[82] Email from D. Crawley to Stapleton attaching GM Canada presentation, Ex. Book, Tab 488-488.1, **TMWABC**, Tab A27, p. 281.
[83] Stapleton CE, Day 20, p. 4023:13, **TMWABC**, Tab B10, p. 497.
[84] Reasons, **JABC**, Tab 6, p. 83, para. 79.
[85] Buonomo CE, Day 26, p. 5424:15, **TMWABC**, Tab B11, p. 500; Stapleton CE, Day 21, p. 4112:24, **TMWABC**, Tab B11, p. 499.
[86] Reasons, **JABC**, Tab 6, p. 83, para. 81.
[87] Email from A. Elias to Comeau re: Assignments from Ray's meeting, Ex. Book, Tab 512, **TMWABC**, Tab A28, p. 305; Email from Elias to Young re: Canadian Network Offer—Update, Ex. Book, Tab 511, **TMWABC**, Tab A29, p. 306.
[88] Reasons, **JABC**, Tab 6, p. 191, para. 592-594; Email from Comeau to Risebrough et. al. attaching Wind Down and Dealer Consolidation presentations, Ex. Book, Tab 524, **TMWABC**, Tab A30, p. 307.
[89] Comeau CE, Day 24, p. 4983:6, **TMWABC**, Tab B12, p. 502.

K. May 15 HIDL – No Disclosure of Wind-Down Plan to Dealers

66. More than four hours after receiving confirmation of the WDA plan, Comeau broadcast an HIDL to the dealers on May 15 at 1:00 p.m. ET.[90] He did not share with the dealers the details of the Washington Meeting or the plan to offer some dealers WDAs in the next few days with a required response date of May 26.[91]

67. Rather, on this broadcast (just 5 days before GMCL planned to deliver Notices of Non-Renewal and WDAs), Comeau told the dealers:

(a) "**Over the next few weeks we will work to achieve solutions** that will best serve our current and future customers while also recognizing some of the unique aspects of our Canadian dealer network…."

(b) "…In Canada, **we will continue to work with all our key stakeholders, including** the CAW, suppliers, governments and **you, our dealers**, to meet our government's requirement that we take faster and deeper restructuring actions here in Canada."

(c) "...**Certainly we will be identifying dealers with whom our relationship *may* come to an end sometime before the end of 2010**…Our governments have made it very clear they have demanded swift and deep actions to ensure the long-term viability of our company. This has to include a viable dealer network as well."

[90] Reasons, **JABC**, Tab 6, p. 84, para. 83; May 15 HIDL, Ex. Book, Tab 503, **TMWABC**, Tab A31, p. 309.
[91] Reasons, **JABC**, Tab 6, p. 84, 103, para. 84, 178.

(d) "...We are hopeful to **roll out our [dealer restructuring] plan potentially by the end of May or in the very first part of June**."

(e) "…**We remain fully committed** to steer this ship to port and make all the necessary decisions **to ensure our collective long-term viability**. As we approach the May 30th deadline imposed by the government, we will continue to keep you informed about the important decisions and actions."

(f) "We have many tough decisions on the immediate horizon. I can assure you they will all be addressed. On that note, thanks for tuning in and **I'll likely be back on air sometime before the end of the month**."

68. The trial judge found that "*Comeau's message in that May 15 HIDL broadcast was* ***delivered in an oddly upbeat fashion****, considering the dire situation faced by GMCL and its dealers –* ***particularly in light of the fact that <u>GMCL knew</u> that WDAs would be delivered within four days***" (emphasis added).[92]

69. The trial judge found that one statement in Comeau's HIDL address - that GMCL was hopeful that it would roll out its dealer restructuring plan potentially by the end of May or in the very first part of June - was "inaccurate" and "untrue."[93] Importantly, as the dealers were aware, the first part of June was *after* GMCL's deadline to submit its plan to the Governments in order to avoid a CCAA filing, as communicated to the dealers on the April 14 HIDL. Thus, although they were told that some dealers' relationships with GMCL would come to an end by the end of

[92] Reasons, **JABC**, Tab 6, p. 103, para. 178.
[93] Reasons, **JABC**, Tab 6, p. 103, para. 178.

2010, they were effectively told not to expect anything abrupt to happen before the CCAA filing deadline. This was consistent with GMCL's messaging to the dealers throughout 2009.

70. While GMCL did not tell its own dealers what was about to hit them, it did tell others. On May 15, it shared its plan with the Canadian Automobile Dealers' Association ("**CADA**") and an *ad hoc* group of GMCL dealers that agreed to form a steering committee to represent all GMCL dealers in Canada should GMCL file for bankruptcy protection (the "**Steering Committee**").[94] GMCL shared its plan with CADA and the Steering Committee in order to gain its support for the plan and to help sell the package.[95] Comeau also told the executive of the dealer advisory council, the Dealer Communications Team ("**DCT**"),[96] and one dealer about the WDA plan.[97]

71. By May 15, GMCL also shared the dealer restructuring plan with representatives of the Governments.[98]

72. Having left the dealers with the disarming message from the May 15 HIDL, Comeau and his team spent the next 5 days completing the list of non-retained dealers, finalizing the wind-down formula and completing the documentation to eliminate the non-retained dealers.[99]

[94] Reasons, **JABC**, Tab 6, p. 84, para. 85, 184; Email from Elias to Young and Clarke dated May 16, 2009 re: Update on Labour Negotiations and Dealer Network Restructuring, Ex. Book, Tab 523, **TMWABC**, Tab A32, p. 312; Email from Ryan to Steering Committee dated May 15, Ex. Book, Tab 516, **TMWABC**, Tab A32, p. 314; Email from Comeau to Ryan dated May 16, Ex. Book, Tab 534, **TMWABC**, Tab A32, p. 316.
[95] Reasons, **JABC**, Tab 6, p. 84, 104, para. 85, 184.
[96] Reasons, **JABC**, Tab 6, p. 119, 120, para. 261, 268.
[97] Email from Cloutier to Gauthier dated May 17, Ex. Book, Tab 538, **TMWABC**, Tab A33, p. 318; Email from Comeau to Ryan dated May 16, Ex. Book, Tab 534, **TMWABC**, Tab A32, p. 316.
[98] Reasons, **JABC**, Tab 6, p. 85, para. 87; Government Briefing Note, Ex. Book, Tab 548, **TMWABC**, Tab A34, p. 320.
[99] Reasons, **JABC**, Tab 6, p. 84-85, para. 86-89.

L. May 19 – GMCL Breaks the News

73. On May 19, GMCL finally broke the news that it would be delivering WDAs to certain dealers *the next day* with a return deadline of May 26.[100] This would leave these non-retained dealers with only four business days, given the intervening weekend, to make a decision.[101]

74. The trial judge found that the "dealers were **understandably shocked and surprised** to receive this news."[102]

75. Up until this point, the only dealer restructuring plan ever disclosed to the dealers involved reducing dealerships through attrition, retirements, and facilitated consolidations, all collaborative processes. The May 19 HIDL was the first mention to the dealers of a WDA and the first indication that any decision would have to be made by May 26.

(4) SIX DAYS IN MAY – MAY 20-26

76. On May 20, GMCL started delivering "Notices of Non-Renewal" and the WDA to 240 dealers, which it called the "non-retained" dealers.[103] The Notices of Non-Renewal informed the non-retained dealers that GMCL would not renew their respective DSSAs when they expired on October 31, 2010.[104]

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[100] May 19 HIDL, Ex. Book, Tab 563, **TMWABC**, Tab A35, p. 323.
[101] Reasons, **JABC**, Tab 6, p. 85, para. 90.
[102] Reasons, **JABC**, Tab 6, p. 85, para. 90. (emphasis added)
[103] Reasons, **JABC**, Tab 6, p. 86, para. 93; Notice of Non-Renewal & WDA, Ex. Book, Tab 597, **TMWABC**, Tab A36, p. 344; Saturn Notice of Non-Renewal & WDA, Ex. Book, Tab 598, **TMWABC**, Tab A37, p. 360.
[104] Reasons, **JABC**, Tab 6, p. 86, para. 93

77. The agreement required the non-retained dealer to contact a lawyer, get an independent legal advice ("**ILA**") certificate from a lawyer and return the signed WDA and certificate to GMCL by 6:00 p.m. ET on May 26.[105]

78. The non-retained dealers had never seen an agreement of this nature before and had never been confronted with a situation like the one before them in May 2009.[106]

79. Complicating the decision was the threat of a CCAA filing in which the dealers were led to believe that they would receive nothing. On May 22, GMCL posted on its GlobalConnect internet portal for dealers a memo on letterhead from the Dealer Communications Team (the "**DCT memo**"), a body comprised of GMCL executives and dealers. The DCT memo told dealers that they would likely receive nothing if GMCL filed for CCAA. The DCT memo recommended accepting the WDA.[107]

80. The dealers also participated on a conference call on May 24, 2009 with CADA and Cassels Brock & Blackwell ("**Cassels**") in which they were told the WDA was a "take it or leave it" offer.[108] Comeau had briefed the CADA on May 15.[109]

81. During those six days, GMCL's field representatives placed calls to each non-retained dealer to discuss the WDA.[110] The call logs prepared by the field reps to track their calls to the

[105] WDA, Ex. Book, Tab 597, **TMWABC**, Tab A36, p. 357.
[106] Reasons, **JABC**, Tab 6, p. 184, para. 558.
[107] Reasons, **JABC**, Tab 6, p. 119, para. 262; DCT Memo dated May 22, Ex. Book, Tab 630, 632, **TMWABC**, Tab A38, p. 380.
[108] Reasons, **JABC**, Tab 6, p. 86, 119, para. 95, 265.
[109] Reasons, **JABC**, Tab 6, p. 84, 104, para. 85, 184.
[110] Reasons, **JABC**, Tab 6, p. 120, para. 269; Email from Elias to Comeau dated May 23, Ex. Book, Tab 644, **TMWABC**, Tab A39, p. 384; Email from M. Moxley dated May 26, Ex. Book, Tab 679, **TMWABC**, Tab A40, p. 386.

non-retained dealers showed that a large number of dealers were "upset," "extremely upset" or "livid."[111]

82. Overall, the trial judge accepted the evidence of the testifying non-retained dealers that they felt "rushed" to make a decision.[112] The trial judge found[113] and GMUS' former global chief litigation counsel admitted under cross-examination[114] that GMCL could have given the dealers until May 29 to return the WDA without affecting its overall restructuring plan.

(5) POST MAY-26 EVENTS

83. By May 26, 2009, 202 (or 84%) of the dealers offered the WDA signed it back. This included all 51 Saturn dealers.[115]

84. There was no negotiation with the dealers over the terms of the WDAs. The trial judge found that GMCL would have negotiated with the dealers for up to the $218 million limit that Clarke had approved. GMCL actually paid only $126 million to the wound-down dealers.[116]

A. Bondholder Negotiations

85. The other stakeholder group in the GMCL restructuring that received attention during the trial was the Nova Scotia bondholders (the "**bondholders**"). The bondholders held notes in an affiliated Nova Scotia company which GMUS had guaranteed. The Nova Scotia company had used the proceeds of the bonds to make an intercompany loan to GMCL that remained

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[111] Summary of Regional Field Rep Calls, Ex. Book, Tab 667.1, **TMWABC**, Tab A40, p. 387.
[112] Reasons, **JABC**, Tab 6, p. 105, para. 189.
[113] Reasons, **JABC**, Tab 6, p. 105, para. 191.
[114] Buonomo CE, Day 26, p. 5531:19, **TMWABC**, Tab B13, p. 503.
[115] Reasons, **JABC**, Tab 6, p. 86, para. 97.
[116] Reasons, **JABC**, Tab 6, p. 87, para. 100.

outstanding and was an issue to be addressed in May 2009 if GMCL were to avoid a CCAA filing.

86. As background, on April 27, GMUS released a bond exchange offer as part of an S-4 document to be filed with the Securities and Exchange Commission in the U.S.[117] The S-4 was an offer to equitize the outstanding bond obligations of GMUS. The S-4 was said by GMUS to be a one-time, non-negotiable offer made to various bondholders, including the Nova Scotia bondholders, and was available for acceptance until May 26. In stark contrast to the dealers, the bondholders were given one month to consider the offer with full disclosure.

87. On May 26, the S-4 offered to the bondholders expired without sufficient take-up.

88. GMUS spent from May 27 to June 1 negotiating with the bondholders. A deal was eventually reached in the morning of June 1, 2009, just prior to GMCL otherwise preparing to file for a CCAA. The negotiations were intense and saw the bondholders extract a significant payment in return for their consent to extinguish the debt owing by GMCL to the Nova Scotia company.

89. The deal with the bondholders represented the last piece of the restructuring puzzle. GMCL did not need to file for CCAA protection. It received over $10 billion in funding from the Governments.

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[117] Reasons, **JABC**, Tab 6, p. 81, para. 69; GMUS S-4 dated April 27, 2009, Ex. Book, Tab 377, **TMWABC**, Tab A19, p. 233.

(6) SUMMARY OF GMCL'S POSITION ON JUNE 1

90. From GMCL's position, its activities were an unqualified success.[118] It negotiated a deal with the CAW to reduce labour costs. It negotiated a deal with the bondholders to compromise its debt obligations. It eliminated from its dealer network 240 dealers who had represented it in Canada for generations for a fraction of their net worth, without negotiation, without court oversight, and without paying a penny more than its first and only offer. It received $10 billion from the Governments, and did not file under the CCAA.

91. The non-retained dealers soon shut down. Family businesses, many spanning decades with millions of dollars invested, were wiped away in six days.

PART IV - ISSUES AND ARGUMENT

92. The following issues will be addressed in this section:

(a) Did the trial judge err in his application of the Wishart Act by defining the scope and content of the duty of fair dealing with reference solely to the business context in which GMCL was operating in May, 2009?

(b) Common issue (c)(i) - Did the trial judge err in finding that giving the dealers six days to consider and sign the WDA was not a breach of the duty of fair dealing?

(c) Common issue (c)(iii) - Did the trial judge err in finding that GMCL had the right not to renew the DSSA?

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[118] Email from Young to senior GMC and GMCL management, Ex. Book, Tab 802, **TMWABC**, Tab A41, p. 405.

(d) Common issue (d) - Did the trial judge err in finding that GMCL's failure to provide material facts to the dealers was not a breach of the duty of fair dealing?

(e) Common issue - (e)(vi) – Did the trial judge err in finding that a term of the WDA (Section 5(c)) did not violate the right of association under the Wishart Act?

(f) Common issue (f) - Did the trial judge err in finding that the release in the WDA was not void or unenforceable pursuant to sections 4 and 11 of the Wishart Act?

(g) Common issue (g) - Did the trial judge err in finding that GMCL was not required to deliver a disclosure document pursuant to the Wishart Act?

(h) Common issues (h) & (i) – Did the trial judge err in finding that the dealers did not have the right to deliver a Notice of Rescission pursuant to the Wishart Act?

(i) What is the appropriate measure of damages?

(1) DID THE TRIAL JUDGE ERR BY DEFINING THE SCOPE AND CONTENT OF THE DUTY OF FAIR DEALING WITH REFERENCE TO THE CONTEXT IN WHICH GMCL WAS OPERATING IN MAY, 2009?

A. Statutory Purpose of the Wishart Act

93. This Court has emphatically and repeatedly held that the purpose of the Wishart Act is to protect franchisees. The following statements of this Court illustrate the point::

> **The purpose of the Act is to protect franchisees**. The provisions of the Act are to be interpreted in that light.[119]

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[119] *405341 Ontario Ltd. v. Midas Canada Inc.*, [2010] O.J. No. 2845 (C.A.) ("***Midas***") at para. 30, **BOA**, Tab 13.

> … The purpose of the statute is clear: **it is intended to redress the imbalance of power as between franchisor and franchisee**; it is also intended to provide a remedy for abuses stemming from this imbalance.[120]

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> ... [**T]he focus of the Act is on protecting the interests of franchisees**.[121]

****

> The purpose of the legislation is to protect franchisees … **The legislation must be considered and interpreted in light of this purpose**.[122]

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> The umbrella under which this issue needs to be addressed **is a recognition that the purpose of the *Wishart Act* is the protection of franchisees**.[123]

94. In answering common issues (c) and (d), as reviewed in more detail below, the trial judge made a fundamental error by losing sight of the statutory purpose and proceeding to determine the scope and content of the duty of fair dealing under the Wishart Act with reference solely to GMCL's business context at the time of the alleged breaches in May, 2009.

95. This error is manifest in the trial judge's remarks before addressing the common issues. At the beginning of his analysis of the common issues against GMCL, the trial judge stated:

> [115] Both Trillium and GMCL agree that GMCL was in the throes of financial crisis during the spring of 2009. GMCL was insolvent during this time and reliant upon the Canadian Governments for short term funding. **One must not lose sight of these unprecedented economic pressures bearing down on GMCL when it formulated and executed its plan to reduce the dealer network [ie., in May, 2009]. [**…] On the other hand, despite these exceptional

[120] *Salah v. Timothy's Coffees of the World Inc.*, [2010] O.J. No. 4336 (C.A.) ("***Salah***") at para. 26, **BOA**, Tab 38.
[121] *Personal Service Coffee Corp. v. Beer* (2005), 256 D.L.R. (4th) 466 (Ont. C.A.) ("***Personal Service Coffee***") at para. 28, **BOA**, Tab 37.
[122] *6792341 Canada Inc. v. Dollar It Ltd.*, [2009] O.J. No. 1881 (C.A.) ("***Dollar It***") at para. 72, **BOA**, Tab 15.
[123] *2130489 Ontario Inc. v. Philthy McNasty's (Enterprises) Inc.*, [2012] O.J. No. 2521 (C.A.) at para. 26, **BOA**, Tab 8.

> circumstances, one must not lose sight of the fact that the dealers were vulnerable, and as franchisees, were dependent upon GMCL for products and information (Emphasis added)
>
> [116] While the exceptional circumstances of this case involve a challenging, fast moving and dire economic situation, they do not negate the legal duties owed by GMCL to the dealers; **rather, those duties must take their colour from <u>that context</u>.** (Emphasis added)

96. Similarly, before specifically addressing common issue (c) – the duty of fair dealing – the trial judge stated:

> [163] Lastly, as I have previously stated, the duty of fair dealing is context-specific… The specific context of GMCL's conduct was that it was making crucial business decisions very quickly during a time of instability and flux for both GMCL and its dealers. **When considering each of the sub-issues below I will review the statutory duty of fair dealing through the <u>lens of commercial reality</u> – that is, GMCL's conduct in <u>that context</u>**. (Emphasis added)

97. Similar statements referring to "that context" are made at various points throughout the trial judge's analysis of the common issues and are identified below.

98. The trial judge should have defined the scope and content of the duties GMCL owed to the dealers:

(a) with regard to the **purpose** of the Wishart Act;

(b) with regard to the **reasonable expectations** of the parties; and

(c) by considering the **context of the long-standing relationship** between the parties, not just one party's solvency problems at one point in time.

99. By failing to do so, the trial judge made an overriding error in principle. Errors in principle are reviewable under the standard of correctness.[124]

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[124] *MacDonald v. Chicago Title Insurance Co. of Canada* (2015), 127 O.R. (3d) 663 (C.A.) at para. 17, **BOA**, Tab 33.

B. The Trial Judge Failed to Take a Purposive Approach in His Interpretation of the Wishart Act

100. The trial judge should have used the purpose of the Wishart Act as the lens through which to view GMCL's conduct, and not the "lens of [GMCL's] commercial reality."

101. The modern approach to statutory interpretation requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[125]

102. Although this was likely the largest franchise case ever heard in Canada, the trial judge gave no consideration to the intent and purpose of the Wishart Act, and referred to none of this Court's many pronouncements on the point. Such an approach to the interpretation of the statutory duties under the Wishart Act is a fundamental error in principle. As this Court recently stated: [126]

> **56** The Act is designed to address the perceived imbalance of power in the franchisor/franchisee relationship. The Act's purpose is to protect both prospective franchisees and those already parties to a franchise agreement….
>
> **57 The Act must be interpreted in a manner that advances this purpose**. (Emphasis added)

103. The trial judge's approach also conflicts with this Court's recent decision in *Addison,* another case against GMCL by its dealers related to the 2009 dealer network restructuring, where this Court held:[127]

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[125] *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26, **BOA**, Tab 20, citing with approval Driedger's *Construction of Statutes* (2nd ed., 1983 at p. 87).(emphasis added) See also R. Sullivan, *Construction of Statutes*, 5th ed., LexisNexis, p. 255-257, 265, **BOA**, Tab 47.

[126] *2240802 Ontario Inc. v. Springdale Pizza Depot Ltd.*, [2015] O.J. No. 1736 (C.A.) ("***Springdale***") at para. 56-57, **BOA**, Tab 10.

[127] *Addison* at para. 59, **BOA**, Tab 17.

> [59] It is also significant that the [Wishart Act] is remedial legislation intended to address the perceived power imbalance between a franchisor and a franchisee and to protect franchisees. **The purpose of the act is the umbrella under which issues must be addressed.** (Emphasis added)

104. The relevant authorities establish that the Wishart Act creates "new standards of conduct in a franchise relationship" and provides remedies for their breach.[128] It is "*sui generis* remedial legislation" that must receive a "broad and generous interpretation."[129] In *Fairview Donut Inc. v The TDL Group Corp.,* Justice Strathy (as he then was) stated:[130]

> The *Arthur Wishart Act* is unquestionably remedial legislation, designed to address the power imbalance between franchisor and franchisee. As such, **it is entitled to a generous interpretation to give effect to its purpose**. (Emphasis added)

105. In addition to failing to consider the purpose of the Wishart Act, the trial judge effectively treated the franchisor-franchisee relationship as no different from any other commercial relationship.[131] This was fundamentally wrong. As this Court recently held: "the obligations of a party in a franchise relationship differ from those in a regular commercial relationship." Further, as this Court recognized in *Salah,* a franchise relationship gives rise to special considerations:[132]

> Our courts have given limited recognition to the duty of good faith between contracting parties in general. However, by enacting legislation that addresses the particular relationship between franchisors and franchisees, **the legislature has clearly indicated that such relationships give rise to special considerations**, both in terms of the duties owed and the remedies that flow from a breach of those duties. This is evident in the wording of s. 3(2), which focuses on the conduct of the breaching party and not injury to the other side. (Emphasis added)

106. The special considerations include: (i) the inherent power imbalance between franchisor and franchisee; (ii) the information disparity between the franchisor (who possesses the

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[128] *Bekah et al. v. Three for One Pizza* (2003), 67 O.R. (3d) 305 (S.C.J.) at p. 19, **BOA**, Tab 19.
[129] *Salah* at para. 26, **BOA**, Tab 38.
[130] 2012 ONSC 1252 ("***TDL***") at para. 496, **BOA**, Tab 29.
[131] *Addison* at para. 64, **BOA**, Tab 17.
[132] *Salah* at para. 28, **BOA**, Tab 38.

information) and the franchisee (who is in an information vacuum); (iii) the inherent vulnerability of franchisees; and (iv) that franchise agreements are typically contracts of adhesion drafted by the franchisor. As this Court recently recognized, "the relationship between a franchisor and franchisee is one of vulnerability for the franchisee."[133]

107. The trial judge did not pay heed to any of these special considerations or the underlying purpose of the Act in his analysis of the duties owed by GMCL to the dealers. The trial judge was not only required to interpret the Wishart Act with the purpose of the statute in mind, he was required to interpret the statute in a manner that "advances" its purpose.[134] He erred in not doing so, and this error infused his analysis of the common issues which are all focused on GMCL's duties under the Wishart Act.

C. Scope and Content of the Duty of Fair Dealing Must Be Informed By the Parties' Reasonable Expectations

108. The statutory duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards.[135] Since the duty of fair dealing, like the duty of good faith, is an implied term of a franchise agreement, its application should be analogous to a contractual interpretation analysis.

109. The case law on good faith shows that in defining the scope and content of the duty of good faith, courts seek to give effect to the reasonable expectations of the parties. The trial judge failed to do so in this case.

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[133] *Addison* at para. 64, **BOA**, Tab 17.
[134] *Springdale* at para. 57, **BOA**, Tab 10.
[135] Wishart Act, section 3(3).

110. In *Bhasin v. Hrynew*,[136] the Supreme Court found that the scope and content of the duty of good faith needs to be determined on a case-by-case basis by looking at the relationship between the parties. Justice Cromwell stated:

> Good faith may be invoked in widely varying contexts and this calls for a highly context-specific understanding of what honesty and reasonableness in performance require **so as to give appropriate consideration to the legitimate interests of both contracting parties.** For example, the general organizing principle of good faith would likely have different implications in the context of a long-term contract of mutual cooperation than it would in a more transactional exchange.[137] (Emphasis added)

111. The Supreme Court also held that the organizing principle of good faith accords with the reasonable expectations of commercial parties,[138] and that "[t]he principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract…"[139]

112. In *Gateway Realty Ltd v Arton Holdings,*[140] one of the seminal good faith cases, the Court stated:

> 60 What will constitute bad faith or breach of the conduct described above will depend on the terms of contract and the circumstances of each case. In most cases, bad faith can be said to occur when one party, without reasonable justification, acts in relation to the contracts in a manner where the result would be to substantially nullify the bargained objective or benefit contracted for by the other, or to cause significant harm to the other, **contrary to the original purpose and expectation of the parties**. (Emphasis added)

113. In *Lac Minerals Ltd. v. International Corona Resources Ltd*.,[141] LaForest J. held that the reasonable expectations of the parties were linked to a duty of good faith:

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[136] 2014 SCC 71, **BOA**, Tab 22.
[137] *Bhasin* at para. 69, **BOA**, Tab 22.
[138] *Bhasin* at para. 34, **BOA**, Tab 22.
[139] *Bhasin* at para. 70, **BOA**, Tab 22.
[140] [1991] N.S.J. 362 (S.C.) at para. 60, **BOA**, Tab 30. See also *Mesa Operating Limited Partnership v Amoco Canada Resources Ltd* (1994), 149 AR 187 (C.A.) at para. 14-15, **BOA**, Tab 34.
[141] [1989] 2 S.C.R. 574 at para. 189, **BOA**, Tab 32.

> ... the institution of bargaining in good faith is one that is worthy of legal protection in those circumstances where that protection accords with the expectations of the parties.

114. In an article entitled "Good Faith in Contract Bargaining: General Principles and Recent Developments,"[142] Professor Cassels commented that good faith means giving effect to the reasonable expectations of the parties. In addition, situations in which one party seeks to snap up an advantage in an unfair manner as well as situations where a party wrongly seeks to avoid an obligation will be considered to be a breach of the duty of good faith.[143]

115. As O'Connor A.C.J.O. explained in *Transamerica Life Canada Inc. v. ING Canada Inc.*[144]:

> [C]ourts have implied a duty of good faith with a view to securing the performance and enforcement of the contract made by the parties, or as it is sometimes put, to ensure that parties do not act in a way that eviscerates or defeats the objectives of the agreement that they have entered into ... [Citations omitted.]

116. In *CivicLife.com Inc. v. Canada (Attorney General)*,[145] this Court recognized that the duty of good faith needs to consider the reasonable expectations of the parties:

> Before leaving this point I wish to mention that in oral argument the Crown submitted that the presence of "entire agreement" clauses in the supply and I.P. agreements between CivicLife and Industry Canada precluded the trial judge from holding that Industry Canada breached its contract with CivicLife because nowhere did the agreements say that there was a duty of good faith or a duty to exercise a discretion reasonably and fairly. There are several responses to this submission. The first is that an entire agreement clause will not preclude the implication of a term of the contract, such as a duty of good faith performance or the duty not to abuse a discretion, because such a term is already part of the existing agreement. **The trial judge was not adding a term to the agreement that was not part of the parties' bargain; he was enforcing the reasonable expectations of the parties under the agreement…**

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[142] J. Cassels, "Good Faith in Contract Bargaining: General Principles and Recent Developments" (1993), 15 Adv. Q. 56 ("**Cassels**"), **BOA**, Tab 44.
[143] Cassels at p. 78, 79, and 82, **BOA**, Tab 44.
[144] (2003), 68 O.R. (3d) 457 (C.A.) at para. 53, **BOA**, Tab 42. See also *Nareerux Import Co. Ltd. v. Canadian Imperial Bank of Commerce,* 2009 ONCA 764 at para. 69, **BOA**, Tab 36.
[145] (2006), 215 O.A.C. 43 (C.A.) at para 52, **BOA**, Tab 25.

117. In *TDL*, Strathy J. (as he then was) found that the duty of fair dealing is imposed "in order to secure the performance of the contract the parties have made."[146] Thus, in assessing whether a party has demonstrated good faith and fair dealing in the performance and enforcement of the agreement, "the party's conduct must be considered in the context of and in conjunction with the contract that the parties have made."[147]

118. The Supreme Court has consistently held that protecting the reasonable expectations of the parties is the proper approach to contractual interpretation.[148] In *Sattva*, it held that in interpreting a contract, a court should undertake the following analysis:

> To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the **parties at the time of formation of the contract**.
>
> It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, [page662] at para. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting.

119. Accordingly, while a party's reasonable expectations may evolve over time with changing circumstances, such expectations are created at the time of the formation of the contract. The trial judge should have asked whether GMCL's conduct when procuring the termination of the DSSA on six days' notice was within the reasonable expectations of the parties at the time they entered into the DSSA. He failed to do so. It is not open to GMCL to change the rules of fair conduct unilaterally mid-contract.[149]

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[146] *TDL* at para. 500, **BOA**, Tab 29.
[147] *TDL* at para. 501, **BOA**, Tab 29. (emphasis added)
[148] *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at para. 62, **BOA**, Tab 18.
[149] *Crawford v. New Brunswick (Agricultural Development **BOA**rd)*, [1997] N.B.J. No. 368 (C.A.) at para. 10-13, **BOA**, Tab 26.

120. By protecting reasonable expectations, the duty of good faith prohibits parties from acting in a way that conflicts with the parties' practices and understanding of the evolving factual circumstances.[150]

121. The trial judge did not direct himself to whether GMCL's conduct fell within the reasonable expectations of the dealers. Had he done so, he would have concluded that GMCL's actions from May 20 to 26 were inimical to the reasonable expectations of the dealers and the expectations that GMCL itself had created in the dealers through its messaging up to May 19 and the historical approach it had taken to dealer restructuring.

122. The trial judge made a fundamental, overriding error in principle by not considering the reasonable expectations of the dealers when determining whether GMCL breached its statutory duties.

D. The Trial Judge Should Have Considered the Historical Context Between the Parties

123. The approach used by the trial judge to define the scope and content of the statutory duty of fair dealing is also inconsistent with this Court's interpretation of the duty of fair dealing. In determining the scope and content of the duty of fair dealing, this Court has held: "The **extensive prior dealings** between the parties in this case **inform the standard of fair dealing** between them."[151] This Court has never endorsed the approach of defining the scope and content of the statutory duty of fair dealing with reference to one party's commercial difficulties at the time of an alleged breach.

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[150] See Yee, Woo Pei. "Protecting Parties' Reasonable Expectations: A General Principle of Good Faith" (2001), 1 *O.U.C.L.J.* 195 at 220-222, **BOA**, Tab 48 cited in *Bhasin* at para. 26, **BOA**, Tab 22.
[151] *3574423 Canada Inc. v. Baton Rouge Restaurants Inc.*, [2013] O.J. No. 297 (C.A.) at para. 20, **BOA**, Tab 12.

124. The trial judge also erred in his interpretation and application of the Supreme Court of Canada's decision in *Bhasin*. At paragraph 151 of the Reasons, the trial judge stated:

> [151] …Because the underlying principle of good faith manifests in a wide variety of contexts, the Supreme Court held at para. 69 that courts should adopt "a highly context-specific understanding of what honesty and reasonableness in performance require."

125. It was for this reason that the trial judge interpreted the scope and content of the duty of fair dealing in "that context" that GMCL faced in May, 2009.

126. *Bhasin* did not endorse the use of a "highly context-specific understanding" of one party's commercial difficulties at one point-in-time to determine the scope and content of the duty of good faith. To the contrary, the Court in *Bhasin* referred to the entire context of the relationship between the parties. The "highly context-specific understanding" needed to determine what "honesty and reasonableness in performance require" required the trial judge to consider the historical context between GMCL and the dealers and to determine whether GMCL's conduct was honest and reasonable in light of that entire context.

127. The facts of *Bhasin* illustrate this point. In *Bhasin*, the Supreme Court of Canada did not absolve the defendant Can-Am of meeting the legal duties it owed to its agent, Mr. Bhasin, because of Can-Am's justifiable fear, at the time of its impugned actions against Mr. Bhasin, of: (i) the risk of the Alberta Securities Commission pulling Can-Am's trading license; or (ii) the pressure from Mr. Hrynew, Can-Am's top agent, to have Can-Am end Mr. Bhasin's contract. These point-in-time factors did not serve to eliminate or diminish the duties Can-Am owed to

Mr. Bhasin. In fact, the Court found the opposite was true.[152] Because Can-Am sought to bring an end to its relationship with Mr. Bhasin, it owed a heightened duty.[153]

128. The correct application of *Bhasin* can be seen in the recent British Columbia Supreme Court trial decision of *0856464 B.C. Ltd. v. TimberWest Forest Corp.*[154] The court in *TimberWest* held, in determining the scope and content of the duty of good faith, "the determination of whether there has been a breach of the good faith obligation requires an analysis of the evidence **as a whole** including the communications between the parties **over the term of the contracts**"[155] and that the "**history of the relationship** has to be examined."[156]

129. Unlike the trial judge in this case, the trial judge in *TimberWest* did not define the scope of the duty only with reference to the defendant's specific circumstances at the time of the alleged breach. More particularly, the trial judge did not lessen the scope and content of the duty of good faith because of the defendant's own financial circumstances or the fact that terminating the agreement was "critical to [the defendant's] ongoing business operation."[157]

130. Rather, the trial judge in *TimberWest* found that the defendant's marked departure from historical relations, combined with the defendant's motivation to terminate the supply agreement, was a breach of the duty of good faith. The trial judge in this case should have taken the same approach.

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[152] *Bhasin* at para. 86, **BOA**, Tab 22.
[153] *Bhasin* at para. 86, **BOA**, Tab 22.
[154] *0856464 B.C. Ltd. v. TimberWest Forest Corp.*, [2014] B.C.J. No. 3170 (S.C.) ("***TimberWest***"), **BOA**, Tab 1.
[155] *TimberWest* at para. 254, **BOA**, Tab 1.
[156] *TimberWest* at para. 303, **BOA**, Tab 1.
[157] *TimberWest* at para. 262, 298-299, **BOA**, Tab 1.

131. Similarly, this Court recently held that it is wrong to consider an employer's financial circumstances when considering the reasonable notice period to a terminated employee.[158] By analogy, it is an error to consider GMCL's financial circumstances as the benchmark against which to evaluate whether GMCL breached the statutory obligations it owed to is dealers under the Wishart Act.

132. In *Dunkin' Brands Canada Ltd. c. Bertico inc.*,[159] the Quebec Court of Appeal did not allow the "commercial reality" facing Dunkin Donuts of a new, dominant competitor in the market (Tim Hortons) to lessen its duties towards its franchisees. Instead of arming its franchisees with the resources and wherewithal to compete against the Canadian behemoth, Dunkin quietly pulled up stakes and retreated from the market because of the competition. The Dunkin franchisees in Quebec brought suit and were successful in obtaining significant damages in both the Superior Court and the Court of Appeal. Instead of viewing Dunkin's competitive threat as a commercial reality that attenuated its duties to its franchisees, the Court of Appeal found that franchisors have a "duty to respond with reasonable measures to help the franchisees as a group to meet the market challenges"[160] and "[t]he franchisees were entitled to rely on the franchisor, as a matter of contractual fairness and as a reflection of their own presumed intentions, to take reasonable measures to protect them from the market challenge presented by Tim Hortons."[161] Although decided in the civil law context, this influential decision rejects the notion that market challenges lessen a franchisor's duty to its franchisees.[162]

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[158] *Michela v. St. Thomas of Villanova Catholic School*, 2015 ONCA 801 at para. 15-17, 22-23, **BOA**, Tab 35.
[159] 2015 QCCA 624 ("***Dunkin Donuts***"), leave to appeal refused, [2015] S.C.C.A. No. 230, **BOA**, Tab 28.
[160] *Dunkin Donuts* at para. 77, **BOA**, Tab 28.
[161] *Dunkin Donuts* at para. 72, **BOA**, Tab 28.
[162] *Dunkin Donuts* at para. 66-76, **BOA**, Tab 28.

133. In the present case, the trial judge, in effect, created a "tough times" defence by allowing GMCL to rely on its own financial problems at a specific point-in-time as a defence to a claim for a breach of the duty of fair dealing. Such a defence has never been accepted and this Court should not endorse it. To do so would allow every franchisor (or commercial party) facing commercial challenges to rely on those challenges to diminish or absolve it of its duties. This is inconsistent with the Supreme Court's direction in *Bhasin* to move the common law towards good faith.[163] It also has the perverse effect of reducing a franchisor's statutory fair dealing duty to a "fair weather" duty that applies in good times but not in bad. As seen in this case, *Bhasin* and *Dunkin Donuts*, it is precisely when the franchisor's back is against the wall that franchisees (or near franchisees as in *Bhasin)* need the protection the most.

134. If GMCL wanted to rely on its own financial hardship to seek to unburden itself of the duties it owed to the dealers, it could have filed for CCAA protection and submitted itself to the court's supervision in carrying out its dealership reduction. It deliberately chose not to do so. GMCL's franchise law obligations under the Wishart Act, including the duty of fair dealing, are not disposable where franchisors face economic turmoil. As demonstrated, such an outcome would be undermine the purpose of the Wishart Act, and would strip the dealers of the protections afforded to them under the legislation.

135. It is an error of law and principle to determine the scope and content of GMCL's duties under the Wishart Act in the manner adopted by the trial judge. This error of law irreparably tainted the conclusions reached by the trial judge on most of the common issues.

136. Below is a discussion of the specific common issues on which the trial judge erred.

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[163] *Bhasin* at para. 59-62, **BOA**, Tab 22.

(1) DID THE TRIAL JUDGE ERR IN ANSWERING COMMON ISSUE(C)(I)?

137. Common issue (c)(i) asked:

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

138. This common issue was at the heart of the trial. In essence, this common issue asked whether giving the dealers only six days, including a weekend, to decide whether to accept the early termination of their DSSAs by signing the WDA was a breach of GMCL's duty of fair dealing.

139. The trial judge erred in principle and law in his determination of common issue (c)(i) by answering this common issue through the lens of GMCL's commercial reality and by defining the scope and content of the duty of fair dealing with reference only to GMCL's specific context in May, 2009. This can be seen in the passages in the Reasons under common issue (c)(i) where the trial judge used "that context" as the foundation for his analysis:

> [166] Before addressing each of these claims individually, **I must again draw attention to the context, described above, in which GMCL formulated its wind-down plan, drafted the WDAs, selected the dealerships to be eliminated and delivered the Notices of Non-Renewal and WDAs.**

> [189] I do not find that failing to extend the deadline by a few days constituted a breach of fair dealing. It was a decision taken by GMCL that was fair and reasonable **given the commercial reality of the circumstances.**

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

> [193] In hindsight, it is arguable that it may have been better for GMCL to give the dealers a few more days to make a decision but, as noted, the timeline was short and there is no evidence

> that it would have affected the ability of the dealers to protect themselves. **In my view, such an argument requires too much of GMCL given the time pressures its was facing, the threat to its continued existence as a business enterprise, and the fact that, for the most part, it was reacting to a worsening economic landscape, GM's instructions, and the Canadian and U.S. Governments' decisions.**

140. The trial judge was bound to follow the approach articulated by this Court. Had he done so, it would have been clear that GMCL breached the duty of fair dealing.

A. Giving Insufficient Time is Contrary to the Purpose of the Wishart Act

141. Requiring the dealers to make this important and critical decision in such a short timeframe runs afoul of the purpose of the Wishart Act to allow franchisees an opportunity to make informed investment decisions.[164] The purpose of the Wishart Act is advanced when courts ensure franchisees are given reasonable time when considering whether to accept an agreement proffered by a franchisor particularly where, as here, the agreement is directed at the end of the franchise relationship.

142. Section 3 of the Wishart Act requires that the time offered by GMCL be in accordance with "reasonable commercial standards."[165] The clearest indication of a minimum fair and reasonable time to consider an agreement such as the WDA is the 14-day cooling-off period mandated by the Legislature under section 5 of the Wishart Act.[166] This is the period of time which a franchisor must give a franchisee after providing the disclosure document referenced in that section and before requiring the franchisee to sign a franchise agreement or pay any money to a franchisor for the franchise.

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[164] *Dollar It* at paras 16, 72, **BOA**, Tab 15; *1490664 Ontario Ltd. v. Dig This Garden Retailers Ltd.* (2005), 256 D.L.R. (4th) 451 (C.A) ("***Dig This Garden***") at para. 16, **BOA**, Tab 6; *Personal Service Coffee* at para. 28, **BOA**, Tab 37; *4287975 Canada Inc. v. Imvescor Restaurants Inc.*, 2009 ONCA 308 ("***Imvescor***") at para. 23, **BOA**, Tab 14.

[165] Wishart Act, Section 3.

[166] Wishart Act, Section 5(1).

143. The minimum 14-day cooling off period is of general application. Unlike the non-retained dealers in this case, franchisees entitled to disclosure generally:

(a) are not “shocked and surprised” to receive a franchise agreement from the franchisor that purports to terminate the franchise relationship;

(b) have not already invested millions of dollars into the franchise business, or any money for that matter;

(c) are not bound to long-term contracts and leases and facing employee termination costs related to the franchise business;

(d) are not forced to understand a fast-moving and complicated financial situation affecting their franchisor; and

(e) get the benefit of a disclosure document which contains full, frank and fair disclosure in one document received at one time.

144. There is no principled reason why the non-retained dealers should not receive at least an equivalent period of time as the reasonable commercial standard for the purposes of section 3. Indeed, given the circumstances facing the non-retained dealers and the additional factors they had to take into account when making their decision to enter into the WDA (including the uncommonness of such an agreement), the purpose of the Wishart Act would be advanced by requiring that the dealers be given *more* than 14 days, not less, and surely not just 6 days.

145. The trial judge erred in outright rejecting the appellant’s submission that the time period in section 5 of the Wishart Act is a relevant and useful benchmark for a determination of the

reasonable commercial standard under section 3.[167] While not determinative, section 5 of the Wishart Act provides guidance on the intent of the Legislature in circumstances where a franchisor seeks to have an agreement signed by a franchisee.

146. It is contrary to the letter and spirit of the Wishart Act and the clear pronouncements from this Court as to the overriding statutory purpose to find, as the trial judge did, that giving the non-retained dealers six days or less to respond in these circumstances met the standard of commercial reasonableness.

B. Giving Insufficient Time is Contrary to the Reasonable Expectations of the Parties

147. The trial judge found that the dealers were "understandably shocked and surprised" to receive notice that GMCL would be delivering Notices of Non-Renewal and WDAs.[168] They were "shocked and surprised" because (i) this was in direct contrast with the consistent messaging to the dealers from December, 2008 to May 15, 2009 on how and when a dealer reduction would be effected; and (ii) because of the aggressiveness of the means suddenly chosen to effect this result as compared to past dealings.

(i) *Messaging From GMCL Did Not Discuss WDA*

148. The six-day deadline must be viewed in light of the information that was flowing to the dealers preceding the May 20 delivery of the WDAs.

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[167] Reasons, **JABC**, Tab 6, p. 101, para. 171.
[168] Reasons, **JABC**, Tab 6, p. 85, para. 90.

149. The trial judge found that the information provided to the dealers by GMCL was lacking in candour, non-specific and less than frank.[169]

150. As set out above, up until May 15, every broadcast, memorandum or meeting with the dealers advised them that the dealer restructuring would be achieved by attrition, retirements or facilitated consolidations. Comeau's messaging was always "upbeat" and "positive."

151. While the dealers would have known that a dealer restructuring would take place, there was no indication until May 19 that it would be effected using a WDA. The April Viability Plan stated that GMCL was planning on reducing its dealer network "*from 705 dealers in 2009 to between 395-425 dealers <u>at the end of 2010</u>*." In other words, even though the dealership reduction was being accelerated from the February Viability Plan, there was no indication that GMCL could not achieve the reductions through these means in the almost 19 months until the end of 2010.

152. Further, while the trial judge found that "the dealers listening to the [May 15 HIDL] broadcast should and likely did understand that a 42 percent reduction could not be achieved through normal attrition and consolidation,"[170] there was no reasonable justification for GMCL not disclosing to the dealers on May 15 (as it chose to disclose to the Governments, CADA and the Steering Committee – see the paragraphs below) that it would attempt to deliver WDAs by May 20 and impose a May 26 response date. Instead, GMCL told the dealers that it was hopeful that it would roll out its dealer restructuring plan potentially by the end of May or in the very first part of June. GMCL breached its duty of fair dealing in leaving the dealers to attempt to

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[169] Reasons, **JABC**, Tab 6, p. 80-81, 85, 103, para. 66, 67, 68, 90, 180. Costs Endorsement of McEwen J. dated March 22, 2016, **JABC**, Tab 8, p. 239, para. 56.
[170] Reasons, **JABC**, Tab 6, p. 84, para. 84.

tease out an inference from Comeau's "pointedly non-specific," "oddly upbeat" and partly "inaccurate" and "untrue" broadcast that something like a WDA was imminently in the offing. The duty of fair dealing required GMCL to plainly disclose the situation as it stood on May 15.

(ii) *Aggressiveness of Dealer Restructuring*

153. GMCL admitted at trial that the dealers had never been asked to make such an important decision in such a short timeframe.[171] Six days to respond to a complex agreement was unprecedented in the dealer world. Historically, GMCL made its decisions after consultation with its dealers and the DCT and took significant time in making its decisions.[172] GMCL, "in the ordinary course," would seek input from dealers.[173] Throughout the 15-year period leading up to 2009, and despite overdealering issues, GMCL did not mandate that any dealer close or consolidate at any time.[174] GMCL consistently renewed each dealer's DSSA both in 2000 and 2005 at the latest renewal.[175] The uncontradicted evidence of the class members was that GMCL implemented significant changes slowly and with consultation with the dealers.[176] This informs GMCL's duties to effect a system change in the nature of the WDAs. This applies equally to the Saturn dealers, even though they had a longer period of notice of GMCL's intention to eliminate the Saturn brand.

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[171] Reasons, **JABC**, Tab 6, p. 184, 186, para. 558, 570; Comeau CE, Day 24, p. 5067:8, **TMWABC**, Tab B14, p. 505.
[172] Condie DE, Day 11, p. 2025:5, **TMWABC**, Tab B15, p. 507; Turpin DE, Day 7, p. 1416:9, **TMWABC**, Tab B15, p. 508.
[173] Comeau CE, Day 23, p. 4642:6, **TMWABC**, Tab B16, p. 509.
[174] Reasons, **JABC**, Tab 6, p. 74, para. 33.
[175] Comeau CE, Day 23, p. 4627:5, **TMWABC**, Tab B17, p. 510.
[176] Turpin DE, Day 7, p. 1416:9, **TMWABC**, Tab B15, p. 508; Condie DE, Day 11, p. 2025:5, **TMWABC**, Tab B15, p. 507.

154. At trial, three dealer witnesses testified that they did not have sufficient time to respond, each were in "shock" and felt that he had a "gun to his head."[177] The trial judge accepted the evidence that the dealers felt "rushed" to make a decision.[178]

C. GMCL Could Have Given At Least 14 days Without Affecting its Dealer Restructuring Plans

155. The trial judge found that GMCL could have given the dealers more time, both before May 20 and after May 26 to prepare for and consider the WDA.[179]

(i) *GMCL Did Not Have to Wait Until May 19 to Disclose the WDA Plan to the Dealers*

156. GMCL could have disclosed to its dealers on May 15: (i) that it would be offering WDAs in five days; and (ii) the same information about the general nature and structure of the WDAs that it disclosed to the Steering Committee, to CADA and to the Governments.

157. On May 15, GMCL disclosed its dealer restructuring plan to the Governments, to the Steering Committee, and to CADA. It could have disclosed this information to the dealers on May 15 but chose not to. Instead, it broadcast an "oddly upbeat" May 15 HIDL which made no mention of a WDA.[180]

158. The trial judge found that "GMCL communicated this information to allow CADA and the Steering Committee to prepare for what was ultimately to come and <u>to disseminate</u>

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[177] Hurdman DE, Day 3, p. 537:4, **TMWABC**, Tab B18, p. 511; Turpin DE, Day 9, p. 1681:5, **TMWABC**, Tab B18, p. 513; Condie DE, Day 11, p. 2073:17, **TMWABC**, Tab B18, p. 515; Turpin DE, Day 9, p. 1712:3, **TMWABC**, Tab B18, p. 516; Turpin CE, Day 10, p. 1865:11, **TMWABC**, Tab B18, p. 517; Condie DE, Day 11, p. 2090:21, **TMWABC**, Tab B18, p. 518; Hurdman CE, Day 7, p. 1328:7, **TMWABC**, Tab B18, p. 522.
[178] Reasons, **JABC**, Tab 6, p. 105, para. 189.
[179] Reasons, **JABC**, Tab 6, p. 102, 105, para. 173, 193.
[180] Reasons, **JABC**, Tab 6, p. 103, para. 178.

information to the dealers."[181] CADA and the Steering Committee did not disclose the WDA plan to the dealers.

159. While finding that "some criticism may be leveled against GMCL for reaching out to CADA and the Steering Committee without advising individual dealers," the trial judge nevertheless went on to find that disclosing the WDA plan to CADA and the Steering Committee on May 15 was "an honest and reasonable level of disclosure" because "[e]ither CADA or the Steering Committee could have shared this information with the dealers."[182] The trial judge's error was again based on the error in principle that GMCL's commercial challenges diminished its duties to the dealers. This is seen in paragraph 186 of the Reasons:

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

160. GMCL owed the duty of fair dealing to the dealers, not to CADA and not to the Steering Committee. The trial judge erred in finding that disclosing the WDA plan to CADA and the Steering Committee, but not to the dealers themselves, was fair and reasonable and was not a breach of GMCL's obligation of fair dealing.[183]

161. The trial judge also erred in finding that it was reasonable for GMCL not to disclose the WDA plan to the dealers until the restructuring process had "crystallized."[184] Such finding is entirely undermined by GMCL's disclosure to CADA and the Steering Committee. If GMCL

[181] Reasons, **JABC**, Tab 6, p. 103, para. 182.
[182] Reasons, **JABC**, Tab 6, p. 104, para. 183, 186 (Emphasis added).
[183] Reasons, **JABC**, Tab 6, p. 104, para. 186.
[184] Reasons, **JABC**, Tab 6, p. 103, para. 181.

disclosed the plan to CADA and the Steering Committee "to allow [them] to prepare for what was ultimately to come and to disseminate information to the dealers,"[185] there can be no question that the plan was sufficiently "crystallized" to have been disclosed directly to the dealers on May 15. Further, Comeau testified that the "marching orders" coming out of the Washington meeting were official.[186] The plan was not tentative.

162. Lastly, although GMCL should have communicated its WDA plans by May 15 at the latest, it also could have communicated its intentions earlier. By early May 2009, GMCL was contemplating offering some form of WDA to a number of the dealers and had begun its dealer selection process.[187] There was nothing stopping GMCL from disclosing this information to the dealers in early May so that the dealers could better prepare themselves for the WDA when it did come. For months leading up to May, 2009, GMCL told the dealers about the planned methods of dealer restructuring, namely, by attrition, retirements and facilitated consolidations. There is no principled reason why GMCL could not have disclosed that it was changing course to much more aggressive wind-down agreements when it began contemplating them.

(ii) *GMCL Could Have Given Dealers Until May 29 to Sign*

163. The trial judge found[188] and GMUS's former global chief litigation counsel admitted under cross-examination[189] that GMCL could have given the dealers until May 29 to return the WDA without affecting its overall restructuring plan.

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[185] Reasons, **JABC**, Tab 6, p. 103, para. 182.
[186] Comeau CE, Day 24, p. 4983:6, **TMWABC**, Tab B12, p. 502.
[187] Reasons, **JABC**, Tab 6, p. 81, para. 70, 74.
[188] Reasons, **JABC**, Tab 6, p. 105, para. 191.
[189] Buonomo CE, Day 26, p. 5531:19, **TMWABC**, Tab B13, p. 503.

164. Notably, and consistent with the 14 day cooling off period found in section 5 of the Wishart Act, when combined with disclosure on May 15, GMCL could have given the dealers at least **fourteen days** to prepare for and return the WDA without affecting its restructuring.[190]

D. Lack of Time Affected Dealer's Rights

165. As stated, the trial judge accepted that the dealers felt "rushed" to make a decision.[191] The non-retained dealers had never seen an agreement of this nature before and had never been confronted by a situation like the one before them in May 2009.[192]

166. The trial judge found that none of them, however, testified that more time was required to make a decision or that a few extra days would have mattered.

167. The trial judge made a palpable and overriding error in finding that there was no evidence that the short six-day timeframe would have affected the ability of the dealers to protect themselves or in finding that additional time would not have mattered.[193] This was wrong for several reasons.

168. Each of the dealers testified that they did not have sufficient time to respond. Each dealer witness testified that it felt like he had a "gun to his head."[194]

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[190] Internal documents prepared by GMCL showed a May 15-29 offer period: GMCL Master Communications Timeline, Ex. Book, Tab 557, **TMWABC**, Tab A42, p. 406; GM Canada May Outlook, Ex. Book, Tab 492, **TMWABC**, Tab A42, p. 415. Comeau's presentation to Clarke showed a May 14-28 timeframe: GMCL follow up items authored by Comeau, Ex. Book, Tab 483.1, **TMWABC**, Tab A25, p. 275.
[191] Reasons, **JABC**, Tab 6, p. 105, para. 189.
[192] Reasons, **JABC**, Tab 6, p. 184, para. 558.
[193] Reasons, **JABC**, Tab 6, p. 105, para. 189,193.
[194] Turpin DE, Day 9, p. 1712:3, **TMWABC**, Tab B19, p. 523; Turpin CE, Day 10, p. 1865:11, **TMWABC**, Tab B19, p. 524; Condie DE, Day 11, p. 2090:21, **TMWABC**, Tab B19, p. 525; Hurdman CE, Day 7, p. 1328:7, **TMWABC**, Tab B19, p. 527.

169. Several dealers and their counsel asked GMCL for more time to consider their options.[195] In an email from Comeau to GMCL's President on May 23, he stated that "most lawyers are recommending they not sign without modifications ... more money, more time, etc."[196]

170. None of this evidence was referred to by the trial judge.

(i) *Timeframe Was Objectively Short*

171. Even from an objective standpoint, six days was an unreasonable timeframe. In just six days, the non-retained dealer had to contact and meet with a lawyer to sign an ILA certificate for an agreement that was governed by Ontario law. This is an objectively difficult task to accomplish in four business days, especially for a non-retained dealer located outside Ontario.

172. Aside from the mechanics of properly returning the WDA, the dealer had to weigh the costs and benefits of accepting the WDA, including employee severance costs, lease or mortgage breakage costs and other financial matters related to the closure of the dealership. This required contacting accountants and other financial advisors. As one example of the impact of the short decision timeline, Hurdman testified that his secretary-treasurer, a chartered accountant whom he had relied upon and trusted for years, made uncharacteristic errors when rushing to analyze whether the business would be able to survive the loss of the dealership.[197] Those errors did not come to light until after Trillium had signed back the WDA. Had Hurdman had sufficient time to properly consider his situation, he might have realized that Trillium would not survive without

[195] Comeau CE, Day 24, p. 4972:22, **TMWABC**, Tab B20, p. 528.
[196] Email from Elias to Comeau dated May 23, Ex 61, Tab 106, **TMWABC**, Tab A39, p. 384.
[197] Hurdman DE, Day 3, p. 549:6, **TMWABC**, Tab B21, p. 532.

the dealership in any event and so he had little to lose by not signing.[198] The trial judge did not refer to this evidence.

173. The dealers still had to ensure that their "large", "complicated" dealerships[199] remained in operation while they were considering the WDA. They had customers to look after. The decision to accept the termination of the dealership would impact long-term employees and their families as well.

174. The rushed timeframe affected the dealer's ability to gather information in order to make a better informed decision. The dealers received no disclosure document pursuant to the Wishart Act.[200] They had to decide for themselves whether the information given to them, mostly orally, was reliable or not. This Court recognized this challenge in *Dig This Garden*, one of the first appellate decisions under the Wishart Act*:* "[i]t is simple commonsense that people have more difficulty processing and assessing information given at different times, some of it orally, than they do information provided in a single, written document."[201]

175. Lastly, the short timeframe affected the ability of the dealers to prepare and protect themselves. In the portion of the Reasons dealing with the claim against Cassels, the trial judge held that Cassels was negligent for taking a "Wait-and-See Approach." He found that, as of May 15, Cassels should have "begun preparing for consequences of the Notices of Non-Renewal and WDAs going out to the dealers."[202] Such preparation would have been assisted had GMCL also informed the dealers of its plan on May 15, particularly when GMCL knew that the dealers had

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[198] Hurdman CE, Day 6, p. 1102:9, **TMWABC**, Tab B22, p. 534.
[199] Comeau DE, Day 21, p. 4160:19, **TMWABC**, Tab B23, p. 535.
[200] Hurdman DE, Day 4, p. 610:12, **TMWABC**, Tab B24, p. 537; Turpin DE, Day 9, p. 1715:24, **TMWABC**, Tab B24, p. 538; Condie DE, Day 11, p. 2092:25, **TMWABC**, Tab B24, p. 540.
[201] *Dig This Garden* at para. 18, **BOA**, Tab 6.
[202] Reasons, **JABC**, Tab 6, p. 178, para. 532.

retained Cassels and that Cassels was in a conflict of interest. [203] Further, the dealers themselves could have taken steps to prepare for such consequences.

(ii) *Fair Dealing Analysis Focuses on Conduct of Franchisor*

176. The trial judge's finding that GMCL did not breach the duty of fair dealing because more time would not have mattered considers the matter from the wrong perspective. As this Court has held, the duty of fair dealing under the Wishart Act focuses on the ***conduct of the franchisor*** and not the impact on the franchisee.[204] Any breach of the duty of fair dealing attracts damages under s. 3(2) of the Wishart Act regardless of whether or not damages result.[205] Thus, even if giving the dealers disclosure of the facts communicated to the Steering Committee and to CADA on May 15, and giving the non-retained dealers time beyond May 26, would not have mattered (which is denied), doing so was clearly unreasonable and unfair and constituted a breach of the duty of fair dealing. Common issue c(i) does not require proof of harm in order to be answered in the affirmative. It only requires proof of a breach.[206] This common issue should have been answered in the affirmative without regard to whether the breach caused damages.

(iii)*GMCL Would Have Negotiated*

177. The trial judge expressly found that there was a real chance that the non-retained dealers would have negotiated productively with GMCL with proper legal representation.[207] This finding is irreconcilable with the finding that giving more than four business days to the non-

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[203] Macdonald CE, Day 35, p. 7261:22, **TMWABC**, Tab B25, p. 542
[204] *Salah* at para. 28, **BOA**, Tab 38.
[205] *Salah* at para. 29, **BOA**, Tab 38.
[206] Common issue (c)(i) asks: If GMCL owed a duty of fair dealing to the Class Members, did GMCL breach this duty by delivering the Wind-Down Agreements to the Class Members on or after May 20, 2009 and requiring acceptance of the Wind-Down Agreements by 6 p.m. EST on May 26, 2009?
[207] Reasons, **JABC**, Tab 6, p. 186, 187, 189, para. 570, 572, 584.

retained dealers would have made no difference. Time matters in negotiations. That is why many negotiations go down to the wire. Indeed, while GMCL imposed an artificial deadline of May 26, it negotiated with the bondholders right up to the morning of June 1. More time may well have mattered.

178. In light of these factors, the finding that more time would not have mattered was the result of an overarching error in principle stemming from a GMCL solvency-centric approach to the evidence. Alternatively, it was a palpable and overriding error.

E. External Pressures Do Not Obviate GMCL's Statutory Duties

179. The trial judge erred in finding that external pressures on GMCL attenuated its duty of fair dealing towards its franchisees. As seen at paragraph 193 of the Reasons, the trial judge found that external pressures, GMUS' instructions to GMCL, and decisions by the Governments were relevant factors in whether GMCL breached its duty of fair dealing towards the dealers:

> [193] In hindsight, it is arguable that it may have been better for GMCL to give the dealers a few more days to make a decision but, as noted, the timeline was short and there is no evidence that it would have affected the ability of the dealers to protect themselves. **In my view, such an argument requires too much of GMCL given the time pressures it was facing, the threat to its continued existence as a business enterprise, and the fact that, for the most part, it was reacting to a worsening economic landscape, GM's instructions, and the Canadian and U.S. Governments' decisions.** (Emphasis added)

180. This finding was a direct result of his error in principle. GMCL owed the duty of fair dealing to the dealers. External pressures do not lower the legal standard of fair dealing. Likewise, stakeholders such as GMCL's parent company imposing conditions that are contrary to a franchisor's obligations under the Wishart Act do not relieve a franchisor of its statutory obligations.

F. Duties are Heightened When Attempting to Wind-Down an Agreement

181. GMCL's duties were heightened because it was seeking to wind down the franchise relationship; those duties were not lessened because of GMCL's commercial challenges. Given this, the trial judge should have considered whether GMCL's conduct met the fair dealing standard; not whether it was "fair enough" in the circumstances given GMCL's commercial reality.[208]

182. The Supreme Court of Canada has stated that "[t]he point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need for protection, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal."[209] As this Court recently recognized, franchisees are generally vulnerable to their franchisors[210] and franchisees are analogous to employees in this regard.[211] Given that the dealers were being asked to end their franchise relationships, the vulnerability was much greater. This heightened – not lessened – the duties owed by GMCL.

183. Further, *Bhasin* is authority for the proposition that: "contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that **if the contract does not work out, <u>they will have a fair opportunity to protect their interests</u>**."[212]

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208 Reasons, **JABC**, Tab 6, p. 106, para. 195.
209 *Wallace v. United Grain Growers Ltd. (c.o.b. Public Press)*, [1997] 3 S.C.R. 701 at para. 95, **BOA**, Tab 43.
210 *Addison* at para. 64, **BOA**, Tab 17.
211 *Shelanu Inc. v. Print Three Franchising Corporation* (2003), 64 O.R. (3d) 533 (C.A.) at para. 5, 66, **BOA**, Tab 40.
212 *Bhasin* at para. 86, **BOA**, Tab 22.

184. As stated above, *Bhasin* also emphasizes that this obligation is not diminished by the fact that the party which owes this duty fears for its own viability. The defendant in *Bhasin*, Can-Am, feared that the Alberta Securities Commission was about to revoke its licence to trade in Alberta. It was also facing “considerable animosity” and “pressure” from Hrynew (its largest enrollment director in Alberta) to end its contractual relationship with Mr. Bhasin.[213] Neither of these factors attenuated Can-Am’s duty to provide Mr. Bhasin a fair opportunity to protect his interests at the end of the contract. Similarly, GMCL’s concerns about its own fate should not allow it to run roughshod over the dealers’ interests or diminish its duties, particularly statutory ones.

G. Conclusion on Common Issue (c)(i)

185. The trial judge erred by finding that giving the dealers only six days to consider and sign-back the WDA and obtain an ILA certificate, under a looming threat of CCAA, was not unfair because of “that context.” “That context” cannot be used to override the purpose of the Wishart Act and the protection it affords to franchisees. GMCL’s process went entirely against the reasonable expectations of the dealers and was in breach of the duty of fair dealing. No GMCL-specific circumstances can make unfair conduct fair.

(2) DID THE TRIAL JUDGE ERR IN ANSWERING COMMON ISSUE (C)(III)?

186. Common issue (c)(iii) asked:

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

[213] *Bhasin* at para. 7, **BOA**, Tab 22.

187. The trial judge erred in finding that GMCL threatening non-renewal of the DSSA during its procurement of the WDA was not a breach of the duty of fair dealing. The trial judge did so by, first, not following the proper approach to contractual analysis as set out by the Supreme Court of Canada, namely by not reading the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.[214] Because he did not follow the correct approach to contractual interpretation, this was an error of law that is reviewable on the standard of correctness.[215] Second, the trial judge found that GMCL did not breach the duty of fair dealing by threatening non-renewal during the procurement of the WDA.

A. Dealers Had a Clear Contractual Right to Renew DSSA

188. The trial judge's finding that GMCL did not breach the duty of fair dealing was premised on his finding that GMCL had the contractual right not to renew the DSSA.

189. For reference, the "Term" provision of the DSSA states:

> This Agreement will expire without any action by either Dealer or GM on October 31, 2010 or in accordance with the terms of the Agreement. **Dealer is assured the opportunity to enter into a new DSSA at the expiration date if GM determines Dealer has fulfilled its obligations under this Agreement.**[216] (Emphasis added)

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[214] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 ("***Sattva***") at para. 47, **BOA**, Tab 39.
[215] *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19 at para. 22, **BOA**, Tab 31; *Sattva* at para. 53, **BOA**, Tab 39.
[216] DSSA, Ex. Book, Tab 77, **TMWABC**, Tab A1, p. 1.

190. Article 4.1 of the Standard Provisions of the DSSA which the trial judge relied on was a general provision that stated that GMCL could take appropriate action to ensure, among other things, that the number of dealers in its dealer network was appropriate.[217] It states:[218]

> 4.1 Dealer Network Planning
>
> Because GM distributes its Products through a network of authorized dealers operating from approved locations, those dealers must be appropriate in number, located properly and have properly sized facilities to ensure that GM Products are competitively represented and serviced in the marketplace and permit each dealer the opportunity to achieve a reasonable return on investment if it fulfills its obligations under the Dealer Agreement. Through such a dealer network, Dealer and GM can provide for the convenience of customers in purchasing Products and having them serviced. As a result, customers, dealers, and GM all benefit.
>
> To maintain an effective dealer network, GM agrees that it will monitor marketing conditions and take appropriate action to ensure that, to the degree possible, the number ,size and location of its dealers is appropriate to achieve the objectives stated above. Such marketing conditions include GM sales and registration results, demographic considerations, competitive dealer networks, industry changes, the ability of GM existing dealers to achieve the objectives stated above, the opportunities available to existing dealers, and other appropriate circumstances.
>
> Nothing in this Agreement shall require GM to limit competition or to prefer or favour one dealer over another or to act contrary to the interests of the dealer network as a whole.
>
> Nothing in this Agreement shall require GM to effectuate or complete any dealer networking plan or strategy that has been or may be published to Dealer. **Except as expressly provided otherwise in this Agreement,** all dealer network decisions will be made solely by GM pursuant to its business judgment. (Emphasis added)

191. The trial judge erred in finding that GMCL had the contractual right not to renew each non-retained dealer's DSSA at their expiry on October 31, 2010 based on Article 4.1:

> [209] It makes sense that Article 4.1, when read together with the TERM provision, should take precedence when one considers the commercial realities of running a large dealer network. It would not make commercial sense, in my view, for the sections to be read in such a way that GMCL would lose control over the size of the dealer network once the DSSAs are entered into.

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[217] Reasons, **JABC**, Tab 6, p. 72, para. 21.
[218] DSSA Standard Provisions, Ex. Book, Tab 77, **TMWABC**, Tab A1, p. 7.

192. The trial judge erred by not interpreting the DSSA in the manner set out in *Sattva*, which states that the trial judge is to look first at the language of the contract, and second at the objective evidence of the background facts *at the time of the execution of the contract,* that is, what was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting.[219]

193. The "Term" provision is an express provision of the DSSA dealing with renewal rights. The "Term" provision is not subject to Article 4.1. The "Term" provision prevails over any general provision in the agreement that does not deal specifically with renewal.[220]

194. This interpretation is supported by the fact that Article 4.1 is subject to other provisions of the DSSA. The tail-end of Article 4.1 states: "**Except as expressly provided otherwise in this Agreement**, all dealer network decisions will be made solely by GM pursuant to its business judgement [Emphasis added]." The "Term" provision is an express term of the DSSA which overrides GMCL's discretionary powers under Article 4.1.

195. This interpretation of the language of the DSSA is also supported by the surrounding circumstances and facts that were within the knowledge of the parties at the time the latest round of DSSAs were signed in October 2005. Among other things:

(a) There was no evidence of GMCL failing to renew any dealer, throughout its entire history, at the expiry of the term of their 5-year agreements.

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[219] *Sattva* at para. 47, **BOA**, Tab 39.

[220] *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 at para. 9, **BOA**, Tab 21; G.R. Hall, *Canadian Contractual Interpretation Law* (Markham, Ontario: LexisNexis Canada 2012) at 18-19, **BOA**, Tab 45.

(b) Dealers had millions of dollars invested into their dealerships. For example, one non-retained dealer had recently invested over $15 million to build his dealership.[221]

(c) It was the evidence of the dealer witnesses that Article 4.1 of the Standard Provisions was never raised or relied upon by GMCL at any time during their respective dealings with GMCL.[222] Comeau confirmed that GMCL never purported to rely on Article 4.1 of the DSSA as a means to rationalize the dealer network.[223]

(d) GMCL knew that the DSSAs were referred to as "evergreen" agreements, and that dealers could argue that the DSSAs were evergreen.[224]

196. The language of the DSSA is also consistent with the evidence of the testifying dealers, who all understood the DSSAs to be evergreen or automatically renewed so long as they were not in default of the DSSA,[225] as seen by the comments below from the trial judge:

> [320] [Hurdman] testified that in May 2009, he thought he was entitled to a renewal of his dealer agreement so long as he was not in breach of the agreement. Similarly, Turpin testified that he always thought he had an automatic right of renewal; he was never under the impression that GMCL had the power to take a dealership out of the network; and he knew he was giving up his right of renewal by signing the WDA. Likewise, Condie testified that his understanding at the time was that he had an automatic right of renewal and he did not believe that GMCL could reduce the dealer network without a dealer's consent.

197. The trial judge made an error of law by improperly interpreting the agreement and by not determining the parties' contractual rights with reference to the "surrounding circumstances" at the time of formation of the DSSA.

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[221] Turpin DE, Day 7, p. 1398:4, **TMWABC**, Tab B26, p. 544.
[222] Turpin DE, Day 7, p. 1413:19, **TMWABC**, Tab B27, p.546; Condie DE, Day 11, p. 2022:5, **TMWABC**, Tab B27, p. 548.
[223] Comeau CE, Day 23, p. 4618:20, **TMWABC**, Tab B28, p.549.
[224] Macdonald CE, Day 35, p. 7147:23, **TMWABC**, Tab B29, p. 552; Macdonald CE, Day 35, p. 7270:23, **TMWABC**, Tab B29, p. 554; Government Briefing Note, Ex. Book, Tab 548, **TMWABC**, Tab A34, p. 320. See also para. 320 of the Reasons, **JBOA**, Tab 6, p. 132.
[225] Hurdman, DE, p. 452:20, **TMWABC**, Tab B30, p. 560; Turpin DE, Day 7, p. 1411:24, **TMWABC**, Tab B30, p. 562; Condie DE, Day 11, p. 2021:20, **TMWABC**, Tab B30, p. 567.

B. Right of Renewal Impacted Dealer Decision

198. Having incorrectly found that GMCL had the contractual right not to renew the DSSAs, the trial judge went on to find that GMCL did not breach the duty of fair dealing by threatening non-renewal during the procurement of the WDA.

199. GMCL's statement to the non-retained dealers that they would not be renewed was incorrect, misleading and intended to make the dealers believe that they were giving up much less than they were by signing the WDA. Hurdman testified that he found those words "paralyzing."[226]

200. Telling the dealers that they would not be renewed in procuring the WDA was a breach of the duty of fair dealing. The trial judge erred in finding otherwise.

(3) DID THE TRIAL JUDGE ERR IN ANSWERING COMMON ISSUE (D)

201. Common issue (d) asked:

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

202. The trial judge correctly found that the duty of fair dealing required GMCL to disclose important and material facts to the dealers.[227] There is ample authority for that finding,[228] including the decision of *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, where the court held

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[226] Hurdman DE, Day 3, p. 546:17, **TMWABC**, Tab B31, p. 569.
[227] Reasons, **JABC**, Tab 6, p. 100, para. 160.
[228] See, for example, *Salah* at para. 22, **BOA**, Tab 38; *1159607 Ontario Inc. v. Country Style Food Services Inc.*, 2012 ONSC 881, 2 B.L.R. (5th) 315, aff'd 2013 ONCA 589 at para. 127-131, **BOA**, Tab 2; *Burnett Management Inc. v. Cuts Fitness for Men,* [2012] OJ No. 2527 (S.C.J.) at para. 58, **BOA**, Tab 23; *1323257 Ontario Ltd. v. Hyundai Auto Canada Corp.* (2009), 55 B.L.R. (4th) 265 (Ont. S.C.J.) at para. 86, **BOA**, Tab 5; *8150184 Canada Corp. v. Rotisseries Mom's Express Ltd.*, [2014] OJ No. 2600 (S.C.J.) at para. 30, **BOA**, Tab 16.

that the keeping or hiding of material information from franchisees can be a violation of section 3 of the Wishart Act.[229] While overturned for other reasons, this Court in *Pet Valu* did not reject the motion judge's finding that material non-disclosure by a franchisor in the performance or enforcement of the franchise agreement can breach section 3 of the Wishart Act. [230]

203. However, the trial judge erred in determining the scope of the duty to disclose in this case. GMCL should have disclosed to the dealers: (A) before May 19 its plan to offer WDAs to certain dealers; and (B) its intentions with respect to the dealers in any proposed CCAA filing by GMCL. As the WDA offer was being made under the threat of a CCAA filing, GMCL had a duty to be frank with the dealers over their anticipated treatment in a CCAA filing. Instead, GMCL failed to disclose this information at a time when it knew that the dealers were being told that they would receive nothing in a CCAA filing.

204. The trial judge ought to have found that GMCL was required to disclose these material facts to the dealers in light of the fact that GMCL was asking the dealers to accept the early termination of their DSSAs and to forfeit their renewal rights. He did not so find because of the error in principle set out above:

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

[229] *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2015 ONSC 29 ("***Pet Valu***") at para. 51-58, **BOA**, Tab 3.
[230] *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, [2016] O.J. No. 186 (C.A.) at para. 57, **BOA**, Tab 4.

A. GMCL's Plan to Offer WDAs Could Have Been Disclosed Before May 19, 2009

205. For the reasons set out in the section above regarding common issue c(i), GMCL was in a position to disclose to its dealers its dealer restructuring plan at the latest by May 15, 2009, i.e. when it disclosed such information to CADA and the Steering Committee. Such information was material and consequential for the dealers, and GMCL's failure to disclose this information constitutes a breach of the duty of fair dealing.

B. As of May 20, GMCL's Intentions Were To Offer the WDA in a CCAA Filing

206. It is clear from numerous draft CCAA filing documents that GMCL intended to re-offer the WDA in a CCAA filing to all non-retained dealers that rejected the WDA. GMCL failed to disclose this fact to the dealers.

207. A draft affidavit dated May 16, 2009 prepared by GMCL's legal counsel in anticipation of a CCAA filing stated:[231]

> Beginning on [insert date], GMCL offered to enter into Wind Down Agreements with all of its Non Retained Dealers. As of [June 1, 2009], [insert number/percentage] of the Non-Retained Dealers had entered into Wind Down Agreements with GMCL. GMCL seeks approval of and authorization to honour the terms of the Wind Down Agreements that it entered into before the filing date (the "Pre-Filing Wind Down Agreements"). **Up to and including [June 6, 2009], GMCL will permit the Non-Retained Dealers who did not enter into Pre-Filing Wind Down Agreements to enter into Wind Down Agreements on identical terms as the Pre-Filing Wind Down Agreements** [after which date the terms of the offer will change]…GMCL also seeks authority in the Initial Order to continue to make payments to Non-Retained Dealers who have entered into Wind Down Agreements pursuant to the terms thereof. (emphasis added)

208. The intention to re-offer the WDA in a CCAA filing to all non-retained dealers that rejected the WDA is also expressed in a May 16 draft CCAA Initial Order.[232] A similar intention

[231] Draft Affidavit of John Stapleton dated May 16; Ex. Book, Tab 532, **TMWABC**, Tab A416, p. 422.
[232] Draft of CCAA Initial Order dated May 16, Ex. Book, Tab 529, **TMWABC**, Tab A44, p. 428.

is expressed in five other draft affidavits and orders dated May 26 and May 29.[233] The May 29 draft affidavit was delivered over the weekend to Justice Pepall of the Toronto Commercial List.[234] Although stated to be subject to change by GMCL, the documents were to be read by Justice Pepall over the weekend in anticipation of a possible Monday morning filing.

209. The trial judge made a palpable and overriding error when he found that the May 16, May 26 and May 29 affidavits did not accurately reflect GMCL's intentions as at those dates.[235] The trial judge based his findings on (i) the evidence of John Stapleton, the proposed affiant, who testified that he did not prepare the draft affidavits, was not consulted on this issue, and that the draft affidavits did not reflect the view of GMCL; and (ii) the fact that a single May 31 draft affidavit (described by the trial judge as the "ultimate affidavit"), which was never filed or sent to the court, makes no mention of offering the WDA to the non-accepting dealers in a CCAA proceeding. This was a palpable and overriding error for three reasons:

(a) Even if Mr. Stapleton may not have given those instructions to the drafters of the affidavit (lawyers from the law firm of Osler, Hoskin and Harcourt LLP ("**Oslers**")), those instructions clearly came from one or more persons with authority at GMCL. The cover email from Oslers to the Governments attaching the draft May 16 affidavit states that the draft reflects "input from several individuals at GMCL."[236]

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[233] Draft of CCAA Initial Order dated May 25, Ex. Book, Tab 676, **TMWABC**, Tab A45, p. 436; Draft Affidavit of J. Stapleton dated May 26, Ex. Book, Tab 684A, **TMWABC**, Tab A45, p. 442; Draft Affidavit of J. Stapleton dated May 29, Ex. Book, Tab 731, **TMWABC**, Tab A45, p. 446; Draft of Sale Affidavit of J. Stapleton dated May 28, **TMWABC**, Tab A45, p. 448; Draft of Sale Affidavit of J. Stapleton dated May 30, Ex. Book, Tab 759, **TMWABC**, Tab A45, p. 453.

[234] Reasons, **JABC**, Tab 6, p. 119, para. 260.

[235] Reasons, **JABC**, Tab 6, p. 118, para. 259.

[236] Email from Sandler to Weinczok dated May 16, Ex. Book, Tab 541, **TMWABC**, Tab A46, p. 454.

(b) The May 31 affidavit is irrelevant to the issue of what GMCL's intentions were from May 20-26 when it solicited the WDAs. The May 31 affidavit was drafted after the May 26 and May 29 affidavits, which both state that the plan was to offer the WDA to the rejecters in the CCAA filing. A decision after May 29 to remove this from the affidavit is not determinative of what GMCL's intentions were from May 20-26 when it was soliciting the WDA. In any event, the May 31 affidavit did not explicitly say that the non-retained dealers would not be offered a WDA; rather, it was silent on the point. Moreover, the decision to remove that intention from the draft CCAA affidavit was made after GMCL knew that the WDA take-up rate was approximately 84%; and

(c) An email from Stapleton dated May 9, 2009 stated: "Our thought is that a 363 filing or no filing ["Chapter 363" is the US equivalent of a CCAA], we will likely have to pay the dealers $120M - 260M."[237] This email reflects that it was GMCL's intention to make an offer either inside or outside a filing.

210. The only reasonable interpretation of this evidence is that GMCL was planning until at least May 29 to offer the WDA to rejecting dealers in a CCAA proceeding. GMCL had a duty not to mislead the dealers in this regard.

[237] Email from Stapleton dated May 9, Ex. Book, Tab 468, **TMWABC**, Tab A47, p. 458. See also Stapleton CE, Day 21, p. 4107:8, **TMWABC**, Tab B32, p. 571.

211. Each of the dealer witnesses testified that he did not know that GMCL was considering offering the WDA in a CCAA. Each testified that this information would have been important to him and that he would not have signed the WDA if he had known this.[238]

212. GMCL's failure to disclose its true intentions on this point is a breach of the duty of fair dealing.

C. Conclusion on Common Issue (d)

213. Although the trial judge found that the duty of fair dealing requires a franchisor to disclose material facts to franchisees in certain circumstances, the trial judge's finding that several documents prepared at the relevant time did not reflect GMCL's thinking, as opposed to the after-the-fact evidence of Mr. Stapleton, is a palpable and overriding error. This information should have been disclosed to the dealers.

214. Similarly, the trial judge erred in finding that GMCL was not required to disclose information and changes with respect to its dealer restructuring plan before May 19. This error flowed from his error in principle set out above, i.e. defining GMCL's duties as franchisor through the lens of GMCL's financial difficulties in May 2009.

(4) DID THE TRIAL JUDGE ERR IN ANSWERING COMMON ISSUE (E)(VI)?

215. Common issue (e)(vi) asked:

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

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[238] Hurdman DE, Day 3, p. 591:22, **TMWABC**, Tab B33, p. 575; Hurdman DE, Day 4, p. 614:13-617:6, **TMWABC**, Tab B33, p. 577; Turpin DE, Day 9, p. 1713:14, **TMWABC**, Tab B33, p. 582; Condie DE, Day 11, p. 2092:6, **TMWABC**, Tab B33, p. 583.

(vi) any terms of the Wind-Down Agreement?

216. The trial judge found that a term of the WDA, specifically section 5(c), offended section 4 of the Wishart Act, i.e., the right of association. At paragraphs 353-354 of the Reasons, he found:

> …**the provisions of s. 5(c) [of the WDA] do violate Trillium's right to bring a class action against GMCL and as such, offend the right of association under section 4**.
>
> [354] As I noted above, Cullity J. in *Midas* (2009) expressly stated that including s. 4 in the *Wishart Act* would be inexplicable if the legislators did not intend to permit franchisees to associate for the purpose of protecting their legal interests and protecting their rights through collective action. I agree.

217. On the trial judge's own reasons, therefore, this question should have been answered in the affirmative. Yet, he answered it in the negative. His negative answer constitutes a palpable and overriding error.

218. When assessing this common issue, the trial judge concluded that he "agreed with GMCL that the relevant period for Trillium's claims under this common issue is the time leading up to the execution of the WDAs."[239] However, interpreting common issue e(vi) in this way made it impossible for this issue to be answered in the affirmative since he also found that no term of the WDA can be in breach of section 4 of the Wishart Act until after the WDA's execution.[240] This was a palpably flawed interpretation of this common issue.

219. The trial judge should have answered this common issue in the affirmative given his finding that section 5(c) of the WDA violated the Wishart Act.

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[239] Reasons, **JABC**, Tab 6, p. 124, para. 291.
[240] Reasons, **JABC**, Tab 6, p. 124, para. 291.

(5) DID THE TRIAL JUDGE ERR IN ANSWERING COMMON ISSUE (F)?

220. Common issue (f) asked:

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

221. The trial judge erred by holding that the release in section 5 of the WDA ("**Release**") did not contravene ss. 4 and 11 of the Wishart Act.[241] Specifically, the trial judge erred by:

(a) misinterpreting section 11 of the Wishart Act. This was an error of law;

(b) misapplying a judicially-created exception to section 11 of the Wishart Act, commonly known as the "*Tutor Time*" exception.[242] This was an error of mixed fact and law; and

(c) not finding that a partially defective release did invalidate the entire release. This was an error of law.

A. Section 11 of the Wishart Act Invalidates Release

222. Section 5 of the WDA purported to release all claims under the Wishart Act. There can be no doubt that the Release was *prima facie* void under section 11 of the Wishart Act, which reads as follows:

[241] Reasons, **JABC**, Tab 6, p. 125, para. 293.

[242] In short, the "*Tutor Time*" exception states that a franchisee can release Wishart Act claims "with the advice of counsel, in settlement of a dispute for existing and fully known breaches of the Act that would otherwise have entitled the franchisee to a claim."

Rights cannot be waived

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

B. The Trial Judge's Failure to Take a Purposive Approach

223. The analysis of this common issue exemplified the trial judge's failure to take a purposive approach to the Wishart Act. This Court has recently held with respect to section 11 of the Wishart Act that:[243]

> Section 11, in particular, aims to protect franchisees against more sophisticated franchisors who might seek to have franchisees contract out of their [Wishart Act] rights.

224. The trial judge approached his analysis under section 11 of the Wishart Act from a commercial certainty perspective, and not from a franchisee protection perspective:

> [328] …In this case, the importance of ensuring that full and final settlements are indeed, full and final, requires the court to answer "no" to Common Issue (f).

225. The dealers did not rely on common law principles as the basis for setting aside the Release. Sections 4 and 11 of the Wishart Act are mandatory statutory provisions. They trump any contractual principles of commercial certainty. This Court in *Midas* pronounced bluntly:

> [26] The language of s. 11 could not be clearer. If you include a term in your franchise agreement that purports to be a waiver or release of any rights a franchisee has under the Act, it will be void.[244]

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[243] *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, [2015] O.J. No. 1189 (C.A.) ("***Cora***") at para. 54, **BOA**, Tab 9.
[244] *Midas* at para. 26, **BOA**, Tab 13.

226. The judge should have approached common issue (f) through a purposive analysis. Had he done so, he would have narrowly applied the "Tutor Time" exception as this Court has done in other cases and as discussed below.[245] He did not. This was a clear error of law.

C. The Limited "*Tutor Time*" Exception Does Not Apply to this Case

227. The trial judge made a palpable and overriding error when he found that GMCL was able to solicit the release of WDA claims through a judicially created exception to section 11 of the Wishart Act, referred to as the "*Tutor Time*" exception.[246] His analysis of whether the "*Tutor Time*" exception applied offends the purpose and spirit of the Wishart Act and is wrong.

228. In *Tutor Time*, the plaintiff franchisee became aware that it had a right of rescission against a franchisor which had not provided it with a proper disclosure document under section 5 of the Wishart Act. After becoming aware of its right of rescission but before delivering a notice of rescission, the franchisee, acting with legal advice, reached a settlement of its rescission claim with the franchisor. As part of the settlement, the franchisee continued to operate its franchise and received consideration in exchange. The settlement was specifically in respect of claims arising out of clear breaches of the Wishart Act known to the parties at the time of the settlement. The franchisee later had settler's remorse and sought to resile from its settlement. It delivered a notice of rescission and brought action against the franchisor based on the original breach.

229. The court found that the franchisee had validly released its claim when it entered into the original settlement and therefore could not rely on section 11. The court found that this section did not apply when a franchisee knowingly entered into a settlement with full knowledge of the

[245] *Midas* at para. 23-24, **BOA**, Tab 13.
[246] *15186628 Ontario Inc. v. Tutor Time Learning Centres LLC*, [2006] O.J. No. 3011 (S.C.J.) ("***Tutor Time***"), **BOA**, Tab 7.

claim it was releasing. To have found otherwise would have made it impossible for franchisees and franchisors to settle any existing dispute or litigation.

230. *Tutor Time* has been explained and distinguished by this Court, which has limited its application to very specific circumstances.[247] This narrow exception exists for the valid purpose of preventing parties from resiling from a genuine settlement entered into with full knowledge of existing breaches.

231. This Court in *Midas* confirmed that *Tutor Time* is limited to cases having five preconditions before section 11 can be overridden. The exception applies where a franchisee has given a release, "[1] with the advice of counsel, [2] in settlement of a dispute [3] for existing and [4] fully known breaches of the Act [5] that would otherwise have entitled the franchisee to a claim."

232. This case does not meet any of the five conditions.

(i) *"With the advice of counsel"*

233. The trial judge misapplied the requirement that a franchisee must receive legal advice on its Wishart Act claims before it can otherwise release those claims.

234. The trial judge relied on the Certificate of Independent Legal Advice[248] that accompanied the WDAs as proof that the non-retained dealers had the advice of counsel with respect to the claims brought in this action. This was an error.

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[247] *Midas* at para. 24, **BOA**, Tab 13.
[248] ILA Certificate attached to WDA, Ex. Book, Tab 597, **TMWABC**, Tab A36, p. 357.

235. The Certificate did not require the ILA lawyer to give an opinion to the dealer on any of the following: that the dealer had the right to a disclosure document; that GMCL's conduct was a breach of the duty of fair dealing; that GMCL breached the dealer's right of association; or that the dealer was voluntarily giving up those rights. The ILA Certificate simply explained what was in the release in general terms. GMCL drafted the release and the required form of ILA.

236. In *Tutor Time*, the plaintiff franchisee received legal advice on the franchisor's specific disclosure breach under section 5 of the Wishart Act. There was no evidence in this case that the class members who testified at trial had legal advice on the specific claims raised in this action. The onus was on GMCL to prove this and it failed.[249]

237. At trial, the plaintiff expressly agreed that no challenge was being made to the accuracy or sufficiency of the legal advice that it and other dealers received from their respective ILA lawyers.[250] However, this is not a concession that any of the ILA lawyers provided an opinion on possible claims that the dealers might advance under the Wishart Act. The ILA Certificate did not require the ILA lawyers to go this far.

238. There was no evidence that the dealers received legal advice on their claims prior to signing the WDA, nor did the trial judge find that such legal advice was given. This precondition of the *Tutor Time* exception was not met.

(ii) *"Settlement of a dispute"*

239. The trial judge erred in finding that the WDA was a settlement of a dispute.

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[249] Wishart Act s. 12.
[250] Reasons, **JABC**, Tab 6, p. 132, para. 319.

240. The only "dispute" found by the trial judge was GMCL's alleged breach of each dealer's renewal rights under the DSSA.[251]

241. There was no evidence of any "dispute," let alone a settlement, between the dealers and GMCL relating to:

(a) GMCL's obligations of fair dealing;

(b) GMCL's obligations to not interfere with the dealers' rights of association; and

(c) GMCL's obligations to provide a disclosure document.

242. In its communications with the non-retained dealers, including in the May 19 HIDL, GMCL did not describe the WDA as a settlement agreement and did not acknowledge any wrongdoing such as to lead the non-retained dealers to believe that they were entering into a genuine "settlement."[252] GMCL denied to the dealers that it was even bound by the Wishart Act.[253] GMCL gave every indication that it was acting within its rights and that the parties were merely amending the DSSA in exchange for formula-based consideration and a release.

243. In describing the nature of the WDA in the Certificate of Independent Legal Advice, GMCL did not refer to the WDA as a settlement. It described the WDA as:[254]

> [An agreement which] sets out the terms and conditions upon which GM is prepared to make certain formula-based payments to Dealer in exchange for Dealer's commitment to continue operating its dealership until Dealer Operator's voluntary resignation and Dealer's voluntary termination and cancellation of the Dealer Sales and Service Agreement, effective December 31, 2009 (or other such date as GM may approve under the Wind Down Agreement, but in any event on or prior to October 31, 2010), to waive all termination assistance rights under the

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[251] Reasons, **JABC**, Tab 6, p. 130, para. 312
[252] May 19 HIDL, Ex. Book, Tab 563, **TMWABC**, Tab A35, p. 323
[253] WDA, Ex. Book, Tab 597, **TMWABC**, Tab A36, p. 350.
[254] WDA, Ex. Book, Tab 597, **TMWABC**, Tab A36, p. 344.

> DSSA (as that term is defined in the Wind Down Agreement) and to provide a general release in favour of GM and other GM Entities (as defined in the Wind Down Agreement).

244. A presentation prepared internally at GMCL states that the WDA was "not seen as a settlement or termination assistance."[255]

245. It cannot be said that by entering into the WDA, a non-retained dealer was entering into a "settlement of a dispute" of a dealer's Wishart Act claims.

(iii) *"Existing claim"*

246. The trial judge erred in concluding that the dealers had an existing claim *prior* to the signing of the WDA. Specifically, the trial judge erred in finding that the rescission claim "crystallized" upon the delivery of the notice of non-renewal and WDA by GMCL:

> [327] **I reject Trillium's submission that the Release cannot be effective because Trillium would have only gained a rescission claim after the Release was executed**. First, in my view, **the Notice of Non-Renewal gave rise to any potential rescission claim** by Trillium against GMCL. The Notice of Non-Renewal was GMCL's way of telling Trillium that the franchise agreement would be coming to an end, *regardless* of whether this violated the DSSA or the *Wishart Act*. It did not say that the DSSA would not be renewed *only if* Trillium signed the WDA. Second, **more generally, any claims against GMCL crystallized when Trillium received the Notice of Non-Renewal and the WDA**, and were immediately released when the Release was signed.

247. The trial judge's conclusion that a rescission claim can crystallize before a franchisee signs the agreement it seeks to rescind is fundamentally wrong. A non-retained dealer could not have an *existing* rescission claim under the Wishart Act until after it signed the WDA. A non-retained dealer would only have an agreement which it could rescind *after* it entered into such agreement.

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[255] Dealer Network Restructuring Plan US/Canada Comparison, Ex. Book, Tab 447.1, **TMWABC**, Tab A48, p. 461.

248. As stated by Justice Brown in *3574423 Canada Inc. v. Baton Rouge Restaurants Inc.*, a franchisee does not have a claim for rescission until after it signs the franchise agreement. There is no legal remedy for a franchisee who does not sign the agreement:[256]

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

249. If the trial judge's conclusion is correct, every franchisor could insert into its initial franchise agreement a release of the disclosure obligation for that same initial agreement. This would yield absurd results and would scrub the disclosure obligation out of the Wishart Act. *Midas CA* is clear that "if you include a term in your franchise agreement that purports to be a waiver or release of any rights a franchisee has under the Act, it will be void."

(iv) *"Fully known breaches of the Act"*

250. The trial judge erred in finding that the breaches alleged in this lawsuit were "fully known" to the dealers at the time of signing the WDA. More specifically, the trial judge erred in finding that a franchisee can unknowingly release all Wishart Act claims if the intention was to have a full and final settlement of all claims, as he purports to do at paragraph 308 of the Reasons:

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

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[256] *3574423 Canada Inc. v. Baton Rouge Restaurants Inc.*, [2011] O.J. No. 5018 at para. 283, 284, **BOA**, Tab 11.

251. Again, the trial judge failed to consider the special requirements of the franchise context, analyzed the Release as if it were included in a commercial agreement between arm's length parties instead of a franchise agreement, and approached the issue from the perspective of GMCL and its commercial wishes. While a typical commercial release may cover claims that are unknown or not fully known as at the date of the release, such a release is expressly prohibited by the Wishart Act in the franchise context.

252. The trial judge incorrectly found that because the non-retained dealers had knowledge of one breach by GMCL – the right of non-renewal, they were able to, and did, release all unknown claims as well:

> [312] Given the factual matrix leading up to the signing of the WDAs – notably, the looming *CCAA* filing and the known restructuring of GMCL's dealer network – the parties must have understood that the central purpose of the WDA was a full and final settlement of any legal claims arising from non-renewal of the DSSA and the WDA itself.
>
> [322] First, it was unnecessary for the Notice of Non-Renewal or the WDA to expressly state that GMCL had breached the DSSA or state that the dealers had full knowledge of such a breach**.** **There was a known dispute between the parties – namely, whether GMCL was entitled under the DSSA to decline to renew Trillium's franchise agreement**.

253. Having knowledge of one (contractual) claim does not mean that the dealers could unknowingly release other (statutory) claims. As stated above, the Wishart Act does not allow dealers to unknowingly release statutory claims. That is the purpose of section 11 of the Act.

254. The trial judge was required to find that the dealers had actual knowledge of all of the Wishart Act claims asserted in this action, namely, knowledge of a breach of the duty of fair dealing, breach of the right of association, and a breach of the disclosure obligations. The trial judge did not make such a finding.

255. A general intention to release all claims, without knowing what those claims are, is insufficient under section 11 of the Wishart Act.

256. There was no evidence that the testifying dealers had knowledge of their Wishart Act claims. Rather, the only claim explored by GMCL was the dealers' knowledge of claims related to their renewal rights:

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

257. Lastly, the WDA stated that it was and had always been GMCL's position that it was not governed by the Wishart Act and the franchisees expressly acknowledged this fact. It cannot be said that the franchisee had "full knowledge" of any claims under the Wishart Act when GMCL expressly denied the Wishart Act even applied. The trial judge erred in finding that GMCL's denial of the applicability of the Wishart Act was not relevant to whether the dealers had full knowledge of their Wishart Act claims.[257]

258. The onus is on GMCL to prove an exemption under the Act.[258] Unless GMCL proved actual knowledge (which it did not), the inference to be drawn is that the dealers lacked the requisite full knowledge of their claims as described in *Tutor Time.* Accordingly, the Release must be set aside pursuant to section 11 of the Wishart Act.

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[257] Reasons, **JABC**, Tab 6, p. 133, para. 325.
[258] Wishart Act, Section 12.

(v) *“Otherwise have entitled the Franchisee to a claim”*

259. The dealers have claims under the Wishart Act which they are asserting in this action.

260. Under section 12 of the Wishart Act, the burden to rely on the exception to sections 4 and 11 was on GMCL. Given the mandatory language of the Wishart Act, it was not the burden of the dealers to show that the Release was void under sections 4 and 11 or that the exception did not apply.

261. For the reasons above, GMCL failed to meet its burden and the trial judge ought to have found that the *Tutor Time* exception did not apply.

D. Breach In *Procurement* of the WDA Cannot Be Released in the WDA

262. The trial judge made a fundamental error in law by finding that a release can whitewash breaches of the Wishart Act committed by the franchisor in procuring that very release:

> [327] …In my view, given the factual matrix in this case – including the fact that Trillium received independent legal advice regarding the Release – there is nothing inherently wrong with a Release “fixing” breaches relating to its own procurement.

263. The trial judge’s reasoning would sanction GMCL engaging in bad faith conduct to obtain a release which absolved it of that same bad faith conduct. This surely cannot be correct as it would fly in the face of the very purpose of the Wishart Act and the statutory protection that it gives to franchisees.

264. The appellant alleges that GMCL breached the duty of fair dealing and the right of association in procuring the WDA which contains the release on which GMCL seeks to rely. A

party cannot breach the Wishart Act in order to procure an agreement containing a release and then rely on the release which it unlawfully obtained to whitewash its actions.[259]

265. Unlike this case, *Tutor Time* was not a case in which the procurement of the release itself was alleged to be wrongful. Courts have repeatedly refused to extend the limited principle in *Tutor Time* given the clear language and intent of section 11.[260]

E. Release Violated Section 4 of the Wishart Act and Court Should Not "Blue-Pencil" Release

266. The trial judge's finding that Section 5(c) of the WDA offended section 4 of the Wishart Act[261] (discussed above) ought to have invalidated the entire release.

267. This Court considered the consequences of a partially-defective release in *2176693 Ontario Ltd. v. Cora Franchise Group Inc.* In *Cora*, this Court held that franchisors cannot draft overly-broad releases and simply wait for a court to blue-pencil to fix the offensive provisions:

> [57] Applying notional severance to clauses otherwise unenforceable under the [Wishart Act] would similarly invite franchisors "to draft overly broad [provisions] with the prospect that the courts will only sever … or read [those provisions] down". It would provide no incentive to franchisors to ensure their franchise agreements are in compliance with the [Wishart Act]. It would also increase the risk that a franchisee – having signed a waiver or release of all claims – would erroneously believe it is not entitled to pursue any claims against the franchisor, including its [Wishart Act] claims. "Reading down" contractual requirements that overreach would have a chilling effect on the exercise of franchisees' rights. Each of these possibilities suggests that notional severance would diminish the protection offered by s. 11 of the [Wishart Act] against franchisors who might seek to have franchisees contract out of their [Wishart Act] rights.
>
> [58] In my view, therefore, permitting notional severance of the overbroad clause in this case could subvert the policy and purpose of s. 11 of the [Wishart Act].

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[259] See C. Stevenson, "Ethics And Negotiation In A Franchise Dispute," Paper delivered for 13th Annual OBA Franchise Law Day, November 19, 2013 at p. 17-18, **BOA**, Tab 46.
[260] See, for example, *Midas* at para. 24, **BOA**, Tab 13 and *Dodd v. Prime Restaurants of Canada Inc.*, 2012 ONSC 1578 at para. 36-37, **BOA**, Tab 27.
[261] Reasons, **JABC**, Tab 6, p. 139-140, para. 353-354.

268. The partially defective release, on the trial judge's own findings, should have invalidated the entire release.

F. Conclusion On Common Issue (f)

269. The trial judge erred in law in upholding the release. The release violated the mandatory provisions of sections 4 and 11 of the Wishart Act. This error has profound implications for this case and beyond and must be reversed.

(6) DID THE TRIAL JUDGE ERR IN ANSWERING COMMON ISSUE (G)?

270. Common issue (g) asked:

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

271. The trial judge found that there was no obligation on GMCL under section 5 of the Wishart Act to deliver a disclosure document to the dealers at least 14 days before the class members signed the WDA. The trial judge incorrectly found that the disclosure obligation only arises when a dealer initially becomes a franchisee.[262]

272. These findings are wrong for three reasons:

(a) a plain reading of the Wishart Act does not limit pre-contractual disclosure to such circumstances;

[262] Reasons, **JABC**, Tab 6, p. 137, para. 338.

(b) it ignores that disclosure under the Wishart Act is required when a franchisee renews or extends its franchise agreement and not only when a dealer becomes a franchisee for the first time; and

(c) the trial judge's findings are inconsistent with the purpose of the Wishart Act;

273. The statutory interpretation of the Wishart Act is a question of law.[263] The trial judge's conclusions on this issue are reviewable on the standard of correctness.

274. Common issue (g) is a standalone right of action. It is not dependent on any finding that GMCL breached any other duty to the dealers.

A. Plain Reading of Wishart Act Not Limited to Initial "Grant" of a Franchise

275. The trial judge made an error in law by finding that section 5 of the Wishart Act only applies to the signing of the franchise agreement at the outset of the franchise relationship.[264] He did so by wrongly finding that the WDA was not a "franchise agreement" and that the dealers were not "prospective franchisees" for the purposes of that section.

276. The Wishart defines a franchise agreement as "**<u>any</u>** agreement that relates to a franchise…" (emphasis added) and a "prospective franchisee" as "a person whom a franchisor … invites to enter into a franchise agreement."[265]

277. Section 5 of the Wishart Act reads as follows:

[263] *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 at para. 33, **BOA**, Tab 24.
[264] Reasons, **JABC**, Tab 6, p. 137, para. 338.
[265] Wishart Act, Section 1(1).

> **5.**(1)A franchisor shall provide a prospective franchisee with a disclosure document and the prospective franchisee shall receive the disclosure document not less than 14 days before the earlier of,
>
> (a) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise; and
>
> (b) the payment of any consideration by or on behalf of the prospective franchisee to the franchisor or franchisor's associate relating to the franchise.

278. If the Wishart Act were intended to apply only to franchisees at the outset of the relationship, the statute could easily have been drafted to say just that. But this is not how section 5 or section 1 of the Wishart Act are drafted. The legislature chose to require disclosure with respect to **any** agreement that relates to a franchise.

279. By contrast, the Alberta *Franchises Act*,[266] which preceded the enactment of the Wishart Act, does limit disclosure to an initial sale. Section 3 of the Alberta Act states: "[t]his Act applies to **the sale of** a franchise made on or after November 1, 1995 ...."[267]

(i) *WDA was a "franchise agreement" under any interpretation*

280. The trial judge erred by finding that the WDA was not a "franchise agreement" for the purposes of section 5 of the Wishart Act.

281. This was an error of law. "Franchise agreement" is a defined term under the Wishart Act and that definition applies to the entire Act. There is no separate or different definition of "franchise agreement" for the purposes of section 5 of the Wishart Act. If the Legislature had

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[266] *Franchises Act*, R.S.A. 2000, c. F-23 ("**Alberta Act**")
[267] Alberta Act, Section 3. It should be noted that the Alberta franchisees are also afforded the protection of the Wishart Act (common issue (b)).

intended to limit the words "franchise agreement" to an agreement involving the initial grant, it could easily have done so. It did not.

282. The Wishart Act defines "franchise agreement" broadly to be "**any agreement that relates to a franchise** between, (a) a franchisor ..., and (b) a franchisee."[268] Under this broad definition, and applying a purposive interpretation, the WDA is unquestionably a "franchise agreement" under the Wishart Act with respect to which disclosure was required.

283. Even if it is accepted that disclosure only applies to the main agreement that gives a franchisee the rights to operate a franchise (and not all ancillary agreements to the main agreement), as the trial judge appears to suggest in his Reasons,[269] the WDA is still a "franchise agreement."

284. There is no dispute that the DSSA is a "franchise agreement" under the Wishart Act. GMCL has admitted this fact. This is why the Wishart Act applies to the GMCL-dealer relationship.

285. The WDA was an agreement that modified many provisions of the DSSA, and became the governing agreement for the franchise operations from May 30, 2009 onward until the dealer's closure. Even after signing the WDA, a non-retained dealer was still expected to operate its franchise under the DSSA as modified by the WDA.

286. The WDA did not immediately terminate any DSSA, but rather changed the terms under which the parties conducted their business. The amending effect of the WDA on the DSSA is plain from the terms of the WDA. Section 15 of the WDA states:

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[268] Wishart Act, Section 1(1).
[269] Reasons, **JABC**, Tab 6, p. 136-137, para. 336-338.

> **[a]ll other terms and conditions of the DSSA not specifically and expressly modified by this Agreement shall remain in full force and effect** until the effective date of the termination and cancellation of the DSSA, as provided in Section 3(b) above.

287. The recitals in the WDA state:

> [s]ubject to the terms and conditions set forth herein, Dealer, Dealer Operator and GM desire to enter into this Agreement, providing for, among other things, … (iii) **Dealer's and Dealer Operator's covenants regarding its continuing Dealership Operations under the DSSA, as supplemented and amended by the terms of this Agreement**.

288. Since the DSSA is a "franchise agreement," it must follow that the WDA is also a "franchise agreement" under the Wishart Act.

289. In *TA & K Enterprises Inc. v. Suncor Energy Products Inc.*,[270] Perell J. stated that any subsequent agreement (here, the WDA) to the initial franchise agreement (here, the DSSA) is either an extension or renewal of that franchise agreement:

> It does not follow, however, that a new agreement is not a "renewal" or "extension" of a franchise agreement. **Indeed, I would go farther and conclude that if there is an existing franchise agreement, the intent of the Legislature was to regard the next signed agreement between the franchisor and franchisee as necessarily being either a renewal or an extension of that existing franchise agreement**.

290. The WDA became the operative agreement governing the franchise relationship. It "renewed" the DSSA. In those circumstances, it is a "franchise agreement" that necessitates disclosure. The trial judge erred by classifying the WDA as a "termination agreement" and not what it truly was, a renewal of the DSSA since a dealer was still expected to continue operating under the WDA.

[270] [2010] O.J. No. 5532 (S.C.J.) ("***Suncor***"); aff'd 2011 ONCA 613, **BOA**, Tab 41.

(ii) *Dealers Were "Prospective Franchisees" In Respect of the WDA*

291. The trial judge erred by finding that prospective franchisees are "those who have not yet entered into a franchise agreement."[271] There is no support for this proposition in the text of the Wishart Act. Further, the proposition ignores the provisions of the Wishart Act that state that an existing franchisee is a "prospective franchisee" when it renews or extends its franchise agreement.

292. "Prospective franchisee" is a defined term under the Wishart Act. The Wishart Act states that a "prospective franchisee" means "… **a person whom a franchisor … invites to enter into a franchise agreement**."[272]

293. The non-retained dealers were "prospective franchisees." When they were invited to enter into the WDAs, they were not yet parties to the franchise agreements (i.e. the WDAs) being offered to them.

(iii)*Disclosure Applies to Renewal or Extensions*

294. The trial judge's error is also evident from the fact that the statutory disclosure obligation applies to a renewal or extension of a franchise agreement (unless certain conditions are met, which would then permit an exemption[273]) and not merely to an initial grant or purchase of a franchise. A renewal or extension of an agreement, by definition, does not arise at the beginning of the franchise relationship.

[271] Reasons, **JABC**, Tab 6, p. 137, para. 340.
[272] Wishart Act, Section 1(1).
[273] Wishart Act, Section 5(7)(f).

295. Section 5(7)(f) of the Wishart Act exempts disclosure for renewals and extensions when certain conditions are satisfied. As such, unless the conditions are satisfied, a franchisor has an obligation to provide a disclosure document when a franchisee renews or extends its franchise agreement.

296. It is also for this reason that a prospective franchisee must necessarily include an existing franchisee. Thus, a "franchisee" can be a "prospective franchisee" at the same time for the purposes of the disclosure obligation.

297. This exemption shows that the Wishart Act does not tie the disclosure obligation to the time before a franchisee begins operations. The disclosure obligation applies to renewals and extensions (subject to the applicability of the exemption) and properly applies to the WDA, an agreement amending and continuing the DSSA as amended.

B. Limiting Disclosure To Pre-sale Agreements Is Inconsistent With the Purpose of the Wishart Act

298. A primary purpose of the Wishart Act is to ensure that franchisees are properly informed before they make an investment decision related to entering into a franchise agreement. This Court has made that clear.[274]

299. Recently, this Court held that the goal of protecting franchisees through the disclosure obligation applies to both "prospective franchisees and those already parties to a franchise agreement":[275]

[274] *Dollar It* at paras 16, 72, **BOA**, Tab 15; *Dig This Garden* at para. 16, **BOA**, Tab 6; *Personal Service Coffee* at para. 28, **BOA**, Tab 37; *Imvescor* at para. 23, **BOA**, Tab 14.
[275] *Springdale* at para. 56, **BOA**, Tab 10.

> **56** The Act is designed to address the perceived imbalance of power in the franchisor/franchisee relationship. The Act's purpose is to protect both prospective franchisees **and those already parties to a franchise agreement**. This goal is achieved, in part, through the obligation imposed on franchisors to provide disclosure, the right given to the franchisee to rescind the franchise agreement in the absence of proper disclosure, and the franchisee's right of action for damages based on a franchisor's failure to comply with the disclosure requirements.

300. The trial judge should have considered whether applying the disclosure obligation to the procurement of the WDA would have achieved a result consistent with the purpose of the legislation.

301. If a disclosure document had been provided, instead of the non-retained dealers being forced to decide the fate of multigenerational businesses over four business days or less, they would have had at least 14 days to consider their decision. Instead of being given selective information lacking in candour at different times from different sources, mostly orally, they would have had a disclosure document containing all material facts[276] and all documents relevant to their decision. Instead of having to divine the truth from uncertified sources, the information in the disclosure document would have been certified as true by two officers or directors of GMCL both bearing personal liability for any misstatements or omissions. They would have received this information in one document, at one time.[277] In short, proper disclosure would have prevented all of the mischief which the dealers assert occurred in this case.

302. Strathy J. (as he then was) heard extensive arguments during the certification hearing about whether or not the disclosure document obligation applied to the WDA. He carefully summarized the arguments for and against and concluded that it was not unreasonable or inconsistent with the purpose of the Wishart Act to suggest that GMCL had a disclosure obligation in respect of the WDA given the importance of the agreement to the class members.

[276] Wishart Act, Section 5(4)(a).
[277] Wishart Act, Section 5(3).

Although His Honour's analysis was in the context of the "cause of action" test under section 5(1)(a) of the *Class Proceedings Act, 1992*,[278] his summary in the following paragraph on the purpose of the Wishart Act is nevertheless compelling:

> [73] While an important purpose – arguably the dominant purpose – of the [Wishart Act] was to ensure full pre-contractual disclosure to would-be franchisees, it clearly was not the only purpose. The leveling of the playing field by imposing a reciprocal duty of fair dealing and a right of free association of franchisees was an important ancillary purpose. I cannot say that it is plain, obvious and beyond doubt that the plaintiff's interpretation of the franchise agreement is doomed to fail. **Nor can I say that the policy of the statute runs contrary to imposing an obligation of disclosure when the franchisor proposes to make an important and unilateral amendment to the franchise agreement. One could certainly argue that an amendment that involves the franchisee divesting itself of its investment, and surrendering important rights under its franchise agreement is every bit as significant as its initial decision to invest in the first instance.** To put this point in context, consider that Trillium and the other 239 franchisees who had been offered the WDA were essentially being told by GMCL, "if this offer is not accepted by every last one of you, there is a strong possibility that we will seek protection from our creditors and you may get nothing." **It does not strike me as unreasonable, or inconsistent with the statutory purpose, to suggest that GMCL had an obligation to make full and fair disclosure of all material facts known to it that might reasonably affect the franchisees' decision**. (Emphasis added)

C. Conclusion On Common Issue (g)

303. The trial judge's conclusion is contrary to a plain reading and a purposive analysis of the Wishart Act. The trial judge erred in finding that the dealers were not entitled to a disclosure document pursuant to the Wishart Act. This common issue should have been answered in the affirmative.

(7) DID THE TRIAL JUDGE ERR IN ANSWERING COMMON ISSUES (H) & (I)?

304. Common issues (h) and (i) asked:

> (h) By virtue of GMCL's failure to deliver any disclosure document:
>
> (i) is each Class Member entitled to rescind the Wind-Down Agreement within two years of signing the Wind-Down Agreement; and

[278] *Class Proceedings Act, 1992*, S.O. 1992, c 6, ("**CPA**").

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

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

305. GMCL did not deliver a disclosure document to any non-retained dealer.[279]

306. Disclosure under the Wishart Act is mandatory.[280] Where there is non-disclosure, the statutory right to rescind is absolute.[281]

307. If common issue (g) is answered in the affirmative, then common issues (h) and (i) must also be answered in the affirmative.

308. 159 class members delivered a notice of rescission under section 6(2) of the Wishart Act[282] within two years of signing the WDA. Each of those class members is entitled to compensation under subsection 6(6) of the Wishart Act. The Wishart Act prescribes what compensation a franchisee is entitled to upon valid rescission:

6(6) The franchisor… shall, within 60 days of the effective date of the rescission,

(a) refund to the franchisee any money received from or on behalf of the franchisee, other than money for inventory, supplies or equipment;

(b) purchase from the franchisee any inventory that the franchisee had purchased pursuant to the franchise agreement and remaining at the effective date of rescission, at a price equal to the purchase price paid by the franchisee;

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[279] Hurdman DE, Day 4, p. 610:12, **TMWABC**, Tab B24, p. 537; Turpin DE, Day 9, p. 1715:24, **TMWABC**, Tab B24, p. 538; Condie DE, Day 11, p. 2092:25, **TMWABC**, Tab B24, p. 540.
[280] *Dollar It* at para. 16, **BOA**, Tab 15.
[281] *Personal Service Coffee* at para. 32, **BOA**, Tab 37.
[282] Appellant's Opening Statement, Day 1, p. 75:17, **TMWABC**, Tab B34, p. 584.

> (c) purchase from the franchisee any supplies and equipment that the franchisee had purchased pursuant to the franchise agreement, at a price equal to the purchase price paid by the franchisee; and
>
> (d) compensate the franchisee for any losses that the franchisee incurred in acquiring, setting up and operating the franchise, less the amounts set out in clauses (a) to (c).

309. There is no causation inquiry in the case of a valid rescission under section 6(2) of the Wishart Act. The amount of such compensation is to be determined, failing agreement between the parties, in an individual inquiry pursuant to section 25 of the CPA.

310. Irrespective of whether a class member delivered a notice of rescission, GMCL's failure to comply with section 5 of the Wishart Act entitles each class member to damages under section 7 of the Wishart Act which reads as follows:

> **7**.(1)If a franchisee suffers a loss because of a misrepresentation contained in the disclosure document or in a statement of a material change **or as a result of the franchisor's failure to comply in any way with section 5**, the franchisee has a right of action for damages against … the franchisor;[283]

311. Damages under section 7(1) require a franchisee to prove causation and damages flowing from the breach. Causation and damages under this section are appropriately established in individual hearings conducted under section 25 of the CPA.[284]

(8) WHAT IS THE APPROPRIATE MEASURE OF DAMAGES?

A. Fair Dealing/Non-Disclosure of Material Facts Damages

312. If this Court finds in favour of the appellant on any one or more of common issues (c)(i), (c)(iii) or (d), damages are available under section 3(2) of the Wishart Act.

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[283] Wishart Act, Section 7(1).
[284] CPA, Section 25.

313. The guideline under section 3(2) is what is fair and reasonable compensation for the breach.

314. If GMCL breached the duty of fair dealing in how it presented the WDA, and this caused class members to sign the WDA, then it is fair and reasonable to compensate those class members for the loss they have suffered. Such damages are properly assessed in individual hearings under section 25 of the *Class Proceedings Act, 1992*.[285] At the individual hearings stage, the court would determine (i) whether or not the wrongful conduct caused the dealer to enter into the WDA and, if so, (ii) what the dealer's losses are.

315. In view of the foregoing, the appellant requests an order directing individual hearings to assess damages under section 3(2) of the Wishart Act for each of the class members.

316. Further, or in the alternative, if the breaches of the duty of fair dealing did not result in the class member entering into the WDA, the class member is nevertheless entitled to **non-**compensatory damages under section 3(2) of the Wishart Act in accordance with the principle set out by this Court in *Salah*.[286] This Court found in that case:

> [29] In summary, **I am in agreement with the trial judge that s. 3(2) of the *Wishart Act* permits an award of damages for the breach of the duty of good faith, separate and in addition to any award in compensation of pecuniary losses**. I would go further to say that any such award must be commensurate with the degree of the breach or offending conduct in the particular circumstances. Taking the conduct of the appellant as found by the trial judge into account, I see no error in her decision to award damages on a merged basis for the breach of duty of good faith and mental distress, either in principle or in respect of quantum. In my view, her findings as to the breach of duty of good faith alone would support the amount of the award. (Emphasis added)

317. The amount of *Salah* damages to be awarded to any individual class member may be determined at an individual inquiry under section 25 of the CPA.

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[285] CPA, Section 25.
[286] *Salah* at para. 26-29, **BOA**, Tab 38.

B. Right of Association Damages

318. There is no guidance in the case law for assessing damages under the right of association. The Legislature provided a remedy in damages for breach of that right, but it has never been judicially considered.

319. If common issue (e)(vi) is answered in the affirmative by this Court, the appellant requests an aggregate assessment of damages under section 4(5) of the Wishart Act.[287]

C. Compensation Under Rescission Remedy

320. If this Court finds that GMCL had an obligation to deliver a disclosure document under section 5 of the Wishart Act, the Act provides a formula for the calculation of compensation under section 6(6).

321. As stated above, compensation under section 6(6) of the Wishart Act is properly determined individually.

322. It is expected that each class member would deliver a brief setting out its section 6(6) compensation claim. To the extent that GMCL disputed those calculations, there would be individual assessments under section 25 of the CPA, bearing in mind that the emphasis in section 25 is on cost-effective and expeditious hearings.

323. Rescission, however, is not an exclusive remedy and a breach of the disclosure obligation does not absolve GMCL or Cassels from liability or exposure to damages for other causes of action. The court will still be required to assess damages under the other causes of action if

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[287] *Salah* at para. 26-29, **BOA**, Tab 38.

liability is found. Overlapping damages can be addressed by the court so as to avoid double compensation.

D. Damages for Failure to Comply with Section 5 of Wishart Act

324. In addition to the right of rescission under section 6,[288] the failure to deliver a disclosure document gives rise to a right of damages under section 7 of the Wishart Act.[289]

325. As stated above, this section is in addition to rescission damages. It differs from rescission in two respects. First, it does not depend on whether or not a class member delivered a notice of rescission. Second, there is a causation element in section 7 that is not required under section 6. It would therefore be necessary to demonstrate at a separate hearing under section 25 of the CPA that (i) the dealer suffered damages as a result of GMCL's failure to provide a disclosure document, and (ii) if so, the extent of the damage.

326. Accordingly, in view of what is set forth in subsections C and D above, and if any one or more of common issues (g), (h) or (i) are answered in the affirmative by this Court, the appellant requests an order directing individual hearings for each of the class members in accordance with section 25 of the CPA to determine compensation under section 6(6) of the Wishart Act and damages under section 7 of the Wishart Act.

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[288] Wishart Act, Section 6.
[289] Wishart Act, Section 7.

PART V - ORDER REQUESTED

327. The appellant requests:

(a) that the appeal be allowed and the Judgment dismissing the Appellant's claims as against GMCL be set aside.

(b) that judgment be granted in favour of the appellant answering common issues (c)(i) and (iii), (d), (e)(vi), (f), (g), (h) and (i) in the affirmative.

(c) an Order directing individual hearings in accordance with section 25 of the CPA to assess damages under section 3(2) of the Wishart Act in respect of common issues (c)(i), (c)(iii) and (d) and, further, or in the alternative, an award of damages under section 3(2) of the Wishart Act in accordance with the principle set out by this Court in *Salah* in respect of these common issues.

(d) an Order awarding damages under section 4(5) of the Wishart Act in respect of common issue e(vi) to be assessed in the aggregate.

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

(f) in the alternative, an Order directing that a new trial be held with respect to the common issues identified in subparagraph (b) above.

(g) an Order setting aside the costs awarded in favour of GMCL and awarding costs of this appeal and the underlying action as against GMCL in favour of the appellant.

All of which is respectfully submitted this 6th day of June, 2016.

Allan D.J. Dick	Bryan Finlay, Q.C.
David Sterns	Marie-Andrée Vermette
Andy Seretis	Michael Statham

Of counsel for the Plaintiff (Appellant)

CERTIFICATE

I certify that an order subrule 61.09(2) (original record and exhibits) is not required.

Counsel for the Appellant estimate that they will require one day for the argument on this appeal, not including reply.

Dated at Toronto, Ontario, this 6th day of June, 2016.

David Sterns

SCHEDULE "A"

CASES

0856464 B.C. Ltd. v. TimberWest Forest Corp., [2014] B.C.J. No. 3170 (S.C.)

1159607 Ontario Inc. v. Country Style Food Services Inc., 2012 ONSC 881, 2 B.L.R. (5th) 315, aff'd 2013 ONCA 589

1250264 Ontario Inc. v. Pet Valu Canada Inc., 2015 ONSC 29

1250264 Ontario Inc. v. Pet Valu Canada Inc., [2016] O.J. No. 186 (C.A.)

1323257 Ontario Ltd. v. Hyundai Auto Canada Corp. (2009), 55 B.L.R. (4th) 265 (Ont. S.C.J.)

1490664 Ontario Ltd. v. Dig This Garden Retailers Ltd. (2005), 256 D.L.R. (4th) 451 (C.A)

15186628 Ontario Inc. v. Tutor Time Learning Centres LLC, [2006] O.J. No. 3011 (S.C.J.)

2130489 Ontario Inc. v. Philthy McNasty's (Enterprises) Inc., [2012] O.J. No. 2521 (C.A.)

2176693 Ontario Ltd. v. Cora Franchise Group Inc., [2015] O.J. No. 1189 (C.A.)

2240802 Ontario Inc. v. Springdale Pizza Depot Ltd., [2015] O.J. No. 1736 (C.A.)

3574423 Canada Inc. v. Baton Rouge Restaurants Inc., [2011] O.J. No. 5018

3574423 Canada Inc. v. Baton Rouge Restaurants Inc., [2013] O.J. No. 297 (C.A.)

405341 Ontario Ltd. v. Midas Canada Inc., [2010] O.J. No. 2845 (C.A.)

4287975 Canada Inc. v. Imvescor Restaurants Inc., 2009 ONCA 308

6792341 Canada Inc. v. Dollar It Ltd., [2009] O.J. No. 1881 (C.A.)

8150184 Canada Corp. v. Rotisseries Mom's Express Ltd., [2014] OJ No. 2600 (S.C.J.)

Addison Chevrolet Buick GMC Ltd. v. General Motors of Canada Ltd., [2016] O.J. No. 2356 (C.A.)

BCE Inc. v. 1976 Debentureholders, 2008 SCC 69

Bekah et al. v. Three for One Pizza (2003), 67 O.R. (3d) 305 (S.C.J.)

Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559

BG Checo International Ltd. v. British Columbia Hydro and Power Authority, [1993] 1 S.C.R. 12

Bhasin v. Hrynew 2014 SCC 71

Burnett Management Inc. v. Cuts Fitness for Men, [2012] OJ No. 2527 (S.C.J.)

Canadian National Railway Co. v. Canada (Attorney General), 2014 SCC 40

CivicLife.com Inc. v. Canada (Attorney General) (2006)*,* 215 O.A.C. 43 (C.A.)

Crawford v. New Brunswick (Agricultural Development Board), [1997] N.B.J. No. 368 (C.A.)

Dodd v. Prime Restaurants of Canada Inc., 2012 ONSC 1578

Dunkin' Brands Canada Ltd. v. Bertico inc., 2015 QCCA 624, leave to appeal refused, [2015] S.C.C.A. No. 230

Fairview Donut Inc. v The TDL Group Corp., 2012 ONSC 1252

Gateway Realty Ltd v Arton Holdings, [1991] N.S.J. 362 (S.C.)

Heritage Capital Corp. v. Equitable Trust Co., 2016 SCC 19

Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574

MacDonald v. Chicago Title Insurance Co. of Canada (2015), 127 O.R. (3d) 663 (C.A.)

Mesa Operating Limited Partnership v Amoco Canada Resources Ltd (1994), 149 AR 187 (C.A.)

Michela v. St. Thomas of Villanova Catholic School, 2015 ONCA 801

Nareerux Import Co. Ltd. v. Canadian Imperial Bank of Commerce, 2009 ONCA 764

Personal Service Coffee Corp. v. Beer (2005), 256 D.L.R. (4th) 466 (Ont. C.A.)

Salah v. Timothy's Coffees of the World Inc., [2010] O.J. No. 4336 (C.A.)

Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53

Shelanu Inc. v. Print Three Franchising Corporation (2003), 64 O.R. (3d) 533 (C.A.)

TA & K Enterprises Inc. v. Suncor Energy Products Inc., [2010] O.J. No. 5532 (S.C.J.); aff'd 2011 ONCA 613

Transamerica Life Canada Inc. v. ING Canada Inc. (2003), 68 O.R. (3d) 457 (C.A.)

Wallace v. United Grain Growers Ltd. (c.o.b. Public Press), [1997] 3 S.C.R. 701

TREATISES

J. Cassels, "Good Faith in Contract Bargaining: General Principles and Recent Developments" (1993), 15 Adv. Q. 56

G.R. Hall, *Canadian Contractual Interpretation Law* (Markham, Ontario: LexisNexis Canada 2012)

C. Stevenson, "Ethics And Negotiation In A Franchise Dispute," Paper delivered for 13th Annual OBA Franchise Law Day, November 19, 2013

R. Sullivan, *Construction of Statutes*, 5th ed., LexisNexis

Yee, Woo Pei. "Protecting Parties' Reasonable Expectations: A General Principle of Good Faith" (2001), 1 *O.U.C.L.J.* 195

SCHEDULE "B"

Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c.3

Definitions

1. (1) In this Act,

"disclosure document" means the disclosure document required by section 5; ("document d'information")

"franchise" means a right to engage in a business where the franchisee is required by contract or otherwise to make a payment or continuing payments, whether direct or indirect, or a commitment to make such payment or payments, to the franchisor, or the franchisor's associate, in the course of operating the business or as a condition of acquiring the franchise or commencing operations and,

(a) in which,

(i) the franchisor grants the franchisee the right to sell, offer for sale or distribute goods or services that are substantially associated with the franchisor's, or the franchisor's associate's, trade-mark, service mark, trade name, logo or advertising or other commercial symbol, and

(ii) the franchisor or the franchisor's associate exercises significant control over, or offers significant assistance in, the franchisee's method of operation, including building design and furnishings, locations, business organization, marketing techniques or training, or

(b) in which,

(i) the franchisor, or the franchisor's associate, grants the franchisee the representational or distribution rights, whether or not a trade-mark, service mark, trade name, logo or advertising or other commercial symbol is involved, to sell, offer for sale or distribute goods or services supplied by the franchisor or a supplier designated by the franchisor, and

(ii) the franchisor, or the franchisor's associate, or a third person designated by the franchisor, provides location assistance, including securing retail outlets or accounts for the goods or services to be sold, offered for sale or distributed or securing locations or sites for vending machines, display racks or other product sales displays used by the franchisee; ("franchise")

"franchise agreement" means any agreement that relates to a franchise between,

(a) a franchisor or franchisor's associate, and

(b) a franchisee; ("contrat de franchisage")

"franchisee" means a person to whom a franchise is granted and includes,

(a) a subfranchisor with regard to that subfranchisor's relationship with a franchisor, and

(b) a subfranchisee with regard to that subfranchisee's relationship with a subfranchisor; ("franchisé")

“franchise system” includes,

(a) the marketing, marketing plan or business plan of the franchise,

(b) the use of or association with a trade-mark, service mark, trade name, logo or advertising or other commercial symbol,

(c) the obligations of the franchisor and franchisee with regard to the operation of the business operated by the franchisee under the franchise agreement, and

(d) the goodwill associated with the franchise; (“système de franchise”)

“franchisor” means one or more persons who grant or offer to grant a franchise and includes a subfranchisor with regard to that subfranchisor’s relationship with a subfranchisee; (“franchiseur”)

“franchisor’s associate” means a person,

(a) who, directly or indirectly,

(i) controls or is controlled by the franchisor, or

(ii) is controlled by another person who also controls, directly or indirectly, the franchisor, and

(b) who,

(i) is directly involved in the grant of the franchise,

(A) by being involved in reviewing or approving the grant of the franchise, or

(B) by making representations to the prospective franchisee on behalf of the franchisor for the purpose of granting the franchise, marketing the franchise or otherwise offering to grant the franchise, or

(ii) exercises significant operational control over the franchisee and to whom the franchisee has a continuing financial obligation in respect of the franchise; (“personne qui a un lien”)

“grant”, in respect of a franchise, includes the sale or disposition of the franchise or of an interest in the franchise and, for such purposes, an interest in the franchise includes the ownership of shares in the corporation that owns the franchise; (“concession”)

“master franchise” means a franchise which is a right granted by a franchisor to a subfranchisor to grant or offer to grant franchises for the subfranchisor’s own account; (“franchise maîtresse”)

“material change” means a change in the business, operations, capital or control of the franchisor or franchisor’s associate, a change in the franchise system or a prescribed change, that would reasonably be expected to have a significant adverse effect on the value or price of the franchise to be granted or on the decision to acquire the franchise and includes a decision to implement such a change made by the board of directors of the franchisor or franchisor’s associate or by senior management of the franchisor or franchisor’s associate who believe that confirmation of the decision by the board of directors is probable; (“changement important”)

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

"misrepresentation" includes,

(a) an untrue statement of a material fact, or

(b) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made; ("présentation inexacte des faits")

"prescribed" means prescribed by regulations made under this Act; ("prescrit")

"prospective franchisee" means a person who has indicated, directly or indirectly, to a franchisor or a franchisor's associate, agent or broker an interest in entering into a franchise agreement, and a person whom a franchisor or a franchisor's associate, agent or broker, directly or indirectly, invites to enter into a franchise agreement; ("franchisé éventuel")

"subfranchise" means a franchise granted by a subfranchisor to a subfranchisee. ("sous-franchise") 2000, c. 3, s. 1 (1); 2009, c. 33, Sched. 10, s. 1 (1).

Master franchise, subfranchise

(2) A franchise includes a master franchise and a subfranchise. 2000, c. 3, s. 1 (2).

Deemed control

(3) A franchisee, franchisor or franchisor's associate which is a corporation shall be deemed to be controlled by another person or persons if,

(a) voting securities of the franchisee or franchisor or franchisor's associate carrying more than 50 per cent of the votes for the election of directors are held, otherwise than by way of security only, by or for the benefit of the other person or persons; and

(b) the votes carried by such securities are entitled, if exercised, to elect a majority of the board of directors of the franchisee or franchisor or franchisor's associate. 2000, c. 3, s. 1 (3).

2009, c. 33, Sched. 10, s. 1 (1-3) - 15/12/2009.

Application

2. (1) This Act applies with respect to a franchise agreement entered into on or after the coming into force of this section, with respect to a renewal or extension of a franchise agreement entered into before or after the coming into force of this section and with respect to a business operated under such an agreement, renewal or extension if the business operated by the franchisee under the franchise agreement or its renewal or extension is to be operated partly or wholly in Ontario. 2000, c. 3, s. 2 (1).

Same

(2) Sections 3 and 4, clause 5 (7) (d) and sections 9, 11 and 12 apply with respect to a franchise agreement entered into before the coming into force of this section, and with respect to a business operated under such agreement, if the business operated by the franchisee under the

franchise agreement is operated or is to be operated partly or wholly in Ontario. 2000, c. 3, s. 2 (2).

Non-application

(3) This Act does not apply to the following continuing commercial relationships or arrangements:

1. Employer-employee relationship.
2. Partnership.
3. Membership in a co-operative association, as prescribed.
4. An arrangement arising from an agreement to use a trade-mark, service mark, trade name, logo or advertising or other commercial symbol designating a person who offers on a general basis, for consideration, a service for the evaluation, testing or certification of goods, commodities or services.
5. An arrangement arising from an agreement between a licensor and a single licensee to license a specific trade-mark, service mark, trade name, logo or advertising or other commercial symbol where such licence is the only one of its general nature and type to be granted by the licensor with respect to that trade-mark, service mark, trade name, logo or advertising or other commercial symbol.
6. An arrangement arising out of a lease, licence or similar agreement whereby the franchisee leases space in the premises of another retailer and is not required or advised to buy the goods or services it sells from the retailer or an affiliate of the retailer.
7. A relationship or arrangement arising out of an oral agreement where there is no writing which evidences any material term or aspect of the relationship or arrangement.
8. A service contract or franchise-like arrangement with the Crown or an agent of the Crown. 2000, c. 3, s. 2 (3).

Fair dealing

3. (1) Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement. 2000, c. 3, s. 3 (1).

Right of action

(2) A party to a franchise agreement has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing in the performance or enforcement of the franchise agreement. 2000, c. 3, s. 3 (2).

Interpretation

(3) For the purpose of this section, the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards. 2000, c. 3, s. 3 (3).

Right to associate

4. (1) A franchisee may associate with other franchisees and may form or join an organization of franchisees. 2000, c. 3, s. 4 (1).

Franchisor may not prohibit association

(2) A franchisor and a franchisor's associate shall not interfere with, prohibit or restrict, by contract or otherwise, a franchisee from forming or joining an organization of franchisees or from associating with other franchisees. 2000, c. 3, s. 4 (2).

Same

(3) A franchisor and franchisor's associate shall not, directly or indirectly, penalize, attempt to penalize or threaten to penalize a franchisee for exercising any right under this section. 2000, c. 3, s. 4 (3).

Provisions void

(4) Any provision in a franchise agreement or other agreement relating to a franchise which purports to interfere with, prohibit or restrict a franchisee from exercising any right under this section is void. 2000, c. 3, s. 4 (4).

Right of action

(5) If a franchisor or franchisor's associate contravenes this section, the franchisee has a right of action for damages against the franchisor or franchisor's associate, as the case may be. 2000, c. 3, s. 4 (5).

Franchisor's obligation to disclose

5. (1) A franchisor shall provide a prospective franchisee with a disclosure document and the prospective franchisee shall receive the disclosure document not less than 14 days before the earlier of,

(a) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise; and

(b) the payment of any consideration by or on behalf of the prospective franchisee to the franchisor or franchisor's associate relating to the franchise. 2000, c. 3, s. 5 (1).

Methods of delivery

(2) A disclosure document may be delivered personally, by registered mail or by any other prescribed method. 2000, c. 3, s. 5 (2).

Same

(3) A disclosure document must be one document, delivered as required under subsections (1) and (2) as one document at one time. 2000, c. 3, s. 5 (3).

Contents of disclosure document

(4) The disclosure document shall contain,

(a) all material facts, including material facts as prescribed;

(b) financial statements as prescribed;

(c) copies of all proposed franchise agreements and other agreements relating to the franchise to be signed by the prospective franchisee;

(d) statements as prescribed for the purposes of assisting the prospective franchisee in making informed investment decisions; and

(e) other information and copies of documents as prescribed. 2000, c. 3, s. 5 (4).

Material change

(5) The franchisor shall provide the prospective franchisee with a written statement of any material change, and the franchisee must receive such statement, as soon as practicable after the change has occurred and before the earlier of,

(a) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise; and

(b) the payment of any consideration by or on behalf of the prospective franchisee to the franchisor or franchisor's associate relating to the franchise. 2000, c. 3, s. 5 (5).

Information to be accurate, clear, concise

(6) All information in a disclosure document and a statement of a material change shall be accurately, clearly and concisely set out. 2000, c. 3, s. 5 (6).

Exemptions

(7) This section does not apply to,

(a) the grant of a franchise by a franchisee if,

(i) the franchisee is not the franchisor, an associate of the franchisor or a director, officer or employee of the franchisor or of the franchisor's associate,

(ii) the grant of the franchise is for the franchisee's own account,

(iii) in the case of a master franchise, the entire franchise is granted, and

(iv) the grant of the franchise is not effected by or through the franchisor;

(b) the grant of a franchise to a person who has been an officer or director of the franchisor or of the franchisor's associate for at least six months, for that person's own account;

(c) the grant of an additional franchise to an existing franchisee if that additional franchise is substantially the same as the existing franchise that the franchisee is operating and if there has been no material change since the existing franchise agreement or latest renewal or extension of the existing franchise agreement was entered into;

(d) the grant of a franchise by an executor, administrator, sheriff, receiver, trustee, trustee in bankruptcy or guardian on behalf of a person other than the franchisor or the estate of the franchisor;

(e) the grant of a franchise to a person to sell goods or services within a business in which that person has an interest if the sales arising from those goods or services, as anticipated by the parties or that should be anticipated by the parties at the time the franchise agreement is entered into do not exceed, in relation to the total sales of the business, a prescribed percentage;

(f) the renewal or extension of a franchise agreement where there has been no interruption in the operation of the business operated by the franchisee under the franchise agreement and there has been no material change since the franchise agreement or latest renewal or extension of the franchise agreement was entered into;

(g) the grant of a franchise if,

(i) the prospective franchisee is required to make a total annual investment to acquire and operate the franchise in an amount that does not exceed a prescribed amount,

(ii) the franchise agreement is not valid for longer than one year and does not involve the payment of a non-refundable franchise fee, or

(iii) the franchisor is governed by section 55 of the *Competition Act* (Canada);

(h) the grant of a franchise where the prospective franchisee is investing in the acquisition and operation of the franchise, over a prescribed period, an amount greater than a prescribed amount. 2000, c. 3, s. 5 (7).

Same

(8) For the purpose of subclause (7) (a) (iv), a grant is not effected by or through a franchisor merely because,

(a) the franchisor has a right, exercisable on reasonable grounds, to approve or disapprove the grant; or

(b) a transfer fee must be paid to the franchisor in an amount set out in the franchise agreement or in an amount that does not exceed the reasonable actual costs incurred by the franchisor to process the grant. 2000, c. 3, s. 5 (8).

Rescission for late disclosure

6. (1) A franchisee may rescind the franchise agreement, without penalty or obligation, no later than 60 days after receiving the disclosure document, if the franchisor failed to provide the disclosure document or a statement of material change within the time required by section 5 or if the contents of the disclosure document did not meet the requirements of section 5. 2000, c. 3, s. 6 (1).

Rescission for no disclosure

(2) A franchisee may rescind the franchise agreement, without penalty or obligation, no later than two years after entering into the franchise agreement if the franchisor never provided the disclosure document. 2000, c. 3, s. 6 (2).

Notice of rescission

(3) Notice of rescission shall be in writing and shall be delivered to the franchisor, personally, by registered mail, by fax or by any other prescribed method, at the franchisor’s address for service or to any other person designated for that purpose in the franchise agreement. 2000, c. 3, s. 6 (3).

Effective date of rescission

(4) The notice of rescission is effective,

(a) on the day it is delivered personally;

(b) on the fifth day after it was mailed;

(c) on the day it is sent by fax, if sent before 5 p.m.;

(d) on the day after it was sent by fax, if sent at or after 5 p.m.;

(e) on the day determined in accordance with the regulations, if sent by a prescribed method of delivery. 2000, c. 3, s. 6 (4).

Same

(5) If the day described in clause (4) (b), (c) or (d) is a holiday, the notice of rescission is effective on the next day that is not a holiday. 2000, c. 3, s. 6 (5).

Franchisor's obligations on rescission

(6) The franchisor, or franchisor's associate, as the case may be, shall, within 60 days of the effective date of the rescission,

(a) refund to the franchisee any money received from or on behalf of the franchisee, other than money for inventory, supplies or equipment;

(b) purchase from the franchisee any inventory that the franchisee had purchased pursuant to the franchise agreement and remaining at the effective date of rescission, at a price equal to the purchase price paid by the franchisee;

(c) purchase from the franchisee any supplies and equipment that the franchisee had purchased pursuant to the franchise agreement, at a price equal to the purchase price paid by the franchisee; and

(d) compensate the franchisee for any losses that the franchisee incurred in acquiring, setting up and operating the franchise, less the amounts set out in clauses (a) to (c). 2000, c. 3, s. 6 (6).

Damages for misrepresentation, failure to disclose

7. (1) If a franchisee suffers a loss because of a misrepresentation contained in the disclosure document or in a statement of a material change or as a result of the franchisor's failure to comply in any way with section 5, the franchisee has a right of action for damages against,

(a) the franchisor;

(b) the franchisor's agent;

(c) the franchisor's broker, being a person other than the franchisor, franchisor's associate, franchisor's agent or franchisee, who grants, markets or otherwise offers to grant a franchise, or who arranges for the grant of a franchise;

(d) the franchisor's associate; and

(e) every person who signed the disclosure document or statement of material change. 2000, c. 3, s. 7 (1).

Deemed reliance on misrepresentation

(2) If a disclosure document or statement of material change contains a misrepresentation, a franchisee who acquired a franchise to which the disclosure document or statement of material change relates shall be deemed to have relied on the misrepresentation. 2000, c. 3, s. 7 (2).

Deemed reliance on disclosure document

(3) If a franchisor failed to comply with section 5 with respect to a statement of material change, a franchisee who acquired a franchise to which the material change relates shall be deemed to have relied on the information set out in the disclosure document. 2000, c. 3, s. 7 (3).

Defence

(4) A person is not liable in an action under this section for misrepresentation if the person proves that the franchisee acquired the franchise with knowledge of the misrepresentation or of the material change, as the case may be. 2000, c. 3, s. 7 (4).

Same

(5) A person, other than a franchisor, is not liable in an action under this section for misrepresentation if the person proves,

(a) that the disclosure document or statement of material change was given to the franchisee without the person's knowledge or consent and that, on becoming aware of its having been given, the person promptly gave written notice to the franchisee that it was given without that person's knowledge or consent;

(b) that, after the disclosure document or statement of material change was given to the franchisee and before the franchise was acquired by the franchisee, on becoming aware of any misrepresentation in the disclosure document or statement of material change, the person withdrew consent to it and gave written notice to the franchisee of the withdrawal and the reasons for it; or

(c) that, with respect to any part of the disclosure document or statement of material change purporting to be made on the authority of an expert or purporting to be a copy of or an extract from a report, opinion or statement of an expert, the person had no reasonable grounds to believe and did not believe that,

(i) there had been a misrepresentation,

(ii) the part of the disclosure document or statement of material change did not fairly represent the report, opinion or statement of the expert, or

(iii) the part of the disclosure document or statement of material change was not a fair copy of or extract from the report, opinion or statement of the expert. 2000, c. 3, s. 7 (5).

Joint and several liability

8. (1) All or any one or more of the parties to a franchise agreement who are found to be liable in an action under subsection 3 (2) or who accept liability with respect to an action brought under that subsection are jointly and severally liable. 2000, c. 3, s. 8 (1).

Same

(2) All or any one or more of a franchisor or franchisor's associates who are found to be liable in an action under subsection 4 (5) or who accept liability with respect to an action brought under that subsection are jointly and severally liable. 2000, c. 3, s. 8 (2).

Same

(3) All or any one or more of the persons specified in subsection 7 (1) who are found to be liable in an action under that subsection or who accept liability with respect to an action brought under that subsection are jointly and severally liable. 2000, c. 3, s. 8 (3).

No derogation of other rights

9. The rights conferred by this Act are in addition to and do not derogate from any other right or remedy a franchisee or franchisor may have at law. 2000, c. 3, s. 9.

Attempt to affect jurisdiction void

10. Any provision in a franchise agreement purporting to restrict the application of the law of Ontario or to restrict jurisdiction or venue to a forum outside Ontario is void with respect to a claim otherwise enforceable under this Act in Ontario. 2000, c. 3, s. 10.

Rights cannot be waived

11. Any purported waiver or release by a franchisee of a right given under this Act or of an obligation or requirement imposed on a franchisor or franchisor's associate by or under this Act is void. 2000, c. 3, s. 11.

Burden of proof

12. In any proceeding under this Act, the burden of proving an exemption or an exclusion from a requirement or provision is on the person claiming it. 2000, c. 3, s. 12.

Exemption

13. (1) REPEALED: 2000, c. 3, s. 13 (7).

Same

(2) If a franchisor meets the criteria prescribed for the purpose of this subsection, the Lieutenant Governor in Council may, by regulation, exempt the franchisor from the requirement to include specified financial information in a disclosure document, subject to the terms and conditions set out in the exempting regulation. 2000, c. 3, s. 13 (2).

General or specific

(3) A regulation made under this section may be general or specific in its application. 2000, c. 3, s. 13 (3).

Revocation of exemption

(4) A regulation made under this section may be revoked if the franchisor no longer meets the prescribed criteria or if the franchisor asks that the exemption be revoked. 2000, c. 3, s. 13 (4).

***Statutory Powers Procedure Act* does not apply**

(5) The *Statutory Powers Procedure Act* does not apply to a decision under this section to grant or to refuse to grant an exemption, to impose terms and conditions on an exemption or to revoke an exemption. 2000, c. 3, s. 13 (5).

(6), (7) REPEALED: 2009, c. 33, Sched. 10, s. 1 (2).

2000, c. 3, s. 13 (7) - 1/07/2005.

2009, c. 33, Sched. 10, s. 1 (2) - 15/12/2009.

Regulations

14. (1) The Lieutenant Governor in Council may make regulations,

(a) defining co-operative association for the purpose of paragraph 3 of subsection 2 (3);

(b) prescribing types of changes that constitute a material change;

(c) prescribing material facts for the purpose of clause 5 (4) (a);

(d) prescribing the financial statements to be included in the disclosure document;

(e) prescribing statements for the purpose of clause 5 (4) (d);

(f) prescribing other information and copies of documents to be included in the disclosure document;

(g) prescribing a percentage of sales for the purpose of clause 5 (7) (e);

(h) prescribing an amount for the purpose of subclause 5 (7) (g) (i);

(i) prescribing an amount and period of time for the purpose of clause 5 (7) (h);

(j) prescribing methods of delivery for the purposes of subsections 5 (2) and 6 (3), and prescribing rules surrounding the use of such methods, including the day on which a notice of rescission delivered by such methods is effective for the purpose of clause 6 (4) (e);

(k) prescribing criteria for the purposes of subsections 13 (1) and (2);

(k.1) defining, for the purposes of this Act, any word or expression used in this Act that has not already been expressly defined in this Act;

(l) respecting any matter that the Lieutenant Governor in Council considers necessary or advisable to carry out effectively the intent and purpose of this Act. 2000, c. 3, s. 14 (1); 2001, c. 9, Sched. D, s. 1.

General or specific

(2) A regulation made under subsection (1) may be general or specific in its application. 2000, c. 3, s. 14 (2).

2001, c. 9, Sched. D, s. 1 - 29/06/2001.

15. Omitted (provides for coming into force of provisions of this Act). 2000, c. 3, s. 15.

16. Omitted (enacts short title of this Act). 2000, c. 3, s. 16

Franchises Act, R.S.A. 2000, c. F-23, s. 3

Application of Act

3(1) This Act applies to the sale of a franchise made on or after November 1, 1995

(a)if the franchised business is to be operated either partly or wholly in Alberta, and

(b)if the purchaser of the franchise is an Alberta resident or has a permanent establishment in Alberta for the purposes of the *Alberta Corporate Tax Act*.

(2) Sections 5(1)(d) and (f), 6, 7, 8, 11, 15, 20 and 21 apply to the sale of a franchise made before November 1, 1995

(a)if the franchised business is operating or is to be operated either partly or wholly in Alberta, and

(b)if, on November 1, 1995, the franchisee is an Alberta resident or has a permanent establishment in Alberta for the purposes of the *Alberta Corporate Tax Act*.

Class Proceedings Act, 1992, S.O. 1992, c 6, ss. 5, 24 & 25

Certification

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

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).

Individual issues

25. (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

(a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;

(b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and

(c) with the consent of the parties, direct that the issues be determined in any other manner. 1992, c. 6, s. 25 (1).

Directions as to procedure

(2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity. 1992, c. 6, s. 25 (2).

Idem

(3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,

(a) dispense with any procedural step that it considers unnecessary; and

(b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate. 1992, c. 6, s. 25 (3).

Time limits for making claims

(4) The court shall set a reasonable time within which individual class members may make claims under this section. 1992, c. 6, s. 25 (4).

Idem

(5) A class member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court. 1992, c. 6, s. 25 (5).

Extension of time

(6) Subsection 24 (9) applies with necessary modifications to a decision whether to give leave under subsection (5). 1992, c. 6, s. 25 (6).

Determination under cl. (1)(c) deemed court order

(7) A determination under clause (1) (c) is deemed to be an order of the court. 1992, c. 6, s. 25 (7).