COURT OF APPEAL FOR ONTARIO

CITATION: Trillium Motor World Ltd. v. Cassels Brock & Blackwell LLP, 2017 ONCA 544
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Cronk, van Rensburg and Pardu JJ.A.

BETWEEN

Trillium Motor World Ltd.

Plaintiff (Respondent/
Appellant by way of cross-appeal)

and

General Motors of Canada Limited and
Cassels Brock & Blackwell LLP

Defendant (Appellant/
Respondent by way of cross-appeal)

Peter H. Griffin, Rebecca Jones and Danielle Glatt, for the appellant/respondent by way of cross-appeal Cassels Brock & Blackwell LLP

Bryan Finlay, Q.C., Marie-Andrée Vermette, Michael Statham, David Sterns, Allan D.J. Dick and Andy Seretis, for the respondent/appellant by way of cross-appeal Trillium Motor World Ltd.

Heard: January 16, 17, 18 and 19, 2017

On appeal from the judgment of Justice Thomas J. McEwen of the Superior Court of Justice, dated July 8, 2015 and March 22, 2016, with reasons reported at 2015 ONSC 3824, 30 C.B.R. (6th) 1 and 2016 ONSC 666.

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Cronk J.A.:

OVERVIEW

[1] In May 2009, Canada, like the United States and many other countries, was in the grips of the biggest global financial crisis since the Great Depression. Corporate Canada as well as countless individual Canadians were experiencing significant financial stress.

[2] General Motors Corporation in the United States ("GM") and its Canadian subsidiary, General Motors of Canada Limited ("GMCL"), were among those affected. Both companies were on the brink of bankruptcy. Their only hope was financial bailouts from the American and Canadian governments. But the governments made the bailouts conditional on acceptable restructuring plans. In GMCL's case, this meant cutting ties with hundreds of its dealerships across Canada. As matters evolved, GMCL had about two months to devise an acceptable restructuring plan and make the necessary cuts.

[3] GMCL initially proposed to contract its national dealer network of 705 dealers by about one-third (cutting 205 to 255 dealers) over five years, through attrition and consolidation of dealerships in the normal course. Later, it revised and accelerated its dealer reduction plan, calling for 280 to 310 dealers to be cut by the end of 2010. This was a dramatic proposal for a 42 percent reduction within 20 months.

[4] Not surprisingly, all sides sought the advice of legal counsel. Three of the key players reached out to the same Toronto-based law firm, Cassels Brock & Blackwell LLP ("Cassels").

[5] First, in early March 2009, GMCL's 51 Saturn automobile dealers (the "Saturn Dealers") retained Cassels to represent them after they learned that GM would be discontinuing the Saturn brand.

[6] Second, in late March 2009, Industry Canada ("Canada") retained Cassels to represent it in respect of a potential commercial financing transaction to support GMCL and Chrysler Canada, which was also experiencing financial difficulties.

[7] Third, by May 4, 2009, a group representing GMCL dealers across Canada had retained Cassels to represent the dealers in a potential GMCL restructuring or insolvency. At the time, the dealers knew that many of them would be forced out of business even if GMCL managed to stay afloat.

[8] Cassels heard the conflict alarm bells, and devised a solution: it decided that if Canada's interests and those of the dealers diverged, it would cease to act for the dealers. Cassels disclosed the Saturn dealer retainer, and later the GMCL dealer retainer, to Canada, and assured it that the firm would drop the GMCL dealers' mandate if a conflict arose.

[9] However, Cassels did not disclose the Canada retainer to the Saturn or other GMCL dealers. It did not tell them that if an adversity of interests arose between the dealers and Canada, the dealers would have to find new lawyers. Cassels' view was that any conflict was prospective, not active, and manageable, not intractable.

[10] Events unspooled rapidly over a short period in May 2009. On May 20, GMCL informed 240 dealers, including all 51 Saturn Dealers, that it would be terminating their franchises. They were offered money in exchange for full and final releases of any legal claims against GMCL. The dealers were given until May 26 to sign Wind-Down Agreements ("WDAs"), terminating their relationships and agreements with GMCL. If GMCL could not get a critical mass of dealers to sign the agreements, it would have to file for bankruptcy protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") on June 1.

[11] In the end, 202 GMCL dealers, including 42 Saturn Dealers, signed the WDAs. It was enough to satisfy the governments. Having also secured agreements with the Canadian Auto Workers' Union and a group of bondholders, GMCL was able to restructure successfully, without having to file under the *CCAA*. GM was not as fortunate. It sought bankruptcy protection in the United States on June 1, 2009.

[12] Some months later, Trillium Motor World Ltd. ("Trillium"), a GMCL dealer in Toronto, commenced class proceedings on behalf of all dealers who had signed the WDAs. Trillium became the representative plaintiff. The defendants were GMCL and Cassels. After opt-outs from the class, 181 dealers became class members. The class actions were certified and tried together over 41 days in 2014.

[13] Against GMCL, Trillium claimed that GMCL had breached both common law and statutory duties to class members in the manner in which it executed the WDAs. GMCL counterclaimed, relying on the releases in the WDAs.

[14] The trial judge dismissed both the claim and the counterclaim. Trillium's appeal and GMCL's cross-appeal are the subject of separate reasons by this court, released concurrently with this decision: *Trillium Motor World Ltd. v. General Motors of Canada Limited*, 2017 ONCA 545.

[15] Against Cassels, Trillium claimed that the firm had breached its contractual and fiduciary duties to the dealers, including its duty of loyalty, by failing to disclose the existence of the Canada retainer, among other things. Trillium asserted that the dealers' interests were adverse to Canada's from the very start: the dealers wanted to get the most money possible from GMCL for their dealerships, and were willing to act as a spoiler in the run-up to a *CCAA* filing to get the best deal they could. In contrast, as the bailout party, Canada wanted GMCL to avoid a *CCAA* filing and to pay as little as possible to the dealers under the WDAs.

[16] Trillium claimed that, with proper legal representation and advice, the dealers would have negotiated successfully with GMCL, acting collectively, for more compensation for the loss of their dealerships. However, Cassels' breaches of its obligations deprived the dealers of their only chance to negotiate, as a group, for a better deal from GMCL. Through Trillium, they sued Cassels for damages for this lost chance.

[17] Cassels denied that it had an existing retainer with the GMCL dealers in the first place; it argued that it had a "contingent" retainer that would only crystallize in the event of a *CCAA* filing – an event that never occurred. It also maintained that there was no actual conflict between the dealers and Canada; the conflict was only a "potential" one that could be prudently managed if and when it materialized.

[18] The trial judge allowed Trillium's claim. In careful and comprehensive reasons, he found there was a retainer between Cassels and the dealers, the Canada retainer gave rise to a bright line conflict or a substantial risk of conflict with the dealers' retainer and, at a minimum, Cassels had breached its duties to the dealers by failing to disclose the Canada retainer and its decision that it would not act for the dealers if their interests came into conflict with Canada's. The trial judge found that, had the dealers been properly represented and advised, they would have negotiated successfully with GMCL. He assessed their damages at $45 million. In a later supplementary ruling, he ordered that the process for calculating the damages awarded, and for identifying the number and identity of the dealers entitled to share in them, would be determined on further motion to the Superior Court, if necessary, following the final disposition of any appeal from the trial judgment.

[19] On appeal to this court, Cassels launches a full-scale attack on most of the trial judge's key findings of fact. It also raises legal issues relating to liability, the availability of an aggregate damages award, and the trial judge's damages assessment. For its part, Trillium cross-appeals the quantum of damages awarded in favour of the class at trial, arguing it should have received more and that the trial judge's supplementary ruling on damages should not be considered.

STANDARD OF REVIEW

[20] Trillium's solicitor's negligence claim against Cassels is grounded in contract and tort. As I will elaborate, the trial judge concluded that Cassels was retained by the GMCL dealers, that it breached its fiduciary and contractual duties to the dealers and that, as a result, it is liable to them for damages. On this appeal, Cassels argues that the trial judge erred, in fact and in law, in both his liability and damages holdings.

[21] Cassels primarily attacks many of the trial judge's factual findings and findings of mixed fact and law. In many instances, its argument is based on alleged errors in the trial judge's processing of the evidence. For example, Cassels argues that the trial judge failed to consider relevant evidence, reached factual conclusions in the absence of supporting evidence, or misapprehended the evidence. In some instances, Cassels alleges legal errors that it characterizes as extricable errors of law, which actually concern findings that are factual in nature.

[22] The Supreme Court has repeatedly emphasized that there is one, and only one, standard of review applicable to factual conclusions made by a trial judge – that of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 25. This standard demands strong appellate deference to a trial judge's findings of fact: see *Waxman v. Waxman* (2004), 186 O.A.C. 201

(C.A.), at para. 291, leave to appeal refused, [2004] S.C.C.A. No. 291; *IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing*, 2017 ABCA 157, at paras. 71-72. It applies, as the *Waxman* court noted, at para. 300, to all factual findings "whether based on credibility assessments, the weighing of competing evidence, expert evidence, or the drawing of inference from primary facts". An appellate court is not permitted to retry any aspect of a case.

[23] The decision of the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 governs the approach to review of the trial judge's interpretation of the retainer contract between the parties. *Sattva* concerns the standard of review for questions of contractual interpretation. It holds, at para. 50, that "[c]ontractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix." Accordingly, questions of contractual interpretation are generally reviewable on the deferential standard of palpable and overriding error: *Sattva*, at paras. 50-52. See also, *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23; *Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc.*, 2017 ONCA 293; and *MacDonald v. Chicago Title Insurance Company of Canada*, 2015 ONCA 842, 127 O.R. (3d) 663, leave to appeal refused, [2016] S.C.C.A. No. 39.

[24] *Sattva* also holds that, rarely, it may be possible to identify an extricable question of law from within what is initially characterized as a question of mixed fact and law. In those exceptional cases, the interpretation of a disputed contract will be reviewable on the correctness standard: *Sattva*, at paras. 53-55.

[25] However, *Sattva* warns that reviewing courts should be slow to identify extricable questions of law in contractual interpretation disputes, given that "the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific": *Sattva*, at paras. 54-55.

[26] My analysis of the issues on appeal proceeds with these settled standard of review principles squarely at the forefront.

FACTS

[27] The parties, for differing purposes, place particular emphasis on the factual background to the matters at issue. And, as I have said, many of Cassels' grounds of appeal challenge findings of fact or mixed fact and law. It is therefore necessary to review the pertinent background facts in some detail. Where other facts are relevant, they will be addressed in the context of the issues to which they relate.

[28] As the following summary illustrates, this litigation arose out of fast-moving and rapidly-deteriorating conditions affecting GMCL and its dealer network in the

spring of 2009. The role that Cassels played – or did not play – as the crisis unfolded was central to Trillium's claims at trial.

(1) GMCL Dealer Network

[29] In late 2008, GMCL had an extensive national dealer network in Canada consisting of 705 franchised dealers, including 51 Saturn Dealers.

[30] GMCL communicated with its dealers in various ways, including through: i) the GMCL Dealer Communications Team, a consultative board comprised of GMCL representatives and dealers from across Canada; ii) the General Motors Dealers' Association, which provided a "voice" for GMCL dealers; iii) the Canadian Automobile Dealers Association ("CADA"), a not-for-profit organization representing more than 3,000 dealers from various automobile manufacturers in Canada; and iv) video-linked, televised broadcasts known as "Highly Interactive Distance Learning Broadcasts" ("HIDLs").

[31] CADA was a long-time Cassels' client. Its Director of Industry Relations and General Counsel, Tim Ryan, and Cassels' partner Peter Harris had a lengthy professional relationship.

(2) Looming Threat of Bankruptcy

[32] By the close of 2008, both GM and GMCL were insolvent or on the eve of insolvency. GMCL took a number of steps to deal with this potential calamity.

[33] First, and critically, it proposed the reduction of its dealer network, described above, in a revised bailout proposal submitted to the Ontario and federal governments (the "Canadian Governments") on February 20, 2009. This plan contemplated a reduction of about one-third of GMCL's dealers, by 2014.

[34] Second, it informed the Saturn Dealers that it would discontinue the Saturn brand at the end of the 2011 model year, but it was hopeful that the brand could be sold to a third party. Faced with this adverse news, the Saturn Dealers formed an action group.

[35] Third, GMCL hired Ernst & Young Inc., as financial advisors, to begin preparations for a filing under the *CCAA.* It is undisputed that a *CCAA* filing would have had serious financial consequences not only for GMCL but, also, for many others associated with or dependent on it. The dealers' position was particularly vulnerable. On a *CCAA* filing, they would rank as unsecured creditors with little, if any, prospect for recovery in the bankruptcy or restructuring. All of GM, GMCL and the involved governments wished to avoid a GMCL *CCAA* filing.

(3) March 2009 Events – Cassels Enters the Picture

[36] By March 2009, GMCL faced a tsunami of problems. In addition to the difficulties posed by an overextended dealer network, it needed to address claims by the Canadian Auto Workers (the "CAW"), various bondholders, and its

own retirees, if it was to avoid bankruptcy. GMCL therefore embarked on negotiations with the CAW in an effort to obtain concessions from the union. It also attempted to restructure legacy costs with its retirees and to resolve issues with its suppliers, who faced liquidity problems of their own. While these efforts were ongoing, a group of hedge funds in the United States (the "Bondholders") sued GM, GMCL and some of their executives in Nova Scotia, alleging a series of wrongful inter-corporate transfers said to be valued at more than $570 million.

[37] These stakeholders – the CAW, the Bondholders and the dealers – were the "three-legged stool" GMCL had to deal with to avoid a *CCAA* filing.

[38] GMCL's outlook continued to go from bad to worse when, at the end of March 2009, the United States and Canadian Governments rejected GM's and GMCL's restructuring plans and called for "tougher measures" (United States government) and "further fundamental changes" (Canadian Governments) in order to secure bailout funds. They granted the beleaguered companies a 60-day extension, until June 1, 2009, to submit revised restructuring plans that met these goals. If this extended deadline was missed, or if unsatisfactory revised plans were delivered, bailout funds would not be forthcoming and GM and GMCL could be liquidated.

[39] By this time, it was clear that neither GM nor GMCL would survive without government financial assistance. In a March 30 HIDL, Marc Comeau, GMCL's

Vice-President of Sales, Service and Marketing, informed dealers that the governments had rejected GM's and GMCL's restructuring plans and suggested, in what the trial judge found soon became GMCL's mantra, that "deeper and faster" changes were required.

(a) Saturn Retainer

[40] In March 2009, Ryan of CADA assisted the Saturn Dealers in retaining Cassels to provide legal advice about GMCL's potential termination of their dealerships (the "Saturn Retainer") and a steering committee of Saturn Dealers was established to provide instructions to counsel. Each Saturn dealer who wished to engage counsel signed a separate retainer agreement with Cassels.

[41] The Saturn Retainer was Cassels' first specific client engagement in matters related to GMCL's and GM's financial difficulties. In April, a new CADA subfile was opened at the firm, concerning advice to be provided to CADA about GMCL's and Chrysler Canada's financial difficulties.

(b) Canada Retainer

[42] At the end of March 2009, Cassels accepted a second key retainer. It agreed to represent Canada concerning a potential commercial financing transaction to support GMCL and Chrysler Canada (the "Canada Retainer"), effective March 30, 2009.

(4) April 2009 Events

[43] In early April 2009, the Canadian Governments cast GMCL a short lifeline, providing it with bridge financing to allow it to remain in business while working on a new restructuring proposal. By mid-April, Comeau had informed the dealers of the acceleration of GMCL's dealer network restructuring and the June 1 deadline imposed by the governments for the submission of revised restructuring plans by GM and GMCL.

(a) GMCL Dealer Retainer and the "Proviso"

[44] On or about April 15, 2009, Ryan contacted Cassels again – this time about representation by Cassels of the GMCL dealers in respect of a potential *CCAA* filing by GMCL. Independent of Ryan's call, a group of dealers formed a dealer steering committee (the "DSC"), to represent all GMCL dealers in Canada "should GM file for bankruptcy protection".

[45] These developments prompted an important internal meeting at Cassels. On April 21, 2009, several Cassels lawyers, including Harris and two of the lawyers involved with the Canada Retainer, met with the firm's managing partner, Mark Young, to discuss whether the firm could accept the retainer for GMCL dealers proposed by Ryan. The group concluded that accepting the proposed dealer engagement would not create a conflict with the firm's existing Canada Retainer. Nonetheless, they decided that a precautionary ethical wall should be

erected within the firm and that each client should be informed about the firm's retainer by the other.

[46] Later the same day, Harris emailed and spoke with Ryan. What Harris told Ryan is significant. The trial judge found, at para. 390, that Harris disclosed the Canada Retainer to Ryan and also informed him that Cassels "could not take on the government, if such a circumstance arose, in any *CCAA* proceeding".

[47] At trial, Harris and Ryan both testified that this "proviso" on Cassels' ability to act for the dealers was acceptable to Ryan and CADA. However, at no point did Harris or anyone else at Cassels disclose the Canada Retainer or this proviso to the GMCL dealers, whether through the DSC or otherwise. Neither did Ryan.

(b) Pontiac Announcement and Revised GMCL Restructuring Plan

[48] Six days later, on April 27, 2009, GM officially announced an anticipated, additional piece of bad news: it would be discontinuing its Pontiac brand of cars. This was a seismic development: Pontiac sales represented approximately 26 percent of GMCL's sales in Canada.

[49] On the same day, GMCL announced its own revised restructuring plan. In its press release regarding the revised plan, GMCL revealed that it intended to expedite cuts to its dealer network. It was now proposing to reduce the number of dealers from 705 to between 395 to 425 dealers by the end of 2010 – a reduction of approximately 42 percent within 20 months.

[50] The trial judge found that, following this announcement, "it would have been obvious to all involved that a large percentage of the dealers would find themselves on the chopping block" in the near future (at para. 65).

(c) Dealers Get Organized

[51] Events continued to unfold rapidly. On April 28, CADA sent an email to GMCL dealers confirming that it was "busy putting in place a contingency plan in order to assist its [GM] dealer members in the event that [GMCL] seek[s] creditor protection under Canada's [*CCAA*]".

[52] The next day, at Ryan's request, Harris provided CADA with a memorandum entitled "Provision of Legal Services to the GM Dealers' Group" (the "Legal Services Memorandum"), in which he described Cassels' history, service guarantee, automotive clients, and relevant expertise and practice experience. The Legal Services Memorandum identified the Cassels lawyers proposed for involvement with the dealers and disclosed both Cassels' 30-year relationship with CADA and the existing Saturn Retainer.

[53] On April 30, the first conference call among CADA, the DSC, and others took place. Harris and David Ward of Cassels were on the call. The participants discussed, among other things, the mandate of the DSC and the creation of a trust fund to be set up by CADA (described below). The minutes of the April 30

call describe a scheduled May 7, 2009 national GMCL dealer conference call, in these terms:

> [I]t would be a listen only call for participants … to inform [GMCL] dealers about the formation of a national General Motors dealer group to ensure that [GMCL] dealer interests are represented should [GMCL] file for bankruptcy protection in Canada in the near future.

[54] Thus, by the end of April, Cassels had three existing retainers regarding GMCL and GM matters – its continuing CADA retainer, the Saturn Retainer, and the Canada Retainer – and one proposed retainer by the GMCL dealers. The scope of the latter is a central issue on this appeal.

(5) May 2009 Events

[55] By early May 2009, GMCL was preparing a plan for the formal wind-down of some of its dealerships, including a process for identifying target dealers who would receive WDAs. The trial judge found that the WDA proposal was intended to terminate the dealers' business relationships and agreements with GMCL and eliminate GMCL's estimated exposure to dealer claims resulting from the restructuring, valued by GMCL at between $300 - $500 million, while providing the dealers with what GMCL considered to be fair treatment in the circumstances.

[56] Of the many events that transpired in May, the following are especially relevant to the issues before this court.

(a) May 4 Memorandum

[57] On May 4, 2009, the DSC sent a memorandum, on CADA letterhead, to all GMCL dealers announcing the formation of the DSC and describing its purpose (the "May 4 Memorandum"). The parties interpret the May 4 Memorandum differently and each relies on it, together with other evidence, to support its characterization of the formation and scope of Cassels' retainer by the dealers.

[58] The May 4 Memorandum indicates that the DSC was created to work with CADA for the purpose of "organiz[ing] [GMCL] dealers into a national [GM] dealer group to ensure that [GMCL] dealer interests are represented should [GMCL] file for bankruptcy protection in Canada in the near future". A covering email from Ryan to all GMCL dealers that accompanied the May 4 Memorandum contains virtually identical language. Importantly, the May 4 Memorandum also states:

> The role of the [DSC] … is to provide policy direction and instructions to legal counsel who will represent the [GMCL] dealers in any bankruptcy filing. We have retained the Toronto law firm of Cassels Brock and Blackwell to handle our interests. [Emphasis added.]

[59] In the May 4 Memorandum, the DSC sought to have each dealer sign a participation form and make a contribution to a "trust fund" on behalf of the GMCL dealer group, to be held by CADA, "to pay for professional services associated in representing you". The memorandum confirms CADA had already contributed $150,000 "to provide administrative and logistical support" and "to

assist with the initial legal and other professional services that may be necessary in preparation for a bankruptcy filing by [GMCL]".

[60] The May 4 Memorandum also outlines various reasons why dealers should participate in the proposed national dealer group, including the following:

> 2. **Reasons to Participate:**
>
> - **General Motors Dealers Have Many Issues in Common**: All [GMCL] dealers share many of the same concerns that will arise out of a [GMCL] restructuring. These include issues such as potential termination of the existing dealership agreements, changes to your relationship with [GMCL], responsibility for and payment of warranty claims, holdbacks and incentive payments, and floor plan financing. It is more effective and efficient to have these common issues addressed by one counsel representing the voice of all [GMCL] dealers.
>
> - **Economies of Scale:** Legal representation in a complex restructuring or insolvency proceeding is expensive. The costs of retaining qualified counsel are considerably lower when you share a single, unified retainer rather than retaining counsel on your own or in a small, regional group.
>
> - **Power in Numbers:** By joining together as one large group, you show [GMCL] and other stakeholders that the [GMCL] dealers are united in their position, which forces those other parties to involve your counsel at the bargaining table and respect your interests.
>
> - **Avoid Getting Left Out:** Cassels Brock and Blackwell can only represent the interests of the [GMCL] dealers who retain them. If you

> are not a part of the client group, they do not represent you and you will not have a voice. [Bold in original; underlining added.]

[61] Eventually, by May 20, approximately 400 GMCL dealers would return participation forms and trust funds of approximately $1 million would be raised in response to the May 4 Memorandum. The trial judge held that Cassels was liable to those dealers who returned a participation form and/or sent funds to CADA in response to the DSC request (the "Participation Form Dealers") and, additionally, the Saturn Dealers.

(b) Cassels' Dealer File

[62] On May 4, 2009, Cassels opened a new file regarding the firm's engagement by the dealers. This precipitated two significant events. First, after learning of the file opening, Bruce Leonard, a Cassels partner involved with the Canada Retainer, emailed two of his colleagues on the Canada Retainer team, sounding an alert about potential conflicts between the Canada Retainer and the new mandate from the GMCL dealers. I will return to the subject matter of these important emails later in these reasons.

[63] The second significant event involved Cassels' circulation throughout the firm, on May 7, of an ethical wall memorandum regarding the GMCL dealer file (the "Ethical Wall Memorandum"). It states in part that the firm had "accepted a retainer from the GM Dealers Action Group…through [CADA] regarding potential claims against [GMCL] with respect to the potential bankruptcy of GM and the

potential restructuring of the GM dealer network". I will have more to say later about the significance of this memorandum.

(c) May 7 Dealer Conference Call

[64] The national GMCL dealer conference call announced in the May 4 Memorandum was held on May 7. Harris and David Ward of Cassels participated in the call. During the call, the Cassels lawyers discussed, among other things: i) whether GM could unilaterally cancel contracts under the *CCAA*; ii) whether and how GM could sell off assets; and iii) the likelihood of a GM protective bankruptcy filing in the United States and a *CCAA* filing by GMCL. They also urged the dealers on the call to organize themselves for the latter potential development.

[65] At trial, Cassels argued the comments by the Cassels lawyers on the call were simply informational, that is, the Cassels lawyers provided general bankruptcy and insolvency-related information only, and did not furnish legal advice to the dealers. The trial judge disagreed. He found that legal advice was provided on the call for the benefit of the dealers. However, and in any event, he also found that it was unnecessary to parse the distinction between legal advice and legal information. The important point was that the May 7 call was an indicium of a solicitor-client relationship between Cassels and the dealers.

(d) Delivery of WDAs

[66] On May 14, an important meeting with representatives of the American and Canadian Governments took place in Washington, D.C., as a result of which it became clear that bailout funds for GMCL from the Canadian Governments would be forthcoming only if it effectively addressed its "three-legged stool", that is, if it successfully resolved the claims of its dealers, the Bondholders and the CAW. Further, while all governments wished to avoid a GMCL *CCAA* filing, this, in their view, had to be accomplished at a reasonable cost.

[67] Also on May 14, GM informed approximately 1,100 of its own dealers in the United States that their agreements with GM would not be renewed.

[68] The next day, GM approved GMCL's proposal to deliver WDAs to 290 GMCL dealers. It also approved a $218 million budget requested by GMCL for this purpose.

[69] Comeau conducted another HIDL on May 15. During the broadcast, he told the dealers about the possibility of a court-supervised *CCAA* restructuring of GMCL if the company could not reach agreements with all its key stakeholders, or if the Canadian Governments did not approve its revised restructuring plan. He also said that GMCL would be identifying dealers with whom its relationship would end and that it hoped to roll out its restructuring plan by the end of May or the beginning of June.

[70] The trial judge found, at para. 84, that the dealers listening to this broadcast "should and likely did understand that a 42 percent reduction [in GMCL's dealer network] could not be achieved through normal attrition and consolidation". In other words, while the dealers were not aware that WDAs specifically were on the horizon, they knew that they were in an intensely precarious, and rapidly changing, position.

[71] Comeau also called Richard Gauthier, the President of CADA, informing him that WDAs would be offered to a group of dealers, and requesting that the DSC play a role with respect to the intended offers. After speaking with the DSC, CADA informed Comeau that neither it nor the DSC would become involved with the WDAs. The trial judge accepted, at para. 85, that the DSC viewed the WDAs as falling outside its mandate to address "issues flowing from a possible GM bankruptcy or GMCL *CCAA* filing" and that it took the position "it had no role to play with respect to any proposal being developed for the dealers whose dealerships would be discontinued".

[72] Cassels places considerable reliance on the DSC's decision to not become involved with the WDAs and on its corresponding instructions to Cassels to the same effect. Notably, Cassels lawyer Glenn Zakaib was on the CADA call with the DSC. In a subsequent email forwarded to Zakaib, Ryan explained that the DSC advised GMCL that the DSC had no role to play in GMCL's proposed offers to dealers outside a *CCAA* filing. In a responding email, Zakaib said he agreed

with this decision and that "dealings with terminated dealers will require a new retainer and a new committee".

[73] On May 19, GMCL completed preparation of the WDAs and Comeau informed the dealers in an HIDL that some of them would receive WDAs on the following day. On May 20, representatives of CADA, Cassels and the DSC met. The DSC confirmed, again, that it would not play a role regarding the WDAs.

[74] GMCL delivered WDAs and Notices of Non-Renewal to 240 dealers, including the Saturn Dealers, on May 20, 2009. The Notices indicated that GMCL would not renew the dealers' respective agreements with GMCL when they expired on October 30, 2010.

[75] The terms of the WDAs were not uniform. The Saturn Dealers, for example, received WDAs providing them with the option of either accepting the payment offered in the applicable WDA and terminating their relationship with GMCL, or electing to defer receipt of the payment in the hope that the Saturn brand would be purchased by a third party and continue to operate. In addition, different forms of WDAs were prepared for single and dual operators of GMCL dealerships and for Saab/Saturn automobile dealers.

[76] The offers in the WDAs were conditional on the acceptance by all 240 dealers (the "Acceptance Threshold Condition"). GMCL, however, reserved its

right to waive this condition. The dealers were given six days, until May 26, within which to decide whether to accept the offers and sign the WDAs.

(e) Subsequent Events

[77] Three important events occurred after delivery of the WDAs. First, on May 22, 2009, CADA sent a memorandum to the GMCL dealers, stating:

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

[78] Second, GMCL delivered the WDAs on a "take it or leave it basis". On May 22, it told the dealers that the WDAs were non-negotiable.

[79] Third, CADA held another call-in dealer conference call on May 24, 2009. Gauthier and Ryan of CADA were both on the call, as were Harris and Zakaib of Cassels. The day before the conference call, Zakaib had also participated in a call with CADA representatives to prepare for the May 24 conference call.

[80] The full details of what was said by the Cassels lawyers on the May 24 conference call are disputed. However, the following appears to be uncontested: i) GMCL's offers and the WDAs were discussed on the call; ii) Gauthier reiterated that the trust funds then held by CADA could be used only for the purpose of representing the dealers in court in a *CCAA* proceeding; iii) the dealers were told that the WDAs were a "take it or leave it" proposition; iv) they were also told that

the Cassels lawyers would not make any recommendations regarding the offers and the WDAs; and v) the dealers were again urged, as they had been in CADA's May 22 memorandum, to obtain independent legal advice.

[81] The record does not establish the number of dealers from across the country who called in for the May 24 conference call (the "Call Dealers"). However, based on the trial judge's reasons, it appears that, at trial, the parties thought approximately 110 dealers were involved. It is unclear how many of the Call Dealers are also Participation Form Dealers. This distinction is important because, ultimately, the trial judge held Cassels had only been retained by – and, thus, only owed duties to – the Participation Form Dealers.

[82] On May 28, 2009, after the WDA sign-back deadline, CADA announced its proposal, should GMCL proceed with a *CCAA* filing, that Cassels would act for the non-continuing dealers (i.e. those who had received WDAs), while a different law firm would act for the continuing dealers.

[83] By May 29, 2009, almost 85 percent of the dealers (202 of 240) who had received WDAs had accepted GMCL's offers and signed the WDAs, thereby releasing GMCL from all claims. On May 30, GMCL waived the Acceptance Threshold Condition. In the end, GMCL paid $126 million to the 202 dealers who accepted its offers and the WDAs.

[84] Cassels did not undertake any negotiations regarding the WDAs, or alternatives to them, with GMCL on behalf of the dealers. Further, with the exception of the Saturn Dealers (as I next explain), Cassels did not engage in any discussions with GMCL or, indeed, with any dealers, about the possibility of attempting to negotiate improved offers from GMCL under the WDAs or otherwise, or the possibility of seeking an extension of time for the dealers' consideration of the WDAs.

[85] In contrast, Cassels lawyers participated on May 22 in a conference call with the Saturn Dealers to discuss their WDAs and options. Subsequently, CADA approached GMCL to seek changes to the options outlined in the Saturn WDAs, described above. This effort failed when GMCL refused to vary the terms of the Saturn WDAs. Eventually, all 51 Saturn Dealers elected to terminate their relationships with GMCL and 42 Saturn Dealers chose to participate in the class proceeding.

(f) GMCL Averts Bankruptcy

[86] Concurrent with these events, GMCL reached and subsequently ratified settlements with its retirees and the CAW. Further, on June 1, after what can only be described as around-the-clock, intense negotiations and with a GMCL *CCAA* filing prepared and ready to be delivered, GMCL also concluded a settlement with its Bondholders, obtained the Canadian Governments' approval

to the settlement, and narrowly avoided a bankruptcy filing. GM was not as successful. On June 1, it was forced to file for bankruptcy protection under Chapter 11 of the *United States Bankruptcy Code*.

[87] By the end of June 2009, GMCL had confirmed that it would not be filing for bankruptcy and CADA had refunded the monies it held in trust to the contributing GMCL dealers. For its part, Trillium had sold its inventory and ceased operating as a GMCL dealer. Its sales and service agreement with GMCL was terminated effective July 2, 2009.

[88] GMCL made all required payments under the WDAs by December 2009. Two months later, in mid-February 2010, Trillium commenced class proceedings against GM and Cassels on behalf of all dealers who had signed WDAs.

[89] In March 2011, Strathy J. of the Superior Court of Justice (as he then was), certified Trillium's action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*"): *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2011 ONSC 1300, 7 C.P.C. (7th) 388 (the "Certification Decision"). The class is defined under the Certification Decision as "all corporations in Canada that signed a [WDA] with the defendant [GMCL] in or after May 2009" (the "Class"). After opt-outs, 181 dealers became class members. Of these, 42 class members are Saturn Dealers.

[90] The Certification Decision certifies four issues concerning Cassels (lettered to reflect that they followed the common issues certified with respect to GMCL):

> (j) Did [Cassels] owe contractual duties to some or all of the Class Members and, if so, did Cassels breach those duties?
>
> (k) Did Cassels owe fiduciary duties as lawyers to some or all of the Class Members and, if so, did Cassels breach those duties?
>
> (l) Did Cassels owe duties of care to some or all of the Class Members and, if so, did Cassels breach those duties?
>
> (m) What is the amount of pre-judgment and post-judgment interest applicable to any damages awarded?

[91] On March 26, 2012, the Divisional Court dismissed Cassels' appeal from the Certification Decision: *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2012 ONSC 1443, 37 C.P.C. (7th) 30, leave to appeal to OCA refused, (M41228, August 24, 2012).

TRIAL DECISION

[92] The common issues trial was lengthy and intensely fought. The parties called 25 witnesses, including eight experts. Hundreds of documents were admitted into evidence and the parties filed approximately 1,500 pages of written closing submissions.

[93] The trial judge's reasons are also lengthy, and comprehensive (143 single-spaced pages, plus appendices). After a detailed review of the evidentiary

record, the trial judge made the following key findings regarding Trillium's liability claims against Cassels:

- By May 4, 2009, the dealers, including the class members, had retained Cassels "to protect their interests in any complex restructuring of the dealer network and to represent them in any GMCL *CCAA* proceedings" (the "Dealer Retainer") (para. 6);

- The scope of the Dealer Retainer was not confined to representation in a GMCL *CCAA* proceeding, as Cassels maintained. Rather, it extended to pre-filing advice on issues relating to the restructuring of the dealer network, including advice about the WDAs (para. 480);

- Cassels breached its contractual and fiduciary duties to the class members by accepting the Dealer Retainer in the face of a known conflict arising from its existing Canada Retainer and by continuing to act on both retainers notwithstanding this conflict (para. 6); and

- Cassels was negligent and breached its contractual duties to the class members by:

  i) agreeing to act for the GMCL dealers notwithstanding its pre-existing Canada Retainer;

  ii) failing to advise the DSC that, after the WDAs were delivered, it was in a position of conflict by acting for two groups of dealers who it knew or ought to have known had divergent and adverse interests, that is, the dealers who had received and accepted the WDAs and those who had not; and

  iii) maintaining a "wait and see approach" long past its appropriateness, instead of

> preparing for a *CCAA* filing or restructuring (paras. 7 and 533).

[94] With respect to damages, the trial judge held:

> - As a result of the breaches described above, the class members lost the chance to negotiate with GMCL for wind-down payments in excess of the compensation offered to them under the WDAs, the latter of which "represented a fraction of the value of their dealerships" (para. 8);
>
> - There was a 55 percent chance that, if negotiations had taken place, GMCL would have paid $218 million to the dealers instead of the $126 million it actually paid (para. 610); and
>
> - Applying this lost chance (55 percent) to the $92 million difference between the amount of post-negotiation compensation that the trial judge found would have been paid by GMCL and the compensation it actually paid ($218 million - $126 million), the class members suffered damages for lost opportunity in the amount of $50 million. After accounting for those dealers who opted out of the Class, these damages should be reduced to the sum of $45 million (para. 611).

[95] In January 2016, after the release of the trial decision, the parties attended before the trial judge to settle the terms of the judgment. At that attendance, it emerged that the trial judge may have misunderstood the composition of the Class. He had assumed that all 181 class members were also Participation Form Dealers, and thus Cassels' clients; in fact, some of the class members may have been Call Dealers who listened in on the May 24 conference call but did not sign a participation form or send in money to the DSC.

[96] In the result, by supplementary reasons dated March 22, 2016, the trial judge directed that the formal judgment provide that the damages awarded ($45 million) may be reduced on further motion to the Superior Court, if necessary, following the final disposition of any appeal from the trial judgment, to settle the process for determining the number and identity of the dealers entitled to share in that award and the calculation of those damages.

ISSUES

[97] Cassels challenges virtually every substantive aspect of the trial judge's liability and damages holdings. Because of the number of issues raised and, in some cases, the overlap between issues, these reasons are lengthy and sometimes repetitive. In general terms, Cassels submits that the trial judge erred:

(1) in his findings concerning the scope of the Dealer Retainer;

(2) by finding that Cassels breached its duties to the class members;

(3) in his treatment of the Saturn Dealers' claims;

(4) by inferring causation;

(5) by awarding aggregate damages; and

(6) in his quantification of damages.

[98] As I will explain, Cassels' primary focus is on challenging the trial judge's findings about the scope of the Dealer Retainer. It submits that if the trial judge

erred in finding that the Dealer Retainer was active throughout May 2009 – and not contingent on a prospective *CCAA* filing, as Cassels maintains – this error is dispositive of the entire appeal.

[99] Trillium cross-appeals from the quantum of the trial judge's damages award. It contends that, properly quantified, the value of the dealers' lost chance is $77.3 million, rather than $45 million as found by the trial judge.

ANALYSIS

ISSUE 1: DID THE TRIAL JUDGE ERR IN FINDING AN OPERATIVE RETAINER BETWEEN TRILLIUM AND CASSELS?

(1) Introduction

[100] Cassels' factum puts both the fact and scope of the Dealer Retainer in issue. However, at the appeal hearing, Cassels narrowed its position, acknowledging that, by May 4, 2009, a retainer did exist between Cassels and the GMCL dealers. But, Cassels maintains that the scope of the retainer was confined to representing the dealers in a *CCAA* filing that never materialized and did not extend to representation and advice on pre-*CCAA* filing matters, including the WDAs. Cassels says there was no operative retainer, no possible breach, and no liability to any of the dealers. This, it says, is sufficient to allow the appeal in its favour.

[101] Cassels' acceptance on appeal of the existence of the Dealer Retainer was prudent. As the trial judge indicated, at paras. 411 and 416, the determination whether a solicitor-client relationship exists is a question of fact and requires a "fact-driven and multifaceted" inquiry. The trial judge found that the documentary record and the conference calls held in late April and May 2009, which I recounted above, established several traditional indicia of a solicitor-client relationship between Cassels and the GMCL dealers. As Cassels effectively concedes, there is no basis on which to conclude that this threshold finding is tainted by palpable and overriding error.

[102] Accordingly, the critical question is whether the trial judge erred in his interpretation of the scope of the Dealer Retainer. For the reasons that follow, I conclude that he did not.

(2) Trial Judge's Findings

[103] The trial judge made the following specific findings regarding the scope of the Dealer Retainer:

- The scope of the retainer was ambiguous. Cassels had failed to discharge its obligation to clearly delineate the scope of the retainer and to document its terms of engagement by the dealers (para. 472);
- In accordance with the governing legal principles, the ambiguity in the retainer must be resolved against Cassels (para. 473);

- The DSC's view of its mandate, and its associated instructions to Cassels to not get involved with the WDAs, was only one of many factors to be considered in determining the scope of the Dealer Retainer.

  By May 15, 2009, the DSC was in a position of conflict – it was speaking for two dealer groups with divergent interests (those who had received WDAs and those who had not). Consequently, the DSC's instructions to Cassels were not dispositive of the scope of the Dealer Retainer (paras. 473-74);

- Even with the ambiguity in the Dealer Retainer, the documentary evidence, in particular: i) the Legal Services Memorandum; ii) the Ethical Wall Memorandum, and iii) especially, the May 4 Memorandum, as well as Harris' and Zakaib's testimony, all supported Trillium's claim that the Dealer Retainer was not "limited to steps in commenced *CCAA* proceedings" (para. 475);

- "Only an unreasonable micro-dissection of the language of the May 4 [Memorandum]" could support Cassels' contention that the Dealer Retainer extended only to representation in commenced *CCAA* proceedings (para. 475); and

- Contrary to Cassels' submission, the evidence of GMCL dealers Hurdman and Turpin, while not always consistent and worthy of only limited weight, did not support Cassels' narrow interpretation of the Dealer Retainer (paras. 476-79).

[104] The trial judge summarized his conclusions about the scope of the Dealer Retainer, at paras. 471 and 480 of his reasons, in this fashion:

> I find that the scope of the retainer was not strictly limited to representation in a possible *CCAA* proceeding. The retainer included pre-filing advice on

> issues relating to the restructuring of the dealer network. … Of course, Cassels was not obligated to provide advice on every aspect of the GMCL dealers' affairs. However, the most important matter in question – namely, the WDAs – ultimately fell squarely within the purview of "complex restructuring" of the GMCL dealer network. Further, while Cassels contested whether the retainer included such restructuring activities, it never suggested that the WDAs were not a pre-filing restructuring event. In my opinion, Cassels' retainer included advice about the WDAs.
>
> ….
>
> I find that there was a retainer between Cassels and the GMCL dealers and that its scope was not limited to representation related exclusively to a *CCAA* proceeding. Given the nature of the common issues certified against Cassels, it is unnecessary to specify the precise scope of the retainer. Nevertheless, it is clear that to the extent that the retainer included "complex restructuring" of the dealer network, Cassels was obligated to provide legal services to the dealers – be it advice or representation – with respect to the Notices of Non-Renewal and the WDAs.

(3) Cassels' Position

[105] As I have said, Cassels mounts an all-out attack on these central findings. Its overarching submission is that CADA, the DSC, the dealers and Cassels itself contemplated a "conditional" group retainer in which Cassels would act for all the GMCL dealers only in the event of a GMCL *CCAA* filing. Cassels' counsel put it this way in oral argument: "There was a present retainer to do things in the future – nothing was to be done under it unless there was a [*CCAA*] filing." Cassels

also renews its claim, advanced at trial, that all the relevant evidence "overwhelmingly" demonstrates this "conditional" retainer.

[106] Cassels further argues that the trial judge erred:

> (1) by failing to define the scope of the Dealer Retainer;
>
> (2) in several respects, in his interpretation of the May 4 Memorandum;
>
> (3) by applying the law of limited retainers and reversing the burden of proof; and
>
> (4) in his treatment of the witnesses' evidence about the scope of the Dealer Retainer.

[107] For the reasons that follow, I disagree. In my opinion, Cassels has not identified a palpable and overriding error or an extricable error of law concerning the trial judge's findings on this central issue.

(4) Discussion

(a) Defining Scope of Dealer Retainer

[108] I begin with the standard of review. This court has confirmed that "the nature and scope of a solicitor's retainer is a factual question on which the findings of the trial judge are entitled to great deference": *Fasken Campbell Godfrey v. Seven-Up Canada Inc.* (2000), 47 O.R. (3d) 15, at para. 40, leave to appeal refused, [2000] S.C.C.A. No. 143, quoting *Woodglen & Co. v. Owens* (1999), 126 O.A.C. 103 (C.A.), at para. 12. Accordingly, Cassels faces a steep

hurdle in attempting to displace the trial judge's findings about the scope of the Dealer Retainer.

[109] Turning to the merits, Cassels' argument that the trial judge erred in law by failing to define the actual scope of the Dealer Retainer arises from the trial judge's statement, at para. 480, quoted above: "Given the nature of the common issues certified against Cassels, it is unnecessary to specify the precise scope of the retainer." With respect, this argument focuses on one isolated sentence in one paragraph of the trial judge's lengthy reasons and, in so doing, distorts his reasoning and his findings regarding the Dealer Retainer.

[110] The trial judge's impugned comment must be read in the light of his entire reasons regarding the Dealer Retainer. He began his analysis of the Dealer Retainer and its scope by stating, at para. 377:

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

[111] The trial judge then devoted 23 paragraphs of his reasons to the retainer issue, including 19 paragraphs expressly on the topic, "What was the scope of the retainer?" Having done so, he found there was a retainer between Cassels and the GMCL dealers and that "its scope was not limited to representation

related exclusively to a *CCAA* proceeding" (at para. 480). It is in this context, and in view of the certified common issues regarding Cassels, that the trial judge concluded: "[I]t is unnecessary to specify the precise scope of the retainer."

[112] I see no basis on which to fault the trial judge for this conclusion in the circumstances of this case. Common issues (j) (breach of contract) and (k) (breach of fiduciary duty) obliged the trial judge to determine if Cassels owed contractual or fiduciary duties to some or all of the class members and, if so, whether it had breached those duties. This determination rested, in the first instance, on whether a retainer between Cassels and the dealers existed and, if so, on the nature of the retainer. It did not require that the precise contours of any retainer found to exist be defined with exactitude. Rather, it required an examination of the essential subject matter of the contract between the parties in order to then assess whether the contract had been breached.

[113] And that is the inquiry the trial judge undertook. When his reasons are read in context, they confirm that he came to grips with, and adequately articulated, the essential subject matter of the contract between the parties. He concluded that, <u>at a minimum</u>, the Dealer Retainer extended to advice or representation concerning pre-*CCAA* filing matters, including the WDAs. Indeed, he said as much, at para. 475:

> [E]ven with [the ambiguity in the May 4 Memorandum that he found existed], it is clear that, <u>at the least</u>, the

> scope of the retainer included pre-filing restructuring of the nature of the WDAs. [Emphasis added.]

[114] He then elaborated, at para. 480:

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

[115] While Cassels challenges these findings on other grounds, I do not think it fairly can be said that the trial judge failed to identify the essential nature of the Dealer Retainer, or that his findings concerning it were insufficient to answer the certified common issues. His definition of what the contract included, at a minimum, resolved the dispute between the parties concerning the ambit of the contract. No further exposition of the scope of the Dealer Retainer was necessary in the circumstances to answer common issues (j) and (k).

(b) Trial Judge's Interpretation of May 4 Memorandum

[116] Cassels next argues that the trial judge erred, in fact and in law, in his interpretation of the May 4 Memorandum. Specifically, it submits that, in rejecting the alleged contingent nature of the Dealer Retainer, the trial judge erred by:

> (1) failing to carefully scrutinize the language of the May 4 Memorandum;
>
> (2) finding that the scope of the Dealer Retainer was ambiguous;

(3) focusing on what the May 4 Memorandum "excluded", rather than on what it "included";

(4) failing to take account of the circumstances surrounding the formation of the contract between the parties;

(5) applying the law of limited retainers and reversing the burden of proof;

(6) failing to consider evidence of relevant post-May 4, 2009 events; and

(7) misapprehending the evidence of relevant witnesses about the Dealer Retainer.

I will consider these arguments in turn.

(i) Failing to scrutinize language of May 4 Memorandum

[117] I do not accept Cassels' contention that the trial judge failed to carefully scrutinize the May 4 Memorandum. In my view, this argument is belied by the trial judge's reasons.

[118] To begin, it is important to underscore that Cassels' challenge to the trial judge's interpretation of the May 4 Memorandum proceeds on the premise that this memorandum, and it alone, establishes the retainer between Cassels and the GMCL dealers and that it conclusively demonstrates that the Dealer Retainer was contingent on a GMCL *CCAA* filing. I do not accept this premise.

[119] This is not a case where the retainer agreement was reduced to a single written document. In contrast to Cassels' arrangements with the Saturn Dealers, where the dealers signed individual retainer agreements, there are no stand-

alone, group or individual retainer agreements between Cassels and the GMCL dealers. Rather, on the trial judge's findings, the Dealer Retainer is evidenced by a series of documents and communications among CADA, Cassels and the DSC at the relevant times, including, but not limited to, the May 4 Memorandum.

[120] As a result, the trial judge's findings regarding the scope of the Dealer Retainer do not rest solely on the May 4 Memorandum. In his reasons, the trial judge identifies and addresses the documentary and other evidence bearing on the nature of Cassels' retainer by the dealers, including evidence that, according to Cassels, supports its narrow interpretation of the engagement. This evidence included, in addition to the May 4 Memorandum itself: the Legal Services Memorandum; the Ethical Wall Memorandum; the notes of Peter Andrews, a GMCL dealer, of the May 7, 2009 call-in dealer conference call; parts of the trial testimony of Cassels lawyers Harris and Zakaib and GMCL dealers Hurdman and Turpin; and CADA's May 22, 2009 memorandum to the dealers.

[121] Having considered the totality of this evidence, the trial judge rejected Cassels' submission that it had a contingent retainer with the dealers, one that would become operative only in the event of a GMCL *CCAA* filing.

[122] The reasons, in particular, at paras. 426-27, also reveal that the trial judge appreciated the parties' conflicting interpretations of the retainer described in the May 4 Memorandum and that he was alert to those parts of the memorandum

cited by each party in support of its urged construction of the document. I recognize that, at these paragraphs of his reasons, the trial judge was addressing whether a retainer by the dealers in fact existed. Nonetheless, his discussion of this issue demonstrates that he did focus on the entirety of the May 4 Memorandum and considered it in the light of the parties' conflicting positions at trial on the existence and subject matter of the Dealer Retainer. That this is so is further confirmed by the trial judge's holding, at para. 475, also quoted above: "Only an unreasonable micro-dissection of the language of the May 4 [Memorandum] could support [Cassels'] contention that the scope of the retainer excluded anything beyond representation in commenced *CCAA* proceedings."

(ii) Finding of ambiguity

[123] Cassels next challenges the trial judge's finding that the scope of the Dealer Retainer was ambiguous. I see no reversible error in this finding.

[124] In support of its contention that the trial judge erred by finding that the scope of the Dealer Retainer was ambiguous, Cassels emphasizes passages from the first two paragraphs of the May 4 Memorandum. For convenience, I repeat them:

> [A] national General Motors Steering Committee … has been created to work with [CADA] to organize [GMCL] dealers … to ensure that [GMCL] dealer interests are represented <u>should [GMCL] file for bankruptcy protection in Canada in the near future</u>.

> The role of the Steering Committee … is to provide policy direction and instructions to legal counsel who will represent the [GMCL] dealers in any bankruptcy filing. We have retained [Cassels] to handle our interests. [Emphasis added.]

[125] As Cassels stresses, these passages suggest that the retainer referenced in the May 4 Memorandum applied only if GMCL filed "for bankruptcy protection in Canada".

[126] However, other parts of the May 4 Memorandum suggest an active and ongoing retainer of Cassels: i) the concluding language of the second paragraph of the May 4 Memorandum, quoted above, confirms that Cassels had been retained "to handle [the GMCL dealers] interests"; ii) the memorandum informs dealers of the April 30, 2009 DSC conference call with CADA and legal counsel "to discuss our going forward strategy"; iii) the memorandum announces the scheduling of a national dealer conference call on May 7, 2009, when dealers would be provided "with the crucial information required on a going forward basis"; and iv) in soliciting dealer participation in the proposed "national General Motors dealer group", the memorandum instructs, in capital letters: "(***IF YOU WISH TO PARTICIPATE AND BE REPRESENTED PLEASE COMPLETE THE FORM ON PG 5***)" (emphasis in original).

[127] These parts of the May 4 Memorandum are expressed in the present tense. They include no marker of a contingent retainer. Specifically, they do not

suggest that Cassels' representation of participating dealers would only become effective, if at all, upon the happening of some future event.

[128] Thus, while the May 4 Memorandum contains language supporting Cassels' contention that the Dealer Retainer was contingent and was to apply only if GMCL filed for bankruptcy protection under the *CCAA*, it also employs language supporting the conclusion that the Dealer Retainer was not conditional and had been activated.

[129] Accordingly, to the extent that the trial judge's finding of ambiguity is tethered to the May 4 Memorandum, a plain reading of that document supports his finding. The May 4 Memorandum uses inconsistent language to describe the nature of the retainer. There is language in the memorandum that both supports and cuts against a narrow interpretation of the Dealer Retainer. The trial judge, therefore, was not obliged to accept Cassels' construction of the memorandum. I also note that the record indicates that the memorandum was reviewed and approved by Cassels prior to its delivery.

(iii) Considering May 4 Memorandum as a whole

[130] I reach a similar conclusion concerning Cassels' related submission that the trial judge erred in his interpretive approach to the May 4 Memorandum by allegedly focusing only on what the memorandum "excluded", rather than on what it "included". Once again, the reasons do not support this claim.

[131] As I have said, at trial, Cassels denied any retainer with the GMCL dealers. In the alternative, it argued that any retainer that did exist related exclusively to services to be rendered on a GMCL *CCAA* filing. In other words, the retainer "excluded" pre-*CCAA* matters. Against the backdrop of the case Cassels ran at trial, the trial judge's use of the language of "exclusion" (for example, at para. 475, quoted above), simply means that he addressed, head-on, Cassels' position regarding the scope of the Dealer Retainer.

[132] In any event, contrary to Cassels' submission, the trial judge also addressed what the Dealer Retainer "included". He held that: i) it "included" pre-filing advice on issues relating to the restructuring of the dealer network" (para. 471); ii) it "included pre-filing restructuring of the nature of the WDAs" (para. 475); iii) it included advising on the WDAs, which "ultimately fell squarely within the purview of 'complex restructuring' of the GMCL dealer network" (para. 471); and iv) "to the extent that the retainer included 'complex restructuring' of the dealer network, Cassels was obligated to provide legal services to the dealers … with respect to the Notices of Non-Renewal and the WDAs" (para. 480) (emphasis added). The latter comment echoes the language of the May 4 Memorandum that dealers could achieve "Economies of Scale" by participating in the proposed national dealer group because "Legal representation in a complex restructuring or insolvency proceeding is expensive" (emphasis added).

[133] Cassels takes aim, especially, at the trial judge's reliance on the language of "complex restructuring" in the May 4 Memorandum to support his finding that the Dealer Retainer included the provision of advice or representation on pre-*CCAA* filing matters, including the WDAs. Cassels submits, for example, that the phrase "complex restructuring" is not found in the "operative language" of the May 4 Memorandum and that the trial judge erred by interpreting this wording as meaning a complex restructuring "of the dealer network", a conclusion that Cassels says is unwarranted and unexplained.

[134] I disagree. Cassels' argument pits those sections of the May 4 Memorandum that explain the purpose and function of the DSC against those parts of the memorandum that describe the suggested reasons for the dealers to participate in the proposed GMCL national dealer group. This artificially divides the May 4 Memorandum into discrete parts and ignores its overall meaning and subject matter.

[135] The trial judge, as he was obliged to do, considered the May 4 Memorandum in its entirety. His finding of ambiguity in the scope of the Dealer Retainer implicitly recognizes the inconsistencies in the language of the May 4 Memorandum. So, too, does his qualifying language at para. 480: "[T]o the extent that the retainer included 'complex restructuring' of the dealer network", it obliged Cassels to provide legal services regarding pre-*CCAA* matters like the Notices of Non-Renewal and the WDAs (emphasis added).

[136] The May 4 Memorandum does not stop with the suggestion, contained in the first two paragraphs of the memorandum, that the dealers' interests were to be represented if GMCL filed for bankruptcy protection. It goes on to expressly reference legal representation for the dealers "in a complex restructuring or insolvency proceeding" (emphasis added). This language necessarily implies that legal representation was to be provided for restructuring matters arising outside of an insolvency or bankruptcy proceeding. That is exactly what GMCL's dealer network reduction plan – and, ultimately, the WDAs – contemplated.

[137] I note also that, in his trial testimony, Peter Harris acknowledged that the scope of the Dealer Retainer included preparatory work for a potential GMCL *CCAA* filing. He also allowed that the May 4 Memorandum contemplates that Cassels would represent the GMCL dealers both in an insolvency and in a "complex restructuring". These acknowledgements are consistent with the conclusion that the Dealer Retainer was active by May 4, 2009 and that its scope went beyond representation of the dealers only in a formal *CCAA* proceeding.

[138] I am unable, in these circumstances, to fault the trial judge for his scrutiny of the May 4 Memorandum, or for his finding that the scope of the Dealer Retainer was ambiguous.

(iv) Evidence of surrounding circumstances

[139] *Sattva* holds, at para. 47, that in matters of contractual interpretation, "the overriding concern is to determine 'the intent of the parties and the scope of their understanding'" (citations omitted). Further, in order 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."

[140] However, *Sattva* also cautions, at para. 57:

> While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement … The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract …. While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement. [Citations omitted.]

[141] *Sattva* provides guidance, at para. 58, on the evidence that can qualify as evidence of "surrounding circumstances":

> The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract … that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. [Citations omitted.]

See also *IFP Technologies (Canada)*, at para. 83.

[142] Cassels maintains that the trial judge erred in law by failing to interpret the May 4 Memorandum in a manner consistent with the surrounding circumstances known to the parties at the time of formation of the Dealer Retainer, contrary to *Sattva*. It asserts, as it did at trial, that the evidence of contemporaneous documents leading up to the memorandum, as well as those post-dating it, "overwhelmingly demonstrate" that all involved parties were contemplating a group retainer on behalf of all GMCL dealers only in relation to a *CCAA* proceeding. Cassels faults the trial judge for allegedly considering only some of the relevant pre-May 4, 2009 documents and, even then, for relying on documents that it says do not support a finding that the Dealer Retainer included advice or representation on pre-*CCAA* matters, including the WDAs.

[143] At the heart of these submissions is the proposition that the Dealer Retainer did not, and could not, extend to advice or representation on the Notices of Non-Renewal and the WDAs, which were delivered after the date of the May 4 Memorandum, because none of Cassels, CADA, the DSC or the GMCL dealers anticipated the delivery of these documents by GMCL at the time of the memorandum. The Notices and the WDAs, therefore, were not part of the surrounding circumstances known to the parties at that date and, consequently, the parties could not have intended that the Dealer Retainer would extend to the provision of legal services regarding them.

[144] I would reject these submissions, for several reasons.

[145] As the trial judge noted, Cassels did not dispute at trial that the Notices of Non-Renewal and the WDAs were pre-*CCAA* filing restructuring events. Nor does Cassels take that position before this court. It follows that, if the Dealer Retainer extended to advice or representation on pre-*CCAA* restructuring matters, as the trial judge found, it included advice or representation regarding the Notices and the WDAs. I have already concluded that the trial judge did not err in finding that the Dealer Retainer extended to "complex restructuring" matters, separate and apart from formal bankruptcy or insolvency proceedings.

[146] The fact that only GMCL was aware of the possibility that Notices of Non-Renewal and WDAs would be delivered prior to the May 4 Memorandum does not preclude this conclusion. The evidence at trial established that, by the beginning of May 2009, GMCL was actively working on its dealer network reduction plan, including a plan for the formal wind-down of some of its dealerships. It publicly announced its revised restructuring plan and its intention to expedite extensive cuts to its dealer network on April 27, 2009.

[147] While the dealers may not have known that WDAs would be chosen as the mechanism for achieving these cuts, they were certainly aware that GMCL would not be continuing all its dealerships, that many dealerships would cease to operate, and that GMCL would be taking steps to shrink its dealer network.

Indeed, as the trial judge found, following GMCL's April 27 announcement, "[I]t 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" (at para. 65). Further, the important implications of GMCL's April 27 announcement were considered and discussed during the April 30, 2009 conference call among DSC members, CADA and Cassels lawyers.

[148] Thus, it was clearly within the parties' contemplation at the time of the May 4 Memorandum that GMCL would be taking steps to restructure, and drastically reduce, its dealer network. This potentially included the termination of dealership agreements outside of a formal bankruptcy proceeding. This is confirmed by the May 4 Memorandum itself, which expressly identifies the "potential termination of the existing dealership agreements" and "changes to your relationship with [GMCL]" as concerns common to all GMCL dealers that "[would] arise out of a [GMCL] restructuring".

[149] I therefore agree with Trillium's submission that the relevant surrounding circumstances at the time of the May 4 Memorandum, considered by the trial judge, included the parties' awareness of the risk that GMCL would pursue an out-of-court restructuring plan that would adversely affect the dealers' rights and interests. The WDAs were simply the device chosen to implement this plan.

[150] In my opinion, there is no tenable case to be made here that, in interpreting the scope of the Dealer Retainer, the trial judge failed to consider the circumstances surrounding its formation. Near the outset of his reasons, the trial judge reviewed, in detail, events pre-dating the May 4 Memorandum. Later in his reasons, when specifically addressing Trillium's claims against Cassels, he returned to a discussion of pre-May 4, 2009 events involving Cassels, CADA, the DSC and the dealers. In so doing, he also considered evidence of many post-May 4, 2009 events pertaining to the Dealer Retainer.

[151] Cassels complains that the trial judge erred by failing to mention some documents that it says formed part of the surrounding circumstances. Again, I disagree.

[152] The trial judge was not obliged to recite all the evidence bearing on the Dealer Retainer. The reasons confirm that he had a strong command of the trial record and undertook a careful analysis of the evidence concerning the Dealer Retainer, leading to detailed findings of fact. His failure to refer to any particular piece of evidence does not lead to the conclusion that he ignored it. Rather, it can be understood as an indication that, in the context of all the evidence, it had no significance to the trial judge in his analysis of the Dealer Retainer. As this court has repeatedly emphasized, the "sorting of the evidentiary wheat from the chaff is the essence of the trial judge's job": *Waxman*, at paras. 344-45.

[153] The crucial point is that the trial judge addressed, and bluntly rejected, Cassels' claim that the pre-May 4, 2009 documentary record "overwhelmingly" supports its interpretation of the scope of the Dealer Retainer. He held, at para. 475: "Cassels' assertion that there is 'extensive, repeated written support' for its position simply cannot be made out on the evidence." I repeat that the trial judge's appreciation of the evidence attracts considerable deference from this court: "It is not the role of appellate courts to second guess the weight to be assigned to various items of evidence": *Nelson (City) v. Mowatt*, 2017 SCC 8, at para. 38.

[154] Moreover, as *Sattva* teaches, "present day contractual interpretation is by its nature a fact-specific inquiry that yields fact-specific results": *Iroquois Falls Power Corporation v. Ontario Electricity Financial Corporation*, 2016 ONCA 271, 398 D.L.R. (4th) 652, at para. 96, leave to appeal refused, [2016] S.C.C.A. No. 279.

[155] Recall again, that the trial judge relied on other evidence, apart from the May 4 Memorandum, to anchor his findings concerning the ambit of the Dealer Retainer. I will address some of this evidence.

[156] First, the Legal Services Memorandum. Cassels downplays the significance of this document, maintaining that it was merely a firm marketing brochure that was not seen by the dealers, that it is evidence only of a potential

future retainer in a *CCAA* proceeding, and that it does not support a finding that the Dealer Retainer included advice or representation on the WDAs.

[157] The trial judge disagreed. He found that the Legal Services Memorandum was created and intended for the benefit of the DSC. Having considered the relevant testimony regarding the origins and purpose of the memorandum, the trial judge inferred that the DSC received and reviewed it. In my view, this inference was available on the evidentiary record.

[158] I am also not persuaded that the trial judge erred by finding that the Legal Services Memorandum supports the conclusion that the Dealer Retainer extended to advice or representation on pre-*CCAA* filing matters. The memorandum contains statements suggesting the potential representation of the dealers by Cassels on a wide array of issues relating to GMCL's difficulties. It advances Cassels' long-standing relationship with CADA and its existing retainer with the Saturn Dealers, coupled with its years of experience in representing clients in the automotive industry, as "direct experience" positioning the firm to be "keenly aware of the issues the [GMCL] Dealers group could face in the coming months". No qualification of these "issues" is expressed in the memorandum.

[159] To the point, the memorandum says nothing about any limitation on or condition attaching to the services available to the dealers from Cassels. And, while the CADA and Saturn Retainers are disclosed, indeed, promoted, in the

Legal Services Memorandum, no mention is made of the Canada Retainer or any potential conflict arising from it.

[160] I appreciate the marketing purposes of the Legal Services Memorandum and that it is not a contract. A certain amount of expansiveness in a promotional document of this kind is commonplace. That said, the memorandum does contain representations concerning Cassels' expertise and the broad range of professional services available to the dealers through the firm. And those representations are unqualified. In this context, as I read his reasons, the trial judge simply held that the Legal Services Memorandum supports the conclusion that the services offered to the dealers through the DSC were not restricted to representation in commenced *CCAA* proceedings. Given the unconstrained language of the memorandum, I agree.

[161] I reach a similar conclusion concerning the trial judge's impugned reliance on the May 7, 2009 Ethical Wall Memorandum.

[162] I accept, as Cassels emphasizes, that this was an internal firm document that was not provided to CADA, the DSC or the dealers. Nonetheless, it is some contemporaneous evidence, expressed in Cassels' own words, of Cassels' understanding of and intention regarding the scope of its representation of the GMCL dealers.

[163] Recall that the Ethical Wall Memorandum references the representation of the dealers by Cassels "regarding potential claims against [GMCL] with respect to the potential bankruptcy of GM and the potential restructuring of the GM dealer network" (emphasis added). Thus, like the May 4 Memorandum, the Ethical Wall Memorandum differentiates restructuring matters from bankruptcy or insolvency proceedings. It also specifically refers to GMCL's restructuring of its dealer network. It contains no suggestion that the firm's new retainer for GMCL dealers was operative only if GMCL filed for bankruptcy protection under the *CCAA*. To the contrary, it bolsters the trial judge's finding that the Dealer Retainer was more expansively cast, extending to restructuring issues outside a formal bankruptcy proceeding.

(v) Law of limited retainers and reversal of burden of proof

[164] Having found that the scope of the Dealer Retainer was ambiguous, the trial judge held, at para. 472: "Even if Cassels honestly believed that the retainer excluded major pre-filing events such as the WDA[s], it woefully failed to delineate the scope of the retainer and document its terms of engagement." In the trial judge's view, absent compelling considerations to the contrary, the ambiguity in the Dealer Retainer fell to be resolved against Cassels. In this context, he stated, at para. 472: "Lawyers and law firms who use limited scope retainers must clearly define the scope of the legal services to be provided and candidly explain these limitations to their clients."

[165] Cassels argues that the trial judge's findings on this issue reflect a misapplication of the law of limited retainers and, consequently, an improper reversal of the burden of proof. It submits that a "limited retainer" is a term of art, having a technical and specific meaning. Relying on two decisions of the Superior Court of Justice (*ABN Amro Bank Canada v. Gowling, Strathy & Henderson* (1995), 20 O.R. (3d) 779 (S.C.), at p. 794, and *Broesky v. Lüst*, 2011 ONSC 167, 330 D.L.R. (4th) 259, (S.C.), aff'd 2012 ONCA 701, 356 D.L.R. (4th) 55), at para. 56. Cassels says that a "limited retainer" is one "where the scope of the retainer requires of the lawyer a standard of conduct less than that required of a reasonably competent and diligent solicitor".

[166] In Stephen Grant, Linda Rothstein and Sean Campbell, *Lawyers' Professional Liability*, 3rd ed. (Markham: LexisNexis Canada Inc., 2013), at p. 4, the authors indicate that the term "limited retainer" refers to a retainer that "does not require the lawyer to perform all of the legal services that might otherwise be necessary to accomplish the client's goals". In other words, a "limited retainer" is a retainer that is limited, by an agreement between the lawyer and the client, with respect to the scope of legal or professional services to be provided under the retainer agreement.

[167] I do not read the trial judge's reasons as indicating that he was considering whether the Dealer Retainer was a "limited retainer" in any technical sense. As Cassels submitted at the appeal hearing, what was at issue at trial was whether

the Dealer Retainer "captured pre-*CCAA* filing events". Cassels argued at trial that the scope of the Dealer Retainer was "limited" to a *CCAA* filing. Thus, the trial judge's use of the term "limited" in relation to the Dealer Retainer was a response to Cassels' own submission that the scope of the retainer was confined or restricted to representation of the dealers only in a commenced GMCL *CCAA* proceeding.

[168] As I apprehend it, the real thrust of Cassels' complaint is not the trial judge's use of "limited retainer" language but, rather, his findings that Cassels was obliged, and failed, to clearly define the scope of the legal services to be provided to the dealers, and that the ensuing ambiguity in the Dealer Retainer had to be resolved against Cassels.

[169] I would reject this complaint. Nothing turns on this issue in the particular circumstances of this case. The trial judge's finding that the scope of the Dealer Retainer extended to pre-filing restructuring matters, including the WDAs, did not depend on resolving any ambiguity in the retainer as against Cassels. The trial judge held, at para. 475: "[E]ven with this ambiguity, it is clear that, at the least, the scope of the retainer included pre-filing restructuring of the nature of the WDAs" (emphasis added). I have already discussed the cogent reasons provided by the trial judge in support of this conclusion.

(vi) Evidence of subsequent events

[170] Cassels also submits that the trial judge erred in his interpretation of the May 4 Memorandum by failing to consider evidence of relevant post-May 4, 2009 events.

[171] There are three responses to this submission. First, the trial judge did not ignore the evidence of post-May 4 events. As I have said, he essentially commenced his reasons with a detailed review of the events relating to GMCL's insolvency and its restructuring plans, including events bearing on the dispute between Cassels and the GMCL dealers. This included a description of events subsequent to the May 4 Memorandum. There is nothing in the trial judge's later analysis of Trillium's claims against Cassels to suggest that, in analyzing these claims, he forgot or discounted his earlier exposition of post-May 4, 2009 events. To the contrary, at this part of his reasons, the trial judge again addressed post-May 4, 2009 events. For example, he expressly considered and made detailed findings about Cassels' argument that it had received and was required to follow the DSC's directions on May 15 and 20, 2009 not to become involved with the WDAs.

[172] Second, this court has held, on the authority of *Sattva*, that evidence of subsequent conduct must be distinguished from the factual matrix surrounding the formation of a contract. Evidence of subsequent conduct is admissible only if

the contract remains ambiguous after considering its language or text and its factual matrix: *Shewchuk v. Blackmont Capital Inc.* 2016 ONCA 912, 404 D.L.R. (4th) 512, at paras. 41-46. Further, if admissible, evidence of subsequent conduct is relevant only to inferentially establish the parties' intentions at the time of formation of their contract: *Shewchuk*, at paras. 50 and 56.

[173] Here, the trial judge found that the Dealer Retainer was ambiguous. However, he also held, in effect, that it was unnecessary to fully resolve that ambiguity because, at a minimum, the retainer extended to the provision of advice or representation on pre-*CCAA* filing issues. It was therefore unnecessary for the trial judge to undertake an extensive review of events subsequent to May 4, 2009 to inferentially establish the parties' intentions at the time of formation of the contract. The available pre-May 4, 2009 documentary evidence and the oral testimony at trial concerning the parties' intentions regarding the scope of the retainer were sufficient to establish the core, contested subject matter of the contract.

[174] Third, Cassels continues to maintain that both the pre- and post-May 4, 2009 documentary records "overwhelmingly" demonstrate that the Dealer Retainer related only to the representation of the dealers in any *CCAA* proceeding. Cassels, for example, relies on CADA's May 20 and May 22, 2009 memoranda to the dealers to argue that they knew or ought to have known that

they could not look to Cassels for advice on the Notices of Non-Renewal and the WDAs.

[175] The trial judge, however, was alert to these memoranda and to Cassels' reliance on them. He specifically identified the May 22, 2009 memorandum, at para. 467, as one of the documents cited by Cassels in support of its assertion that there was "extensive, repeated written support" for its position that the Dealer Retainer was simply a retainer to act in the event of a *CCAA* proceeding. As I have already indicated, the trial judge concluded that this assertion was not made out on the evidence. This was his call to make.

(vii) Treatment of witnesses' evidence

[176] This brings me to Cassels' arguments that the trial judge erred by relying on "out-of-context" trial testimony of Harris and Zakaib to support his findings regarding the scope of the Dealer Retainer, and that he misapprehended the evidence of GMCL dealers Hurdman and Turpin on this issue.

[177] There is no doubt that, at various points in their testimony, Harris and Zakaib said that the Dealer Retainer involved representation of the dealers in a GMCL *CCAA* filing or bankruptcy. However, their evidence on cross-examination undercut Cassels' claim of a narrow retainer restricted to a *CCAA*-filing or bankruptcy. The trial judge put it this way, at para. 475:

> [D]uring examination, Harris and Zakaib were open to the possibility that their retainer with the GMCL dealers

> involved more than just representation in a *CCAA* proceeding. Harris agreed that "complex restructuring" and "insolvency" [as referenced in the May 4 Memorandum] referred to distinct concepts. And with regard to the "potential claims" mentioned in the Ethical Wall memorandum, Zakaib testified that other claims, in addition to the potential bankruptcy, could arise and that the retainer would have generally covered these.

This is a fair depiction of the relevant parts of these witnesses' testimony. Again, the assessment of the evidence was a matter squarely within the trial judge's domain.

[178] I also do not accept that the trial judge erred in his treatment of Hurdman's and Turpin's evidence. The trial judge acknowledged, at para. 455, that their testimony "at times supported the position of Cassels" but concluded, overall, that they had both said they "expected preparation work to have been done if necessary for a potential *CCAA* filing". He also found, at para. 476:

> At best, for Cassels, the evidence of Hurdman and Turpin during cross-examination was equivocal with regard to their understanding of the exact scope of the retainer. Only taken out of context does it suggest that they reviewed the retainer as strictly limited to a *CCAA* proceeding.

[179] For reasons he explained, the trial judge placed little weight on Hurdman's and Turpin's evidence concerning the ambit of the Dealer Retainer. The reasons confirm that this evidence played no material part in the trial judge's reasoning.

(c) Conclusion on Scope of Dealer Retainer

[180] For the foregoing reasons, I see no basis for appellate interference with the trial judge's ruling on the scope of the Dealer Retainer. Deference is required. I would dismiss this ground of appeal.

ISSUE 2: DID THE TRIAL JUDGE ERR IN FINDING THAT CASSELS BREACHED ITS OBLIGATIONS DUE TO THE CANADA CONFLICT?

(1) Introduction

[181] The trial judge concluded that Cassels breached its fiduciary and contractual obligations to the class members in three principal ways: i) by agreeing to act for the GMCL dealers despite its pre-existing Canada Retainer and failing to disclose the Canada Retainer and its implications to the dealers (the "Canada Conflict"); ii) by failing to advise the DSC that it was in a conflict once the WDAs were delivered to some, but not all, dealers and nonetheless accepting the DSC's directions not to become involved with the WDAs (the "DSC Conflict"); and iii) by deferring its preparation for a GMCL *CCAA* filing or restructuring and adopting a "wait-and-see" approach longer than was appropriate.

[182] In my view, the trial judge's findings regarding the Canada Conflict are sufficient to fix Cassels with liability to the class members. I will therefore focus on Cassels' grounds of appeal regarding those findings. While Cassels spent

considerable time, both at trial and on appeal, focused on the DSC Conflict, I regard that aspect of the case as secondary to, and separate from, the Canada Conflict. In this court, Cassels emphasized that it was properly following instructions when, on May 15 and again on May 20, 2009, the DSC indicated that Cassels should not get involved with the WDAs. In my view, that is no defence to Cassels' earlier, pre-May 15 breaches of its contractual and fiduciary duties to the dealers by virtue of the Canada Conflict.

[183] I will address separately Cassels' challenge to the trial judge's findings concerning the Saturn Dealers.

(2) Trial Judge's Findings

[184] The trial judge held, at para. 490, that Trillium and Cassels were in a fiduciary relationship and that Cassels had "a specific obligation to represent the interests of the GMCL dealers in the [GMCL] restructuring and the *CCAA* proceedings". Further, Cassels owed Trillium contractual obligations arising out of the Dealer Retainer, including a duty of loyalty, a duty to avoid conflicts, a duty to provide candid advice and disclosure, and a duty to act in the client's best interest.

[185] The trial judge concluded that Cassels breached its fiduciary and contractual obligations to the dealers in several respects. In respect of the Canada Conflict, he found:

- At the relevant times, Canada's immediate interests were adverse to those of the GMCL dealers, the latter of which were to obtain the best possible non-*CCAA* restructuring deal, if GMCL offered such a deal (para. 497);

- Cassels' conduct fell afoul of the "bright line" conflict rule articulated by the Supreme Court of Canada in *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631 (paras. 494-97);

- Regardless of the bright line conflict rule, Cassels was conflicted at the time it accepted the Dealer Retainer under the principles discussed in *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, [2013] 2 S.C.R. 649, because there was a substantial risk that its representation of Canada would materially and adversely affect its concurrent representation of the GMCL dealers (paras. 494, 498-500 and 508);

- Cassels breached its duty of loyalty to the class members and its duty to avoid conflicts, by accepting the Dealer Retainer despite knowing, or having ought to have known, that there was a substantial risk it would be unable to act for the GMCL dealers because of its pre-existing Canada Retainer (para. 513);

- Cassels also breached its duty to provide candid advice and disclosure to the class members by failing to inform the GMCL dealers, either directly or through the DSC, of the Canada Retainer (paras. 513-14);

- Due to its loyalty to Canada, Cassels failed to act in the GMCL dealers' best interests and, further, failed to represent the dealers "as zealously as [it] could have" (paras. 513 and 518); and

- Cassels failed to have an effective system in place for discussing and resolving potential firm conflicts

> and was liable for its failure to heed "audible" conflict "alarm bells" (para. 381).

[186] The trial judge also considered whether Cassels owed a duty of care to the Call Dealers – those dealers who listened in on the May 24, 2009 dealer conference call arranged by CADA but who, unlike the Participation Form Dealers, did not contribute to the DSC litigation fund and/or send in a participation form. After conducting the requisite proximity analysis in accordance with *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, and *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), the trial judge found that the Call Dealers did not retain Cassels and were not clients of the firm. Accordingly, Cassels owed the Call Dealers no duty of care and was not liable to them. As I will discuss when addressing the trial judge's damages analysis, the fact that some Call Dealers may nonetheless be members of the Class figures prominently in Cassels' appeal from the trial judge's damages award.

(3) Cassels' Position

[187] On appeal, having now accepted that it was retained by the GMCL dealers, Cassels does not dispute that it owed fiduciary and contractual duties to them. However, it continues to assert, generally, that: the trial judge erred in his interpretation of the scope of the Dealer Retainer; that the firm's approach to any potential conflict arising from the Canada Retainer met the applicable standard of care; that, in any event, nothing flowed from the alleged conflict as the lawyers

working on the Dealer Retainer were not affected by the Canada Retainer; that it satisfied all its obligations to the dealers in the circumstances; and, for many of the same reasons it advanced at trial, the trial judge erred in holding to the contrary.

[188] Against this backdrop, Cassels makes four specific submissions regarding the Canada Conflict.

[189] First, it submits that, as the trial judge erred in his interpretation of the scope of the Dealer Retainer, his finding of a bright line conflict arising from the Canada Retainer necessarily falls away. Cassels maintains that any conflict in its representation of both Canada and the GMCL dealers could only have arisen if GMCL filed for protection under the *CCAA*. As this never occurred, no bright line conflict ever arose.

[190] Second, Cassels argues that the trial judge additionally erred by finding that the Canada Retainer created a conflict under the substantial risk principle discussed in *McKercher*.

[191] Third, it submits that the trial judge confused the obvious adversity between GMCL and the GMCL dealers with a "misalignment" of interests between the dealers and Canada.

[192] Finally, Cassels advances a causation-based argument. It contends that the Canada Conflict is, in effect, of no moment because it "led to no consequences and caused no damage whatsoever".

(4) Discussion

(a) Bright Line Conflict

[193] Cassels' attack on the trial judge's finding that the Canada Retainer gave rise to a bright line conflict with the Dealer Retainer fails on several grounds. Most obviously, I have already concluded that the trial judge did not err in his interpretation of the scope of the Dealer Retainer. On the disposition of that issue that I propose, it cannot be said that, by reason of the narrow and contingent ambit of the Dealer Retainer, there was no conflict with the Canada Retainer.

[194] However, there is more. The trial judge appreciated the nature of the bright line conflict rule articulated in *Neil*, and applied it to the facts as he found them. He quoted *Neil* directly, at para. 495 of his reasons:

> In *Neil*, the Supreme Court established the bright line test where a lawyer is not permitted to act for adverse clients unless both parties provide their informed consent. Justice Binnie, writing for the court, articulated the rule as follows at para. 29:
>
> > The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another

> current client – *even if the two mandates are unrelated* – unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other. [Emphasis in original.]

There is no suggestion here that the trial judge misapprehended the nature of this rule. Rather, Cassels argues that it is inapplicable in this case. I disagree.

[195] The trial judge held that the Canada Conflict arose because Trillium had proved, on a balance of probabilities, that the dealers' interests were directly adverse to Canada's immediate interests during the relevant period. Cassels counters that, while a conflict could have arisen between Canada's interests and those of the dealers, it was a "potential" conflict only and there was no direct or immediate adversity between the interests of the two clients. To the contrary, Cassels says, the two clients shared considerable common interests and their interests were not necessarily irreconcilable.

[196] The trial judge considered, and rejected, this argument. As he pointed out, Harris made important admissions during his evidence at trial. These admissions went a long way to establishing direct adversity between the dealers' interests and Canada's immediate interests. Harris testified:

- He understood that in April 2009, the Canadian Governments were setting the pace on GMCL's viability plans;

- If GMCL could avoid liquidation, Canada would be one of the bailout parties;
- If GMCL filed under the *CCAA*, Canada and GMCL would have an identity of interests;
- If he were acting for the dealers and was trying to upset the *CCAA* proceedings in order to obtain leverage for the dealers, these steps would necessarily engage Canada's interests;
- Canada would have an interest in avoiding upset to or delay in a GMCL *CCAA* proceeding;
- It was anticipated that Canada would be the debtor-in-possession financier; and
- Cassels' representation of the dealers would involve Canada, on the one side, and the GMCL dealer group, on the other side.

[197] Moreover, at least one senior lawyer at Cassels recognized the conflict concerns arising from the acceptance of the Dealer Retainer in the face of the pre-existing Canada Retainer. Shortly after learning that the firm opened a file for the GMCL dealers, Cassels lawyer Bruce Leonard sounded alarms in an exchange of emails with members of the firm's Canada legal team. On May 5, 2009, one day after the opening of the dealer file, he wrote to his colleagues:

> I can see some points of conflict that may develop between IC [Canada] and the GM dealers. As in who owns the inventory on hand, collection of A/R from dealers, appeals from disclaimers of contracts, dealers who operate from leased (company) premises and the like. There may be ways to handle this (passing these issues off to Citi as the primary secured creditor) but there is a distinct possibility that we would end up in Court on opposite sides. We could use conflict counsel

> as a device but at some point IC would be alarmed to see the firm acting in a way that depreciates a successful sale of GMCL and the continuance of a GM business in Canada. As far as I know, the GM side of this has not been disclosed to IC.
>
> We said in our Saturn disclosure that the Saturn dealers would amount to a negligible part of any restructuring. I believe the GM dealers would be a much larger issue. I am open to suggestions but I think that if we are going to proceed with the dealer representation, our contact with IC requires at least disclosure if not consent.

[198] One of Leonard's colleagues on the Canada file replied: "Bruce – the disclosure letter generically referred to retainers through CADA not to Saturn or GM specifically thereby constituting disclosure of both (as each came through and are coordinated by the CADA)."

[199] Crucially, Leonard wrote back on May 5:

> Sure but this may not reach the level of informed consent to the representation of the GM dealers. We did say we would back off the dealers if their position threatened the IC position but has this been accepted by Peter Harris? We probably need some parameters on what we can do for the GM dealers and if you have had those discussions with Peter and they are satisfactory to IC, all is well. I would recommend some additional clarity before we commit to do anything aggressive for the dealers that might alarm IC. Thoughts everyone? [Emphasis added.]

[200] Importantly, these emails were not copied to Harris or Cassels' managing partner, Mark Young. Further, and unfortunately, Leonard's warnings were not discussed with or ever brought to Harris' attention.

[201] Nor, on the trial judge's findings, did the internal meeting of Cassels lawyers on April 21, 2009 lead to a proper consideration of the conflict implications arising from the Canada Retainer. The trial judge found that, instead, the participants in that meeting focused only on Canada and CADA's interests. He held, at para. 398, that the "paucity of communication" among Cassels partners regarding potential conflicts at this time, resulted in a lack of understanding of the "whole picture" and a failure by the firm to ever properly address the Canada Conflict.

[202] Finally, as the trial judge observed, at para. 508, there was evidence of "Cassels' conflicts and problems with loyalty" playing out in real time. On May 14, 2009, Cassels, acting for Canada, asked GMCL to provide Canada with a "car dealer analysis of potential claims on shut down obligations to dealers". It also asked GMCL to provide "critical vendor analysis and [a] list of Canadian vendors designated as non-critical".

[203] Cassels argues that Leonard's emails and his evidence at trial concerning them recognize only the possibility of a future conflict and further suggest the potential for managing that conflict. Taking this argument at its highest, it still does not undercut the trial judge's findings concerning the Canada Conflict. The emails clearly recognize the need for disclosure of the potential conflict to one

client – Canada.[1] They do not recognize the companion need for reciprocal disclosure to the other client, the GMCL dealers, of either the fact of the Canada Retainer or the constraint on Cassels' ability to act for the dealers that Harris had communicated to Ryan.

[204] Recall also that the firm's Ethical Wall Memorandum, upon which Cassels in part relies to argue that it properly managed the potential for conflict, expressly contemplates disclosure to both clients of the retainer of the firm by the other. Yet, Cassels, although admittedly free to do so, neither informed the dealers nor the DSC of the Canada Retainer or of any qualification on its ability to represent the dealers.

[205] The Leonard emails support the trial judge's finding, at para. 515: "[A]t a minimum … Cassels owed a duty to the dealers to advise them at the outset of the Canada [R]etainer and all of the potential problems that could thereafter arise, and not, as Cassels suggests, wait until June 1 to 'see what happened'." Cassels' failure to make this disclosure, the trial judge found, was a breach of its duty to provide candid advice and disclosure to the class members. I agree. I note that, at the appeal hearing, Cassels did not attempt to defend its non-disclosure to the dealers and the DSC.

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[1] For the purpose of trial, Canada declined to waive solicitor-client privilege to establish whether it was informed of the Dealer Retainer and, if so, precisely what was said. The trial judge was invited to presume that Canada was informed of the conflict and of Cassels' assurance that it would not act contrary to Canada's interests. Leonard testified that this was what he meant in his May 5 email when he wrote: "We did say [to Canada] that we would back off the dealers."

[206] The Leonard emails also indicate that Cassels intended, and had committed, to "back off the dealers if their position threatened [Canada's] position". Further, they suggest that nothing should be done on behalf of the dealers that might imperil the Canada Retainer or "alarm" Canada, the firm's pre-existing client.

[207] These statements lay bare another important aspect of the bright line conflict. Their clear import is that Cassels accepted the Dealer Retainer with the intention of abandoning the dealers in favour of a preferred client, Canada, should the need arise. While, arguably, this would have been a defensible posture if both clients were fully informed of this prospect and agreed to it, that is not this case. As the trial judge observed, at para. 397: "[A]lthough there was sensitivity for unconflicted loyalty to Industry Canada [by various Cassels lawyers], there appears to have been no similar sentiment for the GMCL dealers' interests."

[208] The evidence fully supports this observation. It also supports the trial judge's finding that Cassels breached its duty of loyalty and its duty to avoid conflicts owed to the GMCL dealers. Indeed, it was its loyalty to Canada that propelled Cassels to impose a condition on its ability to represent the dealers – a condition never disclosed to them and that preferred Canada over the dealers.

[209] Moreover, as the trial judge also held, at para. 497: "[I]t would have been directly against the interests of [Canada] for the GMCL dealers to take a tough stance on the WDAs because this could have jeopardized the restructuring that the Canadian Governments wanted to succeed."

[210] I agree. Leonard's emails, described above, anticipate as much. As long as there was the prospect of a *CCAA* proceeding that could lead to a dispute between the dealers and Canada, Cassels was not positioned to vigorously advance the dealers' interests. Leonard essentially said so in his email exchange with the Cassels' Canada legal team.

[211] Leonard's concerns were well-placed. It was not in Canada's interests (or, for that matter, those of Cassels itself), to take action for the dealers that would provoke a dispute with Canada. But it was not necessarily in the dealers' interests to avoid such a dispute. In this fundamental respect, Canada's immediate interests were indeed adverse to the direct interests of the GMCL dealers, from the outset.

[212] Harris' evidence and the chain of emails described above, in combination, provide ample support for the trial judge's holding of a bright line conflict with the Canada Retainer when Cassels accepted the Dealer Retainer.

(b) Substantial Risk Conflict

[213] I reach a similar conclusion regarding the trial judge's impugned finding of a conflict arising from the Canada Retainer due to the substantial risk that that retainer would materially and adversely affect Cassels' representation of the dealers.

[214] The trial judge recognized the controlling principles for determining whether a conflict of interest can be said to have arisen outside the scope of the bright line conflict rule. *McKercher*, to which the trial judge expressly referred, instructs, at para. 38, that the determination whether a conflict falling outside the scope of the bright line conflict rule exists depends on whether the concurrent representation of the clients in question creates "a substantial risk that the lawyer's representation of the client would be materially and adversely affected".

[215] The trial judge concluded there was a substantial risk of a material and adverse effect on Cassels' representation of the GMCL dealers by reason of its existing Canada Retainer, regardless whether Canada's immediate interests and the interests of the GMCL dealers were adverse and even if Cassels' characterization of a narrow and contingent retainer by the dealers had prevailed. As I see it, this finding is unassailable.

[216] Recall that Cassels' response at trial to Trillium's claim that it was conflicted from accepting the Dealer Retainer because of the pre-existing

Canada Retainer was to argue that, as at May 4, 2009, there was only the potential for a future conflict in the event of a GMCL *CCAA* filing, which the firm properly managed. However, unbeknownst to the dealers or the DSC, Cassels had told CADA that it "could not take on the government, if such a circumstance arose, in any *CCAA* proceeding".

[217] In these circumstances, in my opinion, the trial judge's finding of a substantial risk-based conflict due to the Canada Retainer is firmly anchored in the evidence. With respect, Cassels' position on this issue is inherently contradictory. Trillium puts it well in its factum:

> The implication of Cassels' position is that: **(i)** it had a contingent retainer that would not crystallize unless and until the event of a *CCAA* filing, and that the firm would take no steps until that event occurred; but **(ii)** when and if that event occurred, Cassels would then have to refuse the retainer it had accepted on a contingent basis because the dealer group and Industry Canada would have been adverse in interest and Cassels had already decided it could not act adverse to Industry Canada (i.e. the undisclosed proviso).
>
> This makes no sense. It shows an inescapable conflict of interest, as fully recognized by the trial judge. Cassels was required to be candid at the outset and fully disclose that the retainer (as Cassels saw it) was contingent on the event of a *CCAA* filing, but would then have to be immediately declined if the contingent event occurred. No rational, fully informed dealer group would ever have retained Cassels on this basis. In any event, Cassels made no such disclosure.

I agree with these submissions.

[218] There are additional difficulties with Cassels' attack on the trial judge's substantial risk finding. By recognizing the potential for a conflict arising from the Canada Retainer, as it did, Cassels necessarily acknowledged that it understood there was a risk, from the outset, that its representation of Canada could negatively impact on its representation of the GMCL dealers. On Cassels' own evidence, this risk was real, not merely theoretical. The critical issue was whether the risk was also substantial, as the trial judge found it was.

[219] It is helpful to situate Cassels' argument on this issue in the factual landscape as it existed by May 4, 2009. That factual landscape strongly supports the trial judge's substantial risk finding. By the beginning of May 2009: a GMCL *CCAA* filing "appeared very likely, if not inevitable" (para. 501); GMCL had announced its plan for drastic cuts to its dealer network and, on April 27, had also disclosed publicly that it intended to expedite those cuts (a 42 percent reduction within 20 months); on the same day, GM had announced its own accelerated plan for the discontinuance of the Pontiac brand, a highly negative development for GMCL given that this brand constituted more than a quarter of its book of business; the Saturn brand was to be discontinued by the end of 2011 unless a third party purchaser could be found; GMCL could not survive without a government bailout; and a June 1 deadline had been imposed for the submission of an acceptable, revised GMCL restructuring plan, which GMCL recognized had to include "deeper and [more] drastic" restructuring changes. It is apparent that

GMCL was in perilous financial circumstances, rendering all its dealers especially vulnerable.

[220] Further, in anticipation of a GMCL *CCAA* filing, the GMCL dealers had twice been warned by May 4 that it was crucial that they organize and be represented by legal counsel to ensure their interests were protected. The May 4 Memorandum repeated this message and emphasized the "power in numbers" to be achieved by collective action to ensure the dealers had a seat at the bargaining table. The point was underscored in a May 13, 2009 email from CADA urging the dealers to sign the participation forms to guarantee their "seat at the table".

[221] In this factual context, the trial judge concluded, at para. 499, that the "proviso" attached by Cassels to its acceptance of the Dealer Retainer left "little doubt" of an existing, substantial risk that Cassels' representation of the GMCL dealers would have been materially affected by the Canada Retainer. I agree.

[222] Finally, as the trial judge noted, Cassels was aware from its representation of the Saturn Dealers that the planned reduction to GMCL's dealer network might violate the terms of the dealers' agreements with GMCL; that, if GMCL dealerships were cut, it would have to take a position contrary to Canada's desire for restructuring; that Canada's interests would be aligned with GMCL in the

event of a *CCAA* filing; and that (on Harris' and Leonard's evidence), on a *CCAA* filing, Canada's and the GMCL dealers' interests would be adverse.

[223] Given all this evidence, in my opinion, Cassels has failed to demonstrate any reversible error in the trial judge's impugned substantial risk finding. This finding, by itself, is sufficient to establish Cassels' breaches of its obligations to the dealers.

(c) Alleged Misapprehension of Adverse Interests

[224] Cassels further submits that the trial judge misapprehended the divergent interests at stake by confusing the clear adverse interests between GMCL and the GMCL dealers with the differing interests of Canada and the dealers.

[225] I am not persuaded by this submission. The evidence at trial established, and the trial judge accepted, that Canada's interests would be aligned with those of GMCL on a *CCAA* filing. Obviously, this was not the case for the dealers. As the trial judge found, it was in their interests to either stay in business or obtain as much financial compensation for the loss of their dealerships as possible.

[226] The trial judge had a clear grip on the evidence at trial and was alert to the varying interests at play, in particular, those of Canada and the GMCL dealers. Based on his reasons, there can be no serious claim that he conflated or confused the divergent interests of GMCL and the dealers, on the one hand, and those of Canada and the dealers, on the other hand. That the trial judge did not

fall into this error is manifest, for example, in his observation at para. 497, quoted above, that: "[I]t would have been directly against the interests of Industry Canada for the GMCL dealers to take a tough stance on the WDAs because this could have jeopardized the restructuring that the Canadian Governments wanted to succeed." In my view, the reasons confirm that the trial judge understood and engaged directly with the competition between Canada's interests and those of the GMCL dealers.

(d) Expert Evidence Complaints

[227] Cassels attacks the trial judge's substantial risk finding on two additional bases, both related to the expert evidence at trial. It submits, first, that the trial judge erred in his analysis of the Canada Conflict by failing to take account of the opinion evidence of Cassels' experts that the firm's approach to the "potential" conflict arising from the Canada Retainer met the applicable standard of care. Cassels also says that Trillium failed to lead any expert evidence on this issue. In my opinion, neither assertion does justice to the record or to the trial judge's analysis of the Canada Conflict.

[228] Cassels called opinion evidence at trial from two senior Toronto lawyers accepted as experts in *CCAA* and insolvency and restructuring matters – Kenneth Rosenberg and Jonathan Levin. Trillium, for its part, led opinion

evidence from Gerald Kandestin, a senior Québec lawyer who was qualified at trial as an expert in Canadian insolvency law and practice.

[229] Rosenberg's and Levin's evidence on the Canada Retainer was brief. Suffice it to say, they offered the opinions that Cassels met the standard of care in its approach to a possible conflict arising from the Canada Retainer. For example, Levin testified that there was "clearly" the potential for conflict, but that potential conflicts are not unusual in large insolvencies, and can be managed as they arise. Similarly, Rosenberg testified that Cassels had attempted to manage the Canada Conflict, and that he considered it to be a "future issue" to be dealt with.

[230] In other words, Rosenberg's and Levin's evidence on this issue was premised on Cassels' contention that the Canada Retainer created merely the potential for a future conflict with the Dealer Retainer. The trial judge disagreed. Based on both the *Neil* bright line conflict rule and the *McKercher* substantial risk principle, he concluded that an actual and obvious conflict with the Canada Retainer existed from the beginning, when Cassels accepted the Dealer Retainer. As a result, on the trial judge's findings, the foundational premise for Cassels' experts' opinions on the issue of the Canada Retainer was vitiated on the evidence.

[231] It is also incorrect to say, as Cassels does, that the trial judge ignored their evidence or failed to factor it into his analysis of the Canada Conflict. The reasons do not bear this out. To the contrary, the reasons confirm that the trial judge expressly considered the evidence of both experts regarding the Canada Retainer and simply declined to accept it, for reasons he explained. He was entitled to do so.

[232] Nor, on the record, is it accurate to suggest that Trillium failed to lead any expert evidence on standard of care issues relating to the Canada Retainer. In his report, which was filed as an exhibit at trial, Kandestin addressed the Canada Retainer. He offered the opinion that the Dealer Retainer and, in his view, the Saturn Retainer, were "irreconcilable" with the Canada Retainer and that Cassels had accepted retainers from the GMCL dealers and the Saturn Dealers that it could not fulfill. He posited, for example, the following pertinent question:

> How could Cassels, even though different members of its firm and even with the consent of the … Saturn Dealers and GM Dealers (which it never obtained), represent different parties with conflicting interests before the *CCAA* court? It could not.

[233] I recognize that the trial judge does not refer to Kandestin's evidence in his analysis of the Canada Retainer. In contrast, when later discussing the DSC Conflict, he refers to Kandestin's evidence about how Cassels ought to have managed that conflict, and rejects it.

[234] However, nowhere in his reasons does the trial judge suggest that Kandestin's evidence was otherwise unacceptable or unreliable. Indeed, he confirmed in his costs reasons that Kandestin's opinion evidence, while not accepted on the DSC Conflict issue, was helpful overall. And, in his damages analysis, the trial judge expressly accepted parts of Kandestin's evidence. The fact remains that there was some expert evidence at trial supporting the trial judge's finding of a conflict arising from the Canada Retainer.

(e) Causation Argument

[235] Cassels' last ground on this issue is a causation-based argument. I deal with it in connection with issue (4), relating to Causation and Loss of Chance.

(f) Concluding Comments

[236] I make these final comments regarding the Canada Conflict. I accept that, in complicated insolvencies or *CCAA* matters, law firms, particularly large law firms with established expertise in such matters, may have multiple clients affected by the insolvency or bankruptcy events. In many instances, the means may be found to appropriately manage the risk of conflicts developing among the various clients' interests.

[237] However, two important factors set this case apart from the manageable risk category of cases. First, the dealers were not told of Cassels' engagement by another client, one whose objectives competed with those of the dealers.

Second, the dealers were also not told that Cassels' willingness and ability to represent their interests was qualified. But the pre-existing client was told. This, therefore, is not a case of conflicts risk management. There is no suggestion here of informed client consent to multiple mandates. Rather, this is a case, as found by the trial judge, of divided client loyalties that led the involved law firm to impermissibly favour one client over another.

ISSUE 3: DID THE TRIAL JUDGE ERR IN HIS TREATMENT OF THE SATURN DEALERS?

(1) Trial Judge's Findings

[238] The trial judge held, at para. 488: "What can be said about Cassels' retainer with the GMCL dealers applies equally to its retainer with the Saturn [D]ealers." He found that Cassels owed the Saturn Dealers the same "*per se*" fiduciary and contractual duties as it owed to the GMCL dealers, including the duty of loyalty, the duty of candid disclosure, and the duty to avoid conflicts. In respect of the Canada Conflict specifically, he held that, as with the other GMCL dealers, Cassels' conduct toward the Saturn Dealers amounted to a breach of those duties.

(2) Cassels' Position

[239] Cassels argues these findings are merely conclusory and the trial judge failed to conduct the necessary analysis of the Saturn Dealers' specific

circumstances to support them. It submits the trial judge erred by: i) failing to determine the nature and scope of the Saturn Retainer, including whether it extended to advice on the Saturn WDAs; ii) failing to determine the standard of care applicable to the Saturn Dealers and any breaches of that standard; and iii) failing to make necessary causation findings regarding the Saturn Dealers.

[240] I turn now to Cassels' first two submissions. I will address the third submission under issue (4), relating to Causation and Loss of Chance.

(3) Discussion

(a) Nature and Scope of the Saturn Retainer

[241] Contrary to Cassels' contention, the trial judge's reasons confirm that he did address, albeit in brief compass, the essential subject matter and scope of the Saturn Retainer.

[242] As I earlier indicated, Cassels was retained by the Saturn Dealers in March 2009, shortly after GMCL's announcement that it would be discontinuing the Saturn brand by the end of 2011, unless a purchaser for the brand could be found. Early in his reasons, in identifying this precipitating cause for the Saturn Retainer, the trial judge said, at para. 49: "Cassels was retained by the Saturn Group in March 2009 to provide legal advice with respect to, among other issues, GMCL's legal ability to terminate the Saturn Dealerships" (emphasis added).

[243] The trial judge twice returned to the issue of the nature and scope of the Saturn Retainer in his reasons, stating, at para. 363, that the Saturn Dealers retained Cassels "with respect to the closing or sale of the Saturn dealerships" and, at para. 383: "Cassels was retained by the Saturn [D]ealers to provide advice regarding their rights and options with respect to the discontinuance of the Saturn brand" (emphasis added).

[244] Thus, on the trial judge's explicit findings, the Saturn Retainer involved advice regarding GMCL's intended termination of the Saturn dealerships, including the issue of GMCL's legal entitlement to terminate its agreements with the Saturn Dealers. As the Saturn WDAs were merely the instrument by which GMCL sought to effect this purpose, it is implicit in the trial judge's findings that the Saturn Retainer included advice to the Saturn Dealers regarding the Saturn WDAs.

[245] This conclusion is bolstered by the terms of the individual, written retainer agreements entered into by the Saturn Dealers. Cassels asserts in its factum that Trillium led no evidence from a Saturn dealer regarding the Saturn Retainer. This is incorrect. Turpin was both a Saturn dealer and the principal of a Pontiac Buick dealership in Ottawa. In cross-examination of Turpin, Cassels' counsel introduced into evidence and questioned Turpin about the specific retainer agreement that his company had entered into with Cassels. Turpin confirmed that the agreement set out the nature of the retainer with Cassels.

[246] The agreement is a template document that was prepared for execution by any Saturn dealer who wished to participate in the Saturn group by retaining Cassels. The language of the agreement is widely cast. It stipulates that the applicable dealer retained Cassels to provide advice and "to act on their behalf with respect to all matters to do with" the Saturn Dealer Association and GMCL, including "any other matter requested by the [Saturn] Steering Committee". Without any qualifying wording, which does not appear in the template retainer agreement, this broad language clearly extends to matters relating to the termination of the Saturn dealerships, like the Saturn WDAs.

[247] Cassels argues, and I accept, that the Saturn Retainer obliged it to perform legal work for the Saturn Dealers as a group, and did not require it to advise on the individual circumstances of Saturn Dealers. This was also true of the Dealer Retainer. But this does not mean that advice to the Saturn Dealers, as a group, regarding the WDAs was excluded from the ambit of the Saturn Retainer. Indeed, Cassels recognized its role to provide legal services to the Saturn Dealers, as a group, regarding the termination of their dealerships when, on April 16, 2009, it provided a draft letter for individual Saturn Dealers to deliver to GMCL, if they so chose, to effect withdrawal from their dealership agreements with GMCL.

[248] Nor is it accurate to suggest the trial judge failed to recognize the differences between the Saturn Dealers' circumstances and those of the GMCL

dealers. The trial judge identified those differences at various points in his reasons, including: GMCL's announcement of its plan to discontinue the Saturn brand, as distinct from any other brand; the associated timing of the Saturn Dealers' retainer of Cassels; the fact that, by reason of the separate Saturn Retainer, the May 4 Memorandum did not apply to the Saturn Dealers; and the provision in the Saturn WDAs of the option to defer acceptance of any GMCL payment pending the outcome of efforts to sell the Saturn brand to a third party, which was not contained in the other WDAs.

[249] In these circumstances, while it might have been preferable if the trial judge had conducted a stand-alone analysis of the nature and scope of the Saturn Retainer, I am unable to conclude that his appreciation of it and his articulation of its reach are deficient or tainted by any reversible error. As with his findings on the nature and scope of the Dealer Retainer, the trial judge's findings on the nature and scope of the Saturn Retainer are findings of fact, to which this court must defer: *Seven-Up Canada Inc.*, at para. 40.

(b) Standard of Care

[250] It also does disservice to the trial judge's reasons to claim, as Cassels does, that the trial judge's findings regarding the Saturn Dealers are merely conclusory and that he failed to determine the standard of care applicable to Cassels' representation of the Saturn Dealers.

[251] In respect of the Canada Conflict, Trillium argued before the trial judge that the Saturn Dealers were similarly positioned to the GMCL dealers. The trial judge accepted this argument. As I have said, at para. 488 of his reasons, he held that what could be said about the Dealer Retainer applied equally to the Saturn Retainer. For that reason, he referred generally to the "GMCL dealer group" throughout his analysis of Cassels' conduct concerning the Canada Retainer. I take this to mean that the trial judge concluded that the standard of care applicable to the GMCL dealers under the Dealer Retainer also applied to the Saturn Dealers under the Saturn Retainer.

[252] I see no error in this conclusion as it relates to the Canada Conflict. As the trial judge found, Cassels was clearly in a fiduciary relationship with the Saturn Dealers and owed fiduciary and contractual duties to them by reason of the separate written retainer agreements entered into by them with Cassels. As a matter of law, these duties included the duty of loyalty, the duty of candid disclosure, and the duty to avoid conflicts. In these respects, Cassels' obligations to the Saturn Dealers were no different from those applicable to the other GMCL dealers. The fact that Canada played no role in the discontinuance of the Saturn brand is irrelevant to this conclusion.

[253] Further, and importantly, the record supports the trial judge's finding that the Saturn Dealers and the affected GMCL dealers were similarly vulnerable in their exposure to a GMCL restructuring or *CCAA* filing. This followed inexorably

from GMCL's announcement to CADA on May 15, 2009 that the delivery of WDAs was anticipated for dealerships GMCL wished to terminate, including Saturn dealerships. The Saturn Dealers received their WDAs on May 20, along with the other dealers.

[254] The record also indicates that all involved parties, including Cassels, accepted that, after the delivery of the WDAs and notwithstanding the option contained only in the Saturn WDAs, the interests of all proposed non-continuing GMCL dealers had converged.

[255] Recall that CADA held a conference call with the Saturn Dealers on May 22, 2009 in which Cassels' lawyers participated, to discuss the Saturn WDAs and options. On May 15, in preparation for that call, Ryan emailed members of the Saturn steering committee, indicating in part:

> We would also explain that given the situation of other GM dealer brands like Pontiac it appears that the Saturn issues which were initially in the forefront of GM issues appear now to be converging with general GM issues and that this is likely to only become more pronounced if GM files for bankruptcy protection. [Emphasis added.]

[256] Subsequently, Ryan suggested to Harris and Zakaib that the other GMCL dealers join the May 22 conference call because, as he put it in a May 19 email to the Cassels lawyers, "the Saturn dealers will be part of this group anyway". In the event, under the heading "Next Steps", the agenda for the May 22 call

contemplated the "[e]nd of Saturn Dealer Action Group and to be under the [DSC]".

[257] The Saturn Dealers were also similarly situated to the other GMCL dealers in other significant respects in relation to the Canada Conflict. The trial judge found, at para. 515, that "at a minimum … Cassels owed a duty to the dealers to advise them at the outset of the Canada [R]etainer and all of the potential problems that could thereafter arise". And, he also found, at para. 507: "[M]any of the dealers, GMCL and Saturn alike, stood to lose their livelihoods precisely because the Canadian Governments were demanding massive restructuring before they would offer financial support to the imperilled enterprise."

[258] Yet, as with the other GMCL dealers, Cassels never disclosed the Canada Retainer to the Saturn Dealers or the Saturn steering committee. Nor did it tell them about any constraint on its ability to represent the dealers, including Saturn Dealers, in any matter adverse to Canada's interests.

[259] In my view, therefore, the trial judge was on firm evidentiary ground when he held that, as with the other GMCL dealers, Cassels' conduct regarding the Saturn Dealers in respect of the Canada Conflict amounted to a breach of the applicable standard of care.

ISSUE 4: DID THE TRIAL JUDGE ERR IN HIS CAUSATION AND LOSS OF CHANCE ANALYSES?

(1) Introduction

[260] In its action, Trillium sought aggregate damages against Cassels under s. 24(1) of the *CPA*. It argued that, if Cassels had met the standard of care and provided proper advice to the dealers, including proposing negotiations with GMCL regarding the WDAs, the dealers, acting collectively, would have sought to negotiate with GMCL to improve their compensation under the WDAs. Because Cassels failed to properly advise and represent the dealers, Trillium argued, the dealers lost their only chance to negotiate with GMCL for this purpose.

[261] Trillium's loss of chance claim raises issues of concurrent liability in contract and tort. The question whether an action for damages for a lost chance sounds in tort is unsettled under the current Canadian jurisprudence. However, the doctrine of lost chance in contract law has been expressly recognized both in Canada and England: *Chaplin v. Hicks*, [1911] 2 K.B. 786; *Webb & Knapp (Canada) Limited v. City of Edmonton*, [1970] S.C.R. 588; *St. Thomas Subdividers Ltd. v. 639373 Ontario Ltd.* (1996), 91 O.A.C. 193 (C.A.).

[262] The distinction between loss of chance claims in contract and claims for damages in tort is important because, in contract law, proof of damage is not part

of the liability inquiry. In contrast, in tort law, liability rests not only on proof of a breach of the applicable duty of care but, as well, on a showing by the plaintiff that the defendant's conduct caused a loss.

[263] In a solicitor's negligence case like this one, where there is concurrent liability in contract and tort, the law is clear that a plaintiff may advance a claim for damages for "loss of chance". The leading case on the loss of chance to obtain a benefit or avoid a loss in the solicitor's negligence context is the English Court of Appeal's decision in *Allied Maples Group Ltd. v. Simmons & Simmons (a firm)*, [1995] 4 All E.R. 907. In *Allied Maples*, the defendant solicitors negligently failed to warn their clients of the consequences of deleting a warranty in an agreement of purchase and sale. The warranty stated that there were no existing or contingent liabilities on any leaseholds held by the vendor's subsidiary. In fact, there were such liabilities, and the plaintiff was bound by them.

[264] The plaintiff sued its solicitors, arguing that if it had been properly advised, it would have successfully negotiated some level of protection from liability or, alternatively, walked away from the transaction. In an argument that mirrors Cassels' position on this appeal regarding the Canada Conflict, the solicitors countered that they were not liable because there was no causal link between the breach and the damages.

[265] The Court of Appeal held that this argument confused the issues of causation and damages. The headnote of the case captures the court's key holdings:

> Once the plaintiff proved on the balance of probability as a matter of causation that he would have taken action to obtain a benefit or avoid a risk, he did not have to go on to prove on the balance of probability that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff. Instead, the plaintiff was entitled to succeed provided he showed that there was a substantial, and not merely a speculative, chance that the third party would have taken the action to confer the benefit or avoid the risk to the plaintiff. The evaluation of a substantial chance was a question of quantification of damages, the range lying somewhere between something that just qualified as real or substantial on the one hand and near certainty on the other.

[266] The majority dismissed the solicitors' appeal because the plaintiff had established that it would have negotiated the warranty issue if it had been properly advised, and there was a substantial chance that it would have obtained partial or full protection from the leasehold liabilities: see *Lawyers' Professional Liability*, *supra*, at p. 227.

[267] In Ontario, *Folland v. Reardon* (2005), 74 O.R. (3d) 688 (C.A.), is the leading case on loss of chance in solicitor's negligence. In *Folland*, the plaintiff sued his former lawyer for the alleged negligent conduct of a sexual assault trial. The plaintiff argued that, but for his lawyer's negligence, he would have been acquitted. This court held that the claim raised a genuine issue for trial.

[268] Justice Doherty, writing for the court, went on in *obiter* to consider the plaintiff's additional argument that, as a result of his lawyer's negligence, he had lost the chance to be acquitted. This claim was novel, arising as it did in the criminal law context. The court considered the relevant case law and held, at para. 73:

> Whatever the scope of the lost chance analysis in fixing liability for tort claims based on personal injuries, lost chance is well recognized as a basis for assessing damages in contract. In contract, proof of damage is not part of the liability inquiry. If a defendant breaches his contract with the plaintiff and as a result a plaintiff loses the opportunity to gain a benefit or avoid harm, that lost opportunity may be compensable. As I read the contract cases, a plaintiff can recover damages for a lost chance if four criteria are met. First, the plaintiff must establish on the balance of probabilities that but for the defendant's wrongful conduct, the plaintiff had a chance to obtain a benefit or avoid a loss. Second, the plaintiff must show that the chance lost was sufficiently real and significant to rise above mere speculation. Third, the plaintiff must demonstrate that the outcome, that is, whether the plaintiff would have avoided the loss or made the gain, depended on someone or something other than the plaintiff himself or herself. Fourth, the plaintiff must show that the lost chance had some practical value.

[269] The *Folland* court concluded that a lost chance claim was not available to the plaintiff on the facts of the case; among other reasons, it held, at para. 92, that "public policy would not countenance a damage award" in circumstances where, on the trial court's findings, the plaintiff probably committed the crime for which he was charged.

[270] Recently, in *Berry v. Pulley*, 2015 ONCA 449, 335 O.A.C. 176, at para. 70, this court described a "two-step framework" for the determination of a loss of chance claim. Associate Chief Justice Hoy explained, at para. 72, that the court must first determine if the four criteria set out in *Folland* are met. If they are, then the court proceeds to the second step and "will award damages equal to the probability of securing the lost benefit (or avoiding the loss) multiplied by the value of the lost benefit (or the loss sustained)".

[271] More recently still, in *Jarbeau v. McLean*, 2017 ONCA 115, this court restated the principles that govern a loss of chance claim in the context of an action for solicitor's negligence. Justice Pardu, writing for the court, quoted from para. 73 of *Folland*, set out above, and stated, at paras. 27-28:

> Where a plaintiff in a tort action arising out of solicitor's negligence can establish on the balance of probabilities that but for the [solicitor's] negligence he or she would have avoided the loss, he or she should be fully compensated for that loss.
>
> Where a plaintiff can only establish that but for the solicitor's negligence he or she lost a chance to avoid a loss, a claim for breach of contract may permit recovery for the value of that chance.

[272] In contrast to *Jarbeau*, Trillium advances a claim in this action for damages for loss of chance, flowing from solicitor's negligence.

[273] As I will elaborate, when these principles are applied to the facts of this case as found by the trial judge, I conclude that Cassels has mischaracterized

the nature of the loss of chance claim put against it by Trillium. Consequently, its challenges to the trial judge's causation and loss of chance holdings are also flawed.

(2) Trial Judge's Findings

[274] The trial judge accepted Trillium's loss of chance claim. In his view, the analysis of that claim had two components – causation and quantum. He therefore addressed causation under the rubric of his loss of chance analysis, holding that Trillium had established, on a balance of probabilities, that because of Cassels' wrongful conduct, the GMCL dealers lost the opportunity to negotiate collectively with GMCL for increased WDA payments. He made these specific findings:

- But for Cassels' divided loyalty, Cassels would likely have provided advice to the dealers about the WDAs and proposed the option of collective negotiation with GMCL (para. 555);
- Cassels' divided loyalty due to the Canada Conflict caused it to "soft pedal" its representation of the dealers' interests and prevented it from "fully committing" to their cause (para. 556);
- If the dealers had been properly advised and represented by Cassels, they would have banded together and instructed Cassels to negotiate with GMCL regarding the WDAs (paras. 556-61);
- The dealers' lost chance to negotiate with GMCL was real and significant (para. 562); and

- It was likely that GMCL would have negotiated with the dealers. Further, there was a real chance that those negotiations would have proven to be productive (paras. 563-84).

(3) Cassels' Position

[275] Cassels mounts broad attacks against the trial judge's causation findings. It contends, as a threshold matter, that the trial judge was precluded from making any findings on causation because it was not certified as a common issue. In any event, Cassels says, the evidence necessary to determine causation was not before the court.

[276] Cassels also argues that the trial judge erred by:

(1) finding causation in the absence of any finding about what the standard of care required in the circumstances;

(2) finding, in breach of the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.), that Cassels "soft pedalled" its assistance to the GMCL dealers due to the Canada Retainer;

(3) finding, in the absence of supporting evidence and based on a misapprehension of the composition of the Class, that GMCL would have agreed to negotiate with the GMCL dealers regarding the WDAs;

(4) finding, based on an unavailable inference, that the class members would have instructed Cassels to negotiate collectively with GMCL;

(5) failing to consider causation in relation to the Saturn Dealers; and

(6) failing to undertake a proper loss of chance analysis, specifically, by failing to consider the cumulative elements of probability.

(4) Discussion

(a) Threshold Issues

[277] I deal first with Cassels' threshold submissions that the trial judge impermissibly undertook a causation inquiry and, relatedly, that he made causation findings in the absence of necessary supporting evidence. The first of these submissions concerns the trial judge's jurisdiction. The second relates to his processing of the evidence.

[278] As I have described above, the jurisprudence on loss of chance claims confirms that the concepts of loss of chance, causation and damages overlap. The governing authorities establish that, at the first stage of a loss of chance analysis, liability, the plaintiff must prove on a balance of probabilities that, but for the defendant's conduct, it had a chance to obtain a benefit or avoid a loss. This is fundamentally a question of causation. At the second stage, damages, the court is required to determine how much of the plaintiff's loss is attributable to the defendant's conduct. This, too, is a question of causation.

[279] Thus, in a loss of chance case, causation is relevant both to the existence of liability and the extent of liability: see Ken Cooper-Stevenson, *Personal Injury Damages in Canada*, 2d ed. (Toronto: Carswell, 1996), at pp. 750-51. This

belies Cassels' argument that the trial judge was not entitled to consider causation as it was not certified as a common issue.

[280] Similarly, in a class proceeding, a trial judge can invoke the s. 24 *CPA* aggregate damages remedy regardless whether aggregate damages are certified as a common issue: *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921, 341 O.A.C. 338, at para. 78, leave to appeal discontinued, [2016] S.C.C.A. No. 79; *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, leave to appeal refused, [2007] S.C.C.A. No. 346. In this context, as well, the case law recognizes that issues of causation and damages are inextricably linked.

[281] In his Certification Decision, at paras. 24 and 26, the certification judge helpfully explained what was at issue in Trillium's action with respect, particularly, to the Canada Retainer:

> Trillium alleges that Cassels had an undisclosed conflict of interest. It pleads that Cassels had been retained by the government of Canada to provide legal advice on the GMCL bailout negotiations and that this retainer was not disclosed to the terminated dealers. Canada had made financial assistance conditional on GMCL taking a more aggressive approach to its restructuring, including the reduction of its dealership network. Trillium asserts that because it was in Canada's interest to have the GMCL dealers accept the [WDAs], Cassels was not in a position to provide independent and impartial advice to the terminated dealers.
>
> …

> Trillium pleads that Cassels failed to properly advise and represent class members – in particular, by failing to inform them of their rights under the [*Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3] and by failing to properly represent them in developing a collective response to the [WDA]. Trillium alleges that by failing to disclose its alleged conflict, and by failing to refer class members to an independent lawyer who could inform them of their rights and properly represent their interests in a collective response to GMCL's ultimatum, Cassels deprived all class members of the opportunity to use their group negotiating power to full advantage. Trillium's theory is that the dealers could have used their combined leverage to negotiate a better deal with GMCL by refusing to agree to the voluntary downsizing unless their compensation was increased. Instead, says [Trillium], Cassels told them to obtain advice from their own lawyers, which – in view of GMCL's position that the [WDA] was non-negotiable – meant that there was no possibility of an effective response on an individual basis. [Emphasis added.]

[282] The certification judge went on to describe Trillium's breach of contract and breach of fiduciary duty claims in these terms, at paras. 84 and 87:

> [Trillium] has pleaded the relevant terms of the contract, including implied terms that arise from a solicitor and client relationship.[2] There are allegations that set out the manner in which the contract was breached. Damages are pleaded. [Trillium] pleads that as a result of Cassels' acts or omissions, the class members lost their chance to be represented as a collective and to negotiate a better settlement. I cannot say that this is a patently ridiculous allegation or that the damages claimed are incapable of proof: "[r]ecovery for lost

[2] Based on Trillium's pleading, these express or implied terms included: that Cassels would provide fearless, loyal, competent and vigorous representation of the GM dealers; that Cassels had no conflict of interest and would provide completely faithful representation of the dealers relating to GM's restructuring; and that Cassels would subordinate its own interests, including its commercial interests, in its representation of the dealers.

> chances based on lawyers' negligence either in advising clients, or in conducting litigation, is well established in the common law".
>
> ….
>
> The statement of claim contains allegations that Cassels owed a duty of loyalty and faithful and undivided representation to class members. These are fiduciary duties. There are allegations that Cassels had a conflict of interest that it did not disclose to class members and that it acted contrary to the interests of class members by simultaneously acting for Canada as well as for the ongoing GM dealers who were not being terminated. These are allegations of breaches of the fiduciary obligation of undivided loyalty that is at the heart of the lawyer-client relationship. There is a properly pleaded cause of action for breach of fiduciary duty. [Emphasis added; citations omitted.]

[283] Later in his reasons, in his discussion of the common issues and preferable procedure criteria under the *CPA*, the certification judge reiterated that Trillium's claim was based on a loss of chance, a recognized claim at common law.

[284] On appeal to the Divisional Court from the Certification Decision, Cassels argued that the "but for" test continues to apply in loss of chance cases and that the certification judge erred by holding to the contrary. Justice Lauwers, as he then was, writing for the Divisional Court, described Cassels' argument, at para. 8, in this fashion:

> Justice Strathy erred in rejecting Cassels' argument that the plaintiff must plead (and ultimately prove) that each proposed Class Member would not have signed the

> WDA but for Cassels' alleged breaches. Instead, Justice Strathy found at paragraph 158 of his [Certification] Decision that "the individual motivations of class members are irrelevant." This finding is contrary to the case law.
>
> Justice Strathy erred in finding that the plaintiff need not plead or establish that it would have acted differently but for Cassels' alleged negligence or breach of contract. As the fiduciary duty claim arises from the contract claim, it fails for the same reason.

[285] The Divisional Court rejected this argument, holding at para. 10: "The causes of action on which the plaintiff relies against Cassels do require proof of causation, but not in the way that Cassels suggests." The court then quoted at length from the Certification Decision emphasizing Trillium's loss of chance claim.

[286] Justice Lauwers elaborated, at paras. 16-17:

> [Trillium's] allegation is that an informed and competent lawyer in Cassels' position, but without its inside knowledge and its conflict of interest, would have urged the dealers to take collective action that would have produced a better deal than the WDA. This is not an implausible theory and it is not obviously impossible to prove to the standard required.
>
> If that loss of chance were proven, then the causation element would be satisfied from the viewpoint of contract or tort; it seems axiomatic that if the trier of fact ultimately finds on the evidence that another conflict-free lawyer would have negotiated a better deal, then the [dealers] would plainly have accepted it instead of the WDA and the damages would be easily made out. [Citations omitted.]

[287] I take the certification judge and the Divisional Court to have both concluded that, given the way in which Trillium framed its action – as a loss of chance claim founded in solicitor's negligence – its claim encompassed causation at both the liability and damages stages. This necessarily meant that causation would be a live issue at trial. As a result, it was unnecessary that causation be certified as a discrete common issue. I therefore disagree with Cassels' submission that the trial judge was precluded from making any findings on causation. A causation inquiry by the trial judge was both available and necessary to determine Trillium's claim, as pleaded.

[288] I would also reject Cassels' second threshold submission, that the evidence necessary to determine causation was not before the trial judge. I am not persuaded there was any gap in the evidence at trial that foreclosed the trial judge's causation inquiry or findings.

[289] The alleged evidentiary gap relates to the independent legal advice received by the dealers from their personal lawyers regarding their jeopardy in the face of GMCL's restructuring and the WDAs. As I have said, the certification judge considered Cassels' assertions that evidence of the dealers' independent legal advice was crucial to Trillium's claim. He ruled, at paras. 139 and 158:

> [Trillium's] case is that all dealers had a chance, through Cassels, to obtain a better deal and that due to Cassels' breaches of duty they lost that chance.
>
> ….

> Framing its claim in this fashion, as [Trillium] has every right to do, the individual motivations of class members are irrelevant.

This ruling was upheld by the Divisional Court, as described above.

[290] Not to be deterred, before this court Cassels renews its argument that evidence relating to the independent legal advice received by the dealers, especially about the WDAs, was essential to any causation inquiry. In support of this argument, it relies heavily on a 2012 ruling by Belobaba J. of the Superior Court of Justice, in his capacity as case management judge of this class action, on a motion by Cassels to compel production of documents concerning the dealers' independent legal advice: *Trillium v. General Motors of Canada*, 2012 ONSC 5960. In dismissing the motion, the case management judge said, at paras. 14 and 34-35:

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

….

> The legal advice received by Trillium and the other class members from their respective lawyers is not relevant to common issues (j), (k) and (l). I agree with Trillium that [Cassels] will be the focus of the legal and factual inquiries that will have to be made at the common issues trial, not the class members and not their individual lawyers. The certification judge made this clear:
>
> > The determination of whether Cassels owed a contractual duty, a fiduciary duty or a duty of care to the class can be made without considering the particular circumstances of individual class members. The same is true of the question whether Cassels breached those duties. There is no evidence that Cassels had dealings with individual class members that would make the answers to these questions dependent on individual communications or circumstances.
>
> In sum, the content of the legal advice received by Trillium and the other class members from their respective lawyers is irrelevant to the common issues as certified by Justice Strathy. There is no basis upon which [Cassels] can compel disclosure of that advice at this stage of the proceeding.

[291] Cassels maintains these passages support its argument that a finding of causation on a class basis was not available to the trial judge. I have difficulty understanding the logic of this argument. The certification judge and the Divisional Court explained why Cassels' position on causation failed to meet the

case put against it by Trillium. The case management judge's decision on the production motion did not alter that explanation. It endorsed it.

[292] Cassels lost its argument that causation could not be determined on a class-wide basis before the certification judge. It lost its appeal on this issue in the Divisional Court. It also lost its application for leave to appeal from the Divisional Court's decision. Now, on this appeal, it, in effect, renews its argument that Trillium's claim is one for the recovery of losses that each GMCL dealer suffered by accepting the applicable WDA, rather than the dealers' collective loss of chance to negotiate with GMCL for a better deal.

[293] And it is in this fashion that Cassels mischaracterizes the nature of the claim put against it by the dealers. Trillium has alleged throughout that the GMCL dealers retained Cassels to act for them as a group and that Cassels breached its duties to them as a group by causing them to lose the chance, as a group, to collectively negotiate with GMCL for improved compensation under the WDAs. Cassels, for its own purposes in respect of other issues on this appeal, stresses the group nature of the Dealer Retainer. There was ample evidence before the trial judge to permit the evaluation of this group claim.

[294] Nor was there any procedural unfairness to Cassels on this issue. Trillium pleaded from the outset that Cassels caused the damage suffered by the dealers by reason of the loss of the chance to act and be represented as a collective.

Causation questions were significant issues and occupied considerable time at trial. Well before trial, both Trillium and GMCL delivered extensive expert reports addressing causation and damages issues (including the probabilities regarding whether GMCL would have negotiated with its dealers and whether the dealers would have organized to negotiate collectively). Further, Cassels cross-examined Trillium's witnesses on these issues. It could not have come as any surprise to Cassels that the trial judge would undertake a causation analysis on a group basis in order to determine Trillium's loss of chance claim against Cassels. He was obliged to do so.

(b) Standard of Care

[295] Cassels also complains the trial judge erred by determining causation without first finding what the standard of care required in the circumstances. This complaint focuses primarily on the trial judge's findings regarding the DSC Conflict. In my view, no viable complaint of this kind can be made in relation to the Canada Conflict.

[296] I recognize that, in contrast to his findings on the DSC Conflict, the trial judge did not explicitly refer to the standard of care in relation to the Canada Conflict. However, it is obvious, if implicit, that he defined the standard of care by identifying the duties owed by Cassels to the dealers in respect of the Canada Conflict and its breaches of those duties. Recall that, having defined Cassels'

fiduciary and contractual obligations to the dealers, he held that Cassels breached those obligations in relation to the Canada Conflict: i) by accepting the Dealer Retainer in the first place; ii) at a minimum, by failing to disclose the Canada Conflict to the dealers from the outset; and iii) having accepted the Dealer Retainer, by failing to fully commit to the dealers' cause and by "soft pedalling" its representation of the dealers due to its divided loyalty arising from the Canada Retainer. In this fashion, the trial judge defined the standard of care applicable to the Canada Conflict.

[297] I have already discussed the first two breaches of the standard of care. With respect to the third, the trial judge again made unambiguous findings regarding the standard of care and causation, identifying in the process what Cassels should have done in the circumstances. He held, at para. 556:

> I infer from the existence of the [Canada] [C]onflict and from Cassels' inaction with regard to the dealers that Cassels' divided loyalty caused it to "soft pedal" the representation of the dealers who received WDAs. The fact that Cassels would not confront the government in any *CCAA* proceedings or complex restructuring prevented Cassels from fully committing to the cause of the dealers. … I am satisfied that had Cassels been involved with the WDAs and proactive with regard to the dealers' interests, it would have advised the Class Members about negotiating collectively with GMCL. Alternatively, had Cassels advised the dealers of the Canada Conflict and the [DSC] conflict, and had new counsel been retained, I am confident that new counsel would have advised the dealers regarding the WDAs. [Emphasis added.]

[298] I return to one other aspect of Cassels' standard of care argument, which I have already mentioned under issue (2), regarding Cassels' Breaches of its Obligations due to the Canada Conflict. Cassels argues that, by rejecting the evidence of its standard of care experts, the trial judge was left with no evidentiary foundation for his standard of care findings. This, too, is a complaint about the trial judge's processing of the evidence. This complaint has no traction in respect of the Canada Conflict because it runs contrary to the established standard of care jurisprudence.

[299] Cassels correctly points out that in *Krawchuk v. Scherbak*, 2011 ONCA 352, 106 O.R. (3d) 598, at para. 130, leave to appeal refused, [2011] S.C.C.A. No. 319, this court held: "[I]n general, it is inappropriate for a trial court to determine the standard of care in a professional negligence case in the absence of expert evidence."

[300] However, the *Krawchuk* court also held, at paras. 133-35, that expert evidence is not necessary where:

> (1) it is possible to reliably determine the standard of care in relation to "non-technical matters or those of which an ordinary person may be expected to have knowledge"; or
>
> (2) the impugned actions of the defendant are so egregious that it is obvious that his or her conduct has fallen short of the standard of care, even without knowing precisely the parameters of that standard.

[301] Assuming, for the sake of argument, that there was no expert evidence, accepted by the trial judge, on the relevant standard of care (notwithstanding Kandestin's evidence on this issue, to which the trial judge made no reference), both *Krawchuk* exceptions to the need for expert evidence apply to the Canada Conflict.

[302] First, the standard of care applicable to the Canada Conflict was not technical or complex. It is axiomatic that a lawyer cannot act for clients with directly adverse interests without the clients' informed consent, and certainly not without their knowledge. This should be obvious to a lay person and is certainly obvious to a judge. An expert witness is not better placed than a judge, who is presumed to know the law, to assess this fundamental dimension of a lawyer's fiduciary obligations.

[303] In particular, the case law establishes the following governing principles, none of which requires expert evidence to elucidate:

- A lawyer's fundamental duty is to act in the best interest of his or her client to the exclusion of all other adverse interests, except those disclosed to and willingly accepted by the client: *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, at para. 1;

- A lawyer must not keep the client in the dark about matters he knows will be relevant to the retainer: *Strother*, at para. 55;

- A lawyer must avoid competing interests precisely so that he can remain committed to the client, ensuring that divided loyalty does not cause the lawyer to soft-pedal his or her representation of one client out of concern for another: *Neil*, at para. 19; and *McKercher*, at para. 43; and

- A law firm cannot terminate a client relationship purely in an attempt to circumvent its duty of loyalty to that client: *McKercher*, at para. 55.

[304] Applying these principles to this case compels the conclusion, as the trial judge found, that the standard of care required Cassels, at a minimum, to disclose the Canada Retainer to the GMCL dealers and to discuss with them the implications of the proviso or constraint imposed by Cassels on its ability to act for the dealers.

[305] Second, regardless whether the first *Krawchuk* exception to the need for expert evidence on the standard of care is engaged, the trial judge's findings are tantamount to a holding that Cassels' non-disclosure of the Canada Retainer and of the proviso on the Dealer Retainer was so egregious that Cassels' conduct fell below the standard of care, however defined. The trial judge held, at paras. 516-17:

> I cannot understand how [Cassels lawyers] thought it was acceptable for Cassels to take on [the Dealer Retainer] without advising the [DSC] or the Saturn [D]ealers that it was also acting for Industry Canada.
>
> …
>
> Having engaged Cassels on behalf of the dealers, it was not CADA's right to deal with the conflict of interest.

> … While CADA could certainly provide instructions regarding any conflicts or other issues that it saw with respect to *its own* retainer, it had no authority to waive conflicts or potential conflicts on behalf of the dealers. This should have been obvious. It is astonishing that the Cassels' lawyers, acting on behalf of Canada, Saturn and the GMCL dealers, conducted firm meetings to analyze the likelihood and depth of a conflict – and somehow concluded that it was unnecessary to consult or advise the dealers, whom Cassels was apparently prepared to jettison in favour of Industry Canada's retainer. [Underlining added; italics in original.]

[306] On this record, these findings were open to the trial judge.

(c) Factual Findings and Inferences

[307] Cassels also challenges several key factual underpinnings of the trial judge's conclusions on causation and loss of chance. I will deal with these in turn.

(i) Cassels' inaction for the dealers

[308] First, Cassels challenges the trial judge's findings that, by reason of its divided loyalty due to the Canada Retainer, it "soft-pedalled" its representation of the dealers who received WDAs, failed to act proactively in their interests, and failed to commit fully to their cause. Cassels says that these findings are unfair, unsupported by any evidence, and were made in violation of the rule in *Browne v. Dunn*.

[309] The language of "soft pedalling" and "commitment to the client's cause" did not originate with the trial judge. These words track the language of the

Supreme Court of Canada in *Neil*, at para. 19, referenced above, that a lawyer's duty of loyalty to a client engages many dimensions, including "the duty of commitment to a client's cause" or "zealous representation". This dimension of the duty of loyalty applies from the time counsel is retained and requires that a lawyer not downplay or mute his or her representation of a client out of concern for another client. Both parties accept this duty and the fact that it was encompassed in the Law Society of Upper Canada's rules on the avoidance of conflicts of interest set out in the *Rules of Professional Conduct* as in force in May 2009.

[310] As I see it, there are three problems with Cassels' submissions on this issue. First, when Cassels accepted the Dealer Retainer, it informed CADA, but not the DSC or the dealers, that it "could not take on the government, if such a circumstance arose, in any *CCAA* proceeding". The trial judge concluded that this proviso, arising from the Canada Retainer, prevented Cassels from fully committing to the dealers' cause. As a result, Cassels failed to "represent the dealers as zealously as [it] could have" and its representation of them was "hampered by [its] overriding loyalty to another party in the same matter" (at para. 518).

[311] These factual findings are also rooted in the evidence. The admitted, undisclosed proviso that conditioned Cassels' acceptance of the Dealer Retainer reflected the intention to prefer Canada's interests to those of the dealers, should

the need arise. And, on the trial judge's findings, when lawyers at the firm met to discuss whether Cassels could accept the Dealer Retainer, they were preoccupied with the impact of that potential mandate on Canada's and CADA's interests and did not consider the GMCL dealers' interests.

[312] I note further, as a matter of common sense and logic, that because Cassels knew it could not "take on the Government", it follows that it would not knowingly have done anything that would trigger the conflict it hoped to avoid. Advising the dealers to band together to negotiate improved WDAs with GMCL, thereby impeding GMCL's restructuring plan, could certainly have been such a trigger.

[313] Second, and in any event, Cassels' own Conflict of Interest Policies and Procedures in place at the time set out the Law Society's rules on the avoidance of conflicts of interest and further stipulated: "[I]n considering potential conflicts of interest, the firm must be viewed as a unit, *i.e.* as if it was a single lawyer." Accordingly, once Cassels accepted the Canada Retainer, it was precluded from accepting another retainer that would conflict with it.

[314] Cassels relies on the fact that the relevant lawyers at the firm testified at trial that their actions in respect of the dealers were not affected by the Canada Retainer. However, in his testimony, Harris acknowledged that Canada would have an interest in avoiding upset to or delay in a *CCAA* proceeding and that

Cassels' representation of the dealers put it in the position where its client, Canada, would be on one side of the bargaining table, while its other client, the GMCL dealers, would be on the other. This is undoubtedly correct.

[315] Finally, Cassels submits that, because the involved Cassels lawyers were not cross-examined on whether they "soft pedalled" their representation of the dealers due to the Canada Retainer, it was not open to Trillium to argue at trial that they had done so and the trial judge's finding to the contrary offends the rule in *Browne v. Dunn*. I disagree.

[316] The application of the rule in *Browne v. Dunn*, which seeks to foster trial fairness, is within the wide discretion of the trial judge and depends on the circumstances of the case: *R. v. Quansah*, 2015 ONCA 237, 125 O.R. (3d) 81, at paras. 75-90, leave to appeal refused, [2016] S.C.C.A. No. 203. The trial judge considered and declined to accept Cassels' *Browne v. Dunn* argument, holding that it knew from the outset of this litigation that the Canada Conflict was one of the central issues raised by Trillium, that it had every opportunity to address this issue, and that it in fact did so.

[317] I agree that the fact that Trillium would rely on Cassels' inaction for the dealers as evidence that the dealers' interests were adversely affected by the Canada Retainer could scarcely have caught Cassels by surprise. Trillium pleaded the Canada Conflict and alleged that Cassels did not properly advise or

represent the dealers as a result of it. These allegations were central to Trillium's entire theory of the case. In the circumstances, I agree with the trial judge that the rule in *Browne v. Dunn* was not implicated. Cassels clearly knew the case it had to answer at trial regarding the Canada Conflict and availed itself of the opportunity to do so.

(ii) Findings regarding negotiations with GMCL

[318] Cassels next submits that the trial judge erred, in fact and in law, by holding that: i) properly advised, the affected dealers would have banded together and instructed Cassels or another law firm to pursue negotiations with GMCL regarding the WDAs, even though this risked precipitating a GMCL *CCAA* filing; and ii) if the dealers had done so, GMCL would have entertained negotiations with the dealers.

[319] It is unnecessary to address every argument advanced by Cassels in support of these submissions. I would reject its challenge to these findings on several bases.

[320] First, the finding that the dealers would have instructed Cassels to pursue negotiations with GMCL if they had been properly advised. This finding is an inference drawn by the trial judge from the whole of the evidence. This is a case where Cassels' breaches of its obligations concerning the Canada Retainer were said to arise from its omission or non-feasance in failing to provide proper

representation or advice to the dealers, rather than from some positive act or misfeasance. The question of causation, therefore, depended on the answer to the hypothetical question of what the dealers would have done if Cassels had furnished the necessary representation or advice. This was a matter of inference to be determined from all the circumstances, rather than a question of historical fact: *Allied Maples*, at pp. 914-15.

[321] Thus, Trillium was required to prove, on a balance of probabilities, that the dealers would have taken action, as a collective, to obtain the benefit of improved compensation under the WDAs by attempting to negotiate with GMCL, as a group. The trial judge inferred that they would have done so. This inference did not need to be the only inference available. However, it did need to be among the field of available inferences, and not mere speculation. In my view, the evidence supported this inference and it rises well above mere speculation.

[322] Specifically, the trial judge relied on the evidence of Hurdman, the principal of Trillium, and that of Turpin and Brian Condie, a Pontiac/Buick dealer, that if Cassels had suggested negotiations with GMCL, they would have participated. The trial judge accepted this evidence and inferred from it that other dealers facing the termination of their dealerships would also have done so.

[323] Cassels asserts that the trial judge erred in law by drawing this inference. First, it argues this inference runs contrary to the trial judge's ruling, on an

objection at trial by Cassels to the admissibility of the dealers' testimony, that their evidence went only to the common issues.

[324] Second, Cassels says that Trillium, as the representative plaintiff, was the only party at the common issues trial. As a result, Cassels says, it was prevented from gathering or leading evidence from GMCL dealers who might have elected not to participate in such negotiations. In other words, how each dealer would have responded to its WDA necessarily depended on their individual circumstances, a matter on which Cassels had been precluded from gathering and adducing evidence.

[325] Finally, Cassels submits that the trial judge impermissibly inferred that, because Hurdman, Turpin and Condie testified that they would have negotiated, this evidence could be extrapolated and applied to the entire class. It points to this court's direction in *Ramdath*, at para. 91: "A court cannot extrapolate from the motivation of one person to a conclusion respecting others … [p]roof of reliance must be based on evidence of the experience of each individual class member."

[326] Dealing with the last point first, I do not think that *Ramdath* assists Cassels on this issue. *Ramdath* was concerned with reliance in a misrepresentation case. This is fundamentally different than the collective loss of chance claim advanced here. As the certification judge held, by framing the case in this fashion, as

Trillium had every right to do, the individual motivations of class members became irrelevant.

[327] Further, as Trillium points out, the applicable authorities do not support Cassels' contention that only the representative plaintiff can testify, to the exclusion of all other class members, at a common issues trial. See, for example, *Bywater v. Toronto Transit Commission*, [2001] O.J. No. 2384 (S.C.); *Landsbridge Auto Corp. v. Midas Canada Inc.*, [2009] O.J. No. 1279 (S.C.). There is also authority for the proposition that the normal rules of evidence that apply to a regular civil trial also apply to a common issues trial in a class proceeding: *Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, at para. 39. As the trial judge ruled, Trillium was entitled to call witnesses to prove its case. The trial judge was entitled, therefore, to rely on the evidence adduced from the class member dealers, which he had ruled was admissible.

[328] Perhaps more importantly, there were other compelling considerations upon which the trial judge could, and did, rely to ground his finding that, with proper advice and representation from Cassels, the non-continuing dealers would have joined together and sought to negotiate with GMCL for improved compensation packages. There was evidence at trial that:

- The monetary offers contained in the dealers' WDAs represented a small fraction of the value of their dealerships;

- GMCL's own internal analyses suggested that the compensation offered under the WDAs represented about one-third of the value of the dealerships that received WDAs;

- As the DSC and Cassels itself had urged in communications with the dealers, there was 'strength in numbers'. As the trial judge found, the class members would have gained leverage from banding together as a cohesive unit;

- The May 4 Memorandum, as well as the May 13, 2009 memorandum and the May 7, 2009 dealer conference call, all touted the benefits of collective action by the dealers in order to involve counsel for them "at the bargaining table" and to represent their interests as a whole. By signing the participation forms and/or contributing to the trust fund to be held by CADA, the Participation Form Dealers took up the invitation for collective representation and advice;

- The dealers were repeatedly invited, including by Cassels lawyers on the May 7, 2009 dealer conference call, to organize "to have a seat at the table"; and

- It is common in restructurings or *CCAA* proceedings for stakeholders with common interests to unite as a group in order to gain leverage.

[329] This evidence strongly pointed to the conclusion that the dealers had much to gain from pursuing collective negotiations with GMCL and that, notwithstanding the risks to them of non-recovery in a *CCAA* proceeding, they

would have participated in such negotiations if this option had been raised by Cassels. Further, it is apparent that all of CADA, Cassels and the DSC were of the view that the dealers could, and should, organize as a cohesive, collective negotiating unit and that there were many advantages to the dealers doing so and considerable risk to them if they did not.

[330] Cassels also contends that the trial judge erred by failing to properly consider: i) what would have occurred if some dealers were opposed to negotiations due to the risk of a *CCAA* filing; ii) the "very strong likelihood" that the Saturn Dealers would have rejected any recommendation that might risk their WDAs and the deferred payment option contained in them; and iii) whether any realistic mechanism was available to bind the dealers in any negotiations or to permit Cassels to reliably obtain instructions from the dealers in any negotiations.

[331] Contrary to Cassels' contention, the trial judge did not ignore these considerations. He simply rejected Cassels' position on them. His reasons confirm that he appreciated and took account of the differences among the GMCL dealers, including those differences identified by Cassels' experts in their trial testimony. He also recognized that the Saturn Dealers, as a stand-alone group, would have been in a less advantageous position than the other dealers in any negotiations with GMCL. It was in part for this reason that he held, at para. 612: "[T]hey would have banded together, as it would have made good sense to increase [their] leverage by increasing their numbers." I agree.

[332] Nor did the trial judge ignore the practicalities of obtaining instructions from the dealer group or of devising a mechanism to bind the dealers in any negotiations. He found that it was more likely than not that a mechanism could have been devised to bind the dealers within the negotiation framework. He also held it was not a given that a binding mechanism was necessary in the first place; GMCL had the authority to waive the Acceptance Threshold Condition. 100 percent buy-in from the dealers who were offered WDAs was never required, nor was it actually obtained.

[333] Moreover, there was evidence of a nascent binding mechanism being developed for the dealers: on May 28, 2009, CADA sent a memorandum to "All GM Canada Dealers who have contributed to CADA's General Motors Dealer Group Fund". That memorandum explained that CADA had arranged for Cassels to represent the non-continuing dealers and for another law firm to represent the continuing dealers, so that the dealers would be in a position to "hit the ground running" "on day one of any bankruptcy filing" by GMCL. The May 28 memorandum recognized that the non-continuing dealers and the continuing dealers had different interests. There is no reason why separate counsel could not have been engaged earlier, to permit counsel for the non-continuing dealers to engage in negotiations with GMCL.

[334] This brings me to Cassels' submission that the trial judge erred by inferring that GMCL would have negotiated with the dealers if such negotiations had been proposed.

[335] Cassels submits that this key finding was unsupported by the evidence and was "speculative", that it was contrary to the evidence of Lawrence Buonomo of GM that GMCL would not have negotiated with the dealers, and that it was made in the absence of any evidence about how many Participation Form Dealers would have formed any negotiating group.

[336] The issue whether GMCL would have negotiated with the dealers was an important and hotly contested issue at trial. There was extensive evidence on this question, much of it conflicting, including expert evidence and testimony from two senior GMCL and GM executives (Comeau and Buonomo). The trial judge addressed this evidence in some detail (five pages of his reasons), expressly focusing on the parties' arguments that he considered to be significant. Ultimately, at para. 572, he accepted Trillium's contention that, "if push came to shove", GMCL would have entertained negotiations with the dealers concerning the WDAs. In my view, there was ample evidence at trial to support this inference.

[337] The answer to the question whether, and the extent to which, negotiations on behalf of the dealers as a collective would have borne fruit depended on the

hypothetical action of a third party – GMCL. For the purpose of establishing causation, Trillium was required to demonstrate that the dealers had a real or substantial chance, as opposed to a speculative one, of negotiating with GMCL for improved compensation under the WDAs. As *Allied Maples* instructs, at p. 919, "The prospect of success depends on all the circumstances of the case and the third party's attitude must be a matter of inference."

[338] As I have explained, GMCL argued at trial that its chances of avoiding bankruptcy or a *CCAA* filing rested on a "three-legged stool", namely, successful negotiations with its union (the CAW), the Bondholders and the dealers. Although it did negotiate with the CAW and the Bondholders (and with its retirees), it maintained that the one group with whom it would not negotiate was the dealers.

[339] There is no doubt, on the record, that GMCL took the position the WDAs were non-negotiable and communicated this position to the dealers. However, the trial judge did not accept that, as the prospect of a *CCAA* filing intensified and the clock to the June 1, 2009 deadline set by the Canadian Governments ran down, GMCL would have maintained this position. The trial judge's holding that it was likely that GMCL would have, in fact, entertained negotiations with the dealers "if push came to shove", rested in part on the following explicit findings:

- Given that GMCL needed settlements with all of the CAW, the Bondholders and the dealers to

obtain bailout funds and avoid bankruptcy, it was unlikely it would have refused negotiations "if a critical mass of dealers had rejected the WDAs and/or they had been properly organized". The dealers were part of the "three-legged stool" that had to be dealt with to avoid a *CCAA* filing (paras. 570 and 580);

- The Canadian Governments were the only source of bailout financing for GMCL and they, together with the American government, preferred restructuring outside the *CCAA* regime. Their expressed preference to avoid a *CCAA* finding was "a weighty factor that would have encouraged GMCL to back off from its position that the WDAs were not negotiable" (para. 571);

- Although GMCL's relevant witnesses testified that, in their view, GMCL would not have negotiated with the dealers, none of these witnesses – including Comeau and Buonomo – had final decision-making authority on this issue. Rather, they confirmed in their testimony that the final decision rested with GM in the United States (para. 573);

- No GM representative with final decision-making authority on this issue testified at trial (para. 573);

- While the Saturn Dealers had little leverage with GMCL as a stand-alone group, if they had joined forces with the GMCL dealers who had also received WDAs, the larger, united group would have enjoyed greater leverage in a negotiation with GMCL (para. 574);

- GMCL had a GM-approved fund of $218 million to conclude the WDAs with 290 dealers. In the end, it offered $143.5 million to 240 dealers. This gave GMCL the financial flexibility to improve the compensation offered under the WDAs (para. 580);

- The considerable and varied risks of a *CCAA* filing by GMCL to both GMCL and GM itself outweighed the benefits of such a filing and would have operated to make GMCL amenable to discussions with the dealers (para. 583); and

- Both Rosenberg, for Cassels, and Kandestin, for Trillium, testified that while clients often take the position that an offer is non-negotiable, they also "move off that position on a reasoned basis in order to effect a settlement of an issue" (para. 572).

[340] These factual findings, which were available on the evidence, provide compelling support for the inference that it was likely, at the end of the day, that GMCL would have negotiated with the dealers about the WDAs had the negotiation option been put on the table and had the dealers acted as an organized bloc in opposition to the offers under the WDAs.

[341] Three factors are especially telling. First, GMCL had negotiated successfully with two of the three groups forming its "three-legged stool". Against the backdrop of those negotiations, which continued in the case of the Bondholders past the "11th hour" prior to a *CCAA* filing, GMCL's insistence that it would never have negotiated with the dealers rings hollow. There is no reason why, as with the Bondholders, GMCL could not have entered into negotiations with the dealers, had they been represented by unconflicted counsel. Second, it was the governments' collective preference that GMCL avoid a *CCAA* filing. Third, as detailed by the trial judge, there were considerable costs and risks to a GMCL *CCAA* filing, including risks that could have interfered with its parent

company's efforts to avoid or be released from bankruptcy in the United States. Alone, and in combination, these factors all strongly militated in favour of the conclusion that GMCL would have revised its non-negotiation position if the evolving circumstances eventually cried out for it do so.

[342] The trial testimony of both Kandestin, for Trillium, and Rosenberg, for Cassels, further bolsters this conclusion. Kandestin testified:

> The fact that a party in a circumstance says that something is non-negotiable does not mean that that is an iron-clad statement. I think the experiences of every lawyer and, in particular, insolvency lawyers who deal with negotiations and non-negotiable take-it-or-leave-it positions of clients, be it our client or the other side, this is an initial posture and in many cases that is not the way it ends up.

[343] Rosenberg agreed. He said:

> By May 19th it was clear, you had continuing dealers and potential non-continuing dealers, and you had a jamming exercise by GM. They gave a very short timeline, which is not – which is customary in *CCAA*. Very aggressive positions were taken, take-it-or-leave-it offers and so on. I agree with Mr. Kandestin, you get them, and just because they say it's non-negotiable doesn't mean you can't negotiate. Try to negotiate. [Emphasis added.]

[344] It must also be emphasized that the trial judge was faced with extensive, conflicting evidence on this issue. It was his task to sort through that contested minefield, determine which of the evidence, if any, he accepted as credible and

reliable, and assess the probability that GMCL would have negotiated based on the evidence he did accept. That is precisely what he did.

[345] In doing so, the trial judge was not obliged to accept Buonomo's evidence that GMCL would not have negotiated with the dealers, especially because Buonomo acknowledged that final decision-making authority on that issue rested with others, who did not testify, in the United States. Buonomo had no direct role in the restructuring of GMCL's dealer network and was not involved in the Canadian side of the developing crisis. Nor was the trial judge obliged to accept the evidence of GMCL's witnesses on the issue, although notably, he found support for his conclusion in Rosenberg's (and Kandestin's) testimony.

[346] In my view, it simply cannot be said, on this record, that the trial judge's impugned holding lacked evidentiary support or was merely speculative. To the contrary, it was firmly grounded in the evidence.

(d) Causation and the Saturn Dealers

[347] Cassels also submits that the trial judge erred by making the "unsupported" finding that the Saturn Dealers would have united with the other GMCL dealers to increase their leverage with GMCL, without having made a finding that Cassels ought to have advised them to do so.

[348] This submission again engages the standard of care applicable to the Canada Conflict. As I have stressed, the trial judge found that Cassels breached

its obligations to all the dealers in respect of the Canada Conflict. The standard of care owed to the Saturn Dealers regarding it was the same as that owed to the other GMCL dealers.

[349] Cassels emphasizes that the Saturn Dealers did attempt to negotiate with GMCL, in respect of the option contained in the Saturn WDAs, only to be rebuffed by GMCL. It argues that there was no evidence that they would have instructed Cassels to attempt further negotiations with GMCL or that they would have joined with the other dealers, and been welcomed by them, for a collective negotiation initiative, especially because such negotiations would have endangered the option contained in the Saturn WDAs.

[350] The first difficulty with this submission is that, by reason of Cassels' breaches of its obligations to all the dealers regarding the Canada Conflict, the Saturn Dealers were denied the opportunity to consider the advantages and disadvantages of attempting further negotiations with GMCL. Further, as I have explained, both CADA and Cassels urged the dealers to come together and organize to gain "a seat at the table" to improve their negotiating position and protect their interests. If anything, the common sense logic of this "strength in numbers" proposition resonates even more strongly in relation to the Saturn Dealers subgroup.

[351] Nor did the fact that GMCL, when requested to do so, declined to alter the option contained in the Saturn WDAs foreclose the possibility that it would have been open to revisit the Saturn WDAs if confronted by a large group of GMCL dealers, including the Saturn Dealers, who were refusing to accept the WDAs as offered.

[352] CADA, not Cassels, contacted GMCL to attempt to alter the option in the Saturn WDAs on behalf of the Saturn Dealers. The evidence indicates that this contact consisted of only one telephone call by Ryan to GMCL's then-director of dealer network planning, who told him that GMCL was not prepared to modify the Saturn WDAs. I agree with Trillium's submission that this contact can scarcely be described as a "negotiation" on behalf of the Saturn Dealers, let alone a negotiation conducted by sophisticated and knowledgeable legal counsel.

[353] Finally, I would reject Cassels' related submission that the trial judge's reasons do not permit meaningful appellate review of the basis for his finding that Cassels is liable to the Saturn Dealers for its breaches of its obligations.

[354] When the trial judge's reasons are read in the context of the record as a whole, the live issues at trial and the submissions of counsel, they easily pass the sufficiency of reasons standard. Read in this fashion, as they must be, the reasons regarding the Saturn Dealers perform their function of responding to the live issues involving those dealers, explaining why Cassels was found liable to

them, and revealing how the trial judge decided as he did. While the trial judge could have been more expansive concerning the Saturn Dealers, nothing more was legally required. See *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869; *Hill v. Hamilton – Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41; and *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3. The trial judge was not required to respond to every argument raised by the parties, to recite all the evidence or to articulate all the relevant inferences or principles of law. His reasons were more than adequate for their required purposes.

(e) Loss of chance analysis

[355] I turn now to the final branch of Cassels' attack on the trial judge's causation and loss of chance analyses. In its factum, Cassels submits that the trial judge erred by holding, on an aggregate basis, that absent a breach by Cassels, the dealers had a 55 percent chance of obtaining a successful negotiation with GMCL for more compensation under the WDAs, "without undertaking an analysis of the likelihood of the occurrence of each step in the chain of causation".

[356] Cassels maintains that the trial judge was obliged to identify and assign each step in the causation chain a percentage chance of occurrence, and then multiply those percentage chances of each contingency occurring in order to

determine an overall percentage probability of the dealers achieving a successful outcome in negotiations with GMCL. This "cumulative probabilities" approach, Cassels says, would have yielded an overall percentage probability of successful negotiations well below 50 percent.

[357] I would not accede to this novel proposition, which Cassels raises for the first time on this appeal. Cassels was unable to point to any authority supporting its posited mathematical probabilities approach. This court has not employed this approach in other loss of chance cases. See, for example, *Wong v. 407527 Ontario Ltd.* (1999), 125 O.A.C. 101 (C.A.).

[358] Notably, the analytical approach urged by Cassels has been specifically rejected by some courts in England. In *Tom Hoskins plc v. EMW Law (a firm)*, [2010] EWHC 479 (Ch.), Floyd J. stated, at paras. 133-34:

> Although there are multiple contingencies … I think it would be wrong to apply percentage upon percentage … this is because the contingencies are not independent.
>
> I think it right to ask what were the overall chances that [the plaintiffs] would, absent negligence, have negotiated and agreed [on the posited contract].

[359] This is also not a case where the trial judge lost sight of the various contingencies at play, including relevant negative contingencies affecting the likelihood that the dealers would have achieved a successful outcome through negotiations with GMCL. To the contrary, he considered the contingencies

identified by the parties, including the salient fact that the dealers potentially stood to realize nothing in any *CCAA* filing. On the authority of this court's decision in *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.* (1993), 12 O.R. (3d) 675, leave to appeal refused, [1993] S.C.C.A. No. 225, he also recognized, correctly, that a loss of chance will be smaller when more contingencies are involved.

[360] Having considered the identified contingencies, the trial judge concluded, at para. 608:

> None of these contingencies, individually or together, negate the dealers' chance of achieving a higher payout through negotiation. Nor do they push that chance outside the realm of real and significant possibility. They are simply contingencies which lower the reasonable possibility of the chance lost by the dealers.

[361] I see no reversible error in this conclusion.

ISSUE 5: DID THE TRIAL JUDGE ERR IN HIS ASSESSMENT OF AGGREGATE DAMAGES?

(1) Trial Judge's Original Decision

[362] Once the trial judge concluded that Trillium had established a loss of chance, he moved to the second step of the *Berry v. Pulley* analysis by valuing the chance that the class members lost because of Cassels' conduct. He then calculated damages in proportion to the likelihood that the chance would have materialized.

[363] At trial, Trillium argued that the lost chance should be valued between $375 and $425 million. Cassels maintained that the lost chance was worthless because the downside risk of negotiating with GMCL far outweighed the chance that productive negotiations would have occurred.

[364] The trial judge held that the lost chance did have value, though not nearly as much as Trillium claimed. He found that the most the dealers could have obtained through negotiations was $218 million, which was the total amount GM had approved for GMCL to offer the dealers: $182 million to the GMCL dealers; $30 million to the Saturn Dealers; $4 million to Hummer dealers; and $2 million to Saab dealers. The trial judge held, at para. 592, that any figure above $218 million was “mere speculation”.

[365] The trial judge held that, within the limits of a “real and significant chance” the best possible result the dealers could have achieved would have been a collective increase in their WDA payments of $92 million – the difference between the $218 million GMCL was authorized to spend, and the $126 million it actually paid to the 202 terminated dealers. The trial judge concluded that the total value of the dealers’ lost chance was $92 million.

[366] The trial judge then went on to discount the value of this lost chance by what he found was only a 55 percent likelihood that the dealers would have been wholly successful in negotiations with GMCL. He explained, at para. 610:

> In my view, it is far from certain that the affected dealers would have banded together and instructed Cassels to negotiate; that GMCL would have negotiated rather than file for *CCAA* protection; and that the Class Members would have achieved through negotiation the most that [GMCL] could offer without going to GM for permission to request more. In light of the contingencies, I find that the dealers had a 55 percent chance at obtaining a successful negotiation with GMCL.

[367] Accordingly, the trial judge reduced the $92 million damages figure by 55 percent, yielding $50.06 million, which he rounded down to $50 million.

[368] The trial judge then took into account the fact that only 181 of the 202 affected dealers (or 89.6 percent, which he rounded up to 90 percent) chose to participate in the class proceeding. In the trial judge's view, it would be unfair to allow the class members to reap the benefit of an aggregate damages award based on the 202 dealers who accepted WDAs. He therefore reduced the damages award further, awarding the class members 90 percent of $50 million, for a total damages award of $45 million.

(2) Original Decision Revisited

[369] As I mentioned earlier, after release of the trial decision, the parties were unable to settle the terms of the formal judgment. Their disagreement revealed confusion about precisely which dealers were in the Class. The trial judge had apparently presumed that all 181 class members were Participation Form Dealers, that is, those who had responded to DSC's appeal for support, either by sending in the signed participation forms appended to the May 4 Memorandum

and the follow up May 13 memorandum or by sending in contributions to the CADA trust fund, or both. The trial judge expressly rejected the suggestion that Cassels had a retainer with the Call Dealers – those who listened in on the May 24, 2009 conference call but did not sign a participation form or remit money for the dealers' legal fund.

[370] The 181 figure was important to the trial judge's original calculation of aggregate damages because, as I have just explained, he arrived at his final award of $45 million by comparing how many dealers signed WDAs (202) with how many he understood to be in the Class (181).

[371] The parties returned before the trial judge to try to settle this and other issues. Trillium argued that the trial judge's aggregate damages award should stand even without knowing precisely how many of the 181 class members were Participation Form Dealers. It submitted that the numbers were close enough – it knew that at least 161 of the 181 were Cassels' clients – to let the matter stand.

[372] Cassels disagreed. It argued that it would be unfair to leave the original damages award intact, because the effect would be to award damages to dealers to whom Cassels had been found to have owed no duties.

[373] The trial judge decided that the best approach was to allow for a possible adjustment of the quantum of the aggregate damages award following the

release of this court's judgment on appeal. This is reflected in the final trial judgment:

> **6. THIS COURT ORDERS AND ADJUDGES** that Cassels pay damages in the amount of forty-five million dollars ($45,000,000), which amount may be reduced in accordance with the process set out in paragraph 7 below.
>
> **7. THIS COURT ORDERS AND ADJUDGES** that the process for determining the number and identity of the Participation Form Dealers, and for calculating the damages awarded in paragraph 6 above, shall be determined on further motion to this court, if necessary, following the final disposition of any appeal.

[374] Cassels and Trillium both take issue with aspects of the trial judge's damages analysis. I will begin with Cassels' objections.

(3) Cassels' Damages Appeal

(a) Entitlement to Consider Aggregate Damages

[375] Cassels argues, as a threshold matter, that the trial judge was not entitled to consider aggregate damages in the first place because causation was neither certified nor established. I have already explained why this submission misconceives the nature of Trillium's loss of chance claim, and must fail.

[376] The Certification Decision expressly contemplates that the trial judge could award aggregate damages, if appropriate, at the end of the common issues trial. The certification judge held, at para. 159:

> There is at least a possibility that the damages of the class could be assessed in the aggregate, based on the plaintiff's theory that Cassels could have negotiated a better deal for the class. Given that GMCL took a formulaic approach to compensation of all terminated dealers, it is possible that this could be a template for the distribution of aggregate damages or that the court could develop an equitable plan of distribution.

[377] In addition, the Plan of Proceeding approved under the Certification Decision contains specific provisions outlining the methodology for the valuation of aggregate damages as against Cassels or, in the alternative, for the assessment of damages in individual hearings, as determined by the common issues trial judge.

[378] Similarly, the case management judge observed in his 2012 production ruling, at para. 3, that "the issue of damages was left to be determined by the common issues judge, either by ordering individual hearings on damages or by making an aggregate assessment of damages pursuant to s. 24 of the [*CPA*]".

[379] Section 24(1) of the *CPA* provides that aggregate damages are available 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 part of the defendant's liability to some or all class members can reasonably be

> determined without proof by individual class members.

[380] In *Ramdath*, this court held, at para. 76, that s. 24(1)(c) must be assessed in light of three criteria:

> 1. whether the non-individualized evidence presented by the plaintiff is sufficiently reliable;
>
> 2. whether the use of the evidence will result in unfairness or injustice to the defendant, such as overstatement of its liability; and
>
> 3. whether the denial of an aggregate approach will result in a "wrong eluding an effective remedy" and a denial of access to justice.

[381] The trial judge was satisfied that these criteria were met in this case. He explained, at para. 541:

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

[382] I see no error in this analysis. Again, the collective nature of the class members' loss of chance claim drives the aggregate damages analysis. As the certification judge emphasized, Trillium did not argue that, but for Cassels' misconduct, it would not have signed its WDA. Rather, it argued that, because of Cassels' misconduct, it lost the only chance it had to negotiate collectively to reach a better deal for all the affected dealers.

[383] For these reasons, I am satisfied that it was open to the trial judge to award aggregate damages in this case.

(b) Calculation Errors

[384] Cassels next argues that the trial judge erred in calculating the total value of the class members' loss of chance. Cassels says there are three figures relevant to calculating the value of the lost chance:

> (1) $218 million – the total envelope of compensation GM approved for expenditure by GMCL on the WDAs, based on an estimated 290 terminated dealers;
>
> (2) $143.5 million – the amount GMCL offered to the terminated dealers under the WDAs, based on a final count of 240 terminated dealers; and
>
> (3) $126 million – the amount GMCL paid to the terminated dealers under the WDAs, based on the 202 terminated dealers who accepted the WDA offers.

[385] As I have said, the trial judge calculated the lost chance as the difference between the amount approved and the amount paid: $218 million - $126 million = $92 million.

[386] Cassels argues, and I agree, that the trial judge erred in using the $126 million figure, the amount paid, as the second number. Neither side in hypothetical negotiations could have known that 38 terminated dealers would reject the WDAs. The offers on the table totalled $143.5 million. Unbeknownst to the dealers, GMCL had $218 million to spend. The trial judge should have calculated the value of the lost chance to negotiate successfully as the difference between the money approved for the WDAs and the money offered: $218 - $143.5 = $74.5 million.

[387] This reduces the overall starting point for the quantification of the aggregate damages award to $74.5 million.

[388] Finally, Cassels argues that the trial judge's damages assessment was flawed because he erroneously assumed that all 181 class members were Participation Form Dealers to whom Cassels owed fiduciary and contractual duties.

[389] I also accept this submission, though I emphasize that any confusion in the composition of the Class does not lie at the trial judge's feet. In my view, it was incumbent on counsel to have identified and clarified this issue at trial. The trial

judge cannot be faulted for any misunderstanding about the composition of the Class arising from counsels' failure to do so.

[390] In any event, the trial judge offered a sensible, workable approach when he directed that a process for determining the number and identity of the Participation Form Dealers, and for calculating damages accordingly, shall be determined on a further motion before him following the release of this court's decision. I would endorse this approach.

(4) Trillium's Cross-appeal

[391] This brings me to Trillium's cross-appeal. Trillium submits the trial judge should have been more generous in calculating the class members' damages.

[392] Trillium argues, first, that the trial judge erred in holding that any figure above $218 million was "mere speculation". It submits that by confining himself to a "safe" amount that had already been approved by GM, the trial judge did not fulfil his responsibility to assess the value of the "real and substantial chance" lost by the dealers, however difficult that assessment may be. In concluding that "better evidence" was required to assess the lost chance at more than $218 million, the trial judge failed to heed this court's direction in *Wong*, at para. 27, that, in assessing the value of a lost chance, "[t]he court … must do the best it can with the available evidence".

[393] Here, Trillium argues, the "available evidence" was that there were significant costs and risks if GMCL were to file for *CCAA* protection, that the Canadian Governments preferred to avoid a filing, and that GMCL had negotiated successfully with other groups of stakeholders. All these factors, Trillium submits, would likely have forced GMCL's purported ceiling of $218 million upwards.

[394] In the alternative, Trillium submits that the trial judge should have considered awarding damages based on alternative scenarios reflecting escalating success in the dealers' negotiations with GMCL. It notes that this is a familiar approach in England, though Trillium did not cite a Canadian example of this practice.

[395] I cannot accept these submissions. The trial judge made a careful assessment of the value of the dealers' lost chance based on all the evidence available to him. That evidence was unequivocal – $218 million was the most that GMCL could offer without returning to its American parent, cap in hand, to ask for more. The trial judge considered the hypothetical scenarios Trillium offers on appeal but concluded that there was no evidence about how much more money, if any, GM was willing to spend to placate the dealers and avoid a GMCL *CCAA* filing.

[396] In my view, the trial judge's conclusion that anything above $218 million is speculative, is a paradigmatic finding of fact that ought not to be disturbed on appeal.

[397] Trillium next argues that the trial judge erred in applying a 55 percent contingency to the value of the lost chance.

[398] The trial judge, at paras. 607-08, identified five contingencies which "lowered the reasonable possibility of the chance lost by the dealers". They were:

> (1) whether the dealers, given their differences, would have banded together to instruct Cassels to negotiate;
>
> (2) whether GMCL would have negotiated rather than file for *CCAA* protection;
>
> (3) whether good faith negotiations would simply have failed;
>
> (4) the dealers' leverage had limits because they could have been terminated yet have received nothing in a *CCAA* filing; and
>
> (5) the dealers could have asked for significantly less than the approved $218 million available to GMCL.

[399] Trillium submits that it was not open to the trial judge to apply a discount to the first of these contingencies. It says that, having found that Trillium established a lost chance to negotiate on a balance of probabilities, the trial judge was obliged to accept this "contingency" as a certainty. Trillium submits that the 55 percent contingency the trial judge ascribed to the lost chance should accordingly

be scaled upward by 15 percent, to 70 percent. This would increase the overall value of the lost chance.

[400] I cannot agree. Even assuming that the trial judge should not have factored the first contingency into his quantum analysis, Trillium accepts that he was entitled to consider the remaining four. As I have already said, the trial judge did not ascribe a separate probability to each contingency, nor was he obliged to do so: *Tom Hoskins plc v. EMW Law (a firm)*. Standing alone, any one of the remaining four contingencies had the potential to sink the dealers' chances of successful negotiations. Viewed cumulatively, they were all the more daunting. I therefore see no reversible error in the trial judge's decision to fix the probability of successful negotiations at 55 percent.

[401] Finally, Trillium submits that the trial judge erred in delivering his supplementary ruling, some eight and a half months after the release of his original reasons for judgment. Trillium interprets the supplementary ruling as an impermissible "change" in the trial judge's original decision on damages, one that has the effect of reducing the value of the damages properly owing to the class members.

[402] I reject this submission, as well. I again emphasize that any confusion about the composition of the Class and the implications of that issue for the quantification of damages was not the trial judge's fault. It was only after the

original reasons were released and the parties could not agree on the wording of the trial judgment that they came to identify the problem. With respect, this was an error of counsels' own making. I see no error in the trial judge's attempt to correct it, which the parties themselves asked him to do.

[403] Further, the supplementary ruling arose in the context of a dispute over settling the terms of the judgment. The trial judge was not *functus* at that point. In my view, he properly exercised his jurisdiction to consider the issue, and sensibly left it open to revisit the calculation of damages following the release of this court's decision. With the benefit of these reasons, that process can now be undertaken.

[404] For these reasons, I would hold that the question of the final quantification of damages be returned to the trial judge for further consideration in accordance with the following:

> (1) the proper starting value for the loss of chance should be $74.5 million (and not, as the trial judge found, $92 million). Applying a 55 percent contingency, the damages award would be $40.975 million. This figure should be rounded to $41 million;
>
> (2) account should be taken of the opt-outs from the Class, (10 percent), bringing the figure to $36.9 million; and
>
> (3) a determination should then be made, to the extent possible, of how many class members were Participation Form Dealers (*x* percent) to arrive at a new, final number.

[405] Of course, it will be for the trial judge to determine the appropriate process for the hearing on these issues, including whether further evidence should be received.

DISPOSITION

[406] For the reasons given, I would dismiss the appeal from the trial judge's liability findings, allow the appeal from the trial judge's quantification of damages in accordance with these reasons, and dismiss Trillium's cross appeal.

[407] As success in these proceedings has been divided to some extent, I would direct that both parties are entitled to deliver submissions on the costs of this appeal and cross-appeal. Trillium shall deliver its brief written costs submissions to the Registrar of this court within 30 days from the date of the release of these reasons. Cassels shall deliver its brief responding costs submissions to the Registrar within 30 days thereafter.

Released: "JUL -4 2017"
"EAC"

"E.A. Cronk J.A."
"I agree K. van Rensburg J.A."
"I agree G. Pardu J.A."