Court File No.: CV-10-397096CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

TRILLIUM MOTOR WORLD LTD.

Plaintiff

- and -

GENERAL MOTORS OF CANADA LIMITED and CASSELS BROCK & BLACKWELL LLP

Defendants

Proceeding under the *Class Proceedings Act, 1992*

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PART I – TRILLIUM'S POSITION IN A NUTSHELL

1. General Motors of Canada Limited ("**GMCL**") prepared and executed a plan, the purpose and effect of which was to prematurely terminate the franchise agreements of over 200 independent dealerships. GMCL achieved this by so arranging the circumstances that the franchisees themselves "voluntarily" ended their agreements and in doing so fully released their franchisor from any and all liability for such conduct.

2. GMCL, in executing the plan, breached various statutory duties under provincial franchise statutes including the duties of disclosure, fairness and the right of the franchisees to associate. GMCL did this by intentionally creating a situation where: (i) the franchisees were persuaded that they must agree to terminate or suffer the unknown risk of a court-imposed restructuring; (ii) the information provided was incomplete (did not contain all of material facts) and misleading (iii) the timeframe imposed upon the franchisees to consider the alternatives was too short; and (iv) the franchisees were prevented from banding together or seeking judicial relief.

3. Throughout the structure and execution of the plan, GMCL treated the dealerships as a group: the same notification, the same time line, the same termination agreements, the same releases, the same formula for compensation, the same information, and the same lack of information.

4. Cassels Brock & Blackwell LLP ("**Cassels**") was retained by the dealerships as a group to protect their interests. Cassels chose to deal with their clients as a group. They did so by allowing the national dealers' association to act as their intermediary to, amongst other things, communicate the scope of their retainer, collect their legal fees, and arrange for direct and

general communication with their clients. In all instances, Cassels dealt with the clients not individually, but collectively.

5. Cassels breached their duties to their clients: (i) by failing to disclose that they were in a conflict of interest because they were acting simultaneously for the Government of Canada; (ii) by failing to object to GMCL's plan in order to allow for the rights of their clients to be properly protected; and (iii) by taking instructions, in part, from a committee of the dealers that was itself conflicted because it included both dealers who were terminated and dealers who were continuing.

6. As a result, there exist the common factual and legal issues and readily identifiable class that are ideally suited for a class action. It is preferable for the advancement of these issues, and the administration of justice, that this action proceed as a class proceeding.

PART II – THE FACTS

(1) THE PARTIES

7. The plaintiff, Trillium Motor World Ltd. (formerly, Trillium Pontiac Buick GMC Ltd.) ("**Trillium**"), a Canadian corporation, was a General Motors dealer in the City of Toronto for approximately 20 years from 1990 to 2009.[1]

8. The defendant, GMCL, is a closely-held Canadian corporation that manufactures and distributes automobiles to its dealerships throughout Canada.[2]

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[1] Affidavit of Thomas Lynton Hurdman sworn February 19, 2010 ("Hurdman aff."), Motion Record, Tab 2, p. 20, para. 53.

9. The defendant, Cassels, is an Ontario limited liability partnership practising law.[3]

10. Trillium is a member of, and brings this action on behalf of, all corporations in Canada that signed a Wind-Down Agreement with GMCL[4] ("**proposed class**")

11. There are 207 members of the proposed class.[5] Trillium and all members of the proposed class operated under a Dealer Sales and Service Agreement ("**Dealer Agreement**") with GMCL.[6]

(2) CLAIMS AGAINST GMCL

12. The Dealer Agreement of each affected dealer was to expire on October 31, 2010, but each dealer in good standing was assured the right of renewal thereafter. The "term" provision of the Dealer Agreement reads:

> This Agreement will expire without any action by either Dealer or GM on October 31, 2010 or in accordance with the terms of the Agreement. **Dealer is assured the opportunity to enter into a new Dealer Agreement at the expiration date if GM determines Dealer has fulfilled its obligations under this Agreement.**[7] (Emphasis added)

Thus, each affected dealer had the right to continue in operation until October 31, 2010 and to be renewed thereafter so long as it was not in default.

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[2] Affidavit of M. Comeau sworn May 31, 2010 ("Comeau aff."), Responding Motion Record, Vol. 1, Tab 1, p. 3 para. 6.

[3] Statement of Claim, Motion Record, Tab 3, p. 112, para. 6.

[4] Notice of Motion, Motion Record, Tab 1, p. 1. The class definition in the Notice of Motion refers to a Wind-Down Agreement *dated May 20, 2009.* The reference to the date of the agreement is removed for the purposes of the class definition.

[5] Comeau aff., Responding Motion Record, Vol. 1, Tab 1, p. 36, paras. 112-3.

[6] Hurdman aff., Motion Record, Tab 2, pp. 9-10, para. 8; Dealer Agreement, Ex. A, Hurdman aff., Motion Record, Tab 2A, pp. 22-36.

[7] Dealer Agreement, Ex. A, Hurdman aff., Motion Record, Tab 2A, p. 22.

13. GMCL could not, without exposure to civil liability, prematurely terminate agreements or abrogate the affected dealers' rights of renewal without either obtaining the affected dealer's consent or under a court-sanctioned restructuring.

14. GMCL sent a letter[8] beginning on May 20, 2009 to approximately 240 General Motors dealers across Canada ("**affected dealers**") informing them of a major restructuring of the dealership network. The letter informed the affected dealers that their Dealer Agreements would be prematurely terminated as part of the restructuring.

(a) The Wind-Down Agreement

15. Attached to the May 20, 2009 letter was an agreement entitled "Wind-Down Agreement" ("**WDA**").[9] The WDA made a time-limited offer of compensation ("**Wind-Down payments**") to the affected dealers in exchange for the premature surrender of the affected dealers' rights under their Dealer Agreements, including the rights of renewal and termination assistance,[10] along with other conditions.

16. The Wind-Down payments were composed of two parts: (1) a formula payment based on the number of vehicles the affected dealer had sold in the previous year; and (2) a sign removal allowance. In many cases, these amounts barely covered the affected dealers' employee severance obligations and other winding up costs.[11]

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[8] Letter dated May 20, 2009, Ex. C, Hurdman aff., Motion Record, Tab 2C, pp. 49-50.

[9] WDA, Ex. B, Hurdman aff., Motion Record, Tab 2B, pp. 37-48.

[10] Termination assistance rights included in Standard Provisions to Dealer Agreement, Ex. B, Comeau aff., Responding Motion Record, Vol. 1, Tab1B, p. 87.

[11] Statement of Claim, Motion Record, Tab 3, p. 114, para. 17.

17. The Wind-Down payments were to be made in three instalments and were subject to a number of conditions. The affected dealer had to sell its entire inventory, remove all signs, cease all business operations and comply with all post-termination obligations in order to receive its final payment (to be made 10 days after the termination date).[12] GMCL could terminate the WDA or cease making payments thereunder if the affected dealer breached any of the terms of the WDA or the Dealer Agreement.[13]

18. In the May 20 letter and on a national dealer broadcast presented by GMCL on May 19 ("**GM dealer satellite broadcast**"), GMCL stated that if all affected dealers did not sign the WDA by the deadline, there was a "strong possibility" that GMCL would file for reorganization under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**").[14]

19. The WDA was conditional on acceptance by 100% of the affected dealers subject to GMCL's discretion to waive the condition.[15] The 100% acceptance condition meant that refusal by a single affected dealer could trigger a CCAA application by GMCL. Indeed, GMCL's Vice President, Sales, Service and Marketing, Marc Comeau, expressly advised the affected dealers in the GM dealer satellite broadcast that "[a]cceptance of this wind-down agreement by GM Canada dealers will weigh heavily in GM Canada's decision of whether or not to file for permission to restructure under the provisions of CCAA."[16]

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[12] Section 2(a), WDA, Ex. B, Hurdman aff., Motion Record, Tab 2B, p. 38.

[13] Section 2(b), WDA, Ex. B, Hurdman aff., Motion Record, Tab 2B, pp. 38-39.

[14] Transcript of GM dealer satellite broadcast, Ex. D, Hurdman aff., Motion Record, Tab 2D, p. 61.

[15] Section 1, WDA, Ex. B, Hurdman aff., Motion Record, Tab 2B, p. 37.

[16] Transcript of GM dealer satellite broadcast, Ex. D, Hurdman aff., Motion Record, Tab 2D, p. 61. See also Mr. Comeau's similar comments to the affected dealers at page 65 ("obviously every effort must be expended to avoid

20. In reality, according to an Ontario Government Briefing Note,[17] GMCL was looking for "a substantial proportion (> 90%)" of the affected dealers to take up of the WDA. It did not communicate this to the affected dealers, however. Instead, GMCL led the affected dealers to believe that the only choice an affected dealer had was to accept the WDA or in all probability push GMCL into CCAA.

21. The affected dealers were required to accept the offer and execute and deliver their WDA to GMCL on or before 6:00 PM on Tuesday, May 26, 2009. To accept the WDA, the affected dealer had to obtain a certificate of independent legal advice, signed by a lawyer, attesting that the affected dealer entered into the WDA, including a full waiver and release of the right to sue GMCL and its affiliates, "voluntarily and with a full understanding of the implications."[18]

22. Trillium did not receive the WDA until Friday, May 22, 2009. Each of the affected dealers had only two to four business days to review the WDA, obtain legal advice, and decide the fate of their dealerships.[19]

23. GMCL added a slight variation of the WDA for its Saturn/Saab dealers.[20] As an alternative to the Wind-Down payments, those dealers could choose to wait for GMCL to find a

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such an outcome [i.e. a CCAA filing]"), and page 69 ("these decisions are painful; however, without them, we will potentially see no alternative but to seek the supervision of the court with all the intended consequences").

[17] Briefing Note, Ex. C, affidavit of V. Djuric sworn June 16, 2010 ("Djuric aff."), Supplementary Motion Record, Tab C, p. 5. This document was obtained through a request to the Ontario government under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31: Djuric aff., Supplementary Motion Record, Tab 1, p. 2, para. 5. GMCL refused to answer questions about this document on cross-examination of Mr. Comeau on his affidavit. In a later answer to undertaking, GMCL acknowledged that some of the information in the Briefing Note originated from GMCL. GMCL also stated that there were inaccuracies in the Briefing Note but did not state what parts were inaccurate: GMCL Answers to Undertakings, Joint Book of Transcripts and Answers to Undertakings, Tab 2, p. 72, Q. 150.

[18] Exhibit "B", WDA, Ex. B, Hurdman aff., Motion Record, Tab 2B, p. 46.

[19] Statement of Claim, Motion Record, Tab 3, p. 114, para. 18.

buyer for the Saturn-Saab brand and hope that the buyer would accept their dealership, but they could not do both. The Saturn/Saab dealers had to take the Wind-Down payments and wind up their dealership, or place their faith in GMCL's motivation and ability to find a willing buyer for the brands that would accept them as dealers. GMCL made no disclosure of the status of any negotiations with potential buyers of the Saturn/Saab brands. In the end, there would be no purchaser for the Saturn/Saab brand.[21]

(b) Most affected dealers sign back WDA

24. Facing overwhelming pressure, approximately 85% of the affected dealers, including Trillium, signed the WDA before the expiry of the 6:00 PM deadline on May 26, 2009.[22] GMCL ultimately waived the condition of 100% take-up.[23] The company did not seek CCAA protection. However, GMCL did not subsequently offer the affected dealers that signed the WDA the option of rescinding the WDA.[24]

25. Approximately 33 affected dealers did not sign the WDA.[25] It was nevertheless necessary for 19 of those dealers to sue GMCL for specific performance to compel it to comply with the Dealer Agreements and renewal rights.[26]

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[20] WDA presented to Saturn/Saab dealers, Ex. U, Comeau aff., Responding Motion Record, Vol. 2, Tab 1U, pp. 499-513.

[21] Comeau aff., Responding Motion Record, Vol. 1, Tab 1, p. 46, para. 121.

[22] Statement of Claim, Motion Record, Tab 3, p. 115, para. 20.

[23] Comeau aff., Responding Motion Record, Vol. 1, Tab 1, pp. 45-46, para. 117.

[24] Statement of Claim, Motion Record, Tab 3, p. 115, para. 21.

[25] Comeau aff., Responding Motion Record, Vol. 1, Tab 1, p. 36, paras. 112-113.

[26] See *Stoneleigh Motors Limited v. General Motors of Canada Limited*, 2010 ONSC 1965 (CanLII) ("*Stoneleigh Motors*"), Book of Authorities of the Plaintiff ("**BOA**") Tab 35. (Note: Underlined authorities contain hyperlinks to CanLII and other publicly accessible databases.)

26. All 207 affected dealers that signed the WDA, including the Saturn/Saab dealers, are included in the proposed class. The 33 affected dealers that did not sign the WDA are not included in the proposed class.

(c) WDA amended Dealer Agreement

27. The WDA did not merely provide for the release of rights by the affected dealer in exchange for Wind Down payments. The WDA went further inasmuch as it removed key rights under the Dealer Agreements and imposed a fundamentally different franchise relationship on the affected dealers for the remaining period of the affected dealer's operation. In particular, the WDA:

(a) removed the affected dealer's right to buy new vehicles from GMCL for the duration of the affected dealer's operation, which right was the essence of the Dealer Agreement (sections 6(a) and (c) of the WDA);

(b) eliminated the affected dealer's right to termination assistance under Article 15 of the Dealer Agreement (sections 4 and 6(c) of the WDA);

(c) amended the term of the Dealer Agreement by requiring the affected dealer to cease operation by December 31, 2009, or some other date that GMCL approved, which would be no later than October 31, 2010 (section 3 of the WDA);

(d) required the affected dealer to liquidate all of its new vehicle inventory before receiving the final Wind Down payment (sections 2(b)(vii) and 2(c) of the WDA). This requirement forced the affected dealer to liquidate its inventory through deep discounting, or, as expressly contemplated in the WDA, to sell its inventory to a

continuing GM dealer. This requirement converted the affected dealer from a retail dealership into a liquidation or wholesale operation, with obvious and direct impact on its profit margins;

(e) removed the affected dealer's right to transfer any interest in the franchise, its assets or issued capital (section 6(b) of the WDA);

(f) removed: (1) GMCL's obligation to train the affected dealer under Article 8 of the Dealer Agreement; (2) GMCL's obligation to review the affected dealer's performance under Article 9 of the Dealer Agreement; (3) sections 12.3 and 12.4 of the Dealer Agreement concerning changes in management and ownership; and (4) the parties' right to submit disputes to the industry-specific Alternative Dispute Resolution (NADAP) process under Article 16 of the Dealer Agreement (all pursuant to section 6(c) of the WDA);

(g) removed the affected dealer's right to return subsequently-ordered GMCL parts (section 6(d) of the WDA); and

(h) treated as confidential all facts relating to dealer's franchise and operations, to the extent that such facts touched upon the WDA (section 8 of the WDA).

(d) No disclosure document given to affected dealers

28. The *Arthur Wishart Act (Franchise Disclosure), 2000*[27] ("**Wishart Act**"), the *Franchises Act*[28] ("**Alberta Act**") and the *Franchises Act*[29] ("**PEI Act**") (collectively, the "**Franchise Acts**")

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[27] *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3.

[28] *Franchises Act*, R.S.A. 2000, c. F-23.

define a "franchise agreement" as "any agreement that relates to a franchise between a franchisor … and a franchisee."[30]

29. Trillium asserts in its statement of claim that the WDA is a "franchise agreement" within the meaning of the Franchise Acts.[31] As stated above, the WDA dramatically altered the affected dealers' ongoing contractual relationship with GMCL. It specifically required the affected dealer, in order to receive the Wind Down payments, to "have operated the business in accordance with … this [Wind Down] Agreement." The WDA clearly relates to a franchise, and therefore meets the definition of a franchise agreement under the Franchise Acts.

30. A franchisor is required under each of the Franchise Acts to give to a prospective franchisee carrying on business in Ontario, Alberta and PEI a disclosure document and a 14-day cooling-off period before requiring such a person to sign any agreement relating to a franchise. A prospective franchisee is defined in the Wishart Act and PEI Act as "a person … whom a franchisor …, directly or indirectly, invites to enter into a franchise agreement."[32] Trillium's statement of claim asserts that the affected dealers were "prospective franchisees" in respect of the WDA within the meaning of the Franchise Acts.[33]

31. GMCL did not deliver a disclosure document to any of the affected dealers.[34] Nor did it give the affected dealers 14 days to review the WDA and obtain legal advice before signing it.[35]

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[29] *Franchises Act*, R.S.P.E.I. 1988, c. F-14.1.

[30] Wishart Act, s. 1(1); PEI Act, s. 1(1)(c); Alberta Act, s.1(1)(e). The Alberta Act adds the words "or prospective franchisee" after "franchisee."

[31] Statement of Claim, Motion Record, Tab 3, p. 116, para. 30.

[32] Wishart Act, s. 1(1); PEI Act, s. 1(1)(p). The Alberta Act does not define "prospective franchisee."

[33] Statement of Claim, Motion Record, Tab 3, p. 116, para. 31.

[34] Hurdman aff., Motion Record, Tab 2, p. 12, para. 17.

32. GMCL's failure to provide the affected dealers with a disclosure document (and the 14 day waiting period) had serious consequences for every affected dealer and a direct impact on the 85% acceptance rate of the WDA. If GMCL had complied with the Franchise Acts, it would have had to include in its disclosure document **all material facts** concerning the franchise,[36] in clear and concise language,[37] supported by a certificate[38] signed by at least two officers or directors of GMCL certifying that every material fact required by the Act and Regulation was included.

33. The following facts were material to the WDA such as to come within the disclosure requirements of the Franchise Acts:

(a) An accurate summary of the rights that the affected dealers were asked to surrender. This includes, in particular, the right of renewal that each dealer had under the Dealer Agreement. GMCL had no right to decide unilaterally not to renew the Dealer Agreement as it stated in the May 20 letter (the so-called "Notice of Non-Renewal" as it was termed in WDA[39]).

(b) The facts surrounding GMCL's solvency at the time. GMCL's financial circumstances were not public knowledge, unlike its U.S. parent's financial circumstances which were generally known because it was publicly traded.

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[35] Hurdman aff., Motion Record, Tab 2, p. 12, para. 14(c).

[36] Wishart Act, s. 5(4); PEI Act, s. 5(4); Reg. 240/95 to Alberta Act, s. 2(1).

[37] Wishart Act, s. 5(6); PEI Act, s. 5(6).

[38] Reg. 581/00 to Wishart Act, s. 7(1); Reg. EC232/06 to PEI Act, s. 4(1); Reg. 240/95 to Alberta Act, s. 2(3).

[39] Recital B, WDA, Ex. C, Hurdman aff., Motion Record, Tab 2C, p. 37.

(c) The relevant factors which weighed for and against GMCL making a formal CCAA filing. These material facts would have given the affected dealers insight into whether GMCL was truly contemplating a CCAA filing for no reason other than the fact that fewer than 100% of the affected dealers accepted the WDA.

(d) What a CCAA filing would likely mean for the affected dealers. A CCAA filing would not necessarily result in the affected dealers being terminated for no or inadequate compensation while the remainder of the dealership network continued in business and reaped the benefits of the reduced competition. Knowing their likely fate in a CCAA filing was material to the affected dealers' decision of whether or not to accept the WDA.

(e) Whether the Federal and Ontario financial assistance would have been forthcoming if GMCL had made a CCAA filing.

(f) The names of all of the affected dealers who were presented with the disclosure document. This information was material to allowing the affected dealers to share information and associate with each other in order to mount a common front against GMCL.

(g) The basis on which GMCL selected dealers for wind down. This material information would have allowed for errors on the part of GMCL to be corrected and decisions reversed.

(h) The status of any negotiations with potential buyers of the Saturn/Saab lines. This information was material to the Saturn/Saab dealers' decision on whether to accept

Wind-Down payments or hold out for the possibility that a purchaser might emerge for the Saturn/Saab line.

34. Just as importantly, the disclosure document would have given the affected dealers a full 14 days before being required to sign the WDA, instead of six or fewer days. Had GMCL given the affected dealers more time, they would have been in a better position to evaluate critically the WDA they were being asked to sign. In particular, the affected dealers would have had a better opportunity to make necessary inquiries, identify other affected dealers, and consider any appropriate collective response to GMCL's position. Instead, GMCL forced the affected dealers to make a critical decision in a few days in the context of a threatened insolvency and a supposed government deadline that had been known to GMCL for nearly two months before May 20, 2009.

35. By reason of GMCL's failure to deliver a disclosure document, the affected dealers in Ontario, PEI and Alberta are entitled to rescind the WDA within two years of entering into the agreement, and are entitled to damages and/or compensation under the Franchise Acts, as more fully described below.[40]

(e) GMCL breached duty of fair dealing and right of association

36. GMCL began preparing for its dealership restructuring well before May 20, 2009. GMCL knew by March 30, 2009, at the latest, that part of its plan would involve a reduction of its dealership network.[41] Dealership reduction was an essential aspect of the "more aggressive

[40] See paragraphs 116-7 below for the right of rescission, and paragraph 118 below for damages arising from the failure to comply with disclosure obligations.

[41] Statement of Claim, Motion Record, Tab 3, p. 117, para. 36.

restructuring plans" the Canadian and Ontario governments required GMCL to submit as a condition of receiving billions of dollars of taxpayer money (the "**GMCL bailout**").[42] GMCL had until May 30, 2009 – not May 26 – to satisfy the condition.[43]

37. Before March 30, 2009[44] GMCL had submitted an initial viability plan to the Canadian and Ontario governments. The initial viability plan called for reductions in the size of the GMCL dealer network through consolidation and attrition between 2009 and 2014. As stated above, the Canadian and Ontario governments advised GMCL on March 30, 2009 that the initial viability plan was unacceptable for the purposes of the GMCL bailout. Nevertheless, at various times over the ensuing weeks, GMCL continued to advise its dealers that the company's plans to continue consolidating and rationalizing the dealer network remained as outlined in the initial viability plan the governments had rejected.[45] It was not until April 27, 2009 that GMCL publicly stated that it intended to reduce its dealership network by 42% by the end of 2010, and that it wished to achieve this reduction outside of a formal insolvency proceeding.[46] Yet GMCL had known since March 30, 2009 that it could not achieve a dealership reduction of this magnitude over such a short period of time through normal course attrition.

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[42] Comeau aff., Responding Motion Record, Vol. 1, Tab 1, p. 20, para. 65. Mr. Comeau deposes that "[t]he Canadian and Ontario governments requested that GMCL and all its stakeholders – management, labour, retirees, Dealers and suppliers contribute appropriately to improve overall cost structures in their long-term restructuring plans."

[43] Comeau aff., Responding Motion Record, Vol. 1, Tab 1, p. 20, para. 65.

[44] GMCL's initial viability plan was submitted on February 20, 2009. Comeau aff., Responding Motion Record, Vol. 1, Tab 1, p. 19, para. 60

[45] Comeau aff., Responding Motion Record, Vol. 1, Tab 1, pp. 21-22, paras. 67-69.

[46] Comeau aff., Responding Motion Record, Vol. 1, Tab 1, p. 23, para. 73; GMCL Press Release, Ex. P, Comeau aff., Responding Motion Record, Vol. 1, Tab 1P, p. 477.

38. Trillium alleges that GMCL waited until May 20, 2009 (in Trillium's case, May 22) to communicate the wind down package in order to exert maximum pressure on the affected dealers.[47] In addition, GMCL refused to disclose the names of the dealers that had received the WDA.[48] This high-pressure strategy worked to deprive the affected dealers of the chance to review the WDA properly, to consider their options, and to associate with each other for the purposes of negotiating the terms of the WDA for their collective benefit. All of the affected dealers were impacted by this pre-meditated strategy.

39. Further, GMCL misled all of the affected dealers in its May 20 letter and in the WDA itself.

40. The May 20 letter announced to the affected dealers that "[GMCL] will not be renewing the Dealer Sales and Service Agreement." In fact, the standard form Dealer Agreement "assured" the affected dealers the opportunity to renew for a further term provided they were in good standing.

41. GMCL had no right to decide unilaterally not to renew the Dealer Agreements. An "assurance" is a "pledge or guarantee" "to make certain"[49] "a positive declaration intended to give confidence."[50] GMCL understood that its dealers had a right to renew. A government briefing note obtained through a request under the *Freedom of Information and Protection of*

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[47] Statement of Claim, Motion Record, Tab 3, p. 118, para. 38.

[48] Statement of Claim, Motion Record, Tab 3, p. 119, para. 42.

[49] *Black's Law Dictionary*, 7th ed. (St. Paul, West Publishing Co., 1999) , **BOA** Tab 40; *Dictionary of Canadian Law*, 2nd (Carswell, 1995) at p. 83, **BOA** Tab 41; *The Concise Oxford Dictionary*, 10th ed. (Oxford: Oxford University Press, 2001), **BOA** Tab 44.

[50] See, *e.g.*, *Canada (Attorney General) v. Sacrey*, [2003] F.C.J. No. 1501 (C.A.) at para. 14., **BOA** Tab 12; *The Queen v. CAE Industries Ltd. and CAE Aircraft Ltd.*, [1986] 1 F.C. 129 (C.A.) at para. 61, **BOA** Tab 37.

Privacy Act, refers to the Dealer Agreement as "evergreen," meaning "perpetual."[51] GMCL acknowledges that "some" of the information in the briefing note came from it, but claims that other unspecified information in the briefing note is inaccurate.[52]

42. GMCL told affected dealers their Dealer Agreements would not be renewed to create the false impression that the affected dealers were giving up less than 1½ years of their remaining term, when in fact they were giving up much more.[53] This statement amounted to an anticipatory breach or repudiation of the affected dealer's right of renewal or, alternatively, a misrepresentation to each affected dealer of the right of renewal. GMCL compounded the mischaracterization in the WDA itself by calling the May 20 letter the "Notice of Non-Renewal."[54]

43. GMCL then went further by having the affected dealers "acknowledge" in the WDA that GMCL was not a franchisor within the meaning of the Franchise Acts. The WDA states in Section 5(a)(v):[55]

> Dealer and Dealer Operator acknowledge that **it has always been** and continues to be **GM's position that the Acts are not applicable to the Dealer Agreement** or the relations between GM and Dealer and/or Dealer Operator. [Emphasis added]

44. Thus, GMCL and its team of lawyers represented to the affected dealers and their advisors that the Franchise Acts did not apply and would not assist the affected dealers. As

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[51] Briefing Note, Ex. C, Djuric aff., Supplementary Motion Record, Tab C, p. 5.

[52] See footnote 17 above.

[53] Statement of Claim, Motion Record, Tab 3, p. 120, para. 43(a).

[54] Recital B, WDA, Ex. B, Hurdman aff., Motion Record, Tab 2B, p. 37.

[55] Section 5(a)(v), WDA, Ex. B, Hurdman aff., Motion Record, Tab 2B, p. 41.

referred to in more detail below, Cassels, with its expertise in franchise law and its past dealings with GMCL on behalf of the Saturn/Saab dealers, knew that GMCL was a franchisor and that it was GMCL's policy to deny this to its dealers. However, Cassels kept this fact to itself and never advised the affected dealers of their rights under the Franchise Acts.

45. In fact, it has <u>not</u> always been GMCL's position that the Franchise Acts are not applicable to the Dealer Agreement. GMCL applied for and obtained an exemption[56] under the Wishart Act from the Act's requirement that franchisors attach financial statements to disclosure documents required to be delivered to prospective franchisees. This limited exemption was given only to franchisors which met the definition under the Wishart Act and which applied for the exemption. The Regulation exempting GMCL describes GMCL as a "franchisor."

46. GMCL clearly meets the definition of a franchisor under each of the Franchise Acts.[57] The attempt to convince the affected dealers otherwise was a deliberate act of bad faith at a time when the affected dealers were at their most vulnerable. GMCL's conduct also ran afoul of the provisions in each of the Franchise Acts which prohibit any attempt to effect a waiver or release of the protection available thereunder.[58]

47. The WDA blocked the affected dealers from applying to court for a determination of their rights under the Franchise Acts. If they did so, they would be in breach of the "Covenant not to sue" contained in Article 5 of the WDA, and would forfeit all Wind-Down payments. Similarly,

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[56] Reg. 9/01 to Wishart Act, Ex. N, Hurdman aff., Motion Record, Tab 2N, p. 96.

[57] In *Stoneleigh Motors*, GMCL agreed for the purpose of a recent motion (and without prejudice to its right to later assert otherwise), that the Dealer Agreement is a franchise agreement within the meaning of the Wishart Act and that the Wishart Act therefore applies to each plaintiff's Dealer Agreement: *Stoneleigh Motors* at para. 4, **BOA** Tab 35.

[58] Wishart Act, s. 11; PEI Act, s.12; Alberta Act, s. 18.

if the affected dealers disclosed the terms or conditions of the WDA or any facts relating thereto to other affected dealers, the disclosing dealers would be in breach of the confidentiality provision in Article 8 of the WDA and would forfeit all Wind-Down payments. Thus, the affected dealers could not communicate with each other or seek court assistance without risking forfeiture of the Wind-Down payments.

(3) CLAIM AGAINST CASSELS

48. The causes of action against Cassels are grounded in the following material facts alleged in the statement of claim and contained in documents incorporated therein.[59]

49. After GMCL publicly announced on April 27, 2009 that it intended to reduce the number of dealers in its network by 42%,[60] the dealers knew that they needed to be ready for this event and that time would be of the essence in both their preparation for and response to this impending event.[61]

50. Many GMCL dealers are members of one of the provincial or regional branches of the Canadian Automotive Dealers' Association ("**CADA**") which is a not-for-profit federation of provincial and regional automotive dealer associations. As the national federation of automotive dealers, CADA was uniquely positioned to organize an effective response to any attempt by GMCL to eliminate dealers in Canada.[62]

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[59] Statement of Claim, Motion Record, Tab 3, pp. 124-141, paras. 55-126.

[60] Comeau aff., Responding Motion Record, Vol. 1, Tab 1, p. 20, para. 65.

[61] Statement of Claim, Motion Record, Tab 3, p. 124, para. 58.

[62] Statement of Claim, Motion Record, Tab 3, pp. 124-125, para. 59.

51. In or about April 2009, CADA selected Cassels to represent the GM dealers in the event of a restructuring of the dealership network. CADA selected Cassels based on a number of factors including the firm's expertise in the areas of franchising and distribution law and practice, franchisor/dealer relations, class actions and insolvency proceedings.[63]

52. Another factor in CADA's decision to select Cassels was that Cassels had represented GMCL's Saturn/Saab dealers in their dealings with GMCL. Those dealings involved issues of franchise law, the Franchise Acts, and franchisor/dealer relations generally.[64]

53. After selecting Cassels, CADA sent a memorandum dated May 4, 2009[65] to all GMCL dealers in Canada informing them that CADA had selected Cassels to represent the dealers collectively in a restructuring or insolvency by GMCL. The memorandum urged all GMCL dealers to fill in the attached form and to pay into a legal fund ("**Cassels Legal Fund**") either $5,000 or $2,500 depending on the number of vehicles sold by the dealer in the previous year. The Cassels Legal Fund was to be used to pay Cassels' legal fees and other expenses in representing the dealers in the restructuring or insolvency of GMCL and preparation therefor. The memorandum also stated that 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.[66]

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[63] Statement of Claim, Motion Record, Tab 3, p. 125, para. 61.

[64] Statement of Claim, Motion Record, Tab 3, p. 125, para. 62.

[65] Memorandum dated May 4, 2009, Ex E, Hurdman aff., Motion Record, Tab 2E, p. 71.

[66] Memorandum dated May 4, 2009, Ex E, Hurdman aff., Motion Record, Tab 2E, p. 72.

54. The memorandum stated that by paying the retainer, the GMCL dealers would "be represented" by experienced counsel, have "power in numbers", "force … other parties to involve [their] counsel at the bargaining table and respect [their] interests." By banding together, the memorandum stated, they would have a "voice" in the restructuring. A similarly worded memorandum was also sent by CADA to the GMCL dealers on May 13, 2009.[67]

55. A number of GM dealers, including Trillium, paid into the Cassels Legal Fund.[68] All of the funds paid into the Cassels Legal Fund were raised at the request of Cassels for the purpose of paying Cassels' legal fees and expenses. No other law firm was retained to act for the affected dealers as a collective.

(a) Cassels' undisclosed retainer by Canada in relation to the GMCL bailout

56. Unknown to the GM dealers, Cassels was representing Canada throughout the GMCL bailout negotiations.[69]

57. Subsequently, in July 2009 Canada became a 12% shareholder of GMCL's new parent corporation, General Motors Company, and a representative of Canada was given a seat on General Motors Company's Board of Directors. In the period leading up to this massive investment, Canada was granted privileged access to GMCL's internal documents and strategy.[70]

58. As stated in paragraph 36 above, Canada's conditions for the GMCL bailout directly influenced GMCL's decision to reduce the number of its dealers through the WDA. Both

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[67] Memorandum dated May 13, 2009, Ex F, Hurdman aff., Motion Record, Tab 2F, p. 76.

[68] Hurdman aff., Motion Record, Tab 2, p. 13, para. 23.

[69] Statement of Claim, Motion Record, Tab 3, p. 128, para. 73.

[70] Statement of Claim, Motion Record, Tab 3, p. 129, para. 76.

Canada and GMCL had a vested interest in the removal of the affected dealers. Cassels was in an untenable and indefensible conflict of interest in purporting to act at the same time for Canada and the GMCL dealers.[71]

59. This conflict was known to Cassels both at the time it entered into discussions with CADA about representing the GMCL dealers, and throughout the period after May 4, 2009.[72]

60. Cassels neither informed the GMCL dealers that it was acting for Canada on the GMCL bailout, nor obtained the consent of the GMCL dealers to act for them notwithstanding the conflict. If Cassels informed CADA that it represented Canada in the GMCL bailout, which is not known to Trillium, CADA never informed the GMCL dealers of this fact.[73]

61. Shortly after GMCL sent the WDA to the GMCL dealers on or about May 20, 2009, CADA sent a memorandum dated May 22, 2009 to the GMCL dealers regarding the WDA.[74] The May 22 memorandum provided an overview of the WDA but offered no advice, assistance or recommendations to the affected dealers other than to explain the consequences of signing or not signing the document and to advise the affected dealers to obtain their own independent legal advice. The statement of claim alleges that Cassels was involved in drafting the May 22 memorandum.[75]

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[71] Statement of Claim, Motion Record, Tab 3, p. 129, para. 77.

[72] Statement of Claim, Motion Record, Tab 3, p. 129, para. 78.

[73] Statement of Claim, Motion Record, Tab 3, p. 130, para. 81; Hurdman aff., Motion Record, Tab 2, p. 17, para. 39.

[74] Statement of Claim, Motion Record, Tab 3, p. 130, para. 82.

[75] Statement of Claim, Motion Record, Tab 3, p. 130, para. 83.

62. Despite the promises made in the May 4 and May 13 solicitation memoranda, the May 22 memorandum offered no advice or strategy to the dealers in terms of a response to the WDA. The memorandum was silent on the affected dealers' rights under the Franchise Acts. Cassels was aware from its dealings on behalf of the Saturn/Saab dealers that GMCL was bound by the Franchise Acts and that it was GMCL's practice to deny that it was so bound.[76] Nevertheless, the May 22 memorandum offered no opinion on whether GMCL was bound by the Franchise Acts or what this meant to the affected dealers.

(b) Cassels advises affected dealers on conference call

63. The affected dealers' last chance to act as a collective came on May 24, 2009, two days before the May 26 sign-back deadline in the WDA. CADA and Cassels organized a national conference call for the affected dealers for that date. Notice of the call was sent out midday on May 22.[77]

64. In the course of the approximately four-hour call, two lawyers from Cassels gave legal advice to their client dealers regarding the WDA. One of those lawyers is a tax specialist. The other lawyer is not known to Trillium.[78]

65. During the conference call, Cassels again limited itself to advising the affected dealers of the consequences of signing or not signing the WDA. Cassels did not seek instructions to negotiate with GMCL or Canada over the WDA in the 48 hours remaining until the deadline. Nor did Cassels advise the affected dealers in this regard. Further, Cassels did not advise or seek

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[76] Statement of Claim, Motion Record, Tab 3, p. 131, para. 85.

[77] Statement of Claim, Motion Record, Tab 3, p. 131, para. 87.

[78] Statement of Claim, Motion Record, Tab 3, p. 131, para. 88.

instructions that the affected dealers demand an increase in the Wind-Down payments, or even request an extension of the time to consider the WDA.[79]

66. Cassels did not advise the affected dealers that GMCL is a franchisor under the Franchise Acts, or that the affected dealers had common law and inalienable statutory rights of fair dealing and association which were being breached by GMCL.[80]

67. Cassels did not advise the affected dealers that they were entitled to a disclosure document under the Franchise Acts or, alternatively, that the affected dealers were entitled to a reasonable period of time to review and negotiate the WDA, including pursuant to the right of fair dealing and the right of association under the Franchise Acts.[81]

68. Cassels did not advise the affected dealers that they had a statutory right to associate for the purposes of advancing their collective interests and negotiating the WDA under section 4 of the Wishart Act or similar provisions under the other Franchise Acts.[82]

69. Cassels did not advise the affected dealers, even though Cassels knew or must be deemed to have known, that the deadline of May 26, 2009 imposed by GMCL for signing back the WDA was four days before the actual deadline by which GMCL had to satisfy government conditions.[83]

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[79] Statement of Claim, Motion Record, Tab 3, p. 131, para. 89.

[80] Statement of Claim, Motion Record, Tab 3, p. 132, para. 90.

[81] Statement of Claim, Motion Record, Tab 3, p. 132, para. 91.

[82] Statement of Claim, Motion Record, Tab 3, p. 132, para. 92.

[83] Statement of Claim, Motion Record, Tab 3, p. 132, para. 93.

70. Cassels did not inform the affected dealers of the firm's conflict of interest or recommend that the affected dealers collectively retain another experienced law firm in the few hours remaining so that the dealers could have proper legal representation in the face of GMCL's demands.[84]

71. Instead, Cassels told the affected dealers to obtain independent legal advice from their respective local lawyers in the 48 hours remaining. Despite having been retained by the dealers for this very situation, Cassels would not sign any dealer's certificate of independent legal advice which GMCL required as part of the WDA. Cassels sent their clients to their own local lawyers for this purpose thus depriving them of the knowledge that Cassels had build up in this case and through its considerable experience in the relevant areas of the law.[85]

72. All of the reasons cited in the May 4 and May 13, 2009 memoranda as the basis upon which the dealers were urged to retain Cassels and to raise a multi-million legal fund were engaged upon GMCL's delivery of WDAs to the affected dealers. Cassels knew that the affected dealers would have no negotiating power on their own and that their local lawyers would be unable to assist them in any meaningful way with this complex document in the short time available.[86]

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[84] Statement of Claim, Motion Record, Tab 3, p. 132, para. 94. Hurdman aff., Motion Record, Tab 2, p. 14, para. 25.

[85] Statement of Claim, Motion Record, Tab 3, p. 133, para. 95. Hurdman aff., Motion Record, Tab 2, p. 14, para. 24.

[86] Statement of Claim, Motion Record, Tab 3, p. 133, para. 96.

73. The May 24, 2009 conference call was Cassels' last communication to the affected dealers as a group and the last chance for these dealers to organize themselves before the May 26, 2009 sign-back deadline.[87]

74. As matters transpired, the affected dealers were completely shut out of the negotiating process and were the only significant stakeholders in the GMCL bailout which were denied a voice in the restructuring.[88]

(c) Cassels takes instructions from continuing dealers

75. During the crisis period from May 20 to 26, 2009, Cassels gave advice to and took instructions from a previously organized Steering Committee of CADA which consisted of GM dealers, the majority of which were not asked to sign the WDA ("**continuing dealers**").[89]

76. The elimination of the affected dealers directly benefited the continuing dealers. Not only would the continuing dealers have 42% fewer competitors for the sale of their products, but the affected dealers were required to sell off all of their inventory of vehicles in a very short time in order to receive their Wind-Down payments. The continuing dealers were in a natural position to purchase such inventory at discounted prices. The continuing dealers also stood to benefit by being able to purchase parts and accessories, tools and equipment from the affected dealers at massive discounts. Practically speaking, the elimination of the affected dealers was an

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[87] Statement of Claim, Motion Record, Tab 3, p. 134, para. 98.

[88] Statement of Claim, Motion Record, Tab 3, p. 134, para. 100.

[89] Statement of Claim, Motion Record, Tab 3, p. 134, para. 101; Hurdman aff., Motion Record, Tab 2, p. 14, para. 26.

expropriation of goodwill and market share in favour of the continuing dealers and a valuable opportunity to acquire an inventory of new vehicles and parts from highly motivated sellers.[90]

77. The continuing dealers also had a strong interest in ensuring that all of the affected dealers sign the WDAs by the deadline so that GMCL would not file under the CCAA. Whether a court would condone the sacrifice of one group of independent businesses to the direct benefit of another was a risk that the continuing dealers did not want to take.

78. Cassels did not question the composition of the Steering Committee or insist that the continuing and affected dealers be split into two groups for the purposes of advising and seeking instructions on the negotiations of the WDA with GMCL and Canada.[91]

79. Further, or in the alternative, Cassels took instructions from CADA which was also in a conflict vis-à-vis the affected dealers. CADA's own interests lay with its continuing dealers which would support it in the future.[92] CADA viewed the termination of the affected dealers as a necessary sacrifice for the greater good of GMCL and the continuing dealers, and after the crisis passed would describe the terminations as a "very unfortunate but brutal reality."[93]

80. On May 28, 2009, two days after the May 26 deadline had passed, CADA sent a memorandum[94] to all GMCL dealers that had contributed to the Cassels Legal Fund acknowledging the conflict of interest that existed between the affected dealers and the

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[90] Statement of Claim, Motion Record, Tab 3, p. 134, para. 101.

[91] Statement of Claim, Motion Record, Tab 3, p. 135, para. 102.

[92] Statement of Claim, Motion Record, Tab 3, p. 135, para. 103.

[93] *Canadian Auto World* article dated September 2009, Ex. I, Hurdman aff., Motion Record, Tab 2I, p. 86.

[94] Memorandum dated May 28, 2009, Ex. H, Hurdman aff., Motion Record, Tab 2H, pp. 82-85.

continuing dealers. CADA stated that it was "currently reforming [its] Steering Committees" to separate the two conflicting groups.[95]

81. After the sign-back deadline, CADA refunded the legal fees contributed by the GMCL dealers and told them that it would look after Cassels' legal bills with its own funds. Shortly thereafter, CADA made it known that the affected dealers were on their own and that they should not look to CADA for assistance.[96]

82. Cassels widely publicized its involvement as Canada's legal representative in the GMCL bailout; but has never publicly acknowledged any role in relation to the affected dealers or CADA. Similarly, CADA never publicly mentioned Cassels' role and has stated that CADA handled all legal work relating to the GMCL restructuring in-house.[97]

(4) THE REPRESENTATIVE PLAINTIFF

83. Trillium was a GM dealer from 1990 to 2009. It was the two-time winner of the "Triple Crown" award which is GMCL's highest award for dealerships.[98]

84. Trillium's principal, Thomas Lynton Hurdman, has owned and managed car dealerships since graduating from Queen's University in 1978 with an Honours B.Comm. Mr. Hurdman is

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[95] Statement of Claim, Motion Record, Tab 3, p. 137, para. 111.

[96] Statement of Claim, Motion Record, Tab 3, p. 137, para. 111.

[97] Statement of Claim, Motion Record, Tab 3, pp. 137-138, paras. 116-117.

[98] Hurdman aff., Motion Record, Tab 2, p. 20, para. 53.

aware of the duties of a class representative and is committed to devoting his time, knowledge, energy and leadership to bringing this case to a successful conclusion.[99]

85. Trillium has no interest in conflict with any of the proposed class members.[100] Mr. Hurdman has reviewed and produced the Plan of Proceeding[101] prepared by plaintiff's counsel setting out a method of advancing this case on a timely basis on behalf of the class and of notifying the class members of the action and developments in the case.

PART III – THE LAW

(1) TEST AND GENERAL PRINCIPLES ON CERTIFICATION MOTIONS

86. Section 5(1) of the *Class Proceedings Act, 1992* ("**CPA")** provides that the court *shall* certify an action as a class proceeding where each aspect of the following five-part test for certification is met:

> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
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> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,

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[99] Hurdman aff., Motion Record, Tab 2, p. 20, para. 55.

[100] Hurdman aff., Motion Record, Tab 2, p. 20, para. 56.

[101] Hurdman aff., Motion Record, Tab 2, p. 20, para. 57; Plan of Proceeding, Ex. O, Motion Record, Tab 2O, pp. 99-105.

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.[102]

87. Trillium adopts the following principles applicable to certification motions as summarized in a recent decision of this court:[103]

> (a) The *C.P.A.* is remedial and is to be given a generous, broad, liberal and purposive interpretation. The three goals of a class action regime, as recognized by the Ontario Law Reform Commission, *Report on Class Actions*, 3 vols. (Toronto: Ministry of the Attorney General, 1982) and by the Supreme Court of Canada are: judicial efficiency; improved access to the courts; and, behaviour modification, or the generation of "a sharper sense of obligation to the public by those whose actions affect large numbers of people": *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67 at para. 15; Ontario Attorney General's Advisory Committee on Class Action Reform, *Report* (Toronto: The Committee, 1990) at 16 - 18 and 20; *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63 at paras. 27 – 29.
>
> (b) The *C.P.A.* is entirely procedural. The certification stage is not meant to be a test of whether the plaintiff's claim will succeed. In the event that subsections (a) through (e) of s. 5(1) of the *C.P.A.* are satisfied, certification of the action by the court is mandatory: *C.P.A.* s. 5(1), *Bendall v. McGhan Medical Corp.*, (1993), 14 O.R. (3d) 734, [1993] O.J. No. 1948 at para. 39 (Gen. Div.).
>
> (c) The *C.P.A.* provides the courts with a procedural tool to deal efficiently with cases involving large numbers of interested parties, as well as complex and often-intertwined legal issues, some of which are common and some of which are not: *Hollick v. Toronto (City)*, above, at paras. 14 and 15; *Bendall v. McGhan Medical Corp.*, above, at para. 40.
>
> (d) Certification is a fluid, flexible procedural process. It is conditional, always subject to decertification. Certification is not a ruling on the merits. A certification order is not final. It is an interlocutory order, and it may be amended, varied or set aside at any time: *C.P.A.* ss. 5(5), 10(1) and 10(2);

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[102] *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(1).

[103] *578115 Ontario Inc. (c.o.b. McKee's Carpet Zone) v. Sears Canada Inc.*, 2010 ONSC 4571 (CanLII) ("*Sears Canada*") at para. 30, **BOA** Tab 4.

Bendall v. McGhan Medical Corp., above, at para. 42; *Hollick v. Toronto (City)*, above, at para. 16; Ontario Attorney General's Advisory Committee on Class Action Reform, *Report*, above, at 30 – 33.

(e) The court has no discretion to refuse to certify a proceeding as a class proceeding solely on the ground that one or more of the following are present: (i) the relief claimed would require individual damage assessments; (ii) the relief claimed relates to separate contracts; (iii) there are different remedies sought for different class members; (iv) the number or identity of class members is not known; (v) the identified class includes a sub-class whose members have claims or defences that raise common issues not shared by all class members: *C.P.A.* s. 6; *Anderson v. Wilson*, (1997), 32 O.R. (3d) 400, [1997] O.J. No. 548 at para. 18 (Gen. Div.); varied, (1998), 37 O.R. (3d) 235, [1998] O.J. No. 671 (Div. Ct.); rev'd, certification order varied, (1999), 44 O.R. (3d) 673, [1999] O.J. NO. 2494, (C.A.), leave to appeal to S.C.C. dismissed, [1999] S.C.C.A. NO. 476, 185 D.L.R. (4th) vii.

(f) The Ontario class proceeding regime does not require common questions of fact and law applicable to members of the class to predominate over any questions affecting only individual members. It furthermore does not require that the representative plaintiff be typical: *Hollick v. Toronto (City)*, above, at paras. 29 and 30; *Bendall v. McGhan Medical Corp.*, above, at para. 48; *Andersen v. St. Jude Medical Inc.*, (2003), 67 O.R. (3d) 136, [2003] O.J. No. 3556 at para. 48 (S.C.J.).

(g) In order to succeed on a certification motion, the plaintiff requires only a "minimum evidentiary basis for a certification order." It is necessary that the plaintiff "show some basis in fact" for each of the certification requirements, other than the requirement in s. 5(1)(a) that the claim discloses a cause of action: *Hollick v. Toronto (City)*, above, at paras. 22 and 25.

(h) *"Some basis in fact"* is an elastic concept and its application is difficult. It is not a requirement to show that the action will probably or possibly succeed. It is not a requirement to show that a *prima facie* case has been made out. It is not a requirement to show that there is a genuine issue for trial: *Glover v. Toronto (City)* (2009), 70 C.P.C. (6th) 303, [2009] O.J. No. 1523 at para. 15 (S.C.J.).

88. For the reasons explained in the paragraphs below, Trillium meets all five components of the certification test.

(2) CAUSE OF ACTION

(a) Applicable legal principles

89. The test under section 5(1)(a) is identical to the test on a motion to strike a pleading as disclosing no cause of action under Rule 21.01(1)(b) of the *Rules of Civil Procedure*.[104] It must be "plain and obvious" that the claim cannot succeed. The following principles apply in determining whether the statement of claim discloses a cause of action:

> (a) no evidence is admissible for the purposes of determining the s. 5(1)(a) criterion;[105]
>
> (b) all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proven and thus assumed to be true;
>
> (c) the pleading will be struck out only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect;[106]
>
> (d) matters of law not fully settled in the jurisprudence must be permitted to proceed;[107] and
>
> (e) the pleading must be read generously to allow for inadequacies due to drafting frailties and the plaintiff's lack of access to key documents and discovery information.[108]

90. As detailed below, Trillium has pleaded proper causes of action against the defendants. Each of Trillium's discrete claims meets the "plain and obvious" test.

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[104] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 21.01(1)(b).

[105] *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 ("*Hollick*") at para. 25, **BOA** Tab 22.

[106] *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) ("*Cloud*") at para. 41, leave to appeal to the S.C.C. refused, [2005] 1 S.C.R. vi, **BOA** Tab 15.

[107] *Ford v. F. Hoffman-LaRoche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 17(e), **BOA** Tab 18.

[108] *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980, **BOA** Tab 23; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.) at 679, **BOA** Tab 7.

(b) The claims against GMCL

(i) Overview

91. The claims against GMCL are brought under the Wishart Act and similar legislation in other provinces. The analysis of these causes of action brings into play the principles of interpretation of the Wishart Act. The Court of Appeal has repeatedly emphasized the Act's importance in protecting franchisees. Among other things, the court has held that:

> (a) "[t]he Wishart Act is *sui generis* remedial legislation. It deserves a broad and generous interpretation. The purpose of the statute is clear: it is intended to redress the imbalance of power as between franchisor and franchisee; it is also intended to provide a remedy for abuses stemming from this imbalance."[109]
>
> (b) "[t]he purpose of the Act is to protect franchisees. The provisions of the Act are to be interpreted in that light;"[110]
>
> (c) the Wishart Act is intended "to level the legal playing field between franchisees and franchisors by protecting franchisees when they enter into franchise agreements;"[111]
>
> (d) "the entire purpose of the Act … is to protect the interests of franchisees;"[112]
>
> (e) the language of the Act "is unambiguous, and it is mandatory;"[113]
>
> (f) attempts to read disclosure provisions narrowly "must be met with scepticism;"[114]

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[109] *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673 (CanLII) ("*Salah*") at para. 26, **BOA** Tab 33.

[110] *405341 Ontario Limited v. Midas Canada Inc.*, 2010 ONCA 478 (CanLII) ("*Midas CA*") at para. 30, **BOA** Tab 3; *6792341 Canada Inc v. Dollar It Ltd.* (2009), 95 O.R. (3d) 291 (C.A.) ("*Dollar It*") at paras. 12, 13 and 72, **BOA** Tab 5; *Personal Service Coffee Corp. v. Beer et al.* (2005), 256 D.L.R. (4th) 466 (Ont. C.A.) ("*Personal Service Coffee*") at para. 28, **BOA** Tab 30.

[111] *MDG Kingston Inc. v. MDG Computers Canada Inc.* (2008), 92 O.R. (3d) 4 (C.A.) ("*MDG Kingston*") at para. 1, **BOA** Tab 28.

[112] *Dollar It* at para. 12, **BOA** Tab 5.

[113] *1490664 Ontario Ltd. v. Dig this Garden Retailers Ltd.* (2005), 256 D.L.R. (4th) 451 (Ont. C.A.) ("*Dig this Garden*") at para. 19, **BOA** Tab 2.

[114] *Personal Service Coffee* at para. 28, **BOA**, Tab 30. See also *Dollar It* at para. 13, **BOA**, Tab 5.

(g) "[a]n interpretation of the statute which restricts damages to compensatory damages related solely to proven pecuniary losses would fly in the face of this policy initiative."[115]

(h) "the thrust of the Act is to set standards for adequate disclosure and to create significant penalties for failing to meet those standards;"[116] and

(i) the remedy against franchisors which do not provide prior disclosure is "drastic."[117]

92. The claims asserted against GMCL are for: (1) breach of GMCL's statutory duty of fair dealing; (2) breach of the class members' statutory right of association; and (3) breach of GMCL's statutory duties to deliver a disclosure document in connection with the WDA to class members carrying on business in Ontario, Prince Edward Island and Alberta. All class members claim damages against GMCL in consequence of the first two breaches. Class members in Ontario and Prince Edward Island assert a further claim for damages in consequence of the third breach, in reliance on particular statutory rights conferred by the Wishart Act and by the PEI Act.

93. The class members also claim a range of declaratory relief against GMCL including: (1) a declaration that GMCL is a franchisor within the meaning of the Wishart Act, the PEI Act and the Alberta Act; (2) a declaration that the class members are entitled to the benefit of the statutory duty of fair dealing under section 3 of the Wishart Act, and the right of association under section 4 of the Wishart Act by virtue of the choice of law provisions in the Dealer Agreement and in the WDA; (3) a declaration that any waiver or release contained in the WDA is null, void and unenforceable in respect of the class members' rights under sections 4 and 11 of the Wishart Act; and (4) declarations in respect of GMCL's failure to provide the mandatory pre-

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[115] *Salah* at para. 26, **BOA** Tab 33.

[116] *Dig This Garden* at para. 12, **BOA** Tab 2.

[117] *MDG Kingston* at para. 1, **BOA** Tab 28.

contractual disclosure required by the Wishart Act, the PEI Act and the Alberta Act, including declarations as to the consequences that would follow from the class members' exercise of statutory rights of rescission (in Ontario and PEI) and rights of cancellation (in Alberta) in respect of the WDA.

94. The first three claims for declaratory relief raise the application of the Wishart Act as a threshold issue. Accordingly, the application of the Wishart Act is considered immediately below, to be followed by an analysis of Trillium's pleaded claims for breach of the Wishart Act.

(ii) The application of the Wishart Act

95. The statement of claim pleads the claimed declarations as express propositions. First, Trillium pleads that GMCL "is a franchisor" within the meaning of s. 1(1) of the Wishart Act,[118] and that GMCL's assertion in Section 5(a)(v) of the WDA that provincial franchise legislation did not apply to the Dealer Agreement or to the relations between GMCL and its dealers was "false and misleading" because GMCL "was fully aware that it was a franchise within the meaning of each of the franchise Acts."[119] GMCL's knowledge of this fact is illustrated by, among other things, the substance of Ontario Regulation 9/01 under the Wishart Act which defines GMCL as one of a number of "franchisors" exempted from the requirement to attach financial statements to pre-contractual disclosure documents it is required to deliver to prospective franchisees.

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[118] And sections 1(1) of the PEI Act and the Alberta Act, respectively.

[119] Statement of Claim, Motion Record, Tab 3, pp. 116 and 120, paras. 29 and 43(b).

96. Second, Trillium pleads that "[b]oth the WDA and the Dealer Agreement stipulate that Ontario law applies to the relationship between [GMCL] and its dealers." As such, "the affected dealers in all provinces are entitled to fair dealing protection and to the right of association under the Wishart Act."[120] Trillium's pleading is supported by the text of the WDA[121] which provides in Section 13 that "[t]his Agreement is governed by the laws of the Province of Ontario. However, if performance under this Agreement is illegal under a valid law of any jurisdiction where such performance is to take place, performance will be modified to the minimum extent necessary to comply with such law."[122] The same language appears in Section 17.12 of the "Standard Provisions" which are incorporated as part of the Dealer Agreement.[123]

97. Thus, Ontario law governs all of the members of the proposed class. Where Ontario law is adopted by the parties to a franchise agreement, the parties become subject to the relationship provisions of the Wishart Act, including the duty of fair dealing under section 3 and the right of association under section 4, regardless of where the franchisee carries on business. The Ontario Court of Appeal recently decided this point by the following passage of *405341 Ontario Limited v. Midas Canada Inc.*:[124]

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[120] Statement of Claim, Motion Record, Tab 3, p. 121, para. 47.

[121] The court may have regard to documents referred to and incorporated by reference into the pleading in order to assess the substantive adequacy of the claim. See, for example, *Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d) 802 (C.A.), **BOA** Tab 38 and *Robinson v. Rochester Financial Ltd.*, 2010 ONSC 463 (CanLII) (Div. Ct.) ("*Rochester Financial*") at para. 19, **BOA** Tab 32. Both the WDA and the Dealer Agreement are referred to throughout the Statement of Claim.

[122] Section 13, WDA, Ex. B, Hurdman aff., Motion Record, Tab 2B, p. 43

[123] Standard Provisions to Dealer Agreement, Ex. B, Comeau aff., Responding Motion Record, Vol. 1, Tab 1B, p. 98.

[124] *Midas CA* at para. 45, **BOA** Tab 3.

> Many commercial contracts today contain choice of law clauses. That choice often bears no relationship to where the contract is to be carried out. As the respondent notes in its factum:
>
> > As Peter W. Hogg states "[a]s a general proposition, it is plain that a province may not regulate extraprovincial activity" [FN: Peter W. Hogg, Constitutional Law of Canada, 5th ed. (Toronto: Thomson Carswell, 2007) at § 13.3(d)]. It is equally plain, however, that this inherent territorial limitation does not prevent parties from adopting the law of one province to regulate contracts which have a connection to other provinces, or in the case of franchise agreements, which can span multiple jurisdictions. The law selected by the parties will ordinarily govern the dispute subject to public policy exceptions:
> >
> > > Where the parties have expressly selected a governing law, there is no difficulty in identifying the "law intended by the parties." The law will govern the contract provided the choice is bona fide and legal, and there is no reason for avoiding the choice on the ground of public policy [FN: Janet Walker, Castel & Walker: Canadian Conflict of Laws, 6th ed., looseleaf (Markham, Ont: LexisNexis Butterworths, 2005) at § 31.2a.].

98. Class members operating in other provinces which have no franchise legislation therefore receive the protection (and are under the fair dealing obligations) of the Wishart Act by virtue of the choice of law provisions in the Dealer Agreements and in the WDA.

99. Class members in PEI and Alberta also have the benefit of the Wishart Act notwithstanding that the PEI Act and the Alberta Act both contain a section voiding contractual provisions which purport to contract out of the province's laws or which compel a person to litigate in another province.[125] The adoption of Ontario law as the law of the contract does not amount to a waiver of any class member's rights under the PEI and Alberta Act, respectively. The protection afforded by sections 3 and 4 of the Wishart Act is at least equal to the protection under the PEI Act and the Alberta Act. The application of the Wishart Act does not give rise to a

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[125] Alberta Act, s. 17; Wishart Act, s. 10; PEI Act, s. 12. Section 3 of the Alberta Act also has a residency status requirement for the application of the Act.

conflict of laws issue since nothing in the PEI Act or the Alberta Act prevents a franchisee from incorporating equal or greater protection under another province's law in addition to the law of its home province.

100. Third, Trillium pleads[126] that the WDA's purported release and waiver of class members' rights under franchise legislation[127] is void by reason of sections 4 and 11 of the Wishart Act,[128] which provide in relevant part as follows:

> 4(4) Any provision in a franchise agreement or other agreement relating to a franchise which purports to interfere with, prohibit or restrict a franchisee from exercising any right under this section [i.e. the right to associate with other franchisees] is void.
>
> 11 Any purported waiver or release by a franchisee of a right given under this Act or of an obligation or requirement imposed on a franchisor or franchisor's associate by or under this Act is void.

101. Each of the foregoing pleadings is sustainable under the section 5(1)(a) analysis. Trillium's allegations of fact must be assumed to be true. None of the claims concerning the Wishart Act's applicability to: (1) GMCL; (2) class members outside Ontario; and (3) the release contained in the WDA are "certain to fail." Nor is it "plain and obvious" that the class members will fail to obtain the declaratory relief they seek.

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[126] Statement of Claim, Motion Record, Tab 3, pp. 122-123, para. 50-51.

[127] Section 5(a)(v) of the WDA states that affected dealers waive and release any and all claims and other rights arising out of or relating to (among other things) all applicable laws including the Wishart Act and other similar provincial franchise legislation to the extent such legislation applies (which GMCL expressly denies in the same paragraph).

[128] Or, in the alternative, by reason of the corresponding provisions in the PEI Act (s. 4 and s. 12) and the Alberta Act (s. 8 and s. 18) insofar as those provisions apply to the class members in those provinces.

102. Moreover, these claims for declaratory relief lay the foundation for the causes of action based on GMCL's breaches of the Wishart Act. These causes of action are considered under the next three subheadings.

(iii) GMCL's breach of the statutory duty of fair dealing

103. Section 3(1) of the Wishart Act[129] imposes on each party to a franchise agreement a duty of fair dealing in the performance and enforcement of the franchise agreement.[130] Section 3(2) of the Wishart Act provides a statutory right of action for damages in respect of any breach of this duty as follows:

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

104. Franchisors must not mislead their franchisees or withhold important information from them in the performance of their contracts. Franchisors that do so are in breach of the duty of fair dealing owed to franchisees under s. 3(1) of the Wishart Act.[131] The Court of Appeal recently considered the scope and purpose of the duty of fair dealing under the Wishart Act and gave the following guidelines as to its interpretation:[132]

> [27] The right of action provided under s. 3(2) of the Wishart Act against a party that has breached the duty of good faith and fair dealing is meant to ensure that franchisors observe their obligations in dealing with franchisees.

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[129] Wishart Act, s. 3(1).

[130] The PEI Act and the Alberta Act contain similar fair dealing provisions: s. 3(1) and s. 7, respectively.

[131] *Salah* at para. 22, **BOA** Tab 33.

[132] *Salah* at paras. 27-29, **BOA** Tab 33.

> [28] Our courts have given limited recognition to the duty of good faith between contracting parties in general. However, by enacting legislation that addresses the particular relationship between franchisors and franchisees, the legislature has clearly indicated that such relationships give rise to special considerations, both in terms of the duties owed and the remedies that flow from a breach of those duties. This is evident in the wording of s. 3(2), which focuses on the conduct of the breaching party and not injury to the other side. …
>
> [29] … section 3(2) of the Wishart Act permits an award of damages for the breach of the duty of good faith, separate and in addition to any award in compensation of pecuniary losses. I would go further to say that any such award must be commensurate with the degree of the breach or offending conduct in the particular circumstances. …

105. The particulars of the class members' claim for breach of the duty of fair dealing are pleaded in paragraphs 36 through 44 of the statement of claim. Trillium and the class members allege that GMCL breached this duty by deliberately presenting the WDA to affected dealers in a manner designed "to maximize the impact and pressure on the affected dealers and give them as little chance as possible to obtain adequate advice and representation to attempt to negotiate the terms of, and payments under, the WDA."[133] GMCL's conduct, as pleaded, included: (1) giving affected dealers no more than a few days to review, obtain proper advice on and sign (or decline to sign) a complicated and novel form of agreement (the WDA) which would substantially change and prematurely conclude their dealer operations with GMCL;[134] and (2) misleading the affected dealers by making false statements in the WDA itself, including the assertion that GMCL had the unilateral right not to renew the dealers' respective Dealer Agreements and that GMCL was not bound by provincial franchise legislation.[135] It is further alleged that the purpose

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[133] Statement of Claim, Motion Record, Tab 3, p. 118, para. 38.

[134] Statement of Claim, Motion Record, Tab 3, p. 118, paras. 39 and 40.

[135] Statement of Claim, Motion Record, Tab 3, p. 119-120, para. 43.

of GMCL's conduct was to "take unfair and unlawful advantage of the affected dealers' vulnerability."[136]

106. Claims for breach of the statutory duty of fair dealing under the Wishart Act have been found to be appropriate for certification in previous cases.[137]

107. On the strength of the foregoing and the full particulars as pleaded, the statement of claim discloses a valid cause of action against GMCL for breach of the statutory duty of fair dealing. It is neither plain, obvious nor beyond doubt that the claim will fail.

(iv) GMCL's breach of the class members' statutory right of association

108. Section 4(1) of the Wishart Act gives franchisees a positive right to associate with other franchisees.[138] Section 4(2) of the Act prohibits a franchisor from "interfere[ing] with, prohibit[ing] or restrict[ing], by contract or otherwise, a franchisee from forming or joining an organization of franchisees or from associating with other franchisees." Section 4(5) gives franchisees a right of action for damages for breach of these provisions.

109. The same particulars that support the class members' claim for breach of the duty of fair dealing support the claim for breach of the right of association.[139] The class members allege, among other things, that GMCL "denied the affected dealers access to [information concerning which of the dealers in the GMCL network had received the WDA] in order to further prevent

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[136] Statement of Claim, Motion Record, Tab 3, p. 121, para. 44.

[137] *Sears Canada*, **BOA** Tab 4; *Landsbridge Auto Corp. v. Midas Canada Inc.*, [2009] O.J. No. 1279 (S.C.J.) ("*Midas Certification*") , **BOA** Tab 25; *1176560 Ontario Ltd. v. Great Atlantic & Pacific Company of Canada Ltd.* (1992), 62 O.R. (3d) 535 (Ont. S.C.J.) ("*A&P*"), **BOA** Tab 1.

[138] The PEI Act and the Alberta Act contain similar right of association provisions: s. 4 and s. 8, respectively.

[139] As pleaded in the Statement of Claim, Motion Record, Tab 3, pp. 117-121, paras. 36-44.

them from attempting to associate through the period following May 20, 2009."[140] Moreover, the WDA, by its terms, "purported to penalize the affected dealers if they disclosed the terms or conditions of the WDA or any facts relating thereto to third parties, including to other affected dealers."[141]

110. The Court of Appeal has held that contractual provisions that prohibit franchisees from participating in class proceedings against the franchisor, or which require the release of such rights (as Section 5(c) of the WDA does), violate the right of association under section 4 of the Wishart Act.[142]

111. On the strength of the foregoing and the particulars pleaded, the statement of claim discloses a valid cause of action against GMCL for breach of the class members' right of association. It is neither plain, obvious nor beyond doubt that the claim will fail.

(v) GMCL's breach of the duty of disclosure under the Franchise Acts

112. Trillium alleges that GMCL failed to comply with mandatory pre-contractual disclosure provisions under section 5 of the Wishart Act, section 5 of the PEI Act and section 4 of the Alberta Act at the time GMCL presented the WDA to the class members that carried on business in those provinces.[143] Trillium further alleges that the statutory disclosure obligations were triggered by GMCL's request that the affected dealers sign the WDA. GMCL failed to provide any disclosure document to the affected dealers. Consequently, the class members in Ontario,

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[140] Statement of Claim, Motion Record, Tab 3, p. 120, para. 42.

[141] Statement of Claim, Motion Record, Tab 3, p. 120, para. 43(e).

[142] *Midas CA* at paras 32-39.

[143] Statement of Claim, Motion Record, Tab 3, p. 115, para. 23. There is no comparable mandatory pre-contractual disclosure provision in the franchise legislation of the other provinces.

PEI and Alberta signed the WDA without the benefit of: (1) the disclosure document each was entitled to receive under the applicable Franchise Act; and (2) the 14 day cooling-off period which was to have followed the delivery of a disclosure document and precede any requirement to sign the WDA.[144]

113. The rights set forth in section 5 of the Wishart Act[145] are for the benefit of "prospective franchisees,"[146] and relate to the signing of a "franchise agreement or any other agreement relating to the franchise.[147] In this regard, Trillium pleads that the affected dealers that received the WDA were "prospective franchisees,"[148] and that the WDA is a "franchise agreement" or an "agreement that relates to a franchise" within the meaning of the applicable franchise legislation.[149]

114. As stated in paragraph 27 above, the WDA did not simply terminate the Dealer Agreement; it substantially amended the franchise agreement for the remainder of the period up to the affected dealer's new termination date. The affected dealers were required to operate in accordance with the WDA until the termination date in order to receive the Wind Down payments. The WDA removed the dealers' fundamental right to order new vehicles from

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[144] Statement of Claim, Motion Record, Tab 3, pp. 116-117, paras. 27, 28 and 32.

[145] See also, PEI Act, s. 5 and Alberta Act, s. 4.

[146] "Prospective franchisee" is defined in s. 1(1) of the Wishart Act and s. 1(1)(p) of the PEI Act to mean "a person who has indicated, directly or indirectly, to a franchisor or a franchisor's associate, agent or broker an interest in entering into a franchise agreement, and a person whom a franchisor or a franchisor's associate, agent or broker directly, or indirectly, invites to enter into a franchise agreement." The Alberta Act does not define "prospective franchisee."

[147] "Franchise agreement" is defined in s. 1(1) of the Wishart, s. 1(1)(c) of the PEI Act and s. 1(1)(e) of the Alberta Act to mean "any agreement that relates to a franchise between (a) a franchisor or franchisor's associate, and (b) a franchisee.. The Alberta Act adds the words "or prospective franchisee" after "franchisee."

[148] Statement of Claim, Motion Record, Tab 3, p. 116, para. 31.

[149] Statement of Claim, Motion Record, Tab 3, p. 116, para. 30.

GMCL. In these circumstances, the WDA is an "agreement that relates to a franchise" within the meaning of the Wishart Act. Moreover, none of the exceptions from the requirement to provide a disclosure document set forth in section 5(7) of the Wishart Act[150] apply. The onus of proving an exemption is squarely on the franchisor.[151]

115. There is no dispute that GMCL failed to deliver a disclosure document to any of the members of the proposed class. GMCL's conduct is not a mere technical breach of the Franchise Acts. To the contrary, Trillium pleads that GMCL's deliberate decision to deprive the dealers of: (1) the required disclosure document; and (2) the required 14 day cooling-off period, had a direct impact on and relationship to the 85% WDA acceptance rate that GMCL had achieved by the end of the day of May 26, 2009. Had GMCL complied with the Franchise Acts the dealers in Ontario, PEI and Alberta would have had at their disposal a disclosure document setting forth all material facts concerning the franchise,[152] in clear and concise language,[153] and supported by a certificate[154] certifying that every material fact required under the applicable Franchise Act had been included. Instead, the affected dealers were given none of this information. On the basis of the foregoing, it is neither plain, obvious nor beyond doubt that this claim will fail.

116. There are two statutory remedies that flow from GMCL's failure to provide the required disclosure document. First, the Wishart Act, the PEI Act and the Alberta Act[155] give franchisees

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[150] See also PEI Act, s. 5(7); Alberta Act, s. 5(1).

[151] Wishart Act, s. 12; PEI Act, s. 13; Alberta Act, s. 19.

[152] Wishart Act, s. 5(4); PEI Act, s. 5(4); Reg. 240/95 to Alberta Act, s. 2(1).

[153] Wishart Act, s. 5(6); PEI Act, s. 5(6).

[154] Reg. 581/00 to Wishart Act, s. 7(1); Reg. EC232/06 to PEI Act, s. 4(1); Reg. 240/95 to Alberta Act, s. 2(3).

[155] Wishart Act, s. 6(2); PEI Act, s. 6(2); Alberta Act, s. 13(b).

a statutory right to rescind[156] the franchise agreement (the WDA on the facts of this case) no later than two years after having entered into the agreement where the franchisor failed to provide the disclosure document. If this right of rescission is exercised by a franchisee, the franchisor is required to make certain payments to the franchisee as prescribed in the legislation[157] within sixty days of the effective date of rescission.[158]

117. Each affected dealer in Alberta, Ontario and PEI must exercise the right of rescission individually. The declaratory relief sought in this action will not entitle a franchisee in these provinces to compensation for rescission unless the class member delivers – or instructs class counsel to deliver on its behalf – a notice of rescission within two years of signing the WDA. A franchisee wishing to rescind a franchise agreement must do so expressly.[159] However, the declaratory relief sought in this action, if granted, will provide clear direction to GMCL on its obligations to compensate any such rescinding franchisee.

118. Second, franchisees in Ontario and in PEI (but not in Alberta) have a statutory right of action for damages against the franchisor under section 7 of their respective Acts for losses suffered by the franchisee as a result of the franchisor's "failure to comply in any way" with its

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[156] The Alberta Act uses the term "cancel" instead of "rescind." All references herein to the right of rescission shall include the right of cancellation.

[157] Wishart Act, s. 6(6); PEI Act, s. 6(6); Alberta Act, s. 14(2).

[158] Thirty days after receipt of a "notice of cancellation" under the Alberta Act.

[159] *779975 Ontario Limited v. Mmmuffins Canada Corporation*, 2009 CanLII 28893 (Ont. S.C.J.) ("*Mmmuffins*") at para. 45, **BOA** Tab 6: "The notice … must at least make it clear that the franchisee is exercising its statutory right to rescind the franchise agreement and demanding the compensation to which it is entitled."

statutory pre-contractual disclosure obligations.[160] The rights provided in section 7 are in addition to the rescission rights in section 6.[161]

119. Trillium therefore claims declarations against GMCL which, if granted, would establish that: (1) each class member in Alberta, Ontario and PEI is entitled to rescind the WDA in accordance with their respective Franchise Acts; (2) each class member in Alberta, Ontario and PEI that properly rescinds the WDA is entitled to statutory compensation payments as prescribed in the applicable Franchise Acts; and (3) each class member in Ontario and PEI is entitled to damages under section 7(1) of the Wishart Act and section 7(1) of the PEI Act, respectively, by reason of GMCL's failure to comply with the pre-contractual disclosure obligations.

120. It is clear from the foregoing that the statement of claim asserts valid causes of action against GMCL and that it is not plain, obvious and beyond doubt that any of the claims against GMCL are bound to fail.

(c) The claims against Cassels

(i) Cassels were the lawyers for the class members

121. In paragraphs 55 through 70 of the statement of claim, Trillium sets forth the circumstances under which the class members retained Cassels to represent and advance their interests in the event of a restructuring of GMCL's dealership network. As stated above, Cassels' retainer was arranged through the efforts of CADA. In particular, CADA sent a memorandum to all GMCL dealers in Canada (whether or not the dealers were members of

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[160] Wishart Act, s. 7(1); PEI Act, s. 7(1).

[161] *Dollar It*, **BOA** Tab 5; *Dig this Garden* at para. 38, **BOA** Tab 2; *Mmmuffins* at para. 17, **BOA** Tab 6.

CADA) on May 4, 2009 to: (1) advise the GMCL dealers that CADA had selected Cassels to represent the dealers collectively in any GMCL restructuring or insolvency proceeding; and (2) urge all dealers to contribute to a legal fund[162] which would be used to pay Cassels' legal fees and other expenses in representing the dealers.[163] The memorandum stated, among other things, that in retaining Cassels to represent their interests the dealers would "be represented" by experienced counsel, have "power in numbers", and "force other parties to involve [their] counsel at the bargaining table and respect [their] interests."[164]

122. Many, but not all, of the class members paid into the Cassels Legal Fund. Trillium pleads that whether or not each class member paid into the Cassels Legal Fund, Cassels was retained on behalf of the class members as a collective and, as such, owed duties to all of the class members. In this regard, Trillium pleads in paragraph 70 of the statement of claim as follows:

> 70. Each class member, including Trillium, which indicated on the form attached to the May 4, 2009 memorandum that they wished to participate in the Cassels Legal Fund and returned the form to CADA retained Cassels to represent it as its counsel in relation to the situation at hand. In doing so, they retained a blue chip, Bay Street law firm which held itself out as having the depth, experience and resources to represent them in any complex and fast-paced restructuring or insolvency which may be coming. However, Cassels' duties as lawyers were not restricted to the class members which returned the form. By virtue of CADA retaining Cassels on behalf of the GM dealers and the ensuing circumstances described in more detail below, Cassels owed duties to all of the class members.

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[162] The requested contributions to the legal fund were either $5,000 or $2,500 depending on the number of vehicles sold by the dealer in the previous year.

[163] Statement of Claim, Motion Record, Tab 3, p. 125, para. 63. CADA sent another similarly worded memorandum to GMCL dealers on May 13, 2009.

[164] Statement of Claim, Motion Record, Tab 3, p. 126, para. 64.

123. Against this background, Trillium pleads three causes of action against Cassels: (1) breach of contractual duties; (2) breach of fiduciary duties; and (3) negligence. For the reasons set forth under the headings below, each of these causes of action is valid and meets the test under section 5(1)(a) of the CPA.

(ii) The breach of contract claim

124. Trillium pleads in paragraph 71 of the statement of claim that it was an express or, alternatively, an implied term of Cassels' retainer that:

> (a) Cassels would provide fearless, loyal, competent and vigorous representation of the GM dealers in asserting their rights and powers under the Dealer Agreements and the Franchise Acts;
>
> (b) Cassels had no conflict of interest and would provide completely faithful representation of the dealers relating to GMCL's restructuring;
>
> (c) Cassels would promptly share with and use to the sole benefit of the class members the knowledge, information and documents which it had or which were available to it concerning the GM auto bailout, the WDA, the negotiating positions and strategies of GMCL and Canada, and the legal rights and strategic opportunities available to the class members in the GMCL restructuring;
>
> (d) Cassels would guard all information received from or concerning the GM dealers in strict confidence unless specifically instructed to disclose such information to third parties; and

(e) Cassels would subordinate their own interests, including their commercial interests, in their representations of the GM dealers.

125. Particulars of the breach of contract claim against Cassels are pleaded in paragraphs 79 through 107 of the statement of claim. In summary, the class members plead:

(a) Cassels failed to disclose to the class members that it had been representing Canada throughout the GMCL bailout negotiations. The retainer by Canada placed Cassels in an untenable and indefensible conflict of interest in purporting to also act for the class members. The conflict was palpable and overriding inasmuch as Canada's interests in effecting a restructuring of GMCL, including a reduction in the total number of dealers, were irreconcilable with the class members' interests to remain as dealers or to be paid as much as possible to surrender their rights.[165]

(b) Cassels failed to assist or properly advise the affected dealers at any time after May 20, 2009 in their response to the WDA.[166] At no point did Cassels: (1) seek instructions to negotiate collectively with GMCL (or Canada) over the terms and time for acceptance of the WDA; or (2) advise the affected dealers of their statutory rights under the Wishart Act or other applicable Franchise Acts. Cassels merely summarized the terms of the WDA and repeated GMCL's warnings of the threatened consequences of not signing. Cassels then told the affected dealers to obtain their own legal advice on the WDA in the short period of time remaining.[167] Such advice and representation fell

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[165] Statement of Claim, Motion Record, Tab 3, pp. 128-130, paras. 73-81.

[166] Statement of Claim, Motion Record, Tab 3, pp. 130-131, paras. 82-86.

[167] Statement of Claim, Motion Record, Tab 3, pp. 131-134, paras. 87-99.

far short of the representation that the dealers were promised in the May 4 and 13 memoranda from CADA.[168]

(c) In addition to the conflict presented by the retainer by Canada, Cassels took its instructions from a CADA steering committee comprised of a majority of continuing dealers. The interests of these continuing dealers conflicted with the interests of affected dealers inasmuch as the continuing dealers would directly benefit from the reduction in the size of the dealer network. Even after becoming aware of the conflict, Cassels did not insist that the continuing and affected dealers be divided into separate groups for the purposes of giving advice and seeking instructions concerning the WDA. The notion of dividing the two groups of dealers (and the acknowledgement of the conflict) was identified only after the May 26, 2009 sign back deadline had passed whereupon, among other things, CADA then returned the legal fees dealers had contributed to the Cassels Legal Fund.[169]

126. The foregoing allegations of fact, taken as true for the purposes of the section 5(1)(a) test, support the claim against Cassels for breach of contact. It is not plain and obvious that such a claim will fail.

(iii) The breach of fiduciary duties claim

127. The same allegations that support the claim for breach of contract also support the claim against Cassels for breach of fiduciary duties. As stated, Trillium pleads that the class members had a direct solicitor-client relationship with Cassels. The solicitor-client relationship *per se*

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[168] Memoranda dated May 4 and 13, 2009, Ex. E and F. Hurdman aff., Motion Record, Tab E and F, pp. 71 and 76.

[169] Statement of Claim, Motion Record, Tab 3, pp. 134-138, paras. 100-117

gives rise to fiduciary obligations.[170] The specific fiduciary obligations Cassels is alleged to have breached are pleaded in paragraph 71 of the statement of claim and include: (1) loyalty; (2) acting in the client's best interests; (3) the avoidance of conflicts of interest; (4) the provision of candid advice and disclosure; and (5) the protection of confidentiality.[171]

128. For the reasons stated above, it is not plain and obvious that the claim against Cassels for breach of fiduciary duties will fail.

(iv) The negligence claim

129. As set forth above, Trillium and the class members plead a *direct* solicitor-client relationship with Cassels. As such, the pleaded relationship discloses sufficient foreseeability and proximity to establish a *prima facie* legal duty of care under the first part of the *Anns v. Merton London Borough Council* test.[172] The second part of the *Anns* test – whether there are residual policy considerations, transcending the relationship between the parties, that negate the existence of such a duty - is a question properly left for determination at trial on a full factual record.[173]

130. Further, in paragraph 119 of the statement of claim, Trillium pleads that independent of the contractual retainer, Cassels owed duties of care to all class members due to the unique

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[170] *Galambos v. Perez*, [2009] 3 S.C.R. 247 ("*Galambos*") at paras. 35-39, **BOA** Tab 20.

[171] See generally *Galambos* at para. 75, **BOA** Tab 20, and *Strother v. 346490 Canada Inc.*, [2007] 2 S.C.R. 177 at paras. 1, 35, 40, 47, 53-60, 69-70 and 113, **BOA** Tab 36.

[172] *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), **BOA** Tab 9. See also *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, **BOA** Tab 24; *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129 at paras. 23-24 and 29, **BOA** Tab 21; and *Broome v. Prince Edward Island*, [2010] 1 S.C.R. 360 at paras. 14-15, **BOA** Tab 10.

[173] *Anger v. Berkshire Investment Group Inc.* (2001), 141 O.A.C. 301 (C.A.) at paras. 14 and 15, **BOA** Tab 8; *Rochester Financial* at para. 31, **BOA** Tab 32.

circumstances of the law firm's involvement in the crisis affecting the dealers. These circumstances included the following:

(a) time was of the essence for the affected dealers in organizing themselves into a collective for the purposes of negotiating the WDA;

(b) there could be no reasonable opportunity after the May 24, 2009 conference call organized by CADA and Cassels for the affected dealers to otherwise organize themselves;

(c) Cassels' involvement in the May 24, 2009 conference call was intended to reassure the affected dealers that they had the benefit of the advice and representation of a powerful, experienced Bay Street law firm and that everything that could possibly be done to further their interests was being done or would be done;

(d) because Cassels neither disclosed the conflict nor took any steps to negotiate on behalf of the affected dealers before, during or after the May 24, 2009 conference call, the affected dealers were left with no choice but to sign back the WDA without negotiation or await the dire consequences that GMCL had caused them to fear if they did not sign it and which Cassels itself said during the May 24, 2009 conference call could result from their refusal to sign; and

(e) the affected dealers had no access to the Cassels Legal Fund to pay legal fees to any firm other than Cassels.

131. Thus, Trillium submits that even if it were unable to establish a direct solicitor-client relationship between Cassels and the class members, Cassels was nevertheless in a sufficient

relationship of proximity to all of the class members to owe the class members a *prima facie* duty of care. In the recent decision granting certification in *Robinson v. Rochester Financial Ltd.* the court observed that "…there is clearly a developing line of authority in Ontario and elsewhere that have permitted claims of this kind to proceed", and that the court had been "…pointed to no authority that rejected a third party [i.e., non-client] negligence claim against lawyers at the certification stage."[174]

132. The same alleged acts and omissions particularized in paragraphs 79 to 107 of the statement of claim ground the claims for Cassels' alleged breach of the duty of care and negligence to all class members. Trillium pleads that Cassels' conduct as pleaded in the statement of claim fell below the standard of care required of a lawyer in the circumstances.[175]

133. Accordingly, it is not plain and obvious that a claim in negligence against Cassels will fail.

(d) Conclusion on section 5(1)(a)

134. For the reasons set forth above, Trillium submits that each of the causes of action satisfy the requirement of section 5(1)(a) of the CPA.

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[174] *Rochester Financial* at para. 30, **BOA** Tab 32. See also, *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman* (2001), 18 B.L.R. (3d) 240 (Ont. S.C.J.) , **BOA** Tab 14; *Delgrosso v. Paul* (1999), 45 O.R. (3d) 605 (Gen. Div.), **BOA** Tab 16; *Elms v. Laurentian Bank of Canada*, 2001 BCCA 429 (CanLII), **BOA** Tab 17.

[175] Statement of Claim, Motion Record, Tab 3, p. 139, para. 120.

(3) IDENTIFIABLE CLASS

135. The proposed class consists of all corporations in Canada that signed the WDA.[176]

136. This proposed class definition satisfies the requirements under s. 5(1)(b) of the CPA in that it is objective and not merits based;[177] there is a rational relationship between the class and the common issues since the proposed class: (1) consists entirely of persons which have or had a direct contractual relationship with GMCL;[178] (2) identifies the persons who have a potential claim against the defendants and who will be bound by the court's judgment on the common issues;[179] and (3) establishes a class which is not unlimited.[180]

(4) COMMON ISSUES

(a) General principles

137. Section 1 of the CPA defines "common issues" as:

> (a) common, but not necessarily identical issues of fact, or
>
> (b) common, but not necessarily identical issues of law that arise from common, but not necessarily identical facts.

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[176] The class definition in the Notice of Motion refers to all corporations in Canada that signed a WDA *dated May 20, 2009*. The reference to the date of the agreement is removed for the purposes of the class definition.

[177] *Hollick* at para. 17, **BOA** Tab 22; *Cloud* at para. 45, **BOA** Tab 15.

[178] *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 ("*Western Canadian*") at para. 38, **BOA** Tab 39; *Cloud* at para. 45, **BOA** Tab 15.

[179] *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.) at para. 10, **BOA** Tab 11; *Frohlinger v. Nortel Networks Corporation*, 2007 CanLII 696 (Ont. S.C.J.) at para. 21, **BOA** Tab 19.

[180] *Hollick* at para. 17, **BOA** Tab 22; *Cloud* at para. 45, **BOA** Tab 15.

138. The governing principles for the common issues analysis were summarized in a recent decision of this Court as follows:[181]

> (a) The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 39.
>
> (b) The common issue criterion is not a high legal hurdle, and an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud v. Canada (Attorney General)*, above, at para. 53.
>
> (c) There must be a basis in the evidence before the court to establish the existence of common issues: *Dumoulin v. Ontario* (2005), 19 C.P.C. (6th) 234, [2005] O.J. No. 2961 at para. 25 (S.C.J.); *Fresco v. Canadian Imperial Bank of Commerce* (2009), 71 C.P.C. (6th) 97, [2009] O.J. No. 2531 at para. 21 (S.C.J.). As Cullity J. stated in *Dumoulin v. Ontario*, at para. 27, the plaintiff is required to establish "a sufficient evidential basis for the existence of the common issues" in the sense that there is some factual basis for the claims made by the plaintiff and to which the common issues relate.
>
> (d) In considering whether there are common issues, the court must have in mind the proposed identifiable class. There must be a rational relationship between the class identified by the Plaintiff and the proposed common issues: *Cloud v. Canada (Attorney General)*, above, at para. 48.
>
> (e) The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim: *Hollick v. Toronto (City)*, above, at para. 18.
>
> (f) A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class: *Harrington v. Dow Corning Corp.*(1996), 48 C.P.C. (3d) 28, [1996] B.C.J. No. 734, (S.C.), aff'd, 2000 BCCA 605, [2000] B.C.J. No. 2237, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.
>
> (g) With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful

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[181] *Singer v. Schering-Plough Canada Inc.*, [2010] O.J. No. 113 (S.C.J.) at para. 140, **BOA** Tab 34, as slightly revised in *Sears Canada* at para. 43, **BOA** Tab 4.

prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: Western Canadian Shopping Centres Inc. v. Dutton, above, at para. 40, *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, [2005] B.C.J. No. 2370 at para. 32 (C.A.); *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43, [2009] S.J. No. 179 at paras. 145-146 and 160 (C.A.).

(h) A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant: *Williams v. Mutual Life Assurance Co. of Canada*, (2000), 51 O.R. (3d) 54, [2000] O.J. No. 3821 at para. 39 (S.C.J.), aff'd [2001] O.J. No. 4952, 17 C.P.C. (5th) 103 (Div. Ct.), aff'd [2003] O.J. No. 1160 and 1161 (C.A.); *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110, 27 C.P.C. (5th) 155(S.C.J.), aff'd [2003] O.J. No. 3918, 39 C.P.C. (5th) 151 (Div. Ct.).

(i) Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis: *Chadha v. Bayer Inc.*, (2003), 63 O.R. (3d) 22, [2003] O.J. No. 27 at para. 52 (C.A.), leave to appeal dismissed [2003] S.C.C.A. No. 106; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575, [2008] B.C.J. No. 831 at para. 139 (S.C.).

(j) Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient": *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39 at para. 29.

(b) Proposed common issues

139. Trillium proposes the following common issues:[182]

(a) Is GMCL a franchisor within the meaning of the Franchise Acts or any of them?

(b) Are all class members entitled to the benefit of the statutory duty of fair dealing under s. 3 of the Wishart Act and the right of association under s. 4 of the Wishart Act by virtue of the choice of law provisions in the standard Dealer

[182] Notice of Motion, Motion Record, Tab 1, pp. 2-4, para. 4.

Agreement and the WDA (or similar provisions under such franchise legislation otherwise governing any such class member)?

(c) Did GMCL breach the duty of fair dealing under s. 3 of the Wishart Act (or similar provisions under such franchise legislation otherwise governing any such class member)?

(d) Did GMCL breach the right of association under s. 4 of the Wishart Act (or similar provisions under such franchise legislation otherwise governing any such class member)?

(e) If the answer to (c) or (d) or both is yes, are the damages against GMCL to which the class members are entitled under ss. 3(2) and 4(5) of the Wishart Act (or similar provisions under such franchise legislation otherwise governing any such class member) to be assessed in the aggregate?

(i) If so, what is the aggregate amount of such damages?

(ii) If not, directions pursuant to s. 25(2) of the CPA with respect to the calculation of damages under such provisions;

(f) Are the waiver and release contained in the WDA null, void and unenforceable in respect of the class members' rights under ss. 4 and 11 of the Wishart Act (or similar provisions under such franchise legislation otherwise governing any such class member)?

(g) Was GMCL required to deliver to each class member carrying on business in Ontario, PEI and Alberta a disclosure document within the meaning of the Wishart Act, the Alberta Act and the PEI Act, respectively, at least fourteen days before the class member signed the WDA?

(h) By virtue of GMCL's failure to deliver any disclosure document, is each class member carrying on business in Ontario and PEI entitled to rescind the WDA, and is each class member carrying on business in Alberta entitled to cancel the WDA, within two years of signing the WDA?

(i) Is each class member carrying on business in Ontario, PEI and Alberta which delivers to GMCL a notice of rescission or notice of cancellation, as the case may be, in respect of the WDA within two years of signing the WDA entitled to compensation under ss. 6(6) of the Wishart Act or the PEI Act or under s. 14(2) of the Alberta Act, as the case may be?

(j) Directions pursuant to s. 25(2) of the CPA with respect to the calculation of amounts under s. 6(6) of the Wishart Act and the PEI Act and under s. 14(2) of the

Alberta Act, with such amounts to be assessed with respect to each such rescinding or cancelling class member, in accordance with such directions, in individual hearings held pursuant to s. 25 of the CPA;

(k) Are the damages against GMCL to which the class members are entitled under s. 7(1) of the Wishart Act or the PEI Act by reason of GM's failure to comply with s. 5 of the Wishart Act or the PEI Act to be assessed in the aggregate? If so, what is the aggregate amount of such damages?

(l) Alternatively, directions pursuant to s. 25(2) of the CPA with respect to the calculation of damages under s. 7(1) of the Wishart Act and the PEI Act, with such amounts to be assessed with respect to each class member carrying on business in Ontario and PEI, in accordance with such directions, in individual hearings to be held pursuant to s. 25 of the CPA;

(m) Did Cassels owe contractual duties to some or all of the class members and, if so, did it breach those duties?

(n) Did Cassels owe fiduciary duties as lawyers to some or all of the class members and, if so, did they breach those duties?

(o) Did Cassels owe duties of care to some or all of the class members and, if so, did they breach those duties?

(p) Are the damages which were caused by or contributed to by Cassels' breach of contract, breach of fiduciary duties or negligence to be assessed in the aggregate?

(i) If so, what is the aggregate amount of such damages?

(ii) If not, directions pursuant to s. 25(2) of the CPA with respect to the calculation of such damages;

(q) What is the amount of pre-judgment and post-judgment interest applicable to any damages awarded? and

(r) What scale and quantum of costs should be awarded?

(c) Common issues regarding GMCL claims

140. All class members were parties to a Dealer Agreement with GMCL. The Dealer Agreement is a standard form contract identical in all material respects. All Dealer Agreements "assured" the dealers the same opportunity to enter into a new Dealer Agreement with GMCL at the expiration date.[183]

141. The WDA is also a standard form agreement identical in all material respects for each dealer. The payments under the WDA were calculated using a single formula for all dealers, based on the number of vehicles sold by the dealer over the previous year as well as a fixed amount to remove GM signage.

142. GMCL did not deliver a disclosure document to any class member in respect of the WDA at any time. Therefore, the facts and law relating to this group of proposed common issues are common to all class members carrying on business in Ontario, PEI and Alberta.

143. Several of the proposed common issues concern whether or not GMCL acted unfairly or in bad faith in presenting the WDA to the class members. The circumstances in which GMCL presented the WDA were common to all class members. In particular:

(a) Each class member received an identical letter from GMCL dated May 20, 2009 attaching the WDA and describing its contents. (Trillium did not receive the letter until Friday, May 22, 2009). No class member received the letter or was aware that it would be receiving the letter or that it would otherwise be asked to sign the WDA before May 20, 2009.

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[183] Hurdman aff, Motion Record, p. 10, paras. 9-10.

(b) Each class member was invited to view the GM dealer satellite broadcast on May 19, 2009. During the GM dealer satellite broadcast, GMCL's senior management described the WDA and informed the dealers that 240 of them would be receiving it by email the next day. GMCL did not state which dealers would or would not be receiving the WDA.

(c) GMCL gave a standard "Questions and Answers" script to its managers in order to ensure that they gave consistent answers to questions from the affected dealers about the WDA.[184]

(d) All but five affected dealers were given until May 26, 2009 at 6 PM ET to sign the WDA.[185]

144. Other facts which will have to be proven in support of the unfairness claim are also common to all members of the proposed class. For instance, the information that GMCL knew and did not disclose at the time it presented the WDA is something which each member of the proposed class will have an interest in proving. Also, the fact that GMCL did not disclose to the dealers which ones had received the WDA is common and relevant to whether GMCL acted fairly or was attempting to prevent the dealers from associating for the purpose of responding to the WDA.

145. The duty of fair dealing focuses on the conduct of the wrongdoer (in this case GMCL) and not on the target of the wrongdoing (in this case, the franchisees). The fair dealing analysis

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[184] Questions and Answers, Ex. V, Comeau aff., Responding Motion Record, Vol. 1, Tab. 1V, pp. 609-612.

[185] Five affected dealers were permitted to sign the WDA after the May 26 deadline: Comeau aff., Responding Motion Record, Vol. 1, Tab 1, p. 36, para. 113.

will not depend on "the individual characteristics, sophistication, and experience of the franchisee," [186] but on the conduct of GMCL at the relevant times. The Court of Appeal has recently reaffirmed this by stating:

> [27] **The right of action provided under s. 3(2) of the Wishart Act** against a party that has breached the duty of good faith and fair dealing **is meant to ensure that franchisors observe their obligations in dealing with franchisees**.
>
> [28] Our courts have given limited recognition to the duty of good faith between contracting parties in general. However, by enacting legislation that addresses the particular relationship between franchisors and franchisees, the legislature has clearly indicated that such relationships give rise to special considerations, both in terms of the duties owed and the remedies that flow from a breach of those duties. **This is evident in the wording of s. 3(2), which focuses on the conduct of the breaching party and not injury to the other side. …**[187]
> [Emphasis added]

146. In *Stoneleigh Motors*,[188] GMCL asked this Court to sever the claims of 19 affected dealers which had refused to sign the WDA in order to force them to litigate individually.[189] The plaintiffs in that action sought an order compelling GMCL to comply with its obligations under the Dealer Agreement, including the right of renewal.[190]

147. In refusing to sever the claims, the court reviewed the very same events of last May that form the basis of this action and found the following "common issues of fact and law" at paragraph 75:

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[186] *Sears Canada* at paras. 47 and 48, **BOA** Tab 4.

[187] *Salah* at para. 28, **BOA** Tab 33.

[188] *Stoneleigh Motors* at para. 68, **BOA** Tab 35.

[189] *Stoneleigh Motors* at para. 3, **BOA** Tab 35.

[190]GMCL also sought to stay the action on the basis that it was subject to arbitration under an industry arbitration process known as the National Automotive Dealer Arbitration Program (NADAP). The court found, however, that the claim was not arbitrable under NADAP.

> Clearly the claims for relief arise out of the same series of transactions or occurrences, namely GMCL's restructuring, the non-renewal of the Dealer Agreements, and the events leading up to those terminations. Certainly there are common questions of fact and common questions of law. The former include: the assurance given by GMCL to the plaintiffs in the Dealer Agreements; GMCL's dealer network restructuring plan; the communications made by webcast to the dealers by GMCL; the multivariant tool that was applied to the entire dealer network; the termination notices; the Wind Down Agreements that contained a formula based payment; the timelines for response to the Wind Down Agreements; the refusal by all of the plaintiffs to accept the terminations; and the Management Review Process. The common questions of law include: whether GMCL is a franchisor and subject to any duties pursuant to sections 3 and 4 of the AWA; whether the notice of non-renewal constituted a breach of the common assurance given in each of the Dealer Agreements; as a preliminary issue and quite apart from the dealers' individual circumstances, whether as a matter of law specific performance of the assurance that each plaintiff would have the opportunity to renew its Dealer Agreement for a further 5 year term could be available; whether section 4.1 of the Dealer Agreement affords GMCL a legitimate defence; whether the Management Review Process was a legitimate process characterized by good faith to name a few. All of these common issues of fact and law bear sufficient importance in relation to the other facts or issues in this action.

148. While the test for relief from joinder is not identical to the test for determining common issues, and while the court in *Stoneleigh Motors* acknowledged that there were "numerous differences among the plaintiff dealer group" (at para. 78), the foregoing analysis amply demonstrates that there are many common issues of fact and law shared by the class members in their claim against GMCL.

(d) Common issues regarding the claims against Cassels

149. The issues relating to Cassels are similarly common to all members of the proposed class by reason of the facts set forth in the following paragraphs.

150. CADA sent the May 4 and May 13, 2009 memoranda to all GM dealers in Canada, whether or not they were members of CADA, soliciting the dealers to contribute to the Cassels

Legal Fund. The memoranda informed the GM dealers that CADA had retained Cassels to "represent" them in a restructuring or insolvency by GMCL.

151. Trillium signed and returned the attached form to CADA and paid the retainer fee of $5,000. The form stated: "[y]es, I wish to participate and my cheque is forthcoming." An unknown number of other dealers did the same. Cassels has provided no evidence on this motion and has not stated how many dealers returned the form or paid the retainer fee.

152. The CADA memoranda refer to the dealers which signed and returned the form as the "client group." Cassels dealt with the dealers as a group, not as individual dealers. Cassels' retainer was to represent the interests of the dealers that would be adversely affected by the restructuring. Cassels participated in dealer conference calls which were open to all GM dealers whether they signed and returned the form or not. No roll call was taken by Cassels at any time during the call. Cassels refused to sign any individual certificate of independent legal advice. Cassels treated the affected dealers as a collective during its retainer.

153. Cassels did not disclose to any class member that it represented the Government of Canada in respect of the GMCL bailout. Nor did it disclose to any class members that it was in a conflict of interest in representing the dealers in respect of the WDA.[191]

154. The fact that Cassels may have taken its instructions from a steering committee consisting primarily of continuing GM dealers which were not asked to sign the WDA and which would benefit from the termination of the class members is a common fact.

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[191] Statement of Claim, Motion Record, Tab 3, p. 132, para. 94; Hurdman aff., Motion Record, Tab 2, p. 14, para. 25.

155. Determining whether Cassels also took instructions from CADA during the critical period from May 20 to May 26, 2009 and whether CADA's policy during that time was that the termination of the class members was a "very unfortunate but brutal reality" as it later declared,[192] will also be common to the class members, as will the legal significance of these facts.

156. The circumstances surrounding the retainer of Cassels and the implications of this retainer will be common to many or all class members. Whether or not Cassels failed to perform their duties to some or all of the class members will also be common.

157. The resolution of these common issues will have an immediate and final effect on the class members. Cases where the determination of the common issues will leave few, if any, individual inquiries to be undertaken are ideally suited for class treatment.[193]

(e) Damages as a common issue

158. The plaintiff seeks to preserve the ability to request an aggregate damages assessment at the common issues trial. Each of proposed common issues (e), (k) and (p) leaves the determination of whether or not to assess damages in the aggregate to the common issues trial judge. Only if the threshold question "are the damages … to be assessed in the aggregate?" is answered in the affirmative, based on all of the information available at trial, will the trial judge proceed to an aggregate assessment of a given head of damages. Strictly speaking, it is not

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[192] See quote from *Canadian Auto World* article dated September 2009, Ex. I, Hurdman aff., Motion Record, Tab 2I, p. 86.

[193] *Lau v. Bayview Landmark Inc.*, [1999] O.J. No. 4060 (S.C.J.) at para. 56, **BOA** Tab 26.

necessary to state the possibility of an aggregate damage award as a common issue in order to allow the common issues judge to assess damages in the aggregate.[194]

159. If damages are not capable of assessment in the aggregate, the plaintiff will ask the common issues judge to give directions under sections 25(2) and (3) of the CPA for the efficient conduct of any individual damages assessments. Given the many common features of the class members' businesses (same industry, same dealer networks, proven track records, etc.), it is likely that "individual" assessments will have a great deal of commonality or that affected dealers can be divided into common groups for the purposes of valuation.

160. Sections 25(2) and (3) of the CPA empower the court to give any necessary directions to achieve procedural conformity in individual assessments, and specifically permit the court to dispense with any procedural step that it considers unnecessary. These sections also authorize the trial judge to make any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate. These flexible procedures are themselves an essential part of the CPA and are to be fully utilized to achieve the underlying goals of the CPA.[195]

161. The plaintiff's approach to the issue of damages is addressed in its Plan of Proceeding.[196]

162. GMCL makes much in its responding material of the individuality of the dealers' business valuations.[197] However, GMCL itself used a form of aggregate assessment in the way

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[194] *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) ("*Markson*") at para 59, **BOA** Tab 27.

[195] *Cassano v. The Toronto-Dominion Bank* (2007), 87 O.R. (3d) 401 (C.A.) ("*Cassano*") at paras. 62-64, **BOA** Tab 13.

[196] Plan of Proceeding, Ex. O, Hurdman aff., Motion Record, Tab 2O, pp. 99-105.

in which it allocated the Wind-Down payments. GMCL did not proceed by examining the values of each individual dealer's capital, goodwill and other unique factors but, rather, by using a straight formula of dollars-per-vehicle-sold the previous year. GMCL also told Ontario government officials that the total payments to be made under the WDA equaled approximately one-third of the value of the affected dealers' businesses.[198] Although the plaintiff disputes the accuracy of this estimate, this nevertheless shows that GMCL was able to estimate the aggregate value of the affected dealers' businesses compared to the aggregate amount of the Wind-Down payments when it was asking for billions of dollars of taxpayer money.

(5) CLASS PROCEEDING IS THE PREFERABLE PROCEDURE

(a) General principles for assessing preferability

163. The Court of Appeal has summarized the principles for determining whether an action satisfies the preferable procedure requirement in s. 5(1)(d) of the CPA as follows:[199]

> (1) The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;
>
> (2) "Preferable" is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and,

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[197] See Affidavit of Scott Davidson sworn May 31, 2010, Tab 2, Responding Motion Record, Vol. 3, pp. 734-756.

[198] Briefing Note, Ex. C, Djuric aff., Supplementary Motion Record, Tab C, p. 5. This document was obtained by the plaintiffs through an access to information request to the Ontario government: Djuric aff., Supplementary Motion Record, Tab 1, para. 5, p. 2. The document constitutes a government business record. GMCL's representative on cross-examination denied any knowledge of the meeting to which the document relates. In an answer to undertaking, GMCL acknowledged that some of the information on the document originated from GMCL. GMCL went on to state that there were inaccuracies in the document but did not identify what parts were inaccurate: GMCL Answers to Undertakings, Joint Book of Transcripts and Answers to Undertakings, Tab 2, p. 72, Q. 150.

[199] *Markson* at paras. 69 -70, BOA Tab 27.

> (3) The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.
>
> As I read the cases from the Supreme Court of Canada and appellate and trial courts, these principles do not result in separate inquiries. Rather, the inquiry into the questions of judicial economy, access to justice and behaviour modification can only be answered by considering the context, the other available procedures and, in short, whether a class proceeding is a fair, efficient and manageable method of advancing the claim.

164. Where a plaintiff establishes an identifiable class, and can state a common issue of significance to each class member's claim, it has been said that a *prima facie* case is made that a class proceeding is the preferable procedure provided that one or more goals of the CPA is met, and subject to a contrary showing by the defendant.[200] The question in the preferability analysis is not whether there should be any litigation at all but whether or not there is a preferable procedure for resolving the dispute.[201] The defendants propose no alternative procedure.

165. A recent unanimous decision of the Ontario Court of Appeal has confirmed that class actions involving hundreds of franchisees suing their franchisor over a common franchise agreement are "exactly the kind of case for a class proceeding."[202] In a separate decision[203] released two weeks later, the Court confirmed that the statutory right of association contained in section 4 of the Wishart Act includes the right of franchisees to bring a class action in relation to alleged systemic breaches by their franchisor. Thus, the Legislature intended to accord special

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[200] *A&P* at para. 26, **BOA** Tab 1. Cited with approval in *Midas Certification* at para.79, **BOA** Tab 25.

[201] *A&P* at para. 45, **BOA** Tab 1.

[202] *Quizno's Canada Restaurant Corporation v. 2038724 Ontario Ltd.*, [2010] O.J. No. 2683 (C.A.) at para. 62, **BOA** Tab 31; *Sears Canada* at para. 93, **BOA** Tab 5.

[203] *Midas CA* at paras. 32-39, **BOA** Tab 3.

status and protection to franchise class actions. These principles directly accord with the Ontario Law Reform Commission's *Report on Class Actions* which noted:

> Even small businesses may be reluctant to sue more powerful companies where, for example, in a franchisor-franchisee situation, they must deal continuously with such companies on a basis of dependence.[204]

(b) Analysis of preferability requirement

166. Every member of this class has experienced the loss of its Dealer Agreement. This loss has had a severe impact on the dealers' owners, their families and employees.

167. During the crisis period in May 2009, the affected dealers were deprived of the opportunity to respond as a group to the strategy which GMCL had prepared in advance and put into action. Only by litigating collectively can the effects of the divide-and-conquer strategy be undone.

168. GMCL and Cassels are established, powerful and well-connected defendants. GMCL has the backing of the federal government which is a shareholder in the new parent company, General Motors Company. Cassels is a venerable "Bay Street" law firm with high-powered clients like the Government of Canada.

169. Both GMCL and Cassels have substantial resources to devote to this litigation. Each has the skill sets to manage and direct complex litigation, and each has access to the most sophisticated law firms in the country.

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[204] Ontario Law Reform Commission, *Report on Class Actions* (1982) Vol. 1, Ministry of the Attorney General, 1982, at p. 128, **BOA** Tab 42.

170. Members of the class, by contrast, are scattered throughout Canada, have little or no familiarity with the legal process in complex cases, lack internal management resources to devote to complex litigation, and have just suffered an enormous loss with the termination of their dealerships. Trillium does not have the resources to bring an action against these defendants on its own. Most other terminated dealers would not have sufficient resources either.[205]

171. The WDA states at section 19 that "the courts of the Province of Ontario have exclusive jurisdiction to hear and determine claims or disputes between the parties hereto pertaining to this Agreement." Thus, class members from other provinces that wish to bring individual actions against GMCL may feel compelled to do so in Ontario, even if such provision is void under the Alberta and PEI Act. This would increase the costs and inconvenience to the individual class members and would benefit GMCL and Cassels which are based in Ontario. All of the class members have an interest in proving the common issues at a single trial represented by a single team of lawyers.

172. Another deterrent to individual actions is the fact that most class members do not have ready access to much of the information needed to bring this action. For instance, most or all class members would be unaware even that GMCL is a franchisor under the Wishart Act. The class members have had to piece information together from various sources. GMCL has frustrated the dealers' attempts to utilize the freedom of information laws to obtain information concerning the GMCL bailout.[206] The defendants, on the other hand, have collective expertise

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[205] Hurdman aff., Motion Record, Tab 2, p. 16, para. 37.

[206] Hurdman aff., Motion Record, Tab 2, pp. 17-18, paras. 41-43.

and knowledge gained from their involvement as "insiders" in the events of last May. This information disparity greatly favours GMCL.

173. GMCL refuses to this day to provide the plaintiff's counsel with a list of all dealers that signed the WDA and their contact information.[207] GMCL provided the names and contact information for the Ontario, PEI and Alberta dealers only after the plaintiff brought a motion seeking this information.

174. The action is grounded in facts that took place over a very short time period. To have different lawsuits before different judges over the same facts could give rise to different and possibly conflicting results on the same facts. This would further erode the confidence that class members have in the legal process following from their recent experience. It would also be a colossal waste of court resources. The prosecution of a single case by a team of counsel experienced in such issues, and a trial before a single judge in Toronto holds the best prospect for a meaningful adjudication of the defendants' conduct.

175. In *Stoneleigh Motors,* the court made the following observations about the benefits of a single action on behalf of the affected dealers as compared to individual actions:

> [79] Certainly one action with 19 separate plaintiffs will be somewhat cumbersome although with effective trial management by the Commercial List, an efficient trial is possible. I do not think it would be problematic for a judge to manage the evidence in this case. There will be some complications no doubt but I would not expect them to be undue in nature. **The alternative of nineteen separate actions is a significantly greater ill** in my opinion and **would not promote the convenient administration of justice**. Indeed, it would be just the opposite. Furthermore, there are **obvious evidentiary economies associated with one proceeding and a huge degree of duplication in 19 separate proceedings**. By

[207] Hurdman aff., Motion Record, Tab 2, p. 18, para. 44.

> way of example, much of the evidence in support of the plaintiffs' case resides in GMCL's documents. The plaintiffs propose to call one expert on the issue of the multivariant document prepared by GMCL and used by it in its non-renewal considerations. Evidence of one plaintiff that is relevant to all plaintiffs would only need to be adduced once. An example of this is the e-mail received from Mr. Comeau by Mr. Donnelly [footnote omitted] discussed previously. **In my view if the claims are severed, there would be an increase in the cost and length of each proceeding.**
>
> [80] Furthermore, the uncontroverted and overwhelming evidence is that separate proceedings would cause undue prejudice to the plaintiffs. In contrast, there is no compelling evidence of prejudice to GMCL if the action is permitted to stand as constituted. ….[208] [Emphasis added]

176. These observations apply with even greater force to this action on behalf of ten times more plaintiffs.

177. In certifying a class action by Ford dealers following the amalgamation of the Ford and Lincoln/Mercury dealership lines in 1999, the Divisional Court noted that:[209]

> Only a class proceeding will bind the class and [the defendant] and avoid multiplicity of proceedings and the associated risk of inconsistent results.

178. Certification of this case will advance all three goals of the CPA. It will provide access to justice to a group of former dealers singled out by their franchisor for unfair and unlawful conduct. It will allow the dealers to reverse the effects of isolation and misinformation that caused them to lose their dealerships to the direct benefit of the franchisor and the continuing dealers. It will also serve to deter franchisors from breaching their overriding duties of good

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[208] *Stoneleigh Motors* at paras 79-80, **BOA** Tab 35.

[209] *Mont-Bleu Ford Inc.v. Ford Motor Co. of Canada* (2000), 48 O.R. (3d) 753 (Div. Ct.) at para. 16, **BOA** Tab 29.

faith and fair dealing to their franchisees, no matter what dire circumstances (self-made or otherwise) they may have placed themselves in.

179. Certification of this case will also allow the court to consider important legal issues, such as the nature of the duties owed by lawyers to their clients, with both sides equally represented, in a single trial without the risk of inconsistent results.

(6) CLASS REPRESENTATIVE

180. In *Western Canadian Shopping Centres Inc. v. Dutton*, McLachlin C.J.C. described the factors to be considered in a class representative:

> The **motivation** of the representative, the **competence** of the representative's counsel, and the **capacity of the representative to bear any costs** that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will **vigorously and capably prosecute** the interests of the class.[210] (Emphasis added)

181. Trillium has all of the statutory causes of action asserted against both defendants. It is able to represent all class members across Canada and has no conflict. Trillium's ability or motivation to represent the class has not been challenged by the defendants.

182. Trillium intends that all questions of liability and the guiding principles for the recovery of all compensation, losses and damages for all members of the proposed class will be determined by the common issues trial.

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[210] *Western Canadian* at para. 41, **BOA** Tab 39.

183. Despite the fact that only the affected dealers in Ontario, PEI and Alberta have a statutory rescission claim, it is not necessary to have a separate subclass for the other provinces. Section 5(2) of the CPA recognizes that the creation of a sub-class represented by a separate representative is sometimes necessary to ensure the protection of a particular group of class members. Section 5(2) reads:

> Where a class includes a subclass **whose members have claims or defences that raise common issues not shared by all the class members**, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who [meets the requirements of s. 5(1)(e) with respect to the sub-class].

184. Trillium possesses all of the causes of action of all affected dealers in all provinces. In this regard, this case differs from the *Sears Canada*[211] decision where a subclass was created for the Alberta dealers. In that case, the court noted that there was evidence that, unlike the class members in other provinces, some dealers in Alberta had received a disclosure document which may have specifically disclosed to those franchisees the rebates or other benefits paid to the franchisor that were at issue in the case. The court found that this fact raised a number of possible defences to the claims by the Alberta franchisees that differed from the defences to the claims by the other franchisees and raised the possibility that the other franchisees might argue that they should have received the same disclosure as the Alberta franchisees, while the Alberta franchisees would argue that the disclosure they received was inadequate.

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[211] *Sears Canada*, **BOA** Tab 4.

185. The Ontario Law Reform Commission's *Report on Class Actions* recommended against the express granting of subclassing powers to the court in its proposed legislation. Although the Legislature did not follow this recommendation, the Commission's view that subclassing "would unnecessarily complicate matters" is based on a cross-jurisdictional review of authorities and literature. The Commission's view, expressed in the following passage, was that the court's supervisory powers mitigated many of the concerns thought to give rise to the need for subclassing:

> For example, if at any time in a class action it appears that a group within the class needs additional representation, a member of the group could apply to represent the interests of the group to the extent that the representative plaintiff cannot, or is unwilling, to do so. Similarly, if certain issues are common to only part of a class, the court could accommodate these differences by invoking its powers under the general management provisions.[212]

186. GMCL takes issue with Trillium and Mr. Hurdman primarily on the basis that:

(a) Mr. Hurdman had previously told GMCL that there was "overdealering" in his area;

(b) The majority of the vehicles sold by Trillium were Pontiacs and the Pontiac brand was dropped by GMCL as part of its restructuring and focus on other brands;

(c) Trillium was, according to GMCL, a laggard in its performance and capitalization and does not share the same characteristics as all of the other class members.[213]

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[212] Ontario Law Reform Commission, *Report on Class Actions*, Vol. 3, Ministry of the Attorney General, 1982, at p. 454, **BOA** Tab 43.

[213] Comeau aff., Responding Motion Record, Vol. 1, Tab 1, pp. 47-53, paras. 122-141.

187. None of these issues, if proven, is germane to Trillium's ability or motivation to adequately represent the class members.

188. Mr. Hurdman was not cross-examined on his suitability as a class representative or on the Plan of Proceeding.

PART IV - RELIEF REQUESTED

189. The plaintiff requests an order certifying this action as a class proceeding, together with the costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

22 November 2010

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

Of counsel for the plaintiff

SCHEDULE A - CASES AND TREATISES

I. Cases

1176560 Ontario Ltd. v. Great Atlantic & Pacific Company of Canada Ltd. (1992), 62 O.R. (3d) 535 (S.C.J.)

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

405341 Ontario Limited v. Midas Canada Inc., 2010 ONCA 478 (CanLII)

578115 Ontario Inc. (c.o.b. McKee's Carpet Zone) v. Sears Canada Inc.) 2010 ONSC 4571 (CanLII)

6792341 Canada Inc v. Dollar It Ltd. (2009), 95 O.R. (3d) 291 (C.A.)

779975 Ontario Limited v. Mmmuffins Canada Corporation, 2009 CanLII 28893 (Ont. S.C.J.)

Anderson v. Wilson (1999), 44 O.R. (3d) 673 (C.A.)

Anger v. Berkshire Investment Group Inc. (2001), 141 O.A.C. 301 (C.A.)

Anns v. Merton London Borough Council, [1978] A.C. 728 (H.L.)

Broome v. Prince Edward Island, [2010] 1 S.C.R. 360

Bywater v. Toronto Transit Commission, [1998] O.J. No. 4913 (Gen. Div.)

Canada (Attorney General) v. Sacrey, [2003] F.C.J. No. 1501 (C.A.).

Cassano v. The Toronto-Dominion Bank (2007), 87 O.R. (3d) 401 (C.A.)

CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman (2001), 18 B.L.R. (3d) 240 (Ont. S.C.J.)

Cloud v. Canada (Attorney General) (2004), 73 O.R. (3d) 401 (C.A.)

Delgrosso v. Paul (1999), 45 O.R. (3d) 605 (Gen. Div.)

Elms v. Laurentian Bank of Canada, 2001 BCCA 429 (CanLII)

Ford v. F. Hoffman-LaRoche Ltd. (2005), 74 O.R. (3d) 758 (S.C.J.)

Frohlinger v. Nortel Networks Corporation, 2007 CanLII 696 (S.C.J.)

Galambos v. Perez, [2009] 3 S.C.R. 247

Hill v. Hamilton-Wentworth Regional Police Services Board, [2007] 3 S.C.R. 129

Hollick v. Toronto (City), [2001] 3 S.C.R. 158

Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959

Kamloops v. Nielsen, [1984] 2 S.C.R. 2

Landsbridge Auto Corp. v. Midas Canada Inc., [2009] O.J. No. 1279 (S.C.J.)

Lau v. Bayview Landmark Inc., [1999] O.J. No. 4060 (S.C.J.)

Markson v. MBNA Canada Bank (2007), 85 O.R. (3d) 321 (C.A.)

II. Treatises

SCHEDULE B - STATUTES

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

Definitions

1.(1)In this Act,

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

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

(a) in which,

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

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

(b) in which,

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

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

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

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

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

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

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

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

"franchise system" includes,

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

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

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

(d) the goodwill associated with the franchise; ("système de franchise")

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

"franchisor's associate" means a person,

(a) who, directly or indirectly,

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

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

(b) who,

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

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

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

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

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

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

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

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

"misrepresentation" includes,

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

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

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

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

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

Master franchise, subfranchise

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

Deemed control

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

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

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

Application

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

Same

(2)Sections 3 and 4, clause 5 (7) (d) and sections 9, 11 and 12 apply with respect to a franchise agreement entered into before the coming into force of this section, and with respect to a business operated under such agreement, if the business operated by the franchisee under the franchise agreement is operated or is to be operated partly or wholly in Ontario. 2000, c. 3, s. 2 (2).

Non-application

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

1. Employer-employee relationship.

2. Partnership.

3. Membership in a co-operative association, as prescribed.

4. An arrangement arising from an agreement to use a trade-mark, service mark, trade name, logo or advertising or other commercial symbol designating a person who offers on a general basis, for consideration, a service for the evaluation, testing or certification of goods, commodities or services.

5. An arrangement arising from an agreement between a licensor and a single licensee to license a specific trade-mark, service mark, trade name, logo or advertising or other commercial symbol where such licence is the only one of its general nature and type to be granted by the licensor with respect to that trade-mark, service mark, trade name, logo or advertising or other commercial symbol.

6. An arrangement arising out of a lease, licence or similar agreement whereby the franchisee leases space in the premises of another retailer and is not required or advised to buy the goods or services it sells from the retailer or an affiliate of the retailer.

7. A relationship or arrangement arising out of an oral agreement where there is no writing which evidences any material term or aspect of the relationship or arrangement.

8. A service contract or franchise-like arrangement with the Crown or an agent of the Crown. 2000, c. 3, s. 2 (3).

Fair dealing

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

Right of action

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

Interpretation

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

Right to associate

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

Franchisor may not prohibit association

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

Same

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

Provisions void

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

Right of action

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

Franchisor's obligation to disclose

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

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

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

Methods of delivery

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

Same

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

Contents of disclosure document

(4)The disclosure document shall contain,

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

(b) financial statements as prescribed;

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

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

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

Material change

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

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

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

Information to be accurate, clear, concise

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

Exemptions

(7)This section does not apply to,

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

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

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

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

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

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

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

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

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

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

(g) the grant of a franchise if,

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

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

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

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

Same

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

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

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

Rescission for late disclosure

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

Rescission for no disclosure

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

Notice of rescission

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

Effective date of rescission

(4)The notice of rescission is effective,

(a) on the day it is delivered personally;

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

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

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

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

Same

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

Franchisor's obligations on rescission

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

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

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

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

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

Damages for misrepresentation, failure to disclose

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

(a) the franchisor;

(b) the franchisor's agent;

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

(d) the franchisor's associate; and

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

Deemed reliance on misrepresentation

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

Deemed reliance on disclosure document

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

Defence

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

Same

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

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

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

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

(i) there had been a misrepresentation,

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

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

Joint and several liability

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

Same

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

Same

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

No derogation of other rights

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

Attempt to affect jurisdiction void

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

Rights cannot be waived

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

Burden of proof

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

Exemption

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

Same

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

General or specific

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

Revocation of exemption

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

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

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

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

Regulations

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

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

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

(c) prescribing material facts for the purpose of clause 5 (4) (a);

(d) prescribing the financial statements to be included in the disclosure document;

(e) prescribing statements for the purpose of clause 5 (4) (d);

(f) prescribing other information and copies of documents to be included in the disclosure document;

(g) prescribing a percentage of sales for the purpose of clause 5 (7) (e);

(h) prescribing an amount for the purpose of subclause 5 (7) (g) (i);

(i) prescribing an amount and period of time for the purpose of clause 5 (7) (h);

(j) prescribing methods of delivery for the purposes of subsections 5 (2) and 6 (3), and prescribing rules surrounding the use of such methods, including the day on which a notice of rescission delivered by such methods is effective for the purpose of clause 6 (4) (e);

(k) prescribing criteria for the purposes of subsections 13 (1) and (2);

(k.1) defining, for the purposes of this Act, any word or expression used in this Act that has not already been expressly defined in this Act;

(l) respecting any matter that the Lieutenant Governor in Council considers necessary or advisable to carry out effectively the intent and purpose of this Act. 2000, c. 3, s. 14 (1); 2001, c. 9, Sched. D, s. 1.

General or specific

(2)A regulation made under subsection (1) may be general or specific in its application. 2000, c. 3, s. 14 (2).

15. Omitted (provides for coming into force of provisions of this Act). 2000, c. 3, s. 15.

16. Omitted (enacts short title of this Act). 2000, c. 3, s. 16.

General, O. Reg. 581/00

7. (1) Every disclosure document shall include a certificate certifying that the document,

(a) contains no untrue information, representations or statements; and

(b) includes every material fact, financial statement, statement and other information required by the Act and this Regulation. O. Reg. 581/00, s. 7 (1).

Franchises Act, R.S.P.E.I. 1988, c. F-14.1

Definitions

1. (1) In this Act

1(1)(c) "franchise agreement" means any agreement that relates to a franchise between,
(i) a franchisor or franchisor's associate, and
(ii) a franchisee;

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

Application

2. (1) This Act applies with respect to,
(a) a franchise agreement entered into on or after the coming into force of this section;
(b) a renewal or extension of a franchise agreement described in clause (a) entered into on or after the coming into force of this section; and
(c) a business operated under an agreement, renewal or extension described in clause (a) or (b), if the business operated by the franchisee under the franchise agreement or its renewal or extension is to be operated partly or wholly in Prince Edward Island.

Fair dealing

3. (1) Every franchise agreement imposes on each party a duty of fair dealing in the performance and enforcement of the agreement, including in the exercise of a right under the agreement.

Right to associate

4. (1) A franchisee may associate with other franchisees and may form or join an organization of franchisees.

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

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

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

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

Franchisor's Obligation to Disclose

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

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

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

(4) The disclosure document shall contain,

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

(b) financial statements as prescribed;

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

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

(e) other information and copies of documents as prescribed.

Right of rescission

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

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

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

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

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

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

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

Damages for misrepresentation, failure to disclose

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

(a) the franchisor;

(b) the franchisor's broker;

(c) the franchisor's associate; and

(d) every person who signed the disclosure document or statement of material change.

Attempt to affect jurisdiction void

11. Any provision in a franchise agreement purporting to restrict the application of the law of Prince Edward Island or to restrict jurisdiction or venue to a forum outside Prince Edward Island is void with respect to a claim otherwise enforceable under this Act in Prince Edward Island.

Rights cannot be waived
12. Any purported waiver or release by a franchisee or a prospective franchisee of a right conferred by or under this Act or of an obligation or requirement imposed on a franchisor or franchisor's associate by or under this Act is void.

Burden of proof
13. In any proceeding under this Act, the burden of proving an exemption or an exclusion from a requirement or provision is on the person claiming it.

Franchises Act Regulations, P.E.I. Reg. EC232/06

4. (1) A Certificate of Franchisor in Form 1 of Schedule II shall be completed and attached to every disclosure document provided by a franchisor to a prospective franchisee.

Franchises Act, R.S.A. 2000, c. F-23

Interpretation
1(1) In this Act,
(e) "franchise agreement" means any agreement that relates to a franchise between
(i) a franchisor or its associate, and
(ii) a franchisee or prospective franchisee;

Giving of document to franchisee
4(1) A franchisor must give every prospective franchisee a copy of the franchisor's disclosure document.
(2) The disclosure document must be received by the prospective franchisee at least 14 days before
(a) the signing by the prospective franchisee of any agreement relating to the franchise, or
(b) the payment of any consideration by the prospective franchisee relating to the franchise,

Fair dealing
7 Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement.

Franchisee's right to associate
8(1) A franchisor or its associate must not prohibit or restrict a franchisee from forming an organization of franchisees or from associating with other franchisees in any organization of franchisees.
(2) A franchisor or its associate must not directly or indirectly penalize a franchisee for engaging in the activities described in subsection (1).

Failure to give disclosure document
13 If a franchisor fails to give a prospective franchisee the disclosure document by the time referred to in section 4, the prospective franchisee may rescind all the franchise agreements by giving a notice of cancellation to the franchisor or its associate, as the case may be,
(a) no later than 60 days after receiving the disclosure document, or
(b) no later than 2 years after the franchisee is granted the franchise,
whichever occurs first.

Effect of cancellation
14(1) A notice of cancellation given under section 13 operates
(a) to cancel the franchise agreements, or
(b) in the case of an agreement that is an offer to purchase, to withdraw the offer to purchase.

(2) The franchisor or its associate, as the case may be, must, within 30 days after receiving a notice of cancellation under section 13, compensate the franchisee for any net losses that the franchisee has incurred in acquiring, setting up and operating the franchised business.

Limit on jurisdictional choice
17 Any provision in a franchise agreement restricting the application of the law of Alberta or restricting jurisdiction or venue to any forum outside Alberta is void with respect to a claim otherwise enforceable under this Act in Alberta.

Waiver of rights
18 Any waiver or release by a franchisee of a right given by this Act or the regulations or of a requirement of this Act or the regulations is void.

Burden of proof
19 In any proceeding under this Act, the burden of proving
(a) an exemption, or
(b) an exclusion from a definition
is on the person claiming it.

Franchises Regulation, Alta. Reg. 240/1995

Disclosure document
2(1) A disclosure document must contain all material facts including material facts relating to the matters set out in Schedule 1.

(2) A franchisor may use a document authorized under the franchise law of a jurisdiction outside Alberta as its disclosure document to be given to a franchisee, if supplementary information is included that sets out any material changes to the document from that jurisdiction so that it complies with the requirements of this Regulation.

(3) A disclosure document, including any material changes made in respect of a disclosure document, must include a certificate set out in Schedule 2 that must be dated and must be signed
(a) by at least 2 officers or directors of the franchisor, or a combination of them totaling at least 2, if the franchisor has 2 or more directors or officers,
(b) if the franchisor has only one director or officer, by that person, or
(c) if the franchisor is not a corporation, by the franchisor.

Exemption of Franchisors Under Subsection 13 (1) of the Act, O. Reg. 9/01

Exemption
1. Pursuant to subsection 13 (1) of the Act, the following franchisors are exempt from the requirement to include the financial information described in clause 3 (1) (a) or (b) or subsection 3 (2) or (3) of Ontario Regulation 581/00 in a disclosure document, subject to the terms and conditions set out in section 2:

A & W Food Services of Canada Inc.

Ace Hardware Canada Limited

Amex Canada Inc.

Apple Auto Glass Limited

Applebee’s International Inc.

Bell Distribution Inc.

Belron Canada Incorporated/Belron Canada Incorporée

BMW Canada Inc.

Boston Pizza International Inc.

Bulk Barn Foods Limited

Burger King Restaurants of Canada Inc.

Cara Operations Limited

Carquest Canada Ltd.

Century 21 Real Estate Canada Ltd.

Consultour Inc.

Corbeil Electrique Inc./Corbeil Electric Inc.

DaimlerChrysler Canada Inc.

Dairy Queen Canada Inc.

DFO, Inc.

Discount Car & Truck Rentals Ltd.

Europcar International S.A.S.U.

Ford Motor Company of Canada, Limited

General Motors of Canada Limited

Giant Tiger Stores Limited

Goodyear Canada Inc.

Great Atlantic & Pacific Company of Canada, Limited (The)

Groupe Cantrex Inc.

Hyundai Auto Canada, a registered name of Hyundai Motor America

International Truck and Engine Corporation Canada

Kampgrounds of America (Canada) Ltd.

Kelsey’s Restaurants Inc.

Land Rover Group Canada Inc.

Loblaws Inc.

Lumsden Brothers Limited

M & M Meat Shops Ltd.

Mack Canada Inc.

Mazda Canada Inc.

McDonald’s Restaurants of Canada Limited

Meineke Canada Company

Midas Canada Inc.

Mikes Restaurants Inc.

Mister Transmission (International) Limited

National Car Rental System (Canada) Inc.

Nissan Canada Inc.

O.K. Tire Stores Inc.

Orange Julius Canada Limited

Petro-Canada

Pizza Delight Corporation

Pizza Nova Take Out Ltd.

Pizza Pizza Limited

The Prudential Real Estate Affiliates, Inc.

Realstar Hotel Services Corp.

Red Robin International, Inc.

ServiceMaster of Canada Limited

Shoppers Drug Mart Inc.

Shoppers Drug Mart (London) Limited

Smitty's Canada Limited

Snap-On Tools of Canada Ltd.

Sobeys Capital Incorporated

The Second Cup Ltd.

The TDL Group Ltd.

Toyota Canada Inc.

Travelodge Canada Corp.

Tricon Franchise (Canada) LP

UAP Inc.

Volkswagen Canada Inc.

Volvo Trucks Canada Inc.

Wendy's Restaurants of Canada Inc.

Weston Foods Inc.

William E. Coutts Company, Limited

Yamaha Motor Canada Ltd.

Yogen Früz Canada Inc.

94272 Canada Limited

Class Proceedings Act, 1992, S.O. 1992, c. 6

Definitions

1. In this Act,

"common issues" means,

(a) common but not necessarily identical issues of fact, or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts; ("questions communes")

Certification

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

Individual issues

25. (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

(a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;

(b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and

(c) with the consent of the parties, direct that the issues be determined in any other manner. 1992, c. 6, s. 25 (1).

Directions as to procedure

(2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 21.01(1)(b)

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly

SCHEDULE C - TIMELINE OF EVENTS

DATE	EVENT
Feb. 20, 2009	GMCL submits its Initial GMCL Viability Plan to Canada and Ontario. Among other things, plan called for "reductions in the size of GMCL Dealer Network to 400-500 Dealers through consolidation and attrition between 2009 and 2014."
Mar. 30, 2009	Initial GMCL Viability Plan is rejected by the Canada and Ontario. GMCL given 60 days to submit more aggressive restructuring plan.
Mar. 30, 2009	Dealer Satellite Broadcast in which dealers are updated on GMCL's progress on the Canadian restructuring plan. GMCL states that their plan for dealers would remain as outlined in Initial GMCL Viability Plan.
Apr. 8, 2009	CADA sends memo to dealers advising them that CADA is "actively engaged in organizing legal representation on behalf of dealers that would be necessary to protect their interests should a manufacturer (or manufacturers) file for bankruptcy protection under the CCAA."
Apr. 21, 2009	Dealer Satellite Broadcast informing dealers that plan for dealer network remained as outlined in the Initial GMCL Viability Plan.
Apr. 27, 2009	GMCL issues a press release providing details about its revised restructuring plan. Press release states that GMCL "will reduce its dealer network from 705 dealers to between 395 – 425 dealers at the end of 2010 a percentage reduction of 42% consistent with that in the U.S." Dealer Satellite Broadcast is held which informed dealers about the planned reduction described in press release.
May 4, 2009	CADA sends memo to all GMCL dealers informing them that CADA had retained Cassels to represent the dealers in a restructuring or insolvency of by GMCL. Dealers asked to make payment into a legal fund which would be used to pay Cassels' legal fees and other expenses in representing the dealers as a collective in restructuring or insolvency by GMCL.
May 13, 2009	CADA sends memo which is similar to May 4 memo.
May 15, 2009	Dealer Satellite Broadcast informing dealers that GMCL planned to reduce the total numbers of dealers by approximately 40% by the end of 2010.
May 17, 2009	GMCL updates Ontario on confidential plans for dealer consolidation.
May 15 – 18, 2009	In-house counsel to GMCL briefed counsel to CADA regarding GMCL's plans.
May 19, 2009	Dealer Satellite Broadcast in which GMCL explained their plan, including how GMCL had selected the non-retained dealers and a summary of "key terms" of the WDA.
May 20, 2009	GMCL sends notice letters and WDAs to each of the non-retained dealers.
May 20 – 26, 2009	Follow-up meetings by GMCL with non-retained dealers.
May 22, 2009	CADA sends email to all dealers attaching two memos, one prepared by

	Seguin Advisory Services and one prepared by CADA for non-retained dealers, providing comments to WDA.
May 24, 2009	CADA holds a conference call for non-retained dealers, which includes two lawyers from Cassels. Cassels advises all dealers to retain individual lawyers.
May 26, 2009	GMCL's deadline for acceptance of WDA. Approximately 85% of non-retained dealers deliver signed WDAs.
May 28, 2009	CADA delivers memo to dealers acknowledging conflict of interest in having Cassels take instructions from continuing dealers who were not asked to sign WDA. Cassels would continue to act for non-continuing dealers and another firm would act for continuing dealers.
May 30, 2009	GMCL advises dealers that it was waiving acceptance threshold conditions in WDA (ie., that all non-continuing dealers had to accept the WDA).
June 1, 2009	GM(US) files for Chapter 11 bankruptcy protection in U.S. GMCL announces that their revised plan has been approved by Canada and Ontario "without the need for filing under the CCAA."
June 3, 2009	CADA sends memo to dealers advising them that steering committees have been disbanded.