**CITATION:** *Trillium Motor World Inc. v. General Motors of Canada Limited,* 2011 ONSC 1300
**COURT FILE NO.:** CV-10-397096CP
**DATE:** 20110301

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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| **B E T W E E N:** | |
| **TRILLIUM MOTOR WORLD LTD.** | *Bryan Finlay Q.C., Michael Statham, Allan Dick & David Sterns*, for the Plaintiff/Moving Party |
| Plaintiff/Moving Party | |
| **- and -** | |
| **GENERAL MOTORS OF CANADA LIMITED and CASSELS BROCK & BLACKWELL LLP** | *David Morritt, Jennifer Dolman & Evan Thomas*, for General Motors of Canada Limited, Defendant/Respondent |
| | *Peter Griffin, Rebecca Jones & Stephanie Couzin*, for Cassels Brock and Blackwell LLP, Defendant/Respondent |
| Defendants/Respondents | **HEARD:** December 15 & 16, 2010 |

Proceeding under the *Class Proceedings Act, 2002,* S.O. 2002, c. 6

**G.R. Strathy J.**

[1] This certification motion arises from events that occurred during six days in May 2009. The global economy was sunk in an economic quagmire that some compared to the Great Depression of the 1930s. North American consumer confidence was reeling from rising unemployment, plunging housing prices, a tanking stock market, frozen credit sources and volatile oil prices. With per capita auto purchases falling to fifty-year lows, General Motors

Corp. ("GM") in the United States, and General Motors of Canada Limited ("GMCL"), its Canadian subsidiary, experienced plummeting sales, draining them of liquidity to fund their operations. In the face of a serious credit crunch, they were on the verge of bankruptcy. A financial bailout from governments in the United States and Canada was their only hope of avoiding insolvency.

[2] This government financial aid was conditional on the automaker dealing with some of its more pressing problems, including a bloated dealer network, which was in urgent need of rationalization. Faced with the insistence of the federal and Ontario governments that it had to become leaner, GMCL informed 240 of its 705 franchisees[1] that their dealer agreements would not be renewed on their expiry on October 21, 2010, and offered them a wind-down package. Some 202 dealers accepted the offer within the six day deadline imposed by GMCL. Five more accepted at later dates, one in August 2009 and the other four in November 2009.

[3] This is a motion for certification of a proposed class action brought on behalf of the 207 GMCL franchisees who entered into Wind-Down Agreements ("W.D.A.s") with GMCL in and after May of 2009. The defendants are GMCL and Cassels Brock & Blackwell, LLP ("Cassels"), a law firm allegedly retained on behalf of the dealers. The plaintiff, Trillium Motor World Ltd. ("Trillium"), is one of the GMCL dealers that was offered, and accepted, a W.D.A. and agreed to voluntarily terminate its dealership agreement with GMCL. It seeks to represent a class composed of dealers who signed the W.D.A. and it claims that GMCL breached its obligations under the *Arthur Wishart Act (Franchise Disclosure) 2000*, S.O. 2000, c. 3 (the "*A.W.A.*") and

[1] GMCL admits that the dealers are "franchisees" within the meaning of the *Arthur Wishart Act (Franchise Disclosure), 2002*, S.O. 2000, c. 3 and the franchise legislation in other provinces. I will refer to them from time to

comparable legislation in Alberta and P.E.I.[2] It also claims that Cassels was retained to act on behalf of GMCL dealers, that Cassels had a conflict of interest and that it breached duties that it owed to the terminated dealers.

[4] In order to understand the issues that arise on this certification motion, it will be necessary to give some factual background, which is included in the next section. In that section, I will also describe the dealership agreements under which Trillium and other GMCL dealers operated and the terms of the W.D.A.s, which the proposed class members accepted. In the following section, I will outline some of the relevant provisions of the *A.W.A.* and will make some general observations with respect to the purpose of that statute and of the *Class Proceedings Act, 2002*, S.O. 2002, c. 6 (the "*C.P.A.*"). I will then turn to the application of the test for certification set out in s. 5 of the *C.P.A.* Finally, at the conclusion of these reasons, I will deal with a request by Cassels that the action be stayed against it, pending the resolution of the claim against GMCL.

Background

*GM's Restructuring and the Wind-Down Agreements*

[5] Each GMCL dealer operates under a standard form Dealer Sales and Service Agreement. This agreement contains certain provisions that are applicable to all dealers. The agreements had a common termination date of October 31, 2010, but each dealer was given a contractual assurance of the "opportunity to enter into a new Dealer Agreement with [GMCL] at

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time as "dealers" or "franchisees". The evidence is not uniform as to the number of dealers who received a Wind-Down Agreement, but the number of 240 seems to be accepted by both parties.

[2] *Franchises Act*, R.S.A. 2000, c. F-23; *Franchises Act*, R.S.P.E.I. 1988, c. F-14.1.

the expiration date if [GMCL] determines dealer has fulfilled its obligations under this Agreement."

[6] GMCL's standard dealer agreement includes the right of the dealer on termination to require GMCL to purchase the dealer's inventory, signs, tools, parts, and accessories as well as the right to obtain assistance from GMCL in the disposition of the dealership premises.

[7] While each dealer's agreement may have included addenda particularizing the dealer's relationship with GMCL, there is no evidence that any of those provisions are material to the issues before me.

[8] In the face of the economic crisis of 2008/2009, GM and GMCL sought financial assistance from governments in the United States and Canada and had submitted restructuring plans to those governments. GMCL's initial viability plan of February 20, 2009, proposed reductions in the size of its dealer network through consolidation and attrition between 2009 and 2014. The plan also envisaged the retention of Pontiac as a "niche brand". On March 30, 2009, the governments of Canada and Ontario announced that they were rejecting this plan because it did not go far enough to guarantee GMCL's long-term viability. The United States government gave a similar response to the plan submitted by GM. The companies were given a further 60 days to submit revised plans.

[9] On April 27, 2009, GM and GMCL announced revised restructuring plans. The Pontiac brand would be phased out by the end of 2010. GM's dealerships in the United States would be reduced by 42% by the end of 2010. GMCL promised to make a comparable reduction of its

dealerships, going from 705 dealers in 2009 to approximately 400 by the end of 2010. It had yet to publicly identify which dealers would be cut.

[10] In a satellite broadcast to all its dealers on May 19, 2009, GMCL explained the details of its plan to downsize its dealer network and outlined the criteria that had been used to determine which dealers had been selected for termination. It also explained the key terms of the W.D.A. Dealers who were going to receive a termination notice the following day were encouraged to review the W.D.A. with their legal and financial advisors. On the next day, May 20, 2009, GMCL sent a letter to 240 dealers across Canada, informing them that their dealership agreements would not be renewed on their expiry on October 31, 2010.

[11] Attached to the May 20, 2009 letter addressed to each terminated dealer was a W.D.A. The W.D.A. was open for acceptance until May 26, 2009, and GMCL's obligations under the agreement were expressed to be conditional on the execution of a W.D.A. by 100% of the dealers who were being terminated. That condition could be waived at the option of GMCL. The key terms of the W.D.A. were as follows:

> (a) each dealer was to receive a wind-down payment, in three instalments, based on the number of vehicles that dealer had sold in the previous year, as well as a sign removal allowance;
>
> (b) by accepting the W.D.A., the dealer surrendered all rights under its existing dealer agreement with GMCL, including rights on termination;
>
> (c) the affected dealer had to sell all its inventory, remove all signs, cease all business operations and comply with all post-termination obligations in order to receive its final payment;
>
> (d) GMCL could terminate the W.D.A. or cease making payments if the dealer breached any of the terms of the W.D.A. or of the dealer agreement;
>
> (e) the dealer released GMCL and its affiliates from all claims;

> (f) to accept the W.D.A., the dealer was required to obtain a certificate of independent legal advice, signed by a lawyer, attesting that the dealer had entered into the agreement, including a full waiver and the release of the right to sue GMCL and its affiliates, voluntarily and with a full understanding of the implications; and
>
> (g) the W.D.A. was expressed to be governed by Ontario law and the parties consented to the exclusive jurisdiction of the courts of Ontario.

[12] There was a slight variation in the W.D.A. offered to GMCL's Saturn and Saab dealers. Instead of accepting the wind-down payments, those dealers could elect to wait for GMCL to find a buyer for the Saturn and Saab brands and hope that the new owner would take on their dealerships. It was a take-it-or-leave-it proposition, however, and they could not do both. In the end, no buyer was found for those brands.

[13] GMCL's reduction of its dealer network was founded on Article 4.1 of the standard dealer agreement, which permitted GMCL to make whatever decisions might be necessary in changing market circumstances to preserve the success of its dealer network and to protect the network's reasonable return on investment.

[14] In the letter of May 20, 2009, and in the broadcast to dealers the preceding day, GMCL stated that if all affected dealers did not sign the W.D.A. by May 26, 2009, 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*").

[15] A total of 207 Canadian dealers, or approximately 85% of those who received the W.D.A., including Trillium, signed the agreement and returned it to GMCL before the May 26, 2009 deadline. GMCL elected to waive the 100% acceptance threshold and the W.D.A.s therefore became operative.

[16] On June 1, 2009, GMCL announced that its restructuring plan had been approved by the Canadian and Ontario governments, financial assistance would be forthcoming, and there would be no *CCAA* filing. In the United States, GM was not able to stave off insolvency and it filed for protection from its creditors under Chapter 11 of the United States Bankruptcy Code[3] that same day.

*The Involvement of Cassels*

[17] Many of the GMCL dealers were members of the Canadian Automotive Dealers' Association ("CADA"), a federation of provincial and regional automotive dealer associations. On May 4, 2009, CADA announced that it had formed a General Motors Steering Committee to ensure that the interests of all GMCL dealers were represented "should General Motors of Canada Ltd. file for bankruptcy protection in Canada in the near future." CADA announced that the steering committee would provide policy direction and instructions to legal counsel who would represent the dealers in any bankruptcy filing and that it had retained Cassels "to handle our interests". CADA asked the dealers to contribute either $2,500 or $5,000 (depending on the number of vehicles the dealer had sold in the previous year) to a war chest that was to be held by CADA in trust for the payment of professional services associated with representing the dealers in restructuring or insolvency proceedings. A number of the GMCL dealers, including Trillium, made payments into the fund.

[18] On May 22, 2009, after the distribution of the W.D.A.s to the affected GMCL dealers, CADA sent an email to its members enclosing a memorandum concerning the W.D.A. and

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[3] *Bankruptcy,* 11 U.S.C. §§ 1101-1174.

pointing out the necessity of each dealer reviewing the document with its advisors. It emphasized the importance and urgency of executing and returning the W.D.A. before the May 26th, 2009 deadline if the dealer wished to accept it. The email also informed the dealers that CADA proposed to organize a conference call of all dealers whose franchises had been terminated.

[19] Trillium pleads that Cassels drafted or assisted in drafting the May 22, 2009 memorandum to the affected dealers. It pleads that the memorandum offered no advice or strategy to the dealers about a response to the W.D.A. and did not advise the dealers of their rights under the *A.W.A.*

[20] A conference call with terminated dealers, organized by CADA, was held on May 24, 2009. The terminated dealers were entitled to call in and participate, and a number chose to do so. It is alleged that two lawyers from Cassels participated in the call. The call lasted several hours, but there is no evidence before me concerning what advice, if any, was provided to the dealers by Cassels.

*Subsequent Events*

[21] This action was commenced on February 12, 2010, on behalf of what was then said to be approximately 215 dealers who signed the W.D.A. A separate action was commenced on behalf of 19 of the 33 dealers who did not sign the W.D.A. They claimed that by terminating their dealer agreements, GMCL was in breach of contract, breached its duty of good faith and fair dealing under s. 3 of the *A.W.A.*, and interfered with their right of association under s. 4. In a decision in *Stoneleigh Motors Limited v. General Motors of Canada Limited*, 2010 ONSC 1965,

[2010] O.J. No. 1621, Pepall J. dismissed a request by GMCL to refer the matter to arbitration and refused GMCL's request that the plaintiffs' claim be severed and that they be required to proceed individually.

*The Plaintiff's Claim*

[22] Trillium claims that GMCL breached the legal obligations that it owed to its dealers under the *A.W.A.* and similar legislation in other provinces. Both the dealer agreements and the W.D.A. incorporated Ontario law. As will be discussed below, the franchise legislation in Alberta and P.E.I. is generally similar to the *A.W.A.*, but there are some nuances. The legislation in those provinces invalidates contractual terms that exclude the application of the law of that province or the jurisdiction of the courts of that province. For terminated dealers located in those provinces, there will be a need to consider the law of that particular province, to the extent it differs from the *A.W.A.*

[23] Trillium asserts that the W.D.A. was a "franchise agreement" as the term is defined in the *A.W.A.* and that under s. 5(1) of that statute, GMCL had a duty to deliver a disclosure document at least 14 days before a franchisee was required to sign the W.D.A. It also alleges that GMCL breached its statutory duty of fair dealing and interfered with its franchisees' statutory right of association. Among other things, Trillium claims that GMCL adopted a strategy that was designed to divide the franchisees, give them no time to make a unified response to GMCL's offer, and keep them in the dark concerning GMCL's actual financial position. The plaintiff claims damages against GMCL for breach of its statutory duty of fair dealing and interference with the right of association, seeks a declaration that class members can

rescind or cancel the W.D.A. due to GMCL's failure to provide a disclosure document, and claims damages for GMCL's failure to comply with the disclosure obligations under the *A.W.A.*

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

[25] Trillium also alleges that Cassels continued to take instructions from the "continuing dealers", who had not been terminated and who had an interest in seeing the terminated dealers accept the W.D.A., in order to ensure the survival of GMCL.

[26] Trillium pleads that Cassels failed to properly advise and represent class members – in particular, by failing to inform them of their rights under the *A.W.A.* and by failing to properly represent them in developing a collective response to the W.D.A. Trillium alleges that by failing to disclose its alleged conflict, and by failing to refer class members to an independent lawyer who could inform them of their rights and properly represent their interests in a collective response to GMCL's ultimatum, Cassels deprived all class members of the opportunity to use their group negotiating power to full advantage. Trillium's theory is that the dealers could have used their combined leverage to negotiate a better deal with GMCL by refusing to agree to the voluntary downsizing unless their compensation was increased. Instead, says the plaintiff,

Cassels told them to obtain advice from their own lawyers, which – in view of GMCL's position that the W.D.A. was non-negotiable – meant that there was no possibility of an effective response on an individual basis.

[27] The plaintiff pleads that each partner of Cassels knew or ought to have known of the firm's alleged conflict of interest and has insisted that the statement of claim be served personally on each partner of Cassels. The plaintiff asserts a personal claim against each partner.

[28] The terms of Cassels' retainer are in dispute, but it appears that it will be Cassels' position that its retainer by CADA, as described in the May 22, 2009 memorandum from the CADA, which is incorporated into the statement of claim, was limited to providing legal advice in the event of a bankruptcy of insolvency of GMCL, an event that never transpired. Every one of the proposed class members obtained legal advice from their own lawyer and a certificate was signed by that lawyer as part of the acceptance of the W.D.A.

Discussion

[29] This motion involves the intersection of two important statutes, the *C.P.A.*, enacted in 1992, and the *A.W.A.*, enacted in 2000. It will assist the analysis that follows to give a brief overview of each and to discuss some of the cases in which claims by franchisees against franchisors have been certified as class proceedings.

*The A.W.A.*

[30] The full title of the statute is *Arthur Wishart Act (Franchise Disclosure), 2000.* The words in brackets highlight the primary legislative purpose, which is to protect franchisees by

ensuring that franchisors make full and fair disclosure before the franchise agreement is consummated. Disclosure levels the playing field between franchisor and franchisee by protecting the franchisee when it enters into the agreement: *MDG Kingston Inc. v. MDG Computers Canada Inc.,* (2008), 92 O.R. (3d) 4, [2008] O.J. No. 3770 at para. 1 (C.A.). The legislation must be interpreted in light of this purpose: *6792341 Canada Inc. v. Dollar It Ltd.*, 2009 ONCA 385, [2009] O.J. No. 1881 at para. 72 ; *405341 Ontario Ltd. v. Midas Canada Inc.*, 2010 ONCA 478, [2010] O.J. No. 2845 at para. 30. In *Personal Service Coffee Corp v. Beer* (2005), 256 D.L.R. (4th) 466, [2005] O.J. No. 3043 (C.A.), MacFarland J.A. observed, at para. 28:

> [T]he focus of the Act is on protecting the interests of franchisees. The mechanism for doing so is the imposition of rigorous disclosure requirements and strict penalties for non-compliance. For that reason, any suggestion that these disclosure requirements or the penalties imposed for non-disclosure should be narrowly construed, must be met with skepticism.

[31] In the recent case of *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673, [2010] O.J. No. 4336, Winkler C.J.O. observed at para. 26:

> The *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. An 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.

[32] The *A.W.A.* applies to franchise agreements (and to extension or renewals of agreements) where the business of the franchisee is to be operated wholly or partly in Ontario (s. 2(1)). I will highlight the provisions of the *A.W.A.* that have the greatest application to the plaintiff's claim.

[33] Section 3 of the *A.W.A.* imposes a duty of fair dealing on both parties in the performance and enforcement of the franchise agreement. This includes the duty to act in good faith and in accordance with reasonable commercial standards (s. 3(3)). There is a statutory cause of action for damages for the breach of that duty (s. 3(2)).

[34] Section 4 provides a right of franchisees to associate and to form an association and prohibits the franchisor from interfering with that right. Any provision in a franchise agreement "or other agreement relating to a franchise" which purports to interfere with that right is void (s. 4(4)). A franchisee has a right of action against the franchisor for interference with the right of association (s. 4(5)).

[35] Section 5 requires the franchisor to provide a "disclosure document" to a "prospective franchisee" not less than 14 days before the earlier of the signing of the franchise agreement and the payment of any consideration by the franchisee to the franchisor (s. 5(1)). The disclosure document must contain (a) all material facts, including any material facts prescribed by regulation; (b) financial statements; (c) copies of all proposed franchise agreements and other agreements to be signed by the franchisee; (d) statements, as prescribed by regulation, for the purpose of assisting the prospective franchisee in making informed investment decisions; and (e) other prescribed information (s. 5(4)). Ontario regulation 581/00 under the *A.W.A.* prescribes certain information to be contained in the disclosure document. The franchisor is also required to provide the franchisee with a written statement of any material change as soon as practicable after the change has occurred and before the earlier of the signing of the franchise agreement and payment of consideration by the franchisee (s. 5(5)). The information in a disclosure document and a statement of material change must be "accurately, clearly and concisely set out" (s. 5(6)).

[36] The disclosure requirement does not apply, among other things, to the grant of a franchise that is not valid for more than one year and does not involve the payment of a non-refundable franchise fee (s. 5(7)(g)(ii)).

[37] Section 6 gives the franchisee a right to rescind the franchise agreement, without penalty or obligation, no later than two years after entering into the agreement, if the franchisor never provided the disclosure document. Section 7 confers a cause of action for damages if the franchisor has failed to deliver a disclosure document.

[38] Section 11 provides that any purported waiver or release by a franchisee of a right given by the statute is void.

[39] GMCL has historically maintained that its dealership agreements are not "franchise agreements" subject to the *A.W.A.* The W.D.A. contained the following acknowledgment of this position:

> ... Dealer and Dealer Operator acknowledge that it always has been and continues to be GM's position that the [*A.W.A.* and similar franchise legislation in Alberta and P.E.I.] are not applicable to the Dealer Agreement or the relations between GM and Dealer and/or Dealer Operator.

[40] Notwithstanding this provision, the W.D.A. provided that the dealer released all rights under the *A.W.A.* or similar legislation.

[41] GMCL now admits that its relations with its dealers are subject to the *A.W.A.* It does not, however, agree that the W.D.A. was a "franchise agreement" so as to give rise to a duty to deliver a disclosure agreement.

*The C.P.A.*

[42] Like the *A.W.A.*, the *C.P.A.* is remedial legislation. It was designed in part to facilitate access to justice for individuals whose claims would be uneconomic or inefficient if pursued on an individual basis: *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417, [1998] O.J. NO. 4182 at para. 14 (C.A.). In simplest terms, a class action is an action with a representative plaintiff on behalf of a group of persons who have a cause of action in which there are common questions of fact or law: *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603, [2000] O.J. No. 4597 at para. 50 (S.C.J.).

[43] By avoiding multiple individual actions, a class action promotes judicial economy. The legislation is to be construed generously, to promote the legislative goals of judicial economy, access to justice and behaviour modification: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67.

[44] A class action has many advantages to a multitude of individual actions. The ones most often referred to are:

- enhancing access to justice by making it possible for a large group of plaintiffs to share the cost of litigation that would otherwise be unaffordable on an individual basis;
- promoting efficient administration of justice, by aggregating individual actions and avoiding duplication of fact-finding and legal analysis; and
- changing the behaviour of wrongdoers by holding them accountable for their actions.

[45] In order to proceed as a class action, the action must be certified. Section 5 of the *C.P.A.* provides that the court shall certify the action if (a) the pleadings disclose a cause of action; (b) there is an identifiable class of two or more persons; (c) the claims of the class raise common issues; (d) a class proceeding is the preferable procedure for the resolution of those issues; and (e) the plaintiff would fairly represent the class, is free of conflicts on the common issues, and has produced a workable method of advancing the proceeding. I will be discussing the application of the certification criteria to the facts of this case later in these reasons. Prior to doing so, it will be useful to review some of the cases in which claims by franchisees have been certified as class actions.

Franchise Claims Under the *C.P.A.*

[46] The suitability of claims by franchisees for class action treatment was foreseen by the authors of the Ontario Law Reform Commission, *Report on Class Actions*, vol. 1 (Toronto: Ministry of the Attorney General, 1982) who noted, at p. 128, that:

> 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.

[47] One of the earliest class actions in Ontario involving a franchise was *Rosedale Motors Inc. v. Petro-Canada Inc.* (1998), 42 O.R. (3d) 776, [1998] O.J. No. 5461 (Gen. Div.), rev'd. [2001] O.J. No. 5368 (Div. Ct.) ("*Rosedale Motors*"). The plaintiff alleged that the franchisor had misrepresented the profitability of the proposed franchise. The motion judge had refused to certify the proceeding, finding that the claims of the class members did not turn on a single common representation but rather depended on what had been said by the franchisor in its

communications with each franchisee. He also found that a class action was not the preferable procedure due to the variety and importance of the remaining individual issues. The Divisional Court reversed, noting that the law had evolved in light of the then recent decisions of the Supreme Court of Canada in *Hollick v. Toronto (City)*, above, and *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39, which had been released a few days earlier. The Divisional Court held that the issues of whether the franchisor had a duty of care in relation to its research into the profitability of a franchise, whether it had breached the standard of care, and whether its representations were false and misleading were common issues that would advance the action, prevent duplication of trials and avoid the risk of inconsistent decisions, notwithstanding that there would still be individual issues to be resolved. The fact that different representations may have been made to individual franchisees, and that the resolution of the common issues would not be determinative of the franchisor's liability, were not barriers to certification.

[48] In *909787 Ontario Ltd. v. Bulk Barn Foods Ltd.*, [1999] O.J. No. 2973 (S.C.J.), rev'd (2000), 2 C.P.C. (5th) 61, [2000] O.J. No. 3649 (Div. Ct.), the Divisional Court reversed the decision of the motion judge who had certified a class action on behalf of franchisees of the "Bulk Barn" chain. The plaintiff claimed that the franchisor had charged excessive mark-ups on products sold to franchisees and had breached a contractual obligation to charge prices that were as low or lower than other wholesalers. The motion judge found that there were common issues of fact and law, including issues in the interpretation of the franchise agreements and related documents that would move the litigation forward for all members of the class. The fact that different class members may have paid different prices for the same products was a matter which

could be addressed as the litigation progressed. The Divisional Court reversed, holding, among other things, that the defendant's liability to any particular class member would depend on the products purchased from Bulk Barn at various times and the prices at which those same commodities would be available from other suppliers in the particular area. As a result, the Divisional Court found that the proceeding would be unmanageable.

[49] In *Mont-Bleu Ford Inc. v. Ford Motor Co. of Canada* (2000), 48 O.R. (3d) 753, [2000] O.J. No. 1815 (Div. Ct.), rev'g [2000] O.J. No. 533 (S.C.J.), the Divisional Court reversed a motion judge who had declined to certify a class action, notwithstanding that he had found that the plaintiffs had met all the requirements for certification but for the preferable procedure requirement in s. 5(1)(d) of the *C.P.A.* The plaintiffs, who were Ford dealers, claimed that Ford had breached their dealership agreements by restructuring its dealerships such that Mercury dealers were permitted to sell vehicles that were formerly sold exclusively by Ford dealers. The plaintiffs alleged that this was contrary to their dealership agreements, which only permitted Ford to appoint an additional dealer in a particular area where a market study established the necessity. On the certification motion, it was not disputed that there was a cause of action and an identifiable class and the motion judge found that there were common issues. He held, however, that an application to interpret the dealer agreement, under rule 14.05(3)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, would be a preferable procedure. The Divisional Court held that in the absence of an agreement by Ford that it would be bound by such a determination in the individual action, the determination of the issue on an application would not resolve the claims of the class. It remitted the matter to the motion judge for determination. The action was

ultimately settled with the approval of the court: (2004), 45 C.P.C. (5th) 292, [2004] O.J. No. 1270 (S.C.J.)

[50] In *1176560 Ontario Ltd. v. Great Atlantic & Pacific Company of Canada Ltd.* (2002), 62 O.R. (3d) 535, [2002] O.J. No, 4781 (S.C.J.), aff'd. (2004), 70 O.R. (3d) 182, [2004] O.J. No. 865 (Div. Ct.) ("*A & P*"), franchisees of a grocery store chain claimed that the franchisor had improperly withheld supplier rebates and allowances. The franchisor did not dispute that the claims of the class members raised common issues and the only real issue was whether a class proceeding would be preferable to joinder or consolidation of individual actions. Winkler J., as he then was, certified the action. He stated at para. 26:

> In my view, where a plaintiff has met the evidentiary burden of establishing that there is an identifiable class and common issues, can state a narrow issue that is common to the entire class, and is as significant to the resolution of each individual claim as is the case here, then he or she has established a basis for a determination that a class proceeding is the preferable procedure. This determination remains, consistent with the Supreme Court's holding in *Hollick*, subject to the court finding that the proceeding would achieve one or more of the goals of the *Act* or, conversely, a showing by the defendants that a class proceeding is not the preferable method of dealing with the claims.

[51] In *Landsbridge Auto Corp. v. Midas Canada Inc.* (2009), 73 C.P.C. (6th) 10, [2009] O.J. No. 1279 (S.C.J.), Cullity J. certified a class action on behalf of Midas franchisees who claimed that the franchisor had improperly terminated discounts that it had provided on products supplied to the franchisees. Cullity J. noted that the claims depended almost entirely on the interpretation of the standard form franchise agreement and whether the behaviour of the franchisor amounted to bad faith or unfair dealing. The plaintiffs claimed, among other things, that the franchisor had breached its duty of fair dealing under s. 3 of the *A.W.A.* Cullity J. concluded that the claims of the class raised common issues and, referring to the observations of Winkler J. in *A & P* found

that a class proceeding would be the preferable procedure. He noted that a class proceeding would promote access to justice, noting that Winkler J. at para. 42 of *A & P* had commented on the "inherent vulnerability in the dependent ongoing nature of the relationship between franchisor and franchisee."

[52] Recently, in *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, 2010 ONCA 466, 100 O.R. (3d) 721, aff'g (2009), 96 O.R. (3d) 252, [2009] O.J. No. 1874 (Div. Ct.), rev'g (2008), 89 O.R. (3d) 252, [2008] O.J. No. 833 (S.C.J.), the Court of Appeal affirmed the certification of a class action by the Divisional Court, which had reversed the motion judge's decision denying certification. The plaintiff alleged that the franchisor charged its franchisees excessive prices for the purchase of food and other supplies. Claims were made for breach of the price maintenance provisions of the *Competition Act*, R.S.C. 1985, c. C-34, for conspiracy to fix prices and for breach of contract. The troublesome issue before the motion judge was commonality in relation to the proof of damages, which he found impacted all the other important common issues. The majority in the Divisional Court found that the motion judge did not fully analyze the other common issues and concluded that there were sufficient common issues to certify the proceeding. The Court of Appeal agreed. The claim under s. 61 of the *Competition Act* could be determined as a common issue because it would focus on the conduct of the franchisor, even though proof of loss or damage would be required to complete the claim, under s. 36(1). The claim of each class member would be advanced by a resolution of the issue, which would avoid duplication of legal analysis. For the same reason, the analysis of the conspiracy common issue would focus on the conduct of the franchisor, even in the absence of proof of loss and would avoid duplication of fact-finding and legal analysis. Finally, on the

breach of contract claim, where it was argued that the claims were highly individualistic, the Court of Appeal agreed with the Divisional Court's conclusion that the meaning of the contract terms, the existence of a duty of fairness, and the breach of a particular contract term were all common issues that would advance the litigation. Both courts concluded that the resolution of the common issues would significantly advance the litigation even if the damages could not be dealt with on a class-wide basis.

[53] In *578115 Ontario Inc. (cob McKee's Carpet Zone) v. Sears Canada Inc.*, 2010 ONSC 4571, [2010] O.J. No. 3921, I certified a class action brought on behalf of 73 Sears franchisees alleging a failure to pass on rebates provided by suppliers. The plaintiff claimed breach of contract and breach of s. 3 of the *A.W.A.* The defendant admitted that there were proper causes of action and that some common issues were appropriate for certification, if fairly and neutrally worded. It argued, however, that many of the common issues were dependent on findings of fact that would have to be made with respect to each class member: see *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), 17 C.P.C. (5th) 103, [2001] O.J. No. 4952 (Div. Ct.), aff'd [2003] O.J. No. 1160 and 1161 (C.A.); *Fehringer v. Sun Media Corp.* (2002), 27 C.P.C. (5th) 155, [2002] O.J. No. 4110 (S.C.J.), aff'd (2003), 39 C.P.C. (5th) 151, [2003] O.J. No. 3918 (Div. Ct.). I concluded, referring to *Rosedale Motors*, above, that the existence of the individual issues did not detract from the capacity of the common issues to materially advance the action.

[54] In the more recent case of *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 287, released on January 14, 2011, I certified an action in which it was claimed that the franchisor failed to share volume rebates with its franchisees. It was acknowledged that the

plaintiff had properly pleaded causes of action for breach of contract, breach of s. 3 of the *A.W.A.* and unjust enrichment. I found that the pleadings and the common facts gave rise to common legal issues pertaining to the interpretation of the franchise agreement and the duties of the franchisor under contract, statute and common law.

[55] As these cases indicate, claims by franchisees under the *A.W.A.* have indeed proven to be a fruitful basis for class action litigation, particularly in this province. In the recent decision of the Court of Appeal in *Quizno's Canada Restaurant Corporation v. 2039724 Ontario Ltd.*, above, Armstrong J.A., giving the judgment of the Court, commented on the particular suitability of a class action to franchise disputes, at para. 62:

> I am also of the view that a class proceeding in this case will satisfy at least two of the objectives of the *Class Proceedings Act* of judicial economy and access to justice. It seems to me that this case involving a dispute between a franchisor and several hundred franchisees is exactly the kind of case for a class proceeding.

[56] Armstrong J.A. made these comments in the context of the preferable procedure analysis, having agreed with the majority in the Divisional Court that there were common issues capable of moving that action forward.

[57] A typical franchise relationship involves a common contract, a common "system" and common treatment of franchisees by the franchisor. These attributes may give rise to common issues that can be decided without reference to the individual circumstances of the franchisee, thereby making the proceeding particularly suitable as a class action. The court must nevertheless ask whether there are indeed issues common to the claims of all class members and

whether the resolution of those issues will sufficiently advance the action and avoid duplication of fact-finding and legal analysis, even though individual issues remain to be determined.

[58] As the foregoing cases illustrate, the resolution of the common issues need not be determinative of the franchisor's liability to every class member or of whether a particular franchisee has actually sustained damages. While the court on a certification motion has a duty to ensure that the resulting class proceeding will not collapse under its own weight, the *C.P.A.* contemplates that individual issues may remain after the determination of the common issues and gives the court considerable flexibility in determining the expeditious and least expensive means of resolving those issues.

[59] In making the preceding observations, I do not intend to suggest that every franchise case will be suitable for certification. I simply note that there are aspects of franchise claims that may promote the goals of both the *A.W.A.* and the *C.P.A.* In the section that follows, I shall consider whether this proceeding meets the test for certification under the *C.P.A.*

Application of the Test for Certification

[60] As I noted earlier, there is a five-part test for the certification of an action as a class proceeding under the *C.P.A.* The requirements are linked: "[t]here must be a cause of action, shared by an identifiable class, from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification of behaviour of wrongdoers": see *Sauer v. Canada (A.G.)*, [2008] O.J. No. 3419, 169 A.C.W.S. (3d) 27 at para. 14 (S.C.J). I will now review the elements of this test as they apply to this action.

(a) *The Pleadings Must Disclose a Cause of Action*

[61] The principles applicable to this aspect of the test are:

- no evidence is admissible for the purposes of determining the section 5(1)(a) criterion;
- all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proved and thus assumed to be true;
- 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;
- matters of law which are not fully settled by the jurisprudence must be permitted to proceed; and,
- 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.

[62] The test is the same as is applied in a motion to strike a pleading under rule 21.01(1)(b) on the ground that it discloses no reasonable cause of action: "assuming that the facts as stated in the Statement of Claim can be proved, is it 'plain and obvious' that the plaintiff's Statement of Claim discloses no reasonable case of action?": see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 at para. 33. This test was summarized by Cameron J. in *Balanyk v. University of Toronto* (1999), 1 C.P.R. (4th) 300, [1999] O.J. No. 2162 at para. 25 (S.C.J.) as follows:

> The test to be applied is whether, assuming the facts pleaded are true, it is plain and obvious that the plaintiff's statement of claim discloses no reasonable cause of action. Only if the action is certain to fail because the pleading contains a radical defect should the relevant portions be struck out. If the pleading has some chance of success, it should remain. An arguable point of law or a novel cause of action should be left to the trial judge or a motion for judgment based on the point after exchange of pleadings. The motion for judgment may be under Rule 21.01(a) on the basis of some

> question of law or under Rule 20 where a factual context is required for its resolution: see *Hunt v. Carey Canada*, [1990] 2 S.C.R. 959; *Prete v. Ontario* (1993), 16 O.R. (3d) 161 (C.A); *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.); *Abramovic v. Canadian Pacific Ltd.* (1991), 6 O.R. (3d) 1 (C.A.).

(i) The Pleading Against GMCL

[63] In this case, the claims made by Trillium against GMCL are entirely under the *A.W.A.* or comparable legislation in other provinces. There are three claims, as noted above. First, a claim for breach of the duty of fair dealing in s. 3; second, a claim for breach of the right of association in s. 4; and third, a claim for breach of the franchisor's obligation of disclosure in s. 5.

[64] GMCL acknowledges that the plaintiff has properly pleaded a cause of action for breach of the duty of fair dealing in s. 3 of the *A.W.A.* A claim under s. 3 was certified in *Landsbridge Auto Corp. v. Midas Canada Inc.*, above. In *Salah v. Timothy's Coffees of the World Inc.*, above, Chief Justice Winkler observed that the focus of the cause of action under s. 3 is the conduct of the breaching party.

[65] GMCL also acknowledges that there is a properly pleaded claim for breach of the s. 4 right of association.

[66] The contentious issue is whether there is a properly pleaded cause of action under s. 5 of the *A.W.A.* based on GMCL's failure to deliver a disclosure document at least 14 days before the execution of the W.D.A. by each class member. The parties agree that there is no authority directly on point. The issue is largely a definitional battle, with each party supporting its position by reference to the purpose of the legislation. I shall summarize the opposing arguments.

[67] Trillium notes that the obligation under s. 5 of the *A.W.A.* is to provide a disclosure document to a "prospective franchisee", defined in s. 1(1), in part, as a person who the franchisor "invites to enter into a franchise agreement." A "franchise agreement" is defined as "any agreement that relates to a franchise between a franchisor … and a franchisee." A "franchisor" is a person who grants or offers a franchise and a franchisee is a "person to whom a franchise is granted." A "franchise" is a right to engage in a business that, among other things, requires the franchisee to make a payment or continuing payments to the franchisor in the course of operating the business or as a condition of acquiring the franchise or commencing operations. Trillium argues that the W.D.A. was an agreement that "relates" to the franchise between GMCL and its franchisees, like Trillium. It says that GMCL "invited" the 240 dealers to "enter into" the W.D.A. Trillium notes that the purpose of the *A.W.A.* is to protect franchisees and says that the term "franchise agreement" should be interpreted generously so as to protect franchisees by requiring full disclosure in the event of amendments of the underlying agreement.

[68] GMCL focuses on the definition of "prospective franchisee". The full definition under s. 1(1) of the *A.W.A.* is:

> "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.

[69] GMCL says that a "prospective franchisee" must mean someone who is not already a franchisee. GMCL says that by defining a "franchisee" as someone to whom a franchise is granted, and a "franchisor" as a person who "grants or offers to grant" a franchise, the statute is clearly focusing on persons who may become franchisees, not persons who already are

franchisees. GMCL notes that this interpretation accords with the oft-stated purpose of the *A.WA.*, which is to allow prospective franchisees to make informed investment decisions *before* they enter into a franchise relationship: see Ontario Ministry of Consumer and Commercial Relations, *Ontario Franchise Disclosure Legislation* (Toronto: June 1998); *2189205 Ontario Inc. v. Springdale Pizza Depot Ltd.*, 2010 ONSC 3695, [2010] O.J. No. 3071 at para. 9; *MBCO Summerhill Inc. v. MBCO Associates Ontario Inc.*, 2010 ONSC 5432, [2010] O.J. No. 4201 at para. 16; *4287975 Canada Inc. v. Imvescor Restaurants Inc.* (2008), 91 O.R. (3d) 705, [2008] O.J. No. 3197 at para. 14 (S.C.J.), aff'd 2009 ONCA 308, 98 O.R. (3d) 187, leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 244; *1490664 Ontario Ltd. v. Dig this Garden Retailers Ltd.* (2005), 256 D.L.R. (4th) 451, [2005] O.J. No. 3040 at para. 16 (C.A.); *MDG Kingston Inc. v. MDG Computers Canada Inc.*, above, at para. 1.

[70] GMCL also says that the entire scheme of the *A.W.A.*, including its regulations, indicates that the disclosure obligation relates to persons who are not yet franchisees. For example, a material fact is defined in s. 1(1) of the *A.W.A.* as including information that would reasonably be expected to have a significant effect on "the price of the franchise to be granted or the decision to acquire the franchise" (emphasis added). This can only refer to someone who has not yet become a franchisee. Ontario Regulation 581/00, which prescribes the content of the disclosure document, makes reference to information that must be disclosed in relation to establishing the franchise or operating the franchise, which would have no application to a wind-down agreement. GMCL says that because the disclosure obligation is premised on the "grant" of a franchise, it cannot possibly apply to an agreement that does not grant a franchise.

[71] GMCL notes that the *A.W.A.* must be interpreted in manner that is commercially reasonable and that balances the rights of both franchisor and franchisee: see *4287975 Canada Inc. v. Imvescor Restaurants Inc.* (C.A.), above, at para. 40; *779975 Ontario Limited v. Mmmuffins Canada Corporation*, [2009] O.J. No. 2357 at para. 32 (S.C.J.). It argues that it would not be commercially reasonable to adopt an interpretation that leaves the franchisor in doubt as to what kind of amendments trigger the disclosure obligation and what must be disclosed in the case of an amendment.

[72] GMCL says that the plaintiff's interpretation of the statute is commercially unreasonable because it would force a franchisor to deliver a disclosure document every time it amended an existing franchise agreement. While the *A.W.A.* requires a disclosure document where there is a renewal or extension of a franchise agreement, unless there has been no material change since the franchise agreement or the last renewal or extension, it makes no provision for amendment of the agreement, although it could easily have done so.

[73] While an important purpose – arguably the dominant purpose – of the *A.W.A.* was to ensure full pre-contractual disclosure to would-be franchisees, it clearly was not the only purpose. The leveling of the playing field by imposing a reciprocal duty of fair dealing and a right of free association of franchisees was an important ancillary purpose. I cannot say that it is plain, obvious and beyond doubt that the plaintiff's interpretation of the franchise agreement is doomed to fail. Nor can I say that the policy of the statute runs contrary to imposing an obligation of disclosure when the franchisor proposes to make an important and unilateral amendment to the franchise agreement. One could certainly argue that an amendment that involves the franchisee divesting itself of its investment, and surrendering important rights under

its franchise agreement is every bit as significant as its initial decision to invest in the first instance. To put this point in context, consider that Trillium and the other 239 franchisees who had been offered the WDA were essentially being told by GMCL, "if this offer is not accepted by every last one of you, there is a strong possibility that we will seek protection from our creditors and you may get nothing." It does not strike me as unreasonable, or inconsistent with the statutory purpose, to suggest that GMCL had an obligation to make full and fair disclosure of all material facts known to it that might reasonably affect the franchisees' decision.

[74] The fact that there is no jurisprudence on the issue does not establish that the plaintiff's claim cannot be maintained – on the contrary, it is a good reason to exercise restraint in such circumstances. The issue is a novel one. It involves a relatively new and important piece of legislation that the Court of Appeal has said should be given a "broad and generous interpretation": see *Salah v. Timothy's Coffees of the World Inc.*, above, at para. 26. I cannot say that the plaintiff's interpretation is plainly wrong or that the claim under s. 5 of the *A.W.A.* has no chance of success.

[75] There is another good reason for restraint. The parties do not agree on the nature of the W.D.A. itself. On the one hand, they both describe it as an amendment to the franchise agreement. On the other hand, GMCL has described it as a "settlement agreement" (i.e., a settlement of the franchisee's rights under its dealership agreement), but GMCL also describes it, in its fall-back argument, as a franchise agreement. Reading the W.D.A. itself, it could be described as a free-standing independent agreement, an amendment of the franchise agreement, a supplemental agreement, a settlement and release agreement, or some combination of all four.

The application of the *A.W.A.* to this agreement should be considered on the basis of a full evidentiary foundation and not in the context of this procedural motion.

[76] GMCL's fall-back position is that, if the W.D.A. is a "franchise agreement" within the meaning of the statute, it falls within the exemption contained in s. 5(7)(g)(ii) of the *A.W.A.*, that is, the W.D.A. was not valid for longer than one year and did not involve the payment of a non-refundable fee.

[77] The plaintiff answers that the exemption applies only to "the grant of a franchise" and the W.D.A. was not the grant of a franchise. As I have noted, there is a dispute as to the nature of the W.D.A. and one could certainly make the case that it was not the grant of a franchise and was instead either the termination of the franchise or an amendment of the grant of a franchise. The plaintiff also submits that this exemption does not apply because the W.D.A., by its own terms, could extend beyond the stated termination date of December 31, 2009 and up to October 31, 2010.

[78] Again, I cannot say that it is plain, obvious and beyond doubt that the W.D.A. falls within s. 5(7)(g)(ii). The scope of that exemption is a novel issue and it is preferable that the issue be addressed in the context of full evidence and argument. I conclude, therefore, that the plaintiff has adequately pleaded a cause of action against GMCL under s. 5 of the *A.W.A.*

(ii) <u>The Pleading Against Cassels</u>

[79] The plaintiff pleads causes of action against Cassels for breach of contract, breach of fiduciary duty, and negligence. In connection with the claims for breach of contract and breach

of fiduciary duty, the plaintiff pleads that Cassels had a solicitor-client relationship with the class, that it had an undisclosed conflict of interest which caused it to breach its duty of fidelity and its duty to act in the client's best interests, and that it failed to properly advise the affected dealers in their response to the W.D.A. It is alleged that Cassels failed to advise the dealers of their rights under the *A.W.A.*, including their right to a disclosure document, their right to a reasonable time to review it, and their right and opportunity to associate for the purpose of negotiating a better deal. In the negligence claim, Trillium claims that independent of any retainer, Cassels owed a duty of care to the class. The pleading is that in the "unique circumstances" of Cassels' involvement, the actions or inaction of Cassels left the dealers with no alternative but to take advice from their own personal lawyers, without the benefit of any collective action or negotiation.

[80] I will examine each of these causes of action.

A. Breach of Contract

[81] Cassels says that Trillium has failed to plead particulars of the constituent elements of a cause of action for breach of contract. These are, specifically, the nature of the contract, the parties to the contract, the facts supporting privity of contract, the relevant terms of the contract, what terms were breached, how they were breached and the damages flowing from the breach: *McCarthy Corp. PLC v. KPMG LLP*, [2007] O.J. No. 32 at para. 26 (S.C.J.). Cassels says that the pleading is inconsistent with documents that are incorporated by reference into it, which make it clear that Cassels was only being retained to provide advice in the event of GMCL's bankruptcy. It says that the pleading fails to properly identify which dealers were parties to the

contract – were they all GMCL dealers, those who received a W.D.A., those who contributed to the CADA legal fund, or those who participated in the conference call? It says that the plaintiff has failed to identify whether the contract was written or oral, how the express or implied terms arise, and how privity of contract is established.

[82] It seems to me that Cassels' objections are met by the principles set forth in para. 64, above. In particular, allegations of fact must be accepted as true and the pleading must be read generously to account for the fact that the proceeding is at an early stage and the plaintiff may not have full access to information or documents, such as information or documents from CADA, concerning the precise nature and scope of Cassels' retainer.

[83] Cassels argues that the CADA letter of May 4, 2009 indicates that Cassels' retainer was limited to representing the dealers in a bankruptcy. A generous reading of the pleading, however, would consider other allegations of fact, including the allegation that Cassels drafted the memorandum of May 22, 2009 and participated in the conference call of May 24, 2009. Read generously, these are capable of being interpreted as allegations that Cassels was performing services that are indicative of a broader retainer on behalf of all GMCL dealers, including all class members.

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

that the damages claimed are incapable of proof: "[r]ecovery for lost chances based on lawyers' negligence either in advising clients, or in conducting litigation, is well established in the common law": see *Folland v. Reardon* (2005), 74 O.R. (3d) 688, [2005] O.J. No. 216 at para. 71 (C.A.).

[85] For these reasons, I am satisfied that the plaintiff has pleaded a proper cause of action against Cassels for breach of contract based on a solicitor-client relationship.

B. Breach of Fiduciary Duty

[86] My conclusion on the breach of contract claim also supports the plaintiff's pleading that Cassels breached fiduciary duties that it owed to the class. Both parties rely on the decision of the Supreme Court of Canada in *Galambos v. Perez*, [2009] 3 S.C.R. 247, [2009] S.C.J. No. 48. In that case, the Supreme Court noted that the lawyer-client relationship is a *per se* fiduciary relationship – that is, a relationship that because of its inherent purposes or presumed factual or legal incidents is considered to give rise to fiduciary obligations. The Supreme Court noted, however, that not all of the duties that a lawyer owes to a client are fiduciary in nature. The lawyer may breach some duties to the client without necessarily breaching a fiduciary duty. Cromwell J., giving the judgment of the Supreme Court, noted at para. 37:

> A claim for breach of fiduciary duty may only be founded on breaches of the specific obligations imposed because the relationship is one characterized as fiduciary: *Lac Minerals*, at p. 647. This point is important here because not all lawyers' duties towards their clients are fiduciary in nature. Sopinka and McLachlin JJ. (as the latter then was) underlined this in dissent (but not on this point) in *Hodgkinson*, at pp. 463-64, noting that while the solicitor-client relationship has fiduciary aspects, many of the tasks undertaken in the course of the solicitor-client relationship do not attract a fiduciary obligation. Binnie J. made the same point in *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, at para. 34: "Not every breach of the contract of retainer is a breach of a fiduciary duty." The point was also put nicely by R. M. Jackson and J. L. Powell, *Jackson &*

> *Powell on Professional Liability* (6th ed. 2007), at para. 2-130, when they said that any breach of any duty by a fiduciary is not necessarily a breach of fiduciary duty.

[87] The statement of claim contains allegations that Cassels owed a duty of loyalty and faithful and undivided representation to class members. These are fiduciary duties: see *Strother v. 3464920 Canada Inc.*, [2007] 2 S.C.R. 177, [2007] S.C.J. No. 24 at para. 35. There are allegations that Cassels had a conflict of interest that it did not disclose to class members and that it acted contrary to the interests of class members by simultaneously acting for Canada as well as for the ongoing GM dealers who were not being terminated. These are allegations of breaches of the fiduciary obligation of undivided loyalty that is at the heart of the lawyer-client relationship. There is a properly pleaded cause of action for breach of fiduciary duty.

C. Negligence

[88] It is well established that a lawyer may have a liability to the client in both contract and negligence: *Folland v. Reardon*, above; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, [1986] S.C.J. No. 52.

[89] Trillium pleads, however, that Cassels owed a duty of care to the class members apart from its contractual retainer due to the "unique circumstances" of the situation. This includes the exigent circumstances at the time of the May 24, 2009 conference call when the plaintiff says that dealers were between a rock and a hard place with only Cassels on hand to assist them.

[90] Cassels attacks this pleading on a number of grounds. It notes that a pleading of negligence must contain material facts establishing: (a) that the defendant owed a duty of care to the plaintiff; (b) that the defendant breached that duty by engaging in conduct below the standard

of care; and (c) that the plaintiff suffered damages as a result of the breach: *Balanyk v. University of Toronto*, above, at para. 19; *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333, [2007] S.C.J. No. 7 at para. 6. It also notes that where the claim is for pure economic loss, the plaintiff must satisfy the test set out in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) and revisited in *Cooper v. Hobart*, [2001] 3 S.C.R. 537, [2001] S.C.J. No 76. Finally, Cassels says that the plaintiff has failed to plead a causal link between the alleged negligence of Cassels and damages suffered by the class members. The plaintiff does not plead that it would not have signed the W.D.A. had Cassels not been negligent or that it relied on Cassels to its detriment. Since each class member retained its own lawyer for advice in connection with the W.D.A., and signed it after receiving such advice, Cassels argues that there can be no proximity to Cassels, no reliance on Cassels, no causal connection with anything that Cassels did or failed to do, and no damages.

[91] Although the statement of claim does not organize the factual allegations in a fashion that precisely anticipates Cassels' arguments, there are allegations that:

- Cassels knew, by virtue of its representation of the government of Canada, that the offer contained in the W.D.A. could have been substantially increased and that the sign-back deadline of May 26, 2009 could have been extended;
- Cassels also knew that both GMCL and Canada wanted to avoid formal insolvency proceedings and that GMCL would not have jeopardized a multi-billion dollar bailout package just because the affected dealers held out for more money;
- by participating in the May 24, 2009 conference call, Cassels knew or ought to have known that the dealers were looking to it for legal and strategic advice and that the dealers could reasonably expect that everything possible would be done by Cassels to ensure that their interests would be furthered;

- Cassels failed to take any steps on the dealers' behalf and failed to give them any advice concerning their collective rights, negotiating opportunities or strategies and simply advised them to obtain advice from their local lawyers;

- Cassels knew that the affected dealers would have no negotiating power on their own and that their local lawyers would be unable to give them the kind of advice they required in order to improve on GMCL's offer;

- Cassels had a duty, in the circumstances, to either inform the dealers of their rights, opportunities and strategies or to advise them that it had a conflict and that they should collectively obtain legal advice from another source;

- GMCL knew of Cassels' retainer by Canada and knew that its alleged conflict had not been disclosed to the dealers, that the dealers would not obtain representation from Cassels as a result of its conflict and that, as part of GMCL's "shock and awe" strategy, the dealers would be left without legal representation in their hour of greatest need;

- Cassels' actions or inactions left the dealers with no practical alternative except to sign the W.D.A.; and

- in so doing, the dealers lost the opportunity to be represented as a collective and to negotiate an improvement on GMCL's offer.

[92] In *Robinson v. Rochester Financial Limited*, 2010 ONSC 463, 89 C.P.C. (6th) 91, Lax J. referred to a "developing line of authority" permitting a party to assert a claim in negligence against a lawyer where there is no retainer and no direct solicitor and client relationship between the plaintiff and the lawyer: see also *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman* (2001), 18 B.L.R. (3d) 240, [2001] O.J. No. 4622 (S.C.J.); *Delgrosso v. Paul* (1999), 45 O.R. (3d) 604, [1999] O.J. No. 5742 (Gen. Div.); *Elms v. Laurentian Bank*, 2001 BCCA 429, [2001] B.C.J. No. 488. In this case, it is at least arguable that in participating of the drafting of the May 22, 2009 memo (as it is alleged) and in participating in the May 24, 2009 conference call, Cassels brought itself into a relationship of sufficient proximity to the terminated dealers to

owe them a duty of care – a duty, in light of its alleged conflict, to refer them to counsel who could protect and advance their collective interest. As in *Robinson v. Rochester Financial Limited* and *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, above, I need not decide whether there are policy considerations that might negative or circumscribe the scope of that duty. Those are matters best left for consideration at trial, on a full evidentiary record.

[93] I do not agree that in order to advance such a claim against Cassels the plaintiff must plead that it would not have signed the W.D.A. "but for" Cassels' negligence. As I have noted earlier, the plaintiff's claim is based on loss of a chance, a recognized claim at common law.

[94] I therefore conclude that the plaintiff has met the cause of action requirement in s. 5(1)(a) of the *C.P.A.* I now turn to the requirement that there be an identifiable class.

(b) *There Must be an Identifiable Class*

[95] The plaintiff proposes a class that consists of all corporations in Canada that signed the W.D.A. The class is therefore composed of entities that have a direct contractual relationship with GMCL. There is a rational connection between the class and the common issues relating to both GMCL and Cassels. The class is bounded and readily capable of identification. Neither GMCL nor Cassels objects to the class definition.

[96] I see no conflict between the claims of class members whose claims may be subject to the laws of other provinces. If that concern arises in the future, it can be addressed by creating a sub-class.

(c) *Common Issues*

[97] Section 5(1)(c) of the *C.P.A.* requires that the claims or defences of the parties raise common issues. Both parties accept the following principles applicable to the common issues analysis, as stated in *578115 Ontario Inc. (cob McKee's Carpet Zone) v. Sears Canada Inc.*, above, at para. 43:

> (a) the underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis;
>
> (b) 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;
>
> (c) there must be a basis in the evidence before the court to establish the existence of common issues;
>
> (d) there must be a rational relationship between the class identified by the plaintiff and the proposed common issues;
>
> (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;
>
> (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;
>
> (g) 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;
>
> (h) a common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant;
>
> (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; and
>
> (j) common issues should not be framed in overly broad terms [references omitted].

[98] I might have added to this list as item (k) the following observation of Perell J. in *Graham v. Imperial Parking Canada Corp*, 2010 ONSC 4982, [2010] O.J. No. 3898 at para. 176:

> The core of a class proceeding is the element of commonality; there must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this: *Frohlinger v. Nortel Networks Group*, [2007] O.J. No. 148 at para. 25; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (S.C.J.) at para. 21.

[99] A helpful initial approach to the common issues analysis is to examine what the claims of class members have in common, looking at the proceeding from a bird's eye view. At this altitude, I would observe that in this case, the claims of the class arise from a series of events that came to a head during the six days in May 2009. The issues arise from a franchise agreement that was common to all members of the proposed class, a W.D.A. that was common to all members of the class, and conduct of GMCL and Cassels that was substantially uniform in relation to all members of the class. I will elaborate.

[100] First, the factual nexus includes the circumstances of GMCL, its financial condition, its negotiations with the governments, the facts and information that it possessed concerning its financial position and the likelihood of satisfying the governments' concerns and its communications with class members. While GMCL unquestionably had some individual dealings with particular franchisees, its overall approach was to deal collectively with its dealers. This was done by way of communications that were common to all class members. Indeed, it was part of GMCL's overall strategy to treat the terminated dealers in exactly the same way. These circumstances give rise to common issues of fact.

[101] Second, the claims arise from an offer that was made by GMCL in exactly the same form to all class members on the express condition that it was not negotiable and that it had to be accepted by all, without individual variations. The package offered to the terminated dealers was developed according to a common set of principles. GMCL's dealings and communications with its franchisees concerning the W.D.A. were uniform and formulaic.

[102] Third, the claims of all class members are based on an agreement, the W.D.A., which is a standard form, common to all class members, with irrelevant variations as to the amount of the wind-down and sign removal payments. The common agreement gives rise to common questions of interpretation, which will be discussed below, under the analysis of the proposed common issues.

[103] Fourth, the claims of all class members are based on a common legal regime: the *A.W.A.* and comparable legislation in other provinces. The application of this legislation to the common factual foundation raises significant legal issues that are common to the class. Again, I will discuss these issues below.

[104] The claim against Cassels arises from actions of Cassels that were directed to the class as a collective and not to individual dealers. It gives rise to factual issues concerning the retainer of Cassels, the alleged conflict of interest of Cassels and the facts underpinning what Cassels is alleged to have done, or failed to have done in relation to the class. These factual issues in turn give rise to common legal issues concerning the nature of Cassels' relationship, if any, to the class and its obligations, if any, to the class.

[105] At first impression, therefore, from the bird's perspective, it appears that there is much to be found in common in the claims of the class. It is necessary, however, to make a closer inspection of the proposed issues to see whether the commonality is illusory and really a collection of individual inquiries. I will therefore examine the common issues proposed by the plaintiff to see whether they can, in fact, be determined on a common basis. In the subsequent section of these reasons, dealing with the preferable procedure analysis, I will examine whether a class action would be a fair, efficient and manageable way of resolving the claims of the class.

[106] I will consider the common issues first in relation to the claim against GMCL, then in relation to the claim against Cassels.

Common Issues Relating to GMCL

[107] I will discuss each of the proposed common issues in relation to GMCL.

> (a) Is GMCL a franchisor within the meaning of the Franchise Acts of [Ontario, Alberta and Prince Edward Island] or any of them?

[108] This is an appropriate common issue. It is a question of mixed fact and law that focuses on the conduct of GMCL and the application of a statutory standard to that conduct. GMCL admits that it is a "franchisor" for the purposes of the *A.W.A.*, the Alberta *Franchises Act* and the Prince Edward Island *Franchises Act.* Without certification, this admission is not binding on GMCL in relation to anyone except the plaintiff: see *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172, [1998] O.J. No. 4913 at paras. 13 and 14 (Gen. Div.). GMCL acknowledges that this is an appropriate common issue and would consent to certification of this action only for the purpose of the determination of that issue

> (b) Are all class members entitled to the benefit of the statutory duty of fair dealing under s. 3 of the *Wishart Act* and the right of association under s. 4 of the *Wishart Act* (or similar provisions under such franchise legislation otherwise governing any such class member) by virtue of the choice of law provisions in the standard Dealer Agreement and the WDA?[4]

[109] GMCL acknowledges that this is an appropriate common issue, but notes that the answer may vary depending on the location of the dealership. The Alberta *Franchises Act* and the P.E.I. *Franchises Act* contain provisions that void terms of a franchise agreement that restrict the application of the law of those provinces or restrict jurisdiction or venue to forums outside of those provinces.[5] In *578115 Ontario Inc. (cob McKee's Carpet Zone) v. Sears Canada Inc.*, above, I observed at para. 28 that such provisions would not prevent a class action being brought in Ontario on behalf of a class that includes franchisees in other provinces, but could require the court to apply the law of the province in which the franchise was located. The franchise legislation in Alberta and P.E.I. contain duties of fair dealing and a right to associate that are similar, but not identical, to those provided by ss. 3 and 4 of the *A.W.A.* It is possible, therefore, that the court could ultimately reach different conclusions on these issues depending on nuances in the wording of the applicable legislation. The question as worded addresses this possibility and is appropriate.

> (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)?

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[4] I have modified this question very slightly to make it more grammatically correct by moving the words in brackets from the end of the question to its position after "*Wishart Act*".

[5] PEI *Franchises Act*, s. 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." Alberta *Franchises Act*, s. 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." See also Alberta *Franchises Act*, s. 16.

[110] The breach of the duty of fair dealing can be an appropriate common issue. In *Landsbridge Auto Corp. v. Midas Canada Inc.*, to which reference was made above, a common issue was certified asking whether the franchisor had breached its duty of fair dealing under s. 3 of the *A.W.A.* and other provincial franchise statutes. A common issue was also certified in *578115 Ontario Inc. (cob McKee's Carpet Zone) v. Sears Canada Inc.*, above, at paras. 46 – 49. As Winkler J. noted in *Salah v. Timothy's Coffees of the World Inc.*, above, s. 3 of the *A.W.A.* focuses on the conduct of the breaching party in the performance of the franchise agreement. I accept the submission of GMCL that there may be some breaches of the duty of fair dealing that require an examination of the conduct of the non-breaching party and that there may be cases where the issue cannot be resolved on a common basis. An open-ended question such as the one proposed by the plaintiff runs the risk of offending the principle that common issues should not be stated in overly broad terms. The issue can be addressed, in this case, by adopting GMCL's suggestion that the common issue should be made more precise by identifying the specific allegations of breach made by the plaintiff:

> If GMCL owed a duty of fair dealing to the Class Members, did GMCL breach this duty by:
>
> i. delivering the Wind Down Agreements to the Class Members on or after May 20, 2009 and requiring acceptance of the Wind Down Agreements by 6 p.m. EST on May 26, 2009;
>
> ii. not disclosing to the Class Members the identities of dealers offered a Wind Down Agreement;
>
> iii. stating in the Notice of Non-Renewal and Wind Down Agreement that GMCL "will not be renewing the Dealer Sales and Service Agreement" between GMCL and each of the Class Members at the expiry of its current term on October 31, 2010;
>
> iv. stating in the Wind Down Agreement that "it has always been and continues to be [GMCL's] position that the Acts are not applicable to the

> Dealer Agreement or the relations between GM and Dealer and/or Dealer Operator"; and
>
> v. stating in the Notice of Non-Renewal, the Wind Down Agreement and the May 19, 2009 HIDL broadcasts that GMCL's offer of the Wind Down Agreement was conditional upon all of the Non-Retained Dealers accepting the offer on or before May 26, 2009; or
>
> vi. breaching any terms of the Wind Down Agreement?

[111] These common issues are directed to specific questions concerning the conduct of GMCL that can be answered without reference to the actions of any particular class member. They are similar to the common issues concerning price-fixing, conspiracy and breach of contract that were certified in *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, above.

[112] The plaintiff proposes the following additional common issue:

> What information, if any, did GMCL withhold from its dealers relating to its restructuring at the time of soliciting the W.D.A.s and did such withholding, if any, constitute a breach by GMCL of its statutory duties to the dealers.

[113] Another way of expressing this would be:

> Did GMCL have a duty to disclose material facts concerning its restructuring to franchisees at the time of soliciting the W.D.A.? If so, did it fail to disclose material facts and did it breach such duties?

[114] This question is based on the evidence that GMCL told the dealers who received the W.D.A. that, if they failed to sign the agreement, there was a "strong possibility" that GMCL would seek protection from its creditors. As I observed earlier in these reasons, in these circumstances, it is reasonable to ask whether the duty of fair dealing required GMCL to make full disclosure of its financial condition and restructuring plans, so that franchisees could make an informed decision concerning the risks associated with accepting or rejecting the W.D.A. This question, as amended, is an appropriate common issue.

(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)?

[115] Like the previous question, this question focuses entirely on the conduct of GMCL. The right of association is a collective right and must be inherently capable of collective assertion and enforcement. I accept the submission of GMCL that the common issue should identify the conduct of GMCL that is alleged to be a breach of the franchisees' right of association.

[116] I therefore approve GMCL's proposed amendment to this issue as follows:

> If all Class Members had a statutory right to associate, did GMCL interfere with, prohibit, restrict, penalize, attempt to penalize or threaten to penalize the Class Members' exercise of this right by:
>
> i. delivering the Wind Down Agreements to the Class Members on or after May 20, 2009 and requiring acceptance of the Wind Down Agreements by 6 p.m. EST on May 26, 2009;
>
> ii. not disclosing to the Class Members the identities of dealers offered a Wind Down Agreement;
>
> iii. stating in the Notice of Non-Renewal and Wind Down Agreement that GMCL "will not be renewing the Dealer Sales and Service Agreement" between GMCL and each of the Class Members at the expiry of its current term on October 31, 2010;
>
> iv. stating in the Wind Down Agreement that "it has always been and continues to be [GMCL's] position that the Acts are not applicable to the Dealer Agreement or the relations between GM and Dealer and/or Dealer Operator"; and
>
> v. stating in the Notice of Non-Renewal, the Wind Down Agreement and the May 19, 2009 HIDL broadcasts that GMCL's offer of the Wind Down Agreement was conditional upon all of the Non-Retained Dealers accepting the offer on or before May 26, 2009; or
>
> vi. any terms of the Wind Down Agreement?

(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 *C.P.A.* with respect to the calculation of damages under such provisions.

[117] The damages referred to in this common issue are damages for breach of the duty of fair dealing (s. 3(2)) and for breach of the right of association (s. 4(5)).

[118] It has been noted by the Court of Appeal in *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321 at para. 59 (referring to the observations of Cullity J. in *Healey v. Lakeridge Health Corp.* (2006), 38 C.P.C. (6th) 145, [2006] O.J. No. 4277 at para. 102 (S.C.J.)), that it is not necessary to certify a common issue as to aggregate assessment of damages as the trial judge has authority to do so under s. 24 of the *C.P.A.* if the statutory preconditions have been met. Alternatively, where the court determines that the participation of individual class members is required to determine individual damages issues, the court has broad jurisdiction under s. 25 to fashion fair and efficient procedures to do so.

[119] Lax J. expanded on this in *Glover v. Toronto (City)* (2009), 70 C.P.C. (6th) 303, [2009] O.J. No. 1523, at paras. 62-63 (S.C.J.):

> Strictly speaking, it is not necessary to state this as a common issue as this determination is made by the common issues trial judge. It has become the practice to do this if the court is satisfied that there is a reasonable likelihood that the preconditions in s. 24(1) of the *Act* can be satisfied: *Vezina v. Loblaw Companies Ltd.*, [2005] O.J. No. 1974, 17 C.P.C. (6th) 307 (S.C.J.) at para. 25; *Serhan v. Johnson & Johnson et al.* (2006), 85 O.R. (3d) 665 (Div. Ct.) at para. 139; *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781,

> 87 O.R. (3d) 401 at para. 45, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 15.
>
> These conditions are (a) monetary relief is claimed on behalf of some or all class members; (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[120] In my view, this is not a case in which the certification of the action hinges on the availability of an aggregate assessment. If damages have to be dealt with individually, the task will not be insurmountable. On the other hand, depending on the findings of the common issues judge, there may be a basis for an aggregate assessment of damages against either GMCL or Cassels. I therefore leave the issue of aggregate assessment to the common issues judge.

> (f) Are the waiver and release contained in the W.D.A. 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)?

[121] Section 5 of the W.D.A. contains a lengthy provision entitled "Release; Covenant not to Sue, Indemnity". It includes a release of all claims that franchisees may have under the *A.W.A.*, the Alberta and P.E.I. *Franchise Acts*, or similar franchise legislation.

[122] Section 4 of the *A.W.A.* deals with the franchisee's right of association. Section 4(4) provides:

> 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.

[123] Section 11 of the *A.W.A.* provides:

> 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.

[124] In light of these provisions, it is reasonable to ask whether the release contained in the W.D.A. violates the *A.W.A.* This question addresses the legal consequences of a term of the W.D.A. that is common to all class members. The question can be determined without reference to the conduct of any class member. The plaintiff accepts GMCL's suggestion that the question should refer to the specific provision of the W.D.A. (s. 5) containing the release. I approve the common issue with this amendment.

> (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?

[125] The issue of whether the W.D.A. was a "franchise agreement", triggering a duty to deliver a disclosure document under the relevant provincial legislation, is a question of mixed fact and law that can be determined on facts that are common to all class members and is based on statutory provisions that are also common. A negative answer to this question will bind all class members and will end the inquiry on this issue. An affirmative answer will give rise to the next issue.

> (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?

[126] This is an important question that does not require an examination of the conduct of individual franchisees and an affirmative answer would substantially advance the claims of all class members. GMCL points out that there are differences in the franchise legislation in Ontario

and P.E.I on the one hand and in Alberta on the other. Section 6(2) of the *A.W.A.* and of the P.E.I. *Franchises Act* provide that a franchisee may rescind the franchise agreement without penalty, no later than two years after entering into the franchise agreement if the franchisor never provided a disclosure document. By contrast, s. 13 of the Alberta *Franchises Act* provides a right of rescission, which must be exercised no later than 60 days after receiving the disclosure document, or no later than two years after the franchise is granted. This raises a question, in Alberta, as to whether the "grant of the franchise" refers to the date of the W.D.A. or the date of the underlying franchise agreement. This issue can be addressed simply by breaking it down into sub-issues applicable to the three provinces.

> (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?

[127] The issue of entitlement to compensation, as opposed to the quantum of compensation, can be decided on common facts and is an appropriate common issue.

> (j) Directions pursuant to s. 25(2) of the *C.P.A.* 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 *C.P.A.*;
>
> (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 *C.P.A.* 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 *C.P.A.*

[128] The common issues judge has jurisdiction to give directions under s. 25(2) of the *C.P.A.* for the determination of individual issues and it is not necessary to identify this as a common issue. For the reasons set out above, I do not propose to certify common issues relating to the aggregate assessment of damages, although I acknowledge that the common issues judge may find it appropriate to do so.

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

[129] A number of cases have approved a common issue as to pre-judgment interest: *Bondy v. Toshiba of Canada Ltd.* (2007), 39 C.P.C. (6th) 339, [2007] O.J. No. 784 at paras. 54-56 (S.C.J.); *Barbour v. University of British Columbia*, 2007 BCSC 800, [2007] B.C.J. No. 1216; *Griffin v. Dell Canada Inc.* (2009), 72 C.P.C. (6th) 158, [2009] O.J. No. 418 (S.C.J.); *Robinson v. Medtronic Inc.* (2009), 80 C.P.C. (6th) 87, [2009] O.J. No. 4366 (S.C.J.); *Smith v. National Money Mart Co.* (2007), 37 C.P.C. (6th) 171, [2007] O.J. No. 46 (S.C.J.). In *Ramdath v. George Brown College of Applied Arts and Technology* (2010), 93 C.P.C. (6th) 106, [2010] O.J No. 1411 (S.C.J.), I declined to certify a pre-judgment interest common issue because I found that individual trials would likely be required to assess damages, referring to *Fischer v. IC Investment*, 2010 ONSC 296, [2010] O.J. No. 112 at para. 193. In this case, it is a possibility that the common issues judge will decide that an aggregate assessment is appropriate and I will therefore certify this common issue.

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

[130] In light of the court's discretionary jurisdiction over costs, conferred by s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, I see little point in making costs as a common issue. The court has jurisdiction under s. 11(2) of the *C.P.A.* to give a separate judgment in respect of the common issues, and this necessarily includes the jurisdiction to award costs with respect to the trial of the common issues.

Common Issues Relating to Cassels

[131] The plaintiff proposes the following common issues relating to Cassels:

> (a) Did Cassels owe contractual duties to some or all of the class members and, if so, did it breach those duties?
>
> (b) Did Cassels owe fiduciary duties as lawyers to some or all of the class members and, if so, did they breach those duties?
>
> (c) Did Cassels owe duties of care to some or all of the class members and, if so, did they breach those duties?
>
> (d) 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 *C.P.A.* with respect to the calculation of such damages.

[132] In addition, the plaintiff raises common issues with respect to (q) interest and (r) the quantum and scale of costs.

[133] The identification of a contractual relationship with the class, the terms of that contract, and whether the defendant breached that contract may be appropriate common issues: *Hickey-*

*Button v. Loyalist College of Applied Arts & Technology* (2006), 267 D.L.R. (4th) 601, [2006] O.J. No. 2393 (C.A.). Similarly, whether the defendant owed a duty of care to the class, the standard of care, and whether the defendant breached the duty of care may constitute common issues: *Healey v. Lakeridge Health Corp.*, above; *Bunn v. Ribcor Holdings Inc.* (1998), 38 C.L.R. (2d) 291, [1998] O.J. No. 1790 (Gen. Div.); *Delgrosso v. Paul* (1999), 48 O.R. (3d) 605, [1999] O.J. No. 5742 (Gen. Div.), leave to appeal to Div. Ct. ref'd (1999), 46 C.P.C. (4th) 140, [1999] O.J. No. 2922 (Div. Ct.)

[134] There are some obvious factual commonalities with respect to the claim against Cassels which give rise to common issues of fact:

- Cassels was centrally retained and centrally instructed by CADA – individual class members neither retained nor instructed Cassels – the scope and content of Cassels' retainer was therefore uniform across the class and can therefore be determined as a common issue;

- Cassels dealt with and communicated with the dealers as a group, rather than individually;

- there is no evidence that Cassels had separate dealings with any class member or that it disclosed its alleged retainer by Canada to any member of the class.

[135] The determination of whether Cassels owed a contractual duty, a fiduciary duty or a duty of care to the class can be made without considering the particular circumstances of individual class members. The same is true of the question whether Cassels breached those duties. There is no evidence that Cassels had dealings with individual class members that would make the answers to these questions dependent on individual communications or circumstances.

[136] Cassels says that the diversity of circumstances of the class members means that these issues are not common because they will be answered differently for different class members. It seeks to break down the class into sub-groups:

- those who would have signed the W.D.A. in spite of being advised of their *A.W.A.* rights;
- those who would not have had the "stomach" for a fight with GMCL;
- those who made a contribution to the retainer and those who did not;
- those who participated in the conference call with Cassels and those who did not;
- the eleven dealers who delivered signed W.D.A.s to GMCL before the May 26, 2009 deadline and who presumably felt that they had sufficient time to make up their minds;
- the five dealers who accepted the W.D.A. well after the deadline and who presumably had sufficient time to consider the W.D.A.

[137] Cassels says that the plaintiff has implicitly recognized the diversity of interest of the class members by using the words "some or all [class members]" in framing this common issue.

[138] In my view, Cassels' submissions on this issue mis-characterizes the plaintiff's case. That case is that Cassels' actions or inactions deprived class members of the opportunity to collectively exercise their rights to get a better deal from GMCL. Resolution of the issues depends on legal and factual inquiries that are independent of individual class members, including the following inquiries:

- the circumstances of Cassels' retainer and the nature and scope of that retainer;
- whether Cassels disclosed its alleged conflict of interest to CADA or the class;

- whether Cassels owed duties to the class and whether it breached those duties;
- whether class members have *A.W.A.* rights in relation to the W.D.A.;
- whether the exercise of class members' *A.W.A.* rights would have resulted in any increase in the compensation they were paid.

[139] The plaintiff will say that it is irrelevant that all dealers obtained independent legal advice before signing the W.D.A. and that some would have signed the W.D.A. in any event or returned it early. The plaintiff's case is that all dealers had a chance, through Cassels, to obtain a better deal and that due to Cassels' breaches of duty they lost that chance.

[140] In my view, the answers to these questions will substantially determine whether or not Cassels has a liability to the class and they are appropriate. Even if it is determined that individual issues remain with respect to the sub-groups identified by Cassels, as discussed in the next section, the common issues judge will be able to devise means to address these issues in a fair and efficient way.

[141] In summary, for the above reasons I find that this proceeding meets the requirement of s. 5(1)(c) of the *C.P.A.* in that the claims of the class members against GMCL and Cassels raise common issues, as approved or modified above.

(d) *Preferable Procedure*

[142] Section 5(1)(d) of the *C.P.A.* requires the court to determine whether a class proceeding would be the preferable procedure for the resolution of the common issues. In *Markson v. MBNA Canada Bank*, above at paras. 69-70, leave to appeal to S.C.C. refused,

[2007] S.C.C.A. No. 346, Rosenberg J.A., giving the judgment of the Court of Appeal, summarized the approach to the preferable procedure analysis, as set out in *Hollick v. Toronto (City)*, above:

> (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
> (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.

[143] Not surprisingly, the plaintiff also relies upon the observations of Armstrong J.A., referred to earlier in these reasons, giving the judgment of the Court of Appeal in *Quizno's Canada Restaurant Corporation v. 2038724 Ontario Ltd.*, concerning the suitability of a franchise claim to class action treatment.

[144] In *Stoneleigh Motors Limited v. General Motors of Canada Limited*, above, Pepall J. observed that the trial of 19 separate actions would be contrary to the convenient administration of justice and noted that economies would be achieved in a single proceeding. She held that there were common issues of fact, arising from the termination notices and W.D.A. as well as

common legal issues, including whether GMCL was a franchisor under the *A.W.A.* and whether it was subject to duties under ss. 3 and 4 of the *A.W.A.*

[145] GMCL's position is that a class action is not the preferable procedure. First, it says that the common issues are relatively unimportant to the claims of the class, so that the efficiencies achieved by a common issues trial will be outweighed by the complexity associated with resolution of the individual issues. Second, it says that having collectively received over $123 million in wind-down payments from GMCL, the dealers have the means and the incentive to pursue individual claims if they wish to do so.

[146] Cassels makes similar submissions. It says that the individual issues in this case "overwhelm" the common issues and that the common issues involve numerous individual issues of fact and law that will require individual discoveries and trials. Cassels says that inquiries would have to be made as to the extent to which, if at all, a particular dealer relied on Cassels' advice, in light of the advice that each dealer received from its own lawyer and the dealer's own particular circumstances. Cassels says that the common issues affecting it are of low importance in comparison to to the GMCL common issues and the other individual issues.

[147] Defendants' submissions on the preferability analysis are invariably predicated on the assumption that they will lose the common issues trial. As Perell J. observed in *Smith Estate v. National Money Mart Co.* (2008), 57 C.P.C. (6th) 99, [2008] O.J. No. 2248, at para. 108 (S.C.J.), "it is sometimes lost sight of that class actions are not necessarily a bad thing for defendants." The determination of some of the *A.W.A.* common issues in favour of the defendants could well

eliminate the need for a trial of any individual issues. At the very least, it would reduce the scope of the individual issues.

[148] It also seems to me that the defendants' submissions on the preferable procedure analysis frequently assume that the court will be forced to adopt the most expensive and least expeditious method of determining the individual issues, rather than the opposite. Section 25 of the *C.P.A.* gives the court flexibility to craft a procedure for the resolution of the common issues in a way that is fair to the parties, expeditious and efficient.

[149] In this case, GMCL says that the following individual issues will remain after the common issues:

> (a) whether GMCL breached a statutory duty of fair dealing to each Accepting Dealer;
>
> (b) whether GMCL breached or interfered with a statutory right to associate in respect of each Accepting Dealer;
>
> (c) the quantum of any damages to each Accepting Dealer caused by any such breach or interference;
>
> (d) the validity of each Accepting Dealer's release under its Wind Down Agreement;
>
> (e) by the plaintiff's own admission, the quantum of any compensation to be paid to any Accepting Dealer that rescinds or cancels its Wind Down Agreement under applicable franchise legislation;
>
> (f) whether any failure of GMCL to comply with any applicable disclosure obligations caused each Accepting Dealer a loss; and
>
> (g) the amount of damages to each Accepting Dealer that allegedly suffered a loss from any failure to comply with any applicable disclosure obligations.

[150] I do not agree that issues (a) and (b), as re-phrased in accordance with GMCL's suggestion, are individual issues, since the resolution of those issues will focus on the conduct of GMCL and a breach in relation to one dealer will be a breach for all. I have already concluded that these issues can be determined in common, since they focus on the conduct of the franchisor. Similarly, issue (d) has been identified as an appropriate common issue. Issues (c), (e), (f) and (g) really amount to the same thing – the calculation of any damages to class members arising from GMCL's alleged breach of its duties under the *A.W.A.*

[151] If issues (a) and (b) are answered in favour of the class, the question will arise as to whether damages can be assessed in the aggregate. If not, individual assessments of damages may be required. Section 6 of the *C.P.A.* specifically provides that the court "shall not" refuse to certify a proceeding as a class proceeding "solely" on the ground that the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues. As I have observed, s. 25(1) of the *C.P.A.* gives the court considerable flexibility in establishing inexpensive and efficient procedures, including a reference, for the resolution of individual issues such as damages. I am prepared to assume that if the need arises to make individual assessments, the court can give directions pursuant to s. 25(2) and will be able to devise efficient and economical procedures to do so.

[152] If the trial of the common issues will genuinely advance the litigation, the presence of significant individual issues as to damages should not be a bar to certification: see *Quizno's*, above, at para. 61; and *2038724 Ontario Ltd. v. Quizno's*, (Div. Ct.) above, at paras. 141-2.

[153] Like GMCL, Cassels argues that individual issues will be necessary to resolve its liability, including:

> (a) what legal advice was received by each class member from their individual lawyers in relation to the WDA;
>
> (b) the timing of that legal advice in relation to the CADA memoranda and conference call;
>
> (c) whether the dealer relied on Cassels or could reasonably rely on Cassels when signing the WDA;
>
> (d) what they would have done differently, if anything, before May 26, 2009 if Cassels had not allegedly breached its duties;
>
> (e) whether, in each of their unique personal and professional circumstances, the dealer's decision to sign the WDA caused loss in relation to whatever alternative they can establish to the court that they would otherwise have pursued; and
>
> (f) whether there was a loss or damage reasonably related to any action or omission of Cassels.

[154] Counsel for Cassels submits that:

> The numerous individual factual and legal inquiries necessary to determine the major elements of each claim would overwhelm resolution of any potential common issue. Where resolution of common issues, in relation to the claim as a whole, will not significantly advance the action, a class action will not be the preferable procedure.

[155] Cassels' submission ignores two important points. First, it ignores the significance of three important common issues, which can be summarized as follows:

> (a) was Cassels in a solicitor and client relationship with all class members?
>
> (b) did Cassels owe contractual, fiduciary or other duties to the class and if so what was the content of those duties?
>
> (c) did Cassels breach those duties?

[156] These are weighty questions. A negative answer to the first two questions will send the plaintiffs packing insofar as Cassels is concerned. A positive answer to all will significantly advance the claims of the class against Cassels.

[157] Second, as I have observed earlier, in focusing on the decision of each individual class member to sign the W.D.A., Cassels fails to join issue with the claim as framed by the plaintiff. The plaintiff does not say to Cassels: "If you had properly represented me, I would not have signed the W.D.A." On the contrary, the plaintiff puts his case against Cassels on the following basis:

> If you had properly advised me and all your other clients, you would have told us that we had inalienable rights under the *A.W.A.* and you would have recommended that we use those rights and our bargaining power, as a potential spoiler of GMCL's bail-out, to negotiate a better deal with GMCL. By doing nothing because of your undisclosed conflict of interest, you deprived us of our only chance to negotiate a better deal and instead recommended that we speak to our individual lawyers, knowing that this would make it impossible for us to act collectively.

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

[159] There is at least a possibility that the damages of the class could be assessed in the aggregate, based on the plaintiff's theory that Cassels could have negotiated a better deal for the class. Given that GMCL took a formulaic approach to compensation of all terminated dealers, it is possible that this could be a template for the distribution of aggregate damages or that the court could develop an equitable plan of distribution. Failing that, my comments above concerning the individual assessment of damages apply equally to the plaintiff's claim against Cassels.

[160] I do not see that the issue of the individual liability of all Cassels' partners will be a significant issue in the greater scheme of things. As a practical matter it may never arise unless (a) the plaintiff succeeds against Cassels; and (b) there is insufficient insurance available to cover the judgment against the limited liability partnership. If the need arises, I expect the court could give directions so that the inquiry could be focused and efficient.

[161] Returning to the principles set out earlier in this section, a class proceeding is necessary to give class members *access to justice*. Individual proceedings are not a realistic alternative and as Pepall J. noted in *Stoneleigh Motors Limited v. General Motors of Canada Limited,* above, separate actions would not promote the administration of justice. I do not accept the proposition that class members are flush with cash. There is no specific evidence of this and the termination payments were designed in large measure to enable franchisees to discharge their liabilities (including employee claims) on the winding up of their dealerships and to provide some compensation for the loss of their investments. It is not realistic to think that an individual franchisee, who has experienced the loss of their business, is financially or psychologically equipped to engage in protracted, complicated and very expensive litigation with one of the largest corporations in North America and a major Canadian law firm.

[162] *Judicial economy* will be promoted by the aggregation of the claims of the class, avoiding multiple trials and potential duplication of fact-finding. I have concluded that the tools of the *C.P.A.* can be used to address individual trials, if required, in an efficient, cost-effective manner.

[163] The possibility that the action will promote *behaviour modification* has already been demonstrated by the fact that after several years of denial, GMCL has admitted (in this action and in *Stoneleigh Motors Limited v. General Motors of Canada Limited*) that it is subject to the *A.W.A.* The answers to the GMCL common issues in favour of the class will effect modification of GMCL's behaviour in relation to the class. The Cassels' common issues raise important issues concerning lawyers' duties to their clients, particularly in the context of group retainers.

[164] I am satisfied that the common issues are capable of resolution in a fair, efficient and manageable way. In view of the size of the class, joinder would not be a practical alternative. Individual proceedings would not be realistic. Only a class proceeding will advance the goals of the *C.P.A.*

(e) *Representative Plaintiff*

[165] Section 5(1)(e) of the *C.P.A.* requires the court to be satisfied that 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.

[166] The court must be satisfied that the proposed plaintiff will vigorously and capably prosecute the claim on behalf of the class: see *Campbell v. Flexwatt Corp.* (1997), 15 C.P.C. (4th) 1, [1997] B.C.J. No. 2477 (C.A.), leave to appeal to S.C.C. dismissed, [1998] S.C.C.A. No.

13; *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 41. The court must also be satisfied that counsel is qualified to advance the proceeding on behalf of the class.

[167] There is no criticism of Trillium on this front, and GMCL does not challenge its suitability as a representative plaintiff. I am satisfied that Trillium is informed, committed and competent to represent the class, as is its counsel.

[168] Cassels complains that Trillium's litigation plan is not workable or realistic, because it does not address the individual issues that will remain following the trial of the common issues. The litigation plan contemplates that the only individual issues will only concern damages. It says that if an aggregate assessment of damages is not possible, individual assessments may be required. Counsel for Cassels describes this as "a litigation plan that is afraid to look at itself in the mirror."

[169] I have concluded that the issues other than damages are capable of being resolved on a common basis. The need for individual assessments of damages will depend on how the common issues are answered and whether aggregate assessments are possible. It is not unreasonable to leave this for future determination. This will permit the common issues judge, with a background in the underlying facts and in light of the resolution of the common issues, and with input from the parties, to craft a fair and efficient procedure for the resolution of the individual issues. I consider the litigation plan satisfactory in the present state of affairs and it will be approved.

Cassels' Stay Motion

[170] Cassels brought a motion to stay the action, as against it, pursuant to s. 106 of the *Courts of Justice Act*, rules 5.02 and 5.05 of the *Rules*, and ss. 12 and 13 of the *C.P.A.* There is no dispute that I have jurisdiction to grant a stay where it would be just and convenient to do so. That jurisdiction should be exercised sparingly. The moving party must show that (a) continuation of the action would be unjust because it would be oppressive or vexatious to the moving party or would otherwise be an abuse of the process; and (b) the stay would not cause an injustice to the plaintiff: *Etco Financial Corp. v. Royal Bank of Canada*, [1999] O.J. No 3658 at para. 3 (S.C.J.); *Dowell v. Spencer*, [2001] O.J. No 5149 at para. 2 (S.C.J.); *Canadian Pacific Railway Co. v. Sheena M (The)*, [2000] 4 F.C. 159, [2000] F.C.J. No. 467 at para. 32 (T.D.).

[171] Where the stay relates to the plaintiff's claim against one of several defendants, the principles applicable to joinder are instructive. In the leading case of *Thames Steel Construction Ltd. v. Portman* (1980), 28 O.R. (2d) 445, [1980] O.J. No. 3588 (Div. Ct.), Griffiths J., as he then was, stated at para. 26 that on a joinder motion the court should consider:

> • whether the claims of the plaintiff arise out of the same transaction or series of transactions …;
>
> • whether or not there is a common issue of law or fact of sufficient importance to render it desirable that the claims against the proposed defendant be tried together;
>
> • whether the expense and delay that would be caused by compelling the plaintiff to bring separate actions against the proposed defendant would be greatly out of proportion to the inconvenience, expense or embarrassment which that defendant would be put if the actions were tried together; and

- on the basis of *Samuel v. Klein et al.* (1976), 14 O.R. (2d) 389, 3 C.P.C. 21, if the liability of the proposed defendant is contingent upon the plaintiff first establishing that he suffered a loss in respect of the transaction with the named defendant, then the application to join the proposed defendant may be considered premature.

[172] A motion to stay is necessarily fact dependent. The court must balance fairness to the parties with the goal set out in rule 1.04(1) of securing the "just, most expeditious and least expensive determination of every civil proceeding on its merits." Section 12 of the *C.P.A.* engages similar considerations. The court must also consider the goals of access to justice and judicial economy.

[173] Cassels submits that the action should be stayed as against it because:

- the claim against it is not intertwined with the claim against GMCL;
- there are no common issues of fact and law;
- Cassels will suffer disproportionate inconvenience and expense; and
- the trial of the action against GMCL will not assist in the determination of whether Cassels is liable to the class.

[174] Cassels says that the two claims involve "distinct transactions" and that there is no factual or legal nexus between them, that trying them together will cause unnecessary expense, complication and delay and that the claim against Cassels is premature because "[I]f the court finds that GMC did not violate the *Wishart Act*, and that the proposed class members received independent legal advice, they cannot sustain a claim against Cassels." Cassels says that requiring it to participate in the action at this stage would be oppressive and onerous and staying the action would promote judicial economy. The conclusion of Cassels' submission is that the claim against it is tangential to the main issues in the dispute and that neither victory nor defeat against GMCL necessarily leads to a viable claim against Cassels.

[175] While the claims against GMCL and Cassels are different in nature, and are based on different causes of action, they arise out of the same factual matrix, namely the financial plight of GMCL, the termination of 240 dealerships, the W.D.A. and the events during the six days in May 2009. GMCL and Cassels were different actors in this mix, but from the perspective of the Trillium they were each the cause of related harm. Cassels would have the "transaction" involving it as narrowly confined to the memo of May 22, 2009, and the conference call on May 22, 2009. The plaintiff's pleading, however, is much broader than this, and alleges, particularly at paragraphs 90-97 inclusive, that "at no time" did Cassels properly advise the dealers of their rights under the *A.W.A.* or assist them in asserting their collective negotiating power. These allegations are factually linked to the conduct of GMCL and to the plaintiff's complaints against GMCL.

[176] I do not accept the proposition that if the class members are unsuccessful against GMCL and if all received legal advice (as they were required to do as a condition of accepting the W.D.A.), they will necessarily be unsuccessful against Cassels. As I have said earlier, this is not how the plaintiff frames its claim against Cassels.

[177] This is not a typical solicitor's negligence case, such as *Thames Steel Construction Ltd. v. Portman*, above *or Pryshlack v. Urbancic et al.* (1973), 10 O.R. (2d) 263, [1975] O.J. No. 2488 (H.C.J.), involving a failed business deal or a real estate transaction, where the plaintiff says that if he/she is not successful against the vendor then his/her solicitor is liable for botching the deal. In such a case there may be some logic in staying the action against the solicitor since his/her liability only arises if the plaintiff loses against the other party to the transaction. On the plaintiff's theory of the case against Cassels, the result in the action against GMCL will not

necessarily be determinative of the claim against Cassels. In my view, this is not a reason that favours the stay – it is a reason against granting a stay. If a trial against Cassels may well be necessary regardless of the outcome against GMCL, I see no logic in putting the Cassels' claim on the back burner for years, waiting for the claim against GMCL to work its way through the courts and then potentially reviving the claim against Cassels regardless of the outcome of the other claim. This would not promote judicial economy – on the contrary, it would require much of the same fact-finding with the potential for inconsistent results.

[178] Nor would a stay facilitate access to justice. It would be oppressive and prejudicial to require the plaintiff to take the action against GMCL through the courts, including appeals which would likely ensue, for many years, only to be sent back at some far distant date, to reactivate the claim against Cassels.

[179] I accept that this action may be oppressive and onerous to Cassels and an embarrassment to its partners. A lawsuit, particularly one involving a claim for $750 million, is necessarily so. It cannot be in the interests of the limited liability partnership, or its partners who are being individually sued, to have litigation of this magnitude hanging over their heads for many years awaiting the outcome of a proceeding that may not be determinative of their liability. It seems to me that it would be more advantageous to enable them to participate in the proceeding from the outset, as they are likely to have a real interest in how the evidence unfolds in the claim against GMCL.

[180] For these reasons, I decline to grant a stay.

Summary and Conclusion

[181] For the foregoing reasons, this action will be certified as a class proceeding on the basis set out above. Counsel for the plaintiff should draft an order following the provisions of s. 8 of the *C.P.A.* for review with counsel for the defendants and the order can be settled, if necessary, at a case conference. The plaintiff is entitled to its costs. If the parties are unable to agree, submissions should be addressed to me, in writing. I leave it to counsel to agree on an appropriate timetable.

G.R. Strathy J.

**Released:** March 1, 2011

**CITATION:** *Trillium Motor World Inc. v. General Motors of Canada Limited*, 2011 ONSC 1300
**COURT FILE NO.:** CV-10-397096CP
**DATE:** 20110301

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

**TRILLIUM MOTOR WORLD LTD.**

Plaintiff/Moving Party

**- and -**

**GENERAL MOTORS OF CANADA LIMITED and CASSELS BROCK & BLACKWELL LLP**

Defendants/Respondents

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REASONS FOR JUDGMENT

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G.R. Strathy J.

Released: March 1, 2011