Court File No. CV-12-9667-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

BOOK OF AUTHORITIES

(Motion Returnable April 20, 2012)

April 17, 2012

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP
250 University Avenue, Suite 501
Toronto, ON M5H 3E5
Ken Rosenberg (LSUC No. 21102H)
Massimo Starnino (LSUC No. 41048G)
Tel: 416.646.4300 / Fax: 416.646.4301
Email: ken.rosenberg@paliareroland.com
Email: max.starnino@paliareroland.com

KOSKIE MINSKY LLP
20 Queen Street West, Suite 900
Toronto, ON M5H 3R3
Kirk Baert
Jonathan Bida
Tel: 416.977.8353 / Fax: 416.977.3316
Email: kbaert@kmlaw.ca
Email: jbida@kmlaw.ca

SISKINDS LLP
680 Waterloo Street
London, ON N6A 3V8
A. Dimitri Lascaris
Charles M. Wright
Tel: 519.672.2121 / Fax: 519.672.6065
Email: dimitri.lascaris@siskinds.com
Email: charles.wright@siskinds.com

Lawyers for an Ad Hoc Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action against the Applicant

TO: THE ATTACHED SERVICE LIST

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3	*Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2011 ONSC 1300, [2011] O.J. No. 889.

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TAB 1

1992 CarswellOnt 185, 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339

Campeau v. Olympia & York Developments Ltd.

ROBERT CAMPEAU, ROBERT CAMPEAU INC., 75090 ONTARIO INC., and ROBERT CAMPEAU INVESTMENTS INC. v. OLYMPIA & YORK DEVELOPMENTS LIMITED, 857408 ONTARIO INC., and NATIONAL BANK OF CANADA

Ontario Court of Justice (General Division)

R.A. Blair J.

Judgment: September 21, 1992
Docket: Docs. 92-CQ-19675, B-125/92

Counsel: *Stephen T. Goudge, Q.C.* and *Peter C. Wardle* , for the plaintiffs.

Peter F. C. Howard , for National Bank of Canada.

Yoine Goldstein , for Olympia & York Development Limited and 857408 Ontario Inc.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

Practice --- Disposition without trial — Stay or dismissal of action — Grounds — Another proceeding pending — General.

Application for lifting of CCAA stay refused where proposed action being part of "controlled stream" of litigation and best dealt with under CCAA.

The plaintiffs brought an action against the defendant, O & Y, alleging that it breached an obligation to assist in the restructuring of C Corp. The plaintiffs also alleged that O & Y actually frustrated the individual plaintiff's efforts to restructure C Corp.'s Canadian real estate operation. Damages in the amount of $1 billion for breach of contract or, alternatively, for breach of fiduciary duty, plus punitive damages of $250 million were claimed. The plaintiffs also claimed against the defendant bank alleging breach of fiduciary duty, negligence and breach of the provisions of s. 17(1) of the *Personal Property Security Act* (Ont.). Damages in the amount of $1 billion were claimed against the bank. This action was brought two weeks before an order was made extending the protection of the *Companies' Creditors Arrangement Act* ("CCAA") to O & Y.

The plaintiffs brought a motion to lift the stay imposed by the order under the CCAA and to allow them to pursue their action against O & Y. They argued that the claim would be better dealt with in the context of the action than in the context of the CCAA proceedings as it was uniquely complex.

The bank brought a motion opposing the plaintiffs' motion and seeking an order staying the plaintiffs' action against it pending the disposition of the CCAA proceedings. The bank argued that the factual basis of the claim against it was entirely dependent on the success of the allegations against O & Y and that the claim against O & Y would be better addressed within the context of the CCAA proceedings.

Held:

The plaintiffs' motion was dismissed and the bank's motion was allowed.

In considering whether to grant a stay, a court must look at the balance of convenience. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts is something with which the court must not lightly interfere. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay. The onus of satisfying the court is on the party seeking the stay.

The CCAA proceedings in this case involved numerous applicants, claimants and complex issues and could be considered a "controlled stream" of litigation; maintaining the integrity of the flow was an important consideration.

The stay under the CCAA was not lifted, and a stay made under the court's general jurisdiction to order stays was imposed, preventing the continuation of the action against the bank. There was no prejudice to the plaintiffs arising from these decisions, as the processing of their action was not precluded, but merely postponed. Were the CCAA stay lifted, there might be great prejudice to O & Y resulting from the diversion of its attention from the corporate restructuring process in order to defend the complex action proposed. There might not, however, be much prejudice to the bank in allowing the plaintiffs' action to proceed against it; however, such a proceeding could not proceed very far or effectively without the participation of O & Y.

Cases considered:

Arab Monetary Fund v. Hashim (June 25, 1992), Doc.34127/88, O'Connell J. (Ont. Gen. Div.), [1992] O.J. No. 1330 — *referred to*

Attorney General v. Arthur Anderson & Co. (1988), [1989] E.C.C. 244 (C.A.) — *referred to*

Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co. (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) — *applied*

Empire-Universal Films Ltd. v. Rank , [1947] O.R. (H.C.) — *referred to*

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) — *referred to*

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) — *applied*

Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd. (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 (Fed. T.D.) , appeal allowed by consent without costs (1972), 10 C.P.R. (2d) 96n, 42 D.L.R. (3d) 320n (Fed. C.A.) — *referred to*

Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd. (1972), 10 C.P.R. (2d) 96n, 42 D.L.R. (3d) 320n (Fed. C.A.) — *referred to*

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 —

s. 11

Courts of Justice Act, R.S.O. 1990, c. C.43 —

s. 106

Personal Property Security Act, R.S.O. 1990, c. P.10 —

s. 17(1)

Rules considered:

Ontario, Rules of Civil Procedure —

r. 6.01(1)

Motion to lift stay under Companies' Creditors Arrangement Act; Motion for stay under Courts of Justice Act.

***R.A. Blair J*:**

1 These motions raise questions regarding the court's power to stay proceedings. Two competing interests are to be weighed in the balance, namely,

a) the interests of a debtor which has been granted the protection of the *Companies' Creditors Arrangement Act* , R.S.C. 1985, c. C-36, and the "breathing space" offered by a s. 11 stay in such proceedings, on the one hand, and,

b) the interests of a unliquidated contingent claimant to pursue an action against that debtor *and* an arm's length third party, on the other hand.

2 At issue is whether the court should resort to an interplay between its specific power to grant a stay, under s. 11 of the C.C.A.A., and its general power to do so under the *Courts of Justice Act* , R.S.O. 1990, c. C.43 in order to stay the action completely; or whether it should lift the s. 11 stay to allow the action to proceed; or whether it should exercise some combination of these powers.

Background and Overview

3 This action was commenced on April 28, 1992, and the statement of claim was served before May 14, 1992, the date on which an order was made extending the protection of the C.C.A.A. to Olympia & York Developments Limited and a group of related companies ("Olympia & York", or "O & Y" or the "Olympia & York Group").

4 The plaintiffs are Robert Campeau and three Campeau family corporations which, together with Mr. Campeau, held the control block of shares of Campeau Corporation. Mr. Campeau is the former chairman and CEO of Campeau Corporation, said to have been one of North America's largest real estate development companies, until its recent rather high profile demise. It is the fall of that empire which forms the subject matter of the lawsuit.

The Claim against the Olympia & York Defendants

5 The story begins, according to the statement of claim, in 1987, after Campeau Corporation had completed a successful leveraged buy-out of Allied Stores Corporation, a very large retailer based in the United States. Olympia & York had aided in funding the Allied takeover by purchasing half of Campeau Corporation's interest in the Scotia Plaza in Toronto and subsequently also purchasing 10 per cent of the shares of Campeau Corporation. By late 1987, it is alleged, the relationship between Mr. Campeau and Mr. Paul Reichmann (one of the principals of Olympia & York) had become very close, and an agreement had been made whereby Olympia & York was to provide significant financial support, together with the considerable expertise and the experience of its personnel, in connection with Campeau Corporation's subsequent bid for control of Federated Stores Inc. (a second major U.S. department store chain). The story ends, so it is said, in 1991 after Mr. Campeau had been removed as chairman and CEO of Campeau Corporation and that company, itself, had filed for protection under the C.C.A.A. (from which it has since emerged, bearing the new name of Camdev Corp.).

6 In the meantime, in September 1989, the Olympia & York defendants, through Mr. Paul Reichmann, had entered into a shareholders' agreement with the plaintiffs in which, it is further alleged, Olympia & York obliged itself to develop and implement expeditiously a viable restructuring plan for Campeau Corporation. The allegation that Olympia & York breached this obligation by failing to develop and implement such a plan, together with the further assertion that the O & Y defendants actually frustrated Mr. Campeau's efforts to restructure Campeau Corporation's Canadian real estate operation, lies at the heart of the Campeau action. The plaintiffs plead that as a result they have suffered very substantial damages, including the loss of the value of their shares in Campeau Corporation, the loss of the opportunity of completing a refinancing deal with the Edward DeBartolo Corporation, and the loss of the opportunity on Mr. Campeau's part to settle his personal obligations on terms which would have

preserved his position as chairman and CEO and majority shareholder of Campeau Corporation.

7 Damages are claimed in the amount of $1 billion, for breach of contract or, alternatively, for breach of fiduciary duty. Punitive damages in the amount of $250 million are also sought.

The Claim against National Bank of Canada

8 Similar damages, in the amount of $1 billion (but no punitive damages), are claimed against the defendant National Bank of Canada, as well. The causes of action against the bank are framed as breach of fiduciary duty, negligence, and breach of the provisions of s. 17(1) of the *Personal Property Security Act* [R.S.O. 1990, c. P.10]. They arise out of certain alleged acts of misconduct on the part of the bank's representatives on the board of directors of Campeau Corporation.

9 In 1988 the plaintiffs had pledged some of their shares in Campeau Corporation to the bank as security for a loan advanced in connection with the Federated Stores transaction. In early 1990, one of the plaintiffs defaulted on its obligations under the loan and the bank took control of the pledged shares. Thereafter, the statement of claim alleges, the bank became more active in the management of Campeau, through its nominees on the board.

10 The bank had two such nominees. Olympia & York had three. There were 12 directors in total. What is asserted against the bank is that its directors, in co-operation with the Olympia & York directors, acted in a way to frustrate Campeau's restructuring efforts and favoured the interests of the bank as a secured lender rather than the interests of Campeau Corporation, of which they were directors. In particular, it is alleged that the bank's representatives failed to ensure that the DeBartolo refinancing was implemented and, indeed, actively supported Olympia & York's efforts to frustrate it, and in addition, that they supported Olympia & York's efforts to refuse to approve or delay the sale of real estate assets.

The Motions

11 There are two motions before me.

12 The first motion is by the Campeau plaintiffs to lift the stay imposed by the order of May 14, 1992 under the C.C.A.A. and to allow them to pursue their action against the Olympia & York defendants. They argue that a plaintiff's right to proceed with an action ought not lightly to be precluded; that this action is uniquely complex and difficult; and that the claim is better and more easily dealt with in the context of the action rather than in the context of the present C.C.A.A. proceedings. Counsel acknowledge that the factual bases of the claims against Olympia & York and the bank are closely intertwined and that the claim for damages is the same, but argue that the causes of action asserted against the two are different. Moreover, they submit, this is not the usual kind of situation where a stay is imposed to control the process and avoid inconsistent findings when the same parties are litigating the same issues in parallel proceedings.

13 The second motion is by National Bank, which of course opposes the first motion, and which seeks an order staying the Campeau action as against it as well, pending the disposition of the C.C.A.A. proceedings. Counsel submits that the factual substratum of the claim against the bank is dependent entirely on the success of the allegations against the Olympia & York defendants, and that the claim against those defendants is better addressed within the parameters of the C.C.A.A. proceedings. He points out also that if the action were to be taken against the bank alone, his client would be obliged to bring Olympia & York back into the action as third parties in any event.

The Power to Stay

14 The court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) , and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the *Courts of Justice Act* , R.S.O. 1990, c. C.43, which provides as follows:

> 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

15 Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), Doc. 34127/88 (Ont. Gen. Div.)], [1992] O.J. No. 1330.

16 Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the court is specifically granted the power to stay in a particular context, by virtue of statute or under the *Rules of Civil Procedure* . The authority to prevent multiplicity of proceedings in the same court, under r. 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the C.C.A.A., is an example of the former. Section 11 of the C.C.A.A. provides as follows:

> 11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act* , whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (*a*) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (*b*) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (*c*) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the com pany except with the leave of the court and subject to such terms as the court imposes.

The Power to Stay in the Context of C.C.A.A. Proceedings

17 By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

18 In this respect it has been observed that the C.C.A.A. is "to be used as a practical and effective way of restructuring corporate indebtedness": see the case comment following the report of *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B) , and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) at p. 113 [B.C.L.R.].

19 Gibbs J.A. continued with this comment:

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is *a discretionary power to restrain judicial or extra-judicial conduct* against the debtor company *the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period* .

(emphasis added)

20 I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement.

21 I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance* , supra (a "Mississauga Derailment" case), at pp. 65-66 [C.P.C.]. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff. On all of these issues the onus of satisfying the court is on the party seeking the stay: see also *Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 (Fed. T.D.) , appeal allowed by consent without costs (1972), 10 C.P.R. (2d) 96n, 42 D.L.R. (3d) 320n (Fed. C.A.) , where Mr. Justice Heald recited the foregoing principles from *Empire-Universal Films Ltd. v. Rank*, [1947] O.R. 775 (H.C.) at p.779.

22 *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance* , supra, is a particularly helpful authority, although the question in issue there was somewhat different than those in issue on these motions. The case was one of several hundred arising out of the Mississauga derailment in November 1979, all of which actions were being case-managed by Montgomery J. These actions were all part of what Montgomery J. called "a controlled stream" of litigation involving a large number of claims and innumerable parties. Similarly, while the Olympia & York proceedings under the C.C.A.A. do not involve a large number of separate actions, they do involve numerous applicants, an even larger number of very substantial claimants, and a diverse collection of intricate and broad-sweeping issues. In that sense the C.C.A.A. proceedings are a controlled stream of litigation. Maintaining the integrity of the flow is an important consideration.

Disposition

23 I have concluded that the proper way to approach this situation is to continue the stay imposed under the C.C.A.A. prohibiting the action against the Olympia & York defendants, and in addition, to impose a stay, utilizing the court's general jurisdiction in that regard, preventing the continuation of the action against National Bank as well. The stays will remain in effect for as long as the s. 11 stay remains operative, unless otherwise provided by order of this court.

24 In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with — at least for the purposes of that proceeding — in the C.C.A.A. proceeding itself. On the other hand, there might be great prejudice to Olympia & York if its attention is diverted from the corporate restructuring process and it is required to expend time and energy in defending an action of the complexity and dimension of this one. While there may not be a great deal of prejudice to National Bank in allowing the action to proceed against it, I am satisfied that there is little likelihood of the action proceeding very far or very effectively unless and until Olympia & York — whose alleged misdeeds are the real focal point of the attack on both sets of defendants — is able to participate.

25 In addition to the foregoing, I have considered the following factors in the exercise of my discretion:

1. Counsel for the plaintiffs argued that the Campeau claim must be dealt with, either in the action or in the C.C.A.A. proceedings and that it cannot simply be ignored. I agree. However, in my view, it is more appropriate, and in fact is essential, that the claim be addressed within the parameters of the C.C.A.A. proceedings rather than outside, in order to maintain the integrity of those proceedings. Were it otherwise, the numerous creditors in that mammoth proceeding would have no effective way of assessing the weight to be given to the Campeau claim in determining their approach to the acceptance or rejection of the Olympia & York plan filed under the Act.

2. In this sense, the Campeau claim — like other secured, undersecured, unsecured, and

contingent claims — must be dealt with as part of a "controlled stream" of claims that are being negotiated with a view to facilitating a compromise and arrangement between Olympia & York and its creditors. In weighing "the good management" of the two sets of proceedings — i.e., the action and the C.C.A.A. proceeding — the scales tip in favour of dealing with the Campeau claim in the context of the latter: see *Attorney General v. Arthur Andersen & Co.* (1988), [1989] E.C.C. 224 (C.A.) , cited in *Arab Monetary Fund v. Hashim* , supra.

I am aware, when saying this, that in the initial plan of compromise and arrangement filed by the applicants with the court on August 21, 1992, the applicants have chosen to include the Campeau plaintiffs amongst those described as "Persons not Affected by the Plan". This treatment does not change the issues, in my view, as it is up to the applicants to decide how they wish to deal with that group of "creditors" in presenting their plan, and up to the other creditors to decide whether they will accept such treatment. In either case, the matter is being dealt with, as it should be, within the context of the C.C.A.A. proceedings.

3. Pre-judgment interest will compensate the plaintiffs for any delay caused by the imposition of the stays, should the action subsequently proceed and the plaintiffs ultimately be successful.

4. While there may not be great prejudice to National Bank if the action were to continue against it alone and the causes of action asserted against the two groups of defendants are different, the complex factual situation is common to both claims and the damages are the same. The potential of two different inquiries at two different times into those same facts and damages is not something that should be encouraged. Such multiplicity of inquiries should in fact be discouraged, particularly where — as is the case here — the delay occasioned by the stay is relatively short (at least in terms of the speed with which an action like this Campeau action is likely to progress).

Conclusion

26 Accordingly, an order will go as indicated, dismissing the motion of the Campeau plaintiffs and allowing the motion of National Bank. Each stay will remain in effect until the expiration of the stay period under the C.C.A.A. unless extended or otherwise dealt with by the court prior to that time. Costs to the defendants in any event of the cause in the Campeau action. I will fix the amounts if counsel wish me to do so.

Order accordingly.

END OF DOCUMENT

TAB 2

2009 CarswellOnt 7882, 61 C.B.R. (5th) 200

Canwest Global Communications Corp., Re

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Ontario Superior Court of Justice [Commercial List]

Pepall J.

Heard: December 8, 2009
Judgment: December 15, 2009
Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Alex Cobb, Shawn Irving for CMI Entities

Alan Mark, Alan Merskey for Special Committee of the Board of Directors of Canwest

David Byers, Maria Konyukhova for Monitor, FTI Consulting Canada Inc.

Benjamin Zarnett, Robert Chadwick for Ad Hoc Committee of Noteholders

K. McElcheran, G. Gray for GS Parties

Hugh O'Reilly, Amanda Darrach for Canwest Retirees and the Canadian Media Guild

Hilary Clarke for Senior Secured Lenders to LP Entities

Steve Weisz for CIT Business Credit Canada Inc.

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Contractual rights

Business was acquired through acquisition company, C Co. — C Co. was jointly owned by

moving parties and 441 Inc., wholly owned subsidiary of insolvent entities — Moving parties, 441 Inc., insolvent entities and C Co. entered into shareholders agreement providing that in event of insolvency of insolvent entities, moving parties could effect sale of their interest in C Co. and require sale of insolvent entities' interest — Shareholders agreement also provided that 441 Inc. could transfer its C Co. shares to insolvent entities at any time — 441 Inc. subsequently transferred shares of C Co. to insolvent entities and was dissolved — Insolvent entities obtained initial order under Companies' Creditors Arrangement Act including stay of proceedings — Moving parties brought motion seeking to set aside transfer of shares to insolvent entities or, in alternative, requiring insolvent entities to perform and not disclaim shareholders agreement as if shares had not been transferred — Insolvent entities brought motion for order that motion of moving parties was stayed — Moving parties brought cross-motion for leave to proceed with their motion — Motion of insolvent entities granted; motion and cross-motion of moving parties dismissed — Substance and subject matter of moving parties' motion were encompassed by stay — Substance of moving parties' motion was "proceeding" that was subject to stay under initial order which prohibited commencement of all proceedings against or in respect of insolvent entities or affecting business or property of insolvent entities — Relief sought would involve exercise of any right or remedy affecting business or property of insolvent entities which was stayed under initial order.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Lifting of stay

Business was acquired through acquisition company, C Co. — C Co. was jointly owned by moving parties and 441 Inc., wholly owned subsidiary of insolvent entities — Moving parties, 441 Inc., insolvent entities and C Co. entered into shareholders agreement providing that in event of insolvency of insolvent entities, moving parties could effect sale of their interest in C Co. and require sale of insolvent entities' interest — Shareholders agreement also provided that 441 Inc. could transfer its C Co. shares to insolvent entities at any time — 441 Inc. subsequently transferred shares of C Co. to insolvent entities and was dissolved — Insolvent entities obtained initial order under Companies' Creditors Arrangement Act including stay of proceedings — Moving parties brought motion seeking to set aside transfer of shares from 441 Inc. to insolvent entities or, in alternative, requiring insolvent entities to perform and not disclaim shareholders agreement as if shares had not been transferred — Insolvent entities brought motion for order that motion of moving parties was stayed — Moving parties brought cross-motion for leave to proceed with their motion — Motion of insolvent entities granted; motion and cross-motion of moving parties dismissed — Stay of proceedings not lifted — Balance of convenience, assessment of relative prejudice and relevant merits favoured position of insolvent entities — There was good arguable case that shareholders agreement, which would inform reasonable expectations of parties, permitted transfer and dissolution of 441 Inc. — Moving parties were in no worse position than any other stakeholder who was precluded from relying on rights that arose upon insolvency default — If stay were lifted, prejudice to insolvent entities would be great and proceedings contemplated by moving parties would be extraordinarily disruptive — Litigating subject matter of motion would undermine objective of protecting insolvent entities while they attempted to restructure — It was premature to address issue of whether insolvent entities could disclaim agreement — Issues surrounding any

attempt at disclaimer should be canvassed on basis mandated in s. 32 of Act — Discretion to lift stay on basis of lack of good faith not exercised.

Cases considered by *Pepall J.*:

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 1992 CarswellOnt 185 (Ont. Gen. Div.) — considered

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 1, 2000 CarswellAlta 622 (Alta. Q.B.) — considered

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — considered

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 2007 SKCA 72, 2007 CarswellSask 324, [2007] 9 W.W.R. 79, (sub nom. *Bricore Land Group Ltd., Re)* 299 Sask. R. 194, (sub nom. *Bricore Land Group Ltd., Re)* 408 W.A.C. 194, 33 C.B.R. (5th) 50 (Sask. C.A.) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 92 A.R. 81, 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 1988 CarswellAlta 318 (Alta. Q.B.) — considered

San Francisco Gifts Ltd., Re (2004), 5 C.B.R. (5th) 92, 42 Alta. L.R. (4th) 352, 2004 ABQB 705, 2004 CarswellAlta 1241, 359 A.R. 71 (Alta. Q.B.) — considered

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 8 — referred to

s. 11 — referred to

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — considered

s. 32 — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 106 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 25.11(b) — referred to

R. 25.11(c) — referred to

MOTION by moving party to set aside transfer of shares to insolvent entities or, in alternative, requiring insolvent entities to perform and not disclaim shareholders agreement; MOTION by insolvent entities for order that motion by moving party was stayed; CROSS-MOTION by moving party for leave to proceed with its motion.

***Pepall J.*:**

Relief Requested

1 The CCAA applicants and partnerships (the "CMI Entities") request an order declaring that the relief sought by GS Capital Partners VI Fund L.P., GSCP VI AA One Holding S.ar.l and GS VI AA One Parallel Holding S.ar.l (the "GS Parties") is subject to the stay of proceedings granted in my Initial Order dated October 6, 2009. The GS Parties bring a cross-motion for an order that the stay be lifted so that they may pursue their motion which, among other things, challenges pre-filing conduct of the CMI Entities. The Ad Hoc Committee of Noteholders and the Special Committee of the Board of Directors support the position of the CMI Entities. All of these stakeholders are highly sophisticated. Put differently, no one is a commercial novice. Such is the context of this dispute.

Background Facts

2 Canwest's television broadcast business consists of the CTLP TV business which is comprised of 12 free-to-air television stations and a portfolio of subscription based specialty television channels on the one hand and the Specialty TV Business on the other. The latter consists of 13 specialty television channels that are operated by CMI for the account of CW Investments Co. and its subsidiaries and 4 other specialty television channels in which the CW Investments Co. ownership interest is less than 50%.

3 The Specialty TV Business was acquired jointly with Goldman Sachs from Alliance Atlantis in August, 2007. In January of that year, CMI and Goldman Sachs agreed to acquire the business of Alliance Atlantis through a jointly owned acquisition company which later became CW Investments Co. It is a Nova Scotia Unlimited Liability Corporation ("NSULC").

4 CMI held its shares in CW Investments Co. through its wholly owned subsidiary, 4414616 Canada Inc. ("441"). According to the CMI Entities, the sole purpose of 441 was to insulate CMI from any liabilities of CW Investments Co. As a NSULC, its shareholders may face exposure if the NSULC is liquidated or becomes bankrupt. As such, 441 served as a "blocker" to potential liability. The CMI Entities state that similarly the GS parties served as

"blockers" for Goldman Sachs' part of the transaction.

5 According to the GS Parties, the essential elements of the deal were as follows:

(i) GS would acquire at its own expense and at its own risk, the slower growth businesses;

(ii) CW Investments Co. would acquire the Specialty TV Business and that company would be owned by 441 and the GS Parties under the terms of a Shareholders Agreement;

(iii) GS would assist CW Investments Co. in obtaining separate financing for the Specialty TV Business;

(iv) Eventually Canwest would contribute its conventional TV business on a debt free basis to CW Investments Co. in return for an increased ownership stake in CW Investments Co.

6 The GS Parties also state that but for this arrangement, Canwest had no chance of acquiring control of the Specialty TV Business. That business is subject to regulation by the CRTC. Consistent with policy objectives, the CRTC had to satisfy itself that CW Investments Co. was not controlled either at law or in fact by a non-Canadian.

7 A Shareholders Agreement was entered into by the GS parties, CMI, 441, and CW Investments Co. The GS Parties state that 441 was a critical party to this Agreement. The Agreement reflects the share ownership of each of the parties to it: 64.67% held by the GS Parties and 35.33% held by 441. It also provides for control of CW Investments Co. by distribution of voting shares: 33.33% held by the GS Parties and 66.67% held by 441. The Agreement limits certain activities of CW Investments Co. without the affirmative vote of a director nominated to its Board by the GS Parties. The Agreement provides for call and put options that are designed to allow the GS parties to exit from the investment in CW Investments Co. in 2011, 2012, and 2013. Furthermore, in the event of an insolvency of CMI, the GS parties have the ability to effect a sale of their interest in CW Investments Co. and require as well a sale of CMI's interest. This is referred to as the drag-along provision. Specifically, Article 6.10(a) of the Shareholders Agreement states:

> Notwithstanding the other provisions of this Article 6, if an Insolvency Event occurs in respect of CanWest and is continuing, the GS Parties shall be entitled to sell all of their Shares to any *bona fide* Arm's Length third party or parties at a price and on other terms and conditions negotiated by GSCP in its discretion provided that such third party or parties acquires all of the Shares held by the CanWest Parties at the same price and on the same terms and conditions, and in such event, the CanWest Parties shall sell their Shares to such third party or parties at such price and on such terms and conditions. The Corporation and the CanWest Parties each agree to cooperate with and assist GSCP with the sale process (including by providing protected purchasers designated by GSCP with confidential information regarding the Corporation (subject to a customary confidentiality agreement) and with access to management).

8 The Agreement also provided that 441 as shareholder could transfer its CW Investments Co. shares to its parent, CMI, at any time, by gift, assignment or otherwise, whether or not for value. While another specified entity could not be dissolved, no prohibition was placed on the dissolution of 441. 441 had certain voting obligations that were to be carried out at the direction of CMI. Furthermore, CMI was responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

9 On October 5, 2009, pursuant to a Dissolution Agreement between 441 and CMI and as part of the winding-up and distribution of its property, 441 transferred all of its property, namely its 352,986 Class A shares and 666 Class B preferred shares of CW Investments Co., to CMI. CMI undertook to pay and discharge all of 441's liabilities and obligations. The material obligations were those contained in the Shareholders Agreement. At the time, 441 and CW Investments Co. were both solvent and CMI was insolvent. 441 was subsequently dissolved.

10 For the purposes of these two motions only, the parties have agreed that the court should assume that the transfer and dissolution of 441 was intended by CMI to provide it with the benefit of all the provisions of the CCAA proceedings in relation to contractual obligations pertaining to those shares. This would presumably include both the stay provisions found in section 11 of the CCAA and the disclaimer provisions in section 32 .

11 The CMI Entities state that CMI's interest in the Specialty TV Business is critical to the restructuring and recapitalization prospects of the CMI Entities and that if the GS parties were able to effect a sale of CW Investments Co. at this time, and on terms that suit them, it would be disastrous to the CMI Entities and their stakeholders. Even the overhanging threat of such a sale is adversely affecting the negotiation of a successful restructuring or recapitalization of the CMI Entities.

12 On October 6, 2009, I granted an Initial Order in these proceedings. CW Investments Co. was not an applicant. The CMI Entities requested a stay of proceedings to allow them to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of 8% Noteholders had agreed on terms of such a transaction that were reflected in a support agreement and term sheet. Those noteholders who support the term sheet have agreed to vote in favour of the plan subject to certain conditions one of which is a requirement that the Shareholders Agreement be amended.

13 The Initial Order included the typical stay of proceedings provisions that are found in the standard form order promulgated by the Commercial List Users Committee. Specifically, the order stated:

> 15. THIS COURT ORDERS that until and including November 5, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable

CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.

16. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI Entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

14 The GS parties were not given notice of the CCAA application. On November 2, 2009, they brought a motion that, among other things, seeks to set aside the transfer of the shares from 441 to CMI or, in the alternative, require CMI to perform and not disclaim the Shareholders Agreement as if the shares had not been transferred. On November 10, 2009 the GS parties purported to revive 441 by filing Articles of Revival with the Director of the CBCA. The CMI Entities were not notified nor was any leave of the court sought in this regard. In an amended notice of motion dated November 19, 2009 (the "main motion"), the GS Parties request an order:

(a) Setting aside and declaring void the transfer of the shares from 441 to CMI;

(b) declaring that the rights and remedies of the GS Parties in respect of the obligations of 441 under the Shareholders Agreement are not affected by these CCAA proceedings in any way whatsoever;

(c) in the alternative to (a) and (b), an order directing CMI to perform all of the obligations that bound 441 immediately prior to the transfer;

(d) in the alternative to (a) and (b), an order declaring that the obligations that bound 441 immediately prior to the transfer, may not be disclaimed by CMI pursuant to sec-

tion 32 of the CCAA or otherwise; and

(e) if necessary, a trial of the issues arising from the foregoing.

15 They also requested an order amending paragraph 59 of the Initial Order but that issue has now been resolved and I am satisfied with the amendment proposed.

16 The CMI Entities then brought a motion on November 24, 2009 for an order that the GS motion is stayed. As in a game of chess, on December 3, 2009, the GS Parties served a cross-motion in which, if required, they seek leave to proceed with their motion.

17 In furtherance of their main motion, the GS Parties have expressed a desire to examine 4 of the 5 members of the Special Committee of the Board of Directors of Canwest. That Committee was constituted, among other things, to oversee the restructuring. The GS Parties have also demanded an extensive list of documentary production. They also seek to impose significant discovery demands upon the senior management of CanWest.

Issues

18 The issues to be determined on these motions are whether the relief requested by the GS Parties in their main motion is stayed based on the Initial Order and if so, whether the stay should be lifted. In addition, should the relief sought in paragraph 1(e) of the main motion be struck.

Positions of Parties

19 In brief, the parties' positions are as follows. The CMI Entities submit that the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order. In addition, the relief sought by them involves "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order. The stay is consistent with the purpose of the CCAA. They submit that the subject matter of the motion should be caught so as to prevent the GS parties from gaining an unfair advantage over other stakeholders of the CMI Entities and to ensure that the resources of the CMI Entities are devoted to developing a viable restructuring plan for the benefit of all stakeholders. They also state that CMI's interest in CW Investments Co. is a significant portion of its enterprise value. They state further that their actions were not in breach of the Shareholders Agreement and in any event, debtor companies are able to organize their affairs in order to benefit from the CCAA stay. Furthermore, any loss suffered by the GS Parties can be quantified.

20 In paragraph 1(e) of the main motion, the GS parties seek to prevent CMI from disclaiming the obligations of 441 that existed immediately prior to the transfer of the shares to CMI. If this relief is not stayed, the CMI Entities submit that it should be struck out pursuant to Rule 25.11(b) and (c) as premature and improper. They also argue that section 32 of the CCAA provides a procedure for disclaimer of agreements which the GS Parties improperly seek to circumvent.

21 Lastly, the CMI Entities state that the bases on which a CCAA stay should be lifted are

very limited. Most of the grounds set forth in *Canadian Airlines Corp., Re*[FN1] which support the lifting of a stay are manifestly inapplicable. As to prejudice, the GS parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise on an insolvency default. In contrast, the prejudice to the CMI Entities would be debilitating and their resources need to be devoted to their restructuring. The GS Parties' rights would not be lost by the passage of time. The GS Parties' motion is all about leverage and a desire to improve the GS Parties' negotiating position submits counsel for the CMI Entities.

22 The Ad Hoc Committee of Noteholders, as mentioned, supports the CMI Entities' position. In examining the context of the dispute, they submit that the Shareholders Agreement permitted and did not prohibit the transfer of 441's shares. Furthermore, the operative obligations in that agreement are obligations of CMI, not 441. It is the substance of the GS Parties' claims and not the form that should govern their ability to pursue them and it is clearly encompassed by the stay. The Committee relies on *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*[FN2] in support of their position on timing.

23 The Special Committee also supports the CMI Entities. It submits that the primary relief sought by the GS parties is a declaration that their contracts to and with CW Investments cannot or should not be disclaimed. The debate as to whether 441 could properly be assimilated into CMI is no more than an alternate argument as to why such disclaimer can or cannot occur. They state that the subject matter of the GS Parties' motion is premature.

24 The GS Parties submit that the stay does not prevent parties affected by the CCAA proceedings from bringing motions within the CCAA proceedings themselves. The use of CCAA powers and the scope of the stay provided in the Initial Order and whether it applies to the GS Parties' motion are proper questions for the court charged with supervising the CCAA process. They also argue that the motion would facilitate negotiation between key parties, raises the important preliminary issue of the proper scope and application of section 32 of the CCAA, and avoids putting the Monitor in the impossible position of having to draw legal conclusions as to the scope of CMI's power to disclaim. The court should be concerned with pre-filing conduct including the reason for the share transfer, the timing, and CMI's intentions.

25 Even if the stay is applicable, the GS parties submit that it should be lifted. In this regard, the court should consider the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action. The court should also consider whether the debtor company has acted and is acting in good faith. The GS Parties were the medium by which the Specialty TV Business became part of Canwest. Here, all that is being sought is a reversal of the false and highly prejudicial start to these restructuring proceedings. It is necessary to take steps now to protect a right that could be lost by the passage of time. The transfer of the shares exhibited bad faith on the part of Canwest. 441 insulated CW Investments Co. and the Specialty TV Business from the insolvency of CMI and thereby protected the contractual rights of the GS Parties. The manifest harm to the GS Parties that invited the motion should be given weight in the court's balancing of prejudices. Concerns as to disruption of the restructuring process could be met by imposing conditions on the lifting of a stay as, for example, the establishment of a timetable.

Discussion

(a) Legal Principles

26 First I will address the legal principles applicable to the granting and lifting of a CCAA stay.

27 The stay provisions in the CCAA are discretionary and are extraordinarily broad. Section 11.02 (1) and (2) states:

> 11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> (a) staying until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

28 The underlying purpose of the court's power to stay proceedings has frequently been described in the case law. It is the engine that drives the broad and flexible statutory scheme of the CCAA: *Stelco Inc., Re* [FN3] and the key element of the CCAA process: *Canadian Airlines Corp., Re*[FN4] The power to grant the stay is to be interpreted broadly in order to permit the CCAA to accomplish its legislative purpose. As noted in *Lehndorff General Partner Ltd., Re*[FN5] , the power to grant a stay extends to effect the position of a company's secured and unsecured creditors as well as other parties who could potentially jeopardize the success of the restructuring plan and the continuance of the company. As stated by Farley J. in that case,

> "It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed....The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors."[FN6] (Citations omitted)

29 The all encompassing scope of the CCAA is underscored by section 8 of the Act which precludes parties from contracting out of the statute. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* [FN7] in this regard.

30 Two cases dealing with stays merit specific attention. *Campeau v. Olympia & York Developments Ltd.* [FN8] was a decision granted in the early stages of the evolution of the CCAA. In that case, the plaintiffs brought an action for damages including the loss of share value and loss of opportunity both against a company under CCAA protection and a bank. The statement of claim had been served before the company's CCAA filing. The plaintiff sought to lift the stay to proceed with its action. The bank sought an order staying the action against it pending the disposition of the CCAA proceedings. Blair J. examined the stay power described in the CCAA, section 106 of the Courts of Justice Act[FN9] and the court's inherent jurisdiction. He refused to lift the stay and granted the stay in favour of the bank until the expiration of the CCAA stay period. Blair J. stated that the plaintiff's claims may be addressed more expeditiously in the CCAA proceeding itself.[FN10] Presumably this meant through a claims process and a compromise of claims. The CCAA stay precludes the litigating of claims comparable to the plaintiff's in *Campeau*. If it were otherwise, the stay would have no meaningful impact.

31 The decision of *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* is also germane to the case before me. There, the Bank demanded payment from the debtor company and thereafter the debtor company issued instant trust deeds to qualify for protection under the CCAA. The bank commenced proceedings on debenture security and the next day the company sought relief under the CCAA. The court stayed the bank's enforcement proceedings. The bank appealed the order and asked the appellate court to set aside the stay order insofar as it restrained the bank from exercising its rights under its security. The B.C. Court of Appeal refused to do so having regard to the broad public policy objectives of the CCAA.

32 As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy"[FN11], an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed ac-

tion: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*[FN12]. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.[FN13]

33 Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Canadian Airlines Corp., Re*[FN14]and Professor McLaren has added three more since then. They are:

1. When the plan is likely to fail.

2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).

3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).

4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

7. There is a real risk that a creditor's loan will become unsecured during the stay period.

8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.

9. It is in the interests of justice to do so.

(b) Application

34 Turning then to an application of all of these legal principles to the facts of the case before me, I will first consider whether the subject matter of the main motion of the GS Parties is captured by the stay and then will address whether the stay should be lifted.

35 In analyzing the applicability of the stay, I must examine the substance of the main motion of the GS Parties and the language of the stay found in paragraphs 15 and 16 of my Initial Order.

36 In essence, the GS Parties' motion seeks to:

(i) undo the transfer of the CW Investments Co. shares from 441 to CMI or

(ii) require CMI to perform and not disclaim the Shareholders Agreement as though the shares had not been transferred.

37 It seems to me that the first issue is caught by the stay of proceedings and the second issue is properly addressed if and when CMI seeks to disclaim the Shareholders Agreement.

38 The substance of the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order which prohibits the commencement of all proceedings against or in respect of the CMI Entities, or affecting the CMI Business or the CMI Property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order.

39 When one examines the relief requested in detail, the application of the stay is clear. The GS Parties ask first for an order setting aside and declaring void the transfer of the shares from 441. As the shares have been transferred to the CMI Entities presumably pursuant to section 6.5(a) of the Shareholders Agreement, this is relief "affecting the CMI Property". Secondly, the GS Parties ask for a declaration that the rights and remedies of the GS Parties in respect of the obligations of 441 are not affected by the CCAA proceedings. This relief would permit the GS Parties to require CMI to tender the shares for sale pursuant to section 6.10 of the Shareholders Agreement. This too is relief affecting the CMI Entities and the CMI Property. Thirdly, they ask for an order directing CMI to perform all of the obligations that bound 441 prior to the transfer. This represents the exercise of a right or remedy against CMI and would affect the CMI Business and CMI Property in violation of paragraph 16 of the Initial Order. This is also stayed by virtue of paragraph 15. Fourthly, the GS Parties seek an order declaring that the obligations that bound 441 prior to the transfer may not be disclaimed. This both violates paragraph 16 of the Initial Order and also seeks to avoid the express provisions contained in the recent amendments to the CCAA that address disclaimer.

40 Accordingly, the substance and subject matter of the GS Parties' motion are certainly encompassed by the stay. As Mr. Barnes for the CMI Entities submitted, had CMI taken the steps it did six months ago and the GS Parties commenced a lawsuit, the action would have been stayed. Certainly to the extent that the GS Parties are seeking the freedom to exercise their drag along rights, these rights should be captured by the stay.

41 The real question, it seems to me, is whether the stay should be lifted in this case. In considering the request to lift the stay, it is helpful to consider the context and the provisions of the Shareholders Agreement. In his affidavit sworn November 24, 2009, Mr. Strike, the President of Corporate Development & Strategy Implementation of Canwest Global and its Recapitalization Officer, states that the joint acquisition from Alliance Atlantis was intensely and very carefully negotiated by the parties and that the negotiation was extremely complex and difficult. "Every aspect of the deal was carefully scrutinized, including the form, substance and precise terms of the Initial Shareholders Agreement." The Shareholders Agreement was finalized following the CRTC approval hearing. Among other things:

- Article 2.2 (b) provides that CMI is responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

- Article 6.1 contains a restriction on the transfer of shares.

- Article 6.5 addresses permitted transfers. Subsection (a) expressly permits each shareholder to transfer shares to a parent of the shareholder. CMI was the parent of the shareholder, 441.

- Article 6.10 provides that notwithstanding the other provisions of Article 6, if an insolvency event occurs (which includes the commencement of a CCAA proceeding), the GS Parties may sell their shares and cause the Canwest parties to sell their shares on the same terms. This is the drag along provision.

- Article 6.13 prohibits the liquidation or dissolution of another company[FN15] without the prior written consent of one of the GS Parties[FN16].

42 The recital of these provisions and the absence of any prohibition against the dissolution of 441 indicate that there is a good arguable case that the Shareholders Agreement, which would inform the reasonable expectations of the parties, permitted the transfer and dissolution.

43 The GS Parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise upon an insolvency default. As stated in *San Francisco Gifts Ltd., Re*[FN17] :

> "The Initial Order enjoined all of San Francisco's landlords from enforcing contractual insolvency clauses. This is a common prohibition designed, at least in part, to avoid a creditor frustrating the restructuring by relying on a contractual breach occasioned by the very insolvency that gave rise to proceedings in the first place."[FN18]

44 Similarly, in *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*[FN19] , one of the debtor's joint venture partners in certain petroleum operations was unable to rely on an insolvency clause in an agreement that provided for the immediate replacement of the operator if it became bankrupt or insolvent.

45 If the stay were lifted, the prejudice to CMI would be great and the proceedings contemplated by the GS Parties would be extraordinarily disruptive. The GS Parties have asked to examine 4 of the 5 members of the Special Committee. The Special Committee is a committee of the Board of Directors of Canwest. Its mandate includes, among other things, responsibility for overseeing the implementation of a restructuring with respect to all, or part of the business and/or capital structure of Canwest. The GS Parties have also requested an extensive list of documentary production including all documents considered by the Special Committee and any member of that Committee relating to the matters at issue; all documents considered by the Board of Directors and any member of the Board of Directors relating to the matters at issue; all documents evidencing the deliberations, discussions and decisions of the Special Committee and the Board of Directors relating to the matters at issue; all documents relating to the matters at issue sent to or received by Leonard Asper, Derek Burney, David Drybrough, David Kerr, Richard Leipsic, John Maguire, Margot Micillef, Thomas Strike, and Hap Stephen, the Chief Restructuring Advisor appointed by the court. As stated by Mr. Strike in his affi-

davit sworn November 24, 2009,

> The witnesses that the GS Parties propose to examine include the most senior executives of the CMI Entities; those who are most intensely involved in the enormously complex process of achieving a successful going concern restructuring or recapitalization of the CMI Entities. Myself, Mr. Stephen, Mr. Maguire and the others are all working flat out on trying to achieve a successful restructuring or recapitalization of the CMI Entities. Frankly, the last thing we should be doing at this point is preparing for a forensic examination, in minute detail, over events that have taken place over the past several months. At this point in the restructuring/recapitalization process, the proposed examination would be an enormous distraction and would significantly prejudice the CMI Entities' restructuring and recapitalization efforts.

46 While Mr. McElcheran for the GS Parties submits that the examinations and the scope of the examinations could be managed, in my view, the litigating of the subject matter of the motion would undermine the objective of protecting the CMI Entities while they attempt to restructure. The GS Parties continue to own their shares in CW Investments Co. as does CMI. CMI continues to operate the Specialty TV Business. Furthermore, CMI cannot sell the shares without the involvement of the Monitor and the court. None of these facts have changed. The drag along rights are stayed (although as Mr. McElcheran said, it is the cancellation of those rights that the GS Parties are concerned about.)

47 A key issue will be whether the CMI Parties can then disclaim that Agreement or whether they should be required to perform the obligations which previously bound 441. This issue will no doubt arise if and when the CMI Entities seek to disclaim the Shareholders Agreement. It is premature to address that issue now. Furthermore, section 32 of the CCAA now provides a detailed process for disclaimer. It states:

> 32.(1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.
>
> (2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.
>
> (3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.
>
> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable

compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

48 Section 32, therefore, provides the scheme and machinery for the disclaimer of an agreement. If the monitor approves the disclaimer, another party may contest it. If the monitor does not approve the disclaimer, permission of the court must be obtained. It seems to me that the issues surrounding any attempt at disclaimer in this case should be canvassed on the basis mandated by Parliament in section 32 of the amended Act.

49 In my view, the balance of convenience, the assessment of relative prejudice and the relevant merits favour the position of the CMI Entities on this lift stay motion. As to the issue of good faith, the question is whether, absent more, one can infer a lack of good faith based on the facts outlined in the materials filed including the agreed upon admission by the CMI Entities. The onus to lift the stay is on the moving party. I decline to exercise my discretion to lift the stay on this basis.

50 Turning then to the factors listed by Professor McLaren, again I am not persuaded that based on the current state of affairs, any of the factors are such that the stay should be lifted. In light of this determination, there is no need to address the motion to strike paragraph 1(e) of the GS Parties' main motion.

51 The stay of proceedings in this case is performing the essential function of keeping stakeholders at bay in order to give the CMI Entities a reasonable opportunity to develop a restructuring plan. The motions of the GS Parties are dismissed (with the exception of that portion dealing with paragraph 59 of the Initial Order which is on consent) and the motion of the CMI Entities is granted with the exception of the strike portion which is moot.

52 The Monitor, reasonably in my view, did not take a position on these motions. Its counsel, Mr. Byers, advised the court that the Monitor was of the view that a commercial resolution was the best way to resolve the GS Parties' issues. It is difficult to disagree with that assessment.

Insolvent entities' motion granted; motion and cross-motion of moving party dismissed.

FN1 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.).

FN2 (B.C. C.A.) at p. 4.

FN3 (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 36.

FN4 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.).

FN5 (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

FN6 Ibid, at p. 32.

FN7 Supra, note 2

FN8 (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.).

FN9 R.S.O. 1990, c.C.43.

FN10 Supra, note 6 at paras. 24 and 25.

FN11 (Aurora: Canada Law Book, looseleaf) at para. 3.3400.

FN12 (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68.

FN13 Ibid, at para. 68.

FN14 Supra, note 3.

FN15 This was 4414641 Canada Inc. but not 4414616 Canada Inc., the company in issue before me.

FN16 Specifically, GS Capital Partners VI Fund, L.P.

FN17 (2004), 5 C.B.R. (5th) 92 (Alta. Q.B.) at para.37.

FN18 Ibid, at para. 37.

FN19 (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.).

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TAB 3

2011 CarswellOnt 1286, 2011 ONSC 1300, 82 C.C.L.T. (3d) 292, 7 C.P.C. (7th) 388

Trillium Motor World Ltd. v. General Motors of Canada Ltd.

Trillium Motor World Ltd. (Plaintiff / Moving Party) and General Motors of Canada Limited and Cassels Brock & Blackwell LLP (Defendants / Respondents)

Ontario Superior Court of Justice

G.R. Strathy J.

Heard: December 15-16, 2010
Judgment: March 1, 2011
Docket: CV-10-397096CP

Counsel: Bryan Finlay Q.C., Michael Statham, Allan Dick, David Sterns, for Plaintiff / Moving Party

David Morritt, Jennifer Dolman, Evan Thomas, for Defendant / Respondent, General Motors of Canada Limited

Peter Griffin, Rebecca Jones, Stephanie Couzin, for Defendant / Respondent, Cassels Brock and Blackwell LLP

Subject: Civil Practice and Procedure; Contracts; Estates and Trusts; Torts; Corporate and Commercial

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — General principles

During global economic crisis, defendant automobile corporation sought financial bailout from government of Canada in order to avoid bankruptcy — In order to receive bailout, defendant was required to streamline dealer network — Defendant cut approximately one third of franchises, offering wind-down agreement to those which were cut — Franchisees were given six days to consider agreement, and majority signed within required time frame — Plaintiff brought action against defendant for breach of duty of fair dealing, breach of right of association and breach of franchisor's obligation of disclosure — Plaintiff brought motion to certify action as class proceeding on behalf of all franchisees who entered into wind-down agreement with defendant — Motion granted — Plaintiff adequately pleaded cause of action against defendant — Proposed class was bound and readily capable of identification; any con-

flict between claims of members subject to laws of other provinces could be addressed through creation of sub-classes — Claims of class members raised common issues best dealt with as class proceeding for sake of judicial economy — Plaintiff was informed, committed and competent to represent class — All issues other than damages were capable of being commonly resolved; was not unreasonable to leave assessment of damages for future determination.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Nonbars to certification — Individual assessment of damages

During global economic crisis, defendant automobile corporation sought financial bailout from government of Canada in order to avoid bankruptcy — In order to receive bailout, defendant was required to streamline dealer network — Defendant cut approximately one third of franchises, offering wind-down agreement to those which were cut — Franchisees were given six days to consider agreement, and majority signed within required time frame — Plaintiff brought action against defendant for breach of duty of fair dealing, breach of right of association and breach of franchisor's obligation of disclosure — Plaintiff brought motion to certify action as class proceeding on behalf of all franchisees who entered into wind-down agreement with defendant — Motion granted — Plaintiff adequately pleaded cause of action against defendant — Proposed class was bound and readily capable of identification; any conflict between claims of members subject to laws of other provinces could be addressed through creation of sub-classes — Claims of class members raised common issues best dealt with as class proceeding for sake of judicial economy — Plaintiff was informed, committed and competent to represent class — All issues other than damages were capable of being commonly resolved; was not unreasonable to leave assessment of damages for future determination.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Motion for certification

During global economic crisis, defendant automobile corporation sought financial bailout from government of Canada in order to avoid bankruptcy — In order to receive bailout, defendant was required to streamline dealer network — Defendant cut approximately one third of franchises, offering wind-down agreement to those which were cut — Franchisees were given six days to consider agreement, and majority signed within required time frame — Plaintiff brought action against defendant for breach of duty of fair dealing, breach of right of association and breach of franchisor's obligation of disclosure — Plaintiff brought motion to certify action as class proceeding on behalf of all franchisees who entered into wind-down agreement with defendant — Motion granted — Plaintiff adequately pleaded cause of action against defendant — Proposed class was bound and readily capable of identification; any conflict between claims of members subject to laws of other provinces could be addressed through creation of sub-classes — Claims of class members raised common issues best dealt with as class proceeding for sake of judicial economy — Plaintiff was informed, committed and competent to represent class — All issues other than damages were capable of being commonly resolved; was not unreasonable to leave assessment of damages for future determina-

tion.

Civil practice and procedure --- Disposition without trial — Stay or dismissal of action — Grounds — Another proceeding pending — Civil proceeding

During global economic crisis, defendant automobile corporation sought financial bailout from government of Canada in order to avoid bankruptcy — In order to receive bailout, defendant was required to streamline dealer network — Defendant cut approximately one third of franchises and offered wind-down agreement to those which were cut — Franchisees were given six days to consider agreement, and majority signed within required time frame — Plaintiff brought action against automobile corporation with respect to wind-down agreement; plaintiff brought action against law firm for breach of contract, breach of fiduciary duty and negligence — Law firm brought motion to stay action against it — Motion dismissed — While claims against each defendant were different in nature, they arose from same factual matrix — Plaintiff's case against law firm was not necessarily dependant on result of action against automobile corporation — Was not judiciously economical to put claim on back burner for years when it was unnecessary to await result in other case — Would have been oppressive and prejudicial to plaintiff to stay one action pending outcome of other when result of one did not determine outcome of other — Was more advantageous for law firm to participate in proceeding from outset and view how evidence unfolded in other action.

Cases considered by *G.R. Strathy J.*:

Anns v. Merton London Borough Council (1977), (sub nom. *Anns v. London Borough of Merton)* [1977] 2 All E.R. 492, [1978] A.C. 728, [1977] 2 W.L.R. 1024, 121 S.J. 377, [1977] UKHL 4 (U.K. H.L.) — followed

Balanyk v. University of Toronto (1999), 1 C.P.R. (4th) 300, 1999 CarswellOnt 1786 (Ont. S.C.J.) — considered

Barbour v. University of British Columbia (2007), 2007 CarswellBC 1282, 2007 BCSC 800 (B.C. S.C.) — referred to

Beer v. Personal Service Coffee Corp. (2005), 2005 CarswellOnt 3099, (sub nom. *Personal Services Coffee Corp. v. Beer)* 200 O.A.C. 282, 256 D.L.R. (4th) 466 (Ont. C.A.) — considered

Bondy v. Toshiba of Canada Ltd. (2007), 39 C.P.C. (6th) 339, 2007 CarswellOnt 1419 (Ont. S.C.J.) — referred to

Bunn v. Ribcor Holdings Inc. (1998), 1998 CarswellOnt 2031, 65 O.T.C. 100, 38 C.L.R. (2d) 291 (Ont. Gen. Div.) — referred to

Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172, 1998 CarswellOnt 4645, 83 O.T.C. 1 (Ont. Gen. Div.) — referred to

Campbell v. Flexwatt Corp. (1997), 15 C.P.C. (4th) 1, [1998] 6 W.W.R. 275, 44 B.C.L.R. (3d) 343, 1997 CarswellBC 2439, 98 B.C.A.C. 22, 161 W.A.C. 22 (B.C. C.A.) — referred

to

Campbell v. Flexwatt Corp. (1998), 228 N.R. 197 (note), 120 B.C.A.C. 80 (note), 196 W.A.C. 80 (note) (S.C.C.) — referred to

Canadian Pacific Railway v. "Sheena M" (The) (2000), [2000] 4 F.C. 159, 2000 CarswellNat 615, 2000 CarswellNat 3261, 188 F.T.R. 16 (Fed. T.D.) — referred to

CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman (2001), 18 B.L.R. (3d) 240, 2001 CarswellOnt 4204 (Ont. S.C.J.) — referred to

Central & Eastern Trust Co. v. Rafuse (1986), 37 C.C.L.T. 117, (sub nom. *Central Trust Co. v. Rafuse)* 186 A.P.R. 109, 1986 CarswellNS 40, 1986 CarswellNS 135, 42 R.P.R. 161, 34 B.L.R. 187, (sub nom. *Central Trust Co. c. Cordon)* [1986] R.R.A. 527 (headnote only), (sub nom. *Central Trust Co. v. Rafuse)* [1986] 2 S.C.R. 147, (sub nom. *Central Trust Co. v. Rafuse)* 31 D.L.R. (4th) 481, (sub nom. *Central Trust Co. v. Rafuse)* 69 N.R. 321, (sub nom. *Central Trust Co. v. Rafuse)* 75 N.S.R. (2d) 109 (S.C.C.) — referred to

Cooper v. Hobart (2001), [2002] 1 W.W.R. 221, 2001 CarswellBC 2502, 2001 CarswellBC 2503, 2001 SCC 79, 8 C.C.L.T. (3d) 26, 206 D.L.R. (4th) 193, 96 B.C.L.R. (3d) 36, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.))* 277 N.R. 113, [2001] 3 S.C.R. 537, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.))* 160 B.C.A.C. 268, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.))* 261 W.A.C. 268 (S.C.C.) — referred to

Delgrosso v. Paul (1999), 1999 CarswellOnt 4561, 45 O.R. (3d) 605, 48 C.C.L.T. (2d) 315, 41 C.P.C. (4th) 390 (Ont. Gen. Div.) — referred to

Delgrosso v. Paul (1999), 1999 CarswellOnt 4562, 46 C.P.C. (4th) 140 (Ont. Div. Ct.) — referred to

Dowell v. Spencer (March 28, 2001), Doc. 00-CV-187752 (Ont. Master) — referred to

Elms v. Laurentian Bank of Canada (2001), 90 B.C.L.R. (3d) 195, 5 C.P.C. (5th) 201, 155 B.C.A.C. 73, 254 W.A.C. 73, 2001 BCCA 429, 2001 CarswellBC 1326 (B.C. C.A.) — referred to

Etco Financial Corp. v. Royal Bank (1999), 1999 CarswellOnt 3071 (Ont. S.C.J.) — referred to

Fehringer v. Sun Media Corp. (2002), 27 C.P.C. (5th) 155, 2002 CarswellOnt 3569 (Ont. S.C.J.) — referred to

Fehringer v. Sun Media Corp. (2003), 2003 CarswellOnt 3841, 39 C.P.C. (5th) 151 (Ont. Div. Ct.) — referred to

Fischer v. IG Investment Management Ltd. (2010), 89 C.P.C. (6th) 205, 2010 CarswellOnt 135, 2010 ONSC 296 (Ont. S.C.J.) — referred to

Folland v. Reardon (2005), 249 D.L.R. (4th) 167, (sub nom. *G.F. v. Reardon)* 194 O.A.C. 201, 28 C.C.L.T. (3d) 1, 74 O.R. (3d) 688, 2005 CarswellOnt 232 (Ont. C.A.) — referred to

Gagne v. Silcorp Ltd. (1998), 113 O.A.C. 299, 1998 CarswellOnt 4045, 27 C.P.C. (4th) 114, 41 O.R. (3d) 417, 167 D.L.R. (4th) 325, 39 C.C.E.L. (2d) 253 (Ont. C.A.) — referred to

Glover v. Toronto (City) (2009), 2009 CarswellOnt 1985, 70 C.P.C. (6th) 303 (Ont. S.C.J.) — considered

Graham v. Imperial Parking Canada Corp. (2010), 2010 ONSC 4982, 2010 CarswellOnt 6941, 74 B.L.R. (4th) 172 (Ont. S.C.J.) — followed

Griffin v. Dell Canada Inc. (2009), 72 C.P.C. (6th) 158, 2009 CarswellOnt 560 (Ont. S.C.J.) — referred to

Hanke v. Resurfice Corp. (2007), 69 Alta. L.R. (4th) 1, 404 A.R. 333, 394 W.A.C. 333, 2007 CarswellAlta 130, 2007 CarswellAlta 131, 2007 SCC 7, [2007] 4 W.W.R. 1, 45 C.C.L.T. (3d) 1, 278 D.L.R. (4th) 643, [2007] R.R.A. 1, 357 N.R. 175, [2007] 1 S.C.R. 333 (S.C.C.) — referred to

Healey v. Lakeridge Health Corp. (2006), 38 C.P.C. (6th) 145, 2006 CarswellOnt 6574 (Ont. S.C.J.) — referred to

Hickey-Button v. Loyalist College of Applied Arts & Technology (2006), 2006 CarswellOnt 3618, 267 D.L.R. (4th) 601, 211 O.A.C. 301, 31 C.P.C. (6th) 390 (Ont. C.A.) — referred to

Hollick v. Metropolitan Toronto (Municipality) (2001), (sub nom. *Hollick v. Toronto (City))* 56 O.R. (3d) 214 (headnote only), (sub nom. *Hollick v. Toronto (City))* 205 D.L.R. (4th) 19, (sub nom. *Hollick v. Toronto (City))* [2001] 3 S.C.R. 158, (sub nom. *Hollick v. Toronto (City))* 2001 SCC 68, 2001 CarswellOnt 3577, 2001 CarswellOnt 3578, 24 M.P.L.R. (3d) 9, 13 C.P.C. (5th) 1, 277 N.R. 51, 42 C.E.L.R. (N.S.) 26, 153 O.A.C. 279 (S.C.C.) — referred to

Hunt v. T & N plc (1990), 1990 CarswellBC 216, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.)* [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.)* 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 1990 CarswellBC 759, 4 C.C.L.T. (2d) 1 (S.C.C.) — followed

Kumar v. Mutual Life Assurance Co. of Canada (2001), 2001 CarswellOnt 4449, 17 C.P.C. (5th) 103, (sub nom. *Williams v. Mutual Life Assurance Co. of Canada)* 152 O.A.C. 344, 34 C.C.L.I. (3d) 316, [2002] I.L.R. I-4052 (Ont. Div. Ct.) — referred to

Kumar v. Mutual Life Assurance Co. of Canada (2003), 2003 CarswellOnt 1209, [2003] I.L.R. I-4181, 226 D.L.R. (4th) 112, 31 C.P.C. (5th) 205, 47 C.C.L.I. (3d) 43, 170 O.A.C. 165 (Ont. C.A.) — referred to

Landsbridge Auto Corp. v. Midas Canada Inc. (2009), 2009 CarswellOnt 1655, 73 C.P.C. (6th) 10 (Ont. S.C.J.) — considered

Landsbridge Auto Corp. v. Midas Canada Inc. (2010), 70 B.L.R. (4th) 1, (sub nom. *405341 Ontario Ltd.)* 322 D.L.R. (4th) 177, 2010 ONCA 478, 2010 CarswellOnt 4714, (sub nom. *405341 Ontario Ltd. v. Midas Canada Inc.)* 264 O.A.C. 111 (Ont. C.A.) — referred to

Markson v. MBNA Canada Bank (2007), 43 C.P.C. (6th) 10, 2007 ONCA 334, 2007 CarswellOnt 2716, 282 D.L.R. (4th) 385, 32 B.L.R. (4th) 273, 224 O.A.C. 71, 85 O.R. (3d) 321 (Ont. C.A.) — considered

Markson v. MBNA Canada Bank (2007), 383 N.R. 381, [2007] 3 S.C.R. xii (note), 2007 CarswellOnt 7420, 2007 CarswellOnt 7421, 248 O.A.C. 396 (note) (S.C.C.) — referred to

MBCO Summerhill Inc. v. MBCO Associates Ontario Inc. (2010), 2010 ONSC 5432, 2010 CarswellOnt 7476 (Ont. S.C.J.) — referred to

McCarthy Corp. PLC v. KPMG LLP (2007), 2007 CarswellOnt 35 (Ont. S.C.J. [Commercial List]) — referred to

MDG Kingston Inc. v. MDG Computers Canada Inc. (2008), 51 B.L.R. (4th) 188, 299 D.L.R. (4th) 497, 2008 ONCA 656, 2008 CarswellOnt 5752, 92 O.R. (3d) 4, 241 O.A.C. 84 (Ont. C.A.) — referred to

Mont-Bleu Ford Inc. v. Ford Motor Co. of Canada (2000), 2000 CarswellOnt 541 (Ont. S.C.J.) — referred to

Mont-Bleu Ford Inc. v. Ford Motor Co. of Canada (2000), 2000 CarswellOnt 1826, 134 O.A.C. 66, 48 C.P.C. (4th) 353, 48 O.R. (3d) 753 (Ont. Div. Ct.) — considered

Mont-Bleu Ford Inc. v. Ford Motor Co. of Canada (2004), [2004] O.T.C. 279, 2004 CarswellOnt 1207, 45 C.P.C. (5th) 292 (Ont. S.C.J.) — referred to

Perez v. Galambos (2009), 97 B.C.L.R. (4th) 1, [2009] 12 W.W.R. 193, (sub nom. *Galambos v. Perez)* [2009] 3 S.C.R. 247, 394 N.R. 209, 70 C.C.L.T. (3d) 167, 312 D.L.R. (4th) 220, 276 B.C.A.C. 272, 468 W.A.C. 272, 2009 CarswellBC 2787, 2009 CarswellBC 2788, 2009 SCC 48 (S.C.C.) — considered

Pryshlack v. Urbancic (1975), 10 O.R. (2d) 263, 63 D.L.R. (3d) 67, 1975 CarswellOnt 892 (Ont. H.C.) — considered

Ragoonanan Estate v. Imperial Tobacco Canada Ltd. (2000), 4 C.C.L.T. (3d) 132, 2000 CarswellOnt 4613, 51 O.R. (3d) 603 (Ont. S.C.J.) — referred to

Ramdath v. George Brown College of Applied Arts & Technology (2010), 93 C.P.C. (6th) 106, 2010 CarswellOnt 2038, 2010 ONSC 2019 (Ont. S.C.J.) — considered

Robinson v. Medtronic Inc. (2009), 80 C.P.C. (6th) 87, 2009 CarswellOnt 6337 (Ont. S.C.J.) — referred to

Robinson v. Rochester Financial Ltd. (2010), 89 C.P.C. (6th) 91, 2010 CarswellOnt 206, 2010 ONSC 463 (Ont. S.C.J.) — considered

Rosedale Motors Inc. v. Petro-Canada Inc. (1998), 86 C.P.R. (3d) 1, 42 O.R. (3d) 776, 87 O.T.C. 180, 1998 CarswellOnt 5009, 31 C.P.C. (4th) 340 (Ont. Gen. Div.) — considered

Rosedale Motors Inc. v. Petro-Canada Inc. (October 22, 2001), Doc. 25/99 (Ont. S.C.J.) — referred to

Rumley v. British Columbia (2001), 95 B.C.L.R. (3d) 1, 9 C.P.C. (5th) 1, [2001] 11 W.W.R. 207, 157 B.C.A.C. 1, 256 W.A.C. 1, 275 N.R. 342, 205 D.L.R. (4th) 39, [2001] 3 S.C.R. 184, 2001 SCC 69, 2001 CarswellBC 2166, 2001 CarswellBC 2167, 10 C.C.L.T. (3d) 1 (S.C.C.) — referred to

Salah v. Timothy's Coffees of the World Inc. (2010), 2010 CarswellOnt 7643, 2010 ONCA 673, 74 B.L.R. (4th) 161, 268 O.A.C. 279 (Ont. C.A.) — considered

Sauer v. Canada (Minister of Agriculture) (2008), 2008 CarswellOnt 5081 (Ont. S.C.J.) — referred to

Smith v. National Money Mart Co. (2007), 2007 CarswellOnt 29, 29 E.T.R. (3d) 199, 37 C.P.C. (6th) 171 (Ont. S.C.J.) — referred to

Smith Estate v. National Money Mart Co. (2008), 2008 CarswellOnt 3310, 57 C.P.C. (6th) 99 (Ont. S.C.J.) — referred to

Stoneleigh Motors Ltd. v. General Motors of Canada Ltd. (2010), 2010 CarswellOnt 2381, 2010 ONSC 1965, 71 B.L.R. (4th) 271 (Ont. S.C.J.) — considered

Thames Steel Construction Ltd. v. Portman (1980), 15 C.P.C. 308, 111 D.L.R. (3d) 460, 1980 CarswellOnt 353, 28 O.R. (2d) 445 (Ont. Div. Ct.) — followed

Western Canadian Shopping Centres Inc. v. Dutton (2001), (sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere)* 201 D.L.R. (4th) 385, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, 272 N.R. 135, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, [2001] 2 S.C.R. 534 (S.C.C.) — referred to

Williams v. Mutual Life Assurance Co. of Canada (2000), 2000 CarswellOnt 3739, 24 C.C.L.I. (3d) 298, 51 O.R. (3d) 54, [2001] I.L.R. I-3896 (Ont. S.C.J.) — referred to

Zicherman v. Equitable Life Insurance Co. of Canada (2003), 2003 CarswellOnt 1206, [2003] I.L.R. I-4182, 226 D.L.R. (4th) 131, 47 C.C.L.I. (3d) 60 (Ont. C.A.) — referred to

578115 Ontario Inc. v. Sears Canada Inc. (2010), 2010 ONSC 4571, 2010 CarswellOnt

7016, 325 D.L.R. (4th) 343 (Ont. S.C.J.) — followed

779975 Ontario Ltd. v. Mmmuffins Canada Corp. (2009), 62 B.L.R. (4th) 137, 2009 CarswellOnt 3262 (Ont. S.C.J.) — referred to

909787 Ontario Ltd. v. Bulk Barn Foods Ltd. (1999), 1999 CarswellOnt 2384 (Ont. S.C.J.) — considered

909787 Ontario Ltd. v. Bulk Barn Foods Ltd. (2000), 2000 CarswellOnt 3539, 2 C.P.C. (5th) 61, 138 O.A.C. 180 (Ont. Div. Ct.) — referred to

1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd. (2002), 28 C.P.C. (5th) 135, 62 O.R. (3d) 535, 2002 CarswellOnt 4272 (Ont. S.C.J.) — considered

1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd. (2004), 50 C.P.C. (5th) 25, 184 O.A.C. 298, 70 O.R. (3d) 182, 2004 CarswellOnt 945 (Ont. Div. Ct.) — referred to

1490664 Ontario Ltd. v. Dig This Garden Retailers Ltd. (2005), 201 O.A.C. 95, 7 B.L.R. (4th) 1, 2005 CarswellOnt 3097, 256 D.L.R. (4th) 451 (Ont. C.A.) — referred to

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2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp. (2009), 70 C.P.C. (6th) 27, 2009 CarswellOnt 2533, 96 O.R. (3d) 252, 250 O.A.C. 87 (Ont. Div. Ct.) — referred to

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3464920 Canada Inc. v. Strother (2007), (sub nom. *Strother v. 3464920 Canada Inc.)* 2007 D.T.C. 5273 (Eng.), (sub nom. *Strother v. 3464920 Canada Inc.)* 2007 D.T.C. 5301 (Fr.), 363 N.R. 123, [2007] 2 S.C.R. 177, [2007] 7 W.W.R. 381, [2007] 4 C.T.C. 172, 29 B.L.R. (4th) 175, 399 W.A.C. 108, 241 B.C.A.C. 108, 281 D.L.R. (4th) 640, 2007 SCC 24, 2007 CarswellBC 1201, 2007 CarswellBC 1202, 67 B.C.L.R. (4th) 1, 48 C.C.L.T. (3d) 1 (S.C.C.) — referred to

4287975 Canada Inc. v. Imvescor Restaurants Inc. (2008), 2008 CarswellOnt 4812, 296 D.L.R. (4th) 294, 91 O.R. (3d) 705, 48 B.L.R. (4th) 227, 68 C.P.R. (4th) 186 (Ont. S.C.J. [Commercial List]) — referred to

4287975 Canada Inc. v. Imvescor Restaurants Inc. (2009), 2009 ONCA 308, 2009 CarswellOnt 1965, 73 C.P.R. (4th) 297, 247 O.A.C. 391, 56 B.L.R. (4th) 161, 305 D.L.R. (4th) 193, 98 O.R. (3d) 187 (Ont. C.A.) — referred to

4287975 Canada Inc. v. Imvescor Restaurants Inc. (2009), 401 N.R. 392 (note), 266 O.A.C. 399 (note), 2009 CarswellOnt 5852, 2009 CarswellOnt 5853 (S.C.C.) — referred to

6792341 Canada Inc. v. Dollar It Ltd. (2009), 95 O.R. (3d) 291, 2009 CarswellOnt 2514, 2009 ONCA 385, 250 O.A.C. 280, 310 D.L.R. (4th) 683, 60 B.L.R. (4th) 1 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 1(1) "franchise agreement" — considered

s. 1(1) "franchisee" — considered

s. 1(1) "prospective franchisee" — considered

s. 2(1) — considered

s. 3 — considered

s. 3(2) — considered

s. 3(3) — considered

s. 4 — considered

s. 4(4) — considered

s. 4(5) — considered

s. 5 — considered

s. 5(1) — considered

s. 5(4) — considered

s. 5(5) — considered

s. 5(6) — considered

s. 5(7)(g)(ii) — considered

s. 6 — considered

s. 6(2) — considered

s. 6(6) — considered

s. 7 — considered

s. 7(1) — considered

s. 11 — considered

Bankruptcy Code, 11 U.S.C.

Chapter 11 — referred to

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

Generally — referred to

s. 5 — considered

s. 5(1)(a) — considered

s. 5(1)(c) — considered

s. 5(1)(d) — considered

s. 5(1)(e) — considered

s. 6 — considered

s. 8 — considered

s. 11(2) — considered

s. 12 — referred to

s. 13 — referred to

s. 24 — referred to

s. 25 — considered

s. 25(1) — considered

s. 25(2) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Competition Act, R.S.C. 1985, c. C-34

Generally — referred to

s. 36(1) — referred to

s. 61 — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 106 — referred to

s. 131 — considered

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

Generally — referred to

s. 14(2) — considered

s. 16 — referred to

s. 17 — considered

Franchises Act, R.S.P.E.I, 2005, c. 36

Generally — referred to

s. 5 — considered

s. 6(2) — considered

s. 7(1) — considered

s. 11 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 1.04(1) — considered

R. 5.02 — referred to

R. 5.05 — referred to

R. 14.05(3)(d) — considered

R. 21.01(1)(b) — referred to

Regulations considered:

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

General, O. Reg. 581/00

Generally — referred to

MOTION for certification of proposed class action brought on behalf of franchisees who entered into Wind-Down Agreements with defendant automobile company; MOTION by defendant law firm for stay of action against it.

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 bail-out 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[FN1] 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 comparable legislation in Alberta and P.E.I.[FN2] 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 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 [FN3] 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 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 Ltd. v. General Motors of Canada Ltd.*, 2010 ONSC 1965, [2010] O.J. No. 1621 (Ont. S.C.J.), 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 (Ont. C.A.) at para. 1. 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 (Ont. C.A.) at para. 72; *Landsbridge Auto Corp. v. Midas Canada Inc.*, 2010 ONCA 478, [2010] O.J. No. 2845 (Ont. C.A.) at para. 30. In *Beer v. Personal Service Coffee Corp.* (2005), 256 D.L.R. (4th) 466, [2005] O.J. No. 3043 (Ont. 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 (Ont. C.A.), 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 (Ont. C.A.), at para. 14. 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 (Ont. S.C.J.) at para. 50.

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 (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67 (S.C.C.).

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 (Ont. Gen. Div.), rev'd. (Ont. S.C.J.) ("*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. Metropolitan Toronto (Municipality)*, above, and *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39 (S.C.C.), 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 (Ont. S.C.J.), rev'd (2000), 2 C.P.C. (5th) 61, [2000] O.J. No. 3649 (Ont. 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 (Ont. Div. Ct.), rev'g (Ont. 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 (Ont. S.C.J.)

50 In *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535, [2002] O.J. No, 4781 (Ont. S.C.J.), aff'd. (2004), 70 O.R. (3d) 182, [2004] O.J. No. 865 (Ont. 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 (Ont. 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 (Ont. C.A.), aff'g (2009), 96 O.R. (3d) 252, [2009] O.J. No. 1874 (Ont. Div. Ct.), rev'g (2008), 89 O.R. (3d) 252, [2008] O.J. No. 833 (Ont. 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. v. Sears Canada Inc.*, 2010 ONSC 4571, [2010] O.J. No. 3921 (Ont. S.C.J.), 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 (Ont. S.C.J.), at para. 39, aff'd (2001), 17 C.P.C. (5th) 103, [2001] O.J. No. 4952 (Ont. Div. Ct.), aff'd *Kumar v. Mutual Life Assurance Co. of Canada* (Ont. C.A.) and *Zicherman v. Equitable Life Insurance Co. of Canada* (Ont. C.A.); *Fehringer v. Sun Media Corp.* (2002), 27 C.P.C. (5th) 155, [2002] O.J. No. 4110 (Ont. S.C.J.), aff'd (2003), 39 C.P.C. (5th) 151, [2003] O.J. No. 3918 (Ont. 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 *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, 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 (Minister of Agriculture)*, [2008] O.J. No. 3419, 169 A.C.W.S. (3d) 27 (Ont. S.C.J.), at para. 14. 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. T & N plc*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 (S.C.C.) 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 (Ont. S.C.J.), at para. 25 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 (Ont. S.C.J.) at para. 9; *MBCO Summerhill Inc. v. MBCO Associates Ontario Inc.*, 2010 ONSC 5432, [2010] O.J. No. 4201 (Ont. S.C.J.) at para. 16; *4287975 Canada Inc. v. Imvescor Restaurants Inc.* (2008), 91 O.R. (3d) 705, [2008] O.J. No. 3197 (Ont. S.C.J. [Commercial List]), at para. 14, aff'd, 2009 ONCA 308, 98 O.R. (3d) 187 (Ont. C.A.), leave to appeal to S.C.C. refused, (S.C.C.); *1490664 Ontario Ltd. v. Dig This Garden Retailers Ltd.* (2005), 256 D.L.R. (4th) 451, [2005] O.J. No. 3040 (Ont. C.A.), at para. 16; *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 Ltd. v. Mmmuffins Canada Corp.*, [2009] O.J. No. 2357 (Ont. S.C.J.) at para. 32. 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) The Pleading Against Cassels

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 (Ont. S.C.J. [Commercial List]) at para. 26. 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 (Ont. C.A.) at para. 71.

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 *Perez v. Galambos*, [2009] 3 S.C.R. 247, [2009] S.C.J. No. 48 (S.C.C.). 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 *3464920 Canada Inc. v. Strother*, [2007] 2 S.C.R. 177, [2007] S.C.J. No. 24 (S.C.C.), 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 & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, [1986] S.C.J. No. 52 (S.C.C.).

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; *Hanke v. Resurfice Corp.*, [2007] 1 S.C.R. 333, [2007] S.C.J. No. 7 (S.C.C.), 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* (1977), [1978] A.C. 728 (U.K. H.L.) and revisited in *Cooper v. Hobart*, [2001] 3 S.C.R. 537, [2001] S.C.J. No. 76 (S.C.C.). 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 Ltd.*, 2010 ONSC 463, 89 C.P.C. (6th) 91 (Ont. S.C.J.), 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 (Ont. S.C.J.); *Delgrosso v. Paul* (1999), 45 O.R. (3d) 605 (Ont. Gen. Div.); *Elms v. Laurentian Bank of Canada* , 2001 BCCA 429 (B.C. C.A.). 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 Ltd.* 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. 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 (Ont. S.C.J.) 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 (Ont. Gen. Div.), 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?[FN4]

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.[FN5] In *578115 Ontario Inc. 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)?

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. 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 (Ont. C.A.), 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 (Ont. S.C.J.) at para. 102), 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 (Ont. S.C.J.), at paras. 62-63:

> 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 (Ont. S.C.J.), at paras. 54-56; *Barbour v. University of British Columbia*, 2007 BCSC 800, [2007] B.C.J. No. 1216 (B.C. S.C.); *Griffin v. Dell Canada Inc.* (2009), 72 C.P.C. (6th) 158, [2009] O.J. No. 418 (Ont. S.C.J.); *Robinson v. Medtronic Inc.* (2009), 80 C.P.C. (6th) 87, [2009] O.J. No. 4366 (Ont. S.C.J.); *Smith v. National Money Mart Co.* (2007), 37 C.P.C. (6th) 171, [2007] O.J. No. 46 (Ont. S.C.J.). In *Ramdath v. George Brown College of Applied Arts & Technology* (2010), 93 C.P.C. (6th) 106 (Ont. 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. IG Investment Management Ltd.*, 2010 ONSC 296, [2010] O.J. No. 112 (Ont. S.C.J.) 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 (Ont. 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 (Ont. Gen. Div.); *Delgrosso v. Paul* (1999), 45 O.R. (3d) 605 (Ont. Gen. Div.), leave to appeal to Div. Ct. ref'd (1999), 46 C.P.C. (4th) 140, [1999] O.J. No. 2922 (Ont. 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*, 2007 ONCA 334, 85 O.R. (3d) 321 (Ont. C.A.), above at paras. 69-70, leave to appeal to S.C.C. refused, (S.C.C.), 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. Metropolitan Toronto (Municipality)*, 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 *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, concerning the suitability of a franchise claim to class action treatment.

144 In *Stoneleigh Motors Ltd. v. General Motors of Canada Ltd.*, 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 (Ont. S.C.J.), at para. 108, "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 applic-

able 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 *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, above, at para. 61; and *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* 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 deal-

er'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 Ltd. v. General Motors of Canada Ltd.*, 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 Ltd. v. General Motors of Canada Ltd.*) 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 advan-

cing 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 (B.C. C.A.), leave to appeal to S.C.C. dismissed, *Campbell v. Flexwatt Corp.* (S.C.C.); *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*, [1999] O.J. No. 3658 (Ont. S.C.J.) at para. 3; *Dowell v. Spencer*, [2001] O.J. No. 5149 (Ont. Master) at para. 2; *Canadian Pacific Railway v. "Sheena M" (The)*, [2000] 4 F.C. 159, [2000] F.C.J. No. 467 (Fed. T.D.), at para. 32.

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 (Ont. 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* (1976), 14 O.R. (2d) 389. 3 C.P.C. 21 (Ont. H.C.), 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* (1975), 10 O.R. (2d) 263 (Ont. H.C.), 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.

Order accordingly.

FN1 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 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.

FN2 *Franchises Act*, R.S.A. 2000, c. F-23; *Franchises Act*, R.S.P.E.I. 1988, c. F-14.1.

FN3 *Bankruptcy*, 11 U.S.C. §§ 1101-1174.

FN4 I have modified this question very slightly to make it more grammatically correct by moving the words in bracketsfrom the end of the question to its position after "*Wishart Act*".

FN5 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.

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