

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE)
JUSTICE G.R. STRATHY)
TUESDAY, THE 1ST
DAY OF MARCH, 2011

BETWEEN:

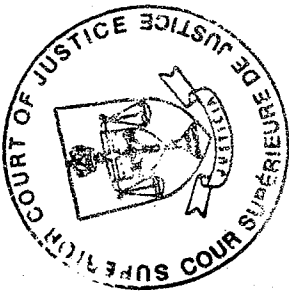
TRILLIUM MOTOR WORLD LTD.

Plaintiff

- and -

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

Defendants



Proceeding under the *Class Proceedings Act, 1992*

ORDER

THIS MOTION, made by the plaintiff for an order certifying this action as a class proceeding, was heard on December 15 and 16, 2010, at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, and the decision reserved to this day.

ON READING the notice of motion, the affidavit of Thomas Lynton Hurdman sworn February 19, 2010, the affidavit of Vukica Djuric sworn June 16, 2010, the affidavit of Marc Comeau sworn May 31, 2010, the affidavit of A. Scott Davidson sworn May 31, 2010, the transcript of the cross-examination of Marc Comeau conducted on September 1, 2010, the transcript of the cross-examination of Thomas Lynton Hurdman conducted on September 7, 2010, the parties' respective facts, and the statement of claim, filed, and on hearing the submissions of counsel for the plaintiff and the defendants,

1. **THIS COURT ORDERS** that this action be and is hereby certified as a class proceeding.
2. **THIS COURT ORDERS** that the relief sought in the class proceeding is set out in Schedule "A" hereof.
3. **THIS COURT ORDERS** that the class be and is hereby defined as all corporations in Canada that signed a Wind Down Agreement with the defendant, General Motors of Canada Limited ("GMCL") (the "Class" or "Class Members") in or after May 2009.
4. **THIS COURT ORDERS** that the plaintiff be and is hereby appointed as the representative plaintiff on behalf of the Class.
5. **THIS COURT ORDERS** that the following common issues be and are hereby certified for the purposes of this proceeding:
 - (a) Is GMCL a franchisor within the meaning of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3 (the "*Wishart Act*"), the *Franchises Act*, R.S.A. 2000, c. F-23 ("Alberta Act") and the *Franchises Act*, R.S.P.E.I. 1988, c. F-14.1 ("PEI Act"), or any of them;
 - (b) Are all class members entitled to the benefit of the statutory duty of fair dealing under s. 3 of the *Wishart Act* and the right of association under s. 4 of the *Wishart Act* (or similar provisions under such franchise legislation otherwise governing any such class member) by virtue of the choice of law provisions in the standard General Motors Dealer Sales and Service Agreement and the Wind-Down Agreement;
 - (c) 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”;
 - (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;
- (d) Did GMCL have a duty to disclose material facts concerning its restructuring to franchisees at the time of soliciting the Wind-Down Agreement? If so, did it fail to disclose material facts and did it breach such duties?
- (e) 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”;
 - (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;
- (f) Are the waiver and release contained in s. 5 of the Wind-Down Agreement null, void and unenforceable in respect of the class members' rights under ss. 4 and 11 of the *Wishart Act* (or similar provisions under such franchise legislation otherwise governing any such class member);
- (g) Was GMCL required to deliver to each class member a disclosure document within the meaning of the *Wishart Act*, the Alberta Act and the PEI Act, as the case may be, at least fourteen days before the class member signed the Wind-Down Agreement;
- (h) By virtue of GMCL's failure to deliver any disclosure document:
 - (i) is each class member entitled to rescind the Wind-Down Agreement within two years of signing the Wind-Down Agreement; and
 - (ii) is each class member carrying on business in Alberta entitled to cancel the Wind-Down Agreement, within two years of signing the Wind-Down Agreement;
- (i) Is each class member which delivers to GMCL a notice of rescission or notice of cancellation, as the case may be, in respect of the Wind-Down Agreement within two years of signing the Wind-Down Agreement entitled to compensation under ss. 6(6) of the *Wishart Act* or the PEI Act or under s. 14(2) of the Alberta Act, as the case may be;
- (j) Did Cassels Brock & Blackwell LLP ("Cassels") owe contractual duties to some or all of the class members and, if so, did Cassels breach those duties;
- (k) Did Cassels owe fiduciary duties as lawyers to some or all of the class members and, if so, did Cassels breach those duties;
- (l) Did Cassels owe duties of care to some or all of the class members and, if so, did Cassels breach those duties; and
- (m) What is the amount of pre-judgment and post-judgment interest applicable to any damages awarded?

6. **THIS COURT ORDERS** that the Plan of Proceeding attached hereto as Schedule "B" be and is hereby approved.

7. **THIS COURT ORDERS** that a notice of certification to the Class in a form to be approved by this Court (the "Notice to the Class") be mailed to all Class Members and published on the website of Sotos LLP on a date to be determined at a case conference.
8. **THIS COURT ORDERS** that, following approval of the English form by the Court, counsel for the plaintiff shall cause the Notice to the Class to be translated into French and submitted to counsel for the defendants for review and comments, which comments shall be provided within five business days.
9. **THIS COURT ORDERS** that the French version of the Notice to the Class shall be posted on the website of Sotos LLP and mailed to all Class Members in the Provinces of Quebec and New Brunswick no later than 3 days after the approval of the translation by counsel for the defendants, or on the date referred to in paragraph 7 hereof, whichever is later.
10. **THIS COURT ORDERS** that a Class Member may opt out of the class proceeding by sending to Sotos LLP either the Opt-Out Coupon attached to the Notice to the Class, or some other legible, written, signed request to opt out containing substantially the same information as the Opt-Out Coupon, on or before the expiry of the 60th day after the Notice to the Class is sent, which date shall be specified in the Notice to the Class.
11. **THIS COURT ORDERS** that Sotos LLP shall advise defendants' counsel of any Notices to the Class returned as undeliverable forthwith upon the return of the Notices to

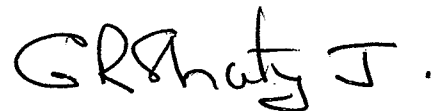
the Class, after which GMCL shall make best efforts to provide class counsel with updated information for the affected dealers so that the Notice to the Class can be re-sent to such dealers.

12. **THIS COURT ORDERS** that a Class Member may not opt out of the class proceeding after the expiry of the 60th day after the Notice to the Class is sent, which date shall be specified in the Notice to the Class.
13. **THIS COURT ORDERS** that Sotos LLP shall serve on the defendants, within 7 days after the end of the opt-out period described in paragraph 12 hereof, an affidavit containing a list of persons who have opted out of the class proceeding and attaching copies of all Opt-Out Coupons, or other legible, written, signed request to opt out containing substantially the same information as the Opt-Out Coupon, received from Class Members.
14. **THIS COURT ORDERS** that the plaintiff is entitled to its costs of the within motion. If the parties are not able to agree on the plaintiff's costs, then the plaintiff shall deliver its costs submissions within 14 days of the entry of this Order; the defendants shall respond within 14 days of the receipt of the plaintiff's costs submissions; and the plaintiff may deliver brief reply submissions within 5 days thereafter.

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ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

MAY - 9 2011

AS DOCUMENT NO.:
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PER / PAR:

STRATHY, J.

SCHEDULE A – RELIEF SOUGHT

The following relief is sought against GMCL in this proceeding:

- (a) a declaration that GMCL is a franchisor within the meaning of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3 (the “Wishart Act”), the *Franchises Act*, R.S.A. 2000, c. F-23 (“Alberta Act”) and the *Franchises Act*, R.S.P.E.I. 1988, c. F-14.1 (“PEI Act”);
- (b) a declaration that the class members are entitled to the benefit of the statutory duty of fair dealing under s. 3 and the right of association under s. 4 of the Wishart Act by virtue of the choice of law provisions in the standard General Motors Dealer Sales and Service Agreement (“Dealer Agreement”) and the Wind-Down Agreement as defined herein (or similar provisions under such franchise legislation otherwise governing any such class members), and that GMCL breached such provisions;
- (c) damages under s. 3(2) and s. 4(5) of the Wishart Act (or similar provisions under such franchise legislation otherwise governing any such class members), in an aggregate amount to be proven, not exceeding \$750,000,000, or, alternatively, an order under s. 25 of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 (“CPA”) directing individual hearings in respect of such damages;
- (d) a declaration that any waiver or release contained in the Wind-Down Agreement is 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 members);
- (e) a declaration that the amounts paid by GMCL under the Wind-Down Agreement are to be credited against each class member’s damages under s. 3(2) and s. 4(5) of the Wishart Act (or similar provisions under such franchise legislation otherwise governing any such class members);
- (f) a declaration that GMCL was required to deliver to each class member a disclosure document within the meaning of the Wishart Act, the Alberta Act and the PEI Act, as the case may be, at least fourteen days before the class member signed the Wind-Down Agreement;
- (g) a declaration that within two years of signing the Wind-Down Agreement:
 - (i) each class member whose Dealer Agreement was governed by the laws of Ontario is entitled under the Wishart Act to rescind the Wind-Down Agreement;
 - (ii) further and in any event, each class member in Ontario and PEI is entitled under the Wishart Act or the PEI Act, as the case may be, to rescind the Wind-Down Agreement; and

- (iii) each class member in Alberta is entitled under the Alberta Act to cancel the Wind-Down Agreement;
- (h) a declaration that upon delivering to GMCL a notice of rescission under the Wishart Act or PEI Act, or a notice of cancellation under the Alberta Act, in respect of the Wind-Down Agreement within two years of signing the Wind-Down Agreement, the Wind-Down Agreement signed by each such rescinding or cancelling class member is thereby rendered null and void;
- (i) a declaration that each class member which delivers to GMCL a notice of rescission in respect of the Wind-Down Agreement within two years of signing the Wind-Down Agreement is entitled to compensation under s. 6(6) of the Wishart Act or the PEI Act, as the case may be, and that each class member in Alberta which delivers to GMCL a notice of cancellation in respect of the Wind-Down Agreement within two years of signing the Wind-Down Agreement is entitled to compensation under s. 14(2) of the Alberta Act;
- (j) a declaration that each class member is entitled to damages under s. 7(1) of the Wishart Act or the PEI Act, as the case may be, by reason of GMCL's failure to comply with s. 5 of the Wishart Act or the PEI Act, as the case may be, in respect of the Wind-Down Agreement;
- (k) an order pursuant to s. 25 of the CPA directing individual hearings in respect of the compensation or damages of each class member under s. 6(6) or 7(1) of the Wishart Act or the PEI Act or under s. 14(2) of the Alberta Act, as the case may be, and directions pursuant to s. 25(2) of the CPA with respect to the manner in which such compensation or damages is to be calculated in such individual hearings; and
- (l) a declaration that amounts paid by GMCL to each class member under the Wind-Down Agreement are to be credited against the class member's damages or compensation under s. 6(6) or s. 7(1) of the Wishart Act or the PEI Act, or under s. 14(2) of the Alberta Act, as the case may be.

The following relief is sought against Cassels in this proceeding:

- (m) a declaration that Cassels owed contractual duties as described herein to class members and that it breached those duties;
- (n) a declaration that Cassels owed fiduciary duties as lawyers as described herein to class members and that it breached those duties;
- (o) a declaration that Cassels owed duties of care as described herein to class members and that it breached those duties;
- (p) damages in an amount to be proven, not exceeding \$750,000,000, in respect of all class members' losses and damages caused by or contributed to by Cassels' breach of contract, breach of fiduciary duties and negligence.

The following relief is sought against all defendants in this proceeding:

- (q) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43;
- (r) costs of this action on a substantial-indemnity scale, plus applicable goods and services and harmonized sales taxes; and
- (s) such further and other relief as this Honourable Court deems just, including all further necessary or appropriate accounts, inquiries and directions.

SCHEDULE "B"

Court File No.: CV-10-397096CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

TRILLIUM MOTOR WORLD LTD.

Plaintiff

- and -

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**PLAN OF PROCEEDING
PURSUANT TO S. 5(1)(e)(ii) OF THE *CLASS PROCEEDINGS ACT, 1992***

A. Identification of Class Members

1. The class is defined as:

All corporations in Canada that signed a Wind Down Agreement with the defendant, General Motors Canada Limited ("GMCL") in or after May 2009.

2. There are approximately 207 class members.

3. All class members can self-identify and are known to GMCL.

4. The plaintiff will request that GMCL provide contact information for all class members within 10 days of the certification Order, if not sooner.

B. Particulars of the Notice of Certification

5. The notice of certification (the "notice") will be sent to all class members in accordance with the certification order and any further direction of the Court.

6. The notice will inform all class members of the nature of the claim and their right to opt out. In addition, the notice will inform the class members of the assertion in the claim of their right to rescind/cancel the Wind-Down Agreement ("WDA") and that, in order to preserve such right, a notice of rescission/cancellation will be required to be delivered by each such class member within two years of their signing the WDA.

7. The cost of such notification will be borne by the plaintiff class at first instance.

8. So long as the list of class members provided by GMCL is complete and accurate, the plaintiff does not consider it necessary to cause the Notice to be published in a national newspaper or other medium. However, if such list is found to be materially incomplete or inaccurate, the plaintiff will request that GMCL pay the cost of publishing the Notice in such media as is considered necessary in order that the Notice may come to the attention of all class members.

9. Sotos LLP has established a page on its website for this class action. Copies of the pleadings, notice to class, court decisions and other information related to the class proceeding will be available on the website. Email contacts are also available on the website.

C. Productions

10. Documents will be exchanged electronically, in formats agreeable to counsel, together with all necessary passwords to open password-protected files.

11. It is anticipated that the discoveries and trial of this proceeding will be conducted based largely or exclusively on electronic documents. Plaintiff's counsel will manage the productions with document management software and will provide documents to the defendants in formats compatible with their document management programs. Documents received in hard copy only will be scanned and stored electronically. Productions will be indexed electronically and summarized as necessary.

D. Method of communication with the class

General communication to class

12. Class counsel are in regular communication with the representative plaintiff regarding all aspects of this action.

13. The representative plaintiff has and will continue to communicate certain information on a regular basis to the class members by means of periodic email communications and other communications.

14. Due to confidentiality issues arising from the continuing relationship of the parties, information communicated to the class members will be of a limited and non-strategic nature.

15. Limited and non-strategic information will also be communicated to the class members by regular updates to the Sotos LLP website.

Specific communication regarding notices of rescission

16. The amended statement of claim seeks a declaration that class members are entitled to rescind/cancel the WDA under franchise legislation. Delivery of a notice of rescission/cancellation is the responsibility of each rescinding/cancelling class member.

17. However, as part of its representation of the class, class counsel will prepare and deliver to each class member a memorandum outlining the steps to be taken in order to properly rescind/cancel the WDA, the deadlines within which this must be done, and all other matters relevant to the exercise of this right.

18. Class counsel will provide this communication to those class members on a timely basis so that each such class member will have the opportunity to exercise its right of rescission/cancellation.

19. In order to ensure the timeliness of this communication to these class members, class counsel may seek an order directing GMCL to provide a list of the last-known addresses of all such class members and may ask that formal notice be sent under section 19 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA").

20. Class counsel will, as part of its contingency retainer, prepare and deliver to GMCL a notice of rescission/cancellation on behalf of each class member which provides specific written instructions to this effect. The communication to the class members will state the conditions on which class counsel will undertake this notice obligation. These conditions will include the timely receipt of signed, written instructions to this effect.

E. Possibility of settlement

21. The parties will conduct settlement negotiations from time to time, as circumstances dictate.

22. The timetable includes mandatory mediation following the exchange of expert reports.

F. Method for valuation of damages/ Distribution of the damage award

Fair dealing/Right of association damages

23. If it is found at the common issues trial that GMCL breached the statutory duty of fair dealing under s. 3 or the right of association under s. 4 of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (the "Wishart Act"), or other relevant legislation in other provinces, the plaintiff will propose that damages be assessed in the aggregate in accordance with s. 24(1) of the CPA.

24. The allocation of the aggregate amount of damages will **not** be the same for each class member. Once the aggregate amount is determined under s. 24(1) of the CPA, the plaintiff will propose to the court a formula which is fair and objective and best approximates the losses suffered by class members as a result of the alleged wrongs.

25. The distribution formula will involve objective criteria and will not necessarily equate to the formula used by GMCL in the WDA which was based solely on the number of vehicles sold in the previous year and whether or not the dealer was located in a metropolitan area.

26. If aggregate damages are awarded following trial, the common issues trial judge will determine the fairness and appropriateness of the objective criteria referred to in paragraph 25 above.

27. If aggregate damages are paid pursuant to a settlement, the designated class proceedings judge will determine the fairness and appropriateness of the objective criteria as part of the settlement approval process.

28. The objective criteria to be used for the distribution of the aggregate damages award will likely require that each class member submit a claim to the aggregate damages fund as contemplated under ss. 24(4), (5) and (6) of the CPA. Any dispute as to whether or not a class member satisfies the criteria will be addressed either by the common issues trial judge or the designated class proceedings judge, as the case may be, or by reference under Rule 54 of the *Rules of Civil Procedure*.

29. If the court finds that damages for these causes of action cannot be assessed in the aggregate, damages will be assessed in individual hearings. The plaintiff will request directions from the judge presiding over the common issues trial under s. 25(2) of the CPA as to how such damages are to be calculated.

Claim against Cassels Brock & Blackwell LLP

30. The valuation of damages as against Cassels Brock and Blackwell LLP will be based on the same methodology as in the preceding paragraphs.

Rescission damages

31. In respect of the claims of the class members which were entitled to receive a disclosure document at least 14 days before entering into the WDA, the plaintiff will propose that damages be calculated in individual hearings conducted pursuant to s. 25 of the CPA. However, there will be a significant amount of commonality in the assessment of those damages. Most important will be the determination of how those damages and amounts are to be calculated in accordance with the relevant statutory provisions. The plaintiff will request directions from the judge presiding over the common issues trial under s. 25(2) of the CPA as to how amounts under ss. 6(6) and 7(1) of the Wishart Act and similar provisions under other provincial Acts are to be calculated.

32. While it is premature to determine how such individual issues will be addressed, the plaintiff will likely propose that individual hearings proceed based on affidavit evidence, as the court may direct.

33. In addition, it is likely that most or all class members will retain the same firm of valuers in order to streamline the valuation process.

34. Class counsel have agreed to represent all class members in any individual hearings which may be required, either on a contingent fee basis or on a fee-for-service basis, at the election of the class member. Notice will be given to class members concerning the participation in any individual hearings, if necessary, and any costs implications of participating in those hearings.

G. What will happen to any surplus funds?

35. Because the class is small and all class members are identifiable, it is not anticipated that there will be any surplus funds.

36. Any amounts owing to corporate class members which have become dissolved will escheat to the Crown in accordance with s. 244 of the *Business Corporations Act*, R.S.O. 1990, c. B-16 or similar federal legislation or legislation in other provinces, with notice to the last known directors who may seek to revive the corporation.

37. If surplus funds do nevertheless remain, the plaintiffs will ask for a *cy-près* distribution to relevant charitable organizations proposed by class members and approved by the court.

H. Funding

38. The plaintiff's legal fees are to be paid on a contingency basis, as provided for in the CPA and are subject to the Court's approval. Funding of all disbursements necessary to properly prosecute this action will be paid by voluntary contributions from the class members. An application may be made to the Class Proceedings Fund.

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TRILLIUM MOTOR WORLD LTD.
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-and-

GENERAL MOTORS OF CANADA LIMITED et. al.
Defendants

Court File No. CV-10-397096CP

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PROCEEDING COMMENCED AT TORONTO

ORDER

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