Wind-downs, Retainers And Releases: The Ontario Court Of Appeal Decision In Trillium Motor World

July 06, 2017

On July 4, 2017 the Ontario Court of Appeal released its much anticipated decision on the appeals taken from the trial decision of Justice McEwen in *Trillium Motor World Ltd. v. Cassels Brock & Blackwell LLP et al.* In two sets of comprehensive reasons, the Court dismissed the appeal from the liability finding against Cassels Brock ("Cassels"), allowed in part the appeal on the calculation of damages, and upheld the trial judge's decision to dismiss the action against General Motors Canada.[1] The decisions provide significant appellate guidance on the questions of (i) management of conflicts of interest by law firms, (ii) "loss of chance" and aggregate damages in the class action context, and (iii) the enforceability of settlement releases in light of the statutory safeguards in franchise legislation.

In particular, the Court upheld the largely factual determinations made by the trial judge with respect to the formation, scope, and ultimate breach of a retainer by Cassels. The Court also upheld the trial judge on the more limited appeal brought forward with respect to the action against General Motors Canada, confirming the distinction to be drawn between those releases entered into by way of settlement, and otherwise unenforceable waivers and releases of statutory protections under franchise legislation. Unfortunately, as a result of the release determination, it was not necessary for the Court to address the other interesting points raised by the trial decision, such as the interaction of governing law provisions and provincial franchise legislation, and the application of the statutory duty of good faith.

A brief overview of the background to the matter is provided below, followed by a description of the salient points that emerge from the Court's reasons.

Background: the GM Wind-Down Agreements

As succinctly summarized by Justice Cronk writing for the Court, in response to the economic downturn of early 2009, General Motors Canada Ltd. ("GMCL") entered into Wind-Down Agreements ("WDA") with certain dealers to drastically reduce the size of its dealer network, and discontinue the Saturn brand altogether. The WDA were necessary to implement a restructuring with the assistance of the Canadian and American

governments. In this context, Cassels was retained by a group of Saturn dealers, and subsequently also retained by Industry Canada ("IC") and a group of GMCL dealers to address a possible GMCL insolvency.

Ultimately, 202 GMCL dealers, including 42 Saturn dealers, executed a WDA which contained, among other things, a release in favour of GMCL.

Cassels disclosed the Saturn and GMCL retainers to IC, and advised that it would drop the GMCL mandate if a conflict arose. However, Cassels did not disclose the IC retainer to the two dealer groups, and was of the view that any conflict was merely prospective, and manageable.

In 2009, Trillium Motor World ("Trillium"), a GMCL dealer that signed a WDA, commenced a class proceeding against Cassels and GMCL, alleging breach of fiduciary duties against the former for failure to disclose the law firm's conflict, and alleging breach of duties at common law and statute against the latter regarding the manner in which the WDA were imposed. Certification was obtained, and after numerous preliminary motions a common issues trial was held over 41 days in 2014.

Cassels is Held Liable for its Conflict of Interest

In extensive reasons, the trial judge Justice McEwen had held Cassels liable on the basis of a finding that since a retainer had arisen between the GMCL dealers and Cassels, the retainer gave rise to a bright line conflict or risk of such, and at a minimum Cassels breached its duties by failing to disclose the IC retainer. Had the dealers been properly represented and advised, they would have negotiated successfully with GMCL. Damages were assessed at $45 million, representing the loss of a 55% chance of obtaining an advantageous collective group negotiation with GMCL, later amended by a supplementary ruling to hold the process of calculation of damages in abeyance pending appeal.

On appeal, Cassels attacked the trial decision on several grounds largely stemming from an alleged failure to properly assess and weigh the evidence. As such, the stringent and deferential standard of review of palpable and overriding error was applied. Trillium in turn cross-appealed, contending that the damages of the dealers in fact totalled $77.3 million rather than the sum found at trial.

Justice Cronk dismissed the Cassels appeal on the basis that the trial judge (i) adequately characterized the scope of the GMCL dealer retainer, and was correct in finding the "legal services memorandum" retainer to possess an ambiguity to be construed against Cassels, (ii) took into account the surrounding factual circumstances of the retainer formation, (iii) properly applied the law applicable to "limited retainers", and (iv) assigned adequate weight to the evidence of certain witnesses. Importantly, the application by Justice McEwen of a "bright line conflict rule" was upheld on appeal. It was established that the interests of the dealers and IC were adverse during the relevant period with respect to a GMCL insolvency, rather than merely "potentially adverse." Cassels accepted the GMCL retainer with the intention of abandoning the dealers in favour of IC if the need arose, yet did not inform the dealers of this posture. A breach of the duty of loyalty consequently arose.

With respect to the appeals concerning the damages findings at trial, Justice Cronk held that no errors arose at trial with respect to the application of the "loss of chance" law to the assessment of damages,[2] or a holding of aggregate damages for the class. With respect to the latter, Cronk J.A. affirmed that the trial judge was permitted to rely on section 24(1) of the *Class Proceedings Act* to award aggregate damages despite the fact causation was not certified as a common issue, as the certification decision had left this open for the common issues trial stage. In addition, aggregate damages were suitable for "loss of chance" flowing from solicitor negligence, since the theory of loss pertained to the dealer group as a whole; the non-individualized evidence was reliable, and; to otherwise deny class members such damages would amount to a denial of a remedy.[3]

However, the Cassels appeal on the calculation of aggregate damages was allowed due to confusion over the composition of the class, and a further motion to correct the damages calculation was endorsed. Lastly, the Trillium cross-appeal on the basis that the trial judge failed to address certain contingencies in the loss of chance analysis, and thus failed to reach a higher damages figure, was rejected.

The GM Dismissal is Upheld

At trial, it was held that GMCL had acted fairly and in good faith with respect to the WDA, and had not contravened the dealers' rights under the *Arthur Wishart Act (Franchise Disclosure), 2000* (the "AWA"). Alternatively, Justice McEwen held that the WDA releases barred the proceeding in any event.

In reasons of Pardu J.A., the Court of Appeal endorsed the trial decision and the dismissal of the action against GM. In particular, the enforceability of the comprehensive releases turned on whether the WDA were settlement agreements, and thus brought within the limited exception to the prohibition in section 11 of the AWA on franchisee waivers or releases of statutory obligations. It was affirmed that a voluntarily negotiated settlement of existing claims, entered into with the benefit of legal advice and in settlement of a dispute over existing and known breaches of the AWA is not caught by section 11. The trial judge's conclusion that the WDA fell within this exception was reasonable and not affected by any palpable and overriding error.

As the enforceability of the WDA releases was a "threshold question", it was unnecessary for the Court to address the other grounds of appeal advanced, such as whether GMCL breached its duty of good faith and fair dealing in the restructuring of its dealer network and execution of WDA.

Lastly, a cross-appeal by GM relying upon certain indemnification rights in the WDA was dismissed. In particular, a covenant in the WDA to not pursue a class proceeding, and to otherwise indemnify GMCL for defence costs, was held unenforceable on the basis of the AWA right to associate, and public policy.

Commentary

The two sets of reasons in *Trillium Motor World* taken as a whole represent a near-total endorsement of the reasoning of the trial judge, Justice McEwen. While the appeal decision with respect to Cassels' liability is heavily fact specific, Cronk J.A.'s exhaustive

reasons confirm several salient points for practitioners, namely that (i) pursuant to the "bright line rule" a lawyer may not act for adverse clients unless both parties provide their informed consent, and (ii) the Court will strictly scrutinize an argument that a retainer represents a mere "potential" conflict contingent on future events. The decision also provides an interesting example of the well-established damages theory of "loss of chance" in solicitor negligence cases being extended to embrace the loss of an opportunity suffered collectively by a client group.

In addition, it is likely that the appellate treatment of the limited "settlement exception" to section 11 of the AWA will bring some consistency to an area which has been marked by a lack of clarity in the past.

Similarly, the other significant holdings at trial that were not the subject of the appeal decisions will, in all likelihood, be viewed as persuasive authority by the Courts going forward. By way of example:

1. the proposition that a choice of law provision in a dealer agreement in favour of Ontario law will permit extra-provincial dealers to avail themselves of the AWA, notwithstanding the territorial application provisions found in the various provincial franchise statutes;
2. the analysis of the content and scope of the statutory duty of good faith and fair dealing, and in particular the holding of McEwen J. that the statutory duty of fair dealing is not broader than the common law duty of good faith, and the two duties give rise to the same obligations in the franchise context; and
3. the finding that section 3 of the AWA (good faith and fair dealing) does not import a similar disclosure obligation as that found under section 5 of the AWA.

The appellate decisions contain conclusions of importance and interest to the class action, franchise, and automotive industry bars, and to the legal profession and law firms more generally. We will continue to monitor developments in the jurisprudence as the Courts apply the reasoning from *Trillium Motor World.*

[1] 2017 ONCA 544 and 2017 ONCA 545

[2] Interestingly, the Court of Appeal held that Cassels mischaracterized the nature of the claim asserted by the GMCL dealers by insisting that, as *individual* damages causation was not certified as a common issue, causation was impermissibly addressed by the trial judge. Cronk J.A. noted that the dealer theory of liability was premised on the loss of a chance to negotiate an improved settlement *as a group*, and any analysis of liability for loss of chance on such a collective basis required establishing that, but for the defendant's conduct, it had a chance to retain a benefit or avoid a loss.

[3] Following Ramdath v. George Brown College, 2015 ONCA 921 where the following criteria were set out to guide the application of section 24(1): i) that non-individualized evidence presented by the plaintiff is sufficiently reliable, ii) the use of the evidence will not result in unfairness to the defendant such as through an overstatement of its liability, and iii) whether the denial of an aggregate approach will result in a denial of a remedy to the wrong.

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