

## Can Franchisors Be Released from Claims Under the *Wishart Act*? The *Trillium* Decision

David Kornhauser (MBA, LLB), Corporate Counsel, & Junaid Malik (BHRM, JD), Student at Law, Macdonald Sager Manis LLP

The Ontario Court of Appeal (the “ONCA”) released its decision regarding an appeal by Trillium Motor World Ltd. (“Trillium”) against General Motors of Canada Ltd. (“GMCL”), which challenged GMCL’s termination of over two-hundred dealerships.<sup>1</sup>

### Background Facts

GMCL was insolvent and as a requirement to it receiving government (US and Canadian) monies, both governments demanded that GMCL reduce the number of GM dealers. As such, GMCL delivered wind-down agreements (the “WDAs”) to 240 dealers. The WDAs offered payment in exchange for: (a) a release (the “Release”) of all claims including any claims under the *Arthur Wishart Act (Franchise Disclosure) 2000* (the “*Wishart Act*”); (b) a promise not to sue GMCL; (c) a requirement to opt-out of or disclaim any interest in any future class proceedings asserted against GMCL; and (d) the dealers indemnifying GMCL against liability that GMCL may incur as a consequence of defending any future class proceedings brought by dealers who failed to opt out of (c). Dealers were given six days to sign the WDAs, and were required to obtain a certificate of independent legal advice (“ILA”). Of the 240 dealers who received the WDAs, 202 were executed.

After GMCL made the final payments, a class action was commenced by dealers who executed the WDAs. Trillium, being the class action plaintiff, alleged that GMCL breached the *Wishart Act*. Trillium argued that the WDAs offended s. 4 of the *Wishart Act*, which protects the right of franchisees to associate, as well as s. 11 of the *Wishart Act*, which bars any waiver or release of a franchisor’s obligations under the *Wishart Act*. GMCL argued that it complied with the *Wishart Act* and that the Release was a full defence.<sup>2</sup> The trial court judge agreed with GMCL and dismissed Trillium’s claim.

### Issues on Appeal

On appeal, Trillium argued that GMCL breached various provisions of the *Wishart Act* and the Release was not valid.<sup>3</sup>

Trillium advanced three arguments. Firstly, that the trial judge failed to appreciate that the overarching purpose of the *Wishart Act* was for the protection of franchisees. Secondly, that

---

<sup>1</sup> Note that the ONCA also issued a concurrent decision addressing Trillium’s claim against Cassels, Brock & Blackwell LLP.

<sup>2</sup> GMCL also counterclaimed for damages on the basis that Trillium breached the WDAs by commencing the action or by failing to opt out of it. This article only addresses the franchise law issue.

<sup>3</sup> The second issue raised by GMCL, was whether the trial judge erred in finding the covenant not to sue, and GMCL’s indemnification void for public policy. Again, this article only addresses the franchise law issue.

the *Tutor Time* exception<sup>4</sup> to s. 11 of the *Wishart Act* is distinguishable, and in any event, should be construed narrowly. Thirdly, that the presentation of the WDA to dealers was contrary to GMCL's duty of fair dealing pursuant to s. 3(3) of the *Wishart Act*.

### The Court of Appeal Decision

The ONCA dismissed Trillium's first argument, citing that the purpose of the *Wishart Act* was in fact explicitly discussed in the lower court's decision. As well, the Court considered the extreme financial predicament GMCL faced and the palpable governmental pressure to restructure. The Court juxtaposed those facts next to s. 3(3) of the *Wishart Act* which holds the duty of fair dealing requires good faith dealings commensurate to *reasonable commercial standards*, noting that GMCL also had good faith obligations with those dealers who did not sign WDA's.

Trillium's second argument was also dismissed. The ONCA found that the *Tutor Time* exception applied because the Release was: (a) a voluntarily-negotiated settlement of existing statutory claims; (b) entered into with ILA; (c) in settlement of a dispute for existing breaches of the *Wishart Act*. *Midas*<sup>5</sup> was decided differently by this same Court because the release was prospective. In that case the franchisor sought a release as a condition of renewal, and not a true settlement of a known breach supplemented with ILA.

Trillium then argued that the WDA was contrary to GMCL's duty of fair dealing under s. 3. The Court did not explore this issue, and held that the lower court's decision that GMCL did not breach its duty of fair dealing by presenting the dealers with WDA's, to be reasonable.

### Conclusion

The ONCA thus dismissed Trillium's appeal paying deference to the trial court's decision in finding it reasonable and unaffected by any palpable and overriding error. Section 11 of the *Wishart Act* was not engaged by the Release and WDA's the dealers entered into with GMCL. This aspect of the ruling placed the balance in favour of settlement enforcement over franchisee safe-guards contained in the *Wishart Act*.

Ultimately, this case solidifies the *Tutor Time* exception, and lower courts will likely hesitate before setting aside a settlement which was a: (a) voluntary-negotiation of existing statutory claims; (b) supplemented with ILA; and (c) in settlement of a dispute for existing *Wishart Act* breaches. Even though the franchisor ended the franchise relationship with dealers by way of the WDAs, this does not mean that the threshold for the *Tutor Time* exception necessitates the execution of de-franchise or termination agreements. Therefore, the franchise relationship can still persist after valid settlement for an s.11 breach has been reached.

---

<sup>4</sup> *Tutor Time* is an Ontario Superior Court decision where the common law exception to s. 11 of the Act first appeared.

<sup>5</sup> In *Midas*, ONCA did not apply the *Tutor Time* exception; however, the Court did affirm the exception in *obiter dicta*.