

Action # 0603-05391

IN THE COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

**JASON ELY and ANDREW DODD**

Plaintiffs

- and -

**GENERAL MOTORS OF CANADA LIMITED  
and GENERAL MOTORS CORPORATION**

Defendants

This Action is commenced pursuant to the  
*Class Proceedings Act of Alberta*,  
S.A. 2003, c. C-16.5

**STATEMENT OF CLAIM**

**A. THE PARTIES:**

**The Plaintiffs**

1. The Representative Plaintiff, Jason Ely (Ely), resides in the City of Calgary, in the Province of Alberta.
2. The Representative Plaintiff, Andrew Dodd (Dodd), resides in the City of Edmonton, in the Province of Alberta.

**The Class**

3. The Plaintiffs bring this action on their own behalf and on behalf of the following class of persons resident in Alberta (the "Class") who:
  - a. currently own or lease vehicles with an Intake Manifold Gasket (hereinafter referred to as an "IMG")

- b. have owned or leased vehicles with an IMG and paid or were charged for the cost of replacing an IMG and/or related services attempting to detect and identify failures associated with the IMG defect.

### **The Defendants**

4. The Defendant General Motors Corporation ("GM USA") is a corporation duly incorporated in the State of Delaware pursuant to the laws of the United States of America. GM USA designs, tests, manufactures and directs the manufacture of the motor vehicles described below.
5. GM USA controls and directs the business of its Canadian subsidiary or affiliate,, General Motors of Canada Limited ("GM Canada") in the design, manufacture, marketing, sales, servicing and export of General Motors ("GM") motor vehicles.
6. The Defendant, GM Canada, is a federally incorporated company which is registered as an extra-provincial corporation and carries on business in the Province of Alberta and throughout Canada. GM Canada's address for service of legal process in Alberta is care of their attorney, James Peacock, Gowling Lafleur Henderson LLP, #1200, 700 – 2 Street SW, Calgary, Alberta, T2P 4V5. GM Canada is wholly owned and controlled by GM USA.

### **B. THE IMG DEFECT**

7. GM USA designed, marketed, tested and/or manufactured in the 1995 through 2003 model-years certain Buick, Chevrolet, Oldsmobile and Pontiac motor vehicles with a 3.1, 3.4, 3.8 or 4.3 litre engine using a specific intake manifold gasket (IMG). These vehicles include those listed in Schedule "A" (the Class Vehicles). Certain of these vehicles were supplied by GM USA to GM Canada and sold or leased in Canada through Canadian GM dealerships.
8. Further, or in the alternative, GM Canada designed, marketed, tested and/or manufactured said 1995 through 2003 model-years motor vehicles with this specific

IMG. Certain of these vehicles were sold or leased in Canada through Canadian GM dealerships.

9. The Class Vehicles were designed and manufactured by the defendants such that the IMG degrades prematurely causing coolant to leak into the engine. In particular, the material used to manufacture the IMG did not prevent corrosion from the coolant in the coolant system and the IMG did not properly seal the gasket to the engine causing leaks to occur. Among other consequences, the coolant mixes with engine oil making the oil ineffective and damaging the engine. In some cases the engines overheat and seize completely creating a danger to the operator and occupants and which means the vehicles need complete engine replacements. This is described herein as the "IMG defect".
10. The IMG defect was corrected when the defendants introduced a new gasket in 2004. This was an implicit admission by the defendants of their negligence described below.

**C. DUTIES OF CARE OWED BY THE DEFENDANTS TO THE PLAINTIFFS AND THE CLASS AS DEFINED BELOW**

11. The plaintiffs plead that the defendants owed to the plaintiffs and the Class the following duties of care to avoid the acts and omissions described in paragraph 10 and more generally:
  - a. to ensure that the IMG was designed, marketed, tested, and/or manufactured safely, properly and in a good and workmanlike manner so that it would not degrade prematurely;
  - b. to warn the plaintiffs and the Class of the IMG defect once it became aware (or through reasonable due diligence could have become aware) of its existence;
  - c. to remedy the IMG defect upon discovering it through the recall and repair of the Class vehicles.

**D. NEGLIGENCE OF THE DEFENDANTS**

12. The defendants negligently designed, marketed, tested and manufactured the Class Vehicles. The particulars include the following:
- a. the IMG was designed in a manner which, under normal conditions, usage and applications causes it to degrade and fail, which in turn causes the engine to overheat and fail;
  - b. the IMG was manufactured in a manner which, under normal conditions, usage and applications would overheat and fail;
  - c. the IMG was not properly or adequately tested to avoid the IMG defect;
  - d. the Class Vehicles were marketed in such a manner as not to reveal the IMG defect and its consequences;
  - e. the Class Vehicles failed to perform at their optimal level because of premature degradation and the defendants' failure to rectify the IMG defect;
  - f. the IMG design was not altered to avoid premature degradation;
  - g. the IMG design was not changed promptly once the defendants knew the IMG was subject to premature degradation;
  - h. inadequate testing was carried out to ensure a proper design and to ensure proper and prompt modifications to the IMG to eliminate the foreseeable risks;
  - i. the defendants consciously accepted the risk of the IMG defect;
  - j. the defendants failed to attach a warning or warning label to the IMG or the owners' manuals alerting users and mechanics to the risk of the premature failure;

- k. the defendants failed to develop any appropriate method for testing the IMG before they were manufactured, assembled, distributed and sold;
- l. the defendants failed to establish any adequate procedures to educate their distributors, sales and service representatives or the ultimate users;
- m. the defendants failed to establish any adequate procedure to ensure that possible design defects in the IMG were discovered and users' complaints were transmitted from them to the customers, sales representatives or distributors;
- n. the defendants failed to establish any or any adequate procedure for evaluating customers' complaints with respect to the IMG;
- o. the defendants failed to recall and repair or to ensure the repair of Class Vehicles that Class members gave to the defendants or the defendants' agents for servicing;
- p. the defendants failed to accurately, candidly, promptly and truthfully disclose the defective nature of the IMG;
- q. the defendants failed to identify, implement and verify that procedures were in place to address design problems, complaint handling or timely notification of IMG failures or complaints;
- r. the defendants failed to implement adequate performance specifications for the IMG;
- s. the defendants failed to conduct in-process and finished device testing to ensure performance specifications for the IMG were met;
- t. the defendants failed to adequately define or control written manufacturing specifications, processes, procedures and controls for the IMG;

- u. the defendants failed to conform with good manufacturing and distribution practices;
- v. the defendants failed to introduce proper quality assurance programs to identify, recommend or provide adequate solutions for the IMG defect;
- w. the defendants failed to change their design, manufacturing and assembly process with respect to the IMG in a reasonable and timely manner;
- x. the defendants hired incompetent personnel and appointed incompetent officers and directors;
- y. the defendants failed to properly supervise their employees, their subsidiaries and associated and affiliated corporations;
- z. the defendants failed to advise the plaintiffs and the Class that the IMG was defective and needed to be replaced;
- aa. the defendants knew or ought to have known of the abnormal wear and tear and risk of damage to vehicles if the IMG was not replaced;
- bb. the defendants failed to conduct adequate testing and research regarding the risk of using the IMG;
- cc. the defendants failed to engage in adequate pre-market and production testing of the vehicles in respect of the IMG;
- dd. the defendants continued to fail to fulfill their ongoing obligation to fully disclose the results of their testing and research regarding the damage to GM vehicles arising from the IMG; and
- ee. the defendants used and recommended the use of coolants which were too abrasive having regard to the design and manufacture of the IMG.

13. By virtue of the acts and omissions described above, the defendants were negligent and caused damage to the plaintiffs and the Class.
14. The plaintiffs plead that by virtue of the acts and omissions described above, the defendants are liable in damages to them and to the Class members and that each defendant is responsible for the acts and omissions of the other defendants for the following reasons:
  - a. each was the agent of the other;
  - b. each companies' business was operated so that it was inextricably interwoven with the business of the other as set out above;
  - c. each company entered into a common advertising and business plan to distribute and sell GM motor vehicles containing the IMG;
  - d. each defendant owed a duty of care to the other and to each Class member by virtue of the common business plan to manufacture, distribute, market, test and sell GM motor vehicles with the IMG defect;
  - e. the defendants intended that their businesses be run as one global business organization.

**E. FAILURE TO DISCLOSE AND RECALL**

15. The defendants have known about the IMG defect for years but have failed to take any adequate remedial steps. In 2001, in an internal service bulletin, the defendants wrote:

"Some owners may comment on excessive engine coolant consumption, or an engine coolant leak near or under the throttle body area of the upper intake manifold."

"Upper intake manifold composite material may degrade . . . and could result in an internal or external coolant leak."

16. Following the manufacture of the Class Vehicles, the defendants were aware that the Class vehicles were experiencing engine failure during operation due to the IMG defect and that such engine failures were occurring with unreasonable frequency and were resulting in considerable expense to owners and lessees of said motor vehicles.
17. From 1995 through to the present, the defendants concealed the nature and scope of the IMG defect from the members of the Class and regulatory bodies in the United States and Canada. Particulars of this concealment include the fact that where any information was provided to such authorities or to the public generally, such information was incomplete or misleading in that it sought to attribute any problems to issues other than the IMG defect.
18. The defendants had a duty to recall the Class Vehicles and rectify the IMG defect. As pleaded above, the defendants became aware following the manufacture of the Class Vehicles of the existence of the IMG defect and its dangers and in breach of said duty failed to recall the Class Vehicles to correct the IMG defect.

**F. STATUTORY REMEDIES**

19. As used below "Representation" means the defendants' failure to state any or all of the following material facts:
  - a. the IMG was not free of defects;
  - b. the IMG was not fit for the purpose intended;
  - c. the IMG was designed in a manner which under normal conditions, usage and applications would cause it to degrade prematurely; or
  - d. the IMG was manufactured in a manner which under normal conditions, usage and applications would cause it to degrade prematurely.
20. The plaintiffs and each other Class member relied on the Representation.

21. The reliance upon the Representation by the plaintiffs and every other Class member is established by his/her purchase and/or use of the Class Vehicle. Had the plaintiffs and each Class member known that the Representation was false and misleading he/she would not have purchased and/or used the Class Vehicle.
  
22. The defendants made the Representation to the public and in so doing breached s. 52 of the *Competition Act* because the Representation:
  - a. was made for the purpose of promoting the business interests of the defendants;
  - b. was made to the public;
  - c. was false and misleading in a material respect; and
  - d. stated a level of performance of the IMG that was not based on adequate and proper testing.
  
23. The plaintiffs and every other Class member relied upon the Representation by buying or using the Class vehicles and suffered damages and loss.
  
24. Pursuant to s. 36 of the *Competition Act* the defendants are liable to pay the damages which resulted from the breach of s. 52.
  
25. Pursuant to s. 36 of the *Competition Act* the plaintiffs and the other Class members are entitled to recover their full costs of investigation and substantial indemnity costs paid in accordance with the Act.
  
26. The plaintiffs and other Class members are also entitled to recover, as damages or costs, in accordance with the Act the costs of administering the plan to distribute the recovery in this action and the costs to determine the damages of each Class member, which administration costs probably will exceed \$5,000,000.00.

27. The damages suffered by the plaintiffs and members of the Class as a result of the breach of the *Competition Act* are those damages claimed in paragraphs 36 & 37 herein.

**G. DECEPTIVE PRACTICE**

28. The Class members are consumers within the meaning of the *Fair Trading Act*, RSA 2000, c. F-2 (the Act).
29. The Class members' purchases and/or leases of Class Vehicles are consumer transactions within the meaning of the Act.
30. The defendants are suppliers to the consumer transactions within the meaning of the Act.
31. The defendants have engaged in deceptive practices within the meaning of Part 2, Division 1 of the Act as follows:
- a. failing to disclose the material facts comprising the Representation described above;
  - b. actively concealing the IMG defect;
  - c. representing that the Class Vehicles are of high quality when they knew the IMG defect seriously diminished the quality of the vehicles.

(Collectively "Deceptive Acts or Practices".)

32. The plaintiffs and Class members have suffered damages as a result of the defendants' Deceptive Acts or Practices, particulars of which are set out above.

**H. WAIVER OF TORT AND UNJUST ENRICHMENT**

33. The plaintiffs and Class plead the doctrine of the waiver of tort and, due to the negligence and failure to warn of the defendants, is entitled to a restitutionary award of

the benefits which accrued to the defendants as a result of their negligence and/or failure to warn.

34. The benefits which accrued to the defendants as a result of their negligence and/or failure to warn include:
- a. the saving of costs of recalling the Class Vehicles;
  - b. the saving of costs of replacing the IMG in the Class Vehicles with a new IMG;
  - c. the saving of costs of redesigning the IMG in the Class Vehicles to overcome the IMG defect; and
  - d. revenues from the sale of replacement IMGs or the components thereof.
35. The benefits which accrued to the defendants as a result of their negligence and/or failure to warn were unjust in the circumstances and there is no juristic reason for them.

**I. DAMAGES**

36. In the alternative, as a result of the breach of the failure to warn, negligence, breach of statutory duties and failure to disclose and recall as pleaded above, the plaintiffs and members of the Class have suffered loss and damage and have incurred damages, the particulars of which include:
- a. repair expenses in attempts to identify and/or rectify the IMG defect;
  - b. resultant damage to persons or property other than the IMG or the Class vehicles;
  - c. overpayment for Class vehicles, which contained a latent hazardous defect;
  - d. diminution in the value of the Class Vehicles of the members of the Class and,

- e. future costs of repair of the IMG defect;
- f. damages for having been put at risk;
- g. consequential expenses, including the cost of repairs to the emission system and the cost of remedying failed emission control tests.

**J. PUNITIVE, EXEMPLARY AND AGGRAVATED DAMAGES**

37. The conduct of the defendants in deliberately concealing the IMG defect and deliberately exposing the Class members to considerable expense and inconvenience is highhanded and demonstrates an indifference to the consumers of their products such that it offends the moral standards of the community and warrants the condemnation of the court.

**K. LEGISLATION**

38. In addition to the *Competition Act* and the *Fair Trading Act*, the plaintiffs plead and rely on the *Class Proceedings Act*, S.A. 2003, c. C-16-6.
39. The plaintiffs state that the trial of this action be held at the Law Courts, Edmonton, Alberta, and that the trial will likely take longer than 25 days.

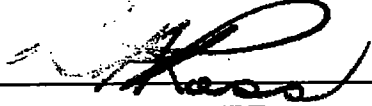
WHEREFORE THE PLAINTIFFS CLAIM, ON THEIR OWN BEHALF AND ON BEHALF OF THE CLASS MEMBERS, AGAINST THE DEFENDANTS, AND EACH OF THEM:


- a. An Order certifying this proceeding as a class proceeding and appointing the plaintiffs as representative plaintiffs for the Class and any appropriate subclass thereof;
- b. A declaration that the benefits which accrued to the defendants as a result of their negligence and failure to warn unjustly enriched the defendants;
- c. An accounting of the benefits which accrued to the defendants as a result of their negligence and/or failure to warn;

- d. a declaration that the defendants hold in trust for the Class the benefits which accrued to the defendants as a result of their negligence and/or failure to warn, which sum is presently estimated to be \$1,200,000,000;
- e. disgorgement of the benefits which accrued to the defendants as a result of their negligence and/or failure to warn;
- f. alternatively:
  - i. damages equivalent to the sums they have paid out of their pockets in attempts to identify and repair the IMG defect or other related failures;
  - ii. damages equivalent to the costs of rectifying the IMG defect or other related failures;
  - iii. damages equivalent to the resultant damage to property other than the IMG or Class Vehicles;
  - iv. damages for diminution in the value of their vehicles;
  - v. a declaration that the Deceptive Acts or Practices contravened the *Fair Trading Act, RSA 2000, c. F-2*, and the regulations thereunder;
  - vi. damages pursuant to s. 13(2) of the *Fair Trading Act*;
- g. exemplary, punitive and aggravated damages in the amount of \$10,000,000.00;
- h. prejudgment and post judgment interest pursuant to the *Judgment Interest Act*;
- i. costs of this action on a party and party basis and a solicitor and client basis, or either of them, as provided for under s.13(4) of the *Fair Trading Act*, together with any applicable Goods and Services Tax payable pursuant to the *Excise Tax Act, R.S.C. 1990. C. E-15*.

DATED at the City of Edmonton, in the Province of Alberta, this 1<sup>st</sup> day of May, 2006 AND DELIVERED BY Kolthammer Batchelor & Laidlaw LLP, Barristers and Solicitors, #208, 11062 - 156 Street, Edmonton, Alberta, T5P 4M8, and by Stevensons LLP, 144 Front Street West, Suite 400, Toronto, Ontario, M5J 2L7, Solicitors for the Plaintiffs herein whose address for service is in care of Kolthammer Batchelor & Laidlaw LLP, #208, 11062 - 156 Street, Edmonton, Alberta, T5P 4M8. Lawyer in charge of file: C. Kenneth W. Kolthammer.

ISSUED out of the office of the Clerk of the Court of Queen's Bench, Judicial District of Edmonton, Law Courts, Edmonton, Alberta, this 1 day of May, 2006.

  
\_\_\_\_\_  
CLERK OF THE COURT



## SCHEDULE "A"

- (a) 1995-1997 Buick Riviera
- (b) 1995-1998/2000-2003 Buick LeSabre
- (c) 1995-1998/2000-2003 Buick Park Avenue
- (d) 1996-1998/2000-2003 Buick Regal
- (e) 2000-2003 Buick Century
- (f) 2002-2002 Buick Rendezvous
- (g) 1996/1998-2001 Chevrolet Lumina
- (h) 1998-2003 Chevrolet Monte Carlo
- (i) 1997-2003 Chevrolet Venture
- (j) 1999-2003 Chevrolet Malibu
- (k) 2000-2003 Chevrolet Impala
- (l) 1995-1998 Oldsmobile Ninety Eight
- (m) 1995-1998 Oldsmobile Eighty Eight
- (n) 1998 Oldsmobile Intrigue
- (o) 1996-2003 Oldsmobile Silhouette
- (p) 1999 Oldsmobile Cutlass
- (q) 1999-2003 Oldsmobile Alero
- (r) 1995-1998/2000-2003 Pontiac Bonneville
- (s) 1997-1998/2000-2003 Pontiac Grand Prix
- (t) 1996-1999 Pontiac Trans Sport
- (u) 1999-2003 Pontiac Grand Am
- (v) 1999-2003 Pontiac Montana
- (w) 2001-2003 Pontiac Aztec
- (x) 1995-1997 Buick Riviera
- (y) 1995-2004 Buick Park Avenue
- (z) 1996-2004 Buick Regal
- (aa) 1997-2004 Buick LeSabre
- (bb) 1998-1999 Chevrolet Lumina
- (cc) 1998-2004 Chevrolet Monte Carlo
- (dd) 2000-2004 Chevrolet Impala
- (ee) 1995-1996 Oldsmobile Ninety-Eight
- (ff) 1995-1999 Oldsmobile Eighty-Eight
- (gg) 1998-1999 Oldsmobile Intrigue
- (hh) 1995-2004 Pontiac Bonneville
- (ii) 1997-2003 Pontiac Grand Prix with 3.8L V6 Engine

0603 05381

**NOTICE TO THE DEFENDANTS:**

**TO: GENERAL MOTORS OF CANADA LIMITED  
and GENERAL MOTORS CORPORATION**

You have been sued. You are the Defendant. You have only **fifteen (15) days** to file and serve a Statement of Defence or Demand of Notice in the office of the Clerk of the Court of Queen's Bench in Edmonton, Alberta. You or your lawyer must also leave a copy of your Statement of Defence or Demand of Notice at the address for service for the Plaintiff named in the Statement of Claim.

**WARNING:** If you do not do both things within fifteen (15) days, you may automatically lose the lawsuit. The Plaintiff may get a Court Judgment against you if you do not file, or do not give a copy to the Plaintiff, or do either thing late.

This Statement of Claim is issued by the solicitors for the Plaintiff whose name and address for service is:

**C. Kenneth W. Kolthammer  
KOLTHAMMER BATCHELOR & LAIDLAW LLP**  
#208, 11062 - 156 Street  
Edmonton, Alberta T5P 4M8  
Phone: (780) 489-5003

**Stevensons LLP**  
144 Front Street West, Suite 400  
Toronto, Ontario, M5J 2L7  
Phone: (416) 599-7900

The Plaintiff's residence is  
Calgary, Alberta  
Edmonton, Alberta

The Defendant's registered office so far as known to the Plaintiff is:  
c/o James S. Peacock  
Gowling LaFleur Henderson LLP  
1200, 700 - 2 Street SW  
Calgary, Alberta, T2P 4V5

**CIVIL MEDIATION PROGRAM**  
Court of Queen's Bench of Alberta  
This civil, non-family action is eligible to proceed to mediation through the Civil Mediation Program. If all parties agree to mediate, they may choose a Roster Mediator and schedule mediation. Alternatively, any party may file and serve a Request to Mediate if the requirements in Civil Practice Note No. 11 are met.  
**FOR MORE INFO, CONTACT:**  
Phone: (780) 427-2721 Fax: (780) 844-7838  
[www.albertacourts.ab.ca/qb/civilmediation](http://www.albertacourts.ab.ca/qb/civilmediation)

No. \_\_\_\_\_

IN THE COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

**JASON ELY and ANDREW DODD**

Plaintiffs

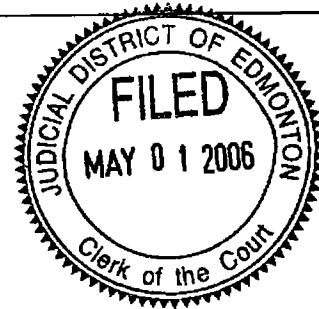
- and -

**GENERAL MOTORS OF CANADA LIMITED  
and GENERAL MOTORS CORPORATION**

Defendant

This action is commenced pursuant to the *Class Proceedings Act of Alberta, S.A. 2003, c. C-16.5*

**STATEMENT OF CLAIM**



**Kolthammer Batchelor & Laidlaw LLP**  
Barristers & Solicitors  
&  
**Stevensons LLP**  
Barristers and Solicitors

All care of  
#208, 11062 - 156 Street  
Edmonton, Alberta, Canada T5P 4M8  
Tel: (780) 489-5003; Fax: (780) 486-2107

Attention: C. Kenneth W. Kolthammer  
File No. 12712 KK