

06-CV-310082 PDI
Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

KENNETH DAVID STEWART

Plaintiff

- and -

GENERAL MOTORS OF CANADA LIMITED
and GENERAL MOTORS CORPORATION

Defendants

Proceedings commenced pursuant to the *Class Proceedings Act, 1992, S.O. 1992, c. 6.*

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. If you wish to defend this proceeding but are unable to pay legal fees, legal aid may be available to you by contacting a local legal aid office.

April 24, 2006

Issued by



Local registrar

Address of court office:
393 University Avenue
Toronto, Ontario
M5G 1E6

TO: **GENERAL MOTORS OF CANADA LIMITED**
1908 Colonel Sam Drive
Oshawa, Ontario
L1H 8P7

AND TO: **GENERAL MOTORS CORPORATION**
300 Renaissance Centre
Detroit, MI

CLAIM

1. The plaintiff claims on his own behalf and on behalf of all of the members of the Class (as defined below):
 - (a) an order certifying this proceeding as a class proceeding and appointing the plaintiff as representative plaintiff for the Class (defined below) 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 (defined below) 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 (defined below) or Class Vehicles (defined below);
- (iv) damages for diminution in the value of their vehicles;
- (g) exemplary, punitive and aggravated damages in the amount of \$10,000,000.00;
- (h) prejudgment and post judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. 43, or equivalent in other provinces;
- (i) costs of this action on a substantial indemnity basis together with any applicable Goods and Services Tax payable pursuant to the *Excise Tax Act*, R.S.C. 1990. C. E-15; and
- (j) such further relief as this Honourable Court may deem just.

THE PARTIES

The Plaintiff

2. The plaintiff, Kenneth David Stewart (Stewart), resides in the Town of Courtice, in the Province of Ontario.

The Class

3. The plaintiff brings this action on his own behalf and on behalf of the following persons resident anywhere in Canada other than in British Columbia or Québec (the "Class") who:

- (a) currently own or lease vehicles with an IMG;

- (b) have owned or leased vehicles with an IMG and paid or were charged for the cost of repairing and/or replacing an IMG, or rectifying any failure related to the IMG defect, or performing services to attempt to detect or identify the IMG defect or any failures related to 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 carries on business in the Province of Ontario and throughout Canada. GM Canada is wholly owned and controlled by GM USA.

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.

**DUTIES OF CARE OWED BY THE DEFENDANTS TO THE PLAINTIFF
AND THE CLASS (AS DEFINED BELOW)**

11. The plaintiff pleads that the defendants owed to the plaintiff and the Class the following duties of care to avoid the acts and omissions described in paragraph 11 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 plaintiff 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.

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 plaintiff 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 plaintiff and the Class.

14. The plaintiff pleads that by virtue of the acts and omissions described above, the defendants are liable in damages to him 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.

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.

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 plaintiff states that the Representation deceived or tended to deceive the plaintiff and the Class and that the Representation constituted an unfair practice which induced the plaintiff and the Class to purchase the Class Vehicles as a result of which they are entitled to damages pursuant to the *Business Practices Act* (Ontario and its equivalent in other provinces).

21. The plaintiff and each other Class member relied on the Representation.

22. The reliance upon the Representation by the plaintiff and every other Class member is established by his/her purchase and/or use of the Class Vehicle. Had the plaintiff and each Class member known that the Representation was false and misleading he/she would not have purchased and/or used the Class Vehicle.

23. 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.

24. The plaintiff and every other Class member relied upon the Representation by buying or using the Class vehicles and suffered damages and loss.

25. Pursuant to s. 36 of the *Competition Act* the defendants are liable to pay the damages which resulted from the breach of s. 52.

26. Pursuant to s. 36 of the *Competition Act* the plaintiff and the other Class members are entitled to recover their full costs of investigation and substantial indemnity costs paid in accordance with the Act.

27. The plaintiff 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.

28. The damages suffered by the plaintiff and members of the Class as a result of the breach of the *Business Practices Act* and *Competition Act* are those damages claimed in paragraph 1 above.

WAIVER OF TORT AND UNJUST ENRICHMENT

29. The plaintiff 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.

30. 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.

31. 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.

DAMAGES

32. 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 plaintiff 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 TFI defects;
- (f) damages for having been put at risk.

PUNITIVE, EXEMPLARY AND AGGRAVATED DAMAGES

33. 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.

LEGISLATION

34. In addition to the *Competition Act* and the *Business Practices Act*, the plaintiff pleads and relies upon the *Class Proceedings Act* and the *Negligence Act* (and equivalent in every province).

REPRESENTATIVE PLAINTIFF

35. Stewart is the owner of a 1997 Pontiac Trans Sport and a 2002 Pontiac Montana in which the IMG has been subject to the IMG defect. Stewart has suffered damages as a result of the IMG defect. The damages include out-of-pocket expenses, repair and replacement costs and diminution of vehicle value.

36. The plaintiff states that this claim may be served, without a court order, on GM USA outside Ontario on the basis that:

- (a) the damage was sustained in Ontario (Ontario Rule 17.02(h));
- (b) GM USA is a necessary and/or proper party to a proceeding properly brought against GM Canada (Ontario Rule 17.02(o));
- (c) the tort was committed in Ontario (Ontario Rule 17.02(g))

- (d) GM USA carries on business in Ontario (Ontario Rule 17.02(p));
- (e) the claim is authorized by statute, the *Competition Act* and the *Business Practices Act* (Ontario Rule 17.02(n)).

37. The plaintiff proposes that this action be tried at the City of Toronto, in the Province of Ontario.

April 24, 2006

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Solicitors for the plaintiff

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

BACKSHEET
(Form 4C under the Rules)
STEWART

GENERAL MOTORS OF CANADA LIMITED and others
Defendants

and

Plaintiff

Court file no.

(Short title of proceeding)

**ONTARIO
SUPERIOR COURT OF JUSTICE**
Proceeding commenced at Toronto

STATEMENT OF CLAIM
(Form 4C under the Rules)

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